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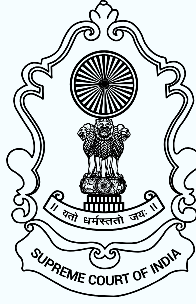

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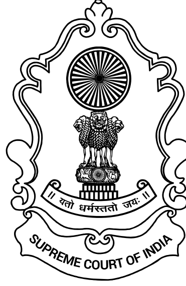

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[2024] 7 S.C.R. 1225 : 2024 INSC 535

M/s New Win Export & Anr.
v.
A. Subramaniam

(Criminal Appeal No. 2948 of 2024)

11 July 2024

[Sudhanshu Dhulia and Ahsanuddin Amanullah, JJ.]

Issue for Consideration

Whether in the instant case, conviction under Section 138 of the Negotiable Instruments Act, 1881 could be quashed by the Supreme Court as the parties had settled the dispute among themselves by entering into a settlement agreement.

Headnotes†

Negotiable Instruments Act, 1881 – s.138 – Offence under – Compounding of – Settlement treated to be compounding of the offence:

Held: Appellants and respondent-complainant had entered into a settlement agreement dated 27.01.2024 – It is clear that the parties have settled the dispute among themselves – As per the agreement, the appellants have paid Rs.5,25,000 to the respondent-complainant, who has agreed to settle the present matter for the said amount – The complainant does not have any objection if the conviction of the appellants is set aside – This settlement agreement can be treated to be compounding of the offence – When the accused and complainant have reached a settlement permissible by law and this Court has also satisfied itself regarding the genuineness of the settlement, the conviction of the appellants would not serve any purpose and thus, it is required to be set aside. [Paras 3, 4, 5]

Negotiable Instruments Act, 1881 – s.147 – Compounding of offences in context of the Act – Dishonour of cheques is a regulatory offence – 'compensatory aspect' of remedy has priority over 'punitive aspect' – Code of Criminal Procedure, 1973 – s.320(5):

Held: Dishonour of cheques is a regulatory offence which was made an offence only in view of public interest so that the reliability

of these instruments can be ensured – s.147 of Negotiable Instruments Act, 1881 makes all offences under NI Act compoundable offences – All the same, s.320(5) CrPC provides that if compounding has to be done after conviction, then it can only be done with the leave of the Court where appeal against such conviction is pending – Keeping in mind that the 'compensatory aspect' of remedy shall have priority over the 'punitive aspect', courts should encourage compounding of offences under the NI Act if parties are willing to do so. [Paras 4, 6]

Case Law Cited

Raj Reddy Kallem v. The State of Haryana & Anr. **[2024] 5 SCR 203**; *Damodar S. Prabhu v. Sayed Babalal H.* **[2010] 5 SCR 678 : (2010) 5 SCC 663;** *Gimpex Private Limited v. Manoj Goel* **[2021] 11 SCR 432 : (2022) 11 SCC 705;** *Meters and Instruments Private Limited and Anr. v. Kanchan Mehta* **[2017] 10 SCR 66 : (2018) 1 SCC 560 – referred to.**

List of Acts

Negotiable Instruments Act, 1881; Code of Criminal Procedure, 1973.

List of Keywords

Section 138 Negotiable Instruments Act, 1881; Insufficient funds; Settlement agreement; Compoundable offences; Compounding of the offence; Compounding after conviction; Compensatory aspect of remedy.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 2948 of 2024

From the Judgment and Order dated 01.04.2019 of the High Court of Judicature at Madras in CRLA No. 45 of 2014

Appearances for Parties

M Yogesh Kanna, K. Paari Vendhan, Manoj Kumar A, Advs. for the Appellants.

Sudhakar Rajendran, Vairawan A.S, Advs. for the Respondent.

M/s New Win Export & Anr. v. A. Subramaniam

Judgment / Order of the Supreme Court

Order

Leave granted.

2. This case arises from a complaint under Section 138 Negotiable Instruments Act filed by the respondent/complainant. In the year 2006, appellant no.2 had borrowed a loan of Rs.5,25,000 from the respondent but did not repay as promised. To discharge the said debt, the appellant no.2 gave a cheque of Rs.5,25,000 which was issued in the name of his partnership firm i.e., appellant no.1 (M/s New Win Export). Since the cheque was dishonoured due to 'insufficient funds', respondent filed a complaint under Section 138 NI Act against the appellants where the Trial Court vide order dated 16.10.2012 convicted the appellants and imposed a sentence of 1 year of simple imprisonment each. The appellants challenged their conviction before the Appellate Court, which reversed the findings of the Trial Court and acquitted the appellants. Finally, when the matter was taken to the High Court at the instance of the respondent/complainant, the High Court in its order dated 01.04.2019 set-aside the order of the Appellate Court and restored the order of the Trial Court, convicting the appellants. Now, the appellants are before this Court.

3. We have been apprised at the bar that before filing the present appeal, appellants and respondent-complainant had entered into a settlement agreement dated 27.01.2024. We have perused the settlement document and from the terms of the agreement, it is clear that the parties have settled the dispute among themselves. As per the agreement, the appellants have paid Rs.5,25,000 to the respondent-complainant, who has agreed to settle the present matter for the said amount. Also, the complainant does not have any objection if the conviction of the appellants is set aside. The relevant portion of the said settlement agreement is reproduced below where the expression 'First Party' is used for the respondent-complainant and accused-appellant has been called as the 'Second Party':

> *"…..The First Party and the second Party had agreed to settle their dispute between them at a final settlement of Rs.5,25,000/ - (Five Lakhs and twenty five thousand only) and the First party had. received a sum of Rs.5,25,000/ (Five Lakhs and. twenty five thousand only) by way of Demand draft dated 08.12.2023 bearing No.135744 drawn*

on Union Bank, Perunthozhuvu Branch received from the second party.

5. The First Party agrees to accept the final settlement amount of Rs.5,25, 000/ - (Five Lakhs and twenty five thousand only) and the First Party had received the sum of Rs.5,25,000/- (Five Lakhs and twenty five thousand only) from the Second party as mentioned above.

6. After the execution of the present Settlement Agreement, the Second Party is intending to file a Special Leave Petition before the Honourable Supreme Court of India and the First Party agrees to support the Special Leave Petition filed by the Second Party, in order to enable the Hon'ble Supreme Court of India to pass appropriate order as the Hon'ble supreme Court may deem it fit and proper in the facts and circumstances of the present.

7. The First Party will have no objection if the conviction of the Second Party is set aside by the Hon'ble Supreme Court of India."

4. Section 147 of the Negotiable Instruments Act, 1881 makes all offences under NI Act compoundable offences. In our opinion, this settlement agreement can be treated to be compounding of the offence. All the same, Section 320 (5) of CrPC provides that if compounding has to be done after conviction, then it can only be done with the leave of the Court where appeal against such conviction is pending.

5. In cases where the accused relies upon some document for compounding the offence at the appellate stage, courts shall try to check the veracity of such document, which can be done in multiple ways. For the same, in the present matter, this Court vide order dated 18.03.2024 had asked the respondent-complainant to file an affidavit to bring on record whether or not any compromise has been reached between the parties. In compliance with the said order, the respondent-complainant has filed before us an affidavit dated 27.03.2024 supporting the case of the appellants wherein it is admitted that the accused have paid the amount to the satisfaction of the complainant and further it is said that he has no objection if conviction of the appellants is set aside. Now, when the accused and complainant have reached a settlement permissible by law and this Court has also satisfied itself regarding the genuineness of the

settlement, we think that the conviction of the appellants would not serve any purpose and thus, it is required to be set aside.

6. At this juncture, we would also like to reiterate a few words regarding the principles of compounding of offences in the context of NI Act. It is to be remembered that dishonour of cheques is a regulatory offence which was made an offence only in view of public interest so that the reliability of these instruments can be ensured. A large number of cases involving dishonour of cheques are pending before courts which is a serious concern for our judicial system. Keeping in mind that the 'compensatory aspect' of remedy shall have priority over the 'punitive aspect', courts should encourage compounding of offences under the NI Act if parties are willing to do so. (See: ***Damodar S. Prabhu** v. **Sayed Babalal H.*** ***(2010) 5 SCC 663,***[1] ***Gimpex Private Limited** v. **Manoj Goel*** ***(2022) 11 SCC 705,***[2] ***Meters And Instruments Private Limited And Anr.** v. **Kanchan Mehta*** ***(2018) 1 SCC 560***[3])

7. In ***Raj Reddy Kallem** v. **The State of Haryana & Anr.*** ***[2024] 5 SCR 203***, this Court followed the same principles and quashed a conviction under the NI Act, by invoking its powers under Article 142, even though the complainant therein declined to give consent for compounding, observing that the accused has sufficiently compensated the complainant.

8. Considering the totality of the circumstances and compromise between the parties, we allow this appeal and acquit the appellants by setting aside the impugned order dated 01.04.2019 as well the Trial Court's order dated 16.10.2012. Appellant no.2, who was exempted from surrendering by this Court, need not surrender and his sureties are hereby discharged.

Pending application(s), if any, are disposed of.

Result of the case: Appeal allowed

[†]*Headnotes prepared by:* Bibhuti Bhushan Bose
(*With assistance from:* Sanyam Mishra, LCRA)

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1 Para 18

2 Para 29

3 Para 18.2

[2024] 7 S.C.R. 1230 : 2024 INSC 536

Elfit Arabia & Anr.
v.
Concept Hotel BARONS Limited & Ors.

(Arbitration Petition (Civil) No. 15 of 2023)

09 July 2024

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

Issue for Consideration

Whether claims of the petitioner in the present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 were barred by limitation.

Headnotes†

Arbitration and Conciliation Act, 1996 – s.11(6) – Petition under – Claims of Petitioners, if barred by limitation – Court exercising jurisdiction u/s 11(6) may reject ex-facie non-arbitrable or dead claims – Duty of the court to protect the parties from being compelled to arbitrate when the claim is demonstrably barred by limitation:

Held: Whether a claim is barred by limitation lies ordinarily within the domain of the arbitral tribunal – However, a Court exercising jurisdiction u/s 11(6) of the Act may reject ex-facie non-arbitrable or dead claims, to protect other party being drawn into protracted arbitration process that is bound to eventually fail – Court must 'cut the deadwood' by refraining from appointing an arbitrator when claims are ex-facie time-barred and dead, or there is no subsisting dispute – This examination does not involve a full review of contested facts but only a primary review, where contested facts speak for themselves – Such limited scrutiny is necessary as it is the duty of the court to protect the parties from being compelled to arbitrate when the claim is demonstrably barred by limitation – If courts don't intervene within this limited compass and mechanically refer every dispute to arbitration, it may undermine the effectiveness of the arbitration process itself – On facts, the notices invoking arbitration were issued 11 years after the cause of action arose, which is well beyond the limitation period of 3 years and thus the claim which is sought to be raised is hopelessly barred by limitation. [Paras 5, 6, 8]

Elfit Arabia & Anr. v. Concept Hotel BARONS Limited & Ors.

Arbitration and Conciliation Act, 1996 – s.11(6) – On dishonour of cheques given to petitioner, it instituted petition u/s.11(6) for appointment of arbitrator – In the interregnum, proceedings u/s.138 NI Act instituted against respondents – If a "continuing cause of action" – Negotiable Instruments Act, 1881 – s.138:

Held: Initiation of arbitration and criminal proceedings under s.138 of NI Act are separate and independent proceedings that arise from two separate causes of action – Institution of proceedings u/s 138 does not imply "continuing cause of action" for purpose of initiating arbitration, as erroneously contended by petitioner. [Para 9]

Case Law Cited

Vidya Drolia v. Durga Trading Corporation **[2020] 11 SCR 1001 : (2021) 2 SCC 1 – relied on.**

Arif Azim Co. Ltd. v. Aptech Ltd. **[2024] 3 SCR 73 : (2024) 5 SCC 313;** *BSNL v. Nortel Networks (India) (P) Ltd.* **[2021] 2 SCR 644 : (2021) 5 SCC 738;** *NTPC Ltd. v. SPML Infra Ltd.* **[2023] 2 SCR 846 : (2023) 9 SCC 385 – referred to.**

List of Acts

Arbitration and Conciliation Act, 1996; Negotiable Instruments Act, 1881.

List of Keywords

Arbitration; Barred by limitation, Domain of arbitral tribunal; Arbitration petition.

Case Arising From

CIVIL ORIGINAL JURISDICTION: Arbitration Petition (Civil) No. 15 of 2023

(Under Section 11(6) of the Arbitration and Conciliation Act 1996)

With

Arbitration Petition (Civil) No. 10 of 2023

Appearances for Parties

Dr. Vineet Kothari, Sr. Adv., Mehul Kothari, Lzafeer Ahmad B. F., Vinay Kothari, Shubham Arun, Advs. for the Petitioners.

Gaurav Aggarwal, Sr. Adv., Chritarth Palli, Ms. Harsheen M Palli, Mrs. Nina Nariman, Avishkar Singhvi, B. Shravanth Shanker, Anil

G Lalla, Ms. Prerna Robin, B Yeshwanth Raj, Naved Ahmed, Vivek Kumar Singh, Shubham Kumar, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Order

ARBITRATION PETITION (CIVIL) NO. 15 OF 2023

1 The petitioner, an entity incorporated in the United Arab Emirates, was purportedly approached by the respondents to finance a telecommunication project undertaken by Telesuprecon Nigeria Limited (TNL). Accordingly, the Memorandum of Understanding (MoU) which forms the basis of the petition under Section 11(6) of the Arbitration and Conciliation Act 1996[1] was executed on 1 June 2004. TNL was represented by the second respondent, who is also a director of the first respondent – a company incorporated in India. Pursuant to the terms of the MoU, the petitioners claim to have disbursed funds on various occasions. On 2 August 2006, a supplementary MoU was executed, setting out the terms of repayment and settlement of the petitioners' dues. The respondents agreed to lien their property as comfort and issue cheques in support of their finances.

2 It has been stated that cheques were given to the petitioner from time to time during the course of meetings between the parties to negotiate repayment. On 7 May 2011, fifteen cheques which had been furnished to the petitioner for a consolidated amount of Rs. 7.30 crores were presented for payment but allegedly dishonoured. Accordingly, on 2 June 2011, the petitioners issued a legal notice to the respondents to implement the MoU and make the necessary payment.

3 Eleven years thereafter, on 4 July 2022, the petitioners invoked arbitration in terms of clause 19 of the MoU. The respondent failed to reply to the notice invoking arbitration. Therefore, the petitioner issued a fresh notice dated 27 October 2022 calling upon the respondent to refer the dispute to arbitration. The petitioner did not receive a response to the second notice and instituted the present petition before this court for the appointment of an arbitrator.

4 According to the petitioner, in the interregnum, proceedings under Section 138 of the Negotiable Instruments Act 1881 were instituted

1 "Act"

against the respondents. An order of acquittal was passed by the Magistrate on 23 July 2018. Proceedings are pending before the High Court of Bombay in appeal.

5 The respondents contend that the claims of the petitioner are barred by limitation and urge this Court to dismiss the petition. Whether a claim is barred by limitation lies ordinarily within the domain of the arbitral tribunal. However, a court exercising jurisdiction under Section 11(6) of the Act may reject ex-facie non-arbitrable or dead claims, to protect the other party from being drawn into a protracted arbitration process,[2] that is bound to eventually fail. The court must 'cut the deadwood' by refraining from appointing an arbitrator when claims are ex-facie time-barred and dead, or there is no subsisting dispute.[3]

6 This examination does not involve a full review of contested facts but only a primary review, where uncontested facts speak for themselves.[4] Such limited scrutiny is necessary as it is the duty of the court to protect the parties from being compelled to arbitrate when the claim is demonstrably barred by limitation. If courts do not intervene within this limited compass and mechanically refer every dispute to arbitration, it may undermine the effectiveness of the arbitration process itself.[5]

7 The above principles that have been affirmed in a consistent line of precedent, flow from the following observations in **Vidya Drolia v. Durga Trading Corporation**[6]**:**

> "**139.** … Undertaking a detailed full review or a long-drawn review at the referral stage would obstruct and cause delay undermining the integrity and efficacy of arbitration as a dispute resolution mechanism. Conversely, if the court becomes too reluctant to intervene, it may undermine effectiveness of both the arbitration and the court. There are certain cases where the prima facie examination may require a deeper consideration. The court's challenge is to find the right amount of and the

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2 Arif Azim Co. Ltd. v. Aptech Ltd. (2024) 5 SCC 313, para 68.

3 Vidya Drolia v. Durga Trading Corporation (2021) 2 SCC 1, para 154.4; BSNL v. Nortel Networks (India) (P) Ltd. (2021) 5 SCC 738, para 45.1.

4 NTPC Ltd. v. SPML Infra Ltd. (2023) 9 SCC 385, para 27.

5 *Ibid,* para 28.

6 [2020] 11 SCR 1001 : (2021) 2 SCC 1

context when it would examine the prima facie case or exercise restraint. The legal order needs a right balance between avoiding arbitration obstructing tactics at referral stage and protecting parties from being forced to arbitrate when the matter is clearly non-arbitrable.

…

148. Section 43(1) of the Arbitration Act states that the Limitation Act, 1963 shall apply to arbitrations as it applies to court proceedings. Sub-section (2) states that for the purposes of the Arbitration Act and Limitation Act, arbitration shall be deemed to have commenced on the date referred to in Section 21. Limitation law is procedural and normally disputes, being factual, would be for the arbitrator to decide guided by the facts found and the law applicable. The court at the referral stage can interfere only when it is manifest that the claims are ex facie time-barred and dead, or there is no subsisting dispute. All other cases should be referred to the Arbitral Tribunal for decision on merits. …

…

154.4. Rarely as a demurrer the court may interfere at Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably "non-arbitrable" and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. … "

(emphasis supplied)

8 Having regard to the uncontested chronology of events detailed in paragraphs 1 to 4 above, it is abundantly clear that the notices invoking arbitration dated 4 July 2022 and 27 October 2022 were

issued eleven years after the cause of action arose in 2011.[7] This is well beyond the limitation period of three years,[8] and the claim which is sought to be raised is hopelessly barred by limitation.

9 The initiation of arbitration and criminal proceedings under Section 138 of the Negotiable Instruments Act 1881 are separate and independent proceedings that arise from two separate causes of action.[9] Therefore, the institution of the proceedings under Section 138 does not imply a 'continuing cause of action' for the purpose of initiating arbitration, as erroneously contended by the petitioner.

10 The facts of the present case undoubtedly fall within the narrow compass of interference that courts must exercise at this stage. If this Court were to refer the dispute to arbitration, it would amount to compelling the parties to arbitrate a 'deadwood' claim that is ex-facie time-barred.

11 We, therefore, decline to entertain the Arbitration Petition.

12 The Arbitration Petition is accordingly dismissed.

13 Pending applications, if any, stand disposed of.

ARBITRATION PETITION (CIVIL) NO. 10 OF 2023

14 The companion Arbitration Petition, namely (Arbitration Petition No. 15 of 2023) has been dismissed by the above order. Save and except for the date of the MoU which is 26 May 2004 in the present case, the facts are similar.

15 For the reasons already indicated, we arrive at the conclusion that the claim is ex-facie barred by limitation.

16 The Arbitration Petition is accordingly dismissed.

17 Pending applications, if any, stand disposed of.

Result of the case: Arbitration Petitions dismissed.

[†]*Headnotes prepared by:* Bibhuti Bhushan Bose
(*With assistance from:* Nivedita Rawat, LCRA)

7 Section 21, Arbitration and Conciliation Act, 1996.

8 Section 46(1), Arbitration and Conciliation Act 1996; Article 55 of the Schedule, Limitation Act, 1963.

9 Sri Krishna Agencies v. State of A.P. (2009) 1 SCC 69, para 7.

[2024] 7 S.C.R. 1236 : 2024 INSC 506

Mohd. Abdul Samad
v.
The State of Telangana & Anr.

(Criminal Appeal No. 2842 of 2024)

10 July 2024

[B.V. Nagarathna* and Augustine George Masih,* JJ.]

Issue for Consideration

(i) Whether section 125 CrPC applies to all married women including Muslim married women; (ii) Whether section 125 CrPC applies to all non-Muslim divorced women; (iii) Whether section 125 of the CrPC applies to all such Muslim women, married and divorced under the Special Marriage Act in addition to remedies available under the Special Marriage Act; (iv) If Muslim women are married and divorced under Muslim law, whether Section 125 of the CrPC as well as the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986 are applicable; (v) If Section 125 of the CrPC is also resorted to by a divorced Muslim woman, as per the definition under the 1986 Act, whether any order passed under the provisions of 1986 Act shall be taken into consideration under Section 127(3)(b) of the CrPC; (vi) In case of an illegal divorce as per the provisions of the Muslim Women (Protection of Rights on Marriage) Act, 2019, whether relief under Section 5 of the said Act could be availed for seeking subsistence allowance or, at the option of such a Muslim woman, remedy under Section 125 of the CrPC could also be availed; (vii) In case of an illegal divorce as per the provisions of the 2019 Act, during the pendency of a petition filed under section 125 of the CrPC, if a Muslim is 'divorced' whether she can take recourse under Section 125 of the CrPC or file a petition under the 2019 Act; (viii) Whether the provisions of the 2019 Act provide remedy in addition to or in derogation of Section 125 of the CrPC.

Headnotes†

Code of Criminal Procedure, 1973 – s.125 – Whether section 125 CrPC applies to all married women including Muslim married women:

* Author

Held: Yes – Section 125 of the CrPC applies to all married women including Muslim married women. [Per Court]

Code of Criminal Procedure, 1973 – s.125 – Whether section 125 CrPC applies to all non-Muslim divorced women:

Held: Yes – Section 125 of the CrPC applies to all non-Muslim divorced women. [Per Court]

Code of Criminal Procedure, 1973 – s.125 – Whether section 125 of the CrPC applies to all such Muslim women, married and divorced under the Special Marriage Act in addition to remedies available under the Special Marriage Act:

Held: Yes – Insofar as divorced Muslim women are concerned, Section 125 of the CrPC applies to all such Muslim women, married and divorced under the Special Marriage Act in addition to remedies available under the Special Marriage Act. [Per Court]

Code of Criminal Procedure, 1973 – s.125 – Muslim Women (Protection of Rights on Divorce) Act, 1986 – If Muslim women are married and divorced under Muslim law, whether Section 125 of the CrPC as well as the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986 are applicable:

Held: If Muslim women are married and divorced under Muslim law then Section 125 of the CrPC as well as the provisions of the 1986 Act are applicable – Option lies with the Muslim divorced women to seek remedy under either of the two laws or both laws – This is because the 1986 Act is not in derogation of Section 125 of the CrPC but in addition to the said provision. [Per Court]

Code of Criminal Procedure, 1973 – s.125 – Muslim Women (Protection of Rights on Divorce) Act, 1986 – s.127(3)(b) – If Section 125 of the CrPC is also resorted to by a divorced Muslim woman, as per the definition under the 1986 Act, whether any order passed under the provisions of 1986 Act shall be taken into consideration under Section 127(3)(b) of the CrPC:

Held: Yes – If Section 125 of the CrPC is also resorted to by a divorced Muslim woman, as per the definition under the 1986 Act, then any order passed under the provisions of 1986 Act shall be taken into consideration under Section 127(3)(b) of the CrPC. [Per Court]

Code of Criminal Procedure, 1973 – s.125 – Muslim Women (Protection of Rights on Divorce) Act, 1986 – In case of an

illegal divorce as per the provisions of the Muslim Women (Protection of Rights on Marriage) Act, 2019, whether relief under Section 5 of the said Act could be availed for seeking subsistence allowance or, at the option of such a Muslim woman, remedy under Section 125 of the CrPC could also be availed:

Held: Yes – In case of an illegal divorce as per the provisions of the 2019 Act then, relief under Section 5 of the said Act could be availed for seeking subsistence allowance or, at the option of such a Muslim woman, remedy under Section 125 of the CrPC could also be availed. [Per Court]

Code of Criminal Procedure, 1973 – s.125 – Muslim Women (Protection of Rights on Divorce) Act, 1986 – In case of an illegal divorce as per the provisions of the 2019 Act, during the pendency of a petition filed under section 125 of the CrPC, if a Muslim is 'divorced' whether she can take recourse under Section 125 of the CrPC or file a petition under the 2019 Act:

Held: Yes – If during the pendency of a petition filed under Section 125 of the CrPC, a Muslim woman is 'divorced' then she can take recourse under Section 125 of the CrPC or file a petition under the 2019 Act. [Per Court]

Code of Criminal Procedure, 1973 – s.125 – Muslim Women (Protection of Rights on Divorce) Act, 1986 – Whether the provisions of the 2019 Act provide remedy in addition to or in derogation of Section 125 of the CrPC:

Held: The provisions of the 2019 Act provide remedy in addition to and not in derogation of Section 125 of the CrPC. [Per Court]

Code of Criminal Procedure, 1973 – s.125 – A measure for social justice:

Held: Numerous decisions of this Court went on to state that Section 125 of CrPC 1973 is a measure for social justice to protect the weaker sections, irrespective of applicable personal laws of the parties, as contemplated through Articles 15(3) and 38 of the Constitution of India – The purpose of Section 125 of CrPC 1973 has been spelt out to prevent vagrancy and destitution of the person claiming rights through invoking the procedure established under the said provision – However, in Inderjit Kaur v. Union of India and Others, it was clarified qua the wife that such a right is not absolute

in nature and is always subject to final determination of the rights of the parties by appropriate courts – Further emphasis has also been placed on the expression "unable to maintain herself" and that the burden of proof is on the wife to prove the existence of said circumstances leading to such inability – This is, in addition, to the requirement to establish that the husband has "sufficient means" to maintain her, and is, however, neglecting or refusing to do so. [Paras 12, 13] [Per Augustine George Masih, J.]

Code of Criminal Procedure, 1973 – s.125 – Muslim Women (Protection of Rights on Divorce) Act, 1986 – s.3 – Comparative dissection:

Held: Under Section 3 of the 1986 Act, the entitlements or rights of a divorced Muslim woman, wider than the ambit of maintenance, arise as against the obligations of her former husband emanating from their divorce – Per contra, under Section 125 of CrPC 1973, a woman seeking maintenance has to establish that she is unable to maintain herself – The right to seek maintenance under Section 125 of CrPC 1973 is invokable even during the sustenance of marriage and, thereby is not contingent upon divorce – Another distinction is related to the time period – While a petition moved under Section 3(2) of the 1986 Act is to be decided in regard to a husband's liability under Section 3(1) of the 1986 Act within a period of one month, there is no such statutory time frame prescribed under Section 125 of CrPC 1973 – However, there is an obligation to determine the interim maintenance within a period of 60 days while dealing with a petition under Section 125 of CrPC 1973 – Moreover, failure to comply with such order passed under Section 3(2) of the 1986 Act may lead to issuance of a warrant for levying the amount of maintenance as directed under the said order and may also sentence him to imprisonment till the payment is made or for a term which may extend to one year – On the other hand, equivalent non-compliance of an order passed under Section 125 of CrPC 1973 may result in imprisonment for a term of one month or until the payment is made. [Paras 22, 23] [Per Augustine George Masih, J.]

Code of Criminal Procedure, 1973 – s.127(3)(b) and s.125:

Held: The most appropriate construction of these secular provisions of CrPC 1973 in regard to the right of maintenance is that the legislature would never intend that an undue benefit is derived after

the end of the marital relationship between the parties concerned – Hence, the provision of Section 127(3)(b) of CrPC 1973 would act in the nature of a proviso to the right provided under Section 125 of CrPC 1973 only in such a circumstance where sufficient means of livelihood after the divorce, and the provisions contemplating the future needs of divorced Muslim women, stands provided to the satisfaction of the court concerned. [Para 32] [Per Augustine George Masih, J.]

Code of Criminal Procedure, 1973 – s.125 – Muslim Women (Protection of Rights on Divorce) Act, 1986 – s.3 – A divorced Muslim woman is not restricted from exercising her independent right of maintenance under the secular provision of Section 125 of CrPC:

Held: This Court has clarified the intent of the Parliament by giving beneficial construction to the expressions contemplated under Section 3 of the 1986 Act, particularly, "within iddat period" by observing that the Parliament never sought to restrict the rights of a divorced Muslim woman to iddat period – Rather, by virtue of the introduction of Section 3 of the 1986 Act in this socio-beneficial legislation, the idea was to confer the benefit of maintenance as well as a reasonable and fair provision for the lifetime of a divorced Muslim woman, subject to her remarriage – Adding to this well-expounded interpretation of the provisions of the 1986 Act, it is hereby pertinent to highlight that a divorced Muslim woman is not restricted from exercising her independent right of maintenance under the secular provision of Section 125 of CrPC 1973, provided she is able to prove the requisites encompassed by the said statute. [Para 32] [Per Augustine George Masih, J.]

Code of Criminal Procedure, 1973 – s.127(3)(b) – The right for seeking cancellation of an order by the husband:

Held: There shall arise a couple of peculiar circumstances while considering the right for seeking cancellation of an order by the husband concerned, through an application under Section 127(3)(b) of CrPC 1973 – The first and settled circumstance is that, when a divorced Muslim woman initially moves a petition under Section 125 of CrPC 1973 and seeks an order for maintenance as against her former husband and only after receiving said entitlements, she chooses to exercise her substantial rights as provided under Section 3 of the 1986 Act, and therein, the husband is also able

to fulfil his concerned obligations to the appropriate satisfaction of the court, ensuring her future maintenance – It is then and only then that the husband can invoke and press his claim under Section 127(3)(b) of CrPC 1973 to seek cancellation of an order, if so, passed under Section 125 of CrPC 1973, directing him to provide maintenance to his former wife. [Para 34] [Per Augustine George Masih, J.]

Code of Criminal Procedure, 1973 – s.125 – Muslim Women (Protection of Rights on Divorce) Act, 1986 – s.3 – Where a husband has fulfilled his obligations under Section 3 of the 1986 Act – The divorced Muslim woman subsequently prefers to invoke Section 125 of CrPC, 1973 on the ground of inability to maintain herself:

Held: In a case where a husband has fulfilled his obligations under Section 3 of the 1986 Act or as provided by customary or personal law so followed, and the divorced Muslim woman subsequently prefers to invoke Section 125 of CrPC 1973 on the ground of inability to maintain herself, in such a factual matrix, undeniably, the right to move under this provision is open in favour of a divorced Muslim woman – When a husband opposes resort to Section 125 CrPC 1973, he has to establish that, (a) initial obligations under the customary and/or personal statutory enactments as detailed earlier stands fulfilled by him, and (b) that the wife, in the light of this, is able to maintain herself – However, if the husband fails to sustain the said objection(s) raised during the proceedings initiated under Section 125 of CrPC 1973, and an order is accordingly passed, it would not be inherently barred or liable to be cancelled through an application under Section 127(3)(b) of CrPC 1973 – Nevertheless, other appropriate remedies as provided under the CrPC 1973 or any other law to that effect, shall always be open to be exercised by such a husband to seek setting aside or appropriate modification of an order so passed under Section 125 of CrPC 1973. [Para 35] [Per Augustine George Masih, J.]

Code of Criminal Procedure, 1973 – s.125 – Reasonable substitute – Double benefit:

Held: Undoubtedly, if a “reasonable substitute” has been provided for by the husband as per their personal or customary laws at the time of their divorce, the maintenance provided for by a Magistrate or a Family Court, as the case may be, under Section 125 of CrPC

1973, can be reduced to the extent of deemed double benefit being given to a divorced wife. [Para 36] [Per Augustine George Masih, J.]

Code of Criminal Procedure, 1973 – s.125 – Muslim Women (Protection of Rights on Divorce) Act, 1986 – s.3 – Secular provision (s.125, CrPC) and personal law (s.3 of 1986 Act) parallelly exist in distinct domains:

Held: Equivalent rights of maintenance ascertained under both, the secular provision of Section 125 of CrPC 1973, and the personal law provision of Section 3 of the 1986 Act, parallelly exist in their distinct domains and jurisprudence – Thereby, leading to their harmonious construction and continued existence of the right to seek maintenance for a divorced Muslim woman under the provisions of CrPC 1973 despite the enactment of the 1986 Act. [Para 37] [Per Augustine George Masih, J.]

Constitution of India – Arts.15(1) and (3) r/w. Art. 39(e) – Code of Criminal Procedure, 1973 – s.125 – Right to maintenance in a constitutional context:

Held: Section 125 of the CrPC is a measure of social justice with a view to protect women and children and is aligned to the salutary object enshrined in Article 15(1) and (3) of the Constitution read with Article 39(e) of the Constitution – Article 15(3) is a fundamental right while Article 39 is a Directive Principle of State Policy that is fundamental in the governance of the country and it is the duty of the State to apply these principles while making the law – Thus, the statutory right to seek maintenance under Section 125 of the CrPC is also embedded in the text, structure and philosophy of the Constitution – Article 15(3), read with Article 39(e) manifests a constitutional commitment towards special measures to ensure a life of dignity for women at all stages of their lives – This ought to be irrespective of the faith a woman belongs to – The remedy of maintenance is a critical source of succour for the destitute, the deserted and the deprived sections of women. [Paras 5, 6] [Per B.V. Nagarathna, J. (concurring)]

Code of Criminal Procedure, 1973 – s.125 – Protection of Women from Domestic Violence Act, 2005:

Held: Section 125 of the CrPC is independent of and in addition to maintenance that could be awarded under the Protection of Women from Domestic Violence Act, 2005 which

is applicable to an 'aggrieved woman' in a 'shared household' as defined under the provisions of the aforesaid Act. [Para 7] [Per B.V. Nagarathna, J. (concurring)]

Code of Criminal Procedure, 1973 – s.125 – Muslim Women (Protection of Rights on Divorce) Act, 1986 – Provision (s.125, CrPC) is meant to achieve a social purpose:

Held: A reading of Section 125 of the CrPC would indicate that the intention of the said provision is to provide for a speedy remedy and prevent vagrancy by compelling the husband to support the wife – The provision is meant to achieve a social purpose – The reason being, that after marriage, it is the duty of the husband to provide shelter and maintenance to the wife in the Indian context – Particularly, if she is unable to maintain herself – If he neglects or refuses to do so, the wife is legally entitled to enforce the said right by filing a petition under Section 125 of the CrPC irrespective of any other right created in favour of the wife under any other law – Therefore, the passing of the 1986 Act, cannot militate against or dilute the salutary nature of Section 125 of the CrPC – The object of this provision is to save a wife including a divorced woman from deprivation and destitution. [Para 8] [Per B.V. Nagarathna, J. (concurring)]

Code of Criminal Procedure, 1973 – s.127 – Cancellation of order of maintenance:

Held: The crux of these judgments (Fuzlunbi vs. K. Khader Vali and Mohd. Ahmed Khan vs. Shah Bano Begum) is that an order under Section 127 ought to be a reasoned order and shall only allow an order for maintenance to be cancelled if a judge was satisfied that the divorced woman had received a sufficient amount of maintenance under any customary or personal law. [Para 16] [Per B.V. Nagarathna, J. (concurring)]

Interpretation of Statutes – Non-obstante clause – Meaning of:

Held: A *non-obstante clause* is usually appended to a Section in the beginning with a view to give the enacting part of the Section, in case of a conflict, an overriding effect over the provision or Act mentioned in the *non-obstante clause* – In other words, in spite of the provision or the Act mentioned in the *non-obstante clause*, the enactment following it will have its full operation or that the provisions embraced in the *non-obstante clause* will not be an impediment for the operation of the enactment – Thus, a

non-obstante clause is a legislative device used by a Parliament or legislature sometimes to give an overriding effect to what has been specified in the enacting part of a section in case of a conflict with what is contained in the *non-obstante clause* as stated above. [Para 23] [Per B.V. Nagarathna, J. (concurring)]

Interpretation of Statutes – *Non-obstante clause*, expression "*subject to*", expression "*notwithstanding anything in any other law*":

Held: A *non-obstante* clause has to be distinguished from the expression "*subject to*" where the latter would convey the idea of a provision yielding place to another provision or other provisions to which it is made subject to – The expression "*notwithstanding anything in any other law*" in a Section of an Act has to be contrasted with the use of the expression "*notwithstanding anything contained in this Act*", which has to be construed to take away the effect of any provision of that particular Act in which the section occurs but it cannot take away the effect of any other law. [Para 23] [Per B.V. Nagarathna, J. (concurring)]

Interpretation of Statutes – *Non-obstante clause* – Utility of:

Held: The utility of *non-obstante clause* is where there is a conflict between what is stated in a provision and any other law for the time being in force, or anything else contained in the said enactment – As already noted, only in the case of a conflict, the object is to give the enacting or operative portion of the section an overriding effect, not otherwise – In other words, only in a case of a conflict, a provision in an enactment containing a *non-obstante clause*, would be given its full operation and what is stated in the *non-obstante clause* will not be an impediment for the operation of the particular provision in the enactment – This would mean that what is stated in the *non-obstante clause* would not take away the effect of any provision of the Act which follows the same. [Para 25] [Per B.V. Nagarathna J. (concurring)]

Code of Criminal Procedure, 1973 – s.125 – Muslim Women (Protection of Rights on Divorce) Act, 1986 – s.3 – Section 3(1) begins with a non-obstante clause as, "*notwithstanding anything contained in any other law for the time being in force*" – Intention of Parliament:

Held: The intent of the Parliament which can be gathered from the use of such a *non-obstante clause* is to enhance the right of a

divorced Muslim woman in addition to what she would have been entitled to under Section 125 of the CrPC – If the intent of the Parliament was otherwise, i.e., to curtail the rights of a divorced Muslim woman then the *non-obstante clause* would not have found a place in sub-section (1) of Section 3 of the 1986 Act – This is evident from the fact that while enacting the 1986 Act, Parliament did not simultaneously or at anytime thereafter create any bar for a divorced Muslim woman from claiming maintenance under Section 125 of the CrPC and thereby constrain her to proceed to make a claim only under the provisions of the 1986 Act – Neither is there any bar, express or implied under the 1986 Act, to the effect that a divorced Muslim woman cannot unilaterally seek maintenance under Section 125 of the CrPC – One cannot read Section 3 of the 1986 Act containing the *non-obstante clause* so as to restrict or diminish the right to maintenance of a divorced Muslim woman under Section 125 of the CrPC and neither is it a substitute for the latter. [Para 28] [Per B.V. Nagarathna, J. (concurring)]

Code of Criminal Procedure, 1973 – s.125 – Muslim Women (Protection of Rights on Divorce) Act, 1986 – s.4:

Held: The expression "*notwithstanding anything contained in the foregoing provisions of this Act or any other law for the time being in force*" in sub-section (1) of Section 4, is indicative of the fact that the Magistrate can order for maintenance of a divorced Muslim woman being entitled to maintenance as per the provisions of the said Act – Further, sub-section (1) of Section 4 takes into consideration the period after the iddat period while sub-section (1) of Section 3 deals with a period which is within the iddat period – This Section is akin to Section 125 of the CrPC for a reasonable and fair provision of maintenance to be made. [Para 29] [Per B.V. Nagarathna, J. (concurring)]

Code of Criminal Procedure, 1973 – s.125 – Muslim Women (Protection of Rights on Divorce) Act, 1986 – ss.3, 4 – A divorced Muslim woman is entitled to seek recourse to either or both the provisions:

Held: The rights created under the provisions of the 1986 Act are in addition to and not in derogation of the right created under Section 125 of the CrPC – The *non-obstante clause* in Sub-section (1) of Section 3 cannot result in Sections 3 and 4 of the 1986 Act whittling down the application of Section 125 of the CrPC

and allied provisions of the CrPC to a divorced Muslim woman – Therefore, if a divorced Muslim woman approaches the Magistrate for enforcement of her rights under Section 125 of the CrPC, she cannot be turned away to seek relief only under Sections 3 and 4 of the 1986 Act as is sought to be contended by the appellant herein – In other words, such a divorced Muslim woman is entitled to seek recourse to either or both the provisions – The option lies with such a woman – The Court would have to ultimately balance between the amount awarded under the 1986 Act and the one to be awarded under Section 125 of the CrPC. [Para 30] [Per B.V. Nagarathna, J. (concurring)]

Code of Criminal Procedure, 1973 – s.125 – Muslim Women (Protection of Rights on Divorce) Act, 1986 – s.3 – Where a divorced woman maintains the children born to her:

Held: Under Section 3(1)(b) of the 1986 Act, where a divorced woman maintains the children born to her before or after her divorce, a reasonable and fair provision and maintenance has to be made and paid by her former husband only for a period of two years from the respective dates of birth of such children and not beyond the said period – However, under Section 125 of the CrPC, there is no such restriction of maintenance to be provided only for a period of two years from the respective dates of birth of such children in the case of a divorced wife – The obligation is until the children attain the age of majority and in terms of the said Section. [Para 40 (iii)] [Per B.V. Nagarathna, J. (concurring)]

Code of Criminal Procedure, 1973 – s.125 – Muslim Women (Protection of Rights on Divorce) Act, 1986 – Section 125 of the CrPC is a more beneficial provision as compared to the provisions of the 1986 Act:

Held: What is of further significance is the fact that by Act 50 of 2001 [by Section 2(i)(a)] w.e.f. 24.09.2001, sub-section (1) of Section 125 of the CrPC has been amended to delete the words “not exceeding 500 rupees in the whole” – By way of this omission, there is no upper limit fixed for payment of maintenance under the said provision – Therefore, Section 125 of the CrPC is a more beneficial provision as compared to the provisions of the 1986 Act *vis-à-vis* a Muslim divorced woman in the context of the obligations of a former husband and the rights of a divorced Muslim woman – This amendment to Section 125 of the CrPC being subsequent to

the enforcement of the 1986 Act, is so significant that it virtually makes Section 3 of the 1986 Act very narrow and insignificant although the expression "provision" under Section 3(1) of the 1986 Act has been broadly interpreted by this Court in Danial Latifi. [Para 40 (v)] [Per B.V. Nagarathna, J. (concurring)]

Code of Criminal Procedure, 1973 – s.125 – Muslim Women (Protection of Rights on Divorce) Act, 1986 – s.3 – Both provisions operate in two separate fields:

Held: If a divorced Muslim woman files an application for maintenance under Section 125 of the CrPC, there is no provision for considering the same under Section 3 of the 1986 Act – The reasons for the same are not far to see: Firstly, Section 125 of the CrPC and Section 3(1) of the 1986 Act operate in two separate fields – The former is a statutory right created, *inter-alia*, for all divorced women, irrespective of the faith they may belong to or follow – On the other hand, the 1986 Act is in the nature of a personal law which applies to only divorced Muslim women who were married under Muslim law and divorced under the said law. [Para 40(vii)] [Per B.V. Nagarathna, J. (concurring)]

Code of Criminal Procedure, 1973 – s.125 – Muslim Women (Protection of Rights on Marriage) Act, 2019:

Held: When divorce is void and illegal, such a Muslim woman can seek remedy under Section 125 of the CrPC. [Para 41] [Per B.V. Nagarathna, J. (concurring)]

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List of Acts

Code of Criminal Procedure, 1973; Muslim Women (Protection of Rights on Marriage) Act, 2019; Muslim Women (Protection of Rights on Divorce) Act, 1986; Constitution of India.

List of Keywords

Section 125 of Code of Criminal Procedure, 1973; Section 127(3)(b) of Code of Criminal Procedure, 1973; Section 3 of Muslim Women (Protection of Rights on Divorce) Act, 1986; Section 5 of of the Muslim Women (Protection of Rights on Marriage) Act, 2019; Muslim married woman; Non-muslim divorced woman; Divorced muslim woman; Illegal divorce; Maintenance; Non-obstante clause; Social justice; Secular provision; Personal law; Socio-beneficial legislation; Deprivation; Destitution.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 2842 of 2024

From the Judgment and Order dated 13.12.2023 of the High Court for the State of Telangana at Hyderabad in CRP No. 12222 of 2023

Appearances for Parties

Gaurav Agrawal, Sr. Adv., Amicus Curiae.

S. Wasim A. Qadri, Sr. Adv., Manan Daga, Ms. Udita Singh, Tamim Qadri, Saeed Qadri, Shraveen Kumar Verma, Mrs. Kareena Fareed, Saahil Gupta, Deepak Bhati, Shvendra Singh, Advs. for the Appellant.

Respondent-in-person.

Judgment / Order of the Supreme Court

Judgment

Augustine George Masih, J.

1. Leave granted.

2. This appeal challenges the Order dated 13.12.2023 passed in Criminal Petition No. 12222 of 2023 moved under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "CrPC 1973"), whereby the High Court of Telangana modified the Order dated 09.06.2023 passed by the Family Court in M.C No. 171 of 2019. By virtue of disposing of the said petition, the High Court decreased the quantum of interim maintenance payable by the Appellant herein from INR 20,000/- (Rupees Twenty Thousand only) per month to INR 10,000/- (Rupees Ten Thousand only) per month.

3. As per the Appellant, the brief facts leading to the instant appeal are that the Appellant herein was the husband of the Respondent No. 02. Both the parties entered the matrimonial consortium on 15.11.2012. However, as their relationship deteriorated, Respondent No. 02 left the matrimonial home on 09.04.2016. Subsequently, Respondent No. 02 initiated criminal proceedings against the Appellant by lodging FIR No. 578 of 2017 for offences punishable under Sections 498A and 406 of the Indian Penal Code, 1860 (hereinafter referred to as "IPC 1860"). In response, the Appellant herein pronounced a triple *talaq* on 25.09.2017 and moved for divorce before the office of *Quzath* seeking a declaration of divorce, which was eventually granted *ex parte,* and the divorce certificate was issued on 28.09.2017.

4. It is further claimed that he attempted to send INR 15,000/- (Rupees Fifteen Thousand only) apropos maintenance for the *iddat* period, which the Respondent No. 02 is said to have refused. Instead, she moved a petition for interim maintenance under Section 125(1) of

CrPC 1973 before the Family Court vide M.C. No. 171 of 2019, which was consequently allowed vide Order dated 09.06.2023. Seeking quashing of the said Order, the Appellant herein moved the High Court of Telangana, eventually leading to passing of the instant Impugned Order dated 13.12.2023.

5. The prime contention of the Appellant while moving this Court is that the provisions of Section 125 of CrPC 1973 do not prevail in light of the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (hereinafter referred to as the "1986 Act"). Furthermore, it is contended that even if a "divorced Muslim woman" seeks to move the court under the secular provision of Section 125 of CrPC 1973, it would not be maintainable, rather the correct procedure would be to file an application under Section 5 of the 1986 Act, which is not the case herein.

6. To substantiate the said contentions, the learned Senior Advocate for the Appellant herein, vehemently argued that since the 1986 Act provides a more beneficial and efficacious remedy for divorced Muslim women in contradistinction to Section 125 of CrPC 1973, thereby the recourse lies exclusively under the 1986 Act. In addition, it is submitted that the 1986 Act being a special law, prevails over the provisions of CrPC 1973. To buttress his contentions, reliance is placed on a decision rendered by a 3-Judge Bench in ***M/s. Jain Ink Manufacturing Company v. Life Insurance Corporation of India and Another*** ***(1980) 4 SCC 435*** wherein this Court went on to hold that a special law would supersede a general law and if such conflicting statutes are passed by the same legislature, the rule of harmonious construction is to be applied while interpreting the said statutes. Several other judgments to this effect were also brought to our notice with the similar position being reiterated as in a recent judgment of this Court in ***Chennupati Kranthi Kumar v. State of Andhra Pradesh and Others (2023) 8 SCC 251.***

7. He further emphasised that Sections 3 and 4 of the 1986 Act, commencing with a *non-obstante* clause, shall have an overriding effect on any other statute operating in the same field. An acknowledgment to this effect is said to have been found in a 5-Judge Bench in ***Danial Latifi and Another v. Union of India*** ***(2001) 7 SCC 740*** and specifically in paragraph numbers 21 to 24. Further reliance is placed on paragraph numbers 03, 07, 08, and

09 of the judgment in ***Iqbal Bano v. State of Uttar Pradesh and Another*** ***(2007) 6 SCC 785.*** Another limb of his submission is based upon the transitional provision of Section 7 of the 1986 Act, in an attempt to establish supersedence and clarity as to the intent of the legislature on prevalence of the 1986 Act and the procedure and rights contemplated therein.

8. To assist this Court, Mr Gaurav Agrawal, Senior Advocate, was appointed as *amicus curiae* vide Order dated 09.02.2024, who eventually went on to submit that the remedy under a secular statutory provision of Section 125 of CrPC 1973 is not foreclosed for a divorced Muslim woman by virtue of enactment of a personal law remedy under Section 3 of the 1986 Act to the limited extent of maintenance, as the latter does not in any manner, expressly or by necessary implication, bar the exercise of former remedy. To buttress this submission, he went on to highlight the distinction between the very object and purpose of the aforesaid provisions. Mr Agrawal, while also extensively referring to the 5-Judge Bench decision in ***Danial Latifi*** ***(supra)***, goes on to submit that the explicit question as to whether the *non-obstante* clause in Section 3 of the 1986 Act takes away the rights under Section 125 of CrPC 1973, was not dealt by this Court therein. However, it is his contention that the observations in paragraph number 33 of this judgment suggest an interpretation that a divorced Muslim woman is also entitled to all the rights of maintenance as are available to other equally situated women in the country and an interpretation otherwise would only infringe upon the fundamental rights conferred through Articles 14, 15, and 21 of the Constitution of India 1950 (hereinafter referred to as "Constitution of India").

9. Mr Agrawal also brought to our attention numerous oppugnant decisions of the High Courts, thus bringing out the conflict between the provisions while interpreting the provisions of the 1986 Act *vis-à-vis* CrPC 1973, as aforementioned. A reference to these decisions would be made as part of the analysis hereinafter.

10. We have heard the learned Senior Advocate for the Appellant, as well as the learned *amicus curiae* at length and in the light of their submissions, it is requisite to consider the historical perspective, the grey areas leading to a clarified position of law by this Court regarding the secular provision of maintenance under Section 125

of CrPC 1973, as well as the rights guaranteed under personal law to a divorced Muslim woman through Section 3 of the 1986 Act.

11. The legislature through Section 488 of the Code of Criminal Procedure, 1898, and subsequently by introducing Section 125 CrPC 1973, sought to carry on the efficacious remedy through a summary procedure in favour of a wife, including a divorced woman, and others as applicable. To better comprehend the instant provision, the same is reproduced hereinbelow:

> "***125. Order for maintenance of wives, children and parents.—***
>
> *(1) If any person having sufficient means neglects or refuses to maintain—*
>
> *(a) his wife, unable to maintain herself, or*
>
> *(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or*
>
> *(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or*
>
> *(d) his father or mother, unable to maintain himself or herself,*
>
> *a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate as such Magistrate thinks fit and to pay the same to such person as the Magistrate may from time to time direct:*
>
> *Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means*
>
> *Provided further that the Magistrate may, during the pendency of the proceeding regarding monthly allowance for the maintenance under this sub-section, order such*

person to make a monthly allowance for the interim maintenance of his wife or such child, father or mother, and the expenses of such proceeding which the Magistrate considers reasonable, and to pay the same to such person as the Magistrate may from time to time direct

Provided also that an application for the monthly allowance for the interim maintenance and expenses of proceeding under the second proviso shall, as far as possible, be disposed of within sixty days from the date of the service of notice of the application to such person.

Explanation.—For the purposes of this Chapter,—

(a) "minor" means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875) is deemed not to have attained his majority;

(b) "wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

(2) Any such allowance for the maintenance or interim maintenance and expenses of proceeding shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance or interim maintenance and expenses of proceeding, as the case may be.

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be, remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:

Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due:

Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

Explanation.—If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him.

(4) No wife shall be entitled to receive an allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be, from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section in living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent."

12. Numerous decisions of this Court went on to state that Section 125 of CrPC 1973 is a measure for social justice to protect the weaker sections, irrespective of applicable personal laws of the parties, as contemplated through Articles 15(3) and 38 of the Constitution of India. This Court similarly held in the decision of ***Shri Bhagwan Dutt v. Smt. Kamla Devi and Another*** ***(1975) 2 SCC 386*** that the nature of power and jurisdiction vested with a Magistrate by virtue of the instate provision is not punitive in nature and neither it is remedial, but it is a preventive measure. It was also observed that while any such right may or may not exist as a consequence of any of the personal laws applicable to the concerned parties, they shall continue to exist distinctively, and independently as against the secular provision.

13. The purpose of Section 125 of CrPC 1973 has been spelt out to prevent vagrancy and destitution of the person claiming rights through invoking the procedure established under the said provision. However, in ***Inderjit Kaur v. Union of India and Others (1990) 1 SCC 344***, it

was clarified qua the wife that such a right is not absolute in nature and is always subject to final determination of the rights of the parties by appropriate courts. Further emphasis has also been placed on the expression "unable to maintain herself" and that the burden of proof is on the wife to prove the existence of said circumstances leading to such inability. This is, in addition, to the requirement to establish that the husband has "sufficient means" to maintain her, and is, however, neglecting or refusing to do so.

14. In ***Fuzlunbi v. K. Khader Vali and Another*** ***(1980) 4 SCC 125 (SC)***, it was categorically observed by this Court that enactment of the said provision charges the court with a deliberate secular design to enforce maintenance or its equivalent against the humane obligation, which is derived from the State's responsibility for social welfare. The same is not confined to members of one religion or region, but the whole community of womanhood.

15. At this stage, it is pertinent to consider the concerned personal laws which allegedly stand in conflict with the secular provision of Section 125 of CrPC 1973. The 1986 Act was brought about by the legislature as an attempt to clarify the position laid down.

    A 5-Judge Bench in ***Mohd. Ahmed Khan v. Shah Bano Begum and others*** ***(1985) 2 SCC 556*** extensively dealt with the issue of maintenance apropos the obligation of a Muslim husband to his divorced wife who is unable to maintain herself, either after having been given divorce or having had sought one. The Bench unanimously went on to hold that the obligation of such a husband would not be affected by the existence of any personal law in the said regard and the independent remedy for seeking maintenance under Section 125 of CrPC 1973 is always available. It also went on to observe that, even assuming, there is any conflict between the secular and personal law provisions in regard to maintenance being sought by a divorced wife, the Explanation to second *Proviso* to Section 125(3) of CrPC 1973 unmistakably shows the overriding nature of the former. While elaborating on the said observation, it explained that the wife has been conferred with the right to refuse to live with her husband who has contracted another marriage, let alone three or four other marriages.

16. After the pronouncement of the aforesaid verdict, a controversy is said to have emerged anent the true obligations of a Muslim husband to

pay maintenance to his divorced wife, particularly beyond the *iddat* period. The Parliament, as an attempt to clarify the position, brought about the 1986 Act. Herein, it was sought to specify the entitlements of such a woman at the time of divorce. Section 3 of the 1986 Act deals with this aspect and reads as follows:

> "***3. Mahr or other properties of Muslim woman to be given to her at the time of divorce***.—
>
> *(1) Notwithstanding anything contained in any other law for the time being in force, a divorced woman shall be entitled to—*
>
> *(a) a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband;*
>
> *(b) where she herself maintains the children born to her before or after her divorce, a reasonable and fair provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of such children;*
>
> *(c) an amount equal to the sum of mahr or dower agreed to be paid to her at the time of her marriage or at any time thereafter according to Muslim law; and*
>
> *(d) all the properties given to her before or at the time of marriage or after her marriage by her relatives or friends or the husband or any relatives of the husband or his friends.*
>
> *(2) Where a reasonable and fair provision and maintenance or the amount of mahr or dower due has not been made or paid or the properties referred to in clause (d) of sub-section (1) have not been delivered to a divorced woman on her divorce, she or any one duly authorised by her may, on her behalf, make an application to a Magistrate for an order for payment of such provision and maintenance, mahr or dower or the delivery of properties, as the case may be.*

(3) Where an application has been made under sub-section (2) by a divorced woman, the Magistrate may, if he is satisfied that—

(a) her husband having sufficient means, has failed or neglected to make or pay her within the iddat period a reasonable and fair provision and maintenance for her and the children; or

(b) the amount equal to the sum of mahr or dower has not been paid or that the properties referred to in clause (d) of sub-section (1) have not been delivered to her,

make an order, within one month of the date of the filing of the application, directing her former husband to pay such reasonable and fair provision and maintenance to the divorced woman as he may determine as it and proper having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of her former husband or, as the case may be, for the payment of such mahr or dower or the delivery of such properties referred to in clause (d) of sub-section (1) the divorced woman:

Provided that if the Magistrate finds it impracticable to dispose of the application within the said period, he may, for reasons to be recorded by him, dispose of the application after the said period.

(4) If any person against whom an order has been made under sub-section (3) fails without sufficient cause to comply with the order, the Magistrate may issue a warrant for levying the amount of maintenance or mahr or dower due in the manner provided for levying fines under the Code of Criminal Procedure, 1973 (2 of 1974), and may sentence such person, for the whole or part of any amount remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one year or until payment if sooner made, subject to such person being heard in defence and the said sentence being imposed according to the provisions of the said Code."

17. After the 1986 Act came into force, a series of writ petitions were moved before this Court challenging its constitutional validity on ground of being violative of Articles 14, 15 and 21 of the Constitution of India. Sections 3 and 4 of the 1986 Act were the principal sections under attack as part of the said writ petitions. Section 3, which opens up with a *non-obstante* clause seeking to override the application of all other existing laws, was carefully perused by this Court in the common verdict rendered on the constitutional validity in the decision in ***Danial Latifi (supra)***. Elaborating on the prevalence of Section 125 of CrPC 1973 as a secular protection available to women across communities, it was observed in paragraph number 33 as follows:

> "***33.*** *In Shah Bano case [(1985) 2 SCC 556: 1985 SCC (Cri) 245] this Court has clearly explained as to the rationale behind Section 125 CrPC to make provision for maintenance to be paid to a divorced Muslim wife and this is clearly to avoid vagrancy or destitution on the part of a Muslim woman. The contention put forth on behalf of the Muslim organisations who are interveners before us is that under the Act, vagrancy or destitution is sought to be avoided but not by punishing the erring husband, if at all, but by providing for maintenance through others. If for any reason the interpretation placed by us on the language of Sections 3(1)(a) and 4 of the Act is not acceptable, we will have to examine the effect of the provisions as they stand, that is, a Muslim woman will not be entitled to maintenance from her husband after the period of iddat once the talaq is pronounced and, if at all, thereafter maintenance could only be recovered from the various persons mentioned in Section 4 or from the Wakf Board. This Court in Olga Tellis v. Bombay Municipal Corpn. [(1985) 3 SCC 545] and Maneka Gandhi v. Union of India [(1978) 1 SCC 248] held that the concept of "right to life and personal liberty" guaranteed under Article 21 of the Constitution would include the "right to live with dignity". Before the Act, a Muslim woman who was divorced by her husband was granted a right to maintenance from her husband under the provisions of Section 125 CrPC until she may remarry and such a right, if deprived, would not be reasonable, just and fair. Thus the provisions of the*

Act depriving the divorced Muslim women of such a right to maintenance from her husband and providing for her maintenance to be paid by the former husband only for the period of iddat and thereafter to make her run from pillar to post in search of her relatives one after the other and ultimately to knock at the doors of the Wakf Board does not appear to be reasonable and fair substitute of the provisions of Section 125 CrPC. Such deprivation of the divorced Muslim women of their right to maintenance from their former husbands under the beneficial provisions of the Code of Criminal Procedure which are otherwise available to all other women in India cannot be stated to have been effected by a reasonable, right, just and fair law and, if these provisions are less beneficial than the provisions of Chapter IX of the Code of Criminal Procedure, a divorced Muslim woman has obviously been unreasonably discriminated and got out of the protection of the provisions of the general law as indicated under the Code which are available to Hindu, Buddhist, Jain, Parsi or Christian women or women belonging to any other community. The provisions prima facie, therefore, appear to be violative of Article 14 of the Constitution mandating equality and equal protection of law to all persons otherwise similarly circumstanced and also violative of Article 15 of the Constitution which prohibits any discrimination on the ground of religion as the Act would obviously apply to Muslim divorced women only and solely on the ground of their belonging to the Muslim religion. It is well settled that on a rule of construction, a given statute will become "ultra vires" or "unconstitutional" and, therefore, void, whereas on another construction which is permissible, the statute remains effective and operative the court will prefer the latter on the ground that the legislature does not intend to enact unconstitutional laws. We think, the latter interpretation should be accepted and, therefore, the interpretation placed by us results in upholding the validity of the Act. It is well settled that when by appropriate reading of an enactment the validity of the Act can be upheld, such interpretation is accepted by courts and not the other way round."

While the Court *prima facie* observed the said provisions to be violative of Articles 14 and 15 of the Constitution of India, the latter interpretation, seeking to uphold the validity, was eventually adopted and the 1986 Act was read down to not foreclose the secular rights of a divorced Muslim woman.

18. The position that the rights under Section 125 of CrPC 1973 would also be accessible to a divorced Muslim woman was substantially reiterated in ***Shabana Bano v. Imran Khan*** ***(2010) 1 SCC 666***, whereby this Court, through a cumulative reading of the decision in ***Danial Latifi*** ***(supra)***, reached the said conclusion.

19. The same question of law again knocked on the doors of this Court in ***Khatoon Nisa v. State of Uttar Pradesh and Others (2014) 12 SCC 646*** wherein the 5-Judge Bench also took the assistance of the observations made in the decision in ***Danial Latifi*** ***(supra)***. While acknowledging the similar parameters and considerations for the purpose of adjudicating petitions under both the laws, secular and personal, it held that a divorced Muslim woman is entitled to invoke the jurisdiction under Section 125 of CrPC 1973 to seek her right of maintenance even if she does not exercise her choice of election as stipulated under Section 5 of the 1986 Act. The relevant paragraph number 10 is reproduced herein below:

> "***10.*** *Subsequent to the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (for short "the Act") as it was considered that the jurisdiction of the Magistrate under Section 125 CrPC can be invoked only when the conditions precedent mentioned in Section 5 of the Act are complied with, in the case in hand, the Magistrate came to a finding that there has been no divorce in the eye of law and as such, the Magistrate has the jurisdiction to grant maintenance under Section 125 CrPC. This finding of the Magistrate has been upheld by the High Court. The validity of the provisions of the Act was for consideration before the Constitution Bench in the case of Danial Latifi v. Union of India [(2001) 7 SCC 740]. In the said case by reading down the provisions of the Act, the validity of the Act has been upheld and it has been observed that under the Act itself when parties agree, the provisions of Section 125 CrPC could be invoked as contained in Section 5 of*

the Act and even otherwise, the Magistrate under the Act has the power to grant maintenance in favour of a divorced woman, and the parameters and considerations are the same as those in Section 125 CrPC. It is undoubtedly true that in the case in hand, Section 5 of the Act has not been invoked. Necessarily, therefore, the Magistrate has exercised his jurisdiction under Section 125 CrPC. But, since the Magistrate retains the power of granting maintenance in view of the Constitution Bench decision in Danial Latifi case [(2001) 7 SCC 740] under the Act and since the parameters for exercise of that power are the same as those contained in Section 125 CrPC, we see no ground to interfere with the orders of the Magistrate granting maintenance in favour of a divorced Muslim woman. In fact, Mr Qamaruddin, learned counsel appearing for the appellants, never objected to pay maintenance as ordered by the Magistrate. But, he seriously disputes the findings of the Magistrate on the status of the parties and contends that the Magistrate was wholly in error in coming to the conclusion that there has been no divorce between the parties in the eye of law."

(Underlining is ours)

20. Subsequently, in ***Shamim Bano v. Asraf Khan*** ***(2014) 12 SCC 636***, this Court had to consider the maintainability of a petition under Section 125 of CrPC 1973 *vis-à-vis* a situation where a petition under Section 3 of the 1986 Act has been subsequently moved. Holding that an election under Section 5 of the 1986 Act was not imperative, since both the petitions were moved before a Magistrate, it clarified that even for the purpose of adjudicating a petition under the personal law, specifically in regard to maintenance for a divorced Muslim woman, the parameters of Section 125 of CrPC 1973 would be applicable.

21. It is imperative to acknowledge that the enactment of the Family Courts Act, 1984 (hereinafter referred to as "FCA 1984") had excluded the jurisdiction of a Magistrate under Chapter IX of CrPC 1973, of which Section 125 is a part, wherein a Family Court had been established for the concerned area or jurisdiction. After the enactment of FCA 1984, a situation arose where a divorced Muslim woman moved a Family Court under Section 125 of CrPC 1973, and a similar circumstance

was dealt in ***Shamima Farooqui v. Shahid Khan (2015) 5 SCC 705*** in light of the question of law at hand. Herein, while relying on the earlier mentioned judgments of this Court, it observed that the concerned Family Court had rightly, and without a shadow of a doubt, held that Section 125 of CrPC 1973 would be applicable. The relevant paragraph number 09 is reproduced below:

> "***9.*** *First of all, we intend to deal with the applicability of Section 125 CrPC to a Muslim woman who has been divorced. In Shamim Bano v. Asraf Khan [(2014) 12 SCC 636 : (2014) 5 SCC (Civ) 145 : (2014) 5 SCC (Cri) 162], this Court after referring to the Constitution Bench decisions in Danial Latifi v. Union of India [(2001) 7 SCC 740 : (2007) 3 SCC (Cri) 266] and Khatoon Nisa v. State of U.P. [Khatoon Nisa v. State of U.P. (2014) 12 SCC 646 : (2014) 5 SCC (Civ) 155 : (2014) 5 SCC (Cri) 170] had opined as follows : (Shamim Bano case [(2014) 12 SCC 636 : (2014) 5 SCC (Civ) 145 : (2014) 5 SCC (Cri) 162], SCC p. 644, paras 13-14)*
>
> *'13. The aforesaid principle clearly lays down that even after an application has been filed under the provisions of the Act, the Magistrate under the Act has the power to grant maintenance in favour of a divorced Muslim woman and the parameters and the considerations are the same as stipulated in Section 125 of the Code. We may note that while taking note of the factual score to the effect that the plea of divorce was not accepted by the Magistrate which was upheld by the High Court, the Constitution Bench [(2001) 7 SCC 740 : (2007) 3 SCC (Cri) 266] opined that as the Magistrate could exercise power under Section 125 of the Code for grant of maintenance in favour of a divorced Muslim woman under the Act, the order did not warrant any interference. Thus, the emphasis was laid on the retention of the power by the Magistrate under Section 125 of the Code and the effect of ultimate consequence.*
>
> *14. Slightly recently, in Shabana Bano v. Imran Khan [(2010) 1 SCC 666 : (2010) 1 SCC (Civ) 216 : (2010) 1 SCC (Cri) 873], a two-Judge Bench, placing reliance*

on Danial Latifi [(2001) 7 SCC 740 : (2007) 3 SCC (Cri) 266], has ruled that : (Shabana Bano case [(2010) 1 SCC 666 : (2010) 1 SCC (Civ) 216 : (2010) 1 SCC (Cri) 873], SCC p. 672, para 21)

'21. The appellant's petition under Section 125 CrPC would be maintainable before the Family Court as long as the appellant does not remarry. The amount of maintenance to be awarded under Section 125 CrPC cannot be restricted for the iddat period only.'

Though the aforesaid decision was rendered interpreting Section 7 of the Family Courts Act, 1984, yet the principle stated therein would be applicable, for the same is in consonance with the principle stated by the Constitution Bench in Khatoon Nisa [Khatoon Nisa v. State of U.P. (2014) 12 SCC 646 : (2014) 5 SCC (Civ) 155 : (2014) 5 SCC (Cri) 170].'

In view of the aforesaid dictum, there can be no shadow of doubt that Section 125 CrPC has been rightly held to be applicable by the learned Family Judge."

22. Before perusing the submissions made by the Counsel, it is paramount to also consider the bare text of the concerned provisions *vis-à-vis* their comparative dissection. Under Section 3 of the 1986 Act, the entitlements or rights of a divorced Muslim woman, wider than the ambit of maintenance, arise as against the obligations of her former husband emanating from their divorce. *Per contra*, under Section 125 of CrPC 1973, a woman seeking maintenance has to establish that she is unable to maintain herself. The right to seek maintenance under Section 125 of CrPC 1973 is invokable even during the sustenance of marriage and, thereby is not contingent upon divorce.

23. Another distinction *vis-à-vis* the aforementioned provisions, relates to the time period within which proceedings initiated thereunder are to be decided. While a petition moved under Section 3(2) of the 1986 Act is to be decided in regard to a husband's liability under Section 3(1) of the 1986 Act within a period of one month, there is no such statutory time frame prescribed under Section 125 of CrPC 1973. However, there is an obligation to determine the interim maintenance within a period of 60 days while dealing with a petition under Section

125 of CrPC 1973. Moreover, failure to comply with such order passed under Section 3(2) of the 1986 Act may lead to issuance of a warrant for levying the amount of maintenance as directed under the said order and may also sentence him to imprisonment till the payment is made or for a term which may extend to one year. On the other hand, equivalent non-compliance of an order passed under Section 125 of CrPC 1973 may result in imprisonment for a term of one month or until the payment is made.

24. After the advent of the decision in ***Danial Latifi*** ***(supra)***, numerous High Courts also went on to contemplate and analyse the instant question of law. A quick examination of the said judgment by various High Courts allows us to categorise the decisions rendered therein into two sets of views. The first view in certain judgments so rendered held that the remedy is to be exclusively exercised under Section 3 of the 1986 Act, impliedly holding that the rights under the secular provisions stood extinguished. Another view in certain other judgments allowed a divorced Muslim woman to seek the remedy of maintenance under Section 125 of CrPC 1973 while explicit existence of Section 3 of the 1986 Act was recognised.

25. The set of judgments, that went on to hold that the rights of a divorced Muslim woman are to be exercised through the provisions of the 1986 Act and specifically under Section 3 therein, and, not through the secular provision of Section 125 of CrPC 1973. One decision by a Single Judge of the High Court of Allahabad in ***Shahid Jamal Ansari v. State of Uttar Pradesh 2008 SCC OnLine All 1077*** is brought to our attention by the learned *amicus curiae* whereby the Court opined that a divorced Muslim woman cannot claim maintenance from her former husband by virtue of secular provision of Section 125 of CrPC 1973 and the 1986 Act, being a complete code in itself on the subject matter of maintenance, prevails.

26. Deviating from the aforesaid approach, certain High Courts adopted a beneficial interpretation, that is to say, that the *non-obstante* clause in the 1986 Act, in no manner bars the remedy under Section 125 CrPC 1973. In this regard, a reference has been made to a decision of Single Judge of High Court of Gujarat in ***Mumtazben Jusabbhai Sipahi v. Mahebubkhan Usmankhan Pathan 1998 SCC OnLine Guj 279***, a decision of High Court of Kerala in ***Kunhimohammed v. Ayishakutty 2010 SCC OnLine Ker 567***, the decisions of High Court

of Allahabad in ***Mrs. Humera Khatoon and Others v. Mohd. Yaqoob 2010 SCC OnLine All 202***, ***Sazid v. State of Uttar Pradesh and Others 2011 SC OnLine All 1059, Jubair Ahmad v. Ishrat Bano 2019 SCC OnLine All 4065,*** and ***Shakila Khatun v. State of Uttar Pradesh and Another 2023 SCC OnLine All 75,*** and the decision of a Single Judge of High Court of Bombay in ***Khalil Abbas Fakir v. Tabbasum Khalil Fakir and Another 2024 SCC OnLine Bom 23.***

27. Amongst these set of decisions, the one rendered by a Division Bench of the High Court of Kerala in ***Kunhimohammed (supra)*** has significantly occupied the field in regard to the limited question of law before us. A perusal of the instant judgment showcases the same to be in line with the *ratio decidendi* rendered by this Court in the decision in ***Danial Latifi*** ***(supra)*** by holding that there is no express extinguishment of the rights under Section 125 CrPC 1973 and neither the same was intended or conceived by the legislature while enacting the 1986 Act. It was observed that the domains occupied by the two provisions are entirely different as the secular provision stipulates an inability to maintain oneself for invoking the said rights while Section 3 of the 1986 Act stands independent of one's ability or inability to maintain. Thereby, adopting a harmonious and purposive approach amidst the two alleged conflicting legislative protections.

28. In consideration of the aforesaid well-established positions of law, as well as the submissions of the learned Senior Advocate and the learned *amicus curiae*, it is apposite to accordingly decide the fate of the instant petition moved before us.

To begin with the contention in regard to the existence of *non-obstante* clause in Sections 3 and 4 of the 1986 Act, it is undoubtedly clarified by the Constitution Benches of this Court that the same cannot promptly be deemed to override any other rights so provided by the enactments of the legislature. We are, accordingly, also bound by the Doctrine of *stare decisis* contemplated through Article 141 of the Constitution of India to accept the said observations. Furthermore, a bare perusal of Section 7 of the 1986 Act, reflects the same to be transitionary in nature and the interpretations in respect of Section 5 of the 1986 Act, as highlighted above through numerous decisions, reflect our inability to accept the passionate contentions of the learned Senior Advocate on behalf of the Appellant.

29. Thus, the High Court of Telangana, while modifying the Order(s) of the Family Court, was correct in upholding the maintainability of the petition filed under Section 125 of CrPC 1973 by Respondent No. 02 herein. Therefore, there is no infirmity in its Impugned Order dated 13.12.2023.

30. In addition, Mr Agrawal proceeded to put forth a question before us that whether fulfilment of a divorced Muslim woman's rights, particularly maintenance under Section 3 of the 1986 Act, accepted by her without *demur*, would bar her to file an application under Section 125 of CrPC 1973 in light of statutory protection ameliorating the issue of double payment by a husband under secular, and personal laws, as provided under Section 127(3)(b) of CrPC 1973.

31. Before proceeding with this additional question of law, it is apposite to refer the bare provision of Section 127(3)(b) of CrPC 1973. The same is accordingly reproduced hereinbelow:

> "***127. Alteration in allowance –***
>
> *(3) Where any order has been made under section 125 in favour of a woman who has been divorced by, or has obtained a divorce from her husband, the Magistrate shall, if he is satisfied that –*
>
> *(a)* xxx-xxx-xxx
>
> *(b) the woman has been divorced by her husband and that she has received, whether before or after the date of the said order, the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce, cancel such order –*
>
> *(i) in the case where such sum was paid before such order, from the date on which such order was made;*
>
> *(ii) in any other case, from the date of expiry of the period, if any, for which maintenance has been actually paid by the husband to the woman;*"

32. Unequivocally, the most appropriate construction of these secular provisions of CrPC 1973 in regard to the right of maintenance is that

the legislature would never intend that an undue benefit is derived after the end of the marital relationship between the parties concerned. Hence, the provision of Section 127(3)(b) of CrPC 1973 would act in the nature of a *proviso* to the right provided under Section 125 of CrPC 1973 only in such a circumstance where sufficient means of livelihood after the divorce, and the provisions contemplating the future needs of divorced Muslim women, stands provided to the satisfaction of the court concerned. To affirm, reliance is placed on paragraph numbers 28 and 29 of the decision in ***Danial Latifi*** **(*supra*)**, which are reproduced below:

> "***28.*** *A careful reading of the provisions of the Act would indicate that a divorced woman is entitled to a reasonable and fair provision for maintenance. It was stated that Parliament seems to intend that the divorced woman gets sufficient means of livelihood after the divorce and, therefore, the word "provision" indicates that something is provided in advance for meeting some needs. In other words, at the time of divorce the Muslim husband is required to contemplate the future needs and make preparatory arrangements in advance for meeting those needs. Reasonable and fair provision may include provision for her residence, her food, her clothes, and other articles. The expression "within" should be read as "during" or "for" and this cannot be done because words cannot be construed contrary to their meaning as the word "within" would mean "on or before", "not beyond" and, therefore, it was held that the Act would mean that on or before the expiration of the iddat period, the husband is bound to make and pay maintenance to the wife and if he fails to do so then the wife is entitled to recover it by filing an application before the Magistrate as provided in Section 3(3) but nowhere has Parliament provided that reasonable and fair provision and maintenance is limited only for the iddat period and not beyond it. It would extend to the whole life of the divorced wife unless she gets married for a second time*
>
> ***29.*** *The important section in the Act is Section 3 which provides that a divorced woman is entitled to obtain from*

her former husband "maintenance", "provision" and "mahr", and to recover from his possession her wedding presents and dowry and authorizes the Magistrate to order payment or restoration of these sums or properties. The crux of the matter is that the divorced woman shall be entitled to a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband. The wordings of Section 3 of the Act appear to indicate that the husband has two separate and distinct obligations : (1) to make a "reasonable and fair provision" for his divorced wife; and (2) to provide "maintenance" for her. The emphasis of this section is not on the nature or duration of any such "provision" or "maintenance", but on the time by which an arrangement for payment of provision and maintenance should be concluded, namely, "within the iddat period". If the provisions are so read, the Act would exclude from liability for post-iddat period maintenance to a man who has already discharged his obligations of both "reasonable and fair provision" and "maintenance" by paying these amounts in a lump sum to his wife, in addition to having paid his wife's mahr and restored her dowry as per Sections 3(1)(c) and 3(1)(d) of the Act. Precisely, the point that arose for consideration in Shah Bano case [(1985) 2 SCC 556 : 1985 SCC (Cri) 245] was that the husband had not made a "reasonable and fair provision" for his divorced wife even if he had paid the amount agreed as mahr half a century earlier and provided iddat maintenance and he was, therefore, ordered to pay a specified sum monthly to her under Section 125 CrPC. This position was available to Parliament on the date it enacted the law but even so, the provisions enacted under the Act are "a reasonable and fair provision and maintenance to be made and paid" as provided under Section 3(1)(a) of the Act and these expressions cover different things, firstly, by the use of two different verbs — "to be made and paid to her within the iddat period" it is clear that a fair and reasonable provision is to be made while maintenance is to be paid; secondly, Section 4 of the Act, which empowers the Magistrate to issue an

order for payment of maintenance to the divorced woman against various of her relatives, contains no reference to "provision". Obviously, the right to have "a fair and reasonable provision" in her favour is a right enforceable only against the woman's former husband, and in addition to what he is obliged to pay as "maintenance"; thirdly, the words of The Holy Quran, as translated by Yusuf Ali of "mata" as "maintenance" though may be incorrect and that other translations employed the word "provision", this Court in Shah Bano case [(1985) 2 SCC 556 : 1985 SCC (Cri) 245] dismissed this aspect by holding that it is a distinction without a difference. Indeed, whether "mata" was rendered "maintenance" or "provision", there could be no pretence that the husband in Shah Bano case [(1985) 2 SCC 556 : 1985 SCC (Cri) 245] had provided anything at all by way of "mata" to his divorced wife. The contention put forth on behalf of the other side is that a divorced Muslim woman who is entitled to "mata" is only a single or onetime transaction which does not mean payment of maintenance continuously at all. This contention, apart from supporting the view that the word "provision" in Section 3(1)(a) of the Act incorporates "mata" as a right of the divorced Muslim woman distinct from and in addition to mahr and maintenance for the iddat period, also enables "a reasonable and fair provision" and "a reasonable and fair provision" as provided under Section 3(3) of the Act would be with reference to the needs of the divorced woman, the means of the husband, and the standard of life the woman enjoyed during the marriage and there is no reason why such provision could not take the form of the regular payment of alimony to the divorced woman, though it may look ironical that the enactment intended to reverse the decision in Shah Bano case [(1985) 2 SCC 556 : 1985 SCC (Cri) 245], actually codifies the very rationale contained therein."

From the aforementioned paragraphs, this Court has clarified the intent of the Parliament by giving beneficial construction to the expressions contemplated under Section 3 of the 1986 Act, particularly, "within *iddat* period" by observing that the Parliament

never sought to restrict the rights of a divorced Muslim woman to *iddat* period. Rather, by virtue of the introduction of Section 3 of the 1986 Act in this socio-beneficial legislation, the idea was to confer the benefit of maintenance as well as a reasonable and fair provision for the lifetime of a divorced Muslim woman, subject to her remarriage. Adding to this well-expounded interpretation of the provisions of the 1986 Act, it is hereby pertinent to highlight that a divorced Muslim woman is not restricted from exercising her independent right of maintenance under the secular provision of Section 125 of CrPC 1973, provided she is able to prove the requisites encompassed by the said statute.

33. Having said that, it is also not to be a case where a specious amount rendered in favour of a divorced woman by virtue of requirements laid down in either the personal law or the customary law of the parties is utilised to evade the liability under Section 125 of CrPC 1973 or to seek an equivalent reduction in the amount of maintenance to be provided therein. There ought to be a reasonable substitute for the maintenance under personal or customary law equating to a rational nexus between the actual sum of maintenance paid and the potential of maintenance under the equivalent provision of secular law. Having made the said observations, a reference should again be made to the decision in ***Fuzlunbi*** ***(supra)*** in paragraph numbers 19(1) to 19(4) which declared that:

"***19.*** *We may sum up and declare the law foolproof fashion:*

(1) Section 127(3)(b) has a setting, scheme and a purpose and no talaq of the purpose different from the sense is permissible in statutory construction.

(2) The payment of an amount, customary or other, contemplated by the measure must inset the intent of preventing destitution and providing a sum which is more or less the present worth of the monthly maintenance allowances the divorcee may need until death or remarriage overtake her. The policy of the law abhors neglected wives and destitute divorcees and Section 127(3)(b) takes care to avoid double payment one under custom at the time of divorce and another under Section 125.

> (3) *Whatever the facts of a particular case, the Code, by enacting Sections 125 to 127, charges the court with the humane obligation of enforcing maintenance or its just equivalent to ill-used wives and castaway ex-wives, only if the woman has received voluntarily a sum, at the time of divorce, sufficient to keep her going according to the circumstances of the parties.*
>
> (4) *Neither personal law nor other salvationary plea will hold against the policy of public law pervading Section 127(3)(b) as much as it does in Section 125. So a farthing is no substitute for a fortune nor naive consent equivalent to intelligent acceptance…*"

34. It is observed that there shall arise a couple of peculiar circumstances while considering the right for seeking cancellation of an order by the husband concerned, through an application under Section 127(3)(b) of CrPC 1973. The first and settled circumstance is that, when a divorced Muslim woman initially moves a petition under Section 125 of CrPC 1973 and seeks an order for maintenance as against her former husband and only after receiving said entitlements, she chooses to exercise her substantial rights as provided under Section 3 of the 1986 Act, and therein, the husband is also able to fulfil his concerned obligations to the appropriate satisfaction of the court, ensuring her future maintenance. It is then and only then that the husband can invoke and press his claim under Section 127(3)(b) of CrPC 1973 to seek cancellation of an order, if so, passed under Section 125 of CrPC 1973, directing him to provide maintenance to his former wife.

35. In a case where a husband has fulfilled his obligations under Section 3 of the 1986 Act or as provided by customary or personal law so followed, and the divorced Muslim woman subsequently prefers to invoke Section 125 of CrPC 1973 on the ground of inability to maintain herself, in such a factual matrix, undeniably, the right to move under this provision is open in favour of a divorced Muslim woman. When a husband opposes resort to Section 125 CrPC 1973, he has to establish that, (a) initial obligations under the customary and/or personal statutory enactments as detailed earlier stands fulfilled

by him, and (b) that the wife, in the light of this, is able to maintain herself. However, if the husband fails to sustain the said objection(s) raised during the proceedings initiated under Section 125 of CrPC 1973, and an order is accordingly passed, it would not be inherently barred or liable to be cancelled through an application under Section 127(3)(b) of CrPC 1973. Nevertheless, other appropriate remedies as provided under the CrPC 1973 or any other law to that effect, shall always be open to be exercised by such a husband to seek setting aside or appropriate modification of an order so passed under Section 125 of CrPC 1973.

36. Having said that, undoubtedly, if a “reasonable substitute” has been provided for by the husband as per their personal or customary laws at the time of their divorce, the maintenance provided for by a Magistrate or a Family Court, as the case may be, under Section 125 of CrPC 1973, can be reduced to the extent of deemed double benefit being given to a divorced wife.

37. From the aforementioned, we are inclined to conclude that equivalent rights of maintenance ascertained under both, the secular provision of Section 125 of CrPC 1973, and the personal law provision of Section 3 of the 1986 Act, parallelly exist in their distinct domains and jurisprudence. Thereby, leading to their harmonious construction and continued existence of the right to seek maintenance for a divorced Muslim woman under the provisions of CrPC 1973 despite the enactment of the 1986 Act.

38. Accordingly, the decisions, as rendered by various High Courts, one of which has been referred as aforesaid, or even otherwise, and stand in contradistinction to the observations made hereinabove, do not lay down the correct position of law, are, therefore, bad in law.

39. We note and acknowledge the able assistance rendered by the learned *amicus curiae* which has immensely benefitted this Court in settling the questions of law at hand.

40. The Impugned Order dated 13.12.2023 passed by the High Court of Telangana is affirmed. Accordingly, the Appeal is dismissed in the above terms.

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

Nagarathna J.

I have perused the judgment proposed by my learned brother Augustine George Masih, J. and I agree with the same. Having concurred with his opinion, I would like to record additional reasons regarding the interpretation of Section 125 of the Code of Criminal Procedure, 1973 (for short, "CrPC") and Section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (for short, "1986 Act").

Section 125 of the CrPC reads as under:

> **"Section 125. Order for maintenance of wives, children and parents. –** (1) If any person having sufficient means neglects or refuses to maintain;
>
> a) his wife, unable to maintain herself, or
>
> b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or
>
> c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or
>
> d) his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate as such magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct;
>
> Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means;
>
> Provided further that the Magistrate may, during the pendency of the proceeding regarding monthly allowance for the maintenance under this Sub-Section, order such person to make a monthly allowance for the interim maintenance of his wife or such child, father or mother,

and the expenses of such proceeding which the Magistrate considers reasonable, and to pay the same to such person as the Magistrate may from time to time direct;

Provided also that an application for the monthly allowance for the interim maintenance and expenses of proceeding under the second proviso shall, as far as possible, be disposed of within sixty days from the date of the service of notice of the application to such person.

Explanation. — For the purposes of this Chapter,- a) "minor" means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875) is deemed not to have attained his majority;

b) "wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

(2) Any such allowance for the maintenance or interim maintenance and expenses for proceeding shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance or interim maintenance and expenses of proceeding, as the case may be.

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole, or any part of each month's allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be, remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:

Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due:

Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds

of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

Explanation.— If a husband has contracted marriage with another women or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him.

(4) No wife shall be entitled to receive an allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be, from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her, husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order."

2. A reading of the aforesaid provision would indicate that in respect of four categories of persons of a family unable to maintain themselves, namely, wife, minor child, father and mother, if a person neglects or refuses to maintain them despite having sufficient means then a Magistrate of the first class (now, the family court in certain States) upon proof of such neglect or refusal may order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate, as such Magistrate thinks fit, and the person has to pay the same as directed.

3. Since the present case revolves around the expression "a wife who is unable to maintain herself", it is relevant to dwell further on the definition of a wife under Section 125 of the CrPC. Explanation (b) thereto defines a wife to include a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried. The definition being inclusive is therefore expansive in nature. A divorced woman who has not remarried as well as a wife are placed on par for the purpose of seeking maintenance.

4. The States of Madhya Pradesh, Maharashtra, Rajasthan, Tripura, Uttar Pradesh and West Bengal have made State Amendments to Section 125 of the CrPC.

Right to maintenance in a constitutional context:

5. Section 125 of the CrPC is a measure of social justice with a view to protect women and children and is aligned to the salutary object enshrined in Article 15(1) and (3) of the Constitution read with Article 39(e) of the Constitution. For immediate reference, Article 15(1) and (3) and Article 39(e) are reproduced as under:

> "**15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.**—(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.
>
> xxx xxx xxx
>
> (3) Nothing in this article shall prevent the State from making any special provision for women and children.
>
> xxx xxx xxx
>
> **39. Certain principles of policy to be followed by the State.**—The State shall, in particular, direct its policy towards securing—
>
> xxx xxx xxx
>
> (e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;"

6. Article 15(3) is a fundamental right while Article 39 is a Directive Principle of State Policy that is fundamental in the governance of the country and it is the duty of the State to apply these principles while making the law. Thus, the statutory right to seek maintenance under Section 125 of the CrPC is also embedded in the text, structure and philosophy of the Constitution. Article 15(3), read with Article 39(e) manifests a constitutional commitment towards special measures to ensure a life of dignity for women at all stages of their lives. This ought to be irrespective of the faith a woman belongs to. The remedy of maintenance is a critical source of succour for the destitute, the deserted and the deprived sections of women. There can be no manner of doubt that it is an instantiation of the

constitutional philosophy of social justice that seeks to liberate the Indian wife including a divorced woman from the shackles of gender-based discrimination, disadvantage and deprivation.

7. Further, Section 125 of the CrPC is independent of and in addition to maintenance that could be awarded under the Protection of Women from Domestic Violence Act, 2005 (for short, “2005 Act”) which is applicable to an ‘aggrieved woman’ in a ‘shared household’ as defined under the provisions of the aforesaid Act.

8. A reading of Section 125 of the CrPC would indicate that the intention of the said provision is to provide for a speedy remedy and prevent vagrancy by compelling the husband to support the wife. The provision is meant to achieve a social purpose. The reason being, that after marriage, it is the duty of the husband to provide shelter and maintenance to the wife in the Indian context. Particularly, if she is unable to maintain herself. If he neglects or refuses to do so, the wife is legally entitled to enforce the said right by filing a petition under Section 125 of the CrPC irrespective of any other right created in favour of the wife under any other law. Therefore, the passing of the 1986 Act, in my view, cannot militate against or dilute the salutary nature of Section 125 of the CrPC. The object of this provision is to save a wife including a divorced woman from deprivation and destitution.

9. The salutary parliamentary intent behind Section 488 of the erstwhile CrPC was exposited by Subba Rao, J., (as the learned Chief Justice of India then was) in ***Jagir Kaur vs. Jaswant Singh*** ***(1964) 2 SCR 73***. It was held that *“Chapter 36 of the Code of Criminal Procedure providing for maintenance of wives and children intends to serve a social purpose.”* After the enactment of the CrPC, 1973, this Court in ***Bhagwan Dutt vs. Kamla Devi*** ***(1975) 2 SCC 386***, held that in order to subserve the object of Section 125(1) of the CrPC the Magistrate must determine the wife’s requirements in such a manner that prevents vagrancy and destitution. While assuring the aggrieved woman a standard of living that is ‘neither luxurious nor penurious,’ this Court held that her separate income must also be accounted for while computing the amount of maintenance. Therefore, the object of maintenance proceedings is rehabilitative and not punitive as it seeks to efficaciously provide a deserted wife with food, clothing and shelter - the very basic essentials or needs of a human life.

10. The direction to provide maintenance seeks to alleviate the financial stress and vulnerability of the impecunious woman who is dependent on her husband economically. It is indeed a constitutional imperative to redress the vulnerability of a married woman which includes a divorced woman who does not have an independent source of income under Section 125 of the CrPC. It is commonplace that married women sacrifice employment opportunities to nurture the family, pursue child rearing, and undertake care work for the elderly, *vide* ***Jasbir Kaur Sehgal vs. District Judge, Dehradun (1997) 7 SCC 7.*** A neglected dependent wife, which also includes a divorced woman who has no other source of income, has to perforce take recourse to borrowings from her parents/relatives/others during the interregnum to sustain herself and the minor children, till she receives interim maintenance. This makes her obligated in so many ways which may be taken advantage of by her parental (or natal) family or others from whom she may have borrowed.

11. It is in this delicate context that the law of maintenance strikes a careful, just and fair balance between the husband's sacrosanct duty towards his wife and children and the social imperative of not imposing oppressive or punitive financial hardship on the husband, *vide* ***Bhuwan Mohan Singh vs. Meena (2015) 6 SCC 353; Reema Salkan vs. Sumer Singh Salkan (2019) 12 SCC 303.***

Adequacy and sufficiency of maintenance:

12. One of the critical aspects of adjudicating claims for maintenance is ensuring adequate and sufficiency of maintenance so that the wife can maintain herself with dignity. The consistent emphasis of this Court's jurisprudence upon sufficiency of maintenance amount and social protection of deserted women transcends the intricacies of our pluralist legal culture and personal laws.

13. I may also note the Kerala High Court's Division Bench judgment in ***Kunhi Moyin vs. Pathumma, 1976 KLT 87 ("Kunhi Moyin")*** authored by Khalid, J. (as his Lordship then was). While dismissing a Muslim husband's constitutional challenge to Section 125 of the CrPC, the High Court held that the salutary provision was enacted to achieve the ends of social welfare and reform. Therefore, no claim of violation of the fundamental right to practice religion under Article 25 could be sustained. Of particular relevance was the interpretation of Section 127(3)(b) of the CrPC. The High Court found that an

attempt may be made to rely upon Section 127(3)(b) to 'destroy the effectiveness of Section 125' and deny its benefit to rightful claimants. For the sake of clarity, the said provision is extracted as under:

> **"127. Alteration in allowance.-** (1) On proof of a change in the circumstances of any person, receiving under section 125 a monthly allowance, for the maintenance or interim maintenance, or ordered under the same section to pay a monthly allowance for the maintenance, or interim maintenance, to his wife, child, father or mother, as the case may be, the Magistrate may make such alteration, as he thinks fit, in the allowance for the maintenance or the interim maintenance, as the case may be.
>
> (2) Where it appears to the Magistrate that, in consequence of any decision of a competent Civil Court, any order made under section 125 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly.
>
> (3) Where any order has been made under section 125 in favour of a woman who has been divorced by, or has obtained a divorce from, her husband, the Magistrate shall, if he is satisfied that –
>
> (a) the woman has, after the date of such divorce, remarried, cancel such order as from the date of her remarriage;
>
> (b) the woman has been divorced by her husband and that she has received, whether before or after the date of the said order, the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce, cancel such order –
>
> (i) in the case where such sum was paid before such order, from the date on which such order was made;
>
> (ii) in any other case, from the date of expiry of the period, if any, for which maintenance has been actually paid by the husband to the woman;

(c) the woman has obtained a divorce from her husband and that she had voluntarily surrendered her rights to maintenance or interim maintenance, as the case may be after her divorce, cancel the order from the date thereof.

(4) At the time of making any decree for the recovery of any maintenance or dowry by any person, to whom a monthly allowance for the maintenance and interim maintenance or any of them has been ordered to be paid under Section 125, the Civil Court shall take into account that sum which has been paid to, or recovered by, such person as monthly allowance for the maintenance and interim maintenance or any of them, as the case may be, in pursuance of the said order."

The learned judge clarified that Section 127(3)(b) does not refer to *mahr* or dower or the maintenance paid during the *iddat* period as these are not the sums 'payable on divorce' under the personal law. What was encompassed by the terms was the amount of alimony or compensation paid upon dissolution of marriage under customary or personal law. Expositing the intent and scheme of Section 125 read with Section 127, it was held that the Parliament did not intend to take away by one hand what is given under Section 125 by the other hand.

14. Krishna Iyer, J.'s judgment in ***Bai Tahira vs. Ali Hussain Fidaalli Chothia*** ***(1979) 2 SCC 316*** is also instructive in this respect. This Court was confronted with the application of Section 125 of the CrPC by a Muslim woman who had been divorced through a consent decree. The husband had challenged the award of maintenance before the Sessions Judge on the ground that the Magistrate lacked jurisdiction to ascertain whether the petitioner-wife was a 'wife' within the meaning of Section 125. Since the High Court had not interfered with the view of the Sessions Judge, the Supreme Court granted leave and held that a destitute divorcee would be covered within the protection of Section 125 since she was suffering neglect. Krishna Iyer, J. emphasised the constitutional import of Section 125 in the following words:

"7. **The meaning of meanings is derived from values in a given society and its legal system. Article 15(3) has**

> **compelling, compassionate relevance in the context of Section 125 and the benefit of doubt, if any, in statutory interpretation belongs to the ill-used wife and the derelict divorcee.** This social perspective granted, the resolution of all the disputes projected is easy. Surely, Parliament, in keeping with Article 15(3) and deliberate by design, made a special provision to help women in distress cast away by divorce. Protection against moral and material abandonment manifest in Article 39 is part of social and economic justice, specificated in Article 38, fulfilment of which is fundamental to the governance of the country (Article 37). From this coign of vantage we must view the printed text of the particular Code."
>
> (emphasis supplied)

15. The critical facet of the case was its interpretation of Section 127 of the CrPC. It was held that Section 127 did not totally exempt a husband from providing maintenance to a destitute ex-wife if the amount he paid to her under the personal law was not sufficient to support her. It was held that:

> "12. The payment of illusory amounts by way of customary or personal law requirement will be considered in the reduction of maintenance rate but cannot annihilate that rate unless it is a reasonable substitute. The legal sanctity of the payment is certified by the fulfilment of the social obligation, not by a ritual exercise rooted in custom. No construction which leads to frustration of the statutory project can secure validation if the court is to pay true homage to the Constitution. The only just construction of the section is that Parliament intended divorcees should not derive a double benefit. If the first payment by way of *mehar* or ordained by custom has a reasonable relation to the object and is a capitalised substitute for the order under Section 125 — not mathematically but fairly — then Section 127(3)(b) subserves the goal and relieves the obliger, not *pro tanto* but wholly. The purpose of the payment "under any customary or personal law" must be to obviate destitution of the divorcee and to provide her with wherewithal to maintain herself. The whole scheme of Section 127(3)(b) is manifestly to recognise the substitute

> maintenance arrangement by lump sum payment organised by the custom of the community or the personal law of the parties. There must be a rational relation between the sum so paid and its potential as provision for maintenance to interpret otherwise is to stultify the project. Law is dynamic and its meaning cannot be pedantic but purposeful. The proposition, therefore, is that no husband can claim under Section 127(3)(b) absolution from his obligation under Section 125 towards a divorced wife except on proof of payment of a sum stipulated by customary or personal law whose quantum is more or less sufficient to do duty for maintenance allowance."

16. This carefully balanced and gender-just interpretation further guided our jurisprudence in ***Fuzlunbi vs. K. Khader Vali* (1980) 4 SCC 125** and ***Mohd. Ahmed Khan vs. Shah Bano Begum* (1985) 2 SCC 556 ("Shah Bano")** insofar as the application of Section 125 to persons governed by Muslim Personal Law was concerned. In ***Shah Bano***, this Court held that Section 125 overrides personal law of Muslims and hence a divorced Muslim woman is a "wife" within the meaning of this provision. The crux of these judgments is that an order under Section 127 ought to be a reasoned order and shall only allow an order for maintenance to be cancelled if a judge was satisfied that the divorced woman had received a sufficient amount of maintenance under any customary or personal law.

    In ***Danial Latifi vs. Union of India* (2001) 7 SCC 740 ("Danial Latifi")**, this Court has recorded that there was a big uproar after the judgment in ***Shah Bano*** was pronounced and Parliament enacted the 1986 Act "perhaps, with an intention of making the decision in ***Shah Bano*** ineffective."

Interpretation of 1986 Act:

17. The Parliament rejected legislative proposals to totally exempt Muslims from Section 125 of the CrPC and after extensive discussion, the Parliament enacted the 1986 Act. The preamble of the 1986 Act reads as under:

    > "An Act to protect the rights of Muslim women who have been divorced by, or have obtained divorce from, their husbands and to provide for matters connected therewith or incidental thereto."

18. The Statement of Objects and Reasons of the 1986 Act manifests the Parliament's intent to clarify the controversy emerging from the judgment in ***Shah Bano*** regarding the obligation of the Muslim husband to pay maintenance to a divorced wife. It underlines that the Parliament was taking the opportunity to 'specify the rights' of a Muslim divorced woman so as to protect her interests. The Bill of the said Act specified rights *vis à vis* a Muslim divorced woman who shall be entitled to the following:

    i. Reasonable and fair provision and maintenance for the woman within the period of *iddat*;

    ii. Reasonable provisions and maintenance for the children born to her before or after her divorce extended to a period of two years from the dates of birth of the children;

    iii. Mahr or dower and all the properties given to her by her relatives, friends, husband or the husband's relatives, if the above benefits are not given to her at the time of divorce.

    In the eventuality that a Muslim divorced woman was unable to maintain herself after the *iddat* period, it was specified that she shall be entitled to:

    i. Maintenance by her relatives who would be entitled to inherit her property on her death according to Muslim law in the proportions in which they would inherit her property.

    ii. If any one of such relatives is unable to pay his or her share on the ground of his or her not having the means to pay, the other relatives who have sufficient means shall pay the shares of these relatives also.

    iii. If a divorced woman has no relatives or if such relatives are unable to provide maintenance then the State Wakf Board shall pay maintenance ordered by the Magistrate.

19. Sections 3 and 4 of the 1986 Act which deal with the aforesaid aspects are extracted hereunder:

> "**3. *Mahr* or other properties of Muslim woman to be given to her at the time of divorce**.—(*1*) Notwithstanding anything contained in any other law for the time being in force, a divorced woman shall be entitled to—

(a) a reasonable and fair provision and maintenance to be made and paid to her within the *iddat* period by her former husband;

(b) where she herself maintains the children born to her before or after her divorce, a reasonable and fair provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of such children;

(c) an amount equal to the sum of *mahr* or dower agreed to be paid to her at the time of her marriage or at any time thereafter according to Muslim law; and

(d) all the properties given to her before or at the time of marriage or after her marriage by her relatives or friends or the husband or any relatives of the husband or his friends.

(*2*) Where a reasonable and fair provision and maintenance or the amount of *mahr* or dower due has not been made or paid or the properties referred to in clause (*d*) of sub-section (*1*) have not been delivered to a divorced woman on her divorce, she or any one duly authorised by her may, on her behalf, make an application to a Magistrate for an order for payment of such provision and maintenance, *mahr* or dower or the delivery of properties, as the case may be.

(*3*) Where an application has been made under sub-section (*2*) by a divorced woman, the Magistrate may, if he is satisfied that—

(a) her husband having sufficient means, has failed or neglected to make or pay her within the *iddat* period a reasonable and fair provision and maintenance for her and the children; or

(b) the amount equal to the sum of *mahr* or dower has not been paid or that the properties referred to in clause (*d*) of sub-section (*1*) have not been delivered to her.

make an order, within one month of the date of the filing of the application, directing her former husband to pay such reasonable and fair provision and maintenance to the

divorced woman as he may determine as fit and proper having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of her former husband or, as the case may be, for the payment of such *mahr* or dower or the delivery of such properties referred to in clause (*d*) of sub-section (*1*) to the divorced woman:

Provided that if the Magistrate finds it impracticable to dispose of the application within the said period, he may, for reasons to be recorded by him, dispose of the application after the said period.

(4) If any person against whom an order has been made under sub-section (*3*) fails without sufficient cause to comply with the order, the Magistrate may issue a warrant for levying the amount of maintenance or *mahr* or dower due in the manner provided for levying fines under the Code of Criminal Procedure, 1973 (2 of 1974), and may sentence such person, for the whole or part of any amount remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one year or until payment if sooner made, subject to such person being heard in defence and the said sentence being imposed according to the provisions of the said Code.

4. Order for payment of maintenance.—(*1*) Notwithstanding anything contained in the foregoing provisions of this Act or in any other law for the time being in force, where the Magistrate is satisfied that a divorced woman has not re-married and is not able to maintain herself after the *iddat* period, he may make an order directing such of her relatives as would be entitled to inherit her property on her death according to Muslim law to pay such reasonable and fair maintenance to her as he may determine fit and proper, having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of such relatives and such maintenance shall be payable by such relatives in the proportions in which they would inherit her property and at such periods as he may specify in his order:

> Provided that where such divorced woman has children, the Magistrate shall order only such children to pay maintenance to her, and in the event of any such children being unable to pay such maintenance, the Magistrate shall order the parents of such divorced woman to pay maintenance to her:
>
> Provided further that if any of the parents is unable to pay his or her share of the maintenance ordered by the Magistrate on the ground of his or her not having the means to pay the same, the Magistrate may, on proof of such inability being furnished to him, order that the share of such relatives in the maintenance ordered by him be paid by such of the other relatives as may appear to the Magistrate to have the means of paying the same in such proportions as the Magistrate may think fit to order.
>
> (*2*) Where a divorced woman is unable to maintain herself and she has no relatives as mentioned in sub-section (*1*) or such relatives or any one of them have not enough means to pay the maintenance ordered by the Magistrate or the other relatives have not the means to pay the shares of those relatives whose shares have been ordered by the Magistrate to be paid by such other relatives under the second proviso to sub-section (*1*), the Magistrate may, by order direct the State Wakf Board established under section 9 of the Wakf Act, 1954 (29 of 1954), or under any other law for the time being in force in a State, functioning in the area in which the woman resides, to pay such maintenance as determined by him under sub-section (*1*) or, as the case may be, to pay the shares of such of the relatives who are unable to pay, at such periods as he may specify in his order."

In ***Danial Latifi***, this Court observed on the effect and implication of the 1986 Act on the judgment of this Court in ***Shah Bano*** as under:

> "**8.** As held in *Shah Bano case* [(1985) 2 SCC 556 : 1985 SCC (Cri) 245] the true position is that if the divorced wife is able to maintain herself, the husband's liability to provide maintenance for her ceases with the expiration of the period of *iddat* but if she is unable to maintain herself

after the period of *iddat*, she is entitled to have recourse to Section 125 CrPC. Thus it is was held that there is no conflict between the provisions of Section 125 CrPC and those of the Muslim personal law on the question of the Muslim husband's obligation to provide maintenance to his divorced wife, who is unable to maintain herself. This view is a reiteration of what is stated in two other decisions earlier rendered by this Court in *Bai Tahira* v. *Ali Hussain Fidaalli Chothia* [(1979) 2 SCC 316 : 1979 SCC (Cri) 473] and *Fuzlunbi* v. *K. Khader Vali* [(1980) 4 SCC 125 : 1980 SCC (Cri) 916] .

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17. This Court in *Shah Bano case* [(1985) 2 SCC 556 : 1985 SCC (Cri) 245] held that although Muslim personal law limits the husband's liability to provide maintenance for his divorced wife to the period of *iddat*, it does not contemplate a situation envisaged by Section 125 CrPC of 1973. The Court held that it would not be incorrect or unjustified to extend the above principle of Muslim law to cases in which a divorced wife is unable to maintain herself and, therefore, the Court came to the conclusion that if the divorced wife is able to maintain herself the husband's liability ceases with the expiration of the period of *iddat*, but if she is unable to maintain herself after the period of *iddat*, she is entitled to recourse to Section 125 CrPC. This decision having imposed obligations as to the liability of the Muslim husband to pay maintenance to his divorced wife, Parliament endorsed by the Act the right of a Muslim woman to be paid maintenance at the time of divorce and to protect her rights."

20. This Court aptly summarised the position of a dependent married woman and her desperation on divorce in para 20 the judgment in ***Danial Latifi*** in the following words:

"**20.** In interpreting the provisions where matrimonial relationship is involved, we have to consider the social conditions prevalent in our society. In our society, whether they belong to the majority or the minority group, what is apparent is that there exists a great disparity in the matter

of economic resourcefulness between a man and a woman. Our society is male dominated, both economically and socially and women are assigned, invariably, a dependent role, irrespective of the class of society to which she belongs. A woman on her marriage very often, though highly educated, gives up her all other avocations and entirely devotes herself to the welfare of the family, in particular she shares with her husband, her emotions, sentiments, mind and body, and her investment in the marriage is her entire life — a sacramental sacrifice of her individual self and is far too enormous to be measured in terms of money. When a relationship of this nature breaks up, in what manner we could compensate her so far as emotional fracture or loss of investment is concerned, there can be no answer. It is a small solace to say that such a woman should be compensated in terms of money towards her livelihood and such a relief which partakes basic human rights to secure gender and social justice is universally recognised by persons belonging to all religions and it is difficult to perceive that Muslim law intends to provide a different kind of responsibility by passing on the same to those unconnected with the matrimonial life such as the heirs who were likely to inherit the property from her or the Wakf Boards. Such an approach appears to us to be a kind of distortion of the social facts. Solutions to such societal problems of universal magnitude pertaining to horizons of basic human rights, culture, dignity and decency of life and dictates of necessity in the pursuit of social justice should be invariably left to be decided on considerations other than religion or religious faith or beliefs or national, sectarian, racial or communal constraints. Bearing this aspect in mind, we have to interpret the provisions of the Act in question."

21. The provisions of the 1986 Act came to be upheld by the Constitution Bench of this Court in ***Danial Latifi***. I may notice the clear conclusion that the Constitution Bench arrived at as under:

"36. While upholding the validity of the Act, we may sum up our conclusions:

(1) A Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the *iddat* period must be made by the husband within the *iddat* period in terms of Section 3(1)(*a*) of the Act.

(2) Liability of a Muslim husband to his divorced wife arising under Section 3(1)(*a*) of the Act to pay maintenance is not confined to the *iddat* period.

(3) A divorced Muslim woman who has not remarried and who is not able to maintain herself after the *iddat* period can proceed as provided under Section 4 of the Act against her relatives who are liable to maintain her in proportion to the properties which they inherit on her death according to Muslim law from such divorced woman including her children and parents. If any of the relatives being unable to pay maintenance, the Magistrate may direct the State Wakf Board established under the Act to pay such maintenance.

(4) The provisions of the Act do not offend Articles 14, 15 and 21 of the Constitution of India."

22. This Court, while interpreting the 1986 Act, specifically repelled the contention that the 1986 Act was enacted to undo the effect of ***Shah Bano*** in the following words:

> "**26**. A reading of the Act will indicate that it codifies and regulates the obligations due to a Muslim woman divorcee by putting them outside the scope of Section 125 CrPC as the "divorced woman" has been defined as "Muslim woman who was married according to Muslim law and has been divorced by or has obtained divorce from her husband in accordance with the Muslim law". But the Act does not apply to a Muslim woman whose marriage is solemnised either under the Indian Special Marriage Act, 1954 or a Muslim woman whose marriage was dissolved either under the Indian Divorce Act, 1869 or the Indian Special Marriage Act, 1954. The Act does not apply to the

deserted and separated Muslim wives. The maintenance under the Act is to be paid by the husband for the duration of the *iddat* period and this obligation does not extend beyond the period of *iddat*. Once the relationship with the husband has come to an end with the expiry of the *iddat* period, the responsibility devolves upon the relatives of the divorcee. The Act follows Muslim personal law in determining which relatives are responsible under which circumstances. If there are no relatives, or no relatives are able to support the divorcee, then the court can order the State Wakf Boards to pay the maintenance.

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28. A careful reading of the provisions of the Act would indicate that a divorced woman is entitled to a reasonable and fair provision for maintenance. It was stated that Parliament seems to intend that the divorced woman gets sufficient means of livelihood after the divorce and, therefore, the word "provision" indicates that something is provided in advance for meeting some needs. In other words, at the time of divorce the Muslim husband is required to contemplate the future needs and make preparatory arrangements in advance for meeting those needs. Reasonable and fair provision may include provision for her residence, her food, her clothes, and other articles. The expression "within" should be read as "during" or "for" and this cannot be done because words cannot be construed contrary to their meaning as the word "within" would mean "on or before", "not beyond" and, therefore, it was held that the Act would mean that on or before the expiration of the *iddat* period, the husband is bound to make and pay maintenance to the wife and if he fails to do so then the wife is entitled to recover it by filing an application before the Magistrate as provided in Section 3(3) but nowhere has Parliament provided that reasonable and fair provision and maintenance is limited only for the *iddat* period and not beyond it. It would extend to the whole life of the divorced wife unless she gets married for a second time.

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> **30.** A comparison of these provisions with Section 125 CrPC will make it clear that requirements provided in Section 125 and the purpose, object and scope thereof being to prevent vagrancy by compelling those who can do so to support those who are unable to support themselves and who have a normal and legitimate claim to support are satisfied. If that is so, the argument of the petitioners that a different scheme being provided under the Act which is equally or more beneficial on the interpretation placed by us from the one provided under the Code of Criminal Procedure deprive them of their right, loses its significance. The object and scope of Section 125 CrPC is to prevent vagrancy by compelling those who are under an obligation to support those who are unable to support themselves and that object being fulfilled, we find it difficult to accept the contention urged on behalf of the petitioners."
>
> (underlining by me)

Although the provisions of the 1986 Act have been upheld by this Court, the controversy raised still remains inasmuch as the respondent herein sought recourse to Section 125 of the CrPC despite the 1986 Act being applicable and the same being objected to by the appellant herein on the premise that on the enforcement of the 1986 Act, Section 125 of the CrPC ceases to apply to a divorced Muslim woman. I shall now analyse the relevant provisions of the 1986 Act.

23. Section 3(1) begins with a non-obstante clause as, "*notwithstanding anything contained in any other law for the time being in force*," a divorced woman shall be entitled to reasonable and fair provision and maintenance and other benefits in the manner stated therein. The object and purpose of a *non-obstante clause* in a statute can be discussed at this stage. A *non-obstante clause* is usually appended to a Section in the beginning with a view to give the enacting part of the Section, in case of a conflict, an overriding effect over the provision or Act mentioned in the *non-obstante clause*. In other words, in spite of the provision or the Act mentioned in the *non-obstante clause*, the enactment following it will have its full operation or that the provisions embraced in the *non-obstante clause* will not be an impediment for the operation of the enactment. Thus, a *non-obstante clause* is a legislative device used by a Parliament or legislature

sometimes to give an overriding effect to what has been specified in the enacting part of a section in case of a conflict with what is contained in the *non-obstante clause* as stated above. Further, a *non-obstante clause* has to be distinguished from the expression "*subject to*" where the latter would convey the idea of a provision yielding place to another provision or other provisions to which it is made subject to. Also, the expression "*notwithstanding anything in any other law*" in a Section of an Act has to be contrasted with the use of the expression "*notwithstanding anything contained in this Act*", which has to be construed to take away the effect of any provision of that particular Act in which the section occurs but it cannot take away the effect of any other law. [Source: Principles of Statutory Interpretation by Justice G.P. Singh, 15th Edition, Chapter 5.4, p.284]

24. Recently, a seven-judge Bench of this Court in ***Curative Petition (C) No.44 of 2023 in Review Petition (C) No.704 of 2021*** arising out of ***Civil Appeal No.1599 of 2020 (In Re : Interplay between Arbitration Agreements under the Arbitration and Conciliation Act, 1996*** and ***the Indian Stamp Act, 1899) (2023) SCC OnLine SC 1666***, in paragraph 84 of the said judgment considered the implication of a *non-obstante* clause in a provision with reference to ***Chandavarkar Sita Ratna Rao vs. Ashalata S. Guram (1986) 4 SCC 447***, wherein it was observed as under:

> **"84.** xxx
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> > "67. A clause beginning with the expression "notwithstanding anything contained in this Act or in some particular provision in the Act or in some particular Act or in any law for the time being in force, or in any contract" is more often than not appended to a section in the beginning with a view to give the enacting part of the section in case of conflict an overriding effect over the provision of the act or the contract mentioned in the non obstante clause. It is equivalent to saying that in spite of the provisions of the Act or any other Act mentioned in the non obstante clause or any contract or document mentioned the enactment following it will have its full operation or that the provisions embraced in the non obstante clause would not be an impediment for an operation of the enactment."

It was further observed in reference to ***ICICI Bank Ltd. vs. SIDCO Leathers Ltd.*** ***(2006) 10 SCC 452***, that even if a *non-obstante* clause has wide amplitude, the extent of its impact has to be measured in view of the legislative intention and legislative policy.

25. Further, the utility of *non-obstante* clause is where there is a conflict between what is stated in a provision and any other law for the time being in force, or anything else contained in the said enactment. As already noted, only in the case of a conflict, the object is to give the enacting or operative portion of the section an overriding effect, not otherwise. In other words, only in a case of a conflict, a provision in an enactment containing a *non-obstante* clause, would be given its full operation and what is stated in the *non-obstante* clause will not be an impediment for the operation of the particular provision in the enactment. This would mean that what is stated in the *non-obstante* clause would not take away the effect of any provision of the Act which follows the same.

26. In ***Aswini Kumar Ghosh vs. Arabinda Bose, AIR 1952 SC 369***, this Court speaking through Chief Justice Patanjali Shastri observed that only when there is any inconsistency between what is contained in a provision of an enactment and a *non-obstante* clause would make the latter in what is to yield to what is stated in the provision following the same. In other words, it is only when the enacting part of the statute cannot be read harmoniously with what is stated in the *non-obstante* clause, would the *non-obstante* clause result in yielding to what is stated in the enacting part. Similarly, in ***Municipal Corporation, Indore vs. Ratnaprabha, AIR 1977 SC 308***, it was observed that there should be a clear inconsistency between a special enactment or rules and a general enactment.

27. Reference may also be made to an earlier judgment of the Full Bench of the Bombay High Court in ***Karim Abdul Rehman Shaikh vs. Shehnaz Karim Shaikh, 2000 SCC OnLine Bom 446***. Ranjana Desai, J, (as Her Ladyship then was) held that the purpose of the 1986 Act was not to take away a pre-existing right to seek maintenance under the extant statutory regime. Its intent could not be to 'absolve Muslim husbands from their obligation to look after them after *iddat* period.' The upshot of the reasoning was that the 1986 Act deliberately used two distinct expressions: maintenance and provision. These expressions allow sufficient interpretive amplitude to reconcile the

Muslim personal law with the secular law of maintenance bearing in mind the constitutional objective of preserving and promoting the dignity of Muslim women. The expression 'provision' denotes a forward-looking approach. It could not be circumscribed to the period of *iddat* but any limit on the same had to have a nexus to the vagrancy of the wife and the sufficiency of maintenance. Therefore, Section 3(1)(a) entitles the divorced wife to an amount that would be necessary in view of her essential expenses on residence, food, clothing, medicine etc.

28. I find that the 1986 Act was upheld by this Court in ***Danial Latifi*** on the basis of a purposive interpretation that mitigated the possibility of the absurd consequence of denying access to justice to a divorced Muslim woman. The premise of such an interpretation is that the expression "divorced woman" is defined in Section 2(a) of the said Act to mean a Muslim woman who has married according to Muslim law and has been divorced by, or has obtained divorce from, her husband in accordance with Muslim Law. A plain reading of the aforesaid expression would also indicate that the right created in favour of a Muslim divorced woman is in addition to and not in derogation of any other law for the time being in force. This would mean that Section 125 of the CrPC applies to such a Muslim woman also and the definition of wife in Section 125 of the CrPC including a divorced wife (irrespective of the faith she follows) would not detract from such a divorced Muslim wife also claiming maintenance under that provision. This is despite Section 3 creating new rights insofar as such a divorced Muslim woman is concerned. The scope and ambit of the *non-obstante clause* must be given its full effect and force. In other words, the intent of the Parliament which can be gathered from the use of such a *non-obstante clause* is to enhance the right of a divorced Muslim woman in addition to what she would have been entitled to under Section 125 of the CrPC. If the intent of the Parliament was otherwise, i.e., to curtail the rights of a divorced Muslim woman then the *non-obstante clause* would not have found a place in sub-section (1) of Section 3 of the 1986 Act. This is evident from the fact that while enacting the 1986 Act, Parliament did not simultaneously or at anytime thereafter create any bar for a divorced Muslim woman from claiming maintenance under Section 125 of the CrPC and thereby constrain her to proceed to make a claim only under the provisions of the 1986 Act. Neither is there

any bar, express or implied under the 1986 Act, to the effect that a divorced Muslim woman cannot unilaterally seek maintenance under Section 125 of the CrPC. One cannot read Section 3 of the 1986 Act containing the *non-obstante clause* so as to restrict or diminish the right to maintenance of a divorced Muslim woman under Section 125 of the CrPC and neither is it a substitute for the latter. Such an interpretation would be regressive, anti-divorced Muslim woman and contrary to Articles 14 and 15(1) and (3) as well as Article 39(e) of the Constitution of India. Therefore, inspite of an option of seeking maintenance under the provisions of the 1986 Act, Section 125 of the CrPC is applicable to a divorced Muslim woman.

29. Similarly, the expression "*notwithstanding anything contained in the foregoing provisions of this Act or any other law for the time being in force*" in sub-section (1) of Section 4, is indicative of the fact that the Magistrate can order for maintenance of a divorced Muslim woman being entitled to maintenance as per the provisions of the said Act. Further, sub-section (1) of Section 4 takes into consideration the period *after* the *iddat* period while sub-section (1) of Section 3 deals with a period which is *within* the *iddat* period. This Section is akin to Section 125 of the CrPC for a reasonable and fair provision of maintenance to be made.

30. In my view, the rights created under the provisions of the 1986 Act are in addition to and not in derogation of the right created under Section 125 of the CrPC, and the same is the basis for this Court's conclusion in ***Danial Latifi*** to save the 1986 Act from the vice of unconstitutionality. This is because nowhere in the judgment of this Court in the aforesaid case is there a reference to any bar under the provisions of the 1986 Act and neither has this Court created any such bar in the aforesaid judgment for a divorced Muslim woman to approach the Court under Section 125 of the CrPC for maintenance. Thus, the *non-obstante clause* in Sub-section (1) of Section 3 cannot result in Sections 3 and 4 of the 1986 Act whittling down the application of Section 125 of the CrPC and other allied provisions of the CrPC to a divorced Muslim woman. Therefore, if a divorced Muslim woman approaches the Magistrate for enforcement of her rights under Section 125 of the CrPC, she cannot be turned away to seek relief only under Sections 3 and 4 of the 1986 Act as is sought to be contended by the appellant herein. In other words, such a divorced Muslim woman is entitled to seek recourse to either or both

the provisions. The option lies with such a woman. The Court would have to ultimately balance between the amount awarded under the 1986 Act and the one to be awarded under Section 125 of the CrPC.

31. In this context, I note that the learned senior counsel for the appellant, Sri Qadri relied upon the language of Sections 5 and 7 of the 1986 Act to argue that the Parliament intended to give the 1986 Act an overriding effect over the secular law on maintenance, i.e. Sections 125 to 128 of the CrPC. Sections 5 and 7 are reproduced for immediate reference:

> **"5. Option to be governed by the provisions of sections 125 to 128 of Act 2 of 1974.-** If, on the date of the first hearing of the application under sub-section (2) of section 3, a divorced woman and her former husband declare, by affidavit or any other declaration in writing in such form as may be prescribed, either jointly or separately, that they would prefer to be governed by the provisions of sections 125 to 128 of the Code of Criminal Procedure, 1973 (2 of 1974); and file such affidavit or declaration in the court hearing the application, the Magistrate shall dispose of such application accordingly.
>
> Explanation.—For the purposes of this section, "date of the first hearing of the application" means the date fixed in the summons for the attendance of the respondent to the application.
>
> xxx xxx xxx
>
> **7. Transitional provisions.-** Every application by a divorced woman under section 125 or under section 127 of the Code of Criminal Procedure, 1973 (2 of 1974) pending before a Magistrate on the commencement of this Act, shall, notwithstanding anything contained in that Code and subject to the provisions of section 5 of this Act, be disposed of by such Magistrate in accordance with the provisions of this Act."

32. I find that Section 5 provides for a situation where a Muslim woman and her former husband decide to voluntarily elect to pursue the remedies under Sections 125 to 128 of the CrPC by way of a

written application on the first date of hearing of an application under Section 3 of the 1986 Act. The provision seeks to provide an option that can be mutually exercised by the Muslim woman and her former husband. The deliberate use of the words ‘option’ and ‘former husband’ demonstrates that Section 5 does not statutorily confine the circumstances under which the claim of maintenance of a divorced Muslim woman can be governed under the secular law of maintenance. Similarly, Section 7, being a transitional provision, only determines that every pending application under Section 125 of the CrPC for maintenance at the time of commencement of the 1986 Act would be disposed of in accordance with the provisions of 1986 Act. The purpose of a transitional provision is to mitigate uncertainty from the minds of the litigants who were faced with the peculiar situation with respect to pending maintenance applications and the possibility of fresh applications being filed under the 1986 Act as per the option of the parties. The use of the expression in Section 7 of the 1986 Act ‘*notwithstanding anything contained in that Code,*’ with respect to the CrPC does not indicate the intent to abrogate the independent right of a Muslim woman, as a victim of neglect or destitution, to claim maintenance from her husband. Moreover, Section 7 is subject to Section 5 of the said Act. Also, a transitional provision is of a temporary nature. On the strength of a transitional provision the main Act i.e. 1986 Act cannot be interpreted in a manner so as to restrict the rights of a divorced Muslim woman to other available remedies such as under Section 125 of the CrPC.

33. This Court in ***Danial Latifi*** was alive to the hardship that would befall Muslim women if the provisions of the 1986 Act were construed in a manner that deprived them of the protection that was equal to the protection afforded to non-Muslim women under Section 125 of the CrPC. It was reasoned that to make a Muslim woman run from pillar to post in search of her relatives one after the other and ultimately to knock at the doors of the Wakf Board could not be reasonable and a fair substitute for the provisions of Section 125 of the CrPC. In this respect, the observations of this Court deserve to be quoted in full:

> “33. In *Shah Bano case* [(1985) 2 SCC 556 : 1985 SCC (Cri) 245] this Court has clearly explained as to the rationale behind Section 125 CrPC to make provision for

maintenance to be paid to a divorced Muslim wife and this is clearly to avoid vagrancy or destitution on the part of a Muslim woman. The contention put forth on behalf of the Muslim organisations who are interveners before us is that under the Act, vagrancy or destitution is sought to be avoided but not by punishing the erring husband, if at all, but by providing for maintenance through others. If for any reason the interpretation placed by us on the language of Sections 3(1)(*a*) and 4 of the Act is not acceptable, we will have to examine the effect of the provisions as they stand, that is, a Muslim woman will not be entitled to maintenance from her husband after the period of iddat once the talaq is pronounced and, if at all, thereafter maintenance could only be recovered from the various persons mentioned in Section 4 or from the Wakf Board. This Court in *Olga Tellis* v. *Bombay Municipal Corpn.* [(1985) 3 SCC 545] and *Maneka Gandhi* v. *Union of India* [(1978) 1 SCC 248] held that the concept of "right to life and personal liberty" guaranteed under Article 21 of the Constitution would include the "right to live with dignity". Before the Act, a Muslim woman who was divorced by her husband was granted a right to maintenance from her husband under the provisions of Section 125 CrPC until she may remarry and such a right, if deprived, would not be reasonable, just and fair. Thus the provisions of the Act depriving the divorced Muslim women of such a right to maintenance from her husband and providing for her maintenance to be paid by the former husband only for the period of iddat and thereafter to make her run from pillar to post in search of her relatives one after the other and ultimately to knock at the doors of the Wakf Board does not appear to be reasonable and fair substitute of the provisions of Section 125 CrPC. Such deprivation of the divorced Muslim women of their right to maintenance from their former husbands under the beneficial provisions of the Code of Criminal Procedure which are otherwise available to all other women in India cannot be stated to have been effected by a reasonable, right, just and fair law and, if these provisions are less beneficial than the provisions of Chapter IX of the Code of Criminal Procedure, a divorced Muslim

> woman has obviously been unreasonably discriminated and got out of the protection of the provisions of the general law as indicated under the Code which are available to Hindu, Buddhist, Jain, Parsi or Christian women or women belonging to any other community. The provisions prima facie, therefore, appear to be violative of Article 14 of the Constitution mandating equality and equal protection of law to all persons otherwise similarly circumstanced and also violative of Article 15 of the Constitution which prohibits any discrimination on the ground of religion as the Act would obviously apply to Muslim divorced women only and solely on the ground of their belonging to the Muslim religion. It is well settled that on a rule of construction, a given statute will become "ultra vires" or "unconstitutional" and, therefore, void, whereas on another construction which is permissible, the statute remains effective and operative the court will prefer the latter on the ground that the legislature does not intend to enact unconstitutional laws. We think, the latter interpretation should be accepted and, therefore, the interpretation placed by us results in upholding the validity of the Act. It is well settled that when by appropriate reading of an enactment the validity of the Act can be upheld, such interpretation is accepted by courts and not the other way round."

34. Therefore, it was held that the Muslim husband has two separate and distinct obligations, *viz*., (i) to make a "reasonable and fair provision" for his divorced wife and (ii) to provide "maintenance" for her. Contrary to limiting the duration of any such "provision" and "maintenance" to only the *iddat* period, the emphasis of Section 3(1)(a) specifically and the 1986 Act generally is to mandate the time for concluding the payment of provision and maintenance within the *iddat* period but not only restricted for the said period. This Court applied its judgment in ***Danial Latifi*** in ***Sabra Shamim vs. Maqsood Ansari (2004) 9 SCC 616*** wherein the High Court's judgment limiting the entitlement of the divorced wife to *iddat* period only was set aside on the ground that the liability "to pay maintenance is not confined to *iddat* period".

35. In other words, the constitutionality of the 1986 Act was upheld only on the basis of the expansive, purposive and progressive interpretation that harmonised the rights under secular and personal law. This

is consistent with the settled norms of judicial review of legislative enactments whereby this Court reads a provision that is found to offend a constitutional guarantee to save its constitutionality, *vide* ***Binoy Viswam vs. Union of India*** ***(2017) 7 SCC 59, Pr. 83.*** Therefore, while extending the scope of 'reasonable and fair provision' in the 1986 Act to the entire lifetime of Muslim women, it was noted in paragraph 28 of ***Danial Latifi*** that 'nowhere has Parliament provided that reasonable and fair provision and maintenance is limited *only* for the *iddat* period.' Thus, it was held that an interpretative approach *de hors* the social facts and questions touching upon basic human rights should invariably be decided on constitutional considerations. Therefore, the Parliament's enactment cannot be construed to intend unjust consequences according to this Court.

This is because under the provision of 1986 Act if during iddat period, no provision is made for the entire life of the divorced wife or if the same is inadequate particularly with the passage of time then Section 125 of the CrPC can be resorted to.

From the above, it can also be noted that if Section 3 read with Section 4 excludes the liability of the husband of a Muslim woman then there is no reason as to why his liability under Section 125 of the CrPC must also be excluded.

36. The 1986 Act thus continues to operate within the same juridical compass as the judgment in ***Shah Bano*** and the reasons for upholding the constitutionality of ***Danial Latifi*** cannot be lost sight of. The crux of the reasoning in ***Danial Latifi*** is that the 1986 Act is a social welfare legislation that seeks to provide an additional right and thereby, an additional remedy. ***Danial Latifi*** implicitly recognises the cardinal principle of non-retrogression that prohibits the State from taking measures or steps that deliberately lead to retrogression on the enjoyment of rights either under the Constitution or otherwise *vide* ***Navtej Singh Johar vs. Union of India*** ***(2018) 10 SCC 1, Pr. 202.*** I therefore reiterate that the 1986 Act does not take away rights that divorced Muslim women have either under personal law or under Section 125 of the CrPC. I do not find any inconsistency between the provisions of the 1986 Act and Section 125 of the CrPC. Thus, a Muslim divorced wife is entitled to maintenance under Section 125 CrPC irrespective of her personal law, as reiterated in ***Shabana Bano vs. Imran Khan*****, 2009 (14) SCALE 331.** Such a construction would

not defeat the legislative intent and diminish the scope of additional protection afforded to Muslim women under the 1986 Act.

37. I note that the fixation of the three-month time limit for disposal of applications under the 1986 Act affords speedy justice and subserves the salutary aim of women's welfare and social security. Thus, the 1986 Act expands the protection of women and ought to be applied as such. I find that remarriage of a divorced Muslim woman does not nullify her claim to a just settlement under the 1986 Act, *vide* ***Abdul Hameed vs. Fousiya (2004) 3 KLT 1049*** wherein it was held that a husband cannot recover the settlement amount awarded under the 1986 Act merely because his ex-wife gets remarried. This finding is consistent with our legislative regime of protecting the rights of married women against matrimonial harassment, *vide* ***Juveria Abdul Majid Patni vs. Atif Iqbal Mansoori (2014) 10 SCC 736.***

Access to Justice:

38. The question of interpreting Section 3 of the 1986 Act should also be construed from the perspective of access to justice. Therefore, a technical or pedantic interpretation of the 1986 Act would stultify not merely gender justice but also the constitutional right of access to justice for the aggrieved Muslim divorced women who are in dire need of maintenance. This Court would not countenance unjust or Faustian bargains being imposed on women. The emphasis is on sufficient maintenance, not minimal amount. After all, maintenance is a facet of gender parity and enabler of equality, not charity. It follows that a destitute Muslim woman has the right to seek maintenance under Section 125 of the CrPC despite the enactment of the 1986 Act. Thus, an application for maintenance under Section 125 of the CrPC would not prejudice another application under Section 3 of the 1986 Act insofar as the latter is additional in nature and does not pertain to the same requirements sought to be provided for by Section 125 of the CrPC. One cannot be a substitute for or supplant another; rather it is in addition to and not in derogation of the other.

39. In this context, it would be apposite to take note of this Court's pertinent observations in ***Rana Nahid @ Reshma @ Sana vs. Sahidul Haq Chisti (2020) 7 SCC 657.*** The appeal before this Court arose out of a judgment passed by the High Court of Rajasthan, by which the order passed by the Family Court, converting the application for maintenance under Section 125 of the CrPC into Section 3 of the

1986 Act and granting maintenance, was set aside. Banumathi, J. in her judgment considered the question which fell for consideration, namely, whether the Family Court had jurisdiction to try an application filed by a Muslim divorced woman for maintenance under Section 3 of the Act. After considering the provisions of the 1986 Act as well as the relevant provisions of the Family Courts Act, 1984, it was observed in paragraph 25 of the judgment that an application under Section 3(2) of the 1986 Act by the divorced wife has to be filed before the competent Magistrate having jurisdiction if she claims maintenance beyond the *iddat* period. Even if the Family Court has been established in that area, the Family Court, not having been conferred the jurisdiction under Section 7 of the Family Courts Act, 1984 to entertain an application filed under Section 3 of the 1986 Act, the Family Court shall have no jurisdiction to entertain an application under Section 3(2) of the 1986 Act. The Family Court, therefore, cannot convert the petition for maintenance under Section 125 of the CrPC to one under Section 3 or Section 4 of the 1986 Act. Accordingly, the High Court's view was affirmed and the appeal was dismissed.

However, Indira Banerjee, J. disagreeing with the aforesaid view observed that the Family Court has the jurisdiction to convert the application for maintenance filed under Section 125 of the CrPC into an application under Section 3 of the 1986 Act and to decide the same.

In view of the difference of opinion between the two learned Judges, the matter was placed before Hon'ble the Chief Justice of India for referring the matter to a larger Bench. However, the larger Bench of three-Judges by its order dated 22.09.2022 disposed of the appeal without going into the questions referred to the said Bench.

Be that as it may, what is of relevance from the aforesaid case, is Banumathi, J.'s reasoning that the 1986 Act is not contrary to the object of Chapter IX of the CrPC as it provides remedies to a divorced Muslim woman. Therefore, the *non-obstante clause*, occurring in Sections 3(1), 4(1) and 7 cannot be lightly assumed to bring in the effect of supersession of Section 125 of the CrPC and cannot be allowed 'to demolish or extinguish the existing right unless the legislative intention is clear, manifest and unambiguous'. I also find force in Indira Banerjee J's reasoning that the 1986 Act manifests the Parliament's intent to protect and further the rights of Muslim women.

Placing reliance upon the right to be treated equally irrespective of religion, as it is enshrined in Article 2 of the Universal Declaration of Human Rights and Articles 14 and 26 of the International Covenant on Civil and Political Rights, the learned judge held that Muslim women cannot be afforded a lesser degree of protection than other classes of women. It was also held that:

> "**57.** The Convention on the Elimination of All Forms of Discrimination against Women, 1979, commonly referred to as CEDAW, recognises amongst others, the right of women to equality irrespective of religion, as a basic human right. Article 2 of CEDAW exhorts State parties to ensure adoption of a woman-friendly legal system and woman-friendly policies and practices.
>
> **58.** As a signatory to CEDAW, India is committed to adopt a woman-friendly legal system and woman-friendly policies and practices. The 1986 Act for Muslim Women, being a post CEDAW law, this Court is duty-bound to interpret the provisions of the said Act substantively, liberally, and purposefully, in such a manner as would benefit women of the Muslim community."

40. Therefore, the position of law with regard to harmonious interpretation of Sections 125-128 of the CrPC and the 1986 Act can be summarised as under:

    i. There cannot be a disparity amongst divorced Muslim women on the basis of the law under which they were married or divorced in the matter of their maintenance post-divorce. The definition of "divorced woman" under the 1986 Act would include only a Muslim woman who has married according to Muslim law but also divorced under that law. But if a Muslim woman has been married under the Special Marriage Act, such a Muslim woman who is divorced, cannot get the benefit of the 1986 Act. Such a Muslim woman, who is divorced, would have to proceed either under the provisions of the Special Marriage Act, 1954 and/or under Section 125 of the CrPC. Therefore, the protective provision of Section 125 ought to remain available to every divorced Muslim woman to avoid the absurd outcome of a section of Muslim women being left remediless under the 1986 Act. As a corollary, it is held that such women who are covered under

the 1986 Act are also entitled to the benefit of Section 125 of the CrPC. Further, there can be no bar under the Explanation (b) to Section 125 of the CrPC so as to exclude any Muslim woman who has been divorced or has obtained a divorce from her husband and has not remarried. This is irrespective of the 1986 Act being applicable to only such divorced Muslim woman who qualifies within the definition of divorced woman under Section 2(a) of the 1986 Act.

ii. Section 3 of the 1986 Act provides for a reasonable and fair provision of maintenance to a divorced Muslim woman only on certain terms and conditions within the *iddat* period by her husband. Once the i*ddat* period expires, the personal law obligation to maintain the divorced Muslim woman by the husband ceases. *Per contra*, under Section 125 of the CrPC, any divorced wife who has not remarried is entitled to maintenance by her ex-husband who has sufficient means but has neglected or refused to maintain her.

iii. Further, under Section 3(1)(b) of the 1986 Act, where a divorced woman maintains the children born to her before or after her divorce, a reasonable and fair provision and maintenance has to be made and paid by her former husband only for a period of two years from the respective dates of birth of such children and not beyond the said period. However, under Section 125 of the CrPC, there is no such restriction of maintenance to be provided only for a period of two years from the respective dates of birth of such children in the case of a divorced wife. The obligation is until the children attain the age of majority and in terms of the said Section.

iv. What is of further significance is the fact that by Act 50 of 2001 [by Section 2(i)(a)] w.e.f. 24.09.2001, sub-section (1) of Section 125 of the CrPC has been amended to delete the words "not exceeding 500 rupees in the whole". By way of this omission, there is no upper limit fixed for payment of maintenance under the said provision. Therefore, Section 125 of the CrPC is a more beneficial provision as compared to the provisions of the 1986 Act *vis-à-vis* a Muslim divorced woman in the context of the obligations of a former husband and the rights of a divorced Muslim woman. This amendment to Section 125 of the CrPC being subsequent to the enforcement of the 1986 Act, is so

significant that it virtually makes Section 3 of the 1986 Act very narrow and insignificant although the expression "provision" under Section 3(1) of the 1986 Act has been broadly interpreted by this Court in ***Danial Latifi***.

v. I, therefore, hold that Section 125 of the CrPC cannot be excluded from its application to a divorced Muslim woman irrespective of the law under which she is divorced. There cannot be disparity in receiving maintenance on the basis of the law under which a woman is married or divorced. The same cannot be a basis for discriminating a divorced woman entitled to maintenance as per the conditions stipulated under Section 125 of the CrPC or any personal or other law such as the 1986 Act. I also note that although the provisions of the 1986 Act have been upheld by a Constitution Bench of this Court in the case of ***Danial Latifi***, the same would not in any way restrict the application of Section 125 of the CrPC to a divorced Muslim woman.

vi. Further, under Section 5 of the 1986 Act, if, on the date of the first hearing of the application under sub-section (2) of Section 3, a divorced woman and her husband declare by an affidavit or any other declaration in writing in the form prescribed, either jointly or separately that they would prefer to be governed by the provisions of Section 125 to Section 128 of the CrPC and file such an affidavit or declaration in the Court hearing the application, the Magistrate shall dispose of such application accordingly. Therefore, the 1986 Act itself provides for the applicability of Sections 125 to 128 of the CrPC, even when an application under sub-section (2) of Section 3 is made seeking relief as per sub-section (1) of Section 3. However, the said option given to the divorced woman and her former husband mandates that there must be a declaration which is *ad idem* for the purpose of applying the provisions of Sections 125 to 128 of the CrPC, when an application is made under sub-section (2) of Section 3 of the 1986 Act. This would imply that if there is no such declaration given then Sections 125 to 128 of the CrPC would not apply when an application is made under sub-section (2) of Section 3 of the 1986 Act by a divorced Muslim woman. This again puts a fetter on the applicability of Sections 125 to 128 of the CrPC to such a divorced woman inasmuch it is necessary for her former husband to concur to be governed by the provisions of Sections

125 to 128 of the CrPC. This means that an option is given to the former husband of a divorced Muslim woman to concur or not to do so. In other words, if there is no such concurrence by the former husband then the aforesaid provisions of the CrPC would not be made applicable to a proceeding initiated under sub-section (2) of Section 3. Such a fetter, in my view, is of no consequence if a Muslim divorced woman can unilaterally maintain an application under Section 125 of the CrPC before the Magistrate or the Family Court, in which event when she unilaterally files such an application, there is no necessity of seeking a declaration from the former husband as required under Section 5 of the 1986 Act.

vii. On the other hand, if a divorced Muslim woman files an application for maintenance under Section 125 of the CrPC, there is no provision for considering the same under Section 3 of the 1986 Act. The reasons for the same are not far to see: firstly, because Section 125 of the CrPC and Section 3(1) of the 1986 Act operate in two separate fields. The former is a statutory right created, *inter alia*, for all divorced women, irrespective of the faith they may belong to or follow. On the other hand, the 1986 Act is in the nature of a personal law which applies to only divorced Muslim women who were married under Muslim law and divorced under the said law.

viii. While under the CrPC prior to CrPC of 1973, the alteration of maintenance was considered on the basis of change in circumstances but Section 127(3)(b) of the CrPC, 1973 specifically takes into account cases where a divorced woman has had the benefit of maintenance under the customary or personal law. In a case of a Hindu divorced woman, it could also include the Hindu Marriage Act, 1955 or Hindu Adoption and Maintenance Act, 1954. In the same manner in the case of a Muslim divorced woman, the 1986 Act is in the nature of a quasi-personal law. Section 127(3)(b), therefore, balances the obligation to pay maintenance by a former husband of a Muslim woman if he has done so under the provisions of any customary or personal law which would also include the 1986 Act applicable to the parties. In such an event, there could always be an alteration in the allowance when there is a change in the circumstances of any person receiving, under Section

125 of the CrPC, a monthly allowance towards the interim maintenance or maintenance under the said Section payable to a divorced wife. In which event, the alteration could be made in accordance with Section 127 of the CrPC.

ix. Section 127 would apply only when there has already been an order for maintenance or interim maintenance passed under Section 125 of the CrPC and if there is a subsequent order passed under the provisions of the 1986 Act. Then, an order for alteration in the maintenance under Section 125 of the CrPC could be made by the Magistrate. Section 127(3)(b) would however not detract a divorced Muslim woman from filing an application under Section 125 of the CrPC, by exercising her option to do so even in the absence of invoking the provisions of the 1986 Act. In other words, such a vulnerable woman cannot be constrained to seek remedy only under the provisions of the 1986 Act. The choice remains with her to be exercised in accordance with law and discretion. However, if a divorced Muslim woman already has an order passed under Section 125 of the CrPC, and thereafter also files an application under Section 3 or Section 4 of the 1986 Act and an order is made under the said Act also, in such an event, there could be an alteration in the order of payment for maintenance or interim maintenance, as the case may be, under Section 127 of the CrPC. This is in order to ensure that there is no double benefit which would be availed by a divorced Muslim woman under Section 125 of the CrPC as well as under the 1986 Act.

x. Hence, what emerges is that the 1986 Act is not a substitute for Section 125 of the CrPC and nor has it supplanted it and both can operate simultaneously at the option of a divorced Muslim woman as they operate in different fields. As I find no conflict between the provisions of the 1986 Act, which is a piece of legislation in the nature of quasi-personal law insofar as the divorced Muslim wife is concerned and Section 125 of the CrPC which is a statutory provision applicable to women belonging to all faiths therefore the latter cannot be restricted in its operation to divorced Muslim women. I find that if Section 125 of the CrPC is excluded from its application to a divorced Muslim woman, it would be in violation of Article 15(1) of the Constitution of India which states that the State shall not discriminate against any

citizen only on the ground of religion, race, caste, sex, place of birth or any of them. Further, our interpretation is consistent with the spirit of Article 15(3) of the Constitution.

2019 Act:

41. At this juncture, Section 5 of the Muslim Women (Protection of Rights on Marriage) Act, 2019 ("2019 Act") merits consideration.

> "**5. Subsistence allowance.-** Without prejudice to the generality of the provisions contained in any other law for the time being in force, a married Muslim woman upon whom *talaq* is pronounced shall be entitled to receive from her husband such amount of subsistence allowance, for her and dependent children, as may be determined by the Magistrate."

Section 5 extends to Muslim women upon whom *talaq* is pronounced. *Talaq* is defined in Section 2(c) as '*talaq-e-biddat*' or any other similar form of *talaq* having the effect of instantaneous and irrevocable divorce pronounced by a Muslim husband which is void and illegal as per Section 3 of the said Act.' In other words, married Muslim woman can seek subsistence allowance if *talaq*, as defined in the 2019 Act, is pronounced on her.

In case a woman has been divorced in a valid manner, she can approach the Magistrate under the 1986 Act but if she has been the victim of the mischief defined under the 2019 Act, then her right to subsistence allowance is secured through Section 5 of the 2019 Act. The intent of the Parliament is clear: it seeks to provide adequate remedies to women from economic deprivation that may result from marital discord, irrespective of their status as a married or divorced woman. Therefore, prior to a divorce in accordance with law, a married woman has access to maintenance under the general law, i.e., Section 125 of the CrPC and under a special law, i.e., 2019 Act. When divorce is void and illegal, such a Muslim woman can also seek remedy under Section 125 of the CrPC.

Maintenance and the Institution of Marriage: A Broader Perspective.

42. Before parting with this case, I pose a question to myself. What is the position of a wife after her marriage in Indian Society? This Court, speaking through Murtaza Fazal Ali, J. in ***Sirajmohmedkhan***

***Janmohamadkhan vs. Hafizunnisa Yasinkh*, AIR 1981 SC 1972**, had acknowledged the paradigm shift from viewing maintenance as a mere charity to a matter of parity and rights, essential for women. It is necessary to extract the pertinent observations as under:

> "14. ... the outmoded and antiquated view that the object of s. 488 was to provide an effective and summary remedy to provide for appropriate food, clothing and lodging for a wife. This concept has now become completely out dated and absolutely archaic. After the International Year of Women when all the important countries of the world are trying to give the fair sex their rightful place in society and are working for the complete emancipation of women by breaking the old shackles and bondage in which they were involved, it is difficult to accept a contention that the salutary provisions of the Code are merely meant to provide a wife merely with food, clothing and lodging as if she is only a chattel and has to depend on the sweet will and mercy of the husband. …"

43. In this context, I would like to advert to the vulnerability of married women in India who do not have an independent source of income or who do not have access to monetary resources in their households particularly for their personal expenses. In Indian society, it is an established practice that once a daughter is married, she resides with her husband and/or his family unless due to exigency of career or such other reason she has to reside elsewhere. In the case of a woman who has an independent source of income, she may be financially endowed and may not be totally dependent on her husband and his family. But what is the position of a married woman who is often referred to as a "homemaker" and who does not have an independent source of income, whatsoever, and is totally dependent for her financial resources on her husband and on his family? It is well-known that such an Indian homemaker tries to save as much money as possible from the monthly household budget, not only to augment the financial resources of the family but possibly to also save a small portion for her personal expenses. Such a practice is followed in order to avoid making a request to the husband or his family for her personal expenses. Most married men in India do not realise this aspect of the predicament such Indian homemakers face as any request made for expenses may be bluntly turned down by

the husband and/or his family. Some husbands are not conscious of the fact that the wife who has no independent source of finance is dependent on them not only emotionally but also financially. On the other hand, a wife who is referred to as a homemaker is working throughout the day for the welfare of the family without expecting anything in return except possibly love and affection, a sense of comfort and respect from her husband and his family which are towards her emotional security. This may also be lacking in certain households.

44. While the contributions of such a homemaker get judicial recognition upon her unfortunate death while computing compensation in cases under the Motor Vehicles Act, 1988 *vide* ***Kirti vs. Oriental Insurance Co. Ltd.*** ***(2021) 2 SCC 166,*** the services and sacrifices of homemakers for the economic well-being of the family, and the economy of the nation, remain uncompensated in large sections of our society.

45. Therefore, I observe that an Indian married man must become conscious of the fact that he would have to financially empower and provide for his wife, who does not have an independent source of income, by making available financial resources particularly towards her personal needs; in other words, giving access to his financial resources. Such financial empowerment would place such a vulnerable wife in a more secure position in the family. Those Indian married men who are conscious of this aspect and who make available their financial resources for their spouse towards their personal expenses, apart from household expenditure, possibly by having a joint bank account or via an ATM card, must be acknowledged.

46. Another aspect of vulnerability of a married Indian woman is regarding her security of residence in her matrimonial home. In this context in the case of ***Prabha Tyagi vs. Kamlesh Devi*** ***(2022) 8 SCC 90,*** this Court while considering Section 17 along with other provisions of the Domestic Violence Act, 2005 opined as under:

> "60. In our view, the question raised about a subsisting domestic relationship between the aggrieved person and the person against whom the relief is claimed must be interpreted in a broad and expansive way, so as to encompass not only a subsisting domestic relationship in praesenti but also a past domestic relationship. Therefore, Parliament has intentionally used the expression "domestic relationship" to mean a relationship between two persons

> who not only live together in the shared household but also between two persons who "*have at any point of time lived together*" in a shared household."

47. Thus, both 'financial security' as well as 'security of residence' of Indian women have to be protected and enhanced. That would truly empower such Indian women who are referred to as 'homemakers' and who are the strength and backbone of an Indian family which is the fundamental unit of the Indian society which has to be maintained and strengthened. It goes without saying that a stable family which is emotionally connected and secure gives stability to the society for, it is within the family that precious values of life are learnt and built. It is these moral and ethical values which are inherited by a succeeding generation which would go a long way in building a strong Indian society which is the need of the hour. It is needless to observe that a strong Indian family and society would ultimately lead to a stronger nation. But, for that to happen, women in the family have to be respected and empowered!

In view of the aforesaid discussion, the Criminal Appeal stands dismissed.

Order

What emerges from our separate but concurring judgments are the following conclusions:

a) Section 125 of the CrPC applies to all married women including Muslim married women.

b) Section 125 of the CrPC applies to all non-Muslim divorced women.

c) Insofar as divorced Muslim women are concerned, -

   i) Section 125 of the CrPC applies to all such Muslim women, married and divorced under the Special Marriage Act in addition to remedies available under the Special Marriage Act.

   ii) If Muslim women are married and divorced under Muslim law then Section 125 of the CrPC as well as the provisions of the 1986 Act are applicable. Option lies with the Muslim

divorced women to seek remedy under either of the two laws or both laws. This is because the 1986 Act is not in derogation of Section 125 of the CrPC but in addition to the said provision.

iii) If Section 125 of the CrPC is also resorted to by a divorced Muslim woman, as per the definition under the 1986 Act, then any order passed under the provisions of 1986 Act shall be taken into consideration under Section 127(3)(b) of the CrPC.

d) The 1986 Act could be resorted to by a divorced Muslim woman, as defined under the said Act, by filing an application thereunder which could be disposed of in accordance with the said enactment.

e) In case of an illegal divorce as per the provisions of the 2019 Act then,

i) relief under Section 5 of the said Act could be availed for seeking subsistence allowance or, at the option of such a Muslim woman, remedy under Section 125 of the CrPC could also be availed.

ii) If during the pendency of a petition filed under Section 125 of the CrPC, a Muslim woman is 'divorced' then she can take recourse under Section 125 of the CrPC or file a petition under the 2019 Act.

iii) The provisions of the 2019 Act provide remedy in addition to and not in derogation of Section 125 of the CrPC.

f) The criminal appeal is dismissed.

Result of the case: Appeal dismissed.

†*Headnotes prepared by:* Ankit Gyan

[2024] 7 S.C.R. 1314 : 2024 INSC 537

The State of Meghalaya
v.
Lalrintluanga Sailo & Anr.

(Special Leave to Appeal (Crl.) No. 16021 of 2023)

16 July 2024

[C.T. Ravikumar and Prashant Kumar Mishra, JJ.]

Issue for Consideration

Whether the High Court erred in granting bail to the accused solely on the ground that she was suffering from HIV, without adverting to the mandate under Section 37(1)(b)(ii), NDPS Act, and without taking in view the quantity of the contraband substance.

Headnotes†

Bail – Narcotic Drugs and Psychotropic Substances Act, 1985 – s.37 – Recording a finding mandated u/s.37 is *sine qua non* for granting bail to accused under the Act – High Court erred in granting bail to accused solely on the ground that she was suffering from HIV, without adverting to the mandate u/s.37(1)(b)(ii), when accused was involved in offences under the Act on more than one occasion and quantity of contraband was much above the commercial quantity.

Narcotic Drugs and Psychotropic Substances Act, 1985 – s.37 – Grant of bail to accused involved in offence under the Act – Twin conditions u/s.37(1)(b)(ii):

Held: While considering the application for bail made by an accused involved in an offence under NDPS Act, a liberal approach ignoring the mandate under Section 37 of the NDPS Act is impermissible – Recording a finding mandated under Section 37 of the NDPS Act is *sine qua non* for granting bail to an accused under the NDPS Act – When the accused is involved in offences u/ss. 21(c)/29 of NDPS Act, on more than one occasion and when the quantity of the contraband substance viz., heroin is 1.040 Kgs, much above the commercial quantity, then the non-consideration of the provisions under Section 37, NDPS Act, has to be taken as a very serious lapse – Twin conditions under s.37 of NDPS Act, were not satisfied and on the sole reason that the accused was a HIV patient, she is not entitled to be released on bail – However, accused being HIV positive, is entitled to benefit u/s.34(2) of the

Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome (Prevention and Control) Act, 2017 – In view thereof the trial Court to take appropriate steps to expedite the trial on priority basis. [Paras 8,10,12,13]

Case Law Cited

Collector of Customs, New Delhi v. Ahmadalieva Nodira **[2004] 2 SCR 1092 : (2004) 3 SCC 549;** *State of Kerala and Ors. v. Rajesh and Ors.* **[2020] 3 SCR 348 : (2020) 12 SCC 122 – relied on.**

Bhawani Singh v. State of Rajasthan, **2022 SCC OnLine SC 1991 – distinguished.**

List of Acts

Narcotic Drugs and Psychotropic Substances Act, 1985; Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome (Prevention and Control) Act, 2017; Code of Criminal Procedure, 1973.

List of Keywords

Bail; NDPS Act; Twin conditions; Contraband substance; Heroin; Commercial quantity; Accused suffering from HIV; Bail granted on solitary ground of HIV positive; Non-consideration of provisions under Section 37 NDPS Act.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Special Leave To Appeal (Crl.) No. 16021 of 2023

From the Judgment and Order dated 29.09.2023 of the High Court of Meghalaya at Shillong in BA No. 38 of 2023

Appearances for Parties

Amit Kumar, Sr. Adv., Avijit Mani Tripathi, Ms. Rekha Bakshi, T.K. Nayak, Ms. Marbiang Khongwir, Advs. for the Petitioner.

Judgment / Order of the Supreme Court

Order

1. The State of Meghalaya filed the captioned Special Leave Petition challenging the order dated 29.09.2023 passed in Bail Application No. 38/2023 by the High Court of Meghalaya at Shillong.

2. FIR No.06(02)23 was registered against the respondent-accused (Smt. X) on 08.02.2023 for offences under Sections 21(c)/29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'NDPS Act'). Anonymization as relates the identity of the respondent-accused as 'Smt.X' has been done, as she is Human Immunodeficiency Virus (HIV) positive. Virtually, from 16.03.2023 onwards, Smt. X was in judicial custody in connection with the crime bearing FIR No.22(03)2023 registered at Khliehriat Police Station under Sections 21(c)/29 of the NDPS Act and her formal arrest in the subject Crime was recorded on 11.04.2023 during such custody. While so, as per the order dated 27.06.2023, the High Court of Meghalaya at Shillong granted bail in connection with FIR No.22(03)2023 on the solitary ground of her being HIV positive.

3. It is the subsequent grant of bail on 29.09.2023 in connection with FIR No.06(02)23, *sans* satisfactory consideration of the twin conditions under Section 37(1)(b)(ii) of the NDPS Act that constrained the State to approach this Court with the captioned Special Leave Petition. As a matter of fact, the bail application that culminated in the said order dated 29.09.2023 was moved by the son of the accused-Smt.X, on her behalf.

4. Heard learned Advocate General Shri Amit Kumar for the State of Meghalaya. Earlier, notice was issued to the respondents and despite being served respondent No.1, the son of Smt. X, through whom B.A. No.38/2023 which culminated in the impugned order was moved, did not enter appearance. Later, bailable warrant was issued against the Smt.X. The report annexed to the office report would reveal that bailable warrant was executed on 02.07.2024 and Smt.X was released on bail with the instructions to appear before this Court on 16.07.2024 at 10.30 a.m. However, the respondent-accused failed to appear before the Court when this matter was taken up for consideration. In this context, it is to be noted that in the order impugned dated 29.09.2023, whereby Smt. X was granted bail, itself one of the conditions is that she should co-operate with the process of the court concerned. Be that as it may, we will now proceed to consider the challenge against the order dated 29.09.2023.

5. There cannot be any doubt with respect to the position that in cases involving commercial quantity of narcotic drugs or psychotropic substances, while considering the application of bail, the Court is

bound to ensure the satisfaction of conditions under Section 37(1)(b)(ii) of the NDPS Act. The said provision reads thus: -

> *"37(1)(b)(ii)- where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail."*

6. While considering the cases under NDPS Act, one cannot be oblivious of the objects and reasons for bringing the said enactment after repealing the then existing laws relating to the Narcotic drugs. The object and reasons given in the acts itself reads thus: -

> *"An act to consolidate and amend the law relating to narcotic drugs, to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances, to provide for the forfeiture of property derived from, or used in, illicit traffic in narcotic drugs and psychotropic substances, to implement the provisions of the International Convention on Narcotic Drugs and Psychotropic Substances and for matters connected therewith."*

In the decision in ***Collector of Customs, New Delhi v. Ahmadalieva Nodira***,[1] the three judge bench of this Court considered the provisions under Section 37(1)(b) as also 37(1)(b)(ii) of the NDPS Act, with regard to the expression "reasonable grounds" used therein. This Court held that it means something more than the *prima facie* grounds and that it contemplates substantial and probable causes for believing that the accused is not guilty of the alleged offence. Furthermore, it was held that the reasonable belief contemplated in the provision would require existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence.

As relates the twin conditions under Section 37(1)(b)(ii) of the NDPS Act, viz., that, firstly, there are reasonable grounds for believing that the accused is not guilty of such offence and, secondly, he is not likely to commit any offence while on bail it was held therein that

1 [2004] 2 SCR 1092 : (2004) 3 SCC 549

they are cumulative and not alternative. Satisfaction of existence of those twin conditions had to be based on the 'reasonable grounds', as referred above.

7. In the decision in ***State of Kerala and Ors. v. Rajesh and Ors.***,[2] after reiterating the broad parameters laid down by this Court to be followed while considering an application for bail moved by an accused involved in offences under the NDPS Act, in paragraph 18 thereof this Court held that the scheme of Section 37 of the NDPS Act would reveal that the exercise of power to grant bail in such cases is not only subject to the limitations contained under Section 439 of the Code of Criminal Procedure, but also subject to the limitation placed by Section 37(1)(b)(ii), NDPS Act. Further it was held that in case one of the two conditions thereunder is not satisfied the ban for granting bail would operate.

8. Thus, the provisions under Section 37(1)(b)(ii) of the NDPS Act and the decisions referred *supra* revealing the consistent view of this Court that while considering the application for bail made by an accused involved in an offence under NDPS Act a liberal approach ignoring the mandate under Section 37 of the NDPS Act is impermissible. Recording a finding mandated under Section 37 of the NDPS Act, which is *sine qua non* for granting bail to an accused under the NDPS Act cannot be avoided while passing orders on such applications.

9. The materials on record would reveal that earlier Smt. X was enlarged on bail by the High Court as per order dated 27.06.2023 in connection with FIR No.22(03)2023, involving the quantity of 55.68 grams of Heroin, despite the opposition of the public prosecutor, taking note of her being HIV positive. In the said order it is stated thus: -

> *"30. Accordingly, on this ground alone, the application for grant of bail is hereby allowed."*

10. The subject FIR viz., FIR No. 06(02)23 under Section(s) 21(c)/29 of the NDPS Act, would reveal that the quantity of the contraband involved is 1.040 kgs of heroin. The impugned order granting bail to accused-Smt. X, dated 29.09.2023 would reveal, this time also, the bail was granted on the ground that she is suffering from HIV and conspicuously, without adverting to the mandate under Section

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2 [2020] 3 SCR 348 : (2020) 12 SCC 122

37(1)(b)(ii), NDPS Act, even after taking note of the fact that the rigour of Section 37, NDPS Act, calls for consideration in view of the involvement of commercial quantity of the contraband substance. When the accused is involved in offences under Section 21(c)/29 of NDPS Act, more than one occasion and when the quantity of the contraband substance viz., heroin is 1.040 Kgs, much above the commercial quantity, then the non-consideration of the provisions under Section 37, NDPS Act, has to be taken as a very serious lapse. In cases of like nature, granting bail solely on the ground mentioned, relying on the decision in ***Bhawani Singh v. State of Rajasthan***[3] would not only go against the spirit of the said decision but also would give a wrong message to the society that being a patient of such a disease is a license to indulge in such serious offences with impunity. In the contextual situation it is to be noted that in ***Bhawani Singh's*** case the offence(s) involved was not one under the NDPS Act. We have no hesitation to say that in the above circumstances it can only be held that the twin conditions under Section 37 of the NDPS Act, are not satisfied and on the sole reason that the accused is a HIV patient, cannot be a reason to enlarge her on bail. Since the impugned order was passed without adhering to the said provision and in view of the rigour thereunder the accused-Smt.X is not entitled to be released on bail, the impugned order invites interference.

11. Consequently, the impugned order is set aside. The accused-Smt.X shall surrender before the trial Court within a week from today and in case of her failure to do so, she shall be taken into custody in accordance with law. Upon such surrender/production of the accused before the trial Court, it shall cancel the bail bond of the accused and discharge the sureties.

12. In view of the indisputable fact that Smt. X is HIV positive she is entitled to the benefit under Section 34(2) of the Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome (Prevention and Control) Act, 2017, which reads thus: -

> *"34. ...*
>
> *...*

3 2022 SCC OnLine SC 1991

> *(2). In any legal proceeding concerning or relating to an HIV-positive person, the court shall take up and dispose of the proceeding on priority basis."*

13. In view of the said provision the trial Court shall take appropriate steps to expedite the trial on priority basis and to dispose of the case as early as possible.

14. The Special Leave Petition is disposed of, as above.

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

Result of the case: Special Leave Petition disposed of.

†*Headnotes prepared by:* Bibhuti Bhushan Bose
(*With assistance from:* Geethika. K, LCRA)

[2024] 7 S.C.R. 1321 : 2024 INSC 524

State of Uttar Pradesh and Anr.
v.
Virendra Bahadur Katheria and Ors.

(Civil Appeal No. 7799 of 2024)

15 July 2024

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

Issue for Consideration

If there was any discrepancy in the pay scales of Sub-Deputy Inspectors of Schools/Assistant Basic Shiksha Adhikaris (SDI/ABSA) and Deputy Basic Shiksha Adhikaris (DBSA) of the Basic Education Department, State of Uttar Pradesh vis-à-vis the Headmasters of Junior High Schools, as alleged. Whether the SDI/ABSA and DBSA were entitled to the higher pay scale of 7500-12000 with effect from 01.07.2001 or whether it was appropriately granted to them from 01.12.2008 onwards.

Headnotes†

Service Law – Uttar Pradesh Subordinate Educational (Sub Deputy Inspector of Schools) Service Rules, 1992 – Pay parity – Revision in pay scales – Of Headmasters w.e.f 01.07.2001 whereby pay scale was revised from 4625-7000 to 6500-10500, additionally, the Selection Grade was also revised to Rs. 7500-250-12000 however, no corresponding revision was made in the pay scales of Sub-Deputy Inspectors of Schools/Assistant Basic Shiksha Adhikaris (SDI/ABSA) and Deputy Basic Shiksha Adhikaris (DBSA) w.e.f. 01.07.2001 making their pay scales lesser than that of the Headmasters (who were amongst the feeder cadre categories for appointment by selection against 10% posts of SDI/ABSA) – Multiple rounds of litigation, various orders passed by Supreme Court and High Court – In the present round of litigation, Single Judge of the High Court directed grant of pay scale of 7500-12000 to SDI/ABSA and DBSA, w.e.f 2001 – Appeal thereagainst was dismissed by Division Bench on the ground of delay:

Held: There was no pay parity between Headmasters and the SDI/ABSA etc. – It was a mere coincidence that the group of

* Author

these posts carried the same pay scale for a long time, till the State Government decided to grant a higher revised pay scale to the Headmasters – This led to an anomalous situation as the Headmasters were amongst the feeder cadre categories for appointment by selection against 10% posts of SDI/ABSA – The State itself acknowledged that there was some disparity in the pay scales that needed to be rectified and constituted the Rizvi Committee which made various recommendations like merger of cadres, re-designation and upgradation of posts, the introduction of new pay scales, with an assurance that the re-designated posts would be on a pay scale higher than that of the feeder cadre to redress the grievances of employees like the Respondents and the anomalies stood removed – Appellant-State on being directed by the High Court recalibrated and recompensed the employees like Respondents and put up a proposal before Supreme Court in the previous round of litigation which was approved – State then issued orders granting restructured benefits to the employees like the Respondents who also got monetary benefits over and above the State's proposal, in furtherance of the High Court decisions dtd. 06.05.02 and 02.02.18 – Now, most of them have retired from service and are senior citizens – The monetary benefits have already been utilised by them on their personal needs – Thus, remittance of the case to the High Court is not likely to bring quietus to the endless litigation – In the case of present nature involving protracted litigation and delay, Article 142 of the Constitution invoked in the larger interest of the administration of justice and to prevent manifest injustice – Directions issued for removal of discrepancy in the pay scales prescribed for SDI/ABSA and DBSA – Respondents entitled to the pay scale, strictly in accordance with the 2011 Order, notionally from 01.01.2006 and actually from 01.12.2008 – Impugned judgement of the Division Bench set aside while that of the Single Judge of the High Court is set aside in part. [Paras 52, 55-57, 60]

Service Law – Constitution of India – Article 16 – Pay parity not an indefeasible right – Incidental grant of same pay scale to different posts not an anomaly:

Held: Prescription of pay scale for a post is policy decision based upon the recommendations of an expert body like Pay Commission – All that the State is obligated to ensure is that the pay structure of a promotional or higher post is not lower than the

feeder cadre – Pay parity cannot be claimed as an indefeasible enforceable right save and except where the Competent Authority consciously decides to equate two posts notwithstanding their different nomenclature or distinct qualifications – Incidental grant of same pay scale to two or more posts, without any express equation amongst such posts, is not an anomaly in a pay scale of a nature which infringes the right to equality u/Article 16. [Paras 53, 54]

Doctrines – Doctrine of merger – Applicability– High Court's previous order dtd. 06.05.2002, if stood merged with the reasoned order dated 08.12.2010 passed by Supreme Court:

Held: Yes – Once leave was granted against the High Court judgment dated 06.05.2002, the doctrine of merger would apply and it stood merged with the reasoned order dated 08.12.2010 – Thus, High Court judgment lost its entity and was subsumed in the order passed by this Court – High Court erred in assuming that its decision dated 06.05.2002 in the first round of litigation was intact and enforceable, independent of the order dated 08.12.2010 passed by this Court in the Civil Appeal arising therefrom. [Paras 41, 44]

Doctrines – Doctrine of merger – Principles – Discussed.

Delay – On the part of State or its instrumentalities – Condonation – Public interest vis-à-vis individual's interest – Discussed.

Service Law – Recovery from retired employees:

Held: Not approved – Pay benefits released to the writ petitioners arrayed before High Court who had meanwhile retired from service, ought not to have been withdrawn and that too with the added measure of recovery orders being fastened upon them – Single Judge's direction upheld to this limited extent. [Para 47]

Constitution of India – Article 142 – Extraordinary powers under – Exercise of – Discussed.

Case Law Cited

State of Punjab v. Rafique Masih (White Washer) and Others [2014] 13 SCR 1343 **: (2015) 4 SCC 334 – relied on.**

Kunhayammed v. State of Kerala [2000] Supp. 1 SCR 538 **: (2000) 6 SCC 359;** *Supreme Court Employees' Welfare Association v. Union of India and Another* [1989] 3 SCR 488 **: (1989) 4 SCC 187;**

Khoday Distilleries Ltd. (now known as Khoday India Ltd.) & Ors. v. Sri Mahadeshwara Sahakara Sakkare Karkhane Ltd., Kollegal (Under Liquidation) represented by the Liquidator [2019] 3 SCR 411 **: (2019) 4 SCC 376;** *Pernod Ricard India Private Limited v. Commissioner of Customs* [2010] 8 SCR 996 **: (2010) 8 SCC 313;** *State of Madhya Pradesh & Ors. v. Bherulal* [2020] 8 SCR 912 **: (2020) 10 SCC 654;** *State of Nagaland v. Lipok AO* [2005] 3 SCR 108 **: (2005) 3 SCC 752;** *Executive Officer, Antiyur Town Panchayat v. G. Arumugam (Dead) by Legal Representatives* [2015] 1 SCR 152 **: (2015) 3 SCC 569;** *Nidhi Kaim v. State of Madhya Pradesh* [2017] 2 SCR 527 **: (2017) 4 SCC 1;** *Abbobaker v. Mahalakshmi Trading Co.* [1998] 1 SCR 762 **: (1998) 2 SCC 753 – referred to.**

List of Acts

Uttar Pradesh Subordinate Educational (Sub Deputy Inspector of Schools) Service Rules, 1992.

List of Keywords

Service Law; Pay parity; Revision in pay scales; Discrepancy in the pay scales; Headmasters; Sub-Deputy Inspectors of Schools/Assistant Basic Shiksha Adhikaris; Deputy Basic Shiksha Adhikaris; Feeder cadre; Multiple rounds of litigation; Protracted litigation; Revised pay scale; Disparity in pay scales; Removal of discrepancy in the pay scales; Anomaly in pay scale; Prescription of pay scale; Policy decision; Article 142 of the Constitution; Doctrine of merger; Principle of *res judicata*; Speaking order; Delay condonation; Delay by State or its instrumentalities; Public interest vis-à-vis private/individual's interest; Recovery from retired employees.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 7799 of 2024

From the Judgment and Order dated 06.04.2023 of the High Court of Judicature at Allahabad in SAD No. 532 of 2019

Appearances for Parties

K.M. Nataraj, ASG, Sharan Dev Singh Thakur, AAG, Ms. Ruchira Goel, Siddharth Thakur, Ms. Indira Bhakar, Adit Jayeshbhai Shah, Sharanya Sinha, Mustafa Sajad, Ms. Keerti Jaya, Advs. for the Appellants.

Dushyant Dave, Sr. Adv., Ms. Tanya Agarwal, Ms. Ayushi, Akshat, Mrs. Shubhangi Tuli, Yatish Mohan, E. C. Vidya Sagar, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Surya Kant, J.

Leave granted.

2. This Civil Appeal is directed against the order dated 06.04.2023 passed by a Division Bench of the High Court of Judicature at Allahabad **(hereinafter, 'High Court')**, whereby an intra-court appeal preferred by the State of Uttar Pradesh **(hereinafter, 'State')** challenging the Single Judge's judgement dated 02.02.2018 was dismissed on the ground of delay. Consequently, the judgment of the Single Judge, which effectively directed to grant the pay scale of 7500-12000 to Sub-Deputy Inspectors of Schools/ Assistant Basic Shiksha Adhikaris **(hereinafter, 'SDI/ABSA')** and the Deputy Basic Shiksha Adhikaris **(hereinafter, 'DBSA')**, with effect from the year 2001, stood affirmed.

3. Since the instant appeal arises out of a long-drawn saga, where multiple rounds of litigation occurred *inter-se* the parties before various fora, including this Court, it would be appropriate to narrate the factual events before delving into the legal issues raised before us concerning the law of precedents, the doctrine of merger and the principle of *res judicata*.

FACTS

4. The controversy centers around the alleged discrepancy in the pay scales of SDI/ABSA and DBSA of the Basic Education Department, State of Uttar Pradesh *vis-à-vis* the Headmasters of Junior High Schools **(hereinafter, 'Headmaster')**. The genesis of this disparity can be traced back to the Government Order dated 20.07.2001 **(hereinafter, '2001 Order')**, issued on the basis of the recommendations of the Fifth Central Pay Commission, pursuant to which the pay scales of State Government teachers, including Headmasters, were brought on par with Central Government teachers, with effect from 01.07.2001.

5. The effect of the 2001 Order, in essence, was that the basic pay scale of Headmasters stood revised from 4625-125-7000 to 6500-200-10500, with a further revision of their Selection Grade from 4800-150-7650 to 7500-250-12000. There was, however, no alteration in the pay scales of SDI/ABSA and DBSA and resultantly, their pay scales became lesser than those granted to the Headmasters.

6. In order to gain a comprehensive understanding of this issue, it is essential to take into account the revision in pay scales across various posts over time.

7. The pay scale granted for the post of Sub-Deputy Inspector of Schools (SDI) since the year 1945, with consequent revisions, is depicted in a tabular format hereinbelow:

Pay Scale with Effect From	Pay Scale Granted to Sub-Deputy Inspector of Schools (Rupees)
1945	120-200
1955	120-300
1965	150-350
1972	325-575
01.07.1979	540-910
01.01.1986	1400-2300
01.01.1996	4500-7000
01.07.2001	Not Revised

The position of the ABSA, being equivalent to that of SDI, likewise bore the same pay scale of 4500-7000, with effect from 01.01.1996.

8. The pay scale assigned for the post of DBSA since 1945, with subsequent revisions, is outlined in the table below:

Pay Scale with Effect From	Pay Scale Granted to Deputy Basic Shiksha Adhikari (Rupees)
1945	200-250
1955	250-250
1965	250-600
1972	450-950

01.07.1979	770-1600
01.01.1986	2000-3500
01.01.1996	6500-10500
01.07.2001	Not Revised

9. Lastly, the pay scale apportioned for the post of Headmaster since 1945, with subsequent revisions, is detailed in the table below:

Pay Scale with Effect From	Pay Scale Granted to the Headmaster, Junior High Schools (Rupees)
1945	75-175
1955	100-200
1965	100-125
1972	240-390
01.07.1979	490-860
01.01.1986	1450-2300
01.01.1996	4625-7000 (4800-7650)*
01.07.2001	6500-10500 (7500-12000)*

*Selection Grade Pay Scale

10. It may be seen from the above table that the post of Headmaster was placed in the pay scale of 4625-7000 w.e.f. 01.01.1996. Thereafter, the said pay scale was revised to 6500-10500 w.e.f. 01.07.2001, and in addition, the Selection Grade of Rs. 7500-250-12000 was also granted through the 2001 Order. Additionally, Headmasters also got a promotion grade pay scale of 8000-13500 *vide* a subsequent government order dated 03.09.2001. No corresponding revision in the pay scales of SDI/ABSA and DBSA was, however, made w.e.f. 01.07.2001.

11. The perceived anomaly in pay scales being the hallmark of disputation, it may be useful to reflect the differentiation in pay scales, which have been granted to SDI/ABSA, DBSA and Headmasters since 1945, along with subsequent revisions, by way of the following comparative tabulation:

Pay Scale with Effect From	**Pay Scale Granted to SDI/ABSA (Rupees)**	**Pay Scale Granted to DBSA (Rupees)**	**Pay Scale Granted to the Headmaster (Rupees)**
1945	120-200	200-250	75-175
1955	120-300	250-250	100-200
1965	150-350	250-600	100-125
1972	325-575	450-950	240-390
01.07.1979	540-910	770-1600	490-860
01.01.1986	1400-2300	2000-3500	1450-2300
01.01.1996	4500-7000	6500-10500	4625-7000 (4800-7650)*
01.07.2001	**Not revised**	**Not revised**	**6500-10500 (7500-12000)***

*Selection Grade Pay Scale

12. The recruitment to the posts of SDI/ABSA is governed by the Uttar Pradesh Subordinate Educational (Sub Deputy Inspector of Schools) Service Rules, 1992 **(hereinafter, 'Rules').** As per the Rules, 80% of the posts of SDI/ABSA are mandated to be filled by direct recruitment through the Public Service Commission, 10% of the posts are to be filled up through selection from amongst the Headmasters of Junior High Schools and the remaining 10% of the posts are filled through the promotion of Extension Teachers and Craft Teachers working in the CT Grade, who were appointed before 21.04.1996 under the Redeployment Scheme. On the other hand, mode of appointment to the post of Headmasters is by way of promotion from among the Assistant Teachers of Junior High Schools. Furthermore, it seems that at one point of time, the SDI/ABSA and DBSA used to exercise supervisory and administrative control over Headmasters and Teachers of Junior High Schools.

13. That being said, in order to fully comprehend the origin of this strife and the parallel, as well as the subsequent legal proceedings leading to the current appeal, it would be beneficial to examine the entire set of events hereafter from the vantage point of two rounds of litigation.

The First Round of Litigation

14. The Uttar Pradesh Vidhyalay Nirikshak Sangh **(hereinafter, 'Caveator')**, along with the Respondents, filed WP No. 675/2002 before the High Court, alleging discrepancies and seeking the grant of pay scale of 7500-12000 to SDI/ABSA and corresponding higher pay scale to DBSA, on identical terms as per the 2001 Order. A Division Bench of the High Court, through its judgment dated 06.05.2002, allowed the writ petition after observing that the SDI/ABSA and DBSA were supervising the work of Headmasters and were previously receiving higher pay scales before further the revision w.e.f. 01.07.2001. The High Court viewed that when the pay scale of Headmasters was revised on 20.07.2001, the pay scales of SDI/ABSA and DBSA also ought to have been simultaneously revised. Consequently, the High Court directed the State to grant the pay scale of 7500-12000 with effect from 01.07.2001 to SDI/ABSA and corresponding higher pay scale (8000-13500) with effect from 01.07.2001 to the DBSA. The High Court further directed the State to consider granting the writ-petitioners therein pay scales higher than that of Headmasters on the premise that they had been enjoying a better pay scale prior to 20.07.2001.

15. The aggrieved State challenged the High Court's order through Civil Appeal No. 8869/2003 (arising out of SLP(C) No. 900/2003) before this Court. During the pendency of that Appeal, the State held discussions with the Caveator and referred the matter to the Chief Secretary's Committee **(hereinafter, 'Rizvi Committee')**. The Rizvi Committee made a proposal dated 12.01.2010 **(hereinafter, 'Proposed Policy')**, to grant the pay scale of 7500-12000 for the post of Assistant Basic Education Block Officer, which was essentially created by merging the posts of SDI/ABSA and DBSA, thereby creating a singular cadre of 1031 posts. As per the Proposed Policy, the pay scale of 7500-12000 to the newly designated post of Block Education Officer would be notionally effective from 01.01.2006, with actual monetary benefits being given with effect from 01.12.2008. The restructuring, as proposed, would make available one Officer at the Tahsil / Block level to assist Basic Education Officers and District Inspector of Schools in carrying out their administrative and supervisory duties. Further, the Proposed Policy was made subject to the filing of an application and affidavit based on mutual consent of the parties. The High Court's order dated 06.05.2002 was to be

accordingly modified to the above extent pursuant to a joint application of the parties in the pending appeal.

16. This Court, after noticing the cause of pay anomaly that occurred in the year 2001, referred to and relied upon the proposed Policy dated 12.01.2010 and eventually found no reason to interfere with the High Court's judgement dated 06.05.2002 and dismissed the appeals *vide* the order dated 08.12.2010, on the ground that the State itself had taken an appropriate decision to rectify the pay discrepancies and hence, no further cause as such survived requiring any further adjudication. This Court also noted the fact that no joint application based on mutual consent of the parties had been filed. This Court, in no uncertain terms, further directed that…. "the Government having taken appropriate decision cannot go back from implementing the same". The operative part of the order dated 08.12.2010 reads as follows:-

> *"We do not find any error to have been committed by the High Court in issuing the impugned directions. However, there is no need to further dilate on this issue* ***since the Government itself appears to have realised the anomaly in fixation of the pay scales as is evident from the proceedings dated 12th May, 2010 emanating from Secretary, Finance Department, Govt. of Uttar Pradesh and addressed to the Secretary, Basic Education Department, Govt. of Uttar Pradesh. The proceedings disclose that an appropriate decision has been taken to rectify the pay discrepancies in respect of the post of Deputy Inspector of Schools/Deputy Basic Education Officer of the Department of Education on the recommendations of the Pay Committee (2008)****. The operative portion of the said proceedings reads as under:-*
>
> > *"According to the above as a result of cadre constitution getting sanctioned imaginary the pay scale of Rs. 7500-12000/- from 01.01.2006 for the post of Block Education Officer, the real benefit be given from 01.12.2008."*
>
> *By the same proceedings, a decision was taken to file the same into this Court together with application supported by an affidavit in as much as such decision was taken with*

mutual consent of the parties. But for whatever reason, the same has not been filed into the Court.

Since the Government itself has taken appropriate decision in the matter as is evident from the proceedings referred to hereinabove, no further cause as such survives requiring any further adjudication of this appeal and the Government having taken appropriate decision cannot go back from implementing the same.

In the circumstances, the Civil Appeals are accordingly dismissed."

[Emphasis supplied]

17. Subsequently, an application seeking clarification of the above order was also filed before this Court, which was dismissed as withdrawn for being not maintainable *vide* order dated 08.07.2011. We may, however, clarify that the details of such an application are neither part of the record of this appeal nor a copy of it was tendered by learned counsel for the parties.

18. Nevertheless, and in compliance to this Court's order dated 08.12.2010, the Appellant-State issued Government Order dated 14.07.2011 (modified on 15.07.2011) **(hereinafter, '2011 Order')**, whereby 1031 posts of 'Block Education Officer' were created by merging 1360 posts of SDI/ABSA and 157 posts of DBSA, with the sanctioned pay scale of 7500-12000, to be given with effect from 01.01.2006 notionally, with actual benefits accruing from 01.12.2008.

The Second Round of Litigation

19. It is pertinent at this stage to provide some insight into the background in which the Respondents instituted parallel proceedings before the High Court during the pendency of the First Round of Litigation. In order to avoid repetition and for the purposes of the present proceedings, we propose to refer the factual matrix pertaining to Respondent No. 1 only since Respondent Nos. 2 and 3 are similarly placed.

20. Respondent No. 1 was initially appointed to the post of Assistant Teacher in a Primary School on 16.11.1971. He was subsequently promoted to Assistant Teacher, Junior High School on 12.01.1977 and thereafter as Headmaster, Junior High School on 05.07.1982. Subsequently, Respondent No. 1 was appointed as the Sub-Deputy

Inspector of Schools within the aforementioned 10% promotion quota through selection from the post of Headmaster in accordance with the 1992 Rules, *vide* the order dated 19.03.1997. Consequently, he was placed in the pay scale of 4800-7650 and was receiving a monthly salary of Rs. 6000/-. However, with the revision of the pay scale of Headmasters to 7500-12000 with effect from 01.07.2001, Respondent No. 1 was inadvertently placed in the revised higher pay scale instead of what he was entitled to for the post of SDI/ABSA. Respondent No.1 eventually retired as a Sub-Deputy Inspector on 31.07.2004 upon reaching the age of superannuation.

21. Though Respondent No. 1, after his retirement, was paid his provident fund dues, his pension and gratuity amounts were withheld on the premise that while working as a Sub-Deputy Inspector, he was erroneously paid salary in a higher pay scale sanctioned for the post of Headmaster of Junior High School. This was followed by recovery orders dated 07.12.2005 and 26.06.2007, directing to adjust the excess amount paid to Respondent No. 1 from his retiral dues. He was further directed to deposit the excess amount within one week, failing which the same would be adjusted from his retiral dues. Respondent No. 1 preferred Writ-A No. 35611/2007 (**hereinafter, '2007 Writ'**) before the High Court, seeking quashing of the abovementioned recovery orders and further sought a direction to the State to pay the entire pension along with arrears calculated at the last pay drawn by him along with 24% interest on the delayed payment, and also to release the remaining 10% of the gratuity amount along with interest from the date it became due.

22. The High Court, *vide* an interim order dated 03.08.2007, directed the State to pay forthwith the retiral dues admissible to Respondent No. 1, excepting the amount which was paid in excess to him. It is the specific case of the State that this order was duly complied with.

23. The High Court kept the above stated 2007 writ petition pending so as to await the outcome of the first round of litigation. Meanwhile, when the State issued the 2011 Order, the Respondents once again approached the High Court *vide* Writ A No. 44344/2011 (**hereinafter, '2011 Writ'**), challenging the 2011 Order while also seeking directions for the grant of pay scale of 7500-12000 with effect from 01.01.1996 and consequential payment of arrears. The High Court then clubbed together the Writ Petitions of 2007 and 2011.

24. A Learned Single Judge of the High Court *vide* judgement dated 02.02.2018 allowed both the writ petitions, quashed the 2011 Order and directed the State to pass appropriate orders within a period of three months (**hereinafter, 'Single Judge Judgement'**). The Learned Single Judge was of the view that the State had wrongfully made misrepresentations to this Court with an intent to nullify the benefits otherwise accrued in favour of the Respondents.

25. The State Government, who until then was so vigorously pursuing the *lis,* for reasons which are still unbeknownst to us, went into a state of slumber. Neither did the State challenge the Single Judge's dictum through an intra-court appeal within a reasonable time, nor did it take any conscious decision to honour and implement the said Judgement.

26. The State authorities, therefore, invited the initiation of contempt proceedings, which the Respondents filed alleging willful disobedience of the Single Judge Judgement, referred to above. Thereafter, on 23.05.2019, the State authorities woke up and filed an inordinately delayed Special Appeal Defective No. 532/2019 before the Division Bench of the High Court, challenging the Single Judge Judgement.

27. The High Court, first in its order dated 10.01.2023 in Contempt proceedings directed the compliance of the Single Judge's Judgement within 15 days. The Principal Secretary, Department of Basic Education was further show caused to file an affidavit disclosing as to how many contempt proceedings had been initiated against him for non-compliance of the orders passed by the High Court and their outcome, the number of pending contempt proceedings and as to why cost of pending litigation be not recovered from him. After such requisite affidavit having been filed, the High Court passed an order on 07.02.2023 initiating proceedings for criminal contempt against the Principal Secretary, Department of Basic Education and further directed the personal presence of the Chief Secretary and the Additional Chief Secretary (Finance), on the next date of hearing – 14.02.2023.

28. The State then approached this Court against the High Court's orders dated 10.01.2023 and 07.02.2023. This Court, *vide* the order dated 13.02.2023, stayed the effect of the abovementioned orders, keeping in abeyance the contempt proceedings until further orders. It was,

however, clarified that the pendency of Special Leave Petitions would not pose an impediment to the Division Bench of the High Court in deciding the State's intra-court appeal expeditiously.

29. In the midst of all of these proceedings and in light of this Court's order dated 13.02.2023, the High Court passed the Impugned Order dated 06.04.2023 dismissing the application for condonation of delay of 428 days filed by the Appellant-State. Consequently, the State's intra-court appeal stood rejected, giving rise to the instant proceedings.

30. The sole issue that arises for our consideration, thus, is whether the SDI/ABSA and DBSA are entitled to the higher pay scale of 7500-12000 with effect from 01.07.2001 or whether it has been appropriately granted to them from 01.12.2008 onwards?

CONTENTIONS OF THE PARTIES

31. Learned Additional Solicitor General of India and Learned Additional Advocate General, while arguing for the State of Uttar Pradesh, urged that the consequence of the directions issued by the Learned Single Judge is that the earlier Division Bench judgement of the HC dated 06.05.2002 stands restored even though the said judgement was no longer in existence as it stood merged in the self-speaking order dated 08.12.2010 passed by this Court in Civil Appeal No. 8869/2003, which was directed against the said judgement of the High Court. They pointed out that the financial implications of the directions issued by the Single Judge of the High Court are enormous, as an additional burden of approximately Rupees 1500 Crores shall be fastened on the state exchequer.

32. They fervently submitted that regardless of the negligence of some officers who failed to file the intra-court appeal promptly and did not render any satisfactory explanation for the inordinate delay, the Division Bench of the HC ought to have appreciated the impersonal character of the State and condoned the delay so that the intra court appeal could be heard on merits. It was emphasized that in deference to the order dated 08.12.2010 of this Court, which explicitly approved the proposed settlement between the parties, the State Government issued the 2011 Order whereby substantial relief with actual arrears of pay with effect from 01.12.2008 had been already granted to the

Respondents and other similarly placed employees of their cadre. The 2011 Order, it was urged on behalf of the Appellant State, was in conformity with the final order passed by this Court.

33. The Learned ASG relied upon the often quoted three-judge bench decision of this Court in ***Kunhayammed v. State of Kerala***[1] to reiterate that once this Court had granted leave against the High Court judgement dated 06.05.2002, the doctrine of merger would apply and it stood merged with the reasoned order dated 08.12.2010, which was eventually passed by this Court. The Appellant-State was thus obligated to give effect to the order passed by this Court. According to Learned ASG, this Court *vide* the order dated 08.12.2010 dismissed the appeals after noticing the subsequent events that unfolded and held that '*no further cause as such survives requiring any further adjudication of this appeal*'. Further, this Court also pointed out that no application based on mutual consent of the parties was moved. In other words, the Learned ASG urged, that this Court rendered the matter infructuous, leaving nothing to be adjudicated even though no formal application based on mutual consent was moved. It was then contended that the 2011 Order was issued in a *bona fide* manner to give effect to the directions mandating that the State would not go back from implementing the proposal approved by this Court.

34. *Per contra*, Mr. Dushyant Dave, Learned Senior Counsel representing the Respondents and learned counsel for the Caveator, Ms. Shubhangi Tuli, vehemently opposed the claim put forth on behalf of the State. They argued that the Respondents, who are retired senior citizens, have been dragged by the State in avoidable litigation for the last twenty-two years, despite this being a *simpliciter* case of acknowledgement and removal of the pay anomaly. They contended that the Appellants have consistently defied the Court's orders and, being in contempt, are making flimsy and false excuses to overreach the judicial system. They urged that firstly, the State's plea regarding the financial burden of approximately Rupees 1500 Crores is unsubstantiated and has no factual foundation. Secondly, the mere consequence of financial burden is not a valid ground to denounce a judicial dictum.

1 [2000] Supp. 1 SCR 538 : (2000) 6 SCC 359

ANALYSIS

35. We have considered the rival submissions in the backdrop of the protracted litigation between the parties, which has led to the passing of multiple orders by this Court and the High Court, a brief reference to which has already been made. The relevant records have also been perused.

36. It may be seen that the instant round of litigation is triggered by the Single Judge's Judgement against which the highly belated intra-court appeal has been summarily dismissed by the Division Bench of the High Court. We are thus required to scrutinize the Single Judge's Judgement to determine whether the consequential directions issued therein are justified and in tune with the previous rounds of litigation.

37. We are constrained to observe at the outset that the judgment of the Learned Single Judge appears to be wholly misconceived, on several parameters, in light of the bizarre observations made with reference to the decision of this Court dated 08.12.2010. Learned Single Judge seems to have been swayed by a hypothetical reason that the intricacies of the Hindi language employed in the proposed Policy were beyond the comprehension of the Hon'ble Judges of the Supreme Court, who were misled to believe as if it was more than just a mere proposal. The Learned Single Judge observed that the State capitalized on this misrepresentation before this Court and, consequently, issued the 2011 Order. It has been further observed that on the basis of such distortion and in blatant contravention of the High Court's previous judgment dated 06.05.2022, the State finagled to release a higher pay scale to SDI/ABSA, aligning it with that of Headmasters, on a notional basis from 01.01.2006 thereby restricting the actual monetary benefits from 01.12.2008 only.

38. In our considered opinion there is nothing in the order dated 08.12.2010 of this Court on the basis of which the Learned Single Judge of the High Court could draw such sweeping inferences. All that this Court unequivocally said was that in light of the Proposed Policy decision taken by the State Government to rectify the pay discrepancies and to grant certain reliefs to the Respondents or their cadre mates, no issue survived for adjudication. To elucidate more simply, this Court was satisfied that the Proposed Policy was fair enough to close the pending *lis*. As a follow up, the State was

obligated to formalize and give effect to the said proposal, which the Appellants eventually did through the 2011 Order.

39. However, the Learned Single Judge, while relying on this Court's decision in ***Supreme Court Employees' Welfare Association v. Union of India and another***,[2] made two pertinent observations, which we propose to analyse in the present context, i.e. — (*i*) since the Supreme Court in its order dated 08.12.2010 *dismissed* Civil Appeal No. 8869/2003 and did not discern any error of fact or law in the decision of the High Court dated 06.05.2022, the latter would consequently operate as *res judicata inter se* the parties; and (*ii*) it is impermissible for the State Government to overreach and render nugatory a judgement of the High Court, once it has attained finality.

40. In this regard, it seems to us that the High Court has construed narrowly the ratio of the decision of this Court in ***Supreme Court Employees' (supra)*** which encapsulated that when a Special Leave Petition is dismissed *in limine*, there is no law laid down under the aegis of Article 141 of the Constitution. Hence, the judgement against which such petition was preferred becomes final and conclusive so as to operate as *res judicata* between the parties thereto. In stark contrast, the dismissal of Civil Appeal No. 8869/2003 by this Court *vide* order dated 08.12.2010 was not a dismissal *simpliciter* or *in limine*. Instead, the appeal was dismissed after taking into consideration the root-cause and consequential steps taken by the State towards rectifying the anomaly in the grant of revised pay scales. To say it differently, the Civil Appeal was not dismissed on the premise that the judgement of the High Court dated 06.05.2002 was a correct statement of law. This Court in fact found that no issue survived for adjudication, for the obvious reason that the State Government had volunteered to redress the grievance of the Respondents and other similarly placed employees through the proposed Policy. It is true that the Proposed Policy did not enure a decision binding on both sides for want of mutual consent. However, leaving aside a microscopic evaluation, this Court expressly approved the said Proposed Policy. The observation that nothing survived in the appeal for adjudication leaves no room to doubt that not only was this Court satisfied with the proposal mooted before it, it also bound down the State and commanded it to implement the same.

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2 [1989] 3 SCR 488 : (1989) 4 SCC 187

41. Equally pertinent to note here is that this Court had granted leave and thereafter dismissed the Civil Appeal by way of a brief reasoned order. Consequently, the High Court Judgment dated 06.05.2002 stood merged with the order dated 08.12.2010 of this Court. In legal parlance, the High Court Judgment lost its entity and was subsumed in the order passed by this Court.

42. The doctrine of merger although has its roots in common law principles, but has been deeply interspersed in Indian jurisprudence, through a series of decisions. This Court in ***Kunhayammed (supra)*** elucidated this doctrine which has been further affirmed and reiterated in ***Khoday Distilleries Ltd. (now known as Khoday India Ltd.) & Ors. v. Sri Mahadeshwara Sahakara Sakkare Karkhane Ltd., Kollegal (Under Liquidation) represented by the Liquidator***.[3] In ***Kunhayammed (supra)***, this Court has expressly laid down as follows:

> " **42.** *"To merge" means to sink or disappear in something else; to become absorbed or extinguished; to be combined or be swallowed up. Merger in law is defined as the absorption of a thing of lesser importance by a greater, whereby the lesser ceases to exist, but the greater is not increased; an absorption or swallowing up so as to involve a loss of identity and individuality. (See Corpus Juris Secundum, Vol. LVII, pp. 1067-68.)*
>
> **44.** *To sum up our conclusions are:*
>
> *(i)* ***Where an appeal or revision is provided against an order passed by a court, tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of law.***
>
> *(ii) The jurisdiction conferred by Article 136 of the Constitution is divisible into two stages. First stage*

3 [2019] 3 SCR 411 : (2019) 4 SCC 376

is up to the disposal of prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and special leave petition is converted into an appeal.

(iii) Doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. ***Under Article 136 of the Constitution the Supreme Court may reverse, modify or affirm the judgment-decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter.***

(iv) An order refusing special leave to appeal may be a non- speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

(v) If the order refusing leave to appeal is a speaking order, i.e. gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the apex court of the country.

But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties.

(vi) ***Once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation****.*

(vii) On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before Supreme Court the jurisdiction of High Court to entertain a review petition is lost thereafter as provided by sub-rule (1) of Rule (1) of Order 47 of the C.P.C."

[Emphasis supplied]

43. These decisions indubitably hold that if Special Leave was not granted and the petition was dismissed by a reasoned or unreasoned order, the order against which such Special Leave Petition is filed would not merge with the order of dismissal. However, once leave has been granted in a Special Leave Petition, regardless of whether such appeal is subsequently dismissed with or without reasons, the doctrine of merger comes into play resulting in merger of the order under challenge with that of the appellate forum, and only the latter would hold the field. Consequently, it is the decision of the superior court which remains effective, enforceable, and binding in the eyes of the law, whether the appeal is dismissed by a speaking order or not.[4]

44. The High Court therefore fell in error on assuming that its previous decision dated 06.05.2002 was intact and enforceable, independent of the order passed by this Court in the Civil Appeal arising therefrom. On the same analogy, the High Court's holding that its previous decision dated 06.05.2002 would operate as *res-judicata,* also

4 Pernod Ricard India Private Limited v. Commissioner of Customs (2010) 8 SCC 313

cannot sustain being erroneous in law. We say so for the reason that the final and binding order between the parties is the one dated 08.12.2010, passed by this Court.

45. We may now advert to the observations made by the High Court regarding the State allegedly rendering its order dated 06.05.2002 nugatory through its executive actions. The High Court, as a matter of principle, has rightly held that the State has no authority whatsoever to annul a Court decision through its administrative fiat. Even legislative power cannot be resorted to, to overrule a binding judicial dictum, except that the legislature can remove the basis on which such judgment is founded upon. However, these settled principles may not be attracted to the facts and circumstances of the instant case.

46. It goes without saying that the 2011 Order was issued by the State after this Court's acknowledgement of the Proposed Policy initiated to rectify the pay scale anomaly. This Court, upon review, did not find fault with the proposed measures and instead, deemed them appropriate for addressing the prevailing pay discrepancy. Thus, the measures taken by the State were in deference to and not in defiance of this Court's orders. To the extent above, the view taken by the High Court is legally and factually incorrect.

47. Regardless to what has been held above, we are in agreement with the Learned Single Judge that the pay benefits which had been released to the writ petitioners arrayed before it, and who had meanwhile retired from service, ought not to have been withdrawn and that too with the added measure of recovery orders being fastened upon them. Such a recourse to effect recovery initiated by the State is contrary to the principles evolved by this Court in ***State of Punjab v Rafique Masih (White Washer) and others***,[5] wherein recovery from retired employees or employees who are due to retire within one year of the order of such recovery, did not get the seal of approval. Thus, to this limited context, the Single Judge's direction deserves to be upheld. Ordered accordingly.

48. Turning to the impugned order passed by the Division Bench of the High Court and as already recounted in the facts, the State's intra-court appeal has been dismissed on account of the inordinate

5 [2014] 13 SCR 1343 : (2015) 4 SCC 334

delay of 428 days in filing. The Division Bench observed that the plea taken by the State regarding movement of the file from one desk to another, particularly in the backdrop of the undertaking provided during the contempt proceedings, did not constitute sufficient ground(s) to condone the delay. The Division Bench accordingly rejected the application for condonation of delay and consequently dismissed the appeal.

49. It is an admitted fact that the State authorities failed to avail their remedy of intra-court appeal within a reasonable time. It was only when contempt proceedings were slapped on them that the authorities woke up and filed the appeal, which, by that time, was highly belated. This Court has in a catena of decisions elaborated the parameters and carved out such exceptional circumstances which may constitute a valid ground to condone the delay in the interest of justice. These principles include the recent approach that no undue leverage can be extended to the State or its entities in condonation of delay and that no special privilege can be extended to the State or its instrumentalities.[6]

50. Nevertheless, the Courts have been cognizant of the fact that as a custodian of public interest, the affairs of the State are run and controlled by human beings. Various factors, including the bona fide formation of erroneous opinion, negligence, lack of initiative, lack of fortitude, collusion or connivance, red tapism, blurred legal advice etc., sway the action or inaction of these functionaries. While waiving the public interest *vis-à-vis* an individual's interest who claims to have meanwhile acquired a vested right on the expiry of the limitation period, the courts invariably tilt towards the public interest, keeping in view the irreversible loss likely to be suffered by the public at large.[7] Even in the case of private litigants, where the appellate court finds that the opposite party can be suitably compensated with cost measures, a lenient and liberal approach is followed in terms of condonation of delay.

51. We may, however, hasten to add that whether a just and valid ground for condonation of delay is made out or not, largely depends on

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6 State of Madhya Pradesh & Ors v. Bherulal (2020) 10 SCC 654

7 State of Nagaland v. Lipok AO (2005) 3 SCC 752; Executive Officer, Antiyur Town Panchayat v. G. Arumugam (Dead) by Legal Representatives (2015) 3 SCC 569

the facts and circumstances of each case and no one size fits all formula can be applied in this regard. It is, however, not necessary for us to further delve into this issue and/or determine whether the Appellant-State has made out a case for condonation of delay in filing their intra-court appeal before the High Court. We rather proceed on the premise that even if it was a fit case for condonation of delay, will it serve the cause of justice to set aside the impugned order of the Division Bench and remit the intra-court appeal for a fresh adjudication on merits?

52. We cannot be oblivious of the fact that the parties started litigating in the year 2002. The dispute had engendered out of a perceived pay anomaly. The State itself acknowledged that there was some disparity in the pay scales that needed to be rectified. Hence, it constituted the Rizvi Committee. That Committee made recommendations, which were broadly fair and just, as various means and measures were recommended to redress the grievances of employees like the Respondents. These measures included the merger of cadres, redesignation and upgradation of posts, the introduction of new pay scales, with an assurance that the redesignated posts would be on a pay scale higher than that of the feeder cadre. Even if these measures were not to the entire satisfaction of the Respondents, the fact remains that the anomalies stood removed.

53. It needs no emphasis that prescription of pay scale for a post entails Policy decision based upon the recommendations of an expert body like Pay Commission. All that the State is obligated to ensure is that the pay structure of a promotional or higher post is not lower than the feeder cadre. Similarly, pay parity cannot be claimed as an indefeasible enforceable right save and except where the Competent Authority has taken a conscious decision to equate two posts notwithstanding their different nomenclature or distinct qualifications. Incidental grant of same pay scale to two or more posts, without any express equation amongst such posts, cannot be termed as an anomaly in a pay scale of a nature which can be said to have infringed the right to equality under Article 16 of our Constitution.

54. Equally well settled is that the creation, merger, de-merger or amalgamation of cadres within a service to bring efficacy or in the administrative exigencies, is the State's prerogative. The Court in exercise of its power of judicial review would sparingly interfere in

such a policy decision, unless it is found to have brazenly offended Articles 14 and 16 of the Constitution.

55. There was no pay parity in the instant case between Headmasters on one hand or the SDI/ABSA etc. on the other. It was a mere co-incidence that the group of these posts carried the same pay scale for a long time, till the State Government decided to grant a higher revised pay scale to the Headmasters. This led to an anomalous situation as the Headmasters were amongst the feeder cadre categories for appointment by selection against 10% posts of SDI/ABSA. Such an incongruent situation could be averted by amending the Rules and deleting Headmasters from the zone of consideration from 10% posts. In that case, the State would have faced no financial burden which has fallen upon it as a consequence to the implementation of the Rizvi Committee recommendations. In other words, the aforesaid disparity could be removed without legitimizing the claim of the Respondents for grant of a pay scale higher or equal to that of Headmasters.

56. Be that as it may, the Appellant-State on being directed by the High Court, agreed to recalibrate and recompense the employees like Respondents and put up a proposal before this Court in the previous round of litigation. That proposal was indeed approved by this Court. The State in furtherance thereto issued the necessary orders granting restructured benefits to the employees like the Respondents. Still further, the Respondents also got monetary benefits over and above the State's proposal, in furtherance of the High Court decisions dated 06.05.2002 and dated 02.02.2018. Most of them have retired from service long back and are now senior citizens. The monetary benefits have already been utilised by them on their personal needs.

57. That being the state of affairs, it seems to us that remittance of the case to the High Court is not likely to bring quietus to the endless litigation. The party who gets aggrieved by the judgement of the Division Bench owing to the previous record will most likely approach this Court again. The litigation has taken its toll on the financial and health conditions of the private Respondents, in their old age. We are, therefore, of the considered view that as long as the Respondents can be suitably compensated without subjecting them to any recovery and in such a manner that the relief so granted does not become a precedent for one and all to open a Pandora's box and drag the State into a flood of litigation, it would be in the interests of one and

all that such like litigation which has the potentiality of multiplying in the future, should be brought to an end without any delay.

58. We, therefore, find it a fit case to invoke the extraordinary powers held by this Court under Article 142 of the Constitution. It is well settled that Article 142 empowers this Court to pass orders in the 'larger interest of the administration of justice' and 'preventing manifest injustice'.[8] This is more so in cases involving protracted litigation and delay,[9] such as in the present case. It is a matter of common knowledge that the cases entailing discord over pay parity, are frequently subjected to prolonged litigation. These squabbles often lead to parties enduring significant challenges and hardships over extended periods as they await adjudication. Regrettably, the delay in resolving such matters usually renders them infructuous by the time a decision is reached.

59. Thus, in light of the long pending litigation between the parties, the rights of the parties involved, and to give quietus to the issue, we deem it appropriate to pass orders towards doing substantial justice.

CONCLUSION AND DIRECTIONS

60. We, therefore, allow this appeal in part and issue the following directions and conclusions by invoking our powers under Article 142 of the Constitution, for the removal of discrepancy in the pay scales prescribed for the posts of SDI/ ABSA and DBSA:

i. The appeal is allowed in part. The Impugned Judgement of the Division Bench in its entirety and that of the Single Judge of the High Court in part, are set aside.

ii. The 2011 Order is approved in its entirety.

iii. The private Respondents and their colleagues in the same cadre (before and after the redesignation of their posts) are held entitled to the pay scale, strictly in accordance with the 2011 Order. The Respondents and other members of their cadre and all members of the Caveator-organization shall be entitled to the pay scale granted by the said Government Order, notionally from 01.01.2006 and actually from 01.12.2008.

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8 Nidhi Kaim v. State of Madhya Pradesh (2017) 4 SCC 1

9 Abbobaker v. Mahalakshmi Trading Co. (1998) 2 SCC 753

iv. However, any payment made to the Respondents more than what they are entitled to with effect from 01.12.2008, towards pay or retiral benefits shall not be recovered from them. The judgement of the Single Judge dated 02.02.2018, which set aside such recovery, is accordingly affirmed.

v. The arrears of pay or pension, if not already paid, shall be paid to the Respondents or their colleagues in the same cadres within a period of four months along with interest @ 7% per annum.

vi. Those who have retired from service, their pension and other retiral benefits shall be re-fixed accordingly, along with arrears with effect from 01.12.2008, to be paid within four months along with interest @ 7% per annum.

vii. The 2011 Order is meant only for the officials belonging to the State's Education Department, namely the Respondents and their colleagues of the same cadre. Employees of other Government Departments shall not be entitled to take benefit thereof as a matter of right. The benefits flowing from this order are also restricted to the employees like Respondents of the State Education Department and only to those who fall in the category of the posts that were the subject matter of consideration before the Rizvi Committee.

viii. This order shall not be taken as a precedent by employees of other departments to claim revised or higher pay scales.

61. The present appeal is disposed of in the above terms. Accordingly, pending applications are also disposed of.

Result of the case: Appeal disposed of.

†*Headnotes prepared by:* Divya Pandey

[2024] 7 S.C.R. 1347 : 2024 INSC 533

P. Ravindranath & Anr.
v.
Sasikala & Ors.

(Civil Appeal No. 7792 of 2024)

15 July 2024

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

Issue for Consideration

Parties entered into an agreement to sell for sale of a property. Defendant no.1 sent various notices to plaintiffs to execute the sale deed. However, plaintiffs did not execute the sale deed. Thereafter, defendants executed sale deeds in favour of another persons (defendant nos. 6, 7 and CN). The plaintiffs instituted suit for specific performance and permanent injunction. Whether plaintiffs were always ready and willing to get the sale deed executed and registered.

Headnotes†

Specific Relief Act, 1963 – s.16(c) – Parties entered into an agreement to sell for sale of a property – The stipulated period was fixed as three months – But, as there was a Government order restricting registration of sale deeds – It was decided by the parties that the sale deed would be executed immediately after the cancellation of the said Government Order – Thereafter, defendant no.1 sent various notices at different intervals to the plaintiffs to come forward and get the sale deed executed – Plaintiffs did not execute the sale deed – After above correspondence, the defendants executed two sale deeds on 22.04.1983 and on 22.06.1983 in favour of defendant nos.6 &7 and third one in favour of CN – Plaintiffs instituted suit for specific performance and permanent injunction – Trial Court decreed the suit for specific performance and denied the relief of permanent injunction – Appeal against the judgment of the trial Court was dismissed by the High Court – Correctness:

Held: In the instant case, a perusal of the plaint reveals that the plaintiffs failed to plead specifically with details about the restriction said to have been imposed by the State on registration of sale

* Author

deeds relating to similar survey numbers and revenue sites – No details of the Government Order are mentioned – Neither the Government Order is placed on record as evidence to connect that such restriction was actually applicable to the land in question – It is recorded by the Trial Court as also the High Court, that these sale deeds (in favour of defendant nos.6 &7 and CN) were executed by the defendants 1 to 5 after depositing some betterment charges, getting the land converted and then effecting the transfer – The plaintiffs do not seem to have ever approached the defendants to get this kind of a status change and, thereafter, get the sale deeds executed – It has not come either in pleadings or in evidence of the plaintiffs that the alleged ban imposed by the State Government had been lifted but still the sale deeds were executed in favour of the appellants and other purchasers in 1983 – It is clear from the record that the defendant no.1 had given written notices requesting for payment of balance sale consideration and, thereafter communicating that advance amount had been forfeited and the agreement to sell had come to an end as the plaintiffs failed to get the sale deed executed within three months – The plaintiffs neither responded to the last communication of the defendant no.1 of December, 1981, nor did they take any steps to file the suit for specific performance of contract for more than one and a half years after the defendant no.1 had communicated forfeiture of the earnest money and the cancellation of the agreement to sell – There is not even a notice by the plaintiffs before filing the suit of showing their readiness and willingness by tendering the amount of balance sale consideration and sending a draft sale deed for approval and fixing a date for execution and registration of the sale deed – This Court is unable to agree with the findings of the courts below that the plaintiffs were always ready and willing to get the sale deed executed and registered – As a matter of fact, the conduct of the plaintiffs throughout gives credence and strength to the contention of the defendant nos.1 to 5 that the plaintiffs never had the funds available with them to clear the balance sale consideration and that they were middlemen only interested in blocking the property and, thereafter, selling it on a higher price to third parties and make profit thereof – Under such facts and circumstances, this Court is of the confirmed view that the decree of specific performance was not warranted in the present case and ought to have been denied and the suit was liable to be dismissed. [Paras 22(ii), 22(iii), 22(viii), 22(ix), 22(x)]

P. Ravindranath & Anr. v. Sasikala & Ors.

Specific Relief Act, 1963 – Pleadings and Evidence – Plaintiffs have to establish that they have made out case for grant of relief of specific performance of contract:

Held: Relief of specific performance of contract is a discretionary relief – As such, the Courts while exercising power to grant specific performance of contract, need to be extra careful and cautious in dealing with the pleadings and the evidence in particular led by the plaintiffs – The plaintiffs have to stand on their own legs to establish that they have made out case for grant of relief of specific performance of contract – The Act, 1963 provides certain checks and balances which must be fulfilled and established by the plaintiffs before they can become entitled for such a relief – The pleadings in a suit for specific performance have to be very direct, specific and accurate – A suit for specific performance based on bald and vague pleadings must necessarily be rejected – Section 16(C) of the 1963 Act requires readiness and willingness to be pleaded and proved by the plaintiff in a suit for specific performance of contract – The said provision has been widely interpreted and held to be mandatory. [Para 22(i)]

Case Law Cited

Man Kaur v. Hartar Singh Sangha [2010] 12 SCR 515 **: (2010) 10 SCC 512;** *U.N. Krishnamurthy (Since Deceased) Thr. Lrs. v. A.M. Krishnamurthy* [2022] 13 SCR 250 **: (2022) SCC Online SC 840;** *His Holiness Acharya Swami Ganesh Dassji v. Sita Ram Thapar* [1996] Supp. 2 SCR 111 **: (1996) 4 SCC 526 – relied on.**

Aniglase Yohannan v. Ramlatha and Others [2005] Supp. 3 SCR 440 **: (2005) 7 SCC 534;** *Umabai and Another v. Neelkanth Dhondiba Chavan (dead) by Lrs. and Another* [2005] 3 SCR 521 **: (2005) 6 SCC 243;** *Rajeshwari v. Puran Indoria* [2005] Supp. 2 SCR 1016 **: (2005) 7 SCC 7;** *Malapali Munaswamy Naidu v. P. Sumathi* **(2004) 13 SCC 364;** *Azhar Sultana v. B. Rajamani and Others* [2009] 2 SCR 537 **: (2009) 17 SCC 27;** *Parminder Singh v. Gurpreet Singh* [2017] 6 SCR 419 **: (2018) 13 SCC 352;** *Universal Sompo General Insurance Co. Ltd. v. Suresh Chand Jain and Another* [2023] 10 SCR 1155 **: (2023) SCC Online SC 877;** *R.K. Mohd. Ubaidullah v. Hajee C. Abdul Wahab* [2000] Supp. 1 SCR 524 **: (2000) 6 SCC 402;** *Ram Baran Prasad v. Ram Mohit Hazra and Others* [1967] 1 SCR 293 **: AIR 1967 SC**

744; *Sughar Singh v. Hari Singh* [[2021] 10 SCR 287] **: (2021) 17 SCC 705;** *Gaddipati Divija and Another v. Pathuri Samrajyam and Others* [[2023] 3 SCR 802] **: (2023) SCC Online SC 442;** *S. Kaladevi v. V.R. Somasundaram* [[2010] 4 SCR 515] **: (2010) 5 SCC 401;** *R. Hemalatha v. Kashthuri* [[2023] 2 SCR 834] **: (2023) 10 SCC 725;** *Suraj Lamp and Industries (P) Ltd. (2) v. State of Haryana* [[2011] 11 SCR 848] **: (2012) 1 SCC 656;** *Manickam alias Thandapani and Another v. Vasantha* **(2022) SCC Online SC 2096 – referred to.**

Himatlal Motilal and Others v. Vasudev Ganesh Mhaskar @ Ganpati Boa and Others, **ILR (1912) 36 Bom. 446;** *Bhup Narain Singh v. Gokhul Chand Mahton,* **AIR 1934 PC 68;** *Gadde Sitayya (dead) and Another v. Gadde Kotayya and Others,* **AIR 1932 Mad. 71;** *Ram Kishan and Another v. Bijender Mann alias Vijender Mann and Others* **(2013) 1 PLR 195 – referred to.**

List of Acts

Specific Relief Act, 1963.

List of Keywords

Section 16 (c) Specific Relief Act, 1963; Agreement to sell; Property; Sale deed; Execution of sale deed; Suit for specific performance; Ready and willing to get the sale deed executed and registered; Pleadings and Evidence; Specific performance of contract; Discretionary relief.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 7792 of 2024

From the Judgment and Order dated 17.12.2015 of the High Court of Karnataka at Bengaluru in RFA No. 362 of 2003

Appearances for Parties

Arvind Varma, Sr. Adv., Brijendra Singh, Ms. Malvika Raghwan, Rana Pratap Singh, Gaurav Dhama, Ved Parkash, Praveen Swarup, Advs. for the Appellants.

Sanjay Parikh, Sr. Adv., Ms. Srishti Agnihotri, Ms. Sanjana Grace Thomas, D.P. Singh, Ms. Tara Elizabeth Kurien, Advs. for the Respondents.

P. Ravindranath & Anr. v. Sasikala & Ors.

Judgment / Order of the Supreme Court

Judgment

Vikram Nath, J.

1. Leave granted.

2. This appeal, by the defendant, assails the correctness of the judgment and order dated 17.12.2015 of the High Court of Karnataka in RFA No.362 of 2003, whereby the appeal of the appellant was dismissed and the judgment and decree of the Trial Court dated 22.10.2002 passed in O.S. No.2188 of 1983, decreeing the suit for specific performance was confirmed.

Brief facts:

3. Smt. Sasikala and K. Satyanarayana (original vendees) entered into an agreement to sell dated 24.05.1981 with Muni Venkata Reddy and his four sons (original vendors) for sale of Survey No.129, New No.220/01, Site No.14 situated at Kodihali Village, HAL, S.B. Area, Bangalore-17 measuring East to West 132 feet and North to South 40 feet total 5280 sq. feet (hereinafter referred to as the "property in dispute"). The total sale consideration was stated to be Rs.29,000/- , out of which, an advance of Rs.12,000/- was paid at the time of agreement to sell dated 24.05.1981. The balance amount was to be paid at the time of registration of the sale deed. The necessity for sale had arisen because of want of funds by the vendors. The stipulated period was fixed as three months, but as there were restrictions of registration of sale deeds with respect to similar revenue sites and survey numbers, as such, the sale deed would be executed immediately after the cancellation of the said Government Order. The agreement to sell also mentioned that possession of the site would be given that very day.

4. After expiry of three months from the date of agreement, when the plaintiffs did not come forward to get the sale deed executed, the defendant no.1 sent communication dated 23.09.1981 to the plaintiff stating that he has not come forward to solve the problem as the decision to sell was only because of his financial problems. The defendant extended the period of three months' time by another week from that day and if he did not get any information from their side, he would give the site to some other party. Thereafter, after waiting

for two more months, legal notice was given through Advocate to the plaintiffs on 18.11.1981 stating that, as he had failed to get the sale deed executed within three months after payment of balance amount of Rs.17,000/-, defendant no.1 has forfeited his earnest money; the agreement dated 24.05.1981 has come to an end, and; as such, he had lost all interest and right over the said property and had also lost the earnest money because of its forfeiture. It was also stated that he was not in a position to pay the balance amount of the sale price.

5. A reply was given by the plaintiffs through their Advocate on 02.12.1981 stating that the plaintiffs had not only given Rs.12,000/- as advance money but had further given additional Rs.2,000/-, for which no receipt was issued. Thus, the total advance amount was Rs.14,000/-. It was also stated that as per the agreement, although the period mentioned was three months, but there was a further stipulation that as there was restriction for registering the sale deeds pertaining to similar revenue sites, as such, it was only after cancelling of such restrictions by the Government that the sale deed was to be registered. As such, the agreement would be alive till the Government lifts the ban on registering the sale deeds pertaining to similar revenue sites. It further mentioned that as soon as registration of documents is opened, they would get the sale deed registered. It was also stated that forfeiture of the amount was without any right and the agreement could not be treated as cancelled. It was also denied that plaintiffs did not have money to pay the balance sale price.

6. In response to the above reply, defendant no.1, through his counsel, again replied on 11.12.1981 denying the payment of additional amount of Rs.2,000/-. It further stated that the contract had been entered because of urgent need of money by the defendants and the price for sale had been lowered to Rs.29,000/- because of urgency, even though the property was then valued at more than Rs.50,000/-. The balance amount was to be paid, in any case, within three months, which plaintiffs had failed to do, as such, the forfeiture had been rightly done. It was also stated that plaintiffs had been deliberately delaying and that they were never ready from the very beginning with the funds. Plaintiffs did not give any reply to the communication dated 11.12.1981.

7. After above correspondence, the defendants executed two sale deeds on 22nd April, 1983 and on 22nd June, 1983 in favour of defendant nos.6 and 7 of part of the land agreed to be sold to the plaintiffs.

There is also a reference of a third sale deed in favour of one C. Nagaraju with respect to the remaining area covered under the agreement to sell. Thus, the total area under the agreement to sell dated 24.05.1981 had been sold by the defendants 1 to 5 in favour of defendant nos.6, 7 and C. Nagaraju.

8. It was after the execution of the two sale deeds mentioned above, the plaintiffs instituted suit for specific performance and permanent injunction in the Court of Civil Judge, Bangalore on 29.07.1983 registered as O.S. No.2188 of 1983. The defendants filed written statements and prayed for dismissal of the suit on various grounds. Both parties led evidence. The Trial Court *vide* judgment dated 22.10.2002 decreed the suit for specific performance and directed the defendants 1 to 7 to execute the sale deed in favour of the plaintiffs after accepting the balance consideration within three months from the date of the order. However, it denied the relief of permanent injunction on the finding that the plaintiffs were not in possession of the suit land. The present appellant alone preferred appeal before the High Court, which was registered as RFA No.362 of 2003. The High Court, by the impugned judgment dated 17.12.2015, has dismissed the appeal giving rise to the present appeal.

9. The pleadings as reflected from reading of the plaint are as follows:

    (a) Parties had entered into an agreement to sell dated 24.05.1981. The defendants 1 to 5 were to transfer the property in dispute in favour of the plaintiffs for total sale consideration of Rs.29,000/-, out of which Rs.12,000/- was paid as advance and a further amount of Rs.2000/- was paid on 22.07.1981, thus, totalling the advance amount to Rs.14,000/-. The transaction was to be completed within three months from the time when the Government would remove the restriction for registration of the sale deed of lands similar to the property in dispute and that the expenses were to be borne by the plaintiffs.

    (b) In paragraph-4, it was stated that the plaintiffs were always ready and willing to perform their part of obligation and that they are ready even now to perform their part, however, it was the defendants 1 to 5 who had been dragging their feet and had been taking time for performing the remaining part of the agreement. They also became elusive and non-committal. The reason for the same was that the price of the property had

shown an upward trend and, as a result of which, defendants were backing out. The plaintiffs also tendered the money and the draft sale deed requesting the defendants to execute the sale deed but they denied the execution as period of three months had expired.

(c) A reference was also mentioned in the plaint with regard to the notice given through an Advocate on 19.11.1981. A reference to the restrictions on registration by the Government was also mentioned and it was stated that the period of three months would run from the time, the restriction was lifted.

(d) It was also mentioned that the plaintiffs sought intervention of well-wishers to settle the matter amicably but the same did not bear any fruit.

(e) It further mentioned that the defendants 1 to 5 have proceeded to sell two portions of the property in dispute in favour of defendant nos.6 and 7, who were fully aware of the earlier agreement to sell in favour of the plaintiffs, but despite the same they got the sale deed executed in their favour; that the defendants 1 to 5 were attempting to sell the remaining portion of the scheduled property.

(f) Accordingly, after stating the cause of action, the valuation of the suit and the payable court fees, relief claimed was for a direction to the defendants to transfer the property in dispute in favour of the plaintiffs by way of absolute sale and to get the sale deed executed and registered in accordance with law in terms of the agreement dated 24.05.1981. Further, relief of granting permanent injunction was also claimed restraining the defendants 1 to 5 from alienating or otherwise dealing with any portion of the plaint scheduled property and from interfering in their possession.

10. Defendants 1 to 5 filed a common written statement which briefly raised the following issues and objections:

a) A plea was taken that the contents of the agreement to sell disclosed only the name of defendant no.1 and not of his four sons defendants 2 to 5. As such, the agreement was only by defendant no.1 and not by defendants 2 to 5 and, as such, not binding upon them.

b) It was next stated that the advance amount paid was only Rs.12,000/- at the time of execution of the agreement to sell. No further amount of Rs.2,000/- was paid as alleged.

c) It was next stated that the plaintiffs were never ready and willing to perform their part of contract at any point of time, which was agreed to be three months, or even thereafter. The defendant had also given repeated notices but despite the same, the plaintiffs never came forward to clear the balance amount as the defendants were in need of money, they were left with no option but to execute the sale deeds.

d) It was also stated that even after the restrictions for registration had been removed by the Government of Karnataka, the plaintiffs did not come forward to pay the balance amount and get the sale deed executed. This fact was clearly mentioned in their notice dated 11.12.1981 but no reply to the same was given by the plaintiffs.

e) It also stated that plaintiffs were middlemen and not genuine purchasers. They never had any funds to fulfil the contract.

f) It was specifically pleaded that time was essence of the contract. It was clearly denied that the plaintiffs ever came forward to tender the balance amount to get the sale deed executed. It was also denied that any Panchayat was convened to resolve the issue.

g) Lastly, it was stated that the entire property had been sold and given in possession of the subsequent defendants 6, 7 and C. Nagaraju.

h) It was denied that the plaintiffs were ever put into possession.

11. Defendant no.6 also filed a written statement denying the plaint allegations and stating that he was in possession from the date of the sale deed in June, 1983.

12. On behalf of the plaintiffs, four (4) witnesses were examined. Plaintiff no.1 was examined as PW-1 and three (3) other witnesses were examined as P.W.-2 to 4, two of whom were marginal witnesses to the agreement to sell. Nine (9) documents were filed and marked as Exts. PW-1 to PW-9 on behalf of the plaintiffs. On behalf of the defendants, one of the sons of defendant no.1 was examined as

DW-1 and, further, one of the sons of defendant no.6 was examined as DW-2. On behalf of the defendants, fourteen (14) documents were filed and exhibited as Ext. DW-1 to DW-14.

13. The Trial Court framed as many as 12 issues which are reproduced hereunder: -

> "1. *Whether defendants 2 to 5 agreed to sell the suit property to the plaintiffs?*
>
> 2. *What are the amounts advanced by plaintiffs to defendants 1 to 5?*
>
> 3. *Whether the plaintiffs paid a further sum of Rs.2000/- on 22.07.1981 as further advance to defendants 1 to 5?*
>
> 4. *Whether the time is the essence of the contract for sale and as the plaintiffs failed to perform their part of the obligation within the period of three months, the plaintiffs cannot specifically enforce the contract?*
>
> 5. *Whether the suit agreement is not enforceable for all or any of the reasons stated by the defendants 1 to 5?*
>
> 6. *Whether the defendants nos.6 and 7 are not the bona fide transferee for value of two portions of the plaint schedule properties without notice to the alleged contract for sale?*
>
> 7. *Whether the defendant 6 had no knowledge of the suit agreement for sale between the plaintiffs and defendants 1 to 5 and she is a bona fide purchaser for value?*
>
> 8. *Whether the plaintiffs have lost their right even to claim refund of the amounts paid by them to defendants 1 to 5?*
>
> 9. *Whether the defendants 1 to 5 have committed breach of the terms of the agreement of sale by their stand taken not to execute the sale deed after expiry of three months and also by selling two portions of the schedule property in favour of the defendants 6 and 7?*

> *10. Whether the plaintiffs are entitled to the relief of specific performance in respect of the suit property?*
>
> *11. Whether the plaintiff is entitled to the relief of permanent injunction?*
>
> *12. To what relief is the plaintiff entitled?"*

14. The findings of the Trial Court on the above issues are given in paragraph 16 of the judgment which is reproduced hereunder:

> *"1. In the affirmative*
>
> *2. Rs.12,000/-*
>
> *3. In the negative*
>
> *4. In the negative*
>
> *5. In the negative*
>
> *6. In the affirmative*
>
> *7. In the negative*
>
> *8. In the negative*
>
> *9. In the affirmative*
>
> *10. In the affirmative*
>
> *11. In the negative*
>
> *12. As per the final order."*

15. As already noted above, *vide* judgment dated 22.10.2002, the Trial Court decreed the suit for specific performance only and declined the relief for permanent injunction. The High Court, after hearing the counsel for the parties, framed six points for consideration, which are reproduced hereunder:

> *"1. Whether plaintiffs have proved that agreement of sale dated 24.05.1981 has been duly executed by defendants 1 to 5?*
>
> *2. Whether parties to the agreement dated 24.05.1981 had agreed that time is the essence of said contract?*
>
> *3. Whether agreement of sale dated 24.05.1981 is hit by any of the provisions of Contract Act, 1872?*

> 4. *Whether defendant no.6 proves that he is a bona fide purchaser of portion of suit schedule property without notice of earlier agreement of sale dated 24.05.1981?*
>
> 5. *Whether defendant no.7 i.e. Respondent no.9 herein is entitled for an opportunity to file written statement and as such, matter requires to be remanded back to the trial court by setting aside judgment and decree under challenge?*
>
> 6. *Whether judgment and decree passed by the trial court decreeing the suit O.S. No.2188/1983 for specific performance suffers from any patent illegality on account of either non-appreciation of available evidence or erroneous appreciation of evidence calling for exercise of appellate jurisdiction by setting aside the same? And what order?"*

16. On point No.1, the High Court held that agreement to sell was executed by all the defendants i.e. 1 to 5. On point no.2, the High Court held that time was not the essence of contract. On point no.3, it held that the contract was not opposed to public policy nor hit by Section 23 of The Indian Contract Act, 1872. On point no.4, it was held that defendants 6 to 7 had failed to discharge the burden that they were *bona fide* purchasers for value without notice. On point no.5, it was held that defendant no.7 had lost the opportunity to contest and on point no.6, the High Court held that the judgment of the Trial Court did not suffer from any infirmity on any count and, accordingly, proceeded to dismiss the appeal while confirming the judgment of the Trial Court.

17. We have heard Sri Arvind Verma, learned Senior Counsel appearing for the appellants and Sri Sanjay Parikh, learned Senior Counsel, appearing for the respondents and have perused the material on record.

18. The submissions of Mr. Verma on behalf of the appellant are briefly summarized hereunder:

    a) No evidence was produced by the plaintiffs regarding the alleged ban on registration of revenue sites/survey numbers similar to the land in suit.

b) Only bald and vague averments have been made to show that the plaintiffs were ready and willing to perform their part. No specific details were mentioned, as such, the suit was hit by Section 16(c) of the Specific Relief Act, 1963[1].

c) The appellant was a *bona fide* purchaser for value without notice. He had exercised due diligence before purchasing the part of the land in suit. As the agreement to sell dated 24.05.1981 was an unregistered document, even the Sub-Registrar's Office could not have provided any information regarding the said agreement to sell.

d) The High Court failed to consider the effect of the provisions contained in Section 53(A) of the Transfer of Property Act, 1882[2] which extended full protection to the appellant.

e) The possession of the land in dispute was never with the plaintiffs and has throughout remained with the appellant and other subsequent purchasers.

f) The High Court committed serious error in not relying upon the correspondence between the defendant no.1 and the plaintiffs relating to the request of the defendant no.1 regarding payment of balance consideration and for getting the sale deed executed as registered.

g) It would be highly inequitable to grant the specific performance after 43 years in order to disturb the settled proprietary possession of not only the appellant but also the other subsequent purchasers.

h) The High Court ought to have denied specific performance, however, any other relief could have been considered and moulded in favour of the plaintiffs.

i) The plaintiffs did not seek decree for declaration of the sale deeds in favour of the appellant as null and void or for its cancellation. Further no relief for possession was sought as such the suit would be barred.

19. Shri Verma, learned counsel appearing for the appellants relied upon the following judgments in support of his submissions:

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1 In short, "the Act, 1963 "

2 In short, "the Act, 1882"

(1) Aniglase Yohannan Vs. Ramlatha and others;[3]

(2) Umabai and another Vs. Neelkanth Dhondiba Chavan (dead) by Lrs and another;[4]

(3) Rajeshwari Vs. Puran Indoria;[5]

(4) Malapali Munaswamy Naidu Vs. P. Sumathi;[6] **and**

(5) Azhar Sultana Vs. B. Rajamani and others;[7]

20. On the other hand, Sri Sanjay Parikh, learned Senior Counsel appearing for the contesting respondents made the following submissions, which are summarized hereunder:

a) The appeal is concluded by concurrent findings of fact recorded by both the Courts below.

b) There is no perversity in the judgment of the High Court warranting interference under Article 136.

c) The appellant No.2/defendant no.7 has no right to challenge the impugned judgment as he failed to file written statement or adduce any evidence before the Trial Court.

d) The application filed by defendant no.7/appellant no.2 under Order 41 Rule 33 of CPC before the High Court had been rejected. He could, thus, make submissions only on the rejection of his application under Order 41 Rule 33 CPC and not on merits.

e) The original vendors, defendant nos.1 to 5, did not challenge the judgment and decree of the Trial Court.

f) Defendant no.6 had died during the pendency of the proceedings and was succeeded by six legal representatives, out of whom, only one i.e. the appellant no.1 has challenged the judgment.

g) No benefit can be granted to the appellant or the subsequent purchasers under Section 19(b) of the Specific Relief Act as

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3 [2005] Supp. 3 SCR 440 : (2005)7 SCC 534

4 [2005] 3 SCR 521 : (2005) 6 SCC 243

5 [2005] Supp. 2 SCR 1016 : (005) 7 SCC 7

6 (2004) 13 SCC 364

7 [2009] 2 SCR 537 : (2009) 17 SCC 27

they had due notice and knowledge of the agreement to sell and, therefore, their contract of sale was not *bona fide*.

h) The plaintiffs have fully established and proved their readiness and willingness both in their pleadings as also through their evidence.

i) Time was not the essence of the agreement as it was contingent upon the lifting of the ban imposed by the State Government on registration.

j) The agreement to sell did not compulsorily require registration to bring a suit for specific performance as the same is permitted under the proviso of Section 49 of the Registration Act, 1908.[8]

k) Relief of possession is inherent in a suit for specific performance and separate relief for possession is not required to be claimed.

21. Shri Parikh, learned Senior Counsel has placed reliance upon the following judgments in support of his submissions: -

1. **Parminder Singh Vs. Gurpreet Singh;**[9]
2. **Universal Sompo General Insurance Co. Ltd. Vs. Suresh Chand Jain and another;**[10]
3. **R.K. Mohd. Ubaidullah Vs. Hajee C. Abdul Wahab;**[11]
4. **Himatlal Motilal and others Vs. Vasudev Ganesh Mhaskar @ Ganpati Boa and others;**[12]
5. **Bhup Narain Singh Vs. Gokhul Chand Mahton;**[13]
6. **Gadde Sitayya (dead) and another Vs. Gadde Kotayya and others;**[14]
7. **Ram Baran Prasad Vs. Ram Mohit Hazra and others;**[15]

8 In short, "the Act, 1908"

9 [2017] 6 SCR 419 : (2018) 13 SCC 352

10 [2023] 10 SCR 1155 : (2023) SCC Online SC 877

11 [2000] Supp. 1 SCR 524 : (2000) 6 SCC 402

12 ILR (1912) 36 Bom.446

13 AIR 1934 PC 68

14 AIR 1932 Mad.71

15 [1967] 1 SCR 293 : AIR 1967 SC 744

8. **Sughar Singh Vs. Hari Singh;**[16]
9. **Gaddipati Divija and another Vs. Pathuri Samrajyam and others;**[17]
10. **S. Kaladevi Vs. V.R. Somasundaram;**[18]
11. **R. Hemalatha Vs. Kashthuri;**[19]
12. **Suraj Lamp and Industries (P) Ltd. (2) Vs. State of Haryana;**[20]
13. **Ram Kishan and another Vs. Bijender Mann alias Vijender Mann and others;**[21] **and**
14. **Manickam alias Thandapani and another Vs. Vasantha;**[22]

22. Having considered the submissions, our analysis is as follows:

(i) Relief of specific performance of contract is a discretionary relief. As such, the Courts while exercising power to grant specific performance of contract, need to be extra careful and cautious in dealing with the pleadings and the evidence in particular led by the plaintiffs. The plaintiffs have to stand on their own legs to establish that they have made out case for grant of relief of specific performance of contract. The Act, 1963 provides certain checks and balances which must be fulfilled and established by the plaintiffs before they can become entitled for such a relief. The pleadings in a suit for specific performance have to be very direct, specific and accurate. A suit for specific performance based on bald and vague pleadings must necessarily be rejected. Section 16(C) of the 1963 Act requires readiness and willingness to be pleaded and proved by the plaintiff in a suit for specific performance of contract. The said provision has been widely interpreted and held to be mandatory. A few of authorities on the point are referred hereunder:

16 [2021] 10 SCR 287 : (2021) 17 SCC 705

17 [2023] 3 SCR 802 : (2023) SCC Online SC 442

18 [2010] 4 SCR 515 : (2010) 5 SCC 401

19 [2023] 2 SCR 834 : (2023) 10 SCC 725

20 [2011] 11 SCR 848 : (2012) 1 SCC 656

21 (2013) 1 PLR 195

22 (2022) SCC Online SC 2096

a) In the case of **Man Kaur v. Hartar Singh Sangha**,[23] this Court held in paragraph 40 which is reproduced hereunder:

> "40………A person who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him (other than the terms the performance of which has been prevented or waived by the defendant) is barred from claiming specific performance. Therefore, even assuming that the defendant had committed breach, if the plaintiff fails to aver in the plaint or prove that he was always ready and willing to perform the essential terms of contract which are required to be performed by him (other than the terms the performance of which has been prevented or waived by the plaintiff), there is a bar to specific performance in his favour. Therefore, the assumption of the respondent that readiness and willingness on the part of the plaintiff is something which need not be proved, if the plaintiff is able to establish that the defendant refused to execute the sale deed and thereby committed breach, is not correct…………"

b) In the case of **U.N. Krishnamurthy (Since Deceased) Thr. Lrs. v. A.M. Krishnamurthy**,[24] following was held in paragraph 46:

> "46. It is settled law that for relief of specific performance, the Plaintiff has to prove that all along and till the final decision of the suit, he was ready and willing to perform the part of the contract. It is the bounden duty of the Plaintiff to prove his readiness and willingness by adducing evidence. This crucial facet has to be determined by considering all circumstances including

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23 [2010] 12 SCR 515 : (2010) 10 SCC 512

24 [2022] 13 SCR 250 : (2022) SCC Online SC 840

availability of funds and mere statement or averment in plaint of readiness and willingness, would not suffice."

c) In the case of **His Holiness Acharya Swami Ganesh Dassji v. Sita Ram Thapar**,[25] it was held under paragraph 2:

> "2. There is a distinction between readiness to perform the contract and willingness to perform the contract. By readiness may be meant the capacity of the plaintiff to perform the contract which includes his financial position to pay the purchase price. For determining his willingness to perform his part of the contract, the conduct has to be properly scrutinised. There is no documentary proof that the plaintiff had ever funds to pay the balance of consideration. Assuming that he had the funds, he has to prove his willingness to perform his part of the contract. According to the terms of the agreement, the plaintiff was to supply the draft sale deed to the defendant within 7 days of the execution of the agreement, i.e., by 27-2-1975. The draft sale deed was not returned after being duly approved by the petitioner. The factum of readiness and willingness to perform plaintiff's part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of the contract. The facts of this case would amply demonstrate that the petitioner/plaintiff was not ready nor had the capacity to perform his part of the contract as he had no financial capacity to pay the consideration in cash as contracted and intended to bide for the time which disentitles him as time is of the essence of the contract."

25 [1996] Supp. 2 SCR 111 : (1996) 4 SCC 526

(ii) In the present case, we find from a perusal of the plaint that, at the first instance, the plaintiffs failed to plead specifically with details about the restriction said to have been imposed by the State on registration of sale deeds relating to similar survey numbers and revenue sites. No details of the Government Order are mentioned. Neither the Government Order is placed on record as evidence to connect that such restriction was actually applicable to the land in question.

(iii) Defendant nos.1 to 5 executed sale deeds in April and June, 1983 in favour of the appellant as also other purchasers. It is recorded by the Trial Court as also the High Court, that these sale deeds were executed by the defendants 1 to 5 after depositing some betterment charges, getting the land converted and then effecting the transfer. The plaintiffs do not seem to have ever approached the defendants to get this kind of a status change and, thereafter, get the sale deeds executed. It has not come either in pleadings or in evidence of the plaintiffs that the alleged ban imposed by the State Government had been lifted but still the sale deeds were executed in favour of the appellants and other purchasers in 1983.

(iv) If the plaintiffs were actually keen, ready and willing to get the land transferred or get the agreement to sell enforced, they should have made an effort in that regard. Neither any specific date has been mentioned in the pleadings or in the evidence, on which date the plaintiffs tendered the balance amount with a request to the defendants 1 to 5 to get the land status changed and execute the sale deed, or otherwise also, request the defendants 1 to 5 to execute the sale deed with the same status of the land in suit.

(v) Even before filing a suit, there is no evidence forthcoming on behalf of the plaintiffs to show that they tendered the balance consideration or a draft sale deed to the defendants 1 to 5 and requested for execution and registration of the sale deed.

(vi) The Courts below have proceeded to hold that there was readiness and willingness primarily relying upon the restriction imposed by the State. According to them, as the restriction had not been lifted, there was no obligation on the part of the plaintiffs to have expressed any readiness or willingness. However, the

Courts below failed to take into consideration that there was no evidence regarding the said ban. Further the Courts below also failed to take into consideration that a keen and a willing buyer would have found out a way for execution of the sale deed just as defendants 6& 7 and C. Nagaraju.

(vii) The Courts below also fell into error in recording a finding that the defendants 1 to 5 had committed breach of contract and had dishonestly proceeded to get the status of the land changed and, thereafter, execute the sale deed in favour of the appellant and other purchasers.

(viii) It is clear from the record that the defendant no.1 had given a written notice in September, 1981, then legal notice in November, 1981 and also another communication in December, 1981 requesting for payment of balance sale consideration and, thereafter communicating that advance amount had been forfeited and the agreement to sell had come to an end as the plaintiffs failed to get the sale deed executed within three months. After December, 1981, the plaintiffs kept silent. They neither responded to the last communication of the defendant no.1 of December, 1981, nor did they take any steps to file the suit for specific performance of contract for more than one and a half years after the defendant no.1 had communicated forfeiture of the earnest money and the cancellation of the agreement to sell. There is no communication from the plaintiffs after December, 1981 till July, 1983 when they filed the suit. There is not even a notice by the plaintiffs before filing the suit of showing their readiness and willingness by tendering the amount of balance sale consideration and sending a draft sale deed for approval and fixing a date for execution and registration of the sale deed.

(ix) We are thus unable to agree with the findings of the courts below that the plaintiffs were always ready and willing to get the sale deed executed and registered. As a matter of fact, the conduct of the plaintiffs throughout gives credence and strength to the contention of the defendant nos.1 to 5 that the plaintiffs never had the funds available with them to clear the balance sale consideration and that they were middlemen only interested in blocking the property and, thereafter, selling it on a higher price to third parties and make profit thereof. The

plaintiffs were never the real purchasers interested in buying the land in suit for themselves.

(x) Under such facts and circumstances as discussed above, we are of the confirmed view that the decree of specific performance was not warranted in the present case and ought to have been denied and the suit was liable to be dismissed.

(xi) In view of the finding on the issue of readiness and willingness being decided against the plaintiffs in the facts of the present case, we are not inclined to enter into other arguments raised by the learned Senior Counsel for the parties.

(xii) However, in order to adjust equities between the parties, as the plaintiffs made a payment of Rs.12,000/- as advance money on 24.05.1981 or before, that being an admitted position, they need to be suitably compensated for the same. About 43 years have passed since the date of the agreement to sell. According to the appellant as stated in the written brief, the value of the property is about four crores. The respondents have not given any such figure of the approximate value of the property in question. Considering the facts and circumstances, we direct that the appellant compensate the plaintiffs by paying an amount of Rs.24 lakhs in lieu of the advance and further Rs.6 lakhs as cost of litigation. Total amount of Rs.30 lakhs to be paid within a period of three months from today and file proof of such payment before this Court within the next four months. In the event, such proof is not filed, the Registry will list the matter before the Court immediately after expiry of the aforesaid period for further orders.

23. The Appeal is, accordingly, allowed. The impugned order is set aside. The suit is dismissed, however, with the direction as contained above regarding payment of Rs.30 lakhs by the appellants to the plaintiffs-respondents within the time stipulated above.

24. Pending application/s, if any, is/are disposed of.

Result of the case: Appeal allowed.

†*Headnotes prepared by:* Ankit Gyan

[2024] 7 S.C.R. 1368 : 2024 INSC 555

U.P. Roadways Retired Officials and Officers Association v. State of U.P. & Anr.

(Civil Appeal No. 894 of 2020)

26 July 2024

[Hrishikesh Roy and Prashant Kumar Mishra,* JJ.]

Issue for Consideration

Whether the appellants who were the former employees of Uttar Pradesh Roadways, a temporary department of the State Government, held any pensionable post before or after their absorption in the U.P. State Roadways Transport Corporation; whether the members of the Roadways Karmchari Sanyukta Parishad (RKSP) who were promoted after the cut-off date of 27.08.1982 were entitled to pension.

Headnotes†

Road Transport Corporation Act, 1950 – U.P. Civil Service Regulations – Article 350 – Roadways (Abolition of Post and Absorption of Employees) Rules, 1982 – Road Transport Corporation Employees (other than officers) Service Regulations, 1981 – Regulations 4, 39 – U.P. State Road Transport Corporation Employees (other than Officers) Service Regulations, 1981 – Pension – When not entitled to – Appellants, if held pensionable posts and thus, entitled for receiving pension:

Held: No – Appellants are not entitled to pension as per GO dated 28.10.1960 as they were neither holding permanent posts in the Roadways nor holding any pensionable posts – Appellants were not covered under Article 350 of the Regulations as amended to hold the pensionable posts inasmuch as despite amendment in the first part of Article 350 of the Regulations, Note 3 thereof did not suffer amendment which provides that service in non-gazetted posts in Government Technical and Industrial Institutions in Uttar Pradesh does not qualify in the case of persons appointed to such posts on or after 15.11.1938 – Roadways is a Technical and Industrial Institution, thus, the appellants are covered under Note 3 of Article 350 and hence, not entitled for pension – Pension is

* Author

a right and not a bounty – However, it can be claimed only when permissible under the relevant rules/scheme – If an employee is covered under the Provident Fund Scheme and is not holding a pensionable post, he cannot claim pension nor can writ court issue mandamus directing the employer to provide pension to an employee not covered under the rules – Appellants having received retiral benefits including the benefit under the Employees Provident Fund Scheme cannot claim pension – A party to the litigation cannot be permitted to approbate and reprobate – Reliance on the judgments of the High Court in Mirza Athar Beg, S.M. Fazil and Shri Narain Pandey misplaced – Only State Government employees absorbed in the Corporation shall be entitled to pension – Employees of Roadways who were not holding any pensionable post prior to their deputation or absorption in the Corporation are not entitled to pension, as their service conditions in the erstwhile Roadways did not provide that they are entitled to pension – Members of the RKSP promoted after the cut-off date of 27.08.1982 are not entitled to pension. [Paras 29, 35, 40, 49]

Case Law Cited

U.P.S.R.T.C. v. Mirza Athar Beg, **2011 (2) ALJ 327;** *The Managing Director, U.P.S.R.T.C v. S.M. Fazil & 03 others* **[W.P. No. 5440 of 2000 (S/B)];** *U.P.S.R.T.C & Ors. v. Shri Narain Pandey* **[2009 : AHC-LKO : 3978-DB] – distinguished.**

Union of India & Ors. v. M.K. Sarkar **[2009] 16 SCR 249 : (2010) 2 SCC 59;** *Bachai Lal v. U. P. S. R. T. C., Allahabad and others* **(1991) 2 UPLBEC1095;** *General Manager, Telecom v. A. Srinivasa Rao & Ors.* **[1997] Supp. 5 SCR 212 : (1997) 8 SCC 767;** *National Council of Educational Research and Training v. Shyam Babu Maheshwari & Ors.* **[2011] 7 SCR 548 : (2011) 6 SCC 412;** *Krishena Kumar v. Union of India* **[1990] 3 SCR 352 : (1990) 4 SCC 207;** *Union of India v. Kailas* **(1998) 9 SCC 721;** *V.K. Ramamurthy v. Union of India & Anr.* **[1996] Supp. 4 SCR 583 : (1996) 10 SCC 73;** *All India Reserve Bank Retired Officers Association & Ors. v. Union of India & Anr.* **[1991] Supp. 3 SCR 256 : (1992) Supp 1 SCC 664;** *The Committee for Protection of Rights of ONGC Employees & Ors. v. Oil and Natural Gas Commission, through its Chairman & Anr.* **[1990] 2 SCR 156 : (1990) 2 SCC 472;** *Prabhu Narain v. State of U.P.* **(2004) 13 SCC 662;** *Rajasthan Road Transport Corporation & Anr. v. Mohini Devi* **[2013] 3 SCR 464 : (2013) 11 SCC 603 – referred to.**

List of Acts

Road Transport Corporation Act, 1950; U.P. Civil Service Regulations; Roadways (Abolition of Post and Absorption of Employees) Rules, 1982; Road Transport Corporation Employees (other than officers) Service Regulations, 1981; U.P. State Road Transport Corporation Employees (other than Officers) Service Regulations, 1981.

List of Keywords

Service Law; Pension; Uttar Pradesh State Road Transport Corporation (UPSRTC); State Roadways Transport Corporation; Uttar Pradesh Roadways; Non-gazetted posts; Deputation; Absorption; Temporary department; Temporary employees Permanent posts; Pensionable post; Provident Fund Scheme; Employees Provident Fund Scheme; Contributory Provident Fund Scheme; Approbate; Reprobate; Government orders; Non-gazetted posts; Government Technical and Industrial Institutions; Roadways; Cut-off date; Promotion/promoted after cut-off date; Retirement; Retirement benefits; Retiral benefits; Permanent employees.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 894 of 2020

From the Judgment and Order dated 24.11.2016 of the High Court of Judicature at Allahabad in SA No. 245 of 2003

With

Civil Appeal Nos. 896, 898, 957, 959-965, 897, 895, 899-901, 910, 902, 912, 909, 913, 958, 915, 966, 914, 832, 967, 905, 907, 903, 911, 904, 906 and 908 of 2020 and Civil Appeal No. 8044 of 2024.

Appearances for Parties

Rakesh Khanna, U.K. Uniyal, Ms. Garima Prashad, Sr. Adv., S.N. Pandey, Dr. Rashmi Khanna, Aditya Pushkar Khanna, Ms. Ramya Khanna, Dr. Vikash Pahal, Ms. Somya Pandey, Ms. Deep Aishwarya, Chander Shekhar Ashri, Dinesh Kumar Garg, Abhishek Garg, Dhananjay Garg, Ishaan Tiwari, Chanakya Gupta, R.P. Bansal, B. K. Pal, Salaj Kumar Rai, Vivek Gupta, Mrinmay Bhattmewara, Mrs. Samprati Bhattmewara, Ankit Verma, Shalabh Kaushik, Amit Singh, Rajvir Singh Bhati, Ankur Yadav, Pramod Kumar Singh, Mahendra

Singh, Vijay Pal, Ms. Kajal Kumari, Gajendra Kumar, Ajay Kumar Talesara, Anurag Dubey, Ms. Anu Sawhney, Meenesh Dubey, Ms. Maitri Goal, Ms. Geetanjali Setia, Ms. Manisha Yadav, Bhupendra Kumar Bharadwaj, S. R. Setia, Bhaskar Y. Kulkarni, Kumar Mihir, Nishit Agrawal, Shadab Khan, Ms. Upasna Agrawal, Ms. Kanishka Mittal, Ms. Vanya Agrawal, Ms. Nidhi Singh, Aditya Pushkal Khanna, Dr. Vikas Pahal, Ms. Somya Pendey, Manan Verma, Ankit Shah, Mrs. D. Bharathi Reddy, Naveen Kumar Tripathi, Sanjay Kumar Pandey, Ms. Saroj Tripathi, Dhruv Surana, Arya Hardik, Rohit Amit Sthalekar, Pradeep Misra, Daleep Dhyani, Manoj Kumar Sharma, Suraj Singh, Kamlendra Mishra, Advs. for the appearing parties.

Judgment / Order of the Supreme Court

Judgment

Prashant Kumar Mishra, J.

Delay condoned in filing SLP(C) Diary No. 10240 of 2020 and leave granted.

2. Abatement is set aside and applications for substitution are allowed. Application(s) for intervention is allowed.

3. By this common judgment a batch of civil appeals arising out of the common order passed by the High Court of Judicature at Allahabad in different writ applications and special appeals is disposed of.

4. Civil Appeal No. 894 of 2020 preferred by UP Roadways Retired Officials and Officers Association is taken as the lead case.

CIVIL APPEAL NO. 894 OF 2020

5. In this civil appeal challenge is to the common order dated 24.11.2016 passed by the High Court in Special Appeal No. 685 of 2014 and other connected matters which in turn arose out of common order passed by the learned Single Judge of the High Court on 07.07.2014 in Writ Application No. 63469 of 2012 (Suresh Chandra vs. State of U.P. through Secretary & Ors.) and 51 connected writ applications. The learned Single Judge as well as the Division Bench, under the impugned judgment have dismissed the special appeals and writ applications holding that the appellants/petitioners do not hold the pensionable post and, thus, are not entitled for receiving pension.

6. The issue falling for consideration is whether the appellants who are the former employees of Uttar Pradesh Roadways, a temporary department of the State Government, are holding any pensionable post before or after their absorption in the U.P. State Roadways Transport Corporation.[1]

Government orders regarding service under U.P. Roadways and thereafter U.P. State Roadways Transport Corporation

7. In 1947, Uttar Pradesh Roadways[2] was created as a temporary department of the State Government for providing public transport facilities. Since the department itself was temporary, the employees working therein were also appointed temporarily and were not members of regular service.

7.1 On 16.09.1960, a Government Order[3] was issued providing service conditions of the Roadways employees which were different than the service conditions of employees working in different Government departments.

7.2. On 28.10.1960, another GO was issued providing for pension to the permanent employees of the erstwhile Roadways. It was mentioned in this order that remaining non-gazetted employees of the Roadways (who are not permanent) would be entitled for benefits under the Employees Provident Fund Scheme.

7.3. On 01.06.1972, the Corporation was created under Section 3 of the Road Transport Corporation Act, 1950.[4]

7.4. On 05.07.1972, a GO was issued treating all the employees of the Roadways on deputation with the Corporation without specifying the period of deputation and also assuring them that their service conditions in the Corporation will not be inferior as compared to their service conditions prior to their absorption in the Corporation.

1 'Corporation'

2 'the Roadways'

3 'GO'

4 'Act, 1950'

7.5. On 20.04.1997, Article 350 of U.P. Civil Service Regulations[5] was amended with retrospective effect. However, no amendment was made in Note 3 of Article 350 which provides that non-gazetted post in Government Technical Industrial Institution is not qualified for pension.

7.6. On 19.06.1981, the Corporation framed service regulations in exercise of power under Section 45(2)(c) of the Act, 1950.

7.7. On 28.04.1982, the Roadways (Abolition of Post and Absorption of Employees) Rules, 1982 were framed providing for absorption of all employees of the Roadways in the service of the Corporation w.e.f. 28.07.1982.

Appellants' Case

8. There are three sets of appellants segregated on the basis of the date of appointment:

(1) Those who were appointed in the Roadways prior to the G.O. dated 16.09.1960 and have retired.

(2) Those who were appointed after 16.09.1960 but prior to creation of the Corporation as on 01.06.1972 and have retired.

(3) Those who were appointed after 01.06.1972 when the Corporation was created and have retired.

9. Admittedly, the appellants employees have already received their entire post-retiral benefits immediately after their retirement decades ago without any protest or claim that they hold a pensionable post. The appellants started claiming pension after the Division Bench judgment of the High Court in ***U.P.S.R.T.C. vs. Mirza Athar Beg***[6] upholding the judgment of the learned Single Judge dated 25.08.2010 passed in W.P. No. 7728 (S/S) of 1996. The appellants' claim is also based on other two judgments of the Allahabad High Court in the matter of ***The Managing Director, U.P.S.R.T.C vs. S.M. Fazil & 03 others***[7] (W.P. No. 5440 of 2000 (S/B) and in the matter of ***U.P.S.R.T.C &***

5 'Regulations'

6 2011 (2) ALJ 327

7 W.P. No. 5440 of 2000 (S/B)

Ors. Vs. Shri Narain Pandey[8] in Special Appeal No. 40 of 2007. A Special Leave Petition (SLP (c) No. 7709/2011) against the judgment in the matter of Mirza Athar Beg was dismissed by a non-speaking order dated 10.07.2013.

10. The appellants submitted representation basing their claim in the line of ***Mirza Athar Beg*** (supra). However, the representation was rejected subsequent to which the subject writ petition was filed.

Appellants' submissions

11. Learned senior counsel appearing for the appellants would submit that the appellants are entitled for pension in terms of the Government Order dated 16.09.1960 as they were appointed prior to establishment of the Corporation in the year 1972. According to them, once the appellants have been made permanent in the Corporation vide Government Orders dated 16.09.1960 and 28.10.1960 they should be treated to be holding a pensionable post. It was also their case that Article 350 of U.P. Civil Service Regulations was amended by a Notification dated 20.04.1977 whereby the word 'Post' was replaced by the word 'Establishment' and as such employees of all establishments under the State Government are deemed to be working on a pensionable post unless the establishment is excluded. Therefore, on a conjoint reading of Government Order dated 28.10.1960 with the amendment made in the year 1977 in Article 350, the appellants are entitled to pension.

12. The appellants also relied on the judgment in the matter of **Mirza Athar Beg** (supra), **S.M. Fazil** (supra) & **Narain Pandey** (supra). The main focus of the appellants' claim is on the amendment to the Article 350 of the Regulations, after which, according to the appellants, Government has not issued any order excluding the establishment in which the appellants were employed and holding a pensionable post. It is also argued that after the establishment of the Corporation under Section 3 of the Act, 1950, no rule or regulation has been framed in exercise of power under Section 44 denying pension to the appellants. Therefore, the general provisions under Article 350 of the Regulations would be applicable and the appellants are entitled for pension.

8 2009 : AHC-LKO : 3978-DB

13. Apropos the objection that the writ petition was filed belatedly, after decades from the date of retirement, it is submitted that the appellants have recurring cause of action and delay in filing the writ petition is not fatal.

14. *Per contra,* Ms Garima Prasad, learned senior counsel appearing for the Corporation vehemently argued that all the appellants have already opted for and availed the post-retiral benefits under the Employees Provident Fund Scheme, therefore, their present claim preferred after huge delay ranging between 8 to 32 years has rightly been dismissed by the High Court. Reference is made to ***Union of India & Ors. Vs. M.K. Sarkar***.[9]

15. Ms. Prasad would distinguish the fact situation in the matters of **Mirza Athar Beg** (supra), **S.M. Fazil** (supra) & **Narain Pandey** (supra) by pointing out that in these cases the High Court has not considered the effect of Note 3 of Article 350 of the Regulations which has neither been amended nor deleted even by the amendment dated 20.04.1977. It is further submitted that the Roadways was an establishment having workshops both major and smaller, thus, included in the category of technical institution as has been held by the Allahabad High Court in the judgment rendered in ***Bachai Lal v. U. P. S. R. T. C., Allahabad and others.***[10] The Roadways is also an industry according to the test prescribed in the matter of ***General Manager, Telecom vs. A. Srinivasa Rao & Ors.***[11] Therefore, the non-gazetted post in the Roadways did not qualify for pension in view of Note 3 of Article 350 of the Regulations. It is then argued that the service conditions of employees of the Roadways as existing prior to their absorption in the Corporation were never protected by GO dated 05.07.1972 under which the appellants are not entitled for pension as they have never worked on any pensionable post as indicated in para 1 of GO dated 28.10.1960 till their absorption in the Corporation w.e.f 28.04.1982. Further distinguishing the above three cases on which the appellants have placed reliance, it is argued that the appellants in the three above cited cases were working on pensionable post even as per GO

9 [2009] 16 SCR 249 : (2010) 2 SCC 59

10 (1991) 2 UPLBEC1095

11 [1997] Supp. 5 SCR 212 : (1997) 8 SCC 767

dated 28.10.1960 whereas none of the appellants in the present batch of appeals have worked on any pensionable post as per the said GO, therefore, the appellants derive no benefit out of the above three cited cases.

16. In respect of the employees appointed after creation of the Corporation w.e.f. 01.06.1972 it is argued that such appellants are not entitled to the benefit of pension on the basis of GO dated 05.07.1972 or the provisions of the Regulations relating to employees of the erstwhile Roadways sent on deputation to the Corporation and thereafter absorbed therein.

17. In respect of the appellants who were appointed subsequent to 01.06.1972 i.e. after creation of the Corporation, the State Government subsequently issued GO dated 20.10.2004 according approval for payment of pension to those employees who had been appointed on pensionable post in the Corporation till 18.06.1981. Therefore, such appellants who were never appointed/worked on pensionable post as per GO dated 28.10.1960 till 18.06.1981, are not entitled to pension.

18. Learned Single Judge of the High Court dismissed the writ petition on the ground of delay and laches; waiver and acquiescence but at the same time proceeded to decide the petitions on merits and after threadbare discussion of the applicable GOs and Regulations rejected the claim on merits. Learned Single Judge distinguished the case of the present batch of the appellants from that of the **Mirza Athar Beg** (supra), **S.M. Fazil** (supra) & **Narain Pandey** (supra).

19. On appeal before the Division Bench, the claim of the appellants was once again dismissed and the order passed by the learned Single Judge has been upheld on all material issues including the appellants' claim on the basis of parity vis-à-vis the earlier cases in the matter of **Mirza Athar Beg** (supra), **S.M. Fazil** (supra) & **Narain Pandey** (supra).

ANALYSIS

20. The Roadways was created as a temporary department in 1947. A Government Order was issued on 16.09.1960 providing service conditions of the Roadways employees. The said GO is reproduced hereunder for ready reference:

U.P. Roadways Retired Officials and Officers Association v. State of U.P. & Anr.

“G.O. No. 3014 D/XXX- 135/59 dated Sept. 16, 1960

Subject: Terms and conditions of service of temporary employees in the U.P. Roadways - Revisions of.

I am directed to say that the question of revising the terms and conditions of service of the Roadways employee, which is a nationalized commercial undertaking and has to work in conditions different from those prevailing in regular government offices, has been under the consideration of Government for some time past.

The passenger and goods services have to run irrespective of the fact whether it is a Sunday or a festival. The schedule of passenger services run by the State Undertaking cannot be altered off an on. In order to keep the Roadways services going the maintenance and repairs of vehicles has to be attend to even at odd hours at the workshops. At present the conditions of service of the employees of the U.P. Government Roadways and the Central Workshop, Kanpur are governed by the various rules and standing orders of Government applicable to other temporary government servants under the rule making powers of the Governor. In view of the special service conditions of employees of the Roadways it seems necessary to evolve a new set of service conditions for its employees which may be compatible with the nature of work and functions of the organization. Accordingly, in super session of all previous orders on the subject, the Governor has been pleased to pass the following orders prescribed revised terms and conditions of service of temporary employees of the U.P. Roadways including those detailed in para 2 below. The revised terms and conditions of service shall be applicable to all future entrants in the Roadways organization and shall be enforced in the manner mentioned hereinafter in the case of temporary employee including those on the work charge strength and paid on monthly basis.

(1) All temporary employees except those referred to in para 2 shall get one day’s rest in every period of seven days in accordance with the rules to be framed by Government.

In case the employees is deprived of any of the days or rest, he shall be allowed within the same or following month compensation holidays of equal number of the days of rest so lost.

(2) They shall be entitled to get one days paid holidays for every 20 days of work performed by them during the previous calender year, subject to the condition that the employee has worked for a period of 240 days or more during the previous calender year. In case the employees is not able to avail of full or part of the leave admissible to him during the calender year, it will be carried over to the following year, subject to a maximum of 30 days.

(3) They shall get five days festival holidays in a calender year as prescribed by Government and subject to the rules to be framed for the purpose.

(4) They shall be paid extra wages at the rate of twice of ordinary rate of wages in respect of work performed by them beyond the prescribed hours of work.

(5) Their services are liable to termination on one month's notice on either side, or one month's pay in lieu thereof.

(6) In other respect the conditions of service will remain the same as at present.

The revised terms and conditions of services mentioned in para 1 above shall not apply to the following category of employees:-

(a) All employees working in the offices establishment of the Asstt. General Manager, General Manager, Service Manager, Chief Mechanical Engineer, Roadways Central Workshop, Kanpur and the Head Quarter Office of the Transport Commissioner.

(b) Supervisory staff of the rank of Junior Station Incharge and above on the traffic side;

(c) Technical staff of the rank of Junior Foreman and above on the engineer side;

The above three categories of Roadways staff will continue to be treated as regular government servants and will be

entitled to the benefits admissible to any other government servant of the same category.

3. The Roadways and Central Workshop employees to whom the revised service rules are being made applicable shall be entitled to the provident fund benefits according to the provisions of the Employees Provident Fund Act. For this necessary orders have already been issued separately in G.O. No. 1488-D/XXX 2198/59 dated July, 29, 1960. Immediate step may please be taken for the implementation of the orders issued in the above G.O. The employees governed by the new terms and conditions of service will continue to get facilities for medical treatment so far enjoyed by them. All future entrants shall also be entitled to facilities for medical treatment admissible to Government servants. The canteen and rest house facilities as may be prescribed by government shall also be made available to them in course of time.

4. These order shall come into force w.e.f. October 1, 1960 and shall apply to all future entrants in the service of the Roadways organization and also the existing temporary employees who accept to continue to work on the revised terms and conditions of service. The status of Roadways employees already made permanent remains unaffected. All the existing temporary employees except those mentioned in para 2 above may be asked to indicate in writing if the new service conditions mentioned above are acceptable to them. Those who accept the new terms and conditions of service will be required to fill in a separate acceptance for which will be kept with their service records. If, however, any of the employees do not accept the new terms their services are to be terminated in accordance with the terms of their employment. I am to suggest that the implications of the revised orders may be explained to all concerned by the General Managers and Asstt. General Mangers and Chief Mechanical Engineer and that necessary action may please be intimated forthwith in order to implement the above orders."

(Emphasis supplied)

21. Thereafter another GO was issued on 28.10.1960 providing for pension to the permanent employees of the Roadways. This GO was issued under Note 3 of Article 350 of the Regulations. We shall first reproduce Article 350 of the Regulations and thereafter GO dated 28.10.1960:

> “**350.** All establishments whether temporary or permanent, shall be deemed to be pensionable establishments;
>
> Provided that it is open to the State Government to rule that the service in any establishment does not qualify for pension.
>
> 1. Service in Dak Bungalow and District Garden Establishments does not qualify.
>
> 2. The service of a Patwari, whether appointed before or after the abolition of the Patwari or Village Officers’ Cases and Funds, does not qualify in any case in which it did not qualify prior to that abolition.
>
> 3. Service in non-gazetted posts in Government Technical and Industrial institutions in the Uttar Pradesh does not qualify in the case of persons appointed to such posts on or after November 15,1938.”
>
> Exceptions-- This rule does not apply to the posts declared pensionable in Shram (Kha) Vibhag G.O.No.810 (E) XXXVI-B-- 106/56, dated May 29, 1963 and Udyog (Gha) Vibhag G.O.No.375-ED/XVII-D-AQ-19-ED,60, dated JUNE 5, 1963.”
>
> “**GO No. 3567-P/XXX-2198/99 dated 28.10.1960** - In continuation of G.O. No. 30140/XXX-135-V/1959 dated 16.9.1960, I am directed to say that the question or declaration the permanent posts in the Roadways Organization (including the Roadways Central Workshop Kanpur) as pensionable has been under consideration of Government for some time past. In this connection, the Governor has been pleased to order that the permanent gazetted and non-gazetted incumbents of the following three categories would be entitled to the contributory 10 Provident Fund cum Pension Rules:-

(a) The employees working in the office establishment of the Asstt. General Manager, General Managers, Service Managers, Chief Mechanical Engineer, Roadways Central workshop, Kanpur and the Headquarter office of the Transport Commissioner.

(b) Supervisory staff of the rank of Junior Station Incharge and above on the traffic side.

(c) Technical staff of the rank of Junior Foreman and above on the Engineering side.

2. The Governor has been further pleased to order, under note 3 Below Article 350 of the Civil Service Regulations that the rest of the permanent non-gazetted Employees both in the traffic and engineering sections of the organization, would be treated as non-pensionable posts referred to above, will be eligible for Provident Fund benefits in accordance with the provisions of the Employees Provident Fund Act.

3. I am also to add that Temporary Employment of the categories mentioned in para 1 above will be entitled to Provident fund benefits as provided under the Employees Provident Funds Act. As and when they became permanent, they will have the option to elect the contributory Provident Fund cum Pension Benefits in lieu of Employees Provident Fund.

4. As regards the grant of Provident Fund Benefits to other temporary and work charges employees of the Roadways organization necessary orders have already been conveyed to you in G.O. No. 14880/XXX-219/59 dated 29.7.1960.

Sd/-
Jt. Secy.

Copy forwarded under U.P. Parivahan Ayukta (Lekha) U.P. Lucknow endorsement NO. C-935FA/594FA/57 dated 1.11.1960 to all the General Managers, Asstt. General Managers, Service Managers, Accounts Officers and all other concerned for information and necessary action."

(***Emphasis supplied***)

22. A bare reading of Article 350 would manifest that service in non-gazetted posts in Government Technical and Industrial Institutions in the State of Uttar Pradesh does not qualify for pension and it will be covered under Contributory Provident Fund Scheme.

23. The State Government felt it necessary to evolve a new set of service conditions considering the nature of duties and functions of the Roadways. In the above quoted GO dated 28.10.1960, the State Government considered and declared some permanent gazetted and non-gazetted posts of the Roadways to be entitled for pension. Clauses (2) & (3) of GO dated 28.10.1960 clearly provided that only those covered in clause (1) of the GO would be entitled to pension whereas the rest of the permanent non-gazetted employees both in the traffic and engineering sections of the Roadways would be treated as non-pensionable posts and will be eligible for provident fund benefits in accordance with the provisions of the Employees Provident Fund Act. This provision made a specific reference to Note 3 of Article 350 of the Regulations.

24. It was also provided that temporary employment of the categories mentioned in para 1 will be entitled to provident fund. However, as and when they became permanent, they will have the option to elect the contributory provident fund cum pension benefits in lieu of employees' provident fund. In yet another circular dated 21.04.1961, it was again clarified that the posts mentioned in clause (1) of GO dated 28.10.1960 should be treated as pensionable and those temporary employees falling in the said clause shall also be treated as pensionable from the date they were converted into permanent post.

25. The Corporation was constituted under Section 3 of the Act, 1950 w.e.f. 01.06.1972. By GO dated 07.06.1972 all the employees of the erstwhile Roadways holding permanent posts as per GO dated 28.10.1960 were declared entitled for pension except the following:

    (i) Those working on daily wages;

    (ii) Those appointed on *ad-hoc* basis;

    (iii) Those who had not completed minimum service period prescribed for the post;

    (iv) Those holding posts which were not declared pensionable;

(v) Those who had been removed from service after departmental inquiry and those had been found guilty of criminal charges.

Subsequent to GO dated 05.07.1972, officers/employees of the Roadways and the officers and staff of the Roadways working in the Office of the Transport Commissioner, whether permanent or temporary were considered to be on deputation under the existing terms and conditions of their services. The permanent staff of the Roadways were considered on deputation up till the date of their absorption permanently in the Corporation. It was also mentioned in the GO dated 05.07.1972 that the Government assures the Roadways employees that whenever service conditions of the employees of the Corporation shall be framed, the same shall not be inferior to the service conditions applicable to them under the Roadways at the time of absorption. The GO dated 05.07.1972 is reproduced hereunder:

"No. 3414/TEES-2-170 N/72

Sender

Shri Girija Prasad Pandey
Commissioner & Secretary
Government of Uttar Pradesh

To

Chief Manager
Uttar Pradesh State Road Transport Corporation
Lucknow

Dated: Lucknow July 5, 1972

Transport Section-2

Sub: Constitution of Uttar Pradesh State Road Transport Corporation and merger of the officers/employees of the Transport Organisation.

Sir,

After merger of the officers/employees working under Uttar Pradesh Roadways with State Road Transport Corporation, in connection with merger of services under the Corporation, I have been directed to issue the following, amending the Government order no. 3000/30-2-1 70/72 dated June 7, 1972:

(1) According to the provision of para (1) (A) of the above Government order, all those permanent or temporary officers/employees who before the constitution of State Road Transport Corporation were in the services of State Roadways, their services would be considered in the Corporation on deputation. For this deputation no period is being fixed now.

(2) The State Road Transport Corporation has under section 45 of the Transport Corporation Act have not made rules about the service conditions till now in connection with the officers and employees under it. Therefore, leaving the above discussed Annexure 1 (1) A of the above Government order dated June 7, 1972, the remaining annexures would be considered dismissed. But whenever the Corporation would make rules regarding service conditions, then in them this assurance of the Government would be included that the service condition of the officers/ employees under the Corporation in any condition would not be contemptuous than those conditions which were available to them under the Uttar Pradesh State Roadways and their government service period, their seniority under the corporation, promotion, fixation of pay, right concerning leave and financial benefits would be considered in that way only as they would have remained in their being in government service.

Yours faithfully
(Girija Prasad Pandey)
Commissioner & Secretary

No. 2114 (1)/Tees-2-170N/72
Copy submitted to Accountant General, Government of Uttar Pradesh, Allahabad, for information and necessary action.

By order,
(Bhagwan Swaroop Saxena)
Dy. Secretary

No. 3414(2)/Tees-2-170N/72
Copy submitted to the following for information: -

(1) Transport Commissioner, Uttar Pradesh, Lucknow.

(2) Finance (Expenditure-7) Section

By order,
(Bhagwan Swaroop Saxena)
Dy. Secretary"

26. In exercise of power under Section 45(2)(c) of the Act, 1950, the State Government framed the Road Transport Corporation Employees (other than officers) Service Regulations, 1981.[12] Regulations 4 and 39 of the Regulations, 1981 being relevant are reproduced hereunder:

"**4.** Option by the employees of the erstwhile Government Roadways Department and other employees. - (1) An employee of the erstwhile U.P. Government Roadways Department who was placed on deputation with the Corporation and who has or is deemed to have offered for absorption in the Service of the Corporation in accordance with Rule 4 of the Uttar Pradesh State Roadways Organisation (Abolition of Posts and Absorptions of Employee) Rules, 1982 (hereinafter referred to as the said, Rules), shall with effect from August 28, 1982, and so absorbed, and shall, accordingly cease to be an employee of the State Government with effect from the said date.

Provided that the terms and conditions of service of the employees so absorbed in the Service of the Corporation shall, subject to the provisions of G.O. No. 3414/XXX-2-170-N-72, dated July 5, 1972, and the said rules be governed by these regulations.

(i) Existing employees, who are not covered by sub-regulation (1) or those who are not exempted under Regulation 2, shall within one month of the commencement of these regulations, inform the appointing authority or such authority as the General Manager may in this behalf appoint whether or not they want to be governed by these regulations.

(ii) If they opt or fail to exercise their option for being governed by these regulations, their terms

12 'Regulations, 1981'

and conditions of appointment, so far as they are inconsistent with these regulations, shall stand rescinded:

Provided that, in respect of workmen where any of the provisions of these regulations is less favourable than the provisions of the U.P. Industrial Disputes Act, 1947, the Payment of Wages Act, 1936, the Minimum Wages Act, 1948, the Factories Act, 1948 or of any other Act applicable to them, the provisions of such Act shall apply.

(iii) If such persons do not opt for being governed by these regulations, their services may be terminated in accordance with the terms of their appointment."

"**39.** Pension and other retirement benefits-(1)(i) Subject to the provisions of clause (ii) of this sub-regulation, an employee of the Corporation shall not be entitled to pension, but he shall be entitled to the retirement benefits mentioned in sub-regulation (2).

(ii) A person, who was the employee of the State Government in the erstwhile U.P. Government Roadways and has opted for the service of the Corporation, shall be entitled to pension and other retirement benefits in terms of the G.O. No.3414/302-170-N-72, dated July 5, 1972.

(iii) Such employees who have come in the service of the Corporation on pensionable posts on 1st June, 1972 or after that and now those posts have been declared non-pensionable under this Rule; the Corporation would contribute in the Provident Fund of such employees as desired under the provisions of Employees Provident Fund Scheme, 1952.

(2) Without prejudice to the provisions of sub-regulation (1) an employee (including an employee who was in the service of the State Government in the erstwhile U.P. Government Roadways Department), shall be entitled to the following retirement benefits:

(i) Employees Provident Fund or the General Provident Fund, as the case may be;

> (ii) Gratuity in accordance with the Payment of Gratuity Act, 1972 or the relevant Government Rules, as may be applicable;
>
> (iii) Amount due under Group Insurance Scheme, 1976;
>
> (iv) One free family pass in a year for journey within the State;
>
> (v) A free family pass for his return to his home from the place of posting at the time of retirement in case he does not accept railway fare;
>
> (vi) Any other benefit that may be allowed by the Corporation from time to time. "

27. Regulations 4 and 39 of the Regulations, 1981 as extracted above made it very clear that an employee of the Corporation shall not be entitled to pension, but he shall be entitled to the retiral benefits mentioned in sub-regulation (2) of Regulation 39. Only those employees of the State Government working in the Roadways who have opted for services of the Corporation shall be entitled to pension and other retirement benefits in terms of GO dated 05.07.1972. It is to be understood that there were temporary and permanent employees working in the Roadways and there were regular State Government employees who were also working in the Roadways. Under Regulation 39, quoted above, it is clearly demarcated that those State Government employees who have opted for service of the Corporation will be entitled for pension, otherwise an employee of the Corporation shall not be entitled to pension and these employees will be entitled to retirement benefits as mentioned in sub-Regulation (2) of Regulation 39. At this juncture, it would be relevant to mention that the pension entitlement of the Roadways employees (who are not State Government employees) are controlled by GO dated 28.10.1960 which has already been dealt with in the preceding paragraphs.

28. By another GO dated 19.08.1993 it was again clarified that the employees/officers of the Roadways who before 28.07.1982 are working/promoted on pensionable post of the previous department, shall be entitled to pension on the terms set forth in this GO. Those employees who do not want to avail pensionary benefits shall submit

their written consent to this effect in order to avoid dispute in future. Once again, GO dated 03.02.1994 was issued to the effect that such employees who before the constitution of the Corporation and promulgation of merger rules, had been on the pensionable post in the State Government, would be considered on deputation service and will be considered entitled for pension.

29. In order to examine the appellants' claim for pension it is necessary to dwell on the pre-requisites provided in the GO dated 28.10.1960. To be covered in the GO for receiving pension it is necessary for the appellants to plead and establish *firstly*, that they were holding permanent posts in the Roadways, and they fall in the three categories of employees referred to in para (1) of the GO. It is not the case of the appellants that they were made permanent by any express order issued by the Roadways management, nor they claim to be working in any of the three posts referred to in para (1) of the GO. Since para (2) of the GO clearly provides that the rest of the permanent non-gazetted employees both in the traffic and engineering sections of the organization, would be treated as non-pensionable and similarly, all temporary employees will also be non-pensionable, the appellants are not entitled to pension as per GO dated 28.10.1960. *Secondly*, the appellants are not covered under Article 350 as amended on 20.04.1997 of the Regulations to hold the pensionable posts inasmuch as despite amendment in the first part of Article 350 of the Regulations, Note 3 thereof has not suffered amendment which provides that service in non-gazetted posts in Government Technical and Industrial Institutions in Uttar Pradesh does not qualify in the case of persons appointed to such posts on or after 15.11.1938. Since the Roadways is considered to be Technical and Industrial Institution, the appellants are covered under Note 3 of Article 350, and they are not entitled for pension.

30. The High Court, under the impugned judgment, has observed that the appellants having received retiral benefits including the benefit under the Employees Provident Fund Scheme, cannot be permitted to turn round and contend that they should also be given pension. We have also considered this aspect of the matter and we approve the observations of the High Court on the principle that a party to the litigation cannot be permitted to approbate and reprobate. See

National Council of Educational Research and Training vs. Shyam Babu Maheshwari & Ors.,[13] **Krishna Kumar vs. Union of India**[14] and **Union of India vs. Kailas**.[15]

31. Similarly, in the matter of **V.K. Ramamurthy vs. Union of India & Anr.**,[16] this Court considered the claim for pension of those who opted for pension after a long gap of retirement and held in para 4 that the contributory provident fund retirees form a different class from those who had opted for pension scheme and as such they are not entitled to claim as of right to switch over from Provident Fund Scheme to Pension Scheme. Similar is the proposition in the matter of **All India Reserve Bank Retired Officers Association & Ors. Vs. Union of India & Anr.**[17]

32. In somewhat similar situation concerning employees of Oil Natural Gas Commission which was earlier run as a department of the Government of India prior to the enactment of Oil and Natural Gas Commission Act, 1959, this Court in **The Committee for Protection of Rights of ONGC Employees & Ors. Vs. Oil and Natural Gas Commission, through its Chairman & Anr.**,[18] held thus in para 13:

> "13. This indicates that the scheme of Contributory Provident Fund, by way of retiral benefit, envisaged by the Provident Fund Act, is in the nature of a substitute for old age pension because it was felt that in the prevailing conditions in India, the institution of a pension scheme could not be visualised in the near future. It was not the intention of Parliament that Provident Fund benefit envisaged by the said Act would be in addition to pensionary benefits. Section 12 of the Provident Fund Act seeks to protect the wages of an employee to whom the scheme framed under the said Act applies as well as the total quantum of certain specified benefits to which he is entitled under the terms of his employment. With that end in view, Section

13 [2011] 7 SCR 548 : (2011) 6 SCC 412

14 [1990] 3 SCR 352 : (1990) 4 SCC 207

15 (1998) 9 SCC 721

16 [1996] Supp. 4 SCR 583 : (1996) 10 SCC 73

17 [1991] Supp. 3 SCR 256 : (1992) Supp 1 SCC 664

18 [1990] 2 SCR 156 : (1990) 2 SCC 472

12 prohibits an employer from reducing, whether directly or indirectly, the wages of an employee to whom the Scheme applies or the total quantum of benefits in the nature of old age pension, gratuity, provident fund or life insurance to which the employee is entitled under the terms of his employment express or implied. The said section proceeds on the basis that if an employee is entitled to any benefit in the nature of old age pension under the terms of his employment the said benefit would not be denied to him on the application of the Scheme. It is not the case of the petitioners that on June 30, 1961, when the Provident Fund Scheme was made applicable to the Commission, the petitioners had become permanent and were entitled to pension. It cannot, therefore, be said that on the date of the application of the Provident Fund Scheme to the Commission, the petitioners were entitled to pension under the terms of their employment. They cannot, therefore, invoke the provisions of Section 12 of the Provident Fund Act."

33. In the matter of **Prabhu Narain vs. State of U.P.,**[19] (2004) 13 SCC 662, this Court held that to receive pension the employees must establish that they are entitled to pension under a particular rule or scheme. The following has been held in para 5:

"5. No doubt pension is not a bounty, it is a valuable right given to an employee, but, in the first place it must be shown that the employee is entitled to pension under a particular rule or the scheme, as the case may be."

34. In yet another judgment rendered in **Rajasthan Road Transport Corporation & Anr. Vs. Mohini Devi,**[20] it is held thus in para nos. 7, 8 & 9:

"7. The Division Bench has considered the Regulations but failed to notice that there is apparent error in the order passed by the learned Single Judge. Indisputably, the employees concerned retired from service in 1991 and 1992

19 (2004) 13 SCC 662

20 [2013] 3 SCR 464 : (2013) 11 SCC 603

and after retirement they were paid CPF including the share of employer's contribution. Hence, as per Regulation 3 of the Regulations, no right accrued to the appellants/employees to claim pensionary benefits without first depositing the amount and complying with the Regulations.

8. The matter was examined by this Court in Pepsu RTC v. Mangal Singh [(2011) 11 SCC 702 : (2011) 2 SCC (L&S) 322] wherein it was held as under: (SCC p. 722, paras 51-52)

"51. The common thread which runs through all these appeals canvassed before us is that the respondents have failed to comply with the terms and conditions of the Regulations, which govern the Pension Scheme. We have already considered the nature and effect of the Regulations, which are made under a statute. These statutory regulations require to be interpreted in the same manner which is adopted while interpreting any other statutory provisions. The Corporation as well as the respondents are obliged and bound to comply with its mandatory conditions and requirements. Any action or conduct deviating from these conditions shall render such action illegal and invalid. Moreover, the respondents have availed the retiral benefits arising out of CPF and gratuity without any protest.

52. The respondents in all these appeals, before us, have made a claim for pensionary benefits under the Pension Scheme for the first time only after their retirement with an unreasonable delay of more than 8 years. It is not in dispute, in some appeals, that the respondents never opted for the Pension Scheme for their alleged want of knowledge for non-service of individual notices. In other appeals, although the respondents applied for the option of the Pension Scheme but indisputably never fulfilled the quintessential conditions envisaged by the Regulations which are statutory in nature."

9. We are, therefore, of the opinion that, in the facts and circumstances of the case and in view of the law laid down by this Court in the judgment referred to hereinabove, the impugned orders passed by the learned Single Judge

> [Madugiri v. Rajasthan SRTC, WP (C) No. 5425 of 1993 (Civil Writ 5425/1993), order dated 5-1-2006 (Raj)] and the Division Bench [Rajasthan SRTC v. Madugiri, Civil Special Appeal (Writ) No. 212 of 2006, decided on 11-10-2006 (Raj)] of the High Court cannot be sustained in law."

35. The common thread in the above referred judgments of this Court is that pension is a right and not a bounty. It is a constitutional right for which an employee is entitled on his superannuation. However, pension can be claimed only when it is permissible under the relevant rules or a scheme. If an employee is covered under the Provident Fund Scheme and is not holding a pensionable post, he cannot claim pension, nor the writ court can issue mandamus directing the employer to provide pension to an employee who is not covered under the rules.

36. The appellant(s) have relied upon three earlier judgments of the Allahabad High Court in the matter of ***Mirza Athar Beg*** *(supra),* **S.M. *Fazil*** *(supra)* and ***Shri Narain Pandey*** *(supra)*, therefore, it would be appropriate to discuss about the status of the said employees.

37. Mirza Athar Beg was promoted on the post of Junior Clerk in the Roadways w.e.f 07.09.1958 in the office of Assistant General Manager at Charbagh Depot, Lucknow and his promotion was regularised on 16.04.1960. The Division Bench of the High Court noted the fact that it is not the case of the Corporation that the respondent Mirza Athar Beg was not a permanent employee of the Roadways. Thus, he was admittedly a permanent employee and, therefore, he was found to be falling in the category of pensionable post as per GO dated 28.10.1960.

38. S.M. Fazil was appointed as Assistant Traffic Inspector in the Roadways on 19.04.1949. He was promoted as Junior Station Incharge on 05.11.1956 and thereafter selected as Traffic Superintendent by the U.P. Public Service Commission in 1961. He was thereafter promoted to the gazetted class post of Assistant Regional Manager in 1981. His claim before the Tribunal was to the effect that pension, gratuity and commutation was sanctioned taking into account the services rendered w.e.f 05.11.1956 till 28.02.1983 leaving his earlier services from 19.04.1949 to 05.11.1996. Therefore, in view of Articles 350 and 370 of the Regulations, his period of service in temporary capacity or on temporary post was countable towards qualifying

services for pension and gratuity and he was never absorbed in the services of the Corporation. Thus, the case of S.M.Fazil is entirely distinguishable on facts.

39. True it is that Shri Narain Pandey was granted pension by the High Court despite he having been appointed on the post of Junior Station Incharge on 05.05.1978. However, this judgment was rendered without any reference to GOs dated 16.09.1960 and 28.10.1960 as also Note 3 of Article 350 of the Regulations and the provisions of the Service Regulations, 1981. This judgment, therefore, cannot be relied upon as binding precedent as the same has been rendered without referring to the applicable GOs and Regulations.

40. In view of the above discussion, the appellant's reliance on the judgments rendered by the Allahabad High Court in the matter of ***Mirza Athar Beg*** *(supra)*, ***S.M. Fazil & 03 others*** *(supra)* and ***Shri Narain Pandey*** *(supra)* are misplaced as in the said matters, the respective appellants were found to be holding permanent posts which were pensionable whereas in the present case, the appellants were neither holding permanent posts nor holding any pensionable posts as per GO dated 28.10.1960. Therefore, judgments in the matter ***Mirza Athar Beg*** *(supra)*, ***S.M. Fazil & 03 others*** *(supra)* and ***Shri Narain Pandey*** *(supra)* rendered by the High Court are distinguishable on facts. The judgment in ***Shri Narain Pandey*** *(supra)* has not considered the legal effect flowing from the GO dated 16.09.1960 and 28.10.1960 as also Note 3 of Article 350 of the Regulations. Therefore, the said judgment of the Allahabad High Court is of no assistance to the appellants.

41. For all the forestated reasons, civil appeal is liable to be and is hereby dismissed.

C.A. No. 895 of 2020, C.A. No. 896 of 2020, C.A. No. 897 of 2020, C.A. No. 898 of 2020, C.A. No. (s) of 2024 @ SLP (c) of 2024 @ Diary No. 10240 of 2020 & C. A. Nos. 899-901 of 2020.

CIVIL APPEAL NO. 895 OF 2020

42. This appeal has been preferred by UPSRTC assailing the order passed by the Division Bench of the High Court of Allahabad (Lucknow Bench) in Special Appeal No. 780 (S/B) of 2013 (UPSRTC & Anr. Vs. Roadways Karmchari Sanyukta Parishad, Uttar Pradesh

& Anr.). Before the Division Bench, UPSRTC challenged the order passed by the learned Single Judge allowing the writ petition preferred by Roadways Karmchari Sanyukta Parishad, Uttar Pradesh,[21] consequently, directing the UPSRTC to extend the pensionary benefits and pay pension w.e.f 27.08.1982 onwards in the light of GO dated 05.07.1972 and in pursuance of order dated 22.05.1989 passed by the Division Bench of the High Court in Writ Petition Nos. 3273 of 1982, 3380 of 1982, 3400 of 1982, 3489 of 1982 and 4119 of 1982.

43. The issue before the Division Bench was in relation to extending pensionary and other benefits in respect of such employees who have been promoted on pensionable posts after 1982. According to the Division Bench, in other words, the issue is whether the cutoff date of 1982 fixed by the UPSRTC basing upon the provisions of absorption rules and the regulations framed thereunder are rational having nexus with the object of denying the benefit of pension to the members of the RKSP.

44. The Division Bench has referred to two GOs dated 07.06.1972 and 05.07.1972. In the first GO, the Officers/employees of the Roadways and those working in the Transport Commissioner's office and Head Office, whether permanent or temporary, shall be considered on deputation under existing terms and conditions of their service. After period of six months, the Corporation shall take steps for their formal appointment and prepare service rules and those who are willing to be absorbed shall be absorbed in the Corporation for which required number of posts, both permanent and temporary, shall be created. It was also provided in Clause (4) of the GO dated 07.06.1972 that on absorption their service conditions shall not be inferior to those under the Government immediately before the absorption and their tenure of government service shall be considered for their seniority, promotion, pay fixation, entitlement for leave and for the benefits of retirement in the same way as would have been under the Government service.

45. In the second GO dated 05.07.1992, the earlier GO dated 07.06.1972 was amended. The GO dated 05.07.1972 as is quoted in impugned

21 'RKSP'

judgment passed in Special Appeal No. 780 (S/B) of 2013 has already been quoted in the preceding para 24.

46. The High Court referred to the above GOs as also the provisions of U.P. State Road Transport Corporation Employees (other than Officers) Service Regulations, 1981 to hold that in view of the clear provisions in the GOs that the Roadways employees sent on deputation shall enjoy the same service conditions and whenever rules are framed their service conditions shall not be inferior to the conditions as were available under the Government immediately before their absorption, therefore, in view of Regulation 39 of the Regulations, 1981 notified on 19.06.1981, the erstwhile employees of the Roadways who have been promoted on pensionable posts after 1982 are entitled for pension.

47. Ms. Garima Prasad, learned senior counsel appearing for the UPSRTC would argue that the High Court has completely misread the contents of GOs dated 07.06.1972 and 05.07.1972 as also the rules and regulations. She would submit that these GOs have not made any specific provision concerning admissibility of pension which is dealt with in the earlier GO dated 28.10.1960. She would thus submit that GOs dated 07.06.1972 and 05.07.1972 would not be applicable to the employees of the erstwhile Roadways insofar as entitlement of pension is concerned and the same is restricted to the government employees who were absorbed in the services of the Corporation.

48. *Per contra,* Mr. Rakesh Khanna, learned senior counsel appearing for RKSP would submit that the High Court has correctly applied the GOs as also the rules and regulations while allowing the writ petition. He would also submit that the Division Bench has erred in directing, in the operative part of the order, that the pension shall be calculated from the date, employee(s) of the Corporation became member of the cadre of the post which is pensionable. According to him, the entire length of service should have been calculated for the purpose of pensionary benefits.

49. We have already discussed the legal effect of the GOs dated 07.06.1972 and 05.07.1972 read along with Clause (4) of Regulation 39 of the Regulations, 1981. To reiterate, only those employees of the State Government working in the Roadways who have opted for services of the Corporation shall be entitled for pension and other

retirement benefits in terms of GO dated 05.07.1972. However, other employees of the Corporation shall not be entitled to pension, but they shall be entitled to the retirement benefits mentioned in sub-Regulations (1) and (2) of Regulation 39. Thus, it is amply clear that only State Government employees absorbed in the Corporation shall be entitled to pension, "phrase that their service conditions shall not be inferior to the conditions as were available under the Government" would be applicable to the State Government employees for the purposes of according benefit of pension. The employees of Roadways who were not holding any pensionable post prior to their deputation or absorption in the Corporation, are not entitled to pension, as their service conditions in the erstwhile Roadways did not provide that they are entitled to pension. Thus, they have not been put to any inferior service conditions on their joining the services in the Corporation. In our considered opinion, the Division Bench of the High Court was not correct in holding that the members of the RKSP are entitled to pension even if they have been promoted after the cutoff date of 27.08.1982.

50. Insofar as the employees who were promoted in the UPSRTC on a pensionable post between 1972 to 1981, they are getting pension in view of GO dated 03.02.1984. This position has been admitted by Ms. Garima Prasad, learned senior counsel appearing for the UPSRTC. However, the members of the Union of RKSP for whose benefit the writ petition was preferred, who were promoted on a pensionable post after the cutoff date, are not entitled for pension.

51. Accordingly, we set aside the order passed by the Division Bench and the learned Single Judge of the Allahabad High Court under the impugned judgment(s). Accordingly, the appeals filed by UPSRTC being C.A. No. 895 of 2020, C.A. No. 896 of 2020, C.A. No. 897 of 2020, C.A. No. 898 of 2020 and C.A. No. (s) ________ of 2024 @ SLP (c) __________of 2024 @ Diary No. 10240 of 2020 are allowed and the appeals filed by Roadways Karamchari Sanyukta Parishad, UP being C.A. Nos. 899-901 of 2020 are dismissed.

C.A. No. 957/2020, C.A. Nos. 959-965/2020, C.A. No. 910/2020, C.A. No. 902/2020, C.A. No. 912/2020, C.A. No. 909/2020, C.A. No. 913/2020, C.A. No. 958/2020, C.A. No. 915/2020, C.A. No. 966/2020, C.A. No. 914/2020, C.A. No. 832/2020, C.A. No. 967/2020,

C.A. No. 905/2020, C.A. No. 907/2020, C.A. No. 903/2020, C.A. No. 911/2020, C.A. No. 904/2020, C.A. No. 906/2020 & C.A. No. 908/2020

52. In view of our judgment allowing the appeals preferred by UPSRTC, these civil appeals are dismissed.

Result of the case: CA No. 894 of 2020 dismissed; Appeals filed by UPSRTC are allowed while those filed by Roadways Karamchari Sanyukta Parishad, UP are dismissed.

†*Headnotes prepared by:* Divya Pandey

[2024] 7 S.C.R. 1398 : 2024 INSC 527

Amro Devi & Ors.
v.
Julfi Ram (Deceased) Thr. Lrs. & Ors.

(Civil Appeal No. 7791 of 2024)

15 July 2024

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

Issue for Consideration

Respondents had filed a suit for declaration and permanent injunction against Appellants, claiming to be owners in possession of suit land on the basis of an alleged compromise entered into by them in an earlier litigation with the original owners of the property. The suit was dismissed by the trial court. The order of dismissal was set aside in first appeal filed by the Respondents and the order of first appellate court was confirmed by the High Court in regular second appeal vide the impugned order.

Whether the High Court was justified in upholding the judgment of the first Appellate court vide which Respondents' suit for declaration and permanent injunction was decreed in their favour.

Headnotes†

Compromise decree – What constitutes a valid compromise decree:

Held: There was no written compromise deed between the parties, there was no verification as such of any written document – The defendants, in the first round of litigation, were admittedly tenants – They could have become owners of the land in suit either by way of a registered sale deed in their favour or by way of a declaration by the Competent Civil Court whether on merits or by way of a compromise decree granting such declaration – Neither of the two happened – Merely because some statement of the parties is recorded by the first Appellate Court that they have settled the dispute and that the suit may be dismissed, would not make the defendants therein from tenants to owners – Dismissal of the suit would only mean that their status as tenants would continue – A plain reading of Rule 3 of Order XXIII CPC clearly provides that for a valid compromise

* Author

in a suit there has to be a lawful agreement or compromise in writing and signed by the parties which would then require it to be proved to the satisfaction of the Court – In the present case there is no document in writing containing the terms of the agreement or compromise – Thus, it cannot be said that the order dated 20.08.1984 was an order under Order XXIII Rule 3 CPC – Once it is held that the order dated 20.08.1984 was not an order of compromise of suit under Order XXIII Rule 3 CPC the argument relating to applicability and bar under Order XXIII Rule 3A CPC would have no relevance at all – In the case of Som Dev v. Rati Ram (2006) 10 SCC 788 it was clarified by this Court that after the amendment of Code of Civil Procedure in 1977, a compromise decree can be passed only on compliance with the requirements of Rule 3 of Order XXIII, otherwise it may not be possible to recognize the same as compromise decree – Mere statements of the parties before court about such said compromise, cannot satisfy the requirements of Order XXIII Rule 3 of the CPC – Therefore, the compromise decree is not valid. [Paras 15, 16, 19, 20, 21, 22 and 23]

***Lis pendens* and restriction under Section 52 of the Transfer of Property Act, 1882:**

Held: At the time of execution of sale deed, on 22.08.1983, in favour of present appellants, defendants in second suit, Mansha Ram and others, were fully competent to execute the sale deed – Even assuming for the sake of argument that ownership rights were also transferred under the alleged compromise deed, the sale deed executed prior to the said compromise will not be affected in any manner as the plaintiffs were not only recorded as land owners but also had a decree of declaration and permanent injunction in their favour at the time when sale deed was executed – The doctrine of *lis pendens* or the restriction imposed under section 52 of the Transfer of Property Act, 1882 may not be relevant or applicable in present case considering the fact that one of the parties-plaintiffs in the proceedings and respondents in pending appeal having executed the sale deed during the pendency of appeal, by their subsequent conduct of giving a statement that their suit be dismissed, acted in dishonest and unfair manner – They were fully aware of having executed the sale deed, their subsequent statement would only be termed as collusive and dishonest – The order in the appeal court was not

a decree on merits declaring any rights of the defendants to the suit (appellants in the appeal) – In such circumstances, the sale deed dated 22.08.1983 could not be said to be hit by doctrine of *lis pendens* – In Thomson Press (India) Ltd. v. Nanak Builders & Investors (P) Ltd. (2013) 5 SCC 397 it was held that transfer of suit property *pendente lite* is not void *ab initio*, as it remains subservient to the pending litigation – Therefore, in the present case the sale deed dated 22.08.1983 is not hit by section 52 of the TP Act. [Paras 12, 15, 17 and 18]

Case Law Cited

Gurpreet Singh v. Chaturbhuj Gopal **[1988] 2 SCR 401 : AIR 1988 SC 400 – referred to.**

Thomson Press (India) Ltd. v. Nanak Builders & Investors (P) Ltd. **[2013] 2 SCR 74 : (2013) 5 SCC 397 – relied on.**

Som Dev v. Rati Ram **[2006] 5 Supp. SCR 778 : (2006) 10 SCC 788 – relied on.**

List of Acts

Transfer of Property Act, 1882; Code of Civil Procedure, 1908.

List of Keywords

Compromise deed; Rule 3 of Order XXIII of CPC; Execution of sale deed during pendency of first appeal; Lis pendens; Section 52 of Transfer of Property Act, 1882; Suit for declaration; Permanent prohibitory injunction; Rule 3A of Order XXIII of CPC.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 7791 of 2024

From the Judgment and Order dated 15.12.2014 of the High Court of Himachal Pradesh at Shimla in RSA No. 55 of 2002

Appearances for Parties

M. C. Dhingra, Gaurav Dhingra, Shashank Singh, Piyush Kant Roy, Abhishek Lakra, Rishabh Kumar Singh, Arvind Kumar Singh, Mahendra Ram, Dipanker Pokhriyal, Advs. for the Appellants.

Anil Nag, Adv. for the Respondents.

Amro Devi & Ors. v. Julfi Ram (Deceased) Thr. Lrs. & Ors.

Judgment / Order of the Supreme Court

Judgment

Vikram Nath, J.

1. Leave granted.

2. The present appeal is filed by defendants against the order of Himachal Pradesh High Court dated 15.12.2014. The Respondents are original plaintiffs who had filed the suit for declaration and specific performance. The Trial Court dismissed the suit. However, the first Appellate Court reversed the finding of Trial Court and decreed the suit. The High Court, by the impugned order, dismissed the second appeal.

3. Following are the facts leading to the Civil Suit in question:

   On 27.12.1979, Mansha Ram, Dev Raj, Khazana Ram, Ramji Das and Bihari Lal (hereinafter referred as "Mansha Ram and others") filed a suit (Civil Suit No. 43 of 1983) for declaration and permanent injunction against Julfi Ram, Tihru Ram, Bakshi Ram-all three are sons of Khajana, Prem Chand-son of Julfi Ram, Kartar Chand-son of Bakshi Ram and Dharam Singh son of Nighu. Plaintiffs were the landowners and defendants were the co-tenants of the land. The Plaintiffs sought a declaration that they are owners in possession of suit land measuring 7 kanals 9 marlas. They also sought permanent injunction restraining defendants from interfering in the land in suit. The defendants contested the suit and stated that they are in cultivatory possession as tenants on payment. Thus, they claimed to be owners by virtue of tenancy.

4. Trial Court by order dated 11.04.1983, decreed the suit in favor of plaintiffs-Mansha Ram & others granting them both the reliefs of declaration and permanent injunction by holding that they are owners in possession. Aggrieved, all six defendants preferred an appeal before the District Judge. As one of the plaintiffs-Dev Raj had died during the pendency, his widow Asha Devi and his son Suresh Kumar were arrayed as Respondents in the first Appeal.

5. During the pendency of appeal, on 22.08.1983 Mansha Ram and others executed a sale deed in favour of Kartar Chand, Sansar Chand and Rajinder Kumar-three sons of Bakshi Ram for consideration of Rs. 12,500/-. The first Appellate Court, by order dated 20.08.1984,

allowed the appeal, setting aside the decree of Trial Court in light of statements made by plaintiffs before the court. It noted that 'the plaintiffs have compromised the case and stated that they do not want to pursue with the suit and it to be dismissed.' Before the first Appellate Court, Julfi Ram, Tihru Ram, Bakshi Ram, Prem Chand and Kartar Singh made a joint statement on 20.06.1984 that they have reached a settlement with Respondents. They have also paid money to Mansha Ram and others and they shall be the owners and hold possession of the land in dispute. Thus, Suit filed by Plaintiffs be dismissed. Dharam Singh-son of Nighu recorded a separate statement to the same effect. On the other hand, Bihari Lal, Suresh Kumar (son of Devraj and holder of General power of attorney of Asha Devi), Ramji Das and Dhyan Chand made a statement that they have reached a settlement and have received money. Thus, possession and ownership of the land shall be with appellants/ defendants. Mansha Ram and Khazana Ram also recorded their statements on 20.06.1984, that they have reached a settlement and the suit may be dismissed. These four statements are on record of the High Court and of this Court.

6. Appellants submit that Bakshi Ram's three son got exclusive possession and mutation in revenue records by virtue of the sale deed dated 22.08.1983. However, the Respondents submit that by virtue of dismissal of suit by first Appellate Court, all four brothers- Julfi, Tihru, Bakshi and Nighu became owners and the sale deed executed in favour of the three sons of Bakshi Ram shall be subject to compromise decree passed by first Appellate Court.

7. On 23.02.1988, the present suit (Civil Suit No. 41 of 1988) was instituted by Respondents/Plaintiffs- Julfi Ram, Prem Chand, Dharam Singh, Premi Devi, Atmi Devi, Asha Devi, Subhash Chand and Gian Chand- two sons of Nighu represented by their mother Premi Devi (hereinafter referred as "Julfi Ram and others") against appellants/ Defendants- Bakshi Ram(since deceased), Tihru Ram, Amro Devi (wife of Bakshi Ram), Sansar Chand, Kartar Chand, Rajinder Kumar (minor son of Bakshi Ram), Mansha Ram, Khazana Ram, Ramji Das, Bihari Lal and Asha Devi- widow of Suresh Kumar (hereinafter referred as "Bakshi Ram and others"). Thus, the erstwhile owners Mansha Ram and others were also impleaded as defendants. The suit was filed for declaration and permanent prohibitory injunction claiming that plaintiffs are owners in possession of half share i.e. 3 kanals

15 marlas in the suit land as per the compromise between parties in Civil Appeal decided by District Court on 20.08.1984. Plaintiffs also stated that they continued to be in possession and they were cultivating the land. However, in June 1987 the defendants started interfering with the land in suit stating that they have purchased the land and plaintiff cannot continue to cultivate. Only at this stage plaintiffs claim to have received knowledge about mutation entries where only the names of defendants have been recorded.

8. On the other hand, defendants (Bakshi Ram and others) submitted a written statement on 28.01.1992, contending that there was no compromise in earlier proceedings since no compromise deed was executed and placed on record before the Court in appeal. They also claimed that they have spent Rs. 9,000/- on improvement of suit land after the purchase.

9. The Trial Court, by order dated 19.12.1992, dismissed the suit. It held that for proceeding under Order XXIII Rule 3 of Code of Civil Procedure, 1908[1] the existence and production of written compromise between the parties duly signed by them is most important. It relied upon the ruling of this Court in ***Gurpreet Singh vs Chaturbhuj Gopal***.[2] Since the said compromise was not presented in written form duly signed by the parties, the mandate under Order XXIII Rule 3 CPC is not fulfilled and thus it lacks legal force. The Trial Court also held that statements before the District Court cannot be treated as agreement or compromise. On the fact of possession, the Trial Court noted that plaintiffs could not prove that they were in possession and in cultivation of the land in suit as pleaded.

10. As the Trial Court dismissed the suit, Julfi Ram and others preferred Civil Appeal No.17/1993 before the District Judge, Hamirpur. By order dated 21.12.2001, the District Judge, allowed the appeal thereby decreeing the suit. It held that the Trial Court had no occasion to comment upon the legality of compromise because neither parties challenged the compromise decree by filing an appeal under Order 43 Rule 1-A of CPC. Thus, it operated as *res judicata* and could not have been re-opened in a subsequent suit. The said compromise would be binding on parties. On merits, it observed that the sale was

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1 CPC

2 [1988] 2 SCR 401 : AIR 1988 SC 400

clandestinely executed by the vendors (Mansha Ram and others) in favour of sons of Bakshi Ram. It further stated that even if the sale deed is considered to be valid, the same cannot be allowed to be acted upon as it has been executed during the pendency of Civil Appeal No. 64 of 1993 between the parties.

11. The Appellants/Defendants preferred a Regular Second Appeal No. 55 of 2002 before the High Court. The High Court, by the impugned order, dismissed the same and confirmed the decree passed by the first Appellate Court dated 21.12.2001. The High Court held that execution of sale deed does not either abrogate, detract or dilute the effect of a previous conclusive determination comprised in the decree of 1984. Thus, the rights of plaintiffs remained intact to the extent of one-half share in the suit land. The sale deed is thus hit by the doctrine of *lis pendens*.

12. We have heard learned counsel for the parties and perused the material on record. The question to be determined in the present case is as to what is the status of the so called compromise order dated 20th August 1984 in the first round of litigation. The plaintiffs in the second round of litigation were the defendants whereas the Mansha Ram and others were plaintiffs in the first round of litigation. The first suit was for declaration and for permanent injunction on account of interference by the defendants therein. The plaintiffs were already recorded in the revenue records. Their suit was decreed by the Trial Court on 11.04.1983. At the time of execution of sale deed, on 22.08.1983, in favour of present appellants (defendants in second suit, Mansha Ram and others) were fully competent to execute the sale deed. It is true that when the said sale deed was executed, the first appeal was pending before the first Appellate Court.

13. Before the first Appellate Court, the plaintiff-respondent therein Bihari Lal gave a short statement to the effect that they had reached a settlement, received money and that possession and ownership of the land would be with the appellants. Mansha Ram and Khazana Ram stated that they had reached a settlement with the appellants, they agreed to the statement of the appellant that suit may be dismissed. At the same time appellants Julfi Ram and others stated that they have reached a settlement with the respondents, they had paid money to Mansha Ram and others, that they shall be owners in possession of the land in dispute and that the suit be dismissed.

14. Based on these statements, the District Judge, Hamirpur by order dated 20.08.1984 accepted the appeal, set aside the judgement and decree of Trial Court and dismissed the suit. It further directed that decree sheet be prepared and file be consigned to the record. The effect of this decree would be that the suit of the plaintiffs was dismissed. No declaration was granted to the defendants in the said suit. There was no written compromise deed between the parties, there was no verification as such of any written document.

15. At best, under the alleged compromise order of dismissal of suit the defendants therein could have claimed to be in possession of the land in suit and no further. The ownership could not have been transferred because of the dismissal of the suit. Even assuming for the sake of argument that ownership rights were also transferred under the alleged compromise deed, the sale deed executed prior to the said compromise will not be affected in any manner as the plaintiffs were not only recorded as land owners but also had a decree of declaration and permanent injunction in their favour at the time when sale deed was executed.

16. The defendants, in the first round of litigation, were admittedly tenants. They could have become owners of the land in suit either by way of a registered sale deed in their favour or by way of a declaration by the Competent Civil Court whether on merits or by way of a compromise decree granting such declaration. Neither of the two happened. Merely because some statement of the parties is recorded by the first Appellate Court that they have settled the dispute and that the suit may be dismissed, would not make the defendants therein from tenants to owners. Dismissal of the suit would only mean that their status as tenants would continue.

17. The first Appellate Court and the High Court failed to consider that there was no challenge to the sale deed dated 22.08.1983. The doctrine of *lis pendens* or the restriction imposed under section 52 of the Transfer of Property Act, 1882[3] may not be relevant or applicable in present case considering the fact that one of the parties- plaintiffs in the proceedings and respondents in pending appeal having executed the sale deed during the pendency of appeal, by their subsequent conduct of giving a statement that their suit be dismissed, acted

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3 The TP Act.

in dishonest and unfair manner. They were fully aware of having executed the sale deed, their subsequent statement would only be termed as collusive and dishonest. The order in the appeal court was not a decree on merits declaring any rights of the defendants to the suit (appellants in the appeal). In such circumstances, the sale deed dated 22.08.1983 could not be said to be hit by doctrine of *lis pendens*.

18. At this juncture, it would be appropriate to note the judicial decision which has been relied upon by the appellants to substantiate their claim that the sale deed is not hit by Section 52 of the TP Act. In ***Thomson Press (India) Ltd. v. Nanak Builders & Investors (P) Ltd.***[4] it was held that transfer of suit property *pendente lite* is not *void ab initio*, as it remains subservient to the pending litigation. The purchaser of any such property takes the bargain subject to the rights of the plaintiff in pending suit. Therefore, in the present case the sale deed dated 22.08.1983 is not hit by section 52 of the TP Act.

19. Referring to the second submission of the respondents regarding the compromise decree being valid in law, at the outset, Order XXIII Rule 3 CPC is reproduced:

> "**3. Compromise of suit.**—Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise 1 [in writing and signed by the parties] or where the defendant satisfied the plaintiff in respect to the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith 2 [so far as it relates to the parties to the suit, whether or not the subject matter of the agreement, compromise or satisfaction is the same as the subject-matter of the suit.]
>
> [Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the Court shall decide the question; but not adjournment shall be granted for the purpose of deciding the question, unless the Court, for reasons to be recorded, thinks fit to grant such adjournment.]

4 [2013] 2 SCR 74 : (2013) 5 SCC 397

> [Explanation.— An agreement or compromise which is void or voidable under the Indian Contract Act, 1872 (9 of 1872), shall not he deemed to be lawful within the meaning of this rule.]”

20. A plain reading of the above provision clearly provides that for a valid compromise in a suit there has to be a lawful agreement or compromise in writing and signed by the parties which would then require it to be proved to the satisfaction of the Court. In the present case there is no document in writing containing the terms of the agreement or compromise. In the absence of any document in writing, the question of the parties signing it does not arise. Even the question of proving such document to the satisfaction of the Court to be lawful, also did not arise. Thus, it cannot be said that the order dated 20.08.1984 was an order under Order XXIII Rule 3 CPC.

21. Once it is held that the order dated 20.08.1984 was not an order of compromise of suit under Order XXIII Rule 3 CPC the argument relating to applicability and bar under Order XXIII Rule 3A CPC would have no relevance at all.

22. Additionally, we must also note the case of ***Som Dev v. Rati Ram***[5] as presented by the appellants to clarify the rigors of Order XXIII Rule 3 of CPC. In this case, it was clarified by this Court that after the amendment of Code of Civil Procedure in 1977, a compromise decree can be passed only on compliance with the requirements of Rule 3 of Order XXIII, otherwise it may not be possible to recognize the same as compromise decree. When a compromise is to be recorded and a decree is to be passed, Rule 3 of Order XXIII of the Code requires that the terms of compromise should be reduced to writing and signed by the parties.

23. In the present case, neither the compromise deed has been reduced to writing, nor it is recorded by the court. Mere statements of the parties before court about such said compromise, cannot satisfy the requirements of Order XXIII Rule 3 of the CPC. Therefore, the compromise decree is not valid.

5 [2006] 5 Supp. SCR 778 : (2006) 10 SCC 788

24. In view of the above analysis, the present Civil Appeal is allowed, the orders passed by the High Court and first Appellate Court are set aside. The judgment and decree of Trial Court dated 19.12.1992 dismissing the suit is confirmed.

25. Pending application(s), if any, is/are disposed of.

Result of the case: Appeal Allowed.

†*Headnotes prepared by:* Adeeba Mujahid, Hony. Associate Editor
(Verified by: Liz Mathew, Sr. Adv.*)*

[2024] 7 S.C.R. 1409 : 2024 INSC 654

PIC Departmentals Pvt. Ltd.
v.
Sreeleathers Pvt. Ltd.

(Civil Appeal No. 8968 of 2024)

30 July 2024

[Sudhanshu Dhulia* and Ahsanuddin Amanullah,* JJ.]

Issue for Consideration

Issue arose as to whether the judgment of the Division Bench of the High Court was justified in allowing extension of time for filing written statement after a considerable delay of 17 years.

Headnotes†

Rules of the High Court at Calcutta (Original Side), 1914 – Chapter XXXVIII r.46, Chapter IX rr.2, 35, Chapter X r.27 – Filing of written statement – Power to extend time, after a considerable delay:

Held: Power to extend time for filing written statement should not be employed as a matter of course, but with great caution so that the purpose of the procedural statute is not defeated and unscrupulous litigants do not abuse the process of the Court by adopting dilatory tactis – However, the same cannot be examined in a strait-jacket compartment for the peculiar facts and circumstances of every case have to be carefully and individually appreciated – Thereafter, the concerned Court would take a call as to whether the request made is genuine or, whether refusal to accede to such request may lead to eventual miscarriage of justice – Procedural technicalities have to give way to substantive justice – Procedure, well and truly, is only the handmaiden of justice – Discretion granted to Courts has to be exercised on a case-specific basis – Sequence of events clearly indicates that the respondent cannot be said to be solely at fault since it was under the impression that the suit already stood disposed of and thus, there was no requirement/occasion to file the written statement – Case was listed suddenly after a prolonged gap of 17 years, in 2017, whereafter the respondent filed an appropriate application – Moreover, the reports submitted by the Registry of the High Court indicated that the official website of the High Court states that the suit had been disposed of in 2000, and; the High Court could not, for reasons best known to it alone, trace out any

* Author

orders in the file of the suit pre-2017 – Situation that prevailed is a direct result of the confusion created by the Registry of High Court – It would be improper to not permit the taking on record of the written statement of the respondent apropos the suit – Thus, discretion rightly exercised by the Division Bench in favour of the respondent. [Paras 15-17]

Case Law Cited

Jayshree Tea & Industries v. General Magnets, **2007 SCC Online Cal 577;** *Prakash Corporates v. Dee Vee Projects Limited* [2022] 8 SCR 889 **: (2022) 5 SCC 112;** *Kailash v. Nanhku* [2005] 3 SCR 289 **: (2005) 4 SCC 480;** *Salem Advocate Bar Association T.N. v. Union of India* [2005] Supp. 1 SCR 929 **: (2005) 6 SCC 344;** *R.N. Jadi and Bros. v. Subhashchandra* [2007] 8 SCR 241 **: (2007) 6 SCC 420;** *Zolba v. Keshao* [2008] 5 SCR 963 **: (2008) 11 SCC 769;** *Mohammed Yusuf v. Faij Mohammad* [2008] 17 SCR 20 **: (2009) 3 SCC 513;** *Atcom Technologies Limited v. Y.A. Chunawala and Company* **(2018) 6 SCC 639;** *State of Gujarat v. Ramprakash P Puri* [1970] 2 SCR 875**;** *Sushil Kumar Sen v. State of Bihar* [1975] 3 SCR 942 **: (1975) 1 SCC 774;** *State v. M Subrahmanyam* [2019] 7 SCR 287 **: (2019) 6 SCC 357;** *Mahadev Govind Gharge v. The Special Land Acquisition Officer, Upper Krishna Project* [2011] 8 SCR 829 **– referred to.**

List of Acts

Rules of the High Court at Calcutta (Original Side), 1914.

List of Keywords

Written statement; Extension of time for filing written statement; Procedural statute; Unscrupulous litigants; Abuse the process of the Court; Miscarriage of justice; Procedural technicalities.

Case Arising From

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8968 of 2024

From the Judgment and Order dated 22.03.2024 of the High Court at Calcutta in APO No. 147 of 2023

Appearances for Parties

Dr. S. Muralidhar, Sr. Adv., Indranil Ghosh, Arup Bhattacharyya, Palzer Moktan, Ms. Suparna Mukherjee, Ms. Mrinal Chaudhry, Ms. Mehar Bedi, Kartik, Ms. Aanchal Tikmani, Advs. for the Appellant.

Rana Mukherjee, Sr. Adv., Ms. Daisy Hannah, Sumanta Biswas, Bikash Shaw, Samarth Mohanty, Ms. Oindrila Sen, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Order

Sudhanshu Dhulia & Ahsanuddin Amanullah, JJ.

Leave granted. The sequence of events relevant to resolve the short controversy is noticed below.

2. This dispute traces its origins to the alleged act of putting-up of a signboard by the respondent on the subject-premises,[1] which according to the appellant, obstructed the hoarding put up by the appellant. Thus, the appellant/plaintiff filed C.S. No.549/1999 on around 30.09.1999 (hereinafter referred to as the "suit") for declaration and permanent injunction before the Calcutta High Court (hereinafter referred to as the "High Court") against the respondent/defendant. The position of the parties was that the appellant was a tenant on the ground floor of the building in question, whereas the respondent was a tenant on the first floor.

3. Summons in the suit was served on the respondent, which entered appearance on 03.02.2000. On 29.02.2000, an interim order of restraint was passed by the High Court, in terms of prayer (a) made in application G.A. No.4229/1999 filed by the petitioner in the suit.

4. It appears that the official website of the High Court showed the status of the suit as having been '*disposed of*' on 01.03.2000. However, on 11.12.2001, the appellant filed Contempt Case No.333/2001 alleging violation of the interim order dated 29.02.2000. Later, on 25.01.2010, by way of a Deed of Conveyance, the original owners of the premises sold the same to M/s TUG Developers Private Limited (hereinafter referred to as "TUG Developers"), which is a subsidiary of the respondent.

5. On 08.09.2015, TUG Developers issued a notice of eviction to the appellant on the grounds of sub-letting and non-payment of rent and for terminating the tenancy/lease with effect from October,

1 3 and 4, Lindsay Street, Kolkata – 700 087.

2015. On 17.01.2017, the suit was listed suddenly before the High Court, which directed the Registrar (Listing) to submit a report on the status of the suit as the learned Single Judge noticed that the website reflected the status of the suit as being disposed of. On 25.01.2017, the Registrar (Listing) submitted his report stating that the case appeared to have been disposed of on 01.03.2000 and that the matter was listed as '*to be mentioned*' on 17.01.2017 in terms of the instructions received from the High Court. On 30.01.2017, the Court directed the suit to be listed in February, 2017. This led to the respondent filing application G.A. No.693/2017[2] in the suit, seeking extension of time to file Written Statement, along with a copy thereof.

6. Ejectment Suit No.34/2018 was filed by TUG Developers seeking ejectment of the appellant from the premises.

7. The High Court on 21.04.2023 asked for a report from its Registry as to how the suit was shown as disposed of to which the Registrar (Original Side) responded by submitting a report on 11.05.2023 stating that there were no details of any orders available in the file prior to 17.01.2017. On 12.06.2023, the learned Single Judge dismissed G.A. No.693/2017. Contempt Case No.331/2001 was also disposed of on 13.06.2023 on a statement by the appellant that the same had become infructuous.

8. Aggrieved by the learned Single Judge's order dated 12.06.2023 *supra*, the respondent preferred A.P.O. No.147/2023 before the Division Bench of the High Court, which, by judgment dated 22.03.2024 allowed the appeal. This judgment of the Division Bench is assailed in the instant appeal.

9. By the Impugned Judgment dated 22.03.2024, the Division Bench found sufficient cause on the ground of the confusion relating to pendency of the suit as also the principle that matter is best adjudged on merits rather than being thrown out on technicalities and the aim of the Court to do substantial justice between the parties rather than disposing of the matter on technical grounds unless a party is guilty of gross negligence or whatever, as described hereinabove; took

2 For clarity, G.A. No.693/2017 was later re-numbered as G.A. No.4/2017. In the context of the suit, both refer to one and the same application.

note of Chapter XXXVIII Rule 46[3] of the Rules of The High Court at Calcutta (Original Side), 1914 (hereinafter referred to as the 'Rules'), and; permitted the Written Statement of the respondent to be taken on record subject to payment of Rs.25,000/- (Rupees Twenty Five Thousand) to the appellant as costs. Resultantly, the Registry of the High Court on 15.04.2024 accepted the Written Statement of the respondent in the suit. However, though costs of Rs.25,000/- (Rupees Twenty Five Thousand) were tendered by the respondent to the appellant, it was refused to be accepted.

SUBMISSIONS BY THE APPELLANT:

10. Learned senior counsel for the appellant submitted that the respondent was served with summons on 28.01.2000, yet it chose not to file any Written Statement. It was submitted that an application seeking extension of time to file Written Statement was filed only in the year 2017, which clearly deserves to be dismissed. It was further contended that the Rules do not permit condonation of delay in filing of Written Statement beyond a period of 21 days. For such proposition, reliance was placed on the judgment of the High Court in ***Jayshree Tea & Industries v General Magnets*, 2007 SCC Online Cal 577**, which held that the Rules take precedence over the Code of Civil Procedure, 1908. Learned senior counsel informed us that ***Jayshree Tea*** (*supra*) was carried up to this Court, which dismissed the challenge thereto by Order dated 20.01.2014 in S.L.P. (C) No.378/2014. It was submitted that Chapter XXXVIII Rule 46 of the Rules cannot be used to defeat the very object of the Rules, specifically in the absence of any cogent reasons having been shown in this behalf by the respondent. Reliance was also placed on the judgment in ***Prakash Corporates v Dee Vee Projects Limited*** **(2022) 5 SCC 112**.

11. He submitted that this Court has held that discretion to allow defendants to file Written Statement beyond the 90-day period, could be exercised only if it is specifically found that it is not a case of laxity or gross negligence or if it is an exceptionally hard case. Reliance

3 '***46. Power to enlarge or abridge time.*** *– The Court or a Judge shall have power to enlarge or abridge the time appointed by these rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered, although the application for the same is Not made until after the expiration of the time appointed or allowed.*'

was also placed on the decisions in ***Kailash v Nanhku*** **(2005) 4 SCC 480;** ***Salem Advocate Bar Association T.N. v Union of India*** **(2005) 6 SCC 344;** ***R.N. Jadi and Bros. v Subhashchandra*** **(2007) 6 SCC 420;** ***Zolba v Keshao*** **(2008) 11 SCC 769;** ***Mohammed Yusuf v Faij Mohammad*** **(2009) 3 SCC 513**, and; ***Atcom Technologies Limited v Y.A. Chunawala and Company*** **(2018) 6 SCC 639**.

SUBMISSIONS BY THE RESPONDENT:

12. *Per contra*, learned senior counsel for the respondent/caveator submitted that in the facts and circumstances of the present case, the discretion employed by the Division Bench in allowing the taking on record of the Written Statement of the respondent is perfectly justified. He drew our attention to the Chapter IX Rules 2[4] and 3,[5] Chapter X Rule 27[6] and Chapter XXXVIII Rule 46 of the Rules. In sum, his contention was that the High Court was empowered to enlarge/abridge the time, as had been done in the present case. It was further stated that the sequence of events and list of dates would show that there was neither any deliberate/wilful *laches* nor any lacuna on the part of the respondent in not filing the Written Statement on time, primarily on the ground that as early as on 01.03.2000, the status of the suit was shown as disposed of, which position is factually verified by the subsequent orders of the High Court in the suit and by the reports submitted by its Registry.

4 '***2. Written statements when not to be filed.*** *– No written statement of a defendant shall be filed unless an appearance has first been entered. No written statement or voluntary statement shall be filed, after the time limited for filing the same by the writ of summons, or any rule, or any order, as the case may be, has expired, except under an order obtained by summons in Chambers taken out prior to the expiry of such time.*'

5 '***3. Where written statement is not filed, suit may be transferred to the Peremptory Undefended List.*** *- Except as provided by Chapter X, rule 27, (a) where the written statement of a sole defendant is, or the written statements of all the defendants are, Not filed within the time fixed by the summons, or within such further time as may be allowed, or (b) where one or more of several defendants has or have failed to enter appearance, and the other or others has or have entered appearance but failed to file a written statement within the time fixed by the summons or further time allowed, or (c) where a defendant, who having obtained an order for transfer of a suit to this Court under section 39 of the Presidency Small Cause Court Act (XV of 1882), and having been directed under the provisions of section 40(2) of that Act to file a written statement, has failed to file the same within the time fixed, the suit shall, unless otherwise ordered by the Judge, Registrar or Master, upon requisition by the plaintiff in writing to the Registrar and production of a certificate showing such default, be transferred to the peremptory list of undefended suits.*'

6 '***27. Undefended suits may be kept out of the Peremptory Undefended List by requisition.*** *- An undefended suit or proceeding Not in the Peremptory List of Undefended Suits, may be kept out of such list for any specified period, on the requisition, in writing of the plaintiff's Advocate acting on the Original Side, or of the plaintiff, if acting in person, under the direction of the Registrar.*'

13. It was further submitted that due to sudden listing of the suit on 17.01.2017**,** which surprised the respondent, by way of abundant caution, it promptly filed G.A. No.693/2017 in *bona fide*. He prayed for dismissal of the appeal.

ANALYSIS, REASONING AND CONCLUSION:

14. Having bestowed our anxious thoughts to the entirety of the *lis* and the submissions canvassed at the Bar, we do not find any ground for interference, particularly with reference to the facts noted above. The propositions laid down in the precedents pressed into service by the learned senior counsel for the appellant cannot be quarrelled with. Yet, they do not aid the appellant due to the unique factual prism herein.

15. Learned senior counsel for the appellant is correct that the power to extend time for filing Written Statement should not be employed as a matter of course, but with great caution so that the purpose of the procedural statute is not defeated and unscrupulous litigants do not abuse the process of the Court by adopting dilatory tactics. However, the same cannot be examined in a strait-jacket/sealed compartment for the peculiar facts and circumstances of every case have to be carefully and individually appreciated. Thereafter, the Court concerned has to take a call as to whether the request made is genuine or, more importantly, whether refusal to accede to such request may lead to an eventual miscarriage of justice. It must not be lost sight of that ultimately, procedural technicalities have to give way to substantive justice. Procedure, well and truly, is only the handmaiden of justice.[7] The discretion granted to Courts has to be exercised on a case-specific basis. Undisputedly, '*procedural laws are primarily intended to achieve the ends of justice and, normally, not to shut the doors of justice for the parties at the very threshold*'.[8]

16. In the present instance, we find that the sequence of events clearly indicates that the, respondent cannot be said to be solely at fault for as it was under the impression that the suit already stood disposed

7 For reference, peruse, *inter alia*, **State *of Gujarat v Ramprakash P Puri*** **[1970] 2 SCR 875**; ***Sushil Kumar Sen v State of Bihar*** **(1975) 1 SCC 774**, and the more recent, ***State v M Subrahmanyam*** **(2019) 6 SCC 357**

8 ***Mahadev Govind Gharge v The Special Land Acquisition Officer, Upper Krishna Project*** **[2011] 8 SCR 829**

of and thus, there was no requirement/occasion to file the Written Statement. Admittedly, the case was listed suddenly after a prolonged gap on 17.01.2017, whereafter that the respondent filed an appropriate application. Moreover, the reports dated 25.01.2017 and 11.05.2023 submitted by the Registry of the High Court indicate that (a) the official website of the High Court did indeed state that the suit had been disposed of on 01.03.2000, and; (b) the High Court could not, for reasons best known to it alone, trace out any orders in the file of the suit pre-17.01.2017. *Stricto sensu*, the situation that prevailed is a direct result of the confusion created by the Registry of the High Court. In this view, it would be improper to not permit the taking on record of the Written Statement of the respondent apropos the suit.

17. We, thus, find that discretion has rightly been exercised by the Division Bench of the High Court in favour of the respondent. We are in agreement with the reasons assigned by the Division Bench for setting aside the learned Single Judge's order dated 12.06.2023.

18. Payment of costs ordered to be paid to the appellant by the High Court be made within ten days.

19. The High Court is requested to proceed with the matter keeping in mind the suit being of the year 1999 without giving any time/indulgence to any of the parties, in accordance with law. We clarify that we have not expressed any opinion on the merits of the matter.

20. The appeal is dismissed in the above terms.

POST-SCRIPT:

21. We request the High Court to take appropriate steps, on the administrative side, to ensure that what has emerged from the reports dated 25.01.2017 and 11.05.2023 does not recur for any other case.

Result of the case: Appeal dismissed.

[†]*Headnotes prepared by:* Nidhi Jain

[2024] 7 S.C.R. 1417 : 2024 INSC 552

Rajinder Kaur (Deceased) Through Legal Heir Usha v. Gurbhajan Kaur (Deceased) Through Lrs. Upinder Kaur and Others

(Civil Appeal Nos. 7946-7947 of 2024)

23 July 2024

[C.T. Ravikumar and Rajesh Bindal,* JJ.]

Issue for Consideration

Suit for partition of the joint property was filed by the appellant-plaintiff. High Court whether justified in passing the impugned judgment holding that defendant No.3(a) and defendant Nos.15 to 19 (subsequent buyers) were not liable to render any accounts.

Headnotes[†]

Suit – Rendition of accounts by co-sharers – Defendant No.3(a) and defendant Nos.15 to 19, if were liable to render accounts:

Held: Yes – Admittedly, defendant No.3(a) had rented out a portion of the property and collected rent therefrom, thus, there was no good reason for the High Court to have absolved him from rendition of accounts – However, as the plea sought to be raised by the defendant No.3(a) regarding rent notes produced by him were prima facie found to be sham transactions, as the market rate of the rent of the portion in control of the defendant No.3(a) was much more at that time, the Trial Court will hold an inquiry on this aspect and fix appropriate rent to which the defendant No.3(a) would be liable to contribute to the common kitty for appropriation amongst all the co-sharers – High Court erred in finding that the defendant No.3(a), being in self-occupation of the part of the property, being a co-sharer, will not be liable to render any accounts to arrive at such a conclusion – Reference was made to the fact that his vendor (defendant No.3) had contested litigation with the tenant (defendant No.10) and spent huge amount thereon – But the fact remains that the Defendant No.3(a) had purchased the property from defendant no.3 after it was already vacated by the tenant and he was handed over vacant physical possession thereof – Further, defendant Nos.15 to 19 were absolved from rendering account on the ground that the portion in their possession was to the extent of their share in the property – However, this issue has not been

* Author

determined by any authority – High Court erred in holding that defendant No.3(a) and defendant Nos.15 to 19 were not liable to render any accounts – Impugned judgments set aside – Defendant No.3(a) and defendant Nos.15 to 19 to render accounts and/or liable to contribute rent as assessed by the Trial Court during the course of passing of final decree for the portions in their respective possession. [Paras 20, 21, 21.2, 22, 23]

Case Law Cited

Resident's Welfare Association and Another v. Union Territory of Chandigarh and Others [2023] 1 SCR 601 **: (2023) 8 SCC 643 : 2023 INSC 22 – referred to.**

List of Acts

Chandigarh (Sale of Sites and Buildings) Rules, 1960.

List of Keywords

Rendition of accounts by co-sharers; Suit for partition; Joint property; Co-sharers of the suit property; Subsequent buyers; Furnishing accounts of rent collected; Tenants; Preliminary decree; Final decree; Auction.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 7946-7947 of 2024

From the Judgment and Order dated 05.04.2018 of the High Court of Punjab & Haryana at Chandigarh in RSA No. 6076 of 2015 and RSA No. 2761 of 2016

Appearances for Parties

Samar Pratap Singh, Karanvir Singh Khehar, Ashok K. Mahajan, Advs. for the Appellant.

Dama Seshadri Naidu, Sanjeev Anand, Sr. Advs., M/s. Delhi Law Chambers, Rajiv Kataria, Ms. Debjani Das Purkayastha, Shurya Bhalla, Santosh Krishnan, Ms. Sonam Anand, Ms. Deepshikha Sansanwal, Ms. SI Soujanya, Ankit Goel, Nikhil Sharma, Sahil Patel, Siddharth Batra, Rhythm Katyal, Chinmay Dubey, Ms. Shivani Chawla, Ms. Archna Yadav, Pratyush Arora, Yuvraj Chhabra, Advs. for the Respondents.

**Rajinder Kaur (Deceased) Through Legal Heir Usha v.
Gurbhajan Kaur (Deceased) Through Lrs Upinder Kaur and Others**

Judgment / Order of the Supreme Court

Judgment

Rajesh Bindal, J.

1. Leave granted.

2. The present appeals arise out of a suit for partition[1] filed by the appellant for partition of the property jointly owned at that time by the appellant-plaintiff and respondents-defendant Nos.1 to 9. Defendant Nos.10 to 14 were impleaded in the suit as they were stated to be tenants on the part of the property. During the pendency of the suit before the Trial Court[2] respondent-defendant No.3, Bhupinder Singh, having sold his share to S.C. Bhalla, he was impleaded as defendant No.3(a). Further, defendant Nos.6 to 9 having sold their shares to the subsequent buyers, who were impleaded as defendant Nos.15 to 19.

3. After the amendments were carried out in the plaint, considering the subsequent events and impleadment of subsequent buyers, the final prayer was for partition of the suit property by metes and bounds and in case not possible, sale thereof by open auction and distribution of the sale proceeds amongst the co-sharers. Prayer was also made for directing the defendant Nos.3 to 9 to furnish accounts of rent collected by them from tenants and a direction to the tenants (defendant Nos.10 to 14) to deposit the rent in the court. Further, the plaintiff sought direction against defendant No.3-Bhupinder Singh to pay mesne profit at the rate of ₹150/- per square ft. per month for the area under his occupation. The present litigation is at the stage of passing of preliminary decree. The percentage of shares of the plaintiff and the defendants originally impleaded in the suit, to which no dispute has been raised by the parties before this Court, have been noticed by the High Court[3] in the impugned judgment dated 05.04.2018.[4] The same is extracted below:

1 Civil Suit No. 4406 of 2005

2 Civil Judge (Junior Division), U.T. Chandigarh

3 High Court of Punjab and Haryana at Chandigarh

4 Passed in RSA No. 6076 of 2015

S. NO.	NAME OF OWNER	SHAREHOLDING
1.	Rajinder Kaur (Plaintiff)	25%
2.	Gurbhajan Kaur (Defendant No. 1)	12.5%
3.	Prabhasharan Singh Sandhu (Defendant No. 2)	12.5%
4.	Bhupinder Singh (Defendant No. 3)	1%
5.	Ajay Aggarwal (Defendant No. 4)	17%
6.	Neelam Aggarwal (Defendant No. 5)	17%
7.	Amarnath Singla (Defendant No. 6)	3.75%
8.	Laxmi Devi (Defendant No. 7)	3.75%
9.	Meena Singla (Defendant No. 8)	3.75%
10.	Seema Rani (Defendant No. 9)	3.75%

4. The aforesaid position was before the sale of their respective shares by defendant No.3-Bhupinder Singh to defendant No.3(a)-S.C. Bhalla and by defendant Nos.6 to 9 to defendant Nos.15 to 19. Preliminary decree for partition of the suit property to the extent of 25% share was passed by the Trial Court on 10.10.2012 in favour of the plaintiff. As the property could not be partitioned on account of legal bar under the Chandigarh (Sale of Sites and Buildings) Rules, 1960,[5] the same was directed to be auctioned. The preliminary decree was also passed for rendition of accounts against the defendants wherein all the co-sharers of the suit property were directed to render accounts. Defendant Nos.4 & 5 having inducted tenants in some portion of the suit property in their possession were directed to submit the accounts of rent collected by them. The market rate of the rent of the portions in possession of defendant no.3(a)-S.C. Bhalla and defendant Nos.15 to 19 were to be determined while passing the final decree. Defendant No.3(a) having stepped into the shoes of defendant No.3, defendant Nos.4 & 5, and defendant Nos.15 to 19, having stepped into the shoes of defendant Nos.6 to 9, were restrained from creating charge or encumbrances on the suit property.

5. Challenging the aforesaid preliminary decree passed by the Trial Court, two appeals were filed. Civil Appeal No. 857 of 2012 was filed by defendant No.3(a), and Civil Appeal No. 850 of 2012 was filed

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5 Hereinafter referred to as ‘the 1960 Rules’

by defendant Nos.15 to 19, the subsequent buyers from defendant Nos.6 to 9.

5.1. Inter alia the ground raised by defendant No.3(a)-S.C. Bhalla regarding the mesne profit was that the assessment of the rent by the Trial Court was not appropriate as material evidence placed on record was not considered. Rent being given by a tenant for a small area cannot be made the basis of assessment of rent of the complete building. There was no denial as such regarding his liability to pay the rent. He had even admitted the fact that certain tenants had been inducted by him.

5.2. The defendant Nos.15 to 19/appellants before the First Appellate Court are in possession of part of the suit property on the ground floor, in which they are carrying on business. The appeal was filed primarily on two grounds, firstly, that the property was sold to them while concealing the fact of pendency of the civil suit regarding partition of the property and passing of restraint order. Another objection raised by them was for rendition of accounts claiming that they were in possession of less than 15 % share of the suit property and had not been collecting any rent, hence, no accounts are to be rendered.

5.3. The First Appellate Court[6] allowed the appeal filed by the defendant Nos.15 to 19 holding that they, being in possession of the share of the suit property to the extent of their ownership, were not liable to render accounts to other co-sharers.

5.4. As far as the appeal filed by the defendant No.3(a) is concerned, the judgment and decree of the Trial Court was upheld and the appeal filed by him was dismissed.

6. Aggrieved against the judgment and decree of the First Appellate Court, two appeals were preferred before the High Court.

6.1. R.S.A. No.6076 of 2015 was filed by the plaintiff impugning the judgment and decree passed in the appeal preferred by the defendant Nos.15 to 19, which was allowed by the First Appellate Court.

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6 Additional District Judge, Chandigarh

6.2. R.S.A. No.2761 of 2016 was filed by the defendant No.3(a) impugning the judgment and decree of the First Appellate Court whereby the judgment and decree of the Trial Court qua him was upheld.

6.3. Both the appeals were taken up together and decided vide judgment[7] dated 05.04.2018. Second appeal[8] was disposed of by a short order in terms of judgment passed in R.S.A. No.6076 of 2015. The appeal preferred by the plaintiff challenging the judgment and decree in favour of the defendant Nos.15 to 19 was dismissed, whereas appeal filed by defendant No.3(a) was allowed. The High Court held that defendant No.3(a) cannot be asked to render accounts. He got the possession of the property after purchase from the earlier co-sharer Bhupinder Singh (defendant No.3), who got the same vacated after protracted litigation. Even if he was owner of the 1% share, he was not in wrongful possession.

6.4. As far as the appeal pertaining to defendant Nos.15 to 19 is concerned, it was opined that they being the co-sharers in possession having no income are not liable to render any accounts.

7. In the aforesaid factual matrix, the matter is before this Court at the stage of preliminary decree in a partition suit. The plaintiff has challenged the judgment of the High Court.

8. Learned counsel for the appellant-plaintiff submitted that with the impugned judgment passed by the High Court an anomalous situation has been created. In the suit property at present there are 11 co-sharers, which was originally owned by 10 co-sharers. Judgment and decree of the Trial Court regarding sale of the property by way of auction was not challenged by any of the co-sharers to the extent of 84%. Challenge was made on the issue of rendition of accounts by the co-sharers. Dispute was sought to be raised only by co-sharers to the extent of 16% by filing two separate appeals. One by a co-sharer who owns only 1% share and another by a set of five co-sharers who own 15% shares.

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7 Passed in R.S.A. No. 6076 of 2015.

8 Passed in R.S.A. No. 2761 of 2016 dated 05.04.2018

8.1. The party which owned 1% share in the suit property has in his possession half portion of the ground floor in a three-story building. Whereas another set of persons who were owners to the extent of 15% of shares are in possession of another half on the ground floor. The first and second floors of the building were under the control of the defendant Nos.4 & 5 which were let out to the tenants. They have no objection to render accounts of the rent collected.

9. As far as defendant No.3(a)-S.C. Bhalla, who is owner to the extent of 1% share and in possession of half portion of the ground floor, is concerned even if he had not let out the property, still he is liable to make good the loss suffered by the other co-sharers. The reasoning given by the High Court to absolve him from rendering accounts cannot be legally sustained as he had purchased the property from the erstwhile owner defendant No.3-Bhupinder Singh and got the vacant physical possession. There is nothing on record to suggest that after purchasing the property, he litigated and got the possession from the tenants.

9.1. Insofar as another set of co-sharers to the extent of 15% shares is concerned, they are using half portion of the ground floor for their business, hence liable to pay for use and occupation of the property. They cannot, of their own, claim that the portion in their possession is to the extent of their ownership in the suit property. This is to be determined by the Court. In case they are found to be in possession of the property to the extent of their share and they do not contribute to the common kitty for use and occupation of the premises, they will not be entitled to any share out of the amount collected from the balance 85%. This exercise can very well be done at the time of passing of final decree.

10. Learned counsel for the respondents-defendant nos.15 to 19, set of co-sharers having 15% share in the property, submitted that they are in possession of only 9.48% of the property, on the ground floor. It was purchased during the pendency of litigation. There was no relief claimed for rendition of accounts qua them in the suit. There was no prayer made in the suit for a direction to the defendant Nos.15 to 19 to render accounts. They may be liable to render accounts if they are in possession of area more than their share. In fact, they

are in possession of area less than their share. In the alternative, regarding the rate of rent to be calculated in such circumstances, it was submitted that in case the said defendants are required to render accounts, the rent should not be calculated at the market rate. In fact, the defendant No.3(a)-S.C. Bhalla is in possession of the area of the property more than his share.

11. Insofar as the co-sharer, defendant No.3(a)-S.C. Bhalla, to the extent of 1% share is concerned, the argument is that issue no.3 framed by the Trial Court was regarding direction to furnish the accounts of rent collected from the tenants. In the case in hand, the portion in possession of the present co-sharer was never let out. Rendition of accounts and mesne profits are two different concepts. It was further argued that when the matter was pending before the High Court, defendant No.3(a) offered to give possession of the suit property with him to other co-sharers. An application[9] in the paper book at page no.343 was referred to. The same is dated 27.09.2017. The argument raised is that he having offered possession cannot now be made liable to render accounts or mesne profits. He had purchased the property from defendant No.3-Bhupinder Singh. Whatever possession was available with him was given to defendant No.3(a)-S.C. Bhalla. Issue of mesne profits will come in only if the defendant No.3(a) is found to be in wrongful possession and the same was not given to other owners when asked for.

12. As far as the respondents-defendant Nos.4 & 5 are concerned, the arguments raised by the learned counsel are that when partition of an immovable property is to take place, Order XX Rule 18(2) of C.P.C. will be applicable. Sub-rule (2) clearly provides that at the time of passing of preliminary decree declaring the rights of several parties interested in the property, the Court may give such further directions as may be required. The Trial Court had rightly directed all the parties to render accounts either for the rent collected by them or for the portion in their possession for which the rent was assessed at the rate of ₹107/- per square ft. per month. It was pertaining to the defendant No.3(a) and the defendants Nos.15 to 19. For the portion under the control of the defendant Nos.4 & 5,

9 CM-12168-C-2017 in RSA-2761-2016 (O&M)

which was let out, they have already furnished the accounts. It is only the defendant No.3(a) and defendant Nos.15 to 19 who are reluctant to do the same. A simple suit for partition is pending for about two decades despite the direction issued by this Court, when the matter came at the stage of interim direction, on 10.01.2012[10] to decide the suit within nine months.

13. Heard learned counsel for the parties and perused the relevant referred record. As far as the percentage of shares of different co-sharers in the property in-question is concerned, though partly sold during the pendency of the suit, there is no dispute. As on today it stands as under:

S. NO.	NAME OF PARTIES	SHARE	TRIAL COURT	SUPREME COURT
1.	Rajinder Kaur (Died on 01.12.2006)	25%	Plaintiff	• Appellant (Thr. LR Usha) in SLP (C) No. 12198 of 2018. • Appellant (Thr. LR Usha) in SLP (C) No. 12199 of 2018.
2.	Gurbhajan Kaur	12.5%	Defendant No. 1	• R. No. 1 in SLP (C) No. 12198 of 2018. • R. No. 5 in SLP (C) No. 12199 of 2018.
3.	Prabhsharan Singh Sandhu	12.5%	Defendant No. 2	• Respondent No. 2 (Thr. LRs) in SLP (C) No. 12198. • Respondent No. 6 (Thr. LRs) in SLP (C) No. 12199 of 2018.
4.	SC Bhalla (impleaded on 01.11.2008)	1%	Defendant No. 3(a)	• Respondent No. 3(a) (Thr. LRs] in SLP (C) No. 12198 of 2018. • Respondent No. 1 (Thr. LRs] in SLP (C) No. 12199 of 2018.

10 Passed in S.L.P. (C) No. 33302 of 2011

5.	Ajay Aggarwal	17%	Defendant No. 4	• Respondent No. 4 in SLP (C) No. 12198 of 2018. • Respondent No. 8 in SLP (C) No. 12199 of 2018.
6.	Neelam Agarwal	17%	Defendant No. 5	• Respondent No. 5 in SLP (C) No. 12198 of 2018. • Respondent No. 9 in SLP (C) No. 12199 of 2018.
7.	Kailash Chand Gupta	3%	Defendant No. 15	• Respondent No. 15 in SLP (C) No. 12198 of 2018. • Respondent No. 19 in SLP (C) No. 12199 of 2018.
8.	Indu Bala	3%	Defendant No. 16	• Respondent No. 16 in SLP (C) No. 12198 of 2018. • Respondent No. 20 in SLP (C) No. 12199 of 2018.
9.	Sahil Gupta	3%	Defendant No. 17	• Respondent No. 17 in SLP (C) No. 12198 of 2018. • Respondent No. 21 in SLP (C) No. 12199 of 2018.
10.	Pratik Gupta	3%	Defendant No. 18	• Respondent No. 18 in SLP (C) No. 12198 of 2018. • Respondent No. 22 in SLP (C) No. 12199 of 2018

11.	Ankita Gupta	3%	Defendant No. 19	• Respondent No. 19 in SLP (C) No. 12198 of 2018. • Respondent No. 23 in SLP (C) No. 12199 of 2018.

14. No dispute has been raised regarding partition of the property by the Trial Court by any of the co-sharers. It is not a matter of dispute that in terms of law laid down by this Court in **Resident's Welfare Association and Another vs Union Territory of Chandigarh and Others**[11] interpreting the 1960 Rules, there cannot be partition of property by metes and bounds at Chandigarh. Hence, the only solution was for sale of property by way of auction. This was the decree passed by the Trial Court, which was not challenged by any of the co-sharers on this issue.

15. It has now come on record that defendant No.3(a), who purchased 1% share from the defendant No.3, is in possession of half portion of the ground floor which according to him has not been let out. Another half portion of the ground floor is stated to be in possession of the respondents-defendant Nos.15 to 19, who purchased 15% shares from the defendant Nos.6 to 9 during the pendency of the civil suit and are utilizing the same for their own business. Defendant Nos.4 & 5 are stated to be in control of the first and second floor of the property which are under the tenancy of different tenants. They do not have any grievance against the direction issued by the Trial Court regarding rendition of accounts of the rent collected by them. In fact, they have already rendered the accounts.

16. The effect of the judgment of the High Court is that the co-sharers in the property to the extent of 16% are not liable to render accounts.

17. Firstly, we deal with the issue regarding rendering of accounts by the defendant No.3(a), who had stepped into the shoes of defendant No.3 as he had purchased his share during the pendency of this suit. It is not in dispute that the defendant No.3 was owing only 1% of the share in the property in question, whereas he had possession of a substantial part thereof and handed over the possession of the same to the defendant No.3(a).

11 [2023] 1 SCR 601 : (2023) 8 SCC 643 : 2023 INSC 22

18. Defendant No.3(a), when appeared as a witness before the Trial Court for his examination-in-chief, filed affidavit dated 01.06.2012. He admitted that he had stepped into the shoes of defendant No.3, having purchased his share by way of a registered sale deed dated 02.06.2006. In paragraph 8 of the affidavit, he stated that he had inducted five tenants in the property, namely Sushma Kanwar, Santosh Chauhan, Deepak Sagar, Inder Pal and Gurusharan Singh. The monthly rent received therefrom was ₹1,500/-, ₹1,000/-, ₹1,500/-, ₹1,000/- and ₹800/-, respectively was also mentioned. This information was furnished by the defendant No.3(a) in compliance with an order passed by the Trial Court on 04.04.2006, the relevant parts thereof as contained in paras 23 and 26 of the said order are extracted below:

> "23. ....In the eventuality of the partition, the plaintiff and the other co-owners shall be entitled to a share in the rent and profits so, it will be in the fitness of the things if the defendant No.3 is directed to keep the proper accounts of the amount so realized by him regarding the property in question. He is hereby directed accordingly.
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> xxx xxx xxx
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> 26. As a result of the above detailed discussions, both the applications are disposed of accordingly. The application for receiver stands dismissed and the application under Order 39 rule 1 & 2 r/w 151 CPC stands disposed of with the directions to defendant No.3 and the remaining defendants to keep the proper accounts of the amount so realized by them regarding the property in dispute, like rent etc., and in case, the defendant No.3 lets out the demised premises to anyone after obtaining the possession, he will intimate the court in advance with complete particulars of the person and will also intimate such person that he will be bound by the final outcome of the partition proceedings, and defendant No.3 and the other co-owners will not create any kind of charge on the property in dispute, so as that the rights of the parties after partition can be protected."

18.1. To put the record straight with reference to the amount of rent claimed to have been received by the defendant No.3(a), it is relevant to refer to the fact that the learned Additional District Judge vide order dated 24.05.2010 had appointed the receiver.

The receiver visited the spot (property in question) and informed that none of the tenants as pointed by defendant No.3(a)-S.C. Bhalla was occupying the premises. The Trial Court in its order passed on 27.02.2012 found that the documents (rent notes as were available in the record of the Trial Court)[12] produced by defendant No.3(a)-S.C. Bhalla showing tenancy of the portion of the building in his possession has doubt of genuineness thereof. It was also noticed that the plaintiff was ready to pay ₹1,50,000/- per month as rent for the portion in possession of defendant No.3(a)-S.C. Bhalla. Hence, it would not be possible that he would rent out the same @ ₹5,800/- per month. Be that as it may, this matter will require examination by the Trial Court in the course of passing the final decree.

19. As far as defendant Nos.15 to 19 are concerned, admittedly they are purchasers of the property from defendant Nos.6 to 9 during the pendency of the suit. It is claimed by them that they are carrying on their own business in the portion in their possession and have not let out the same to anyone. Hence, not generating any income therefrom by way of letting out the property. The First Appellate Court held that they are owners to the extent of 15% share in the property and are stated to be in possession of front half portion on the ground floor of the show-room (property in question), stated to be about 1,050 sq. ft. The First Appellate Court had accepted their contention, relieving them from liability to render accounts on the ground that they are in possession of the suit property to the extent of their ownership, a fact yet to be determined. The value of the portion of different floors of the suit property may be different, hence, the value of shares.

20. As noticed earlier, the issue raised by the plaintiff seeking partition of the joint property before this Court is only with reference to rendition of accounts by the defendant No.3(a) and defendant Nos. 15 to 19. The opinion expressed by the High Court in the impugned judgment, that both of them are not liable to render any accounts, deserves to be set aside.

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12 (i) Dated 10.10.2008 executed between S.C. Bhalla [D-3(a)] and Deepak Rai
(ii) Dated 15.10.2008 executed between S.C. Bhalla [D-3(a)] and Santosh Chauhan
(iii) Dated 18.10.2008 executed between S.C. Bhalla [D-3(a)] and I.P. Sharma
(iv) Dated 24.10.2008 executed between S.C. Bhalla [D-3(a)] and Gursharan Singh
(v) Dated 24.10.2008 executed between S.C. Bhalla [D-3(a)] and Sushma Kanwar

20.1. As far as defendant No.3(a) is concerned, as noticed above, he, being in possession of part of the property on the ground floor, had claimed that he had let out that to five tenants @ ₹5,800/- per month. When the receiver was appointed, defendant No.3(a) wanted to deposit with him the rent collected from tenants. The receiver refused to accept the rent. An application filed by the defendant No.3(a)-S.C. Bhalla before the Trial Court for a direction to the receiver to receive a cheque dated 25.08.2011 for ₹87,000/- was disposed of with the observation that the receiver had rightly refused to receive the alleged rent as the alleged tenancies created by S.C. Bhalla were found to be *prima facie* not genuine. He shall be bound to render the accounts at the time of partition as observed by the High Court in its order dated 08.08.2011. The reference can be made to the order dated 27.02.2012 passed by the Trial Court while disposing of the applications filed by the receiver and the defendant No.3(a).

21. Since it is the admitted case of the defendant No.3(a) himself that he had rented out a portion of the property and collected rent therefrom, there was no good reason for the High Court to have absolved him from rendition of accounts. However, this is with a rider as the plea sought to be raised by the defendant No.3(a) regarding rent notes produced by him were prima facie found to be sham transactions, as the market rate of the rent of the portion in control of the defendant No.3(a) was much more at that time. Even plaintiff offered ₹1,50,000/- per month. Hence, Trial Court will have to hold an inquiry on this aspect and fix appropriate rent to which the defendant No.3(a) would be liable to contribute to the common kitty for appropriation amongst all the co-sharers.

21.1. As far as the argument raised by the learned counsel for the defendant No.3(a)-S.C. Bhalla regarding application filed in the High Court offering to hand over possession of the property in his possession is concerned, as annexed in the present paper book at page No.343, the application was traced out from the record and the same bears No.CM-12168-C-2017 in RSA-2761-2016. It is evident from the order passed by the High Court dated 30.01.2018 that the aforesaid application was directed to be heard with the main case. Meaning thereby that the defendant No.3(a) may not be serious about the prayer

made in the application. It is further evident from the fact that at the time of the final argument of the appeal again the prayer made in the application was not pressed as there is no discussion on the same and the issue was not raised by defendant No.3(a) thereafter.

21.2. The High Court misdirected itself in recording the finding that the defendant No.3(a)-S.C. Bhalla, being in self-occupation of the part of the property, being a co-sharer, will not be liable to render any accounts to arrive at such a conclusion. Reference was made to the fact that his vendor (defendant No.3-Bhupinder Singh) has contested litigation with the tenant (defendant No.10-M/s. H.M. Traders) and spent huge amount thereon. But the fact remains that the defendant No.3(a)-S.C. Bhalla has purchased the property from defendant no.3-Bhupinder Singh after it had already been vacated by the tenant and he was handed over vacant physical possession thereof.

22. As far as defendant Nos.15 to 19 are concerned, there is no dispute that the portion in their possession has not been rented out to any third party. But it is also a fact admitted by them that they are carrying their own business in the portion in their possession. They have been absolved from rendering account on the ground that the portion in their possession is to the extent of their share in the property. However, this issue has not been determined by any authority. The fact remains that the defendant Nos.15 to 19 are carrying on their own business in the property in question in their possession and earning therefrom. Had their business been carried on in a rented premises, they would have certainly paid some rent. In case, during the course of proceedings for passing of final decree, the Court determines that the defendant Nos.15 to 19 were in actual physical possession of the property in question to the extent of their share, they may not be liable to contribute any amount in the kitty and subsequently will not be entitled to any share from the total amount in the kitty coming out of the amount collected from other portion of the property i.e. 85%. However, in case it was found that they are in possession of portion more than their share, there can be two options; either they contribute to the common kitty for the entire portion of the property in their possession and then get share therefrom or they may be held liable to contribute to the common kitty for the property in their possession beyond their share and subsequently they will not be

entitled to any share from the common kitty. However, such an option will have to be exercised by the defendant Nos.15 to 19 before assessment of the rent, to be paid by the aforesaid defendants and not after the rent has been assessed by the Trial Court.

23. The appeals are accordingly allowed. The impugned judgments passed by the High Court are set aside. There shall be no order as to costs. It is directed that the defendant No.3(a)-S.C. Bhalla and defendant Nos.15 to 19, namely, Kailash Chand Gupta, Indu Bala, Sahil Gupta, Pratik Gupta and Ankita Gupta, respectively shall be liable to render accounts and/or liable to contribute rent as assessed by the Trial Court during the course of passing of final decree for the portions in their respective possession. This Court has already elaborated the course which needs to be adopted in para '22' hereinabove insofar as defendant Nos.15 to 19 are concerned.

24. It is further clarified that after the sale of the property if any of the co-sharers fail to contribute any amount to the common kitty for distribution amongst all the co-sharers as determined by the Trial Court, the distribution of the amount so collected after the sale of the property shall be reduced to that extent from the share of that co-sharer.

25. We may notice here that the suit for partition was filed way back in the year 2005. The matter is pending at the stage of passing of preliminary decree for the last about two decades that too in a case where the share of the parties is not in dispute. The only dispute was with reference to rendition of accounts by two of the co-sharers. Issues regarding whom have been dealt with in this Judgment we direct the Trial Court to expedite the proceedings and dispose of the same within a period of nine months from the date of receipt of this order.

Result of the case: Appeals allowed

[†]*Headnotes prepared by:* Divya Pandey

[2024] 7 S.C.R. 1433 : 2024 INSC 573

Meenakshi
v.
The Oriental Insurance Co. Ltd.

(Civil Appeal No. 8473 of 2024)

23 July 2024

[Hima Kohli and Sandeep Mehta, JJ.]

Issue for Consideration

Whether perquisites/allowances in the nature of house rent allowance, flexible benefit plan and company contribution to provident fund can be excluded from the basic salary of the deceased while applying the principle of rise in income by future prospects for assessing compensation under the Motor Vehicles Act, 1988.

Headnotes†

Motor Vehicles Act, 1988 – Claim for compensation – Perquisites/allowances in the nature of house rent, flexible benefit plan and company contribution to provident fund cannot be excluded from the basic salary for the purpose of applying future prospects – High Court erred in excluding them – High Court justified in deducting Income Tax from the gross salary of the deceased for calculating his gross income – Appeal partly allowed:

Held: Claim for compensation by deceased's mother – High Court vide impugned judgment reduced compensation amount awarded by Accident Claims Tribunal – It excluded the components of house rent allowance, flexible benefit plan and contribution to provident fund etc. from the gross income for the purpose of applying future prospects – It also deducted income tax from the gross salary – Appeal partly allowed – High Court erred in omitting to add components of house rent allowance, flexible benefit plan and company contribution to provident fund to the basic salary of the deceased – However, High Court justified in deducting income tax from the gross salary while calculating the gross income – Compensation amount re-assessed. [Paras 12-15]

Case Law Cited

Raghuvir Singh Matolya and Ors. v. Hari Sigh Malviya and Ors. [2009] 5 SCR 379 **: (2009) 15 SCC 363;** *National Insurance Company Ltd. v. Nalini and Ors.,* **Special Leave to Appeal (C) No. 4230/2019 – relied on.**

List of Acts

Motor Vehicles Act, 1988.

List of Keywords

Claim; Compensation; MACT; Arrear of rent; Loss of dependency; Principle of rise in income by future prospects; House rent allowance; Flexible benefit plan; Company contribution to provident fund; Income tax deduction; Basic salary of the deceased.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 8473 of 2024

From the Judgment and Order dated 02.08.2017 of the High Court of Karnataka at Kalaburagi in MFA No. 200311 of 2016

Appearances for Parties

C.M. Angadi, Rameshwar Prasad Goyal, Advs. for the Appellant.

Arvind Gupta, Anil Kumar Sahu, Mohit Bidhuri, Mrs. Suman Sharma, Kanav Bhardwaj, Sunil Kumar Roy, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Order

1. Delay condoned.

2. Leave granted.

3. This appeal arises from the judgment dated 2nd August, 2017 rendered by the learned Division Bench of the High Court of Karnataka, Kalaburagi Bench in M.F.A. No. 200311/2016 (MV) whereby, while partly accepting the appeal preferred by the respondent No. 1- Insurance Company,[1] the High Court reduced the compensation

1 Respondent no. 2 was deleted vide order dated 28th August, 2023 by the Hon'ble Judge-in-Chamber

awarded to the claimant i.e., Appellant herein *vide* award dated 25th November, 2015 passed by the Principal Senior Civil Judge and MACT[2] at Kalaburagi in a claim petition[3] filed by the appellant herein. The Accident Claims Tribunal had awarded compensation to the tune of ₹ 1,04,01,000/- with interest @ 6% per annum to the claimant i.e., the appellant herein being the mother of Shri Suryakanth who expired in a road accident on 29th August, 2013. The Accident Claims Tribunal, assessed and quantified the compensation in the following manner:-

> "16. **Loss of Dependency**: The petitioner is the mother of deceased Suryakanth. Admittedly, the age of the deceased is shown as 26 years in the post mortem report as per Exh.P13, that is taken into account. Regarding the income of the deceased, PW.1 has stated that the deceased Suryakanth was doing as service consultant and drawing monthly gross salary of Rs.56,935/- per month and to prove the said fact she has produced Exh.P15 to Exh.P25 which are appointment letter, Salary review letter, Salary certificates, certificate issued by CISCO, PAN Card, Diploma Certificate, Income Tax Returns and Form No.16 respectively, but as per Exh.P17 Salary Certificate which is of the August 2013 of the deceased which shows the total earning of the deceased is Rs. 50,942/-, so the said fact is taken into consideration for awarding compensation amount, because as per the income tax returns which are produced by the petitioner it is seen the deceased was PAN cardholder and he was paying income tax which shown that he was capable of earning the amount which is shown in the Exh.P17 and even though the deceased was working in a private limited Company, the said salary amount is to be considered because he is Diploma Certificate Holder and basing on his efficiency the Company was paying the said amount to him. So for salary of Rs. 50,942/- Professional Tax of Rs. 200/- is deducted which comes to Rs. 50,742/- per month. Therefore, in my opinion, it is feasible to consider

2 hereinafter being referred to as 'The Accident Claims Tribunal'

3 MVC No. 887 of 2013

the income of the deceased @ 50,742/- and annual income comes to Rs.6,08,904/-. As the deceased was unmarried person, 50% of the said amount is to be deducted, it comes to Rs.3,04,452/-. As per the recent decision of the Hon'ble Apex Court reported in 2015 (3) TAC.1 (SC) and case law reported in Sarla Varma and others V/s Delhi Transport Corporation and another and Rajesh and others, the deceased is also entitled for loss of future prospects at 50% of his income. So, if 50% of the said Income is added Rs.3,04,452/- It would be Rs.6,08,904/- (3,04,452 + 3,04,452) per annum. Regarding the age of the deceased, In the post mortem report as per Exh.P13 the age of the deceased is shown as 26 years. So, the same is taken into consideration for applying multiplier as per the case law reported in Sarla Verma and others V/s Delhi Transport Corporation and another is "17". The calculation of the total loss of dependency is as under: Rs.6,08,904 x 17 multiplier = Rs.1,03,51,368/-. The petitioner is entitled for loss of dependency Rs.1,03,51,368/- .

Therefore, the petitioner is entitled for total compensation under different heads as follows:

1. Loss of Love and Affection	₹ 25,000-00
2. Funeral Expenses	₹ 25,000-00
3. Loss of Dependency	₹ 1,03,51,368-00
Total Compensation Rounded off	₹ 1,04,01,368-00 ₹ 1,04,01,000-00

Therefore, the petitioner is entitled for total compensation of Rs.1,04,01,000/- along with interest @ 6% per annum from the date of petition till its realization."

4. The High Court, while considering the appeal preferred by respondent No. 1- Insurance Company, concluded that the Accident Claims Tribunal's approach while assessing the compensation under the head of 'loss of dependency' was erroneous on various grounds. It was held that the salary of the deceased, should be based on the Annual Salary Review for the year 2013, according to which his gross salary was ₹ 4,88,982/- (Rupees four lakh eighty eight thousand nine hundred and eighty two only). This figure realistically

reflects what the deceased-Suryakanth would have received for the year 2013. The High Court took the basic salary of deceased-Suryakanth @ ₹ 2,30,652/- (Rupees two lakh thirty thousand six hundred and fifty two only) per annum for calculating the loss of income and only on the said figure, the future prospects @50% were applied, which worked out to ₹ 1,15,326/- (Rupees one lakh fifteen thousand three hundred and twenty six only). As per the High Court, the total loss of income, including the allowances worked out to ₹ 6,20,967/- (Rupees six lakh twenty thousand nine hundred and sixty seven only). From the said amount professional tax to the tune of ₹ 2,400/- (Rupees two thousand four hundred only) and Income Tax to the tune of @ ₹ 61,857/- (Rupees sixty one thousand eighty hundred and fifty seven only) was deducted and hence, the total annual income of the deceased-Suryakanth worked out to ₹ 5,56,710/- (Rupees five lakh fifty six thousand seven hundred and ten only) as per the High Court. The High Court in particular held that the components of house rent allowance, flexible benefit plan and contribution to provident fund etc. could not be accounted for the purpose of adding 50% to the gross income of the deceased on the principle of future prospects.

5. Multiplier of 17 was applied to the said figure and 50% from the total income calculated as above was deducted towards personal expenses considering the fact that the claimant, i.e., the appellant herein, being the mother of the deceased, was the sole dependent of the deceased. The net re-assessed compensation as calculated by the High Court came out to ₹ 49,57,035/- (Rupees forty nine lakh fifty seven thousand and thirty five only). Consequently, the compensation awarded by the Accident Claims Tribunal was reduced as above *vide* the impugned judgment dated 2nd August, 2017 which is subjected to challenge by the claimant-appellant by way of this appeal by special leave.

6. Having heard and considered the submissions advanced by learned counsel for the parties and after going through the impugned judgments and the record, we are of the opinion that the reasoning assigned by the High Court, that the perquisites/allowances in the nature of house rent, flexible benefit plan and Company contribution to provident fund would have to be excluded from the gross income for the purpose of applying future prospects, is erroneous on the face of record. There cannot be any two views on the aspect that

these perquisites/allowances admissible to a salaried employee do not remain static and continue to rise generally proportionate to the length of the service of the employee. These allowances are generally fixed on a pro rata basis with reference to the basic salary.

7. As per the service conditions and pay scales of the Government officials, the house rent allowance is payable between 8% and 30% of the basic salary. Therefore, the house rent allowance is paid in a fixed ratio proportionate to the basic salary. With the increase in basic salary, the quantum of house rent allowance also increases proportionately. The flexible benefit plan and Company contribution admissible to a person employed in private service would also not remain static and are bound to increase with the length of service. The only bone of contention in this appeal is whether perquisites/allowances referred to above should also be taken into account while applying the future prospects. Therefore, entirely excluding these components from the salary of the employee for applying the principle of future prospects would be unjustified. Consequently, we have no hesitation in holding that these allowances cannot be ignored and have to be added to the salary when assessing the rise in income due to future prospects of a person employed in private service. This Court has carved out a rational formula to fix the percentage of rise of income by future prospects. In the case at hand, the said percentage has been fixed at 50% by both, the Accident Claims Tribunal as well as the Division Bench of the High Court. In view of the discussion made *supra*, the perquisites/allowances have to be added to the basic salary of the deceased before applying the rise by future prospects.

8. In ***Raghuvir Singh Matolya and Others v. Hari Singh Malviya and Others***,[4] this Court held that the house rent allowance ought to be included for determining the income of the deceased. The relevant paras are extracted hereinbelow for ready reference:-

> "6. Dearness allowance, in our opinion, should form a part of the income. House rent allowance is paid for the benefit of the family members and not for the employee alone. What would constitute an income, albeit in a different fact

4 [2009] 5 SCR 379 : (2009) 15 SCC 363

situation, came up for consideration before this Court in *National Insurance Co. Ltd. v. Indira Srivastava* [(2008) 2 SCC 763] wherein it was held:

"19. The amounts, therefore, which were required to be paid to the deceased by his employer by way of perks, should be included for computation of his monthly income as that would have been added to his monthly income by way of contribution to the family as contradistinguished to the ones which were for his benefit. We may, however, hasten to add that from the said amount of income, the statutory amount of tax payable thereupon must be deducted.

20. The term 'income' in P. Ramanatha Aiyar's *Advanced Law Lexicon* (3rd Edn.) has been defined as under:

'(iii) the value of any benefit or perquisite whether convertible into money or not, obtained from a company either by a director or a person who has substantial interest in the company, and any sum paid by such company in respect of any obligation, which but for such payment would have been payable by the director or other person aforesaid, occurring or arising to a person within the State from any profession, trade or calling other than agriculture.

'It has also been stated: ' "Income" signifies "what comes in" (per Selborne, C., *Jones v. Ogle* [(1861-73) All ER Rep 918]). "It is as large a word as can be used" to denote a person's receipts (per Jessel, M.R., *Huggins, ex p., Re* [51 LJ Ch 935]). Income is not confined to receipts from business only and means periodical receipts from one's work, lands, investments, etc. *Secy. to the Board of Revenue, Income Tax v. Al. Ar. Rm. Arunachalam Chettiar & Bros.* [AIR 1921 Mad 427] Ref. *Vulcun Insurance Co. Ltd. v. Corpn. of Madras* [AIR 1930 Mad 626 (2)] .'

21. If the dictionary meaning of the word 'income' is taken to its logical conclusion, it should include those benefits, either in terms of money or otherwise, which are taken into consideration for the purpose of payment of income

> tax or professional tax although some elements thereof may or may not be taxable or would have been otherwise taxable but for the exemption conferred thereupon under the statute.
>
> To the same effect is the decision of this Court in Oriental Insurance Company Limited v. Ram Prasad Varma and Others [(2009) 2 SCC 712 : (2009) 1 SCC (Cri) 853 : (2009) 1 Scale 598].
>
> 7. We, therefore, are of the opinion that "dearness allowance" and "house rent allowance" payable to the deceased should have been included for determining the income of the deceased and consequently the amount of compensation."
>
> (emphasis supplied)

9. Recently in a judgment dated 11th July, 2024 in ***National Insurance Company Ltd. v. Nalini and Ors. [Petition for Special Leave to Appeal (C) No. 4230/2019],*** this Court held that, allowances under the heads of transport allowance, house rent allowance, provident fund loan, provident fund and special allowance ought to be added while considering the basic salary of the victim/deceased to arrive at the dependency factor.

10. Therefore, components of house rent allowance, flexible benefit plan and company contribution to provident fund have to be included in the salary of the deceased while applying the component of rise in income by future prospects to determine the dependency factor. The Accident Claims Tribunal was justified in factoring these components into the salary of the deceased, before applying 50% rise by future prospects due to future prospects, while calculating the total compensation payable to the appellant.

11. Clearly, the High Court erred in accepting the appeal filed by the respondent No. 1- Insurance Company and reducing the compensation payable to the appellant from a sum of ₹ 1,04,01,000/- (Rupees One crore four lakh one thousand only) awarded by the Accident Claims Tribunal to ₹ 49,57,035/-(Rupees Forty nine lakh fifty seven thousand and thirty five only).

12. We, therefore, hold that the High Court has erred while omitting to add the components of house rent allowance, flexible benefit plan and Company contribution to provident fund to the basic salary of the deceased while applying the principle of rise in income by future prospects.

13. However, we are of the opinion that the High Court was justified in deducting Income Tax from the gross salary of the deceased-Suryakanth for calculating his gross income. This factor was overlooked by the Accident Claims Tribunal while quantifying the award.

14. As a result, the re-assessed compensation payable to the appellant after making deduction towards Income Tax is tabulated in the following manner: -

S. No.	Heads	Amount
1.	**Loss of Dependency**	
	Monthly Salary of the Deceased - ₹ 50,942/- (inclusive of house rent allowance, flexible benefit plan and contribution to provident fund).	-
	(Less) Professional Tax of ₹ 200/month to be deducted (₹ 50,942-₹ 200)	₹ 50,742/-
	(Less) Income Tax @ 10% as per 2013-2014 i.e., Rs. 5,074 (₹ 50,742 – ₹ 5,074)	₹ 45,668/-
	Annual Gross Income (₹ 45,668 x 12)	₹ 5,48,016/-
	(Less) 50% to be deducted towards dependency as the deceased was unmarried (₹ 5,48,016 – ₹ 2,74,008)	₹ 2,74,008/-
	(Add) 50% to be added towards rise in income by future prospects (₹ 5,48,016 + ₹ 2,74,008)	₹ 5,48,016/-
	Total Loss of Dependency = ₹ 5,48,016 X 17 (Multiplier as the deceased age was 26)	₹ 93,16,272/-
1.	**Funeral Expenses**	₹ 25,000/-
2.	**Loss of Love and Affection**	₹ 25,000/-
	Total Compensation	**₹ 93,66,272**

15. The impugned judgment dated 2nd August, 2017 passed by the Division Bench of the High Court is thus, reversed. The appeal is partly allowed on the above terms. Costs made easy.

Result of the case: Appeal partly allowed.

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

[2024] 7 S.C.R. 1443 : 2024 INSC 559

Yash Developers
v.
Harihar Krupa Co-Operative Housing Society Limited & Ors.

(Civil Appeal No. 8127 of 2024)

30 July 2024

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

Issue for Consideration

Development agreement in favour of the appellant was terminated by the Apex Grievance Redressal Committee (AGRC) exercising its power under Section 13 of the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971. Order of termination upheld by the High Court. Issue as regards scope of judicial review under Article 226 of the Constitution against an order passed under Section 13; accountability of officers exercising power coupled with duty under Section 13; Performance audit of Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971.

Headnotes†

Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971 – s.13 – Constitution of India – Article 226 – Rehabilitation of slum dwellers – Appellant was appointed as a developer by respondent no. 1 – However, development was prolonged for over two decades – Development agreement terminated by the statutory authority – Apex Grievance Redressal Committee (AGRC) – Validity of the said power exercised by the AGRC – Order of termination upheld by the High Court – Plea of the appellant that the delay in implementation of the project was in various phases between 2003 to 2011, 2011 to 2014 and 2014 to 2019 due to various reasons *inter alia* long-drawn litigation with a competing builder, delay in obtaining the environmental clearances or the delay due to non-cooperation of certain slum dwellers, in which the appellant had no role and was not at all responsible for:

Held: Under s.13(2), Slum Rehabilitation Authority (SRA) has the power to redevelop the project if it is satisfied that the development is not proceeding within the time specified – This power of SRA

* Author

is coupled with a duty to ensure that the project is completed within time – The provision is a statutory incorporation of time integrity in the performance of the duty – SRA is accountable for the performance of this duty – The primary responsibility to implement s.13 and allied provisions and to monitor compliances of schemes and agreements vests with the CEO – If the actions of CEO are based on the directions of the SRA, then the SRA must equally bear the responsibility – A writ of mandamus would lie against the concerned authorities if they do not perform the statutory duty of ensuring that the project is completed within the time prescribed – Delay of 8 years in resolving disputes with a competing builder cannot be a justification under any circumstance – Appellant being a developer fully understands the process of obtaining environmental clearances while other sanctions and permissions are pending, and it was for him to make all the necessary arrangements – Non-cooperation of some of the members cannot be a ground for delaying the project from 2014 to 2019 – AGRC and High Court correctly held that the delay caused due to the sanction of the draft development plan for the construction of the road cannot be a justification for delaying the project from 2015 to 2019 – Justifications given by the appellant for delaying the project, rejected – No merit in the present appeal, costs imposed – Though the justifications for delay are rejected, but there was dereliction of the statutory duty of the SRA in ensuring that the project is completed within time – There was negligence on the part of CEO and the SRA and they are accountable for their actions. [Paras 13, 14.1, 24, 26, 27]

Constitution of India – Article 21 – Right to life – Slum Rehabilitation Scheme – Rehabilitation of slum dwellers:

Held: Execution of the project under the Slum Rehabilitation Scheme cannot be viewed as a real estate development project – There is a public purpose involved inextricably connected to the right to life of some of our brother and sister citizens living in pathetic conditions. [Para 27]

Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971 – Performance audit of – Litigation under the Act, worrisome – Directions for comprehensive statutory audit issued – Problem with the statutory scheme w.r.t issues such as identification and declaration of land as a slum; identification of slum dwellers; selection of a developer;

apportionment of the slum land between redevelopment area and sale area; obligation to provide transit accommodation for the slum dwellers pending redevelopment; issues of lack of independence and objectivity in the functioning of statutory authorities; effectiveness of statutory remedies; judicial review proceedings under Art. 226 cannot be a long-term solution:

Held: The problems arising out of the statutory scheme and policy framework should have come under review by the State of Maharashtra – Assessment of the working of the statute to realise if its purpose and objective achieved or not is the implied duty of the executive government – Reviewing and assessing the implementation of a statute is an integral part of Rule of Law – It is in recognition of this obligation of the executive government that the constitutional courts have directed governments to carry performance audit of statutes – Role of judiciary elaborated – Chief Justice of the Bombay High Court requested to constitute a bench to initiate suo motu proceedings for reviewing the working of the statute to identify the cause of the problems indicated. [Para 35, 42]

Judicial review – Directions for review and assessment of the implementation of a Statute – Justification:

Held: Constitutional courts are fully justified in giving such directions as they are in a unique position of perceiving the working of a statute while exercising judicial review, during which they could identify the fault-lines in the implementation of a statute. [Para 37]

Case Law Cited

Susme Builders Pvt. Ltd. v. CEO, Slum Rehabilitation Authority & Ors. [2018] 1 SCR 1 **: (2018) 2 SCC 230;** *Vijay Rajmohan v. CBI* [2022] 19 SCR 563 **: (2023) 1 SCC 329;** *State of Haryana v. Mukesh Kumar* [2011] 14 SCR 211 **: (2011) 10 SCC 404;** *Pravin Electricals (P) Ltd. v. Galaxy Infra & Engineering (P) Ltd.* [2021] 1 SCR 1162 **: (2021) 5 SCC 671;** *Preeti Gupta v. State of Jharkhand* [2010] 9 SCR 1168 **: (2010) 7 SCC 667;** *Arif Azim Co. Ltd. v. Aptech Ltd.* [2024] 3 SCR 73 **: (2024) 5 SCC 313;** *Public Interest Foundation v. Union of India* [2018] 10 SCR 141 **: (2019) 3 SCC 224 – referred to.**

Galaxy Enterprises v. State of Maharashtra **(2019) SCC OnLine Bom 897;** *Tulsiwadi Navnirman Co-op Housing Society Ltd. & Anr.*

v. State of Maharashtra & Ors., **2008 (1) Bom.C.R.1;** *New Janta SRA CHS Ltd. v. State of Maharashtra* **(2019) SCC Online Bom 3896 – referred to.**

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List of Acts

Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971; Constitution of India.

List of Keywords

Section 13 of the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971; Judicial review under Article 226 of the Constitution; Development agreement; Developer; Performance audit of statute; Order of termination; Comprehensive statutory audit; Rehabilitation of slum dwellers; Delay in implementation of the project; Development agreement terminated; Redevelopment of the project; Rehabilitation building; Environmental clearance; Development plan; Builders; Slum Rehabilitation Scheme; Right to life.

Case Arising From

CIVIL APPELLATE/INHERENT JURISDICTION: Civil Appeal No. 8127 of 2024

From the Judgment and Order dated 14.10.2022 of the High Court of Judicature at Bombay in WPL No.18022 of 2021

With

Contempt Petition (Civil) No. 217 of 2024 In SLP (C) No. 20844 of 2022

Appearances for Parties

Kapil Sibal, Sr. Adv., C.U. Singh, Vikas Mehta, Adit Nair, Prakash Shah, Ranbir Singh, Abhik Chimni, Ms. Rupali Samuel, Kartik, Advs. for the Appellant.

Sanjay Kharde, Shekhar Naphade, C.A. Sunderam, Dama Seshadri Naidu, Dhruv Mehta, Huzeifa Ahmadi, Vinay Navare, Sr. Advs., Satyajeet Kharde, Sunil Kumar Verma, Anirudha Joshi, Shashibhushan P. Adgaonkar, Ms. Pradnya S. Adgaonkar, Aaditya

Yash Developers v.
Harihar Krupa Co-Operative Housing Society Limited & Ors.

Aniruddha Pande, Ms. Rukmini Bobde, Siddharth Dharmadhikari, Bharat Bagla, Sourav Singh, Aditya Krishna, Ms. Preet S. Phanse, Adarsh Dubey, Ms. Soumya Priyadarshinee, Ankit Ambasta, Amit Srivastava, Amlaan Kumar, Saket Sikri, Aman Vachher, Dhiraj, Ashutosh Dubey, Ms. Anshu Vachher, Ms. Abhiti Vachher, Akshat Vachher, Ms. Smriti Puri, Amit Kumar, P. N. Puri, Anil Nag, Zulfikar Ali, Mrs. Jaya, Ms. Monica Saini, Amit Agnihotri, Ms. Priyanka Midha, Ms. Priya Misra, M. Yogesh Kanna, Ms. Anshula Vijay Kumar Grover, Ms. Rucha Deshpande, Rajeev Maheshwaranand Roy, Nilesh Kumar, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Pamidighantam Sri Narasimha, J.

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1. Leave granted.

I. *Introduction*:

2. The present controversy is a manifestation of common battles between competing real estate developers under the pretext of rehabilitating slum dwellers under the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971.[1] In the year 2003, the appellant was appointed as a developer by respondent no. 1, a co-operative Housing Society of slum dwellers having their hutments on the subject land in Borivali, Mumbai which was declared as a 'slum area' under the Act. As the development was unduly prolonged for over two decades, the development agreement in favour of the appellant was terminated by the Apex Grievance Redressal Committee[2] by its order dated 04.08.2021. The order of termination was challenged by the appellant before the Bombay High Court.[3]

3. The Bombay High Court formulated the following issues:

> *"(i) A developer being removed on the non-fulfillment of the basic requirement to commence construction of a slum rehabilitation building for a long period of 18 years, whether is not fatal to the object and intention of a statutory intent behind a Slum Rehabilitation Scheme.*
>
> *(ii) Another question would be as to whether the right to shelter which is part of the slum dwellers' right to livelihood guaranteed under Article 21 of the Constitution, can be*

1 Hereinafter, referred to as the "Act".

2 For short, the 'AGRC'.

3 Writ Petition (L) No. 18022 of 2021.

continued to be nullified by such actions of unconscionable delay on the part of the developer, in not commencing construction of the slum project even by an inch more particularly when the nature of such work awarded to a developer for him is purely a commercial venture, for profit."

4. Apart from the above two issues, the High Court highlighted the limited scope of judicial review under Article 226 of the Constitution against the decision of the statutory authority-AGRC. The High Court, however, proceeded to examine the facts in full detail and dismissed the writ petition on facts, as well as on law.[4] Thus, the present appeal.

5. Even before us, the appellant argued the case only on facts, to the extent that we were under an illusion that we were hearing suit for specific performance involving an issue of ready and willingness. Having heard the learned counsels for the parties at length on facts, we will certainly deal with their submissions, but before that we must reiterate the limited scope of inquiry under Article 226 of the Constitution.

II. *Scope of Judicial Review against an order under Section 13 of the Act:*

6. In this case, as in any other public law proceedings, we are concerned with the legality and validity of the power exercised by the AGRC in terminating the development agreement with the appellant by its order dated 04.08.2021. This order is in exercise of power under Section 13 of the Act which is as under:

"***13. Power of Competent Authority to redevelop clearance area:***

(1) Notwithstanding anything contained in sub-section (1) of Section 12 the Competent Authority may, at any time, after the land has been cleared of buildings in accordance with a clearance order, but before the work of redevelopment of that land has been commenced by the owner, by order, determine to redevelop the land at its own cost, if that Authority is satisfied that it is necessary in the public interest to do so.

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4 By judgment dated 14.10.2022, reported as 2022 SCC Online Bom 3712, hereinafter referred to as the impugned Judgment.

> *(2) Where land has been cleared of the buildings in accordance with a clearance order,* ***the Competent Authority, if it is satisfied that the land has*** *been, or is being, redeveloped by the owner thereof in contravention of plans duly approved, or any restrictions or conditions imposed under sub-section (10) of Section 12, or has* ***not been redeveloped within the time, if any, specified under such conditions, may, by order, determine to redevelop the land at its own cost****.*
>
> *Provided that, before passing such order, the owner shall be given a reasonable opportunity of showing cause why the order should not be passed."*
>
> (emphasis supplied)

7. Section 13(2) of the Act specifically empowers the competent authority to re-determine the agreement if it is satisfied that the re-development has not been done within the time specified. The provision is certainly a statutory incorporation of *time integrity* in the performance of the duty. We recognise this as a statutory duty of the competent authority to ensure that the project is completed within the prescribed time. We have no hesitation even in holding that a writ of mandamus would lie against the concerned authorities if they do not perform the statutory duty of ensuring that the project is completed within the time prescribed.

8. In *Susme Builders Pvt. Ltd.* v. *CEO, Slum Rehabilitation Authority & Ors.*,[5] this Court held that Section 13(2) of the Act empowers the statutory authorities to take action and hand over the project to some other agency if the development is being delayed. The relevant portions of the judgment are as under:-

> "*49. Otherwise, there would be an anomalous situation where the Society would have terminated its contract with Susme but the letter of intent issued by the SRA would continue to hold the field and it would be entitled to develop the land. The Society approached the SRA, in fact, asking it to take action against Susme. Since the SRA is the authority which issued the letter of intent, it will definitely have the power to cancel the letter of intent...*

5 [2018] 1 SCR 1 : (2018) 2 SCC 230

…

52. A bare reading of these provisions shows that in terms of clauses (c) and (d) of sub-section (3) of Section 3-A of the Slum Act, the SRA not only has the power, but it is duty-bound to get the slum rehabilitation scheme implemented and to do all such other acts and things as will be necessary for achieving the object of rehabilitation of slums. In this case, the SRA was faced with a situation where the slum-dwellers were suffering for more than 25 years and, therefore the action taken by SRA to remove Susme for the unjustified delay was totally justified."

9. Case after case, the Bombay High Court has been ruling that, a) the developer is duty-bound to complete the project within the stipulated time and that b) the Slum Rehabilitation Authority (SRA) has not merely the power but a broader duty to ensure that the developer completes the project within time. We will refer to those judgments, not so much to certify that the issue is no more res-integra, but to emphasise that the rulings have not had the desired impact, much less compliance. The reason is that, neither the developer nor the authority is asked to face the consequences of their derelictions. That Section 13(2) is a power coupled with duty is clear from the judgments of this Court and many other judgments of the High Courts, however experience tells us that this recognition of a statutory duty in itself is not sufficient. Until and unless duty is identified with accountability, judicial review is ineffective.

10. In *Galaxy Enterprises* v. *State of Maharashtra,*[6] the Bombay High Court observed:

"53. The record reveals that what M/s Saral could do in eight years of its appointment, was to get the Annexure II, namely the list of the 73 eligible occupants certified from the MHADA. It was, thus, expected from the petitioner that the revalidation of Annexure II, which was possibly not a complex formality be undertaken at the earliest. However this certainly did not happen and citing various reasons, which cannot be believed to be not attributable

6 2019 SCC OnLine Bom 897.

to the petitioner, ultimately, the petitioner could not get the Annexure II certified only on 23 December 2013, which is after about eight years of the petitioner's appointment. This fact itself raises a serious doubt as to the real intentions of the petitioner to undertake the scheme. The petitioner could not have simply blamed the authorities for the delay, as there is complete lack of concrete and/or any real steps which were to be taken by the petitioner to effectively seek different approvals, once the society had put the petitioner in the driver's seat, in complete control of the project as rightly commented, in the impugned orders. Thus, the case of the petitioner, that from time to time steps were taken to implement the slum scheme as entrusted to it be the society cannot be accepted. These are the contentions of the petitioner, merely pointing out some movement of the files with the authorities. This was certainly not sufficient and what was required and expected by the petitioner was to take real effective steps to progress the slum redevelopment. The petitioner was expected to expeditiously obtain an Annexure II, as certified by the MHADA, thereafter obtain a LOI and then obtain a Commencement Certificate to start with the constructions and before that make a provision for temporary alternate accommodation for the slum dwellers to reside till completion of the scheme. There is not an iota of material to show that any such steps much less expeditiously were taken by the petitioner which will show the real bonafides of the petitioner to undertake the scheme.

54. In fact the petitioner kept the slum dwellers/society in dark on any of the steps alleged to be taken by the petitioner. There was no transparency in the petitioner's approach with the slum-dwellers whose anxious, impatient and painful wait of so many years for the slum scheme to start was continuously staring at the petitioner's right from the word go. This was not what was expected of a diligent developer. The slum schemes are expected to be taken and pursued by the developers for genuine and bonafide object and purpose to redevelop the slums as reflected in the rules which is for the mutual benefit namely the benefit of

the slum dwellers of being provided a permanent alternate accommodation and so far as the developer, to exploit the free sale component, which is nothing but a business consideration for the developer. If this be the long and short of a slum scheme what can be the intention of a developer to sit tight on a slum scheme and not take expeditious measures to undertake and complete the scheme. The reasons can be innumerable, if the reasons are attributable to the authorities, the developer has certainly remedies in law to be immediately resorted. No forum competent to entertain such complaints would refuse to look into such grievances when the very right to livelihood of the slum dwellers who are living in inhuman conditions, being a concomitant of Article 21 of the Constitution, is involved and which becomes a matter of urgent concern and of utmost priority. A developer cannot shut his eyes to all these factors and attributes, once appointed by the society. For the developer, there has be relentless action on day to day basis as any delay in not implementing the slum scheme is not only detrimental to the slum dwellers, but to the society at large. Delay in effective implementation of the slum scheme would defeat the very goal, the ideals and the purpose of the slum redevelopment scheme.

55. A perusal of the record indicates that the society is correct in contending that during the period from 2006 to 2016 i.e. for about 10 years the petitioner did not take any concrete steps towards implementation of the slum rehabilitation scheme and the petitioner had clearly failed to obtain a LOI for such a long period. The society, thus, was constrained to file the application dated 15 March 2016, under Section 13(2) of the Slums Act, praying for change of the petitioner as the developer. It is correct that Annexure-II was originally issued by MHADA on 16 April 1998. The petitioner was appointed as developer in the month of June 2006 and it clearly took about seven to eight years for the petitioner to obtain revised Annexure-II which was obtained on 23 December 2013. Before the Chief Executive Officer and even before the appellate authority the petitioner has failed to show any

justifiable reason as to why it took these many years for the petitioner to simply obtain a revised Annexure-II when as per norms issued by the Slum Rehabilitation Authority Annexure-II is required to be finalised within a period of four months when the hutment dwellers are below 500 in number. Further the record clearly indicates that even after obtaining the revised Annexure II, on 23 December 2013, the petitioner did not initiate immediate steps to obtain LOI for the next three years. There is, thus, much substance in the contention of the society that only after the society initiated proceedings under Section 13(2) of the Slums Act, the petitioner initiated steps to obtain a LOI.

...

57. There cannot be a myopic approach to these issues of a delay in implementation of a slum rehabilitation scheme. Things as they stand are required to be seen in their entirety. The only mantra for the slum schemes to be implemented is it's time bound completion and a machinery to be evolved by the authorities, to have effective measures in that direction to monitor the schemes as a part of their statutory obligation to avoid delays. Non-commencement of the slum scheme for long years and substantial delay in completion of the slum schemes should be a thing of the past. In the present case, looked from any angle there is no plausible explanation forthcoming for the delay of so many years at the hands of the petitioner to take bare minimum steps to commence construction.

58. The authorities should weed away and reprimand persons who are not genuine developers and who are merely agents and dealers in slum schemes. These persons after get themselves appointed as developers, to ultimately deal/sell the slum schemes, as if it is a commodity. Any loopholes in the rules to this effect, therefore, are required to be sealed.

...

64. Thus, it is quite clear that inordinate delay is a sufficient ground for removal of a developer. There is neither any

> *perversity nor any illegality in the findings as recorded by both authorities below, in observing that the petitioner had grossly delayed the implementation of the slum scheme in question. The findings as recorded in the impugned order passed by the Apex Grievance Redressal Committee are also sufficiently borne out by the files produced before this Court…"*
>
> (emphasis supplied)

11. A Full Bench of the Bombay High Court in *Tulsiwadi Navnirman Co-op Housing Society Ltd. & Anr.* v. *State of Maharashtra & Ors.*,[7] held that the SRA has been conferred with certain powers and each one of them is coupled with a duty. If the slum dwellers are eligible to be rehabilitated at the site and within a reasonable period, they cannot be left at the mercy of developers and builders. The slum dwellers cannot be expected to occupy a transit accommodation endlessly, without proper maintenance, and hygiene. An independent and impartial implementation, supervision and monitoring of the projects is the purpose for which the authority has been set up under the Act.

12. In *New Janta SRA CHS Ltd.* v. *State of Maharashtra*,[8] the High Court considered the dispute between two rival societies claiming rights over a slum scheme. The Court observed as under:-

> "*187. It thus cannot be accepted more particularly considering the provisions of Section 13(2) of the Slums Act that a slum society at its sole discretion and/or without any control and regulations by SRA can change the developer. If such a course of action is made permissible, considering the hard realities and the hundreds of developers being available to take over such schemes, it would create a chaos and it is likely that a situation is created, that the slum rehabilitation scheme never takes off and it is entangled into fights between two factions within the society and/or two rival developers. This is certainly not the object of the legislation. It would be too farfetched to read such draconian rights available to the Managing Committee or to general*

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7 2008(1) Bom.C.R.1.

8 2019 SCC Online Bom 3896.

body of a society without any regulation, supervision and control of the SRA to change the developer. The SRA has all the powers not only to regulate and control such situations but to take a decision as to what is in the best interest of the slum dwellers and intended to achieve the object of the legislation.

188. Secondly it is not in dispute that the application of the petitioner for change of respondent no.5-developer was under Section 13(2) of the Slums Act. Having noted this provision in the foregoing paragraphs, Section 13(2) of the Slums Act would come into play only when the developer fails to adhere to the provisions of the development permissions granted by the SRA and a change of developer can be sought only when there is an inordinate delay or the construction carried on, is contrary to the sanctioned plans and/or the permissions. Considering this clear position falling under Section 13(2), in the context of this factual controversy as raised by the petitioner in regard to the consent of 70% of the slum dwellers being not available to respondent no.5, 1 am of the clear opinion that the view taken by both the authorities, in not accepting the petitioner's contention, is required to be held to be correct and valid. "

III. *Accountability of officers exercising power coupled with duty under Section 13:*

13. Two facets of Section 13 (2) of the Act are that; a) the SRA has the power to redevelop the project if it is satisfied that the development is not proceeding within the time specified, and b) that power of SRA is coupled with a duty to ensure that the project is completed within time. We hold that the SRA is accountable for the performance of this duty. Accountability need not be superimposed by the text of a statute, it exists wherever power is granted to accomplish statutory purpose. In *Vijay Rajmohan* v. *CBI*,[9] this Court held:-

"34. Accountability in itself is an essential principle of administrative law. Judicial review of administrative action will be effective and meaningful by ensuring accountability of the officer or authority in charge.

9 [2022] 19 SCR 563 : (2023) 1 SCC 329

35. The principle of accountability is considered as a cornerstone of the human rights framework. It is a crucial feature that must govern the relationship between "duty bearers" in authority and "right holders" affected by their actions. Accountability of institutions is also one of the development goals adopted by the United Nations in 2015[10] and is also recognised as one of the six principles of the Citizens Charter Movement.[11]

36. Accountability has three essential constituent dimensions: (i) responsibility, (ii) answerability, and (iii) enforceability. Responsibility requires the identification of duties and performance obligations of individuals in authority and with authorities. Answerability requires reasoned decision-making so that those affected by their decisions, including the public, are aware of the same. Enforceability requires appropriate corrective and remedial action against lack of responsibility and accountability to be taken.[12] Accountability has a corrective function, making it possible to address individual or collective grievances. It enables action against officials or institutions for dereliction of duty. It also has a preventive function that helps to identify the procedure or policy which has become non-functional and to improve upon it."

14. For effective implementation of the principle of accountability of power under the Act, we identify the duties and performance obligations of the CEO. It is evident from the statutory scheme that the responsibility vests in the CEO, defined under Section 2 (b+a) read with Section 3A(2) of the Act. The CEO reports to the SRA, the duty of which is defined under Section 3B of the Act. One of the most important duties of the SRA is to ensure that the Slum Rehabilitation Scheme is implemented.

10 United Nations General Assembly Resolution 70/1 dated 25-9-2015.

11 Citizens Charter adopted by the Government in the "Conference of Chief Ministers of various States and Union Territories" held in May 1997 in New Delhi, available from https://goicharters.nic.in/public/website/home.

12 *See* Office of United Nations High Commissioner for Human Rights, Who will be Accountable? Human Rights and the Post-2015 Development Agenda, available from http://www.ohchr.org/Documents/Publications/WhoWillBeAccountable.pdf

14.1. The primary responsibility to implement Section 13 of the Act and allied provisions and to monitor compliances of schemes and agreements vests with the CEO. If the actions of CEO are based on the directions of the SRA, then the SRA must equally bear the responsibility. The CEO and/or the SRA must explain the delay in implementation, failing which, the consequences as determined by the court will follow.

PART-II

IV. *Submissions and Analysis:*

15. Returning to facts of the case, Mr. Kapil Sibal, learned senior counsel, appearing on behalf of the appellant, articulated the allegation of delay into six parts and in his inimitable style proceeded to explain how in each part, the appellant had no role and not at all responsible. We will deal with each phase of delay in the same manner as Mr. Sibal has presented the case before us.

16. *(i) The first phase of delay is between 2003 and 2011*. The relevant facts are as follows.

16.1. The appellant was appointed by respondent no.1 to develop the Project under a development agreement dated 20.08.2003, following which the appellant made a proposal for development on 11.12.2003. The Municipal Corporation of Greater Mumbai, however, assigned the re-development to a rival society, namely Omkareshwar Co-Operative Housing Society[13] and a developer, namely Siddhivinayak Developers[14] on 06.05.2004. Pursuant to this, on 07.09.2004, the SRA accepted the proposal given by Omkareshwar and Siddhivinayak for the development of the Property. After a long-drawn litigation between the appellant and respondent no. 1 on one side, and Omkareshwar and Siddhivinayak on the other, the CEO, SRA finally settled the dispute by its order dated 07.06.2011 and held that the appellant had the required 70% consent of individual slum dwellers to implement the project and also that the proposal of Omkareshwar was not valid as it was

13 Hereinafter, referred to as “Omkareshwar”.

14 Hereinafter, referred to as “Siddhivinayak”.

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made after the proposal of respondent no.1. Dealing with the period, Mr. Sibal has submitted that multiple proceedings between the appellant and respondent no. 1 on one side and Omkareshwar and Siddhivinayak on the other consumed lot of time. While the High Court initially disposed of a writ petition recording a settlement that appellant and respondent no.1 are entitled to develop the Property, Omkareshwar challenged it leading to several rounds of litigation before the High-Powered Committee[15] and the High Court. The issue was laid to rest only on 07.06.2011 by an order of the CEO, SRA holding that the appellant enjoyed the consent of 70% of eligible slum dwellers and hence was qualified to be the developer. Mr. Sibal has submitted that the consequence of this litigation is that the LOI could be issued in favour of the appellant only on 29.06.2011, i.e. after this dispute was settled. The eight years' delay in obtaining the LOI was inevitable and was not due to any fault of the appellant.

16.2. Per *contra*, Mr. C A Sundaram, learned senior counsel, appearing for the respondent no.6-Veena Developers, has submitted that the appellant did not have the financial capacity or the technical expertise to complete the project within the prescribed time of 3 years. It is due to this reason that the appellant was unable to commence construction even when all the requisite permissions and approvals had been obtained. Further, Mr. Huzefa Ahmadi, learned senior counsel, appearing for respondent nos.8-48, who are some of the slum dwellers, has submitted that the delay in the construction is entirely attributable to the appellant. He submitted that the appellant did not take any action to obtain the LOI anytime between 2003-2011.

16.3. While adjudicating on the delay in implementation of the project during 2003-2011, the AGRC relied on clause 11 of the development agreement dated 20.08.2003 requiring the appellant to complete the development of the project within three years from the issuance of the Commencement Certificate dated 14.07.2014.

15 Hereinafter, referred to as the "HPC".

16.4. On the issue of delay from 2003 to 2011, the High Court examined the facts independently and upheld the findings of the AGRC. The High Court held that a delay cannot be viewed as reasonable. Further, the High Court held that the litigation with Omkareshwar did not prevent the appellant from starting the project, especially when the appellant had the consent of more than 70% of the slum dwellers at all material times. The High Court also observed that the appellant was not diligent in procuring the LOI.

17. *(ii) The second phase relates to the delay in obtaining necessary permissions, approvals and environmental clearances from 2011 to 2014.* The SRA issued Annexure-III, certifying the financial capability of a developer on 21.06.2011 and this was followed by issuance of LOI dated 29.06.2011. The appellant applied for Environmental Clearance[16] on 15.12.2011 and obtained it only on 28.04.2014. The Commencement Certificate for the construction of the rehabilitation building and the high-rise clearance by the Municipal Corporation of Greater Mumbai were issued to the appellant on 14.07.2014 and 09.10.2014, respectively.

17.1. In the above referred background, Mr. Sibal submitted that the EC had to be obtained before the Commencement Certificate could be issued for the construction of the rehabilitation building. For on-site construction of more than 20,000 square meters, EC is required and for this, he relied on condition no. 51 of the LOI dated 29.06.2011 and condition no. 38 of the intimation of approval dated 21.04.2012. While the appellant made an application for EC in the year 2011, it was granted only on 28.04.2014. He has submitted that the delay between 2011-2014 was again unavoidable as certain mandatory permissions were required. Per *contra*, Mr. Ahmadi submitted that an EC was not required to commence construction of the rehabilitation building as the on-site construction did not exceed 20,000 square meters.

17.2. Upon perusing the record, the AGRC found that the delay was indeed attributable to the appellant. The High Court also noticed that the appellant did not commence the construction after

16 Hereinafter, referred to as "EC".

getting the necessary approvals but waited for the EC. The High Court also noted that some parts of the project like the rehabilitation building did not require an EC for commencing construction.

18. *(iii) The third phase of delay relates to the alleged non-cooperation of certain slum dwellers leading to the stalling of the project from 2014 to 2019.* Mr. Sibal submitted that as some of the slum dwellers were not cooperative, applications under Sections 33 and 38 of the Act for eviction were made to the Assistant Municipal Commissioner, MCGM. Initially, the Deputy Collector passed orders on 05.11.2020 observing that the eviction proceedings can be taken forward only after directions from the High Court and in the meanwhile directed the appellant to deposit 11 months rent concerning 30 non-cooperating slum dwellers. These applications under Sections 33 and 38 of the Act came to be decided only in 2021, and that is how, it is submitted, the project got delayed for reasons beyond the control of the appellant.

18.1. Mr. Ahmadi submitted that the pendency of the eviction applications does not justify the extraordinary delay of 5 years on the part of the appellant. Mr. Sundaram submitted that the mere filing of applications under Sections 33 and 38 of the Act is not sufficient to justify the delay. It is submitted that the appellant has failed to take active steps in getting the applications disposed of. This inaction suited the appellant as it did not have the capacity or the capability to complete the project.

18.2. Affirming the findings of the AGRC, the High Court observed that the appellant went into deep slumber after filing applications for eviction of non-cooperating slum dwellers between 2014-2015.

18.3. The fact that the appellant had to initiate proceedings against certain non-cooperating members and that the proceedings were pending for a long time, whether justified or not, should not have a bearing on the obligations of the appellant to complete and handover the project as per the development agreement. Under no circumstance, litigation of this nature would justify inaction from 2014 to 2019.

19. *(iv) The next period of inaction is from 2015 to 2017. This is sought to be justified on the ground that the Municipal Corporation sanctioned*

a road that may pass through the property and published the draft development plan (DP) on 25.02.2015.

19.1. The objections filed by the appellant on 03.04.2015 eventually came to be disposed of only on 12.11.2018 when the said road was deleted from the development plan. This period, Mr. Sibal submits, must be excluded as no development, much less any construction, is permissible once the draft plan is published.

19.2. Mr. Sundaram submitted that if the appellant had commenced the construction after the commencement certificate dated 14.07.2014, the draft development plan published in 2015 could never have affected the re-development at all. He further submitted that as LOI and IOA were issued in 2011 and 2012, the so-called draft DP published in 2015 cannot be a justification. Mr. Ahmadi has submitted that except for 2 months between 25.02.2015 and 23.04.2015, there was no proposed development plan road in any of the plans. He would submit that the proposed DP road affected only the proposed sale building, not the entire project. In any event, he would submit that the sale building could not have commenced till substantial progress in rehabilitation building was made.

19.3. The observations of AGRC also go to show that draft DP could justify 2 years' delay and no more. The High Court observed that the notification dated 25.02.2015 under no circumstances precluded the appellant from starting construction of other parts of the Property.

20. *(v) Re: Appellant did not have the financial resources.* Dealing with the findings of the AGRC and the High Court that the appellant did not have the financial resources as evidenced by the agreements that they have executed in favour of third parties, Mr. Sibal submitted that this issue was never raised in the show-cause notice dated 04.12.2020, which initiated the proceedings leading to the termination of the development agreement of the appellant. The factual background is that from 2017 onwards, the appellant executed certain financial agreements with third parties. On 17.02.2017, an agreement with M/s Rajesh Habitat Private Limited was executed as per which the saleable rights under the project were transferred in favour of Rajesh Habitat in lieu of finance of Rs. 30 crores. Further, Rajesh Habitat mortgaged their rights in favour of M/s Vistra ITCL

by a deed dated 22.03.2017, which later came to be cancelled on 08.02.2019 and a deed of reconveyance between the appellant and Vistra was entered into. Later, one M/s Sanghvi Associates provided financial assistance of Rs. 50 crores to the appellant by way of a mortgage deed. In pursuance of these financing arrangements, Sanghvi Associates gave no objection to the appellant entering into an agreement with respondent no.6-Veena Developers. Following this, a joint development agreement dated 18.10.2019 was entered into between the appellant and respondent no. 6.

20.1. Mr. Sibal contended that the appellant has the requisite financial capacity of technical expertise to complete the project. He would submit that these agreements do not establish that the appellant does not have the financial capacity or the technical expertise to undertake and complete the project. That the appellant had the capacity is evidenced by the deposit of rents due to the slum dwellers and in fact, the SRA has certified the appellant's financial capacity on 21.12.2019.

20.2. Mr. Sundaram submitted that all the documents were before the SRA and that the parties have made submissions on all aspects of the matter. He has taken us through the various findings of the High Court on the finances and the clauses in the agreements entered into with the third parties. The following findings of the High Court were referred to:

> *"57. In any case, the petitioner struggled to avail finance and was facing severe financial crisis, this itself was material for the Chief Executive Officer of the SRA to come to a conclusion that it may not be possible for the petitioner to execute the scheme. The Chief Executive Officer however did not call upon the petitioner to satisfy that it had the appropriate finances to undertake the "entire scheme". The Chief Executive Officer merely asking the petitioner to deposit the arrears of rent, can in no manner, whatsoever, be accepted as a certificate to the petitioner possessing a financial capacity to complete the project.*
>
> *58. It is crystal clear from the petitioner's own showing that the petitioner was required to take the crutches/financial assistance initially from Rajesh*

Habitat Pvt. Ltd., who in turn looked at Vistra ITCL India Ltd. and thereafter having failed with both these entities, with one M/s Sanghvi Associates, which is not for a small amount but for a substantial amount of Rs. 50 crores. Things however would not stop at this and subsequently it appears that now respondent no.6-Veena Developers was roped in, to provide working capital for the entire project described to be the business partners/joint developers of the petitioner as in para 1 of the petition."

20.3. Mr. Sundaram also brought to our notice certain clauses in agreements with third parties and submitted that this amounts to complete subversion of the scheme. High Court has reflected on these clauses. The following findings of the High Court are important:

"73. Certainly, the period of two years as contractually agreed, under the development agreement cannot be stretched to such a long period of almost 17 to 18 years as in the present case, despite these circumstances, an attempt on the part of the petitioner to justify that such delay was not attributable to the petitioner, at least in the facts of the case, is wholly untenable. The AGRC examined the case of the petitioner and of the society and the situation persisting at the ground level. The AGRC however not agreeing with the findings of the Chief Executive Officer-SRA, has reached a conclusion that the petitioner could not take the project forward for reasons which were borne out by the record.

74. In these circumstances to upset the decision of the AGRC would amount to rewarding the petitioner of its defaults and the breaches committed by it, not only of the very terms and conditions of the Development Agreement, but also, the clear statutory mandate in undertaking Slums Rehabilitation Schemes. In fact, the petitioner has betrayed the trust of the society/slum dwellers. Even otherwise, a closer scrutiny of the petitioner's actions clearly hint of the petitioner's interest not in the rehabilitation of the slum dwellers but in its own private interest, solely in relation

to the sale component. There cannot be a space for a pure commercial greed in taking up such projects which involves the basic rights of the slum dwellers."

21. *(vi) Re: Submission on maintainability of proceedings before AGRC.* Finally, Mr. Sibal submitted that the complaints filed by the 12 members of the managing committee of respondent no.1 on 18.11.2019 were withdrawn by 8 members on 31.12.2019 and by another member on 14.01.2020. Consequently, the show-cause notice dated 04.12.2020, based on these complaints, was rightly withdrawn on 16.03.2021. Secondly, although the managing committee of respondent no. 1 had initially terminated the development agreement on 02.02.2020, this termination was revoked on 28.02.2021. The revocation of termination was because the agreement was terminated by Mr. Rai, who did not have the requisite authorisation. Mr. Sibal has relied on the above to submit that respondent no.1 did not object to the withdrawal of the termination of the development agreement of the appellant, and in fact, wanted the appellant to continue as the developer. He would further submit that Mr. Rai was acting without the authorisation of the other members, and hence, he also could not have filed an appeal before the AGRC on behalf of respondent no.1 against the order of the respondent no. 3 – CEO, SRA dated 16.03.2021 that dropped the proceedings against the appellant. Mr. Navare, learned senior counsel, appearing for some of the slum dwellers, supported the submissions put forth by Mr. Sibal regarding the lack of authorisation of Mr. Rai to act on behalf of respondent no. 1.

21.1. Mr. Sundaram submitted that the appeal before the AGRC against the order dated 16.03.2021 was maintainable even if some of the complaints filed on 18.11.2019 were withdrawn. He submits that Mr. Rai, who filed the appeal, had the requisite locus because he, along with some others, had also filed complaints that were not withdrawn. It is submitted that Mr. Rai was still a slum dweller and a member of respondent no.1 and hence, was an 'aggrieved person' against the order dated 16.03.2021. There were also, as many as 132 complaints against the appellant by other slum dwellers who filed complaints in January and February, 2021 before the SRA under Section 13(2) of the Act alleging non-payment of rent. Lastly, he submits that in any case, the SRA has the power to

suo moto proceed against the appellant under Section 13(2) of the Act and therefore the withdrawal of complaints is not fatal to proceeding against the appellant and does not preclude the AGRC from deciding the appeal. Mr. Ahmadi made a submission along the same lines and to the same effect.

21.2. Answering the question regarding the maintainability of the proceedings after the complaints dated 18.11.2019 were withdrawn, the High Court held that even if many complaints before the SRA were withdrawn, the complaint filed by Mr. Rai survived to be adjudicated. Further, the High Court rejected the contention of the appellant that Mr. Rai was not authorised by respondent no. 1 to take any action against the appellant. In order to reach this conclusion, the High Court observed that if the contention of the appellant was true, then respondent no. 1 would have supported the appellant before the High Court; however, this was not the case. The High Court also held that in any case, the SRA and the AGRC have the requisite power under Section 13(2) of the Act to *suo moto* examine the delay caused by the appellant in implementing the project.

22. *(vii) Re: Locus or conflict of respondent no.6:* Mr. Sibal concluded his submissions by arguing that respondent no.6 does not have the locus to take a stand contrary to that of the appellant as it has been involved with the venture from the time of the joint development agreement dated 18.10.2019. For this reason, he would submit that the findings of AGRC and the High Court must apply to respondent no. 6 as well.

22.1. Mr. Dhruv Mehta, learned senior counsel, appearing for the administrator of respondent no.1 has argued that Section 13(2) of the Act empowers and places an obligation upon the SRA to take action against the developer when the project is not being implemented. Therefore, he submits that even if some of the complaints have been withdrawn, the termination of the development agreement is valid.

V. *Findings:*

23. Having considered the findings of the AGRC and the High Court in detail, we have found them to be correct on law and fact. Further, having independently considered the detailed submissions of the

appellant and the respondents, on delay as well as on lack of financial and technical capabilities and maintainability of the appeal, we proceed to analyse and discuss them as follows.

24. Admittedly, the delay in executing the project, by the time of the termination order is more than 16 years. This period is sought to be explained by fragmenting it into bits and pieces falling between 2003 to 2011, 2011 to 2014 and 2014 to 2019.

25. What amuses us is that we are called upon to hold that the order of termination for delaying the project for 16 years must be held to be bad by examining each episode of delay as independent and stand alone. Judicial Review Courts enquiring into these allegations would only examine whether it would be arbitrary and/or unreasonable to exclude the delay caused because of the incidents that occurred from 2003 to 2019. In other words, the inquiry must be to see whether it would be unjust if we do not account for the long-drawn litigation with a competing builder between 2003 to 2011, the delay in obtaining the environmental clearances from 2011 to 2014, or the delay caused due to non-cooperation of certain slum dwellers.

26. Having examined the matter, we are of the opinion that the delay of 8 years in resolving disputes with a competing builder cannot be a justification under any circumstance. The appellant is a developer and fully understands the process of obtaining environmental clearances while other sanctions and permissions are pending, and it is for him to make all the necessary arrangements. To say the least, the non-cooperation of some of the members cannot be a ground for delaying the project from 2014 to 2019. The findings of the AGRC and the High Court are very clear, they have correctly held that the delay caused due to the sanction of the draft DP for the construction of the road cannot be a justification for delaying the project from 2015 to 2019.

27. In any event, execution of the project under the Slum Rehabilitation Scheme cannot be viewed as a real estate development project. There is a public purpose involved, and that is inextricably connected to the right to life of some of our brother and sister citizens who are living in pathetic conditions. While we reject the justifications given by the appellant for delaying the project, we are fully conscious of the dereliction of the statutory duty of the SRA in ensuring that the project is completed within time. We have already expressed our opinion that the CEO and the SRA are accountable for their actions.

While we reject the justification for delay, we record our dissatisfaction about the indifference, amounting to negligence on the part of CEO and the SRA.

28. So far as the submissions relating to the financial resources are concerned, we have seen the number of agreements that the appellants have entered into. We need not examine this aspect independently as the findings are concurrent and thorough. The following findings of the High Court are sufficient for disposing of this issue:

> *"59. The petitioner time and again having approached third parties for financial requirements in the manner as discussed above, in fact was quite fatal and counter productive to the implementation of the slum scheme, for the reason that if any of the financers were to withdraw from their financial support and the commitments as made to the petitioner, the same would leave the petitioner with no remedy but to wander further hunting for fresh finance. Such financial instability of a developer certainly would have a devastating effect on the implementation of the slum scheme which could also result in the total collapse of the slum scheme being implemented and in fact a death knell for the slum scheme. It is for such reason, the real wherewithal and financial stability of a developer plays an extremely pivotal role, as finance is the very lifeline for successful implementation and completion of the slum scheme. The present case is a classic case of how the petitioner is running helter-skelter to secure finance, that too without taking the society into confidence much less the authorities. This on the basis of a solitary clause in the Development Agreement which is being discussed hereafter."*

29. We will now deal with the submission on the maintainability of the appeal before the AGRC and that respondent no. 6 who was the collaborator of the appellant must face the same consequence as that of the appellant. This submission proceeds on the assumption that the statutory power under Section 13(2) of the Act is to be exercised only upon an application made to the authority. This is a complete misconception. We have already dealt with the scope and

ambit of Section 13 of the Act, and in particular the duty followed by accountability of the SRA under the said provision. Irrespective of whether anybody applied or not, the authority is bound to ensure that the project is completed within the time stipulated. In any event, as the dispute before us is confined to the legality and propriety of the termination order, we are not concerned about the relationship of the appellant with respondent no. 6.

VI. *Conclusion:*

30. For the reasons stated above, there is no merit in this appeal, and we dismiss the Civil Appeal arising out of SLP (C) No. 20844 of 2022 with costs quantified at Rs. 1,00,000/- (Rupees One Lakh) payable to Supreme Court Mediation and Conciliation Project Committee. In view of our decision, no further orders are necessary in the Contempt Petition (Civil) No. 217 of 2024.

31. Pending applications, if any, stand disposed of.

VII. *Re : Performance audit of statute:*

32. Though we have disposed of this Civil Appeal by dismissing it, we must record that this case has provoked us to reflect on the working of this Act.

33. The Act came into being in 1971 and since then, for over five decades, the High Court has been exercising judicial review jurisdiction, disposing of Writ Petitions raising claims or challenges to the exercise of powers or dereliction of duties by Authorities under the Act. Data fetched from National Judicial Data Grid (NJDG) reveals that a total of 1612 cases involving disputes arising under the Act are pending before the Bombay High Court. Of these, 135 cases are more than 10 years old. In the last 20 years, 4488 cases have been filed and disposed of under the said Act. Latest data from the Bombay High Court reveal that about 923 cases on the Appellate side and 738 on the Original Side are pending adjudication. The Act is a beneficial legislation, intended to materialize the Constitutional assurance of dignity of the individual by providing basic housing, so integral to human life. However, the propensity and the proclivity of the statute to generate litigation are worrisome. There seems to be a problem with the statutory framework for realizing the purpose and object of the statute. In *M/s. Galaxy Enterprises* v. *State of Maharashtra* (supra) the Bombay High Court has remarked that:

"3. …*Nonetheless, considering the volumes of disputes still reaching the Courts, it can certainly be said that time is ripe, if not too late, to ponder, whether things are realistically working in the right direction, to eradicate slums and rehabilitate the slum dwellers, with the desired efficacy and expedition. This not only at the hands of the authorities but also at the hands of the other stake holders. The vital issue which has often led to controversy and disputes, is on the rules permitting, the selection and appointment of developers to undertake a Slum Rehabilitation Scheme, being conferred on the slum dwellers, who are hardly expected to know the nitty-gritty of the slum redevelopment schemes. It is seen that the so called leaders of the slum dwellers who are themselves in need to be rehabilitated, are often lured by developers and their agents, and once a developer is appointed, what normally prevails is a constant fear of incertitude and scepticism amongst the slum dwellers, leading to disputes on variety of issues affecting their final rehabilitation. Such issues not only frustrate the very object of a speedy slum redevelopment but completely derail the slum schemes. It can be seen that scores of slum schemes have remained incomplete for years together and are languishing on such issues, either in litigation before Courts and/or before the authorities. These schemes need not face such ordeal, including of an unending litigation. To change the developer is no answer as even this process involves dispute resolution and ultimately lengthy litigation from one forum to another*."

33.1. Further, referring to the statutory scheme, as per which development is possible only when the slum dwellers feel the need and seek development, the High Court pointed out yet another problem about the statutory framework in the following terms;

"…*It cannot be countenanced that the slums be redeveloped only when the slum dwellers feel the need of a redevelopment and the Government Authorities cannot initiate redevelopment and cannot initiate a suo motu action in that behalf. It is hence, for the Government and the Slum Authority to give its anxious consideration to these*

issues and in its wisdom to device a substantial, nay a full proof mechanism, by undertaking a study and identify these grey areas, so that the helping hand as extended by the legislature in providing this beneficial law as far back in 1971 that is almost 50 years back is held strongly and firmly by all concerned. It is never too late."

34. The exasperation of the High Court about working of the Act is understandable. The present appeal is a classic example of why the High Court's concern is genuine. It has been noticed that the statutory scheme is problematic with respect to: i) Identification and declaration of land as a slum. This problem involves an examination of the role of authorities in giving such recognition, insidious intervention of builders in the said process cast doubts on the independence and integrity in the decision-making process; ii) Identification of slum dwellers: This involves a complicated process of proof of such a status, the attendant problem of groupism, giving rise to competing claims inevitably leading to litigation; iii) Selection of a developer: The Act leaves this decision to the cooperative society of slum dwellers and the majority decision is manipulated by competing and rival developers; iv) Apportionment of the slum land between redevelopment area and sale area: This is yet another area where court has witnessed developers seeking to increase the proportion of the sale area, leading to contestation; v) Obligation to provide transit accommodation for the slum dwellers pending redevelopment: Invariably, we see instances where the developer does not provide transit accommodation within time or provides an inadequate alternative in the form of a quantified amount towards rent, On the other hand, there are instances where some slum dwellers refuse to vacate the premises on the ground that the transit accommodation is either inconvenient or the amount offered is insufficient; vi) There are also issues of lack of independence and objectivity in the functioning of statutory authorities: This is a matter of serious concern. Courts have witnesses that the authorities have no independence and, their tenure is also short. Additionally, the functioning of these statutory authorities gives an indication that there could be a regulatory capture; vii) Another concern which exists is about the effectiveness of statutory remedies: Statutory remedies are ineffective and at the same time, lacking in accountability and vii) Judicial review proceedings under Art. 226 cannot be a long-term solution: We have given details of the number of writ petitions pending before the High Court in Para 33.

35. The above-referred problems arising out of the statutory scheme and policy framework should have come under review by the State of Maharashtra. Assessment of the working of the statute to realise if its purpose and objective achieved or not is the implied duty of the executive government. Reviewing and assessing the implementation of a statute is an integral part of Rule of Law. It is in recognition of this obligation of the executive government that the constitutional courts have directed governments to carry performance audit of statutes.

36. Four aspects for achieving justice are well founded and articulated as, i) distribution of advantages and disadvantages of society, ii) curbing the abuse of power and liberty, iii) deciding disputes and, iv) adapting to change.[17] Adapting to change is important for achieving justice, as failure to adapt produces injustice and is, in a sense, an abuse of power. Thus, failure to use power to adapt to change is in its own way an abuse of power. In fact, the issue is not one of change or not to change, but of the direction and the speed of change and such a change may come in various ways, and most effectively through legislation. Legal reform through legislative correction improves the legal system and it would require assessment of the working of the law, its accessibility, utility and abuse as well. The Executive branch has a constitutional duty to ensure that the purpose and object of a statute is accomplished while implementing it. It has the additional duty to closely monitor the working of a statute and must have a continuous and a real time assessment of the impact that the statute is having. As stated above, reviewing and assessing the implementation of a statute is an integral part of Rule of Law. The purpose of such review is to ensure that *a law is working out in practice as it was intended. If not, to understand the reason and address it quickly*. It is in this perspective that this court has, in a number of cases, directed the Executive to carry a performance/ assessment audit of a statute or has suggested amendments to the provisions of a particular enactment so as to remove perceived infirmities in its working.[18]

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17 *See*: *Justice in Adapting to Change,* in R.W.M. Dias*,* Jurisprudence, 305-327 (5th edn., 2013).

18 *State of Haryana v. Mukesh Kumar* (2011) 10 SCC 404; *Pravin Electricals (P) Ltd. v. Galaxy Infra & Engineering (P) Ltd.* (2021) 5 SCC 671; *Preeti Gupta v. State of Jharkhand* (2010) 7 SCC 667; *Arif Azim Co. Ltd. v. Aptech Ltd.* (2024) 5 SCC 313; *Public Interest Foundation v. Union of India* (2019) 3 SCC 224.

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37. Constitutional courts are fully justified in giving such directions as they are in a unique position of perceiving the working of a statute while exercising judicial review, during which they could identify the fault-lines in the implementation of a statute. This extraordinary capacity to assess the working of a statute is available to the judicial institution because of its unique position where, i) disputes, based on the statutory provisions unfold before it, ii) claims of rights or allegations of dereliction of duties are raised with varied, and sometimes, contradictory interpretations of the same text of the statute, iii) submissions of lawyers opens up a debate and as officers of the Court experienced lawyers would lay bare the fault-lines in the statutory scheme, iv) many a times court silently witnesses the play of statutory power relegating the deserving to the backseat, and the undeserving taking away all the benefits.

38. Laws that are made by Parliament or the legislative assemblies create rights, entitlements, duties or liabilities. Application of such empowerments or disabilities gives rise to competing claims or conflicting interests. For resolution of these disputes, constitutional courts provide public law remedies[19] where claims and contestations are decided by High Courts on a case by case basis. Judicial review is generally episodic, and is intended to resolve the *lis* on a case-to-case basis. Though cases are decided on their own merit and the *lis* disposed of, what is left behind is the institutional memory of the Court about the working of the statute and its interpretation preserved as precedents. Over a period of time, a critical mass of adjudicatory determinations on the working of the statute is built. This critical mass, coupled with the experiences gained by the Judges and the Court on the working of the statute, is of immense value for auditing the working of the legislation. It enables the court to assess whether the purpose and object of the Act is being achieved or not.

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19 Judicial control of administrative action in our country, the effective and the most prolific, has evolved from its classical scrutiny of ultra vires exercise of power, to a whole set of procedural and substantive principles, such as: legality, procedural propriety, reasonableness, legitimate expectation, proportionality, transparency, legal certainty, accountability, level playing field, consultation or participation etc. These principles are now well entrenched in our judicial review processes and are part of our administrative law. In fact, bulk of judicial review proceedings initiate before the High Courts examine if the power exercised is with its bounds.

39. The traditional perception of the constitutional role of writ courts was confined to judicial review of executive and legislative action. In that role, the courts were to decide the vires of the legislative and executive actions based on constitutional parameters. Not only have the tools of judicial review been reinvented (the rise of the proportionality and arbitrariness doctrines) but also the breadth of the judicial power has substantially expanded to areas that were hitherto forbidden (review of policy decisions, constitutional amendments and continuing mandamus being prime examples). However, even this expansive reading of judicial review does not capture the essence of the judicial branch in its entirety.

40. There is yet another role which the judiciary can and ought to perform- that of facilitator of access to justice and effective functioning of constitutional bodies. In this role, the judiciary does not review executive and legislative actions, but only nudges and provides impetus to systemic reforms. The statute in question is one which was intended to benefit the marginalised and the impoverished. It is not easy for the intended beneficiaries of this legislation to carry their voice to legislative branch for effective reform. The exercise that this Court intends to direct presently is aimed at facilitating their access to legislative and executive reform, which this court believes is an essential component of constitutional justice. That all justice is to be achieved only through courtroom debates is too myopic an understanding of constitutional justice. The facilitative role is not just inspired from the institutional role that the judiciary perceives for itself, but is also a directive of many of the fundamental rights in Part III and the cherished preambular vision of justice- social, economic and political.

41. A peculiar feature of how our legislative system works is that an overwhelming majority of legislations are introduced and carried through by the Government, with very few private member bills being introduced and debated. In such circumstances, the judicial role does encompass, in this court's understanding, the power, nay the duty to direct the executive branch to review the working of statutes and audit the statutory impact. It is not possible to exhaustively enlist the circumstances and standards that will trigger such a judicial direction. One can only state that this direction must be predicated on a finding that the statute has through demonstrable judicial data or other cogent material failed to ameliorate the conditions of the

beneficiaries. The courts will also do well, to arrive the very least, at a prima facie finding that much statutory schemes and procedures are gridlocked in bureaucratic or judicial quagmires that impede or delay statutory objectives. This facilitative role the judiciary compels audit of the legislation, promote debate and discussion but does not and cannot compel legislative reforms.

42. In light of the foregoing, considering that the Act is a state-legislation, implementation of which lies with the State of Maharashtra, and till date no comprehensive statutory audit has been undertaken, we request the Ld. Chief Justice of the Bombay High Court to constitute a bench to initiate *suo motu* proceedings for reviewing the working of the statute to identify the cause of the problems indicated in Paragraph 34. The concerned bench will hear the government, the statutory authorities, the necessary stakeholders including intended beneficiaries and perhaps take the assistance of some senior members of the bar specialising in this area as *amici curae*. We leave it to the High Court to devise such methods as it deems fit and appropriate. Having examined the matter, the bench may consider directing the government to constitute a committee for performance audit of the Act. The court's jurisdiction extends only to that extent, and no further. The law-making, including amendments, is the exclusive domain of the legislature.

Result of the case: Civil Appeal dismissed.

†*Headnotes prepared by:* Divya Pandey

[2024] 7 S.C.R. 1476 : 2024 INSC 690

A.S. Pharma Pvt. Ltd.
v.
Nayati Medical Pvt. Ltd. & Ors.

(Criminal Appeal No(s). 3051-3052 of 2024)

23 July 2024

[C.T. Ravikumar and Sanjay Karol, JJ.]

Issue for Consideration

High Court whether justified in exercising its inherent power under Section 482, Cr.P.C and the power under Section 147, N.I. Act, 1881 to compound the offence u/s.138 of the Negotiable Instruments Act, 1881, despite the non-consent of the complainant-appellant.

Headnotes†

Code of Criminal Procedure, 1973 – s.482 – Negotiable Instruments Act, 1881 – ss.138, 147 – Scope – Trial Court dismissed the application for compounding the offence u/s.138, N.I. Act filed u/s.320 Cr.P.C. – High Court despite the absence of the consent of the appellant-complainant compounded the offence u/s.138, N.I. Act qua the respondent-accused, exercising its inherent power u/s.482 Cr.P.C. and the power u/s.147, N.I. Act, on the ground that the appellant was equitably compensated – Sustainability:

Held: Cannot be sustained, set aside to that extent – s.482, Cr.P.C. and s.147, N.I. Act are different and distinct – s.482, Cr.P.C. is the inherent power of High Court exercisable even suo motu to give effect to any order under Cr.P.C., or to prevent abuse of the process of any court or otherwise to secure the ends of justice – However, the provision for compounding every offence punishable under the N.I. Act, u/s.147, N.I. Act, is not a power available to a Court to exercise without the consent of the complainant – Inherent powers u/s.482, Cr.P.C. are invocable when no other efficacious remedy is available to the party concerned and not where a specific remedy is provided by the statute concerned – Power u/s.482, Cr.P.C. cannot be invoked ignoring the factor which is *sine qua non* for the exercise of power to compound the offence(s) under N.I. Act viz., the consent of the complainant – An offence u/s.138, N.I. Act could be compounded u/s.147 only with the consent of the complainant

concerned – In view of the peculiar facts w.r.t the deposit of the amount payable under the impugned judgment and the readiness of the respondent-accused to effect the payment and to settle the matter, there is no point in restoring the proceedings and continue them before the trial Court though the impugned judgment has been set aside – Hence, despite the lack of consent from the appellant, complaint and all the proceedings emerging therefrom quashed exercising power u/Article 142 of the Constitution of India. [Paras 11, 17, 19, 21]

Code of Criminal Procedure, 1973 – s.482 – Negotiable Instruments Act, 1881 – ss.138, 147 – Constitution of India – Article 142 – Exercise of power u/Article 142 by the Supreme Court in Raj Reddy Kallem's case to quash the proceeding pending u/s.138, N.I. Act – High Courts quashing proceeding u/s.138, N.I. Act on the similar lines – Impermissibility:

Held: Supreme Court in Raj Reddy Kallem's case took note of the fact that the accused therein had compensated the complainant and deposited the additional amount as ordered – It was in view of such peculiar factual situation obtained therein that the Supreme Court invoked the power u/Article 142 of the Constitution of India to quash the proceeding pending against the appellant-accused therein u/s.138, N.I. Act, despite the non-consent of the complainant-respondent – However, this cannot be a reason for 'compounding' an offence u/s.138, N.I. Act, invoking the power u/s.482, Cr.P.C. and the power u/s.147, N.I. Act, in the absence of consent of the complainant concerned – The fact that Supreme Court quashed the proceedings u/s.138, N.I. Act, invoking the power u/Article 142 can be no reason at all for High Courts to pass an order quashing proceeding u/s.138, N.I. Act, on the similar lines as the power u/Article 142 of the Constitution of India is available only to the Supreme Court of India. [Para 18]

Case Law Cited

Monica Kumar (Dr.) v. State of Uttar Pradesh **[2008] 9 SCR 943 : (2008) 8 SCC 781;** *Arvind Barsaul (Dr.) v. State of M.P.* **(2008) 5 SCC 794;** *Damodar S. Prabhu v. Sayed Babalal H.* **[2010] 5 SCR 678 : (2010) 5 SCC 663;** *K.M. Ibrahim v. K.P. Mohammed & Anr.* **[2009] 15 SCR 1300 : (2010) 1 SCC 798;** *O.P. Dholakia v. State*

of Haryana & Anr. **(2000) 1 SCC 762;** *JIK Industries Ltd. & Ors v. Amarlal V. Jumani & Anr.* [2012] 3 SCR 114 **: (2012) 3 SCC 255;** *Raj Reddy Kallem v. The State of Haryana & Anr.* [2024] 5 SCR 203 **: 2024 INSC 347;** *Meters and Instruments Private Ltd. & Anr. V. Kanchan Mehta* [2017] 10 SCR 66 **: (2018) 1 SCC 560;** *Expeditious Trial of Cases Under Section 138, N.I. Act, 1881, In re* [2021] 4 SCR 257 **: (2021) 16 SCC 116;** *State of Punjab & Ors. v. Surinder Kumar & Ors.* [1991] Supp. 3 SCR 553 **: (1992) 1 SCC 489 – referred to.**

List of Acts

Negotiable Instruments Act, 1881; Code of Criminal Procedure, 1973; Constitution of India.

List of Keywords

Section 482 of the Code of Criminal Procedure, 1973; Section 147, Negotiable Instruments Act, 1881; Article 142 of the Constitution of India; Quashing of proceeding u/s.138, Negotiable Instruments Act, 1881; Inherent power; Compounding the offence u/s.138 of the Negotiable Instruments Act, 1881; Dishonor of cheques; Consent; Consent of the complainant; Non-consent of the complainant; Lack of consent of the complainant; 'Consent' for compounding offence; Compounding of offence; Complainant compensated; To do complete justice between the parties.

Case Arising From

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 3051-3052 of 2024

From the Judgment and Order dated 13.12.2023 of the High Court of Delhi at New Delhi in CRLMC No. 970 of 2023 and CRLMA No. 3701 of 2023

Appearances for Parties

Vimit Trehan, Dhruv Dwivedi, Ravi Bharuka, Advs. for the Appellant.

Giriraj Subramanium, Simarpal Singh Sawhney, Siddhant Juyal, Veda Singh, Ravi Pathak, Simar Singh Sawhney, Akhilesh Talluri, Joy Banarjee, Ms. Urvarshi Singh, Aditya Singh, Advs. for the Respondents.

A.S. Pharma Pvt. Ltd. v. Nayati Medical Pvt. Ltd. & Ors.

Judgment / Order of the Supreme Court

Order

Delay condoned.

Leave granted.

1. These appeals are directed against the judgment dated 13.12.2023 passed by the High Court of Delhi in Criminal Miscellaneous Case No. 970 of 2023 and Criminal Miscellaneous Appeal No. 3701 of 2023. The appellant filed Complaint Case No. 5564 of 2022 alleging commission of offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the 'N.I. Act') against the respondents. On receipt of the summons, the respondents appeared before the Court and expressed their readiness to settle the matter by effecting the payment. An application to permit to compound the offence was filed under Section 320 of the Code of Criminal Procedure, 1973 (for short, the 'Cr.P.C.'). The Trial Court dismissed the same as per order dated 06.02.2023. Aggrieved by the order of the Trial Court, respondents took up the matter before the High Court challenging the order dismissing the application for compounding the offence under Section 138, N.I. Act also seeking quashment of C.C. No.5564 of 2022 and all further proceeding thereon in Criminal M. C. No. 970 of 2023. As per the impugned judgment the High Court, apparently, exercised the inherent power under Section 482, Cr.P.C., coupled with those under Section 147, N.I. Act, and ordered thus:-

> *"17. Accordingly, the present petition is allowed and the offence of the petitioners/ accused persons in Complaint Case No.5564/2022 titled A.S. Pharma Pvt. Ltd. vs M/S Nayati Medical Pvt. Ltd. & Ors. pending before the learned Trial Court is hereby compounded, albeit subject to the petitioners depositing before the concerned learned Trial Court the cumulative cheque(s) amount of Rs.6,50,000/- (Rs. Six Lakhs fifty thousand only) with 12% simple interest per annum thereon from the date of cheque(s) return memo i.e. 18.03.2020 till the date of actual payment of the amount as also a sum of Rs.1,00,000/- Rs. One Lakh only), within a period of eight weeks. Needless to mention, the amount, if any, already deposited before the learned Trial*

Court be adjusted in the aforesaid sum(s). The respondent/ complainant is free to move an appropriate application for release of the amount deposited before the learned Trial Court in above terms."

2. Heard the learned counsel appearing for the appellant and the learned counsel appearing for the respondents.

3. The core contention of the appellant is that an offence under Section 138 of the N.I. Act is not compoundable under Section 320 Cr.P.C., and in such circumstances, the application was rightly dismissed by the Trial Court. Ergo, invoking the power under Section 482 Cr.P.C., coupled with those under Section 147, N.I. Act, the High Court ought not to have compounded the offence without the consent of the appellant.

4. *Per contra,* the learned counsel appearing for the respondents submitted that when the indisputable position is that the offence under Section 138 of the N.I. Act is compoundable under Section 147 of the N.I. Act, no palpable illegality could be attributed to the action in invoking the power under Section 482, Cr.P.C, coupled with the power under Section 147, N.I. Act to compound the offence. The said contention of the respondents was resisted by the learned counsel for the appellant contending that for compounding the offence, consent of the complainant is required. Sans consent from the complainant, the High Court was not justified in compounding of the offence under Section 138, N.I. Act, it is further contended.

5. A perusal of the impugned order would reveal that though the High Court entertained the challenge against the order rejecting an application for compounding the offence under Section 138, N.I. Act filed under Section 320 Cr.P.C., the High Court actually compounded the offence invoking its inherent power under Section 482 Cr.P.C., coupled with the power under Section 147 of the N.I. Act. To consider the legality and correctness of the said exercise of power, it is imperative to understand the scope of Section 482, Cr.P.C, as also Section 147 of the N.I. Act. Section 482, Cr.P.C., reads thus: -

"482. Saving of inherent powers of High Court. — Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be

> *necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."*

6. In the decision in ***Monica Kumar (Dr.) v. State of Uttar Pradesh [(2008) 8 SCC 781]****,* this Court held that the inherent jurisdiction under Section 482, Cr.P.C, would be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the Section itself viz., to give effect to any order under Cr.P.C., or to prevent abuse of process of any Court or otherwise to secure the ends of justice.

7. In the decision in ***Arvind Barsaul (Dr.) v. State of M.P. [(2008) 5 SCC 794]****,* this Court held that though offence under Section 498A, IPC is not compoundable, but when parties have compromised, continuance of proceedings would be an abuse of process of law and hence, could be quashed on a petition filed under Section 482, Cr.P.C. We referred to this decision to show that when the parties are *ad idem* for discontinuance of criminal proceedings which are not of grave nature, power under Section 482, Cr.P.C. is exercisable.

8. Now, we will refer to Section 147 of the N.I. Act and it reads thus: -

> *"147. Offence to be compoundable-*
>
> *Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), every offence punishable under this Act shall be compoundable."*

9. Thus, a bare perusal of Section 482, Cr.P.C., and Section 147, N.I. Act would reveal they are different and distinct. The former being the inherent power of High Court exercisable even *suo motu* to give effect to any order under Cr.P.C., or to prevent abuse of the process of any court or otherwise to secure the ends of justice. However, the provision for compounding every offence punishable under the N.I. Act, under Section 147, N.I. Act, is not a power available to a Court to exercise without the consent of the complainant. We will dilate on this aspect a little later.

10. Now, in the context of the rival contentions, it is worthwhile to note that by the combined exercise of powers under Section 482, Cr.P.C., and Section 147, N.I. Act, the High Court, has actually compounded the offence, under Section 138, N.I. Act, despite the non-consent of

the complainant/ appellant herein therefor. Contextually, it is relevant to refer to paragraph 102 (6) of the decision of this Court in ***State of Haryana v. Bhajan Lal*** ***(AIR 1992 SC 604)***, which reads thus: -

> *"Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party."*
>
> *(underline supplied)*

11. It is thus well-neigh settled position that the inherent powers under Section 482, Cr.P.C., are invocable when no other efficacious remedy is available to the party concerned and not where a specific remedy is provided by the statute concerned. We may further add here that certainly the power under Section 482, Cr.P.C., is not invocable, ignoring the factor which is *sine qua non* for the exercise of power to compound the offence(s) under N.I. Act viz., the consent of the complainant.

12. Before delving into the question whether consent of the complainant, who is to compound the offence, is required to exercise the power under Section 147, N.I. Act, it is only appropriate to refer to paragraphs 12 and 13 of the impugned judgment of the High Court. They read thus: -

> *"12. Broadly speaking, in the considered opinion of this Court, the essence of all the aforesaid pronouncements by the Hon'ble Supreme Court coupled with Section 138 of the N.I. Act read together with the other provisions of the N.I. Act is that the consent of the complainant is not mandatory at the time of compounding of the offence under Section 138 of the N.I. Act, once the complainant has been equitably compensated.*
>
> *13. In effect, whence the complainant has been reasonably compensated the accused can be discharged/ acquitted even without the consent of the complainant, in the interest of justice and to prevent the abuse of the process of law,*

> *since once an accused accepts his liability to pay the cheque amount, there will be no fruitful purpose in keeping the complaint alive."*
>
> *(Underline supplied)*

13. Having gone through the factual matrix of the case on hand and the afore-extracted paragraph Nos. 12 and 13 of the impugned judgment, we are of the considered view that the understanding and exposition of law by the High Court on the question of invocation of the power under Section 482, Cr.P.C., and Section 147, N.I. Act to compound the offence under Section 138, N.I. Act, run contrary to the law enunciated by this Court on the said question. In the light of the decisions of this Court in ***Damodar S. Prabhu v. Sayed Babalal H. [(2010) 5 SCC 663], K.M. Ibrahim v. K.P. Mohammed & Anr. [(2010) 1 SCC 798]*** *and* ***O.P. Dholakia v. State of Haryana & Anr. [(2000) 1 SCC 762]****,* there cannot be any doubt with regard to the position that offence under Section 138, N.I. Act could be compounded under Section 147, N.I. Act, at any stage of the proceedings.

14. As relates the requirement of 'consent' for compounding offence under Section 138, N.I. Act, by invoking the power under Section 147, N.I. Act, it is to be noted that the question is no longer *res integra*. This Court in the decision in ***JIK Industries Ltd. & Ors v. Amarlal V.Jumani & Anr. [(2012) 3 SCC 255]*** declined to accept the contention that in view of the non-obstante clause in Section 147, NI Act, which is a special statute, the requirement of consent of the person compounding the offence under Section 138, N.I. Act, is not required. After extracting provision under Section 147, N.I. Act, this Court in JIK Industries Ltd. case (supra) observed and held in paragraph 58 and 59 thereof thus: -

> *"58. Relying on the aforesaid non obstante clause in Section 147 of the NI Act, the learned counsel for the appellant argued that a three-Judge Bench decision of this Court in Damodar [(2010) 5 SCC 663], held that in view of non obstante clause in Section 147 of the NI Act, which is a special statute, the requirement of consent of the person compounding in Section 320 of the Code is not required in the case of compounding of an offence under the NI Act.*

> *59. This Court is unable to accept the aforesaid contention for various reasons which are discussed below."*

15. In the contextual situation it is relevant to refer to a recent decision of this Court in ***Raj Reddy Kallem v. The State of Haryana & Anr. [2024 INSC 347]***. The said decision would reveal that this Court took note of earlier decisions of this Court in JIK Industries Ltd. case (supra) as also in the decision in ***Meters and Instruments Private Ltd. & Anr. V. Kanchan Mehta [(2018) 1 SCC 560]*** and in un-ambiguous terms held that for compounding the offence under Section 138, N.I. Act, 'consent' of the complainant is required. In Kanchan Mehta's case (supra) even after referring to the decision in *JIK Industries ltd.* case (supra) this Court held that even in the absence of 'consent' Court could close criminal proceedings against an accused in a case under Section 138, N.I. Act, if the accused had compensated the complainant. It was held therein thus: -

> *18.3. Though compounding requires consent of both parties, even in absence of such consent, the court, in the interests of justice, on being satisfied that the complainant has been duly compensated, can in its discretion close the proceedings and discharge the accused.*

16. But then, it is to be noted that later a five-Judge Constitution Bench in ***Expeditious Trial of Cases Under Section 138, N.I. Act, 1881, In re (2021) 16 SCC 116*** held that observation in Kanchan Mehta's decision giving discretion to the trial Court *"to close the proceedings and discharge the accused"*, by reading Section 258, Cr.P.C., which confers the power to stop proceeding in certain cases, 'not a good law'. In Raj Reddy Kallem's case (supra), after referring to the above positions this Court further observed that even in Kanchan Mehta's case (supra) nowhere it was contemplated that 'compounding' could be done without the 'consent' of the parties. It is worthwhile to note at this juncture that in Raj Reddy Kallem's case this Court drew nice distinction between 'quashing of a case' and 'compounding an offence'. To drive that point home, this Court referred to the decision in JIK Industries Ltd. case (supra), where this Court distinguished the quashing of a case from compounding as hereunder: -

> *"Quashing of a case is different from compounding. In quashing, the Court applies it but in compounding it is primarily based on consent of the injured party. Therefore, the two cannot be equated."*

17. It is in the aforesaid circumstances that we held that the question whether the offence under Section 138, N.I. Act could be compounded invoking the power under Section 147, N.I. Act, without consent of the complainant concerned, is no longer *res integra.* In short, the position is 'that an offence under Section 138, N.I. Act could be compounded under Section 147 thereof, only with the consent of the complainant concerned'. In that view of the matter, the impugned judgment of the High Court wherein despite the absence of the consent of the appellant-complainant compounded the offence under Section 138, N.I. Act, on the ground that the appellant was equitably compensated, could not be sustained.

18. In the context of the issues involved another aspect of the matter also requires consideration. The decision in Raj Reddy Kallem's case (supra), also stands on a similar footing inasmuch as the complainant therein was duly compensated by the accused but the complainant did not agree for compounding the offence. After observing that, Courts could not compel the complainant to give consent for compounding the offence under Section 138, N.I. Act, this Court in Raj Reddy Kallem's case (supra) took note of the peculiar factual situation obtained and invoked the power under Section 142 of the Constitution of India to quash the proceeding pending against the appellant-accused under Section 138, N.I. Act. True that in Raj Reddy Kallem's case it was despite the non-consent of the complainant-respondent that the proceedings were quashed against the appellant therein, *inter alia*, taking note of the fact that the accused therein had compensated the complainant and furthermore deposited the additional amount, as has been ordered by this Court. We have no doubt in holding that merely because taking into account such aspects and circumstances this Court 'quashed' the proceedings by invocation of the power under Article 142 of the Constitution of India, cannot be a reason for 'compounding' an offence under Section 138, N.I. Act, invoking the power under Section 482, Cr.P.C. and the power under Section 147, N.I. Act, in the absence of consent of the complainant concerned in view of the decision referred hereinbefore. In this context, this is to be noted that the fact that this Court quashed the proceedings

under Section 138, N.I. Act, invoking the power under Article 142 of the Constitution of India can be no reason at all for High Courts to pass an order quashing proceeding under Section 138, N.I. Act, on the similar lines as the power under Article 142 of the Constitution of India is available only to the Supreme Court of India. In this context it is relevant to refer to the three-Judge Bench of this Court in ***State of Punjab & Ors. v. Surinder Kumar & Ors.*** ***[(1992) 1 SCC 489]***, this Court in paragraph 6 to 8 therein held thus: -

> *6. A decision is available as a precedent only if it decides a question of law. The respondents are, therefore, not entitled to rely upon an order of this Court which directs a temporary employee to be regularised in his service without assigning reasons. It has to be presumed that for special grounds which must have been available to the temporary employees in those cases, they were entitled to the relief granted. Merely because grounds are not mentioned in a judgment of this Court, it cannot be understood to have been passed without an adequate legal basis therefor. On the question of the requirement to assign reasons for an order, a distinction has to be kept in mind between a court whose judgment is not subject to further appeal and other courts. One of the main reasons for disclosing and discussing the grounds in support of a judgment is to enable a higher court to examine the same in case of a challenge. It is, of course, desirable to assign reasons for every order or judgment, but the requirement is not imperative in the case of this Court. It is, therefore, futile to suggest that if this Court has issued an order which apparently seems to be similar to the impugned order, the High Court can also do so. There is still another reason why the High Court cannot be equated with this Court. The Constitution has, by Article 142, empowered the Supreme Court to make such orders as may be necessary "for doing complete justice in any case or matter pending before it", which authority the High Court does not enjoy. The jurisdiction of the High Court, while dealing with a writ petition, is circumscribed by the limitations discussed and declared by the judicial decisions, and it cannot transgress the limits on the basis of whims or subjective sense of justice varying from Judge to Judge.*

> *7. It is true that the High Court is entitled to exercise its judicial discretion in deciding writ petitions or civil revision applications but this discretion has to be confined in declining to entertain petitions and refusing to grant relief, asked for by petitioners, on adequate considerations; and it does not permit the High Court to grant relief on such a consideration alone.*
>
> *8. We, therefore, reject the argument addressed on behalf of the respondents that the High Court was entitled to pass any order which it thought fit in the interest of justice. Accordingly, we set aside the impugned order and allow the appeal, but in the circumstances without costs.*

19. The upshot of the discussion is that the High Court had clearly fallen in error in invoking the power under Section 482, Cr.P.C., as also the power under Section 147, N.I. Act, to compound the offence under Section 138 of the N.I. Act *qua* the respondent-accused. Hence, the impugned judgment to the extent it compounded the offence under Section 138, N.I. Act invoking the inherent power under Section 482, Cr.P.C. and the power under Section 147, N.I. Act stands quashed and set aside.

20. However, the position is that the respondents have, by now, deposited an amount of Rs. 6,50,000/- along with 12% simple interest per annum from the date of cheque till the date of actual payment besides a sum of Rs. 1 lakh payable additionally, as ordered under the impugned judgment before the trial court. Therefore, the amount is available to be withdrawn by the appellant-complainant.

21. In view of the peculiar position thus obtained with respect to the deposit of the amount payable under the impugned judgment, the fact that the dishonored cheque Nos.17632 dated 19.01.2020 and 17633 dated 09.02.2020 were respectively for Rs.3,00,000/- and Rs.3,50,000/- and the further fact that upon receiving the summons, the respondent-accused have expressed their readiness to effect the payment and to settle the matter, we are of the considered view that there is no point in restoring the proceedings and to permit their continuance before the trial Court, though we have set aside the impugned judgment to the extent it compounded the offence under Section 138, of the N.I. Act, invoking the power under Section 482, Cr.P.C., and Section 147, N.I. Act. Hence, despite the lack of consent

from the appellant-complainant, we found that it is a befitting case to invoke the power of this Court under Article 142 of the Constitution of India to do complete justice between the parties and to quash Complaint Case No.5564 of 2022 as also all proceedings emerging therefrom. Hence, Complaint Case No. 5564 of 2022, pending before the Court of MM (N.I. Act), Digital Court-02/SED, Saket District Courts and all the further proceedings therefrom stand set aside and quashed. The appellant-complainant will be entitled to withdraw, in accordance with law, entire amount in deposit before the trial Court viz., Rs.6,50,000/- along with 12% simple interest per annum from the date of the cheque in question till the date of actual payment along with the additionally paid Rs.1,00,000/-. We make it clear that observations, if any, made in this case are solely for the purpose of deciding the captioned appeals.

22. The appeals stand disposed of on the above terms.

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

Result of the case: Appeals disposed of.

†*Headnotes prepared by:* Divya Pandey

[2024] 7 S.C.R. 1489 : 2024 INSC 558

Gaurav Kumar
v.
Union of India and Ors.

(Writ Petition (Civil) No. 352 of 2023)

30 July 2024

[Dr Dhananjaya Y Chandrachud,* CJI and J.B. Pardiwala, JJ.]

Issue for Consideration

Whether the enrolment fees charged by the State Bar Councils (SBC) are in contravention of Section 24(1)(f) of the Advocates Act, 1961; whether payment of other miscellaneous fees can be made a pre-condition for enrolment.

Headnotes†

Advocates Act, 1961 – s.24(1)(f) – Enrolment of advocates – Challege to the validity of Enrolment fees charged by SBCs – The grievance is that the fees charged by the SBCs at the time of admission of persons on State rolls are more than the enrolment fee prescribed under Section 24(1)(f) of the Advocates Act 1961:

Held: While acting as a delegate of Parliament, the SBCs and the Bar Council of India (BCI) can frame rules under the Advocates Act – However, any rule enacted by the SBCs is only ancillary and cannot be so exercised to bring into existence substantive rights, obligations or disabilities not contemplated by the provisions of the parent enactment – Further, the rules must align with the object and purpose of the Advocates Act, namely, the creation of a common bar and regulation of legal practitioners and their qualifications, enrolment, right to practice, and discipline – A delegate cannot act contrary to the express provisions and object of the parent legislation – A delegate cannot widen or constrict the scope of the parent legislation or the legislative policy prescribed under it – A fiscal provision has to be construed strictly and a delegate cannot consider any circumstance, factors or condition not contemplated by the parent legislation – Section 24(1) lays down the qualifications subject to which an advocate may be admitted on a State roll – Section 24(1)(f) provides that the enrolment fee payable by general candidates is Rupees seven hundred fifty and

* Author

by SC and ST candidates, Rupees one hundred and twenty-five – Section 24(1)(f) reflects the legislative policy of the Advocates Act that subject to the fulfilment of other conditions of Section 24(1), the payment of the stipulated monetary amount will make a person eligible to be admitted as an advocate – Presently, the SBCs charge enrolment fees in the following manner: (i) they charge an enrolment fee according to the legal stipulation under Section 24(1)(f), but charge miscellaneous fees, and (ii) they charge an enrolment fee beyond the legal stipulation in addition to charging miscellaneous fees – The SBCs cannot charge "enrolment fees" beyond the express legal stipulation under Section 24(1)(f) as it currently stands – Therefore, prescribing enrolment fees beyond Rupees seven hundred for general candidates and Rupees one hundred twenty-five for SC and ST candidates is contrary to Section 24(1)(f) – The subject matter of enrolment fee is covered by the Advocates Act – Therefore, the SBCs, being delegated authorities, do not have any legislative powers to prescribe enrolment fees contrary to the statutory stipulation – Section 24(1)(f) specifically lays down the fiscal pre-conditions subject to which an advocate can be enrolled on State rolls – The SBCs and the BCI cannot demand payment of fees other than the stipulated enrolment fee and stamp duty, if any, as a pre-condition to enrolment – The decision of the SBCs to charge fees and charges at the time of enrolment in excess of the legal stipulation under Section 24(1)(f) violates Article 14 and Article 19(1)(g) of the Constitution. [Paras 58, 66, 67, 68, 109(b), 109(c)]

Advocates Act, 1961 – All India Bar Committee – Legal Background – discussed.

Advocates Act, 1961 – A Complete Code – Admission and enrolment of advocates:

Held: The provisions of the Advocates Act indicate that it provides a complete machinery to deal with the admission and enrolment of advocates – The SBCs are vested with sufficient powers to ensure effectual and complete implementation of the enactment. [Para 26]

Delegated Legislation – When can a delegated legislation be challenged:

Held: It is well established in *Indian Express Newspapers (Bombay) (P) Ltd v. Union of India* [1985] 2 SCR 287 and *State of Tamil Nadu v. P Krishnamurthy* [2006] 3 SCR 396 that delegated legislation can be challenged on the following grounds: (i) lack of

legislative competence to make delegated legislation; (ii) violation of fundamental rights guaranteed under the Constitution; (iii) violation of any provision of the Constitution; (iv) failure to conform to the statute under which it is made or exceeding the limits of authority conferred by the enabling Act; (v) repugnance to any other enactment; and (vi) manifest arbitrariness. [Para 28]

Constitution of India – Arts.265 and 366 – Power to levy fees:

Held: (i) a fee is an impost in terms of Article 366(28); (ii) the expression "tax" occurring in Article 265 means all imposts, including fees and therefore any fee must be levied by the authority of a valid law; (iii) fees being a compulsory exaction of money, the power to levy fees cannot be implied; (iv) delegation of the power to levy fees to a delegate of the legislature should be specifically provided for under the parent legislation; and (v) the delegate must strictly act within the parameters of the legislative policy laid down by the parent legislation when levying fees and taxes.[Para 34]

Constitution of India – Advocates Act, 1961 – s.24(1)(f) – Enrolment fee meets the characteristic of a Regulatory Fees:

Held: The State grants a licence to regulate a particular trade, business, or profession – These regulatory activities entail a duty on behalf of the State or its instrumentalities to supervise, regulate, and monitor that particular trade, business, or profession – Because such activities require the State to expend public resources, the State can charge licence fees to defray the administrative costs – The enrolment fee stipulated by Section 24(1)(f) of Advocates Act meets the characteristic of a regulatory fee. [Paras 35, 38]

Advocates Act, 1961 – s.24(1)(f) – Bar Councils cannot levy fees beyond the express stipulation of law:

Held: Section 24(1)(f) is a fiscal regulatory provision and has to be construed strictly – Parliament has prescribed the enrolment fees in the exercise of its sovereign legislative powers – The SBCs and the BCI, being delegates of Parliament, cannot alter or modify the fiscal policy laid down by Parliament – The delegate can create substantive rights and obligations only to the extent to which the parent enactment empowers the delegate – By prescribing additional fees at the time of enrolment, the SBCs have created new substantive obligations not contemplated by the provisions of the Advocates Act – The basis for the fees imposed by the SBCs has to be traceable to the provisions of the statute –

There is no express provision in the Advocates Act empowering the SBCs to levy fees, except for the enrolment fee and stamp duty, if any, under Section 24(1)(f), at the time of admission of advocates on the State roll – The decision of the SBCs to charge miscellaneous fees is contrary to the legislative prescription of the Advocates Act. [Para 70]

Advocates Act, 1961 – s.24 – Charges other than the enrolment fee cannot be a valid pre-condition:

Held: Admission on the roll of advocates is a pre-requisite for any person intending to practice law in India – At the time of enrolment, candidates have little agency but to pay the miscellaneous fees imposed by the SBCs to get enrolled – Non-payment of the fees means that a candidate cannot get enrolled on the State roll – Thus, all the miscellaneous fees collected from a candidate at the time of enrolment essentially serve as a pre-condition to the process of enrolment – Section 24(1) specifically lays down the pre-conditions subject to which an advocate can be enrolled on State rolls – Since Section 24(1)(f) specifies the amount that can be charged by the SBCs as an enrolment fee, the SBCs and the BCI cannot demand payment of fees other than the stipulated enrolment fee as a pre-condition to enrolment. [Para 79]

Bar Council of India Rules – Rule 40 under Section IVA of Chapter II of Part VI:

Held: Rule 40 under Section IVA of Chapter II of Part VI under the BCI Rules mandates every advocate borne on the rolls to pay the SBC a sum of Rupees three hundred every third year – The sum under Rule 40 can only be collected from advocates already admitted on the State rolls – Therefore, this sum cannot be collected from persons at the time of enrolment – It must be collected from advocates after they are admitted on the State roll. [Para 80]

Constitution of India – Art.14 – Enrolment of advocates – Exorbitant Enrolment fees charged by SBCs – Substantive equality and manifest arbitrariness:

Held: The burden of payment of enrolment fees and other miscellaneous fees imposed by the SBCs falls equally on all persons seeking enrolment – While the burden is facially neutral, it perpetuates structural discrimination against persons from marginalized and economically weaker sections of the society – In more than one way, the process of enrolment perpetuates a culture

of systemic exclusion and discrimination that impacts the entry of law graduates into the legal profession and even beyond – The right to pursue a profession of one's choice and earn livelihood is integral to the dignity of an individual – Charging exorbitant enrolment fees and miscellaneous fees as a pre-condition for enrolment creates a barrier to entry into the legal profession – The levy of exorbitant fees as a pre-condition to enrolment serves to denigrate the dignity of those who face social and economic barriers in the advancement of their legal careers – This effectively perpetuates systemic discrimination against persons from marginalized and economically weaker sections by undermining their equal participation in the legal profession – Therefore, the current enrolment fee structure charged by the SBCs (Eg: the Bar Council of Maharashtra and Goa charges a cumulative fee of Rupees fifteen thousand from the general candidates and Rupees fourteen thousand five hundred from SC and ST candidates) is contrary to the principle of substantive equality. [Paras 84, 90]

Constitution of India – Art. 19(1)(g) – The right to practice law – Fees or licences levied by the authorities – Unreasonableness:

Held: According to the current enrolment fee structure of the SBCs, an advocate has to pay anywhere between Rupees fifteen thousand to Rupees forty-two thousand as a pre-condition to enrolment – The SBCs charge enrolment fees in excess of the stipulated fee prescribed under Section 24(1)(f) – The excess enrolment fee imposed by the SBCs is without authority of law – Compounded with this there are no reasonable criteria behind the decision of the SBCs to charge such exorbitant amounts as enrolment fees – The SBCs cannot have unbridled powers to charge any fees given the express legislative policy under Section 24(1)(f) – Imposing excessive financial burdens on young law graduates at the time of enrolment causes economic hardships, especially for those belonging to the marginalized and economically weaker sections of the society – Therefore, the current enrolment fee structure charged by the SBCs is unreasonable and infringes Article 19(1)(g). [Para 102]

Advocates Act, 1961 – Exorbitant Enrolment fees charged by the SBCs – Financial implications for the SBCs and the BCI:

Held: According to the legislative scheme of the Advocates Act, the Bar Councils must only charge the amount stipulated under Section 24(1)(f) as an enrolment fee – Once the advocates are enrolled on

the State rolls, the Bar Councils can charge fees for the services provided to the advocates in accordance with the provisions of the Advocates Act – It is for the SBCs and the BCI to devise an appropriate method of charging fees that is fair and just not only for the law graduates intending to enroll, but also for the advocates already enrolled on the State rolls – There are several reasonable ways by which the SBCs and BCI can and already do collect funds at later stages of an advocate's career. [Paras 103, 104]

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List of Acts

Legal Practitioners Act, 1879; Indian Bar Councils Act, 1926; Advocates Act, 1961; Constitution of India; Bar Council of India Rules; Advocates Welfare Fund Act, 2011.

List of Keywords

All India Bar Committee; Delegated Legislation; Power to levy fees; Regulatory fees; State Bar Councils; Enrolment of advocates; Enrolment fees of advocates; Valid pre-condition; Substantive equality; Arbitrariness; Article 14 of Constitution of India; Article 19(1)(g) of the Constitution; Section 24(1)(f) of the Advocates Act, 1961; Bar Council of India; Enrolment fee of advocates; Enrolment of advocates; Miscellaneous fees; Article 265 of the Constitution of India; Article 366(28) of the Constitution of India; Article 110 of the Constitution of India; Legislative policy; Marginalized communities in legal profession; Dignity of an individual; Reasonable restrictions; Excessive Enrolment fees; Financial implications for State Bar Councils.

Case Arising From

CIVIL ORIGINAL JURISDICTION: Writ Petition (Civil) No. 352 of 2023

(Under Article 32 of The Constitution of India)

With

T.C.(C) Nos. 28, 29, and 30 of 2023, T.P.(C) Nos. 2526, 1982, 2088-2089, 2171, 2123 and 2734 of 2023

Appearances for Parties

By Courts Motion

Solicitor General of India, K.M. Natraj, ASG, Raghenth Basant, R. Balasubramanian, Manan Kumar Mishra, S. Prabakaran, Apurba Kumar Sharma, C. Nageswara Rao, V. Giri, Sr. Advs., Ms. Kaushitaki Sharma, Ms. Hima Bhardwaj, Ms. Purnima Krishna, Sachin Patil, Rohit Kumar, Shailendra Singh, Adarsh Mishra, Mrs. Usha Prabakaran, Ms. Divya, Ms. Rv Shaarumathi, G Jai Singh, Muthu Ganesa Pandian, M/s. Ram Sankar & Co, Dr. Arvind S. Avhad, Rajat Kapoor, Sushil Sonkar, Sanjay Shirsat, Mrs. Resmi Shirsat, Shivakant Vats, Rohit Jaiswal, Mangesh Naik, Dnyaneshwar N Telange, Kailas Bajirao Autade, Ravindra Sadanand Chingale, Dr. Ravindra Chingale, Ms. Rashi Sheth, Ms. Sumbul Ausaf, Ms. Deeplaxmi Matwankar, Dr. Rakesh Kumar, Ms. Kalyani Lal, Prabhas Bajaj, Anmol Chandan, Sharath Nambiar, Ms. Ruchi Gour Narula, Shivank Pratap Singh, Satvik Mishra, Arvind Kumar Sharma, Shubham Saurav, Gaurav Sharma, M/s. Axess Legal Corp, Nitin Lonkar, Siddharth Dharmadhikari, Aaditya Aniruddha Pande, Bharat Bagla, Sourav Singh, Aditya Krishna, Ms. Preet S. Phanse, Adarsh Dubey, Ms. Deepanwita Priyanka, M. Naveen, Ms. Anjul Dwivedi, G Anandan, Dr. Ram Sankar, B Sasi Kumar, Mrs. Harini Ramsankar, M/s. Ram Sankar & Co., Sudarshan Singh Rawat, Ms. Anubha Dhulia, Ms. Saakshi Singh Rawat, Byrapaneni Suyodhan, Kumar Shashank, Ms. Tatini Basu, Purvish Jitendra Malkan, Ms. Dharita Purvish Malkan, Alok Kumar, Kush Goel, Dhruva Kumar, Ajay Kuamr Agarwal, Sachin Jain, Vishal, Rajiv Ranjan Dwivedi, Ms. Radhika Gautam, Mohammed Sadique T.A., Alim Anvar, Rahul Narang, Rao Vishwaja, Harshed Sundar, Nihar Dharmathikari, Niranjan Sahu, Umakant Misra, Mrs. Prabhati Nayak, Debabrata Dash, Ms. Apoorva Sharma, Abhishek Gautam, Sanjay Sharma, Keshari Kumar Tiwari, Karan Kapur, Dr. Ravinder Kumar Singh, Ms. Kamayani Tripathi, Ajit Pathak, Yusuf, Sanpreet Singh Ajmani, Sandeep Malik, Amit Kumar, Vishal Gera, Pukhrambam Ramesh Kumar, Karun Sharma, Ms. Anupama Ngangom, Ms. Rajkumari Divyasana, Ms. Vrinda Bhandari, Ms. Pragya Barsaiyan, Madhav Aggarwal, Ms. Anandita Rana, Durgesh Ramchandra Gupta, Vikas Verma, Mrs. Sapna Verma, Mayank Choudhary, Shafik Ahmed, Danish Saifi, Ms. Anju, Bibhav Kumar Singh, Satya Prakash Gautam, Shahid Akhtar, Advs. for the appearing parties.

Gaurav Kumar, Petitioner-in-person

Gaurav Kumar v. Union of India and Ors.

Judgment / Order of the Supreme Court

Judgment

Dr Dhananjaya Y Chandrachud, CJI

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1. The proceedings under Article 32 of the Constitution address a challenge to the validity of the enrolment fees charged by State Bar

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

Councils.[1] The grievance is that the fees charged by the SBCs at the time of admission of persons on State rolls are more than the enrolment fee prescribed under Section 24(1)(f) of the Advocates Act 1961.[2]

A. Background

2. The Advocates Act was enacted to amend and consolidate the law relating to legal practitioners and constitute a common Bar for the whole country. The enactment establishes the SBCs[3] and the Bar Council of India.[4] Section 6 of the Advocates Act entrusts myriad functions to the SBCs. These functions comprehend entry into and conduct of legal professionals, including admission of advocates to their rolls, preparation and maintenance of rolls, determination of cases of misconduct against advocates on the rolls and safeguarding the rights, privileges and interests of advocates. The statute empowers the SBCs to organize legal aid for the poor, promote and support law reform, conduct academic discourses, and publish journals and papers on matters of legal interest.

3. The functions of the BCI have been enumerated under Section 7. These include laying down standards of professional conduct and etiquette for advocates, enunciating the procedure to be followed by its disciplinary committee and the disciplinary committee of the SBCs, safeguarding the rights, privileges, and interests of advocates, and promoting law reform. BCI is empowered to exercise general supervision and control over the SBCs. BCI is also empowered to impart legal education and lay down standards for legal education in consultation with the universities whose degrees in law would be a qualification for enrolment as an advocate and, for that purpose, visit and inspect universities.

4. Chapter III of the Advocates Act pertains to the admission and enrolment of advocates. Section 17 mandates the SBCs to prepare and maintain a roll of advocates. An application for admission as an advocate on a State roll is made to the SBCs.[5] The SBCs are

1 "SBCs"

2 "Advocates Act"

3 Section 3, Advocates Act

4 "BCI"; Section 4, Advocates Act

5 Section 25, Advocates Act

required to issue a certificate of enrolment to every person whose name is enrolled in the roll of advocates.[6] Section 24 prescribes the qualifications and conditions for a person to be admitted as an advocate.[7]

5. To qualify to be admitted as an advocate on a State roll, a person must:

(a) be a citizen of India;

(b) complete the age of twenty-one years;

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6 Section 22, Advocates Act

7 Section 24, Advocates Act [It reads:
24. Persons who may be admitted as advocates on a State roll.—(1) Subject to the provisions of this Act, and the rules made thereunder, a person shall be qualified to be admitted as an advocate on a State roll, if he fulfils the following conditions, namely:—
(a) he is a citizen of India:
Provided that subject to the other provisions contained in this Act, a national of any other country may be admitted as an advocate on a State roll, if citizens of India, duly qualified, are permitted to practise law in that other country;
(b) he has completed the age of twenty-one years;
(c) he has obtained a degree in law—
(i) before the [12th day of March, 1967], from any University in the territory of India; or
(ii) before the 15th day of August, 1947, from any University in any area which was comprised before that date within India as defined by the Government of India Act, 1935; or
[(iii) after the 12th day of March, 1967, save as provided in sub-clause (iii-a), after undergoing a three-year course of study in law from any University in India which is recognised for the purposes of this Act by the Bar Council of India; or
(iii-a) after undergoing a course of study in law, the duration of which is not less than two academic years commencing from the academic year 1967-68, or any earlier academic year from any University in India which is recognised for the purposes of this Act by the Bar Council of India; or]
[(iv) in any other case, from any University outside the territory of India, if the degree is recognised for the purposes of this Act by the Bar Council of India; or]
[he is a barrister and is called to the Bar on or before the 31st day of December, 1976; [or has passed the articled clerk's examination or any other examination specified by the High Court at Bombay or Calcutta for enrolment as an attorney of that High Court;] or has obtained such other foreign qualification in law as is recognised by the Bar Council of India for the purpose of admission as an advocate under this Act];
(e) he fulfils such other conditions as may be specified in the rules made by the State Bar Council under this Chapter;
[(f) he has paid, in respect of the enrolment, stamp duty, if any, chargeable under the Indian Stamp Act, 1899 (2 of 1899), and an enrolment fee payable to the State Bar Council of [six hundred rupees and to the Bar Council of India, one hundred and fifty rupees by way of a bank draft drawn in favour of that Council]:
Provided that where such person is a member of the Scheduled Castes or the Scheduled Tribes and produces a certificate to that effect from such authority as may be prescribed, the enrolment fee payable by him to the State Bar Council shall be [one hundred rupees and to the Bar Council of India, twenty-five rupees].
[*Explanation.*—For the purposes of this sub-section, a person shall be deemed to have obtained a degree in law from a University in India on the date on which the results of the examination for that degree are published by the University on its notice-board or otherwise declaring him to have passed that examination.]]

(c) obtain a degree in law;

(d) fulfil such other conditions as may be specified in the rules made by the SBCs under Chapter III; and

(e) pay an enrolment fee of Rupees six hundred payable to the SBC and Rupees one hundred to the BCI along with any stamp duty, if chargeable. In the case of a person belonging to the Scheduled Castes or Scheduled Tribes, the enrolment fee of Rupees one hundred is payable to the SBC and Rupees twenty-five to the BCI.

6. The SBCs charge enrolment fees stipulated under Section 24(1)(f) of the Advocates Act to admit law graduates on their State roll. At the time of enrolment, the SBCs also charge various "fees" and "charges" in addition to the enrolment fees in the form of library fund contributions, administration fees, identity card fees, welfare funds, training fees, processing fees, certificate fees, etc. The amount of fees charged by the SBCs differ significantly. This results in a situation where a law graduate has to pay somewhere between Rupees fifteen thousand to Rupees forty-two thousand (depending upon the SBC) as cumulative fees at the time of enrolment.

7. The petitioner instituted proceedings under Article 32 of the Constitution seeking a declaration that the fees charged by the SBCs at the time of enrolment violate Section 24(1)(f) of the Advocates Act. In its order dated 10 April 2023, this Court issued notice while observing that the petitioner has raised a significant issue about the enrolment fees charged by the SBCs. By an order dated 17 July 2023, this Court transferred to itself the petitions dealing with similar issues from the High Court of Kerala,[8] the High Court of Judicature at Madras at Madurai,[9] and the High Court of Judicature at Bombay.[10] Given this background, we now deal with the challenge to the validity of enrolment fees charged by the SBCs.

B. Issues

8. The petitions give rise to the following issues:

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8 Akshai M Sivan v. Bar Council of Kerala, Writ Petition (Civil) No. 3068 of 2023

9 Manimaran v. Bar Council of India, Writ Petition (MD) No. 8756 of 2023

10 Amey Shejwal v. Bar Council of Maharashtra and Goa, Writ Petition No. 3795 of 2021

a. Whether the enrolment fees charged by the SBCs are in contravention of Section 24(1)(f) of the Advocates Act; and

b. Whether payment of other miscellaneous fees can be made a pre-condition for enrolment.

C. Submissions

9. Mr Gaurav Kumar, the petitioner-in-person, made the following submissions:

a. Section 24(1)(f) expressly prescribes the enrolment fee chargeable by the SBCs and the BCI for persons to be admitted as an advocate. SBCs are charging exorbitant enrolment fees, often under different heads, in derogation of Section 24(1)(f);

b. Once there is a specific provision prescribing enrolment fees, the SBCs or the BCI through their delegated rule-making power cannot charge fees beyond the substantive provision. Therefore, the BCI and the SBCs cannot invoke their powers to frame rules under Section 49(1) and Section 28(1) of the Advocates Act respectively to prescribe enrolment fees that are at variance with Section 24(1)(f);

c. The term 'subject to the provisions of this Act' at the beginning of Section 24 has been misconstrued to permit charging enrolment fees beyond the statutory prescription. It only means that other provisions of the Act must be considered while deciding the 'eligibility' of law graduates to be admitted as advocates on the state rolls;

d. Section 6(3) of the Advocates Act prescribes how the SBCs may constitute 'funds' to fulfil their functions under Section 6(2). It does not allow imposing additional charges under different heads along with the enrolment fees or charging exorbitant fees as a mandatory condition for persons to get enrolled;

e. The exorbitant enrolment fees prevent law graduates belonging to economically weaker sections of society from getting admitted to the rolls of the SBCs. Such an indirect bar on law graduates enrolling as advocates offends Article 19(1)(g) of the Constitution. It also makes the process of enrolment coercive, improper, unjust and unfair, violating Article 14 of the Constitution; and

f. The Advocates' Welfare Fund Act 2001 enacted by Parliament allows for the collection of funds through various sources for the welfare of advocates. This amount does not need to be collected by levying exorbitant enrolment fees.

10. Mr Manan Kumar Mishra, senior counsel made the following submissions on behalf of the BCI:

a. Bar Councils require adequate operational funds to effectively discharge their functions. They require funds for day-to-day functioning including administrative expenses, staff salaries, infrastructure maintenance and technological advancements. Inadequate funding will hinder the ability of SBCs to comply with their statutory obligations under the Advocates Act;

b. The enrollment fee prescribed under Section 24(1)(f) was fixed by the legislature in 1993 and has not been modified since. It fails to account for inflation and is not adequate to meet current financial demands. Unlike other professional bodies that levy an annual subscription fee on members, SBCs rely on the one-time enrolment fee;

c. The fees charged by SBCs at the time of enrollment include additional expenses incurred in the enrolment process along with the enrolment fee prescribed by the Act, such as online data processing fee, identity card fee and verification process fee. Therefore, the fees charged do not violate Section 24(1)(f) and are linked to the services being rendered by the SBCs;

d. Section 6(2) lays down the functions of the SBCs and places enrolment of advocates exclusively within their domain. An entity on whom statutory powers or duties have been conferred impliedly possesses incidental powers necessary for its effective exercise;

e. Section 15 of the Act provides SBCs with the power to make rules to carry out the purposes of Chapter II of the Act (including Section 6). This general power to frame Rules includes the power to levy charges for services rendered under the Act;

f. Merely because a charge is levied at the time of 'enrollment' does not make it an enrollment fee. The 'enrollment fee' charged by most SBCs under Section 24(1)(f) continues to be six hundred

rupees and the remaining amount is usually attributable to additional charges for other services. SBCs may be directed to comply with Section 24(1)(f) while charging an 'enrollment fee'. But this must be distinguished from other charges levied at the time of enrolment. Such charges are permissible provided they pass the test of *quid pro quo* in terms of services rendered in return for the charges levied; and

g. The BCI has the power to frame rules to charge reasonable fees under Section 49(1) (ah) and Section 49(h). The term 'any matter' used in Section 49(h) also includes matters relating to the enrolment of an advocate. In exercise of this power and to ensure uniformity, the BCI has placed on record before this Court, the draft Uniform Rules (For Enrolment and Other Fees To Be Charged By The State Bar Councils) 2023[11] laying down a uniform fee to be charged by all SBCs at the time of enrollment.

11. In view of the above submissions, the BCI has submitted that this Court exercise its extraordinary powers under Article 142 to implement a uniform enrolment fee structure that adequately caters to the financial requirements of the SBCs until legislative amendments are made to the Advocates Act. Additionally, it has urged this Court to direct the Union Government to revise the enrolment fee prescribed in Section 24(1)(f).

12. The SBCs have filed counter affidavits justifying the imposition of the fees charged by them at the time of enrollment. In essence, they contend that (i) the statutorily prescribed enrolment fee in Section 24(1)(f) fails to account for the current economic situation; (ii) the SBCs are charging fees in addition to the statutorily prescribed enrolment fee in return for services such as library fee and ID card fee under their rule-making powers under Section 15 and Section 28; and (iii) the additional charges are essential to enable the SBCs to fulfil their statutory functions. In order to fulfil these statutory functions, the SBCs *inter alia* run various welfare programs, insurance schemes, seminars and training programmes, which require adequate funding.

13. Mr Raghenth Basant, senior counsel appearing for the petitioners before the Kerala High Court assailed the levy of enrollment fees by

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11 "BCI Draft Enrolment Rules"

the Bar Council of Kerala in excess of the fee prescribed in Section 24(1)(f). Mr Basant made the following submissions:

a. Rules prescribed by the SBCs under general provisions such as Section 24(1)(e) cannot be with respect to the enrolment fee which has been specifically dealt with in Section 24(1)(f);

b. Rule-making powers cannot be used to frame rules contrary to the Advocates Act, especially in the absence of any provision stipulating that the BCI or the SBCs are entitled to increase the statutory enrolment fee as they deem fit;

c. The 1993 amendment which increased the statutory enrolment fee to its present form indicates that Parliament has been conscious of the need to increase the enrolment fee as and when required and is the only competent authority to carry out such changes; and

d. Other fees charged by the Bar Council of Kerala, such as the sums charged under Rule 40 of Section IVA under Chapter II of Part VI of the Bar Council of India Rules[12] cannot be made a condition precedent for enrolment. Rule 40 of the BCI Rules prescribes that the payment be made by an advocate on the rolls of the SBC and thus, it cannot be a pre-requisite for enrolment.

D. Legal background

i. All India Bar Committee

14. The establishment of the High Courts by Letters Patent in the Presidencies of Calcutta, Bombay, and Madras brought all courts in the territories of British India under a unified system. The Letters Patent also allowed the High Courts to enroll advocates, vakils, and attorneys. The Legal Practitioners Act 1879 empowered the High Courts not established by royal charters to make rules for the qualifications and admission of persons seeking to be advocates of the Court.[13] Initially, barristers and solicitors predominated the Original Side practice in the High Courts.[14] Gradually, both advocates and vakils (who were Indian non-barristers) could act and plead before

12 "BCI Rules"

13 Section 41, Legal Practitioners Act 1879

14 Report of the All-India Bar Committee (1953) 15

all High Courts, except for the Calcutta High Court which excluded vakils from the Original Side.[15] This distinction between advocates and vakils led to the demand for the creation of an all-India Bar.

15. To give effect to this demand, the colonial legislature enacted the Indian Bar Councils Act 1926[16] "to provide for the constitution and incorporation of Bar Councils and to confer powers and impose duties on such Bar Councils." Section 3 prescribed the constitution of a Bar Council for every High Court. Section 8 pertained to the admission and enrolment of Advocates. It authorized the High Courts to prepare and maintain a roll of advocates. Section 9 empowered the Bar Councils to make rules regulating the admission of persons to be advocates of the High Court including the charging of fees payable to the Bar Councils in respect of enrolment. Thus, the 1926 Act empowered the Bar Councils to prescribe fees in respect of enrolment. However, the 1926 Act did not substantially fulfil the demands of the Indian legal practitioners for an all-India Bar. In 1951, the Government set up the All-India Bar Committee to inquire into this issue and provide a feasible legal solution.

16. The Committee recommended setting up of the SBCs and an All-India Bar Council, uniform minimum qualification for admission to the roll of Advocates, a common roll of Advocates maintained by the respective SBCs, and permitting the enrolled advocates to practice in any court in India, including the Supreme Court. The Committee's observations on the finances of the BCI and the SBCs are relevant:

> "It is obvious that in order to carry on its duties the All-India Bar Council and the State Bar Councils shall require funds. At present the Advocates, at the time of their enrolment, pay a certain amount ranging from Rs. 25/- to Rs. 100/- which goes to the Bar Council besides Rs. 250/- to Rs. 1,125/- which goes to the State. Entrants to the professions other than the legal profession are not required to pay any amount to the State as and by way of admission fee. Persons exercising any profession, calling or vocation including Advocates in several places have to pay a licence fee, but there is no reason why there should be a taxation

15 Ibid

16 "1926 Act"

> by the State at the time of enrolment of Advocates only. **The Committee suggests that an Advocate at the time of his admission shall pay a sum of Rs. 500/- to the State Bar Council to which he makes his application and nothing should be payable to the State. This amount may be paid in a lump sum or an Advocate may elect to pay annual amounts of Rs. 50/- with an option to pay Rs. 500/- at any time, amounts already paid not being deducted**. Those Vakils and Pleaders who according to the recommendations of the Committee become eligible to be enrolled as Advocates may pay Rs. 500/- in lump sum or an annual amount of Rs. 50/- with the option mentioned above. Each State Bar Council shall for the first five years contribute 40% of the enrolment fees received by it to the All-India Bar Council. At the end of the first 5 years the proportion of the contribution may be reconsidered."[17]
>
> (emphasis added)

17. The Committee was aware of the fact that the SBCs will require funds to carry out their functions and duties. Consequently, the Committee recommended that an advocate should pay an enrolment fee of Rupees five hundred to the SBCs "at the time of his admission". The Committee suggested that this amount could either be paid as a lump sum or on a yearly instalment basis. In 1958, the Law Commission of India observed that the amount of Rupees five hundred proposed by the All-India Bar Committee was excessive. It instead suggested an enrolment fee of Rupees one hundred twenty-five.[18]

18. In 1959, the Legal Practitioners Bill 1959 was introduced in Parliament. The Bill was referred to a Joint Committee of Parliament

17 All-India Bar Committee (supra) 40

18 Law Commission of India, Fourteenth Report, Reform of Judicial Administration 1958 (Volume 1) 575. [It observed: "It appears to us that the amount of Rs. 500 proposed by the Committee is excessive. At present various State bar Councils are receiving payments which range from Rs. 50 to Rs. 100 from each entrant to the profession and so far we have been able to ascertain, not only are the amounts received sufficient to finance their activities but some of these Councils have accumulated out of these and other receipts substantial amounts which have been invested by them. The creation of the All India Bar Council envisaged by the Bar Committee will no doubt involve substantial additional expenditure. Considering all aspects of the matter, we suggest that an enrolment fee of Rs 125 may be charged by the State Bar Council from each entrant out of which Rs. 25 may be paid by the State Bar Council to the All India Bar Council."]

which submitted its recommendations in 1960. The Joint Committee recommended renaming the proposed enactment as the Advocates Act because there would only be one class of legal practitioners in India, that is, advocates. Importantly, the Joint Committee recommended reducing the proposed enrolment fee from Rupees five hundred to Rupees two-hundred and fifty. The aim behind reducing the enrollment fee was "to bring in as many eligible lawyers within its [the legislation's] fold as possible."[19]

19. The recommendation of the Joint Committee was accepted by Parliament and incorporated under Section 24(1)(f). During the Parliamentary debates preceding the passage of the Advocates Act, many members suggested that the enrolment fee of Rupees two-hundred fifty was exorbitant.[20] It was suggested that the enrolment fee should be further reduced or abolished altogether.[21] The then Minister of Law (Mr A K Sen) justified the rationale for prescribing Rupees two hundred fifty as enrolment fee thus:

> "So far the Bar Council is concerned, a fee of Rs. 250 is not very unreasonable especially having regard to the fact that when we are setting up an autonomous body, we must give it enough funds to make it effective and useful. **If it is to discharge all the functions given to it under this statute, then it requires funds and therefore Rs. 250 per entrant is not too much of a fee to pay when the Bar Council is going to function in so many different ways**."[22]
>
> (emphasis added)

The statement of the Law Minister indicates that the enrolment fee was meant to allow the SBCs to effectively discharge "all functions" under the Advocates Act.

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19 The Legal Practitioners Bill 1959, Report of the Joint Committee (28 March 1960) xiii. (Raghubir Sahai and Khuswant Rai, the members of the Joint Committee noted: "The Constitution of an All India Bar was demand of the country since long and this Bill has been brought forward to meet it. Its aim would be to bring in as many eligible lawyers within its fold as possible. That is why the enrolment fee has been reduced from Rs. 500/- originally proposed in the Bill to Rs. 250/-. It would have been much better if this could be reduced to Rs. 125/- as suggested by the Law Commission and the stamp duty would have been done away with altogether.")

20 Shri Shankaraiya, Legal Practitioners Bill, Lok Sabha (27 April 1961) 14162

21 Legal Practitioners Bill, Lok Sabha (27 April 1961) 14164

22 Rajya Sabha, Advocates Bill 1961 (4 May 1961) 2125.

20. In 1973, the enrolment fee payable by the members of the Scheduled Castes and Scheduled Tribes was reduced to Rupees one hundred twenty-five. Subsequently, Section 24(1)(f) was amended in 1993 to revise the fees payable by general candidates from Rupees two hundred fifty to Rupees seven hundred fifty, without increasing the fees payable by candidates belonging to the SC and ST category. The enrolment fees were increased given the representations made by the Bar Councils.[23] This indicates that Parliament is aware and responsive to the financial problems faced by the Bar Councils.[24]

ii. Advocates Act: A Complete Code

21. In **O N Mohindroo v. Bar Council of Delhi**,[25] a Constitution Bench held that the Advocates Act was enacted by Parliament under the legislative field of Entries 77[26] and 78[27] of List I. It was observed that the object of the Advocates Act is to constitute one common Bar for the whole of the country and to provide machinery for its regulated functioning. It was further observed that the expression "persons entitled to practice" under Entries 77 and 78 of List I includes within its scope the determination or prescription of qualifications and conditions entitling a person to practice as an advocate before the Supreme Court or the High Courts.[28]

22. In **Bar Council of U P v. State of U P**,[29] the issue before a three-Judge Bench was whether the State legislature could impose stamp duty on the certificate of enrolment issued by the SBCs. It was held that the enrolment fee payable under Section 24(1)(f) is covered by Entry 96 in List I. Concerning the imposition of stamp duty, it was

23 Shri H R Bhardwaj, Minister of State in the Ministry of Law, Justice and Company Affairs, Lok Sabha (26 November 1992) 451. [The minister stated: "The Bar Council of India and the State Bar Councils represented that the expenses involved in the administration of the Bar Council of India and the State Bar Councils are growing every year and that it has become necessary to revise the enrolment fee upwards from Rs. 250/- to Rs. 750/- without disturbing the fee payable in case of persons belonging to Scheduled Castes and Scheduled Tribes."]

24 Bar Council of Maharashtra v. Union of India, 2002 SCC OnLine Bom 251 [3] :

25 [1968] 2 SCR 709 : 1968 SCC OnLine SC 3

26 Entry 77, List I, Seventh Schedule, Constitution of India. [It reads: 77. Constitution, organization, jurisdiction and powers of the Supreme Court (including contempt of such Court), and the fees taken therein; persons entitled to practice before the Supreme Court"]

27 Entry 78, List I, Seventh Schedule, Constitution of India. [It reads: 78. Constitution and organization (including vacations) of the High Court except provisions as to officers and servants of High Court; persons entitled to practice before High Courts.]

28 O N Mohindroo (supra) [9]; Bar Council of U P v. State of U P (1973) 1 SCC 261 [11]

29 [1973] 2 SCR 1073 : (1973) 1 SCC 261

held that stamp duty payable on the certificate of enrolment cannot be regarded as a condition prescribed for enrolment because it pertains to the domain of taxation.[30] It was held that the State Legislature was competent to levy stamp duty under Entry 44 of List III of the Seventh Schedule.

23. The Advocates Act was enacted to implement the recommendations of the All-India Bar Committee. According to the Statement of Objects and Reasons, the main features of the enactment are:

(i) establishment of an All-India Bar Council and a common roll of advocates, and advocates on the common roll having a right to practice in any part of the country and any Court, including the Supreme Court;

(ii) integration of the bar into a single class of legal practitioners known as advocates;

(iii) prescription of a uniform qualification for the admission of persons to be advocates;

(iv) division of advocates into senior advocates and other advocates based on merit; and

(v) creation of autonomous Bar Councils, one for the whole of India and one for each State.

24. The 1926 Act did not prescribe any qualifications to be possessed by persons applying for admission as advocates. Under the 1926 Act, the Bar Councils prescribed qualifications, but the enrollment was carried out by the High Courts. Under the Advocates Act, the enrolment process is completely undertaken by the SBCs. The SBCs are mandated to maintain and prepare a State roll and admit persons as advocates on the roll if they fulfil the statutory prescriptions, along with any other qualifications laid down by the SBCs. Section 24(1) of the Advocates Act statutorily engrafts the minimum qualifications to be possessed by advocates seeking enrolment. The provision specifies the qualifications to be possessed by persons to be admitted as an advocate on a State roll. Additionally, the SBCs can also specify other conditions by rules.

30 Bar Council of U P (supra) [14]

25. Section 24A provides that no person shall be admitted on a State roll if he is: (i) convicted of an offence involving moral turpitude; (ii) convicted of an offence under the provisions of the Untouchability (Offences) Act 1955; and (iii) dismissed or removed from employment or office under State on any charge involving moral turpitude. Section 25 provides that an application for admission as an advocate shall be made to the SBC within whose jurisdiction the applicant proposes to practice. Section 26 mandates the SBCs to refer every application for admission to their enrolment committee for decision. The SBCs are also empowered to remove the names of advocates from the State roll.[31] Section 28 empowers the SBCs to make rules for the admission and enrolment of advocates.

26. The provisions of the Advocates Act indicate that it provides a complete machinery[32] to deal with the admission and enrolment of advocates. The SBCs are vested with sufficient powers to ensure effectual and complete implementation of the enactment. In **Dr Haniraj L Chulani** v. **Bar Council of Maharashtra and Goa**, this Court held that the Advocates Act provides a complete code for regulating the legal education and professional qualifications of an aspirant seeking entry into the legal profession.[33]

iii. Delegated legislation

27. The basic principle underlying the concept of delegated legislation is that the legislature cannot directly exert its will in every detail.[34] It lays down the legislative policy and delegates the subsidiary or ancillary powers to the delegated or subordinate authorities to carry out the legislative policy.[35] It is now a settled legal principle that the legislature cannot abdicate essential legislative functions to the delegated authority.[36] The legislature can entrust subsidiary or ancillary legislation to the delegate. Before such delegation, the legislature should enunciate the policy and the principles for the

31 Section 26A, Advocates Act

32 *See* Girnar Traders v. State of Maharashtra (2011) 3 SCC 1 [80]

33 (1996) 3 SCC 342 [17]

34 Mahachandra Prasad Singh (Dr.) v. Bihar Legislative Council (2004) 8 SCC 747 [13]

35 In re Delhi Laws Act 1912 (1951) SCC 568 [22]

36 Vasantlal Maganbhai Sanjanwala v. State of Bombay, 1960 SCC OnLine SC 27 [4]

guidance of the delegated authority.[37] As a corollary, the delegated authority must carry out its rule-making functions within the framework of the law. The delegated legislation must be consistent with the law under which it is made and cannot go beyond the limits of policy and standards laid down in the law.[38]

28. Although delegated legislation enjoys the presumption of constitutionality, it does not enjoy the same immunity as the parent legislation. It is now well-established[39] that delegated legislation can be challenged on the following grounds:

    (i) lack of legislative competence to make delegated legislation;

    (ii) violation of fundamental rights guaranteed under the Constitution;

    (iii) violation of any provision of the Constitution;

    (iv) failure to conform to the statute under which it is made or exceeding the limits of authority conferred by the enabling Act;

    (v) repugnance to any other enactment; and

    (vi) manifest arbitrariness.

29. Modern legislation often contains provisions enabling the delegate of the legislature to frame subordinate legislation. The statutory provision for delegation is often couched in general terms empowering the delegate the power to frame rules "to carry out the purposes of this Act" or a particular segment of the statute contained in a Chapter. The general provision is then followed by a provision enumerating specific matters on which the delegate may frame rules. A similar legislative scheme is reflected in Sections 15 and 28 of the Advocates Act. Where a rule-making power is conferred upon the delegate in general terms, a subsequent enumeration of matters on which the delegate may frame rules is illustrative and does not limit the scope of the general power.[40] The enumerated matters in such a situation

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37 Harishankar Bagla v. State of MP (1954) 1 SCC 978 [12]

38 Municipal Corporation of Delhi v. Birla Cotton, Spinning and Weaving Mills, Delhi, 1968 SCC OnLine SC 13 [13], [71]

39 Indian Express Newspapers (Bombay) (P) Ltd v. Union of India (1985) 1 SCC 641 [77]; State of Tamil Nadu v. P Krishnamurthy (2006) 4 SCC 517 [15]

40 Azfal Ullah v. State of U P, 1963 SCC OnLine SC 76 [13]; Rohtak and Hissar Districts Electric Supply Co. Ltd v. State of Uttar Pradesh, 1965 SCC OnLine SC 75 [18].

provide guidelines for the delegated authority while framing rules in exercise of the general power.[41]

iv. Power to levy fees

30. Article 265 of the Constitution stipulates that no tax shall be levied or collected except by the authority of law. Article 366(28) defines taxation or tax to include the imposition of a tax or impost, whether general, local or special.

31. In **CIT v. McDowell and Co. Ltd.**,[42] a three-Judge Bench of this Court enunciated the principles for interpreting Article 265 read with Article 366(28):

> "**21.** "Tax", "duty", "cess" or "fee" constituting a class denotes various kinds of imposts by State in its sovereign power of taxation to raise revenue for the State. Within the expression of each specie each expression denotes different kinds of impost depending on the purpose for which they are levied. This power can be exercised in any of its manifestations only under any law authorising levy and collection of tax as envisaged under Article 265 which uses only the expression that no "tax" shall be levied and collected except authorised by law. It in its elementary meaning conveys that to support a tax legislative action is essential, it cannot be levied and collected in the absence of any legislative sanction by exercise of executive power of State under Article 73 by the Union or Article 162 by the State.
>
> **22.** Under Article 366(28) "Taxation" has been defined to include the imposition of any tax or impost whether general or local or special and tax shall be construed accordingly. "Impost" means compulsory levy. The well-known and well-settled characteristic of "tax" in its wider sense includes all imposts. Imposts in the context have following characteristics:

41 D K Trivedi and Sons v. State of Gujarat, 1986 Supp SCC 20 [33]

42 [2009] 8 SCR 983 : (2009) 10 SCC 755

> (*i*) The power to tax is an incident of sovereignty.
>
> (*ii*) "Law" in the context of Article 265 means an Act of legislature and cannot comprise an executive order or rule without express statutory authority.
>
> (*iii*) The term "tax" under Article 265 read with Article 366(28) includes imposts of every kind viz. tax, duty, cess or fees.
>
> (*iv*) As an incident of sovereignty and in the nature of compulsory exaction, a liability founded on principle of contract cannot be a "tax" in its technical sense as an impost, general, local or special."

32. The Seventh Schedule to the Constitution differentiates between taxing entries and general entries. Subjects pertaining to the levy of taxes must be traced to specific taxing entries enumerated in either List I or List II.[43] In addition, Parliament has the residuary power under Article 248 read with Entry 97 of List I to legislate on matters not enumerated in List II or List III, including on matters of taxation. The power of the legislature to levy fees is dealt with under separate heads: (i) Entry 96 of List I empowers Parliament to levy fees in respect of any matters in List I; (ii) Entry 66 of List II empowers the State legislatures to levy fees in respect of any matters in List II; and (iii) Entry 47 of List III empowers both Parliament and the State legislatures (subject to Article 254) to levy fees for any matter enumerated in List III. Parliament has prescribed an enrolment fee under Section 24(1)(f) of the Advocates Act under Entry 96 of List I.

33. The legislature can delegate its power to levy fees.[44] Since a fee is an impost and a compulsory exaction of money, the power of a delegate to levy fees must flow from the express authority of law. In **Ahmedabad Urban Development Authority** v. **Sharadkumar Jayantikumar Pasawalla**[45] this Court observed:

> "7. […] In our view, such power of imposition of tax and/or fee by delegated authority must be very specific and there is no scope for implied authority for imposition of such tax

43 M P V Sundararamier & Co. v. State of Andhra Pradesh, 1958 SCC OnLine SC 22

44 Kandivali Coop. Industrial Estate v. Municipal Corporation of Greater Mumbai (2015) 11 SCC 161 [25]

45 [1992] 3 SCR 328 : (1992) 3 SCC 285 [7]

> or fee. It appears to us that the delegated authority must act strictly within the parameters of the authority delegated to it under the Act and it will not be proper to bring the theory of implied intent or the concept of incidental and ancillary power in the matter of exercise of fiscal power."

34. The principles that flow from the above discussion are: (i) a fee is an impost in terms of Article 366(28); (ii) the expression "tax" occurring in Article 265 means all imposts, including fees and therefore any fee must be levied by the authority of a valid law; (iii) fees being a compulsory exaction of money, the power to levy fees cannot be implied; (iv) delegation of the power to levy fees to a delegate of the legislature should be specifically provided for under the parent legislation; and (v) the delegate must strictly act within the parameters of the legislative policy laid down by the parent legislation when levying fees and taxes.

v. Regulatory fees

35. Article 110 of the Constitution, though in a different context, recognizes that fees imposed under the authority of law may include (i) fees for licences; and (ii) fees for service.[46] In **Commissioner, Hindu Religious Endowments, Madras** v. **Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt**,[47] a Constitution Bench explained the concept of licence fees thus:

> "47. […] In the first class of cases, the Government simply grants a permission or privilege to a person to do something, which otherwise that person would not be competent to do and extracts fees either heavy or moderate from that person in return for the privilege that is conferred. A most common illustration of this type of cases is furnished by the licence fees for motor vehicles. Here the costs incurred by the Government in maintaining an

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46 Article 110(2), Constitution of India. [It reads:
"110. Definition of "Money Bills"-
[…]
(2) A Bill shall not be deemed to be a Money Bill by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licences or fees for services rendered, or by reason that it provides for the imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes."]

47 [1954] 1 SCR 1005 : (1954) 1 SCC 412

> office or bureau for the granting of licences may be very small and the amount of imposition that is levied is based really not upon the costs incurred by the Government but upon the benefit that the individual receives. In such cases, according to all the writers on public finance, the tax element is predominant, and if the money paid by the licence-holders goes for the upkeep of roads and other matters of general public utility, the licence fee cannot but be regarded as a tax"

In **Shirur Mutt** (supra), it was held that a fee is money taken by the Government "as the return for the work done or services rendered."[48] Therefore, a fee was characterised by an element of *quid pro quo* between the payer and the public authority.

36. In a series of subsequent decisions, this Court held that a levy can be regarded as a fee if it has a "reasonable relationship" with services rendered by the public authority.[49] The traditional view that there must be an actual *quid pro quo* for a fee has not been applied in the strict sense in subsequent decisions of this Court. It has been held that the relationship between the levy of a fee and services rendered is one of general character and not of mathematical exactitude.[50]

37. In **Corporation of Calcutta** v. **Liberty Cinema**,[51] a Constitution Bench observed that licence fees are not necessarily charged in return for services rendered. This Court referred to a Privy Council decision[52] which inter alia held that licence fees could be charged to defray the costs of administering the local regulations. In **Secunderabad Hyderabad Hotel Owners' Association v. Hyderabad Municipal**

48 Shirur Mutt (supra) [48]

49 H H Sudhindra Thirtha Swamiar v. Commissioner for Hindu Religious and Charitable Endowments, [1963] Supp. 2 SCR 302 [18]. [It was observed: "18. […] A levy in the nature of a fee does no cease to be of that character merely because there is an element of compulsion or coerciveness present in it, not is it a postulate of a fee that it must have direct relation to the actual services rendered by the authority to each individual who obtains the benefit of service. If with a view to provide a specific service, levy is imposed by law and expenses for maintaining the service are met out of the amounts collected there being a reasonable relation between the levy and the expenses incurred for rendering the service, the levy would be in the nature of a fee and not in the nature of a tax."]; Indian Mica Micanite Industries v. State of Bihar (1971) 2 SCC 236 [15].

50 Kewal Krishan Puri v. State of Punjab (1980) 1 SCC 416 [23]; Sreenivasa General Traders v. State of A P (1983) 4 SCC 353 [31].

51 [1965] 2 SCR 477 : 1964 SCC OnLine SC 65 [8]

52 George Walkem Shannon v. Lower Mainland Dairy Products Board, 1938 AC 708.

Corporation,[53] this Court observed that licence fees could broadly be classified as either regulatory or compensatory. It was observed that licence fees are regulatory when the activities for which a licence is given are required to be regulated or controlled. It was further held that the fees charged for regulation of activities could be validly classified as fees although no service is rendered. A regulatory fee such as a licence fee enables authorities to supervise, regulate, and monitor the activity related to which the licence has been issued and to secure proper enforcement of the legal provisions.[54]

38. The principle which follows from the above discussion is that the State grants a licence to regulate a particular trade, business, or profession.[55] These regulatory activities entail a duty on behalf of the State or its instrumentalities to supervise, regulate, and monitor that particular trade, business, or profession. Because such activities require the State to expend public resources, the State can charge licence fees to defray the administrative costs. The enrolment fee stipulated by Section 24(1)(f) of Advocates Act meets the characteristic of a regulatory fee.

39. Having encapsulated the broad gist of the historical and legal context, we now deal with the issues arising in these petitions.

E. Fees charged by the SBCs

40. Presently, the SBCs charge different fees from advocates at the time of enrolment. Most SBCs charge an enrolment fee in addition to other miscellaneous fees. For instance, the Bar Council of Maharashtra and Goa is charging library fees, certificate fees, administration fees, identity card fees, training fees, and welfare fund contributions. Resultantly, the enrolment fee and the other fees charged by the SBC amounts to Rupees fifteen thousand for general candidates and Rupees fourteen thousand five hundred for candidates from SC and ST category.

41. The Bar Council of Odisha is charging Rupees forty-two thousand one hundred from advocates at the time of enrolment. In their counter affidavit, the SBC concedes the fact that Section 24(1)(f)

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53 [1999] 1 SCR 143 : (1999) 2 SCC 274 [9]

54 Vam Organic Chemicals Ltd v. State of U P (1997) 2 SCC 715 [18]; A P Paper Mills Ltd. v. Government of A P (2000) 8 SCC 167 [24].

55 Indian Mica Micanite Industries v. State of Bihar (1971) 2 SCC 236 [14]

only mandates the SBCs to charge Rupees seven hundred fifty in total at the time of enrolment. However, the SBC sought to justify charging the enhanced enrolment fee and other fees from the advocates "having regard to the functions of the Odisha Bar Council" under the Advocates Act. The SBC further claims that in line with its functions under Section 6, it has created various welfare funds for the benefit of advocates on its roll and utilizes the contributions received from the fees towards this end. Resultantly, the SBC is charging Rupees twenty-six thousand nine hundred as a one-time deposit to enable an advocate to avail of a lifetime benefit of various welfare schemes. This amount is in addition to the enrolment fee of Rupees six thousand, processing/ development fees of Rupees seven thousand, and other miscellaneous charges. The SBC justified charging Rupees six thousand as the enrolment fee on the basis of a BCI resolution dated 26 June 2013. The BCI resolution reads thus:

> "The council is of the unanimous view that the enrolment fee fixed earlier is too less amount and it has never been revised after the year of 1961. The council resolves that the enrolment fee per candidate will be Rs 6000 and for SC/ST Candidates, it should be Rs 3000. This provision is applicable throughout the country and out of this as per the provisions of the Act, 20% amount is to be sent to the Bar Council of India by all the State Bar Councils. These rules will come into effect the day it is published in the Gazette of India. Soon after the publication the office is directed to communicate this resolution to all the State Bar Councils and all the Bar Associations of the country. It is made clear that this resolution is confined to the enrolment fee only and the other charges fixed or prescribed by the different State Bar Councils would be applicable as of their own suitability."[56]

In view of the above resolution, the BCI directed all the SBCs to charge the revised enrolment fee.[57]

42. All the SBCs justify charging the miscellaneous fees for the following reasons: (i) the miscellaneous fees are one-time fees paid by the

56 Resolution No. 32 of 2013, Gazette Notification dated 28 June 2013.

57 BCI. D 7114/2016(C1) dated 22 December 2016

advocates to the Bar Councils; (ii) the fees are charged as a one-time lump sum because advocates do not pay the fees periodically after their enrolment; (iii) the SBCs do not get any financial assistance from the Government and have to sustain their operations, including payment of salaries to their employees, from the amount collected by way of enrolment fee and miscellaneous fees; and (iv) the lump sum fees are intended to defray the expenditure incurred by each SBC while discharging myriad statutory functions including continuing legal education and welfare schemes for advocates.

43. The Bar Council of Manipur has stated that it meets all its expenses including the staff salary and office maintenance from the enrolment fees. The SBC charges Rupees sixteen thousand six hundred fifty as enrolment fees from general candidates. Out of this, nine thousand five hundred is allowed to be used for office expenses while the balance is deposited into other accounts and used for specified purposes. According to the SBC, the average annual enrolment in Manipur is of a hundred advocates. Therefore, the total enrolment fee collected by the SBC is Rupees nine lakh fifty thousand against the overall annual expense of Rupees nine lakh.

44. The legal profession is a serious occupation and requires advocates to maintain exemplary conduct both inside and outside the court.[58] The SBCs and the BCI perform the important function of regulating and maintaining the standards of conduct required from advocates. The Bar Councils conduct activities related to providing advocates knowledge about the substantive and procedural aspects of law. Many SBCs have published books and manuals and assisted members of the legal profession in acquiring the practical skills required for the successful pursuit of a career as an advocate. The Bar Councils conduct welfare schemes for advocates. During the period of the Covid pandemic and even at other times, the Bar Councils have stepped in to provide relief to advocates and their families. In doing so many Bar Councils have provided significant aid to advocates. The enrolment fee and other miscellaneous fees are the only source of income available to the SBCs to perform their functions under the Advocates Act and implement welfare schemes for advocates.

58 In Re Sanjiv Dutta, Deputy Secretary, Ministry of Information and Broadcasting (1995) 3 SCC 619 [20]; Ajitsinh Arjunsinh Gohil v. Bar Council of Gujarat (2017) 5 SCC 465 [39]

However, the imposition of the enrolment fee and other miscellaneous fees by the SBCs must be consistent with the Constitution and the scheme of the Advocates Act.

F. SBCs cannot charge enrolment fees beyond the mandate of Section 24(1)(f)

i. Legislative Scheme

45. Parliament has enacted the Advocates Act under Article 246 read with Entries 77 and 78 of List I to deal with legal practitioners and their qualifications, enrolment, right to practice, and discipline. The Advocates Act establishes the SBCs and the BCI to create a common all-India bar. The SBCs have been entrusted with the function of admitting persons as advocates on the State roll. Persons who are admitted on the roll are entitled to the right to practice in all courts, tribunals, or authority throughout the territory of India.[59]

46. Sections 15 and 28 of the Advocates Act vests a rule-making power in the SBCs. The rule-making power under Section 15 is available to both the SBCs and the BCI. Section 15(1) specifies that a Bar Council "may make rules to carry out the purposes of this Chapter." A Bar Council can make rules providing for the election of members, Chairman and Vice-Chairman, filing of casual vacancies, constitution of one or more funds to give financial assistance or legal aid or advice, organization of legal aid, etc. Section 15(3) provides that no rule made by the SBCs shall have effect unless it is approved by the BCI. Thus, the scope of the rule-making powers of the SBCs and the BCI under Section 15 pertains to the subjects in Chapter II. Other than Section 15, Chapter II comprises of Sections 3 to 14:

    (a) Section 3 provides for establishment of the SBCs;

    (b) Section 4 establishes the BCI;

    (c) Section 5 provides that every Bar Council should be a body corporate;

    (d) Section 6 lays down the functions of the SBCs;

    (e) Section 7 lays down the functions of the BCI;

59 Section 30, Advocates Act

(f) Section 7A pertains to membership in international bodies;

(g) Section 8 specifies terms of office of the members of the SBCs;

(h) Section 8A talks about constitution of a special committee in the absence of an election;

(i) Section 9 deals with disciplinary committees;

(j) Section 9A talks about constitution of legal aid committees;

(k) Section 10 provides for constitution of committees other than disciplinary committees;

(l) Section 10A pertains to transaction of business by Bar Councils and committees;

(m) Section 11 allows Bar Councils to appoint staff;

(n) Section 12 mandates Bar Councils to maintain books of account for audit;

(o) Section 13 provides that vacancies in Bar Councils cannot be a ground to challenge the validity of acts done by a Bar Council; and

(p) Section 14 pertains to challenges to elections to Bar Councils.

47. Chapter II establishes Bar Councils and delineates their functions and responsibilities. The provisions of the Chapter II also empower Bar Councils to constitute disciplinary and other committees and appoint qualified staff. The rule-making powers granted to Bar Councils under Section 15 are regulatory powers and must be construed widely[60] because they support the objective of regulation of the legal profession.

48. In **Pratap Chandra Mehta** v. **State Bar Council of MP**,[61] a two-Judge Bench of this Court observed that the power of Bar Councils to frame rules must be interpreted broadly:

> "51. The power to frame rules has to be given wider scope, rather than a restrictive approach so as to render the legislative object achievable. The functions to be performed by the Bar Councils and the manner in which these functions

60 Gupta Modern Breweries v. State of Jammu and Kashmir (2007) 6 SCC 317 [20]

61 [2011] 11 SCR 965 : (2011) 9 SCC 573

> are to be performed suggest that democratic standards both in the election process and in performance of all its functions and standards of professional conduct need to be adhered to. In other words, the interpretation furthering the object and purposes of the Act has to be preferred in comparison to an interpretation which would frustrate the same and endanger the democratic principles guiding the governance and conduct of the State Bar Councils."

49. The SBCs have broad powers under Section 15 to give effect to the provisions of Chapter II. Although the rule-making power under Section 15 is broad, it is confined to the subject matters of Chapter II. In **Bar Council of Delhi** v. **Surjeet Singh**,[62] the issue before a three-Judge Bench was whether the Bar Council of Delhi could frame election rules prescribing qualifications and conditions entitling an advocate to vote at Bar Council elections. It was held that the SBCs cannot use the rule-making power under Section 15 to override the specific provisions of the Advocates Act. This Court observed that Sections 3(4) and 49(1)(a) empowered the BCI to prescribe qualifications or conditions subject to which an advocate may be entitled to vote at an election to the SBCs. Resultantly, it was held that Section 15(1) cannot be interpreted to confer rule-making powers on the SBCs which are expressly provided to the BCI.[63]

50. In **Surjeet Singh** (supra), it was argued that the election rules of the Bar Council of Delhi were valid because they were approved by the BCI according to Section 15(3). It was further argued that the approval provided by the BCI had the effect of making it a rule made by the BCI itself. Speaking for the three-Judge Bench, Justice N L Untwalia held that there is a difference between making a rule and granting approval to a rule:

> "8. […] Any rule made by the State Bar Council cannot have effect unless it is approved by the Bar Council of India. But the approval of the Bar Council of India can make the rule made by the State Bar Council valid and effective only if the rule made is within the competence of the State Bar Council, otherwise not. Mere approval

62 [1980] 3 SCR 946 : (1980) 4 SCC 211

63 Reiterated in Bar Council of Maharashtra and Goa v. Manubhai Paragji Vashi (2012) 1 SCC 314 [16]

by the Bar Council of India to a rule ultra vires the State Bar Council cannot make the rule valid. Nor has it the effect of a rule made by the Bar Council of India. Making a rule by the Bar Council of India and giving approval to a rule made by the State Bar Council are two distinct and different things. One cannot take the place of the other."

51. We can derive the following principles concerning the rule-making power of the SBCs under Section 15: (i) the SBCs can exercise rule-making powers only for the subject matters specified under Chapter II; (ii) although the SBCs have a broad rule-making power, it must be exercised to further the object and purpose of the Advocates Act; (iii) the SBCs cannot use their rule-making power under Section 15 with respect to subject matters on which the BCI has been granted exclusive power to make rules under the Advocates Act; and (iv) approval by the BCI to an invalid rule made by the SBCs cannot be deemed to validate the invalid rule.

52. The scope of the rule-making power of Bar Councils under Section 15 pertains to carrying "out the purposes of" Chapter II. As mentioned above, the purposes of Chapter II can be determined from Sections 3 to 14. Therefore, the scope of the rule-making power of Bar Councils under Section 15 extends to give effect to the provisions of Chapter II, namely, Sections 3 to 14.

53. Chapter III pertains to the admission and enrolment of advocates. As discussed in the earlier segment of this judgment, the Advocates Act is a complete code for admission of advocates on the State roll. Section 28 empowers the SBCs to make rules to carry out the purposes of Chapter III. According to Section 28(2), the SBCs can make rules providing for the:

(a) time within which and form in which an advocate shall express an intention for the entry of their name in the State roll under Section 20;

(b) form in which an application shall be made to the SBCs for admission as an advocate and how such application shall be disposed of by the enrolment committee of the SBCs;

(c) conditions subject to which a person may be admitted as an advocate; and

(d) instalments in which the enrolment fee may be paid.

54. The admission of persons as advocates on the State roll is within the exclusive domain of the SBCs.[64] The Advocates Act vests rule-making power under Section 28 with the SBCs, who are the chosen representatives of legal practitioners, to regulate and control the admission of people to the legal profession. In **Dr. Haniraj L Chulani** (supra), the issue before a three-Judge Bench was whether an SBC can refuse admission as an advocate to a medical practitioner who does not want to give up their medical practice. This Court held that the rule-making power conferred on the SBCs to lay down further conditions for controlling the entry to the legal profession is not unfettered.[65] It was held that the rule-making power of the SBCs draws sustenance from the guidelines laid down by the Advocates Act. It was further observed that the "[r]ule-making power conferred on the SBCs is inherently hedged in with the obligation to frame only such rules regarding enrolment which would fructify the purpose of having efficient members of the Bar who can stand up to the expectation of the noble and learned profession to which they are to be given entry." Given the above reasoning, it was held that the rule enacted by the SBC barring a medical practitioner from simultaneously practicing law was valid.

55. Section 24 lays down the eligibility qualifications for a person who seeks admission as an advocate on the State roll. Section 24(1)(e) provides that such a person must also fulfil "such other conditions as may be specified in the rules made by the State Bar Council under this Chapter." The use of the expression "other conditions" indicates that the SBCs can prescribe conditions and qualifications in addition to what has already been prescribed statutorily under Section 24(1). Section 24(1) lays down requirements such as citizenship, age, and educational efficiency that make a person eligible to be admitted on a State roll. These minimum qualifications enable a person to effectively perform their responsibilities as legal professionals. In addition, the BCI can also prescribe "such other conditions" in addition to the qualifications already prescribed under Section 24(1). Generally, a condition is a qualification, restriction, or limitation.[66] However, the "conditions" to be imposed by the SBCs should be consistent with

64 Indian Council of Legal Aid and Advice v. Bar Council of India (1995) 1 SCC 732 [11]

65 Dr. Haniraj L Chulani (supra) [18]

66 Union of India v. Rajdhani Grains & Jaggery Exchange Ltd (1975) 1 SCC 676 [13]

the qualifications already prescribed by the statute. The BCI cannot prescribe any conditions or qualifications that: (i) seek to modify what has already been prescribed by the statute; (ii) are contrary to the stipulated qualifications; and (iii) are inconsistent with the object and purpose of the Advocates Act.

56. Section 24(1)(e) has to be read conjointly with Section 28(1)(d) which empowers the SBCs to make rules prescribing "the conditions subject to which a person may be admitted as an advocate on any such roll." Since Section 24(1) already prescribes the basic substantive qualifications, the SBCs are empowered under Section 24(1)(e) read with Section 28(1)(d) to make rules concerning other conditions not already prescribed under Section 24(1).

57. Section 49 pertains to the general power of the BCI to make rules. It provides that the BCI may make rules for discharging its functions under the Advocates Act. The BCI may prescribe rules providing for the conditions subject to which an advocate may be entitled to vote at Bar Council elections, qualifications for membership of Bar Councils and disqualification for such membership, minimum qualifications required for admission to a course for a degree in law in any recognised university, etc. Importantly, Section 49(1)(h) empowers the BCI to make rules prescribing the fees which may be levied in respect of any matter under the Advocates Act. Pursuant to this, the BCI has prescribed fees under Part VIII of the BCI Rules. It mandates the SBCs to levy fees not exceeding the limits prescribed under Part VIII. The BCI has prescribed fees for varied purposes including petitions challenging the election of one or more members of the SBCs, complaints of professional misconduct under Section 35, certificates as to the date of enrolment and the continuance of the name of the advocate on the roll. The above legislative scheme suggests that the SBCs and the BCI act as the delegates of Parliament under the Advocates Act.

ii. Bar Councils cannot levy fees beyond the express stipulation of law

58. While acting as a delegate of Parliament, the SBCs and the BCI can frame rules under the Advocates Act. However, any rule enacted by the SBCs is only ancillary and cannot be so exercised to bring into existence substantive rights, obligations or disabilities not

contemplated by the provisions of the parent enactment.[67] Further, the rules must align with the object and purpose of the Advocates Act, namely, the creation of a common bar and regulation of legal practitioners and their qualifications, enrolment, right to practice, and discipline.

59. A legislation can confer the power to make subordinate legislation upon a delegate. In conferring such powers, the legislation has to specifically law down the policy, principles, and standards that will guide the subordinate authority.[68] The legislative policy can be determined from the preamble and the provisions of an enactment.[69] The delegate derives its legislative powers from the parent statute. Unlike the legislature, which has sovereign legislative powers derived from the Constitution, the delegated authority is conferred powers by the parent enactment. Therefore, delegated authority must strictly conform to the provisions of the statute under which it is framed.[70] A delegate cannot alter or change the legislative policy.[71] A delegate cannot override the provisions of the parent enactment either by exceeding the legislative policy or making provisions inconsistent with the enactment.[72]

60. In **Agricultural Market Committee** v. **Shalimar Chemical Works Ltd.**,[73] the Andhra Pradesh (Agricultural Produce and Livestock) Markets Act 1966 allowed the market committee to levy market fees on all transactions of purchase and sale provided the transactions took place within the notified market area. Section 12 created a legal fiction by providing that if any notified agricultural produce, livestock, or products of livestock is taken out of a notified market area, it shall be presumed to have been purchased or sold within such area. The market committee framed bylaws providing that the notified agricultural produce, livestock or products of livestock shall be deemed to have been purchased or sold after the notified commodity has been

67 Kunj Behari Lal Butail v. State of H P (2000) 3 SCC 40 [14]

68 Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd. v. CST (1974) 4 SCC 98 [12]

69 Harishankar Bagla v. State of Madhya Pradesh (1954) 1 SCC 978 [12]

70 Indian Express Newspapers (Bombay) (P) Ltd v. Union of India (1985) 1 SCC 641 [75]; General Officer Commanding-in-Chief v. Subhash Chandra Yadav (1988) 2 SCC 352 [14].

71 Rajnarain Singh v. Patna Administration Committee (1954) 2 SCC 82 [32]

72 Avinder Singh v. State of Punjab (1979) 1 SCC 137 [18]; J K Industries Ltd. v. Union of India (2007) 13 SCC 673 [133]

73 [1997] Supp. 1 SCR 164 : (1997) 5 SCC 516

weighed, measured, counted or when it is taken out of the notified market area. Thus, the bylaws introduced additional circumstances to the legal fiction contemplated under Section 12.

61. A two-Judge Bench of this Court identified the following relevant principles in matters of delegated legislation:

> "26. […] the delegate which has been authorized to make subsidiary rules and regulations has to work within the scope of its authority and cannot widen or constrict the scope of the Act or the policy laid down thereunder. It cannot, in the garb of making rules, legislate on the field covered by the Act and has to restrict itself to the mode of implementation of the policy and purpose of the Act."

Given the above principle, it was observed that Section 12 is a fiscal provision and had to be construed strictly. It was further observed that any circumstance, situation, factor, or condition which was not contemplated by the Act could not be taken into consideration to raise the presumption regarding sale or purchase of the notified agricultural produce. It was held that the bylaw introduced additional factors such as 'weighed', 'measured', and 'counted' which were not contemplated under Section 12. Therefore, the bylaws were held to be ultra vires for widening the scope of the presumption under Section 12.

62. In **Assam Co. Ltd.** v. **State of Assam**,[74] the State Government framed a rule empowering the State authorities to reexamine the computation of agricultural income made by the Central officers. It was contended that this rule was beyond the power delegated under the Assam Agricultural Income Tax Act. A three-Judge Bench of this Court observed:

> "10. […] It is an established principle that the power to make rules under an Act is derived from the enabling provision found in such Act. Therefore, it is fundamental that a delegate on whom such power is conferred has to act within the limits of the authority conferred by the Act and it cannot enlarge the scope of the Act. A delegate cannot override the Act either by exceeding the authority

74 [2001] 2 SCR 515 : (2001) 4 SCC 202

> or by making a provision that is inconsistent with the Act. Any rule made in exercise of such delegated power has to be in consonance with the provisions of the Act, and if the rule goes beyond what the Act contemplates, the rule becomes in excess of the power delegated under the Act, and if it does any of the above, the rule becomes ultra vires the Act."

63. In **Assam Co. Ltd.** (supra), it was observed that enactment empowered the State Government to make such rules as were necessary for carrying out the purposes of the enactment. It was further observed that the object and the scheme of the enactment did not empower the State authorities to recompute agricultural income contrary to the computation made by the Central officers. It was held that the rule framed by the State government was *ultra vires* because it enlarged the scope of the enactment.

64. In **Consumer Online Foundation and Others** v. **Union of India**,[75] this Court was dealing with the validity of the levy of development fees on embarking passengers by the lessees of the Airports Authority of India[76] at the international airports in New Delhi and Mumbai. The unamended Section 22A of the Airports Authority of India Act 1994[77] empowered the AAI, after the previous approval of the Central Government, to levy development fees on embarking passengers "at the rate as may be prescribed." A two-Judge Bench of this Court held that the development fee was in the nature of a cess or tax for generating revenue for the specified purposes mentioned in Section 22A.[78] Further, it was held that the power to levy a development fee under Section 22 could not be exercised without the rules prescribing the rate at which the development fee was to be levied. Since no rules were framed prescribing the rate of development fee, it was held that the levy was without authority of law.

65. In **Consumer Online Foundation** (supra), the Central Government determined the rate of development fee in two letters communicated to the lessees. This Court held that under Section 22A the Central

75 [2011] 5 SCR 911 : (2011) 5 SCC 360

76 "AAI"

77 "AAI Act"

78 Section 22A, AAI Act.

Government only had the power to grant its approval to the levy and collection of development fees but had no power to fix the rate at which the development fee would be levied and collected from embarking passengers. The rates determined by the Central Government were held to be ultra vires the AAI Act.

66. From the above discussion, we can cull out the following principles: (i) a delegate cannot act contrary to the express provisions and object of the parent legislation; (ii) a delegate cannot widen or constrict the scope of the parent legislation or the legislative policy prescribed under it; and (iii) a fiscal provision has to be construed strictly and a delegate cannot consider any circumstance, factors or condition not contemplated by the parent legislation.

67. The legislative policy of enrolment and admission of advocates is contained in Chapter III of the Advocates Act. Section 24(1) lays down the qualifications subject to which an advocate may be admitted on a State roll. Section 24(1)(f) provides that the enrolment fee payable by general candidates is Rupees seven hundred fifty and by SC and ST candidates, Rupees one hundred and twenty-five. Section 24(1)(f) reflects the legislative policy of the Advocates Act that subject to the fulfilment of other conditions of Section 24(1), the payment of the stipulated monetary amount will make a person eligible to be admitted as an advocate.

68. Presently, the SBCs charge enrolment fees in the following manner: (i) they charge an enrolment fee according to the legal stipulation under Section 24(1)(f), but charge miscellaneous fees, and (ii) they charge an enrolment fee beyond the legal stipulation in addition to charging miscellaneous fees. Section 24(1)(f) expressly stipulates that the total enrolment fees shall be Rupees seven hundred fifty for advocates belonging to the general category and Rupees one hundred twenty-five for advocates belonging to the SC and ST category. The SBCs cannot charge "enrolment fees" beyond the express legal stipulation under Section 24(1)(f) as it currently stands. Therefore, prescribing enrolment fees beyond Rupees seven hundred for general candidates and Rupees one hundred twenty-five for SC and ST candidates is contrary to Section 24(1)(f). The subject matter of enrolment fee is covered by the Advocates Act. Therefore, the SBCs, being delegated authorities, do not have any legislative powers to prescribe enrolment fees contrary to the statutory stipulation.

69. As discussed in the above segments of this judgment, the legislature prescribed the enrolment fee under Section 24(1)(f) to cover "all functions" carried out by the SBCs and the BCI under the Advocates Act. The legislative history suggests that the legislature was averse to imposing any charges other than enrolment fees at the time of enrolment. This was in furtherance of the legislative object to foster an inclusive Bar. However, the SBCs are imposing miscellaneous fees and charges in the guise of an enrolment fee, which cumulatively exceed the statutory stipulation under Section 24(1)(f). The decision of the SBCs to charge an enrolment fee beyond the stipulated amount is contrary to the legislative object of the Advocates Act.

70. Section 24(1)(f) is a fiscal regulatory provision and has to be construed strictly. Parliament has prescribed the enrolment fees in the exercise of its sovereign legislative powers. The SBCs and the BCI, being delegates of Parliament, cannot alter or modify the fiscal policy laid down by Parliament. The delegate can create substantive rights and obligations only to the extent to which the parent enactment empowers the delegate.[79] By prescribing additional fees at the time of enrolment, the SBCs have created new substantive obligations not contemplated by the provisions of the Advocates Act. The basis for the fees imposed by the SBCs has to be traceable to the provisions of the statute. There is no express provision in the Advocates Act empowering the SBCs to levy fees, except for the enrolment fee and stamp duty, if any, under Section 24(1)(f), at the time of admission of advocates on the State roll. The decision of the SBCs to charge miscellaneous fees is contrary to the legislative prescription of the Advocates Act.

71. On 26 June 2013, the BCI passed a resolution directing the SBCs to charge Rupees six thousand as enrolment fees for general candidates and Rupees three thousand for SC and ST candidates. Importantly, the resolution stated that the SBCs could charge other fees according to "their own suitability." On 22 December 2016, the BCI addressd a letter to all the SBCs directing them to charge the revised enrolment fees. The BCI resolution dated 26 June 2013 prompted many SBCs such as the Odisha Bar Council to enhance their enrolment fees. Section 24(1)(f) stipulates the enrolment fee

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79 *See* Global Energy Ltd. v. Central Electricity Regulatory Commission (2009) 15 SCC 570 [25]

to be charged by the SBCs. In the face of the express stipulation of law, the BCI had no authority to pass a resolution revising the enrolment fees charged by the SBCs. The fact that the enrolment fee stipulated under Section 24(1)(f) has not been revised by the legislature does not clothe the BCI with any authority to direct the SBCs to charge revised enrolment fees. Since the BCI exercises general supervision and control over all the SBCs, it is incumbent upon it to ensure that the SBCs strictly follow the mandate of the Advocates Act. The resolution dated 26 June 2013 is devoid of legal authority and contrary to Section 24(1)(f) of the Advocates Act.

G. All fees charged at the time of enrolment are 'enrolment fees'

72. In this batch of matters, we have transferred to this Court similar petitions pending before the Kerala High Court. In **T Koshy** v. **Bar Council of Kerala**,[80] the SBC was charging special fees for enrolment from candidates who had retired from government service. A Single Judge of the Kerala High Court observed that the special fees were charged in addition to the enrolment fees and other miscellaneous charges such as application form fee, registration fee, enrolment certificate fee, and verification fee. The vires of the miscellaneous fees was not challenged before the High Court. The High Court construed the special fee charged by the SBC as an enrolment fee and held that the amount charged by the SBC was over and above the enrolment fee stipulated by Section 24(1)(f). In appeal, the Division Bench of the High Court upheld the judgment of the Single Judge by holding that Section 28(2)(d) did not empower the SBC "to prescribe any fee for enrolment, either in the form of enrolment fee or special fee."[81] The Special Leave Petition filed by the SBC was dismissed by this Court on 4 June 2019.[82]

73. In adjudicating upon WP (C) No. 3068 of 2023,[83] another Single Judge of the Kerala High Court relied on **T Koshy** (supra) to observe that the SBC is only entitled to collect the enrolment fee stipulated under Section 24(1)(f) of the Advocates Act. Subsequently, the writ petition was heard by a Division Bench of the Kerala High Court which passed

80 2016 SCC OnLine Ker 41055

81 Bar Council of Kerala v. T Koshy, W A No. 2170 of 2017.

82 Bar Council of Kerala v. N S Gopakumar, SLP(C) No. 44268 of 2018.

83 Akshai M Sivan v. Bar Council of Kerala, WP(C) No. 3068 of 2023 (order dt. 12 June 2023)

an interim order directing the SBC to admit the petitioners on the State roll by accepting Rupees seven hundred fifty as enrolment fees.

74. Given the above background, two issues arise for consideration: (i) whether the miscellaneous fees which are charged in addition to the enrolment fee at the time of enrolment can be considered as enrolment fee; and (ii) whether the SBCs or the BCI can charge miscellaneous fees as a pre-condition for enrolment.

i. Charges other than the enrolment fee cannot be a valid pre-condition

75. Section 24(1) of the Advocates Act lays down the conditions subject to which an advocate may be admitted on a State roll. Section 24(1)(f) provides that the enrolment fee is paid by the advocate "in respect of the enrolment." The use of the phrase "in respect of the enrolment" conveys that the fee is paid for the entire enrolment process. Under the Advocates Act, the process of enrolment commences when an applicant makes an application to the SBC within whose jurisdiction the applicant proposes to practice. Thereafter, the enrolment committee of the SBC scrutinizes the application on the basis of the eligibility qualifications laid down under Section 24(1). The name of an applicant who is found eligible is entered on the roll of advocates and a certificate of enrolment is issued to the applicant by the SBC. The enrolment fee prescribed under Section 24(1)(f) comprehends the whole enrolment process.

76. On 27 December 2016,[84] the BCI passed a resolution fixing the verification fees charged by the SBCs at the time of submission of enrolment forms. The resolution was in the following terms

> "The State Bar Councils/ Enrolment Committees of the State Bar Councils shall require the Xerox as well as the original certificates of the candidates applying for enrolment. Following certificates shall be required to be submitted alongwith the enrolment forms:-
>
> (a) Certificate of concerned Board for Secondary/10th examination.

84 Communication dated 28 January 2017 by the BCI to the secretaries of the SBCs, BCI:D 529/2017(Council) dated 28 January 2017.

(b) Certificate of concerned Board for Senior Secondary or intermediate examination.

(c) Certificate of graduation, if any or/and the LLB degree or the provisional certificates of these Degrees granted by the University as well as the mark-sheets of all the three or five year of LL.B. examinations.

The office of State Bar Councils shall charge a sum of Rs. 2500/- for verification of the said certificates from the candidates at the time of submission of the enrolment forms only."

77. In view of the BCI resolution, many SBCs increased the verification fees charged by them. Currently, the SBCs charge various fees such as verification fees, application fees, registration fees, and identity card fees at the time of enrolment. The SBCs charge these fees as concomitant to the process of enrolment. For instance, a verification fee is charged for the verification of academic qualification certificates of the candidates. The verification fee is collected from the candidates "at the time of submission of enrolment forms." These additional fees are in furtherance of the process of enrolment of advocates and are encompassed within the meaning of the phrase "in respect of the enrolment" appearing in Section 24(1)(f).

78. Additionally, the SBCs also collect charges such as building fund and benevolent fund from advocates at the time of enrolment. These charges are *per se* not related to the process of enrolment, but in most cases the candidates have no choice but to pay the levies. The SBCs admit that they charge the fees at the time of enrolment as a one-time payment for all the services offered by them. The SBCs contend that they charge these fees at the time of enrolment because the advocates do not pay periodic fees after enrolment.

79. Admission on the roll of advocates is a pre-requisite for any person intending to practice law in India. At the time of enrolment, candidates have little agency but to pay the miscellaneous fees imposed by the SBCs to get enrolled. Non-payment of the fees means that a candidate cannot get enrolled on the State roll. Thus, all the miscellaneous fees collected from a candidate at the time of enrolment essentially serve as a pre-condition to the process of enrolment. Section 24(1) specifically lays down the pre-conditions subject to which an advocate

can be enrolled on State rolls. Since Section 24(1)(f) specifies the amount that can be charged by the SBCs as an enrolment fee, the SBCs and the BCI cannot demand payment of fees other than the stipulated enrolment fee as a pre-condition to enrolment.

80. Rule 40 under Section IVA of Chapter II of Part VI under the BCI Rules mandates every advocate borne on the rolls to pay the SBC a sum of Rupees three hundred every third year.[85] The sum under Rule 40 can only be collected from advocates already admitted on the State rolls. Therefore, this sum cannot be collected from persons at the time of enrolment. It must be collected from advocates after they are admitted on the State roll.

ii. Article 14: substantive equality and manifest arbitrariness

81. Article 14 has a substantive content that mirrors the quest for ensuring fair treatment of an individual in every aspect of human endeavour and existence.[86] In **Joseph Shine** v. **Union of India**,[87] one of us (D Y Chandrachud, J) observed that substantive equality is directed at eliminating individual, institutional, and systemic discrimination against disadvantaged groups which effectively undermines their full and equal participation in society at the social, economic, political, and cultural levels. It was further observed:

> "**172.** The primary enquiry to be undertaken by the Court towards the realisation of substantive equality is

85 Rule 40, Section IVA, Chapter II, Part VI, BCI Rules. [It reads:

"40. Every Advocate borne on the rolls of the State Bar Council shall pay to the State Bar Council a sum of Rs. 300 every third year commencing from 1st August, 2001 along with a statement of particulars as given in the form set out at the end of these Rules, the first payment to be made on or before 1st August, 2001 or such extended time as notified by the Bar Council of India or the concerned State Bar Council.

Provided further however that an advocate shall be at liberty to pay in lieu of the payment of Rs. 60043 every three years a consolidated amount of Rs. 1000. This will be a life time payment to be kept in the fixed deposit by the concerned State Bar Council. Out of life time payment, 80% of the amount will be retained by the State Bar Council in a fixed deposit and remaining 20% has to be transferred to the Bar Council of India. The Bar Council of India and State Bar Council have to keep the same in a fixed deposit and the interest on the said deposits shall alone be utilized for the Welfare of the Advocates"44.

Explanation 1.—Statement of particulars as required by Rule 40 in the form set out shall require to be submitted only once in three years.

Explanation 2.—The Advocates who are in actual practise and are not drawing salary or not in full time service and not drawing salary from their respective employers are only required to pay the amount referred to in this rule.

Explanation 3.—This rule will be effective from 1-10-2006 and for period prior to this, advocates will continue to be covered by old rule."]

86 Navtej Singh Johar v. Union of India (2018) 10 SCC 1 [409]

87 [2018] 11 SCR 765 : (2019) 3 SCC 39 [171]

> to determine whether the provision contributes to the subordination of a disadvantaged group of individuals. The disadvantage must be addressed not by treating a woman as "weak" but by construing her entitlement to an equal citizenship. The former legitimises patronising attitudes towards women. The latter links true equality to the realisation of dignity. The focus of such an approach is not simply on equal treatment under the law, but rather on the real impact of the legislation. Thus, Section 497 has to be examined in the light of existing social structures which enforce the position of a woman as an unequal participant in a marriage."

82. In **Navtej Singh Johar** v. **Union of India**,[88] a Constitution Bench held that Section 377 undermined substantive equality because it created barriers, systemic and deliberate, for the effective participation of the members of the LGBTIQ+ community in the workforce.

83. In **Bonnie Foi Law College** (supra), a Constitution Bench of this Court recognized the effect of the exorbitant enrolment fees charged by the SBCs:

> "**54.** We also have one caveat arising from the plea that different State Bar Councils are charging different fees for enrolment. This is something which needs the attention of the Bar Council of India, which is not devoid of the powers to see that a uniform pattern is observed and the fee does not become oppressive at the threshold of young students joining the Bar."

84. The burden of payment of enrolment fees and other miscellaneous fees imposed by the SBCs falls equally on all persons seeking enrolment. While the burden is facially neutral, it perpetuates structural discrimination against persons from marginalized and economically weaker sections of the society. In more than one way, the process of enrolment perpetuates a culture[89] of systemic exclusion and discrimination that impacts the entry of law graduates into the legal profession and even beyond. A law graduate in India undergoes legal

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88 [2018] 7 SCR 379 : (2018) 10 SCC 1 [453]

89 *See* Nitisha v. Union of India (2021) 15 SCC 125 [77]

education which typically entails a study of a three-year LLB course or an integrated five-year course. The model of legal education in India is largely centred around a standardized admissions test. Candidates desirous of taking the admission test have to pay a hefty fee for taking the examination and in many cases engage tutors or coaching classes to prepare for these tests. Although the engagement of tutors or purchase of preparation material is a choice a candidate can choose not to make, it puts them against a cohort of competitors who have engaged such help. Once admitted to a recognized institute for legal education, a student has to afford the fees of the college either by paying on their own or by availing of a student loan. Students are also expected and sometimes mandated to partake in internships, research work, and co-curricular and extra-curricular activities among others.[90] Partaking in these activities entails additional expenses.

85. Young law graduates seeking to enter litigation start from a position of disadvantage. In **S Seshachalam v. Bar Council of Tamil Nadu**,[91] Justice R Banumathi summed up the struggle of young advocates in apt words:

> "**26.** The profession of Law is a noble calling. The legal fraternity toils day and night to be successful in the profession. **Although it is true that slowly working one's way up is the norm in any profession, including Law, but initially young advocates have to remain in the queue for a prolonged period of time and struggle through greater hardships. Despite being extremely talented, a number of young lawyers hardly get proper opportunity or exposure in their profession. New entrants to the profession in the initial stages of the profession suffer with the meagre stipend which young lawyers may receive during their initial years, coupled with the absence of a legislation concerning this, they struggle to manage their food, lodging, transportation and other needs. Despite their valiant efforts, they**

90 Rule 25, Part IV of the Rules of Legal Education 2008, BCI mandates law students to complete an internship under an advocate for a minimum of 12 weeks for the three year law course and twenty weeks for the five year law course.

91 [2014] 12 SCR 465 : (2014) 16 SCC 72

> **are unable to march ahead in their profession. It is only after years of hardwork and slogging that some of the fortunate lawyers are able to make a name for themselves and achieve success in the profession**. For the majority of the legal fraternity, everyday is a challenge. Despite the difficult times, the lawyer who sets up practice straight after enrolment, struggles to settle down … in the profession. Some of the lawyers remain struggling throughout their lives yet choose to remain in the profession. It is something like "*riding a bicycle uphill with the wind against one*".
>
> (emphasis added)

86. Young law graduates who start litigating right after graduation earn anywhere between Rupees ten thousand to Rupees fifty thousand per month, depending upon the location of their practice and the chambers they join. The structure of the Indian legal setup is such that the struggle for getting acceptance in chambers and law firms is greater for those who belong to the marginalized sections, first-generation advocates, or law graduates without a degree from a National Law University. A recent report suggests that many law students from the Dalit community face English language barriers, reducing their opportunities of practicing before the High Courts and the Supreme Court where the court proceedings are in English.[92] In a legal system that is predisposed against the marginalized, the pre-condition of paying exorbitant fees in the name of enrolment fee creates a further barrier for many.

87. In **Neil Aurelio Nunes v. Union of India**,[93] a two-Judge Bench of this Court, explained the redundancy of the concept of merit and the struggles of a first-generation learner:

> "**33.** The crux of the above discussion is that the binary of merit and reservation has now become superfluous once this Court has recognised the principle of substantive equality as the mandate of Article 14 and as a facet of Articles 15(1) and 16(1). An open competitive exam may

92 Challenges for Dalits in South Asia's Legal Community, Chapter III – Dalit Justice Defenders in India, American Bar Association (2021) 16

93 [2022] 11 SCR 585 : (2022) 4 SCC 1

> ensure formal equality where everyone has an equal opportunity to participate. However, widespread inequalities in the availability of and access to educational facilities will result in the deprivation of certain classes of people who would be unable to effectively compete in such a system. Special provisions (like reservation) enable such disadvantaged classes to overcome the barriers they face in effectively competing with forward classes and thus ensuring substantive equality. **The privileges that accrue to forward classes are not limited to having access to quality schooling and access to tutorials and coaching centres to prepare for a competitive examination but also include their social networks and cultural capital (communication skills, accent, books or academic accomplishments) that they inherit from their family. The cultural capital ensures that a child is trained unconsciously by the familial environment to take up higher education or high posts commensurate with their family's standing. This works to the disadvantage of individuals who are first-generation learners and come from communities whose traditional occupations do not result in the transmission of necessary skills required to perform well in open examination. They have to put in surplus effort to compete with their peers from the forward communities. On the other hand, social networks (based on community linkages) become useful when individuals seek guidance and advice on how to prepare for examination and advance in their career even if their immediate family does not have the necessary exposure. Thus, a combination of family habitus, community linkages and inherited skills work to the advantage of individuals belonging to certain classes, which is then classified as "merit" reproducing and reaffirming social hierarchies**."
>
> (emphasis added)

88. Social capital and networks play an important role in the Indian legal setup in advancing legal careers. Most litigation chambers hire advocates through networks and community linkages. The structure of the Indian legal system is such that social capital and networks also

play an important role in getting clients. The lack of social capital and network is acutely felt by advocates from marginalized communities.[94] The marginalized sections of our society face insurmountable obstacles in navigating the Indian legal system.[95] This is further compounded by their lack of representation in the legal profession. Greater representation of the marginalized communities in the legal profession will increase the diversity within the profession, enable the marginalized sections to trust the legal system and facilitate the delivery of legal aid and services to unrepresented communities.

89. Section 24(1)(f) prescribes an enrolment fee of Rupees seven hundred fifty from general candidates and Rupees one hundred twenty-five from SC and ST candidates. Therefore, the enrolment fee prescribed for candidates from the SC and ST communities is far less than the fees paid by a candidate from the general category. In 1993, Parliament increased the enrolment fee for general candidates from Rupees two-hundred fifty to Rupees seven-hundred fifty, without disturbing the fees paid by candidates from the SC and ST community. This shows that Parliament is conscious of the socio-economic marginalization of the SC and ST community. However, the present enrolment fee structure reinforces the socio-economic marginalization of the SCs and STs. For instance, the Bar Council of Maharashtra and Goa charges a cumulative fee of Rupees fifteen thousand from the general candidates and Rupees fourteen thousand five hundred from SC and ST candidates. Similarly, in Manipur, the general category candidates pay Rupees sixteen thousand six hundred fifty as an enrolment fee while a candidate from the SC and ST category pays Rupees sixteen thousand fifty. Thus, the candidates from the SC and ST category practically pay as much as the candidates from the general category. This is evidently against the legislative policy of the Advocates Act.

90. Dignity is crucial to substantive equality. The dignity of an individual encompasses the right of the individual to develop their potential to the fullest.[96] The right to pursue a profession of one's choice and

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94 Challenges for Dalits in South Asia's Legal Community, Chapter III – Dalit Justice Defenders in India, American Bar Association (2021) 17

95 Hariram Bhambhi v. Satyanarayan, 2021 SCC OnLine SC 1010 [12]

96 K S Puttaswamy v. Union of India (2017) 10 SCC 1 [525]

earn livelihood is integral to the dignity of an individual. Charging exorbitant enrolment fees and miscellaneous fees as a pre-condition for enrolment creates a barrier to entry into the legal profession. The levy of exorbitant fees as a pre-condition to enrolment serves to denigrate the dignity of those who face social and economic barriers in the advancement of their legal careers.[97] This effectively perpetuates systemic discrimination against persons from marginalized and economically weaker sections by undermining their equal participation in the legal profession. Therefore, the current enrolment fee structure charged by the SBCs is contrary to the principle of substantive equality.

91. In **Ravinder Kumar Dhariwal** v. **Union of India**,[98] a three-Judge Bench of this Court held that substantive equality is aimed at producing equality of outcomes through different modes of affirmative action. The purpose of the Advocates Act of creating an inclusive Bar cannot be defeated by having exclusionary conditions which seek to create social and economic barriers. The Bar Councils have a responsibility in the public interest to ensure greater representation of persons from marginalized communities in the legal profession.

92. The decision of the SBCs to charge exorbitant fees also suffers from the vice of manifest arbitrariness. In **Khoday Distilleries Ltd** v. **State of Karnataka**,[99] this Court laid down the following principles for challenging delegated legislation: (i) the test of arbitrary action which applies to executive actions does not necessarily apply to delegated legislation; (ii) a delegated legislation can be struck down only if it is manifestly arbitrary; and (iii) a delegated legislation is manifestly arbitrary if it is not in conformity with the statute or offends Article 14. In **Clariant International Ltd.** v. **SEBI**,[100] a three-Judge Bench of this Court held that when any criterion is fixed by a statute or by a policy, the subordinate authority must follow the policy formulation broadly and substantially. Non-conformity with the legislative policy will render delegated legislation arbitrary.[101]

97 *See* Neil Aurelio Nunes (supra) [35]

98 (2023) 2 SCC 209 [37]

99 [1995] Supp. 6 SCR 759 : (1996) 10 SCC 304 [13]

100 [2004] Supp. 3 SCR 843 : (2004) 8 SCC 524 [63]

101 Secretary, Ministry of Chemicals & Fertilizers, Government of India v. Cipla Ltd (2003) 7 SCC 1 [9]

93. In **Shayara Bano** v. **Union of India**,[102] a Constitution Bench held that manifest arbitrariness must be something done by the legislature capriciously, irrationally, and/or without adequate determining principles. It was further held that legislation which is excessive and disproportionate would also be manifestly arbitrary. In **Joseph Shine** (supra), one of us (D Y Chandrachud, J) held that an "adequate determining principle" is a principle that aligns with constitutional values. With respect to a piece of delegated legislation, an adequate determining principle is a principle that aligns with the legislative policy of the parent enactment as well as constitutional values. Delegated legislation that is forbiddingly excessive or disproportionate will also be manifestly arbitrary.[103]

94. As held in the preceding segments of this judgment, the SBCs at the time of enrolment charge fees in contravention of Section 24(1)(f) and the legislative policy of the Advocates Act. Therefore, the excess enrolment fees charged by the SBCs are manifestly arbitrary. Further, the effect of charging exorbitant enrolment fees as a pre-condition for enrolment has created entry barriers, especially for people from marginalized and economically weaker sections, to enter into the legal profession. Thus, the current enrolment fee structure is manifestly arbitrary because it denies substantive equality.

iii. Article 19(1)(g): unreasonableness

95. Section 30 of the Advocates Act inheres in every advocate whose name is entered in the State roll the right to practice in all courts throughout the territory of India. Article 19(1)(g) of the Constitution provides that all citizens of India shall have the right to practice any profession or to carry on any occupation, trade, or business. Article 19(6) subjects the right under Article 19(1)(g) to reasonable restrictions. Further, the provision allows the State to make any law relating to the professional or technical qualifications necessary for practicing any profession or carrying on any occupation, trade or business. Thus, the right to practice law is not only a statutory right but also a fundamental right protected under Article 19(1)(g).[104] However, the right of citizens to practice law can be regulated and

102 [2017] 9 SCR 797 : (2017) 9 SCC 1 [101]

103 Franklin Templeton Trustee Services (P) Ltd. v. Amruta Garg (2021) 9 SCC 606 [79]

104 N K Bajpai v. Union of India (2012) 4 SCC 653 [25]

is not absolute.[105] Under the Advocates Act, only those advocates who are admitted on the State roll have a right to practice throughout the territory of India.[106]

96. In **Chintamanrao v. State of Madhya Pradesh**,[107] a Constitution Bench explained the purpose of the expression "reasonable restrictions" thus:

> "**8.** The phrase "reasonable restriction" connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word "reasonable" implies intelligent care and deliberation, that is, the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in Article 19(1)(*g*) and the social control permitted by clause (6) of Article 19, it must be held to be wanting in that quality."

97. In **Rashid Ahmed v. Municipal Board, Kairana**,[108] a Constitution Bench of was called upon to decide the validity of bye-laws framed by the Municipal Board. Bye-law 2 provided that no person could establish any new market or place for wholesale transactions without the previous permission of the Municipal Board. Justice S R Das (as the learned Chief Justice then was), speaking for the Constitution Bench, held:

> "**11.** The Constitution by Article 19(1) guarantees to the Indian citizen the right to carry on trade or business subject to such reasonable restrictions as are mentioned in clause (6) of that article. The position, however, under Bye-law 2 is that while it provided that no person shall establish a market for wholesale transactions in vegetables except with the permission of the Board, there is no bye-law authorising the respondent Board to issue the licence. The net result

105 Jamshed Ansari v. High Court of Judicature at Allahabad (2016) 10 SCC 554 [17]

106 N K Bajpai (supra) [25]

107 [1950] 1 SCR 759 : 1950 SCC 695

108 [1950] 1 SCR 566 : 1950 SCC 221

> is that the prohibition of this bye-law, in the absence of any provision for issuing licence, becomes absolute."

98. In **Mohammad Yasin** v. **Town Area Committee, Jalalabad**,[109] a Constitution Bench of this Court was called upon to determine the validity of the bye-laws framed by the Town Area Committee imposing licence fees on any person intending to sell in wholesale at any place in the town area. The issue before this Court was whether the Committee had legal authority to impose the fees. Justice S R Das (as the learned Chief Justice then was) observed that a "licence fee on a business not only takes away the property of the licensee but also operates as a restriction on his right to carry on his business, for without the payment of such fee the business cannot be carried on at all." It was held that the restriction on the fundament right under Article 19(1)(g) can be imposed by the State according to Article 19(6). It was held that an illegal impost is an unreasonable restriction on the right to carry on occupation, trade or business under Article 19(1)(g):

> "12. […] If, therefore, the licence fee cannot be justified on the basis of any valid law no question of its reasonableness can arise, for an illegal impost must at all times be an unreasonable restriction and will necessarily infringe the right of the citizen to carry on his occupation, trade or business under Article 19(1)(*g*) and such infringement can properly be made the subject-matter of a challenge under Article 32 of the Constitution."

99. In **Mohammad Yasin** (supra), the United Provinces Town Areas Act 1914 empowered the Town Area Committee to charge fees for the use or occupation of any immoveable property vested in or entrusted to the management of the Town Area Committee, including any public street or place. It was held that this power did not include the power to levy licence fees on a person intending to sell in wholesale at any place in the town area. Therefore, it was held that the licence fee imposed by the Town Area Committee was ultra vires the 1914 Act:

> **"20.** In our opinion, the bye-laws which impose a charge on the wholesale dealer in the shape of the prescribed fee,

109 [1952] 1 SCR 572 : (1952) 1 SCC 205

> irrespective of any use or occupation by him of immovable property vested in or entrusted to the management of the Town Area Committee including any public street, are obviously ultra vires the powers of the respondent Committee and, therefore, the bye-laws cannot be said to constitute a valid law which alone may, under Article 19(6) of the Constitution, impose a restriction on the right conferred by Article 19(1)(*g*). In the absence of any valid law authorising it, such illegal imposition must undoubtedly operate as an illegal restraint and must infringe the unfettered right of the wholesale dealer to carry on his occupation, trade or business which is guaranteed to him by Article 19(1)(*g*) of our Constitution."

100. In **Cooverjee B Bharucha v. Excise Commissioner**,[110] another Constitution Bench held that a licence fee levied without the authority of law was not protected under Article 19(6). In **R M Seshadri v. District Magistrate**,[111] the District Collector imposed a condition compelling the licencee to exhibit at each performance one or more approved films of such length and for such length of time as directed by the Government. The condition was challenged for violation of Article 19(1)(g). A Constitution Bench of this Court observed that the condition was couched in wide language and did not lay down any guideline to the licencing authority. It was held that a "condition couched in such wide language is bound to operate harshly upon the cinema business and cannot be regarded as a reasonable restriction."

101. We can cull out the following principles from the above discussion: (i) the power of the authority to impose restrictions on the right under Article 19(1)(g) is not absolute and must be exercised in a reasonable manner; (ii) any fees or licences levied by the authorities must be valid and levied on the basis of the authority of law; and (iii) delegated legislation which is contrary to or beyond the scope of the legislative policy laid down by the parent legislation places an unreasonable restriction in violation of Article 19(1)(g).[112]

110 [1954] 1 SCR 873 : (1954) 1 SCC 18 [9]

111 (1954) 2 SCC 320

112 Minerva Talkies v. State of Karnataka, 1988 Supp SCC 176 [15]

102. According to the current enrolment fee structure of the SBCs, an advocate has to pay anywhere between Rupees fifteen thousand to Rupees forty-two thousand as a pre-condition to enrolment. As held in the above segments of this judgment, the SBCs charge enrolment fees in excess of the stipulated fee prescribed under Section 24(1)(f). The excess enrolment fee imposed by the SBCs is without authority of law. Compounded with this there are no reasonable criteria behind the decision of the SBCs to charge such exorbitant amounts as enrolment fees. The SBCs cannot have unbridled powers to charge any fees given the express legislative policy under Section 24(1)(f). Imposing excessive financial burdens on young law graduates at the time of enrolment causes economic hardships, especially for those belonging to the marginalized and economically weaker sections of the society. Therefore, the current enrolment fee structure charged by the SBCs is unreasonable and infringes Article 19(1)(g).

H. Financial implications for the SBCs and the BCI

103. As discussed in the above segments of this judgment, we are cognizant of the fact that the SBCs and the BCI depend entirely on the amount collected from candidates at the time of enrolment for performing their functions under the Advocates Act, including payment of salaries to their staff. According to the legislative scheme of the Advocates Act, the Bar Councils must only charge the amount stipulated under Section 24(1)(f) as an enrolment fee. Instead of devising ways and means to charge fees from enrolled advocates for rendering services, the SBCs and the BCI have been forcing young law graduates to cough up exorbitant amounts of money as a pre-condition for enrolment.

104. Once the advocates are enrolled on the State rolls, the Bar Councils can charge fees for the services provided to the advocates in accordance with the provisions of the Advocates Act. It is for the SBCs and the BCI to devise an appropriate method of charging fees that is fair and just not only for the law graduates intending to enroll, but also for the advocates already enrolled on the State rolls. There are several reasonable ways by which the SBCs and BCI can and already do collect funds at later stages of an advocate's career. For instance, under the Advocates Welfare Fund Act 2001, advocates must affix mandatory welfare stamps on *vakalatnamas* which are used to collect funds for advocate welfare. Unlike an enrollment fee

charged before a graduate is given a fair chance to earn a living, such sources of income are directly correlated to the advocates' practice.

105. It is clarified that the only charges permissible at the stage of enrolment are those stipulated under Section 24(1)(f) of the Advocates Act. All other miscellaneous fees, including but not limited to, application form fees, processing fees, postal charges, police verification charges, ID card charges, administrative fees, photograph fees etc. charged from the candidates at the time of admission are to be construed as part of the enrollment fee. The fees charged under these or any similar heads cannot cumulatively exceed the enrolment fee prescribed in Section 24(1)(f).

106. The Advocates Welfare Fund Act 2001[113] is enacted to provide for the constitution of a welfare fund for the benefit of advocates. Section 3 provides that the appropriate government shall constitute an Advocates Welfare Fund. Section 15 mandates the SBCs to pay annually to the welfare fund an amount equal to twenty per cent of the enrolment fee received by it under Section 24(1)(f) of the Advocates Act.[114] This decision will not have any effect on the obligation of the SBCs under Section 15 because they will continue to charge the enrolment fee as stipulated under Section 24(1)(f).

107. The SBCs and the BCI are directed to ensure that the fees charged at the time of enrollment comply with Section 24(1)(f) and the provision is not defeated either directly or indirectly under the garb of different nomenclatures. The SBCs cannot charge an enrolment fee or miscellaneous fees above the amount prescribed in Section 24(1)(f). No case is made out for this Court to exercise its power under Article 142 to implement the BCI Draft Enrolment Rules in their current form.

108. The result of this decision would have entitled advocates who have paid the excess enrolment fee to a refund from the SBCs.[115] The SBCs have been levying the enrolment fees for a considerable

113 "2001 Act"

114 Section 15, Advocates Welfare Fund Act 2001. [It reads:
15. Payment of certain monies to Fund by State Bar Council – The State Bar Council shall pay to the Fund annually an amount equal to twenty per cent of the enrolment fee received by it under clause (f) of Section 24 of the Advocates Act, 1961 (25 of 1961).]

115 *See* Somaiya Organics (India) Ltd v. State of U.P. (2001) 5 SCC 519 [46]

duration and utilizing the collected amounts to carry out their day-to-day functioning. Therefore, we declare that this judgment will have prospective effect. Resultantly, the SBCs are not required to refund the excess enrolment fees collected before the date of this judgment.

I. Conclusions

109. In view of the above discussion, we conclude that:

a. The SBCs cannot charge "enrolment fees" beyond the express legal stipulation under Section 24(1)(f) as it currently stands;

b. Section 24(1)(f) specifically lays down the fiscal pre-conditions subject to which an advocate can be enrolled on State rolls. The SBCs and the BCI cannot demand payment of fees other than the stipulated enrolment fee and stamp duty, if any, as a pre-condition to enrolment;

c. The decision of the SBCs to charge fees and charges at the time of enrolment in excess of the legal stipulation under Section 24(1)(f) violates Article 14 and Article 19(1)(g) of the Constitution; and

d. This decision will have prospective effect. The SBCs are not required to refund the excess enrolment fees collected before the date of this judgment.

110. In view of the above, the writ petition, transferred cases and transfer petitions are disposed of.

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

Result of the case: Matters disposed of.

†*Headnotes prepared by:* Ankit Gyan