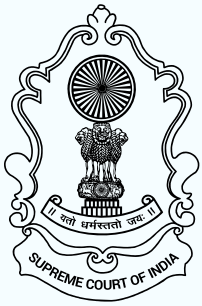
ISSN: 3048-4839 (Online)



DIGITAL SUPREME COURT REPORTS

The Official Law Report
Fortnightly

2024 | Volume 6 | Part 2

Citation Style: [Year] Volume No. S.C.R. Page no.

Digitally Published by
Supreme Court of India

DIGITAL SUPREME COURT REPORTS

The Official Law Report
Fortnightly

2024 I Volume 6 I Part 2

Digitally Published by
Supreme Court of India

Editorial Board

Digitally Published by
Supreme Court of India

Tilak Marg, New Delhi-110001
E-mail: digiscr@sci.nic.in
Web.: digiscr.sci.gov.in/, www.sci.gov.in/

Contents

[2024] 6 S.C.R. 337 : 2024 INSC 364

Commissioner of Trade and Taxes
v.
FEMC Pratibha Joint Venture

(Civil Appeal No. 3940 of 2024)

01 May 2024

[Pamidighantam Sri Narasimha* and Prasanna Bhalachandra Varale, JJ.]

Issues for Consideration

(1) Whether the timeline for refund prescribed under s. 38(3) of the Delhi Value Added Tax Act, 2004 must be mandatorily followed while recovering dues under the Act; and

(2) Whether the Tax Assessing Officer could pass an adjustment order to adjust Respondent's claim for refund against default notices issued subsequently.

Headnotes†

Tax-VAT – Delhi Value Added Tax Act, 2004. – ss. 38(3) and 42 – Respondent claimed refund of excess tax credit along with interest for 4th quarter of 2015-2016 and 1st quarter of 2017-2018 – Appellant did not refund – Issued adjustment order against dues under four default notices issued in 2020, 2021 and 2022 – Adjustment order quashed by High Court – Appellant directed to refund with interest – High Court's judgment affirmed.

Held: Respondent claimed refund of excess tax credit along with applicable interest under Delhi Value Added Tax Act, 2004, s. 42, for the 4th quarter of 2015-2016 and 1st quarter of 2017-2018 through return filed on 29.03.2019 – Appellant did not refund until 2022 – Adjustment order issued to adjust Respondent's claims against four default notices issued in 2020, 2021 and 2022 – Adjustment order challenged in High Court and is quashed – High Court's judgment affirmed.

Language of s. 38(3) of 2004 Act is mandatory – Timeline stipulated must be adhered to – Object of provision to ensure refunds are processed and issued in a timely manner – Adjustment under s. 38(2) permitted only against amounts 'due under the Act' –

* Author

Appellant not justified in retaining refund amount and adjusting it towards notices issued subsequent to the refund period – Effect of timeline under s. 38(3) not only for calculation of interest under s. 42 – Contention rejected. [Paras 6-10]

Case Law Cited

Flipkart India Private Limited v. Value Added Tax Officer, Ward 300, **2023 SCC OnLine Del 5201;** *Swarn Darsan Impex v. Commissioner, Value Added Tax,* **2010 SCC OnLine Del 4697;** *Nucleus Marketing and Communication v. Commissioner of Delhi Value Added Tax,* **2016 SCC OnLine Del 3941;** *Rockwell Industries v. Commissioner of Trade and Taxes,* **2019 SCC OnLine Del 8432;** *ITD-ITD CEM JV v. Commissioner of Trade and Taxes,* **2019 SCC OnLine Del 9568;** *Ramky Infrastructure Ltd. v. Commissioner of Trade and Taxes,* **2023 SCC OnLine Del 4236;** *Commissioner of Trade and Taxes v. Corsan Corviam Construction S.A. Sadbhav Engineering Ltd. JV,* **2023 SCC OnLine Del 1900 - referred to.**

List of Acts

Delhi Value Added Tax Act, 2004.

List of Keywords

Refund; Adjustment; Adjustment order; Timeline; Default notices.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 3940 of 2024

From the Judgment and Order dated 21.09.2023 of the High Court of Delhi at New Delhi in WP (C) No. 2491 of 2023

Appearances for Parties

N Venkataraman, A.S.G., Mukesh Kumar Maroria, V C Bharathi, Udai Khanna, Siddharth Sinha, Advs. for the Appellant.

Rajesh Jain, Virag Tiwari, Rishabh Jain, Ramashish, K. J. Bhat, Avadh Bihari Kaushik, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Judgment

Pamidighantam Sri Narasimha, J.

1. The issue for consideration before us is whether the timeline for refund under Section 38(3) of the Delhi Value Added Tax Act, 2004[1] must be mandatorily followed while recovering dues under the Act by adjusting them against the refund amount.

2. The brief facts relevant for our purpose are as follows. The respondent is a joint venture engaged in the execution of works contracts for the Delhi Metro Rail Corporation and makes purchases for this purpose. It claimed refund of excess tax credit amounting to Rs. 17,10,15,285/- for the 4th quarter of 2015-16 through revised return filed on 31.03.2017 and Rs. 5,44,39,148/- for the 1st quarter of 2017-18 through return filed on 29.03.2019, along with applicable interest under Section 42 of the Act. The appellant did not pay the refund even until 2022, pursuant to which the respondent sent a letter dated 09.11.2022 for the consideration of their refund. The Value Added Tax Officer passed an adjustment order dated 18.11.2022 to adjust the respondent's claims for refund against dues under default notices dated 30.03.2020, 23.03.2021, 30.03.2021, and 26.03.2022. The respondent then filed a writ petition before the Delhi High Court for quashing the adjustment order and the default notices.

3. By judgment dated 21.09.2023, impugned herein, the High Court quashed the adjustment order and directed refund of Rs. 17,10,15,285/- for the 4th quarter of 2015-16 and Rs. 5,44,39, 148/- for the 1st quarter of 2017-18, along with interest as per Section 42 till the date of realisation.[2] In respect of the default notices, the High Court gave liberty to the respondent to avail statutory appeal under Section 74 of the Act.

4. The present appeal is restricted to the issue of quashing the adjustment order. The High Court placed reliance on the Delhi High Court's judgment in *Flipkart India Private Limited* v*. Value Added Tax*

1 Hereinafter 'the Act'.

2 WP (C) 2491/2023, judgment dated 21.09.2023 ('Impugned judgment').

Officer, Ward 300[3] to summarise the law on refund under Section 38. It held that the department must scrupulously adhere to the time limit for processing and issuing the refunds under Section 38. Whenever the department seeks to obtain necessary information under Section 59 of the Act, it must take steps within the time limit envisaged under the Act. Further, the refund amount can be adjusted only when an enforceable demand in the nature of tax or duty is pending against the assessee. The department does not have any legal right or justification to retain the amount beyond the time limit prescribed under Section 38.[4] In the facts of the present case, it was held that the mandate of the Act has not been followed and hence the adjustment order is not maintainable.[5]

5. We have heard the learned ASG for the department and Mr. Rajesh Jain, learned counsel for the respondent-assessee. The learned ASG has submitted that the timelines specified in Section 38(3) are only to ensure that interest is paid if the refund is delayed beyond the statutorily prescribed period. However, he has argued, the timeline cannot be used to denude the power to adjust refund amounts against outstanding dues under Section 38(2). The refund can be adjusted as long as outstanding dues exist at the time when the refund is processed, even if it is beyond the stipulated timeline. The learned counsel for the assessee has supported the reasoning of the High Court and has placed reliance on several judgments of the Delhi High Court that affirm this position of law.[6]

6. We find no reason to interfere with the impugned judgment, which follows the view that has been consistently adopted by the High Court.[7] The finding of the High Court is based on the plain language of Section 38 of the Act, which reads as follows:

---

3 2023 SCC OnLine Del 5201

4 Impugned judgment, para 10.

5 ibid, para 11.

6 *Swarn Darsan Impex v. Commissioner, Value Added Tax*, 2010 SCC OnLine Del 4697; *Nucleus Marketing and Communication v. Commissioner of Delhi Value Added Tax*, 2016 SCC OnLine Del 3941; *Rockwell Industries v. Commissioner of Trade and Taxes*, 2019 SCC OnLine Del 8432; *ITD-ITD CEM JV v. Commissioner of Trade and Taxes*, 2019 SCC OnLine Del 9568; *Ramky Infrastructure Ltd v. Commissioner of Trade and Taxes*, 2023 SCC OnLine Del 4236; *Commissioner of Trade and Taxes v. Corsan Corviam Construction S.A. Sadbhav Engineering Ltd JV*, 2023 SCC OnLine Del 1900; *Flipkart India* (supra).

7 ibid.

"***38. Refunds***

(1) Subject to the other provisions of this section and the rules, the Commissioner shall refund to a person the amount of tax, penalty and interest, if any, paid by such person in excess of the amount due from him.

(2) Before making any refund, the Commissioner shall first apply such excess towards the recovery of any other amount due under this Act, or under the CST Act, 1956 (74 of 1956).

(3) Subject to sub-section (4) and sub-section (5) of this section, any amount remaining after the application referred to in sub-section (2) of this section shall be at the election of the dealer, either –

(a) refunded to the person, –

(i) within one month after the date on which the return was furnished or claim for the refund was made, if the tax period for the person claiming refund is one month;

(ii) within two months after the date on which the return was furnished or claim for the refund was made, if the tax period for the person claiming refund is a quarter; or

(b) carried forward to the next tax period as a tax credit in that period.

(4) Where the Commissioner has issued a notice to the person under section 58 of this Act advising him that an audit, investigation or inquiry into his business affairs will be undertaken or sought additional information under section 59 of this Act, the amount shall be carried forward to the next tax period as a tax credit in that period.

(5) The Commissioner may, as a condition of the payment of a refund, demand security from the person pursuant to the powers conferred in section 25 of this Act within fifteen days from the date on which the return was furnished or claim for the refund was made.

(6) The Commissioner shall grant refund within fifteen days from the date the dealer furnishes the security to his satisfaction under sub-section (5).

(7) For calculating the period prescribed in clause (a) of sub- section (3), the time taken to –

(a) furnish the security under sub-section (5) to the satisfaction of the Commissioner; or

(b) furnish the additional information sought under section 59; or

(c) furnish returns under section 26 and section 27; or

(d) furnish the declaration or certificate forms as required under Central Sales Tax Act, 1956,

shall be excluded

(8) Notwithstanding anything contained in this section, where –

(a) a registered dealer has sold goods to an unregistered person; and

(b) the price charged for the goods includes an amount of tax payable under this Act;

(c) the dealer is seeking the refund of this amount or to apply this amount under clause (b) of sub-section (3) of this section;

no amount shall be refunded to the dealer or may be applied by the dealer under clause (b) of sub-section (3) of this section unless the Commissioner is satisfied that the dealer has refunded the amount to the purchaser.

(9) Where –

(a) a registered dealer has sold goods to another registered dealer; and

(b) the price charged for the goods expressly includes an amount of tax payable under this Act,

the amount may be refunded to the seller or may be applied by the seller under clause (b) of sub-section (3) of this section and the Commissioner may reassess the buyer to deny the amount of the corresponding tax credit claimed by such buyer, whether or not the seller refunds the amount to the buyer.

(10) Where a registered dealer sells goods and the price charged for the goods is expressed not to include an amount of tax payable under this Act the amount may be refunded to the seller or may be applied by the seller under clause (b) of sub-section (3) of this section without the seller being required to refund an amount to the purchaser.

(11) Notwithstanding anything contained to the contrary in sub-section (3) of this section, no refund shall be allowed to a dealer who has not filed any return due under this Act."

7. Sub-section (1) provides that any amount of tax, penalty and interest that is in excess of the amount due from a person shall be refunded to him by the Commissioner. Sub-section (2) permits the Commissioner to first apply such excess to recover any other amount that is due under the Act or the Central Sales Tax Act, 1956. Sub-section (3), which is relevant for our purpose, provides the assessee with the option of getting the refund or carrying it forward to the next tax period as a tax credit. In case of refund, Section 38(3)(a) provides the timeline for refund from the date on which the return is furnished or claim for refund is made as: (i) within one month, if the period for refund is one month; (ii) within two months, if the period for refund is a quarter. Sub-section (4) provides that if notice has been issued under Section 58 or additional information has been sought under Section 59, then the amount shall be carried forward to the next tax period as tax credit. Sub-sections (5) and (6) pertain to security. Sub-section (7) provides certain exclusions while calculating the period under sub-section (3). Sub-sections (8)-(10) pertain to refund in cases of sale to registered and unregistered dealers. Lastly, sub-section (11) provides that the refund shall not be allowed to a dealer who has not filed any return that is due under the Act.

8. The language of Section 38(3) is mandatory and the department must adhere to the timeline stipulated therein to fulfil the object of the provision, which is to ensure that refunds are processed and issued in a timely manner.

9. In the present case, Section 38(3)(a)(ii) is relevant as both the refunds in the present case pertain to quarter tax periods. Therefore, as per Section 38(3)(a)(ii), the refund should have been processed within two months from when the returns were filed (31.03.2017 and 29.03.2019), which comes up to 31.05.2017 and 29.05.2019. The default notices are dated 30.03.2020, 23.03.2021, 30.03.2021, and 26.03.2022. It is therefore evident that the default notices were issued after the period within which the refund should have been processed. Sub-section (2) only permits adjusting amounts towards recovery that are "due under the Act". By the time when the refund should have been processed as per the provisions of the Act, the dues under the default notices had not crystallised and the respondent was not liable to pay the same at the time. The appellant-department is therefore not justified in retaining the refund amount beyond the stipulated period and then adjusting the refund amount against the amounts due under default notices that were issued subsequent to the refund period.

10. Further, the learned ASG's contention that the purpose of the timeline provided under sub-section (3) is only for calculation of interest under Section 42[8] would defeat the object of the provision. Such an interpretation would effectively enable the department to retain refundable amounts for long durations for the purpose of adjusting

---

8 The relevant portion of Section 42 reads:
"***42. Interest***
(1) A person entitled to a refund under this Act, shall be entitled to receive, in addition to the refund, simple interest at the annual rate notified by the Government from time to time, computed on a daily basis from the later of –
(a) the date that the refund was due to be paid to the person; or
(b) the date that the overpaid amount was paid by the person, until the date on which the refund is given.
PROVIDED that the interest shall be calculated on the amount of refund due after deducting therefrom any tax, interest, penalty or any other dues under this Act, or under the Central Sales Tax Act, 1956 (74 of 1956):
PROVIDED FURTHER that if the amount of such refund is enhanced or reduced, as the case may be, such interest shall be enhanced or reduced accordingly.
Explanation.- If the delay in granting the refund is attributable to the said person, whether wholly or in part, the period of the delay attributable to him shall be excluded from the period for which the interest is payable."

them on a future date. This would go against the object and purpose of the provision. This contention is hence rejected.

11. In view of the above, we dismiss the present appeal and affirm the impugned judgment directing the refund of amounts along with interest as provided under Section 42 of the Act.

12. Pending applications, if any, are disposed of.

Result of the case: Appeal dismissed.

†*Headnotes prepared by:* Aishani Narain, Hony. Associate Editor
(Verified by: Shibani Ghosh, Adv.*)*

[2024] 6 S.C.R. 346 : 2024 INSC 400

Arvind Kejriwal
v.
Directorate of Enforcement

(Criminal Appeal No. 2493 of 2024)

10 May 2024

[Sanjiv Khanna and Dipankar Datta, JJ.]

Issue for Consideration

Whether the Appellant is entitled to grant of interim bail/release during the pendency of the Appeal challenging his arrest by the Directorate of Enforcement, on account of an intervening factor i.e. 18th Lok Sabha General Elections.

Headnotes†

Bail – Interim Bail during the pendency of Appeal – Court to consider peculiarities associated with person in question and surrounding circumstances – Appellant has not been convicted, no criminal antecedents – Question of legality and validity of arrest *sub judice* – Interim bail granted.

Held: Appellant arrested on 21.03.2024 by Directorate of Enforcement – Arrest upheld by trial court and High Court – Order and judgment challenged – Questions relating to legality and validity of arrest *sub judice* – Power to grant interim bail – 18th Lok Sabha General Elections is an intervening factor – More holistic and libertarian view justified – While examining the question of grant of interim bail, courts to consider peculiarities associated with person in question and surrounding circumstances – Appellant is the Chief Minister of Delhi and leader of one of the national parties – He has not been convicted and has no criminal antecedents – Investigation pending since August 2022 – Grant of interim bail to Appellant does not give premium of placing the politicians in a benefic position compared to ordinary citizens – Interim bail granted subject to terms and conditions. [Paras 7, 8, 15]

Bail – Grant of Interim Bail – Terms and Conditions:

Held: Interim Bail granted subject to terms and conditions – Appellant to surrender on 02.06.2024 – Bail bonds with surety to be furnished – Appellant not to visit the Office of the Chief Minister and the Delhi Secretariat – Appellant bound by statement made

on his behalf that he shall not sign official files unless it is required and necessary for obtaining clearance/ approval of the Lieutenant Governor of Delhi – Appellant will not make any comment with regard to his role in the present case – Appellant will not interact with any of the witnesses and/or have access to any official files connected with the case. [Para 18]

Case Law Cited

Siba Shankar Das @ Pintu v. State of Odisha and Another, **2024 SCC Online 410;** *State of Andhra Pradesh v. Nara Chandra Babu Naidu,* **Special Leave Petition (Criminal) No. 15099 of 2023 – relied on.**

Mohinder Singh Gill and Another v. Chief Election Commissioner, New Delhi and Others **[1978] 2 SCR 272 : (1978) 1 SCC 405;** *Mukesh Kishanpuria v. State of West Bengal* **[2010] 5 SCR 702 : (2010) 15 SCC 154;** *Sunil Fulchand Shah v. Union of India and Others* **[2000] 1 SCR 945 : (2000) 3 SCC 409;** *Dadu @ Tulsidas v. State of Maharashtra* **[2000] Supp. 3 SCR 703 : 2000 INSC 479;** *Siddharam Satlingappa Mhetre v. State of Maharashtra and Others* **[2010] 15 (ADDL.) SCR 201: (2011) 1 SCC 694;** *Shri Gurbaksh Singh Sibbia and Others v. State of Punjab* **[1980] 3 SCR 383 : (1980) 2 SCC 565;** *Central Inland Water Transport Corporation Limited and Another v. Brojo Nath Ganguly and Another* **[1986] 2 SCR 278 : (1986) 3 SCC 156;** *Anukul Chandra Pradhan v. Union of India and Others* **[1997] Supp. 1 SCR 641 : (1997) 6 SCC 1;** *Anoop Baranwal v. Union of India (Election Commission Appointments)* **[2023] 9 SCR 1 : 2023 INSC 190;** *S.R. Chaudhuri v. State of Punjab and Others* **[2001] Supp. 1 SCR 621 : (2001) 7 SCC 126;** *K. Ananda Nambiar and Another v. Chief Secretary to the Government of Madras and Others* **[1966] 2 SCR 406 : AIR 1966 SC 657;** *State of Maharashtra v. Anand Chintaman Dighe* **[1990] 1 SCR 73 : (1990) 1 SCC 397;** *Athar Pervez v. State,* **2016 SCC Online Del 6662 – referred to.**

List of Acts

Prevention of Money Laundering Act, 2002; Indian Penal Code, 1860.

List of Keywords

Interim Bail; Interim suspension of sentence.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 2493 of 2024

From the Judgment and Order dated 09.04.2024 of the High Court of Delhi at New Delhi in WPCRL No. 985 of 2024

Appearances for Parties

Dr. Abhishek Manu Singhvi, Amit Desai, Vikram Chaudhari, Sr. Advs., Vivek Jain, Mohd. Irshad, Rajat Bharadwaj, Karan Sharma, Amit Bhandari, Rishikesh Kumar, Shadan Farasat, Ms. Suchitra Kumbhat, Rajat Jain, Sadiq Noor, Mohit Siwach, Kaustubh Khanna, Gopal Shenoy, Shailesh Chauhan, Advs. for the Appellant.

Tushar Mehta, S.G., Suryaprakash V. Raju, A.S.G., Mukesh Kumar Maroria, Kanu Agarwal, Annam Venkatesh, Zoheb Hossain, Vivek Gurnani, Hitarth Raja, Ms. Abhipriya, Kartik Sabarwal, Vivek Gaurav, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Order

Leave granted.

2. Arvind Kejriwal in this appeal has challenged the order and judgment passed by the trial court and the High Court of Delhi, upholding his arrest by the Directorate of Enforcement[1] on 21.03.2024.

3. A number of legal pleas and issues have been raised, including the scope and violation of Section 19 of the Prevention of Money Laundering Act, 2002. We have heard learned counsel appearing for both the appellant as well as DoE at some length, albeit hearing is yet to conclude and considered decision will take time.

4. In view of the prolongation of proceedings, in the hearing held on 03.05.2024, we had put the parties to notice, that the Court may

1 For short, 'DoE'.

examine the question of grant of interim bail/release. Accordingly, we have heard arguments on the said aspect.

5. DoE had registered ECIR No. HIU-II/14/2022 on 22.08.2022 pursuant to registration of the predicate offences by the Central Bureau of Investigation[2] on 17.08.2022 in RC No. 0032022A0053 under Section 120-B read with Section 447A of the Indian Penal Code, 1860 and Section 7 of the Prevention of Corruption Act, 1988. This RC was registered on the complaint dated 20.07.2022 made by the Lieutenant Governor of the Government of NCT of Delhi and on the directions of the competent authority conveyed by Director, Ministry of Home Affairs, Government of India.

6. The investigation by the DoE resulted in filing of the first prosecution complaint on 26.11.2022. The Special Court took cognisance on 20.12.2022. Thereafter, DoE has filed four supplementary prosecution complaints. CBI has filed a chargesheet, followed by two supplementary chargesheets. However, charges have not been framed.

7. At this stage, it is not possible for us to either conclude the arguments or finally pronounce the judgment. However, there is an intervening factor which has prompted us to consider and pass the present order, namely, 18th Lok Sabha General Elections, which are in progress. As the appeal is pending before us, we do not think it would be proper for us to direct the appellant – Arvind Kejriwal to approach the trial court for interim bail/release. This may not be apt in view of the legal issues and contentions that are under examination and consideration before us.

8. It is no gain saying that General Elections to Lok Sabha is the most significant and an important event this year, as it should be in a national election year. Between 650-700 million voters out of an electorate of about 970 million will cast their votes to elect the government of this country for the next five years. General Elections supply the *vis viva* to a democracy.[3] Given the prodigious importance, we reject the argument raised on behalf of the prosecution that grant of interim bail/release on this account would be giving premium of placing the

2 For short, 'CBI'.

3 See *Mohinder Singh Gill and Another v. Chief Election Commissioner, New Delhi and Others* (1978) 1 SCC 405

politicians in a benefic position compared to ordinary citizens of this country. While examining the question of grant of interim bail/release, the courts always take into consideration the peculiarities associated with the person in question and the surrounding circumstances. In fact, to ignore the same would be iniquitous and wrong.

9. We will now refer to some case law on the power to grant interim bail/release, which power is exercised routinely even by the trial courts.

10. In ***Mukesh Kishanpuria v. State of West Bengal***[4], this Court has held that the power to grant regular bail includes the power to grant interim bail, particularly in view of Article 21 of the Constitution of India.

11. ***Sunil Fulchand Shah v. Union of India and Others***[5] observes that parole by way of temporary release can be granted by Government or its functionaries in case of detenus under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. Further, the High Courts and this Court can direct temporary release of a detenu for specified reasons when the request is unjustifiably rejected by the authorities. However, the power of temporary release of a detenu suffering preventive detention is exercised only in extreme and deserving cases.

12. In ***Dadu @ Tulsidas v. State of Maharashtra***[6], notwithstanding Section 32A of the Narcotic Drugs and Psychotropic Substances Act, 1985[7], which prohibits the appellate court from suspending sentence awarded to the convict, this restriction, it is observed, does not affect the power and authority of the court to grant parole or furlough, even where a person has been convicted and sentenced and his appeal has been dismissed.

13. ***Athar Pervez*** v. ***State***[8], a judgment of the Delhi High Court authored by one of us (Sanjiv Khanna), on the power to grant interim bail in cases registered under the NDPS Act, in addition to the judgments noted, refers to ***Siddharam Satlingappa Mhetre v. State of Maharashtra***

4 [2010] 5 SCR 702 : (2010) 15 SCC 154

5 [2000] 1 SCR 945 : (2000) 3 SCC 409

6 [2000] Supp. 3 SCR 703 : (2000) 8 SCC 437

7 For short, the 'NDPS Act'.

8 2016 SCC Online Del 6662

and Others[9], which decision leans on the Constitutional Bench judgment in ***Shri Gurbaksh Singh Sibbia and Others v. State of Punjab***[10], and ***Central Inland Water Transport Corporation Limited and Another v. Brojo Nath Ganguly and Another***[11], and observes:

> "20. The expression "interim" bail is not defined in the Code. It is an innovation by legal neologism which has gained acceptance and recognition. The terms, "interim" bail/"interim" suspension of sentence, have been used and accepted as part of legal vocabulary and are well known expressions. The said terms are used in contradistinction and to distinguish release on regular bail during pendency of trial or appeal till final adjudication. Applications for "interim" suspension or bail are primarily moved and prayed for, when the accused or convict is not entitled to or cannot be granted regular bail or suspension of sentence, or the application for grant of regular bail is pending consideration and is yet to be decided. "Interim" bail entailing temporary release can be granted under compelling circumstances and grounds, even when regular bail would not be justified. Intolerable grief and suffering in the given facts, may justify temporary release, even when regular bail is not warranted. Such situations are not difficult to recount, though making a catalogue would be an unnecessary exercise."

14. Power to grant interim bail is commonly exercised in a number of cases. Interim bail is granted in the facts of each case. This case is not an exception.

15. The prosecution has rightly pointed out that the appellant – Arvind Kejriwal had failed to appear in spite of nine (9) notices/summons, first of which was issued in October 2023. This is a negative factor, but there are several other facets which we are required to take into consideration. The appellant – Arvind Kejriwal is the Chief Minister of Delhi and a leader of one of the national parties. No doubt, serious accusations have been made, but he has not been convicted. He

---

9 [2010] 15 SCR 201 : (2011) 1 SCC 694

10 [1980] 3 SCR 383 : (1980) 2 SCC 565

11 [1986] 2 SCR 278 : (1986) 3 SCC 156

does not have any criminal antecedents. He is not a threat to the society. The investigation in the present case has remained pending since August 2022. Arvind Kejriwal was arrested, as noted above, on 21.03.2024. More importantly, legality and validity of the arrest itself is under challenge before this Court and we are yet to finally pronounce on the same. The fact situation cannot be compared with harvesting of crops or plea to look after business affairs. In this background, once the matter is *subjudice* and the questions relating to legality of arrest are under consideration, a more holistic and libertarian view is justified, in the background that the 18th Lok Sabha General Elections are being held.

16. We will now refer to the judgments relied on behalf of the DoE:

(i) In ***Anukul Chandra Pradhan v. Union of India and Others***[12], this Court rejected the constitutional challenge to sub-section (5) to Section 62 of the Representation of the People Act, 1951, observing that the right to vote is not a constitutional right, and that the right can be curtailed. Interestingly, the proviso to the said sub-section states that a person subjected to preventive detention can vote. The prohibition was upheld on several grounds, including, *inter alia*, it promotes the object of free and fair elections. Indeed there are decisions of this Court that advert to the importance of elections in democracy, described as the barometer and lifeline of parliamentary system and its setup.[13]

(ii) In ***K. Ananda Nambiar and Another v. Chief Secretary to the Government of Madras and Others***[14], challenge to the Defence of India Rules, 1962 in its application to Members of Parliament, was rejected on the ground that members of the legislature cannot claim freedom from arrest. Detention does not violate privileges of the Members of Parliament.

(iii) In ***State of Maharashtra v. Anand Chintaman Dighe***[15], this Court while allowing the appeal, observed that the High Court has misdirected itself in granting bail to an accused convicted

12 [1997] Supp. 1 SCR 641 : (1997) 6 SCC 1

13 See *Anoop Baranwal v. Union of India (Election Commission Appointments)*, (2023) 6 SCC 161, quoting from *S.R. Chaudhuri v. State of Punjab and Others* (2001) 7 SCC 126

14 [1966] 2 SCR 406 : AIR 1966 SC 657

15 [1990] 1 SCR 73 : (1990) 1 SCC 397

under the Terrorist and Disruptive Activities (Prevention) Act, 1987, by refusing to look into statements and further material collected by the investigating agency.

17. We would reject the argument that the reasoning recorded by us in paragraphs 7, 8 and 14, results in grant of privilege or special status to politicians. As observed in paragraphs 7, 8 and 14, several peculiarities of the case have weighed with us. In ***Siba Shankar Das @ Pintu*** v. ***State of Odisha and Another***[16], this Court accepting the appeal, deleted the condition imposed by the High Court stipulating that the appellant shall not be involved in any political activities, directly or indirectly. Imposition of this condition, the order holds, would breach fundamental rights. No such condition should be imposed. A coordinate Bench of this Court in ***State of Andhra Pradesh*** v. ***Nara Chandra Babu Naidu***[17], in an appeal filed by the State, by an interim order has deleted the condition restraining the respondent therein from organising or participating in public rallies and meetings, thereby permitting him to participate in the political process. This petition seeking special leave to appeal is still pending.

18. For the aforesaid reasons, we direct that the appellant – Arvind Kejriwal will be released on interim bail in connection with case ECIR No. HIU-II/14/2022 dt. 22.08.2022 till 1st of June 2024, that is, he will surrender on 2nd of June 2024 on the following terms and conditions:

    (a) he shall furnish bail bonds in the sum of Rs.50,000/- with one surety of the like amount to the satisfaction of the Jail Superintendent;

    (b) he shall not visit the Office of the Chief Minister and the Delhi Secretariat;

    (c) he shall be bound by the statement made on his behalf that he shall not sign official files unless it is required and necessary for obtaining clearance/ approval of the Lieutenant Governor of Delhi;

    (d) he will not make any comment with regard to his role in the present case; and

16 2024 SCC OnLine SC 410

17 Special Leave Petition (Criminal) No. 15099 of 2023

(e) he will not interact with any of the witnesses and/or have access to any official files connected with the case.

19. The grant of interim bail will not be treated as an expression of opinion on the merits of the case or the criminal appeal which is pending consideration before us.

Result of the case: Interim Bail granted.

†*Headnotes prepared by:* Prastut Mahesh Dalvi, Hony. Associate Editor
(*Verified by:* Shibani Ghosh, Adv.)

[2024] 6 S.C.R. 355 : 2024 INSC 431

United India Insurance Co. Ltd.
v.
M/s Hyundai Engineering & Construction Co. Ltd. & Ors.

(Civil Appeal No. 1496 of 2023)

16 May 2024

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

Issue for Consideration

Matter pertains to the correctness of the decision by the National Commission which directed the appellant-insurer to release and pay an insurance claim to the respondent-contractor for the collapse of the bridge.

Headnotes†

Consumer Protection Act, 1986 – Insurance Contract – Exclusion clause – Interpretation – Payment of insurance claim – Contract for design, construction and management of a bridge awarded to the respondent and another company – Issuance of contractor's all risk insurance policy for the project by the appellant-insurer – However, during the construction, part of the bridge collapsed resulting in fatalities – Investigation report holding the respondents liable due to defects in the design, construction and supervision – Report submitted by Surveyor as also the Committee of Experts – Respondents made a insurance claim, however the appellant repudiated the same – Meanwhile the respondents completed the work under the contract and the bridge was put to public use – Almost after 2 years of the rejection of the claim, the respondents filed a consumer complaint alleging deficiency in the appellant's service – National Commission allowed the same, directing the appellant to pay the insurance claim – Correctness:

Held: Insurance is a contract of indemnification, being a contract for a specific purpose, which is to cover defined losses – Courts have to read the insurance contract strictly – Essentially, the insurer cannot be asked to cover a loss that is not mentioned – Exclusion clauses in insurance contracts are interpreted strictly and against the insurer as they have the effect of completely exempting the insurer of its liabilities – Appellants-insurer discharged the burden –

* Author

There was sufficient evidence to justify repudiation of the claim on the basis of the exclusion clause – Reliance on the findings of the Expert Committee justified – It was found from the Expert Committee's report that combination of factors such as lack of stability and robustness in the structure, shortfall in design, lack of quality workmanship all contributed to the collapse – On the other hand, there was absolutely no evidence on behalf of the respondents – Surveyor was examined and his evidence remained unrebutted – Reports of independent experts relied on by the respondents were not based on site inspection but were theoretical in nature – Furthermore, continuation of work by respondents could be due to various reasons – Even if the NHAI's decision to continue is taken to be a valid economic decision, that by itself cannot be a reason for not applying the applicable clause of the contract if such applicability is otherwise proved by cogent evidence – Thus, the NCDRC erred in allowing the consumer complaint – Impugned order passed by the NCDRC set aside. [Paras 16, 18, 20.3, 21, 23, 26, 28-30]

Case Law Cited

Oriental Insurance Co. Ltd. v. Sony Cheriyan [1999] Supp. 1 SCR 622 **: (1999) 6 SCC 451;** *United India Insurance Co. Ltd. v. Levis Strauss (India) (P) Ltd.* [2022] 10 SCR 231 **: (2022) 6 SCC 1;** *New India Assurance Co. Ltd. v. Rajeshwar Sharma* [2018] 14 SCR 1181 **: (2019) 2 SCC 671;** *Canara Bank v. United India Insurance Co. Ltd.* [2020] 7 SCR 498 **: (2020) 3 SCC 455;** *Oriental Insurance Co. Ltd. v. Samayanallur Primary Agricultural Coop. Bank* [1999] Supp. 4 SCR 329 **: (1999) 8 SCC 543;** *Texco Marketing P. Ltd. v. TATA AIG General Insurance Company Ltd.* [2022] 9 SCR 1031 **: (2023) 1 SCC 428;** *National Insurance Company Ltd. v. Vedic Resorts and Hotels Pvt. Ltd.* [2023] 7 SCR 419 **: (2023) SCC OnLine SC 648;** *National Insurance Co. Ltd. v. Ishar Das Madan Lal* [2007] 2 SCR 1014 **: (2007) 4 SCC 105;** *National Insurance Company Ltd. v. Hareshwar Enterprises (P) Ltd.* [2021] 8 SCR 895 **: (2021) SCC Online SC 628 – referred to.**

List of Acts

Consumer Protection Act, 1986; Penal Code, 1860.

United India Insurance Co. Ltd. v.
M/s Hyundai Engineering & Construction Co. Ltd. & Ors.

List of Keywords

Consumer Complaint; Release and pay insurance claim; Contractor's all risk insurance policy; Investigation report; Surveyor report; Committee of Experts report; Repudiation of insurance claim; Deficiency in service; Insurance, contract of indemnification; Exclusion clauses in insurance contracts; Discharge the burden.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1496 of 2023

From the Judgment and Order dated 16.01.2023 of the National Consumer Disputes Redressal Commission, New Delhi in C.C. No. 160 of 2019

Appearances for Parties

Dr. Abhishek Manu Singhvi, Niraj Kishan Kaul, Sr. Advs., Amit Kumar Singh, Ms. K Enatoli Sema, Ms. Chubalemla Chang, Prang Newmai, Advs. for the Appellant.

Dama Sheshadri Naidu, Sr. Adv., Mahesh Agarwal, Rishi Agrawala, Ankur Saigal, Ms. S. Lakshmi Iyer, Ms. Anwesha Padhi, Himanshu Saraswat, E. C. Agrawala, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Pamidighantam Sri Narasimha, J.

1. The appellant, United India Insurance Co. Ltd., an insurance company, challenges the decision by the National Consumer Disputes Redressal Commission (hereinafter 'the NCDRC'), which by its impugned order dated 16.01.2023 allowed the Consumer Complaint No.160 of 2019 and directed the appellant to release and pay an insurance claim of Rs. 39,09,92,828/-.

2. ***Facts***: The National Highway Authority of India ('NHAI'), respondent no. 3 herein, awarded a contract for the design, construction and maintenance of a cable-stayed bridge across the river Chambal on NH-76 at Kota, Rajasthan to a joint venture company comprising of respondent no. 1 and respondent no. 2. The value of the project under the contract was Rs. 213,58,76,000/-. The contract provided that the construction work was to be completed within 40 months

and the joint venture was thereafter assigned the task of maintaining the said bridge for a period of 6 years, of which, 2 years was the 'defect-notification period'. NHAI also assigned consultancy services for design, construction and maintenance of the bridge to another joint venture of M/s Louis Berger Group Inc. (USA) and M/s COWI A/S (Denmark).

3. The appellant issued a Contractor's All Risk Insurance Policy covering the interest of NHAI as principal, and M/s Hyundai Engineering Infrastructure Co. Ltd. along with M/s Gammon India as JV Contractor under the policy bearing No. 011900/44/07/03/60000001 for the period from 05.12.2007 to 04.12.2011 for a total amount of Rs. 213,58,76,000/-. The relevant clauses of the policy are extracted as follows:

> "*SECTION I - MATERIAL DAMAGE:*
>
> *1. The Company hereby agrees with the Insured (subject to the exclusions and conditions contained herein or endorsed hereon) that if, at anytime during the period of insurance stated in the Schedule, or during any further period of extension thereof the property (except packing materials of any kind) or any part thereof described in the Schedule be lost, damaged or destroyed by any cause, other than those specifically excluded hereunder, in a manner necessitating replacement or repair, the Company will pay or make good all such loss or damage upto an amount not exceeding in respect of each of the items specified in the Schedule the sum set opposite thereto and not exceeding in the whole the total Sum Insured hereby.*
>
> *The Company will also reimburse the Insured for the cost of clearance and removal of debris following upon any event giving rise to an admissible claim under this Policy but not exceeding in all the sum (if any) set opposite thereto in the Schedule. The term debris only of the Insured property and the cost of clearance and removal of debris pertaining to property not Insured by the policy will not be payable*."
>
> "*EXCLUSIONS TO SECTION - I*
>
> *The Company, shall not, however, be liable for;*

a) the first amount of the loss arising out of each and every occurrence shown as Excess in the Schedule;

b) loss discovered only at the time of taking an inventory;

c) normal wear and tear, gradual deterioration due to atmospheric conditions or lack of use or obsolescence or otherwise, rust, scratching of painted or polished surfaces or breakage of glass;

d) loss by damage due to faulty design;

e) the cost of replacement, repair or rectification of defective material and/or workmanship, but this exclusion shall be limited to the items immediately affected and shall not be deemed to exclude loss of or damage to correctly executed items resulting from an accident due to such defective material and/ or workmanship;

f) the cost necessary for rectification or correction of any error during construction unless resulting in physical loss or damage

g) loss of or damage to files, drawings, accounts, bills, currency, stamps, deeds, evidence of debt, notes, securities, cheques, packing materials such as cases, boxes, crates;

h) any damage or penalties on account of the Insured's non-fulfilment of the terms of delivery or completion under this Contract of construction or of any obligations assumed thereunder or lack of performance including consequential loss of any kind or description or for any aesthetic defects or operational deficiencies;

i) loss of or damage to vehicles licensed for general road use or waterborne vessels or machinery/equipment mounted or operated or fixed on floating vessels/ craft/barges or aircraft."

4. The construction project commenced in December, 2007. While the construction was in progress, a part of the constructed bridge collapsed on 24.12.2009, resulting in the death of 48 workmen. On 26.12.2009,

the Ministry of Road Transport and Highways, Government of India constituted a Committee of Experts (hereinafter, 'Expert Committee') under the chairmanship of the Director General (Road Development) and Special Secretary, Ministry of Road Transport and Highways. The task of this committee was to investigate and report the cause of the collapse. An FIR was also lodged against the respondents for offences under Sections 304/308 of the Indian Penal Code, 1860. After investigation, a final report dated 19.03.2010 was filed wherein the officials of the respondent companies were charged under the said provisions. It was found that they were liable for the loss of 48 lives due to several defects at the stage of design, construction and supervision.

5. The NHAI intimated the appellant about the incident on 29.12.2009 and requested the deputation of a surveyor to assess the damage caused due to the accident and also sought indemnification of the loss. A surveyor was appointed. He commenced his work and by a letter dated 06.01.2010, he called for certain details and clarifications from the respondents. While furnishing the details, the respondents made a claim of Rs. 151,59,94,542/-.

6. The Committee of Experts constituted by the Government of India submitted its report on 07.08.2010. Relevant parts of some of the important findings of the Committee are as follows:

> "*8.2.2 Views of the Committee*
>
> *8.2.2.1 The majority of failures in structures occur during construction stages when they are most vulnerable. The Chambal Bridge Accident was a sudden and catastrophic structural failure. It may be pointed out that the bridge was at one of its critical stages at the time of the accident.* […]
>
> *8.2.2.2* […] *At this stage, as noted in para 5.8, the stabilizing moment would become less than the overturning moment. Uncontrolled rotation of the pylon about the base would take place which would result in its gaining momentum as it fell. This is borne out by the fact that the catastrophic failure involved a catapult action wherein the span P3-P4 as a whole, (which was tied together by prestressing cables) was thrown some 100 m away.*

8.2.2.3 The serious distress in span P3-P4 referred to para 8.2.2.2 could have been caused by shortfall in design, poor workmanship, unexpected load, sub-standard material or distress in foundation P4 or a combination of some of these. […]

8.2.2.4 It can be seen that had there been additional stability devices in place (such as those mentioned in para 8.2.2.1) the cycle involving progressive loss of rotational restrain at the base of the pylon and accentuation of distress in P3-P4 might not have been initiated and the collapse might not have occurred."

7. The final conclusions of the committee are relevant for this case, and are as follows:

"*CONCLUSIONS*

9.1 From all the information made available by the various agencies as also the analysis and evaluation made by the Committee, it is felt that a combination of factors such as lack of stability and robustness in the partially completed structure, shortfalls in design and lack of quality of workmanship in the construction of span P3-P4 have contributed to the collapse of this bridge. The trigger for initiation of the collapse appears to have been unpredictable and sudden additional loading due to failure of supporting arrangement of the form traveller."

9.2 Since this is a design-build "Turnkey Contract" which covers planning, investigation, design, construction and maintenance of the cable stayed bridge, the primary responsibility for the collapse lies with the Contractor, M/s Hyundai — Gammon (JV). The Contractors are responsible for allowing the structure to reach a vulnerable stage without taking adequate precautions with respect to stability and robustness of the partially completed structure and the short fall in the design. They are also responsible for deficiency in workmanship in the construction of span P3-P4.

9.3 The design for this bridge was prepared by M/s SYSTRA, the Design Consultants of the Contractor M/s Hyundai-Gammon (JV). Since there have been shortfalls

in design, the responsibility for the same also lies with M/s SYSTRA.

9.4 The Supervision Consultants for this Project are M/s LBG-COWI whose duties include construction supervision along with the proof-checking of the design through M/s COWI While carrying out the proof-checking work M/s COWI have not highlighted the shortfalls in the design which have been observed subsequently by the Committee. Further, the Supervision Consultants have not been sufficiently proactive in preventing lapses in workmanship. They have also given tacit approval for major changes during construction without insisting on a proper review of the design by the Contractors / Design Consultants. As such, the Supervision Consultants are responsible for these lapses.

9.5 M/s Freyssinet acted as specialist Agency to M/s Hyundai for supply, installation and operation of the form traveller equipment for cantilever construction, post - tensioning work and installation of stay cables. Since the trigger for the collapse appears to be the failure of the Freyssibar and / or the supporting arrangement for the form traveller, the extent of their responsibility may be examined keeping in view the Contract Agreement between the concerned agencies.

9.6 Apportioning of extent of responsibility to the various agencies for the collapse of the structure could be examined further by the Employer (NHAI) keeping in view the contracts for this Project entered into between various agencies with each other and with NHAI."

8. On 06.12.2010, NHAI issued a show-cause notice to the respondent nos. 1 and 2 calling upon them to justify as to why they should not be debarred. The respondents replied to the show cause notice, and after perusing the reply, the NHAI took a decision to permit them to carry out the remaining part of the contract.

9. In the meanwhile, the surveyor appointed by the appellant submitted its final report on 28.02.2011. While assessing the net loss at Rs. 39,09,92,828/-, the surveyor recommended to the appellant that the

insurance claim must be rejected as the respondents no. 1 and 2 had violated the conditions of the insurance policy. Based on the surveyor's report and also the findings and conclusions of the Expert Committee, the appellant repudiated the insurance claim in its letter dated 21.04.2011.

10. By their letter dated 17.06.2011, respondents nos. 1 and 2 requested the appellants to reconsider the decision of repudiation. In support of their contentions, the respondents relied on certain independent reports submitted by i) Mr. Jacques Combault; ii) M/s SETRA/CETE (French Ministry of Transportation Technical Department); iii) M/s Halcrow Group Ltd. and iv) AECOM Asia Co. Ltd. Relying on these reports, the respondents urged stated that there is no fault in the design of the bridge, and this is clearly reiterated by technical experts, who are specialists in the field.

11. As the appellant agreed to reconsider the repudiation, respondents no. 1 and 2 submitted various documents in support of their claim. The appellant re-considered the claim, and by a letter dated 17.04.2017 informed the respondents that the original decision of repudiation is affirmed as they did not find any justifiable reason for accepting the claim. The relevant portion of the said communication dated 17.04.2017 is as follows:

> "*We refer to your letter Ref: 17011/27/2006-kota/CAR/ RJ-05/3909, dt: 18.01.2017 and Contractor letter Ref: HZ-6718, dt: 04.02.2017 and also the subsequent meeting held at our office-Chennai. On perusal of the documents provided, we find that no further points have emerged in support of the claim*.
>
> *In view of the above we regret our inability to reconsider the claim which was repudiated*."

12. In the meanwhile, respondents no. 1 and 2 completed the work under the contract by 31.07.2017. The bridge was inaugurated and put to public use from 29.08.2017, and it is said to be operating since then.

13. Almost after 2 years of the rejection of the claim, on 24.01.2019, respondents no. 1 and 2 filed a Consumer Complaint No. 160 of 2019 before the NCDRC alleging deficiency in the appellant's service and unfair trade practice adopted by it.

14. ***Decision of the NCDRC***: At the outset, the NCDRC rejected the preliminary objection of the appellant that the summary jurisdiction under the Consumer Protection Act, 1986 (hereinafter, 'the CPA') is not appropriate for dealing with complicated questions of law and fact. The objection relating to limitation in filing the complaint was also dismissed by holding that the period for calculating the limitation would commence from 17.04.2017 and not from 21.04.2011.

14.1 On merits of the matter, the NCDRC held that the report of the Committee of Experts was inconclusive as it could not identify the precise reasons for the collapse of the bridge. On the other hand, the NCDRC placed reliance on the reports of i) Mr. Jacques Combault, ii) the Halcrow Group, iii) SETRA and iv) AECOM Asia Co. Ltd., and came to the conclusion that there is no defect in the design of the bridge and that the respondent nos. 1 and 2 are not at fault.

14.2 Finally, the NCDRC relied on the decision of the NHAI permitting the respondent nos. 1 and 2 to proceed with the construction of the remaining part of the bridge and held that if the NHAI found the respondents to be competent enough to continue with the contract, it can safely be concluded that they were not at fault.

14.3 In this view of the matter, the NCDRC directed the appellant to pay the respondents no. 1 and 2 a sum of Rs. 39,09,92,828/- with an interest at 9% p.a. from the first date of repudiation, i.e., 21.04.2011.

14.4 Strangely, while the judgment of the NCDRC was pronounced on 16.01.2023, an addendum came to be added to the judgment. This addendum is undated and seeks to amend paragraphs 28 and 29 and directs payment of Rs. 151,59,94,542/- instead of Rs. 39,09,92,828/-. The relevant portion of the addendum is extracted here for ready reference:

> "*32. It will be relevant to mention here that though the Complainant No.1, vide letter dated 27.02.2010 had submitted a detailed Claim Statement of ₹93,67,17,876 to the Surveyor but it was revised vide e-mail dated 07.03.2010 to the tune of ₹149,87,44,914/-. It was again revised vide letter dated 24.06.2010 (Serial No.2 of the Claim Statement - ₹8,29,15,604 to*

₹10,01,65,232) to a final Claim of ₹151,59,94,542/-. The Surveyor had, however, assessed the total loss at ₹39,09,92,828/- . Even though in the Written Submissions filed by the Learned Counsel for the Complainants they have claimed that at least a net loss of ₹39,09,92,828/- be payable towards the insurance claim but in my considered opinion the Complainants are entitled for the payment of entire loss of ₹151,59,94,542/- claimed by them.

33. Consequently, the Complaint is partly allowed with a direction to the Insurance Company to pay a sum of ₹151,59,94,542/- to the Complainants along with interest @9% p.a. from the date of repudiation of the claim i.e. 21.04.2011 till the actual realization, within a period of 8 weeks from the date of passing of the order failing which the amount shall attract interest @12% p.a. for the said period. The Complainants shall also be entitled for a costs of ₹50,000/-."

15. Mr. Dama Seshadri Naidu, learned senior counsel appearing for the respondents has submitted that he is not in a position to support the judgment amending the paragraphs 28 and 29 and directing the payment of the revised amount of Rs. 151,59,94,542/-. It is unimaginable as to how the NCDRC could unilaterally revise the claim from Rs. 39,09,92,828/- to Rs. 151,59,94,542/-, without hearing the parties and more surprisingly when respondent nos. 1 and 2 have themselves filed written submissions confining the claim to Rs. 39,09,92,828/-. Be that as it may, in view of the submission of the learned counsel for the respondent that he will confine the claim Rs. 39,09,92,828/-, this issue need not detain us any further.

16. ***Analysis***: Insurance is a contract of indemnification, being a contract for a specific purpose[1], which is to cover defined losses[2]. The courts have to read the insurance contract strictly. Essentially, the insurer cannot be asked to cover a loss that is not mentioned. Exclusion clauses in insurance contracts are interpreted strictly and against the

1 *Oriental Insurance Co. Ltd. v. Sony Cheriyan* (1999) 6 SCC 451

2 *United India Insurance Co. Ltd. v. Levis Strauss (India) (P) Ltd.* (2022) 6 SCC 1

insurer as they have the effect of completely exempting the insurer of its liabilities.[3]

17. In *Texco Marketing P. Ltd.* v. *TATA AIG General Insurance Company Ltd.*,[4] while dealing with an exclusion clause, this Court has held that the burden of proving the applicability of an exclusionary clause lies on the insurer. At the same time, it was stated that such a clause cannot be interpreted so that it conflicts with the main intention of the insurance. It is, therefore, the duty of the insurer to plead and lead cogent evidence to establish the application of such a clause[5]. The evidence must unequivocally establish that the event sought to be excluded is specifically covered by the exclusionary clause.[6] The judicial positions on the nature of an insurance contract, and how an exclusion clause is to be proved, shall anchor our reasoning in the following paragraphs.

18. Seeking to justify their repudiation, the appellant relied on the affidavit of evidence by Mr. S. Anantha Padmanabhan, examined as RW 2. He produced the surveyor's report as well as the Expert Committee's report as Ex. RW 2/2. On the other hand, the reports of the *independent experts* relied upon by the respondents no. 1 and 2 were not marked as exhibits. They were not adduced in evidence as none of these experts was examined as a witness. Under these circumstances, we have no hesitation in coming to a conclusion that the appellants have discharged the burden as enunciated in *Texco* (supra).

19. The Expert Committee was constituted by the Ministry of Road Transport and Highways ('MORTH'), Government of India. It was chaired by the Director General (Road Development) and Special Secretary, MORTH. The other members of the Committee were Mr. Ninan Koshi DG (RD) & AS (Retd.), Prof. Mahesh Tandon, Bridge Specialist, and Prof. A.K. Nagpal, Dept. of Civil Engineering, IIT Delhi. We have referred to the constitution as well as the expertise of the Committee only to assure ourselves that it comprised of

---

3 *New India Assurance Co. Ltd. v. Rajeshwar Sharma* (2019) 2 SCC 671; *Canara Bank v. United India Insurance Co. Ltd.* (2020) 3 SCC 455;
Oriental Insurance Co. Ltd. v. Samayanallur Primary Agricultural Coop. Bank (1999) 8 SCC 543

4 [2022] 9 SCR 1031 : (2023) 1 SCC 428

5 *National Insurance Company Ltd. v. Vedic Resorts and Hotels Pvt. Ltd.*, 2023 SCC OnLine SC 648

6 *National Insurance Co. Ltd. v. Ishar Das Madan Lal*, 2007 (4) SCC 105

experts in the field of civil engineering. It is also indicative of the fact that the members were independent and well-qualified to examine and submit a report. We would, therefore, be justified in relying on the findings of the Expert Committee. In fact, the NCDRC's opinion about the Expert Committee is not about lack of credibility, or lack of expertise, rather its opinion was only that the Committee was not conclusive in its findings.

20. The proof of the pudding is in its eating - we will straight away refer to the relevant portions of the Expert Committee's report. Referring to the variations introduced on-site without any approval by the design checker, the Committee held as follows:

> "*5.1.2 Since this is a Design Build Contract, the Contractors M/s Hyundai-Gammon (JV) had appointed M/s SYSTRA of France as their Design Consultant. The designs prepared by M/s SYSTRA were proof checked by M/s COWI, the Proof Check Consultant. During the course of presentations and discussions with various agencies, there were some contradictions in the stand taken by M/s SYSTRA and M/s COWI as regards the extent of proof checking of designs by the Proof Check Consultant. In fact, M/s COWI in their submission dated 28th May, 2010 (Annexure L-21) have stated as follows: "The Design Checker verified the Final Design prior to start of construction. The variations introduced on site were introduced by the BOT Contractor. We expect that all variations were subject to verification and approval of the Designer. The Design Checker was not requested to review any design verification following variations on site from the Final Design.* […]"
>
> (**emphasis supplied**)

20.1 The Committee noted that each lateral span of the bridge was supposed to be a monolithic structure. A lateral span is the structure between two support pillars. However, the collapsed lateral span was cast in multiple parts, as noted in the following paragraph:

> "*5.3.3 M/s SYSTRA have expressed vide their submission dated 17th April, 2010 (Annexure H-11, page 3) that they have envisaged "one go"*

(i.e. monolithic construction) for each lateral span during the development of the design. However, during actual construction the lateral span P3-P4 was cast in seven parts. The lower part of the box girder (U-shaped section comprising bottom slab and webs upto about mid height) was concreted in four different stages with three vertical construction joints. The upper part of the box girder (comprising deck slab and top half of the webs) was later concreted in three stages (with two vertical construction joints). It has been informed by M/s Hyundai-Gammon JV vide their letter HN-1656 dated 1st September, 2009 (Annexure L-18, page 3) that M/s SYSTRA, the designer of the main bridge including lateral spans, were aware of this. In fact, Mr. J. Mirailles of M/s SYSTRA had visited the site in the month of July 2009 and stayed there for a couple of weeks to inspect the ongoing construction. The construction of lateral span P3- P4 in parts was being carried out at that time…"

"*5.3.5 The query of the Committee regarding position of M/s LBG-COWI in respect of applicability of Clauses of AASHTO relating to "Segmentally Constructed Bridges" to the design of lateral span P3-P4, was discussed with Mr. Nielsen of M/s COWI on 23rd June, 2010. Mr. Nielsen mentioned that as per his understanding, it was a case of segmental construction*. […]"

(**emphasis supplied**)

20.2 The Committee noted that the point at which the cable was going to be suspended with the pylon was crucial. It observed that the height at which the suspension took place was 77 metres, whereas, it was supposed to be 40 metres. The relevant paragraph is as follows:

"*6.2 The drawing No.A104-DWG-MB-FD-1301 REV. 1 dated 28th May, 2009 [Annexure H-01(ii)] shows that the lateral spans P3-P4 as well as*

P2-P3, should have been completed and external tendons tensioned before the first stay cable was installed. The steel box for anchoring the first stay cable was to be placed in the pylon at the height of 33.30m. Also, the first cantilever segment towards the river side from P4 was to be constructed only after the lateral spans P3-P4 and P2-P3 had been completed and fully prestressed. It is seen that this sequence was changed in the actual construction. Further, drawing No.A104-DWG-MB-FD-846 REV. 2(c) dated (??)/07/09 [Annexure H-01(ii)] specifically mentions that "tendons tensioning on span P2-P3 must be performed before pouring segment S10". This requirement was also changed during actual construction. […]

6.3…This implies that the height of the pylon should have been about 40 m at the time of tensioning of first stay cable at cantilever segment S10. However, it is seen that at the time of casting of segment S10, the free-standing pylon had already been constructed to a height of 77 m."

(**emphasis supplied**)

20.3 The other relevant portions cited to us from the Committee's Report include para 6.5, which speaks about the changes in the sequence of construction without consulting or informing the design consultants of the project. Para 6.8 was relied on to highlight further discrepancies between the approved drawing plans and the actual construction. Concrete batching plants involved were of a lower capacity, leading to delays in construction of the lateral spans. Para 8.1.2 (iii) was also brought to our notice, as it spoke about the changes which were brought about without a proper technical review. The conclusions of the committee have already been quoted by us in paragraph 7 above, and it was found that:

a) a combination of factors such as lack of stability and robustness in the structure, shortfall in design, lack of quality workmanship have all contributed to the collapse;

b) the primary responsibility lies with the contractor, M/s Hyundai and Gammon (JV) who are responsible for allowing the structure to reach a vulnerable stage without taking adequate precautions and there is a shortfall in the design;

c) there were shortcomings in the design for the bridge prepared by M/s SYSTRA and the responsibility for the design lies with M/s SYSTRA;

d) M/S COWI, the supervision consultants have not highlighted the shortfall in the design. M/s COWI has not been sufficiently proactive in preventing lapses in workmanship. They have given tacit approvals for major changes without insisting on a proper review of the design;

e) The trigger for the collapse appears to be the failure of M/s Freyssinet. Their responsibility must be examined in detail.

21. We are inclined to accept the appellant's submission that there is sufficient evidence to justify repudiation of the claim on the basis of the exclusion clause. On the other hand, there is absolutely no evidence on behalf of the respondents. His argument is only that the Surveyor/Committee report is not clinching, it is open ended and does not hold that the respondents no. 1 and 2 are responsible for the negligence.

22. We will now refer to the surveyor's report, the findings of which are as follows:

> "*C) After a detailed study of the Insured's submission vide their letter dt; 27.02.2010 and several rounds of face to face interactions with the Insured's Engineers at site, we derived the following inferences;*
>
> *1). The junction at Pylon P4, was the most critical and vulnerable in the entire construction and had to be handled with due care and diligence.*
>
> *2). It was clear and obvious, that, an unstable equilibrium has been created at this junction, (where, the over turning moment was in excess of resisting moment), due to the shearing of the slab in lateral span P3*

-P4 at about 15 mts from the P4 junction, which has caused the tilting of the Pylon, dragging with it, spans P3-P4, P3-P2 and Piers P4, P3. The shearing of the slab is purely a Design aspect.

3). *The restraints imposed on the movement of the Bearings at P4 were released by the Insured prior to completion of the main spans, which facilitated movement of Pylon along with Lateral spans and this is one of the most significant factors, contributing to this massive failure.*

4). *The sequence of operations in the construction of the Bridge were changed in actual construction to make up for the time lost and this has adversely affected the stability of the P4 joint.*

5). *Raising Pylon P4 to an abnormal height of 77 mts (out of 80 mts) without any lateral anchorage in the form of stringers, had left the Pylon P4 exposed to heavy wind pressure and in a state of unstable equilibrium, ready to collapse at any time, with the application of a little external force in excess.*

6). *We were informed that, the concreting of Lateral span P3-P4 was done in 7 stages, whereas, it should have been done at ONE GO. This leaves vertical joints which are vulnerable. We also noted that, the Insured had to resort to concreting in stages, due to insufficient Batching Plants.*

7). *Change in allocation of works amongst the Joint Venture Partners also played a key role in the quality of workmanship. At several places, M/s.Gammon had to carryout the jobs, supposed to have been carried out by M.s,Hyundai. Even in the affected location of P4, the construction of Pier P4 was the responsibility of M/s. Hyundai, whereas, it was carried out by M/s Gammon.*

8). *Lack of co-ordination and planning between proof checking consultant and design consultants could have been streamlined.*

[…]

11). The sequence of concreting carried out on the date of failure, as informed to us, was different from the versions of the Insured. […]"

23. It is important to note that the surveyor was examined as RW-1 and his evidence remained unrebutted. In *National Insurance Company Ltd. v. Hareshwar Enterprises (P) Ltd*.[7] and *National Insurance Company Ltd. v. Vedic Resorts and Hotels Pvt. Ltd*.,[8] this court has held that the surveyor's report is a credible evidence and the court may rely on it until a more reliable evidence is brought on record. In the present case, the surveyor's report was the evidence tendered by the insurance company, and it has not been treated as unreliable by the NCDRC.

24. Mr. Naidu, appearing on behalf of the respondents, commenced his submission by referring to certain portions of the judgment of this court in *Texco* (supra) to emphasise that exclusionary clauses place extraordinary burden on the insurance company. We have already answered this question by referring to the evidence adduced by the appellant, which we consider to be a sufficient discharge of the burden. On the Expert Committee's report, Mr. Naidu has re-iterated the finding of the NCDRC that it is inconclusive apart from being a mere opinion. Even this submission stands answered by extracting specific and categorical findings of the Committee as well as the surveyor's report.

25. Mr. Naidu sought to draw support from the reports of independent experts on the issue of design to establish that the respondents are not at fault. Mr. Naidu sought to rely on reports by (i) Mr. Jacques Combault; (ii) M/s SETRA/CETE (French Ministry of Transportation Technical Department); (iii) M/s Halcrow Group Ltd.; and (iv) AECOM Asia Co. Ltd.

26. At the outset, the concerned experts were never examined before the NCDRC. Further, these reports were not based on site-inspection. They are all theoretical in nature. For example, the report Mr. Jacques Combault is based on:

---

7 [2021] 8 SCR 895 : (2021) SCC Online SC 628

8 [2023] 7 SCR 419 : 2023 SCC OnLine SC 648

"*The analysis reported in the following pages is based on:*

- *The description of Bridge Concept as proposed by Systra*
- *The Main characteristics of the Structural Concept as proposed by Systra*
- *The State of the Art in the field of prestressed concrete cable stayed bridges*
- *Examples of similar bridges successfully achieved in the past*"

After a theoretical analysis, the following conclusion is drawn:

"*The structural concept of the Chambal Bridge as proposed by Systra is: -*

- *perfectly fitting the site-conditions*
- *conforming to the state of the art in the field of cable stayed bridges*

The construction methods, as proposed by Systra, are simple and proven processes well adapted to the structural concept."

27. A similar approach was adopted by the other experts. On the other hand, the surveyor has examined himself and adduced documents. Further, there is sufficient evidence to indicate that the surveyor has made site-visits and the proof of that was part of the pleadings filed before us.

28. The submission that NHAI continuing the contract with respondent nos. 1 and 2 and they have, in fact, completed the contract does not impress us. The continuation of work by respondent nos. 1 and 2 could be due to various reasons. Even if the NHAI's decision to continue is taken to be a valid economic decision, that by itself cannot be a reason for not applying the applicable clause of the contract if such applicability is otherwise proved by cogent evidence.

29. For the reasons stated above, we are of the opinion that the NCDRC fell into a clear error of law and fact in allowing the consumer complaint for multiple reasons. As we have not agreed with the preliminary objection of the appellant to reject the complaint and relegate the

respondents to civil court, we made extra efforts to examine the facts in detail. It is for this reason that the evidentiary value of the reports, their scope and ambit, and their contents were examined by us in some detail.

30. For the reasons stated above, we allow the appeal and set-aside the impugned order dated 16.01.2023 passed by the NCDRC in Consumer Complaint No. 160 of 2019.

31. Pending applications, if any, shall be disposed of.

32. There shall be no order as to costs.

Result of the case: Appeal allowed.

†*Headnotes prepared by:* Nidhi Jain

[2024] 6 S.C.R. 375 : 2024 INSC 406

Indian Medical Association & Anr.
v.
Union of India & Ors.

(Writ Petition (Civil) No. 645 of 2022)

07 May 2024

[Hima Kohli and Ahsanuddin Amanullah, JJ.]

Issue for Consideration

The number of misleading advertisements that are being published/displayed with little/nil accountability on the part of the manufacturers, promoters and advertisers.

Headnotes†

Guidelines for Prevention of Misleading Advertisements and Endorsements of Misleading Advertisements, 2022 – Advertisement – Misleading advertisement – Deceptive advertisement – Responsibility and duty of manufacturers, service providers, advertisers and advertising agencies:

Held: Advertisers/advertising agencies and endorsers are equally responsible for issuing false and misleading advertisements – Such endorsements that are routinely made by public figures, influencers, celebrities etc. go a long way in promoting a product – It is imperative for them to act with a sense of responsibility when endorsing any product and take responsibility for the same, as reflected in Guideline No.8 of the Guidelines, 2022 that relates to advertisements that address/target or use children for various purposes and Guideline No.12 that lays down the duties of manufacturers, service providers, advertisers and advertising agencies to ensure that the trust of the consumer is not abused or exploited due to sheer lack of knowledge or inexperience – Guideline No.13 requires a due diligence to be undertaken for endorsement of advertisements and requires a person who endorses a product to have adequate information about, or experience with a specific good, product or service that is proposed to be endorsed and ensure that it must not be deceptive. [Para 21]

Consumer Protection – Awareness – Food and health sector – Promote mechanism for consumer complaints:

Held: All the statutory provisions/rules, regulations and guidelines have a salutary object, which is to serve the consumers and

ensure that they are made aware of the kind of product that is being offered for purchase, particularly in the food and health sector – This Court is of the opinion that the concerned Ministries ought to set up and promote a mechanism which encourages the consumer to lodge a complaint and for the said complaint to be taken to its logical conclusion, instead of simply being marked/forwarded to the concerned State authority, thus leaving the consumer clueless as to the final outcome of the complaint made. [Para 22]

Cable Television Networks Rules, 1994 – r.7 – Constitution of India – Enforcement of the fundamental right to health – Awareness regarding quality of products – Self-declaration by the advertiser/advertising agency:

Held: In the absence of any robust mechanism enacted in law to ensure that the obligations cast on the advertiser to adhere to stipulations in the Guidelines, 2022 in letter and spirit, it is deemed appropriate to invoke the powers vested in this Court under Article 32 of the Constitution of India for the enforcement of the fundamental right to health that encompasses the right of a consumer to be made aware of the quality of products being offered for sale by manufacturers, service providers, advertisers and advertising agencies – To fill up this vacuum, it is directed that henceforth, before an advertisement is printed/aired/displayed, a Self declaration shall be submitted by the advertiser/advertising agency on the lines contemplated in Rule 7 of the Cable Television Networks Rules, 1994 – No advertisements to be run on the relevant channels and/or in the print media/internet without uploading the self-declaration – The said directions to be treated as the law declared by the Supreme Court u/Art.141 of the Constitution. [Paras 23 and 24]

Food, Safety and Standards Act, 2006 – Direction to file affidavit furnishing relevant data with regard to the complaints received by FSSAI:

Held: Ministry of Health and Family Welfare directed to file an affidavit furnishing the relevant data with regard to the complaints received by the Food, Safety and Standard Authority of India (FSSAI) and the action taken on such complaints relating to penalty for selling food not of the nature or substance or quality demanded (Section 50), penalty for sub-standard food (Section 51), penalty for misbranded food (Section 52), penalty for misleading advertisement

(Section 53) and penalty for food containing extraneous matter (Section 54) – FSSAI is authorized to take action on its own in the event of any such misleading advertisements coming to its notice, without waiting for any complaint to be received – Therefore, the affidavit proposed to be filed as directed above, shall indicate the nature of action taken by FSSAI on its own, besides on complaints received under the FSSA, 2006 from the year 2018 onwards and the action proposed to be taken by it to deal with misleading advertisements. [Paras 25 and 26]

Directions by the Supreme Court – Advertisement – Misleading advertisement – Deceptive advertisement:

Held: The Counsels for all the State Governments/Union Territories, are directed to file independent affidavits of the Licensing authorities in each State/UT regarding the action taken by them in respect of misleading advertisements being published/displayed in the press/ electronic media that run contrary to the provisions of the DMR, 1954 and Rules, DC Act, 1940 and C.P. Act, 1986 – The affidavits shall focus on the action taken for the period from the year 2018 onwards. [Para 8]

Drugs and Cosmetics Rules, 1945 – r.170 – The Union of India was called upon to explain its letter dated 29th August, 2023 issued by the Ministry of AYUSH and addressed to all State Governments/Union Territories and Drug Controllers of the Ministry of AYUSH informing that the Ayurvedic Siddha and Unani Drugs Technical Advisory Board (ASUDTAB) had recommended in its meeting that r.170 of the Drugs and Cosmetics Rules, 1945 be deleted from the Drugs and Cosmetics Rules, 1945 and pending action on the said recommendation, all authorities were directed not to initiate any action under the said rule:

Held: The ASUDTAB had recommended that final notification be issued for omission of r.170 – The said recommendation was placed before the Ministry of Law and Justice for approval – The Ministry recommended that the final notification should be published, if no objections/suggestions are received – The said development took place in the month of July, 2023 – However, the Ministry of AYUSH proceeded to issue the Notification only on 02nd February, 2024, inviting objections to the recommendations/suggestions to the draft notification from all stakeholders – No further steps have been taken by the Ministry – There is no clarity as to how many objections

were received on the draft notification – The Ministry of AYUSH is directed to expedite steps proposed to be taken by it – In view of the Court, an administrative instruction issued by virtue of the letter dated 29th August, 2023, cannot put on hold r.170 of the Drugs and Cosmetics Rules, 1945 so long as it remains enforceable in law – Additional Solicitor General submitted on instructions that the Ministry shall forthwith withdraw the letter dated 29th August, 2023 – Same was directed to be given an immediate effect. [Paras 9, 10, 11]

Consumer Protection Act, 1986 – Central Consumer Protection Authority (Chapter III) – Use of:

Held: When the C.P. Act, 1986 has dedicated an entire chapter to the Central Consumer Protection Authority (Chapter III) that contemplates establishment of a Central Consumer Protection Authority by the Central Government to regulate matters relating to violation of the rights of the consumers, unfair trade practices and false/misleading advertisements which are prejudicial to the interest of the public and consumers and to promote, protect and enforce the rights of the consumers as a class, the said provisions ought to be used with much more vigour and intensity. [Para 18]

List of Acts

Drug and Magic Remedies (Objectionable Advertisements) Act, 1954; Drug and Cosmetics Act, 1940; Consumer Protection Act, 1986; Drugs and Cosmetics Rules, 1945; TV channels under the Cable Television Networks (Regulation) Act, 1995; Food, Safety and Standards Act, 2006; Cable Television Networks (Amendment) Rules, 2021; Cable Television Networks Rules, 1994.

List of Keywords

Advertisement; Misleading advertisement; Deceptive advertisement; Responsibility and duty of manufacturers, Service providers; Advertisers; Advertising agencies; Enforcement of the fundamental right to health; Awareness regarding quality of products; Self-declaration by the advertiser/advertising agency; Violation of the rights of the consumers; Unfair trade practices.

Case Arising From

CIVIL ORIGINAL JURISDICTION: Writ Petition (Civil) No. 645 of 2022

(Under Article 32 of The Constitution of India)

Appearances for Parties

P.S. Patwalia, Sr. Adv., Prabhas Bajaj, Priyanshu Tyagi, Amarjeet Singh, Rishav Rai, Ms. Deveshi Chand, Dipanshu Krishan, Advs. for the Petitioners.

K.M. Natraj, ASG., Mukul Rohatgi, Vipin Sanghi, Balbir Singh, Arvind Nayar, C.U. Singh, Sr. Advs., Sharath Nambiar, Vinayak Sharma, Rajat Nair, Kanu Agrawal, Shashank Bajpai, Ms. Priya Mishra, Ishaan Sharma, Gurmeet Singh Makker, Harish Pandey, Shafik Ahmed, Ajay Sharma, Mukesh Verma, Ms. Priyanka, Sunny, Ms. Avni Singh, Jitin Chaturvedi, Ms. Bhawna Gera, Divyansh Shrivastava, Amrish Kumar, Simranjeet Singh, Gautam Talukdar, Raushal Kumar, Ms. Apurbaa Dutta, Ms. Neha Gupta, Ms. Smita Jain, Karan Jain, Rishabh Pant, Nikhil Rohatgi, Naman Tandon, Rohit Gandhi, Akshay Joshi, Ms. Vanshaja Shukla, Kumar Anurag Singh, Honey Khanna, Ms. Pallavi Langar, Ms. Aparna Bhat, Ms. Karishma Maria, Ms. Bidya Mohanty, Katyayani Suhrud, Ms. Mrinmoi Chatterjee , Ms. Mrinal Gopal Elker, Saurabh Singh, Ms. Swati Ghildiyal, Ms. Devyani Bhatt, Ms. Neha Singh, Ms. Abhipsa Mohanty, Ms. Indira Bhakar, Mukesh Kumar Verma, Kanu Agarwal, Varun Chugh, Vatsal Joshi, Rajesh Singh Chauhan, Anil Hooda, Vineet Singh, Piyush Beriwal, Mukesh Kumar Maroria, Ms. Sakshi Kakkar, Ms. Limayinla Jamir, Amit Kumar Singh, Ms. K. Enatoli Sema, Ms. Chubalemla Chang, Prang Newmai, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Order

Interlocutory Application No.110011 of 2024

1. This application has been moved by the respondent No.5 praying inter alia that judicial notice be taken of the statements made by the President, Indian Medical Association[1]-Petitioner No.1 of the offending statements made by him in his interview published in various publications on 29th April, 2024, on the eve of this matter being listed in this Court on 30th April, 2024.

2. It is pertinent to note that a reference was made by learned counsel for the respondents No.5 to 7 to the aforesaid interview on the

1 For short 'IMA'

last date of hearing as well and a copy of the interview printed in the press was duly furnished to Mr. P.S. Patwalia, learned Senior counsel who had sought time to respond. Despite that, no response has been filed so far.

3. Issue notice.

4. Mr. P.S. Patwalia, learned Senior counsel states that his briefing counsel accepts notice on behalf of the President, IMA. He shall be impleaded as a co-respondent in the present proceedings. Amended Memo of parties shall be filed by the counsel for the petitioner no. 1- IMA before the next date of hearing. Reply be filed well before the next date of hearing, i.e., 14th May, 2024.

WRIT PETITION (CIVIL) NO.645/2022:

1. It is submitted on behalf of the respondents no. 5 to 7/proposed contemnors that pursuant to the orders passed on the last date of hearing, i.e. 30th April, 2024, the relevant pages of each newspaper in original, where a public apology has been published by the respondents no.5 to 7, tendering an unqualified apology for violating the orders of this Court as passed on 23rd April, 2024, by continuing to issue deceptive advertisements and for breaching the undertakings given to this Court, has been filed. It is submitted that the Registry has accepted one set of the said documents. The second set of documents, that are photocopies of the originals of the already filed newspapers, are proposed to be filed in the course of the day.

2. The photo copies shall be filed at the earliest. The Registry shall take the same on record.

3. Service has been effected on the National Medical Commission[2] that is represented by a counsel. However, no steps have been taken by NMC to file an affidavit in the light of the observations made by this Court in para 9 of the order passed on 23rd April, 2024. NMC shall file an affidavit before the next date of hearing, i.e. 14th May, 2024.

4. On the last date of hearing, keeping in mind the number of misleading advertisements that are being published/displayed with little/nil accountability on the part of the manufacturers, promoters and advertisers, it was deemed appropriate to implead the Ministry of

2 For short 'the NMC'

Consumer Affairs, Ministry of Food and Public Distribution, Ministry of Information and Broadcasting and Ministry of Electronics and Information Technology as parties in the present proceedings to examine the steps taken by them to prevent abuse of the Drug and Magic Remedies (Objectionable Advertisements) Act, 1954[3] and the Rules, the Drug and Cosmetics Act, 1940[4] and the Consumer Protection Act, 1986[5]. In light of the stand taken by Union of India that implementation of the DMR Act, 1954 lies in the hands of the State Governments/UT Licensing Authorities, all of them were also directed to be impleaded in the present proceedings.

5. Mr. K.M. Natraj, learned Additional Solicitor General who is already appearing for the Ministry of Ayush and Ministry of Health and Family Welfare, Union of India submits that besides an earlier affidavit filed by the Ministry of AYUSH, an additional affidavit has been filed. Ministry of Consumer Affairs and the Ministry of Information and Broadcasting have also filed separate affidavits. He submits that the Department of Food and Public Distribution (under the Ministry of Consumer Affairs) and the Ministry of Electronics and Information Technology do not have a major role to play in respect of the issue being examined by the Court. The relevant ministries are the Ministry of AYUSH, Ministry of Health and Family Welfare, Ministry of Consumer Affairs and the Ministry of Information and Broadcasting.

6. Learned counsel for the petitioner-IMA submits that as was permitted by this Court, service has been effected on the Standing counsel of all the State Governments/Union Territories. Only the following State Governments/Union Territories have been served:

   (i) Himachal Pradesh;

   (ii) Jharkhand;

   (iii) Kerala;

   (iv) NCT of Delhi;

   (v) Odisha;

   (vi) Puducherry;

---

3 In short DMR Act, 1954

4 In short DC Act, 1940

5 In short C.P. Act, 1986

(vii) Rajasthan;

(viii) Tamil Nadu;

(ix) Telangana;

(x) Uttarakhand; and

(xi) West Bengal

Appearance has been entered by learned counsel for the NCT of Delhi, States of Gujarat, Nagaland, Uttar Pradesh, Madhya Pradesh and U.T. of Ladakh.

7. Learned counsel for the State of Uttarakhand submits that an affidavit has already been filed by the State Licensing Authority and an additional affidavit is proposed to be filed.

8. Learned counsel for all the State Governments/Union Territories besides those mentioned above, are directed to file independent affidavits of the Licensing authorities in each State/UT regarding the action taken by them in respect of misleading advertisements being published/displayed in the press/electronic media that run contrary to the provisions of the DMR, 1954 and Rules, DC Act, 1940 and C.P. Act, 1986. The affidavits shall focus on the action taken for the period from the year 2018 onwards.

9. Coming to the issue highlighted on the last date of hearing when the Union of India was called upon to explain its letter dated 29th August, 2023 issued by the Ministry of AYUSH and addressed to all State Governments/Union Territories and Drug Controllers of the Ministry of AYUSH informing that the Ayurvedic Siddha and Unani Drugs Technical Advisory Board[6] had recommended in its meeting that Rule 170 of the Drugs and Cosmetics Rules, 1945 be deleted from the Drugs and Cosmetics Rules, 1945 and pending action on the said recommendation, all authorities were directed not to initiate any action under the said rule, Learned ASG seeks to explain that Rule 170 has been challenged in different proceedings pending before various High Courts including the High Courts of Delhi, Bombay and Kerala. Pursuant to an order dated 01st May, 2023 passed by the High Court of Delhi in a batch of petitions, lead matter being W.P.

6 In short ASUDTAB

(C) No.321/2019, directions were issued that any decision taken by the Union of India pursuant to the recommendations made by ASUDTAB shall not be implemented for a period of four weeks from the date of its communication and the said interim arrangement shall continue to operate.

10. It is submitted that thereafter, ASUDTAB had recommended that final notification be issued for omission of Rule 170. The said recommendation was placed before the Ministry of Law and Justice for approval. The Ministry recommended that the final notification should be published within three months, if no objections/suggestions are received and within six months if a large number of objections/ suggestions are received on the draft notification.

11. The above development took place in the month of July, 2023. However, the Ministry of AYUSH proceeded to issue the Notification only on 02nd February, 2024, inviting objections to the recommendations/ suggestions to the draft notification from all stakeholders within 30 days from the date of the notification being issued in the Official Gazette. Period of 30 days has long since expired but no further steps have been taken by the Ministry of AYUSH. Learned ASG is not in a position to inform us as to how many objections/suggestions were received on the draft notification. The Ministry of AYUSH is directed to expedite steps proposed to be taken by it.

12. In our view, an administrative instruction issued by virtue of the letter dated 29th August, 2023, cannot put on hold Rule 170 of the Drugs and Cosmetics Rules, 1945 so long as it remains enforceable in law.

13. Mr. Natraj, learned Additional Solicitor General submits on instructions that the Ministry shall forthwith withdraw the letter dated 29th August, 2023. Needful shall be done with immediate effect.

14. Coming next to the affidavit filed by the Ministry of Information and Broadcasting, the same refers to a series of regulatory mechanisms laid down for TV channels under the Cable Television Networks (Regulation) Act, 1995[7]. It is submitted that there are self regulatory bodies of the broadcasters, constituted by the broadcasters or its Association and it is for them to perform various functions including overseeing and assurance and an adherence by the broadcasters

7 In short, CTN Act, 1995

to the Programme Code and Advertising Code, provide guidance to broadcasters on various aspects of the aforesaid Codes, dispose of grievances that have not been disposed of by the broadcasters within a fixed timeline, hear appeals and issue guidance/advisories to the broadcasters from time to time. It is further submitted that where the broadcasters fail to comply with the guidance/advisory of the said regulating body within the specified timeline, the self regulatory body shall refer the matter to the Oversight Mechanism within 15 days.

15. The details regarding the Oversight Mechanism have also been set out in the affidavit. Reference has been made to Inter Departmental Committee to be constituted by the Central Government that is required to devise its own procedure for hearing grievances/ complaints and for advising/warning/censuring/admonishing/ reprimanding the defaulting broadcaster or requiring an apology from such a broadcaster, including a warning card or a disclaimer and deletion/modification of the content. The last option is of taking the channel or the programme in question off-air for a specified time period. The affidavit also refers to the steps taken for implementation of the Cable Television Networks (Amendment) Rules, 2021[8].

16. The Regulatory Mechanism in respect of the Print Media and the overall action taken by the Ministry of Information and Broadcasting since 2018 has been mentioned in the affidavit. A computation of the action taken on complaints received against TV channels between the year 2018 to 03rd May, 2024 shows that a total of 1645 complaints have been received in the above duration out of which, only 53 were sent to the broadcasters, 769 were sent to the ASCI, 235 were sent to the concerned departments/regulators and 22 were sent to PCI. Only 566 complaints have been responded to. Learned ASG submits that there is no data available in the Ministry on the action if any, ultimately taken to redress the grievances received against the TV Channels.

17. The summary of the action taken against broadcasters for violation of the Advertisement Code since 2018 points a dismal picture. Action has been taken against the broadcasters for violation of the Advertisement Code in only 60 cases. Coordinated action with the Ministry of AYUSH finds separate mention in the affidavit. It also

8 In short, Amendment Rules, 2021

refers to the *suo moto* action taken by the Ministry on grounds of obscenity. There are only 3 instances of action taken in respect of misleading advertisements aired on FM Radio. The Press Council of India is stated to have received 77 complaints relating to misleading advertisements since the year 2018. Out of those 77 cases, 39 have been closed being defective, 15 have been closed on undertaking from the respondents stating that they will not publish such advertisements in the future and 17 cases are on-going.

18. We are of the opinion that when the C.P. Act, 1986 has dedicated an entire chapter to the Central Consumer Protection Authority (Chapter III) that contemplates establishment of a Central Consumer Protection Authority[9] by the Central Government to regulate matters relating to violation of the rights of the consumers, unfair trade practices and false/misleading advertisements which are prejudicial to the interest of the public and consumers and to promote, protect and enforce the rights of the consumers as a class, the said provisions ought to be used with much more vigour and intensity.

19. Learned Additional Solicitor General informs the Court that Central Government has established a Consumer Protection Authority which is functional and its powers and functions as delineated in Section 18, are fairly broad based and all encompassing.

20. It is pertinent to note that the Ministry of Consumer Affairs has enclosed with its affidavit, Notification dated 09th June, 2022, setting out the Guidelines for Prevention of Misleading Advertisements and Endorsements of Misleading Advertisements, 2022[10] that deals with prohibition of surrogate advertising, free claims advertisements, children targeted advertisements, and advertisements that are prohibited by law. Guidelines, 2022 specifically define amongst others, the expression “bait advertisements”, “endorser” and “surrogate advertising”. A status report of the action taken by the Central Authority on false and misleading advertisements including food and health products finds mention at Annexure R-4 and shows that from July, 2020 to April, 2024, the total notices issued by the Central Authority for misleading advertisements is 163. Out of the said 163 notices, 58 were closed and the remaining 105 are stated to be under process.

9 In short, Central Authority

10 In short, Guidelines, 2022

Not much light has been thrown on the nature of action taken and the activities of the Authority which is empowered to take even *suo moto* action, whenever false/misleading advertisements are noticed. The Ministry of Consumer Affairs is directed to file an additional affidavit setting out the action taken by the Central Authority on noticing/ being informed of false/misleading advertisements, particularly in the food and health sector.

21. We are of the firm view that advertisers/advertising agencies and endorsers are equally responsible for issuing false and misleading advertisements. Such endorsements that are routinely made by public figures, influencers, celebrities etc. go a long way in promoting a product. It is imperative for them to act with a sense of responsibility when endorsing any product and take responsibility for the same, as reflected in Guideline No.8 of the Guidelines, 2022 that relates to advertisements that address/target or use children for various purposes and Guideline No.12 that lays down the duties of manufacturers, service providers, advertisers and advertising agencies to ensure that the trust of the consumer is not abused or exploited due to sheer lack of knowledge or inexperience. Guideline No.13 requires a due diligence to be undertaken for endorsement of advertisements and requires a person who endorses a product to have adequate information about, or experience with a specific good, product or service that is proposed to be endorsed and ensure that it must not be deceptive.

22. All the aforesaid provisions including statutory provisions/rules, regulations and guidelines have a salutary object, which is to serve the consumers and ensure that they are made aware of the kind of product that is being offered for purchase, particularly in the food and health sector. We are of the opinion that the aforesaid Ministries ought to set up and promote a mechanism which encourages the consumer to lodge a complaint and for the said complaint to be taken to its logical conclusion, instead of simply being marked/forwarded to the concerned State authority, thus leaving the consumer clueless as to the final outcome of the complaint made.

23. In view of the above and in the absence of any robust mechanism enacted in law to ensure that the obligations cast on the advertiser to adhere to stipulations in the Guidelines, 2022 in letter and spirit, it is deemed appropriate to invoke the powers vested in this Court

under Article 32 of the Constitution of India for the enforcement of the fundamental right to health that encompasses the right of a consumer to be made aware of the quality of products being offered for sale by manufacturers, service providers, advertisers and advertising agencies. To fill up this vacuum, it is directed that henceforth, before an advertisement is printed/aired/displayed, a Self declaration shall be submitted by the advertiser/advertising agency on the lines contemplated in Rule 7 of the Cable Television Networks Rules, 1994 which is as follows :

> "7. **Advertising Code.** - (1) Advertising carried in the cable service shall be so designed as to conform to the laws of the country and should not offend morality, decency and religious susceptibilities of the subscribers.
>
> (2) No advertisement shall be permitted which-
>
> (i) derides any race, caste, colour, creed and nationality;
>
> (ii) is against any provision of the Constitution of India;
>
> (iii) tends to incite people to crime, cause disorder or violence, or breach of law or glorifies violence or obscenity in any way;
>
> (iv) presents criminality as desirable;
>
> (v) exploits the national emblem, or any part of the Constitution or the person or personality of a national leader or a State dignitary;
>
> (vi) in its depiction of women violates the constitutional guarantees to all citizens. In particular, no advertisement shall be permitted which projects a derogatory image of women. Women must not be portrayed in a manner that emphasises passive, submissive qualities and encourages them to play a subordinate, secondary role in the family and society. The cable operator shall ensure that the portrayal of the female form, in the programmes carried in his cable service, is tasteful and aesthetic, and is within the well established norms of good taste and decency;
>
> (vii) exploits social evils like dowry, child marriage.

(viii) promotes directly or indirectly production, sale or consumption of-

(A) cigarettes, tobacco products, wine, alcohol, liquor or other intoxicants;

(5) No advertisement shall contain references which are likely to lead the public to infer that the product advertised or any of its ingredients has some special or miraculous or super-natural property or quality, which is difficult of being proved."

24. The Self-declaration shall be uploaded by the advertiser/advertising agency on the Broadcast Sewa Portal run under the aegis of the Ministry of Information and Broadcasting. As for the advertisements in the Press/Print Media/Internet, the Ministry is directed to create a dedicated portal within four weeks from today. Immediately on the portal being activated, the advertisers shall upload a Self-declaration before any advertisement is issued in the Press/Print Media/Internet. Proof of uploading the Self-declaration shall be made available by the advertisers to the concerned broadcaster/printer/publisher/T.V. Channel/electronic media, as the case may be, for the records. No advertisements shall be permitted to be run on the relevant channels and/or in the print media/internet without uploading the self-declaration as directed above. The above directions shall be treated as the law declared by this Court under Article 141 of the Constitution of India.

25. Noticing the provisions of the Food, Safety and Standards Act, 2006[11], it is deemed appropriate to direct the Ministry of Health and Family Welfare to file an affidavit furnishing the relevant data with regard to the complaints received by the Food, Safety and Standard Authority of India[12] and the action taken on such complaints relating to penalty for selling food not of the nature or substance or quality demanded (Section 50), penalty for sub-standard food (Section 51), penalty for misbranded food (Section 52), penalty for misleading advertisement (Section 53) and penalty for food containing extraneous matter (Section 54).

11 In short, FSSA, 2006

12 In short, FSSAI

26. We may note that FSSAI is authorized to take action on its own in the event of any such misleading advertisements coming to its notice, without waiting for any complaint to be received. Therefore, the affidavit proposed to be filed as directed above, shall indicate the nature of action taken by FSSAI on its own, besides on complaints received under the FSSA, 2006 from the year 2018 onwards and the action proposed to be taken by it to deal with misleading advertisements.

27. List on 09th July, 2024, at the top of the Board.

Result of the case: Directions issued.

†*Headnotes prepared by:* Ankit Gyan

[2024] 6 S.C.R. 390 : 2024 INSC 429

Lehna Singh (D) By Lrs.
v.
Gurnam Singh (D) By Lrs. & Ors.

(Review Petition (C) No. 1025 of 2019)

16 May 2024

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

Issue for Consideration

Issue arose whether the questions of law are not required to be framed in second appeal before Punjab and Haryana High Court whose jurisdiction in second appeal is circumscribed by provision of s.41 of the Punjab Act.

Headnotes†

Code of Civil Procedure, 1908 – s.100 – Punjab Courts Act, 1918 – s. 41 – Second appeal – Framing of a substantial question of law for entertaining the second appeal – Requirement – On facts, suit for perpetual injunction by the plaintiff against the defendant that he and his brother were owners in possession of the suit land – Defendant's case rested on the Will executed by the plaintiff's brother – Trial court passed a decree in favour of the plaintiff holding that the Will was not validly executed – First appellate court set aside the finding of the trial court and passed a decree for joint possession in favour of the defendant – High Court restored the judgment and decree passed by the trial court – In appeal, this Court set aside the judgment passed by the High Court holding that the High Court went beyond the scope and ambit of s. 100 CPC by re-appreciating the entire evidence on record and substituting its own opinion for that of the first appellate court – Review petition thereagainst – Correctness:

Held: s. 41 does not mandate framing of a substantial question of law for entertaining the second appeal – Thus, a second appeal u/s. 41 can be entertained by the Punjab and Haryana High Court even without framing a substantial question of law – However, the finding of fact recorded, cannot be interfered with even in terms of s.41 – Judgment under review was wrongly decided holding that the Punjab and Haryana High Court travelled beyond the jurisdiction u/s. 100 CPC by interfering with the finding of fact recorded by the first

* Author

appellate court without framing a substantial question of law – Since there is an error apparent on the face of the record, the judgment in civil appeal is reviewed and recalled for deciding on merits – First appellate court while setting aside the judgment and decree of the trial court, was required to meet the reasoning given by the trial court in rejecting the Will, which was not been done – Having considered the evidence on record and the findings of the trial court, the first appellate court and the High Court, the first appellate court wrongly set aside the judgment, decree, and findings of the trial court without meeting the findings of the trial court which could not have been done in exercise of power s. 96 CPC – Thus, the High Court rightly set aside the judgment and decree of the first appellate court to restore the judgment and decree of the trial court – On independent examination also, it is found that the findings recorded by trial court are borne out from the evidence on record and are neither perverse nor illegal – Thus, no substance in the civil appeal and is dismissed. [Paras 20, 23, 10, 12, 14, 15, 26, 27]

Case Law Cited

Pankajakshi (Dead) Through Legal Representatives & Ors. v. Chandrika & Ors. [2016] 3 SCR 1018 **: (2016) 6 SCC 157 – followed.**

Kulwant Kaur & Ors. v. Gurdial Singh Maan (Dead) By Lrs. & Ors. [2001] 2 SCR 525**: (2001) 4 SCC 262;** *Randhir Kaur v. Prithvi Pal Singh & Ors.* [2019] 9 SCR 776 **: (2019) 17 SCC 71;** *Gurbachan Sing (Dead) Through Lrs. v. Gurcharan Singh (Dead) Through Lrs. & Ors.* **(2023) SCC Online SC 875;** *Chintamani Ammal v. Nandagopal Gounder and Anr.* [2007] 2 SCR 903 **: (2007) 4 SCC 163;** *Jagannath v. Arulappa & Anr.* **(2005) 12 SCC 303;** *H.K.N. Swami v. Irshad Basith (Dead) By Lrs.* **(2005) 10 SCC 243 – referred to.**

List of Acts

Code of Civil Procedure, 1908; Code of Civil Procedure (Amendment) Act, 1976; Punjab Courts Act, 1918.

List of Keywords

Second appeal; Framing of a substantial question of law; Suit for perpetual injunction; Will; Suspicious circumstances; Decree for joint possession; First appellate court; Review petition.

Case Arising From

CIVIL APPELLATE JURISDICTION: Review Petition (C) No. 1025 of 2019

In

Civil Appeal No. 6567 of 2014

From the Judgment and Order dated 13.03.2019 of the Supreme Court of India in CA No. 6567 of 2014

Appearances for Parties

P.S. Patwalia, Gagan Gupta, Sr. Advs., Ashwani Kumar Dubey, Deepak Malik, Advs. for the Petitioners.

Manoj Swarup, Sr. Adv., Neelmani Pant, Ms. Apoorva Singh, Avinash Gautam, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Prashant Kumar Mishra, J.

The petitioner has preferred this Review Petition seeking review of the Order dated 13.03.2019 passed in Civil Appeal No. 6567 of 2014 wherein the present petitioner was the respondent. In the Order under review, the Civil Appeal was allowed, and the judgment and decree passed by the High Court of Punjab and Haryana on 27.11.2007 in Civil Regular Second Appeal No. 2191 of 1985 was set aside and the judgment and decree passed by the District Judge, Sangrur, on 06.06.1985 in Civil Appeal No. 27 of 1983 has been restored.

2. In the judgment under review, this Court held that the judgment and decree passed by the Punjab and Haryana High Court is beyond the scope and ambit of Section 100 of Code of Civil Procedure, 1908[1] on the ground that in exercise of such power, the High Court could not have reappreciated the entire evidence on record to unsettle the finding of facts recorded by the First Appellate Court, by substituting its own opinion for that of the First Appellate Court.

1 'CPC'

3. Basing the judgment rendered in ***Pankajakshi (Dead) Through Legal Representatives & Ors. v. Chandrika & Ors.***[2]**,** this Court directed that the review petition be listed before the open Court for hearing and subsequently on 13.08.2019 notices were issued to the opposite parties, at the same time, directing the parties to maintain status quo.

4. In substance, the main ground for review of the judgment is that the Constitution Bench of this Court in ***Pankajakshi*** (supra) have uphold the validity of Section 41 of Punjab Courts Act, 1918[3], overruling this Court's earlier judgment in case of ***Kulwant Kaur & Ors. v. Gurdial Singh Maan (Dead) By Lrs. & Ors.***[4] holding that since Section 97(1) of the Code of Civil Procedure (Amendment) Act, 1976 has no application to Section 41 of the Punjab Act, therefore, Section 41 of the Punjab Act would necessarily continue as a law in force and the second appeal before the High Court has to be heard within the parameters of Section 41 of the Punjab Act, and not under Section 100 CPC.

5. Shri P.S. Patwalia, learned Senior counsel appearing for the petitioner would also refer to the subsequent judgments of this Court in ***Randhir Kaur v. Prithvi Pal Singh & Ors.***[5] and ***Gurbachan Sing (Dead) Through Lrs. v. Gurcharan Singh (Dead) Through Lrs. & Ors.***[6] wherein this Court relying upon ***Pankajakshi*** (supra) held that the scope of interference within the jurisdiction of the Punjab and Haryana High Court would be the same as under Section 100 of CPC as it existed prior to the 1976 amendment. The provisions of Section 41 of the Punjab Act and of Section 100 CPC, before its amendment in 1976, are in pari materia. Therefore, the questions of law are not required to be framed in second appeal before Punjab and Haryana High Court whose jurisdiction in second appeal is circumscribed by provision of Section 41 of the Punjab Act.

6. Shri Patwalia would submit that this Court has set aside the Judgment of High Court terming it as beyond the power under Section 100

---

2 [2016] 3 SCR 1018 : (2016) 6 SCC 157

3 'Punjab Act'

4 [2001] 2 SCR 525 : (2001) 4 SCC 262

5 [2019] 9 SCR 776 : (2019) 17 SCC 71

6 (2023) SCC Online SC 875

CPC which is not legally correct, in view of the law laid down in ***Pankajakshi*** (supra). It is further argued that in the facts and circumstances of the case, the petitioner was entitled to succeed to the property by way of natural succession and the finding of the High Court that the Will relied upon by the respondents has not been proved as it is surrounded by suspicious circumstances ought not to have been interfered by this Court. It is argued that a finding of fact erroneously or perversely recorded by the First Appellate Court can always be interfered by the High Court. Hence, there is no infirmity in the Judgment rendered by the High Court and the same ought not to have been interfered by this Court while deciding the Civil Appeal No. 6567 of 2014 on an erroneous ground that the High Court has travelled beyond its jurisdiction and power under Section 100 CPC as it stands of the 1976 amendment.

7. Shri Manoj Swarup, learned senior counsel appearing for the respondents would not dispute the legal position as has been settled by this Court in the matter of ***Pankajakshi*** (supra). However, he would submit that even in the case when the High Court would exercise the power under Section 41 of the Punjab Act, the finding of fact recorded by the First Appellate Court cannot be interfered on re-appreciation of evidence to substitute its own decision for that of the First Appellate Court. According to him, the finding recorded by the First Appellate Court was borne out from the record. Therefore, the High Court erred in interfering with the said finding, and this Court rightly set aside the Judgment and decree of the High Court while deciding the Civil Appeal. According to Shri Swarup, the respondents had proved the Will, which was a registered one, in accordance with law and that there were no suspicious circumstances accompanying the Will.

8. When this Court rendered the judgment under review in Civil Appeal No. 6567 of 2014, the only ground which weighed with the Court was that the High Court exercised the power under Section 100 CPC erroneously and decided the second appeal by re-appreciating the evidence without even framing a substantial question of law.

9. The second appeal in Punjab and Haryana High Court is heard under Section 41 of the Punjab Act, which is reproduced hereunder for ready reference: -

> ***"41. Second Appeals – (1) An appeal shall lie to the High Court from every decree passed in appeal by any court subordinate to the High Court on any of the following grounds, namely:***
>
> *(a) the decision being contrary to law or to some custom or usage having the force of law:*
>
> *(b) the decision having failed to determine some material issue of law or custom or usage having the force of law:*
>
> *(c) a substantial error or defect in the procedure provided by the Code of Civil Procedure 1908 (V of 1908), or by any other law for the time being in force which may possibly have produced error or defect in the decision of the case upon the merits;*
>
> *[Explanation – A question relating to the existence or validity of a custom or usage shall be deemed to be a question of law within the meaning of this section:]*
>
> ***(2) An appeal may lie under this section from an appellate decree passed ex parte."***

10. The provision contained in Section 41 of the Punjab Act, as reproduced above, does not mandate framing of a substantial question of law for entertaining the second appeal. Therefore, a second appeal under Section 41 of Punjab Act can be entertained by the Punjab and Haryana High Court even without framing a substantial question of law.

11. It would be appropriate to refer to the provision contained in Section 41 of the Punjab Act in juxtaposition to Section 100 CPC, before its amendment in 1976, to appreciate and understand the jurisdiction of Punjab and Haryana High Court in second appeal. The provisions are reproduced hereunder for ready reference: -

"Section 41 of the Punjab Act	***Section 100 CPC***
41. Second appeals.—(1) An appeal shall lie to the High Court from every decree passed in appeal by any court subordinate to the High Court on any of the following grounds, namely:	*100. Second appeal.—(1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any court subordinate to a High Court, on any of the following grounds, namely:*
(a) the decision being contrary to law or to some custom or usage having the force of law;	*(a) the decision being contrary to law or to some usage having the force of law;*
(b) the decision having failed to determine some material issue of law or custom or usage having the force of law;	*(b) the decision having failed to determine some material issue of law or usage having the force of law;*
(c) a substantial error or defect in the procedure provided by the Code of Civil Procedure, 1908 (V of 1908), or by any other law for the time being in force which may possibly have produced error or defect in the decision of the case upon the merits;	*(c) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.*
* * *	
(2) An appeal may lie under this section from an appellate decree passed ex parte.	*(2) An appeal may lie under this section from an appellate decree passed ex parte."*

12. In ***Pankajakshi*** (supra), the Constitution Bench of this Court has held that substantial question of law may not be required to be framed in a second appeal before Punjab and Haryana High Court. However, the finding of fact recorded, cannot be interfered with even in terms of Section 41 of Punjab Act. The law laid down by this Court in ***Pankajakshi*** (supra) has been relied upon in ***Randhir Kaur*** (supra) to hold thus in paragraphs 10 to 12: -

"10. The effect of the Constitution Bench judgment in Pankajakshi is that in second appeal, the scope of interference within the Punjab and Haryana High Court would be the same as the Code of Civil Procedure existed prior to the 1976 Amendment. The provisions of Section 41 of the Punjab Act and of Section 100 CPC are in pari materia.

11. Some of the judgments of this Court dealing with the scope of the old Section 100 are required to be discussed. In a judgment in Deity Pattabhiramaswamy v. S. Hanymayya [AIR 1959 SC 57] — three Judges, while examining the scope of Section 100 CPC, held as under : (AIR p. 59, para 13)

> *"13. The finding on the title was arrived at by the learned District Judge not on the basis of any document of title but on a consideration of relevant documentary and oral evidence adduced by the parties. The learned Judge, therefore, in our opinion, clearly exceeded his jurisdiction in setting aside the said finding. The provisions of Section 100 are clear and unambiguous. As early as in 1891, the Judicial Committee in Durga Choudhrain v. Jawahir Singh Choudhri [1890 SCC OnLine PC 10 : (1889-90) 17 IA 122] stated thus : (SCC OnLine PC)*
>
> *'There is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be.'*
>
> *The principle laid down in this decision has been followed in innumerable cases by the Privy Council as well as by different High Courts in this country. Again the Judicial Committee in Midnapur Zamindary Co. Ltd. v. Uma Charan Mandal [1923 SCC OnLine PC 31 : (1924-25) 29 CWN 131] further elucidated the principle by pointing out : (SCC OnLine PC)*

'[If] the question to be decided is one of fact, it does not involve an issue of law merely because documents which were not instruments of title or contracts or statutes or otherwise the direct foundations of rights but were merely historical documents, have to be construed.'

Nor does the fact that the finding of the first appellate court is based upon some documentary evidence make it any the less a finding of fact (see Wali Mohammad v. Mohd. Bakhsh [1929 SCC OnLine PC 115 : (1929-30) 57 IA 86 : ILR (1930) 11 Lah 199]). But, notwithstanding such clear and authoritative pronouncements on the scope of the provisions of Section 100 CPC, some learned Judges of the High Courts are disposing of second appeals as if they were first appeals. This introduces, apart from the fact that the High Court assumes and exercises a jurisdiction which it does not possess, a gambling element in the litigation and confusion in the mind of the litigant public. This case affords a typical illustration of such interference by a Judge of the High Court in excess of his jurisdiction under Section 100 CPC. We have, therefore, no alternative but to set aside the decree of the High Court on the simple ground that the learned Judge of the High Court had no jurisdiction to interfere in second appeal with the findings of fact given by the first appellate court based upon an appreciation of the relevant evidence. In the result, the decree of the High Court is set aside and the appeal is allowed with costs throughout."

12. Later, in a judgment, in Kshitish Chandra Bose v. Commr. [(1981) 2 SCC 103] — three Judges, of this Court held that the High Court has no jurisdiction to entertain second appeal on findings of fact even if it was erroneous. The Court held as follows : (SCC p. 108, para 11)

> *"11. On a perusal of the first judgment of the High Court we are satisfied that the High Court clearly exceeded its jurisdiction under Section 100 in reversing pure concurrent findings of fact given by the trial court and the then appellate court both on the question of title and that of adverse possession. In Kharbuja Kuer v. Jangbahadur Rai [AIR 1963 SC 1203 : (1963) 1 SCR 456] this Court held that the High Court had no jurisdiction to entertain second appeal on findings of fact even if it was erroneous. In this connection, this Court observed as follows : (AIR pp. 1205-06, paras 5 & 7)*
>
> *'5. It is settled law that the High Court has no jurisdiction to entertain a second appeal on the ground of erroneous finding of fact. …*
>
> *****
>
> *7. … As the two courts approached the evidence from a correct perspective and gave a concurrent finding of fact, the High Court had no jurisdiction to interfere with the said finding.'*
>
> *To the same effect is another decision of this Court in V. Ramachandra Ayyar v. Ramalingam Chettiar [AIR 1963 SC 302 : (1963) 3 SCR 604] where the Court observed as follows : (AIR p. 306, para 12)*
>
> *'12. … But the High Court cannot interfere with the conclusions of fact recorded by the lower appellate court, however erroneous the said conclusions may appear to be to the High Court, because, as the Privy Council has observed, however gross or inexcusable the error may seem to be, there is no jurisdiction under Section 100 to correct that error.' "*

13. In a recent decision in the matter of ***Gurbachan Singh*** (supra), this court has reiterated the legal position vis-à-vis Section 41 of Punjab Act and the unamended Section 100 CPC holding thus in paragraphs 9 to 11: -

"9. The Constitution bench in Pankajakshi (Dead) through LRs v. Chandrika had held Kulwant Kaur v. Gurdial Singh Mann which held section 41 of the Punjab Courts Act, 1918 to be repugnant to section 100, CPC to be bad in law, thereby implying that section 41 of the Punjab Court Act holds as good law. It was held as under: —

> *"25. We are afraid that this judgment in Kulwant Kaur case [Kulwant Kaur v. Gurdial Singh Mann, (2001) 4 SCC 262] does not state the law correctly on both propositions. First and foremost, when Section 97(1) of the Code of Civil Procedure (Amendment) Act, 1976 speaks of any amendment made or any provision inserted in the principal Act by virtue of a State Legislature or a High Court, the said section refers only to amendments made and/or provisions inserted in the Code of Civil Procedure itself and not elsewhere. This is clear from the expression "principal Act" occurring in Section 97(1). What Section 97(1) really does is to state that where a State Legislature makes an amendment in the Code of Civil Procedure, which amendment will apply only within the four corners of the State, being made under Schedule VII List III Entry 13 to the Constitution of India, such amendment shall stand repealed if it is inconsistent with the provisions of the principal Act as amended by the Parliamentary enactment contained in the 1976 Amendment to the Code of Civil Procedure. This is further made clear by the reference in Section 97(1) to a High Court. The expression "any provision inserted in the principal Act" by a High Court has reference to Section 122 of the Code of Civil Procedure by which High Courts may make rules regulating their own procedure, and the procedure of civil courts subject to their superintendence, and may by such rules annul, alter, or add to any of the rules contained in the First Schedule to the Code of Civil Procedure."*

10. Recently, a Bench of three learned Judges in Satyender v. Saroj while dealing with a property dispute arising out of the State of Haryana, held as under:—

> *"16. We may also add here that we are presently concerned with the laws in the State of Haryana. All the same, the laws as applicable in Punjab in the year 1918, were also applicable to the present territory of Haryana since it was then a part of the State of Punjab. Later on, the creation of the new State of Haryana, under the provision given in Section 88 of the Punjab Re-organization Act, 1966, the laws applicable in the erstwhile State of Punjab continued to be applicable in the new State of Haryana. Furthermore, State of Haryana formally adopted the laws of the erstwhile State of Punjab, under Section 89 of the Punjab Re-Organisation Act, 1966. Therefore, in the State of Haryana a court in second appeal is not required to formulate a substantial question of law, as what is applicable in Haryana is Section 41 of the Punjab Courts Act, 1918 and not Section 100 of CPC. Consequently, it was not necessary for the High Court to formulate a substantial question of law."*

11. In view of the above discussion, it is clear to this court that the judgment of the learned single Judge sitting in second appellate jurisdiction cannot be faulted for not having framed substantial questions of law under section 100, CPC".

14. Regard being had to the settled legal position in ***Pankajakshi*** (supra) reiterated in ***Randhir Kaur*** (supra) and ***Gurbachan Singh*** (supra), we are of the view that the Judgment of this Court under review in Civil Appeal No. 6567 of 2014 has been wrongly decided holding that the Punjab and Haryana High Court has travelled beyond the jurisdiction under Section 100 CPC by interfering with the finding of fact recorded by the First Appellate Court without framing a substantial question of law.

15. Since there is an error apparent on the face of the record, in view of the law laid down in ***Pankajakshi*** (supra), we review our judgment in Civil Appeal No. 6567 of 2014 and recall the same for deciding the Civil Appeal on merits. The Review Petition is allowed. The Civil Appeal is restored to its original number and taken on board with the consent of the parties, and we proceed to decide the Civil Appeal afresh on merits.

Civil Appeal No. 6567 of 2014

16. This Civil Appeal is preferred by the defendants in the suit against whom the plaintiff brought a suit for perpetual injunction on the pleadings, inter alia, that he and his brother Bhagwan Singh *alias* Nikka Singh were owners in possession of the suit land. Bhagwan Singh was issueless being unmarried. Since the defendant No. 1 was trying to dispossess the plaintiff forcibly, the suit for perpetual injunction was filed. The defendants did not deny that plaintiff and Bhagwan Singh were real brothers. However, he claimed to be the half-brother of Bhagwan Singh as they were given birth by same lady namely Mrs. Har Kaur who was earlier married to Sunder Singh but after his death, she was married to Mehar Singh and the defendant no. 1 was born out of the wedlock of Har Kaur with Mehar Singh. The defendant's case rested on a Will allegedly executed by Bhagwan Singh on 17.01.1980. Prior to this, Bhagwan Singh had executed an unregistered Will on 17.08.1979. However, the defendant admitted that during the lifetime of Bhagwan Singh, the suit land was cultivated jointly by the plaintiff and Bhagwan Singh. In the alternative, the defendant pleaded that if plaintiff's possession over the suit land is proved, the defendant nos. 2 to 6, the beneficiary of the Will, are entitled to joint possession of half share of the suit land.

17. On the strength of evidence adduced by the parties in course of trial, it was held by the trial court that the defendants have failed to prove the genuineness of the Will, therefore, the plaintiff is entitled to succeed by way of natural succession. It was found that the Will relied by the defendants is surrounded by suspicious circumstances, therefore, it is not a validly executed Will. The trial court held that the defendants' case that they served the deceased Bhagwan Singh during the lifetime and out of love and affection for the services rendered, he executed the Will in their favour as they were also related to the deceased, has not been believed by the trial court. There is evidence that it was plaintiff who admitted Nikka Singh in

hospital on 02.08.1979 when he was ill and his address was also shown as care of Lehna Singh (the 'plaintiff').

18. Upon careful marshalling of evidence, the trial court recorded a finding about active participation of Jagjit Singh (DW-3) in execution of the Will and the absence of mention in the Will as to why he disinherited his real brother, the plaintiff, from succeeding the property and more so when he was living with him and was attended to during his ill health. Since the defendant admit joint possession and cultivation of the land by Nikka Singh and plaintiff, a fact contrary to this mentioned in the Will was also highlighted by the trial court. Despite there being an earlier Will there was no mention that the said Will is cancelled and the name of father of Gurnam Singh was also wrongly mentioned. The trial court also found that Nikka Singh was suffering from cancer and was also a patient of T.B.

19. The trial court also found that the plaintiff is in possession of the suit land as the said fact has been admitted by one of the defendant's witnesses namely Gurnam Singh.

20. The First Appellate Court set aside the finding of the trial court holding that the trial court was wrongly persuaded by insignificant circumstances to hold that the Will in favour of the defendant nos. 2 to 6 is not genuine and that it is surrounded by suspicious circumstances. The First Appellate Court eventually passed a decree for joint possession in favour of defendant which was assailed by plaintiff Lehna Singh before the High Court by preferring an appeal under Section 41 of the Punjab Act. The High Court, under the impugned Judgment, allowed the appeal, set aside the appellate decree passed by the District Judge, Sangrur, restoring the Judgment and decree passed by the trial court.

21. The High Court has discussed the evidence threadbare and framed the following substantial questions of law: -

    (i) Whether the Appellate Court can reverse the findings recorded by the learned trial court without adverting to the specific finding of the trial court?

    (ii) Whether the judgment passed by the learned lower Appellate Court is perverse and outcome of misreading of evidence?

22. The High Court answered both the questions of law in favour of the plaintiff/respondent herein (in Civil Appeal) on the reasoning that when the person entitled to the property of the deceased by way of natural succession, is disinherited from the property without giving any reason and the covenants in the Will are also found to be factually incorrect, mere registration of the Will and proof of the same by attesting witnesses could not be treated to be sufficient to overcome the suspicious circumstances as has been done by the First Appellate Court. The High Court also observed that the propounders of the Will were earlier tried for murder of the deceased-testator and there being no evidence on record to show that the deceased had special love and affection with the defendants and when it is proved that the plaintiff is in possession of the land and the defendant and their witnesses actively participated in the execution of the Will, there is glaring suspicious circumstances to hold that the Will is not genuine. It was also observed that the testator was residing with the plaintiff, and it was he who got him admitted in the hospital, it was proved that the plaintiff was taking care of the deceased at the time of his need. Merely because the attesting witnesses had no enmity towards the plaintiff, it cannot dispel the suspicious circumstances surrounded around the Will.

23. It is settled law that the First Appellate Court, while setting aside the Judgment and decree of the trial court, is required to meet the reasoning given by the trial court in rejecting the Will, which in the present case has not been done by the First Appellate Court.

24. The requirement of exercise of jurisdiction by the First Appellate Court under Section 96 of CPC has been dealt with by this Court in ***Chintamani Ammal vs. Nandagopal Gounder and Anr.***[7], wherein after noticing the previous judgments of this Court, the following has been held in paragraphs 18, 19 and 20 thus: -

> ***"18. Furthermore, when the learned trial Judge arrived at a finding on the basis of appreciation of oral evidence, the first appellate court could have reversed the same only on assigning sufficient reasons therefor. Save and except the said statement of DW 2,***

7 [2007] 2 SCR 903 : (2007) 4 SCC 163

the learned Judge did not consider any other materials brought on record by the parties.

19. In Madholal Sindhu v. Official Assignee of Bombay, it was observed: (AIR p. 30, para 21)

> *"It is true that a judge of first instance can never be treated as infallible in determining on which side the truth lies and like other tribunals he may go wrong on questions of fact, but on such matters if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at, the appeal court should not lightly interfere with the judgment."*
>
> *(See also Madhusudan Das v. Narayanibai)*

20. In Rajbir Kaur v. S. Chokesiri and Co., this Court observed: (SCC pp. 39-41, paras 48-52)

> *"48. Reference on the point could also usefully be made to A.L. Goodhart's article in which, the learned author points out:*
>
> > *'A judge sitting without a jury must perform dual function. The first function consists in the establishment of the particular facts. This may be described as the perceptive function. It is what you actually perceive by the five senses. It is a datum of experience as distinct from a conclusion.*
> >
> > *It is obvious that, in almost all cases tried by a judge without a jury, an appellate court, which has not had an opportunity of seeing the witnesses, must accept his conclusions of fact because it cannot tell on what grounds he reached them and what impression the various witnesses made on him.'*
>
> *49. The following is the statement of the same principle in 'The Supreme Court Practice':*
>
> > *'Great weight is due to the decision of a judge of first instance whenever, in a conflict of testimony,*

the demeanour and manner of witnesses who have been seen and heard by him are material elements in the consideration of the truthfulness of these statements. But the parties to the cause are nevertheless entitled as well on questions of fact as on questions of law to demand the decision of the court of appeal, and that court cannot excuse itself from the task of weighing conflicting evidence, and drawing its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. (pp. 854-55)

…Not to have seen witnesses puts Appellate Judges in a permanent position of disadvantage against the trial Judge, and unless it can be shown that he has failed to use or has palpably misused his advantage—for example has failed to observe inconsistencies or indisputable fact or material probabilities (ibid. and Yuill v. Yuill; Watt v. Thomas —the higher court ought not take the responsibility of reversing conclusions so arrived at merely as the result of their own comparisons and criticisms of the witnesses, and of their view of the probabilities of the case. … (p. 855)

…But while the court of appeal is always reluctant to reject a finding by a judge of the specific or primary facts deposed to by the witnesses, especially when the finding is based on the credibility or bearing of a witness, it is willing to form an independent opinion upon the proper inference to be drawn from it. … (p. 855)

50. A consideration of this aspect would be incomplete without a reference to the observations of B.K. Mukherjea, J., in Sarju Pershad Ramdeo Sahu v. Jwaleshwari Pratap Narain Singh [1950 SCC 714 : AIR 1951 SC 120 : 1950 SCR 781] which as a succinct statement of the rule, cannot indeed be bettered:

> *'The question for our consideration is undoubtedly one of fact, the decision of which depends upon the appreciation of the oral evidence adduced in the case. In such cases, the appellate court has got to bear in mind that it has not the advantage which the trial Judge had in having the witnesses before him and of observing the manner in which they deposed in court. This certainly does not mean that when an appeal lies on facts, the appellate court is not competent to reverse a finding of fact arrived at by the trial Judge. The rule is— and it is nothing more than a rule of practice—that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of the witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lies, the appellate court should not interfere with the finding of the trial Judge on a question of fact.*

51. The area in which the question lies in the present case is the area of the perceptive functions of the trial Judge where the possibility of errors of inference does not play a significant role. The question whether the statement of the witnesses in regard to what was amenable to perception by sensual experience as to what they saw and heard is acceptable or not is the area in which the well-known limitation on the powers of the appellate court to reappreciate the evidence falls. The appellate court, if it seeks to reverse those findings of fact, must give cogent reasons to demonstrate how the trial court fell into an obvious error.

52. With respect to the High Court, we think, that, what the High Court did was what perhaps even an appellate court, with full-fledged appellate jurisdiction

would, in the circumstances of the present case, have felt compelled to abstain from and reluctant to do. Contention (c) would also require to be upheld."

(emphasis in original)

25. ***In Jagannath v. Arulappa & Anr.***[8] and ***H.K.N. Swami v. Irshad Basith (Dead) By Lrs.***[9]**,** this Court has opined that it would be wholly improper to allow first appeal without adverting to the specific findings of the trial court and that the First Appellate Court is required to address all the issues and determine the appeal upon assignment of cogent reasons.

26. Having considered the evidence on record and the findings of the trial court, the First Appellate Court and the High Court, we are satisfied that the First Appellate Court wrongly set aside the Judgment, decree, and findings of the trial court without meeting the findings of the trial court which could not have been done in exercise of power under Section 96 CPC. Therefore, the High Court has rightly set aside the Judgment and decree of the First Appellate Court to restore the Judgment and decree of the trial court. On independent examination also, we have found that the findings recorded by trial court are borne out from the evidence on record and are neither perverse nor illegal.

27. Therefore, we find no substance in this appeal which deserves to be and is hereby dismissed.

28. The parties shall bear their own costs.

Result of the case: Review Petition allowed and Civil Appeal dismissed.

[†]*Headnotes prepared by:* Nidhi Jain

8 (2005) 12 SCC 303

9 (2005) 10 SCC 243

[2024] 6 S.C.R. 409 : 2024 INSC 407

Shento Varghese
v.
Julfikar Husen & Ors.

(Criminal Appeal Nos. 2531-2532 of 2024)

13 May 2024

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

Issue for Consideration

What is the implication of non-reporting of the seizure forthwith to the jurisdictional Magistrate as provided under Section 102(3) Cr.P.C.; does delayed reporting of the seizure to the Magistrate vitiate the seizure order altogether.

Headnotes†

Code of Criminal Procedure, 1973 – s.102(3) – Implication of non-reporting of the seizure forthwith to the jurisdictional Magistrate:

Held: The meaning of the word 'forthwith' as used in section 102(3) has not received judicial construction – The said expression must receive a reasonable construction and in giving such construction, regard must be had to the nature of the act or thing to be performed and the prevailing circumstances of the case – When it is not the mandate of the law that the act should be done within a fixed time, it would mean that the act must be done within a reasonable time – It all depends upon the circumstances that may unfold in a given case and there cannot be a straight-jacket formula prescribed in this regard – In that sense, the interpretation of the word 'forthwith' would depend upon the terrain in which it travels and would take its colour depending upon the prevailing circumstances which can be variable – Therefore, in deciding whether the police officer has properly discharged his obligation under Section 102(3) Cr.P.C., the Magistrate would have to, firstly, examine whether the seizure was reported forthwith – If it finds that the report was not sent forthwith, then it must examine whether there is any explanation offered in support of the delay – If the Magistrate finds that the delay has been properly explained, it would leave the matter at that – The non reporting of the seizure forthwith by the police

* Author

officer to the jurisdictional court would not vitiate the seizure order, it also would not mean that there would be no consequence whatsoever as regards the police officer, upon whom the law has enjoined a duty to act in a certain way – If it finds that there is no reasonable explanation for the delay or that the official has acted with deliberate disregard/ wanton negligence, then it may direct for appropriate departmental action to be initiated against such erring official. [Paras 18, 19, 20, 23, 24]

Code of Criminal Procedure, 1973 – s.102(3) – Delay in reporting the seizures to the Magistrates:

Held: The delay in reporting the seizure to the Magistrate may, subject to proof of prejudice, at best, dent the veracity of the prosecution case *vis-à-vis* the date, time and occasion for seizure of the property – Since the proof of prejudice on part of the accused and the explanation for delay on part of the prosecution can only be demonstrated at trial, the effect of non-compliance becomes an issue to be adjudicated at the time of appreciation of evidence – Moreover, this Court has consistently held that even illegalities in the investigation (including illegality in search and seizures) is no ground for setting aside the investigation in toto. [Para 16]

Code of Criminal Procedure, 1973 – s.102(1) and s.102(3) – Whether validity of the seizure order is contingent on compliance with the reporting obligation:

Held: The validity of the power exercised under Section 102(1) Cr.P.C. is not dependent on the compliance with the duty prescribed on the police officer under Section 102(3) Cr.P.C. – The validity of the exercise of power under Section 102(1) Cr.P.C. can be questioned either on jurisdictional grounds or on the merits of the matter – That is to say, the order of seizure can be challenged on the ground that the seizing officer lacked jurisdiction to act under Section 102(1) Cr.P.C. or that the seized item does not satisfy the definition of 'property' or on the ground that the property which was seized could not have given rise to suspicion concerning the commission of a crime, in order for the authorities to justify the seizure – The pre-requisite for exercising powers under Section 102(1) is the existence of a direct link between the tainted property and the alleged offence – It is essential that the properties sought to be seized under Section 102(1) of the

Cr.P.C. must have a direct or close link with the commission of offence in question. [Para 13]

Code of Criminal Procedure, 1973 – s.102(3) – Expression "shall forthwith report" – Discussed. [Paras 18-22]

Case Law Cited

Tmt. T .Subbulakshmi v. The Commissioner of Police **(2013) 4 MLJ (Crl) 41;** *The Meridian Educational Society v. The State of Telangana* **(2022) 1 ALT (Cri) 229;** *Dr Shashikant D. Karnik v. State of Maharashtra* **(2008) CRL.L.J. 148;** *Ruqaya Akhter v. Ut Through Crime Branch* **(CRM(M) No.223/2022, Jammu & Kashmir and Ladakh High Court).** *Operation Mobilization India v. State of Telangana* **(2021) SCC OnLine TS 1529;** *Bharath Overseas Bank v. Minu Publication* **(1988) MLJ (Crl.) 309;** *Ms Swaran Sabharwal v. Commissioner of Police* **(1990) 68 Comp Cas 652 Delhi (DB) – referred to.**

Anwar Ahmad v. State of UP **[1976] 1 SCR 779 : AIR (1976) SC 680;** *Nevada Properties (P) Ltd. v. State of Maharashtra & Anr.* **[2019] 15 SCR 223 : (2019) 20 SCC 119;** *State of Maharashtra v. Tapas D. Neogy* **[1999] Supp. 2 SCR 609 : 1999 INSC 417;** *Ravinder Kumar & Anr. v. State of Punjab* **[2001] Supp. 2 SCR 463 : (2001) 7 SCC 690;** *Bhajan Singh and Ors. v. State of Haryana* **[2011] 7 SCR 1 : 2011 INSC 422;** *HN Rishbud v. State of Delhi* **[1955] 1 SCR 1150 : (1954) 2 SCC 934;** *Sk. Salim v. State of West Bengal* **[1975] 3 SCR 394 : (1975) 1 SCC 653;** *China Apparao and Others v. State of Andhra Pradesh* **[2002] Supp. 3 SCR 175 : (2002) 8 SCC 440;** *Navalshankar Ishwarlal Dave v. State of Gujarat* **[1993] 3 SCR 676 : 1993 Supp. 3 SCC 754;** *Rao Mahmood Ahmad Khan v. Ranbir Singh* **[1995] 2 SCR 230 : (1995) Supp. 4 SCC 275;** *Bidya Deb Barma v. District Magistrate* **[1969] 1 SCR 562 : (1968) SCC OnLine SC 82 – referred to.**

Books and Periodicals Cited

Black's Law Dictionary, 10th Edition; Wharton's Law Lexicon, 17th Edition – **referred to.**

List of Acts

Code of Criminal Procedure, 1973; Code of Criminal Procedure, 1882; Code of Criminal Procedure, 1898; Bharatiya Nagarik Suraksha Sanhita, 2023; Maintenance of Internal Security Act, 1971; Preventive Detention Act, 1950; Gujarat Prevention of Anti-Social Activities Act, 1985.

List of Keywords

Section 102(3) of the Code of Criminal Procedure, 1973; Section 102(1) of the Code of Criminal Procedure, 1973; Implication of non-reporting of the seizure forthwith to the jurisdictional Magistrate; Reasonable construction; Seizure of property; Reporting obligation.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal Nos. 2531-2532 of 2024

From the Judgment and Order dated 09.08.2023 of the High Court of Judicature at Madras in CRLOP Nos. 14029 and 14031 of 2023

Appearances for Parties

Himinder Lal, Roy Abraham, Ms. Reena Roy, Adithya Koshy Roy, Ms. Anju Kanodiya, Advs. for the Appellant.

S. Mahendran, Adv. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Aravind Kumar J.

1. Leave granted.

2. These appeals have been preferred at the instance of the first informant in Crime No.318 of 2022. By the impugned order dated 09.08.2023, passed in Crl. O.P. Nos.14029 & 14031 of 2023 and Crl. M.P. Nos.8658 of 2023, the High Court of Madras has allowed the claim of the Respondents-accused for de-freezing of their bank accounts. The High Court has ordered for de-freezing on the specific ground that there was delay on part of the police in reporting the seizure to

the jurisdictional Magistrate. The facts in the instant case, which we shall advert to later below, have given rise to following question of law:

> ***What is the implication of non-reporting of the seizure forthwith to the jurisdictional Magistrate as provided under Section 102(3) Cr.P.C.?***
>
> *more specifically;*
>
> ***Does delayed reporting of the seizure to the Magistrate vitiate the seizure order altogether?***

That is the question which needs to be answered in these appeals.

3. Our research indicates that there is no authoritative pronouncement of this Court on this issue. If we turn to the pronouncements of the High Courts, there are decisions[1] which have directly confronted this question. Having reviewed these decisions, we find that, broadly, there are two prevailing strands of thought: one set of cases holding that delayed reporting to the Magistrate would, ipso facto, vitiate the seizure order; and the other view being that delayed reporting would constitute a mere irregularity and would not vitiate the seizure order.

4. The former view has been justified on the grounds that:

(a) the obligation [u/S 102(3) Cr.P.C.] to report the seizure forthwith to the Magistrate is mandatory and non-negotiable, breach of which would qualify as an illegality in following the prescribed statutory procedure[2];

(b) the employment of the word '***shall***' in Section 102(3) makes it clear that non-compliance of the mandatory requirement to report forthwith to the Magistrate goes to the root of the matter[3];

(c) the power to seize has been subjected to procedural requirements prescribed under Section 102(3) –

1 See Table at Annexure A for a compilation of the 36 decisions on this issue.

2 Tmt. T .Subbulakshmi vs The Commissioner of Police 2013(4) MLJ (Crl) 41

3 The Meridian Educational Society Vs. The State of Telangana, 2022 1 ALT(Cri) 229

and breach of complying with follow-up procedures would render the exercise of the main power to be without authority and jurisdiction – in that sense, the requirement to report is in the nature of a *condition subsequent* clause.[4]

5. The latter view has been sustained on the reasoning that:

a) The statutory provision provides no express consequence(s) for non-compliance and therefore, the procedural requirement is merely directory and not mandatory[5];

b) The power to seize property connected with a crime is plenary and the obligation to intimate is a mere incidental exercise of power – breach of the latter cannot affect the former[6];

c) the object of reporting is to facilitate disposal of property seized – *prejudice* caused by delayed reporting, if any, can always be demonstrated at the trial[7];

d) Neither is there any obligation to seek prior leave before exercising the power to seize nor is there any statutorily provided consequence for non-compliance of the reporting obligation[8];

e) No prejudice would be caused to the owner of a property by non-reporting of seizure to the concerned Magistrate during the investigation phase.

Therefore, it cannot be a case of illegality but such an omission may only be an irregularity.[9]

---

4 Dr Shashikant D. Karnik Vs. State of Maharashtra, 2008 CRL.L.J. 148

5 Ruqaya Akhter Vs Ut Through Crime Branch, CRM(M) No.223/2022, Jammu & Kashmir and Ladakh High Court.

6 Operation Mobilization India Vs. State of Telangana 2021 SCC OnLine TS 1529

7 Bharath Overseas Bank Vs. Minu Publication [1988] MLJ (Crl.) 309

8 *Supra, 7*

9 *Supra, 5*

6. In light of conflicting precedents operating across various High Courts, we find it expedient and necessary to settle the conflict and bring in uniformity in adjudication.

LEGISLATIVE HISTORY – A COMPARATIVE ANALYSIS

Criminal Procedure Codes	***Relevant Provision***
1882[10]	**Section 523- Procedure by police upon seizure of property taken under Section 51 or stolen** *The seizure by any Police-officer of property taken under Section 51, or alleged or suspected to have been stolen, or found under circumstances which create suspicion of the commission of any offence, shall be forthwith reported to a magistrate, who shall make such order as he thinks fit respecting the delivery of such property to the person entitled to the possession thereof, or, if such person cannot be ascertained, respecting the custody and production of such property.*
1898[11]	**Section 550- Powers to police to seize property suspected to be stolen**: *Any police-office may seize any property which may be alleged or suspected to have been stolen, or which may be found under circumstances which create suspicion of the commission of any offence. Such police-officer, if subordinate to the office in charge of a police station, shall forthwith report the seizure to that officer.*
1973[12]	***102. Power of police officer to seize certain property**.—(1) Any police officer may seize any property which may be alleged or suspected to have been stolen, or which may be found under circumstances which create suspicion of the commission of any offence.*

10 Hereinafter referred to as "1882 Code".

11 Hereinafter referred to as "1898 Code".

12 Hereinafter referred to as "1973 Code".

	(2) Such police officer, if subordinate to the officer in charge of a police station, shall forthwith report the seizure to that officer *(3) Every police officer acting under sub-section (1) shall forthwith report the seizure to the Magistrate having jurisdiction and where the property seized is such that it cannot be conveniently transported to the Court, [or where there is difficulty in securing proper accommodation for the custody of such property, or where the continued retention of the property in police custody may not be considered necessary for the purpose of investigation,] he may give custody thereof to any person on his executing a bond undertaking to produce the property before the Court as and when required and to give effect to the further orders of the Court as to the disposal of the same:* *[Provided that where the property seized under sub-section (1) is subject to speedy and natural decay and if the person entitled to the possession of such property is unknown or absent and the value of such property is less than five hundred rupees, it may forthwith be sold by auction under the orders of the Superintendent of Police and the provisions of Sections 457 and 458 shall, as nearly as may be practicable, apply to the net proceeds of such sale.]*
2023[13]	**106.** *(1) Any police officer may seize any property which may be alleged or suspected to have been stolen, or which may be found under circumstances which create suspicion of the commission of any offence.* *(2) Such police officer, if subordinate to the officer in charge of a police station, shall forthwith report the seizure to that officer.*

13 Hereinafter referred to as the "2023 Code".

	(3) Every police officer acting under sub-section (1) shall forthwith report the seizure to the Magistrate having jurisdiction and where the property seized is such that it cannot be conveniently transported to the Court, or where there is difficulty in securing proper accommodation for the custody of such property, or where the continued retention of the property in police custody may not be considered necessary for the purpose of investigation, he may give custody thereof to any person on his executing a bond undertaking to produce the property before the Court as and when required and to give effect to the further orders of the Court as to the disposal of the same: Provided that where the property seized under sub-section (1) is subject to speedy and natural decay and if the person entitled to the possession of such property is unknown or absent and the value of such property is less than five hundred rupees, it may forthwith be sold by auction under the orders of the Superintendent of Police and the provisions of Sections 505 and 506 shall, as nearly as may be practicable, apply to the net proceeds of such sale.

7. The responsibility of the police officer to promptly inform the Magistrate about the seizure can be historically traced to the 1882 Code. Oddly enough, this provision was absent in the 1898 Code. In the 1898 Code, however, it was provided that if the seizing officer was below the rank of an officer-in charge of a police station, then such officer was under a duty to give information to his superior regarding the seized property. It appears that the provision as it existed in the 1898 Code was retained as is in the 1973 Code. Sub-section (3) to Section 102 was inserted by way of an amendment only in the year 1978. This amendment reintroduced the reporting obligations of police officer to the Magistrate, as it originally existed in the 1882 Code. It also empowered the seizing officer to give custody of the seized property to any person, on such person executing a bond undertaking to produce the property before the Court as and when required. There was no provision in the 1973 Code nor the 1898 Code till the insertion of sub-section (3) by an amendment in 1978, empowering the police to take a bond from a person undertaking to produce the property entrusted to

him by the police later on before the Court. The law as it existed then was that the bond could be entered before the Court but not in favour of the police. While setting aside the order of forfeiture in regard to the bond in favour of the police, this Court in *Anwar Ahmad v State of UP*[14], pointed out the lacuna in the 1973 Code and suggested the insertion of a suitable provision. That is why this sub-section (3) empowering the police to execute the bond under certain conditionalities came to be inserted by way of the 1978 Amendment. For the sake of completeness, it may be observed that Section 102 Cr.P.C. in its present form has been retained as is in the 2023 Code, which is scheduled to come into force on 1st July 2024 and replace the 1973 Code.

8. The Notes on Clauses appended to the 1978 Bill had set out the following reasons for inserting sub section (3) to Section 102 Cr.P.C.:

> "*Clause 10- Section 102 is being amended (1) to provide that the police officer shall forthwith report the seizure of any property under sub-section (1) to the Magistrate, as there is a lacuna in the Law and (2) to give effect to the observations of the Supreme Court made in Anwar Ahmad vs. the State of U.P. (AIR 1976 SC 680) that the police should be given the power to get a bond from the person to whom the property seized is entrusted, particularly in cases where a bulky property like elephant or car, is seized and the Magistrate is living at a great distance and it is difficult to produce the property seized before the Magistrate.*"

9. The reason cited for inserting the amendment was to overcome a '*lacuna*' in the law. What could have been the lacuna in the law that impelled the insertion of this amendment?

10. In our view, the answer to this question can be derived by referring to the provisions in Chapter XXXIV of the 1973 Code which is titled as '*Disposal of Property'*. Section 457 Cr.P.C. sets out the procedure to be followed by police upon seizure of the property. Sub section (1) begin with the words: '***Whenever the seizure of property by any police officer is reported to a Magistrate*** *under the provisions of*

14 [1976] 1 SCR 779 : AIR 1976 SC 680

this Code, and such property is not produced before a Criminal Court during an inquiry or trial…..". Similarly, we may refer to Section 459 Cr.P.C. which empowers the Magistrate with the power to auction/ sell seized property in certain situations. It begins with the words: '*If the person entitled to the possession of such property is unknown or absent and the property is subject to speedy and natural decay, or* ***if the Magistrate to whom its seizure is reported*** *is of opinion that……*".

11. Both, Section 457 Cr.P.C. and Section 459 Cr.P.C. contemplates the act of seizure by police to be reported to the Magistrate so that necessary steps could be taken for its custody and disposal. However, the provision [Section 102(1) Cr.P.C.] which conferred substantive power on the police to seize property linked to a crime, did not impose on such officers a consequent duty to report the seizures made to the Magistrate. Section 523 in the 1882 Code had coupled the power to seize property linked to the crime and the duty to report forthwith the seizure to the Magistrate in the same provision. Since the relevant provisions in the 1898 Code and the 1973 Code provided only for the substantive power to seize and did not impose any duty on such seizing officer to report to the Magistrate, there arose a need for amendment. That appears to us to be the *lacuna* in the law which was sought to be overcome. In fact, there are several decisions which indicate that the purpose of reporting to the Magistrate is to ensure an order of the disposal of the seized property either on *superdari,* or otherwise, during the pendency of the case/investigations under Section 457 Cr.P.C. This further reinforces our view regarding the *lacuna* which was sought to be fixed. Therefore, the main object underlying the amendment appears to be a mere gap-filling exercise and an attempt to fix a basic omission in legislative drafting.

12. It is in this background that we must consider whether '*seizure orders'* can be set at naught for non-compliance with the procedural formality of reporting such seizure forthwith to the Magistrate.

13. This requires us to consider whether validity of the seizure order is contingent on compliance with the reporting obligation? In our view, the validity of the power exercised under Section 102(1) Cr.P.C. is not dependent on the compliance with the duty prescribed on the police officer under Section 102(3) Cr.P.C. The validity of the exercise

of power under Section 102(1) Cr.P.C. can be questioned either on jurisdictional grounds or on the merits of the matter. That is to say, the order of seizure can be challenged on the ground that the seizing officer lacked jurisdiction[15] to act under Section 102(1) Cr.P.C. or that the seized item does not satisfy the definition of '*property*'[16] or on the ground that the property which was seized could not have given rise to suspicion concerning the commission of a crime, in order for the authorities to justify the seizure.[17] The pre-requisite for exercising powers under Section 102(1) is the existence of a direct link between the tainted property and the alleged offence. It is essential that the properties sought to be seized under Section 102(1) of the Cr.P.C. must have a direct or close link with the commission of offence in question.[18]

14. As stated hereinbefore, the obligation to report the seizure to the Magistrate is neither a jurisdictional pre-requisite for exercising the power to seize nor is the exercise of such power made subject to compliance with the reporting obligation. Contrast this with Section 105E Cr.P.C., 1973 which provides for similar power of seizure and attachment of property. While Section 105E(1) confers the substantive power to make seizure under circumstances provided in that section, sub-section (2) of Section 105E declares that the order passed under Section 105E(1) '*shall have no effect unless the said order is confirmed by an order of the said Court, within a period of thirty days of its being made'.* In that sense, the order of seizure, for it to take effect and have legal force, is subjected to a further statutory requirement of the seizure order being confirmed by an order of Court. It is only upon passing of the confirmation order within the stipulated period does the order of seizure take effect. Until then, it remains an order in form but without having any legal force.

15. We find that there are certain other provisions[19] in the 1973 Code which place similar obligation(s) on the police officer to report their actions to the jurisdictional Magistrate. For example, Section 157 Cr.P.C.

15 Nevada Properties (P) Ltd. Vs. State of Maharashtra & Anr. (2019) 20 SCC 119

16 Ms Swaran Sabharwal Vs. Commissioner of Police, 1990 (68) Comp Cas 652 Delhi (DB)

17 State of Maharashtra Vs. Tapas D. Neogy,1999/INSC/417

18 *Supra, 17.*

19 See, Section 168 Cr.P.C.

provides that '*if, from information received or otherwise, an officer in charge of a police station has reason to suspect the commission of an offence……he shall forthwith send a report of the same to a Magistrate'.* As in the case of Section 102(3) Cr.P.C., Section 157 Cr.P.C. does not provide for any consequence in the event there is failure to promptly comply with the reporting obligation. It would be helpful to understand how this Court has elucidated on the effect of such non-compliance in the context of Section 157 Cr.P.C. since the provision is nearly *pari materia* with Section 102(3).

16. It is now too well settled that delay in registration of FIR is no ground for quashing of the FIR itself.[20] It follows as a corollary that if delay in registration of FIR is no ground to quash the FIR, then delay in forwarding such FIR to the Magistrate can also afford no ground for nullification of the FIR. In fact, this Court has gone to the extent of holding that unless serious prejudice is demonstrated to have been suffered as against the accused, mere delay in sending the FIR to the Magistrate by itself will not have any deteriorating effect on the case of the prosecution.[21] If prejudice is demonstrated and the prosecution fails to explain the delay, then, at best, the effect of such delay would only be to render the date and time of lodging the FIR suspect and nothing more.[22] Drawing from this analogy, the delay in reporting the seizure to the Magistrate may, subject to proof of prejudice, at best, dent the veracity of the prosecution case vis-à-vis the date, time and occasion for seizure of the property. Since the proof of prejudice on part of the accused and the explanation for delay on part of the prosecution can only be demonstrated at trial, the effect of non-compliance becomes an issue to be adjudicated at the time of appreciation of evidence. Moreover, this Court has consistently held that even illegalities in the investigation (including illegality in search and seizures) is no ground for setting aside the investigation in toto[23].

17. In the background of the aforesaid discussion, therefore, the line of precedents which have taken the position that '*seizure orders'*

20 Ravinder Kumar & Anr. Vs. State of Punjab (2001) 7 SCC 690

21 *Supra, 20.*

22 Bhajan Singh and Ors. vs. State of Haryana, 2011/INSC/422

23 HN Rishbud v. State of Delhi (1954) 2 SCC 934

are vitiated for delay in compliance with the reporting obligation are declared to be manifestly erroneous and are accordingly, overruled. The relevant question to be determined was not whether the duty of the police to report the seizure to the Magistrate is mandatory or directory. Instead, what ought to have been inquired into was whether the exercise of the seizure power was subjected to compliance of reporting obligation, as illustrated in Section 105E Cr.P.C.

18. Merely because we have held that non reporting of the seizure forthwith by the police officer to the jurisdictional court would not vitiate the seizure order, it would not mean that there would be no consequence whatsoever as regards the police officer, upon whom the law has enjoined a duty to act in a certain way. Since there is an obligation cast on the officer to report the seizure *forthwith*, it becomes necessary to understand the meaning of the expression forthwith as used in Section 102(3) CrPC. For, without a clear understanding of the said expression, the Magistrate would not be in a position to determine whether the obligation cast on the police officer has been properly complied with. In this background, the expression ***'shall forthwith report** the seizure to the Magistrate'* occurring in sub-section (3) of the Section 102 requires to be examined.

19. The meaning of the word *'forthwith'* as used in Section 102(3) has not received judicial construction by this Court. However, this Court has examined the scope and contours of this expression as it was used under the Maintenance of Internal Security Act, 1971; Preventive Detention Act, 1950; Section 157(1) of the Cr.P.C.; and Gujarat Prevention of Anti-Social Activities Act, 1985 in the case of *Sk. Salim v. State of West Bengal*[24], *Alla China Apparao and Others v. State of Andhra Pradesh*[25] and *Navalshankar Ishwarlal Dave v. State of Gujarat*[26].

20. This Court, in *Rao Mahmood Ahmad Khan v. Ranbir Singh*[27], has held that the word '*forthwith*' is synonymous with the word immediately, which means with all reasonable quickness. When a statute requires something to be done *'forthwith'* or *'immediately'* or even *'instantly'*,

24 [1975] 3 SCR 394 : (1975) 1 SCC 653 (para 10 and 11)

25 [2002] Supp. 3 SCR 175 : (2002) 8 SCC 440 (para 9)

26 [1993] 3 SCR 676 : 1993 Supp (3) SCC 754 (para 9)

27 [1995] 2 SCR 230 : 1995 Supp (4) SCC 275

it should probably be understood as allowing a reasonable time for doing it[28].

21. The expression 'forthwith' has been defined in Black's Law Dictionary, 10th Edition as under:

> *"forthwith, adv. (14c) 1. Immediately; without delay. 2. Directly; promptly; within a reasonable time under the circumstances; with all convenient dispatch"*

Wharton's Law Lexicon, 17th Edition describes 'forthwith' as extracted:

> *Forthwith, When a defendant is ordered to plead forthwith, he must plead within twenty four hours. When a statute or rule of Court requires an act to be done 'forthwith', it means that the act is to be done within a reasonable time having regard to the object of the provision and the circumstances of the case [Ex parte Lamb, (1881) 19 Ch D 169; 2 Chit. Arch. Prac., 14th Edition]*

22. From the discussion made above, it would emerge that the expression *'forthwith'* means *'as soon as may be'*, *'with reasonable speed and expedition'*, *'with a sense of urgency'*, and *'without any unnecessary delay'.* In other words, it would mean as soon as possible, judged in the context of the object sought to be achieved or accomplished.

23. We are of the considered view that the said expression must receive a reasonable construction and in giving such construction, regard must be had to the nature of the act or thing to be performed and the prevailing circumstances of the case. When it is not the mandate of the law that the act should be done within a fixed time, it would mean that the act must be done within a reasonable time. It all depends upon the circumstances that may unfold in a given case and there cannot be a straight-jacket formula prescribed in this regard. In that sense, the interpretation of the word *'forthwith'* would depend upon the terrain in which it travels and would take its colour depending upon the prevailing circumstances which can be variable.

24. Therefore, in deciding whether the police officer has properly discharged his obligation under Section 102(3) Cr.P.C., the Magistrate would have to, firstly, examine whether the seizure

28 Bidya Deb Barma v. District Magistrate,1968 SCC OnLine SC 82

was reported forthwith. In doing so, it ought to have regard to the interpretation of the expression, *'forthwith'* as discussed above. If it finds that the report was not sent forthwith, then it must examine whether there is any explanation offered in support of the delay. If the Magistrate finds that the delay has been properly explained, it would leave the matter at that. However, if it finds that there is no reasonable explanation for the delay or that the official has acted with deliberate disregard/ wanton negligence, then it may direct for appropriate departmental action to be initiated against such erring official. We once again reiterate that the act of seizure would not get vitiated by virtue of such delay, as discussed in detail herein above.

25. Having clarified the applicable legal position above, we now proceed to consider the facts in instant case.

26. The Respondents-accused is said to have placed an order for purchase of forty-seven Kerala Model Gold Chains from the Appellant-first informant, who worked as a deliveryman in a company called 'PR Gold'. In consideration for the supply of gold chains, the Respondents had agreed to provide gold bars of equivalent value. The allegations in the complaint suggest that the exchange took place on 20.12.2022. Shortly thereafter, the Appellant learns that gold bars handed over to him were fake. On this basis, the Appellant approached the police and lodged the first information report. On registration of the first information report, the police initiated investigation and during such investigation, it was noticed that certain monies to the tune of Rs.19,83,036/- were deposited in the bank accounts of Accused 1 and 3. On 09.01.2023, the investigating officer wrote to the bank and ordered for freezing of their bank accounts. The order of freezing was reported to the Magistrate on 27.01.2023. The Respondents had unsuccessfully approached[29] the jurisdictional Magistrate for taking custody of the seized bank accounts. The Respondents then approached the High Court by filing an original petition under Section 482 Cr.P.C. and sought for de-freezing of the bank accounts. The High Court vide the impugned order has allowed the application of the Respondents-accused for de-freezing of the bank accounts, and therefore set at naught the

29 Application under Section 457 – Cr. M.C 2032 of 2023 was filed.

seizure order on the sole ground that the order of seizure was not *forthwith* reported to the Magistrate.

27. The reasoning adopted by the High Court cannot be sustained in the light of aforestated discussion. This takes us to the consequential question, namely, whether at this distance of time, we ought to direct freezing of the bank accounts afresh? The answer has to be in the negative, since undisputedly by virtue of the impugned order, the bank accounts of the respondents has been defreezed and resultantly, the Respondents would have operated the accounts and amount of Rs.19,83,036/- which had been frozen would have been withdrawn. The ends of justice would be met and the interest of prosecution would be served if the Respondents are called upon, forthwith, to execute a bond undertaking to deposit the amount (which has been thus far withdrawn from the seized bank accounts) before the jurisdictional Court in the event the Court were to return a finding of guilt against the accused persons. The Respondents would have to undertake to deposit the amount within four weeks from the date on which the Court passes an order of conviction. It is needless to say that the bond executed would stand discharged if the accused persons are acquitted at the end of trial.

28. With these observations, appeals are allowed in part.

ANNEXURE 'A'

CASES WHERE COURTS HAVE HELD THAT BREACH OF REPORTING CONDITIONS IS ILLEGAL			
S. No	CASE	CITATION	COURT
1.	Manish Khandelwal And Ors vs The State of Maharashtra And Ors	2019 SCC OnLine Bom 1412	Bombay High Court
2.	V Plus Technology Pvt Ltd vs The State (Nct Of Delhi) & Anr	2022/DHC/001595	Delhi HC
3.	Muktaben M. Mashru vs State Of Nct Of Delhi & Anr	2019 SCC OnLine Del 11509	Delhi HC
4.	Tmt.T.Subbulakshmi vs The Commissioner of Police	2013(4)MLJ(Crl)41	Madras High Court

5.	Ms Swaran Sabharwal Versus Commissioner of Police	1990 (68) Comp Cas 652 Delhi (DB)	Delhi High Court
6.	Uma Maheshwari Vs. The State Rep. By Inspector of Police, Central Crime Branch, Egmore, Channai; Criminal O.P. No.15467 of 2013	2013 SCC OnLine Mad 3829	Madras HC
7.	The Meridian Educational Society Vs. The State of Telangana; Writ Petition No.21106 of 2021	2022 1 ALT(Cri) 229	Telangana HC
8.	Padmini vs. Inspector of Police, Tirunelveli	2008(3) Crimes 716 (Mad.)	Madras HC
9.	R. Chandrasekar vs. Inspector of Police, Salem	2003 Criminal Law Journal 294	Madras HC
10.	Lathifa Vs. State of Karnataka	2012 Cri. L.J. 3487	Karnataka High Court
11.	B. Ranganathan Vs. State and Ors	2003 Crl.L.J 2779	Madras HC
12.	Shashikant D. Karnik Vs. The State of Maharashtra	II(2007)BC337	Bombay HC
13.	Karthika Agencies Export House vs The Commissioner of Police	W.P.No.17953 of 2021	Madras High Court
14.	S. Ganapathi Vs. State and Ors.	Crl.O.P.No.800 of 2014	Madras HC
15.	R. Sivaraj Vs. State of Tamil Nadu	Criminal O.P.Nos.576 and 577 of 2013	Madras HC
16.	Shri. Vilas S/o. Prabhakar Dange Vs. State of Maharashtra	Criminal Writ Petition No. 1033/2017	Bombay HC
17.	Purbanchal Road Service, Gauhati VS State	1991CRILJ2798	Gauhati High Court

18.	S. T. Cleopatra VS Commissioner of Police, Chennai City, Vepery, Chennai	W.P.No.17953 of 2021	Madras HC
19.	Kiruthika Vs. State rep. by Inspector of Police and another	Crl.O.P.No.14733 of 2021	Madras HC
20.	Dr.Shashikant D. Karnik Vs. State Of Maharashtra	2008 CRL.L.J. 148	Bombay HC
21.	Ali Trading and Anr v The State of Assam	WA 296/2019	Gauhati HC
22.	B. Kavitha v. Inspector of Police & ors	Crl.OP. NO. 14824/2019	Madras HC
CASES WHERE THE COURT HAS HELD THE REPORTING CONDITIONS ARE DIRECTORY AND NOT ILLEGAL			
23.	Dattasai (Kisan Seva Kendra) VS State of Telangana	2022 6 ALD 702	Telangana HC
24.	M/S SJS Gold Pvt. Ltd. Thru. Director Sunil Jaihind Salunkhe & Anr V. State of UP	Criminal Misc. Writ Petition No. - 3511 Of 2022	Allahabad High Court
25.	Amit Singh vs State of U.P. And Anr.	Criminal Misc. Writ Petition No. - 11201 Of 202	Allahabad High Court
26.	Ruqaya Akhter Vs Ut Through Crime Branch	CRM(M) No.223/2022	The Jammu & Kashmir and Ladakh High Court
27.	Narottam Singh Dhillon and another vs. State of Punjab	Criminal Misc. No.43768 of 2004	Punjab-Haryana High Court
28.	Vinoshkumar Ramachandran Valluvar Vs. The State of Maharashtra	2011(1) MWN (Cr) 497	Bombay HC

29.	C.Aranganayagam Vs. State by the Director of Vigilance and Anti-corruption, Erode and another	1999 SCC OnLine Mad 463	Madras HC
30.	M/S. Ap Product vs State Of Telangana on 3 December, 2020	AIR ONLINE 2020 TEL 135	Telangana High Court
31.	Mohd. Maqbool Ahmed @ Mateen And Anr. vs The Deputy Commissioner Of Police	1996(3) ALT215	Andhra High Court
32.	State of Manipur v Canning Keishing	2021 SCC OnLine Mani 272	Manipur HC
33.	M.S. Jaggi vs Subaschandra Mohapatra	1977 CRILJ 1902	Orissa High Court
34.	Bharath Overseas Bank v. Minu Publication	[1988] MLJ (Crl.) 309	Madras HC
35.	Dr. Shaik Haseena v State of Telangana	2020 SCC OnLine TS 2851	Telangana HC
36.	Operation Mobilization India v. State of Telangana	2021 SCC OnLine TS 1529: (2021) 1 HLT 81	Telangana HC

Result of the case: Appeals partly allowed

†*Headnotes prepared by:* Ankit Gyan

[2024] 6 S.C.R. 429 : 2024 INSC 392

Union of India & Ors.
v.
Santosh Kumar Tiwari

(Civil Appeal No. 6135 of 2024)

08 May 2024

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

Issue for Consideration

Whether Rule 27 of the Central Reserve Police Force Rules, 1955 to the extent it provides for punishments other than those specified in Section 11 of the Central Reserve Police Force Act, 1949, is ultra vires the CRPF Act and as such inoperable and void; whether the punishment of compulsory retirement from service could have been imposed upon the respondent (a Head Constable in CRPF) by relying upon the provisions of Rule 27 of the CRPF Rules; whether the punishment of compulsory retirement imposed suffers from any procedural infirmity and / or is shockingly disproportionate to the proven misconduct of the respondent.

Headnotes†

Central Reserve Police Force Rules, 1955 – Rule 27 – Central Reserve Police Force Act, 1949 – Section 11 – Punishment of compulsory retirement prescribed in Rule 27, if ultra vires the CRPF Act:

Held: The rule-making power of the Central Government found in Section 18 is in broad terms – The Central Government is not only empowered to make rules for regulating the award of minor punishment under Section 11 but also to carry out the purposes of the Act which includes superintendence of, and control over, the Force as well as its administration – The delegate cannot override the Act either by exceeding the authority or by making provisions inconsistent with the Act however, when the enabling Act itself permits its modification by rules, the rules made prevail over the provision in the Act – While enacting the CRPF Act the legislative intent was not to declare that only those minor punishments could be imposed as are specified in Section 11 of the CRPF Act – Rather, it was left open for the Central Government to frame rules to carry out the purposes of the Act

* Author

and the punishments imposable were subject to the rules framed under the Act – Section 8 vests the superintendence and control over the Force in the Central Government – 'Control' is a word of wide amplitude and includes disciplinary control – Therefore, if the CRPF Act envisages vesting of control over the Force in the Central Government and the various punishments imposable under Section 11 are subject to the rules made under the Act, the Central Government in exercise of its general rule-making power, to ensure full and effective control over the Force, can prescribe punishments other than those specified in that section, including the punishment of compulsory retirement – To keep the Force efficient, weeding out undesirable elements therefrom is essential and is a facet of control over the Force, which the Central Government has over the Force by virtue of Section 8 of the CRPF Act – Thus, to ensure effective control over the Force, if rules are framed, in exercise of general rule-making power, prescribing the punishment of compulsory retirement, the same cannot be said to be ultra vires Section 11 of the CRPF Act, particularly when sub-section (1) of Section 11 clearly mentions that the power exercisable therein is subject to any rules made under the Act – The punishment of compulsory retirement prescribed by Rule 27 is intra vires the CRPF Act and is one of the punishments imposable – In the present case, respondent was part of a disciplined force and was found guilty of assaulting his colleague – Punishment awarded not shockingly disproportionate to the proven misconduct – Rather, considering his past service, already a sympathetic view was taken in the matter and no further latitude needs be shown – The punishment of compulsory retirement awarded to the respondent is affirmed – Impugned order of the High Court set aside. [Paras 17, 29, 30-32, 35, 36]

Service Law – Service jurisprudence – Punishments – Compulsory retirement:

Held: Ordinarily a person in service cannot be visited with a punishment not specified in the contract of service or the law governing such service – Punishments may be specified either in the contract of service or in the Act or the rules governing such service – Compulsory retirement is a well-accepted method of removing dead wood from the cadre without affecting his entitlement for retirement benefits, if otherwise payable – It is another form of terminating the service without affecting retirement benefits –

Ordinarily, compulsory retirement is not considered a punishment – But if the service rules permit it to be imposed by way of a punishment, subject to an enquiry, so be it. [Paras 18, 33]

Interpretation of Statutes – Central Reserve Police Force Act, 1949 – ss.11, 9, 10 – "subject to":

Held: As regards Section 11 being exhaustive of the minor punishments which could be imposed, the intention of the legislature appears to the contrary – Section 11 expressly uses the phrase "subject to any rules made under this Act" before "award in lieu of, or in addition to, suspension or dismissal any one or more of the following punishments" – While prescribing punishment for "more heinous offences" and "less heinous offences" in Sections 9 and 10 respectively, the phrase "subject to any rules made under this Act" is not used – The expression "subject to" conveys the idea of a provision yielding place to another provision or other provisions subject to which it is made. [Para 28]

Administrative Law – Delegate's power to make rules:

Held: The intention of the legislature, as indicated in the enabling Act, must be the prime guide to the extent of delegate's power to make rules – However, the delegate must not travel wider than the object of the legislature rather it must remain true to it. [Para 24]

Words and Phrases – 'control' – Concept and import of – Discussed – Central Reserve Police Force Act, 1949.

Case Law Cited

State of West Bengal v. Nripendra Nath Bagchi [1966] 1 SCR 771 **: AIR 1966 SC 447 – followed.**

State of Jammu and Kashmir v. Lakhwinder Kumar and Ors. [2013] 2 SCR 1070 **: (2013) 6 SCC 333;** *St. Johns Teachers Training Institute v. Regional Director, National Council for Teacher Education and Anr.* [2003] 1 SCR 975 **: (2003) 3 SCC 321;** *Madan Mohan Choudhary v. State of Bihar & Ors.* [1999] 1 SCR 596 **: (1999) 3 SCC 396 – relied on.**

Union of India & Ors. v. Ghulam Mohd. Bhat [2005] Supp. 4 SCR 367 **: (2005) 13 SCC 228;** *Union of India & Ors. v. Diler Singh* [2016] 4 SCR 473 **: (2016)**

13 SCC 71; *General Officer Commanding-in-Chief & Anr. v. Subash Chandra Yadav & Anr.* [1988] 3 SCR 62 **: (1988) 2 SCC 351;** *State Bank of India and Ors. v. T.J. Paul* [1999] 2 SCR 1060 **: (1999) 4 SCC 759;** *Rohtak & Hissar Districts Electric Supply Co. Ltd. v. State of U.P. & Ors.* [1966] 2 SCR 863 **: AIR 1966 SC 1471;** *Dr. Mahachandra Prasad Singh v. Chairman, Bihar Legislative Council & Ors.* [2004] Supp. 5 SCR 692 **: (2004) 8 SCC 747;** *Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector & ETIO* [2007] 6 SCR 955 **: (2007) 5 SCC 447;** *Prasar Bharti & Ors. v. Amarjeet Singh & Ors.* [2007] 2 SCR 160 **: (2007) 9 SCC 539 – referred to.**

Books and Periodicals Cited

"Principles of Statutory Interpretation" by G.P. Singh (13th Edition, Chapter 12 at page 1019, published by LexisNexis); P. Ramanatha Aiyer's Advanced Law Lexicon 4th Edition Vol.4 at page 4640; Statutory Interpretation (Fifth Edition, page 262, Section 69) by Francis Bennion **– referred to.**

List of Acts

Central Reserve Police Force Act, 1949; Central Reserve Police Force Rules, 1955.

List of Keywords

Central Reserve Police Force (CRPF); Head Constable in CRPF; Assaulting and abusing fellow colleague; Charges proved; Departmental enquiry; Suspension; Dismissal; Punishments; Minor punishments; Major punishments; More heinous offences; Less heinous offences; Punishment of imprisonment/fine; Disciplinary action; Dismissal from service; Removal from service; Delinquent employee; Award of punishment; Compulsory retirement; Punishment of compulsory retirement from service; Non-gazetted officer; Departmental appeal; Misconduct; Proven misconduct; Rule making power of Central Government; Purpose of the Act; Intention of the legislature; Commandant; Competent authority; Delegate; Delegate's power to make rules; Rules prevail over the provision in the Act; Control; Control over the Force; Disciplinary control; Central Government; ultra vires the CRPF Act; intra vires the CRPF Act.

Case Arising From

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6135 of 2024

From the Judgment and Order dated 10.12.2020 of the High Court of Orissa at Cuttack in WA No. 435 of 2020

Appearances for Parties

Mrs. Aishwarya Bhati, A.S.G., R Bala, Sr. Adv., Navanjay Mahapatra, Ms. Seema Bengani, Ms. Shagun Thakur, Arvind Kumar Sharma, Advs. for the Appellants.

Anand Shankar, Arvind Wishwabandhu, Arun Kumar Arunchal, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Judgment

Manoj Misra, J.

1. Leave granted.

2. This appeal is against the judgment and order of the High Court of Orissa at Cuttack[1] dated 10.12.2020, whereby the Writ Appeal No. 435/2020, preferred by the appellants against the judgment and order of the learned Single Judge dated 14.01.2020, has been dismissed and the order of the learned Single Judge has been affirmed.

Factual Matrix

3. The respondent[2] was a Head Constable in Central Reserve Police Force[3]. He was charge-sheeted on allegations of assaulting and abusing his fellow colleague. In the ensuing enquiry, the charges were found proved against the respondent. As a result thereof, the respondent was compulsorily retired from service *vide* order dated 16.02.2006. Aggrieved therewith, the respondent filed a departmental appeal, which was dismissed by the Deputy Inspector General (P), CRPF *vide* order dated 28.07.2006.

1 High Court

2 The original petitioner

3 CRPF

4. Assailing the order of compulsory retirement and dismissal of his appeal, the respondent filed a Writ Petition (C) No.17398/2006 before a Single Judge Bench of the High Court. The learned Single Judge *vide* order dated 14.01.2020 allowed the writ petition, *inter alia*, on the ground that the punishment of compulsory retirement was not one of the punishments specified in Section 11 (1) of the Central Reserve Police Force Act, 1949[4]. The operative portion of the order of the learned Single Judge is extracted below:

> "Thus, this court is of the opinion that the award of punishment by the order vide Annexure 5 not only remains bad, but in the circumstances, the consequential order vide Annexure 7 also becomes bad. In such view of the matter and as the Disciplinary Authority is to reconsider the question of punishment, this matter is relegated back to the Disciplinary Authority to hear the question of punishment, giving opportunity of hearing to the petitioner and pass the final order involving the disciplinary proceeding. For a remand of the matter to the Disciplinary Authority, this court observes, the Disciplinary Authority, while reconsidering the matter will also consider other grounds raised herein. For the setting aside of the order vide Annexure 5 and as the matter is relegated back to the authority, the position of the petitioner before passing of the final order shall be restored and for interference of this court with the order vide Annexures 5 and 7 release of the arrears, if any, involving the petitioner shall be dependent on the ultimate outcome involving fresh disposal of the proceeding by the Disciplinary Authority in terms of the directions of the apex court in paragraph 24 of the judgement in the case of Ranjit Singh versus Union of India as reported in (2006) 4 SCC 153."

5. Aggrieved with the order of the learned Single Judge, the appellants preferred writ appeal (supra) before the Division Bench of the High Court, *inter alia*, on the following grounds:

(i) The charges against the respondent were found proved in the enquiry. They were of serious nature warranting penalty including that of dismissal or removal from service. Compulsory retirement

4 CRPF Act

is nothing but a species of removal from service and, therefore, being a lesser penalty than dismissal or removal from service, was an imposable punishment.

(ii) Section 11 of the CRPF Act provides that, subject to the rules made under the Act, the Commandant or any other authority or officer, as may be prescribed, award in lieu of, or in addition to, suspension or dismissal, anyone or more of the punishments specified therein to any member of the Force whom he considers to be guilty of disobedience, neglect of duty or remissness in the discharge of any duty or of other misconduct in his capacity as a member of the Force. Sub-section (1) of Section 18 empowers the Central Government to notify rules for carrying out the purposes of the CRPF Act. Sub-section (2) of Section 18 provides that without prejudice to the generality of the foregoing power, rules may provide for all or any of the matters specified therein, which includes regulating the award of minor punishment under Section 11, and providing for appeals from, or the revision of, orders under that section, or remission of fines imposed under that section. Rule 27 of the Central Reserve Police Force Rules, 1955[5], specifies the procedure for the award of punishments. Clause (a) of Rule 27 enumerates in a tabular form the punishments which could be imposed and the authority competent to impose such punishments. At serial no.4, under column no.2, in the table, the punishment of compulsory retirement is mentioned as being one of the punishments that may be imposed by the Commandant after a formal departmental enquiry. Thus, in light of the provisions of Section 11 of the CRPF Act read with Rule 27 of the CRPF Rules, and by taking into consideration that charges were duly proved in the enquiry, the punishment of compulsory retirement was fully justified.

6. The Division Bench of the High Court, however, found no merit in the writ appeal and dismissed the same accordingly.

7. In these circumstances, the appellants are before this Court questioning the impugned judgment and order of the High Court.

5 CRPF Rules

8. We have heard Ms. Aishwarya Bhati, learned Additional Solicitor General, appearing for the appellants, and Mr. Anand Shankar, learned counsel, appearing for the respondent.

Submissions on behalf of the appellants

9. Ms. Bhati, learned counsel for the appellants, *inter alia,* submitted:

(i) The only ground pressed by the original petitioner was that the punishment of compulsory retirement is not imposable as it is not provided for in Section 11 of the CRPF Act, which is nothing but misconceived;

(ii) The High Court while accepting the above ground failed to consider:

(a) Section 11[6] of the CRPF Act is expressly made subject to any rules made under the Act. Section 18[7] of the

---

6 **11. Minor punishments—**

(1) The Commandant or any other authority or officer as may be prescribed, may, subject to any rules made under this Act, award in lieu of, or in addition to, suspension or dismissal any one or more of the following punishments to any member of the Force whom he considers to be guilty of disobedience, neglect of duty, or remissness in the discharge of any duty or of other misconduct in his capacity as a member of the Force, that is to say,—
   (a) reduction in rank;
   (b) fine of any amount not exceeding one month's pay and allowances;
   (c) confinement to quarters, lines or camp for a term not exceeding one month;
   (d) confinement in the quarter-guard for not more than twenty-eight days, with or without punishment drill or extra guard, fatigue or other duty; and
   (e) removal from any office of distinction or special emolument in the Force.

(2) Any punishment specified in clause (c) or clause (d) of sub-section (1) may be awarded by any gazetted officer when in command of any detachment of the Force away from headquarters, provided he is specially authorised in this behalf by the commandant.

(3) The Assistant Commandant, a company officer or a subordinate officer, not being below the rank of subedar or inspector, commanding a separate detachment or an outpost, or in temporary command at the headquarters of the Force, may, without a formal trial, award to any member of the Force who is for the time being subject to his authority any one or more of the following punishment for the commission of any petty offence against discipline which is not otherwise provided for in this Act, or which is not of a sufficiently serious nature to require prosecution before a criminal court, that is to say,—
   (a) confinement for not more than seven days in the quarter-guard or such other place as may be considered suitable, with forfeiture of all pay and allowances during its continuance;
   (b) punishment drill, or extra guard, fatigue or other duty, for not more than thirty days with or without confinement to quarters, lines or camp;
   (c) censure or severe censure:

   Provided that this punishment may be awarded to a subordinate officer only by the Commandant.

(4) A jemadar or sub-inspector who is temporarily in command of a detachment or an outpost may, in like manner and for the commission of any like offence, award to any member of the Force for the time being subject to his authority any of the punishments specified in clause (b) of sub-section (3) for not more than fifteen days.

7 **18. Power to make rules: -**

1) The Central Government may by notification in the official Gazette, make rules for carrying out the purposes of this Act.

CRPF Act empowered the Central Government to make rules for carrying out the purposes of the Act and without prejudice to the generality of the foregoing power, rules could be made regulating the award of punishment under Section 11. CRPF Rules, 1955 were notified by the Central Government. Rule 27[8] specifically provided for compulsory retirement as one of the punishments imposable on a non-gazetted officer, like the respondent. Thus, the impugned order of the High Court is in ignorance of the relevant provisions of the Act as well as the rules.

(b) Section 11 empowers the Commandant or any other competent authority to award in lieu of, or in addition to, suspension or dismissal anyone or more of the specified punishments. The specified punishments include removal from any office of distinction or special emolument in the Force. Dismissal is the highest of those punishments. Removal is a lesser punishment. Section 11 uses the word removal as an expression of wide amplitude so as to include any punishment that has the effect of terminating the service. As compulsory retirement also entails in

---

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:-
   (a) regulating the classes and grades of, and the pay, pension and other remuneration of, member of the force, and their conditions of service in the force;
   (b) regulating the powers and duties of officers authorized to exercise any function by or under this Act;
   (c) fixing the period of service for members of the force;
   (d) regulating the award of minor punishment under section 11, and providing for appeals from, or the revision of, orders under that section, or the remission of fines imposed under that section, and the remission of deductions made under section 13;
   (e) regulating the several or collective liability of member of the force in the case of the loss or theft of weapons and ammunition;
   (f) for the disposal of criminal cases arising under this Act and for specifying the prison in which a person convicted in any such case may be confined.

(3) Every rule made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule, or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the cases may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

8 **27. Procedure for the award of punishments —**
(a) [The punishments shown as items 1 to 11 in column 2 of the table] below may be inflicted on non--Gazetted Officers and men of the various ranks shown in each of the headings of columns 3 to 6, by the authorities named below such headings under the conditions mentioned in column 7.
[TABLE

Sl. No.	Punishment	Subedar (inspector)	Sub Inspector	Others except Const. & enrolled followers	Consts. & enrolled followers	Remarks
1	2	3	4	5	6	7
1.	Dismissal or removal from the Force	DIGP	DIGP	Comdt.	Comdt.	To be inflicted after formal departmental enquiry
2.	Reduction to a lower time-scale of pay or service	DIGP	DIGP	Comdt.	Comdt.	
3.	Reduction to a lower stage in the time-scale of pay for a specified period	DIGP	DIGP	Comdt.	Comdt.	
4.	Compulsory retirement	DIGP	DIGP	Comdt.	Comdt.	
5.	Fine of any amount not exceeding one month's pay and allowances	DIGP	DIGP	Comdt.	Comdt.	
6.	Confinement in the Quarter Guard exceeding seven days but not more than twenty eight days with or without punishment drill or extra guard fatigue or other duty	-	-	-	Comdt.	
7.	Stoppage of increment	DIGP	DIGP	Comdt.	Comdt.	
8..	Removal from any office of distinction or special emolument in the Force	DIGP	DIGP	Comdt.	Comdt.	May be inflicted without a formal departmental enquiry
9.	Censure	Comdt.	Comdt.	Asstt. Comdt. or Coy Comdr.	A. Comdt. or Coy Comdr.	
10.	Confinement to quarter Guard for not more than seven days with or without punishment or extra guard fatigue or other duty	-	-	-	Comdt.	
11.	Confinement to quarters lines, camp, punishment, drill, fatigue duties, etc., for a term not exceeding one month	-	-	-	Comdt.	

Note— 1. When the post of Deputy Inspector General remains unfilled for a period of over one month at a time the Commandant shall exercise the powers of punishing the Subedars (Inspectors) and Sub-Inspectors except the powers of ordering dismissal or removal from the Force.

termination of service, it is nothing but a species of removal, which is permissible under the CRPF Rules. Therefore, once an enquiry is held, charge of gross indiscipline is found proved, bearing in mind that the original petitioner was a member of a disciplined force, the punishment awarded, being one of the punishments imposable, was not liable to be interfered with by the High Court.

10. In support of her submissions, Ms. Bhati relied on two decisions of this Court, namely, (a) **Union of India & Ors. v. Ghulam Mohd. Bhat**[9]; and (b) **Union of India & Ors. v. Diler Singh**[10].

Submissions on behalf of the respondent

11. Mr. Anand Shankar, learned counsel for the respondent, defending the impugned order submitted:

(i) Punishment of compulsory retirement as specified in Rule 27 of the CRPF Rules is *ultra vires* the provisions of Section 11 of the CRPF Act, which is exhaustive, and no punishment beyond what is specified therein can be imposed;

(ii) Decision of this Court in **Ghulam Mohd. Bhat** **(supra)** is of no help to the appellants as it relates to the punishment of removal from service and not compulsory retirement from service;

(iii) Rule 27 was framed in exercise of power delegated to the Central Government under clause (d) of sub-section (2) of Section 18 of the CRPF Act, which is only to regulate the award of minor punishment not to introduce any other species / kind of punishment. Therefore, a punishment which is not contemplated under the statute cannot be introduced by way of a rule, particularly in absence of specific delegation of power in this regard. Dismissal and compulsory retirement are two different kinds of punishment and cannot be treated as interchangeable. Thus, in absence of any delegation of power

---

Note— 2. When the post of Commandant remains unfilled for a period of over one month at a time consequent on the incumbent proceeding on leave or otherwise, the Assistant Commandant shall exercise the powers of punishment vested in the Commandant, except the powers of ordering dismissal or removal from the Force.

9 [2005] Supp. 4 SCR 367 : (2005) 13 SCC 228

10 (2016) 13 SCC 71

to frame rules introducing a new punishment, Rule 27, to the extent it introduces the punishment of compulsory retirement, is *ultra vires* the CRPF Act;

(iv) The charge levelled on the original petitioner was not established, as no eye-witness was presented to prove it. Otherwise also, Hawaldar M. Devnath, who was allegedly assaulted by the original petitioner, was inimical to the original petitioner and made a false complaint. The Disciplinary Authority and the Appellate Authority acted in a mechanical manner.

12. In support of his submissions, Mr. Anand Shankar relied on a decision of this Court in **General Officer Commanding-in-Chief & Anr. v. Subash Chandra Yadav & Anr**[11]**.**

Issues

13. Having taken note of the rival submissions, the issues that arise for our consideration in this appeal are as follows:

(i) Whether the punishment of compulsory retirement from service could have been imposed upon the respondent by relying upon the provisions of Rule 27 of the CRPF Rules?

(ii) Whether Rule 27 of the CRPF Rules to the extent it provides for punishments other than those specified in Section 11 of the CRPF Act, *ultra vires* the CRPF Act and as such inoperable and void?

(iii) Whether the punishment of compulsory retirement imposed upon the respondent suffers from any procedural infirmity and / or is shockingly disproportionate to the proven misconduct of the respondent?

An Overview of the CRPF Act and the Rules

14. Before we address the above issues it would be useful to have an overview of the relevant provisions of the CRPF Act and the rules made thereunder. The CRPF Act is "an Act to provide for the constitution and regulation of an armed Central Reserve Police Force (for short the Force)". Section 3 provides for constitution of

11 [1988] 3 SCR 62 : (1988) 2 SCC 351

the Force. Sub-section (2) of Section 3 provides that the Force shall be constituted in such manner, and the members of the Force shall receive such pay, pension and other remuneration, as may be prescribed. The word "prescribed" is defined in Section 2 (f) as prescribed by rules made under the Act. Section 8[12] vests the superintendence, control and administration of the Force in the Central Government. It declares that the Force shall be administered by the Central Government in accordance with the provisions of the Act and of any rules made thereunder, through such officers as the Central Government may from time to time appoint in that behalf. Section 9 enumerates "more heinous offences", whereas Section 10 enumerates "less heinous offences", both punishable under the Act. For "more heinous offences", the punishment is of transportation for life or for a term of not less than seven years or with imprisonment for a term which may extend to 14 years or with fine which may extend to three months' pay, or with fine to that extent, in addition to such sentence of transportation or imprisonment. The punishment for "less heinous offences" is imprisonment for a term which may extend to one year, or with fine which may extend to three months' pay or with both. Section 11 deals with minor punishments. According to it, the Commandant or any other authority or officer as may be prescribed, may, subject to any rules made under the Act, award in lieu of, or in addition to, suspension or dismissal anyone or more of the punishments specified therein to any member of the Force whom he considers to be guilty of disobedience, neglect of duty, or remissness in the discharge of any duty or of other misconduct in his capacity as a member of the Force. One of the minor punishments specified in Section 11, other than dismissal or suspension, is "removal from any office of distinction or special emolument in the Force".

15. Section 18 confers rule-making power on the Central Government. Sub-section (1) of Section 18 states that the Central Government

12 **Section 8. Superintendence, Control and Administration of the Force.---** (1) The superintendence of, and control over, the Force shall vest in the Central Government; and the Force shall be administered by the Central Government, in accordance with the provisions of this Act, and of any rules made there under, through such officers as the Central Government may from time to time appoint in this behalf.
(2) The headquarters of the force shall be at Neemuch or at such other place as may from time to time be specified by the Central Government.
(3) While on active duty outside its headquarters, the Force shall be subject to the general control and direction of such authority or officer as may be prescribed or as may be specially appointed by the Central Government in this behalf.

may, by notification in the Official Gazette, make rules for carrying out the purposes of the Act. Sub-section (2) of Section 18 provides that without prejudice to the generality of the foregoing power, such rules may provide for all or any of the matters specified therein. Amongst other matters specified therein, clause (d), *inter alia*, empowers the Central Government to make rules for regulating the award of minor punishment under Section 11, and providing for appeals from, or the revision of, orders under that section.

16. An overview of the CRPF Act would make it clear that the Central Government has overall superintendence and control over the Force and the Force is to be administered by the Central Government in accordance with the provisions of the CRPF Act and of any rules made thereunder through such officers as the Central Government may from time to time appoint.

Discussion/ Analysis

17. The rule-making power of the Central Government found in Section 18 is in broad terms. sub-section (1) of Section 18 empowers the Central Government to make rules for carrying out the purposes of the CRPF Act. Rule-making power under sub-section (2) of Section 18 is without prejudice to the generality of the power conferred by sub-section (1) thereof. Thus, the Central Government is not only empowered to make rules for regulating the award of minor punishment under Section 11 but also to carry out the purposes of the Act which includes superintendence of, and control over, the Force as well as its administration.

Punishment of compulsory retirement is *intra vires* the CRPF Act

18. Ordinarily a person in service cannot be visited with a punishment not specified in the contract of service or the law governing such service. Punishments may be specified either in the contract of service or in the Act or the rules governing such service. In **State Bank of India and Ors. v. T.J. Paul**[13] this Court had occasion to deal with a situation where, for a proven charge of gross misconduct, punishment of removal was not one of the punishments specified in the extant rules though, punishment of dismissal was imposable.

13 [1999] 2 SCR 1060 : 1999 (4) SCC 759

This Court set aside the punishment of removal and remitted the matter to the Appellate Authority for considering imposition of one or the other punishment as specified in the extant rules.

19. In the case on hand the CRPF Rules provide for imposition of the punishment of compulsory retirement though the CRPF Act itself does not provide for it in specific terms. Therefore, the argument on behalf of the respondent is that the CRPF Rules are *ultra vires* the CRPF Act. In support of this submission reliance has been placed on a decision of this Court in **Subash Chandra Yadav** **(supra)** where it was observed:

> **"14…**….. It is well settled that rules framed under the provisions of a statute form part of the statute. In other words, rules have statutory force. **But before a rule can have the effect of a statutory provision, two conditions must be fulfilled, namely, (1) it must conform to the provisions of the statute under which it is framed; and (2) it must also come within the scope and purview of the rule-making power of the authority framing the rule. If either of these two conditions is not fulfilled, the rule so framed would be void.**"
>
> (Emphasis supplied)

20. The CRPF Act while dealing with offences and punishments, categorizes offences in two parts. One "more heinous offences" (*vide* Section 9) and the other "less heinous offences" (*vide* Section 10). These two categories of offences entail a punishment of imprisonment and/or fine. The usual disciplinary action which befalls on a delinquent employee is envisaged as a minor punishment under Section 11 of the CRPF Act even though many of the punishments specified therein, such as dismissal, reduction in rank and removal from office of distinction, in common service jurisprudence are considered major punishment. That apart, Section 11 which describes minor punishments declares: (a) that the minor punishments specified in Section 11 may be awarded "*in lieu of, or in addition to, suspension or dismissal";* and (b) that the power of the Commandant or any other authority or officer, as may be prescribed, to award the specified punishment "*is subject to any rules made under the CRPF Act*". Another important feature is that Section 11 does not use common expressions such as

"dismissal from service" or "removal from service" while describing the punishments. Though, Rule 27 (*vide Table)* uses those expressions.

21. The question which would therefore arise for our consideration is whether Section 11 is exhaustive as far as minor punishments imposable under the CRPF Act are concerned or it merely provides for a skeletal framework to be supplemented by the rules framed under the Act.

22. In **Ghulam Mohd. Bhat (supra)**, a question arose whether punishment of removal from service could be awarded to a Constable in the Force. The argument against the award of punishment of removal from service was that it is not one of the punishments specified in Section 11 of the CRPF Act. The Union of India defended the said punishment on the ground that it is a species of dismissal and is permissible under Rule 27 of the CRPF Rules. After examining the provisions of Section 11 of the CRPF Act and Rule 27 of the CRPF Rules, this Court observed:

> "5. A bare perusal of Section 11 shows that it deals with minor punishment as compared to the major punishments prescribed in the preceding section. It lays down that the Commandant or any other authority or officer, as may be prescribed, may, subject to any rules made under the Act, award any one or more of the punishments to any member of the Force who is found guilty of disobedience, neglect of duty or remissness in the discharge of his duty or of other misconduct in his capacity as a member of the Force. According to the High Court the only punishments which can be awarded under this section are reduction in rank, fine, confinement to quarters and removal from any office of distinction or special emolument in the Force. In our opinion, the interpretation is not correct, because the section says that these punishments may be awarded in lieu of, or in addition to, suspension or dismissal.
>
> 6. The use of the words "in lieu of, or in addition to, suspension or dismissal", appearing in sub-section (1) of Section 11 before clauses (a) to (e) shows that the authorities mentioned therein are empowered to award punishment of dismissal or suspension to the member of the Force who is found guilty and in addition to, or in lieu

thereof, the punishment mentioned in clauses (a) to (e) may also be awarded.

8. It is fairly well-settled position in law that removal is a form of dismissal. This Court in Dattatraya Mahadev Nadkarni (Dr.) v. Municipal Corpn. of Greater Bombay [(1992) 2 SCC 547 : 1992 SCC (L&S) 615 : (1992) 20 ATC 275 : AIR 1992 SC 786] explained that **removal and dismissal from service stand on the same footing and both bring about termination of service though every termination of service does not amount to removal or dismissal.** The only difference between the two is that in the case of dismissal the employee is disqualified from future employment while in the case of removal he is not debarred from getting future employment. Therefore, dismissal has more serious consequences in comparison to removal. **In any event, Section 11(1) refers to the Rules made under the Act under which action can be taken. Rule 27 is part of the Rules made under the Act. Rule 27 clearly permits removal by the competent authority. In the instant case the Commandant who had passed the order of removal was the competent authority to pass the order."**

(Emphasis supplied)

23. The learned counsel for the respondent seeks to distinguish the above decision, *inter alia*, on the ground that removal may be a species of dismissal or *vice versa* but compulsory retirement is not, because in common service jurisprudence compulsory retirement is not considered a punishment. Therefore, according to him, Rule 27 prescribes an altogether new punishment which is not contemplated by the CRPF Act. Hence, according to him, Rule 27 to that extent is *ultra vires* the CRPF Act and as such void.

24. To determine whether the punishment of compulsory retirement prescribed in Rule 27 is *ultra vires* the CRPF Act, it would be apposite to first examine the scope of rule-making power conferred on the Central Government by the statute. The CRPF Act, *vide* sub-section (1) of Section 18, grant the power to make rules in general terms, that is, "*to carry out the purposes of this Act*". And, *vide* sub-section (2) of Section 18, "*in particular and without prejudice to the generality*

of the foregoing power", to make rules for all or any of the matters enumerated therein. Interpreting such a rule-making provision, in **State of Jammu and Kashmir v. Lakhwinder Kumar and Ors.**[14], a two-Judge Bench of this Court, relying on a Constitution Bench decision in **Rohtak & Hissar Districts Electric Supply Co. Ltd. v. State of U.P. & Ors.**[15], held:

> "23. In our opinion, **when the power is conferred in general and thereafter in respect of enumerated matters, as in the present case, the particularization in respect of specified subject is construed as merely illustrative and does not limit the scope of general power.** Reference in this connection can be made to a decision of this Court in Rohtak and Hissar Districts Electric Supply Co. Ltd. v. State of UP, in which it has been held as follows:
>
> > "18..... Section 15 (1) confers wide powers on the appropriate government to make rules to carry out the purposes of the Act; and Section 15 (2) specifies some of the matters enumerated by clauses (a) to (e) in respect of which rules may be framed. It is well settled that the enumeration of the particular matters by sub-section (2) will not control or limit the width of the powers conferred on the appropriate government by sub-section (1) of Section 15; and so, if it appears that the item added by the appropriate government has relation to conditions of employment, its addition cannot be challenged as being invalid in law."
>
> (Emphasis supplied)

This would imply that the intention of the legislature, as indicated in the enabling Act, must be the prime guide to the extent of delegate's power to make rules. However, the delegate must not travel wider than the object of the legislature rather it must remain true to it[16].

14 [2013] 2 SCR 1070 : (2013) 6 SCC 333

15 [1966] 2 SCR 863 : AIR 1966 SC 1471

16 Dr. Mahachandra Prasad Singh v. Chairman, Bihar Legislative Council & Ors. : (2004) 8 SCC 747, para 13

25. In St. Johns Teachers Training Institute v. Regional Director, National Council for Teacher Education and Anr.[17], a three-Judge Bench of this Court observed:

> "10. ……. The power to make subordinate legislation is derived from the enabling act and it is fundamental that the delegate on whom such a power is conferred has to act within the limits of authority conferred by the Act. **Rules cannot be made to supplant the provisions of the enabling act but to supplement it. What is permitted is the delegation of ancillary or subordinate legislative functions, or, what is fictionally called, a power to fill up details.** The legislature may, after laying down the legislative policy confer discretion on an administrative agency as to the execution of the policy and leave it to the agency to work out the details within the framework of policy……..
>
> 12. **The question whether any particular legislation suffers from excessive delegation has to be decided having regard to the subject matter, the scheme, the provisions of the statute including its preamble and the facts and circumstances in the background of which the statute is enacted…….It is also well settled that in considering the vires of subordinate legislation one should start with the presumption that it is *intra vires* and if it is open to two constructions, one of which would make it valid and the other invalid, the courts must adopt that construction which makes it valid and the legislation can also be read down to avoid its being declared *ultra vires*.**"
>
> (Emphasis supplied)

26. Francis Bennion in his treatise on Statutory Interpretation (Fifth Edition, page 262, Section 69) has written:

> "There are various types of delegated legislation, but all are subject to certain fundamental factors. Underlying the concept of delegated legislation is the basic principle that

17 [2003] 1 SCR 975 : (2003) 3 SCC 321

> the legislature delegates because it cannot directly exert its will in every detail. All it can in practice do is lay down the outline. This means that the intention of the legislature, as indicated in the outline (that is the enabling Act), must be the prime guide to the meaning of delegated legislation and the extent of the power to make it."

27. As discussed above, since the rule-making power under Section 18 of the CRPF Act is in broad terms, that is to carry out the purposes of the Act as well as to regulate the award of minor punishment under Section 11, in order to determine whether Rule 27 of the CRPF Rules, insofar as it prescribes an additional punishment of compulsory retirement, is *intra vires* or *ultra vires* the CRPF Act, we would have to consider: (a) whether the intention of the legislature, as borne out from the provisions of the CRPF Act, was to leave it open for the Central Government to prescribe any other minor punishment than what has already been prescribed in Section 11 of the Act; and (b) whether it is in conflict with any of the provisions of the CRPF Act.

28. As regards Section 11 being exhaustive of the minor punishments which could be imposed, the intention of the legislature appears to the contrary. Section 11 expressly uses the phrase "*subject to any rules made under this Act*" before "*award in lieu of, or in addition to, suspension or dismissal any one or more of the following punishments*". Importantly, while prescribing punishment for "*more heinous offences*" and "*less heinous offences*" in Sections 9 and 10 respectively, the phrase "*subject to any rules made under this Act*" is not used. The expression "*subject to*" conveys the idea of a provision yielding place to another provision or other provisions subject to which it is made[18].

29. G.P. Singh in his treatise "Principles of Statutory Interpretation" (13th Edition, Chapter 12 at page 1019, published by LexisNexis) writes: *"The delegate cannot override the Act either by exceeding the authority or by making provisions inconsistent with the Act. But when the enabling Act itself permits its modification by rules, the rules made prevail over the provision in the Act. When provision A*

18 P. Ramanatha Aiyer's Advanced Law Lexicon 4th Edition Vol.4 at page 4640, see also Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector & ETIO : (2007) 5 SCC 447, paragraph 68

in the Act is subject to other provisions of the Act, a valid notification issued under any other provision in the Act would in case of conflict with section A override its provisions."

30. In light of the discussion above, we are of the view that while enacting the CRPF Act the legislative intent was not to declare that only those minor punishments could be imposed as are specified in Section 11 of the CRPF Act. Rather, it was left open for the Central Government to frame rules to carry out the purposes of the Act and the punishments imposable were subject to the rules framed under the Act.

31. In that context, one of the purposes of the Act could be gathered from Section 8, which vests the superintendence and control over the Force in the Central Government. The concept of "*control*", as per P. Ramantha Aiyer's Advanced Law Lexicon (4th Edition), *inter alia,* implies that the controlling authority must be in a position to dominate the affairs of its subordinate[19]. In **State of West Bengal v. Nripendra Nath Bagchi**[20], a Constitution Bench of this Court had occasion to explore the true import of the expression 'control' as used in Article 235 of the Constitution of India. After considering the submissions, it was held that the word 'control' must include disciplinary jurisdiction. In **Madan Mohan Choudhary v. State of Bihar & Ors.**[21] it was reiterated that the expression 'control,' as used in Article 235 of the Constitution, includes disciplinary control. It was also observed that transfers, promotions, and confirmations including transfer of District Judges or the recall of District Judges posted on ex-cadre post or on deputation or on administrative post etc. is also within the administrative control of the High Court. So also, premature and compulsory retirement is within the control of the High Court.

32. From above, it is clear that 'control' is a word of wide amplitude and includes disciplinary control. Therefore, in our view, if the CRPF Act envisages vesting of control over the Force in the Central Government and the various punishments imposable under Section 11 are subject to the rules made under the Act, the Central Government in exercise

19 See also Prasar Bharti & Ors. v. Amarjeet Singh & Ors. : (2007) 9 SCC 539, paragraph 20

20 [1966] 1 SCR 771 : AIR 1966 SC 447

21 [1999] 1 SCR 596 : (1999) 3 SCC 396, paragraphs 25 and 26

of its general rule-making power, to ensure full and effective control over the Force, can prescribe punishments other than those specified in that section, including the punishment of compulsory retirement.

33. It cannot be gainsaid that compulsory retirement is a well-accepted method of removing dead wood from the cadre without affecting his entitlement for retirement benefits, if otherwise payable. It is another form of terminating the service without affecting retirement benefits. Ordinarily, compulsory retirement is not considered a punishment. But if the service rules permit it to be imposed by way of a punishment, subject to an enquiry, so be it. To keep the Force efficient, weeding out undesirable elements therefrom is essential and is a facet of control over the Force, which the Cen tral Government has over the Force by virtue of Section 8 of the CRPF Act. Thus, to ensure effective control over the Force, if rules are framed, in exercise of general rule-making power, prescribing the punishment of compulsory retirement, the same cannot be said to be *ultra vires* Section 11 of the CRPF Act, particularly when sub-section (1) of Section 11 clearly mentions that the power exercisable therein is subject to any rules made under the Act. We, therefore, hold that the punishment of compulsory retirement prescribed by Rule 27 is *intra vires* the CRPF Act and is one of the punishments imposable. Issues (i) and (ii) are decided in the above terms.

Punishment of compulsory retirement suffers from no other infirmity.

34. The charge against the respondent has been that on 18.06.2005, during Forest Camp Training, he abused M. Devnath, Forest Camp Training Haw/ B.H.M. and assaulted him with a stick. M. Devnath was medically examined. The medical examination report confirmed that he suffered injuries. P.K. Sahu (PW-1), who was the Camp Commander, proved that M. Devnath came to him and complained to him about being beaten by the respondent. PW-2, G D Bhukara, initially supported the case against the respondent but during cross-examination stated that no third person was present during the incident. PW-3, T.K. Hajra, stated that M. Devnath had complained to him about the conduct of the respondent, and he could also notice presence of injuries on his body. Similar is the statement of PW-4 Heera Lal Yadav. PW-5 Liyakat Ali, stated that he saw them fighting and saw respondent striking a stick blow to M. Devnath. He

also stated that M. Devnath went to his tent saying that he would commit suicide, though he was rescued. The statement of M. Devnath (the victim) was also recorded. He supported the charge. After considering the statement of the witnesses, including the victim, and perusing the documents, including the medical report, the charges were found proved. In consequence, after considering the defence of the respondent and the tenure of his service, the Commandant imposed punishment of compulsory retirement on the respondent and preserved his right for pension and gratuity.

35. The learned counsel for the respondent made a feeble attempt to challenge the finding returned in the enquiry by claiming that the enquiry officer and the disciplinary authority did not meticulously consider the respondent's defence and the weaknesses in the evidence led against him. To test the above submission, and to find out whether there is any perversity in the enquiry report, we went through the materials on record and found that there is no such perversity in the enquiry report, which is, in fact, founded on the evidence on record as noticed in the preceding paragraph. Further, no palpable error in the conduct of the enquiry was brought to our notice. The punishment awarded is also not shockingly disproportionate to the proven misconduct. Rather, considering his past service, already a sympathetic view has been taken in the matter and no further latitude need be shown to the respondent who was part of a disciplined force and has been found guilty of assaulting his colleague. Consequently, we find no good reason to interfere with the punishment awarded to the respondent.

36. For the foregoing reasons, the appeal is allowed. The impugned order of the High Court is set aside. The writ petition filed by the respondent (original petitioner) shall stand dismissed. The punishment of compulsory retirement awarded to the respondent is affirmed. There is no order as to costs.

Result of the case: Appeal allowed.

†*Headnotes prepared by:* Divya Pandey

[2024] 6 S.C.R. 452 : 2024 INSC 395

Mrs. Bhumikaben N. Modi & Ors.
v.
Life Insurance Corporation of India

(Civil Appeal No.270 of 2012)

08 May 2024

[A. S. Bopanna and C. T. Ravikumar,* JJ.]

Issue for Consideration

Whether the issuance of Acceptance-cum-First Premium Receipt gave rise to a presumption of acceptance of the policy by the insurer; whether the NCDRC was justified in dismissing the appellants' complaint and reversing the concurrent orders of the forums below, in exercise of its revisional jurisdiction, wherein directions were issued for payment of benefits in terms of the subject life insurance policy and for grant of compensation.

Headnotes†

Consumer Protection Act, 1986 – s.21(b) – Revisional power – Insurance – Life Insurance Policy – Deceased submitted proposal for Life Insurance Policy on 06.07.1996 – Issued cheque towards premium on 09.07.1996 – Met with an accidental death on 14.07.1996 – Appellants (widow and children of deceased) claimed benefits based on Insurance Policy – Claim repudiated by respondent primarily contending that the proposal form was accepted only on 15.07.1996 whereas the death of the deceased was on 14.07.1996 and therefore, there was no concluded contract as mere preparation of the policy document is not acceptance so as to create a concluded contract – District Forum allowed the complaint filed by appellants – Appeal thereagainst dismissed by State Commission – In revision, NCDRC reversed the said orders of the forums below and dismissed the complaint – Sustainability:

Held: It is the case of the appellants that the first premium was accepted and a duly signed receipt (Acceptance-cum-First Premium Receipt-Annexure B) therefor was issued by the respondent on 09.07.1996 – The factum of receipt of cheque amount cannot be disputed by the respondent – The cheque amount was received prior to the death of 'the deceased' is also not in dispute – In Annexure B, it is specifically stated that the acceptance of

* Author

payment would place the insurer on risk with effect from the date of the said Acceptance-cum-First Premium Receipt, subject to the realization of the amount in cash and the terms and conditions of acceptance printed overleaf – What is printed overleaf is not on record as the same was not produced – The circumstances justify the conclusion of acceptance of the proposal prior to the death of 'the deceased' – Annexure B would justify drawing of presumption of acceptance of the policy and not otherwise – Thus, in view of the entire circumstances based on the documents in the orders of the District Forum and the State Commission, in the light of the decision in D. Srinivas's case, the proposal was accepted – No material irregularity or illegality in the conclusions drawn with regard to the acceptance of proposal by the District Forum confirmed by the State Commission with reasons – In the absence of anything suggesting that the State Commission acted in the exercise of its jurisdiction illegally or with material irregularity, interference with an order of the State Commission confirming the order of the District Forum, in exercise of the limited revisional power u/s.21 (b), by NCDRC, is unsustainable – Impugned order set aside and that of the District Forum which was confirmed by the State Commission,is restored. [Paras 19, 23, 24-27, 29]

Consumer Protection Act, 1986 – s.21(b) – Revisional power – Despite reversing the concurrent orders of the forums below in revision and thus, dismissing the appellants' complaint seeking benefits in terms of the subject policy, NCDRC directed for payment of ex-gratia taking note of the offer made by the respondent to the appellant:

Held: Powers u/s.21(a) and (b) are different and distinct – Powers u/s.21 (b) is very limited – Further, ex gratia is an act of gratis and has no connection with the liability, payable as a legal duty – Also, such an offer was made by the Respondent much earlier even before the matter reached the District Forum, but the appellant had denied to accept such an offer – The impugned order virtually partakes the character of an order modifying the order of the District Forum which was confirmed by the State Commission – No justification for NCDRC to upturn the concurrent orders and to order for the dismissal of the complaint and at the same time issue a direction only to grant Rs.1 lakh as ex gratia merely because such an offer was made by the respondent-insurer in the memorandum of the revision petition – There cannot be any doubt with respect to the position that in the absence of anything suggesting that the State

Commission had acted in the exercise of its jurisdiction illegally or with material irregularity, interference with an order of the State Commission confirming the order of the District Forum, in exercise of the limited revisional power under Section 21 (b) of the Act, by NCDRC, is without rhyme or reason and cannot be sustained. [Paras 10, 11, 27]

Practice and Procedure – Decision of the Supreme Court, applicable to all cases irrespective of the stage of pendency thereof:

Held: Normally, the decision of the Supreme Court enunciating a principle of law is applicable to all cases irrespective of the stage of pendency thereof because it is assumed that what is enunciated by the Supreme Court is, in fact, the law from inception. [Para 16]

Words and Phrases – "ex gratia" – Discussed.

Case Law Cited

Life Insurance Corporation of India v. Raja Vasireddy Komalavalli Kamba and Ors. [1984] 3 SCR 350 **: (1984) 2 SCC 719 – held inapplicable.**

D. Srinivas v. SBI Life Insurance Co. Ltd. & Ors. **(2018) 3 SCC 653;** *Murthy v. State of Karnataka & Others* [2003] Supp. 3 SCR 327 **: (2003) 7 SCC 517 – relied on.**

Kongaraananthram v. Telecom Distt. Engineer, Ma-Habubnagar **1990 SCC OnLine NCDRC 24;** *Sudesh Dogra v. Union of India & Ors.* **(2014) 6 SCC 486;** *Gokal Chand (D) Thr. Lrs. v. Axis Bank Ltd. and Anr.* [2022] 17 SCR 739 **: 2022 SCC OnLine 1720 – referred to.**

Books and Periodicals Cited

Oxford Dictionary of Law, 5th Edition.

List of Acts

Consumer Protection Act, 1986; Life Insurance Corporation Act, 1956.

List of Keywords

Insurance; Life Insurance Policy; Proposal form; Accidental death; District Forum; State Commission; Acceptance of the policy by insurer; Revisional jurisdiction; Compensation; Cheque towards

premium; Repudiation of claim; Premium accepted; Duly signed receipt; Acceptance-cum-First Premium Receipt; Cheque amount received prior to the death of deceased; Acceptance of the proposal prior to the death of deceased; Concluded contract; "ex gratia".

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 270 of 2012

From the Judgment and Order dated 09.12.2010 of the National Consumers Disputes Redressal Commission, New Delhi in RP No. 3384 of 2006

Appearances for Parties

Ms. Manisha T. Karia, Ms. Nidhi Nagpal, Adarsh Kumar, Aditya Kesar, Rohan Trivedi, Advs. for the Appellants.

Kailash Vasdev, Sr. Adv., Ms. Indra Sawhney, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Judgment

C.T. Ravikumar, J.

1. The appellants herein were the respondents before the National Consumer Disputes Redressal Commission, New Delhi (for short 'the NCDRC'). As per the impugned order, the NCDRC allowed revision petition No. 3384 of 2006 filed by the Life Insurance Corporation of India, the respondent herein and reversed the concurrent orders of the forums below passed in favour of the appellants herein and dismissed their complaint that culminated in a direction in their favour for grant of compensation.

2. Succinctly stated, the facts that led to the captioned appeal, are as follows: -

The appellants are the widow and the children of one Shri Narender Kumar Kantilal Modi (hereafter referred to as 'the deceased') who met with an accidental death due to electric shock on 14.07.1996. Prior to his death, the deceased submitted a proposal form for Life Insurance Policy on 06.07.1996 and issued cheque of Rs. 3388/- towards premium on 09.07.1996 through cheque No. 187009 dated 08.07.1996 of Dhokla Branch of State Bank of Saurastra.

At this juncture, it is to be noted that there is no dispute regarding the permissibility of effecting premium in the said mode. After the death of the deceased the appellants herein claimed benefits based on Insurance Policy Diary No. 832471906. Even after 14 months since the death of the policy holder, the respondent did not give any benefit and as such the appellants were constrained to cause legal notice. The stand of the respondent for repudiating the claim was that the proposal submitted by the deceased was not accepted and therefore there is no concluded contract between the deceased and the respondent. In fact, the respondent had blocked policy No.832471906 and issued Acceptance-cum-First Premium Receipt showing the policy No. 832471906.

3. In the aforementioned circumstances, aggrieved by the repudiation, the appellants herein approached the District Forum by filing complaint No. 1044 of 1997 in terms of Section 11 of the Consumer Protection Act, 1986 (for short "the Act"). As per order dated 19.07.2001, the District Forum allowed the complaint and directed the respondent to pay total outstanding amount payable to the appellants as per terms and conditions of Insurance Policy No. 832471906 along with interest at the rate of 12% per annum till realization within 30 days from the date of receipt of the copy of the order. Further, it was directed to pay Rs. 5000/- to the appellants towards compensation for mental agony and harassment as also Rs. 2000/- towards costs. Aggrieved by the order of the District Forum, the respondent herein/the opponent therein filed an appeal viz. appeal No. 464 of 2002 before the State Commission. The State Commission dismissed the appeal as per order dated 25.07.2006 against which the respondent herein filed a revision petition before the National Commission in terms of the provisions of the Section 21 (b) of the Act. The impugned order was passed thereon and it resulted in reversal of the concurrent orders of the forums below and dismissal of the complaint.

4. Heard, learned counsel for the appellant and also the learned Senior Counsel appearing for the respondent. The factum of submission of proposal for Life Insurance Policy on 06.07.1996 by the deceased and also issuance of cheque bearing No. 1870092 therewithal towards premium are not in dispute. The allotment of policy No. 832471906, rather its blocking in the name of the deceased is also not in dispute. The contention of the appellants before the District Forum was that the respondent had accepted the first premium amount and issued

Acceptance-cum-First Premium Receipt on 09.07.1996 and in view of the nature of the receipt issued the respondent could not have repudiated the claim and wriggled out of the liability to assume the risk.

5. *Per contra,* the respondent took the stand that the policy prepared was not actually communicated to the deceased and it was blocked on 15.07.1996 owing to the demise of the proposer Shri Narender Kumar Kantilal Modi. Further, it was contended that in the aforesaid circumstances there was no concluded contract between the deceased and the respondent. It is to be noted that even after taking such a stand the respondent offered Rs. 1 Lakh on *ex gratia* basis to the appellants. However, the appellants refused to accept the same and claimed the amount payable in terms of the terms and conditions in Policy No. 832471906. Obviously, the District Forum took note of the rival factual contentions and also the further fact of payment of commission in respect of the policy to the agent and consequently, the defence raised on behalf of the respondent herein to justify that the repudiation of the claim was rejected and the complaint was allowed.

6. In the appeal before the State Commission, the respondent reiterated the contentions unsuccessfully taken before the District Forum. As noticed before, the core contention was that on the date of death of "the deceased" there was no concluded contract between the insurer and the deceased. The contentions raised did not find favour with the State Commission and the State Commission found that the acceptance of the proposal was unconditional and in favour of the deceased and therefore the contract should relate back to the date from which the insurance coverage was granted i.e., w.e.f. 28.06.1996. Assigning such a reason, the State Commission dismissed the appeal. It is the order of the appeal confirming the order of the District Forum that was taken up in revision before the NCDRC by the respondent herein, which culminated in the impugned order.

7. A perusal of the impugned order would reveal that for reversing the concurrent orders and dismissing the complaint, the NCDRC assigned the reason that mere receipt and retention of the premium until after the death of the deceased-applicant or even the mere preparation of the policy and its blocking would not amount to acceptance of the proposal for insurance policy. To arrive at such conclusions, it relied on the decision of this Court in ***Life Insurance Corporation***

***of India v. Raja Vasireddy Komalavalli Kamba and Ors.*[1].** It was held that the fora below had erred in directing for payment of benefits in terms of the subject policy.

8. Various contentions were raised on behalf of the parties before us to support their rival contentions. We have already taken note of the factual contentions raised on behalf of the parties. In the light of the contentions the question to be considered is whether the NCDRC was justified in reversing the concurrent orders of the forums below and in dismissing the complaint. It is to be noted that even after dismissing the complaint NCDRC took note of the offer made by the respondent to the appellant for payment of an amount of Rs. 1 Lakh *ex-gratia* vide paragraph 4 (d) of the memo of the revision petition, and issued a specific direction to the respondent to pay a sum of Rs. 1 Lakh to the appellant by way of *ex-gratia*. Before adverting to the rival contentions and looking into the correctness or otherwise of the reversal of the concurrent orders we find it appropriate to dilate this aspect of the impugned order.

9. As noted hereinbefore, as per the impugned order the NCDRC dismissed the complaint. Therefore, the question is how can an order carrying a specific direction for payment, even by way of *ex-gratia,* be issued in a complaint after dismissing the same. It is to be noted that such an order was passed in a revision petition filed by the respondent herein. Jurisdiction of the NCDRC under the Act is provided under Section 21 thereof. Section 21 (a) has two Sub-clauses and Sub-clause (i) thereof deals with the original jurisdiction of NCDRC to entertain complaints and Sub-clause (ii) thereof deals with appeals against orders of the State Commission. Section 21 (b) deals with its revisional power. Section 21 of the Act reads thus: -

> *"21. Jurisdiction of the National Commission.—*
>
> *Subject to the other provisions of this Act, the National Commission shall have jurisdiction—*
>
> *(a) to entertain—*
>
> *(i) complaints where the value of the goods or services and compensation, if any, claimed exceeds [rupees one crore]; and*

1 [1984] 3 SCR 350 : (1984) 2 SCC 719

(ii) appeals against the orders of any State Commission; and

(b) to call for the records and pass appropriate orders in any consumer dispute which is pending before or has been decided by any State Commission where it appears to the National Commission that such State Commission has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity."

10. A bare perusal of Sections 21 (a) and 21 (b) would reveal that the powers thereunder are different and distinct and the powers under Section 21 (b) is very limited. The NCDRC itself, in the decision in ***Kongaraananthram v. Telecom Distt. Engineer, Ma- Habubnagar***[2], held that its revisional powers under the said Section are very limited. The said Section provides power to call for the records from the State Commission and to set aside its order issued *sans* jurisdiction vested in it by law or if the State Commission failed to exercise a jurisdiction so vested or if the State Commission has acted in exercise of its jurisdiction illegally or with material irregularity.

11. As noticed hereinbefore, a specific direction was issued under the impugned order by NCDRC after dismissing the complaint which was allowed by the District Forum and got confirmance from the State Commission. It is true that what was ordered by NCDRC is not for payment of benefits based on the policy bearing No.832471906 but only payment of Rs.1 lakh by way of *ex gratia,* as offered in the memorandum of the revision petition. *Ex gratia* is an act of gratis and has no connection with the liability, payable as a legal duty. Going by the Oxford Dictionary of Law, 5th Edition, the term "*ex gratia*" is payment not required to be made by a legal duty.

12. In the contextual situation, it is relevant to refer to the decision of this Court in ***Sudesh Dogra v. Union of India & Ors.***[3]. This Court held therein that *ex gratia* is an act of gratis and it got no connection with the liability of the State under law and the very nature of the relief

2 1990 SCC OnLine NCDRC 24

3 (2014) 6 SCC 486

and its dispensation by the State could not be governed by directions in the nature of mandamus unless, of course, there is an apparent discrimination in the manner of grant of such relief.

13. In the context of the directions, it is also to be noted that such an offer was made by the Respondent much earlier even before the matter reached the District Forum, but the appellant had denied to accept such an offer. The specific direction, in such circumstances issued in exercise of the revisional power dissuade us to accept the impugned order as one dismissing the complaint in toto and in the aforesaid circumstances, the impugned order virtually partakes the character of an order modifying the order of the District Forum which was confirmed by the State Commission. Be that as it may, we will further consider the question whether the NCDRC is justified in reversing the concurrent order in the complaint filed by the appellants in exercise of its revisional jurisdiction.

14. A perusal of the impugned order would reveal, as noted earlier, that the reversal of the concurrent order(s) of the forums below and the consequential rejection of the complaint made by the NCDRC after coming to a conclusion of non-existence of a concluded contract was by relying on a decision of this Court in ***Raja Vasireddy Komalavalli Kamba's*** case (supra). It is true that in the said decision this Court held thus:-

> *"15. Though in certain human relationships silence to a proposal might convey acceptance but in the case of insurance proposal, silence does not denote consent and no binding contract arises until the person to whom an offer is made says or does something to signify his acceptance. Mere delay in giving an answer cannot be construed as an acceptance, as, prima facie, acceptance must be communicated to the offerer. The general rule is that the contract of insurance will be concluded only when the party to whom an offer has been made accepts it unconditionally and communicates his acceptance to the person making the offer. Whether the final acceptance is that of the assured or insurers, however, depends simply on the way in which negotiations for an insurance have progressed. See in this connection statement of law in MacGillivray & Parkington on Insurance Law, Seventh Edn., p. 94, para 215."*

15. The factual position obtained in the case on hand tend us to hold that the NCDRC had failed to bestow proper consideration of the factual position which consequently led to the mis-application of the decision in ***Raja Vasireddy Komalavalli Kamba's*** case (supra). In view of the decision in ***D. Srinivas v. SBI Life Insurance Co. Ltd. & Ors.***[4], wherein this Court distinguished the decision in ***Raja Vasireddy Komalavalli Kamba's*** case (supra), we are of the view that NCDRC had misdirected itself in considering the relevant question involved, which was rightly considered by the District Forum. In the decision in ***D. Srinivas*** case, this Court held thus:-

> *"12. Although we do not have any quarrel with the proposition laid therein, it should be noted that aforesaid judgments only laid down a flexible formula for the Court to see as to whether there was clear indication of acceptance of the insurance. It is to be noted that the impugned majority order merely cites the aforesaid judgment, without appreciating the circumstances which give rise to a very clear presumption of acceptance of the policy by the insurer in this case at hand. The insurance contract being a contract of utmost good faith, is a two-way door. The standards of conduct as expected under the utmost good faith obligation should be met by either party to such contract."*

16. Paragraph 11 of the decision in ***D. Srinivas*** case (supra) would reveal that the afore-quoted recital was made thereunder after considering the decision in ***Raja Vasireddy Komalavalli Kamba*** case (supra). In short, the decision in ***D. Srinivas*** case (supra) would obligate us to consider whether the circumstances obtained in this case give rise to a very clear presumption of acceptance of the policy by the insurer instead of merely giving imprimatur to the impugned order of NCDRC on the ground that it was rendered relying on the decision in ***Raja Vasireddy Komalavalli Kamba's*** case. In this context, it is only apposite to note that though the orders were passed by the District Forum which was confirmed by the State Commission would reveal that the analysis and the consequential conclusion arrived at thereunder lie in conformity with the exercise

4 (2018) 3 SCC 653

expected to be undertaken based on the aforementioned exposition of law in ***D. Srinivas's*** case (supra). We are not oblivious of the fact that the decision in ***D. Srinivas's*** case (supra) was rendered much later to the order impugned in this appeal. But then, in view of the exposition of law in ***Murthy v. State of Karnataka & Others***[5] as also in view of ***D. Srinivas's*** case (supra), if the analysis and the ultimate conclusions of the District Forum is in tune with the decision in ***D. Srinivas's*** case, we are bound to restore the same. In ***Murthy's*** case (supra), this Court held that normally the decision of the Supreme Court enunciating a principle of law is applicable to all cases irrespective of the stage of pendency thereof because it is assumed that what is enunciated by the Supreme Court is, in fact, the law from inception.

17. The decision in ***D. Srinivas's*** case was followed by this Court again in the decision in ***Gokal Chand (D) Thr. LRs v. Axis Bank Ltd. and Anr.***[6]***,*** after rejecting a defence relying on the decision in ***Raja Vasireddy Komalavalli Kamba's*** case.

18. Now, we will proceed to consider the question whether circumstances obtained in this case carry clear presumption of the acceptance of the policy by the insurer, as has been obligated under the decision in ***D. Srinivas's*** case (supra).

19. Evidently, it is the case of the appellants that the first premium was accepted and a duly signed receipt therefor, noting policy No.832471906 was issued by the respondent on 09.07.1996. The contents of the same has been reproduced in the synopsis of this case at page 'E' as hereunder.

> **"Annexure B**
>
> Dear Sir/Madam
>
> *Your proposal for Assurance as per particulars noted in the schedule has been accepted by the corporation as proposed at ordinary rates with E.D.B .....*
> *.....*

5 [2003] Supp. 3 SCR 327 : (2003) 7 SCC 517

6 [2022] 17 SCR 739 : 2022 SCC OnLine 1720

We have also received amount noted in the schedule being the First Premium on the policy of assurance for the plan and amount indicated therein. The acceptance of this payment places the corporation on risk with effect from the date of this Acceptance cum First Premium Receipt or if the proposal is under the Children/Deferred or Children Anticipated Assurance Plan from the deferred date on terms & conditions of the policy of assurance which will be sent shortly.

The issue of this receipt is also subject to this realisation of the amount in cash and the terms and conditions of acceptance printed over leaf.

Policy will be despatched shortly, if you do not receive the same within next 90 days please write to us."

20. The photocopy of the Acceptance-cum-First Premium Receipt is produced by the respondent along with its written submission as Annexure B. In fact, Annexure B would reveal the accuracy and correctness of what is stated at page 'E' of the synopsis of the captioned appeal. A perusal of the same would make it clear that the acceptance of the payment would place the Corporation to assume the risk with effect from the date of the Acceptance-cum-First Premium Receipt. True that in Annexure B, it is stated that it would be subject to the realization of the amount in cash and the terms and conditions of acceptance printed overleaf. Though this Court called upon the respondent to produce the original, the same was not produced and what was produced was only a photo copy as Annexure B. In this context, as also in view of the decision in ***D. Srinivas's*** case, it is only appropriate to refer to certain recitals from the order of the District Forum. They, in so far as relevant, read thus:-

*"**1**……
……*

The deceased had filled up the proposal form of the said disputed policy on 06.07.1996 and issued cheque of Rs. 3388/- towards premium on 09.07.1996 through' cheque of Rs. 187009/- of State Bank of Saurastra and the opponent accepted the said premium and issued said policy no. 832471906. The opponent also prepared cover note with the details of said policy. The opponent also issued receipt

for the said premium. The deceased has accordingly accident benefit policy. The policy holder insured Narendra Kumar K. Modi, the complainant husband died due to electric shock and it is proved by death certificate issued the Medical caused by electric shock passing through the body. He died at young age. It was sudden and accidental death……..……..…This complaint was filed before this forum on 19.07.1997. the complainant has engaged learned advocate Shri A.V. Modi and D. V. Modi under Vakalatnama and produced 22 documentary evidence as stated in the list of documents including Suspense Memorandum dated 09.07.1996 and copy of the police i.e. disputed policy no. 832471906, copy of opponent's notice to call for second installment premium, copy of death certificate and policy papers and certificate issued by Police Inspector, Dholka Police Station and documents issued by the Medical Officer of Sheth G.K. Municipal Hospital and all relevant documents issued by the opponent and notice given by the complainant to the opponent dated 10.09.1996 and opponent letter dated 29.08.1996 and copy of other correspondence including notice given by Shri T.S. Nanavati dated 25.03.1997 to the opponent and notice dated 21.04.1997 notice given through Shri A.V. Modi dated 14.08.1997 to the opponent.

4. *The complainant's advocate notice to the opponent on 03 .07.1998 and requested the opponent to produce required original documents and requested the opponent's authorized person Shri Mukund Krishnarao Joshi (Shri. M. K Joshi) to remain present with the said documents. In response to that Shri. M. K. Joshi, Manager (Lega) of opponent LIC of India has filed affidavit. He has explained about the documents produced by the complainant along with complaint.*

5*……..…The complainant have produced documentary evidence with complaint from no. 6061830 and the opponent issued policy no. 832417906 and as per the suspense memorandum BOC No. 600392 dated*

09.07.1996 issued by the opponent LIC of India, SM Market, Bavla, Dist. Ahmadabad. It was issued against policy/proposal no. F.P. of Rs. 3388/- and as per the case of the complainant the opponent LIC accepted the proposal form and accepted the premium thereof of Rs.3388/- and issued receipt dated policy no.832471906 and in the said receipt issued by the opponent, policy number is written and date of commencement of policy is written as 28.06.1996 and maturity is 27.06.2016 and all the details including sum insured Rs. 1.00 lakh, instatement premium Rs. 3388/- table and term no. 75/20, short name of insured N. K. Modi, due date, mode of payment half yearly, date of birth, age whether admitted: yes and all other details about BR. DO. DO code, Agent code etc are written and full address of policy holder Mr. Narendra Kumar Modi is written and office of the LI C of India has issued the legal receipt and the same original receipt is produced by the complainant along with complaint. The opponents have also produce copy of the insurance policy issued by the opponent, the policy no.832471906 all the details of commencement of policy, mode of premium, date of proposal, name. and address of proposer and life assured of Shri. Narendra Kumar Kantila Modi and full address is written and it was signed by the office of the LIC and the opponent have of commencement of policy and policy no. is written 832471906 and commencement of policy 28.06.1996 and all necessary details are stated. The State Bank of Saurashtra, Dholka Branch has issued certificate that the . cheque no. 187009 dated 8.07.1996 favoring LIC of India Rs. 3388/- drawn by Narendra Kumar Modi paid by them as on 12.07.1996. The opponent also issued first premium commission bill in the favour of Shri. P.B. Shah, the agent of the policy issued in the favour of complaint and in the said bill policy no. -· 832471906, sum insured Rs. 1.00 lakh, mode of payment, table and term, all details are stated. The said first premium commission bill issued by the opponent……..…. ……... We have to note that when policy number itself is stated in the said letter dated 29.08.1996 of disputed

policy, means all procedure prior to issuance of policy were completed and then only the policy number can be allotted to the proposer and in this case when policy number was already given to the proposer, means the contract was started or concluded so the opponent cannot go back with the terms and conditions of the said contract i.e. policy no.832471906……

……. The opponent wrote letter dated 17.06.1997 in connection of complaint's notice given through advocate dated 25.03.1997 and 21.04.1997. We have noted that the title of the letter is stated by the opponent that the title of the letter is stated by the opponent that "Re: Policy No. 832471906 addressed to Shri T.S. Nanavati, who gave two legal notices on behalf of the complainants, the opponent have shown their failings to pay exgratia payment sum insured only in full and final settlement of the dues under the aforesaid policy. At this juncture, we have to interpret the said all words used by the LIC i.e. Ex- gratia or basic sum insured only in full and final settlement of the dues under the · above policy all the said words are proving that the opponent have issued the policy and accepted the risk ……..... ……. We have also noted that the opponent has deliberately not examined any witness to prove that the decision to accept the proposal was taken by the opponent on 15.07.1996 and the death of the proposer has taken place on 14.07.1996, the contract could not be said to have been concluded and the contract was never in existence. We have noted that the contract was already concluded prior to the death of the policy holder Shri Narendra Kumar Modi, if the opponent were and are in possession of the documentary evidence to prove that the decision to accept the proposal was taken by the opponent on 15.07.1996, then definitely, the opponent would have produced oral or documentary evidence to prove the said facts as this is a crucial point, but the opponent has not taken . any action to produce oral or documentary evidence oat this point i.e. only defense of the opponent in the written statement which amounts to

crush the object of LIC act and other prevailing act to give protection and risk coverage ……..…… ……The opponent have not produced their own record to prove that after the receipt of the proposal and cheque of premium of Rs3388/- dated 09.07.1996, the decision to accept the proposal was not taken on 09.07.1996 or immediately within reasonable period 213 days and took only on 15.07.1996……."

21. Obviously, the said First Premium Receipt contains the number of the policy as 832471906 and the next premium date was shown therein as 28.12.1996. In addition to the aforesaid recitals from the order of the District Forum, we are of the view that certain other emerging aspects also assume relevance.

22. Though it is stated, as can be seen from the extracted portion, that the issue of the receipt is subject to the realization of the amount in cash and the terms and condition of acceptance printed overleaf, the printing on overleaf is conspicuously absent in Annexure B. So also, there is no case for the respondent that the cheque issued was dishonored.

23. The factum of receipt of cheque amount cannot be disputed by the respondent. In fact, the statement in the counter affidavit of the respondent in this appeal that the appellant's entitlement is only to get refund of the amount tendered as initial deposit at the time of submitting proposal would reveal the said position. Another circumstance is also relevant in the context of consideration based on the decision in ***D. Srinivas's*** case (supra) viz., the stand of the respondent that mere preparation of the policy document is not acceptance so as to create a concluded contract. The cheque amount was received prior to the death of 'the deceased' is not in dispute. Paragraph 5 of the order of the District Forum would reveal that the Dhokla Branch of the State Bank of Saurashtra issued certificate that Cheque No.187009 favouring the respondent herein for Rs.3388/- drawn by 'the deceased' was paid by him on 12.07.1996. The order of the State Commission in paragraph 3 would reveal the consistent stand of the respondent that the proposal form was accepted only on 15.07.1996 whereas the death of 'the deceased' was on the previous day viz., on 14.07.1996 and therefore, there was no concluded contract. The documents pertaining to the proposal were perused by

both the District Forum and the State Commission and the said fact is discernible from their respective orders. The various documents were referred to in the orders with reference to the page numbers, in which they are available. In the said context, paragraph 6 of the orders of the State Commission assumes relevance and the same to the extent it is relevant, read thus:-

> "6. *Page 125 is the proposal form. Perusal of the same suggests that the amount of Rs. 3,388/- is shown as deposit amount and the risk date is shown to be 28.06.1996. Thus, it will be seen that the policy was desired to be effective and risk commenced retrospectively with effect from 28.06.1996. It is also suggested that the said proposal form was filled in on 09.07.1996. Page 126 reads the same to be suspense memorandum with BOC No. 600392 dated 09 .07 .1996 and the policy of proposal number is shown as F.P. Page 130 reads that next premium would become due on 28.12.1996……."*

24. In the circumstances, referred to in the orders of the District Forum and the State Commission as also noted hereinbefore, the question is whether a clear presumption as to the acceptance of the policy by the insurer is available in the case on hand. In Annexure B receipt of the first premium, it is specifically stated that the acceptance of payment would place the Corporation on risk with effect from the date of the said Acceptance-cum-First Premium Receipt, subject to the realization of the amount in cash and the terms and conditions of acceptance printed overleaf. What is printed overleaf is not on record as the same was not produced, though it should be a part of Annexure B. Thus, the entire circumstances discussed based on the documents in the orders of the District Forum and the State Commission hereinbefore in this judgment, in the light of the decision in ***D. Srinivas's*** case (supra) constrain us to hold that the proposal was accepted.

25. When the aforesaid being the circumstances revealed from the conclusions and concurrent findings by the District Forum and the State Commission entered with reference to the documents perused by them, in exercise of revisional power the NCDRC could not have arrived at a finding that the forums below acted in the exercise of jurisdiction illegally or that there occurred a material irregularity. In

fact, all the circumstances discussed above justify the conclusion of acceptance of the proposal prior to the death of 'the deceased'.

26. There is no case for the respondent that Annexure B viz., the First Premium Receipt carrying the assurance, as mentioned earlier, was not issued. Annexure B would justify drawing of presumption of acceptance of the policy and not otherwise. We have also found that no material irregularity or illegality could be found in the conclusions drawn with regard to the acceptance of proposal by the District Forum which was confirmed by the State Commission with reasons. We are fortified in our view by the following further reasons/ circumstances.

The entry 15.07.1996 in Annexure B and the contentions that the factum of death was made known on 15.07.1996 and the acceptance of policy also on 15.07.1996 cannot co-exist. If the amount received on account of encashment of cheque is kept as deposit/suspense and was not accepted by way of premium, as has been contended before the State Commission and duly recorded in paragraph 3 of its order what was the necessity to prepare the First Premium Receipt on 15.07.1996. There is incongruity in the contentions and the documents. Along with the written submission on behalf of the respondent herein, true copy of the suspense memorandum/First Premium Receipt is produced in this proceeding as Annexure B. A perusal of the same with reference to what is extracted from paragraph 6 of the order of the State Commission, would reveal certain disturbing aspects. As stated in paragraph 6 thereunder Annexure B would reveal that the date for next premium would become due on 28.12.1996. At the same time a dubious entry 'NIL' is also appearing thereon. Another dubious entry is the writing on the right top corner of Annexure B i.e., 15.07.1996. The dubiousness on account of that entry is because of the specific stand taken by the respondent. As noted earlier, the stand of the respondent is that the policy was prepared on 15.07.1996 and that the First Premium Receipt was issued earlier. If it be so why an entry of 15.07.1996 should be made in Annexure B. As stated in paragraph 6 of the order of the State Commission, the next premium date is shown as due as 28.12.1996. The name and address of Narendra Kumar Kantilal Modi and the policy number are also specifically entered therein.

27. In the aforesaid circumstances, there was absolutely no reason or justification for NCDRC to upturn the concurrent orders and to order

for the dismissal of the complaint and at the same time issuing a direction only to grant Rs.1 lakh as *ex gratia* merely because such an offer was made by the respondent-insurer in the memorandum of the revision petition. There cannot be any doubt with respect to the position that in the absence of anything suggesting that the State Commission had acted in the exercise of its jurisdiction illegally or with materially irregularity, interference with an order of the State Commission confirming the order of the District Forum, in exercise of the limited revisional power under Section 21 (b) of the Act, by NCDRC, is without rhyme or reason and cannot be sustained.

28. Before the year 1956, life insurance business was in the hands of private companies which were operating mostly in urban areas. The avowed objects and reasons of the Life Insurance Corporation Act, 1956 would reveal that the main object and reason is to ensure absolute security to the policy-holder in the matter of his life insurance protection.

29. In the circumstances, the impugned order is set aside and the order of the District Forum in complaint No.1044 of 1997 dated 19.07.2001 which was confirmed by the State Commission as per order dated 25.07.2006 in appeal No.464 of 2002 is restored. The respondent is granted two months' time to effect payment in terms of the order thus restored.

30. The appeal is allowed.

Result of the case: Appeal allowed.

†*Headnotes prepared by:* Divya Pandey

[2024] 6 S.C.R. 471 : 2024 INSC 367

Chaitra Nagammanavar
v.
State of Karnataka & Ors.

(Civil Appeal Nos. 6772-6773 of 2023)

02 May 2024

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

Issue for Consideration

For the selection in question, whether the Bangalore University was bound to comply with the 2001 Rules which was to be the mode/ method of selection as per its advertisement; whether respondent No. 7 was entitled to be appointed as per the 2001 Rules; whether the aforesaid advertisement issued by the University intending to follow the 2001 Rules made under the Karnataka State Civil Services Act, 1978 suffered from any illegality.

Headnotes†

Karnataka SCs, STs and OBCs (Reservation of Appointments etc.) Act, 1990 – ss.4(1A), 2(2), 2(3)(vi) – Karnataka State Civil Services (Unfilled Vacancies Reserved For Persons Belonging to the SC's and ST's) (Special Recruitment) Rules, 2001 – Karnataka State Universities Act, 2000 – ss.53, 54, 78 – Karnataka State Civil Services Act, 1978 – Filling up of backlog vacancies of SCs and STs as per the advertisement issued by the Bangalore University – Applicability of the 2001 Rules to appointments by the University governed by the Universities Act, 2000 – Appellant and respondent No.7, both ST candidates were eligible for appointment to the solitary post of Assistant Professor (English) reserved for a candidate belonging to the STs – While the appellant was higher in merit, respondent no.7 was within the age bracket of 29-40 years, and thus, a preferential candidate under the 2001 Rules which was to be the mode/ method of Selection as per the advertisement – However, the university following its own procedure appointed the appellant on the basis of merit – High Court held that respondent No.7 is entitled to be appointed as per the 2001 Rules – Correctness:

Held: The controversy about filling up backlog vacancies of SCs and STs by the university came to an end with the insertion of Sec. 4(1A) of the Reservation Act, 1990 – In fact, the provocation

* Author

for introducing sub-Section (1A) was that the mandate of the 2001 Rules was not followed by the universities – In order to extend the provision of the 2001 Rules to universities, sub-Section (1A) was introduced – Thus, there was no uncertainty left after the introduction of sub-Section (1A) to Sec. 4 of the Reservation Act, 1990, requiring an establishment, i.e., the university, to take action for filling the backlog vacancies as a one-time measure by following the method prescribed by the Government – The purpose and object of the amendment was amply clear from its statements of objects and reasons contemplating the application of the 2001 Rules for the universities – The conduct of the university in not responding to the categorical demands of the Government to implement the 2001 Rules is conclusive about its acceptance of the applicable law and the policy, and therefore, the advertisement – Hence, the requirement of the Government to specify the manner, procedure and time for identifying, filling backlog vacancies and completing the same was amply clear to the university – It is with this view that the university advertised that the 'Mode of Selection' shall be as per the 2001 Rules – Compliance with the 2001 Rules was mandatory – University was bound to comply with what was declared in its advertisement – The 2001 Rules will be the guiding principles for the selection in question – High Court rightly held that respondent No. 7 is entitled to be appointed as per the 2001 Rules – Appeals against impugned judgment dismissed – However, the appellant has been working for almost four and a half years – University may consider creating a supernumerary post to accommodate her. [Paras 16, 17, 20, 22 and 23]

Case Law Cited

Official Liquidator v. Dayanand **[2008] 15 SCR 331 : (2008) 10 SCC 1;** *N.T. Bevin Katti v. Karnataka Public Service Commission* **[1990] 2 SCR 239 : (1990) 3 SCC 157 – referred to.**

List of Acts

Karnataka SCs, STs and OBCs (Reservation of Appointments etc.) Act, 1990; Karnataka State Civil Services (Unfilled Vacancies Reserved For Persons Belonging to the SC's and ST's) (Special Recruitment) Rules, 2001; Karnataka State Universities Act, 2000; Karnataka State Civil Services Act, 1978; UGC Regulations, 2010; UGC (4th Amendment) Regulations, 2016.

Chaitra Nagammanavar v. State of Karnataka & Ors.

List of Keywords

Backlog vacancies; Selection; Appointment; Advertisement issued by University; Appointment to solitary post; Assistant Professor; Mode/method of Selection as per the advertisement; Appointments of teachers by Universities; University bound to comply with the advertisement.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 6772-6773 of 2023

From the Judgment and Order dated 12.03.2021 of the High Court of Karnataka at Bengaluru in WA Nos. 233 and 190 of 2021

Appearances for Parties

Shailesh Madiyal, Sr. Advs., Vaibhav Sabharwal, Ms. Divija Mahajan, Ms. Sunidhi Hegde, Mrigank Prabhakar, Advs. for the Appellant.

Gagan Gupta, Anand Sanjay M. Nuli, Sr. Advs., Rahmathulla Kothwal, Siddika Aisha, Ms. Sara Parveen, Ms. Manju Jetley, D. L. Chidananda, Ravindera Kumar Verma, Ishan Roy Chaudhary, Shubhranshu Padhi, Suraj Kaushik, Shiva Swaroop, Agam Sharma, M/s. Nuli & Nuli, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Pamidighantam Sri Narasimha, J.

1. A routine service dispute involving competing claims for appointment was transformed into a pleasurable discourse by the newly designated senior advocates of this court, Mr. Shailesh Madiyal, Mr. Anand Sanjay M. Nuli, Mr. Gagan Gupta. Mr. D.L. Chidananda, appearing for the respondent-State rose to the occasion and made crisp, clear and categorical arguments to match the submissions made by the senior counsels.

2. The facts, to the extent they are relevant for our consideration, are that the Banglore University, constituted under the Karnataka State Universities Act, 2000,[1] issued an advertisement dated 21.03.2018

1 Hereinafter, referred to as the 'Universities Act'.

for filling up backlog vacancies to posts reserved for scheduled castes (SC's) and scheduled tribes (ST's). Of the 34 posts advertised for Assistant Professors, one post of Assistant Professor in the department of English was reserved for a candidate belonging to the ST community.

3. The advertisement provides that qualifications for the post shall be as provided under the UGC Regulations, 2010 and the UGC (4th Amendment) Regulations, 2016. The 'Mode of Selection', or the method of selection, as specified in the advertisement, is important.[2] It is provided that the list of selected candidates will be prepared as per the Karnataka State Civil Services (Unfilled Vacancies Reserved For Persons Belonging to the SC's and ST's) *(Special Recruitment) Rules, 2001*, hereinafter referred to as the '2001 Rules'. Rule 6 of the 2001 Rules provides for a preference in favour of candidates between the age bracket of 29 and 40 years. In other words, amongst the eligible candidates belonging to a scheduled tribe, those who fall within the age bracket of 29-40 years, would have a preferential right to be appointed over and above even meritorious candidates.

4. The appellant and respondent No. 7 are both ST candidates, and both of them were eligible for appointment to the solitary post of Assistant Professor in the English department reserved for a candidate beloniging to the ST community. While the appellant was higher in merit, respondent no. 7 was within the age bracket of 29-40 years, and as such, was a preferential candidate as per Rule 6 of the 2001 Rules. Though the university advertised that the 'Mode of Selection' shall be as per the 2001 Rules, it followed its own procedure and proceeded to appoint the appellant on the basis of merit. Respondent no. 7 naturally challenged the appointment of the appellant by filing Writ Petition No. 4923/2020 before the High Court of Karnataka.

5. The Ld. Single Judge of the High Court, by a judgment dated 16.01.2021, allowed the writ petition and set aside the appellant's

---

2 *"MODE OF SELECTION*
The list of selected candidates will be prepared as per the following Government of Karnataka Notifications:
1. No. DPAR 13 SBC 2001 dated: 21.11.2001 & Dated: 01.06.2002
2. UGC Regulations 2010, UGC (4th Amendment) Regulations, 2016 and AICTE 2016 Regulations."

selection and appointment on the ground that the university specifically declared in the advertisement that the 'Mode of Selection' shall be as per the 2001 Rules. Therefore, its appointment of the appellant, who did not fall in the age bracket of 29-40 years, was illegal. Consequently, Respondent No. 7, who is the preferential candidate, was directed to be appointed.

6. The appellant and the university filed their respective writ appeals, namely W.A. 190/2021 and 233/2021, before the Division Bench of the High Court. While confirming the order of the Single Judge, the Division Bench also directed that respondent No. 7 is entitled to be appointed as per the 2001 Rules. Thus, the present Civil Appeal by the appellant, who was the originally appointed candidate.

7. Before we consider the rival contentions, it is necessary to refer to three legislations that have a bearing on the case. The Karnataka State Civil Services Act, 1978[3]; the Karnataka SCs, STs and OBCs (Reservation of Appointments etc.) Act, 1990[4]; and the Karnataka State Universities Act, 2000[5]. Very importantly, we will also consider the applicability of the 2001 Rules framed under the Civil Services Act, 1978.

8. The relevant law governing the filling up of backlog vacancies as per the advertisement issued by the university will be the Reservation Act, 1990 and the 2001 Rules. These rules are made under the Civil Services Act, which naturally relates to civil services under the State of Karnataka. The applicability of the 2001 Rules to appointments by the universities, which is governed by the University Act, is the controversy that has led to the present litigation.

9. The Bangalore University is governed by the Karnataka Universities Act, 2000. Sec. 53[6] of this law recognises a 'Board of Appointment' to be the appointing authority for *teachers* and other employees of the university. Sec. 54[7] provides that notwhithstanding anything in

---

3 Hereinafter referred to as the Civil Services Act, 1978.

4 Hereinafter referred to as the Reservation Act, 1990

5 Hereinafter referred to as the Universities Act, 2000.

6 "***Sec. 53. Appointment of Teachers, Librarians.***- *(1) There shall be a Board of Appointment for selection of persons for appointment as teachers and librarians in the University* […]"

7 "***Sec. 54. Appointment in accordance with the promotion schemes.***- *(1) Notwithstanding anything contained in section 53 but subject to the rules and orders of the State Government issued from time to time for reservation of appointment and posts for the persons belonging to Scheduled Castes and*

Sec. 53, but subject to the rules and orders of the State Government, appointments to the posts of professors, readers, principals and asst. professors shall be made by the syndicate as per the scheme evolved by the UGC. Furthermore, under Sec. 78, the Universities Act is given an overriding effect to it over other statutes.

10. Apart from the Universities Act, there is an overarching law, namely, the Karnataka SCs, STs and OBCs (Reservation of Appointment etc.) Act, 1990. It is intended to provide reservations in favour of SCs, STs and other OBCs in the state civil services and 'establishments'. The definitions of 'establishment' and 'appointing authority' under the Reservation Act, 1990 are relevant. Sec. 2(2) and 2(3)(vi) defines 'appointing authority' and 'establishments in public sector' as follows:

> *"Section 2. Definitions: In the Act, unless the context otherwise requires* […]
>
> *(2) "appointing authority" in relation to a service or posts, means the authority empowered to make appointment to such service or post;*
>
> *(3) "establishments in public sector" means,-* […]
>
> *(vi) a University established or deemed to have been established by or under any law of the State Legislature* […]".

10.1 The most relevant provision in the Reservation Act, 1990 is Sec. 4 and it is extracted hereinafter for ready reference:-

> " ***Sec. 4. Reservation of appointments or posts etc:-*** (1) *After the appointed day, while making appointments to any office in a civil service of the State of Karnataka or to a civil post under the State of Karnataka, appointments or posts shall be reserved for the member of the Scheduled Castes, Scheduled Tribes and other Backward Classes to such extent and in such manner as may be specified from time*

Scheduled Tribes under Article 16(4) and 16(4A) of the Constitution, the appointment to the post of Professors and Readers, Principals and Assistant Professors in the constituent Engineering Colleges and to the post of Principal Grade-I, Principal Grade-II, Lecturer (Selection Grade), Lecturer (Senior Scale) in the constituent Engineering Colleges shall be made by the Syndicate in accordance with the scheme governing promotions as prescribed by the Statutes adopting the schemes evolved by the University Grants Commission or All India Council for Technical Education.[…]"

to time in the order made by the Government under clause 4 of Article 16 of the Constitution of India."

(emphasis supplied)

10.2 There was uncertainty about the applicability of the procedure contemplated under Sec. 4 of the Reservation Act, 1990 for the appointments of teachers by the universities, as Section 4 speaks about appointments in the civil service of the state and civil posts under the State of Karnataka. A common understanding was that an office in the civil service of the state or a civil post under the state did not include 'teachers' as contemplated under S. 53 of the Universities Act. This uncertainty was greater with respect to filling up of backlog vacancies in the university by following the procedure provided in the 2001 Rules.

10.3 It is under these circumstances that an amendment was proposed to the Reservation Act, 1990. The statements of objects and reasons ('SOR') for the introduction of sub-section (1A) to Sec. 4 clarifies the position and helps us understand the newly introduced sub-Section (1A) in its proper perspective.

"***Amending Act 8 of 2004***.- *Government issued a Notification dated: 21.11.2001 under the Karnataka Civil Services (Unfilled Vacancies reserved for the persons belonging to Scheduled Castes and Scheduled Tribes (Special Recruitment) Rules, 2001 for filling up of vacancies reserved for persons belonging to the Scheduled Castes and Scheduled Tribes. This Special Recruitment Rules was published under clause (a) of sub-section (2) of section 3 of the Karnataka Civil Services Act, 1978 (Karnataka Act 14 of 1990) in Notification No. DPAR 13 SBC 2001, dated 6th August 2001. The Notification was issued to fill all unfilled vacancies by all the appointing authorities wherever the service conditions are governed by the Karnataka Civil Services Act, 1978. The Cabinet appointed a sub-committee of the Cabinet to monitor and review the progress. The Social Welfare Department was made the nodal Department. As on date the Social Welfare Department has identified 17021 numbers of vacancies out of them, 14485 have*

already been notified, of which 11573 vacancies are filled up and the balance is in the process of being filled. During the course of the review meeting it was pointed out to the Cabinet Sub Committee that the Karnataka Civil Services (Unfilled Vacancies reserved for the persons belonging to Scheduled Castes and Scheduled Tribes (Special Recruitment) Rules, 2001 does not apply to the Universities, including Agriculture Universities and other institutions, etc., because they do not come under the purview of the said Rules. The non-inclusion of these institutions under the purview of the Notification dated 21.11.2001 and 1.6.2002 meant that the filling up of the backlog vacancies by the Universities and other institutions could suffer from a legal infirmity.

In view of the fact that the process of recruitment by these institutions i.e., Universities etc. 80% of the recruitment are already over, both for teaching and non-teaching staff and the persons recruited have already reported and are working, there is an immediate need to amend the Act to legally enforce the recruitment's already made.[…]"

10.4 It is clear from the SOR that the Cabinet Sub-Committee realised that the 2001 Rules were not made applicable to Universities as they do not come with the purview of the 2001 Rules. It is for this reason that the Reservation Act, 1990 is amended and the following sub-Section (1A) was introduced. The newly included sub-section (1A) to Sec. 4 of the Act is as follows:

***"Sec. 4: Reservation of appointments or posts etc*:-**

1. […]

(1A). Notwithstanding anything contained in any law for the time being in force, the appointing authority shall identify unfilled vacancies reserved for the persons belonging to Scheduled Castes and Scheduled Tribes in any service or post in an establishment in public sector as existing on the date of commencement of

> *the Second Amendment Act, 2004 and take action to fill them as a one time measure within a specified time. The manner in which the number of vacancies is to be computed, the procedure for filling such vacancies and the time within which action is to be taken shall be as specified by notification by the State Government.*
>
> *Provided that the provisions of sub-section shall not apply to any unfilled vacancy in Karnataka State Civil Services or Post in respect of which provisions have been already made* […]*"*
>
> (emphasis supplied)

11. The above-referred amendment to Sec. 4 of the Reservation Act, 1990 had the effect of bringing universities established by the state, within the mandate of sub-section (1A) of the Reservation Act, 1990. A combined reading of Sec. 2(2), 2(3)(vi) and sub-sections (1) and (1A) of Sec. 4 of the Reservation Act, 1990 with Sec. 53 and 54 of the Universities Act, 2000 would establish that the Board of Appointment of the university is tasked with identifying the unfilled vacancies reserved for SCs and STs existing as on the amendment dated 2004 and to fill them up as a one-time measure within a specified time. Till here there is no difficulty. In fact, this is in the natural flow of the two statutes.

12. The difficulty, however, arises out of the latter part of sub-Section (1A) which provides that the manner, procedure and the time for identifying, filling and completing the same *'shall be as specified by the State Government by way of a notification*'. There is nothing on record to show that the State Government issued any notification in furtherance of Sec. 4(1A) specifying the manner, procedure and time for identifying, filling and completing the same. Sub-Section (1A) delegates the power of specifying the method and manner of selection to the Government.

13. Mr. Shailesh Madiyal, learned Senior Counsel appearing for the appellant argues that the advertisement of the university, declaring that the 'Mode of Selection' shall be under the 2001 Rules, is a mistake. He calls it a mistake because the university shall be governed by the

Universities Act and the Statutes made thereunder and not the 2001 Rules, particularly when these Rules are made under the Karnataka State Civil Services Act, 1978.[8] The university is an autonomous institution and can never be bound, much less governed, by rules intended to regulate State Civil Services, is his argument.

14. Mr. Anand Sanjay M. Nuli, learned Senior Counsel appearing for the university, has taken the same stand as the appellant. He submitted that Sec. 78 of the Universities Act gives an overriding effect to the provisions of this law over other laws. He has drawn our attention to Sec. 53 of the Universities Act as the guiding principle for appointments to the post of 'teachers' in the university, which includes assistant professors, readers and professors.

15. Mr. Gagan Gupta, learned Senior Counsel appearing for respondent no. 7, submits that the mandate under Sec. 4(1A) on the Government to specify the method and manner of selection by the issuance of a notification stood fulfilled when the university itself advertised by notifying that the 'Mode of Selection' shall be as per the 2001 Rules. He also submitted that this is the natural consequence of the purpose and object of introducing sub-Section (1A), which was to enable the universities to follow the 2001 Rules. He also relied on certain letters written by the State Government calling upon the university to follow the mandate of the 2001 Rules.

16. We will examine the question as to whether the advertisement issued by the university intending to follow the 2001 Rules made under the Civil Services Act suffers from any illegality. If we come to the conclusion that compliance with the 2001 Rules is mandatory, we will affirm the judgments of the Ld. Single Judge and the Division Bench, and dismiss these appeals. On the other hand, if we find that the 2001 Rules have no application, or that they are not extended to appointment by the university, we will allow the appeals and affirm the appellant's appointment.

17. The controversy about filling up backlog vacancies of SCs and STs by the university comes to an end with the insertion of Sec. 4(1A) of the Reservation Act, 1990. In fact, the provocation for introducing sub-Section (1A) is that the mandate of the 2001 Rules was not

8 Herinafter referred to as the 'Civil Services Act'.

followed by the universities. In order to extend the provision of the 2001 Rules to universities, sub-Section (1A) was introduced and this is clear from the SOR of the amendment introducing sub-section (1A).

18. The identification, procedure and the time for computing, filling and completing the exercise of filling up backlog vacancies is specifically delegated under sub-Section (1A) to the Government. The intent behind the amendment is to vest the power of specifying the method, procedure and time for identifying, filling and completing the same to the State. The importance of the Government specifying the same lies in the fact that these incidents vary from service to service and establishment to establishment. The Government is best placed to address the same due to its resources. This is also evident from Sec. 54 of the Universities Act, which suggests that appointments to several posts in a university shall be laid down by the Government. It is an admitted fact that there is no notification issued by the Government to this effect. However, the university was aware of the continuous demand of the Government to follow the method of selection provided in the 2001 Rules. Therefore, in compliance with the statutory requirement and the Governmental demand, it issued the advertisement declaring that the 'Mode of Selection' shall be as per the 2001 Rules.

19. There have been letters by the Government demanding compliance with the 2001 Rules while filling up the backlog vacancies for posts for SCs/STs and OBCs. We will now refer to these letters. Even before the advertisement was issued on 21.03.2018, there was a letter addressed by the Principal Secretary, Department of Higher Education, State of Karnataka, to the university on 27.02.2018, instructing the latter to fill up backlog teaching posts as per the 2001 Rules and the guidelines prescribed by the university. We may mention at this very stage that similar letters were addressed by the State Government to the university on 22.05.2018 and 09.06.2021, directing that the procedure contemplated under the 2001 Rules must be followed for filling up the vacancies of SC/ST and other backward classes in the university. With these letters, the issue relating to the legality and validity of the university's advertisement is beyond doubt.

20. While we reject the submission of Mr. Shailesh Madiyal that the advertisement declaring that the 2001 Rules will be the 'Mode of Selection', is a mistake, we also hold that the university is bound to

comply with what is declared in its advertisement: the 2001 Rules will be the guiding principles for the selection in question. We state this for the following reasons. Firstly, there was no uncertainty left after the introduction of sub-Section (1A) to Sec. 4 of the Reservation Act, 1990, requiring an *establishment*, i.e., the university, to take action for filling the backlog vacancies as a one-time measure by following the method prescribed by the Government. Secondly, the purpose and object of the amendment was amply clear from its SOR contemplating the application of the 2001 Rules for the universities. Thirdly, the conduct of the university in not responding to the categorical demands of the Government through its letters dated 27.02.2018, 22.05.2018 and 09.06.2021 to implement the 2001 Rules is conclusive about its acceptance of the applicable law and the policy, and therefore, the advertisement. Hence, the requirement of the Government to specify the manner, procedure and time for identifying, filling backlog vacancies and completing the same was amply clear to the university. It is with this view that the university advertised that the 'Mode of Selection' shall be as per the 2001 Rules.

21. For the reasons stated above, the writ petition filed by respondent no. 7 was rightly allowed by the Ld. Single Judge of the High Court. While re-iterating the reasoning of the Single Judge, the Division Bench by the detailed order, upheld the findings of the Single Judge. Having considered the matter in detail, we have given our own reasons why respondent no. 7 should succeed even before this court. The appeals must, therefore, fail, and we hereby dismiss the same.

22. Having dismissed the appeals, we realise that an unusual situation has arisen in this case because of the university's conduct. Though the appellant was appointed in contravention of Rule 6 of the 2001 Rules, she continued in office during the subsistence of the writ proceedings. When the Ld. Single judge allowed respondent no. 7's writ petition and set aside the appellant's appointment dated 27.12.2019, the appellant approached the Division Bench and obtained a stay. After the Division Bench affirmed the Ld. Single Judge's order and dismissed the writ appeal, she approached this court and again obtained a stay, and this order is operating till date. In other words, the appellant's appointment dated 27.12.2019 is continuing till date without any interruption. She has been working for almost four and a half years. On the other hand, the wrongful denial of appointment to respondent no. 7 was addressed by the Ld.

Single Judge and Division Bench of the High Court by setting aside the appellant's appointment, and also directing that respondent no. 7 must be given the appointment instead. While we have agreed that respondent no. 7 must succeed and be restituted to the rightful position that he had earned, the university must also address the concern of the appellant. The unfortunate situation has arisen not because of anything wrong attributable to the appellant, but due to the indifferent manner with which the university conducted itself. In order to obviate the injustice caused to the appellant, the university may consider creating a supernumerary post to accommodate her. We are fully conscious of the limitations in creating such posts over and above the positions that are borne by a cadre,[9] but this is an extraordinary situation for exercising such discretion.[10] We leave it to the university to take a decision on this issue and pass the necessary orders.

23. For the reasons stated above, the Civil Appeal Nos. 6772-6773/2023 against the judgment and final order dated 12.03.2021 passed by the High Court of Karnataka at Bengaluru in Writ Appeal No. 233 of 2021 c/w Writ Appeal No. 190 of 2021 (S-RES) are dismissed, subject to the observations made in the previous paragraph.

24. There shall be no order as to costs.

Result of the case: Appeals dismissed.

†*Headnotes prepared by:* Divya Pandey

9 *Official Liquidator v. Dayanand* (2008) 10 SCC 1

10 *N.T. Bevin Katti v. Karnataka Public Service Commission* (1990) 3 SCC 157

[2024] 6 S.C.R. 484 : 2024 INSC 410

Bar of Indian Lawyers Through its President Jasbir Singh Malik
v.
D. K. Gandhi PS National Institute of Communicable Diseases and Anr.

(Civil Appeal No. 2646 of 2009)

14 May 2024

[Bela M. Trivedi* and Pankaj Mithal,* JJ.]

Issue for Consideration

Matter pertains to whether a complaint alleging "deficiency in service" against advocates practising legal profession, would be maintainable under the Consumer Protection Act, 1986 as re-enacted in 2019; whether "Service" hired or availed of an advocate would fall within the definition of "Service" contained in the C.P. Act, 1986/2019; whether the legislature ever intended to include the professions or services rendered by the professionals within the purview of the CP Act 1986 as re-enacted in 2019; whether the legal profession is sui generis; and whether service hired or availed of an advocate could be said to be the service under "contract of personal service" so as to exclude it from the definition of "Service" contained in s. 2(42) of the CP Act 2019.

Headnotes†

Consumer Protection Act, 1986 – Consumer Protection Act, 2019 – Complaint alleging "deficiency in service" against Advocates practising Legal Profession – Maintainability – District Forum held that it had the jurisdiction to adjudicate upon the dispute between the parties and decided the complaint in favour of the complainant – However, the State Commission held that the services of lawyers/advocates did not fall within the ambit of "service" defined u/s. 2(1)(o) of the 1986 Act – In Revision, the National Commission held inter alia that if there was any deficiency in service rendered by the Advocates/Lawyers, a complaint under the 1986 Act would be maintainable – Correctness:

Held: Services hired or availed of an Advocate would be that of a contract 'of personal service' and would thus, stand excluded from the definition of "service" contained in the s. 2(42) of the CP

* Author

Act, 2019 – In view thereof, the complaint alleging "deficiency in service" against Advocates practising legal profession would not be maintainable under the CP Act, 2019 – Thus, the impugned judgment passed by the National Commission set aside [Paras 42, 43] – **Held: Per Pankaj Mithal, J. (Concurring)** In the era of globalization, a law has to be applied in context with the prevailing situation of the country, nonetheless, on the basis of the common resolution of the UNO, laws must have a uniform application in all nations – It is, thus, essential that the consumer protection laws in all countries may somewhat have universal application and be confined to 'consumers' only i.e. to the persons who buys any goods for consideration or hires or avails of any service for consideration, impliedly excluding the professional services especially that of a lawyer – In doing so, in India also the services of professionals more particularly that of lawyers have to be excluded from consumer protection law in accordance with the intention expressed in enacting the same – Legislature in India as in some other countries, had not intended to include the services rendered by the professionals especially the lawyers to their client within the purview of CP Act, 1986 and re-enacted in 2019 – Thus, the view taken by the National Commission that complaint would be maintainable in CP Act, 1986, in respect of deficiency in service rendered by the lawyers, is incorrect and is set aside. [Paras 24-28]

Consumer Protection Act, 1986 – Consumer Protection Act, 2019 – Legislature, if intended to include the Professions or services rendered by the Professionals within the purview of the CP Act 1986/2019:

Held: The very purpose and object of the CP Act 1986 as re-enacted in 2019 was to provide protection to the consumers from unfair trade practices and unethical business practices – Legislature never intended to include either the Professions or the services rendered by the Professionals within the purview of the said Acts – Other object of the Act was to provide to the consumers timely and effective administration and settlement of their disputes arising out of the unfair trade and unethical business practices – If the services provided by all the Professionals are also brought within the purview of the Act, there would be flood-gate of litigations in the commissions/forums established under the Act, and the very object of Act would be frustrated – Legislative draftsmen are presumed to know the law and there is no reason to assume that the legislature intended to include the Professions or the

Professionals or the services provided by them within the ambit of the CP Act – Any interpretation of the Preamble or the scheme of the Act for construing 'Profession' as 'Business' or 'Trade'; or 'Professional' as 'service provider' would be extending the scope of the Act which was not intended, rather would have a counter productive effect. [Paras 42, 19, 20, 18]

Legal Profession – Legal Profession is sui generis or is different from the other Profession:

Held: Having regard to the role, status and duties of the Advocates as the professionals, the legal profession is sui generis i.e unique in nature and cannot be compared with any other profession – Legal profession is different from the other professions for the reason that what the Advocates do, affects not only an individual but the entire administration of justice, which is the foundation of the civilized society – Legal profession is a solemn and serious profession, and has always been held in very high esteem – Their services in making the judicial system efficient, effective and credible, and in creating a strong and impartial Judiciary, which could not be compared with the services rendered by other professionals [Paras 42, 30] – **Held: Per Pankaj Mithal, J. (Concurring)** Profession of law, as such, is regarded as sui generis i.e. which is unique – It is distinct from all other professions and is one of its own kind. [Para 3]

Consumer Protection Act, 2019 – s. 2(42) – Service hired or availed of an Advocate, if could be said to be the service under a "contract of personal service" so as to exclude it from the definition of "Service" contained in s. 2(42):

Held: Service hired or availed of an Advocate is a service under "a contract of personal service," and thus, would fall within the exclusionary part of the definition of "Service" contained in s. 2(42) – Greater the amount of direct control exercised over the person rendering the services by the person contracting for them, the stronger would be the grounds for holding it to be a "contract of service" – Considerable amount of direct control is exercised by the Client over the manner in which an Advocate renders his services during the course of his employment. [Paras 42, 39, 41]

Reference to larger Bench – Three-Judge Bench decision in *Indian Medical Association vs. V.P. Shantha & Others holding inter alia that the wide amplitude of the definition of 'service' in the main part of s. 2(1)(o) of the Consumer Protection Act, 1986

would cover the services rendered by Medical Practitioners within the said s. 2(1)(o) of the Act – Correctness:

Held: Having regard to the history, object, purpose and the scheme of the CP Act and that neither the "Profession" could be treated as "business" or "trade" nor the services provided by the "Professionals" could be treated at par with the services provided by the Businessmen or the Traders, so as to bring them within the purview of the CP Act, the decision in *Indian Medical Association vs. V.P Shantha's case to be revisited and considered by a larger bench – Thus, matter referred to Hon'ble the Chief Justice of India for consideration – Supreme Court Rules – Order VI r 2. [Paras 21, 24]

Consumer Protection Act, 1986 – Consumer Protection Act, 2019 – Scope and object of – Intention of the legislature:

Held: The said Act was enacted to provide for the better protection of the interests of the consumers against their exploitation by the traders and manufacturers of the consumer goods, and to help consumers in getting justice and fair treatment in the matter of goods and services purchased and availed by them in a market dominated by large trading and manufacturing bodies – Reasons for re-enacting the CP Act, 2019 by the Legislature, were certain shortcomings found in the CP Act 1986 while administering the said Act, and due to the emergence of global supply chains, rise in international trade and rapid development of ecommerce leading to new systems for goods and services, new options and opportunities had become available to the consumers – New forms of unfair trade and unethical business practices also came to be developed, which made the consumers more vulnerable – Furthermore, there was not a whisper in the statement of objects and reasons either of the CP Act, 1986 or 2019 to include the Professions or the Services provided by the Professionals like Advocates, Doctors etc. within the purview of the Act – Professionals could not be called Businessmen or Traders, nor Clients or Patients be called Consumers. [Paras 12, 14, 15]

Words and phrases – Definition of term "Profession" – Meaning and explanation of:

Held: "Profession" would require advanced education and training in some branch of learning or science – Nature of work is also skilled and specialised one, substantial part of which would be

mental rather than manual – Thus, having regard to the nature of work of a professional, which requires high level of education, training and proficiency and which involves skilled and specialized kind of mental work, operating in the specialized spheres, where achieving success would depend upon many other factors beyond a man's control, a Professional cannot be treated equally or at par with a Businessman or a Trader or a Service provider of products or goods as contemplated in the Consumer Protection Act – Similarly, services rendered by Businessman or Trader to consumers with regard to his goods or products cannot be equated with the Services provided by Professional to his clients with regard to his specialized branch of profession. [Paras 15, 18]

Legal profession – Justice Delivery System and the evolving jurisprudence – Role of Advocates:

Held: Legal profession cannot be equated with any other traditional professions – It is not commercial in nature but is essentially a service oriented, noble profession – Role of Advocates is indispensable in the Justice Delivery System – Evolution of jurisprudence to keep the Constitution vibrant is possible only with the positive contribution of the Advocates – Advocates are expected to be fearless and independent for protecting the rights of citizens, for upholding the Rule of law and also for protecting the Independence of Judiciary – People repose immense faith in the Judiciary, and the Bar being an integral part of the Judicial System has been assigned a very crucial role for preserving the independence of the Judiciary, and in turn the very democratic set up of the Nation – Advocates are perceived to be the intellectuals amongst the elites and social activists amongst the downtrodden, thus are expected to act with utmost good faith, integrity, fairness and loyalty while handling the legal proceedings of his client – Being a responsible officer of the court and an important adjunct of the administration of justice, an Advocate owes his duty not only to his client but also to the court as well as to the opposite side [Para 29] – **Held: Per Pankaj Mithal, J. (Concurring)** Profession of law is a noble profession having an element of duty towards the court – Lawyers perform multi-faceted duties – They not only have a duty towards the client or their opponents but they have a paramount duty to assist the court as well – In a way, they are officers as well as ambassadors of the court – Thus, in rendering such kind of a duty to enable the courts to come to a

just conclusion, it may be possible that at times, the lawyers may earn displeasure of the client while assisting the court. [Para 2]

Advocates Act, 1961 – Advocate – Legal Practitioner – Definition of, and explanation:

Held: Advocate is included in the definition of "Legal Practitioner" but legal practitioner is not included in the definition of Advocate – Advocate is one who has been entered in any roll under the provisions of the Advocates Act – Law relating to legal practitioners and to provide for the constitution of Bar Councils and an All-India Bar is covered under the Advocates Act, 1961 – As per s. 29, there is only one class of persons entitled to practice the profession of law, namely Advocates, and as per s. 30, every advocate whose name is entered in the State roll is entitled as of right to practice in all Courts including the Supreme Court and before any Tribunal or any other authority or person before whom such advocate is by or under any law for the time being in force entitled to practice – Comprehensive provisions are contained in the Advocates Act, 1961 and the Bar Council of India Rules to take care of the professional misconduct of the Advocates, and prescribing the punishments if they are found guilty of professional or other misconduct by the Disciplinary Committees of the State Bar Council or the Bar Council of India. [Para 34]

Consumer Protection Act, 1986 – s. 2(1)(o) – Consumer Protection Act, 2019 – s. 2(42) – Definition of "Service" contained in s. 2(1)(o) of the CP Act 1986 and in s. 2(42) of the CP Act 2019 – Elucidation:

Held: Definition of "Service" contained in s. 2(1)(o) of the CP Act 1986 and in s. 2(42) of the CP Act 2019 is the same – Definition of 'service' is divided into three parts-first part is explanatory in nature and defines service to mean service of any description which is made available to the potential users; the second part is inclusionary part, which expressly includes the provision of facilities in connection with the specific services; and the third part is exclusionary part which excludes rendering of any service free of charge or under a contract of personal service. [Paras 35, 37]

Consumer Protection Act, 1986 – s. 2(1)(g) – Consumer Protection Act, 2019 – s. 2(11) – Definition of 'Deficiency' in s. 2(1)(g) of 1986 Act and s. 2(11) of 2019 Act:

Held: There is slight difference in the definition of 'Deficiency' in s. 2(1)(g) of 1986 Act and s. 2(11) of 2019 Act. [Para 36]

Advocates – Relationship between an Advocate and his Client – Nature of control – Unique attributes:

Held : Advocates are generally perceived to be their client's agents and owe fiduciary duties to their clients – Advocates are fastened with all the traditional duties that agents owe to their principals – Advocates have to respect the client's autonomy to make decisions at a minimum, as to the objectives of the representation – Advocates are not entitled to make concessions or give any undertaking to the Court without express instructions from the Client – It is the solemn duty of an Advocate not to transgress the authority conferred on him by his Client – Advocate is bound to seek appropriate instructions from the Client or his authorized agent before taking any action or making any statement or concession which may, directly or remotely, affect the legal rights of the Client – Advocate represents the client before the Court and conducts proceedings on behalf of the client – He is the only link between the court and the client – Thus, his responsibility is onerous – He is expected to follow the instructions of his client rather than substitute his judgment – Thus, a considerable amount of direct control is exercised by the Client over the manner in which an Advocate renders his services during the course of his employment. [Para 41]

Consumer Protection Laws – Exclusion of lawyers from Consumer Protection Laws – International practice/norms – Discussed. [Paras 6-9, 13-15, 17, 24] **Per Pankaj Mithal, J. (Concurring)**

Case Law Cited

In the judgment of Bela M. Trivedi, J.

Indian Medical Association v. V.P. Shantha & Others [1995] Supp. 5 SCR 110 **: (1995) 6 SCC 651 – To be revisited.**

State of Karnataka v. Vishwabharathi House Building Coop. Society and Others [2003] 1 SCR 397 **: (2003) 2 SCC 412;** *Common Cause, A Registered Society v. Union of India and Others* [1993] 1 SCR 10 **: (1997) 10 SCC 729;** *Lucknow Development Authority v. M.K. Gupta* [1993] Supp. 3 SCR 615 **: (1994) 1 SCC 243;** *Laxmi Engineering Works v. P.S.G. Industrial Institute* [1995] 3 SCR 174 **: (1995) 3 SCC 583;** *State of West Bengal*

v. Subodh Gopal Bose & Others [1954] 1 SCR 587 : **AIR 1954 SC 92;** *Triveniben v. State of Gujarat* [1989] 1 SCR 509 **: (1989) 1 SCC 678;** *Byram Pestonji Gariwala v. Union Bank of India and Others* [1991] Supp. 1 SCR 187 **: (1992) 1 SCC 31;** *R. Muthukrishnan v. Registrar General, High Court of Judicature at Madras* [2019] 1 SCR 589 **: (2019) 16 SCC 407;** *State of U.P and Others v. U.P. State Law Officers Association and Others* [1994] 1 SCR 348 **: (1994) 2 SCC 204;** *Dharangadhra Chemical Works Ltd. v. State of Saurashtra and Others* [1957] 1 SCR 152 **: AIR 1957 SC 264;** *Himalayan Cooperative Group Housing Society v. Balwan Singh and Others* [2015] 4 SCR 616 **: (2015) 7 SCC 373 – referred to.**

Simmons v. Heath Laundry Company **(1924) 1 KB 762 – referred to.**

In the judgment of Pankaj Mithal, J.

Om Prakash v. Assistant Engineer, Haryana Agro Industries Corporation Ltd. and Anr. [1994] 3 SCR 463**: (1994) 3 SCC 504;** *Laureate Buildwell (P) Ltd. v. Charanjeet Singh* [2021] 6 SCR 673 **: (2021) 20 SCC 401 – referred to.**

D'Orta-Ekenaike v. Victoria Legal Aid **(2005) 223 CLR 1.**

Books and Periodicals Cited

In the judgment of Bela M Trivedi, J.

Black's Law Dictionary, 11th Edition; "Jackson and Powell on Professional Liability" 2nd supplement to the 7th edition **– referred to.**

List of Acts

Consumer Protection Act, 1986; Consumer Protection Act, 2019; Legal Practitioners Act, 1879; Bombay Pleaders Act, 1920; Indian Bar Councils Act, 1926; Advocates Act, 1961; Supreme Court Rules.

List of Keywords

Deficiency in service; Service hired or availed of an Advocate; Definition of Service; Professions or services rendered by the Professionals; Legal Profession, sui generis; Service under contract

of personal service; Unfair trade practices and unethical business practices; Timely and effective settlement of consumers' disputes; 'Profession' as 'Business' or 'Trade'; 'Professional' as 'service provider'; Exclusionary part of the definition of "Service"; Reference to larger Bench; Decision to be revisited; Justice Delivery System; Role of Advocates; Independence of Judiciary; Relationship between an Advocate and his Client; International practices; Duty of advocates/lawyers towards the court.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2646 of 2009

From the Judgment and Order dated 06.08.2007 of the National Consumers Disputes Redressal Commission, New Delhi in RP No.1392 of 2006

With

Civil Appeal Nos. 2647, 2648 and 2649 of 2009, Civil Appeal No. 6959 of 2011 and Civil Appeal No. 8214 of 2017

Appearances for Parties

Guru Krishna Kumar, Narender Hooda, Manoj Swarup, Rakesh Tikku, V. Giri, Jaideep Gupta, Shekhar Naphade, Dr. Adish C. Aggarwala, Sukumar Pattjoshi, Arijit Prasad, Jayant Bhushan, Dinesh Kumar Goswami, S. Wasim Ahmed Quadri, Vikas Singh, Ramkrishna Viraragvan, Vivek Subba Reddy, V.K. Singh, Sr. Advs., Ashok Kumar Singh, Shantwanu Singh, Ms. Pragya Singh, Akshay Singh, Rahul Dubey, Daya Krishan Sharma, D K Sharma, Rohit Vats, Yashdeep, Akshay Amritanshu, Samyak Jain, Ayush Raj, Ankit Swarup, Neelmani Pant, Ms. Apoorva Singh, Rishi Bhargava, Ms. Yashvi Aswani, Jasbir Singh Malik, Ms. Chandni Sharma, Shaurya Lamba, Varun Punia, K. Maruthi Rao, Mrs. Anjani Aiyagari, Gaurav Yadava, Mohinder Jit Singh, Hardik Rupal, Satyam Aneja, Ms. Suveni Bhagat, Ms. Vishwaja Rao, Rahul Narang, Harshed Sundar, Nihar Dharmahikari, Shubham Rana, Piyush Goel, Mrs. Sunita Sharma, Ms. N. Annapoorani, Devvrat, Manoj K. Mishra, Snehashish Mukherjee, Ms. Rashmi Malhotra, Puneet Singh Bindra, Sachin Sharma, Ms. Harshita Sharma, Ms. Sachita Chawla, Ms. Swati Setia, Devesh Kumar Agnihotri, Rohit Pandey, Meenesh Kumar Dubey, Ms. Yugandhara Pawar Jha, Amrendra Kumar Singh, Vibhu Shanker Mishra, Kumar Gaurav, Shashank Shekhar, Vikas Gupta,

Pratap Venugopal, Chanchal Kumar Ganguli, Manish Goswami, Upendra Mishra, Ratnesh Kumar, Meghraj Singh, Pradeep Kumar Yadav, Pankaj Kumar, Pankaj Singh, Munawwar Naseem, Siddharth, Mukes Kumar, Subhendu Adikari, Siddharth Batra, Rhythm Katyal, Ms. Archna Yadav, Chinmay Dubey, Ms. Shivani Chawla, Pratyush Arora, Ashutosh Chugh, Rajesh Srivastava, Gaurav Verma, M/S. Krishna & Nishani Law Chambers, Anil C Nishani, H. M. Harish, Krishna M Singh, Nikhil Jain, Rajiv Kumar, K Krishna Kumar, Vishwesh R Murnal, P. Prasanna Kumar, Ajit Achappa, Kiran Kumar, Hitesh Kumar Sharma, S.K. Rajora, Akhileshwar Jha, Amit Kumar Chawla, Sandeep Singh Dhingra, Ms. Niharika Dewivedi, Ms. Priya Singh, Sanjay Singh, Ms. Kavita Singh, Advs. for the appearing parties.

Petitioner-in-person

Respondent-in-person

Judgment / Order of the Supreme Court

Judgment

Bela M. Trivedi, J.

1. An important question of law pertaining to the Legal Profession as a whole that has fallen for consideration before this Court is – whether a complaint alleging "deficiency in service" against Advocates practising Legal Profession, would be maintainable under the Consumer Protection Act, 1986 as re-enacted in 2019? In other words, whether a "Service" hired or availed of an Advocate would fall within the definition of "Service" contained in the C.P. Act, 1986/2019, so as to bring him within the purview of the said Act?

2. The present set of Appeals emanate from the impugned order dated 06.08.2007 passed by the National Consumer Disputes Redressal Commission (NCDRC), New Delhi in Revision Petition No.1392/2006, in which the NCDRC has held *inter alia* that if there was any deficiency in service rendered by the Advocates/Lawyers, a complaint under the Consumer Protection Act, 1986 (for short "CP Act, 1986") would be maintainable.

FACTUAL MATRIX

3. The short facts in C.A. No.2649/2009, arising out of the impugned order passed by the NCDRC are that: -

(i) The appellant is an Advocate by profession. The respondent Mr. D.K. Gandhi had hired the services of the appellant as an advocate for filing a Complaint in the Court of Metropolitan Magistrate, Tis Hazari Court, Delhi, against one Kamal Sharma under Section 138 of the Negotiable Instruments Act, as the cheque for Rs.20,000/- issued by the said Kamal Sharma in favour of the respondent D.K. Gandhi was dishonoured.

(ii) During the course of the said complaint case, the accused Mr. Sharma agreed to pay the sum of Rs.20,000/- for the dishonoured cheque besides Rs.5,000/- as the expenses incurred by the complainant. It was alleged by the respondent (complainant) that though the appellant had received from the accused Mr. Sharma the DD/pay order for Rs.20,000/- and the crossed cheque of Rs.5,000/- on behalf of the respondent, the appellant did not deliver the same to the respondent and instead demanded Rs.5,000/- in cash from the respondent. The appellant also filed a suit for recovery of Rs.5,000/- in the court of Small Causes, Delhi raising a plea that the sum was due to him as his fees. Subsequently, the appellant gave the DD/pay order for Rs.20,000/- and cheque for Rs.5,000/- to the respondent, however, the payment of cheque for Rs.5,000/- was stopped by the accused Mr. Sharma at the instance of the appellant. The respondent therefore filed a complaint before the District Consumer Disputes Redressal Forum, Delhi seeking compensation of Rs. 15,000/- in addition to the amount of cheque of Rs.5,000/-, as also Rs.10,000/- for the mental agony and harassment along with the cost. The appellant resisted the said complaint by filing a reply on 03.03.1998 raising a preliminary objection to the effect that the District Consumer Forum had no jurisdiction to adjudicate the dispute raised in the complaint as the Advocates were not covered under the provisions contained in the CP Act.

(iii) The District Forum, however, rejected the said preliminary objection, holding that it had the jurisdiction to adjudicate upon the dispute between the parties and further decided the complaint in favour of the respondent. The appellant being aggrieved by the said order had filed an appeal before the State Commission, which by the order dated 10.03.2006 allowed the

same holding that the services of lawyers/advocates did not fall within the ambit of "service" defined under section 2(1)(o) of the CP Act, 1986. The NCDRC, however in the Revision Application preferred by the respondent passed the impugned order as stated hereinabove.

(iv) Being aggrieved by the said impugned order passed by the NCDRC, the present set of appeals has been filed by the Bar of Indian Lawyers, Delhi High Court Bar Association, Bar Council of India, and by the appellant M. Mathias.

SUBMISSIONS

4. Since the issues involved in this batch of Appeals pertain to the Advocates practising in the various courts/tribunals and other legal forums of the country, a wide range of arguments were advanced before us. Having regard to the significance and sensitivity of the issues involved, we had appointed the learned Senior Advocate, Mr. V. Giri as an *Amicus Curiae* to assist the Court.

5. The broad submissions made by the learned Senior Counsels Mr. Narender Hooda, Mr. Guru Krishna Kumar, Mr. Manoj Swarup, Mr. Manan Mishra, Mr. Jaideep Gupta, Mr. Shekhar Naphade, Mr. Vikas Singh and learned counsel, Mr. D.K. Sharma may be summarized as under: -

(i) The Advocates Act, 1961 is a law dealing exclusively with the legal profession which provides a robust mechanism laying down professional standards for compliance and for determining professional misconduct.

(ii) The legal profession is a noble profession and not a business or trade. It is an extension of system of justice, and the success of judicial process depends on the independence of the Bar. Hence, its autonomy is needed to preserve the democracy and to keep judiciary strong.

(iii) A unique feature which distinguishes an Advocate from other professional is that an Advocate has a duty to the court and his peers, in addition to his duty to the client. He is not mere a mouthpiece but he has to exercise his own judgment for upholding the interest of his client by all fair, legal and reasonable means, and by being respectful to the court.

(iv) The Bar Council of India and State Bar Councils are invested with the disciplinary powers. An error of judgment or mere negligence may not be a professional misconduct. In any case, the professional misconduct which subsumes cases of negligence, which is covered by the special law i.e., Advocates Act, 1961.

(v) The Advocates Act being special law would prevail over the CP Act so far as the conduct of Advocates are concerned.

(vi) The law of negligence recognizes that a professional would be held liable in a civil action for negligence and includes professionals of varied fields who possess special skill in that profession generally.

(vii) The legal professionals in United Kingdom can be sued for negligence by a way of regular civil action, however they would not be liable under the law dealing with consumer rights for trade/commercial activities.

(viii) Allowing consumer protection law to apply to the Advocates would open floodgates of unnecessary litigations and it would not be in the larger public interest to do so. It would also lead to multiple proceedings before multiple forums, reagitation of issues decided by a judicial body including the Supreme Court with potentially conflicting decisions.

(ix) The summary nature of proceeding under the consumer protection law with its accent on inexpensive and speedy remedy (though enacted with laudable objects for protection of consumers against trade and commercial activities), can become an easy tool for disgruntled litigants to knock at the doors of the consumer forums against the advocates. It would lead to speculative/vexatious claims, rather than seeking relief in respect of bona fide grievances against professional misconduct.

(x) The legal profession is recognized as *sui generis* and stands out among other profession due to its distinctive nature, where the lawyers often find themselves operating in an environment where control is elusive. Unlike many other professions where practitioners may have a higher degree of control over their

surroundings, the lawyers frequently navigate through complex legal landscapes shaped by diverse factors.

(xi) One of the primary distinctions of legal profession is the inherent complexity of legal issues. Lawyers must grapple with intricate statutes, case laws and regulatory frameworks, which often lack definitive answers. Legal disputes frequently involve multiple parties with conflicting interests, further complicating the matters. Unlike some other professions where problems may have more straightforward solutions, the lawyers often face ambiguity and uncertainty in their work, making control over outcomes elusive.

(xii) The adversarial dynamics have an element of unpredictability, as outcomes depend not only on the lawyer's skill and knowledge but also on the strategies employed by opposing counsel and the decisions of judges.

(xiii) Lawyers are bound by ethical and professional obligations that constrain their autonomy and control over their work. Adherence to the codes of conduct, client confidentiality, and obligations to the court limit the freedom of lawyers to act solely in their own interest or according to their preferences.

(xiv) Unlike any other profession, where professionals are in control of their surrounding fully, legal profession is the sole profession, where advocates have no control over their environment. The environment they work in is controlled by the presiding Judge.

(xv) The Bar Council of India Rules prescribe at least four sets of duty that a lawyer has to oblige, viz., Duty to the Court, Duty to the Client, Duty to Opponent and Duty to Colleagues, in no particular order. These duties are sometimes conflicting in nature, however whenever a conflict arises, the duty to court is considered to be paramount.

(xvi) Unlike the medical profession, where scientific standards exist to decide the standard of care, there is no universal standard of care or objective test that exists or can be prescribed as the threshold in the case of legal profession to adjudicate upon the question of abdication of duty to care.

(xvii) Distinguishing the decision of this Court in ***Indian Medical Association vs. V.P. Shantha & Others***[1]**,** it was sought to be submitted that there is a fundamental difference between the practice of law and the practice of medicine, as also the difference in the nature of professional-client relationship. The complexity of legal issues, and the diversity of legal contexts also would take the legal services rendered by the Advocates outside the purview of the services defined under the CP Act.

6. The learned Senior Advocate Mr. V. Giri - *Amicus Curiae*, submitted that the Advocates can be broadly classified into two categories based on the terms of their engagement and the nature of work being done by them for their clients – (1) Advocates engaged by clients to conduct their cases and then represent them before any court, tribunal or other forum, on the strength of a *vakalatnama* and (2) Advocates engaged by clients to provide their professional expertise for providing legal opinions, issuing legal notices, drafting agreements, etc. He submitted that the first category of advocates would not come within the purview of a service provider under the CP Act, as in that case the advocate acts as a representative or agent of the client. He further submitted that it is open to a party to plead and appear in person in the court, however when he executes a *vakalatnama*, he chooses to engage an Advocate as his agent, and the acts and statements of the advocate, in the course of his duties in the matter, are like the acts and statements of the principal i.e., the client himself. Such relationship cannot be equated to that of a "service provider" and a "consumer" as contemplated in the CP Act. However, the *Amicus Curiae* Mr. Giri fairly submitted that in the second category of Advocates i.e., the Advocates who are engaged by the clients outside the precincts of the court and outside the litigation process i.e., who are not engaged on the strength of a *vakalatnama* but engaged to provide legal services outside the court process, would come within the purview of a service provider, and any deficiency or shortcoming in the professional services rendered by such Advocates, completely outside the confines of the litigation process, would be covered under the CP Act.

1 [1995] Supp. 5 SCR 110 : (1995) 6 SCC 651

ANALYSIS

7. Though the question posed before us is, whether a complaint alleging "deficiency in service" against Advocates practising Legal Profession, would be maintainable under the Consumer Protection Act, having regard to the entire spectrum and scheme of the said Act, following further questions stem from the said question, which deserve consideration.

(i) Whether the Legislature ever intended to include the Professions or services rendered by the Professionals within the purview of the CP Act 1986 as re-enacted in 2019?

(ii) Whether the Legal Profession is *sui generis*?

(iii) Whether a Service hired or availed of an Advocate could be said to be the service under "a contract of personal service" so as to exclude it from the definition of "Service" contained in Section 2 (42) of the CP Act 2019?

8. For adverting to the first question, whether the Legislature ever intended to include the Professions or the services rendered by the Professionals within the purview of the CP Act 1986 as re-enacted in 2019, it would be germane to ascertain the legislative intention and to look back to the history, object and purpose of enacting the CP Act 1986. A three-Judge Bench in case of ***State of Karnataka vs. Vishwabharathi House Building Coop. Society and Others***[2]**,** while dealing with the issue raised about the constitutional validity of the CP Act 1986, had elaborately considered the history, objects and purpose of enacting the said Act.

> "**5.** Before adverting to the question as regard the competence of Parliament to enact the said Act, we may notice the history of legislation leading to enactment of the said Act.
>
> **6.** The Secretary General, United Nations submitted draft guidelines for consumer protection to the Economic and Social Council (UNESCO) in 1983. The General Assembly of the United Nations upon extensive discussions and

2 [2003] 1 SCR 397 : (2003) 2 SCC 412

negotiations among governments on this scope and content thereof adopted the guidelines which inter alia provide for the following:

"Taking into account the interests and needs of consumers in all countries, particularly those in developing countries, recognizing that consumers often face imbalances in economic terms, educational level, and bargaining power, and bearing in mind that consumer should have the right of access to non-hazardous products, as well as the importance of promoting just, equitable and sustainable economic and social development, these guidelines for consumer protection have the following objectives:

(a) To assist countries in achieving or maintaining adequate protection for their population as consumers.

(b) To facilitate production and distribution patterns responsive to the needs and desires of consumers.

(c) To encourage high levels of ethical conduct for those engaged in the production and distribution of goods and services to consumers.

(d) To assist countries in curbing abusive business practices by all enterprises at the national and international levels which adversely affect consumers.

(e) To facilitate the development of independent consumer groups.

(f) To further international cooperation in the field of consumer protection.

(g) To encourage the development of market conditions which provide consumers with greater choice at lower prices."

7. The framework for the Consumer Act was provided by a resolution dated 9-4-1985 of the General Assembly of the United Nations Organisation. This is known as "Consumer Protection Resolution No. 39/248". India is a signatory to the said Resolution.

> **8.** The said Act was enacted having regard to the aforementioned Resolution.
>
> **9.** It seeks to provide for better protection of the interests of consumers and for the said purpose, to make provision for the establishment of Consumer Councils and other authorities for the settlement of consumer disputes and for matters connected therewith, as would appear from the Statement of Objects and Reasons of the Act.
>
> **10.** It further seeks inter alia to promote and protect the rights of consumers such as—
>
> *"(a)* The right to be protected against marketing of goods which are hazardous to life and property;
>
> *(b)* the right to be informed about the quality, quantity, potency, purity, standard and price of goods to protect the consumer against unfair trade practices;
>
> *(c)* the right to be assured, wherever possible, access to variety of goods at competitive prices;
>
> *(d)* the right to be heard and to be assured that consumers' interests will receive due consideration at appropriate forums;
>
> *(e)* the right to seek redressal against unfair trade practice or unscrupulous exploitation of consumers; and
>
> *(f)* right to consumer education.""

9. The scope and object of the said legislation had also come up for consideration before this Court in ***Common Cause, A Registered Society vs. Union of India and Others***[3] in which it was observed: -

> **"2.** The object of the legislation, as the Preamble of the Act proclaims, is "for better protection of the interests of consumers". During the last few years preceding the enactment there was in this country a marked awareness among the consumers of goods that they were not getting their money's worth and were being exploited by both

3 [1993] 1 SCR 10 : (1997) 10 SCC 729

traders and manufacturers of consumer goods. The need for consumer redressal fora was, therefore, increasingly felt. Understandably, therefore, legislation was introduced and enacted with considerable enthusiasm and fanfare as a path-breaking benevolent legislation intended to protect the consumer from exploitation by unscrupulous manufacturers and traders of consumer goods. A three-tier fora comprising the District Forum, the State Commission and the National Commission came to be envisaged under the Act for redressal of grievances of consumers…."

10. In ***Lucknow Development Authority vs. M.K. Gupta***[4]**,** it was observed in paragraph 2 as under: -

> **"2.** ……To begin with the preamble of the Act, which can afford useful assistance to ascertain the legislative intention, it was enacted, 'to provide for the protection of the interest of consumers. Use of the word 'protection' furnishes key to the minds of makers of the Act. Various definitions and provisions which elaborately attempt to achieve this objective have to be construed in this light without departing from the settled view that a preamble cannot control otherwise plain meaning of a provision. In fact the law meets long felt necessity of protecting the common man from such wrongs for which the remedy under ordinary law for various reasons has become illusory. Various legislations and regulations permitting the State to intervene and protect interest of the consumers have become a haven for unscrupulous ones as the enforcement machinery either does not move or it moves ineffectively, inefficiently and for reasons which are not necessary to be stated. The importance of the Act lies in promoting welfare of the society by enabling the consumer to participate directly in the market economy. It attempts to remove the helplessness of a consumer which he faces against powerful business, described as, 'a network of rackets' or a society in which, 'producers have secured power' to 'rob the rest' and the might of public bodies which are

4 [1993] Supp. 3 SCR 615 : (1994) 1 SCC 243

degenerating into storehouses of inaction where papers do not move from one desk to another as a matter of duty and responsibility but for extraneous consideration leaving the common man helpless, bewildered and shocked……"

11. Yet in ***Laxmi Engineering Works vs. P.S.G. Industrial Institute***[5]**,** it was held in paragraph 10 as under: -

> **"10.** A review of the provisions of the Act discloses that the quasi-judicial bodies/authorities/agencies created by the Act known as District Forums, State Commissions and the National Commission are not courts though invested with some of the powers of a civil court. They are quasi-judicial tribunals brought into existence to render inexpensive and speedy remedies to consumers. It is equally clear that these forums/commissions were not supposed to supplant but supplement the existing judicial system. The idea was to provide an additional forum providing inexpensive and speedy resolution of disputes arising between consumers *and* suppliers of goods and services. The forum so created is uninhibited by the requirement of court fee or the formal procedures of a court. Any consumer can go and file a complaint. Complaint need not necessarily be filed by the complainant himself; any recognized consumers' association can espouse his cause. Where a large number of consumers have a similar complaint, one or more can file a complaint on behalf of all. Even the Central Government and State Governments can act on his/their behalf. The idea was to help the consumers get justice and fair treatment in the matter of goods and services purchased and availed by them in a market dominated by large trading and manufacturing bodies. Indeed, the entire Act revolves round the consumer and is designed to protect his interest. The Act provides for "business-to-consumer" disputes and not for "business-to-business" disputes. This scheme of the Act, in our opinion, is relevant to and helps in interpreting the words that fall for consideration in this appeal."

5 [1995] 3 SCR 174 : (1995) 3 SCC 583

12. Thus, considering the intention of the Legislature, the objects and reasons of the Act of 1986 it was repeatedly held that the said Act was enacted to provide for the better protection of the interests of the consumers against their exploitation by the traders and manufacturers of the consumer goods, and to help consumers in getting justice and fair treatment in the matter of goods and services purchased and availed by them in a market dominated by large trading and manufacturing bodies.

13. After several years of passing of the CP Act 1986, still many shortcomings in the said Act were noticed while administering various provisions of the said Act. Hence, the CP Act 1986 was repealed and the CP Act, 2019 came to be re-enacted. The statement of objects and reasons for re-enacting the said Act of 2019 reads as under:-

> **"1.** The Consumer Protection Act, 1986 (68 of 1986) was enacted to provide for better protection of the interests of consumers and for the purpose of making provision for establishment of consumer protection councils and other authorities for the settlement of consumer disputes, etc. Although, the working of the consumer dispute redressal agencies has served the purpose to a considerable extent under the said Act, the disposal of cases has not been fast due to various constraints. Several shortcomings have been noticed while administering the various provisions of the said Act.
>
> **2.** Consumer markets for goods and services have undergone drastic transformation since the enactment of the Consumer Protection Act in 1986. The modern market place contains a plethora of products and services. The emergence of global supply chains, rise in international trade and the rapid development of e-commerce have led to new delivery systems for goods and services and have provided new options and opportunities for consumers. Equally, this has rendered the consumer vulnerable to new forms of unfair trade and unethical business practices. Misleading advertisements, tele- marketing, multi-level marketing, direct selling and e-commerce pose new challenges to consumer protection and will require

> appropriate and swift executive interventions to prevent consumer detriment. Therefore, it has become inevitable to amend the Act to address the myriad and constantly emerging vulnerabilities of the consumers. In view of this, it is proposed to repeal and re-enact the Act."

14. It is trite to say that a reference to statement of objects and reasons is permissible for understanding the background, the antecedent state of affairs, the surrounding circumstances in relation to the statute, and the evil which the statute had sought to remedy.[*] As discernible from the statement of objects and reasons for re-enacting the CP Act, 2019, there were certain shortcomings found in the CP Act 1986 while administering the said Act, and at the same time, due to the emergence of global supply chains, rise in international trade and rapid development of e-commerce leading to new systems for goods and services, new options and opportunities had become available to the consumers. However, new forms of unfair trade and unethical business practices also came to be developed, which made the consumers more vulnerable. Misleading advertisements, telemarketing, multi-level marketing, e-commerce posed new challenges, which necessitated the Legislature to re-enact the Act.

15. There was not a whisper in the statement of objects and reasons either of the CP Act, 1986 or 2019 to include the Professions or the Services provided by the Professionals like Advocates, Doctors etc. within the purview of the Act. It is very well accepted proposition of the fact that Professionals could not be called Businessmen or Traders, nor Clients or Patients be called Consumers. It is also required to be borne in mind that the terms 'business' or 'trade' having a commercial aspect involved, could not be used interchangeably with the term 'Profession' which normally would involve some branch of learning or science. Profession as such would require knowledge of an advanced type in a given field of learning or science, or learning gained by a prolonged course of specialized study. As per Black's Law Dictionary, 11th Edition, "Profession" means "a vocation requiring advanced education and training; especially one of the three traditional Professions- Law, Medicine and the Ministry." "Professional" means "someone who

---

[*] ***State of West Bengal vs. Subodh Gopal Bose & Others, AIR 1954 SC 92***

belongs to a learned profession or whose occupation requires a high level of training and proficiency."

16. According to Rupert M. Jackson and John L. Powell,* the Occupations which are regarded as Professions have four characteristics, viz.,

(i) the nature of the work which is skilled and specialized and a substantial part is mental rather than manual;

(ii) commitment to moral principles which go beyond the general duty of honesty and a wider duty to community which may transcend the duty to a particular client or patient;

(iii) professional association which regulates admission and seeks to uphold the standards of the profession through professional codes on matters of conduct and ethics; and

(iv) high status in the community.

17. As observed in ***Indian Medical Association*** (supra) :-

> **"22.** In the matter of professional liability professions differ from other occupations for the reason that professions operate in spheres where success cannot be achieved in every case and very often success or failure depends upon factors beyond the professional man's control. In devising a rational approach to professional liability which must provide proper protection to the consumer while allowing for the factors mentioned above, the approach of the courts is to require that professional men should possess a certain minimum degree of competence and that they should exercise reasonable care in the discharge of their duties. In general, a professional man owes to his client a duty in tort as well as in contract to exercise reasonable care in giving advice or performing services."

18. In view of the above, a "Profession" would require advanced education and training in some branch of learning or science. The nature of work is also skilled and specialised one, substantial part of which would be mental rather than manual. Therefore, having regard to the nature of work of a professional, which requires high level of education, training and proficiency and which involves skilled and

* **"Jackson and Powell on Professional Liability" 2nd supplement to the 7th edition**

specialized kind of mental work, operating in the specialized spheres, where achieving success would depend upon many other factors beyond a man's control, a Professional cannot be treated equally or at par with a Businessman or a Trader or a Service provider of products or goods as contemplated in the CP Act. Similarly, the services rendered by a Businessman or a Trader to the consumers with regard to his goods or products cannot be equated with the Services provided by a Professional to his clients with regard to his specialized branch of profession. The legislative draftsmen are presumed to know the law and there is no good reason to assume that the legislature intended to include the Professions or the Professionals or the services provided by the professionals within the ambit of the CP Act. Any interpretation of the Preamble or the scheme of the Act for construing 'Profession' as 'Business' or 'Trade'; or 'Professional' as 'service provider' would be extending the scope of the Act which was not intended, rather would have a counter productive effect. We are therefore of the considered opinion that the very purpose and object of the CP Act 1986 as re-enacted in 2019 was to provide protection to the consumers from the unfair trade practices and unethical business practices only. There is nothing on record to suggest that the Legislature ever intended to include the Professions or the Professionals within the purview of the Act.

19. One should also not lose sight of the fact that the other object of the Act was to provide to the consumers timely and effective administration and settlement of their disputes. If the services provided by all the Professionals are also brought within the purview of the Act, there would be flood-gate of litigations in the commissions/forums established under the Act, particularly because the remedy provided under the Act is inexpensive and summary in nature. Consequently, the very object of providing timely and effective settlement of consumers' disputes arising out of the unfair trade and unethical business practices would be frustrated.

20. We may clarify at this juncture that we do not propose to say that the professionals could not be sued or held liable for their alleged misconduct or tortious or criminal acts. In the process of overall depletion and erosion of ethical values and degradation of the professional ethics, the instances of professional misconduct are also on the rise. Undoubtedly, no professional either legal, medical

or any other professional enjoys any immunity from being sued or from being held liable for his professional or otherwise misconduct or other misdeeds causing legal, monetary or other injuries to his clients or the persons hiring or availing his services. The fact that professionals are governed by their respective Councils like Bar Councils or Medical Councils also would not absolve them from their civil or criminal liability arising out of their professional misconduct or negligence. Nonetheless, as discussed hereinabove, we are of the opinion that neither the Professions nor the Professionals were ever intended to be brought within the purview of the CP Act either of 1986 or 2019.

21. Of course, we are conscious of the decision in ***Indian Medical Association vs. V.P. Shantha & Others*** (supra), in which a three-Judge Bench of this Court has held *inter alia* that the wide amplitude of the definition of 'service' in the main part of Section 2(1)(o) would cover the services rendered by Medical Practitioners within the said Section 2(1)(o). However, in our humble opinion, the said decision deserves to be revisited having regard to the history, object, purpose and the scheme of the CP Act and in view of the opinion expressed by us hereinabove to the effect that neither the "Profession" could be treated as "business" or "trade" nor the services provided by the "Professionals" could be treated at par with the services provided by the Businessmen or the Traders, so as to bring them within the purview of the CP Act .

22. At this juncture, we may rely upon Order VI Rule 2 of the Supreme Court Rules which reads as under: -

> **"ORDER VI, Rule 2.-**
>
> Where in the course of the hearing of any cause, appeal or other proceeding, the Bench considers that the matter should be dealt with by a larger Bench, it shall refer the matter to the Chief Justice, who shall thereupon constitute such a Bench for the hearing of it."

23. The said Rule has been interpreted in ***Triveniben vs. State of Gujarat***[6]**,** in which it has been observed that: -

6 [1989] 1 SCR 509 : (1989) 1 SCC 678

> **"35.** This is undoubtedly a salutary rule, but it appears to have only a limited operation. It apparently governs the procedure of a smaller Bench when it disagrees with the decision of a larger Bench. If the Bench in the course of hearing of any matter considers that the matter should be dealt with by a larger Bench, it shall refer the matter to the Chief Justice. The Chief Justice shall then constitute a larger Bench for disposal of the matter. This exercise seems to be unnecessary when a larger Bench considers that a decision of a smaller Bench is incorrect unless a constitutional question arises".

24. In view of the above, we are of the opinion that the decision of the three-judge bench, in case of ***Indian Medical Association vs. V.P. Shantha*** (supra) deserves to be revisited and considered by a larger bench. We, therefore refer the matter to Hon'ble the Chief Justice of India for His Lordship's consideration.

25. This takes us to the next question. Even if, it is held that the CP Act applies to the "Professions" and the "Professionals," the next question that falls for our consideration is whether the Legal Profession is *sui generis* or is different from the other Profession, particularly from the Medical Profession because the NCDRC in the impugned order has relied upon the decision in case of ***Indian Medical Association vs. V.P. Shantha*** (supra) for bringing the Advocates within the purview of the CP Act.

26. As observed in ***Byram Pestonji Gariwala vs. Union Bank of India and Others***[7], the Indian legal system is the product of history. It is rooted in our soil; nurtured and nourished by our culture, languages and traditions; fostered and sharpened by our genius and quest for social justice; reinforced by history and heritage. After the attainment of independence and the adoption of the Constitution of India, judicial administration and the constitution of the law courts remained fundamentally unchanged. The concept, structure and organisation of courts, the substantive and procedural laws, the adversarial system of trial and other proceedings and the function of judges and lawyers remained basically unaltered and rooted in the common law traditions

7 [1991] Supp. 1 SCR 187 : (1992) 1 SCC 31

in contradistinction to those prevailing in the civil law or other systems of law. Resultantly, the role, status and capacity of an advocate to represent his client has also remained by and large unaltered.

27. This Court in ***R. Muthukrishnan vs. Registrar General, High Court of Judicature at Madras***[8]**,** delineating the unique nature of the legal profession and of the services rendered by the lawyers, observed thus:

> **"16.** The legal profession cannot be equated with any other traditional professions. It is not commercial in nature and is a noble one considering the nature of duties to be performed and its impact on the society. The independence of the Bar and autonomy of the Bar Council has been ensured statutorily in order to preserve the very democracy itself and to ensure that judiciary remains strong. Where the Bar has not performed the duty independently and has become a sycophant that ultimately results in the denigrating of the judicial system and judiciary itself. There cannot be existence of a strong judicial system without an independent Bar.
>
> **17.** It cannot be gainsaid that lawyers have contributed in the struggle for independence of the nation. They have helped in the framing of the Constitution of India and have helped the courts in evolving jurisprudence by doing hard labour and research work. The nobility of the legal system is to be ensured at all costs so that the Constitution remains vibrant and to expand its interpretation so as to meet new challenges.
>
> **18.** It is basically the lawyers who bring the cause to the Court are supposed to protect the rights of individuals of equality and freedom as constitutionally envisaged and to ensure the country is governed by the rule of law. Considering the significance of the Bar in maintaining the rule of law, right to be treated equally and enforcement of various other fundamental rights, and to ensure that various

8 [2019] 1 SCR 589 : (2019) 16 SCC 407

institutions work within their parameters, its independence becomes imperative and cannot be compromised. The lawyers are supposed to be fearless and independent in the protection of rights of litigants. What lawyers are supposed to protect, is the legal system and procedure of law of deciding the cases.

19. Role of the Bar in the legal system is significant. The Bar is supposed to be the spokesperson for the judiciary as Judges do not speak. People listen to the great lawyers and people are inspired by their thoughts. They are remembered and quoted with reverence. It is the duty of the Bar to protect honest Judges and not to ruin their reputation and at the same time to ensure that corrupt Judges are not spared. However, lawyers cannot go to the streets or go on strike except when democracy itself is in danger and the entire judicial system is at stake. In order to improve the system, they have to take recourse to the legally available methods by lodging complaint against corrupt Judges to the appropriate administrative authorities and not to level such allegation in the public. Corruption is intolerable in the judiciary.

20. The Bar is an integral part of the judicial administration. In order to ensure that judiciary remains an effective tool, it is absolutely necessary that the Bar and the Bench maintain dignity and decorum of each other. The mutual reverence is absolutely necessary. The Judges are to be respected by the Bar, they have in turn equally to respect the Bar, observance of mutual dignity, decorum of both is necessary and above all they have to maintain self-respect too.

21. It is the joint responsibility of the Bar and the Bench to ensure that equal justice is imparted to all and that nobody is deprived of justice due to economic reasons or social backwardness. The judgment rendered by a Judge is based upon the dint of hard work and quality of the arguments that are advanced before him by the lawyers. There is no room for arrogance either for a lawyer or for a Judge.

> **22.** There is a fine balance between the Bar and the Bench that has to be maintained as the independence of the Judges and judiciary is supreme. The independence of the Bar is on equal footing, it cannot be ignored and compromised and if lawyers have the fear of the judiciary or from elsewhere, that is not conducive to the effectiveness of the judiciary itself, that would be self-destructive."

28. In ***State of U.P and Others vs. U.P. State Law Officers Association and Others***[9]**,** it was observed thus: -

> **"14.** Legal profession is essentially a service-oriented profession. The ancestor of today›s lawyer was no more than a spokesman who rendered his services to the needy members of the society by articulating their case before the authorities that be. The services were rendered without regard to the remuneration received or to be received. With the growth of litigation, lawyering became a full-time occupation and most of the lawyers came to depend upon it as the sole source of livelihood. The nature of the service rendered by the lawyers was private till the Government and the public bodies started engaging them to conduct cases on their behalf."

29. It is thus well recognized in catena of decisions that the legal profession cannot be equated with any other traditional professions. It is not commercial in nature but is essentially a service oriented, noble profession. It cannot be gainsaid that the role of Advocates is indispensable in the Justice Delivery System. An evolution of jurisprudence to keep our Constitution vibrant is possible only with the positive contribution of the Advocates. The Advocates are expected to be fearless and independent for protecting the rights of citizens, for upholding the Rule of law and also for protecting the Independence of Judiciary. People repose immense faith in the Judiciary, and the Bar being an integral part of the Judicial System has been assigned a very crucial role for preserving the independence of the Judiciary, and in turn the very democratic set up of the Nation. The Advocates

9 [1994] 1 SCR 348 : (1994) 2 SCC 204

are perceived to be the intellectuals amongst the elites and social activists amongst the downtrodden. That is the reason they are expected to act according to the principles of *uberrima fides* i.e., the utmost good faith, integrity, fairness and loyalty while handling the legal proceedings of his client. Being a responsible officer of the court and an important adjunct of the administration of justice, an Advocate owes his duty not only to his client but also to the court as well as to the opposite side.

30. The legal profession is different from the other professions also for the reason that what the Advocates do, affects not only an individual but the entire administration of justice, which is the foundation of the civilized society. It must be remembered that the legal profession is a solemn and serious profession. It has always been held in very high esteem because of the stellar role played by the stalwarts in the profession to strengthen the judicial system in the country. Their services in making the judicial system efficient, effective and credible, and in creating a strong and impartial Judiciary, which is one of the three pillars of the Democracy, could not be compared with the services rendered by other professionals. Therefore, having regard to the role, status and duties of the Advocates as the professionals, we are of the opinion that the legal profession is *sui generis* i.e unique in nature and cannot be compared with any other profession.

31. The next question that falls for our consideration is whether a service hired or availed of an Advocate could be said to be the service under a "contract of personal service?"

32. At the outset, it may be stated that in the Indian Courts, various sobriquets or epithets like pleaders, advocates, lawyers, vakils, counsels, attorneys etc. are being used interchangeably to describe the Legal Practitioners, may be because various Acts like Legal Practitioners Act, 1879, Bombay Pleaders Act, 1920, Indian Bar Councils Act, 1926 were in force during pre-independence era. However, on the Advocates Act, 1961 having come into force, the provisions of the said Acts stood repealed as per Section 50 of the Advocates Act. The Advocates Act 1961 was enacted to amend and consolidate the law relating to legal practitioners and to provide for the constitution of Bar Councils and an All-India Bar.

33. The Advocates Act defines "Advocate" separately from "Legal Practitioner" -

> "2(1)(a) - "advocate" means an advocate entered in any roll under the provision of this Act;"

Section 2(1)(i) defines "legal practitioner' as under: -

> "2(1)(i) - "Legal Practitioner" means an advocate or vakil of any High Court, a pleader, mukhtar or revenue agent;"

34. Advocate is included in the definition of "Legal Practitioner" but legal practitioner is not included in the definition of "Advocate." Advocate is one who has been entered in any roll under the provisions of the Advocates Act. If we glean over the provisions of the Advocates Act, 1961, it appears that the said Act was enacted to amend and consolidate the law relating to legal practitioners and to provide for the constitution of Bar Councils and an All-India Bar. As per Section 16 thereof, there are only two classes of Advocates, namely Senior Advocates and other Advocates. As per Section 29, there is only one class of persons entitled to practice the profession of law, namely Advocates, and as per Section 30, every advocate whose name is entered in the State roll is entitled as of right to practice in all Courts including the Supreme Court and before any Tribunal or any other authority or person before whom such advocate is by or under any law for the time being in force entitled to practice. The disciplinary powers for taking action against the Advocates and impose punishment for their misconduct have been conferred upon the State Bar Councils and Bar Council of India as the case may be under the Chapter V of the Advocates Act. The Bar Council of India Rules framed under the Advocates Act lay down the restrictions on the Senior Advocates, and also lay down the standards of professional conduct and etiquette, which include the duties of the advocate to the Court, to the client, to the opponent and to the colleagues. Thus, comprehensive provisions are contained in the Advocates Act, 1961 and the Bar Council of India Rules framed thereunder, to take care of the professional misconduct of the Advocates, and prescribing the punishments if they are found guilty of professional or other misconduct by the Disciplinary Committees of the State Bar Council or the Bar Council of India as the case may be.

35. In the light of the above provisions of the Advocates Act, let us consider some of the provisions of the Consumer Protection Act 1986/2019. The definition of "Service" contained in Section 2(1)(o) of the CP Act 1986 and in Section 2(42) of the CP Act 2019 is the same which reads as under: -

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

36. There is slight difference in the definition of 'Deficiency' in Section 2(1)(g) of 1986 Act and Section 2(11) of 2019 Act. The same is reproduced as under: -

> **Section 2(1)(g) of CP Act, 1986**:-
>
> "Section 2(1) (g) -"Deficiency" means any fault imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service."
>
> **Section 2(11) of CP Act, 2019:-**
>
> Section 2(11) - "Deficiency " means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service and includes-
>
> (i) any act of negligence or omission or commission by such person which causes loss or injury to the consumer; and

(ii) deliberate withholding of relevant information by such person to the consumer"

37. As can be seen, the definition of 'service' is divided into three parts – the first part is explanatory in nature and defines service to mean service of any description which is made available to the potential users; the second part is inclusionary part, which expressly includes the provision of facilities in connection with the specific services; and the third part is exclusionary part which excludes rendering of any service free of charge or under a contract of personal service. Therefore, let us consider whether the service rendered by the Advocates practising Legal Profession could be said to be the Service under "a contract of personal service," so as to exclude it from the definition of "Service" contemplated under the Act.

38. The question as to whether a given relationship should be classified as a contract '*for services'* as opposed to a contract '*of service'* [i.e. contract '*of personal service'*] is a vexed question of law and is incapable of being answered with exactitude without reference to the underlying facts in any given case. This Court in ***Dharangadhra Chemical Works Ltd. vs. State of Saurashtra and Others***[10], recognized this position of law and held that "the correct method of approach, therefore, would be to consider whether having regard to the nature of the work there was due control and supervision by the employer". In the words of Fletcher Moulton, L.J. at P.549 in Simmons v. Heath Laundry Company [(1924) 1 KB 762] which were cited with approval in ***Dharangadhra Chemcial Works Ltd.*** (supra):

> "In my opinion it is impossible to lay down any rule of law distinguishing the one from the other. It is a question of fact to be decided by all the circumstances of the case. The greater the amount of direct control exercised over the person rendering the services by the person contracting for them the stronger the grounds for holding it to be a contract of service, and similarly the greater the degree of independence of such control the greater the probability that the services rendered are of the nature of professional services and that the contract is not one of service."

10 [1957] 1 SCR 152 : AIR 1957 SC 264

39. What is sought to be opined in the above cases is that the greater the amount of direct control exercised over the person rendering the services by the person contracting for them, the stronger would be the grounds for holding it to be a "contract of service." Hence, let us see whether in case of Advocate-Client relationship, the client exercises direct control over the Advocate who is rendering his legal professional services to him. At this stage, it would be beneficial to refer to some of the important provisions of Code of Civil Procedure, which pertain to the representation of party-litigant through Advocates. Order III of CPC pertains to the Recognized Agents and Pleaders. As per the definition of "Pleader" contained in Section 2 (15) CPC, 'Pleader means any person entitled to appear and plead for another in Court and includes an Advocate, a Vakil and an Attorney of a High Court. Rule1 of Order III states that any appearance, application or act in or in any Court may be made or done by the party in person, or by his recognized agent or by a pleader appearing, applying or acting, as the case may be on his behalf. Rule 4 of the said Order III states that no pleader shall act for any person in any Court, unless he has been appointed for the purpose by such person by document in writing signed by such person or by his recognized agent or by some other person duly authorized by or under a power of attorney to make such appointment. It further provides that every such appointment shall be filed in Court and shall for the purposes of sub-rule (1) be deemed to be in force until determined with the leave of the Court by writing signed by the client or the pleader as the case may be and filed in the Court, or until the client or the pleader dies, or until all proceedings in the suit are ended so far as regards the client. Such document regarding appointment of a pleader is known in common parlance as "Vakalatnama", the proforma of which has been appended in Form No.19 of the 'Appendix H' to CPC. The said form is reproduced here under: -

"**No.19**

VAKALATNAMA

In the Court ……..Suit/Miscellaneous case/ Civil Appeal/ Execution Case No…….. of 19…./20…,fixed for Plaintiff/ Appellant/ Applicant/ D.H…….. Defendant/ Respondent/

Opposite Party/ J.D. Vakalatnama of Plaintiff/ Appellant Applicant/ D.H./ Defendant/ Respondent/ Opposite Party/ J.D.

In the case noted above Sri……, each of Sarvasri……. Advocate, is hereby appointed as counsel, to appeals, plead and act on behalf of the undersigned, in any manner, he thinks it proper, either himself or through any other Advocate, and in particular to do the following, namely, -

To receive any process of Court (including any notice from any appellate or revisional Court), to file any applications, petitions or pleadings, to file, produce or receive back any documents, to withdraw or compromise the proceedings, to refer to any matter to arbitration, to deposit or withdraw any moneys, to execute any decree or order, to certify payment, and receive any money due under such decree or order.

The undersigned should be bound by all whatsoever may be done in the aforesaid case (including any appeal or revision therefrom) for and on behalf of the undersigned by any of the said counsel.

Signature…… Attesting Witness:

Name in full ……. Name in full…….

Date ……. Address……

Date…….

Accepted/ Accepted on the strength of the signature of the attesting witnesses."

40. A conjoint reading of the provisions contained in Order III CPC and Chapter IV of Advocates Act pertaining to right to practise, there remains no shadow of doubt that an advocate whose name has been entered in the State roll is entitled as of right to practise in all Courts, however he can act for any person in any Court only when he is appointed by such person by executing the document called "Vakalatnama." Such Advocate has certain authorities by virtue of such "Vakalatnama" but at the same time has certain duties too, i.e. the duties to the courts, to the client, to the opponent and to

the colleagues as enumerated in the Bar Council of India Rules. In this regard, this Court in ***Himalayan Cooperative Group Housing Society vs. Balwan Singh and Others***[11] has made very apt observations, which are reproduced hereunder-

> **22.** Apart from the above, in our view lawyers are perceived to be their client's agents. The law of agency may not strictly apply to the client-lawyer's relationship as lawyers or agents, lawyers have certain authority and certain duties. Because lawyers are also fiduciaries, their duties will sometimes be more demanding than those imposed on other agents. The authority-agency status affords the lawyers to act for the client on the subject-matter of the retainer. One of the most basic principles of the lawyer-client relationship is that lawyers owe fiduciary duties to their clients. As part of those duties, lawyers assume all the traditional duties that agents owe to their principals and, thus, have to respect the client's autonomy to make decisions at a minimum, as to the objectives of the representation. Thus, according to generally accepted notions of professional responsibility, lawyers should follow the client's instructions rather than substitute their judgment for that of the client. The law is now well settled that a lawyer must be specifically authorised to settle and compromise a claim, that merely on the basis of his employment he has no implied or ostensible authority to bind his client to a compromise/settlement. To put it alternatively that a lawyer by virtue of retention, has the authority to choose the means for achieving the client's legal goal, while the client has the right to decide on what the goal will be. If the decision in question falls within those that clearly belong to the client, the lawyer's conduct in failing to consult the client or in making the decision for the client, is more likely to constitute ineffective assistance of counsel.
>
> **23.** The Bar Council of India Rules, 1975 (for short "the BCI Rules"), in Part VI Chapter II provide for the "Standards

11 [2015] 4 SCR 616 : (2015) 7 SCC 373

of Professional Conduct and Etiquette" to be observed by all the advocates under the Advocates Act, 1961 (for short "the 1961 Act"). In the Preamble to Chapter II, the BCI Rules provide as follows:

> "An advocate shall, at all times, comport himself in a manner befitting his status as an officer of the Court, a privileged member of the community, and a gentleman, bearing in mind that what may be lawful and moral for a person who is not a member of the Bar, or for a member of the Bar in his non-professional capacity may still be improper for an advocate. *Without prejudice to the generality of the foregoing obligation, an advocate shall fearlessly uphold the interests of his client and in his conduct conform to the rules hereinafter mentioned both in letter and in spirit*. The rules hereinafter mentioned contain canons of conduct and etiquette adopted as general guides; yet the specific mention thereof shall not be construed as a denial of the existence of others equally imperative though not specifically mentioned."

24. The Preamble makes it imperative that an advocate has to conduct himself and his duties in an extremely responsible manner. They must bear in mind that what may be appropriate and lawful for a person who is not a member of the Bar, or for a member of the Bar in his non-professional capacity, may be improper for an advocate in his professional capacity.

25. Section II of the said Chapter II provides for duties of an advocate towards his client. Rules 15 and 19 of the BCI Rules, have relevance to the subject-matter and therefore, they are extracted below:

> "**15.** It shall be the duty of an advocate fearlessly to uphold the interests of his client by all fair and honourable means without regard to any unpleasant consequences to himself or any

> other. He shall defend a person accused of a crime regardless of his personal opinion as to the guilt of the accused, bearing in mind that his loyalty is to the law which requires that no man should be convicted without adequate evidence.
>
> *****
>
> **19.** An advocate shall not act on the instructions of any person other than his client or his authorised agent."

26. While Rule 15 mandates that the advocate must uphold the interest of his clients by fair and honourable means without regard to any unpleasant consequences to himself or any other. Rule 19 prescribes that an advocate shall only act on the instructions of his client or his authorised agent"

41. When we examine the relationship between an Advocate and his Client from this point of view, the following unique attributes become clear:

1) Advocates are generally perceived to be their client's agents and owe fiduciary duties to their clients.

2) Advocates are fastened with all the traditional duties that agents owe to their principals. For example, Advocates have to respect the client's autonomy to make decisions at a minimum, as to the objectives of the representation.

3) Advocates are not entitled to make concessions or give any undertaking to the Court without express instructions from the Client.

4) It is the solemn duty of an Advocate not to transgress the authority conferred on him by his Client.

5) An Advocate is bound to seek appropriate instructions from the Client or his authorized agent before taking any action or making any statement or concession which may, directly or remotely, affect the legal rights of the Client.

6) The Advocate represents the client before the Court and conducts proceedings on behalf of the client. He is the only link between the court and the client. Therefore, his responsibility is onerous. He is expected to follow the instructions of his client rather than substitute his judgment.

Thus, a considerable amount of direct control is exercised by the Client over the manner in which an Advocate renders his services during the course of his employment. All of these attributes strengthen our opinion that the services hired or availed of an Advocate would be that of a contract 'of personal service' and would therefore stand excluded from the definition of "service" contained in the section 2(42) of the CP Act, 2019. As a necessary corollary, a complaint alleging "deficiency in service" against Advocates practising Legal Profession would not be maintainable under the CP Act, 2019.

42. In that view of the matter, we summarize our conclusions as under-

(i) The very purpose and object of the CP Act 1986 as re-enacted in 2019 was to provide protection to the consumers from unfair trade practices and unethical business practices, and the Legislature never intended to include either the Professions or the services rendered by the Professionals within the purview of the said Act of 1986/2019.

(ii) The Legal Profession is *sui generis i.*e. unique in nature and cannot be compared with any other Profession.

(iii) A service hired or availed of an Advocate is a service under "a contract of personal service," and therefore would fall within the exclusionary part of the definition of "Service" contained in Section 2 (42) of the CP Act 2019.

(iv) A complaint alleging "deficiency in service" against Advocates practising Legal Profession would not be maintainable under the CP Act, 2019.

43. The impugned judgment passed by the NCDRC is set aside. The Appeals stand allowed accordingly.

44. Before parting, we appreciate and place on record the valuable assistance and services rendered by the learned Senior Advocate Mr. V. Giri appointed as an Amicus Curiae in these matters.

Bar of Indian Lawyers Through its President Jasbir Singh Malik v. D. K. Gandhi PS National Institute of Communicable Diseases and Anr.

Pankaj Mithal, J.

1. The moot question which emanates from the proceedings at hand, if put in a different way, is whether the legal services of the lawyer availed of by the client would be covered under the Consumer Protection Act, 1986 (now Consumer Protection Act, 2019).

2. It is well recognized that the profession of law is a noble profession having an element of duty towards the court. Lawyers perform multi-faceted duties. They not only have a duty towards the client or their opponents but they have a paramount duty to assist the court as well. In a way, they are officers as well as ambassadors of the court. Thus, in rendering such kind of a duty to enable the courts to come to a just conclusion, it may be possible that at times, the lawyers may earn displeasure of the client while assisting the court.

3. The profession of law, as such, is regarded as *sui generis* i.e. which is unique. It is distinct from all other professions and is one of its own kind.

4. It is in the above context that we have to examine if the legislature in enacting the Consumer Protection Act intended to include the services rendered by professionals, particularly by lawyers to their clients, within the ambit of the Consumer Protection Act.

5. The laws intended to protect consumers, as opposed to traders are comparatively of recent origin.

6. The General Assembly of United Nations upon extensive discussions with Governments of various nations submitted draft guidelines for consumer protection to the United Nations Economic and Social Council (UNESCO) in the year 1983 *inter alia* providing for the following:

a) To assist countries in achieving or maintaining adequate protection for their population as consumers;

b) To facilitate production and distribution patterns responsive to the needs and desires of the consumers;

c) To encourage high levels of ethical conduct for those engaged in the production and distribution of goods and services to consumers;

d) To assist countries in curbing abusive business practices by all enterprises at the national and international levels which adversely affect consumers;

e) To facilitate the development of independent consumer groups;

f) To further international cooperation in the field of consumer protection;

g) To encourage the development of market conditions which provide consumers with greater choice at lower prices;

7. A bare reading of the above guidelines reveals that the same have been formulated taking into account the interests and needs of consumers in various countries, particularly developing countries, in order to level out economic imbalances between consumers and service providers.

8. The General Assembly of the United Nations Organization by Resolution No. 39/248 dated 9.4.1985 provided a framework known as Consumer Protection Resolution to which our country is also a signatory.

9. It is on the basis of the above Consumer Protection Resolution of the UNO that the Consumer Protection Act, 1986 in India was enacted with the objective to save the consumers from unfair conduct and practices of traders.

10. In ***Om Prakash vs. Assistant Engineer, Haryana Agro Industries Corporation Ltd. and Anr.***[1] a three Judge Bench vide paragraph 7 described the Objects and Reasons for the enactment of the Consumer Protection Act as under:

> "**7**. From the Statement of Objects and Reasons of the Act, it appears that the purpose of the Act is to protect the interest of the consumer and to provide 'the right, to seek redressal against unfair trade practices or unscrupulous exploitation of consumers'…"

11. Recently, in ***Laureate Buildwell (P) Ltd. vs. Charanjeet Singh,***[2] a three Judge Bench of this Court, highlighting the objectives of the Consumer Protection Act held as follows:

---

1 [1994] 3 SCR 463 : (1994) 3 SCC 504

2 [2021] 6 SCR 673 : (2021) 20 SCC 401

> "26. If one also considers the broad objective of the Consumer Protection Act, which is to provide for better protection of the interests of consumers and for that purpose, provide for the establishment of Consumer Councils and other authorities for the settlement of consumer disputes and for matters connected therewith, as evident from the Statement of Objects and Reasons of the Act. The Statement further seeks inter alia to promote and protect the rights of consumers such as—
>
> "2. … (a) the right to be protected against marketing of goods which are hazardous to life and property;
>
> (b) the right to be informed about the quality, quantity, potency, purity, standard and price of goods to protect the consumer against unfair trade practices;
>
> (c) the right to be assured, wherever possible, access to variety of goods at competitive prices;
>
> (d) the right to be heard and to be assured that consumers' interests will receive due consideration at appropriate forums;
>
> (e) the right to seek redressal against unfair trade practices or unscrupulous exploitation of consumers; and
>
> (f) right to consumer education."

12. The idea behind the Consumer Protection Act from 1986 till today has been to help the consumers get justice and fair treatment in matters of goods and services purchased and availed of by them in a market dominated by large trading and manufacturing bodies. The entire Act revolves around the consumer and is designed to protect their interests.

13. Leaving aside India for the time being, if we consider the international practice with regard to the inclusion of lawyer-client relationships within the ambit of consumer protection laws, we would notice that the practice of common law countries evidences the exclusion of lawyers from the umbrella of consumer protection laws. It must be kept in mind that the consumer protection laws of almost all countries are based upon the same resolution of

the UNO which forms the foundation for framing the Consumer Protection Act in India.

14. To illustrate, Consumer Protection Act, 1999 enacted by the Parliament of Malaysia vide Section 2 (2)(e) specifically provides that the said act shall not apply, *inter alia*, to services provided by professionals who are regulated by any law. It may be worth noting that the services of the professionals such as lawyers in Malaysia are governed by Legal Profession Act, 1976. Therefore, by virtue of the above Section 2 (2) (e), the services provided by the professionals such as lawyers stand excluded from the application of the Consumer Protection Act of Malaysia.

15. This legislative intent of excluding regulated professions from the ambit of Consumer Protection Law has been continuing for over a considerable period of time now. Aspects of such exclusion find mention in the DIRECTIVE 2011/83/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 25 OCTOBER 2011 on consumer rights where it has been said that provisions of the said directive should not apply to regulated professions.

16. At the heart of this legislative intent to exempt such 'regulated professions' from the scope of consumer laws lies the fact that such professions are *sui generis* and paramount as services of general interest.

17. The recent DIRECTIVE (EU) 2018/958 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 28 June 2018 bears a befitting testimony to this continuing intent of lawmakers and the desire to safeguard regulated professions from any outside interreference.

18. Similarly, Section 188 of the Consumer Protection Act (Québec) provides that:

> "For the purpose of this division, every person offering or providing any of the services referred to in section 189 [covering contracts of service] is considered to be a merchant, except: … (i) persons who are **members of a professional order governed by the Professional Code (chapter C-26)."**
>
> (emphasis supplied)

19. In a similar vein, States in the USA also exempt legal professionals from consumer laws.

20. Illustratively, the Code of Maryland, Title 13, dealing with minimum standards of consumer protection in Maryland, in Subtitle 1 § 13-104 explicitly states that:

> "this title does not apply to: (1) The professional services of a certified public accountant, architect, clergyman, professional engineer, lawyer…."
>
> (emphasis supplied)

21. The Code of the District of Columbia, while highlighting the powers of the consumer protection agency in Title 28 Chapter 39 § 28–3903 states in clause (c) that:

> "(c) The Department may not: … **(2) apply the provisions of section §28-3905 [Consumer Protection Complaints] to: … (C) professional services of clergymen, lawyers, and Christian Science practitioners engaging in their respective professional endeavors";**
>
> (emphasis supplied)

22. The Australian High Court, the highest court of the land in Australia, in ***D'Orta-Ekenaike vs. Victoria Legal Aid***[3] has emphatically echoed the need for such exemption and its direct bearing on the justice delivery system. The reasoning of its majority is instructive and deserves to be quoted in full:

> "84. **To remove the advocate's immunity would make a significant inroad upon what we have earlier described as a fundamental and pervading tenet of the judicial system. That inroad should not be created.** There may be those who will seek to characterize the result at which the Court arrives in this matter as a case of lawyers looking after their own, whether because of personal inclination and sympathy, or for other base motives. But the legal principle which underpins the Court's conclusion

3 (2005) 223 CLR 1

> is fundamental. Of course, there is always a risk that the determination of a legal controversy is imperfect. And it may be imperfect because of what a party's advocate does or does not do. The law aims at providing the best and safest system of determination that is compatible with human fallibility. But underpinning the system is the need for certainty and finality of decision. The immunity of advocates is a necessary consequence of that need".
>
> (emphasis supplied)

23. It would be trite to mention here that the legal profession is a regulated profession in India. The Advocates Act, 1961 regulates the conduct of lawyers in India and is a complete code in itself. Given the regulation, India also needs to bring the working of its regulated professions in alignment with international practices.

24. In the era of globalization, though I am conscious that a law has to be applied in context with the prevailing situation of the country, nonetheless, to have a uniform application of any law particularly the one which has been framed on the basis of the common resolution of the UNO, laws must have a uniform application in all nations. It is, therefore, essential that the consumer protection laws in all countries may somewhat have universal application and be confined to 'consumers' only i.e. to the persons who buys any goods for consideration or hires or avails of any service for consideration, impliedly excluding the professional services especially that of a lawyer whose profession is *sui generis*.

25. In doing so, in India also the services of professionals more particularly that of lawyers have to be excluded from consumer protection law in accordance with the intention expressed in enacting the same.

26. With the above additional reasoning supplementing the various other grounds for excluding the services of the professionals from the Consumer Protection Act, I am in agreement with the opinion expressed by my esteemed sister and I am of the view that the legislature in India as in some other countries, had not intended to include the services rendered by the professionals especially the lawyers to their client within the purview of Consumer Protection Act, 1986 and re-enacted in 2019.

27. Accordingly, the view taken by the NCDRC to the effect that in respect of deficiency in service rendered by the lawyers, a complaint in Consumer Protection Act, 1986 would be maintainable, is incorrect and stands overruled.

28. The impugned order of the National Consumer Disputes Redressal Commission dated 06.08.2007 is hereby set aside.

29. The appeals stand disposed of accordingly.

Result of the case: In the judgment of Bela M. Trivedi, J.:
Appeals allowed.

In the judgment of Pankaj Mithal, J.:
Appeals disposed of.

†*Headnotes prepared by:* Nidhi Jain

[2024] 6 S.C.R. 530 : 2024 INSC 381

Abhimeet Sinha & Ors.
v.
High Court of Judicature at Patna & Ors.

(Writ Petition (C)No. 251 of 2016)

06 May 2024

[Hrishikesh Roy* and Prashant Kumar Mishra, JJ.]

Issue for Consideration

Issue arose as regards the constitutionality of the Rules-Bihar Superior Judicial Service Rules, 1951 and Gujarat State Judicial Service Rules, 2005 stipulating minimum qualifying marks in the viva voce test as a part of the selection criteria for appointment to the District Judiciary in the States of Bihar and Gujarat respectively; whether the prescription of minimum marks for viva voce, in contravention of the law laid down by this Court in All India Judges (2002) which accepted certain recommendations of the Shetty Commission; whether the prescription of minimum marks for viva voce, violative of Articles 14 and 16 of the Constitution of India; whether the selection process in Bihar vitiated given the moderation of marks and corrective steps; whether non-consultation with the Public Service Commission as required u/Art. 234 of the Constitution for selection to the post of Civil Judge in the State of Gujarat would render the Gujarat Rules, 2005 (as amended in 2011) void.

Headnotes†

Judiciary – Selection of judicial officers – District Judge (Entry Level) by direct recruitment from the Bar (2015 Advertisement) for the State of Bihar and the post of Civil Judge (2019 and 2022 Advertisement) for the State of Gujarat – Rule 8(5) of Gujarat Rules, 2005 and Clause 11 of the Bihar Rules prescribing minimum qualifying marks in the viva voce test as a part of the selection criteria for appointment, if in contravention of the law laid down by this Court in *All India Judges (2002) case which accepted certain recommendations of the Shetty Commission:

Held: Prescription of minimum qualifying marks for interview is permissible – It is not in violation of *All India Judges (2002) case which accepted certain recommendations of the Shetty Commission – Judgment in *All India Judges (2002) case is sub-

* Author

silentio on the aspect of minimun marks for interview – It cannot be considered as having authoritatively pronounced on doing away with minimum cut-off marks in the interview segment – In case of inconsistency between the Shetty Commission recommendations and the Rules, primacy should be given to the existing statutory Rules – In the absence of existing Rules, the High Court should follow the directions of this Court – Furthermore, even though the statutory Rules can be supplemented to fill in gaps, the High Court cannot act contrary to the Rules – Prescription of minimum cut-off in the recruitment process was notified for information of the candidates well before the commencement of the selection process under the Patna High Court – By virtue of the decision in *All India Judges (2002), it cannot be said that adequate elbow room was not available to prescribe qualifying marks in the interview segment to ensure the selection of the best possible person – Thus, the prescription of minimum marks in the Rules is not found to be in contravention of the judgment in the *All-India Judges (2002) – Bihar Superior Judicial Service Rules, 1951 – Gujarat State Judicial Service Rules, 2005. [Paras 102, 37, 39, 40, 48, 49]

Judiciary – Selection of judicial officers – Rule 8(5) of Gujarat Rules, 2005 and Clause 11 of the Bihar Rules prescribing minimum qualifying marks in the viva voce test as a part of the selection criteria for appointment, if violative of Art. 14 and 16:

Held: Validity challenge to Clause 11 of the Bihar Rules, 1951 and s. 8(3) of the Gujarat Rules, 2005 (as amended in 2011) prescribing minimum marks for interview are repelled – Recruitment procedure should not only test the candidate's intellect but also their personality, for appointment to posts in the higher judiciary - In recruitment for judicial vacancies oral interviews play an important role to test the personality and caliber of the aspirant to judicial posts – High scores for the written test by itself do not determine the merit and suitability of an aspirant – An interview can also provide a medium for marginalized candidates to showcase their talents in ways which a written test may not possibly allow – Members of the interview board can provide a level-playing field during the interview process for those who come from a disadvantaged background, to assess the true merit and potential of the interviewees – Solution lies in the interviewing members being aware and sensitive to alleviate bias in the process of interview – However, the apprehension of bias cannot be the sole ground to strike down a

Rule – Overriding weightage to the viva voce segment has been frowned upon but the prescription of reasonable qualifying cut-off marks is not considered discriminatory – Minimum cut-off of 20% for the Bihar recruitment and 40% for the Gujarat recruitment , cannot be considered to provide a high threshold if one keeps in mind that the recruitment is for selection of judicial officers – Thus, the concerned recruitment Rules not unconstitutional – There is no violation of the legitimate expectation of the writ petitioners so as to fail the test u/Art. 14 –Bihar Superior Judicial Service Rules, 1951 –Gujarat State Judicial Service Rules, 2005. [Paras 102, 57, 60, 63, 65, 66, 68]

Judiciary – Selection of judicial officers – District Judge (Entry Level) by direct recruitment from the Bar for the State of Bihar and recuitment to the post of Civil Judge in the State of Gujarat – Rules stipulating minimum qualifying marks in the viva voce test as a part of the selection criteria for appointment – Selection process, if vitiated given the moderation of marks and corrective steps:

Held: Selection process in the State of Bihar found to be legally valid and are upheld – On examination of the subsequent steps taken by the High Court after conducting the exam, no mala fide or statutory violation found so as to vitiate the entire selection process in Bihar – High Court was vested with requisite powers to provide clarification, relaxation and even exemption in the interest of the Judiciary – Words "relaxation" as also the general power to issue orders/directions in case of any "difficulty", would permit the process of moderation in order to provide for the adequate number of candidates for the interview test – In a moderation exercise, addition of marks and/or deduction of marks is envisaged – If certain resolvable deficiencies are noticed in the selection process, the High Court has the elbow room to take corrective measures – Process of moderation can always be exercised bona fide if it uniformly benefits all the candidates – It cannot be said that corrective measures were not bonafide – Process adopted is consistent with the Rules – Chart produced makes it clear that moderation, in fact, benefited the writ petitioners to facilitate their participation in the interview round – Decision of the Selection Committee was approved by the Full Court for increasing the number of candidates available for final selection – As regards, Gujarat cases, besides making vague allegations, nothing presented to demonstrate any malicious intent or bias on the part of the selection Committee in

the interview process – Thus, the selection process not found to be tainted – Bihar Superior Judicial Service Rules, 1951 – Gujarat State Judicial Service Rules, 2005. [Paras 102, 80, 75, 76, 78, 79]

Constitution of India – Art.234 – Appointment of persons other than district judges to the judicial service – Selection to the post of Civil Judge in the State of Gujarat – Non-consultation with the Public Service Commission as required u/Art. 234 for amending the selection Rules-Gujarat Rules, 2005(as amended in 2011) stipulating minimum viva voce marks, if rendered void:

Held: Non-consultation with the Public Service Commission would not render the Gujarat Rules, 2005 (as amended in 2011) void – In Gujarat, when the Public Service Commission did not wish to be consulted under the proviso to Art. 320(3), in the absence of such consultation, it cannot be held that the Gujarat Rules, 2005 suffers from any legal or constitutional invalidity particularly when the Rules were framed with due consultation with the High Court – Consultation with the High Court as envisaged in Art. 234 is to preserve the constitutional mandate of the independence of the judiciary – Consultation with the High Court must be given primacy in matters of judicial recruitment as compared to the consultation with the Public Service Commission – Governor is under no compulsion to consult the Public Service Commission in case the Commission does not wish to be consulted – Gujarat Rules cannot, thus, be declared to be void on this count – Status which the High Court as an institution enjoys in the constitutional scheme and the expertise and the experience which it possesses of judicial services, justify a place of primacy being assigned to the High Court in the process of consultation – Thus, it is mandatory to consult the High Court for framing Rules and any Rule enacted by the State Government without such consultation is ultra vires. [Paras 102, 97,87, 93, 96]

Judiciary – Recruitment/Selection of judicial officers – Certain directions/suggestions as regards the conduct of judicial service examinations:

Held: Processes such as moderation should be preferably set out in the Rules to ensure transparency and avoid dilemmas in the selection process – Moderation of marks for bonafide reasons should be permitted when the authority needs to do so, to address the issue of non availability of adequate number of candidates for consideration in the interview segment – Furthermore, there

is absence of a designated authority that can be approached by the candidates – Concerned High Court to notify a designated authority for a given recruitment process with clearly defined roles, functions and responsibilities – Candidates can approach such a designated authority to seek clarification in case of any doubt and this would assuage the anxiety of the candidates to a considerable extent – Designation of those in the interview panel, be provided for appropriately, in the Rules – Basic outline of the syllabus for the proposed test to be provided, to help candidates from diverse backgrounds to plan and prepare for the proposed examination even before the examination notification is released – Also the recruitment process must adhere to the timeline but if there is any special and unavoidable exigency, the stakeholders should be kept informed with due promptitude – Said judgment to be brought to the notice of the Hon'ble Chief Justices of all the High Courts in India to enable all the stakeholders to take consequential steps. [Paras 100, 101]

Constitution of India – Art. 32 – Writ petition – Maintainability – Principle of estoppel – Applicability – Matter pertaining to constitutionality of the Rules stipulating minimum qualifying marks in the viva voce test as a part of the selection criteria for appointment to the District Judiciary in the States of Bihar and Gujarat – Plea of the various High Courts that after having participated in the recruitment process, the writ petitioners having not succeeded, cannot turn around and challenge the recruitment process or the vires of the Recruitment Rules; that all candidates knew about the prescription of minimum marks for viva voce, well before the selection process commenced and the principle of estoppel would operate against the unsuccessful challengers whereas the writ petitioners pleaded that the principle of estoppel not applicable since glaring illegalities in the selection process; and that the estoppel is not applicable when the arbitrariness affects fundamental rights u/Art. 14 and 16:

Held: Principle of estoppel cannot override the law – In matters like this, to non-suit the writ petitioners at the threshold would hardly be reasonable when the alleged deficiencies in the process could be gauged only by participation in the selection process. [Paras 19-20]

Constitution of India – Art. 32 – Principle of res judicata – Instant matter as regards constitutionality of the Rules stipulating minimum qualifying marks in the viva voce test as

a part of the selection criteria for appointment to the District Judiciary in the States of Bihar and Gujarat respectively – Validity of r. 8(3) of the Gujarat Rules, 2005 (as amended) was earlier challenged before the Supreme Court, and this Court transferred the said writ petition to the Gujarat High Court wherein the High Court upheld the validity of the amendment prescribing 40% cutoff marks for interview, and Special Leave Petition thereagainst was dismissed – Principle of res judicata, if attracted:

Held: Principle of res judicata cannot however be applied stricto sensu – It was not the same writ petitioner who has approached this Court under Art. 32 – Court here is confronted with a different set of facts, another set of litigants who have raised additional contentions – Thus, the submission that the writ petition should not be dismissed on the ground of res-judicata, is reasonable – In any case, the dismissal of Special Leave Petition has no consequence on the question of law. [Para 23]

Judiciary – Selection of judicial officers – *All India Judges (2002) matter which accepted certain recommendations of the Shetty Commission while modifying or rejecting a few others – Explained.[Paras 33, 34, 36, 37, 49]

Judiciary – Selection of judicial officers – Recommendations of the Shetty Commission – Genesis – Explanation of. [Paras 25-32]

Judiciary – Selection of judicial officers – Recommendations of the Shetty Commission – Implementation of:

Held: On facts, minimum cut-off as per the amended Rules was 55% and this was further lowered to 50% as per proviso to Clause 10 of Bihar Rules, 1951 – There cannot be selective implementation of the Shetty Commission recommendation, for doing away with the cut-off marks in the viva voce segment – Candidates cannot be allowed to "approbate and reprobate" in the same breath – It would be impermissible to seek dilution of the Shetty Commission recommended criteria, only for the viva voce segment– Shetty Commission recommended that the degree of subjectivity and arbitrariness should be reduced and the selection should be transparent. [Paras 30, 31]

Gujarat State Judicial Service Rules, 2005 – r. 8(5) – Viva voce – Object – Explained. [Para 67]

Case Law Cited

All India Judges Association and Others v. Union of India and Others* [2002] 2 SCR 712 : **(2002) 4 SCC 247 – explained and relied on.

Dr. (Major) Meeta Sahai v. Union of India **(2019) 20 SCC 17 – relied on.**

Sivananda CT v. High Court of Kerala [2023] 11 SCR 674 **: (2024) 3 SCC 799;** *Hemani Malhotra v. High Court of Delhi* [2008] 5 SCR 1066 **: (2008) 7 SCC 11;** *Ramesh Kumar v. High Court of Delhi* [2010] 2 SCR 256 **: (2010) 3 SCC 104 – distinguished.**

AC Thalwal v. High Court of Himachal Pradesh [2000] Supp. 2 SCR 428 **: (2000) 7 SCC 1 – held inapplicable.**

N. Devasahayam v. State of Madras, **AIR (1958) Mad 53 – disapproved.**

Raj Kumar v. Shakti Raj [1997] 1 SCR 1159 **: (1997) 9 SCC 527;** *Basheshar Nath v. Commr. of Income-tax, Delhi* [1959] Supp. 1 SCR 528 **: AIR (1959) SC 149;** *Olga Tellis v. Bombay Municipal Corporation* [1985] Supp. 2 SCR 51 **: AIR (1986) SC 180;** *Nar Singh Pal v. Union of India and others* [2000] 2 SCR 752 **: (2000) 3 SCC 588;** *Madan Lal v. State of J&K* [1995] 1 SCR 908 **: (1995) 3 SCC 486;** *Dhananjay Malik v. State of Uttaranchal* [2008] 3 SCR 1035 **: (2008) 4 SCC 171;** *Ramesh Chandra Shah v. Anil Joshi* [2013] 5 SCR 687 **: (2013) 11 SCC 309;** *Anupal Singh v. State of Uttar Pradesh* [2019] 12 SCR 1071 **: (2020) 2 SCC 173;** *Krishna Rai v. Banaras Hindu University* [2022] 7 SCR 1104 **: (2022) 8 SCC 713;** *Daryao v. State of UP* [1962] 1 SCR 574 **: AIR (1961) SC 1457;** *Inderjit Singh Sodhi v. Chairman, Punjab State Electricity Board* [2020] 11 SCR 966 **: (2021) 1 SCC 198;** *All India Judges Association v. Union of India* [1991] Supp. 2 SCR 206 **: (1992) 1 SCC 119;** *All India Judges Association v. Union of India* [1993] Supp. 1 SCR 749 **: (1993) 4 SCC 288;** *Pradeep Kumar Rai v. Dinesh Kumar Pandey* [2015] 6 SCR 825 **: (2015) 11 SCC 493;** *Dr. Kavita Kamboj v. High Court of Punjab and Haryana and Others* [2024] 2 SCR 1136 **: 2024 SCC OnLine SC 254;** *Syed T.A.*

Naqshbandi v. State of J&K [2003] Supp. 1 SCR 114 **: (2003) 9 SCC 592;** *Rakhi Ray v. High Court of Delhi* [2010] 2 SCR 239 **: (2010) 2 SCC 637;** *Mahinder Kumar v. High Court of Madhya Pradesh* [2013] 13 SCR 884 **: (2013) 11 SCC 87;** *Sasidhar Reddy v. State of AP* [2013] 12 SCR 985 **: (2014) 2 SCC 158;** *Salam Samarjeet Singh v. High Court of Manipur at Imphal* [2016] 9 SCR 771 **: (2016) 10 SCC 484;** *Shayara Bano v. Union of India* [2017] 9 SCR 797 **: (2017) 9 SCC 1;** *Joseph Shine v. Union of India* [2018] 11 SCR 765 **: (2019) 3 SCC 39;** *Lok Prahari v. State of UP* 2016 (4) SCR 1026 **: (2016) 8 SCC 389***; E.P. Royappa v. State of T.N* [1974] 2 SCR 348 **: (1974) 4 SCC 3;** *Ajay Hasia v. Khalid Mujib Sehravardi* [1981] 2 SCR 79 **: (1981) 1 SCC 722;** *Association for Democratic Reforms v. Union of India* [2024] 2 SCR 420 **: 2024 INSC 113;** *Lila Dhar v. State of Rajasthan* [1982] 1 SCR 320 **: (1981) 4 SCC 159;** *KH Siraj v. High Court of Kerela* [2006] Supp. 2 SCR 790 **: (2006) 6 SCC 395;** *State of UP v. Rafiquiddin* [1988] 1 SCR 794 **: (1987) Supp SCC 410;** *Taniya Malik v. Registrar General of the High Court of Delhi* [2018] 10 SCR 348 **: (2018) 14 SCC 129;** *Pranav Verma v. The Registrar General of High Court* [2019] 15 SCR 43 **: (2020) 15 SCC 377;** *B.K. Pavitra v. Union of India* [2017] 1 SCR 631 **: (2019) 16 SCC 129;** *Manish Kumar Shahi v. State of Bihar* **(2010) 12 SCC 576;** *Ashok Kumar Yadav v. State of Haryana* [1985] Supp. 1 SCR 657 **: (1985) 4 SCC 417;** *Inderpreet Singh Kahlon v. State of Punjab* [2006] Supp. 1 SCR 772 **: (2006) 11 SCC 356;** *Sanjay Singh v. UP Public Service Commission* [2007] SCR 1 235 **: (2007) 3 SCC 720;** *State of Bihar v. Bal Mukund Sah* [2000] 2 SCR 299 **: (2000) 4 SCC 640;** *State of U.P. v. Manbodhan Lal Srivastava* [1958] 1 SCR 533 **: AIR (1957) SC 912;** *Rajendra Singh Verma v. Lt. Governor (NCT of Delhi)* [2011] 12 SCR 496 **: (2011) 10 SCC 1;** *Supreme Court Advocateson-Record Association v. Union of India* [1993] Supp. 2 SCR 659 **: (1993) 4 SCC 441;** *Hari Dutt Kainthla v. State of Himachal Pradesh* [1980] 3 SCR 364 **: (1980) 3 SCC 189;** *Goa Judicial Officer's Association v. State of Goa* **(1997) 4 BOM CR 372;** *Malik Mazhar v. U.P Public Service Commission* [2006] 3 SCR 689 **: (2006) 9 SCC 507 – referred to.**

Books and Periodicals Cited

Michael J Sandel, The Tyranny of Merit: What's become of the Common Good? (Allen Lane,2020) **– referred to.**

Websites

Diksha Sanyal and Shriyam Gupta, "Discretion and Delay: Challenges in Becoming a District and Civil Judge" (December 2018) <https://vidhilegalpolicy.in/research/2019-1-7-discretionand-delaychallenges-of-becoming-a-district-and-civil-judge/> accessed 3rd May, 2024 **– referred to.**

List of Acts

Constitution of India; Bihar Superior Judicial Service Rules, 1951; Bihar Superior Judicial (Amendment) Rules 2013; Gujarat State Judicial Service Rules, 2005; Gujarat Judicial Services Recruitment Rules,1961; Gujarat State Judicial Service (Amendment) Rules, 2011; Gujarat State Judicial Service (Amendment Rule, 2014); Gujarat Public Service Commission (Exemption from Consultation) Regulations,1960.

List of Keywords

Recruitment; Selection of judicial officers; District Judge (Entry Level) by direct recruitment from Bar; Post of Civil Judge; Minimum qualifying marks in the viva voce test; District Judiciary in the States of Bihar and Gujarat; All India Judges (2002) case; Recommendations of the Shetty Commission; Moderation of marks and corrective steps; Non-consultation with the Public Service Commission; Minimun marks for interview; Inconsistency between the Shetty Commission recommendations and the Recruitment Rules; Statutory Rules, supplemented to fill in gaps; Recruitment process; Uniformity in service conditions of judicial officers; Viva voce test as part of selection criteria for appointment; Legitimate expectation; Public Service Commission; Writ petition, maintainability; Principle of estoppel; Arbitrariness; Principle of res judicata.

Case Arising From

CIVIL ORIGINAL JURISDICTION: Writ Petition (Civil) No.251 of 2016

(Under Article 32 of The Constitution of India)

With

Writ Petition (C) Nos. 663 and 735 of 2021, 1073 and 1146 of 2022 and 785 of 2023

Appearances for Parties

Ajit Kumar Sinha, Rameshwar Singh Malik, Yatindra Singh, Sr. Advs., Deepak Goel, Mithilesh Kumar Jaiswal, Ms. Alka Goyal, Ms. Urvashi Sharma, Ms. Harshita Maheshwari, Kumar Kartikay, Mrs. Archana Preeti Gupta, Naveen Soni, Vipin Kumar Saxena, Jitesh Malik, B C Bhatt, Mrs. Leelawati Suman, N D Kaushik, Satish Kumar, Anil Kumar Sahu, Arvind Gupta, Prakash Gautam, Sujeet Kumar, Arunansh Bharti Goswami, Brahma Prakash, Pawanshree Agrawal, Sunil Kumar Jain, Ms. Rashika Swarup, Rishabh Sancheti, Ms. Padma Priya, Garvit Sharma, K. Paari Vendhan, Ms. Shraddha Deshmukh, Arjun Singh Bhati, Gurdeep Singh, Gautam Narayan, Ms. Asmita Singh, Harshit Goel, Sujay Jain, K. Prasad, Purvish Jitendra Malkan, Ms. Dharita Purvish Malkan, Alok Kumar, Kush Goel, Ms. Deepa Gorasia, Ms. Deepanwita Priyanka, Ms. Prerna Singh, Guntur Prabhakar, Guntur Pramod Kumar, Lalit Kumar, Devendra Singh, Mritunjay Kumar Sinha, Mrs. Vimal Sinha, Abhay Kumar, B S Rajesh Agrajit, Ms. Rajbala, Ms. Meetu Goswami, Shyamal Kumar, Krishnavani Sharma, Hitesh Kumar Sharma, Akhileshwar Jha, Sandeep Singh Dingra, Ms. Tanishka Grover, Amit Kumar Chawla, Verendra Mohan, Ms. Niharika Dewivedi, Ranjit Kumar Sharma, Amit Pawan, Ratnesh Kumar Shukla, Purushottam Sharma Tripathi, Vimal Dubey, Mukesh Kumar Singh, Ravi Chandra Prakash, Ms. Vani Vyas, Anup Kumar, M/S. Parekh & Co., Advs. for the appearing parties.

Judgment / Order of the Supreme Court

Judgment

Hrishikesh Roy, J.

1. The common challenge in these six writ petitions filed under Article 32 of the Constitution of India is to the constitutionality of the Rules stipulating minimum qualifying marks in the *viva voce* test as a part of the selection criteria for appointment to the District Judiciary in the States of Bihar and Gujarat respectively. The writ petitioners have approached this Court alleging a violation of their fundamental rights under Articles 14 and 16 contained in Part III of the Constitution of India. The specific consideration to be made in these matters is whether prescribing minimum qualifying marks for viva voce is in contravention of the law laid down by this Court

in *All India Judges Association and Others vs. Union of India and Others*[1] (for short "All India Judges (2002)) which accepted certain recommendations of Justice KJ Shetty Commission (for short "Shetty Commission"). The recruitment pertains to the selection of judicial officers of different ranks and respective selection cycles i.e. *District Judge (Entry Level)* by direct recruitment from the Bar (2015 Advertisement) for the State of Bihar and the post of *Civil Judge* (2019 and 2022 Advertisement) for the State of Gujarat. The Individual facts in the writ petitions may differ but the legal arguments broadly overlap. Wherever necessary, the individual facts and legal arguments will be dealt with separately.

I. FACTS

2. The writ petition i.e. WP(C) No.251 of 2016 (considered here as the lead case), relates to the recruitment of District Judge (Entry Level) direct from Bar Examination (2015), in the State of Bihar. The recruitment process is governed by the *Bihar Superior Judicial Service Rules, 1951* (for short "Bihar Rules, 1951") as amended, from time to time. The prayer in the writ petition is to strike down Clause 11 of Appendix "C" of *Bihar Superior Judicial (Amendment) Rules 2013* which is projected to be contrary to the recommendation of the Shetty Commission, as accepted by this Court in *All India Judges (2002)* in paragraphs 37 and 38. The second prayer in the writ petition is to set aside the selection for Bihar Superior Judicial Service, under the Advertisement No. 1/2015 as published vide notice dated 08.04.2016.

3. The connected matters i.e. WP(C) No.663/2021, WP(C) No.735/2021, WP(C) No.1073/2022, WP(C) No.1146/2022 and WP(C) No.785/2023 relate to the recruitment to the post of Civil Judge in Gujarat. The writ petitioners therein challenged the vires of the amended Rule 8(3) of the *Gujarat State Judicial Service Rules, 2005* (for short "Gujarat Rules, 2005"), which was amended by notification dated 23.6.2011 as well as the corresponding clauses of the advertisement of the respective recruitment years. The ancillary prayer is to prepare a fresh select list based on the aggregate marks of written examination and interview, irrespective of the cut-off marks prescribed.

1 [2002] 2 SCR 712 : (2002) 4 SCC 247

A) Bihar Selection Process (2015)

4. The main writ petition is filed by 46 unsuccessful candidates who participated in the District Judges (Direct from Bar) Examination in 2015. The *Bihar Rules,1951* came into force on 31.7.1951. The amendment to the *Bihar Rules, 1951* was brought by a notification dated 3.4.2013, which, *inter alia*, provided for a screening test, a written main test, and also an interview for selection to the Bihar Superior Judicial Service. The total marks in the main written examination and the interview were 250 and 50 marks respectively. To qualify, candidates had to secure a minimum of 150 marks out of 250 marks (60%) in the main written examination and at least 10 out of the total 50 marks (20%), in the viva voce segment.

4.1. Following the further amendment on 3.12.2014 of the *Bihar Rules, 1951*, a proviso was added to clause 10 of Appendix C, granting power to the High Court to relax the qualifying marks in aggregate. Clauses 10,11 and 12 of the appendix C of *Bihar Rules, 1951* provided as follows: -

> "10. A candidate will qualify for interview only if he secures minimum 45% marks in each paper and 55% marks in aggregate in the written test.
>
> Provided that in case the number of qualified candidates are not adequate, the High Court may, in the interest of judiciary, relax the qualifying marks in aggregate as may be required but this relaxation will not be below 50% in aggregate.
>
> 11. The candidates must secure at least 10 marks out of 50 marks in the interview.
>
> 12. The candidate must pass both the written test and interview before he is considered for appointment."

4.2. With the above prescription of marks, the advertisement No. 1/2015 was issued in January 2015 by the Patna High Court to fill up 99 vacancies in the Bihar Superior Judicial Service. The advertisement provided in clauses 6(d) and (e) that the candidates will have to secure at least 10 out of 50 marks, in the interview segment.

4.3. Responding to the above advertisement in January 2015, around 6771 candidates appeared in the preliminary

examination held on 22.03.2015. Those securing 176 marks or more in the screening test were cleared to participate in the main examination. Some unsuccessful candidates had filed writ petitions before the High Court alleging discrepancies in the framing of questions and revised model answers. Eventually, on the High Court's interim order, those with a reduced score of 173 or more marks in the screening test were also "provisionally" allowed to write the main examination. The main written test was held on 12.7.2015 where around 1000 candidates (qualifying in the preliminary examination) appeared.

4.4. However, only 3 candidates were found to have obtained the qualifying marks i.e. above 55 % in the written examination. Accordingly, the five Judges of the Selection and Appointment Committee of the Patna High Court proposed moderation of marks in their meeting dated 8.1.2016. This led to adding of 4% marks in paper 1 and 6% marks in paper 2 in the respective scores of the individual candidates.

4.5. Despite the above moderation exercise, very few candidates could secure the notified 55% marks in aggregate. To address the issue, the Selection and Appointment Committee permitted a relaxation of 5% in the aggregate in the meeting held on 13.1.2016 by exercising options under the proviso to Clause 10 of Appendix – 'C' of the *Bihar Rules 1951*. The Full Court endorsed the relaxation of aggregate marks at 50% in the written test. With this, 81 candidates who had scored 50% in the written test qualified for the interview, and their results were declared on 22.1.2016.

4.6. In the meantime, the Patna High Court on 8.1.2016 dismissed the Writ Petition (CWJC No.11731/2015) of candidates who were earlier allowed by way of an ad-interim order, to appear in the main written exam with the declaration that candidates who had secured less than 176 marks in the screening test, are ineligible to take part in the main examination. Accordingly, 5 such candidates who scored less than 176 marks were disqualified on 1.2.2016. During the verification process, 3 other shortlisted candidates were found to be not practicing as lawyers and were thus found ineligible. Finally, 69 candidates were cleared for the interview which was conducted in February

2016, by a Committee of 5 Judges of the High Court. Following the viva voce test, after computing the average of the marks awarded by the individual members of the Board, it was found that only 9 candidates had secured the minimum 10 marks out of 50, in the interview segment. The Full Court of the Patna High Court in their meeting held on 5.4.2016 then approved the appointment of these 9 candidates and they were appointed on 17.5.2016.

4.7. Challenging the selection process in Bihar, 46 candidates who did not qualify for not securing the minimum 10 marks in the interview, moved this Court. As noted earlier, the validity of Clause 11 of Appendix – C of the *Bihar Rules 1951* (amended on 3.4.2013) is challenged in this writ petition. Notice was issued in the Writ Petition on 2.5.2016 by this Court.

4.8. When the reply was being prepared by the Patna High Court to respond to the writ petition, certain discrepancies were noticed during decoding, tabulation, and collation of marks in the main examination and the Registrar General of the High Court on 1.6.2016 apprised the Selection and Appointment Committee, about the errors. Then the Chairperson of the Committee in consultation with the Acting Chief Justice of the Patna High Court ordered for fresh tabulation. Following detailed verification of the records, it was found that 3 more candidates had obtained the qualifying marks in the written examination and as such were eligible to appear in the interview segment. It was simultaneously found that 4 candidates earlier shown to have qualified, had not actually obtained the qualifying marks. Following the resultant course corrections, 3 more candidates were allowed to participate in the interview and a corrigendum was issued for the 4 candidates, who were wrongly shown to have been qualified. Then the interview of the 3 candidates was held on 19.7.2016 but none of them secured the minimum 10 marks prescribed in the interview segment. Two serving judicial officers had applied under the 25% quota meant for Bar members and under a judicial order passed by the High Court on 9.8.2016, both judicial officers were permitted to participate in the selection process, without requiring them to resign from their job. One of them had not secured the required minimum marks for appearing in the interview segment and accordingly,

only one person (Sunil Kumar Singh) was called for the interview on 31.8.2016. But since the concerned candidate failed to secure the minimum 10 marks in the interview, he was also not selected.

B) Developments Post-2015 Selection in Bihar

5. In August 2016, the Patna High Court issued another advertisement for filling up posts for District Judge (Entry Level), for 98 vacancies (including 90 unfilled vacancies of 2015 examination). In the meantime, the proposal was made to amend the *Bihar Rules 1951* and delete the cut-off requirement of minimum 10 marks, for qualifying in the interview. The August 2016 advertisement did not provide for a minimum qualifying mark in the interview segment. The appropriate in-tune amendment of the Rules was approved by the Full Court on 22.6.2016. Thereafter, the *Bihar Rules 1951* was again amended on 16.2.2017 and Clauses 10,11 and 12 of Appendix-C of the Bihar Rules 1951 were substituted as follows: -

> "10. The ratio of marks of theory papers and viva-voce will be 80% and 20%.
>
> 11. A candidate will be called for viva-voce only if he secures at least 45% in each theory paper.
>
> 12. A candidate will qualify for appointment if the candidate secures at least 45% marks in each theory paper and 50% in aggregate in written test (theory papers) and viva-voce, taken together."

5.1. Following the aforesaid amendment, the 2016 recruitment process was conducted and 98 selected candidates were appointed in March 2018, against the advertised vacancies.

5.2. Further examinations were held under the aforenoted amended Rules through the advertisement in the year 2019 for 16 vacancies against which, 12 candidates were appointed. In the next examination conducted in 2020, 16 more candidates were selected and appointed.

5.3. After the above recruitment process in the years 2016, 2019 and 2020 respectively, on 6.1.2020 the *Bihar Rules 1951* were amended again by which Clause 12 of Appendix-C was substituted. The amended Clause 12 reads as under:-

> **"12.** A candidate will qualify for appointment if the candidate secures at least 45% marks in each theory paper, 30% marks in viva-voce/interview and 50% marks in aggregate in written test (theory papers) and viva-voce taken together."

5.4. With the above amendment carried out on 6.1.2020, a candidate aspiring for selection in the Bihar Superior Judicial Service is required to score 30% marks in the interview and 50% in the aggregate of written test and viva-voce test taken together, to qualify for recruitment.

C) Gujarat Selection Process

6. For the batch of five writ petitions relating to the selection process in Gujarat, the relevant facts are taken from the WP(C) 663/2021. The salient facts on which the challenge is raised, are substantially similar in these cases. The *Gujarat Rules, 2005*, substituted the erstwhile *Gujarat Judicial Services Recruitment Rules,1961*. The *Gujarat Rules,2005* came to be amended firstly by the *Gujarat State Judicial Service (Amendment) Rules, 2011* dated 23.6.2011 and secondly by the *Gujarat State Judicial Service(Amendment Rule,2014)* dated 9.9.2014. As per the amendments, Rule 8 provided for competitive examination for recruitment to the respective cadres of District Judge and Civil Judge. The following was the prescription for the competitive examination:

> "8. Competitive examination:-
>
> (1) the competitive examination for direct recruitment to the cadre of District Judge or Civil Judges shall consist of:-
>
> (i) a written examination of not less than two hours of duration with 200 maximum marks; and
>
> (ii) viva voce test of maximum 50 marks.
>
> (2) the candidates who obtain fifty percent (50%) or more marks in the competitive examination conducted for direct recruitment to the cadre of District Judge or Civil Judge, shall be eligible for being called for Viva-voce;

Provided that the candidates belonging to Schedule Castes and Scheduled Tribes who obtain forty five percent (45%) or above marks, in the written examination, conducted for direct recruitment to the cadre of Civil Judges, shall be eligible for being called for Viva-Voce.

(3) the minimum qualifying marks in the Viva-voce conducted for direct recruitment to the cadre of District Judge and Civil Judge, shall be forty percent (40%) of marks.

(4) merit list shall be prepared on the basis of total marks obtained in the written examination and Viva-Voce Test (interview).

(5) the object of the Viva-Voce Test (interview) is to assess the suitability of the candidate for the cadre by judging the mental alertness, knowledge of law, clear and logical exposition, balance of judgment, skills, attitude, ethics, power of assimilation, power of communication, character and intellectual depth and the like, of the candidate.

(6) all necessary procedure not provided for in these rules of recruitment shall be decided by the High Court."

6.1. With the Rules amended as above, an advertisement was issued on 26.8.2019, for recruitment of Civil Judges in Gujarat. The scheme of examination and syllabus was notified for the preliminary examination, main written examination, and the viva-voce test in the advertisement. Under Clause 5 (II) (B), it was specified that the viva-voce test shall be of 50 marks. Under sub-Clause (ii) of Clause 5 (II) (B) the object of the Viva-voce test was indicated as under:

"(II) (B) (i) **** ****

(ii) The object of the Viva-voce Test is to assess the suitability of the Candidate for the cadre by judging the mental alertness, knowledge of law, clear and logical exposition, balance of judgment, skills, attitude, ethics, power of assimilation, power

of communication, character and intellectual depth and the like, of the Candidate."

6.2. It was also specified in the advertisement under sub-Clause (iii) of Clause 5 (II) (B) that for being eligible to be included in the select list, the candidate must obtain a minimum of 40% marks in the viva-voce test.

6.3. On 8.9.2019, Kritika Bodha (WP(C) 663/2021), one of the candidates, submitted her application for selection to the post of Civil Judge. The results of the preliminary exam were declared on 18.12.2019. The main written examination was conducted on 19.1.2020 and the results thereof were published on 24.7.2020, declaring 132 candidates as successful for the interview round. The interview was conducted on 7.3.2021. The last candidate in the general category had 124 marks and the writ petitioner (because of the below 40% viva voce marks), despite getting 135.33 marks, was not selected. The prayer in all five writ petitions is to quash Rule 8(4) of *Gujarat Rules,2005* (as amended in 2011) specifying 40% qualifying marks for viva voce. The related prayers are to quash the selection list and conduct fresh interviews.

II. SUBMISSIONS

7. We have heard learned Senior Counsel, Mr. Ajit Kumar Sinha, Mr. Yatinder Singh, Mr. Rameshwar Singh Malik, and learned counsel, Ms. Shraddha Deshmukh, Mr. Pawanshree Agrawal and Mr. Rishabh Sancheti for the writ petitioners. Learned counsel, Mr. Gautam Narayan, and Mr. Purvish Jitendra Malkan, represented High Courts of Patna and Gujarat respectively.

8. The fundamental challenge in these cases is the prescription of the minimum cut-off in the viva voce segment i.e. 20 per cent for the recruitment by the Patna High Court and 40 per cent for the recruitment under the Gujarat High Court respectively.

9. The learned counsel on behalf of the writ petitioners contend that the selection process is vitiated as the same is in contravention of the law laid down in *All India Judges (2002)* where a three Judges Bench after deliberating on the report dated 11.11.1999 submitted by Shetty Commission, inter alia, in the matter of direct recruitment of judicial officers, opined that subject to various modifications in

the judgment, all other recommendations of the Commission are accepted. As because Shetty Commission while suggesting the procedure for selection of judicial officers had specifically indicated that the interview segment shall carry 50 marks without any minimum cut-off marks, the prescription of minimum marks in the viva-voce test is contended to be arbitrary and unreasonable.

10. According to the learned counsel, the writ petitioners have better aggregate score (written and viva-voce combined), but are deprived of selection only because they failed to secure the qualifying marks in the interview. It is additionally argued that the interview marks are arbitrarily awarded and that is why the Shetty Commission recommended doing away with the cut-off of marks, in the viva-voce segment.

11. Mr. Ajit Kumar Sinha, learned senior counsel appearing in the lead writ petition, highlights the discrepancies in the Bihar selection process. Commenting on the meandering nature of the selection process under the Patna High Court and the decision taken for the moderation of marks and granting further relaxation of 5% in aggregate marks in the written examination, Mr. Sinha argued that moderation of marks should have been considered for the interview segment, as well for facilitating selection of those who scored high marks in the written examination but failed to qualify only for securing the below cut off marks in the interview segment. The learned counsel questions the fairness of the process which needed repeated course correction such as resorting to moderation and the relaxation of aggregate marks in the written test segment, as is clearly admitted in the additional affidavit of the Patna High Court. It is therefore argued that the Court should not only pass appropriate order on the faulty selection process but should also allow appointment on the basis of the aggregate score (written+viva) basis, without enforcing the cut-off marks bar, in the viva segment.

12. According to the petitioner's counsel, even after the declaration of the final result on 8.4.2016, the Selection and Appointment Committee, continued to act till September, 2016, by issuing corrigendum, publishing fresh result of the written examination, conducting interviews for a few candidates and publishing the ultimate result. It is then argued by Mr. Sinha that if the Patna High Court wanted to consider candidates from a larger pool, because of the large number

of vacancies, the relaxation of qualifying marks in the interview segment should have been a natural option.

13. The learned counsel Mr. Pawanshree Agarwal in his turn submits that the interview board members in the Gujarat Selection Board had access to the written marks of the candidates and therefore it was possible for the interview board to arbitrarily disqualify a meritorious candidate, by awarding them less than the qualifying marks. It is also submitted that the Rules were amended in 2011 only with the consultation of the High Court of Gujarat but not the Gujarat Public Service Commission. Therefore, such an amendment violates Article 234 of the Constitution of India.

14. In the same line, Mr. Rishabh Sancheti, learned counsel appearing in the WP(C) No.1146/2022 argued that denial of appointment because of below par score in the viva-voce segment, is discriminatory since such power can be selectively used for knocking out deserving candidates.

15. Projecting the contrary view, the learned counsel representing the High Court of Patna, Mr. Gautam Narayan argued that the High Court in order to make the best selection has the discretion to enforce a stricter criteria than what was prescribed by the Shetty Commission. According to Mr. Narayan, the procedure suggested by the Shetty Commission is only recommendatory. The recommendations of the Shetty Commission according to the learned counsel should be construed as guidelines only. It is submitted that the Patna High Court broadly adhered to the recruitment process for the District Judiciary and only made it slightly more stringent. The objective was to ensure the selection of meritorious judicial officers and ultimately maintain the standard of the District Judiciary. It is also submitted that the writ petitions at the instance of the unsuccessful candidates is not maintainable.

16. Mr. Purvish Malkan, learned counsel for the High Court of Gujarat while adopting the other submissions of Mr. Narayan, argues that the power is vested with the High Court to evolve its own procedure under Articles 233,234 and 235 of the Constitution. With this Mr. Malkan supports the amendment of the Rules by the High Court. The learned counsel refers to the High Court's counter affidavit to contend that the Internal Board members did not have access to the marks in the written test while conducting the viva voce test.

III.ISSUES

17. The issues to be considered here are:

i) Whether the prescription of minimum marks for viva voce is in contravention of the law laid down by this Court in *All India Judges(2002)* which accepted certain recommendations of the Shetty Commission?

ii) Whether the prescription of minimum marks for viva voce is violative of Articles 14 and 16 of the Constitution of India?

iii) Whether the selection process in Bihar is vitiated given the moderation of marks and corrective steps, highlighted by the petitioners in the Bihar Selection process?

iv) Whether non-consultation with the Public Service Commission as required under Article 234 of the Constitution for selection to the post of *Civil Judge* in the State of Gujarat would render the *Gujarat Rules,2005*(as amended in 2011) void?

IV. MAINTAINABILITY

18. At the outset, it is apposite to address the issue of the maintainability of the writ petitions. It is argued by Mr. Gautam Narayan and Mr. Purvish Jitendra Malkan learned counsel that after having participated in the recruitment process, the writ petitioners having not succeeded, cannot turn around and challenge the recruitment process or the vires of the Recruitment Rules. It is submitted that all candidates knew about the prescription of minimum marks for viva voce, well before the selection process commenced and the principle of estoppel will operate against the unsuccessful challengers. On the other hand, the learned counsel representing the writ petitioners argued that the principle of estoppel would have no application when there are glaring illegalities[2] in the selection process. Further, estoppel is not applicable when the arbitrariness affects fundamental rights under Articles 14 and 16 of the Constitution of India[3].

19. As argued by the learned counsel for the High Courts, the legal position is that after participating in the recruitment process, the

2 Raj Kumar v Shakti Raj (1997) 9 SCC 527

3 Basheshar Nath v. Commr. of Income-tax, Delhi, AIR 1959 SC 149; Olga Tellis v. Bombay Municipal Corporation, AIR 1986 SC 180; Nar Singh Pal v. Union of India and Others, 2000 3 SCC 588.

unsuccessful candidates cannot turn around and challenge the recruitment process[4]. However, it is also settled that the principle of estoppel cannot override the law[5]. Such legal principle was reiterated by the Supreme Court in *Dr.(Major) Meeta Sahai Vs. Union of India*[6] where it was observed as under:

> "17. However, we must differentiate from this principle insofar as the candidate by agreeing to participate in the selection process only accepts the prescribed procedure and not the illegality in it. In a situation where a candidate alleges misconstruction of statutory rules and discriminating consequences arising therefrom, the same cannot be condoned merely because a candidate has partaken in it. The constitutional scheme is sacrosanct and its violation in any manner is impermissible. In fact, a candidate may not have locus to assail the incurable illegality or derogation of the provisions of the Constitution, unless he/she participates in the selection process."

20. Guided by the above ratio, in matters like this, to non-suit the writ petitioners at the threshold would hardly be reasonable particularly when the alleged deficiencies in the process could be gauged only by participation in the selection process.

21. The next question is whether the principle of res judicata is attracted in these cases. Mr. Purvish Malkan, learned counsel for the High Court of Gujarat brought to our notice that the validity of Rule 8(3) of the *Gujarat Rules,2005* (as amended on 23.6.2011) was earlier challenged before the Supreme Court in *WP(C) 291 of 2013*. This Court after completion of pleadings transferred the said writ petition to the Gujarat High Court. Thereafter, the Gujarat High Court in a detailed judgment in the Special Civil Application No.8793 of 2015, upheld the validity of the amendment prescribing 40% cut-off marks for interview. The Special Leave Petition arising from the said judgment was dismissed by this Court on 30.1.2017.

---

4 Madan Lal v. State of J&K (1995) 3 SCC 486; Dhananjay Malik v. State of Uttaranchal (2008) 4 SCC 171; Ramesh Chandra Shah v. Anil Joshi (2013) 11 SCC 309; Anupal Singh v State of Uttar Pradesh (2020) 2 SCC 173

5 Krishna Rai v Banaras Hindu University (2022) 8 SCC 713

6 (2019) 20 SCC 17

22. In the above context, a Constitution Bench of this Court in *Daryao v State of UP*[7] *(*for short "Daryao"*)* unanimously held that the principle of res judicata is one of universal application and since the final judgment is binding on the parties thereto, an applicant under Article 226 cannot apply on the same grounds under Article 32, without getting the adverse judgment set aside in appeal. However, a distinction was made between cases where the application under Article 226 has been dismissed on merits and cases where it is dismissed on a preliminary ground. It was further held that an Article 32 petition would not be maintainable on the same facts and the same grounds.

23. The above ratio cannot however be applied stricto sensu in the present facts. This is for the reason that it is not the same writ petitioner who has approached this Court under Article 32 of the Constitution. The Court here is confronted with a different set of facts, another set of litigants who have raised additional contentions. Therefore, the submission of Mr. Pawanshree Agrawal, learned counsel for the writ petitioner that the writ petition should not be dismissed on the ground of res-judicata, is found to be more reasonable. In any case, the dismissal of a Special Leave Petition has no consequence on the question of law[8].

24. Let us now address the fundamental question as to whether prescribing minimum marks for interview contravenes the ratio in *All India Judges (2002).* To do this, it is necessary to bear in mind the following contextual background.

V. GENESIS OF THE SHETTY COMMISSION

25. In 1989, the *All-India Judges' Association* and its working President filed a writ petition under Article 32 of the Constitution of India seeking various reliefs for members of the District Judiciary focusing on uniformity in service conditions. On 13.11.1991, a three-judge bench speaking through Ranganath Misra CJ disposed of the said writ petition in *All India Judges Association v Union of India*[9], after considering, *inter alia*, the issues relating to pay scales and service conditions of the District Judiciary. The Supreme Court directed

7 [1962] 1 SCR 574 : AIR 1961 SC 1457

8 Inderjit Singh Sodhi v. Chairman, Punjab State Electricity Board (2021) 1 SCC 198.

9 [1991] Supp. 2 SCR 206 : (1992) 1 SCC 119

States and Union Territories to separately examine and review the pay structure. Aggrieved by the aforesaid judgment, the Union of India and few State Governments filed review petitions before this Court. In *All India Judges Association v Union of India*[10] (for short "All India Judges (1993)), this Court on 24.8.1993, modified some of the reliefs in the original judgment but, *inter alia,* recommended that the service conditions of judicial officers should be reviewed periodically by an independent Commission exclusively constituted for the purpose. From 1993 onwards, this Court exercising its writ remedy of 'continuing mandamus' had issued multiple directions under the rubric of this case.

26. Pursuant to the aforementioned direction, the Union of India appointed the first National Judicial Pay Commission on 21.3.1996 under the chairmanship of Justice KJ Shetty. Justice Shetty Commission submitted a preliminary report on 31.1.1998 and a final report on 11.11.1999. The terms of reference of the Commission are extracted below:

> "(a) To evolve the principles which should govern the structure of pay and other emoluments of judicial officers belonging to the subordinate judiciary all over the country.
>
> (b) To examine the present structure of emoluments and conditions of service of judicial officers in the States, Union territories taking into account the total packet of benefits available to them and make suitable recommendations having regard, among other relevant factors, to the existing relativities in the pay structure between the officers belonging to subordinate judicial service vis-a-vis other civil servants.
>
> (c) To examine and recommend in respect of minimum qualifications, age of recruitment, *method of recruitment,* etc., for judicial officers. In this context, the relevant provisions of the Constitution and directions of the Supreme Court in All India Judges Association case and other cases may be kept in view.

10 [1993] Supp. 1 SCR 749 : (1993) 4 SCC 288

(d) To examine the work methods and work environment as also the variety of allowances and benefits in kind that are available to judicial officers in addition to pay and to suggest rationalization and simplification thereof with a view to promoting efficiency in judicial administration, optimizing the size of the judiciary etc."

27. The above would indicate that the terms of reference essentially focused on the evolution of principles that would govern the formulation of pay structure and emoluments of judicial officers. Suggestions were also expected on minimum qualifications, age, and "method of recruitment" etc. for judicial officers. The final report submitted on 11.11.1999 focused on the age of retirement, nomenclature for judicial officers, equation of posts, inter-se seniority, the age for direct recruitment, the establishment of *All India Judicial Service*, etc.

28. Before extracting the relevant portion of the Shetty Commission report which inter-alia, prescribed that no cut-off marks should be fixed for the interview segment, a reference to the context is apposite:

> "10.95 We have earlier set out the procedures followed by the High Courts for selecting candidates for direct recruitment. *Most of the High Courts are having only Viva Voce Test.*
>
> 10.96 High Courts of Andhra Pradesh, Allahabad, Jammu & Kashmir, Madhya Pradesh, Orissa, however, have prescribed written test in addition to viva-voce.
>
> 10.97 The Commission has received innumerable complaints that the selection by only viva-voce has more often led to arbitrariness if not whimsical selection, unjust if not unreasonable. With respect to High Courts, we do not want to carry any such impression. But we do feel that there is less transparency and objectivity in the selection process."

29. Since most of the High Courts were selecting candidates based only on the viva voce test without conducting the written test, the absence of transparency and objectivity in the interview process was noticed. The Commission therefore opined that accepting the viva voce as the sole selection mode could lead to arbitrariness. However, this

by itself does not lend any clarity on how prescribing minimum cut-off marks for viva voce together with the written test, could possibly lead to arbitrariness in selection. In order to reduce subjectivity, the Shetty Commission in its subsequent recommendation, delineated the methodology for conducting viva voce as under:

> "10.97. ….We would, therefore, like to recommend the following procedure to reduce degrees of subjectivity and arbitrariness:
>
> (i) There shall be written examination followed by viva-voce.
>
> (ii) Written Examination must carry 200 marks on the subject/subjects prescribed by the High Court. The paper should be of a duration of minimum two hours.
>
> (iii) The cut off marks in the Written Examination should be 60% or corresponding grade for general candidates and 50% or corresponding grade for SC/ ST candidates. Those who have secured the marks above the cut off marks shall be called for viva-voce Test.
>
> (iv) The viva-voce Test should be in a thorough and Scientific Manner and it should be taken anything between 25 and 30 minutes for each candidate. The viva-voce shall carry 50 marks. *There shall be no cut off marks in viva-voce test.*
>
> (v) The merit list will be prepared on the basis of marks/ grades obtained both in the Written Examination and viva-voce."

30. At this point, the fundamental fallacy in the argument of the writ petitioners, as is pointed out by Mr. Gautam Narayan, the learned counsel for the High Court of Patna becomes distinctly discernible. If the above procedure recommended by the Shetty Commission is to be implemented *stricto sensu*, the cut-off marks even for the written examination can never be, below 60%. Therefore, if the recruitment process of the Patna High Court is to be tested on the recommended threshold marks of Shetty Commission i.e. 150 marks out of 250 marks for shortlisting general category candidates in the written exam, none of the writ petitioners would qualify for the viva-

voce segment since they never secured the minimum 60% in the written marks aggregate. In the present case, the minimum cut-off as per the amended Rules was 55% and this was further lowered to 50% as per proviso to Clause 10 of *Bihar Rules, 1951.* The writ petitioners should not therefore be permitted to argue for selective implementation of the Shetty Commission recommendation, for doing away with the cut-off marks in the viva voce segment. In other words, the candidates cannot be allowed to "approbate and reprobate"[11] in the same breath. As such, it would be impermissible to seek dilution of the Shetty Commission recommended criteria, only for the viva voce segment.

31. The Shetty Commission recommended that the degree of subjectivity and arbitrariness should be reduced and the selection should be transparent. In clauses (vi) and (vii) of Para 10.99 of the Report, it was specifically noted as under:

> "(vi) Today, the viva voce examination can be more unfair than the written examination in view of the fact that it is decided on chance or impression in the shortest possible time. Rural candidates are generally at a disadvantage in this process. English-speaking candidates sometimes gain advantage without they being superior in skills for the job. A dominant member of the interview board may carry the day to the disadvantage of many deserving candidates. These things happen not necessarily because of any conscious bias or disposition of members of the Board. This is inherent in the process itself as it operates at present in many places. The judiciary cannot afford to lose opportunities to get the most outstanding candidate because of infirmities in the selection system. As such, an alternative procedure by and large modelled on the lines of the written examination is recommended for the viva voce as well.
>
> (vii) The viva-voce Examination will adopt the following procedure:
>
> (a) A proforma containing categories such as knowledge /Skills/ Attitude/ Ethics/Communication /Character, etc.,

11 Pradeep Kumar Rai v Dinesh Kumar Pandey (2015) 11 SCC 493 (Para 17)

be developed (this will depend on what are the qualities the judiciary is looking for in the prospective Judges being interviewed) in advance and each category may be given relative weightage (credits)in terms of marks. For example, if the total Viva marks are 100, one may assign 10 marks for knowledge /comprehension, 5 marks for ethics /attitude, 25 marks for skills of judging, 10 marks for communication abilities, 10 marks for general knowledge, etc

(b) Each member of the Board including the Chairman will be asked to assign marks for each category immediately after a candidate is interviewed and before the next candidate is called in. To strike some commonality or relative parity in approach of members, the board may have some general discussion before commencement of interview on range of marks to be given for a particular level of assessment. If necessary, some written guidelines may also be circulated to be adhered to in assigning marks at the time of interview.

(c) At the end of each day's interview, the tabulator will convert the numerical marks assigned to each category into grades and then to grade values. This will then be totalled up and the Cumulative Grade Value Average of each candidate interviewed will be obtained."

32. As rightly noted above, the English-speaking urban candidates could possibly be at an advantage compared to those from a rural background and those belonging to marginalized communities. It must however be seen that the Shetty Commission report was in the backdrop of High Courts selecting candidates simply on the basis of viva voce without conducting written test. What is also essential to note is that the Shetty Commission recommended evaluation through grades instead of numerical marks, for the selection of judicial officers, whether in written exam or viva voce. It also suggested that there must be written guidelines for assigning marks at the time of the interview.

VI. ISSUE WISE DISCUSSION

Issue No.1) Whether the prescription of minimum marks for viva voce is in contravention of the law laid down by this Court in *All*

India Judges (2002) which accepted certain recommendations of the Shetty Commission?

33. The judgment in *All India Judges (2002),* will now have to be analyzed in the above prefatory context. The Court therein accepted certain recommendations made by the Shetty Commission while modifying or rejecting a few others. In paragraph 27, the 3-judge bench speaking through Justice B.N. Kirpal specifically noted thus:

> **"27.** … At the same time, we are of the opinion that there has to be certain minimum standard, *objectively adjudged,* for officers who are to enter the Higher Judicial Service as Additional District Judges and District Judges. While we agree with the Shetty Commission that the recruitment to the Higher Judicial Service i.e. the District Judge cadre from amongst the advocates should be 25 per cent and the process of recruitment is to be by a competitive examination, *both written and viva voce*, we are of the opinion that there should be an objective method of testing the suitability of the subordinate judicial officers for promotion to the Higher Judicial Service."
>
> [emphasis supplied]

34. The above would show that while dealing with the method of recruitment, this Court stressed the importance of an objective standard for recruitment and emphasized that the process of direct recruitment should be through a written and viva-voce examination. A careful reading of the entire judgment would show that there is no direct discussion on the aspect of viva voce except the remark in paragraph 27 that there should be an objective method of testing suitability. The issue as to whether there should be minimum qualifying marks for viva-voce, did not engage the Court's attention. Moreover, even the Shetty Commission report did not provide any specific reasoning as to why there should be no minimum marks for *viva voce*. For this discussion, we may benefit by referring to the recent decision of this Court in *Dr.Kavita Kamboj v. High Court of Punjab and Haryana and Others*[12](for short "Kavita Khamboj"). Chief Justice, DY Chandrachud writing for the three-judge bench adverted to the

12 [2024] 2 SCR 1136 : 2024 SCC OnLine SC 254

earlier judgment in *All India Judges (2002)* and specifically noted that the Court did not make any observation about the desirability or otherwise of a minimum cut-off generally. The following passage from the judgment is relevant here:-

> "41. Now, it is true that certain recommendations of the Shetty Commission in regard to the improvement of the pay scales of the judicial officers were accepted by this Court in the decision of this Court in All India Judges' Association (supra). However, *there was no specific finding in paragraphs 27 and 28 of the All India Judges' Association (supra) in regard to whether a cut-off should be imposed for recruitment by way of regular promotion*. The Court had merely remarked that "there should be an objective method of testing the suitability of the subordinate judiciary", without making any observation about the desirability or otherwise of minimum cutoffs for viva voce generally."
>
> [emphasis supplied]

35. Also in the aforementioned judgment, the bench noted that the High Court cannot be precluded from framing Rules prescribing a minimum cut-off based on the exigencies of the Service in the State.

36. In the present case, the writ petitioners additionally argued that by virtue of paragraph 37 in *All India Judges (2002),* the Court accepted even those recommendations which were not otherwise discussed in the judgment. The said paragraph reads as under:

> "37. Subject to the various modifications in this judgment, all other recommendations of the Shetty Commission are accepted."

37. The above paragraph cannot persuade us to conclude that this Court accepted the recommendation of the Shetty Commission to do away with minimum marks for the interview. This is simply because in the preceding paragraphs, the Court listed various recommendations of the Shetty Commission. Dispensing with minimum marks for interview however finds no mention in the said list. Without such specific mention, it would be logical to say that the judgment in *All India Judges (2002)* is sub-silentio, on the aspect of minimum marks for interview. Therefore, this judgment cannot be considered

as having authoritatively pronounced on doing away with minimum cut-off marks in the interview segment.

38. Let us now turn to the other cases where this Court had the occasion to interpret the recommendations of the Shetty Commission in situations where the recruitment rules were inconsistent with the recommendations:

i) In *Syed T.A. Naqshbandi v. State of J&K*[13], while giving primacy to the Rules framed by the High Court *vis-a-vis* policy decisions and Full Court Resolutions, the Supreme Court made the following pertinent observations:

> "8. Reliance placed upon the recommendations of Justice Jagannatha Shetty Commission or the decision reported in All India Judges' Assn. v. Union of India [(2002) 4 SCC 247 : 2002 SCC (L&S) 508] or even the resolution of the Full Court of the High Court dated 27-4-2002 is not only inappropriate but a misplaced one and the grievances espoused based on this assumption deserve a mere mention only to be rejected. The conditions of service of members of any service for that matter are governed by statutory rules and orders, lawfully made in the absence of rules to cover the area which has not been specifically covered by such rules, and so long as they are not replaced or amended in the manner known to law, it would be futile for anyone to claim for those existing rules/ orders being ignored yielding place to certain policy decisions taken even to alter, amend or modify them."

ii) In *Rakhi Ray v. High Court of Delhi*[14], the Supreme Court concluded that the recommendations of the Commission even if accepted by this Court were required to be incorporated in the statutory Rules governing the service conditions of the Judicial Officers. However, in the absence of statutory Rule to deal with a particular issue, the High Courts are bound to give effect to the decisions of the Supreme Court.

13 [2003] Supp. 1 SCR 114 : (2003) 9 SCC 592

14 [2010] 2 SCR 239 : (2010) 2 SCC 637

iii) Likewise in *Mahinder Kumar v High Court of Madhya Pradesh*[15] (for short "Mahinder Kumar"), the challenge was to the procedure adopted by the High Court of Madhya Pradesh for recruitment of District Judge (entry level). While discussing paragraph 10.97 of the Shetty Commission, the 3 judge Bench speaking through Justice FM Ibrahim Kalifulla, clarified as under:

> "71. Sub-paras (i) to (v) of Para 10.97 of the Shetty Commission Report have been set out to show how while holding a written examination and a viva voce examination, prescription of marks and other aspects are to be followed. In fact those sub-paragraphs, contained in Para 10.97 of the Shetty Commission Report, can at best be stated to be a guideline, which any High Court should keep in mind, while resorting to selection for filling up the posts in the Higher Judicial Service. In this context, in para 28 of All India Judges Assn. (3) [(2002) 4 SCC 247 : 2002 SCC (L&S) 508] , this Court while prescribing the extent to which direct recruitment to the Higher Judicial Service for the post of Higher Judicial Service for the District Judges can be made, also said that appropriate rules should be framed by the High Courts at the earliest possible time. Therefore, once the rules come into place it will have to held that what all that can be expected of the High Court, would be to follow the said rules. We have in this judgment held that by virtue of Rule 7 and Para 9(iv), the 1st respondent High Court had every authority to prescribe the procedure, while making the selection to the post of Higher Judicial Service and that such procedure followed was also rational."

In the above paragraph, the Court specifically noted that the Shetty Commission recommendations can at best be considered a guideline and that the High Court is vested with the required power to evolve its own procedure for selection of judicial officers. We must reiterate that a reference was also made to paragraph 28 of *All India Judges (2002)* which provided for the

15 [2013] 13 SCR 884 : (2013) 11 SCC 87

High Court to frame appropriate Rules. Moreover, the Shetty Commission itself mentioned that the recommendation was subject to the prescription of Rules by the High Court.

iv) In like manner, this Court in *Sasidhar Reddy v State of AP*[16], observed that the recommendations of the Shetty Commission would have to be supported by the Rules for implementation. It was clarified that when recommendations and the Rules are at variance, the statutory Rules should be followed. The grievance of the appellant therein was that it was not necessary to complete 35 years for being appointed to the post of District and Sessions Judge (Entry Level) in the AP State Judicial Service. In this context, the Court analysed the recommendations of the Shetty Commission as under:

> **"14.** The said concept, with regard to the minimum age, has been brought in only from the report of the Commission. For the reasons recorded in the report of the Commission, the Commission was of the view that the post of a District and Sessions Judge, being an important post, which not only requires integrity and intelligence but also requires maturity, the Commission was of the view that a person not having completed 35 years of age should not be appointed to the said post. It is pertinent to note that this was merely a recommendation or suggestion made by the Commission. The recommendation or suggestion, if not supported by the Rules, cannot be implemented. In the instant case, the Rules are silent with regard to the minimum age. It only speaks about the maximum age. In the circumstances, one cannot read provisions incorporated in the report of the Commission into the Rules. The Rules are statutory and framed under the provisions of Article 309 of the Constitution of India. In our opinion, if the recommendations made by the Commission and the statutory rules are at variance, the provisions incorporated in the recruitment rules have to be followed. It is pertinent to note that when

16 [2013] 12 SCR 985 : (2014) 2 SCC 158

> such a question had been raised before this Court, in Syed T.A. Naqshbandi case [Syed T.A. Naqshbandi v. State of J&K, (2003) 9 SCC 592 : 2003 SCC (L&S) 1151] , this Court had also observed that till relevant recruitment rules are suitably amended so as to incorporate the recommendations made by the Commission, provisions of the statutory rules must be followed.
>
> **17.** In our opinion, the High Court was in error while giving undue weightage to the recommendations made by the Shetty Commission, especially when the Rules do not provide for any minimum age for the appointment to the post in question. Moreover, even Article 233 of the Constitution of India is also silent about the minimum age for being appointed as a District Judge."

39. With the above pronouncements on the inter-play between the Shetty Commission recommendations and the prevalent Rules, the following logical deduction can be laid down: -

(i) In case of inconsistency between the recommendations and the Rules, primacy should be given to the *existing* statutory Rules.

(ii) In the absence of *existing* Rules, the High Court should follow the directions of this Court.

40. For the sake of completeness, we may however clarify that even though the statutory Rules can be supplemented to fill in gaps[17], the High Court cannot act contrary to the Rules[18].

41. With the above understanding, let us now examine the contention that the judgments in *Hemani Malhotra v. High Court of Delhi*[19](for short "Hemani Malhotra"), and *Ramesh Kumar v. High Court of Delhi*[20] (for short "Ramesh Kumar"), are authorities for the proposition that there can be no minimum marks for viva voce since the recommendations of the Shetty Commission were *accepted* in *All India Judges (2002).* Mr. Rishabh Sancheti, the learned counsel for the writ petitioners

17 Dr. Kavita Khamboj v High Court of Punjab and Haryana, 2024 SCC OnLine SC 254

18 Sivananda CT v High Court of Kerala (2024) 3 SCC 799

19 [2008] 5 SCR 1066 : (2008) 7 SCC 11

20 [2010] 2 SCR 256 : (2010) 3 SCC 104

would additionally argue that the judgment in *Mahinder Kumar (supra)* is *per incuriam* because despite being a subsequent decision, it does not refer or consider the earlier relevant observations in *Ramesh Kumar (supra)*. Mr. Pawanshree Agarwal, the learned counsel would submit that there is a dichotomy between the decisions in *Mahender Kumar (supra)* and *Ramesh Kumar (supra).* While *Mahender Kumar (supra)* endorses the Shetty Commission recommendations to be a guideline, *Ramesh Kumar (supra)* notes that the recommendations were accepted by this Court in *All India Judges (2002).*

42. The learned counsel for the writ petitioners have relied on the following paragraph from *Hemani Malhotra (supra)*:

> **"18.** This Court notices that in *All India Judges' Assn. v. Union of India* [(2002) 4 SCC 247 : 2002 SCC (L&S) 508] subject to the various modifications indicated in the said decision, the other recommendations of the Shetty Commission were accepted by this Court. It means that prescription of cut-off marks at viva voce test by the respondent was not in accordance with the decision of this Court. It is an admitted position that both the petitioners had cleared written examination and therefore after adding marks obtained by them in the written examination to the marks obtained in the viva voce test, the result of the petitioners should have been declared. As noticed earlier 16 vacant posts were notified to be filled up and only five candidates had cleared the written test. Therefore, if the marks obtained by the petitioners at viva voce test had been added to the marks obtained by them in the written test then the names of the petitioners would have found place in the merit list prepared by the respondent. Under the circumstances, this Court is of the opinion that the petitions filed by the petitioners will have to be accepted in part."

43. The factual backdrop of the aforementioned case was that there was no prescription of minimum cut-off marks or viva voce in the *Delhi Higher Judicial Service Examination, 2006*. Therefore, the issue before the Court was whether the introduction of the requirement of minimum marks for interview, *after* the selection process was completed, would amount to changing the rules of the game after the game was played. It is noteworthy that the Court in paragraph 15 of *Hemani Malhotra (supra)* itself notes that:

> "**15.** There is no manner of doubt that the authority making rules regulating the selection **can prescribe** by rules the minimum marks both for written examination and viva voce, but if minimum marks are not prescribed for viva voce before the commencement of selection process, the authority concerned, cannot either during the selection process or after the selection process add an additional requirement/qualification that the candidate should also secure minimum marks in the interview. Therefore, this Court is of the opinion that prescription of minimum marks by the respondent at viva voce test was illegal."
>
> [emphasis supplied]

44. The above findings in *Hemani Malhotra* (*supra*) were in the absence of rules prescribing minimum marks for interview. The facts here are significantly different since the qualifying marks in the interview segment was notified before commencement of the recruitment process. In line with the settled principle of law as discussed above, in case of inconsistency of the existing Rules with the recommendations, the Rules will prevail.

45. Similarly in the other cited cases i.e., *Ramesh Kumar* (*supra*), the Court noted that in the absence of any contrary provision in relevant Rules, the competent authority can fix minimum qualifying marks, both for the written and viva voce. It was held that if specific Rules provide for minimum marks for viva voce, strict adherence to the same is mandatory. Significantly, the judgment also elucidates the importance of the viva voce test in bringing out a candidate's overall intellectual and personal qualities. Importantly in *Hemani Malhotra (supra)* and *Ramesh Kumar (supra),* the fundamental issue was whether the rules of the game could be changed midway through the selection process. However, in the present matters, the writ petitioners were aware of the rules of the game i.e. the prescription of minimum marks, well before the selection process commenced. This distinguishing feature cannot be overlooked. At this point, we may also note that the present writ petitions were de-tagged from the five-judge Constitution Bench matter[21] concerning the issue of changing the rules of the game which is currently reserved for

21 Tej Prakash Pathak And Ors. v. Rajasthan High Court And Ors. C.A. No. 2634/2013 & batch

judgment. This has been fairly conceded by the learned senior counsel for the petitioners, Mr. Ajit Kumar Sinha. Therefore, the challenge here is not w.r.t. changing the rules of the game but the implication of the Shetty Commission recommendations and the law laid down in *All India Judges (2002).*

46. On the contention relating to the decision in *Mahender Kumar (supra)* being per incuriam, it is plausible in the present facts to reconcile both decisions i.e. *Mahender Kumar (supra)* and *Ramesh Kumar (supra).* Crucially in both the decisions, it is emphasized that primacy must be given to the *existing* statutory rules. The relevant passage in *Ramesh Kumar (supra)* is extracted below:

> **"15.** Thus, the law on the issue can be summarised to the effect that in case the statutory rules prescribe a particular mode of selection, it has to be given strict adherence accordingly. In case, no procedure is prescribed by the rules and there is no other impediment in law, the competent authority while laying down the norms for selection may prescribe for the tests and further specify the minimum benchmarks for written test as well as for viva voce."

47. The above paragraph explicitly provides that the Courts can fix minimum qualifying marks for viva voce. In the present cases, the Rules provided for the qualifying marks and as such the cited judgments can be of no assistance for the writ petitioners.

48. The implications of the split judgment in *Salam Samarjeet Singh vs. High Court of Manipur at Imphal*[22] will next bear consideration. Justice *Banumathi* in her judgment noticed that *All India Judges (2002)* is *sub silentio* on the aspect of minimum cut off marks for the viva-voce test. In his dissenting judgment, Justice *Shiva Kirti Singh* had not expressed any disagreement on the said *sub silentio* observation but left it open for determination in a future case. There again, the dissent of Justice Singh was based on the fact that minimum cut off was not prescribed in the recruitment Rules and were brought in midway through the recruitment process, just prior to the stage of interview, by resolution of the Court. Here however the prescription of minimum cut-off in the recruitment process was notified for information

22 [2016] 9 SCR 771 : (2016) 10 SCC 484

of the candidates well before the commencement of the selection process under the Patna High Court and also under the Gujarat High Court and this distinguishing feature will have to be borne in mind.

49. The Justice Shetty Commission was constituted to bring about uniformity in service conditions of judicial officers. The recommendations made by the Commission are in the nature of guidelines and those will have to be seen in the context of the Rules governing recruitment of judicial officers. By virtue of the decision in *All India Judges (2002),* it cannot be said that adequate elbow room was not available to prescribe qualifying marks in the interview segment to ensure the selection of the best possible person. Therefore, the prescription of minimum marks in the Rules is not found to be in contravention of the judgment in the *All-India Judges (2002).*

Issue No. ii) Whether the prescription of minimum marks for viva voce violates Articles 14 and 16 of the Constitution of India?

50. The learned counsel for the writ petitioners argued that the prescription of minimum marks for viva voce is violative of Articles 14 and 16 of the Constitution of India for being manifestly arbitrary. Reliance has been placed on decisions of this Court which have expanded the scope of examination under Article 14.[23] In this context, we must recall the oft-quoted passage from the five-judge bench decision in *E.P. Royappa v. State of T.N*[24], where the Court while dealing with an allegedly discriminatory transfer order noted as under:

> "**85**.....From a positivistic point of view, equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it effects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must

23 Shayara Bano v Union of India 2017(9) SCC 1; Joseph Shine v Union of India (2019) 3 SCC 39; Lok Prahari v State of UP [Para 30,35,36,39] (2016) 8 SCC 389

24 [1974] 2 SCR 348 : (1974) 4 SCC 3

> be based on valid relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. Where the operative reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would amount to mala fide exercise of power and that is hit by Articles 14 and 16. Mala fide exercise of power and arbitrariness are different lethal radiations emanating from the same vice: in fact the latter comprehends the former. Both are inhibited by Articles 14 and 16."

51. Commenting on the principle of non-arbitrariness in the words of Article 14, another five-judge bench speaking through P.N. Bhagwati J. in *Ajay Hasia v. Khalid Mujib Sehravardi*[25], (for short "Ajay Hasia") made the following pertinent observations:

> "16. …It must therefore now be taken to be well settled that what Article 14 strikes at is arbitrariness because any [Under Article 32 of the Constitution] action that is arbitrary, must necessarily involve negation of equality. The doctrine of classification which is evolved by the courts is not paraphrase of Article 14 nor is it the objective and end of that article. It is merely a judicial formula for determining whether the legislative or executive action in question is arbitrary and therefore constituting denial of equality. If the classification is not reasonable and does not satisfy the two conditions referred to above, the impugned legislative or executive action would plainly be arbitrary and the guarantee of equality under Article 14 would be breached. Wherever therefore there is arbitrariness in State action whether it be of the legislature or of the executive or of an "authority" under Article 12, Article 14 immediately springs into action and strikes down such State action. In fact, the concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution."

25 [1981] 2 SCR 79 : (1981) 1 SCC 722

52. In *Shayara Bano v Union of India*[26], after examining a long line of precedents, the Supreme Court noted that a legislation can also be struck down for being manifestly arbitrary, if it is "*irrational, capricious and/or without an adequate determining principle*". This principle of manifest arbitrariness has been highlighted in other decisions of this Court[27]. The issue to be examined now is whether the vice of arbitrariness is attracted for the Rules prescribing qualifying marks for the viva voce test.

53. The challenge raised on behalf of the writ petitioners to the prescription of minimum marks for viva voce is not uncommon and the precedents suggest that much turns on the nature of the post and the extent of weightage given to viva voce. For the present matters, the distinction between the *Bihar Rules, 1951* governing the selection process for higher judiciary, specifically District Judges, and Rule 8(3) of the *Gujarat Rules, 2005* which pertains to the recruitment of both Civil and District Judges would need careful consideration.

54. The relevant clauses of *Bihar Rules,1951* dealing with the appointment to the Higher judiciary are extracted below for ready reference:

> "10. candidate will qualify for interview only if he secures minimum 45% marks in each paper and 55% marks in aggregate in the written test.
>
> Provided that in case the number of qualified candidates are not adequate, the High Court may, in the interest of judiciary, relax the qualifying marks in aggregate as may be required but this relaxation will not be below 50% in aggregate.
>
> 11. The candidates must secure at least 10 marks out of 50 marks in the interview.
>
> 12. The candidate must pass both the written test and interview before he is considered for appointment."

---

26 [2017] 9 SCR 797 : 2017 (9) SCC 1

27 Association for Democratic Reforms v Union of India, 2024 INSC 113; Joseph Shine v Union of India 2019 (3) SCC 39; Lok Prahari v Union of India 2018(6) SCC 1; Shayara Bano v Union of India, 2017 (9) SCC 1

55. The significance of interview for selection in judicial service can be best understood from the opinion of Justice O Chinappa Reddy J in *Lila Dhar v State of Rajasthan*[28]*:*

> "5. …It is now well recognised that while a written examination assesses a candidate's knowledge and intellectual ability, an interview test is valuable to assess a candidate's overall intellectual and personal qualities. While a written examination has certain distinct advantage over the interview test there are yet no written tests which can evaluate a candidate's initiative, alertness, resourcefulness, dependableness, cooperativeness, capacity for clear and logical presentation, effectiveness, in discussion, effectiveness in meeting and dealing with others, adaptability, judgment, ability to make decision, ability to lead, intellectual and moral integrity. Some of these qualities may be evaluated, perhaps with some degree of error, by an interview test, much depending on the constitution of the interview Board."

56. The above view has been consistently endorsed by later decisions of this Court[29]. Notably in *Tanya Malik v Registrar General of High Court*[30]*,* in the context of recruitment to the post of District Judge, it was held that prescribing minimum marks for interview is not only desirable but also necessary. More recently in *Kavita Khamboj (supr*a), a 3-judge bench upheld the requirement of 50% minimum marks in interview for promotion as District Judges. Making a succinct distinction between judicial appointments at the junior level and higher levels of judiciary, this Court speaking through Chief Justice DY Chandrachud observed the following:

> "44….the interview in such cases is not being held at the very threshold of the service, while making recruitments at the junior-most level. Rather, the interview is being held to fill up a senior position in the District Judiciary, that of an Additional District and Sessions Judge. Such

28 [1982] 1 SCR 320 : (1981) 4 SCC 159

29 KH Siraj v High Court of Kerela (2006) 6 SCC 395; State of UP v Rafiquiddin, 1987 Supp SCC 410; Taniya Malik v Registrar General of the High Court of Delhi (2018) 14 SCC 129; Pranav Verma v The Registrar General of High Court (2020) 15 SCC 377

30 (2018) 14 SCC 129

> officers, based on their prior experience, must be expected to demonstrate a proficiency in judicial work borne from their long years of service. The purpose of the interview for officers in that class is to assess the officer in terms of the ability to meet the duties required for performing the role of an Additional District and Sessions Judge. Consequently, there would be a reasonable and valid basis, if the High Court were to do so, to impose a requirement of a minimum eligibility or cut-off both in the written test and in the viva voce separately."

57. The recruitment procedure should not only test the candidate's intellect but also their personality, for appointment to posts in the higher judiciary. The writ petitioners have placed great reliance on the judgment in *Ajay Hasia (supra)* where it is canvassed that providing for more than 15% of the total marks for interview, is arbitrary and constitutionally invalid. In *Ajay Hasia (supra)* the challenge was to the validity of admissions made to the Regional Engineering College for the academic year 1979-80. Out of 150 total marks, 50 marks were earmarked for interview. Commenting on the validity of viva voce as a permissible test, the Court observed thus:

> "But, despite all this criticism, the oral interview method continues to be very much in vogue as a supplementary test for assessing the suitability of candidates wherever test of personal traits is considered essential. Its relevance as a test for determining suitability based on personal characteristics has been recognised in a number of decisions of this Court which are binding upon us."

58. It was further noted that:

> "The oral interview test is undoubtedly not a very satisfactory test for assessing and evaluating the capacity and calibre of candidates, but in the absence of any better test for measuring personal characteristics and traits, the oral interview test must, at the present stage, be regarded as not irrational or irrelevant though it is subjective and based on first impression, its result is influenced by many uncertain factors and it is capable of abuse. We would, however, like to point out that in the matter of admission to college or even in the matter of public employment, the

> oral interview test as presently held should not be relied upon as an exclusive test, but it may be resorted to only as an additional or supplementary test and, moreover, great care must be taken to see that persons who are appointed to conduct the oral interview test are men of high integrity, calibre and qualification."

59. It was ultimately concluded that providing for as high a percentage as 33.5% for the interview segment, was infecting the admission procedure with the vice of arbitrariness. For the facts of the present case, the writ petitioners' contention on violation of the aforementioned dictum in *Ajay Hasia (supra)* is adequately answered in *Lila Dhar (supra)* where the three-judge bench considered the issue of selection of Munsifs for Rajasthan Judicial Service. The selection was to be made through written examination as well as interview where 25% marks were earmarked for the viva voce segment. Distinguishing the judgement in *Ajay Hasia (supra)* which was in the context of college admissions, the Court in *Lila Dhar (supra)* pertinently opined as under:

> "The observations of the Court were made, primarily in connection with the problem of admission to colleges, where naturally, academic performance must be given prime importance. The words "or even in the matter of public employment" occurring in the first extracted passage and the reference to the marks allocated for the interview test in the Indian Administrative Service examination were not intended to lay down any wide, general rule that the same principle that applied in the matter of admission to colleges also applied in the matter of recruitment to public services. The observation relating to public employment was per incuriam since the matter did not fall for the consideration of the Court in that case. Nor do we think that the Court intended any wide construction of their observation. As already observed by us the weight to be given to the interview test should depend on the requirement of the service to which recruitment is made, the source material available for recruitment, the composition of the interview Board and several like factors. Ordinarily recruitment to public services is regulated by rules made under the proviso to Art. 309 of the Constitution and we would be usurping a function which is not ours, if we try to redetermine the

> appropriate method of selection and the relative weight to be attached to the various tests."

60. The above opinion in *Lila Dhar (supra)* makes it clear that the ratio in *Ajay Hasia (supra),* in the context of college admission, may not have much bearing on recruitment for judicial vacancies where oral interviews play an important role to test the personality and caliber of the aspirant to judicial posts.

61. Let us now examine the specific challenge questioning the constitutionality of Rule 8(3) of *Gujarat Rules,2005* which deals with both District Judges and Civil Judges. The Rule 8(3) reads as under:

> "The minimum qualifying marks in the Viva-voce conducted for recruitment to the cadre of District Judge and Civil Judge, shall be forty percent {40%) of marks."

62. To strike down Rule 8(3) of *Gujarat Rules,2005* under Article 14, the argument of the petitioners is that a classification is sought to be created between meritorious and non-meritorious candidates since meritorious candidates who have worked hard to score good marks in the written test may not succeed since the interviewing committee can award below par marks to a candidate, based on their subjective evaluation. The second argument is on the issue of the absence of a level playing field for those from a marginalized background suggesting that such candidates will be at a disadvantage. In response the learned counsel for the High Court of Gujarat submits that the objective is to select the best possible candidates and the High Court Judges who are conducting the interviews can certainly test the real potential of a candidate, irrespective of their background.

63. A relevant question here is whether those who had high marks in the written test can by itself be considered in the "meritorious" category? This is a debatable issue since the high scores for the written test by itself do not determine the merit and suitability of an aspirant. The performance would also depend on the social, economic, and cultural capital of the candidate. Access to resources such as coaching institutes, quality school education, financial stability, time and flexibility, networking opportunities, mentorship, and access to relevant study materials, are vital factors which also manifestly contribute to the performance in the written test. In the context, the

observations of this Court in a case relating to reservation in promotion in *B.K. Pavitra v Union of India*[31] is illuminating where the aspects of "merit" and "efficiency" was discussed in the following passage:-

> "134. It is well settled that existing inequalities in society can lead to a seemingly —neutral system discriminating in favour of privileged candidates. As Marc Galanter notes, three broad kinds of resources are necessary to produce the results in competitive exams that qualify as indicators of —merit.
>
> These are: —…
>
> (a) *economic resources* (for prior education, training, materials, freedom from work, etc.);
>
> (b) *social and cultural resources* (networks of contacts, confidence, guidance and advice, information, etc.); and
>
> (c) *intrinsic ability and hard work…*ll [Galanter M., Competing Equalities : Law and the Backward Classes in India, (Oxford University Press, New Delhi 1984), cited by Deshpande S., Inclusion versus excellence : Caste and the framing of fair access in Indian higher education, 40 : 1 South African Review of Sociology 127-147.]
>
> 135. The first two criteria are evidently not the products of a candidate's own efforts but rather the structural conditions into which they are borne."

64. As can be seen from above, the reliance on competitive exams or written tests as the sole determinant of merit is increasingly being frowned upon. To borrow the phrase from philosopher Michael Sandel's book, "The Tyranny of Merit", successful candidates often feel a sense of "*meritocratic hubris*"[32], overlooking how factors such as socio-economic background, caste, gender, and other structural inequalities can shape opportunities and outcomes.

65. The written test cannot possibly capture the full spectrum of the individual's abilities and potential. An interview can also provide a

31 [2017] 1 SCR 631 : (2019) 16 SCC 129

32 Michael J Sandel, The Tyranny of Merit: What's become of the Common Good? (Allen Lane, 2020)

medium for marginalized candidates to showcase their talents in ways which a written test may not possibly allow. However, a caveat may be necessary here that candidates hailing from English-speaking urban environments might possess linguistic fluency and familiarity with cultural norms typically associated with interviews and therefore are likely to navigate the viva voce segment with relative ease. Conversely, candidates from marginalized communities may face challenges due to their lack of exposure to urban settings. This is further exacerbated by conscious and unconscious bias on grounds of gender, religion, caste etc. But can we ignore the intrinsic ability of the members of the interview panel constituted by the High Court judges to separate the grain from the chaff? This Court would like to believe that the members of the interview board can provide a level-playing field during the interview process for those who come from a disadvantaged background, to assess the true merit and potential of the interviewees. The solution lies in the interviewing members being aware and sensitive to alleviate bias in the process of Interview. However, the apprehension of bias cannot be the sole ground to strike down a Rule.

66. As is seen from the precedents, only the overriding weightage to the viva-voce segment has been frowned upon by this Court but the prescription of reasonable qualifying cut-off marks[33] is not considered discriminatory. In any case, administrative law remedies are always available to secure relief in cases where abuse of power is seen. When the minimum cut-off of 20% for the Bihar recruitment and 40% for the Gujarat recruitment are taken into account, those cannot be considered to provide a high threshold if one keeps in mind that the recruitment is for selection of judicial officers. In the context, the object of viva voce set out in Rule 8(5) of *Gujarat Rules, 2005* deserves attention and is extracted:

> "(5) the object of the Viva-Voce Test (interview) is to assess the suitability of the candidate for the cadre by judging the mental alertness, knowledge of law, clear and logical exposition, balance of judgment, skills, attitude, ethics, power of assimilation, power of communication, character and intellectual depth and the like, of the candidate."

33 Manish Kumar Shahi v State of Bihar (2010) 12 SCC 576

67. The above would show that there is a reasonable and direct nexus with the object sought to be achieved i.e. the appointment of well-rounded judicial officers. The prescription of minimum cut off is also not perceived to be of such a nature that it reeks of irrationality, or was capricious and/or without any adequate determining principle. It does not appear to be disproportionate so as to adversely affect "meritorious" candidates, as has been argued. It is certainly not manifestly arbitrary, or irrational or violative of Article 14 of the Constitution of India. For recruitment of judicial officers, ideally the effort should be to not only test the candidate's intellect but also their personality. An interview unveils the essence of a candidate—their personality, passion, and potential. While the written exam measures knowledge, the interview reveals character and capability. Therefore, a person seeking a responsible position particularly as a judicial officer should not be shortlisted only by their performance on paper, but also by their ability to articulate and engage which will demonstrate their suitability for the role of a presiding officer in a court. In other words, the capability and potential of the candidate, to preside in Court to adjudicate adversarial litigation must also be carefully assessed during the interview.

68. On the above parameters, it can't be said that the concerned recruitment Rules are unconstitutional. It may also be observed here that there is no violation of the legitimate expectation of the writ petitioners so as to fail the test under Article 14. In *Sivananda CT v High Court of Kerala*[34] which is cited, the factual backdrop was different. The *Kerala State Higher Judicial Services Rules 1961* stipulated that the direct recruitment from the Bar shall be "*on the basis of aggregate marks/grade* obtained in a competitive examination and viva voce conducted by the High Court." It was only after the conduct of viva voce that the High Court decided to have a minimum cut off, as a qualifying criterion. The distinguishing feature is that neither the provisions of the *Kerala State Higher Judicial Services Special Rules,1961* nor the exam scheme or recruitment notification therein stipulated any cut-off for the viva voce. Therefore, it was in that context that the Court held that the minimum cut-off marks was manifestly arbitrary for frustrating the substantive legitimate expectation of the candidates under Article 14 of the Constitution.

34 [2023] 11 SCR 674 : (2024) 3 SCC 799

Therefore, the cited case can have no application in the present matters where the cut off marks in the viva voce was notified before commencement of the selection process.

Issue No.iii) Whether the selection process in Bihar is vitiated given the moderation of marks and corrective steps, highlighted by the petitioners in the Bihar Selection process?

69. For this, it needs to be seen whether there are proven allegations of violations of statutory Rules, bias, *malafide* or fraud[35]. In this regard, the four-judge bench in *Ashok Kumar Yadav v. State of Haryana*[36], discussed the threshold for invalidating the entire selection process as under:

> "21. …But suspicion cannot take the place of proof and we cannot strike down the selections made on the ground that the evaluation of the merits of the candidates in the viva voce examination might be arbitrary. It is necessary to point out that the Court cannot sit in judgment over the marks awarded by interviewing bodies unless it is *proved* or *obvious* that the marking is plainly and indubitably arbitrary or affected by oblique motives. It is only if the assessment is patently arbitrary or the risk of arbitrariness is so high that a reasonable person would regard arbitrariness as inevitable, that the assessment of marks at the viva voce test may be regarded as suffering from the vice of arbitrariness."

70. Guided by the above principle, the steps taken by the High Court after the issuance of advertisement as mentioned in the additional affidavit of Patna High Court summarized below, would bear consideration.

i) The preliminary examination was held on 22.3.2015. 6,771 candidates appeared for the same.

ii) The main exam was held on 12.7.2015 and over 1000 candidates appeared for the same.

iii) The affidavit notes that only 15 candidates obtained qualifying marks in the written exam i.e. above 55%. However, Mr. Gautam

35 K.H. Siraj v. High Court of Kerala (2006) 6 SCC 395; Inderpreet Singh Kahlon v. State of Punjab (2006) 11 SCC 356

36 [1985] Supp. 1 SCR 657 : (1985) 4 SCC 417

Narayan, learned counsel for the Patna High Court has clarified that this is a typographical error and only 3 candidates had, in fact, obtained qualifying marks. This is in consonance with the RTI Reply dated 10.2.2017.

iv) In order to fill up vacancies, the Selection and Appointment Committee of the High Court examined 20 answer sheets of each paper at random. It was decided that there was a need for moderation. Accordingly, the Selection and Appointment Committee comprising of 5 judges of the High Court in its meeting dated 8.1.2016 proposed for moderation by adding 4% marks in Paper I & 6% marks in Paper II.

v) Despite moderation, only few candidates secured above 55% marks in aggregate. Thereafter, the Full Court decided to permit relaxation of 5% in the aggregate marks under proviso to Clause 10 of Appendix C of the 1951 Rules.

vi) After relaxation of marks to 50%, 81 candidates were found qualified in the written examination and results were uploaded on 22.1.2016.

vii) The interviews for those who scored 50% in the written, were conducted on 19.2.2016, 20.2.2016,22.2.2016 and 23.2.2016 by a Board of 5 judges of the High Court. Eventually, only 9 candidates could secure 10 marks or more out of 50 total marks in the interview. The said 9 persons upon Full Court approval were appointed by the Bihar Government on 17.5.2016.

71. After issuance of notice in the Bihar writ petition, the concerned High Court officials while preparing the response, noticed discrepancies during decoding, tabulation and collation of marks and arranged for re-verification of the selection data. Thereafter, the following directions were issued by the Chairperson of the Committee in consultation with the Acting Chief Justice of the Patna High Court:

> "In view of summer vacations, the Committee is not available. Discussed the matter with Hon'ble ACJ on phone. Being a serious lapse, the following steps need be taken immediately:
>
> 1) Under personal supervision of Registrar (App), Sr. Programmer, Nitesh will undertake the entire exercise

> of decoding, collation, and tabulation a fresh. In case of any assistance required Registrar General will be consulted. Prepare fresh tabulation, identifying lapses, submit report.
>
> 2) Registrar General will conduct enquiry to find out where was the lapses and consequently who was responsible. On this report being submitted, to initiate disciplinary proceedings against the person responsible for these lapses. Registrar General will issue show cause and Brother Ajay Kumar Tripathi will conduct the disciplinary proceedings. Put up before Hon'ble ACJ no sooner he is available. Matters to be dealt with utmost urgency and confidentiality."

72. After detailed verification of the record, it was found that 3 more candidates had obtained qualifying marks in the written examination for the purpose of viva voce having roll nos. 1111006603, 1111006636 and 1111006667 respectively. It was also found that 4 candidates had not obtained the qualifying marks in the written examination, though they were earlier shown to be qualified. Therefore, a corrigendum was issued on 30.6.2016 by which the High Court cancelled the candidatures of 4 unqualified candidates and also called the 3 other candidates for the viva-voce, who had obtained qualifying marks. The interview of the 3 candidates was held on 19.7.2016. However, none of them could qualify.

73. Mr. Ajit Sinha, learned Senior Counsel had argued that these irregularities are so egregious that it would vitiate the entire selection process. While conceding that moderation did benefit the writ petitioners, it is still argued that the defective procedure must persuade this Court to set aside the selection process in Bihar. Per Contra, Mr. Gautam Narayan, learned counsel for the High Court of Patna argues that the discrepancies in Roll Numbers were due to the mistake of the candidates themselves. As regards moderation, Mr. Narayan, produced a chart before us containing the marks obtained by the candidates before and after moderation to show that it enured to the benefit of the writ petitioners.

74. Whether moderation of marks was legally permissible, would require a reference to the relevant Rules and Advertisement. The relevant Clause 13 of Appendix C of *Bihar Rules,1951* is extracted below: -

> "13. The Standing committee of the High Court, Patna may issue orders/directions in case of any doubt and difficulty"

The Para 10 of the 2015 Advertisement reads as under:

> "10. The High Court shall have the power to make any relaxation in or exemption from the aforesaid terms and condition in the interest of Judiciary."

75. The above makes it clear that the High Court has been vested with requisite powers to provide clarification, relaxation and even exemption in the interest of the Judiciary. The words "relaxation" as also the general power to issue orders/directions in case of any "difficulty", would in our view permit the process of moderation in order to provide for the adequate number of candidates for the interview test. The Clause 13 of Appendix C of the Bihar Rules read with Para 10 of the Advertisement provide adequate elbow room to the High Court to overcome difficulties in the selection process. It is nobody's case that the corrective measures were not bonafide. Moreover, the process adopted is consistent with the Rules.

76. In a moderation exercise, addition of marks and/or deduction of marks is envisaged. This Court in *Sanjay Singh v UP Public Service Commission*[37], laid down certain guidelines for moderation of marks in judicial services examination. Preferring the method of "moderation" over "scaling", it was noted that moderation is a more viable technique to reduce the variability of the examiners.

77. In the same context, it would be useful to refer to the judgment in *Pranav Verma & Ors. v. Registrar General of the High Court of Punjab & Haryana*[38] where this Court underscored the option of using moderation or normalization of marks, to ensure the selection of adequate number of candidates. In the said case, this Court had appointed Justice (Retd.) A.K. Sikri, a former Supreme Court judge to examine the selection process in a recruitment exercise where adequate number of candidates had not qualified. The learned judge verified the selection process but found no fundamental flaws. However, deficiencies were found in the evaluation of the Civil Law-I paper as only 8.5 minutes were available to the candidates to answer

37 [2007] 1 SCR 235 : (2007) 3 SCC 720

38 [2019] 15 SCR 43 : (2020) 15 SCC 377

for each question. This was noted to be insufficient for the descriptive type questions and the lengthy paper. It was also noticed that marking in the Civil Law-II paper was too stringent, with the highest score being 95 out of 200 (47.5%) and the evaluators, as can be noticed, expected lengthy answers for each question without considering the limited time available for the candidates. Despite noting these facts, the Supreme Court held that the selection process need not be invalidated. Instead to save the selection, the Court directed that grace marks be awarded to all examinees.

78. The above would show that if certain resolvable deficiencies are noticed in the selection process, the High Court has the elbow room to take corrective measures. The process of moderation can always be exercised bona fide if it uniformly benefits all the candidates. In the context, the chart produced by the learned counsel for the High Court makes it clear that moderation, in fact, benefited the present writ petitioners to facilitate their participation in the Interview round. The reduction of aggregate marks from 55% to 50% is traceable to the proviso to Clause 10 of Appendix – 'C' of the *Bihar Rules 1951*. A modest variation in the sequence of events narrated in the RTI Reply is shown but even in such situation the additional affidavit makes it clear that following the moderation exercise, the aggregate marks were reduced to 50%, in accordance with the Rules.

79. The argument that for the interview also the qualifying marks should have been reduced just like in the written test is not acceptable since the Rules itself provided for a reduction in the aggregate marks in the written test. The proviso concerning relaxation is contained in Clause 10 which deals only with the written test. The Court in any case should not step into the shoes of the Selection Committee. The assessment and evaluation of the candidates appearing before the Selection Committee/Interview Board should best be left to the members of the Committee unless it is violative of the statutory Rules or tainted with ill motive. The decision of the Selection Committee was approved by the Full Court for increasing the number of candidates available for final selection.

80. On examination of the subsequent steps taken by the High Court after conducting the exam, we do not find any *mala fide* or statutory violation so as to vitiate the entire selection process in Bihar. Similarly, in the Gujarat cases, besides making vague allegations, the petitioners have

not presented any material to demonstrate any malicious intent or bias on the part of the selection Committee in the interview process. Thus, the selection process is not found to be tainted.

Issue No. iv) Whether non-consultation with the Public Service Commission as required under Article 234 of the Constitution for amending the selection Rules stipulating minimum viva voce marks is rendered void?

81. Mr. Pawanshree Agarwal, the learned counsel for the writ petitioner has argued that in IA 20279 of 2022 in WP(C) 663 of 2021, an additional challenge on account of violation of Article 234 has been raised. It is argued that the prescription of minimum qualifying marks in the viva-voce under Rule 8(3) as amended in 2011 was only in consultation with the High Court of Gujarat but not with the Gujarat Public Service Commission. Therefore, in view of the mandatory requirement of Article 234, the Rules must be declared to be void. On the other hand, Mr. Malkan on behalf of the Gujarat High Court contended that the Public Service Commission itself requested for exemption as per the *Gujarat Public Service Commission (Exemption from Consultation) Regulations,1960* framed under the proviso to Article 320(3) of the Constitution of India. Additionally, Ms. Deepanwita Priyanka who appeared through video conferencing for the State of Gujarat, read out the contents of a letter dated 10.6.2005 written by the Gujarat Public Service Commission stating that the proposed post of "Civil Judge", does not fall within its jurisdiction.

82. To appreciate the above contentions, it would be helpful to note the relevant portion of the *Gujarat Rules,2005* prior to the 2011 amendment:

> "In exercise of the powers conferred by the proviso to Article 309 read with Article 234 of the Constitution of India, the Governor of Gujarat, after consultation with the High Court of Gujarat and the Gujarat Public Service Commission, and in supersession of the Gujarat Judicial Services Recruitment Rules, 1961 hereby makes the following Rules regulating the Recruitment to the Gujarat State Judicial) Service."

83. The relevant portion of Gujarat Rules,2005(as amended in 2011) is next extracted:

> "In exercise of the powers conferred by the proviso to article a) read with Articles 233 and 234 of the Constitution of India, the Governor of Gujarat after consultation with the High Court of Gujarat hereby makes the following rules further to amend the Gujarat State Judicial Service Rules, 2005."

84. The omission of the words "and the Gujarat Public Service Commission" in the 2011 Rules is a relevant aspect, that requires attention. Articles 233, Article 234 and 235 in the Constitution which deals with "Subordinate Courts" would bear consideration here. Article 233 provides for the appointment of District Judges without requirement of consultation with Public Service Commission. The Article 234 empowers the Governor of a State to make appointments of persons other than District Judges to the judicial service of a State in accordance with the Rules after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State. Article 235 provides for the control of the High Court over the Subordinate Courts. Article 234 is relevant for our purpose:

> "Appointment of persons other than district judges to the judicial service of a State shall be made by the Governor of the State in accordance with rules made by him in that behalf after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State"

85. Since the Rules were framed as per the proviso to Article 309, it is also extracted below for ready reference:

> "309. Recruitment and conditions of service of persons serving the Union or a State
>
> Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State:Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such

person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act."

86. This Court has had the occasion to examine the aforementioned provisions in the Articles in multiple decisions. While it is true that Article 234 mandates consultation with the Public Service Commission and the High Court, the five-judge Constitution Bench of this Court in *State of Bihar v. Bal Mukund Sah*[39] (for short "Bal Mukund"), noted that there is a fine distinction in the nature of consultation between the two:

> **"51.** As seen earlier, consultation with the High Court as envisaged by Article 234 is for fructifying the constitutional mandate of preserving the independence of the Judiciary, which is its basic structure. The Public Service Commission has no such constitutional imperative to be fulfilled. The scope of the examining body's consultation can never be equated with that of consultation with the appointing body whose agent is the former. It is also pertinent to note that the essence of consultation is the communication of a genuine invitation to give advice and a genuine consideration of that advice which in turn depends on sufficient information and time being given to the party concerned to enable it to tender useful advice. It is difficult to appreciate how the Governor while consulting the Public Service Commission before promulgating the rules of recruitment under Article 234 has to solicit similar type of advice as he would solicit from the High Court on due consultation. The advice which in the process of consultation can be tendered by the Public Service Commission will confine itself to the constitutional requirements of Article 320. They are entirely

39 [2000] 2 SCR 299 : (2000) 4 SCC 640

different from the nature of consultation and advice to be solicited from the High Court which is having full control over the Subordinate Judiciary under Article 235 of the Constitution and is directly concerned with the drafting of efficient judicial appointments so that appropriate material will be available to it through the process of selection both at the grass-root level and at the apex level of the District Judiciary. Consultation, keeping in view the role of the High Court under Article 234 read with Article 235, stands on an entirely different footing as compared to the consultation with the Public Service Commission which has to discharge its functions of an entirely different type as envisaged by Article 320 of the Constitution."

87. It is well-settled that the consultation with the High Court as envisaged in Article 234 is to preserve the constitutional mandate of the Independence of the judiciary which forms part of the basic structure of the Constitution of India. The consultation with the High Court must be given primacy in matters of judicial recruitment as compared to the consultation with the Public Service Commission.

88. With the above understanding of the law, let us now refer to Article 320 of the Constitution of India which is extracted below:

"**Functions of Public Service Commission**

(1) It shall be the duty of the Union and the State Public Service Commissions to conduct examinations for appointments to the services of the Union and the services of the State respectively.

(2) It shall also be the duty of the Union Public Service Commission, if requested by any two or more States so to do, to assist those States in framing and operating schemes of joint recruitment for any services for which candidates possessing special qualifications are required.

(3) The Union Public Service Commission or the State Public Service Commission, as the case may be, shall be consulted—

a. on all matters relating to methods of recruitment to civil services and for civil posts;

b. on the principles to be followed in making appointments to civil services and posts and in making promotions and transfers from one service to another and on the suitability of candidates for such appointments, promotions or transfers;

c. on all disciplinary matters affecting a person serving under the Government of India or the Government of a State in a civil capacity, including memorials or petitions relating to such matters;

d. on any claim by or in respect of a person who is serving or has served under the Government of India or the Government of a State or under the Crown in India or under the Government of an Indian State, in a civil capacity, that any costs incurred by him in defending legal proceedings instituted against him in respect of acts done or purporting to be done in the execution of his duty should be paid out of the Consolidated Fund of India, or, as the case may be, out of the Consolidated Fund of the State;

e. on any claim for the award of a pension in respect of injuries sustained by a person while serving under the Government of India or the Government of a State or under the Crown in India or under the Government of an Indian State, in a civil capacity, and any question as to the amount of any such award,

and it shall be the duty of a Public Service Commission to advise on any matter so referred to them and on any other matter which the President, or, as the case may be, the Governor of the State, may refer to them:

Provided that the President as respects the all- India services and also as respects other services and posts in connection with the affairs

> *of the Union, and the Governor, as respects other services and posts in connection with the affairs of a State, may make regulations specifying the matters in which either generally, or in any particular class of case or in any particular circumstances, it shall not be necessary for a Public Service Commission to be consulted.*
>
> Nothing in clause (3) shall require a Public Service Commission to be consulted as respects the manner in which any provision referred to in clause (4) of article 16 may be made or as respects the manner in which effect may be given to the provisions of article 335.
>
> All regulations made under the proviso to clause (3) by the President or the Governor of a State shall be laid for not less than fourteen days before each House of Parliament or the House or each House of the Legislature of the State, as the case may be, as soon as possible after they are made, and shall be subject to such modifications, whether by way of repeal or amendment, as both Houses of Parliament or the House or both Houses of the Legislature of the State may make during the session in which they are so laid."
>
> [emphasis supplied]

89. The source for the consultation with the "Public Service Commission" under Article 234 of the Constitution of India is to be traced from Article 320 of the Constitution which deals with the "Functions of Public Service Commission". In this regard, Justice Hidayatullah in Constitutional Law of India[40] had this to say on the nature of consultation:

> "The Consultation with the High Court is imperative. The insistence on the consultation with the High Court is obviously attributable to the recognition of that source

40 M. Hidayatullah(Ed), Constitutional law of India (The Bar Council of India Trust in association with Arnold-Heinemann Publishers, 1984) Vol. 2,147

> as one from which the most useful advice is obtainable on a matter concerning a service under its own control. Requirement to consult the Public Service Commission is equally understandable for the reason that the Commission is enjoined by Article 320 to conduct examinations for appointment to the Services under the State."

90. This Court has consistently held[41] that the High Court should be assigned primacy in the process of consultation and the Rules framed without such consultation would be void. The same however is not true for absence of consultation, with the Public Service Commission. In *State of U.P. v. Manbodhan Lal Srivastava*[42], this Court while interpreting Article 320(3) of the Constitution had noted that the word "shall" though generally taken in a mandatory sense, must be interpreted as "may", leading to the conclusion that the consultation under Article 320(3), is not mandatory. Tracing the power of the High Court under Article 235 of the Constitution of India, in *Rajendra Singh Verma v. Lt. Governor (NCT of Delhi)*[43], in the context of compulsory retirement, the Court pertinently noted that:

> "*36*. The Governor could not have passed any order on the advice of the Public Service Commission in this case. The advice should be of no other authority than the High Court in the matter of judicial officers. This is the plain implication of Article 235. Article 320(3)(*c*) is entirely out of place so far as the High Court is concerned dealing with judicial officers. To give any other interpretation to Article 320(3)(*c*) will be to defeat the supreme object underlying Article 235 of the Constitution specially intended for the protection of the judicial officers and necessarily the independence of the subordinate judiciary. It is absolutely clear that the Governor cannot consult the Public Service Commission in the case of judicial officers and accept its advice and act according to it. There is no room for any outside body between the Governor and the High Court."

---

41 AC Thalwal v High Court of Himachal Pradesh (2000) 7 SCC 1; Supreme Court Advocates-on-Record Association v Union of India (1993) 4 SCC 441; Hari Dutt Kainthla v State of Himachal Pradesh, 1980 3 SCC 189

42 [1958] 1 SCR 533 : AIR 1957 SC 912

43 [2011] 12 SCR 496 : (2011) 10 SCC 1

91. At this stage, it needs to be clarified that this Court is not tasked to authoritatively decide whether consultation with Public Service Commission should be "mandatory" or "directory" under Article 234 of the Constitution of India. The question that needs to be answered in these matters is whether the Rules would be rendered void, in case the Public Service Commission itself didn't wish to be consulted? The letter dated 10.6.2005, written by the Joint Secretary of the Public Service Commission is relevant and is extracted as follows: -

> "Sir,
>
> With reference to the subject noted above, vide the Notification No. GK-2005-5-JSR-1982-994-D, dated 9/05/2005 of the Legal Department, the recruitment rules of instant post have been issued. In pursuance of the details of the letter dated 6/06/2005 of the Commission, it is requested to remove the provision of "and the GPSC" from third line of the first paragraph of aforementioned rules. As the proposed posts under the recruitment rules do not fall within the purview of the Commission, it is requested to initiate the procedure to remove aforementioned words from aforesaid published recruitment rules."

92. The learned counsel for the Gujarat High Court has relied on Entry 11B in the Schedule to the *Gujarat Public Service Commission (Exemption from Consultation) Regulations,1960* framed under the proviso to Article 320(3) of the Constitution which mentions the post of "The Civil Judge (Junior Division) and Judicial Magistrate of First Class."

93. The above discussion persuades us to say that the Governor is under no compulsion to consult the Public Service Commission in case the Commission does not wish to be consulted. Such a course would be in consonance with the proviso to Article 320(3) of the Constitution. The concerned Gujarat Rules cannot, therefore, be declared to be void on this count.

94. For the Writ Petitioner, reliance has been placed by Mr. Pawanshree Agarwal on the decision of the Bombay High Court in *Goa Judicial Officer's Association v State of Goa*[44] to argue that the consultation

44 1997(4) BOM CR 372

with Public Service Commission is mandatory. While it is true that the Bombay High Court decided that the consultation is mandatory, a careful reading of the judgment would show that the Court refused to grant any relief to the petitioner therein noting that this was an issue between the Government and the PSC and the petitioner could not claim any cause of action. The High Court specifically noted as under:

> "20. This controversy, however, need not detain us for long, because even assuming that there was no consultation at all, whether the petitioner is entitled to get any relief in this petition on that score is to be examined. The consultation or non-consultation is a matter between the Public Service Commission and the Government and that too at the stage of framing rules. Therefore, individual candidates are not very much concerned with that. Their rights are not dependent upon or decided upon the consultation or non-consultation with either the High Court or with the Public Service Commission. Therefore, non-consultation with the Public Service Commission will not give any cause of action to the petitioner or any one of the members of the petitioner's Association to maintain this writ petition."

95. Similarly, reliance by the petitioners counsel on the judgment of the Madras High Court in *N. Devasahayam v. State of Madras*[45] as regards the mandatory nature of the Consultation which is argued to have been endorsed by the Constitution Bench of this Court in *Bal Mukund (supra),* is found to be misplaced. In *Bal Mukund (supra),* the Court endorsed the finding in *N. Devasahayam (supra),* but the judgment would also show that there is no authoritative finding on the 'mandatory' or 'directory' nature of Article 234.

96. Likewise, the judgment of the Supreme Court in *AC Thalwal v High Court of HP*[46] would also be of no assistance for the petitioners as in that case, the *Ex-Servicemen (Reservation of Vacancies in the Himachal Pradesh Judicial Service) Rules, 1981* was declared ultra vires the Constitution and hence void in the context of non-consultation with the High Court but not with the Public Service Commission under Article 234 of the Constitution of India. As discussed earlier, the Court

45 AIR 1958 Mad 53

46 [2000] Supp. 2 SCR 428 : (2000) 7 SCC 1

noted that "the status which the High Court as an institution enjoys in the constitutional scheme and the expertise and the experience which it possesses of judicial services, justify a place of primacy being assigned to the High Court in the process of consultation." It is undoubtedly mandatory to consult the High Court for framing Rules and any Rule enacted by the State Government without such consultation is considered ultra vires. The rationale is to safeguard the judicial service from executive influence which is rooted in the constitutional objective of establishing an independent judiciary.

97. In Gujarat, when the Public Service Commission did not wish to be consulted under the proviso to Article 320(3) of the Constitution of India, in the absence of such consultation, it cannot be held that the *Gujarat Rules, 2005* suffers from any legal or constitutional invalidity particularly when the Rules were framed with due consultation with the High Court.

VII. CONCLUSION AND DIRECTIONS

98. Before reaching our final conclusion in these matters, reference to *Malik Mazhar v. U.P Public Service Commission*[47] would be in order where the Supreme Court emphasised the importance of having a prescribed time-schedule for conducting the judicial service examinations. The need for having a fixed timeline for each step of the examination process was also suggested in this case. Recently, taking note of the judicial vacancies in District Judiciary, this Court had taken suo moto cognizance[48] and directed the High Courts and State governments to report on whether the judicial vacancies will be filled in a timely fashion, as prescribed in *Malik Mazhar (supra)* . A report of the Supreme Court's Centre for Research and Planning[49] notes that despite the judgment in *Malik Mazhar (supra)* prescribing timelines for recruitment, only 9 out of 25 states completed the recruitment of Civil Judge (Judge Division), within the stipulated time frame. The report notes that the State of Bihar took 945 days to complete the recruitment process computed from the date of advertisement (March 9,2020) to the date of final result (October 10,2022).

47 [2006] 3 SCR 689 : (2006) 9 SCC 507

48 Filling up of Vacancies, In re, 2018 SCC OnLine SC 3648

49 Centre for Research and Planning, Supreme Court of India, *State of the Judiciary, A Report on Infrastructure, Budgeting, Human Resources and ICT* (November 2023)

99. As can also be seen in the matters before us, for the Bihar selection process, the advertisement was issued in January, 2015; the final selection was made on 17.5.2016, and because of the need to do a few course corrections, the last candidate was called for the interview only in August, 2016. Similarly, for the selection of Civil Judges in Gujarat, while the advertisement was issued in 2019, the selection process could be completed only in 2021.

100. To avoid the meandering process noticed in the recruitment in the State of Bihar and to ensure more clarity and certainty with the process, we deem it necessary to declare that processes such as moderation should be preferably set out in the Rules to ensure transparency and avoid dilemmas in the selection process. The moderation of marks for bonafide reasons should be permitted when the authority needs to do so, to address the issue of non-availability of adequate number of candidates for consideration in the interview segment. As a confidence building measure, the designation of those in the interview panel, could also be provided for appropriately, in the Rules. It would be apposite at this stage to note a few of the recommendations flagged in the December,2018 Report of Vidhi Centre for Legal Policy titled "Discretion & Delay- Challenges of Becoming a District & Civil Judge"[50] which examined the judicial Service Rules of 29 States. The absence of a designated authority that can be approached by the candidates is flagged in the said report. As this appears to be a valid concern, the concerned High Court should notify a designated authority for a given recruitment process with clearly defined roles, functions and responsibilities. The candidates can approach such a designated authority to seek clarification in case of any doubt and this would assuage the anxiety of the candidates to a considerable extent. Another such suggestion of providing a basic outline of the syllabus for the proposed test will also help candidates from diverse backgrounds to plan and prepare for the proposed examination even before the examination notification is released. The recruitment process must adhere to the timeline but if there is any special and unavoidable exigency, the stakeholders should be kept informed with due promptitude.

50 Diksha Sanyal and Shriyam Gupta, "Discretion and Delay: Challenges in Becoming a District and Civil Judge" (December 2018) <https://vidhilegalpolicy.in/research/2019-1-7-discretion-and-delaychallenges-of-becoming-a-district-and-civil-judge/> accessed 3rd May, 2024

101. To enable all the stakeholders to take consequential steps pursuant to the above directions, this judgment should be brought to the notice of the Hon'ble Chief Justices of all the High Courts in India.

102. With the foregoing discussion, the following conclusions are reached for the cases under consideration: -

i) The Prescription of minimum qualifying marks for interview is permissible and this is not in violation of *All India Judges (2002)* which accepted certain recommendations of the Shetty Commission.

ii) The validity challenge to Clause 11 of the *Bihar Rules, 1951* and Rule 8(3) of the Gujarat Rules, 2005 (as amended in 2011) prescribing minimum marks for interview are repelled.

iii) The impugned selection process in the State of Bihar and Gujarat are found to be legally valid and are upheld.

iv) The non-consultation with the Public Service Commission would not render the Gujarat Rules, 2005 (as amended in 2011) void.

The Writ petitions are, accordingly, dismissed without any order on cost.

Result of the case: Writ Petitions dismissed.

†*Headnotes prepared by:* Nidhi Jain

[2024] 6 S.C.R. 594 : 2024 INSC 401

Mrugendra Indravadan Mehta and Others
v.
Ahmedabad Municipal Corporation

(Civil Appeal Nos. 16956-16957 of 2017)

10 May 2024

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

Issue for Consideration

Trial Court decreed the suit filed by appellants-plaintiffs by accepting the alternative prayer that they should be allotted an extent of 974 sq. mts. in any Town Planning Scheme in the western zone of Ahmedabad, but rejected the main prayer for compensation with interest. Whether the High Court was justified in allowing the first appeal filed by the respondent-Corporation and non-suiting the plaintiffs; Impugned judgment if liable to be set aside as contended by the plaintiffs, on the ground that no points for determination were framed therein, as required by Order 41 Rule 31, Code of Civil Procedure, 1908.

Headnotes†

Code of Civil Procedure, 1908 – Or. 41, r.31 – Gujarat Town Planning and Urban Development Act, 1976 – ss.52, 54, 70, 71, 81, 82 – Plaintiffs' father owner of various plots surrendered land pursuant to a Town Planning Scheme – The Corporation allotted two separate final plots out of which possession of one was delivered to the plaintiffs' father however, the possession of the other plot i.e. Final Plot No.463 was not delivered – Town Planning Scheme was varied later but without any alternative plot being allotted in lieu of Final Plot No.463 – However, under the second varied scheme, plaintiffs were offered Final Plot No.187 which had a smaller area by 974 sq. mts., and as per them they were offered meagre compensation @ ₹25/- per sq. mt. for the deducted area of 974 sq. mts. – Suit filed by plaintiffs against Corporation seeking compensation with interest or, alternatively, for allotment of land, i.e., an extent of 974 sq. mts., in any Town Planning Scheme in the western zone of Ahmedabad – Suit decreed by Trial Court accepting the alternative prayer, main prayer for compensation was rejected – Appeal filed by the Corporation was allowed by High Court,

* Author

cross-objection filed by the plaintiffs were rejected – Plea of the plaintiffs *inter alia* that the judgment of the High Court is liable to be set aside on the ground that no points for determination were framed therein, as required by Or. 41, r.31 CPC:

Held: Mere omission to frame the points for determination would not vitiate the judgment of the first appellate Court, provided that the first appellate Court recorded its reasons based on the evidence adduced by both parties – Thus, even if the first appellate Court does not separately frame the points for determination arising in the first appeal, it would not prove fatal as long as that Court deals with all the issues that actually arise for deliberation in the said appeal – Substantial compliance with the mandate of Order 41 Rule 31 CPC in that regard is sufficient – High Court did set out all the issues framed by the Trial Court in the body of the judgment and was, therefore, fully conscious of all the points that it had to consider in the appeal – Further, no particular issue that was considered by the Trial Court was left out by the High Court while adjudicating the appeal – No merit in the contention that the impugned judgment is liable to be set aside on this preliminary ground, warranting reconsideration of the first appeal by the High Court afresh – Furthermore, on merits, plaintiffs, being well aware of the fact that Final Plot No. 187 allotted to them under the second varied Town Planning Scheme, was of lesser area, accepted the same without any protest and without agitating a right to a larger area in the light of the initial allotment of Plot No.463, and their conduct in depositing ₹24,350/- thereafter, implying receipt of the compensation amount for the shortfall area of 974 sq. mts. @ 25/- per sq. mt., foreclosed their right, if any, to either challenge the allotment of a plot of lesser area or to seek more compensation – Further, upon the preparation or variation of a Town Planning Scheme, the rights in the earlier plots of land would stand extinguished – Thus, such rights, if any, which became extinct cannot be the basis for a later cause of action – Also, the quantification of compensation @ 25/- per sq. mt. for the shortfall area of 974 sq. mts., which is relatable to the power of the Town Planning Officer u/s.52(3)(x), was a decision which was amenable to appellate review u/s.54 however, admittedly the plaintiffs did not avail such remedy – Plaintiffs' claim for damages/compensation was also not supported by material evidence – Further, as there was never any guarantee that a plot owner who surrendered his land pursuant to a Town Planning Scheme would be allotted any land after reconstitution of the plots, the plaintiffs cannot assert

any vested right in that regard – High Court justified in allowing the first appeal filed by the Corporation and non-suiting the plaintiffs in entirety – Impugned judgment not interfered with. [Paras 29-31, 34, 35, 39, 41 and 42]

Gujarat Town Planning and Urban Development Act, 1976 – ss.70, 71 – Plaintiffs argued that variation of the Town Planning Scheme as permitted u/ss.70 and 71 must be read together:

Held: No merit in this submission – Section 70 deals with the power to vary a Town Planning Scheme on the ground of error, irregularity or informality while Section 71 is general in nature and states that, notwithstanding anything contained in Section 70, a Town Planning Scheme may at any time be varied by a subsequent scheme made, published and sanctioned in accordance with the provisions of the Act of 1976 – The very fact that Section 71 begins with a non-obstante clause referring to Section 70, manifests that the power thereunder is not fettered in any manner, unlike the power under Section 70 which can only be exercised on the grounds of error, irregularity or informality – Further, Section 71 postulates that the variation of the Town Planning Scheme is to be made, published and sanctioned in accordance with the provisions of the Act of 1976, which would mean that the entire exercise would be undertaken afresh upon such variation, including reconstitution of the plots under Section 45 – Therefore, further reduction of a plot notified in the original Town Planning Scheme is implicit in the general power of variation vesting in the authority under Section 71 of the Act of 1976. [Para 37]

Gujarat Town Planning and Urban Development Act, 1976 – Scheme – Chapter 5 – Town Planning Schemes – ss.40-76 – Discussed.

Gujarat Town Planning and Urban Development Act, 1976 – s.45 – Reconstitution of plots – Plaintiffs contended that the 1976 Act does not contemplate a second reduction in the reconstituted plot area:

Held: Said argument does not merit acceptance – Section 45 deals with reconstitution of plots – A plot owner who has surrendered his original land for the purposes of the Town Planning Scheme is not even assured of allotment of a reconstituted plot in lieu thereof – In such an event, he is entitled only to compensation – Therefore, there is no guaranteed right vesting in a plot owner who surrendered his land in accordance with the Town Planning Scheme that he would

be allotted another plot of land in lieu thereof, much less, a plot of the same area – It is an admitted fact that, when the plaintiffs' father surrendered an extent of 19823 sq. yds./16575 sq. mts., he was allotted a lesser extent of 15576 sq. yds./13023 sq. mts in two plots in the original Town Planning Scheme, with a deduction of 21.40% – As there was never any guarantee that a plot owner who surrendered his land pursuant to a Town Planning Scheme would be allotted any land after reconstitution of the plots, the plaintiffs cannot assert any vested right in that regard. [Paras 38, 41]

Case Law Cited

Union of India and Another v. Smt. Shanti Devi and Others [1984] 1 SCR 217 : **(1983) 4 SCC 542;** *N. Nagendra Rao and Co. v. State of A.P.* [1994] Supp. 3 SCR 144 : **(1994) 6 SCC 205 – held inapplicable.**

State of Gujarat v. Shantilal Mangaldas and Others [1969] 3 SCR 341 : **(1969) 1 SCC 509;** *Prakash Amichand Shah v. State of Gujarat and Others* [1985] Supp. 3 SCR 1025 : **(1986) 1 SCC 581;** *Ahmedabad Municipal Corporation and Another v. Ahmedabad Green Belt Khedut Mandal and Others* [2014] 11 SCR 855 : **(2014) 7 SCC 357;** *Maneklal Chhotalal and Others v. M.G. Makwana and Others* [1967] 3 SCR 65 : **AIR 1967 SC 1373;** *Malluru Mallappa (Dead) through Lrs. v. Kuruvathappa and Others* [2020] 2 SCR 789 : **(2020) 4 SCC 313;** *Santosh Hazari v. Purushottam Tiwari (Deceased) by Lrs.* [2001] 1 SCR 948 : **(2001) 3 SCC 179;** *Laliteshwar Prasad Singh and Others v. S.P. Srivastava (Dead) thru. Lrs.* [2016] 11 SCR 1 : **(2017) 2 SCC 415;** *G. Amalorpavam and others v. R.C. Diocese of Madurai and Others* [2006] 2 SCR 899 : **(2006) 3 SCC 224 – referred to.**

Bhupendra Kumar Ramanlal and Others v. State of Gujarat and Others **(1995) 1 GLH 1124 : (1996) AIHC 109 – approved.**

List of Acts

Code of Civil Procedure, 1908; Gujarat Town Planning and Urban Development Act, 1976; Gujarat Town Planning and Urban Development Rules, 1979.

List of Keywords

Order 41 Rule 31 Code of Civil Procedure, 1908; Town Planning and Urban Development; Town Planning Scheme; Variation of a Town Planning Scheme; Original Town Planning Scheme; Plot owner surrendered land pursuant to Town Planning Scheme; Vacant possession; Compensation; Points for determination not framed; Alternative plot; Second varied scheme; Allotment of land; Cross-objection; First appellate Court; Allotment of a plot of lesser area; Right to a larger area; Initial allotment; Reconstitution of plots; Reduction in the reconstituted plot area; Allotment of a reconstituted plot; Rights in the earlier plots of land extinguished; Market value of land in question at relevant point of time.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 16956-16957 of 2017

From the Judgment and Order dated 18.06.2013 of the High Court of Gujarat at Ahmedabad in FA No. 3596 of 2009 and CRO No. 81 of 2010

Appearances for Parties

Huzefa Ahmadi, Sr. Adv., Amit Thakkar, Mrugen Purohit, Mahesh Agarwal, Ankur Saigal, Ms. S. Lakshmi Iyer, Ms. Kamakshi Sehgal, E. C. Agrawala, Advs. for the Appellants.

Preetesh Kapur, Sr. Adv., Ms. Hemantika Wahi, Ms. Jesal Wahi, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Judgment

Sanjay Kumar, J.

1. These two appeals arise out of the common judgment dated 18.06.2013 passed by a Division Bench of the High Court of Gujarat at Ahmedabad in First Appeal No. 3596 of 2009 and Cross-Objection No. 81 of 2010 in First Appeal No. 3596 of 2009. Thereby, the Division Bench allowed the first appeal filed by the Ahmedabad Municipal Corporation (for brevity, 'the Corporation') and dismissed the cross-objection filed by the respondents in the first appeal. Aggrieved thereby, the said respondents filed these appeals.

2. The Corporation filed the aforestated first appeal challenging the judgment and decree dated 17.12.2008 passed by a learned Judge of the City Civil Court, Ahmedabad, in Civil Suit No. 4583 of 1998. The said suit was filed by the appellants herein against the Corporation seeking compensation of ₹1,63,97,673/- with interest thereon @ 18% p.a. or, in the alternative, allotment of land, i.e., an extent of 974 sq. mts., in any Town Planning Scheme in the western zone of Ahmedabad.

3. The suit averments of the appellants (hereinafter, referred to as 'the plaintiffs') were as follows: The plaintiffs' father was the owner of original Plot Nos. 144, 150/P and 151/P in Survey Nos. 155, 209 and 210/P respectively, admeasuring 19823 sq. yds./16575 sq. mts. While so, the Corporation prepared Town Planning Scheme No.6, Paldi, under the provisions of the Gujarat Town Planning and Urban Development Act, 1976 (for brevity, 'the Act of 1976'). The scheme came into force from 01.08.1963, whereupon the plaintiffs' father was required to contribute 21.40% of his lands, i.e., 4247 sq. yds./3552 sq. mts., to the Corporation for public purposes. For the remaining extent of 15576 sq. yds./13023 sq. mts., the Corporation allotted two separate final plots, *viz.,* Final Plot No. 478, admeasuring 11686 sq. yds./9771 sq. mts., and Final Plot No. 463, admeasuring 3890 sq. yds./3252 sq. mts. The vacant possession of Final Plot No. 478 was delivered to the plaintiffs' father but the Corporation failed to deliver possession of Final Plot No. 463 owing to its occupation by slum dwellers. Town Planning Scheme No. 6 was varied thereafter in 1983 but without any alternative plot being allotted in lieu of Final Plot No. 463. The Corporation then prepared a second varied scheme in the year 1986, *viz.,* Town Planning Scheme No. 6, Paldi (second varied), which came into force on 26.04.1991. Thereunder, Final Plot No. 463 was taken back for the purpose of slum upgradation and the plaintiffs were offered Final Plot No. 187, admeasuring 2724 sq. yds./2278 sq. mts. In effect, the land allotment in their favour was reduced by 974 sq. mts., when compared with the area of the initially allotted plot. The plaintiffs claimed that they were offered meagre compensation @ ₹25/- per sq. mt. for the deducted area of 974 sq. mts, though the value of the land in 1991 was about ₹6000/- per sq. mt. in Paldi area. Even after the second variation of the scheme, in which Final Plot No. 187 was allotted to them, the Corporation failed to give vacant possession thereof, due to litigation between the Corporation

and the occupant of the said plot. Ultimately, the Corporation was able to handover possession of Final Plot No. 187 to them only on 31.01.1996, after the litigation came to an end. Thus, from 01.08.1963, the date on which Town Planning Scheme No. 6, Paldi (Principal Scheme), came into force, the plaintiffs were deprived of possession and enjoyment of 3890 sq. yds. of land, as was promised initially, as the Corporation was not in a position to allot the said land to them and on 31.01.1996, they were finally delivered possession of Final Plot No. 187 admeasuring only 2278 sq. mts. The compensation awarded to them for the shortfall of 974 sq. mts. @ ₹25/- per sq. mt. was an eye wash in view of the prevailing prices of land in Paldi area in the year 1991. The plaintiffs stated that they were, therefore, constrained to sue for compensation for the damages suffered by them due to the failure of the Corporation in discharging its duties under the Act of 1976.

4. Further, the plaintiffs pointed out that, in Town Planning Scheme No. 6, Final Plot No. 187 was reserved for construction of a school but the Corporation permitted one Pulkit Trust to use it as a playground in 1970. In the first variation of the scheme, Final Plot No. 187 was reserved for a Civic Centre. Litigation cropped up between Pulkit Trust and the Corporation and during the pendency thereof, the Corporation prepared the second varied scheme, whereby the plaintiffs were allotted Final Plot No. 187 though it was still in the occupation of Pulkit Trust. The Corporation issued Notice dated 27.04.1992 under Section 68 of the Act of 1976 proposing to evict Pulkit Trust from the land. After considering the objections raised by Pulkit Trust, the Corporation informed it on 27.09.1994 that the same were not accepted. Thereupon, Pulkit Trust filed Civil Suit No. 5415 of 1994, which ultimately culminated with the dismissal of the SLP filed by it before this Court in 1995.

5. The plaintiffs further stated that, in the meantime, a public interest litigation was instituted before the High Court of Gujarat *vide* Special Civil Application No. 3980 of 1992. The plaintiffs also joined the litigation thereafter as necessary parties. This case was finally dismissed by the High Court on 3/4.04.1995. The plaintiffs stated that they had suffered huge monetary losses as they were deprived of the benefit of enjoying the property since 1963 and the failure of the Corporation in allotting them suitable land, at the time the scheme was implemented, amounted to failure in discharge of its statutory obligation and duty

under Sections 65, 68, 84 and 85 of the Act of 1976. The plaintiffs claimed that the market rate of the land allotted to the plaintiffs was about ₹150/- per sq. yd. in the year 1963 and, therefore, the value of 3890 sq. yds. would come to ₹5,83,500/-. They asserted that if this amount had been invested at 10% p.a. compound rate of interest, it would come to ₹1,63,97,673/-. They prayed for compensation of ₹1,63,97,673/-. They further stated that, the scheme was framed as per the provisions of the Act of 1976, whereby deduction of 21.40% of their land was necessitated, but they were finally allotted land with a further deduction of 974 sq. mts. illegally. They, therefore, sought allotment of that land in the alternative.

6. The Corporation filed its written statement in the suit, stating as under: The suit, as framed, was not maintainable and the Civil Court had no jurisdiction to entertain it and grant the reliefs prayed for therein. The suit also required to be dismissed for non-joinder of parties, as the State Government had not been impleaded therein. Even on merits, the plaintiffs were not entitled to the reliefs prayed for. The plaintiffs were allotted Final Plot No. 187, admeasuring 2278 sq. mts., under the scheme, which had been varied after following the due procedure. As regards the shortfall of land, the plaintiffs were paid compensation @ ₹25/- per sq. mt. under the scheme itself and, as such, the plaintiffs accepted possession of Final Plot No. 187 and the compensation, in respect of the remaining area of land, without protest and without challenging the same. Therefore, it was not open to them to make out a grievance either with respect to the remaining area of land and/or the quantum of compensation. If they had any grievance with respect to the quantum of compensation, they were required to prefer an appeal under Section 54 of the Act of 1976. Further, the plaintiffs could not pray for compensation for the extent of 974 sq. mts. on the basis of the original Town Planning Scheme No. 6, Paldi, as upon variation of the scheme, the original scheme ceased to be in existence and stood substituted by the varied scheme under Section 71 of the Act of 1976. The Corporation, accordingly, prayed for dismissal of the suit.

7. On the basis of the aforesaid pleadings, the Trial Court framed the following issues for consideration: -

> ‘1) Whether the plaintiff proves that deceased father was the original owner of land bearing S. Nos. 255, 209

and 210/P (original plot Nos. 144, 150/P and 151/P) admeasuring 19823 sq. yards in Paldi area?

2) Whether the plaintiff proves that they required to be allotted 155/6 sq. yards by Ahmedabad Municipal Corporation due to enforcement of Town Planning Scheme?

3) Whether the plaintiff proves that one final plot was allotted on the original plot itself and another final plot admeasuring about 3890 sq. yards bearing S. No. 403 was allotted to other side?

4) Whether the plaintiff proves that the defendant failed perform its legal obligation to give vacant and peaceful possession of Final Plot No. 463 due to alleged reasons?

5) Whether the plaintiff proves that the defendant offered Final Plot No. 187 admeasuring 2278 sq. mts.?

6) Whether the plaintiff proves that the defendant offered a meagre compensation for the deducted area of 972 sq. meter. Even though the real value of the land in 1991 was about Rs. 6000/- per sq. meter, in Paldi area?

7) Whether the plaintiff proves that the defendant handed over and allotted the possession of Final Plot No. 187 on dt. 3196 after litigation as alleged in the plaint?

8) Whether the plaintiff proves that the compensation awarded, for the difference of 974 sq. meter. At the rate of Rs. 25 per sq. meter, was merely an eye wash in view of the prevailing prices of land in Paldi area in the year 1991?

9) Whether the plaintiff proves that as alleged plots handed over to him on different dates, so he suffered huge monetary loss and deprived of benefit on enjoyment of their property since 1963?

10) Whether the plaintiff proves that the prevailing market rate of the allotted land to them was about Rs. 150/- per sq. yard in 1963? And value of 3890 sq. yards land would come to Rs. 5,83,500?

11) Whether the plaintiffs prove that they are entitled to the interest at the rate of 10% p.a. on Rs. 5,83,500/- which have turned out in investment at compound rate of interest comes to Rs. 1,63,97,673/- as alleged?

11A) Whether the plaintiff is entitled to be allotted remaining land of 974 sq. meter by the defendant as prayed for in para 10(A) of plaint?

12) Whether the defendant proves that the suit is bad and illegal for non-joinder of necessary parties as alleged?

13) Whether the defendant proves that the suit is not maintainable as alleged?

14) Whether the defendant proves that the plaintiff had not raised any objection at the proper time as alleged?

15) Whether the defendant proves that the plaintiff is not entitled to any special notice as alleged?

16) Whether the defendant proves that in plaintiff's case they followed all the necessary procedure as alleged?

17) Whether the defendant proves that this Court has no jurisdiction to try this suit?

18) What order and what decree?'

8. After considering the evidence, oral and documentary, and the arguments of both sides, the Trial Court answered Issue Nos. 1,2,3,4,5,7, 8,9 and 11A in the affirmative and Issue Nos. 6,10,11,12,13,14,15,16 and 17 in the negative. Significantly, the Corporation adduced no oral or documentary evidence. As regards Issue Nos. 4 and 5, pertaining to the offer and allotment of Final Plot No. 187, admeasuring 2278 sq. mts., the Trial Court noted that Resolution dated 15.10.1986 was passed by the Town Planning Committee, in which it was stated that in the place of Final Plot No. 463, it was advised that the same area in Final Plot No. 187 is to be allotted. The Trial Court also noted the Resolution passed by the Corporation on 30.10.1986 that the plaintiffs would be allotted the same area of land which was earlier allotted in Final Plot No. 463. The Trial Court further noted the correspondence thereafter, which reflected that Final Plot No. 187 was being allotted to the plaintiffs and that the change of allotment of plots resulted in a reduction of

974 sq. mts. of land. The Trial Court accordingly answered Issue Nos. 4 and 5 in the affirmative. As regards Issue No. 6, pertaining to the compensation for the reduced area of 974 sq. mts., the Trial Court noted that though the plaintiffs pleaded that, in the year 1991 the value of the land in Paldi area was about ₹6000/- per sq. mt., they did not produce a single document or corroborative evidence to prove that fact. The issue was, therefore, answered in the negative.

9. As regards Issue Nos. 8 and 9 as to whether the compensation @ ₹25/- per sq. mt. was merely an eye wash and whether the plaintiffs suffered huge monetary losses, the Trial Court noted that Final Plot No. 187 had been allotted to the plaintiffs in the place of Final Plot No. 463, which was initially allotted to them in the year 1963 and for which the rate was shown as ₹25/- per sq. mt. The Trial Court noted that 33 years after the allotment of Final Plot No. 463, Final Plot No. 187 was handed over to the plaintiffs in January, 1996, and the same rate of ₹25/- per sq. mt. was adopted for the compensation. The Trial Court, accordingly, agreed with the plaintiffs that the said rate was meagre and, therefore, the compensation offered at that rate was merely an eye wash. As Final Plot No. 187 was handed over to the plaintiffs 33 years after the allotment of the first plot and as Paldi area could be considered a posh area, the Trial Court affirmed that the plaintiffs had suffered monetary loss by the deprivation of the benefit of enjoying the property since 1963. Issue Nos. 8 and 9 were accordingly answered in the affirmative.

10. As the plaintiffs failed to adduce evidence in support of their claim as to the market value of the land but as they had proved that the Corporation failed to allot the remaining extent of 974 sq. mts. due to total negligence, they were held entitled to get that extent of land. Issue Nos. 10 and 11 were answered in the negative but Issue No. 11A was answered in the affirmative. Issue No. 12, pertaining to the maintainability of the suit, was answered in favour of the plaintiffs and in the negative.

11. Issue Nos. 13,14,15,16 and 17 were taken up together and the Trial Court answered all of them also in the negative. As regards the bar under Section 105 of the Act of 1976, the Trial Court opined that this provision was not intended to protect injustice caused to the parties and as the Corporation had failed to provide the second final plot till

the year 1996 and the same was given with a short fall in area and with meagre compensation therefor, the said actions were not in good faith and the statutory provision would not protect the Corporation.

12. The Trial Court, accordingly, decreed the suit by accepting the alternative prayer made by the plaintiffs that they should be allotted an extent of 974 sq. mts. in any Town Planning Scheme in the western zone of Ahmedabad, but rejected the main prayer for compensation of ₹1,63,97,673/- with interest thereon. The plaintiffs were, however, directed to repay the amount of compensation received by them @ ₹25/- per sq. mt. for the extent in question.

13. Assailing the aforestated judgment and decree, the Corporation preferred the subject first appeal before the High Court while the plaintiffs filed their cross-objection therein, apropos the rejection of their main prayer for compensation to the tune of ₹1,63,97,673/-. Before doing so, the plaintiffs deposited ₹24,350/-, being the amount awarded towards compensation for 974 sq. mts. of land @ ₹25/- per sq. mt., as directed by the Trial Court. Thereafter, by the impugned judgment, the High Court held in favour of the Corporation by allowing its appeal and against the plaintiffs by rejecting their cross-objection.

14. Perusal of the impugned judgment reflects that the High Court noted the contentions of both parties and then extracted the issues framed by the Trial Court *in extenso.* The High Court, however, did not frame the points that arose for determination in the appeal, in terms of Order 41 Rule 31 CPC. The High Court then referred to the arguments advanced on behalf of the parties and started the discussion on merits from para 5.1 of the judgment. The High Court observed that compensation had been paid for the shortfall of 974 sq. mts. @ ₹25/- per sq. mt. and noted that it was not in dispute that the said compensation amount had been accepted without protest. The High Court also noted that the plaintiffs had not challenged the second varied Town Planning Scheme No. 6, Paldi, under which they were allotted Final Plot No. 187, admeasuring 2278 sq. mts., in lieu of the originally allotted Final Plot No. 463, admeasuring 3890 sq. yds. The High Court also took note of the fact that the plaintiffs supported the second varied scheme before the Division Bench of the High Court in Special Civil Application No. 3980 of 1992 and concluded that they could not make out a grievance with regard to the non-delivery of the remaining 974 sq. mts. of land.

15. Reference was made by the High Court to Section 71 of the Act of 1976, which allowed variation of a Town Planning Scheme and it was held that any right with respect to the remaining 974 sq. mts., on the basis of the original Town Planning Scheme No. 6, Paldi, no longer remained in existence after such variation. The High Court, accordingly, held that the Trial Court had erred in directing the Corporation to allot 974 sq. mts. of land in any other scheme in the western zone of Ahmedabad. The High Court also took note of the fact that the Trial Court had opined that the compensation paid to the plaintiffs for the shortfall of 974 sq. mts. @ ₹25/- per sq. mt. was inadequate, which had led to the direction to the Corporation to allot an equivalent extent of land in any other Town Planning Scheme, while directing the plaintiffs to return the amount of compensation paid to them. The High Court, thereupon, observed that once the plaintiffs accepted Final Plot No. 187 and the compensation for the 974 sq. mts. of land @ ₹25/- per sq. mt. under the second varied Town Planning Scheme, No. 6, Paldi, without protest, it was not open to the Trial Court to pass any order which would tantamount to further varying the scheme when it was not even challenged by the plaintiffs.

16. As regards the inaction on the part of the Corporation in handing over vacant possession of Final Plot No. 463, the High Court observed that once the original Town Planning Scheme was varied, it was not open to the plaintiffs to assert any grievance in relation to the plot allotted to them under that scheme. As regards the inadequacy of compensation, the High Court held that the Trial Court could not have gone into that issue as no appeal was preferred by the plaintiffs under Section 54 of the Act of 1976, if they were unhappy with the quantum of compensation.

17. Insofar as the cross-objection filed by the plaintiffs is concerned, the High Court noted that the Trial Court had not accepted their prayer to award them compensation of ₹1,63,97,673/- as they had failed to prove, by leading evidence, that at the relevant time in 1963 the market price of the land was ₹150/- per sq. mt. The High Court further held that it was not open to them to claim any damages, having accepted the smaller plot allotted to them under the varied scheme and the compensation for the shortfall of 974 sq. mts. @ ₹25/- per sq. mt. without protest. The High Court, accordingly, concluded that the cross-objection deserved to be dismissed. It is on this basis that

the High Court allowed the first appeal filed by the Corporation and dismissed the cross-objection of the plaintiffs.

18. Before we proceed further, it would be apposite to take note of the statutory milieu pertinent to this case and the case law relevant thereto. Chapter 5 of the Act of 1976 is titled 'Town Planning Schemes' and comprises Sections 40 to 76. Section 40 deals with the making and the contents of a Town Planning Scheme and empowers the appropriate authority to make one or more Town Planning Scheme(s) for a development area. Section 40(3) states that a Town Planning Scheme may make provision for the matters enumerated in clauses (a) to (m) thereunder. Clause (jj) therein was, however, substituted with effect from 01.05.1999. Clause (a) refers to laying out or re-laying out of land, either vacant or already built upon, while clause (d) relates to the construction, alteration and removal of buildings, bridges and other structures. Clause (e) relates to the allotment or ear-marking of land for roads, open spaces, gardens, recreation grounds, schools, markets, green-belts, dairies, transport facilities and public purposes of all kinds. Section 41 requires the appropriate authority, in consultation with the Chief Town Planner, to declare its intention to make a Town Planning Scheme in respect of a particular area and, within 21 days from the date of such declaration, publish the same in the prescribed manner and dispatch a copy thereof to the State Government, along with a plan showing the area which it proposes to include in the Town Planning Scheme. A copy of such plan shall be open to public inspection at the office of the appropriate authority. Section 42 deals with the making and publication of a draft scheme and states that, within 9 months from the date of declaration of intention under Section 41, the appropriate authority shall make a draft scheme of the area in respect of which the said declaration was made and publish the same in the Official Gazette along with the draft regulations for carrying out the provisions of the scheme. Section 44 details the contents of the draft scheme and provides that it should contain the particulars enumerated under Clauses (a) to (h). Clause (a) pertains to the area, ownership and tenure of each original plot while clause (b) relates to the particulars of land allotted or reserved under Section 40(3)(e). Clause (c) relates to the extent to which it is proposed to alter the boundaries of the original plot and clause (e) requires a full description of all the details of the scheme under Section 40(3), as may be applicable.

19. Section 45 of the Act of 1976 pertains to the reconstitution of plots and Section 45(1) states that, in the draft scheme referred to in Section 44, the size and shape of every plot shall be determined, so far as may be, to render it suitable for building purposes and where the plot has already been built upon, to ensure that the building, as far as possible, complies with the provisions of the scheme as regards open spaces. Section 45(2) states that, for the purposes of sub-section (1), the draft scheme may contain proposals as to the details mentioned under clauses (a) to (e). This provision reads as under: -

> '(2) For the purposes of sub-section (1), the draft scheme may contain proposals-
>
> (a) to form a final plot by the reconstitution of an original plot by the alteration of its boundaries, if necessary;
>
> (b) to form a final plot from an original plot by the transfer of any adjoining lands;
>
> (c) to provide with the consent of the owners that two or more original plots which are owned by several persons or owned by persons jointly be held in ownership in common as a final plot, with or without alteration of boundaries;
>
> (d) to allot a final plot to any owner dispossessed of land in furtherance of the scheme; and
>
> (e) to transfer the ownership of a plot from one person to another.'

20. Section 47 of the Act of 1976 provides for objections being raised against the draft scheme and states that such objections are to be made in writing within one month from the date of publication of the draft scheme and the same should be considered by the appropriate authority. Further, before submitting the draft scheme to the State Government, the appropriate authority may modify the scheme as it thinks fit. Section 48 empowers the State Government to sanction the draft scheme. Section 50 requires the State Government to appoint a Town Planning Officer within one month from the date on which the draft scheme has been sanctioned and notified in the Official Gazette and the duties of such Town Planning Officer are set out in Section 51. Thereunder, the Town Planning Officer is required, within twelve

months from the date of his appointment, to sub-divide the Town Planning Scheme into a preliminary scheme and a final scheme, following the prescribed procedure. Section 52 details the contents of the preliminary and final schemes. Insofar as a preliminary scheme is concerned, the Town Planning Officer is required, under Section 52(1), to give notice in the prescribed manner to the persons affected by the scheme and define and demarcate the areas allotted to or reserved for a public purpose or for the purpose of the appropriate authority and the final plots. Under Section 52(1)(iii), the Town Planning Officer is empowered to provide for the total or partial transfer of any right in an original plot to a final plot or provide for the transfer of any right in an original plot in accordance with the provisions of Section 81. Section 52(2) requires the Town Planning Officer to submit the preliminary scheme so prepared to the State Government for sanction and to, thereafter, prepare and submit to the State Government the final scheme in accordance with the provisions of Section 52(3).

21. In the said final scheme, the Town Planning Officer is required, under Section 52(3), to fix the difference between the total of the values of the original plots and the total of the values of the plots included in the scheme, in accordance with the provisions of Section 77(1)(f). Under Clause (iii) of Section 52(3), the Town Planning Officer is required to estimate the sums payable as compensation on each plot used, allotted or reserved for a public purpose or for the purpose of the appropriate authority, which is beneficial partly to owners or residents within the area of the scheme and partly to the general public, which shall be included in the costs of the scheme. Clauses (iv) to (ix), thereafter, deal with the Town Planning Officer's power to calculate and determine the contribution to be made by the plot owners in relation to the plots used, allotted or reserved for public purposes or for the purpose of the appropriate authority which is beneficial partly to the owners or residents within the area of the scheme and partly to the general public. This would also include the calculation of the contribution to be levied on each plot owner under the final scheme. Section 52(3)(x) requires the Town Planning Officer to estimate, with reference to claims made before him, after giving due notice in the prescribed manner and form, the compensation to be paid to the owner of any property or right injuriously affected by the making of the Town Planning Scheme, in accordance with the provisions of Section 82. Section 54 provides for an appeal

against any decision of the Town Planning Officer under Section 52(3)(iii), (iv), (vi), (vii), (viii) and (x) which are to be communicated forthwith to the party concerned and such party, if aggrieved thereby, is entitled to file an appeal within one month from the date of such communication before the Board of Appeal, constituted under Section 55. Section 67(a) refers to the effect of a preliminary scheme and states that, on the day on which the preliminary scheme comes into force, all lands required by the appropriate authority shall, unless it is otherwise determined in such scheme, vest absolutely in the appropriate authority, free from all encumbrances. Section 67(b) states that upon the preliminary scheme coming into force, all rights in the original plots, which have been reconstituted into final plots, shall determine and the final plots shall become subject to the rights settled by the Town Planning Officer. Section 68 empowers the appropriate authority to summarily evict any person continuing to occupy land which he is not entitled to occupy under the preliminary scheme, in accordance with the prescribed procedure, after such preliminary scheme comes into force. Section 70 empowers the appropriate authority to apply in writing to the State Government for variation of the preliminary or final scheme after it has come into force, if the said authority considers that the scheme is defective on account of an error, irregularity or informality. Section 71 is titled 'Variation of Town Planning Scheme by another scheme'. It begins with a non-obstante clause and reads as under: -

> '**71. Variation of town planning scheme by another scheme.** -Notwithstanding anything contained in Section 70, a town planning scheme may at any time be varied by a subsequent scheme made, published and sanctioned in accordance with the provisions of this Act.'

22. Section 81 is titled 'Transfer of right from original to final plot or extinction of such right' and states that any right in an original plot which, in the opinion of the Town Planning Officer, is capable of being transferred wholly or in part, without prejudice to the making of a Town Planning Scheme, to a final plot shall be so transferred and any right in an original plot which, in the opinion of the Town Planning Officer, is not capable of being so transferred, shall be extinguished. Section 82 is titled 'Compensation in respect of property or right injuriously affected by the scheme' and states that the owner of any property or right which is injuriously affected by the making

of a Town Planning Scheme shall, if he makes a claim before the Town Planning Officer within the prescribed time, be entitled to be compensated in respect thereof by the appropriate authority or by any person benefited or partly by the appropriate authority and partly by such person, as the Town Planning Officer may in each case determine. The *proviso* thereunder states that the value of such property or right shall be deemed to be its market value on the date of declaration of the intention to make a scheme or the date of the notification issued by the State Government under Section 43(1) without reference to improvements contemplated in the scheme, as the case may be. Section 84 deals with cases in which the amount payable to the owner exceeds the amount due from him and states that, if the owner of an original plot is not provided with a plot in the preliminary scheme or if the contribution to be levied on him under Section 79 is less than the total amount to be deducted therefrom under any of the provisions of the Act of 1976, the net amount of his loss shall be payable to him by the appropriate authority in case or in such other manner as may be agreed upon by the parties. Section 105 is titled 'Bar of legal proceedings' and states that no suit, prosecution or other legal proceeding shall lie against the State Government, the appropriate authority or any public servant or person duly appointed or authorized under the Act of 1976 in respect of anything in good faith done or purported to be done under the provisions thereof or any rules or regulations made thereunder.

23. Section 118 of the Act of 1976 empowers the State Government to make rules consistent with the provisions of that statute to carry out the purposes thereof. In exercise of such power, the Gujarat Town Planning and Urban Development Rules, 1979, were framed. Rule 16 thereof prescribes the procedure to be followed for publication of the declaration under Section 41 of the Act of 1976. Rule 17 states that, for the purpose of making the draft scheme under Section 42 of the Act of 1976, the appropriate authority shall call a meeting or meetings of the owners of the lands included in the Town Planning Scheme, by a public notice as well as by individual notice to every owner whose address is known to the appropriate authority, and explain in such meeting the tentative proposals of the draft scheme for eliciting public opinion and suggestions on the said proposals. Thereafter, the appropriate authority is empowered to take into consideration all such suggestions and objections raised on the proposals for making the

draft scheme under Section 42. Rule 26 details the procedure to be followed by the Town Planning Officer under Sections 51 and 52(1) of the Act of 1976. Rule 26(1) requires the Town Planning Officer to give notice in Form H of the date on which he would commence his duties for preparing the preliminary scheme and final scheme and he shall also state the time within which the owner of any property or right which is injuriously affected by the making of the scheme, who would be entitled under Section 82, to make a claim for compensation before him. Under Rule 26(4), the Town Planning Officer is required to give every person, interested in any land affected by a scheme, sufficient opportunity of stating their views and not give a decision till he has duly considered their representations, if any. Rule 37 states that a claim under Section 82 shall be made within three months from the date fixed in the notice given under Rule 26(1).

24. Now, a quick recce of precedential thought on the Act of 1976 and the like. In ***State of Gujarat vs. Shantilal Mangaldas and others***[1], a Constitution Bench had occasion to consider the provisions of the Bombay Town Planning Act, 1955. The provisions of that enactment were earlier applicable in the State of Gujarat and are in *pari materia* with those of the Act of 1976. Section 53 of the Bombay Town Planning Act, 1955, provided that all lands required by the local authority shall, on the day on which the final scheme comes into force, vest absolutely in the local authority free from all encumbrances, unless it is otherwise determined in such scheme, and that all rights in the original plots which have been reconstituted shall determine and the reconstituted plots shall become subject to the rights settled by the Town Planning Officer. In effect, this provision is identical to Section 67 of the Act of 1976. The argument advanced in that case before the High Court, which had found favour with it in holding Section 53 *ultra vires*, was that when a plot is reconstituted and out of that plot, a smaller area is given to the owner and the remaining area is utilized for a public purpose, the area so utilized vests in the local authority but as the Act did not provide for giving compensation, which is a just equivalent of the land expropriated on the date of extinction of interest, the guaranteed right under Article 31(2) of the Constitution stood infringed. Negating this contention, the Constitution Bench held that Section 53 did not provide that a reconstituted plot is transferred

1 [1969] 3 SCR 341 : (1969) 1 SCC 509

or is deemed to be transferred from the local authority to the owner of the original plot, as it provides for statutory readjustment of the rights of the owners of the original plots of land. The Bench pointed out that when the scheme comes into force, all rights in the original plots stand extinguished and, simultaneously therewith, ownership springs in the reconstituted plots. Noting that there is no vesting of original plots in the local authority nor transfer of the rights of the local authority in the reconstituted plots, the Bench observed that a part or even the whole plot belonging to an owner may go to form a reconstituted plot which may be allotted to another person or may be appropriated to public purposes under the scheme. The Bench further observed that the source of the power to appropriate the whole or a part of the original plot in forming a reconstituted plot is statutory and it does not predicate ownership of the plot in the local authority and no process - actual or notional - of transfer is contemplated in that appropriation. The Bench ultimately held that the concept that lands vest in the local authority when the intention to make a scheme is notified is against the plain intendment of the Act. Significantly, while considering the provision in the Bombay Town Planning Act, 1955, pertaining to the method of adjustment of contribution against compensation receivable by an owner of land, *viz.,* Section 67, the Bench noted that the said provision states that the difference between the market value of the plot, with all the buildings and works thereon, on the date of declaration of the intention to make a scheme and the market value of the plot as reconstituted on the same day and without reference to the improvements contemplated in the scheme, is to be the compensation due to the owner and in the event the owner of the original land is not allotted a plot at all, he shall be paid the value of the original plot on the date of declaration of the intention to make a scheme.

25. In ***Prakash Amichand Shah vs. State of Gujarat and others***[2], another Constitution Bench again dealt with the provisions of the Bombay Town Planning Act, 1955. It was observed therein that, on the final scheme coming into force, the lands affected by the said scheme which are needed by the local authority for the purposes of the scheme automatically vest in the local authority and there is no need to set in motion the provisions of the Land Acquisition Act, 1894.

2 [1985] Supp. 3 SCR 1025 : (1986) 1 SCC 581

The Bench pointed out that the Town Planning Officer is authorized to determine whether any reconstituted plot can be given to a person whose land is affected by the scheme, as all rights of private owners in the original plots would determine and certain consequential rights in favour of the owners would arise therefrom. The Bench noted that, if reconstituted or final plots are allotted to them in the scheme, they become owners of such final plots, subject to the rights settled by the Town Planning Officer in the final scheme, and in some cases the original plot of an owner might be completely allotted by the local authority for a public purpose and such private owner may be paid compensation or given a reconstituted plot in some other place. Significantly, it was noted that such a reconstituted plot may be a smaller or a bigger plot and, in some cases, it may not be possible to allot a final plot at all. Reference was made to the provisions of the said Act, which provided for certain financial adjustments regarding payment of money to the local authority or to the owners of the original plots and it was noted that the development and planning carried out under the Act is primarily for the benefit of the public and the local authority is under an obligation to function according to the Act and bear a part of the expenses of the development. The Bench observed that, in one sense, it is a package deal.

26. In ***Ahmedabad Municipal Corporation and another vs. Ahmedabad Green Belt Khedut Mandal and others***[3], a 3-Judge Bench of this Court considered the provisions of the Act of 1976. It was observed that the provisions of the Act of 1976, read conjointly, give a clear picture that the Town Planning Scheme is just like consolidation proceedings as the land belonging to various persons is first put into a pool and then allocated for different purposes and, in such a way, after having all deductions, the loss and profit of individual tenure-holders is to be calculated. It was noted that a Town Planning Scheme would provide for pooling the entire land covered by the scheme and, thereafter, reshuffling and reconstituting of plots and the market value of the original plots and final plots is to be assessed and the authority has to determine as to whether a land owner has suffered some injury or has gained from such process. It was also pointed out that reconstitution of plots is permissible, as provided under the scheme of the Act and as is evident from a reading of Sections

3 [2014] 11 SCR 855 : (2014) 7 SCC 357

45(2)(a),(b),(c) and Section 52(1)(iii), in accordance with Section 81 of the Act of 1976. The Bench observed that, if by reconstitution of the plots, anybody suffers injury, the statutory provisions provide for compensation under Section 67(b) read with Section 82 of the Act of 1976. It was further noted that, by such reconstitution and readjustment of plots, there is no vesting of land in the local authority and the Act of 1976 provides for payment of non-monetary compensation and that mode was approved by the Constitution Bench in ***Shantilal Mangaldas*** (*supra*), wherein this Court held that when the scheme comes into force, all rights in the original plots are extinguished and, simultaneously therewith, ownership springs in the reconstituted plots. Reference was also made to ***Maneklal Chhotalal and others vs. M.G. Makwana and others***[4], wherein it was observed that, even if an original plot owner is allotted a smaller extent of land in the final plot and has to pay certain amount as contribution, having regard to the scheme and its objects, it is inevitable and would not amount to deprivation. The 3-Judge Bench, accordingly, observed that it is evident that in case a land owner is not provided with a final plot, the amount of his loss would be payable to him as required under Section 82 of the Act of 1976. Again referring to ***Shantilal Mangaldas*** (*supra*), it was noted that there is no necessity to acquire the land as the title of the owners is readjusted upon the scheme being sanctioned and the lands required for any of the purposes of the scheme need not be acquired otherwise than under the Act, for it is a settled rule of interpretation of statutes that when power is given thereunder to do a certain thing in a certain way, the thing must be done in that way or not at all.

27. This being the legal position *vis-à-vis* the Act of 1976, it was contended before us by the plaintiffs that the impugned judgment of the High Court is liable to be set aside on the short ground that no points for determination were framed therein, as required by Order 41 Rule 31 CPC. Reliance was placed on ***Malluru Mallappa (Dead) through Lrs. vs. Kuruvathappa and others***[5], wherein this Court observed that the first appellate Court is required to set out the points for determination, record the decision thereon and give its own reasoning. It was further observed that, even when the said Court affirms the

4 [1967] 3 SCR 65 : AIR 1967 SC 1373

5 [2020] 2 SCR 789 : (2020) 4 SCC 313

judgment of the Trial Court, it has to comply with the requirements of Order 41 Rule 31 CPC as non-observance thereof would lead to an infirmity in its judgment. However, it may be noted that no absolute proposition was laid down therein to the effect that failure to frame points for determination, in itself, would render the first appellate Court's judgment invalid on that ground.

28. Reference was also made to ***Santosh Hazari vs. Purushottam Tiwari (Deceased) by LRs***[6], wherein this Court held that a first appeal is a valuable right and unless restricted by law, the whole case would be open for rehearing before it, both on questions of fact and law, and, therefore, the judgment of the first appellate Court must reflect conscious application of mind and it must record findings supported by reasons on all the issues arising, along with the contentions put forth and pressed by the parties for decision of the said Court. It was further observed that, while reversing a finding of fact, the first appellate Court must come into close quarters with the reasoning of the Trial Court and then assign its own reasons for arriving at a different finding. This, *per* this Court, would satisfy the requirement of Order 41 Rule 31 CPC.

29. However, in ***Laliteshwar Prasad Singh and others vs. S.P. Srivastava (Dead) thru. Lrs.***[7], this Court, while affirming the aforestated principles, observed that it is well settled that the mere omission to frame the points for determination would not vitiate the judgment of the first appellate Court, provided that the first appellate Court recorded its reasons based on the evidence adduced by both parties.

30. Thus, even if the first appellate Court does not separately frame the points for determination arising in the first appeal, it would not prove fatal as long as that Court deals with all the issues that actually arise for deliberation in the said appeal. Substantial compliance with the mandate of Order 41 Rule 31 CPC in that regard is sufficient. In this regard, useful reference may be made to ***G. Amalorpavam and others vs. R.C. Diocese of Madurai and others***[8], wherein this Court held as under: -

---

6 [2001] 1 SCR 948 : (2001) 3 SCC 179

7 [2016] 11 SCR 1 : (2017) 2 SCC 415

8 [2006] 2 SCR 899 : (2006) 3 SCC 224

> '9. The question whether in a particular case there has been substantial compliance with the provisions of Order 41 Rule 31 CPC has to be determined on the nature of the judgment delivered in each case. Non-compliance with the provisions may not vitiate the judgment and make it wholly void, and may be ignored if there has been substantial compliance with it and the second appellate court is in a position to ascertain the findings of the lower appellate court. It is no doubt desirable that the appellate court should comply with all the requirements of Order 41 Rule 31 CPC. But if it is possible to make out from the judgment that there is substantial compliance with the said requirements and that justice has not thereby suffered, that would be sufficient. Where the appellate court has considered the entire evidence on record and discussed the same in detail, come to any conclusion and its findings are supported by reasons even though the point has not been framed by the appellate court there is substantial compliance with the provisions of Order 41 Rule 31 CPC and the judgment is not in any manner vitiated by the absence of a point of determination. Where there is an honest endeavour on the part of the lower appellate court to consider the controversy between the parties and there is proper appraisement of the respective cases and weighing and balancing of the evidence, facts and the other considerations appearing on both sides is clearly manifest by the perusal of the judgment of the lower appellate court, it would be a valid judgment even though it does not contain the points for determination. The object of the rule in making it incumbent upon the appellate court to frame points for determination and to cite reasons for the decision is to focus attention of the court on the rival contentions which arise for determination and also to provide litigant parties opportunity in understanding the ground upon which the decision is founded with a view to enable them to know the basis of the decision and if so considered appropriate and so advised to avail the remedy of second appeal conferred by Section 100 CPC.'

31. As already noted hereinabove, the High Court did set out all the issues framed by the Trial Court in the body of the judgment and was, therefore, fully conscious of all the points that it had to consider

in the appeal. Further, we do not find that any particular issue that was considered by the Trial Court was left out by the High Court while adjudicating the appeal. In effect, we do not find merit in the contention that the impugned judgment is liable to be set aside on this preliminary ground, warranting reconsideration of the first appeal by the High Court afresh.

32. As regards the merits of the matter, we may note that though the father of the plaintiffs was allotted Final Plot No. 463, admeasuring 3890 sq. yds./3252 sq. mts. in the original Town Planning Scheme No. 6, Paldi, in the year 1963, possession thereof could not be delivered to him as it was occupied by slum dwellers. It was only in the second variation of Town Planning Scheme No. 6 in August, 1986, that Final Plot No. 187 was allotted to the plaintiffs in lieu of Plot No. 463 and it had a smaller area by 974 sq. mts. Reliance was placed by the plaintiffs upon the resolutions passed by the Town Planning Committee in its meeting held on 15.10.1986 and the Corporation in its general board meeting held on 30.10.1986 respectively to contend that it was the intention of the authorities concerned to allot the same area as in Final Plot No. 463 to them. However, we find from the resolutions in question that Final Plot No. 187 was specifically mentioned therein and the intention was that this plot should be allotted to the plaintiffs. It is an admitted fact that this final plot was part of the original Town Planning Scheme No. 6, Paldi, and it was always of the same area, i.e., 2724 sq. yds/2278 sq. mts. Therefore, the mere use of the words 'same area' or 'equal area' in the resolutions had no impact as those words were used in juxtaposition to Final Plot No. 187 and the area of the said plot must have been within the knowledge of all concerned as on the dates of the resolutions, given the statutory scheme of transparency.

33. Further, though so much stress was laid by the plaintiffs upon the resolutions passed by the authorities in the year 1986 to contend that the 'same area' was to be allotted to them in lieu of Plot No. 463, we may note that this mistaken impression, if at all entertained by the plaintiffs, despite the clear mention of Final Plot No. 187 in those resolutions and their own knowledge of the details of the scheme, stood dispelled in April, 1995. They were parties to the public interest litigation initiated in Special Civil Application No. 3980 of 1992 before a Division Bench of the High Court of Gujarat at Ahmedabad. The challenge therein was to the allotment of Final Plot No. 187 to them

on the ground that the said plot was meant for a public purpose. The plaintiffs were respondent Nos. 4 and 5 in Special Civil Application No. 3980 of 1992. In the judgment rendered therein on 03/04.04.1995, the Division Bench observed that Final Plot No. 187 was to be given to the plaintiffs instead of Final Plot No. 463 which was larger. The Division Bench further observed that it was they who appeared to have lost in the bargain, because the plot of land which was now being offered to them, *viz.,* Plot No. 187, was nearly 1200 sq. yds. lesser than Plot No. 463 and the only advantage which they got was that Plot No. 187 was free from encumbrance. Nearly nine months later, Final Plot No. 187 was actually delivered to the plaintiffs. However, in the interregnum, they raised no objection or grievance as to the reduction in the plot size and quietly waited for delivery of Final Plot No. 187. It is also an admitted fact that, shortly thereafter, in the year 1998, the plaintiffs sold the said plot to J.K. Cooperative Housing Society Limited.

34. The failure of the Corporation in handing over vacant possession of Plot No. 463 was also subjected to attack, but we find that when the said allotment was modified by the second variation of Town Planning Scheme No. 6, Paldi, in the year 1986, whereby the plaintiffs were allotted Final Plot No. 187 which was of a lesser area, they silently accepted the same and did not choose to either seek implementation of the original scheme, whereunder they were allotted a larger plot, or challenge the varied scheme, whereby they were given a smaller plot. Having accepted the plot allotted to them upon variation of the scheme without demur or protest, the plaintiffs cannot now seek to reopen the negligence and delay, if any, on the part of the Corporation prior to such variation. Further, as is evident from the edicts laid down by this Court, referred to *supra*, upon the preparation or variation of a Town Planning Scheme, the rights in the earlier plots of land would stand extinguished. That being so, such rights, if any, which have become extinct cannot be the basis for a later cause of action.

35. No doubt, even in 1986, when Final Plot No. 187 was allotted to the plaintiffs, it was not free of occupation as it had been given to Pulkit Trust for utilization as a playground. Even if this action on the part of the Corporation is held to be not in good faith, it would only entail a claim for compensation or damages, but as noted by the Trial Court as well as the High Court, the plaintiffs did not choose to adduce any evidence in support of their claim for the quantified damages of

₹1,63,97,673/-. No document was produced by the plaintiffs in proof of the price of land in Paldi area being ₹150/- per sq. yd. in the year 1963. Though reference was made to the decision of this Court in ***Union of India and another vs. Smt. Shanti Devi and others***[9] in the context of a return of 10% p.a. being anticipated from investment in land and a multiplier of 13% being adopted for the purpose of capitalization, this method of calculation would have had meaning had the value of the land in the present case at the relevant point of time been determined. However, as the plaintiffs did not adduce any evidence whatsoever in proof of their claim as to the market value of the land in question at the relevant point of time, this judgment does not further their case, insofar as their claim for compensation/ damages is concerned. Reference to ***N. Nagendra Rao and Co. vs. State of A.P.***[10], in support of the plaintiffs' claim for compensation owing to the negligence of the authorities is also of no avail as the principles contained therein would have had application if the plaintiffs' claim for damages/compensation was duly supported by material evidence, which it is not.

36. Further, though it has been contended before us that the plaintiffs never actually received the compensation offered by the Corporation for the shortfall of 974 sq. mts. @ ₹25/- per sq. yd., it is an admitted fact that, pursuant to the judgment and decree of the Trial Court, the plaintiffs did deposit the sum of ₹24,350/-, being the compensation for 974 sq. mts. @ ₹25/- per sq. mt., as directed by the Trial Court. Had it been their case that they did not receive such compensation, they ought not to have abided by the direction of the Trial Court and deposited that amount. This voluntary act on their part precludes them from contending, at this stage, that the said compensation was never paid to them and that they had deposited the amount as it was only a paltry sum.

37. The further argument of the plaintiffs that the Act of 1976 does not contemplate a second reduction in the reconstituted plot area does not merit acceptance. Section 45 of the Act of 1976 deals with reconstitution of plots and it is a settled legal position, *per* the decisions of this Court in ***Prakash Amichand Shah*** and ***Ahmedabad Green Belt***

9 [1984] 1 SCR 217 : (1983) 4 SCC 542

10 [1994] Supp. 3 SCR 144 : (1994) 6 SCC 205

Khedut Mandal, referred to hereinabove, that a plot owner who has surrendered his original land for the purposes of the Town Planning Scheme is not even assured of allotment of a reconstituted plot in lieu thereof. In such an event, he is entitled only to compensation. Therefore, there is no guaranteed right vesting in a plot owner who surrendered his land in accordance with the Town Planning Scheme that he would be allotted another plot of land in lieu thereof, much less, a plot of the same area. It is an admitted fact that, when the plaintiffs' father surrendered an extent of 19823 sq. yds./16575 sq. mts., he was allotted a lesser extent of 15576 sq. yds./13023 sq. mts in two plots in the original Town Planning Scheme No. 6, Paldi, with a deduction of 21.40%.

38. Though it has been contended on behalf of the plaintiffs that variation of the Town Planning Scheme as permitted under Sections 70 and 71 of the Act of 1976 must be read together, we find no merit in this submission. Section 70 deals with the power to vary a Town Planning Scheme on the ground of error, irregularity or informality while Section 71 is general in nature and states that, notwithstanding anything contained in Section 70, a Town Planning Scheme may at any time be varied by a subsequent scheme made, published and sanctioned in accordance with the provisions of the Act of 1976. The very fact that Section 71 begins with a *non-obstante* clause referring to Section 70, manifests that the power thereunder is not fettered in any manner, unlike the power under Section 70 which can only be exercised on the grounds of error, irregularity or informality. Further, Section 71 postulates that the variation of the Town Planning Scheme is to be made, published and sanctioned in accordance with the provisions of the Act of 1976, which would mean that the entire exercise would be undertaken afresh upon such variation, including reconstitution of the plots under Section 45. Therefore, further reduction of a plot notified in the original Town Planning Scheme is implicit in the general power of variation vesting in the authority under Section 71 of the Act of 1976. Reference in this regard may be made to the Division Bench judgment of the Gujarat High Court in ***Bhupendra Kumar Ramanlal and others vs. State of Gujarat and others***[11], wherein It was held that Section 71 of the Act of 1976 provides for the procedure laid down in the Act of 1976 for making a Town Planning Scheme being

11 (1995) 1 GLH 1124 : (1996) AIHC 109

followed for the purpose of varying a sanctioned scheme. We are in complete and respectful agreement with the above view expressed by the High Court.

39. Viewed thus, we find that the plaintiffs, being well aware of the fact that Final Plot No. 187 allotted to them under the second varied Town Planning Scheme No. 6, Paldi, was of lesser area, accepted the same without any protest and without agitating a right to a larger area in the light of the initial allotment of Plot No. 463, and their conduct in depositing ₹24,350/- thereafter, implying receipt of the compensation amount for the shortfall area of 974 sq. mts. @ ₹25/- per sq. mt., foreclosed their right, if any, to either challenge the allotment of a plot of lesser area or to seek more compensation. In this regard, we may also note that Section 52 deals, not only with the allotment of plots, but also the amount to be paid as compensation. Section 52(3)(x) states that the Town Planning Officer shall estimate, with reference to the claims made before him after notice has been given by him in the prescribed manner and form, the compensation to be paid to the owner of any property or right injuriously effected by the making of the Town Planning Scheme in accordance with the provisions of Section 82. Further, Section 54 provides an appellate remedy to the person aggrieved by any decision of the Town Planning Officer under Section 52(3)(x). In effect, the quantification of compensation @ ₹25/- per sq. mt. for the shortfall area of 974 sq. mts., which is relatable to the power of the Town Planning Officer under Section 52(3)(x), was a decision which was amenable to appellate review under Section 54. However, it is an admitted fact that the plaintiffs did not avail such remedy.

40. We may also note that the plaintiffs' main prayer in their suit was for quantified compensation, which they had calculated on the strength of the area of Final Plot No. 463 which could not be allotted to them, i.e., 3890 sq. yds., but their prayer, in the alternative, was for allotment of an extent of land of 974 sq. yds., which was the shortfall in area when they were allotted Final Plot No. 187 in the second varied scheme. In effect, the value of 3890 sq. yds. in Final Plot No. 463 in the original Town Planning Scheme was equated by them to an extent of 974 sq. yds. in any Town Planning Scheme in the western zone of Ahmedabad. Significantly, no evidence was led as to the values of the two final plots, *viz.,* Final Plot No. 463, admeasuring 3890 sq. yds., and Final Plot No. 187, admeasuring 2724 sq. yds.

The monetary value of these two plots would depend upon their situation, development, proximity and access to the main road or highway, etc., and cannot be surmised or estimated without relevant material being produced. It cannot even be assessed as to whether they were of equal monetary value. Therefore, the prayer of the plaintiffs for allotment of an extent of land equivalent to the shortfall area of Final Plot No. 463 may not have been logical as their values may not necessarily be commensurate or comparable.

41. To sum up, having sought quantified damages of ₹1,63,97,673/-, it was incumbent upon the plaintiffs to adduce evidence in support of their claim for this pre-determined sum. However, no evidence whatsoever was produced by them in support of the land values relevant to any point in time, be it of the original final plot or the final plot that was ultimately given to them. In the absence of such crucial material, the plaintiffs' prayer for compensation necessarily had to be negated. Further, as there was never any guarantee that a plot owner who surrendered his land pursuant to a Town Planning Scheme would be allotted any land after reconstitution of the plots, the plaintiffs cannot assert any vested right in that regard.

42. On the above analysis, we are of the considered opinion that the High Court was fully justified in allowing the first appeal filed by the Corporation and non-suiting the plaintiffs in entirety. The impugned judgment does not brook interference on any count.

The appeals are, therefore, bereft of merit and are accordingly dismissed.

In the circumstances, parties shall bear their respective costs.

Result of the case: Appeals dismissed.

†*Headnotes prepared by:* Divya Pandey

[2024] 6 S.C.R. 624 : 2024 INSC 411

Bhikchand S/o Dhondiram Mutha (Deceased) Through Lrs.
v.
Shamabai Dhanraj Gugale (Deceased) Through Lrs.

(Civil Appeal No. 5026 of 2023)

14 May 2024

[Hrishikesh Roy and Prashant Kumar Mishra,* JJ.]

Issue for Consideration

Whether the present is a fit and suitable case for exercising power under Section 144, Code of Civil Procedure, 1908 directing restitution in favour of the appellant-judgment debtor by placing the parties in the position which they would have occupied before the execution.

Headnotes†

Code of Civil Procedure, 1908 – s.144 – Application for restitution – Decree passed by the Trial Court was varied by the appeal court by reducing the decretal amount of Rs.27694/- to Rs.17120/- –However, in the meantime, the plaintiff-decree holder executed the decree and the properties of the defendant-judgment debtor (appellant) were put to auction and were purchased by the decree holders – Confirmed by Executing Court – After variation of decree, the appellant-judgment debtor filed application under Section 144 CPC for restitution – Rejected – First property in auction was sold by the plaintiff in favour of respondent no.3 herein vide registered sale deed – Appellant-judgment debtor, if entitled to restitution:

Held: Section 144 CPC statutorily recognises a pre-existing rule of justice, equity and fair play – That is why it is often held that even away from Section 144, the court has inherent jurisdiction to order restitution so as to do complete justice between the parties – Further, where the decree holder is himself the auction purchaser, the sale cannot stand, if the decree is subsequently set aside – Respondent no.3 purchased the property from decree holder with full knowledge of pending restitution proceedings as the same was contained in the recital in para 4 of the sale deed – Thus, the purchaser or the assignee from the decree holder is not entitled to object restitution on the ground that he is a bona fide purchaser–

* Author

In the present case, the decree was subsequently modified/ varied and the decretal amount was reduced from Rs.27,694/- to Rs.17,120/-, the sale of all the three attached properties was not at all required and further in the facts and circumstances of the case variation of the decree read together with the sale of the properties at a low price caused huge loss to the judgment debtor where restitution by setting aside the execution sale is the only remedy available – Present is a fit and suitable case for exercising power under Section 144 CPC directing restitution in favour of the judgment debtor by placing the parties in the position which they would have occupied before such execution and for this purpose the Court may make any order, as provided under Section 144 CPC – Order passed by the High Court set aside, appellants' application under Section 144 CPC is allowed and the sale of the attached properties belonging to the judgment debtor is set aside – Parties restored back to the position where the execution was positioned before the attachment of the immovable properties of the judgment debtor. [Paras 12, 14, 18, 26-28]

Code of Civil Procedure, 1908 – Execution of the decree by attachment of whole property when part of the property could have satisfied the decree – Impermissibility:

Held: A decree for realisation of a sum in favour of the plaintiff should not amount to exploitation of the judgment debtor by selling his entire property – The execution of a decree by sale of the entire immovable property of the judgment debtor is not to penalise him but the same is provided to grant relief to the decree holder and to confer him the fruits of litigation – However, the right of a decree holder should never be construed to have bestowed upon him a bonanza only because he had obtained a decree for realisation of a certain amount – Court's power to auction any property or part thereof is not just a discretion but an obligation imposed on the Court and the sale held without examining this aspect and not in conformity with this mandatory requirement would be illegal and without jurisdiction – In the case at hand, the Executing Court did not discharge its duty to ascertain whether the sale of a part of the attached property would be sufficient to satisfy the decree – When the valuation of three attached properties was mentioned in the attachment Panchanama, it was the duty of the Court to have satisfied itself on this aspect and having failed to do so the Court caused great injustice to the judgment debtor by auctioning his entire attached properties causing huge loss to him and undue

benefit to the auction purchaser – The fact that the properties were sold for Rs. 34,000/- would further demonstrate that the decree holder who himself was the auction purchaser calculatedly offered a bid at Rs. 34,000/- despite being aware that the value of the attached properties was Rs. 1,05,700/-. [Paras 25, 27]

Code of Civil Procedure, 1908 – Order XXI, Rule 54(1) r/w Order XXI CPC, Rule 66 – Plea of the respondent nos.1 and 2 that the valuation of the attached properties as shown in the attachment panchanama cannot be the basis to hold that the property of the judgment debtor valued much more than the decretal sum has been sold in execution as, Rule 54 of Order XXI CPC does not contemplate valuation at the time of attachment:

Held: Sub-rule (2) of Rule 66 of Order XXI CPC mandates that the sale proclamation should mention the estimated value of the property and such estimated value can also be given under Rule 54 Order XXI CPC – The fact that the Court is also entitled to enter in the proclamation of sale its own estimate of the value of the property demonstrates that whenever the attached immovable property is to be sold in public auction the value thereof is required to be estimated – In between Rule 54 to Rule 66 of Order XXI CPC, there is no other provision requiring assessment of value of the property to be sold in auction – The provisions contained in Rule 54(1) Order XXI read with Rule 66 of Order XXI CPC are to be borne in mind wherein it is provided that either whole of the attached property or such portion thereof as may seem necessary to satisfy the decree shall be sold in auction – If there is no valuation of the property in the attachment Panchanama and there being no separate provision for valuation of the property put to auction, it is to be understood that the valuation of the property mentioned in attachment Panchanama prepared under Rule 54 can always provide the estimated value of the property otherwise the provisions enabling the court to auction only a part of the property which would be sufficient to satisfy the decree would be unworkable or redundant – In the present case, the assessed value of all the attached properties was Rs.1,05,700/- whereas the original decretal sum was Rs.27,694/- which is about 26.2% of the total value of the property – Therefore, when only one of the attached properties was sufficient to satisfy the decree there was no requirement for effecting the sale of the entire attached properties. [Paras 21, 22]

Bhikchand S/o Dhondiram Mutha (Deceased) Through Lrs. v. Shamabai Dhanraj Gugale (Deceased) Through Lrs.

Case Law Cited

Binayak Swain v. Ramesh Chandra Panigrahi & Anr. [1966] 3 SCR 24 **: AIR 1966 SC 948;** *South Eastern Coalfields Ltd. v. State of M.P. & Ors.* [2003] Supp. 4 SCR 651 **: (2003) 8 SCC 648;** *Chinnamal & Ors. v. Arumugham & Anr.* [1990] 1 SCR 78 **: AIR 1990 SC 1828;** *Padanathil Rugmini Ama v. P.K. Abdulla* [1996] 1 SCR 651 **: (1996) 7 SCC 668;** *Lal Bhagwant Singh v. Sri Kishen Das* [1953] 1 SCR 559**;** *Balakrishnan v. Malaiyandi Konar* [2006] 2 SCR 363 **: (2006) 3 SCC 49;** *Ambati Narasayya v. M. Subba Rao* [1989] Supp. 1 SCR 451 **: 1989 supp (2) SCC 693 – relied on.**

Gurjoginder Singh v. Jaswant Kaur & Anr. [1994] 1 SCR 794 **: (1994) 2 SCC 368;** *Kuppa Sankara Sastri & Ors. v. Kakumanu Varaprasad & Anr.,* **AIR 1948 MAD.12 – referred to.**

Jai Berham v. Kedar Nath Marwari, **AIR 1922 PC 269;** *Zain-UlAbdin Khan v. Muhammad Asghar Ali Khan* **(1888) ILR 10 ALL 166 (PC) – referred to.**

List of Acts

Code of Civil Procedure, 1908.

List of Keywords

Section 144 of Code of Civil Procedure, 1908; Restitution; Judgment debtor; Properties of judgment debtor; Decree holders; Decree varied/Variation of decree; Auction; Public auction; Auction sale; Decree holder is auction purchaser, Decree subsequently set aside; Decree holder purchased property in execution of his own decree; Person not party to the decree; Third-party auction purchaser; Knowledge of pending proceeding; Executing Court; Registered sale deed; Decree subsequently modified/varied; Attachment of immovable properties of the judgment debtor; Purchaser or the assignee from the decree holder; Bona fide purchaser; Sale of all the attached properties; Restitution in favour of judgment debtor; Execution sale; Restitution by setting aside execution sale; Execution of a decree by sale of entire immovable property; Sale of a part of the attached property sufficient to satisfy the decree; Valuation of the property put to auction; Valuation at the time of attachment; Valuation of the attached properties; Attachment Panchanama.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 5026 of 2023

From the Judgment and Order dated 05.06.2017 of the High Court of Bombay in SA No. 338 of 1994

Appearances for Parties

D.N. Goburdhan, Sr. Adv., Ms. Kamakshi S. Mehlwal, Sanveer Mehlwal, Ms. Deepa Joseph, Ms. Gauri Goburdhan, Advs. for the Appellants.

K. Parameshwar, Yuvraj Vijayrao Kakade, Kailas B. Autade, Sachin Patil, Shashibhushan P. Adgaonkar, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Prashant Kumar Mishra, J.

1. The legal issue in this appeal, concerns restitution of a judgment debtor on a decree being varied, reversed, set aside or modified as it is statutorily recognised in Section 144 of the Code of Civil Procedure, 1908.[1] The decree passed by the Trial Court in the present case was varied by the appeal court. However, in the meantime, the decree was executed by sale of the judgment debtor's property on 23.09.1985 in favour of the decree holders, including respondent Nos. 1 and 2.

2. After the decree was varied by the Appellate Court, the appellant/ judgment debtor applied for restitution by invoking Section 144 CPC. The Trial Court, Appellate Court and the second Appellate Court as well, under impugned judgment have rejected the appellant/Judgment debtor's application for restitution *inter alia* on the ground that the original decree was modified to the extent of interest payable and the judgment debtor not having deposited any amount in the court after the original decree and the property was put in auction, is not entitled to restitution.

3. Before proceeding to deal with the legal issue, few relevant facts need to be referred which are stated intra:

1 'CPC'

3.1 Dhanraj, the husband of the original plaintiff - Shamabai Dhanraj Gugale advanced loan of Rs. 8,000/- to the original defendant – appellant/judgment debtor in the year 1969. Upon his failure to repay the debt, the original plaintiff instituted a Special Civil Suit No. 255 of 1972 for recovery of Rs. 10,880/- (Rs.8,000/- as principal amount + Rs. 2880/- as accrued interest) along with interest @ 12% per annum *pendente lite* and post decree and for other ancillary reliefs and costs. On 15.02.1982, the 4th Joint Civil Judge, Senior Division, Pune partly decreed the suit by awarding the principal amount; pre-suit accrued interest; *pendente lite* and further interest at the rate of 12% per annum till realization of the principal amount and costs. The original plaintiff-decree holder preferred appeal against rejection of part of the claim. In this appeal (C.A. No. 1293 of 1986), the judgment debtor preferred cross objections. During the pendency of the above first appeal, the plaintiff-decree holder also preferred execution application which came to be transferred to the court of Civil Judge, Senior Division, Ahmednagar because the property belonging to the judgment debtor against which the decretal amount was to be recovered fell within the jurisdiction of Ahmednagar court. A special Darkhast No. 100 of 1982 came to be filed in the Ahmednagar court on 20.09.1982. In these execution proceedings, the decree holder sought attachment and sale of the following properties of the judgment debtor for satisfaction of the decree:

(1) The land situate at Mauje Davtakli, Taluka Shevgaon, District Ahmednagar at Gut No. 72, admeasuring approximately 9 Hectares 55 Are. (approximately 24 acres);

(2) land situate at Mauje Davtakli, Taluka Shevgaon, District-Ahmednagar at Gut No. 280, admeasuring approximately 0 Hectare 48 Are.

(3) Three House Property bearing nos. 13, 23 and 8 situate at Mauje Devtakli, Taluka Shevgaon, District Ahmednagar.

3.2 The civil appeal preferred by the original plaintiff came to be dismissed by the district court on 02.08.1988 and at the same time the defendant's cross objections were allowed to the extent

of interest and cost. The appellate court reduced the interest from 12% per annum to 6% per annum for both pre-suit and *pendente lite/* future interest and further directed the parties to bear their own costs. As a result, the appellate decree, while retaining the principal decretal amount of Rs. 8,000/-, reduced the pre-suit interest from Rs. 2880/- to Rs. 1440/- and the *pendente lite* interest from Rs. 15360/- to Rs. 7680/- and denied costs of Rs. 1454/- altogether. The total decretal amount of Rs.27694/- thus stood reduced to Rs. 17120/-.

3.3 Before the decision rendered by the appellate court reducing the decretal amount, as above, the plaintiff/decree holder executed the decree and the properties of the defendant/judgment debtor as mentioned (supra) were put to auction and were purchased by the original plaintiffs/decree holders themselves for a sum of Rs. 34000/- in the auction dated 09.08.1985 which was confirmed by the Executing Court i.e. 2nd Joint Civil Judge, Senior Division, Ahmednagar in Special Darkhast No. 100 of 1982 on 23.09.1985. The first property in auction admeasuring 24 acres was subsequently sold by the plaintiff in favour of respondent no. 3 herein vide registered sale deed dated 17.07.2009 for a sum of Rs.3.9 Lakhs.

3.4 On 29.01.1990, the present appellant/ judgment debtor moved an application for restitution under Section 144 CPC on the ground that the original decree having been varied, substantially, the execution sale deserves to be set aside and reversed by way of restitution. The appellant/judgment debtor also deposited the entire decretal amount (as finally decreed by the appeal court) in the Trial Court. As noted above, the courts below have concurrently rejected the appellant/judgment debtor's application for restitution basing the reasoning that he had not deposited any amount in court, when the suit was originally decreed and the decree was put in execution, and not even a part of the amount which was finally decreed by the appeal court was deposited, hence, the principle of restitution is not invokable.

4. Mr. D.N. Goburdhan, learned senior counsel appearing for the appellant/judgment debtor has strenuously urged that the auction purchaser, being the decree holder, in the present case, is not entitled to any equity, which a bona fide auction purchaser with no

knowledge of the litigation, or the pending appeal would have in such matter. Reliance is placed on ***Binayak Swain vs. Ramesh Chandra Panigrahi & Anr***[2]***.*** & ***Chinnamal & Ors. Vs. Arumugham & Anr***[3]***.*** It is further argued that even an assignee of a decree holder/ auction purchaser (respondent no. 3 herein) cannot be equated with a bona fide purchaser for value without notice. Reference is made to the decision of this Court in ***Padanathil Rugmini Ama Vs. P.K. Abdulla***[4]***.*** It is then argued that where a decree holder himself is an auction purchaser, the sale cannot stand not only in the case of reversal of a decree but also on any variation or modification of it. It is submitted that the judgment debtor's right under Section 144 CPC is ignited immediately after reversal or modification of the decree. Referring to ***South Eastern Coalfields Ltd. Vs. State of M.P. & Ors.***[5], it is argued that the principles enshrined in Section 144 CPC have to be given the widest possible meaning, therefore, even in case of variation or modification of decree, restitution must follow. Reference is also made to ***Chinnamal*** (supra).

5. Learned senior counsel for the appellant would highlight that the decree holder in the present case enjoyed harvesting 24 acres of land for over 25 years and then sold the said land for a sum of Rs. 39 lakhs on 17.07.2009 to respondent no. 3 who was gambling on the litigation. He had full knowledge of the litigation which is reflected from the recital in the sale deed (in para 4 of the sale deed) wherein he agreed that if the decree holder loses the litigation, Rs. 39 lakhs would be paid back to him (to the purchaser) without interest. This crucial point was not noticed by the courts below as probably, the said information was not made available to the court. Such subsequent purchaser can never be treated as bona fide purchaser as held in the matter of ***Chinnamal*** (supra), ***Gurjoginder Singh vs. Jaswant Kaur & Anr.***[6] & ***Padanathil*** (supra).

6. Per contra, Mr. Vinay Navare learned senior counsel appearing for respondent nos. 1 and 2 would submit that even assuming that the modified decree was for Rs. 17120/-, auction sale by the Executing

2 [1966] 3 SCR 24 : AIR 1966 SC 948

3 [1990] 1 SCR 78 : AIR 1990 SC 1828

4 [1996] 1 SCR 651 : (1996) 7 SCC 668

5 [2003] Supp. 4 SCR 651 : (2003) 8 SCC 648

6 [1994] 1 SCR 794 : (1994) 2 SCC 368

Court was inevitable and the appellant cannot claim for setting aside the sale and his only right is to recover the amount of difference i.e. Rs. 10574/- under Section 144 CPC. It is argued that the appellant/ defendant remained absent during the proceedings, and he entered into two agreements to defraud the respondent/plaintiff which has been noted by the Executing Court while rejecting his objections to the attachment and sale of the said property. Insofar as the valuation of the property mentioned in the attachment Panchanama under Rule 54 of Order XXI it is argued that the rule itself does not contemplate valuation at the time of attachment. It is then argued that the contention regarding hurried auction cannot be raised in the proceedings under Section 144 CPC for which there are various provisions in Order XXI CPC which can be invoked in the course of the execution proceedings. The appellant having not invoked any such provisions, the same cannot be raised in proceeding under Section 144 CPC. It is also submitted that Order XXI is a self-contained code and Principal of Estoppel would apply because the appellant, having accepted the conclusion of auction proceedings and choosing not to challenge the same, is now estopped from questioning the validity of the auction.

7. Learned counsel would further submit that the judgments referred by the appellant in the matter of ***South Eastern Coal Field*** (supra) has no application in the facts of the present case. It is further put forth that difference in the value of the property in the year 1985 and 2009 also cannot be allowed to be raised, as it is alien to jurisprudence under Section 144 CPC. According to the learned counsel, the provisions contained in Section 144 CPC need to be read in correct perspective and restitution can be ordered in appropriate case, when decree is set aside, but restitution is not the only way of compensating the party under Section 144 CPC. Laying emphasis on the words "restitution or otherwise" in Section 144 CPC, it is vehemently argued that the wordings clearly show such legislative intention that restitution is not the only way of compensating the party and the judgment debtor can be granted relief by way of compensation or interest, in appropriate case.

8. Mr. K. Parameshwar learned counsel appearing for respondent no. 3 would submit that the said respondent had purchased the subject property vide sale deed dated 17.07.2009 as a bona fide purchaser for value. He would refer to the conduct of the appellant throughout

the litigation including the execution proceedings wherein he did not prefer any appeal against the trial court's decree nor against the confirmation of sale by the Executing Court. It is argued that the cases relied upon by the appellant/judgment debtor are in respect of reversal of decree whereas the present is one of variation of the decree and not of reversal.

9. Mr. Parameshwar would submit that the appellant/judgment debtor is not entitled for restitution, and he had no means to pay the reduced decretal amount, therefore, the sale was inevitable. Reference is made to ***Kuppa Sankara Sastri & Ors. Vs. Kakumanu Varaprasad & Anr.***[7] so also ***Lal Bhagwant Singh vs. Sri Kishen Das***[8] & ***South Eastern Coalfields Ltd.*** (supra).

10. It is next argued by Mr. Parameshwar that the appellant/judgment debtor is not entitled to restitution against respondent no. 3 who purchased the property from the decree holder. Reference is made to ***Chinnamal*** (supra) & ***Padanathil*** (supra). Alternatively, it is argued by Mr. Parameshwar that extent of variation in the decree/order is an important factor to be considered by the Court in view of the language employed in Section 144 CPC providing restitution will be made "so far as may be" in the context of "insofar as a decree is varied or reversed". It is argued that the restitution to the judgment debtor shall be in proportion to the variation/modification made in the decree so that equitable justice is done to subsequent purchaser as well. The conduct of the party and lapse of time from the date of variation of decree and when the restitution is going to be ordered as well as the third-party interest are other factors which need to be considered while ordering restitution.

ANALYSIS

11. The statutory mandate for restitution is contained in Section 144 CPC which is reproduced hereunder:

> "144. Application for restitution.—(1) Where and in so far as a decree [or an order] is [varied or reversed in any appeal, revision or other proceeding or is set aside or modified in any suit instituted for the purpose, the Court

7 AIR 1948 MAD.12

8 [1953] SCR 559

which passed the decree or order] shall, on the application of any party entitled in any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree [or order] or [such part thereof as has been varied, reversed, set aside or modified]; and, for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly [consequential on such variation, reversal, setting aside or modification of the decree or order].

[Explanation.—For the purposes of sub-section (1) the expression "Court which passed the decree or order" shall be deemed to include,— (a) where the decree or order has been varied or reversed in exercise of appellate or revisional jurisdiction, the Court of first instance; (b) where the decree or order has been set aside by a separate suit, the court of first instance which passed such decree or order; (c) where the Court of first instance has ceased to exist or has ceased to have jurisdiction to execute it, the Court which, if the suit wherein the decree or order was passed were instituted at the time of making the application for restitution under this section, would have jurisdiction to try such suit.]

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-section (1)."

The principle behind the order of restitution made after the original decree is reversed or varied or modified has been explained by this Court in the matter of ***South Eastern Coal Fields*** (supra) in the following words in paras 26, 27 & 28:

"26. In our opinion, the principle of restitution takes care of this submission. The word "restitution" in its etymological sense means restoring to a party on the modification, variation or reversal of a decree or order, what has been lost to him in execution of decree or order of the court or in direct consequence of a decree or order (see Zafar

Khan v. Board of Revenue, U.P. [1984 Supp SCC 505 : AIR 1985 SC 39]) In law, the term "restitution" is used in three senses: (i) return or restoration of some specific thing to its rightful owner or status; (ii) compensation for benefits derived from a wrong done to another; and (iii) compensation or reparation for the loss caused to another. (See Black's Law Dictionary, 7th Edn., p. 1315). The Law of Contracts by John D. Calamari & Joseph M. Perillo has been quoted by Black to say that "restitution" is an ambiguous term, sometimes referring to the disgorging of something which has been taken and at times referring to compensation for injury done:

> "Often, the result under either meaning of the term would be the same. … Unjust impoverishment as well as unjust enrichment is a ground for restitution. If the defendant is guilty of a non-tortious misrepresentation, the measure of recovery is not rigid but, as in other cases of restitution, such factors as relative fault, the agreed-upon risks, and the fairness of alternative risk allocations not agreed upon and not attributable to the fault of either party need to be weighed."

The principle of restitution has been statutorily recognized in Section 144 of the Code of Civil Procedure, 1908. Section 144 CPC speaks not only of a decree being varied, reversed, set aside or modified but also includes an order on a par with a decree. The scope of the provision is wide enough so as to include therein almost all the kinds of variation, reversal, setting aside or modification of a decree or order. The interim order passed by the court merges into a final decision. The validity of an interim order, passed in favour of a party, stands reversed in the event of a final decision going against the party successful at the interim stage. Unless otherwise ordered by the court, the successful party at the end would be justified with all expediency 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 of benefit earned by the opposite party under the interim order of the court, or (b) to make restitution for what it has lost; and it is the duty of the court to do so unless it feels that in the facts and on the circumstances of the case, the restitution far from meeting the ends of justice, would rather defeat the same. Undoing the effect of an interim order by resorting to principles of restitution is an obligation of the party, who has gained by the interim order of the court, so as to wipe out the effect of the interim order passed which, in view of the reasoning adopted by the court at the stage of final decision, the court earlier would not or ought not to have passed. There is nothing wrong in an effort being made to restore the parties to the same position in which they would have been if the interim order would not have existed.

27. Section 144 CPC is not the fountain source of restitution, it is rather a statutory recognition of a pre-existing rule of justice, equity and fair play. That is why it is often held that even away from Section 144 the court has inherent jurisdiction to order restitution so as to do complete justice between the parties. In Jai Berham v. Kedar Nath Marwari [(1922) 49 IA 351: AIR 1922 PC 269] Their Lordships of the Privy Council said: (AIR p. 271)

> "It is the duty of the court under Section 144 of the Civil Procedure Code to 'place the parties in the position which they would have occupied, but for such decree or such part thereof as has been varied or reversed'. Nor indeed does this duty or jurisdiction arise merely under the said section. It is inherent in the general jurisdiction of the court to act rightly and fairly according to the circumstances towards all parties involved."

Cairns, L.C. said in Rodger v. Comptoir D'Escompte de Paris [(1871) 3 PC 465: 7 Moo PCC NS 314: 17 ER 120]: (ER p. 125)

> "[O]ne of the first and highest duties of all courts is to take care that the act of the court

> does no injury to any of the suitors, and when the expression, 'the act of the court' is used, it does not mean merely the act of the primary court, or of any intermediate court of appeal, but the act of the court as a whole, from the lowest court which entertains jurisdiction over the matter up to the highest court which finally disposes of the case."

This is also on the principle that a wrong order should not be perpetuated by keeping it alive and respecting it (A. Arunagiri Nadar v. S.P. Rathinasami [(1971) 1 MLJ 220]). In the exercise of such inherent power the courts have applied the principles of restitution to myriad situations not strictly falling within the terms of Section 144.

28. That no one shall suffer by an act of the court is not a rule confined to an erroneous act of the court; the "act of the court" embraces within its sweep all such acts as to which the court may form an opinion in any legal proceedings that the court would not have so acted had it been correctly apprised of the facts and the law. The factor attracting applicability of restitution is not the act of the court being wrongful or a mistake or error committed by the court; the test is whether on account of an act of the party persuading the court to pass an order held at the end as not sustainable, has resulted in one party gaining an advantage which it would not have otherwise earned, or the other party has suffered an impoverishment which it would not have suffered but for the order of the court and the act of such party. The quantum of restitution, depending on the facts and circumstances of a given case, may take into consideration not only what the party excluded would have made but also what the party under obligation has or might reasonably have made. There is nothing wrong in the parties demanding being placed in the same position in which they would have been had the court not intervened by its interim order when at the end of the proceedings the court pronounces its judicial verdict which does not match with and countenance its own interim verdict. Whenever called upon to adjudicate,

> the court would act in conjunction with what is real and substantial justice. The injury, if any, caused by the act of the court shall be undone and the gain which the party would have earned unless it was interdicted by the order of the court would be restored to or conferred on the party by suitably commanding the party liable to do so. Any opinion to the contrary would lead to unjust if not disastrous consequences. Litigation may turn into a fruitful industry. Though litigation is not gambling yet there is an element of chance in every litigation. Unscrupulous litigants may feel encouraged to approach the courts, persuading the court to pass interlocutory orders favourable to them by making out a prima facie case when the issues are yet to be heard and determined on merits and if the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by swallowing the benefits yielding out of the interim order even though the battle has been lost at the end. This cannot be countenanced. We are, therefore, of the opinion that the successful party finally held entitled to a relief assessable in terms of money at the end of the litigation, is entitled to be compensated by award of interest at a suitable reasonable rate for the period for which the interim order of the court withholding the release of money had remained in operation."

12. The principle explained by this Court in ***South Eastern Coal Fields*** (supra) as extracted above is to the effect that Section 144 CPC statutorily recognises a pre-existing rule of justice, equity and fair play. That is why it is often held that even away from Section 144 the court has inherent jurisdiction to order restitution so as to do complete justice between the parties as held by Privy Council in ***Jai Berham vs. Kedar Nath Marwari***[9]. It is also explained that the factor attracting applicability of restitution is not the act of the court being wrongful or a mistake or error committed by the court; the test is whether on account of an act of the party persuading the court to pass an order held at the end as not sustainable, has resulted in one party gaining an advantage which it would not have otherwise earned.

9 AIR 1922 PC 269

13. In the matter of ***Binayak Swain*** (supra), this Court held that the obligation for restitution arises automatically on the reversal or modification of the decree and necessarily carries with it the right to restitution of all that has been done under the erroneous decree; and the Court in making restitution is bound to restore the parties, so far as they can be restored to the same position they were in at the time when the Court by its erroneous action had displaced them from.

14. Drawing the distinction between a decree holder who himself is the auction purchaser and a third-party auction purchaser, this Court in ***Binayak Swain*** (supra) approved an earlier judgment of Privy Council in the matter of ***Zain-Ul-Abdin Khan vs. Muhammad Asghar Ali Khan***[10] to reiterate that "great distinction between the decree-holders who came in and purchased under their own decree, which was afterwards reversed on appeal, and the *bona fide* purchasers who came in and bought at the sale in execution of the decree to which they were no parties, and at a time when that decree was a valid decree, and when the order for the sale was a valid order". It is categorically held that where the decree holder is himself the auction purchaser, the sale cannot stand, if the decree is subsequently set aside.

15. In the matter of ***Chinnamal*** (supra), this Court again dealt with the distinction between the decree holder who purchased the property in execution of his own decree, which is afterwards modified or reversed, and a person who is not a party to the decree. This Court held thus in paras 10 and 11:

> "10. There is thus a distinction maintained between the decree holder who purchases the property in execution of his own decree, which is afterwards modified or reversed, and an auction purchaser who is not party to the decree. Where the purchaser is the decree holder, he is bound to restore the property to the judgment debtor by way of restitution but not a stranger auction purchaser. The latter remains unaffected and does not lose title to the property by subsequent reversal or modification of the decree. The courts have held that he could retain the property since he is a bona fide purchaser. This principle is also based on the premise that he is not bound to enquire into correctness

10 (1888) ILR 10 ALL 166 (PC)

of the judgment or decree sought to be executed. He is thus distinguished from an eo nomine party to the litigation.

11. There cannot be any dispute on this proposition, and it is indeed based on a fair and proper classification. The innocent purchaser whether in voluntary transfer or judicial sale by or in execution of a decree or order would not be penalised. The property bona fide purchased ignorant of the litigation should be protected. The judicial sales in particular would not be robbed of all their sanctity. It is a sound rule based on legal and equitable considerations. But it is difficult to appreciate why such protection should be extended to a purchaser who knows about the pending litigation relating to the decree. If a person ventures to purchase the property being fully aware of the controversy between the decree holder and judgment debtor, it is difficult to regard him as a bona fide purchaser. The true question in each case, therefore, is whether the stranger auction purchaser had knowledge of the pending litigation about the decree under execution. If the evidence indicates that he had no such knowledge he would be entitled to retain the property purchased being a bona fide purchaser and his title to the property remains unaffected by subsequent reversal of the decree. The court by all means should protect his purchase. But if it is shown by evidence that he was aware of the pending appeal against the decree when he purchased the property, it would be inappropriate to term him as a bona fide purchaser. In such a case the court also cannot assume that he was a bona fide or innocent purchaser for giving him protection against restitution. No assumption could be made contrary to the facts and circumstances of the case and any such assumption would be wrong and uncalled for."

16. Whether a third-party auction purchaser who had the knowledge of the pending proceedings can resist restitution has been answered against such auction purchaser in paras 14, 16 & 17 of ***Chinnamal*** (supra)

"14. This proposition, we are, however, unable to accept. In our opinion, the person who purchases the property in court auction with the knowledge of the pending appeal

against the decree cannot resist restitution. His knowledge about the pending litigation would make all the difference in the case. He may be a stranger to the suit, but he must be held to have taken calculated risk in purchasing the property. Indeed, he is evidently a speculative purchaser, and, in that respect, he is in no better position than the decree holder purchaser. The need to protect him against restitution, therefore, seems to be unjustified. Similarly, the auction purchaser who was a name lender to the decree holder or who has colluded with the decree holder to purchase the property could not also be protected to retain the property if the decree is subsequently reversed.

16. This is also the principle underlying Section 144 of the Code of Civil Procedure. It is the duty of all the courts as observed by the Privy Council "as aggregate of those tribunals" to take care that no act of the court in the course of the whole of the proceedings does an injury to the suitors in the court. The above passage was quoted in the majority judgment of this Court in A.R. Antulay v. R.S. Nayak [(1988) 2 SCC 602, 672: 1988 SCC (Cri) 372]. Mukharji, J., as he then was, after referring to the said observation of Lord Cairns, said: (SCC p. 672, para 83)

> "No man should suffer because of the mistake of the court. No man should suffer a wrong by technical procedure of irregularities. Rules or procedures are the handmaids of justice and not the mistress of the justice. Ex debito justitiae, we must do justice to him. If a man has been wronged so long as it lies within the human machinery of administration of justice that wrong must be remedied."

17. It is well to remember that the Code of Civil Procedure is a body of procedural law designed to facilitate justice and it should not be treated as an enactment providing for punishments and penalties. The laws of procedure should be so construed as to render justice wherever reasonably possible. It is in our opinion, not unreasonable to demand restitution from a person who has purchased

the property in court auction being aware of the pending appeal against the decree."

17. In the matter of ***Padanathil Rugmini Amma*** (supra), this Court while dealing with somewhat similar fact situation (as in the case in hand) wherein a decree holder himself became the auction purchaser and later on leased out the property to a third party who in turn sold to another one and then this man again sold out to a fourth person, held thus in paras 10, 11, 14, 15,16 and 17:

> "10. It is, however, contended by the respondent that he is a lessee from the decree-holder auction-purchaser. The appellant cannot seek restitution of properties leased to him by the decree-holder auction-purchaser. The lease in his favour is protected, he being a third party to the court proceedings and the auction sale. This contention has been upheld by the Kerala High Court and is challenged before us. Now, under Section 144 of the Civil Procedure Code where and insofar as a decree or an order is varied or reversed or is set aside, the court which passed the decree or order, shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or order. For this purpose, the court may make such orders including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation, reversal, setting aside or modification of the decree or order.
>
> 11. In the present case, as the ex parte decree was set aside, the judgment-debtor was entitled to seek restitution of the property which had been sold in court auction in execution of the ex parte decree. There is no doubt that when the decree-holder himself is the auction-purchaser in a court auction sale held in execution of a decree which is subsequently set aside, restitution of the property can be ordered in favour of the judgment-debtor. The decree-holder auction-purchaser is bound to return the property. It is equally well settled that if at a court

auction sale in execution of a decree, the properties are purchased by a bona fide purchaser who is a stranger to the court proceedings, the sale in his favour is protected and he cannot be asked to restitute the property to the judgment-debtor if the decree is set aside. The ratio behind this distinction between a sale to a decree-holder and a sale to a stranger is that the court, as a matter of policy, will protect honest outsider purchasers at sales held in the execution of its decrees, although the sales may be subsequently set aside, when such purchasers are not parties to the suit. But for such protection, the properties which are sold in court auctions would not fetch a proper price and the decree-holder himself would suffer. The same consideration does not apply when the decree-holder is himself the purchaser and the decree in his favour is set aside. He is a party to the litigation and is very much aware of the vicissitudes of litigation and needs no protection.

14. In the case of Satis Chandra Ghose v. Rameswari Dasi [AIR 1915 Cal 363: 20 CWN 665], the Calcutta High Court relied upon these observations of the Privy Council and held that the decree-holders and those who claim under decree-holders will form one class as against strangers to the decree who purchase in a court auction sale. The title of a purchaser from one who has bought at the sale in execution of his own decree is liable to be defeated when the decree is subsequently set aside. The Calcutta High Court said:

> "The Court as a matter of policy has a tender regard for honest purchasers at sales held in execution of its decrees though the sales may be subsequently set aside, where those purchasers are not parties to the suit and the decree has not been passed without jurisdiction. But the same measure of protection is not extended to purchasers who are themselves the decree-holders; nor can the purchasers from such decree-holders claim that the Court owes them any duty…."

The policy which prompts the extension of protection to the strangers who purchase at court auctions is based on a need to ensure that proper price is fetched at a court auction. This policy has no application to sales outside the court. The purchasers from a decree-holder auction-purchaser have bought from one whose title is liable to be defeated. The title acquired by the purchaser from the decree-holder is similarly defeasible. The Court further observed: "… the defeasibility of a decree-holder's title where the decree is ex parte is of such common occurrence that the plea of a purchaser for value without notice hardly applies".

15. The same view has been reaffirmed by the Calcutta High Court in the case of Abdul Rahman v. Sarat Ali [AIR 1916 Cal 710: 20 CWN 667] where it has been held that the assignee of a decree-holder auction-purchaser stands in no better position than his assignor. The special protection afforded to a stranger who purchases at an execution sale is not extended to an assignee of the decree-holder auction-purchaser.

16. The distinction between a stranger who purchases at an auction sale and an assignee from a decree-holder purchaser at an auction sale is quite clear. Persons who purchase at a court auction who are strangers to the decree are afforded protection by the court because they are not in any way connected with the decree. Unless they are assured of title; the court auction would not fetch a good price and would be detrimental to the decree-holder. The policy, therefore, is to protect such purchasers. This policy cannot extend to those outsiders who do not purchase at a court auction. When outsiders purchase from a decree-holder who is an auction-purchaser clearly their title is dependent upon the title of decree-holder auction-purchaser. It is a defeasible title liable to be defeated if the decree is set aside. A person who takes an assignment of the property from such a purchaser is expected to be aware of the defeasibility of the title of his assignor. He has not purchased the property through the court at all. There is, therefore, no question of the court extending any

protection to him. The doctrine of a bona fide purchaser for value also cannot extend to such an outsider who derives his title through a decree-holder auction-purchaser. He is aware or is expected to be aware of the nature of the title derived by his seller who is a decree-holder auction-purchaser.

17. The High Courts of Patna, Madras and Kerala, however, appear to have taken a different view. They have equated an assignee from a decree-holder auction-purchaser with a stranger auction-purchaser on the basis that an assignee from a decree-holder auction-purchaser has to be considered as a bona fide purchaser for value who should not be allowed to suffer on account of the mistakes or irregularities committed in a court of law. It is difficult to see how an assignee from a decree-holder auction-purchaser can be equated with a bona fide purchaser for value without notice. He is aware of the nature of the title of his seller or assignor. He is also aware that the title of his assignor or seller is subject to the doctrine of restitution if the decree is ultimately set aside particularly in a case where the decree is an ex parte decree and there is a greater possibility of such a decree being set aside. The reasons which prompt the courts to protect strangers who purchase at court auction sales also do not apply to assignees or purchasers from a decree-holder auction purchaser. They purchase outside the court system and cannot expect any protection from the court. Their title is liable to be defeated if the title of their seller or assignor is defeated. The view, therefore, expressed by the Patna High Court in the case of Gopi Lal v. Jamuna Prasad [AIR 1954 Pat 36:1 BLJ 406] , the Madras High Court in S. Chokalingam Asari v. N.S. Krishna Iyer [AIR 1964 Mad 404 : ILR (1964) 1 Mad 923] and the cases cited therein as also by the Kerala High Court in the case of Parameswaran Pillai Kumara Pillai v. Chinna Lakshmi [1970 Ker LJ 450] is not the correct view. The High Court, therefore, was not right in protecting the lease created in favour of the respondent by Mohammed Haji who was a decree-holder auction-purchaser at the sale in execution of the ex parte decree which was subsequently set aside."

18. The judgment in ***Padanathil Rugmini Amma*** (supra), completely answers the argument raised by Mr. K. Parameshwar, learned counsel for respondent no. 3 who has purchased the property from decree holder on 17.07.2009 with full knowledge of pending restitution proceedings as the same is contained in the recital in para 4 of the sale deed. Thus, the purchaser or the assignee from the decree holder is not entitled to object restitution on the ground that he is a bona fide purchaser.

19. We shall now deal with the arguments raised by Mr. Navare, learned senior counsel that the valuation of the attached properties as shown in the attachment panchanama cannot be the basis to hold that the property of the judgment debtor valued much more than the decretal sum has been sold in execution. According to him, Rule 54 of Order XXI CPC does not contemplate valuation at the time of attachment. This argument is raised in answer to court's query that when only a sum of Rs. 27,694/- was to be realised why all the properties i.e. three houses approximately valued at Rs. 25,700/-, 9 H 55 Are land valued at Rs. 75,000/- and third property admeasuring 0 H 48 Are valued at Rs. 5,000/- were put to auction.

20. The above stated three properties were attached under Order XXI Rule 54 CPC and thereafter the Executing Court vide its order dated 22.10.1982 (Annexure P/4) issued sale notice under Order XXI Rule 66 CPC for sale of the attached property by public auction. The object of attachment of immovable property in course of execution of decree is for realisation of the decretal amount by way of the sale of the attached property under Order XXI Rule 66 CPC. The said rule (Order XXI Rule 66 CPC) provides for proclamation of sale by public auction. Sub-rule (2) of Rule 66 CPC needs reference which is reproduced hereinbelow:

> "**(**2**)** Such proclamation shall be draw up after notice to the decree-holder and the judgment-debtor and shall state the time and place of sale, and specify as fairly and accurately as possible-
>
> **(a)** the property to be sold or, where a part of the property would be sufficient to satisfy the decree, such part;
>
> **(b)** the revenue assessed upon the estate or part of the State, where the property to be sold is an interest in

an estate or in part of an estate paying revenue to the Government;

(c) any incumbrance to which the property is liable;

(d) the amount for the recovery of which the sale is ordered; and

(e) every other thing which the Court considers material for a purchaser to know in order to judge of the nature and value of the property:

Provided that where notice of the date for settling the terms of the proclamation has been given to the judgement-debtor by means of an order under rule 54, it shall not be necessary to give notice under this rule to the judgment-debtor unless the Court otherwise directs:

Provided further that nothing in this rule shall be construed as requiring the Court to enter in the proclamation of sale its own estimate of the value of the property, but the proclamation shall include the estimate, if any, given, by either or both of the parties."

21. The above quoted provisions contained in sub-rule (2) of Rule 66 of Order XXI CPC clearly mandates that the sale proclamation should mention the estimated value of the property and such estimated value can also be given under Rule 54 Order XXI CPC. The fact that the Court is also entitled to enter in the proclamation of sale its own estimate of the value of the property clearly demonstrates that whenever the attached immovable property is to be sold in public auction the value thereof is required to be estimated. In between Rule 54 to Rule 66 of Order XXI CPC, there is no other provision requiring assessment of value of the property to be sold in auction.

22. It is also important to bear in mind the provisions contained in Rule 54(1) Order XXI read with Rule 66 of Order XXI CPC wherein it is provided that either whole of the attached property or such portion thereof as may seem necessary to satisfy the decree shall be sold in auction. If there is no valuation of the property in the attachment Panchanama and there being no separate provision for valuation of the property put to auction, it is to be understood that the valuation of the property mentioned in attachment Panchanama prepared under Rule 54 can always provide the estimated value of the property

otherwise the provisions enabling the court to auction only a part of the property which would be sufficient to satisfy the decree would be unworkable or redundant. In the case in hand, the assessed value of all the attached properties is Rs. 1,05,700/- whereas the original decretal sum was Rs. 27,694/- which is about 26.2% of the total value of the property. Therefore, when only one of the attached properties was sufficient to satisfy the decree there was no requirement for effecting the sale of the entire attached properties.

23. In the matter of ***Balakrishnan vs. Malaiyandi Konar***[11] this Court observed thus:

> "9. The provision contains some significant words. They are "necessary to satisfy the decree". Use of the said expression clearly indicates the legislative intent that no sale can be allowed beyond the decretal amount mentioned in the sale proclamation. (See Takkaseela Pedda Subba Reddi v. Pujari Padmavathamma [(1977) 3 SCC 337: AIR 1977 SC 1789].) In all execution proceedings, the court has to first decide whether it is necessary to bring the entire property to sale or such portion thereof as may seem necessary to satisfy the decree. If the property is large and the decree to be satisfied is small the court must bring only such portion of the property, the proceeds of which would be sufficient to satisfy the claim of the decree-holder. It is immaterial whether the property is one or several. Even if the property is one, if a separate portion could be sold without violating any provision of law only such portion of the property should be sold. This is not just a discretion, but an obligation imposed on the court. The sale held without examining this aspect and not in conformity with this mandatory requirement would be illegal and without jurisdiction. (See Ambati Narasayya v. M. Subba Rao [1989 Supp (2) SCC 693].) The duty cast upon the court to sell only such property or portion thereof as is necessary to satisfy the decree is a mandate of the legislature which cannot be ignored. Similar view has been expressed in S. Mariyappa v. Siddappa [(2005) 10 SCC 235].

11 [2006] 2 SCR 363 : (2006) 3 SCC 49

> 10. In S.S. Dayananda v. K.S. Nagesh Rao [(1997) 4 SCC 451] it was held that the procedural compliance with Order 21 Rule 64 of the Code is a mandatory requirement. This was also the view expressed in Desh Bandhu Gupta v. N.L. Anand [(1994) 1 SCC 131]."

24. In ***Ambati Narasayya vs. M. Subba Rao***[12] this Court has held that in auction sale this is obligatory on Court that only such portion of property as would satisfy decree is sold and not the entire property. This court observed thus in paras 6, 7 & 8:

> "6. The principal question that has been highlighted before us relates to the legality of the sale of 10 acres of land without considering whether a portion of the land could have been sold to satisfy the decree. It is said that the total sum claimed in the execution was Rs 2395.50. The relevant provision which has a bearing on the question is Rule 64 Order XXI of the Code of Civil Procedure and it reads as follows: -
>
> > "Order XXI Rule 64: Power to order property attached to be sold and proceeds to be paid to persons entitled.—Any court executing a decree may order that any property attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold, and that the proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same."
>
> 7. It is of importance to note from this provision that in all execution proceedings, the court has to first decide whether it is necessary to bring the entire attached property to sale or such portion thereof as may seem necessary to satisfy the decree. If the property is large and the decree to be satisfied is small, the court must bring only such portion of the property, the proceeds of which would be sufficient to satisfy the claim of the decree holder. It is

12 [1989] Supp. 1 SCR 451 : 1989 Supp (2) SCC 693

immaterial whether the property is one, or several. Even if the property is one, if a separate portion could be sold without violating any provision of law only such portion of the property should be sold. This, in our opinion, is not just a discretion, but an obligation imposed on the court. Care must be taken to put only such portion of the property to sale the consideration of which is sufficient to meet the claim in the execution petition. The sale held without examining this aspect and not in conformity with this requirement would be illegal and without jurisdiction.

8. In Takkaseela Pedda Subba Reddi v. Pujari Padmavathamma [(1977) 3 SCC 337, 340] this Court after examining the scope of Rule 64 of Order XXI CPC has taken a similar view: (SCC p. 340, para 3)

> "Under this provision the executing court derives jurisdiction to sell properties attached only to the point at which the decree is fully satisfied. The words 'necessary to satisfy the decree' clearly indicate that no sale can be allowed beyond the decretal amount mentioned in the sale proclamation. In other words, where the sale fetches a price equal to or higher than the amount mentioned in the sale proclamation and is sufficient to satisfy the decree, no further sale should be held, and the court should stop at that stage."

25. It is, thus, settled principle of law that court's power to auction any property or part thereof is not just a discretion but an obligation imposed on the Court and the sale held without examining this aspect and not in conformity with this mandatory requirement would be illegal and without jurisdiction. In the case at hand, the Executing Court did not discharge its duty to ascertain whether the sale of a part of the attached property would be sufficient to satisfy the decree. When the valuation of three attached properties is mentioned in the attachment Panchanama, it was the duty of the Court to have satisfied itself on this aspect and having failed to do so the Court has caused great injustice to the judgment debtor by auctioning his entire attached properties causing huge loss to the judgment debtor and undue

benefit to the auction purchaser. The fact that the properties were sold for a sum of Rs. 34,000/- would further demonstrate that the decree holder who himself is the auction purchaser has calculatedly offered a bid at Rs. 34,000/- despite being aware that the value of the attached properties is Rs. 1,05,700/-.

26. In view of the above discussion, we are satisfied that the present is a case where the decree is subsequently modified/varied, and the decretal amount was reduced from Rs. 27,694/- to Rs. 17,120/-, the sale of all the three attached properties was not at all required and further in the facts and circumstances of the case variation of the decree read together with the sale of the properties at a low price has caused huge loss to the judgment debtor where restitution by setting aside the execution sale is the only remedy available. It is not a case where the restitution can be ordered appropriately or suitably by directing the decree holder to make payment of some additional amount to the judgment debtor to compensate him for the loss caused due to sale of his properties. Doing so would perpetuate the injustice suffered by the judgment debtor.

27. It has been argued that the execution sale cannot be set aside at this stage when the judgment debtor has not paid any amount to satisfy the original decree or the modified decree nor he has challenged the legality of the auction sale on any permissible ground as contemplated in Order XXI CPC. However, we are not convinced with this submission made on behalf of the learned counsel for the respondents for the reason that we are not *per se* setting aside the execution sale as if the present is the proceedings challenging the execution of the decree by way of sale of the attached immovable properties of the judgment debtor. We are concerned herewith and we have confined ourselves to the core issue as to whether the present is a fit and suitable case for exercising power under Section 144 CPC directing restitution in favour of the judgment debtor by placing the parties in the position which they would have occupied before such execution and for this purpose the Court may make any order, as provided under Section 144 CPC. It is in exercise of this power that we have considered the aspect of execution of the decree by attachment of whole property when part of the property could have satisfied the decree. This examination was necessary to ascertain the extent of injury the judgment debtor has suffered at the time of execution of the original decree for Rs. 27,694/- opposite to

the modified decree for Rs. 17,120/-. The execution of a decree by sale of the entire immovable property of the judgment debtor is not to penalise him but the same is provided to grant relief to the decree holder and to confer him the fruits of litigation. However, the right of a decree holder should never be construed to have bestowed upon him a bonanza only because he had obtained a decree for realisation of a certain amount. A decree for realisation of a sum in favour of the plaintiff should not amount to exploitation of the judgment debtor by selling his entire property.

28. For the foregoing, the appeal is allowed. The order dated 05.06.2017 passed by the High Court is set aside and the appellants' application under Section 144 CPC is allowed and the sale of the attached properties belonging to the judgment debtor is set aside and the parties are restored back to the position where the execution was positioned before the attachment of the immovable properties of the judgment debtor. The execution of the modified decree, if not already satisfied, shall proceed in accordance with law.

Result of the case: Appeal allowed.

†*Headnotes prepared by:* Divya Pandey