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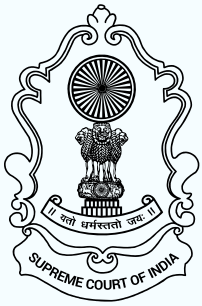

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The Excise Commissioner Karnataka & Anr.
v.
Mysore Sales International Ltd. & Ors.

(Civil Appeal No. 2168 of 2007)

08 July 2024

[B.V. Nagarathna and Ujjal Bhuyan,* JJ.]

Issue for Consideration

Whether provisions of Section 206C of the Income Tax Act is applicable in respect of the appellant and whether the liquor vendors (contractors) who bought the vending rights from the appellant on auction, can be termed as "buyer" within the meaning of Explanation(a) to Section 206C of the Income Tax Act or excluded from the said definition of "buyer" as per clause (iii) of Explanation (a) to Section 206C of the said Act. Relatable to the above core issue is the question as to, whether, the High Court was justified in rejecting the challenge to the said orders made by the appellant.

Headnotes†

Income Tax Act, 1961 – Explanation(a)(iii) to section 206C – Karnataka Excise Act, 1965 – Karnataka Excise (Arrack Vend Special Conditions of Licenses) Rules, 1967 – Rule 4 – Karnataka Excise (Lease of the Right of Retail Vend of Liquors) Rules, 1969 – Karnataka Excise (Manufacture and Bottling of Arrack) Rules, 1987 – By the order dated 17.01.2001, the assessing officer held that the appellant is a "seller" and the liquor vendors are "buyers" in terms of Section 206C of the Income Tax Act and hence the appellant was under a legal obligation to collect income tax at source from the liquor vendors (contractors) – The challenge to the said order dated 17.01.2001 was negatived first by the Single Judge and then by the Division Bench of the High Court – Justified or not:

Held: Explanation(a)(iii) to section 206C of the Income Tax Act, 1961 visualizes two conditions for a person to be excluded from the meaning of "buyer" as per the definition in Explanation(a) – The first condition is that the goods are not obtained by him by way of auction – The second condition is that the sale price of such goods to be sold by the buyer is fixed under a state enactment – These two

* Author

conditions are joined by the word 'and' – The word 'and' is conjunctive to mean that both the conditions must be fulfilled; it is not either of the two – Therefore, to be excluded from the ambit of the definition of "buyer" as per Explanation(a)(iii), both the conditions must be satisfied – In the instant case, Mysore Sales is the licensee for the manufacture and bottling of arrack for specified area(s) – By a process of auction or tender or auction-cum-tender etc., excise contractors are shortlisted who are thereafter granted permits to vend arrack by retail in their respective area(s) – These retail vendors i.e. excise contractors have to procure the arrack from the warehouse or depot maintained by Mysore Sales on payment of the issue price fixed by the Excise Commissioner – The arrack is procured in sealed bottles or in sealed polythene sachets – So, there are two transactions, each distinct – The first transaction is shortlisting of excise contractors by a process of auction etc. for the right to retail vend – The second transaction, which is contingent upon the first transaction, is obtaining of arrack for retail vending by the excise contractors on the strength of the permits issued to them post successful shortlisting following auction – Therefore, it is evidently clear that arrack is not obtained by the excise contractors by way of auction – What is obtained by way of auction is the right to vend the arrack on retail on the strength of permits granted, following successful shortlisting on the basis of auction – Thus, the first condition under clause (iii) is satisfied – Rule 4 of the 1967 Rules enables the excise contractor to sell the arrack in retail at a price within the range of minimum floor price and maximum ceiling price which is fixed by the Excise Commissioner – The price of arrack to be sold in retail is not dependent on the market forces but pre-determined within a range – Therefore, though price range is provided for by the statute, it cannot be said that because there is a price range providing for a minimum and a maximum, the sale price is not fixed – The sale price is fixed by the statute but within a particular range beyond which price, either on the higher side or on the lower side, the arrack cannot be sold by the excise contractor in retail – Since both the conditions as mandated under Explanation(a)(iii) are satisfied, the excise contractors or the liquor vendors selling arrack would not come within the ambit of "buyer" as defined under Explanation(a) to Section 206C of the Income Tax Act – Thus, the question framed in issue for consideration, is answered in the negative by holding that Section 206C of the Income Tax Act is not applicable in respect of Mysore Sales and that the liquor vendors(contractors) who bought the vending rights from the appellant on auction cannot be termed as "buyers" within the meaning of Explanation(a) to Section

206C of the Income Tax Act – Thus, the High Court was not justified in dismissing the writ petitions and consequently, the writ appeal challenging the orders dated 17.01.2001. [Paras 14.5, 15, 15.2, 16]

Income Tax Act, 1961 – Karnataka Excise Act, 1965 – Karnataka Excise (Arrack Vend Special Conditions of Licenses) Rules, 1967 – Karnataka Excise (Lease of the Right of Retail Vend of Liquors) Rules, 1969 – Karnataka Excise (Manufacture and Bottling of Arrack) Rules, 1987 – Essentials of the Principle of Natural Justice to be followed:

Held: In the instant case, though show cause notice was issued to the assessee to which reply was also filed, the same would not be adequate having regard to the consequences that such an order passed under Section 206C(6) of the Income Tax Act would entail. Even though the statute may be silent regarding notice and hearing, the court would read into such provision the inherent requirement of notice and hearing before a prejudicial order is passed – Therefore, it is held that before an order is passed under Section 206C of the Income Tax Act, it is incumbent upon the assessing officer to put the person concerned to notice and afford him an adequate and reasonable opportunity of hearing, including a personal hearing. [Para 19]

Case Law Cited

Union of India v. A. Sanyasi Rao [1996] 2 SCR 570 **: (1996) 3 SCC 465;** *Gian Chand Ashok Kumar and Company v. Union of India* **(1991) 187 ITR 188 (HP);** *K.K. Mittal v. Union of India* **(1991) 187 ITR 208 (P&H);** *State of Bihar v. Commissioner of Income Tax* **(1993) 202 ITR 535 (PAT);** *M/s Naresh Kumar and Company v. Union of India ILR* **(2000) 2 P&H;** *Saini and Company v. Union of India* **(2000) 246 ITR 762 (HP);** *Chandigarh Distillers and Bottlers Ltd. v. Union of India* **(2002) 253 ITR 205 (P&H);** *Union of India v. Om Parkash S.S. and Company* [2001] 1 SCR 1113 **: (2001) 3 SCC 593 – referred to.**

List of Acts

Income Tax Act, 1961; Karnataka Excise Act, 1965; Karnataka Excise (Arrack Vend Special Conditions of Licenses) Rules, 1967; Karnataka Excise (Lease of the Right of Retail Vend of Liquors) Rules, 1969; Karnataka Excise (Manufacture and Bottling of Arrack) Rules, 1987.

List of Keywords

Explanation(a)(iii) to section 206C of the Income Tax Act, 1961; Buyer as defined under Explanation(a) to Section 206C of the Income Tax Act, 1961; Liquor vendors; Process of auction or tender or auction-cum-tender; Retail vendors; Excise contractors; Rule 4 of the Karnataka Excise (Arrack Vend Special Conditions of Licenses) Rules, 1967; Principle of Natural Justice; Reasonable opportunity of hearing.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2168 of 2007

From the Judgment and Order dated 13.03.2006 of the High Court of Karnataka at Bangalore in WA No. 7825, 7926 and 8021 of 2003

Appearances for Parties

Avishkar Singhvi, A.A.G., V. N. Raghupathy, Vivek Kumar Singh, Naved Ahmed, Bharat Garg, Manendra Pal Gupta, Advs. for the Appellants.

Balbir Singh, A.S.G. Arijit Prasad, Sr. Adv., Raj Bahadur Yadav, Mrs. Archana Pathak Dave, Anmol Chandan, Ms. Niranjna Singh, Prashant Singh Ii, Udai Khanna, Indrajit Prasad, Vijay Nand Tripathi, Deepak Kumar, Dr. Nanda Kishore, Rajesh Mahale, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Ujjal Bhuyan, J.

Heard learned counsel for the parties.

2. This appeal has been preferred against the judgment and order dated 13.03.2006 passed by the Division Bench of the High Court of Karnataka at Bengaluru (briefly "the High Court" hereinafter) in Writ Appeal No. 7926/2003. By the aforesaid judgment and order, the Division Bench had dismissed the writ appeal filed by the appellant as well as other writ appeals filed by Mysore Sales International, State of Karnataka and Mysore Sugar Company Limited assailing the common judgment and order dated 27.10.2003 passed by the learned Single Judge of the High Court, dismissing

Writ Petition Nos. 6869-6874 of 2001 filed by the appellant and other writ petitions filed by the above parties against the orders dated 17.01.2001 passed by the Deputy Commissioner of Income Tax (TDS)–1, Bengaluru (referred to hereinafter as "the assessing officer" or "the revenue") under Section 206C(6) of the Income tax Act, 1961 (referred to hereinafter as "the Income Tax Act") for the assessment years 2000-2001, 1999-2000, 1998-1999, 1997-1998, 1996-1997 and 1995-1996 as well as the consequential demand notices of even date issued under Section 156 of the Income Tax Act. By the orders dated 17.01.2001, the assessing officer held that the appellant is a "seller" and the liquor vendors are "buyers" in terms of Section 206C of the Income Tax Act and hence the appellant was under a legal obligation to collect income tax at source from the liquor vendors (contractors) for the financial years relevant to the aforesaid assessment years. Accordingly, the assessing officer declared certain sums as income tax collectible at source by the appellant which it failed to do. Therefore, the appellant was directed to deposit the amounts so quantified as income tax deductible at source. Further, interest was also levied on the aforesaid amounts. This was followed by the demand notices. As noticed above, the challenge to the said orders dated 17.01.2001 by the appellant was negatived first by the learned Single Judge and then by the Division Bench of the High Court.

3. The short point for consideration in this appeal is whether provisions of Section 206C of the Income Tax Act is applicable in respect of the appellant and whether the liquor vendors (contractors) who bought the vending rights from the appellant on auction, can be termed as "buyer" within the meaning of Explanation(a) to Section 206C of the Income Tax Act or excluded from the said definition of "buyer" as per clause (iii) of Explanation (a) to Section 206C of the said Act. Relatable to the above core issue is the question as to, whether, the High Court was justified in rejecting the challenge to the said orders made by the appellant.

4. Before attempting to answer the question(s) so framed above, it would be apposite to briefly narrate the relevant facts of the case. Mysore Sales International Limited (also referred to "Mysore Sales" hereinafter) is a Karnataka Government undertaking, *inter alia*, engaged in the business of manufacturing arrack. Mysore Sales is an assessee under the Income Tax Act. Appellant had entered the

arrack trade in July, 1993 in terms of the excise laws of the State of Karnataka. Prior to 1993, there were several private bottling units in the State of Karnataka and they were manufacturing and selling arrack. Auctions were conducted periodically for the purpose of conferring lease right for retail vending of arrack. It was conducted with reference to designated areas. Successful bidders were entitled to procure arrack from the bottling units and then to sell it in retail trade within their respective allotted areas. The arrack trade is controlled by the state government.

4.1. The Karnataka Excise Act, 1965 (briefly "the Excise Act" hereinafter) has been enacted to provide for a uniform excise law in the State of Karnataka. Preamble to the Excise Act says that it is expedient to provide for a uniform law relating to production, manufacture, possession, import, export, transport, purchase and sale of liquor and intoxicating drugs and the levy of duties of excise thereon in the State of Karnataka and for certain matter related thereto. Under the Excise Act, several rules have been framed for appropriate enforcement of the excise law. These rules, *inter alia*, are:

(i) The Karnataka Excise (Arrack Vend Special Conditions of Licenses) Rules, 1967 ("the 1967 Rules" hereinafter);

(ii) The Karnataka Excise (Lease of the Right of Retail Vend of Liquors) Rules, 1969 (briefly "the 1969 Rules" hereinafter);

(iii) The Karnataka Excise (Manufacture and Bottling of Arrack) Rules, 1987 ("the 1987 Rules" hereinafter).

4.2. In the year 1993, the state government discontinued private bottling units from engaging in the manufacture or bottling of arrack and instead decided as a policy to restrict those operations in the hands of state government companies or undertakings, such as, Mysore Sales and Mysore Sugar Company Limited (appellant in Civil Appeal No. 2169/2007 which was dismissed for non-prosecution by this Court on 12.10.2023). Thus, Mysore Sales and Mysore Sugar were entrusted with the task of bottling arrack and marketing it on behalf of the state government. Mysore Sales was entrusted with the above task for the northern districts of the State of Karnataka while for the rest of the state, Mysore Sugar was

entrusted with the responsibility. It is the case of the appellant that the job entrusted i.e. bottling of arrack and marketing it on behalf of the state was in the nature of works contract.

4.3. Once arrack is manufactured and bottled, it becomes the property of the State of Karnataka in as much as the property vests with the state. The Excise Commissioner determines the amount realizable by the appellant from the excise (liquor) vendors or contractors taking into consideration the cost incurred by the appellant. The excise contractors are required to remit the requisite amount of excise duty into the state government treasury and then secure permit on production of which, appellant delivers arrack to them. The State of Karnataka controls the entire operation including the amount realizable by the assessee in terms of the Excise Act.

4.4. Successful excise contractors secure arrack from Mysore Sales and Mysore Sugar depending upon the areas allotted to them. The lease for the right to retail vend of liquor provides auctioning of such right with reference to a designated area. The retail sale price is fixed by the state government in terms of the 1967 Rules. The margin would depend upon various factors.

4.5. Section 206C was inserted in the Income Tax Act by the Finance Act, 1988 with effect from 01.06.1988. It casts an obligation on the "seller" of alcoholic liquor etc. of deducting tax at source (TDS) at the time of payment by the "buyer". As per Explanation(a), certain persons were not included within, rather excluded from, the definition of "buyer".

4.6. A circular came to be issued by the Excise Commissioner of Karnataka on 16.06.1998 to which an addendum was also issued. The circular clarified that since arrack was not obtained through auction and since the selling price of arrack was fixed by the Excise Commissioner, there was no question of recovery of TDS from the excise (liquor) vendors or contractors.

4.7. In view of the above, appellant did not deduct any TDS from the liquor vendors.

4.8. Assessing officer issued notices dated 26.10.2000 calling upon the assessee to show cause as to why it should not

pay the requisite TDS amount which it had failed to collect from the "buyers" i.e. the excise contractors for the financial years relevant to the assessment years under consideration. It appears that the assessee had submitted its reply to such notice. Thereafter, the assessing officer passed orders dated 17.01.2001 under Section 206C(6) of the Income Tax Act for the assessment years under consideration. As pointed out earlier, by the aforesaid orders, the assessee was directed to pay certain sums of money as TDS which it had failed to collect from the liquor vendors or contractors. Following such orders, consequential demand notices for the respective assessment years under Section 156 of the Income Tax Act were also issued to the assessee by the assessing officer.

4.9. Mysore Sales filed writ petitions before the High Court. While the main contention was that Section 206C(6) of the Income Tax Act was not applicable to it, a corollary issue raised was that before passing the order under Section 206C(6) of the Income Tax Act, no opportunity of hearing was given to it. Therefore, there was violation of the principles of natural justice. Learned Single Judge *vide* the judgment and order dated 27.10.2023 dismissed the writ petitions confirming the orders passed under Section 206C(6) of the Income Tax Act.

4.10. Thereafter, Mysore Sales and others preferred writ appeals before the Division Bench. However, by the judgment and order dated 13.03.2006, the writ appeals were dismissed by affirming the orders passed by the assessing officer and also that of the learned Single Judge.

5. Aggrieved by the aforesaid, SLP(C) No. 12524 of 2006 was preferred. After leave was granted on 23.04.2007, the same came to be registered as Civil Appeal No. 2168 of 2007.

6. Sh. Avishkar Singhvi, learned AAG appearing for the appellant submits that Section 206C of the Income Tax Act is not applicable in respect of Mysore Sales which is a public sector undertaking controlled by the Government of Karnataka. In fact, it is a government company. It is engaged in the manufacture of arrack. Arrack is bottled under the supervision of the Excise Commissioner. Whatever arrack is manufactured, the same belongs to the state government alone.

Excise buyers i.e. liquor contractors do not obtain any arrack in auction. They only obtain the right/licence to carry out retail vending of arrack. Therefore, such contractors are not "buyers" as defined in the Explanation under Section 206C of the Income Tax Act.

6.1. Learned AAG argued that what is disposed of in the auction is the retail or vending right of arrack and not auctioning of the arrack itself. The final sale of arrack is carried out by the contractors at the retail price fixed by the government. He, therefore, submits that Section 206C is not applicable to a public sector undertaking like Mysore Sales. Both Explanations (a)(ii) and (iii) clearly exclude retail vendors from the ambit and purview of "buyers" as defined under the Explanation.

6.2. Elaborating further, he submits that "buyers" falling in the above exception were exempted from paying income tax at source at the time of obtaining licence for retail vending of arrack in their respective assigned areas as per the price fixed by the state government. The auction is only regarding transferring the right or privilege which is vested in the state to the liquor contractors who would thereafter operate the retail business of vending in arrack. Therefore, there is no sale involved in the auction transaction.

6.3. Assessing officer had wrongly relied upon the decision of the Supreme Court in *Union of India Vs. A. Sanyasi Rao*[1]. In the said decision, the constitutional validity of Section 206C of the Income Tax Act was challenged and the same was negatived by this Court. However, the judgment clarifies that there are just exceptions carved out in Section 206C in which cases, income tax is not required to be collected at source.

6.4. Learned counsel further submits that the objective behind introduction of Section 206C in the Income Tax Act was to ensure proper tax collection in matters relating to profits and gains from the business of trading in alcoholic liquor etc. However, a taxing statute has to be interpreted strictly. It cannot be interpreted in an overly expansive and wide manner so as

1 [1996] 2 SCR 570 : (1996) 3 SCC 465

to bring persons within the tax net who are otherwise exempted from paying tax. Both the Single Bench and the Division Bench had erred in adopting such an interpretation and wrongly holding that Section 206C was applicable in respect of Mysore Sales and since it had not deducted TDS, the same was required to be recovered. Both the Benches had erred in taking the view that purchase of arrack was by way of public auction only and not in any other manner and that the "seller" (Mysore Sales) had an obligation to collect income tax at source from such "buyers" who would be further vending the same in retail.

6.5. Even if the view taken by the revenue and affirmed by the High Court is accepted, it cannot be said that there was sale of arrack by Mysore Sales to the licence holders. Such sale, if at all it can be said so, was at the price fixed by the state government under the Excise Act and the Rules framed thereunder. The sale was wholly for the purpose of retail vending and not a sale within the meaning of Section 206C of the Income Tax Act; moreover, under the aforesaid provision, a sale must be made to a "buyer" defined under the Explanation to Section 206C of the Income Tax Act. As a matter of fact, it is the contention of the appellant that there is no sale between Mysore Sales and the excise contractors.

6.6. The revenue has wrongly taken the view that the act of auction and purchase of arrack by the successful liquor contractors is inextricably intertwined and is part of one collective action. In the auction, the excise contractors are granted permits/licences for retail sale of arrack by the successful excise contractors in their allotted areas. It is thereafter that sale of arrack is affected by the excise contractors at a price fixed by the government between a minimum floor value and maximum ceiling value. Therefore, such a transaction cannot be said to be a sale or purchase through auction.

6.7. Learned counsel also submitted that the assessing officer was not conferred the jurisdiction to pass the orders under Section 206C(6) of the Income Tax Act. Jurisdiction was conferred upon the Assistant Commissioner of Income Tax (TDS)-1, Bengaluru. This contention of the appellant regarding

jurisdiction was rejected by the learned Single Judge as being merely a technical one.

6.8. Learned counsel also submits that orders dated 17.01.2001 passed by the assessing officer under Section 206C(6) of the Income Tax Act were in breach of the principles of natural justice. No opportunity of hearing was given to the assessee. Without such hearing, the aforesaid orders were passed. Such orders being in violation of the principles of natural justice are *void ab initio*. This aspect was overlooked by the Single Bench as well as by the Division Bench of the High Court.

6.9. He therefore submits that both the orders of the learned Single Judge and the Division Bench are liable to be set aside. Orders dated 17.01.2001 passed by the assessing officer under Section 206C(6) of the Income Tax Act for the assessment years under consideration are also liable to be set aside and quashed. The civil appeal may be allowed accordingly.

6.10. In support of his submissions, learned counsel for the appellant has placed reliance on the following decisions:

(i) *Gian Chand Ashok Kumar and Company Vs. Union of India*[2];

(ii) *K.K. Mittal Vs. Union of India*[3];

(iii) *State of Bihar Vs. Commissioner of Income Tax*[4];

(iv) *M/s Naresh Kumar and Company Vs. Union of India*[5];

(v) *Saini and Company Vs. Union of India*[6];

(vi) *Chandigarh Distillers and Bottlers Ltd. Vs. Union of India*[7];

(vii) *Union of India Vs. Om Parkash S.S. and Company*[8].

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2 (1991) 187 ITR 188 (HP)

3 (1991) 187 ITR 208 (P&H)

4 (1993) 202 ITR 535 (PAT)

5 ILR (2000) 2 P&H

6 (2000) 246 ITR 762 (HP)

7 (2002) 253 ITR 205 (P&H)

8 [2001] 1 SCR 1113 : (2001) 3 SCC 593

7. Learned senior counsel for the revenue at the outset submits that the impugned order of the Division Bench of the High Court does not suffer from any error or infirmity to warrant interference. The civil appeal is misconceived and is, therefore, liable to be dismissed.

7.1. Learned senior counsel submits that the assessing officer had issued notices to the assessee and had also verified relevant materials. Thereafter, the assessing officer held that the sale price of liquor was not fixed. What was fixed was only the range of minimum and maximum selling price. As per the gazette notification furnished by the Excise Department of the State of Karnataka for the year 2000, the minimum and maximum selling price was fixed at Rs. 55/- and Rs. 85/- per bulk litre respectively. Nowhere did it mention that liquor had to be sold at a specific fixed price. The contractors were at liberty to sell the liquor at any rate between the minimum and maximum price. There being a wide range within which the sale of liquor could be affected, the assessing officer has rightly held that the sale price of liquor was not fixed.

7.2. Learned senior counsel further submits that the assessing officer was right in taking the view that the excise vendors had obtained goods by way of auction because the goods(arrack) were obtained only on production of permits which were available on successful bidding in the auction.

7.3. Thus, the liquor contractors clearly came within the ambit of the meaning of "buyer" under Explanation(a) to Section 206C of the Income Tax Act. Therefore, Mysore Sales was under an obligation to deduct income tax at source(TDS) from the liquor contractors. Since it failed to do so, the assessing officer was fully justified in passing the orders dated 17.01.2001 under Section 206C(6) of the Income Tax Act.

7.4. Learned Single Judge had elaborately examined the entire gamut of the issues and rightly affirmed the orders dated 17.01.2001. Similarly, the Division Bench also made a threadbare examination of the entire issues and, thereafter, came to the conclusion that the assessing officer was fully justified in passing the orders dated 17.01.2001. That being the position, there is no reason why, at this stage, the concurrent findings of the assessing officer as affirmed by the Single and

Division Benches of the High Court should be disturbed. As such, the civil appeal should be dismissed.

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

9. Before we proceed to Section 206C of the Income Tax Act, we may have a broad overview of the excise law framework in the State of Karnataka relevant for the purpose of the present *lis*. As already noted above, the parent enactment is the Excise Act which is an Act to provide for an uniform excise law in the State of Karnataka. It covers the entire spectrum from production to sale of liquor and intoxicating drugs and the levy of excise duty thereon. Section 2 defines various words and expressions used in the Excise Act. Section 2 (2) defines the expression "to bottle" to mean transferring liquor from a cask or other vessel to a bottle, jar, flask, polythene sachet or similar receptacle for the purpose of sale, whether any process of manufacture be employed or not and includes re-bottling. "Manufacture" is defined in Section 2 (19) to include every process whether natural or artificial, by which any fermented, spirituous or intoxicating liquor or intoxicating drug is produced or prepared and also redistillation and every process for the rectification of liquor. As per Section 3(1), the state government may appoint, by notification, an officer not below the rank of Deputy Commissioner as the Excise Commissioner in the State of Karnataka. He shall be the chief controlling authority in all matters connected with the administration of the Excise Act. Powers of the Excise Commissioner are dealt with in sub-section (2) of Section 3. He shall have the overall control of the administration of the Excise Department.

9.1. Section 17 deals with the power to grant lease of right to manufacture etc. Sub-section (1) thereof says that the state government may grant lease to any person on such conditions and for such period, as it may think fit, the exclusive or other right-

(a) of manufacturing or sale by wholesale or of both; or

(b) of selling by wholesale or by retail; or

(c) of manufacturing or supplying by wholesale, or of both and of selling by retail,

any Indian liquor or intoxicating drug within any specified area.

9.2. Though sub-section (1A) provides that no lease granted under sub-section (1) shall be transferred, the proviso thereto empowers the state government to grant permission to the lessee to transfer the lease or a part thereof in favour of any other person. As per sub-section (2), the licencing authority may grant to a lessee under sub-section (1) or to a transferee under sub-section (1A), a licence in terms of his lease. Sub-section (3) deals with determination of a lease for violation of the conditions mentioned therein. Under sub-section (4), when a lease is determined in terms of sub-section (3), the state government may direct the Deputy Commissioner to take over the right under his management and to lease it again by resale or otherwise.

9.3. Section 71 confers power on the state government to make rules to carry out the purposes of the Excise Act.

10. The Karnataka Excise (Arrack Vend Special Conditions of Licenses) Rules, 1967 (already referred to "the 1967 Rules" hereinabove) have been framed by the Government of Karnataka in exercise of the powers conferred by Section 71 of the Excise Act. Rule 2 of the 1967 Rules deals with selling of arrack of prescribed strength etc. by the licensee. Rule 2(1) says that every licensee licensed to vend arrack by retail sale shall sell only arrack of prescribed strength. As per sub-rule (2), no arrack except in sealed bottles or in sealed polythene sachets obtained from a warehouse or depot shall be kept for sale or sold in the licensed premises. Rule 3 provides for construction of counter. As per Rule 3, the licensee to vend arrack shall construct a counter in the shop which is not more than one metre high. Rule 4 deals with retail price. It says that subject to such minimum and maximum price fixed by the Deputy Commissioner or by the Excise Commissioner, the licensee may vend arrack on such rates as he may deem fit. Heading of Rule 5 is, *licensee to buy arrack only from warehouse, etc.* As per sub-rule (1), the licensee to vend arrack by retail shall purchase the required quantity of arrack for sale only from the warehouse or depot authorized by the Excise Commissioner, on payment of issue price fixed by the Excise Commissioner from time to time. This provision, being relevant, is extracted hereunder:

5. Licensee to buy arrack only from Warehouse, etc.: -

(1) The licensee to vend arrack by retail shall purchase the required quantity of arrack for sale only from the warehouse or depot authorized by the Excise Commissioner, on payment of issue price fixed by the Excise Commissioner from time to time.

10.1. Rule 5(2) clarifies that no arrack except in sealed bottles of the approved sizes with the excise labels or in sealed polythene sachets obtained from the authorized warehouse or depot shall be sold in the licenced premises.

10.2. Rule 6 says that the consignment of arrack should be under seal. All the consignments of arrack issued from the warehouse or depot shall be sealed by the officer-in-charge of the warehouse or depot in such a manner that the letters of the seal are distinct. The licensees shall be responsible for any breakage of seal in transit. The arrack so transported may be packed by the licensee at his own cost for the purpose of sale in such containers as may be approved by the Excise Commissioner and under supervision of the officer-in-charge of the warehouse.

11. Government of Karnataka has also framed the Karnataka Excise (Lease of the Right of Retail Vend of Liquors) Rules, 1969 (already referred to as "the 1969 Rules" hereinabove) exercising powers under Section 71 of the Excise Act. As per Rule 2(c), the expression "right of retail vend of liquors" means the lease of the right of retail vend of liquors. Rule 3 deals with lease of retail vend. As per Rule 3(1), the right of retail vend of liquors may be disposed of either by tender or by auction or by tender-cum-auction or in any other manner as the state government may by order specify. Rule 3(3) provides that the right of retail vend of arrack shall be the exclusive right but in such districts as may be specified by the government and only bottled arrack or arrack in polythene sachet shall be sold to consumers. Rule 3A deals with grant of lease to government companies etc. As per sub-rule (1), notwithstanding anything contained in the 1969 Rules, the state government may, if it is considered expedient in the interest of government revenue or for any other reasons to be recorded in writing, grant the lease of right of retail vend of liquor in favour of any

company or agency owned or controlled by the state government or a state government department on such terms and conditions as it deems fit.

11.1. Registration of excise contractors is provided for in Rule 4A. As per sub-rule (1), every application for registration as excise contractor shall be made to the Excise Commissioner in the prescribed format. After following the procedure prescribed in sub-rules (2) to (4), the Excise Commissioner under sub-rule (5) may register such an applicant as an excise contractor and grant a certificate of registration in the prescribed format which is not transferable. Sub-rule (8) clarifies that the registration certificate so issued shall be valid for participation in tender/ auction for the disposal of the right of retail vend of liquor for the excise year specified in such certificate.

11.2. As per Rule 10(1), where the right of retail vend of liquor within a district is to be disposed of by auction, the Deputy Commissioner of that district and where the disposal of the right is in more than a district in a Division, the Divisional Commissioner of that Division shall hold the auction on the date, time and place as may be notified. The procedure to be followed in the auction is laid down in Rule 11.

12. Under Section 71 of the Excise Act, Government of Karnataka has framed another set of rules called the Karnataka Excise (Manufacturing and Bottling of Arrack) Rules, 1987 (already referred to as "the 1987 Rules" hereinabove). Rule 2(b) defines "arrack" to mean the spirit manufactured by blending or reducing the spirit and includes spiced arrack, but does not include Indian or foreign liquor. "Blending" is defined in Rule 2(c) to mean the mixing of spirits with other spirits of the same or different strengths. As per Rule 2(e), "commissioner" means the Excise Commissioner. Rule 2(n) defines "warehouse" to mean any distillery or other place where spirit is stored, blended, matured, fortified, diluted or flavoured to produce arrack and also a place for bottling such arrack, but does not include a manufactory where wine or Indian liquor, beer or toddy is manufactured.

12.1. As per Rule 3(1), a licence may be granted by the Excise Commissioner for the manufacture and bottling of arrack for any specified area or areas. Sub-rule (2) of Rule 3 was inserted

subsequently w.e.f. 01.07.1993. Sub-rule (2) of Rule 3 clarifies that a licence under Rule 3 shall be issued only to a company or agency owned or controlled by the state government or to a state government department. This provision, being important, is extracted as under:

> **3. Licence to be granted only to a company etc** : -
>
> (1) A licence shall be granted by the Commissioner, whenever necessary for any specified area or areas for the manufacture and bottling of arrack.
>
> (2) The licence under this rule shall be issued only to a company or agency owned or controlled by the state government or to a state government department.

12.2. Rule 8 provides that in case where a warehouse serves more than one district, the warehouse shall be deemed to be a depot for storing bottled arrack and for supply of arrack to the person holding a licence to sell arrack in retail. Under Rule 9, the Commissioner may fix the number of warehouses, the area to be served by each of the warehouse and their location. Removal of arrack from the warehouse is provided for in Rule 16. As per sub-rule (1), no arrack shall be removed from the warehouse without payment of excise duty. Sub-rule (2) says that arrack shall not be issued from the warehouse or depot except in bottles or in polythene sachets of approved capacity and design. As per sub-rule (3), the same shall be issued from the warehouse or depot only to the persons holding a licence to sell arrack in retail. Rule 17 says that the price to be paid by the government to the distillery for the rectified spirit supplied by the distillery to the warehouse, the price to be paid by the government to the warehouse for manufacture and bottling of arrack and the price to be paid by the lessees for the right of retail vend of arrack to the government for the supply of bottled arrack shall be fixed by the Excise Commissioner from time to time with prior approval of the government. Rule 17, being relevant, is extracted hereunder:

> **17. Fixation of price**: -
>
> The price to be paid by government to the distillery for the rectified spirit supplied by the

> distillery to the warehouse, the price to be paid by the government to the warehouse for manufacture and bottling of arrack and the price to be paid by the lessees for the right of retail vend of arrack to the government for the supply of bottled arrack shall be fixed by the Commissioner from time to time with prior approval of the government and the same shall be communicated to the persons concerned.

13. From the above conspectus, we find that under Section 17 of the Excise Act, the state government grants lease of right to any person for manufacture etc. of liquor, arrack in this case. The licencing authority i.e. Excise Commissioner may grant to the lessee a licence in terms of his lease. In supplement to the above provision, Rule 3(1) of the 1987 Rules provides that the Excise Commissioner shall grant a licence for any specified area or areas for the manufacture or bottling of arrack. From 01.07.1993, sub-rule (2) of Rule 3 has come into force as per which provision the licence under Rule 3 of the 1987 Rules shall be issued only to a company or agency owned or controlled by the state government or to a state government department. This is how Mysore Sales was granted licence for manufacture and bottling of arrack. Through a process of auction, excise contractors are shortlisted who are thereafter granted licence or permits to vend arrack by retail in their respective area(s). They are required to procure the arrack from the warehouse or depot on payment of the issue price fixed by the Excise Commissioner as per Rule 5(1) of the 1967 Rules. Rule 2 makes it very clear that no arrack in retail vend shall be sold except in sealed bottles or in sealed polythene sachets obtained from either a warehouse or a depot. For such retail vending, Rule 3 of the 1967 Rules requires the excise contractor to construct a counter in the shop. The right to retail vend of liquor is granted either by tender or by auction or by a combined process of tender-cum-auction etc. As per Rule 17 of the 1987 Rules, the price to be paid by the lessee for the right of retail vend of arrack to the government for the supply of bottled arrack shall be fixed by the Commissioner with prior approval of the government. In so far the retail price is concerned, Rule 4 of the 1967 Rules says that the excise contractor can sell the arrack at a price within the range of

minimum floor price and maximum ceiling price that may be fixed by the Excise Commissioner.

14. Having broadly surveyed the statutory framework of the business of arrack in the State of Karnataka, let us now deal with Section 206C of the Income Tax Act. For ready reference, the said provision is extracted hereunder:

> 206-C. **Profits and gains from the business of trading in alcoholic liquor, forest produce, scrap, etc.**—(1) Every person, being a seller shall, at the time of debiting of the amount payable by the buyer to the account of the buyer or at the time of receipt of such amount from the said buyer in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, collect from the buyer of any goods of the nature specified in column (2) of the Table below, a sum equal to the percentage, specified in the corresponding entry in column (3) of the said Table, of such amount as income tax:
>
> TABLE
>
> | *Sl. No.* | *Nature of Goods* | *Percentage* |
> |---|---|---|
> | (i) | Alcoholic liquor for human consumption (other than India-made foreign liquor) and tendu leaves | Ten percent |
> | (ii) | Timber obtained under a forest lease | Fifteen percent |
> | (iii) | Timber obtained by any mode other than under a forest lease | Five percent |
> | (iv) | Any other forest produce not being timber or tendu leaves | Fifteen percent |
>
> **Provided** that where the Assessing Officer, on an application made by the buyer, gives a certificate in the prescribed form that to the best of his belief any of the goods referred to in the aforesaid Table are to be utilized for the purposes of manufacturing, processing or producing articles or things and not for trading purposes, the provisions of this sub-section shall not apply so long as the certificate is in force.

(2) The power to recover tax by collection under sub-section (1) shall be without prejudice to any other mode of recovery.

(3) Any person collecting any amount under sub-section (1) shall pay within seven days the amount so collected to the credit of the Central Government or as the Board directs.

(4) Any amount collected in accordance with the provisions of this section and paid under sub-section (3) shall be deemed as payment of tax on behalf of the person from whom the amount has been collected and credit shall be given to him for the amount so collected on the production of the certificate furnished under sub-section (5) in the assessment made under this Act for the assessment year for which such income is assessable.

(5) Every person collecting tax in accordance with the provisions of this section shall within ten days from the date of debit or receipt of the amount furnish to the buyer to whose account such amount is debited or from whom such payment is received, a certificate to the effect that tax has been collected, and specifying the sum so collected, the rate at which the tax has been collected and such other particulars as may be prescribed.

(5A) Every person collecting tax in accordance with the provisions of this section shall prepare half yearly returns for the period ending on 30th September and 31st March in each financial year, and deliver or cause to be delivered to the prescribed income-tax authority such returns in such form and verified in such manner and setting forth such particulars and within such time as may be prescribed.

(5B) Notwithstanding anything contained in any other law for the time being in force, a return filed on a floppy, diskette, magnetic cartridge tape, CD-ROM or any other computer readable media as may be specified by the Board (hereinafter referred to as the computer media) shall be deemed to be a return for the purposes of sub-section (5A) and the rules made thereunder and shall be admissible in any proceedings thereunder, without further proof of

production of the original, as evidence of any contents of the original or of any fact stated therein.

(5C) A return filed under sub-section (5B) shall fulfill the following conditions, namely:-

(a) while receiving returns on computer media, necessary checks by scanning the documents filed on computer media will be carried out and the media will be duly authenticated by the Assessing Officer; and

(b) the Assessing Officer shall also take due care to preserve the computer media by duplicating, transferring, mastering or storage without loss of data.

(6) Any person responsible for collecting the tax who fails to collect the tax in accordance with the provisions of this section, shall, notwithstanding such failure, be liable to pay the tax to the credit of the Central Government in accordance with the provisions of sub-section (3).

(7) Without prejudice to the provisions of sub-section (6), if the seller does not collect the tax or after collecting the tax fails to pay it as required under this section, he shall be liable to pay simple interest at the rate of one and one-fourth percent per month or part thereof on the amount of such tax from the date on which such tax was collectible to the date on which the tax was actually paid.

(8) Where the tax has not been paid as aforesaid, after it is collected, the amount of the tax together with the amount of simple interest thereon referred to in sub-section (7) shall be a charge upon all the assets of the seller.

(9) Where the Assessing Officer is satisfied that the total income of the buyer justifies the collection of the tax at any lower rate than the relevant rate specified in sub-section (1), the Assessing Officer shall, on an application made by the buyer in this behalf, give to him a certificate for collection of tax at such lower rate than the relevant rate specified in sub-section (1).

(10) Where a certificate under sub-section (9) is given, the person responsible for collecting the tax shall, until such certificate is cancelled by the Assessing Officer, collect the tax at the rates specified in such certificate.

(11) The Board may, having regard to the convenience of assessees and the interests of revenue, by notification in the Official Gazette, make rules specifying the cases in which, and the circumstances under which, an application may be made for the grant of a certificate under sub-section (9) and the conditions subject to which such certificate may be granted and providing for all other matters connected therewith.

Explanation. – For the purposes of this section,-

(a) "buyer" means a person who obtains in any sale, by way of auction, tender or any other mode, goods of the nature specified in the table in sub-section (1) or the right to receive any such goods but does not include, -

(i) a public sector company,

(ii) a buyer in the further sale of such goods obtained in pursuance of such sale, or

(iii) a buyer where the goods are not obtained by him by way of auction and where the sale price of such goods to be sold by the buyer is fixed by or under any State Act;

(b) "seller" means the Central Government, a State Government or any local authority or corporation or authority established by or under a Central, State or Provincial Act, or any company or firm or co-operative society.

14.1. Sub-section (1) of Section 206C says that every person who is a seller shall collect from the buyer of the goods specified in the table, a sum equal to the percentage specified in the corresponding entry of the table. The collection is to be made at the time of debiting of the amount payable by the buyer to the account of the buyer or at the time of the receipt of such

amount from the said buyer, be it in cash or by way of cheque or by way of draft etc. In so far alcoholic liquor for human consumption (other than India made foreign liquor i.e., IMFL), the amount to be collected is 10 percent. Sub-section (3) provides that any person collecting such amount under sub-section (1) shall pay the said amount within 7 days of the collection to the credit of the central government or as the Central Board of Direct Taxes (CBDT) directs. Sub-section (4) clarifies that any amount so collected under Section 206C(1) and paid under sub-section (3) shall be deemed as payment of income tax on behalf of the person from whom the amount has been collected and credit shall be given to such person for the amount so collected and paid at the time of assessment proceeding for the relevant assessment year. Sub-section (5) says that every person collecting such tax shall issue a certificate to the buyer within 10 days of debit or receipt of the amount. Sub-section (5A) requires the person collecting tax to prepare half yearly returns for the periods ending on 30th September and 31st March for each financial year and submit the same in the prescribed form before the competent income tax authority.

14.2. Sub-section (6) is relevant. Sub-section (6) says that any person responsible for collecting the tax but fails to collect the same shall notwithstanding such failure be liable to pay the tax which he ought to have collected to the credit of the central government in accordance with the provisions of sub-section (3). Sub-section (7) deals with a situation where such tax is not collected in which event the seller is liable to pay interest at the prescribed rate. Sub-section (8) on the other hand deals with a situation where the seller does not deposit the amount even after collecting the tax. In such an event also, he would be liable to pay interest.

14.3. That brings us to the Explanation to Section 206C of the Income Tax Act. The Explanation defines “buyer” and “seller” for the purposes of Section 206C. While Explanation(a) defines “buyer”, (b) defines “seller”. As per Explanation(a), “buyer” means a person who obtains in any sale by way of auction, tender or by any other mode, goods of the nature specified in the table in sub-section (1) or the right to receive any such goods but “buyer” would not include:

(i) a public sector company;

(ii) a buyer in the further sale of such goods obtained in pursuance of such sale;

(iii) a buyer where the goods are not obtained by him by way of auction and where the sale price of such goods to be sold by the buyer is fixed by or under any State Act.

14.4. On the other hand, "seller" has been defined to mean the central government, a state government or any local authority or corporation or authority established by or under a central, state or provincial act or any company or firm or cooperative society.

14.5. Adverting to the definition of "buyer", Explanation (a) says that a person who obtains in any sale by way of auction, tender or by any other mode, goods of the nature specified in the table in sub-section (1) or the right to receive any such goods is a buyer. But as we have seen above, there is an exclusion clause to the definition of "buyer". If the buyer is a public sector company or it has obtained the goods in further sale or if the goods are not obtained by him by way of auction and where the sale price of such goods to be sold by the buyer is fixed by or under any state enactment, then such a person would not come within the ambit of "buyer" as per the definition in Explanation(a). Since much emphasis has been placed on Explanation(a)(iii), we may extract the same again to understand the significance thereof: *a buyer where the goods are not obtained by him by way of auction* **and** *where the sale price of such goods to be sold by the buyer is fixed by or under any State Act.* Thus, Explanation(a)(iii) visualizes two conditions for a person to be excluded from the meaning of "buyer" as per the definition in Explanation(a). The first condition is that the goods are not obtained by him by way of auction. The second condition is that the sale price of such goods to be sold by the buyer is fixed under a state enactment. These two conditions are joined by the word 'and'. The word 'and' is conjunctive to mean that both the conditions must be fulfilled; it is not either of the two. Therefore, to be excluded from the ambit of the definition of "buyer" as per Explanation(a)(iii), both the conditions must be satisfied.

15. In view of the above, let us examine the position of an excise contractor. In the scheme under consideration which we have discussed above, would such an excise contractor be construed as a "buyer" within the meaning of Explanation(a) to the Section 206C of the Income Tax Act? Going back to the Excise Act and the rules framed thereunder, it is seen that Mysore Sales is the licensee for the manufacture and bottling of arrack for specified area(s). By a process of auction or tender or auction-cum-tender etc., excise contractors are shortlisted who are thereafter granted permits to vend arrack by retail in their respective area(s). These retail vendors i.e. excise contractors have to procure the arrack from the warehouse or depot maintained by Mysore Sales on payment of the issue price fixed by the Excise Commissioner. The arrack is procured in sealed bottles or in sealed polythene sachets. Pausing here for a moment, what is discernible is that by a process of auction etc., excise contractors are shortlisted. Thereafter, they are provided permits. On the strength of the permits, they obtain arrack in bottled condition (or in sealed polythene sachets) from the warehouse or depot on payment of issue price fixed by the Excise Commissioner. Such arrack either in sealed bottled condition or in sealed polythene sachets are then sold in retail by the excise contractors in the area or areas allotted to them. Therefore, by the process of auction etc., the excise contractors are only shortlisted and conferred the right to retail vend of arrack in their respective areas. It cannot be said that by virtue of the auction, certain quantities of arrack are purchased by the excise contractors. Thus, at this stage there are two transactions, each distinct. The first transaction is shortlisting of excise contractors by a process of auction etc. for the right to retail vend. The second transaction, which is contingent upon the first transaction, is obtaining of arrack for retail vending by the excise contractors on the strength of the permits issued to them post successful shortlisting following auction. Therefore, it is evidently clear that arrack is not obtained by the excise contractors by way of auction. What is obtained by way of auction is the right to vend the arrack on retail on the strength of permits granted, following successful shortlisting on the basis of auction. Thus, the first condition under clause (iii) is satisfied.

15.1. In *Om Parkash* (supra), this Court considered the issue of tax collection at source in respect of the liquor trade under Section 206C of the Income Tax Act and as to whether a licensee who

is issued a licence by the government permitting him to carry on the liquor trade would be a "buyer" as defined in Explanation (a) to Section 206C (11) of the Income Tax Act. This Court held that "buyer" would mean a person who by virtue of the payment gets a right to receive specific goods and not where he is merely allowed/permitted to carry on business in that trade. On licences issued by the government permitting the licensee to carry on liquor trade, provisions of Section 206C are not attracted as the licensee does not fall within the concept of "buyer" referred to in that section. This Court emphasized that a buyer has to be a buyer of goods and not merely a person who acquires a licence to carry on the business.

15.2. After the arrack is obtained in the above manner by the excise contractor, the requirement of the second condition under Explanation(a)(iii) is that he has to sell the same in the area(s) allotted to him at the sale price fixed as per Rule 4 of the 1967 Rules. The language of the second condition is that the sale price of such goods to be sold by the buyer is fixed by or under any state statute. As already noted above, Rule 4 of the 1967 Rules enables the excise contractor to sell the arrack in retail at a price within the range of minimum floor price and maximum ceiling price which is fixed by the Excise Commissioner. A minimum price and a maximum price are fixed within which range the arrack has to be sold by the excise contractor. Thus, the price of arrack to be sold in retail is not dependent on the market forces but pre-determined within a range. Therefore, though price range is provided for by the statute, it cannot be said that because there is a price range providing for a minimum and a maximum, the sale price is not fixed. The sale price is fixed by the statute but within a particular range beyond which price, either on the higher side or on the lower side, the arrack cannot be sold by the excise contractor in retail. Therefore, the arrack is sold at a price which is fixed statutorily under Rule 4 of the 1967 Rules and thus the second condition stands satisfied.

16. Since both the conditions as mandated under Explanation(a)(iii) are satisfied, the excise contractors or the liquor vendors selling arrack would not come within the ambit of "buyer" as defined under Explanation(a) to Section 206C of the Income Tax Act.

17. We have perused the orders dated 17.01.2001 passed by the assessing officer under Section 206C(6) of the Income Tax Act. From a perusal of the said orders, more particularly the order in respect of the assessment year 2000-2001 which is the main order passed by the assessing officer followed in other assessment proceedings, it is seen that the same was passed under Section 206C(6) of the Income Tax Act. By the said order dated 17.01.2001 for the assessment year 2000-01, the assessing officer declared that Mysore Sales had failed to collect and deposit an amount of Rs. 3,90,57,516.00 as TDS from the excise contractors and, therefore, directed the appellant to deposit the said amount to the credit of the central government. That apart, interest was also charged and levied under Section 206C(6) following which demand notice of even date under Section 156 of the Income Tax Act was issued. Before passing the said order, it is seen that the assessing officer had considered Section 206C of the Income Tax Act and the reply submitted by Mysore Sales to the show cause notice issued.

18. We have already analysed the various sub-sections of Section 206C of the Income Tax Act. As per sub-section (3), any person collecting TDS under sub-section (1) shall have to pay the same to the credit of the central government within seven days. Requirement under sub-section (5A) is that every person collecting TDS in terms of Section 206C (1) shall prepare half yearly returns for the periods ending on 30th September and 31st March respectively for each financial year and thereafter to submit the same before the competent assessing officer. Sub-rule (6) mandates that if any person responsible for collecting TDS fails to collect the same, he shall have to deposit the said amount to the credit of the central government notwithstanding failure to deduct TDS.

19. Though there is no express provision in sub-section (6) or any other provision of Section 206C of the Income Tax Act regarding issuance of notice and affording hearing to such a person before passing an order thereunder, nonetheless, it is evident that an order passed under Section 206C(6) of the Income Tax Act, as in the present case, is prejudicial to the person concerned as such an order entails adverse civil consequences. It is trite law that when an order entails adverse civil consequences or is prejudicial to the person concerned, it is essential that principles of natural justice are followed. In the

instant case, though show cause notice was issued to the assessee to which reply was also filed, the same would not be adequate having regard to the consequences that such an order passed under Section 206C(6) of the Income Tax Act would entail. Even though the statute may be silent regarding notice and hearing, the court would read into such provision the inherent requirement of notice and hearing before a prejudicial order is passed. We, therefore, hold that before an order is passed under Section 206C of the Income Tax Act, it is incumbent upon the assessing officer to put the person concerned to notice and afford him an adequate and reasonable opportunity of hearing, including a personal hearing.

20. In view of the discussions made above and the conclusions reached, it is not necessary for us to delve into other contours of the *lis*. Thus, the question framed in paragraph 3 above, is answered in the negative by holding that Section 206C of the Income Tax Act is not applicable in respect of Mysore Sales and that the liquor vendors(contractors) who bought the vending rights from the appellant on auction cannot be termed as "buyers" within the meaning of Explanation(a) to Section 206C of the Income Tax Act. We also hold that the High Court was not justified in dismissing the writ petitions and consequently, the writ appeal challenging the orders dated 17.01.2001.

21. Having regard to the discussions made above, we are of the view that the appeal should be allowed. Accordingly, we pass the following order:

(i) judgment and order dated 13.03.2006 passed by the Division Bench of the High Court of Karnataka at Bengaluru in Writ Appeal No. 7926/2003 and connected writ appeals, is hereby set aside;

(ii) judgment and order dated 27.10.2003 passed by the learned Single Judge of the High Court of Karnataka at Bengaluru in Writ Petition Nos. 6869-6874 of 2001 and other connected writ petitions, is hereby set aside; and

(iii) orders dated 17.01.2001 passed by the Deputy Commissioner of Income Tax (TDS)–1, Bengaluru under Section 206C(6) of the Income Tax Act for the assessment years 2000-2001, 1999-2000, 1998-1999, 1997-1998, 1996-1997 and 1995-1996 as well

as the consequential demand notices of even date issued under Section 156 of the Income Tax Act, are hereby set aside and quashed.

22. Civil Appeal accordingly stands allowed. However, there shall be no order as to cost.

Result of the case: Appeal allowed.

†*Headnotes prepared by:* Ankit Gyan

[2024] 7 S.C.R. 316 : 2024 INSC 493

G.M. Shahul Hameed
v.
Jayanthi R. Hegde

(Civil Appeal No. 1188 of 2015)

09 July 2024

[Dipankar Datta* and Pankaj Mithal, JJ.]

Issue for Consideration

Whether upon admission of an instrument in evidence and its marking as an exhibit by a court (despite the instrument being chargeable to duty but is insufficiently stamped), such a process can be recalled by the court in exercise of inherent powers saved by Section 151 of the Code of Civil Procedure, 1908 for the ends of justice or to prevent abuse of the process of the court.

Headnotes†

Code of Civil Procedure, 1908 – s.151 – Karnataka Stamp Act, 1957 – ss.33-35, 58 – GPA insufficiently stamped, admitted in evidence and marked as exhibit – No objection from the appellant – Trial Court if can recall such process of admission and marking of the instrument in exercise of its inherent power saved by s.151 or the remedy available under the 1957 Act was required to be pursued by the appellant to fasten the respondent with the liability to pay the deficit duty and penalty:

Held: The presiding officer of a court being authorised in law to receive an instrument in evidence, is bound to give effect to the mandate of ss.33 and 34 and retains the authority to impound an instrument even in the absence of any objection from any party to the proceedings – Irrespective of whether objection is raised or not regarding admissibility of an instrument, owing to its insufficient stamping, the question of admissibility has to be decided according to law – The presiding officer of a court when confronted with the question of admitting an instrument chargeable with duty but which is either not stamped or is insufficiently stamped ought to judicially determine it – Application of judicial mind is a *sine qua non* having regard to the express language of ss.33 and 34 – However, once a decision on the objection is rendered- right or wrong, s.35 would kick in to bar any question

* Author

being raised as to admissibility of the instrument on the ground that it is not duly stamped at any stage of the proceedings and the party aggrieved by alleged improper admission has to work out its remedy as provided by s.58 of the 1957 Act – On the date the GPA was admitted in evidence and marked as an exhibit, the Trial Court did not deliberate on its admissibility, much less applied its judicial mind, resulting in an absence of judicial determination – Trial Court not having 'decided' whether the GPA was sufficiently stamped, s.35 of the 1957 Act cannot be called in aid by the respondent – For s.35 to come into operation, the instrument must have been "admitted in evidence" upon a judicial determination – The words "judicial determination" have to be read into s.35 – Once there is such a determination, whether the determination is right or wrong cannot be examined except in the manner ordained by s.35 – However, in a case of "no judicial determination", s.35 is not attracted – No error in the order dated 19.10.2010 passed by the Trial Court in exercise of its inherent power saved by s.151, CPC to do justice as well as to prevent abuse of the process of court and allowing the interlocutory applications filed by the appellant and directing the respondent to pay the deficit stamp duty with penalty – Impugned order of the High Court set aside. [Paras 14, 18, 4, 22]

Karnataka Stamp Act, 1957 – s.35 – When not attracted – Discussed.

Karnataka Stamp Act, 1957 – s.33 – Examination and impounding of instruments – Duty of the court:

Held: s.33 has been inserted in the statute with a definite purpose – The revenue would stand the risk of suffering huge loss if the courts fail to discharge the duty placed on it per provisions like s.33 – The legislature has reposed responsibility on the courts and trusted them to ensure that requisite stamp duty, along with penalty, is duly paid if an unstamped or insufficiently stamped instrument is placed before it for admission in support of the case of a party – It is incumbent upon the courts to uphold the sanctity of the legal framework governing stamp duty, as the same are crucial for the authenticity and enforceability of instruments – Allowing an instrument with insufficient stamp duty to pass unchallenged, merely due to technicalities, would undermine the legislative intent and the fiscal interests of the State – The courts ought to ensure that compliance with all substantive and procedural requirements

of a statute akin to the 1957 Act are adhered to by the interested parties – This duty of the court is paramount, and any deviation would set a detrimental precedent, eroding the integrity of the legal system. [Para 21]

Case Law Cited

Javer Chand and Others v. Pukhraj Surana [1962] 2 SCR 333; *Ram Rattan v. Bajrang Lal* [1978] 3 SCR 963 **: (1978) 3 SCC 236 – referred to.**

List of Acts

Code of Civil Procedure, 1908; Karnataka Stamp Act, 1957; Indian Stamp Act, 1899; Constitution of India.

List of Keywords

Inherent powers; Inherent powers saved by Section 151 of the Code of Civil Procedure, 1908; Stamp duty; Instrument chargeable with duty; Instrument not stamped/insufficiently stamped; Admission of instrument in evidence; Objection to the instrument's insufficient stamping; Objection regarding admissibility of instrument owing to its insufficient stamping; Question of admitting instrument chargeable with duty but not stamped/insufficiently stamped; General Power of Attorney; GPA; GPA insufficiently stamped; GPA admitted in evidence and marked as exhibit; Instrument marked as exhibit; Recall of process of admission of instrument in evidence and marking of the instrument; Impounding of instruments; Liability to pay the deficit duty and penalty; Application of judicial mind; Judicial determination; Prevent abuse of the process of the court.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1188 of 2015

From the Judgment and Order dated 26.09.2011 of the High Court of Karnataka at Bangalore in WP No. 11653 of 2011

Appearances for Parties

D.P. Chaturvedi, Tarun Kumar Thakur, Ms. Parvati Bhat, Vivek Ram, Abhay Choudhary M, Ms. Anuradha Mutatkar, Advs. for the Appellant.

Mrs. Rekha Pandey, Suyash Mohan Guru, Ms. Sharmistha Choudhury, Raghav Pandey, Ms. Gauri Pandey, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Judgment

Dipankar Datta, J.

1. The substantial question arising for decision in this civil appeal is whether upon admission of an instrument in evidence and its marking as an exhibit by a court (despite the instrument being chargeable to duty but is insufficiently stamped), such a process can be recalled by the court in exercise of inherent powers saved by section 151 of the Code of Civil Procedure[1] for the ends of justice or to prevent abuse of the process of the court.

2. Assail in this civil appeal is to the judgment and order dated 26th September, 2011[2] passed by a learned Single Judge of the High Court of Karnataka at Bengaluru[3] whereby His Lordship set aside the order dated 19th October, 2010 passed by the Court of Additional Senior Judge-III, Mangalore[4] and allowed the petition[5] preferred by the respondent under Article 227 of the Constitution.

3. The facts, relevant for the disposal of the present appeal, are adverted to in brief hereunder:

   a. **First Sale Agreement and Sale Deed**: On 3rd October, 2003, a Sale Deed was executed regarding the suit property by one B. Ramesh Hegde in favour of his wife, who is the respondent here. This Sale Deed was executed on the strength of a General Power of Attorney[6] dated 16th September, 2003, which was allegedly executed by one Praveen Shetty in favour of B. Ramesh Hegde in respect of the suit property, authorizing him with power to sell the suit property.

   b. **Second Sale Agreement and Sale Deed:** An agreement to sell the suit property was executed between the appellant and Praveen Shetty on 11th September, 2003. The appellant paid the

1 CPC, hereafter

2 impugned order, hereafter

3 High Court, hereafter

4 Trial Court, hereafter

5 Writ Petition No. 11653 of 2011 (GM-CPC)

6 GPA, hereafter

consideration, and a Sale Deed was executed on 8th October, 2003 between the appellant and Praveen Shetty.

c. **Civil Suit by the appellant:** The appellant instituted a civil suit[7] against the respondent, B. Ramesh Hegde, and Praveen Shetty, seeking a declaration that the Sale Deed dated 3rd October, 2003 was null and void, and not binding on the appellant.

d. **Civil Suit by the respondent:** Conversely, the respondent also instituted a civil suit[8] against the appellant and Praveen Shetty, seeking a declaration that the Sale Deed dated 8th October, 2003 was null and void, and not binding on the respondent.

e. **Filing of GPA before the Trial Court:** In the suit instituted by the respondent, witness action commenced. B. Ramesh Hegde, in whose favour the GPA was executed by the respondent, on 6th June, 2010 tendered the GPA in course of his examination-in-chief. The appellant's counsel was engaged in another court; hence, he was unable to appear. The junior counsel did not object that the GPA was insufficiently stamped and, thus, inadmissible in evidence. The Trial Court, in the absence of objection, admitted the GPA in evidence and marked it as an exhibit whereafter the matter stood adjourned for cross-examination.

f. **Interlocutory Applications:** On the next hearing date, 25th June, 2010 to be precise, the appellant filed two interlocutory applications[9] in the suit filed by the respondent. In I.A. No. IX, the appellant sought a review of the order dated 6th June, 2010, and in I.A. No. X, it was prayed that the GPA be impounded on the ground that it has been insufficiently stamped. The appellant contended that since the GPA was executed in favour of a third party with power to sell the property, article 41 of the Schedule to the Karnataka Stamp Act, 1957[10] was applicable, necessitating payment of requisite stamp duty based on the market value of the property. The GPA was prepared only on a stamp paper worth Rs.100, rendering it insufficiently stamped and in accordance with section 34 of the 1957 Act,

7 O.S. No. 301 of 2003

8 O.S. No. 134 of 2005

9 I.A.s, hereafter

10 1957 Act, hereafter

an insufficiently stamped document had to be impounded and a penalty of ten times the duty value paid.

g. The respondent objected to the I.A.s asserting that the appellant had to avail his remedy under section 58 of the 1957 Act and that being available, the appellant could not seek a review. Further, it was claimed that no proof had been furnished that the appellant's counsel was otherwise engaged at that time. Lastly, it was contended that once a document had been admitted in evidence, the stamp duty could not subsequently be questioned on the ground that it has been insufficiently stamped, as per section 35 of the 1957 Act.

4. *Vide* order dated 19th October, 2010, the Trial Court allowed the I.A.s and directed the respondent to pay the deficit stamp duty, along with the penalty, as required for a power of attorney under article 41(eb) of the Schedule to the 1957 Act.

5. Dissatisfied with the aforesaid order of the Trial Court, the respondent approached the High Court whereupon the petition was allowed by the impugned order, *inter alia*, recording that:

> "2. It is evident from the material that the document has been marked and admitted in evidence and exhibited. It is the contention of the respondent under order 13 rule 4 there should be a specific statement to the effect that the document has been so admitted and endorsement shall be signed and initialed by the Judge. In the absence of the said requirement, marking of document does not mean admission of document in evidence. The argument of the counsel for the respondent is untenable. In the normal procedure when the document is produced, it is marked and exhibit number has assigned and beneath the said exhibit Judge puts his initial. This procedure fully complies with the requirement under Order 13 Rule 4 of the Act. Therefore, the contention that the document has not been properly marked and it should be rejected in evidence on the ground of insufficiently stamped is untenable. The trial court will have no jurisdiction to reconsider the issue. The remedy available for the respondent is only under section 58 of the Stamp Act. Accordingly, the writ petition is allowed."

6. It is the legality of the impugned order that we are tasked to examine while answering the question formulated at the beginning of this judgment.

7. Mr. Chaturvedi, learned counsel for the appellant, while laying a challenge to the impugned order argued that admission of an insufficiently stamped instrument in a casual manner by mechanically marking it as an exhibit, without any application of judicial mind, should not preclude the court seized of the proceedings from reconsidering whether such document is sufficiently stamped and could have at all been admitted in evidence. Various provisions of the 1957 Act were referred to by him for persuading us to hold that the view taken by the High Court was grossly erroneous. Accordingly, it was prayed by him that the impugned order be set aside and the civil appeal be allowed with liberty to the respondent to take steps in accordance with the order of the Trial Court.

8. Mr. Guru, learned counsel for the respondent, defended the impugned order by asserting that it is correct both in law as well as on facts. It was argued that setting aside of the Trial Court's order by the impugned order was indeed justified since the GPA having been admitted in evidence, such admission could not have been reviewed by the same court under any circumstance. Emphasis was placed on the need for an objection to the document's admissibility being raised when it was first tendered for being admitted and then marked as an exhibit. Citing section 35 of the 1957 Act, it was contended that once an instrument is admitted in evidence, the admission cannot be questioned by the trial court or any appellate or revisional court; and that the only remedy that the 1957 Act provides is a revision under section 58 thereof in the manner as provided. Thus, he submitted that the civil appeal being devoid of any merit deserved outright dismissal.

9. A short but interesting question has engaged our consideration. There is no doubt that the GPA is insufficiently stamped. What we need to consider on facts and in the circumstances is, which of the two conflicting views taken by the Trial Court and the High Court is right.

10. Despite the GPA having been admitted in evidence and marked as an exhibit without objection from the side of the appellant, we propose to hold for the reasons to follow that the Trial Court did have the authority to revisit and recall the process of admission and marking of the instrument, not in the sense of exercising a power of review

under section 114 read with Order XLVII, CPC but in exercise of its inherent power saved by section 151 thereof, and that the other remedy made available by the 1957 Act was not required to be pursued by the appellant to fasten the respondent with the liability to pay the deficit duty and penalty.

11. We may refer to the statutory framework of the 1957 Act. Sections 33, 34, 35 and 58, to the extent relevant for a decision on this appeal, read as follows:

> "**33. Examination and impounding of instruments**.-
>
> (1) Every person having by law or consent of parties authority to receive evidence, and every person in charge of a public office, except an officer of police, before whom any instrument, chargeable in his opinion, with duty, is produced or comes in the performance of his functions, shall, if it appears to him that such instrument is not duly stamped, impound the same.
>
> (2) For that purpose every such person shall examine every instrument so chargeable and so produced or coming before him, in order to ascertain whether it is stamped with a stamp of the value and description required by the law in force in the State of Karnataka when such instrument was executed or first executed:
>
> Provided that,—
>
> (a) ***
>
> (b) ***
>
> (3) For the purposes of this section, in cases of doubt, the Government may determine,—
>
> (a) what offices shall be deemed to be public offices; and
>
> (b) who shall be deemed to be persons in charge of public offices.
>
> **34. Instruments not duly stamped inadmissible in evidence, etc**.- No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or

authenticated by any such person or by any public officer, unless such instrument is duly stamped:

Provided that,—

(a) ***

(b) ***

(c) ***

(d) ***

35. Admission of instrument where not to be questioned. – Where an instrument has been admitted in evidence such admission shall not, except as provided in section 58, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped.

58. Revision of certain decisions of Courts regarding the sufficiency of stamps. –

(1) When any Court in the exercise of its Civil or Revenue jurisdiction or any Criminal Court in any proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898, makes any order admitting any instrument in evidence as duly stamped or as not requiring a stamp, or upon payment of duty and a penalty under Section 34, the Court to which appeals lie from, or references are made by, such first mentioned Court may, of its own motion or on the application of the Deputy Commissioner, take such order into consideration.

(2) If such Court, after such consideration, is of opinion that such instrument should not have been admitted in evidence without the payment of duty and penalty under Section 34, or without the payment of a higher duty and penalty than those paid, it may record a declaration to that effect, and determine the amount of duty with which such instrument is chargeable, and may require any person in whose possession or power such instrument then is, to produce the same, and may impound the same when produced.

(3) When any declaration has been recorded under sub-section (2), the Court recording the same shall send a copy thereof to the Deputy Commissioner and, where the instrument to which it relates has been impounded or is otherwise in the possession of such Court, shall also send him such instrument.

(4) The Deputy Commissioner may thereupon, notwithstanding anything contained in the order admitting such instrument in evidence, or in any certificate granted under Section 41, or in Section 42, prosecute any person for any offence against the stamp law which the Deputy Commissioner considers him to have committed in respect of such instrument.

Provided that, -

(a) no such prosecution shall be instituted where the amount (including duty and penalty) which, according to the determination of such Court, was payable in respect of the instrument under Section 34, is paid the Deputy Commissioner, unless he thinks that the offence was committed with an intention of evading payment of the proper duty;

(b) except for the purpose of such prosecution, no declaration made under this section shall affect the validity of any order admitting any instrument in evidence, or of any certificate granted under Section 41."

(emphasis ours)

12. Read in isolation, a literal interpretation of section 35 of the 1957 Act seems to make the position in law clear that once an instrument has been admitted in evidence, then its admissibility cannot be contested at any stage of the proceedings on the ground of it not being duly stamped. A *fortiori*, it would follow that any objection pertaining to the instrument's insufficient stamping must be raised prior to its admission.

13. However, section 35 of the 1957 Act is not the only relevant section. It is preceded by sections 33 and 34 and all such sections are part of Chapter IV, tiled *"Instruments Not Duly Stamped"*. Certain obligations

are cast by section 33 on persons/officials named therein. Should the presiding officer of the court find the instrument to be chargeable with duty but it is either not stamped or is insufficiently stamped, he is bound by section 33 to impound the same. Section 34 places a fetter on the court's authority to admit an instrument which, though chargeable with duty, is not duly stamped. The statutory mandate is that no such instrument shall be admitted in evidence unless it is duly stamped.

14. The presiding officer of a court being authorised in law to receive an instrument in evidence, is bound to give effect to the mandate of sections 33 and 34 and retains the authority to impound an instrument even in the absence of any objection from any party to the proceedings. Such an absence of any objection would not clothe the presiding officer of the court with power to mechanically admit a document that is tendered for admission in evidence. The same limitation would apply even in case of an objection regarding admissibility of an instrument, owing to its insufficient stamping, being raised before a court of law. Irrespective of whether objection is raised or not, the question of admissibility has to be decided according to law. The presiding officer of a court when confronted with the question of admitting an instrument chargeable with duty but which is either not stamped or is insufficiently stamped ought to judicially determine it. Application of judicial mind is a *sine qua non* having regard to the express language of sections 33 and 34 and interpretation of *pari materia* provisions in the Indian Stamp Act, 1899[11] by this Court. However, once a decision on the objection is rendered – be it right or wrong – section 35 would kick in to bar any question being raised as to admissibility of the instrument on the ground that it is not duly stamped at any stage of the proceedings and the party aggrieved by alleged improper admission has to work out its remedy as provided by section 58 of the 1957 Act.

15. Profitable reference may be made to the decision of this Court in ***Javer Chand and others v. Pukhraj Surana***[12]. There, provisions of section 36 of the 1899 Act, which is *pari materia* section 35 of the 1957 Act, came up for consideration. A Bench of four Hon'ble Judges of this Court held that when a document's admissibility is questioned due to

11 1899 Act, hereafter

12 [1962] 2 SCR 333

improper stamping, it must be decided immediately when presented as evidence. The relevant paragraph is extracted hereunder:

> "4. *** Where a question as to the admissibility of a document is raised on the ground that it has not been stamped, or has not been properly stamped, it has to be decided then and there when the document is tendered in evidence. Once the court, rightly or wrongly, decides to admit the document in evidence, so far as the parties are concerned, the matter is closed. Section 35 is in the nature of a penal provision and has far-reaching effects. Parties to a litigation, where such a controversy is raised, have to be circumspect and the party challenging the admissibility of the document has to be alert to see that the document is not admitted in evidence by the court. The court has to judicially determine the matter as soon as the document is tendered in evidence and before it is marked as an exhibit in the case. The record in this case discloses the fact that the *hundis* were marked as Exts. P-1 and P-2 and bore the endorsement 'admitted in evidence' under the signature of the court. It is not, therefore, one of those cases where a document has been inadvertently admitted, without the court applying its mind to the question of its admissibility. Once a document has been marked as an exhibit in the case and the trial has proceeded all along on the footing that the document was an exhibit in the case and has been used by the parties in examination and cross-examination of their witnesses, Section 36 of the Stamp Act comes into operation. Once a document has been admitted in evidence, as aforesaid, it is not open either to the trial court itself or to a court of appeal or revision to go behind that order. Such an order is not one of those judicial orders which are liable to be reviewed or revised by the same court or a court of superior jurisdiction."
>
> (emphasis ours)

16. Once again, addressing a matter concerning section 36 of the 1899 Act, a Bench of three Hon'ble Judges of this Court in ***Ram Rattan v. Bajrang Lal***[13] held as follows:

13 [1978] 3 SCR 963 : (1978) 3 SCC 236

"6. When the document was tendered in evidence by the plaintiff while in witness box, objection having been raised by the defendants that the document was inadmissible in evidence as it was not duly stamped and for want of registration, it was obligatory upon the learned trial Judge to apply his mind to the objection raised and to decide the objects in accordance with law. Tendency sometimes is to postpone the decision to avoid interruption in the process of recording evidence and, therefore, a very convenient device is resorted to, of marking the document in evidence subject to objection. This, however would not mean that the objection as to admissibility on the ground that the instrument is not duly stamped is judicially decided; it is merely postponed. In such a situation at a later stage before the suit is finally disposed of it would none-the-less be obligatory upon the court to decide the objection. If after applying mind to the rival contentions the trial court admits a document in evidence, Section 36 of the Stamp Act would come into play and such admission cannot be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped. The court, and of necessity it would be trial court before which the objection is taken about admissibility of document on the ground that it is not duly stamped, has to judicially determine the matter as soon as the document is tendered in evidence and before it is marked as an exhibit in the case and where a document has been inadvertently admitted without the court applying its mind as to the question of admissibility, the instrument could not be said to have been admitted in evidence with a view to attracting Section 36 (see Javer Chand v. Pukhraj Surana) [AIR 1961 SC 1655] . The endorsement made by the learned trial Judge that 'Objected, allowed subject to objection', clearly indicates that when the objection was raised it was not judicially determined and the document was merely tentatively marked and in such a situation Section 36 would not be attracted."

(emphasis ours)

17. The pivotal aspect emerging for consideration on the terms of sections 33 and 34 of the 1957 Act, with which we are concerned, is that whether the Trial Court did judicially determine the question of admissibility. It is here that we need to ascertain the rationale behind the Trial Court's approach to go behind admission of the GPA in evidence and marking thereof as an exhibit, leading to the order under challenge before the High Court. Relevant portions of the order of the Trial Court read thus:

> "2. *** There are two suits before this court, one is the present suit and another suit is OS No. 301/03. In the present suit, the GPA holder of plaintiff filed an affidavit by way of chief examination in the morning session and the documents were marked. While marking the documents he was held up in the court of Civil Judge (Jr. Dn.), Mangalore and hence no objection regarding the deficiency of stamp duty on GPA could be raised before this court. Accordingly the matter has been adjourned for cross examination of PW1. The alleged GPA is in favour of third party with power to sell the property and hence article 41 of the Karnataka Stamp Act 1957 is applicable and stamp duty on the market value has to be paid on the same. The GPA is executed on a stamp paper of value of Rs.100/- only. As per Section 33 of the Karnataka Stamp Act, 1957, the court shall impound the said GPA even without the objections by the advocate for 1st defendant. His absence at the time of chief examination of PW1 is not intentional but as he was held up in another court.
>
> 3. The 1st defendant has also filed IA No. IX under Sec. 114, R/w. Sec. 151 of CPC to review the order of marking Ex.P2 which is insufficiently stamped and to hear the objections regarding inadequacy of stamp duty on the similar grounds.
>
> 7. The points that arise for consideration are:-
>
> > 1. Whether Ex.P2 GPA is insufficiently stamped and plaintiff is liable to pay deficit duty and penalty?
> >
> > 2. Whether the order permitting the plaintiff to mark the document requires to be reviewed?
>
> 8. The points are answered in affirmative for the following:

Reasons

9. *** The clauses are very specific that the power of attorney has been given powers to sell the properties and the power of attorney has acted upon the GPA and has execute the sale deed in favour of the plaintiff as per Ex.P3. Under Article 41(e), when the power of attorney is given for consideration and authorizing the attorney to sell the immovable property, the duty payable is same duty as a conveyance for a market value equal to the amount of the consideration. As stated above, no consideration has been mentioned in the GPA., but the GPA has been given authorizing to sell the immovable property. The GPA has been issued to a third party, … article 41(ab) is applicable. The learned counsel for plaintiff objected for considering these applications on the ground that document is already marked with out any objections and hence the question of reviewing the order considering the question of stamp duty at this stage does not arise. As seen from the order sheet, the plaintiff was examined on 6.6.2010 and document was marked on same day. Immediately on the next date of hearing the counsel has filed IA No. IX and X to consider the aspect of payment of stamp duty and penalty i.e., on the day on which the matter was posted for cross examination of PW1. It is certain that the senior counsel appearing for the plaintiff was not present at the time of examination of PW1 in chief as the court remembers that the junior counsel was present and probably being unaware of the question of stamp duty has not raised any objections. The court has marked the document as an exhibit and has put the seal for having marked the document as to who has produced the document and admitted through which witness and marked for plaintiff. No doubt, there is mention that the document is admitted through PW1 and Ex.P2, but the court has not applied its mind while marking the document as to whether document is sufficiently stamped or insufficiently stamped.

10. *** The circumstances under which the application is being filed and circumstances under which the document came to be marked, clearly show that the document was

> marked without application of the mind of the court and without objection of the other side and this court is of the view that the admissibility of the document could be considered at this stage.
>
> ORDER
>
> The IA Nos. IX and X are allowed."

18. On the face of such an order, it does not leave any scope for doubt that on the date the GPA was admitted in evidence and marked as an exhibit, the Trial Court did not deliberate on its admissibility, much less applied its judicial mind, resulting in an absence of judicial determination. In the absence of a 'decision' on the question of admissibility or, in other words, the Trial Court not having 'decided' whether the GPA was sufficiently stamped, section 35 of the 1957 Act cannot be called in aid by the respondent. For section 35 to come into operation, the instrument must have been "admitted in evidence" upon a judicial determination. The words "judicial determination" have to be read into section 35. Once there is such a determination, whether the determination is right or wrong cannot be examined except in the manner ordained by section 35. However, in a case of "no judicial determination", section 35 is not attracted.

19. In the light of the aforesaid reasoning of the Trial Court of admitted failure on its part to apply judicial mind coupled with the absence of the counsel for the appellant before it when the GPA was admitted in evidence and marked exhibit, a factor which weighed with the Trial Court, we have no hesitation to hold that for all purposes and intents the Trial Court passed the order dated 19th October, 2010 in exercise of its inherent power saved by section 151, CPC, to do justice as well as to prevent abuse of the process of court, to which inadvertently it became a party by not applying judicial mind as required in terms of sections 33 and 34 of the 1857 Act. We appreciate the approach of the Trial Court in its judicious exercise of inherent power.

20. Reference to section 58 of the 1957 Act by learned counsel for the respondent is without substance. The clear language of section 58 refers to a situation, where an order is passed admitting an instrument in evidence as duly stamped or as one not requiring a stamp, for its attraction. As evident from a bare reading of the order dated 19th October, 2010, the Trial Court did neither hold the GPA as duly

stamped or as not requiring a stamp and, therefore, its applicability was not attracted.

21. We may not turn a blind eye to the fact that the revenue would stand the risk of suffering huge loss if the courts fail to discharge the duty placed on it per provisions like section 33 of the 1957 Act. Such provision has been inserted in the statute with a definite purpose. The legislature has reposed responsibility on the courts and trusted them to ensure that requisite stamp duty, along with penalty, is duly paid if an unstamped or insufficiently stamped instrument is placed before it for admission in support of the case of a party. It is incumbent upon the courts to uphold the sanctity of the legal framework governing stamp duty, as the same are crucial for the authenticity and enforceability of instruments. Allowing an instrument with insufficient stamp duty to pass unchallenged, merely due to technicalities, would undermine the legislative intent and the fiscal interests of the state. The courts ought to ensure that compliance with all substantive and procedural requirements of a statute akin to the 1957 Act are adhered to by the interested parties. This duty of the court is paramount, and any deviation would set a detrimental precedent, eroding the integrity of the legal system. Thus, the court must vigilantly prevent any circumvention of these legal obligations, ensuring due compliance and strict adherence for upholding the rule of law.

22. Having regard to the aforesaid discussion, we answer the substantial question in the affirmative. Finding no error in the order of the Trial Court dated 19th October, 2010, we set aside the impugned order of the High Court dated 26th September, 2011, meaning thereby that the order of the Trial Court is restored. Since proceedings of the civil suit remained stalled because of pendency of this appeal, we expect the Trial Court to proceed expeditiously and in accordance with law.

23. The appeal is, accordingly, allowed without any order for costs.

Result of the case: Appeal allowed.

†*Headnotes prepared by:* Divya Pandey

[2024] 7 S.C.R. 333 : 2024 INSC 488

Gaurav Maini
v.
The State of Haryana

(Criminal Appeal No(S). 696 of 2010)

09 July 2024

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

Issue for Consideration

Courts below, if justified in convicting and sentencing the appellants for the offences punishable u/ss. 364A, 392 and 120B IPC.

Headnotes†

Penal Code, 1860 – ss. 364A, 392 and 120B – Kidnapping for ransom – Robbery – Prosecution case that the appellants kidnapped a minor boy for ransom and robbed him, and on payment of ransom of Rs. One crore, the boy was released – FIR was registered by police on the basis of the secret information received by them while patrolling about such offences – Pursuant thereto, first disclosure of the incident made by the grandfather to the Investigating Officer, however, FIR was not registered regarding the alleged kidnapping of the boy – Conviction and sentence of the appellants for the offences punishable u/ss. 364A, 392 and 120B by the trial court – Upheld by the High Court – Correctness:

Held: Entire prosecution story totally concocted and does not inspire confidence – Inherent improbabilities in the versions of the two star prosecution witnesses-father of the kidnapped boy and the kidnapped boy – Prosecution failed to examine the most relevant witness-grandfather which compels the Court to draw an adverse inference against the prosecution – No convincing evidence led by the prosecution to connect the accused persons with the suspected mobile numbers – FIR could not have been registered on the basis of the secret information received by SI because the said information did not disclose the commission of any cognizable offence – If at all, the FIR had to be registered, on the basis of the statement of grandfather recorded by the police officials – However, no such steps taken by the police officials, thus, creates doubt on the bona fides of the actions of the Investigating Agency – Complainant party

* Author

failed to offer logical explanation for failing to file an FIR even after the kidnapped boy had returned home – Delay in taking legal action creates a grave doubt on the truthfulness of the entire prosecution case – Kidnapped boy though knew accused A2 from before and claims to have identified him at the time of the incident however did not disclose his name to the police officials till the statement was recorded by the investigating officer – Also omission of the names of the accused persons in the special report – Furthermore, identification of the accused by the boy not free from doubt – Prosecution case failed to led trustworthy evidence to establish the recovery of the currency notes at the instance of the accused because the disclosure statements were not proved as per law – Currency notes were handed back to father without any order of the Court which is an act of gross misconduct on the part of the Investigating Officer – High Court as well as the trial court failed to advert to these important loopholes and shortcomings in the evidence available on record which are fatal to the prosecution case – Prosecution case is fabricated and the accused were framed in the case for ulterior motive – No iota of truth in the prosecution story – Thus, conviction of the accused appellants by the trial court and as affirmed by the High Court cannot be sustained – Judgment passed by the courts below quashed and set aside – Evidence. [Paras 30, 31, 51-55]

FIR – Registration by police officials merely based on source information – Effect:

Held: Police officials could not register the FIR merely on the basis of such source information without even verifying the fact as to whether any such incident had actually occurred – Very fact that the said FIR was registered by referring to an incident without making any verification from the aggrieved persons clearly shows that the Investigating Agency right from inception had started plotting that the case should proceed in a particular direction – This is a very suspicious circumstance which creates a grave doubt on the conduct of the Investigating Agency. [Para 34]

Code of Criminal Procedure, 1973 – ss. 451, 452 and 457 – Disposal of property – Action of the Investigating Officer in returning the mudammal currency notes to the complainant without any order of the Court – Effect:

Held: Disposal of the case property could only have been done by taking recourse to the procedure contained u/ss. 451, 452 and 457 as the case may be – Investigation Officer had no authority to release

the currency notes without an order of the Court and his action to the contrary tantamounts to grave misconduct – Trial court causally brushed aside the plea regarding the non-production of the currency notes in the Court observing that the recovered currency notes were released on superdari by the Magistrate – However, the trial court went on to note that the currency notes were never seen after the recovery and were not produced in the Court when the prosecution witnesses were examined – No order for final disposal of the currency notes was passed by the trial court u/s. 452 which is a mandatory requirement – Sheer indifference exhibited by the courts below is shocking, to say the least – Thus, the entire process of recovery of the currency notes is clearly flawed, marked by procedural errors – Courts below erred by not pulling up the prosecution for flagrant disregard of legal procedures and failure to document key details which undermines the prosecution's case. [Para 42]

Code of Criminal Procedure, 1973 – s. 311 – Evidence Act, 1872 – s. 165 – Power to summon material witness, or examine person present – Power to put questions or order production – Ambit of:

Held: Conjoint reading of s. 311 CrPC and s. 165 of the Evidence Act makes it clear that the trial court is under an obligation not to act as a mere spectator and should proactively participate in the trial proceedings, so as to ensure that neither any extraneous material is permitted to be brought on record nor any relevant fact is left out – It is the duty of the trial court to ensure that all such evidence which is essential for the just decision of the case is brought on record irrespective of the fact that the party concerned omits to do so – On facts, grandfather of the kidnapped boy was the first person who came into contact of the police officials and he admittedly disclosed about the incident to Investigating Officer, thus, the grandfather would have been the most vital witness to unfurl the truth of the matter, however, for the reasons best known to the prosecution, he was not examined as a witness in the case – Trial court should have remained vigilant and it was absolutely essential for the Court to have exercised powers u/s. 311 CrPC read with s. 165 of the Evidence Act so as to summon and examine the grandfather in evidence because his evidence was essential for a just decision of the case – Non-examination of the said witness at the trial is a fatal lacuna to draw an adverse inference against the prosecution. [Paras 47, 48, 50]

Witness – Non-examination of the most relevant witness at the trial – Effect:

Held: Trial court failed to perform its lawful obligation u/s. 311 CrPC rw s. 165 of the Evidence Act – Most vital witness whose deposition was imperative for arriving at the truth of the matter not produced by the prosecution and the trial court took no steps whatsoever to summon him by exercising its powers u/s. 311 CrPC and s.165 of the Evidence Act – Non-examination of the said witness at the trial is a fatal lacuna leading to an adverse inference against the prosecution – Code of Criminal Procedure, 1973 – s. 311 – Evidence Act, 1872 – s. 165. [Paras 47]

Case Law Cited

Pooja Pal v. Union of India and Others [2016] 11 SCR 560 **: (2016) 3 SCC 135;** *Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal and Ors.* [2020] 7 SCR 180 **: (2020) 3 SCC 216 – referred to.**

List of Acts

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

List of Keywords

Kidnapping for ransom; First disclosure; Inherent improbabilities; Delay; Dock identification; Trustworthy evidence; Disclosure statements; Registration of FIR by police officials based on source information; Aggrieved person; Disposal of property; Non-production of the case property; Recovery of the currency notes; Summon witness; Non-examination of witness.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 696 of 2010

From the Judgment and Order dated 19.01.2009 of the High Court of Punjab & Haryana at Chandigarh in CRLA No.779-DB of 2005

With

Criminal Appeal Nos. 695 and 1724 of 2010 and Criminal Appeal No. 584 of 2013

Gaurav Maini v. The State of Haryana

Appearances for Parties

Ms. Kiran Suri, Neeraj Kumar Jain, Sr. Advs., Ms. Bharti Tyagi, Vikash Kumar, T. N. Singh, Vikas Kumar Singh, Ms. Rajshree Singh, T. Mahipal, Advs. for the Appellant.

S. Udaya Kumar Sagar, A.A.G., Ms. Bina Madhavan, Dr. Monika Gusain, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Judgment

Mehta, J.

1. The appellants were subjected to trial in the Court of learned Additional Sessions Judge, Panchkula(hereinafter being referred to as the 'trial Court') in Sessions Case No. 11 of 2003 for the offences punishable under Sections 364A, 392 and 120B of the Indian Penal Code, 1860(hereinafter being referred to as 'IPC'). *Vide* judgment and order dated 26th September, 2005, the learned trial Court held the appellants guilty for the above mentioned offences and sentenced them as below: -

Provision under which convicted	Sentence
Section 364A IPC	Life imprisonment and a fine of Rs. 10,000/- and in default, further undergo rigorous imprisonment for one year.
Section 392 IPC	Rigorous imprisonment for five years and a fine of Rs. 5,000/- and in default, further undergo rigorous imprisonment for six months.
Section 120B IPC	Life imprisonment and a fine of Rs. 10,000/- and in default, further undergo rigorous imprisonment for one year.

2. Being aggrieved by the conviction and sentences awarded by the learned trial Court, the appellants preferred separate appeals before the Punjab and Haryana High Court. The Division Bench of the Punjab and Haryana High Court dismissed the appeals preferred by the appellants *vide* common judgment dated 19th January, 2009

affirming the judgment passed by the learned trial Court and upholding the conviction and sentences of the appellants.

3. The aforesaid judgment rendered by the Division Bench of the Punjab and Haryana High Court is subjected to challenge in these four appeals.

4. Since all the appeals arise from common judgment dated 19th January, 2009, the same have been heard and are being decided together by this judgment.

Brief Facts: -

5. On 15th April, 2003 Jai Singh, SI(PW-27), Police Station, Sector-5, Panchkula, while being present near the market of Sector 16, Panchkula along with the police team in connection with patrol duty and crime checking, claims to have received a secret information to the effect that a gang was operating in Panchkula which was indulged in demanding ransom from parents after kidnapping the children and in case of non-payment of ransom, threats were given to eliminate the kidnapped children. It was further divulged in the information that such type of incident had already occurred in Kothi No. 81-A, Sector 17, Panchkula.

6. A *ruqa*(Exhibit-PAA) with these allegations was sent to the police station by Jai Singh, SI(PW-27) based whereupon a formal FIR No. 283 of 2003(Exhibit-PAAA/1) dated 15th April, 2003 came to be registered by Jai Raj, ASI(PW-25) for the offences punishable under Sections 387 and 507 IPC at Police Station, Sector-5, Panchkula. Investigation of the case was assigned to Surjit Kumar(Investigating Officer)(PW-37), Sub-Inspector, CIA, Panchkula. He proceeded to Kothi No. 81-A on 15th April, 2003 where one Shamlal Garg met him and informed that his grandson namely, Sachin Garg(PW-2) had been kidnapped. Shamlal Garg also alleged that they had received ransom calls from two mobile phones bearing Nos. 9815XXXXXX and 9815XXXXXX. Both the numbers were found to be of service provider Bharti Airtel Company. The Investigating Officer(PW-37) made enquires from the office of Bharti Airtel Company and received information that these mobile SIMs had been sold to Kohli Traders, Sector 26, Chandigarh. The Senior Manager of Bharti Airtel Company, Shri Rakesh Michael provided the call detail records of both the mobile

numbers from 28th March, 2003 to 3rd April, 2003. On an inquiry made from Kohli Traders, it came to light that both the SIM cards had been sold to one Singla Traders, Sector-7, Chandigarh on 24th February, 2003. On an enquiry from the shop of Singla Traders, the Investigation Officer(PW-37) was provided information that these SIM cards had been purchased by two boys from Reena Singla, sister of the owner of Singla Traders. Based on the call data of the mobile numbers as provided by Bharti Airtel Company, it was found that mobile sets bearing IMEI(International Mobile Equipment Identity) Nos. 350179626659830, 350019563917100 and 350609807685060 had been used for operating these SIM cards. The statements of Sachin Garg[kidnapped boy(PW-2)] and Mahesh Garg[(Father of the kidnapped boy(PW-1)] were recorded by Investigating Officer(PW-37) on 20th April, 2003.

7. Mahesh Garg(PW-1) stated that on 2nd April 2003, his son Sachin Garg had gone to play badminton at the playground of Sector 7, Panchkula, in a car, but he did not return till 9:00 pm. Thereupon, he along with his family members made efforts to trace Sachin Garg out. He received calls from Mobile Nos. 9815XXXXXX and 9815XXXXXX and the caller(s) informed them that Sachin Garg(PW-2) was in their custody and demanded ransom to the tune of Rs. 1 crore for his release. The caller(s) also threatened that in case, the ransom demand was not satisfied, Sachin Garg would be eliminated. A threat was also given to eliminate the entire family in case any intimation was given to the police.

8. Fearing for the life of his son, Mahesh Garg(PW-1) arranged money from his relatives, friends and his own bank accounts. He again received calls on 3rd April, 2003 threatening him not to inform the police. He was further directed to reach a designated place with the ransom amount and to wait for further instructions. Accordingly, he took the ransom amount to the address given by the miscreants i.e. Sector 17, Chandigarh, thereafter, to Sector 8, Chandigarh and ultimately to PGI hospital. On reaching there, he received another call and was directed to leave the bag with the ransom amount in his car and to proceed to the emergency ward of the hospital and wait for further instructions. Accordingly, he left the briefcase containing the money in the car and proceeded to the emergency ward of PGI hospital. However, he did not find anyone present there. After some time, he received another call

asking him to leave the place and wait for another call with the assurance that his son would be released along with the car after the cash amount had been counted and verified. He received another call by which he was informed that his car was parked near the *chowk* of Sector 11/15, Chandigarh. Accordingly, he took the car and proceeded to his house. At about 10:30 pm, another call was received informing him that his son Sachin Garg(PW-2) was standing near the *chowk* of Sector 20, Panchkula. He brought Sachin Garg(PW-2) back home from that place. He again received a call threatening that if any attempt was made to inform the police, then the entire family would be eliminated. Thus, out of fear, they did not approach the police.

9. Sachin Garg(PW-2) in his statement(Exhibit-DB) recorded by the Investigating Officer (PW-37) on 20th April, 2003 under Section 161 of the Code of Criminal Procedure, 1973(hereinafter being after referred to as 'CrPC') stated that on 2nd April, 2003, he had gone to Sector 7, Panchkula in his car for playing badminton. While he was returning home, and had reached near Sector 17, Panchkula, a Maruti car obstructed his path. Three persons came out of the car from which one was carrying a pistol. The said assailant placed the pistol against his head and asked him to shift to the adjoining seat. The second assailant armed with a knife occupied the rear seat. He was then directed to shift to the rear seat. His wrist watch, ATM card, school card, gold chain and some money lying in his pocket were robbed at pistol and knife point. In the meantime, the third assailant who was also armed with a knife took the driver's seat and his car was driven towards the *pulia* where Sachin Garg(PW-2) was blindfolded and shifted into the Maruti car and was taken away to some unknown location. He was kept confined in a room during the intervening night of 2nd and 3rd April, 2003. A person named Gaurav Bhalla was present in the room and he was calling out names of the other accused as Sanjay, Mintu and Gaurav. He was again blindfolded in the evening and was taken in a car and was dropped off at the market of Sector 20, Panchkula with the instruction to remove the blindfold(*patti*) after 10 minutes and stand there and wait for his father. The accused threatened to eliminate his entire family in case intimation of the incident was given to the police. On returning home, he came to know that his father had paid an amount of Rs. 1 crore for securing his release.

10. Further investigation revealed that Gaurav Maini was using Mobile No. 9814XXXXXX, Gaurav Bhalla was using Mobile No. 9814XXXXXX and Sanjay @ Sanju was using Mobile No. 9814XXXXXX.

11. Based on the statements of Mahesh Garg(PW-1) and Sachin Garg(PW-2), offences punishable under Sections 392, 342, 364A and 506 IPC were added to the case on 20th April, 2003.

12. The accused Pankaj Bansal, Gobind, Amit Verma and Gaurav Maini were arrested on 29th April, 2003. It is alleged that Gaurav Maini suffered a disclosure statement under Section 27 of the Indian Evidence Act, 1872(hereinafter being referred to as 'Evidence Act') divulging that he, along with Gaurav Bhalla, Sanjay @ Sanju and Munish Bhalla had kidnapped Sachin Garg(PW-2), who was released after collecting an amount of Rs.1 crore as ransom. The accused Gaurav Bhalla was arrested on 1st May, 2003 and he too suffered a disclosure statement under Section 27 of the Evidence Act. Likewise, the accused Munish Bhalla and Sanjay @ Sanju also made disclosures to the Investigating Officer(PW-37) under Section 27 of the Evidence Act.

13. Following items were allegedly recovered at the instance and in furtherance of the disclosures made by the accused appellants being Gaurav Maini(A1), Gaurav Bhalla(A2), Munish Bhalla(A3) and Sanjay @ Sanju(A4): -

Name of Accused	Recovered Articles
Gaurav Maini	(i) A wristwatch of Sachin. (ii) Currency notes to the tune of Rs. 17,00,000/- (iii) Cash amount to the tune of Rs. 3,50,000/- from his house (iv) A motorcycle along with papers. (v) One mobile phone marked Digital worth Rs. 7500/- (vi) One gold kara (vii) Cash amount to the tune of Rs. 3,72,500/- from his house (viii) One mobile phone Panasonic bearing IMEI No. 350179626659830

Gaurav Bhalla	(i) Cash amount to the tune of Rs. 18,50,000/- from his locker at Central Bank of India, Sector 10, Panchkula. (ii) Receipt worth Rs. 27,300/- regarding the purchase of a Mobile phone. (iii) A mobile phone worth Rs. 27,000/- (iv) One L.G. Air Conditioner worth Rs. 23,500/- from Cabin No. 20, SCO No. 37, Sector 11, Panchkula (v) Cash amount to the tune of Rs. 5,80,000/- from Cabin No. 20, SCO No. 37, Sector 11, Panchkula
Munish Bhalla	(i) Cash amount to the tune of Rs. 20,00,000/- from his locker at Ambala Central Cooperative Bank, Ambala. (ii) An ATM card and school card of Sachin. (iii) One Motorcycle bearing registration No. HR01E-4113 (Bullet) worth Rs. 35,000/- (iv) One Panasonic mobile (v) Cash amount to the tune of Rs. 4,55,500/- from his Battery shop in Mohar Market Ambala City. (vi) His Maruti Car bearing No. HR 35A-0012 used in Kidnapping.
Sanjay @ Sanju	(i) Rs. 22,000/- during his personal search. (ii) Rs.20,50,000/- currency notes in denomination of Rs. 500/- from the Almirah of his house. (iii) Rs. 1,28,000/- from a shop (iv) An Air pistol used in the offence. (v) One mobile phone marked Samsung IMEI No. 350019563917100 (vi) A gold chain of Sachin (vii) Amount to the tune of Rs. 40,000/- deposited in his bank account at HDFC bank, Sector 11, Panchkula.

14. Upon completion of the investigation, a charge sheet came to be filed against seven accused persons in the Court of learned Chief Judicial Magistrate, 1st Class, Panchkula. The offence under Section 364A IPC being exclusively sessions triable, the case was committed to the Court of learned Additional Sessions Judge, Panchkula for trial. The learned trial Court framed charges against the accused Gaurav Maini(A1), Gaurav Bhalla(A2), Munish Bhalla(A3) and Sanjay @ Sanju(A4) for offences punishable under Sections 364A, 392 and 120B IPC. They denied the charges and claimed trial. The remaining three accused namely Pankaj Bansal, Gobind and Amit Verma were discharged.

15. The prosecution examined 37 witnesses and exhibited 125 documents in order to bring home the charges. The accused were questioned under Section 313 CrPC. They denied the prosecution allegations and claimed to be innocent. Gaurav Maini(A1) made a pertinent assertion that he had no concern whatsoever with the alleged crime and the case was totally cooked up. Gaurav Bhalla(A2) stated that he was involved in a love affair with Shivani @ Kaku, daughter of Mahesh Garg(PW-1) since 3 to 4 years prior to the occurrence. Shivani @ Kaku used to send him greeting cards as an expression of love. She often used to ring him up from her mobile phone and landline numbers. On 1st April, 2003, Shivani @ Kaku approached him and pressurized him to elope with her. He tried to reason with her that it was not the right step and advised her to return home. Since, she was pressurizing him for marriage, he assured her that they would marry. He was illegally detained by the CIA officials on 26th April, 2003 and was kept confined and tortured in custody. No recovery was effected from him and all the recoveries were manipulated. The other accused also denied the prosecution allegations and claimed to be innocent. Four witnesses were examined in defence.

16. After hearing the arguments of both the sides and analysing the evidence, the learned trial Court proceeded to convict and sentence the accused appellants(A1, A2, A3 and A4) as above *vide* judgment and order dated 26th September, 2005. The appeals preferred by the appellants against the judgment rendered by the trial Court were rejected by the Division Bench of the Punjab and Haryana High Court *vide* judgment dated 19th, January, 2009 which is subjected to challenge in these four appeals by special leave.

Submissions of learned counsel for the appellants:-

17. Ms. Kiran Suri, learned senior counsel representing the accused appellant Gaurav Bhalla(A-2), vehemently and fervently contended that the entire case setup by the prosecution is false and fabricated. For assailing the impugned judgments, learned senior counsel advanced the following pertinent submissions: -

(i) That the alleged incident of kidnapping and demand of ransom took place on 2nd April, 2003. Even though the kidnapped boy, i.e., Sachin Garg(PW-2) had been released on 3rd April, 2003, the family members took no steps whatsoever to report the matter to the police. This rank silence of the family members and their utter failure to report the matter to the police or the authorities casts a grave doubt on the truthfulness of the entire prosecution case.

(ii) That the Investigating Officer(PW-37) went to the house of the kidnapped boy on 15th April, 2023, and recorded the statement of his grandfather Shamlal Garg on the very same day. However, no effort was made by the Investigating Officer(PW-37) to record the statement of Sachin Garg(PW-2) on the same day despite he being available in the house. Sachin Garg(PW-2), categorically stated to the Investigation Officer(PW-37) on 20th April, 2003 that he had identified Gaurav Bhalla(A2) at the time of the incident. Had there been an *iota* of truth in the prosecution case, identity of Gaurav Bhalla(A2) would definitely have been disclosed by Shamlal Garg to the Investigating Officer(PW-37), when his statement was recorded on 15th April, 2003.

(iii) That the entire process of recovery of money and other articles at the instance of the accused is totally fabricated and remained unsubstantiated because the arrest memos of the accused were never proved by the prosecution. The accused made pertinent assertion that the police had kept them illegally confined for almost seven days and thus proving of the arrest documents was imperative to arrive at the truth of the case.

(iv) That the prosecution, did not tender any evidence regarding the fate of the currency notes allegedly recovered at the instance of the accused. The Investigating Officer(PW-37) candidly admitted that he handed back the currency notes to Mahesh Garg(PW-1)

of his own accord. As per the learned senior counsel, this action of the Investigating Officer in returning the *mudammal* currency notes to the complainant(PW-1) without any order of the Court, throws grave doubt on the truthfulness of the entire process of disclosures and discovery.

(v) That the SIM cards in question were not issued in the name of the accused. The prosecution did not lead any evidence whatsoever to show that the accused had ever acquired or were using the mobile numbers from which the ransom calls were allegedly made.

(vi) That the secret information based whereupon FIR No. 283 of 2003(Exhibit-PAA/1) was registered was not brought on record and thus it is a clear case of concealment of vital evidence warranting adverse inference against the prosecution.

(vii) That there is no material to show as to when the special report reached the Magistrate concerned pursuant to the registration of the formal FIR No. 283 of 2003(Exhibit- PAA/1).

(viii) That the accused other than Gaurav Bhalla(A2) were not known to the victim Sachin Garg(PW-2) from before. The Investigation Officer(PW-37) made no effort whatsoever to subject these accused to the Test Identification Parade(TIP) and thus, the dock identification of the accused namely Gaurav Maini(A1), Munish Bhalla(A3) and Sanjay @ Sanju(A4) for the first time in the Court by Sachin Garg(PW-2) is of no value whatsoever. Attention of the Court in this regard was drawn to the deposition of Mahesh Garg(PW-1) who stated that his son was never asked to identify the accused by the police in any identification parade. Learned senior counsel also referred to the cross-examination of Sachin Garg(PW-2) wherein, he stated that once he had gone to CIA with his father and there, he saw the accused from some distance. The police did not record his statement regarding the identification of the accused. Sachin Garg(PW-2) also admitted that he had told his father Mahesh Garg(PW-1) and his grandfather Shamlal Garg that one of the accused was Gaurav Bhalla (A2) and that the other accused were calling out the names of each other. Thus, as per the learned senior counsel, the omission regarding the names of these accused in the previous statement of Sachin

Garg(PW-2) recorded under Section 161 CrPC is fatal to the prosecution case.

(ix) That the so-called disclosure statements of the accused as recorded by Munish Kumar, Sub-Inspector(PW-33) and Surjit Kumar, Investigating Officer(PW-37) were not proved as per law. The prosecution failed to prove that the recovered *mudammal* articles including the currency notes were kept securely at the *malkhana* of the police station. In this regard, attention of the Court was drawn to the statement of Investigating Officer(PW-37), highlighting the fact that the said witnesses did not utter a single word regarding the fate of the currency notes after the purported seizure and his failure to explain as to how the same were dealt with after the seizures were allegedly made at the instance of the accused.

(x) That the learned trial Court as well as the High Court failed to give due credence to the evidence of the defence witnesses. Stress was laid by the learned senior counsel to the deposition of Manav Malhotra(DW-4) who stated that he often saw Gaurav Bhalla(A2) and Shivani @ Kaku, sister of the kidnapped boy-Sachin Garg(PW-2) together. It was contended that, as a matter of fact, the family members were aware about the ongoing affair between Gaurav Bhalla(A2) and Shivani @ Kaku and were opposed to it and hence, the case of kidnapping for demand of ransom was cooked up so as to put Gaurav Bhalla(A2) and his companions behind bars and sever the relationship.

(xi) It was further contended that the defence witnesses, gave affirmative evidence for proving the plea of *alibi* raised by the accused. However, neither the trial Court nor the High Court gave due consideration to the evidence of the defence witnesses and brushed their testimonies aside in a totally perfunctory manner.

18. The learned counsel representing the remaining accused appellants adopted the submissions of learned senior counsel Ms. Kiran Suri.

19. The court was apprised that accused Gaurav Maini(A1), Gaurav Bhalla(A2), Munish Bhalla(A3) and Sanjay @ Sanju(A4) were in custody for 10 years 11 months(approx.); 9 years(approx.); 7 years 2 months; 10 years 10 months(approx.), respectively.

20. On these grounds, learned counsel for the appellants implored the Court to accept the appeals, set aside the impugned judgments, and acquit the accused appellants of the charges.

Submissions on behalf of the respondent-State: -

21. *Per contra*, learned counsel for the State, vehemently and fervently opposed the submissions advanced by learned senior counsel for the accused appellants. It was contended that the prosecution case is founded on unimpeachable testimony of the minor boy Sachin Garg(PW-2) who was kidnapped by the accused appellants for demand of ransom. The witness gave clinching evidence identifying and implicating the accused appellants for his kidnapping and release after payment of ransom. The trivial contradictions appearing in the evidence of the witness rather establish that he is a truthful witness and has given a true picture of the incident. The evidence of Sachin Garg(PW-2) finds due corroboration from the testimony of Mahesh Garg(PW-1), 161 CrPC statement of Shamlal Garg recorded by Investigating Officer(PW-37) and the incriminating recoveries effected at the instance of the accused appellants.

22. He contended that the recoveries having been effected proximate to the incident of kidnapping for ransom, the burden of explaining, as to how the incriminating articles including the huge sums of money came into their possession shifted on to the accused appellant by virtue of the presumption provided under Section 106 read with Section 114(a) of the Evidence Act. Since, the accused failed to offer any plausible explanation in this regard the prosecution is entitled to raise the statutory presumption against them.

23. Learned counsel further urged that since the accused appellants had given a grave threat of evil consequences to Mahesh Garg(PW-1), he was justified in not approaching the police for reporting the matter and his silence cannot be treated as an unnatural conduct.

24. He further urged that the trivial contradictions in the evidence of the prosecution witnesses cannot be considered sufficient so as to discard the entire prosecution case which is based on unimpeachable direct as well as circumstantial evidence. He further contended that the trial Court and the High Court have recorded concurrent findings of facts in the impugned judgments after appreciating the evidence available on record and thus this Court should not feel persuaded

to interfere in the conviction of the accused while exercising the jurisdiction under Article 136 of the Constitution of India. On these grounds, he implored the Court to dismiss the appeals and affirm the impugned judgments.

25. We have given our thoughtful consideration to the submissions advanced at bar and have gone through the impugned judgments and the evidence placed on record.

Discussion and Conclusion: -

26. At the outset, we are of the opinion that the very inception of the prosecution case is shrouded under a grave cloud of doubt and we shall record our reasons for the above conclusion while discussing the prosecution evidence. It is undisputed that neither the victim Sachin Garg nor his family members ever reported the incident to the police. Sachin Garg(PW-2) deposed that when he was driving on the road dividing Sectors 17 and 18, three miscreants obstructed his path. They had come in a Maruti car. One of them placed a pistol against the head of Sachin Garg and asked him to shift to the adjoining seat. The other assailant was armed with a knife and he directed Sachin Garg to shift to the rear seat of the car and snatched away his gold chain. The person holding the pistol came and sat beside him. The third assailant who too was armed with a knife, occupied the driver's seat and extended a threat. His wrist watch, ATM card, identity card and some cash amount were also snatched away by the same person who had taken the gold chain. The miscreants then put a blindfold on his eyes and drove away the car. Sachin Garg(PW-2) admitted that while being blindfolded, he could identify the driver as Gaurav Bhalla(A2). He was taken to an unknown location where they reached after driving for 45 minutes. He was kept confined in a room for the entire night with the blind-fold. He overheard the accused appellants talking to each other and, thus, he managed to catch their names. Then, he was taken in a car and accused appellants told him that they would be releasing him at a place from where, his father would pick him up. He was extended a threat that in case he disclosed about the occurrence to anyone, his entire family would be eliminated. He was dropped off after some time. He opened the blind-fold(*patti*) and found himself standing in Sector 20, Panchkula. Ten to fifteen minutes later, his father arrived and took him home. Thereafter,

he came to know that his father had paid a sum of Rs. 1 crore as ransom for securing his release.

27. In cross examination, Sachin Garg(PW-2) admitted that the gold chain which had been snatched by the accused appellants was returned to him at Sector 20, Panchkula and the ATM card was returned to him by the police officials. The witness admitted that he was never called by the police officials to join any identification proceedings. He had randomly gone to the CIA officer with his father where he saw the accused from some distance. A pertinent admission was made by the witness that he had identified the accused appellants and had overheard them taking names of each other and that he had disclosed these facts to his father Mahesh Garg(PW-1) and grandfather Shamlal Garg. The witness also admitted that when the police officials recorded his statement, he did not give the description about the features of the accused.

28. A pertinent suggestion was given by the defence to the witness(PW-2) in cross examination that his sister Shivani @ Kaku was involved in a relationship with Gaurav Bhalla(A2) and that both of them eloped on 1st April, 2003. Shivani @ Kaku returned on 14th April, 2003, whereafter, the case was cooked up by concocting a story against Gaurav Bhalla(A2) and other accused who were his friends and relatives. However, he denied the said suggestion. The witness(PW-2) was confronted with his previous statement under Section 161 CrPC statement(Exhibit-DB) wherein he had named Gaurav Bhalla(A2) as the fourth accused. He admitted that his statement was recorded by the police officials for the first time on 20th April, 2003 and that the police officials had visited his house once or twice earlier.

29. Mahesh Garg(PW-1) testified that his son Sachin Garg(PW-2) had gone to play badminton on 2nd April, 2003 at around 6.00 pm. He did not return till 9:00 pm, on which efforts were made to trace his whereabouts, but he could not be located. At 11:00 pm, a telephone call was received by the witness(PW-2) from an unknown person who demanded a ransom of Rs. 1 crore for the safe return of his son. A threat was given that if police was informed, his son would not remain alive. Fearing for his son's life, Mahesh Garg (PW-1) did not report the matter to the police. However, he discussed the issue with his relatives and friends and collected an amount of Rs.

1 crore from various sources. The next day, he received a second telephone call informing him the location of the car of Sachin Garg(PW-2) which he collected. He received a third telephone call on 3rd April, 2003 wherein again, the demand of ransom and the threat to kill Sachin Garg(PW-2) was repeated. On the same day at about 7:00-7:30 pm, he received a call directing him to leave his house with the ransom amount. Acting on the directions of the miscreant(s), the witness placed the ransom amount in his car and proceeded towards PGI hospital, Chandigarh. As instructed by the caller, he left the cash in the car and went to the emergency ward of the hospital. Sometime later, his car was seen lying abandoned at the crossing of Sector 11-Sector 15, Chandigarh. The suspects called and told him that Sachin Garg(PW-2) would be released after counting the ransom amount and, thus, he returned home. On the same day, at about 10:30 pm, he got a telephone call intimating that his son had been released in the market area of Sector 20, Panchkula. On receiving this information, Mahesh Garg(PW-1) proceeded to Sector 20, Panchkula and brought his son Sachin Garg(PW-2) back home. One more call was received with a threat that if the police or anyone else was informed, the entire family would be eliminated.

30. We find that there exist inherent improbabilities in the versions of these two star prosecution witnesses i.e. Mahesh Garg(PW-1) and Sachin Garg(PW-2) which go to the root of the matter.

31. Neither of the witnesses stated that the kidnappers allowed Sachin Garg(PW-2) to talk to his family members so as to lend assurance about his safety. In this background, it is hard to believe that Mahesh Garg(PW-1) would rely upon such an unverified telephone conversation and proceed to collect a huge sum of Rs. 1 crore and thereafter, leave it in an unsecured condition inside his car without having any assurance whatsoever regarding the safety of Sachin Garg(PW-2) for whose purported release the ransom amount had been demanded. This is a grave lacuna which brings the entire prosecution case under a cloud of doubt. In the natural course of human conduct, the family members of the kidnapped person would expect and require some kind of assurance about the victim's safety before agreeing to part with a huge sum of money as ransom.

32. Admittedly, the police had visited the house of Mahesh Garg(PW-1) on two to three occasions before 20th April, 2003, but he never informed them about the incident. Inspite of the statement of Shamlal Garg having been recorded by the police, the FIR was not registered regarding the alleged kidnapping of Sachin Garg(PW-2) and his release after payment of ransom. The FIR(Exhibit-PAA/1) was admittedly registered on the basis of the so-called secret information received by Jai Singh, SI(PW-27) which was also not brought on record.

33. A perusal of the deposition of Mahesh Garg(PW-1) would reveal that he admitted that from the very ransom amount paid by him, he received back a sum of Rs. 95,08,000/- from the Court, but he could not remember the date of receiving the amount. It is however an admitted position as emerging from record that no such order was ever sought for or procured from the Court. Mahesh Garg(PW-1) also admitted that his son Sachin Garg(PW-2) was never asked to identify the accused by the police in any identification parade.

34. Jai Singh, SI(PW-27) deposed that he was on patrolling duty at the market of Sector-16, Panchkula when he received a secret information about a gang operating in Panchkula which was indulged in kidnapping children for ransom and if the amount was not paid, they would kill the victims and that such an incident had occurred in Kothi No. 81-A, Sector 17, Panchkula. The witness(PW-27) recorded a *ruqa*(Exhibit-PAA) dated 15th April, 2003 on the basis of this information and forwarded the same to the Police Station, Sector 5, Panchkula for registration of a case. Acting on the *ruqa*(Exhibit-PAA) forwarded by Jai Singh(PW-27), FIR(Exhibit-PAA/1) came to be registered for the offences punishable under Sections 387 and 507 IPC by Jai Raj, ASI(PW-25). Indisputably, the *ruqa*(Exhibit-PAA) was merely based on a source information and it is totally unacceptable that the police officials could register the FIR merely on the basis of such source information without even verifying the fact as to whether any such incident had actually occurred. The very fact that this FIR(Exhibit-PAA/1) was registered by referring to an incident which took place in Kothi No. 81-A, Sector 17, Panchkula without making any verification from the aggrieved person/s clearly shows that the Investigating Agency right from inception had started plotting that the case should proceed in a

particular direction. This is a very suspicious circumstance that creates a grave doubt on the conduct of the Investigating Agency.

35. After the FIR(Exhibit-PAA/1) had been registered on the basis of *ruqa*(Exhibit-PAA) received from Jai Singh, SI(PW-27), the investigation of the case was assigned to Surjit Kumar, Investigating Officer(PW-37). The Investigating Officer(PW-37) testified on oath that he proceeded to Kothi No. 81-A, Sector-17, Panchkula where Shamlal Garg met him and gave him two mobile Nos. being 9815XXXXXX and 9815XXXXXX alleging that these mobile numbers were of the kidnappers. The Investigating Officer(PW-37) then proceeded to the Bharti Airtel Company, Mohali to verify the ownership of these two mobile numbers. The administrative official of the Company informed the Investigating Officer(PW-37) that the mobile numbers had been sold to Kohli Traders, Sector-26, Chandigarh on which he proceeded to Kohli Traders and met the proprietor Yogesh Kohli who in turn provided information that the mobile numbers(SIM cards) had been sold to Singla Traders, Sector-8, Chandigarh. He thereupon went to Singla Traders, but could not find anyone there. He again went to Singla Traders on 17th April, 2003, where Niranjan Singla and Reena Singla met him and gave him the details of the persons to whom the SIM cards had been sold. However, no record of this sale was maintained at Singla Traders. Pawan Kumar, Head Constable procured the call details of these two mobile numbers *vide* memo(Exhibit-PV). However, the Investigating Officer(PW-37) did not divulge anything about the identity of the person/s to whom the SIM Cards had been sold by Singla Traders.

36. It is important to note here that as per the version of Investigating Officer(PW-37), Shamlal Garg's statement was recorded on 15th April, 2003 wherein he gave details of the two mobile numbers alleging that these were the mobile numbers of the kidnappers. The Investing Officer(PW-37) did not state that Shamlal Garg complained to him that his grandson Sachin Garg(PW-2) had been kidnapped or that ransom money had been paid to the kidnappers for securing his release. It is not in dispute that Shamlal Garg was not examined as a witness in the case and that Section 161 CrPC statements of Mahesh Garg(PW-1) and Sachin Garg(PW-2) were recorded as late as on 20th April, 2003. Thus, there is a glaring omission manifest from the

evidence of the Investigating Officer(PW-37) which shows that even after the police officials had contacted the family members of the kidnapped boy on 15th April, 2003, no details were provided by them regarding the alleged incident of kidnapping of Sachin Garg(PW-2) on 2nd April, 2003 or that he was got released after paying ransom to the tune of Rs. 1 crore. This manifest lacuna in the prosecution story is another indication that the entire case is nothing but a cock and bull story.

37. The decision of Investigating Officer(PW-37) in abruptly proceeding to the Bharti Airtel Company, Mohali for verifying the mobile numbers without even requiring Shamlal Garg to file a formal complaint regarding the alleged incident of kidnapping and without recording the statement of the kidnapped boy-Sachin Garg(PW-2), brings the conduct of the Investigating Officer(PW-37) under a cloud of doubt. Shamlal Garg's statement should have put the Investigating Officer(PW-37) on a high degree of alert and his first reaction and lawful obligation would have been to immediately make enquiry from the allegedly kidnapped boy Sachin Garg(PW-2). However, the Investigating Officer(PW-37) delayed recording his statement for almost five days.

38. The Investigating Officer(PW-37) stated that he again went to Kothi No. 81-A, Panchkula on 20th April, 2003 and on that day, he recorded the statements of Mahesh Garg(PW-1) and Sachin Garg(PW-2) under Section 161 CrPC whereafter, offences punishable under Sections 342, 364A, 392 and 506 IPC were added to the case. This gross delay on part of the police officials in collecting tangible evidence regarding the so-called kidnapping and release of Sachin Garg(PW-2) after paying ransom amount is a grave indication of unnatural conduct which has to be kept in mind while appreciating the evidence of the star prosecution witness. In the later part of his examination-in-chief, the Investigating Officer(PW-37) stated about the further steps of investigation including the arrest of the accused, recording of their disclosure statements, recovery of currency notes and other incriminating articles in the sequence which have been narrated *supra* at Para No.13 of this judgment.

39. In cross-examination, the Investigating Officer(PW-37) stated that after the investigation of the case was entrusted to him, he went to the house of Mahesh Garg(PW-1) on 15th April, 2003. A *zimni*

was recorded in the case file to the effect that Jai Singh, SI(PW-27) had visited the house of Mahesh Garg(PW-1) on 15th April 2003 at about 8:00 pm to make enquiry about the case from Mahesh Garg(PW-1). Admittedly, the statement of Mahesh Garg(PW-1) was never recorded by Jai Singh(PW-27) under Section 161 CrPC. The Investigating Officer(PW-37) further stated that he reached the house of Mahesh Garg(PW-1) at about 10:00 pm on the very same day, the investigation of the case was assigned to him, but Mahesh Garg(PW-1) was not available at that time. Shamlal Garg, father of Mahesh Garg(PW-1) was found present and he made an enquiry about the incident from him. However, the witness did not record the statement of Shamlal Garg under Section 161 CrPC on the premise that Shamlal Garg seemed to be apprehensive and frightened because of old age. However, this seems to be nothing but a lame excuse. The Investigating Officer(PW-37) stated that he had recorded the statement of Shamlal Garg under Section 161 CrPC at a later date. He recorded the statements of Sachin Garg(PW-2) and Mahesh Garg(PW-1) on 20th April, 2003 at about 12:00 noon. Mahesh Garg(PW-1), divulged the names of accused as Gaurav, Sanjay, Munish @ Mintu and Gaurav Maini in his statement under Section 161 CrPC. Subsequently, the Investigating Officer(PW-37) resiled from this version and stated that names of the accused were not disclosed by Mahesh Garg(PW-1), but rather the same were stated by Sachin Garg(PW-2). The Investigating Officer(PW-37) was confronted with the special report(Exhibit-PEEE) prepared by the SHO of Police Station, Sector 5, Chandigarh under Section 173 CrPC wherein, neither the names of the accused nor the title of the case were mentioned. The Investigating Officer explained that in spite of the statements of Mahesh Garg(PW-1) and Sachin Garg(PW-2), being available on the case file, he did not consider it essential to mention the names of the accused in the special report. This omission is again an indication of suspicious conduct of the Investigating Officer(PW-37). The Investigating Officer(PW-37) further admitted that on making enquiry from Niranjan Singla and Reena Singla, he could not gather any information regarding the identity of the person(s) to whom the SIM cards had been sold. The Investigating Officer(PW-37) also admitted that the cash amount recovered from the accused was not available in the Court. The recovered currency notes were deposited with CIA staff, i.e. Male

Head Constable, Panchkula(hereinafter being referred to as 'MHC'). These currency notes were not in a sealed condition when they were deposited. The currency notes recovered at the instance of the accused were not produced before the Court as the same already been taken on *superdari* by the *Superdar*. He did not remember the name of the MHC. He also could not state whether the MHC had been cited as a witness in the case. A pertinent suggestion was given to the witness(PW-37) that he was deliberately concealing the name of the MHC because amount recovered from Munish Bhalla and Gaurav Bhalla was never deposited with him.

40. At this stage, it would be relevant to mention that the Investigating Officer(PW-37) claimed that the recovered currency notes had been handed over to the *Superdar*, but no order of the Court concerned directing/permitting handing over of the currency notes to anyone is available on record. Admittedly, the recovered currency notes were neither sealed at the time of recovery nor did the prosecution led any evidence to show that the currency notes allegedly seized from the accused were ever deposited in the *malkhana* of the police station. As a matter of fact, on going through the entire record and the evidence of the material prosecution witnesses *viz*. Mahesh Garg(PW-1) and the Investigating Officer(PW-37), we find that the prosecution has not given any evidence whatsoever to explain the fate of the currency notes allegedly recovered at the instance of the accused other than the bald version of Investigating Officer(PW-37) referred to above. No proceedings to prove the purported release of the currency notes on *superdari* were brought on record.

41. Mahesh Garg(PW-1) in his examination-in-chief did not state that he had received the recovered currency notes on *superdari*. Only during cross-examination, did he admit that he had received back an amount of Rs. 95,08,000/- from the Court but could not divulge the date of such receipt.

42. Since the prosecution alleged demand of ransom amount of around Rs. 1 crore and the recovery thereof from the accused without any doubt, the recovered currency notes were in the nature of case property/*mudammal.* The disposal of the case property could only have been done by taking recourse to the procedure contained under Sections 451, 452 and 457 CrPC as the case may be. The Investigation Officer(PW-37) had no authority to release the currency

notes without an order of the Court and his action to the contrary tantamounts to grave misconduct. At Para 96 of its judgment, the trial Court causally brushed aside the contention of the defence counsel regarding the non-production of the case property(currency notes) in the Court observing that the recovered currency notes were released on *superdari* by the learned Magistrate. However, in the same para, the trial Court went on to note that the currency notes were never seen after the recovery and were not produced in the Court when the prosecution witnesses were examined. The fact remains that there is no indication in the judgment of the trial Court or for that matter of the High Court regarding the date of the order whereby, the currency notes were directed to be returned to Mahesh Garg(PW-1). We further find that no order for final disposal of the currency notes was passed by the trial Court under Section 452 CrPC which is a mandatory requirement. The sheer indifference exhibited by the trial Court and the High Court to this extremely important aspect of the case is shocking, to say the least. Therefore, the entire process of recovery of the currency notes is clearly flawed, marked by procedural errors and grave lacuna which goes to the root of the matter. The trial Court and High Court fell in grave error by not pulling up the prosecution for flagrant disregard of legal procedures and failure to document key details which undermines the prosecution's case.

43. The defence has come up with a pertinent theory that Gaurav Bhalla(A2) and Shivani @ Kaku, daughter of Mahesh Garg(PW-1) and sister of Sachin Garg(PW-2) were involved in a love affair and that Shivani had eloped from her house on 1st April, 2003. Immediately, thereafter, the complainant took steps to get caller IDs installed on the landline numbers operational in his house. In this regard the trial Court recorded its findings at Para 95 of the judgment dated 26th September, 2005 which are reproduced hereinbelow for the sake of ready reference: -

> "95. No doubt, the FIR in the present case was recorded on 15.4.2003 on ruqa Ex. PAA sent by PW 27 Jai Singh SI whereas the occurrence took place on 2.4.2003. Ex. DD is a letter dated 9.4.2003 written by S.P. Panchkula to the Spice Tele. Com. Mohali. Document Ex. DE is also a copy of same letter dated 9.4.2003. Ex. DF is also a letter dated 9.4.2003 written by S.P. Panchkula to Bharti

Mobile Ltd. Mohali. Letter Ex. DG is a letter written by Surjit Kumar SI to the Commercial Officer. Telephone, Panchkula for providing I.D. Caller facility on telephone nos. 566403 and 572139. Even if it is presumed that the above referred letters were issued by the police to the Mobile companies and telephone department prior to the lodging of FIR, even then the prosecution case cannot be dislodged reason being that his delay in lodging the FIR has been explained by the prosecution. It has also been explained why the FIR was not got lodged by the family members of Sachin Garg. PW 1 Mahesh Kumar Garg father of Sachin Garg has stated that the kidnappers after kidnapping his son gave threatening on the telephone repeatedly that in case ransom amount is not paid or police is informed, his son would be killed and due to this reason, he did not report the matter to the police. When a person under threat of life has paid ransom for release of his kidnapped son and if he does not report the matter to the police under constant fear of his and his family life, if the FIR was lodged by the police official, does not amount that it has created suspicion in the present case but in such a case, role of agency must be appreciated. It has also been proved in this case that from the call details of mobile No. 9815475291 and 9815475360 that these were used for demanding ransom amount and calls were given on telephone nos. of Mahesh Garg 2562954 and Mobile no. 9817208181. It has also proved form the record of Airtel Company that three mobile sets bearing IMEI nos. 3501796266-59830, 350019563917100 and 35060980768- 5060 were used for these two SIM Cards. From the evidence of PW 33 Manish Kumar SI, it is established from the record of Spice Communication Ltd. that other mobile Nos. 9814783373, 9814688843 and 9814735976 were also registered on the above referred IMEI numbers and it was found that the above referred mobile numbers were pertaining to accused Gaurav Maini, Gaurav Bhalla and accused Sanjay @Sanju respectively. When there is cogent and convincing evidence of the prosecution on record to prove the complicity of the accused persons

> in the commission of offence, then this delay in lodging the FIR and letters Ex. DD. Ex. DE and Ex. DF reflecting the date prior to the FIR do not create such doubt going in favour of the accused but indicting the serious efforts of the police agency to check the crime in the society. Even the name of the accused has not been mentioned in special report Ex. PEEE sent on 20.04.2003, does not make any difference because this special report was sent when offence under section 364-A IPC was added and this was only the purpose for recording the special report. In judgment Ravindra @ Ravi Bansi Gohan's case (Supra), it was held by the Apex Court that FIR should not be on the basis of investigation but should be outcome of investigation. In the present case, FIR is not on the basis of investigation as it was only first information report given by PW 27 Jai Singh ASI when he was on patrolling duty and hence, this judgment does not help the accused in any manner."

44. We find that the aforesaid reasonings assigned by the trial Court are absolutely fanciful and unconvincing. The trial Court held that steps had been taken by the police to install Caller ID facilities on the telephone numbers installed at the house of Mahesh Garg(PW-1) on 9th April, 2003 in order to check the crime. It is not in dispute that the kidnapped boy had returned home on 3rd April, 2003 itself and thus, there was no logical reason whatsoever for Mahesh Garg(PW-1) to have initiated steps for installing Caller ID facilities on the landline numbers thereafter.

45. The delay in lodging of the FIR was sought to be overlooked by both the Courts with a bald observation that the complainant party was under the fear of the threats given by the accused. Indisputably, Sachin Garg had returned home on 3rd April, 2003. Consequently, the complainant party could not be labouring under the fear of threats allegedly given by the accused after the victim had returned home.

46. The Investigating Officer(PW-37) stated that Mahesh Garg (PW-1) was not present in the house on 15th April, 2003. However, it is not the case of the prosecution that even Sachin Garg(PW-2) was not present in the house when the Investigating Officer(PW-37) visited

Kothi No. 81-A and recorded the statement of Shamlal Garg. Hence, a further doubt is created on the truthfulness of the prosecution case on account of non-examination of Sachin Garg (PW-2) by the police, on the date on which the incident of kidnapping came into the knowledge of the police officials. Thus, the very core of the prosecution case is shaken to its foundation on account of the complainant party failing to inform the police about the incident, in spite of ample opportunities.

47. Shamlal Garg, grandfather of the kidnapped boy-Sachin Garg(PW-2) was the first person who came into contact of the police officials on 15th April, 2003 and he admittedly disclosed about the incident to Investigating Officer(PW-37). In that background, Shamlal Garg would have been the most vital witness to unfurl the truth of the matter. However, for the reasons best known to the prosecution, Shamlal Garg was not examined as a witness in the case. As a matter of fact, the trial Court should have remained vigilant and it was absolutely essential for the Court to have exercised powers under Section 311 CrPC so as to summon and examine Shamlal Garg in evidence because his evidence was essential for a just decision of the case. Section 165 of the Evidence Act permits the Judge to ask any question as he pleases in any form, at any time, of any witness, or of the parties about any fact relevant or irrelevant or may order production of any document or thing.

48. A conjoint reading of Section 311 CrPC and Section 165 of the Evidence Act makes it clear that the trial Court is under an obligation not to act as a mere spectator and should proactively participate in the trial proceedings, so as to ensure that neither any extraneous material is permitted to be brought on record nor any relevant fact is left out. It is the duty of the trial Court to ensure that all such evidence which is essential for the just decision of the case is brought on record irrespective of the fact that the party concerned omits to do so.

49. This Court in the case of ***Pooja Pal v. Union of India and Others***[1] examined the ambit of powers of the Courts under Section 311 CrPC read with Section 165 of the Evidence Act and held as below: -

1 [2016] 11 SCR 560 : (2016) 3 SCC 135

"54. It was propounded in Zahira Habibulla case [Zahira Habibulla H. Sheikh v. State of Gujarat, (2004) 4 SCC 158] that in a criminal case, the fate of the proceedings cannot always be left entirely in the hands of the parties, crimes being public wrongs in breach and violation of public rights and duties, which affect the whole community and are harmful to the society in general. That the concept of fair trial entails the triangulation of the interest of the accused, the victim, society and that the community acts through the State and the prosecuting agency was authoritatively stated. This Court observed that the interests of the society are not to be treated completely with disdain and as persona non grata. It was remarked as well that due administration of justice is always viewed as a continuous process, not confined to the determination of a particular case so much so that **a court must cease to be a mute spectator and a mere recording machine but become a participant in the trial evincing intelligence and active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth and administer justice with fairness and impartiality both to the parties and to the community**.

57. It was underlined in Zahira Habibulla case [Zahira Habibulla H. Sheikh v. State of Gujarat, (2004) 4 SCC 158] that if ultimately the truth is to be arrived at, the eyes and ears of justice have to be protected so that the interest of justice do not get incapacitated in the sense of making the proceedings before the courts, mere mock trials. **While elucidating that a court ought to exercise its powers under Section 311 of the Code and Section 165 of the Evidence Act judicially and with circumspection, it was held that such invocation ought to be only to subserve the cause of justice and the public interest by eliciting evidence in aid of a just decision and to uphold the truth.** It was proclaimed that though justice is depicted to be blindfolded, it is only a veil not to see who the party before it is, while pronouncing judgment on the cause brought before it by enforcing the law and administer justice and not to ignore or turn the attention away from

> the truth of the cause or the lis before it, in disregard of its duty to prevent miscarriage of justice. That any indifference, inaction or lethargy displayed in protecting the right of an ordinary citizen, more particularly when a grievance is expressed against the mighty administration, would erode the public faith in the judicial system was underlined. It was highlighted that the courts exist to do justice to the persons who are affected and therefore they cannot afford to get swayed by the abstract technicalities and close their eyes to the factors which need to be positively probed and noticed. The following statement in Jennison v. Baker [Jennison v. Baker, (1972) 2 QB 52 : (1972) 2 WLR 429 : (1972) 1 All ER 997 (CA)] , was recalled : (QB p. 66)
>
> > "… 'The law should not be seen to sit by limply, while those who defy it go free, and those who seek its protection lose hope.'""
>
> (emphasis supplied)

50. We are fully satisfied that the trial Court failed to perform its lawful obligation under Section 311 CrPC read with Section 165 of the Evidence Act inasmuch as, the most vital witness whose deposition was imperative for arriving at the truth of the matter i.e. Shamlal Garg was not produced by the prosecution and the trial Court took no steps whatsoever to summon him by exercising its powers under Section 311 CrPC and Section 165 of the Evidence Act. The fact that the FIR was not registered on the first disclosure of the incident made by Shamlal Garg to Surjit Singh, Investigating Officer(PW-37) and non-examination of the said witness at the trial is a fatal lacuna which persuades this Court to draw an adverse inference against the prosecution.

51. The trial Court as well as the High Court placed reliance upon the call detail records, concluding that the suspected mobile numbers were in use of Gaurav Maini(A1), Gaurav Bhalla(A2) and Sanjay @ Sanju(A4). However, the fact remains that no convincing evidence was led by the prosecution to connect the accused persons with the afore-mentioned mobile numbers. Furthermore, the prosecution admittedly, did not prove the call detail records in accordance with the mandate of Section 65B of the Evidence Act and hence, the call detail records cannot be read in evidence. Reference in this regard

may be made to the judgment of this Court in the case of ***Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal and Ors.***[2]

52. In wake of the discussion made hereinabove, we summarise our conclusions as below: -

i. That the entire prosecution story is totally concocted and does not inspire confidence.

ii. The FIR(Exhibit-PAA/1) could not have been registered on the basis of the secret information received by Jai Singh, SI(PW-27) because the said information did not disclose the commission of any cognizable offence. If at all, the FIR had to be registered, the same should have been done on the basis of the statement of Shamlal Garg recorded by the police officials on 15th April, 2003. However, no such steps were taken by the police officials, thereby, creating a grave doubt on the bona fides of the actions of the Investigating Agency.

iii. That the complainant party failed to offer logical explanation for failing to file an FIR even after the kidnapped boy-Sachin Garg(PW-2) had returned home. It can safely be presumed that once the kidnapped boy had returned home, the threat perception at the hands of the offenders, if any, would have been diluted/disappeared. The delay in taking legal action creates a grave doubt on the truthfulness of the entire prosecution case.

iv. That the kidnapped boy-Sachin Garg(PW-2) knew accused Gaurav Bhalla(A2) from before and claims to have identified him at the time of the incident but in spite thereof, the name of Gaurav Bhalla(A2) was not disclosed to the police officials up to 20th April, 2003 which completely demolishes the veracity of the prosecution case. The omission of the names of the accused persons in the special report forwarded by Investigating Officer(PW-37) to his superior officials is also vital and creates further doubt on the conduct of the Investigating Agency.

v. It is an admitted fact that the accused appellants other than Gaurav Bhalla(A2) were not known to the kidnapped boy-

2 [2020] 7 SCR 180 : (2020) 3 SCC 216

Sachin Garg(PW-2) and they were identified by him for the first time in the dock during deposition in the Court. This creates a doubt on the dock identification of these accused by Sachin Garg(PW-2) who also admitted in the cross-examination that the accused persons were shown to him and his father by the officers of the CIA. This admission lends further succour to the conclusion that the identification of the accused by the witness Sachin Garg(PW-2) is not free from doubt.

vi. That the prosecution case failed to led trustworthy evidence to establish the recovery of the currency notes at the instance of the accused because the disclosure statements were not proved as per law. Furthermore, the currency notes were handed back to Mahesh Garg(PW-1) without any order of the Court which is an act of gross misconduct on the part of the Investigating Officer(PW-37). Rather, this Court is compelled to observe that perhaps the entire exercise of recording disclosure statements and the recovery of the currency notes is totally sham and that is why, the currency notes were neither deposited in the *malkhana* of the police station/bank nor were the same produced in the Court thereby, creating strong doubt on the very factum of the recovery.

vii. That the prosecution failed to examine the most relevant witness, namely, Shamlal Garg which compels the Court to draw an adverse inference against the prosecution.

53. The High Court as well as the trial Court failed to advert to these important loopholes and shortcomings in the evidence available on record which are fatal and completely destroy the fabric of the prosecution case.

54. As a consequence, this Court is of the firm opinion that entire story of the prosecution is nothing but a piece of fabrication and the accused were framed in the case for ulterior motive. There is no *iota* of truth in the prosecution story what to talk of proof beyond all manner of doubt which establishes the guilt of the accused. The fabric of the prosecution case is full of holes which are impossible to mend. Thus, conviction of the accused appellants as recorded by the trial Court and affirmed by the High Court cannot be sustained. The impugned judgments do not stand to scrutiny.

55. Resultantly, the judgment dated 26th September, 2005 passed by the trial Court and the judgment dated 19th January, 2009 passed by the High Court are hereby quashed and set aside and the appeals are accordingly allowed.

56. The appellants are acquitted of the charges. They are on bail and need not surrender. Their bail bonds are discharged.

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

Result of the case: Appeals allowed.

†*Headnotes prepared by:* Nidhi Jain

[2024] 7 S.C.R. 365 : 2024 INSC 490

Vinod Jaswantray Vyas (Dead) Through Lrs.
v.
The State of Gujarat

(Criminal Appeal No. 2038 of 2017)

09 July 2024

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

Issue for Consideration

The instant appeal is directed against the judgment dated 13.02.2017 passed by the Division Bench of the High Court, whereby, the Division Bench partly accepted the appeal preferred by the appellant accused-A1 and altered his conviction as recorded by the trial Court for the offence punishable under Section 302 of the Penal Code, 1860 to one under Section 304 Part I IPC.

Headnotes†

Penal Code, 1860 – Custodial torture – Death of victim – Acquittal of accused – Prosecution case that the two police officers i.e. A1 and A2, assaulted J in the confines of the Amraiwadi police station at separate intervals causing multiple injuries all over his body due to which he later died – Trial Court proceeded to convict both the accused and sentenced them to imprisonment for life – A1 and A2 appealed before the High Court – During the pendency of appeal, A-2 expired – High Court affirmed the decision of the trial Court, however, the offence was toned down from Section 302 IPC to offence under Section 304 Part I IPC – Correctness:

Held: J had come along with his advocate and his two sisters namely, PW-1 and PW-2 and surrendered at the Amraiwadi police station – Next evening J was produced before the jurisdictional Magistrate, who remanded him to judicial custody whereafter, he was taken to and lodged at the Sabarmati Central jail – J's condition deteriorated in the prison, later he died – It is further revealed from the records that deceased-J had been taken and presented before the DCP at the Karanj Bhavan, Ahmedabad and only thereafter, he was produced in the concerned Court of the Magistrate – The Medical Jurist (PW-9) stated that the person having received the injuries noted in the post-mortem report (Exhibit-50) would not be

* Author

able to climb a stair case without support and that the expression of the person and his movement would be painful – Thus, there was hardly any possibility that after having received the injuries mentioned in the postmortem report (Exhibit-50), deceased-J could have climbed up the stairs of Karanj Bhavan, Ahmedabad for being presented before DCP – Furthermore, on being presented before the Magistrate, the expression of pain on the face of the victim, would be prominently visible and could not have escaped being noticed by the Magistrate – Medical Jurist (PW-9) opined in his examination in chief that the injuries caused to the deceased were fresh and must have occurred within six to eight hours of the death – Thus, there is formidable evidence of the Medical Jurist (PW-9) which totally discredits the version of the eyewitnesses (PW-1, PW-2 and PW-3) that deceased-J was inflicted the injuries leading to his death while being in police custody at the Amraiwadi Police Station – Their evidence is contradicted in material particulars by the medical evidence and other attending circumstances – Considering the unimpeachable and strong opinion of the Medical Jurist (PW-9), the probability of the victim having been assaulted in Sabarmati Central jail leading to the fatal injuries noted in the postmortem report (Exhibit-50) is much higher as compared to the theory set up in the complaint and the evidence of the star prosecution witness that deceased-J was fatally assaulted by A1 and A2 while he was detained at the Amraiwadi Police Station – The prosecution has failed to bring home the guilt of both the accused persons (A1) (since deceased) and (A2)(since deceased) by leading cogent, convincing and reliable evidence and their conviction as recorded by the trial Court and affirmed by the High Court is not sustainable in the eyes of law – Resultantly, both accused A-1 and A-2 are acquitted of the charges. [Paras 41, 42, 43, 46, 50, 52]

Evidence – Testimony of witness – Unnatural conduct:

Held: In the instant case, two sisters (PW-1 and PW-2) claimed to have personally witnessed the assault being made on J (deceased) – They admitted in their cross-examination that they had been arraigned as accused in a couple of prohibition cases – Thus, it can safely be inferred that these two so-called eyewitnesses were having sufficient contact with the legal system and were well aware of the legal machinery and would be knowing the importance of filing a complaint promptly – However, they did not approach the higher officials or the concerned Court to make

a complaint of the alleged assault made on their victim brother in the Amraiwadi Police Station by the police officials – They also did not approach the advocate engaged by them to tell him about the custodial torture – This pertinent omission in failing to inform their advocate about the custodial torture allegedly meted out to J gives rise to a strong assumption about the unnatural conduct of these eyewitnesses, casting a doubt on the truthfulness of their version and discredits their testimony. [Paras 29, 30]

Evidence Act, 1872 – Marking of exhibit – Proof of document:

Held: Mere marking of exhibit upon the letter without the expert deposing about the opinion given therein would not dispense with the proof of contents of the document as per the mandate of the Indian Evidence Act, 1872. [Para 36]

Evidence – Contradiction between the opinion of Medical jurist and ocular testimony:

Held: This Court is conscious of the proposition that where there are contradictions *inter se* between the opinion of the Medical Jurist and the ocular testimony, generally, the evidence of the eyewitnesses should be given precedence – However, where the contradiction is so prominent that it completely demolishes the version of the eyewitnesses who are interested and partisan, in such cases, the Court should be circumspect in admitting the evidence of the eyewitness while ignoring the convincing opinion of the Medical Expert. [Para 44]

Case Law Cited

Lahu Kamlakar Patil and Anr. v. State of Maharashtra [2012] 9 SCR 1173 **: (2013) 6 SCC 417;** *Shivasharanappa and Others v. State of Karnataka* [2013] 5 SCR 1104 **: (2013) 5 SCC 705;** *Narendrasinh Keshubhai Zala v. State of Gujarat* [2023] 2 SCR 746 **: [2023] 4 SCALE 478;** *Harvinder Singh alias Bachhu v. State of Himachal Pradesh* [2023] 13 SCR 1157 **: 2023 SCC OnLine SC 1347;** *Chunthuram v. State of Chhattisgarh* [2020] 8 SCR 1071 **: (2020) 10 SCC 733;** *Sait Tarajee Khimchand and Others v. Yelamarti Satyam alias Satteyya and Others* **(1972) 4 SCC 562;** *Narbada Devi Gupta v. Birendra Kumar Jaiswal and Another* [2003] Supp. 5 SCR 90 **: (2003) 8 SCC 745;** *Bhajan Singh alias Harbhajan Singh and Others v. State of Haryana* [2011] 7 SCR 1 **: (2011) 7 SCC 421 – relied on**

List of Acts

Penal Code, 1860; Evidence Act, 1872

List of Keywords

Custodial torture; Custodial death; Police custody; Judicial custody; Multiple injuries; Formidable evidence of the Medical Jurist; Ocular evidence; Acquittal of charges; Unnatural conduct of witnesses; Marking of exhibit; Proof of document; Contradiction between the opinion of Medical jurist and ocular testimony.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 2038 of 2017

From the Judgment and Order dated 13.02.2017 of the High Court of Gujarat at Ahmedabad in CRLA No. 210 of 1997

Appearances for Parties

Harin P. Raval, Sr. Adv., Anando Mukherjee, Ms. Ekta Bharati, Shwetank Singh, Ms. Shreya Bansal, Ms. Shrestha Narayan, Ms. Urmi H. Raval, Advs. for the Appellants.

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

Judgment / Order of the Supreme Court

Judgment

Mehta, J.

1. The instant appeal is directed against the judgment dated 13th February, 2017 passed by the Division Bench of the High Court of Gujarat in Criminal Appeal No. 210 of 1997, whereby, the Division Bench partly accepted the appeal preferred by the accused appellant Vinod Jaswantray Vyas and altered his conviction as recorded by the trial Court for the offence punishable under Section 302 of the Indian Penal Code, 1860(hereinafter being referred to as 'IPC') to one under Section 304 Part I IPC and sentenced him to undergo eight years rigorous imprisonment and further directed that he shall pay a compensation of Rs. 50,000/- to the heirs of the deceased.

2. Learned Additional City Sessions Judge, Ahmedabad(hereinafter being referred to as the 'trial Court') tried the accused appellant Vinod Jaswantray Vyas(Original accused No.1)(hereinafter being referred to as 'A1') and his co-accused Chinubhai Govindbhai Patel(Original accused No.2)(hereinafter being referred to as 'A2') for the offences punishable under Section 302 read with Section 114 IPC and *vide* judgment dated 4th March, 1997, the learned trial Court proceeded to convict both the accused for the above offences and sentenced them to imprisonment for life and fine of Rs. 25,000/- each, in default, to undergo rigorous imprisonment for a period of two years.

3. A1 and A2 preferred separate appeals before the Gujarat High Court being Criminal Appeal Nos. 210 of 1997 and 226 of 1997 respectively, to challenge the judgment dated 4th March, 1997 passed by the learned trial Court. A2 expired during the pendency of the appeal before the High Court. However, being a Government servant, the question of his conviction had a direct bearing on his death-cum-retiral benefits and thus, his legal heirs applied for and were granted permission to prosecute the appeal further. Both appeals were decided by a learned Division Bench of the Gujarat High Court *vide* common judgment dated 13th February, 2017 and the learned Division Bench proceeded to affirm the findings of the learned trial Court holding that A1 and A2 had subjected Jeeva(deceased) to physical violence in police custody and thereby, the findings of guilt were affirmed. However, the offence was toned down from Section 302 IPC to offence under Section 304 Part I IPC and the sentence was modified as above.

4. Only A1 approached this Court to challenge the impugned judgments whereas, the legal heirs of the co-accused, A2 have not challenged his conviction. Leave was granted by this Court on 27th November, 2017.

5. During the pendency of the appeal, the sentence awarded to the accused appellant(A1) was suspended *vide* order dated 6th June, 2017 and he was directed to be released on bail. However, A1 also passed away during pendency of the instant appeal and accordingly, by an order dated 12th August, 2022 his legal heirs were taken on record and were allowed to continue the appeal by virtue of provisions contained in Section 394 of the Code of Criminal Procedure, 1973(hereinafter being referred to as 'CrPC'), so as to seek service benefits of the original appellant Vinod Jaswantray Vyas(since deceased) in the event of the acceptance of the appeal.

Brief facts: -

6. The accused appellant(A1) was posted as a Police Inspector at Amraiwadi Police Station, Ahmedabad. One Jeeva had appeared and surrendered at the said police station in the late hours of the night on 10th June, 1992 as he had been arraigned as an accused in C.R. No. 555 of 1992 registered at the said police station for the offences punishable under Sections 143, 147, 148, 149, 307, 323, 324 and 427 IPC. He was also accompanied by the co-accused Anna Dorai.

7. Jeeva had come to surrender at the police station along with his advocate Shri Patanwadia and his two sisters namely, Selvin Prabhakar(PW-1) and Dhanlakshmi Vaiyapuri(PW-2). The advocate Shri Patanwadia left after production of Jeeva at the police station, however, the two sisters remained behind.

8. The original accused No.2(A2) was the Superintendent of Police at the relevant point of time who came to the police station sometime later. It is the case of prosecution that the two police officers i.e. A1 and A2, assaulted Jeeva with fists and sticks in the confines of the police station at separate intervals causing multiple injuries all over his body due to which he became unconscious. He was then dragged and placed in the lockup room of the police station. Next evening i.e. on 11th June, 1992, Jeeva was produced before the jurisdictional Magistrate, who remanded him to judicial custody whereafter, he was taken to and lodged at the Sabarmati Central jail. Jeeva's condition deteriorated in the prison and thus, he was rushed to the civil hospital in the early hours of 12th June, 1992, where the doctors declared him dead.

9. Selvin Prabhakar(PW-1), the sister of Jeeva(deceased), forwarded a telegram(Exhibit-14) to the DGP office, Ahmedabad regarding the custodial torture leading to her brother Jeeva's death. However, no action was forthcoming upon this telegraphic complaint, whereupon she lodged a complaint(Exhibit-13) in the Court of the Magistrate concerned on 1st July, 1992. In the interregnum, a magisterial enquiry(inquest) had been undertaken. The dead body of Jeeva(deceased) was subjected to postmortem at the BJ Medical College, Ahmedabad by Dr. Nayan Kumar-Medical Jurist(PW-9). As per the postmortem report(Exhibit-50), following external injuries were observed on the body of Jeeva: -

"1) Abrasion on the doraam of right hand 1 x 1 cm in size which was red in colour.

2) Abrasion on the posterior aspect of middle one-third of the right arm 1 x 1 cm in size red in colour.

3) Two abrasions on the right shoulder each admeasuring 17 x 1 cm in size and red in colour.

4) Two bruises on the right scapular region each 6 x 4 cm in size on the back.

5) Seven bruises on the back each varying in size but about 2 x 4 cms to 4 x 1 cm.

6) Abrasion on the left wrist 1 x 1 cm.

7) Abrasion on the middle third of left forearm posterior aspect about 2 x 1 cm.

8) Abrasion on the left shoulder 1 x 1 cm.

9) Abrasion on the left side of ligome 1 x 1 cm.

10) Bruise on the left lateral aspect of abdomen on mid-axillary line at 10th rib 6 x 4 cm in size.

11) Bruise on the front of chest midline and 3rd rib 6 x 4 cm in size.

12) Bruise on the left anterior axillary line 4 x 5 cms in size at nipple level.

13) Bruise on the left side of knee 2 x 5 cm.

14) Bruise on the left third 4 x 4 cm in size on thigh on front middle.

Corresponding to such external injuries, following internal injuries were observed:-

There was fracture of sternum under external wound No.11 which was transverse in direction. There was fracture of 4th, 5th and 6th ribs under external injury No.12. Pleura on left side was cut. Left lung was ruptured under external injury No.12. There was about 600ml fluid and clotted blood in thorasic cavity. Paretareal cavity contained 1600 ml of clotted blood and fluid blood. Rupture of liver on

the interior aspect of right lobe 3 x 4 cm in size. There as rupture of spleen under external injury No.10. Rupture of 4 x 6 in size at diaphragmatic surface."

10. The complaint(Exhibit-13) submitted by Selvin Prabhakar(PW-1) was initially registered as Inquiry Case No. 84 of 1992. The learned Magistrate directed an inquiry under Sections 200 and 202 CrPC. Cognizance was taken for the offence punishable under Section 302 IPC and the complaint came to be registered as Criminal Case No. 1920 of 1993. Since the offence alleged was exclusively sessions triable, the case was committed to the Court of Additional City Sessions Judge, Ahmedabad, where the same was registered as Sessions Case No. 378 of 1993. Charges were framed by the trial Court against both the accused for the offence punishable under Section 302 read with Section 114 IPC. The accused abjured their guilt and claimed trial. The prosecution examined a total of 10 witnesses and exhibited 62 documents in order to prove its case. In their statements under Section 313 CrPC, the accused denied the allegations appearing against them in the prosecution case and claimed to have been falsely implicated.

11. The learned trial Court, after hearing the arguments advanced by the learned Additional Public Prosecutor and the learned defence counsel and upon appreciating the evidence available on record proceeded to convict A1 and A2 and sentenced them both as above *vide* judgment dated 4th March, 1997. The Division Bench of the Gujarat High Court in appeal, while affirming the guilt of both the accused, toned down the offence from Section 302 IPC to offence under Section 304 Part I IPC *vide* judgment dated 13th February, 2017 which is assailed in the present appeal by special leave.

Submissions on behalf of the appellant: -

12. Shri Harin P. Raval, learned senior counsel representing the accused appellant(A1), put forth the following submissions in order to assail the impugned judgments seeking acquittal for the accused appellant-Vinod Jaswantray Vyas(since deceased):-

    (i) That there is a delay of around 20 days in filing the formal complaint before the concerned Court of the Magistrate, since the alleged incident took place on 10th June, 1992 and the complaint came to be filed on 1st July, 1992.

(ii) That the accused appellant had neither any motive nor any reason to assault Jeeva(deceased).

(iii) That Jeeva(deceased) and Anna Dorai(both accused in C.R. No. 555/92) had voluntarily surrendered at the Amraiwadi Police Station. However, the injuries were suffered only by Jeeva(deceased) which creates a doubt about the prosecution story, inasmuch as, it cannot be believed that the police officers who were presumably intending to extract confessions from the accused would focus their attention only on one accused while totally sparing the other who was also arraigned in the same case.

(iv) That Jeeva(deceased) was presented in the concerned Court on 11th June, 1992, but he made no complaint whatsoever to the Magistrate that he had been maltreated or assaulted by the police officials at the police station. Jeeva(deceased) was having significant criminal antecedents and had been arraigned as an accused in multiple cases and had also been placed under preventive detention. Therefore, he was fully aware about the nitty gritties of the legal system. Thus, the rank silence on part of the victim and his failure in raising a grievance before the remand Magistrate that he had been subjected to custodial torture at the police station despite having ample opportunity, creates a grave doubt on the truthfulness of the entire prosecution case.

(v) That Jeeva(deceased) had been taken and presented before the DCP Shri Surelia at the Karanj Bhavan, Ahmedabad and only thereafter, he was produced in the concerned Court of the Magistrate. Shri Raval referred to the testimony of Pratapbhai Jagannath(PW-6) to contend that the office of DCP Shri Surelia was located on the fifth floor and Jeeva(deceased) climbed the staircases without any support or displaying signs of discomfort or pain. He fervently contended that it is impossible to believe that after having received such grave debilitating injuries as described in the postmortem report, Jeeva(deceased) would have been in a physical or mental condition to ascend and descend five flights of stairs and that too without exhibiting any sign of discomfort.

(vi) Shri Raval urged that Jeeva(deceased) had been sent to the Sabarmati Central jail on 11th June, 1992 at around 6:30 pm after being remanded to judicial custody. As per Shri Raval, the

probability of Jeeva(deceased) having been assaulted by co-prisoners in the prison cannot be ruled out and is rather more probabilized considering the fact that the injuries noticed on the body of the victim were fresh in nature as per Dr. Nayan Kumar-Medical Jurist(PW-9). To emphasize the above contention, Shri Raval referred to the testimony(Exhibit-49) of the Medical Jurist(PW-9) who categorically stated that the injuries caused to Jeeva(deceased) were fresh and would have been suffered within six hours of the death.

(vii) Shri Raval referred to the testimony of Udesingh Himmatsingh Chauhan(PW-8) who stated that he had seen the red dust over the clothes of dead body. He also claimed to have seen Sabarmati Central jail from inside and stated that the soil of the jail was red in colour. Based on the deposition of PW-8, Shri Raval contended that when the inquest(Exhibit-45) was carried out, the dead body of Jeeva was found smeared with red soil which is typical to the Sabarmati Central jail. He thus urged that there is imminent probability that Jeeva(deceased) must have suffered the fatal injuries while being confined at the Sabarmati Central jail.

(viii) That the so-called eyewitnesses(Selvin Prabhakar(PW-1), Dhanlakshmi Vaiyapuri(PW-2) and Nyakar Vasudev(PW-3)) emphatically stated that Jeeva(deceased) was beaten on same parts of the body both by the accused appellant(A1) and co-accused(A2). Shri Raval urged that it is impossible to believe that two accused who assaulted the deceased at different intervals would selectively target the same parts of the body to land the blows.

(ix) That the accused appellant(A1) was a seasoned police officer and hence, it does not stand to reason that he would use sticks to assault the victim so as to leave behind visible marks and risk the chance of the injuries being detected. He submitted that clearly Jeeva(deceased) had been assaulted at the Sabarmati Central jail and a totally false case has been foisted by the family members of Jeeva(deceased) to wreak vengeance against the accused persons on account of the fact that Jeeva(deceased) was a known bootlegger and had been arraigned in number of criminal cases by the police officials.

On these counts, learned senior counsel implored the Court to accept the appeal, set aside the impugned judgment and acquit the accused appellant of the charges.

Submissions on behalf of the respondent-State: -

13. *Per contra*, Ms. Deepanwita Priyanka, learned Standing Counsel for the State of Gujarat, vehemently and fervently opposed the submissions advanced by the learned senior counsel for the appellant. She contended that the trial Court and the High Court, after thorough appreciation of evidence have recorded concurrent findings of facts holding the accused appellant(A1) and the co-accused(A2) responsible for indulging in custodial violence thereby causing death of Jeeva.

14. She contended that the witnesses, Selvin Prabhakar(PW-1), Dhanlakshmi Vaiyapuri(PW-2) had no reason so as to falsely implicate the accused appellant(A1) for the murder of their brother Jeeva(deceased). Presence of these witnesses at the Amraiwadi Police Station was not disputed by the accused persons. The evidence of these witnesses is reliable and trustworthy. The witness Nyakar Vasudev(PW-3) was admittedly detained in the lockup of the police station with Jeeva(deceased) and he too has given clinching evidence supporting the case of prosecution and hence, this Court should not feel persuaded to interfere with the concurrent finding of facts recorded in the impugned judgments.

15. She further urged that Jeeva(deceased) was apprehensive that he may be subjected to further cruelty at the hands of the police officials if he made a complaint about the violence meted out to him in police custody. Thus, rather than speaking out before the learned Magistrate, he confided about the violence to his sister, Selvin Prabhakar(PW-1), who sent a prompt telegram(Exhibit-14) setting out the details of the incident to the DGP office, Ahmedabad promptly after the news of death of her brother Jeeva was conveyed to her and thus, there is no delay in lodging of the complaint.

16. She further contended that the influence of the accused persons upon the investigation agency is clearly visible inasmuch as no action was taken on the telegram(Exhibit-14) promptly sent by Selvin Prabhakar(PW-1) who was later compelled to lodge a complaint before the concerned Magistrate, only whereafter, the criminal case could be registered against the accused.

17. She thus urged that the testimony of the witnesses examined by the prosecution was rightly relied upon by the trial Court and the High Court and that the impugned judgments do not warrant any interference by this Court.

18. We have given our thoughtful consideration to the submissions advanced at bar and have minutely reappreciated the evidence available on record. We have also perused the judgments rendered by the High Court as well as the trial Court.

Discussion of material/evidence available on record: -

19. The following facts are undisputed as per the record: -

(i) That A1 was posted as Police Inspector, Amraiwadi Police Station and A2 was posted as Superintendent of Police on the date of the incident.

(ii) That Jeeva(deceased) and Anna Dorai were arraigned as accused in C.R. No. 555 of 1992, registered at the Amraiwadi Police Station for the offences punishable under Sections 143, 147, 148, 149, 307, 323, 324 and 427 IPC.

(iii) That on 10th June, 1992 at 10:45 pm, Jeeva(deceased) accompanied by his two sisters, Selvin Prabhakar(PW-1) and Dhanlakshmi Vaiyapuri(PW-2) and advocate Shri Patanwadia had gone to the Amraiwadi Police Station for surrendering in connection with the above case. Anna Dorai also surrendered along with Jeeva as he too was arraigned as an accused in the same case.

(iv) That advocate Shri Patanwadia was not examined in evidence in support of the prosecution case.

(v) That Anna Dorai who surrendered at the police station along with Jeeva(deceased) in the same case, did not suffer any injuries during the period of detention at the police station. Anna Dorai was surprisingly not examined as a witness by the prosecution.

(vi) That Meena, wife of Jeeva(deceased), who went to meet him in the morning of 11th June, 1992 was not examined in evidence.

(vii) Jeeva(deceased) had sufficient exposure to the legal system and procedure as he had previously also been arraigned in numerous

criminal cases. Association of advocate Shri Patanwadia in the process of Jeeva's surrender is ample proof of this fact.

(viii) Before being presented in the Court of the Magistrate, Jeeva (deceased) was taken to the Karanj Bhavan and was presented before DCP Shri Surelia whose office was located at the fifth floor of the building and that Jeeva(deceased) ascended and descended the multiple flight of stairs without exhibiting any discomfort or signs of pain whatsoever.

(ix) Jeeva(deceased) was produced in the Court of Magistrate in evening of 11th June, 1992 but he did not make any kind of complaint whatsoever to the Magistrate that he had been beaten by the accused at the police station.

(x) That as per Jeeva's sister, Selvin Prabhakar(PW-1), Jeeva(deceased) had complained after coming out of the Magistrate's Court that he had been beaten/tortured at the police station but he could not make any complaint to the Magistrate owing to the threat of retribution at the hands of the police officials. However, the fact remains that Jeeva's sisters(PW-1 and PW-2) were free birds and nothing prevented them from lodging a prompt complaint regarding the custodial torture allegedly meted out to Jeeva(deceased) while he was in police custody.

(xi) That the first complaint of the custodial torture meted out to Jeeva(deceased) in form of the telegram(Exhibit-14) came to be forwarded by Selvin Prabhakar(PW-1) to the DGP office, Ahmedabad on 13th June, 1992. When no action was forthcoming on this telegram(Exhibit-14), a formal complaint came to be filed in the Court of the Magistrate concerned on 1st July, 1992.

(xii) That as per the evidence of Medical Jurist(PW-9), the injuries noticed on the body of the deceased at the time of the postmortem examination which was conducted on 12th June, 1992(between 4:15 pm to 5:30 pm) were fresh and were caused within six to eight hours of the death. The Medical Jurist(PW-9) observed in the postmortem report(Exhibit-50) that he noticed 600 ml fluid blood and clotted blood in the thoracic cavity and 1600 ml of fluid blood and clotted blood in peritoneal cavity. He also gave a pertinent reply to a question put in cross-examination that looking to the number of injuries

including the fractures and having rupture of liver and lung, a person could not climb a staircase without support; he would be depressed and his expression and movements would be painful. The fracture of sternum and ribs would cause severe pain and would also affect the respiratory system. Due to the bruises and the fractures, the loss of blood would be about 30-35% of the total volume of blood in the body which would cause drop in the blood pressure.

(xiii) The prosecution tried to overcome this pertinent opinion of the Medical Jurist(PW-9) regarding the time of injuries by examining the expert witness-Dr. Ravindra(PW-10) who gave his opinion(Exhibit-53) on queries being raised by the Investigating Officer which were based on the findings in postmortem report(Exhibit-50). Nevertheless, the expert witness(PW-10) while deposing, did not elaborate about the opinion which he had expressed in answer to the queries raised by the Investigating Officer. He only formally proved the letter(Exhibit-53) without elaborating upon its contents. In the cross-examination, the expert witness(PW-10) admitted that the doctor who had performed the postmortem examination would be in a better position to give opinion about the age of injuries.

20. Having set out the admitted facts, we shall now proceed to discuss the evidence of the prosecution witnesses. For the sake of convenience, the details of the prosecution witnesses are reproduced hereinbelow in a tabular form: -

PW-1	Selvin Prabhakar(Eyewitness)
PW-2	Dhanlakshmi Vaiyapuri(Eyewitness)
PW-3	Naykar Vasudev(Eyewitness)
PW-4	Harishkumar Fakirswamy
PW-5	Dr. Digant Kalidas Dixit(Medical Officer)
PW-6	Pratapbhai Jagannath
PW-7	Ranjitsing Tensing
PW-8	Udesinh Himmatsinh Chauhan
PW-9	Dr. Nayankumar Natvarlal Parikh(Medical Jurist)
PW-10	Dr. Ravindra Shrikrishna Bhise(Expert witness)

21. First, we shall discuss the evidence of the star prosecution witnesses namely, Selvin Prabhakar(PW-1) and Dhanlakshmi Vaiyapuri(PW-2). Some relevant excerpts from the deposition of Selvin Prabhakar(PW-1) and Dhanlakshmi Vaiyapuri(PW-2) are reproduced hereinbelow for the sake of ready reference: -

Examination-in-Chief of Selvin Prabhakar(PW-1)

> "1.....Thereafter in the night at quarter to eleven hours PSI Shri Vyas in the same room only nearby to the table of the PSO making my brother to stand up facing the wall and keeping both hands up and thereafter Shri Vyas delivered blows with stick on the claws of the hands of my brother, on the back, on the buttock, on the ankle and on the thigh as also on the leg. Vyas Sir also pushed with stick on the chest of my brother. For half an hour, as on getting beaten up in this manner, my brother had fainted and had fallen down. Thereafter two police persons lifted and threw away my brother nearby to the table. At two hours in the night, SP Shri C.G. Patel had come. I know that C.G. Patel and at present he is present in the court as an accused person.
>
> 2. Shri C.G. Patel coming there made my brother to stand up in such manner that his face was towards the wall and he delivered stick blows on the hand, on the back, on the side and also pushed with stick in the chest. Thereafter two police persons had put my brother in the lock up. When this happened at that time I and my sister Dhanlaxmi both were present at the Amraivadi Police Station. We were present in front of the lock up....
>
> 3.....At quarter to six hours in the evening police persons brought down stairs my brother and Anna. Thereafter, policemen took both these persons at Court No. 7 and I and my sister Dhanlaxmi had gone to the Court No.7. In Court No. 7 these policemen were waiting for Shri Vyas Sir with my brother and Anna as they were not having sufficient papers. At that time my brother talked with me in Madrasi means in Tamil language. At that time my brother was weeping. When I asked him the reason for weeping he told to me that- he is having severe pain in the chest

and stomach and therefore he is unable to stand up. When asked why, then he told to me that- both those persons had beaten me up and therefore I am feeling the pain. I asked my brother that as he has been beaten up, do you want to file complaint before the Magistrate sir. Then refused for the same. When I asked why, then he told to me that- PI Shri Vyas and C.G. Patel have given me the threat that if you will file complaint against us then, after getting released from the jail, by planning police encounter, and making you to run, bullet will be fired at you. Again he stated to say that still he feels fearful….

4. On 12/6/92, at half past eleven hour in the morning two police persons from jail had come there in civil dress and told to us that-my brother Jeeva has died and his dead body is kept in the PM Room of Civil Hospital and saying this they had gone away……

….Thereafter at seven hours in the evening after conducting the post mortem, we were handed over the dead body. We had brought the dead body to our home. During the night the dead body was kept at the home and on the next day morning means on 13/6/92 the last ritual rites were performed. During this night I had sent a telegram from Lal Darwaja telegram office to Meghaninagar DGP Office. The telegram stating about death of my brother in this manner was sent…..

Thereafter, regarding this incident I had filed complaint in the Metropolitan Court.

5…..In the year 1990, my brother Jeeva was arrested and was sent up outside Ahmedabad in the jail. Jeeva was kept in this manner for four months and after around four months he was released…..

6.….During last year two cases of prohibition were filed against me. The cases that were filed against me were pertaining to Amraivadi Police Station. When Vyas Sir was in charge of the Amraivadi Police Station, at that time prohibition case was filed against me…..

….I have filed the complaint. In this complaint as witness No.3 name of Vasu Parthasarthi is in Ex-12 complaint who is not known to me…..

….In this complaint I did not give the name of Anna as the witness. On 1/7/92, complaint was filed. During the period when I had sent to telegram and filed the present complaint, Vasu, Ravi, Hari and Anna none of these persons had met me and I have not met them….

….It is not true that I, Jaykant and my sister and my deceased brother Jeeva were jointly working as botleggers. It is not true that, due to Vyas Sir joining the duty, as this business has been closed, we have animosity towards Vyas Sir….”

Cross-examination of Selvin Prabhakar(PW-1)

“8…..Thereafter on the next day, at 5.45 hours in the evening when my brother was brought in the Court at that time Advocate Shri Patanwadia met us. Prior to that we did not inform to our advocate that as my brother is to be produced, he should make the preparation for getting him released on bail….

….During the period from 5.45 to 6.45 hours means for around one hour my brother was made to sit in the Court. During this period in the Court room many persons were moving…..

….After my brother was brought in the Court, Patanwadia Sir had gone out of the court compound. We had sent the message to Patanwadia Sir and he came there and after meeting he had gone. Our advocate stayed with us for five-ten minutes….

….After my brother was beaten up, we met Patanwadia Sir in the Court and during the intervening period, we did not meet him. In the Court when Patanwadia Sir met us for five-ten minutes, at that time he was informed that my brother Jeeva has been beaten up in this manner and we had shown the marks of my brother Jeeva getting beaten up. These marks were not shown to Patanwadia Sir so that he can take appropriate actions….

9. When Jeeva is produced before the Magistrate and if Jeevo makes a complaint before the Magistrate about his getting beaten up, then threat was given to him for killing him. We had informed about this to our advocate Patanwadia Sir. At the time when Jeeva was produced before the Magistrate at that time Patanwadia Sir should remain present before the Magistrate, about which we had not given intimation to Patanwadia Sir. However he told to us that at the time when Jeeva will be produced before the Hon'ble Magistrate, at that time we should inform him. When Patanwadia Sir left the court compound means at the second time he did not meet us…..

10…..We do not have any relationship with accused person Mr. Vyas and we also do not have relationship with Patel Sir. Prior to the incident I had never met any of the accused persons…..

11…..The facts as to how he was beaten up and who had beaten up where, have not been stated in the telegram…..

12…..My brother was kept at the Karanj Bhavan for two and half hour. During this two and half hours, when was my brother kept in the Karanj Bhavan I could not know about the same. However he was taken upstairs and was made to climb the steps about which fact I am aware. I am not aware as to which floor he was taken. The police persons who had brought my brother downstairs, had told that Jeeva was taken before Sureliya Sir…..

14….Ex-14 is the copy of the telegram wherein it has been stated that, "when my brother was produced PI Shri Vyas Saheb had beaten up him severely with stick."…..

19. …..It is true that I have not seen if my brother had been beaten up by Sureliya Sir. In the Karanj Bhavan, Sureliya Sir had beaten up my brother, if such fact has been stated in the telegram then the same is false. It is true that I have not seen taking my brother to Stadium. It is true that I had filed complaint against the present two accused persons and Sureliya Sir.

20…..It is true that prohibition cases have been filed against my mother, myself and Pappu….."

Examination-in-Chief of Dhanlakshmi Vaiyapuri(PW-2)

"2. Thereafter in the night at eleven or quarter to eleven hours PI Shri Vyas making my brother Jeeva to stand facing the wall and keeping hands up as support, PI Shri Vyas had beaten up my brother. He delivered blows with stick on the palm of his hand, on the back on the waist, on the thigh, on the ankle and pushed with stick in the chest. He continued to beat up my brother in this manner for around half an hour. Thereafter my brother fainted and had fallen down and thereafter two police persons had come and lifting my brother they had thrown him on the wooden bench. Thereafter at night at quarter to two or two hours, SP Shri Patel had come there. He had come down from the second floor. Thereafter he made my brother to stand up facing the wall with hands up and Shri C.G. Patel had beaten up Jeeva on the palm of his hand, on the back, on the side, on the buttock, on the thigh and on the ankle with stick and pushed with stick in the chest. The C.G. Patel was the SP…….

3……Thereafter on that day at two hours in the noon PSI Shri Rana along with one police persons taking out from the police station my brother and Anna, they were sitting in the auto rickshaw and they had come in the office of DCP Shri Sureliya Sir. His office is at Lal Darwaja. After this rickshaw, in another auto rickshaw we had gone after Shri Rana Saheb. Thereafter, Rana Sir had taken my brother and Anna in the Office of DCP Shri Sureliya Sir. At 5.45 hours in the evening he was brought downstairs…….

3…..Thereafter my brother Jeevo was talking in Tamil language told to my sister crying. He said that- SP and PI had beaten up very severely. In the hand and leg, marks of stick could be seen. When my sister touched the body of my brother, at that time there was swallowing…….

5……Thereafter on 12/2/92, at eleven or quarter to eleven hours in the morning, two police persons came to our' home. They said that Jeeva has died."

Cross-Examination of Dhanlakshmi Vaiyapuri(PW-2)

> "6…..It is true that, arresting my brother under PASA , he was set up in the jail outside Ahmedabad……
>
> 8……It is true that in the portion inside the police station, Jeeva and Anna were taken and our advocate was with them and at that time the inside portion could not seen…..
>
> 12….It is not true that in my statement dated 13/6/92 I have stated that, " on the next day on 11/6/92, at nine hours in the morning I and my sister Selvin and my sister in law all the three of us had gone to the Amraivadi Police Station for giving snack to my brother but my brother did not eat the snack. My sister stayed back to have talk with my brother. I and my sister in law Meenaben were sitting outside the police station"….
>
> 12…For an hour Jeevo was in the Court of the Metropolitan Magistrate. I had seen Jeeva in Court No. 7. I am not aware as to whether on that day whether the Magistrate of Court No. 7 was on leave or not?....
>
> 12…..My brother Jeeva was taken at Karanj Bhavan on the upper floor where there is staircase and from the staircase, one can go upstairs about which I am not aware…."

22. From the testimony of Selvin Prabhakar(PW-1) and Dhanlakshmi Vaiyapuri(PW-2), it is evident that Jeeva(deceased) was having long standing criminal antecedents and there were allegations of bootlegging against him. He had also been detained under the Gujarat Prevention of Anti-Social Activities Act, 1985. Likewise, the evidence of the prosecution witnesses(PW-1 and PW-2) also reveals that Anna Dorai who too was arraigned as accused with Jeeva(deceased) in C.R. No. 555 of 1992 also had similar criminal antecedents. However, as per these prosecution witnesses, Jeeva(deceased) was singled out for the custodial torture whereas even a finger was not laid on Anna Dorai by A1 and A2. This creates a doubt in the mind of the Court on the truthfulness of the allegations set out in the evidence of the two sisters of Jeeva, i.e., PW-1 and PW-2.

23. PW-1 and PW-2 claim to have personally witnessed the assault being made on Jeeva. In this background, there is a serious question mark on the claim of PW-1 that after being produced in the Court,

Jeeva talked to her in Tamil language and that he was weeping and when the witness asked Jeeva for the reason of his grief, he told her that the police personnel had beaten him up and he was under severe pain and was unable to standup. If at all PW-1 and PW-2 had themselves seen the victim being beaten up, there was no occasion for PW-1 to put a question to Jeeva as to why he was weeping or as to the manner in which he had been beaten up.

24. This Court has considered the effect of unnatural conduct on the credibility and evidentiary value of testimony of a witness through a series of judicial pronouncements over time. In the case of ***Lahu Kamlakar Patil and Anr. v. State of Maharashtra***[1], this Court held as follows: -

> "**26.** From the aforesaid pronouncements, it is vivid that witnesses to certain crimes may run away from the scene and may also leave the place due to fear and if there is any delay in their examination, the testimony should not be discarded. **That apart, a court has to keep in mind that different witnesses react differently under different situations. Some witnesses get a shock, some become perplexed, some start wailing and some run away from the scene and yet some who have the courage and conviction come forward either to lodge an FIR or get themselves examined immediately. Thus, it differs from individuals to individuals. There cannot be uniformity in human reaction. While the said principle has to be kept in mind, it is also to be borne in mind that if the conduct of the witness is so unnatural and is not in accord with acceptable human behaviour allowing variations, then his testimony becomes questionable and is likely to be discarded."**
>
> (emphasis supplied)

25. In the case of ***Shivasharanappa and Others v. State of Karnataka***[2]**,** it was held as follows: **-**

1 [2012] 9 SCR 1173 **:** (2013) 6 SCC 417

2 [2013] 5 SCR 1104 **:** (2013) 5 SCC 705

> **"22.** Thus, the behaviour of the witnesses or their reactions would differ from situation to situation and individual to individual. Expectation of uniformity in the reaction of witnesses would be unrealistic but the court cannot be oblivious of the fact that even taking into account the unpredictability of human conduct and lack of uniformity in human reaction, whether in the circumstances of the case, the behaviour is acceptably natural allowing the variations. **If the behaviour is absolutely unnatural, the testimony of the witness may not deserve credence and acceptance."**
>
> (emphasis supplied)

26. In ***Narendrasinh Keshubhai Zala*** v. ***State of Gujarat***[3], it was held as follows: -

> "**8.** It is a settled principle of law that doubt cannot replace proof. Suspicion, howsoever great it may be, is no substitute of proof in criminal jurisprudence [Jagga Singh *v.* State of Punjab, 1994 Supp (3) SCC 463]. Only such evidence is admissible and acceptable as is permissible in accordance with law. In the case of a sole eye witness, the witness has to be reliable, trustworthy, his testimony worthy of credence and the case proven beyond reasonable doubt. **Unnatural conduct and unexplained circumstances can be a ground for disbelieving the witness."**
>
> (emphasis supplied)

27. In the case of ***Harvinder Singh alias Bachhu v. State of Himachal Pradesh***[4]**,** this Court held as below: -

> **"18. Character and reputation do have an element of interconnectivity. Reputation is predicated on the general traits of character. In other words, character may be subsumed into reputation. Courts are not expected to get carried away by the mere background of a person especially while acting as an appellate forum, when his conduct, being a relevant fact, creates**

3 [2023] 2 SCR 746 : 2023(4) SCALE 478

4 [2023] 13 SCR 1157 : 2023 SCC OnLine SC 1347

> **serious doubt. In other words, the conduct of a witness under Section 8 of the Evidence Act, is a relevant fact to decide, determine and prove the reputation of a witness. When the conduct indicates that it is unnatural from the perspective of normal human behaviour, the so-called reputation takes a back seat."**
>
> (emphasis supplied)

28. In the case of ***Chunthuram v. State of Chhattisgarh***[5]**,** a three judge Bench of this Court discarded the testimony of a eyewitness on the ground that the deceased was known to the witness and claimed to have seen the assault on the deceased, but curiously, he did not take any proactive steps in the matter to either report to the police or inform any of the family members. The Court held that such conduct of the eyewitness is contrary to human nature. The relevant extracts from the judgment are as follows: -

> **"15.** Next the unnatural conduct of PW 4 will require some scrutiny. The witness Bhagat Ram was known to the deceased and claimed to have seen the assault on Laxman by Chunthuram and another person. But curiously, he did not take any proactive steps in the matter to either report to the police or inform any of the family members. Such conduct of the eyewitness is contrary to human nature. In **Amar Singh v. State (NCT of Delhi)[2020 SCC OnLine SC 826]**, one of us, Krishna Murari, J. made the following pertinent comments on the unreliability of such eye witness : (SCC para 32)
>
> > "32. The conviction of the appellants rests on the oral testimony of PW 1 who was produced as eyewitness of the murder of the deceased. Both the learned Sessions Judge, as well as High Court have placed reliance on the evidence of PW 1 and ordinarily this Court could be reluctant to disturb the concurrent view but since there are inherent improbabilities in the prosecution story and the conduct of eyewitness is inconsistent with ordinary course of human nature we do not

5 [2020] 8 SCR 1071 : (2020) 10 SCC 733

> think it would be safe to convict the appellants upon the uncorroborated testimony of the sole eyewitness. Similar view has been taken by a three-Judge Bench of this Court in **Selveraj v. State of T.N.** [(1976) 4 SCC 343] wherein on an appreciation of evidence the prosecution story was found highly improbable and inconsistent of ordinary course of human nature concurrent findings of guilt recorded by the two courts below were set aside."
>
> **16.** The witness here knew the victim, allegedly saw the fatal assault on the victim and yet kept quiet about the incident. If PW 4 had the occasion to actually witness the assault, his reaction and conduct does not match up to ordinary reaction of a person who knew the deceased and his family. His testimony therefore deserves to be discarded."

29. The two sisters(PW-1 and PW-2) were not under any restraint after witnessing the custodial assault allegedly made on Jeeva. They admitted in their cross-examination that they had been arraigned as accused in a couple of prohibition cases. Thus, it can safely be inferred that these two so-called eyewitnesses were having sufficient contact with the legal system and were well aware of the legal machinery and would be knowing the importance of filing a complaint promptly. Nothing prevented these ladies from immediately approaching the higher officials or the concerned Court to make a complaint of the alleged assault made on their victim brother in the Amraiwadi Police Station by the police officials.

30. Admittedly, an advocate named Shri Patanwadia was taken to the Amraiwadi Police Station for facilitating Jeeva's surrender and he was also present when Jeeva(deceased) was presented in the Court on 11th June, 1992 by the Investigating Officer. Thus, the advocate was a vital witness to unfold the truth of the case. However, he was not examined in evidence for reasons best known to the prosecution. Even if we assume that the advocate may have been hesitant to become a witness in a case involving his client, the fact remains that PW-1 and PW-2 had engaged Shri Patanwadia to represent Jeeva(deceased) in the criminal case wherein he was arraigned as an accused and he was taken along for effecting the surrender of Jeeva at the police

station. Thus, it was logically expected from PW-1 and PW-2, that after having seen their brother Jeeva being assaulted by the police officer, they would have immediately thought of approaching the advocate engaged by them and tell him about the custodial torture. However, no such step was taken by the sisters(PW-1 and PW-2) of the deceased and this pertinent omission in failing to inform their advocate about the custodial torture allegedly meted out to Jeeva gives rise to a strong assumption about the unnatural conduct of these eyewitnesses, casting a doubt on the truthfulness of their version and discredits their testimony.

31. Keeping in view the above referred judgments and the infirmities noticeable in the evidence of Selvin Prabhakar(PW-1) and Dhanlakshmi Vaiyapuri(PW-2), we are convinced that they are not witnesses of sterling worth and their evidence is not fit to be relied upon.

32. The prosecution claims that Naykar Vasudev(PW-3) was purportedly arraigned as an accused on a complaint lodged by one Babu Raja Ram and was also lodged at the Amraiwadi Police Station, at the same time, when Jeeva was allegedly subjected to custodial violence. He was examined as PW-3 and deposed that he saw the Police Inspector Vyas(appellant herein)(A1) and Mr. Patel(co-accused)(A2) beating Jeeva with sticks, etc. However, in cross-examination, the witness admitted that he had not stated the aforesaid details to the Sabarmati police which were being asked from him in the Court. He also feigned ignorance as to the nature of case filed against him by Babu Raja Ram. He also stated that he had not tried to move Jeeva or talk to him when they were taken out of their lockup. Selvin(PW-1) and Dhanlakshmi(PW-2) had come to the police station with breakfast on the next morning. He did not see Jeeva in a conscious state till he woke up in the next morning. He was released on bail at half past 3'o clock in the afternoon. He did not tell his advocate Mr. Pathan about the incident with Jeeva. He also admitted that he had not given the name of Mr. Patel in the statement recorded by the Sabarmati police. He explained that Sabarmati police had not recorded his statement willingly. He also admitted that he did not state at the police station that he was knowing Mr. Vyas and Mr. Patel previously. He tried to explain that he had not divulged at the Sabarmati Police Station that Mr. Patel had inflicted blow of stick on the chest of Jeeva as he was not asked about the same.

33. Considering the tenor of evidence of PW-3, it is evident that his version also suffers from grave infirmities, contradictions and omissions and thus, implicit reliance cannot be placed on his testimony.

34. Jeeva(deceased) expired around 36 hours after his surrender before the officials of the Amraiwadi Police Station and thus, the medical evidence assumes great significance in the case. Dr. Digant Kalidas Dixit(PW-5) who was working as a Medical Officer at the Civil Hospital, Ahmedabad deposed as below: -

> "On 12th June 1992 at 8/00AM to 2/00 PM I was on duty as Casualty Medical Officer at Civil Hospital, Ahmedabad. At about 8/30AM on that day Shri R.K. Thakur, Jailor of Sabarmati Central Prison, Head Constable Udaysinghbhai and police constable Maheshbhai of Central Prison, Ahmedabad had brought one Jeevabhai Vaiyapuri from Sabarmati Central Prison. I had examined him and I found that the patient was unconscious. His body was cold and calm. Pulse was not palpable and it was not possible to record Blood Pressure: respiration was absent; heart sounds were not heard by stethoscope; pupils were dilated, fixed and not reactive to light. All functions were suggestive that the patient is dead. As such I had made a note in the Register that the person is dead."

35. Dr. Nayan Kumar-Medical Jurist(PW-9) conducted postmortem upon the dead body of Jeeva. The relevant excerpts from the evidence of the Medical Jurist(PW-9) are reproduced below: -

> "The injuries found by me externally were fresh in nature. The injuries were fresh and must have occurred within six to eight hours of the death. I have brought the case papers. A query was raised by the Police Inspector of Sabarmati Police Station and it was replied by my brother doctor Dr. Desai. In reply to the query, it was stated by Dr. Desai that the injuries were fresh and he had opined in the said letter that the injuries were within few hours before the death. Again there was query from the Crime Branch and they had made a query to the tune as to what was the meaning of "few hours" and he had given time that it may have occurred within four to five hours prior to the post-mortem.

> It is true that if lathi blow is given on the back side of a person, then it will cause wheel marks.
>
> All the bruises were red in colour. From the colour of bruises time can be ascertained by the medical man who has seen the injuries.
>
> Taking into consideration the bruises and the fracture there will be loss of blood of about 30 to 35 per cent of the total blood. With this loss of blood gradually blood pressure will come down. It is true that fracture of sternum and three ribs would cause severe pain and would also affect the respiratory system as well. In the present case there was fracture of lung also. I am of the view that having four fractures as in this particular case and after having rupture of liver and lung, a person cannot climb stair-case without support. A man would be depressed and his expression and movements will be painful."

36. Dr. Ravindra(PW-10) was examined by the prosecution as an expert witness to give opinion on certain queries raised by the Investigating Officer. Dr. Ravindra(PW-10) responded to these queries *vide* a letter which was marked as Exhibit-53 during his sworn testimony. However, what precisely were the contents of the letter were not deposed by the expert in his evidence. Thus, mere marking of exhibit upon the letter without the expert deposing about the opinion given therein would not dispense with the proof of contents of the document as per the mandate of the Indian Evidence Act, 1872.

37. This Court in the case of ***Sait Tarajee Khimchand and Others v. Yelamarti Satyam alias Satteyya and Others***[6] held as follows: -

> "**15**. The plaintiffs wanted to rely on Exs. A-12 and A-13, the day book and the ledger respectively. The plaintiffs did not prove these books. There is no reference to these books in the judgments. **The mere marking of an exhibit does not dispense with the proof of documents**. It is common place to say that the negative cannot be proved. The proof of the plaintiffs' books of account became important because the plaintiffs' accounts were impeached and falsified by the

6 (1972) 4 SCC 562

> defendants' case of larger payments than those admitted by the plaintiffs. The irresistible inference arises that the plaintiffs' books would not have supported the plaintiffs."
>
> (emphasis supplied)

38. In the case of ***Narbada Devi Gupta v. Birendra Kumar Jaiswal and Another***[7], it was held as follows:

> "**16.** ....The legal position is not in dispute that mere production and marking of a document as exhibit by the court cannot be held to be a due proof of its contents. Its execution has to be proved by admissible evidence, that is, by the "evidence of those persons who can vouchsafe for the truth of the facts in issue"....."

39. Furthermore, the expert witness(PW-10) admitted in his cross-examination that the doctor who had performed the postmortem examination physically can give better opinion about the age of the injuries. Thus, there is no doubt in the mind of the Court that the evidence of the expert witness(PW-10) does not lend any support to the case of prosecution.

40. From the evidence of the so called eyewitnesses Selvin Prabhakar(PW-1) and Dhanlakshmi Vaiyapuri(PW-2), it is apparent that the victim was made to climb the five flights of stairs for being presented before DCP Shri Surelia at the Karanj Bhavan, Ahmedabad.

41. Looking to the nature of injuries noted by the Medical Jurist(PW-9) in the postmortem report(Exhibit-50), it is impossible to believe that the victim, having received the multiple injuries, which included rupture of spleen, rupture of liver, fracture of ribs, would have been in a position to walk what to say of climb five flight of stairs. The Medical Jurist(PW-9) stated that the person having received the injuries noted in the postmortem report(Exhibit-50) would not be able to climb a stair case without support and that the expression of the person and his movement would be painful. Thus, there was hardly any possibility that after having received the injuries mentioned in the postmortem report(Exhibit-50), Jeeva(deceased) could have climbed up the stairs of Karanj Bhavan, Ahmedabad for being presented before DCP Shri Surelia.

7 [2003] Supp. 5 SCR 90 : (2003) 8 SCC 745

42. Viewed in light of the evidence of the Medical Jurist(PW-9) who conducted the autopsy upon Jeeva's dead body, we are of the opinion that, if at all, the victim had already been subjected to the injuries noted in the postmortem report(Exhibit-50), he would be having a severe expression of pain and it would have been impossible for him to climb up the flights of stairs. Furthermore, on being presented before the learned Magistrate, the expression of pain on the face of the victim, would be prominently visible and could not have escaped being noticed by the learned Magistrate.

43. The opinion of the Medical Jurist(PW-9) regarding the age of injuries has not been controverted by the prosecution. The said witness was examined by the prosecution and he has categorically opined in his examination in chief that the injuries caused to the deceased were fresh and must have occurred within six to eight hours of the death. The expert witness(PW-10) also admitted that the doctor who had performed the postmortem examination would be in a better position to give opinion about the age of injuries. Thus, there is formidable evidence of the Medical Jurist(PW-9) which totally discredits the version of the so called eyewitnesses(PW-1, PW-2 and PW-3) that Jeeva(deceased) was inflicted the injuries leading to his death while being in police custody at the Amraiwadi Police Station. Their evidence is contradicted in material particulars by the medical evidence and other attending circumstances.

44. We are conscious of the proposition that where there are contradictions *inter se* between the opinion of the Medical Jurist and the ocular testimony, generally, the evidence of the eyewitnesses should be given precedence. However, where the contradiction is so prominent that it completely demolishes the version of the eyewitnesses who are interested and partisan, in such cases, the Court should be circumspect in admitting the evidence of the eyewitness while ignoring the convincing opinion of the Medical Expert.

45. Our view is fortified by the judgment of this Court in the case of ***Bhajan Singh alias Harbhajan Singh and Others. v. State of Haryana***[8] wherein, it was held as below: -

> **"38**. Thus, the position of law in such a case of contradiction between medical and ocular evidence can be crystallised

8 [2011] 7 SCR 1 : (2011) 7 SCC 421

> to the effect that though the ocular testimony of a witness has greater evidentiary value vis-à-vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. **However, where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved.**"
>
> (emphasis supplied)

46. Considering the unimpeachable and strong opinion of the Medical Jurist(PW-9), the probability of the victim having been assaulted in Sabarmati Central jail leading to the fatal injuries noted in the postmortem report(Exhibit-50) is much higher as compared to the theory set up in the complaint and the evidence of the star prosecution witness that Jeeva(deceased) was fatally assaulted by A1 and A2 while he was detained at the Amraiwadi Police Station.

47. The witness Udesingh Himmatsinh Chauhan(PW-8) categorically stated in his evidence that at the time of inquest, he had seen the victim's clothes thoroughly and there was red dust over the said clothes. He also stated to have seen Sabarmati Central jail from inside and deposed that soil of the jail is red.

48. We feel that since the victim was brought dead from the Sabarmati Central jail, it was imperative upon the Investigating Agency to have made extensive investigation from the prison authorities so as to rule out the possibility of injuries having been caused, while the victim was lodged in the prison. We are also of the view that if at all, Jeeva(deceased) was having the large number of injuries as noted in the postmortem report(Exhibit-50), the prison authorities would definitely have made a note thereof in the jail records at the time of his admission in the jail premises and the observations made at that time would be crucial for arriving at the truth of the matter.

49. The theory of motive attributed by the prosecution witnesses (PW-1 and PW-2) to the accused A1 and A2 is also not palpable. It may be noted that the accused appellant(A1) had been posted as Police Inspector at the Amraiwadi Police Station just a few months before the incident. Merely because Jeeva(deceased) was having prior criminal antecedents, that by itself, could not have provided motive

to the accused police officials to have singled him out for custodial torture while totally sparing the co-accused Anna Dorai.

50. As an upshot of the above discussion, we are of the view that the prosecution has failed to bring home the guilt of both the accused persons i.e. Vinod Jaswantray Vyas(A1)(since deceased) and Chinubhai Govindbhai Patel(A2)(since deceased) by leading cogent, convincing and reliable evidence and their conviction as recorded by the trial Court and affirmed by the High Court is not sustainable in the eyes of law.

51. Resultantly, the accused appellant Vinod Jaswantray Vyas(A1) (since deceased) deserves to be acquitted of the charges. The co-accused Chinubhai Govindbhai Patel(A2)(since deceased) who too was convicted by the trial Court and his appeal was also dismissed by the High Court, also deserves to be given the benefit of the conclusions drawn by us in this appeal even though no appeal has been preferred on his behalf.

52. As a consequence, the judgment dated 4th March, 1997 passed by the trial Court and judgment dated 13th February, 2017 passed by the Division Bench of the High Court are quashed and set aside. Both the accused i.e. Vinod Jaswantray Vyas(A1)(since deceased) and Chinubhai Govindbhai Patel(A2)(since deceased) are acquitted of the charges.

53. The appeal is allowed in these terms.

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

Result of the case: Appeal allowed.

†*Headnotes prepared by:* Ankit Gyan

[2024] 7 S.C.R. 396 : 2024 INSC 491

Maharaj Singh & Ors.
v.
Karan Singh (Dead) Thr. Lrs. & Ors.

(Civil Appeal No. 6782 of 2013)

09 July 2024

[Abhay S. Oka* and Sanjay Karol,JJ.]

Issue for Consideration

Can the contention that the suit agreement was sham and bogus and not intended to be acted upon be allowed to be raised notwithstanding Sections 91 and 92 of the Evidence Act; Was the suit agreement sham and bogus and not intended to be acted upon; Were the second to fourth defendants bona fide purchasers for value without notice of the suit agreement; Whether, in view of the decision of Supreme Court in B. Vijaya Bharathi, the plaintiffs were not entitled to a decree of specific performance in the absence of any prayer for cancellation of the two subsequent sale deeds; Do the provisions of the Zamindari Abolition Act create a bar on the execution of the sale deed in terms of the suit agreement; Whether the plaintiffs were entitled to a decree of specific performance.

Headnotes†

Specific Relief Act, 1963 – s.19(b) – Relief against parties and persons claiming under them by subsequent title – Defendants-subsequent purchasers claimed under the sale deeds executed after the execution of the suit agreement, if can be subjected to decree of specific performance – Plea of the defendants that in view of the decision in B. Vijaya Bharathi case, plaintiffs not entitled to decree of specific performance in the absence of prayer for cancellation of the subsequent sale deeds:

Held: In two Judges bench decision in B. Vijaya Bharathi, the attention of the Bench was not invited to binding precedent of larger bench in Lala Durga Prasad & Ors. – Hence, the decision in the case of B. Vijaya Bharathi is not a binding precedent and there was no requirement to make a prayer in the plaint for cancellation or setting aside the subsequent sale deeds – Furthermore, in view of s.19(b), the defendants claiming under the sale deeds executed after the execution of the suit agreement can be subjected to a decree of specific performance as the suit agreement can be

* Author

enforced specifically against such defendants unless they are bona-fide purchasers without the notice of the original contract – When, the defendants-subsequent purchasers fail to prove that they entered into the sale deed in good faith and without notice of the suit agreement, in view of s.19(b), a decree for specific performance can be passed against such defendants – Therefore, in such a case where s.19(b) is applicable, under the decree of specific performance, the subsequent purchasers can be directed to execute the sale deed along with the original vendor – There is no necessity to pray for the cancellation of the subsequent sale deeds – There are concurrent findings of the three Courts on the issue of the readiness and willingness shown by the first plaintiff – No reason to disturb the said findings – However, as the second plaintiff was not interested in getting the specific performance, the decree ought to have been restricted to the undivided one-half share in the suit property in favour of only the first plaintiff – Impugned decree modified. [Paras 15, 16, 19-21]

Evidence Act, 1872 – ss.91, 92:

Held: s.91 excludes oral evidence of the terms of the written document by requiring those terms to be proved by the document itself – s.92 excludes oral evidence for contradicting, varying, adding to or subtracting to such terms – These sections do not prevent parties from adducing evidence on the issue of whether the parties to the documents had agreed to contract on the terms set forth in the document – In the present case, the contention that the deceased-first defendant was addicted to vices was never raised in the written statements and the same has come by way of an afterthought in the evidence of the mother of the first defendant – Moreover, the stand of the defendants in their written statement is that the suit agreement was forged – Therefore, on facts, the contention that the suit agreement was got executed from the first defendant with the object to deter him from selling the suit property to meet the demands of his bad lifestyle cannot be accepted – Hence, the suit agreement cannot be held as bogus or sham. [Para 12]

Uttar Pradesh Civil Laws (Reforms and Amendment) Act, 1976 – Registration Act, 1908 – s.17(2)(v) – Transfer of property Act, 1882 – s.3(1) – Defendants-subsequent purchasers claimed under the sale deeds executed after the execution of the suit agreement – Whether they were bona-fide purchasers who paid consideration in good faith without the notice of the suit agreement:

Held: No – Under the 1976 Amendment Act, clause (v) of S.17(2) of the Registration Act 1908 was amended making an agreement for the sale of immovable property, a compulsorily registerable document in the State – In view of explanation 1 to s.3 of the TP Act, the second to fourth defendants shall be deemed to have knowledge of the suit agreement, which was duly registered – It cannot be said that they had no knowledge of the suit agreement in view of the constructive notice or they paid money in good faith to the first Defendant – Therefore, the second to fourth defendants were not bona-fide purchasers who paid consideration in good faith without the notice of the suit agreement. [Para 13]

Uttaranchal (The Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950) (Adaption and Modification order, 2001) (Amendment) Ordinance, 2003 – s.154-B(1) – Transfer of property Act, 1882 – s.54 – s.154-B(1), if created a bar on the execution of the sale deed in terms of the suit agreement:

Held: s.154-B(1) prohibits the sale or transfer of agricultural lands to a person who is not an agriculturalist – In view of s.54 of the TP Act, an agreement for sale does not transfer the property subject matter of the agreement to the purchaser – It does not create any interest in the property subject matter of the agreement – Therefore, the embargo created by sub-section (1) of s.154-B will apply only to the execution of the sale deed and not to the execution of the agreement for sale. [Para 17]

Uttaranchal (The Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950) (Adaption and Modification order, 2001) (Amendment) Ordinance, 2003 – s.154-B(2)(h) – Whether the vendor and the persons claiming through him can be directed to apply for permission in accordance with s.154-B(2)(h) to sell and whether a decree for execution of the sale deed can be made contingent upon the grant of permission to sell:

Held: s.154-B(2)(h) permits the sale of agricultural land to a non-agriculturalist with the permission of the State Government for the purposes specified in clause (i) to (v) of clause (h) – In the present case, defendants shall join the first plaintiff in applying to the State Government/Competent Authority for the grant of permission u/s.154-B(2)(h) to sell the one half-undivided share in the suit land to the first plaintiff – It shall be the obligation of the defendants to apply for the permission and to do all such things which are necessary to get the permission – Further directions issued. [Paras 17, 21]

Case Law Cited

B.Vijaya Bharathi v. P. Savitri & Ors. [2017] 7 SCR 746 **: (2018) 11 SCC 761 – not a binding precedent.**

Lala Durga Prasad & Ors. v. Lala Deep Chand & Ors. [1954] 1 SCR 360 **: (1953) 2 SCC 509 – relied on.**

Tyagaraja Mudaliyar and Anr. v. Vedathanni **ILR (1936) 59 Mad 446 : (1935) SCC OnLine PC 68;** *Krishnabai Bhritar Ganpatrao Deshmukh v. Appasaheb Tuljaramarao Nimbalkar & Ors.* [1980] 1 SCR 161 **: (1979) 4 SCC 60;** *Rojasara Ramjibhai Dahyabhai v. Jani Narottamdas Lallubhai and Another* [1986] 2 SCR 447 **: (1986) 3 SCC 300 – referred to.**

List of Acts

Specific Relief Act, 1963; Uttaranchal (The Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950) (Adaption and Modification order, 2001) (Amendment) Ordinance, 2003; Evidence Act, 1872; Uttar Pradesh Civil Laws (Reforms and Amendment) Act 1976; Registration Act, 1908; Transfer of Property Act, 1882.

List of Keywords

Specific performance; Suit for specific performance; Decree of specific performance; Suit agreement; Sale deed; Agreement for sale; Subsequent purchasers; Subsequent sale deeds; Absence of prayer for cancellation or setting aside of the subsequent sale deeds in the plaint; Bona-fide purchasers; Bona fide purchasers for value without notice of the suit agreement; Defendants not bona-fide purchasers; Consideration not paid in good faith; Notice of the suit agreement; Knowledge of suit agreement; Constructive notice; Suit agreement not sham and bogus; Sale deeds executed after the execution of the suit agreement; Original vendor; Subsequent purchasers to execute the sale deed along with original vendor; Readiness and willingness; Sale of agricultural land to a non-agriculturalist; Binding precedent; Binding precedent of larger bench.

Case Arising From

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6782 of 2013

From the Judgment and Order dated 21.04.2010 of the High Court of Uttarakhand at Nainital in SA No. 206 of 2001 (old No. 42 of 1994)

Appearances for Parties

Ashok Kumar Sharma, Sr. Adv., Vanshdeep Dalmia, Ms. Anisha Jain, Advs. for the Appellants.

Sumit Kumar, Jatinder Kumar Bhatia, Krishnam Mishra, Param Kumar Mishra, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Abhay S. Oka, J.

1. This appeal is at the instance of the original third, second, and fourth defendants. The first and second respondents are the original plaintiffs. The third respondent is the mother of the deceased original first defendant. For convenience, we are referring to the parties according to their status in the suit.

FACTUAL ASPECT

2. Reference to a few factual aspects will be necessary. The first defendant executed a registered agreement for sale dated 7th December 1981 by which he agreed to sell his Bhumidhari land measuring 2.90 acres of Khasra no. 48 (for short, 'the suit property') at village-Jauniwala, Tehsil-Kashipur, District-Nainital in favour of the plaintiffs for the consideration of Rs. 20,300/-. There was a recital in the registered agreement dated 7th December 1981 (for short, 'the suit agreement') that the first defendant had received a sum of Rs. 7,000/- as advance and the balance consideration was payable at the time of execution of the sale deed. The first defendant agreed to execute the sale deed within three years from the date of the suit agreement. According to the plaintiffs' case, requests were made orally and by sending notices to the first defendant to execute the sale deed. It is pleaded in the plaint that the first defendant refused to accept notices.

3. On 6th September 1983, the first defendant sold 1.60 acres out of the suit property to the second and third defendants by a registered sale deed. By another sale deed dated 12th December 1983, the first defendant sold the remaining part of the suit property to the second to fourth defendants. We must note that the suit was filed on 17th December 1983, and the averments regarding the subsequent alienations were incorporated by the amendment made to the plaint

in terms of the order dated 28th July 1984. The case made out in the plaint is that the subsequent sale deeds are collusive. The prayer in the suit was for specific performance of the suit agreement with a direction to the defendants to hand over possession of the suit property to the plaintiffs and to execute a sale deed in respect of the suit property in their favour.

4. The defendants, including the legal representative (Smt. Bhagwati Devi) of the original first defendant, filed separate written statements. In the written statement filed by the legal representative of the first defendant, it was contended that the suit agreement was fictitious. In the written statement filed by the second and third defendants, it was pleaded that the suit agreement is a forged document which was never to be acted upon. It is pointed out that the first plaintiff - Karan Singh, and the first defendant were relatives. The plaintiffs never paid any money to the first defendant.

5. The first plaintiff was examined as a witness. The second plaintiff, Murari Singh, did not support the first plaintiff. He deposed in favour of the defendants. He stated on oath that the suit agreement was made only to ensure that the first defendant did not alienate the suit land. He stated that the first defendant was his relative. He stated that the first plaintiff was related to him and was a well-known person. The first plaintiff's name was included as the purchaser in the suit agreement to deter the first defendant. He stated that he and the first plaintiff never demanded execution of the sale deed from the first defendant. The second plaintiff proceeded to state that he had not filed the suit, and the signature shown to him on the vakalatnama was of someone else. Subsequently, the second plaintiff filed an affidavit stating that the first defendant had several bad habits and, therefore, there was an apprehension that he would sell the suit property.

FINDINGS OF THE COURTS

6. The Trial Court held that the execution of the suit agreement was proved. Relying upon Section 92 of the Indian Evidence Act, 1872 (for short, 'the Evidence Act'), the learned Trial Judge held that evidence contrary to the contents of the suit agreement could not be adduced and was not admissible in evidence. The learned Trial Judge held that in view of the provisions of the Uttar Pradesh Civil Laws (Reforms and Amendment) Act, 1976, which came into force

on 31st December 1976, an agreement for sale was compulsorily registrable in the State at the relevant time. Therefore, the learned Trial Judge held that in view of the explanation to Section 3 of the Transfer of Property Act, 1882 (for short, 'the TP Act'), the second to fourth defendants shall be deemed to have a notice of the execution of the suit agreement. The learned Judge held that it was a duty of the second to fourth defendants to take a search in the office of the Sub-Registrar to ascertain whether there was any prior transfer. Therefore, the learned Trial judge held that the second to fourth defendants could not be held to be *bona fide* purchasers for value received. The finding on the issue of readiness and willingness was also recorded in favour of the plaintiffs. Therefore, the Trial Court passed a decree for the specific performance, directing all the defendants to execute the sale deed and deliver possession of the suit property to the plaintiffs. In an appeal preferred by the second to fourth defendants, the Additional District Judge, Nainital, confirmed all the findings of the Trial Court. The Additional District Judge dismissed the appeal. A second appeal was preferred by the second to fourth respondents. The second appeal has been dismissed by the impugned judgment.

ORDERS OF THIS COURT

7. On 26th October 2010, this Court issued notice. The order of this Court reads thus:

> "Mr. K.B. Sinha, senior advocate appearing for the petitioners submits that after coming into force of the Uttaranchal (The Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950) (Adaptation and Modification Order, 2001) (Amendment) Act, 2003, the sale of the suit land in terms of the decrees of the Court would be violative of the provisions of the Act because the plaintiff is not an agriculturist.
>
> Issue notice.
>
> In the meanwhile, there shall be stay of operation of the impugned decree."

On 12th August 2013, leave was granted. This Court granted a stay to the operation of the impugned decrees on 26th October 2010.

SUBMISSIONS

8. The learned senior counsel appearing for the second to fourth defendants submitted that the three Courts refused to consider the submission that the suit agreement was sham and bogus. By pointing out Sections 91 and 92 of the Evidence Act, he urged that the provisions did not prevent the defendants from leading evidence to show that the suit agreement was bogus or sham. He relied on the Privy Council's decision in the case of ***Tyagaraja Mudaliyar and Anr. v. Vedathanni***[1]. He submitted that Sections 91 and 92 of the Evidence Act do not exclude evidence on the question of whether the parties had agreed to contract on the terms set forth in the document. He also relied upon a decision of this Court in the case of ***Krishnabai Bhritar Ganpatrao Deshmukh v. Appasaheb Tuljaramarao Nimbalkar & Ors.***[2]**.** He submitted that it was brought on record in the depositions of the second plaintiff who was the uncle of the first defendant, and Bhagwati Devi, the mother of the first defendant, that the first defendant had many vices. Bhagwati Devi was apprehensive that the first defendant would sell the property to fund his bad lifestyle. The second plaintiff, Murari Singh, was her brother; therefore, she approached Murari Singh to prevent the first defendant from selling the suit property. The second plaintiff, Murari Singh, brought his friend, the first plaintiff. Thereafter, the suit agreement was executed to deter the first defendant from selling the property. He submitted the specific contention that the suit agreement was a sham document which was not to be acted upon has been brushed aside by the three Courts.

9. He submitted that the first plaintiff filed the suit within a few days after the first defendant executed a sale deed on 12th December 1983 in favour of the second to fourth defendants. The learned senior counsel further submitted that the second to fourth defendants are *bona-fide* purchasers as the suit agreement is sham and bogus. He submitted that the defence that the plaintiffs were not ready and willing to perform their part of the suit agreement is also available to the defendants claiming to be subsequent purchasers through the vendor. The learned senior counsel relied upon a decision of

1 ILR (1936) 59 Mad 446 : 1935 SCC OnLine PC 68

2 [1980] 1 SCR 161 **:** (1979) 4 SCC 60

this Court in the case of ***B. Vijaya Bharathi v. P. Savitri & Ors.***[3]**,** and submitted that the plaintiffs are disentitled to relief of specific performance as they have not prayed in the plaint for setting aside or cancelling the subsequent sale deeds. Learned senior counsel also relied upon Section 154-B of the Uttaranchal (The Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950) (Adaption and Modification order, 2001) (Amendment) Ordinance, 2003 (for short, 'the Zamindari Abolition Act"). He submitted that as the 1st plaintiff is not an agriculturist within the meaning of Section 3(a) thereof, in view of Section 154-B, a sale deed cannot be executed in terms of the suit agreement. He also pointed out that the legal representatives of the first respondent (first Plaintiff) have not chosen to contest the appeal despite service of notice. Therefore, they are not interested in contesting the appeal.

QUESTIONS FOR CONSIDERATION

10. After having considered the submissions of the learned counsel appearing for the appellants, we find that the following questions arise:

a) Can the contention that the suit agreement was sham and bogus and not intended to be acted upon be allowed to be raised notwithstanding Sections 91 and 92 of the Evidence Act?

b) Was the suit agreement sham and bogus and not intended to be acted upon?

c) Were the second to fourth defendants *bona fide* purchasers for value without notice of the suit agreement?

d) Whether, in view of the decision of this Court in the case of ***B. Vijaya Bharathi***[3]**,** the plaintiffs are not entitled to a decree of specific performance in the absence of any prayer for cancellation of the two subsequent sale deeds?

e) Do the provisions of the Zamindari Abolition Act create a bar on the execution of the sale deed in terms of the suit agreement?

f) Whether the plaintiffs are entitled to a decree of specific performance?

3 [2017] 7 SCR 746 **:** (2018) 11 SCC 761

FIRST TWO QUESTIONS – (a) AND (b)

11. Now, we come to the first two questions. Right from the decision of the Privy Council in the case of ***Tyagaraja Mudaliyar***[1] the law is well settled. Section 91 of the Evidence Act excludes oral evidence of the terms of the written document by requiring those terms to be proved by the document itself. Section 92 excludes oral evidence for contradicting, varying, adding to or subtracting to such terms. These two sections do not prevent parties from adducing evidence on the issue of whether the parties to the documents had agreed to contract on the terms set forth in the document.

12. Coming to the facts of the case, firstly, we must refer to the pleadings of the legal representative of the first defendant. In paragraph 11 of her written statement, she raised the following contention:

> "……
>
> **11.** That the real facts are that plaintiff Murari Singh is the brother of answering respondent and Karan Singh is his friend. So, under fear and making the pressure on Preetam Singh, a fictitious agreement was prepared by plaintiff Murari Singh without any consideration in order to deter late Preetam Singh, so that the should not sale the land. Neither this agreement was acted upon nor was disclosed any time. The said amount for consideration, written in the agreement, is shown at very low price from the market price.
>
> ……"

Thus, the legal representative of the first defendant did not plead that the first defendant was addicted to several vices and that to prevent him from selling the suit property for supporting his bad lifestyle, the suit agreement was executed. It is merely stated that the second plaintiff prepared a fictitious agreement without any consideration to deter the first defendant from selling the land. It is not pleaded that as the first plaintiff was an influential person, he was brought into the picture to deter the first defendant. The second and third defendants filed a written statement. The contention raised by them in the written statement is entirely different. In paragraph 12 of the written statement, they pleaded thus:

> "……

> **12.** That the alleged agreement to sale dated 17.12.1981 is a forged document and was never acted upon. The plaintiff no. 1 and Sh. Pritam Singh are relative to each other. The plaintiffs are the resident of some other districts. They never paid any money. They got prepared a forged documents colluding with some persons of their party. The agreement to sale is illegal and the plaintiffs are not entitled of any relief on the basis of this forged document.
>
> ……"

The legal representative of the first defendant did not dispute that the first defendant signed the agreement. However, the other defendants raised a contention that the suit agreement was a forged document. The second to fourth defendants did not plead anything about the object of getting the agreement for sale executed from the first defendant. The case that the first defendant was addicted to vices and that with a view to deter him from selling the suit property, the agreement for sale was executed, was pleaded for the first time by the mother of the first defendant in her evidence. Even the allegation that the first plaintiff was joined as a purchaser to put pressure on the deceased - the first defendant was made by her for the first time in her evidence. Thus, the contention that the deceased-first defendant was addicted to vices was never raised in the written statements and the same has come by way of an afterthought in the evidence of the mother of the first defendant. Moreover, the stand of the second to fourth defendants in their written statement is that the suit agreement was forged and was prepared by the plaintiffs and some persons of their party. Therefore, in the facts of the case, it is very difficult to accept the contention that the suit agreement was got executed from the first defendant with the object to deter him from selling the suit property to meet the demands of his bad lifestyle. Hence, the suit agreement cannot be held as bogus or sham.

ON QUESTION – (c)

13. The three Courts concurrently found that under the Uttar Pradesh Civil Laws (Reforms and Amendment) Act 1976, clause (v) of Section 17(2) of the Registration Act 1908 was amended, which made an agreement for the sale of an immovable property, a compulsorily registerable document in the State. On this aspect, no arguments have been canvassed by the appellants. Therefore, in view of explanation

1 to Section 3 of the TP Act, the second to fourth defendants shall be deemed to have knowledge of the suit agreement, which was duly registered. It cannot be said that the second to fourth defendants had no knowledge of the suit agreement in view of the constructive notice. It is not their case that they took a search in the office of the Sub-Registrar before getting the sale deeds in their favour. Hence, it cannot be said that they paid money in good faith to the first Defendant. Therefore, the second to fourth defendants can never be held to be *bona-fide* purchasers who have paid consideration in good faith without the notice of the suit agreement.

ON QUESTION (d)

14. Now, we deal with another argument that the plaintiffs ought to have prayed in the suit to cancel the subsequent sale deeds executed by the first defendant. On this aspect, the law has been laid down by a Bench of three Hon'ble Judges of this Court in the case of ***Lala Durga Prasad & Ors. v. Lala Deep Chand & Ors.***[4]**,**. Paragraphs 40 to 42 of the said decision read thus:

> **"40.** First, we reach the position that the title to the property has validly passed from the vendor and resides in the subsequent transferee. The sale to him is not void but only voidable at the option of the earlier "contractor". As the title no longer rests in the vendor it would be illogical from a conveyancing point of view to compel him to convey to the plaintiff unless steps are taken to revest the title in him either by cancellation of the subsequent sale or by reconveyance from the subsequent purchaser to him. We do not know of any case in which a reconveyance to the vendor was ordered but Sulaiman, C.J. adopted the other course in *Kali Charan Singh* v. *Janak Deo Singh* [*Kali Charan Singh* v. *Janak Deo Singh*, AIR 1932 All 694 : 1932 SCC OnLine All 154] . He directed cancellation of the subsequent sale and conveyance to the plaintiff by the vendor in accordance with the contract of sale of which the plaintiff sought specific performance. But though this sounds logical the objection to it is that it might bring in its train complications between the vendor and the

4 [1954] 1 SCR 360 **:** (1953) 2 SCC 509

subsequent purchaser. There may be covenants in the deed between them which it would be inequitable to disturb by cancellation of their deed. Accordingly, we do not think that is a desirable solution.

41. We are not enamoured of the next alternative either, namely, conveyance by the subsequent purchaser alone to the plaintiff. It is true that would have the effect of vesting the title to the property in the plaintiff but it might be inequitable to compel the subsequent transferee to enter into terms and covenants in the vendor's agreement with the plaintiff to which he would never have agreed had he been a free agent; and if the original contract is varied by altering or omitting such terms the court will be remaking the contract, a thing it has no power to do; and in any case it will no longer be specifically enforcing the original contract but another and different one.

42. In our opinion, the proper form of decree is to direct specific performance of the contract between the vendor and the plaintiff and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the plaintiff. He does not join in any special covenants made between the plaintiff and his vendor; all he does is to pass on his title to the plaintiff. This was the course followed by the Calcutta High Court in *Kafiladdin* v. *Samiraddin* [*Kafiladdin* v. *Samiraddin*, AIR 1931 Cal 67 : 1930 SCC OnLine Cal 46] and appears to be the English practice. See *Fry on Specific Performance*, 6th Edn., p.90, Para207; also *Potter* v. *Sanders* [*Potter* v. *Sanders*, (1846) 6 Hare 1 : 67 ER 1057] . We direct accordingly."

(emphasis added)

15. Reliance is placed by the appellants on the decision of this Court in the case of ***B. Vijaya Bharathi***[3]. In paragraph 17 of the said decision, this Court held thus:

"17. It must also be noted that though aware of two conveyances of the same property, the plaintiff did not ask for their cancellation. This again, would stand in the way of a decree of specific performance for

> **unless the sale made by Defendant 1 to Defendant 2, and thereafter by Defendant 2 to Defendant 3 are set aside, no decree for specific performance could possibly follow.** While Mr Rao may be right in stating that mere delay without more would not disentitle his client to the relief of specific performance, for the reasons stated above, we find that this is not such a case. The High Court was clearly right in finding that the bar of Section 16(*c*) was squarely attracted on the facts of the present case, and that therefore, the fact that Defendants 2 and 3 may not be bona fide purchasers would not come in the way of stating that such suit must be dismissed at the threshold because of lack of readiness and willingness, which is a basic condition for the grant of specific performance.**"**
>
> (emphasis added)

A bench of two Hon'ble Judges has rendered this decision. Unfortunately, the attention of the Bench was not invited to binding precedent in the form of a decision of a larger bench in the case of ***Lala Durga Prasad & Ors.***[4] Hence, the decision in the case of ***B. Vijaya Bharathi***[3] is not a binding precedent. Therefore, there was no requirement to make a prayer in the plaint for cancellation or setting aside the subsequent sale deeds.

16. Clause (a) to (c) of Section 19 of the Specific Relief Act read thus:

> "19. Relief against parties and persons claiming under them by subsequent title.— Except as otherwise provided by this Chapter, **specific performance of a contract may be enforced against—**
>
> (*a*) either party thereto;
>
> **(*b*) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract;**
>
> (*c*) any person claiming under a title which, though prior to the contract and known to the plaintiff, might have been displaced by the defendant;

(d).....

(e).....”

(emphasis added)

In view of clause (b) of Section 19, the defendants who are claiming under the sale deeds executed after the execution of the suit agreement can be subjected to a decree of specific performance as the suit agreement can be enforced specifically against such defendants unless they are *bona-fide* purchasers without the notice of the original contract. When, in a given case, the defendants, who are subsequent purchasers, fail to prove that they entered into the sale deed in good faith and without notice of the suit agreement, in view of Section 19(b), a decree for specific performance can be passed against such defendants. Therefore, in such a case where Section 19(b) is applicable, under the decree of specific performance, the subsequent purchasers can be directed to execute the sale deed along with the original vendor. There is no necessity to pray for the cancellation of the subsequent sale deeds.

ON QUESTION – (e)

17. We have perused Section 154-B of the Zamindari Abolition Act. Sub-section (1) prohibits the sale or transfer of agricultural lands to a person who is not an agriculturalist. Clause (h) of sub-section (2) of Section 154-B permits the sale of agricultural land to a non-agriculturalist with the permission of the State Government for the purposes specified in clause (i) to (v) of clause (h). What is prohibited is the sale of agricultural land to a non-agriculturalist. In view of Section 54 of the TP Act, an agreement for sale does not transfer the property subject matter of the agreement to the purchaser. It does not create any interest in the property subject matter of the agreement. Therefore, the embargo created by sub-section (1) of Section 154-B will apply only to the execution of the sale deed and not to the execution of the agreement for sale.

18. Now the question is whether the vendor and the persons claiming through him can be directed to apply for permission in accordance with clause (h) of sub-section (2) of Section 154-B to sell and whether a decree for execution of the sale deed can be made contingent upon the grant of permission to sell. The law on this aspect is no longer *res integra*. In the case of ***Rojasara Ramjibhai Dahyabhai***

v. Jani Narottamdas Lallubhai and another[5], in paragraphs 12 to 14, this Court held thus:

> "12. Although Rana Mohabat Singh having failed to fulfil the terms of his contract with the appellant and execute a sale deed in his favour might have rendered the contract between them incapable of performance, but with the extinction of the title of Rana Mohabat Singh and the conferral of the rights of an occupant on the appellant, the property became transferable subject, of course, to the express covenant on the part of the appellant to do all things necessary to give effect to the agreement. Here, the suit banakhat (Ex. 25) embodies an express covenant to that effect. **There is always in such contracts an implied covenant on the part of the vendor to do all things necessary to give effect to the agreement, including the obtaining of the permission for the transfer of the property. The principles on which a term of this nature may be implied in contracts are well-settled.** It is enough to refer to Halsbury's Laws of England, Vol. 8, 3rd Edn., p. 121 where the principles are summarised as follows:
>
> "In construing a contract, a term or condition not expressly stated may, under certain circumstances be implied by the court, if it is clear from the nature of the transaction or from something actually found in the document that the contracting parties must have intended such a term or condition to be a part of the agreement between them. Such an implication must in all cases be founded on the presumed intention of the parties and upon reason, and will only be made when it is necessary in order to give the transaction that efficacy that both parties must have intended it to have, and to prevent such a failure of consideration as could not have been within the contemplation of the parties."
>
> Chitty on Contracts Vol. 1, 23rd Edn., paras 694-95 points out that a term would be implied if it is necessary in the business sense, to give efficacy to the contract.

5 [1986] 2 SCR 447 : (1986) 3 SCC 300

13. In this context, reference may be made to the decision of the Privy Council in Motilal v. Nanhelal [AIR 1930 PC 287 : (1930) 57 IA 333] . There, the facts were these. In that case, the plaintiff Mst Jankibai entered into an agreement to purchase from Rajbahadur Seth Jiwandas of Jabalpur four annas proprietary share of Mauja Raisalpur together with the sir and khudkast lands appurtenant thereto, with cultivating rights in the sir lands. The property was subject to the provisions of the Central Provinces Tenancy Act, 1920. She filed a suit for specific performance of the said contract. The Privy Council held that the contract was for a transfer of the sir lands without reservation of the right of occupancy, and that the sanction of the Revenue Officer to the transfer was necessary under Section 50(1) of the Act, which was in these terms:

"50. (1) If a proprietor desires to transfer the proprietary rights in any portion of his sir land without reservation of the right of occupancy specified in Section 49, he may apply to a revenue-officer and, if such revenue-officer is satisfied that the transferor is not wholly or mainly an agriculturist, or that the property is self-acquired or has been acquired within the twenty years last preceding, he shall sanction the transfer."

14. It was contended before the Privy Council that a decree for specific performance of the agreement of sale could not be made, because such performance would necessitate an application by or on behalf of the vendor to the Revenue Officer for sanction to transfer the cultivating rights in the sir land, and that the court had no jurisdiction to require the vendor to make such an application. In repelling the contention, the Privy Council observed that in view of their construction of the agreement, namely, that the vendor agreed to transfer the cultivating rights in the sir land:

"There was, in Their Lordships' opinion, an implied covenant on the part of the vendor to do all things necessary to effect such transfer, which would include an application to the Revenue Officer to sanction the transfer."

It was further observed that it was not necessary for their Lordships to decide whether in that case the application for

> sanction to transfer must succeed, but that it was material to mention that no facts were brought to their Lordships' notice which would go to show that there was any reason why such sanction should not be granted. **After making the said observations, the Privy Council held that in those circumstances the court had jurisdiction to enforce the contract under the Specific Relief Act, 1877 and Order 21, Rule 35 of the Code of Civil Procedure, 1908 by a decree ordering the vendor to apply for sanction and to execute a conveyance on receipt of such sanction. The decision of the Privy Council in Motilal v. Nanhelal [AIR 1930 PC 287 : (1930) 57 IA 333] therefore is an authority for the proposition that if the vendor agrees to sell the property which can be transferred only with the sanction of some government authority, the court has jurisdiction to order the vendor to apply to the authority within a specified period, and if the sanction is forthcoming to convey to the purchaser within a certain time. See also Chandnee Widya Vati Madden v. C.L. Katial [AIR 1964 SC 978 : (1964) 2 SCR 495] and R.C. Chandiok v. Chuni Lal Sabharwal [(1970) 3 SCC 140 : AIR 1971 SC 1238 : (1971) 2 SCR 573] where this Court following the Privy Council decision in Motilal v. Nanhelal case [AIR 1930 PC 287 : (1930) 57 IA 333] reiterated the same principle."**
>
> (emphasis added)

Hence, a decree enjoining the defendants to obtain permission to sell the suit property can be passed as it is their implied obligation to do so. A decree for the specific performance can be passed contingent upon the grant of the permission.

ON QUESTION – (f)

19. Now, the question is whether the plaintiffs were entitled to a decree for specific performance. In his deposition, the first plaintiff has proved the service of notice of demand to the first defendant. The suit is filed within limitation, and the defendants did not raise a plea of delay and laches. There are concurrent findings of the three Courts on the issue of the readiness and willingness shown by the first plaintiff. There is no reason to disturb the said findings. Now, the question is, what

is the effect of the failure of the second plaintiff to support the first plaintiff and his conduct of supporting the defendants? In the facts of the case, the answer lies in the submissions made by the second to fourth defendants before the High Court. In paragraph 9 of the judgment, the High Court has recorded the following submissions made by the counsel for the second to fourth defendants:

> **"9.** The learned senior counsel for the appellants submitted that the plaintiff no.2 Murari Singh did not file the suit nor had signed the vakalatnama and that the said plaintiff had admitted this fact in his deposition, consequently, the suit was not maintainable. **It was further submitted that the percentage of share between the plaintiffs were not defined in the agreement to sell and, consequently, under Section 45 of the Transfer of Property Act, the plaintiffs would be deemed to have equal shares, namely, 50 percent. The learned senior counsel for the appellants contended that since Murari Singh did not institute the suit, the decree for specific performance for the whole land, which was undivided could not have been decreed by the trial court and, consequently, to that extent, the decree passed by the trial court was erroneous**. ……"
>
> (emphasis added)

20. In our view, as the second plaintiff was not interested in getting the specific performance, the decree ought to have been restricted to the undivided one-half share in the suit property in favour of only the first plaintiff.

21. Accordingly, we partly allow the appeal by passing the following order:

(a) We modify the impugned decree by directing the legal representative of the first defendant and second to fourth defendants to execute a sale deed in favour of the first plaintiff (Karan Singh) only to the extent of one half undivided share in the suit property;

(b) The defendants shall join the first plaintiff in applying to the State Government/Competent Authority for the grant of permission under clause (h) of sub-section (2) of Section 154-B of the

Zamindari Abolition Act to sell the one half-undivided share in the suit land to the first plaintiff within two months from today. It shall be the obligation of the defendants to apply for the permission and to do all such things which are necessary to get the permission;

(c) If the defendants or any of them do not sign and file the application with relevant documents within the period mentioned above of two months, the executing Court shall appoint a Court Commissioner to sign and file the application on their behalf and to do all such things which are necessary to get the permission;

(d) If the application for grant of permission is rejected, it will be open to the first plaintiff to challenge the order of rejection in accordance with law. If the application for grant of permission is finally rejected, there shall be a decree for refund of the sum of Rs. 7,000/- against the legal representative of the first defendant together with interest thereon at the rate of 8 per cent per annum from the date of filing of the suit till the realisation. However, her liability shall be restricted to the extent of the estate of the first defendant inherited by her;

(e) If the State Government grants permission, the sale deed shall be executed in terms of clause (a) by all the defendants within three months from the date of grant of the permission;

(f) The suit stands dismissed as far as the second plaintiff is concerned;

(g) The impugned decree stands modified accordingly;

(h) Even if a sale deed is executed in favour of the first plaintiff in respect of the one-half undivided share in the suit property, he will not be entitled to seek possession in the execution of this decree as he will be at liberty to file a suit for general partition;

(i) Accordingly, the appeal is partly allowed with no orders as to cost.

Result of the case: Appeal partly allowed.

[†]*Headnotes prepared by:* Divya Pandey

[2024] 7 S.C.R. 416 : 2024 INSC 496

M/s Daimler Chrysler India Pvt. Ltd.
v.
M/s Controls & Switchgear Company Ltd. & Anr.

(Civil Appeal No. 353 of 2008)

09 July 2024

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

Issue for Consideration

Issue arose as regards the purchase of a vehicle/good by a Company for the use/personal use of its directors, if would amount to purchase for "commercial purpose" within the meaning of s. 2(1)(d) of the Consumer Protection Act, 1986; in the matter pertaining to overheating of the car, the National Commission, if justified in awarded the compensation by directing the appellants to refund the purchase price-Rs. 58 lakhs approx. to the complainant, and take back the car; and National Commission, if justified in directing the appellants to pay a sum of Rs. 5 lakhs to the complainant for the deficiency in the services rendered to it on account of the airbags of the car having not deployed/triggered and to pay a sum of Rs. 5 lakhs as compensation to the complainant for the unfair trade practice indulged into by them.

Headnotes†

Consumer Protection Act, 1986 – ss. 2(1)(d), 2(1)(f) – Consumer – Commercial purpose – Defect in the car – Complainant purchased two high priced luxury cars for the personal use of its Directors and for his family members, as a part of the perquisite to the Director from the appellant company – Persistent problem of hump heating in one of the car – Complaint and applications before the National Commission – National Commission awarded the compensation by directing the appellants to refund the purchase price-Rs. 58 lakhs approx. to the complainant, and take back the car – Interference with:

Held: No material to suggest that the purchase of car had a nexus or was linked to any profit generating activity of the company, as such it could not be said that such a high-priced luxurious car was purchased by the complainant for its "commercial purpose" – It

* Author

was clearly established by the complainant that an excessive heat was generated in the car – Appellant though not admitted specifically about the said defects in the car, had indirectly stated about the same in the applications filed before the Commission – Thus, the inherent defect of overheating of the car had persisted despite the appellant having provided the rectification measures like providing additional insulation in the car, which caused great inconvenience and discomfort to the passengers seated in the car – Such overheating of the surface of hump and the overall high temperature in the car was a fault, imperfection or shortcoming in the quality or standard which was expected to be maintained by the appellants under the contract with the complainant and thus, was a 'defect' within the meaning of s. 2(1)(f) – People do not purchase the high-end luxurious cars to suffer discomfort more particularly when they buy the vehicle keeping utmost faith in the supplier who would make the representations in the brochures or the advertisements projecting and promoting such cars as the finest and safest automobile in the world – Complainant having suffered great inconvenience, discomfort and also the waste of time and energy in pursuing the litigations, the impugned order passed by the National Commission directing the appellants to refund the purchase price-Rs. 58 lakhs approx. to the complainant, and take back the car does not warrant any interference – However, having regard to the offer made by the appellants to repurchase the car, and having regard to the complainant having retained and used the car for about seventeen years, in the interest of justice and balance of equity the complainant permitted to retain the car and the appellant to refund Rs. 36 lakhs instead of Rs. 58 lakhs to the complainant by way of compensation within the stipulated time. [Paras 17, 23, 24, 25, 40]

Consumer Protection Act, 1986 – s. 2(1)(d), 2(1)(r) – Consumer – Commercial purpose – Deficiency in the services – Unfair trade practice – Complainant's case that they purchased Mercedes Benz, E-Class-E 240 petrol version car from the appellants for its Managing Director based on its safety features – Said car met with the accident, the car was being driven by the company driver, while the director was seated on the rear left side seat of the car, and the driver was wearing the seat belt, whereas the Director did not wear the seat belt – At the time of accident, neither the airbags on the front side nor the airbags on the side of the the Director opened, as a result the

Director sustained grievous injuries, and the driver sustained some minor injuries – Complainants filed the complaint seeking compensation – National Commission directed the appellants to pay a sum of Rs. 5 lakhs to the complainant for the deficiency in the services rendered to it on account of the airbags of the car having not deployed/triggered and further directed the appellants to pay a sum of Rs. 5 lakhs as compensation to the complainant for the unfair trade practice indulged into by them – Interference with:

Held: Not called for – Trade practice which for the purpose of promoting the sale of any goods by adopting deceptive practice like falsely representing that the goods are of a particular standard, quality, style or model, would amount to "unfair trade practice" within the meaning of s. 2(1)(r) – It cannot be said that the purchase of the car by the company for the use of its director would tantamount to purchase for commercial purpose – Appellants failed to bring on record any material to show that the dominant purpose or dominant use of the car was for commercial purpose or that the purchase of the car had any nexus or was linked with any profit generating activity of the complainant company, thus, the complaint was maintainable – Nothing produced by the appellants to show that they had disclosed either in the Owner's Manual or in the Brochure about the limited functioning of the airbags, which according to them was an additional safety measure in the car – On the contrary, the complainant's case that misrepresentation was made by the appellants at the time of promotion of the car that it had a safety system which included front airbags, side-airbags and window airbags – Even if it is accepted that the airbags would deploy only when the seat belt was fastened by the passenger, admittedly, the frontal airbags of the car were not deployed though the driver had already fastened the seat belt – Thus, the defect in the car clearly established as regards non-deployment of frontal airbags – National Commission rightly considered incomplete disclosure or non-disclosure of the complete details with regard to the functioning of the airbags at the time of promotion of the car, as the "unfair trade practice" on the part of the appellants, and awarded a sum of Rs. 5 lakhs towards it as also rightly balanced the equity by awarding Rs. 5 lakhs towards the deficiency in service on account of the frontal airbags of the car having not deployed at the time of accident. [Para 40]

M/s Daimler Chrysler India Pvt. Ltd. v.
M/s Controls & Switchgear Company Ltd. & Anr.

Consumer Protection Act, 1986 – s. 2(1)(d) – Consumer – Commercial purpose – Purchase of a vehicle/good by a Company for the use/personal use of its directors, if would amount to purchase for "commercial purpose" within the meaning of s. 2(1)(d) – Determination:

Held: Would depend upon facts and circumstances of each case – However ordinarily "commercial purpose" is understood to include manufacturing/industrial activity or business-to-business transactions between commercial entities – Purchase of the goods should have a close and direct nexus with a profit generating activity – It has to be seen whether the dominant intention or dominant purpose for the transaction was to facilitate some kind of profit generation for the purchaser and/or their beneficiary – If it is found that the dominant purpose behind purchasing the goods was for the personal use and consumption was not linked to any commercial activity, it need not be looked into, if such purchase was for the purpose of "generating livelihood by means of self-employment" – Said determination cannot be restricted in a straitjacket formula and has to be decided on case-to-case basis – Furthermore, in a consumer complaint, the onus to prove that the goods were purchased for "commercial purpose" and thus, such goods would fall outside the definition of "consumer" contained in s. 2(1)(d), would be on the opponent-seller and not on the complainant-buyer. [Para 17]

Case Law Cited

General Motors Pvt. Ltd. v. G.S. Fertilizers Pvt. Ltd. **(2013) CPJ 72 (NC);** *Laxmi Engineering Works v. P.S.G Industrial Institute* [1995] 3 SCR 174 **: (1995) 3 SCC 583;** *Lilavati Kirtilal Mehta Medical Trust v. Unique Shanti Developers and Others* [2019] 14 SCR 563 **: (2020) 2 SCC 265;** *Shrikant G. Mantri v. Punjab National Bank* [2022] 5 SCR 945 **: (2022) 5 SCC 42;** *National Insurance Company Limited v. Harsolia Motors and Others* [2023] 3 SCR 448 **: (2023) 8 SCC 362;** *Rohit Chaudhary and Another v. Vipul Limited* [2023] 14 SCR 394 **: (2024) 1 SCC 8 – referred to.**

List of Acts

Consumer Protection Act, 1986.

List of Keywords

Commercial purpose; Consumer; Onus to prove; Profit generating activity; Dominant purpose; Maintainability of the consumer complaint; Problem of hump heating of the car; Compensation; Repurchase the car; High-end luxurious cars; Balance of equity; Mercedes Benz, E-Class-E 240 petrol version car; Airbags of the car; Grievous injuries; Minor injuries; Deficiency in service; Unfair trade practice; Safety measure in the car; Defect in the car; Trade practice; Deceptive practice.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 353 of 2008

From the Judgment and Order dated 17.09.2007 of the National Consumers Disputes Redressal Commission, New Delhi, in CC No.9 of 2006

With

Civil Appeal Nos. 19536-19537 of 2017 and Civil Appeal No. 2633 of 2018

Appearances for Parties

Dhruv Mehta, P. C Sen, Sr. Advs., Rakesh Kumar, Sidharth Sethi, Avinash Das, Ms. Anupama Dhurve, P. S. Sudheer, Rishi Maheshwari, Ms. Anne Mathew, Bharat Sood, Ms. Miranda Solaman, Ms. Akshita Chhabra, Kamal Kant, Vivek Jain, Arun Khosla, M. A. Chinnasamy, Mrs. C Rubavathi, C Raghavendren, P Raja Ram, Sarubh Gupta, Manoj Kumar Chowdhary, Ms. Janani B, Dr. B.P. Nilaratna, Ch. Leela Sarveswar, V. Senthil Kumar, Ms. Manjula Gupta, Vipin Singhania, Diwakar Chirania, Abhay Singh Malik, Ms. Sapna Kaushik, Pranav Raina, Sanjay Kumar Pathak, S.N. Pandey, Miss K.K. Kiran Pathak, M.S. Akhtar, Sunil Kr. Jha, Mayank Madhu, Miss Nidhi Thakur Advs. for the appearing parties.

Judgment / Order of the Supreme Court

Judgment

Bela M. Trivedi, J.

1. Though factually different, these appeals involve common question of law - whether the purchase of a vehicle/good by a Company for

the use/personal use of its directors would amount to purchase for "commercial purpose" within the meaning of Section 2(1)(d) of the Consumer Protection Act, 1986 (now re-enacted as Consumer Protection Act, 2019)?

2. The CA No. 353 of 2008 has been filed by the appellant - M/s Daimler Chrysler India Pvt. Ltd., now known as Mercedes Benz India Pvt. Ltd. (original opponent no. 1) arising out of the Original Petition No. 09 of 2006 filed by the respondent no. 1 - M/s Controls and Switchgear Company Ltd. (original complainant), challenging the impugned judgment and order dated 17.09.2007 passed by the National Consumer Disputes Redressal Commission (hereinafter referred to as the National Commission), in the said O.P. No. 9/2006.

3. The CA Nos. 19536-19537 of 2017 have been preferred by the appellant - Mercedes Benz India Pvt. Ltd. and Anr. (original opponent nos. 1 and 2) arising out of the Consumer Case No. 51 of 2006 filed by the respondent no. 1 - CG Power and Industrial Solutions Ltd. and Mr. Sudhir M. Trehan, M.D. of respondent no. 1, (original complainants), challenging the impugned orders dated 08.07.2016 and 11.09.2017 passed by the National Commission in the said C.C. No. 51/2006. The cross appeal being no. CA No. 2633 of 2018 has been preferred by the appellant – M/s CG Power and Industrial Solutions Ltd. (original complainant no. 1) against the respondents - Mercedes Benz India Pvt. Ltd. and Ors. (original opponents) challenging the judgment and order dated 11.09.2017 passed in the said Consumer No. 51 of 2006 by the National Commission, in so far as it is against M/s. C.G. Power.

4. At the outset, it may be noted that in Original Petition No. 09 of 2006 (from which CA No. 353 of 2008 arises), the National Commission vide the impugned order dated 17.09.2007 after holding that the Complainant-Company being a legal entity, was entitled to file a Complaint, and that the cars purchased for the use of the directors of the Company, not used for any activity directly connected with commercial purpose of earning profit, could not be said to have been purchased by the complainant-company for "commercial purpose", had directed the appellant (original opponent no. 1) to replace the Car no. DL-5CR-0333 with a new car of the same or similar model, or in the alternative refund its full purchase price, namely one half of the amount of Rs. 1,15,72,280/- which was paid by the complainant to the opposite parties for the purchase of the two vehicles in question,

and take back the vehicle. It may further be noted that vide the said impugned order dated 17.09.2007, the National Commission had also passed the order with regard to the second car being car no. DL-9CV-5555, purchased by the complainant. In respect of that part of the order pertaining to the second car, the appellant had preferred an appeal being CA No. 6042 of 2007 before this Court. The said Appeal came to be disposed of vide the order dated 11.01.2008 by this Court. Hence, now, we are concerned with the impugned order dated 17.09.2007 pertaining to the car no. DL-5CR-0333 only, so far as the CA No. 353 of 2008 is concerned.

5. It is further pertinent to note that the findings recorded in the said judgment and order dated 17.09.2007 in Original Petition No. 09 of 2006 with regard to the maintainability of the Complaint at the instance of the complainant-company in respect of the car purchased for the use/personal use of the director of the company, being in conflict with the findings recorded by an another two-member Bench of the National Commission in case of ***General Motors Pvt. Ltd. Vs. G.S. Fertilizers Pvt. Ltd.***[1] in which it was held *inter alia* that the vehicle purchased by a company for its Managing Director would amount to its purchase for a commercial purpose, the matter was referred to the three-member Bench of the National Commission. The three-member Bench in the Consumer Complaint No. 51 of 2006 vide the impugned judgment and order dated 08.07.2016 held as under:

> "11(a) If a car or any other goods are obtained or any services are hired or availed by a company for the use/personal use of its directors or employees, such a transaction does not amount to purchase of goods or hiring or availing of services for a commercial purpose, irrespective of whether the goods or services are used solely for the personal purposes of the directors or employees of the company or they are used primarily for the use of the directors or employees of the company and incidentally for the purposes of the company.
>
> (b) The purchase of a car or any other goods or hiring or availing of services by a company for the purposes of the company amount to purchase for a commercial purpose,

1 II (2013) CPJ 72 (NC)

even if such a car or other goods or such services are incidentally used by the directors or employees of the company for their personal purposes."

6. The appellants - Mercedes Benz India Pvt. Ltd. (the original opponents in Consumer Complaint No. 51/2006) challenged the said Judgment and Order dated 08.07.2016 passed by the three-member Bench of the National Commission, before this Court by preferring an Appeal being C.A. No. 10410 of 2016. This Court disposed of the said Appeal by passing following order on 20.02.2017: -

> "Heard Mr. Shyam Divan, learned senior counsel along with Mr. Vineet Maheshwari, learned counsel appearing for the petitioner and Mr. Amir Singh Pasrich, learned counsel appearing for the 1st respondent.
>
> The present appeal calls in question the legal propriety of the order dated 8.7.2016 passed by the National Consumer Disputes Redressal Commission, Bench No. 1, New Delhi (for short, 'the National Commission') in Consumer Complaint No. 51 of 2006 repelling the submission of the appellant that the complaint before the said Commission is not maintainable.
>
> Having heard learned counsel for the parties, we are of the considered opinion that the National Commission should adjudicate the dispute finally and thereafter it will be open to the appellant to challenge the order of maintainability, i.e., the present order as well as the final order. The National Commission is requested to dispose of the Consumer Complaint No. 51 of 2006 within three months hence.
>
> With the aforesaid observation and liberty, the civil appeal stands disposed of. There shall be no order as to costs."

7. Thereafter, the National Commission adjudicated the disputes between the parties on merits vide the impugned judgment and order dated 11.09.2017 and disposed of the Consumer Case No. 51 of 2006 by giving following directions:

> "(i) The opposite parties No.1 & 2 shall pay a sum of Rs.5.00 lacs to complainant No.1 for the deficiency in the services rendered to it on account of the airbags of the car having not deployed/triggered;

(ii) The opposite parties No.1 & 2 shall pay a sum of Rs.5.00 lacs as compensation to complainant No.1 for the unfair trade practice indulged into by them;

(iii) The Opposite Parties No.1 & 2 shall, in the Owner's Manual to be provided to the buyers of their E-class Cars, as well as on their website, provide adequate information with respect to the deployment triggering of the airbags of the vehicle, in consultation with AAUI.

(iv) The opposite parties No.1 & 2 shall pay a sum of Rs. 25,000/- as the cost of litigation to complainant No.1.

(v) The payment in terms of this order shall be made and the directions contained herein will be complied within three months from today."

8. As stated earlier, the said two orders 08.07.2016 and 11.09.2017 passed in Consumer case no. 51 of 2006 have been challenged by the appellants-Mercedes Benz by way of C.A. No. 19536-19537 of 2017. The Cross Appeal being C.A. No. 2633 has been preferred by M/s CG Power and Industrial Solutions Ltd. (original complainant), being aggrieved by the judgment and order dated 11.09.2017 passed by the National Commission.

9. The common bone of contention raised by the learned counsels appearing for the appellants - M/s Daimler Chrysler India Pvt. Ltd., (now Mercedes Benz India Pvt. Ltd.) in their respective Appeals is that the purchase of car/vehicle by a company for the use/personal use of its directors could not be said to be the purchase of vehicle for self-employment to earn its livelihood, but it has to be construed as the purchase of vehicle for "commercial purposes", and therefore such company would fall outside the purview of the definition of "consumer" within the meaning of Section 2(1)(d) of the said Act. In this regard it would be apt to reproduce the relevant part of the definition of "Consumer" as contained in Section 2(1)(d) of the Act, which reads as under-

"2(1)(d) "consumer" means any person who,—

(i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any

> user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or
>
> (ii)….
>
> *Explanation*.—For the purposes of this clause, "commercial purpose" does not include use by a person of goods bought and used by him and services availed by him exclusively for the purposes of earning his livelihood by means of self-employment;"

10. From the bare reading of the said definition, it is discernible that the definition of "consumer" does not include a person who obtains any goods for "resale" or for "any commercial purpose". Though what is "commercial purpose" has not been defined under the Act, it has been interpreted in catena of decisions by this Court.

11. In ***Laxmi Engineering Works vs. P.S.G Industrial Institute***[2] this Court after discussing the earlier decisions concluded *inter alia* that whether the purpose for which a person has bought goods is a "commercial purpose" within a meaning of definition of expression "consumer" in Section 2(1)(d) of the Act, is always a question of fact to be decided in the facts and circumstances of each case.

12. In ***Lilavati Kirtilal Mehta Medical Trust vs. Unique Shanti Developers and Others***[3]**,** this Court culled out broad principles for determining whether an activity or transaction is for a "commercial purpose" or not, while holding that though no strait jacket formula could be adopted in every case.

> **"19.** To summarise from the above discussion, though a strait jacket formula cannot be adopted in every case, the following broad principles can be culled out for determining whether an activity or transaction is "for a commercial purpose":

2 [1995] 3 SCR 174 : (1995) 3 SCC 583

3 [2019] 14 SCR 563 : (2020) 2 SCC 265

19.1. The question of whether a transaction is for a commercial purpose would depend upon the facts and circumstances of each case. However, *ordinarily*, "commercial purpose" is understood to include manufacturing/industrial activity or business-to-business transactions between commercial entities.

19.2. The purchase of the good or service should have a close and direct nexus with a profit-generating activity.

19.3. The identity of the person making the purchase or the value of the transaction is not conclusive to the question of whether it is for a commercial purpose. It has to be seen whether the dominant intention or dominant purpose for the transaction was to facilitate some kind of profit generation for the purchaser and/or their beneficiary.

19.4. If it is found that the dominant purpose behind purchasing the good or service was for the personal use and consumption of the purchaser and/or their beneficiary, or is otherwise not linked to any commercial activity, the question of whether such a purchase was for the purpose of "generating livelihood by means of self-employment" need not be looked into."

13. Further in the case of ***Shrikant G. Mantri vs. Punjab National Bank***[4], this Court observed thus-

> **"50.** It is thus clear, that this Court has held that the question, as to whether a transaction is for a commercial purpose would depend upon the facts and circumstances of each case. However, **ordinarily, "commercial purpose" is understood to include manufacturing/industrial activity or business-to-business transactions between commercial entities; that the purchase of the good or service should have a close and direct nexus with a profit-generating activity; that the identity of the person making the purchase or the value of the transaction is not conclusive for determining the question as to whether it is for a commercial purpose or not. What**

4 [2022] 5 SCR 945 : (2022) 5 SCC 42

> **is relevant is the dominant intention or dominant purpose for the transaction and as to whether the same was to facilitate some kind of profit generation for the purchaser and/or their beneficiary.** It has further been held that if the dominant purpose behind purchasing the good or service was for the personal use and the consumption of the purchaser and/or their beneficiary, or is otherwise not linked to any commercial activity, then the question of whether such a purchase was for the purpose of "generating livelihood by means of self-employment" need not be looked into."

14. In the case of ***National Insurance Company Limited vs. Harsolia Motors and Others*** [5]**,** this Court while relying and emphasizing on the principles laid down in ***Lilavati Kirtilal Mehta Medical Trust*** (supra) noted that what needs to be seen while determining whether the object purchased is being used for commercial purpose or not, is whether the dominant intention or dominant purpose for the transaction was to facilitate some kind of profit generation for the purchaser and/or their beneficiary. What needs to be determined is whether the object had a close and direct nexus with the profit generating activity and whether the dominant intention or dominant purpose for the transaction was to facilitate some kind of profit generation for the purchaser and/or their beneficiary.

15. Further in the case ***Rohit Chaudhary and Another vs. Vipul Limited*** [6]**,** it was held as follows –

> **"15.** The expression "commercial purpose" has not been defined under the Act. In the absence thereof we have to go by its ordinary meaning. "Commercial" denotes **"pertaining to commerce"** (Chamber's Twentieth Century Dictionary); it means **"connected" with or engaged in commerce; mercantile**; **"having profit as the main aim"** (Collin's English Dictionary); relate to or is connected with trade and traffic or commerce in general, is occupied with business and commerce.

5 [2023] 3 SCR 448 : (2023) 8 SCC 362

6 [2023] 14 SCR 394 : (2024) 1 SCC 8

16. The Explanation [added by Consumer Protection (Amendment) Act 50 of 1993 replacing Ordinance 24 of 1993 w.e.f. 18-6-1993] excludes certain purposes from the purview of the expression "commercial purpose" — a case of explanation to an exception to amplify this definition by way of an illustration would certainly clear the clouds surrounding such interpretation. For instance, a person who buys a car for his personal use would certainly be a consumer, but if purchased for plying the car for commercial purposes, namely, as a taxi, it can be said that it is for a commercial purpose. However, the Explanation clarifies that even purchases in certain situations for "commercial purposes" would not take within its sweep the purchaser out of the definition of expression "consumer". In other words, if the commercial use is by the purchaser himself for the purpose of earning his livelihood by means of self-employment, such purchaser of goods would continue to be a "consumer".

17. This Court in Lilavati Kirtilal Mehta Medical Trust v. Unique Shanti Developers [Lilavati Kirtilal Mehta Medical Trust v. Unique Shanti Developers, (2020) 2 SCC 265 : (2020) 1 SCC (Civ) 320] , has held that **a straitjacket formula cannot be adopted in every case and the broad principles which can be curled out for determining whether an activity or transaction is for a commercial purpose would depend on facts and circumstances of each case.**

18. Thus, if the dominant purpose of purchasing the goods or services is for a profit motive and this fact is evident from the record, such purchaser would not fall within the four corners of the definition of "consumer". On the other hand, if the answer is in the negative, namely, if such person purchases the goods or services is not for any commercial purpose and for one's own use, it cannot be gainsaid even in such circumstances the transaction would be for a commercial purpose attributing profit motive and thereby excluding such person from the definition of "consumer"."

16. The sum and substance of the above decisions is that to determine whether the goods purchased by a person (which would include a legal entity like a company) were for a commercial purpose or not, within the definition of a "consumer" as contemplated in Section 2(1)(d) of the said Act, would depend upon facts and circumstances of each case. However ordinarily "commercial purpose" is understood to include manufacturing/industrial activity or business-to-business transactions between commercial entities. The purchase of the goods should have a close and direct nexus with a profit generating activity. It has to be seen whether the dominant intention or dominant purpose for the transaction was to facilitate some kind of profit generation for the purchaser and/or their beneficiary. If it is found that the dominant purpose behind purchasing the goods was for the personal use and consumption of the purchaser and/or their beneficiary, or was otherwise not linked to any commercial activity, the question of whether such a purchase was for the purpose of "generating livelihood by means of self-employment" need not be looked into. Again, the said determination cannot be restricted in a straitjacket formula and it has to be decided on case-to-case basis.

I. CIVIL APPEAL NO. 353 OF 2008

17. So far as the CA No. 353/2008 is concerned, it appears that as per the case of the respondent no. 1 (original complainant), it had purchased two cars for the use by its Whole-time Executive Directors as part of their perquisites and the said high priced luxury cars were in fact being used by them for their personal use and for the use of their immediate family members. It was strenuously urged by the learned senior counsel Ms. Arora for the appellant that if the car in question was purchased by the respondent no. 1 for the personal use of its Director, it must carry a requisite form attested by the Chartered Accountant along with the Income Tax returns of the concerned Director, and since such document or form having never been submitted and produced before the Commission, it was required to be presumed that the car was purchased by the respondent no. 1-company for its commercial purpose. Such a submission could not be accepted. It is trite to say that when a consumer files a complaint alleging defects in the goods purchased by him from the opponent seller, and if the opponent-seller raises an objection with regard to the maintainability of the consumer complaint on the ground that the goods in question were purchased by the complainant-buyer for its

commercial purpose, the onus to prove that they were purchased for "commercial purpose" and therefore, such goods would fall outside the definition of "consumer" contained in Section 2(1)(d) of the Act, would be on the opponent-seller and not on the complainant-buyer. In the instant case, it has been specifically asserted by the respondent-complainant that the car in question was purchased by it for the personal use of its Whole-time Director and for his immediate family members, and the dominant purpose of purchasing the car was to treat it as a part of the perquisite to the Director. There is nothing on record worth the name to show that the said car was used for any commercial purpose by the respondent-complainant. Even if it is presumed that the respondent-complainant company had taken benefit of deduction available to it under the Income Tax Act, nonetheless in absence of any material placed on record to suggest that such purchase of car had a nexus or was linked to any profit generating activity of the company, it could not be said that such a high-priced luxurious car was purchased by the respondent no. 1 for its "commercial purpose".

18. As regards the defects in the car, both the sides have heavily placed reliance upon the correspondence which took place between them after the purchase of the car by the respondent no. 1 and after the defects were detected in the car. The said correspondence has also been tabulated by National Commission in the impugned order from which it appears that within a very short time after the purchase of the car in question on 31.03.2003, one of the directors of the respondent-company namely Mr. Ashok Khanna had taken the car out from Delhi for going to Chandigarh and Dehradun in April, 2003 and found that "sitting at the back seat, the center hump on the floor over the drive shaft of the vehicle was excessively heated and particularly so on the left side of the center hump". The said defect was immediately reported to the appellant and the respondent no. 2, however after examining the vehicle they had reported that everything was fine and nothing unusual was observed. Since, the said complaint of heating persisted, the respondent-complainant again requested the appellant to rectify the defect. Thereafter, several correspondences ensued between the parties. It is pertinent to note that in the letter dated 21.08.2003, it was stated by the appellant that "although the area (center hump) was observed to be warm, it is not a defect". In its letter dated 02.07.2004, the respondent

no. 2 who happened to be the dealer of the appellant required the complainant-company with regard to the center hump to keep it under observation over a longer distance and to report the matter in case of any abnormalities, had confirmed that the AC control unit was found to be defective. Thereafter, on the respondent-company having made the complaint of excessive heating on the center hump more prominently on long drives out of station, the car was once again inspected by the engineers of the appellant-company, who had informed the respondent-complainant vide letter dated 03.12.2004 that "on account of the catalytic converter fitted underneath the car, these cars do heat a lot", and advised that "the matter could be resolved by adjusting the rear air-conditioning vents suitably". It appears that thereafter repeated requests/complaints having been made by the respondent-complainant, the respondent no. 2 wrote vide the letter dated 22.12.2004 that the exhaust pipe of the car needed replacement. The respondent-complainant again wrote to the appellant vide the letter dated 23.12.2004 that though they were offering to replace the exhaust pipe, it was not only the center portion which was heating up but the entire floor was heating up with excessive heat and therefore, the vehicle needed to be replaced. The respondent-complainant ultimately wrote a letter dated 21.03.2005 to the appellant reiterating the persisting problem of hump heating despite a catena of experiments carried out towards rectification of the malfunctioning of the car and requested for the replacement of the vehicle. The said request having been rejected by the appellant on 30.03.2005, the complaint was filed by the respondent-complainant before the National Commission.

19. It appears that on the submission made on behalf of the appellant that it would call the concerned Engineer for examining the vehicle, the National Commission vide order dated 10.08.2006 directed that the vehicle would be examined by the Engineer of the appellant in presence of the respondent No.1 or its representative. Pursuant to the said order, Mr. Stephen Lobo, Manager Field Service working at Pune Office of the Appellant, conducted a test drive alongwith the representative of the respondent – complainant, and submitted his affidavit to the Commission. However, the temperature recorded by the said Manager of the Appellant having been disputed by the respondent - complainant, the National Commission vide the order dated 25.09.2006 appointed one Joint Registrar and one Deputy

Registrar of the Commission as Local Commissioners, further directing them to travel in the cars in question separately on 07.10.2006 for more than 300 kms towards Rishikesh side. Accordingly, the Local Commissioners travelled and submitted their respective reports before the Commissioner.

20. In view of the order dated 10.08.2006 passed by the National Commission the test drive was conducted by the engineers of the appellant in presence of the respondent-complainant on 21.08.2006 and the result of the test drive of the car DL-5CA-0333 was as under:

Chassis No.	Time	Kms	Temp Gauge I	Temp Gauge II	Remark	Ambient Temp
WDB 201676A 326003			Provided by DCIPL	Provided by C&S		
1 start	11.45	41523	32.5	39		38
2	13.15	41577	19.7	44		36
3	14.35	41632	17.00	51		35.5
4	16.11	41673	19.1	50		34
5	17.22	41723	19.6	53		34.5
6	19.23	41769	19.4	49		36.5
7	20.18	41823	17.4	48		35

21. Again, the National Commission having passed the order on 25.09.2006, appointing the Local Commissioners for measuring the temperature of the hump of the car, in presence of representatives of both the parties, the Local Commissioners had travelled on 07.10.2006 in the car in question for more than 300 kms. towards Rishikesh side, and submitted the report regarding the temperature of the running car at a distance of every 50 kms. as under:

S. No.	Time	Km.	Temp. gauge 1 of DCIPL (Degree)	Temp. gauge 2 of C & S (Degree)	Ambient (Degree)
1.	8.30 AM	43649	33.2	39	25.5
2.	9.45 AM	43699	38.6	46	30.5
3.	10.45 AM	43749	38.6	47	32
4.	11.05 AM	43759	39.5	47	34
5.	12.40 PM	43799	38.6	46	32

6.	1.55 PM	43850	37.3	47	32
	Return Journey				
7.	4.00 PM	43866	35.7	39	35
8.	5.00 PM	43899	37.3	47	33
9.	6.00 PM	43950	38.1	46	29
10.	7.50 PM	44000	38.1	45	29.5
11.	9.00 PM	44050	37	44	30
12.	10.00 PM	44083	38.2	46	29.5

The Local Commissioner in his report dated 09.10.2006, had made following note with regard to the car in question: -

> "1. The sensor gauge fixed by the opposite party was 1 mm above while the sensor gauge provided by the complainant was fixed on the mat. The same can be seen with the help of photographs taken by the parties.
>
> 2. While traveling in the car the temperature recorded by the sensor gauges generally showing the increasing tendency.
>
> 3. There is a variation of 5 - 9 degree temperature between the temperatures noted down from the two sensor gauges provided by the parties.
>
> 4. On perusing the temperature chart, it is found that the temperature recorded by both the sensor gauges is higher than ambient temperature throughout the journey."

22. It is further pertinent to note that pending the said proceedings before the National Commission, the appellant had made two applications, one on 12.10.2006 seeking permission to make one more effort by providing additional insulation to address the concerns of the complainant in regard to the high temperature at the left hand side of the hump felt by it, and the other application seeking prayer to permit to test the complainant's car by an appropriate laboratory, or in the alternative to dispose of the matter with direction to provide an additional insulation to the hump of the cars being used by the complainant or in the alternative to hold that the used car be resold by the complainant to the appellant (opponent no. 1) for present market value/book value. The respondent-complainant having not

agreed to the said proposals made in the said applications, the National Commission vide the order dated 06.02.2007 had rejected the said applications.

23. From the afore-discussed documents/applications produced on record before the National Commission, it was clearly established by the respondent-complainant that an excessive heat was generated in the car, and particularly, the center hump on the floor over the drive shaft was felt excessively heated as also the left side of the center hump. As rightly submitted by the learned counsel for the respondent-complainant, after continuous trial and error method of rectification conducted to remove the defect of overheating, since the said complaint persisted, the appellant had moved the applications seeking permission of the Commission to make one more effort by providing additional insulation, and also for permitting the appellant to repurchase the car in question for the market value/book value as it existed at the relevant time in 2007. The market value of the car in question as on 25.11.2006 was stated to be Rs. 34 lakhs, and the book value thereof as on 31.12.2006 was stated to be about Rs. 36 lakhs. The appellant though not admitted specifically about the said defects in the car, had indirectly stated in the said application seeking permission to provide additional insulation to the effect that the warm surface of hump/tunnel was a natural physical characteristic of the car and hence could not be altered to a large extent and that the additional insulation could be fitted by a minor modification. The said statements in the said applications read with the other materials/ documents on record as also the reports of the Local Commissioner appointed by the National Commission, has led us to come to an irresistible conclusion that the inherent defect of overheating of the car in question had persisted despite the appellant having provided the rectification measures like providing additional insulation in the car, which had caused great inconvenience and discomfort to the passengers seated in the car in question. The advice given by the technical expert of the appellants that the overheated portions of the rear cabin of the car should be cooled by directing the draft from the air-conditioning vents towards the said portion, was not only an illogical advice but was an absolute improper advice given to conceal the defect in the car.

24. Considering the affidavits, correspondences, reports and the other material on record, we have no hesitation in holding that such

overheating of the surface of hump and the overall high temperature in the car was a fault, imperfection or shortcoming in the quality or standard which was expected to be maintained by the appellants under the contract with the respondent-complainant and therefore was a 'defect' within the meaning of Section 2(1)(f) of the said Act.

25. People do not purchase the high-end luxurious cars to suffer discomfort more particularly when they buy the vehicle keeping utmost faith in the supplier who would make the representations in the brochures or the advertisements projecting and promoting such cars as the finest and safest automobile in the world. The respondent-complainant having suffered great inconvenience, discomfort and also the waste of time and energy in pursuing the litigations, we are of the opinion that the impugned order passed by the National Commission of awarding the compensation by directing the appellants to refund the purchase price i.e., Rs. 58 lakhs approx. to the respondent-complainant, and take back the car (vehicle) as such does not warrant any interference. However, at this juncture, it may be noted that the impugned order was passed on 17.09.2007 and before that pending the proceedings, the appellant had already made an offer in the year 2006 to repurchase the car in question as per the market value of the car as of November 2006 to be Rs. 34 lakhs or at the book value of the car as of December 2006 to be about Rs. 36 lakhs, however the respondent had not agreed to the said proposal, and continued to use the said car for about seventeen years till this date. Therefore, having regard to the said offer made by the appellants, and having regard to the subsequent event of the respondent-complainant having retained and used the car in question for about seventeen years, we are of the opinion that the interest of justice and balance of equity would be met if the respondent-complainant is permitted to retain the car in question and the appellant is directed to refund Rs. 36 lakhs instead of Rs. 58 lakhs as directed by the National Commission in the impugned order.

II. CIVIL APPEAL NOS. 19536-19537/2017 AND 2633/2018

26. So far as C.A. No. 19536-19537/2017 filed by the appellants - Mercedes Benz India Private Ltd. and another (Original Opponents) and the cross Appeal being C.A. No.2633 of 2018 filed by M/s C.G. Power and Industrial Solutions Ltd., (Original Complainant No.1) arising out of Consumer Complaint No. 51/2006 are concerned, as

stated hereinabove, after the challenge of the order dated 08.07.2016 passed by the National Commission in the said case, before this Court by way of filing C.A. No.10410/2016, this Court had disposed of the said Appeal by directing the National Commission to adjudicate the dispute between the parties finally, leaving it open for the appellant Mercedes Benz to challenge the order on maintainability as well as the final order. Accordingly, the final order having been passed by the Commission, the appellant has challenged the order dated 08.07.2016 as well as the final order dated 11.09.2017 by way of instant appeals, and the cross appeal has been filed by the respondent-complainant against the order dated 11.09.2017.

27. In the instant case, the respondent nos. 1 and 2 (Original Complainants) had filed the complaint being Consumer Complaint No. 51/2006 before the National Commission, alleging *inter alia* that in October 2002, the appellants (original opponents) had launched a new Mercedes Benz, E-Class - E 240 petrol version (hereinafter referred to as the car in question). At the time of launch of e-class model, the appellants had proclaimed and elaborated safety system of e-class *inter alia* that it included front airbags, side airbags, and window airbags, automatic child seat recognition and central locking with crash sensors, and that it was the safest place on the road etc. The correct operation of the airbags was also guaranteed by the appellants. Based on such representations and especially of the safety features, the respondent no. 1 on 27.11.2002 had purchased the car in question bearing registration No. MH-01-GA-6245 from the appellants for its Managing Director-respondent No. 2 for a total consideration of Rs.45,38,123/-.

28. It was further alleged in the complaint by the respondents that on an official trip on 17.01.2006 at 06:20 A.M, the respondent No.2 was returning from Nasik to Mumbai. At that time, the car in question was being driven by the company driver Mr. Madhukar Ganpat Shinde, while the respondent no. 2 was seated in the back seat of the car. On Nasik express, NH-3, a goods carrier coming from the opposite side, collided head-on with the car, and the impact of the collision was so high that the entire front portion of the car was smashed, however none of the airbags opened. As a result, thereof, the driver suffered the injuries on his neck, arms and forehead, whereas the respondent no. 2 suffered grievous injuries on his face, a deep gash on the forehead fracture at the nasal bone and nasal septum, fracture of the C1 vertebra at the anterior and posterior arches and fracture of C2

vertebra. The respondent no. 2 had to be hospitalized for more than six weeks and even after the discharge he was advised strict bedrest at home. It took very long time for him to recover and resume the work. According to the respondents-complainants, if the airbags had opened at the right time, as represented by the appellants-opponents, the respondent no. 2 might have suffered less or no injuries. The complainants had also filed an FIR with the police station at Nasik on 17.01.2006. On 20.01.2006, the car was taken by the respondent No. 3 being authorized service centre and a detailed inspection and assessment of cost for the repairs was made. It was also alleged that in number of cases the airbags had failed to deploy at the time of accidents and people had suffered grievous injuries or had died also. Due to the said accident, not only that respondent no.2 had suffered grave injuries, agony and mental trauma, his family members and the respondent-company itself, had suffered lot of inconvenience and financial loss. It appears that lot of correspondence had ensued between the parties, and ultimately the respondents-complainants had filed the complaint seeking compensation under the various heads.

29. On the maintainability of the complaint, though the learned Senior Advocate Mr. Dhruv Mehta had strenuously urged that the purchase of the car by the respondent no. 1 company for the use of the respondent no.2 i.e., its director would tantamount to purchase for commercial purpose, the said submission cannot be accepted in view of the elaborate discussion and reasonings recorded by us hereinbefore while dealing with the issue in C.A. No. 353/2008. In this case also the appellants had failed to bring on record any material to show that the dominant purpose or dominant use of the car in question was for commercial purpose or that the purchase of the car had any nexus or was linked with any profit generating activity of the respondent no. 1 company. We therefore confirm the finding recorded by the three-member Bench of the National Commission in the order dated 08.07.2016 on the maintainability of the complaint filed by the respondent-complainant company.

30. On the merits of the claim made by the respondents – complainants, it was sought to be submitted by Learned Senior Advocate Mr. Dhruv Mehta for the appellants-original opponents that the complainants did not lead any expert evidence or any other evidence to establish that there was any defect in the front airbags of the car in question and in absence of any such evidence, the National Commission could

not have concluded that the front airbags of the car were defective. According to him, the Commission had committed gross error in discarding the report of the expert produced by the appellants, who had stated as to why deployment of the driver's airbag was not required in this case. According to him, since, the driver was sufficiently restrained by the seat belt, there was no need for the front airbag to deploy at the time of accident and the front passenger airbag would be triggered only if the front passenger seat was occupied, whereas in the instant case, the complainant no. 2 was sitting at the rear left seat and therefore the front passenger's airbag could not have deployed. In any case, runs the submission of Mr. Mehta, the complainants had already sold out the car during the pendency of the proceedings before the National Commission and thereby had created a situation where the Commission could not have inspected the car in question. He further submitted that there was no "unfair trade practice" practiced by the appellants and the damages/compensation awarded by the Commission was without any legal basis.

31. The Senior Learned Advocate Mr. Prashanto Chandra Sen appearing on behalf of the respondents-complainants however vehemently submitted that admittedly neither the front airbags nor the side airbags of the car deployed as a result of the accident. The appellants had not produced on record the owner's manual and the features of the airbags given in the owner's manual on record produced by the complainants did not disclose as to what was the pre-determined level at which the airbags would deploy. According to him, the appellants had misrepresented that their car was the safest place on the road and that the provision of airbags was an additional safety measure not only for the front passengers but also for the rear passengers. According to him, since the owner's manual did not contain accurate and complete information as regards the safety measure of airbags, and the appellants having misrepresented about the safety measures at the time of the promotion of the car, it was rightly construed as an "unfair trade practice" on the part of the appellants by the Commission, however, the Commission had committed an error in not awarding exemplary damages to the respondents-complainants.

32. In the instant case, there are certain undisputed facts as transpiring from the record, like that the purchase of the car was by the respondent no.1 for the respondent no. 2 its Managing Director. The occurrence

of the accident on 17.01.2006 is not disputed. It is also not disputed that at the time of accident, the driver of the car was wearing the seat belt, whereas the respondent No. 2 who was sitting on the rear left side seat did not wear the seat belt. It is also not disputed that neither the airbags on the front side nor the airbags on the side of the respondent no. 2 had opened at the time of accident, as a result thereof, the respondent no. 2 sustained grievous injuries, and the driver sustained some minor injuries. It is also not disputed that neither the respondents nor the appellants had produced on record the owner's manual of 2002 i.e. the year when the car in question was purchased by the respondents, though it was specifically directed by the Commission to produce the same by passing the order on 24.08.2017. Though subsequently, the complainant had produced on record one owner's manual, the same did not appear to be of the relevant year by the Commission. The appellants-opponents had produced on record certain photographs as also the reports of technical experts of the appellants.

33. The National Commission after considering the material on record disposed of the complaint of the respondents - complainants directing the appellants to pay a sum of Rs. 5 lakhs to the complainant no. 1 for the deficiency in the services rendered to it on account of the airbags of the car having not deployed/ triggered and further directed the appellants to pay a sum of Rs. 5 lakhs as compensation to the complainant no. 1 for the unfair trade practice indulged into by them, and a sum of Rs.25,000/- as cost of litigation.

34. The National Commission after elaborately considering the Owner's Manual produced by the complainants, as the appellants - opponents had failed to produce the owner's manual of the relevant year 2002 when the car was purchased by the complainants and the other material on record, observed in Para no. 9 and 10 of the impugned judgment dated 11th September, 2017 as under: -

> **"9.** It is evident from a perusal of the above referred extract from the Manual that the side airbags are triggered only on the side on which an impact occurs in an accident and that the said airbags are independent of the front airbags. Since, admittedly, there was no impact on the side of the car in which complainant no.2 was sitting at the time of the accident, the side airbag would obviously not have triggered. Even otherwise the airbags on the side will not

trigger in the event of frontal accident unless the airbags system is such as to trigger every airbag irrespective of the side on which the impact occurs in an accident. Similarly, window bags which are independent of the front airbags also trigger on the side on which the impact occurs. Therefore, the window airbags would not have triggered in this case since there was no impact on the sides on which the window bags were provided in the vehicle.

10. As far as the front airbags are concerned, it is stated in the Manual that they are triggered if (i) a front-end impact occurs (ii) if collision happens at a force exceeding a 'predetermined level.' The Manual however, does not disclose as to what the said predetermined level was. If the front airbags were not to deploy in every accident resulting in front end impact, the opposite parties, in my view, ought to have disclosed to the buyers as to what the predetermined level necessary to trigger the front passenger airbag were. In the absence of such a disclosure in the Owner's Manual, as far as the functioning of the front passenger airbags are concerned would be deficient, on account of its not providing the requisite information to the buyer.

Section 2(1)(r) of the Consumer Protection Act, 1986 to the extent it is relevant provides that unfair trade practice means a trade practice which for the purpose of promoting the sale, use or supply of any goods adopts any unfair method or unfair or deceptive practice including that the goods are of a particular standard and quality. It is alleged in the complaint that the opposite parties at the time of launching E-Class Model highlighted its safety system, including airbags while proclaiming the vehicle to be the safest place on the road. Obviously, the opposite parties were seeking to encash upon the safety features of the vehicle, including the airbags provided therein, for the purpose of selling the vehicle. Therefore, it would be necessary for them to disclose to the buyers as to what the predetermined levels, necessary for triggering the front airbags of the vehicle were. Highlighting the safety features including the airbags for selling the vehicle, without

> such a disclosure, in my opinion, constituted an unfair and deceptive trade practice. It is only the opposite parties which knew what would be the level which would trigger the frontal airbags in the event of an accident. Therefore, the aforesaid material information ought not to have been withheld while selling the vehicle. The opposite parties therefore, indulged in unfair trade practice or the purpose or promoting the sale of their vehicle."

35. The National Commission also considered the report of Mr. Lothar Ralf Schusdzarra, the Technical Expert and Senior Engineer working with the Appellant Company who had inspected the car after the accident, and the photographs forming part of the report of the technical expert, and observed that the vehicle that is the car in question, had frontal accidental with another vehicle stated to be a container truck which had a higher chassis, and that the front portion of the car was badly damaged as a result of the said accident. The said photographs also corroborated with the depositions of the driver Mr. Madhukar Shinde and the respondent-complainant no. 2 Mr. Mohan Trehan which established that the front portion of the vehicle was smashed when it was hit by the truck and the collision of car with the truck was quite impactful.

36. There was nothing on record produced by the appellants to show that they had disclosed either in the Owner's Manual or in the Brochure about the limited functioning of the airbags, which according to them was an additional safety measure in the car. On the contrary, as per the case of the respondents-complainants a misrepresentation was made by the appellants at the time of promotion of the car in question that e-class car had a safety system which included front airbags, side-airbags and window airbags. Even if it is accepted that the airbags would deploy only when the seat belt was fastened by the passenger, in the instant case admittedly, the frontal airbags of the car were not deployed though the driver had already fastened the seat belt. Thus, the defect in the car was clearly established so far as non-deployment of frontal airbags was concerned.

37. Incomplete disclosure or non-disclosure of the complete details with regard to the functioning of the airbags at the time of promotion of the car, has rightly been considered by the National Commission as the "unfair trade practice" on the part of the appellants, and awarded

a sum of Rs. 5 lakhs towards it. The National Commission has also rightly balanced the equity by awarding Rs. 5 lakhs only towards the deficiency in service on account of the frontal airbags of the car having not deployed at the time of accident.

38. Since the National Commission has considered in detail the evidence and the material on record adduced by the both the parties, in our opinion the well-considered judgment dated 11th September 2017 passed by the National Commission does not warrant any interference.

39. It is needless to say that a trade practice which for the purpose of promoting the sale of any goods by adopting deceptive practice like falsely representing that the goods are of a particular standard, quality, style or model, would amount to "unfair trade practice" within the meaning of Section 2(1)(r) of the said Act.

40. In that view of the matter, following order is passed: -

I. C.A. No. 353/2008

The respondent-complainant is permitted to retain the car bearing registration no. DL-9CV-5555. The appellant is directed to refund Rs. 36,00,000/- (Rupees thirty-six lakhs) to the respondent by way of compensation within three months from the date of this order, failing which the appellant shall pay interest at the rate of 9% per annum thereon from the date of this order till payment. The Appeal stands partly allowed.

II. C.A. No. 19536 & 19537/2017 and C.A. No. 2633/2018

All the three Appeals are dismissed.

Result of the case: C.A. No. 353/2008 partly allowed.
C.A. No. 19536 and 19537/2017
and C.A. No. 2633/2018 dismissed.

†*Headnotes prepared by:* Nidhi Jain

[2024] 7 S.C.R. 443 : 2024 INSC 509

New Okhla Industrial Development Authority
v.
Harnand Singh (Deceased) through LRs & Ors.

(Civil Appeal No. 3674-3675 of 2023)

10 July 2024

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

Issue for Consideration

The matters in the instant case can be categorized into two groups:

(i) SLPs, Miscellaneous Applications and Civil Appeals preferred by landowners who had already been granted compensation at INR 340 per sq. yd. and who are now seeking parity with Bir Singh where compensation was enhanced to INR 449 per sq. yd.; and (ii) Civil Appeals preferred by NOIDA as against the enhanced compensation of INR 449 per sq. yd. granted to some of the landowners

The following questions arise for Consideration:

(i) Should compensation be enhanced, and if so, to what extent. How should the quantum be calculated; (ii) Are the Miscellaneous Applications maintainable; (iii) Can the landowners rely upon Section 28A of the Land Acquisition Act, 1894 to seek parity with Bir Singh.

Headnotes†

Land Acquisition Act, 1894 – Whether the compensation should be enhanced – Determination of compensation – Applicability and use of principle of guesstimation:

Held: The Court can use the principle of guesstimation in reasonably estimating the value of land in the absence of direct evidence, the exercise ought not to be purely hypothetical – Instead, the Court must embrace a holistic view and consider all relevant factors and existing evidence, even if not directly comparable, to arrive at a fair determination of compensation – Broadly, such relevant factors can be divided into three categories; Characteristics of the land; Future potentiality of the land; Factors denoting market sentiments – In the instant case, the evidence led by parties

* Author

provides several relevant factors – For instance, while the sale deed produced by the landowners cannot directly be relied upon for determining the price of the land, given its relative proximity, it nonetheless establishes its potentiality in the form of possible use towards residential purposes – Likewise, the lease deeds further underscore the commercial potentiality of land in the adjoining vicinity – As highlighted by the landowners, the land under acquisition lies near prominent amenities and landmarks such as a prominent school, a large Golf Course, and a prominent tourist attraction - the Film City – Apart from that, it is also in proximity to the DSC Shade, Okhla Barrage Highway and a School of Business Management – Additionally, the acquired land is enveloped by developed colonies and markets on all three sides – The acquired land benefits from convenient access to key landmarks in Delhi, highlighting its strategic location *vis-à-vis* its potentiality and future multiplicity of its market value – Taken together, all these facts and evidence lead to the reasonable inference that the subject land had significant potential for future commercial development at the time of issuance of the notification under Section 4 – This Court is inclined to estimate that the value of the subject land was appreciating at around 15% annually – Given that INR 350 per sq. yd rates were released by NOIDA towards the latter half of 1989, and considering how the acquisition process began on 05.01.1991, it would be appropriate to apply a 15% escalation for one year to this price-bringing total guesstimate to Rs. 403 per sq. yd – Therefore, in the light of the evidence produced by both, the State and the landowners, and on employing the principle of guesstimation, it stands conclusively surmised that the landowners herein are entitled to an enhancement in the compensation awarded – Accordingly, this Court partly allow these present appeals and revise the rate of compensation to INR 403 per sq. yd. for the entire acquired land except such part of it which was subject matter of the decision in Bir Singh. [Paras 34, 35, 36, 37, 38, 39, 41, 42, 44]

Land Acquisition Act, 1894 – Maintainability of the Miscellaneous applications – Miscellaneous Applications seek parity with the rate of compensation awarded in Bir Singh:

Held: It would indeed be unfair to single out a few individual landowners and deny them the benefit of just compensation, owing to factors and processes outside their control – Comparing the impact of not allowing these miscellaneous applications solely

on grounds of maintainability *vis-à-vis* allowing them marginally higher compensation in the larger interest of justice, this Court is persuaded to accede to the landowners' prayers – Disallowing these applications would in a way be against the spirit of Article 14 of Constitution and will defy the right to treat those placed equally in an equal manner – Consequently, compensation is enhanced using powers u/Art. 142 of the Constitution – Moreover, it is clarified that since the analysis is agnostic to the decision in Bir Singh, this Court is, therefore, not applying a subsequent change of law, but instead only correcting a judicial error and restoring uniformity in a case involving peculiar circumstances – Consequently, the landowners in these miscellaneous applications are also held entitled to the new revised rate of INR 403 per sq. yd. for their acquired land. [Paras 47, 48, 49]

Land Acquisition Act, 1894 – Can the landowners rely upon Section 28A of the Land Acquisition Act, 1894 to seek parity with Bir Singh:

Held: In the instant case, this Court is not delving deep into the landowners' prayer for parity based on Section 28A of the 1894 Act in consonance with the Bir Singh judgement – There are three reasons to do so: (a) Bir Singh would not bind this Court given its precarious and *sui generis* facts; (b) the landowners have not demonstrated compliance with the procedural technicalities of this provision, such as writing to the Collector within the prescribed limitation period; and (c) the issue is rendered academic in light of the analysis where this Court has independently revised the rate of compensation to INR 403 per sq. yd for one and all. [Para 52]

Doctrine/Principle – Principle of Guesstimation:

Held: Guesstimation is a heuristic device that enables the court, in the absence of direct evidence and relevant sale exemplars, to make a reasonable and informed guess or estimation of the market value of the land under acquisition, and concomitantly the compensation payable by the appropriate Government – In that sense, guesstimation hinges on the Court's ability to exercise informed judgement and expertise in assessing the market value of land, especially when the evidence does not tender a straightforward answer – This principle accentuates the fundamental understanding that determining compensation for land is not a matter of exact science but involves a significant element of estimation. [Paras 31, 32]

Case Law Cited

Trishala Jain v. State of Uttaranchal [2011] 8 SCR 520 : **(2011) 6 SCC 47 – relied on.**

Jagdish Chandra and others v. New Okhla Industrial Development Authority **(First Appeal No. 774/2001 before the High Court);** *Bir Singh v. State of Uttar Pradesh* **(Judgment dated 09.11.2017 by the Supreme Court in Civil Appeal Nos. 18620-18623/2017);** *Ramsingbhai Jerambhai v. State of Gujarat* [2018] 3 SCR 1019 **: (2018) 16 SCC 445;** *Administrator General of W.B. v. Collector* [1988] 2 SCR 1025 **: (1988) 2 SCC 150;** *Ram Kanwar v. State of Haryana* **(2020) 17 SCC 232;** *Shaji Kuriakose v. Indian Oil Corpn. Ltd.* [2001] Supp. 1 SCR 573 **: (2001) 7 SCC 650;** *ONGC Ltd. v. Rameshbhai Jivanbhai Patel* [2008] 11 SCR 927 **: (2008) 14 SCC 745;** *Ravinder Kumar Goel v. State of Haryana and Others* [2023] 3 SCR 912 **: 2023 SCC OnLine SC 147;** *Atma Singh v. State of Haryana and others* [2007] 12 SCR 1120 **: (2008) 2 SCC 568;** *Krishan Kumar v. Union of India* **(2015) 15 SCC 220;** *State (NCT of Delhi) v. K.L. Rathi Steels Ltd.* [2023] 6 SCR 209 **: (2024) SCC OnLine SC 1090;** *Mewa Ram v. State of Haryana* [1986] 3 SCR 660 **: (1986) 4 SCC 151;** *Babua Ram v. State of U.P.* [1994] Supp. 4 SCR 148 **: (1995) 2 SCC 689 – referred to.**

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List of Acts

Land Acquisition Act, 1894; Constitution of India.

List of Keywords

Compensation; Enhancement of compensation; Determination of compensation; Principle of guesstimation; Value of land; Characteristics of the land; Future potentiality of the land; Factors denoting market sentiments; Commercial potentiality of land; Market value of land; Strategic location of land; Acquired land benefits; Benefit of just compensation; Section 28A of the Land Acquisition Act, 1894; Article 142 of the Constitution; Article 14 of the Constitution; Restoring uniformity; Correction of judicial error.

New Okhla Industrial Development Authority v.
Harnand Singh (Deceased) through LRs & Ors.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 3674-3675 of 2023

From the Judgment and Order dated 08.02.2021 in FAD No.26 of 2021 and dated 22.07.2021 in CMRA No.130 of 2021 of the High Court of Judicature at Allahabad

With

Civil Appeal Nos. 3676-3688 and 3869 of 2023, M.A. No. 2424 of 2019 In SLP (C) No. 9732 of 2014, M.A. No. 2663 of 2023 In SLP (C) No. 36027 of 2009, M.A. No. 2404 of 2023 In SLP (C) No. 28146 of 2009, M.A. No. 2305 of 2023 In SLP (C) No. 23068-23070 of 2010, M.A. No. 2402 of 2023 In SLP (C) No. 23900 of 2009, M.A. No. 2600 of 2023 In SLP (C) No. 29597-29639 of 2010, M.A. No. 2602 of 2023 In SLP (C) No. 29597-29639 of 2010, M.A. No. 2598 of 2023 In SLP (C) No. 29597-29639 of 2010, M.A. No. 2601 of 2023 In SLP (C) No. 29597-29639 of 2010, M.A. No. 2603 of 2023 In SLP (C) No. 29597-29639 of 2010, M.A. No. 2597 of 2023 In SLP (C) No. 29597-29639 of 2010, M.A. No. 2604 of 2023 In SLP (C) No. 29597-29639 of 2010, M.A. No. 2596 of 2023 In SLP (C) No. 29597-29639 of 2010, M.A. No. 2416 of 2019 In SLP (C) No. 25328-25360 of 2010, M.A. No. 2418 of 2019 In SLP (C) No. 25328-25360 of 2010, M.A. No. 2412 of 2019 In SLP (C) No. 30610 of 2010, M.A. No. 2413 of 2019 In SLP (C) No. 20397 of 2010, M.A. No. 2417 of 2019 In SLP (C) No. 25328-25360 of 2010, M.A. No. 2414 of 2019 In SLP (C) No. 25328-25360 of 2010, M.A. No. 2423 of 2019 In SLP (C) No. 25328-25360 of 2010, M.A. No. 2422 of 2019 In SLP (C) No. 25328-25360 of 2010, M.A. No. 2415 of 2019 In SLP (C) No. 25328-25360 of 2010, M.A. No. 2421 of 2019 In SLP (C) No. 25328-25360 of 2010, M.A. No. 2420 of 2019 In SLP (C) No. 25328-25360 of 2010, M.A. No. 2419 of 2019 In SLP (C) No. 25328-25360 of 2010, SLP (C) No. 20251 of 2023, M.A. No. 2606 of 2023 In SLP (C) No. 29597-29639 of 2010, M.A. No. 2605 of 2023 In SLP (C) No. 29597-29639 of 2010, M.A. No. 2411 of 2019 In SLP (C) No. 23068-23070 of 2010, M.A. No. 274 of 2021 In SLP (C) No. 9732 of 2014, M.A. No. 2607 of 2023 In SLP (C) No. 29597-29639 of 2010 and Diary No. 9072 of 2024

Appearances for Parties

Ravindra Kumar, Jitendra Mohan Sharma, Ashok Kumar Sharma, Vimlesh Kumar Shukla, Sr. Advs., Rachit Mittal, Parish Mishra, Adarsh Srivastava, Praveen Swarup, Sheo Kumar Gupa, Shekhar Kumar, Binay Kumar Das, Ms. Priyanka Das, Ms. Neha Das, Shivam Saksena, Vipin Kumar Saxena, Shrivandit Mishra, Suraj, M/s. Anuradha & Associates, Dr. Rajeev Sharma, Prashant Sharma, Raghuvir Sharma, Dharmendra Sharma, Vipin Kumar Sharma, Anil Kaushik, Advs. for the appearing parties.

Judgment / Order of the Supreme Court

Judgment

Surya Kant, J.

Delay condoned. Leave granted.

2. These appeals and applications have been preferred by the New Okhla Industrial Development Authority (hereinafter, '**NOIDA**') and landowners owning land in Village Chhalera Bangar, Tehsil Dadri, District Ghaziabad, contesting various identical impugned orders, including the judgment dated 08.02.2021 and in the review order dated 22.07.2021 passed in the lead case by the High Court of Judicature at Allahabad (hereinafter, '**High Court**'), enhancing the compensation granted to the landowners for an acquisition initiated under the Land Acquisition Act, 1894 (hereinafter, '**1894 Act**'). In the appeals preferred by NOIDA, the High Court has enhanced the rate of compensation from the range of INR 222 and 233 per sq. yd. as granted by the Additional District Judge, Ghaziabad (hereinafter, '**Reference Court**'), to INR 449 per sq. yd. Whereas, in the appeals and applications filed by the landowners, it was enhanced to INR 340 per sq. yd.

A. Facts

3. The present controversy has a chequered history. The acquisition process was initiated by State of U.P./NOIDA on 05.01.1991 through a notification issued under Section 4(1) of the 1894 Act, for the acquisition of approximately 492 acres of land in Village Chhalera Bangar, intended for planned Industrial Development. Afterwards, on 07.01.1992, the government issued a declaration under Section 6 read in conjunction with the 'urgency clause' contained in Section 17

of the 1894 Act. Possession of the land was taken on 30.03.1992, 07.08.1995 and 18.11.1995.

4. Subsequently, on 17.08.1996, the Land Acquisition Officer (hereinafter, '**LAO**') issued an award under Section 11 of the 1894 Act, affixing compensation at INR 110 per sq. yd. The LAO relied on a sale deed dated 16.12.1988, whereby one Jyoti Prasad had sold the land to G.R. Pant at a rate of INR 125 per sq. yd. Applying a further 12% deduction, owing to the large area under acquisition, the rate of compensation was finally determined at INR 110 per sq. yd.

5. Following the award, several landowners made a reference before the Reference Court seeking enhancement of compensation under Section 18 of the 1894 Act. The record indicates two kinds of compensation rates granted by the Reference Court: first, INR 233 and second, INR 222 per square yard. In both these awards, the evidence suggested the market value of the land at the relevant time, at INR 390 per sq. yd., upon which a 40% deduction for development was applied. However, the final figure achieved after this calculation has been noted differently in both orders, where INR 222 per square yard seems to be the result of a calculation error.

6. Some landowners further preferred appeals before the High Court. One such initiative was filed by Jagdish Singh etc., who challenged the Reference Court's award in First Appeal No. 774/2001, titled ***Jagdish Chandra and others v. New Okhla Industrial Development Authority***. The High Court through its judgement dated 14.12.2007, reversed the deductions made by the Reference Court from the assessed market value and directed the State / NOIDA authorities to recalculate the compensation at INR 297.50 per sq. yd. without deducting development charges. However, in another similar group of appeals, the High Court, *vide* the later judgement dated 09.05.2008, refused to enhance the compensation.

7. The landowners' review application(s) against the order dated 09.05.2008 were dismissed by the High Court observing that they could independently file appeals, if so aggrieved. However, in response to a later application seeking clarification, the High Court on 19.05.2010 clarified the operative part of its earlier judgment and enhanced the compensation to INR 340 per sq. yd. The other alike appeals filed by similarly situated landowners

were also allowed in part and the compensation was enhanced to INR 340 per sq. yd.

8. Seeking further enhancement, a few landowners approached this Court, but their Special Leave Petitions (SLPs) were dismissed on 05.02.2014. However, in Civil Appeal Nos. 18620-18623 / 2017 titled ***Bir Singh v. State of Uttar Pradesh***, this Court *vide* judgement dated 09.11.2017, further enhanced the compensation to INR 449 per sq. yd., relying on a sale exemplar dated 16.12.1988 for a land situated in Village Chhalera Bangar, and noting that the sale price of the said land was INR 400 per sq. yd. The Review and Curative Petitions preferred by the State / NOIDA authorities against this order were dismissed on 06.03.2018 and 13.03.2019, respectively. Consequently, all the First Appeals pending before the High Court, pertaining to the same acquisition came to be allowed in line with ***Bir Singh (supra),*** and compensation was accordingly enhanced to INR 449 per sq. yd.

9. It is in this backdrop that a majority of the cases before us mount a challenge to those High Court orders which were pronounced before ***Bir Singh (supra)*** and wherein the High Court had granted compensation at INR 340 per sq. yd. only. The landowners thus seek parity with ***Bir Singh (supra)*** and the resultant enhancement of their compensation to INR 449 per sq. yd. On the other hand, NOIDA has also filed multiple appeals challenging the High Court judgements that were decided on the anvil of ***Bir Singh (supra)***. The landowners too have filed several Miscellaneous Applications against the earlier dismissal of their SLPs, seeking recall of the previous orders and to restore parity with ***Bir Singh (supra)***. Additionally, two of the SLPs included in the batch of cases before us assail an order of the High Court dismissing the landowners' Review Petitions and rejecting their enhancement claim on account of delay in filing the review before the High Court.

10. The matters pending before us, therefore, can be categorized into two groups:

i. SLPs, Miscellaneous Applications and Civil Appeals preferred by landowners who had already been granted compensation at INR 340 per sq. yd. and who are now seeking parity with ***Bir Singh (supra)*** where compensation was enhanced to INR 449 per sq. yd.; and

ii. Civil Appeals preferred by NOIDA as against the enhanced compensation of INR 449 per sq. yd. granted to some of the landowners.

B. Contentions on behalf of the State

11. We have heard learned Senior Counsels for the parties at considerable length and have perused the record at length.

12. Mr. Ravinder Kumar, learned Senior Counsel representing NOIDA, argued that ***Bir Singh (supra)*** had based its finding on an erroneous reading of a sale exemplar, wherein this Court read a description of the extent of land being 400 sq. yds. as the value of the land instead, i.e., INR 400 per sq. yd. He submitted that the Reference Court had read the figure correctly and granted compensation at INR 110 per sq. yd. Thus, he urged that there being an *ex-facie* factual error while deciding ***Bir Singh (supra)***, parity could not be sought with that decision which was only binding *inter partes* and ought not to be treated as a precedent.

13. Learned Senior Counsel contended that the landowners could not invoke Section 28A of the 1894 Act for re-determination of the market value of their lands as the said provision was restricted to the compensation determined by the Reference Court. Reliance has been placed on the decision of this Court in ***Ramsingbhai Jerambhai v. State of Gujarat***.[1] He also argued that the sale deeds produced before this Court by the landowners were of *abadi* land whereas, in the present case, agricultural or non-*abadi* land has been acquired. Mr. Kumar then highlighted that the acquired land is a huge chunk of land and cannot be utilised for non-agricultural purposes unless major developmental works are carried out, in the form of roads, water supply, sewage, open spaces, schools, hospitals, parks etc., as a result of which not more than 50% of it will be left for carving out industrial or institutional plots for actual sale.

14. Mr. Kumar, Learned Senior Counsel, proffered that a uniform rate of compensation ought to be fixed for the entire acquisition rather than individual rates applicable for different parcels of land. The relevant factors while affixing compensation ought to include the fact that the

1 [2018] 3 SCR 1019 : (2018) 16 SCC 445

authorities do not derive any income from the land. He highlighted the aims and objects of NOIDA to impress upon the fact that the Statutory Authority is an extended hand of the State, with the responsibility of implementing development projects and several concessional allotments have been made towards marginalised sections of society, on a no profit basis. Additionally, he canvassed that the compensation cannot be fixed at the current market value considering the fact that the rates would have increased over time on account of planned development carried out in neighbouring areas post-acquisition. A pointed reference was also made to the overall development of the Township in the National Capital Region. Further, he maintained that the circle rate might not accurately reflect the correct market value of the acquired land at the relevant cut off dates, as the acquisition was made of an undeveloped large tract of agricultural land.

15. In the context of the Miscellaneous Applications seeking to rely on ***Bir Singh (supra)***, for recalling the orders dismissing the SLPs, Mr. Kumar argued that they ought not to be entertained, being not maintainable, as none of these applicants invoked the review jurisdiction of this Court within a reasonable period of time. He pointed out significant delays of over nine years in some of the cases, and vehemently urged this Court to not enhance compensation considering that the land had already been allocated to third parties and it is now impossible to recover the enhanced compensation amount from such allottees in the absence of any binding contract to this effect. Mr. Kumar underscored that in many of these SLPs in which Miscellaneous Applications have now been filed, Review and Curative Petitions had been filed and dismissed earlier by this Court.

C. Contentions on behalf of the landowners

16. *Per contra*, Mr. Yatinder Singh and Mr. Vimlesh Kumar Shukla, Learned Senior Counsels representing the landowners, at the outset very fairly acknowledged that the decision in ***Bir Singh (supra)*** was founded on a *bona fide* factual error of misreading the sale exemplar relied upon therein. They however bounced back to claim compensation not less than the rate awarded in ***Bir Singh (supra)***. In this regard, they drew our attention to evidence establishing parity for awarding compensation at the rate determined by this Court in ***Bir Singh (supra)***. They banked upon the sale exemplar dated 22.02.1989, which, according to them, is similar to the sale

instance relied upon in ***Bir Singh (supra)***, wherein a plot of 470 sq. yds. was sold at INR 446 per sq. yd. The sale deed dated 22.02.1989, being for a small piece of land, it was urged, ought not to undermine its relevance. They made a pointed reference to the Reference Court's order, which the NOIDA authorities relied upon, was also based on a sale deed of only 400 sq. yds. Learned Senior Counsels also disputed NOIDA's claim that the said sale deed was within *abadi* land, and drew our attention to the map indicating it was an agricultural land only.

17. It was then argued that the factors necessary for evaluating the potentiality of land are the same as those used towards fixing the circle rate. The circle rate, therefore, is a crucial and relevant piece of evidence and ought to be employed in determining the market value of the land for which the said circle rate was affixed. The acquired land was claimed to be situated amidst developed areas and near the Amity Public School, a large Golf Course, a Film City, and with developed Residential Colonies and Shopping Areas on all three sides. The acquired land being in the heart of NOIDA, which has become one of the largest industrial and commercial cities in India, is in proximity to the DSC Shade, Okhla Barrage Highway and the MAT Public School of Business Management. Even parts of the national capital – Delhi, were shown as being no more than a few kilometres away, with important national landmarks such as Connaught Place, Nehru Place, the Supreme Court and the ITO all being within a 15-kilometre radius. They further highlighted that the lands in nearby Sector 18, were acquired in 1976 for between INR 7,200 to INR 10,200 per bigha. Further, a plot of 575 sq. yds. was leased by the NOIDA authorities on 28.08.1988 for INR 11,576 per sq. yd. and another similar plot was leased for INR 22,125 per sq. yd. on 09.12.1988.

18. Other Learned Counsel for some of the landowners also articulated that ***Bir Singh (supra)*** could not be revisited as the Review and Curative Petitions against it had already been dismissed. Parity was once again sought with ***Bir Singh (supra)***, invoking Section 28A of the 1894 Act.

D. Issues

19. In our considered opinion, the following questions arise for deliberation by this Court:

i. Should compensation be enhanced, and if so, to what extent? How should the quantum be calculated?

ii. Are the Miscellaneous Applications maintainable?

iii. Can the landowners rely upon Section 28A of the 1894 Act to seek parity with ***Bir Singh (supra)***?

E. Analysis

E.1 Quantum of Compensation

20. The primary issue in this case centres around the quantum of compensation granted to the landowners, and the inconsistency and disparity in the amounts awarded at different stages of the judicial process.

21. To begin with, we may clarify that although this Court in ***Bir Singh (supra)*** had enhanced compensation to INR 449 per sq. yd., both sides very fairly agreed during the course of hearing that the same was founded on a *bona fide* factual error. ***Bir Singh (supra)*** relied on a sale deed dated 16.12.1988, noting the value of the land therein as being INR 400 per sq. yd. However, it is apparent that the figure of 400 actually denoted the area and size of the plot and not its sale value. Nevertheless, the decision was not revisited by this Court while exercising Review and Curative jurisdictions – likely on account of the practical difficulties in recovering the excess compensation amount already paid to the expropriated land owners and given the larger interest of justice. While ***Bir Singh (supra)*** thus remains a binding precedent *inter-se* the parties, it would not bind us because of its *sui generis* factual position. Given this, it becomes necessary for us to determine the market value of the land independently.

E.1.1 Evidence used in determining the quantum of compensation

22. Firstly, it may be refreshed that for the purpose of evaluating compensation for the acquired land, Section 23(1) of the 1894 Act, acts as a lighthouse. It stipulates that:-

> "*23.* ***Matters to be considered in determining compensation****. — (1) In determining the amount of compensation to be awarded for land acquired under this Act, the Court shall take into consideration—*

first, the market-value of the land at the date of the publication of the notification under Section 4, sub- section (1);

secondly, the damage sustained by the person interested, by reason of the taking of any standing crops or trees which may be on the land at the time of the Collector's taking possession thereof;

thirdly, the damage (if any) sustained by the person interested, at the time of the Collector's taking possession of the land, by reason of severing such land from his other land;

fourthly, the damage (if any) sustained by the person interested,

at the time of the Collector's taking possession of the land, by reason of the acquisition injuriously affecting his other property, movable or immovable, in any other manner, or his earnings;

fifthly, if, in consequence of the acquisition of the land by the Collector, the person interested is compelled to change his residence or place of business, the reasonable expenses (if any) incidental to such change; and

sixthly, the damage (if any) bona fide resulting from diminution of the profits of the land between the time of the publication of the declaration under Section 6 and the time of the Collector's taking possession of the land."

23. While the 1894 Act does not provide a strict definition of the term 'market-value', it essentially refers to the price that the asset would likely fetch in an open market transaction. Incontrovertibly, the Legislature has consciously chosen not to define this term, as is discernible from the reports of the Select Committee, wherein they posited that "*no attempt would be made to define strictly the term in the Act and that the price which a willing vendor might be expected to obtain in the market from a willing purchaser, should be left for the decision primarily of the Collector and ultimately of the Court.*"[2]

2 Commentary on the Land Acquisition Act, Om Prakash Aggarwal, 8th Edn. (New Delhi: Universal Law Publishing Co. Pvt. Ltd., 2008), pg. 761

Hence, during the framing of the 1894 Act, it was understood that the 'market value' would simply be the price which a willing buyer would give to a willing seller.

24. Given the statutory intention behind term 'market value', the natural corollary is that the sale exemplars reflecting the prices paid by a willing buyer to a willing seller would be the most relevant piece of evidence for determination of such value.[3]

25. However, for utilizing these sale deeds as the foundation for determining compensation, it is imperative that these sale instances satisfy certain criteria of comparability. In this regard, it is necessary that the sale deeds adhere to the following factors:

i. the sale must be a genuine transaction;

ii. the sale deed must have been executed at the time proximate to the date of the notification issued under Section 4 of the 1894 Act;

iii. the land covered by the sale must be in the vicinity of the acquired land; and

iv. the nature of such land, including its size, must be similar to the acquired land.[4]

26. Adverting to the facts of the case in hand, it is germane to our analysis to note that the landowners have placed their reliance on only one sale deed dated 22.02.1989, which values the land at INR 446 per sq. yd. Although this sale deed pertains to the land situated within the same village, its plot size is significantly smaller—being only 470 sq. yds.—as compared to the vast area under acquisition, which spans approximately 492 acres or 23.81 lakh sq. yds. There is no gainsaying that the prices of small plots of land cannot ordinarily serve as the basis of evaluating the market value of larger tracts of land.[5] However, there is no legal impediment against considering sale exemplars of smaller parcels of land, provided they are subjected

3 Administrator General of W.B. v. Collector (1988) 2 SCC 150, para 8; Ram Kanwar v. State of Haryana (2020) 17 SCC 232, para 11

4 Shaji Kuriakose v. Indian Oil Corpn. Ltd. (2001) 7 SCC 650, para. 3

5 ONGC Ltd. v. Rameshbhai Jivanbhai Patel (2008) 14 SCC 745

to cuts or deductions.[6] The reasoning behind this exercise is that smaller plots of land are typically valued at a higher price owing to their developed nature, contrasting with larger tracts that require substantial areas to be set aside towards setting up infrastructure such as roads, parks or other civic amenities.[7] Therefore, adjusting these values through appropriate cuts would provide a more accurate approximation of the land's value.

27. However, in this particular instance, the acquired land exceeds the land in the cited sale exemplar by more than 5000 times. The issue in this context is not restricted to the smaller size of the land in the sale exemplar but rather the fact that there is only a solitary instance of sale brought on record. Had there been multiple such sale instances, there could have been some basis for estimation that this Court could have deduced from. However, the sale deed dated 22.02.1989, which is the sole example relied upon, not only inadequately represents the values of the land being acquired but also introduces significant risk and imprecision, if relied upon as the sole foundation of our assessment. We are, therefore, extremely reluctant to rely on this sale deed as a direct piece of evidence for determining the fair and just market value of the acquired land.

28. Furthermore, a closer look at the lease deeds submitted by the landowners also reveals that they pertain to properties not comparable to the land under acquisition. For instance, the lease deeds dated 01.09.1988 and 09.12.1988 pertain to well-developed commercial spaces in a Shopping Complex. No such development or construction had taken place on the acquired lands. Commercialisation of the acquired land can only occur after it is fully developed, to attract similar lease offers that could exhibit comparable values. The lands as they stood as on the date of the Section 4 notification were not exactly analogous to the leased-out plots or commercial buildings relied upon by the landowners. These lease deeds hence cannot be mechanically relied upon either.

29. Finally, the landowners seek refuge in the circle rate of the area in which the subject lands are situated – contending that it was as much

6 Ravinder Kumar Goel v. State of Haryana and Others, 2023 SCC OnLine SC 147

7 Atma Singh v. State of Haryana and others (2008) 2 SCC 568

as INR 1500 per sq. yd. in the year 1991. We must note, however, at the outset that this claim is unsubstantiated by any reliable material on record. A document enumerating the circle rates of 37 villages, based upon notification issued by the State / NOIDA authorities, dated 30.11.1989, was, of course, produced by the landowners to demonstrate that the NOIDA authority itself determined the rate for lands in village Chhalera Bangar at INR 650 per sq. yd. (for lands adjoining the road) and INR 350 per sq. yd. (for the lands away from the road); but this too cannot be the sheet anchor as the said circular was apparently issued with the primary object of levying stamp-duty on an estimated price value of the land in the year 1989.

30. Consequently, given our analysis above, it is apparent that there exists no direct piece of evidence to determine fair and just compensation in the instant cases. We must, therefore, resort to the settled principle of guesstimation.[8]

E.1.2. Applicability and use of the principle of guesstimation

31. Guesstimation is a heuristic device that enables the court, in the absence of direct evidence and relevant sale exemplars, to make a reasonable and informed guess or estimation of the market value of the land under acquisition, and concomitantly the compensation payable by the appropriate Government. In that sense, guesstimation hinges on the Court's ability to exercise informed judgement and expertise in assessing the market value of land, especially when the evidence does not tender a straightforward answer.

32. This principle accentuates the fundamental understanding that determining compensation for land is not a matter of exact science but involves a significant element of estimation. Indeed, this holds true for valuation of land in general, which is affected by a multitude of factors such as its location, surrounding market conditions, feasible uses etc. Accordingly, while evidence and calculations can aid in estimating the land value, they ultimately serve as tools for approximation rather than precision. Instead, land valuation—and consequently the affixation of compensation—remains an exercise of informed estimation, requiring the integration of diverse data points and professional judgment concerning subjective, intangible and

8 Trishala Jain v. State of Uttaranchal (2011) 6 SCC 47, para 63

dynamic elements. Pursing a single precise valuation or compensation figure is bound to be unjust, representing a rigid approach and a procrustean endeavour at best.

33. Having said that, it is important to clarify that the process of determining compensation is not entirely subjective. While it may not be possible to arrive at a definitive figure, the exercise is still epistemologically objective in so far as it is grounded in evidence and the consideration of relevant factors. In case the compensation is fixed agnostically to the factors affecting the valuation of the land, the resultant figure might be arbitrary and may fail to adequately compensate the landowner for the expropriated land. Hence, while some subjectivity may exist in fixing the final figure based on these factors, the sliding scale of judicial discretion cannot be extended to mere speculation.

34. Accordingly, while the Court can use the principle of guesstimation in reasonably estimating the value of land in the absence of direct evidence, the exercise ought not to be purely hypothetical. Instead, the Court must embrace a holistic view and consider all relevant factors and existing evidence, even if not directly comparable, to arrive at a fair determination of compensation. ***Trishala Jain v. State of Uttaranchal***,[9] summarizes these yardsticks as follows:

> "*65. It will be appropriate for us to state certain principles controlling the application of "guesstimate":*
>
> *(a) Wherever the evidence produced by the parties is not sufficient to determine the compensation with exactitude, this principle can be resorted to.*
>
> *(b) Discretion of the court in applying guesswork to the facts of a given case is not unfettered but has to be reasonable and should have a connection to the data on record produced by the parties by way of evidence. Further, this entire exercise has to be within the limitations specified under Sections 23 and 24 of the Act and cannot be made in detriment thereto*."

35. Broadly, such relevant factors can be divided into three categories:

9 [2011] 8 SCR 520 : (2011) 6 SCC 47, para 65

i. *Characteristics of the land*: The valuation of land is undeniably influenced by its inherent characteristics. A parcel of land endowed with advantageous features that enhance its accessibility and usability tends to command higher market price and thus, a greater valuation in comparison to lands lacking such attributes. Key factors contributing to such features include connectivity *via* roads and other means of transportation, the size and shape of the land, availability of essential utilities such as electricity and water, the evenness or levelling of the land's surface, width of frontage, and nature and status of the surrounding area etc.;

ii. *Future potentiality of the land*: In addition to its characteristics, the valuation of land is also influenced by its potentiality. Lands with the potential to be used for commercial or residential purposes; that are located in or near a developed area; or which are proximate to tourist destinations, are perceived to hold greater value in the future. Consequently, landowners may anticipate higher future prices and accordingly demand higher sale prices compared to lands lacking these attributes. Accordingly, these features also lead to an increase in valuation; and

iii. *Factors denoting market sentiment*: Market sentiments are powerful drivers of land valuation. Even if a particular piece of land possesses all desirable features, its valuation can still suffer if the market conditions at the time of publication of the notification under Section 4 of the 1894 Act were unfavourable. Factors such as economic recessions, political instability, speculative investments or real estate crisis can impact the perceived value of the land. Thus, these extraneous economic and political factors must also be considered when assessing land valuation.

36. In the instant case, the evidence led by parties provides several relevant factors, as enumerated above. For instance, while the sale deed produced by the landowners cannot directly be relied upon for determining the price of the land, given its relative proximity, it nonetheless establishes its potentiality in the form of possible use towards residential purposes.

37. Likewise, the lease deeds further underscore the commercial potentiality of land in the adjoining vicinity—as Sector 18 is situated

only 3-4 kilometres away from the subject land. Moreover, as in the case of Sector 18, the acquired land is well connected to major roads and has adequate supply of water and electricity. Further, as highlighted by the landowners, the land under acquisition lies near prominent amenities and landmarks such as the Amity Public School, a large Golf Course, and a prominent tourist attraction - the Film City. Apart from that, it is also in proximity to the DSC Shade, Okhla Barrage Highway and the MAT Public School of Business Management.

38. Additionally, the acquired land is enveloped by developed colonies and markets on all three sides. Towards the western periphery, it is bordered by N.T. Road which offers excellent connectivity to the Kalindikunj area near Delhi *via* the Yamuna Barrage. Beyond the southern side, the land is flanked by a six-lane road leading towards Delhi through Noida, alongside residential enclaves designated for Army Officers, along with the aforementioned golf course. Eastward, there are developed sectors 43 and 45, as well as the lands belonging to village Sadarpur. Lastly, the acquired land benefits from convenient access to key landmarks in Delhi including the Supreme Court, Connaught Place and the ITO, highlighting its strategic location *vis-à-vis* its potentiality and future multiplicity of its market value at the time of issuance of the Section 4 notification.

39. More importantly, the land is not uneven, prone to flooding or subject to construction restrictions. Taken together, all these facts and evidence lead to the reasonable inference that the subject land had significant potential for future commercial development at the time of issuance of the notification under Section 4, akin to the developments witnessed in the lease deeds for Sector 18, NOIDA.

40. At this juncture, we may clarify that the mere absence of multiple sale exemplars also does not by itself support a conclusion that the market condition was unfavourable or that the lands had stagnant demand and low value, as sellers often hold on to lands whose prices are in the process of increasing or likely to increase in the near future, owing to urbanisation or other upcoming development projects and changes.

41. Thus, even devoid of numerous sale exemplars showing frequent transactions and considering the factors enumerated in the preceding paragraph, we are inclined to estimate that the value of the subject land was appreciating at around 15% annually. This rough estimate

of ours is supported by the decision of this Court in ***ONGC Ltd. v. Rameshbhai Jivanbhai Patel***,[10] which recognised that a 15% annual growth in prices can be assumed for lands situated in urban areas.

42. Regarding the quantum of compensation and/or valuation of the acquired land, an escalation is merited even if we were to rely on the lower end of the rates fixed by NOIDA itself in 1989 in Chhalera Banger, for lands lying away from the road, being INR 350 per sq. yd. Given that these rates were released by NOIDA towards the latter half of 1989, and considering how the acquisition process began on 05.01.1991, it would be appropriate to apply a 15% escalation for one year to this price – bringing our total guesstimate to Rs. 403 per sq. yd.

43. In order to further substantiate this estimation, we place our reliance on the decision rendered in ***Krishan Kumar v. Union of India***,[11] where this Court acknowledged that while sale exemplars may not directly establish the amount of compensation to be granted, compensation could be determined applying the principle of guesstimation, based on the circle rate after granting a marginal increase over the same.

44. In light of the above analysis, the evidence produced by both, the State and the landowners, and on employing the principle of guesstimation, it stands conclusively surmised that the landowners herein are entitled to an enhancement in the compensation awarded. Accordingly, we partly allow these present appeals and revise the rate of compensation to INR 403 per sq. yd. for the entire acquired land except such part of it which was subject matter of the decision in ***Bir Singh (supra)***.

E.2. Maintainability of the Miscellaneous Applications

45. The miscellaneous applications in the present batch of cases before us seek parity with the rate of compensation awarded in ***Bir Singh (supra)***. Learned Senior Counsel for NOIDA is not wrong in contending that this would effectively amount to recall of the previous orders and part acceptance of the appeals by way of Review based on a subsequent change of law.

10 [2008] 11 SCR 927 : (2008) 14 SCC 745, para 14

11 (2015) 15 SCC 220, para 22-25

46. Although, as laid down in ***State (NCT of Delhi) v. K.L. Rathi Steels Ltd.***,[12] Miscellaneous Applications based on change of law are typically not maintainable, except in certain exceptional circumstances, and in the interests of justice. These circumstances pertain to a position where the law is in a continuous state of flux and/or where not allowing the applications would have a significant detrimental effect and result in the miscarriage of justice. It seems to us that the current situation exemplifies such a scenario.

47. In our considered opinion, it would indeed be unfair to single out a few individual landowners and deny them the benefit of just compensation, owing to factors and processes outside their control. Comparing the impact of not allowing these miscellaneous applications solely on grounds of maintainability *vis-à-vis* allowing them marginally higher compensation in the larger interest of justice—we are persuaded to accede to the landowners' prayers. Disallowing these applications would in a way be against the spirit of Article 14 of our Constitution and will defy the right to treat those placed equally in an equal manner.

48. Consequently, invoking our powers under Article 142 of the Constitution with a view to do complete justice between the parties, we deem it fit to enhance compensation notwithstanding the dismissal of earlier Review and Curative Petitions. Moreover, it is clarified that since our analysis above is agnostic to the decision in ***Bir Singh (supra),*** we are, therefore, not applying a subsequent change of law, but instead only correcting a judicial error and restoring uniformity in a case involving peculiar circumstances.

49. Consequently, the landowners in these miscellaneous applications are also held entitled to the new revised rate of INR 403 per sq. yd. for their acquired land.

E.3 Applicability of Section 28A of the 1894 Act

50. Section 28A of the 1894 Act serves as a legislative safeguard against discrimination in the grant of compensation. It stipulates that if an individual whose land is acquired receives enhanced compensation, all other affected persons covered by the same notification under Section 4 of the 1894 Act are entitled to seek parity with such enhancement.

12 [2023] 6 SCR 209 : 2024 SCC OnLine SC 1090, para 113

51. This provision was not originally a part of the 1894 Act and was introduced through the Land Acquisition (Amendment) Act, 1984. The Statement of Objects and Reasons accompanying the aforementioned Amendment Act, clarified that Section 28A aimed to rectify disparities between landowners. It addressed situations where more affluent landowners could avail themselves of a reference to the civil court under Section 18, while inarticulate and poor people often could not resort to a similar recourse, resulting in inequality in compensation for similar quality of land. The provision sought to remedy this by allowing all affected parties covered by the same notification to seek redetermination of compensation once the court grants higher compensation under Section 18 to any one of them.[13]

52. In the instant case, however, we are not delving deep into the landowners' prayer for parity based on Section 28A of the 1894 Act in consonance with the ***Bir Singh (supra)*** judgement. We do so for three reasons: (a) that as mentioned in para 22 of this judgement, ***Bir Singh (supra)*** would not bind us given its precarious and *sui generis* facts; (b) the landowners have not demonstrated compliance with the procedural technicalities of this provision, such as writing to the Collector within the prescribed limitation period; and (c) the issue is rendered academic in light of our analysis above where we have independently revised the rate of compensation to INR 403 per sq. yd for one and all.

53. Similarly, the plea hovering around Article 14 of the Constitution to seek uniformity in the matter of award of compensation, has also become academic, as such a relief already stands granted to all the landowners, though on different grounds.

F. Conclusion

54. The present factual situation had three set of cases – appeals filed by the landowners, appeals filed by NOIDA, and the Miscellaneous Applications filed by the landowners. Without disturbing the ratio of ***Bir Singh (supra)*** and the compensation granted to landowners therein, and with a view to put a *quietus* on this long-standing dispute, the landowners' appeals are allowed in part; the appeals by NOIDA

13 Mewa Ram v. State of Haryana (1986) 4 SCC 151, Para 4; Babua Ram v. State of U.P (1995) 2 SCC 689, para 36

authorities against the grant of compensation are also allowed in part, such that the rate of compensation is enhanced from INR 340 per sq. yd. to INR 403 per sq. yd. and where the High Court has, following ***Bir Singh (supra)*** granted compensation at INR 449 per sq. yd., the same is reduced to INR 403 per sq. yd.

55. The enhanced compensation amount shall be deposited with the Reference Court within a period of eight weeks. It shall then be disbursed to the claimants at the earliest.

56. All the matters stand disposed of in the aforementioned terms and directions.

Result of the case: Matters disposed of.

†*Headnotes prepared by:* Ankit Gyan

[2024] 7 S.C.R. 466 : 2024 INSC 487

Ratnu Yadav
v.
The State of Chhattisgarh

(Criminal Appeal No. 1635 of 2018)

09 July 2024

[Abhay S. Oka* and Rajesh Bindal, JJ.]

Issue for Consideration

Whether the Courts below erred in convicting appellant u/s.302, IPC for committing the murder of his stepmother by relying upon the alleged extra-judicial confession of appellant before PW1 and 'last seen together' evidence of PW5; and the guilt of the appellant was not proved beyond reasonable doubt.

Headnotes†

Penal Code, 1860 – s.302 – Prosecution case that Appellant assaulted his step-mother; dragged her by holding her hair from her house up to the village pond and suffocated her to death by putting her head inside the pond water – No direct evidence – Conviction by Courts below, relying upon alleged extra-judicial confession of appellant before PW1-village officer and 'last seen together' evidence of PW5 (deceased's brother) – If justified:

Held:1. The normal rule of human conduct is that if a person wants to confess to the crime committed by him, he will do so before the person in whom he has implicit faith. It is not the case of the prosecution that the appellant had a close acquaintance with PW-1 for a certain length of time before the incident. Moreover, the version of the witness in examination-in-chief and cross-examination is entirely different. Therefore, the testimony of PW-1 is not reliable. Hence, the case of extra-judicial confession cannot be accepted. [Para 10]

2. Between the house of the deceased and the pond, there is a road and ridge of the pond. This means the appellant must have dragged the deceased for a considerable distance. The incident happened in the evening before 7 p.m. There must be many people around the place of the incident. None of them has been examined as a witness. An adverse inference must be drawn against the

* Author

prosecution for not examining material witnesses. Moreover, in the absence of injuries on the body of the deceased, it is very difficult to accept the testimony of PW-5 that by holding the hair of his mother, the appellant dragged her to the pond. Therefore, evidence of PW-5 of last seen together is not worthy of acceptance. Guilt of appellant not proved beyond a reasonable doubt. Appellant is acquitted. [Paras 5, 12, 13 and 14]

Code of Criminal Procedure, 1973 – s.161 – Statement under – Departure from – Evidence Act, 1872 – s.145.

Held: Cross-examination of the witness by the public prosecutor shows that the witness was not confronted by showing the relevant part of her statement recorded u/s.161 of CrPC – The witness ought to have been confronted with her prior statement in accordance with s.145 of Evidence Act. [Para 8]

Confession – Extra-judicial Confession – Normal rule of human conduct.

Held: Normal rule of human conduct is that if a person wants to confess a crime, he will do so before the person in whom he has implicit faith. [Para 10]

Case Law Cited

Devi Lal v. State of Rajasthan [2019] 1 SCR 168 **: (2019) 19 SCC 447;** *Nikhil Chandra Mondal v. State of West Bengal* [2023] 2 SCR 20 **: (2023) 6 SCC 605 – referred to.**

List of Acts

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

List of Keywords

Life Imprisonment; Extra-Judicial confession; Beyond reasonable doubt; Last seen together.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No.1635 of 2018

From the Judgment and Order dated 07.04.2018 of the High Court of Chhattisgarh at Bilaspur in CRLA No.929 of 2013

Appearances for Parties

Shridhar Y. Chitale, Sr. Adv. (Amicus Curiae), Ms. Beleena Biju, Vinayak S. Chitale, Advs. for the Appellant.

Mrs. Prerna Dhall, Piyush Yadav, Prashant Singh, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Judgment

Abhay S. Oka, J.

1. The Sessions Court convicted the appellant-accused for the offence punishable under Section 302 of the Indian Penal Code (for short, 'IPC') for committing the murder of Smt Hemwati Bai, who was his stepmother. Appellant was sentenced to undergo life imprisonment. By the impugned judgment, the High Court has dismissed the appeal preferred by the appellant.

FACTUAL ASPECT

2. The case of the prosecution in brief is that the appellant had a land dispute with the deceased. The allegation against the appellant is that on 2nd March 2013, he assaulted the deceased. After that, he caught hold of the deceased by her hair and dragged her up to the village pond. The appellant put her head inside the pond water. The deceased was suffocated to death. The first informant–Darshu, PW-4, informed the police that Hemwati Bai died due to drowning. Accordingly, a First Information Report (for short, 'FIR') was registered. After the completion of the investigation, a chargesheet was filed against the appellant. The prosecution examined ten witnesses. There is no direct evidence. The prosecution relied upon evidence of PW-1, Sukhmani Bai, the village officer. The prosecution case is that the appellant made an extra-judicial confession before the witness. The prosecution relied upon the evidence of PW-5, Chaprasi, the deceased's brother. According to PW-5, he saw the appellant holding the hair of the deceased and was taking her towards the pond. Though PW-1 was declared hostile, the Trial Court and High Court relied upon a part of her testimony. The Courts also believed the testimony of PW-5.

SUBMISSIONS

3. Shri Shridhar Y. Chitale, learned counsel appearing for the appellant as amicus curiae, has taken us through the postmortem report and testimony of relevant prosecution witnesses. Based on the evidence of PW-9, Dr Pankaj Kishore, his submission is that the death was due to drowning, and the prosecution has not discharged the burden on it to prove that it was a homicidal death. He submitted that evidence of PW-1, who was declared as hostile, cannot be believed as in the examination-in-chief, the witness did not depose that the appellant made a confession of killing the deceased. However, in the cross-examination made by the public prosecutor, the witness purportedly stated that the appellant confessed before her about killing the deceased. He submitted that evidence of PW-1 cannot be believed. As regards the evidence of PW-5, he stated that though the witness deposed that he saw the appellant dragging the deceased towards the pond, PW-2 – Bisoha, who was allegedly present at that time, did not support the prosecution. Moreover, another witness, Lakhan, was allegedly present there and was not examined by the prosecution. He pointed out that the incident happened in the evening and PW-10, Investigating Officer admitted that there is a temple near the house of the deceased and other people lived nearby. He would, therefore, submit that the prosecution has failed to prove the appellant's guilt beyond a reasonable doubt.

4. Shri Prashant Singh, learned counsel appearing for the respondent State, submitted that in her cross-examination made by the public prosecutor, PW-1 has clearly deposed about the confessional statement made by the appellant. He submitted that evidence of a hostile witness need not be rejected in its entirety and that the Court can always rely upon a part of the testimony of such a witness. He submitted that the evidence of PW-5 proves that the appellant was last seen together with the deceased, and at that time, he was holding the deceased by her hair. He submitted that this evidence is sufficient to hold that the death of the deceased is homicidal. He submitted that in view of the oral testimony of the said two witnesses, the appellant's guilt has been established.

CONSIDERATION OF SUBMISSIONS

5. We have carefully perused the evidence of prosecution witnesses and other documents on record. The prosecution is relying upon the

extra-judicial confession made by the appellant before PW-1 and evidence of PW-5 of last seen together. The case of the prosecution is that after an altercation with the deceased in her house, the appellant held the deceased by her hair and dragged her to the village pond. The prosecution is relying upon a site map. It shows that a road separates the pond and the house of the deceased. The sketch shows the existence of a ridge around the pond and two temples on the ridge of the pond abutting the road. The temples are exactly opposite the house of the deceased. According to the prosecution case, the appellant dragged the deceased by holding her hair from her house up to the pond. Between the house of the deceased and the pond, there is a road and ridge of the pond. This means the appellant must have dragged the deceased for a considerable distance. The postmortem report records explicitly that no marks of any injury were found on the body of the deceased. In his evidence, PW-9 Dr Pankaj Kishore reiterated that there was no injury mark on the body of the deceased. If the prosecution story of the appellant dragging the deceased was true, there would have been some injury on the body of the deceased. Therefore, the absence of any injury marks on the body militates against the prosecution's case.

6. Evidence of PW-9 shows that salt water was found in the trachea and lungs of the deceased. Perhaps to find out whether the water found in the trachea and lungs of the deceased was the water in the pond, samples of water from the pond were collected and sent to the laboratory. That is what PW-10, the Investigating Officer, has stated in paragraph 11 of his deposition. He further stated that the Director of the State Judicial Laboratory returned the samples without testing them on the ground that the cause of death was established in the postmortem notes.

7. According to PW-9, the cause of death was due to drowning; however, he was unable to state whether the death was homicidal or accidental. The reason is that it was difficult for him to state whether deceased immersed in the water herself or she was forced into water. In fact, in postmortem notes, PW-9 stated that an expert's opinion should be sought. Admittedly, an expert's opinion was not sought.

8. Now, we turn to evidence of PW-1. She was a village Kotwal. She was a signatory to the panchnama of the recovery of the dead body and a signatory to the sketch of the site made by the police. In the

examination-in-chief, she stated that on the date of the incident, around 7 p.m., the appellant came to her house and stated that his mother had died. She has not deposed in her examination-in-chief that the appellant stated that he had killed the deceased. A Statement under Section 161 of the Code of Criminal Procedure, 1973 (for short, 'CrPC') of the witness was recorded by the police. Obviously, as the said witness made a departure from what she had stated in the police statement, at the instance of the public prosecutor, the witness was declared hostile. The cross-examination of the witness by the public prosecutor shows that the witness was not confronted by showing the relevant part of her statement recorded under Section 161 of CrPC. The witness ought to have been confronted with her prior statement in accordance with Section 145 of the Indian Evidence Act. However, in the cross-examination made by the public prosecutor, the witness accepted the suggestion given by the public prosecutor that the appellant came to her house at 7 p.m. on the date of the incident and told her that he had killed his stepmother by putting her head into the village pond.

9. As regards the evidentiary value of an extra-judicial confession, a bench of three Hon'ble Judges of this Court in the case of ***Devi Lal v. State of Rajasthan***[1], in Paragraph 11, this Court held thus:

> **"11. It is true that an extra-judicial confession is used against its maker but as a matter of caution, advisable for the court to look for a corroboration with the other evidence on record. In Gopal Sah v. State of Bihar [Gopal Sah v. State of Bihar, (2008) 17 SCC 128 : (2010) 4 SCC (Cri) 466] , this Court while dealing with extra-judicial confession held that extra-judicial confession is, on the face of it, a weak evidence and the Court is reluctant, in the absence of a chain of cogent circumstances, to rely on it, for the purpose of recording a conviction.** In the instant case, it may be noticed that there are no additional cogent circumstances on record to rely on it. At the same time, Shambhu Singh (PW 3), while recording his statement under Section 164 CrPC, has not made such statement of extra-judicial confession (Ext. D-5) made by accused

1 [2019] 1 SCR 168 : (2019) 19 SCC 447

> Babu Lal. In addition, no other circumstances are on record to support it."
>
> (emphasis added)

In paragraph 16 of the decision of this Court in the case of ***Nikhil Chandra Mondal v. State of West Bengal***[2], this Court held thus:

> **"16. It is a settled principle of law that extra-judicial confession is a weak piece of evidence. It has been held that where an extra-judicial confession is surrounded by suspicious circumstances, its credibility becomes doubtful and it loses its importance. It has further been held that it is well-settled that it is a rule of caution where the court would generally look for an independent reliable corroboration before placing any reliance upon such extra-judicial confession**. It has been held that there is no doubt that conviction can be based on extra-judicial confession, but in the very nature of things, it is a weak piece of evidence."
>
> (emphasis added)

10. The normal rule of human conduct is that if a person wants to confess to the crime committed by him, he will do so before the person in whom he has implicit faith. It is not the case of the prosecution that the appellant had a close acquaintance with PW-1 for a certain length of time before the incident. Moreover, the version of the witness in examination-in-chief and cross-examination is entirely different. Therefore, in our considered view the testimony of PW-1 is not reliable. Hence, the case of extra-judicial confession cannot be accepted.

11. Now, we come to the testimony of PW-5. At the beginning of his examination-in-chief, he stated that the deceased was his elder sister. He stated that there was an altercation between the deceased and the appellant in her house. Thereafter, the appellant caught hold of the deceased by her hair, and he slammed her. At that time, PW-2, Bisoha was present. The witness further stated that by holding his mother's hair, the appellant took her towards the pond. At that time, one Lakhan came there and tried to tell the appellant that he should

2 [2023] 2 SCR 20 : (2023) 6 SCC 605

not do such acts with his mother. The appellant abused him and forced him to leave. It is pertinent to note that PW-2 Bisoha did not support the prosecution and was declared hostile. More importantly, Lakhan, who has allegedly seen the appellant dragging the deceased with her hair, has not been examined as a witness.

12. As admitted by PW-10, Investigating Officer, there is a temple near the deceased's house, and other people live nearby. The incident happened in the evening before 7 p.m. There were two temples on the ridge of the pond. Obviously, there must be many people around the place of the incident. None of them has been examined as a witness. Moreover, the officer stated that it was not revealed during the investigation that the deceased shouted. An adverse inference must be drawn against the prosecution for not examining material witnesses, including Lakhan. Considering the evidence of PW-5, Lakhan was a very crucial witness. The prosecution has not explained his non-examination. PW-2, Bisoha has not supported the prosecution. Moreover, in the absence of injuries on the body of the deceased, it is very difficult to accept the testimony of PW-5 that by holding the hair of his mother, the appellant dragged her to the pond. Therefore, evidence of PW-5 of last seen together is not worthy of acceptance.

13. Considering what we have held earlier, the appellant's guilt was not proved beyond a reasonable doubt. The appellant was incarcerated for 11 years.

14. Hence, the impugned judgment and order dated 7th April 2018 and 9th July 2013 are hereby set aside. The appellant is acquitted of the offence registered with FIR No. 68 of 2013 of Police Station Kharora, district Raipur. The appellant shall be immediately set at liberty unless his custody is required in any other case. The appeal is, accordingly, allowed.

Result of the case: Appeal allowed.

†*Headnotes prepared by:* Bibhuti Bhushan Bose
(With assistance from : Nivedita Rawat, LCRA*)*

[2024] 7 S.C.R. 474 : 2024 INSC 500

M/s Al-Can Export Pvt. Ltd.
v.
Prestige H.M. Polycontainers Ltd. & Ors.

(Civil Appeal No. 7254 of 2024)

09 July 2024

[J. B. Pardiwala* and Manoj Misra, JJ.]

Issue for Consideration

Matter pertains to the legality, validity and propriety of the auction proceedings conducted by the Tahsildar of the subject property, originally owned by the respondent No. 1; whether the provisions of Order XXI r. 90 CPC would apply to the writ proceedings u/Art. 226 of the Constitution; and whether the Additional Commissioner, had the jurisdiction to decide the two appeals filed by the respondent nos. 1 and 6 respectively u/s. 247 of the Maharashtra Land Revenue Code, 1966.

Headnotes†

Maharashtra Land Revenue Code, 1966 – ss. 194, 195, 212 – Auction sale – Matter pertaining to auction proceedings conducted by the Tahsildar of the subject property originally owned by the respondent No. 1 – Respondent no. 1 mortgaged its property in favour of the Bank and obtained loan – Bank assigned the debts due and payable to it in favour of the respondent no. 6 – Respondent no. 1 was in arrears of land revenue and despite issuance of demand notices failed to make the payment and as such the property owned by him was put to auction under the provisions of the Land Revenue Code – Appellant declared the successful bidder and sale certificate issued by the Additional Collector in his favour – Legality, validity and propriety of the auction proceedings conducted by Tahsildar of the subject property originally owned by the respondent No. 1:

Held: There was gross violation of the mandatory provisions of the Revenue Code as regards the conduct of the auction sale – Sale of the property took place before the expiry of the mandatory 30 days' notice, thus, the sale was conducted in breach of the provisions of s. 194 – Sale certificate was issued on the same day,

* Author

i.e., on the date of the auction itself, much before the confirmation of sale by the Additional Collector, thus, the sale was conducted in breach of the provisions of s. 212 – Appellant-purchaser was put in possession of the property much before the sale came to be confirmed and that too prior to the cheque being realised, thus, breach of the provisions of ss. 212 and 208 respectively – Undue haste was exhibited by the Tahsildar in completing the sale in favour of the appellant – Tahsildar supressing an important fact before the Additional Collector as regards the objections received by him from IFCI itself indicates that there was some collusion between the Tahsildar and the appellant – Said lapses, cannot be termed as irregularity – Various illegalities were committed even in confirming the sale – If all the illegalities taken note of were to be condoned or overlooked, applying the provisions of Ord. XXI r. 90 CPC, the same would result in nothing but gross travesty of justice – No interference warranted with the impugned judgment of the High Court – Having taken the view that the High Court committed no error, much less any error of law, the appeals could have been dismissed – However, the appellant having running an oxygen cylinder manufacturing plant on the suit property, for almost 15 years after investing a huge amount wherein 200 employees are working, it is fit to give one opportunity to the appellant to save its industrial unit set up on the subject land – Appellant to deposit a sum of Rupees Four Crore Only with the respondent no. 6 towards full and final settlement of all liabilities – In case of the failure to deposit the amount, the competent authorities to take over the possession of the entire unit with the land and put the same once again for sale by way of fresh auction process. [Paras 56-64, 66-67, 75-78]

Code of Civil Procedure, 1908 – Ord. XXI r. 90, ss. 141 and 9 – Constitution of India – Art. 226 – Ordinary civil jurisdiction and extraordinary original jurisdiction – Applicability of the provisions of Ord. XXI r. 90 to writ proceedings u/Art. 226:

Held: Provisions of the CPC do not apply to writ petitions u/Art. 226 except some of the principles enshrined therein like res judicata, delay and laches, addition of parties, matters which have not been specifically dealt with by the writ rules framed by the respective High Court – As a court of plenary jurisdiction, the writ court while exercising powers u/Art. 226 is free to adopt its own procedures and follow them – It cannot be compelled to follow the procedures

prescribed in the CPC – This is so for the specific provision made in its s. 141 explanation – High Court while exercising jurisdiction u/Art. 226 has jurisdiction to pass appropriate orders – Such power can neither be controlled nor affected by the provisions of Ord. XXI r. 90 – It would not be correct to say that the terms of Ord. XXI r. 90 should be mandatorily complied with while exercising jurisdiction under Article 226 – Proceedings u/Art. 226 stand on a different footing when compared to the proceedings in suits or appeals arising therefrom – High Court exercises its writ jurisdiction u/Art. 226, whereas the Civil Courts exercise their jurisdiction in terms of the provisions of the respective State Civil Courts Acts read with s. 9 CPC – High Court exercises constitutional function, the Civil Court exercises a statutory function – High Court exercises a wide power u/Art. 226 and in a given situation, it can even mould the reliefs in order to do substantial justice between the parties. [Paras 39, 48-50]

Code of Civil Procedure, 1908 – Ord. XXI r. 90 – Auction sale conducted by the State through its authorities – Legality, validity and propriety of – Auction sale challenged on the ground of mala fides, undue favour for extraneous considerations and gross violation of the mandatory provisions of law – Principles enshrined in Ord. XXI r. 90 CPC, if applicable:

Held: It would be hazardous to apply the principles enshrined in Ord. XXI r. 90 CPC – Human values and ethics in public functionaries have degraded to a considerable extent – Corruption is on a rampage – Having regard to the same and in order to protect and uphold the rule of law, the courts have a duty to ensure that the State authorities have conducted public auctions in a fair and transparent manner and have not done anything by which public exchequer has suffered – It would be too much to say that although the writ court may find auction sale conducted by a public functionary to be in gross violation of the mandatory provisions of law and the action of such public functionary to be arbitrary, yet the aggrieved party complaining about the same should be told to establish the dual conditions stipulated in Ord.XXI r.90 CPC – First and the foremost aspect that the writ court should look into is fairness and transparency on the part of the State in conducting the auction sale so as to be in conformity with Art.14 – Once the action of the State is found to be unfair and arbitrary, then that is end of the matter for the writ court. [Para 55]

Maharashtra Land Revenue Code, 1966 – s. 247 – Appeal and appellate authorities – Matter pertaining to auction proceedings conducted by the Tahsildar of the subject property originally owned by the respondent No. 1 – Respondent no. 1 mortgaged its property in favour of the Bank and obtained loan – Bank assigned the debts due and payable to it in favour of the respondent no. 6 – Respondent no. 1 was in arrears of land revenue and despite issuance of demand notices failed to make the payment and as such the property owned by the respondent no. 1 put to auction under the provisions of the Land Revenue Code and the appellant was declared the successful bidder and sale certificate issued by the Additional Collector in his favour – Appeals filed by the original owner and respondent no. 6 u/s. 247 – Jurisdiction of the Additional Commissioner to decide the appeals – Plea of the appellant that the appeals before the Additional Commissioner u/s. 247 not maintainable as there was remedy available u/s. 210 of the Code:

Held: Under s. 210, an application before the Collector to get the Sale set aside has to be made within a period of 30 days and it is after considering the objections the sale is to be confirmed – Remedy u/s. 210 rendered illusory as the sale was finalised by the Tahsildar much before the confirmation by the Collector – In fact, the sale certificate was issued and the possession was also handed over to the appellant – Confirmation was done by the Tahsildar much before the expiry of 30 days – There was nothing left for the Collector to consider and decide u/s. 210 of the Revenue Code – Once the sale certificate is issued, then the remedy falls u/s. 247 instead of s. 210 of the Revenue Code – Furthermore, s. 210 may be applicable in case of owner of the property but not to a lender who has valid subsisting mortgage – Respondent No. 6 does not fall within the category as provided u/s. 210(1) nor has the respondent No. 6 claimed to be the owner of the property or has an interest in the property by virtue of the "title acquired" – Assuming that the Additional Commissioner had no jurisdiction to adjudicate and decide the two appeals filed by the respondent No. 1 and respondent No. 6 respectively, yet the common order passed by the Additional Commissioner allowing the appeals and remanding the matter back to the authority concerned could not have been disturbed and the High Court rightly did not disturb the same – Had the High Court taken the view that the Additional Commissioner had no jurisdiction and the order passed by it was

a nullity, the result would have been the revival of the illegal order passed by the Additional Collector confirming the sale – Moreso, the writ court should not quash the order if it revives a wrong or illegal order. [Paras 69-74]

Auction – Auction sale – Conduct of, by the court in the execution proceedings initiated by the decree holder under the provisions of the CPC, and by the State through its revenue authorities like Tahsildar, etc. under the provisions of different enactments like Land Revenue Code etc. – Difference between:

Held: There is a fine distinction between the two – Whole object behind Ord. XXI r. 90 CPC appears to be to discourage the judgment debtors from filing frivolous application complaining about the irregularity or fraud in the conduct of the auction sale – Lot of sanctity is attached to the auction sale conducted by the executing court under the provisions of the CPC compared to the auction sale conducted by the State through its authorities – Execution is the enforcement by the process of the court of its orders and decrees – This is in furtherance of the inherent power of the court to carry out its orders or decrees – Order XXI CPC deals with the elaborate procedure pertaining to the execution of orders and decrees – Sale is one of the methods employed for execution – r. 89 of Ord. XXI CPC is the only means by which a judgment-debtor can escape from a sale that has been validly carried out – Object of the rule is to provide a last opportunity to put an end to the dispute at the instance of the judgment debtor before the sale is confirmed by the court and also to save his property from dispossession. [Para 38]

Code of Civil Procedure, 1908 – Ord. XXI r. 90 – Nature and scope of:

Held: R. 90 of Ord. XXI deals with cases of setting aside auction-sale on the ground of material irregularity or fraud in publishing or conducting such sale and the applicant proves substantial injury by reason of such irregularity or fraud – Explanation to r. 90 clarifies that mere absence of or defect in, attachment of property sold would be no ground for setting aside sale – Ord. XXI is exhaustive and in the nature of a complete code as to how the execution proceedings should take place – This is the second stage after the success of the party in the civil proceedings – Another legal battle, more prolonged, starts in execution proceedings defeating the right of the party which has succeeded in establishing its

claim in civil proceedings – This is the reason why Ord. XXI r. 90 provides that both the conditions enumerated therein should be fulfilled. [Paras 36, 37]

Public functionaries – Role of – Conduct of auction sale – Requirement of fairness and non-arbitrariness by the State:

Held: State action must be informed by reason and the action uninformed by reason is per se arbitrary – Basic requirement of Art. 14 is fairness in action by the State and non-arbitrariness in essence and substance is the heartbeat of fair play – These actions are amenable to the judicial review not only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose – Public authorities are governed by the "rule of law" – Such authorities are constitutionally obliged in law to maintain absolute fairness and transparency during the conduct of the auction sale right from the initiation of the same till its completion – Judicial audit and scrutiny play a key role in ensuring that the public authorities do not act in an unreasonable manner. [Para 55]

Public functionaries – Public efficiency – Maintenance of balance between accountability and autonomy of action – Test of justness, fairness, reasonableness:

Held: Accountability is an impediment to efficient discharge of the duty – There is a distinction between prying into details of day-to-day administration and of the legitimate actions or resultant consequences thereof – To enthuse efficiency into administration, a balance between accountability and autonomy of action should be carefully maintained – Over-emphasis on either would impinge upon public efficiency – But undermining the accountability would give immunity or carte blanche power to deal with the public property or of the debtor at whim or vagary – Whether the public authority acted bona fide would be gauged from the impugned action and attending circumstances – Authority should justify the action assailed on the touchstone of justness, fairness, reasonableness and as a reasonable prudent owner – Test of reasonableness is stricter – Public functionaries should be duty conscious rather than power charged – Its actions and decisions which touch the common man have to be tested on the touchstone of fairness and justice – That which is not fair and just is unreasonable – And what is unreasonable is arbitrary – An arbitrary action is ultra vires – It does not become bona fide and in good faith merely because no

personal gain or benefit to the person exercising discretion has been established – An action is mala fide if it is contrary to the purpose for which it was authorised to be exercised – Dishonesty in discharge of duty vitiates the action without anything more – An action is bad even without proof of motive of dishonesty, if the authority is found to have acted contrary to reason. [Para 67]

Words and phrases – Illegality and irregularity – Distinction between :

Held: Once it is evident that the mandatory provisions as stipulated under the rules and regulations are not followed or abridged, any action pursuant to the same could be termed as gross illegality – There is a fine distinction between illegality and irregularity – Whereas the former goes to the root of the matter and renders the action null and void, of no effect whatsoever, the latter does not ipso facto invalidate the action, unless prejudice is caused to the person making a complaint. [Para 64]

Case Law Cited

Chilamkurti Bala Subrahmanyam v. Samanthapudi Vijaya Lakshmi and Another [2017] 3 SCR 826 **: (2017) 6 SCC 770;** *Mahesh Chandra v. Regional Manager, U.P. Financial Corporation & Ors* [1992] 1 SCR 616 **: (1993) 2 SCC 279;** *M/s Jagan Singh & Co. v. Ludhiana Improvement Trust & Ors.* [2022] 14 SCR 747 **: (2024) 3 SCC 308 – relied on.**

Mathew Varghese v. M. Amritha Kumar [2014] 2 SCR 736 **: [2014] 5 SCC 610;** *Saheb Khan v. Mohd. Yousufuddin* **(2006) 4 SCC 476;** *Dhirendra Nath Gorai v. Sudhir Chandra Ghosh* [1964] 6 SCR 1001 **: AIR 1964 SC 1300;** *Jaswantlal Natvarlal Thakkar v. Sushilaben Manilal Dangarwala* **(1991) Supp 2 SCC 691;** *Kadiyala Rama Rao v. Gutala Kahna Rao* [2000] 1 SCR 1045 **: (2000) 3 SCC 87;** *State of U.P. v. Vijay Anand* [1963] 1 SCR 1**: IR 1963 SC 946;** *Babubhai Muljibhai Patel v. Nandlal Khodidas Barot* [1975] 2 SCR 71 **: (1974) 2 SCC 706;** *Puran Singh & Ors. v. State of Punjab & Ors.* [1996] 1 SCR 730**:(1996) 2 SCC 205;** *Tata Cellular v. Union of India* [1994] Supp. 2 SCR 122 **: (1994) 6 SCC 651;** *Jagdish Mandal v. State of Orissa and Others* [2006] 10 Suppl. SCR 606 **: (2007) 14 SCC 517;** *State of Punjab & Others v. Mehar Din* **(2022) 5 SCC 648;** *Ashutosh v. Behari Lal* **(1908) 35 Cal 61;** *Gadde Venkateswara Rao v. Government of*

Andhra Pradesh **AIR 1966 SC 828;** *Maharaja Chintamani Saran Nath Shahdeo v. State of Bihar* **[1999] Supp. 3 SCR 518 : (1999) 8 SCC 16 : AIR 1999 SC 3609 : 1999 AIR SCW 3623;** *M.C. Mehta v. Union of India* **[1999] 3) SCR 1173 : (1999) 6 SCC 237: AIR 1999 SC 2583;** *Mallikarjuna Mudhagal Nagappa v. State of Karnataka* **[2000] Supp. 3 SCR 102 : (2000) 7 SCC 238: AIR 2000 SC 2976 : 2000 AIR SCW 3289;** *and Chandra Singh v. State of Rajasthan* **[2003] Supp. 1 SCR 674 : (2003) 6 SCC 545 : AIR 2003 SC 2889 : 2003 AIR SCW 3518;** *Raj Kumar Soni v. State of U.P.* **[2007] 4 SCR 733 : (2007) 10 SCC 635 – referred to.**

Holmes v. Russel **(1841) 9 Dowl 487 – referred to**

List of Acts

Maharashtra Land Revenue Code, 1966; Securitisation and Reconstruction of Financial Assets and Enforcement Of Security Interest Act, 2002; Maharashtra Realisation of Land Revenue Rules, 1967; Code of Civil Procedure (Amendment) Act, 1976; Code of Civil Procedure, 1908; Constitution of India.

List of Keywords

Auction proceedings conducted by the Tahsildar; Provisions of Order XXI r. 90 CPC; Writ proceedings u/Art. 226; Auction sale; Sale certificate; Illegality and irregularity; Jurisdiction of the Additional Commissioner; Role of public authorities; Amenability to judicial review; Judicial audit and scrutiny; Human values and ethics in public functionaries; Test of fairness and justice; Accountability; Public efficiency.

Case Arising From

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7254 of 2024

From the Judgment and Order dated 09.12.2015 of the High Court of Judicature at Bombay in WP No. 415 of 2011

With

Civil Appeal No. 7255 of 2024

Appearances for Parties

P.S. Patwalia, Sr. Adv., Abhay Kumar, Janak R. Shah, Shagun Ruhil, Advs. for the Appellant.

K.M. Nataraj, A.S.G., Amar Dave, Sr. Adv., Sachin Patil, Siddharth Dharmadhikari, Aaditya Aniruddha Pande, Bharat Bagla, Sourav Singh, Aditya Krishna, Ms. Preet S. Phanse, Adarsh Dubey, Geo Joseph, Durgesh Gupta, Risvi Muhammed, Mukesh Kumar Maroria, Adit Khorana, Ms. Nisha Bagchi, Shailesh Madiyal, T.S. Sabarish, Ishaan Sharma, B.K. Satija, Ms. Amrita Narayan, Mohit D. Ram, Ashwin Rakesh, Anubhav Sharma, Madhav Sharma, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

J. B. Pardiwala, J.

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

INDEX*

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

1. Leave granted.

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

3. The captioned appeals arise from the common judgment and order passed by the High Court of Judicature at Bombay dated 9.12.2015 in Writ Petition (C) No. 415 of 2011 with Writ Petition (C) No. 418 of 2011 respectively filed by the appellant herein by which the High Court rejected both the writ petitions and thereby affirmed the common order dated 18.02.2010 passed by the Additional Commissioner, Konkan Division, Mumbai setting aside the order of sale passed by the Tahsildar, Talasari dated 3.12.2008 as affirmed by the Additional Collector, Thane dated 15.01.2009 passed in favour of the appellant herein.

4. The subject-matter of the present litigation relates to the legality, validity and propriety of the auction proceedings conducted by the Tahsildar, Talasari of the subject property which was originally owned by the respondent No. 1 herein, namely, Prestige H.M. Polycontainers Limited.

5. The subject property owned by the respondent no. 1 herein was put to auction under the provisions of the Maharashtra Land Revenue Code, 1966 (hereinafter referred to as "**the Revenue Code**"). In the said auction proceedings, the appellant herein was declared as the successful bidder and ultimately, sale certificate was issued by the Additional Collector, Thane in favour of the appellant.

A. FACTUAL MATRIX

6. This litigation has a chequered history and therefore, it is necessary for this Court to look into the events that occurred over a period of time giving rise to the present two appeals before us:

a. The respondent no. 1, M/s Prestige H.M. Polycontainers, executed necessary loan and security documents in favour of the State Bank of India thereby mortgaging its property situated at Village Vadavali, Taluka Talsari, District Thane (Now District Palaghar), Maharashtra (hereinafter referred to as "**the property**") bearing Survey No. 87/11, admeasuring 13,978 sq. mts. Subsequently, the State Bank of India by an assignment agreement assigned the debts due and payable to it in favour of the respondent no. 6, Asset Reconstruction Company (India) Ltd. (hereinafter referred to as "**ARCIL**") under the provisions of The Securitisation and Reconstruction of Financial Assets and Enforcement Of Security Interest Act, 2002 (hereinafter referred to as the "**SARFAESI Act, 2002**").

   It is the case of the respondent no. 6 that accordingly it became legally entitled to recover the debt due and payable from the respondent no. 1 by way of the sale of the property subject to the pre-existing mortgage in favour of the respondent no. 6.

b. Two demand notices dated 15.10.2007 and 20.11.2007 respectively of Rs. 29,52,000/- were issued as per Form No. 1 under Section 178 of the Revenue Code and Rule 5(1) of the Maharashtra Realisation of Land Revenue Rules, 1967 (hereinafter referred to as "**the Rules**") to the respondent no.1 by the office of the Tahsildar.

   The notices were pasted on the main door of the respondent no. 1 and also on the office board of the Gram panchayat.

c. The Office of the Circle Officer, Talasari issued a letter dated 27.11.2007 to the Tahsildar, Talasari stating that the demand notices were sent to the respondent no. 1 as it was in arrears of land revenue to the tune of Rs. 29,52,000/-. It also noted that since the company was closed, the notices were affixed on the gate of respondent no. 1 in the presence of panchas.

d. The respondent no. 4 issued a letter dated 14.08.2008 addressed to the government certified valuer, Mr. Dilip Sahani of the M/s Trimurti Industrial Engineering Services, with a request to calculate the upset price of the property for the purpose of recovery of the arrears of land revenue, as the respondent no. 1 had failed to make the payment towards penalty.

e. The respondent no. 4 thereafter issued a letter dated 18.08.2008 addressed to the Circle Officer, Talasari informing him about the facts of the case and requesting him to seize and seal the premises of the respondent no. 1.

f. The respondent No. 4 also issued a letter dated 21.08.2008 addressed to the Police Inspector, Talasari apprising him of the necessary facts of the case and further informing that they would undertake the necessary exercise of determining the valuation of the property. In view thereof, the respondent no. 4 requested him to provide one police guard.

g. The valuation report of the property dated 21.08.2008 was issued by Mr. G.W. Sahani of M/s Trimurthi Industrial Engineering Services with a disposal value of Rs. 69,00,000/- and Distressed Value of Rs. 51,75,000/-

h. Although it is the case of the respondent No. 4 that the Director of Respondent No. 1, *viz.* Mr. P.K. Gupta had issued a No-Objection Certificate dated 20.10.2008 for conducting the auction sale of the property, yet the said fact was outrightly denied by Mr. P.K. Gupta in proceedings before the Additional Commissioner and the High Court.

i. On 20.10.2008, respondent no. 4 issued a letter to the Sub-Divisional Officer, Dahanu division, informing him of the valuation of the property at Rs. 51,75,000/- and requesting him to fix the upset price.

j. On 07.11.2008, the respondent no. 4 issued a letter to the Sub Divisional Officer, Dahanu Division stating that No-Objection Certificate had been received from the Director Mr. P.K. Gupta of the respondent no. 1 for the auction of the Property.

k. On 17.11.2008, the Sub-Divisional Officer, Dahanu Division approved the price of the land at Rs. 54,33,750 being a total of Rs. 51,75,000 (which had been fixed by M/s Trimurti Industries Eng. Services, Mumbai) + 2,58,750 (+5%) under Rule 13 of the Rules.

l. Notice dated 18.11.2008 came to be published by the respondent no. 4 in the newspaper *viz.* Dahanu Times for public auction furnishing details of the suit property with the upset price, auction

date and time.The notice specified that if the dues towards the arrears of revenue would not be cleared on or before 03.12.2008, the Property, free from encumbrances would be put to auction at the Tahsildar's office.

m. The Board Officer, Talasari issued a letter dated 19.11.2008 to the respondent No. 4 informing that they had pasted the copy of the notice on the gate of the property of the respondent no. 1 as per Namuna 5, Rule 12(2)A of the Rules.

n. Respondent no. 4 issued a letter dated 20.11.2008 to the Assistant Director, Director of Enforcement requesting to keep one representative present on their behalf on 03.12.2008 at 11 AM.

o. On 21.11.2008, respondent no. 4 issued a letter addressed to the Collector, Thane; Additional Collector, Thane H.Q. Jawar; Sub-Divisional Officer, Dahanu Division; Group Development Officer, Talsari; Gram Panchayat Vadavli-Bhavane and Talathi Saja, Vadavli requesting them to display the public notice on their office notice boards and to provide a publicity report regarding the public advertisement of the immovable and movable properties of the respondent no. 1 proposed to be auctioned on 03.12.2008.

p. Respondent no. 4 issued a letter dated 21.11.2008 to the respondent no. 1 informing that the auction was fixed on 03.12.2008 at 11 AM at the Office of Tahsildar, Talsari district, Thane. It was further notified that if the amount toward the arrears would be paid the auction would be cancelled.

q. Respondent no. 4 issued another public notice on 23.11.2008 in the local newspaper called the Dahanu Times.

r. On 29.11.2008, respondent no. 4 requested the Additional Collector Thane, Head Office Javar, to accord sanction for the auction of the Property since the arrears had not been received.

s. On 01.12.2008, the Additional Collector Thane, Head Office, Jawar accorded its sanction for the auction.

t. Ultimately the public auction was held on 03.12.2008 wherein the appellant was declared as the highest bidder having offered Rs. 54,50,000/-.

u. The appellant was issued the Sale Certificate dated 03.12.2008 of the Immovable Property which was sold under liquidation by the respondent no. 4 according to Specimen 8 as per Rule 14(A) of the Rules.

v. On 04.12.2008, the appellant deposited the entire auction amount.

w. On 10.12.2008, the IFCI raised its objections with respondent no. 4 which came to be recorded in its letter dated 19.12.2008.

x. The respondent No. 1 issued a letter dated 16.12.2008 to the Assistant Director, FEMA stating that they had not received the Enforcement Order dated 12.08.2003.

y. On 18.12.2008, respondent no. 4 in its letter recorded that full sale consideration of the property was deposited by the appellant on 04.12.2008.

z. On 19.12.2008, respondent no. 4 issued a response to the letter dated 10.12.2008 of the IFCI.

aa. On 26.12.2008, the WP (C) No. 2998 of 2008 (renumbered as WP 207 of 2009) was preferred by the respondent no. 1 against the auction and sale dated 03.12.2008 before the Bombay High Court. Vide the said writ petition the respondent no. 1 sought a direction to quash and set aside the enforcement order dated 12.08.2003 and all the consequential acts of recovery of penalty by auction of the properties.

bb. The Bombay High Court by its order dated 31.12.2008 passed in WP (C) NO. 2998 of 2008 (renumbered as WP 207 of 2009) directed Union of India, the respondent therein, to provide photocopies of the relevant documents and to allow inspection.

cc. The Additional Collector, Head Office, Jawar issued a letter dated 07.10.2009 to respondent no. 4, directing him to submit a detailed report on whether all the conditions as stipulated under Section 208 of the Revenue Code had been fulfilled.

dd. Respondent no. 4, vide its letter dated 12.01.2009 addressed to the Additional Collector, Head Office Jawar, informed that except for the writ petition pending before the High Court of Bombay, no objections were received. Thereby all requirements under

Section 208 of the Revenue Code had been fulfilled (despite IFCI raising its objections).

ee. On 15.01.2009, the office of the District Collector, Thane informed the respondent no. 4 that the auction sale had been approved and the appellant had been declared and confirmed as the auction purchaser of the suit property as per the Section 208 of the Revenue Code.

ff. Respondent no. 4 issued a letter dated 16.01.2009 to the appellant informing that the auction sale was approved and the appellant was declared and confirmed as successful auction purchaser of the property by the Additional Collector as per the Sections 207 and 208 respectively of the Revenue Code.

gg. The Writ Petition No. 207 of 2009 with Chamber Summons No. 49 of 2009 filed by the respondent no. 1 was permitted by the High Court to be withdrawn.

hh. On 4.04.2009, respondent no. 6 filed the Writ Petition (C) No. 648 of 2009 before the High Court of Judicature at Bombay challenging legality and validity of the sale of the said property.

ii. A division bench of the High Court, *vide* its order dated 16.04.2009 passed in WP No. 648 of 2009, recorded that as the respondent no. 1 had filed an appeal under the Revenue Code, the respondent no. 6 should also prefer an independent appeal. Accordingly, the said writ petition was dismissed.

jj. On 09.07.2009 the respondent no. 1 filed an appeal being the Appeal No. 195 of 2009 under Section 247 of the Revenue Code before respondent no. 8, the Additional Commissioner, Konkan Division, Maharashtra.

kk. On 17.11.2009, the appellant filed Writ Petition No. 3444 of 2009 in the High Court of Judicature at Bombay. Vide order dated 17.11.2009 the High Court directed the respondent no. 4 to release the arrears due to MSEDCL from the balance auction amount relying on the newspaper auction notice that mentioned the property was to be free from all encumbrances.

ll. On 18.06.2010 the respondent no. 1 and respondent no. 6 filed Appeal Nos. 195 and 288 of 2009 respectively under Section 247 of the Revenue Code against the sale of the property.

Both the appeals came to be allowed by respondent no. 8 by a common order wherein it was held that the order of sale dated 03.12.2008 and the process followed by respondent no. 4 and affirmed by the Additional Collector, Thane H.Q. Jawar dated 15.01.2009 was illegal and accordingly remanded the entire proceedings to the Additional Collector, Thane for appropriate fresh adjudication.

mm. Against the aforesaid order dated 18.06.2010, the appellant filed WP No. L-1564 of 2010/W.P. No. 415 of 2011 and WP No. 418 of 2011 before the High Court of Judicature at Bombay.

nn. The High Court in WP No. 1564 of 2010 vide its order dated 07.09.2010 stayed the operation of the order dated 18.06.2010 and directed the parties to maintain the status quo.

7. Both the writ petitions filed by the appellant herein, i.e., Writ Petition (C) No. 415 of 2011 with Writ Petition No. 418 of 2011 ultimately came to be adjudicated by the High Court and *vide* its impugned judgment & order dated 9.12.2014 were rejected. The relevant observations made by the High Court while rejecting both the writ petitions are as under:

> *"33. Heard the learned counsel for the parties at length. Considering the submissions made by both the counsel and after going through the pleadings, the issue involved in the petitions is "whether the Petitioner has made out a case for setting aside the common order dated 18/02/2010 passed by the Additional Commissioner, Konkan Division in appeal No.195/2009 and 288/2009".*
>
> *34. As per section 192 of the code, for holding an auction, the Collector, has to issue a proclamation in a prescribed form with its translation in Marathi of the intended sale specifying its time and place, along with description of the immovable property. Such proclamation is required to be made by beat of drum at the headquarters of Taluka and in the village in which the immovable property is situated. As per section 193 of the Code, a written notice of the intended sale of immovable property and its time and place is required to be affixed in the office of Collector of District, office of Tahsildar of the Taluka in which the immovable*

property is situate and other public building in the Village in which it is situate and the dwelling place.

35. As per section 195, if the sale is postponed for a period longer than 30 days, for sufficient reason, a fresh proclamation and notice is required to be issued unless defaulter consents for waiver of it.

36. Section 202 to 210 provide a procedure when payment to be made, when confirmation of auction sale to be done, how to deal with objections before confirmation etc.

37. In the present proceedings, admittedly, a fresh notice was issued by the Authority on 08/11/2008 for public auction in two newspapers i.e. "Nirdhar" and "Dahanu Times" informing the details of the property and time and date of auction. The Authority Mandal Adhikari, Talasari issued letter dated 19/11/2008 to the owner of the property informing that they have pasted the copy of notice on the gate of the suit property. The auction was held by the Tahasildar on 03/12/2008 and same was confirmed on the same date. This shows that the auction took place before expiry of 30 days from the date of proclamation which is contrary to section 193 of the Code. Moreover, the Tahasildar confirmed the said auction sale in favour of the Petitioner on the same day and handed over possession to the suit property receipt executing a possession receipt. This means, without waiting for 30 days from the date of proclamation, the Tahasildar held a public auction and handed over possession to the Petitioner, which was contrary to law.

38. It is interesting to note that after handing over possession to the Petitioner, the Collector, by order dated 16/01/2009 confirmed the sale of the suit property in favour of the Petitioner. That means, before confirmation of the auction sale in favour of the Petitioner, the Tahasildar on his own, without any authority, handed over possession to the Petitioner. This court, in the matter of Shravan Vithoba Dekate (supra) in paragraph 12 specifically held that the provisions of the Code in respect of the auction sale to be strictly followed. The Apex Court, in the matter of Mathew

(supra) categorically held that if the Rules framed for public auction under the SARFAESI Act are not followed strictly, the auction sale is required to be set aside. These facts are considered by the Additional Commissioner at the time of passing the impugned order. The Additional Commissioner categorically held that the orders passed by the Tahasildar as well as the Additional Collector were contrary to the provisions of the Code. Hence, the Additional Commissioner Konkan Division set aside both the orders and the matter was remanded to the Additional Collector to decide on its own merits.

39. It is to be noted that, allowing the petition amounts to revival of illegal order and same is not permitted in view of the Apex Court judgment in the matter of Maharaja Chintamani (supra).

40. Considering the above mentioned facts that the Tahasildar as well as the Additional Collector, without following due process of law as required under the said Code, passed the order dated 3/12/2008 and 15/01/2009 and handed over possession of the suit property to the Petitioner and in view of the law declared by the Apex Court as stated herein above, I am of the opinion that the Petitioner failed to make out any case for interference with the well reasoned impugned common order dated 18/02/2010.

41. Hence, following order is passed:

a. Rule stands discharged.

b. Writ Petitions stand dismissed with cost.

42. At this stage, the learned counsel for the Petitioner submits that the interim protection granted by this court to continue for a period of 12 weeks to enable the Petitioner to take chance in higher court.

43. Considering the fact that the Petitioner is in possession of the subject property for last several years and there is a running factory, I am of the opinion that the interim protection granted by this court (Coram : S. J. Kathawalla,

J.) on 07/09/2010 shall continue for a period of 12 weeks from today. Same is granted."

(Emphasis supplied)

8. It appears from the materials on record that against the above referred impugned judgment passed by the learned Single Judge of the High Court two appeals were filed, i.e., (Appeal (L) No. 41 of 2016 in Writ Petition (C) No. 418 of 2011 with Appeal No. 42 of 2016 in Writ Petition (C) No. 415 of 2011). Both these appeals were not pressed by the appellant before the High Court on the ground that those were not maintainable in law. Thereafter, on 19.09.2016, the two special leave petitions came to be filed before this Court. It appears that although the High Court had ordered the parties to maintain status quo pending the two writ petitions filed by the appellant, yet on 13.10.2016, i.e., much after the two writ petitions came to be rejected by the High Court, the appellant created a mortgage on the suit property.

9. In such circumstances referred to above, the respondent No. 6 had to file Contempt Petition No. 81 of 2016 in Writ Petition No. 418 of 2016.

10. We were informed that the said contempt petition is pending as on date before the High Court. This Court vide its order dated 3.11.2019 directed the Debt Recovery Tribunal – (I) (hereinafter, "**DRT**") at Mumbai to proceed to decide the original application filed by the respondent no. 6. These proceedings before the DRT were relating to the Mortgage which came to be created by the appellant herein. The DRT declared the mortgage over the suit property to be illegal and allowed the O.A. No. 168 of 2002 against all the **defendants** with costs for an amount of Rs. 24,15,20,115.76/- with interest @ 12 per cent per annum from the date of filing of O.A. till such realisation.

11. In such circumstances referred to above, the appellant is here before this Court with the present appeals.

B. SUBMISSIONS ON BEHALF OF THE APPELLANT

12. Mr. P.S. Patwalia, the learned Senior Counsel appearing for the appellant, vehemently submitted that the High Court committed an egregious error in holding that the auction proceeding conducted by the Tahsildar was a sham and much contrary to the statutory

provisions of the Revenue Code more particularly Sections 193 and 194 respectively of the Revenue Code.

13. The learned Senior Counsel submitted that a written notice of the intended sale of the suit property with the time and place thereof was affixed strictly in accordance with the conditions as stipulated under Section 193 of the Revenue Code. In this regard, our attention was drawn to the findings recorded by the High court as contained in para 37 of the impugned judgment of the High Court. The learned Senior Counsel further submitted that the original owner (respondent no. 1) on his own free will and volition had given his consent on 20.10.2008 to proceed with the auction sale of the suit property.

14. The learned Senior Counsel further submitted that the appellant is a *bona fide* purchaser of the suit property in an auction proceeding duly conducted by the Tahsildar under the provisions of the Revenue Code. According to the learned Senior Counsel it is not just sufficient to exhibit some material irregularity or fraud for the purpose of setting at naught the entire sale. It was argued that the aggrieved party must go further and establish to the satisfaction of the Court that the material irregularity or fraud had resulted in substantial injury to it.

15. According to the learned Senior Counsel, even assuming that the aggrieved party in the present litigation suffered substantial injury by reason of the sale of the suit property the same would not be sufficient to set aside the sale unless substantial injury is shown to have been caused by material irregularity or fraud in publishing or conducting the sale.

16. With a view to fortify the aforesaid submission strong reliance was placed on the decision of this Court in the case of ***Chilamkurti Bala Subrahmanyam v. Samanthapudi Vijaya Lakshmi and Another*** reported in (2017) 6 SCC 770.

17. The learned Senior Counsel, thereafter, proceeded to argue that the two appeals filed before the Additional Commissioner, Division Konkan, Maharashtra were, by themselves, not maintainable in law. Thus, the Additional Commissioner had no jurisdiction to entertain and decide the two appeals.

18. In this regard, our attention was drawn to the provisions of Section 247 of the Revenue Code read in conjunction with Sections 207 and 210 respectively of the Revenue Code. It was argued that in

view of Sections 207 and 210 respectively of the Revenue Code the appeals filed by the respondent no. 1 and 6 before the Additional Commissioner were not maintainable under Section 247 of the Revenue Code.

19. It was submitted that the suit property was purchased by the appellant in the year 2008 by depositing the amount of Rs. 55 lakhs in accordance with the valuation report prepared by two government approved valuers. It was pointed out that thereafter, the appellant put up a huge industrial unit for the purpose of manufacturing oxygen cylinders. Various permissions and licences from the Central Government were obtained for the purpose of setting up the oxygen cylinder plant. It was also pointed out that as on date more than two hundred workers are employed in the appellant company.

20. In such circumstances referred to above, Mr. Patwalia, the learned Senior Counsel submitted that if the appellant is asked to hand over the possession of the entire suit property at this point of time, he would incur irreparable injury, which cannot be compensated in terms of money.

21. It was submitted that ordinarily the court should not disturb the sale by auction unless it is an evident case of *mala fide* or a result of fraud. According to Mr. Patwalia, sometime back his client had also offered to pay to the lenders the market value of the suit property. However, such proposal was not entertained by the bankers.

22. In such circumstances referred to above, the learned senior counsel prayed that there being merit in his appeals, those may be allowed and an appropriate order may be passed protecting the interests of all the parties to this litigation.

C. SUBMISSIONS ON BEHALF OF THE RESPONDENT NO. 6/ Asset Reconstruction Co. (India) Ltd. (ARCIL)

23. Mr. Amar Dave, the learned Senior Counsel appearing for the respondent No. 6 made the following submissions:

    a. The entire transaction on the basis of which the suit property was taken over by the appellant was nothing but absolute fraud perpetrated in collusion with each other.

    b. The entire process initiated by the Tahsildar was by supressing various critical facts from time to time from the Additional

Collector who under the scheme of the Act was to approve the process of any such auction and pursuant thereto to confirm any such sale under the auction.

c. The sequence of events clearly indicate that the Tahsildar did not disclose to the Additional Collector at the relevant time that there were objections already received from one of the banks/financial institution i.e., IFCI and the said objections were summarily rejected solely on the ground that the sale process in pursuance of the auction was being undertaken as per law. In this regard, the provisions of Section 208 of the Revenue Code are extremely vital in so far as the same contemplates that even if there is no challenge by any other party, the collector himself can set aside any such sale or not approve the same for valid reasons. The said provision clearly indicates the legislative intent that if there are valid legal objections (which in the present case was clearly on the record in so far as IFCI had already raised issues with regard to the mortgage of the land) and therefore in terms of the said provision the collector was obliged in law to factor the said objections and could have examined the issue and not approved the sale. However, it is apparent that the Tahsildar kept the office of the Additional Collector in dark about the said objection and hence the entire process was clearly vitiated.

d. The Tahsildar, with an oblique motive, initiated proceedings for confirmation of the sale without following the mandatory process as laid under the scheme of the Act. In fact, the sale was confirmed on 03.12.2008 even without ensuring whether the complete payments in respect of the sale proceed had been fully realised or not. More surprisingly, the perusal of the affidavit filed by the Tahsildar in the High court (in the first round of litigation filed by Prestige) clearly indicates that the attempt was to suppress the fact to the extent that one of the cheques had been realised after the sale confirmation 03.12.2008. The cheque was actually realised on 04.12.2008. No public authority can confirm a sale without even realizing the entire consideration and any such attempt is clearly indicative of the fraudulent and collusive nature of the proceedings in question.

e. That the so-called reliance on the letter of 'No Objection' being the entire basis of the starting of the final auction proceeding

is clearly indicative of the fraud perpetuated more particularly when the respondent No. 1 company, i.e., Prestige H.M. Polycontainers Ltd. clearly declared that no such 'No Objection' letter was ever signed by it. Even otherwise the sequence of events including the newspaper advertisements clearly indicate that such a plea of taking "no objection" from the owner and then subsequently asking the owner to make payment before the due date is indicative of the nature of fraud perpetuated in the present proceedings.

f. The record reveals that the entire valuation of the immovable as well as the movable properties were done in a self-serving manner, and the same was done only to benefit the appellant. In this regard, the pleadings clearly reflect that the movable properties itself were almost having a market value of around Rs. 3 Crore (if not around Rs. 1 crore as per depreciated value reflected in the books). In spite of such valuation, the valuer had assigned only around Rs. 75, 000 for the entire machinery and shown the same as scrap. That apart, even the valuation of the immovable property was completely incorrect and therefore in the teeth of these glaring facts, the entire transaction seems to have been engineered in a fraudulent manner. The appellant cannot be termed as *bona fide* purchaser.

g. As per the law laid down in the decision of ***Mathew Varghese v. M. Amritha Kumar*** reported in 2014 (5) SCC 610, it is now well settled that 30 days' sale notice is mandatory. The High Court correctly placed reliance on the said judgment of this Court to come to the conclusion that sale was conducted in breach of various provisions of the Revenue Code which are mandatory in nature.

h. In fact, 30 days' notice is not just mandatory for the purpose of giving an opportunity to the defaulter but also to invite maximum publicity and get maximum offer. Admittedly, no 30 days' sale notice was given. Further, no wide publicity was made.

i. There are various illegalities in confirming the sale as well. In a process of sale, first the sale is to be conducted, then the proceeds are required to be received. It is only after the receipt of the proceeds that the sale confirmation is required

to be made by collector and thereafter sale certificate and possession is to be handed over. In the present case, the sale was conducted and concluded on the same day i.e., 03.12.2008. The sale certificate was issued on the same day without the confirmation from the collector and the possession was handed over on the very next day.

j. From a bare perusal of Section 212 of the Revenue Code, it is evident that the purchaser can be put into possession only after confirmation of sale and the sale certificate being handed over to the purchaser. However, in the present case, the appellant was put in possession on 04.12.2008 and the sale of property was confirmed on 15.01.2009 by the Additional Collector, which is per se illegal in nature. The haste with which the proceedings were undertaken speaks for itself.

k. Indisputably, objection was raised by the IFCI on 10.12.2008, which has been recorded by the Tahsildar in its letter dated 19.12.2008.

l. On 07.01.2009, the Additional Collector, Head Office Jawar directed respondent no. 4 to submit a detailed report on whether it had fulfilled all the conditions as stipulated under Section 208 of the Revenue Code. However, *vide* its letter dated 12.01.2009 addressed to the Additional Collector, Head Office Jawar, respondent no. 4 informed that except for the WP in the High Court of Bombay, no other objection was received and thereby all requirements under Section 208 of the Revenue Code had been fulfilled, despite IFCI having raised its objections vide a letter dated 10.12.2008.

24. As regards the offer put forward by the appellant to deposit the requisite amount as per the market value of the property, Mr. Dave fairly submitted that sometime back, the appellant had offered to pay to the lenders but as the lenders found the offered amount to be very meagre the said proposal was not accepted. According to Mr. Dave, the market value of the suit property as on date could be around Rs. 6 to 7 crores.

25. In such circumstances referred to above, the learned Senior Counsel prayed that there being no merit in the appeals those may be dismissed with costs.

D. ISSUES FOR DETERMINATION

26. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the following questions of law fall for our consideration:

a. Whether the provisions of Order XXI Rule 90 of the Code of Civil Procedure would apply to the writ proceedings under Article 226 of the Constitution?

b. Whether the Additional Commissioner, Konkan Division, Maharashtra had the jurisdiction to decide the two appeals filed by the respondent nos. 1 and 6 respectively under Section 247 of the Maharashtra Land Revenue Code, 1966?

E. RELEVANT STATUTORY PROVISIONS OF THE REVENUE CODE

27. Before adverting to the rival submissions canvassed on either side, it is necessary for us to look into few relevant provisions of the Revenue Code:

> *"S. 69. Settlement of assessment to be made with holder directly from State Government.—The settlement of the assessment of each portion of land, or survey number, to land revenue, shall be made with the person who is primarily responsible to the State Government for the same.*
>
> *xxx xxx xxx*
>
> *S. 169. Claims of State Government to have precedence over all others.—(1) The arrears of land revenue due on account of land shall be a paramount charge on the land and on every part thereof and shall have precedence over any other debt, demand or claim whatsoever, whether in respect of mortgage, judgment-decree, execution or attachment, or otherwise howsoever, against any land or the holder thereof.*
>
> *(2) The claim of the State Government to any monies other than arrears of land revenue, but recoverable as a revenue demand under the provisions of this Chapter, shall have priority over all unsecured claims against any land or holder thereof.*
>
> *xxx xxx xxx*

S. 178. When notice of demand may issue.—(1) A notice of demand may be issued on or after the day following that on which the arrear accrues.

(2) The Commissioner may from time to time make orders for the issue of such notices, and with the sanction of the State Government shall fix the costs recoverable from the defaulter as an arrear of revenue, and direct by what officer such notices shall be issued.

S. 179. Occupancy or alienated holding for which arrear is due may be forfeited.—The Collector may declare the occupancy or alienated holding in respect of which an arrear of land revenue is due, to be forfeited to the State Government, and subject to rules made in this behalf, sell or otherwise dispose of the same under the provisions of section 72 or 73 and credit the proceeds, if any, to the defaulter's accounts :

Provided that, the Collector shall not declare any such occupancy or alienated holding to be forfeited–

(a) unless previously thereto he shall have issued a proclamation and written notices of the intended declaration in the manner provided by sections 192 and 193 for sales of immovable property, and

(b) until after the expiration of at least fifteen days from the latest date on which any of the said notices shall have been affixed as required by section 193.

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S. 192. Procedure in effecting sales.—(1) When any sale of either movable or immovable property is ordered under the provisions of this Chapter, the Collector shall issue a proclamation in the prescribed form with its translation in Marathi of the intended sale, specifying the time and place of sale, and in the case of movable property whether the sale is subject to confirmation or, not and when land paying revenue to the State Government is to be sold, the revenue assessed upon it, together with any other particulars he may think necessary.

(2) Such proclamation shall be made by beat of drum at the headquarters of the taluka and in the village in which the immovable property is situate if the sale be of immovable property ; and if the sale be of movable property, the proclamation shall be made in the village in which such property was seized, and in such other places as the Collector may direct.

(3) A copy of the proclamation issued under this section where it relates to the sale of any holding shall be sent to the Co-operative Bank or the Land Development Bank or both operating within the area in which the holding is situated.

S. 193. Notification of sales.—(1) A written notice of the intended sale of immovable property, and of the time and place thereof, shall be affixed in each of the following places, namely :–

(a) the office of the Collector of the district,

(b) the office of the Tahsildar of the taluka in which the immovable property is situate,

(c) the Chavdi, or some other public building in the village in which it is situate, and

(d) the defaulter's dwelling place.

(2) In the case of movable property, the written notice shall be affixed in the Tahsildar's office, and in the Chavdi, or some other public building in the village in which such property was seized.

(3) The Collector may also cause notice of any sale, whether of movable or immovable property, to be published in any other manner that he may deem fit.

(4) A notice referred to in this section shall be in such form as may be prescribed.

S. 194. Sale by whom to be made ; time of sale, etc.—(1) Sales shall be made by auction by such persons as the Collector may direct.

(2) No such sale shall take place on a Sunday or other general holiday recognized by the State Government, nor until after the expiration of at least thirty days in the case of immovable property, or seven days in the case of movable property, from the latest date on which any of the said notices shall have been affixed as required by section 193.

S. 195. Postponement of sale.—The sale may from time to time be postponed for any sufficient reason : Provided that, when the sale is postponed for a period longer than thirty days a fresh proclamation and notice shall be issued unless the defaulter consents to waive it.

S. 196. Sale of perishable articles.—Nothing in sections 192, 193, 194 and 195 applies to the sale of perishable articles. Such articles shall be sold by auction with the least possible delay, in accordance with such orders as may from time to time be made by the Collector either generally or especially in that behalf.

S. 197. When sale may be stayed.—If the defaulter or any person on his behalf, pays the arrear in respect of which the property is to be sold and all other charges legally due by him at any time before the property is knocked down, to the person prescribed under section 170 to receive payment of the land revenue due, or to the officer appointed to conduct the sale or if furnishes security under section 191, the sale shall be stayed.

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S. 200. Mode of payment when sale is subject to confirmation.—(1) When sale is subject to confirmation, the party who is declared to be the purchaser shall be required to deposit immediately twenty-five per centum of the amount of his bid, and in default of such deposit, the property shall forthwith be again put up and sold.

(2) The full amount of purchase money shall be paid by the purchaser before the sunset of the third day after he is informed of the sale having been confirmed, or if the said third days be a Sunday or other authorized holiday,

then before sunset of the first office day after such day. On payment of such full amount of the purchase money, the purchaser shall be granted, a receipt for the same, and the sale shall become absolute as against all persons whomsoever 2[after the expiry of a period of seven days from the date of sale, if no application is made under section 206, or if made, after it is rejected.]

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S. 207. Application to set aside sale of immovables.—(1) At any time within thirty days from the date of sale of immoveable property an application may be made to the Collector to set aside the sale on the ground of some material irregularity, or mistake, or fraud, in publishing or conducting it, but, except as is otherwise provided in sections 208, 209 and 210, no sale shall be set aside on the ground of any such irregularity or mistake, unless the applicant proves to the satisfaction of the Collector that he has sustained substantial injury by reason thereof :

[Provided that, such application may be made by a defaulter who is a person belonging to a Scheduled Tribe or any person on his behalf, within one hundred and eighty days from such date.]

(2) If the application be allowed, the Collector shall set aside the sale, and direct fresh one.

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S. 208. Order confirming or setting aside sale.—On the expiration of thirty days or, as the case may be, one hundred and eighty days] from the date of the sale, if no such application as is mentioned in section 207 has been made, or if such application has been made and rejected the Collector shall make an order confirming the sale :

Provided that, if he has reason to think that the sale ought to be set aside notwithstanding that no such application has been made, or on ground other than those alleged in any application which has been rejected, he may, after recording his reasons in writing, set aside the sale.

S. 209. Purchaser may apply to set aside sale under certain circumstances.—Except in a case, where land has been sold for arrears which form a charge on the land, the purchaser may, at any time within thirty days from the date of sale, apply to the Collector to set aside the sale on the ground that the defaulter had no saleable interest in the property sold; and the Collector shall, after due enquiry, pass such order on such application as he deems fit.

S. 210. Application to set aside sale by person owning to holding interest in property.—(1) Where immoveable property has been sold under this code, any person either owning such property or holding an interest therein by virtue of a title acquired before such sale may, at any time within thirty days from the date of sale, apply to the Collector to have the sale set aside on his depositing—

(a) for payment to the purchaser a sum equal to five per cent of the purchase money;

(b) for payment on account of the arrear, the amounts specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may have been paid since the date of sale on that account ; and

(c) the cost of the sale :

[Provided that, such application may be made by any such person belonging to a Scheduled Tribe within one hundred and eighty days from the date of sale.]

(2) If such deposit is made within thirty days, 2[or as the case may be, one hundred and eighty days] from the date of sale, the Collector shall pass an order setting aside the sale.

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S. 247. Appeal and appellate authorities.—(1) In the absence of any express provisions of the Code, or of any law for the time being in force to the contrary, an appeal shall lie from any decision or order passed by a revenue or survey officer specified in column 1 of the Schedule E under this Code or any other law for the time being in

force to the officer specified in column 2 of that Schedule whether or not such decision or order may itself have been passed on appeal from the decision of order of the officer specified in column 1 of the said Schedule :

Provided that, in no case the number of appeals shall exceed two.

(2) When on account of promotion of change of designation an appeal against any decision or order lies under this section to the same officer who has passed the decision or order appealed against, the appeal shall lie to such other officer competent to decide the appeal to whom it may be transferred under the provisions of this Code.

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S. 250. Periods within which appeals must be brought.—No appeal shall be brought after the expiration of sixty days if the decision or order complained of have been passed by an officer inferior in rank to a Collector or a Superintendent of Land Records in their respective departments ; nor after the expiration of ninety days in any other case. The period of sixty and ninety days shall be counted from the date on which the decision or order is received by the appellant. In computing the above periods, the time required to obtain a copy of the decision or order appealed against shall be excluded.

S. 251. Admission of appeal after period of limitation.—Any appeal or an application for review under this Chapter may be admitted after the period of limitation prescribed therefor when the appellant or the applicant, as the case may be, satisfies the officer or the State Government to whom or to which he appeals or applies, that he had sufficient cause for not presenting the appeal or application, as the case may be, within such period."

F. ANALYSIS

i. Whether the provisions of Order XXI Rule 90 of the Code of Civil Procedure would apply to the writ proceedings under Article 226 of the Constitution?

28. We shall now proceed to record our findings on the submissions canvassed on either side. We start with the decision of this Court in the case of ***Chilamkurti*** (supra) as strong reliance has been placed on the same on behalf of the appellant. This judgment has been relied upon to make good the contention that the provisions of Order XXI Rule 90 of the Code of Civil Procedure (hereinafter, "**CPC**") should be made applicable to the present litigation or in other words even in the writ proceedings under Article 226 of the Constitution. This decision is relied upon to fortify the submission that merely establishing a material irregularity or fraud is not sufficient to set aside the auction sale. It is necessary for the party aggrieved to go further and establish to the satisfaction of the court that the material irregularity or fraud in the conduct of the auction has resulted in substantial injury to the said party. Conversely, even if the party aggrieved has suffered substantial injury by reason of the sale, the same would not be sufficient to set aside the auction sale unless substantial injury has been shown to have been caused by a material irregularity or fraud in publishing or conducting the sale.

29. In ***Chilamkurti*** (supra), the respondent no. 2 before this Court was the State Bank of India. The State Bank of India was the plaintiff decree holder, whereas the respondent No. 1 was the defendant judgment debtor. The State Bank of India obtained a money decree against the judgment debtor in a suit. As the judgment debtor failed to satisfy the decree, the State Bank of India filed execution application and brought the scheduled property owned by the judgment debtor to auction sale through the process server of the Court of Senior Civil Judge, Kovvur in the execution proceedings for the realisation of decretal dues. The suit scheduled property was accordingly attached by the executing court under a warrant. The property was ultimately put to auction sale. The appellant before this Court in the said proceedings was the highest bidder. The judgment debtor being dissatisfied with the auction conducted under the supervision of the executing court filed an application under Order XXI Rule 90 of the CPC seeking setting aside of the sale on the ground that the proclamation did not give clear 15 days' notice and the same was illegal.

30. The Senior Civil Court, Kovvur found no merit in any of the objections raised by the judgment debtor and accordingly dismissed the application. The judgment debtor thereafter preferred an appeal before the High Court. The High Court allowed the appeal and set

aside the order of the executing court *inter alia* holding that if the judgment debtor deposits a sum of Rs. 7,15,000/- (Rs. Seven Lakh Fifteen Thousand Only) being the price fetched at the public auction within a period of three weeks from the date of the receipt of a copy of the judgment, the sale held would not be given effect to.

31. Aggrieved by the aforesaid, the auction purchaser preferred appeal before this Court. A Division Bench of this Court in ***Chilamkurti*** (supra) relying on the decision of this Court in ***Saheb Khan v. Mohd. Yousufuddin*** reported in (2006) 4 SCC 476, allowed the appeal filed by the successful auction purchaser holding as under: -

> *"14. The law which governs the controversy involved in this appeal is laid down by this Court in Saheb Khan v. Mohd. Yousufuddin [Saheb Khan v. Mohd. Yousufuddin, (2006) 4 SCC 476] (a three-Judge Bench). While examining the scope of Order 21 Rule 90 of the Code, Ruma Pal, J. speaking for the Bench held as under: (SCC pp. 480-81, paras 12-14)*
>
> *"12. We are unable to sustain the reasoning of the High Court. Order 21 Rule 90 of the Code of Civil Procedure allows, inter alia, any person whose interests are affected by the sale to apply to the court to set aside a sale of immovable property sold in execution of a decree on the ground of "a material irregularity or fraud in publishing or conducting" the sale. Sub-rule (2) of Order 21 Rule 90 however places a further condition on the setting aside of a court sale in the following language:*
>
> > *'90. (2) No sale shall be set aside on the ground of irregularity or fraud in publishing or conducting it unless, upon the facts proved, the court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.'*
>
> *13. Therefore before the sale can be set aside merely establishing a material irregularity or fraud will not do. The applicant must go further and establish to the satisfaction of the court that the material irregularity or fraud has resulted in substantial injury to the applicant. Conversely even if the applicant has suffered substantial injury by reason of*

the sale, this would not be sufficient to set the sale aside unless substantial injury has been occasioned by a material irregularity or fraud in publishing or conducting the sale. (See Dhirendra Nath Gorai v. Sudhir Chandra Ghosh [Dhirendra Nath Gorai v. Sudhir Chandra Ghosh, (1964) 6 SCR 1001 : AIR 1964 SC 1300] , Jaswantlal Natvarlal Thakkar v. Sushilaben Manilal Dangarwala [Jaswantlal Natvarlal Thakkar v. Sushilaben Manilal Dangarwala, 1991 Supp (2) SCC 691] and Kadiyala Rama Rao v. Gutala Kahna Rao [Kadiyala Rama Rao v. Gutala Kahna Rao, (2000) 3 SCC 87] .)

14. A charge of fraud or material irregularity under Order 21 Rule 90 must be specifically made with sufficient particulars. Bald allegations would not do. The facts must be established which could reasonably sustain such a charge. In the case before us, no such particulars have been given by the respondent of the alleged collusion between the other respondents and the auction-purchaser. There is also no material irregularity in publishing or conducting the sale. There was sufficient compliance with Order 21 Rule 67(1) read with Order 21 Rule 54(2). No doubt, the trial court has said that the sale should be given wide publicity but that does not necessarily mean by publication in the newspapers. The provisions of Order 21 Rule 67 clearly provide if the sale is to be advertised in the local newspaper, there must be specific direction of the court to that effect. In the absence of such direction, the proclamation of sale has to be made under Order 21 Rule 67(1) "as nearly as may be, in the manner prescribed by Rule 54 sub-rule (2)". Rule 54 sub-rule (2) provides for the method of publication of notice and reads as follows:

> *'54. (2) The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the courthouse, and also, where the property is land paying revenue to the Government, in the office of the Collector of the district in which the land is situate and, where the*

property is land situate in a village, also in the office of the Gram Panchayat, if any, having jurisdiction over that village.'"

15. After examining the facts of this case in the light of the law laid down in Saheb Khan [Saheb Khan v. Mohd. Yousufuddin, (2006) 4 SCC 476], we are of the considered opinion that the reasoning and the conclusion arrived at by the executing court deserves to be restored as against that of the High Court in the impugned order. In other words, no case was made out by the judgment-debtor for setting aside of the sale of the property in question on the ground of committing any material irregularity or fraud in publishing or in conducting the sale so as to enable the Court to invoke its powers under Order 21 Rule 90(2) of the Code.

16. It is noticed that Respondent 1, in her application for setting aside the sale, had mainly raised four objections. Firstly, clear 15 days' notice was not given for sale of the properties as required under the Rules. Secondly, the valuation of the property was not properly mentioned in the documents concerned so as to enable the parties to know its proper valuation prevailing on the date of sale. Thirdly, the market value of the property on the date of auction was more than the price actually fetched in the auction, and fourthly, no proper publication including beating of drum was made before the date of auction due to which there was less participation of the bidders in the auction-sale.

17. The executing court dealt with all the four objections with reference to the record of the proceedings and found as a fact that none of the objections had any merit. The High Court, however, found fault in the same though not in all but essentially in the matter relating to giving of clear 15 days' notice and the manner in which it was issued and finding merit in the objection, set aside the sale on imposing certain conditions enumerated above.

18. In our considered opinion, as mentioned above, the executing court was justified in overruling the objections

and we concur with the reasoning and the conclusion of the executing court.

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24. The law on the question involved herein is clear. It is not the material irregularity that alone is sufficient for setting aside of the sale. The judgment-debtor has to go further and establish to the satisfaction of the Court that the material irregularity or fraud, as the case may be, has resulted in causing substantial injury to the judgment-debtor in conducting the sale. It is only then the sale so conducted could be set aside under Order 21 Rule 90(2) of the Code. Such is not the case here."

32. Thus, the dictum as laid by this Court in ***Chilamkurti*** (supra) relying upon ***Saheb Khan*** (supra) is that a charge of fraud or material irregularity in Order XXI Rule 90 CPC must be specifically made with sufficient particulars. Mere bald allegation would not be sufficient. The fact must be established which could reasonably sustain such charge. The dictum as further laid is that the sale conducted by the court in the execution proceedings should not ordinarily be set aside merely on the basis of some material irregularity or fraud. The party concerned must go further and establish to the satisfaction of the court that the material irregularity or fraud has resulted in substantial injury to such party.

33. Order XXI Rule 90 of the CPC reads as under: -

"90. Application to set aside sale on ground of irregularity or fraud*. (1) Where any immovable property has been sold in execution of a decree, the decree-holder, or the purchaser, or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it.*

(2) No sale shall be set aside on the ground of irregularity or fraud in publishing or conducting it unless, upon the facts proved, the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

(3) No application to set aside a sale under this rule shall be entertained upon any ground which could have been taken on or before the date on which the proclamation of sale was drawn up.

Explanation.-The mere absence of, or defect in, attachment of the property sold shall not, by itself, be a ground for setting aside a sale under this rule."

34. **Legislative changes**: By the Code of Civil Procedure (Amendment) Act, 1976, the following changes have been effected in Rule 90:

(i) In sub-rule (1), the words "or the purchaser" and "other" were inserted after the words "the decree-holder" and "or any" respectively;

(ii) The proviso to old sub-rule has been renumbered as sub-rule (2) with necessary changes in phraseology and with addition of the words "in publishing or conducting it" after the words "irregularity or fraud";

(iii) Sub-rule (3) has been inserted;

(iv) Explanation to the rule has been added.

35. **Object of Amendment**: Rule 90, as originally enacted, reads thus:

"90.(1) Where any immovable property has been sold in execution of a decree, the decree-holder, or any other person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale; may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it.

Provided that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud."

The Law Commission in its Fourteenth Report, Vol. 1, pp. 454-55 considered the provision and recommended change by stating: -

"51. Under Rule 90 a sale of immovable property in execution of a decree can be set aside on the ground of material irregularity or fraud in publishing or conducting

> *the sale. The right to apply under this rule is given to the decree-holder or to any person entitled to a share in a rateable distribution of assets or whose interests are affected by the sale. It is generally accepted that a large percentage of application made by the judgment-debtors to set aside sales under this Rule are frivolous and are filed with the object of delaying the delivery of possession. It is therefore necessary to make an amendment to Rule 90 by providing that no sale shall be set aside on the ground of delay in the proclamation of sale at the instance of any person who did not attend though given notice to appear at the drawing up of the proclamation or of any person, in whose presence the proclamation was drawn up, unless an objection was taken by him before the sale was held."*
>
> (Emphasis supplied)

The Law Commission again considered the question as to irregularity in attachment and in its Twenty-seventh Report stated:-

> *"The question whether absence of, or irregularity in attachment is, a defect in the "publication or conduct of the sale" has been discussed in several decisions. At one extreme is the view that attachment is not necessary at all before sale. At the other extreme stands the view that sale without attachment is void. A third view is, that attachment is an irregularity, but not in publishing or conducting the sale. According to the fourth view, a sale is not a nullity because of a defect in the attachment or want thereof, but if it causes "substantial injury", it can be set aside under Rule 90. The last view seems to be the correct one. The object of attachment is to bring the property under the control of the court, and in the case of immovable property one of the requirements is that the order of attachment should be publicly proclaimed. The main object of the proclamation is to give publicity to the fact that the sale of the proclaimed property is in contemplation. The publication of the attachment is thus a step leading up to the proclamation of the sale.*
>
> *The question whether it is necessary to insert a provision to clarify the position on the subject, has been considered. In*

the draft Report which had been circulated, an Explanation had been proposed to Rule 90 to the effect that absence of or defect in attachment shall be regarded as an irregularity under this rule. After some consideration, it has been decided that no such provision need be inserted."

In its Fifty-fourth Report, the Law Commission ordered:

"The Commission noted that the question whether the absence of, or irregularity in, attachment is, a defect in the "publication or conduct of the sale" within Order 21, Rule 90 had been discussed in several decisions. At one extreme was the view that attachment is not necessary at all before sale. At the other extreme stood the view that sale without attachment is void. A third view was that want of attachment is an "irregularity" but it is not an illegality in publishing or conducting the sale."

In the Notes on Clauses, Gazette of India dated 8.4.1974, Pt. II S.2, Extra, p. 325, the State of Objects and Reasons, it was stated:

"Clause 75, sub-clause (xxxi).-There is a conflict of decisions as to whether an auction-purchaser can apply to set aside a sale under Rule 90. The words "or the purchaser" have been inserted in the rule to make it clear that the auction-purchaser can also apply to set aside the sale.

The rule is also being amended to provide that a sale shall not be set aside on the ground of an irregularity or fraud unless the applicant has sustained a substantial injury by reason of such irregularity or fraud.

It is further being provided that no application to set aside the sale shall be entertained on any ground which the applicant could have taken on or before the date on which the proclamation of sale was drawn up.

In view of the divergence of opinion as to whether absence of, or irregularity in, attachment is a defect in the publication or the conduct of sale, an Explanation is being added to the effect that mere absence of or defect in the attachment of the property sold shall not, by itself, be a ground for setting the sale."

36. **Nature and Scope**: Rule 90 of Order XXI deals with cases of setting aside auction-sale on the ground of material irregularity or fraud in publishing or conducting such sale. Sub-rule (1) states that where any immovable property has been sold in execution of a decree, any person adversely affected may apply to the court for setting aside sale on the ground of material irregularity or fraud in publishing or conducting the sale. Sub-rule (2) is in the nature of proviso to sub-rule (1) and declares that no sale shall be set aside unless the applicant proves substantial injury by reason of such irregularity or fraud. Sub-rule (3) bars the court from entertaining an application for setting aside sale on any ground which the applicant could have taken on or before the date of proclamation of sale. The Explanation to Rule 90 clarifies that mere absence of or defect in, attachment of property sold would be no ground for setting aside sale.

37. Order XXI of the CPC is exhaustive and in the nature of a complete code as to how the execution proceedings should take place. This is the second stage after the success of the party in the civil proceedings. This Court in many of its decisions has said that this is the second stage after the success of the party in the civil proceedings. It is often said in our country that another legal battle, more prolonged, starts in execution proceedings defeating the right of the party which has succeeded in establishing its claim in civil proceedings. This is the reason why Order XXI Rule 90 provides that both the conditions enumerated therein should be fulfilled. (See: ***M/s Jagan Singh & Co. v. Ludhiana Improvement Trust & Ors.*** reported in (2024) 3 SCC 308)

    a. Difference between the auction sale conducted by the court in the execution proceedings initiated by the decree holder and the auction proceedings conducted by the State through its revenue authorities like Tahsildar, etc.

38. There is a fine distinction between the auction sale conducted by the executing court under the provisions of the CPC and the auction sale conducted by the State under the provisions of different enactments like Land Revenue Code etc. The whole object behind Order XXI Rule 90 of the CPC appears to be to discourage the judgment debtors from filing frivolous application complaining about the irregularity or fraud in the conduct of the auction sale. A lot of sanctity is attached to the auction sale conducted by the executing court under the

provisions of the CPC compared to the auction sale conducted by the State through its authorities. Execution is the enforcement by the process of the court of its orders and decrees. This is in furtherance of the inherent power of the court to carry out its orders or decrees. Order XXI CPC deals with the elaborate procedure pertaining to the execution of orders and decrees. Sale is one of the methods employed for execution. Rule 89 of Order XXI of the CPC is the only means by which a judgment-debtor can escape from a sale that has been validly carried out. The object of the rule is to provide a last opportunity to put an end to the dispute at the instance of the judgment-debtor before the sale is confirmed by the court and also to save his property from dispossession.

39. We are of the view that even otherwise the provisions of the CPC do not apply to writ petitions under Article 226 of the Constitution of India except some of the principles enshrined therein like *res judicata*, delay and laches, addition of parties, matters which have not been specifically dealt with by the writ rules framed by the respective High Court.

Position Prior to 1976

40. Before the Code of Civil Procedure (Amendment) Act, 1976, Section 141 of the Code of Civil Procedure, 1908 read as under:

> *"Miscellaneous proceedings.- The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any court of civil jurisdiction."*

41. There was cleavage of opinion on the question whether the provisions of the Code would apply to writ proceedings under the Constitution. Some High Court had held that writ petitions could be said to be proceedings in 'any court of civil jurisdiction' within the meaning of Section 141 of the CPC. According to other High Courts, however, writ proceedings, being special in nature, were not covered by Section 141 and the provisions of the Code were not applicable to writ petitions.

42. In ***State of U.P. v. Vijay Anand*** reported in AIR 1963 SC 946, drawing the distinction between ordinary civil jurisdiction and extraordinary civil jurisdiction, a Constitution Bench of this Court stated:-

> *"It is, therefore, clear from the nature of the power conferred under Article 226 of the Constitution and the decisions on the subject that the High Court in exercise of its power under Article 226 of the Constitution exercises original jurisdiction, though the said jurisdiction shall not be confused with the ordinary civil jurisdiction of the High Court. This jurisdiction, though original in character as contrasted with its appellate and revisional jurisdiction, is exercisable throughout the territories in relation to which it exercises jurisdiction and may, for convenience, be described as extraordinary original jurisdiction."*
>
> (Emphasis supplied)

43. Again, in ***Babubhai Muljibhai Patel v. Nandlal Khodidas Barot*** reported in (1974) 2 SCC 706, construing the words 'as far as it can be made applicable' in Section 141 of the CPC (prior to Amendment of 1976), this Court observed:

> *"10. It is not necessary for this case to express an opinion on the point as to whether the various provisions of the Code of Civil Procedure apply to petitions under Article 226 of the Constitution. Section 141 of the Code, to which reference has been made, makes it clear that the provisions of the Code in regard to suits shall be followed in all proceedings in any court of civil jurisdiction as far as it can be made applicable. The words "as far as it can be made applicable" make it clear that, in applying the various provisions of the Code to proceedings other than those of a suit, the court must take into account the nature of those proceedings and the relief sought. The object of Article 226 is to provide a quick and inexpensive remedy to aggrieved parties. Power has consequently been vested in the High Courts to issue to any person or authority, including in appropriate cases any government, within the jurisdiction of the High Court, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari. It is plain that if the procedure of a suit had also to be adhered to in the case of writ petitions, the entire purpose of having a quick and inexpensive remedy would be defeated. A writ*

petition under Article 226, it needs to be emphasised, is essentially different from a suit and it would be incorrect to assimilate and incorporate the procedure of a suit into the proceedings of a petition under Article 226."

(Emphasis supplied)

Position After 1976

44. By the Code of Civil Procedure (Amendment) Act, 1976, Explanation to Section 141 came to be inserted. It reads thus:

> *"Explanation.-In this section, the expression "proceedings" includes proceedings under Order IX, but does not include any proceeding under Article 226 of the Constitution."*

45. In the Statement of Objects and Reasons, it has been stated:

> *"The question of whether an application under Article 226 of the Constitution is a 'proceeding in any court of civil jurisdiction' within the meaning of Section 141 has been the subject matter of controversy. While the Andhra Pradesh High Court holds that Section 141 applies to such proceedings, the Allahabad, Calcutta, Madras and Punjab High Court have held that Section 141 does not apply to such proceedings and in the circumstances, it is being clarified that Section 141 does not apply to proceedings under Article 226 of the Constitution."*

46. In view of the Explanation to Section 141 of the CPC, now it can no longer be contended that the provisions of CPC would apply to the proceedings under Article 226 of the Constitution.

47. This Court in ***Puran Singh & Ors. v. State of Punjab & Ors.*** reported in (1996) 2 SCC 205, in paras 9, 10 and 11 respectively has held as under:-

> *"9. In the case of Ram Kala v. Asstt. Director, Consolidation of Holdings [AIR 1977 P&H 87 : 79 Punj LR 100] , a Full Bench of three Judges held that Article 137 of the Schedule to the Limitation Act does not apply to an application for adding or substituting a party to a petition under Article 226 of the Constitution. It was also held that Section 141 of the Code cannot be pressed into service for applying*

the provisions including Order 22 of the Code in a petition under Article 226 of the Constitution. Later a Full Bench of five Judges of the same Court in the case of Teja Singh v. Union Territory of Chandigarh [AIR 1982 P&H 169; (1981) 1 SLR 274 : 84 Punj LR 160] held that in view of Rule 32 of the Writ Rules framed by the High Court under Article 225 of the Constitution which provided that in all matters in which no provision had been made by those Rules, the provisions of Civil Procedure Code shall apply mutatis mutandis insofar as they were not inconsistent with those Rules the explanation which had been added to Section 141 of the Code by the aforesaid Amending Act, did not in any way nullify the effect of Rule 32 of the Writ Rules. Rule 32 of the Writ Rules is as follows:

> *"32. In all matters for which no provision is made in these rules, the provisions of the Code of Civil Procedure, 1908, shall apply mutatis mutandis insofar as they are not inconsistent with these rules."*

10. On a plain reading, Section 141 of the Code provides that the procedure provided in the said Code in regard to suits shall be followed "as far as it can be made applicable, in all proceedings". In other words, it is open to make the procedure provided in the said Code in regard to suits applicable to any other proceeding in any court of civil jurisdiction. The explanation which was added is more or less in the nature of proviso, saying that the expression 'proceedings' shall not include any proceeding under Article 226 of the Constitution. The necessary corollary thereof shall be that it shall be open to make applicable the procedure provided in the Code to any proceeding in any court of civil jurisdiction except to proceedings under Article 226 of the Constitution. Once the proceeding under Article 226 of the Constitution has been excluded from the expression 'proceedings' occurring in Section 141 of the Code by the explanation, how on basis of Section 141 of the Code any procedure provided in the Code can be made applicable to a proceeding under Article 226 of the Constitution? In this background, how merely on basis of Writ Rule 32 the provisions of the Code shall be

applicable to writ proceedings? Apart from that, Section 141 of the Code even in respect of other proceedings contemplates that the procedure provided in the Code in regard to suits shall be followed "as far as it can be made applicable". Rule 32 of Writ Rules does not specifically make provisions of Code applicable to petitions under Articles 226 and 227 of the Constitution. It simply says that in matters for which no provision has been made by those rules, the provisions of the Code shall apply mutatis mutandis insofar as they are not inconsistent with those rules. In the case of Rokyayabi v. Ismail Khan [AIR 1984 Kant 234 : (1984) 2 Kant LC 114] in view of Rule 39 of the writ proceedings rules as framed by the Karnataka High Court making the provisions of Code of Civil Procedure applicable to writ proceedings and writ appeals, it was held that the provisions of the Code were applicable to writ proceedings and writ appeals.

11. We have not been able to appreciate the anxiety on the part of the different courts in judgments referred to above to apply the provisions of the Code to writ proceedings on the basis of Section 141 of the Code. When the Constitution has vested extraordinary power in the High Court under Articles 226 and 227 to issue any order, writ or direction and the power of superintendence over all courts and tribunals throughout the territories in relation to which such High Court is exercising jurisdiction, the procedure for exercising such power and jurisdiction have to be traced and found in Articles 226 and 227 itself. No useful purpose will be served by limiting the power of the High Court by procedural provisions prescribed in the Code. Of course, on many questions, the provisions and procedures prescribed under the Code can be taken up as guide while exercising the power, for granting relief to persons, who have invoked the jurisdiction of the High Court. It need not be impressed that different provisions and procedures under the Code are based on well-recognised principles for exercise of discretionary power, and they are reasonable and rational. But at the same time, it cannot be disputed that many procedures prescribed in the said

> *Code are responsible for delaying the delivery of justice and causing delay in securing the remedy available to a person who pursues such remedies. The High Court should be left to adopt its own procedure for granting relief to the persons concerned. The High Court is expected to adopt a procedure which can be held to be not only reasonable but also expeditious."*
>
> (Emphasis supplied)

48. As a court of plenary jurisdiction, the writ court while exercising powers under Article 226 of the Constitution is free to adopt its own procedures and follow them. It cannot be compelled to follow the procedures prescribed in the CPC. This is so for the specific provision made in its Section 141.

49. The High Court while exercising jurisdiction under Article 226 of the Constitution has jurisdiction to pass appropriate orders. Such power can neither be controlled nor affected by the provisions of Order XXI Rule 90 of the CPC. It would not be correct to say that the terms of Order XXI Rule 90 should be mandatorily complied with while exercising jurisdiction under Article 226 of the Constitution. Proceedings under Article 226 of the Constitution stand on a different footing when compared to the proceedings in suits or appeals arising therefrom.

50. The High Court exercises its writ jurisdiction under Article 226 of the Constitution of India, whereas the Civil Courts exercise their jurisdiction in terms of the provisions of the respective State Civil Courts Acts read with Section 9 of the CPC. The High Court exercises constitutional function, the Civil Court exercises a statutory function. The High Court exercises a wide power under Article 226 of the Constitution of India and in a given situation, it can even mould the reliefs in order to do substantial justice between the parties.

51. Where a particular mode is prescribed for doing an act and there is no impediment in adopting the procedure, the deviation to act in a different manner which does not disclose any discernible principle which is reasonable itself is liable to be labelled as arbitrary. The State action must be informed by reason and it follows that the action uninformed by reason is *per se* arbitrary. The basic requirement of Article 14 is fairness in action by the State and non-arbitrariness in

essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review not only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. The public authorities are governed by the "rule of law". Such authorities are constitutionally obliged in law to maintain absolute fairness and transparency during the conduct of the auction sale right from the initiation of the same till its completion. Judicial audit and scrutiny play a key role in ensuring that the public authorities do not act in an unreasonable manner.

52. The dictum as laid by this Court in ***Tata Cellular v. Union of India*** reported in (1994) 6 SCC 651 is that the judicial power of review is exercised to rein in any unbridled executive functioning. It was observed that the restraint has two contemporary manifestations viz. one is ambit of judicial intervention and the other covers the scope of the court's ability to quash an administrative decision on its merits. These restraints bear the hallmarks of judicial control over administrative action. It was held that the principle of judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision-making process itself. It was held that the principle of judicial review would apply to the exercise of contractual powers by the Government bodies in order to prevent arbitrariness or favouritism. It was held that the duty of the court is to confine itself to the question of legality and its concern should be whether a decision-making authority exceeded its powers; whether it committed an error of law or committed a breach of the rules of natural justice or reached a decision which no reasonable tribunal would have reached or, abused its powers. The grounds upon which an administrative action can be subjected to judicial review are classified as illegality, irrationality and procedural impropriety. In that very decision, while deducing the principles from various cases referred, it was held that the modern trend points to judicial restraint in administrative action; that the Court does not sit as a court of appeal but merely reviews the manner in which the decision was made; that the court does not have the expertise to correct the administrative decision and if a review of the administrative decision is permitted, it will be substituting its own decision, without the necessary expertise which itself may be fallible; that the terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the

realm of contract; and, that the government must have freedom of contract, i.e. a free-play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness, but must be free from arbitrariness not affected by bias or actuated by *mala fides*. Moreover, quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

53. In ***Jagdish Mandal v. State of Orissa and Others*** reported in (2007) 14 SCC 517, this Court observed as under:

> *"**22.** Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold."*
>
> (Emphasis supplied)

54. This Court in ***State of Punjab & Others v. Mehar Din*** reported in (2022) 5 SCC 648, after referring to both the aforesaid decisions held as under:

> "***20.*** *The scope of judicial review in the matters of tenders/ public auction has been explored in depth by this Court in a catena of cases. Plausible decisions need not be overturned and, at the same time, latitude ought to be granted to the State in exercise of its executive power. However, allegations of illegality, irrationality and procedural impropriety would be enough grounds for courts to assume jurisdiction and remedy such ills."*
>
> (Emphasis supplied)

55. We are of the view that in cases such as the one at hand wherein the legality, validity and propriety of the auction sale conducted by the State through its authorities is questioned on the ground of *mala fi*des, undue favour for extraneous considerations and gross violation of the mandatory provisions of law, it would be hazardous to apply the principles enshrined in Order XXI Rule 90 of the CPC. Times have changed. Human values and ethics in public functionaries have degraded to a considerable extent. Corruption is on a rampage. Having regard to the same and in order to protect and uphold the rule of law, the courts have a duty to ensure that the State authorities have conducted public auctions in a fair and transparent manner and have not done anything by which public exchequer has suffered. It would be too much to say that although the writ court may find an auction sale conducted by a public functionary to be in gross violation of the mandatory provisions of law and the action of such public functionary to be arbitrary, yet the aggrieved party complaining about the same should be told to establish the dual conditions stipulated in Order XXI Rule 90 of the CPC. Once the action of the State is found to be unfair and arbitrary, then that is the end of the matter so far as a writ court is concerned. The first and the foremost aspect that the writ court should look into is fairness and transparency on the part of the State in conducting the auction sale so as to be in conformity with Article 14 of the Constitution.

56. The litigation at hand is one of gross violation of the mandatory provisions of the Revenue Code in so far as conduct of the auction sale is concerned. In terms of Section 194 of the Revenue Code, no

sale shall take place until after the expiration of at least 30 days from the latest date on which any of the notice shall have been affixed as required by Section 193 of the Revenue Code. The materials on record reveal that the auction of the property was conducted before the expiry of 30 days' time as prescribed under Section 194 of the Revenue Code. At the cost of repetition, Section 194 of the Revenue Code is reproduced hereunder:-

> *"Section 194: (1) Sale shall be made by auction by such persons as the Collector may direct.*
>
> *(2) No such sale shall take place on a Sunday or other general holiday recognised by the State Government¸ nor until after the expiration of at least thirty days in the case of immovable property, or seven days in the case of movable property, from the latest date on which any of the said notices shall have been affixed as required by section 193."*

57. Further, in terms of Section 195 of the Revenue Code, a fresh notice is required to be issued if the sale is postponed for any reason beyond 30 days and a fresh proclamation and notice has to be issued unless the defaulter consents to waive it. In this regard, it is relevant to note that a fresh proclamation was made on 23.11.2008 in furtherance of Section 195 of the Revenue Code. At the cost of repetition, Section 195 of the Revenue Code is reproduced hereunder:-

> *"**Section 195. Postponement of sale**.—The sale may from time to time be postponed for any sufficient reason:*
>
> *Provided that, when the sale is postponed for a period longer than thirty days a fresh proclamation and notice shall be issued unless the defaulter consents to waive it."*

58. Various illegalities were committed even in confirming the sale. In a process of sale, first the sale is to be conducted, then the proceeds are required to be received. It is only after the receipt of the proceeds that sale confirmation is required to be made by the collector and thereafter sale certificate and possession is to be handed over. In the present case, the sale was conducted and concluded on the same day i.e., 03.12.2008. The sale certificate was issued on the same day and that too without the confirmation from the collector and the possession was also handed over on the very next day.

59. From a bare perusal of Section 212 of the Revenue Code, it is evident that the purchaser can be put into possession only after confirmation of sale and the sale certificate being handed over to the purchaser. However, in the present case, the appellant was put in possession on 04.12.2008 and the sale of property was confirmed on 15.01.2009 by the Additional Collector, which is *per se* illegal in nature. Again at the cost of repetition, Section 212 of the Revenue Code is reproduced hereunder:-

> ***"Section 212. On confirmation of sale, purchaser to be put in possession. Certificate of purchase.—*** *After a sale of any occupancy or alienated holding has been confirmed in the manner aforesaid, the Collector shall put the person declared to be the purchaser into possession of the land and shall cause his name to be entered in the land records as occupant or holder in lieu of that of the defaulter and shall grant him a certificate to the effect that he has purchased the land to which the certificate refers."*

60. Indisputably, although a specific objection was raised by the IFCI on 10.12.2008, as recorded by the Tahsildar in its letter dated 19.12.2008, yet the objection was suppressed from the Additional Collector.

61. On 07.01.2009, the Additional Collector, Head Office Jawar directed the respondent no. 4 to submit a detailed report on whether it had fulfilled all the conditions as stipulated under Section 208 of the Revenue Code. At the cost of repetition, Section 208 of the Revenue Code is reproduced hereunder:-

> *"**Section 208: Order confirming or setting aside sale.—** On the expiration of thirty days or, as the case may be, one hundred and eighty days from the date of the sale, if no such application as is mentioned in section 207 has been made, or if such application has been made and rejected, the Collector shall make an order confirming the sale:"*

62. However, respondent no. 4, *vide* its letter dated 12.01.2009 addressed to the Additional Collector, Head Office Jawar, misinformed that except for the writ petition pending before the High Court of Bombay, no other objection was received and thereby all requirements under Section 208 of the Revenue Code had been fulfilled, despite IFCI raising its objections.

63. From the aforesaid, the following inescapable conclusions are discernible:

    a. The sale of the Property took place before the expiry of the mandatory 30 days' notice. This clearly shows that the sale was conducted in breach of the provisions of Section 194 of the Revenue Code. The notice was issued on 19.11.2008 and the auction came to be conducted on 03.12.2008.

    b. The sale certificate was issued on the same day, i.e., on the date of the auction itself, much before the confirmation of sale by the Additional Collector. This clearly shows that the sale was conducted in breach of the provisions of Section 212 of the Revenue Code.

    c. The purchaser, that is, the appellant was put in possession of the property much before the sale came to be confirmed i.e. on 15.01.2009 ***and that too prior to the cheque being realised***. This clearly shows that the sale was conducted in breach of the provisions of Sections 212 and 208 respectively of the Revenue Code.

    d. The undue haste exhibited by the Tahsildar in completing the sale in favour of the appellant speaks for itself. Why did the Tahsildar supress an important fact before the Additional Collector as regards the objections received by him from IFCI? This itself indicates that there was some collusion between the Tahsildar and the appellant.

64. The aforesaid lapses, in our opinion, cannot be termed as irregularity. Once it is evident that the mandatory provisions as stipulated under the rules and regulations are not followed or abridged, any action pursuant to the same could be termed as gross illegality. There is a fine distinction between illegality and irregularity. Whereas the former goes to the root of the matter and renders the action null and void, of no effect whatsoever, the latter does not *ipso facto* invalidate the action, unless prejudice is caused to the person making a complaint, even if, for the purposes of Order XXI Rule 90 of the CPC the lapses we have taken note of could be termed as material irregularities going to the root of the matter.

65. Almost a century back, in ***Ashutosh v. Behari Lal*** (1908) 35 Cal 61, drawing the distinction between 'nullity' and 'irregularity', Mookerjee, J. stated;

> *"No hard and fast line can be drawn before a nullity and irregularity; but this much is clear, that an irregularity is a deviation from a rule of law which does not take away the foundation of authority for the proceeding, or apply to its whole operation, whereas a nullity is a proceeding that is taken without any foundation for it or is so essentially defective as to be of no avail or effect whatever, or is void and incapable of being validated".*

66. Whether a provision falls under one category or other is not of easy discernment, and in the ultimate analysis it depends upon the nature, scope and object of a particular provision. A workable test, however, has been laid down in ***Holmes v. Russel*** *(1841) 9 Dowl 487,* wherein it was held thus*:*

> *"It is difficult sometimes to distinguish between an irregularity and a nullity, but the safest rule to determine what is an irregularity and what is a nullity is to see whether the party can waive the objection; if he can waive it, it amounts to an irregularity; if he cannot, it is a nullity." [see Dhirendra Nath v. Sudhir Chandra]*
>
> (Emphasis supplied)

67. If we were to condone or overlook all the illegalities we have taken note of in para 63 of this judgment, applying the provisions of Order XXI Rule 90 of the CPC, the same would result in nothing but gross travesty of justice. Bureaucracy feels that accountability is an impediment to efficient discharge of the duty. Accountability is no more and no less than, the concept of accountability of a private concern to their shareholders. There is a distinction between prying into details of day-to-day administration and of the legitimate actions or resultant consequences thereof. To enthuse efficiency into administration, a balance between accountability and autonomy of action should be carefully maintained. Over-emphasis on either would impinge upon public efficiency. But undermining the accountability would give immunity or carte blanche power to deal with the public property or of the debtor at whim or vagary. Whether the public

authority acted bona fide would be gauged from the impugned action and attending circumstances. The authority should justify the action assailed on the touchstone of justness, fairness, reasonableness and as a reasonable prudent owner. Test of reasonableness is stricter. The public functionaries should be duty conscious rather than power charged. Its actions and decisions which touch the common man have to be tested on the touchstone of fairness and justice. That which is not fair and just is unreasonable. And what is unreasonable is arbitrary. An arbitrary action is ultra vires. It does not become bona fide and in good faith merely because no personal gain or benefit to the person exercising discretion has been established. An action is mala fide if it is contrary to the purpose for which it was authorised to be exercised. Dishonesty in discharge of duty vitiates the action without anything more. An action is bad even without proof of motive of dishonesty, if the authority is found to have acted contrary to reason. [See: ***Mahesh Chandra v. Regional Manager, U.P. Financial Corporation & Ors*** : (1993) 2 SCC 279]

ii. Whether the Additional Commissioner, Konkan Division, Maharashtra had the jurisdiction to decide the two appeals filed by the respondent nos. 1 and 6 respectively under Section 247 of the Maharashtra Land Revenue Code, 1966?

68. We shall now proceed to deal with the contention canvassed on behalf of the appellant that the Additional Commissioner, Konkan Division, State of Maharashtra had no jurisdiction to adjudicate the two appeals filed by the respondent no. 1 and respondent no. 6 herein respectively. It was argued that the appeals filed before the Additional Commissioner under Section 247 of the Revenue Code were not maintainable as there was a remedy available under Section 210 of the same code.

69. Application before the Collector to get the Sale set aside has to be made within a period of 30 days. It is after considering the objections that the sale is to be confirmed. Section 210 of the Revenue Code reads:

> *"**Section 210. Application to set aside sale by person owning to holding interest in property.—** (1) Where immovable property has been sold under this Code, any person either owning such property or holding an interest therein by virtue of a title acquired before such sale may,*

at any time within thirty days from the date of sale, apply to the Collector to have the sale set aside on his holding depositing-

(a) *For payment to the purchaser a sum equal to five per cent of the purchase money*

(b) *For payment on account of the arrear, the amounts specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may have been paid since the date of sale on that account; and*

(c) *The cost of the sale:*

Provided that, such application may be made by such person belonging to a Schedule Tribe within one hundred and eighty days from the date of sale.

(2) If such deposit is made within thirty days or, as the case may be, one hundred and eighty days from the date of sale, the Collector shall pass an order setting aside the sale."

70. As rightly argued by Mr. Dave, the said remedy was rendered illusory as the sale was finalised by the Tahsildar much before the confirmation by the Collector. In fact, the sale certificate was issued & the possession was also handed over to the appellant. The confirmation was done by the Tahsildar much before the expiry of 30 days. There was nothing left for the Collector to consider and decide under Section 210 of the Revenue Code. It is further pertinent to note that the provision may be applicable in case of owner of the property but not to a lender who has valid subsisting mortgage. The argument that lender is not required to make deposit before challenging the sale is not something which is borne on plain reading of the language of Section 210.

71. Section 210(1) of the Revenue Code provides that an application can be made where an immovable property has been sold under the Revenue Code by i) owner of the property; and ii) holding interest therein by virtue of a title acquired before such sale. It would be relevant to state that the respondent No. 6 does not fall within the category as provided under Section 210(1) of the Revenue Code nor

has the respondent No. 6 claimed to be the owner of the property or has an interest in the property by virtue of the "title acquired".

72. The confirmation of the sale had no bearing after the issuance of sale certificate. Therefore, the remedy under Section 210 was rendered illusory and not a remedy actually available as the certificate of sale was already issued. Further, once the sale certificate is issued, then the remedy falls under Section 247 instead of Section 210 of the Revenue Code. At the cost of repetition, Section 247 of the Revenue Code is reproduced hereunder:

> *"**Section 247: Appeal and appellate authorities.—**(1) In the absence of any express provisions of the Code, or of any law for the time being in force to the contrary, an appeal shall lie from any decision or order passed by a revenue or survey officer specified in column 1 of the Schedule E under this Code or any other law for the time being in force to the officer specified in column 2 of that Schedule whether or not such decision or order may itself have been passed on appeal from the decision or order of the officer specified in column 1 of the said Schedule:*
>
> *Provided that, in no case the number of appeals shall exceed two.*
>
> *(2) When on account of promotion or change of designation an appeal against any decision or order lies under this section to the same officer who has passed the decision or order appealed against, the appeal shall lie to such other officer competent to decide the appeal to whom it may be transferred under the provisions of this Code."*

73. Assuming for the moment that the Additional Commissioner had no jurisdiction to adjudicate and decide the two appeals filed by the respondent No. 1 and respondent No. 6 respectively, yet the common order passed by the Additional Commissioner allowing the appeals and remanding the matter back to the authority concerned could not have been disturbed and the High Court rightly did not disturb the same. Had the High Court taken the view that the Additional Commissioner had no jurisdiction and the order passed by it was a nullity, the result would have been the revival of the illegal order passed by the Additional Collector confirming the sale.

74. It is well settled principle in law that issuance of a writ or quashing/ setting aside of an order if revives another pernicious or wrong or illegal order then in that eventuality the writ court should not interfere in the matter and should refuse to exercise its discretionary power conferred upon it under Article 226 of the Constitution of India. The writ court should not quash the order if it revives a wrong or illegal order. *Vide* : ***Gadde Venkateswara Rao v. Government of Andhra Pradesh***, AIR 1966 SC 828; ***Maharaja Chintamani Saran Nath Shahdeo v. State of Bihar***, (1999) 8 SCC 16: AIR 1999 SC 3609: 1999 AIR SCW 3623; ***M.C. Mehta v. Union of India***, (1999) 6 SCC 237: AIR 1999 SC 2583; ***Mallikarjuna Mudhagal Nagappa v. State of Karnataka***, (2000) 7 SCC 238: AIR 2000 SC 2976: 2000 AIR SCW 3289; and ***Chandra Singh v. State of Rajasthan***, (2003) 6 SCC 545: AIR 2003 SC 2889: 2003 AIR SCW 3518 and ***Raj Kumar Soni v. State of U.P.***, (2007) 10 SCC 635.

G. CONCLUSION

75. In view of the foregoing discussion, we are of the view that no interference is warranted with the impugned judgment of the High Court. However, the facts and circumstances of this case have left us with an uphill task to mould the final order necessary to be passed in order to do substantial justice with the parties to this litigation.

76. Having taken the view that the High Court committed no error, much less any error of law, we could have dismissed both the appeals and closed this litigation. However, doing the same will put the appellant in immense difficulties. As noted in the earlier part of this judgment, the appellant has set up an oxygen cylinder manufacturing plant on the suit property. It has invested a huge amount in setting up this plant and has been running this plant for almost 15 years. Approximately 200 employees are working in the said plant. If the possession of the suit property is taken over, then the plant will have to be dismantled unless in any fresh auction proceedings some person is interested in taking over the entire plant with the land. In such circumstances, we deem fit to give one opportunity to the appellant to save its industrial unit set up on the subject land. If the appellant wants to save the industrial unit and the land, it must deposit a sum of Rs. 4,00,00,000/- (Rupees Four Crore Only) with the respondent no. 6-ARCIL towards full and final settlement of all liabilities. No other lender or financial institution shall thereafter put forward any further

claim, even if any. It is for the respondent no. 6-ARCIL to deal with such a situation.

77. In view of the aforesaid, both the appeals are allowed in part. While affirming the impugned judgment and order passed by the High Court, we direct the appellant to deposit a sum of Rs. 4,00,00,000/- (Rupees Four Crore Only) with the respondent no. 6-ARCIL within a period of six months from today, failing which we shall proceed to pass further orders.

78. Let this matter be notified once again before this Bench to report whether the appellant has deposited the amount of Rs. 4,00,00,000/- (Rupees Four Crore Only) with ARCIL or not. We clarify that if the appellant fails to deposit the amount, we shall direct the competent authorities to take over the possession of the entire unit with the land in question and put the same once again for sale by way of fresh auction process.

79. We may further clarify that if the appellant deposits the requisite amount within the stipulated period, then the contempt proceedings pending before the High Court of Bombay shall also stand terminated.

80. There shall be no order as to costs.

81. Pending applications if any shall stand disposed of.

Result of the case: Appeals partly allowed.

†*Headnotes prepared by:* Nidhi Jain

[2024] 7 S.C.R. 532 : 2024 INSC 486

Subodh Kumar Singh Rathour
v.
The Chief Executive Officer & Ors.

(Civil Appeal No. 6741 of 2024)

09 July 2024

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

Issue for Consideration

Scope of judicial review of the actions of the State in the matters relating to contract/tender disputes under writ jurisdiction; whether the action on the part of the respondent in cancelling the tender was amenable to the writ jurisdiction of the High Court; if so, whether the said action could be termed as arbitrary or unfair and in consequence of violation of Article 14 of the Constitution of India.

Headnotes†

Contract/tender disputes – Judicial review – Scope – Tender awarded to the appellant on Public-Private Partnership basis for maintenance of two underpasses was cancelled by the respondent-Kolkata Metropolitan Development Authority stating that there was a technical fault therein and also on account of a change in policy whereby, the operation & maintenance of the concerned underpasses was handed over to another authority – Action to cancel the tender, if amenable to writ jurisdiction and whether was arbitrary and influenced by extraneous considerations:

Held: The tender was not terminated pursuant to any terms of the contract subsisting between the parties – Respondent cancelled the tender saying that there was technical fault in the tender that was floated – Thus, the respondent exercised powers in its executive capacity as the action to cancel the tender fell outside the purview of the terms of the contract – Hence, the present matter is not purely a contractual dispute even if related to a tender, as the dispute involves a public law element – Although there is no discharge of a public function by the respondent

* Author

towards the appellant yet there is a right to public law action vested in him against the respondent in terms of Article 14 – Thus, writ petition filed by the respondent was maintainable and the relief prayed for could have been considered by the High Court in exercise of its writ jurisdiction – On facts, just a month prior to cancelling the tender, the respondent issued work stop notice to the appellant, asking to stop all work in respect of the tender in view of the handing over of the operation & maintenance of the concerned underpasses by the respondent to another authority, Kolkata Municipal Corporation – Appellant pointed out that the work stop orders were misconceived as the respondent continued to retain the custody as well as the advertisement rights of the concerned underpasses – As such the respondent even after the change in policy, remained well within its rights to continue charging license fee in lieu of the advertisement rights by way of the tender issued to the appellant – Change in policy had no bearing on the cancellation of the tender – It was only after the appellant highlighted why the work stop orders were misconceived and uncalled for, that the respondent immediately flipped its stance and in its notice of cancellation that was issued just 1-month later, it attributed 'technical faults' in the tender – Furthermore, although the internal-file notings mention about the policy change in the operation and maintenance of the concerned underpasses, however, the cancellation of the tender for work was neither due to any technical fault nor due to the policy change but it was at the behest of the concerned minister who suggested to cancel the tender – The concerned minister's decision to cancel the tender on account of purported 'change in policy' was without any application of mind, capricious and influenced by malice – Cancellation of the tender was not in public interest – Present lis is a classic case of an arbitrary and capricious exercise of powers by the respondent to cancel the tender on the basis of extraneous considerations and at the behest of the concerned Minister-In-Charge – Notice of cancellation was *non-est*, quashed – Impugned judgment of the High Court upholding the decision of the respondent to cancel the tender, set aside. [Paras 60-62, 103-105, 107, 122]

Contract/tender disputes – Involving State or its instrumentalities – Administrative actions of the State – Judicial Review – Shift in the scope of – Earlier position of law; misconception of the State as a Largesse – Concept of 'Public Law' Element in contractual matters – Development

of principles of natural justice, reasonableness and proportionality – Judicial review and administrative discretion – Interplay between – Discussed.

Administrative Law – Internal-file notings – Judicial review – Constitution of India – Article 14 – Tender awarded to the appellant was cancelled by the respondent-Authority on the ground that there was a technical fault therein – Challenge to – Appellant relied on various notings made in the internal file of the respondent in respect of the tender to contend that the cancellation thereof was arbitrary and influenced by extraneous considerations:

Held: Once a decision has been officially made through proper means and channel, any internal deliberations or file notings that formed a part of that decision-making process can certainly be looked into by the Court for the purposes of judicial review in order to satisfy itself of the impeccability of the said decision and whether it conforms to the principles enshrined in Article 14 of the Constitution – In the present case, if the purported action of cancelling the tender was claimed to have been taken in view of certain technical faults in the same or even a change in policy, the same ought to be clearly reflected from its internal file notings as-well, pursuant to which the purported decision was taken – However, in the entire records, there is no whisper of any particular clauses of the tender that was floated nor of any conflict or technical fault in the same, as claimed by the respondent – From the internal-file notings it is evident that the notice of cancellation issued to the appellant was at the behest of the concerned minister – Respondent recorded that, because instructions for cancellation were received from the higher-ups, there was no option but to proceed with the cancellation – Even before the respondent could properly and thoroughly explore the possibility of acceding to such request by consulting its legal cell, the tender was cancelled only at the instance and specific instructions of the concerned minister. [Paras 85, 90]

Contract/tender disputes – Administrative Decisions – Public Interest – Potential financial losses – Possibility of fetching higher license fees if can be a ground to cancel the tender:

Held: No – Any decision to terminate a contract must be grounded in a real and palpable public interest, duly supported by cogent

materials and circumstances in order to ensure that State actions are fair, transparent, and accountable – Public interest cannot be used as a pretext to arbitrarily terminate contracts and there must be a clear and demonstrable ramification or detriment on the public interest to justify any such action – Considerations of public interest should not be narrowly confined to financial aspects – Courts must have a more holistic understanding of public interest wherever the fairness of public authorities is in question, giving due regard to the broader implications of such action on the stability of contractual obligations – Merely because the financial terms of a contract are less favourable over a period of time does not justify its termination – Respondent's stance of a mere possibility of fetching higher license fees was no ground to cancel the tender for the purposes of rectifying it, especially when it failed to demonstrate as to how there was a technical fault in the tender or how potential interested bidders did not participate due to it or how fetching higher license fees was more than a mere possibility. [Paras 115, 116, 118]

Tenders – Sanctity of Public-Private Partnership Tenders – Termination of tenders – Public authorities cautioned – Duty of Courts:

Held: Public tenders are a cornerstone of governmental procurement processes, ensuring transparency, competition, and fairness in the allocation of public resources – It emanates from the Doctrine of Public Trust which lays down that all natural resources and public use amenities & structures are intended for the benefit and enjoyment of the public – Public tenders are designed to provide level playing field for all potential bidders – Its sanctity lies in their role in upholding the principles of equal opportunity and fairness – Once a contract has come into existence through a valid tendering process, its termination must adhere strictly to the terms of the contract, with the executive powers to be exercised only in exceptional cases by the public authorities and that too in loathe – Arbitrary terminations of contract create uncertainty and unpredictability, thereby discouraging public participation in the tendering process – Courts are duty bound to zealously protect the sanctity of any tender duly conducted and concluded by ensuring that the larger public interest of upholding bindingness of contracts are not sidelined by a capricious or arbitrary exercise of power by the State – Failure on the part of the courts to zealously protect

the binding nature of a lawful and valid tender, would erode public faith in contracts and tenders – Public authorities also to be circumspect in disturbing or wriggling out of its contractual obligations through means beyond the terms of the contract in exercise of their executive powers. [Paras 124-126]

Contractual disputes – Judicial review – Amenability to writ jurisdiction – Private law element *vis-à-vis* public law element – Demarcation – Assessment:

Held: Demarcation between a private law element and public law element in the context of contractual disputes, may be assessed by ascertaining whether the dispute or the controversy pertains to the consensual aspect of the contract or tender in question or not – Judicial review does not extend to fixing contract stipulations but ensures that the public authorities act within their authority to prevent arbitrariness – Judicial review is permissible to prevent arbitrariness of public authorities and to ensure that they do not exceed or abuse their powers in contractual transactions and requires overseeing the administrative power of public authorities to award or cancel contracts or any of its stipulations – Although disputes arising purely out of contracts are not amenable to writ jurisdiction yet keeping in mind the obligation of the State to act fairly and not arbitrarily or capriciously, when contractual power is being used for public purpose, it is certainly amenable to judicial review. [Paras 57-59]

Contract/tender disputes – Contractual disputes concerning public authorities – Arbitrary exercise of powers by public functionaries – Challenge to – Constitution of India – Article 14 – Duty of Courts:

Held: Where State action is challenged on the ground of being arbitrary, unfair or unreasonable, the State would be under an obligation to comply with the basic requirements of Article 14 and not act in an arbitrary, unfair and unreasonable manner – This is the constitutional limit of their authority – There is a jural postulate of good faith in business relations and undertakings which is given effect to by preventing arbitrary exercise of powers by the public functionaries in contractual matters with private individuals – With the rise of the Social Service State more and more public-private-partnerships continue to emerge, which makes it all the more imperative for the courts to protect the sanctity of such relation. [Para 56]

Contract – Contractual disputes – Arbitrariness of State actions – Meaning and Import of – Test of reasonableness – Vice of arbitrariness – When attracted:

Held: The question, whether an impugned action is arbitrary or not, is to be answered on the facts and in the circumstances of a given case – An obvious test to apply is to see whether there is any discernible principle emerging from the impugned act and if so, does it satisfy the test of reasonableness – Where a mode is prescribed for doing an act and there is no impediment in following that procedure, the performance of the act otherwise and in a manner which does not disclose any discernible principle which is reasonable, may itself attract the vice of arbitrariness – Every State action must be informed by reason and an act uninformed by reason, is arbitrary – To enthuse efficiency in administration, a balance between accountability and autonomy of action should be carefully maintained – Whether the public authority acted bona fide would be gauged from the impugned action and attending circumstances – The authority should justify the action assailed on the touchstone of justness, fairness and reasonableness – Test of reasonableness is more strict – Supporting an order with a rationale which in the circumstances is found to be reasonable will go a long way to repel a challenge to State action – The reasons need not in every case be part of the order as such – If there is absence of good faith and the action is actuated with an oblique motive, it could be characterised as being arbitrary – A total non-application of mind without due regard to the rights of the parties and public interest may be a clear indicator of arbitrary action – Another way to assess whether an action complained of could be termed as arbitrary is by scrutinizing the reasons assigned to such an action – However, the Court is not supposed to delve into every minute details of the reasoning assigned, but should only see whether the reasons were earnest, genuine and had a rationale with the ultimate decision – What is under scrutiny in judicial review of an action is the decision-making process and whether there is any element of arbitrariness or mala fide – Thus, the question to be answered in such situations is whether the decision was based on valid considerations. [Paras 65, 67, 69-71]

Case Law Cited

Pimpri Chinchwad New Township Development Authority v. Vishnudev Coop. Housing Society **[2018] 11 SCR 310 : (2018)**

8 SCC 215; *Shanti Sports Club v. Union of India* [2009] 13 SCR 710 **: (2009) 15 SCC 705 – distinguished.**

Radhakrishna Agarwal & Ors. v. State of Bihar & Ors. [1977] 3 SCR 249 **: (1977) 3 SCC 457;** *Premji Bhai Parmar & Ors. v. Delhi Development & Ors.* [1980] 2 SCR 704 **: (1980) 2 SCC 129;** *Divisional Forest Officer v. Bishwanath Tea Co. Ltd.* [1981] 3 SCR 662 **: (1981) 3 SCC 238;** *Bareilly Development Authority & Anr. v. Ajai Pal Singh & Ors.* [1989] 1 SCR 743 **: (1989) 2 SCC 116;** *M/s Indian Medicines Pharmaceuticals Corp Ltd. v. Kerala Ayurvedic Co-operative Society Ltd.* [2023] 1 SCR 473 **: (2023) SCC OnLine SC 5;** *M.C. Mehta v. Union of India* [1987] 1 SCR 819 **: (1987) 1 SCC 395;** *Mahabir Auto Stores & Ors. v. Indian Oil Corporation* [1990] 1 SCR 818 **: (1990) 3 SCC 752;** *Dwarkadas Marfatia & Sons v. Board of Trustees of the Port of Bombay* [1989] 2 SCR 751 **: (1989) 3 SCC 293;** *LIC v. Consumer Education & Research Centre* [1995] Supp. 1 SCR 349 **: (1995) 5 SCC 482;** *Shrilekha Vidyarthi (Kumari) v. State of U.P.* [1990] Supp. 1 SCR 625 **: (1991) 1 SCC 212;** *Verigamto Naveen v. Govt. of A.P. & Ors.* [2001] Suppl. 3 SCR 112 **: (2001) 8 SCC 344;** *Binny Ltd. & Anr. v. Sadasivan & Ors.* [2005] Supp. 2 SCR 421 **: (2005) 6 SCC 657;** *ABL International Ltd. v. Export Credit Guarantee Corporation of India Ltd.* **(2004) 3 SCC 553;** *Noble Resources Ltd. v. State of Orissa* [2006] Supp. 6 SCR 53 **: (2006) 10 SCC 236;** *Joshi Technologies International Inc. v. Union of India & Ors.* [2015] 6 SCR 1042 **: (2015) 7 SCC 728;** *M.P. Power Management Co. Ltd., Jabalpur v. Sky Power Southeast Solar India Pvt. Ltd. & Ors.* [2022] 5 SCR 1 **: (2023) 2 SCC 703;** *Ramana Dauaram Shetty v. The International Airport Authority of India & Ors.* [1979] 3 SCR 1014 **: AIR 1979 SC 1628;** *Mahesh Chandra v. Regional Manager, U.P. Financial Corporation & Ors.* [1992] 1 SCR 616 **: (1993) 2 SCC 279;** *Tata Cellular v. UOI* [1994] Supp. 2 SCR 122 **: (1994) 6 SCC 651;** *Bachhittar Singh v. State of Punjab & Anr.* [1962] Supp. 3 SCR 713 **: AIR 1963 SC 395;** *Delhi Development Authority v. Hello Home Education Society* **(2024) 3 SCC 148;** *Mahadeo & Ors. v. Sovan Devi & Ors.* [2022] 11 SCR 153 **: (2023) 10 SCC 807;** *Municipal Committee, Barwala v. Jai Narayan and Co. & Anr.* [2022] 16 SCR 897 **: (2022) SCC OnLine 376;** *Sethi Auto*

Service Station v. DDA [2008] 14 SCR 598 **: (2009) 1 SCC 180;** *State of Uttaranchal v. Sunil Kumar Vaish* [2011] 13 SCR 754 **: (2011) 8 SCC 670;** *State of Bihar v. Kripalu Shankar* [1987] 3 SCR 1 **: (1987) 3 SCC 34;** *Vice Chariman & Managing Director, City & Industrial Development Corporation of Maharashtra Ltd. & Anr. v. Shishir Realty Pvt. Ltd. & Ors.* [2021] 13 SCR 190 **: (2021) SCC OnLine SC 1141;** *Vasantkumar Radhakisan Vora (Dead) by His Lrs. v. Board of Trustees of the Port of Bombay* [1990] 3 SCR 825 **: (1991) 1 SCC 761;** *Har Shankar & Ors. v. Dy. Excise and Taxation Commr. & Ors.* [1975] 3 SCR 254 **: (1975) 1 SCC 737;** *Nagar Nigam v. Al. Farheem Meat Exporters Pvt. Ltd.* [2006] Supp. 10 SCR 354 **: (2006) 13 SCC 382;** *Sivanandan C.T. v. High Court of Kerala* [2023] 11 SCR 674 **: (2024) 3 SCC 799 – referred to.**

List of Acts

Constitution of India.

List of Keywords

Contract/tender disputes; Contractual matters; Operation & maintenance of underpasses; Advertisement rights of the underpasses; Judicial review; Writ jurisdiction; Amenability to writ jurisdiction; Public-Private Partnership basis; Notice of cancellation; Tender cancelled/terminated; Tender cancelled at the behest of the minister; Administrative actions of the State; Arbitrary; Unfair; Unreasonable; Influenced by extraneous considerations; Non-application of mind; Capricious exercise of powers; Malice; Contractual disputes; Dispute not purely contractual; Public law element; Private law element; Right to public law action; Work stop notice/order; Handing over of the operation & maintenance of the underpasses; Change in policy, License fee in lieu of advertisement rights; Technical faults in the tender floated; Cancellation of the tender not in public interest; Administrative discretion; Internal file notings; Public interest; Potential financial losses; Possibility of fetching higher license fees; Arbitrariness; Arbitrariness of State actions; Administrative decisions; Test of reasonableness; Vice of arbitrariness; Wednesbury principle of reasonableness; Public tenders; Principles of natural justice, reasonableness and proportionality; Valid considerations; Bona-fide.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 6741 of 2024

From the Judgment and Order dated 25.05.2023 of the High Court at Calcutta in MAT No. 744 of 2023

Appearances for Parties

Shyam Divan, Sr. Adv., Ateev Mathur, Ajay Monga, Sanjay Gupta, Ms. Varsha Kriplani, Anmol Sharma, Ananta Prasad Mishra, Advs. for the Appellant.

Rakesh Dwivedi, Sr. Adv., Zoheb Hossain, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

J.B. PARDIWALA, J.

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

INDEX*

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

1. This appeal arises out of the final judgment and order dated 25.05.2023 passed by the High Court of Calcutta in M.A.T. No. 744 of 2023 ("**Impugned Order**"), by which the High Court upheld the decision of the respondent to cancel the tender that had been awarded to the appellant for the maintenance of two underpasses on Public-Private Partnership basis, and thereby dismissed the writ appeal filed by the appellant.

A. FACTUAL MATRIX

2. The respondent floated a tender notice dated 12.05.2022 inviting bids for the maintenance of two underpasses on the Eastern Metropolitan Bypass and its abutting area against a License Fee for Advertisement Rights over designated sites at each underpass, for a period of 10-years. As per the aforesaid tender, the scope of work included the regular maintenance of the aforementioned underpasses and the upkeep of its garden area and electro-mechanical fittings. The relevant portion reads as under: -

Sl. No	*Name of Work*	*License Fee of the Yearly Charge for the 1st year (Rs.)*	*Earnest Money (Rs.)*	*Allotted Time Period for License & Work*
(1)	*(2)*	*(3)*	*(4)*	*(5)*
	REGULAR MAINTENANCE OF BELIAGHATA UNDERPASS INCLUDING UPKEEPING OF UNDERPASS PROPER, GARDEN AREA, AT GRADE UNDERPASS AREA AND ALL ELECTRO-MECHANICAL FITTINGS AGAINST LICENSE FEE OF ADVERTISEMENT RIGHTS OVER (10) YEARS. *Tender ID – 2022_ KMDS_380215_1*	*TO BE QUOTED*	*5,00,000.00* *[Rupees Five Lakh Only]* *Online* *(Net Banking/ NEFT/ RTGS)*	*10 (Ten) Years*
	REGULAR MAINTENANCE OF SWABHUMI UNDERPASS INCLUDING UPKEEPING OF UNDERPASS PROPER, GARDEN AREA, AT GRADE UNDERPASS AREA AND ALL ELECTRO-MECHANICAL FITTINGS AGAINST LICENSE FEE OF ADVERTISEMENT RIGHTS OVER (10) YEARS. *Tender ID – 2022_ KMDS_380215_1*	*TO BE QUOTED*	*5,00,000.00* *[Rupees Five Lakh Only]* *Online* *(Net Banking/ NEFT/ RTGS)*	*10 (Ten) Years*

3. Pursuant to the aforesaid, the tendering process was undertaken and the appellant herein on 13.06.2022 submitted his bid with a quotation of Rs. 29,55,555/- for the Beliaghata Underpass and Rs. 23,55,555/- for the Swabhumi Underpass. Out of the total bids received, the appellant's quotations were found to be the highest and was classified as 'H1' for both the underpasses.

4. Accordingly, the respondent issued two Letter of Intents dated 27.06.2022 in favour of the appellant, accepting the quotation offered by him and declaring his firm as the successful bidder for the aforementioned tender, and a formal Memorandum of Tender for Work was executed and issued to the appellant.

5. As per the Memorandum of Tender for Work, the detailed 'Scope of Work' *inter-alia* included (i) the sweeping of floors & cleaning of the walls, stairwell, escalators, railings and glass-fixtures, (ii) regular emptying of dustbins and removal / processing of waste trash, (iii) upkeep of the garden and plants and (iv) the maintenance of light-fittings, escalators, water pumps and other electro-mechanical fixtures.

6. Furthermore, the Special Terms & Conditions of the Memorandum, more particularly Clause 35 therein stipulated that the contract would be liable to be terminated *inter-alia* in the event of any failure, breach or non-compliance of any of the obligations or terms delineated in the tender by the successful bidder.

7. Upon completion of all the formalities, the Work Orders dated 18.10.2022 were issued by the Executive Engineer, pursuant to which the appellant commenced his work in terms of the contract.

8. On 01.12.2022, the Urban Development and Municipal Affairs Department, Government of West Bengal issued an Order directing that the maintenance of the roads and drainage of the E.M. Bypass including the two subject underpasses shall be handed over by the Kolkata Metropolitan Development Authority (KMDA) i.e., the respondent herein to the Kolkata Municipal Corporation (KMC). The said order reads as under: -

"Government of West Bengal
Urban Development and Municipal Affairs Department
NAGARYAN, DF-8, Sector-I
Salt Lake, Kolkata - 700 064
Memo No. 5783 – UDMA-22012(14)/11/2022
Date : 01.12.2022

ORDER

KMDA was the custodian for the maintenance of the E.M Bypass connecting the northern and southern part of the city and starts from northern hub Ultadanga to Garia in the South. The road length is 15.6 Km which runs along the eastern ring of the city. After careful consideration it has been decided that the maintenance of the road alongwith the drainage be handed over from KMDA to KMC with the following scope of activities.

(1) The defects in carriageway would be maintained and restored by KMC henceforth.

(2) The existing carriageway alongwith the surface and underground drainage would be maintained by KMC. The conservancy in and around the Eastern Bypass would also be maintained by KMC.

(3) Subject to clearance from KMDA, KMC would issue NOC to all utility and service providers. The cost of road restoration from the charges to be levied is to be paid to KMC by all utility and service providers.

(4) The right of collecting revenues from the advertisement displays will remain with KMDA.

(5) All the structures, as the new or old Bridges, Culverts, FoBs etc. will be under the custody of KMDA.

(6) All development activities along the road except for the Bridges, Culverts, FoBs etc. will be taken up by KMC.

(7) KMC would remain custodian for illumination of the Bypass.

(8) The green verge along the E.M. Bypass to be maintained by KMC.

The order is issued in the interest of public service.

Sd/-
Principal Secretary
to the Govt. of West Bengal"

9. As per the aforesaid Order dated 01.12.2022, the maintenance and restoration of carriageway, structures, underground drainage and

development activities of the E.M. Bypass Area was taken over by the KMC. However, the Order specifically, clarified that the right of collecting revenue from advertisements displayed would continue to remain with the KMDA.

10. Thereafter, in light of the aforesaid order, the Executive Engineer, KMDA under instructions issued by the competent authorities sent a notice dated 24.01.2023 to the appellant herein asking him to stop all work in respect of the maintenance of the two underpasses with immediate effect in view of the handing over of the maintenance of the E.M. Bypass to the KMC.

11. In response to the above, the appellant sent a letter dated 25.01.2023 *inter-alia* pointing out that as per the Urban Development and Municipal Affairs Department's Order dated 01.12.2022, the custody and rights of revenue of all structures, bridges, culverts etc. including the concerned underpasses, continued to remain with the respondent, and requested to recall the notice dated 24.01.2023 asking him to stop the work.

12. However, on 07.02.2023, the respondent issued one another notice to the appellant stating that the tender for work of maintenance has been cancelled on account of a technical fault in the tender. It was stated therein that the tender was found to be 'non-specific' & 'not well defined' and that had created ambiguity resulting in financial losses to the respondent. The said Notice of Cancellation reads as under: -

"Date: 07.02.2023

To,V.S. Advertising,
65/268, M.N. Sarkar Road,
Siliguri, West Bengal 7340001

Sub: Cancellation of Work/Tender

Sir,

The cited tender is hereby cancelled by the Authority in KMDA. We would state with regret that the tender has been found having technical fault, non-specific and not well defined thus creating ambiguity for obvious reasons. By this, the Authority is incurring financial loss as well.

We regret for the inconvenience caused to you and are ready to reimburse the cost you have so far incurred in the work. This has been decided that the license fee deposited by you and the cost incurred for construction activity and maintenance work would be refunded as per actual assessment by the divisional engineers based upon the approved drawing and execution.

This is for your information with kind compliance please.

Sd/-
Chief Engineer-II (Bridge)
Roads & Bridges Sector, KMDA"

13. It is pertinent to note from the aforesaid that, no reference was made as regards handing over of the maintenance to KMC which was previously alluded to, for stopping all work pertaining to the tender.

B. IMPUGNED ORDER

14. Aggrieved by the aforesaid, the appellant preferred a writ petition being WPA No. 3381 of 2023 before the High Court of Calcutta assailing the respondent's Notice dated 07.02.2023 cancelling the tender for work of maintenance of the two underpasses.

15. The aforesaid writ petition referred to above came to be rejected by the High Court vide its order dated 24.04.2023, wherein the Ld. Single Judge held that the decision to cancel the tender had to be taken on account of the administrative exigencies and also due to the 'change in policy'. It was further held that the decision to cancel the tender was not borne out of any ulterior motives on the part of the respondent. The decision of the learned Single Judge is based on two grounds: -

(i) ***First,*** the High Court took the view that the decision to cancel the tender cannot be termed as an arbitrary action on the part of the respondent. The appellant was put to prior notice as regards the change of hands of the management of the concerned underpasses, much before the ultimate cancellation notice was issued. It further observed that, since the notice of cancellation dated 07.02.2023 specifically provided the reasons for cancelling the tender i.e., the technical faults found in the tender that

was floated, there was no element of arbitrariness in the said action. The relevant observations read as under: -

> *"11. [...] The effect of the administrative decision was reiterated in the stop-work request of 24.01.2023 where the reason given for the stop-work was also the "changed scenario" of handover of the maintenance work of E.M. Bypass to KMC from KMDA. Hence, the reason for the stop-work and the impugned cancellation is a change of policy for administrative convenience simpliciter.*
>
> *xxx xxx xxx*
>
> *18. In the present case, the impugned cancellation of 07.02.2023 cannot be described as a bolt from the blue since the petitioner was put on notice of the impending change in circumstance on 24.01.2023 where the reason for the change was also conveyed to the petitioner. The order dated 01.12.2022 of the Urban Development and Municipal Affairs Department stating that the maintenance of the E.M. Bypass would be handed over from the KMDA to KMC provides the rationale for the impugned cancellation. Seen in this backdrop, it cannot be said that the impugned letter of cancellation of the tender /work was issued with an ulterior motive or for extraneous considerations. In fact, the letter of cancellation provides further reasons, namely, that the tender has been found to be non-specific and having technical faults. This would also be borne out from clauses 10 and 14 of the Special Terms and Conditions of the tender document which give rise to conflicting interpretations on the placement of the signboards. Hence, besides the administrative decision to hand over the maintenance of E.M. Bypass from KMDA to KMC, the respondent KMDA as the tendering*

authority, has a right to rectify the ambiguities in the bid document by cancelling the same."

(Emphasis supplied)

(ii) ***Secondly,*** the appellant could not have redressed his grievances by invoking the writ jurisdiction of the High Court under Article 226 of the Constitution, as there was no failure of any statutory duty or public law element involved. Moreover, since the relief sought was essentially in the nature of specific performance, it could have been prayed for only under ordinary civil law and not by way of a writ petition. The relevant observations read as under: -

"20. It is well settled that a contractual dispute with a public law element would be amenable to writ jurisdiction. The present dispute however arises out of a private contract for maintenance of underpasses in the E.M. Bypass and advertisement rights over certain spaces within the contracted area. The rights following out of the contract are purely private in nature and there is nothing to show that the performance of the contract or the consequence therefrom would affect the public at large or even a sizeable section of the public. A public law element is generally understood to mean the reach of an obligation to a large section of the public or the obligation affecting the lives and livelihood of the general public by its very nature. M.P. Power sounded a cautionary note in such cases where the State cites monetary gains or losses as reason for termination of a contract. This is also not' the case at hand since the reasons given for cancellation were on a wholly different plane."

21. The above reasons persuade this Court to hold that the remedy available to the petitioner is in the realm of private law and not under Article· 226 of the Constitution which contemplates certain tests including that the dispute must

> *have a public law element. The complaint of the petitioner is essentially for the specific performance of the contractual obligation of the respondent KMDA. Doubtless, the petitioner can avail of appropriate civil remedies for redress which would include damages for breach of the contractual terms.*
>
> (Emphasis supplied)

16. Aggrieved with the aforesaid, the appellant went in appeal before a Division Bench of the High Court by way of M.A.T. No. 744 of 2023, wherein the appeal court finding no fault in the decision of the learned Single Judge, dismissed the appeal and thereby affirmed the judgment of the learned Single Judge referred to above.

17. In view of the aforesaid, the appellant is here before this Court with the present appeal.

C. DEVELOPMENTS THAT OCCURRED DURING THE PENDENCY OF THE PRESENT APPEAL.

18. During the pendency of the present appeal, the appellant herein preferred a RTI seeking further information on the respondent's internal note-file pertaining to the cancellation of the subject tender.

19. The Public Information Officer, KMDA vide its reply dated 18.08.2023 provided the internal file-notings of the respondent on the aforesaid tender. In the internal file-notings of the respondent, the following entries / notes are relevant: -

a) As per Note #91 dated 30.12.2022, the respondent in view of the maintenance of the concerned underpasses being handed over to KMC, was contemplating the possibility of cancelling the tender for work. The relevant noting reads as under: -

> "***Note # 91***
>
> *Recently maintenance of EM Bye pass has been handed over to KMC. Thus, in this changed scenario we may cancel the work order.*
>
> ***03/01/2023 11:51 AM*** ***FIRHAD HAKIM***
> ***CHRMN (KMDA)***"

b) As per Note #95 dated 10.01.2023, the respondent instructed that the tender be cancelled in view of the maintenance of the concerned underpasses being handed over to KMC. However, since the respondent was in doubt as regards the legality & validity of such decision, it opined that the opinion of the Legal Department may be sought first before any action of cancellation is taken. However, as an interim measure, it decided to issue a notice to stop all work in respect of the tender. The relevant noting reads as under: -

> "***Note # 95***
>
> *[...] Now, as instructed by the competent authority of KMDA keeping in view of the recent changed scenario of handing over of maintenance of E.M. Bypass from KMDA to KMC, cancelling the work order as instructed may require judicious action towards implementing the same and to make it lawful, legal advice from Law-Cell, KMDA may be required so that, KMDA doesn't fall in any legal obligation. However, for immediate compliance of the order, a notice to stop the works in all respect with regards to the two above-mentioned tenders may be served to the agency for immediately stopping his all activities at site till further notice. As instructed, a draft Letter is attached herewith for his kind perusal and direction in this regard. [...]*
>
> ***10/01/2023 02:55 PM PARTHA PROTIM GHOSH EE (RBBRDG) (KMDA)"***

c) Again, in Note #96, it was noted that since the competent authority of the respondent was desirous to cancel the tender, the respondent was of the view that the opinion of its legal cell be obtained first before such action is taken. The relevant noting reads as under: -

> "***Note # 96***
>
> *[...]*
>
> *As per **Note#91**, Competent Authority desires to cancel the Work Order.*

*In **Note#95**, a draft letter has been attached for approval towards issuance to the agency to stop any type of work related to this project.*

Considering the Chronological development and acceptance by Authority, the matter may kindly be viewed lawfully, so that, if it is cancelled by this end, no legal action is taken by the Agency.

Submitted for necessary action.

13/01/2023 02:13 PM SANTANU PATRA
SE (RBBRDG) (KMDA)"

d) In Note #97 dated 16.01.2023, the respondent has noted that since the competent authority had decided to cancel the work tender there was no option but to cancel it. However, the respondent once again insisted that a legal opinion may be sought first, in order to avoid further litigations. The relevant noting reads as under: -

"***Note # 97***

Sub: Cancellation of Work Order of Maintenance of two Underpasses

A concurrence of Law Cell, KMDA may kindly be obtained before cancelling the Work Order of the existing agency. There is no different opinion than to get this cancelled, once this has been decided by the Authority but a legal opinion may be sought for avoiding further litigations. [...]

16/01/2023 04:38 PM SUBHANKAR
BHATTACHARYA
CE (RBBRDG) (KMDA)"

e) Thereafter, it could be seen from Note #101 dated 19.01.2023, that the other officials of the authority also concurred with the respondent's opinion to first seek advice of its legal cell on the possible consequences in the event the tender for work is cancelled. The relevant observations read as under: -

"***Note # 101***

As concurred by the Authority the legal aspects and the possible consequences may be reviewed and opined back prior to cancelling the Work Order. The draft of order for stopping work further is enclosed, which may kindly be seen and commented.

For kind concern of Law Cell with request to revert back with further advice and opinion on above please.

19/01/2023 02:28 PM SUBHANKAR BHATTACHARYA CE (RBBRDG) (KMDA)"

f) However, before the legal cell of the respondent could give any definite opinion on the legal implications of cancelling the tender, it appears from the records, more particularly Note #108 dated 24.01.2023 that the concerned minister during his visit instructed the officials of the respondent on his own to cancel the tender, upon which the respondent undertook the steps to duly comply with such instructions. The relevant noting reads as under: -

"***Note # 108***

For immediate compliance of HMIC's instruction. This is as per the instruction given during his visit to Unnanyan Bhavn today in presence of KMDA Officials.

24/01/2023 05:16 PM SUBHANKAR BHATTACHARYA CE (RBBRDG) (KMDA)"

g) Pursuant to the above, as per Note #109 dated 02.02.2023, the Tender Committee of the respondent convened a meeting wherein the proposal for cancellation of the aforesaid tender was finalized and placed for approval. The relevant noting reads as under: -

"***Note # 109***

As per the discussion held in the 5th meeting of Tender Committee, KMDA, proposal for cancellation of this tender, as per the Note #91 for this

changed scenario vide memo : 5783-UDMA-22012(14)/11/2022 Dt. 01-12-2022 maintenance of E.M. Bypass has been handed over to KMC from KMDA, is placed herewith for approval please. [...]

02/02/2024 02:31 PM SANTANU PATRA
SE (RBBRDG) (KMDA)"

h) Thereafter, as per the last entry in the internal notings – Note #110 dated 03.02.2023, the respondent floated one another proposal seeking approval to cancel the tender, which culminated into the final notice of cancellation dated 07.02.2023 which is the subject matter of challenge in the present litigation.

20. During the course of hearing of this appeal, it was brought to the notice of this Court that after the work order issued in favour of the appellant was cancelled, the respondent floated a fresh tender dated 15.05.2023 for the work of maintenance of the very same underpasses, the selection process for which stood completed and that the tender had been awarded along with the work order(s) to one another third-party agency.

21. This Court was further apprised of the order dated 16.09.2023 passed by the Urban Development and Municipal Affairs Department, Government of West Bengal, modifying its earlier order dated 01.12.2022 to the extent that both **i)** the operation & maintenance of 37 bridges, flyovers, underpasses, etc. including the concerned two underpasses **along with ii)** the right to collect revenue towards the advertisement rights for the said structures, shall be taken over by KMC from KMDA. The said letter reads as under: -

"Government of West Bengal

Urban Development and Municipal Affairs Department

NAGARYAN, DF-8, Sector-I

Salt Lake, Kolkata - 700 064

Memo No. 5271 – UDMA-22012(14)/11/2022

Date : 16.09.2023

ORDER

In continuation with the order issued vide no. 5783-UDMA-22012(14)/11/2022 dated 01.12.2022, it has been further decided that the operation and maintenance of the 37 bridges, flyovers, foot over bridges, under pass & culverts attached herewith to be taken over by KMC from KMDA. In that case the revenues earned from advertisements and displays erected on these assets (including the piers of the bridges) to be accrued to KMC.

This order shall take immediate effect.

Sd/-
Principal Secretary
to the Govt. of West Bengal'

22. In view of the fact that a fresh tender had already been awarded to a third-party, coupled with the fact that the right to collect revenue from the advertisements for the concerned underpasses had been handed over to KMC, the counsel for the respondent submitted that the matter had since become infructuous.

D. SUBMISSIONS ON BEHALF OF THE APPELLANT

23. Mr. Shyam Divan, the learned Senior Counsel appearing for the appellant submitted that the impugned notice of cancellation dated 07.02.2023 is manifestly arbitrary and tainted with extraneous considerations. He submitted that though the impugned notice purports to cancel the tender on the ground of being ambiguous and non-specific, but in reality the said action was at the behest of the concerned Minister-In-Charge who directed such cancellation without any justifiable cause. In this regard he placed strong reliance on the internal-file notings of the respondent.

24. He submitted that the reasons assigned for cancelling the tender in the impugned notice are not to be found in the entire file of notings maintained by the respondent. He further pointed out that the file of the internal notings indicate that, before the respondent could take a judicious call the concerned minister issued a specific direction on the basis of which the cancellation was undertaken & that to without any application of mind.

25. Mr. Divan also submitted that no orders to stop the work could have been issued by the respondent on account of handing over of the maintenance to another authority, because even after the handover, the respondent continued to operate & maintain the underpasses including the licensing rights for advertisements.

26. He further submitted that, although the terms of the contract provided for assigning cogent grounds for termination, yet the same was not followed and instead the respondent arbitrarily proceeded to cancel the tender.

27. In the last, Mr Divan submitted that the contention as regards the financial losses being suffered is erroneous, as the respondent voluntarily accepted the bid that was submitted by the appellant, and even as per the notings in the file the tender was generating more revenue than earlier.

E. SUBMISSIONS ON BEHALF OF THE RESPONDENT

28. Mr. Rakesh Dwivedi, the learned Senior Counsel appearing for the respondent submitted that the present matter being purely a contractual dispute was rightly not entertained by the High Court in exercise of its writ jurisdiction under Article 226 of the Constitution of India.

29. He further submitted, that the decision to cancel the tender was *bona fide* and had to be taken considering the technical faults in the same. He submitted, that there was ambiguity in the tender as regards whether it was lawful to put up advertisements at the places outside the underpasses, due to which, many interested bidders might not have participated in the tender. The respondent was of the view that a higher license fee could be fetched by rectifying such ambiguity.

30. Mr. Dwivedi also submitted that the decision to cancel the tender had to be taken to enable the respondent to float separate tenders, one for the maintenance of the underpasses and the other for the licensing advertisement rights. Thus, the decision was taken in public interest. He submitted that the decision to cancel the tender was on the basis of a change in the policy, and thus cannot be said to be arbitrary.

31. He further submitted that no reliance could have been placed on the notings in the file maintained by the respondent, as the file notings

are only internal deliberations. Such notings cannot be construed as decisions of the respondent and thus, creates no right in favour of the appellant.

32. In the last, Mr Dwivedi submitted that since during the pendency of the present appeal, the operation, maintenance and the licensing rights for the advertisements have been taken over by a third party, the present appeal has been rendered infructuous.

F. POINTS FOR DETERMINATION

33. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the two pivotal questions that fall for our consideration are as under: -

I) What is the scope of judicial review of the actions of the State in the matters relating to contract / tender disputes under writ jurisdiction?

II) Whether the action on the part of the respondent herein in cancelling the tender vide its notice dated 07.02.2023 was amenable to the writ jurisdiction of the High Court? If so, whether the said action could be termed as arbitrary or unfair and in consequence of violation of Article 14 of the Constitution of India?

G. ANALYSIS

i. Scope of Judicial Review of the actions of the State in matters relating to Contract / Tender under Writ Jurisdiction.

a. Earlier Position of Law and Misconception of the State as a Largesse.

34. Over the years, the scope of judicial review and the extent to which a Court can interfere in disputes arising out of contracts or tenders has seen a significant development, marked by a nuanced understanding of the critical role of administrative discretion. The judicial quest in administrative matters has always been to find a right balance between **i)** allowing leeway to the States in deciding the exercise of their administrative discretion in matters pertaining to policy and **ii)** the need to ensure fairness and propriety in such administrative actions.

35. Earlier, the position of law was that any dispute arising out of a contract entered into with the State or its instrumentalities could not

be adjudicated by the court under its writ jurisdiction, as in all such cases, it could be said that the 'real grievance' was essentially only one being that of breach of a contract for which the appropriate remedy would be an ordinary suit and not a writ petition. One of the earliest judicial pronouncements in this regard is the decision of this Court in ***Radhakrishna Agarwal & Ors. v. State of Bihar & Ors.*** reported in **(1977) 3 SCC 457** wherein the following relevant observations were made: -

> "*19. [...] None of these cases lays down that, when the State or its officers purport to operate within the contractual field and the only grievance of the citizen could be that the contract between the parties is broken by the action complained of, the appropriate remedy is by way of a petition under Article 226 of the Constitution and not an ordinary suit. There is a formidable array of authority against any such a proposition. [...]*"
>
> (Emphasis supplied)

36. It was further explained by this Court in ***Radhakrishna Agarwal*** (supra) that once the State or its instrumentalities enter into a contract, any dispute arising out of that contract cannot be decided in writ jurisdiction as their relations no longer remain governed by the constitutional provisions, and it is only the contract which thereafter determines the rights and obligations of the parties. Any claim to a right flowing from a contract cannot be redressed through the writ jurisdiction except where some statute steps in and confers some special statutory power or obligation on the State in the contractual field or if the agreement is in the nature of a statutory contract. The relevant observations read as under: -

> *"10. [...] But, after the State or its agents have entered into the field of ordinary contract, the relations are no longer governed by the constitutional provisions but by the legally valid contract which determines rights and obligations of the parties inter se. No question arises of violation of Article 14 or of any other constitutional provision when the State or its agents, purporting to act within this field, perform any act. In this sphere, they can only claim rights conferred upon them by contract and are bound by the terms of the contract only unless some statute steps in*

and confers some special statutory power or obligation on the State in the contractual field which is apart from contract.

11. In the cases before us the contracts do not contain any statutory terms or obligations and no statutory power or obligation which could attract the application of Article 14 of the Constitution is involved here. Even in cases where the question is of choice or consideration of competing claims before an entry into the field of contract facts have to be investigated and found before the question of a violation of Article 14 could arise. If those facts are disputed and require assessment of evidence the correctness of which can only be tested satisfactorily by talking detailed evidence, involving examination and cross-examination of witnesses, the case could not be conveniently or satisfactorily decided in proceedings under Article 226 of the Constitution. Such proceedings are summary proceedings reserved for extraordinary cases where the exceptional and what are described as, perhaps not quite accurately, "prerogative" powers of the Court are invoked. We are certain that the cases before us are not such in which powers under Article 226 of the Constitution could be invoked."

(Emphasis supplied)

37. Similar view as above, was reiterated by this Court in ***Premji Bhai Parmar & Ors. v. Delhi Development & Ors.*** reported in **(1980) 2 SCC 129** at para 8 and in ***Divisional Forest Officer v. Bishwanath Tea Co. Ltd.*** reported in **(1981) 3 SCC 238** wherein it was held that any right to relief flowing from a breach of contract cannot be entertained under the extraordinary writ jurisdiction of the court, even if the action of the State or its instrumentality was unauthorized in law. The relevant observations read as under: -

"9. Ordinarily, where a breach of contract is complained of, a party complaining of such breach may sue for specific performance of the contract, if contract is capable of being specifically performed, or the party may sue for damages. Such a suit would ordinarily be cognizable by the civil

> *court. The High Court in its extraordinary jurisdiction would not entertain a petition either for specific performance of contract or for recovering damages. A right to relief flowing from a contract has to be claimed in a civil court where a suit for specific performance of contract or for damages could be filed. This is so well-settled that no authority is needed.*
>
> *10. In substance, this was a suit for refund of a royalty alleged to be unauthorisedly recovered and that could hardly be entertained in exercise of the writ jurisdiction of the High Court."*
>
> (Emphasis supplied)

38. We do not propose to dwell any further, on the position of law that existed earlier, and leave it at rest with one last reference to the decision of this Court in ***Bareilly Development Authority & Anr. v. Ajai Pal Singh & Ors.*** reported in **(1989) 2 SCC 116**, wherein this Court once again reiterated that no writ can be issued in contractual disputes between the State and an aggrieved party where the rights or claims arise or stem only from the terms of the contract. The relevant observations read as under: -

> *"22. There is a line of decisions where the contract entered into between the State and the persons aggrieved is non-statutory and purely contractual and the rights are governed only by the terms of the contract, no writ or order can be issued under Article 226 of the Constitution of India so as to compel the authorities to remedy a breach of contract pure and simple [...]"*
>
> (Emphasis supplied)

39. Thus, for a period of time the courts recognized that there was a clear brightline distinction between when a State or its instrumentalities could be said to be acting in its executive capacity and when it could be said to be acting in its private capacity, with the existence of a 'contractual relation' *inter-se* the parties being the determinative factor. Wherever, there was a contract, the State's relations and all its actions were said to be within the field of a contract i.e., within the realm of private law, and the courts would resile from interfering with the same under their writ jurisdiction or embarking upon a judicial review of such actions.

40. Such reluctance on the part of the courts stemmed from its understanding that State or any of its instrumentalities must have the flexibility or the discretion to take decisions that are in the best interest of the public and efficient governance. Government being the decision-maker of the State is said to be the best judge of when a contract or an agreement is in its interest and by its extension in the interest of the public, and as such the courts should not interfere in the State's discretion to award or terminate contracts. One another reason why contractual disputes were precluded from being espoused under the writ jurisdiction of the courts was due to the summary nature of such proceedings, which do not allow for an exhaustive review unlike civil suits. [See: ***Radhakrishna Agarwal*** (supra) at para 11]

41. This simplistic approach of the courts in deeming every act and action of the State which was complained of as nothing more than a 'contractual dispute' or a case of 'breach of contract' often led to the State abusing its position and acting unfairly under the misconceived notion, that all its actions such as award of contracts or tenders were nothing but a 'largess' – a generosity bestowed upon its citizens, which it can at its own whims choose to deny, alter, modify, or take away without any consequences. This often led to a conflation of power with duty, and resulted in every arbitrary exercise of power by the State under the guise of a 'contractual dispute' to remain unchecked and undisputable before the courts and out of the reach of judicial review, undermining the rights of the citizen to have their interests safeguarded and protected. We may in this regard refer to ***M/s Indian Medicines Pharmaceuticals Corp Ltd. v. Kerala Ayurvedic Co-operative Society Ltd.*** reported in **(2023) SCC OnLine SC 5** wherein this Court speaking eruditely through one of us, Dr. D.Y. Chandrachud, CJI made the following pertinent observations: -

> *"11 The welfare State plays a crucial role in aiding the realisation of the socioeconomic rights which are recognised by the Constitution. Social welfare benefits provided by the State under the rubric of its constitutional obligations are commonly understood in the language of 'largesse', a term used to describe a generous donation. Terming all actions of government, ranging from social security benefits, jobs, occupational licenses, contracts and use of public resources – as government largesse results in doctrinal misconceptions. The reason is that this*

conflates the State's power with duty. The Constitution recognises the pursuit of the well-being of citizens as a desirable goal. In doing this the Constitution entrusts the State with a duty to ensure the well-being of citizens. Government actions aimed at ensuring the well-being of citizens cannot be perceived through the lens of a 'largess'. The use of such terminology belittles the sanctity of the social contract that the 'people of India' entered into with the State to protect and safeguard their interests.

xxx xxx xxx

13. In the early 1950s', judicial review of the process of concluding contracts by government was limited. The courts allowed the State due deference on the ground of governmental policy. In C.K Achuthan v. State of Kerala, AIR 1959 SC 490 a Constitution Bench of this Court held that it is open to the Government 'to choose a person to their liking, to fulfil contracts which they wish to be performed.' The Court observed that when one party is chosen over another, the aggrieved party cannot claim the protection of Article 14 since the government has the discretion to choose with whom it will contract."

(Emphasis supplied)

42. Before proceeding further to discuss how the scope of judicial review came to be evolved, we would like to refer to the observations made by this Court in ***M.C. Mehta v. Union of India*** reported in **(1987) 1 SCC 395** which are significant, and read as under: -

"31. [...] Law has to grow in order to satisfy the needs of the fast changing society and keep abreast with the economic developments taking place in the country. As new situations arise the law has to be evolved in order to meet the challenge of such new situations. Law cannot afford to remain static. We have to evolve new principles and lay down new norms which would adequately deal with the new problems which arise in a highly industrialised economy. [...]"

(Emphasis supplied)

b. Concept of 'Public Law' Element: Scope of Judicial Review in Contractual Matters.

43. Over a period of time the courts recognized the crucial role of judicial oversight in preventing the abuse of power and maintaining public confidence in the administrative process. Courts developed various doctrines and principles to guide their review, such as the principles of natural justice, reasonableness and proportionality. These principles ensured that the administrative actions are not arbitrary, discriminatory or capricious. By enforcing such standards, the courts also ensured that the rule of law was maintained and the individual rights were protected.

44. The interplay between judicial review and administrative discretion has been a dynamic process. As new challenges and complexities kept on arising before the courts as regards the State's actions and governance, it continued to refine its approach. This ongoing dialogue between the courts and the executive branch contributed to the development of a more accountable and transparent administrative framework, paving the way for the exercise of judicial review even in the realm of contractual disputes to achieve a fine balance between efficiency and fairness in policy decisions on the one hand and the rights of individuals and overall public interest on the other.

45. In ***Mahabir Auto Stores & Ors. v. Indian Oil Corporation*** reported in **(1990) 3 SCC 752**, this Court expressed doubts over the correctness of the earlier position of law, that actions of the State in the private contractual field cannot be questioned in writ jurisdiction. This Court further held that even if the *inter-se* relation of parties with the State is governed purely by a contract, the method, motive and decision of the State would be subject to judicial review on the grounds of relevance and reasonableness, fair play, natural justice, equality and non-discrimination. The relevant observations read as under: -

> *"12. [...] It appears to us that rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law applicable in situation or action by State instrumentality in dealing with citizens in a situation like the present one. Even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject*

to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination in the type of the transactions and nature of the dealing as in the present case.

13. The existence of the power of judicial review however depends upon the nature and right involved in the facts and circumstances of the particular case. It is well settled that there can be "malice in law". Existence of such "malice in law" is part of the critical apparatus of a particular action in administrative law. Indeed "malice in law" is part of the dimension of the rule of relevance and reason as well as the rule of fair play in action.

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20. [...] we are of the opinion that it would be appropriate to state that in cases where the instrumentality of the state enters the contractual field, it should be governed by the incidence of the contract. It is true that it may not be necessary to give reasons but, in our opinion, in the field of this nature fairness must be there to the parties concerned, and having regard to the large number or the long period and the nature of the dealings between the parties, the appellant should have been taken into confidence. Equality and fairness at least demands this much from an instrumentality of the State dealing with a right of the State not to treat the contract as subsisting. We must, however, evolve such process which will work."

(Emphasis supplied)

[See also: ***Dwarkadas Marfatia & Sons v. Board of Trustees of the Port of Bombay*** : **(1989) 3 SCC 293** at para 27.]

46. In ***LIC v. Consumer Education & Research Centre*** reported in **(1995) 5 SCC 482**, the Court held that the law as it stood earlier that a State or its instrumentality whose action is hedged with public element cannot be called into question because such action was in the field of private law is no longer a good law. The relevant observations read as under: -

"23. Every action of the public authority or the person acting in public interest or any act that gives rise to public element,

should be guided by public interest. It is the exercise of the public power or action hedged with public element (sic that) becomes open to challenge. If it is shown that the exercise of the power is arbitrary, unjust and unfair, it should be no answer for the State, its instrumentality, public authority or person whose acts have the insignia of public element to say that their actions are in the field of private law and they are free to prescribe any conditions or limitations in their actions as private citizens, simpliciter do in the field of private law. Its actions must be based on some rational and relevant principles. It must not be guided by irrational or irrelevant considerations. Every administrative decision must be hedged by reasons. [...]

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26. This Court has rejected the contention of an instrumentality or the State that its action is in the private law field and would be immuned from satisfying the tests laid under Article 14. The dichotomy between public law and private law rights and remedies, though may not be obliterated by any strait-jacket formula, it would depend upon the factual matrix. The adjudication of the dispute arising out of a contract would, therefore, depend upon facts and circumstances in a given case. The distinction between public law remedy and private law field cannot be demarcated with precision. Each case will be examined on its facts and circumstances to find out the nature of the activity, scope and nature of the controversy. The distinction between public law and private law remedy has now become too thin and practicably obliterated."

(Emphasis supplied)

47. This Court in ***Consumer Education & Research Centre*** (supra) further held that the writ jurisdiction of the courts cannot be shackled by technicalities and that any action of the State which has a public law element or a public character, such actions by their nature are required to be just, fair, reasonable & in the interest of public, and as such they would be amenable to judicial review. As to what is meant by actions bearing insignia of public law element, this Court held that wherever the action of a State or its instrumentality in the sphere of

contractual relations is enjoined with a duty or an obligation to the public, such actions could be said to bear the insignia of a public element. The relevant observation reads as under: -

> *"27. In the sphere of contractual relations the State, its instrumentality, public authorities or those whose acts bear insignia of public element, action to public duty or obligation are enjoined to act in a manner i.e. fair, just and equitable, after taking objectively all the relevant options into consideration and in a manner that is reasonable, relevant and germane to effectuate the purpose for public good and in general public interest and it must not take any irrelevant or irrational factors into consideration or appear arbitrary in its decision. Duty to act fairly is part of fair procedure envisaged under Articles 14 and 21. Every activity of the public authority or those under public duty or obligation must be informed by reason and guided by the public interest.*
>
> *xxx xxx xxx*
>
> *29. [...] The arms of the High Court are not shackled with technical rules or procedure. The actions of the State, its instrumentality, any public authority or person whose actions bear insignia of public law element or public character are amenable to judicial review and the validity of such an action would be tested on the anvil of Article 14. While exercising the power under Article 226 the Court would be circumspect to adjudicate the disputes arising out of the contract depending on the facts and circumstances in a given case. The distinction between the public law remedy and private law field cannot be demarcated with precision. Each case has to be examined on its own facts and circumstances to find out the nature of the activity or scope and nature of the controversy. The distinction between public law and private law remedy is now narrowed down. [...]"*
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> (Emphasis supplied)

48. In another decision of this Court in ***Shrilekha Vidyarthi (Kumari) v. State of U.P.*** reported in **(1991) 1 SCC 212** it was held that every

action of the State that has some degree of impact on the public interest, can be challenged under writ jurisdiction to the extent that they are arbitrary, unfair or unreasonable, irrespective of the fact that the dispute falls within the domain of contractual obligations. It was further held, that it is the nature of a government body's personality which characterizes the action as having a public law element, and not the field of law where such action is taken. The relevant observation reads as under: -

> *"22. There is an obvious difference in the contracts between private parties and contracts to which the State is a party. Private parties are concerned only with their personal interest whereas the State while exercising its powers and discharging its functions, acts indubitably, as is expected of it, for public good and in public interest. The impact of every State action is also on public interest. This factor alone is sufficient to import at least the minimal requirements of public law obligations and impress with this character the contracts made by the State or its instrumentality. It is a different matter that the scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes. However, to the extent, challenge is made on the ground of violation of Article 14 by alleging that the impugned act is arbitrary, unfair or unreasonable, the fact that the dispute also falls within the domain of contractual obligations would not relieve the State of its obligation to comply with the basic requirements of Article 14. To this extent, the obligation is of a public character invariably in every case irrespective of there being any other right or obligation in addition thereto. An additional contractual obligation cannot divest the claimant of the guarantee under Article 14 of non-arbitrariness at the hands of the State in any of its actions.*
>
> *xxx xxx xxx*
>
> *24. The State cannot be attributed the split personality of Dr Jekyll and Mr Hyde in the contractual field so as to impress on it all the characteristics of the State at the*

threshold while making a contract requiring it to fulfil the obligation of Article 14 of the Constitution and thereafter permitting it to cast off its garb of State to adorn the new robe of a private body during the subsistence of the contract enabling it to act arbitrarily subject only to the contractual obligations and remedies flowing from it. It is really the nature of its personality as State which is significant and must characterize all its actions, in whatever field, and not the nature of function, contractual or otherwise, which is decisive of the nature of scrutiny permitted for examining the validity of its act. The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters. There is a basic difference between the acts of the State which must invariably be in pubic interest and those of a private individual, engaged in similar activities, being primarily for personal gain, which may or may not promote public interest. Viewed in this manner, in which we find no conceptual difficulty or anachronism, we find no reason why the requirement of Article 14 should not extend even in the sphere of contractual matters for regulating the conduct of the State activity.

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28. Even assuming that it is necessary to import the concept of presence of some public element in a State action to attract Article 14 and permit judicial review, we have no hesitation in saying that the ultimate impact of all actions of the State or a public body being undoubtedly on public interest, the requisite public element for this purpose is present also in contractual matters. We, therefore, find it difficult and unrealistic to exclude the State actions in contractual matters, after the contract has been made, from the purview of judicial review to test its validity on the anvil of Article 14."

(Emphasis supplied)

49. In ***Verigamto Naveen v. Govt. of A.P. & Ors.*** reported in **(2001) 8 SCC 344** this Court held that where a breach of contract involves

the decision-making authority exceeding its power or violating the principles of nature justice or its decision being borne out of perversity, then such cancellation of contract can certainly be scrutinized under the writ jurisdiction. This is because such an exercise of power by the authority is apart from the contract. The relevant observation reads as under: -

> *"21. [...] Though there is one set of cases rendered by this Court of the type arising in Radhakrishna Agarwal case [(1977) 3 SCC 457 : AIR 1977 SC 1496] much water has flown in the stream of judicial review in contractual field. In cases where the decision-making authority exceeded its statutory power or committed breach of rules or principles of natural justice in exercise of such power or its decision is perverse or passed an irrational order, this Court has interceded even after the contract was entered into between the parties and the Government and its agencies. [...] Where the breach of contract involves breach of statutory obligation when the order complained of was made in exercise of statutory power by a statutory authority,* ***though cause of action arises out of or pertains to contract, brings it within the sphere of public law because the power exercised is apart from contract****. The freedom of the Government to enter into business with anybody it likes is subject to the condition of reasonableness and fair play as well as public interest. After entering into a contract, in cancelling the contract which is subject to terms of the statutory provisions, as in the present case, it cannot be said that the matter falls purely in a contractual field. Therefore, we do not think it would be appropriate to suggest that the case on hand is a matter arising purely out of a contract and, therefore, interference under Article 226 of the Constitution is not called for. This contention also stands rejected."*
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> (Emphasis supplied)

50. Similarly in ***Binny Ltd. & Anr. v. Sadasivan & Ors.*** reported in **(2005) 6 SCC 657** this Court in view of the increasing trend of the State and its instrumentalities to use contracts as a means for dispensing their regulatory functions, held that whenever a contract is used for

a public purpose, it will be amenable to judicial review. The relevant observations read as under: -

> *"30. A contract would not become statutory simply because it is for construction of a public utility and it has been awarded by a statutory body. But nevertheless, it may be noticed that the Government or government authorities at all levels are increasingly employing contractual techniques to achieve their regulatory aims. It cannot be said that the exercise of those powers are free from the zone of judicial review and that there would be no limits to the exercise of such powers, but in normal circumstances, judicial review principles cannot be used to enforce contractual obligations. When that contractual power is being used for public purpose, it is certainly amenable to judicial review. The power must be used for lawful purposes and not unreasonably."*
>
> (Emphasis supplied)

51. The decision of this Court in ***ABL International Ltd. v. Export Credit Guarantee Corporation of India Ltd.*** reported in **(2004) 3 SCC 553** is significant and was the turning point in the scope of judicial review in contractual matters. In this landmark ruling, this Court decisively laid down and approved that a relief against a State or its instrumentalities in matters related to contractual obligations can be sought under the writ jurisdiction. The relevant observations read as under: -

> *"23. It is clear from the above observations of this Court, once the State or an instrumentality of the State is a party of the contract, it has an obligation in law to act fairly, justly and reasonably which is the requirement of Article 14 of the Constitution of India. Therefore, if by the impugned repudiation of the claim of the appellants the first respondent as an instrumentality of the State has acted in contravention of the abovesaid requirement of Article 14, then we have no hesitation in holding that a writ court can issue suitable directions to set right the arbitrary actions of the first respondent.*
>
> *xxx xxx xxx*

27. From the above discussion of ours, the following legal principles emerge as to the maintainability of a writ petition:

(a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.

(b) Merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.

(c) A writ petition involving a consequential relief of monetary claim is also maintainable."

(Emphasis supplied)

52. At the same time, this Court in ***ABL*** (supra) cautioned that the power to issue writs under Article 226 being discretionary and plenary, the same should only be exercised to set right the arbitrary actions of the State or its instrumentality in matters related to contractual obligations. The relevant observations read as under: -

"28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power. (See Whirlpool Corpn. v. Registrar of Trade Marks) And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise the said jurisdiction."

(Emphasis supplied)

53. In ***Noble Resources Ltd. v. State of Orissa*** reported in **(2006) 10 SCC 236** this Court for the purposes of judicial review of contractual disputes recognized a distinction between a matter where the contract is at the threshold and at the stage of breach. It held that at the threshold, the court's scrutiny is more intrusive & expansive while at the stage of breach it is discretionary except where the action is found to be arbitrary or unreasonable. The relevant observations read as under: -

> *"15. It is trite that if an action on the part of the State is violative of the equality clause contained in Article 14 of the Constitution of India, a writ petition would be maintainable even in the contractual field. A distinction indisputably must be made between a matter which is at the threshold of a contract and a breach of contract; whereas in the former the court's scrutiny would be more intrusive, in the latter the court may not ordinarily exercise its discretionary jurisdiction of judicial review, unless it is found to be violative of Article 14 of the Constitution. While exercising contractual powers also, the government bodies may be subjected to judicial review in order to prevent arbitrariness or favouritism on their part. Indisputably, inherent limitations exist, but it would not be correct to opine that under no circumstances a writ will lie only because it involves a contractual matter."*
>
> (Emphasis supplied)

54. The law on the subject with which we are dealing was laid down exhaustively by this Court in its decision in ***Joshi Technologies International Inc. v. Union of India & Ors***. reported in **(2015) 7 SCC 728**, and the position was summarised as under: -

> *"69. The position thus summarised in the aforesaid principles has to be understood in the context of discussion that preceded which we have pointed out above. As per this, no doubt, there is no absolute bar to the maintainability of the writ petition even in contractual matters or where there are disputed questions of fact or even when monetary claim is raised. At the same time, discretion lies with the High Court which under certain circumstances, it can refuse to exercise. It also follows that under the following*

circumstances, "normally", the Court would not exercise such a discretion:

69.1. The Court may not examine the issue unless the action has some public law character attached to it.

69.2. Whenever a particular mode of settlement of dispute is provided in the contract, the High Court would refuse to exercise its discretion under Article 226 of the Constitution and relegate the party to the said mode of settlement, particularly when settlement of disputes is to be resorted to through the means of arbitration.

69.3. If there are very serious disputed questions of fact which are of complex nature and require oral evidence for their determination.

69.4. Money claims per se particularly arising out of contractual obligations are normally not to be entertained except in exceptional circumstances.

70. Further, the legal position which emerges from various judgments of this Court dealing with different situations/ aspects relating to contracts entered into by the State/ public authority with private parties, can be summarised as under:

70.1. At the stage of entering into a contract, the State acts purely in its executive capacity and is bound by the obligations of fairness.

70.2. State in its executive capacity, even in the contractual field, is under obligation to act fairly and cannot practise some discriminations.

70.3. Even in cases where question is of choice or consideration of competing claims before entering into the field of contract, facts have to be investigated and found before the question of a violation of Article 14 of the Constitution could arise. If those facts are disputed and require assessment of evidence the correctness of which can only be tested satisfactorily by taking detailed evidence, involving examination and cross-examination of witnesses, the case could not be conveniently or satisfactorily decided

in proceedings under Article 226 of the Constitution. In such cases the Court can direct the aggrieved party to resort to alternate remedy of civil suit, etc.

70.4. Writ jurisdiction of the High Court under Article 226 of the Constitution was not intended to facilitate avoidance of obligation voluntarily incurred.

70.5. Writ petition was not maintainable to avoid contractual obligation. Occurrence of commercial difficulty, inconvenience or hardship in performance of the conditions agreed to in the contract can provide no justification in not complying with the terms of contract which the parties had accepted with open eyes. It cannot ever be that a licensee can work out the licence if he finds it profitable to do so: and he can challenge the conditions under which he agreed to take the licence, if he finds it commercially inexpedient to conduct his business.

70.6. Ordinarily, where a breach of contract is complained of, the party complaining of such breach may sue for specific performance of the contract, if contract is capable of being specifically performed. Otherwise, the party may sue for damages.

70.7. Writ can be issued where there is executive action unsupported by law or even in respect of a corporation there is denial of equality before law or equal protection of law or if it can be shown that action of the public authorities was without giving any hearing and violation of principles of natural justice after holding that action could not have been taken without observing principles of natural justice.

70.8. If the contract between private party and the State/ instrumentality and/or agency of the State is under the realm of a private law and there is no element of public law, the normal course for the aggrieved party, is to invoke the remedies provided under ordinary civil law rather than approaching the High Court under Article 226 of the Constitution of India and invoking its extraordinary jurisdiction.

70.9. The distinction between public law and private law element in the contract with the State is getting blurred.

However, it has not been totally obliterated and where the matter falls purely in private field of contract, this Court has maintained the position that writ petition is not maintainable. The dichotomy between public law and private law rights and remedies would depend on the factual matrix of each case and the distinction between the public law remedies and private law field, cannot be demarcated with precision. In fact, each case has to be examined, on its facts whether the contractual relations between the parties bear insignia of public element. Once on the facts of a particular case it is found that nature of the activity or controversy involves public law element, then the matter can be examined by the High Court in writ petitions under Article 226 of the Constitution of India to see whether action of the State and/or instrumentality or agency of the State is fair, just and equitable or that relevant factors are taken into consideration and irrelevant factors have not gone into the decision making process or that the decision is not arbitrary.

70.10. Mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirements of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness.

70.11. The scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes."

(Emphasis supplied)

55. Thereafter, this Court in its decision in ***M.P. Power Management Co. Ltd., Jabalpur v. Sky Power Southeast Solar India Pvt. Ltd. & Ors.*** reported in **(2023) 2 SCC 703** exhaustively delineated the scope of judicial review of the courts in contractual disputes concerning public authorities. The aforesaid decision is in the following parts: -

i. Scope of Judicial Review in matters pertaining to Contractual Disputes: -

This Court held that the earlier position of law that all rights against any action of the State in a non-statutory contract would be governed by the contract alone and thus not amenable to the writ jurisdiction of the courts is no longer a good law in view of the subsequent rulings. Although writ jurisdiction is a public law remedy, yet a relief would still lie under it if it is sought against an arbitrary action or inaction of the State, even if they arise from a non-statutory contract. The relevant observations read as under: -

> *"53. [...] when the offending party is the State. In other words, the contention is that the law in this field has witnessed an evolution and, what is more, a revolution of sorts and a transformatory change with a growing realisation of the true ambit of Article 14 of the Constitution of India. The State, he points out, cannot play the Dr. Jekyll and Hyde game anymore. Its nature is cast in stone. Its character is inflexible. This is irrespective of the activity it indulges in. It will continue to be haunted by the mandate of Article 14 to act fairly. There has been a stunning expansion of the frontiers of the Court's jurisdiction to strike at State action in matters arising out of contract, based, undoubtedly, on the facts of each case. It remains open to the Court to refuse to reject a case, involving State action, on the basis that the action is, per se, arbitrary.*
>
> *[...] i. It is, undoubtedly, true that the writ jurisdiction is a public law remedy. A matter, which lies entirely within a private realm of affairs of public body, may not lend itself for being dealt with under the writ jurisdiction of the Court.*
>
> *ii. The principle laid down in Bareilly Development Authority (supra) that in the case of a non statutory contract the rights are governed only by the terms of the contract and the decisions, which are purported to be followed, including*

Radhakrishna Agarwal (supra), may not continue to hold good, in the light of what has been laid down in ABL (supra) and as followed in the recent judgment in Sudhir Kumar Singh (supra).

iii. *The mere fact that relief is sought under a contract which is not statutory, will not entitle the respondent-State in a case by itself to ward-off scrutiny of its action or inaction under the contract, if the complaining party is able to establish that the action/ inaction is, per se, arbitrary."*

(Emphasis supplied)

(ii) Exercise of Writ Jurisdiction in disputes at the stage prior to the Award of Contract: -

An action under a writ will lie even at the stage prior to the award of a contract by the State wherever such award of contract is imbued with procedural impropriety, arbitrariness, favouritism or without any application of mind. In doing so, the courts may set-aside the decision which is found to be vitiated for the reasons stated above but cannot substitute the same with its own decision. The relevant observations read as under: -

"iv. An action will lie, undoubtedly, when the State purports to award any largesse and, undoubtedly, this relates to the stage prior to the contract being entered into [See R.D. Shetty (supra)]. This scrutiny, no doubt, would be undertaken within the nature of the judicial review, which has been declared in the decision in Tata Cellular vs. Union of India."

(Emphasis supplied)

(iii) Exercise of Writ Jurisdiction after the Contract comes into Existence: -

This court held that even after the contract comes into existence an action may lie by way of a writ to either (I) obviate an arbitrary or unreasonable action on part of the State or (II) to call upon it to honour its obligations unless there is a serious or genuine

dispute as regards the liability of the State from honouring such obligation. Existence of an alternative remedy or a disputed question of fact may be a ground to not entertain the parties in a writ as long as it is not being used as smokescreen to defeat genuine claims of public law remedy. The relevant observations read as under: -

> *"v. After the contract is entered into, there can be a variety of circumstances, which may provide a cause of action to a party to the contract with the State, to seek relief by filing a Writ Petition.*
>
> *vi. Without intending to be exhaustive, it may include the relief of seeking payment of amounts due to the aggrieved party from the State. The State can, indeed, be called upon to honour its obligations of making payment, unless it be that there is a serious and genuine dispute raised relating to the liability of the State to make the payment. Such dispute, ordinarily, would include the contention that the aggrieved party has not fulfilled its obligations and the Court finds that such a contention by the State is not a mere ruse or a pretence.*
>
> *vii. The existence of an alternate remedy, is, undoubtedly, a matter to be borne in mind in declining relief in a Writ Petition in a contractual matter. Again, the question as to whether the Writ Petitioner must be told off the gates, would depend upon the nature of the claim and relief sought by the petitioner, the questions, which would have to be decided, and, most importantly, whether there are disputed questions of fact, resolution of which is necessary, as an indispensable prelude to the grant of the relief sought. Undoubtedly, while there is no prohibition, in the Writ Court even deciding disputed particularly when questions the dispute of fact, surrounds demystifying of documents only, the Court*

may relegate the party to the remedy by way of a civil suit.

viii. *The existence of a provision for arbitration, which is a forum intended to quicken the pace of dispute resolution, is viewed as a near bar to the entertainment of a Writ Petition (See in this regard, the view of this Court even in ABL (supra) explaining how it distinguished the decision of this Court in State of U.P. and others v. Bridge & Roof Co., by its observations in paragraph-14 in ABL (supra)].*

ix. *The need to deal with disputed questions of fact, cannot be made a smokescreen to guillotine a genuine claim raised in a Writ Petition, when actually the resolution of a disputed question of fact is unnecessary to grant relief to a writ applicant.*

x. *The reach of Article 14 enables a Writ Court to deal with arbitrary State action even after a contract is entered into by the State. A wide variety of circumstances can generate causes of action for invoking Article 14. The Court's approach in dealing with the same, would be guided by, undoubtedly, the overwhelming need to obviate arbitrary State action, in cases where the Writ remedy provides an effective and fair means of preventing miscarriage of justice arising from palpably unreasonable action by the State."*

(Emphasis supplied)

(iv) Exercise of Writ Jurisdiction after Termination or Breach of the Contract: -

A relief by way of a writ under Article 226 of the Constitution will also lie against a termination or a breach of a contract, wherever such action is found to either be palpably unauthorized or arbitrary. Before turning away the parties to the remedy of civil suit, the courts must be mindful to see whether such termination or breach was within the contractual domain or

whether the State was merely purporting to exercise powers under the contract for any ulterior motive. Any action of the State to cancel or terminate a contract which is beyond the terms agreed thereunder will be amenable to the writ jurisdiction to ascertain if such decision is imbued with arbitrariness or influenced by any extraneous considerations. The relevant observations read as under: -

> *"xi. Termination of contract can again arise in a wide variety of situations. If for instance, a contract is terminated, by a person, who is demonstrated, without any need for any argument, to be the person, who is completely unauthorised to cancel the contract, there may not be any necessity to drive the party to the unnecessary ordeal of a prolix and avoidable round of litigation. The intervention by the High Court, in such a case, where there is no dispute to be resolved, would also be conducive in public interest, apart from ensuring the Fundamental Right of the petitioner under Article 14 of the Constitution of India. When it comes to a challenge to the termination of a contract by the State, which is a non-statutory body, which is acting in purported exercise of the powers/ rights under such a contract, it would be over simplifying a complex issue to lay down any inflexible Rule in favour of the Court turning away the petitioner to alternate Fora. Ordinarily, the cases of termination of contract by the State, acting within its contractual domain, may not lend itself for appropriate redress by the Writ Court. This is, undoubtedly, so if the Court is duty-bound to arrive at findings, which involve untying knots, which are presented by disputed questions of facts. Undoubtedly, in view of ABL Limited (supra), if resolving the dispute, in a case of repudiation of a contract, involves only appreciating the true scope of documentary material in the light of pleadings, the Court*

may still grant relief to an applicant. We must enter a caveat. The Courts are today reeling under the weight of a docket explosion, which is truly alarming. If a case involves a large body of documents and the Court is called upon to enter upon findings of facts and involves merely the construction of the document, it may not be an unsound discretion to relegate the party to the alternate remedy. This is not to deprive the Court of its constitutional power as laid down in ABL (supra). It all depends upon the facts of each case as to whether, having regard to the scope of the dispute to be resolved, whether the Court will still entertain the petition.

xii. *In a case the State is a party to the contract and a breach of a contract is alleged against the State, a civil action in the appropriate Forum is, undoubtedly, maintainable. But this is not the end of the matter. Having regard to the position of the State and its duty to act fairly and to eschew arbitrariness in all its actions, resort to the constitutional remedy on the cause of action, that the action is arbitrary, is permissible (See in this regard Kumari Shrilekha Vidyarthi and others v. State of U.P. and others). However, it must be made clear that every case involving breach of contract by the State, cannot be dressed up and disguised as a case of arbitrary State action. While the concept of an arbitrary action or inaction cannot be cribbed or confined to any immutable mantra, and must be laid bare, with reference to the facts of each case, it cannot be a mere allegation of breach of contract that would suffice. What must be involved in the case must be action/inaction, which must be palpably unreasonable or absolutely irrational and bereft of any principle. An action, which is completely malafide, can hardly be described as a fair action and may, depending on the facts, amount to*

arbitrary action. The question must be posed and answered by the Court and all we intend to lay down is that there is a discretion available to the Court to grant relief in appropriate cases."

(Emphasis supplied)

(v) Other relevant considerations for Exercise of Writ Jurisdiction: -

Lastly, this Court held that the courts may entertain a contractual dispute under its writ jurisdiction where **(I)** there is any violation of natural justice or **(II)** where doing so would serve the public interest or **(III)** where though the facts are convoluted or disputed, but the courts have already undertaken an in-depth scrutiny of the same provided that the it was pursuant to a sound exercise of its writ jurisdiction. The relevant observations read as under: -

"xiii. A lodestar, which may illumine the path of the Court, would be the dimension of public interest subserved by the Court interfering in the matter, rather than relegating the matter to the alternate Forum.

xiv. Another relevant criteria is, if the Court has entertained the matter, then, while it is not tabooed that the Court should not relegate the party at a later stage, ordinarily, it would be a germane consideration, which may persuade the Court to complete what it had started, provided it is otherwise a sound exercise of jurisdiction to decide the matter on merits in the Writ Petition itself.

xv. Violation of natural justice has been recognised as a ground signifying the presence of a public law element and can found a cause of action premised on breach of Article 14. [See Sudhir Kumar Singh and Others (supra)]."

(Emphasis supplied)

56. What can be discerned from the above is that there has been a considerable shift in the scope of judicial review of the court when it

comes to contractual disputes where one of the parties is the State or its instrumentalities. In view of the law laid down by this Court in ***ABL*** (supra), ***Joshi Technologies*** (supra) and in ***M.P. Power*** (supra), it is difficult to accept the contention of the respondent that the writ petition filed by the appellant before the High Court was not maintainable and the relief prayed for was rightly declined by the High Court in exercise of its Writ jurisdiction. Where State action is challenged on the ground of being arbitrary, unfair or unreasonable, the State would be under an obligation to comply with the basic requirements of Article 14 of the Constitution and not act in an arbitrary, unfair and unreasonable manner. This is the constitutional limit of their authority. There is a jural postulate of good faith in business relations and undertakings which is given effect to by preventing arbitrary exercise of powers by the public functionaries in contractual matters with private individuals. With the rise of the Social Service State more and more public-private partnerships continue to emerge, which makes it all the more imperative for the courts to protect the sanctity of such relations.

57. It is needless to state that in matters concerning specific modalities of the contract — such as required work, execution methods, material quality, timeframe, supervision standards, and other aspects impacting the tender's purpose — the court usually refrains from interference. State authorities, like private individuals, have a consensual element in contract formation. The stipulations or terms in the underlying contract purpose are part of the consensual aspect, which need not be entertained by the courts in writ jurisdiction and the parties may be relegated to ordinary private law remedy. Judicial review does not extend to fixing contract stipulations but ensures that the public authorities act within their authority to prevent arbitrariness.

58. Thus, the demarcation between a private law element and public law element in the context of contractual disputes if any, may be assessed by ascertaining whether the dispute or the controversy pertains to the consensual aspect of the contract or tender in question or not. Judicial review is permissible to prevent arbitrariness of public authorities and to ensure that they do not exceed or abuse their powers in contractual transactions and requires overseeing the administrative power of public authorities to award or cancel contracts or any of its stipulations.

59. Therefore, what can be culled out from the above is that although disputes arising purely out of contracts are not amenable to writ jurisdiction yet keeping in mind the obligation of the State to act fairly and not arbitrarily or capriciously, it is now well settled that when contractual power is being used for public purpose, it is certainly amenable to judicial review.

60. Now coming to the facts of the case at hand, the appellant has challenged the cancellation of the tender at the instance of the respondent on the ground of being manifestly arbitrary and influenced by extraneous considerations. It is evident from the notice of cancellation dated 07.02.2023, that the tender was not terminated pursuant to any terms of the contract subsisting between the parties, rather, the respondent 'cancelled' the tender saying that there was technical fault in the tender that was floated.

61. Thus, the respondent could be said to have exercised powers in its executive capacity as the action to cancel the tender falls outside the purview of the terms of the contract. Hence, it cannot be said that the present matter is purely a contractual dispute. It is also not a breach of contract, as no such breach has been imputed to the appellant in terms of the contract, but rather a plain and simple exercise of the executive powers.

62. Thus, the present dispute even if related to a tender, cannot be termed as a pure contractual dispute, as the dispute involves a public law element. Although there is no discharge of a public function by the respondent towards the appellant yet there is a right to public law action vested in him against the respondent in terms of Article 14 of the Constitution. This is because the exercise of the executive power by it in the contractual domain i.e., the cancelling of the tender carries a corresponding public duty to act in a reasonable and rationale manner. Thus, we find that the writ petition filed by the respondent was maintainable and the relief prayed for could have been considered by the High Court in exercise of its writ jurisdiction.

c. Meaning and True Import of Arbitrariness of State Actions in Contractual Disputes.

63. In ***Ramana Dauaram Shetty v. The International Airport Authority of India & Ors.*** reported in **AIR 1979 SC 1628** this Court held that the actions of the State in contractual matters must conform

to some standard or norms which is rational, non-discriminatory and not guided by extraneous considerations, otherwise the same would be in violation of Article 14 of the Constitution. The relevant observations read as under: -

> *"This rule also flows directly from the doctrine of equality embodied in Article 14. It is now well settled as a result of the decisions of this Court in E.P. Royappa v. State of Tamil Nadu, A.I.R. 1974 S.C. 555 and Maneka Gandhi v. Union of India, A.I.R. 1978 S.C. 597 that Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. It requires that State action must not be arbitrary but must be based on some rational and relevant principle which is non discriminatory; it must not be guided by any extraneous or irrelevant consideration, because that would be denial of equality. The principle of reasonableness and rationality which is legally as well as philosophically an essential element of equality or non-arbitrariness is projected by Article 14 and it must characterise every State action, whether it be under authority of law or in exercise of executive power without making of law. The State cannot, therefore, act arbitrarily in entering into relationship, contractual or otherwise with a third party, but its action must conform to some standard or norm which is rational and non-discriminatory."*
>
> (Emphasis supplied)

64. In ***Dwarkadas Marfatia & Sons*** (supra) this Court speaking through Sabyasachi Mukherji, CJ. (as the learned Chief Justice then was) held that every action of the State or an instrumentality of the State must be informed by reason.....actions uninformed by reason may be questioned as arbitrary. The relevant observations read as under: -

> *"22. [...] every action of the State or as instrumentality of the State, must be informed by reason. Indubitably, the respondent is an organ of the State under Article 12 of the Constitution. In appropriate cases, as was observed in the last mentioned decision, actions uninformed by reason may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution. But it has to be remembered that Article 14 cannot be construed as a*

charter for judicial review of State action, to call upon the State to account for its actions in its manifold activities by stating reasons for such actions."

(Emphasis supplied)

65. The meaning and true import of arbitrariness is more easily visualized than precisely stated or defined. The question, whether an impugned action is arbitrary or not, is ultimately to be answered on the facts and in the circumstances of a given case. An obvious test to apply is to see whether there is any discernible principle emerging from the impugned act and if so, does it satisfy the test of reasonableness. Where a mode is prescribed for doing an act and there is no impediment in following that procedure, the performance of the act otherwise and in a manner which does not disclose any discernible principle which is reasonable, may itself attract the vice of arbitrariness. Every State action must be informed by reason and it follows that an act uninformed by reason, is arbitrary. Rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom the governance is entrusted for the time being. It is trite that be you ever so high, the laws are above you.

66. Control of administrative discretion is an important concern in the development of Rule of Law. According to Wade and Forsyth, the Rule of Law has four meanings, and one of them is that "government should be conducted within a framework of recognized rules and principles which restrict discretionary power".

67. To enthuse efficiency in administration, a balance between accountability and autonomy of action should be carefully maintained. Overemphasis on either would impinge upon public efficiency. But undermining the accountability would give immunity or carte blanche power to act as it pleases with the public at whim or vagary. Whether the public authority acted bona fide would be gauged from the impugned action and attending circumstances. The authority should justify the action assailed on the touchstone of justness, fairness and reasonableness. Test of reasonableness is more strict. The public authorities should be duty conscious rather than power charged. Its actions and decisions which touch the common man have to be tested on the touchstone of fairness and justice. That which is not fair and just is unreasonable. And what is unreasonable is arbitrary. An arbitrary action is ultra vires. It does not become bona fide and in

good faith merely because no personal gain or benefit to the person exercising discretion has been established. An action is mala fide if it is contrary to the purpose for which it was authorised to be exercised. Dishonesty in discharge of duty vitiates the action without anything more. An action is bad even without proof of motive of dishonesty, if the authority is found to have acted contrary to reason. [See: ***Mahesh Chandra v. Regional Manager, U.P. Financial Corporation & Ors.*** : **(1993) 2 SCC 279**]

68. The dictum as laid in ***Tata Cellular v. UOI*** reported in **(1994) 6 SCC 651** is that the judicial power of review is exercised to rein in any unbridled executive functioning. It was observed that the restraint has two contemporary manifestations viz. one is the ambit of judicial intervention and the other covers the scope of the court's ability to quash an administrative decision on its merits. These restraints bear the hallmarks of judicial control over administrative action. It was held that the principle of judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision-making process itself. It was held that the principle of judicial review would apply to the exercise of contractual powers by the Government bodies in order to prevent arbitrariness or favouritism. It was held that the duty of the court is to confine itself to the question of legality and its concern should be whether a decision-making authority exceeded its powers; whether it committed an error of law or committed a breach of the rules of natural justice or reached a decision which no reasonable tribunal would have reached or, abused its powers. The grounds upon which an administrative action can be subjected to judicial review are classified as illegality, irrationality and procedural impropriety. In that very decision, while deducing the principles from various cases referred, it was held that the modern trend points to judicial restraint in administrative action; that the Court does not sit as a court of appeal but merely reviews the manner in which the decision was made; that the court does not have the expertise to correct the administrative decision and if a review of the administrative decision is permitted, it will be substituting its own decision, without the necessary expertise which itself may be fallible; that the terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract; and, that the government must have freedom of contract, i.e. a free-play in the joints is a necessary concomitant

for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness, but must be free from arbitrariness not affected by bias or actuated by *mala fides*. Moreover, quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

69. To ascertain whether an act is arbitrary or not, the court must carefully attend to the facts and the circumstances of the case. It should find out whether the impugned decision is based on any principle. If not, it may unerringly point to arbitrariness. If the act betrays caprice or the mere exhibition of the whim of the authority it would sufficiently bear the insignia of arbitrariness. In this regard supporting an order with a rationale which in the circumstances is found to be reasonable will go a long way to repel a challenge to State action. No doubt the reasons need not in every case be part of the order as such. If there is absence of good faith and the action is actuated with an oblique motive, it could be characterised as being arbitrary. A total non-application of mind without due regard to the rights of the parties and public interest may be a clear indicator of arbitrary action.

70. One another way, to assess whether an action complained of could be termed as arbitrary is by way of scrutinizing the reasons that have been assigned to such an action. It involves overseeing whether the reasons which have been cited if at all genuinely formed part of the decision-making process or whether they are merely a ruse. All decisions that are taken must earnestly be in lieu of the reasons and considerations that have been assigned to it. The Court must be mindful of the fact that it is not supposed to delve into every minute details of the reasoning assigned, it need not to go into a detailed exercise of assessing the pros and cons of the reasons itself, but should only see whether the reasons were earnest, genuine and had a rationale with the ultimate decision. What is under scrutiny in judicial review of an action is the decision-making process and whether there is any element of arbitrariness or *mala fide*.

71. Thus, the question to be answered in such situations is whether the decision was based on valid considerations. This is undertaken to ensure that the reasons assigned were the true motivations behind the action and it involves checking for the presence of any ulterior

motives or irrelevant considerations that might have influenced the decision. The approach of the court must be to respect the expertise and discretion of administrative authorities while still protecting against arbitrary and capricious actions. Thus, now the only question that remains to be considered is whether the action of the respondent to cancel the tender could be termed as arbitrary?

ii. Whether the action of cancelling the tender is arbitrary or unfair and in consequence of violation of Article 14 of the Constitution?

72. The principal contention of the appellant is that the notice of cancellation dated 07.02.2023 that was issued by the respondent is manifestly arbitrary, unreasonable and influenced by *mala fide* and extraneous considerations.

73. Before we proceed to determine whether the cancellation of tender could be termed as arbitrary, it is necessary to understand the stance of the respondent in the present litigation, as discernible from their pleadings, which has left us quite perplexed. The argument of the respondent is two-fold: -

(i) ***First,*** that the tender had to be cancelled as there was a technical fault. The tender was found to be 'non-specific' & 'not well defined' as a result it created ambiguity resulting in financial losses to the respondent.

(ii) ***Secondly,*** the cancellation was also on account of a change in policy whereby, the operation & maintenance of the concerned underpasses had been handed over to another authority.

74. The primary thrust of the respondent's contention is that the decision to cancel the tender was taken in view of the technical faults in the same, more particularly the ambiguity as to whether the advertisement boards could be put up beyond the area of the concerned underpasses.

75. The learned Single Judge of the High Court in its order dated 24.04.2023 observed that there was an ambiguity in the Special Terms & Conditions of the Memorandum of Tender more particularly clauses 10 and 14 respectively which gave rise to a conflicting interpretation as to the placement of the signboards. This in the opinion of the High Court was a technical fault, which the respondent sought to

rectify by way of cancelling the tender. The relevant observations read as under: -

> *"18. [...] In fact, the letter of cancellation provides further reasons, namely, that the tender has been found to be non-specific and having technical faults. This would also be borne out from clauses 10 and 14 of the Special Terms and Conditions of the tender document which give rise to conflicting interpretations on the placement of the signboards. Hence, besides the administrative decision to hand over the maintenance of E.M. Bypass from KMDA to KMC, the respondent KMDA as the tendering authority, has a right to rectify the ambiguities in the bid document by cancelling the same."*
>
> (Emphasis supplied)

76. However, interestingly, the Notice of Cancellation dated 07.02.2023 that came to be issued by the respondent makes no mention of any such lacuna. In fact, there is no reference to the aforementioned clauses or any conflict in their interpretation. The aforesaid notice only states that the tender was found to be 'non-specific' and 'not well defined' which created ambiguity due to which the respondent is incurring losses, and nothing is stated either about the ambiguity in putting up the advertisement boards or for that matter which aspect of the tender is non-specific.

77. It is also apposite to mention that just a month prior to cancelling the tender, the respondent on 24.01.2023 issued a notice to the appellant, asking him to stop all work in respect of the tender. Remarkably, in the said notice, there is no whisper about there being any of the aforementioned technical faults in the tender floated by the respondent. In fact, a close reading of the aforesaid notice would reveal that the orders to stop the work had been issued for an altogether different reason – i.e., handing over of the operation & maintenance of the concerned underpasses to another authority i.e., KMC.

a. Scrutiny of Internal File-Notings and Deliberations of the State.

78. The appellant has in particular placed reliance on various notings made in the internal file of the respondent in respect of the tender to

contend that the cancellation of the same was arbitrary and influenced by extraneous considerations. The respondent on the other hand submitted that the internal file-notings cannot be used or relied upon to impute any ill-motives to the decision of cancelling the tender as they only reflect the opinion of a particular individual and cannot be construed or interpreted as the decision of the respondent. In this regard, reliance has been placed on the following decisions: -

i. ***Pimpri Chinchwad New Township Development Authority v. Vishnudev Coop. Housing Society*** : **(2018) 8 SCC 215**.

ii. ***Shanti Sports Club v. Union of India*** : **(2009) 15 SCC 705.**

79. This Court in its decision in ***Bachhittar Singh v. State of Punjab & Anr.*** reported in **AIR 1963 SC 395** held that merely because something was written in the internal files and notesheet does not amount to an order, it at best is an expression of opinion which may be changed, and it only becomes an order when such opinion is formally made into a decision. The relevant observations read as under: -

> *"9. The question, therefore, is whether he did in fact make such an order. Merely writing something on the file does not amount to an order. Before something amounts to an order of the State Government two things are necessary. The order has to be expressed in the name of the Governor as required by clause (1) of Article 166 and then it has to be communicated. As already indicated, no formal order modifying the decision of the Revenue Secretary was ever made. Until such an order is drawn up the State Government cannot, in our opinion, be regarded as bound by what was stated in the file. [...]*
>
> *10. The business of State is a complicated one and has necessarily to be conducted through the agency of a large number of officials and authorities. The Constitution, therefore, requires and so did the Rules of Business framed by the Rajpramukh of PEPSU provide, that the action must be taken by the authority concerned in the name of the Rajpramukh. It is not till this formality is observed that the action can be regarded as that of the State or here, by the Rajpramukh. [...] Indeed, it is possible that after expressing one opinion about a particular matter at*

> *a particular stage a Minister or the Council of Ministers may express quite a different opinion, one which may be completely opposed to the earlier opinion. Which of them can be regarded as the "order" of the State Government? Therefore, to make the opinion amount to a decision of the Government it must be communicated to the person concerned."*
>
> (Emphasis supplied)

[See also: ***Delhi Development Authority v. Hello Home Education Society*** : **(2024) 3 SCC 148** at para 17 ***Mahadeo & Ors. v. Sovan Devi & Ors.*** : **(2023) 10 SCC 807** at paras 15-17; ***Municipal Committee, Barwala v. Jai Narayan and Co. & Anr.*** : **(2022) SCC OnLine 376** at para 16]

80. In ***Sethi Auto Service Station*** v. ***DDA*** reported in ***(2009) 1 SCC 180*** this Court held that notings in a departmental file are nothing more than an opinion by an officer for internal use and consideration of other officials for the final decision making. The relevant observations read as under: -

> "*14. It is trite to state that notings in a departmental file do not have the sanction of law to be an effective order. A noting by an officer is an expression of his viewpoint on the subject. It is no more than an opinion by an officer for internal use and consideration of the other officials of the department and for the benefit of the final decision-making authority. Needless to add that internal notings are not meant for outside exposure. Notings in the file culminate into an executable order, affecting the rights of the parties, only when it reaches the final decision-making authority in the department, gets his approval and the final order is communicated to the person concerned.*"
>
> (Emphasis supplied)

81. In ***Shanti Sports Club*** (supra) several representations were made by the landowners requesting to release their land from acquisition. After considering those representations, the concerned minister recorded in the note file that the land should be denotified on suitable terms and left the final decision to his successor. The new minister, however, rejected the request for denotification. Consequently, writ

petitions were filed, seeking the release of the land based on the note file. This Court held that the notings recorded in the official files do not become decisions and confer no right unless the same are sanctified, authenticated and communicated in the prescribed manner. It further held that any recording in the note-file can always be reviewed, reversed or overruled. The relevant observations read as under: -

> *"43. A noting recorded in the file is merely a noting simpliciter and nothing more. It merely represents expression of opinion by the particular individual. By no stretch of imagination, such noting can be treated as a decision of the Government. Even if the competent authority records its opinion in the file on the merits of the matter under consideration, the same cannot be termed as a decision of the Government unless it is sanctified and acted upon by issuing an order in accordance with Articles 77(1) and (2) or Articles 166(1) and (2). The noting in the file or even a decision gets culminated into an order affecting right of the parties only when it is expressed in the name of the President or the Governor, as the case may be, and authenticated in the manner provided in Article 77(2) or Article 166(2). A noting or even a decision recorded in the file can always be reviewed/reversed/overruled or overturned and the court cannot take cognizance of the earlier noting or decision for exercise of the power of judicial review.*
>
> *xxx xxx xxx*
>
> *52. As a result of the above discussion, we hold that the notings recorded in the official files by the officers of the Government at different levels and even the Ministers do not become decisions of the Government unless the same is sanctified and acted upon by issuing an order in the name of the President or Governor, as the case may be, authenticated in the manner provided in Articles 77(2) and 166(2) and is communicated to the affected persons. The notings and/or decisions recorded in the file do not confer any right or adversely affect the right of any person and the same can neither be challenged in a court nor made basis*

for seeking relief. Even if the competent authority records a noting in the file, which indicates that some decision has been taken by the authority concerned, the same can always be reviewed by the same authority or reversed or overturned or overruled by higher functionary/authority in the Government."

(Emphasis supplied)

[See also: ***State of Uttaranchal v. Sunil Kumar Vaish*** : **(2011) 8 SCC 670** at para 24]

82. In ***Pimpri Chinchwad*** (supra), a revenue minister passed an order for deletion of the land of the respondent therein from acquisition proceeding, but the said order was never communicated, however, the same was mentioned in the internal note file. Sometime later, the government decided to reconsider all uncommunicated orders. As a result the respondents therein filed a writ seeking implementation of the order as mentioned in the internal note-file. This Court held that the notings in official files of the government are an internal matter and carry no legal sanctity unless they are approved and duly communicated as per the prescribed procedure. It is only when such notings are translated into formal decisions, they would create some right or claim in favour of a person. The relevant observations read as under: -

"36. [...] first, a mere noting in the official files of the Government while dealing with any matter pertaining to any person is essentially an internal matter of the Government and carries with it no legal sanctity; second, once the decision on such issue is taken and approved by the competent authority empowered by the Government in that behalf, it is required to be communicated to the person concerned by the State Government. In other words, so long as the decision based on such internal deliberation is not approved and communicated by the competent authority as per the procedure prescribed in that behalf to the person concerned, such noting does not create any right in favour of the person concerned nor it partake the nature of any legal order so as to enable the person concerned to claim any benefit of any such

internal deliberation. Such noting(s) or/and deliberation(s) are always capable of being changed or/and amended or/and withdrawn by the competent authority."

(Emphasis supplied)

83. We are of the view that the reliance on the part of the respondent on the decisions of this Court in ***Pimpri Chinchwad*** (supra) and ***Shanti Sports Club*** (supra) to assert that no reference could be made to the internal-file notings for the purposes of judicial review of its decision is completely misplaced. In ***Shanti Sports Club*** (supra) the question before the Court was as to when an internal noting can be used to confer or claim a right. Whereas in ***Pimpri Chinchwad*** (supra) the issue for consideration before the Court was whether any internal-note or deliberation once written in the files was capable of being reconsidered, changed, modified or withdrawn.

84. None of the aforementioned decisions lay down that the courts are completely precluded from appraising or scrutinizing the internal file notings and deliberations for the purposes of judicial review of a decision. This Court in ***Pimpri Chinchwad*** (supra) and ***Shanti Sports Club*** (supra) only went so far as to say that as long as the deliberations in the internal file notings have not been formalized into an official decision, the same cannot be relied upon to claim any right.

85. We are of the considered opinion that once a decision has been officially made through proper means and channel, any internal deliberations or file notings that formed a part of that decision-making process can certainly be looked into by the Court for the purposes of judicial review in order to satisfy itself of the impeccability of the said decision.

86. In the aforesaid context, we may refer to the decision of this Court in ***State of Bihar v. Kripalu Shankar*** reported in **(1987) 3 SCC 34**, wherein it was held that the internal file notings reflect the views and line of thinking of a particular officer. It further held that such views would amount to disobedience or contempt of court only when they are translated into a formal decision. The relevant observations read as under: -

"11. After this finding, the High Court held some of the officers of the government guilty solely on the basis of the

views expressed by them in the files, which were not, in fact, accepted by the Government and which were only at the stage of suggestions and views. Shri K.K. Venugopal, the learned Counsel for the State contended that it would be unsafe to initiate action in contempt merely on the strength or notings by officials on the files, expressing their views and to do so would imperil the working of various departments in a Government in a democracy and would have far-reaching consequences. Sometimes a view expressed by an officer may be incorrect. The view so expressed passes through various hands and gets translated into action only at the ultimate stage. The views so expressed are only for internal use. Such views may indicate the line of thinking of a particular officer. Until the views so expressed culminate into an executable order, the question of disobedience of court's order does not arise. Though the State Government have been found not guilty, the State has filed the appeal to protect its officers from independent and fearless expression of opinion and to see that the order under appeal does not affect the proper functioning of the Government."

(Emphasis supplied)

87. The above observations of this Court fortify our view that once a decision is made, all opinions and deliberations pertaining to the said decision in the internal file-notings become a part of the process by which the decision is arrived at, and can be looked into for the purposes of judicial review. In other words, any internal discussions or notings that have been approved and formalized into a decision by an authority can be examined to ascertain the reasons and purposes behind such decisions for the overall judicial review of such decision-making process and whether it conforms to the principles enshrined in Article 14 of the Constitution.

88. One another reason why the respondent cannot claim that its internal file-notings fall outside the purview of judicial review of the courts is in view of the inviolable rule that came to be recognized by this Court in ***Ramana Dayaram Shetty*** (supra) wherein it was held that an executive authority must be rigorously held to the standard by which it professes its actions to be judged. The relevant observations read as under: -

> *"10. [...] It is a well-settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them. [...]"*
>
> (Emphasis supplied)

89. The aforesaid leaves no manner of doubt in our mind that if the purported action of cancelling the tender is claimed to have been taken in view of certain technical faults in the same or even a change in policy the same ought to be clearly reflected from its internal file notings as-well, pursuant to which the purported decision was taken.

90. We have gone through the internal file-notings of the respondent on the aforesaid tender wherein the entire internal deliberations of the KMDA officials as to the tender for work have been recorded. In the entire records – right from the time the Notice Inviting Tender was being formulated till the issuance of the final Notice of Cancellation dated 07.02.2023, there is no whisper of any particular clauses of the tender that was floated nor of any conflict or technical fault in the same, as claimed by the respondent.

91. We are in *seisin* of the fact that although the internal-file notings mention about the policy change in the operation and maintenance of the concerned underpasses, yet a careful reading of the same reveals that the cancellation of the tender for work was neither due to any technical fault nor due to the policy change in the operation and maintenance of the concerned underpasses but was for altogether a different reason.

92. As per Note #91 dated 30.12.2022 of the file-notings, when the Order dated 01.12.2022 of the Urban Development and Municipal Affairs Department came to be passed whereby the maintenance was handed over to KMC, it was the Minister-In-Charge as the Chairperson of the respondent authority – who suggested that in view of the change in scenario the tender be cancelled. In the aforesaid note, the following has been recorded - "*Recently maintenance of EM Bye pass has been handed over to KMC. Thus, in this changed scenario we may cancel the work order*".

93. The words "*may cancel the work order*" clearly indicate, that the respondent at that stage by no means was of the opinion that the

tender was required to be cancelled, as no specific reasons had been assigned as to what effect the policy change had impacted the feasibility or practicality of the tender. This is especially because, none of the officials of the respondent suggested that the tender be cancelled, rather it was the concerned minister who did so.

94. In Note #95 dated 10.01.2023 it has been clearly recorded by the officials of the respondent that it was the competent authority of the KMDA that instructed to cancel the tender in view of the aforesaid change in the policy. However, since the officials of the respondent were in doubt regarding the legality of such action, it insisted on first obtaining the advice or opinion from its legal cell before proceeding further. Furthermore, the aforesaid note clearly indicates that the work stop order had to be issued only with a view to comply with the instructions of the competent authority while it decided upon the aspect of cancellation of the tender.

95. In Note #97, the respondent has recorded the following – "*There is no different opinion than to get this cancelled, once this has been decided by the Authority but a legal opinion may be sought for avoiding further litigations*". This also clearly indicates that as the competent authority had decided that the tender be cancelled, the officials of the respondent had no other choice but to cancel the tender. However, the respondent continued insisting on first obtaining the opinion from its legal cell before cancelling the same.

96. However, thereafter, as per Note #108 dated 24.01.2023 it is apparent that the concerned minister during his visit specifically instructed the officials of the respondent to cancel the tender. Pursuant to which, the respondent as per Note #109 dated 02.02.2023 immediately convened a meeting to undertake the steps for cancellation even though the advice from the legal cell had yet to be obtained. It thereafter prepared a proposal for cancellation, which culminated into the ultimate notice of cancellation dated 07.02.2023.

97. From the above narrated sequence of events, it is evident that it was none other but the concerned minister who suggested to cancel the tender. The respondent was reluctant to immediately cancel the tender for work and continued to insist on obtaining the opinion from its legal cell. Even though the opinion of the legal cell was yet to be obtained, the respondent, despite its initial reluctance, undertook

immediate steps to cancel the tender after the concerned minister personally instructed the officials to do so.

98. Thus, it is evident that the Notice of Cancellation dated 07.02.2023, issued to the appellant, was at the behest of the concerned minister. The respondent clearly recorded that, because instructions for cancellation had been received from the higher-ups, there was no option but to proceed with the cancellation. Even before the respondent could properly and thoroughly explore the possibility of acceding to such request by consulting its legal cell, the tender was cancelled only at the instance and specific instructions of the concerned minister.

99. The aforesaid aspect can be looked at from one another angle. The concerned Minister-In-Charge had instructed to cancel the tender in view of the change in policy whereby the operation & maintenance of the underpasses was vested in another authority. To ascertain whether the decision of the concerned minister to cancel the tender was arbitrary or not, we must first consider whether the reason for such cancellation was genuinely on the basis of the aforesaid change in policy or whether it was driven by some personal discretion or motives. This can be discerned by first understanding the change in policy that took place.

100. The Urban Development and Municipal Affairs Department by way of its Order dated 01.12.2022 decided that the maintenance of the roads and drainage of the E.M. Bypass shall be handed over by the respondent to the KMC.

101. As per the Note #91 dated 30.12.2022, the concerned minister for the first time proposed cancellation of the tender in view of the aforesaid change in scenario as a result of the maintenance of the E.M. Bypass being handed over from the respondent to the KMC.

102. However, it is pertinent to note that in the aforesaid order of the Urban Development and Municipal Affairs Department it has been specifically stated that the right to collect revenue from the advertisements as-well as the control of the E.M. Bypass shall continue to remain with the respondent herein.

103. Thus, the respondent at the relevant point of time was not only in control of the two underpasses, but was also empowered to continue collecting revenue from the advertisements displayed at

the underpasses. As such the respondent even after the change in policy, remained well within its rights to continue charging license fee in lieu of the advertisement rights by way of the aforesaid tender that was issued to the appellant.

104. When the respondent issued the work stop orders to the appellant on 24.01.2023 in view of the handing over of the maintenance of the E.M. Bypass to the KMC, the appellant in response, pointed out that the work stop orders were completely misconceived as the respondent continued to retain the custody as-well as the advertisement rights of the concerned underpasses.

105. It was only after the appellant highlighted why the work stop orders were misconceived and uncalled for, that the respondent immediately flipped its stance and in its notice of cancellation that was issued just 1-month later, it attributed 'technical faults' in the tender floated.

106. At the relevant point of time, there could have been no occasion for the respondent to cancel the tender on the basis of the Urban Development and Municipal Affairs Department's order dated 01.12.2022. We say so because:-

(i) ***First,*** as per the aforesaid order, it was explicitly clarified that the respondent would continue to retain the operation & maintenance as-well as the advertisement rights of the concerned underpasses.

(ii) ***Secondly,*** only the structural maintenance and restoration of the E.M. Bypass's carriageway, roads, underground drainage etc. were to be handed over to the KMC. Indisputably, the tender that was issued in favour of the appellant was distinct from the maintenance that was handed over to KMC inasmuch as the scope of work of tender was limited to cleaning the roads, walls, floors etc., maintaining the electric-fixtures and upkeep of the gardens.

(iii) ***Thirdly,*** despite the stance of the respondent of "change in scenario" due to the handing over of the maintenance, we find that after cancelling the tender and during the pendency of the present appeal, it was the respondent who floated fresh tender for the work of maintenance in respect of the same underpasses and not KMC, thus fortifying our view that the aforesaid change in policy had no bearing on the cancellation of the tender.

107. It is only on 16.09.2023 i.e., much after the cancellation of the tender that the Urban Development and Municipal Affairs Department, Government of West Bengal modified its earlier order whereby both, the control along with the right to revenue for the said structures were handed over to KMC from the respondent. This leaves no manner of doubt in our mind that the concerned minister's decision to cancel the tender on account of purported 'change in policy' was without any application of mind, capricious and influenced by malice.

b. Concept of Public Interest in Administrative Decisions.

108. The reluctance on the part of the respondent to cancel the tender is also evident from Note #97, wherein the authority expressed its concern over the potential consequences of such cancellation. The respondent apprehended that in the event the tender for work was being cancelled, the routine maintenance of the underpasses would be disrupted. Due to this, the underpasses would have to be closed until some other agency could take over the maintenance. The relevant observations read as under: -

> "***Note # 97***
>
> *[...] Besides, the underpasses are being maintained by the bidder. Once the contract is cancel led, the routine maintenance would be an issue till the work is awarded thru tender. The E&M Sector may be asked to do the maintenance by engaging one of the existing agency from their set up. 0therwise, both the underpasses should be under the lock and key or police custody.*
>
> ***16/01/2023 04:38 PM*** ***SUBHANKAR BHATTACHARYA CE (REBBRDG) (KMDA)***"

109. From the above it is evident that the cancellation of the tender was not in public interest. It may also not be out of place to mention that as per the internal file-notings the respondent had itself acknowledged that the revenue model of the aforesaid tender for work was far more beneficial and was fetching higher rates than the existing models of other agencies on the E.M. Bypass. The relevant observations read as under: -

"***Note # 88***

[...] In this model KMDA is saving Rs. 90.00 Lacs per year mentioned in Note#49 and earned Rs.62,67,110/- per year with 5% increment for each year. [...]

So it appears that the rate of this current Revenue model tender are receiving much higher rate than any hoarding installed on E.M. Bypass. [...]

29/12/2022 02:52 PM ***SANTANU PATRA***
SE (REBBRDG) (KMDA)

Note # 89

[...] The cost of revenue generation would be enhanced at a rate 5% at the end of each year, whereas, the authority need not to bother about the routine annual maintenance cost of appurtenances and labours, security force etc. which would increase as well. By this way two simultaneous benefits go in favour of the Authority. [...]

30/12/2022 05:54 PM ***SUBHANKAR BHATTACHARYA***
CE (REBBRDG) (KMDA)"

110. Thus, the respondent's reasoning in the Notice of Cancellation dated 07.02.2023 that it was incurring financial losses from the aforesaid tender does not hold well either. It has been contended by the respondent that due to the ambiguity in tender as regards placement of advertisements, many interested bidders might not have been able to submit their bids. Thus, the respondent formed the view that if the ambiguity is corrected a higher license fee could be fetched.

111. However, we are not impressed with the above submission. As discussed in the preceding paragraphs of this judgment, nothing to this effect is even remotely indicated from the internal file notings of the respondent or the materials on record. There is nothing to suggest that there was a technical fault in the tender resulting in financial losses or that there was a possibility of fetching higher license fees. On the contrary, it can be seen that the respondent itself was of the opinion that the tender for work was financially beneficial to it. This further undermines the claims of technical faults or potential financial losses, and suggests that the decision to cancel the tender was not

based on genuine financial concerns but rather on other, possibly extraneous factors.

112. Even assuming for a moment that there was a technical fault in the tender, which if rectified had the possibility of generating more revenue, the same by no stretch could be said to be a cogent reason for cancelling an already existing tender. In this regard reference may be made to the decision of this Court in ***Vice Chariman & Managing Director, City & Industrial Development Corporation of Maharashtra Ltd. & Anr. v. Shishir Realty Pvt. Ltd. & Ors.*** reported in **(2021) SCC OnLine SC 1141** wherein it was held that mere possibility of more money in public coffers does not in itself serve 'public interest'. A blanket claim by the State claiming loss of public money cannot be used to forgo contractual obligations, especially when it is not based on any evidence or examination as the larger interest of upholding contracts is also in the play. The relevant observations read as under: -

> *"58. When a contract is being evaluated, the mere possibility of more money in the public coffers, does not in itself serve public interest. A blanket claim by the State claiming loss of public money cannot be used to forgo contractual obligations, especially when it is not based on any evidence or examination. The larger public interest of upholding contracts and the fairness of public authorities is also in play. Courts need to have a broader understanding of public interest, while reviewing such contracts."*
>
> (Emphasis supplied)

113. In ***Vasantkumar Radhakisan Vora (Dead) by His LRs.*** v. ***Board of Trustees of the Port of Bombay***, reported in **(1991) 1 SCC 761**, this Court held that wherever a public authority seeks to resile or relive itself from the enforcement of a promise made or obligation undertaken in the name of public interest, it is legally bound to first show the material or circumstances by which public interest would be jeopardised if such enforcement is insisted. The relevant observations read as under: -

> *"20. When it seeks to relieve itself from its application the government or the public authority are bound to place before the court the material, the circumstances or grounds on*

which it seeks to resile from the promise made or obligation undertaken by insistence of enforcing the promise, how the public interest would be jeopardised as against the private interest. It is well settled legal proposition that the private interest would always yield place to the public interest. [...]"

(Emphasis supplied)

114. We may again refer to the decision of this Court in ***M.P. Power Management Company Ltd.*** (supra) wherein this Court observed that merely because the rates embodied in a contract with the passage of time have become less appealing, the same cannot become a determinative criterion for either terminating the contract or for the courts to decline interference in such contractual disputes. The relevant observations read as under: -

"88. Therefore, on a conspectus of the case law, we find that the concept of overwhelming public interest has essentially evolved in the context of cases relating to the award of contract by the State. It becomes an important consideration in the question as to whether then the State with whatever free play it has in its joints decides to award a contract, to hold up the matter or to interfere with the same should be accompanied by a careful consideration of the harm to public interest. We do not go on to say that consideration of public interest should not at all enter the mind of the court when it deals with a case involving repudiation of a claim under a contract or for that matter in the termination of the contract. However, there is a qualitative State enters into the contract, rights are created. If the case is brought to the constitutional court and it is invited to interfere with State action on the score that its action is palpably arbitrary, if the action is so found then an appeal to public interest must be viewed depending on the facts of each case. If the aspect of public interest flows entirely on the basis that the rates embodied in the contract which is arbitrarily terminated has with the passage of time become less appealing to the State or that because of the free play of market forces or other developments, there is a fall in the rate of price of the services or goods then this cannot become determinative of the question as

to whether court should decline jurisdiction. In this case, it is noteworthy that the rates were in fact settled on the basis of international competitive bidding and in which as many as 182 bidders participated and the rate offered by the first respondent was undoubtedly the lowest. The fact that power has become cheaper in the market subsequently by itself should not result in non-suiting of the complaint of the first respondent, if it is found that a case of clear arbitrariness has been established by the first respondent.

89. In other words, public interest cannot also be conflated with an evaluation of the monetary gain or loss alone."

(Emphasis supplied)

115. What can be discerned from the above is that this Court has consistently underscored that any decision to terminate a contract must be grounded in a real and palpable public interest, duly supported by cogent materials and circumstances in order to ensure that State actions are fair, transparent, and accountable. Public interest cannot be used as a pretext to arbitrarily terminate contracts and there must be a clear and demonstrable ramification or detriment on the public interest to justify any such action.

116. Considerations of public interest should not be narrowly confined to financial aspects. The courts must have a more holistic understanding of public interest wherever the fairness of public authorities is in question, giving due regard to the broader implications of such action on the stability of contractual obligations. Merely because the financial terms of a contract are less favourable over a period of time does not justify its termination. Such decisions must be based on a careful consideration of all relevant factors, including the potential harm to the integrity and sanctity of contractual relationships. The larger interest of upholding contracts cannot be discarded in the name of monetary gain labelled as public interest.

117. We may make a reference to the observations made by this Court in ***Har Shankar & Ors. v. Dy. Excise and Taxation Commr. & Ors.*** reported in **(1975) 1 SCC 737**, wherein this Court held that those who contract with open eyes must accept the burdens of contract along with its benefit. It further held that the enforcement of rights and obligations arising out of a contract cannot depend on whether

the contracting party finds it prudent to abide by it. The relevant observations read as under: -

> *"16. [...] Those who contract with open eyes must accept the burdens of the contract along with its benefits. The powers of the Financial Commissioner to grant liquor licences by auction and to collect licence fees through the medium of auctions cannot by writ petitions be questioned by those who, had their venture succeeded, would have relied upon those very powers to found a legal claim. Reciprocal rights and obligations arising out of contract do not depend for their enforceability upon whether a contracting party finds it prudent to abide by the terms of the contract. By such a test no contract could ever have a binding force."*
>
> (Emphasis supplied)

118. Thus, we are of the view that the respondent's stance of a mere possibility of fetching higher license fees was no ground to cancel the tender issued to the appellant for the purposes of rectifying it, especially when the respondent completely failed to demonstrate as to how there was a technical fault in the tender or how potential interested bidders did not participate due to it or how fetching higher license fees was more than a mere possibility.

119. At this stage, we may also answer one another submission that was canvassed on behalf of the respondent as regards the other aspect of public interest besides the monetary gain. It was submitted on behalf of the respondent that the decision to cancel the tender was also keeping in mind the considerations such as being able to engage experts for maintenance of critical public infrastructure. It is the case of the respondent that the tender was cancelled in order to float separate tenders, one for the maintenance work and another for licensing advertisement rights to ensure expertise in each respective field.

120. We are not impressed by the above submission either. We need not refer to a copious amount of documents in this regard, as just a bare perusal of the notice inviting tender shows that the eligibility criterion for participating in the tender process prescribed a comprehensive threshold of requirement of experience in structural works and successful completion of similar natured projects, thus ensuring

that the bidders participating in the tender possess the necessary expertise for the work of maintenance.

121. Even otherwise, if at all the respondent was very much concerned about the maintenance of the underpasses due to lack of expertise of the appellant, it was always open to the respondent to terminate the contract in terms of the termination clause as envisaged in Clause 35 of the Special Terms & Conditions of the Memorandum for the breach or non-compliance of any of the obligations or terms of the tender. Mere apprehension of lack of expertise was no ground for the respondent to cancel the tender by taking recourse to its executive powers in complete ignorance of the contractual terms that were agreed upon by them.

122. From the above discussion, we are of the considered opinion that the present *lis* is nothing but a classic textbook case of an arbitrary and capricious exercise of powers by the respondent to cancel the tender that was issued to the appellant on the basis of extraneous considerations and at the behest of none other but the concerned Minister-In-Charge.

II. Sanctity of Public-Private Partnership Tenders

123. Before we close this judgment, we must also address one very important aspect as regards the importance of maintaining the sanctity of tenders in public private procurement processes.

124. Public tenders are a cornerstone of governmental procurement processes, ensuring transparency, competition, and fairness in the allocation of public resources. It emanates from the Doctrine of Public Trust which lays down that all natural resources and public use amenities & structures are intended for the benefit and enjoyment of the public. The State is not the absolute owner of such resources and rather owns it in trust and as such it cannot utilize these resources as it pleases. As a trustee of the public resources, the State owes **i)** a duty to ensure that community resources are put to fair and proper use that enures to the benefit of the public as-well as **ii)** an obligation to not indulge in any favouritism or discrimination with these resources. The State with whatever free play it has in its joints decides to award a contract, to hold up the matter or to interfere with the same should be accompanied by a careful consideration of the harm to public interest.

125. Public tenders are designed to provide a level playing field for all potential bidders, fostering an environment where competition thrives, and the best value is obtained for public funds. The integrity of this process ensures that public projects and services are delivered efficiently and effectively, benefiting society at large. The principles of transparency and fairness embedded in public tender processes also help to prevent corruption and misuse of public resources. In this regard we may refer to the observations made by this Court in ***Nagar Nigam v. Al. Farheem Meat Exporters Pvt. Ltd.*** reported in **(2006) 13 SCC 382**, which reads as under: -

> *"16. The law is well settled that contracts by the State, its corporations, instrumentalities and agencies must be normally granted through public auction/public tender by inviting tenders from eligible persons and the notification of the public auction or inviting tenders should be advertised in well-known dailies having wide circulation in the locality with all relevant details such as date, time and place of auction, subject-matter of auction, technical specifications, estimated cost, earnest money deposit, etc. The award of government contracts through public auction/public tender is to ensure transparency in the public procurement, to maximise economy and efficiency in government procurement, to promote healthy competition among the tenderers, to provide for fair and equitable treatment of all tenderers, and to eliminate irregularities, interference and corrupt practices by the authorities concerned. This is required by Article 14 of the Constitution."*
>
> (Emphasis supplied)

126. The sanctity of public tenders lies in their role in upholding the principles of equal opportunity and fairness. Once a contract has come into existence through a valid tendering process, its termination must adhere strictly to the terms of the contract, with the executive powers to be exercised only in exceptional cases by the public authorities and that too in loathe. The courts are duty bound to zealously protect the sanctity of any tender that has been duly conducted and concluded by ensuring that the larger public interest of upholding bindingness of contracts are not sidelined by a capricious or arbitrary exercise of power by the State. It is the duty of the courts to interfere in contractual

matters that have fallen prey to an arbitrary action of the authorities in the guise of technical faults, policy change or public interest etc.

127. The sanctity of contracts is a fundamental principle that underpins the stability and predictability of legal and commercial relationships. When public authorities enter into contracts, they create legitimate expectations that the State will honour its obligations. Arbitrary or unreasonable terminations undermine these expectations and erode the trust of private players from the public procurement processes and tenders. Once a contract is entered, there is a legitimate expectation, that the obligations arising from the contract will be honoured and that the rights arising from it will not be arbitrarily divested except for a breach or non-compliance of the terms agreed thereunder. In this regard we may make a reference to the decision of this Court in ***Sivanandan C.T. v. High Court of Kerala*** reported in **(2024) 3 SCC 799** wherein it was held that a promise made by a public authority will give rise to a legitimate expectation that it will adhere to its assurances. The relevant portion reads as under: -

> *"18. The basis of the doctrine of legitimate expectation in public law is founded on the principles of fairness and non-arbitrariness in Government dealings with individuals. It recognises that a public authority's promise or past conduct will give rise to a legitimate expectation. The doctrine is premised on the notion that public authorities, while performing their public duties, ought to honour their promises or past practices. The legitimacy of an expectation can be inferred if it is rooted in law, custom, or established procedure*
>
> *xxx xxx xxx*
>
> *45. The underlying basis for the application of the doctrine of legitimate expectation has expanded and evolved to include the principles of good administration. Since citizens repose their trust in the State, the actions and policies of the State give rise to legitimate expectations that the State will adhere to its assurance or past practice by acting in a consistent, transparent, and predictable manner. The principles of good administration require that the decisions of public authorities must withstand the test of consistency,*

transparency, and predictability to avoid being regarded as arbitrary and therefore violative of Article 14."

(Emphasis supplied)

128. Cancellation of a contract deprives a person of his very valuable rights and is a very drastic step, often due to significant investments having already been made by the parties involved during the subsistence of the contract. Failure on the part of the courts to zealously protect the binding nature of a lawful and valid tender, would erode public faith in contracts and tenders. Arbitrary terminations of contract create uncertainty and unpredictability, thereby discouraging public participation in the tendering process. When private parties perceive that their contractual rights can be easily trampled by the State, they would be dissuaded from participating in public procurement processes which may have a negative impact on such other public-private partnership ventures and ultimately it is the public who would have to bear the brunt thereby frustrating the very object of public interest.

129. We caution the public authorities to be circumspect in disturbing or wriggling out of its contractual obligations through means beyond the terms of the contract in exercise of their executive powers. We do not say for a moment that the State has no power to alter or cancel a contract that it has entered into. However, if the State deems it necessary to alter or cancel a contract on the ground of public interest or change in policy then such considerations must be *bona-fide* and should be earnestly reflected in the decision-making process and also in the final decision itself. We say so because otherwise, it would have a very chilling effect as participating and winning a tender would tend to be viewed as a situation worse than losing one at the threshold.

H. FINAL CONCLUSION

130. We are of the considered opinion that the litigation at hand is nothing but a classic textbook case of an arbitrary exercise of powers by the respondent in cancelling the tender that was issued in favour of the appellant and that too at the behest of none other than the concerned Minister-In-Charge and thereby rendering the Notice of Cancellation dated 07.02.2023 illegal.

131. During the course of hearing, we were informed that the appellant herein pursuant to the terms of the subject tender had erected multiple structures at different sites on the concerned underpasses

for displaying advertisements at a huge personal cost. He has made significant investments pursuant to the tender.

132. As, we have held the Notice of Cancellation dated 07.02.2023 to be *non-est*, the issuance of a fresh tender to any third-party in respect of the same work would not defeat the vested rights that accrued in favour of the appellant. Similarly, the handing over of the operation and maintenance of the E.M. Bypass to the KMC also would have no bearing whatsoever, on the rights that stood vested in the appellant as on the date of cancellation of the tender. Such vested rights would continue to operate notwithstanding any change in the control and maintenance of the underpasses.

133. The order dated 16.09.2023 passed by the Urban Development and Municipal Affairs Department, Government of West Bengal merely transferred the operation and maintenance of the underpasses including the right to receive revenue from KMDA to KMC and therefore will have no effect on any rights that accrued in favour of the appellant as such rights are independent of the authority in control of operations and maintenance.

134. Thus, for all the foregoing reasons, the appeal succeeds and is hereby allowed. The notice of cancellation dated 07.02.2023 is quashed and the impugned judgment and order passed by the High Court is hereby set aside.

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

Result of the case: Appeal allowed.

†*Headnotes prepared by:* Divya Pandey

[2024] 7 S.C.R. 611 : 2024 INSC 497

Ujagar Singh (Dead) Thr. Lrs. & Anr.
v.
Punjab State & Ors.

(Civil Appeal No.1365 of 2011)

09 July 2024

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

Issue for Consideration

Whether the High Court fell in error in dismissing the suit primarily on the ground that the Civil Court's jurisdiction was barred by s.21 of the Punjab Land Reforms Act, 1972 when the issue of jurisdiction was not pressed by the respondents during the trial court proceedings.

Headnotes†

Punjab Land Reforms Act, 1972 – s.21 – Jurisdiction of Civil Courts, if barred – Appellants filed suit for declaration and perpetual injunction, asserting that the land in question was exempt under the Act – They sought declaration that the land belonged to the religious and charitable shrine Dam Dama Sahib of Una and an injunction to prevent the respondents from transferring or declaring it surplus – Trial Court dismissed the suit – First Appellate Court partly allowed appeal – High Court set aside the judgment of First Appellate court, holding that the Civil Court's jurisdiction was barred u/s.21 of the Act – Correctness of:

Held: The issue of jurisdiction was not pressed by the respondents during the Trial Court proceedings – The Trial Court specifically recorded that the issue of jurisdiction was not pressed and decided it in favour of the plaintiffs – The respondents did not challenge this finding before the first appellate Court, and, hence precluded from raising it in the second appeal before the High Court – s.21 of the Land Reforms Act bars the jurisdiction of Civil Courts only in specific circumstances – (a) suits for specific performance of a contract for transfer of land, and – (b) questioning the validity of any proceeding or order taken or made under the Act – The present suit does not fall under either of these two categories –

* Author

The appellants' suit was essentially for a declaration that the land belonged to the religious and charitable shrine Dam Dama Sahib, and there was no challenge to the validity of any order under the Act – The Civil Court alone has the jurisdiction to decide and declare whether the land belonged to the religious shrine or to Tikka Devinder Singh in his personal capacity – The suit filed by the appellants was not a challenge to the validity of the surplus order but a suit for declaration regarding the ownership of the land – Matter remitted back to High Court for fresh consideration on merits. [Paras 5, 7, 8]

List of Acts

Punjab Land Reforms Act, 1972.

List of Keywords

Suit for declaration and perpetual injunction; Surplus land; Bar of jurisdiction of Civil Courts; Section 21 of the Land Reforms Act; Land dedicated to religious and charitable institution; Religious shrine; Dam Dama Baba Sahib Singh of Una; Transfer of land.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1365 of 2011

From the Judgment and Order dated 09.03.2010 of the High Court of Punjab & Haryana at Chandigarh in RSA No. 250 of 1983

Appearances for Parties

P.S. Patwalia, Sr. Adv., Ms. Diya Kapur, Mrs. Pragya Baghel, Raghav Kumar, Aditya Ladha, Ms. Gahena Gambani, Vishal Banshal, Advs. for the Appellants.

Ms. Bhakti Pasrija, D.A.G., Karan Sharma, Moksh Pasrija, Ms. Princy Sharma, Rishabh Sharma, Ms. Urvi Kashiwal, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Vikram Nath, J.

1. The present appeal assails the correctness of the judgment and order dated 09.03.2010 passed by the High Court of Punjab & Haryana at Chandigarh in R.S.A No. 250 of 1983, whereby the High

Court set aside the judgment and decree dated 25.9.1982 of the Additional District Judge, Hoshiarpur. The High Court held that the Civil Court's jurisdiction was barred under Section 21 of the Punjab Land Reforms Act, 1972[1].

2. The background of this case is as follows:

2.1 The appellants, followers of the religious shrine of Dam Dama Baba Sahib Singh of Una, filed a suit for declaration and perpetual injunction against the respondents and one Smt. Sangeet Kaur, daughter of Baba Madhusudan Singh Sahib Una. The appellants contended that the land detailed in the headnote of the plaint was dedicated to the religious and charitable institution Dam Dama Sahib of Una, under the management and supervision of Baba Madhusudan Singh.

2.2 The appellants pleaded that the shrine was worshipped by them and countless Sikhs. They asserted that Shri Kala Dhari, the founder of Una and a descendant of Baba Nanak, established the shrine, which was later managed by his successors. Shri Sahib Singh, the successor of Shri Kala Dhari, established another shrine at Quilla Jawahar Singh in Gujranwala (now in Pakistan), where followers gifted land for religious and charitable purposes. The income from these lands was used for maintaining the shrine and other charitable activities.

2.3 Upon the partition of India, 1440 kanals and 8 marlas of land were allotted to the Bedi families of Una in lieu of their land in Pakistan, including 735 kanals and 7 marlas allotted to Tikka Devinder Singh, a descendant of Baba Sahib Singh. The appellants argued that this land, though recorded in the name of Tikka Devinder Singh, was actually meant for the shrine and managed by Baba Madhusudan Singh.

2.4 The appellants claimed that despite not having the right to transfer the land, Baba Madhusudan Singh transferred 156 kanals and 8 marlas to the Agriculture Department of Punjab and 330 kanals and 14 marlas to his daughter, Sangeet Kaur. These transfers, the appellants contended, were illegal and not binding on the worshippers of the shrine.

1 In short, the "Land Reforms Act"

2.5 The Government of Punjab initiated proceedings to declare part of this land as surplus. The Collector, Agrarian, Hoshiarpur, declared 20.0943 standard acres of the land as surplus on 28.06.1976. The appellants filed a suit for declaration and perpetual injunction, asserting that the land was of religious and charitable nature, and thus exempt under the Land Reforms Act. They sought a declaration that the land belonged to Dam Dama Sahib of Una and an injunction to prevent the respondents from transferring or declaring it surplus.

2.6 The Trial Court framed several issues for determination, including whether the Civil Court had jurisdiction to try the suit under Section 21 of the Land Reforms Act. The Trial Court noted that the issue of jurisdiction was not pressed by the defendants during the proceedings and, regardless, decided it in favour of the plaintiffs. After considering the evidence, the Trial Court dismissed the suit on 15.12.1980, holding that the appellants failed to prove that the land was dedicated to a religious and charitable institution.

2.7 Aggrieved by the dismissal, the appellants filed an appeal before the Additional District Judge, Hoshiarpur. The First Appellate Court, by judgment and decree dated 25.09.1982, partly allowed the appeal. The Appellate Court concluded that 133/290 share of the land in the suit was charitable and belonged to Dam Dama Baba Sahib Singh of Una. The court held that this share could not be declared surplus by the Collector and restrained the respondents from making further transfers of this share of the land.

3. The respondents, dissatisfied with the First Appellate Court's judgment, filed a Regular Second Appeal before the High Court of Punjab & Haryana. The High Court, vide its order dated 09.03.2010, set aside the judgment and decree of the Additional District Judge, holding that the Civil Court's jurisdiction was barred under Section 21 of the Land Reforms Act. The High Court emphasized that the appellants had not challenged the order declaring the land surplus before the appropriate authorities under the Act, and thus, the suit was not maintainable. The same has been challenged giving rise to the present appeal.

4. Having heard the arguments of both sides, this Court is of the opinion that the High Court fell in error in dismissing the suit primarily on the ground that the Civil Court's jurisdiction was barred by Section 21 of the Land Reforms Act.

5. It is pertinent to note that the issue of jurisdiction was not pressed by the respondents during the Trial Court proceedings. The Trial Court specifically recorded that the issue of jurisdiction was not pressed and decided it in favour of the plaintiffs. The respondents did not challenge this finding in the First Appellate Court, and hence, they were precluded from raising it in the second appeal before the High Court.

6. Section 21 of the Land Reforms Act reads as follows:

> **"21. Bar of jurisdiction.**
>
> (1) Save as provided by or under this Act, the validity of any proceedings or order taken or made under this Act shall not be called in question in any court or before any other authority.
>
> (2) No civil court shall have jurisdiction to entertain any suit, or proceed with any suit instituted after the appointed day, for specific performance of a contract for transfer of land which affects the right of the State Government to the surplus area under this Act."

7. Section 21 of the Land Reforms Act bars the jurisdiction of Civil Courts only in specific circumstances: (a) suits for specific performance of a contract for transfer of land, and (b) questioning the validity of any proceeding or order taken or made under the Act. The present suit does not fall under either of these two categories. The appellants' suit was essentially for a declaration that the land belonged to the religious and charitable shrine Dam Dama Sahib, and there was no challenge to the validity of any order under the Act. The Civil Court alone has the jurisdiction to decide and declare whether the land belonged to the religious shrine or to Tikka Devinder Singh in his personal capacity. The suit filed by the appellants was not a challenge to the validity of the surplus order but a suit for declaration regarding the ownership of the land.

8. In view of the above, the High Court's order is set aside. The matter is remitted back to the High Court for fresh consideration on merits in accordance with law.

9. The appeal is accordingly allowed as above.

10. There shall, however, be no order as to costs.

Result of the case: Appeal allowed.

†*Headnotes prepared by:* Bibhuti Bhushan Bose
(With assistance from : Geethika. K, LCRA*)*