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The State of West Bengal represented through the Secretary & Ors.
v.
Rajpath Contractors and Engineers Ltd.

(Civil Appeal No. 7426 of 2023)

08 July 2024

[Abhay S. Oka* and Pankaj Mithal, JJ.]

Issue for Consideration

Issue arose as regards correctness of the order passed by the High Court dismissing the petition u/s. 34 of the Arbitration and Conciliation Act, holding that it was not filed within the period specified under sub-section (3) of s. 34 of the Act.

Headnotes†

Arbitration and Conciliation Act, 1996 – s. 34 – Application for setting aside arbitral awards – Period of limitation for filing petition u/s. 34 – On facts, petition u/s. 34 filed by the appellant challenging the arbitral award – Dismissed by the High Court, holding that it was not filed within the period specified under sub-section (3) of s. 34 – Correctness:

Held: Period of limitation for filing a petition u/s. 34 will have to be reckoned from the day when the appellants received the award, i.e. 30th June 2022 – In view of s. 12(1) of the Limitation Act, the day from which the limitation period is to be reckoned must be excluded, as such 30th June 2022 will have to be excluded while computing the limitation period – Thus, in effect, the period of limitation, started running on 1st July 2022 – Period of limitation is of three months and not ninety days – Thus, from the starting point of 1st July 2022, the last day of the period of three months would be 30th September 2022 – Pooja vacation started on 1st October 2022 – Three months provided by way of limitation expired a day before the commencement of the pooja vacation – Furthermore, the prescribed period within the meaning of s. 4 of the Limitation Act ended on 30th September 2022 – Thus, the appellants are not entitled to take benefit of s. 4 – As per the proviso to sub-section (3) of s. 34, the period of limitation could have been extended by a maximum period of 30 days – Maximum period of 30 days

* Author

expired on 30th October 2022 – Petition was filed on 31st October 2022 – Thus, the High Court was right in holding that the petition u/s. 34 was not filed within the period specified under sub-section (3) of s. 34 of the Act. [Paras 6, 7, 10,11]

Case Law Cited

State of Himachal Pradesh and Another v. Himachal Techno Engineers and Another [2010] 8 SCR 1025 **: (2010) 12 SCC 210;** *Assam Urban Water Supply & Sewerage Board v. Subash Projects & Mktg. Ltd.* [2012] 1 SCR 403 **: (2012) 2 SCC 624;** *Union of India v. Popular Construction Co.* [2001] Supp. 3 SCR 619 **: (2001) 8 SCC 470 – referred to.**

List of Acts

Arbitration and Conciliation Act, 1996; Limitation Act of 1963; Constitution of India; General Clauses Act, 1897.

List of Keywords

Arbitral awards; Period of limitation; Limitation period to be reckoned.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No.7426 of 2023

From the Judgment and Order dated 04.05.2023 of the High Court of Calcutta in AP No. 737 of 2022

Appearances for Parties

Ms. Madhumita Bhattacharjee, Ms. Urmila Kar Purkayasthe, Ms. Srija Choudhury, Advs. for the Appellants.

Saurav Agrawal, Priyankar Saha, Sarad Kumar Singhania, Mrs. Rashmi Singhania, Anshuman Choudhary, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Judgment

Abhay S. Oka, J.

FACTUAL ASPECTS

1. The first appellant – the State of West Bengal appointed the respondent as a contractor for the construction of a bridge. As there

was a dispute between the parties, the respondent invoked the arbitration clause in the contract, and a sole arbitrator was appointed. On 30th June 2022, the Arbitral Tribunal passed an award directing the appellants to pay a sum of Rs.2,11,67,054.00 (Two Crores Eleven Lakhs Sixty-Seven Thousand Fifty-Four Rupees Only) to the respondent with interest thereon, as directed. The counter-claim made by the appellants was dismissed. The appellants received a copy of the award on the same day. The High Court of Judicature at Calcutta was closed for pooja vacation from 1st October 2022 to 30th October 2022 (both days inclusive). On 31st October 2022, the appellants filed a petition under Section 34 of the Arbitration and Conciliation Act, 1996 (for short, 'the Arbitration Act') to challenge the award. By the impugned order dated 4th May 2023, the High Court dismissed the petition under Section 34 of the Arbitration Act filed by the appellants on the ground of bar of limitation. The High Court held that the period of limitation for filing a petition under Section 34 expired on 30th September 2022. Therefore, the appellants are not entitled to the benefit of Section 4 of the Limitation Act of 1963 (for short, 'the Limitation Act').

2. Being aggrieved by the view taken by the High Court, the appellants are in this appeal. We may note here that under the impugned judgment, the High Court granted a certificate to prefer an appeal before this Court by exercising powers under Article 133 (1) and Article 134(A)(a) of the Constitution of India.

SUBMISSIONS

3. The learned counsel appearing for the appellants submitted that as the period of limitation for filing a petition under Section 34 of the Arbitration Act ought to have been calculated from 1st July 2022, the prescribed period of limitation ended on 1st October 2022, which was the first day of pooja vacation. Therefore, the petition under Section 34 of the Arbitration Act filed immediately after the re-opening of the Court on 31st October 2022 must be held to be within limitation. The learned counsel relied upon Section 9 of the General Clauses Act, 1897 (for short, 'the General Clauses Act'). The learned counsel also submitted that the petition could not be e-filed in pooja vacation as the relevant e-filing notification provided for e-filing of only urgent matters during the vacations. The learned counsel relied upon a

decision of this Court in the case of ***State of Himachal Pradesh and Another v. Himachal Techno Engineers and Another***[1].

4. The learned counsel appearing for the respondent supported the findings recorded by the High Court. He submitted that in any event, the benefit of Section 4 of the Limitation Act is available only if the proceedings are filed within the prescribed period of limitation, which will be three months in this case in terms of Section 34(3) of the Arbitration Act. The learned counsel relied upon a decision made by this court in the case of ***Assam Urban Water Supply & Sewerage Board v Subash Projects & Mktg. Ltd.***[2]. He also invited our attention to a decision of this Court in the case of ***Union of India v. Popular Construction Company***[3]**.** He submitted that, as held by this Court in the said decision, the applicability of Section 5 of the Limitation Act is excluded in view of the language used in the proviso to sub-section (3) of Section 34.

OUR VIEW

5. The facts are undisputed. The award made by the Arbitral Tribunal on 30th June 2022 was served upon the appellant on the same day. Between 1st October 2022 and 30th October 2022 (both days inclusive), the High Court was closed for pooja vacation. The petition under Section 34 of the Arbitration Act was filed on 31st October 2022.

6. The period of limitation for filing a petition under Section 34 of the Arbitration Act is governed by sub-section (3) of Section 34. Sub-section (3) of Section 34 reads thus:

> "(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:
>
> Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application

1 [2010] 8 SCR 1025 : (2010) 12 SCC 210

2 [2012] 1 SCR 403 : (2012) 2 SCC 624

3 [2001] Supp. 3 SCR 619 : (2001) 8 SCC 470

within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter."

7. As per Section 12(1) of the Limitation Act, the day from which the limitation period is to be reckoned must be excluded. In this case, the period of limitation for filing a petition under Section 34 will have to be reckoned from 30th June 2022, when the appellants received the award. In view of Section 12(1) of the Limitation Act, 30th June 2022 will have to be excluded while computing the limitation period. Thus, in effect, the period of limitation, in the facts of the case, started running on 1st July 2022. The period of limitation is of three months and not ninety days. Therefore, from the starting point of 1st July 2022, the last day of the period of three months would be 30th September 2022. As noted earlier, the pooja vacation started on 1st October 2022.

8. We may note here that Section 43 of the Arbitration Act provides that the Limitation Act shall apply to the arbitrations as it applies to proceedings in the Court. We may note here that the consistent view taken by this Court right from the decision in the case of ***Union of India v. Popular Construction Co.***[3] is that given the language used in proviso to sub-section (3) of Section 34 of the Arbitration Act, the applicability of Section 5 of the Limitation Act to the petition under Section 34 of the Arbitration Act has been excluded.

9. Now, we proceed to consider whether the appellant will be entitled to the benefit of Section 4 of the Limitation Act. Section 4 of the Limitation Act reads thus:

> **"4. Expiry of prescribed period when court is closed.**—Where the prescribed period for any suit, appeal or application expires on a day when the court is closed, the suit, appeal or application may be instituted, preferred or made on the day when the court re-opens.
>
> Explanation.—A court shall be deemed to be closed on any day within the meaning of this section if during any part of its normal working hours it remains closed on that day."
>
> (underline supplied)

The meaning of "the prescribed period" is no longer *res integra.* In the case of ***Assam Urban Water Supply & Sewerage Board v. Subash Projects & Mktg. Ltd.***[2], in paragraphs nos. 13 and 14, the law has been laid down on the subject. The said paragraphs read thus:

> "**13.** The crucial words in Section 4 of the 1963 Act are "prescribed period". What is the meaning of these words?
>
> **14.** Section 2(j) of the 1963 Act defines:
>
> > "**2. (*j*)** 'period of limitation' [which] means the period of limitation prescribed for any suit, appeal or application by the Schedule, and 'prescribed period' means the period of limitation computed in accordance with the provisions of this Act;
> >
> > Section 2(*j*) of the 1963 Act when read in the context of Section 34(3) of the 1996 Act, it becomes amply clear that the prescribed period for making an application for setting aside an arbitral award is three months. The period of 30 days mentioned in the proviso that follows sub-section (3) of Section 34 of the 1996 Act is not the "period of limitation" and, therefore, not the "prescribed period" for the purposes of making the application for setting aside the arbitral award. The period of 30 days beyond three months which the court may extend on sufficient cause being shown under the proviso appended to sub-section (3) of Section 34 of the 1996 Act being not the "period of limitation" or, in other words, the "prescribed period", in our opinion, Section 4 of the 1963 Act is not, at all, attracted to the facts of the present case."
>
> (underline supplied)

Even in this case, this Court was dealing with the period of limitation for preferring a petition under Section 34 of the Arbitration Act. We may note that the decision in the case of ***State of Himachal Pradesh and Another v. Himachal Techno Engineers and Another*** [1] which is relied upon by the appellant, follows the aforesaid decision.

10. In the facts of the case in hand, the three months provided by way of limitation expired a day before the commencement of the pooja vacation, which commenced on 1st October 2022. Thus, the prescribed period within the meaning of Section 4 of the Limitation Act ended on 30th September 2022. Therefore, the appellants were not entitled to take benefit of Section 4 of the Limitation Act. As per the proviso to sub-section (3) of Section 34, the period of limitation could have been extended by a maximum period of 30 days. The maximum period of 30 days expired on 30th October 2022. As noted earlier, the petition was filed on 31st October 2022.

11. Thus, looking from the angle, the High Court was right in holding that the petition filed by the appellants under Section 34 of the Arbitration Act was not filed within the period specified under sub-section (3) of Section 34. Hence, we find no merit in the appeal, and it is, accordingly, dismissed.

Result of the case: Appeal Dismissed.

†*Headnotes prepared by:* Nidhi Jain

[2024] 7 S.C.R. 8 : 2024 INSC 481

Shiv Pratap Singh Rana
v.
State of Madhya Pradesh & Anr.

(Criminal Appeal No. 1552 of 2023)

08 July 2024

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

Issue for Consideration

The prosecutrix had lodged an FIR u/s. 376(2)(n) and s.506 of IPC on 06.09.2018 against the appellant. The charges u/s. 376(2)(n) and s.506 of IPC were framed against the appellant and the application for discharge filed by the appellant was rejected.

Headnotes†

Penal Code, 1860 – s. 376(2)(n) and s.506 – Prosecution case that appellant had committed rape on the prosecutrix on the false promise of marriage and threatening to make public her photographs – Trial Court framed charges u/s.376(2)(n) and s.506 of IPC – A criminal revision filed against the said order was dismissed by the High Court – Correctness:

Held: From a perusal and comparison of the two statements of the prosecutrix, one before the police u/s. 161 Cr.P.C. and the other u/s. 164 Cr.P.C., that too recorded within a span of 24 hours, what is noticeable is that not only are the statements contradictory in themselves, those are contradictory to each other as well – The fact that the appellant had lodged the FIR two years after the alleged incident is itself suggestive of the consensual nature of the relationship which had gone sour – There were also talks between the parties and their family members regarding marriage, the same did not fructify leading to lodging of FIR – The act of the prosecutrix having bath under the waterfall and changing her clothes thereafter in the company of the appellant virtually rules out any threat or coercion by the appellant on the prosecurtix – The mobile phone of the appellant or the photographs allegedly taken by the appellant were not recovered or seized – The jewellery allegedly given by the prosecutrix to the appellant has not been seized – A stamp paper dated 07.07.2017 wherein appellant

* Author

expressed his desire to marry the prosecutrix has also not been seized – In the absence of such materials, it is impossible for the prosecution to prove the charges of rape and intimidation against the appellant – Compelling the appellant to face the criminal trial on these materials would be nothing but an abuse of the process of the Court. [Paras 16, 17, 18, 24]

Penal Code, 1860 – s.90 – Consent to be given under fear or misconception – Misconception of fact – Discussed.

Case Law Cited

Dr. Dhruvaram Murlidhar Sonar v. State of Maharashtra [2018] 13 SCR 920 **: (2019) 18 SCC 191;** *Pramod Suryabhan Pawar v. State of Maharashtra* [2019] 11 SCR 423 **: (2019) 9 SCC 608 – relied on.**

List of Acts

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

List of Keywords

Rape; Section 376(2)(n) of Penal Code, 1860; Section 90 of Penal Code, 1860; Commission of rape on false pretext of marriage; Contradiction in statements; Delay in filing FIR; Consensual relationship gone sour; Threat; Coercion; Consent to be given under fear or misconception; Misconception of fact.

Case Arising From

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1552 of 2023

From the Judgment and Order dated 03.10.2019 of the High Court of M.P. at Gwalior in CRR No. 2288 of 2019

Appearances for Parties

Abhinav Ramkrishna, Amit Lahoti, Ms. Anjali Chauhan, Ms. Samina Thakura, Advs. for the Appellant.

Harmeet Ruprah, D.A.G., Yashraj Singh Bundela, Surjeet Singh, Mrs. Pratima Singh, Chanakya Baruah, Abhijeet Singh, Ms. Chitrangda Rastravara, Anirudh Singh, Aishwary Mishra, Dhananjai Shekhwat, Dashrath Singh, Ms. Anjali Sexena, Gp. Capt. Karan Singh Bhati, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Ujjal Bhuyan, J.

This criminal appeal by special leave is directed against the judgment and order dated 03.10.2019 passed by the High Court of Madhya Pradesh at Gwalior (the 'High Court' hereinafter) dismissing Criminal Revision No. 2288 of 2019 filed by the appellant. The aforesaid criminal revision petition was filed by the appellant before the High Court assailing the order dated 24.04.2019 passed by the Xth Additional Sessions Judge, Gwalior ('Sessions Judge' hereinafter) in Sessions Trial No. 505 of 2018 whereby charges under Section 376(2)(n) and 506 of the Indian Penal Code, 1860 (IPC) were framed against the appellant and the application for discharge filed by the appellant was rejected.

2. The case of the prosecution is that the prosecutrix had lodged a first information report (FIR) on 06.09.2018 alleging that in the year 2016, the accused (appellant herein) used to show photographs of hers and telling her to come to Gwalior with him otherwise her photographs would be uploaded on Whatsapp. It was due to fear that she came to Gwalior alongwith the appellant by train from Dabra. One boy from Anupam Nagar came to the railway station to receive her. On his motorbike, the prosecutrix and the appellant went to Anupam Nagar city centre where the appellant was living in rented premises. There, the appellant forcefully committed wrongful act on her. Thereafter, the appellant forcefully took the signature of the prosecutrix on an affidavit. It was mentioned in the affidavit that the prosecutrix would live with the appellant for life. After that she came to Dabra with the appellant and went home. Appellant used to tell her again and again about having a relationship. He told her that he would marry her after the marriage of his brother. But after the marriage of his brother when the prosecutrix broached the topic of marriage, the appellant told her that his brother had received Rs. 15 lakhs in marriage; if her family would give Rs. 15 lakhs then only he would marry her, otherwise not. Her parents went to the residence of the appellant with a marriage proposal but his family members turned out the proposal. In the FIR, it was alleged that the appellant while having relationship with the prosecutrix took money from her on various occasions totalling

Rs. 90,000/-; besides jewellery were also taken. When the appellant started threatening the prosecutrix, she filed the FIR before the Vishwavidhyalaya Police Station, District Gwalior.

3. The FIR was registered as Crime No. 401 of 2018 under Sections 376 and 506 IPC.

4. Police carried out the investigation during the course of which statement of the prosecutrix under Section 161 of the Code of Criminal Procedure, 1973 (Cr.P.C.) was recorded on 11.09.2018. That apart, statement of the prosecutrix was also recorded on 12.09.2018 under Section 164 Cr.P.C. On completion of the investigation, chargesheet was filed against the appellant under Sections 376 and 506 of IPC.

5. Appellant filed an application under Section 227 Cr.P.C. before the Sessions Judge seeking his discharge. By the order dated 24.04.2019, the Sessions Judge took the view that *prima-facie* the chargesheet discloses sufficient evidence to frame charge against the appellant. In such circumstances, the accused (appellant) could not be discharged from the trial for the offences under Sections 376 and 506 of IPC. Consequently, the application filed by the appellant under Section 227 Cr.P.C. was dismissed.

6. Aggrieved by the aforesaid order of the Sessions Judge, appellant filed a criminal revision petition under Section 397 Cr.P.C. The said petition was registered as Criminal Revision No. 2288 of 2019. By the judgment and order dated 03.10.2019, the High Court took the view that trial needs to be conducted for unearthing the truth and that no case for interference was made out. Consequently, the criminal revision petition was dismissed.

7. Assailing the aforesaid decision of the High Court, appellant preferred Special Leave Petition (Criminal) No. 11671 of 2019 before this Court. By order dated 07.01.2020, this Court issued notice and passed an interim order staying further proceedings in Sessions Trial No. 505 of 2018 pending before the Sessions Judge. Subsequently by order dated 12.05.2023, this Court granted leave and directed continuance of the interim order during the pendency of the criminal appeal, which came to be registered as Criminal Appeal No. 1552 of 2023.

8. Learned counsel for the appellant submits that the relationship between the appellant and the prosecutrix was purely consensual. Therefore, there is no question of any offence committed by the

appellant either under Section 376 IPC or under Section 506 IPC. A bare reading of the FIR and the chargesheet would go to show that there is no criminal element involved in the case. Therefore, it would be contrary to the principles of justice if the appellant is made to suffer the ordeal of a long-drawn criminal trial and in the process suffer ignominy which would have irreparable consequences. This aspect of the matter was overlooked by the Sessions Judge as well as by the High Court. He, therefore, seeks quashing of the orders passed by the Sessions Judge and the High Court and further to quash the proceedings in Sessions Trial No. 505 of 2018 pending before the Sessions Judge.

9. Learned counsel for respondent No. 1 on the other hand submits that on the information of the prosecutrix, police registered FIR under Sections 376 and 506 IPC against the accused (appellant). Police investigated the case and collected materials. Having considered the medical records, statement of the prosecutrix under Section 164 Cr.P.C. and other corroborating materials, a report under Section 173 Cr.P.C. was filed to prosecute the accused (appellant) under the aforesaid provisions of IPC.

9.1. Learned counsel further submitted that there were sufficient materials for the learned Sessions Judge to frame charges against the appellant. It is trite law that at the stage of framing charge, a full-fledged trial is not required. The court is required to take a *prima-facie* view based on the materials available on record as to whether the case is fit to stand trial. Trial court found sufficient material to frame charge against the appellant. The High Court while exercising revisional jurisdiction, examined the case in detail and found no merit in the application of the appellant. Appellant had committed rape on the prosecutrix on the false promise of marriage and threatening to make public her photographs. Thus, it is a fit case which comes within the ambit of the definition of rape under Section 375 IPC. Inducing a woman to have a sexual relationship on the basis of false promise of marriage would be rape within the meaning of Section 375 IPC. At this stage, the prosecution case is supported by the statement of the prosecutrix recorded under Section 164 Cr.PC. and other corroborating material. It is not a case where the trial should be nipped in the bud. At least a triable case is made out where the appellant would have all the opportunity to defend

himself to prove his innocence. He, therefore, submits that no case is made out for interference by this Court in the impugned order of the High Court and the appeal is liable to be dismissed.

10. After narrating the factual matrix, learned counsel for respondent No. 2 (prosecutrix) submits that appellant took advantage of the friendly nature of the prosecutrix in the context of appellant being the friend of her younger brother. Taking advantage of her vulnerability, appellant took private photographs of hers when she was changing her clothes after taking bath near a temple compound which they had visited together. Appellant later on showed such pictures to the prosecutrix and blackmailed her to indulge in a physical relationship with him. He threatened her that if she refused his demand, he would upload her private pictures on social media and also show them to her father. It is under such circumstances that the prosecutrix travelled with the appellant to Gwalior where he forced himself upon her in his tenanted premises. He asserts that compelling the prosecutrix to have intercourse with the appellant under the fear that he would leak her photographs would be in essence a consent vitiated by coercion. Such a consent is no consent at all. It is a clear case which would come within the ambit of the definition of rape.

10.1. To pacify the prosecutrix and to keep on exploiting her physically and mentally, appellant swore an affidavit on 28.09.2016 stating therein that he loved the prosecutrix and would take care of her under all circumstances. According to learned counsel, the physical relationship between the two was on the basis of consent of the prosecutrix which was obtained under 'misconception of fact' on the false promise of marriage. Intention of the appellant was quite clear. He deceived the prosecutrix on the pretext of marriage to have and maintain a physical relationship.

10.2. He submitted that appellant had obtained a stamp paper dated 07.07.2017 wherein he expressed his desire to marry the prosecutrix. According to learned counsel for respondent No. 2 i.e. the prosecutrix, that was done with the *malafide* intention of procuring financial support for his 'purported' business investment from her because of which respondent No. 2 had handed over various articles to the appellant amounting to Rs. 90,000/-.

10.3. Though respondent No. 2 continuously requested the appellant to solemnize their marriage but on one pretext or the other, the appellant evaded the same. At the same time he continued to physically exploit her. Initially, he had assured the prosecutrix that he would marry her after the marriage of his elder brother. But his *malafide* intention became obvious when he raised a demand of Rs. 15 lakhs saying that such amount was received by his elder brother in marriage.

10.4. In the course of his submissions, learned counsel also relied upon Section 90 IPC to buttress the point that consent of the prosecutrix was obtained on a 'misconception of fact'.

11. In response to a query of the Court, learned counsel for the State, i.e., respondent No. 1 submitted on instructions that neither the photographs nor the mobile phone of the appellant have been seized. He also admits that the affidavit dated 28.09.2016 and the stamp paper dated 07.07.2017 have also not been seized. No jewellery as alleged by the prosecutrix to have been given to the appellant by her has been recovered or seized from the appellant.

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

13. At the outset, let us examine the statement of the prosecutrix made before the police. In her statement under Section 161 Cr.P.C., the prosecutrix stated that appellant was not only a friend of her younger brother Mukul Rana but also a distant brother of her brother-in-law Shailendra Rana. Appellant used to run a competition coaching centre at Dabra, which the prosecutrix used to attend alongwith her brother Mukul during the years 2015 and 2016. On the recommendation of the appellant, prosecutrix got a job of receptionist in a company. In the year 2016, appellant disclosed his affection towards the prosecutrix which was turned down by her on the ground that he was not only younger to her but also friend of her younger brother Mukul. However, they became friends. She stated that on one Monday in the month of Savan of that year, appellant took her to a forest outside Kitore village ahead of Gijorra where there was a temple of Doodhkho Shankar Ji. There she took bath in the waterfall. Later on, appellant showed her the photographs which he had taken while she was changing her clothes in the temple. Though the prosecutrix told the appellant to delete the photographs, he did not do so. Thereafter, he started

blackmailing her by showing her the photographs because of which the prosecutrix stated that she had left the coaching centre and the job. Notwithstanding the same, appellant continued to threaten her by saying that the photographs would be made viral and that those would be shown to her father. It was because of such threatening that she went with the appellant by train from Dabra to Gwalior. On reaching Gwalior, he took her to one place at Anoopam Nagar where he forcefully made physical relationship with her. The place was taken on rent by a friend of the appellant Nitin Nagariya. On 28.09.2016, appellant obtained a stamp paper where he put his as well as the signature of the prosecutrix. It was mentioned in the stamp paper that he would support her throughout her life. According to the prosecutrix, she told the appellant many a times to marry her but on one pretext or the other, he evaded the proposal. Later on, he said that he would marry her after the marriage of his brother Jaideep. Prosecutrix stated that she had given the appellant money on several occasions after withdrawing from bank. On 16.06.2017, prosecutrix gave the appellant a cheque of Rs. 10,000/- of her mother. Appellant also stated that he had left the coaching centre and wanted to do business of his own and then his family members would be ready for marriage. On 07.07.2018, appellant had given the prosecutrix one e-stamp in his name wherein it was mentioned that he would marry her and on his assurance on 22.11.2017, prosecutrix took the pendant of the *mangalsootra* of her sister and gave it to the appellant. She went with the appellant to the bank where he mortgaged the pendant of the *mangalsootra* and took loan of Rs. 8,000/-. She further helped him in obtaining loan of Rs. 5,000/-. Later on, when she broached the topic of marriage since marriage of his brother had taken place on 18.04.2018, appellant told the prosecutrix that his brother had received Rs. 15 lacs in marriage; therefore, if she paid Rs. 15 lacs, he would marry her. However, when her family members talked with the family members of the appellant at his house, they refused. Though in the meeting of relatives, appellant was ordered to return the jewellery and money to the prosecutrix and also to marry her, he refused to do so. It was thereafter that she lodged the FIR on 05.09.2018.

14. Let us now examine the statement of the prosecutrix dated 12.09.2018 made under Section 164 Cr.P.C.

15. In her statement recorded under Section 164 Cr.P.C., prosecutrix stated that the incident was of the year 2016, in the month of Savan.

However, as two years had elapsed, she could not remember the date. She used to go to coaching class along with the appellant, who was a distant brother of her *jijaji*. The coaching class used to be held in the house of cousin brother of the appellant. One day, the appellant told the prosecutrix that a post of receptionist was vacant in the office in which she could work. Thereafter, he expressed his affection towards her which she turned down on the ground that the appellant was the friend of her younger brother and was also younger to her. After a few days, in the month of Savan, appellant took the prosecutrix to a temple near his village where she took bath under a water fall. Appellant took her photographs while prosecutrix was bathing. After 5/6 days, when she went to the coaching class, appellant showed her the photographs. He also expressed his desire of marrying her but the prosecutrix refused such proposal of the appellant. At that time, the appellant told her that if she continued to refuse his proposal, he would send the photographs to her father.

15.1. After a few days, appellant took her to Anupam Nagar of Gwalior, where his friend Nitin was residing in a rented premise. There the appellant forced himself upon the prosecutrix and when she refused, then he made physical relation with her without her consent. On her request to delete the photographs, the appellant told her that he would do so only if she agreed to marry him. Thereafter, he dropped the prosecutrix at Dabra and continued with the physical relationship with her. On 28.09.2016, appellant gave a stamp paper to the prosecutrix stating that he would support her throughout her life. On 16.06.2017, appellant demanded money from the prosecutrix, pursuant to which she gave him a cheque of her mother amounting to Rs.10,000/-. Again on 07.07.2017, appellant gave a stamp paper to the prosecutrix seeking her consent for marriage. Next when he asked for more money, prosecutrix gave him jewellery of her mother and sister as she was not having any money. Appellant mortgaged the jewellery in a bank against which he withdrew some money. Thereafter, she stated that when she withdrew money from the bank to meet the demands of the appellant, her family members came to know about the relationship.

15.2. Appellant told her before the marriage of his elder brother in April, 2018, that her family members should not come to his

place till the marriage of his brother was over. After the marriage was over, he told her that his brother had received Rs.15 lacs in marriage and asked her whether her family members would be in a position to furnish such an amount. After the marriage of his brother, family members of the prosecutrix went to the house of the appellant in the month of June, 2018 but found his family members to be evasive on the question of marriage. Though people of the community told the appellant and his family members to return the jewellery and also to marry the prosecutrix, they did not do so. Thereafter, appellant switched off his mobile phone and disappeared from Dabra. Brother of the appellant told the prosecutrix that if she complained before the police, she would be killed and that her brother would be implicated in a false case. It was thereafter that she lodged the FIR on 05.09.2018.

16. From a perusal and comparison of the two statements of the prosecutrix, one before the police under Section 161 Cr.P.C. and the other under Section 164 Cr.P.C., that too recorded within a span of 24 hours, what is noticeable is that not only are the statements contradictory in themselves, those are contradictory to each other as well. The fact that the appellant had lodged the FIR two years after the alleged incident is itself suggestive of the consensual nature of the relationship which had gone sour. It is inconceivable that the prosecutrix, who was about 22 years of age at the time of the alleged incident, would accompany the appellant to a temple if she was being threatened by the appellant. She was a major and, therefore, fully conscious of the consequences of her own actions. It is not the case of the prosecutrix that the appellant had forced her to have bath under the waterfall and thereafter took her photographs. The act of the prosecutrix having bath under the waterfall and changing her clothes thereafter in the company of the appellant virtually rules out any threat or coercion by the appellant on the prosecurtix.

17. In the course of the hearing, the Bench had put a pointed query to learned counsel for the State as to whether the mobile phone of the appellant or the photographs allegedly taken by the appellant of the prosecutrix while she was bathing and changing clothes were recovered to which the reply on instructions was that those were neither recovered nor seized. Further, the stamp paper dated

28.09.2016 as well as the cheque dated 16.06.2017 have not been seized. The jewellery allegedly given by the prosecutrix to the appellant has also not been seized. The stamp paper dated 07.07.2017 has not been seized. In the absence of such materials, it would be virtually impossible for the prosecution to prove the charges of rape and intimidation against the appellant.

18. We have carefully gone through the definition of rape provided under Section 375 IPC. We have also gone through the provisions of Section 376(2)(n) IPC, which deals with the offence of rape committed repeatedly on the same woman. Section 375 IPC defines 'rape' by a man if he does any of the acts in terms of clauses (a) to (d) under the seven descriptions mentioned therein. As per the second description, a man commits rape if he does any of the acts as mentioned in clauses (a) to (d) without the consent of the woman. Consent has been defined in Explanation 2 to mean an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act. However, the proviso thereto clarifies that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

19. Having regard to the above and in the overall conspectus of the case, we are of the view that the physical relationship between the prosecutrix and the appellant cannot be said to be against her will and without her consent. On the basis of the available materials, no case of rape or of criminal intimidation is made out.

20. Learned counsel for the respondents had placed considerable reliance on the provisions of Section 90 IPC, particularly on the expression "under a misconception of fact". Section 90 IPC reads thus:

> ***"90. Consent known to be given under fear or misconception.—***
>
> *A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or*

> *Consent of insane person.— if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or*
>
> *Consent of child.— unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age."*

21. Section 90 IPC says that a consent is not such a consent as it is intended by any section of IPC, if the consent is given by a person under the fear of injury or under a misconception of fact.

22. In *Dr. Dhruvaram Murlidhar Sonar vs. State of Maharashtra*, (2019) 18 SCC 191, this Court after examining Section 90 of the IPC held as follows:

> *"Thus, section 90 though does not define "consent", but describes what is not "consent". Consent may be express or implied, coerced or misguided, obtained willingly or through deceit. If the consent is given by the complainant under misconception of fact, it is vitiated. Consent for the purpose of section 375 requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act, but also after having fully exercised the choice between resistance and assent. Whether there was any consent or not is to be ascertained only on a careful study of all relevant circumstances."*

23. This Court also examined the interplay between Section 375 IPC and Section 90 IPC in the context of consent in the case of *Pramod Suryabhan Pawar Vs. State of Maharashtra*, (2019) 9 SCC 608, and held that consent with respect to Section 375 IPC involves an active understanding of the circumstances, actions and consequences of the proposed act. An individual who makes a reasoned choice to act after evaluating various alternative actions (or inaction) as well as the various possible consequences flowing from such action (or inaction), consents to such action. After deliberating upon the various case laws, this Court summed up the legal position as under:

> *"To summarise the legal position that emerges from the above cases, the "consent" of a woman with respect*

> *to Section 375 must involve an active and reasoned deliberation towards the proposed act. To establish whether the "consent" was vitiated by a "misconception of fact" arising out of a promise to marry, two propositions must be established. The promise of marriage must have been a false promise, given in bad faith and with no intention of being adhered to at the time it was given. The false promise itself must be of immediate relevance, or bear a direct nexus to the woman's decision to engage in the sexual act."*

24. Learned counsel for respondents had relied heavily on the expression "misconception of fact". However, according to us, there is no misconception of fact here. Right from the inception, it is the case of the prosecution that while the appellant was insisting on having a relationship with the prosecutrix, the later had turned down the same on the ground that appellant was the friend of her younger brother and a distant relative of her *jijaji*. That apart, according to the prosecutrix, the appellant was younger to her. Nonetheless, the prosecutrix had accompanied the appellant to a temple, where she had voluntarily taken bath under a waterfall. Her allegation that appellant had surreptitiously taken photographs of her while she was bathing and later on changing clothes and was blackmailing her with such photographs remain unfounded in the absence of seizure of such photographs or the mobile phone on which such photographs were taken by the appellant. If, indeed, she was under some kind of threat from the appellant, it defies any logic, when the prosecutrix accompanied the appellant to Gwalior from Dabra, a journey which they had made together by train. On reaching Gwalior, she accompanied the appellant on a scooter to a rented premises at Anupam Nagar, where she alleged that appellant had forced himself upon her. But she did not raise any alarm or hue and cry at any point of time. Rather, she returned back to Dabra alongwith the appellant. The relationship did not terminate there. It continued even thereafter. It is the case of the prosecutrix herself that at one point of time the family members of the two had met to discuss about their marriage but nothing final could be reached regarding their marriage. It was only thereafter that the FIR was lodged. As already pointed out above, neither the affidavit nor stamp papers have been recovered or seized by the police; so also the jewellery.

The alleged cheque of the prosecutrix's mother given to the appellant or the bank statement to indicate transfer of such money have not been gathered by the police. In the absence of such materials, the entire sub-stratum of the prosecutrix's case collapses. Thus, there is hardly any possibility of conviction of the appellant. As a matter of fact, it is not even a case which can stand trial. It appears to be a case of a consensual relationship which had gone sour leading to lodging of FIR. In the circumstances, Court is of the view that compelling the appellant to face the criminal trial on these materials would be nothing but an abuse of the process of the Court, result of the trial being a foregone conclusion.

25. From the factual matrix of the case, the following relevant features can be culled out:

(i) the relationship between the appellant and the prosecutrix was of a consensual nature;

(ii) the parties were in a relationship for a period of almost two years; and

(iii) though there were talks between the parties and their family members regarding marriage, the same did not fructify leading to lodging of FIR.

26. That being the position and having regard to the facts and circumstances of the case, we are of the view that it would be in the interest of justice if the proceedings are terminated at this stage itself. Consequently, impugned order of the High Court dated 03.10.2019 and the order of the Sessions Judge dated 24.04.2019 are hereby set aside and quashed.

27. Resultantly, proceedings in Sessions Trial No. 505/2018, pending before the 10th Additional Sessions Judge, Gwalior, are hereby quashed.

28. Consequently, the appeal is allowed.

Result of the case: Appeal allowed.

†*Headnotes prepared by:* Ankit Gyan

[2024] 7 S.C.R. 22 : 2024 INSC 463

R. Radhakrishna Prasad
v.
Swaminathan & Anr.

(Civil Appeal No. 910 of 2024)

08 July 2024

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

Issue for Consideration

Appellant-plaintiff filed suit for specific performance of the agreement of sale and in the alternative prayed for refund of the advance sale consideration of Rs.18,00,000/- (initial advance sale consideration of Rs. 3,00,000/- and additional sum of Rs. 15,00,000/), mesne profits etc. with interest. Trial Court denied specific performance however, directed the defendant no.1 to refund Rs.18,00,000/- to the plaintiff with interest. High Court modified the decree and allowed the plaintiff to recover only Rs.3,00,000/- with interest. Whether the plaintiff proved payment of Rs. 3,00,000/- initially and another sum of Rs.15,00,000/- totalling to Rs.18,00,000/- to the defendant no.1.

Headnotes†

Specific performance – Suit for specific performance of the agreement of sale – Alternative prayer for refund of the advance sale consideration of Rs.18,00,000/- by defendant no.1 was made which was allowed by Trial Court – High Court allowing the appeal filed by the defendant no.1 modified the decree and allowed the plaintiff to recover only Rs.3,00,000/- with interest – Correctness:

Held: Both the Courts below found that payment of Rs.3,00,000/- on the date of agreement was duly proved in the evidence of PW-1 and PW-3 – The bone of contention between the parties was the payment of additional advance consideration of Rs.15,00,000/- as evidenced by exhibit A-1(a) endorsement – Considering the entire evidence, the plaintiff has proved payment of advance sale consideration of Rs. 3,00,000/- at the time of execution of the agreement – However, the case of the plaintiff as to the subsequent payment of Rs.15,00,000/- was not established by positive evidence as rightly held by High Court – No substance in the appeal. [Paras 11-13]

* Author

List of Acts

Specific Relief Act, 1963.

List of Keywords

Specific performance; Suit for specific performance of the agreement of sale; Balance sale consideration; Ready and willing to pay; Advance sale consideration; Alternative prayer for refund of advance sale consideration; Specific relief of the agreement of sale declined;Specific performance denied; Decree for refund of money.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No.910 of 2024

From the Judgment and Order dated 23.06.2011 of the High Court of Kerala at Ernakulam in RFA No.25 of 2010

Appearances for Parties

V.Chitambaresh, Sr. Adv., K. Rajeev, Ms. Niveditha R. Menon, Bijo Mjoy, Advs. for the Appellant.

Zulfiker Ali P. S, Adv. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Prashant Kumar Mishra, J.

This appeal would call in question the Judgment and decree of the High Court of Kerala by which the High Court has allowed the appeal preferred by the defendant no. 1 and modified the decree passed by the Trial Court whereby, in a suit for specific performance, the Trial Court had directed the defendant no. 1 to refund a sum of Rs. 18,00,000/- (Rs. Eighteen Lakhs only) to the plaintiff. Under the impugned Judgment, the High Court has allowed the plaintiff to recover only a sum of Rs. 3,00,000/- (Rs. Three Lakhs only) with 12% interest per annum from the date of suit till realisation from the defendant no. 1.

2. Briefly stated, the facts of the case are that the appellant/plaintiff preferred a suit for specific performance of the agreement dated 26.03.1998 whereunder the parties entered into an agreement for sale of the suit property over which the defendant no. 1 had a right

by virtue of Partition Deed no. 2304/81 and Sale Deed nos. 759/93 & 1586/93 of the S.R.O. Chengannur. The defendant no. 1 agreed to sell the said property to the plaintiff for a sale consideration of Rs. 30,00,000/- (Thirty Lakhs only) and to handover the vacant possession of the suit property to the plaintiff within 06 months from the date of agreement. He received an advance sale consideration of Rs. 3,00,000/- (Three Lakhs only) from the plaintiff and also handed over the title deeds and encumbrance certificate to the plaintiff. The defendant no. 1 had availed of a loan from the defendant no. 2 - Bank by way of creating an equitable mortgage on deposit of his title deeds. Therefore, to clear the said liabilities, the defendant no. 1 received an additional amount of Rs. 15,00,000/- (Fifteen Lakhs only) from the plaintiff between the period from 26.03.1998 and 12.09.1998 and extended the period of the agreement for one year from 12.09.1998. The plaintiff averred in the suit that he was always ready and willing to pay the balance sale consideration as per the agreement but due to the laches on the part of the defendant no. 1, the sale deed could not be executed in time. In spite of repeated requests, the defendant no. 1 did not execute the sale deed, therefore, the suit was preferred. The plaintiff claimed for specific performance of the agreement and in the alternative prayed for refund of the advance sale consideration of Rs. 18,00,000/- (Eighteen Lakhs only), mesne profits etc. together with interest and other incidental expenses. No relief was sought from the defendant no. 2.

3. The defendant no. 1 contested the suit by denying the whole transaction. He denied having any acquaintance with the plaintiff as also the execution of the agreement. He also stated that he is only a co-owner of the suit property which would fetch value of more than Rs. 1,00,00,000/- (One Crore only). Thus, according to the defendant no. 1, the plaintiff has raised a false claim on the basis of a non-existing agreement. It is also stated in the written statement that there were financial transactions between one K.K. Vijayadharan Pillai and defendant no. 1 during which the said K.K. Vijayadharan Pillai obtained his signatures on blank papers and cheques from him and his wife. He has also initiated criminal prosecutions and instituted civil suit against defendant no. 1. The present suit is one of such instances. Thus, he denied any privity of contract between himself and the plaintiff. The suit has been instituted under the influence of K.K Vijayadharan Pillai on the strength of some forged and fabricated

documents. The defendant no. 2 - Bank did not appear despite receiving summons and was thus proceeded exparte.

4. Before the Trial Court, the plaintiff examined three witnesses and exhibited documents A1 to A8 whereas, on his side, defendant no. 1 examined two witnesses and exhibited two documents B1 and B2.

5. Basing on the undisputed facts that the agreement bears the signatures of defendant no. 1, the Trial Court found that the agreement was executed by the defendant no. 1 and the two witnesses of the agreement namely, K.K. Vijayadharan Pillai (PW-2) and Jose P. George (PW-3) having supported the plaintiff's case, the agreement is not forged or fabricated. The Trial Court also considered the documentary evidence as contained in exhibit A-1 to A-8 to conclude that the suit notice was duly served on the defendant no. 1 and that he was ready with the sale consideration amount for the execution of the sale deed as reflected in the document exhibit A-7. Therefore, the plaintiff is entitled to a decree for specific performance. This finding was also found supported by the evidence of PW-2 who was examined as a witness to the agreement and the endorsement exhibit A-1(a) and has proved that the documents were exhibited in his presence and the defendant no. 1 had put his signatures on the documents. Similar is the case with the other witness PW-3 – Jose P. George. The Trial Court also considered the evidence of DW-1, a practicing advocate who issued exhibit B-2 notice on the defendant no. 1. However, this witness has been disbelieved by the Trial Court. The defendant no. 1 examined himself as DW-2 who admitted his ownership in the suit property. He maintained his stand that K.K. Vijayadharan Pillai had obtained his signatures on blank papers and blank cheque leaves and the same has been misused to create forged agreement. However, the Trial Court upon consideration of the equitable principles on which a decree for specific performance is granted, was convinced with the case of defendant no. 1 that the suit property would fetch more value than the sale consideration mentioned in the agreement, therefore, considering the principles under Section 20 of the Specific Relief Act, 1963, the Trial Court denied specific performance and, in the alternative, directed the defendant no. 1 to repay the advance sale consideration of Rs. 18,00,000/- (Eighteen Lakhs only) together with interest at the rate of 12% per annum to the plaintiff.

6. Feeling aggrieved by the decree for refund of money passed by the Trial Court, the defendant no. 1 preferred R.F.A. No. 25 of 2010 in the High Court, and the another Ex. F.A. No. 6 of 2011 was preferred by a claimant who had set up a claim over the property of the defendant no. 1, which had been brought to sell in execution to satisfy the decree passed by the Trial Court. The claimant was the advocate who appeared for the defendant no. 1 in the execution proceedings, and his claim was dismissed. Aggrieved thereby, he preferred the said appeal i.e. Ex. F.A. 6 of 2011.

7. Under the impugned judgement of the High Court, the appeal preferred by the defendant no. 1 has been allowed in part, modifying the decree and allowing the plaintiff to recover only a sum of Rs. 3,00,000/- (Three Lakhs only) with 12% interest per annum from the date of suit till realisation from the defendant no. 1 and at the same time rejecting the claim petition of the claimant who was the appellant in Ex. F.A. No. 6 of 2011.

8. In this Civil Appeal, we are concerned with the appeal preferred by the plaintiff who alone has approached this Court. The claimant in Ex. F.A. No. 6 of 2011 is not before us, therefore, the said part of the judgment has attained finality.

9. It is also to notice that in so far as the declining of the specific relief of the agreement of sale, there is no further challenge from the plaintiff by preferring First Appeal before the High Court. Therefore, the same has become final and we are only concerned with the refund part of the relief allowed in favour of the plaintiff by the Trial Court and modified by the High Court.

10. We have heard the learned counsel for the parties and perused the material papers available on record of the Civil Appeal as also the copy of the agreement which was made part of the record in course of hearing.

11. Since the defendant no. 1 has not preferred any appeal before this Court challenging the findings of the First Appellate Court that the execution of the agreement is proved, we are not considering the said issue. The material issue to be decided in this appeal is whether the plaintiff has proved payment of Rs. 3,00,000/- (Three Lakhs only) initially and another sum of Rs. 15,00,000/- (Fifteen Lakhs only) totalling to Rs. 18,00,000/- (Eighteen Lakhs only) to the

defendant no. 1. Both the Courts below have found that payment of Rs. 3,00,000/- (Three Lakhs only) on the date of agreement has been duly proved in the evidence of PW-1 and PW-3. The bone of contention between the parties is the payment of additional advance consideration of Rs. 15,00,000/- (Fifteen Lakhs only) as evidenced by exhibit A-1(a) endorsement. On this aspect, the only evidence is that of the plaintiff himself without any corroboration from any other witness. The High Court has noted that PW-1 would state that stamp receipts had been collected whenever such subsequent payment were made but none of the stamp receipts were produced. We have perused the xerox copy of the document which was made available to us at the time of hearing. The document would show that the witness PW-2 had signed just below that endorsement and only thereafter, the signature of the defendant no. 1 is seen subscribed. Ordinarily, in any agreement witnessing payment of money, the party signs first and the witness(s) puts his signature(s) below that endorsement. However, in the case in hand, the witness has signed just below that endorsement and only thereafter, the defendant no. 1 is seen subscribing to the endorsement. In the suit notice exhibit B-1 also, there is no mention of payment of a definite sum paid as advance sale consideration nor existence of any endorsement has been mentioned therein. The amount of Rs. 15,00,000/- (Fifteen Lakhs only) so received subsequent to exhibit A-1 agreement of sale, as stated in the second notice and also in the plaint and so reflected in exhibit A-1(a) endorsement is not stated in exhibit B-1 suit notice. There is no reason why payment of such substantial amount of Rs. 15,00,000/- (Fifteen Lakhs only) would be missing in the suit notice. The only possible reason for this could be that the advocate who prepared the notice was not apprised of this fact. If such was the case, plaintiff's statement in Court, without any further corroboration, is not believable and the High Court has rightly found that the case of the plaintiff as to the subsequent payment of Rs. 15,00,000/- (Fifteen Lakhs only) is not established by positive evidence.

12. We have considered the entire evidence to examine the correctness of the findings recorded by the High Court and we fail to persuade ourselves to reach to any other conclusion than the one reached by the High Court holding that the plaintiff has proved payment of advance sale consideration of Rs. 3,00,000/- (Three Lakhs only) at the time of execution of the agreement.

13. In view of the foregoing, we find no substance in this appeal which deserves to be and is hereby dismissed.

14. The parties shall bear their own costs.

Result of the case: Appeal dismissed.

†*Headnotes prepared by:* Divya Pandey

[2024] 7 S.C.R. 29 : 2024 INSC 467

Har Narayan Tewari (D) Thr. Lrs.
v.
Cantonment Board, Ramgarh Cantonment & Ors.

(Civil Appeal No. 8829 of 2010)

08 July 2024

[Abhay S. Oka and Pankaj Mithal,* JJ.]

Issue for Consideration

Whether the present suit (claiming title and possession over the suit land) as filed by the plaintiff-appellant was barred under Section 11 CPC on principle of *res judicata* inasmuch as there was no adjudication of the rights of the co-defendants (including appellant) in the previous suit with regard to the suit land and the issue therein was not directly or indirectly and substantially the same as in the present suit.

Headnotes†

Code of Civil Procedure, 1908 – s.11 – *Res judicata* – Rights of co-defendants – The title suit no.9/89 of the plaintiff-appellant was decreed by the Court of the first instance – In appeal, the First appellate Court reversed the decree on the ground that the suit was hit by the principle of *res judicata* in view of an earlier suit no.8/64 instituted by M wherein the plaintiff-appellant was defendant no.2 – The second appeal was dismissed on the ground that it did not state any substantial question of law – Propriety:

Held: The *lis* in the previous suit i.e. Suit No.8/64 was regarding ownership and entitlement of M over the entire 5.38 acres of land of village Ramgarh qua the Cantonment Board, Ramgarh; the plaintiff-appellant and other defendants in the said suit; whereas the controversy in the present suit is quite distinct with regard to only 0.30 acres of the suit land *vis-à-vis* the plaintiff-appellant and the Cantonment Board, Ramgarh – The suit, as filed by M claiming right, title and interest over 5.38 acres of land of village Ramgarh was dismissed simpliciter without adjudication of any rights of the plaintiff-appellant over the suit land *vis-à-vis* the Cantonment Board, Ramgarh – It is a settled law that the principle of res *judicata* is applicable not only between the plaintiff and the defendants but

* Author

also between the co-defendants – In applying the principle of res *judicata* between the co-defendants, primarily three conditions are necessary to be fulfilled, namely, (i) there must be a conflict of interest between the co-defendants; (ii) there is necessity to decide the said conflict in order to give relief to plaintiff; and (iii) there is final decision adjudicating the said conflict – In the instant case, there was no conflict of interest between the co-defendants in the earlier Suit No. 8 of 64 inasmuch as the plaintiff-appellant was independently claiming rights over 0.30 acres of suit land whereas the Cantonment Board, Ramgarh was claiming rights over 2.55 acres of the land which formed part of the Estate of R without asserting that the land settled in its favour is the same as claimed by plaintiff-appellant or that there was any encroachment upon the land settled in its favour – M was claiming the entire Estate of 5.38 acres of land and her claim was defeated as she was unable to prove the grant of the said land in her favour with no specific finding by the court regarding the claims set up by the codefendants, the *inter se* dispute of the co-defendants as raised in the present suit never came to be adjudicated – In view of the facts and circumstances, the principle of res *judicata* is not attracted – As far as claim of the plaintiff-appellant is concerned, the plaintiff-appellant by sufficient evidence has proved the settlement of the suit land by the R in his favour – It stands proved by the *Amin* report (Exh.8) dated 15.04.1942 20 and the *Hukumnama* (Exh.9) dated 07.04.1943 as well as the Rent receipt (Exh.6, 6/A and 7) – The order of the Additional Collector, Hazaribagh dated 07.01.1963 (Exh.16) directing realization of rent from the plaintiff-appellant also confirms the above settlement and its subsequent approval by the State on enhancement of rent – All these documents have not been confronted by the other side – The fact that the name of the plaintiff-appellant was also mutated in the revenue records proves it beyond doubt, in the absence of any contrary evidence that he is in possession of the suit land. [Paras 20, 21, 23, 25, 33]

Case Law Cited

Govindammal (Dead) by Legal Representatives and Ors. v. Vaidiyanathan and Ors. [2018] 11 SCR 1092 **: (2019) 17 SCC 433 – referred to.**

List of Acts

Code of Civil Procedure, 1908.

Har Narayan Tewari (D) Thr. Lrs. v. Cantonment Board, Ramgarh Cantonment & Ors.

List of Keywords

Principle of res judicata; Section 11 of Code of Civil Procedure, 1908; Rights of co-defendants; Claim of right, title, interest; Conflict of interest between the co-defendants.

Case Arising From

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8829 of 2010

From the Judgment and Order dated 01.04.2009 of the High Court of Jharkhand at Ranchi in SA No.266 of 2006

Appearances for Parties

Manoj Goel, Sr. Adv., Mrs. Smriti Prasad, Vinayak Goel, Mrs. S. Gupta, Shuvodeep Roy, Advs. for the Appellants.

Manoj Swarup, Sr. Adv., Ms. Madhurima Tatia, Adv. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Pankaj Mithal, J.

1. Shri Manoj Goel, learned senior counsel for the appellants and Shri Manoj Swarup, learned senior counsel for the respondents were heard.

2. The Title Suit No.9/89 of the plaintiff-appellant (Har Narayan Tewari) was decreed on 16.03.2000 by the court of first instance. In an appeal by the Cantonment Board, Ramgarh, the said decree was reversed by the First Appellate Court vide judgment and order dated 28.06.2006; basically on the ground that the suit was hit by principle of *res judicata* in view of the decision in the earlier Title Suit No.8/64 instituted by Maharani Lalita Rajya Lakshmi[1] (wife of Raja Bahadur Kamakshya Narayan Singh[2]) wherein the plaintiff-appellant was defendant No.32 and the Cantonment Board, Ramgarh was the main contesting defendant. The Second Appeal preferred by the plaintiff-appellant to the High Court was dismissed on 01.04.2009 simply stating that it does not raise any substantial question of law.

1 *Hereinafter referred to as "Maharani"*

2 *Hereinafter referred to as "Raja"*

3. Aggrieved by the judgment and order of the High Court dated 01.04.2009 dismissing the appeal; the plaintiff-appellant has preferred this appeal and has also assailed the judgment and order dated 28.06.2006 of the First Appellate Court alleging that his suit was not barred by *res judicata* and that he has validly acquired title and possession over the disputed land.

4. The plaintiff-appellant had filed the above referred Title Suit No.9/89 for declaration of his title over the properties mentioned in Schedule 'A' of the plaint with structures and buildings standing thereon and for confirmation of his possession over the same. In the alternative, a prayer was made that in case the plaintiff-appellant was not found in possession of the said property, the Cantonment Board, Ramgarh, or any person claiming through it, be evicted and he be put in possession with the further direction that they be restrained by a decree of permanent injunction from dispossessing the plaintiff-appellant from the said property in future.

5. According to Schedule 'A' of the plaint, the dispute is about two pieces of land: First, land measuring 0.12 acres out of 2.04 acres of Plot No.432; and secondly land measuring 0.18 acres out of 0.66 acres of Plot No.438 both situate in village Ramgarh, within the Cantonment Board, Ramgarh with boundaries as described in the Schedule. In short, the dispute in the suit is only regarding 0.12 acres of Plot No.432 and 0.18 acres of Plot No.438 i.e. total of 0.30 acres of the above two plots and the structures existing thereon.

6. The plaintiff-appellant is claiming title and possession over the suit land alleging that the Raja, the proprietor of the village, had settled the aforesaid land measuring 0.30 acres of the land comprising of Plot Nos.432 and 438 in his favour in the year 1942.

7. The case of the plaintiff-appellant was that village Ramgarh was the part of the Estate of Raja. It was under the management of the Court of Wards and was released in Raja's favour in the year 1937. During the period of its management by the Court of Wards, its manager acquired 5.38 acres of additional land comprised in various plots including Plot Nos.432 and 438 in proceedings bearing Case No.1/1926-27 and came in possession thereof.

8. The Raja in the year 1942 made a permanent *raiyati* settlement of the suit land in favour of the plaintiff-appellant and also delivered its possession to him on payment of rent and *salami* of Rs.2,000/-. After

vesting of the Estate of Ramgarh in the State of Bihar, the name of the plaintiff-appellant was mutated upon enhancement of rent @ Rs.2/- per decimal by an order dated 04.01.1963 of the Additional Collector, Ramgarh passed in Case No.115/62-63 *(Exh.13)*. The plaintiff-appellant had constructed certain structures on the said land which have been let out to various persons, all of whom are defendants in the suit.

9. Upon the establishment of the Cantonment Board, Ramgarh, the ex-proprietor Raja handed over 2.55 acres of land (excluding the suit land) with the dispensary building etc. to the Cantonment Board temporarily. The Cantonment Board, as such, never came in possession of more than 2.55 acres of land that too which was other than the land settled and occupied by the plaintiff-appellant.

10. In 1964, Maharani, the wife of the Raja, instituted a Title Suit No.8/64, *inter alia,* for declaration of her title over 5.38 acres of the land of the village including 0.30 acres land of the plaintiff-appellant. The aforesaid claim was made on the basis of the maintenance grant allegedly made by the Raja in her favour.

11. The aforesaid suit was contested by the plaintiff-appellant by filing a written statement and claiming 0.30 acres land on the basis of *raiyati* rights granted by the Raja in the year 1942. The Cantonment Board, Ramgarh, claimed distinct rights in different portions of the land to the extent of 2.55 acres only, comprising of dispensary building and quarters of the doctors on the basis of possessory rights granted by the Raja.

12. In the aforesaid case, Maharani entered into a compromise with several defendants including the plaintiff-appellant (who was defendant No.32 in the said suit). According to the said compromise, Maharani admitted the possession of the plaintiff-appellant over the suit land to the extent of 0.30 acres in Plot Nos.432 and 438 and it was agreed that she will have no concern with the same and that the plaintiff-appellant will remain in exclusive possession of it. The Cantonment Board, Ramgarh did not object to it or challenge the compromise.

13. In the said suit, as many as nine issues were framed including the maintainability of the suit and about the right, title and possession of Maharani. The suit of the Maharani was dismissed vide judgment and order dated 31.03.1984, primarily on the ground that it was not

maintainable as the State of Bihar being a necessary party, was not made a party and that Maharani had not entered into the witness box to prove her case. She as such, was not found to be the owner in possession of the land claimed by her. The court in dismissing the suit clearly mentioned that the parties who have entered into the compromise with Maharani will not have any right on the basis of the compromise deed as she herself has failed to prove her independent rights over the land claimed by her.

14. The second appeal filed by the plaintiff-appellant was dismissed by the High Court as it failed to raise any substantial question of law, which is mandatory for entertaining an appeal under Section 100 of the Code of Civil Procedure. Therefore, the first point which arises for consideration herein is - *whether in the facts and circumstances of the case, any substantial question of law was involved in the second appeal*.

15. The submission is that the plaintiff-appellant was non-suited by the First Appellate Court, on the ground that his suit was barred by *res judicata*. One of the essential conditions for the applicability of principle of *res judicata* as enshrined under Section 11 of the CPC is that the issue in the earlier suit and the subsequent suit ought to be directly and substantially the same. In the earlier Suit No. 8/64 instituted by Maharani, her claim was that she is the lawful owner of the entire 5.38 acre of land of Village Ramgarh, on the basis of the maintenance grant made in her favour by the Raja. In the said suit, the plaintiff-appellant was defendant no. 32 and the Cantonment Board, Ramgarh was defendant No. 1. The claim set up by Maharani was not accepted and *ex-facie* there was no adjudication regarding the rights of the co-defendants over the suit land *viz* 0.30 acres of land of plot Nos. 432 and 438 as claimed by the plaintiff-appellant in the present suit. The limited issue therein was whether the Maharani had acquired any right in the above entire property on the basis of maintenance in grant alleged to be executed by the Raja in her favour. There was no issue as to whether the suit land as claimed by the plaintiff-appellant belonged to him or was settled or not settled in his favour as claimed. Thus, in the facts and circumstances of the case, a clear substantial question of law as to whether the present suit as filed by the plaintiff-appellant was barred under Section 11 CPC on principle of *res judicata* inasmuch as there was no adjudication of the rights of the co-defendants in the previous suit with regard to

the suit land and the issue therein was not directly or indirectly and substantially the same as in the present suit.

16. In view of the above, we are of the opinion that the High Court manifestly erred in dismissing the second appeal *in limine* on the ground that there was no substantial question of law involved therein.

17. As stated earlier, the substantial question of law arising in the second appeal was - *Whether the suit as setup by the plaintiff-appellant was barred by principle of res judicata in view of the decision in the earlier Suit No. 8 of 64 wherein rights of the co-defendants in respect of the suit land were never adjudicated and non-acceptance of the claim of Maharani was not sufficient so as to decide the rights of the co-defendants.*

18. There are no factual disputes which may require consideration of any evidence so as to answer the above substantial question of law. Therefore, we consider it appropriate to decide the above substantial question of law ourselves instead of leaving it for the High Court to adjudicate it.

19. It is an admitted position that the suit land i.e., portions of plot Nos. 432 and 438 were part of the Estate of Raja who had acquired about 5.38 acres of additional land of village Ramgarh. Maharani had claimed title over the entire aforesaid land of village Ramgarh but her claim was not accepted by the court in her Title Suit No.8/64. It means that she was unable to establish her right, title and interest over the said land on the basis of the alleged maintenance grant made in her favour by the Raja, but it does not mean that the suit land was not settled by the Raja in favour of the plaintiff-appellant or that the suit land had come to be settled with Cantonment Board, Ramgarh in any manner.

20. The *lis* in the previous suit i.e. Suit No.8/64 was regarding ownership and entitlement of Maharani over the entire 5.38 acres of land of village Ramgarh qua the Cantonment Board, Ramgarh; the plaintiff-appellant and other defendants in the said suit; whereas the controversy in the present suit is quite distinct with regard to only 0.30 acres of the suit land *vis-à-vis* the plaintiff-appellant and the Cantonment Board, Ramgarh.

21. The judgment and order of the previous suit which is final and conclusive, in no specific terms adjudicates upon the right, title

and interest of either of the plaintiff-appellant or of the Cantonment Board, Ramgarh with regard to the suit land. In the said suit, there was no issue with regard to the right, title and possession of either the plaintiff-appellant or of the Cantonment Board, Ramgarh and no finding in this connection was returned by the court in dismissing the said suit. In simple words, the suit, as filed by Maharani claiming right, title and interest over 5.38 acres of land of village Ramgarh was dismissed simpliciter without adjudication of any rights of the plaintiff-appellant over the suit land *vis-à-vis* the Cantonment Board, Ramgarh.

22. It may also be pertinent to point out that the Cantonment Board, Ramgarh throughout had claimed rights over 2.55 acres of land of village Ramgarh and not in respect of the entire 5.38 acres of land which was additionally acquired by the Raja. It is also not the case of the Cantonment Board, Ramgarh that the land which was temporarily settled in its favour by the Raja has been occupied by the plaintiff-appellant or that the plaintiff-appellant is claiming rights over the land which was settled in its favour. In other words, the land belonged to the Raja, part of which was settled in favour of the plaintiff-appellant to the extent of 0.30 acres of plot Nos. 432 and 438, whereas, another piece of land measuring 2.55 acres with certain structures but certainly excluding the suit land was settled in favour of Cantonment Board, Ramgarh. The right of the plaintiff-appellant to claim the suit land or the right of the Cantonment Board over the 2.55 acres of land settled in its favour never came to be adjudicated in previous Title Suit No. 8 of 64.

23. The general policy behind the principle of *res judicata* as enshrined under Section 11 CPC is to avoid parties to litigate on the same issue which has already been adjudicated upon and settled. This is in consonance with the public policy so as to bring to an end the conflict of interest on the same issue between the same parties. One of the basic essential ingredients for applying the principle of *res judicata*, as stated earlier also, is that the matter which is directly and substantially in issue in the previous litigation ought not to be permitted to be raised and adjudicated upon in the subsequent suit. It is a settled law that the principle of *res judicata* is applicable not only between the plaintiff and the defendants but also between the co-defendants. In applying the principle of *res judicata* between the co-defendants, primarily three conditions are necessary to be

fulfilled, namely, (i) there must be a conflict of interest between the co-defendants; (ii) there is necessity to decide the said conflict in order to give relief to plaintiff; and (iii) there is final decision adjudicating the said conflict. Once all these conditions are satisfied, the principle of *res judicata* can be applied *inter se* the co-defendants.

24. In context with the above settled principle, though reference can be made to several decisions starting from that of Privy Council, but we consider it appropriate to refer to only one of the latest decisions on the point rendered by this Court in the case of ***Govindammal (Dead) by Legal Representatives and Ors. vs. Vaidiyanathan and Ors.***[3], wherein after considering all previous decisions regarding application of principle of *res judicata* between co-defendants, this Court culled out the above three conditions for applying the same.

25. In the light of the above legal position, we find that there was no conflict of interest between the co-defendants in the earlier Suit No. 8 of 64 inasmuch as the plaintiff-appellant was independently claiming rights over 0.30 acres of suit land whereas the Cantonment Board, Ramgarh was claiming rights over 2.55 acres of the land which formed part of the Estate of Raja without asserting that the land settled in its favour is the same as claimed by plaintiff-appellant or that there was any encroachment upon the land settled in its favour. Even assuming that there was some *inter se* conflicts between the co-defendants with regard to the suit land, the adjudication of the said conflict was not necessary for granting any relief to Maharani who was the plaintiff in the suit. Since she was claiming the entire Estate of 5.38 acres of land and her claim was defeated as she was unable to prove the grant of the said land in her favour with no specific finding by the court regarding the claims set up by the co-defendants, the *inter se* dispute of the co-defendants as raised in the present suit never came to be adjudicated. Thus, none of the conditions as laid down in *Govindammal (supra)* between co-defendants stood fulfilled for applying *res judicata*. In view of the aforesaid facts and circumstances, we are of the opinion that the principle of *res judicata* would not be attracted as the issue in the present suit was neither directly or indirectly in issue in the previous suit and there was no conflict of interest between the co-defendants in the said previous suit which if any never came to be adjudicated upon. Accordingly, the suit as filed

3 [2018] 11 SCR 1092 : (2019) 17 SCC 433

by the plaintiff-appellant claiming title over the suit land against the Cantonment Board, Ramgarh is not barred under Section 11 CPC.

26. Having said so, we proceed to examine the respective claims of the parties on merits, treating the suit as maintainable and not barred by *res judicata*.

27. The plaintiff-appellant has set up his claim over the suit land as described in Schedule 'A' to the plaint. The said schedule mentions 0.12 acres of land of plot No.432 and 0.18 acres of land of plot No.438 totaling 0.30 acres of land situate in village Ramgarh. There is no dispute that during the said period the Estate of the Raja was under the management of Court of Wards, its manager had acquired 5.38 acres of additional land including the suit land and the same was added to the Estate of the Raja. In the year 1942, the Raja had settled the aforesaid land in favour of the plaintiff-appellant on 18.10.1942. It was followed by *Hukumnama* dated 07.04.1943 (*Exh.9*) which confirmed the above settlement.

28. The above settlement was confirmed by the Additional Collector, Hazaribagh on enhancement of rent @ Rs.2/- per decimal some time in the year 1963 and had started realizing rent from the plaintiff-appellant accordingly.

29. There is no dispute by any person claiming rights under the Raja that the aforesaid land was not so settled in favour of the plaintiff-appellant. The Maharani had claimed the entire 5.38 acres of land on the basis of the maintenance grant executed by Raja in her favour but her aforesaid claim was not accepted. The Cantonment Board, Ramgarh on the other hand had staked its claim only in respect of 2.55 acres of land forming part of 5.38 acres of the land but has nowhere claimed any right, title and interest over the suit land as claimed by the plaintiff-appellant. The Cantonment Board only on the basis of the judgment and order dated 16.03.2000 passed in Title Suit No.8/64 alleges that it has been recognized to be the owner of the entire 5.38 acres of land by adverse possession and, therefore, the plaintiff-appellant has no subsisting right in the suit land. The Cantonment Board further contends that the entire 5.38 acres of land was leased out by the Raja on 02.06.1931 for a period of 15 years to the Dublin University Mission and, therefore, no part of it could have been settled by him in favour of the plaintiff-appellant in the year 1942.

30. In respect to the second aspect as raised on behalf of the Cantonment Board, it is necessary to note that no material or evidence was adduced by the Cantonment Board to establish that the entire 5.38 acres of land was transferred by way of lease to Dublin University Mission; not even any oral evidence was adduced to prove such a transfer restricting the right of the Raja to settle the land in favour of the plaintiff-appellant. Even otherwise assuming there was such a lease, it would have expired in June 1946 on completion of 15 year period in which case the settlement of 1942 and the *Hukumnama* of 1943 being valid would revive and continue in favour of the plaintiff-appellant, more particularly with its confirmation by the Additional Collector and mutation in 1963.

31. In context with the first contention that in Title Suit No.8/64, possession of the Cantonment Board over the entire 5.38 acres was accepted by adverse possession, it would be pertinent to note that on perusal of the said judgment and order and decree would reveal that the court of first instance in the said suit has not given any finding with regard to the claim to the plaintiff-appellant (who was defendant No.32 in the said suit) nor with regard to the claim set up by the Cantonment Board. It is misconceived to contend that the said judgment and order accepts the title of the Cantonment Board by adverse possession on the entire 5.38 acres of land. In the said suit, the Cantonment Board had claimed rights only in respect of the part of the aforesaid 5.38 acres of land to the extent of 2.55 acres and, therefore, any observation of the trial court regarding adverse possession of the Cantonment Board would be deemed to be in respect of the claim as set up by the Cantonment Board and would not be construed to be in connection with the entire 5.38 acres of land so as to include the land of the plaintiff-appellant.

32. The written statement of the Cantonment Board itself as filed in Title Suit No.8/64 *(Exh.12)* makes it abundantly clear that upon the establishment of the Cantonment Board as a temporary measure in the year 1941, the Raja on being approached permitted it on 06.11.1941 to use 2.55 acres of land consisting of the dispensary building and other structures along with adjoining land to be used by the Cantonment Board for a period of six months which was extended up to 31.12.1943. There was no other settlement of any land in favour of the Cantonment Board and the Cantonment Board was in permissive possession of only 2.55 acres of land out of the

5.38 acres of the entire land of village Ramgarh. The land settled in favour of the plaintiff-appellant and that in favour of the Cantonment Board by the Raja were distinct and as such there was no apparent conflict between them.

33. The plaintiff-appellant by sufficient evidence has proved the settlement of the suit land by the Raja in his favour. It stands proved by the *Amin* report (*Exh.8*) dated 15.04.1942 and the *Hukumnama* (*Exh.9*) dated 07.04.1943 as well as the Rent receipt (*Exh.6, 6/A and 7*). The order of the Additional Collector, Hazaribagh dated 07.01.1963 (*Exh.16*) directing realization of rent from the plaintiff-appellant also confirms the above settlement and its subsequent approval by the State on enhancement of rent. All these documents have not been confronted by the other side. The fact that the name of the plaintiff-appellant was also mutated in the revenue records proves it beyond doubt, in the absence of any contrary evidence that he is in possession of the suit land. It may also be worth noting that in the earlier suit, the Cantonment Board has accepted that the plaintiff-appellant has been realizing rent of the shops existing over the suit land from the tenants.

34. In view of the aforesaid overwhelming unconfronted evidence, the First Appellate Court manifestly erred in reversing the finding of the court of first instance that the plaintiff-appellant is in settled possession of the suit land and he has successfully proved his ownership rights over the same.

35. Accordingly, the judgment and order of the High Court dated 01.04.2009 and that of the First Appellate Court dated 28.06.2006 are hereby set aside and the judgment and order dated 16.03.2000 passed by the trial court is restored decreeing the title suit of the plaintiff-appellant but with no order as to costs.

36. The appeal is allowed.

Result of the case: Appeal allowed.

†*Headnotes prepared by:* Ankit Gyan

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Lal Mohammad Manjur Ansari
v.
The State of Gujrat

(Criminal Appeal No. 3524 of 2023)

08 July 2024

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

Issue for Consideration

Conviction and sentence of the appellant for offence punishable u/s. 302 IPC, if justified.

Headnotes†

Evidence – Extra-judicial confession – Dying declaration – Reliance upon, when – Murder case wherein prosecution case based on the evidence of eyewitnesses, extra-judicial confession made by the appellant-accused to his employer, and the dying declaration made by the victim to one of the prosecution witness – Though few prosecution witnesses who were eyewitnesses turned hostile, courts below relied upon certain parts of their testimony – High Court disbelieved the testimony of the appellant's employer and the prosecution witness to whom dying declaration was made – Conviction and sentence of the appellant for offence punishable u/s. 302 IPC – Correctness:

Held: Normal rule of human conduct is that a person would confess the commission of a serious crime to a person in whom he has implicit faith – It is unnatural that the appellant-accused would call his employer-prosecution witness with whom he worked barely for five months on the phone and confess, and further call him to the Bus Station – Furthermore, the employer admittedly did not disclose to the police the telephone number from which he allegedly received a call from the appellant – No investigation was made to ascertain the said phone number as also the phone number from which the employer called PSI – It was necessary for the prosecution to collect evidence on these aspects and place it before the Court – Though the employer

* Author

stated that the appellant again made extra-judicial confession at the Bus Station in the presence of PSI, the prosecution did not examined PSI as a witness – Statement of PSI not recorded during the investigation – Alleged confession made by the appellant before PSI could not be proved against the appellant – Hence, the prosecution's evidence regarding extra-judicial confession cannot be believed – It was PSI who took the appellant into custody – Hence, PSI was a crucial witness – Vital prosecution witness was withheld from the Court – Moreover, the manner in which the appellant was taken into custody becomes highly suspicious as it was not even recorded in the arrest panchnama that PSI arrested the appellant – Thus, not possible to rely upon the evidence of the employer – Prosecution case regarding the dying declaration made to one of the prosecution witness does not inspire confidence at all – Also, on perusal of the evidence of the hostile prosecution witnesses, nothing in the evidence to be relied upon by the prosecution for connecting the appellant with the murder of the deceased – Appellant's conviction cannot be sustained – Conviction and sentence of the appellant set aside – Penal Code, 1860 – s. 302 – Evidence Act, 1872. [Paras 7, 8, 10, 14, 15]

List of Acts

Penal Code, 1860; Evidence Act, 1872.

List of Keywords

Extra-judicial confession; Dying declaration; Eyewitnesses.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 3524 of 2023

From the Judgment and Order dated 05.03.2013 of the High Court of Gujarat at Ahmedabad in CRLA No. 2436 of 2005

Appearances for Parties

Rajat Bhardwaj, Mohd.Ainul Ansari, Manoj Kumar Goyal, Ms. Ankita M.Bhardwaj, Rishabh Goyal, Kaustubh Khanna, Advs. for the Appellant.

Ms. Swati Ghildiyal, Ms. Devyani Bhatt, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Judgment

Abhay S. Oka, J.

1. The appellant-accused has been convicted for the offence punishable under Section 302 of the Indian Penal Code (for short, 'IPC') by the Sessions Court. By the impugned judgment, the High Court has confirmed the appellant's conviction. The appellant has been sentenced to undergo life imprisonment.

FACTUAL ASPECT

2. The appellant raised a plea of juvenility. By the order dated 10th April 2023, this Court directed the Trial Court to hold an inquiry into the plea of juvenility. Accordingly, an order was made by the learned Trial Judge on 8th April 2023. The learned Trial Judge held that the appellant was not a juvenile in conflict with the law on the date of the commission of the offence. After that, leave was granted, and the appeal was heard on merits.

3. The incident occurred on 6th September 2004. The accused was staying in room no. 3 rented to him by PW-3 - Alimuddin Amiruddin Shaikh. According to the prosecution, the deceased – Mohmed Akhtar Gafur Ansari, was also staying in the room no. 3, along with the appellant. There was a dispute between them about playing music. The dispute led to an altercation in which the appellant attacked the deceased. The injuries sustained by the deceased caused his death. The prosecution case is based on the evidence of eyewitnesses PW-3 to PW-9, extra-judicial confession by the appellant made to PW-19 - Mohammad Afroz and dying declaration made by the deceased to PW-24 - Mohd. Rafiq. Though PW-3 to PW-9 were declared hostile, the Trial Court and High Court have relied on certain parts of their testimony. The High Court has believed the testimony of PW-19 and PW-24.

SUBMISSIONS

4. The learned counsel appearing for the appellant has taken us through the testimony of hostile eyewitnesses. By pointing out the findings of the High Court, he submitted that, firstly, certain statements made by the eyewitnesses out of context could not be relied upon by the prosecution. Secondly, the testimony of the said witnesses does not support the prosecution. Pointing out the evidence of PW-19,

he submitted that according to the witness, he was the appellant's employer. According to him, the appellant made a phone call to him at 3.30 p.m. on the date of the incident and informed him that he had murdered his roommate. He pointed out that no investigation has been made about the phone from which this call was made. Moreover, he pointed out that though PW-19 claims that he informed PSI Mishra of Limbayat Police Station about the confession and called him to Central Bus Station, PSI Mishra has not been examined as a witness. He pointed out that according to the prosecution's case, even at Central Bus Sation, the appellant allegedly made the second extra-judicial confession in the presence of PSI Mishra. Therefore, the omission to examine PSI Mishra becomes fatal to the prosecution case. He pointed out that the prosecution case was that it was PSI Mishra who took the appellant into custody and produced before PW-25. The version of PW-25, the Investigating Officer, appears to be doubtful. He submitted that the entire prosecution case cannot be believed.

5. The learned counsel appearing for the State submitted that though the eyewitnesses were declared hostile, their testimony cannot be entirely discarded. She submitted that the evidence of the said witnesses brings on record the fact that at the time of the murder of the deceased, he, along with the appellant, were staying together in room no. 3 of the building owned by PW-3. Learned counsel pointed out the evidence of PW-4 (Salehabanu). In the cross-examination made by the learned public prosecutor, the witness stated that she first saw the appellant running towards the stairs from the lobby, and immediately after that, the deceased was found in a heavily bleeding condition. She pointed out that the witness's evidence proved that the appellant and the deceased were quarrelling. The witness heard shouts of "save, save" from the appellant's room. She also pointed out that even the evidence of PW-7 - Najma brings on record that she had seen the deceased bleeding in the gallery of the building and was shouting "save, save" at that time. The witness saw the appellant coming down from the building and was seen cleaning blood stains from his shirt. She pointed out that even the evidence of PW-14 – Sagufta Parvin shows that the deceased was murdered in room no. 3 where the deceased, along with the appellant, were staying together. She further submitted that PW-19 was the appellant's employer; therefore, it was natural that the appellant would confide with his employer about his guilt. She submitted that there is no

reason to discard the testimony of PW-19, which proves extra-judicial confession. Similarly, there is no reason to discard the testimony of PW-24 before whom a dying declaration was made by the deceased that the appellant murdered him. The learned counsel submitted that there is no reason to interfere with the impugned judgments, which contain elaborate findings recorded after making a detailed analysis of the evidence of the prosecution witnesses.

CONSIDERATION OF SUBMISSIONS

6. We have minutely scanned the testimony of the prosecution witnesses. Firstly, we will deal with evidence of PW-19, who claims that the deceased made an extra-judicial confession before him. Even though this witness was declared hostile, the prosecution relied upon a part of his testimony. We are summarising the statements made by PW-19 in his examination-in-chief, in his cross-examination made by the learned public prosecutor after he was declared hostile and in the cross-examination made by the learned counsel appearing for the appellant. The summary of his version is as follows:

a) The appellant worked in his textile store for five months in 2004 till the first week of September 2004;

b) In September 2004, he received a call from the appellant around 3.30 p.m. and on the phone, the appellant informed him that he had killed his room partner;

c) The appellant called PW-19 to the Central Bus Station near Surat Railway Station;

d) Thereafter, PW-19 made a phone call to PSI Mishra of Limbayat Police Station and called him to the Central Bus Station;

e) PSI Mishra came to the Central Bus Station, where they met the appellant. The appellant again reiterated that there was a quarrel between him and his room partner over playing a tape recorder, and that he had murdered his room partner;

f) PW-19 stated that though the appellant had told him the name of the person who was murdered, he was unable to recollect the name;

g) In the cross-examination by the learned public prosecutor, he was confronted with the relevant part of his statement recorded under Section 161 of the Code of Criminal Procedure, 1973

(for short, 'CrPC'). He accepted of having made the statement. He stated that the appellant had told him that he had murdered Mohmed Akhtar Gafur Ansari;

h) In the cross-examination made by learned counsel appearing for the appellant, he stated that PSI Mishra took the appellant with him, and there were two or three policemen with him;

i) He did not remember whether he stated to the police the phone number from which he made a phone call to PSI Mishra; and

j) He admitted that he did not disclose the phone number from which the appellant called him.

7. The normal rule of human conduct is that a person would confess the commission of a serious crime to a person in whom he has implicit faith. The appellant had worked in PW-19's shop only for five months in 2004. The appellant was otherwise not known to PW-19. Therefore, it is unnatural that the appellant would call the deceased on the phone and confess. Moreover, PW-19 stated that the appellant called him to the Central Bus Station after confessing on the phone. Even this conduct is very unnatural. Furthermore, PW-19 admittedly did not disclose to the police the telephone number from which he allegedly received a call from the appellant. As can be seen from the testimony of PW-25, Investigating Officer, no investigation was made to ascertain the phone number on which PW-19 received a call from the appellant and the phone number from which PW-19 called PSI Mishra. It was necessary for the prosecution to collect evidence on these aspects and place it before the Court. Though PW-19 stated that the appellant again made extra-judicial confession at the Central Bus Station in the presence of PSI Mishra, the prosecution has not examined PSI Mishra as a witness. According to the testimony of PW-25, statement of PSI Mishra was not recorded during the investigation. In any event, the alleged confession made by the appellant before PSI Mishra cannot be proved against the appellant in view of Section 25 of the Indian Evidence Act, 1872. Hence, the prosecution's evidence regarding extra-judicial confession cannot be believed.

8. PW-19 stated that PSI Mishra and two to three other constables took the appellant away. Thus, it was PSI Mishra who took the appellant into custody. Hence, PSI Mishra was a crucial witness. A vital prosecution witness has been withheld from the Court. Nothing is placed on record

to show that PSI Mishra made any official record to show that he had taken the appellant into custody. PW-25, the Investigating Officer, stated that PSI Mishra and other police personnel were tracing the appellant in the market as he was working there. He further noted that PSI Mishra produced the appellant at the police station and was shown as arrested at 9.30 p.m. on that day. Thus, PW-25 did not state that PSI Mishra went to the Central Bus Station upon receiving a phone call from PW-19, and that he nabbed the appellant at the Bus Station. The version of PW-25 is entirely different. In the cross-examination, PW-25 specifically admitted that he did not record the statement of PSI Mishra. He stated that he arrested the appellant when PSI Mishra produced him. Further, in the cross-examination, PW-25 stated that in the panchnama of arrest, it is not mentioned that PSI Mishra produced the appellant before him. He stated that he had no information about the time, in whose presence and from which place PSI Mishra arrested the appellant. In further cross-examination, he stated that he was not aware that PSI Mishra met the appellant at Central Bus Station in the presence of the appellant's employer. He denied that PSI Mishra kept the appellant in custody and produced the appellant before him. Thus, it is impossible to believe the testimony of PW-19 that he conveyed the appellant's extra-judicial confession to PSI Mishra. Moreover, the manner in which the appellant was taken into custody becomes highly suspicious as it is not even recorded in the arrest panchnama that PSI Mishra arrested the appellant. Apart from the fact that it is very difficult to believe that the appellant confessed before PW-19, the further part of the testimony of PW-19 makes his testimony extremely doubtful as the prosecution has withheld PSI Mishra from the Court. Therefore, it is not possible to rely upon the evidence of PW-19.

9. Now, we come to the theory of dying declaration made by the deceased before PW-24. In the examination-in-chief, PW-24 stated that after he heard that his friend (deceased) was injured, he rushed to the site and found that the deceased was fully covered in blood, and he disclosed that the appellant was the author of the injuries. In the cross-examination by the learned public prosecutor, he denied having made such a statement before the police. In the cross-examination by the learned public prosecutor, the witness was confronted with his prior statement recorded by the police. The relevant part of the cross-examination reads thus:

> "Such has not happened and been dictated by me in my statement before police that, 'Therefore, when I was coming downstairs, I saw Lal Mohammad, staying with Mohammad Akhtar, running on the road towards Limbayat Police Station.
>
> …Therefore, I called rickshaw and landlord Alimuddin Shaikh and I took Mohammad Akhtar for treatment in the rickshaw and at that time, I saw Mohammad Akhtar had sustained injuries on throat and head and it was bleeding continuously. At that time, I asked Mohammad Akhtar and he told me, I had an altercation and quarrel with Lal Mohammad, staying with me, regarding playing a tape recorder and therefore, Lal Mohammad caused injuries to me using a knife and ran away."
>
> ……"

Thus, the witness stated that he did not dictate to the police the statement with which he was confronted. In the cross-examination by the advocate for the appellant, he admitted that when he informed Limbayat Police Station, a policeman came in an auto-rickshaw. The policeman, along with two or three other persons, brought the deceased down and put him in the auto-rickshaw. The police personnel and the other two to three persons were not examined as witnesses. He stated that the deceased was unconscious at that time. So, when the deceased was put in the auto-rickshaw, he was not in a position to speak.

10. At this stage, we may also refer to the testimony of PW-3, who was the complainant and landlord of the appellant. He stated that when he went to the place where the deceased was lying in a heavily bleeding condition, the deceased did not disclose anything to him, and there was no conversation when the deceased was taken by him by an auto-rickshaw to the hospital. Therefore, the prosecution story regarding the dying declaration made to PW-24 does not inspire confidence at all.

11. Now, we turn to the evidence of the eyewitnesses who were declared hostile. PW-3, according to the prosecution, was the witness before whom the deceased made a dying declaration while he was being carried in an auto-rickshaw. PW-3 did not support the prosecution on this aspect, and PW-24 claimed that when the deceased was

put in an auto-rickshaw, he was not conscious. PW-3 stated that he heard a quarrel between the appellant and the deceased. When the witness was confronted with his police statement in the cross-examination, he denied having made such a statement. PW-4 was declared as hostile. When he was confronted with relevant part of his police statement, he denied to have made the statement.

12. The High Court has relied upon the testimony of PW-7, who was again declared hostile. In the cross-examination made by the public prosecutor, PW-7 accepted that she informed the police that she saw the appellant going down, and while going down, he was cleaning the blood off his clothes. However, in the cross-examination made by the advocate for the accused, she stated that except for seeing the deceased in injured condition, she had not seen anything else and that she was not aware of the persons who were involved in the incident.

13. The High Court held that the evidence of PW-9 Kalu Shaikh, another hostile witness, proves the appellant's presence at the time of the incident. In cross-examination by the advocate for the accused, PW-9 stated that he did not know the appellant and the deceased before the incident. He stated that he was unable to identify the appellant. He stated that except for hearing the shouts "save, save," he knew nothing.

14. Therefore, after having carefully perused the evidence of the hostile prosecution witnesses (PW-3 to PW-9), we find that there is nothing in the evidence which could be relied upon by the prosecution for connecting the appellant with the murder of the deceased.

15. Thus, the appellant's conviction cannot be sustained for the above reasons. Accordingly, the appeal is allowed. The conviction and sentence of the appellant are set aside, and the appellant is acquitted of the offence alleged against him in Sessions Case No. 80 of 2005, decided by the 3rd Fast Track Court, Surat arising out of CR No. I/142/2004 of Limbayat Police Station. The appellant shall be set at liberty unless he is required to be detained in connection with any other case.

Result of the case: Appeal allowed.

†*Headnotes prepared by:* Nidhi Jain

[2024] 7 S.C.R. 50 : 2024 INSC 482

Vishwanatha
v.
The State of Karnataka by the Secretary, Home Department

(Criminal Appeal No. 129 of 2012)

08 July 2024

[Sudhanshu Dhulia* and Prasanna B. Varale,JJ.]

Issue for Consideration

High Court reversing the order of acquittal found the appellant along with co-accused (now deceased) guilty of offences under Sections 302 and 450 read with Section 34 of Penal Code, 1860 and sentenced them. In view of doubt as regards the identity of the appellant, whether it was the accused persons who were responsible for the death of PW-1 and PW-3's mother.

Headnotes†

Evidence – Test Identification Parade (TIP) – Absence of – When fatal – As per the prosecution, the appellant and the co-accused (now deceased) broke into the house of PW-1 and PW-3 to commit robbery when they were not at home and killed their old mother – However, this was witnessed by PW-1 when she returned home at around 12:30 in the afternoon but, she could not enter the room as it was locked from inside – On raising alarm, PW-2, a neighbour came and they both peeped through the window of the bedroom and saw the incident – TIP not conducted, PW-1 and PW-2 identified accused in Court – Trial Court acquitted the accused persons – Acquittal reversed by High Court – Correctness:

Held: As per the eyewitnesses, PW-1 and PW-2 they saw the two accused strangulating PW-1's mother by pulling both ends of the rope – However, their evidence does not corroborate with the post mortem report – The report does suggest that the deceased was indeed strangulated to death but, it could not be in the manner as seen by PW-1 and PW-2 as the ligature mark extended only from one angle of the mandible to the other and no such mark was seen at the back of the neck – Absence of any reasonable explanation as to how PW-1 reached her house in a

* Author

short span of time of $2^{1/2}$ hours, after leaving home at 10:00 AM, creates doubt on the prosecution story – Furthermore, appellant was not known to any of the witnesses and more pertinently, the two eyewitnesses – Co-accused was related to the complainant and was thus, known to the eyewitnesses – Hence, there was no requirement of TIP as regards him – But, the appellant was a total stranger to PW-1 and PW-2 – His name 'Vishwanatha' came to their knowledge, only after co-accused called him by name exhorting him to run – The identification of an accused in court is acceptable without a prior TIP and absence of TIP may not be fatal for the prosecution – It would depend on facts of each case – In a case where the identity of the accused is not known and TIP has not been conducted, the court has to see if there was any description of the accused either in the FIR or in any of the statement of witness recorded during the investigation – There was none in the present case – There were six persons by the name of 'Vishwanatha' in the locality and when there is doubt on the presence of the two star witnesses PW-1 and PW-2 (who identified the accused), the identity of the present appellant remained in doubt – Not safe to convict the appellant solely only on the basis of the testimony of PW1 and PW2 – Prosecution not able to prove its case beyond reasonable doubt – Appellant acquitted by giving him the benefit of doubt – Impugned judgment set aside as far as it relates to the conviction of the appellant. [Paras 13-17, 19]

Case Law Cited

Mulla v. State of U.P. [2010] 2 SCR 633 **: (2010) 3 SCC 508;** *Malkhansingh v. State of M.P.* [2003] Supp. 1 SCR 443 **: (2003) 5 SCC 746 – relied on.**

List of Acts

Penal Code, 1860.

List of Keywords

Test identification parade; Absence of test identification parade; Order of acquittal reversed; Doubt as regards the identity of the accused; Robbery; Stareyewitnesses; Identity of accused not known; Identification of accused in court; Prior TIP; Description of accused either in FIR/ statement of witness; Benefit of doubt; Case not proved beyond reasonable doubt.

Case Arising From

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No.129 of 2012

From the Judgment and Order dated 06.06.2009 of the High Court of Karnataka at Bengaluru in CRLA No. 1217 of 2002

Appearances for Parties

X M Joseph, Omanakuttan K. K., Antony Ignatius M J, Advs. for the Appellant.

R Nedumaran, D. L. Chidananda, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Judgment

Sudhanshu Dhulia, J.

1. The appellant in this Criminal Appeal challenges judgement and order dated 06.06.2009 passed by the High Court of Karnataka which has allowed the Criminal Appeal of the State; thereby reversing the order of acquittal of the Trial Court, thus convicting the present appellant of offences under Sections 302 and 450 read with Section 34 of the Indian Penal Code and sentenced him, *inter alia*, to life imprisonment, under Section 302 of IPC.

2. The case of the prosecution is that Rohini (PW-1) and Rohithaksha (PW-3) were residing with their mother Devaki (deceased; aged 86 y/o) at Kudupu, Mangalore. Devaki was strangulated to death by the present appellant and co-accused Ravikumar. On 26.12.2000 when PW-1, PW-3 and PW-4 (wife of PW-3) were not present in their home, and their 86-year-old mother was alone, the present appellant and the co-accused broke into their house with the intention to commit robbery and killed Devaki. A written complaint was filed before the police at 2:30 p.m. by PW-1 which formed the basis of the FIR which was registered at PS: Mangalore Rural Circle at approximately 3:00 p.m, in which the two accused Ravikumar and the present appellant Vishwanatha were named.

3. In the FIR, it was mentioned that on that fateful day (26.12.2000), she (i.e. PW-1/Complainant), had gone out for some work and when she returned home at about 12:30 in the afternoon, she heard some

sound coming from inside her house which alerted her, but she could not enter the room as it was locked from inside. PW-1 then raised an alarm and as a result PW-2, who is a neighbour came for her help. Then both PW-1 and PW-2 managed to peep through the window of the bedroom, where they saw that the accused had twisted a cloth around the neck of the deceased (PW-1's 86-year-old mother), which they were pulling at the two ends, each holding one end of the rope. PW-1 recognised the first accused as Ravikumar as he was the nephew of PW-4 (the daughter-in-law of the deceased). PW-1 called Ravikumar by name which alerted the two and they escaped.

4. The police submitted its chargesheet on 05.03.2001 against both the accused, who were caught the same day. The case was committed to Sessions and ultimately assigned to the Court of II[nd] Additional Sessions Judge, Mangalore who framed charges against the accused on 20.09.2001 under sections 450 and 302 read with 34 of IPC. The prosecution examined 18 witnesses and 11 documents as exhibits placed by the prosecution. The Sessions Judge passed its order on 18.12.2001 acquitting both the accused.

5. What weighed with the Sessions Court was the apparent contradictions between the oral testimony and autopsy report. PW-1 and PW-2 who were eye-witnesses to the crime and had identified both the accused and had deposed that the two had committed the murder of Devaki. Dr. Bhaskar Alva, (PW-6) Sr. Specialist in Wedlock District Hospital, Mangalore who conducted the post-mortem of deceased-Devaki on 26.12.2000 had given his opinion that the cause of death was asphyxia as a result of strangulation. The Sessions Court observed that PW-1 and 2 had deposed that cloth was tied around the neck of the deceased which was used to strangulate her, however, PW-6 had deposed there were no ligature marks on the back of the neck of the deceased. Under these circumstances, the Sessions Court discredited the two eye-witnesses, PW-1 and PW-2 and also noted the discrepancies in the deposition of PW-1 as regards the identity of the appellant and consequently his role in the crime.

6. The appeal of the State against this acquittal was allowed by the High Court on 06.06.2009, which reversed the order of acquittal, and found both the accused guilty of offences under Sections 302 and 450 read with Section 34 of IPC and sentenced them to Rigorous Imprisonment for 5 years and Rigorous Imprisonment for life along

with fine of Rs. 5,000/- respectively. The High Court held that the contradictions in the case of prosecution were minor and not material enough to warrant acquittal of the accused persons. These were the observations made by the High Court at paragraph 27 of the Impugned Judgement:

> ***"27.*** *Test Identification Parade not being conducted for the identification of accused No. 2 is also not fatal to the prosecution because by 6'O clock in the evening both accused Nos. 1 and 2 were apprehended and produced before the investigating officer P.W.18. It is also apparent on record that when accused No. 1 uttered the name of accused No. 2 both P.Ws. 1 and 2 learnt the name and they had seen exactly what was happening inside the bedroom. Therefore, question of mistaking in identifying accused Nos. 1 and 2 does not arise. However, both P.Ws. 1 and 2 identified accused Nos. 1 and 2 before the Court. The time gap between the date of crime and the evidence being only 10 months, we are of the opinion that it was quite possible for any who witnesses and especially P.W.1 to remember the details of the assailants who took the life of her mother. Therefore, this discrepancy also would not come in the way of the prosecution."*

7. Shortly after the Judgement was passed by the High Court, Ravikumar, who was accused no. 1 passed away. The present criminal appeal thus has been filed on behalf of the remaining accused Vishwanatha.

8. The learned counsel on behalf of the appellant would argue that PW-1 and PW-2 are not credible witnesses pointing again towards the contradictions in their testimony and autopsy report. He would submit that there has been no test identification parade (hereinafter referred to as 'TIP') to establish the identity of the appellant who was a total stranger to the two witnesses and in the absence of TIP, the appellant cannot be convicted, as then it cannot be said that the prosecution has proved its case beyond a reasonable doubt.

9. The learned counsel for the State would argue that the High Court has rightly observed that this is not a case of mistaken identity. Further, TIP is not a substantive piece of evidence and absence of TIP would not be fatal for the prosecution case as PW-1 & PW-2 had already identified the accused before the court. As far as discrepancies in

the testimonies of the witnesses are concerned, they are minor in nature and do not affect the case of prosecution in any manner.

10. We have heard the submissions of the learned counsel of the State and that of the State and also perused the material on record.

11. In the present case, there are concurrent findings by both the courts below as to the death of the deceased Devaki, being a homicidal death and these findings are corroborated by the testimony of PW-6, the doctor who conducted the autopsy and issued the post-mortem report on 26.12.2000. There cannot be any doubt that the death of the deceased was homicidal and the only question for determination before this Court is whether it is the accused persons who were responsible for this death?

12. PW-1 and PW-2 are the star witnesses of the prosecution. They had deposed during the trial that the two accused had strangulated the deceased to death. PW-1 had said that on the day of the incident, she left home at around 9:30 in the morning and when she returned at 12:30 in the afternoon she found that her room was bolted from inside and then she heard her mother screaming. It was then that she called PW-2 for help. PW-1 further states that she saw through the window both the accused strangulating her mother by pulling the rope at the two ends. She further states, that when PW-1 called one of the accused Ravikumar by name, who she immediately recognised being their relative, Ravikumar called the name of the other accused i.e., the present appellant and the two escaped. The relevant extract of the deposition given by PW-1 on 22.10.2001 before the trial court is reproduced below:

> *"…When I came to courtyard of our house I heard sound full of pain and scream. I found that both the bolts of the house was locked inside. Immediately I called my neighbour Rajesh. He came there. Since Northern side of window was kept opened my self and Rajesh peeped inside the room……we saw in the western side of the room and found Accused Ravi, who is standing before the Court now and he used to twist the cloth rope and put round the neck and caught one end of rope. Another end of the rope was in the hands of another person. They were tightening the rope, which was round the neck of my mother. I made a big noise. I addressed Accused Ravi "what he is doing" (In Tulu*

> *'Dane Malpuva'). What is he doing, I asked. Immediately he (Accused Ravi) told Accused Vishwananth that "the work is spoiled", you run (In Tulu 'KelasaKettand'). Said accused ran through the back door of the house, after unlocking bolts. My neighbour Rajesh followed them in the back of them……..when seeing my mother I found her right leg and right hand was in twisting condition and found no clothes on the body of my mother and found little temperature in the body. Immediately called Dr.K.B Shetty by phone…..After 10 minutes from my phone call, doctor came there. After coming to our house, said doctor examined my mother and told us that she was dead…."*

PW-2 also claimed to have seen the incident from the window along with PW-1 and he then narrates his unsuccessful attempt to catch the accused persons. The relevant portion of PW-2's examination-in-chief is as follows:

> *"When seeing through the window we found mother of Rohini (PW-1), Smt. Devaki (deceased) was on the cot. On the right side of Devaki, Ravikumar was standing and in another side another accused was standing. We found cloth was rolled round neck of Devaki. The one end of cloth rope was found in the hands of 1st Accused and cloth ropes another end was found in the hands of 2nd Accused. Both accused were, found dragging the cloth rope on both sides……Accused ran away through back door of the house."*

13. The above evidence of PW-1 and PW-2, all the same, does not corroborate with the post mortem report, which shows that the ligature marks, though round the neck, but are missing on the back of the neck. If the testimony of PW-1 and PW-2 is to be believed then the ligature marks should have been all round the neck, including the back. The ante mortem injuries in the post mortem report are as follows:

> *"On examination, I found the following external injuries:*
>
> *(i) Ligature mark round the neck above the thyroid cartilage, extending from 1 angle of mandible to the other- size 8"x ¾"*
>
> *(ii) Finger nail marks over the tip of the nose.*

(iii) Fracture of both legs below the knee and fracture of right forearm below the elbow"

The report does suggest that the deceased was indeed strangulated to death. But it could not be in the manner as seen by PW-1 and PW-2 (who had seen the two accused strangulating the 86 years old woman by pulling both ends of the rope) as the ligature mark extended only from one angle of the mandible to the other and no such mark was seen at the back of the neck. Had the strangulation been in the manner as described by PW-1 and PW-2, the ligature marks would have been different.

14. The aspect which perhaps weighed heavily in the mind of the Trial Court which had acquitted the two accused was the fact that the first complaint, inquest report, the 'autopsy report' and the ocular evidence of PW-1 (also of PW-2) did not match. Having regard to the positioning of the bed on which the deceased was allegedly strangulated, the trial court has given a finding that it would be highly improbable for two persons to strangulate the deceased by pulling the two ends of the rope of cloth from behind, since the cot was touching the northern and western walls. Moreover, the fact that Dr. K.B Shetty, (who was the first doctor to examine the deceased within 10 minutes of the incident), was never examined by the prosecution. The absence of any reasonable explanation as to how PW-1 reached her house in a short span of time of $2^{1/2}$ hours, after leaving home at 10:00 AM[1], creates doubt on the prosecution story. Trial Court also expressed its doubt as to the involvement of the present appellant (Accused No.2), as no TIP was conducted. This aspect was argued at length before this Court as well, since it goes to the very root of any criminal trial. Admittedly, no TIP was conducted in the present case. This Court in ***Mulla v. State of U.P.*****, (2010) 3 SCC 508** had emphasized the scope and object of TIP as follows:

"55. The identification parades are not primarily meant for the court. They are meant for investigation purposes. The object of conducting a test identification parade is twofold. First is to enable the witnesses to satisfy themselves that the accused whom they suspect is really the one who was

1 The complaint (Ex.P1) given by PW-1 to the PSI on the spot, mentions that she left her house at around 10.00 am, whereas in her deposition before the Trial Court, she mentions the time as 9.30 am.

seen by them in connection with the commission of the crime. Second is to satisfy the investigating authorities that the suspect is the real person whom the witnesses had seen in connection with the said occurrence."

15. This Court in ***Malkhansingh v. State of M.P*** ***(2003) 5 SCC 746***[2] has held that:

"The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings."

In the case at hand, it is an admitted position that the Appellant was not known to any of the witnesses and more pertinently, the two eyewitnesses, PW1 and PW2.

16. Coming back to the facts and circumstances of the present case, it is an admitted fact that Ravikumar (Accused No.1, now deceased) was known to the eyewitnesses and was also related to the complainant. Hence, there was no requirement of TIP as regard to Ravikumar (accused no.1). But the case of appellant- Vishwananth stands on a different footing. He was a total stranger to the two eye witnesses i.e. PW-1 and PW-2. The name 'Vishwanath' came to their knowledge, only after Ravikumar (Accused no. 1) called his co-accused, by name exhorting him to run. In a case where the identity of the accused is not known and TIP has not been conducted, the court has to see if there was any description of the accused either in the FIR or in any of the statement of witness recorded during the investigation. There is none in the present case.

The identification of an accused in court is acceptable without a prior TIP and absence of TIP may not be fatal for the prosecution. It would depend on facts of each case. In the case at hand, though the appellant was identified in court by PW-1 and PW-2, the Trial Court

2 Para 7.

did not attach much weight to it, as no identification proceedings were conducted, and the Court found it unsafe to acknowledge the identity merely on the basis of identification in the Court.

In the present case, where there are six persons by the name of 'Vishwanatha' in the locality and where this Court has doubts on the presence of the two star witnesses PW-1 and PW-2 (who have identified the accused), we are of the opinion that the identity of the present appellant remained in doubt.

17. Another fact which casts a doubt on the identity of the present appellant, is that there is no description in the FIR of 'Vishwanatha' except that his name is mentioned. He then becomes the first of the two to be arrested by the police. Learned counsel of the appellant would submit that there were six persons by the name of 'Vishwanantha' in Kudupu village at the relevant point of time, a fact which was placed by the defence during trial, which has not been confronted. In such a situation, it was the duty of the prosecution to show as to how and on what basis, the appellant came to be apprehended by the police. The Sub-Inspector, PS-Mangalore Rural (PW-19), who apprehended the appellant, had also failed to explain how he came to apprehend the appellant without any information regarding his description. In his examination-in-chief, the Sub-Inspector (PW-19) explained the arrest of the appellant in the following manner:

> *"2. In respect of this case, crime no.388-2000 on 26.12.2000 my inspector instructed me to find out the accused. The same day myself and my staff taken into custody the accused Vishwananth at 4:30 PM near Goraksha Jnana Mandira, Near Kadri Park, Mangalore. Said accused is before the Court. I identify him. With the help of Vishwanath we had arrested another accused, Ravi Kumar at 5 P.M in a 'Galli' near State Bank of Mysore, Silver gate, Kulashekara, Mangalore…"*

A perusal of the testimony of the Sub-Inspector/PW-19 indicates that there is not even a whisper as to what formed the basis of the appellant's arrest. He was cross-examined and what was gathered from his cross-examination is that the appellant was arrested in absence of any independent witnesses and without preparing any arrest memo. All these facts combined together cast a doubt on the

identity of the appellant. Thus, it is not safe to convict the appellant solely only on the basis of the testimony of PW1 and PW2, which itself.

18. Another aspect which needs to be considered is that the prosecution case rests primarily on the evidence of PW-1 and PW-2, who were the star witnesses. The admitted case of the prosecution is that PW-1, who is the daughter of the deceased, had gone out for some household work and there was no one in the house when the crime was committed. First, PW-1 had gone to a place named 'Kulshekara' and then to the Post Office, and in the end to her uncle's house at 'Ullal'. The distance between her residence at Kudupu and Ullal is about 20 km. She first walks some distance and then catches a bus to reach Kulshekara and from there she went to the post office, and after attending to her work, she takes a bus to go to her uncle's house at Ullal. Finally, she returned home in Kudupu and all of this was done by her within a period of 2½ hours. But this is not enough, as per the prosecution version, she also reached her house at the very moment when the deceased was being strangulated and then peeping through the window pane, she witnessed the two accused pulling the two ends of the rope. She called Accused no. 1-Ravikumar by his name, which led to the two accused fleeing from the spot and PW-2 who is the neighbour, chased them but in vain. This whole story of the prosecution is unbelievable for more reasons than one. Even if it is assumed for the sake of argument that PW-1 had reached the house at the exact time when the crime was being committed, the testimony to the effect that her mother was strangulated to death by a rope-like material, in the manner narrated by her, is not corroborated by the post-mortem report where ligature marks on the neck were not found to be encircling the neck in a round manner, as it should have been in such a case of strangulation. There were no ligature marks on the back of the neck. As discussed earlier, the marks were only on the front side extending from one angle of the mandible to the other. We therefore conclude that the prosecution has not been able to prove its case beyond reasonable doubt.

19. In view of the above, we allow this appeal and acquit the appellant in this case by giving him the benefit of doubt. Consequently, the impugned judgment and order dated 06.06.2009 is set aside as far as it relates to the conviction of the appellant, and the order of acquittal

of the Trial Court is upheld qua the appellant. The appellant, who is already on bail, need not surrender. His bail bonds and sureties stand discharged.

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

Result of the case: Appeal allowed.

†*Headnotes prepared by:* Divya Pandey

[2024] 7 S.C.R. 62 : 2024 INSC 483

The State of Punjab
v.
Partap Singh Verka

(Criminal Appeal No. 1943 of 2024)

08 July 2024

[Sudhanshu Dhulia* and Prasanna B. Varale, JJ.]

Issue for Consideration

Correctness of the order passed by the High Court setting aside the order of the trial court which had summoned respondent u/s 319 CrPC to face the trial for the offences u/s. 7/13(2) of the Prevention of Corruption Act, 1988, as sanction u/s. 19 of the P.C. Act was not sought.

Headnotes†

Prevention of Corruption Act, 1988 – s. 19 – Previous sanction necessary for prosecution – On facts, the trial court summoned the respondent-public servant u/s 319 CrPC to face the trial for the offences u/s. 7/13(2) of the P C Act – High Court set aside the order of the trial court as sanction u/s. 19 was not sought – Correctness:

Held: Respondent is a 'Public Servant' as defined u/s. 2(c) of the P.C Act – Words and phrases used in s. 19(1) of the P.C Act itself make it evident that the provision is mandatory in nature – Courts cannot take cognizance against any public servant for offences committed u/ss. 7, 11, 13 and 15 of the P.C. Act, even on an application u/s. 319 CrPC, without first following the requirements of s. 19 – On facts, the correct procedure should have been for the prosecution to obtain sanction u/s. 19 from the appropriate Government, before formally moving an application before the Court u/s. 319 CrPC – In fact, the trial court too should have insisted on the prior sanction, which it did not – In absence of the sanction the entire procedure remains flawed – Thus, the impugned order passed by the High Court does not call for interference – ss. 7, 11, 13 and 15 – Code of Criminal Procedure, 1973 – s. 319. [Paras 7, 10, 11]

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* Author

Case Law Cited

Dilawar Singh v. Parvinder Singh [2005] Supp. 5 SCR 83 **: (2005) 12 SCC 709;** *Paul Varghese v. State of Kerala* [2007] 4 SCR 1155 **: (2007) 14 SCC 783;** *Surinderjit Singh Mand v. State of Punjab* [2016] 5 SCR 653 **: (2016) 8 SCC 722 – referred to.**

List of Acts

Prevention of Corruption Act, 1988; Code of Criminal Procedure, 1973.

List of Keywords

Previous sanction; Public servant; Mandatory in nature.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No.1943 of 2024

From the Judgment and Order dated 02.08.2018 of the High Court of Punjab & Haryana at Chandigarh in CRR No. 2317 of 2017

Appearances for Parties

Vivek Jain, D.A.G., Ms. Nupur Kumar, Abhinav Jain, Advs. for the Appellant.

R.P. Nagrath, Sr. Adv., Manuj Nagrath, Raktim Gogoi, Kartikeya Singh, Shivam Sharma, S Vinod, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Judgment

Sudhanshu Dhulia, J.

1. The State of Punjab is in appeal here against the judgment and order dated 02.08.2018, passed by the High Court of Punjab and Haryana setting aside the order dated 20.05.2017 of the Trial Court which had summoned respondent Pratap Singh Verka under Section 319 of Criminal Procedure Code (hereinafter referred to as 'CrPC') to face the trial for the offences under sections 7/13(2) of the Prevention of Corruption Act, 1988 (hereinafter referred to as 'P.C Act').

2. Brief facts of the case are that on 25.04.2016, an FIR u/s 7/13 (2) of the P.C Act was lodged against Respondent- Dr. Partap Singh Verka and another co-accused i.e. 'Vikas', at Police Station Vigilance Bureau, Amritsar. It was disclosed in the FIR that the present respondent was working as a doctor in Guru Nanak Hospital at the relevant point of time when complainant-Gurwinder Singh sought treatment for his brother who was in jail. The complainant alleged that on 20.04.2016 the Respondent took a bribe of Rs.10,000 from the complainant through the accused-Vikas for admitting the complainant's brother in his hospital, as he was otherwise reluctant to treat a prisoner. Again on 24.04.2016, the respondent demanded another Rs.10,000/- to keep the patient in the hospital for further treatment and asked the complainant to give that amount to the other accused i.e. 'Vikas' in two installments of Rs.5,000 each. The complainant, however, contacted the Vigilance Bureau instead and the officials of Vigilance laid a trap to catch the culprits. On 25.04.2016, the accused-Vikas (ward attendant) was caught red-handed in the parking lot of the hospital receiving Rs.5000 from the complainant. On the same day, the respondent was also arrested from his office.

3. In May 2016, both the accused were released on bail. A chargesheet dated 22.12.2016 was later filed only against the other accused-Vikas. The present respondent was not named in the charge-sheet as an accused.

4. However, during the course of the trial, the complainant-Gurwinder Singh deposed as PW-1 on 12.05.2017 and in his examination-in-chief, he said that it was the present Respondent who had demanded the bribe and it was on his behalf that the other accused, Vikas had received the bribe amount. The trial Court deferred the hearing on the request of the Public Prosecutor of the State who then wanted to move an application under Section 319 of the CrPC for summoning the respondent as an accused. Consequently, an application was moved by the State on 18.05.2017 under Section 319 CrPC, which was allowed on 20.05.2017 and Dr. Partap Singh Verka was summoned to face the trial.

5. The accused Respondent challenged this order of the Trial Court before the High Court which has set aside the order of the Trial Court, as sanction under Section 19 of the P.C Act had not been taken.

6. We have heard the counsel for the Appellant-State as well as for the Respondent and have also perused the material before us.

7. There is no dispute on the fact that the Respondent is a 'Public Servant' as defined under Section 2(c) of the P.C Act. Section 19 of the P.C Act puts a bar on Courts to take cognizance of an offence under Sections 7, 11, 13 and 15, without the previous sanction of the State Government, Central Government or the competent authority, as the case may be. The relevant portion of Section 19 of the P.C Act is as follows:

> *"19. Previous sanction necessary for prosecution.—(1) No court shall take cognizance of an offence punishable under sections 7, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction save as otherwise provided in the Lokpal and Lokayuktas Act, 2013 (1 of 2014)—*
>
> *(a) in the case of a person who is employed, or as the case may be, was at the time of commission of the alleged offence employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government;*
>
> *(b) in the case of a person who is employed, or as the case may be, was at the time of commission of the alleged offence employed in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State Government, of that Government;*
>
> *(c) in the case of any other person, of the authority competent to remove him from his office."*

8. While allowing the Section 319 (CrPC) application moved by the Public Prosecutor, the Trial Court did not consider the question of sanction. Before this Court the stand of the State of Punjab is that there was no need for this sanction as cognizance was taken in the Court itself under Section 319 of the CrPC.

In ***Dilawar Singh v. Parvinder Singh*, [(2005) 12 SCC 709]**, this Court while explaining the provisions of Section 19 of the P.C Act and also the provisions under Section 319 Cr.PC., said as under:

> *"This section creates a complete bar on the power of the court to take cognizance of an offence punishable under Sections 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction of the competent authority enumerated in clauses (a) to (c) of this sub-section. If the sub-section is read as a whole, it will clearly show that the sanction for prosecution has to be granted with respect to a specific accused and only after sanction has been granted that the court gets the competence to take cognizance of an offence punishable under Sections 7, 10, 11, 13 and 15 alleged to have been committed by such public servant…"*
>
> *(para 4)*

Further, in regard to the relation between Section 19 of P.C Act and the provisions of cognizance under CrPC, this Court laid down the law in the following words:

> *"…….the provisions of Section 19 of the Act will have an overriding effect over the general provisions contained in Section 190 or 319 CrPC. A Special Judge while trying an offence under the Prevention of Corruption Act, 1988, cannot summon another person and proceed against him in the purported exercise of power under Section 319 CrPC if no sanction has been granted by the appropriate authority for prosecution of such a person as the existence of a sanction is sine qua non for taking cognizance of the offence qua that person."* *(para 8)*

9. In ***Paul Varghese v. State of Kerala*, (2007) 14 SCC 783**, this Court again reiterated this provision and held:

> *"As has been rightly held by the High Court in view of what has been stated in Dilawar Singh case [(2005) 12 SCC 709 : (2006) 1 SCC (Cri) 727] the trial court was not justified in holding that Section 319 of the Code has to get preference/primacy over Section 19 of the Act, and that matter stands concluded."* *(para 4)*

10. The words and phrases used in Section 19(1) of the P.C Act itself make it evident that the provision is mandatory in nature. In ***Surinderjit Singh Mand v. State of Punjab* (2016) 8 SCC 722**, although this

court was dealing with the issue of sanction under Section 197 of CrPC but while doing so it referred to various judgments including the two cases discussed above and emphasized the provision of prior sanction:

> *"The law declared by this Court emerging from the judgments referred to hereinabove, leaves no room for any doubt that under Section 197 of the Code and/or sanction mandated under a special statute (as postulated under Section 19 of the Prevention of Corruption Act) would be a necessary prerequisite before a court of competent jurisdiction takes cognizance of an offence (whether under the Penal Code, or under the special statutory enactment concerned). The procedure for obtaining sanction would be governed by the provisions of the Code and/or as mandated under the special enactment. The words engaged in Section 197 of the Code are,*
>
> *"… no court shall take cognizance of such offence except with previous sanction…".*
>
> *Likewise sub-section (1) of Section 19 of the Prevention of Corruption Act provides—*
>
> *"19. Previous sanction necessary for prosecution.—(1) No court shall take cognizance … except with the previous sanction …."*
>
> *The mandate is clear and unambiguous that a court "shall not" take cognizance without sanction. The same needs no further elaboration. Therefore, a court just cannot take cognizance without sanction by the appropriate authority. Thus viewed, we find no merit in the second contention advanced at the hands of the learned counsel for the respondents that where cognizance is taken under Section 319 of the Code, sanction either under Section 197 of the Code (or under the special enactment concerned) is not a mandatory prerequisite."*

11. It is a well settled position of law that courts cannot take cognizance against any public servant for offences committed under Sections 7,11,13 & 15 of the P.C. Act, even on an application under section 319 of the CrPC, without first following the requirements of Section

19 of the P.C Act. Here, the correct procedure should have been for the prosecution to obtain sanction under Section 19 of the P.C Act from the appropriate Government, before formally moving an application before the Court under Section 319 of CrPC. In fact, the Trial Court too should have insisted on the prior sanction, which it did not. In absence of the sanction the entire procedure remains flawed. We are completely in agreement by the decision of the High Court and therefore are not inclined to interfere with the impugned order passed by the High Court and accordingly this appeal is hereby dismissed.

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

Result of the case: Appeal dismissed.

†*Headnotes prepared by:* Nidhi Jain

[2024] 7 S.C.R. 69 : 2024 INSC 469

The State of West Bengal
v.
Dr. Sanat Kumar Ghosh and Ors.

(Special Leave To Appeal (Civil) No. 17403 of 2023)

08 July 2024

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

Issue for Consideration

Matter pertains to the appointment of Vice-Chancellors in the State-aided Universities in the State of West Bengal.

Headnotes†

Universities – Appointment of Vice-Chancellors in 35 State-aided Universities in the State of West Bengal – Dispute between the State Government and the Governor of West Bengal-Chancellor of subject Universities, as regards the appointment of regular Vice-Chancellors – No consensus between the authorities in the matter of constitution and composition of Search Committees for shortlisting the candidates for appointment as Vice Chancellors – Neither regular Vice-Chancellors nor interim or ad-hoc Vice-Chancellors permitted to be appointed – Invocation of power u/Art. 142:

Held: Order passed for constitution of Search-cum-Selection Committee for all the subject Universities – It is resolved to constitute Search-cum-Selection Committee(s) of the same composition so as to avoid any confusion – Endeavour is to infuse transparency, independence, fairness, and impartiality so as to ensure that the persons possessing the highest level of competence and integrity and are capable of leading the University – Experts who are eminent scientists, educationists, jurists, subject experts, and administrators in their own right, are shortlisted – Appointment of Hon'ble Mr. Justice Uday Umesh Lalit, Former Chief Justice of India as Chairperson of the Search-cum-Selection Committees for all the Universities in West Bengal – Chairperson authorized to constitute separate or joint Search-cum-Selection Committees for one or more Universities, keeping in view the nature of subjects/disciplines in which education is being imparted therein – Chairperson to nominate 4 persons out of the empaneled experts, whom he finds capable of short-listing suitable names for appointment as Vice-Chancellors – Chairperson

* Author

to constitute the Search-cum-Selection Committees for the group or the individual Universities as early as possible – Chairperson to be paid an honorarium of Rs. 3 lakhs for every effective day of proceedings of the Search Committee, until the entire process is completed – The Chief Minister, State of West Bengal to recommend the shortlisted names in order of preference for appointment as Vice-Chancellors – In case the Chief Minister has reasons to believe that any short-listed person is unsuitable for appointment as Vice-Chancellor, the remarks to this effect to be put up before the Chancellor – In cases where said objection is not acceptable to the Chancellor or where the Chancellor has objection against empanelment of any particular name for which he has assigned his own reasons, all such files to be put up before this Court – Final decision in this regard to be taken by this Court after giving reasonable opportunity of being heard to the objectors – State of West Bengal to file the Status Report in respect to compliance of the directions issued – West Bengal University Laws (Amendment) Act,2012 – West Bengal Laws (Amendment) Act,2014 – Constitution of India – Art.142. [Paras 10,12,14-20]

List of Acts

West Bengal University Laws (Amendment) Act, 2012; West Bengal Laws (Amendment) Act, 2014; Calcutta University Act, 1979; Constitution of India; University Grants Commission Act, 1956; University Grants Commission's Regulations, 2018.

List of Keywords

Universities; Appointment of Vice-Chancellors; State-aided Universities in West Bengal; Appointment of regular Vice-Chancellors; Constitution and composition of Search-cum-Selection Committees; Interim or ad-hoc Vice-Chancellors; Powers u/Art. 142; Appointment of Hon'ble Mr. Justice Uday Umesh Lalit, Former Chief Justice of India as Chairperson of the Search-cum-Selection Committees for Universities in West Bengal; Honorarium of Rs. 3 lakhs to Chairperson; Filing of Status Report.

Case Arising From

CIVIL APPELLATE JURISDICTION: Special Leave To Appeal (Civil) No.17403 of 2023

From the Judgment and Order dated 28.06.2023 of the High Court at Calcutta in WPA(P) No.272 of 2023

The State of West Bengal v. Dr. Sanat Kumar Ghosh and Ors.

Appearances for Parties

Dr. Abhishek Manu Singhvi, Jaideep Gupta, Sr. Advs., Sanjay Basu, Ms. Astha Sharma, Amit Bhandari, Nipun Saxena, Piyush Agarwal, Ms. Shrivalli Kajaria, Srisatya Mohanty, Ms. Anju Thomas, Sanjeev Kaushik, Ms. Mantika Haryani, Shreyas Awasthi, Himanshu Chakravarty, Ms. Ripul Swati Kumari, Bhanu Mishra, Ms. Muskan Surana, Archit Adlakha, Ms. Soumya Saxena, Aditya Raj Pandey, Ms. Lihzu Shiney Konyak, Simranjeet Singh Rekhi, Ms. Pratibha Yadav, Abhijit Pattanaik, Advs. for the Petitioner.

Gopal Shankarnarayan, Rana Mukherjee, Sr. Advs., Dr. Chaples Bandyopadhyay, Subhasish Bhowmick, Ms. Gargy Basu, Ms. Ananda Mayee, Ms. Manisha Pandey, Rahul Kushwaha, Ms. Neerja Sharma, Reegan S. Bel, Joydeep Mazumdar, P. Sil, B.K. Pandit, Ms. Shalini Kaul, Chandrashekhar A. Chakalabbi, Pijush Biswas, S.K. Pandey, Awanish Kumar, Anshul Rai, Abhinav Garg (For M/S. Dharmaprabhas Law Associates), Shyam D. Nandan, Rohit Bohra, Priyanshu Upadhyay, Viraat Tripathi, Abeer Gobind Shandilya, Anilendra Pandey, Manoj Ranjan Sinha, Deepak Sain, Ms. Nisha, Mrigank Prabhakar, Ms. Sakshi Banga, Anand Varma, Ayush Gupta, Soumya Dutta, Ms. Aditi Gupta, Kunal Chatterji, Ms. Maitrayee Banerjee, Rohit Bansal, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Order

Surya Kant, J.

There are approximately **[**35**]** state-aided Universities in the State of West Bengal. The appointment of their Vice-Chancellors is the hallmark of this controversy. It seems that the Petitioner-State of West Bengal appointed 24 Vice-Chancellors in the year 2022. These appointments, along with the West Bengal University Laws (Amendment) Act, 2012 and the West Bengal Laws (Amendment) Act, 2014, were challenged before the High Court in a Public Interest Litigation. The High Court vide judgement dated 14.03.2023 held that the Search Committee constituted by the State Government for the selection of those 24 Vice-Chancellors did not have any Member nominated by the Chairman of the University Grants Commission (UGC) and since the said Search Committee was in violation of the UGC's Act, the appointment of 24 Vice-Chancellors

was unsustainable in law. The Division Bench judgment was upheld by this Court.

2. It further seems that the State of West Bengal thereafter made certain amendments in the State Universities Act in tune with the UGC's Regulations, 2018. However, instead of resorting to the statutorily prescribed procedure for appointment of regular Vice-Chancellors, the Minister-in-charge of the Department of Higher Education, Government of West Bengal, sent a proposal on 18.05.2023 to the Chancellor for extending the tenure of 27 Vice-Chancellors whose tenure was about to expire. The Chancellor, on the other hand, appointed 'Interim Vice-Chancellors' and as many as 28 professors were given such assignments. The appointments of these interim/ad-hoc/caretaker Vice-Chancellors came to be challenged by Respondent No. 1 through a Public Interest Litigation, which the High Court not only dismissed vide impugned judgment dated 28-06-2023 but also conferred perks and other monetary benefits on its own to these acting Vice-Chancellors, a benefit which the Chancellor himself had not granted to them.

3. The Division Bench order, to the extent of granting pay, allowance, perks or facilities admissible to a regular Vice-Chancellor, was consequently stayed by this Court vide order dated 06.10.2023.

4. The rift between the State Government, on the one hand, and the Governor of West Bengal, who happens to be the Chancellor of subject Universities, on the other, is the root cause of stalemate in the appointment of regular Vice-Chancellors. To elaborate further, there is no consensus between the two sets of authorities in the matter of constitution and composition of Search Committees for shortlisting the candidates for appointment as Vice Chancellors.

5. Since we, *prima facie*, disapproved the Chancellor's action of appointing interim Vice-Chancellors without consulting the State Government, all such further appointments were stayed vide order dated 06.10.2023.

6. The chaos has further deepened as neither there are regular Vice-Chancellors nor interim or ad-hoc Vice-Chancellors are permitted to be appointed. Regardless thereto, the Chancellor has assigned the powers of Vice-Chancellors to various persons — not necessarily all of them are academicians. The State of West Bengal has strongly

protested against such a recourse. We, however, do not deem it necessary to dwell on that issue at this stage for the reasons stated hereinafter:

(I) On 15-09-2023, the learned Senior Counsel for the State of West Bengal, as well as learned counsel for the Chancellor, very fairly suggested that, pending multiple controversies, the Search Committee may be constituted by this Court. In order to explore that possibility, this Court on 27.09.2023 directed the learned senior counsel/counsel for the parties to submit, in a tabulated chart, the details of the Universities, the description of their subjects/disciplines, existing provisions for constitution of Search Committees, as well as the new provision which the State of West Bengal had proposed in the Bill awaiting assent of the Governor. Counsel for the intervenors were also granted liberty to suggest the names of renowned scientists, technocrats, administrators, educationists, jurists or any other eminent person for the purpose of nomination to the Search Committee.

(II) On 06.10.2023, the parties sought time to replace certain names earlier suggested by them for nomination to the Search Committees.

(III) On 20.11.2023, learned senior counsel for the parties agreed to submit a consolidated list of the names proposed by the State Government/Chief Minister/Chancellor/UGC and other prescribed authorities for the purpose of constituting Search Committees.

(IV) On 01.12.2023, learned Attorney General for India entered appearance on behalf of the Chancellor. He assured that the names to be suggested by the Chancellor for the constitution of Search Committees will be shared with counsels for the petitioner/intervenors. Besides granting time in this regard, we also impressed upon the learned Attorney General to use his good offices to explore an amicable mode of appointment of the Vice-Chancellors, in conformity with the Statutes governing such appointments.

(V) It seems that pursuant to the initiative taken by learned Attorney General, some meetings were held on 04.12.2023, 13.03.2024

and 14.03.2024. These meetings, however, did not yield the desired results.

(VI) On 16.04.2024, learned Attorney General, however, very fairly stated that six posts of the Vice-Chancellors will be filled up out of the list recommended by the State Government. Eventually, on 17.05.2024, we were informed that the State Government had sent a list of 15 names for appointment of Vice-Chancellors in 15 Universities. The learned Chancellor found 07 of them unsuitable and apparently had no objection against the remaining 08 persons. We, therefore, directed that those 08 names be appointed within 10 days. In order to instill confidence on both sides, it was observed that the Chief Minister of the State may send names of some more eminent persons to fill up the 07 vacancies of Vice-Chancellors.

(VII) We have no reason to doubt that the Chief Minister must have sent a few more names of eminent personalities and the Chancellor hopefully has accorded his approval for their appointment. As regard to the left-out Universities, we agreed on 17.05.2024, on the joint request of learned senior counsel for the parties, that a Search-cum-Selection Committee shall be constituted by this Court before the next date of hearing.

7. This is how we are tasked to constitute the Search-cum-Selection Committees.

8. Learned senior counsel/counsel for the parties are *ad idem* that the appointment of Vice-Chancellors in all the Universities are regulated by different Statutes. The academic qualification, teaching experience, and some other distinct features also vary from university to university, depending upon the speciality of the subjects being taught thereby. The (i) names of the University Acts; (ii) existing provision for appointment of Vice-Chancellors; (iii) amended provision for appointment of Vice-Chancellor under the ordinance of 2023; and (iv) subjects/disciplines which are being taught in a University, have been consequently provided to us in a tabulated form. On a cursory look, we find that every statute, broadly speaking, provides that the Vice-Chancellor shall be appointed by the Chancellor on the recommendations of a Search-cum-Selection Committee, who shall hold the office upto the age of 65 years and should be a person possessing the highest level

of competence, integrity, morals and institutional commitment. The Vice-Chancellor must also be a distinguished academician with 10 years of experience as a Professor in a University or a well-reputed research/academician organization.

9. On an illustrative basis, we deem it appropriate in this regard to reproduce Section 8 of the Calcutta University Act, 1979, which reads as follows:

> *"8. (1) The Vice-Chancellor shall be appointed by the Chancellor on the unanimous recommendation of the Senate. If the Senate fails to make any such recommendation, the Vice-Chancellor shall be appointed by the Chancellor in consultation with the Minister from a panel of three persons to be elected by the Senate in accordance with the system of proportional representation by means of the single transferable vote.*
>
> *(2) (a) The Vice-Chancellor shall hold office for a period of four years or till he attains the age of 65 years, whichever is earlier, and shall, subject to the provisions of this section, be eligible for re-appointment for a period not exceeding four years.*
>
> *(b) The Chancellor may, notwithstanding the expiration of the term of the office of the Vice-Chancellor or his attaining the age of 65 years, allow him to continue in office till a successor assumes office, provided that he shall not continue as such for any period exceeding one year.*
>
> *(3) The Vice-Chancellor shall be a whole-time officer of the University and shall be paid from the University Fund a salary of three thousand and five hundred rupees per month and such allowances as the Chancellor may decide.*
>
> *(4) The Vice-Chancellor may resign his office by writing under his hand addressed to the Chancellor.*
>
> *(5) If—*
>
> *(a) the Vice-Chancellor is, by reason of leave, illness or other cause, temporarily unable to exercise the powers and perform the duties of his office, or*

(b) a vacancy occurs in the office of the Vice-Chancellor by reason of death, resignation or expiry of the term of his office, removal or otherwise,

then, during the period of such temporary inability or pending the appointment of a Vice-Chancellor, as the case may be, the Pro-Vice- Chancellor for Academic Affairs shall exercise the powers and perform the duties of the Vice-Chancellor.

(6) The vacancy in the office of the Vice-Chancellor occurring by reason of death, resignation or expiry of the term of his office, removal or otherwise shall be filled up by appointment of a Vice-Chancellor in accordance with the provisions of sub-section (1) within a period of six months from the date of occurrence of the vacancy."

10. We may hasten to add at this stage that notwithstanding some variance in the provisions of the Acts under which Vice-Chancellors are to be appointed, especially with regard to composition of the Search-cum-Selection Committee, we deem it appropriate to invoke our powers under Article 142 of the Constitution to do complete justice in this matter and pass this common order for constitution of Search-cum-Selection Committee for all the subject Universities. Hence, we resolve to constitute Search-cum-Selection Committee(s) of the same composition so as to avoid any confusion, irrespective of the fact that the relevant provision of the Statute of the concerned University may contain slight variations. Our endeavour is to infuse transparency, independence, fairness, and impartiality so as to ensure that the persons possessing the highest level of competence and integrity and are capable of leading the University by example are shortlisted. In this regard, we have made an effort to shortlist experts who are eminent scientists, educationists, jurists, subject experts, and administrators in their own right. We have further attempted to set out that nominees of the Chancellor, Chief Minister, UGC, State Government, the Higher Education Department of West Bengal the intervenors etc. are adequately represented.

11. While shortlisting the experts for composition of the Search-cm-Selection Committee, we have been further guided by the nature of subjects and disciplines in which education is being imparted in

different Universities. We find that, broadly, all the Universities can be categorized as follows:

i) Universities with faculties predominantly in arts and science:

   a) West Bengal State University
   b) Sidho Kanhi Birsha University
   c) Burdwan University
   d) Jadavpur University
   e) Gour Banga University
   f) Bankura University
   g) Presidency University
   h) Cooch Behar Panchanan Barma University
   i) Sadhu Ram Chand Murmu University of Jhargram
   j) Alipurduar University
   k) Raiganj University
   l) Diamond Harbour Women's University
   m) Murshidabad University
   n) Mahatma Gandhi University
   o) Dakshin Dinajpur University

ii) Universities with faculties predominantly in commerce and science:

   a) North Bengal University
   b) Kalyani University

iii) Universities with faculties predominantly in arts:

   a) Kanyashree University
   b) Rabindra Bharati University
   c) Harichand Guruchand University
   d) Hindi University
   e) Biswa Bangla Biswabidyalaya

f) Darjeeling Hills University

iv) Universities with faculties predominantly in science:

a) Maulana Abdul Kalam Azad University of Technology

b) Aliah University

c) West Bengal University of Health Sciences

d) West Bengal University of Animal and Fishery Sciences

e) Kazi Nazrul University

f) Rani Rashmoni Green University

v) Other miscellaneous and multi-disciplinary universities:

a) Calcutta University

b) Sanskrit College and University

c) Baba Saheb Ambedkar Education University

d) Vidyasagar University

e) Netaji Subhas Open University

f) Uttar Banga Krishi Vishwavidyalaya

g) Bidhan Chandra Krishi Vishwavidyalaya

12. We hereby appoint **Hon'ble Mr. Justice Uday Umesh Lalit, Former Chief Justice of India** as Chairperson of the Search-cum-Selection Committees for all the Universities.

13. Following is the list of eminent educationists, scientists, jurists, subject experts and administrators etc. who have been short-listed for the purpose of empanelment on Search-cum-Selection Committee(s):

(i) Arts & Humanities

a) Prof. Sabyasachi Basu Ray Chaudhury, Ex. V.C., Rabindra Bharti University. Address: 56A, BT Road, Kolkata - 700500.

b) Prof. Siuli Sarkar, Principal, Lady Brabourne College.

c) Prof. Sibaji Pratim Basu, Professor, Vidyasagar University. Address: Department of Political Science with Rural Administration, Vidyasagar University, Midanpore – 721102.

d) Professor Ujjwal K Singh, Department of Political Science, University of Delhi. Email: ujjwalksingh@gmail.com; Phone no: 8800788862.

(ii) History

a) Prof. Tapati Guha Thakurta, Prof. in Social Sciences, Centre for Studies in Social Sciences. Address: C D 157, Salt Lake, Sector I, Kolkata – 700064.

b) Prof. Amit De, Ashutosh Chair Professor of History, Calcutta University.

c) Prof. Sajal Nag, Retd. Professor, Assam University.

d) Prof. Rajat Kanta Roy, Former VC, Visva Bharati.

e) Prof. Raghuvendra Tanwar, Chairman, Indian Council for Historical Research. Email: chairman@ichr.ac.in; Phone no: 9896219909.

(iii) Sociology & Anthropology

a) Prof. Ramanuj Ganguly, Professor, WBSU. Address: Flat: A-106, Mall Enclave, 13, KB Sarani, Kolkata – 700080.

b) Prof. Tanka Bahadur Subba, Ex VC, Sikkim Central University.

c) Prof. Ravinder Kaur, Professor of Sociology, IIT Delhi, email: ravinder.iitd@gmail.com.

(iv) Economics

a) Prof. Abhirup Sarkar, Professor, Indian Statistical Institute, Calcutta. Address: 10 Mandeville Gardens, Flat 802, Kolkata – 700019.

b) Prof. Saibal Kar, RBI Chair Professor of Economics, Centre for Studies in Social Sciences. Address: R1, BP Township, Kolkata – 700094.

c) Prof. (Dr.) Ram Singh, Director, Delhi School of Economics, University of Delhi, Delhi. Email: ramsingh@econdse.org; Phone number: 9971863030.

(v) Law

a) Prof. Rathin Bandyopadhyay, Professor of Law, Department of Law, NBU. Address: Department of Law, University of North Bengal, Siliguri – 734013.

b) Justice G. Raghuram, former Judge, Andhra Pradesh High Court and former Director, National Judicial Academy.

(vi) English

a) Prof. Debnarayan Bandyopadhyay, Ex VC Bankura University. Address: 20 Chandranath Chatterjee Street, Kolkata 700025.

b) Prof. Anindyo Roy, Associate Professor Emeritus, Department of English, Colby College, Waterville. Email: aroy@colby.edu.

c) Prof. (Dr.) Meena T. Pillai – Dean, Faculty of Arts and Professor, Institute of English and Director, Centre for Cultural Studies of University of Kerala.

(vii) Hindi

a) Prof. T.V. Kattimani, VC, Central Tribal University, Andhra Pradesh.

b) Dr. Chander Trikha, Director, Urdu Cell, Sahitya Academy, Haryana, R/o of House No.345, Sector 22A, Chandigarh (Mob. No.09417004423).

(viii) Bengali

a) Prof. Mir Rejaul Karim, Professor, Aliah University. Address: Department of Bengali, Aliah University, Park Circus Campus, 17 Gorachand Road, Kolkata-700014

b) Prof. Tapadhir Bhattacharya, former VC, Assam University.

(ix) Chemistry

a) Prof. Abhijit Chakrabarti, Retired Professor, Saha Institute of Nuclear Physics. Email: abhijit1960@gmail.com.

b) Prof. Dhrubajyoti Chattopadhyay, VC, Sister Nibedita University.

c) Prof. Uday Maitra, FNA Deprtment of Organic Chemistry, Indian Institute of Sciences, Bangalore. Email: maitra@iisc.ac.in.

d) Prof. Ramesh Chandra, VC, Maharaja Surajmal Brij University, Bharatpur. Email: acbrdu@hotmail.com.

e) Prof. Siva Umapathy, Physical Chemistry, Indian Institute of Sciences, Bangalore. Email: umapathy@iisc.ac.in

(x) Physics

a) Swami Atmapriayanand, VC, Ramakrishna Mission Vivekananda Educational and Research Institute.

b) Prof. Amitava Mukhapadhyay, Professor, NBU.

c) Prof. Amitabha Roy Chaudhuri, Deptt of Physics, CU.

d) Prof. A.N. Basu, former VC, JU and distinguished Professor of Physics.

(xi) Biology

a) Prof. Subhra Chakraborty, Director, Genomics Research Centre, Delhi.

b) Prof. B.A. Chopade, VC – AKS University, Satna, Former VC, Dr. Babasaheb Ambedkar Marathwada University, Aurangabad.

c) Prof. (Dr.) Navin Sheth – former VC, Gujarat Technological University.

d) Prof. Emeritus. Prof. V. S. Chauhan, Ph.D., D.Phil. (Oxon), FNA, FNASc, TWAS, Former UGC Chairman. Email: viranderschauhan@gmail.com. Phone No.: 9811292058.

(xii) Botany and Zoology

a) Prof. Subhas Chandra Roy, Professor, NBU

b) Prof. Dipak Kumar Kar, ex VC, SKB University. Address: 409 Lake Gardens, Kolkata 700045; Phone No.: 7044577044

(xiii) Mathematics

a) Prof. Kallol Paul, Professor, Jadavpur University. Address: 188 Raja SC Mallik Road, Kolkata 700032.

b) Prof. Suparna De Sarkar, Senior Professor, NBU.

c) Prof. Tarun Das, Department of Mathematics, University of Delhi. Email: tarukd@gmail.com; Phone No.: 9911854923.

(xiv) Computer Science

a) Prof. Amlan Chakraborty, Calcutta University.

b) Prof. Anupam Basu, Director NIT, Durgapur.

c) Shri Raj Shekhar Joshi, Group Head (Digital Technology & Transformation), Joint President, Aditya Birla Group.

(xv) Electrical Engineering

a) Prof. Bhaskar Gupta, Professor, Jadavpur University. Address: 19C/1, Kalibari Lane, Kolkata - 700032.

b) Prof. Ajoy Roy, IIT Kharagpur.

c) Dr. Prith Banerjee, Chief Technology Officer of Ansys.

(xvi) Chemical and Biochemcal Engineering

a) Prof. Chiranjib Bhattacharya, ex Pro-VC, JU

b) Prof. S.E. Hasnain, Padma Shree Awardee, National Science Chair, SERB, Department of Biochemical Engineering and Biotechnology, IIT Delhi.

c) Prof. RC Kuhad, Former Vice-Chancellor, Central University of Haryana, and retired Professor of Bio-Chemistry. Email: kuhad85@gmail.com; Phone no.: 9817813027.

(xvii) Civil and Mechanical Engineering

a) Prof. Deepankar Choudhury, T. Kant Chair Professor and Head of Civil Engineering department at IIT Bombay.

b) Prof. Sunil Kumar, VC- Rajiv Gandhi Proudyogiki Vishwavidyalay, Bhopal.

(xviii) Minerals and Agricultural Engineering

a) Prof. Indranil Manna, JC Bose Fellow, FTWAS, FNA, FNAE, FNASc, FASc, MAPAM, FIE(I), FEMSI, FAScT, Professor, IIT Kharagpur, Former Director, CSIR- Central

Glass & Ceramic Institute, VC Birla Institute of Technology, Mesra.

b) Prof. (Dr.) Virendra Kumar Tiwari, Director, IIT Kharagpur.

(xix) International Relations

a) Prof. Om Prakash Mishra, ex PVC, IGNOU & ex VC, NBU

(xx) Statistics & Information Science

a) Prof. Sabuj Kumar Chodhury, Professor, Department of Library & Information Science. Address: Third Floor, Asutosh Building, 87/1, College Street, Kolkata – 700073.

b) Prof. Bimal Kumar Roy, Head, RC Bose Centre for Cryptology and Security, ISI Kolkata.

(xxi) Physiology

a) Prof. Gautam Pal, Pro VC, Kalyani University

(xxii) Geology

a) Prof. S.K Tandon, former Pro Vice-Chancellor and retired Professor University of Delhi. Email: sktand@iiser.ac.in; Phone no: 9810437365.

(xxiii) Business and Management

a) Prof. Sujit Kumar Basu, former VC, Visva Bharati University.

b) Professor Errol D'Souza (former Director IIMA), Indian Institute of Management, Ahmedabad. Email: errol@iimahd.ernet.in Phone No.: 9558820604

(xxiv) Environment and Climate

a) Prof. Jayanta Bandopadhya, Retd. Professor, IIM Kolkata Environmental Studies.

b) Mr. Anirban Ghosh, Eminent Technocrat & Head, Centre for Sustainability, Mahindra University.

(xxv) Human Resource

a) Mr. Saptarshi Roy, Technocrat & Director (HR) NTPC Ltd., New Delhi.

(xxvi) Miscellaneous

b) Dr. S.K. Pattanayak, IAS (Retd.), Former Secretary, Deparment of Agriculture, GOI, New Delhi.

c) Mr. Parimal Rai, IAS (Retd.), Former Chief Secretary, Goa. Address: 60, Poorvi Marg, Third Floor, Vasant Vihar, New Delhi. Phone no: 09779866666/09810533311.

14. The learned Chairperson is hereby authorized to constitute separate or joint Search-cum-Selection Committees for one or more Universities, keeping in view the nature of subjects/disciplines in which education is being imparted in such pooled Universities. The Chairperson is requested to nominate 4 persons out of the empaneled experts, whom he finds capable of short-listing suitable names for appointment as Vice-Chancellors. Learned Chairperson shall preside over every Search-cum-Selection Committee and thus, composition of each such Committee shall be five. The Search-cum-Selection Committee shall prepare a panel of at least 03 names (alphabetically and not in order of merit) for each University.

15. The learned Chairperson is requested to constitute the Search- cum-Selection Committees for the group or the individual Universities as early as possible and preferably within two weeks. The Department of Higher Education, Government of West Bengal is hereby nominated as the nodal department of the State Government to issue advertisements giving vide publicity to invite applications for the posts of Vice-Chancellors. Such advertisements shall contain the details of the requisite qualification and other eligibility conditions, with a specific reference to this Court's order so as to infuse confidence, leaving no uncertainty in the minds of the meritorious aspirants in submitting their claims. The advertisements shall give four weeks' time to submit the applications. Such applications shall be scrutinized by the concerned department of the State Government within one week and shall thereafter the entire set of all applications be placed before the learned Chairperson of the Search-cum-Selection Committee, who in turn, will get the dossier of each candidate prepared for consideration of the Search-cum-Selection Committee. The Search Committee may endeavour to complete their task within three months from today.

16. The learned Chairperson shall be paid an honorarium of Rs. 3 lakhs for every effective day of proceedings of the Search Committee, until

the entire process is completed. The State Government, in addition to honorarium, provide the Chairperson with a suitable office and full secretarial assistance, along with transit accommodation at Kolkata. The learned Chairperson shall also be provided with an official vehicle and necessary paraphernalia forthwith, commensurate to the constitutional position held by him in the past.

17. The members of the Search-cum-Selection Committee shall be entitled to such allowance, perks, and facilities as may have been prescribed under the Statutes or by the State Government. If nothing has been prescribed, in that case, the petitioner-State shall apprise this Court of the status on the next date of hearing to enable us to pass appropriate order in this regard. Meanwhile, State Government is directed to reimburse their air fare (economy class) lodging and boarding expenses within one week of submission of such claims.

18. The recommendations made by the Search-cum-Selection Committee, duly endorsed by the learned Chairperson, shall be put up before the Chief Minister (and not the Minister-in-charge of a Department) for necessary consideration. In case the Chief Minister, State of West Bengal has reasons to believe that any short-listed person is unsuitable for appointment as Vice-Chancellor, the remarks to this effect along with supporting material and the original record of the recommendation made by the Search-cum-Selection Committee, shall be put up before the learned Chancellor within two weeks. The Chief Minister shall be entitled to recommend the shortlisted names in order of preference for appointment as Vice-Chancellors.

19. The learned Chancellor on the receipt of record from the Chief Minister of the State, shall appoint the Vice-Chancellors out of the empaneled names, in the same order of preference as recommended by the Chief Minister of the State. In case the learned Chancellor has any reservation against the empaneled names and/or the remarks made by the Chief Minister of the State against any short-listed candidate, the learned Chancellor shall be entitled to put up his own opinion on file, duly supported with reasons and relevant material.

20. The learned Chancellor shall accord his approval (save and except when there is a difference of opinion) within two weeks of receipt of file from the Chief Minister of the State. The Department of Higher Education, Government of West Bengal or any other concerned Department of the State Government are hereby directed to notify

the appointment within one week from the date of receipt of approval from the learned Chancellor of the University.

21. In the case(s) where the Chief Minister of the State has objected to the inclusion of any name in the panel and such objection is not acceptable to the Chancellor or where the Chancellor has an objection against empanelment of any particular name for which he has assigned his own reasons, all such files shall be put up before this Court. We make it clear that a final decision in this regard shall be taken by this Court after giving reasonable opportunity of being heard to the objectors.

22. The State of West Bengal shall file the Status Report in respect to compliance of the directions issued here-in-above before the next date of hearing. We make it clear that since the constitution and composition of Search-cum-Selection Committee is at the instance and with the consent of the parties, we will not entertain any objection from any side for non-compliance.

Result of the case: Directions issued.

†*Headnotes prepared by:* Nidhi Jain

[2024] 7 S.C.R. 87 : 2024 INSC 474

P. Sasikumar
v.
The State Rep. by the Inspector of Police

(Criminal Appeal No. 1473 of 2024)

08 July 2024

[Sudhanshu Dhulia* and Prasanna B. Varale, JJ.]

Issue for Consideration

High Court, if justified in upholding the conviction of the appellant u/s. 302/34 as well as u/ss. 449, 404 and 201 r/w 302 IPC, in absence of test identification parade, where accused is a stranger to a witness and the trial court accepted the dock identification by such a witness.

Headnotes†

Evidence – Test identification parade – Relevance – Non-conduct of Test Identification Parade-TIP, effect on prosecution case – On facts, in a brutal murder of a teenager girl allegedly by the main accused and co-accused, conviction and sentence u/s. 302/34, ss. 449, 404 and 201 r/w 302 IPC – Appeal by the co-accused, wherein the High Court upheld the conviction and sentence, in absence of TIP, where accused is a stranger to a witness and there was dock identification made by witness in court during trial – Correctness:

Held: In cases where accused is a stranger to a witness and there has been no TIP, the trial court should be very cautious while accepting the dock identification by such a witness – On facts, TIP was not conducted – All the prosecution witnesses who identified the accused in the court were not known to the appellant – They had not seen the appellant prior to the said incident – He was a stranger to both of them – More importantly, both of them have seen the appellant on the date of the crime and that too from a distance while he was wearing a monkey cap which majorly covers the face – Under these circumstances, TIP had become necessary particularly when both the accused, who are alleged to have committed this murder were arrested within two days – No explanation whatsoever has been given by the prosecution and the Investigating Officer as to why TIP was not conducted – High

* Author

Court also recorded this flaw in the investigation – Not conducting a TIP was a fatal flaw in the police investigation and in the absence of TIP, the dock identification of the appellant will always remain doubtful – Doubt always belongs to the accused – Prosecution has not been able to prove the identity of the appellant beyond a reasonable doubt – Not conducting TIP is fatal for the prosecution – Identification of the accused before the court ought to have been corroborated by the previous TIP which was not done – Thus, the identity of the appellant is in doubt – Appellant could not have been convicted on the basis of a very doubtful evidence as to the appellant's identity – Impugned order of the High Court set aside – Penal Code, 1860 – s. 302/34, s. 449, 404 and 201 r/w 302. [Paras 10, 11, 12, 13, 15, 16]

Evidence – Test identification parade – Relevance of:

Held: Test identification parade-TIP is only a part of Police investigation – Identification in TIP of an accused is not a substantive piece of evidence – Substantive piece of evidence, or what can be called evidence is only dock identification that is identification made by witness in Court during trial – In cases where accused is a stranger to a witness and there has been no TIP, the trial court should be very cautious while accepting the dock identification by such a witness – In a given case, TIP may not be necessary – Non-conduct of a TIP may not prejudice the case of the prosecution or affect the identification of the accused – It would all depend upon the facts of the case – It is possible that the evidence of prosecution witness who has identified the accused in a court is of a sterling nature, thus TIP may not be necessary – It is the task of the investigation team to see the relevance of a TIP in a given case. [Paras 12, 13]

Case Law Cited

Kunjumon v. State of Kerala [2012] 9 SCR 1032 **: (2012) 13 SCC 750;** *Rajesh v. State of Haryana* [2020] 14 SCR 1 **: (2021) 1 SCC 118;** *Ravi Kapur v. State of Rajasthan* [2012] 10 SCR 229 **: (2012) 9 SCC 284;** *Malkhansingh and Ors. v. State of Madhya Pradesh* [2003] Supp. 1 SCR 443 **: (2003) 5 SCC 7462;** *Jayan v. State of Kerala* **(2021) 20 SCC 38;** *Amrik Singh v. State of Punjab* [2022] 7 SCR 451 **: (2022) 9 SCC 402 – referred to.**

List of Acts

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

P. Sasikumar v. The State Rep. by the Inspector of Police

List of Keywords

Test identification parade; Dock identification by witness; Non-conduct of Test Identification Parade; Police investigation.

Case Arising From

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1473 of 2024

From the Judgment and Order dated 12.01.2017 of the High Court of Judicature at Madras in CRLA No. 574 of 2016

Appearances for Parties

Jayanth Muth Raj, Sr. Adv., C. K. Sasi, Mrs. Malavika Jayanth, Ms. Anupriya, Advs. for the Appellant.

V. Krishnamurthy, Sr. A.A.G., D. Kumanan, Mrs. Deepa. S, Sheikh F. Kalia, Ms. Richa Vishwakarma, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Judgment

Sudhanshu Dhulia, J.

1. The appellant before us has challenged the order dated 12.01.2017 of the High Court of Madras which has upheld the conviction of the appellant under Section 302 read with Section 34 of the Indian Penal Code (hereinafter referred to as 'IPC') as well as under Section(s) 449, 404 and 201 r/w 302 IPC. He has been, *inter alia*, sentenced for life imprisonment under Section 302 IPC.

2. It was a brutal murder of a 14-year-old girl committed inside her house on the night of 13.11.2014, allegedly by two accused, one of them being the present appellant before this Court. There is no direct evidence of the crime although there is both ocular as well as forensic evidence placed by the prosecution to prove the murder of the 14-year-old girl, at the hands of the present appellant and another accused, who is accused no.1 and also the main accused. The present accused is accused no.2.

3. The case of the prosecution is largely based on circumstantial evidence. FIR No.408/2014 was lodged on 13.11.2014 at police station Alagapuram by PW-1 Durairaj, who is the father of the

deceased. The complainant states that he is working as a Manager at JSP Granite Company at Salem, Tamil Nadu and he has two daughters. The elder daughter had studied engineering from Mahendra Engineering College and is now working in L&T Company, Chennai. His younger daughter was studying in the 8th standard in a local school in Salem. His wife is working as an accountant in a private company. On 13.11.2014 his wife had gone to Chennai to meet their elder daughter as she was not well. The younger daughter (deceased) was alone in the house. That day he had called his younger daughter about 2-3 times, in order to remind her to receive her tiffin but she did not answer his call. He had then made up his mind to return to his house early. When he was climbing the stairs of his house at about 07:15 p.m., after parking his scooter, he saw a person aged about 25 years, walking down the stairs. This man had a helmet in his hand, which he immediately wore on seeing the complainant. He found the door of his house open and his daughter was bleeding profusely from her neck. Meanwhile, neighbors had gathered on hearing his cries and they informed him that two persons had come to his house who had brutally killed his daughter. The deceased was still alive was rushed to the hospital where she was declared dead.

4. The post mortem was conducted on the body of the deceased by Dr. K. Gokularamanan (PW-14) at 10:30 a.m. next day on 14.11.2014 and the following antemortem injuries were found on the deceased –

> *"1. A well extended broad cut injury on the front side of neck and on both sides extending up to the upper side of Thyroid ligament bone measuring a depth of 14 x 6 up to the depth of the bone and the neck spinal bone present in the underside of injury, Adams apple, muscles and blood vessels were seen on the edges of the injury and blood outflow was seen in the surrounding areas.*
>
> *2. On the right hand side of the aforesaid injury a cut injury on the lower and outer side was seen which extended up to the backside of neck measuring 12 x 4 depths in the muscles and blood outflow was seen in the surrounding areas. No other injuries were seen on the external parts of the body."*

According to the postmortem report, the cause of death was shock due to the antemortem injuries on the neck and profuse bleeding and the time of death was 12-18 hours prior to the post mortem.

5. Meanwhile the FIR was registered as Case Crime No.408/2014. The two accused were apprehended by the Police on 15.11.2014, at about 10 p.m.

6. Recoveries were made during the investigation on their pointing out which is as follows :-

From the pointing out of accused No. 1 :-

A black colour Pulsar Vehicle without registration number, a black colour helmet, a black colour cell phone with broken glass, a knife with a maroon handle and a checkered blood-stained shirt were recovered.

From pointing out of accused No. 2 i.e. present appellant :-

A dark green monkey cap, a Samsung Galaxy Pro Cell Phone, a blood-stained elephant-coloured jeans and a white/green shirt were recovered.

7. At this juncture, we must also record that although there are two accused in the case and, both were charged for the above offences and faced the trial and were convicted by the Trial Court under Section 302 read with Section 34 IPC apart from other offences such as 449, 404 and 201 r/w 302 IPC, yet there is no record, before this Court of any appeal being filed before the High Court by accused no. 1 who also stands convicted and sentenced for the same offences like the present appellant. This is also mentioned by the High Court while deciding the appeal that they have before them only the criminal appeal of accused No. 2 i.e. the present appellant- Sasikumar, and the court is not aware of any Criminal Appeal being filed by accused no.1 – Yugadhithan. Before us, thus, is only accused no. 2. Accused no.1, who is the main accused inasmuch as it was accused no.1 against whom the prosecution additionally has a case of motive to commit this murder.

8. The prosecution case is that when Harini (PW2)-the elder sister of the deceased was a student in Mahendra Engineering College, accused no. 1 (Yugadhithan) was also studying in the same college and was totally infatuated by her. His feelings were never reciprocated

by the elder sister of the deceased. It is because of this reason that he was enraged and had even started stalking the elder sister of the deceased. He had even reached her present place of work L&T Company at Chennai, causing much anxiety to her. PW2 had also complained against accused no. 1 to the principal of Mahendra Engineering College earlier stating that he had been harassing her. The prosecution case further, is that accused no. 1 had threatened the elder sister of the deceased warning her that if she does reciprocate his feelings, he would kill her entire family.

9. But the one who is before us today and whose conviction stands confirmed by the High Court is not accused No.1 but accused no.2. The entire question before us here is of identification of accused no. 2. From all available evidences which the prosecution has placed before the Trial Court, *inter alia*, in the form of PW-1 and PW-5 have stated that accused No.2 i.e., the present appellant was seen by them wearing a "green colored monkey cap". When this accused had entered the premises, when he knocked the door of the house of the deceased, when he was coming down from the stairs along with accused no.1 and at all other relevant times the witnesses who have seen and identified the accused no.2 i.e., the present appellant, had seen the appellant for the first time on 13.11.2014 while he was wearing a green colored monkey cap. None of them had seen him earlier. PW-5 who is the closest witness in this case states as under :-

> *"…I know Duraiaj. It could be 6.30 hours in the evening on 13.11.2014. At that time I was taking good water in balcony at that time a person went wearing monkey cap. Another person went wearing a helmet. The time could be 6.35, 640 hrs in the evening. They both knocked the door of Tejashree house and went inside the house. They both were found talking inside in a sofa. They are the present accused. They were asking phone number with Tejashree for that Tejashree has told them that father has gone out and he has to come. Both the accused and Tejashree were found to be talking. After taking water I went to my home. I informed my house by around 7.00 hrs in the evening that I am going to super market. Later I came back by 7 .25 hrs at that time Sun News was under broadcast when I parked my vehicle and climbed stairs Durairaj came behind me. When I placed the articles in home within 5*

minutes I heard the sound of Durairaj. Immediately I went to Durairaj House. After tearing the cloth he was shouting from the place where his daughter was lying. I told Durairaj that 2 person came and went half an hour prior to that. I told Durairaj that they both kept Tejashree sitting and was talking with her. Immediately call was made to ambulance…"

PW-5 is said to have identified the accused later when both the accused were apprehended by the police and were in the hospital. In other words, while these two accused persons were in the custody of the police this particular witness PW-5 was taken to the hospital where he had identified the two accused. This so-called identification, on which much reliance has been placed by the prosecution, was made by PW-5 in the hospital by way of a statement to the police, and it can only be read as a statement under Section 162 of the Criminal Procedure Code which can only be used for the limited purpose as provided under Section 162 of the CrPC itself.

The case of the prosecution is that both the accused were apprehended on 15.11.2014 near the Salem-Coimbatore bye pass fly over. The recovery of incriminating material such as motor bike, weapon, the monkey cap, helmet, clothes etc. were made on the same day. In other words, when the accused were in judicial custody, there is nothing on record to suggest that the investigating officer or the investigating team had taken any permission from the Magistrate for the release of the accused for these recoveries. These recoveries therefore, have no relevance. At this juncture, we must reiterate that our observation in this case and our finding and conclusions are based only on the evidences and the material which is available against the present appellant, it should not be construed in any manner as a finding or a comment on the case of accused no. 1 who is not before us and evidently against whom the prosecution has some more material, including motive. There is also no motive against the present appellant. In fact, the Pulsar bike which has been recovered on pointing out of accused no.1 does not belong to the appellant but was purchased by a person named 'Satish' from the showroom and this person 'Satish' has never been questioned by the police or produced as a prosecution witness during the trial.

10. The admitted position in this case is that the test identification parade (hereinafter referred to as 'TIP') was not conducted. All the

prosecution witnesses who identified the accused in the Court such as PW-1 and PW-5 were not known to the present appellant i.e., accused no.2. They had not seen the present appellant prior to the said incident. He was a stranger to both of them. More importantly, both of them have seen the appellant/accused No. 2 on the date of the crime while he was wearing a "green colour monkey cap"!

11. Now, as one is familiar a monkey cap covers the entire face, chin and cheek of a person, leaving only his eyes and nose and part of forehead exposed. These two witnesses (PW-1 and PW-5), had seen the appellant wearing a monkey cap and that too from a distance. Under these circumstances, TIP had become necessary particularly when both the accused, who are alleged to have committed this murder were arrested within two days. The incident is of about 7:00 pm on 13.11.2014 and both of them were arrested at around 10 pm on 15.11.2014. The case of the prosecution is that while they were being arrested, they received injuries as they tried to escape and consequently, they were taken to the Hospital for treatment. It was in the hospital, that PW-1 i.e. father of the deceased and the complainant and PW-5 were taken by the Investigating Officer who are said to have identified the two accused as the one who had committed the crime. No explanation whatsoever has been given by the prosecution as to why TIP was not conducted in this case before a Magistrate as it ought to have been done. In fact, the High Court has recorded this flaw in the investigation at more than one place in its judgment. It has again observed that the Investigating Officer (PW-24) was before the Court and in spite of being questioned as to what the reasons were for not holding TIP in this case, no satisfactory reply was given by him.

12. It is well settled that TIP is only a part of Police investigation. The identification in TIP of an accused is not a substantive piece of evidence. The substantive piece of evidence, or what can be called evidence is only dock identification that is identification made by witness in Court during trial. This identification has been made in Court by PW-1 and PW-5. The High Court rightly dismisses the identification made by PW-1 for the reason that the appellant i.e., accused no.2 was a stranger to PW-1 and PW-1 had seen the appellant for the first time when he was wearing a monkey cap, and in the absence of TIP to admit the identification by PW-1 made for the first time in the Court was not proper. However, the High Court has believed the

testimony of PW-5 who has identified accused no.2 under similar circumstances! The appellant was also stranger to PW-5 and PW-5 had also seen the accused i.e., the present appellant for the first time on that fateful day i.e. on 13.11.2014 while he was wearing a green colour monkey cap. The only reason assigned for believing the testimony of PW-5 is that he is after all an independent witness and has no grudge to falsely implicate the appellant. This is the entire reasoning. We are afraid the High Court has gone completely wrong in believing the testimony of PW-5 as to the identification of the appellant. In cases where accused is a stranger to a witness and there has been no TIP, the trial court should be very cautious while accepting the dock identification by such a witness (See: ***Kunjumon v. State of Kerala*** **(2012) 13 SCC 750**).

13. After considering the peculiar facts of the present case, we are of the opinion that not conducting a TIP in this case was a fatal flaw in the police investigation and in the absence of TIP in the present case the dock identification of the present appellant will always remain doubtful. Doubt always belongs to the accused. The prosecution has not been able to prove the identity of the present appellant i.e. A-2 beyond a reasonable doubt.

The relevance of a TIP, is well-settled. It depends on the fact of a case. In a given case, TIP may not be necessary. The non conduct of a TIP may not prejudice the case of the prosecution or affect the identification of the accused. It would all depend upon the facts of the case. It is possible that the evidence of prosecution witness who has identified the accused in a court is of a sterling nature, as held by this Court in the case of ***Rajesh v. State of Haryana*** **(2021) 1 SCC 118** and therefore TIP may not be necessary. It is the task of the investigation team to see the relevance of a TIP in a given case. Not conducting TIP in a given case may prove fatal for the prosecution as we are afraid it will be in the present case.

14. The relevance of TIP has been explained by this Court in a number of cases **(Please see: *Ravi Kapur v. State of Rajasthan* (2012) 9 SCC 284** [1]**, *Malkhansingh and Ors. v. State of Madhya Pradesh* (2003) 5 SCC 746** [2]**).**

1 Para 35

2 Para 16

15. In the facts of the present case, the identification of the accused before the court ought to have been corroborated by the previous TIP which has not been done. The emphasis of TIP in a given case is of vital importance as has been shown by this Court in recent two cases of ***Jayan v. State of Kerala*** **(2021) 20 SCC 38** and ***Amrik Singh v. State of Punjab*** ***(2022) 9 SCC 402***. In **Jayan** (supra), this Court disbelieved the dock identification of the accused therein by a witness and while doing so, this Court discussed the aspect of TIP in the following words:

> *"It is well settled that TI parade is a part of investigation and it is not a substantive evidence. The question of holding TI parade arises when the accused is not known to the witness earlier. The identification by a witness of the accused in the Court who has for the first time seen the accused in the incident of offence is a weak piece of evidence especially when there is a large time gap between the date of the incident and the date of recording of his evidence. In such a case, TI parade may make the identification of the accused by the witness before the Court trustworthy…."* *(Para 18)*

16. Under these circumstances, we hold that the identity of the present appellant is in doubt. The appellant could not have been convicted on the basis of a very doubtful evidence as to the appellant's identity. The appeal is allowed and the impugned order of the High Court dated 12.01.2017 is hereby set aside. The appellant has been in jail for about 8 years as we have been told at the Bar, he shall be released forthwith unless he is required in some other case. We make it absolutely clear that this decision of acquittal is based on the evidence, or lack thereof, which the prosecution has against accused no. 2 i.e. the present appellant. This will absolutely have no bearing on the case of accused no.1.

Result of the case: Appeal allowed.

†*Headnotes prepared by:* Nidhi Jain

[2024] 7 S.C.R. 97 : 2024 INSC 479

Frank Vitus
v.
Narcotics Control Bureau & Ors.

(Criminal Appeal No. 2814-2815 of 2024)

08 July 2024

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

Issue for Consideration

The appellant was ordered to be enlarged on bail subject to various terms and conditions incorporated in the said order. The petitioner is aggrieved by the two conditions imposed while granting bail. The two conditions are as follows: (i) A certificate of assurance from the High Commission of Nigeria is to be placed on record that the applicants/accused shall not leave the country and shall appear before the Special Judge as and when required; (ii) Accuse shall drop a PIN on the google map to ensure that their location is available to the Investigation Officer of the case.

Headnotes†

Constitution of India – Art. 21 – Narcotic Drugs and Psychotropic Substances Act, 1985 – Code of Criminal Procedure, 1973 – Terms and conditions in a bail – A condition of dropping pin on Google Map:

Held: In an affidavit, Google LLC stated that the user has full control over sharing PINs with other users – It does not impinge on the user's privacy, as the user retains full control – Most importantly, it is stated that the PIN location does not enable real-time tracking of the user or the user's device – Therefore, the condition of the accused dropping a pin on Google Maps, as it stands, is completely redundant as the same does not help the first respondent-Narcotics Control Bureau (NCB) – Imposing any bail condition which enables the Police/Investigation Agency to track every movement of the accused released on bail by using any technology or otherwise would undoubtedly violate the right to privacy guaranteed under Article 21 – In the instant case, the condition of dropping a PIN on Google Maps has been incorporated without even considering the technical effect of dropping a PIN and the relevance of the said condition as a condition of bail – This cannot be a condition of

* Author

bail – Accordingly, the condition is ordered to be deleted. [Paras 10.1, 10.2]

Narcotic Drugs and Psychotropic Substances Act, 1985 – Code of Criminal Procedure, 1973 – Terms and conditions in a bail – A condition of furnishing certificate of the Embassy:

Held: It is not necessary that in every case where bail is granted to an accused in an NDPS case who is a foreign national on the ground of long incarceration of more than 50% of the minimum sentence, the condition of obtaining a 'certificate of assurance' from the Embassy/High Commission should be incorporated – It will depend on the facts of each case – Even if such a condition is incorporated, on an application made by the accused, the concerned Embassy/High Commission declines or fails to issue the certificate within a reasonable time, say within a period of seven days, the Court always has the power to dispense with the said condition – Grant of such a certificate by the Embassy/ High Commission is beyond the control of the accused to whom bail is granted – Therefore, when the Embassy/High Commission does not grant such a certificate within a reasonable time, as explained above, the accused, who is otherwise held entitled to bail, cannot be denied bail on the ground that such a condition, which is impossible for the accused to comply with, has not been complied with – Hence, the Court will have to delete the condition – Instead of the condition of obtaining such a certificate, the condition of surrendering the passport and regularly reporting to the local police station/Trial Court can always be imposed, depending upon the facts of each case – Accordingly, in the instant case, the said condition of furnishing certificate of the Embassy is ordered to be deleted. [Paras 11.1, 12]

Narcotic Drugs and Psychotropic Substances Act, 1985 – s.37 and s.52 – Code of Criminal Procedure, 1973 – s.437(3) – Application of CrPC to the arrests made under NDPS:

Held: Under Section 37 of the NDPS Act, the Court's power to grant bail is constrained by Sub-section 1(b)(ii) – However, once a case is made out for a grant of bail in accordance with Section 37, the conditions of bail will have to be in terms of Section 437(3) of the CrPC – The reason is that because of Section 52 of the NDPS Act, the provisions of the CrPC apply to the arrests made under the NDPS Act insofar as they are not inconsistent with the NDPS Act. [Para 4.1]

Code of Criminal Procedure, 1973 – s.437(3) – Meaning of the words "interest of justice":

Held: A broader meaning cannot be assigned to the words "interest of justice" in Section 437(3) of CrPC – By borrowing the language used by the Supreme Court in its earlier decisions, it is clear that the bail conditions cannot be fanciful, arbitrary or freakish – The object of imposing conditions of bail is to ensure that the accused does not interfere or obstruct the investigation in any manner, remains available for the investigation, does not tamper with or destroy evidence, does not commit any offence, remains regularly present before the Trial Court, and does not create obstacles in the expeditious conclusion of the trial – The conditions incorporated in the order granting bail must be within the four corners of Section 437(3) – The bail conditions must be consistent with the object of imposing conditions – While imposing bail conditions, the Constitutional rights of an accused, who is ordered to be released on bail, can be curtailed only to the minimum extent required – Even an accused convicted by a competent Court and undergoing a sentence in prison is not deprived of all his rights guaranteed by Article 21 of the Constitution. [Para 7]

Case Law Cited

Kunal Kumar Tiwari v. State of Bihar **(2018) 16 SCC 74;** *Munish Bhasin v. State (NCT of Delhi)* [2009] 2 SCR 806 **: (2009) 4 SCC 45;** *State of A.P. v. Challa Ramkrishna Reddy* [2000] 3 SCR 644 **: (2000) 5 SCC 712 – relied on.**

Supreme Court Legal Aid Committee Representing Undertrial Prisoners v. Union of India & Ors. [1994] Supp. 4 SCR 386 **: (1994) 6 SCC 731;** *Tofan Singh v. State of Tamil Nadu* [2020] 12 SCR 583 **: (2021) 4 SCC 1 – referred to.**

List of Acts

Constitution of India; Narcotic Drugs and Psychotropic Substances Act, 1985; Code of Criminal Procedure, 1973.

List of Keywords

Bail; Terms and conditions in a bail; Section 437(3) of Code of Criminal Procedure, 1973; Section 37 of Narcotic Drugs and Psychotropic Substances Act, 1985; Section 52 of Narcotic Drugs and Psychotropic Substances Act, 1985; Meaning of the

words "interest of justice" in section 437(3) of Code of Criminal Procedure, 1973; A condition of dropping pin on Google Map in a bail; A condition of furnishing certificate of the Embassy in a bail; Article 21 in the Constitution of India; Right to privacy.

Case Arising From

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 2814-2815 of 2024

From the Judgment and Order dated 31.05.2022 and 18.08.2022 of the High Court of Delhi at New Delhi in BA No. 4187 of 2020

Appearances for Parties

Varun Mishra, Adv. for the Appellant.

Vinay Navare, Sr. Adv., Amicus Curiae.

Vikramjit Banerjee, A.S.G., Venkata Raghu Vamsy Dasika, Upendra Mishra, Rahul G Tanwani, Prasenjeet Mohapatra, Arvind Kumar Sharma, Gurmeet Singh Makker, Prashant Rawat, Advitiya Awasthi, Annirudh Sharma-ii, Ashok Panigrahi, Raj Bahadur Yadav, Abhishek Singh, M/S. Trilegal Advocates On Record, Lzafeer Ahmad B. F., Anuj Berry, Ms. Anusha Ramesh, Ms. Karishma Sundara, Aparajita Sen, Ms. Muskan Wadhwa, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Order

Abhay S. Oka, J.

1. Leave granted.

FACTUAL ASPECTS

2. The appellant is being prosecuted for the offences punishable under Sections 8, 22, 23, and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (short 'NDPS Act'). The appellant was arrested on 21st May 2014. By the first impugned order dated 31st May 2022, the appellant was ordered to be enlarged on bail subject to various terms and conditions incorporated in the said order. The terms and conditions incorporated were in terms of the directions issued by this Court in paragraph no.15 of its decision in the case of ***Supreme Court Legal Aid Committee Representing Undertrial Prisoners v.***

Union of India & Ors.[1]. The appellant was ordered to be enlarged on bail on his furnishing a bail bond in the sum of Rs.1,00,000/- with two sureties in the like amount to the satisfaction of the learned Special Judge under the NDPS.

3. The grievances in this appeal have been summed up in the order dated 21st July 2023 passed by this Court, which reads thus:

> **"**The petitioner is aggrieved by the following condition imposed while granting bail:
>
> > ".. the learned Special Judge, NDPS seized of the trial in SC No.27/14 shall ensure that the certificate of assurance from the High Commission of Nigeria is placed on record that the applicants/accused shall not leave the country and shall appear before the learned Special Judge as and when required, in as much as, the complaint filed by the Narcotics Control Bureau under Sections 8/22/23/29 of the NDPS Act, 1985 indicates that the appellants are residents of Nigeria.."
>
> In the case of ***Supreme Court Legal Aid Committee vs. vs Union Of India*** [(1994) 6 SCC 731] Clause (iv) reads as under:
>
> > "(iv)in the case of undertrial accused who are foreigners, the Special Judge shall, besides impounding their passports, insist on a certificate of assurance from the Embassy/High Commission of the country to which the foreigner-accused belongs, that the said accused shall not leave the country and shall appear before the Special Court as and when required;"
>
> Prima facie, we are of the view that none of the Embassies/ High Commissions may be able to give assurances as mentioned in Clause (iv). The question is whether we need to refer this case to a larger Bench for re-consideration of Clause (iv).

1 [1994] Supp. 4 SCR 386 : (1994) 6 SCC 731

Another condition imposed by the High Court reads thus:

> "… they shall drop a PIN on the google map to ensure that their location is available to the Investigation Officer of the case;..."

The question is whether this condition will offend rights of the accused under Article 21 of the Constitution of India.

We request Mr. Vinay Navare, learned Senior Advocate to assist us as amicus curiae on both the issues. Registry to provide a complete set of paper book to the learned Senior Counsel as well as a copy of this order.

List on 14.08.2023."

3.1 We have heard Shri Vinay Navare, the learned senior counsel appointed as Amicus Curiae, Shri Varun Mishra, the learned counsel appearing for the appellant and Shri Vikramjeet Banerjee, the learned Additional Solicitor General of India for the first respondent-Narcotics Control Bureau.

CONDITIONS OF BAIL

4. Section 439 of the Code of Criminal Procedure,1973 (for short, 'the CrPC') deals with the power of a Court of Sessions or a High Court to grant bail in non-bailable offences. We are reproducing Section 439 for ready reference:

> **"439. Special powers of High Court or Court of Session regarding bail**.—(1) A High Court or Court of Session may direct—
>
> **(a) that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in sub-section (3) of Section 437, may impose any condition which it considers necessary for the purposes mentioned in that sub-section;**
>
> (b) that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified:
>
> Provided that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Session or which, though not so triable, is punishable

with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice:

[Provided further that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence triable under sub-section (3) of Section 376 or Section 376-AB or Section 376-DA or Section 376-DB of the Indian Penal Code (45 of 1860), give notice of the application for bail to the Public Prosecutor within a period of fifteen days from the date of receipt of the notice of such application.]

[(1-A) The presence of the informant or any person authorised by him shall be obligatory at the time of hearing of the application for bail to the person under sub-section (3) of Section 376 or Section 376-AB or Section 376-DA or Section 376-DB of the Indian Penal Code (45 of 1860)].

(2) A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody."

Section 437(3) reads thus:

"**437. When bail may be taken in case of non-bailable offence.**—

(1) .....

(2).....

(3) When a person accused or suspected of the commission of an offence punishable with imprisonment which may extend to seven years or more or of an offence under Chapter VI, Chapter XVI or Chapter XVII of the Indian Penal Code (45 of 1860) or abetment of, or conspiracy or attempt to commit, any such offence, is released on bail under sub-section (1), the [Court shall impose the conditions,—

(a) that such person shall attend in accordance with the conditions of the bond executed under this Chapter,

(b) that such person shall not commit an offence similar to the offence of which he is accused, or suspected, of the commission of which he is suspected, and

(c) that such person shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer or tamper with the evidence,

and may also impose, in the interests of justice, such other conditions as it considers necessary.]

(4) ……"

4.1 In this case, we are concerned with the offences under the NDPS Act which are punishable with imprisonment of seven years or more. The provision relating to bail is contained in Section 37 of the NDPS Act, which reads thus:

> **"37. Offences to be cognizable and non-bailable**.—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—
>
> (a) every offence punishable under this Act shall be cognizable;
>
> (b) no person accused of an offence punishable for [offences under Section 19 or Section 24 or Section 27-A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless—
>
> (i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and
>
> (ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.
>
> (2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure,

> 1973 (2 of 1974), or any other law for the time being in force on granting of bail]"

Under Section 37 of the NDPS Act, the Court's power to grant bail is constrained by Sub-section 1(b)(ii). However, once a case is made out for a grant of bail in accordance with Section 37, the conditions of bail will have to be in terms of Section 437(3) of the CrPC. The reason is that because of Section 52 of the NDPS Act, the provisions of the CrPC apply to the arrests made under the NDPS Act insofar as they are not inconsistent with the NDPS Act.

5. Apart from conditions (a) to (c) in Section 437(3) of the CrPC, there is a power to impose additional conditions "in the interest of justice". The scope of the concept of "interest of justice" in Section 437(3) of the CrPC has been considered by this Court in the case of ***Kunal Kumar Tiwari v. State of Bihar***[2]. In paragraph 9, this Court held thus:

> *"9. There is no dispute that clause (c) of Section 437(3) allows courts to impose such conditions in the interest of justice. We are aware that palpably such wordings are capable of accepting broader meaning.* ***But such conditions cannot be arbitrary, fanciful or extend beyond the ends of the provision. The phrase "interest of justice" as used under the clause (c) of Section 437(3) means "good administration of justice" or "advancing the trial process" and inclusion of broader meaning should be shunned because of purposive interpretation****."*
>
> (emphasis added)

6. In view of Section 438(2)(iv) of the CrPC, while granting anticipatory bail, the Court is empowered to impose the conditions as provided in Section 437(3) of the Cr. PC. While dealing with the condition which can be imposed while granting anticipatory bail, this Court, in the case of ***Munish Bhasin v. State (NCT of Delhi)***[3], held thus:

> *"10.* ***It is well settled that while exercising discretion to release an accused under Section 438 of the Code***

2 (2018) 16 SCC 74

3 [2009] 2 SCR 806 : (2009) 4 SCC 45

> ***neither the High Court nor the Sessions Court would be justified in imposing freakish conditions.*** *There is no manner of doubt that the court having regard to the facts and circumstances of the case can impose necessary, just and efficacious conditions while enlarging an accused on bail under Section 438 of the Code. However, the accused cannot be subjected to any irrelevant condition at all."*
>
> (emphasis added)

7. A broader meaning cannot be assigned to the words "interest of justice" in Section 437(3) of Cr. PC. By borrowing the language used by this Court in the above decisions, we can say that the bail conditions cannot be fanciful, arbitrary or freakish. The object of imposing conditions of bail is to ensure that the accused does not interfere or obstruct the investigation in any manner, remains available for the investigation, does not tamper with or destroy evidence, does not commit any offence, remains regularly present before the Trial Court, and does not create obstacles in the expeditious conclusion of the trial. The Courts have imposed a condition that the accused should cooperate with the investigation when bail is granted before filing the final report or chargesheet. Cooperating with the investigation does not mean that the accused must confess. The conditions incorporated in the order granting bail must be within the four corners of Section 437(3). The bail conditions must be consistent with the object of imposing conditions. While imposing bail conditions, the Constitutional rights of an accused, who is ordered to be released on bail, can be curtailed only to the minimum extent required. Even an accused convicted by a competent Court and undergoing a sentence in prison is not deprived of all his rights guaranteed by Article 21 of the Constitution. This Court, in the case of ***State of A.P. v. Challa Ramkrishna Reddy***,[4] reiterated the settled position by holding as follows:

> *"22. Right to life is one of the basic human rights. It is guaranteed to every person by Article 21 of the Constitution and not even the State has the authority to violate that right. A prisoner, be he a convict or undertrial or a detenu, does not cease to be a human being.* ***Even when lodged***

4 [2000] 3 SCR 644 : (2000) 5 SCC 712

in the jail, he continues to enjoy all his fundamental rights including the right to life guaranteed to him under the Constitution. On being convicted of crime and deprived of their liberty in accordance with the procedure established by law, prisoners still retain the residue of constitutional rights."

(emphasis added)

7.1. We are dealing with a case of the accused whose guilt is yet to be established. So long as he is not held guilty, the presumption of innocence is applicable. He cannot be deprived of all his rights guaranteed under Article 21. The Courts must show restraint while imposing bail conditions. Therefore, while granting bail, the Courts can curtail the freedom of the accused only to the extent required for imposing the bail conditions warranted by law. Bail conditions cannot be so onerous as to frustrate the order of bail itself. For example, the Court may impose a condition of periodically reporting to the police station/Court or not travelling abroad without prior permission. Where circumstances require, the Court may impose a condition restraining an accused from entering a particular area to protect the prosecution witnesses or the victims. But the Court cannot impose a condition on the accused to keep the Police constantly informed about his movement from one place to another. The object of the bail condition cannot be to keep a constant vigil on the movements of the accused enlarged on bail. The investigating agency cannot be permitted to continuously peep into the private life of the accused enlarged on bail, by imposing arbitrary conditions since that will violate the right of privacy of the accused, as guaranteed by Article 21. If a constant vigil is kept on every movement of the accused released on bail by the use of technology or otherwise, it will infringe the rights of the accused guaranteed under Article 21, including the right to privacy. The reason is that the effect of keeping such constant vigil on the accused by imposing drastic bail conditions will amount to keeping the accused in some kind of confinement even after he is released on bail. Such a condition cannot be a condition of bail.

8. In view of sub-section (2) of Section 441 of the CrPC, the conditions imposed by the Court while granting bail always stand incorporated in the bail bond executed by the accused. Therefore, the accused is bound by the conditions imposed while granting bail. If the accused, after being enlarged on bail, commits a breach of bail conditions or commits any offence, the Courts always have the power to cancel the bail.

9. A condition cannot be imposed while granting bail which is impossible for the accused to comply with. If such a condition is imposed, it will deprive an accused of bail, though he is otherwise entitled to it.

CONDITION OF DROPPING PIN ON GOOGLE MAP

10. Firstly, we will deal with the issue of the condition of dropping a PIN on Google Maps. The condition imposed on the appellant of dropping a PIN on Google Map gives an impression that the condition will enable the first respondent Narcotics Control Bureau (NCB) to monitor the movements of the accused on a real-time basis, which will be violative of the right to privacy guaranteed under Article 21 of the Constitution of India. To understand the technical aspects of "dropping a PIN on Google Map", we issued a notice to Google LLC, having its office in the USA. Accordingly, Shri R. Suresh Babu, authorised signatory of Google LLC, has filed an affidavit. Paragraphs 5 to 10 of his affidavit read thus:

> "5. Google Maps is a web and app-based service that enables users to search for and navigate to local places. It inter alia offers real-time traffic conditions, and route planning for travelling by foot, car, bike, air, and public transportation. Google Maps can be accessed through the Google Maps application available on mobiles or through a web browser at www.google.com/maps.
>
> 6. **One of the features available to users on Google Maps is the ability of users to drop a 'PIN' on a location of their choosing on the map. Dropping a PIN, allows the user to mark or identify a location on the map without necessarily requiring access to the user's location data.** Users may drop a PIN either on the mobile application or on the web browser. To drop a PIN, a user may either:

a. press and hold the desired location where the PIN is to be dropped on the map on the mobile application; or

b. click on the desired location on the map on a web browser.

7. Upon dropping the PIN, the user dropping the PIN can identify the specific coordinates of the location on the map. Through the Google Maps app or through a web browser, the user dropping the PIN may opt to get directions to the location, mark the location with a label, add a business address to the location, or share the location with another user.

8. The PIN identifies and marks a specific location of the user's choosing on Google Maps. The PIN need not be dropped at the location where the user/the user's device is located at the time of sharing the PIN. The PIN dropped and shared need not be the real-time location of the user sharing the PIN.

9. Google Maps allows users to share information, such as the PIN, with third parties. This is explained in Google's privacy policy, which is available at https:policies.google.com/privacy?hl=en-US, and shares as follows: "*Many of our services let you share information with other people, and* ***you have control over how you share*** *[emphasis supplied]". Users consent to the privacy policy* when they create a Google Account. In this case, if a user wants to share a PIN, they can do so by clicking on the 'share' button. This generates a link to Google Maps that the user can share with others through messaging platforms or other modes of online communication. When clicked, the link directs users (having access to the link) to the location where the PIN was dropped on the map.

10. The Google Maps PIN feature, which includes the creation of a PIN or the sharing of such a PIN with another user, does not impinge on the user's privacy as the user has full control over sharing of such information. The user with access to the link can only access the static

location pinned and shared on Google Maps. **The pinned location does not enable real-time tracking of the user or their device.** Even if the PIN were to coincide with a user's location at a given time, this would (a) be the static location pinned by the user; and (b) only be accessible to others when a user affirmatively shares the PIN with them by clicking on the share button."

(emphasis added)

10.1. In paragraph 10 of the affidavit, Google LLC stated that the user has full control over sharing PINs with other users. Moreover, it does not impinge on the user's privacy, as the user retains full control. Most importantly, it is stated that the PIN location does not enable real-time tracking of the user or the user's device. Therefore, the condition of the accused dropping a pin on Google Maps, as it stands, is completely redundant as the same does not help the first respondent.

10.2. Imposing any bail condition which enables the Police/ Investigation Agency to track every movement of the accused released on bail by using any technology or otherwise would undoubtedly violate the right to privacy guaranteed under Article 21. In this case, the condition of dropping a PIN on Google Maps has been incorporated without even considering the technical effect of dropping a PIN and the relevance of the said condition as a condition of bail. This cannot be a condition of bail. The condition deserves to be deleted and ordered accordingly. In some cases, this Court may have imposed a similar condition. But in those cases, this Court was not called upon to decide the issue of the effect and legality of such a condition.

THE CONDITION OF FURNISHING CERTIFICATE OF THE EMBASSY

11. Now, we come to the decision of the ***Supreme Court Legal Aid Committee***[1] relied upon by the High Court. In the first part of paragraph 15, the prayers made in the petition filed before this Court have been set out. We are quoting the relevant part of paragraph 15, which reads thus:

> ***"15. But the main reason which motivated the Supreme Court Legal Aid Society to file this petition under Article 32 of the Constitution was the delay in the disposal of cases under the Act involving foreigners****. The reliefs claimed included a direction to treat further detention of foreigners, who were languishing in jails as undertrials under the Act for a period exceeding two years, as void or in any case they be released on bail and it was further submitted by counsel that their cases be given priority over others. When the petition came up for admission it was pointed out to counsel that such an invidious distinction between similarly situate undertrials who are citizens of this country and who are foreigners may not be permissible under the Constitution and even if priority is accorded to the cases of foreigners it may have the effect of foreigners being permitted to jump the queue and slide down cases of citizens even if their cases are old and pending since long. Counsel immediately realised that such a distinction if drawn would result in cases of Indian citizens being further delayed at the behest of foreigners, a procedure which may not be consistent with law. He, therefore, rightly sought permission to amend the cause-title and prayer clauses of the petition which was permitted. In substance the petitioner now prays that all undertrials who are in jail for the commission of any offence or offences under the Act for a period exceeding two years on account of the delay in the disposal of cases lodged against them should be forthwith released from jail declaring their further detention to be illegal and void and pending decision of this Court on the said larger issue, they should in any case be released on bail. ……"*
>
> (emphasis added)

In the same paragraph 15, directions have been issued which read thus:

> "We, therefore, direct as under:
>
> *(i)* ***Where the undertrial is accused of an offence(s) under the Act prescribing a punishment of imprisonment of five years***

or less and fine, such an undertrial shall be released on bail if he has been in jail for a period which is not less than half the punishment provided for the offence with which he is charged and where he is charged with more than one offence, the offence providing the highest punishment. If the offence with which he is charged prescribes the maximum fine, the bail amount shall be 50% of the said amount with two sureties for like amount. If the maximum fine is not prescribed bail shall be to the satisfaction of the Special Judge concerned with two sureties for like amount.

(ii) Where the undertrial accused is charged with an offence(s) under the Act providing for punishment exceeding five years and fine, such an undertrial shall be released on bail on the term set out in (i) above provided that his bail amount shall in no case be less than Rs 50,000 with two sureties for like amount.

(iii) Where the undertrial accused is charged with an offence(s) under the Act punishable with minimum imprisonment of ten years and a minimum fine of Rupees one lakh, such an undertrial shall be released on bail if he has been in jail for not less than five years provided, he furnishes bail in the sum of Rupees one lakh with two sureties for like amount.

(iv) Where an undertrial accused is charged for the commission of an offence punishable under Sections 31 and 31-A of the Act, such an undertrial shall not be entitled to be released on bail by virtue of this order.

The directives in clauses (i), (ii) and (iii) above shall be subject to the following general conditions:

(i) ***The undertrial accused entitled to be released on bail shall deposit his passport with the learned Judge of the Special Court concerned and if he does not hold a passport, he shall file an affidavit to that effect in the form that may be prescribed by the learned Special Judge.*** *In the latter case the learned Special Judge will, if he has reason to doubt the accuracy of the statement, write to the Passport Officer concerned to verify the statement and the Passport Officer shall verify his record and send a reply within three weeks. If he fails to reply within the said time, the learned Special Judge will be entitled to act on the statement of the undertrial accused;*

(ii) *the undertrial accused shall on being released on bail present himself at the police station which has prosecuted him at least once in a month in the case of those covered under clause (i), once in a fortnight in the case of those covered under clause (ii) and once in a week in the case of those covered by clause (iii), unless leave of absence is obtained in advance from the Special Judge concerned;*

(iii) ***the benefit of the direction in clauses (ii) and (iii) shall not be available to those accused persons who are, in the opinion of the learned Special Judge, for reasons to be stated in writing, likely to tamper with evidence or influence the prosecution witnesses****;*

(iv) in the case of undertrial accused who are foreigners, the Special Judge shall, besides impounding their passports, insist on a certificate of assurance from the Embassy/ High Commission of the country to which the foreigner-accused belongs, that the said accused shall not leave the country and shall appear before the Special Court as and when required;

(v) the undertrial accused shall not leave the area in relation to which the Special Court is constituted except with the permission of the learned Special Judge;

(vi) the undertrial accused may furnish bail by depositing cash equal to the bail amount;

(vii) the Special Judge will be at liberty to cancel bail if any of the above conditions are violated or a case for cancellation of bail is otherwise made out; and

(viii) after the release of the undertrial accused pursuant to this order, the cases of those undertrials who have not been released and are in jail will be accorded priority and the Special Court will proceed with them as provided in Section 309 of the Code."

(emphasis added)

However, paragraph 16 is relevant, which reads thus:

"***16. We may state that the above are intended to operate as one-time directions for cases in which the accused persons are in jail and their trials are delayed. They are not intended to interfere with the Special Court's power to grant bail under Section 37 of the Act. The Special Court will be free to exercise that power keeping in view the complaint of inordinate delay in the disposal of the pending cases.*** *The Special Court will, notwithstanding the directions, be free to cancel bail if the accused is found to be misusing it and grounds for cancellation of bail exist. Lastly, we grant liberty to apply in case of any difficulty in the implementation of this order.*"

(emphasis added)

11.1. The directions contained in paragraph 15 were to operate as one-time directions applicable only to the pending cases of the accused who were in jail on the date of the judgment. These conditions were required to be incorporated in the order while releasing an accused on bail as a one-time measure.

Paragraph 16 clarifies that if a bail application is made to the Special Court with a grievance regarding inordinate delay in the disposal of pending cases, the Special Court will be empowered to exercise power to grant bail in light of what is held in paragraph 15. Therefore, it is not necessary that in every case where bail is granted to an accused in an NDPS case who is a foreign national on the ground of long incarceration of more than 50% of the minimum sentence, the condition of obtaining a 'certificate of assurance' from the Embassy/High Commission should be incorporated. It will depend on the facts of each case.

12. Even if such a condition is incorporated, on an application made by the accused, the concerned Embassy/High Commission declines or fails to issue the certificate within a reasonable time, say within a period of seven days, the Court always has the power to dispense with the said condition. Grant of such a certificate by the Embassy/ High Commission is beyond the control of the accused to whom bail is granted. Therefore, when the Embassy/High Commission does not grant such a certificate within a reasonable time, as explained above, the accused, who is otherwise held entitled to bail, cannot be denied bail on the ground that such a condition, which is impossible for the accused to comply with, has not been complied with. Hence, the Court will have to delete the condition. If the Embassy/High Commission records reasons for denying the certificate and the reasons are based on the adverse conduct of the accused based on material, the Court can always consider the reasons recorded while considering an application for dispensing with the condition. However, the Courts must remember that the accused has no right to compel the Embassy/High Commission to issue such a certificate. There can be very many reasons for recording adversely which again cannot be the basis to deny bail already granted. In such a case, instead of the condition of obtaining such a certificate, the condition of surrendering the passport and regularly reporting to the local police station/Trial Court can always be imposed, depending upon the facts of each case.

13. Coming to the facts of the case, bail has been granted to the appellant firstly on the ground that the appellant has been implicated based on statements recorded under Section 67 of the NDPS Act, and that such statements are entirely inadmissible in view of the decision

of this Court in the case of ***Tofan Singh v. State of Tamil Nadu***[5]**.** So, bail has been granted on merits as well. Secondly, the bail has also been granted relying upon what is held in paragraph 15 of the decision in the case of ***Supreme Court Legal Aid Committee***[1]**.** As the bail was granted on merits by relying upon the decision of this Court in the case of ***Tofan Singh***[2], there was no reason for the High Court to have imposed all the onerous conditions incorporated in paragraph 15 of the decision in the case of ***Supreme Court Legal Aid Committee***[1]**.**

14. Therefore, in view of the above discussion, we are of the view that it is not necessary to refer the case to a larger Bench for reconsideration of condition No. (iv) in paragraph 15 of the decision in the case of ***Supreme Court Legal Aid Committee***[1]**.**

15. Based on our findings on the two issues mentioned above, we direct that the two conditions in the order granting bail to the appellant, namely, obtaining a certificate from the Embassy/High Commission and dropping a pin of Google Maps, shall stand deleted.

16. The case shall be listed on 15 July 2024 for passing final orders after considering the compliances made by the appellant so far.

Result of the case: Listed for final orders.

†*Headnotes prepared by:* Ankit Gyan

5 [2020] 12 SCR 583 : (2021) 4 SCC 1

[2024] 7 S.C.R. 117 : 2024 INSC 470

Commissioner of Central Excise, Jaipur -II
v.
M/s Miraj Products Pvt. Ltd.

(Civil Appeal Nos. 143-147 of 2010)

08 July 2024

[Abhay S. Oka* and Pankaj Mithal, JJ.]

Issue for Consideration

Whether the commodity sold by the respondent-assessee will attract Section 4A of the Central Excise Act, 1944.

Headnotes†

Central Excise Act, 1944 – s.4A – Valuation of excisable goods with reference to retail sale price – When not applicable – Standards of Weight & Measures (Packaged Commodity) Rules, 1977 – rr.2 (q), (g), (x)(iii), 34 – HDPE (High-Density Polyethylene Bag) bags containing 100 poly packs containing 33 plus one smaller pack of chewing tobacco sold by the respondent, if was meant for retail sale and therefore be treated as a group package or it was a wholesale package not meant for retail sale:

Held: In view of sub-section (1) of s.4A of the Excise Act, the question is whether there was any requirement in the 1977 Rules to declare the retail sale price of the commodity on the package – What is relevant is whether the package is of such nature that attracts any of the provisions of the 1977 Rules, which mandatorily require the mention of retail price on the package – In case of a package that does not attract provisions of the 1977 Rules regarding mentioning the retail price, even if the retail price is mentioned on the package, that itself will not attract sub-section (1) of s.4A – However, on facts, there is no requirement to deal with the issue of whether a poly pack containing 33 plus one small package was intended for retail sale as the specific case made out by the respondent in reply to the show cause notices that it was selling HDPE bags containing 100 poly packs containing 33 plus one smaller pack was not rejected by the Commissioner – Therefore, the respondent was selling HDPE bags containing 100 poly packs each to the distributors and dealers – The 1977 Rules do not require the display of price on such HDPE bags – Even

* Author

assuming that 100 poly packs were retail packages, HDPE bags would be covered by the definition of 'wholesale package' as defined in clause (iii) of r.2(x) of the 1977 Rules – Thus, the HDPE bags are not group packages within the meaning of r.2(g) – s.4A(1) of the Excise Act was not applicable to the goods subject matter of the show cause notices – Impugned judgment of the Tribunal not interfered with. [Paras 15-18]

Case Law Cited

M/s.Varnica Herbs v. Central Board of Excise & Customs, New Delhi, **2004 (163) ELT 160 (Madras);** *Commissioner of Central Excise, Vapi v. Kraftech Products Inc.* **[2008] 5 SCR 251 : (2008) 12 SCC 321 – referred to.**

List of Acts

Central Excise Act, 1944; Standards of Weight & Measures (Packaged Commodity) Rules, 1977.

List of Keywords

Excisable goods; Excise duty; Customs, Excise and Service Tax Appellate Tribunal; Show cause notices; Retail Sale; Retail sale price; Chewing tobacco; Poly packs; HDPE bags; Retail packages, Group packages; Wholesale package; MRP on poly packs; Retail sale of the poly packs; Display of price; Retail dealers; Retail price of the goods; Packages intended for retail sale; Declaration of retail sale price of the commodity on package.

Case Arising From

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 143-147 of 2010

From the Judgment and Order dated 07.11.2008 of the Customs, Excise and Service Tax Appellate Tribunal, Principal Bench, New Delhi in Final Order Nos.861-865 of 2008 in Appeal Nos. E/3675, 3313/2005 – Ex. [DB] & 245/06 & 979-980/07

Appearances for Parties

Ms. Nisha Bagchi, Ms. B. Sunita Rao, Ms. Gunmaya S. Mann, Tarun Kumar Sobti, Shambhavi Singh, Mukesh Kumar Maroria, Siddhant Kohli, Ms. Chinmayee Chandra, Ms. Aakansha Kaul, Shiv Mangal Sharma, Rupesh Kumar, Randhir Singh, Advs. for the Appellant.

Commissioner of Central Excise, Jaipur -II v. M/s Miraj Products Pvt. Ltd.

V. Lakshmikumaran, Ms. Charanya Lakshmikumaran, Ms. Apeksha Mehta, Ms. Neha Choudhary, Ms. Falguni Gupta, Ms. Umang Motiyani, M.P. Devanath, Punit Dutt Tyagi, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Judgment

Abhay S. Oka, J.

FACTUAL DETAILS

1. These appeals take exception to the judgment and order dated 7th November 2008 passed by the Customs, Excise and Service Tax Appellate Tribunal (for short, 'the Tribunal'). The issue involved, in short, is whether the goods sold by the respondent-assessee are covered by Section 4 or Section 4A of the Central Excise Act, 1944 (for short, 'The Excise Act'). The proceedings commenced based on the show cause notices issued to the respondent-assessee. The first show cause notice issued on 22nd April 2004, pertains to a brief period in April 2003. The second show cause notice is of 31st May 2004 covering the period from May 2003 till December 2003. By a notification dated 1st March 2002 issued under sub-section (1) of Section 4A of the Excise Act, tobacco was notified by including the same at Sr.no.24A in the Notification with effect from 1st March 2003. The allegations made in both the show cause notices are similar. The show cause notice dated 22nd April 2004 was supplemented by an addendum dated 10th June 2004. The allegation against the respondent-assessee in the show cause notices was that the assessee was packing 33 pouches of 6 gms each of chewing tobacco and one pouch of 15 gms of chewing tobacco in a larger poly pack. It is alleged that MRP (maximum retail price) of Rs. 1 per pouch is mentioned on the pouches carrying a quantity of 6 gms, and MRP of Rs. 3 was mentioned on the pouch carrying 15 gms quantity. It is alleged that on the larger poly pack, a weight of 213 gms and MRP of Rs. 36 was mentioned. It is alleged in the show cause notice that the larger poly packs are group packages as defined in Rule 2(g) of the Standards of Weight & Measures (Packaged Commodity) Rules, 1977 (for short, 'the said Rules'). It is alleged that the group package made by the respondent was intended for retail sale. Further allegation in the show cause notice is that the weight of each group package

exceeds 10 gms. Therefore, the group packages of the respondent-assessee are not covered by the exemption under Rule 34(b) of the said Rules. Reliance was placed on a decision of the Madras High Court in the case of **M/s.Varnica *Herbs v. Central Board of Excise & Customs, New Delhi*** [1]. Therefore, the respondent-assessee was called upon to pay duty on the poly pack sold by the assessee in the manner provided under Section 4A of the Excise Act. Apart from the differential duty, a demand was made for interest and penalty.

2. The respondent replied to the show cause notice by contending that 100 poly packs, each containing 33 small pouches of 6 gms each, and one pouch of 15 gms are being put into one HDPE bag (High-Density Polyethylene Bag). The quantity of 15 gms is kept in a zipper pouch, on which duty is paid under Section 4A of the Excise Act on MRP. A factual contention was raised in the reply by the respondent-assessee that it is not selling poly packs of 33 small pouches directly to the customers. It is stated that the assessee is clearing only HDPE bags containing 100 poly packs, and HDPE bags are being sold to distributors or dealers. Therefore, the assessee did not make a retail sale. It is contended by the respondent that poly packs containing 33 pouches of 6 gms quantity are not group packages within the meaning of Rule 2(g) of the said Rules, and the said poly packs and HDPE bags are wholesale packages as defined in Rule 2(x) of the said Rules. Therefore, the contention is that Section 4A will have no application.

3. After hearing the respondent, the order-in-original was passed by the Commissioner. By the said order dated 19th July 2005, the contentions raised by the respondent-assessee were rejected, and the demand made in the show cause notices was confirmed. The Commissioner referred to the declarations made on poly pack and held that it was in terms of Rule 16 of the said Rules, and Rule 16 is a part of Chapter II of the said Rules, which deals with retail sales. It was held that a declaration on the poly packs confirms the requirement of Rule 6 and Rule 16 of Chapter II of the said Rules, and therefore, poly packs were intended for retail sale. The order further records that the sale price was mentioned on the poly pack,

1 2004 (163) ELT 160 (Madras)

which was not the requirement of Rule 29 of the said Rules, which deals with declarations on the wholesale packages. However, the Commissioner held that the assessee's HDPE bags, which contain 100 larger poly pack packages and do not declare the sale price, would be wholesale packages. The Commissioner rejected the respondent's contention that the poly packs were not sold in retail by holding that whether the manufacturer sold them in retail or not is relevant and what is material is whether the goods were intended for retail sale.

4. By the impugned judgment, the Tribunal held that the decision of the Madras High Court in the case of ***Varnica Herbs***[1] was not a binding precedent. The Tribunal relied upon a decision of this Court in the case of ***Commissioner of Central Excise, Vapi v. Kraftech Products Inc.***[2]**.** The Tribunal proceeded to set aside the Commissioner's order.

SUBMISSIONS

5. The learned counsel appearing for the appellant submitted that the decision of this Court in the case of ***Commissioner of Central Excise, Vapi***[2]*,* has no application as the assessee in the said case was selling three sachets of 3 gms of hair dye in one pack. Learned counsel pointed out that thus the total weight of the pack was 9 gms, which was covered by the exemption under Section 34(b) of the said Rules. The learned counsel pointed out that the weight of poly packs and HDPE bags is much more than 10 gms in the present case. Learned counsel submitted that what was being sold by the respondent was a group package meant for retail sale, and therefore, Section 4A was rightly applied by the Commissioner. Learned counsel submitted that even otherwise, as the poly packs are not sold by weight or measure, Rule 34 (b) of the said Rules has no application. Learned counsel submitted that the Tribunal had not considered the factual position in this case, which the Commissioner considered in detail. Learned counsel further submitted that one pouch of 15 gms quantity of chewable tobacco forms part of the poly pack on which the respondent was admittedly paying duty in accordance with Section 4A of the Excise Act. Learned counsel has taken us through the relevant provisions of the said Rules.

2 [2008] 5 SCR 251 : (2008) 12 SCC 321

6. The learned counsel representing the respondent supported the impugned judgment and urged that the principles laid down by this Court in the case of ***Commissioner of Central Excise, Vapi***[2], will squarely apply. It was submitted that HDPE bags containing 100 poly packs containing 34 pouches was not meant for retail sale; therefore, it cannot be treated as a group package, and it has to be a wholesale package that is not meant for retail sale. Learned counsel submitted that there is no need to interfere with the impugned judgment, which takes the correct view.

CONSIDERATION OF SUBMISSIONS

7. It is not in dispute that the respondent is dealing with chewing tobacco. From 7th April 2003, the respondent started the practice of packing together 33 pouches of 6 gms each and one pouch of 15 gms of chewing tobacco in a larger poly pack. The Revenue contends that as the larger poly pack has weight and MRP printed on it, the same was a group package intended for retail sale. The case made out in the show cause notices is that the poly pack contains a quantity of more than 10 gms of chewing tobacco, and therefore, exemption under Rule 34(b) of the said Rules will not apply. As can be seen from Clause (b) of Rule 34 of the said Rules, the exemption will apply to any package containing a commodity if the net weight of the commodity is 10 gms or less and if the same is being sold by weight. The stand of the respondent-assessee in reply to the show cause notices is that though the poly packs may have MRP printed on it, it was never intended for retail sale. Moreover, the respondent was packing 100 poly packs in one HDPE bag, and the HDPE bags were sold to distributors. The weight of the chewing tobacco in one poly pack or HDPE bag is more than 10 gms. Therefore, Rule 34(b) of the said Rules has no application.

8. As far as facts are concerned, even in the order-in-original passed by the Commissioner, which was impugned before the Tribunal and in particular, clause (d) of paragraph 16, it is accepted that the respondent is packing 100 poly pack packages in one HDPE bag.

9. The real controversy is whether the commodity sold by the respondent will attract Section 4A of the Excise Act. Sub-section (1) of Section 4A of the Excise Act reads thus:

> **"Section 4A. Valuation of excisable goods with reference to retail sale price. –**

> (1) The Central Government may, by notification in the Official Gazette, specify any goods, **in relation to which it is required, under the provisions of the Standards of Weights and Measure (PC) Rules, 1976 (60 of 1976) or the rules made thereunder or under any other law for the time being in force, to declare on the package thereof the retail sale price of such goods, to which the provisions of sub-section (2) shall apply."**
>
> (emphasis added)

10. In the facts of the case, chewable tobacco has been notified under sub-section (1) of Section 4A. The question is whether the provisions of the said Rules framed under the Standards of Weights and Measure (PC) Rules, 1977, require a declaration of retail sale on the packages of the respondent. In short, the controversy is whether the packages made by the respondent-assessee are such that under the said Rules, there is a requirement to declare the retail price of the goods on the packages.

11. Now, we turn to the said Rules. Chapter II of the said Rules deals with the provisions applicable to packages intended for retail sale. Retail sale is defined in Rule 2(q) of the said Rules, which reads thus:

> **"(q) "retail sale"** in relation to a commodity, means the sale, distribution or delivery of such commodity through retail sales agencies or other instrumentalities for consumption by an individual or group of individuals or any other consumer;"

Therefore, to attract the definition of retail sale, a commodity has to be sold, distributed, or delivered for consumption by an individual, a group of individuals, or any other consumer. Thus, the sale or distribution of a commodity to a dealer who, in turn, sells the commodity to retail dealers will not be a retail sale.

12. Rule 2(g) defines group package which reads thus:

> **"2(g) "group package"** means a package intended for retail sale, containing two or more individual packages, or individual pieces, of similar, but not identical (whether in quantity or size), commodities;

> Explanation.- Commodities which are generally the same but differ in weight, measure or volume, appearance or quality are similar but not identical commodities;"

Therefore, a package can become a group package, provided it is intended for retail sale. In this case, there is no dispute that the respondent's poly packs and HDPE bags contain more than 2 individual packages of similar commodities but are not identical in quantity. The question is whether the package made by the respondent was intended for retail sale.

13. Rule 2(x) of the said Rule defines "wholesale package", which reads thus:

> **"(x) "wholesale package"** means a package containing-
>
> (i) a number of retail packages, where such first mentioned package is intended for sale, distribution or delivery to an intermediary and is not intended for sale direct to a single consumer; or
>
> (ii) a commodity sold to an intermediary in bulk to enable such intermediary to sell, distribute or deliver such commodity to the consumer in smaller quantities; or
>
> (iii) packages containing ten or more than ten retail packages provided that the retail packages are labelled as required under the rules."

14. Now, we turn to the order-in-original and the findings recorded therein. The Commissioner held that Rules 6 and 16 form a part of Chapter II of the said Rules and, therefore, apply to the packages intended for retail sale. The Commissioner found that the poly packs contained a declaration in terms of both Rule 6 and Rule 16. The Commissioner referred to the format of declaration to be made under Rule 29, which is a part of Chapter IV of the said Rules, which did not apply to packages intended for retail sale. The Commissioner held that Rule 29 does not require a declaration of sale price on the wholesale package. The Commissioner found that the poly pack containing 33 plus one small packages contained a declaration of the price. Therefore, the Commissioner held that the poly packs were intended for retail sale. Otherwise, there was no reason to mention MRP on the poly packs. The Commissioner held that the intention to

make retail sale of the poly packs was clear, and, therefore, whether poly packs were sold by way of retail sale was irrelevant.

15. As noted earlier, in view of sub-section (1) of Section 4A, the question is whether there is any requirement in the said Rules to declare the retail sale price of the commodity on the package. What is relevant is whether the package is of such nature that attracts any of the provisions of the said Rules, which mandatorily require the mention of retail price on the package. In case of a package that does not attract provisions of the said Rules regarding mentioning the retail price, even if the retail price is mentioned on the package, that itself will not attract sub-section (1) of Section 4A of the Excise Act.

16. However, on facts, we may not be required to deal with the issue of whether a poly pack containing 33 plus one small package was intended for retail sale. The reason is that the specific case made out by the respondent in reply to the show cause notices was that the respondent was selling HDPE bags containing 100 poly packs containing 33 plus one smaller pack has not been rejected by the Commissioner. In fact, the Commissioner seems to have accepted the contention, as seen from Clause (d) of paragraph 16 of the order-in-original. In clause (d), the Commissioner held thus:

> **"(d) Further the intentions of the assessee that HDPE bag is a wholesale package and the larger polypack packages are group packages intended for retail sale is also expressed from the fact that there is no requirement under Rule 29 of the Standards of Weights & Measures (Packaged Commodities), Rules, 1977 of mentioning sale price or unit sale price or the MRP on a wholesale package whereas their larger polypack package contains the declaration "MAX UNIT SALE PRICE" and** they are not declaring sale price on HDPE bag (it has also been admitted by them in the reply to Show Cause Notice that their HDPE bag is a wholesale package), therefore, this larger polypack package containing the declaration "MAX UNIT SALE PRICE" cannot be considered as a wholesale package but can be considered only a group package intended for retail sale. **Only the HDPE bag of the assessee, which contains 100 larger polypack packages and**

does not contain declaration of sale price, would be a wholesale package."

(emphasis added)

17. In so many words, the Commissioner held that an HDPE bag containing 100 poly packs does not contain a declaration of selling price and therefore, it would be a wholesale package. There is no finding recorded that what is distributed or sold by the respondent is a poly pack containing 33 plus one small pack. The respondent's case that 100 poly pack packages are being put in one HDPE bag has been accepted by the Commissioner. Therefore, the respondent is selling HDPE bags containing 100 poly packs each to the distributors and dealers. The said Rules do not require the display of price on such HDPE bags. Even assuming that 100 poly packs were retail packages, HDPE bags would be covered by the definition of 'wholesale package' as defined in clause (iii) of Rule 2(x) of the said Rules. Thus, the HDPE bags are not group packages within the meaning of Rule 2(g).

18. Though the impugned judgment is not satisfactorily worded, for the reasons which were recorded above, the ultimate conclusion recorded in the impugned judgment that Section 4A(1) of the Excise Act was not applicable to the goods subject matter of the show cause notices, cannot be faulted with. Hence, there is no reason to interfere with the impugned judgment.

19. Accordingly, the appeals are dismissed with no order as to costs.

Result of the case: Appeals dismissed.

†*Headnotes prepared by:* Divya Pandey

[2024] 7 S.C.R. 127 : 2024 INSC 472

Sardar Ravi Inder Singh & Anr.
v.
State of Jharkhand & Anr.

(Criminal Appeal No. 2807 of 2024)

08 July 2024

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

Issue for Consideration

High Court whether erred in dismissing the writ petition filed by the appellants for quashing the complaint filed by the second respondent stating that the contentions raised were rejected in an earlier criminal revision application, which cannot be re-agitated and therefore, there was a bar under Section 362 of the Cr. PC.

Headnotes†

Quashing – Code of Criminal Procedure, 1973 – s.362 – When not applicable – Suit for specific performance of the agreements for sale filed against the appellants by the second respondent and his brother was later withdrawn in view of the out-of-court settlement – Effect on complaint filed by the second respondent – Writ petition filed by the appellants for quashing the complaint was dismissed by the High Court on the ground that there was a bar u/s.362 as the contentions raised were rejected in an earlier criminal revision application, which cannot be re-agitated – Correctness:

Held: High Court lost sight of the fact that it was a substantive petition under Article 226 of the Constitution of India for quashing the complaint on the ground that the continuation of the same was an abuse of the process of law – The second prayer in the writ petition could have been hit by s.362, as the prayer was to quash the order on the application for discharge – But the first prayer was for quashing the complaint itself – Therefore, dismissing the first prayer in the writ petition on the ground of the bar of Section 362 of the Cr.PC was erroneous – Furthermore, the second respondent filed application in the pending suit seeking withdrawal thereof categorically stating that in view of the out-of-court settlement with the appellants, he would not lay any claim in any manner whatsoever over the suit properties – He

* Author

never disputed the correctness of what was stated in the said application, and the order passed permitting the withdrawal of the suit – Thus, he gave up his claim under the agreements and therefore, continuing the complaint would be nothing but an abuse of the process of law – A case was made out to quash the complaint – High Court fell in error in refusing to do so – Complaint quashed. [Paras 15, 16]

Case Law Cited

State of Orissa v. Debendra Nath Padhi [2004] Suppl. 6 SCR 460 **: (2005) 1 SCC 568 – referred to.**

List of Acts

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

List of Keywords

Quashing, Agreements for sale; Suit for specific performance; Suit withdrawn/Withdrawal of suit; Out-of-court settlement; Application for discharge; Same contentions rejected earlier; Giving up claim under the agreements; Continuing the complaint would be abuse of process of law.

Case Arising From

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2807 of 2024

From the Judgment and Order dated 17.07.2017 of the High Court of Jharkhand at Ranchi in WP No.243 of 2016

Appearances for Parties

Krishnan Venugopal, Sr. Adv., M/s. Legal Options, Ms. Sonia Dube, Shatadru Chakraborty, Ms. Kanchan Yadav, Ms. Surbhi Anand, Krishnan Agarwal, Tanishq Sharma, Ms. Saumya Sharma, Advs. for the Appellants.

Saurabh Kumar, Ms. Rose Maria Sebi, Faisal Sherwani, Rajiv Shankar Dwivedi, Jayant Mohan, Ms. Meenakshi Chatterjee, Ms. Adya Shree Dutta, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Abhay S. Oka, J.

1. Leave granted.

FACTUAL ASPECTS

2. In substance, the appellants' prayer in this appeal is to quash the criminal proceedings of a complaint filed by the second respondent, Ganesh Kumar Agiwal. The present appellants are the trustees of Sardar Bahadur Sir Inder Singh (Personal Estate) Trust (for short, "the Trust"). The present appellants and one Gurdev Singh, as the trustees of the said Trust, entered into two separate agreements for sale dated 29th January 2001 (for short "the agreements") in favour of the second respondent and one Uma Shankar Agiwal. In the agreements, the second respondent and Uma Shankar were described as the partners of Sri Mahakaleshwar Enterprises (for short, "the firm"). They entered into the agreements on behalf of the firm. Uma Shankar is the real brother of the second respondent.

3. The second respondent and his brother Uma Shankar filed a suit for specific performance of the agreements against the appellants in the year 2005. On 8th May 2007, Uma Shankar filed an application in the pending suit stating that the entire advance of Rs.28,01,000/- paid by him and the second respondent has been received back from the appellants by way of a Demand Draft, and in addition, the second respondent and Uma Shankar received a sum of Rs.5,00,000/- by a pay order. Therefore, Uma Shankar prayed for permission to withdraw the suit.

4. On 28th June 2007, the second respondent filed a complaint bearing C/1 Case No.1027 of 2007 under Section 200 of the Code of Criminal Procedure, 1973 (for short, 'the Cr. PC') against the appellants and others before the Chief Judicial Magistrate, Jamshedpur, alleging the commission of offences punishable under Sections 420, 406, 424 and 120-B of the Indian Penal Code, 1860 (for short, 'the IPC'). The foundation of the complaint was the sale transaction of property in the form of the agreements. In the complaint, Uma Shankar was shown as the first accused, and the present appellants were shown as the second and third accused. In the complaint, the second respondent

referred to the application dated 8th May 2007 for withdrawing the suit filed by Uma Shankar. He alleged that this was done without his knowledge by Uma Shankar in connivance with the appellant. He alleged that he had paid the entire advance to the appellants. The allegation is that the appellants failed to execute the sale deeds notwithstanding the agreements. Cognizance was taken by a criminal Court based on the above complaint on 19th July 2007. It must be noted here that the second respondent filed, more or less, a similar complaint under Section 200 of the Cr.PC against the appellants on 31st July 2007. The second respondent's subsequent complaint bearing Case No.1248 of 2007 was dismissed by the learned Judicial Magistrate by the order dated 14th September 2009, in the exercise of power under Section 203 of the Cr.PC by holding that no case was made out against the appellants.

5. Uma Shankar was transposed as a defendant in the suit for specific performance, who filed a written statement contending that the entire consideration paid to the appellants with compensation for delayed payment has been returned. On 11th November 2008, the second respondent filed an application in the pending suit, contending that there was a settlement between the parties and that the second respondent has no right, title or interest in the suit properties. Therefore, he prayed for a grant of permission to withdraw the suit. By the order dated 27th November 2008, the learned Trial Judge dismissed the suit for specific performance as withdrawn.

6. In the first complaint bearing Case No.1027 of 2007, the appellants applied under Section 245 of the Cr.PC for discharge on the grounds of compromise. The application for discharge was rejected by the learned Judicial Magistrate, First Class, Jamshedpur, by the order dated 28th August 2012. The appellants preferred a criminal revision application against the order before the High Court of Jharkhand at Ranchi. The High Court dismissed the criminal revision application. The High Court declined to look into the application for withdrawal of the suit made by the second respondent, and the consequent order passed on the said application by the Trial Court on the ground that at the time of framing of the charge, the accused had no right to produce any documents. The Special Leave Petition filed before this Court by the appellants against the orders of the Trial Court and the High Court was withdrawn with liberty to avail such remedies as may be available.

7. Thereafter, the appellants invoked a remedy before the High Court by filing a substantive writ petition under Article 226 of the Constitution of India for quashing the first criminal complaint. By the impugned order, the High Court dismissed the said writ petition on the ground that the same contentions had been rejected in an earlier criminal revision application, which cannot be re-agitated. Therefore, there was a bar under Article 362 of the Cr. PC.

SUBMISSIONS

8. The learned senior counsel appearing for the appellants has taken us through the copy of the plaint, the application for withdrawal made by the second respondent and the order passed thereon by the learned Trial Court. He submitted that the High Court had adopted a very hyper-technical approach. He submitted that the learned Judicial Magistrate dismissed the second complaint filed by the second respondent by holding that no case was made out to proceed. He submitted that after the second respondent received all the money he had paid under the agreements for sale, the prosecution of the first complaint was nothing but an abuse of the process of law.

9. The learned counsel appearing for the second respondent supported the impugned order and submitted that the High Court was correct in not allowing the appellants to re-open the issue, which was closed by the order passed in the earlier criminal revision application filed by the appellants. The learned counsel appearing for the respondent state also supported the impugned order.

CONSIDERATION OF SUBMISSIONS

10. The agreements for sale were executed by the appellants and another Trustee of the said Trust for the sale of two properties described as Schedule 'A' and Schedule 'B' and for consideration of Rs.2.75 crores and Rs.1.50 crores, respectively. The averments made in paragraph 3 of the suit filed by the second respondent and his brother, Uma Shankar, disclose that they paid the earnest money of Rs.28,01,000/- to the appellants by separate demand drafts. The allegation in the suit is that by another agreement dated 17th February 2004, the appellants agreed to execute and register the sale deed in favour of the second respondent and his brother regarding the properties subject matter of the agreements. According to the case of the second respondent and his brother, the suit for specific performance was filed as the appellants refused to execute the deed.

11. In the first complaint (subject matter of this appeal) bearing C/1Case No.1027 of 2007 filed by the second respondent, the facts stated in the plaint have been reiterated. It is alleged that the appellants have refused to execute the sale deed. It is claimed that as TISCO Ltd. had objected to the execution of the sale deed in terms of the agreements, a fresh agreement was executed on 17th February 2004 on request made by the appellants. After that, the second respondent referred to a suit for specific performance. It is alleged in the complaint that the first appellant herein had executed a power of attorney in favour of one Kishan, who was the fifth accused and subsequently, on 23rd October 2005, the first appellant transferred the property symbolically in favour of one Ashish, who was the fourth accused. After that, there is a reference in the complaint to the application dated 8th May 2007 made by Uma Shankar to withdraw the suit for specific performance. The application is alleged to be a false document that Uma Shankar created by entering a conspiracy with the present appellants. Therefore, the offences punishable under Sections 468, 420, 406, 424 and Section 120-B of the IPC were alleged. Cognizance was taken on the said complaint by the Criminal Court. Uma Shankar was transposed as a defendant in the suit for specific performance.

12. What is material here is the application dated 11th November 2008, admittedly filed by the second respondent as a plaintiff in the suit for specific performance. Paragraphs 2 and 3 of the said application read thus:

> "**.. .. ..**
>
> **2. That henceforthwith the plaintiff has got no manner of right, title, interest and possession over the suit properties of this suit any more he will lay any claim in any manner whatsoever over the suit properties of this suit in future.**
>
> **3.** That in view of the aforesaid facts and circumstances the plaintiff does not want to proceed further in this suit and wants to withdraw the same.
>
> .. .. … .. .. … ..."
>
> (emphasis added)

On 27th November 2008, the Trial Court allowed the application and disposed of the suit as withdrawn. In the said order, the Trial Court specifically recorded that the second respondent had signed the application. The second respondent never challenged the order permitting withdrawal of the suit passed on 27th November 2008.

13. The second complaint bearing no.1248 of 2007 was filed by the second respondent, showing the appellants as accused nos.1 and 2 and Ashish and Kishan as accused nos.3 and 4, respectively, who were shown as accused nos.4 and 5 in the first complaint. By the detailed order dated 14th September 2009, the learned Judicial Magistrate held that no prima facie case was made out in the complaint. He also noted that the suit for specific performance was pending. The allegations in the second complaint were again based on the same agreements for sale. It is alleged that the accused conspired to cheat the second respondent.

14. Now, we come to the prayer made for discharge by the appellants in the second complaint. The order of the learned Judicial Magistrate dated 28th August 2012 does not refer to the subsequent development of the second respondent withdrawing the suit based on the application dated 11th November 2008. In the criminal revision application preferred against the said order by the appellants, the subsequent events were pointed out regarding the settlement and withdrawal of the suit for specific performance. However, the High Court did not consider the said events by relying upon the law laid down by this Court in its decision in the case of ***State of Orissa v. Debendra Nath Padhi***[1]. The High Court held that the accused was not entitled to produce documents at the stage of the framing charge. As noted earlier, the special leave petition filed by the appellants against the said order was withdrawn with the liberty to adopt appropriate remedies as available.

15. Under the liberty granted by this Court, a writ petition under Article 226 of the Constitution of India was preferred by the appellants, in which the first prayer was for quashing the first complaint on the ground that in view of the compromise in the suit, the continuation of the complaint was a complete abuse of the process of law. We have perused the impugned order of the High Court. What the

1 [2004] Supp. 6 SCR 460 : (2005) 1 SCC 568

High Court lost sight of was that it was a substantive petition under Article 226 of the Constitution of India for quashing the complaint on the ground that the continuation of the same was an abuse of the process of law. A prayer was made in the petition for quashing the order passed by the learned Judicial Magistrate, by which the application for discharge, made by the appellants, was rejected. In the earlier criminal revision application, the High Court had confirmed the order dismissing the application for discharge. The criminal revision application was rejected on the ground that the documents relied upon by the appellants regarding the settlement in the suit with the second respondent and disposal of the suit could not be considered while considering the prayer for discharge. While passing the impugned order, the High Court relied upon Section 362 of the Cr.PC, which reads thus:

> **"362. Court not to alter judgment.—** Save as otherwise provided by this Code or by any other law for the time being in force, no Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error."

The second prayer in the writ petition could have been hit by Section 362 of the Cr.PC, as the prayer was to quash the order on the application for discharge. But the first prayer was for quashing the complaint itself. Therefore, dismissing the first prayer in the writ petition on the ground of the bar of Section 362 of the Cr.PC was erroneous.

16. We have already quoted what the second respondent stated in the application dated 11th November 2008. He categorically stated that in view of the out-of-court settlement with the appellants, he would not lay any claim in any manner whatsoever over the suit properties. The second respondent never disputed the correctness of what is stated in the said application, and the order passed permitting the withdrawal of the suit. The second respondent did not challenge the order permitting withdrawal by filing any proceedings. When the second respondent stated that he would not lay any claim in any manner whatsoever over the suit properties, he gave up his claim under the agreements dated 29th January 2001. The primary grievance in the first complaint was that notwithstanding the said agreements, the appellants tried to transfer the properties to the co-accused and

created a false application for withdrawal of the suit dated 8th May 2007, which was, in fact, the creation of Uma Shankar, brother of the second respondent.

17. As the second respondent had given up his rights under the agreements, it is crystal clear that continuing the complaint would be nothing but an abuse of the process of law. Therefore, a case was made out to quash the complaint. The High Court fell in error in refusing to do so.

18. Accordingly, the appeal succeeds, and we quash C/1 Case No.1027 of 2007, pending before the Court of the learned Judicial Magistrate, First Class, Jamshedpur.

Result of the case: Appeal allowed.

†*Headnotes prepared by:* Divya Pandey

[2024] 7 S.C.R. 136 : 2024 INSC 478

Bombay Slum Redevelopment Corporation Private Limited
v.
Samir Narain Bhojwani

(Civil Appeal No. 7247 of 2024)

08 July 2024

[Abhay S. Oka* and Pankaj Mithal, JJ.]

Issue for Consideration

In the instant case, issue revolves around the power of the Appellate Court dealing with the appeal under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 to pass an order of remand to Section 34 Court.

Headnotes†

Arbitration and Conciliation Act, 1996 – s.34 and s.37 – An award was passed by the Tribunal – Appellant filed a petition u/s. 34 of the Arbitration Act before the High Court to challenge the award – The Single Judge of the High Court allowed the petition u/s. 34 and proceeded to set aside the award on various grounds, such as perversity, patent illegality, etc. – Appeal by the respondent u/s. 37 of the Arbitration Act challenging the judgment of the single Judge of the High Court –The Division Bench of the High Court passed an order of remand to the single Judge on the ground that the single Judge of the High Court did not consider several issues – Correctness:

Held: In the facts of the case in hand, while deciding the petition under Section 34 of the Arbitration Act, the Single Judge has made a very elaborate consideration of the submissions made across the Bar, the findings recorded by the Arbitral Tribunal and the issue of illegality or perversity of the award – Detailed reasons while dealing with the alleged patent illegalities associated with the directions issued under the arbitral award have been recorded – Considering the nature of the findings recorded by the Single Judge, the job of the Appellate Court was to scrutinise the said findings and to decide, one way or the other, on merits – In this case, the finding of the Appellate Bench that the impugned judgment of the Single Judge does not address several issues raised by the parties cannot

* Author

be sustained at all – As far as the power of the Appellate Court under Section 37(1)(c) to pass an order of remand is concerned, the Appellate Court can exercise the power of remand only when exceptional circumstances make an order of remand unavoidable – Some of the exceptional cases can be stated by way of illustration: a) Summary disposal of a petition under Section 34 of the Arbitration Act is made without consideration of merits; b) Without service of notice to the respondent in a petition under Section 34, interference is made with the award; and c) Decision in proceedings under Section 34 is rendered when one or more contesting parties are dead, and their legal representatives have not been brought on record – In the facts of the case, the remand was completely unwarranted – The reason is that the Single Judge has elaborately dealt with the merits of the challenge in the Section 34 petition – This Court should benefit from reasoned judgment rendered by the Court under Section 37 – In the instant case, this Court does not have the benefit of a decision of the Appellate Court dealing with all the issues dealt with by the Single Judge while deciding the petition under Section 34 of the Arbitration Act – Therefore, the impugned judgment of the Division Bench of the High Court is set aside and the Divison Bench of the High Court is directed to decide the appeal on merits after considering the arbitral award and the decision under section 34. [Paras 17, 18, 20]

Arbitration and Conciliation Act, 1996 – s. 34 and s.37 – Jurisdiction of the Appellate Court dealing with an appeal u/s. 37 against the judgment in a petition u/s. 34:

Held: The jurisdiction of the Appellate Court dealing with an appeal under Section 37 against the judgment in a petition under Section 34 is more constrained than the jurisdiction of the Court dealing with a petition under Section 34 – It is the duty of the Appellate Court to consider whether Section 34 Court has remained confined to the grounds of challenge that are available in a petition under Section 34 – The ultimate function of the Appellate Court under Section 37 is to decide whether the jurisdiction under Section 34 has been exercised rightly or wrongly – While doing so, the Appellate Court can exercise the same power and jurisdiction that Section 34 Court possesses with the same constraints. [Para 16]

Arbitration and Conciliation Act, 1996 – s. 34, s.37 and s.19 – Code of Civil Procedure, 1908 – Applicability of the provisions

of CPC to the proceedings before the Arbitrator and the Court under Sections 34 and 37 of the Arbitration Act:

Held: The provisions of the CPC have not been made applicable to the proceedings before the learned Arbitrator and the Court under Sections 34 and 37 of the Arbitration Act – The legislature's intention is reflected in Section 19(1) of the Arbitration Act, which provides that an Arbitral Tribunal is not bound by the provision of the CPC – That is why the provisions of the CPC have not been made applicable to the proceedings under Sections 34 and 37(1)(c). [Para 18]

Arbitration and Conciliation Act, 1996 – Object of:

Held: The object of the Arbitration Act is to provide an arbitral procedure that is fair, efficient, and capable of meeting the needs of specific arbitration – The object is to ensure that the arbitral proceedings and proceedings filed for challenging the award are concluded expeditiously – The proceedings have to be cost-effective – The supervisory role of the Courts is very restricted – Moreover, one cannot ignore that arbitration is one of the modes of Alternative Disputes Redressal Mechanism provided in Section 89 of the CPC. [Para 19]

Arbitration and Conciliation Act, 1996 – s.37 – Consequences of passing routinely order of remand:

Held: If the Courts dealing with appeals under Section 37 of the Arbitration Act start routinely passing the orders of remand, the arbitral procedure will cease to be efficient – It will cease to be cost-effective – Such orders will delay the conclusion of the proceedings, thereby defeating the very object of the Arbitration Act – Therefore, an order of remand by Section 37 Court can be made only in exceptional cases where remand is unavoidable. [Para 19]

Constitution of India – Art.136 – Arbitration and Conciliation Act, 1996 – s. 34 and s.37:

Held: An order of remand by Section 37 Court can be made only in exceptional cases where remand is unavoidable – The scope of interference in a petition under Section 34 is very narrow – The jurisdiction under Section 37 of the Arbitration Act is narrower – Looking to the objects of the Arbitration Act and the limited scope available to the Courts to interfere with the award of the Arbitral

Tribunal, this Court, while dealing with the decisions under Sections 34 and 37 of the Arbitration Act, in its jurisdiction under Article 136 of the Constitution of India, has to be circumspect – By their own volition, the parties choose to go before the Arbitral Tribunal instead of availing remedy before the traditional civil courts – Therefore, the Courts must be very conservative when dealing with arbitral awards and confine themselves to the grounds strictly available under Section 34 of the Arbitration Act. [Para 19]

Arbitration and Conciliation Act, 1996 – Bulky pleadings – Time-consuming submissions, leading to very lengthy awards – Bar to show restraint:

Held: The arbitral proceedings have become synonymous with very bulky pleadings and evidence and very long, time-consuming submissions, leading to very lengthy awards – Moreover, there is a tendency to rely upon a large number of precedents, relevant or irrelevant – The result of all this is that there are very long hearings before the Courts in Sections 34 and 37 proceedings – In many cases, the proceedings under Sections 34 and 37 are being treated as if the same are appeals under Section 96 of the CPC – When members of the bar take up so many grounds in petitions under Section 34, which are not covered by Section 34, there is a tendency to urge all those grounds which are not available in law and waste the Court's time – The members of the Bar should show restraint by incorporating only legally permissible grounds in petitions under Section 34 and the appeals under Section 37 – Brevity will make the arbitral proceedings and the proceedings under Sections 34 and 37 more effective – Arbitration must become a tool for expeditious, effective, and cost-effective dispute resolution. [Para 23]

Case Law Cited

MMTC Limited v. Vedanta Limited [2019] 3 SCR 1023 **: (2019) 4 SCC 163;** *UHL Power Company Limited v. State of Himachal Pradesh* [2022] 1 SCR 1 **: (2022) 4 SCC 116;** *Konkan Railway Corporation Limited v. Chenab Bridge Project Undertaking* [2023] 11 SCR 215 **: (2023) 9 SCC 85 – relied on.**

List of Acts

Constitution of India; Arbitration and Conciliation Act, 1996; Code of Civil Procedure, 1908.

List of Keywords

Section 34 of Arbitration and Conciliation Act, 1996; Section 37 of Arbitration and Conciliation Act, 1996; Order of remand passed under section 37 of Arbitration and Conciliation Act, 1996; Illegality or perversity of the award; Object of Arbitration and Conciliation Act, 1996; Consequences of passing routinely order of remand; Article 136 of the Constitution of India; Bulky pleadings; Time-consuming submissions, leading to very lengthy awards; Arbitration; Cost-effective dispute resolution; Exceptional cases of remand under section 37 of Arbitration and Conciliation Act, 1996.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No.7247 of 2024

From the Judgment and Order dated 07.07.2023 of the High Court of Judicature at Bombay in CA No.30 of 2023

With

Civil Appeal Nos. 7248 and 7249 of 2024

Appearances for Parties

A.M. Singhvi, Ramesh Singh, Mukul Rohatgi, C. U. Singh, Ritin Rai, Ms. Meenakshi Arora, Sr. Advs., Mohit D. Ram, Atman Mehta, Anand Pai, Vipul Patel, Ms. Monisha Handa, Rajul Shrivastav, Rachit Bharwada, Anubhav Sharma, Mahesh Agarwal, Parimal K. Shroff, Rishi Agrawala, Ankur Saigal, Anirudh Bhatia, Devansh Srivastava, Ms. Vidisha Swarup, E. C. Agrawala, R. Gopalakrishnan, Murtaza Kanchwalla, S. M. Algaus, Palash Moolchandani, Ms. Ekta Basin, Ms. Anushree Prashit Kapadia, Nishant Chothani, Ms. Ruchi Krishna Chauhan, Murtaza Kachwalla, Parimal Shroff, Victor Das, Anup Jain, Advs. for the appearing parties.

Judgment / Order of the Supreme Court

Judgment

Abhay S. Oka, J.

1. The application for permission to file special leave petition is allowed. Leave granted.

FACTUAL ASPECTS

2. These appeals take exception to the same judgment and order dated 7th July 2023 passed by the High Court of Judicature at Bombay. Therefore, the same are being decided together. We are setting out a few factual aspects necessary for deciding the appeals.

3. On 31st March 1993, the Maharashtra Housing and Area Development Authority (MHADA) executed a lease agreement in respect of the subject property in favour of Andheri Kamgar Nagar Co-operative Housing Society Limited (for short, 'the Society'). It is stated to be a society of slum dwellers. The Society, by the agreement dated 6th October 1996, appointed M/s. Aurora Properties and Investments (for short, 'M/s. Aurora') as the property developer to implement a slum rehabilitation scheme. M/s. Aurora was to construct 237 rehabilitation tenements for slum dwellers and 40 tenements for project-affected persons (PAPs) free of cost and develop the property using the available Floor Space Index (FSI) and dispose of the same. It appears that M/s. Aurora could not discharge its obligations. Therefore, by the agreement dated 22nd September 1999 (described as an agreement for the grant of sub-development rights), the society appointed Bombay Slum Redevelopment Corporation Private Limited (the appellant) as the developer. Apart from taking over the obligations of M/s. Aurora under the development agreement dated 6th October 1996, the appellant corporation agreed to hand over 15,000 square feet of built-up area in the redeveloped property to M/s.Aurora against M/s. Aurora paying the cost of construction at Rs.600 per square foot. After that, the appellant started the development of the property. On 10th March 2003, an agreement was executed by and between the appellant and one Samir Narain Bhojwani (the respondent), under which the appellant retained 45% of the total available FSI and permitted the respondent to construct the free sale area by allotting him FSI to the extent of the remaining 55%. According to the appellant's case, the respondent was appointed as a contractor to carry out the construction activities of the said building on the site. On 3rd July 2004, a deed of confirmation was executed to register the agreement dated 10th March 2003. Thereafter, on 11th September 2009, there was a letter/ tripartite agreement executed, to which M/s. Aurora, the appellant and the respondent were parties under which it was agreed that the appellant would provide 22,500 square feet of constructed area to

M/s. Aurora instead of 15,000 square feet, which was agreed to be allotted under the agreement dated 22nd September 1999.

4. The dispute began on 22nd March 2012 when the respondent, by his letter, alleged default against the appellant as set out in the said letter. After the letter was sent, there was a prolonged correspondence, exchange of drafts of the sale agreements, etc. Ultimately, the respondent filed a petition before the High Court under Section 11 of the Arbitration and Conciliation Act, 1996 (for short, 'the Arbitration Act'). An Arbitrator was appointed. The arbitral proceedings concluded in the form of an award made by the Arbitral Tribunal on 7th September 2018 in favour of the respondent (the claimant before the Arbitral Tribunal). Most of the claims made by the respondent were granted. The counter-claim made by the appellant was rejected. The appellant filed a petition under Section 34 of the Arbitration Act before the High Court to challenge the award. By the judgment dated 13th September 2019, the learned Single Judge of the High Court allowed the petition under Section 34 of the Arbitration Act and proceeded to set aside the award on various grounds, such as perversity, patent illegality, etc. The respondent filed an appeal under Section 37(1)(c) of the Arbitration Act to challenge the judgment of the learned Single Judge. By the impugned judgment, which set aside the judgment of the learned Single Judge, the Division Bench of the High Court passed an order of remand to the learned Single Judge on the ground that the learned Single Judge did not consider several issues. The Division Bench referred to an application made by the third parties. It directed that the interim arrangements made earlier by making an appointment of the Court Receiver shall continue for four weeks with a liberty to the parties to seek appropriate interim orders in the restored petition under Section 34 of the Arbitration Act. Both the parties to the appeal under Section 37 have preferred these cross-appeals.

SUBMISSIONS

5. We have heard the learned senior counsel appearing for the parties in these appeals. The learned senior counsel representing the appellant submitted that an appeal under Section 37 of the Arbitration Act is essentially a continuation of the proceedings under Section 34. The scope of interference in an appeal under Section 37(1)(c) is narrower than what is available under Section 34 of the Arbitration Act. Reliance was placed on various decisions of this Court in

support of the said submissions. Another contention is that while deciding the appeal under Section 37(1)(c), the Court can either set aside the award or affirm the award but cannot remand the petition under Section 34 for a fresh hearing. The submission is that the provisions of Order XLI of the Code of Civil Procedure, 1908 (for short, 'the CPC') concerning remand do not apply to an appeal under Section 37 of the Arbitration Act as the provisions of the CPC do not apply to such an appeal. Inviting our attention to the findings recorded by the learned Single Judge, the learned senior counsel submitted that while allowing the petition under Section 34 of the Arbitration Act, the learned Single Judge, by a detailed judgment, has dealt with all the issues canvassed by the parties. Pointing out the findings recorded by the Division Bench in the impugned judgment, he submitted that it cannot be said that the reasons recorded by the learned Single Judge are not elaborate. The reasons are very detailed and more than elaborate. In short, the submission is that the remand order is wholly unwarranted, and the Division Bench ought to have decided the appeal under Section 37 of the Arbitration Act on merits.

6. The appellant was the respondent before the Arbitral Tribunal. Even the claimant Samir Narain Bhojwani (described in this judgment as the respondent) has filed the Civil Appeal arising out of Special Leave Petition (C) No.20359 of 2023. The intervenor before the Division Bench in the appeal under Section 37 of the Arbitration Act has preferred a Civil Appeal arising out of Special Leave Petition (C) Diary No.40494 of 2023. The plea by the respondent is naturally for restoration of the award of the Arbitral Tribunal. We have heard the detailed submissions of the learned senior counsel representing the respondent (the claimant) and the intervenors. We are not referring to the submissions made by them relating to the merits of the Award, considering the limited scope of these appeals.

CONSIDERATION OF SUBMISSIONS

7. After considering the submissions made across the Bar, we find that the issue revolves around the power of the Appellate Court dealing with the appeal under Section 37(1)(c) of the Arbitration Act to pass an order of remand to Section 34 Court. Before we address the issue regarding the power of the Appellate Court, we will need to refer to the award made by the Arbitral Tribunal. There are six different

parts of the award by the Arbitral Tribunal. The operative part of the award of the Arbitral Tribunal reads thus:

"..

203. In view of the foregoing discussion, the following Award is made:

I

(a) It is declared that the Development Agreement dated 10th March 2003 is valid, subsisting and binding upon the Claimant and the Respondent;

(b) It is declared that the Claimant is entitled to retain possession of 15 Flats in Wing A *(earmarked for the Respondent)* and 0.63 Flat in Wing B *(earmarked for the Respondent),* till the Respondent complies with all the directions being given in this Award;

(c) The Respondent is directed to construct at its own cost 107 PAP tenements (or any higher number as may be specified by SRA) at Shiv Shakti Nagar, Kandivali, relatable to the Andheri Kamgar Nagar CHS Scheme and handover the same to SRA within 2 months from the date of this Award;

(d) The Respondent is further directed to obtain from SRA a certificate of discharge of the Respondent from its obligation of constructing 107 (or any higher number of) PAP tenements relatable to Andheri Kamgar Nagar CHS Scheme, and handing over the same to SRA, within 3 months from the date of this Award;

(e) The Respondent is directed to obtain further Commencement Certificate for construction of 6th to 22nd floors of Wing C (further CC for Wing C) on the basis of sanctioned building plans dated 21st October 2010, within 4 months from the date of this Award;

(f) In case SRA requires the Respondent to comply with any condition under any Letter of Intent or under any Regulation or Circular, including payment of any premium, before issuance of further CC for Wing C, the Respondent shall comply with such condition or

direction with utmost expedition and within one month from the date of receipt of such communication;

(g) Once the Respondent obtains further CC for Wing C as aforesaid, the Claimant shall at its own cost construct 6th to 22nd floors of Wing C as per the sanctioned building plans dated 2ist October 2010, within 18 months from the date of receiving further CC for Wing C and after completion of construction of Wing C, give intimation thereof to the Respondent for applying to SRA for Occupation Certificate **(OC)** for Wing C;

(h) The Respondent shall obtain from SRA OC for Wing C, within 2 months from the date of receipt of intimation from the Claimant as per the above direction;

(i) In case SRA requires the Respondent to comply with any condition under any Letter of Intent or under any Regulation or Circular, including payment of any premium, before issuance of OC for Wing C, the Respondent shall comply with such condition or direction with utmost expedition and within one month from the date of receipt of such communication;

II

(j) The Respondent shall pay the Claimant Rs.67,00,000/- (Rupees Sixty Seven lakhs) along with Rs.26,00,000/- (Rupees Twenty Six Lakhs) being interest @ 18% p.a. from 19th July, 2016 till the date of this Award and further interest @ 18% p.a. from the date of this Award till the date of payment / realization, within 3 months from the date of this Award;

(k) The Respondent shall also pay the Claimant Rs.53,00,00,000/(Rupees Fifty Three Crores) as compensation for the period from 19th July 2016 till the date of this Award, being compensation for the delay on the part of the Respondent in not obtaining further CC for Wing C, within 4 months from the date of this Award;

(l) The Respondent shall further pay the Claimant Rs.50,00,00,000/(Rupees Fifty Crores) as compensation for delay in obtaining further CC for Wing C for the period of 24 months from the date of this Award till issuance of OC for Wing C, within 4 months from the date of issuance of OC for Wing C;

III

(m) The Respondent is directed to remove all encroachments from 9.15 mtr wide road to the South Side of the property under the said project; (n) The Respondent is also directed to obtain at its own cost, all necessary permissions for separate Lease and/or Assignment from MHADA in respect of the free sale component area in favour of the Andheri Kamgar Nagar Society, and, thereafter, in favour of the purchasers of the Apartments or their Association under the Indenture of Lease dated 31st March 1993 from MHADA;

(o) The Respondent is further directed to pay Stamp Duty on the Indenture of Lease dated 31st March 1993 executed by MHADA and on the Development Agreement for Development dated 6th October 1996 between Andheri Kamgar Nagar CHS and Aurora Properties & Investments and also on the Agreement for Sub Development dated

22nd September 1999 between Aurora Properties & Investments and the Respondent;

IV

(p) Till the OC is received for Wing C, neither the Claimant nor the Respondent shall sell, or in any other manner dispose of, encumber, or create any third party rights in any flat or any parking space in Wing C;

(q) Till the OC is received for Wing C and till the Respondent complies with the other directions given in Part II of the operative portion of this Award, the Respondent and the persons claiming through the

Respondent shall not sell/ re-sell or in any other manner dispose of or encumber or create any third party rights in any of the 15 flats in Wing A (earmarked for the Respondent) and the parking spaces related thereto;

V

(r) It is declared that the Letters of Allotment purportedly issued by the Respondent in respect of 31 flats in Wings A and B (earmarked for the Respondent) are sham, bogus, illegal and null and void ab-initio and not binding on the Claimant;

(s) It is further declared that the Agreements for Sale of 15 flats in Wing A (earmarked for the Respondent) purportedly executed by the Respondent in favor of the Managing Director and Directors of the Respondent Company and their family members are also sham and null and void ab-initio and not binding on the Claimant;

(t) In case, within 4 months from the date of this Award, the Respondent does not pay the Claimant the aforesaid amount of Rs.54.03 crores or does not surrender 3.63 flats in Wing B (out of those earmarked for the Respondent), the Claimant shall be entitled to sell 0.63 flat in Wing

B (Flat No.4 on the pt floor) and 3 flats in Wing B, out of the following 9 flats:-

- 2 Flats purportedly transferred by the Respondent to Mr. Kiran H.Hemani - M.D. of the Respondent,
- 7 flats purportedly transferred by the Respondent to Mr. Priyank K. Hemani - Director of the Respondent;

(u) The Respondent and the persons claiming through the Respondent are hereby restrained from selling/ reselling, or in any other manner disposing of or encumbering or parting with possession of or creating any third party rights, in the flats in Wing B purportedly

transferred to Mr. Kiran H. Hemani and Mr. Priyank K. Hemai till identification and intimation of 3 flats out of those 9 flats in Wing B is conveyed by the Respondent to the Claimant for the purpose of being available for sale by the Claimant for recovery Rs.54.03 crores as directed in (h), (i) & (r) hereinabove and explained in detail para 199 hereinabove;

(v) In case the Respondent does not obtain further CC for Wing C within 4 months from the date of this Award, the Claimant shall be entitled to sell the 15 flats in Wing A (earmarked for the Respondent) and adjust the sale proceeds thereof against the loss of profit from Wing C;

(w) In case the Respondent obtains further CC for Wing C and also obtains OC for Wing C within the time limits stipulated in this Award, but the Respondent does not pay the Claimant Rs. 50 crores, as directed in (j) above within 4 months from the date of obtaining OC for Wing C, or does not surrender 3.37 flats to the Claimant and the parking spaces related thereto, within the said period, the Claimant shall be entitled to sell off 3.37 flats earmarked for the Respondent in Wing C and the parking spaces related thereto;

VI

(x) The Respondent shall pay the Claimant costs of this proceeding quantified at Rs.1,50,00,000/- (Rupees One Crore Fifty Lakhs), within **4** months from the date of this Award. The Respondent shall bear its own costs for this proceeding.

205. The claims made by the Claimant for the other reliefs not granted in this Award are hereby rejected. All the Counter Claims made by the Respondent are also rejected.

206. It is clarified that this Award does not deal with any of the 5 flats in Wing A, 3 flats in Wing B and 4 flats in Wing C, earmarked for Aurora Properties & Investments, for which orders of injunction were

> passed by the Bombay High Court on 3rd and 17th December 2013 in Notice of Motion 147 of 2013, and which injunction orders have been restored by the Supreme Court by judgment and order dated 2ist August 2018 in Civil Appeal No. 7079 of 2018.
>
> .. .."

8. While deciding the petition under Section 34 of the Arbitration Act, the learned Single Judge has made an in-depth discussion on the factual aspects and the submissions of the learned counsel representing the parties. Paragraphs 1 to 35 of his judgment deal with the factual aspects and details about the directions issued by the Arbitral Tribunal under the award. Paragraphs 36 to 125, spanning over 45 pages, record the submissions made by the parties, and paragraphs 126 to 194, covering 37 pages, are the reasons recorded by the learned Single Judge. There is a discussion about the oral and documentary evidence adduced by the parties. From paragraphs 140 onwards, the learned Single Judge discussed the issue of jurisdiction of the Arbitral Tribunal to pass the award against the third parties who were not parties to the arbitral proceedings. The learned Single Judge referred to the finding of the Arbitral Tribunal that 31 agreements/ allotment letters for the sale of flats were sham and bogus and were not binding on the respondent. The learned Single Judge found that no persons shown as purchasers under the agreement were parties to the proceedings before the Arbitral Tribunal. The learned Single Judge also noted that these 31 flats were mortgaged in favour of various Banks and Financial Institutions. Therefore, the learned Single Judge held that even the Banks and Financial Institutions would be affected by the finding of the Arbitral Tribunal that 31 flats under the sale agreements were sham, bogus, null, and void. Therefore, the learned Single Judge held that the Arbitral Tribunal had exceeded its jurisdiction. The learned Single Judge also held that the respondent before the Arbitral Tribunal (the appellant herein) was entitled to sell the said 31 flats, and the purchasers thereof were neither parties to the agreement containing the arbitration clause nor claiming under the said agreement.

9. The learned Single Judge also referred to that part of the arbitral award, which provided that there would be a charge over the flats held by the appellant herein. The learned Single Judge held that

the charge on the properties could be either created by operation of law or by agreement of the parties, and in this case, there was no such agreement. Therefore, the learned Single Judge held that the direction to create the charge was *ex-facie* without the jurisdiction. Thereafter, the learned Single Judge referred to the reliefs granted by the Arbitral Tribunal in clauses (c) to (l), (m) to (q), (t), (u) and (v) of paragraph 203 of the award. According to the learned Single Judge, some of the reliefs could have been granted only in the execution of the award. Further, the learned Single Judge held that under clauses (c) to (l) and (m) to (q) of paragraph 203 of the award, the appellant herein was directed to carry out various acts to obtain multiple permissions from the authorities within the prescribed time and based on such compliance, further directions were issued for the execution of multiple documents, etc. The authorities from whom the appellant was directed to obtain various permissions were admittedly not parties before the arbitral proceedings. The learned Single Judge also noted that the directions issued in the abovementioned clauses required continuous supervision by the Court. Therefore, in view of the provisions of the Specific Relief Act, 1963, such reliefs ought not to have been granted by the Arbitral Tribunal.

10. The learned Single Judge also held that though specific performance was sought in the claim made before the Arbitral Tribunal based on the Letter of Intent dated 7th March 2012, the Arbitral Tribunal granted specific performance based on the Letter of Intent of 2010. The learned Single Judge also held that the learned Arbitrator or the Court could not supervise whether the appellant can shift 107 PAPs in its other properties as directed under the award. Further, it was observed that the direction to construct the 6th to 22nd floors could be implemented only upon completing the entire chain of events, such as obtaining permissions, shifting of PAPs, etc. The learned Single Judge held that the grant of specific performance in the present case would be hit by Section 14 of the Specific Relief Act, 1963, as the enforcement of such a contract involves continuous supervision by the Court. On perusing the material on record, the learned Single Judge also held that the respondent herein had not proved his readiness and willingness to perform his obligations. The learned Single Judge held that since the relief of specific performance is discretionary, the conduct of the respondent ought to have been taken into consideration by the Arbitral Tribunal.

11. The learned Single Judge dealt with the award of damages in the sum of Rs.53 crores for the period from 19th July 2016 till the date of the award on account of the alleged delay by the respondent. The learned Single Judge held that the evidence on record had been completely overlooked while granting the relief of damages in the sum of Rs.53 crores. The learned Single Judge recorded that the Arbitral Tribunal referred to only a part of the depositions of the witnesses and ignored the rest. Further, the learned Single Judge held that the delay on the part of the appellant in completing other projects was neither pleaded nor proved. Moreover, the learned Single Judge held that even assuming that there was a delay in completion of other projects on the part of the appellant, that would be no ground for grant of relief for specific performance. The learned Single Judge recorded something about the approach of the Arbitral Tribunal in paragraph 168. The learned Single Judge objected to the learned Arbitrator relying on the news report of some other developer's project in the Times of India. The learned Single Judge noted that the news article was published after the arguments were concluded. Moreover, the learned Single Judge found that relying upon the material, not forming part of the record, amounts to a breach of the principles of natural justice. A clear finding recorded by the learned Single Judge is that the learned Arbitrator has applied different yardsticks to the evidence adduced by both parties. Therefore, the Arbitral Tribunal did not treat the parties as equals.

12. The learned Judge held that while dealing with the per square feet rate of the flats for awarding a claim for damages, the Arbitral Tribunal completely ignored the evidence on record, which showed that the respondent had sold the flats at much lower rates. The learned Single Judge also discussed the finding recorded while rejecting the counterclaim. The learned Single Judge held that though the Arbitral Tribunal concluded that the building did not have a load-bearing capacity of 22 floors, the respondent neither pleaded nor proved the load-bearing capacity of the building. The learned Single Judge also held that awarding payment of interest on interest-free deposit was contrary to the terms of the contract, which shows patent illegality. However, the learned Single Judge rejected the allegation of bias made by the appellant against the learned Arbitrator.

13. We have referred to only material findings of the learned Single Judge by way of illustration to emphasise that there is a very elaborate consideration of the merits of the challenge to the award in the judgment of the learned Single Judge.

14. Now, we turn to the judgment of the Division Bench in the appeal under Section 37 of the Arbitration Act. The approach of the Division Bench is reflected in paragraph 4 of the impugned judgment, which reads thus:

> **"4. Having heard the learned counsel for the parties, we were of the opinion that the impugned order is required to be set aside and the matter needs to be remanded to the learned Single Judge for *de novo* consideration. We had put it to the counsel for the parties that the appeal can be remanded, without detailed reasons, by consent, keeping all contentions open. The Appellant was ready but the Respondent was not ready. Therefore, we are required to give elaborate reason why remand is necessary.** In this context, we have briefly referred to the core facts of the case, the rival contentions, the award and the impugned order. The factual backdrop leading to the dispute is narrated in detail in the Award and by the learned Single Judge. The summary of the factual position is as follows.
>
> .. .."
>
> (emphasis added)

In paragraphs 42 and 43, the Division Bench held thus:

> **"42. Even otherwise, question would arise as to whether such a detailed factual enquiry can be made to set aside the award. To reach such a conclusion that it suffers from perversity, the Award had to be carefully analyzed to rule out other possibilities. It is not enough to merely state a conclusion.** Further, when such a conclusion can be reached under Section 34 of the Act is a debatable issue that also needs to be addressed.
>
> **43.** In the impugned order in paragraphs 161 and 162 reference is made to the principle of law governing the discretion to be used for grant of specific performance.

> In paragraph 163, it is stated that 'perusal of the record' will indicate that the Appellant has not proved that he was ready and willing. When the Appellant sought to argue that the Appellant was ready and willing, the same was dealt with in paragraph 164. The submission of the Appellant that unless the Respondent would have fully satisfied the Appellant that he had made appropriate provision for shifting 107 PAPs to some other plot the Appellant was not required to proceed with the construction of building, was not accepted. However, there is no discussion as to why this stand of the Appellant was rejected.
>
> .. .. … .."
>
> (emphasis added)

In the impugned judgment, certain findings recorded by the learned Single Judge have been criticised. Ultimately, in paragraphs 61 and 62 of the impugned judgment, the Division Bench held thus:

> "**61.** Considering that the impugned order has not addressed several issues raised by both parties before setting aside the Award, for the above reasons we are inclined to set aside the impugned order to remand the proceedings to the learned Single Judge. Further under the Award itself. question now will remain for damages.
>
> **62.** Since we are of the opinion that the petition filed by the Respondent needs to be reconsidered, we refrain from going deeper into the controversy and in our discussion, which have only highlighted as to why the impugned order is unreasoned and therefore needs to be set aside for reconsideration.
>
> .. .."

Thus, eventually, an order of remand was passed directing the learned Single Judge to hear the petition under Section 34 afresh.

15. We need not dwell on the limited scope of the interference in the petition under Section 34 of the Arbitration Act. That position is very well settled. However, as far as the appeal under Section 37(1)(c)

of the Arbitration Act is concerned, in the case of ***MMTC Limited v. Vedanta Limited***[1], in paragraph 14, this Court held thus:

> **"14. As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court under Section 34 has not exceeded the scope of the provision.** Thus, it is evident that in case an arbitral award has been confirmed by the court under Section 34 and by the court in an appeal under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings."
>
> (emphasis added)

In another decision of this Court in the case of ***UHL Power Company Limited v. State of Himachal Pradesh***[2], in paragraph 16, it was held thus:

> **"16. As it is, the jurisdiction conferred on courts under Section 34 of the Arbitration Act is fairly narrow, when it comes to the scope of an appeal under Section 37 of the Arbitration Act, the jurisdiction of an appellate court in examining an order, setting aside or refusing to set aside an award, is all the more circumscribed.** In MMTC Ltd. v. Vedanta Ltd. [MMTC Ltd. v. Vedanta Ltd., (2019) 4 SCC 163 : (2019) 2 SCC (Civ) 293] , the reasons for vesting such a limited jurisdiction on the High Court in exercise of powers under Section 34 of the Arbitration Act have been explained in the following words : (SCC pp. 166-67, para 11)
>
> > "11. As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground

1 [2019] 3 SCR 1023 : (2019) 4 SCC 163

2 [2022] 1 SCR 1 : (2022) 4 SCC 116

> provided under Section 34(2)(b)(ii) i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the "fundamental policy of Indian law" would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and Wednesbury [Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn., (1948) 1 KB 223 (CA)] reasonableness. Furthermore, "patent illegality" itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract."
>
> (emphasis added)

In the decision of this Court in the case of ***Konkan Railway Corporation Limited v. Chenab Bridge Project Undertaking***[3]**,** in paragraph 18, it was held thus:

> **"18. At the outset, we may state that the jurisdiction of the court under Section 37 of the Act, as clarified by this Court in MMTC Ltd. v. Vedanta Ltd. [MMTC Ltd. v. Vedanta Ltd., (2019) 4 SCC 163 : (2019) 2 SCC (Civ) 293], is akin to the jurisdiction of the court under Section 34 of the Act.** [Id, SCC p. 167, para 14:"14. As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court under

3 [2023] 11 SCR 215 : (2023) 9 SCC 85

Section 34 has not exceeded the scope of the provision."]
Scope of interference by a court in an appeal under Section 37 of the Act, in examining an order, setting aside or refusing to set aside an award, is restricted and subject to the same grounds as the challenge under Section 34 of the Act."

(emphasis added)

16. The jurisdiction of the Appellate Court dealing with an appeal under Section 37 against the judgment in a petition under Section 34 is more constrained than the jurisdiction of the Court dealing with a petition under Section 34. It is the duty of the Appellate Court to consider whether Section 34 Court has remained confined to the grounds of challenge that are available in a petition under Section 34. The ultimate function of the Appellate Court under Section 37 is to decide whether the jurisdiction under Section 34 has been exercised rightly or wrongly. While doing so, the Appellate Court can exercise the same power and jurisdiction that Section 34 Court possesses with the same constraints.

17. In the facts of the case in hand, while deciding the petition under Section 34 of the Arbitration Act, the learned Single Judge has made a very elaborate consideration of the submissions made across the Bar, the findings recorded by the Arbitral Tribunal and the issue of illegality or perversity of the award. Detailed reasons while dealing with the alleged patent illegalities associated with the directions issued under the arbitral award have been recorded. Considering the nature of the findings recorded by the learned Single Judge, the job of the Appellate Court was to scrutinise the said findings and to decide, one way or the other, on merits. In this case, the finding of the Appellate Bench that the impugned judgment of the learned Single Judge does not address several issues raised by the parties cannot be sustained at all.

18. The provisions of the CPC have not been made applicable to the proceedings before the learned Arbitrator and the Court under Sections 34 and 37 of the Arbitration Act. The legislature's intention is reflected in Section 19(1) of the Arbitration Act, which provides that an Arbitral Tribunal is not bound by the provision of the CPC. That is why the provisions of the CPC have not been made applicable to the proceedings under Sections 34 and 37(1)(c). We are not even suggesting that because the provisions of the CPC are not applicable,

the Appellate Court dealing with an appeal under Section 37(1)(c) is powerless to pass an order of remand. The remedy of an appeal will not be effective unless there is a power of remand vesting in the appellate authority. In the Arbitration Act, there is no statutory embargo on the power of the Appellate Court under Section 37(1)(c) to pass an order of remand. However, looking at the scheme of the Arbitration Act, the Appellate Court can exercise the power of remand only when exceptional circumstances make an order of remand unavoidable. There may be exceptional cases where remand in an appeal under Section 37 of the Arbitration Act may be warranted. Some of the exceptional cases can be stated by way of illustration:

a. Summary disposal of a petition under Section 34 of the Arbitration Act is made without consideration of merits;

b. Without service of notice to the respondent in a petition under Section 34, interference is made with the award; and

c. Decision in proceedings under Section 34 is rendered when one or more contesting parties are dead, and their legal representatives have not been brought on record.

19. Some of the objectives mentioned in the Statement of Objects and Reasons of the Arbitration Act are very relevant which are as follows:

> "4. The main objectives of the Bill are as under:-
>
> (i) to comprehensively cover international commercial arbitration and conciliation as also domestic arbitration and conciliation;
>
> (ii) **to make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration**;
>
> (iii) to provide that the arbitral tribunal gives reasons for its arbitral award;
>
> (iv) to ensure that the arbitral tribunal remains within the limits of its jurisdiction;
>
> (v) **to minimise the supervisory role of courts in the arbitral process**;
>
> ……."
>
> (emphasis added)

While coming out with the 2015 Amendment Bill, the legislature has noted in the objects and reasons that a lot of delay is involved in concluding the arbitral proceedings. In paragraphs 6 and 7 of the objects and reasons of the Bill, the Legislature has stated thus:

> "6. It is proposed to introduce the Arbitration and Conciliation (Amendment) Bill, 2015, to replace the Arbitration and Conciliation (Amendment) Ordinance, 2015, which inter alia, provides for the following, namely—
>
> (i) to amend the definition of "Court" to provide that in the case of international commercial arbitrations, the Court should be the High Court;
>
> (ii) to ensure that an Indian Court can exercise jurisdiction to grant interim measures, etc., even where the seat of the arbitration is outside India;
>
> (iii) an application for appointment of an arbitrator shall be disposed of by the High Court or Supreme Court, as the case may be, as expeditiously as possible and an endeavour should be made to dispose of the matter within a period of sixty days;
>
> (iv) to provide that while considering any application for appointment of arbitrator, the High Court or the Supreme Court shall examine the existence of a prima facie arbitration agreement and not other issues;
>
> (v) **to provide that the arbitral tribunal shall make its award within a period of twelve months from the date it enters upon the reference and that the parties may, however, extend such period up to six months, beyond which period any extension can only be granted by the Court, on sufficient cause;**
>
> (vi) to provide that a model fee Schedule on the basis of which High Courts may frame rules for the purpose of determination of fees of arbitral tribunal, where a High Court appoints arbitrator in terms of Section 11 of the Act;

(vii) to provide that the parties to dispute may at any stage agree in writing that their dispute be resolved through fast track procedure and the award in such cases shall be made within a period of six months;

(viii) to provide for neutrality of arbitrators, when a person is approached in connection with possible appointment as an arbitrator;

(ix) **to provide that application to challenge the award is to be disposed of by the Court within one year.**

7. **The amendments proposed in the Bill will ensure that arbitration process becomes more user friendly, cost effective and lead to expeditious disposal of cases."**

(emphasis added)

The object of the Arbitration Act is to provide an arbitral procedure that is fair, efficient, and capable of meeting the needs of specific arbitration. The object is to ensure that the arbitral proceedings and proceedings filed for challenging the award are concluded expeditiously. The proceedings have to be cost-effective. The supervisory role of the Courts is very restricted. Moreover, we cannot ignore that arbitration is one of the modes of Alternative Disputes Redressal Mechanism provided in Section 89 of the CPC. If the Courts dealing with appeals under Section 37 of the Arbitration Act start routinely passing the orders of remand, the arbitral procedure will cease to be efficient. It will cease to be cost-effective. Such orders will delay the conclusion of the proceedings, thereby defeating the very object of the Arbitration Act. Therefore, an order of remand by Section 37 Court can be made only in exceptional cases where remand is unavoidable. As observed earlier, the scope of interference in a petition under Section 34 is very narrow. The jurisdiction under Section 37 of the Arbitration Act is narrower. Looking to the objects of the Arbitration Act and the limited scope available to the Courts to interfere with the award of the Arbitral Tribunal, this Court, while dealing with the decisions under Sections 34 and 37 of the Arbitration Act, in its jurisdiction under Article 136 of the Constitution of India, has to be circumspect. By their own volition, the parties choose to go before the Arbitral Tribunal instead of availing remedy before the traditional civil courts. Therefore, the Courts must be very conservative

when dealing with arbitral awards and confine themselves to the grounds strictly available under Section 34 of the Arbitration Act.

20. In the facts of the case, the remand was completely unwarranted. The reason is that the learned Single Judge has elaborately dealt with the merits of the challenge in the Section 34 petition. This Court should benefit from reasoned judgment rendered by the Court under Section 37. In this case, we do not have the benefit of a decision of the Appellate Court dealing with all the issues dealt with by the learned Single Judge while deciding the petition under Section 34 of the Arbitration Act. Therefore, it will not be appropriate for this Court to look at the arbitral award and the findings recorded by the Section 34 Court and exercise the jurisdiction of the Section 37 Court. If we do something which Section 37 Court was required to do, it will be unjust to the parties as the unsuccessful party before us will be deprived of one forum of challenge. Therefore, we have no option but to set aside the impugned judgment of the Division Bench and request the Division Bench to decide the appeals on merits after considering the arbitral award and the decision of Section 34 Court.

21. Before we part with the judgment, we must record some serious concerns based on our judicial experience. Case after case, we find that the arbitral proceedings have become synonymous with very bulky pleadings and evidence and very long, time-consuming submissions, leading to very lengthy awards. Moreover, there is a tendency to rely upon a large number of precedents, relevant or irrelevant. The result of all this is that we have very long hearings before the Courts in Sections 34 and 37 proceedings.

22. By way of illustration, we are referring to the factual aspects of the present case. The award runs into 139 pages. The petition under Section 34 of the Arbitration Act runs into 93 pages and incorporates 151 grounds. The judgment of the learned Single Judge dealing with the petition under Section 34 consists of 101 pages. One of the contributing factors is that more than 35 decisions were relied upon by the parties before the learned Single Judge. On the same point, multiple judgments have been cited, taking similar views. As per the practice in the High Court of Judicature at Bombay, a memorandum of appeal under Section 37 of the Arbitration Act does not contain the facts but only the grounds of challenge. In the memorandum of appeal preferred by the respondent consisting of 46 pages, 164

grounds have been incorporated. Considering the narrow scope of interference under Sections 34 and 37 of the Arbitration Act, we cannot comprehend how there could be 151 grounds in a petition under Section 34 and 164 grounds in an appeal under Section 37. It is not surprising that this appeal has a synopsis running into 45 pages, and it contains as many as 54 grounds of challenge.

23. In many cases, the proceedings under Sections 34 and 37 are being treated as if the same are appeals under Section 96 of the CPC. When members of the bar take up so many grounds in petitions under Section 34, which are not covered by Section 34, there is a tendency to urge all those grounds which are not available in law and waste the Court's time. The time of our Courts is precious, considering the huge pendency. This is happening in a large number of cases. All this makes the arbitral procedure inefficient and unfair. It is high time that the members of the Bar show restraint by incorporating only legally permissible grounds in petitions under Section 34 and the appeals under Section 37. Everyone associated with the arbitral proceedings must remember that brevity will make the arbitral proceedings and the proceedings under Sections 34 and 37 more effective. All that we say is that all the stakeholders need to introspect. Otherwise, the very object of adopting the UNCITRAL model will be frustrated. We are not called upon to consider whether the arbitral proceedings are cost-effective. In an appropriate case, the issue will have to be considered. Arbitration must become a tool for expeditious, effective, and cost-effective dispute resolution.

24. As we are directing the rehearing of the appeal under Section 37 of the Arbitration Act, it is necessary to extend the interim relief that was operative during the pendency of these appeals.

25. Accordingly, we pass the following order:

a. The impugned judgment dated 7th July 2023 in Commercial Appeal no.31 of 2023 is, hereby, set aside, and Commercial Appeal no.30 of 2023 is restored to the file of the High Court of Judicature at Bombay;

b. The restored appeal shall be placed before the roster Bench on 29th July 2024 at 10:30 a.m. The parties to the appeal before this Court shall be under an obligation to appear before the concerned Bench on that day, and no fresh notice shall be

served to the parties. The High Court will permit the appellants to file an amended memorandum of appeal containing only the relevant and permissible grounds. The concerned Division Bench shall fix a schedule for hearing of the appeal;

c. The Registry of this Court shall forward a copy of this judgment to the Prothonotary and Senior Master of the High Court of Bombay, who shall ensure that the appeal is listed before the roster Bench as directed above;

d. The interim relief, granted by this Court on 11th August 2023, shall continue to operate till the disposal of the remanded appeal;

e. We make it clear that we have made no adjudication on the merits of the arbitral award and the judgment of the learned Single Judge and all the issues arising in the remanded appeal are left open to be decided by the High Court; and

f. The appeals are, accordingly, partly allowed with no orders as to costs.

Result of the case: Appeals partly allowed.

†*Headnotes prepared by:* Ankit Gyan

[2024] 7 S.C.R. 163 : 2024 INSC 424

Surender Singh
v.
State (NCT of Delhi)

(Criminal Appeal No. 597 of 2012)

03 July 2024

[Sudhanshu Dhulia* and Rajesh Bindal, JJ.]

Issue for Consideration

Correctness of the order of the High Court upholding the conviction and sentence of the appellant for offences under ss. 302 and 307 IPC .

Headnotes†

Penal Code, 1860 – ss. 302 and 307, s. 300 exception 1 – Murder – Culpable homicide not amounting to murder, when – Plea of self-defence – Prosecution case that the appellant-police guard committed murder of the deceased inside the police station while he was on duty – Deceased was having illicit relationship with the appellant's wife – Deceased and the appellant last seen together in conversation with each other inside the police station by more than one witnesses even minutes before these witnesses saw the appellant killing the deceased with his official 9 m.m. carbine – Plea of self defence by the appellant that the death of the deceased was caused by the appellant when the appellant was deprived of his power of self-control due to grave and sudden provocation caused by the deceased which resulted in his death by accident – Conviction and sentence of the appellant for offences ss. 302 and 307 by the courts below – Justification:

Held: All the evidences are unassailable – Prosecution case stands secured on these evidences – It is a clear case of murder – Motive for the appellant that the deceased was having an affair with his wife, and the execution of the crime at the Police Station, all point towards the murder committed inside the police station by the appellant – One fire arm injury with blackening at the entry point also explains that the deceased was first shot from a close range – Remaining injuries also correlate with the testimony of the eye witnesses – Plea of self-defence and in the alternative the

* Author

plea of grave and sudden provocation taken by the appellant that it was the deceased who came to the police station in full speed in his car thereby first hitting the gate of the police station and then making an attempt to snatch the weapon from the appellant in order to kill him, do not hold any ground – Defence not been able to establish a case of private defence by any evidence – Eye witness accounts of police personnels who were all present at the Police Station at that point of time, establish a case of murder beyond any reasonable doubt – Thus, the nature of weapon used; number of gun shots fired at the deceased; part of the body where gun shots are fired, all point towards the fact that the appellant was determined to kill the deceased and ultimately, he achieved his task – Not a case of any lesser magnitude, and definitely not culpable homicide not amounting to murder – Facts do not even remotely make out any case under exception 1 to s. 300, or under any other exceptions to s. 300 IPC – Interferance with the findings of the courts below not called for – Evidence Act, 1872 – s. 105. [Paras 19-26]

Penal Code, 1860 – s. 300 exception 1 – Culpable homicide when not amounting to murder – Provocation when grave and sudden to bring the case under exception 1 to s. 300:

Held: In order to convert a case of murder to a case of culpable homicide not amounting to murder, provocation must be such that would temporarily deprive the power of self-control of a "reasonable person" – Provocation itself is not enough to reduce the crime from murder to culpable homicide not amounting to murder – Time gap between this alleged provocation and the act of homicide; the kind of weapon used; the number of blows, etc, is also to be seen – These are again all questions of facts – There is no standard or test as to what reasonableness should be in these circumstances as this would again be a question of fact to be determined by a Court. [Para 25]

Criminal trial – Cross-examination of witness deferred by two months – Effect:

Held: Such long adjournment after examination-in-chief, should never be given – This may affect the fairness of the trial and may even endanger, in a given case, the safety of the witness – As far as possible, the defence should be asked to cross examine the witness the same day or the following day – Only in very

exceptional cases, and for reasons to be recorded, the cross examination should be deferred and a short adjournment can be given after taking precautions and care, for the witness, if it is required – Courts should be slow in deferring these matters – This practice is not a healthy practice – Mandate of s. 231 Cr.PC and the law laid down on the subject to be followed in its letter and spirit – Code of Criminal Procedure, 1973 – s. 231.[Paras11,13]

Case Law Cited

State of U.P v. Shambhu Nath Singh [2001] 2 SCR 854 **: (2001) 4 SCC 667;** *Ambika Prasad v. State (Delhi Admn.)* [2000] 1 SCR 342 **: (2000) 2 SCC 646;** *Mohd. Khalid v. State of W.B.* [2002] Suppl. 2 SCR 31 **: (2002) 7 SCC 334;** *State of Kerala v. Rasheed* [2018] 13 SCR 587 **: (2019) 13 SCC 297;** *State of M.P. v. Ramesh* [2004] Suppl. 6 SCR 152 **: (2005) 9 SCC 705;** *Salim Zia v. State of U.P.* [1979] 2 SCR 394 **: (1979) 2 SCC 648;** *K.M. Nanavati v. State of Maharashtra* [1961] 1 SCR 497 **: AIR 1962 SC 605 –referred to.**

List of Acts

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

List of Keywords

Murder; Culpable homicide not amounting to murder; Plea of self defence; Power of self-control; Grave and sudden provocation; Motive; Testimony of the eye witnesses; Private defence; Burden of proof; Case under exception 1 to s. 300 IPC; Deferring of cross-examination of witness; Long adjournment after examination-in-chief; Fairness of the trial.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No.597 of 2012

From the Judgment and Order dated 18.05.2011 of the High Court of Delhi at New Delhi in CRLA No.202 of 2008

Appearances for Parties

S K Agarwal, Sr. Adv., Arun K. Sinha, Rakesh Singh, Ms. Anjali Rajput, Sumit Sinha, Rohan Goel, Abhinav Mutyalwar, Vijay Raj Singh Chouhan, Advs. for the Appellant.

Satyajit A. Desai, Adv. (Amicus Curiae)

Mrs. Aishwarya Bhati, A.S.G., Mukesh Kumar Maroria, Ms. Ameya Vikrama Thanvi, Mrs. Chitrangda Rastaravara, Santosh Kumar, Ms. Sweksha, Ms. Poornina Singh, Chinmay Mehta, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Judgment

Sudhanshu Dhulia, J.

1. The appellant before this Court has challenged the order of the High Court (dated 18.05.2011) which has dismissed his appeal while upholding his conviction and sentence by the Trial Court for offences under Sections 302 and 307 of the Indian Penal Code, for which he has been sentenced for life imprisonment and 7 years of rigorous imprisonment respectively.

2. We have heard the learned counsel for the appellant as well as for the State at length.

3. As the facts of the case would reveal the present case is of a brazen murder, committed inside a Police Station in Delhi. The prosecution case is that the appellant, who was posted as a police guard at Mayur Vihar Police Station, Delhi, executed this murder inside the police station, while he was on duty!

4. The deceased was married to the appellant's first cousin and was also his neighbour. The prosecution case is that the deceased had an illicit relationship with the wife of the appellant. There are more than one witnesses to the fact that the deceased and the appellant were last seen together in conversation with each other inside the police station even minutes before these witnesses saw the appellant killing the deceased with his official 9 m.m. carbine.

5. An FIR was lodged at Police Station Mayur Vihar, New Delhi on 30.06.2002 at 2:30 pm, under Sections 302/307 IPC on the narration of PW-2 who was posted at the Police Station, Mayur Vihar, New Delhi as Head Constable at the relevant point of time. PW-2 states that on the date of the incident she reached the Police Station at around 11.30 am and saw the appellant talking to the deceased. She further states that at around 11.40 am, she

heard sounds of fire and then saw the deceased running towards the Duty Officer's room; he was bleeding with his hands held up in the air. The appellant was seen firing at the deceased from his Carbine. When the firing stopped, the deceased was seen lying outside the duty officer's room, bleeding profusely. The appellant was apprehended along with his carbine by the police staff, and PW-2 who was also injured in the firing was taken to the LBS Hospital where she received medical aid, and later lodged the FIR.

6. The police after its investigation filed chargesheet and the case was committed to Sessions, where charges were framed under Sections 302/307 of IPC against the present appellant. The prosecution examined as many as 27 witnesses. The accused, after giving his statement under Section 313 CrPC, had also examined a witness as DW-1. The Trial Court ultimately convicted and sentenced the appellant under Sections 302 and 307 IPC as already stated above.

7. Strangely, and for reasons best known to the prosecution, it examined PW-6 who is the brother of the appellant and PW-25 who is wife of the appellant, as prosecution witnesses. Although these two witnesses have supported the case of the prosecution to the extent that they establish that the deceased was having an extra marital affair with the appellant's wife, yet both of them added in their testimony that it was the deceased who was determined to kill the appellant!

8. PW-25, who is the wife of the appellant, says that, minutes prior to the incident, the deceased had come to her place and had warned her that he was going to the Police Station to kill her husband! PW-6 is also a witness to this expression on the part of the deceased.

9. The accused/appellant who as we shall see, has neither denied the incident nor the fact that he killed the deceased. His argument is that he did it as a matter of self-defence, and in the alternative if self-defence is not accepted by the Court, then it was a case of grave and sudden provocation at best, which led to the death of the deceased at the hands of the appellant. In other words, if at all, the appellant can be punished only for culpable homicide not amounting to murder.

It has been argued before us that on the fateful day (i.e. 30.06.2002), it was the deceased who had come to the police station to kill the appellant and the appellant used his weapon only in self defence, but unfortunately the deceased was killed.

The evidence of PW-25 and PW-6 which we have just referred apparently supports this theory, to the extent that the deceased was determined to kill the appellant. The appellant states in his Section 313 Cr.P.C. statement as under :-

> *"…I was doing my duty as a santari. At about11.40 Satish (deceased) who was my relative came there. I had half closed the doors of PS as per directions of SHO. He opened the doors by hitting car against these. He parked his car inside the PS. He started shouting at me. I took him towards near police quarters. He pounced at me. I forbade him from doing so. I took him towards duty officer's room. I tried to snatch my carbine from his hand. In that process firing took place. Magazine fell down. I tried to pick it up and fit in the carbine. In that process it fired four-five times in air. Satish tried to snatch said carbine from me and in that process was hit by bullets. The carbine fired in rapid action from gate of PS up to police quarters. When we were near duty officer's room the carbine was set at automatic mode. It fired which hit deceased Satish as well as walls, tube lights and windows of duty officer's room."*

The entire case of the defence is built on the above statement of the accused appellant, which is that it was the deceased who had come rushing to the Police Station on that fateful day knowing very well that the appellant was posted there as a guard. He then tried to snatch the weapon from the appellant and in this scuffle, shots were fired from the weapon, which was an accident, which ultimately led to the death of the deceased. This, in short is the case of the defence.

All the same, this trumped up story did not find favour with the trial court and the appellate court and understandably so as the prosecution has an overwhelming evidence to the contrary, which only points towards a dastardly murder at the hands of the present appellant.

The prosecution case is primarily based on the statement of the eye witnesses present in the Police Station itself and mainly PW-2 who is a lady head constable and also the complainant. This witness has remained steadfast to her version of the incident, which was given in the first information report lodged by her; and later in her examination-in-chief and cross-examination, during the trial. She is

an extremely credible and trustworthy witness and the veracity of her statement and deposition establishes the guilt of the accused beyond reasonable doubt, and has its corroboration with other evidences, including ocular evidences of PW-1, PW-14 and PW-17, who were also constables or head Constables posted at Police Station Mayur Vihar, New Delhi, and were present at the Police Station at the relevant time. Additionally, this is also confirmed by the forensic evidence which was gathered by the Police during investigation from the site itself, to which we shall refer in a while.

PW-2 was put to a lengthy cross-examination by the defence. In the cross-examination the defence made every possible attempt to cast doubt on the presence of this witness at the Police Station, but this was all in vain since there are more than one witnesses in this case which clearly establish the presence of PW-2 at the Police Station. Her presence is established by the other witnesses such as PW-1, PW-14 and PW-17, who were also Police constables posted at the same Police Station. Most importantly her presence is established by the fact that this witness (PW-2) is also an injured witness as she had sustained bullet injuries on her left shoulder. Her medical examination was done on the same day and the following injuries were found :

1. *Lacerated wound 2x2 cm over left (L) shoulder near lateral end of clavicle, penetrating anterior aspect, fresh, oozing of blood.*

2. *Lacerated wound left (L) shoulder, posterior aspect near lateral end of clavicle, 3x3 cm, fresh, oozing of blood.*

PW-11, Head Constable Jai Prakash, is the one who took PW-2 to the LBS hospital and also testified before the court in this regard. PW-27, the SHO of the police station who investigated the case, also testified that he reached the police station right after the incident and then rushed to the hospital where he recorded the statement of PW-2.

10. In her examination-in-chief PW-2 says that on 30.06.2002, she was posted at Police Station, Mayur Vihar where she was to work as duty officer from 9 a.m. to 5 p.m., but as she had some personal work in the morning that day, she had taken prior permission from the SHO to arrive late. She hence reached the P.S. at 11.35 a.m. and at the gate, she saw the appellant-Surender (whom she identifies in the court),

and who was posted as guard in the same Police Station, talking to a stranger near a corner of the premises. She then went straight to her duty room and while she was talking to the Head Constable Om Pal (PW-1) from whom she had to take the charge, and where constable Vinod (PW-17) and DHG Jai Singh (PW-5) were also present along with Munshi Gulzari Lal, she suddenly heard sounds of bullet shots in the compound of the Police Station. Then she saw the person with whom the appellant was having a conversation (i.e. the deceased) rushing towards the duty officers' room with his hands up in the air; and he was bleeding. She also saw Constable Surender (i.e. the appellant before this Court), chasing this person from behind, still firing from his 9mm carbine, aiming at the deceased. She as well as the head Constable Om Prakash, Constable Vinod and DHG Jai Singh bent down and took shield in order to avoid stray bullets. She then saw the deceased lying outside the room, bleeding profusely. By this time, she had realized that she too had received bullet injuries on her left shoulder. She was then taken to LBS Hospital by Head Constable Jai Prakash. It was in the hospital that she was informed that the deceased (Satish) was a relative of Surender and that he is now dead, due to the bullet injuries sustained in the firing.

11. The defence did not cross-examine this witness immediately after her examination-in-chief, but sought that the cross examination be deferred, which was done and she was cross-examined only on 30.11.2004, which is more than two months after her examination-in-chief. We may just stop here for a while only to sound a note of caution. Such long adjournment as was given in this case after examination-in-chief, should never have been given. Reasons for this are many, but to our mind the main reason would be that this may affect the fairness of the trial and may even endanger, in a given case, the safety of the witness. As far as possible, the defence should be asked to cross examine the witness the same day or the following day. Only in very exceptional cases, and for reasons to be recorded, the cross examination should be deferred and a short adjournment can be given after taking precautions and care, for the witness, if it is required. We are constrained to make this observation as we have noticed in case after case that cross examinations are being adjourned routinely which can seriously prejudice a fair trial.

12. This Court had, on more than one occasion, condemned this practice of the trial court where examinations are deferred without sufficient

reasons. We may refer here to some cases, which are **State of U.P v. Shambhu Nath Singh (2001) 4 SCC 667; Ambika Prasad v. State (Delhi Admn.) (2000) 2 SCC 646; Mohd. Khalid v. State of W.B. (2002) 7 SCC 334.**

13. As we have said cross examination can be deferred in exceptional cases and for reasons to be recorded by the Court, such as under sub-section 2 of Section 231 of CrPC[1] but even here the adjournment is not to be given as a matter of right and ultimately it is the discretion of the Court. In ***State of Kerala v. Rasheed*** **(2019) 13 SCC 297**, this Court has set certain guidelines under which such an adjournment can be given. The emphasis again is on the fact that a request for deferral must be premised on sufficient reasons, justifying the deferral of cross-examination of the witness.

As we could see from the records in the present case the cross examination of PW-2 was deferred precisely on grounds referred in sub-section (2) of Section 231 of CrPC. The defence requested to examine PW-2 with another prosecution witness (Vinod-PW-17). Yet the records of the case also reveal that though the cross-examination was deferred yet the other witness (PW-17) was examined much later, nearly a year after the cross examination of PW-2. We only wanted to record this cautionary note to make our point that this practice is not a healthy practice and the Courts should be slow in deferring these matters. The mandate of Section 231 of Cr.PC and the law laid down on the subject referred above must be followed in its letter and spirit.

Thankfully, in the case at hand, the deferred cross-examination of PW-2 has not affected the course of the trial. This witness has remained consistent.

14. PW-19 is Dr. S.B. Jangpangi, Casualty Medical Officer posted at LBS Hospital Delhi, who had examined PW-2 as she had received bullet injuries on that fateful day. PW-19 in his statement mentions that two injuries were found on Panwati's (PW-2) body. PW-19 had

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

also examined the deceased who was declared dead by him and found his body riddled with bullet injuries.

15. PW-1, Ompal Singh, who was posted as head constable in P.S. Mayur Vihar is another key prosecution witness. He says that he was working as duty officer on 30.06.2002 in place of WHC Panwati (PW2). After PW-2 reported for her duties Constable Vinod (PW-17), DHG Jai Singh and PW-1 were also in the duty officers' room. He recounts that on the day of the incident he heard sounds of firing at about 11.35 a.m. and saw a person with blood-stained clothes (i.e. the deceased) trying to reach the duty officers' room. He was being chased by the appellant, who was identified by this witness in court. He states that the police staff tried to save their own life in the duty officer's room and then saw the deceased lying on the ground. Constable Panwati (PW-2) also sustained bullet injuries in this firing. He then gave a wireless message of the incident to the SHO. This witness was cross examined later but again nothing has come in the cross to doubt the statement of this witness.

16. PW-11 and PW-17 were again, Head Constable and Constable respectively, who were posted at this police station on that fateful day of June 30, 2002. They were also witness to the crime and their deposition states similar facts as narrated by PW-1 and PW-2.

17. The post-mortem was conducted on 01.07.2002 by Dr. Vinay Kumar Singh (PW18) of LBS Hospital. He found 17 ante mortem injuries on the body of the deceased. He confirms his post-mortem report, in his deposition, where in his opinion the cause of death was shock resulting from fire arm injuries. He states that the injuries on the chest and on the back of the deceased were sufficient to cause his death. He also mentions that bullets were also recovered from the chest cavity of the deceased and one bullet was recovered from the right side of the back. There were 6 fire-arm entry wounds corresponding to 6 fire-arm exit wounds. At least one fire-arm entry wound has a blackening at the entry point which shows that this was fired at a point-blank range.

18. In all, the deceased had received 8 to 9 shots from the carbine of the appellant which are spread all over his body. Entry wounds exist on the front as well as on the back of the deceased's body, which makes it clear that the deceased was shot not only from the front but also from the back, while he was trying to escape. The nature

of these injuries corroborates with the ocular testimony of PW-2. It is PW-2 who had said that when she came to the Police Station, she had seen the deceased talking to the appellant at the gate of the police station and that the appellant was armed with a carbine. PW-21, Constable Devender Kumar who had to take the charge of 'sentry'/guard at 12 noon, also states that he saw the appellant talking to the deceased before the incident. PW-2 heard the sound of firing few minutes later and then saw the deceased (who was bleeding) rushing towards the duty room with his hands in the air, and the appellant was seen firing at him from behind.

19. Taken together, all these evidences are unassailable. The case of the prosecution stands secured on these evidences. It is a clear case of murder. The motive for the appellant (admittedly the deceased was having an affair with the appellant's wife), and the execution of the crime at the Police Station, all point towards the murder committed inside the police station by the present appellant. The one fire arm injury with blackening at the entry point also explains that the deceased was first shot from a close range. The remaining injuries also correlate with the testimony of the eye witnesses referred above.

20. The plea of self-defence and in the alternative the plea of grave and sudden provocation taken by the appellant is based on the theory that it was the deceased who came to the police station in full speed in his car thereby first hitting the gate of the police station and then making an attempt to snatch the weapon from the appellant in order to kill him. But these arguments do not hold any ground and most importantly there is not even an iota of evidence to sustain this bizarre line of defence.

21. Under Section 105 of the Indian Evidence Act[2], the burden of proof that the accused's case falls within the general exception is upon the accused himself. This Court in ***State of M.P. v. Ramesh*, (2005) 9 SCC 705** observed that:

> *"Under Section 105 of the Indian Evidence Act, 1872 (in short "the Evidence Act"), the burden of proof is on the*

2 **105. Burden of proving that case of accused comes within exceptions**.—When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code (XLV of 1860), or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.

accused, who sets up the plea of self-defence, and, in the absence of proof, it is not possible for the court to presume the truth of the plea of self-defence. The court shall presume the absence of such circumstances……Where the right of private defence is pleaded, the defence must be a reasonable and probable version satisfying the court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused."

This burden of proof though is not as onerous as the burden of proof beyond all reasonable doubts which is on the prosecution, nevertheless some degree of reasonable satisfaction has to be established by the defence, when this plea is taken. (*See : **Salim Zia v. State of U.P.**, **(1979) 2 SCC 648***).

22. In the case at hand, the defence has not been able to establish a case of private defence by any evidence. There is no evidence on this aspect and therefore this plea was rightly rejected by the Trial Court as well as the Appellate Court.

23. In fact, the plea of self-defence taken by the accused/appellant is childish to say the least, in the light of the facts of the case, and on the weight of the evidence of the prosecution. The case of the defence that the deceased came to the Police Station "unarmed" to kill the appellant knowing very well that the appellant was armed with a weapon is an awkward attempt to present the deceased as the aggressor. It does not make any sense. What is most important here is the eye-witness accounts of PW-2, PW-1, PW-11 & PW-17, which prove that the appellant did not stop at the initial firing of the shot, which he had fired from a close range (the entry wound of gun shot with blackening). Instead, he continued to spray bullets on the deceased even when he was trying to escape. The eye witness accounts of four police personnels who were all present at the Police Station at that point of time, establish a case of murder beyond any reasonable doubt.

24. The defence again has not even been able to discharge its burden by showing that it is a case of grave and sudden provocation, though an attempt has been made by the defence to bring the case under Exception I to Section 300 IPC. There is however, nothing on record to show that the deceased hit the car at the gate of the

Police Station, which was found parked inside that Police Station with no scratch on its body, thus disproving that it had hit the gate as was the case of the defence. Moreover, all the facts which have been placed before the Court show that it was the appellant who had a motive to kill the deceased as the deceased was having an illicit relationship with his wife. In spite of best efforts by the family members of the appellant and the deceased, the deceased continued with this relationship with the wife of the appellant. This was hence the motive for the appellant to kill the deceased.

25. The appellant would argue that the Act attributable to him would fall under Exception 1 to Section 300 of the Indian Penal Code, which reads as under:

> *"Exception 1.—When culpable homicide is not murder.—Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.*
>
> *The above exception is subject to the following provisos:—First.—That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.*
>
> *Secondly.—That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.*
>
> *Thirdly.—That the provocation is not given by anything done in the lawful exercise of the right of private defence.*
>
> *Explanation.—Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact."*

According to the defence, the death of the deceased was caused by the appellant when the appellant was deprived of his power of self-control due to grave and sudden provocation caused by the deceased which resulted in his death by accident.

This court has reiterated in more than one cases right from ***K.M. Nanavati*** *v.* ***State of Maharashtra*** ***AIR 1962 SC 605*** onwards that

provocation itself is not enough to reduce the crime from murder to culpable homicide not amounting to murder. In order to convert a case of murder to a case of culpable homicide not amounting to murder, provocation must me such that would temporarily deprive the power of self-control of a "reasonable person". What has also to be seen is the time gap between this alleged provocation and the act of homicide; the kind of weapon used; the number of blows, etc. These are again all questions of facts. There is no standard or test as to what reasonableness should be in these circumstances as this would again be a question of fact to be determined by a Court. ***Nanavati*** (supra) answers this question as follows:

> *"84. Is there any standard of a reasonable man for the application of the doctrine of "grave and sudden" provocation? No abstract standard of reasonableness can be laid down. What a reasonable man will do in certain circumstances depends upon the customs, manners, way of life, traditional values etc.; in short, the cultural, social and emotional background of the society to which an accused belongs. In our vast country there are social groups ranging from the lowest to the highest state of civilization. It is neither possible nor desirable to lay down any standard with precision : it is for the court to decide in each case, having regard to the relevant circumstances. It is not necessary in this case to ascertain whether a reasonable man placed in the position of the accused would have lost his self-control momentarily or even temporarily when his wife confessed to him of her illicit intimacy with another, for we are satisfied on the evidence that the accused regained his self-control and killed Ahuja deliberately.*
>
> *85. The Indian law, relevant to the present enquiry, may be stated thus : (1) The test of "grave and sudden" provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control. (2) In India, words and gestures may also, under certain circumstances, cause grave and sudden provocation to an accused so as to bring his act within the First Exception to Section 300 of the Indian Penal Code. (3) The mental background created by the*

> *previous act of the victim may be taken into consideration in ascertaining whether the subsequent act caused grave and sudden provocation for committing the offence. (4) The fatal blow should be clearly traced to the influence of passion arising from that provocation and not after the passion had cooled down by lapse of time, or otherwise giving room and scope for premeditation and calculation."*

In the present case on every possible count the case is nothing but a case of murder. The nature of weapon used; the number of gun shots fired at the deceased; the part of the body where gun shots are fired, all point towards the fact that the appellant was determined to kill the deceased. Ultimately, he achieved his task and made sure that the deceased is dead. By no stretch of logic is it a case of any lesser magnitude, and definitely not culpable homicide not amounting to murder.

The facts of the present case do not even remotely make out any case under Exception 1 to Section 300 of the IPC, or under any other Exception(s) to Section 300 of IPC.

26. In view of the above, we are not inclined to interfere with the findings of the Trial Court and the High Court. Accordingly, this appeal is dismissed. The interim order dated 02.04.2012 granting bail to the appellant, hereby, stands vacated and the appellant is hereby directed to surrender before the trial court within four weeks from today. A copy of this Judgment shall be sent to the Trial Court to ensure that the appellant surrenders and undergoes the remaining part of his sentence.

Result of the case: Appeal dismissed.

†*Headnotes prepared by:* Nidhi Jain

[2024] 7 S.C.R. 178 : 2024 INSC 464

Naresh Kumar
v.
State of Delhi

(Criminal Appeal No.1751 of 2017)

08 July 2024

[C.T. Ravikumar* and Sandeep Mehta, JJ.]

Issue for Consideration

Non-questioning the appellant convicted u/s.302 r/w s.34, Penal Code, 1860 on the twin incriminating circumstances during his examination u/s.313, Code of Criminal Procedure, 1973, if caused material prejudice to him vitiating the trial qua him.

Headnotes†

Code of Criminal Procedure, 1973 – s.313 – Penal Code, 1860 – s.302 r/w s.34 – Non-compliance of s.313 – Non-questioning on the twin incriminating circumstances to the appellant convicted u/s.302 r/w s. 34, IPC during his examination u/s.313, when the finding of common intention was based on the aforesaid twin incriminating circumstances, if caused material prejudice vitiating the trial qua him:

Held: Yes – Non-questioning or inadequate questioning on incriminating circumstances to an accused by itself would not vitiate the trial qua the accused concerned and to hold that the trial qua him is vitiated it is to be established further that it resulted in material prejudice to the accused – Examination of the appellant u/s.313 reveals that both the incriminating circumstances appearing against the appellant in the prosecution evidence viz., exhortation to do away with the lives of the deceased and others in his family and the evidence that the appellant had caught hold of the hands of the deceased to enable his brother-co-accused to stab him repeatedly with knife, were not directly or even indirectly put to him while being examined u/s.313 – The conclusion that the appellant had shared the common intention to commit murder of the deceased was based only on the aforesaid two incriminating circumstances which were not put to him while being questioned u/s.313 – There was no charge of commission of an offence u/s. 300, IPC, punishable u/s. 302, IPC, simplicitor

* Author

against the appellant, he was charged thereunder with the aid of s.34, IPC – Thus, when the finding of common intention was based on the twin incriminating circumstances and when they were not put to the appellant while he was being questioned u/s.313, and when they ultimately culminated in his conviction u/s.302 with the aid of s.34, IPC, and when he was awarded with the life imprisonment, the appellant was materially prejudiced and it had resulted in blatant miscarriage of justice – The failure is not a curable defect and it is a patent illegality vitiating the trial qua the appellant – Appellant's conviction cannot be sustained, acquitted – Impugned judgments set aside qua the appellant. [Paras 20, 21, 24, 26, 27]

Code of Criminal Procedure, 1973 – s.313 – Non-questioning/ inadequate questioning on incriminating circumstances – Prejudice or miscarriage of justice – Onus to establish:

Held: Onus to establish the prejudice or miscarriage on account of non-questioning or inadequate questioning on any incriminating circumstance(s), during the examination u/s. 313 is on the convict concerned. [Para 21]

Code of Criminal Procedure, 1973 – s.313 – Code of Criminal Procedure (Amendment) Act, 2008 (Act 5 of 2009) – s.313(5) – "actus curiae neminem gravabit" – Contention as regards the non-examination/inadequate examination u/s.313 causing material prejudice to the appellant was not appropriately raised and argued before the High Court and was raised for the first time before Supreme Court – Said contention if can be maintained at this stage:

Held: s.313 would reveal the irrecusable obligation coupled with duty on Court concerned to put the incriminating circumstances appearing in the prosecution evidence against accused concerned facing the trial providing him an opportunity to explain – Sub-Section (5) of Section 313 inserted under 2008 Amendment Act lends support to this view – Also, the act of court shall prejudice no one – In a charge for commission of a serious offence where extreme penalty alone is imposable in case the accused is found guilty, procedural safeguards ensuring protection of right(s) of accused must be followed and at any rate, in such cases when non-compliance of the mandatory procedure capable of vitiating trial qua the convict concerned is raised and revealed from records,

irrespective of the fact it was not raised appropriately, it must be considered lest the byproduct of consideration of the case would result in miscarriage of justice – Being the Court existing for dispensation of justice, this Court is bound to consider and correct the mistake committed by the Court by looking into the question whether non-examination or inadequate examination of accused concerned caused material prejudice or miscarriage of justice. [Paras 15, 16]

Code of Criminal Procedure, 1973 – s.313 – Object:

Held: s.313 embodies salutary principle of natural justice viz., audi alteram partem and empowering the Court to examine the accused thereunder is to give the accused concerned an opportunity to explain the incriminating circumstances appearing against him in the prosecution evidence – The general position is that if any incriminating circumstance, appearing against an accused in the prosecution evidence, is not put to him it should not be used against him and must be excluded from consideration – At the same time, it is a well-settled position that non-examination or inadequate examination u/s.313 on any incriminating circumstance, by itself, would not vitiate a trial qua the convict concerned unless it has resulted in material prejudice to him or in miscarriage of justice. [Para 11]

Practice and Procedure – Judgment not containing discussion on a particular point – Said point is to be prima facie assumed not to have been argued unless contrary is shown – Contention of the appellant as regards non-examination/inadequate examination u/s.313 causing material prejudice to him, if was argued before the High Court:

Held: Normally, it has to be presumed that all the arguments actually pressed at the hearing in the High Court were noticed and appropriately dealt with and if the judgment of the High Court does not contain discussion on a point, then that point should be assumed prima facie not to have been argued at the bar unless the contrary is specifically shown – In the present case, though grounds A to Z and AA to GG were taken in this appeal, there was absolute absence of any contention in any one of them to the effect that despite being pressed into, the contention as regards non-examination u/s. 313 was not taken into consideration and appropriately dealt with by the High Court – Hence, the conclusion can only be that it was not argued. [Para 12]

Case Law Cited

V.K. Sasikala v. State [2012] 10 SCR 641 **: (2012) 9 SCC 771;** *Suresh Chandra Bihari v. State of Bihar* [1994] Supp. 1 SCR 483 **: AIR 1994 SC 2420;** *Wariyam Singh & Ors. v. State of U.P.* [1995] Supp. 3 SCR 807 **: AIR 1996 SC 305;** *Amanullah v. State of U.P.,* **AIR 1973 SC 1370;** *Shobit Chamar & Anr. v. State of Bihar* [1998] 2 SCR 117 **: AIR 1998 SC 1693;** *Oil and Natural Gas Company Limited v. Modern Construction and Company* [2013] 10 SCR 466 **: (2014) 1 SCC 648;** *Raj Kumar @ Suman v. State (NCT of Delhi)* [2023] 5 SCR 754 **: 2023 SCC OnLine SC 609;** *State of Punjab v. Swaran Singh* 2005 Supp. 1 SCR 786 **: (2005) 6 SCC 101 – referred to.**

List of Acts

Code of Criminal Procedure, 1973; Penal Code, 1860; Code of Criminal Procedure (Amendment) Act, 2008 (Act 5 of 2009).

List of Keywords

Section 313 of Code of Criminal Procedure, 1973; Questioning under clause (b) Section 313 of Code of Criminal Procedure, 1973 is mandatory; Conviction under Section 302 read with Section 34, Penal Code, 1860; Examination under Section 313 of Code of Criminal Procedure, 1973; Incriminating circumstances; Non-questioning/inadequate questioning on incriminating circumstances; Material prejudice or blatant miscarriage of justice; Procedural safeguards; Protection of rights of accused; non-compliance of the mandatory procedure; Finding of common intention based on the incriminating circumstances; Exhortation; Non-curable defect; Patent illegality; Trial vitiated; Principle of natural justice viz., "audi alteram partem"; "actus curiae neminem gravabit"; Act of court shall prejudice no one; Contention not argued before the High Court; Contention not raised appropriately.

Case Arising From

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1751 of 2017

From the Judgment and Order dated 20.12.2016 of the High Court of Delhi at New Delhi in CRLA No. 540 of 2000

Appearances for Parties

S. D. Singh, Ms. Bharti Tyagi, Ms. Shweta Sinha, Ram Kripal Singh, Dhiraj Kumar, Siddharth Singh, Advs. for the Appellant.

Ms. Sonia Mathur, Sr. Adv., Shreekant Neelappa Terdal, Ms. Ruchi Kohli, Ms. Swarupama Chaturvedi, Ms. Noor Rampal, Shantnu Sharma, Mukesh Kumar Maroria, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Judgment

C.T. Ravikumar, J.

1. Births of crimes and culprits concerned, occur together. Yet, under the criminal justice delivery system only on concluding findings on commission of the crime concerned in the affirmative, the question whether the accused is its culprit would arise. Culpability can be fixed, if at all it is to be fixed, on the accused upon conclusive proof of the same established by the prosecution only after following various procedural safeguards recognizing certain rights of an accused. Failure to comply with such mandatory procedures may even vitiate the very trial, subject to the satisfaction of conditions, therefor. Foremost among one such right is embedded in Section 313 of the Code of Criminal Procedure, 1973 (for short the 'Cr.PC'). Though questioning under clause (a) of sub-Section (1) of Section 313, Cr.PC, is discretionary, the questioning under clause (b) thereof is mandatory. Needless to say, a fatal non-compliance in the matter of questioning under Clause (b) of sub-section (1) thereof, in case resulted in material prejudice to any convict in a criminal case the trial concerned, qua that convict should stand vitiated. This prelude becomes necessary as in the captioned appeal the main thrust of the argument advanced is founded on fatal, non-compliance in the matter of questioning under Section 313, Cr.PC, qua the appellant who is a life convict. We will dilate on this a little later.

2. The appellant, who was accused No.4 in Sessions Case No.3/97 is challenging the confirmation of his conviction under Section 302, IPC, with the aid of Section 34, IPC, under the impugned judgment in Criminal Appeal No.540/2000 dated 20.12.2016 passed by the High Court of Delhi. As per the prosecution, an argy-bargy over spilling of drops of water over the roof of the appellant's house

while Laxmi, the sister of the deceased-Arun Kumar was cleaning the *chajja* (parapet) of their house resulted in the accurst incident, where the said Arun Kumar lost his life on 14.06.1995 at 08.45 pm. The case of the prosecution is that enraged by the dropping of water over the roof, the wife of the appellant, namely, Meena, hurled filthy words at Laxmi. Then the appellant came out and he, too, started abusing. Thereupon, the deceased asked him to stop abusing his sister and then the appellant exhorted his brother Mahinder Kumar to come out and finish them. Soon, Mahinder came out with a knife and the appellant-Naresh Kumar caught hold of Arun Kumar and Mahinder stabbed on his chest repeatedly with the knife. The necroscopic evidence in this case consists of the oral testimony of PW-17, Dr. LK Baruah and the postmortem report Ext.PW7/A, which disclosed that the deceased had sustained the following antemortem injuries:

> *"1. Incised wound size 1.3 cm x 0.5 cm. On the left side front of chest. There is 1-1/2 medial to the left nipple placed abliquely.*
>
> *2. Incised wound size .3 cm x 0.5 cm.x? on the middle of chest situated 1.5 cm. Right to the mid line and below a line drawn between two nipples.*
>
> *3. Two incised wounds size 1.3 cm. And other 1.5 cm. In the right epigeastric region.*
>
> *4. Incised wounds left side lower part of chest 9 cm. Below left nipple size 1.4 cm x 2.3 cm.*
>
> *5. Abrasion on the dorsom left forearm and hand*
>
> *6. Abrasion seen below left eye."*

3. Taking note of the said necroscopic evidence corroborating the events unfolded through the oral testimonies of the eye-witnesses viz., Anil Kumar (PW-7), Smt. Prem Devi (PW-8), Sanjay (PW-20), who are respectively the brother, mother and one cousin of the deceased and Smt. Madhu (PW-19) and Anand Kumar (PW-22) besides the other evidences, the trial Court found that the homicidal death of Arun Kumar amounts to murder and culpability was fixed on Mahinder Kumar, the first accused. We make it clear that we are not going to make any observation in respect of Sri Mahinder Kumar in this

appeal and reference about him was made solely for the purpose of disposing this appeal.

4. As noticed earlier, the conviction of the appellant under Section 302, IPC, was then made with the aid of Section 34, IPC, and upon which he was awarded imprisonment for life. The conviction of the appellant herein was confirmed under the impugned common judgment dated 20.12.2016 in Criminal Appeal No.540/2000 (filed by the appellant herein), and Criminal Appeal No.764/2000 (filed by Mahinder Kumar).

5. Heard Sh. S.D. Singh, learned counsel appearing for the appellant and Ms. Sonia Mathur, learned senior counsel appearing for the respondent State.

6. As noticed earlier, the thrust of the argument for the appellant was founded on prejudicial non-compliance of Section 313, Cr.PC, during the examination thereunder, qua the appellant. Before going into its details, we think it appropriate to consider whether the appellant is raising this contention for the first time before this Court. In this context, it is to be noted that there is nothing on record which would reveal that specific contention in this regard was raised before the High Court in the appeal. True, that in the appeal before the High Court a ground in this regard was raised as 'ground No.13' as hereunder: -

> *"13. That has been no proper examination of the appellant u/s. 313 Cr.P.C. which has caused material prejudice to the appellant."*

7. There is nothing in the impugned judgment to reveal that this point was argued with specific details establishing prejudice, before the High Court. The innumerable grounds (grounds A to Z and AA to GG) raised in this appeal would reveal that neither directly nor indirectly, this core contention was taken in any of them. At any rate, no ground was raised to the effect that despite raising this ground, the High Court had failed to consider it. Be that as it may, the order dated 21.07.2017 of this Court would reveal that the learned counsel for the appellant argued before this Court that while recording the statement of the appellant under Section 313, Cr.PC, no incriminating circumstances appearing in the prosecution evidence against him, were put to him and that vitiated the whole trial. Obviously, thereupon notice was issued in the Special Leave Petition from which this appeal arose. Later, only in the first application for bail, a contention

on the following lines was taken and it was reiterated in the second application for bail as well:

> *"7. That on completion of the evidence statement of accused under Section 313 Cr. PC have been recorded on 6.6.2000 and the mere perusal of the statement would show that no incriminating evidence which had been subsequently considered for the conviction of the appellant by the Ld. Trial Court as well as Hon'ble High Court had been put to the Appellant. Therefore, the entire trial against the Appellant is vitiated."*

8. During the course of the arguments by the learned counsel for the appellant submitted that this contention is based on non-questioning on two incriminating circumstances appeared against the appellant in the prosecution evidence viz., exhortation to do away with their lives (*aaj inko jaan se hi khatam karde*) and the evidence that 'the appellant had caught hold of the hands of the deceased Arun Kumar to enable Mahinder Kumar to stab him repeatedly with knife' and they formed the foundation for holding that the appellant had shared common intention with the first accused and ultimately, for holding the appellant guilty with the aid of Section 34, IPC, for the offence under Section 300, IPC, punishable under Section 302, IPC.

9. In view of the aforementioned core contentions, we are of the considered view that we need to consider the other grounds taken up in the appeal on the merits only if the appellant could not succeed based on non-examination under Section 313, Cr.PC, qua the appellant. We may consider any other relevant aspect, circumstance or evidence if we find that it is required for a proper consideration and appreciation of the above-mentioned core contention.

10. We have taken note of the absence of materials to show that the aforesaid core contention was appropriately raised and argued before the High Court. In the captioned appeal, it was not taken at all. In view of the circumstances the contention is resurrected, we are of the considered view that to entertain the same, it is essential to have a short survey on the authorities on the scope of maintaining such a contention at this stage in the aforementioned circumstances. Subject to its answer, we may also have to consider the question of prejudice or miscarriage of justice due to the non-compliance with mandate for questioning under Section 313, Cr.PC.

11. In the context of the issues thus involved, it is only proper to look into the very object of Section 313, Cr.PC. This aspect has been considered many a times by this Court to hold that it embodies one salutary principle of natural justice viz., *audi alteram partem* and empowering the Court to examine the accused thereunder is to give the accused concerned an opportunity to explain the incriminating circumstances appearing against him in the prosecution evidence. In the decision in ***V.K. Sasikala v. State***[1], this Court held that examination of an accused under Section 313, Cr.PC, would not only provide an opportunity to him to explain the incriminating circumstances appearing in evidence against him, but also would permit him to forward his own version with regard to his alleged involvement in the crime. Furthermore, it was held that such an examination would have a fair nexus with a defence he might choose to bring and, therefore, any failure in such examination might take the effect of curtailing his right in the event he took up a specific defence. The general position is that if any incriminating circumstance, appearing against an accused in the prosecution evidence, is not put to him it should not be used against him and must be excluded from consideration. At the same time, we may hasten to add that it is a well-neigh settled position that non-examination or inadequate examination under Section 313, Cr.PC, on any incriminating circumstance, by itself, would not vitiate a trial qua the convict concerned unless it has resulted in material prejudice to him or in miscarriage of justice. In the decision in ***Suresh Chandra Bihari v. State of Bihar***[2] and in ***Wariyam Singh & Ors. v. State of U.P.***[3], this Court held that mere defective/improper examination under Section 313, Cr.PC, would be no ground to set aside a conviction of the accused unless it has resulted in prejudice to the accused. In view of the said position which is being followed with alacrity we do not think it necessary to multiply the authorities on it.

12. We have already noted that 'ground No.13' raised in the appeal before the High Court was too vague, in the sense without clarity whatsoever, as to what were the incriminating circumstances that

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1 [2012] 10 SCR 641 : (2012) 9 SCC 771

2 [1994] Supp. 1 SCR 483 : AIR 1994 SC 2420

3 [1995] Supp. 3 SCR 807 : AIR 1996 SC 305

appeared in the prosecution evidence not being put to the appellant while being examined and what is the material prejudice or miscarriage of justice caused consequent to such failure. To make matters worse, a scanning of the impugned judgment of the High Court would not disclose whether before the High Court, the said contention was pressed into service much-less whether it was argued with precision on quintessential materials to establish that the trial qua the appellant was vitiated. In the contextual situation it is relevant to refer to the decision of this Court in ***Amanullah v. State of U.P.***[4]. Normally, it has to be presumed that all the arguments actually pressed at the hearing in the High Court were noticed and appropriately dealt with and if the judgment of the High Court does not contain discussion on a point, then that point should be assumed *prima facie* not to have been argued at the bar unless the contrary is specifically shown, it was so, held in the said judgment. In the case on hand though grounds A to Z and AA to GG were taken in this appeal, there is absolute absence of any contention in any one of them to the effect that despite being pressed into the said contention was not taken into consideration and appropriately dealt with by the High Court. Hence, the conclusion can only be that it was not argued.

13. This position takes us to the next question as to whether in such circumstances the contention based on non-examination/inadequate examination under Section 313, Cr.PC, causing material prejudice qua the appellant can be maintained at this stage. In this context, it is only appropriate to refer to the decision of this Court in ***Shobit Chamar & Anr. v. State of Bihar***[5]. It was held therein that where the plea as to non-compliance of the provisions of Section 313, Cr.PC, was raised for the first time before the Supreme Court, in case no prejudice had resulted to the accused was proved, the trial could not be held as vitiated. In that case, though the non-compliance was taken for the first time before the Supreme Court, the records showed that the relevant portion of the statement of witnesses were put to the accused in examination under Section 313, Cr.PC, and, thereupon, the plea was rejected. It is to be noted that was also a case of murder.

4 AIR 1973 SC 1370

5 [1998] 2 SCR 117 : AIR 1998 SC 1693

14. In the light of the aforesaid question posed for consideration, it is only appropriate to refer to the relevant provisions under Section 313 (1), (4) and (5).

> *"**313. Power to examine the accused**. — (1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court—*
>
> > *(a) may at any stage, without previously warning the accused put such questions to him as the Court considers necessary;*
> >
> > *(b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case:*
> >
> > *Provided that in a summons-case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b).*
>
> *(2) …*
>
> *(3) …*
>
> *(4) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.*
>
> *(5) The Court may take help of Prosecutor and Defence Counsel in preparing relevant questions which are to be put to the accused and the Court may permit filing of written statement by the accused as sufficient compliance of this section."*

15. A bare perusal of the provisions under Section 313, Cr.PC, extracted above, would undoubtedly reveal the irrecusable obligation coupled with duty on Court concerned to put the incriminating circumstances appearing in the prosecution evidence against accused concerned facing the trial providing him an opportunity to explain. Sub-Section

(5) of Section 313, Cr.PC, which was inserted under Code of Criminal Procedure (Amendment) Act, 2008 (Act 5 of 2009) with effect from 31.12.2009, would lend support to this view. It reads thus: -

> ***"Section 313. Power to examine the accused.***
>
> *** *** *** ***
>
> *(5) The Court may take help of Prosecutor and Defence Counsel in preparing relevant questions which are to be put to the accused and the Court may permit filing of written statement by the accused as sufficient compliance of this section."*

16. In this context, the maxim *"actus curiae neminem gravabit"* – "the act of court shall prejudice no one", has also to be looked into. In the decision in ***Oil and Natural Gas Company Limited v. Modern Construction and Company***[6], this Court held that the court has to correct the mistake it has done, rather than to ask the affected party to seek his remedy elsewhere. In the context of the decisions referred above, there can be no doubt that in a charge for commission of a serious offence where extreme penalty alone is imposable in case the accused is found guilty, procedural safeguards ensuring protection of right(s) of accused must be followed and at any rate, in such cases when non-compliance of the mandatory procedure capable of vitiating trial qua the convict concerned is raised and revealed from records, irrespective of the fact it was not raised appropriately, it must be considered lest the byproduct of consideration of the case would result in miscarriage of justice. Being the Court existing for dispensation of justice, this Court is bound to consider and correct the mistake committed by the Court by looking into the question whether non-examination or inadequate examination of accused concerned caused material prejudice or miscarriage of justice. We may hasten to add here, that we shall not be understood to have held that always such a mistake has to be corrected by this Court by examining the question whether material prejudice or miscarriage of justice had been caused. In this context, the summarization of law on the subject of consequence of omission to make questioning on incriminating circumstances appearing in the prosecution evidence

6 [2013] 10 SCR 466 : (2014) 1 SCC 648

and the ways of curing the same, if it is called for, by this Court in the decision in ***Raj Kumar @ Suman v. State (NCT of Delhi)***[7], assumes relevance. Paragraph 16 of the said decision reads thus:-

> *"17. The law consistently laid down by this Court can be summarized as under:*
>
> *(i) It is the duty of the Trial Court to put each material circumstance appearing in the evidence against the accused specifically, distinctively and separately. The material circumstance means the circumstance or the material on the basis of which the prosecution is seeking his conviction;"*
>
> *(ii) The object of examination of the accused under Section 313 is to enable the accused to explain any circumstance appearing against him in the evidence;*
>
> *(iii) The Court must ordinarily eschew material circumstances not put to the accused from consideration while dealing with the case of the particular accused;*
>
> *(iv) The failure to put material circumstances to the accused amounts to a serious irregularity. It will vitiate the trial if it is shown to have prejudiced the accused;*
>
> *(v) If any irregularity in putting the material circumstance to the accused does not result in failure of justice, it becomes a curable defect. However, while deciding whether the defect can be cured, one of the considerations will be the passage of time from the date of the incident;*
>
> *(vi) In case such irregularity is curable, even the appellate court can question the accused on the material circumstance which is not put to him; and*

7 [2023] 5 SCR 754 : 2023 SCC OnLine SC 609

(vii) In a given case, the case can be remanded to the Trial Court from the stage of recording the supplementary statement of the concerned accused under Section 313 of CrPC.

(viii) While deciding the question whether prejudice has been caused to the accused because of the omission, the delay in raising the contention is only one of the several factors to be considered."

17. In view of the circumstances obtained in this case, factually and legally, it is also relevant to refer to paragraph 20 of the decision in ***Raj Kumar's*** case (supra) and it reads thus:-

> *"21. Even assuming that the defect or irregularity was curable, the question is whether today, the appellant-accused can be called upon to explain the said circumstance. More than 27 years have passed since the date of the incident. Considering the passage of time, we are of the view that it will be unjust now at this stage to remit the case to the Trial Court for recording further statement of the appellant under Section 313 of CrPC. In the facts of the case, the appellant cannot be called upon to answer something which has transpired 27 years back. There is one more aspect of the matter which persuaded us not to pass an order of remand. The said factor is that the appellant has already undergone incarceration for a period of 10 years and 4 months."*

18. In this case, the incident in question occurred on 14.06.1995 and thus, obviously, more than 29 years have passed by. The appellant has already undergone incarceration for a period of more than 12 years. In the circumstances, we are inclined to proceed with the consideration of the contentions bearing in mind the aforesaid authorities laying down the position of law on various aspects of Section 313, Cr.PC.

19. In the case on hand, the appellant was convicted for the offence under Section 300, IPC, punishable under Section 302, IPC, with the aid of Section 34, IPC. In other words, the conviction was not under Section 302, Cr.PC, simpliciter. Upon finding guilty for commission of murder only one of two extreme penalties viz., death or imprisonment for life

could be imposed on the convict. When this be the consequence of finding an accused to have committed murder or in any other serious offence where extreme punishment of like nature alone is imposable, the failure to comply with the mandatory questioning on incriminating circumstance(s) appearing in the prosecution case, if made out, the plea of non-examination or inadequate examination under Section 313, Cr.PC, whether resulted in material prejudice to the accused or total miscarriage of justice, shall not be ignored or declined to be taken into account by the Court.

20. We have already noted that crucial incriminating circumstances viz., (1) pertaining to the exhortation of the appellant to kill Arun Kumar and others in his family (2) he had caught hold of the deceased to enable Mahinder Kumar to stab on his chest repeatedly, were not allegedly put to the appellant while being examined under Section 313, Cr.PC. The first among the twin incriminating circumstances not to put to the appellant was virtually the charge framed against him to the effect that in furtherance of the common intention of Mohinder Kumar and the appellant caught hold of deceased Arun Kumar and the other accused Mohinder Kumar inflicted knife blows on deceased Arun Kumar and murdered him. The former incriminating circumstance relating to exhortation by the appellant did not form part of the charge against the appellant. There can be no doubt with respect to the position that the question whether the aforementioned twin incriminating circumstances appeared in the prosecution evidence and whether they were put to the appellant while being examined under Section 313, Cr.PC, to enable him an opportunity to offer explanation are not matters of argument as a bare perusal of the materials on record viz., the oral testimonies of the eyewitnesses and Section 313, Cr.PC, examination of the appellant would reveal the verity or otherwise of the said contentions. The oral testimonies of Anil Kumar (PW-7), Smt. Prem Devi (PW-8), Mrs. Madhu (PW-19) and Anand Kumar (PW-22) would reveal that they have deposed regarding the exhortation from the appellant though in slightly different manner, and also about the fact that he had caught hold of the deceased to enable Mohinder Kumar to stab on the chest of the deceased repeatedly. The examination of the appellant under Section 313, Cr.PC, which is available on record, would reveal that both the incriminating circumstances were not directly or even indirectly put to the appellant while being examined

under Section 313, Cr.PC. The learned counsel appearing for the respondent would fairly admit that the said material on record would reveal the correctness of the contentions of the appellant.

21. We have already held that whether non-questioning or inadequate questioning on incriminating circumstances to an accused by itself would not vitiate the trial *qua* the accused concerned and to hold the trial *qua* him is vitiated it is to be established further that it resulted in material prejudice to the accused. True that the onus to establish the prejudice or miscarriage on account of non-questioning or inadequate questioning on any incriminating circumstance(s), during the examination under Section 313, Cr.PC, is on the convict concerned. We say so, because if an accused is ultimately acquitted, he could not have a case that he was prejudiced or miscarriage of justice had occurred owing to such non-questioning or inadequate questioning.

22. In the light of the above view of the matter, we are inclined to consider the further question whether the non-questioning on the aforesaid twin incriminating circumstances to the appellant during his examination under Section 313, Cr.PC, had caused material prejudice to him. The decision of this Court in ***State of Punjab v. Swaran Singh***[8], constrain us to consider one another factor while considering the question of prejudice. In ***Swaran Singh's*** case (supra), this Court held that where the evidence of the witnesses is recorded in the presence of the accused who had the opportunity to cross examine them but did not cross examine them in respect of facts deposed, then, omission to put question to the accused regarding the evidence of such witnesses would not cause prejudice to such an accused and, therefore, could not be held as grounds vitiating the trial *qua* the convict concerned. We have already found that Anil Kumar (PW-7), Smt. Prem Devi (PW-8), Mrs. Madhu (PW-19) and Anand Kumar (PW-22) have deposed about the said circumstances. A scanning of their oral testimonies, available on record, would undoubtedly reveal that on both the points, on behalf of the appellants they were cross examined.

23. The position, as above, would take us to the last question whether material prejudice was caused to the appellant on account of non-

8 [2005] Supp. 1 SCR 786 : (2005) 6 SCC 101

questioning him on the aforesaid incriminating circumstances and thereby depriving him an opportunity to explain. This question can better be considered by referring to paragraph 31 of the judgment of the Trial Court, which virtually got confirmance from the High Court under the impugned judgment. It reads thus:-

> *"31. As far the part played by accused Naresh is concerned, this has come in the evidence of PWs that he (Naresh) is the man, who called his brother Mahinder and exhorted "Mahender came out and kill them today" and thereafter his taking part in the incident, by catching hold of deceased Arun Kumar, clearly goes to show the common' intention of the two, i.e. Naresh and Mahinder and even the Learned Defence Counsel, cannot be benefited from the above noted authorities."*

24. It is evident from the afore-extracted paragraph from the judgment of the Trial Court that the said conclusion that appellant had shared the common intention to commit murder of the deceased Arun Kumar was based only on the aforesaid two incriminating circumstances which were not put to the appellant while being questioned under Section 313, Cr.PC. When the very charge framed against him, as referred as above, would reveal that there was no charge of commission of an offence under Section 300, IPC, punishable under Section 302, IPC, simplicitor against the appellant whereas the said charge thereunder with the aid of Section 34, IPC. In such circumstances, when the finding of common intention was based on the twin incriminating circumstances and when they were not put to the appellant while he was being questioned under Section 313, Cr.PC, and when they ultimately culminated in his conviction under Section 302, IPC, with the aid of Section 34, IPC, and when he was awarded with the life imprisonment consequently, it can only be held that the appellant was materially prejudiced and it had resulted in blatant miscarriage of justice. The failure as above is not a curable defect and it is nothing but a patent illegality vitiating the trial qua the appellant.

25. Once, the upshot of the discussion is above, we do not think it proper to deal with the innumerable grounds raised by the appellant, not only because it has become unnecessary but also such consideration may adversely affect the co-accused whose appeal was also decided under the very same common judgment impugned in this appeal.

26. As noticed hereinbefore, the incident in question occurred more than 29 years ago and the appellant had already undergone incarceration more than 12 years. In such circumstances, if he is again subjected to examination under Section 313, Cr.PC, it would cause further prejudice to him in view of the patent illegality occurred *qua* the appellant. Hence, the conviction of the appellant could not be sustained.

27. For the aforesaid reasons, the appeal must succeed. Accordingly, the impugned judgment of the trial Court and the High Court are set aside qua the appellant. We make it clear that this judgment would not disturb the conviction of the other accused. We also make it clear that this observation shall not be taken as confirmation of his conviction as it is a matter which may be dealt with in an appeal, if any, filed by him. The appellant herein stands acquitted of the offences alleged against him. If his detention is not required in connection with any other case, he shall be released, forthwith.

28. The appeal is allowed on the above terms.

29. Pending application(s), if any, are disposed of.

Result of the case: Appeal allowed.

[†]*Headnotes prepared by:* Divya Pandey

[2024] 7 S.C.R. 196 : 2024 INSC 466

Mahesh Chand Bareth & Anr.
v.
State of Rajasthan & Ors.

(Civil Appeal No. 7906 of 2010)

08 July 2024

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

Issue for Consideration

Is Rule 13(v) of the Rajasthan Panchayati Raj Prabodhak Service Rules, 2008 , insofar as it provides age relaxation to the persons serving under educational projects discriminatory and contrary to Article 14 of the Constitution of India; Was the award of bonus marks to the project employed applicants discriminatory and ultra vires the Rules; Were the guidelines sanctioning the award of bonus marks on a differential basis for applicants with project experience and other applicants invalid for any other reason.

Headnotes†

Rajasthan Panchayati Raj Prabodhak Service Rules, 2008 – r.13(v) – Age relaxation – Selection to the post of Prabodhak (Teacher) – Constitution of India – Article 14 – r.13(v), if discriminatory and contrary to Article 14:

Held: Validity of r.13(v) is upheld – The relaxation provided for in r.13(v) is not arbitrary or unreasonable – Fixing of minimum and maximum age requirement is a policy decision – r.13 reveals that the minimum age required was 23 years and the maximum outer limit was 35 years – In the proviso there were several categories to which relaxation was granted – The challenge of the appellants is only to sub clause (v) – Insofar as the clause (v) is concerned, the historical background leading to the enactment of the Rules itself provides a justification for granting relaxation to the persons serving under the educational project, if they fulfil the condition that they were within the age limit when they were initially engaged – The projects were designed to deal with absentee teachers in the far flung areas which was causing a serious jeopardy to the education of the rural children – The para teachers worked under difficult circumstances – They had the advantage of interacting personally with the children of the far-flung areas – They only received an honorarium – The projects themselves played a large

* Author

part in uplifting the elementary education programme in the State of Rajasthan – The para teachers motivated the children to come to school – It was in this background that the grade of 'Prabodhak' (teacher) and Senior 'Prabodhak' were encadred and separate rules enacted – Those who served in projects formed a separate class – There was a valid classification based on intelligible differentia which distinguished applicants with project experience and those who lacked project experience – The differentia had a rational relation to the object sought to be achieved by the Rules – The job of a Prabodhak was exactly the job that the para teachers carried out in the projects and if the Government felt that the experience gained by them should not be lost and in that regard granted them age relaxation, provided they fulfil the condition of being within the age limit at the time of their initial appointment in the project, no fault can be found with the same – No error, perversity or mala fide in the criterion adopted on the peculiar facts of the present case – Also, there is no illegality in the prescription of additional marks for those applicants who had experience of working in projects, while recruiting Prabhodhaks – The statutory rules in r.13(v) recognize that project employed applicants were a class apart with the idea being that their experience should not be wasted Before the advertisement was issued, the guidelines setting out various aspects including the aspect of bonus marks were issued and no infirmity can be found with the same – Opportunity was given to all, with the only difference being that by an executive instruction additional marks were granted for project experience – The executive guidelines only supplemented the Rules and did not supplant them – No illegality in the award of bonus marks. [Paras 20, 22-25, 28, 29, 37]

Case Law Cited

Union of India & Ors v. Shivbachan Rai **(2001) 9 SCC 356;** *Srinivas K. Gouda v. Karnataka Institute of Medical Sciences and Others* [2021] 6 SCR 1144 **: (2022) 1 SCC 49 – relied on.**

Satya Dev Bhagaur & Ors. Vs. The State of Rajasthan & Ors. **(2022) 5 SCC 314 – held applicable.**

Bedanga Talukdar vs. Saifudaullah Khan & Ors. [2011] 11 SCR 635 **: (2011) 12 SCC 85;** *State of Maharashtra vs. Raj Kumar* **(1982) 3 SCC 313;** *Kailash Chand Sharma vs State of Rajasthan & Ors.* [2002] Supp. 1 SCR 317 **: (2002) 6 SCC 562;** *Official Liquidator vs. Dayanand & Ors.* [2008] 15 SCR 331 **: (2008) 10**

SCC 1; *State of Rajasthan vs. Archana* **(2017) 11 SCC 421;** *Manoj Kumar Acharya vs. State of Rajasthan & Ors.* **(Civil Appeal 12335 of 2016 dated 18.01.2022) – held inapplicable.**

List of Acts

Rajasthan Panchayati Raj Prabodhak Service Rules, 2008; Constitution of India; Rajasthan Panchayati Raj Act, 1994.

List of Keywords

Rule 13(v) of the Rajasthan Panchayati Raj Prabodhak Service Rules, 2008; Service Rules; Prabodhak; Senior Prabodhak; Teachers; Advertisement; Recruitment; Service conditions; Age relaxation not discriminatory and contrary to Article 14; Age relaxation to persons serving under educational projects; Educational projects; Fixing of minimum and maximum age requirement; Within the age limit at the time of initial appointment; Direct recruitment; Policy decision; Project employed applicants; Bonus marks; Bonus marks to project employed applicants; Bonus marks for teaching experience; Far flung areas; Children of the far-flung areas; Encouraging/motivating children to attend schools; Absentee teachers; Education of rural children; Para teachers; Difficult circumstances; Honorarium; Dropouts; Drop out of students; Dropouts from schools; Elementary education programme; Separate class; Valid classification; Valid classification based on intelligible differentia; Intelligible differentia; Project experience; Guidelines sanctioning the award of bonus marks on differential basis; Lack of Project experience; Differentia had a rational relation to the object sought to be achieved; Executive instruction; Executive guidelines; Executive guidelines supplemented the Rules and did not supplant them; Rajiv Gandhi Pathshala; Shiksha Karmi Board; Lok Jumbish Pariyojana; Sarva Shiksha Abhiyan; District Primary Education Programme; Guidelines in public domain; Rules of the game were not changed after the match had begun; Error; Perversity; Mala fide.

Case Arising From

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7906 of 2010

From the Judgment and Order dated 21.05.2010 of the High court of Rajasthan at Jaipur in DBSAW No. 402 of 2009

With

Civil Appeal No. 7250 of 2024, Civil Appeal Nos. 8656-8668, 9618, 10709, 10712, 10711 and 10710 of 2011, Civil Appeal Nos. 6898, 1668 and 1038 of 2012, Civil Appeal Nos. 11332, 11442 and 11407 of 2011, Civil Appeal Nos. 4559, 6096-6104 and 8661 of 2012, Civil Appeal Nos. 7251-7252 of 2024, Civil Appeal No. 322 of 2013, Civil Appeal Nos. 9328-9331 and 10281 of 2010, Civil Appeal Nos. 2800-2802, 2806-2808, 2803, 2804-2805, 2980, 2978, 2979, 2976, 2977, 4569, 3732, 5180, 5183, 3731, 5182 and 7646 of 2011, Civil Appeal No. 1210 of 2012, Civil Appeal No. 8302 of 2010, Civil Appeal Nos. 2982, 2981, 2921, 3730, 4688, 4745 and 5258 of 2011 and Civil Appeal No. 8215 of 2013

Appearances for Parties

Sushil Kumar Jain, Ms. Archana Pathak Dave, Dr. Manish Singhvi, Sr. Advs., Puneet Jain, Mrs. Christi Jain, Ms. Akriti Sharma, Mann Arora, Ms. Lisha Bhati, Ms. Pratibha Jain, Ms. Chitrangda Rastravara, Aishwary Mishra, Dhananjai Shekhwat, Dashrath Singh, Anirudh Singh, Rakesh Dahiya, Aditya Dahiya, Kapil Dahiya, Satyavan Kudalwal, Praveen Swarup, Sarad Kumar Singhania, P. K. Jain, Ajay Choudhary, Rameshwar Prasad Goyal, Abhijeet Singh, Anjali Saxena, Gp. Capt. Karan Singh Bhati, Bankey Bihari Sharma, Ajit Kumar Thakur, R N Verma, Sanjay Misra, Mukul Kumar, H. D. Thanvi, Rishi Matoliya, Nikhil Kumar Singh, Raghuveer Pujari, Ms. Sumati Sharma, Ms. Parul Shukla, Udayaditya Banerjee, Ms. Tanvi Chuphal, Ms. Shubhangi Pandey, Abhishek Kumar, Ms. Deeksha Saggi, Rituparn Uniyal, B Tyagi, Nayyar Siddiqui, Ram Lal Roy, Milind Kumar, Ms. Shubhangi Agarwal, Apurv Singhvi, Rohan Darade, Nikilesh Ramachandran, Ms. Ruchi Kohli, Sandeep Kumar Jha, Ranbir Singh Yadav, Prateek Yadav, Puran Mal Saini, Pati Raj Yadav, Ms. Akansha Singh Yadav, Ankit Yadav, Dr. Nirmal Chopra, Ms. Pragati Neekhra, Ram Nath, Ms. Kalpana Kumari, Dr. Sushil Balwada, R.K. Rathore, Sandeep Singh Dingra, Amit Kumar Chawla, Ms. Tanishka Grover, Niharika Dewivedi, Mahi Pal Singh, Ms. Manisha Chawla, T.R. Meena, Vijay Rathore, Satpal Singh, Advs. for the appearing parties.

Judgment / Order of the Supreme Court

Judgment

K.V. Viswanathan, J.

1. Leave granted in SLP (Civil) No. 34742 of 2013 and SLP (Civil) No. 34663 of 2013.

2. This batch of 47 appeals involves common questions of law. They arise from the judgments of the Division Bench of the High Court of Judicature for Rajasthan at Jaipur Bench, Jaipur. The main appeal, namely, Civil Appeal 7906 of 2010 (*Mahesh Chand Bareth & Anr.* Vs. *State of Rajasthan & Ors.*) (hereinafter referred to as '**Mahesh Chand Bareth**') arises out of a judgment of the Division Bench of the High Court of Judicature for Rajasthan at Jaipur Bench, Jaipur in D.B. Civil Special Appeal No. 402 of 2009 dated 21.05.2010. The other matters arise out of the same batch as Mahesh Chand Bareth or out of the judgments relying on Mahesh Chand Bareth or based on the judgments which, in turn, relied on Mahesh Chand Bareth. By virtue of the said judgments, the appellants were denied relief. The appellants challenged the selection of candidates to the post of "Prabodhak" (teacher) by virtue of advertisement issued on 31.05.2008. Recruitment and other service conditions for the post of Prabodhak are governed by the Rajasthan Panchayati Raj Prabodhak Service Rules, 2008 (hereinafter referred to as the '**Rules'**).

3. About 20060 vacancies were advertised and the vacancies came to be filled up soon thereafter. The grievance of the appellants is that their candidature should also be considered for the appointment on the post of 'Prabodhak', by adopting similar criteria in the grant of bonus marks for teaching experience as was done in the case of the applicants who had experience of working in Government educational projects. Their further grievance is that Rule 13(v) of the Rules insofar as it provides for age relaxation to those persons serving under educational projects is a provision which is unconstitutional and invalid.

Background facts:

4. A brief narration of the background facts is essential for appreciating the issues involved in this case. The Shiksha Karmi Project was a unique initiative launched in the State of Rajasthan in 1987 with assistance from the Swedish International Development Cooperation Agency (SIDA). The object was to seek to reach out to children in remote rural areas where the formal primary schools are either not in existence or dysfunctional. Local youth with some basic educational qualifications were identified, trained and provided continuous educational support to teach children in Shiksha Karmi Day Schools, Prehar Pathshalas (Schools of convenient timings) and Angan Pathshalas (Courtyard Schools).

5. The concept of Shiksha Karmi Project (as is clear to us from the document containing a study, placed on record by the appellants) indicates that the Shiksha Karmi Project rested on the assumption that barefoot teachers belonging to the local community, who enjoy local community support if intensively trained, can overcome lack of formal educational qualification.

6. They were selected through an established procedure laid out in the manuals and once the Gram Sabha voted on the creation of a Shiksha Karmi School, spot tests were held to identify Shiksha Karmis. The Shiksha Karmi Project had significant overlaps with the Lok Jumbish Project and the District Primary Education Programme (DPEP).

7. The Shiksha Karmi Project was fairly successful in reaching out to children from disadvantaged communities. A person serving in various educational projects possessed rich experience of teaching and motivating people for education in rural areas. The workers were engaged in the name of Shiksha Karmis to address the problem of teacher absenteeism, poor enrolment, high dropout trends and inadequate access to education. The workers were to get only a fixed honorarium. The projects were introduced to accelerate universalization of elementary education. After the passage of the 83rd Constitutional Amendment and the setting up of an elected Panchayat structure, the project worked in tandem with the elected representative members of the Panchayat.

Formulation of Rules:

8. When matters stood thus, a Cabinet note was prepared which set out that to provide access to education to children living in far-flung areas/difficult terrain/small villages (Hamlet) called Dhanis, a new regular cadre in the name of Prabodhak and Senior Prabodhak be created. As a first step, Section 89 of the Rajasthan Panchayati Raj Act, 1994 was amended and in 89(2)(v) 'Prabodhak' and 'Senior Prabodhak' were added as one of the grades. Section 89(2)(v), (5) & 6B reads as under:

> "**89. Constitution of the Rajasthan Panchayat Samiti and Zila Parishad Service.**
>
> (2) The Service may be divided into different categories, such category being divided into different grades, and shall consist of -

(v) Prabodhak and Senior Prabodhak.

(5) All appointed to posts in the service shall be made-

(a) by direct recruitment; or

(b) By promotion ; or

(c) by transfer.

6B. Appointed on the posts specified in clause (v) of Sub-section (2) Shall be made by additional Chief Executive Office-cum-District Education officer (Elementary-Education) of the District concerned in accordance with the rules made in this behalf by the State Government, from out of persons selected for the posts by the recruitment committee constituted by the Government in accordance with the rules made by the State Government in this Behalf:

9. Thereafter, in accordance with Section 102 of the Rajasthan Panchayati Raj Act, 1994 were framed the Rajasthan Panchayati Raj Prabodhak Service Rules, 2008. Certain relevant clauses of the Rules are extracted hereunder:

"2. Definitions.

In these rules unless the context otherwise requires,-

(c) "Direct recruitment" means recruitment made in accordance with Part IV of these rules;

(k) "Teaching Experience" for the purpose of direct recruitment includes the experience gained in supervisory capacity in any recognized educational institution or project;

6. Methods of Recruitment.

Recruitment to the service after the commencement of the rules shall be made by the following methods:-

(a) by direct recruitment in accordance with Part IV of these rules,

(b) by promotion in accordance with Part V of these rules.

13 Age.

A candidate for direct recruitment to a post enumerated in the Schedule must have attained the age of 23 years and must not have attained the age of 35 years on the first day of January following the last date fixed for receipt of applications:

Provided

(v) that the person serving under the educational project in the State viz Rajiv Gandhi Pathshala/Shiksha Karmi Board/Lok Jumbish Pariyojana/Sarva Shiksha Abhiyan/ District Primary Education Programme shall be deemed to be within age limit, had they been within the age limit when they were initially engaged even though they may have crossed the age limit at the time of direct recruitment.

14. Academic and Professional Qualifications.

A candidate for direct recruitment to the posts specified in the Schedule shall, in addition to such experience as is required shall possess –

(i) the qualification and experience given in column 6 of the schedule, and

(ii) working knowledge of Hindi written in Devnagri Scripts and knowledge of Rajasthani culture.

25. Recommendation of the Committee:-

The committee shall prepare a list of the candidates whom, they consider suitable for appointment to the posts concerned, arranged in the order of merit and forward the same to the Appointing Authority:

Provided that the Committee may, to the extent of 50% of the advertised vacancies, keep names of suitable candidates on the reserve list. The names of such candidates may, on requisition, be recommended in the order of merit to the Appointing Authority within 6 months from the date on which the Committee forwards the original list to the Appointing Authority.

Schedule

S. No.	Name of Post	Method of Recruitment with percentage	Post from which promotion is to be made	Qualifications and experience for Promotion	Qualification and experience for direct Recruitment	Remarks
2	Prabodhak (4500-7000)	100% by Direct Recruitment	-	-	Senior Secondary School Certificate or Intermediate or its equivalent, with Diploma or certificate in basic teachers training of a duration of not less than two years of Diploma or certificate in elementary teachers training of a duration of not less than two years. OR Bachelor of Elementary Education (B. El. Ed.) OR Graduation with Bachelor of Education (B. Ed.) or its equivalent AND Must have at least 5 years continuous teaching experience without any break in any recognized educational institution/ educational project.	

Guidelines of 27.05.2008 & advertisement of 31.05.2008:

10. Before the advertisement was issued on 31.05.2008, appropriate guidelines were formulated on 27.05.2008 for the purpose of selection of Prabodhak. The guidelines dealt with various aspects including award of bonus marks. Among the matters dealt with apart from educational qualifications and emoluments were also matters pertaining to disqualification if the applicant had more than two children on or after 01.06.2002; disqualification with regard to persons having more than one spouse and of persons who had obtained dowry during their weddings. The guidelines also dealt with the requirements with regard to community certificate; reservation of 30% for women of which 5% was to be for widows; requirements of age limit and relaxation. One of the clauses provided as under :

> "Selection Process: -
>
> Selection will be done entirely through interview for which a total of 100 marks have been allotted.
>
> The classification of these numbers is as follows: -
>
> General Knowledge – maximum 40 marks
>
> Personality – maximum 35 marks
>
> Experience - maximum 25 marks
>
> A maximum of 10 marks will be given according to 2 marks per year for a maximum of 5 years of teaching/supervision experience. If the experience is for the employee receiving honorarium under the projects run by the state government, then he will be given 5 marks for each academic session, maximum 25 marks."

11. Thereafter, on 31.05.2008, advertisement for district-wise recruitment for the post of Prabodhak was issued and selection came to be made. The appellants, who are teachers in recognized educational institutions filed writ petitions aggrieved by the award of excess bonus marks for the candidate with project experience. In some writ petitions, the age relaxation granted to the project employed applicants were also challenged.

Contentions of Appellants:

12. The appellants contend that Rule 13 (v) of the Rules providing age relaxation only to a few categories of teachers of certain government projects and denial of the same to other similarly situated teachers is discriminatory and violative of Article 14 of the Constitution of India. Insofar as the award of bonus marks is concerned, learned counsels relying on Rule 2(k) which deals with teaching experience, point out that granting additional marks to para teachers having teaching experience from government projects is ultra vires the Rules.

13. Learned counsels also contend that the advertisement of 31.05.2008 did not sanction the grant of bonus marks and the administrative guidelines dated 27.05.2008 were not brought in public domain. It was argued that the rules of the game have been changed after the match has begun. It was contended that if the intention of the legislature was to create the said post only for para teachers working in project, the same would not have been offered to private and other teachers at all. Learned counsels further contend that the Rules do not provide for grant of any bonus marks. Learned counsels for the appellants argued that the effect of awarding extra bonus marks for project experience has the effect of an indirect absorption of all the project appointees and this, according to learned counsels, was contrary to the Rules. Learned counsels for the appellants relied on the judgment in ***Bedanga Talukdar* vs. *Saifudaullah Khan & Ors.*, *(2011) 12 SCC 85*** to argue that the selection process should be strictly in accordance with the stipulated selection procedure. Learned counsels also cited ***State of Maharashtra*** vs. ***Raj Kumar***, (1982) 3 SCC 313.

Contentions of the State:

14. The State contended that there was a historical background to the introduction of the Rules; that there was a laudable objective of achieving the universalization of elementary education and such educational projects initiatives had led to significant increase in literacy rate in Rajasthan from 38% to 66% between 1991 to 2011; that persons who had worked in the aforesaid educational projects were having valuable experience working in far flung areas and had direct interaction and connection with children. That the projects were started to mitigate the absenteeism of teachers in the rural areas especially in small villages. Added to this, there were dropouts

from schools and to tackle all these several initiatives in the form of educational projects were introduced.

15. According to the State, 'Prabodhak' was to facilitate and encourage children to attend schools. The State contended that as part of the selection process guidelines for the purpose of giving marks for experience can always be legally prescribed. All the Prabodhaks who were recruited possessed the minimum educational qualification and according to the State that was clear from the advertisement, which contained a specific clause with regard to the minimum qualification of Basic School Teaching Certificate (BSTC) for primary and Bachelor of Education (B.Ed) for imparting education for middle school students.

16. The State contended that the experience gained in the projects has reasonable nexus with the concept of Prabodhak for which the newly framed Prabodhak Rules and Cadre were created. Insofar as age relaxation was concerned, it was contended by the State that it was meant for persons who worked in the projects after joining within the age limit but have now become over age. According to the State, the idea was not to oust from consideration these persons who had worked in the education projects for significant number of years. Hence age relaxation was provided to them. According to the State, there was nothing discriminatory about it. In support of the submission, learned counsels for the State relied on ***Satya Dev Bhagaur & Ors. Vs. The State of Rajasthan & Ors., (2022) 5 SCC 314.***

17. The learned Single Judge and the Division Bench declined relief to the appellants. Aggrieved the appellants are before us. We have also heard the learned counsels for the parties proposing to implead or intervene.

Questions for consideration:

18. The two questions that arise for consideration are:

    i. Is Rule 13(v) of the Rules, insofar as it provides age relaxation to the persons serving under educational projects discriminatory and contrary to Article 14 of the Constitution of India?

    ii. Is the award of bonus marks to the project employed applicants discriminatory and ultra vires the Rules? Are the guidelines of 27.05.2008 sanctioning the award of bonus marks on a differential basis for applicants with project experience and other applicants invalid for any other reason?

Question No. 1:

19. To answer this, a full look at Rule 13 is essential:

> "13. Age.
>
> A candidate for direct recruitment to a post enumerated in the Schedule must have attained the age of 23 years and must not have attained the age of 35 years on the first day of January following the last date fixed for receipt of applications :
>
> Provided -
>
> (i) that the upper age limit mentioned above, shall be relaxed by 5 years in the case of male candidates belonging to the Scheduled Castes, Scheduled Tribes and the Other Backward classes.
>
> (ii) that the upper age limit mentioned above shall be relaxed by 5 years in case of women candidates belonging to General Category.
>
> (iii) that the upper age limit mentioned above shall be relaxed by 10 years in the case of women candidates belonging to the Scheduled Castes, Scheduled Tribes and the Other Backward classes.
>
> (iv) that the upper age limit mentioned above shall be 50 years in the case of Ex-service personnel and the reservists, namely the Defence Service Personnel who were transferred to the reserve.
>
> (v) that the person serving under the educational project in the State viz Rajiv Gandhi Pathshala/Shiksha Karmi Board/Lok Jumbish Pariyojana/Sarva Shiksha Abhiyan/District Primary Education Programme shall be deemed to be within age limit, had they been within the age limit when they were initially engaged even though they may have crossed the age limit at the time of direct recruitment.
>
> (vi) that the upper age limit mentioned above shall be relaxed by a period equal to the service rendered in the NCC in the case of Cadet instructors and if

the resultant age does not exceed the prescribed maximum age limit by more than three years, they shall be deemed to be within the prescribed age limit.

(vii) that the Released Emergency Commissioned Officers and Short Service Commissioned Officers after release from the Army shall be deemed to be within the age limit even though they have crossed the age limit when they appear before the Committee had they been eligible as such at the time of their joining the Commission in the Army.

(viii) that there shall be no upper age limit in the case of widows and divorced women."

20. Fixing of minimum and maximum age requirement is a policy decision. In this case, the said decision is engrafted in Rule 13. A careful perusal of the Rule reveals that the minimum age required was 23 years and the maximum outer limit was 35 years. In the proviso there are several categories to which relaxation has been granted. Under clause (i) of the proviso, a relaxation of 5 years is granted to male candidates belonging to the Scheduled Castes, Scheduled Tribes and the Other Backward classes. Under clause (ii) of the proviso, the upper age limit is relaxed by 5 years in case of women candidates belonging to General Category and under clause (iii) it is relaxed by 10 years in the case of women candidates belonging to the Scheduled Castes, Scheduled Tribes and the Other Backward classes. Under Clause (iv), the age relaxation is of 50 years in the case of Ex-service Personnel and the reservists, namely the Defence Service Personnel who were transferred to the reserve.

21. Thereafter, we have clause (v) which states that the person serving under the educational project in the State, namely, Rajiv Gandhi Pathshala/Shiksha Karmi Board/Lok Jumbish Pariyojana/Sarva Shiksha Abhiyan/District Primary Education Programme shall be deemed to be within age limit, had they been within the age limit when they were initially engaged even though they may have crossed the age limit at the time of direct recruitment. Thereafter, we have clause (vi) which states that the upper age limit mentioned above shall be relaxed by a period equal to the service rendered in the NCC in the case of Cadet instructors and if the resultant age does not exceed the prescribed maximum age limit by more than three

years, they shall be deemed to be within the prescribed age limit. In clause (vii) the Released Emergency Commissioned Officers and Short Service Commissioned Officers after release from the Army shall be deemed to be within the age limit even though they have crossed the age limit when they appear before the Committee had they been eligible as such at the time of their joining the Commission in the Army. So finally in clause (viii) it is provided that there shall be no upper age limit in the case of widows and divorced women.

22. The challenge of the appellants is only to sub clause (v). We find that the provisions generally including sub clause (v) are not arbitrary or discriminatory. Insofar as the clause (v) is concerned, as has been mentioned hereinabove, the historical background leading to the enactment of the Rules itself provides a justification for granting relaxation to the persons serving under the educational project, if they fulfil the condition that they were within the age limit when they were initially engaged.

23. As the counter affidavit of the State indicates that the projects were designed to deal with absentee teachers in the far flung areas which was causing a serious jeopardy to the education of the rural children. The para teachers, as they were called, worked under difficult circumstances. They had the advantage of interacting personally with the children of the far-flung areas. They only received an honorarium. The projects themselves played a large part in uplifting the elementary education programme in the State. The para teachers motivated the children to come to school. It was in this background that the grade of 'Prabodhak' and Senior 'Prabodhak' were encadred and separate rules enacted.

24. No doubt, under the Rules, opportunity to apply was also given to all those who possess the essential qualifications and who had teaching experience in any recognized educational institutions apart from the educational projects. This, however, does not mean that those who served in projects did not form a separate class. There was a valid classification based on intelligible differentia which distinguished applicants with project experience and those who lacked project experience. Further the differentia had a rational relation to the object sought to be achieved by the Rules. In fact, the job of a Prabodhak was exactly the job that the para teachers carried out in the projects and if the Government felt that the experience gained

by them should not be lost and in that regard granted them age relaxation, provided they fulfil the condition of being within the age limit at the time of their initial appointment in the project, no fault can be found with the same.

25. Dealing with the similar challenge in ***Union of India & Ors v. Shivbachan Rai, (2001) 9 SCC 356***, this Court held that the prescribing of any age limit for a given post, as also deciding the extent to which any relaxation can be given to the said age limit are essentially matters of policy. It was further held that it was open for the Government while framing the rules to prescribe such age limits or to prescribe the extent to which any relaxation can be given. Applying the said principle to this case, we find that the relaxation provided for in Rule 13(v) is not arbitrary or unreasonable.

Question No.2:

26. Insofar as the award of bonus marks is concerned, a careful perusal of the guidelines indicates that it was issued before the advertisement and all that it provided was out of the allotted maximum marks of 25 for the experience, ordinarily 2 marks were to be given for every year with a cap of 10 marks. However, if the experience is for the employee receiving honorarium under the projects run by the State Government, then he was to be given 5 marks for each academic session with the maximum of 25 marks. Even if part of the experience was in a project to that extent extra marks were provided to all the applicants.

27. In the application form, there was a specific column, namely, column fourteen which asked about details of the experience. The form also asked for the name of the employer and the address of the institution employed. Thereafter, there was another column asking for the post in which they were employed and the period during which the emoluments were received.

28. Apart from this, the justification offered for defending the age relaxation is also available for the grant of excess bonus marks. In fact, as is clear from the background set out above, the creation of the post of 'Prabodhak' and 'Senior Prabodhak' was to get the advantage of the benefits that the projects gave to the State. At the same time, opportunity was given to all, with the only difference being that by an executive instruction additional marks were granted for project

experience. The executive guidelines only supplemented the Rules and did not supplant them.

29. Moreover, intrinsically from Rule 13(v) the validity of which we have upheld, evidence is available to show that the Rule recognized the experience gathered from project work stood on a higher pedestal because it was in tune with the nature of the work of Prabodhak. Further, under Rule 25, the Committee was to prepare a list of candidates whom they consider suitable for appointment.

30. In ***Srinivas K. Gouda v. Karnataka Institute of Medical Sciences and Others*** ***(2022) 1 SCC 49***, a notification was issued inviting applications for the post of Junior Lab Technician. Eligibility and requirements were prescribed. At the time of selection, the Selection Committee decided that out of the 15% marks for interview, 10% of the marks were to be set apart for the length of work experience and/or additional training in teaching hospitals of the medical college, with special preference to those who had worked in teaching hospitals of Government/autonomous medical colleges and the remaining 5% marks were to be assigned to the personality of the candidates based on viva voice. In the minutes, it was set out as under:

> *"4. …. It was decided that in order to select the most suitable candidates, proportionate weightage based on the length of experience and/or additional training to the extent of 10 marks be given to those candidates who had work experience and/or additional training in medical college teaching hospitals and especially those who had worked in government/autonomous medical college teaching hospitals. It was agreed that the type of work in these institutions most closely resembled the working conditions at Karnataka Institute of Medical Sciences, Hubli and hence the candidates who had experience in such institutions would be the most suitable. It was also decided to set apart a maximum of 5 marks for the personality of the candidate and his/her presentation and performance…."*
>
> (Emphasis supplied)

31. The appellant in that case was selected and the selection had been set aside by the Division Bench of the High Court. The appellant secured 9.5 marks in the experience category while the

writ petitioner who had challenged his appointment had secured one (1) mark under the component of experience. On appeal, the appellant contended that the selection committee, an expert body, was entitled to apportion marks, and that the appellant had experience in Government/Autonomous medical institutions. The writ petitioner had contended that no explanation was furnished for dividing the marks and bifurcating the same. This Court while allowing the appeal in para 19 held as under:

> "19. It is in this background that we need to determine whether the marks allotted to the appellant in the category of experience and personality are arbitrary. The appellant at the time of submitting the application had a one year work experience in Bapuji Medical College, Devanagere (a private institution) and three years of work experience with the first respondent. On the other hand, the respondent at the time of the application, had six months' experience of working under a doctor who was undertaking private practice. Not only did the appellant have more years of work experience, he had work experience in a governmental institution. Hence, the marks awarded to the third respondent and the appellant bore a nexus to the yardstick determined by the Selection Committee. It is not the case of the third respondent that the appellant was given more marks for experience despite having less work experience. On a comparison of the marks allotted to both the candidates with reference to the yardstick determined by the Selection Committee, no mala fides could be imputed to the Selection Committee. Nor is there an obvious or glaring error or perversity. The Court does not sit in appeal over the decision of the Selection Committee."

32. In the present case too, we find no glaring error or perversity in the criterion adopted on the peculiar facts of the present case. No mala fide could also be attributed to the State and the Selection Committee.

33. ***Satya Dev Bhagaur (supra)*** was a case wherein the State of Rajasthan had issued a notification providing that such of the candidate who had worked under the Government, Chief Minister BPL Life Saving Fund, NRHM Medicare Relief Society, AIDS Control

Society, National TB Control Program, Jhalawar Hospital and Medical College Society, Samekit Rog Nirgrani Pariyojna or State Institute of Health Family Welfare would be entitled to bonus marks as per the experience attained. It was provided that for one year of experience, the bonus marks will be 10, for two years of experience the bonus marks will be 20 and for three years of experience it will be 30. This notification was challenged by certain persons who had experience of working in NRHM Scheme on contract basis in States other than Rajasthan. They sought a direction to accept their experience certificate so as to entitle them to obtain the bonus marks. While the Single Judge allowed the Writ Petitions, the Division Bench reversed the same and the aggrieved Writ Petitioners were in Appeal. Examining the question whether bonus marks would be available to employees of NRHM Scheme in other States, this Court while repelling the contention held that in matters of policy, Courts should be slow in interfering, unless the policy is found to be palpably discriminatory and arbitrary. It was further held that the court would not interfere with the policy decision when the State was in a position to point out that there was an intelligible differentia in the application of the policy and that such intelligible differentia had a nexus with the object sought to be achieved. On the facts of that case, the Court held as follows:

> "20. It could thus clearly be seen that the Division Bench in Jagdish Prasad [Jagdish Prasad v. State of Rajasthan, 2016 SCC OnLine Raj 646] after considering the record, has come to the finding that the Government of Rajasthan has conducted several training programmes for the persons working with it on contractual basis, as well as under different schemes. The training programmes mainly pertain to the peculiar working pattern in the rural areas of the State of Rajasthan including tribal and arid zones. The Division Bench has further come to a finding that participation in such a training is mandatory and non-joining of the same would result in non-renewal of service contracts. It has been held that persons having special knowledge in working in the State of Rajasthan form a class different than the persons not having such experience of working in the State. It was found that the benefit extended by the State policy was only that of giving a little more weightage on the

> basis of experience and all the candidates were required to undergo the rigor of selection process. The Division Bench has clearly held that the experienced candidates in other States cannot be compared with the candidates working in the State of Rajasthan, as every State has its own problems and issues and the persons trained to meet such circumstances, stand on a different pedestal."

34. We find that the ratio laid down in the said judgment is applicable to the facts of the present case also to uphold the action of the State.

35. The judgment of this Court in ***Raj Kumar (supra)*** cited by the learned counsel for the appellants is clearly distinguishable. That case dealt with the Rule which provided that any person who has passed the SSC examination and is supposed to be a rural candidate was to be given weightage by the Public Service Commission by awarding 10% marks in each subject for such a candidate. It was also provided that the Viva Voce Board was to put relevant questions to judge the suitability of the candidate for working in rural areas and to test whether or not they had sufficient knowledge of rural problems. Rural candidate was defined to mean a candidate who comes from the rural area and who has passed SSC examination which is held from a village or a town having only a 'C' type Municipality. The purported object of the Rule was to take officers who had full knowledge of rural life, its problems, aptitudes and working of the people in villages. This Court held that the Rule did not fulfil or carry out the object sought to be achieved since as the Rules stood any person who may not have lived in a village at all can appear for SSC Examination from a village and yet become eligible for selection. The Court found that there was no nexus between the classification and the object sought to be achieved. The Court also faulted the weightage marks given by holding that since in the viva voce questions to judge the suitability of the candidate for working in rural areas were anyway being put, there was absolutely no occasion for giving weightage which would convert demerit into merit and merit into demerit. On the facts of that case, the Court found the rule of weightage to be manifestly unreasonable and wholly arbitrary. The said case has no application to the facts of the present case.

36. Equally the judgment in ***Kailash Chand Sharma vs State of Rajasthan & Ors., (2002) 6 SCC 562*** has also no application.

This Court in that case held that the award of bonus marks to the residents of the district and residents of the rural areas of the district amounts to impermissible discrimination. The Court found that there was no rational basis for such preferential treatment on the material placed before the Court. The Court found that the ostensible reasons advanced by the State were non-existent or irrelevant, having no nexus with the object sought to be achieved. It also found that no criteria was set out for determining as to residents in rural areas. The Court in ***Kailash Chand Sharma*** ***(supra)*** followed the judgment in ***Raj Kumar (Supra)***.

37. The judgment in ***Official Liquidator vs. Dayanand & Ors.*** ***(2008) 10 SCC 1*** cited by the appellants has no connection at all with the issues raised in the present case. Yet another case cited by the appellants is ***Bedanga Talukdar*** ***(supra).*** The appellants relied on the said judgment to contend that there could be no relaxation in the terms and conditions contained in the advertisement and even if there was power of relaxation the same will have to be specifically indicated in the advertisement. The case is wholly inapplicable. In this case, before the advertisement was issued, the guidelines setting out various aspects including the aspect of bonus marks were issued and, as discussed earlier, no infirmity can be found with the same.

38. Similarly, the judgment in ***State of Rajasthan vs. Archana (2017) 11 SCC 421*** and the judgment in ***Civil Appeal 12335 of 2016 dated 18.01.2022 in Manoj Kumar Acharya vs. State of Rajasthan & Ors.***, cited by the State have no application to the facts of the present case.

39. The argument that the guideline was not in public domain was not an argument canvassed either before the learned Single Judge or before the Division Bench. In any event, the contention does not impress us on the facts of the present case. The guideline setting out the selection process was issued before the advertisement and it was applied uniformly and across the board to all the applicants. No prejudice has been caused to the applicants even assuming that the guideline was not in the public domain. It was a procedure adopted by the recruiting Authority and endorsed by the Selection Committee. The appellants have had the opportunity to assail the validity of the prescription of the award of bonus marks and as such have had a fora to ventilate their grievance. They have failed in the

process. Hence, we cannot jettison the guideline on the alleged ground that it was not in public domain. Equally, since the guidelines of 27.05.2008 preceded the advertisement of 31.05.2008, there is no merit in the argument feebly advanced that the rules of the game had been changed after the match had begun.

40. On the special facts of this case, considering the peculiarity that obtained in the State of Rajasthan with regard to absentee teachers and drop out of students and the introduction of the projects with para legals to address the situation, we find no illegality in the prescription of additional marks for those applicants who had experience of working in projects, while recruiting Prabhodhaks. The statutory rules itself in Rule 13(v) recognize that project employed applicants were a class apart and the idea being that their experience should not be wasted. In view of the above, we find no illegality in the award of bonus marks.

41. In view of the above, we find no merit in the appeals and all the appeals are dismissed with no order as to costs. All applications for impleadment and intervention are closed.

Result of the case: Appeals dismissed.

†*Headnotes prepared by:* Divya Pandey

[2024] 7 S.C.R. 218 : 2024 INSC 480

Dharmendra Kumar @ Dhamma
v.
State of Madhya Pradesh

(Criminal Appeal No. 2806 of 2024)

08 July 2024

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

Issue for Consideration

High Court if justified in upholding conviction and sentence of the appellant under ss. 302/34 IPC; the contradictions or discrepancies and the absence of blood group classification or inconclusive FSL results on the recovered weapon, if detrimental to the prosecution's case; the Investigating Officer's failure to obtain a fitness certificate from the medical officer, if would invalidate the consideration of the statement of the deceased recorded u/s. 161 CrPC before his death, as a 'dying declaration; and disclosure statement made by the appellant leading to the discovery and subsequent seizure of the knife, if admissible in evidence.

Headnotes†

Penal Code, 1860 – ss. 302/34 – Conviction and sentence under – On facts, dispute over construction of wall – Verbal abuses hurled at the complainant – Two persons who constructed the wall physically assaulted by the opposite party, the appellant inflicted knife blow to one, and later both of them succumbed to their injuries – Appellant convicted u/ss. 302, 147, 148, and 149 and sentenced to life imprisonment – High Court upheld the appellant's conviction u/s. 302/34, however, acquitted him u/ss. 147 and 148 – Correctness:

Held: No contradictions or discrepancies in the prosecution case that would compel to take a view different than that of the courts below – When the testimonies of eyewitnesses are consistent, unimpeachable, and duly corroborated by medical evidence or the recovery of incriminating material like the weapon used, the deficiencies, if any, in the recording of FIR alone do not constitute a valid ground to overturn the conviction or undermine the prosecution case – Non-reading of contents of FIR to the complainant would not effect the prosecution case – Presence of appellant on the place

* Author

of occurrence established – Disclosure statement by the appellant leading to the discovery and seizure of the knife admissible in evidence – Knife injury can be attributed to the appellant – Absence of blood group classification or inconclusive FSL results on the recovered weapon would not effect the prosecution case – Also, mere non-obtainment of a medical fitness certificate would not deter the court from considering a properly recorded statement u/s. 161 CrPC, to be a dying declaration – Thus, the order passed by the High Court upheld – Evidence.[Paras 44, 51, 58, 61, 69, 70]

Evidence – Contradictions in the prosecution case – Omission on the part of the Investigating Officer in marking a spot where incident took place, on the site plan – Effect:

Held: Mere omission on the part of the Investigating Officer does not deflect the prosecution case – Site plan merely denotes the location of the incident without implying further details – In light of the fact that the persons who had seen that to which they have testified, due weightage must be given to their first-hand version – Their evidence cannot be jettisoned merely because the I.O. forgot to describe the room on the spot map – It is a case where eyewitnesses corroborated each other; their depositions are reinforced by deceased himself in his statement recorded u/s. 161 CrPC, and the location of the incident is depicted on the spot map as a `brick room' – Thus, stands established that there was another Jhuggi where the deceased sought refuge and was eventually assaulted – So-called contradiction fails to invade the corpus delicti. [Paras 33, 34]

First information report – Non-reading of contents of FIR to the complainant – Effect:

Held: Subject FIR fully satisfies all the ingredients of s. 154 CrPC – During the cross-examination, the complainant-informant claimed that the Police neither read out the FIR to her nor did it mention the contents of her statements which were recorded by the Police – Assuming it to be correct, such omission did not cause any prejudice to the appellant – Not a case where the appellant was not provided with a copy of the FIR or the charge sheet, which could have hindered his ability to effectively cross-examine the informant – Also no suggestion that he was not present at the scene, that he did not participate in the incident, or that he was falsely implicated for any reason – Appellant, thus, failed to demonstrate any prejudice resulting from the alleged non-reading of the contents of the FIR

to the informant – Reading over of the information after it is written down, the signing of the said information by the informant, and the entry of its substance in the prescribed manner not obligatory, but procedural in nature, and the omission of any of them does not impact the legal consequences resulting from the information provided – Furthermore, when testimonies of eyewitnesses are consistent, unimpeachable, and duly corroborated by medical evidence or recovery of weapon used, the deficiencies, if any, in recording of FIR alone do not constitute a valid ground to overturn the conviction or undermine the prosecution case. [Paras 40-44]

Evidence – Presence of appellant on the place of occurrence, if doubtful:

Held: No reason to doubt that the appellant was not only present at the scene of crime, but he actively participated in the occurrence and gave one of the fatal blows to deceased – Submission of poor visibility owing to darkness at the spot of occurrence not tenable – Place of occurrence, was adjacent to that of the complainant making it easier for the witnesses to observe and identify the accused persons – Each accused, particularly the appellant, was familiar to the eyewitnesses – Considering that the incident occurred on a summer night, there would have been minimal obstruction to visibility for the witnesses – Appellant, in his 313 CrPC statement, nowhere took the plea of alibi also did not pursue this defence during the cross-examination of witnesses either, as also did not adduce any evidence in support thereof – Furthermore, not a case where the complainant or prosecution witness held grudges against the appellant and fabricated a story to implicate him after the incident – Rather, the name of the appellant surfaced in the very first version, duly recorded, within less than two hours of the occurrence – Also no motive to falsely implicate the appellant indicated.[Paras 48, 49, 51]

Evidence – Disclosure statement by the appellant leading to the discovery and seizure of the knife-weapon of offence – Admissibility in evidence – Knife injury, if can be attributed to the appellant:

Held: Disclosure statement of the appellant to the extent it led to the recovery of a knife correctly admitted in evidence – Prosecution version was accepted by the courts below – It cannot be ignored that both eyewitnesses, are illiterate labourers, and their testimonies were recorded after a considerable length of time had passed since

the occurrence – Both the witnesses emphatically denied that they were tutored by Police or anyone else – Unfiltered testimony of a rustic witness, even if marred with some minor inconsistencies or discrepancies, cannot debilitate its perseverance – Evidence of such witnesses has to be evaluated comprehensively and carefully, especially when the cross-examination discreetly suggests that the accused persons did make a bid to win them over by exerting some extraneous pressure – Thus, the statements of the prosecution witness does not suffer from the discrepancy of such a nature that they should be discarded – Even the testimony of the Investigating Officer is devoid of any ulterior motive or attempt to fabricate evidence or falsely implicate the appellant and his co-accused – It would be too unfair and unreasonable to expect a witness, unless parroted, to recall every minute detail of the occurrence and present it with a totally accumulative narrative – Appellant's submission that knife injury was not caused by him, bereft of any merit. [Paras 56-58]

Evidence – Absence of blood group classification – Inconclusive FSL results on the recovered weapon – Effect on the prosecution case:

Held: Upon a thorough examination of the FSL report, its confirmed that the blood group classification test conducted on the recovered knife yielded inconclusive results – However, the human blood was detected on the knife recovered at the instance of the appellant – Various weapons, including lathis and even the knife attributed to accused underwent an FSL examination, yet, no traces of human blood were found on them – Notably, human blood was solely found on the knife used by the appellant – Furthermore, non-explanation of human blood on the weapon of crime constitutes a circumstance against the accused – It is incumbent upon the accused to provide an explanation regarding the presence of human blood on the weapon – Appellant failed to do so – While it may not be a decisive factor to determine the guilt, but conspicuous silence does lend support to prosecution case. [Para 61]

Code of Criminal Procedure, 1973 – s. 161 – Statement made by deceased to a police officer u/s. 161, regarding cause of death – Admissibility as dying declaration:

Held: s.161 empowers the Police to examine orally any person who is acquainted with the facts and circumstances of the case

under investigation – Police may reduce such statement into writing also – s. 162(1), nonetheless, mandates that no statement made by any person to a Police Officer, if reduced to writing, be signed by the person making it, nor shall such statement be used in evidence except to contradict a witness in the manner provided by s. 145 of the Evidence Act – However, Sub-Section (2) of s. 162 carves out an exception to Sub-Section (1) that nothing in s. 162 shall be deemed to apply to any statement falling within the ambit of clause (1) of s. 32 of the Evidence Act – Statement made by a person who is dead, as to the cause of his death or to the circumstances of the transaction which resulted in his death, to a Police Officer and which has been recorded u/s. 161, shall be relevant and admissible, notwithstanding the express bar against use of such statement in evidence contained therein – In such eventuality, the statement recorded u/s. 161 assumes the character of a dying declaration – Since extraordinary credence has been given to such dying declaration, the court ought to be extremely careful and cautious in placing reliance thereupon. [Para 64]

Code of Criminal Procedure, 1973 – s. 161 – Consideration of the statement of one of the deceased recorded u/s. 161 before his death, as a dying declaration – Non-obtainment of a medical fitness certificate by the investigating officer from the medical officer – Effect:

Held: As regard to the assessment of mental fitness of the person making a dying declaration, it is indubitably the responsibility of the court to ensure that the declarant was in a sound state of mind – This is because there are no rigid procedures mandated for recording a dying declaration – If an eyewitness asserts that the deceased was conscious and capable of making the declaration, the medical opinion cannot override such affirmation, nor can the dying declaration be disregarded solely for want of a doctor's fitness certification – Requirement for a dying declaration to be recorded in the presence of a doctor, following certification of the declarant's mental fitness, is merely a matter of prudence – On facts, investigating officer recorded the statement instantly, a day after the incident, categorically stating that the medical report did not mention that the condition of the declarant, was serious in nature – On perusal of the statement, it is clear that the declarant was in a fit condition as not only did he properly explain the incident but has also markedly specified the role of the appellant – That

apart, the injuries found during the post-mortem examination conducted by the doctor have duly corroborated the statement of deceased – Mere non-obtainment of a medical fitness certificate would not deter the Court from considering a properly recorded statement u/s. 161 to be a dying declaration. [Para 70]

First information report – Object of:

Held: FIR is not a substantive piece of evidence, and it can be used only to corroborate or contradict the version of an informant – Also written complaint to register the FIR not necessary – Even an oral communication to the Police disclosing the commission of a cognizable offence is sufficient to register the FIR – Object of the FIR is to inform the jurisdictional Magistrate and the Police Administration of the offence reported to the Police Station; to acquaint the Judicial Officer before whom the case is ultimately tried as to what are the actual facts stated immediately after the occurrence and on what materials the investigation commenced; and most importantly, to safeguard the accused against subsequent variations, exaggerations or additions. [Paras 38, 39]

Case Law Cited

Shivanna v. State of Hunsur Town Police [2010] 10 SCR 410 **: (2010) 15 SCC 91;** *State v. N.S. Gnaneswaran* **(2013) 3 SCC 594;** *State (NCT of Delhi) v. Navjot Sandhu* [2005] Supp. 2 SCR 79 **: (2005) 11 SCC 600;** *Heera v. State of Rajasthan* **[2007] 7 SCR 1065 (2007) : 10 SCC 175;** *Nathuni Yadav v. State of Bihar* [1996] Supp. 10 SCR 905 **: (1998) 9 SCC 238;** *Pulukuri Kottaya v. Emperor* **(1946) SCC OnLine PC 47;** *Raja @ Rajinder v. State of Haryana* [2015] 3 SCR 947 **: (2015) 11 SCC 43;** *John Pandian v. State* [2010] 15 SCR 1012 **: (2010) 14 SCC 129;** *Mukeshbhai Gopalbhai Barot v. State of Gujarat* [2010] 9 SCR 632 **: (2010) 12 SCC 224;** *Sri Bhagwan v. State of U.P.* [2012] 12 SCR 774 **: (2013) 12 SCC 137;** *Pradeep Bisoi v. State of Odisha* [2018] 12 SCR 947 **: (2019) 11 SCC 500;** *Koli Chunilal Savji v. State of Gujarat* [1999] Supp. 3 SCR 284 **: (1999) 9 SCC 562;** *Laxman v. State of Maharashtra* [2002] Supp. 1 SCR 697 **: (2002) 6 SCC 710 – referred to.**

List of Acts

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

List of Keywords

Contradictions or discrepancies; Absence of blood group classification; Inconclusive FSL; Medical fitness certificate; Statement of the declarant recorded u/s. 161 CrPC before his death; Dying declaration; Disclosure statement; Admissible in evidence; Testimonies of eyewitnesses; First information report; Plea of alibi; Onus to prove; Test Identification tests.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No.2806 of 2024

From the Judgment and Order dated 19.12.2017 of the High Court of M.P. Principal Seat at Jabalpur in CRA No.193 of 2006

Appearances for Parties

Dushyant Dave, Sr. Adv., Kuldip Singh, Mrs. Ayushi Gaur, Gaurav Yadava, Advs. for the Appellant.

Ms. Mrinal Gopal Elker, Saurabh Singh, Ashish Rawat, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Judgment

Surya Kant, J.

Leave granted.

2. This appeal is directed against the judgment dated 19.12.2017, passed by the High Court of Madhya Pradesh at Jabalpur **(hereinafter, 'High Court')**, dismissing the Criminal Appeal filed by the Appellant against his conviction and sentence under Section 302 read with Section 34 of the Indian Penal Code, 1860 **(hereinafter, 'IPC')** awarded by the Learned Additional Sessions Judge, Bhopal **(hereinafter, 'Trial Court')** vide judgment and order dated 10.11.2005.

FACTS :

3. At this juncture, it is imperative to delve into the factual matrix to set out the context of the present proceedings.

4. FIR No. 268 dated 20.06.2004 was registered at Police Station Kamla Nagar, Bhopal under Sections 307, 147, 148, and 149 of IPC on the

statement of Usha Bai (P.W.10). The said Complainant stated that on the night of 20.06.2004, at around 9:30 pm, she was overseeing the construction of the wall of her Jhuggi (hut) by Devi Singh @ Tillu, and Tularam. At that moment, accused persons, Ahmad and his wife, Kanija Bi, arrived and objected to the construction. Tillu asserted that it was their Jhuggi and they had the right to build the wall. Meanwhile, other accused persons, including Vijay, Dharmendra @ Dhamma **(Appellant)**, Katchu @ Ramswaroop, Ballu, Ravi, and Asgar, arrived and began verbally abusing the Complainant, Tillu, and Tularam. The situation intensified as all the accused, including the Appellant, rushed to physically assault Tillu. In defence, Tillu sought refuge inside a nearby unoccupied Jhuggi belonging to one Bhairav Shastri, locking the door from inside. However, the accused forcibly entered Bhairav Shastri's Jhuggi by breaking open the door. Once inside, they surrounded Tillu, with the Appellant delivering a knife blow to Tillu in his abdomen, while Asgar inflicted another blow slightly lower on his stomach. Following this, the other accused persons also physically assaulted Tillu using their fists and sticks. Meanwhile, Tularam attempted to intervene, but he too was subjected to blows from Katchu and Ahmad, resulting in injuries to his head and hands. Upon hearing the commotion, residents from the locality arrived at the scene, prompting the accused to flee. The Complainant further stated that she attempted to intervene but was threatened with dire consequences if she did not leave the area.

5. After the incident, Tillu and Tularam, both injured, were taken to Katju Hospital for medical aid. The Emergency Medical Officer, Dr. R.S. Vijayvargiya (P.W.4), noted Tillu's lack of pulse, as well as two stab wounds in his chest and three stab wounds in his abdomen, indicating a critical condition. Upon examining Tularam, Dr. Vijayvargiya observed severe injuries to the occipital and temporal regions of his head. Subsequently, both injured persons were referred to Hamidia Hospital for further treatment.

6. Tillu unfortunately succumbed to his injuries and was declared dead, while Tularam was still alive and was admitted to Hamidia Hospital.

7. Dr. C.S. Jain (P.W. 13) conducted the post-mortem examination on Tillu, determining that the cause of death was shock and haemorrhage resulting from multiple stab wounds across the body and head injuries. The wounds were inflicted by a sharp, penetrating weapon, causing the stab injuries, while the head injuries were inflicted by a hard and

blunt object. The combined injuries to the head and abdomen were deemed sufficient to cause death.

8. Girish Bohre, the Investigating Officer (P.W.14), commenced the investigation by preparing a spot map (Ex.P.2) and also seized the blood-stained pieces of the floor from the place of occurrence (Ex.P.31).

9. As Tularam was alive though critically injured, the Investigating Officer (P.W. 14) documented his statement (Ex.P.40) under Section 161 of the Code of Criminal Procedure, 1973 **(hereinafter, 'CrPC')** wherein Tularam recounted the events during the subject incident. Tularam mentioned that he and Tillu were constructing the wall of Usha Bai's Jhuggi at Navgrah Mandir. Around 9:15 pm, Ahmad and his wife, Kanija Bi, approached and opposed the construction. Despite Tillu's assertion that it was their wall, Ahmad persisted in preventing them. Shortly after, Vijay, Dharmendra @ Dhamma (Appellant), Katchu @ Ramaswaroop, Ballu, Ravi, and Asgar arrived, initiating verbal abuse. The accused then assaulted Tillu, who sought refuge inside Bhairav Shastri's nearby Jhuggi, locking himself inside. The assailants forcibly entered and surrounding Tillu, Dhamma (Appellant) inflicted a knife blow to Tillu's abdomen, while Asgar also stabbed him near the navel. Additionally, the other accused engaged in physical assault using sticks, lathis, and fists. When Tularam attempted to intervene, Katchu and Ahmad struck him with sticks, inflicting injuries to his head, hands, and body. Tularam noted that Lallu (P.W.11) and one Ramesh were eyewitnesses to the incident.

10. Tularam too passed away approximately five days after undergoing surgery in Hamidia Hospital. Dr. Neelam Srivastava (P.W.15) conducted his post-mortem examination, concluding that the cause of death was cardio-respiratory failure resulting from a head injury. Moreover, the severity of the injury was such that it could have led to death under normal circumstances. This injury, deemed homicidal, was inflicted by hard, blunt, and heavy objects.

11. During the course of investigation, the Investigating Officer (P.W. 14), following a disclosure statement (Ex.P.14) made by the Appellant, recovered a knife, which the Appellant had concealed in Barrack No. 2 of Police Line Nehru Nagar. Lallu Vishwakarma (P.W.11) was a witness to this recovery. The knife was then submitted for forensic examination (Ex.P.39), where the human blood on the knife was detected but the blood group classification was inconclusive.

12. After the investigation, all the accused persons, including the Appellant, were charged under Sections 147, 148, 302/149, 307/149 of IPC.

13. In the trial, the prosecution examined as many as 15 witnesses to bring the guilt home, including Usha Bai, P.W.10 (Complainant) and Lallu Vishwakarma, P.W.11, both eyewitnesses. The prosecution case is largely based upon the version of these two eyewitnesses, who claimed that the fatal blows were caused to the victims in front of them.

14. The Trial Court, having found the version of the two eyewitnesses (P.W.10 and P.W.11) to be trustworthy, which was duly corroborated by the testimony of the Investigating Officer (P.W.14), the medical evidence and the recovery of the weapon, held the Appellant guilty of offences under Sections 302, 147, 148, and 149 of IPC and sentenced him to undergo life imprisonment.

15. The High Court, vide the impugned judgment, upheld the Appellant's conviction under Section 302 read with Section 34 of the IPC, though it has acquitted him under Sections 147 and 148 of the IPC. The High Court has held that: (i) The presence of the Appellant stood established through the testimony of Lallu Vishwakarma (P.W.11), and his cross-examination further confirms that there was no motive for falsely incriminating the Appellant; (ii) The allegations against the Appellant, as detailed by eyewitnesses Usha Bai (P.W.10) and Lallu Vishwakarma (P.W.11), were duly corroborated by the medical opinions of Dr. C.S. Jain (P.W.13) and Dr. Neelam Shrivastava (P.W.15); (iii) The statement given by deceased Tularam, as recorded by P.W.14, aligns with other evidence relied upon for conviction; (iv) The weapon (knife) was seized based on the disclosure statement of the Appellant, making the recovery admissible under Section 27 of the Indian Evidence Act, 1872 **(hereinafter, 'IEA')**; and (v) the testimony of Investigating Officer, P.W.14, also corroborated the weapon's seizure.

16. Discontented with his conviction, the Appellant is in appeal before us.

***Contentions Of Parties* :**

17. Mr. Dushyant Dave, learned Senior Counsel for the Appellant, argued that the High Court erred in upholding the Appellant's conviction under Section 302/34 IPC. Substantiating this, he made the following submissions:

a) The prosecution's case presented inherent contradictions. On the one hand, the two eyewitnesses (P.W.10 and P.W.11),

relied upon by the courts below, testified that the entire incident unfolded inside Bhairav Shastri's Jhuggi, situated near that of the Complainant, (P.W.10). On the other hand, the Investigating Officer (P.W.14), during his cross-examination, stated that no quarrel took place near P.W.10's Jhuggi, and that there was no 'Bhairon Baba Temple' or residence near the site of occurrence. It was argued that since the incident admittedly occurred inside a Jhuggi, it is unbelievable that the eyewitnesses could have seen it.

b) It was contended that the presence of the Appellant at the place of incident is stoutly disputed, and such an inference can be well drawn from the statement of the Complainant herself. The incident took place around 9:30 pm, posing visibility challenges for the witnesses. Usha Bai (the Complainant, P.W.10) has deposed that she was familiar with accused Ahamd, Asghar Ali, Ravi, and Kanija Bi but was aware of the other accused by name only. This clearly indicates that P.W.10 was not acquainted with the Appellant. Barring the eyewitness account, there is no other credible evidence to suggest that the Appellant was present or participated in the occurrence.

c) Further, the knife injury could not be attributed to the Appellant, as testified by Lallu Vishwakarma (P.W.11), who explicitly stated that he couldn't discern who assaulted whom.

d) That apart, it was urged that the weapon confiscated from the Appellant underwent a Forensic Science Laboratory **(hereinafter, 'FSL')** examination, producing inconclusive results, which bolsters the Appellant's case that he was falsely implicated.

e) Finally, it was canvassed that the statement of the deceased Tularam, recorded by Investigating Officer Girish Bohre (P.W.14) under Section 161 CrPC, could not have been considered a 'dying declaration' due to the absence of certification from the doctor regarding Tularam's mental fitness.

f) Even otherwise, a dying declaration made before the Investigating Officer/ Police is always shrouded by suspicious circumstances and no reliance thereupon can be made.

18. *Per Contra*, Ms. Mrinal Gopal Elker, learned counsel on behalf of the State, argued that the impugned judgment dated 19.12.2017 does not warrant any interference by this Court. She submitted as follows:

a) The Courts below have expressly affirmed the presence of the Appellant at the site of incident and his involvement in the occurrence, based on the testimony of Lallu Vishwakarma (P.W.11). She argued that Vishwakarma's cross-examination provides no reason to doubt his version qua the Appellant.

b) There is a specific accusation against the Appellant of inflicting the knife blow on the deceased Tillu's abdomen, which is supported by the Medical Legal Certificate (MLC) conducted by Dr. R.S. Vijayvargiya (P.W.4), who confirmed the presence of a stab wound on the abdomen with profuse bleeding.

c) After he was apprehended, the Appellant voluntarily disclosed the location of the concealed knife to the Investigating Officer in the presence of witnesses. Such a recovery is admissible in evidence as an incriminating material against the Appellant.

d) Finally, Ms. Elker highlighted that the courts below have rightly considered the statement of deceased Tularam recorded under Section 161 of CrPC as a 'dying declaration', corroborating the prosecution's case against the Appellant beyond any doubt.

***ANALYSIS* :**

19. Having heard learned Senior Counsel/Counsel for the parties at a considerable length and on perusal of the statements of eyewitnesses along with other relevant material on record, we find that the following three questions fall for our consideration in the present appeal:

A. Have the Courts below erred in not appreciating the contradictions or discrepancies which would dislodge the prosecution's case?

B. Is the absence of blood group classification or inconclusive FSL results on the recovered weapon detrimental to the prosecution's case?

C. Does the Investigating Officer's failure to obtain a fitness certificate from the medical officer invalidate the consideration of the statement of Tularam recorded under Section 161 CrPC before his death, as a 'dying declaration'?

A. CONTRADICTIONS IN THE PROSECUCTION'S CASE:

20. Since the prosecution case against the Appellant predominantly hinges upon the testimonies of Usha Bai (P.W.10), Lallu Vishwakarma

(P.W.11), Dr. C.S. Jain (P.W.13), Dr. Neelam Shrivastava (P.W.15) and Girish Bohre (P.W.14), we deem it appropriate to briefly summarise their testimonies hereunder:

21. Usha Bai (P.W.10) swore that on 20.06.2004, around 9.00 p.m., she was overseeing the construction of wall of her Jhuggi by Devi Singh alias Tillu and Tularam. Ahmad and Kanija Bi, two of the accused, arrived and ordered them to halt construction. Following this, Ahmad struck Tularam on the head with a lathi. Subsequently, Asgar, Ahmad's son, incited the other accused to attack, prompting all the accused to rush in and assault Tillu, Tularam, and Lalaram with various weapons like sticks, rods, and pipes. When P.W.10 attempted to intervene by grabbing Ahmad's lathi, she was verbally abused and told to step aside. Consequently, she retreated to the sidelines. The accused continued to beat Tillu and Tularam until they were incapacitated. Tillu succumbed to his injuries at the scene, while Tularam was barely breathing. Immediately after the incident, Tillu, Tularam, and Lalaram were rushed to Hamidia Hospital for treatment by the Kamla Nagar Police Station. Tillu passed away *en route* to the hospital. P.W.10 lodged a First Information Report (FIR) (Ex.P.7) detailing the incident.

22. Lallu Vishwakarma (P.W.11) recounted that the incident occurred near a wall owned by Usha Bai (P.W.10). Around 8-9:30 pm, Ahmad arrived wielding a lathi at the place of construction of Usha Bai's wall, where P.W.11 and Tillu were sharing a meal. Ahmad confronted them, objecting to the wall's construction. In response, Tillu urged them to allow the construction to proceed. Subsequently, all the other accused arrived and assaulted Tillu and another individual, although P.W.11 couldn't discern the specific assailants. The accused wielded various weapons such as lathis, knives, sticks, rods, and pipes during the attack. Tillu was found injured inside Bhairon Baba's room, while Tularam lay injured at the construction site. P.W.11 then arranged for the injured to be transported in an auto. He noted that Tillu's intestines were protruding, which he wrapped in cloth and placed in the auto. Additionally, Tularam had suffered traumatic and haemorrhagic shock due to multiple injuries. The injured were then taken to Hamidia Hospital. The Police subsequently confiscated the knife and sticks from the Appellant (Ex.P.14) and prepared a memorandum, which P.W.11 signed.

23. In addition to the two eyewitnesses, the prosecution so as to lend corroboration to the ocular evidence, called upon medical experts, namely Dr. C.S. Jain (P.W.13) and Dr. Neelam Shrivastava (P.W.15), who conducted the post-mortem examinations of Tillu and Tularam, respectively.

24. Dr. C.S. Jain, P.W.13, reported that Tillu's body was brought in for post-mortem examination on 21.06.2004, revealing four stab wounds on the front side of the abdomen, along with a laceration on the head and three abrasions. He concluded that the stab wounds were inflicted by a hard, sharp, and penetrating weapon, while the head injuries were caused by a hard and blunt object. The combined injuries to the head and abdomen were deemed sufficient to cause death.

25. Dr. Neelam Shrivastava, P.W.15, testified that Tularam's body was brought for post-mortem examination on 24.06.2004, revealing multiple radial fractures, subdural subarachnoid haemorrhage, and various wounds. She concluded that Tularam's death resulted from respiratory failure due to a head injury and its associated complications. The severity of the injury was sufficient to cause death in the ordinary course of nature, and it was determined to be homicidal, inflicted by a hard, blunt, and heavy weapon. During cross-examination, she clarified that Tularam did not sustain any injuries from knives or swords on his body.

26. The prosecution also examined Girish Bohre, Investigating Officer (P.W.14), of the subject incident. He testified how the investigation was conducted, a spot map (Ex.P.2) of the location was prepared, and a blood-stained piece of flooring was also seized from the place of the incident. Additionally, he conducted a panchnama on Tillu's dead body (Ex.P.32). He apprehended the Appellant and interrogated him in the presence of witnesses. During interrogation, the Appellant confessed to hiding the knife used in the assault in Barrack No. 2 of the Police Line Nehru Nagar. P.W.14 then drafted a memorandum, leading to the recovery of an iron knife at the instance of the Appellant. Following this, he arrested the Appellant and other co-accused. P.W.14 also prepared a panchnama (Ex.P.34) of Tularam's dead body.

27. It is pertinent to mention at this stage that Ajjharruddin (P.W.1), Sukhram (P.W.2), and Reshambai (P.W.3) were also brought in as eyewitnesses to the incident. However, they were deemed hostile by the prosecution, as according to them, no incident occurred in their presence.

28. It is noteworthy to mention here that during the trial of the Appellant and other co-accused, one of the accused, Vijay Singh absconded. Subsequent to the judgment of the Trial Court in 2005, that Vijay Singh was apprehended and tried. The Trial Court vide another judgment delivered in the year 2007, convicted him based on the testimony of eyewitness Usha Bai (P.W.10), duly supported by the medical opinions of Dr. C.S. Jain (P.W.13) and Dr. Neelam Shrivastava (P.W.15) as well as the testimony of Girish Bohre, the Investigating Officer (P.W.14).

29. Having elaborated on the testimonies of the key witnesses in the instant case, we may now dredge up the contradictions highlighted on behalf of the Appellant.

A.1 Bhairav Shastri's Jhuggi

30. It was vehemently agitated that there is a latent dissension in the testimonies of the witnesses regarding the location of the occurrence. While Usha Bai, P.W.10 and Lallu Vishwakarma, P.W.11, deposed that the deceased Tillu entered the Jhuggi of Bhairav Shastri, where he was subsequently surrounded and assaulted in the abdomen by the Appellant wielding a knife, the Investigating Officer (P.W.14) veraciously admitted during cross-examination that he was unaware of any individual named Bhairon Baba residing near the scene of the incident. The I.O. further clarified that there was no house or temple associated with Bhairon Baba in the vicinity of the incident, which is why he did not name it in the spot map (Ex.P.2).

31. We have thoroughly scrutinized the testimonies of the witnesses in this regard. We find a consistent mention of Bhairav Shastri across all prosecution accounts, with Bhairav Shastri also being loosely referred to as Bhairon Baba. Lallu Vishwakarma, P.W. 11, has unerringly stated in his testimony that the deceased Tillu was discovered inside Bhairon Baba's room following the incident. Additionally, the presence of Bhairon Shastri's Jhuggi is noted in Section 161 CrPC statement of the deceased Tularam recorded by Girish Bohre, the Investigating Officer (P.W.14), wherein he unequivocally stated that Tillu sought refuge inside Bhairav Shastri's hut and locked himself in. The mention of Bhairon Shastri's Jhuggi is also evident in the FIR (Ex.P.7) filed by the Complainant, P.W.10, as well as in her statement (Ex.D.1) recorded under Section 161 CrPC.

32. It is true that while Girish Bohre (P.W.14), as per his statement, was unaware of any Bhairon Baba near the scene of occurrence, the location referred to as 'Bhairon Shastri's Jhuggi' by the other witnesses is indeed depicted on the spot map (Ex.P.2) prepared by him. A plain examination of the spot map (Ex.P.2) reveals a marked structure labelled 'B', identified as a `brick room' where the deceased took refuge. Even though the said structure is not captioned as Bhairav Shastri's Jhuggi or by any other name, it gives credence to the version of the eye witnesses that Tillu was attacked in the neighbouring Jhuggi. Moreover, the defence has not disputed the depictions in the spot map while cross-examining the I.O. (P.W.14).

33. A mere omission on the part of the Investigating Officer in marking a spot on the site plan does not deflect the prosecution's case. It is well-established that the site plan merely denotes the location of the incident without implying further details.[1] In light of the fact that the persons who had seen that to which they have testified, due weightage must be given to their first-hand version. Their evidence cannot be jettisoned merely because the I.O. forgot to describe the room as 'Bhairav Shastri's Jhuggi' on the spot map.

34. It is a case where eyewitnesses have corroborated each other; their depositions are reinforced by deceased Tularam himself in his statement recorded under Section 161 CrPC, and the location of the incident is depicted on the spot map (Ex.P.2) as a `brick room'. It, thus, stands established that there was another Jhuggi where the deceased sought refuge and was eventually assaulted. Given these circumstances, the so-called contradiction miserably fails to invade the *corpus delicti.*

A.2 Legal Effect of Non-reading of Contents of FIR to the Complainant

35. It was then argued that the Complainant, Usha Bai (P.W.10), in her cross-examination, has candidly admitted that the FIR (Ex.P.7) was not read out to her and she put her thumb impression under the instructions of the Police. Reliance is placed on her deposition during cross-examination where she claims to have thumb marked on a blank paper, whereupon Ex.P.7 was prepared.

1 Shivanna v. State of Hunsur Town Police (2010) 15 SCC 91

36. In order to appreciate the contention, we have gone through the translated version of the statement of Usha Bai (P.W.10), which the Appellant has appended along with the original paper book as well as a part of "Compilation of Depositions of Witnesses". Since the translated version was seemingly incorrect, making it difficult to discern as to what the witness had deposed, we have also gone through the original Hindi version of Usha Bai's (P.W.10) statement.

37. The statement of a witness has to be extolled in its entirety. It may be recapitulated that Usha Bai (P.W.10), in her complaint which led to the registration of the subject FIR, had categorically stated that, "Vijay, Dharmendra @ Dhamma, Katchu @ Ramswaroop, Ballu, Ravi, Asgar all came shouting that Tillu was indulging in Dadagiri and he be finished today……..." The FIR further states that, "*ye sabhee log*" [all these persons] started attacking, Tillu ran towards Bhairav Shastri's Jhuggi, entered and closed the door from inside to save himself. "*Sabhee ne"* (all of them) forcefully broke the door open and entered the Jhuggi and surrounded Tillu ….. and Dharmendra @ Dhamma (Appellant) then gave a knife blow in the abdomen of Tillu.

38. It must also be borne in mind that FIR is not a substantive piece of evidence, and it can be used only to corroborate or contradict the version of an Informant. It is also not necessary that there should always be a written complaint to register the FIR. Even an oral communication to the Police disclosing the commission of a cognizable offence is sufficient to register the FIR.

39. The object of the FIR is three-fold: firstly, to inform the jurisdictional Magistrate and the Police Administration of the offence that has been reported to the Police Station; secondly, to acquaint the Judicial Officer before whom the case is ultimately tried as to what are the actual facts stated immediately after the occurrence and on what materials the investigation commenced; thirdly and most importantly, to safeguard the accused against subsequent variations, exaggerations or additions.

40. The subject FIR (Ex.P.7) fully satisfies all the ingredients of Section 154 CrPC. The occurrence is reported to have taken place on 20.06.2004 at 9.30 p.m., and the FIR was recorded on the same day at 10.45 p.m. The names of all the eight accused who allegedly participated in the occurrence are duly recorded. The FIR is written in a natural, consistent flow of handwriting, with no signs of spaces being left, words being overwritten or shrunken, or any word or sentence being

interpolated. The last line of the FIR categorically records that the report was read out and explained to the Informant. The FIR is in the prescribed format and Usha Bai (P.W.10) has thereafter put her thumb impression.

41. It is true that during her cross-examination, Usha Bai (P.W.10), has claimed that the Police neither read out the FIR (Ex.P.7) to her nor did it mention the contents of her statements which were recorded by the Police on 5-6 occasions. She further stated that it could not be determined what version was included in Ex.P.7 since she is not a literate person. It seems that the Appellant made an overt attempt to influence the witness. However, despite Usha Bai's innocuous intent to help the Appellant from the wrath of law, she could not deny the fact that the FIR was registered on her complaint or that Tillu and Tularam suffered fatal injuries in the occurrence reported by her.

42. Assuming that the Police failed to read out or apprise the informant about the contents of the FIR, the question that falls for consideration is whether such omission has caused any prejudice to the Appellant? In our considered opinion, the answer has to be in the negative. This is not a case where the Appellant was not provided with a copy of the FIR or the charge sheet, which could have hindered his ability to effectively cross-examine the Informant. The record reveals that Shri A.K. Shrivastava, Advocate, cross-examined Usha Bai (P.W.10) on behalf of the Appellant. Usha Bai did try to help the Appellant by not disclosing his name as one of the accused, but she could not hide the fact that besides Ahmad, Asgar, Ravi and Kanija Bi, she also knew the other accused by their names. The Appellant is admittedly one of those accused. She has further deposed that *sabhee ne* (all of them) assaulted Tillu with lathi, rods and pipes. She further stated that when she tried to intervene, Ahmad abused her and threatened to kill her. She then went and stood at some distance and witnessed that those *aaropigan*, i.e., all the accused, had given fatal assaults to Tillu and Tularam. Most importantly, she further testified that she, along with Lalaram, then went to the Police Station Kamla Nagar, whereafter the Police Officials immediately sent Lalaram and Tularam for treatment at Hamidia Hospital. Tillu, however, could not reach the hospital as he succumbed to the injuries on the way. Additionally, in paragraph 4 of her deposition, Usha Bai (P.W.10) unmistakably states that she reported the matter to Police Station Kamla Nagar through Ex.P.7,

which is thumb marked by her. This part of her deposition has not been questioned by the Appellant while cross-examining Usha Bai (P.W.10). We have also gone through the Appellant's own statement recorded under Section 313 CrPC. Aside from a vague denial and claims of false implication, there is no suggestion that he was not present at the scene; that he did not participate in the incident, or that he was falsely implicated for any reason. The Appellant, thus, has failed to demonstrate any prejudice resulting from the alleged non-reading of the contents of the FIR to the Informant. The contention raised in this regard is entirely misconceived.

43. Be that as it may, this Court in ***State v. N.S. Gnaneswaran***[2] has ruled that the stipulations outlined in Section 154 CrPC concerning the reading over of the information after it is written down, the signing of the said information by the informant, and the entry of its substance in the prescribed manner are not obligatory. These requirements are procedural in nature, and the omission of any of them does not impact the legal consequences resulting from the information provided under the section.

44. It is equally well-settled that when the testimonies of eyewitnesses are consistent, unimpeachable, and duly corroborated by medical evidence or the recovery of incriminating material like the weapon used, the deficiencies, if any, in the recording of FIR alone do not constitute a valid ground to overturn the conviction or undermine the prosecution case.

A.3 Presence of Appellant on the Place of Occurrence

45. Learned Senior Counsel for the Appellant argued that it is a case of false implication as the presence of the Appellant at the spot of occurrence has not been established beyond doubt. He relied upon the statement of Usha Bai (P.W.10), who, in the opening statement of her examination-in-chief, named Ahmad, Asgar, Ravi and Kanija Bi as accused and claimed that she did not know anyone else. It was highlighted that Usha Bai (P.W.10) not only failed to name the Appellant in her entire statement but also admitted during the cross-examination that she never provided the names of the assailants, as mentioned by the Police in the FIR (Ex.P.7).

2 (2013) 3 SCC 594

46. We are, however, not impressed by the submission. We say so for the following reasons :

(a) The statement of Usha Bai (P.W.10) has to be read and appreciated in its entirety and not in piecemeal.

(b) She, as discussed earlier, deposed that she knew the remaining accused by name. She was indisputably referring to the remaining accused who were present in court which included the Appellant as well.

(c) She deposed that "all the accused" attacked Lalaram, Tularam and Devi Singh @ Tillu with dandas, rods and pipes.

(d) She further deposed that all the accused assaulted Tillu and Tularam with the intention to kill them.

(e) She also admitted that she went to Police Station Kamla Nagar and got the FIR (Ex.P.7) lodged, which bore her thumb impression.

(f) Having admitted these material facts, it would be too far-fetched to dissect Usha Bai's version to hold that the Appellant was not present or participated in the occurrence.

(g) In any case, Lallu Vishwakarma (P.W.11), another eyewitness, explicitly stated that the Appellant was present and he participated in the incident by delivering a knife blow to Tillu's abdomen.

(h) The knife injury attributed to the Appellant has been duly established by Dr. R.S. Vijayvargiya (P.W.4) and Dr. C.S. Jain (P.W.13).

(i) The Investigating Officer (P.W.14) successfully established the recovery of the weapon of offence, namely a knife, based on the Appellant's disclosure statement. Lallu Vishwakarma (P.W.11), who witnessed the recovery, supported the Investigating Officer's testimony.

(j) To dispel any doubts, Lallu Vishwakarma (P.W.11) identified the Appellant in court and specifically pointed out, *"The person standing in front wearing a check shirt is Dharmendra".*

47. It is trite law that identification tests (TIP) do not serve as substantive evidence but are primarily intended to assist the investigating agency in ensuring that their progress in investigating the offence is on the

correct path. Holding a TIP is not obligatory. Further, a failure to hold TIP cannot be a ground to eschew the testimony of witnesses whose evidence was concurrently accepted by the trial and appellate courts.[3] Additionally, a failure to hold a parade would not make inadmissible the evidence of identification in the court.[4]

48. Similarly, the contention of poor visibility owing to darkness at the spot of occurrence is also not tenable. In analysing the incidents occurring at night, this Court in ***Nathuni Yadav v. State of Bihar***[5] has taken into account several factors, including:

(i) The proximity at which the assailants would have confronted the injured.

(ii) The possibility of some ambient light reaching the scene from the stars.

(iii) The familiarity of the witnesses with the appearance of each assailant.

49. In the instant case, firstly, the place of occurrence, i.e., Bharav Shastri's Jhuggi, was adjacent to that of the Complainant (P.W.10) making it easier for the witnesses to observe and identify the accused persons. Secondly, each accused, particularly the Appellant, was familiar to the eyewitnesses. Thirdly, considering that the incident occurred on a summer night, there would have been minimal obstruction to visibility for the witnesses. Fourthly and most importantly, the Appellant, in his 313 CrPC Statement, has nowhere taken the plea of *alibi*. He did not pursue this defence during the cross-examination of witnesses either.

50. There is no gainsaying that whosoever pleads *alibi* in contrast and derogation of the eyewitness version, is under cumbrous onus to prove absence from the scene and time of crime. The Appellant not only failed to raise this defence but also did not adduce any evidence in support thereof. Taking into consideration the cumulative effect of all these factors, we have no reason to doubt that the Appellant was not only present at the scene of crime, but he actively participated also in the occurrence and gave one of the fatal blows to Tillu (deceased).

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3 State (NCT of Delhi) v. Navjot Sandhu (2005) 11 SCC 600

4 Heera v. State of Rajasthan (2007) 10 SCC 175

5 [1996] Supp. 10 SCR 905 : (1998) 9 SCC 238

51. We cannot overlook the fact that in a situation where two people are killed in a heated altercation, it is highly unlikely that the eyewitnesses would want the real perpetrators to escape justice. In the absence of any prior motive, it is not plausible that they would falsely accuse the Appellant in this case. This is not a scenario where the Complainant or P.W.11 held grudges against the Appellant and fabricated a story to implicate him after the incident. Rather, the name of the Appellant surfaced in the very first version, duly recorded vide Ex.P.7, within less than two hours of the occurrence. Pertinently, no motive to falsely implicate the Appellant has been suggested during the cross-examination of the eyewitnesses.

A.4 Attribution of knife injury on the Appellant

52. It was maintained by Learned Senior Counsel for the Appellant that since the incident took place inside the Jhuggi and at night, it is highly improbable that the witnesses could see the manner in which the incident took place. Further, reliance was placed on the statement of Lallu Vishwakarma, P.W.11, who stated that he could not see who assaulted whom, and he could not tell which weapon was seized from whom. It was, thus, asserted that there is not even an iota of evidence to conclude that the knife injury was caused by the Appellant.

53. We have deeply analysed the submission. It is essential for this Court to examine the Disclosure Statement (Ex.P.14) of the Appellant, which resulted in the discovery of the weapon (knife) in question. The statement reads as under:

> "On 20.04.2004, I along with my companions Ahmad, Asgar, Ravi, Vijay, Katchu @Ramswaroop, Ballu, and Kanija Bi committed Maarpeet with Tillu @ Devi Singh with knife and stick voluntarily, the knife, by which Tillu @ Devising was assaulted by me, has been hidden by me in the Barrack No. 2 of Police Line Nehru Nagar. Come with me, I will hand over it to you."

54. The disclosure statement made by the Appellant led to the discovery and subsequent seizure of the knife, namely, the weapon of offence. Subsequently, a seizure memo (Ex.P.20) was prepared, which stated as follows:

> "One knife made of iron with wooden handle the total length of which is about 14 ½ inches, the length of handle is about 4 ¾ inches and length of blade is about 10 inches

and width of blade is about 1 ¼ inches, the tip of knife is pointed, blood is present in the front (agla) part of the blade which has dried up. On producing by accused Dharmendra @ Dhamma, the same was taken in possession of Police and sealed pack on the spot itself as evidence."

55. The question that requires determination is whether the above-stated disclosure statement is admissible in evidence? The issue regarding the admissibility of a disclosure statement within the meaning of Section 27 of the IEA was comprehensively addressed by this Court in ***Pulukuri Kottaya v. Emperor,***[6] delineating the following briefly summed up criteria:

(i) There should be a discovery of the fact.

(ii) The discovery of fact should be in consequence of information received from a person accused of an offence.

(iii) The person giving the information should be in the custody of a Police Officer.

(iv) Only that portion of information which relates distinctly or strictly to the fact discovered can be proved.

56. The testimony of the Investigating Officer (P.W.14) unfolds that the Appellant voluntarily made the disclosure statement while he was in police custody, pursuant to which the weapon of offence (knife) was recovered. Whether the said statement was made voluntarily or was secured through coercion is essentially a question of fact. In this regard, the testimony of Lallu Vishwakarma (P.W.11) assumes significance as the disclosure statement was duly witnessed by him. In our considered opinion, the disclosure statement of the Appellant to the extent it led to the recovery of a knife fulfils the basic tenets of Section 27 of IEA and has been correctly admitted in evidence.

57. We may hasten to add at this stage that the prosecution version was not only accepted by the Trial Court but the High Court has also affirmed it in appeal. In our quest to find out whether the Appellant is guilty beyond a reasonable doubt, we have expanded the wings of our limited jurisdiction and assumed the role akin to that of the 1st Appellate Court. We are conscious of the fact that the jurisdictional

6 1946 SCC OnLine PC 47

magnification ought to be an exception and be invoked with great circumspection, in a case of extreme hardship, after taking into consideration the socio-economic conditions of the victim(s) of a crime, the accused, as well as the vulnerable witnesses. Keeping such parameters in view, it cannot be ignored that both eyewitnesses, P.W.10 and P.W.11, are illiterate labourers, and their testimonies were recorded after a considerable length of time had passed since the occurrence. Both the witnesses have emphatically denied that they were tutored by Police or anyone else. The unfiltered testimony of a rustic witness, even if marred with some minor inconsistencies or discrepancies, cannot debilitate its perseverance. The evidence of such witnesses has to be evaluated comprehensively and carefully, especially when the cross-examination discreetly suggests that the accused person(s) did make a bid to win them over by exerting some extraneous pressure. We are, thus, satisfied that the statements of P.W.10 and P.W.11 do not suffer from the discrepancy of such a nature that they should be discarded. Even the testimony of the Investigating Officer (P.W.14) is devoid of any ulterior motive or attempt to fabricate evidence or falsely implicate the Appellant and his co-accused.

58. It would be too unfair and unreasonable to expect a witness, unless parroted, to recall every minute detail of the occurrence and present it with a totally accumulative narrative. The Appellant's contention is thus bereft of any merit.

B. Effect of Absence of Blood Group Classification on Prosecution's Case

59. Learned Senior Counsel on behalf of Appellant asserted that the knife purportedly retrieved from him underwent examination at the Forensic Science Laboratory, where the test results were inconclusive, particularly regarding the determination of the blood group on the weapon. Consequently, the absence of a conclusive match in the blood group analysis should be construed in favour of the Appellant and against the prosecution.

60. Upon a thorough examination of the FSL report, it stands confirmed that the blood group classification test conducted on the recovered knife yielded inconclusive results. However, it is crucial to note that human blood was detected on the knife recovered at the instance of the Appellant (Exhibit "I" before FSL). This fact gains some importance, considering that various weapons, including lathis and even the knife

attributed to accused Asgar, underwent an FSL examination, yet, no traces of human blood were found on them. Notably, human blood was solely found on the knife used by the Appellant.

61. In line with the precedents set forth by this Court in ***Raja @ Rajinder v. State of Haryana***[7] and ***John Pandian v. State***[8]**,** the non-explanation of human blood on the weapon of crime constitutes a circumstance against the accused. It is incumbent upon the accused to provide an explanation regarding the presence of human blood on the weapon. The Appellant has failed to do so. The judgments delivered by both the Trial Court and the High Court also do not reveal that the Appellant rendered any satisfactory explanation concerning the presence of blood on the recovered knife. Top of Form While it may not be a decisive factor to determine the guilt, but a conspicuous silence does lend support to the prosecution case.

C. Consideration of Section 161 CrPC Statement of Deceased Tularam as Dying Declaration

62. It is contended on behalf of the Appellant that the courts below have erred in relying on the statement of Tularam (Ex.P.40) given to Investigating Officer, Girish Bohre (P.W.14) and that the said statement cannot be considered to be a 'dying declaration' as the Investigating Officer did not take any certification from the doctor regarding the fitness of mind of Tularam.

63. In this regard, the following part of the testimony of Investigating Officer, Girish Bohre (P.W.14), who recorded the statement of Tularam under Section 161 CrPC, becomes quintessential:

> "It is correct that I did not take permission from the Doctor about the condition of giving statement of Tularam before recording statement of Tularam. It is correct that I knew this fact at the time of recording statement that one person has died in this case. As head injury was not told to be serious in the Medical Report, so it is incorrect to say that I knew this fact that Tularam had sustained lathi blow on his head and his condition was serious. It is incorrect to say that head injury caused to Tularam was serious and his condition was

7 [2015] 3 SCR 947 : (2015) 11 SCC 43

8 [2010] 15 SCR 1012 : (2010) 14 SCC 129

> told to be serious in his medical report. It is correct that proceedings of recording dying declaration of Tularam was not conducted by me till Tularam was alive. It is incorrect to say that Tularam was not able to speak after sustaining the injuries and till his death, so I did not record his dying declaration. It is incorrect to say that due to this reason the statement of Exhibit P.40 has been falsely prepared."

64. Before we proceed further, it would be apt to recapitulate Section 32(1) of the IEA, whereunder the statement made by a person, who is dead, as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, is relevant and admissible, irrespective of the fact that such person at the time of making the statement was not under expectation of death.

65. Section 161 CrPC empowers the Police to examine orally any person who is acquainted with the facts and circumstances of the case under investigation. The Police may reduce such statement into writing also. Section 162(1) CrPC, nonetheless, mandates that no statement made by any person to a Police Officer, if reduced to writing, be signed by the person making it, nor shall such statement be used in evidence except to contradict a witness in the manner provided by Section 145 of the IEA. However, Sub-Section (2) of Section 162 CrPC carves out an exception to Sub-Section (1) as it explicitly provides that nothing in Section 162 shall be deemed to apply to any statement falling within the ambit of clause (1) of Section 32 of the IEA. In other words, a statement made by a person who is dead, as to the cause of his death or to the circumstances of the transaction which resulted in his death, to a Police Officer and which has been recorded under Section 161 CrPC, shall be relevant and admissible, notwithstanding the express bar against use of such statement in evidence contained therein. In such eventuality, the statement recorded under Section 161 CrPC assumes the character of a dying declaration. Since extraordinary credence has been given to such dying declaration, the court ought to be extremely careful and cautious in placing reliance thereupon. There are a catena of decisions of this Court which lend support to the inter-play between provisions of the CrPC and the IEA, as explained above[9].

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9 See: i) Mukeshbhai Gopalbhai Barot v. State of Gujarat (2010) 12 SCC 224; (ii) Sri Bhagwan v. State of U.P. (2013) 12 SCC 137; (iii) Pradeep Bisoi v. State of Odisha (2019) 11 SCC 500

66. As regard to the assessment of mental fitness of the person making a dying declaration, it is indubitably the responsibility of the court to ensure that the declarant was in a sound state of mind. This is because there are no rigid procedures mandated for recording a dying declaration. If an eyewitness asserts that the deceased was conscious and capable of making the declaration, the medical opinion cannot override such affirmation, nor can the dying declaration be disregarded solely for want of a doctor's fitness certification. The requirement for a dying declaration to be recorded in the presence of a doctor, following certification of the declarant's mental fitness, is merely a matter of prudence.[10]

67. The Constitution Bench in Laxman v. State of Maharashtra[11] has authoritatively ruled that:

> "3. … …But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a Magistrate or a doctor or a police officer. … … What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise."

10 Koli Chunilal Savji v. State of Gujarat (1999) 9 SCC 562

11 [2002] Supp. 1 SCR 697 : (2002) 6 SCC 710

68. It is important in this case to appreciate that the Investigating Officer recorded the statement instantly, a day after the incident. He has categorically stated that the medical report did not mention that the condition of the declarant, Tularam, was serious in nature. More importantly, Tularam was able to convey his statement properly. Furthermore, on perusal of the statement, it is clear that the declarant Tularam was in a fit condition as not only did he properly explain the incident but has also markedly specified the role of the Appellant. That apart, the injuries found during the post-mortem examination conducted by P.W.13 and P.W.15 have duly corroborated the statement of deceased Tularam.

69. From the above discussion, it is manifest that the mere non-obtainment of a medical fitness certificate will not deter this Court from considering a properly recorded statement under Section 161 CrPC to be a dying declaration.

CONCLUSION :

70. For the reasons stated above, we are satisfied that there are no contradictions or discrepancies in the prosecution case of such a nature that would compel us to take a view different than that of the Trial Court and the High Court. We, therefore, do not find any merit in this appeal, which is, consequently, dismissed. If the Appellant is on bail, his bail bonds are cancelled, and he is directed to surrender and undergo the remainder of the sentence. However, if the Appellant is already in custody, in that event, he shall complete the remainder of the sentence.

71. Ordered accordingly.

Result of the case: Appeal dismissed.

†*Headnotes prepared by:* Nidhi Jain

[2024] 7 S.C.R. 246 : 2024 INSC 465

Nipun Malhotra
v.
Sony Pictures Films India Private Limited & Ors.

(Civil Appeal No. 7230 of 2024)

08 July 2024

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

Issue for Consideration

The appellant is a person with arthrogryposis and is aggrieved by the manner in which persons with disabilities have been portrayed in the movie titled 'Aankh Micholi'. The appellant seeks guidelines against filmmakers, regarding the provisions of the Right of Persons with Disabilities Act, 2016 and the composition of the Board and the Advisory panel under the Cinematograph Act and recommendations to beep certain parts of the present film as well.The issues arises for consideration include the impact of the provisions of RPwD Act 2016 on the certification of films and under the Cinematograph Act.

Headnotes†

Cinematograph Act, 1952 – Rights of Persons with Disabilities Act 2016 – The appellant seeks recommendations to beep certain parts of the present film as well:

Held: This Court endorses slow interference with the determination of an expert body under the Cinematograph Act, particularly to allow the exhibition of a film – It is for the Board to draw the line between permissible and impermissible portrayal of social ills through visual media, and ensure that the Guidelines are meant to be read as broad standards for the same – The certification in the present case implies that the Board found that the overall message of the film was in accordance with the guidelines and the RPwD Act – This Court is not inclined to interfere with this finding by recommending beeping out parts of the film, especially considering the inclusion of a disclaimer in the film.[Para 72.1]

Cinematograph Act, 1952 – Rights of Persons with Disabilities Act 2016 – Recommendation that Sony Pictures make an awareness film according to Section 7 (d) of the RPwD Act:

* Author

Held: The recommendation that Sony Pictures make an awareness film according to Section 7 (d) of the RPwD Act cannot be granted – Section 7(d) is directed towards the appropriate government – This Court has underlined that the principle of reasonable accommodation includes positive obligations of private parties to support persons with disabilities and facilitate their full participation, this Court does not agree that Section 7(d) includes such an obligation against private persons – Even otherwise, such a direction would amount to compelled speech – Such compelled speech has been allowed by this Court under Article 19(1) of the Constitution, *albeit* in a very different context from the present – The recommendation sought in the present case is for creation of a whole different film on the ground of a statutory mandate of spreading awareness which is not even directed towards a private entity such as Sony Pictures – The positive obligation mentioned in Vikash Kumar cannot be so extended to compel speech in the manner suggested by the appellant. [Para 72.2]

Cinematograph Act, 1952 – Rights of Persons with Disabilities Act 2016 – Cinematograph (Certification) Rules 1983 – Cinematograph (Certification) Rules, 2024 – Inclusion of subject matter experts to the Board and advisory panels:

Held: On inclusion of subject matter experts to the Board and advisory panels, this Court believes that the field is sufficiently occupied by the Cinematograph Act and the certification Rules of 1983 and 2024 does not merit interference – Under the 1983 Rules, the Board may take steps to assess public reactions to films – The Examining Committee is supposed to include women as its members – The 1983 Rules and the 2024 Rules envisage consultation with a subject matter expert: the Examining Committee's final report is forwarded to the Chairperson in 10 days, unless the Committee feels that expert opinion is necessary – In that case, it may submit a provisional report and seek expert opinion before submitting the final report – The 2024 Certification Rules go a step further and provide that a Regional Officer may invite subject matter experts for the examination of the film by the Examination Committee or Revising Committee. [Para 72.3]

Cinematograph Act, 1952 – Rights of Persons with Disabilities Act 2016 – Cinematograph (Certification) Rules 1983 – Cinematograph (Certification) Rules, 2024 – Disparaging portrayal of person with disabilities:

Held: The Board must decide whether a disparaging portrayal stood redeemed by the overall message or not – No doubt this entails a complex balancing of interests – It would be ideal if the statutory bodies included subject matter experts – The 2024 Rules are a welcome acknowledgment of this principle and consultations with subject matter experts on disability would certainly better inform the perspective of the Board – The policy underlying the Act and the Rules already accounts for expert consultation – This Court cannot interfere merely because it could be better or that a better alternative is available, when the legality of such policy is not in question. [Para 72.5]

Cinematograph Act, 1952 – Rights of Persons with Disabilities Act 2016 – Cinematograph (Certification) Rules 1983 – Cinematograph (Certification) Rules, 2024 – The appellant has sought formulation of guidelines to restrict content that contravenes the Constitution and the RPwD Act 2016:

Held: The guidelines under the Act are quite extensive and cover the field – Such directions are issued to fill legislative gaps – If allowed, such guidelines would be akin to reading the provisions of one statute that is, the RPwD Act 2016 into another statute, that is the Cinematograph Act, even though the latter does not suffer from a vacuum on the issue, and the statutory expert body is presumed to have account for the effect of the former anyway – Courts cannot trench into policy-making. [Para 72.6]

Constitution of India – Art. 19 – Cinematograph Act, 1952 – Rights of Persons with Disabilities Act 2016 – Cinematograph (Certification) Rules 1983 – Cinematograph (Certification) Rules, 2024 – Provision of a framework of the portrayal of persons with disabilities in visual media that aligns with the anti-discrimination and dignity affirming objectives of the Constitution as well as the RPwD Act – The framework is laid down is in line with findings in Vikash Kumar case where it was emphasised that fundamental rights under Part III of the Constitution apply with equal rigour to persons with disabilities:

Held: The representation of persons with disabilities must regard the objective social context of their representation and not marginalise persons with disability: (i) Words cultivate institutional discrimination – Terms such as "cripple" and "spastic" have come to acquire devalued meanings in societal perceptions about persons

with disabilities – They contribute to the negative self-image and perpetuate discriminatory attitudes and practices in society; (ii) Language that individualises the impairment and overlooks the disabling social barriers (e.g. terms such as "afflicted", "suffering", and "victim") should be avoided or adequately flagged as contrary to the social model; (iii) Creators must check for accurate representation of a medical condition as much as possible – The misleading portrayal of what a condition such as night blindness entails may perpetuate misinformation about the condition, and entrench stereotypes about persons with such impairments, aggravating the disability; (iv)Persons with disabilities are under-represented – Average people are unaware of the barriers persons with disabilities face – Visual media must reflect their lived experiences – Their portrayal must capture the multitudes of their lived realities, and should not be a uni-dimensional, ableist characterisation; (v) Visual media should strive to depict the diverse realities of persons with disabilities, showcasing not only their challenges but also their successes, talents, and contributions to society – This balanced representation can help dispel stereotypes and promote a more inclusive understanding of disability; (vi) They should neither be lampooned based on myths (such as, 'blind people bump into objects in their path') nor presented as 'super cripples' on the other extreme – This stereotype implies that persons with disabilities have extraordinary heroic abilities that merit their dignified treatment; (vii) Decision-making bodies must bear in mind the values of participation – The 'nothing about us, without us' principle is based on the promotion of participation of persons with disabilities and equalisation of opportunities – It must be put to practice in constituting statutory committees and inviting expert opinions for assessing the overall message of films and their impact on dignity of individuals under the Cinematograph Act and Rules; (viii) The CPRD also requires consultation with and involvement of persons with disabilities in the implementation of measures to encourage portrayal that is consistent with it; (ix) Training and sensitization programs should be implemented for individuals involved in creating visual media content, including writers, directors, producers, and actors – These programs should emphasize the impact of their portrayals on public perceptions and the lived experiences of persons with disabilities – Topics should include the principles of the social model of disability, the importance of respectful language, and the need for accurate and empathetic representation. [Para 74]

Cinematograph Act, 1952 – Rights of Persons with Disabilities Act 2016 – Disability humour and Disabling humour:

Held: Humour and disabilities are viewed as uneasy companions – This is primarily because of the historical use of humour to mock disability, make jokes at the expense of persons with disabilities and to use them for comic relief – This Court must distinguish '*disabling humour*' that demeans and disparages persons with disability from '*disability humour*' which challenges conventional wisdom about disability – While disability humour attempts to better understand and explain disability, disabling humour denigrates it – The two cannot be equated in their impact on dignity and on stereotypes about persons with disabilities. [Para 66]

Constitution of India – Art. 19(1)(a) – Cinematograph Act, 1952 – Fundamental right to freedom of speech and expression – Cinematograph Act, an instance of reasonable restriction:

Held: A filmmaker's right to exhibit films is a part of their fundamental right to freedom of speech and expression under Article 19(1)(a), which is subject to reasonable restrictions under Article 19(2) – The Cinematograph Act is an instance of reasonable restrictions on this right under the 'decency and morality' rubric of Article 19(2) – Prior certification under the Act has been regarded as a valid restraint on cinematic speech because of its 'instant appeal' and the ability to stir emotions more deeply than other artistic media. [Para 22]

Constitution of India – Art. 19(1)(a) and Art. 19(2) – Cinematograph Act, 1952 – Restraints on films – Principles:

Held: Restraints on films are founded on principles of due process, social interest, limited application in cases of absolute necessity and clear purpose of the restraint – Among the principles which must be borne in mind when deciding the fitness of a film for public exhibition include the following: (i) Social impact of the film is judged from the perspective of an ordinary person of reasonable intelligence and not a hypersensitive person; (iii) Social change, rather than orthodox notions or what is right and moral must be borne in mind; and (iv) The film must be judged by its overall message and not from isolated depictions of social evils. [Para 25]

Rights of Persons with Disabilities Act 2016 – Core aim:

Held: The RPwD Act represents a fundamental shift from viewing disability through a charity lens to a human rights perspective –

Its core aim is to empower persons with disabilities by upholding their inherent dignity and autonomy – The Act broadly underscores principles of non-discrimination, full and effective participation in society, and the inclusion of all individuals, emphasizing the respect for differences and the acceptance of disabilities as an integral part of human diversity – It enshrines equality of opportunity, accessibility, gender equality, and the recognition of the evolving capacities of children with disabilities, ensuring their right to maintain their identities. [Para 38]

Jurisprudence – International Jurisprudence –Persons with disabilities – Discussed.

Jurisprudence – Indian Jurisprudence aligns with the human rights approach – Persons with disabilities – Discussed.

Case Law Cited

Bobby Art International v. Om Pal Singh Hoon [1996] Supp. 2 SCR 136 **: (1996) 4 SCC 1;** *Director General, Directorate General of Doordarshan & Ors. v. Anand Patwardhan* [2006] Supp. 5 SCR 403 **: (2006) 8 SCC 433;** *S Rangarajan v. P Jagjivan Ram and Ors.* [1989] 2 SCR 204 **: (1989) 2 SCC 574;** *Union of India v. KM Shankarappa* [2000] 5 Suppl. SCR 117 **: (2001) 1 SCC 582;** *Prakash Jha v. Union of India* [2011] 10 SCR 496 **: (2011) 8 SCC 372;** *KA Abbas v. Union of India* [1971] 2 SCR 446 **: (1970) 2 SCC 780;** *Ramesh v. Union of India* [1988] 2 SCR 1011 **: (1988) 1 SCC 668;** *Nachiketa Walhekar v. Central Board of Film Certification* **(2018) 1 SCC 778;** *Anuj Garg v. Hotel Association of India* [2007] 12 SCR 991 **: (2008) 3 SCC 1;** *Navtej Singh Johar v. Union of India* [2018] 7 SCR 379 **: (2018) 10 SCC 1;** *Indian Young Lawyers Association v. State of Kerala* [2018] 9 SCR 561 **: (2019) 11 SCC 1;** *Vikash Kumar v. Union Public Service Commission* [2021] 12 SCR 311 **: (2021) 5 SCC 370;** *Jeeja Ghosh v. Union of India* [2016] 4 SCR 638**;** *Rajive Raturi v. Union of India* [2017] 12 SCR 827 **: (2018) 2 SCC 413;** *Ravindra Kumar Dhariwal v. Union of India* [2016] 4 SCR 638**;** *Sakal Papers (P) Ltd v. Union of India* [1962] 3 SCR 842 **: (1962) 3 SCR 842;** *Maneka Gandhi v. Union of India* [1978] 2 SCR 621 **: (1978) 1 SCC 248;** *Indibly Creative Private Limited v. Government of West Bengal* [2019] 5 SCR 679 **: 2020 12 SCC 436;** *In Re Noise Pollution* [2005] 1 Suppl. SCR 624 **: (2005) 5 SCC 733;** *Central Public Information Officer, Supreme Court of India v. Subash Chandra Agarwal* **(Civil Appeal No. 10044**

of 2010); *Union of India v. Motion Pictures Association* [1999] 3 SCR 875 **: (1999) 6 SCC 150;** *Raj Kapoor v. State* [1980] 1 SCR 1081 **: (1980) 1 SCC 43;** *Directorate of Film Festivals v Gaurav Ashwin Jain* [2007] 5 SCR 7 **: (2007) 4 SCC 737;** *Padma Sundara Rao v. State of Tamil Nadu* [2002] 2 SCR 383 **: (2002) 3 SCC 533;** *State of Punjab v. Salil Sabhlok* [2013] 5 SCR 18 **: (2013) 5 SCC 1;** *P. Ramachandra Rao v. State of Karnataka* [2002] 3 SCR 60 **: (2002) 4 SCC 578;** *Census Commissioner v. R Krishnamurthy* [2014] 11 SCR 463 **: (2015) 2 SCC 796 – referred to.**

Glor v. Switzerland 13444/04, para 53; Bacher v. Austria (026/2014), views CRPD/C/19/D/26/2014, para 3.3 – referred to.

F.A. Picture International v. Central Board of Film Certification **(2004) SCC OnLine Bom 961 – referred to.**

Books and Periodicals Cited

Madhavi Goradia Divan, Facets of Media Law, Second Edition pg 284-285; Madhavi Divan, 'Morality, Obscenity and Censorship', Supreme Court Cases (Journal), Vol 1 (2003), 1– 16; Ronald Dworkin, Foreword, in Hare and Weinstein, eds., Extreme Speech and Democracy, v–ix.as cited in Jeremy Waldron, The Harm in Hate Speech, Harvard University Press Cambridge, Massachusetts London, England (2012), Pg 175; John Stuart Mill, On Liberty (Penguin Books, 1982) [99, 106] as cited in Jeremy Waldron, The Harm in Hate Speech, Pgs 194, 197; Colin Barnes, Disabling Imagery and the Media, An Exploration of the Principles for Media Representation of Disabled People, The British Council Of Organisations Of Disabled People, Part Two :Commonly Recurring Media Stereotypes (1992); Angharad E. Beckett, Citizenship and Vulnerability: Disability and Issues of Social and Political Engagement, Palgrave Mamillan (2006); Colin Barnes et al., Exploring Disability. A Sociological Introduction, Cambridge, Polity Press, (1999) Pg 10; Allan Sutherland, Disabled we Stand, London: Souvenir Press (1981); Teresa Milbrodt, Today I Had an Eye Appointment, and I'm Still Blind": Crip Humor, Storytelling, and Narrative Positioning of the Disabled Self, Disability Studies Quarterly, University of Missouri, Columbia, Volume 38 (2018) [11]; Tom Shakespeare, Joking a part, Body and Society, (1999) Volume 5(4), 47-55 as cited in Kinda Abujbarah, Laughing Back: A Phenomenological Study of Disability Humor Using Culturally Responsive Methodologies (Doctoral Dissertation) (2019); The Handbook for Parliamentarians on the Convention on the Rights of

Persons with Disabilities and its Optional Protocol, From Exclusion to Equality: Realizing the rights of persons with disabilities (2007); The UN General Assembly adopted the WPA, and declared at the same time the United Nations Decade of Disabled Persons, 1983-1992. See also Paul Harpur, 'From Disability to ability: changing the phrasing of the debate' (2012) 27 (3) Disability & Society 325, 327; United Nations, Improving Communications about People with Disabilities (Recommendations of a United Nations Seminar, 8-10 June 1982, Vienna), p. 5; Allison Hobgood and David Wood, Disability Humour and the Meanings of Impairment in Early Modern England, Hobgood, Recovering Disability in Early Modern England. The Ohio State University Press, 2013; Shawn Bingham and Sara Green, Aesthetic as Analysis: Synthesizing theories of humor and disability through stand-up comedy, Humanity & Society, Volume 40(3), 1, 6 (2016); 7 Mike Oliver, The social model of disability: Thirty years on, Disability & Society, 28(7), 1024-1026; Teresa Milbrodt, Today I Had an Eye Appointment, and I'm Still Blind": Crip Humor, Storytelling, and Narrative Positioning of the Disabled Self, Disability Studies Quarterly, University of Missouri – Columbia Vol. 38 No. 2 (2018); Robin Smith and Mara Shapon-Shevin, Disability Humor, Insults, and Inclusive Practice Social Advocacy and Systems Change, 1(2), 2008-2009; "Nothing about Us, Without Us", International Day of Disabled Persons: Themes and Observances of Previous Years, United Nations (2004) – referred to.

Websites

https://disability-studies.leeds.ac.uk/wp-content/uploads/sites/40/library/Barnes-disabling-imagery.pdf

https://disability-studies.leeds.ac.uk/wp-content/uploads/sites/40/library/Sutherland-CHAPTER6.pdf

https://dsq-sds.org/index.php/dsq/article/view/6163/4902

https://web.archive.org/web/20200506223854id_/

https:/digitalcommons.chapman.edu/cgi/viewcontent.cgi?article=1008&context=education_dissertations

https://www.un.org/disabilities/documents/toolaction/ipuhb.pdf

https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no6-equality-and-non-discrimination

https://www.ohchr.org/sites/default/files/Documents/Publications/Disabilities_training_17EN.pdf

https://muse.jhu.edu/pub/30/oa_monograph/chapter/897500

https://journals.sagepub.com/doi/10.1177/0160597615621594

https://sites.cortland.edu/sasc/wp-content/uploads/sites/12/2012/12/Disability-Humor-Final.pdf

https://www.un.org/esa/socdev/enable/iddp2004.htm#:%7E:text=The%20motto%20%E2%80%9CNothing%20About%20Us,and%20with%20persons%20with%20disabilities

List of Acts

Constitution of India; Cinematograph Act, 1952; Rights of Persons with Disabilities Act 2016; Cinematograph (Certification) Rules 1983; Cinematograph (Certification) Rules, 2024.

List of Keywords

Article 19(1)(a) of Constitution of India; Article 19(2) of Constitution of India; Section 7 (d) of the Rights of Persons with Disabilities Act 2016; Persons with disabilities; Impact of the provisions of Rights of Persons with Disabilities Act 2016 on the certification of films;Principle of reasonable accommodation; Expert on disability; Experts for the examination of the film; Complex balancing of interests; Cripple and spastic; Societal perceptions about persons with disabilities; Negative self-image and perpetuate discriminatory attitudes; Language that individualises the impairment; Accurate representation of a medical condition; Misleading portrayal of a condition; Barriers persons with disabilities face; Visual media; Showcasing diverse realities of persons with disabilities; Promotion of inclusive understanding of disability; Promotion of participation of persons with disabilities; Equalisation of opportunities; Expert opinions for assessing the overall message of films; Involvement of persons with disabilities in the implementation of measures; Training and sensitization programs; Lived experiences of persons with disabilities; Principles of the social model of disability; Importance of respectful language; Accurate and empathetic representation of persons with disabilities; Humour and disabilities; Disability humour; Disabling humour;Cinematograph Act an instance of reasonable restrictions under Article 19(2); Restraints on films; Principles of due process, social interest; Equality of opportunity; Gender equality;

Recognition of the evolving capacities of children with disabilities, ensuring their right to maintain their identities.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No.7230 of 2024

From the Judgment and Order dated 15.01.2024 of the High Court of Delhi at New Delhi in WP(C) No.522 of 2024

Appearances for Parties

Jai Anant Dehadrai, Pulkit Agarwal, Sudhanshu Kaushesh, Siddharth Sharma, Md Tasnimul Hassan, Martin George, Prashant Kumar, Md Anas Chaudhary, Md Sharyab Ali, Zahid Ali, Vibhu Tandon, Avnish Chaturvedi, Advs. for the Appellant.

Tushar Mehta, Solicitor General, Parag Tripathi, Sr. Adv., Ritin Rai, Alipak Banerjee, Karishma Karthik, Salvador Santosh Rebello, Raghav Sharma, Ms. Kritika Grover, Jaskirat Pal Singh, Prateek Tanmay, Madhav Sinhal, Mrs. Sansriti Pathak, Mayank Pandey, Mrs. Aarushi Singh, Amrish Kumar, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Dr Dhananjaya Y Chandrachud, CJI

Contents*

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

1. Leave granted.

2. The appellant is the founder of an organisation that promotes awareness about disabilities, conducts policy research and provides education to underprivileged children. The appellant is a person with arthrogryposis and is aggrieved by the manner in which persons with disabilities have been portrayed in the movie titled '*Aankh Micholi*'.

3. The appeal arises from the judgment dated 15 January 2024 of the High Court of Delhi by which a petition under article 226 was dismissed on grounds of maintainability.

A. Factual Background

4. The appellant addressed a legal notice to the first respondent, Sony Pictures, on 6 October 2023 raising objections to the trailer of their film. The appellant was particularly aggrieved by the introduction of some of the characters of the film, who were portrayed to suffer from physical impairments. Sony Pictures replied to the notice on 17 October 2023. The movie was released on 3 November 2023 with 'U' certification from the Central Board of Film Certification.

5. The appellant claims that the film violates the constitutionally protected rights of persons with disabilities; and the provisions of the Cinematograph Act, 1952[1] and the Rights of Persons with Disabilities Act 2016[2]. The appellant claims that the Central Board

1 "Cinematograph Act"

2 "RPwD Act"

of Film Certification[3] has violated its statutory duty to certify films in accordance with the applicable guidelines.

6. He therefore sought directions:

   (i) Mandating the inclusion of an expert on disability within the Central Board of Film Certification and its advisory panel constituted under Sections 3 and 5 of the Cinematograph Act;

   (ii) Mandating the inclusion of the expert under Section 3 of the Cinematograph Act, 1952;

   (iii) Seeking relief against the first respondent, including punitive damages; and

   (iv) A public apology from the first respondent.

7. The appellant has highlighted instances in the trailer as well as the film where certain medical conditions have been misrepresented and derogatory terms have been used for characters who are persons with disabilities. These include (a) misrepresentation of the condition of night blindness; and (b) derogatory references to (i) a person with Alzheimer's as "bhulakkad baap", (ii) a hearing-impaired person as a "soundproof system"; and (iii) a character with speech impairment as an "atki hui cassette". The appellant submits that the film portrays a family of persons with various disabilities and revolves around their attempts to conceal their disabilities in a bid to come across as a 'normal family'. The female lead is a person with nyctalopia or night blindness, while the male lead is a person with hemeralopia, which is an inability to see clearly in bright light. The plot of the film revolves around the two families of the lead characters concealing their impairments, in order to arrange a matrimonial alliance.

8. The appellant has urged that the film's portrayal is derogatory to persons with disabilities generally and conveys the message that they ought to conceal their impairments in order to deserve a matrimonial partner. The appellant has further urged that the film (i) reinforces stereotypes with its misguided portrayals of persons with disabilities, thereby creating misconceptions, biases and prejudices against them; (ii) promotes the idea that persons with disability are unequal; (iii) presents them as subjects of comic relief; (iv) creates

3 "CBFC"/"The Board"

an environment of ridicule; (iv) does not generate empathy towards persons with disabilities; and (v) fails to promote inclusive and accurate representations of disabilities. In response, Sony Pictures stated that the overall message of the film was one of 'overcoming the challenge of disability'; the film sought to depict the struggles faced by persons with disabilities and their families and in an effort to overcome them. The film, they claimed in the reply, sought to dislodge the idea that disability obstructs a fulfilling life. The reply stated further that (i) the introduction of the characters in the trailer is protected by the freedom of speech and expression; (ii) the film does not pity or look down upon the characters but depicts their agency and skills; (iii) the depiction is neither derogatory nor stereotypical.

B. The High Court

9. The High Court of Delhi noted that the appellant had not disputed the explanation offered by the first respondent that the overall message of the film was around overcoming the disability and dwelt on the strength of the characters suffering from disabilities. The Court noted that the primary challenge that the film is offensive to the sensibilities of persons with disabilities, is thus not established. Underlining that the film was granted certification for unrestricted public exhibition by CBFC, the High Court held that the reliefs sought by the appellant were non-maintainable.

10. Summarised briefly, the High Court's findings are:

    (i) The first respondent's reply refutes the allegations made in the notice. They contested any suggestion that the movie's intent was to offend or humiliate differently-abled persons. Instead, they elucidated the overarching message of the film as intended by its creator;

    (ii) The appellant did not raise further grievances after receiving the reply and until filing the petition, indicating a lack of challenge to the film's alleged offensive nature;

    (iii) There is a lack of legal justification for the reliefs sought; and

    (iv) This dismissal is reinforced by the existence of guidelines issued by the Central Government under Section 5B(2) of the Act of 1952. These guidelines, including specific provisions for persons with disabilities provided a comprehensive framework for film certification.

C. Legislative Framework

11. We have heard Mr Sanjoy Ghose, senior counsel and Mr Jai Anant Dehadrai, counsel appearing on behalf of the appellant; Mr Parag Tripathi, senior counsel appearing on behalf of Sony Pictures and Mr Tushar Mehta, Solicitor General of India who has appeared to assist the Court on its request. The issues that arise for our consideration include the impact of the provisions of the RPwD Act 2016 on the certification of films under the Cinematograph Act.

12. The appellant has alleged that the Board has violated its duties under the statute for film certification in granting a certificate to the film. The Cinematograph Act 1952, the Cinematograph (Certification) Rules 1983[4] and the Guidelines for Certification of Films for Public Exhibition 1991[5], constitute the framework for certification of films. These provide for certification of films for exhibition and for regulation of the exhibition of such films. Every film must obtain a prior certificate for exhibition from the Board under Section 5A of the Act. The Board is constituted under Section 3 by the Central Government and consists of a chairperson and a minimum of twelve, and a maximum of twenty-five members[6]. An application for the grant of a certificate has to be in the format prescribed in the Rules[7].

13. Once an application is made, it is assessed by an Examining Committee, which makes recommendations to the relevant authority, which could be the Chairperson of the Board or the Regional Officer concerned. The authority, acting on the Board's behalf may act on the recommendations or refer the application to the Revising Committee which includes members of the Board or of advisory panels.[8]

14. Section 5 provides for Advisory Panels[9] consisting of persons qualified to judge the effect of the films on the public. The Advisory panels are appointed to facilitate the efficient functioning of the Board. The Board may consult the panel in respect of any application for the

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4 "1983 Rules". The 1983 Rules have been superseded by the Cinematograph (Certification) Rules, 2024 ("2024 Rules").

5 "Guidelines"

6 Cinematograph Act 1952, Section 3.

7 Cinematograph Act 1952, Section 4; Cinematograph (Certification) Rules 1983, Rule 21.

8 Cinematograph (Certification) Rules, 1983, Rule 24.

9 Cinematograph Act 1952, Section 5.

certification of a film. The panel has to examine the film and make its recommendations to the Board in accordance with the applicable rules.

15. Section 8 empowers the Central Government to make rules. The 1983 Certification Rules (and the 2024 Rules which superseded them) were framed under the rule making power. Under the Rules, the Regional Officer appoints an Examining Committee consisting of members of the Advisory Panel (constituted under Section 5) and an Examining Officer[10]. The Examining Officer submits recommendations of the Examining Committee to the authority prescribed in the Rules, based on the type and length of the content, and takes personal responsibility for compliance with every guideline.[11] The Chairperson of the Board can require the Regional Officer to act on behalf of the Board, in conformity with the recommendations of the Examining Committee. The Chairperson may, in the alternative, on their own motion or on a request by the applicant, refer the record to the Revising Committee under Rule 24. The Revising Committee shall examine the film and send the recommendations to the Chairperson of the Board. If the Chairperson disagrees with the decision by majority of the Revising Committee, the Board shall itself examine the film or cause the film to be examined again by another Revising Committee and the decision of the Board or a second Revising Committee, as the case may be, shall be final.[12] The certificate granted by the Board is published in the Gazette is valid for 10 years.[13]

16. The Board may sanction the film for unrestricted public exhibition ('U' certificate); public exhibition restricted to adults ('A' certificate); (U/A certificate); or public exhibition restricted to members of a class, having regard to the nature, content and theme of the film ('S' certificate). The Board may certify the film as it is, or subject to excisions or modifications or refuse to sanction the film for public exhibition altogether.

17. Section 5B provides that a film shall not be certified if in the opinion of the Board, it is against "the interests of the sovereignty and integrity

10 Cinematograph (Certification) Rules, 1983, Rule 22.

11 *ibid,* Rule 22 (13).

12 *ibid,* Rule 24.

13 *ibid,* Rule 29.

of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or involves defamation or contempt of court or is likely to incite the commission of any offence." Section 5B(2) states that the Central Government may delineate principles to guide the authority granting a certificate for public exhibition of films. Accordingly, Guidelines have been framed in 1991.

I. The 1991 Guidelines

18. The appellant states that the egregious portrayal of characters with disabilities in the film necessitates judicially mandated checks and the framing of guidelines for creators of content. The Guidelines, framed under Section 5B of the Cinematograph Act, are interpreted as broad standards and require (inter alia) that the Board must ensure that scenes showing abuse of physically or mentally handicapped persons are not presented needlessly.[14] The guidelines prescribe sensitive portrayal of women, children and persons with disabilities.[15] The film must be examined as a whole and in line with contemporary standards of the country and the people to whom it relates.

19. This Court has laid down tests to determine challenges to the portrayal of persons, situations and characters in films. The aversion defence states that the portrayal of a social evil meant to arouse revulsion, such as scenes of sexual violence or communal tension, are meant to draw attention to these evils rather than to glorify them. They must not be barred for mere portrayal and due regard must be had to the overall message of the film, rather than standalone scenes.[16] Films must remain sensitive to standards of society and alive to social changes.[17] The Board is required to view the film as a whole in applying the above metrics. The decision must not be based on isolated bits and scenes in the film.[18]

20. Once certified, the film is presumed to have complied with the applicable Rules and Guidelines, and its effect on the public

14 Guidelines For Certification of Films for Public Exhibition 1991, Clause 2 (iii) (b).

15 *ibid,* Clause 2 (iii) (a), (b).

16 Madhavi Goradia Divan, Facets of Media Law, Second Edition pg 284-285; Bobby Art International v. Om Pal Singh Hoon, 1996 4 SCC 1 [27-28]

17 Guidelines (supra), Clauses 1 (a) and 3 (ii)

18 Director General,Directorate General of Doordarshan & Ors. (2006) 8 SCC 433 [20, 34] (supra) [38]; S Rangarajan v P Jagjivan Ram and Ors. (1989) 2 SCC 574

cannot ordinarily be re-assessed by the Court, having already been considered by an expert body[19].

21. The certification of the film in question is not in issue before us. In that regard, as the High Court has noted, the appellant has not contested Sony Pictures' reply to their legal notice. During the course of the hearing it was stated across the Bar that since the film has been released in the meantime, the certification itself is not seriously in challenge. The appellant has sought the framing of guidelines and inclusion of recommendations for creators to follow while dealing with sensitive subjects such as the rights of persons with disabilities in the visual media.

II. Article 19(1)(a) and The Cinematograph Act

22. A filmmaker's right to exhibit films is a part of their fundamental right to freedom of speech and expression under Article 19(1)(a), which is subject to reasonable restrictions under Article 19(2)[20]. The Cinematograph Act is an instance of reasonable restrictions on this right under the 'decency and morality' rubric of Article 19(2).[21] Prior certification under the Act has been regarded as a valid restraint on cinematic speech because of its 'instant appeal' and the ability to stir emotions more deeply than other artistic media.[22] Even so, like restraints on cinematic speech have to be narrowly construed because of their potential to imperil the significant value of free speech which is a constitutionally protected value.

23. In **KA Abbas v. Union of India** [23], this Court underlined that restraints on cinematic expression have to be extremely narrow.[24] The Court held that when determining the effect of a film, the Board must view it from the vantage of an ordinary person of common sense rather than

19 Union of India v. KM Shankarappa (2001) 1 SCC 582; Prakash Jha v. Union of India (2011) 8 SCC 372

20 *19. Protection of certain rights regarding freedom of speech, etc.*
(1) All citizens shall have the right-(a)to freedom of speech and expression;
(2)Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with Foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

21 Madhavi Divan, 'Morality, Obscenity and Censorship', Supreme Court Cases (Journal), Vol 1 (2003), 1–16; KA Abbas v. Union of India, (1970) 2 SCC 780 [40].

22 KA Abbas (supra) [20,34]

23 [1971] 2 SCR 446 : (1970) 2 SCC 780

24 KA Abbas (supra) [34]

a hypersensitive person. Moreover, the Board must be alive to social change and must not adopt a conservative or orthodox approach. The limits on expression must be 'necessary', rather than merely expedient or convenient, which are relatively lower thresholds.[25] The Board must make a "substantial allowance" in favour of freedom and allow creative works to interpret both the foibles as well as the good in the society.[26]

24. Since the Cinematograph Act provides for an elaborate procedure for certification of films by expert bodies, the approval of the statutory committees such as the Examination Committee must be given due weight. The Board has the benefit of hearing the perspective of the filmmakers, who make relevant representations before the Board. Courts are slow to interfere with the conclusions of specialised bodies, constituted under the Act.[27] In this narrow scope of intervention, the Court may not act like a film critic and must observe certain grounding principles. For instance, the mere mention of a subject in the film is not problematic in itself and a deeper examination of the *manner* in which the theme has been handled is required.[28] In **Bobby Art International v. Om Pal Singh Hoon[29],** this Court held that as long as the overall message of the film is not to extol a social evil, its mere depiction of a social evil is not impermissible. It was held there that the portrayal of sexual violence could not be construed as a promotion of such violence.[30] In **Nachiketa Walhekar v. Central Board of Film Certification[31],** a three-judge bench speaking through one of us (Dr DY Chandrachud J) refused to stay the release of a film on the ground of its apprehended use as evidence in a pending trial. It was held that the Court will be extremely slow to restrain creative works, once the Board had approved exhibition.[32]

25. Restraints on films are founded on principles of due process, social interest, limited application in cases of absolute necessity and clear

25 S Rangarajan (supra) [21,53]

26 Ramesh v. Union of India, (1988) 1 SCC 668 [15]

27 Ramesh (Supra) [19]

28 KA Abbas (supra) [50]; See also Ramesh (supra) [17]

29 [1996] Supp. 2 SCR 136 : 1996 4 SCC 1

30 Bobby Art International (supra) [29-33]

31 (2018) 1 SCC 778

32 Nachiketa Walhekar (supra) [2,4]; See also, Viacom 18 vs Union of India 2018 1 SCC 761 [16]

purpose of the restraint.[33] Among the principles which must be borne in mind when deciding the fitness of a film for public exhibition include the following: (i) Social impact of the film is judged from the perspective of an ordinary person of reasonable intelligence and not a hypersensitive person; (iii) Social change, rather than orthodox notions or what is right and moral must be borne in mind; and (iv) The film must be judged by its overall message and not from isolated depictions of social evils.

D. The Context of speech

26. We are dealing with cinematic speech. In a slightly different context of anti-hate speech and group-defamation laws, Professor Ronald Dworkin argued that freedom of speech and expression extended even to hate speech. While he conceded the need to protect certain groups from violence and discrimination, he believed society could adopt laws to offer such protection. He regarded hate speech as protected speech and necessary, so that anti-discrimination laws could gain political legitimacy and enforceability among their opponents. His argument was that "if we want legitimate laws against violence or discrimination, we must let their opponents speak".[34] John Stuart Mill on the other hand, argued that such speech served a public-education function by promoting public debate, and to sustain constant questioning of the truth[35]. Disagreeing with Dworkin's legitimacy argument as well as Mill's public debate argument, Jeremy Waldron argued in *The Harm in Hate Speech* that on certain issues, society is past the point where it needs to debate fundamental aspects of issues such as race. Waldron argued that if hate speech were to be allowed because of its ability to sustain a public debate, such debate would come at the cost of the dignity of racial minorities, who have had to bear humiliating attacks on their objective social standing due to such speech.[36] This affront to one's dignity and objective treatment by society, rather than the

33 KA Abbas (supra) [40]

34 Ronald Dworkin, Foreword, in Hare and Weinstein, eds., Extreme Speech and Democracy, v–ix.as cited in Jeremy Waldron, The Harm in Hate Speech, Harvard University Press Cambridge, Massachusetts London, England (2012), Pg 175.

35 John Stuart Mill, On Liberty (Penguin Books, 1982) [99, 106] as cited in Jeremy Waldron, The Harm in Hate Speech, Pgs 194, 197.

36 Jeremy Waldron (supra), Pg 195.

more subjective notion of the 'effect on one's feelings' by way of such speech must be curbed.[37]

27. Even though Waldron was writing in a different context, he highlights the importance of the 'context' of speech as paramount in deciding the validity of restraints on it. Derogatory speech and stereotypes usually target the marginalised. The impact of the speech on human dignity; the identity of the speaker and the target; and the linguistic connotations of the speech may be considered in deciding issues around stereotypical speech. The standard of the 'overall message' of a film, in some ways, furthers this emphasis on the importance of context and manner of portrayal in visual media.[38]

I. Disabling imagery: stereotypical portrayal of persons with disabilities in the media.

28. Media portrayals of persons with disabilities have been historically oppressive. Consistent with the understanding that disability was 'anomalous' in a normative framework of ability, persons with disabilities were represented in disparaging ways. They were portrayed as evil, as objects of pity, violence, curiosity and ridicule, as burdens on society, sexually abnormal, and overall, as people incapable of community participation[39]. Such disabling imagery formed "the bedrock on which the attitudes towards, assumptions about and expectations of disabled persons are based"[40]. Such portrayal perpetuated stigmatising views about disability as a vulnerability or a 'suffering'.[41] Recurrent negative portrayals as illustrated above and frequent use of patronising and offensive language such as "victim", "differently abled", or "unfortunate"

37 Jeremy Waldron (supra), Pgs 107,197 *"I think we do need to ask whether we are past the stage where society is in such need of a robust debate about fundamental matters of race that we ought to bear the costs of what amount to attacks on the dignity of minority groups. Think of what those costs may involve. Are we re ally in need of such robust debate on racial ontology that we have no choice but to require individuals and families within minority groups to bear the costs of such humiliating attacks on their social standing?"*

38 Bobby Art International (supra).

39 Colin Barnes, Disabling Imagery and the Media, An Exploration of the Principles for Media Representation of Disabled People, The British Council Of Organisations Of Disabled People, Part Two :Commonly Recurring Media Stereotypes (1992) Pg 7 <https://disability-studies.leeds.ac.uk/wp-content/uploads/sites/40/library/Barnes-disabling-imagery.pdf>; Angharad E. Beckett, Citizenship and Vulnerability: Disability and Issues of Social and Political Engagement, Palgrave Mamillan (2006) Pg.

40 *ibid.*

41 Beckett (ibid) at Pg 109.

to describe individuals continue to perpetuate negative attitudes towards persons with disabilities.

29. The problem with such portrayal is that it channels attention on the medical aspects of impairment rather than the social aspects that actually disable a person. This impacts persons with disabilities as individuals as well, subjecting them to stigma and social exclusion.[42]

30. As Allan Sutherland wrote, "*stereotyped views frequently act as self-fulfilling prophecies, forcing the person with a disability into a role that can then be used to justify the original treatment*."[43] They shape and strengthen the already existing negative assumptions about their abilities[44]. This resultantly exacerbates systemic inequalities, and inhibits their dignified participation in the public sphere for education or employment.[45]

31. Humour is a powerful medium of speech that can reinforce attitudes and influence behaviour towards groups. Pejorative jokes may reinforce stereotypical assumptions about disabilities, validating abusive attitudes and practices towards persons with disabilities.[46] Humour, however, also has a complex dual role for persons with disabilities. It could be "both liberating and stigmatising" depending on the *context* of the joke and who is telling it.[47] We shall advert to this dual role later.

II. Stereotyping as an anti-thesis to dignity and non-discrimination.

32. This Court is cognisant of the impact of stereotypes on discrimination and the enjoyment of fundamental rights. We have traced safeguards

42 Colin Barnes et al., Exploring Disability. A Sociological Introduction, Cambridge, Polity Press, (1999) Pg 10.

43 Allan Sutherland, Disabled we Stand, London: Souvenir Press (1981) < https://disability-studies.leeds.ac.uk/wp-content/uploads/sites/40/library/Sutherland-CHAPTER6.pdf>

44 Beckett (supra) Pg 3.

45 *ibid* Pg 109.

46 Teresa Milbrodt, Today I Had an Eye Appointment, and I'm Still Blind": Crip Humor, Storytelling, and Narrative Positioning of the Disabled Self, Disability Studies Quarterly, University of Missouri, Columbia, Volume 38 (2018) [11] < https://dsq-sds.org/index.php/dsq/article/view/6163/4902 >

47 Tom Shakespeare, Joking a part, Body and Society, (1999) Volume 5(4), 47-55 as cited in Kinda Abujbarah, Laughing Back: A Phenomenological Study of Disability Humor Using Culturally Responsive Methodologies (Doctoral Dissertation) (2019) < https://web.archive.org/web/20200506223854id_/https://digitalcommons.chapman.edu/cgi/viewcontent.cgi?article=1008&context=education_dissertations > [39-40]; See Union of India v. National Federation of the Blind, (2013) 10 SCC 772 [Justice P Sathasivam, 50].

against stereotyping to the anti-discrimination code under Article 15, the right to dignity and to equality.

33. For instance, in **Anuj Garg** v. **Hotel Association of India**,[48] this Court struck down a law that barred women's employment in premises where liquor was consumed. Such an indirectly discriminatory law was held to be inflicted by "incurable fixations of stereotype morality and conceptions of sexual role".[49] In **Navtej Singh Johar** v. **Union of India**,[50] this Court found that Section 377 of the Indian Penal Code was discriminatory and premised on stereotypes about binary genders and the role of sex. It singled out a class of people on a basis proscribed under Article 15(1)[51]. A provision that was based on and perpetuated stereotypes deprived certain individuals of their right to equal participation as citizens and equal enjoyment of life.[52] In **Indian Young Lawyers Association v. State of Kerala**[53], a Constitution Bench of which one of us was a part (Dr DY Chandrachud), found that stereotypes about sex undercut dignity. The paternalistic notion that women were a weaker sex was found to be contrary to the dignity of women (inter alia) and as such, impermissible.[54] The Constitution envisions dignity, liberty and equality as imperatives for a dignified society. The "*dehumanising effect of stereotypes*" has been recognised by this Court in upholding the rights of those at the receiving end of these prejudicial notions and biases.[55]

III. The Framework of the RPwD Act, 2016

34. The Rights of Persons with Disabilities Act, 2016, inspired by the Social Model of Disability, marks a significant legislative step forward. This model, which gained prominence after the American Civil Rights Movement, uses the term "person with disability" instead of "disabled person," emphasizing the individuality of people rather than their disabilities. According to the Social model, disability arises not from

48 [2007] 12 SCR 991 : (2008) 3 SCC 1

49 Anuj Garg (supra).[46]

50 [2018] 7 SCR 379 : (2018) 10 SCC 1

51 Navtej Singh Johar v. Union of India (2018) 10 SCC 1 [Justice Chandrachud, 460]

52 *ibid* [608]

53 [2018] 9 SCR 561: (2019) 11 SCC 1

54 ibid, [Justice Chandrachud, 297]

55 Indian Young Lawyers Association (supra) [300]

a person's impairments but from the artificial barriers imposed by society and the environment.

35. The RPwD Act defines a person with a disability as someone with a long-term physical, mental, intellectual, or sensory impairment that, in interaction with societal barriers, hinders their full and effective participation in society on an equal basis with others[56].

36. For the first time, the 2001 Census counted people with disabilities. This inclusion marked a step towards recognizing persons with disabilities as a distinct group deserving of rights tailored to their needs. Earlier efforts, such as the Mental Health Act of 1987 and the establishment of the Rehabilitation Council of India in 1986, laid the groundwork for these advancements. The 1995 Persons with Disabilities Act further propelled the Disability Rights Movement by addressing early detection, education, employment, affirmative action, non-discrimination, and barrier-free access.[57]

37. Years of advocacy culminated in the enactment of the RPwD Act 2016, aligning Indian law with the UN Convention on the Rights of Persons with Disabilities[58]. The Act embodies principles of dignity, individual autonomy (freedom to make personal choices), non-discrimination, and effective participation. The CRPD asserts that disability arises from the interaction between impairments and social attitudes, creating barriers to full and equal participation in society.

38. The RPwD Act represents a fundamental shift from viewing disability through a charity lens to a human rights perspective. Its core aim is to empower persons with disabilities by upholding their inherent dignity and autonomy. The Act broadly underscores principles of non-discrimination, full and effective participation in society, and the inclusion of all individuals, emphasizing the respect for differences and the acceptance of disabilities as an integral part of human diversity. It enshrines equality of opportunity, accessibility, gender equality, and the recognition of the evolving

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56 The Rights of Persons with Disabilities Act, 2016, s. 2(S).
(s) "person with disability" means a person with long term physical, mental, intellectual or sensory impairment which, in interaction with barriers, hinders his full and effective participation in society equally with others;

57 The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.

58 "CRPD"

capacities of children with disabilities, ensuring their right to maintain their identities.

39. Section 3(1) of the RPwD Act mandates that the appropriate government ensure persons with disabilities enjoy the right to equality, life with dignity, and respect for their integrity on par with others.[59] The Act comprehensively prohibits discrimination against persons with disabilities in various spheres, including employment, education, access to public places, and provision of goods and services. It asserts that no person with a disability shall be deprived of any right or benefit available to others. This legislative framework reinforces the commitment of the Act to fostering a society that respects and upholds the rights of all individuals, regardless of disability status, thereby promoting inclusivity and societal harmony.

IV. International Jurisprudence

40. The human rights approach to disability has evolved over the latter half of the 20th century, incorporating disability into a broader paradigm of rights that began with the United Nations' Universal Declaration of Human Rights of 1948. This declaration acknowledged that all individuals have civil, political, economic, social, cultural, and development rights, despite their differences.[60] From this viewpoint, disability is seen as a variation in human characteristics, enriching the diversity of societal contributions and requiring mechanisms to ensure individuals can realize their potential.[61]

41. This rights-based perspective views people with disabilities as subjects rather than objects, shifting from seeing them as problems to recognizing them as rights holders. Since the mid-1970s, this

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59 Section *3. Equality and non-discrimination.—*
(1) The appropriate Government shall ensure that the persons with disabilities enjoy the right to equality, life with dignity and respect for his or her integrity equally with others.
(2) The appropriate Government shall take steps to utilise the capacity of persons with disabilities by providing appropriate environment.
(3) No person with disability shall be discriminated on the ground of disability, unless it is shown that the impugned act or omission is a proportionate means of achieving a legitimate aim.
(4) No person shall be deprived of his or her personal liberty only on the ground of disability. 8 (5) The appropriate Government shall take necessary steps to ensure reasonable accommodation for persons with disabilities.

60 The Universal Declaration of Human Rights of 1948.

61 See The Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol, From Exclusion to Equality: Realizing the rights of persons with disabilities (2007). https://www.un.org/disabilities/documents/toolaction/ipuhb.pdf

perspective has manifested in four ways at the UN level: through non-binding declarations and resolutions, in the interpretation of general human rights treaties, in the drafting of thematic human rights treaties, and in the ongoing work of specialized agencies. The CRPD aims to promote, protect, and ensure the full and equal enjoyment of all human rights and fundamental freedoms by persons with disabilities, emphasizing respect for their inherent dignity. The Convention does not create new rights but expresses existing rights in a way that addresses the needs of PWDs.

42. A Committee monitors the implementation of the Convention. Countries that ratify it, including India (in 2007), must report regularly on their progress. The 2030 Agenda for Sustainable Development also pledges to "leave no one behind," asserting that persons with disabilities must be both beneficiaries and agents of change.

1. Equality and Non-Discrimination

43. Equality and non-discrimination are fundamental to all human rights treaties. The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights prohibit discrimination on various grounds, forming the basis for Article 5 of the CRPD.[62] Thematic UN human rights conventions aim to establish equality and eliminate discrimination, with provisions specifically addressing these principles. The CRPD builds on the experiences of other conventions, evolving the UN's approach to equality and non-discrimination.

44. The CRPD Committee routinely observes several forms of discrimination against persons with disabilities, including violations in accessing the built environment, transportation, information, and communications; negative portrayals and harmful stereotypes in the media; deprivation of the right to legal capacity; barriers to accessing justice, education, and employment; and restrictions on participating

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62 *Article 5 - Equality And Non-Discrimination*
1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.
3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.
4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.

in cultural life, recreation, leisure, and sports.[63] Despite the adoption and ratification of the CRPD by many countries, disability-based discrimination persists due to continued reliance on charity and medical paradigms. In light of the foregoing considerations, it is evident that there exist outdated approaches to addressing disability, which fail to acknowledge individuals with disabilities as full rights holders.[64] These approaches, characterized by a desire to "care for and protect" persons with disabilities or to "fix" or "cure" them, are fundamentally incompatible with the principles of equality and non-discrimination enshrined in the CRPD.

45. The General Comment on Article 5 of the CRPD states that state parties should take proactive measures to address discriminatory portrayals of persons with disabilities in the media. [65] Such portrayals, rooted in charity, welfare, and medical paradigms, perpetuate harmful stereotypes and undermine the dignity and autonomy of individuals with disabilities. States must therefore implement measures to encourage the media to portray persons with disabilities in a manner consistent with the CRPD, thereby combating negative views that depict them as dependent or lacking autonomy.

46. The human rights approach to disability has been highlighted in many international cases. In **Glor v. Switzerland[66]**, the European Court of Human Rights declared a European and worldwide consensus on protecting persons with disabilities against discrimination, referencing the CRPD. In this case, the applicant, deemed unfit for military service due to diabetes, was still taxed for not performing military service.[67] The court held that Switzerland had unlawfully discriminated against him. In **Bacher v. Austria[68]**, the applicant, with autism and Down Syndrome, faced accessibility issues when a wooden roof crucial for accessing his home was destroyed. The CRPD Committee noted that states must ensure equal access for Persons with Disabilities

63 OHCHR, General Comment 6 on Article 5: Equality and Non Discrimination, (CRPD/C/GC/6, 26 April 2018), Para 2. See https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no6-equality-and-non-discrimination

64 *Ibid.* Para 3.

65 *Ibid,* Para 44.

66 Glor v Switzerland, 13444/04, para 53.

67 *Ibid.*

68 Bacher v Austria (026/2014), Views CRPD/C/19/D/26/2014, para 3.3.

to public goods, products, and services in a manner that respects dignity. [69]

47. The human rights approach to disability, reflected in the CRPD, represents a significant evolution in international human rights law. It emphasizes the need to treat persons with disabilities as rights holders, ensuring their full participation and inclusion in society.

2. Awareness-raising

48. Article 8 of the CRPD mandates measures for raising awareness about disability rights,[70] including:

i. Raising awareness at all levels of society, starting from families, to instill respect for disability rights and dignity;

ii. Fighting stereotypes and prejudices against persons with disabilities in various life domains, regardless of sex or age; and

iii. Promoting recognition of the abilities and valuable contributions of persons with disabilities.

49. Awareness-raising campaigns targeting both the public and private sectors are essential for combating stereotypes, prejudices, and harmful practices relating to persons with disabilities.[71] These campaigns should address misconceptions that individuals with disabilities, such

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69 Ibid. Para 9.9.

70 *Article 8 – Awareness-raising*
1. States Parties undertake to adopt immediate, effective and appropriate measures:
a) To raise awareness throughout society, including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities;
b) To combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life;
c) To promote awareness of the capabilities and contributions of persons with disabilities.
2. Measures to this end include:
a) Initiating and maintaining effective public awareness campaigns designed:
i. To nurture receptiveness to the rights of persons with disabilities;
ii. To promote positive perceptions and greater social awareness towards persons with disabilities;
iii. To promote recognition of the skills, merits and abilities of persons with disabilities, and of their contributions to the workplace and the labour market;
b) Fostering at all levels of the education system, including in all children from an early age, an attitude of respect for the rights of persons with disabilities;
c) Encouraging all organs of the media to portray persons with disabilities in a manner consistent with the purpose of the present Convention;
d) Promoting awareness-training programmes regarding persons with disabilities and the rights of persons with disabilities.

71 OHCHR, Monitoring the Convention on the Rights of Person with Disabilities: Guidance for Human Rights Monitors Professional Training Series No. 17 (2010). https://www.ohchr.org/sites/default/files/Documents/Publications/Disabilities_training_17EN.pdf

as autistic persons, deaf persons, blind persons, and persons with psychosocial disabilities, are less likely to interact with colleagues or be more productive due to fewer distractions. It is crucial to identify and eliminate value systems like ableism that underpin legislation, policies, and practices leading to inequality and discrimination.

50. Article 4.3 is significant for raising awareness.[72] The CRPD Committee recommends that States parties implement systematic awareness-raising programs with the participation of Disabled Persons' Organizations[73] and Organizations of Persons with Disabilities.[74] This is articulated in the General Comment 7 on Articles 4.3 and 33.3 which talk about the participation of persons with disabilities in the implementation and monitoring of the Convention[75]. The Comment states that these programs should include media campaigns that portray positive images of persons with disabilities, especially those with albinism, psychosocial and/or intellectual disabilities, and deaf-blind persons, as human rights holders. [76]

51. Stereotypes, ableism, and misconceptions that prevent independent living for persons with disabilities must be eradicated, promoting a positive image of their contributions to society. Training programs for public-sector officials must align with the principles of the CRPD and the human rights model of disability to overcome entrenched gender and disability stereotypes. Awareness-raising should involve authorities, civil servants, professionals, the media, the general public, and persons with disabilities and their families, and should be carried out in close cooperation with representative organizations of persons with disabilities.

52. The CRPD requires member states to "closely consult with" and "actively involve" persons with disabilities through their organizations

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72 Art 4 (2) CRPD states that: *"With regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights, without prejudice to those obligations contained in the present convention that are immediately applicable according to international law."*

73 "DPO"

74 "OPDs"

75 See OHCHR, General Comment 7 on Article 4.3 and Article 33.3- the participation of persons with disabilities in the implementation and monitoring of the Convention, (CRPD/C/GC/7, 09 November 2018).

76 *Ibid.*

in the development and implementation of awareness-raising campaigns.[77] This is crucial for shifting the perception of persons with disabilities from "objects of charity" to "rights holders." While awareness creation is not a right per se, the Convention obliges States parties to raise awareness about the rights of persons with disabilities. Establishing a right is different from ensuring its realization, which is why State parties must provide an enabling environment for persons with disabilities to fully enjoy their rights. The media's power to shape attitudes and create awareness is a vital component of this enabling environment.

53. The CRPD emphasizes respect for difference and acceptance of persons with disabilities as part of human diversity. It aims to prevent discrimination rather than disability, shifting the focus from a medical approach to a rights-based approach. This perspective should also guide public service campaigns related to public safety and health, ensuring they respect diversity and combat discrimination.

54. The World Programme of Action Concerning Disabled Persons[78] , adopted in 1982, promotes disability from a human rights perspective and provides recommendations for national, regional, and international action.[79] It encourages developing media guidelines in consultation with disability organizations, training in self-advocacy for persons with disabilities, and informed education and training within the media sector to improve disability portrayal.[80] The guidelines should promote sensitive and accurate portrayals of persons with disabilities across various media forms, not just news media.

55. In line with the WPA, the United Nations developed guidelines for the inclusion and portrayal of disabled people in the media, culminating in the booklet titled "Improving Communications about People with Disabilities."[81] These guidelines, designed to be adaptable across different media and countries, aim to improve public perception of persons with disabilities. They cover topics such as inclusion in

77 *Ibid.*

78 "WPA"

79 The UN General Assembly adopted the WPA, and declared at the same time the United Nations Decade of Disabled Persons, 1983-1992. See also Paul Harpur, 'From Disability to ability: changing the phrasing of the debate' (2012) 27 (3) Disability & Society 325, 327.

80 I*bid.*

81 United Nations, Improving Communications about People with Disabilities (Recommendations of a United Nations Seminar, 8-10 June 1982, Vienna), p. 5.

mainstream programming, portrayal and depiction issues, the use of language, and participation of persons with disabilities in media production.[82]

56. While the guidelines from the WPA provide effective measures for improving media portrayal, they are outdated in some respects, particularly their medical-based understanding of disability. For instance, they include recommendations on preventing and treating impairments, which may contradict the CRPD's principle of respecting disability as part of human diversity. However, the guidelines' promotion, availability, and monitoring mechanisms remain valuable for encouraging accurate and positive media representations of persons with disabilities.

V. Indian jurisprudence aligns with the human rights approach.

57. The foundation of laws for persons with disabilities has been traced to the guarantee of dignity as a core human right, recognised by the Constitution under Article 21[83]. The Scheme of the 2016 Act, as opposed to the preceding 1995 Act, is not constrained by the availability of resources, but recognises positive obligations of the State to materialise these rights housed in its various provisions.[84]

58. This Court has held in **Vikash Kumar** v. **Union Public Service Commission**[85] that while not specifically mentioned in the Constitution, persons with disabilities are equally entitled to the rights enumerated therein. We recognised that the RPwD Act provisions create a protective ambit which encompasses equality, non-discrimination and dignity. Section 3 of the Act casts an affirmative obligation on the government to enable the exercise of rights including the right to equality and dignity, which vest in persons with disabilities with equal rigour as others.[86] This Court underlined the positive obligation of both State and private parties to provide support to persons with disabilities to facilitate their full and effective participation in society. The RPwD Act, we noted, was more than an anti-discrimination legislation. It emphasized creation of an *environment conducive* to the above-mentioned rights including substantive equality and opportunity

82 *Ibid.*

83 Jeeja Ghosh v. Union of India (2016) 7 SCC 761 [37, 38]

84 Rajive Raturi v. Union of India, (2018) 2 SCC 413

85 [2021] 12 SCR 311 : 2021 5 SCC 370.

86 Vikash Kumar (supra) [41-44]

to participate in society.[87] This ruling reinforced the obligation of the State and of private entities to support full participation in society, aligning with the CRPD's human rights model of disability.

59. This approach was further demonstrated in **Ravindra Kumar Dhariwal v. Union of India**[88], where this Court addressed the discrimination faced by a Central Reserve Police Force Assistant Commandant who developed a mental disability during service. The Court emphasized *'dignity' and 'equality'* under Section 3 of the RPWD Act, highlighting the State's positive duty to protect the rights of persons with disabilities.

60. Recent rulings reflect the judiciary's evolving role in not only safeguarding individual rights but also in addressing the complex intersections of disability, gender and mental health, enriching the discourse on equality. This perspective rejects a one-size-fits-all approach, acknowledging that disability is a nuanced, individualized concept shaped by factors such as mental impairment and personal circumstances. The legal framework stresses the need to prevent stigmatization and discrimination against individuals with disabilities, recognizing the profound impact on their sense of identity and dignity.

61. The 2016 Act came much after the 1991 Guidelines. The Guidelines include the Board's duty to protect against 'needlessly' abusive and ridiculing scenes about persons with disabilities. In view of the instant appeal of visual media, this guideline furthers the goal of creating an environment conducive to inclusive and substantive equality in the context of their historically oppressive social treatment. The certificate entails a presumption that the film complies with the Guidelines. In this instance, the film was granted a 'U' – certificate and it implies that it does not needlessly portray persons with disabilities in a manner contrary to the guidelines and statutes governing the field.

E. Speech must not prejudice the marginalised and disenfranchise them further.

62. Article 19(1)(a) has been termed as "*perhaps the most precious of all the freedoms guaranteed by our Constitution*".[89] Speech and

87 Vikash Kumar (supra) [52, 53, 60]

88 [2021] 13 SCR 823 : (2016) 7 SCC 761

89 Sakal Papers (P) Ltd v. Union of India [1962] 3 SCR 842 [Justice Mudholkar, 41]

expression form a crucial part of the democratic give and take[90] and serve as a corrective check on public policy.[91] Overall, they promote the discursive health of democracy[92]. Social debate must be enriched by diverse voices and wide participation from across the social spectrum.[93] Unfortunately, normative stereotypes about gender, identity, sexual orientation and disability have hitherto deprived certain groups of such participation. In **Indibly Creative** (supra), we held that while satirical speech effectively exposed social absurdities, hypocrisies and contradictions, even such expression was subject to Article 19(2). This Court had remarked that if such expression, which is otherwise acceptable because it promotes discourse, targets the society's marginalised, it may *"confirm and strengthen people's prejudices against the group in question, which only marginalises and disenfranchises them more".*[94] Such expression, it was held, may not enjoy the complete protection of Article 19(1)(a).

F. Caveat: Disability Humour v. Disabling Humour.

63. In the context of historically oppressive representation of persons with disabilities, speech that entrenches stereotypes is opposed to the dignity of such individuals. However, not all speech that uses stereotypes commonly employed against persons with disabilities is abhorrent by reason of such use alone. As stated in the preceding sections, the context, intention and the overall message must be considered before such use may be termed as prejudicial, and the protection of free speech lifted.

64. Humour and disabilities are viewed as uneasy companions. This is primarily because of the historical use of humour to mock disability, make jokes at the expense of persons with disabilities and to use them for comic relief.[95] Also, the medical model treats disability as a personal 'tragedy' which is by definition, incompatible with humour.[96]

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90 S Rangrajan (supra) [36, 40-43]

91 Maneka Gandhi v. Union of India, (1978) 1 SCC 248 [Bhagwati J, 29]

92 Prakash Jha v. Union of India (2011) 8 SCC 372 [8, 22-27]

93 Maneka Gandhi (supra), Indibly Creative (supra) [22, 28]

94 Indibly Creative Private Limited v. Government of West Bengal 2020 12 SCC 436. [23]

95 Allison Hobgood and David Wood, Disability Humour and the Meanings of Impairment in Early Modern England, Hobgood, Recovering Disability in Early Modern England. The Ohio State University Press, 2013 [58] <https://muse.jhu.edu/pub/30/oa_monograph/chapter/897500>

96 Shawn Bingham and Sara Green, Aesthetic as Analysis: Synthesizing theories of humor and disability through stand-up comedy, Humanity & Society, Volume 40(3), 1, 6 (2016) < https://journals.sagepub.

This understanding is now obsolete under the social model which views disability as a function of social barriers that disable such individuals.[97] The social model says that stereotypes stem from a lack of familiarity with disability. This lack arises due to inadequate representation and participation of persons with disabilities in dominant discourse.[98]

65. Despite the history and the obsolescence of the medical model, humour is not universally denounced in the context of disability. It is now being increasingly used as a sophisticated literary medium for engagement with the society by persons with disabilities. It familiarises the society with the lived experiences of persons with disability, thereby dispelling prejudicial myths, and sensitising people.[99] Challenging notions of 'otherness' or 'inferiority' associated with persons with disability, humour creates an equal space.[100] Comics with disabilities use self-deprecating humour to critique the social order and counter stereotypical images[101]. They bring stereotypes to the fore and rely on them in order to dispel them.[102] Humour is a reclamation of the public discourse by persons with disabilities who are pushing back against the dominant, ableist narratives around disability.[103]

66. We must therefore, distinguish '*disabling humour'* that demeans and disparages persons with disability from '*disability humour'* which challenges conventional wisdom about disability. While disability humour attempts to better understand and explain disability, disabling humour denigrates it.[104] The two cannot be equated in their impact on dignity and on stereotypes about persons with disabilities[105].

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com/doi/10.1177/0160597615621594 >

97 Mike Oliver, The social model of disability: Thirty years on, Disability & Society, 28(7), 1024-1026, <https://www.tandfonline.com/doi/full/10.1080/09687599.2013.818773 >

98 Kinda Abujbarah (supra) [29]

99 *ibid.*

100 Bingham and Green (supra) [31]

101 Teresa Milbrodt, Today I Had an Eye Appointment, and I'm Still Blind": Crip Humor, Storytelling, and Narrative Positioning of the Disabled Self, *Disability Studies Quarterly,* University of Missouri – Columbia Vol. 38 No. 2 (2018) < https://dsq-sds.org/index.php/dsq/article/view/6163/4902 >

102 Kinda Abujbarah (supra) [43]

103 Bingham and Green (supra) [3]

104 Bingham and Green (supra) for differences between theories of humour based on how they treat disability- the

105 See Robin Smith and Mara Shapon-Shevin, Disability Humor, Insults, and Inclusive Practice Social

G. The Present Case

67. The appellant had invoked the writ jurisdiction of the High Court on the ground that the exercise of the second respondent's fundamental right to freedom of speech and expression, contravened the appellant's rights under Articles 14, 15 and 21 by reinforcement of stereotypes by the film.

68. Both these rights are fundamental rights under Article 19(1)(a) and Article 21 respectively. The High Court noted at paragraph 8 of the judgment that since the appellant had not contested the second respondent's claim that the overall message of the film was about resilience of persons with disability, the primary challenge that the film offended the sensibilities was not established. The countervailing right of freedom of speech and expression of the filmmaker as stated in the previous sections was not weighed against the rights claimed by the appellant. The High Court could have found that the two rights – the freedom of speech and expression of the filmmaker on the one hand and the rights of persons with disabilities need not be balanced because the rights in question (dignity, non-discrimination and equality) do not include the right to curb the filmmakers' rights to exhibit a film duly certified for such exhibition[106]. In the alternative, the High Court could have undertaken a balancing of the two rights according to the single or the double proportionality test- depending on whether it felt one of the rights took precedence over the other.[107]

69. The High Court rightly does not engage in this discussion perhaps because the appellant expressed satisfaction with a direction for inclusion of expert members to the Board and the Advisory Panel and because the certification of the film was not in issue. Therefore,

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Advocacy and Systems Change, 1(2), 2008-2009 <https://sites.cortland.edu/sasc/wp-content/uploads/sites/12/2012/12/Disability-Humor-Final.pdf > Smith et all provide a set of questions one must ask when evaluating humour vis-à-vis disability:

• In the presence of a person with this disability, would you be comfortable sharing this joke? Hearing this joke? • Does this joke laugh AT or WITH? • Is there a cost? Is it exploitive? Who benefits? • Does this joke make you feel empathy, closeness, understanding. • Does it tell you "they" are irrevocably different, make you feel more distant from "them", give the impression they are somehow less than human, provide/reinforce incorrect information about the disability, make you likely to be tense or awkward in the presence of a person with this disability?

106 In Re Noise Pollution, (2005) 5 SCC 733

107 Central Public Information Officer, Supreme Court of India v. Subash Chandra Agarwal, Civil Appeal No. 10044 of 2010.

limiting its inquiry to whether such relief could be granted, the High Court decided against the appellant.

70. In line with the observation in **Indibly** (supra), we are of the view that the freedom under Article 19(1)(a), that is the creative freedom of the filmmaker cannot include the freedom to lampoon, stereotype, misrepresent or disparage those already marginalised. There is a difference between a film that is set in the backdrop of communal violence and which cannot eschew depiction of violence from portrayal that outright extols such violence.[108] Similarly, if the overall message of the work infringes the rights of persons with disabilities, it is not protected speech, obviating the need for any balancing. However, in appropriate cases, if stereotypical/disparaging portrayal is justified by the overall message of the film, the filmmaker's right to retain such portrayal will have to be balanced against the fundamental and statutory rights of those portrayed.

71. The appellant seeks guidelines against filmmakers, regarding the provisions of the RPwD Act and the composition of the Board and the Advisory panel under the Cinematograph Act and recommendations to beep certain parts of the present film as well.

72. Regarding specific recommendations, our views are summarised as follows:

    72.1. We endorse slow interference with the determination of an expert body under the Cinematograph Act, particularly to allow the exhibition of a film. It is for the Board to draw the line between permissible and impermissible portrayal of social ills through visual media, and ensure that the Guidelines are meant to be read as broad standards for the same.[109] The certification in the present case implies that the Board found that the overall message of the film was in accordance with the guidelines and the RPwD Act.[110] We are not inclined to interfere with this finding by recommending beeping out parts of the film, especially considering the inclusion of a disclaimer in the film.

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108 *F.A. Picture International* v. *Central Board of Film Certification*, 2004 SCC OnLine Bom 961 [12] as cited in Indibly (supra) [35].

109 Bobby Art International (supra) [23]

110 See Raj Kapoor (supra).

72.2. The recommendation that Sony Pictures make an awareness film according to Section 7 (d) of the RPwD Act cannot be granted.[111] Section 7(d) is directed towards the appropriate government. While we have underlined that the principle of reasonable accommodation includes positive obligations of private parties to support persons with disabilities and facilitate their full participation, we cannot agree that Section 7(d) includes such an obligation against private persons. Even otherwise, such a direction would amount to compelled speech. Such compelled speech has been allowed by this Court under Article 19(1) of the Constitution, albeit in a very different context from the present. A must-carry provision under the Cinematograph Act, mandated exhibition of short educational films as a licensing pre-condition for exhibitors. The provision was upheld by this Court in **Union of India v. Motion Pictures Association**[112]. The provision related to exhibition of a pre-produced educational short film alongside other films and it applied to exhibitors. The recommendation sought in the present case is for creation of a whole different film on the ground of a statutory mandate of spreading awareness which is not even directed towards a private entity such as Sony Pictures. The positive obligation mentioned in **Vikash Kumar** (supra) cannot be so extended to compel speech in the manner suggested by the appellant.

72.3. On inclusion of subject matter experts to the Board and advisory panels, we believe that the field is sufficiently occupied by the Cinematograph Act and the certification Rules of 1983 and 2024 does not merit our interference. Under the 1983 Rules, the Board may take steps to assess public reactions to films[113]. The Examining Committee is supposed to include women as its members[114]. The 1983 Rules and the 2024 Rules envisage consultation with a subject matter expert: the Examining Committee's final report is forwarded to the Chairperson in

111 Section 7(d)- appropriate Government shall take protective measures against all forms of abuse, violence and exploitation and shall (inter alia) create awareness and make available information among the public.

112 [1999] 3 SCR 875 : (1999) 6 SCC 150 [Justice Sujata Manohar, 13-15]

113 1983 Rules, Rule 11; 2024 Rules, Rule 12.

114 1983 Rules, Rule 22.

10 days, unless the Committee feels that expert opinion is necessary. In that case, it may submit a provisional report and seek expert opinion before submitting the final report.[115] The 2024 Certification Rules go a step further and provide that a Regional Officer may invite subject matter experts for the examination of the film by the Examination Committee or Revising Committee[116].

72.4. Courts have also placed adequate thrust on the fitness of these expert committees to assess legal requirements beyond the Cinematograph Act, even with their existing composition.[117] In **Raj Kapoor v. State**[118], a two-judge bench of this Court noted that the certificate, which represented the judgment of an expert body selected for judging the fitness of a film for public exhibition, also included consideration of the ingredients of other laws such as the Indian Penal Code[119]. Similarly, in **Prakash Jha** (supra)[120], this Court rejected a film ban founded on public order. The Court noted that the film dealt with a sensitive subject of reservations but it had been duly cleared by examining committees comprising legal and subject matter experts and members belonging to the Scheduled Castes/ Scheduled Tribes and Other Backward Class communities, who had approved the screening of the film.

72.5. The Board must decide whether a disparaging portrayal stood redeemed by the overall message or not. No doubt this entails a complex balancing of interests as we noted at the outset. It would be ideal if the statutory bodies included subject matter experts. We believe the 2024 Rules are a welcome acknowledgment of this principle and consultations with subject matter experts on disability would certainly better

115 1983 Rules, Rules 41 (4) (c), (d).

116 2024 Rules, Rules 23 (3), 25 (3),

117 S Rangarajan (supra) [52].

118 [1980] 1 SCR 1081 : (1980) 1 SCC 43

119 Raj Kapoor (supra) [Justice Pathak, 26] – "Regard must be had by the court to the fact that the certificate represented the judgment of a body of persons particularly selected under the statute for the purpose of adjudging the suitability of films for public exhibition and that judgment extends to a consideration of the principal ingredients which go to constitute offences under Sections 292 and 293 of the Indian Penal Code." (emphasis supplied). Also see [Justice Krishna Iyer, 14]

120 Prakash Jha Productions v. Union of India, (2011) 8 SCC 372 [13, 26]

inform the perspective of the Board. The policy underlying the Act and the Rules already accounts for expert consultation. This Court cannot interfere merely because it could be better or that a better alternative is available, when the legality of such policy is not in question.[121] The Court cannot read additional requirements into unambiguous provisions.[122] It is beyond the remit of constitutional courts to specify the qualifications or expertise that the constituents of these bodies must possess or to direct that such a requirement be legislatively included into the statute.[123]

72.6. The appellant has sought formulation of guidelines to restrict content that contravenes the Constitution and the RPwD Act 2016. We have stated above that the guidelines under the Act are quite extensive and cover the field. Such directions are issued to fill legislative gaps.[124] If allowed, such guidelines would be akin to reading the provisions of one statute that is, the RPwD Act 2016 into another statute, that is the Cinematograph Act, even though the latter does not suffer from a vacuum on the issue, and the statutory expert body is presumed to have account for the effect of the former anyway[125]. Courts cannot trench into policy-making.[126] The High Court was therefore, justified in not granting the abovementioned reliefs and we cannot make recommendations to that effect.

73. Since the issue involves the fundamental rights of persons with disabilities, we take this opportunity to provide a framework of the portrayal of persons with disabilities in visual media that aligns with the anti-discrimination and dignity-affirming objectives of the Constitution as well as the RPwD Act. We are cognisant that Article 19(2) of the Constitution is exhaustive of the limitations that can be applied on the freedom guaranteed under Article 19(1)(a)[127]. The framework we wish to lay down is in line with our findings in **Vikash**

121 See Directorate of Film Festivals v Gaurav Ashwin Jain 2007 (4) SCC 737

122 Padma Sundara Rao v. State of Tamil Nadu, (2002) 3 SCC 533 [12. 14]

123 State of Punjab v. Salil Sabhlok, (2013) 5 SCC 1 [33, 36]

124 P. Ramachandra Rao v. State of Karnataka, (2002) 4 SCC 578 [25, 26]

125 See Raj Kapoor (supra)

126 Census Commissioner v. R Krishnamurthy, (2015) 2 SCC 796 [24-26]

127 See Indibly (supra)

Kumar (supra) where we emphasised that the fundamental rights under Part III of the Constitution apply with equal rigour to persons with disabilities.

74. The language of our discourse ought to be inclusive rather than alienating. We noted in **Vikash Kumar** (supra), that insensitive language was contrary to the dignity of persons with disabilities.[128] As long as the overall message of the film justifies the depiction of disparaging language being used against persons with disabilities, it cannot be subjected to restrictions beyond those placed in Article 19(2). However, language that disparages persons with disabilities, marginalises them further and supplements the disabling barriers in their social participation, without the redeeming quality of the overall message of such portrayal must be approached with caution. Such representation is problematic not because it offends subjective feelings but rather, because it impairs the objective societal treatment of the affected groups by society.[129] We believe that representation of persons with disabilities must regard the objective social context of their representation and not marginalise persons with disability:

(i) Words cultivate institutional discrimination. Terms such as "cripple" and "spastic" have come to acquire devalued meanings in societal perceptions about persons with disabilities. They contribute to the negative self-image and perpetuate discriminatory attitudes and practices in society;

(ii) Language that individualises the impairment and overlooks the disabling social barriers (e.g. terms such as "afflicted", "suffering", and "victim") should be avoided or adequately flagged as contrary to the social model[130];

(iii) Creators must check for accurate representation of a medical condition as much as possible. The misleading portrayal of what a condition such as night blindness entails may perpetuate misinformation about the condition, and entrench stereotypes about persons with such impairments, aggravating the disability;

128 Vikash Kumar (supra) [84]

129 Jeremy Waldron (supra)

130 See Vikash Kumar (supra) [84-86]

(iv) Persons with disabilities are under-represented. Average people are unaware of the barriers persons with disabilities face. Visual media must reflect their lived experiences. Their portrayal must capture the multitudes of their lived realities, and should not be a uni-dimensional, ableist characterisation;

(v) Visual media should strive to depict the diverse realities of persons with disabilities, showcasing not only their challenges but also their successes, talents, and contributions to society. This balanced representation can help dispel stereotypes and promote a more inclusive understanding of disability. Such portrayals should reflect the multifaceted lives of persons with disabilities, emphasizing their roles as active community members who contribute meaningfully across various spheres of life. By highlighting their achievements and everyday experiences, media can shift the narrative from one of limitation to one of potential and agency;

(vi) They should neither be lampooned based on myths (such as, 'blind people bump into objects in their path') nor presented as 'super cripples' on the other extreme. This stereotype implies that persons with disabilities have extraordinary heroic abilities that merit their dignified treatment. For instance, the notion that visually impaired persons have enhanced spatial senses may not apply to everyone uniformly. It also implies that those who do not have such enhanced superpowers to compensate for the visual impairment are somehow less than ideal;

(vii) Decision-making bodies must bear in mind the values of participation. The 'nothing about us, without us' principle is based on the promotion of participation of persons with disabilities and equalisation of opportunities. It must be put to practice in constituting statutory committees and inviting expert opinions for assessing the overall message of films and their impact on dignity of individuals under the Cinematograph Act and Rules;[131]

131 "Nothing about Us, Without Us", International Day of Disabled Persons: Themes and Observances of Previous Years, United Nations (2004) <https://www.un.org/esa/socdev/enable/iddp2004.htm#:~:text=The%20motto%20%E2%80%9CNothing%20About%20Us,and%20with%20persons%20with%20disabilities.>

(viii) The CPRD also requires consultation with and involvement of persons with disabilities in the implementation of measures to encourage portrayal that is consistent with it.[132] Collaboration with disability advocacy groups can provide invaluable insights and guidance on respectful and accurate portrayals, ensuring that content aligns with the lived experiences of persons with disabilities; and

(ix) Training and sensitization programs should be implemented for individuals involved in creating visual media content, including writers, directors, producers, and actors. These programs should emphasize the impact of their portrayals on public perceptions and the lived experiences of persons with disabilities. Topics should include the principles of the social model of disability, the importance of respectful language, and the need for accurate and empathetic representation. Regular workshops and collaboration with disability advocacy groups can foster a deeper understanding and commitment to responsible portrayal.

75. The appeal shall stand disposed of in the above terms. There shall be no order as to costs.

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

Result of the case: Appeal Disposed of.

†*Headnotes prepared by:* Ankit Gyan

132 Article 8(2)(c) "Encouraging all organs of the media to portray persons with disabilities in a manner consistent with the purpose of the present Convention".