ISSN: 3048-4839 (Online)

DIGITAL SUPREME COURT REPORTS

The Official Law Report
Fortnightly

2024 | Volume 7 | Part 8

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

Digitally Published by
Supreme Court of India

DIGITAL SUPREME COURT REPORTS

The Official Law Report
Fortnightly

2024 | Volume 7 | Part 8

Digitally Published by
Supreme Court of India

Editorial Board

Digitally Published by
Supreme Court of India

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

Contents

[2024] 7 S.C.R. 2143 : 2024 INSC 548

BRS Ventures Investments Ltd.
v.
SREI Infrastructure Finance Ltd. & Anr.

(Civil Appeal No. 4565 of 2021)

23 July 2024

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

Issue for Consideration

Whether the payment of Rs.38.87 crores to the financial creditor under the resolution plan of the corporate guarantor will extinguish the liability of the principal borrower/corporate debtor to pay the entire amount payable under the loan transaction after deducting the amount paid on behalf of the corporate guarantor in terms of its resolution plan; whether a holding company is the owner of the assets of its subsidiary and can the assets of the subsidiaries be included in the resolution plan of the holding company; can the financial creditor file simultaneous/separate applications under Section 7 of the IBC against the corporate debtor and the corporate guarantor as well.

Headnotes†

Insolvency and Bankruptcy Code, 2016 – ss.7, 31 – Contract Act, 1872 – ss.126, 128, 133-139 – 1st respondent-financial creditor granted a loan of Rs.100 crores to the 2nd respondent-corporate debtor – Corporate guarantee furnished by ACIL-Corporate Guarantor – Corporate debtor defaulted payment of the loan – s.7 application filed against Corporate Guarantor – Corporate Insolvency Resolution Process (CIRP) against the Corporate Guarantor commenced, Rs.38.87 crores paid to the financial creditor under the resolution plan – Corporate debtor, if liable to pay the entire amount payable under the loan transaction after deducting the aforesaid amount paid on behalf of the corporate guarantor:

Held: Yes – Payment of Rs.38.87 crores to the financial creditor under the resolution plan of the corporate guarantor will not extinguish the liability of the corporate debtor to pay the entire amount payable under the loan transaction after deducting the amount paid on behalf of the corporate guarantor in terms of

* Author

its resolution plan – As far as the guarantee is concerned, the liability of the surety and the principal debtor is co-extensive – The creditor has remedies available to recover the amount payable by the principal borrower by proceeding against both or any of them – The creditor can proceed against the guarantor first without exhausting its remedies against the principal borrower – If the creditor recovers a part of the amount guaranteed by the surety from the surety and agrees not to proceed against the surety for the balance amount, that will not extinguish the remaining debt payable by the principal borrower and the creditor can proceed against the principal borrower to recover the balance amount – Where a company furnishes a corporate guarantee for securing a loan taken by another company and if the CIRP of the corporate guarantor ends in a resolution plan, it will bind the creditor of the corporate guarantor – The corporate guarantor's liability may end in such a case by operation of law – However, such a resolution plan of the corporate guarantor will not affect the liability of the principal borrower to repay the loan amount to the creditor after deducting the amount recovered from the corporate guarantor or the amount paid by the resolution applicant on behalf of the corporate guarantor as per the resolution plan – View taken by NCLAT cannot be faulted. [Paras 14, 15, 17, 28]

Insolvency and Bankruptcy Code, 2016 – ss.7, 60 – Contract Act, 1872 – Simultaneous proceedings against the Corporate Debtor and the Guarantor – Permissibility:

Held: Is permissible – Consistent with the basic principles of the Contract Act that the liability of the principal borrower and surety is co-extensive, the IBC permits separate or simultaneous proceedings to be initiated u/s.7 by a financial creditor against the corporate debtor and the corporate guarantor. [Para 19]

Insolvency and Bankruptcy Code, 2016 – ss.18(1) Explanation (b), 36(4)(d) – Whether a holding company is the owner of the assets of its subsidiary – Can the assets of the subsidiaries be included in the resolution plan of the holding company – Whether the assets of the 2nd respondent-corporate debtor were a part of the CIRP in respect of ACIL-Corporate Guarantor (holding company of the corporate debtor):

Held: No – NCLAT rightly held that the resolution plan took care only of the investments of ACIL in the subsidiaries and not the assets of subsidiaries – Assets of a subsidiary company cannot

be part of the resolution plan of the holding company – A holding company and its subsidiary are always distinct legal entities – The holding company would own shares of the subsidiary company, but this does not make the holding company the owner of the subsidiary's assets – By virtue of the CIRP process of ACIL, the 2nd respondent-corporate debtor does not get a discharge, and its liability to repay the loan amount to the extent to which it is not recovered from the corporate guarantor did not extinguish. [Paras 20, 21]

Insolvency and Bankruptcy Code, 2016 – Contract Act, 1872 – s.140 – Rights of surety on payment or performance – "upon payment or performance of all that he is liable for"; 'all that he is liable' – Liability of ACIL-Corporate Guarantor was to the extent of the entire amount repayable by the 2nd respondent-corporate debtor – In the CIRP of ACIL, the appellant-Resolution Applicant of ACIL paid Rs.38.87 crores only to the 1st respondent-financial creditor on behalf of ACIL – Plea of the appellant that it has the right of subrogation over the right of the financial creditor over the corporate debtor in respect of its dues as well as the security provided to the financial creditor of the mortgage in respect of SEZ land:

Held: Rejected – Only the liability of ACIL under the corporate guarantee to repay the loan to the financial creditor was extinguished on the payment of Rs.38.87 crores – By the involuntary act of the creditor of accepting part of the amount from the surety in the discharge of the entire liability of the surety, even if s.140 is attracted, it will confer on the guarantor or the appellant the right to recover only the aforesaid amount from the corporate debtor – The subrogation will be only to the extent of the amount recovered by the creditor from the surety – Notwithstanding the subrogation to the extent of the amount paid on behalf of the corporate guarantor by the resolution applicant, the right of the financial creditor to recover the balance debt payable by the corporate debtor is in no way extinguished. [Para 25]

Case Law Cited

Lalit Kumar Jain v. Union of India & Ors. **[2021] 3 SCR 1075 : (2021) 9 SCC 321;** *Bacha F. Guzdar v. Commissioner of Income Tax, Bombay* **[1955] 1 SCR 876;** *Vodafone International Holdings BV v. Union of India & Anr.* **[2012] 1 SCR 573 : (2012) 6 SCC 613 – relied on.**

Amit Lal Goverdhan Lalan v. State Bank of Travancore & Ors. [1968] 3 SCR 724**;** *Economic Transport Organization, Delhi v. Charan Spinning Mills Pvt. Ltd. & Anr.* [2010] 2 SCR 887 **: (2010) 4 SCC 114;** *Lala Kapurchand Godha & Ors. v. Mir Nawab Himayatalikhan Azamjah* [1963] 2 SCR 168**;** *Jaypee Kensington Boulevard Apartments Welfare Association & Ors. v. NBCC (India) Ltd. & Ors.* [2021] 12 SCR 603 **: (2022) 1 SCC 401;** *Committee of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta & Ors.* [2019] 16 SCR 275 **: (2019) SCC Online SC 1478;** *Laxmi Pat Surana v. Union of India & Anr.* [2021] 2 SCR 924 **: (2021) 8 SCC 481;** *Punjab National Bank Ltd. v. Shri Vikram Cotton Mills & Anr.* [1970] 2 SCR 462 **: (1970) 1 SCC 60;** *State Bank of India v. V. Ramakrishnan & Anr.* [2018] 10 SCR 974 **: (2018) 17 SCC 394 – referred to.**

Shib Charan Das v. Muqaddam & Ors., **AIR 1936 ALL 62;** *Kadamba Sugar Industries Pvt. Ltd. v. Devru Ganapathi Hegde Bhairi,* **1993 SCC Online KAR 7;** *Maitreya Doshi v. Anand Rathi Global Finance Ltd. & Anr.* [2022] 15 SCR 536 **: (2022) SCC Online SC 1276;** *Darbari Lal & Anr. v. Mahbub Ali Mian & Ors.* **(1927) SCC Online ALL 121 – referred to.**

State Bank of India v. Ghanshyam Surajbali Kurmi **(2022) SCC Online NCLT 14567 – referred to.**

List of Acts

Insolvency and Bankruptcy Code, 2016; Contract Act, 1872.

List of Keywords

Principal borrower/corporate debtor; Financial creditor; Corporate guarantor; Resolution plan of the corporate guarantor; Liability of Corporate Guarantor; Corporate guarantor's liability; Balance debt; Corporate Insolvency Resolution Process (CIRP); Subrogation; Holding company; Subsidiary; Owner; Assets of subsidiary; Corporate guarantee; Guarantor; Surety; Resolution plan of the holding company; Distinct legal entities.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 4565 of 2021

From the Judgment and Order dated 11.05.2021 of the National Company Law Appellate Tribunal, Delhi in CAAT(I)-1109 and 1096 of 2020

BRS Ventures Investments Ltd. v.
SREI Infrastructure Finance Ltd. & Anr.

Appearances for Parties

Jaideep Gupta, Sr. Adv., Ajay Gaggar, Amarjit Singh Bedi, Yashwant Gaggar, Ms. Racheeta Chawla, Ms. Riddhi Bose, Ms. Anindita Mitra, Advs. for the Appellants.

Navin Pawa, Sr. Adv., Abhimanyu Bhandari, Arav Pandit, Thakur Ankit Singh, Ms. Rooh-e-hina Dua, Shamik Shirishbhai Sanjanwala, Raheel Patel, Shantanu Parmar, Advs. for the Respondents.

Darius Khambata, Sr. Adv., Ritin Rai, Rishabh Parikh, Tirth Nayak, Vinam Gupta, Advs. for the Intervenor.

Judgment / Order of the Supreme Court

Judgment

Abhay S. Oka, J.

FACTUAL ASPECTS

1. The 2nd respondent–Gujarat Hydrocarbon and Power SEZ Limited, is a corporate debtor. The corporate debtor approached the 1st respondent–SREI Infrastructure Finance Limited (the financial creditor), for a grant of a loan. Under the agreement dated 5th January 2011, the financial creditor granted the corporate debtor a loan of Rs.100 crores for setting up a SEZ project. The corporate debtor is a subsidiary of M/s. Assam Company India Limited (ACIL). The loan granted by the financial creditor to the corporate debtor was secured by a mortgage made by the corporate debtor of its leasehold land and a pledge of shares of the corporate debtor and ACIL. The loan was also secured by the corporate guarantee dated 5th January 2011 furnished by ACIL. The financial creditor filed an Original Application before the Debt Recovery Tribunal-I, Kolkata (for short, 'the DRT') to recover the outstanding loan amount. On 24th March 2015, a "debt repayment and settlement agreement" was executed to which the financial creditor, the corporate debtor and ACIL (the guarantor) were parties. On account of the default committed by the corporate debtor, the financial creditor invoked the corporate guarantee of ACIL. Thereafter, an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for short, 'the IBC') was filed concerning ACIL as the guarantee was not honoured. The adjudicating authority vide order dated 26th October 2017 admitted the

said application. Thus, the Corporate Insolvency Resolution Process (for short, 'CIRP') of ACIL commenced. The 1st respondent-financial creditor filed a claim of Rs.648.81 crores, out of which the claim of Rs.357.29 crores was admitted towards the claim by the Interim Resolution Professional (for short, 'IRP'). After the appointment of the Resolution Professional (RP), the claim amount of the 1st respondent financial creditor was reassessed at Rs.241.27 crores inclusive of the principal amount of Rs.100 crores. The appellant is the successful Resolution Applicant of ACIL. The appellant submitted a resolution plan. The resolution plan was approved on 13th August 2018 by the Committee of Creditors (for short, 'the COC'), which was approved by the adjudicating authority by the order dated 20th September 2018. The order of the adjudicating authority was confirmed in appeal by the National Company Law Appellate Tribunal (for short, 'the NCLAT'). The appellant paid Rs.38.87 crores to the 1st respondent-financial creditor, against the admitted claim of Rs.241.27 crores in full and final settlement of all its dues and demands submitted in the resolution plan.

2. On 10th February 2020, the 1st respondent financial creditor filed an application under Section 7 of the IBC against the 2nd respondent corporate debtor. The claim of the 1st respondent-financial creditor was of Rs.1428 crores, which is claimed to be the balance amount payable to the financial creditor under the loan facility of Rs.100 crores. By the order dated 18th November 2020, the adjudicating authority admitted the application under Section 7 of the IBC. Aggrieved by the said order, the appellant preferred an appeal before the NCLAT. A suspended Director of the corporate debtor also preferred an appeal against the said order of the adjudicating authority. By the impugned judgment of the NCLAT, both appeals have been dismissed.

3. M/s. Zaveri & Co. Pvt. Ltd. has filed I.A. No.11685 of 2023 for intervention. It is stated in the application that the applicant and other interested parties had submitted the resolution plan of the 2nd respondent-corporate debtor. A final resolution plan was submitted by the applicant on 23rd August 2021, proposing to pay a sum of Rs.135 crores within a period of 15 months to the creditors of the 2nd respondent-corporate debtor. The COC of the 2nd respondent-corporate debtor approved the resolution plan of the applicant on

30th August 2021. As required by the approved resolution plan, the applicant has furnished a bank guarantee of Rs.2 crores on 3rd September 2021.

SUBMISSIONS OF THE APPELLANT

4. Mr. Jaideep Gupta, the learned senior counsel appearing for the appellant, submitted that in the CIRP of ACIL, the appellant's resolution plan was duly approved. As per the resolution plan, a sum of Rs.38.87 crores was paid to the 1st respondent-financial creditor, which was in full and final settlement of the dues of the 1st respondent-financial creditor. He submitted that upon such payment being made by the appellant, Section 140 of the Indian Contract Act, 1872 (for short, 'the Contract Act') would squarely apply as the rights of the 1st respondent-financial creditor shall stand subrogated in favour of the appellant. Therefore, through ACIL, the appellant would step into the shoes of the 1st respondent-financial creditor. He would, thus, submit that the appellant has the right of subrogation over the right of the financial creditor over the principal borrower (corporate debtor) in respect of its dues as well as the security provided to the financial creditor of the mortgage in respect of SEZ land. He submitted that upon payment of Rs.38.87 crores to the 1st respondent-financial creditor, as a full and final settlement of its total dues of Rs.241.27 crores, the appellant has now stepped into the shoes of the 1st respondent-financial creditor. He relied on this Court's decision in the case of ***Amit Lal Goverdhan Lalan v. State Bank of Travancore & Ors.***[1]

5. The learned senior counsel further submitted that for attracting Section 140 of the Contract Act, the payment by the guarantor does not have to be of the entire amount due from the principal debtor. Even a partial payment made in the full and final settlement is sufficient to trigger the principle of subrogation. He placed reliance on a decision of the Allahabad High Court in the case of ***Shib Charan Das v. Muqaddam & Ors.***[2] He submitted that the High Court of Karnataka, in the case of ***Kadamba Sugar Industries Pvt. Ltd. v. Devru Ganapathi Hegde Bhairi***[3] has held that acceptance of the

1 [1968] 3 SCR 724

2 AIR 1936 ALL 62

3 1993 SCC Online KAR 7

lesser amount by the creditor under the complete satisfaction of the dues paid by the surety, entitled surety to the right of subrogation. The surety is entitled to all the rights of the creditor against the principal debtor. He also relied upon a decision of this Court in the case of ***Economic Transport Organization, Delhi v. Charan Spinning Mills Pvt. Ltd. & Anr.***[4]

6. He submitted that upon receipt of Rs.38.87 crores from the guarantor, the debt repayable to the 1st respondent financial creditor has been discharged. The 1st respondent financial creditor is now estopped from enforcing the remaining part of the debt from the 2nd respondent-corporate debtor in view of Section 63 read with Section 41 of the Contract Act. The 1st respondent financial creditor applied Section 7 of the IBC against the 2nd respondent corporate debtor, though the entire debt of the 1st respondent financial creditor has been discharged. Moreover, there is a right of subrogation. He relied upon a decision of this Court in the case of ***Lala Kapurchand Godha & Ors. v. Mir Nawab Himayatalikhan Azamjah.***[5]

SUBMISSIONS OF THE 1ST RESPONDENT – FINANCIAL CREDITOR

7. Mr Abhimanyu Bhandari, the learned counsel appearing for the 1st respondent-financial creditor, has taken us through the impugned orders. He pointed out that the resolution plan of the 2nd respondent-corporate debtor has been approved by the adjudicating authority by the order dated 19th September 2023. He submitted that no payment was made against the claim raised by ACIL as it was an unsecured financial creditor primarily because the liquidation value of the 2nd respondent-corporate debtor is much lower than the total claim amount of the secured financial creditors. He pointed out that the main grievance of the appellant is that the institution of corporate insolvency has been upheld against the 2nd respondent-corporate debtor, for the assets allegedly part of the CIRP of ACIL, which is the holding company of the 2nd respondent-corporate debtor. He pointed out that under Section 36(4) of the IBC, the assets of the subsidiary of the corporate debtor cannot be included in the liquidation estate assets. He invited our attention to Section 18

4 [2010] 2 SCR 887 : (2010) 4 SCC 114

5 [1963] 2 SCR 168

of the IBC, which contains the duties of IRPs. He submitted that if there is a resolution of a corporate debtor, the assets of any of its subsidiaries will not be included in the scope of the resolution process. He submitted that the holding company and its subsidiaries are distinct legal persons, and the holding company does not own the subsidiary's assets. The learned counsel relied upon a decision of this Court in the case of ***Vodafone International Holdings BV v. Union of India & Anr.***[6] He also relied upon a decision of this Court in the case of ***Jaypee Kensington Boulevard Apartments Welfare Association & Ors. v. NBCC (India) Ltd. & Ors.***[7] Inviting our attention to the information memorandum in the CIRP of ACIL, he submitted that the same did not contain the particulars of the assets of the 2nd respondent-corporate debtor. It was specifically stated therein that the 2nd respondent-corporate debtor was still to unlock the value of the land, that is, the value of the investment made by ACIL. It was disclosed that the 2nd respondent-corporate debtor was a 51% subsidiary of ACIL. The assets and liabilities of ACIL, disclosed in the information memorandum, did not include the assets and liabilities of the subsidiaries. Therefore, the assets and liabilities of the 2nd respondent-corporate debtor were not part of CIRP of ACIL. He also pointed out the definition clause in the resolution plan. The liquidation value of ACIL was shown as Rs.360 crores, and the financial value did not include its subsidiaries' income. It is expressly provided in clauses 13.1 and 13.3 of the resolution plan that all the assets of ACIL shall stand extinguished, and the corporate guarantee of ACIL would also be extinguished. There is a specific clause that no right of subrogation shall be available to the existing guarantors. He submitted that only a sum of Rs.38.87 crores was given to the 1st respondent-financial creditor. Therefore, the liability of the 2nd respondent-corporate debtor concerning the balance amount continued to exist.

8. He invited our attention to the decision of this Court dated 21st May 2021 in the case of ***Lalit Kumar Jain v. Union of India & Ors.***[8] This judgment lays down that it is open for the creditors to move against personal guarantors under the IBC. He submitted

6 [2012] 1 SCR 573 : (2012) 6 SCC 613

7 [2021] 12 SCR 603 : (2022) 1 SCC 401

8 [2021] 3 SCR 1075 : (2021) 9 SCC 321

that because the liability of the guarantor is co-extensive with the corporate debtor, this Court held that the approval of a resolution plan of the corporate debtor does not *ipso facto* discharge guarantors of the corporate debtor of their liabilities under the contract of guarantee. It was held that by involuntary process or due to liquidation or insolvency proceedings, corporate guarantors are not absolved of their liability, which arises out of an independent contract. In this case, the entire outstanding amount payable by the 2nd respondent-corporate debtor has not been recovered from ACIL. Therefore, there is no bar on the 1st respondent-financial creditor to proceed against the 2nd respondent-corporate debtor for the remaining amount. In this case, the 1st respondent-financial creditor first moved against the guarantor and, after exhausting the remedies against the guarantor, filed an application under Section 7 against the 2nd respondent-corporate debtor. Merely because the creditor has made a partial recovery from the guarantor, it does not absolve the corporate debtor of his financial obligations. Reliance was placed upon a decision of this Court in the case of ***Maitreya Doshi v. Anand Rathi Global Finance Ltd. & Anr.***[9]

9. Regarding the plea of subrogation, the learned counsel pointed out that the plea was never raised before the adjudicating authority and the NCLAT. The ground of subrogation was made by way of an amendment to the memorandum of this appeal; therefore, the contention not raised earlier cannot be considered at this stage. He pointed out that the COC and the adjudicating authority have already approved the resolution plan for the 2nd respondent-corporate debtor. He submitted that this Court had settled this issue in the case of ***Committee of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta & Ors.***[10] He relied upon a decision of the Hyderabad Bench of the NCLT in the case of ***State Bank of India v. Ghanshyam Surajbali Kurmi,***[11] which covered the issue.

SUBMISSIONS OF INTERVENORS

10. Mr. Darius Khambata, the learned senior counsel appearing for the intervenor, also made detailed submissions. He pointed out that under

9 [2022] 15 SCR 536 : 2022 SCC Online SC 1276

10 [2019] 16 SCR 275 : 2019 SCC Online SC 1478

11 2022 SCC Online NCLT 14567

Section 128 of the Contract Act, the liability of a surety is co-extensive with that of the principal debtor unless there is something contrary to that in the contract. He relied upon a decision of this Court in the case of ***Laxmi Pat Surana v. Union of India & Anr***[12] on this behalf. He submitted that the guarantor's liability is separate and distinct from the principal debtor as held by this Court in the case of ***Punjab National Bank Ltd. v. Shri Vikram Cotton Mills & Anr.***[13] This Court held that a binding obligation created under a composition under Section 391 of the Companies Act, 1956, between the company and its creditors, did not affect the liability of surety. He submitted that any variation in the contract between the creditor and guarantor does not discharge the principal debtor. If there is a variance made without the guarantor's consent in the contract between the corporate debtor and the creditor, it amounts to the discharge of the guarantor as regards the transactions subsequent to the variance. He pointed out various provisions of the Contract Act regarding the discharge of a guarantor. Relying upon Section 60(2) of the IBC and a decision of this Court in the case of ***Lalit Kumar Jain,***[8] he urged that the IBC permits simultaneous petitions against the corporate debtor and corporate guarantor. He also invited our attention to Section 60(2) of the IBC. He relied upon a decision of this Court in the case of ***State Bank of India v. V. Ramakrishnan & Anr.***[14] He submitted that Section 140 of the Contract Act will be applicable only when the guarantor pays all that he is liable for under the contract of guarantee. He submitted that if the guarantor makes only a part payment of the debt, Section 140 will not have any application. He relied upon a decision of the Allahabad High Court in the case of ***Darbari Lal & Anr. v. Mahbub Ali Mian & Ors.***[15] He submitted that this proposition finds support even in the decision of the Allahabad High Court in the case of ***Shib Charan Das***[2] relied upon by the appellant. He pointed out that in the information memorandum of ACIL, the assets and liabilities of the 2nd respondent-corporate debtor were not included. The assets of the 2nd respondent-corporate debtor cannot be treated as a part of ACIL's assets. He submitted that the resolution plan of ACIL has been prepared based on the information memorandum.

12 [2021] 2 SCR 924 : (2021) 8 SCC 481

13 [1970] 2 SCR 462 : (1970) 1 SCC 60

14 [2018] 10 SCR 974 : (2018) 17 SCC 394

15 (1927) SCC Online ALL 121

He submitted that the information memorandum and the resolution plan must be consistent with Section 36(4)(d) of the IBC.

REPLY OF THE APPELLANT

11. Replying to the submissions made by the learned counsel appearing for the 1st respondent-financial creditor, the learned senior counsel appearing for the appellant reiterated his submissions on the applicability of Section 140 of the Contract Act. His submission is that the information memorandum indicates taking over the business of ACIL and the 2nd respondent-corporate debtor. He submitted that the business of the 2nd respondent-corporate debtor was included in the insolvency plan. He submitted that by the admission of an application under Section 7 against the 2nd respondent-corporate debtor, a valuable asset of ACIL has been taken away.

CONSIDERATION

12. Before we deal with the submissions canvassed across the Bar, we must note the issues formulated in the impugned judgment of the NCLAT. Based on the submissions made before it, two issues were framed, which read thus:

> **"13.** Following issues arise in this appeal for our consideration:
>
> (i) Whether the application under Section 7 of IBC is barred by limitation?
>
> (ii) Whether the second Application under Section 7 of IBC is not maintainable against the Corporate Debtor as for the same debt and default, CIRP has already been taken place against the Corporate Guarantor and the Financial Creditor has accepted the amount in full and final settlement of all its dues?"

13. The present appellant did not canvas the issue of subrogation before the NCLAT. It is also not urged in the memorandum of appeal before the NCLAT. We may note here that the appellant has not seriously pressed the issue of the bar of limitation in this appeal. The NCLAT rendered the findings on both issues in favour of the respondents. There is no dispute that the 1st respondent financial creditor had granted a loan of Rs.100 crores to the 2nd respondent corporate debtor. The loan was secured by the corporate guarantee furnished

by ACIL, which is the holding company of the corporate debtor. There is no dispute that the 2nd respondent-corporate debtor committed a default in payment of the loan amount. Therefore, the guarantee was invoked by the 1st respondent-financial creditor, which led to the filing of an application under Section 7 of the IBC against ACIL. The CIRP of ACIL was completed, and the resolution plan was approved. The claim lodged by the 1st respondent-financial creditor was of Rs.241.27 crores. However, as per the resolution plan, the 1st respondent-financial creditor had to accept a haircut as it was provided therein that the 1st respondent-financial creditor would get only a sum of Rs.38.87 crores from the resolution applicant.

LIABILITY OF GUARANTOR / SURETY

14. As far as the guarantee is concerned, the law is very well settled. The liability of the surety and the principal debtor is co-extensive. The creditor has remedies available to recover the amount payable by the principal borrower by proceeding against both or any of them. The creditor can proceed against the guarantor first without exhausting its remedies against the principal borrower. Chapter VIII of the Contract Act contains provisions regarding indemnity and guarantee. Section 126 is relevant for our purposes, which reads thus:

> **"126. "Contract of guarantee", "surety", "principal debtor" and "creditor".—** A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety"; the person in respect of whose default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor". A guarantee may be either oral or written."

A surety is also known as a guarantor. Section 128 reads thus:

> **"128. Surety's liability.—** The liability of the surety is co- extensive with that of the principal debtor, unless it is otherwise provided by the contract."

It lays down the fundamental principle that the liability of the surety is co-extensive with that of the principal debtor unless otherwise provided by the contract. Sections 133 to 139 deal with the discharge of surety, which read thus:

"133. Discharge of surety by variance in terms of contract.— Any variance, made without the surety's consent, in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance.

134. Discharge of surety by release or discharge of principal debtor.— The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.

135. Discharge of surety when creditor compounds with, gives time to, or agrees not to sue, principal debtor.— A contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal debtor, discharges the surety, unless the surety assents to such contract.

136. Surety not discharged when agreement made with third person to give time to principal debtor.— Where a contract to give time to the principal debtor is made by the creditor with a third person, and not with the principal debtor, the surety is not discharged.

137. Creditor's forbearance to sue does not discharge surety.— Mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him does not, in the absence of any provision in the guarantee to the contrary, discharge the surety.

138. Release of one co-surety does not discharge others.— Where there are co-sureties, a release by the creditor of one of them does not discharge the others; neither does it free the surety so released from his responsibility to the other sureties.

139. Discharge of surety by creditor's act or omission impairing surety's eventual remedy.— If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety

> requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged."

Thus, the law provides that if any variance is made without surety's consent in the terms of the contract between the principal debtor and the creditor, it amounts to discharge of the surety as to the transactions subsequent to the variance. Under the provisions of Section 133, surety can be discharged only when there is a variance made in the terms of the contract between the principal debtor and the creditor. Section 134 contemplates a situation where the principal debtor is released by a contract between the creditor and the principal debtor. In such a case, the surety is discharged. If by any act or omission on the part of the creditor, the legal consequence of which is the discharge of the principal debtor, the surety stands discharged. Section 135 is based on the same principle on which Section 133 is based. If there is a contract between the creditor and the principal debtor by which the creditor makes a composition or promise with the principal debtor, or gives time to the principal debtor or agrees not to sue the principal debtor, it amounts to discharge of the surety provided the surety has not assented to such a contract. If the creditor contracts with a third party to give time to the principal debtor, and when the principal debtor is not a party to such a contract, the surety is not discharged. Section 137 lays down a settled principle that it is not necessary for the creditor to first sue the principal debtor or adopt a remedy against him. If the creditor omits to do that, unless there is a contract to the contrary, it will not amount to discharge of the surety. This means that without proceeding to recover the debt against the principal debtor, the creditor can proceed against the surety unless there is a contract to the contrary. Even if the creditor discharges one surety, it will not amount to the discharge of the other surety. There are two other contingencies provided under Sections 138 and 139. We are not concerned with these two contingencies in the present case.

15. If the creditor recovers a part of the amount guaranteed by the surety from the surety and agrees not to proceed against the surety for the balance amount, that will not extinguish the remaining debt payable by the principal borrower. In such a case, the creditor can proceed against the principal borrower to recover the balance amount. Similarly, if there is a compromise or settlement between

the creditor and the surety to which the principal borrower is not a consenting party, the liability of the borrower *qua* the creditor will remain unaffected. The provisions regarding the discharge of the surety discussed above show that involuntary acts of the principal borrower or creditor do not result in the discharge of surety.

16. In the case of ***Lalit Kumar Jain***,[8] this Court dealt with the legal effect of approving the resolution plan in CIRP of the corporate debtor on the liability of the surety. This is in the context of Section 135 of the Contract Act, which provides that if the creditor compounds with or gives time or agrees not to sue the principal debtor, it amounts to discharge of the surety. In paragraphs 122 to 125 of the said decision, this Court held thus:

> **"122.** It is therefore, clear that the sanction of a resolution plan and finality imparted to it by Section 31 does not per se operate as a discharge of the guarantor's liability. As to the nature and extent of the liability, much would depend on the terms of the guarantee itself. **However, this Court has indicated, time and again, that an involuntary act of the principal debtor leading to loss of security, would not absolve a guarantor of its liability. In Maharashtra SEB [Maharashtra SEB v. Official Liquidator, (1982) 3 SCC 358] the liability of the guarantor (in a case where liability of the principal debtor was discharged under the Insolvency law or the Company law), was considered. It was held that in view of the unequivocal guarantee, such liability of the guarantor continues and the creditor can realise the same from the guarantor in view of the language of Section 128 of the Contract Act, 1872 as there is no discharge under Section 134 of that Act.** This Court observed as follows : (SCC pp. 362-63, para 7)
>
> > "7. Under the bank guarantee in question the Bank has undertaken to pay the Electricity Board any sum up to Rs 50,000 and in order to realise it all that the Electricity Board has to do is to make a demand. Within forty-eight hours of such demand the Bank has to pay the amount to the Electricity Board which is not under any obligation to prove any default on

the part of the Company in liquidation before the amount demanded is paid. The Bank cannot raise the plea that it is liable only to the extent of any loss that may have been sustained by the Electricity Board owing to any default on the part of the supplier of goods i.e. the Company in liquidation. The liability is absolute and unconditional. The fact that the Company in liquidation i.e. the principal debtor has gone into liquidation also would not have any effect on the liability of the Bank i.e. the guarantor. Under Section 128 of the Contract Act, 1872, the liability of the surety is coextensive with that of the principal debtor unless it is otherwise provided by the contract. A surety is no doubt discharged under Section 134 of the Contract Act, 1872 by any contract between the creditor and the principal debtor by which the principal debtor is released or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor. **But a discharge which the principal debtor may secure by operation of law in bankruptcy (or in liquidation proceedings in the case of a company) does not absolve the surety of his liability** (see Jagannath Ganeshram Agarwale v. Shivnarayan Bhagirath [Jagannath Ganeshram Agarwale v. Shivnarayan Bhagirath, 1939 SCC OnLine Bom 65 : AIR 1940 Bom 247]; see also Fitzgeorge, In re [Fitzgeorge, In re,(1905)1KB462])."

123. This legal position was noticed and approved later in Industrial Finance Corpn. of India Ltd. v. Cannanore Spg. & Wvg. Mills Ltd. [Industrial Finance Corpn. of India Ltd. v. Cannanore Spg. & Wvg. Mills Ltd., (2002) 5 SCC 54] An earlier decision of three Judges in Punjab National Bank v. State of U.P. [Punjab National Bank v. State of U.P., (2002) 5 SCC 80] pertains to the issues regarding a guarantor and the principal debtor. The Court observed as follows : (Punjab National Bank case [Punjab National Bank v. State of U.P., (2002) 5 SCC 80] , SCC p. 80-81, paras 1-6)

"1. The appellant had, after Respondent 4's management was taken over by U.P. State Textile Corporation Ltd. (Respondent 3) under the Industries (Development and Regulation) Act, advanced some money to the said Respondent 4. In respect of the advance so made, Respondents 1, 2 and 3 executed deeds of guarantee undertaking to pay the amount due to the Bank as guarantors in the event of the principal borrower being unable to pay the same.

2. Subsequently, Respondent 3 which had taken over the management of Respondent 4 became sick and proceedings were initiated under the Sick Textile Undertakings (Nationalisation) Act, 1974 (for short "the Act"). The appellant filed suit for recovery against the guarantors and the principal debtor of the amount claimed by it.

3. The following preliminary issue was, on the pleadings of the parties, framed:

'Whether the claim of the plaintiff is not maintainable in view of the provisions of Act 57 of 1974 as alleged in Para 25 of the written statement of Defendant 2?'

4. The trial court as well as the High Court, both came to the conclusion that in view of the provisions of Section 29 of the Act, the suit of the appellant was not maintainable.

5. We have gone through the provisions of the said Act and in our opinion the decision of the courts below is not correct. Section 5 of the said Act provides for the owner to be liable for certain prior liabilities and Section 29 states that the said Act will have an overriding effect over all other enactments. This Act only deals with the liabilities of a company which is nationalised and there is no provision therein which in any way affects the liability of a guarantor who is bound by the deed of guarantee executed by it. The High Court has referred to a decision of this Court in Maharashtra SEB v. Official Liquidator [Maharashtra SEB v. Official Liquidator, (1982) 3 SCC 358] where the

liability of the guarantor in a case where liability of the principal debtor was discharged under the Insolvency law or the Company law, was considered. **It was held in this case that in view of the unequivocal guarantee, such liability of the guarantor continues and the creditor can realise the same from the guarantor in view of the language of Section 128 of the Contract Act, 1872 as there is no discharge under Section 134 of that Act.**

6. In our opinion, the principle of the aforesaid decision of this Court is equally applicable in the present case. The right of the appellant to recover money from Respondents 1, 2 and 3 who stood guarantors arises out of the terms of the deeds of guarantee which are not in any way superseded or brought to a naught merely because the appellant may not have been able to recover money from the principal borrower. It may here be added that even as a result of the Nationalisation Act the liability of the principal borrower does not come to an end. It is only the mode of recovery which is referred to in the said Act."

124. In Kaupthing Singer & Friedlander Ltd. [Kaupthing Singer & Friedlander Ltd. (No. 2), In re, (2012) 1 AC 804 : (2011) 3 WLR 939 : (2012) 1 All ER 883, paras 11, 12, 53-54] the UK Supreme Court reviewed a large number of previous authorities on the concept of double proof i.e. recovery from guarantors in the context of insolvency proceedings. The Court held that: (AC p. 814, para 11)

"11. The function of the rule is not to prevent a double proof of the same debt against two separate estates (that is what insolvency practitioners call "double dip"). The rule prevents a double proof of what is in substance the same debt being made against the same estate, leading to the payment of a double dividend out of one estate. It is for that reason sometimes called the rule against double dividend. In the simplest case of suretyship (where the surety has neither given nor been provided with security, and has an unlimited liability) there is a triangle of rights

> and liabilities between the principal debtor ("PD"), the surety ("S") and the creditor ("C"). PD has the primary obligation to C and a secondary obligation to indemnify S if and so far as S discharges PD's liability, but if PD is insolvent S may not enforce that right in competition with C. S has an obligation to C to answer for PD's liability, and the secondary right of obtaining an indemnity from PD. C can (after due notice) proceed against either or both of PD and S. If both PD and S are in insolvent liquidation, C can prove against each for 100p in the pound but may not recover more than 100p in the pound in all."

125. In view of the above discussion**, it is held that approval of a resolution plan does not ipso facto discharge a personal guarantor (of a corporate debtor) of her or his liabilities under the contract of guarantee. As held by this Court, the release or discharge of a principal borrower from the debt owed by it to its creditor, by an involuntary process i.e. by operation of law, or due to liquidation or insolvency proceeding, does not absolve the surety/guarantor of his or her liability, which arises out of an independent contract."**

(emphasis added)

This Court dealt with a situation where a resolution plan for the principal borrower was approved in CIRP, and the principal borrower was discharged from the debt by operation of law through an involuntary process. It was held that the contract between the creditor and the surety is independent; therefore, the approval of the resolution plan of the principal borrower will not amount to the discharge of the surety. The same principles will apply when the resolution plan is approved in CIRP of the surety. In such a case, the surety gets a discharge from his liability under the guarantee by operation of law or by involuntary process. It will not amount to the discharge of the principal borrower.

17. Section 31 of the IBC reads thus:

> **"31. Approval of resolution plan.–**
>
> (1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of

creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, **it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, guarantors and other stakeholders involved in the resolution plan.**

Provided that the Adjudicating Authority shall, before passing an order for approval of resolution plan under this sub-section, satisfy that the resolution plan has provisions for its effective implementation.

(2) Where the Adjudicating Authority is satisfied that the resolution plan does not confirm to the requirements referred to in sub-section (1), it may, by an order, reject the resolution plan.

(3) After the order of approval under sub-section (1),-

(a) the moratorium order passed by the Adjudicating Authority under section 14 shall cease to have effect; and

(b) the resolution professional shall forward all records relating to the conduct of the corporate insolvency resolution process and the resolution plan to the Board to be recorded on its database.

(4) The resolution applicant shall, pursuant to the resolution plan approved under sub-section (1), obtain the necessary approval required under any law for the time being in force within a period of one year from the date of approval of the resolution plan by the Adjudicating Authority under sub-section (1) or within such period as provided for in such law, whichever is later:

Provided that where the resolution plan contains a provision for combination, as referred to in section 5 of the Competition Act, 2002, the resolution applicant shall

> obtain the approval of the Competition Commission of India under that Act prior to the approval of such resolution plan by the committee of creditors."
>
> (emphasis added)

The resolution plan of the corporate debtor approved by the adjudicating authority binds the corporate debtor, its employees, members, creditors, guarantor and other stakeholders. Therefore, where a company furnishes a corporate guarantee for securing a loan taken by another company and if the CIRP of the corporate guarantor ends in a resolution plan, it will bind the creditor of the corporate guarantor. The corporate guarantor's liability may end in such a case by operation of law. However, such a resolution plan of the corporate guarantor will not affect the liability of the principal borrower to repay the loan amount to the creditor after deducting the amount recovered from the corporate guarantor or the amount paid by the resolution applicant on behalf of the corporate guarantor as per the resolution plan.

18. As observed earlier, in such a loan transaction secured by a guarantee, the guarantor has an obligation to repay the loan amount to the creditor, and there is a separate and distinct obligation on the borrower to pay the amount to the creditor. Such a transaction creates a right in favour of the creditor to proceed against the guarantor and borrower for recovery. However, he has the right to recover the amount only to the extent of the loan amount payable by the borrower.

SIMULTANEOUS PROCEEDINGS UNDER THE IBC AGAINST THE CORPORATE DEBTOR AND GUARANTOR

19. Now, we turn to the provisions of the IBC. Sub-section (8) of Section 5 defines 'financial debt'. Clauses (a) and (i) of sub-section (8) show that the money borrowed against the payment of interest and the amount of any liability in respect of any guarantee for repayment of the loan covered by clause (a) have been put under separate headings. Thus, the liability of the guarantor or surety is a financial debt, and even the money borrowed against the payment of interest is also a financial debt. In the light of these provisions, Section 60 of the IBC is relevant, which reads thus:

"60. Adjudicating Authority for corporate persons. -

(1) The Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall be the National Company Law Tribunal having territorial jurisdiction over the place where the registered office of a corporate person is located.

(2) Without prejudice to sub-section (1) and notwithstanding anything to the contrary contained in this Code, **where a corporate insolvency resolution process or liquidation proceeding of a corporate debtor is pending before a National Company Law Tribunal, an application relating to the insolvency resolution or liquidation or bankruptcy of a corporate guarantor or personal guarantor, as the case may be, of such corporate debtor shall be filed before the National Company Law Tribunal.**

(3) An insolvency resolution process or liquidation or bankruptcy proceeding of a corporate guarantor or personal guarantor, as the case may be, of the corporate debtor pending in any court or tribunal shall stand transferred to the Adjudicating Authority dealing with insolvency resolution process or liquidation proceeding of such corporate debtor.

(4) The National Company Law Tribunal shall be vested with all the powers of the Debt Recovery Tribunal as contemplated under Part III of this Code for the purpose of sub-section (2).

(5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of –

(a) any application or proceeding by or against the corporate debtor or corporate person;

(b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and

(c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.

(6) Notwithstanding anything contained in the Limitation Act, 1963 or in any other law for the time being in force, in computing the period of limitation specified for any suit or application by or against a corporate debtor for which an order of moratorium has been made under this Part, the period during which such moratorium is in place shall be excluded."

(emphasis added)

Sub-section (2) of Section 60 contemplates separate or simultaneous insolvency proceedings against the corporate debtor and guarantor. Therefore, sub-section (3) of Section 60 provides that if CIRP in respect of the corporate guarantor is pending before an adjudicating authority and if the CIRP against the corporate debtor is pending before another adjudicating authority, CIRP proceedings against the corporate guarantor must be transferred to the adjudicating authority before whom CIRP in respect of the corporate debtor is pending. Thus, consistent with the basic principles of the Contract Act that the liability of the principal borrower and surety is co-extensive, the IBC permits separate or simultaneous proceedings to be initiated under Section 7 by a financial creditor against the corporate debtor and the corporate guarantor.

WHETHER THE ASSETS OF THE CORPORATE DEBTOR WERE PART OF CIRP IN RESPECT OF ACIL – CORPORATE GUARANTOR

20. Now, we will deal with the submissions made by the appellant that the assets of the 2nd respondent-corporate debtor were also a part of the CIRP in respect of ACIL. This submission was made on the ground that according to the appellant, the information memorandum published in accordance with Section 29 of the IBC indicates taking over of the business of ACIL and the 2nd respondent-corporate debtor. Clause 3, under the heading "SEZ Business" in the information memorandum, specifically mentions that ACIL has acquired, through its subsidiary (2nd respondent-corporate debtor),

296 hectares of land for setting up the SEZ project. It is further stated that the entire project cost of SEZ, inclusive of land acquisition, was financed through equity and unsecured loans contributed by ACIL. It further records that SEZ is a separate company. However, it is stated that the financial obligations of the SEZ units are on ACIL. As SEZ is stated to be a separate company, it is not included in the resolution plan, which was duly approved. As rightly found by the NCLAT, the resolution plan takes care only of the investments of ACIL in the subsidiaries and not the assets of subsidiaries. As indicated in the subsequent paragraphs, considering the scheme of the IBC, assets of a subsidiary company cannot be part of the resolution plan of the holding company.

21. It is necessary to take notice of the two critical provisions of the IBC, which are Sections 18 and 36. Section 18 and Section 36 read thus:

> **"18. Duties of interim resolution professional.-**
>
> The interim resolution professional shall perform the following duties, namely: -
>
> (a) collect all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate debtor, including information relating to-
>
> (i) business operations for the previous two years;
>
> (ii) financial and operational payments for the previous two years;
>
> (iii) list of assets and liabilities as on the initiation date; and
>
> (iv) such other matters as may be specified;
>
> (b) receive and collate all the claims submitted by creditors to him, pursuant to the public announcement made under sections 13 and 15;
>
> (c) constitute a committee of creditors;
>
> (d) monitor the assets of the corporate debtor and manage its operations until a resolution professional is appointed by the committee of creditors;

(e) file information collected with the information utility, if necessary; and

(f) take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including –

(i) assets over which the corporate debtor has ownership rights which may be located in a foreign country;

(ii) assets that may or may not be in possession of the corporate debtor;

(iii) tangible assets, whether movable or immovable;

(iv) intangible assets including intellectual property;

(v) securities including shares held in any subsidiary of the corporate debtor, financial instruments, insurance policies;

(vi) assets subject to the determination of ownership by a court or authority;

(g) to perform such other duties as may be specified by the Board.

Explanation. – For the purposes of this, the term "assets" shall not include the following, namely: -

(a) assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment;

(b) assets of any Indian or foreign subsidiary of the corporate debtor; and

(c) such other assets as may be notified by the Central Government in consultation with any financial sector regulator.

.. ..

(emphasis added)

36. Liquidation estate. –

(1) For the purposes of liquidation, the liquidator shall form an estate of the assets mentioned in sub-section (3), which will be called the liquidation estate in relation to the corporate debtor.

(2) The liquidator shall hold the liquidation estate as a fiduciary for the benefit of all the creditors.

(3) Subject to sub-section (4), the liquidation estate shall comprise all liquidation estate assets which shall include the following: -

(a) any assets over which the corporate debtor has ownership rights, including all rights and interests therein as evidenced in the balance sheet of the corporate debtor or an information utility or records in the registry or any depository recording securities of the corporate debtor or by any other means as may be specified by the Board, including shares held in any subsidiary of the corporate debtor;

(b) assets that may or may not be in possession of the corporate debtor including but not limited to encumbered assets;

(c) tangible assets, whether movable or immovable;

(d) intangible assets including but not limited to intellectual property, securities (including shares held in a subsidiary of the corporate debtor) and financial instruments, insurance policies, contractual rights;

(e) assets subject to the determination of ownership by the court or authority;

(f) any assets or their value recovered through proceedings for avoidance of transactions in accordance with this Chapter;

(g) any asset of the corporate debtor in respect of which a secured creditor has relinquished security interest;

(h) any other property belonging to or vested in the corporate debtor at the insolvency commencement date; and

(i) all proceeds of liquidation as and when they are realised.

(4) The following shall not be included in the liquidation estate assets and shall not be used for recovery in the liquidation: -

(a) assets owned by a third party which are in possession of the corporate debtor, including –

(i) assets held in trust for any third party;

(ii) bailment contracts;

(iii) all sums due to any workmen or employee from the provident fund, the pension fund and the gratuity fund;

(iv) other contractual arrangements which do not stipulate transfer of title but only use of the assets; and

(v) such other assets as may be notified by the Central Government in consultation with any financial sector regulator;

(b) assets in security collateral held by financial services providers and are subject to netting and set-off in multi-lateral trading or clearing transactions;

(c) personal assets of any shareholder or partner of a corporate debtor as the case may be provided such assets are not held on account of avoidance transactions that may be avoided under this Chapter;

(d) assets of any Indian or foreign subsidiary of the corporate debtor; or

(e) any other assets as may be specified by the Board, including assets which could be subject to set-off on account of mutual dealings between the corporate debtor and any creditor."

(emphasis added)

There is a mandate of clause (d) of sub-section (4) of Section 36 of the IBC that the assets of an Indian subsidiary of the corporate debtor shall not be included in the liquidation estate assets and shall not be used for the recovery in liquidation. Section 18 entrusts several duties to the IRPs concerning the corporate debtor's assets. Consistent with the provisions of Section 36(4)(d), the explanation (b) to Section 18(1) provides that the term 'assets' used in Section 18 shall not include the assets of any Indian subsidiary of the corporate debtor. Perhaps the reason for including these two provisions is that it is well-settled that a shareholder has no interest in the company's assets. This view has been taken by this Court in paragraph 10 of its decision in the case of ***Bacha F. Guzdar v. Commissioner of Income Tax, Bombay***,[16] which reads thus:

> **"10.** The interest of a shareholder vis-à-vis the company was explained in Charanjit Lal Chowdhury v. Union of India [Charanjit Lal Chowdhury v. Union of India, 1950 SCC 833 at p. 862 : 1950 SCR 869 at p. 904]. That judgment negatives the position taken up on behalf of the appellant that a shareholder has got a right in the property of the company. **It is true that the shareholders of the company have the sole determining voice in administering the affairs of the company and are entitled, as provided by the articles of association, to declare that dividends should be distributed out of the profits of the company to the shareholders but the interest of the shareholder either individually or collectively does not amount to more than a right to participate in the profits of the company. The company is a juristic person and is distinct from the shareholders. It is the company which owns the property and not the shareholders. The dividend is a share of the profits declared by the company as liable to be distributed among the shareholders."**
>
> (emphasis added)

A holding company and its subsidiary are always distinct legal entities. The holding company would own shares of the subsidiary company. That does not make the holding company the owner of

16 [1955] 1 SCR 876

the subsidiary's assets. In the case of ***Vodafone International Holdings BV***,[6] this Court took the view that if a subsidiary company is wound up, its assets do not belong to the holding company but to the liquidator. As mentioned in the decision, the reason is that a company is a separate legal persona and the fact that the parent company owns all its share has nothing to do with its separate legal existence. Therefore, the assets of the subsidiary company of the corporate debtor cannot be part of the resolution plan of the corporate debtor.

22. In the impugned judgment, the NCLAT has referred to various clauses in the revised resolution plan of ACIL, including clauses 12.3 and 13.3 and held that these clauses do not suggest that the 1st respondent-financial creditor accepted the amount as full and final settlement of all its dues. It was held that the effect of approval of the resolution plan is that the right to recover the loan amount from the corporate guarantor stands extinguished. Chapter VI, under the heading 'financial, value and projections' in the approved resolution plan, records as follows:

> **"**The projections have been made on the basis that ACIL shall continue to operate all the businesses. Provided that the investments of ACIL in the subsidiaries may be discontinued/liquidated sold depending a business exigency. **Therefore, the business plan financial projections do not include income that the subsidiaries**."
>
> (emphasis added)

Clause 13.3 of the approved resolution plan reads thus:

> **"13.3** All corporate guarantees, indemnities, letters of comfort, undertakings provided by ACIL., in respect of any third party liability (including of subsidiaries) shall stand revoked and extinguished on the effective date pursuant to approval of the resolution plan by the order of the NCLT, without the requirement of any further act or deed by the Resolution Applicant and/or ACIL.**"**

The effect of the said clause is that the liabilities of ACIL in respect of the third parties including the subsidiaries shall stand revoked and extinguished with effect from the effective date.

23. Thus, by virtue of the CIRP process of ACIL (corporate guarantor), the 2nd respondent-corporate debtor does not get a discharge, and its liability to repay the loan amount to the extent to which it is not recovered from the corporate guarantor is not extinguished.

SUBROGATION UNDER SECTION 140 OF THE CONTRACT ACT

24. Now, we come to the argument based on subrogation as provided under Section 140 of the Contract Act. Reliance was placed by both parties on conflicting decisions of different High Courts. Therefore, this issue will have to be resolved. Section 140 is relevant which reads thus:

> **"140. Rights of surety on payment or performance.—** Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety upon payment or performance of all that he is liable for is invested with all the rights which the creditor had against the principal debtor."

The words used in Section 140 are "upon payment or performance of all that he is liable for". When the principal debtor commits a default and when the liability under the deed of guarantee of the surety is not limited to a particular amount, its liability is in respect of the entire amount repayable by the principal debtor to the creditor. The words 'all that he is liable' used under Section 140 cannot be ignored. The principal borrower must continuously indemnify the surety. Section 140 of the Contract Act may be founded on the said obligation. The 1st respondent-financial creditor relied upon a decision of this Court in the case of ***Economic Transport Corporation, Delhi***,[4] which holds that the doctrine of subrogation is a creature of equity. Therefore, the Section will have to be interpreted having regard to the equitable principles. If the surety pays the entirety of the amount payable under guarantee to the creditor, Section 140 provides a remedy to the surety to recover the entire amount paid by him in the discharge of his obligations. Therefore, the surety gets invested with the rights of the creditor to recover from the principal debtor the amount which was paid as per the guarantee. If the surety pays only a part of the amount payable to the creditor, the equitable right the surety gets under Section 140 will be confined to the debt he cleared.

25. Under the corporate guarantee, in the facts of this case, the liability of ACIL was to the extent of the entire amount repayable by the 2nd respondent-corporate debtor to the corporate creditor. In the CIRP of ACIL, the appellant paid a sum of Rs.38.87 crores only to the 1st respondent-financial creditor. The amount was paid by the appellant on behalf of ACIL, the corporate guarantor. For the rest of the amount payable as per the guarantee, the 1st respondent-financial creditor had to take a haircut because of the involuntary process by operation of law. Only the liability of ACIL under the corporate guarantee to repay the loan to the 1st respondent-financial creditor has been extinguished on the payment of Rs.38.87 crores. By the involuntary act of the creditor of accepting part of the amount from the surety in the discharge of the entire liability of the surety, even if Section 140 is attracted, it will confer on the guarantor or the appellant the right to recover only the amount mentioned above from the corporate debtor. The subrogation will be only to the extent of the amount recovered by the creditor from the surety. Notwithstanding the subrogation to the extent of the amount paid on behalf of the corporate guarantor by the resolution applicant, the right of the financial creditor to recover the balance debt payable by the corporate debtor is in no way extinguished.

26. In the circumstances, we cannot accept the submissions made by the learned counsel appearing for the appellant based on Section 140 of the Contract Act. As stated earlier, the issue of the subrogation canvassed before us has not been pressed into service by the appellant, as can be seen even from the written submissions.

27. The last argument sought to be canvassed was that by the admission of an application under Section 7 of the IBC against the 2nd respondent-corporate debtor, the valuable assets of ACIL have been taken away. As observed earlier, the assets of the subsidiary company of ACIL cannot form part of the CIRP process of ACIL, and factually, the assets of the 2nd respondent-corporate debtor were not part of the resolution plan approved in the CIRP of ACIL.

28. Hence, we summarize some of our conclusions as under:

a. Payment of the sum of Rs.38.87 crores to the 1st respondent-financial creditor under the resolution plan of the corporate guarantor-ACIL will not extinguish the liability of the 2nd respondent-principal borrower/corporate debtor to pay the

entire amount payable under the loan transaction after deducting the amount paid on behalf of the corporate guarantor in terms of its resolution plan;

b. A holding company is not the owner of the assets of its subsidiary. Therefore, the assets of the subsidiaries cannot be included in the resolution plan of the holding company, and

c. The financial creditor can always file separate applications under Section 7 of the IBC against the corporate debtor and the corporate guarantor. The applications can be filed simultaneously as well;

29. Thus, the view taken by NCLAT cannot be faulted. Accordingly, the appeal is hereby dismissed with no order as to costs.

Result of the case: Appeal dismissed.

†*Headnotes prepared by:* Divya Pandey

[2024] 7 S.C.R. 2176 : 2024 INSC 501

Army Welfare Education Society New Delhi
v.
Sunil Kumar Sharma & Ors. Etc.

(Civil Appeal Nos. 7256-7259 of 2024)

09 July 2024

[J.B. Pardiwala* and Manoj Misra, JJ.]

Issue for Consideration

a. Whether the appellant Army Welfare Education Society is a "State" within Article 12 of the Constitution of India so as to make a writ petition under Article 226 of the Constitution maintainable against it. In other words, whether a service dispute in the private realm involving a private educational institution and its employees can be adjudicated upon in a writ petition filed under Article 226 of the Constitution;

b. Even if it is assumed that the appellant Army Welfare Education Society is a body performing public duty amenable to writ jurisdiction, whether all its decisions are subject to judicial review or only those decisions which have public law element therein can be judicially reviewed under the writ jurisdiction.

Headnotes†

Constitution of India – Art.12 and Art.226 – A service dispute in the private realm involving a private educational institution (Army Welfare Education Society) and its employees – Whether appellant-Army Welfare Education Society is a "State" within Art.12 – The High Court held that appellant society is a "State" within Art.12 of the Constitution – Correctness:

Held: High Court committed an egregious error in entertaining the writ petition filed by the respondents-employees herein holding that the appellant society is a "State" within Article 12 of the Constitution – Undoubtedly, the school run by the Appellant Society imparts education – Imparting education involves public duty and therefore public law element could also be said to be involved – However, the relationship between the respondents herein and the appellant society is that of an employee and a private employer arising out of a private contract – If there is a

* Author

breach of a covenant of a private contract, the same does not touch any public law element – The school cannot be said to be discharging any public duty in connection with the employment of the respondents. [Para 42]

Constitution of India – In the instant case, even if it is assumed that the appellant Army Welfare Education Society is a body performing public duty amenable to writ jurisdiction, whether all its decisions are subject to judicial review or only those decisions which have public law element therein can be judicially reviewed under the writ jurisdiction:

Held: It was held in St. Mary's Education Society & Anr. v. Rajendra Prasad Bhargava & Ors. that merely because a writ petition can be maintained against the private individuals discharging the public duties and/or public functions, the same should not be entertained if the enforcement is sought to be secured under the realm of a private law – It would not be safe to say that the moment the private institution is amenable to writ jurisdiction then every dispute concerning the said private institution is amenable to writ jurisdiction – It largely depends upon the nature of the dispute and the enforcement of the right by an individual against such institution – The right which purely originates from a private law cannot be enforced taking aid of the writ jurisdiction irrespective of the fact that such institution is discharging the public duties and/or public functions – The scope of the mandamus is basically limited to an enforcement of the public duty and, therefore, it is an ardent duty of the court to find out whether the nature of the duty comes within the peripheral of the public duty – There must be a public law element in any action – In the instant case, the relationship between the respondents herein and the appellant society is that of an employee and a private employer arising out of a private contract – If there is a breach of a covenant of a private contract, the same does not touch any public law element – The school cannot be said to be discharging any public duty in connection with the employment of the respondents. [Paras 38, 39, 40, 42]

Doctrine/Principles – Doctrine of Legitimate Expectation – The respondents contended that they were under a legitimate expectation that their service conditions and salary would not be unilaterally altered by the appellant society to their disadvantage – Thus, as the respondents were neither

consulted with nor taken in confidence by the appellant society before effecting the changes in their service conditions, it amounted to a breach of their legitimate expectation, thereby making it a fit case for the exercise of writ jurisdiction by the High Court:

Held: The following are features regarding the doctrine of legitimate expectation: First, legitimate expectation must be based on a right as opposed to a mere hope, wish or anticipation; Secondly, legitimate expectation must arise either from an express or implied promise; or a consistent past practice or custom followed by an authority in its dealings; Thirdly, expectation which is based on sporadic or casual or random acts, or which is unreasonable, illogical or invalid cannot be treated as a legitimate expectation; Fourthly, legitimate expectation operates in relation to both substantive and procedural matters; Fifthly, legitimate expectation operates in the realm of public law, that is, a plea of legitimate action can be taken only when a public authority breaches a promise or deviates from a consistent past practice, without any reasonable basis; Sixthly, a plea of legitimate expectation based on past practice can only be taken by someone who has dealings, or negotiations with a public authority – It cannot be invoked by a total stranger to the authority merely on the ground that the authority has a duty to act fairly generally – It is clear that legitimate expectation, jurisprudentially, was a device created in order to maintain a check on arbitrariness in state action – It does not extend to and cannot govern the operation of contracts between private parties, wherein the doctrine of promissory estoppel holds the field – In the instant case, the relationship between the administration of an institution and its employees remains a contractual one, falling within the ambit of private law – Nothing has been placed on record by the respondents to show that any express or implied promise was made by the appellant regarding keeping their salary and service conditions intact – There is no statutory obligation on the appellant society which requires that the salaries and allowances of the respondents are to be kept at par with what is payable to teachers of Government institutions – Lastly, the appellant society, for the purposes of its relationship with its employees, cannot be regarded as a public or Government authority – For all the aforesaid reasons, the doctrine of legitimate expectation will have no applicability to the facts of the present case. [Paras 48, 49, 50, 51, 52]

**Army Welfare Education Society New Delhi v.
Sunil Kumar Sharma & Ors. Etc.**

Case Law Cited

St. Mary's Education Society & Anr. v. Rajendra Prasad Bhargava & Ors. [2022] 8 SCR 301 **: (2023) 4 SCC 498;** *Union of India v. Hindustan Development Corporation* [1993] 3 SCR 128 **: (1993) 3 SCC 499;** *Ram Pravesh Singh v. State of Bihar* [2006] Supp. 6 SCR 512 **: (2006) 8 SCC 381;** *Jitender Kumar v. State of Haryana* [2007] 13 SCR 98 **: (2008) 2 SCC 161 – relied on.**

Army School, Kunaraghat, Gorakhpur v. Smt. Shilpi Paul **(2004) 5 AWC 4934;** *Executive Committee of Vaish Degree College v. Lakshmi Narain* [1976] 2 SCR 1006 **: (1976) 2 SCC 58 : AIR 1976 SC 888;** *J. Tiwari v. Jawala Devi Vidya Mandir* **(1979) 4 SCC 160;** *Dipak Kumar Biswas v. Director of Public Instruction* [1987] 2 SCR 572 **: (1987) 2 SCC 252;** *Tekraj v. Union of India* [1988] 2 SCR 260 **: (1988) 1 SCC 236;** *Shri Anadi Mukta Sadguru Shree Muktajee Vandasjiswami Suvarna Jayanti Mahotsav Smarak Trust & Ors. v. V. R. Rudani & Ors.* [1989] 2 SCR 697 **: (1989) 2 SCC 691;** *K. Krishnamacharyulu & Ors. v. Sri Venkateswara Hindu College of Engineering & Anr.* [1997] 2 SCR 368 **: (1997) 3 SCC 571;** *Satimbla Sharma v. St. Paul's Senior Secondary School* [2011] 10 SCR 203 **: (2011) 13 SCC 760;** *Regina v. St. Aloysius Higher Secondary School* [1971] Supp. 1 SCR 6 **: (1972) 4 SCC 188 : AIR 1971 SC 1920;** *Binny Ltd. v. V. Sadasivan* [2005] Supp. 2 SCR 421 **: (2005) 6 SCC 657;** *Apollo Tyres Ltd. v. C.P. Sebastian* [2009] 7 SCR 336 **: (2009) 14 SCC 360;** *K.K. Saksena v. International Commission on Irrigation & Drainage* [2014] 14 SCR 892 **: (2015) 4 SCC 670;** *G. Bassi Reddy v. International Crops Research Institute* [2003] 1 SCR 1174 **: (2003) 4 SCC 225;** *Praga Tools Corpn. v. C.A. Imanual* [1969] 3 SCR 773 **: (1969) 1 SCC 585;** *Federal Bank Ltd. v. Sagar Thomas* [2003] Supp. 4 SCR 121 **: (2003) 10 SCC 733;** *Janet Jeyapaul v. SRM University* [2015] 10 SCR 1049 **: (2015) 16 SCC 530;** *Committee of Management, Delhi Public School v. M.K. Gandhi* **(2015) 17 SCC 353;** *Trigun Chand Thakur v. State of Bihar* **(2019) 7 SCC 513;** *S.K. Varshney v. Principal, Our Lady of Fatima Higher Secondary School* **(2023) 4 SCC 539;** *Vidya Ram Misra v. Shri Jai Narain College* [1972] 3 SCR 320 **: (1972) 1 SCC 623 : AIR 1972 SC 1450;** *T.M.A. Pai Foundation v. State of Karnataka* [2002] Supp. 3 SCR 587 **: (2002) 8 SCC 481;** *Ahmedabad St. Xavier's College Society v. State of Gujarat* [1975] 1 SCR 173 **: (1974) 1 SCC 717;** *Unni Krishnan, J.P. v. State of A.P.* [1993] 1 SCR 594 **: (1993) 4 SCC 111;**

Sushmita Basu v. Ballygunge Siksha Samity [2006] Supp. 6 SCR 506 **: (2006) 7 SCC 680;** *Ramakrishna Mission v. Kago Kunya* [2019] 5 SCR 452 **: (2019) 16 SCC 303 – referred to.**

Roychan Abraham v. State of U.P., **AIR 2019 All 96;** *Uttam Chand Rawat v. State of U.P.* **(2021) 6 ALL LJ 393 (FB);** *Anita Verma v. D.A.V. College Management Committee, Unchahar, Rai Bareilly* **(1992) 1 UPLBEC 30 – referred to.**

List of Acts

Constitution of India.

List of Keywords

Article 12 of Constitution; State; Article 226 of Constitution; Service dispute; Private Educational Institution; Public law element; Army Welfare Education Society; Scope of mandamus; Enforcement of public duty; Breach of a covenant of a private contract; Doctrine of Legitimate Expectation; Private contract; Doctrine of promissory estoppel; Judicial review.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 7256-7259 of 2024

From the Judgment and Order dated 02.11.2018 in SPA No. 524 of 2014 in WPSS No. 439 of 2015 in WPMS No. 776 of 2015 in SPA No. 128 of 2015 and dated 09.10.2020 in RA No. 1623 of 2018 of the High Court of Uttarakhand at Nainital

With

Civil Appeal Nos. 7260-7264 of 2024

Appearances for Parties

Naresh Kaushik, Sr. Adv., Abhinav Agrawal, Kartik Sharma, Vardhman Kaushik, Anand Singh, Manoj Joshi, Shubham Dwivedi, Advs. for the Appellant.

Navin Pahwa, Sridhar Potaraju, Sr. Advs., B. Shravanth Shanker, Aayush, Rajat Srivastava, Lalit Mohan, Rahul Jajoo, Ms. Grahita Agarwal, Ms. Manju Jetley, Ms. Pankhuri Shrivastava, Ms. Neelam Sharma, Rajeev Sharma, Advs. for the Respondents.

Army Welfare Education Society New Delhi v.
Sunil Kumar Sharma & Ors. Etc.

Judgment / Order of the Supreme Court

Judgment

J.B. Pardiwala, J.

For the convenience of exposition, this judgment is divided into the following parts:

INDEX*

1. Leave granted.

2. Since the issues raised in both the captioned appeals are the same and the challenge is also to the self-same judgment and order passed by the High Court of Uttarakhand, those were taken up for hearing analogously and are being disposed of by this common judgment and order.

A. FACTUAL MATRIX

3. These appeals arise from the common judgment and order passed by the High Court of Uttarakhand at Nainital dated 02.11.2018 in Special Appeal No. 523 of 2014, Special Appeal No. 524 of 2014, Special Appeal No.128 of 2015, Writ Petition No. 439 of 2015 and Writ Petition No. 776 of 2015 resply by which the High Court dismissed the appeals filed by the appellants herein and thereby affirmed the judgment and order passed by the learned single Judge of the High Court dated 05.08.2014 in Writ Petition No. 341 of 2012 filed by the respondents herein.

* Ed. Note: Pagination as per the original Judgment.

4. The controversy involved in the present litigation falls within a very narrow compass. We need not state the facts in detail as the order passed by a coordinate Bench of this Court dated 15.02.2021 speaks for itself and gives more than a fair idea as regards the dispute between the parties. The order dated 15.02.2021 reads thus:-

> *"1. Delay condoned.*
>
> *2. We have heard Mr Sajan Poovayya, learned Senior Counsel appearing on behalf of the Bengal Engineering Group and Centre, the petitioner in the Special Leave Petitions arising out of SLP (C) Diary No 24505 of 2020, with Mr Abhinav Agrawal, learned counsel, Mr Naresh Kaushik, learned counsel appearing on behalf of Army Welfare Education Society1, petitioner in the Special Leave Petition arising out of SLP(C) Diary No 26155 of 2020 and Mr Gopal Sankaranarayanan, learned Senior Counsel appearing on behalf of the caveators.*
>
> *3. The submission which has been urged by the learned counsel appearing on behalf of the petitioners is that the Bengal Engineering Group and Centre had entered into a lease agreement with the Institute of Brothers of St. Gabriel in respect of the land, which is a B-3 class land under the Cantonment. A School was being conducted by St Gabriel's Academy. After the term of the lease came to an end, a decision was taken to run a school under the auspices of AWES. AWES runs about 139 schools all over the country. On 28 February 2012, a letter was addressed to the staff of the school indicating that those among the teachers who are eligible in terms of CBSE guidelines would be considered for appointment on ad hoc basis for one year and would have to appear and qualify in a written test under AWES Rules and the teachers will be paid salary at par with the service conditions applicable to other teachers of the Army Public Schools. This gave rise to the filing of a writ petition before the High Court of Uttarakhand. The Single Judge allowed the writ petition by issuing a mandamus to the petitioners not to vary the service conditions of the teaching and nonteaching staff to their disadvantage. During the pendency of the proceedings*

before the Division Bench in appeal, an order was passed by the High Court on 6 January 2016. Paragraphs 3 and 4 of the order read as follows:

> *"3. BEG has decided to run the institution as an Army School under the Army Welfare Education Society (AWES), which has also come up in appeal against the judgment. According to AWES, it is running 134 schools all over India. They have a complaint that, at present, for the past two years since 1st April 2012, they are collecting fees at the rates they are collecting in the other Army Public Schools and, yet, they have been compelled to pay the salary, which is being paid to the teachers earlier by St. Gabriel's, which was in fact collecting far more fees and there is a huge deficit. According to them, they will not terminate the services of the teachers and non-teaching staff, if AWES is permitted to take over; but, they will be paid the salary in terms of the standards, which they have in respect of the other Army Public Schools. It is their case that they are prepared to allow the teachers and non-teaching staff to continue, provided some modalities are complied with, relevance of which may not present itself immediately. According to the teachers and non-teaching staff, they have a right to continue as such.*
>
> *4. We would think that the interest of justice requires that the arrangement, which has been ordered by the Court in Writ Petition No. 776 of 2015 (M/S) must be modified. Accordingly, we modify the order and direct that AWES can take over the management of the school and the teaching and other non-teaching staff will be allowed to continue, however, with the modification that the pay will be such as they would be entitled to treating it as another Army Public School. This arrangement will*

be provisional and subject to the result of the litigation and without prejudice to the contentions of the parties. The Committee will handover the management to the AWES upon production of a certified copy of this order. The accounts, etc., will also be handed over to the Principal of the school. We record the submission of the learned counsel appearing for St Gabriel's that they will handover the amount representing gratuity, earned leave encashment and the installment of the sixth pay commission directly to the teachers and other nonteaching staff. We make it clear that the school can be run in terms of the Rules of AWES otherwise. The payment of salary as per AWES can commence from 1st January, 2016."

4. The Division Bench eventually dismissed the Special Appeal against the judgment of the Single Judge, which has given rise to the proceedings before this Court under Article 136 of the Constitution.

5. On behalf of the petitioners, it was submitted that the teaching and nonteaching staff were employees of St Gabriel's Academy and since the erstwhile management has ceased to conduct the school, the staff would have no claim as against AWES which is conducting the school, at present.

6. In order to resolve the dispute, a suggestion has been made by learned counsel for the petitioners to the effect that the teaching and non-teaching staff of the erstwhile school which is continuing with the present school, which is conducted by AWES, would be continued on a permanent basis. However, it has been submitted that their conditions of service will be those which are applicable to the teaching and non-teaching staff of Army Public Schools. It has been submitted that under the judgment of the High Court the petitioners would be obligated to provide service conditions at par with the teaching and nonteaching staff which was recruited by the erstwhile management which

would involve an outlay which the Army Public School will not be in a financial position to meet. That apart, it has been submitted that there cannot be two sets of service conditions in respect of the same school.

7. Responding to the above submissions, Mr Gopal Sankaranarayanan with Mr B Shravanth Shanker, learned counsel, submitted that there are two areas which would require to be resolved, namely,:

> *(i) Seniority of the teaching and non-teaching staff due to the past service should be taken into account; and*
>
> *(ii) In computing their terminal dues, benefit of the past service should be taken into reckoning.*

8. We find prima facie that the suggestions which have emerged from both the sides are fair and proper in their own way, in order to resolve the dispute amicably. If the dispute is eventually resolved amicably, it would be ensured that, on the one hand, the teaching and non-teaching staff of the erstwhile school would not be displaced and continue to get employment in the present school and, at the same time, their service conditions are at par with those which are applicable to the employees of the Army Public Schools.

9. In order to enable the Court to give the parties an opportunity to resolve the dispute finally, we are of the view that a meeting should be held between the concerned authorities of the School as well as the representatives of the employees in the presence of the learned Senior Counsel so that agreed terms for resolving the dispute finally can be presented before this Court.

10. To facilitate this, we stand over the proceedings by a period of four weeks. The proceedings shall now be listed on 22 March 2021. In the meantime, we request all the parties to ensure that a meeting is convened within a period of one week from today so that progress can effectively be made towards a satisfactory resolution of

the dispute in a spirit of dialogue in which the parties have addressed the Court.

11. We direct that no further steps shall be taken in the contempt proceedings till the next date of listing.

12. The services of the teaching and non-teaching staff who are continuing in the management of the Army Public School at Roorkee, at present, shall not be disturbed in the meantime."

5. It appears that after the aforesaid order was passed, the following order dated 23.07.2021 came to be passed:-

"1. Issue notice.

2. Mr Gopal Sankaranarayanan, learned Senior Counsel, appears on behalf of the first respondent with Mr B Shravanth Shanker, learned counsel and waives service.

3. Pending further orders, we stay the operation of the judgments and orders of the High Court dated 2 November 2018 in SPA Nos 523 and 524 of 2014, Writ Petition Nos 439 of 2015 and 776 of 2015 and SPA No 128 of 2015 and dated 9 October 2020 in MCC No 1623 of 2018 and 1626 of 2018, subject to the following conditions:

(i) The respondent – employees who are presently in service shall continue to be on the rolls of Army Public School No 2 conducted by the Army Welfare Education Society1 at Roorkee; and

(ii) The employees shall be entitled to receive their emoluments and other conditions of service at par with the other employees of the corresponding grade who are engaged by the AWES in Army Public School No 2."

B. ISSUES FOR DETERMINATION

6. The following two questions of law fall for our consideration:-

a. Whether the appellant Army Welfare Education Society is a "State" within Article 12 of the Constitution of India so as to make

a writ petition under Article 226 of the Constitution maintainable against it? In other words, whether a service dispute in the private realm involving a private educational institution and its employees can be adjudicated upon in a writ petition filed under Article 226 of the Constitution?

b. Even if it is assumed that the appellant Army Welfare Education Society is a body performing public duty amenable to writ jurisdiction, whether all its decisions are subject to judicial review or only those decisions which have public law element therein can be judicially reviewed under the writ jurisdiction?

C. SUBMISSIONS ON BEHALF OF THE APPELLANT

7. Mr. Naresh Kaushik, the learned senior counsel appearing for the appellant submitted that the respondents originally were employees of an unaided private minority public school by the name St. Gabriel's Academy. As St. Gabriel's Academy is no longer in existence, the teaching and non-teaching staff of St. Gabriel's Academy came to be absorbed by the appellant society. In such circumstances, according to the learned counsel, the writ petition filed by the respondents before the High Court, by itself, was not maintainable. According to him, the learned single Judge committed a serious error in entertaining such writ petition at the instance of the respondents herein. Even the appeal Court committed the same error.

8. It was further submitted that the appellant is a wholly unaided private society which was established to provide educational facility to meet the needs of the children of the army personnel including the widows and ex-servicemen. It was pointed out that the appellant society is running many schools and institutions and the entire finance for the purpose of administration is managed from the fees collected from the students of the respective school and institution.

9. It was argued that there was no privity of contract between the appellant society and the staff of St. Gabriel's Academy. It was also argued that St. Gabriel's Academy was being run and administered by an unaided private minority society and the appointment/termination of the staff was vested with the Brothers of St Gabriel's only. Further, the Provincial Superior of the Institute of Brothers of St. Gabriel's was the Chairman of School Management Committee (SMC) of St. Gabriel's Academy as well. The Provincial Superior of the Society is

the appointing authority, as well as the appellate authority for the staff, and can appoint/terminate/retire the staff, in their schools. Further, the Provincial Superior of the Society used to be the Head of School Managing Committee vested with the power to appoint/nominate the members as per their rules and regulations. The appellant had no role to play in the affairs of the said school or its management.

10. It was also argued that the education of children is certainly a public function, but that is not the issue in the present matter. The only issue involved is the continuity of service and service conditions of employees of St. Gabriel's Academy, a private minority institution. Neither the institution nor the posts held by the teachers are governed by any statutory obligation. Moreover, the burden of safeguarding such service conditions has been erroneously placed on the appellant. These service conditions are in clear contravention of those followed by all 137 schools run by the appellant society resulting in creating two sets of employees at the APS No. 2, Roorkee. A contract of purely personal service between the Respondents and their erstwhile employer, viz. St. Gabriels Academy cannot be executed against the appellant in a writ petition with whom there is no privity of contract.

11. It was further pointed out that the appellants are running an Army Public School under the aegis of the Army Welfare Education Society which is a self-financing school managing all expenditures from the school fees. It was submitted that if the impugned order is allowed to operate and the arrangement made in the order dated 06.01.2016 which continued so far smoothly for 8 years is disturbed, the school will suffer irreparable loss and might have to be closed down. The demands of the respondents are outrageous which can be gauged from the fact that the respondents have claimed an amount of Rs. 5.10 crore in their Counter affidavit filed in 2021.

12. In the last, it was pointed out that all the respondents are currently employed at APS No. 2, Roorkee, and their status is on par with any other APS staff member. They are availing the same perks and emoluments available to any APS No 2, Roorkee employee. The basic pay as per the AWES Rules and Regulations was maintained for the teaching staff in accordance with the recommendations of the VI Pay Commission. Furthermore, for the members of the teaching staff, experience of more than 5 years was accounted for with additional increments at 3% of Basic Pay for every block of

three years of service or part thereof, as of April 2012. Subsequently, an annual increment of 3% of Basic Pay (as on March 31 of every financial year) was provided for every completed year. Dearness Allowance (DA), House Rent Allowance (HRA), and all other applicable allowances, including free education for the wards of staff, was considered as per the AWES Rules and Regulations, as prevailing in January 2016. The salary of office and Class IV staff was fixed as per the prevailing rules and seniority was catered to by additional increments at 10% of the annual increment for every three years of service. No employee came to be appointed after 2012 drawing a higher salary than the respondents. These staff members have been given even ten to twelve increments, a practice usually not followed in APS 2.

13. In such circumstances referred to above, the learned counsel appearing for the appellant society submitted that there being merit in the appeals, those may be allowed by setting aside the impugned common judgment and order passed by the High Court. But at the same time, the interim order passed by this Court dated 15.02.2021 may be made absolute.

D. SUBMISSIONS ON BEHALF OF THE RESPONDENTS

14. On the other hand, these appeals have been vehemently opposed by the learned senior counsel appearing for the respondent by submitting that the no error, not to speak of any error of law, could be said to have been committed by the High Court in passing the impugned judgment and order. Accordingly to the learned counsel, the appellant society is a "State" within Article 12 of the Constitution for the following reasons:-

a) That, as per the amendments made to the Memorandum of Army Welfare Education Society, the address of the Army Welfare Education Society (AWES) is shown to be the Adjutant General's Branch in the Integrated headquarters of the Ministry of Defence [MoD] (Army).

b) Further, the Executive Committee and the Board of Governors i.e., the President, Vice President and the Secretaries are none other than the Lt. Generals, chief of the Army Staff, and General Officer commanding in-chief of the Eastern, Southern, Western and Northern commands.

c) That, as per the Financial Management clause of the said Memorandum, ***"the corpus and grants for establishment of Army educational institution will be provided by the executive Committee from the welfare funds of the Adjutant General Branch, Army Headquarters.***"

d) AWES is a government run institution i.e., by the Ministry of Defence and hence, a State under Article 12 of the Constitution of India.

15. It was further submitted that the Army Public School-2, Roorkee, is affiliated with the CBSE and is governed by its norms. In other words, the AWES and its affiliate school - Army Public School-2, Roorkee are governed and regulated by statutory provisions. Assuming for the sake of arguments that the dispute is private in nature, the present case is still amenable to writ jurisdiction for the service conditions of the answering respondents are governed/regulated by statutory provisions.

16. It was further argued that the CBSE Affiliation Bye-Laws Norm 3 (v) categorically provides that ***"The school in India must pay salaries and admissible allowances to the staff not less that the corresponding categories of employees in the State Government schools or as per scales etc. prescribed by the Government of India."*** In fact, AWES publishes advertisement to fill up any vacancy in Army Public School as "Govt. Jobs" in Job's category. It was submitted that considering the alliance between the appellant and St. Gabriel's Academy Roorkee, the respondents were under a legitimate expectation that their conditions of service would not be changed to their disadvantage by the appellant.

17. In such circumstances referred to above, the learned counsel appearing for the respondents prayed that there being no merit in the appeals, those may be dismissed and the impugned judgment and order passed by the learned single Judge as affirmed in appeal may be given effect to.

E. JUDGMENT PASSED BY THE LEARNED SINGLE JUDGE

18. At this stage, we should also look into the judgment passed by the learned single judge of the High Court dated 05.08.2014. The relevant findings recorded by the learned single Judge is as under:-

"10. As we have seen, the school in question was earlier known as "St. Gabriel School" which was under the management of a Society, namely, respondent no.4 i.e. St. Gabriel Province of Delhi. Now the management has changed and is presently with respondent no.5/Bengal Sappers St. Gabriel's Academy, Roorkee.

11. According to the respondents, referred above, the establishment of school in an Army Unit or Regimental Center is a welfare activity which a Unit or Regimental Center undertakes for the welfare of its personnel and troops and this welfare work does not form apart of any official or statutory duty of the officers of the Army so engaged in the school activity and, therefore, the school activity including its administration is entirely a private enterprises undertaken by the officers and staff of the Indian Army for the welfare of their personnel and their dependents.

12. The said respondents (Respondent Nos. 2, 3, 5, 7) further argue that in such a welfare activity, the Government or the Indian Army does not have any control or a role to play, leave aside any deep or pervasive control on the administration or running of the School, as is alleged by the petitioners. They also argue that the welfare activities which are undertaken are financed entirely by raising private funds, primarily from private contributions, by the officers and men of various military establishments. The fund is known as "Regimental Fund of the Unit" and is purely private in nature and non-auditable by Central Defence Accounts. The building furniture and equipments provided to respondent nos. 3/Bengal Engineering Group Benevolent Trust and earlier to respondent no.4/ Institute of Brothers of St. Gabriel is provided from the Regimental funds which is purely private property of Bengal Engineering Group Benevolent Trust. There is no Central Government control at all. It is further being argued that respondent nos. 1, 2 i.e. Union of India as well as the Bengal Engineering Group and Centre have been made parties in the writ petition with the sole purpose to make the matter amenable to the writ jurisdiction of this Court, under Article 226 of the

Constitution of India, though respondent nos. 1 and 2 do not have any role to play in the present matter or dispute and for the remaining respondents who are presently in control of the affairs of the school a writ petition would not be maintainable.

13. It has also been argued that the Commandant of Bengal Engineering Group and Centre, Roorkee is only the Ex-officio Chairman of the Bengal Engineering Group Benevolent Trust and the welfare activity conducted by the Trust are purely honorary having absolutely no relation to official charter of the duty of army officers and army persons. Respondent no.7 i.e. Army Welfare Education Society is again a private unaided Society registered under the Registration Act, hence does not come under the writ jurisdiction it does not have any grant from the Government of India, State Government and, therefore, not a State or its instrumentalities as defined in Article 12 of the Constitution of India. In order to substantiate this argument, learned counsel for the respondents Mr. Manoj Tiwari, Senior Advocate and Mr. Pullak Raj Mullick have relied upon a Division Bench judgment of Allahabad High Court, namely, ***Army School, Kunaraghat, Gorakhpur Vs. Smt. Shilpi Paul****, 2004 (5) AWC 4934, where it was held that an Army school is purely a private body and not "State" under Article 12 of the Constitution of India, hence writ petition was not maintainable against it. Since it has been held that a writ petition is not maintainable against an Army school by a Division Bench judgment of Allahabad High Court the present writ petition is not maintainable, which is also against an Army School and is exactly on the same footing as the present school i.e. respondent no. 5, which is now known as "Army School No.2". In paragraph nos. 23, 25 and 26 of the above judgment the Division Bench of Allahabad High Court said as under:-*

> *"23. We have carefully considered these judgments as well as the other decisions relied on by the learned counsels for the parties. We have also considered the decision of the learned single judge of this Court in Abu*

Zaid v. Principal Madrasa-Tul-Islah Sarai Mir, Azamgarh, Civil Misc. Writ Petition No. 14238 of 1998, decided on 28.7.1998. In the decision of Abu Zaid v. Principal Madrasa-Tul-Islah Sarai Mir, Azamgarh (supra) the learned single Judge has held that a writ petition lies even against a private educational institution since the educational institution is discharging a public duty of imparting education which has been held to be a fundamental right by the Supreme Court. We do not agree. In our opinion every school cannot be regarded as State under Article 12 of the Constitution and a writ petition will not lie against a purely private educational institution not receiving funds from the Government or a Government agency as it cannot be deemed to be an instrumentality of the State.

25. We agree with the view taken by the learned single Judge in V.K. Walia v. Chairman, Army School Mathura Cannt. (supra) and we do not agree with the view taken by the learned single Judge in Smt. Rajni Sharma v. Union of India (supra) since we are of the opinion that the Army School, Gorakhpur, is not State under Article 12 of the Constitution as it does not receive funds from the Government nor does the Government have any control much less deep and pervasive control over it.

26. A similar view was taken by a Division Bench of the Jammu and Kashmir High Court in Writ Petition No. 1415 of 1996, Mrs. Asha Khosa v. Chairman, Army Public School, decided on 17.2.1997, in which the Division Bench of that Court held that the writ petition was not maintainable as the Army Welfare Educational Society is not an instrumentality of the State under Article 12 of the Constitution. Against the judgment of the Jammu and Kashmir High Court a Special Appeal No. 6482 of 1997 was filed

before the Supreme Court which was dismissed on 31.3.1997. We fully agree with the view taken by the Jammu and Kashmir High Court in the aforesaid decision."

x x x x

25. During the discussions and negotiation before the transfer, the authorities with whom the management was to vest shortly have not made any definite commitment or given assurance to the teaching or the non teaching staff of the College regarding security of their tenure, or regarding status of their service. In fact the teaching and non teaching staff of the school were never taken into confidence either by the BEG & C or the St. Gabriel Society in their negotiations. When such agreement was executed and the baton was handed over to the new employer and management, the concern and interest of those who are under the employment ought to be addressed. These are the basic requirements when such change over takes place in a civil society, which is bound by the rule of law. The employees of the school have a legitimate expectation that their conditions of service which were applicable immediately before the change over will not be varied to their disadvantage. However, this is what the new employer intend to do, which is reflected in his letter dated 28.02.2012. The danger to their service is not a mere apprehension of the 14 petitioners. It is a "clear and present" danger. This Court consequently intends to issue its writ of mandamus to stop the respondents from doing this.

26. In the entire process of the change of management, the petitioners were never taken into confidence. Their point of view was never considered necessary. They were never given any opportunity of hearing. On the contrary BEG & C and respondent no. 7 AWES, have shown documents before this Court justifying their unilateral action. Mr. P.R. Mullick, counsel for the respondent nos. 2 & 3 has argued that the society i.e. Brothers of St. Gabriel Province of Delhi have made immense profit from the school and

they have opened another school in Roorkee and if they are really concerned about the petitioners then they can adjust them in their new school.

27. This is not the correct way of dealing with the issue. What has happened is not a simple change over from one management to another, which can only be seen on the basis of "profit and loss accounts" and "balance sheets." It is not a business commercial deal we are looking at. What we are looking at is a change over of management in a school which imparts education to school going children and therefore the "public element" in this transaction has always to be kept in mind.

28. We also have to appreciate the "legitimate expectations" of the petitioners who expect equity, fair-play and justice, from a public authority which respondent nos. 2, 3 and 7 indeed are and, therefore, they must meet such standards as a public authority ought to 15 have. The new management of the School, including respondent no.2, 3 and 7 are hereby directed not to change or vary the conditions of the petitioners to their disadvantage.

29. The writ petition, consequently, succeeds. The order dated 28.02.2012, since it is only in the nature of letter, need not be quashed. All the same, a mandamus is hereby issued to the respondents not to change, vary or resent any of those conditions on which the petitioners (teaching as well as non teaching staff of the school) were appointed, to the disadvantage of the petitioners."

(Emphasis supplied)

19. Thus, the error is in para 27 when the learned single Judge says that since the school imparts education, the public element should be kept in mind. Undoubtedly, any institution imparting education discharges public duty and, therefore, public element may be involved. However, the learned single Judge overlooked the fact that the dispute between the school and the teachers and also the non-teaching staff is relating to their service conditions. In such circumstances, public element will not come into play.

F. APPEAL COURT JUDGMENT

20. We should also look into the impugned judgment and order passed by the Division Bench of the High Court affirming the above referred judgment of the learned single Judge. The relevant findings are as under:-

> *"16) The Parliament in its wisdom has enacted the Right of Children to Free and Compulsory Education Act, 2009, considering it as a fundamental right of children. The institution is affiliated to the Central Board of Secondary Education. The Central Government has accorded affiliation to the CBSE to impart education as per its syllabus. Thus, there is a discharge of public function of the institutions recognized and affiliated with CBSE. Though the learned Single Judge has recorded the reasons in holding that the writ petition is maintainable against the appellant but, at the cost of repetition, we deem it necessary to deal with the issue and after having considered the provisions of Article 12 and 226 of the Constitution of India and the catena of judgments, we are of considered opinion that the writ petition against the appellant was maintainable and has rightly been held maintainable by the learned Single Judge.*
>
> *17) Second issue before the learned Single Judge and this Court is - as to whether the cancellation of regular appointment of the teaching and non-teaching employees of the institution run by joint venture and giving the ad hoc appointment to the teachers is valid or not? The learned Single Judge on the pleadings of the parties and considering the fact that long back in the year 1967 created a joint venture for imparting the education and continued till 2012 and the appellant by unilateral action decided to break up the joint venture. The institute of brothers of St. Gabriel did not challenge their unilateral action, and departed quietly.*
>
> *18) Admittedly, the appellant herein has unilaterally changed the service conditions of the writ petitioners by way of letter dated 28.02.2012 (copy Annexure 6 to the writ petition). A perusal of the pleadings of the rival*

parties would reveal that the appellant herein as well as the respondent Bengal Engineering Group and Center were not a party before learned Single Judge. The Deputy Commandant of the Bengal Engineering Group and Center is the de facto Chairman of the Bengal Engineering Group Benevolent Trust. The Union of India was also impleaded as a party respondent. The Commandant or the Deputy Commandant has no individual or personal capacity. Deputy Commandant has discharged his duties as de facto Chairman of the Bengal Engineering Group and Benevolent Trust (hereinafter referred to as Benevolent Trust). The Deputy Commandant has no independent power being an ex officio of the Benevolent Trust. The Deputy Commandant cannot work arbitrarily. Since the appellant and respondent Bengal Engineering Group Benevolent Trust were party and same relief was granted, the Bengal Engineering Group Benevolent Trust has not chosen to file the Special Appeal against the impugned judgment and order passed by learned Single Judge. It is true that the appellant being a Society has preferred this Special Appeal, but it was the decision of respondent no. 51 to issue letter dated 28.02.2012 (copy Annexure 6 to the writ petition). The service conditions of the teaching staff and non-teaching staff, which were continuing before terminating the legality of Institute of Brothers of St. Gabriel and taking over the entire management of the Institution by the Bengal Engineering Group Benevolent Trust. The learned Single Judge has considered elaborately that the Benevolent Trust cannot change the service condition unilaterally and convert the regular services of the teaching and non-teaching staff and to issue ad hoc appointments to them. The appeal has been preferred by Army Welfare Education Society, whereof the institution was a joint venture of Brother of St. Gabrial and Bengal Engineering Group Benevolent Trust. The appellant may be an apex body (society) running the Army Schools throughout the country, but it cannot escape from the noble idea of creating Bengal Engineering Group Benevolent Trust for imparting education. Service benefits and status of the employee/

employees could not be reduced without assigning sound reasons by the employer and without affording opportunity of hearing to them. We are also of the view that the services of the teaching and non- teaching staff cannot be changed from regular services to ad hoc services.

19. We have noticed that the Bengal Engineering Group Benevolent Trust is the aggrieved party, but appeal has not been preferred by it. We are of the opinion that the appellants cannot be said to be aggrieved persons and appeal at their behest is not maintainable.

20) The affairs of Bengal Engineering Group and Center come within the control of the Ministry of Defence, Union of India. Deputy Commandant has no authority to engage a private lawyer without the permission of Union of India. The purpose of granting permission to engage a private lawyer is also a serious issue, but for the reasons best reason to the officer concerned a private lawyer has been appointed by the appellant herein, which is discharging a public duty, to contest the aforementioned matters. Deputy Commandant of Bengal Engineering Group and Center holding a post in the Indian Army, which comes within the control of Ministry of Defence, Union of India ought not to have engaged a private lawyer without permission of the Union of India.

21) We find no illegality, perversity or jurisdiction error in the impugned judgment passed by learned Single Judge dated 05.08.2012, allowing the writ petition, filed by the teaching and non- teaching staff of the Institution. Since the record of the writ petitions which were pending before the learned Single Judge were called by this Court considering the common question involved in the special appeals as well as in the writ petitions which were pending before the learned single judge, we are of the view that aforementioned special appeals are liable to be dismissed. The same are hereby dismissed. The writ petitions mentioned aforesaid are also disposed of accordingly as the relief sought in the writ petitions has already been adjudicated in the appeals."

G. ANALYSIS

21. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for our consideration is whether the High Court was justified in entertaining the writ petition filed by the respondents herein under Article 226 of the Constitution against the appellant society?

22. From the materials on record, the following is discernible:-

    1) In 1962, the Commandant of Bengal Engineering Group and Centre ("BEGC"), by virtue of his position as *ex officio* Chairman of the Bengal Engineering Group Benevolent Trust ("BEGBT") granted land to the Institute of Brothers of St Gabriel's ("IBSG"), an unaided private minority society, for running a school.

    2) On 13.07.1967, the BEGBT executed a formal lease agreement with IBSG with respect to the land situated at Cantonment B-31, including the School Building, playground and Bungalow No.1, for the establishment of a Higher Secondary School under the Board of All India Higher Secondary School in Delhi, or any other similar Government Board. The school so formed was named as the Bengal Sappers St Gabriel's Academy, Roorkee ("BSSGA").

    3) On 29.04.1983, the Army Welfare Education Society was registered under the Societies Registration Act.

    4) On 20.04.1997, the BEGBT and IBSG respectively renewed the lease agreement dated 13.07.1967 for a further period of 15 years i.e. up to 31.03.2012.

    5) On 26.04.2010, the Chairman of BEGBT took a policy decision not to renew the lease agreement dated 20.04.1997. BEGBT, by its letter addressed to the Provincial Superior, IBSG, communicated that the lease would not be renewed beyond the stipulated period and requested IBSG to consider the letter as an advance notice and suitably apprise all the students and their parents so that they get adequate time to make alternate arrangements by 31.03.2012 i.e. when the lease was set to expire.

    6) On 15.05.2010, IBSG, by its letter addressed to the Deputy Commandant, BEGC, requested to furnish information as regards the non- renewal of the lease dated 20.04.1997.

7) On 22.06.2010, BEGC, in its reply to IBSG's letter dated 15.05.2010, stated that there was a proposal under consideration to establish an Army School at the location that was leased to IBSG, and again requested IBSG to inform the Board and the parents about the said proposal.

8) In July, 2021, BEGC initiated a proposal to establish an Army Public School under the aegis of Army Welfare Education Society (appellant) at the place that was then leased to IBSG.

9) On 23.02.2012, the appellant society granted approval to establish Army Public School No.2 at Roorkee ("APS No.2"), on the land that was earlier leased to IBSG. The approval dated 23.02.2012 laid down the modalities for adjusting the existing staff at BSSGA into APS No.2, stating that-

> *"(g) The process of selecting Principal and teachers must be completed by March 12 and they should be in position by 01 Apr 2012. Service of the teachers and administrative staff of St Gabriel's Academy School should be terminated before the establishment of APS No 2 Roorkee. Existing competent teachers meeting the CBSE educational qualifications may be considered for appointment on ad-hoc basis for one year after a gap of minimum of seven days from the date of termination of service. The condition of holding an AWES Score Card for appointment as teachers may be relaxed their case. They should be advised to appear and qualify in All India Written Test scheduled on second Sunday of Dec 2012. The terms and conditions for their employment should accordingly be formulated."*

10) On 28.02.2012, BEGC, by its letter to IBSG, communicated the conditions laid down in the approval letter dated 23.02.2012.

11) On 14.03.2012 the respondents herein filed Writ Petition No. 341 of 2012 before the High Court of Uttarakhand at Nainital seeking a direction to quash the letter dated 28.02.2012 and also to direct the appellant society to continue their services on the same terms and conditions provided to them by the IBSG.

12) It appears that the appellant society is a purely unaided private society established for the purpose of imparting education to the children of the army personnel including the widows and ex-servicemen.

i. Position of Law

23. We begin with the decision of this Court in ***Executive Committee of Vaish Degree College v. Lakshmi Narain***, AIR 1976 SC 888. This is one of the landmark decisions of this Court as this case discussed and considered all the previous decisions and the same has been referred to and relied upon by this Court till this date. This Court held that a contract of personal service cannot ordinarily be enforced specifically. Three exceptions were set out as well recognized : (1) Where a public servant is sought to be removed from service in contravention of the provisions of Article 311 of the Constitution of India; (2) Where a worker is sought to be reinstated under the Industrial Law; (3) Where a statutory body acts in breach or violation of the mandatory-provisions of the statute. A statutory body was defined in that case as one which was created by or under a statute and owed its existence to a statute. It was held that an institution governed by certain statutory provisions for its proper maintenance and administration would not be a statutory body. The test prescribed was whether the institution would exist in the absence of a statute.

24. In ***J. Tiwari v. Jawala Devi Vidya Mandir*** (1979) 4 SCC 160, it was held that the rights and obligations of an employee of a private institution are governed by the terms of the contract between the parties. It was also observed that the regulations of the University or the provisions of the Educational Code framed by the State Government may be applicable to the institution and if the provisions thereof are violated, the University may be entitled to disaffiliate the institution. But that would not, however, make that the institution a public or a statutory body.

25. In ***Dipak Kumar Biswas v. Director of Public Instruction***, 1987 (2) SCC 252, the appellant before this Court instituted a suit for declaration that he continued to be in service in Lady Keane Girls College, Shillong and for an injunction. His services were terminated by the College on the ground that the Director of Public Instruction had not approved of his appointment. The trial court dismissed the suit. The first appellate court allowed the appeal of the plaintiff and granted

a decree as prayed for. The High Court, while holding that there was no necessity for the approval by the Director of Public Instruction as the Assam College Management Rules were not adopted by the State of Meghalaya, held that reinstatement of the plaintiff in service was not possible as it could be granted only to persons belonging to the categories of (1) Government servants (2) Industrial workmen and (3) Employees of statutory bodies. Consequently, the High Court granted a decree for damages only. The aggrieved plaintiff took the matter on appeal to this Court. Following the view token in ***Vaish Degree College v. Lakshmi Narain*** (supra), this Court held that a contract of service could not be enforced specifically. Then the question to be considered was whether the college in that case which was admittedly receiving aid from the Government and was governed by the regulations of the University was a statutory body. The Court answered in the negative and rejected the claim for reinstatement. The Court observed as follows:-

> *"The law enunciated in these decisions stand fully attracted to this case also. Even though the Lady Keane Girls College may be governed by the statutes of the University and the Education Code framed by the Government of Meghalaya and even though the college may be receiving financial aid from the Government it would not be a statutory body because it has not been created by any statute and its existence is not dependent upon any statutory provision. Ultimately the Supreme Court granted additional damages to the appellant."*

26. In ***Tekraj v. Union of India***, 1988 (1) SCC 236, the question was whether the Institute of Constitutional and Parliamentary studies registered under the Societies Registration Act, 1860 was a "State" within the meaning of Article 12 of the Constitution of India. After tracing the case law on the subject the Court observed as follows:-

> *"Democracy pre-supposes certain conditions or its successful working. It is necessary that there must be a deep sense of understanding, mutual confidence and tolerance and regard and acceptance of the views of others. In the early years of freedom, the spirit of sacrifice and a sense of obligation to the leadership that had helped the dream of freedom to materialise had been accepted.*

The emergence of a new generation within less than two decades of independency gave rise to a feeling that the people's representatives in the legislatures required the acquisition of the appropriate democratic ideas and spirit. ICPS was born as a voluntary organisation to fulfil this requirement. At the inception it was certainly not a governmental organisation and it has not been the case of the parties in their pleadings nor have we been told at the bar during the long arguments that had been advanced that the objects of ICPS are those which are a State obligation to fulfil. The Society was thus born out of a feeling that there should be a voluntary association mostly consisting of members of the two Houses of Parliament with some external support to fulfil the objects which were adopted by the Society. The objects of the Society were not governmental business but were certainly the aspects which were expected to equip Members of Parliament and the State Legislatures with the requisite knowledge and experience for better functioning. Many of the objects adopted by the Society were not confined to the two Houses of Parliament and were intended to have an impact on society at large.

The Memorandum of the Society permitted acceptance of gifts, donations and subscriptions. There is material to show that the Ford Foundation, a US based Trust, had extended support for sometime. Undoubtedly, the annual contribution from the Government has been substantial and it would not be wrong to say that they perhaps constitute the main source of funding, yet some money has been coming from other sources. In later years, foreign funding came to be regulated and, therefore it became necessary to provide that without Government clearance, like any other institution, ICPS was not to receive foreign donation. No material has been placed before us for the stand that the Society was not entitled to receive contributions from any indigenous source without Government sanction. Since Government moneys has been coming, the usual conditions attached to Government grants have been applied and enforced. If the Society's affairs were really

> *intended to be carried on as part of the Lok Sabha or Parliament as such, the manner of functioning would have been different. The accounts of the Society are separately maintained and subject to audit in the same way as the affairs of societies receiving Government grants are to be audited. Government usually impose certain conditions and restrictions when grants are made. No exception has been made in respect of the Society and the mere fact that such restrictions are made is not a determinative aspect.*
>
> *Considerable attempt has been made by Mr. Rao, learned Counsel for the appellant, to show that in the functioning of the Society there is deep and pervasive control of Government. We have examined meticulously the correspondence and the instances where control was attempted to be exercised or has, as a fact, been exercised but these again are features which appear to have been explained away."*

27. In spite of the above facts and circumstances, this Court held that the institute was not a "State" or State instrumentality or other authority.

28. If the Authority/Body can be treated as a "State" within the meaning of Article 12 of the Constitution of India, then in such circumstances, it goes without saying that a writ petition under Article 226 would be maintainable against such an Authority/Body for the purpose of enforcement of fundamental and other legal rights. Therefore, the definition contained in Article 12 is for the purpose of application of the provisions contained in Part III. Article 226 of the Constitution, which deals with powers of the High Courts to issue certain writs, *inter alia*, stipulates that every High Court has the power to issue directions, orders or writs to any person or authority, including, in appropriate cases, any Government, for the enforcement of any of the rights conferred by Part III and for any other purpose.

29. So far as Article 12 of the Constitution is concerned, the "State" includes "all local and other Authorities within the territory of India or under the control of the Government of India". The debate on the question as to which body would qualify as "other authority" & the test/principles applicable for ascertaining as to whether a particular body can be treated as "other authority" has been never ending. If such an authority violates the fundamental right or other legal rights

of any person or citizen (as the case may be), a writ petition can be filed under Article 226 of the Constitution invoking the extraordinary jurisdiction of the High Court and seeking appropriate direction, order or writ. However, under Article 226 of the Constitution, the power of the High Court is not limited to the Government or authority which qualifies to be "State" under Article 12. Power is extended to issue directions, orders or writs "to any person or authority". Again, this power of issuing directions, orders or writs is not limited to enforcement of fundamental rights conferred by Part III, but also "for any other purpose". Thus, power of the High Court takes within its sweep more "authorities" than stipulated in Article 12 and the subject-matter which can be dealt with under this Article is also wider in scope.

30. There are three decisions of this Court we must look into and discuss.

31. The first judgment is ***Shri Anadi Mukta Sadguru Shree Muktajee Vandasjiswami Suvarna Jayanti Mahotsav Smarak Trust & Ors. v. V. R. Rudani & Ors.*** reported in (1989) 2 SCC 691 and the other two judgments, we are talking about are ***K. Krishnamacharyulu & Ors. v. Sri Venkateswara Hindu College of Engineering & Anr.*** reported in 1997 (3) SCC 571 and ***Satimbla Sharma v. St. Paul's Senior Secondary School***, reported in (2011) 13 SCC 760.

32. In ***Shri Anadi Mukta Sadguru*** (supra), dispute arose between the Trust which was managing and running science college and teachers of the said college. It pertained to payment of certain employment related benefits like basic pay, etc. The matter was referred to the Chancellor of Gujarat University for his decision. The Chancellor passed an award, which was accepted by the University as well as the State Government and a direction was issued to all affiliated colleges to pay their teachers in terms of the said award. However, the aforesaid Trust running the science college did not implement the award. Teachers filed the writ petition seeking mandamus and direction to the Trust to pay them their dues of salary, allowances, provident fund and gratuity in accordance therewith. It is in this context an issue arose as to whether the writ petition under Article 226 of the Constitution was maintainable against the said Trust which was admittedly not a statutory body or authority under Article 12 of the Constitution as it was a private Trust running an educational institution. The High Court held that the writ petition was maintainable and the said view was upheld by this Court in the aforesaid judgment.

The discussion which is relevant for our purposes is contained in paras 14 to 19. However, we would like to reproduce paras 14, 16 and 19, which read as under:-

> *"14. If the rights are purely of a private character no mandamus can issue. If the management of the college is purely a private body with no public duty mandamus will not lie. These are two exceptions to mandamus. But once these are absent and when the party has no other equally convenient remedy, mandamus cannot be denied. It has to be appreciated that the appellant Trust was managing the affiliated college to which public money is paid as government aid. Public money paid as government aid plays a major role in the control, maintenance and working of educational institutions. The aided institutions like government institutions discharge public function by way of imparting education to students. They are subject to the rules and regulations of the affiliating university. Their activities are closely supervised by the University authorities. Employment in such institutions, therefore, is not devoid of any public character. [See The Evolving Indian Administrative Law by M.P. Jain (1983) p. 266.] So are the service conditions of the academic staff. When the University takes a decision regarding their pay scales, it will be binding on the management. The service conditions of the academic staff are, therefore, not purely of a private character. It has super-added protection by University decisions creating a legal right-duty relationship between the staff and the management. When there is existence of this relationship, mandamus cannot be refused to the aggrieved party.*
>
> *xxx xxx xxx*
>
> *16. There, however, the prerogative writ of mandamus is confined only to public authorities to compel performance of public duty. The 'public authority' for them means everybody which is created by statute—and whose powers and duties are defined by statute. So government departments, local authorities, police authorities, and statutory undertakings and corporations, are all 'public authorities'. But there is no*

such limitation for our High Courts to issue the writ 'in the nature of mandamus'. Article 226 confers wide powers on the High Courts to issue writs in the nature of prerogative writs. This is a striking departure from the English law. Under Article 226, writs can be issued to 'any person or authority'. It can be issued 'for the enforcement of any of the fundamental rights and for any other purpose'.

xxx xxx xxx

19. The term 'authority' used in Article 226, in the context, must receive a liberal meaning like the term in Article 12. Article 12 is relevant only for the purpose of enforcement of fundamental rights under Article 32. Article 226 confers power on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. The words 'any person or authority' used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected party. No matter by what means the duty is imposed. If a positive obligation exists mandamus cannot be denied."

(Emphasis supplied)

33. In para 14, the Court spelled out two exceptions to the writ of mandamus viz. (*i*) if the rights are purely of a private character, no mandamus can issue; and (*ii*) if the management of the college is purely a private body "with no public duty", mandamus will not lie. The Court clarified that since the Trust in the said case was an aided institution, because of this reason, it discharges public function, like government institution, by way of imparting education to students, more particularly when rules and regulations of the affiliating university are applicable to such an institution, being an aided institution. In such a situation, the Court held that the service conditions of academic staff were not purely of a private character as the staff had super-added protection by university's decision creating a legal right and duty relationship between the staff and

the management. Further, the Court explained in para 19 that the term "authority" used in Article 226, in the context, would receive a liberal meaning unlike the term in Article 12, inasmuch as Article 12 was relevant only for the purpose of enforcement of fundamental rights under Article 32, whereas Article 226 confers power on the High Courts to issue writs not only for enforcement of fundamental rights but also non-fundamental rights. What is relevant is the dicta of the Court that the term "authority" appearing in Article 226 of the Constitution would cover any other person or body performing public duty. The guiding factor, therefore, is the nature of duty imposed on such a body, namely, public duty to make it exigible to Article 226.

34. In ***K. Krishnamacharyulu*** (supra), this Court again emphasised that where there is an interest created by the Government in an institution to impart education, which is a fundamental right of the citizens, the teachers who impart the education get an element of public interest in performance of their duties. In such a situation, remedy provided under Article 226 would be available to the teachers.

35. However, both the decisions referred to abovea pertain to educational institutions and in the said cases, the function of imparting education was treated as the performance of the public duty, that too by those bodies where, the aided institutions were discharging the said functions like Government institutions and the interest was created by the Government in such institutions to impart education.

36. In ***Satimbla Sharma*** (supra), the school therein was initially established as a mission school by the respondent No. 2. The school adopted the 10+2 system in 1993 and got affiliated to the Himachal Pradesh Board of School Education. Before independence in 1947, the school was receiving grant-in-aid from the British Indian Government and thereafter from the Government of India up to 1950. Between 1951 and 1966, the school received grant-in-aid from the State Government of Punjab. After the State of Himachal Pradesh was formed, the school received grant-in-aid from the Government of Himachal Pradesh for the period between 1967 and 1976. From the year 1977-1978, the Government of Himachal Pradesh stopped the grant-in-aid. In such circumstances, the teachers of the school were paid less than the teachers of the Government schools and the Government-aided schools in the State of Himachal Pradesh. This led to filing of a writ petition in the High Court of Himachal Pradesh

seeking a direction to pay the salary and allowances at par with the teachers of Government schools and the Government-aided schools. A learned single Judge of the High Court allowed the writ petition and directed the respondents therein to pay to the writ petitioners therein salary and allowances at par with their counterparts working in the Government schools from the dates they were entitled to and at the rates admissible from time to time. The respondent Nos. 1 and 2 therein preferred letters patent appeal before the Division Bench of the High Court. The appeal came to be allowed and the writ petition filed by the teachers was dismissed. In such circumstances referred to above, the litigation travelled to this Court. This Court, while disposing of the appeal, held as under:-

> *"25. Where a statutory provision casts a duty on a private unaided school to pay the same salary and allowances to its teachers as are being paid to teachers of government-aided schools, then a writ of mandamus to the school could be issued to enforce such statutory duty. But in the present case, there was no statutory provision requiring a private unaided school to pay to its teachers the same salary and allowances as were payable to teachers of government schools and therefore a mandamus could not be issued to pay to the teachers of private recognised unaided schools the same salary and allowances as were payable to teachers of government institutions.*
>
> *26. In K. Krishnamacharyulu v. Sri Venkateswara Hindu College of Engg. (1997) 3 SCC 571 : 1997 SCC (L&S) 841, relied upon by the learned counsel for the appellants, executive instructions were issued by the Government that the scales of pay of Laboratory Assistants as non-teaching staff of private colleges shall be on a par with the government employees and this Court held that even though there were no statutory rules, the Laboratory Assistants as non-teaching staff of private college were entitled to the parity of the pay scales as per the executive instructions of the Government and the writ jurisdiction of the High Court under Article 226 of the Constitution is wide enough to issue a writ for payment of pay on a par with government employees. In the present case, there are no executive instructions issued by the Government requiring*

private schools to pay the same salary and allowances to their teachers as are being paid to teachers of government schools or government-aided schools.

27. We cannot also issue a mandamus to Respondents 1 and 2 on the ground that the conditions of provisional affiliation of schools prescribed by the Council for the Indian School Certificate Examinations stipulate in Clause (5)(b) that the salary and allowances and other benefits of the staff of the affiliated school must be comparable to that prescribed by the State Department of Education because such conditions for provisional affiliation are not statutory provisions or executive instructions, which are enforceable in law. Similarly, we cannot issue a mandamus to give effect to the recommendations of the Report of Education Commission 1964-1966 that the scales of pay of school teachers belonging to the same category but working under different managements such as Government, local bodies or private managements should be the same, unless the recommendations are incorporated in an executive instruction or a statutory provision. We, therefore, affirm the impugned judgment of the Division Bench of the High Court.

28. We, however, find that the 2009 Act has provisions in Section 23 regarding the qualifications for appointment and terms and conditions of service of teachers and sub-section (3) of Section 23 of the 2009 Act provides that the salary and allowances payable to, and the terms and conditions of service of, teachers shall be such as may be prescribed. Section 38 of the 2009 Act empowers the appropriate Government to make rules and Section 38(2)(l) of the 2009 Act provides that the appropriate Government, in particular, may make rules prescribing the salary and allowances payable to, and the terms and conditions of service of teachers, under sub-section (3) of Section 23. Section 2(a) defines "appropriate Government" as the State Government within whose territory the school is established.

> *29. The State of Himachal Pradesh, Respondent 3 in this appeal, is thus empowered to make rules under sub-section (3) of Section 23 read with Section 38(2)(l) of the 2009 Act prescribing the salary and allowances payable to, and the terms and conditions of service of, teachers. Article 39(d) of the Constitution provides that the State shall, in particular, direct its policy towards securing that there is equal pay for equal work for both men and women. Respondent 3 should therefore consider making rules under Section 23 read with Section 38(2)(l) of the 2009 Act prescribing the salary and allowances of teachers keeping in mind Article 39(d) of the Constitution as early as possible."*
>
> (Emphasis supplied)

37. Thus, the dictum as laid in ***Satimbla Sharma*** (supra) is clear. In the absence of any statutory provisions requiring a private unaided school to pay to its teachers the same salary and allowances as payable to the teachers of the Government schools, a mandamus cannot be issued to pay to the teachers of private recognised unaided schools the same salary and allowances as payable to the teachers of Government institutions. In the case at hand, the respondents are being paid the same salary and allowances as being paid to the teachers and non-teaching staff appointed by the appellant society.

38. In one of the recent pronouncements of this Court in the case of ***St. Mary's Education Society & Anr. v. Rajendra Prasad Bhargava & Ors.*** reported in (2023) 4 SCC 498, to which one of us (J.B. Pardiwala, J.) was a member, the entire law on the subject has been discussed threadbare. In the said case, this Court held that while a private unaided minority institution might be touching the spheres of public function by performing a public duty, its employees have no right of invoking the writ jurisdiction of the High Court under Article 226 of the Constitution in respect of matters relating to service where they are not governed or controlled by the statutory provision.

39. In the said case, the following two questions fell for the consideration of the Court:-

    (a) *Whether a writ petition under Article 226 of the Constitution of India is maintainable against a private unaided minority institution?*

(b) *Whether a service dispute in the private realm involving a private educational institution and its employee can be adjudicated in a writ petition filed under Article 226 of the Constitution? In other words, even if a body performing public duty is amenable to writ jurisdiction, are all its decisions subject to judicial review or only those decisions which have public element therein can be judicially reviewed under the writ jurisdiction?*

40. This Court ultimately held as under:-

> *"29. Respondent 1 herein has laid much emphasis on the fact that at the time of his appointment in the school, the same was affiliated to the Madhya Pradesh State Board. It is his case that at the relevant point of time the school used to receive the grant-in-aid from the State Government of Madhya Pradesh. Later in point of time, the school came to be affiliated to CBSE. The argument of Respondent 1 seems to be that as the school is affiliated to the Central Board i.e. CBSE, it falls within the ambit of "State" under Article 12 of the Constitution. The school is affiliated to CBSE for the purpose of imparting elementary education under the Right of Children to Free and Compulsory Education Act, 2009 (for short "the 2009 Act"). As Appellant 1 is engaged in imparting of education, it could be said to be performing public functions. To put it in other words, Appellant 1 could be said to be performing public duty. Even if a body performing public duty is amenable to the writ jurisdiction, all its decisions are not subject to judicial review. Only those decisions which have public element therein can be judicially reviewed under the writ jurisdiction. If the action challenged does not have the public element, a writ of mandamus cannot be issued as the action could be said to be essentially of a private character.*
>
> *30. We may at the outset state that CBSE is only a society registered under the Societies Registration Act, 1860 and the school affiliated to it is not a creature of the statute and hence not a statutory body. The distinction between a body created by the statute and a body governed in accordance with a statute has been explained by this*

*Court in **Executive Committee of Vaish Degree College v. Lakshmi Narain** (1976) 2 SCC 58, as follows:- (SCC p. 65, para 10)*

> *"10. … It is, therefore, clear that there is a well marked distinction between a body which is created by the statute and a body which after having come into existence is governed in accordance with the provisions of the statute. In other words the position seems to be that the institution concerned must owe its very existence to a statute which would be the fountainhead of its powers. The question in such cases to be asked is, if there is no statute would the institution have any legal existence. If the answer is in the negative, then undoubtedly it is a statutory body, but if the institution has a separate existence of its own without any reference to the statute concerned but is merely governed by the statutory provisions it cannot be said to be a statutory body."*

31. As stated above, the school is affiliated to CBSE for the sake of convenience, namely, for the purpose of recognition and syllabus or the courses of study and the provisions of the 2009 Act and the Rules framed thereunder.

32. The contention canvassed by Respondent 1 is that a writ petition is maintainable against the Committee of Management controlling the affairs of an institution (minority) run by it, if it violates any rules and bye-laws laid down by CBSE. First, as discussed above, CBSE itself is not a statutory body nor the regulations framed by it have any statutory force. Secondly, the mere fact that the Board grants recognition to the institutions on certain terms and conditions itself does not confer any enforceable right on any person as against the Committee of Management.

*33. In **Regina v. St. Aloysius Higher Secondary School** (1972) 4 SCC 188 : AIR 1971 SC 1920, this Court held that the mere fact that an institution is recognised by an authority, does not itself create an enforceable right to an*

aggrieved party against the Management by a teacher on the ground of breach or non-compliance of any of the Rules which was part of terms of the recognition. It was observed as under:-

> *"24. … The Rules thus govern the terms on which the Government would grant recognition and aid and the Government can enforce these rules upon the management. But the enforcement of such rules is a matter between the Government and the management, and a third party, such as teacher aggrieved by some order of the management cannot derive from the rules any enforceable right against the management on the ground of breach or non-compliance of any of the rules."*

34. In ***Anita Verma v. D.A.V. College Management Committee, Unchahar, Rai Bareilly*** *(1992) 1 UPLBEC 30:-*

> *"… 30. Where the services of a teacher were terminated, the Court held that the writ petition under Article 226 is not maintainable as the institution cannot be treated as the instrumentality of the State. The matter was considered in detail in Harbans Kaur v. Guru Tegh Bahadur Public School [Harbans Kaur v. Guru Tegh Bahadur Public School, 1992 SCC OnLine All 444 : 1992 Lab IC 2070], wherein the services of the petitioner were terminated by the Managing Committee of the institution recognised by CBSE. It was held that the Affiliation Bye-laws framed by CBSE have no statutory force. The Court under Article 226 of the Constitution of India can enforce compliance of statutory provision against a committee of management as held in a Full Bench decision of this Court in Aley Ahmad Abidi v. District Inspector of Schools [Aley Ahmad Abidi v. District Inspector of Schools, 1976 SCC OnLine*

All 325 : AIR 1977 All 539]. The Affiliation Bye-laws of CBSE having no statutory force, the only remedy against the aggrieved person is to approach CBSE putting his grievances in relation to the violation of the Affiliation Bye-laws by the institution."

35. Thus, where a teacher or non-teaching staff challenges the action of Committee of Management that it has violated the terms of contract or the rules of the Affiliation Bye-laws, the appropriate remedy of such teacher or employee is to approach CBSE or to take such other legal remedy available under law. It is open to CBSE to take appropriate action against the Committee of Management of the institution for withdrawal of recognition in case it finds that the Committee of Management has not performed its duties in accordance with the Affiliation Byelaws.

36. It needs no elaboration to state that a school affiliated to CBSE which is unaided is not a State within Article 12 of the Constitution of India [see ***Satimbla Sharma v. St Paul's Senior Secondary School*** *(2011) 13 SCC 760 : (2012) 2 SCC (L&S) 75 . Nevertheless the school discharges a public duty of imparting education which is a fundamental right of the citizen [see* ***K. Krishnamacharyulu*** v. Sri ***Venkateswara Hindu College of Engineering*** *(1997) 3 SCC 571 : 1997 SCC (L&S) 841. The school affiliated to CBSE is therefore an "authority" amenable to the jurisdiction under Article 226 of the Constitution of India [see* ***Binny Ltd. v. V. Sadasivan*** *(2005) 6 SCC 657 : 2005 SCC (L&S) 881]]. However, a judicial review of the action challenged by a party can be had by resort to the writ jurisdiction only if there is a public law element and not to enforce a contract of personal service. A contract of personal service includes all matters relating to the service of the employee — confirmation, suspension, transfer, termination, etc. [see* ***Apollo Tyres Ltd. v. C.P. Sebastian*** *(2009) 14 SCC 360].*

37. This Court in ***K.K. Saksena v. International Commission on Irrigation & Drainage*** *(2015) 4 SCC 670,*

after an exhaustive review of its earlier decisions on the subject, held as follows:- (SCC pp. 692 & 696, paras 43 & 52)

> *"43. What follows from a minute and careful reading of the aforesaid judgments of this Court is that if a person or authority is "State" within the meaning of Article 12 of the Constitution, admittedly a writ petition under Article 226 would lie against such a person or body. However, we may add that even in such cases writ would not lie to enforce private law rights. There are a catena of judgments on this aspect and it is not necessary to refer to those judgments as that is the basic principle of judicial review of an action under the administrative law. The reason is obvious. A private law is that part of a legal system which is a part of common law that involves relationships between individuals, such as law of contract or torts. Therefore, even if writ petition would be maintainable against an authority, which is "State" under Article 12 of the Constitution, before issuing any writ, particularly writ of mandamus, the Court has to satisfy that action of such an authority, which is challenged, is in the domain of public law as distinguished from private law.*
>
> *x x x x*
>
> *52. It is trite that contract of personal service cannot be enforced. There are three exceptions to this rule, namely:*
>
> *(i) when the employee is a public servant working under the Union of India or State;*
>
> *(ii) when such an employee is employed by an authority/body which is a State within the meaning of Article 12 of the Constitution of India; and*

(iii) when such an employee is "workmen" within the meaning of Section 2(s) of the Industrial Disputes Act, 1947 and raises a dispute regarding his termination by invoking the machinery under the said Act.

In the first two cases, the employment ceases to have private law character and "status" to such an employment is attached. In the third category of cases, it is the Industrial Disputes Act which confers jurisdiction on the Labour Court/Industrial Tribunal to grant reinstatement in case termination is found to be illegal."

38. The following decisions have been adverted to in ***K.K. Saksena*** *(supra):-*

1. ***Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust v. V.R. Rudani*** *(1989) 2 SCC 691*

2. ***G. Bassi Reddy v. International Crops Research Institute*** *(2003) 4 SCC 225,*

3. ***Praga Tools Corpn. v. C.A. Imanual*** *(1969) 1 SCC 585,*

4. ***Federal Bank Ltd. v. Sagar Thomas*** *(2003) 10 SCC 733.*

39. This Court in ***Janet Jeyapaul v. SRM University*** *(2015) 16 SCC 530, held that when a private body exercises its public functions even if it is not a State, the aggrieved person has a remedy, not only under the ordinary law, but also by way of a writ petition under Article 226 of the Constitution. In* ***Binny Ltd.*** *(supra), this Court held that Article 226 of the Constitution is couched in such a way that a writ of mandamus could be issued even against a private authority. However, such private authority must be discharging a public function and that the decision sought to be corrected or enforced must be in the discharge of public function.*

40. Paragraph 11 of the judgment in ***Binny Ltd.*** *(supra) is reproduced below:- (SCC pp. 665-66)*

> *"11. Judicial review is designed to prevent the cases of abuse of power and neglect of duty by public authorities. However, under our Constitution, Article 226 is couched in such a way that a writ of mandamus could be issued even against a private authority. However, such private authority must be discharging a public function and that the decision sought to be corrected or enforced must be in discharge of a public function. The role of the State expanded enormously and attempts have been made to create various agencies to perform the governmental functions. Several corporations and companies have also been formed by the Government to run industries and to carry on trading activities. These have come to be known as public sector undertakings. However, in the interpretation given to Article 12 of the Constitution, this Court took the view that many of these companies and corporations could come within the sweep of Article 12 of the Constitution. At the same time, there are private bodies also which may be discharging public functions. It is difficult to draw a line between public functions and private functions when it is being discharged by a purely private authority. A body is performing a "public function" when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest."* (Emphasis supplied)

41. This Court considered various of its other decisions to examine the question of public law remedy under Article 226 of the Constitution. This Court observed in ***Binny Ltd.*** *(supra) as under:-*

(SCC p. 673, para 29)

> *"29. Thus, it can be seen that a writ of mandamus or the remedy under Article 226 is pre-eminently a public law remedy and is not generally available as a remedy against private wrongs. It is used for enforcement of various rights of the public or to compel the public/statutory authorities to discharge their duties and to act within their bounds. It may be used to do justice when there is wrongful exercise of power or a refusal to perform duties. This writ is admirably equipped to serve as a judicial control over administrative actions. This writ could also be issued against any private body or person, specially in view of the words used in Article 226 of the Constitution. However, the scope of mandamus is limited to enforcement of public duty. The scope of mandamus is determined by the nature of the duty to be enforced, rather than the identity of the authority against whom it is sought. If the private body is discharging a public function and the denial of any right is in connection with the public duty imposed on such body, the public law remedy can be enforced. The duty cast on the public body may be either statutory or otherwise and the source of such power is immaterial, but, nevertheless, there must be the public law element in such action. Sometimes, it is difficult to distinguish between public law and private law remedies."*
>
> *(Emphasis supplied)*

*42. In the penultimate paragraph, this Court ruled as under:- (**Binny** case, SCC p. 674, para 32)*

> *"32. Applying these principles, it can very well be said that a writ of mandamus can be issued against a private body which is not "State" within the meaning of Article 12 of the Constitution and such body is amenable to the jurisdiction under Article 226 of the Constitution and the High*

Court under Article 226 of the Constitution can exercise judicial review of the action challenged by a party. But there must be a public law element and it cannot be exercised to enforce purely private contracts entered into between the parties."

(Emphasis supplied)

43. In the background of the above legal position, it can be safely concluded that power of judicial review under Article 226 of the Constitution of India can be exercised by the High Court even if the body against which an action is sought is not State or an authority or an instrumentality of the State but there must be a public element in the action complained of.

44. A reading of the above extract shows that the decision sought to be corrected or enforced must be in the discharge of a public function. No doubt, the aims and objective of Appellant 1 herein are to impart education, which is a public function. However, the issue herein is with regard to the termination of service of Respondent 1, which is basically a service contract. A body is said to be performing a public function when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so.

45. In the case of ***Committee of Management, Delhi Public School v. M.K. Gandhi*** *, reported in (2015) 17 SCC 353, this Court held that no writ is maintainable against a private school as it is not a "State" within the meaning of Article 12 of the Constitution of India.*

46. In ***Trigun Chand Thakur v. State of Bihar***, *reported in (2019) 7 SCC 513, this Court upheld the view of a Division Bench of the Patna High Court which held that a teacher of privately managed school, even though financially aided by the State Government or the Board, cannot maintain a writ petition against an order of termination from service passed by the Management.*

*47. In **Satimbla Sharma** (supra), this Court held that the unaided private minority schools over which the Government has no administrative control because of their autonomy under Article 30(1) of the Constitution are not "State" within the meaning of Article 12 of the Constitution. As the right to equality under Article 14 of the Constitution is available against the State, it cannot be claimed against unaided private minority private schools.*

*48. The Full Bench of the Allahabad High Court in **Roychan Abraham v. State of U.P.**, AIR 2019 All 96, after taking into consideration various decisions of this Court, held as under:-*

> *"38. Even if it be assumed that an educational institution is imparting public duty, the act complained of must have direct nexus with the discharge of public duty. It is undisputedly a public law action which confers a right upon the aggrieved to invoke extraordinary writ jurisdiction under Article 226 for a prerogative writ. Individual wrongs or breach of mutual contracts without having any public element as its integral part cannot be rectified through petition under Article 226. Wherever Courts have intervened in exercise of jurisdiction under Article 226, either the service conditions were regulated by statutory provisions or the employer had the status of "State" within the expansive definition under Article 12 or it was found that the action complained of has public law element."*
>
> *(Emphasis supplied)*

*49. We may refer to and rely upon one order passed by this Court in **S.K. Varshney v. Principal, Our Lady of Fatima Higher Secondary School** (2023) 4 SCC 539, in the Civil Appeal No. 8783-8784 of 2003 dated July 19, 2007, in which the dispute was one relating to the retirement age of a teacher working in an unaided institution. This Court, while dismissing the appeal preferred by the employee, held as under:-*

"4. Both the petitions were dismissed by the learned Single Judge on the ground that no writ would lie against unaided private institutions and the writ petitions were not maintainable.

5. Aggrieved thereby, writ appeals have been filed before the Division Bench without any result. The Division Bench held [S.K. Varshney v. Our Lady of Fatima Higher Secondary School, 1999 SCC OnLine All 908] that the writ petitions are not maintainable against a private institute. Aggrieved thereby, these appeals have been filed.

6. The counsel for the appellant relied on a decision rendered by this Court in K. Krishnamacharyulu v. Sri Venkateswara Hindu College of *Engg. (1997) 3 SCC 571. He particularly relied on the observation made by this Court in para 4 of the order that when an element of public interest is created and the institution is catering to that element, the teacher, being the arm of the institution, is also entitled to avail of the remedy provided under Article 226.*

7. This Court in Sushmita Basu v. Ballygunge Siksha Samity (2006) 7 SCC 680 : 2006 SCC (L&S) 1741] in which one of us (Sema, J.) is a party, after considering the aforesaid judgment has distinguished the ratio by holding that the writ under Article 226 of the Constitution against a private educational institute would be justified only if a public law element is involved and if it is only a private law remedy no writ petition would lie. In the present cases, there is no question of public law element involved inasmuch as the grievances of the appellants are of personal nature.

8. We, accordingly, hold that writ petitions are not maintainable against the private institute. There is no infirmity in the order passed by

the learned Single Judge and affirmed by the Division Bench. These appeals are devoid of merit and are, accordingly, dismissed. No costs."

(Emphasis supplied)

50. We may also refer to and rely upon the decision of this Court in ***Vidya Ram Misra v. Shri Jai Narain College*** *(1972) 1 SCC 623 : AIR 1972 SC 1450. The appellant therein filed a writ petition before the Lucknow Bench of the High Court of Allahabad challenging the validity of a resolution passed by the Managing Committee of Shri Jai Narain College, Lucknow, an associated college of Lucknow University, terminating his services and praying for issue of an appropriate writ or order quashing the resolution. A learned Single Judge of the High Court finding that in terminating the services, the Managing Committee acted in violation of the principles of natural justice, quashed the resolution and allowed the writ petition. The Managing Committee appealed against the order. A Division Bench of the High Court found that the relationship between the college and the appellant therein was that of master and servant and that even if the service of the appellant had been terminated in breach of the audi alteram partem rule of natural justice, the remedy of the appellant was to file a suit for damages and not to apply under Article 226 of the Constitution for a writ or order in the nature of certiorari and that, in fact, no principle of natural justice was violated by terminating the services of the appellant. The writ petition was dismissed. In appeal, this Court upheld the decision of the High Court holding that the lecturer cannot have any cause of action on breach of the law but only on breach of the contract, hence he has a remedy only by way of suit for damages and not by way of writ under Article 226 of the Constitution.*

51. In ***Vidya Ram Misra*** *(supra), this Court observed thus:- (SCC p. 629, paras 12-13)*

"12. Whereas in ***P.R.K. Jodh v. A.L. Pande*** *(1965) 2 SCR 713], the terms and conditions of service embodies in Clause 8(vi)(a) of the*

"College Code" had the force of law apart from the contract and conferred rights on the appellant there, here the terms and conditions mentioned in Statute 151 have no efficacy, unless they are incorporated in a contract. Therefore, appellant cannot found a cause of action on any breach of the law but only on the breach of the contract. As already indicated, Statute 151 does not lay down any procedure for removal of a teacher to be incorporated in the contract. So, Clause 5 of the contract can, in no event, have even a statutory flavour and for its breach, the appellant's remedy lay elsewhere.

13. Besides, in order that the third exception to the general rule that no writ will lie to quash an order terminating a contract of service, albeit illegally, as stated in ***S.R. Tewari v. District Board*** *(1964) 3 SCR 55 : AIR 1964 SC 1680], might apply, it is necessary that the order must be the order of a statutory body acting in breach of a mandatory obligation imposed by a statute. The college, or the Managing Committee in question, is not a statutory body and so the argument of Mr Setalvad that the case in hand will fall under the third exception cannot be accepted. The contention of counsel that this Court has sub silentio sanctioned the issue of a writ under Article 226 to quash an order terminating services of a teacher passed by a college similarly situate in* ***P.R.K. Jodh****, and, therefore, the fact that the college or the Managing Committee was not a statutory body was no hindrance to the High Court issuing the writ prayed for by the appellant has no merit as this Court expressly stated in the judgment that no such contention was raised in the High Court and so it cannot be allowed to be raised in this Court."*

52. In the case on hand, the facts are similar. Rule 26(1) of the Affiliation Bye-laws, framed by CBSE, provides that each school affiliated with the Board shall frame Service Rules. Sub-rule (2) of it provides that a service contract will be entered with each employee as per the provision in the Education Act of the State/Union Territory, or as given in Appendix III, if not obligatory as per the State Education Act. These rules also provide procedures for appointments, probation, confirmation, recruitment, attendance representations, grant of leave, code of conduct, disciplinary procedure, penalties, etc. The model form of contract of service, to be executed by an employee, given in Appendix III, lays down that the service, under this agreement, will be liable to disciplinary action in accordance with the Rules and Regulations framed by the school from time to time. Only in case where the post is abolished or an employee intends to resign, Rule 31 of the Affiliation Bye-laws of the Board will apply. It may be noted that the above Bye-laws do not provide for any particular procedure for dismissal or removal of a teacher for being incorporated in the contract. Nor does the model form of contract given in Appendix III lay down any particular procedure for that purpose. On the contrary, the disciplinary action is to be taken in accordance with the Rules and Regulations framed by the school from time to time.

53. On a plain reading of these provisions, it becomes clear that the terms and conditions mentioned in the Affiliation Bye-laws may be incorporated in the contract to be entered into between the school and the employee concerned. It does not say that the terms and conditions have any legal force, until and unless they are embodied in an agreement. To put it in other words, the terms and conditions of service mentioned in Chapter VII of the Affiliation Bye-laws have no force of law. They become terms and conditions of service only by virtue of their being incorporated in the contract. Without the contract they have no vitality and can confer no legal rights. The terms and conditions mentioned in the Affiliation Bye-laws have no efficacy, unless they are incorporated in a contract. In the

absence of any statutory provisions governing the services of the employees of the school, the service of Respondent 1 was purely contractual. A contract of personal service cannot be enforced specifically. Therefore, Respondent 1 cannot find a cause of action on any breach of the law, but only on the breach of the contract. That being so, the appellant's remedy lies elsewhere and in no case the writ is maintainable.

54. Thus, the aforesaid order passed by this Court makes it very clear that in a case of retirement and in case of termination, no public law element is involved. This Court has held that a writ under Article 226 of the Constitution against a private educational institution shall be maintainable only if a public law element is involved and if there is no public law element is involved, no writ lies.

55. In ***T.M.A. Pai Foundation v. State of Karnataka*** (2002) 8 SCC 481, an eleven-Judge Bench of this Court formulated certain points in fact to reconsider its earlier decision in ***Ahmedabad St. Xavier's College Society v. State of Gujarat*** *(1974) 1 SCC 717, and also* ***Unni Krishnan, J.P. v. State of A.P.*** *(1993) 4 SCC 111, regarding the "right of the minority institution including administration of the student and imparting education vis-à-vis the right of administration of the non-minority student".*

56. In the said case, very important points arose as follows:- (T.M.A. Pai Foundation case, SCC pp. 709-10, para 450)

> *"450. … Q.5. (c) Whether the statutory provisions which regulate the facets of administration like control over educational agencies, control over governing bodies, conditions of affiliation including recognition/withdrawal thereof, and appointment of staff, employees, teachers and principals including their service conditions and regulation of fees, etc. would interfere with the right of administration of minorities?*
>
> *A. So far as the statutory provisions regulating the facets of administration are concerned,*

> *in case of an unaided minority educational institution, the regulatory measure of control should be minimal and the conditions of recognition as well as conditions of affiliation to a university or board have to be complied with, but in the matter of day-to-day management, like appointment of staff, teaching and non-teaching and administrative control over them, the management should have the freedom and there should not be any external controlling agency. However, a rational procedure for selection of teaching staff and for taking disciplinary action has to be evolved by the management itself. For redressing the grievances of such employees who are subjected to punishment or termination from service, a mechanism will have to be evolved and in our opinion, appropriate tribunals could be constituted, and till then, such tribunal could be presided over by a judicial officer of the rank of District Judge. The State or other controlling authorities, however, can always prescribe the minimum qualifications, salaries, experience and other conditions bearing on the merit of an individual for being appointed as a teacher of an educational institution.*

Regulations can be framed governing service conditions for teaching and other staff for whom aid is provided by the State without interfering with overall administrative control of management over the staff, government/ university representative can be associated with the Selection Committee and the guidelines for selection can be laid down. In regard to unaided minority educational institutions such regulations, which will ensure a check over unfair practices and general welfare of teachers could be framed."

57. We now proceed to look into the two decisions of this Court in ***Ramesh Ahluwalia*** *(supra) and* ***Marwari Balika Vidyalaya*** *(supra) respectively.*

*58. In **Ramesh Ahluwalia** (supra), the appellant therein was working as an administrative officer in a privately run educational institution and by way of disciplinary proceedings, was removed from service by the Managing Committee of the said educational institution. A writ petition was filed before the learned Single Judge of the High Court challenging the order of the disciplinary authority wherein he was removed from service. The writ petition was ordered to be dismissed in limine holding that the said educational institution being an unaided and a private school managed by the society cannot be said to be an instrument of the State. The appeal before the Division Bench also came to be dismissed. The matter travelled to this Court.*

59. The principal argument before this Court was in regard to the maintainability of the writ petition against a private educational institution. It was argued on the behalf of the appellant therein that although a private educational institution may not fall within the definition of "State" or "other authorities/instrumentalities" of the State under Article 12 of the Constitution, yet a writ petition would be maintainable as the said educational institution could be said to be discharging public functions by imparting education. However, the learned counsel for the educational institution therein took a plea before this Court that while considering whether a body falling within the definition of "State", it is necessary to consider whether such body is financially, functionally and administratively dominated by or under the control of the Government. It was further argued that if the control is merely regulatory either under a statute or otherwise, it would not ipso facto make the body "State" within Article 12 of the Constitution. On the conspectus of the peculiar facts of the case and the submissions advanced, this Court held that a writ petition would be maintainable if a private educational institution discharges public functions, more particularly imparting education. Even by holding so, this Court declined to extend any benefits to the teacher as the case involved disputed questions of fact.

*60. We take notice of the fact that in **Ramesh Ahluwalia** (supra) the attention of the Hon'ble Judges was not drawn to the earlier decisions of this Court in **K. Krishnamacharyulu** (supra), **Federal Bank** (supra), **Sushmita Basu v. Ballygunge Siksha Samity** (2006) 7 SCC 680, and **Delhi Public School v. M.K. Gandhi** (supra).*

*61. In **Marwari Balika Vidyalaya** (supra), this Court followed **Ramesh Ahluwalia** (supra) referred to above.*

*62. We may say without any hesitation that respondent 1 herein cannot press into service the dictum as laid down by this Court in **Marwari Balika Vidyalaya** (supra) as the said case is distinguishable. The most important distinguishing feature of **Marwari Balika Vidyalaya** (supra) is that in the said case the removal of the teacher from service was subject to the approval of the State Government. The State Government took a specific stance before this Court that its approval was required both for the appointment as well as removal of the teacher. In the case on hand, indisputably the Government or any other agency of the Government has no role to play in the termination of Respondent 1 herein.*

*63. In context with **Marwari Balika Vidyalaya** (supra), we remind ourselves of Bye-law 49(2) which provides that no order with regard to the imposition of major penalty shall be made by the disciplinary authority except after the receipt of the approval of the Disciplinary Committee. Thus unlike **Marwari Balika Vidyalaya** (supra) where approval was required of the State Government, in the case on hand the approval is to be obtained from the Disciplinary Committee of the institution. This distinguishing feature seems to have been overlooked by the High Court while passing the impugned order.*

*64. In **Marwari Balika Vidyalaya** (supra), the school was receiving grant-in-aid to the extent of dearness allowance. The appointment and the removal, as noted above, is required to be approved by the District Inspector of School (Primary Education) and, if any action is taken dehors such mandatory provisions, the same would not come within the realm of private element.*

65. In ***Trigun Chand Thakur*** *(supra)s, the appellant therein was appointed as a Sanskrit teacher and a show-cause notice was issued upon him on the ground that he was absent on the eve of Independence day and Teachers Day which resulted into a dismissal order passed by the Managing Committee of the private school. The challenge was made by filing a writ petition before the High Court which was dismissed on the ground that the writ petition is not maintainable against an order terminating the service by the Managing Committee of the private school. This Court held that even if the private school was receiving a financial aid from the Government, it does not make the said Managing Committee of the school a "State" within the meaning of Article 12 of the Constitution of India.*

66. Merely because a writ petition can be maintained against the private individuals discharging the public duties and/or public functions, the same should not be entertained if the enforcement is sought to be secured under the realm of a private law. It would not be safe to say that the moment the private institution is amenable to writ jurisdiction then every dispute concerning the said private institution is amenable to writ jurisdiction. It largely depends upon the nature of the dispute and the enforcement of the right by an individual against such institution. The right which purely originates from a private law cannot be enforced taking aid of the writ jurisdiction irrespective of the fact that such institution is discharging the public duties and/or public functions. The scope of the mandamus is basically limited to an enforcement of the public duty and, therefore, it is an ardent duty of the court to find out whether the nature of the duty comes within the peripheral of the public duty. There must be a public law element in any action.

67. Our present judgment would remain incomplete if we fail to refer to the decision of this Court in ***Ramakrishna Mission v. Kago Kunya*** *(2019) 16 SCC 303. In the said case this Court considered all its earlier judgments on the issue. The writ petition was not found maintainable against the Mission merely for the reason that it was*

found running a hospital, thus discharging public functions/ public duty. This Court considered the issue in reference to the element of public function which should be akin to the work performed by the State in its sovereign capacity. This Court took the view that every public function/public duty would not make a writ petition to be maintainable against an "authority" or a "person" referred under Article 226 of the Constitution of India unless the functions are such which are akin to the functions of the State or are sovereign in nature.

68. Few relevant paragraphs of the said judgment are quoted as under for ready reference:- (Ramakrishna Mission case, SCC pp. 309-11 & 313, paras 17-22 & 25-26)

> *"17. The basic issue before this Court is whether the functions performed by the hospital are public functions, on the basis of which a writ of mandamus can lie under Article 226 of the Constitution.*
>
> *18. The hospital is a branch of the Ramakrishna Mission and is subject to its control. The Mission was established by Swami Vivekanand, the foremost disciple of Shri Ramakrishna Paramhansa. Service to humanity is for the organisation co-equal with service to God as is reflected in the motto "Atmano Mokshartham Jagad Hitaya Cha". The main object of the Ramakrishna Mission is to impart knowledge in and promote the study of Vedanta and its principles propounded by Shri Ramakrishna Paramahansa and practically illustrated by his own life and of comparative theology in its widest form. Its objects include, inter alia to establish, maintain, carry on and assist schools, colleges, universities, research institutions, libraries, hospitals and take up development and general welfare activities for the benefit of the underprivileged/backward/tribal people of society without any discrimination. These*

activities are voluntary, charitable and non-profit making in nature. The activities undertaken by the Mission, a non-profit entity are not closely related to those performed by the State in its sovereign capacity nor do they partake of the nature of a public duty.

19. The Governing Body of the Mission is constituted by members of the Board of Trustees of Ramakrishna Math and is vested with the power and authority to manage the organisation. The properties and funds of the Mission and its management vest in the Governing Body. Any person can become a member of the Mission if elected by the Governing Body. Members on roll form the quorum of the annual general meetings. The Managing Committee comprises of members appointed by the Governing Body for managing the affairs of the Mission. Under the Memorandum of Association and Rules and Regulations of the Mission, there is no governmental control in the functioning, administration and day-to-day management of the Mission. The conditions of service of the employees of the hospital are governed by service rules which are framed by the Mission without the intervention of any governmental body.

20. In coming to the conclusion that the appellants fell within the description of an authority under Article 226, the High Court placed a considerable degree of reliance on the judgment of a two-Judge Bench of this Court in ***Andi Mukta [****Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust v. V.R. Rudani (1989) 2 SCC 691 : AIR 1989 SC 1607].* ***Andi Mukta [****Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust v. V.R. Rudani (1989) 2 SCC 691 :*

AIR 1989 SC 1607] was a case where a public trust was running a college which was affiliated to Gujarat University, a body governed by the State legislation. The teachers of the University and all its affiliated colleges were governed, insofar as their pay scales were concerned, by the recommendations of the University Grants Commission. A dispute over pay scales raised by the association representing the teachers of the University had been the subject-matter of an award of the Chancellor, which was accepted by the Government as well as by the University. The management of the college, in question, decided to close it down without prior approval. A writ petition was instituted before the High Court for the enforcement of the right of the teachers to receive their salaries and terminal benefits in accordance with the governing provisions. In that context, this Court dealt with the issue as to whether the management of the college was amenable to the writ jurisdiction. A number of circumstances weighed in the ultimate decision of this Court, including the following:

> *20.1. The trust was managing an affiliated college.*
>
> *20.2. The college was in receipt of government aid.*
>
> *20.3. The aid of the Government played a major role in the control, management and work of the educational institution.*
>
> *20.4. Aided institutions, in a similar manner as government institutions, discharge a public function of imparting education to students.*
>
> *20.5. All aided institutions are governed by the rules and regulations of the affiliating University.*

20.6. Their activities are closely supervised by the University.

20.7. Employment in such institutions is hence, not devoid of a public character and is governed by the decisions taken by the University which are binding on the management.

21. It was in the above circumstances that this Court came to the conclusion that the service conditions of the academic staff do not partake of a private character, but are governed by a right-duty relationship between the staff and the management. A breach of the duty, it was held, would be amenable to the remedy of a writ of mandamus. While the Court recognised that "the fast expanding maze of bodies affecting rights of people cannot be put into watertight compartments", it laid down two exceptions where the remedy of mandamus would not be available:- (SCC p. 698, para 15)

'15. If the rights are purely of a private character no mandamus can issue. If the management of the college is purely a private body with no public duty mandamus will not lie. These are two exceptions to mandamus.'

22. Following the decision in ***Andi Mukta [Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust v. V.R. Rudani*** *(1989) 2 SCC 691 : AIR 1989 SC 1607] , this Court has had the occasion to re-visit the underlying principles in successive decisions. This has led to the evolution of principles to determine what constitutes a "public duty" and "public function" and whether the writ of mandamus would be available to an individual who seeks to enforce her right.*

x x x x

*25. A similar view was taken in **Ramesh Ahluwalia v. State of Punjab** (2012) 12 SCC 331 : (2013) 3 SCC (L&S) 456 : 4 SCEC 715], where a two-Judge Bench of this Court held that a private body can be held to be amenable to the jurisdiction of the High Court under Article 226 when it performs public functions which are normally expected to be performed by the State or its authorities.*

*26. In **Federal Bank Ltd. v. Sagar Thomas** (2003) 10 SCC 733] , this Court analysed the earlier judgments of this Court and provided a classification of entities against whom a writ petition may be maintainable : (SCC p. 748, para 18)*

> *'18. From the decisions referred to above, the position that emerges is that a writ petition under Article 226 of the Constitution of India may be maintainable against (i) the State (Government); (ii) an authority; (iii) a statutory body; (iv) an instrumentality or agency of the State; (v) a company which is financed and owned by the State; (vi) a private body run substantially on State funding; (vii) a private body discharging public duty or positive obligation of public nature; and (viii) a person or a body under liability to discharge any function under any statute, to compel it to perform such a statutory function.' "*

*69. The aforesaid decision of this Court in **Ramakrishna Mission** (supra) came to be considered exhaustively by a Full Bench of the High Court of **Allahabad in Uttam Chand Rawat v. State of U.P.** reported in (2021) 6 ALL LJ 393 (FB), wherein the Full Bench was called upon to answer the following question:- (Uttam Chand Rawat case, SCC OnLine All para 1)*

"1. …(i) Whether the element of public function and public duty inherent in the enterprise that an educational institution undertakes, conditions of service of teachers, whose functions are a sine qua non to the discharge of that public function or duty, can be regarded as governed by the private law of contract and with no remedy available under Article 226 of the Constitution?"

70. The Full Bench proceeded to answer the aforesaid question as under:- ((Uttam Chand Rawat case, SCC OnLine All paras 16-20)

"16. The substance of the discussion made above is that a writ petition would be maintainable against the authority or the person which may be a private body, if it discharges public function/ public duty, which is otherwise primary function of the State referred in the judgment of the Supreme Court in Ramakrishna Mission (supra) and the issue under public law is involved. The aforesaid twin test has to be satisfied for entertaining writ petition under Article 226 of the Constitution of India.

17. From the discussion aforesaid and in the light of the judgments referred above, a writ petition under Article 226 of the Constitution would be maintainable against (i) the Government; (ii) an authority; (iii) a statutory body; (iv) an instrumentality or agency of the State; (v) a company which is financed and owned by the State; (vi) a private body run substantially on State funding; (vii) a private body discharging public duty or positive obligation of public nature; and (viii) a person or a body under liability to discharge any function under any statute, to compel it to perform such a statutory function.

18. There is thin line between "public functions" and "private functions" discharged by a person

or a private body/authority. The writ petition would be maintainable only after determining the nature of the duty to be enforced by the body or authority rather than identifying the authority against whom it is sought.

19. It is also that even if a person or authority is discharging public function or public duty, the writ petition would be maintainable under Article 226 of the Constitution, if Court is satisfied that action under challenge falls in the domain of public law, as distinguished from private law. The twin tests for maintainability of writ are as follows:

1. The person or authority is discharging public duty/public functions.

2. Their action under challenge falls in domain of public law and not under common law.

20. The writ petition would not be maintainable against an authority or a person merely for the reason that it has been created under the statute or is to be governed by regulatory provisions. It would not even in a case where aid is received unless it is substantial in nature. The control of the State is another issue to hold a writ petition to be maintainable against an authority or a person." *(Emphasis supplied)*

71. We owe a duty to consider one relevant aspect of the matter. Although this aspect which we want to take notice of has not been highlighted by Respondent 1, yet we must look into the same. We have referred to the CBSE Affiliation Bye-laws in the earlier part of our judgment. Appendix IV of the Affiliation Bye-laws is with respect to the minority institutions. Clause 6 of Appendix IV is with respect to the disciplinary control over the staff in a minority educational institution. We take notice of the fact that in Clause 6, the State has the regulatory power to safeguard the interests

of their employees and their service conditions including the procedure for punishment to be imposed.

72. For the sake of convenience and at the cost of repetition, we quote Clause 6 once again as under:

> *"**6. Disciplinary control over staff in Minority Educational Institutions**.—While the managements should exercise the disciplinary control over staff, it must be ensured that they hold an inquiry and follow a fair procedure before punishment is given. With a view to preventing the possible misuse of power by the management of the Minority Educational Institutions, the State has the regulatory power to safeguard the interests of their employees and their service conditions including procedure for punishment to be imposed."*
> *(Emphasis supplied)*

73. It could be argued that as the State has regulatory power to safeguard the interests of the employees serving with the minority institutions, any action or decision taken by such institution is amenable to writ jurisdiction under Article 226 of the Constitution.

74. In the aforesaid context, we may only say that merely because the State Government has the regulatory power, the same, by itself, would not confer any such status upon the institution (school) nor put any such obligations upon it which may be enforced through issue of a writ under Article 226 of the Constitution. In this regard, we may refer to and rely upon the decision of this Court ***in*** ***Federal Bank*** *(supra). While deciding whether a private bank that is regulated by the Banking Regulation Act, 1949 discharges any public function, this Court held thus:-*

(Ramakrishna Mission case, SCC pp. 315-16, paras 33-35)

> *"33. … '33… 'in our view, a private company carrying on banking business as a scheduled bank, cannot be termed as an institution or a*

company carrying on any statutory or public duty. A private body or a person may be amenable to writ jurisdiction only where it may become necessary to compel such body or association to enforce any statutory obligations or such obligations of public nature casting positive obligation upon it. We do not find such conditions are fulfilled in respect of a private company carrying on a commercial activity of banking. Merely regulatory provisions to ensure such activity carried on by private bodies work within a discipline, do not confer any such status upon the company nor put any such obligation upon it which may be enforced through issue of a writ under Article 226 of the Constitution. Present is a case of disciplinary action being taken against its employee by the appellant Bank. The respondent's service with the Bank stands terminated. The action of the Bank was challenged by the respondent by filing a writ petition under Article 226 of the Constitution of India. The respondent is not trying to enforce any statutory duty on the part of the Bank.' (Federal Bank case, SCC pp. 758-59, para 33)

34. Thus, contracts of a purely private nature would not be subject to writ jurisdiction merely by reason of the fact that they are structured by statutory provisions. The only exception to this principle arises in a situation where the contract of service is governed or regulated by a statutory provision. Hence, for instance, in K.K. Saksena [K.K. Saksena v. International Commission on Irrigation & Drainage (2015) 4 SCC 670 : (2015) 2 SCC (Civ) 654 : (2015) 2 SCC (L&S) 119] this Court held that when an employee is a workman governed by the Industrial Disputes Act, 1947, it constitutes an exception to the general principle that a contract of personal service is not capable of being specifically enforced or performed.

35. It is of relevance to note that the Act was enacted to provide for the regulation and registration of clinical establishments with a view to prescribe minimum standards of facilities and services. The Act, inter alia, stipulates conditions to be satisfied by clinical establishments for registration. However, the Act does not govern contracts of service entered into by the hospital with respect to its employees. These fall within the ambit of purely private contracts, against which writ jurisdiction cannot lie. The sanctity of this distinction must be preserved."

(Emphasis in original and supplied)

41. The final conclusion drawn in the said decision is reproduced herein:-

"75. *We may sum up our final conclusions as under:-*

75.1. An application under Article 226 of the Constitution is maintainable against a person or a body discharging public duties or public functions. The public duty cast may be either statutory or otherwise and where it is otherwise, the body or the person must be shown to owe that duty or obligation to the public involving the public law element. Similarly, for ascertaining the discharge of public function, it must be established that the body or the person was seeking to achieve the same for the collective benefit of the public or a section of it and the authority to do so must be accepted by the public.

75.2. Even if it be assumed that an educational institution is imparting public duty, the act complained of must have a direct nexus with the discharge of public duty. It is indisputably a public law action which confers a right upon the aggrieved to invoke the extraordinary writ jurisdiction under Article 226 for a prerogative writ. Individual wrongs or breach of mutual contracts without having any public element as its integral part cannot be rectified through a writ petition under Article 226. Wherever Courts have intervened in their exercise of jurisdiction under Article 226, either the service conditions were regulated by the statutory provisions or the employer had the status of

"State" within the expansive definition under Article 12 or it was found that the action complained of has public law element.

75.3. It must be consequently held that while a body may be discharging a public function or performing a public duty and thus its actions becoming amenable to judicial review by a constitutional court, its employees would not have the right to invoke the powers of the High Court conferred by Article 226 in respect of matter relating to service where they are not governed or controlled by the statutory provisions. An educational institution may perform myriad functions touching various facets of public life and in the societal sphere. While such of those functions as would fall within the domain of a "public function" or "public duty" be undisputedly open to challenge and scrutiny under Article 226 of the Constitution, the actions or decisions taken solely within the confines of an ordinary contract of service, having no statutory force or backing, cannot be recognised as being amenable to challenge under Article 226 of the Constitution. In the absence of the service conditions being controlled or governed by statutory provisions, the matter would remain in the realm of an ordinary contract of service.

75.4. Even if it be perceived that imparting education by private unaided school is a public duty within the expanded expression of the term, an employee of a non-teaching staff engaged by the school for the purpose of its administration or internal management is only an agency created by it. It is immaterial whether "A" or "B" is employed by school to discharge that duty. In any case, the terms of employment of contract between a school and non-teaching staff cannot and should not be construed to be an inseparable part of the obligation to impart education. This is particularly in respect to the disciplinary proceedings that may be initiated against a particular employee. It is only where the removal of an employee of non-teaching staff is regulated by some statutory provisions, its violation by the employer in contravention of law may be interfered with by the Court. But such interference will be on the ground of breach of

law and not on the basis of interference in discharge of public duty.

75.5. From the pleadings in the original writ petition, it is apparent that no element of any public law is agitated or otherwise made out. In other words, the action challenged has no public element and writ of mandamus cannot be issued as the action was essentially of a private character.

76. In view of the aforesaid discussion, we hold that the learned Single Judge of the High Court was justified in taking the view that the original writ application filed by Respondent 1 herein under Article 226 of the Constitution is not maintainable. The appeal court could be said to have committed an error in taking a contrary view."

42. In view of the aforesaid, nothing more is required to be discussed in the present appeals. We are of the view that the High Court committed an egregious error in entertaining the writ petition filed by the respondents herein holding that the appellant society is a "State" within Article 12 of the Constitution. Undoubtedly, the school run by the Appellant Society imparts education. Imparting education involves public duty and therefore public law element could also be said to be involved. However, the relationship between the respondents herein and the appellant society is that of an employee and a private employer arising out of a private contract. If there is a breach of a covenant of a private contract, the same does not touch any public law element. The school cannot be said to be discharging any public duty in connection with the employment of the respondents.

ii. Doctrine of Legitimate Expectation

43. During the course of the arguments, a submission was canvassed that the respondents were under a legitimate expectation that their service conditions and salary would not be unilaterally altered by the appellant society to their disadvantage. Thus, as the respondents were neither consulted with nor taken in confidence by the appellant society before effecting the changes in their service conditions, it amounted to a breach of their legitimate expectation, thereby making it a fit case for the exercise of writ jurisdiction by the High Court.

44. The doctrine of legitimate expectation was also referred to and relied upon by the single Judge of the High Court as one of the reasons to allow the writ petition filed by the respondents. The relevant observations made by the single Judge in the judgment and order dated 05.08.2014 are reproduced hereinbelow:-

> *"28. We also have to appreciate the "legitimate expectations" of the petitioners who expect equity, fairplay and justice, from a public authority which respondent nos. 2, 3 and 7 indeed are and, therefore, they must meet such standards as a public authority ought to 15 have. The new management of the School, including respondent no.2, 3 and 7 are hereby directed not to change or vary the conditions of the petitioners to their disadvantage."*

45. Before parting with the matter, we deem it necessary to answer the aforesaid submission of the respondents. This Court in ***Union of India v. Hindustan Development Corporation*** reported in (1993) 3 SCC 499 enunciated that the doctrine of legitimate expectation is a creature of public law aimed at combating arbitrariness in executive action by public authorities. It held thus:-

> *"Time is a three-fold present: the present as we experience it, the past as a present memory and future as a present expectation. For legal purposes, the expectation cannot be the same as anticipation. It is different from a wish, a desire or a hope nor can it amount to a claim or demand on the ground of a right. However earnest and sincere a wish, a desire or a hope may be and however confidently one may look to them to be fulfilled, they by themselves cannot amount to an assertable expectation and a mere disappointment does not attract legal consequences. A pious hope even leading to a moral obligation cannot amount to a legitimate expectation. The legitimacy of an expectation can be inferred only if it is founded on the sanction of law or custom or an established procedure followed in regular and natural sequence. Again, it is distinguishable from a genuine expectation. Such expectation should be justifiably legitimate and protectable. Every such legitimate expectation does not by itself fructify into a right and therefore it does not amount to a right in the conventional sense."*

46. In ***Ram Pravesh Singh v. State of Bihar*** reported in (2006) 8 SCC 381, this Court explained the doctrine of legitimate expectation in details as follows:-

> *"What is legitimate expectation? Obviously, it is not a legal right. It is an expectation of a benefit, relief or remedy, that may ordinarily flow from a promise or established practice. The term "established practice" refers to a regular, consistent, predictable and certain conduct, process or activity of the decision-making authority. The expectation should be legitimate, that is, reasonable, logical and valid. Any expectation which is based on sporadic or casual or random acts, or which is unreasonable, illogical or invalid cannot be a legitimate expectation. Not being a right, it is not enforceable as such. It is a concept fashioned by the courts, for judicial review of administrative action. It is procedural in character based on the requirement of a higher degree of fairness in administrative action, as a consequence of the promise made, or practice established. In short, a person can be said to have a "legitimate expectation" of a particular treatment, if any representation or promise is made by an authority, either expressly or impliedly, or if the regular and consistent past practice of the authority gives room for such expectation in the normal course. As a ground for relief, the efficacy of the doctrine is rather weak as its slot is just above "fairness in action" but far below "promissory estoppel". It may only entitle an expectant : (a) to an opportunity to show cause before the expectation is dashed; or (b) to an explanation as to the cause for denial. In appropriate cases, the courts may grant a direction requiring the authority to follow the promised procedure or established practice. A legitimate expectation, even when made out, does not always entitle the expectant to a relief. Public interest, change in policy, conduct of the expectant or any other valid or bona fide reason given by the decision-maker, may be sufficient to negative the "legitimate expectation". The doctrine of legitimate expectation based on established practice (as contrasted from legitimate expectation based*

on a promise), can be invoked only by someone who has dealings or transactions or negotiations with an authority, on which such established practice has a bearing, or by someone who has a recognised legal relationship with the authority. A total stranger unconnected with the authority or a person who had no previous dealings with the authority and who has not entered into any transaction or negotiations with the authority, cannot invoke the doctrine of legitimate expectation, merely on the ground that the authority has a general obligation to act fairly."

47. In ***Jitender Kumar v. State of Haryana*** reported in (2008) 2 SCC 161, this Court, while differentiating between legitimate expectation on the one hand and anticipation, wishes and desire on the other, observed thus:-

"A legitimate expectation is not the same thing as an anticipation. It is distinct and different from a desire and hope. It is based on a right. [See Chanchal Goyal (Dr.) v. State of Rajasthan [(2003) 3 SCC 485 : 2003 SCC (L&S) 322] and Union of India v. Hindustan Development Corpn. [(1993) 3 SCC 499] It is grounded in the rule of law as requiring regularity, predictability and certainty in the Government's dealings with the public. We have no doubt that the doctrine of legitimate expectation operates both in procedural and substantive matters."

48. A reading of the aforesaid decisions brings forth the following features regarding the doctrine of legitimate expectation:

a. *First*, legitimate expectation must be based on a right as opposed to a mere hope, wish or anticipation;

b. *Secondly*, legitimate expectation must arise either from an express or implied promise; or a consistent past practice or custom followed by an authority in its dealings;

c. *Thirdly*, expectation which is based on sporadic or casual or random acts, or which is unreasonable, illogical or invalid cannot be treated as a legitimate expectation;

d. *Fourthly*, legitimate expectation operates in relation to both substantive and procedural matters;

e. *Fifthly*, legitimate expectation operates in the realm of public law, that is, a plea of legitimate action can be taken only when a public authority breaches a promise or deviates from a consistent past practice, without any reasonable basis.

f. *Sixthly*, a plea of legitimate expectation based on past practice can only be taken by someone who has dealings, or negotiations with a public authority. It cannot be invoked by a total stranger to the authority merely on the ground that the authority has a duty to act fairly generally.

49. The aforesaid features, although not exhaustive in nature, are sufficient to help us in deciding the applicability of the doctrine of legitimate expectation to the facts of the case at hand. It is clear that legitimate expectation, jurisprudentially, was a device created in order to maintain a check on arbitrariness in state action. It does not extend to and cannot govern the operation of contracts between private parties, wherein the doctrine of promissory estoppel holds the field.

50. We have discussed in detail in preceding paragraphs that even if the function being performed by a private educational institution in imparting education may be considered as a public function, the relationship between the administration of such an institution and its employees remains a contractual one, falling within the ambit of private law.

51. Nothing has been placed on record by the respondents to show that any express or implied promise was made by the appellant regarding keeping their salary and service conditions intact. There have been no past negotiations or dealings between the respondents and the appellant society as the dispute arose as soon as the appellant took over the administration of the school. Moreover, there is no statutory obligation on the appellant society which requires that the salaries and allowances of the respondents are to be kept at par with what is payable to teachers of Government institutions. Lastly, the appellant society, for the purposes of its relationship with its employees, cannot be regarded as a public or Government authority.

52. We are of the view that for all the aforesaid reasons, the doctrine of legitimate expectation will have no applicability to the facts of the present case. The submission of the respondents in that regard is thus answered accordingly.

H. CONCLUSION

53. In the result, the appeals succeed and are hereby allowed. The impugned judgment and order passed by the High Court is hereby set aside.

54. Although we have set aside the impugned judgment and order passed by the High Court, yet having regard to the submissions made on behalf of the appellants as recorded in paragraph 6 of the order dated 15.02.2021 (extracted in paragraph 4 herein above) as also the fact that all the respondents as on date are serving with the appellant society, they shall continue to serve on the terms and conditions as stipulated by the appellant society. The appellant society shall not discharge the respondents from service.

55. There shall be no order as to costs.

Result of the case: Appeals allowed.

†*Headnotes prepared by:* Ankit Gyan

[2024] 7 S.C.R. 2248 : 2024 INSC 505

Kazi Akiloddin
v.
State of Maharashtra & Ors.

(Civil Appeal No. 6776-6777 of 2013)

10 July 2024

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

Issue for Consideration

What should be the market value of the land of the appellant as on 03.06.1999; does the site of the appellant fall within 'Blue Zone' as contended by the acquiring body-Vidarbha Irrigation Development Corporation (VIDC); if it falls within the 'Blue Zone', what should be the market value for the land; if the land or any part thereof is not to be determined as a 'Blue Zone', what was the 'No Construction Zone' as per the extant laws; and what should be the market value payable for that portion; what should be the market value payable for any portion, falling outside the 'No Construction Zone'.

Headnotes†

Maharashtra Regional and Town Planning Act, 1966 – ss.14(j), 21, 22(j) – Land Acquisition Act, 1894 – s.4 – Land of the appellant, if fell within the blue zone – Market value thereof as on 03.06.1999, the date of the Section 4 notification:

Held: High Court not justified in declaring the entire land of the appellant as falling within the blue zone – If an acquiring body relies on a statutory injunction, to establish that the land has no potential, then the burden is on the said acquiring body to demonstrate without any ambiguity that such a statutory interdict is in place – VIDC did not discharge the burden in demonstrating that statutorily there was a valid demarcation of a "Blue Zone" on the date of the s.4 notification, under the Act – What was established was only the existence of the bye-law i.e. "Standardised Building Byelaws and Development Control Rules for "B" and "C" Class Municipal Councils of Maharashtra" – As on 03.06.1999, i.e. the date of the s.4 notification for the appellant's land, the no construction zone can only be taken as 15 meters from the defined boundary of the water course which is the Morna river – If the site to the extent it is within the 15 meters of the defined boundary of

* Author

water course, that part alone could be said to have no potential for development – The land beyond the 15 meters mark from the defined boundary of the water course in the site of the appellant should be treated independently – Land of the appellant except to the extent of 15 meters from the defined boundary of the water course is not covered by the no construction zone – Considering the potentiality of the land and its situs, except for the lands upto 15 meters from the defined boundary of the water course, Rs.100/- per sq.ft. awarded for 68.3% of the total admeasuring area – Thus, appellant entitled to Rs.100/- per sq. ft. for the 68.3% (approx.) of the balance area, after excluding the land area, if any, which falls within the 15 meters from the defined boundary of the water course – For the land falling within the no construction zone, if any, as per the Standardized Building Byelaws, he will be paid at the rate determined by the Special Land Acquisition Officer in the award – Appellant entitled to rental compensation @ 8% of the awarded amount, as directed – Operative order of the Reference Court modified. [Paras 41, 43, 45, 56, 57, 66]

Land Acquisition – Exemplars – Reliance upon – Two transactions, one between independent/unrelated parties and the other between related parties – Both transactions took place without much time gap:

Held: When there is a choice between an exemplar where the transaction is between unrelated parties dealing at arm's length and between an exemplar where the transaction is between related parties of a higher value, both of which are broadly around the same period, prudence would dictate and common sense would command that the value set out in the transaction between unrelated parties is accepted – In the present case, the transaction which is at arm's length is accepted and the market value of the amount of Rs. 100/- per sq. ft. is accepted and the claim of Rs. 175/- per sq. ft is rejected. [Paras 62, 65]

Land Acquisition – Development charges – Determination – Acquisition for construction of a flood protection wall:

Held: The purpose for which the land is acquired must be taken into consideration while determining development charges – Since the acquisition was for construction of a flood protection wall, thus there can be no question of any development or any cost thereof – Land was ripe for use for building purposes – In the special facts and circumstances of the case, no deduction ordered based on the

cost for incurring development – Value fetched by smaller plots, when can be applied in valuing larger tracts of land, discussed. [Paras 67, 66]

Case Law Cited

State of Orissa v. Brij Lal Misra and Others [1995] Supp. 2 SCR 354 **: (1995) 5 SCC 203;** *Sardara Singh and Others v. Land Acquisition Collector, Improvement Trust, Rupnagar and Others* **(2020) 14 SCC 483;** *Om Parkash and Others v. State of Haryana* **(2016) 13 SCC 190;** *Special Land Acquisition Officer v. Karigowda and Others* [2010] 5 SCR 164 **: (2010) 5 SCC 708;** *Administrator General of West Bengal v. Collector, Varanasi* [1988] 2 SCR 1025 **: (1988) 2 SCC 150;** *Himmat Singh & Ors. v. State of Madhya Pradesh & Anr.* **(2013) 16 SCC 392;** *Nelson Fernandes v. Land Acquisition Officer* [2007] 3 SCR 563 **: (2007) 9 SCC 447;** *Bhag Singh and Others v. Union Territory of Chandigarh through the Land Acquisition Collector, Chandigarh* [1985] Supp. 2 SCR 949 **: (1985) 3 SCC 737;** *Ashok Kumar and Another v. State of Haryana* [2016] 1 SCR 1084 **: (2016) 4 SCC 544 – relied on.**

Kazi Akiloddin Sujaoddin v. State of Maharashtra & Ors. [2013] 7 SCR 382 **: (2013) 14 SCC 8;** *Munusamy v. Land Acquisition Officer* [2021] 9 SCR 1 **: (2021) 13 SCC 258;** *Mehrawal Khewaji Trust (Registered), Faridkot and Others v. State of Punjab and Others* [2012] 4 SCR 24 **: (2012) 5 SCC 432;** *Bhagwathula Samanna and Others v. Special Tahsildar and Land Acquisition Officer, Visakhapatnam Municipality, Visakhapatnam* [1991] Supp. 1 SCR 172 **: (1991) 4 SCC 506;** *Charan Dass (Dead) by LRs. v. H.P. Housing & Urban Development Authority & Ors.* [2009] 14 SCR 163 **: (2010) 13 SCC 398;** *State of M.P. v. Radheshyam* [2022] 9 SCR 743 **: 2022 SCC OnLine SC 162;** *State of Maharashtra and Others v. Digamber Bhimashankar Tandale & Ors.* [1996] 2 SCR 90 **: (1996) 2 SCC 583 – referred to.**

List of Acts

Maharashtra Regional and Town Planning Act, 1966; Land Acquisition Act, 1894.

List of Keywords

Land Acquisition; Compensation; Market value of the land; Exemplars; Development charges; Special Land Acquisition Officer; Acquisition for construction of a flood protection wall; Blue Zone;

Blue colour; No Construction Zone; Water course; Potentiality of the land; Potential value; Building Byelaws; Rental compensation; Transactions, Independent/unrelated parties; Related parties; Agricultural purposes; Non-agricultural purposes; Non-agricultural land; Proximity; Developed areas.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 6776-6777 of 2013

From the Judgment and Order dated 17.06.2013 of the High Court of Bombay at Nagpur in FA No. 1210 of 2008 and FA No. 6 of 2009

With

Civil Appeal Nos. 7322, 7323, 7324, 7325, 7326, 7327, 7328 and 7329 of 2024

Appearances for Parties

Ranjit Kumar, Sr. Adv., R. B. Agrawal, Satyajit A Desai, Ansuman Singh, Siddharth Gautam, Gajanan N Tirthkar, Abhinav K. Mutyalwar, Vijay Raj Singh Chouhan, Lav Kumar, Ms. Anagha S. Desai, Nishant R. Katneshwarkar, Amol Nirmalkumar Suryawanshi, Ms. Srishty Pandey, Uday B. Dube, Himanshu Chaubey, Siddharth Garg, Srijan Sinha, Ms. Pallavi Aggarwal, S. S. Shroff, Shrirang B. Varma, Siddharth Dharmadhikari, Aaditya Aniruddha Pande, Bharat Bagla, Sourav Singh, Aditya Krishna, Ms. Preet S. Phanse, Adarsh Dubey, Advs. for the appearing parties.

Judgment / Order of the Supreme Court

Judgment

K.V. Viswanathan, J.

I. Civil Appeal Nos. 6776-6777/2013 (Kazi Akiloddin Vs. State of Maharashtra & Ors.)

A. Facts

1. These Civil Appeals call in question the correctness of the judgment dated 17.06.2013 of the High Court of Judicature at Bombay, Nagpur Bench, Nagpur in First Appeal No. 1210 of 2008 (filed by the appellant herein) and First Appeal No. 6 of 2009, which was a cross appeal

filed by the State of Maharashtra & Ors. By the said judgment, the High Court had dismissed the appeal of the appellant. Dealing with the appeal of the State, the High Court, while allowing the same, directed that the appellant shall refund the excess amount withdrawn with interest @ 9% p.a. from the respective dates of withdrawal.

2. The facts lie in a narrow compass. The appellant is the owner of the land bearing Survey No.1 admeasuring 1 hectare and 1700 sq. meters (1,25,937 sq. ft.) at Mouza Akola (Bujurg), Taluk and District Akola.

3. A Section 4 notification under the Land Acquisition Act, 1894 (for short 'the Act') was issued for acquisition of the subject land on 03.06.1999. Prior to this, on 15.11.1998, in view of the proposal to acquire the subject land for construction of a flood protection wall, the appellant was approached for handing over the subject land on the assurance of rental compensation. On 15.11.1998, the possession was also taken. A Section 6 notification under the Act was issued on 02.12.1999. In the award proceedings, the appellant claimed compensation @ of Rs. 500 per sq. ft. On 04.08.2000, the Land Acquisition Officer passed an award to the tune of Rs. 5,61,000/- per hectare for the subject land, which works out to Rs. 5/- per sq. ft. (approx.). Importantly, in the award, there is no reference to the land falling under 'Blue Zone' which has become the main issue in controversy between the parties before the Reference Court, the High Court and this Court.

4. Before the Reference Court, the appellant claimed additional compensation of Rs. 4,30,84,000/- @ of Rs. 500/- per sq. ft. for the acquired land of 84,481 sq. ft. on the premise that in the said area 43 plots have been carved out by him. In the break up given for 1 Hectare, 17 R totalling 1,25,937 sq. ft. following was provided:

> Total under plots area - 84481 sq. ft. (68.3% approx.)
>
> Total under roads area – 30106 sq. ft.
>
> Total under open space area – 11298 sq. ft.

He also claimed compensation of Rs. 25 lakhs for the expenditure made on the road and also prayed for damages of Rs. 50 lakhs. Except for claiming expenditure for laying road to the tune of Rs. 25 lakhs, no enhanced compensation was claimed for an area of 41,404 sq. ft. (The area of the road and the open space area as stated above).

5. Before the Reference Court, the appellant examined himself as PW-1, Mohd. Nadir, photographer, was examined as PW-2 and T.N. Bhoob, Civil Engineer, was examined as PW-3. The State examined K.S. Bhoyar, Sub-Divisional Engineer, as DW-1 and Laxman Bhika Raut, Land Acquisition Officer, as DW-2. The appellant in his deposition stated that he had planned to convert the land to non-agricultural purposes. Accordingly, the appellant deposed that he had measured and demarcated all the 43 plots in the land; that the land was allotted Seat No. 28-D and Plot No. 20 in Akola City Nazul record and that the payment receipt evidencing payment for conversion to non-agricultural purpose was also available on record. The appellant deposed that the land was touching the Akola Gaothan and that all the adjacent lands were put to residential use; that the surrounding lands have been converted to non-agricultural purpose; that the acquired land was within the municipal limits of Akola City surrounded by police quarters, other government quarters, Maratha Mahasangh Hostel, Swami Vivekanand Ashram, Jaju Housing Society, Geeta Nagar, Laxmi Nagar, Sneh Nagar, A.P.M.C. Sub-Market, Luxury Bus Stand, Dr. Ambedkar Nagar, BR High School and Kamala Nagar.

6. As exemplars, certified copies of sale transaction dated 10.05.1999 (exhibit-71) whereby plot no. 50 of an area of 3,000 sq. ft. out of layout Survey No. 7/2 purchased for a consideration of Rs. 5,25,000/- averaging to Rs. 175/- per sq. ft. was produced by the appellant. A Sale Deed of 17.11.1999 (exhibit-72) evidencing an average price of Rs. 601/- per sq. ft. was also produced. Index of Sale Deed of 14.07.1998 @ of Rs. 1047 per sq. ft. (exhibit -73) was produced. Sale Deed of 24.08.1998 @ of Rs. 422 per sq. ft. (exhibit-33) was produced. The appellant/claimant pleaded that the above transactions were at a nominal distance of 200 ft. to 500 ft. and on that basis, he claimed an additional compensation @ of Rs. 500/- per sq. ft. for the 84,481 sq. ft. land as indicated above.

7. PW-2 Mohd. Nadir, photographer, also spoke about the land being adjacent to the Akola Gaothan and the existence of Rahat Nagar Police locality towards west and Maratha Mahasangh towards north. Photographs were marked.

8. PW-3, T.N. Bhoob, deposed that he referred to the town planning development plan at the time of inspection of the property and that the acquired land did not fall within the 'Blue Zone' area.

9. DW-1, K.S. Bhoyar, deposed that a joint measurement was carried out and a map was prepared depicting the acquired land. In the map, the zones were shown. According to DW-1, the land in question in field survey no. 1 was situated in 'Blue Zone' and was also on the river bed. DW-1 stated that the land was an agricultural land but at the relevant time, it was barren and was never converted to non-agricultural purpose. According to DW-1, the land was valueless as it came under 'Blue Zone'; that the land was always covered by water whenever there was flood and that is the reason why the land was taken for the construction of flood protection wall and even the appellant executed a Rajinama letter. DW-1 stated that he had consulted the Town Planning Authority and collected the town planning map also.

10. In the cross-examination on 22.01.2008 , DW-1 deposed that he had not brought the original map on the basis of which Exh.141 was prepared and that he was not in a position to say in which year Exh.141 was prepared. He though added that it could have been prepared probably in 1998-99 but even he could not definitely provide the date and month of its preparation. DW-1 also stated that after joint measurement, the Taluka Inspector of Land Records (TILR) office gave the measurement map and in that map the 'Blue Zone' is not shown. He denied the suggestion that there was no joint measurement and no map was prepared.

11. DW-2 Laxman Bhika Raut, Land Acquisition Officer, deposed that he visited the site and inspected the same and found the land to be in the river bed and comes under 'Blue Zone'. DW-2 stated that in the award he had not noted the location and other descriptions of the property and he could not assign any reason as to why he had not so mentioned in the award. DW-2 admitted that he did not mention in the award about the inspection of the property. DW-2 stated that the sale instance referred to in the case of Brijmohan Bhartiya was not considered as that land was far away from the suit property. DW-2 admitted that there was no reference in the award Exh.46 to the effect that the suit property was in a 'Blue Zone' and that he could not assign any reason why it was not so referred.

B. Findings of the Reference Court

12. The Reference Court, by its judgment dated 02.08.2008, after setting out the legal position that the potentiality of the acquired lands is to

be seen as relevant consideration, set out to analyze the evidence. It noticed the deposition of the claimant witnesses to the effect that the land was abutting the Akola Gaothan; that adjoining properties have been converted to non-agricultural purpose; that the suit property was surrounded by residential houses, societies, sub-markets and luxury bus stand; that maps and photographs establishing the said fact have been produced and held that the claimant had discharged the initial onus. Dealing with the evidence of the State, it held that maps produced at Exh.57 to Exh.59 and Exh.141 only showed that a small strip of blue colour was shown as passing through the suit property and that it was not clear whether the whole area of the property is covered under 'Blue Zone'. It highlighted the fact that in the award Exh.46 there was no reference about the suit property falling in the 'Blue Zone' and that the said factor had no bearing while computing the award amount. After discussing the proximity of the property to developed areas, it held that the acquired property was within the municipal limit of Akoli city and that evidence on record showed that the property was surrounded by public offices, roads and Government residential quarters.

13. The Reference Court held that the Land Acquisition Officer had not worked out the market value properly since many relevant factors were ignored. It referred to Exh.71 Sale Exemplar dated 10-5-1999 and the index II extracts at Exh.73(14-7-98) and Exh.74(27-8-1998) to conclude that the suit property had high potential value. It noticed that under award Exh.46, the suit property (Survey No. 1), Survey No. 5/2, Survey No. 7 and Survey No. 2 situated at Akoli (Bk) were acquired by the same notification for the same purpose of construction of the said protection wall. On that basis, it held that the claimants were entitled to get the compensation at the same rate. It took on record the certified copy of the award passed in LAC No. 183 of 2000 dated 15.10.2005 at Exh.88 and found that in that case the Reference Court determined the market value @ of Rs. 100/- per sq. ft. It also noticed that copy of the award of LAC No. 209 of 2022 dated 10.08.2006 with regard to Survey No. 6, Survey No. 7 and Survey No. 60 of Akoli Khurd were acquired by another notification for the same purpose. In that case also, the Reference Court determined the market value @ of Rs. 100/- per sq. ft. Though the certified copy of the said award was not exhibited, it was taken on record as Exh.131 C. Thereafter, it held that the appropriate market value

would be Rs. 100/- per sq. ft. for the acquired property and ordered the same with all the other consequential benefits.

C. Findings of the High Court

14. The appellant and the State filed Appeals and cross Appeals before the High Court. The High Court held that on perusal of the maps, it was clear that the suit land was just on the bank of the river Morna and that the other Survey Nos. 5, 6 and 7 [which were the lands acquired in the awards relied upon by the Reference Court] were well above survey no. 1 beyond the Gaothan of Akoli (Bk) away from the river. The High Court found that Survey Nos. 5, 6 and 7 were further sub-divided and Survey No. 7/2 had been converted to non-agricultural use by order dated 08.07.1982. According to the High Court, the sale deed (Exh.71) dated 10.05.1999 was in respect of Plot No. 50 admeasuring 3000 sq. ft. from Survey No. 7/2 @ of Rs.175 per sq. ft. The High Court held that the sale deed (Exh.71) could not be taken into account since the acquired land in the present appeals (Survey No. 1) were never converted to non-agricultural use. Insofar as the sale deed (Exh.72) dated 17.11.1999 was concerned, it rejected the same holding that the sale deed was after the Section 4 notification and that the sale deed dealt with a small piece of land and also appeared to be suspicious for the reason that while Exh.71 showed value @ of Rs. 175 per sq. ft., Exh.72 which was after the notification under Section 4 showed value @ of Rs. 601 per sq. ft. Insofar as Exh.33 was concerned, the High Court held that it was not shown from which survey number it arose and as to when the property was converted to residential use.

15. The High Court further held that the acquired land in the appeal was situated on the bank of river Morna and relied on the evidence of DW-2 Laxman Bhika Raut, the Land Acquisition Officer in support of the same. It relied on the findings of the Reference Court with regard to the blue colour only affecting a small strip of the land and held that the appellant had not seriously challenged the findings. It further held that upon perusal of Exh.141 map the finding of the Reference Court that only a small strip of land was affected by blue colour was also wrong since in Exh.141, major area of the suit land was in the 'Blue Zone'. Thereafter, it held that since the suit property was affected by the 'Blue Zone', the same could not have been converted into non-agricultural use like other adjoining survey numbers and observed

that perhaps that was why no attempt to convert the land to non-agricultural use was made. It relied on Exh.67 dated 25.02.2000 which was a communication by the Assistant Director, Town Planning, Akola to the Land Acquisition Officer. That letter mentioned in para 2 that the acquired land in the appeal fell in a no development zone and as such was not eligible to be converted to non-agricultural purpose.

16. Thereafter, the High Court concluded that the suit land was not having non-agricultural potential unlike Survey Nos. 5/2, 6, 7 and 8. It held that the award @ of Rs. 100/- per sq. ft. was incorrect. It rejected the contention about the proposed layout of 43 plots since the land could not be converted.

17. In spite of noticing that certain areas claimed by the appellant as developed areas were reckoned and excluded from the computation of market value, the High Court still held that the value required for carrying out development ought to be deducted. Holding so, it held that deduction to the extent of 70% area was required to be made and as such went on to allow the appeal of the State and restored the award of the Land Acquisition Officer. It further ordered refund by the appellant of the compensation withdrawn with interest @ 9% p.a. Ultimately, the Appeal of the appellant was dismissed and that of the State allowed. Aggrieved, the appellant is in Civil Appeal Nos. 6776-6777 of 2013 before us.

D. Contentions:

18. Mr. Himanshu Chaubey, learned counsel, diligently presented the case for the appellant. Learned Counsel contended that Exh.141 was prepared on the basis of another map and admittedly the original map was never produced in Court; that under Section 83 of the Indian Evidence Act, plans made for the purpose of any cause must be proved to be accurate; that DW-1 K.S. Bhoyar (Sub Divisional Engineer) deposed that Exh.141 was prepared as part of joint measurement to show the exact situation of the land and hence presumption of Section 83 is not available to the State; that Exh.141 was at best a secondary evidence and is admissible only if it is proved that the original has been destroyed or lost or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in a reasonable time and as such argued that the ingredients for admitting secondary evidence has not been established.

19. Learned counsel further argued that there was no notification or order brought on record by the respondent to prove that the subject land was specified as a 'Blue Zone' and that the development plan, as placed on record by the appellant, showed that no markings were present. Learned counsel relied on Section 14(j) and 22(j) of the Maharashtra Regional and Town Planning Act, 1966 (hereinafter referred to as the 'MRTP Act') to contend that the master plan must show the flood control area as the 'Blue Zone' and contended that no such marking was in the master plan. Learned counsel argued that no rules or regulations have been brought on record to prove that respondent no. 2 the Special Land Acquisition Officer is authorized to prepare the map in the absence of any order; that the High Court erred in only going by the evidence of DW-1, particularly when DW-1 did not remember as to when the map was made and furthermore the author of the map-Sh. A.K. Kulkarni was also not examined. Learned Counsel relied on the affidavit filed by the State of Maharashtra dated 02.04.2024, to buttress his submission.

20. Learned counsel contends that admittedly as on the date of issuance of Section 4 notification i.e. 03.06.1999, the blue zone lines had not been demarcated and the construction was solely governed by the 1974 byelaws. Learned counsel contends that even the documents sought to be relied upon by the respondent-State have been brought on record for the first time before this Court and admittedly other than the map i.e. Exh.141, no other document has been brought on record to establish that the land of the appellant fell under the 'Blue Zone'. Learned Counsel contends that the High Court has failed to consider Exh.52, namely, the map issued by the Authority whereby the land of the appellant was granted Nazul Sheet No. 28-D and Plot No. 20. Learned counsel contends that any land for which Nazul Sheet is issued is considered as a non-agricultural land and relies on the award dated 05.02.2008 in relation to acquisition of Survey No. 11 Shahnawazpur, Akola City. Learned counsel contended that the Land Acquisition Officer did not whisper about the 'Blue Zone' issue in his award; and that the Land Acquisition Officer proceeded on the basis of the exemplar from Survey No. 9/1A and the issue of the 'Blue Zone' was raised for the first time before the Reference Court.

21. Learned counsel argued that the potentiality of the land as established by the evidence has been ignored by the High Court. Learned counsel submits that pending the Appeal before the High Court, the Income

Tax Department had passed an order dated 31.08.2012 wherein the land of the appellant was considered as an urban land and a non-agricultural land. Learned counsel stated that the respondent in the said proceedings did not object to the same and rather acceded to the finding that the land of appellant which is acquired is a non-agricultural land.

22. Learned counsel relying on the standardized building byelaws and Government resolution of 02.04.1974 contended that the acquired land was not in a no-construction zone and argued that the State Authorities have failed to bring on record any document to establish any average flood mark. Learned Counsel stated that as per the Joint Measurement Report submitted by the respondent-State Irrigation Department before this Court, the distance between the land of the appellant and the defined boundary of the water course is between 15 to 20 meters and therefore, as per the extant byelaws the land of the appellant is outside the no-construction zone. The learned counsel argued that the said Joint Measurement Report was prepared by the respondent at the time of the acquisition and has even been referred to in the evidence of DW-1. It is stated that DW-1 further admitted that based on Exh.32 there was an open land between the river Morna and Survey No. 1. According to the learned counsel, the explanation offered by the VIDC (Vidarbha Irrigation Development Corporation) during the hearing that the gap is due to the curved bank of the river and ought not to be considered as a gap is unacceptable. According to the learned counsel, such an argument is itself an admission to the fact that *firstly* the land of the appellant was at a height from the river and *secondly* that there is a gap between the river and the land of the appellant. According to the learned counsel for the appellant, the width of the flood wall is 30 meters taking the measurement from the defined boundary water course till the end of the wall; that as per the Joint Measurement Map the width of the appellant land is on an average between 50 to 55 meters and the counsel contended that hence the total distance from the boundary of the water course till the end of the appellant land is 65 meters. Learned counsel contended that in spite of the rules declaring that only land upto 15 meters from the defined boundary of the water course as falling under the no development zone, the whole land of the appellant has been considered as falling under the no development zone.

23. The learned counsel assailed the finding of the High Court about failure to convert the land to non-agricultural by contending that the appellant had obtained a Nazul Plot No. from the revenue authority and carved out 43 plots and even fees were paid and the receipt was placed on record; and that the only reason why steps could not be taken was in the meantime Section 4 notification came to be issued. Learned counsel contended that sale instances cited have not been taken into consideration by the High Court. In this regard, he relied on Exh.33 (Rs. 422 per sq. ft.), Exh.71 (Rs. 175 per sq. ft.) and the sale index of Survey No. 5/1,in Akholi Bk where there was a transaction of sale deed dated 12.02.1999 of Rs. 1,50,000/- for 1500 Sq. ft. area of plot no 78. Learned counsel contended that the highest exemplar should have been considered. Learned counsel argues that the question of development charges does not arise since that purpose of acquisition did not entail any development.

24. Mr. Uday B. Dube, learned Counsel for the Vidarbha Irrigation Development Corporation (VIDC) strongly opposed the appellant's submissions and contended that admittedly the land is situated on the bank of the river and concurrent findings have been recorded in that regard. Learned counsel placed reliance on the evidence of DW-1 in respect of the location of the land. Learned counsel relied on Exh.67 dated 25.02.2000 wherein it is recorded that Survey No. 1 fell in a no development zone. Learned counsel relied on the evidence of DW-2-the Special Land Acquisition Officer. Learned Counsel argued that the soil for the wall was obtained from digging the land of the appellant. Learned counsel submits that the appellant in spite of being a developer has not obtained a non-agricultural use permission; learned counsel contends that the land was prone to floods and that the award of Rs. 100/- per sq. ft. in the case of appellant was totally untenable. Learned counsel stated that the map relied upon by the appellant to show that there was a road in between the land of the appellant and river is completely incorrect and that the dotted land denoted the slope. Learned counsel prayed that the map produced during the hearing in this Court should be rejected.

25. Insofar as the issue of 'Blue Zone' is concerned, learned counsel contended that it was the duty of the Irrigation Department to draw blue or red line and that the Irrigation Department has done its duty. In the written submission of VIDC, it is categorically averred as follows :-

> "*Mere failure on the part of the Town Planning Department to give effect to it in Development Plan would not have any bearing on the valuation*".

26. Learned counsel submitted that three sale deeds produced in the matter of Bhartiyas (LAC No. 183) were suspicious transactions between related parties, and hence prayed that the Appeals be dismissed.

27. We have also heard Mr. Shrirang B. Varma, the learned counsel for the State who has placed reliance on the affidavit dated 02.04.2024 filed by them pursuant to the order of 20.03.2024. We have considered the affidavit in detail hereinbelow.

28. We have given our anxious consideration to the contentions urged by the parties.

E. Questions

29. The following questions arise for consideration:

(i) What should be the market value of the land of the appellant as on 03.06.1999? To answer this, the following further questions need to be considered.

(a) Does the site of the appellant fall within 'Blue Zone' as contended by the acquiring body –VIDC?

(b) If it falls within the 'Blue Zone', what should be the market value for the land?

(c) If the land or any part thereof is not to be determined as a 'Blue Zone', what was the 'No Construction Zone' as per the extant laws and what should be the market value payable for that portion?

(d) What should be the market value payable for any portion, falling outside the 'No Construction Zone'?

Reasoning and conclusion:

We have considered question no. 1(a) to 1(d) together for convenience.

30. During the course of hearing on 20th March, 2024, we made the following order:

> "1. Arguments by the parties remained inconclusive. Meanwhile, original records have been requisitioned.

2. Learned counsel for the parties seek and are granted time to inspect the original record and make further submissions.

3. An officer of the Irrigation Department is present along with some latest photographs of the site. However, he has not brought the original record regarding fixation of blue line by the Irrigation Department in purported exercise of its power under the Maharashtra Regional & Town Planning Act, 1966.

4. Mr. Uday B. Dube, learned counsel for the respondent Corporation undertakes to produce such record."

31. Pursuant to the said Order, a duly sworn affidavit of 2nd April, 2024 has been filed by the Assistant Director of Town Planning (Branch Office, District Akola) which reveals certain telling facts. The affidavit states that its contents are confined to marking of flood lines in the city Akola and the maps thereof. It avers that the land in question in these Appeals was situated outside the Municipal Council of Akola which fact, however, is disputed by the appellant. Be that as it may, the affidavit acknowledges that under Section 14(j) of the MRTP Act, the proposals for irrigation, water supply and hydro-electric, works, flood control and prevention of river pollution are the constituents of the regional plan. It further avers that as per the provisions of Section 22(j) of the MRTP Act, the proposals for flood control and prevention of river pollution are constituents of the development plan.

32. Digressing a bit from the affidavit, it may be pointed out herein that under the MRTP Act, Section 2(25) defines regional plan to mean a plan for the development or redevelopment of a region which is approved by the State Government and has come into operation under the Act. Under Section 21, development plan is defined to mean a plan for the development or redevelopment of the area within the jurisdiction of a planning authority and includes revision of a development plan and proposals of a special planning authority for development of land within its jurisdiction. Section 14 which deals with the contents of the regional plan along with sub-clauses - a and j are extracted herein below:

"**14. Contents of Regional Plan**

Subject to the provisions of this Act and any rules made thereunder for regulating the form of a Regional Plan and

the manner in which it may be published, any such Regional plan shall indicate the manner in which the Regional Board propose that land in the Region should be used, whether by carrying out thereon development or otherwise, the stages by which any such development is to be carried out, the network of communications and transport, the proposals for conservation and development of natural resources, and such other matters as are likely to have an important influence on the development of the Region; and any such plan in particular, may provide for all or any of the following matters, or for such matters thereof as the State Government may direct, that is to say-

(a) allocation of land for different uses, general distribution and general locations of land, and the extent to which the land may be used as residential, industrial, agricultural, or as forest, or for mineral exploitation;

xxx xxx

(j) proposals for irrigation, water supply and hydro-electric works, flood control and prevention of river pollution;"

33. Section 21 speaks of the Development plan and Section 22 which speaks of the contents of the development plan, insofar as they are relevant, are extracted herein below:

"**21. Development Plan**

(1) As soon as may be after the commencement of this Act, but not later than three years after such commencement, and subject however to the provisions of this Act, every Planning Authority shall carry out a survey, prepare an existing land-use map and prepare a draft Development plan for the area within its jurisdiction, in accordance with the provisions of a Regional plan, where there is such a plan [publish a notice in the Official Gazette and in such other manner as may be prescribed stating that the draft Development plan has been prepared] and submit the plan to the State Government for sanction. The Planning Authority shall also submit a quarterly Report to the State Government about the progress made in carrying out the survey and prepare the plan.

22. Contents of Development Plan

A Development plan shall generally indicate the manner in which the use of development land in the area of a Planning Authority shall be regulated, and also indicate the manner in which the development of land therein shall be carried out. In particular, it shall provide so far as may be necessary for all or any of the following matters, that is to say,—

(a) proposals for allocating the use of land for purposes, such as residential, industrial, commercial, agricultural, recreational;

....

(j) proposals for food control and prevention of river pollution;"

34. Reverting to the affidavit of the State dated 02.04.2024, the affidavit avers that the draft regional plan was of the year 2002 and the draft development plan (revised) was of the year 2000. It is averred that under Section 26(1) of the MRTP Act, the publication of notice of draft development plan was of 03.02.2000. The affidavit avers that the notice of regional plan for Akoli Washim District in draft form under Section 16 was published on 25.12.2002. The draft regional plan itself is of 2002 and the affidavit indicates that it was sanctioned under Section 15(1) of the MRTP Act on 23.04.2012 and came into force on 15.06.2012.

35. The State makes out a case that both for the draft regional plan of 2002 for the Akola Washim region as well as draft development plan (revised) 2000, the blue and red flood lines which have been produced by the concerned Executive Engineer, Irrigation Section Akola vide letter dated 18.01.1999 were taken into consideration as constituents. It is a case that the blue and red flood lines were shown on the maps of the peripheral plan of the Akoli City based on the proposal of the Executive Engineer.

36. The affidavit has certain other interesting averments. It avers that the development plan for the original limits of the Akola Municipal Council was in force from 01.04.1977 where Survey no. 1 wherein appellant's land is situated, was not included in the No Development

Zone. Thereafter, the development plan for the extended limits of the Akola Municipal Council was sanctioned by the Government on 30.12.1992 and came into force from 01.03.1993. In the said development plan, the affidavit states that the land in question was not part of the sanctioned development plan. The affidavit states that the Municipal Council was converted into Municipal Corporation since 01.10.2001 and that the revised development plan which came into force on 15.12.2004 also did not include the appellant's land. Thereafter, the following crucial paras occur in affidavit which have a great bearing in deciding the present controversy, particularly the issue as to whether the land of the appellant falls in the Blue Zone:-

> "vii. Meanwhile, the Regional Plan for Akola – Washim Region was published in the year 2002 wherein for the first time the Blue and Red flood lines were incorporated by taking into consideration the letter and circular of the concerned Irrigation Department as mentioned above. The said map of the Peripheral Plan of the said Regional Plan which further has been sanctioned by the Government in Urban Development Department vide Notification No. TPS-2502/205/CR-106/2009/UD-30, dated 23.04.2012 which came in force from 15.06.2012.
>
> viii) According to the Peripheral Plan of the said Regional Plan, the land bearing Survey No. 1 of Mouza Akoli (Budruk) was included in the "Agriculture Zone/No Development Zone and also the part of this land is situated within the River Bank and Blue Flood Line, whereas, the other lands bearing Survey No. 6 and 7 of Mouza Akoli (Khurd) are included in Residential Zone. A true copy of the part plan of the said Peripherial Plan showing the aforesaid lands is annexed herewith and marked as Annexure R-5.
>
> ix) Now, the Development Plan for the whole limits of the Municipal Corporation, Akola named as Draft Development Plan of Original Limit (2nd revision) + First Extended Limit (R.) + 2nd Extended Limit is being prepared for which notices has been published in the Maharashtra Government Gazette dated 25 - 31/01/2024 under the provisions of the section 26 of MRTP Act and further process is in progress as per the legal framework of the said Act.

> x) According to the said draft Development Plan, the land under reference bearing Survey No. 1 & 7 of Mouza Akola (Budruk) and other lands bearing Survey No.6, 7 & 60 of Mouza Akoli (Khurd) are proposed to be included in 'Residential Zone'.
>
> In the said draft proposed development plan, the Blue and Red Flood lines are shown as per the information available from Akola Irrigation Department, Akola vide letter No. 5396/Line- 1/2023, dated 06/10/2023. A true copy of the letter dated 06.10.2023 is annexed herewith and marked as Annexure R-6.
>
> xi) The land under reference bearing Survey No.1 of Mouza Akoli (Budruk) is situated between the Blue and Red Flood lines."
>
> (Emphasis supplied)

37. The affidavit clearly indicates that on the date of Section 4 notification i.e. 03.06.1999 there was no published notice of draft regional plan or draft development plan. The attempt made is to rely on the letter of the Executive Engineer of 18.01.1999 containing proposals for demarcation of red and blue lines. The affidavit further avers that on 03.06.1999 the statutory scheme that was in force was the Standardized Building Byelaws and Development Control Rules for 'B' and 'C' Class Municipal Councils of Maharashtra which were applicable for the outside Municipal limits as per Government resolution dated 02.04.1974. The affidavit avers that according to Rule No. 17.1.2 no permission to construct a building on a site shall be granted, if

> **"*the site is within 9 (nine) meters of the highest water mark, and if there be major water course nearby the distance of the plots from the same shall be 9 m. from average high flood mark or 15 mt. from the defined boundary of water course whichever is more*."**

38. The appellant has filed a response to the affidavit on 15.04.2024. The appellant has pointed out that the map annexed to the Engineer's letters as produced by the State Government in its affidavit of 02.04.2024 is at variance with Exh.141 produced before the Reference Court and submits that either of them cannot be correct. The appellant

also controverts the fact that the land was outside the municipal limits and relies on the letter of 25.02.2000 issued by the Deputy Director, Town Planning indicating that the land was within the municipal limits. The appellant avers that as on date of the acquisition admittedly none of the sanctioned development/regional plan demarcated the whole area of survey no. 1 as No Development Zone. The appellant also relied on the Standardized Building Byelaws and Development Control Rules for 'B' and 'C' Class Municipal Councils of Maharashtra referred to in the affidavit of the State Government.

39. In the written submissions of the appellant, it is submitted that since there is no valid document determining the flood mark, the no construction zone will have to be determined with reference to the defined boundary of the major water course. According to the appellant, as per the Joint Measurement Report submitted by the respondent-Irrigation Department, the distance between the land of the appellant and the defined boundary of the water course is 15 to 20 meters. The appellant disputes the explanation of the VIDC that the dotted lines indicate the curved bank of the river.

40. Be that as it may, the appellant submits that as per the Joint Measurement Map, the width of the appellant land is between 50 to 55 meters. The appellant submits that the extant rules declare that only in land up till 15 meters from the defined boundary of the water course shall fall in the no development zone and as such the whole land could not have been considered as falling under no development zone.

41. Having considered the facts and circumstances including the affidavit of the State filed before us, we are constrained to hold that the High Court was not justified in declaring the entire land of the appellant as falling within the blue zone.

42. As has been demonstrated hereinabove, the statutory documents under the MRTP Act demarcating the blue zone/blue line came in its draft form only in 2000 as far as the development plan was concerned and in 2002 as far as the regional plan was concerned. The Section 4 notification under the Act in this case is of 03.06.1999. Before the Reference Court, the document that was available was Exh.141 map. However, we are not inclined to place any reliance on the same for the reason that DW-1 K.S. Bhoyar, Sub-Divisional Engineer, who filed his affidavit in chief on 05.01.2008 clearly deposed that he

was not in a position to definitely say as to in which year Exh.141 was prepared. He also deposed that he had not brought the original map on the basis of which Exh.141 was prepared. Since under the MRTP Act, there is a procedure for notifying the plans and since the whole process commenced after the Section 4 notification dated 03.06.1999 was issued, it will be very unsafe to proceed on the basis of the proposal, if any, in the letter of the Executive Engineer dated 18.01.1999, though it may have the basis for ultimately drafting the regional plan and the development plan.

43. If an acquiring body relies on a statutory injunction, to establish that the land has no potential, then the burden is on the said acquiring body to demonstrate without any ambiguity that such a statutory interdict is in place. In the present case, the VIDC has not discharged the burden in demonstrating that statutorily there was a valid demarcation of a "Blue Zone" on the date of the Section 4 notification, under the Act. What has been established is only the existence of the byelaw i.e. "Standardised Building Byelaws and Development Control Rules for "B" and "C" Class Municipal Councils of Maharashtra".

44. The statutory regime that was in force admittedly, according to the State, was the Standardized Building Byelaws and Development Control Rules for 'B' and 'C' class Municipal Councils of Maharashtra which by a Government resolution of 02.04.1974 was even made applicable to lands outside Municipal limits. Going by that, the building permissions could be denied only if the site was within 9 meters of the highest water mark and if there be a major water course nearby, the distance of the plot from the same shall be 9 meters from the average high flood mark or 15 meters from the defined boundary of water course whichever is more.

45. There is no definitive evidence on record to indicate as to what was the highest water mark or the average high flood mark, with the result we conclude, in the peculiar facts of the case, that as on 03.06.1999, i.e. the date of the Section 4 notification for the appellant's land, the no construction zone can only be taken as 15 meters from the defined boundary of the water course which is the Morna river. If the site to the extent it is within the 15 meters of the defined boundary of water course, that part alone could be said to have no potential for development. The land beyond the

15 meters mark from the defined boundary of the water course in the site of the appellant should be treated independently and as to what would be the value thereof, we shall discuss herein below. For the land up to 15 meters (in the event of the site or part of the site falling within 15 meters of the defined boundary of the water course) shall be paid the amount as determined by the Land Acquisition Officer in the award dated 04.08.2000.

46. Now that we have concluded that the land of the appellant except to the extent of 15 meters from the defined boundary of the water course is not covered by the no construction zone, the question arises as to what should be the market value payable as on 03.06.1999. As has been narrated earlier, the LAO in his Award (Exh. 46) awarded an amount of Rs.5,61,000/- per hectare for the entire extent of 1,25, 937 sq. ft. which works out to Rs. 5/- per sq. ft. The Land Acquisition Officer relied on a sale transaction pertaining to one parcel of land in Survey No. 9/1A dated 24.04.1998. On a reference under Section 18, after noticing the status of the land and after concluding that the land is not covered under the blue zone and after finding that the Land Acquisition Officer made no reference to the land being on the blue zone in the award, the Reference Court awarded a sum of Rs.100/- per sq. ft.

47. The Reference Court found that the property was within the Akoli City Municipal limits and referring to Exh. 71, 73 and 74 had concluded that the land had high potential and value. Thereafter, it relied on the award of the Reference Court in LAC No. 183 of 2000 (Civil Appeal arising out of SLP (C) No. 6820 of 2023 and Civil Appeal arising out of SLP (C) No. 2753 of 2023) and LAC No. 209 of 2002 dated 10.08.2006 (Civil Appeal arising out of SLP (C) No. 6817 of 2023 and Civil Appeal arising out of SLP (C) No. 2324 of 2023) which are appeals in this very batch.

48. Our discussion hereinbelow on LAC No.183/2000 dated 15.01.2015 shall insofar as they are relevant, also apply to the disposal by this judgment of Civil Appeal arising out of SLP (C) No. 6820 of 2023 and Civil Appeal arising out of SLP(C) No. 2753 of 2023. Similarly, our discussion on LAC No. 209 of 2002 dated 10.08.2006 shall insofar as they are relevant also apply to the disposal by this judgment of Civil Appeal arising out of SLP(C) No. 6817 of 2023 and Civil Appeal arising out of SLP(C) No. 2324 of 2023.

49. In Civil Appeal arising out of SLP (C) No. 6820 of 2023 and Civil Appeal arising out of SLP (C) No. 2753 of 2023, the Section 4 notification was common. In those appeals, the land was situated in Survey No. 7/2 of Akoli Village Bujurg (Bk). The Reference Court by judgment dated 15.01.2005 in LAC No. 183 of 2000 awarded Rs. 100 per sq. ft. which was the same rate awarded in LAC No. 209 of 2002 dated 10.08.2006, though in those matters lands were situated in Survey Nos. 6,7 and 60 at Akoli Khurd Village.

50. In matters involved in LAC No. 183 of 2000, the Land Acquisition Collector awarded Rs.5,61,000/- per hectare. It is important to note that even though the land was situated in Survey No. 7/2 of Akoli Bujurg, the Land Acquisition Collector awarded equal value for the lands in Survey No. 1 (the present appeals) as well as Survey No. 7/2 and the Reference Court also awarded Rs.100/- per sq. ft. for both the Survey Nos.

51. In LAC No. 209 of 2002, the Land Acquisition Officer awarded Rs.72,400/- per hectare for the land situated in Survey Nos, 6,7 and 60 of Akoli Khurd Village. The Reference Court and the High Court have awarded Rs.100/- per sq. ft. even for those set of lands, for plotted area of 359684.44 sq. ft.

52. The only reason why in the present the High Court did not award Rs.100/- per sq. ft. was the finding that the land was on the blue zone, which finding we have already set aside. The Land Acquisition Officer found similarity between the lands that are subject matter of LAC No. 183 of 2000 dated 15.01.2005 and the present land. If we are persuaded to hold that the order of the Reference Court in LAC No.183 of 2000 with regard to the land in Survey No. 7/2 of Akola Bujurg Village is correct then there is no reason why the same value should not be awarded to the present appellant except to that extent of the land, if any, falling within the 15 meters restriction from the defined boundary of the water course as explained earlier.

53. If we peruse the award of the Reference Court dated 15.01.2005 in LAC No. 183 of 2000, as an exemplar, a sale deed marked in that case as (Exh. 45) executed by one Usha Santosh Gode in favour of Ashok Krushnarao Sapkal dated 12.02.1999 in respect of plot no. 78 was relied upon. This is the sale deed set out in the present case in the claim statement as well as in IA No. 85664 of 2019 which is an application for permission to file additional documents

as Annexure-A3. Though what is given in the present case is an index of sale-purchase details as on 21.05.1999, the sale Exh.45 referred to in C.A. arising out if SLP (C) No. 6820 of 2023 and C.A. arising out of SLP (C) No. 2753 of 2023, is mentioned at entry No. 8 dated 12.02.1999. There an extent of 1500 sq. ft. was sold for Rs.1,50,000/- which would be @ 100 per sq. ft. Ultimately in the order of the Reference Court in LAC No. 183 of 2000 dated 15.01.2005, the Court considered the valuation offered by the valuer in that case of Rs.200/- per sq. ft.; sale instance of Rs.175/- per sq. ft. in one of the exemplars and after reducing the value of the land for fluctuations in the market value and the prevailing ambience had arrived at a figure of Rs.100/-. This coincidentally tallies with the sale instance mentioned in Exh. 45 therein. In that case, other statutory benefits were awarded.

54. Be that as it may, in law what is mandated is to examine the potentiality of the land. Indisputably, by a common award the appellant's land and the land in Survey No. 7/2 in Akoli Bujurg were treated on par by the Land Acquisition Officer. Admittedly, the surrounding areas have lands for which non-agricultural permission had been given. It has also come in evidence that the land is in a locality surrounded by bustling commercial establishments and educational institutions and even the evidence of the acquiring body admits that the Tehsil's office and Collector's office in Akola District and Akola Taluk are located in the nearby area (evidence of DW-1). Photographs produced by PW-2 also show that there have been developments around the area.

55. The question here is whether in the present appeals the Reference Court was justified in following the award in LAC No. 183 of 2000. The High Court has held that the land fell in the blue zone which finding we have set aside. It further held that while the land of the appellant was on the bank of the river Morna, other Survey Nos., namely, Survey Nos. 5, 6 and 7 were above Survey No.1 and beyond the Gaothan of Akoli Bk. and away from the bank of river Morna. It also held that Survey No.7/2 was converted into non-agricultural use. It held that Survey No. 1 was never converted to non-agricultural land and hence Exh.71 sale deed of 10.05.1999 could not be relied upon. The High Court also relied on Exh.67 a letter dated 25.02.2000 wherein it is mentioned in para therein that Survey No. 1 (suit land) Survey No. 5/2, Survey Nos. 5/1, 7, 8 2, 25, 9/1-A of mauza Akoli fell in the no Development zone and therefore could not be converted

into non-agricultural purpose though the said lands fell within the municipal town. This finding has been countered by the appellant by stating that in fact non-agricultural permission has been granted for Survey Nos.5/1, 7 8, 9/1-A and 28 in the written submissions. The same has not been converted by the respondent-authorities.

56. The surrounding land to the appellant's land has already been converted and the appellant has been granted the Nazul sheet and necessary charges have also been paid. We say nothing more on this aspect except that while determining the market value we are really concerned with the potentiality of the land. If except to the extent of 15 meters from the defined boundary of the water course the other land was not in the no construction zone, there is no reason why the same market value could not be awarded. In view of the above, considering the potentiality of the land and its situs, except for the lands upto 15 meters from the defined boundary of the water course, we are inclined to award Rs.100/- per sq.ft. for 68.3% of the total admeasuring area. It should not be forgotten that the LAO treated the land in Survey No. 7 Akoli Bk. No.1, namely, the appellant's land alike. The Reference Court also awarded them @ Rs. 100/-. The High Court proceeded on the basis that the land was purportedly in the blue zone and set aside the order of the Reference Court and the award.

57. We are inclined to restore the award insofar as the land if any within the 15 meters of the defined boundary of the water course and for the rest of the land in Survey No.1 belonging to the appellant for the 68.3% of the balance area, we award the rate of Rs.100/- per sq.ft.

58. LAC No. 209 of 2002 dated 10.08.2006, is the Reference Court order which is under consideration in C.A. No. @ SLP (C) No. 6817 of 2023 and C.A. No. @ SLP (C) No. 2324 of 2023 which are part of this very batch of matters. The Land involved in the said reference case is situated in village Akoli Khurd bearing Survey Nos. 6, 7 and 60. Here again, the Section 4 notification was issued on 03.06.1999. The lands were no doubt converted to non-agricultural use on 03.03.1983.

59. The plot area involved in LAC No. 209/2002 is 33415.50 sq. mts and the applicants were claiming for the plotted area and not claiming compensation for the open area and roads. In LAC No. 209/2002, the LAO awarded Rs. 72,400 per hectare resulting in a reference under Section 18. There is no case for the government that the land

is adjacent to Morna river. The Land in question in LAC No. 209/2002 was situated near several educational and other religious institutions. The claim for enhancement in LAC No. 209/2002 was based on Exh. 78 dated 10/11.05.1999 where plot no. 50 Survey No. 7/2 of Akoli Bk. was sold @ Rs. 175/- per sq. ft. The LAO admits that the Akoli (Bk) and Akoli Khurd are adjoining twin villages. It is also recorded that the lands lying therein are similar in nature. Based on the previous award Rs.100/- per sq. ft. was awarded. The High Court upheld the said award. Exh. 75 was the sale deed of 12.02.2009 of plot no. 75 of Akola Survey No.8 and Survey No. 5/1. The price in the said sale deed was Rs. 100 per sq.ft. for an area of 1500 sq.ft. This is the document which is Exh.45 in C.A.No. @ SLP (C) No. 6820 of 2023 and C.A. No. @ SLP (C) No. 2753 of 2023 and this document is also one of the basis for the enhancement. According to our conclusion in this batch of appeals, decided hereinabove, the High Court was right in rejecting the other sale deeds.

Relevant Legal Principles:

60. It is well settled that in determining the compensation the court would take into consideration the potentialities of the land existing as on the date of the notification published under Section 4(1) (***State of Orissa vs. Brij Lal Misra and Others*** ***(1995) 5 SCC 203***)

61. This Court in ***Sardara Singh and Others v. Land Acquisition Collector, Improvement Trust, Rupnagar and Others*** **(2020) 14 SCC 483,** has held that the rates of compensation awarded in adjacent villages cannot be disregarded if in the given set of facts and evidence, similarity is established. Similarly, in ***Om Parkash and Others v. State of Haryana*** **(2016) 13 SCC 190,** the Court held that compensation awarded in the adjoining village can be considered when there was similarity in potentiality. [*See also* ***Special Land Acquisition Officer v. Karigowda and Others*** **(2010) 5 SCC 708]**. In view of this settled position of law, we see no ground to interfere with this finding.

62. When there is a choice between an exemplar where the transaction is between unrelated parties dealing at arm's length and between an exemplar where the transaction is between related parties of a higher value, both of which are broadly around the same period, prudence would dictate and common sense would command that we accept the value of set out in the transaction between

unrelated parties. We are inclined to accept the transaction which is at arm's length and accept the market value of the amount of Rs. 100/- per sq. ft. and reject the claim of Rs. 175/- per sq. ft.

63. It is well settled that market value is determined based on the price of a willing buyer- a willing seller at arm's length. In ***Administrator General of West Bengal Vs. Collector, Varanasi*** ***(1988) 2 SCC 150***, it was held :

> **"8.** The determination of market value of a piece of land with potentialities for urban use is an intricate exercise which calls for collection and collation of diverse economic criteria. The market value of a piece of property, for purposes of Section 23 of the Act, is stated to be the price at which the property changes hands from a willing seller to a willing, but not too anxious a buyer, dealing at arm's length. The determination of market value, as one author put it, is the prediction of an economic event viz. the price outcome of a hypothetical sale, expressed in terms of probabilities. Prices fetched for similar lands with similar advantages and potentialities under bonafide transactions of sale at or about the time of the preliminary notification are the usual, and indeed the best, evidences of market value. Other methods of valuation are resorted to if the evidence of sale of similar lands is not available."

64. In this case, when we have two exemplars, one between two independent parties and the other between two admittedly related parties and both transactions have taken place without much of a time gap.

65. Insofar as the where the exemplar is a small extent of land is concerned, it is now clear that even in these lands in Survey No. 1 where the permission is not yet obtained, except to the extent of those lands falling within the 15 meters from the defined boundary of the water course, they were also ripe for use for building purposes and hence to adopt the same value as was done in the case of sale deed dated 12.02.1999 @ Rs. 100/- per sq. ft. is justified. There is evidence on record to the effect that the area was plotted to the extent of 7948 sq. mtrs. and there were 43 plots. It is also in evidence given by them that roads were constructed. Though this is disputed in the evidence of the acquiring body, the evidence

led by them is to the effect that the land is of agricultural use, barren and there is no development. There is no specific denial that there were no demarcated plots. It is also true that on the date of the acquisition there was no non-agricultural permission though the case of the appellant is he had taken preparatory steps and deposited the fees.

66. In ***Administrator General of West Bengal (Supra)*** dealing with the aspect of valuing large tracts of land based on the price fetched for smaller plots, this Court held as under:

> **"12.** It is trite proposition that prices fetched for small plots cannot form safe bases for valuation of large tracts of land as the two are not comparable properties. (See *Collector of Lakhimpur* v. *B.C. Dutta* [(1972) 4 SCC 236] ; *Mirza Nausherwan Khan* v. *Collector (Land Acquisition), Hyderabad* [(1975) 1 SCC 238] ; *Padma Uppal* v. *State of Punjab* [(1977) 1 SCC 330] ; *Smt Kaushalya Devi Bogra* v. *Land Acquisition Officer, Aurangabad* [(1984) 2 SCC 324] The principle that evidence of market value of sales of small, developed plots is not a safe guide in valuing large extents of land has to be understood in its proper perspective. The principle requires that prices fetched for small developed plots cannot directly be adopted in valuing large extents. However, if it is shown that the large extent to be valued does not admit of and is ripe for use for building purposes; that building lots that could be laid out on the land would be good selling propositions and that valuation on the basis of the method of hypothetical lay out could with justification be adopted, then in valuing such small, laid out sites the valuation indicated by sale of comparable small sites in the area at or about the time of the notification would be relevant. In such a case, necessary deductions for the extent of land required for the formation of roads and other civil amenities; expenses of development of the sites by laying out roads, drains, sewers, water and electricity lines, and the interest on the outlays for the period of deferment of the realisation of the price; the profits on the venture etc. are to be made…. …"

The appellant was claiming compensation @ Rs. 500 per sq. ft. and examined the valuer to substantiate the same which the Reference Court was not inclined to award and we agree with the Reference Court in that regard. We are also not awarding any amount for the 32% (approx.) of the land which, even according to the claimant, pertain to the area covered by roads and open space. We are not inclined to award any compensation or damages. Additionally for that reason also, we are not inclined to make any deductions from the market value fixed @ Rs. 100 per sq. ft. for the 68.3% (approx.) of the land. We have evidence to show that the land was ripe for use for building purposes. We are not inclined to, in the special facts and circumstances of the case, to order any deduction based on extent of land and the cost for incurring development. The LAO in the award which in law is an offer, treated the appellant's land and the land in Survey No. 7/2 (subject-matter of LAC No. 183/2000) on par and the Reference Court also treated them on par.

67. In this case since the acquisition is for construction of a flood protection wall, the question of there being any development or any cost thereof cannot arise. It is well settled that the purpose for which the land is acquired must be taken into consideration while determining development charges.

68. In ***Himmat Singh & Ors. Vs. State of Madhya Pradesh & Anr. (2013) 16 SCC 392***, this Court, dealing with the issue of deduction of development charges in the context of acquisition for a railway line held as under:

> **"33.** The approach adopted by the Reference Court and the High Court in making deductions towards the cost of development/development charges from the market value determined on the basis of the sale deeds produced by the appellants was clearly wrong. The respondents had not even suggested that the development envisaged by the Reference Court i.e. laying of roads, drains, sewer lines, parks, electricity lines, etc. or any other development work was required to be undertaken for laying the railway line. Therefore, 25% deduction made by the Reference Court and approved by the High Court under two different heads is legally unsustainable."

69. Insofar as the Development charge is concerned, as held in ***Himmat Singh,*** where no Development is envisaged like laying of roads, drains, sewer lines, parks etc. and what is required is only construction of a flood control wall, the question of deducting any development charge cannot arise. [*See also* ***Nelson Fernandes vs. Land Acquisition Officer*** ***(2007) 9 SCC 447***].

70. The VIDC has relied upon certain circulars to show the consequence of blue zone. Since the finding is that no construction area is limited to 15 meters from the boundary, the circulars do not carry the case of the State any further. In any event, the State Government's affidavit has clearly stated that what was in vogue in the relevant time was the Standardized Building Byelaws and Development Control Rules for B and C Class Municipal Councils of Maharashtra which was made applicable to even areas outside Municipal limits by Government resolution of 02.04.1974. The State does not in its affidavit make any reference to any applicable circular.

71. The appellant had averred that out of the total extent of 125937.8 sq. ft., he had claimed @ Rs, 500/- per sq. ft. for 84481 sq. ft. which constitutes 68.3% (approx.) of the total extent. The balance area of 41404 sq. ft. which constituted approximately 32%, according to him were the area covered by roads and open space. He had claimed Rs.25 lakhs for the extent of making the roads and also prayed for damages at Rs. 50 lakhs.

72. In view of our judgment, the appellant will be entitled to Rs.100/- per sq. ft. for the 68.3% (approx.) of the balance area, after excluding the land area, if any, which falls within the 15 meters from the defined boundary of the water course. For the land falling within the no construction zone, if any, as per the Standardized Building Byelaws, he will be paid at the rate determined by the Special Land Acquisition Officer in the award. Insofar as the market value of the land in question and other statutory benefits are concerned, the judgment of the Reference Court will continue to operate, subject to one modification. The possession of the land in this case was taken on 15.11.1998 before the issuance of Section 4 notification. In another Appeal decided by us in this batch today, we have held the appellant entitled to rental compensation at the rate of 8% of the awarded amount for the period from 15.11.1998 to 04.08.2000, the date of the award. In view of the same, direction no. 5 in the operative order of the Reference Court requires to be modified. That direction was under Section 28 of the

Act. In view of the entitlement for the rental income till 04.08.2000, the appellant shall be entitled to interest on the enhanced amount at 9% for a period of one year from 04.08.2000 and at the rate of 15% for the period thereafter till payment of amount in the court. If the amount is already deposited, nothing further needs to be done. If not, the State may pay the deficit, if any.

73. In view of our findings hereinabove, Civil Appeal Nos. 6776-6777 of 2013 are partly allowed. The impugned judgment dated 17.06.2013 in First Appeal No. 1210 of 2008 and First Appeal No. 6 of 2009 are set aside and will stand superseded by our present judgment. No order as to costs.

II. Civil Appeal arising out of SLP (C) No. 21611 of 2018 (Kazi Akiloddin Sujaoddin Vs. State of Maharashtra & Ors.)

74. Leave granted.

75. In this case, the facts are identical with Civil Appeal Nos. 6776-6777 of 2013. The question involved is about the payment of rental compensation for the period from 15.11.1998 (when the possession of the appellant's land was taken) to 04.08.2000 (when the award was passed by the Land Acquisition Officer). After the Reference Court enhanced the compensation on 02.08.2008, the appellant and the State filed Appeals and cross Appeals in the High Court, namely, First Appeal No. 1210 of 2008 by the appellant and First Appeal No. 6 of 2009 by the State. Pending the Appeal in the High Court, the appellant applied to the 3rd respondent herein, the Special Land Acquisition officer, for grant of rental compensation on the basis of enhanced compensation awarded by the Reference Court by its order dated 02.08.2008. Receiving no reply, the appellant filed Writ Petition No. 2763 of 2009 before the High Court. That Writ Petition was disposed off on 06.07.2009 by recording the statement of the Assistant Government Pleader that the application of the appellant would be decided on merits at the earliest.

76. Thereafter, on 05.10.2009, the application was rejected on the ground that order of the Reference Court was under challenge before the High Court.

77. Aggrieved, the appellant filed Writ Petition No. 3883 of 2010. By the judgment of 15.09.2011, Writ Petition No. 3883 of 2010 was allowed directing that enhanced rental compensation @ 8% of the

enhanced amount as directed to be paid by the Reference Court, be deposited in the High Court. It further directed that the appellant could withdraw half the amount by furnishing the security and remaining amount to be kept in fixed deposit. It is undisputed that 8% was calculated for the period 15.11.1998 till the date of award i.e. 04.08.2000.

78. The State Government did not challenge the order dated 15.09.2011 which determined the entitlement for rental compensation from 15.11.1998 (the date of taking advance possession) till 04.08.2000 (date of the award). The appellant, aggrieved by the judgment of 15.09.2011 in Writ Petition 3883 of 2010, filed Civil Appeal No. 5084 of 2013 before this Court which was disposed off on 3rd July, 2013, directing that in case compensation is enhanced, the appellant shall be entitled for the rental compensation as per the enhanced amount. It did not interfere with the order of the High Court directing the State Government to deposit the rental compensation @ of 8% of the amount awarded by the Reference Court with the Appellate Court and allowing the appellant to withdraw only half the amount. Liberty was also reserved to the appellant to claim proportionate higher rental compensation, if the order of the Reference Court is upheld or further enhancement of compensation is made by the Appellate Court. So holding, the Appeal of the appellant was dismissed.

79. What is significant is that this Court by its judgment referred to above of 3rd July, 2013 in Civil Appeal No. 5084 of 2013 [***Kazi Akiloddin Sujaoddin Vs. State of Maharashtra & Ors.***] reported in ***(2013) 14 SCC 8,*** in the absence of any appeal by the State had no occasion to disturb the mandamus issued in Writ Petition 3883 of 2010 by the High Court, insofar as it fixed the entitlement to the rental compensation for the period 15.11.1998 till 04.08.2000. Hence, the State cannot challenge the period for which the appellant was entitled to rental compensation, in these proceedings. The rental compensation and the period were based on the Government Resolutions dated 02.05.1961, 01.12.1972, 02.04.1979 and 24.03.1998.

80. Hence, the appellant is entitled for the rental compensation for the period 15.11.1998 till 04.08.2000 on the basis of 8% of the awarded amount as decided by us today in Civil Appeal Nos. 6776-6777 of 2013 by this very judgment. The Civil Appeal is allowed in the above

terms and the impugned judgment in Writ Petition No. 4062 of 2018 dated 10.07.2018 stands superseded by the present judgment. No order as to costs.

III. Civil Appeal arising out of SLP (C) No. 6490 of 2022 (Sau. Dwarkabai Vs. The State of Maharashtra & Anr.)

81. Leave granted.

82. The present Appeal arises from the judgment of the High Court of Judicature at Bombay, Nagpur Bench, Nagpur in First Appeal No. 896 of 2016 dated 18.02.2021. The facts are as follows. Section 4(1) notification under the Act was published on 11.03.1999. The land of the appellant situated in Field Gut No. 4/2 admeasuring 0.86 Hectares i.e. 2 acres and 6 Gunthas at village Hingana Mhaispur, Tq. & District Akola (Maharashtra) was sought to be acquired by the respondents for the purpose of construction of a flood protection wall for Akola city. Thereafter, on 22.06.2000, award was passed awarding a total compensation of Rs. 56,588/- per hectare. On a reference being made under Section 18 of the Act, the appellant claimed higher compensation. Four witnesses were examined on the side of the appellant. The appellant examined himself as PW-1. A map was produced by him to show that the surrounding area was completely non-agricultural and developed. Three certified copies of sale deeds, one of which is a post-notification deed was also produced. A list pertaining to plots sold in Survey Nos. 7/1 and 7/2 of Akola Bujurg was also produced. The appellant contended that the situation of the land was in a developed area adjoining to Ramakrishna Vivekanand Vikri Kendra, Maratha Sewa Sangh, Vyankatesh Restaurant, Agricultural Produce Market Committee etc. Strangely, the State did not subject the appellant to any cross-examination.

83. The appellant examined two Talathies of the village, namely, Sudhakar Namdeorao Ambuskar (PW-3) and Bhagwan Shamrao Thite (PW-4). PW-3 marked the sketch of Hingana Mhaispur to establish that towards the north of the property is a cart track and towards the south of the cart track is the boundary of village Akoli. In the cross-examination, he deposed that Survey No.4 was adjacent to the river and since there was a possibility of proceeding of water only, it was not useful for non-agricultural purpose. To the similar effect is the evidence of PW-4.

84. The respondents did not adduce any evidence. The Reference Court awarded Rs. 100/- per sq. ft. Para 9, 10 and 11 of the order of the Reference Court are extracted herein below:

> "9. The acquired land physical situation is supported by oral evidence of P.W. Nos.3 and 4, who are Talathi and concern with the said landed portion. Both these witnesses have proved the vicinity of the landed portion, which is acquired. Not only the oral evidence of P.W. Nos.3 and 4 support to the vicinity of landed portion allegedly contended by the petitioner, but it is also supported to the blue-print map, which is available on record and other maps also available, which are drawn by the revenue authorities itself. There are two maps filed on record. One is of Akoli Kd. and another is of Hingana Mhaispur. These two lands appears to be accessible and fetchable for the residential purposes before the time of notification. There is no any rebuttable evidence regarding the physical status of landed area in question and objection raised by respondent in their written statement.
>
> 10. It is exfacie proved on the basis of sale-deeds, maps, oral evidence in support of petitioner's case that the landed zone of Akoli Kd. and Hingana Mhaispur having concern with the residential zone, and therefore, there are so many possibilities of high escalation in market value that too, since the time of notification.
>
> 11. ...On the basis of materials on record and the oral evidence supported to the case, the petitioner's case for enhancement of the compensation appears to be well founded. Not only this, petitioner has supported with the relevant judgment passed in L.A.C.No.183/2000 dated 15/01/2005. Certified copy is on record, which clearly shows the fetchable prevailing rate as per market valuation of the concern land was Rs.100/- per square feet. This rate cannot be remained constant. In the present circumstances, there must be escalation in the market valuation. Considering this fact, petitioner did not make any amendment in his pleading. At the stage of argument vide written argument Exh.48 on Page No.8 of it, claiming

> the enhanced compensation at the rate of Rs.100/-, that found me justifiable and natural and supported with all backgrounds about market valuation."
>
> Other statutory benefits were also awarded.

85. Aggrieved by the order of the Reference Court, the State preferred First Appeal No. 896 of 2016 before the High Court. The State contended that reliance placed by the Reference Court on LAC No. 183/2000 was not justified as the judgment in the said LAC No. 183/2000 was pending Appeal in the High Court; that the land that was subject matter of LAC No. 183/2000 was located in a different village and the land was not similar in nature; that the judgment in LAC No. 183/2000 has been mechanically relied upon without considering its applicability to the case at hand; that the sale deeds relied upon related to small non-agricultural plots which had construction potentiality and are not comparable instances. The State further argued that in another First Appeal No. 1210 of 2008 arising from LAC No. 140/2000 (subject matter of the Appeal in Civil Appeal Nos. 6776-6777 of 2013 herein), the Appeal of the State was allowed and the compensation fixed at Rs. 100/- per sq. ft. was set aside and the compensation fixed by the Land Acquisition Officer at Rs. 5.30/- per sq. ft. was restored.

86. Mr. Nishant Katneshwarkar, learned counsel for the appellant contended that though the land is situated in Village Hingana Mhaispur, the said village is separated from Village Akoli (Bk) only by a bullock-cart track; that civic amenities were available in and around the acquired land; that the land had construction potentiality; that the judgment in LAC No.183/2000 was not the only basis and that sale deeds dated 04.05.1999 (Exh.40), 11.06.1998 (Exh.41) and 15.07.1998 (Exh.42) were relied upon which showed that the land located in the same vicinity was sold @ of Rs. 110/- per sq. ft., Rs. 60/- per sq. ft. and Rs. 50/- per sq. ft. It was also submitted that there was no evidence to show that the land was along the riverbank and was prone to flooding. It was also submitted that the judgment in First Appeal No. 1210 of 2008 (subject matter in Civil Appeal Nos.6776-6777 of 2013 herein) had not attained finality.

87. The High Court, in the impugned order, proceeded as if the only basis of the judgment of the Reference Court was the order in LAC No. 183/2000. That is clear from the reading of para 8 of

the impugned order which states that "*the Reference Court has determined the market rate of the acquired land on the basis of the judgment in LAC No.183/2000*." This may not be entirely an accurate statement as a careful perusal of the portions of the Reference Court judgment extracted herein above indicates that the order in LAC No. 183/2000 was an additional factor. Be that as it may, the High Court held that the land in LAC No. 183/2000 pertained to a small plot, namely, Survey No. 7/2 which was converted to non-agricultural use way back in the year 1982. It was also found that unlike the present plot, the land that was subject matter in LAC No. 183/2000 was not on the riverbank. The High Court found that the sale deed of 04.05.1999 (Exh.40) was a post notification transaction. As far as the sale deeds dated 11.06.1998 (Exh.41) and 15.07.1998 (Exh.42) are concerned, the High Court held that they pertained to plot nos. 117, 162 and 12 respectively carved out from Survey Nos. 6, 7 and 60 of village Akoli (Khurd) which was converted to non-agricultural land way back in the year 1982. Thereafter, the High Court held as follows:

> "11. The Respondent had also relied upon the sale-deed dated 04/05/1999 at Exh.40, which is a post notification transaction. The said sale-deed as well as sale-deeds dated 11/06/1998 at Exh.41 and 15/07/1998 at Exh. 42 relate to plot Nos.117, 162 and 12 respectively carved out from Survey No.6, 7 and 60 of village Akoli (khurd), which was converted to non-agricultural land way back in the year 1982. These sale-deed plots were sold at the rate of Rs. 50-60 per sq.ft. It is not in dispute that these sale-deed plots are situated in village Akoli khurd which is separate from village Hingana by a bullock cart track. These sale-deed plots were small in size and were suitable for construction purpose. Moreover, these sale-deed plots were away from the river bank and were not prone to getting submerged during rainy season or floods.
>
> 12. As compared to the sale-deed land, the acquired land is a vast track of agricultural land, along the river bank and was prone to getting inundated during rainy season and hence was not suitable for construction purpose. On account of these dissimilarities, the acquired land would not have fetched the same price as that of the sale-deed land. The above stated disadvantageous

> factors possessed by the acquired land would warrant appropriate deductions.
>
> 13. The above referred sale-deed plots were sold in the year 1998 at the rate of Rs. 50-60 per sq.ft.. Considering the fact that the notification under Section 4 is of the year 1999, and further considering increase in the price of land at 10% per annum, the rate of these developed plots can be considered at Rs.60/- per sq.ft. upon deducting 30% towards development charges, 30% towards the difference in area and 15% in view of disadvantageous location of the acquired land vis-a-vis the sale-deed land, the price works out to Rs.15/- per sq. ft."

So holding, the compensation was fixed at Rs. 15/- per sq. ft. The High Court not only deducted 30% towards development charges, which we find is unjustified, it further went on to deduct 30% towards the difference in area and 15% in view of the disadvantageous location.

88. We notice that the State is not in the Appeal in this matter and there is no dispute about the applicability of the exemplars Exh.41 dated 11.06.1998 and Exh.42 dated 15.07.1998 to determine the base value. We also note that the appellant's own witness PW 3 and 4 deposed in cross-examination that the land could not be put to non-agricultural use. The appellant did not re-examine them.

89. While we do not fault the judgment of the High Court in fixing Rs. 60/- per sq. ft and applying 30% towards difference in area, we feel that further deduction towards development charges while the acquisition was for the construction of the wall involving no development and further 15% due to disadvantageous location was completely unjustified. Hence, we award the compensation for the land in question in this Appeal @ of Rs. 42/- per sq. ft. The Rest of the order with regard to the statutory benefits and interest is maintained. We are conscious that the amount of Rs. 42 per sq. ft. awarded by us is above the amount claimed.

90. In the affidavit-in-chief of the appellant, there is a poignant averment to the following effect *"…. But as I could not be able to arrange for the Court fee, I have claimed the price of the land @ Rs. 30/- per sq. ft. which comes to Rs.19,35,000/-. The Land Acquisition Officer paid Rs. 56,585/- towards the value of the land and hence I am claiming*

Rs.18,78,450/- towards the balance market value of the land along with all other benefits, interest and solatium and also give other benefits given to landless persons. I have no land on my own now."

91. We are supported in this course of action by the earlier judgments of this Court in ***Bhag Singh and Others*** vs. ***Union Territory of Chandigarh through the Land Acquisition Collector, Chandigarh*** (1985) 3 SCC 737 where Chief Justice Bhagwati held while tempering law with justice:-

> "3… The learned Single Judge and the Division Bench should not have, in our opinion, adopted a technical approach and denied the benefit of enhanced compensation to the appellants merely because they had not initially paid the proper amount of court fee. It must be remembered that this was not a dispute between two private citizens where it would be quite just and legitimate to confine the claimant to the claim made by him and not to award him any higher amount than that claimed though even in such a case there may be situations where an amount higher than that claimed can be awarded to the claimant as for instance where an amount is claimed as due at the foot of an account. Here was a claim made by the appellants against the State Government for compensation for acquisition of their land and under the law, the State was bound to pay to the appellants compensation on the basis of the market value of the land acquired and if according to the judgments of the learned Single Judge and the Division Bench, the market value of the land acquired was higher than that awarded by the Land Acquisition Collector or the Additional District Judge, there is no reason why the appellants should have been denied the benefit of payment of the market value so determined. To deny this benefit to the appellants would tantamount to permitting the State Government to acquire the land of the appellants on payment of less than the true market value. There may be cases where, as for instance, under agrarian reform legislation, the holder of land may, legitimately, as a matter of social justice, with a view to eliminating concentration of land in the hands of a few and bringing about its equitable distribution, be deprived of land which is not being personally cultivated by

him or which is in excess of the ceiling area with payment of little compensation or no compensation at all, but where land is acquired under the Land Acquisition Act, 1894, it would not be fair and just to deprive the holder of his land without payment of the true market value when the law, in so many terms, declares that he shall be paid such market value. The State Government must do what is fair and just to the citizen and should not, as far as possible, except in cases where tax or revenue is received or recovered without protest or where the State Government would otherwise be irretrievably be prejudiced, take up a technical plea to defeat the legitimate and just claim of the citizen. We are, therefore, of the view that, in the present case, the Division Bench as well as the learned Single Judge should have allowed the appellants to pay up the deficit court fee and awarded to them compensation at the higher rate or rates determined by them."

The said principle has been followed in other cases including in ***Ashok Kumar and Another*** vs. ***State of Haryana*** (2016) 4 SCC 544 wherein para 7 it was held as under: -

> **"7.** The pre-amended provision puts a cap on the maximum : the compensation by court should not be beyond the amount claimed. The amendment in 1984, on the contrary, puts a cap on the minimum : compensation cannot be less than what was awarded by the Land Acquisition Collector. The cap on maximum having been expressly omitted, and the cap that is put is only on minimum, it is clear that the amount of compensation that a court can award is no longer restricted to the amount claimed by the applicant. It is the duty of the court to award just and fair compensation taking into consideration the true market value and other relevant factors, irrespective of the claim made by the owner.

92. The above are classic instances where this Court ensured that justice and fairness triumphed over technicalities. By the said course, it is ensured that a balance was struck between recognizing the right of the State in exercising its power of eminent domain with the right of the citizen to receive what was legally due. In accordance with the above judgment, we also direct that the deficit court fee which

will now become payable when compensation is awarded @ of Rs. 42/- per sq. ft along with other statutory benefits shall be payable by the appellant.

93. The Civil Appeal is allowed in the above terms and the impugned judgment dated 18.02.2021 in First Appeal No. 896 of 2016 stands set aside and will be superseded by the present judgment insofar as fixing the market value is concerned. All statutory and other benefits as ordered by the Reference Court shall continue to operate. No order as to costs.

IV. Civil Appeal arising out of SLP (C) No. 6817 of 2023 (Smt. Vijayadevi Navalkishore Bhartia & Ors. Vs. State of Maharashtra & Anr.) and Civil Appeal arising out of SLP(C) No. 2324 of 2023 (The Executive Engineer Vs. Smt. Vijayadevi Navalkishore Bhartia & Ors.)

94. Leave granted in both the matters.

95. Civil Appeal arising out of SLP (C) 6817 of 2023 is filed by the family of landowners aggrieved by the judgment of the High Court of Judicature at Bombay, Nagpur Bench, Nagpur in First Appeal No. 643 of 2006 dated 27.09.2022. Civil Appeal arising out of SLP (C) 2324 of 2023 is filed by the State against the dismissal of their First Appeal No. 541 of 2007 by the same judgment dated 27.09.2022. By virtue of the said judgment, the High Court confirmed the judgment of the Ld. Ad-hoc Additional District Judge, Akola awarding compensation @ of Rs. 100/- per sq. ft. for the plot area admeasuring 359684.44 sq. ft., further @ of Rs. 50/-per sq. ft. for open belt area admeasuring 108501.12 sq. ft. and @ of Rs. 25/- per sq. ft. for the plot area created due to division admeasuring 28809.84 sq. ft. with consequential benefits.

A. **Brief Facts:**

96. Brief facts giving rise to the case are as follows. The lands of the claimants are situated in Survey Nos. 6, 7 and 60 at Mauza Akoli Khurd district Akola. According to the appellants, on 03.03.1983 the land was converted to non-agricultural use. Survey No. 7 was reserved for development of residential tenements by the Nagpur Housing and Area Development Board vide gazette notification dated 11.10.1984. A notification under Section 4 of the Act was issued on 03.06.1999 for acquiring the land for construction of flood protection wall.

On 06.10.1999, notice under Section 6 of the Act was published. On 09.04.2001, an award was passed @ of Rs. 72,400/- per hectare. The appellants have a case that originally the award was proposed for higher amount but the same was re-evaluated and reduced ultimately in the final award of 09.04.2001. This issue need not detain the Court as ultimately there is no dispute that the amount as awarded by the Land Acquisition Officer was Rs. 72,400/- per hectare. In fairness to the claimant owners, no serious argument in this Court was even canvassed. In fact, a Writ Petition was filed, namely, Writ Petition No. 753 of 2003 challenging the decision of the Commissioner in reducing the compensation. That Writ Petition was dismissed and in Civil Appeal No. 2045 of 2003 filed in this Court, an order was made on 12.02.2004. By the said order, the claimant owners were asked to raise all the issues before the Reference Court.

97. In the meantime, on 13.05.2002, aggrieved by the award passed by the Land Acquisition Officer, the appellants filed reference application bearing LAC No. 209 of 2002. Evidence was adduced about the situs of the land and a claim was made that compensation should be awarded @ of Rs. 175/- per sq. ft. Primarily, four sale deeds were relied upon being (i) Exh.75 dated 12.02.1999 pertaining to plot no. 78 of Akoli (Bk) from Survey Nos. 8 and 5/1. The total area of the plot was 1500 sq. ft. and it was sold @ of Rs. 100/- per sq. ft. (ii) Exh.76 dated 04.05.1999 pertained to plot no. 58 from Survey Nos. 6, 7 and 60 of Akoli (Kh) and it was sold @ of Rs. 100/- per sq. ft. (iii) Exh.77 dated 04.05.1999 was in respect of plot no. 117 from Survey Nos. 6, 7 where the plot was sold at Rs. 110/- per sq. ft. and (iv) Exh. 78 is the sale deed of Plot No. 50 dated 11.05.1999 from Survey No. 7/2 of Akoli (Kh) and it was sold @ of Rs. 175/- per sq. ft.

98. The main case of the claimant owners is that compensation should have been awarded based on the sale deed of 11.05.1999 which pertained to plot No. 50 from Survey no. 7/2 of Akoli (Bk) where the price was Rs. 175/- per sq. ft.

99. By the judgment of 10.08.2006, the Reference Court awarded enhanced compensation. For the plot area admeasuring 359684.44 a sum of Rs. 100/- per sq. ft. was awarded. For area under open belt admeasuring 108501.12 sq. ft. enhanced compensation at Rs. 50 per sq. ft. was awarded. For the balance area of divided plots admeasuring 28809.84 sq. ft., Rs. 25/- per sq. ft. was awarded.

100. This judgment dated 10.08.2006 was challenged by filing First Appeal No. 643 of 2006 by the claimant owners and the First Appeal No. 541 of 2007 by the State. The High Court by the impugned judgment has affirmed the findings of the Reference Court. The appellants and the State are in Appeal.

B. Contentions:

101. Shri Ranjit Kumar, learned senior counsel for the appellants contended that land was developed non-agricultural land converted to non-agricultural use on 03.03.1983; that the area around the land is fully developed and is abutting the road leading to national highway at 1 km; that roads are available; development works were going on and that the land did not fall under 'Blue Zone' and in any case the said contention was given up by the State insofar as the appellant's land was concerned. The learned senior counsel further contended that the highest exemplar at Rs. 175/- per sq. ft. ought to have been taken and the stand that the sale was between the related parties ought to be rejected since there was no evidence to show that the sale was intended to obtain higher compensation. Additionally, the sale was in favour of the legal entity. The learned counsel relied upon the judgments in ***Munusamy v. Land Acquisition Officer (2021) 13 SCC 258*** and ***Mehrawal Khewaji Trust (Registered), Faridkot and Others v. State of Punjab and Others (2012) 5 SCC 432*** to contend that Exh. 78 the sale dated 11.05.1999 of plot no. 50 in Survey No. 7/2 of Akoli (bk) should have been taken being the highest exemplar. The learned senior counsel also submits that no deduction for development charges ought to have been made. According to learned counsel, since it is for the construction of a flood wall no development is required and in any event no compensation has been awarded for the portions of the land consisting of roads, lanes and open space. Learned counsel relied on ***Bhagwathula Samanna and Others Vs. Special Tahsildar and Land Acquisition Officer, Visakhapatnam Municipality, Visakhapatnam (1991) 4 SCC 506; Charan Dass (Dead) by LRs. Vs. H.P. Housing & Urban Development Authority & Ors. (2010) 13 SCC 398*** and ***State of M.P. vs. Radheshyam, 2022 SCC OnLine SC 162.***

102. Rebutting the arguments, Shri Uday B. Dube, learned counsel for the Vidharbha Industrial Development Corporation (hereinafter referred to as 'VIDC') contends that of the four sale deeds, Exh.75 dated 12.02.1999 was a transaction between unrelated parties.

The other three Exh.76, Exh.77 and Exh.78 were also executed just prior to the issuance of the Section 4 notification and were between the related parties. The sale deeds were executed just prior to the initiation of the acquisition and according to the State, the parties had full knowledge regarding sanction of the project for construction of flood control wall and as such sale deeds are suspicious in nature and are intended only for the purpose of getting more compensation for the plots which could not be sold for 15 to 16 long years. The State relied upon ***State of Maharashtra and Others Vs. Digamber Bhimashankar Tandale & Ors.*** ***(1996) 2 SCC 583*** to contend that though the lands were converted for non-agricultural purpose, there was no development and hence compensation on per sq. ft. basis could not have been awarded. According to the State, the claimant owners were not available to sell a single plot for 15 to 16 long years.

103. It is further contended that the land extend to more than 7 lac sq. ft. in all the matters pertaining to the family and as such compensation at Rs. 100/- per sq. ft. relying on an exemplar sale deed involving sale of an area measuring 1500 sq. ft. was not justified.

104. The State vehemently argues that the intra family sale deed Exh. 78 dated 11.05.1999 executed just twenty-three days prior to the notification under Section 4 cannot be the basis for the award of compensation @ of Rs. 175/- per sq. ft. In fact, the claimants prayed only for an average compensation of Rs. 121.25/- per sq. ft. So praying, the State prayed for restoration of the award passed by Land Acquisition Officer.

C. **Findings of the High Court:**

105. The High Court in the impugned order has found that the land was reserved for development of residential tenements. It relied on Exh. 67 a notification dated 21.09.1984 published in the Government Gazette. In fact, the High Court records that the witness for the respondent-State had not countered this fact that the document was produced and the document had remained unrebutted. Dealing with the argument of the claimants/land owners that the Commissioner could not sit in appeal against the proposed award, the High Court rightly rejected the plea stating that in the reference proceedings all the issues have been raised and as such no prejudice has been caused to the claimant land owners. Dealing with the situs of the

land, the High Court recognized the fact that the land was in close proximity to the various institutions of prominence in Akola City. It recorded the following finding:

> "20. ….It is to be noted that in the award passed by the SLAO, a reference has been made to the prominent location of the acquired land. The distance of the acquired land from various institutions of prominence and the close proximity of the land to Akola city has been mentioned. It has been proved that on the Northern side of the acquired land, there are police quarters known as Rahat Nagar, Sneh Nagar and to the North-west, there is Ambedkar Nagar, Vijay Oil Industries and Krushi Utpanna Bazar Samiti market. So also, near the acquired land, there are Ramkrushna Vivekanand Ashram, Maa Sharda Balak Mandir, Ramkrushna Vivekanand Sahitya Kharedi Vikri Kendra and Saint Anne's School of Hyderabad etc. It has been proved that temple of Lord Vyankatesh Balaji, Maratha Seva Sangh, Swami Vivekanand High School, Jijau Vasatigruha. Vyankatesh Restaurant, Wholesale Grain Merchant's Housing and Commercial Complex Society and Alankar Petrol Pump, are located in the close proximity of the acquired land.
>
> 21. PW2 Brijmohan Modi, a registered valuer, examined by the claimants has proved the Valuation Reports at Exhs.63 and 64. The map drawn by the valuer is at Exh.83. On the basis of the evidence of PW1 and PW2, prominent location of the acquired land in close proximity of Akola city has been proved. It has been proved that in the vicinity of the acquired land, there has been development. There are residential and commercial complexes. Evidence adduced in rebuttal by the respondents is not sufficient to disprove the above aspects. The only statement reiterated time and again by the respondents is that the acquired land being situated on the bank of Morna river, it had no future prospects of development. In our opinion, this contention of the respondents cannot be accepted in view of the positive evidence adduced by the claimants. Learned Presiding Officer of the Reference Court has accepted this evidence. We do not see any reason to discard or disbelieve this evidence."

106. Analysing Exh. 75 to Exh. 78 relied upon by the Appellants, the High Court observed as follows:

> 23. In order to prove that the market price of the land on the date of Section 4 notification was not less than Rs.200/- per sq.ft., the claimants have placed on record four sale instances at Exhibits-75 to 78. Exh.75 is the sale deed dated 12.02.1999 of plot no.78 of Akoli (Bk.) from survey nos. 8 and 5/1. Total area of the plot was 1500 sq.ft. It was sold @ Rs.l00/- per sq.ft. It has come on record that this plot was sold by one Usha Santoshrao Gole to Ashok Krushnarao Sapkal and Shalikram Ramkrushna Zamre. It is to be noted that this sale transaction has been made the basis for quantifying the enhanced compensation by the learned Presiding Officer of the Reference Court. The vendor and vendee are not concerned with the claimants in any manner. In our opinion, therefore, the contention of the respondents that this sale instance was brought into existence to claim excessive and exorbitant compensation by the claimants cannot be accepted. On a perusal of the oral evidence adduced by the claimants and supporting documentary evidence, we do not see any reason to discard and disbelieve this sale instance."

107. Hence, the High Court ultimately confirmed the order of the Reference Court relying upon Exh. 75 sale deed dated 12.02.1999 for Rs. 100/- per sq. ft. It expressly recorded that the vendor and vendee were not concerned with the claimants in any manner and that was also the admitted case of the State. Rejecting Exh. 76, Exh. 77 and Exh. 78, the High Court recorded that the sale deeds were executed by members of the family and as such it did not chose to rely upon the same.

Findings:

108. We have already in this judgment while dealing with Civil Appeal Nos. 6776-6777 of 2013 hereinabove, discussed the correctness of the judgment and order in LAC No. 209 of 2002, which reference concerned the present appellants. We have also discussed the law on reliance of exemplars of unrelated parties and related parties and as to how when there are two exemplars, one between unrelated parties at arm's length and the other between related parties mentioning a

higher value and when both are within reasonable time gap, prudence would dictate and common sense would command the acceptability of the exemplars involving unrelated parties. The same reasoning applies here also.

109. We have also therein discussed the law on the applicability of the development charges and also dealt therein the aspect of in what circumstances the value fetched by smaller plots can be applied in valuing larger tracts of land. Additionally, it has also to be borne in mind that while Rs.100/- per sq. ft. was awarded by the Reference Court for plotted area admeasuring 359684.44 sq. ft., for the open belt area admeasuring 108501.12 sq. ft., the enhanced compensation was only @ Rs. 50/- per sq. ft. Additionally, for the plot area created due to division admeasuring 28809.84 per sq. ft., the enhanced compensation was @ Rs. 25/- per sq. ft. For this reason also, additionally, we are not inclined to make any deduction in the amount of Rs.100/- per sq. ft. awarded for the plot area admeasuring 359684.44 sq. ft. In view of the above, both the Civil Appeals are dismissed. No order as to costs.

V. Civil Appeal arising out of SLP (C) No. 6819 of 2023 (Vijayadevi Navalkishore Bhartia & Ors. vs. The State of Maharashtra & Anr.) and Civil Appeal arising out of SLP (C) No. 2892 of 2023 (The Executive Engineer Vs. Smt. Vijayadevi Navalkishore Bhartia & Ors.)

110. Leave granted in both the matters.

111. These Appeals are similar to Civil Appeal arising out of SLP (C) 2324 of 2023 and Civil Appeal arising out of SLP (C) No. 6817 of 2023. The only difference being that the land is situated in Survey No. 6 and Survey No. 7 in Akoli (kd) and measures 26016.59 sq. ft. Section 4 notification under the Act was dated 21.07.2000; and Section 6 notification of the Act was dated 02.02.2001. The Special Land Acquisition Officer published the award on 27.06.2002 @ of Rs. 96364/- per hectare. On 20.04.2006, the Reference Court allowed LAC No. 53/2005 and granted Rs. 100/- per sq. ft. The High Court has dismissed the First Appeal No. 384/2006 filed by the claimant and First Appeal No. 621/2006 filed by the respondents. Both parties have relied on the arguments raised in Civil Appeal arising out of SLP (C) No. 2324 of 2023 and Civil Appeal arising out of SLP (C)

No. 6817 of 2023 and as such whatever has been held therein holds good for these Appeals also. In view of the above, both the Civil Appeals are dismissed. No order as to costs.

VI. Civil Appeal arising out of SLP (C) No. 6820 of 2023 (Smt. Taradevi Chimanlalji Bhartia & Ors. Vs. The State of Maharashtra & Anr.) and Civil Appeal arising out of SLP (C) No. 2753 of 2023 (The Executive Engineer Vs. Smt. Taradevi Chimanlalji Bhartia & Ors.)

112. Leave granted in both the matters.

113. The claimants filed First Appeal No. 282 of 2005 and the State filed First Appeal No. 155 of 2005 arising out of LAC No. 183/2000. The facts are same as in Civil Appeal arising out of SLP (C) No. 6817 of 2023 and Civil Appeal arising out of SLP (C) No. 2324 of 2023. The slight difference being the area involved i.e. plot area of 15562 sq. ft. and open sub divided area of 9464 sq. ft. On 03.06.1999, Section 4 notification under the Act was issued and Section 6 notification under the Act was issued on 02.12.1999. On 04.08.2000, the LAO made award @ of Rs. 5,61,000/- per hectare. On a reference being filed, the Reference Court in LAC No. 183/2000 awarded compensation @ of Rs. 100/- per sq. ft. Both the claimants and the State filed Appeals. We have already in this judgment affirmed the findings in LAC No. 183/2002 out of which these Appeals arise. By the impugned order, the High Court confirmed the order of the Reference Court. Arguments are similar, hence, whatever has been held in Civil Appeal arising out of SLP (C) No. 6817 of 2023 and Civil Appeal arising out of SLP (C) No. 2324 of 2023 would hold good for these Appeals also. In view of the above, the Civil Appeals of the appellant landowners as well as the acquiring body are dismissed. No order as to costs.

Result of the case: Civil Appeal Nos. 6776-6777 of 2013 partly allowed, and other connected Civil Appeals disposed of.

†*Headnotes prepared by:* Divya Pandey

[2024] 7 S.C.R. 2295 : 2024 INSC 540

Kaushik Premkumar Mishra & Anr.

v.

Kanji Ravaria @ Kanji & Anr.

(Civil Appeal No. 1573 of 2023)

19 July 2024

[Vikram Nath* and Ahsanuddin Amanullah, JJ.]

Issue for Consideration

Whether the sale deed dated 02.12.1985 was executed by Respondent No. 2; whether the sale consideration was paid with respect to sale deed dated 02.12.1985; whether the sale deed dated 02.12.1985 was presented for registration on 05.12.1985 or not; whether delayed registration of the sale deed dated 02.12.1985 would prove to be fatal; whether non-mutation would take away the right created by the sale deed in favor of the vendees; whether respondent no.2 had any right, title or interest left in the suit property after 02.12.1985; whether the sale deed dated 02.12.1985 was void as the vendees were alleged to be minors; whether the respondent no. 1 was a *bona fide* purchaser for value by way of a subsequent sale deed dated 03.12.2010.

Headnotes†

Contract Act, 1872 – s.11 – Registration Act, 1908 – s.85 – A Land measuring 3.40 Hectares was sold by respondent no.2 to appellants and collaterals of the appellants – Half of the total land (suit land) was purchased by appellants and other half by the collaterals of appellants – Respondent no.2 herein executed a Sale Deed (suit land) in favour of appellant no.1 and his minor brother (since deceased) on 02.12.1985 with respect to suit land and another sale deed was also executed with the collateral of the appellants – The sale deed (suit land) in favour of the appellant no.1 and his minor brother could not be registered and remained pending for registration before the Sub-Registrar on account of deficiency in stamp duty – On 03.12.2010 respondent no.2 executed a Conveyance Deed with respect to the suit land in favour of respondent no.1 – It is the same land which was transferred in favour of the appellant no.1 and his brother in December, 1985 – The appellants then followed up registration of their sale deed,

* Author

which was registered on 14.06.2011 – Appellant filed suit for cancellation of sale deed 03.12.2010 and the same was dismissed by the Trial Court – First Appellate Court allowed the appeal filed by the appellants – However, the High Court set aside the decision of the First Appellate Court and upheld the decision of the Trial Court – Correctness:

Held: The Trial Court and the High Court had proceeded on the premise that the defendant No.1-the vendor (respondent no.2 herein) had denied the execution of the sale deed and had also denied that he had not received any consideration – This premise taken by both the Courts i.e. Trial Court and the High Court are contrary to the pleadings on record and the evidence led during the Trial – There is clear misreading of the evidence – In his written statement, defendant no.1 has not specifically denied anywhere that he had not executed the sale deed or that the signatures on the sale deed were not his signatures – Thus, the very premise on the basis of which the Trial Court and the High Court proceeded are perverse being contrary to the material on record – Both the said courts also failed to take into consideration that defendant no.1 the vendor (respondent no.2 herein) neither entered the witness box in support of his pleadings and to prove them, nor did lead any evidence, either oral or documentary, in support of his pleadings – There was no justification to treat a vague statement in the written statement of not recollecting about execution of sale deed, to be taken as a denial of the execution – The Trial Court and the High Court fell into the trap of clever drafting and a vague statement of defendant no.1 – The Trial Court and the High Court also committed a manifest error in recording that the defendant no.1- vendor (respondent no.2 herein) had denied having received any sale consideration with respect to the sale deed dated 02.12.1985 – In the written statement filed by the defendant no.1, there is no such statement made – Based upon the aforesaid two factual errors, the Trial Court and the High Court wrongly shifted the burden on the plaintiff to prove execution of the sale deed and also payment of the sale consideration – The impugned judgment thus suffers from manifest error of law and facts both – It is not disputed by respondent No.2 that on 02.12.1985, he had executed another sale deed with respect to the remaining portion of the land in favour of the collaterals of the appellants – This sale deed in favour of the collateral was presented for registration on the same date as the sale deed of the appellant i.e. 05.12.1985 and was thereafter duly registered – The respondent No.2 has never challenged the

said sale deed in favour of the collaterals – It is thus apparent that the family members and collaterals of the appellants purchased the entire land measuring 3.40 Hectares from respondent No.2 in equal shares by two separate documents which were executed on the same date and presented for registration on the same day – There is no specific denial in the written statement filed by respondent No.2 about the sale deed in favour of collaterals – General denial has been made by placing strict proof of liability on the plaintiff – The respondent No.2 apparently wants to take advantage of certain minor aberrations and minor technicalities and is also taking up self-conflicting pleas – As far as the question of payment of sale consideration is concerned, assuming that no sale consideration was paid even though there was a registered sale deed, it would be at the instance of the vendor to challenge the said sale deed on the ground of no sale consideration being paid – In the present, case, there is no such challenge to the sale deed for being declared as void or being cancelled on such ground – Regarding delay of 26 years in registering the document, Non-registration of a document duly presented for registration could be for many reasons – But once it is registered, there is a presumption of correctness attached to it, that is to say that the document has been duly executed and registered in accordance to law – It was for the defendants (respondents) to come forward and to establish that the document was wrongly registered – They did not lead any evidence in this respect – Instead, they tried to put burden on the plaintiff-appellant by requiring him to call the Sub-Registrar as a witness, which the appellant rightly denied – It was always open for the respondents to have called for the records of the Sub-Registrar's office and also the Sub-Registrar in order to find out any mandatory lacuna or illegality or lack of procedure not being followed with respect to the registration – They did nothing of this sort – In fact, respondent No.2 did not make any bone of contention with regard to the registration process and the registration of the documents after 26 years by challenging the same before the same authority or any superior authority or any Court of law – Registration of a document carries with it presumption of correctness until and unless the same was challenged by way of independent proceeding or a counter claim – In the absence of any such claim, the sale deed in favour of the appellants has to be treated as a valid document – The High Court recorded the findings that the fact that the purchasers were minors would not per se affect the validity of the sale deed for the reason that

the second purchaser who was mentioned as a minor in the sale deed was represented through his natural guardian and mother – The respondent no.2 appears to be a dishonest person, which is apparent from his conduct not only during the trial but also acting in collusion with respondent no.1 to execute the sale deed for the same land which he had already transferred – Thus, the impugned judgement of the High Court is set aside and that of the first Appellate Court decreeing suit of the appellant is restored and maintained. [Paras 29, 30, 33.1,33.2, 33.6, 33.8, 33.9, 33.12, 33.13]

Contract Act, 1872 – s.11 – Registration Act, 1908 – s.85 – Whether the sale deed dated 02.12.1985 was executed by Respondent No. 2:

Held: It is not disputed by respondent No.2 that on 02.12.1985, he had executed another sale deed with respect to the remaining portion of survey No.13/1 in favour of the collaterals of the appellants – This sale deed in favour of the collateral was presented for registration on the same date as the sale deed of the appellant i.e. 05.12.1985 and was thereafter duly registered – The respondent No.2 has never challenged the said sale deed in favour of the collaterals – It is thus apparent that the family members and collaterals of the appellants purchased the entire survey No. 13/1 measuring 3.40 Hectares from respondent No.2 in equal shares by two separate documents which were executed on the same date and presented for registration on the same day – There is no specific denial in the written statement filed by respondent No.2 about the sale deed in favour of collaterals – General denial has been made by placing strict proof of liability on the plaintiff. [Para 33.1]

Registration Act, 1908 – Transfer of Property Act, 1882 – Registration of documents/sale deed – Payment of stamp duty – Deficiency of stamp duty – Deficiency of stamp duty cannot enure any benefit to the vendor:

Held: The issue of registration of a document is with the State, which requires compulsory registration of documents so that it is not deprived of revenue by way of stamp duty payable on such transfers of immovable property – If the purchaser has no means to pay stamp duty or exorbitant demand of stamp duty is made by the registering authority which the purchaser is unable to pay at that time but he remains satisfied with the fact that the vendor has fairly and duly executed the sale deed presented it for registration and put him in possession of the purchased property which he is

peacefully enjoying, he is always at liberty to pay the deficiency of stamp duty at any point of time – The document presented for registration will remain with the Registering Authority till such time, the deficiency is removed – However, this pendency of registration on account of deficiency cannot enure any benefit to the vendor, who has already eliminated all his rights by executing the sale deed after receiving the sale consideration – He cannot become the owner of the transferred land merely because the document of sale is pending for registration – It is the purchaser who cannot produce such document which is pending registration with respect to the immovable property in evidence before the Court of law as the same would be inadmissible in view of statutory provision contained in the TP Act as also the Act, 1908. [Para 33.13]

Principles/Doctrines – Doctrine of bona fide purchaser – Applicability in case of subsequent purchaser:

Held: The doctrine of bona fide purchaser for value applies in situations where the seller appears to have some semblance of legitimate ownership rights – However, this principle does not protect a subsequent purchaser if the vendor had already transferred those rights through a prior sale deed – In a case where the vendor deceitfully executes a second sale deed 26 years after the initial transfer, without disclosing the earlier transaction and without any ongoing litigation regarding the property, the subsequent purchaser cannot claim the benefits of a bona fide purchaser – Essentially, if the vendor's rights were already severed by the first sale, any later sale deed made without transparency and in bad faith is invalid – The subsequent purchaser, even if unaware of the prior sale, cannot be considered bona fide because the vendor no longer had the legal right to sell the property – Thus, the protection afforded by the bona fide purchaser doctrine is nullified by the vendor's deceitful conduct and the pre-existing transfer of rights – This ensures that the original purchaser's rights are upheld and prevents unjust enrichment through fraudulent transactions. [Para 35]

Case Law Cited

Raghunath & Ors. v. Kedar Nath [1969] 3 SCR 497 **: (1969) 1 SCC 497;** *Bondar Singh & Ors. v. Nihal Singh & Ors.* [2003] 2 SCR 564 **: (2003) 4 SCC 161;** *Suraj Lamps and Industries Pvt. Ltd. v. State of Haryana and Anr.* [2009] 9 SCR 1048 **: (2009) 7**

SCC 363; *S. Kaladevi v. V.R. Somasundaram & Ors.* [2010] 4 SCR 515 **: (2010) 5 SCC 401;** *M/s Paul Rubber Industries Pvt. Ltd. v. Amit Chand Mitra & Anr.* [2023] 14 SCR 28**;** *Veena Singh (dead) Thr. Lrs. v. District Registrar/Additional Collector* [2022] 3 SCR 736 **: (2022) 7 SCC 1;** *Maya Devi v. Lalta Prasad* [2014] 2 SCR 1129 **: (2015) 3 SCC 588 – distinguished.**

Alka Bose v. Parmatma Devi and others [2008] 17 SCR 822 **: (2009) 2 SCC 582;** *Anathula Sudhakar v. P. Buchi Reddy & Ors.* [2008] 5 SCR 331 **: (2008) 4 SCC 594;** *Raghwendra Sharan Singh v. Ram Prasanna Singh by LR* [2019] 4 SCR 1069 **: (2020) 16 SCC 601;** *Mathai Mathai v. Joseph Mary & Ors.* [2014] 5 SCR 621 **: (2015) 5 SCC 622;** *Smriti Debbarma v. Prabha Ranjan Debbarma* [2023] 1 SCR 355 **: (2023) SCC On Line SC 9;** *Sukhwinder Singh v. Jagroop Singh and Anr.* [2020] 1 SCR 512 **: (2020) SCC Online SC 86;** *Seethakathi Trust Madras v. Krishnaveni* [2022] 1 SCR 322 **: (2022) 3 SCC 150;** *Hansa V. Gandhi v. Deep Shankar Roy* **(2013) 12 SCC 776;** *Hardev Singh v. Gurmail Singh* [2007] 2 SCR 141 **: (2007) 2 SCC 404;** *Krishnaveni v. M.A. Shagul Hameed and another* **(Civil Appeal No.2591 of 2024 @ SLP(Civil) No.23655 of 2019);** *Babasaheb Dhondiba Kure v. Radha Vithoba Barde* **(C.A. No.002458 of 2024);** *The Tehsildar, Urban Improvement Trust and Anr. v. Ganga Bai Menariya (dead) through Lrs. and others* [2024] 2 SCR 650**;** *Maya Devi v. Lalta Prasad* [2014] 2 SCR 1129 **: (2015) 3 SCC 588 – referred to.**

Kunda wd/o Mahadeo Supare & Ors. v. Haribhau s/o Husan Supare **(2014) 5 Mah. L.J.726 – referred to.**

List of Acts

Contract Act, 1872; Registration Act, 1908; Transfer of Property Act, 1882.

List of Keywords

Section 11 of Contract Act, 1872; Section 85 of Registration Act, 1908; Execution of sale deed; Registration of sale deed; Payment of stamp duty; Deficiency of stamp duty; Deficiency of stamp duty cannot enure any benefit to the vendor; Doctrine of bona fide purchaser; Subsequent purchaser; Fraudulent transaction; Delay in registration of document; Pendency of registration of document; Payment of sale consideration.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1573 of 2023

From the Judgment and Order dated 09.06.2022 of the High Court of Judicature at Bombay in SA No. 649 of 2019

Appearances for Parties

Vinay Navare, Sr. Adv., Chinmay Deshpande, Sudhanshu Prakash, Anirudh Sanganeria, Advs. for the Appellants.

Huzefa Ahmadi, Ranjit Kumar, Sr. Advs., Mahesh Agarwal, Rishi Agrawala, Ankur Saigal, Devansh Srivastava, E. C. Agrawala, Tirathraj Pandya, Nirali Sarda, Kaushik Poddar, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Vikram Nath, J.

1. *"Law is the king of kings, nothing is mightier than law, by whose aid, even the weak may prevail over the strong."*

The power structures of our society are such that the weaker ones often find themselves exploited and oppressed by those who yield greater power. Land ownership is one such arena where we see the swords of powerplay being sharpened with continued fraud, deceit, and greed. While we shall deal with the facts of the present case in detail later, it is a classic example of continued suffering faced by the common man owing to *mala fide* intentions of the vendors who try to gain double-benefits, either by arm-twisting or through manipulation of the legal processes. Sometimes, the misery of the litigant is deepened when such travesty of justice is prolonged for decades. It is in cases like these, the law comes to the aid of the weak. While adjudicating such cases, it is not just the lives and the properties of the people that we are dealing with, but also their trust in the legal system. In cases like the one before us, it is not for us to just mechanically analyse the contentious transactions but to also ensure that injustice is remedied and nobody is benefitted by their own wrongs. Justice knows no bias and thus, through its aid, even the weak may prevail over the strong.

2. This appeal by the plaintiff assails the correctness of the judgment and order dated 9th June, 2022 passed by the High Court of Judicature at Bombay, whereby the Second Appeal filed by the defendant no.2 (respondent no.1 herein) was allowed the judgment of the first Appellate Court was set aside and that of the Trial Court dismissing the suit of the appellant was maintained.

3. Respondent no.2 was the owner of Survey No.13 Hissa No.1 measuring 3.40 Hectares situate in village Shelwali, Tehsil Palghar, District Thane, Maharashtra. Half of the total area which would come to 1.70 Hectares on the western side is the suit land purchased by the appellants. Remaining half was purchased by collaterals of the appellants.

4. Relevant facts for appropriate adjudication of this appeal are as follows:

   (a) Respondent no.2 herein executed a Sale Deed in favour of appellant no.1 and his minor brother Ambrish Mishra (since deceased) on 02.12.1985 with respect to suit land and the appellant no.1, along with his brother, was put into possession of the same.

   (b) On the same date another Sale Deed was executed by the respondent no.2 in favour of one Param Umakant Mishra and Sohardha Jagdish Mishra (collaterals of the appellants) for the remaining half portion.

   (c) On 05.12.1985 both the aforementioned Sale Deeds were presented for registration before the Sub-Registrar, Palghar.

   (d) The Sale Deed in favour of Param Mishra and Sohardha Mishra was registered and later on their names were mutated in the revenue records. However, on account of deficiency in stamp duty, the Sale Deed in favour of the appellant no.1 and his minor brother could not be registered and remained pending for registration before the Sub-Registrar. As such their names could not be incorporated in the revenue records and the name of the respondent no.2 continued to be recorded.

   (e) It would be relevant to mention that in the Sale Deed it was mentioned that the appellant no.1 is aged 18 years whereas

his brother Ambrish, was a minor and was represented through his natural guardian-mother (Smt. Malti).

(f) On 8th October, 1999, brother of the appellant Ambrish passed away issueless and later on his widow re-married, as such, his parents became the successors and legal heirs of the estate of Ambrish.

(g) On 3rd December, 2010 respondent no.2 executed a Conveyance Deed with respect to the suit land in favour of respondent no.1. It is the same land which was transferred in favour of the appellant no.1 and his brother in December, 1985.

(h) On 8th June, 2011 the appellants came to know about inspection of the suit land by some strangers, so they went to the spot. They found that respondent no.1, along with some musclemen, was trying to take possession of the suit land but on account of suit land being protected by fencing, they could not enter. It was at that time the appellant no.1 came to know about a conveyance deed in favour of respondent no.1 on the basis of which he was trying to take possession.

(i) The appellants thereafter made inquiries in the office of the Sub-Registrar and came to know that there was a sale deed dated 3rd December, 2010 in favour of respondent no.1

(j) After obtaining a certified copy of the said Deed, which was received on 14th June 2011, the picture became clear to the appellant. The fraud played on them by respondent no.2 of transferring the same property (suit land) in favour of respondent no.1, which had been earlier transferred in their favour, became apparent.

(k) The appellants then followed up registration of their sale deed. After removing the deficiency in stamp duty, the sale deed executed on 02.12.1985 and presented for registration on 05.12.1985 before the Sub-Registrar came to be registered on 14th June, 2011. The above incident of interference in possession by the respondent no.1 gave rise to filing of the suit.

5. The appellants along with Premkumar, father of appellant no.1, instituted a suit for cancellation of sale deed dated 03.12.2010 and

for perpetual injunction on 27th June, 2011 which was registered as Special Civil Suit No.46 of 2011. The vendor was impleaded as defendant No.1 (respondent no.2 herein) and the subsequent purchaser as defendant No.2 (respondent no.1 herein). The facts as stated in paragraph 4 above are pleaded in the plaint as such are not being repeated.

6. Both the defendants filed separate written statements. The written statement filed by the defendant no.1 averred that the plaintiff was not entitled to any of the reliefs; the suit was barred by limitation; the land in suit was owned by him; that he did not recollect having executed any such sale deed in favour of the appellant no.1 and his brother; that the plaintiff purchasers were minors, as such, the sale deed in their favour was void; it was also denied that defendant no.2 had tried to trespass the property and take forcible possession with the help of musclemen.

7. Defendant no.2 in his written statement averred that the valuation of the suit was not proper; that no cause of action arose to file the suit; that the plaintiffs had supressed material facts and documents and, as such, the suit was liable to be dismissed; that the plaintiff no.1 and his brother Ambrish were minors and, as such incompetent to contract; that as per section 11 of the Indian Contract Act, 1872[1] the transaction with minor was void and as such unenforceable in law; that guardian of minor Ambrish was shown as his mother whereas actually it should have been his father and therefore also the sale deed was bad; that there was no signature of plaintiff no.2 in the sale deed; that the widow of brother Ambrish was not made a party, as such, the suit was bad for non-joinder of the necessary party; that the sale deed was not duly registered as per provisions of law; that before registration no notice was issued to the vendor i.e. defendant no.1; no explanation or details were given with regard to the delay of 26 years in getting the registration; that under section 85 of the Registration Act, 1908,[2] the documents pending for two years were liable to be destroyed, as such, the sale deed was not legal and proper; that there was interpolation in the documents of sale; that he was *bona fide* purchaser for value and had done so after verification

1 The Act, 1872

2 The Act, 1908

of the title from the revenue records as also having searched the records of the Sub-Registrar; lastly, it was prayed that the suit be dismissed.

8. In the written statement of the respondent no.2 (defendant no.1) there was no specific denial of the execution of the Sale Deed on 02.12.1985 in favour of the appellant no.1 and his brother. There was also no specific or even general denial of not receiving the sale consideration. No suit for cancellation of the said Sale Deed has ever been filed nor any counter claim was filed by the defendants to the suit filed by the appellants assailing the sale deed dated 02.12.1985.

9. On the basis of the pleadings, the Trial Court framed the following issues:

"(i) Do plaintiffs prove that they are in possession and occupation of the suit land?

(ii) Do plaintiffs prove that they are owners of the suit land by virtue of registered Sale Deed dated 02/12/1985?

(iii) Do plaintiffs prove that the defendants were trying to take possession of the suit land forcibly and unauthorizedly?

(iv) Do plaintiffs prove that the Deed of Conveyance dated 03/12/2010 registered at serial No.9176 is void-ab-initio?

(v) Do plaintiffs prove that they are entitle for relief of permanent injunction against the defendants as prayed in the suit?

(vi) Do plaintiffs prove that they are entitled for any other relief?

(vii) Does defendant No.1 prove that the alleged Agreement to Sale dated 02/12/1985 is void-ab-initio?

(viii) Does defendant No.1 prove that the plaintiffs' suit is barred by limitation?

(ix) Does defendant No.2 prove that the Sale Deed dated 02/12/1985 was not enforceable by law?

(x) Does defendant No.2 prove that he is bona fide purchaser and the possessor of suit land?

(xi) What order and decree?"

10. The parties to the suit led evidence, both oral and documentary. On behalf of the plaintiffs Kaushik Premkumar Mishra examined himself

as PW-1 and further examined Shri Mohan Joshi, Advocate as PW-2 and Prashant Mishra as PW-3. They also filed documentary evidence which included amongst others (i) sale deed dated 02.12.1985, (ii) certified copy of 7/12 extract of suit property, (iii) mutation entry no.668, (iv) Form No.1 of Register of Marriages for the year 2007 and (v) Conveyance deed dated 03.12.2010.

11. Defendant no.1 the vendor did not lead any evidence, either oral or documentary. He failed to appear and enter the witness box even to support his pleadings made in the written statements. There was also no cross-examination of PW-1 on his behalf.

12. Defendant no.2, the subsequent purchaser examined himself as DW-1, and further examined Ranjeet Patil as DW-2, Parvez Patel as DW-3, Sunit Patil as DW-4, Govind Rawaria as DW-5. He also filed voluminous documents relating to revenue records, mutation entries, search reports, copy of notices and various other documents relating to his possession.

13. The Trial Court, after considering the evidence led by the parties, dismissed the suit, vide judgment dated 24.02.2016. The Trial Court recorded the following findings:

    13.1 Issues Nos.1,2,4,5 and 6 were decided in negative, whereas Issues nos. 7, 8, 9 and 10 in the affirmative, mainly for the reason that the appellant no.1 as also his brother were minors at the time of the execution of the Sale Deed on 02.12.1985, as such could not have entered into a contract being a minor and, therefore, the Sale Deed was void.

14. The appellants preferred appeal before the District Judge which was registered as Civil Appeal No.28 of 2016. The District Judge, vide judgment dated 7th March, 2019 allowed the appeal, set aside the judgment of the Trial Court and decreed the suit. The first Appellate Court framed the following points for determination in paragraph 14 of the judgment and in the said table, it also recorded the outcome of the said findings. The said table is reproduced below:

> "14. Heard the Ld. Advocates for both the parties. Perused the record and the proceedings. Following points arise for my determination on which I have recorded my findings for the reasons to follow:

S.No.	Points	Findings
1.	Whether plaintiffs prove that they are in possession and occupation of the suit property?	…In the affirmative.
2.	Whether plaintiffs prove that they are owners of the suit land by virtue of registered sale deed dated 02.12.1985?	…In the affirmative.
3.	Whether plaintiffs prove that the defendants were trying to take forcible possession of suit property unauthorizedly?	…In the affirmative.
4.	Whether plaintiffs prove that the deed of conveyance dated 03.12.2010 registered at sr. no.9176 is void-ab-initio?	…In the affirmative.
5.	Whether plaintiffs prove that they are entitled for relief of permanent injunction?	…In the affirmative.
6.	Whether plaintiffs prove that they are entitled for other reliefs?	…In the affirmative.
7.	Whether defendant no.1 proves that the alleged agreement to sale dated 02.12.1985 is void ab-initio?	…In the negative.
8.	Whether defendants prove that the suit is barred by Law of Limitation?	…In the negative.
9.	Whether defendant no.2 proves that sale deed dated 02.12.1985 was not enforceable by law?	…In the negative.
10.	Whether defendant no.2 proves that he is *bona fide* purchaser and in possession of the suit property?	…In the negative.
11.	Whether judgment and decree in Spl. Civil Suit No.46 of 2011 requires interference and is liable to be set aside?	…In the affirmative.
12.	What order?	As per final order.

"

15. In the analysis, the First Appellate Court recorded the following findings also:

    15.1. It held that the title of the property relates back to the date of execution of the sale deed and not the date of the registration.

    15.2. It held that during the lifetime of the father, mother can act as the natural guardian of the minor.

    15.3. The defendants having failed to seek a declaration of the sale deed dated 02.12.1985 being declared *void ab-initio* or for its cancellation, once the document is duly registered by the Sub-Registrar, it is only the competent Civil Court which would have the jurisdiction to declare it as cancelled or *void ab-initio*.

    15.4. Merely because the challenge to the procedure has been made with respect to the registration, the submission of the defendants with respect to the delayed registration etc. gets washed out.

16. The said judgment was assailed by way of Second Appeal by the respondent no.1, the subsequent purchaser (defendant no.2) only. No appeal was filed by the respondent no.2 (defendant no.1), vendor of the appellant. This appeal was registered as Second Appeal No.649 of 2019.

17. By the impugned judgment dated 09.06.2022, the High Court has allowed the same and after setting aside the judgment of the first Appellate Court, restored that of the Trial Court and dismissed the suit. It is this judgment of the High Court, which is under challenge in the present appeal. The High Court framed the following substantial questions of law in paragraph 12 of the judgment which are reproduced hereunder: -

> "12. The substantial questions of law raised in the appeal are:
>
> **i)** Whether execution of the sale deed dated 02.12.1985 at Exhibit 54 has been duly proved;
>
> **ii)** Whether the sale deed at Exhibit 54 conveys title in favour of plaintiffs;

iii) Whether the findings of the first Appellate court on the issue of execution and validity of sale deed dated 02.12.1985 are not based on evidence on record and are perverse."

18. The High Court recorded the following findings:

18.1. The sale deed in question dated 02.12.1985 could not be held to be invalid for the sole reason that the deed was signed only by the vendor and not by the vendees (in favour of plaintiffs).

18.2. The fact that the purchasers were minors would not *per se* affect the validity of the sale deed (in favour of plaintiffs).

18.3. It criticizes the findings of the first Appellate Court regarding the sale deed dated 02.12.1985 having been validly proved by the plaintiffs to be not based on consideration of material facts on record as discussed and considered by the Trial Court while holding that the sale deed was not validly proved.

18.4. It considered in great detail the provisions of the Registration Act to hold that the sale deed dated 02.12.1985 was not validly registered, as such, could not have been relied upon by the plaintiffs for any of the reliefs claimed by them or to maintain the suit.

19. We have heard Shri Vinay Navare, learned senior counsel for the appellants, Shri Ranjit Kumar, learned senior counsel appearing for respondent No.2 and Shri Huzefa Ahmadi, learned senior counsel representing respondent No.1.

20. The submissions of Shri Navare for the appellant may be summarized as under:

20.1. Respondent No.2 did not specifically deny execution of the sale deed in favour of appellant no.1 and his brother. He has only stated in the written statement that he does not recollect to have executed any such document.

20.2. Respondent No.2 did not cross-examine the appellant No.1 who had entered the witness box. The appellant No.1 had specifically stated, not only in the plaint but also in his deposition, that respondent No.2 had executed the sale deed on 02.12.1985 after receiving the sale consideration.

20.3. Respondent No.2, although filed a written statement making vague assertions but chose not to appear in the witness box apparently to avoid being cross-examined.

20.4. The first Appellate Court had decreed the suit of the appellant but no appeal was filed against the same by the respondent No.2. The only appeal filed before the High Court was by respondent No.1.

20.5. The objection as to the registration or the procedure adopted while registering the sale deed was essentially available to respondent No.2 but he did not raise it in the written statement. Further respondent no.2 neither cross-examined appellant No.1 nor did he enter the witness box nor did he assail the judgment of the first Appellate Court decreeing the suit.

20.6. The only manner in which respondent No.2 could have challenged the sale deed in favour of the appellants was by way of either a counter-claim or by way of an independent suit praying for cancellation of the sale deed by impleading the registering authority, which he chose not to do.

20.7. As there was no counter-claim filed by the defendant, in particular, respondent No.2, the question of validity of execution and registration of the Sale Deed dated 02.12.1985 in favour of the appellant no.1 and his brother, could not be tested.

20.8. The Trial Court did not frame any issue with respect to the validity of the registration process or the registration of the sale deed by the registering authorities, after such a long gap of 26 years. Without framing such an issue, the Trial Court committed serious error and a patent illegality in recording a finding with regard to the registration process and commenting on the registering authorities. Even the High Court committed the same illegality.

20.9. There is no limitation provided under the law for a sale deed which had been executed and duly presented before the Registrar for registration, for such document to be registered within a particular time. Even if there was a gap of 26 years from the date of presentation till the date of registration, it would not make any difference and the sale deed would relate back to the date of execution once registered.

20.10. The fact that the sale deed was duly executed on 02.12.1985 and thereafter presented for registration on 05.12.1985 is apparent from the fact that respondent No.2 on the same date i.e. 02.12.1985 had executed the sale deed for the remaining half portion of Survey No.13/1 in favour of collaterals of the appellant and further, the said sale deed in favour of the collaterals was also presented for registration on 05.12.1985 i.e. the same day on which the appellant presented the sale deed for registration. The sale deed of the collaterals was later on registered. However, the sale deed of the appellant no.1 remained pending for registration due to deficiency in stamp duty and was finally registered in 2011 after the deficiency was removed.

20.11. The registration of the sale deed of the appellant even after 26 years could not be said to be faulted on that ground alone. The said registration was never challenged either before superior authority of the registration department or before the High Court under Article 226 of the Constitution. Till date there is no challenge to the said sale deed in favour of the appellant either on the ground of non-execution by respondent No.2 or on the ground of the registration being faulty before any forum whatsoever.

20.12. Reference to the deposition of appellant No.1 has been made to submit that the appellant No.1 nowhere stated that no sale consideration was paid but he only stated that he had not placed any documents on record to show that the sale consideration of Rs.40,000/- had been paid.

20.13. The arguments advanced on behalf of respondent No.1 that the appellant No.1 was a minor, as such the sale deed was void, also does not benefit the respondents inasmuch as on behalf of the brother of the appellant No.1, who was stated to be a minor in the sale deed, was duly represented by his mother, natural guardian. As such the sale would, in any case, be valid insofar as the brother of the appellant No.1 was concerned.

20.14. The collusion of respondent Nos.1 and 2 was writ large and more than apparent from the conduct of the respondent No.2; that he did not cross-examine the appellant no.1; he did not

enter the witness box; he did not lead any evidence and; he did not file any appeal before the High Court.

20.15. Reliance was placed upon the judgment of this Court in the case of **Alka Bose vs. Parmatma Devi and others**[3] wherein this Court had observed that in India, an agreement of sale signed by the vendor alone and possession delivered to the purchaser and accepted by the purchaser has always been considered to be a valid contract.

20.16. Lastly, it was submitted that the respondent No.1, the subsequent purchaser was not a *bona fide* purchaser. The sale deed in favour of respondent No.1 has a clause that the property was being sold on as is where is basis which clearly reflects that respondent no.1 had knowledge of the sale deed in favour of appellant and about their possession.

20.17. On such submissions, learned counsel for the appellants submitted that the appeal deserves to be allowed, the impugned order of the High Court deserves to be set aside and that of the first Appellate Court be maintained.

21. Mr. Ranjit Kumar, learned senior counsel appearing for respondent No.2 made detailed submissions which we shall note a little later. He, however, did not give any explanation whatsoever as to why the respondent No.2 did not cross-examine the appellant No.1, why the respondent No.2 did not enter the witness box in support of his pleadings stated in the written statement, why no evidence was led by him and why no second appeal was preferred by respondent No.2 against the judgment of the first Appellate Court decreeing the suit. The submissions advanced on behalf of respondent no.2 are summarized hereunder:

21.1. Much emphasis has been laid on the fact that the sale deed in favour of appellant was registered after 26 years.

21.2. With respect to the arguments relating to sale deed in favour of respondent No.1 mentioning on as is where is basis, the submission is that as there was encroachment on the suit property by the local tribal people as such this clause was

3 [2008] 17 SCR 822 : (2009) 2 SCC 582

inserted so that respondent No.2 would not be saddled with any further liability of handing over a clear and vacant possession.

21.3. The suit instituted by the appellant as framed, was not maintainable inasmuch as no relief of declaration of title was sought and only relief claimed was for cancellation of the sale deed dated 03.12.2010 executed in favour of respondent No.1 and further for grant of permanent injunction. This was deliberately done as suit for declaration would be time barred.

21.4. Once the pleadings have been exchanged and the issues are framed, the burden would lie on both the parties to establish their cases and it would be wrong on the part of the appellant to argue that the burden would be on the respondent alone with respect to certain issues.

21.5. The appellant No.1 has admitted that he did not know the details of the bank, cheque number, the date of the cheque, etc. and that he had no documents to show that consideration of Rs.40,000/- was paid except for the fact that it was mentioned in the sale deed. Reference was also made to section 25 of the Act,1872 to submit that the agreements without consideration are void agreements.

21.6. Appellant No.1 had admitted that the property was not recorded in his name and that he had applied to the revenue authorities to record his name which he was pursuing from 1996.

21.7. Appellant No.1 declined to produce the pleadings of Special Civil Suit No.812 of 1996, the partition suit between the members of the family. Appellant No.1 admits of not challenging the Mutation Entry No.668 recorded in favour of respondent No.1 pursuant to the sale deed dated 03.12.2010.

21.8. Appellant No.1 admitted of not having clearance and prior sale permission from the competent authority which was a pre-condition for purchase of suit property.

21.9. The appellant No.1 admitted that the word “cash” in the sale deed was scored out and the word “cheque” was mentioned in its place and that on some pages of the sale deed, full signature of his mother are not there rather it has initials.

21.10. The appellant No.1 admitted that he does not remember as to who had presented the sale deed for registration in the year 1985 and admits that he was not the one who presented.

21.11. With respect to the submission that the suit was not maintainable as relief of declaration of title was not sought, reliance was placed upon the judgment of this Court in the cases of **Anathula Sudhakar vs. P. Buchi Reddy & Ors.**[4] and **Raghwendra Sharan Singh vs. Ram Prasanna Singh by LR.**[5]

21.12. Appellant No.1 had admitted in his deposition that he was a minor at the time of the execution of the sale deed on 02.12.1985 and the age shown in the sale deed that he was 18 years was incorrect. Under Section 11 of the Act, 1872 a minor is not competent to enter into a contract and as the appellant No.1 admitted that he was a minor at the time of the sale deed, the said contract would be *void ab initio.* Reliance was placed upon a judgment of this Court in the case of **Mathai Mathai** vs. **Joseph Mary & Ors.**[6]

21.13. The burden of proof was on the plaintiff, who has based the suit on the sale deed dated 02.12.1985 to prove the same to be a valid sale. As the Trial Court recorded the finding that the appellants had failed to establish their right, title and interest in the suit property, there was shifting of the onus on the respondent No.2 would not arise and there was no necessity or requirement of the respondent No.2 to enter the witness box as the same would be of no consequence. Reliance was placed upon the judgment of this Court in **Smriti Debbarma vs. Prabha Ranjan Debbarma.**[7]

21.14. Referring to section 114 of the Indian Evidence Act,1872[8] regarding presumption of existence of certain facts by the Court, it was submitted that although the said presumption is rebuttable but as the appellant No.1 in his cross-examination has made various admissions which were sufficient to decide

4 [2008] 5 SCR 331 : (2008) 4 SCC 594, (relevant paras 13-16, 21)

5 [2019] 4 SCR 1069 : (2020) 16 SCC 601 (para 7-10)

6 [2014] 5 SCR 621 : (2015) 5 SCC 622 (para 16-19)

7 [2023] 1 SCR 355 : (2023) SCC On Line SC 9 (para 35)

8 The Evidence Act

the fate of the suit against him, it was not necessary for the respondent no.2 to either cross-examine him or to enter the witness box. Reliance was placed upon the judgment of this Court in the case of **Kunda wd/o Mahadeo Supare & Ors. vs. Haribhau s/o Husan Supare.**[9]

21.15. Appellant No.1 also admits that serial numbers of the stamps are not in continuation and that regular registration process of the sale deed was not complete at the time when the sale deed of 2010 in favour of respondent No.1 was registered.

21.16. Relying upon section 54 of the Transfer of Property Act, 1882[10] read with section 17 and 49 of the Registration Act, the submission is that an unregistered sale deed could not have been received in evidence as no title would pass on the basis of an unregistered document relating to immovable property. As such the respondent No.2 continued to be the owner of the suit property holding a valid title over the same. Reliance has been placed upon the following judgments:

- **Raghunath & Ors. vs. Kedar Nath; [11]**
- **Bondar Singh & Ors. Vs. Nihal Singh & Ors.;[12]**
- **Suraj Lamps and Industries Pvt. Ltd. vs. State of Haryana and Anr.;[13]**
- **S. Kaladevi v. V.R. Somasundaram & Ors.;[14] and**
- **M/s Paul Rubber Industries Pvt. Ltd. vs. Amit Chand Mitra & Anr.[15]**

21.17. Lastly it was submitted that as mandatory legal conditions were not fulfilled for the registration of the sale deed dated 02.12.1985, the same could not have been treated as a registered sale deed.

---

9 (2014) 5 Mah. L.J.726 (para 8)

10 The TP Act

11 [1969] 3 SCR 497 : (1969) 1 SCC 497 (para 3)

12 [2003] 2 SCR 564 : (2003) 4 SCC 161 (para 5)

13 [2009] 9 SCR 1048 : (2009) 7 SCC 363 (para 15-18)

14 [2010] 4 SCR 515 : (2010) 5 SCC 401 [para 12,13,15]

15 [2023] 14 SCR 28 : SLP No.15774 of 2023.

21.18. To elaborate the above argument following further facts were stated:

a) Appellant No.1 in his cross-examination (at Pg.135) has admitted that Defendant No.1 (original Vendor) was not called for completing process of registration on 14.06.2011 and that there is no endorsement of the Sub-Registrar on the last page of Sale Deed about completion of registration. Therefore, the mandates of Section 60, which prescribes as to what constitutes a Certificate of registration is not fulfilled and hence, the alleged sale deed was not validly registered on 14.06.2011 and therefore, alleged sale deed dated 02.12.1985 cannot be treated as a registered sale deed.

b) That the alleged sale deed was registered in violation of Section 32 of the Indian Stamp Act, 1899 and Sections 17 and 20 of the Act, 1908. The essential requirement under Section 54 of the TP Act were also not fulfilled. That from the record as well as the admission of appellant no.1, it is clear from the serial number of the stamps that the same are not in continuum.

c) As per Section 32 of the Stamp Act when any instrument is brought to the Collector then the Collector may determine the Stamp Duty. That in the present case, the alleged Sale Deed shows that at the time of presentation the stamp of Rs.1600/- was given but on 14.06.2011 the Sub-Registrar accepted extra amount of Rs.2200/- and penalty of Rs.500/- but there is no endorsement to show that it was sent to the Collector for determining the Stamp duty and it is not shown in the Sale Deed that deficit stamp duty was affixed. As per Sections 33 and 34 of the Stamp Act, the Collector has power to impound the document.

d) The alleged sale deed does not show that under which provision of law the Sub-Registrar had accepted the deficit charges after 26 years and no reasons were given as to why it was kept pending for such a long time.

e) Even if assuming for the sake of arguments without admitting that the alleged sale deed was presented

before the Sub-Registrar, the same was unclaimed for 26 years and hence, by operation of Section 85, documents unclaimed for more than two years are required to be destroyed.

f) Compulsory affixing of photograph on the conveyance deed is also not followed at the time of registration process. Reliance was placed on the case of **Veena Singh (dead) Thr. LRs. District Registrar/Additional Collector**.[16]

22. Mr. Huzefa Ahmadi, learned Senior Counsel appearing for respondent No.1, the subsequent purchaser, has mainly laid stress on the point that respondent No.1 was a *bona fide* purchaser having exercised due diligence as such there would be no justification of cancellation of sale deed executed in his favour.

23. Mr. Ahmadi has also broadly submitted that the appellant no.1 had failed to prove the basis of claim i.e. the sale deed dated 02.12.1985 and as such had not acquired any right, title or interest in the suit property. The respondent No.2, therefore, was well within his rights to execute the sale deed in favour of the respondent No.1 in 2010. He has also referred to the statement of appellant No.1 in order to show certain admissions which already have been pointed out and noted above in the arguments of Mr. Ranjit Kumar, learned senior counsel appearing for respondent No.2. In so far as the main submission regarding *bona fide* purchase for value without notice, he referred to Section 41 of the TP Act, 1882.[17] Reliance has been placed upon the following judgements:

1. **Sukhwinder Singh vs. Jagroop Singh and Anr.**,[18]

2. **Seethakathi Trust Madras vs. Krishnaveni**,[19]

3. **Hansa V. Gandhi vs. Deep Shankar Roy**,[20]

16 [2022] 3 SCR 736 : (2022) 7 SCC 1

17 TP Act

18 [2020] 1 SCR 512 : 2020 SCC Online SC 86

19 [2022] 1 SCR 322 : (2022) 3 SCC 150

20 (2013) 12 SCC 776

4. Hardev Singh vs. Gurmail Singh,[21]

5. Raghwendra Sharan Singh vs. Ram Prasanna Singh by LR.[22]

24. In the additional written submissions, respondent no.1 has placed further reliance upon two judgments of this Court, for the proposition that the sale contract with the minor even though he was the vendee, would be *void ab-initio*. The two cases are **Mathai vs. Mathai**,[23] and another recent judgment dated **15.02.2024** passed in **Civil Appeal No.2591 of 2024 @ SLP(Civil) No.23655 of 2019, Krishnaveni vs. M.A. Shagul Hameed and another**. Further, reliance was placed upon another judgment of this Court dated **15.02.2024** in **C.A. No.002458 of 2024, Babasaheb Dhondiba Kure vs. Radha Vithoba Barde** for the proposition that conveyance by way of sale would take place only at the time of registration of a sale deed in accordance with section 17 of the Act, 1908. Lastly, it is submitted that the suit was not maintainable as no relief for declaration of title was sought for which reliance was placed upon judgment of this Court in the case of The Tehsildar, Urban Improvement Trust and Anr. vs. Ganga Bai Menariya (dead) through Lrs. and others.[24]

25. Both the learned senior counsel for the respondents thus submitted that the appeal was devoid of merit and liable to be dismissed.

26. From the submissions advanced and the perusal of the material on record, the following issues/questions arise for consideration in the present appeal:

1) Whether the sale deed dated 02.12.1985 was executed by Respondent No. 2?

2) Whether the sale consideration was paid with respect to sale deed dated 02.12.1985?

3) Whether the sale deed dated 02.12.1985 was presented for registration on 05.12.1985 or not?

4) Whether delayed registration of the sale deed dated 02.12.1985 would prove to be fatal?

---

21 [2007] 2 SCR 141 : (2007) 2 SCC 404

22 [2019] 4 SCR 1069 : (2020) 16 SCC 601

23 (2015) 5 SCC 622

24 [2024] 2 SCR 650 : (2024) 2 SCR 650

5) Whether non-mutation would take away the right created by the sale deed in favor of the vendees?

6) Whether respondent no.2 had any right, title or interest left in the suit property after 02.12.1985?

7) Whether the sale deed dated 02.12.1985 was void as the vendees were alleged to be minors?

8) Whether the respondent no. 1 was a *bona fide* purchaser for value by way of a subsequent sale deed dated 03.12.2010?

27. Having considered the submissions advanced by the counsels for the parties our analysis on the issues stated above is as under. As the issues/questions raised are interlinked, they have been taken up together in our analysis.

28. At the outset, it may be relevant to refer to the certified/xerox copy of the sale deed dated 2.12.1985, presented for registration on 5.12.1985, copies of which were filed by both the sides under the direction of this Court. We have carefully perused the sale deed. The following facts may be noticeable from the said perusal:

(i). The stamp paper had been purchased on 29.11.1985.

(ii). The document was prepared and executed on 02.12.1985

(iii). The document was presented before the Sub-Registrar on 5.12.1985. The total value of the stamp paper used was Rs 1,600/-.

(iv). The document was presented by respondent no.2, the vendor.

(v). The document bears the signature of Anees Ismail Khoja, respondent no. 2, the witnesses and also contains the respective endorsement by the Sub-Registrar.

(vi). The document was impounded for non-payment of proper stamp duty. However, on 14.6.2011 the deficiency in stamp duty of Rs.2200/- along with penalty of Rs.500/- and other statutory payments of Rs.700/- having been paid, it was finally registered in Book No. 1 from pages 141-147.

(vii). The document bears the signatures of not only the vendor, the attesting witnesses and also the necessary endorsement by the Sub-Registrar. This makes it abundantly clear that the

sale deed was executed on 02.12.1985 and presented before the Sub-Registrar on 5.12.1985. Later on, it was registered on 14.06.2011.

29. The Trial Court and the High Court had proceeded on the premise that the defendant No.1 - the vendor (respondent no.2 herein) had denied the execution of the sale deed and had also denied that he had not received any consideration. This premise taken by both the Courts i.e. Trial Court and the High Court are contrary to the pleadings on record and the evidence led during the Trial. There is clear misreading of the evidence. In his written statement in paragraph 7 defendant no.1 (vendor) has stated that he does not recollect having executed the sale deed. He has not specifically denied anywhere in the written statement that he had not executed the sale deed or that the signatures on the sale deed were not his signatures. Thus, the very premise on the basis of which the Trial Court and the High Court proceeded are perverse being contrary to the material on record. Both the said courts also failed to take into consideration that defendant no.1 the vendor (respondent no.2 herein) neither entered the witness box in support of his pleadings and to prove them, nor did lead any evidence, either oral or documentary, in support of his pleadings. There was no justification to treat a vague statement in the written statement of not recollecting about execution of sale deed, to be taken as a denial of the execution. The defendant no.1 - the vendor was deliberately and mischievously avoiding to make specific statement either denying his signatures on the sale deed or his presentation before the Sub-Registrar or had not received any sale consideration. The Trial Court and the High Court fell into the trap of clever drafting and a vague statement of defendant no.1.

30. The Trial Court and the High Court also committed a manifest error in recording that the defendant no.1- vendor (respondent no.2 herein) had denied having received any sale consideration with respect to the sale deed dated 02.12.1985. In the written statement filed by the defendant no.1, there is no such statement made. In case he had made such a statement then he would be admitting the execution but without consideration. Both the Courts again misread the deposition of appellant no.1 (PW-1) wherein he said that he does not have any proof of payment of the consideration to hold that no sale consideration was paid. A registered document carries with it presumption of correctness unless proved otherwise as per

Section 114 of the Evidence Act read with Section 17 of the Act, 1908. In the present case there is no such evidence.

31. The defendant no.1 having not entered the witness box and not having led any evidence, it was a mere presumption of the Trial Court and the High Court to have recorded that defendant no.1 denied receiving any sale consideration.

32. Based upon the aforesaid two factual errors, the Trial Court and the High Court wrongly shifted the burden on the plaintiff to prove execution of the sale deed and also payment of the sale consideration. The impugned judgment thus suffers from manifest error of law and facts both.

33. The appeal deserves to be allowed on several other grounds which we are dealing hereunder and hereinafter.

    33.1. It is not disputed by respondent No.2 that on 02.12.1985, he had executed another sale deed with respect to the remaining portion of survey No.13/1 in favour of the collaterals of the appellants, namely, Param Umakant Mishra and Sohardha Mishra. This sale deed in favour of the collateral was presented for registration on the same date as the sale deed of the appellant i.e. 05.12.1985 and was thereafter duly registered. The respondent No.2 has never challenged the said sale deed in favour of the collaterals. It is thus apparent that the family members and collaterals of the appellants purchased the entire survey No. 13/1 measuring 3.40 Hectares from respondent No.2 in equal shares by two separate documents which were executed on the same date and presented for registration on the same day. Despite the fact that specific query was put to learned senior counsel for respondent no.2 with regard to the above aspect, no answer was given. In the plaint specific averment was made with regard to the sale deed in favour of the collaterals. There is no specific denial in the written statement filed by respondent No.2 about the sale deed in favour of collaterals. General denial has been made by placing strict proof of liability on the plaintiff.

    33.2. The respondent No.2 apparently wants to take advantage of certain minor aberrations and minor technicalities and is also taking up self-conflicting pleas.

33.3. The sale deed is sought to be ignored and rejected on account of a minor cutting/over writing with regard to the word 'cash' (*Roch*) by 'cheque'. The fact remains that respondent No.2 did not enter the witness box to depose that he has not received any sale consideration either by way of cash or by way of cheque and further to state that he had not executed the sale deed and the signatures and thumb impression on the sale deed are not his. He also did not come forward to say that the signatures and thumb impression available in the Sub-Registrar's office in the register taken at the time for registration also did not bear his signatures.

33.4. Another aspect submitted on behalf of respondent was that the appellant No.1 in his deposition has said that he had no proof of the payment of the sale consideration, to assert that the appellant No.1 admitted that he had not paid any sale consideration is not correct. Appellant No.1 was being examined sometime after 2013, i.e. after a gap of 28 years from the date of the sale deed. He could not be expected to remember such facts distinctly and as such he made a fair statement that he did not have any document that could prove the passing of the sale consideration. This would not, by itself, be interpreted to hold that appellant admitted of not paying any sale consideration.

33.5. The question of payment of sale consideration would arise only and only if the vendor makes a specific statement in his pleadings as also in his deposition in support of the pleading that he did not receive any sale consideration either by way of cheque or by cash. There is no such pleading and as the vendor did not enter the witness box, even if there was any such pleading, there is no statement to prove such pleading. Thus, the above argument being based on minor discrepancy in the statement of the appellant, no benefit can be derived by the respondents. The argument is accordingly rejected.

33.6. There is one more reason to reject this argument. Even if assuming that no sale consideration was paid even though there was a registered sale deed, it would be at the instance of the vendor to challenge the said sale deed on the ground of no sale consideration being paid. In the present case, there

is no such challenge to the sale deed for being declared as void or being cancelled on such ground. Thus also, the said argument deserves to be rejected.

33.7. It has also been argued on behalf of the respondents that appellant No.1, in his deposition, stated that he did not remember as to who had presented the document for registration. Such statement would not be relevant at all inasmuch as the fact remains that the document of sale was presented for registration on 05.12.1985, which fact is not denied. Who presented the document is not relevant. It was for the registering authority to examine and once the document is registered, it is presumed that it was presented by the competent person and necessary signatures of the vendor and vendee must have been taken by the registering authority. From a perusal of the xerox copy of the sale deed it is apparent that there is an endorsement by the Sub-Registrar that the sale deed was presented by respondent no.2, the vendor (defendant no.1 in the suit).

33.8. The submission with regard to delay of 26 years in getting the document registered also does not extend any benefit to the respondents. Non-registration of a document duly presented for registration could be for many reasons. But once it is registered, there is a presumption of correctness attached to it, that is to say that the document has been duly executed and registered in accordance to law. It was for the defendants (respondents) to come forward and to establish that the document was wrongly registered. They did not lead any evidence in this respect. Instead, they tried to put burden on the plaintiff-appellant by requiring him to call the Sub-Registrar as a witness, which the appellant rightly denied. It was always open for the respondents to have called for the records of the Sub-Registrar's office and also the Sub-Registrar in order to find out any mandatory lacuna or illegality or lack of procedure not being followed with respect to the registration. They did nothing of this sort.

33.9. In fact, respondent No.2 did not make any bone of contention with regard to the registration process and the registration of the documents after 26 years by challenging the same before

the same authority or any superior authority or any Court of law. Registration of a document carries with it presumption of correctness until and unless the same was challenged by way of independent proceeding or a counter claim. In the absence of any such claim, the sale deed in favour of the appellants has to be treated as a valid document.

33.10. Much stress has been laid by Mr. Ranjit Kumar, and Mr. Huzefa Ahmadi learned senior counsel appearing for respondents that once the appellant No.1 admitted that he was a minor at the time of execution of the sale deed and that his age was incorrectly recorded as 18 years in the sale deed, the sale deed would be void ab initio and would not transfer any right, title or interest in the favour of the appellants. This submission is again liable to be rejected. The sale deed was in favour of two persons, appellant No.1 as also his minor brother, Ambrish who was mentioned to be a minor in the sale deed and was represented through his natural guardian, his mother. The sale deed, therefore, in any case, would be valid in so far as the rights of Ambrish are concerned. Respondent No.2 for 26 years never came forward to return the sale consideration and for rescinding the contract of sale. His intentions are clearly tainted with malice and dishonesty. His conduct throughout the trial and at appeal stage also reflects the same.

33.11. The issue of minority of appellant no.1 would also not be of any relevance for the reason that even if he was a minor at the time of the execution of the sale deed and he had so stated honestly in his deposition, the fact remains that the mother of appellant No.1 was already representing his younger brother as guardian who was stated to be a minor in the sale deed. She was also the natural guardian of appellant no.1, and therefore, it would be deemed that she was acting on behalf of both her minor sons.

33.12. The High Court recorded the findings that the fact that the purchasers were minors would not *per se* affect the validity of the sale deed for the reason that the second purchaser Ambrish who was mentioned as a minor in the sale deed was represented through his natural guardian and mother Smt. Malti Premkumar Mishra and also that the age of the

first purchaser Kaushik was mentioned to be 18 years in the sale deed.

33.13. The respondent no.2 appears to be a dishonest person. We are saying so for very strong reasons, which are apparent from his conduct not only during the trial but also acting in collusion with respondent no.1 to execute the sale deed for the same land which he had already transferred. The issue of registration of a document is with the State, which requires compulsory registration of documents so that it is not deprived of revenue by way of stamp duty payable on such transfers of immovable property. If the purchaser has no means to pay stamp duty or exorbitant demand of stamp duty is made by the registering authority which the purchaser is unable to pay at that time but he remains satisfied with the fact that the vendor has fairly and duly executed the sale deed presented it for registration and put him in possession of the purchased property which he is peacefully enjoying, he is always at liberty to pay the deficiency of stamp duty at any point of time. The document presented for registration will remain with the Registering Authority till such time, the deficiency is removed. However, this pendency of registration on account of deficiency cannot enure any benefit to the vendor, who has already eliminated all his rights by executing the sale deed after receiving the sale consideration. He cannot become the owner of the transferred land merely because the document of sale is pending for registration. It is the purchaser who cannot produce such document which is pending registration with respect to the immovable property in evidence before the Court of law as the same would be inadmissible in view of statutory provision contained in the TP Act as also the Act, 1908.

34. Coming to the submission of Mr. Ahmadi, learned senior counsel for the subsequent purchaser-respondent No.1, his claim would come up for consideration only if it is finally held that the sale deed of 02.12.1985 was not a valid sale deed. As otherwise all the rights, title and interest of the vendor- respondent no.2 would be curtailed from the date of execution of the first sale deed on 02.12.1985. As we have already held above that the sale deed cannot be discarded

as *void ab initio*, rather we have held that it is a valid document of sale, therefore, no benefit can be extended to respondent no.1. Respondent no.1 would enter the shoes of the respondent no.2. If respondent no.2 had alienated all his rights, title and interest and also delivered possession, respondent no.1 could not claim to be a *bona fide* purchaser for value without notice.

35. The doctrine of *bona fide* purchaser for value applies in situations where the seller appears to have some semblance of legitimate ownership rights. However, this principle does not protect a subsequent purchaser if the vendor had already transferred those rights through a prior sale deed. In a case where the vendor deceitfully executes a second sale deed 26 years after the initial transfer, without disclosing the earlier transaction and without any ongoing litigation regarding the property, the subsequent purchaser cannot claim the benefits of a *bona fide* purchaser. Essentially, if the vendor's rights were already severed by the first sale, any later sale deed made without transparency and in bad faith is invalid. The subsequent purchaser, even if unaware of the prior sale, cannot be considered *bona fide* because the vendor no longer had the legal right to sell the property. Thus, the protection afforded by the *bona fide* purchaser doctrine is nullified by the vendor's deceitful conduct and the pre-existing transfer of rights. This ensures that the original purchaser's rights are upheld and prevents unjust enrichment through fraudulent transactions.

36. This is not a case of agreement to sell in favour of appellants but is a case of sale deed transferring ownership rights and possession. It would be open to respondent no.1 to avail such remedy as may be available under law to recover the sale consideration paid by him to respondent No.2. The sale deed in favour of the respondent No.1 dated 03.12.2010 needs to be cancelled and the registering authority be directed to score out the same from the records as directed by the first Appellate Court.

37. Another argument raised that the sale deed did not contain the signatures of the mother also deserves to be rejected. Prior to insertion of section 32A in the Act, 1908 in the year 2001 there was no requirement under law that the vendee must mandatorily sign the document of sale for immovable property and also affix passport size photograph and thumb impression along with proof of identification.

In the present case the sale deed was presented for registration in 1985, much before 2001.

38. Mr. Ranjit Kumar, learned senior Counsel appearing for Respondent No. 2, has relied upon the following judgments in order to substantiate his arguments pertaining to the issue of registration of the sale deed:

    a. **Raghunath Singh & Ors.** v. **Kedar Nath**,[25]

    b. **Bondar Singh & Ors.** v. **Nihal Singh & Ors.**,[26]

    c. **Suraj Lamps and Industries Pvt. Ltd.** v. **State of Haryana and Anr.**,[27]

    d. **S. Kaladevi** v. **V.R. Somasundaram & Ors.**,[28]

    e. **M/s Paul Rubber Industries Pvt. Ltd.** v. **Amit Chand Mitra & Anr.**,[29]

    f. **Maya Devi** v. **Lalta Prasad**,[30]

    g. **Veena Singh (dead) thr. LRs.** v. **District Registrar/Additional Collector**[31]

39. We observe that the cases relied upon by the Respondent No. 2 do not extend any kind of benefit in the facts of the present case as the judgments above are clearly distinguishable on facts. Thus, to avoid lending any further burden on the instant judgment, we are not dealing with them on their individual facts.

40. In view of the discussions made above, the appeal deserves to be allowed. The impugned judgement of the High Court is set aside and that of the first Appellate Court decreeing suit of the appellant is restored and maintained.

41. Facts of this case deserves that the suit should be decreed with exemplary costs considering the conduct of the defendant-respondents, which is quantified at Rs.10,00,000/- (Rupees ten lakhs only) to be paid to the appellants within eight weeks from today.

---

25 [1969] 3 SCR 497 : (1969) 1 SCC 497

26 [2003] 2 SCR 564 : (2003)4 SCC 161

27 [2009] 9 SCR 1048 : (2009) 7 SCC 363

28 [2010] 4 SCR 515 : (2010) 5 SCC 401

29 [2023] 14 SCR 28 : SLP (C)No.15774 of 2023 decided on 25.09.2023

30 (2015) 3 SCC 588

31 [2022] 3 SCR 736 : (2022) 7 SCC 1

The liability to pay costs shall be borne equally by each of the two respondents. Proof of payment of costs may be filed before this Court within ten weeks from today.

42. 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. 2329 : 2024 INSC 511

Md. Rahim Ali @ Abdur Rahim
v.
The State of Assam & Ors.

(Civil Appeal No. 7332 of 2024)

11 July 2024

[Vikram Nath and Ahsanuddin Amanullah,* JJ.]

Issue for Consideration

The Foreigners Tribunal, Nalbari declared the appellant to be a foreigner on the grounds that he failed to discharge his burden under Section 9 of the Foreigners Act, 1946.

Headnotes†

Foreigners Act, 1946 – s.9 – Foreigners (Tribunal) Order, 1964 – Illegal Migrants (Determination by Tribunals) Act, 1982 – The case against the appellant was initiated in the year 2004 alleging that the appellant illegally migrated to India after 25.03.1971 from Village Dorijahangirpur, Police Station – Torail, District Mymansingh, Bangladesh and was living in Village Kasimpur, Police Station, District-Nalbari in the State of Assam – The initiation of the case against the appellant was based on the report submitted by the Sub-Inspector which in turn was based on the fact that in his deposition he had stated that upon being directed by the S.P. (B), Nalbari, he had undertaken an inquiry against the appellant and asked him to show the documents regarding his Indian nationality – However, appellant failed to do so – Reference was made to the Tribunal – By ex-parte order dated 19.03.2012, the Tribunal held that the appellant had failed to discharge his burden under Section 9 of the Act and failed to prove that he is not a foreigner – Aggrieved, appellant filed writ petition, which was dismissed – Correctness:

Held: Undisputedly, the appellant is not a foreigner recognised as a national by the law of more than one foreign country – Thus, the appellant's case would not fall under Section 8 of the Act – Section 9 of the Act stipulates if in a case not falling under Section 8 of the Act, any question arises as to whether a person is or is not a foreigner or is or is not a foreigner of a particular class,

* Author

the person concerned must prove that he/she is not a foreigner or not a foreigner of that particular class – In the instant case, it was specifically alleged that the appellant had come to Assam from Village-Dorijahangirpur, Police Station-Torail, District-Mymansingh in Bangladesh while making a reference to the Tribunal – Hence, it was incumbent on the authority making the reference to provide details as to how it had received such information as also its bona fide belief of such factum being true – In other words, the authority had been, as claimed, able to trace the appellant's place of origin – Surely then, the authority had some material to back its assertion – The record does not show such material was given either to the appellant or the Tribunal by the authority – In the absence of the basic/primary material, it cannot be left to the untrammelled or arbitrary discretion of the authorities to initiate proceedings, which have life-altering and very serious consequences for the person, basis hearsay or bald and vague allegation(s) – Under the garb of and by taking recourse to Section 9 of the Act, the authority, or for that matter, the Tribunal, cannot give a go-by to the settled principles of natural justice – *Audi alteram partem* does not merely envisage a fair and reasonable opportunity of being heard – In opinion of this Court, it would encompass within itself the obligation to share material collected with the person/accused concerned – The evidence produced before the Tribunal by the appellant to indicate that his parents had been resident in India much prior to 01.01.1966 whereas his siblings and he himself much prior to 25.03.1971, has been disbelieved only on the ground of mismatch of actual English spelling of the names and discrepancy in dates – As far as the discrepancy(ies) in dates and spellings are concerned, this Court is of the view that the same are minor in nature – The appellant had produced a document showing that his father and mother had been resident of Village Dolur Pather since 1965; that his sibling had also been declared not to be a foreigner by the Tribunal, and; his elder brother and he were both voters as per the 1985 Electoral Roll relating to 41 Bhabanipur Legislative Assembly Constituency – For and on the strength of the totality of reasons, the Tribunal's order dated 19.03.2012 as also the Impugned Judgment dated 23.11.2015 passed by the High Court are set aside – Putting an authoritative quietus to the issue, the appellant is declared an Indian citizen and not a foreigner. [Paras 36, 37, 41, 43, 54, 55]

Evidence – Imposing reverse burden – discussed.

Case Law Cited

Mukesh Singh v. State (Narcotic Branch of Delhi) [2020] 9 SCR 245 **: (2020) 10 SCC 120;** *Union of India v. Ghaus Mohammad* **(1961) SCC OnLine SC 2 – followed.**

Mangilal v. State of Madhya Pradesh [2004] 1 SCR 1 **: (2004) 2 SCC 447;** *Noor Aga v. State of Punjab* [2008] 10 SCR 379 **: (2008) 16 SCC 417;** *Sarbananda Sonowal v. Union of India* [2006] Supp. 10 SCR 167 **: (2007) 1 SCC 174 – relied on.**

Abdul Kuddus v. Union of India [2019] 8 SCR 669 **: (2019) 6 SCC 604;** *Sarbananda Sonowal v. Union of India* [2005] Supp. 1 SCR 472 **: (2005) 5 SCC 665;** *Tolaram Relumal v. State of Bombay* [1955] 1 SCR 158**;** *Krishi Utpadan Mandi Samiti v. Pilibhit Pantnagar Beej Ltd.* [2003] Supp. 6 SCR 344 **: (2004) 1 SCC 391;** *Govind Impex Pvt. Ltd. v. Appropriate Authority, Income Tax Dept.* [2010] 14 SCR 523 **: (2011) 1 SCC 529;** *Commissioner of Customs (Import), Mumbai v. Dilip Kumar & Company* [2018] 7 SCR 1191 **: (2018) 9 SCC 1;** *London and North Eastern Railway Co. v. Berriman* **1946 AC 278, 295;** *Sri Krishna Coconut case,* **AIR 1967 SC 973;** *Karnataka State Financial Corporation v. N Narasimhaiah* [2008] 4 SCR 853 **: (2008) 5 SCC 176;** *Fateh Mohd. v. Delhi Administration* [1963] Supp. 2 SCR 560**;** *Masud Khan v State of Uttar Pradesh* [1974] 1 SCR 793 **: (1974) 3 SCC 469 – referred to.**

London and North Eastern Rly. Co. v. Berriman, **1946 AC 278 : (1946) 1 All ER 255 (HL);** *Tuck & Sons v. Priester* **(1887) 19 QBD 629 : 56 LJ QB 553 (CA) – referred to.**

List of Acts

Citizenship Act, 1955; Foreigners Act, 1946; Foreigner (Tribunal) Order, 1964; Illegal Migrants (Determination by Tribunals) Act, 1982; Evidence Act, 1872; Constitution of India.

List of Keywords

Illegal migration; Citizenship; Indian nationality; Section 9 of Foreigners Act, 1946; Minor variations in spelling of names in government record; Reverse burden; Arbitrary discretion of authority; Principles of Natural Justice; *Audi alteram partem*.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 7332 of 2024

From the Judgment and Order dated 23.11.2015 of the Gauhati High Court in WPC No. 2668 of 2012

Appearances for Parties

Kaushik Choudhury, Saksham Garg, Parth Davar, Shaantanu Jain, Advs. for the Appellant.

Shuvodeep Roy, Sai Shashank, Deepayan Dutta, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Ahsanuddin Amanullah, J.

I.A. No.58315 of 2017 [Condonation of Delay] is allowed, keeping in mind the peculiar facts and circumstances herein. I.A. No.58325 of 2017 [Exemption from filing Certified Copy of the Impugned Judgment], being formal in nature, is also allowed.

2. Leave granted.

3. The present appeal arises out of the Final Judgment and Order passed by a Division Bench of the Gauhati High Court at Guwahati (hereinafter referred to as the "High Court") in Writ Petition (Civil) No.2668 of 2012 dated 23.11.2015 (hereinafter referred to as the "Impugned Judgment") by which the Writ Petition filed by the appellant was dismissed and the order passed by the Foreigners Tribunal, Nalbari (hereinafter referred to as the "Tribunal") dated 19.03.2012 passed in F.T. (Nal) Case No.(N)/1096/06 declaring the appellant to be a foreigner on the grounds that he failed to discharge his burden under Section 9 of the Foreigners Act, 1946 (hereinafter referred to as the "Act") and failed to prove that he is not a foreigner, was affirmed.

THE FACTUAL PRISM:

4. The appellant claims that his parents' names appeared in the Voter List of the year 1965 at Sl. Nos.71 & 72 showing the address as House No.17 in Village Dolur Pather, P.S. - Patacharkuchi, in the

then district of Kamrup under 48 Bhabanipur Legislative Assembly Constituency in the State of Assam. It is further his claim that his parents' names also appeared in the Voter List of the year 1970 at Sl. Nos.79 & 80 showing the same address. The appellant was born in the Village Dolur under Patacharkuchi Police Station in the District of Barpeta and his name was enrolled alongwith his family members in the voter list of 1985 which appeared in the additional amended voter list of 1985 at Sl. No.552 showing the same address. However, upon getting married in the year 1997, he left the joint family and shifted to his present place of residence i.e., village Kashimpur, P.O.-Kendu Kuchi, P.S. - Nalbari, in the district of Nalbari in the State of Assam. As a result of this, the appellant's name was in the Voter List of the year 1997 at Sl. No.105 showing the address as House No.38 in Village Kashimpur, P.S. - Nalbari in the district of Nalbari under 61 No. Dharmapur LAC. In the year 2006, doubting his nationality, a case was registered in the Tribunal, Nalbari, being F.T. (Nal) Case No.(N)/1096/06, Police Reference No.948/04 and notice was served upon him.

5. The appellant's daughter was issued a certificate by the Gaonbura of Kashimpur Village stating the residential status of the appellant/ his daughter on 07.09.2010.

6. The appellant, on receipt of notice from the Tribunal, appeared on 18.07.2011, praying for time to file Written Statement but the same could not be done as the appellant claimed to be suffering from serious health issues.

7. On 12.09.2011, the Gaonbura of Village Dolur Pathar issued certificate to the appellant regarding his residential status. By *ex-parte* order dated 19.03.2012, the Tribunal held that the appellant had failed to discharge his burden under Section 9 of the Act and failed to prove that he is not a foreigner. The appellant also obtained a medical certificate issued by the consultant doctor of Civil Hospital, Nalbari dated 24.04.2012 stating that he was suffering from Chronic Bronchitis Respiration disturbance from 25.11.2011 to 24.04.2012. Upon becoming aware of the order dated 19.03.2012 of the Tribunal from his counsel, the appellant filed Writ Petition (Civil) No.2668 of 2012 on 30.05.2012 before the High Court.

8. In the said writ petition, the High Court by its interim order dated 06.06.2012 stayed the operation of the Tribunal's order

dated 19.03.2012 directing the authority not to deport the appellant during the pendency of the proceedings before itself. However, ultimately *vide* the order dated 23.11.2015, the High Court dismissed the Writ Petition, which is assailed herein.

SUBMISSIONS BY THE APPELLANT:

9. Learned counsel for the appellant submitted that he has been subjected to unfair treatment by the Tribunal as though he had entered appearance upon notice, one opportunity was required to be given to him since he was faced with serious penal consequences like detention and/or deportation from the country, which was not done. Further, it was submitted that even the High Court in the Impugned Judgment has gone on technicalities by accepting minor discrepancies in the documents which were not of the nature to lead to a presumption in law that the same were not correct and were merely differences in the spellings and date of birth. Even the medical certificate, which is disputed, has been issued by the consultant of the hospital, who was never examined. It was urged that as is known to everybody, on the prescription given to a patient, a doctor writes his opinion, record of which may not be maintained meticulously or even casually in a hospital which is at the level of the District, as may be done in big hospitals in cities.

10. It was submitted that the High Court has erroneously presumed that the ground for not appearing before the Tribunal was not genuine. Learned counsel contended that even if for the sake of argument it is presumed that the reason for his absence was not genuine, it cannot take away the basic fundamental right of the appellant to be heard, that too in such an important case, where the appellant stood not only to lose his nationality but also separation from his family and possible deportation to a foreign State which would obviously not accept him because he was born in India and thus, there was no occasion for any foreign country to accept him as its citizen.

11. It was submitted that earlier also, this Court in the present proceedings by order dated 28.07.2017 had directed the Tribunal to decide the nationality of the appellant on merit by holding an enquiry and submit a report after hearing the appellant and the same has been done resulting in the Tribunal passing an opinion and order on 16.11.2017 which has again declared the appellant to be a foreigner.

12. It was submitted that such declaration is totally perverse in the face of overwhelming evidence to show that the appellant besides being born in India and being a resident in India for his entire life and his blood relatives i.e., siblings and parents having been Indian citizens much prior to the cut-off date, the appellant has still been singled out to be declared a foreigner which does not stand to reason. Another point which learned counsel canvassed was that there was no occasion for the appellant's name to figure in the National Register of Citizens (hereinafter referred to as the "NRC") as he was declared a foreigner way back in the year 2012 and as per the judgment of this Court in ***Abdul Kuddus v Union of India*** **(2019) 6 SCC 604**, a person whose name is not included in the NRC and is declared a foreigner by the Tribunal can only move before the High Court in writ proceedings, the relevant being Paragraph 27.[1]

SUBMISSIONS BY THE STATE [RESPONDENTS NO.1 AND 3]:

13. *Per contra*, learned counsel for the State of Assam submitted that because of the grave threat to the economy, demography and culture on account of unabated and large-scale illegal migration from Bangladesh, this Court in ***Sarbananda Sonowal v Union of India*** **(2005) 5 SCC 665** [hereinafter referred to as ***Sarbananda Sonowal I***] had held that '***…****there can be no manner of doubt that the State of Assam is facing "external aggression and internal disturbance" on account of large-scale illegal migration of Bangladeshi nationals. It, therefore, becomes the duty of India to take all measures for protection of the State of Assam from such external aggression and internal disturbance as in Article 355 of the Constitution…*'.

14. It was submitted that the present was a case of illegal migration of a Bangladeshi national to India (Assam) after the cut-off date of 25.03.1971 and has to be dealt with utmost caution, considering the adverse consequence of illegal migration on the whole country in general and the respondent-State in particular. It was further submitted that the present proceedings against the appellant have been initiated under the Act, which under Section 9 provides that

1 '***27.*** *As stated above, a person aggrieved by the opinion/order of the Tribunal can challenge the findings/opinion expressed by way of a writ petition wherein the High Court would be entitled to examine the issue with reference to the evidence and material in the exercise of its power of judicial review premised on the principle of "error in the decision-making process", etc. This serves as a necessary check to correct and rectify an "error" in the orders passed by the Tribunal.*'

the onus is on the person proceeded against/alleged foreigner to prove that he is not a foreigner.

15. Learned counsel contended that the justification for placing the burden upon the alleged foreigner has been dealt with by this Court in ***Sarbananda Sonowal I*** (*supra*) at Paragraph 26.[2]

16. Learned counsel submitted that the proceeding against the appellant was initiated on the basis of inquiry conducted in the year 2004 and due to the appellant failing to produce any document before the Inquiry Officer, the case was referred to the Tribunal and after service of notice, the appellant had appeared on 18.07.2011 and prayed for time to file written statement which was allowed and the matter was fixed for 11.08.2011, on which date his counsel filed a petition for further time and the matter was fixed for 09.09.2011, but thereafter the appellant remained absent on all subsequent dates. Thus, learned counsel contended that the appellant failed to discharge the burden cast upon him under Section 9 of the Act and the Tribunal had no option but to proceed and pass an *ex-parte* order/opinion on 19.03.2012 holding him to be a foreigner.

17. Learned counsel submitted that in the Writ Petition before the High Court, the appellant placed reliance on the medical certificate of Swahid Mukunda Kakati Civil Hospital, Nalbari dated 24.04.2012 to the effect that he was under treatment from '*25.11.2011 till now*'. The High Court, after verification, found the authenticity of the said certificate to be fake and held that the appellant had taken recourse to falsehood with production of fake medical certificate and on that count alone, the writ petition was dismissed which cannot be said to be unreasonable warranting interference. It was submitted that in compliance of the order of this Court in the present matter on 28.07.2017 directing the Tribunal to examine the documents

---

2 '***26.*** *There is good and sound reason for placing the burden of proof upon the person concerned who asserts to be a citizen of a particular country. In order to establish one's citizenship, normally he may be required to give evidence of (i) his date of birth (ii) place of birth (iii) name of his parents (iv) their place of birth and citizenship. Sometimes the place of birth of his grandparents may also be relevant like under Section 6-A(1)(d) of the Citizenship Act. All these facts would necessarily be within the personal knowledge of the person concerned and not of the authorities of the State. After he has given evidence on these points, the State authorities can verify the facts and can then lead evidence in rebuttal, if necessary. If the State authorities dispute the claim of citizenship by a person and assert that he is a foreigner, it will not only be difficult but almost impossible for them to first lead evidence on the aforesaid points. This is in accordance with the underlying policy of Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.*'

filed by the appellant and to undertake an inquiry and submit report, the Tribunal undertook such exercise and submitted its opinion finally holding that the appellant had entered India illegally on or after 25.03.1971 i.e., the cut-off date and thus, was an illegal migrant post the cut-off date.

18. It was submitted that this Court may also consider the fact that the proceedings against the appellant had already taken two decades to reach this stage and any further delay would defeat the very object and purpose of the Act which is speedy detection and deportation of illegal migrants/foreigners staying in India. He also reiterated the fact that because the appellant was declared to be a foreigner prior to the preparation of the Draft and Supplementary NRC List, his name was not included in the same. Learned counsel submitted that this Court in ***Abdul Kuddus*** (*supra*) had settled the position that the proceedings before the Tribunal being quasi-judicial in nature, the findings thereof would operate as *res judicata* over the administrative process of inclusion in NRC List and any person aggrieved by the findings/opinion of the Tribunal would have to invoke the power of judicial review under writ jurisdiction. Thus, he contended that if any further liberty is given to the appellant to again challenge the fresh report dated 16.11.2017 of the Tribunal in writ proceedings, a time-limit be fixed so that closure could be given to the proceedings.

ANALYSIS, REASONING AND CONCLUSION:

19. Having considered the matter, the Court finds that grave miscarriage of justice has occasioned in the instant case. We may note that Section 8 of the Act reads as follows:

> "*8. Determination of nationality.—(1) When a foreigner is recognised as a national by the law of more than one foreign country or where for any reason it is uncertain what nationality if any is to be ascribed to a foreigner, that foreigner may be treated as the national of the country with which he appears to the prescribed authority to be most closely connected for the time being in interest or sympathy or if he is of uncertain nationality, of the country with which he was last so connected:*
>
> *Provided that where a foreigner acquired a nationality by birth, he shall, except where the Central Government so*

directs either generally or in a particular case, be deemed to retain that nationality unless he proves to the satisfaction of the said authority that he has subsequently acquired by naturalization or otherwise some other nationality and still recognized as entitled to protection by the Government of the country whose nationality he has so acquired.

(2) A decision as to nationality given under sub-section (1) shall be final and shall not be called in question in any Court:

Provided that the Central Government, either of its own motion or on an application by the foreigner concerned, may revise any such decision."

20. Undisputedly, the appellant is not a foreigner[3] recognised as a national by the law of more than one foreign country. Thus, the appellant's case would not fall under Section 8 of the Act. That being the position as regards Section 8 of the Act, we venture forward.

21. There is judicial clarity as regards the scope and nature of proceedings before the Tribunal under the Act, as delineated by the judgments in ***Abdul Kuddus*** (*supra*) and ***Sarbananda Sonowal I*** (*supra*). For the purposes of proper appreciation, it is worthwhile to reproduce Section 9 of the Act which reads as under:

"*9. Burden of proof – If in any case not falling under section 8 any question arises with reference to this Act or any order made or direction given thereunder, whether any person is or is not a foreigner of a particular class or description the onus of proving that such person is not a foreigner or is not a foreigner of such particular class or description, as the case may be, shall, notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872), lie upon such person.*"

22. In ***Abdul Kuddus*** (*supra*), it has been explained that after the preparation and publication of NRC for the State of Assam, as set out in Paragraphs 2 to 8 of the Schedule to the Citizenship (Registration of Citizens and Issue of National Identity Cards) Rules, 2003 made

3 A '*foreigner*' under Section 2(a) of the Act means "*a person who is not a citizen of India*".

under Section 18 of the Citizenship Act, 1955 (hereinafter referred to as the "Citizenship Act"), the right to appeal before the Tribunal under Paragraph 8 would not be available to persons whose nationality and citizenship status, either as an Indian or as a foreign national, has already been adjudicated and declared under the Foreigners (Tribunal) Order, 1964 (hereinafter referred to as the "1964 Order") issued under Section 3 of the Act. In the present case, it is not in dispute that the matter was decided by the Tribunal and at the first round, the verdict was against the appellant based on an *ex-parte* proceeding. Later, in view of the interim order of this Court, after giving an opportunity to the appellant, the matter was again gone into by the Tribunal and a report submitted to this Court which reiterated its earlier decision that the appellant is a foreigner.

23. Thus, the Court, for completeness of adjudication, has to trace its steps back to the proceeding right to the stage of inception i.e., the very initiation of proceedings before the Tribunal under the Act.

24. A reference to Section 6A of the Citizenship Act is warranted:

> "*6A. Special provisions as to citizenship of persons covered by the Assam Accord.—(1) For the purposes of this section*
>
> *(a) "Assam" means the territories included in the State of Assam immediately before the commencement of the Citizenship (Amendment) Act, 1985 (65 of 1985);*
>
> *b) "detected to be a foreigner" means detected to be a foreigner in accordance with the provisions of the Foreigners Act, 1946 (31 of 1946) and the Foreigners (Tribunals) Order, 1964 by a Tribunal constituted under the said Order;*
>
> *c) "specified territory" means the territories included in Bangladesh immediately before the commencement of the Citizenship (Amendment) Act, 1985 (65 of 1985);*
>
> *(d) a person shall be deemed to be Indian origin, if he, or either of his parents or any of his grandparents was born in undivided India;*
>
> *(e) a person shall be deemed to have been detected to be a foreigner on the date on which a Tribunal constituted under the Foreigners (Tribunals) Order, 1964 submits its*

opinion to the effect that he is a foreigner to the officer or authority concerned.

(2) Subject to the provisions of sub-sections (6) and (7), all persons of Indian origin who came before the lst day of January, 1966 to Assam from the specified territory (including such of those whose names were included in the electoral rolls used for the purposes of the General Election to the House of the People held in 1967) and who have been ordinarily resident in Assam since the dates of their entry into Assam shall be deemed to be citizens of India as from the lst day of January, 1966.

(3) Subject to the provisions of sub-sections (6) and (7), every person of Indian origin who—

(a) came to Assam on or after the lst day of January, 1966 but before the 25th day of March, 1971 from the specified territory; and

(b) has, since the date of his entry into Assam, been ordinarily resident in Assam; and

(c) has been detected to be a foreigner;

shall register himself in accordance with the rules made by the Central Government in this behalf under section 18 with such authority (hereafter in this sub-section referred to as the registering authority) as may be specified in such rules and if his name is included in any electoral roll for any Assembly or Parliamentary constituency in force on the date of such detection, his name shall be deleted therefrom.

Explanation.—In the case of every person seeking registration under this sub-section, the opinion of the Tribunal constituted under the Foreigners (Tribunals) Order, 1964 holding such person to be a foreigner, shall be deemed to be sufficient proof of the requirement under clause (c) of this subsection and if any question arises as to whether such person complies with any other requirement under this sub-section, the registering authority shall,—

(i) if such opinion contains a finding with respect to such other requirement, decide the question in conformity with such finding;

(ii) if such opinion does not contain a finding with respect to such other requirement, refer the question to a Tribunal constituted under the said Order having jurisdiction in accordance with such rules as the Central Government may make in this behalf under section 18 and decide the question in conformity with the opinion received on such reference.

(4) A person registered under sub-section (3) shall have, as from the date on which he has been detected to be a foreigner and till the expiry of a period of ten years from that date, the same rights and obligations as a citizen of India (including the right to obtain a passport under the Passports Act, 1967 (15 of 1967) and the obligations connected therewith), but shall not entitled to have his name included in any electoral roll for any Assembly or Parliamentary constituency at any time before the expiry of the said period of ten years.

(5) A person registered under sub-section (3) shall be deemed to be a citizen of India for all purposes as from the date of expiry of a period of ten years from the date on which he has been detected to be a foreigner.

(6) Without prejudice to the provisions of section 8—

(a) if any person referred to in sub-section (2) submits in the prescribed manner and form and to the prescribed authority within sixty days from the date of commencement of the Citizenship (Amendment) Act, 1985 (65 of 1985), a declaration that he does not wish to be a citizen of India, such person shall not be deemed to have become a citizen of India under that sub-section;

(b) if any person referred to in sub-section (3) submits in the prescribed manner and form and to the prescribed authority within sixty days from the date of commencement of the Citizenship (Amendment) Act, 1985(65 of 1985),

or from the date on which he has been detected to be a foreigner, whichever is later, a declaration that he does not wish to be governed by the provisions of that sub-section and sub-sections (4) and (5), it shall not be necessary for such person to register himself under sub-section (3).

Explanation.— Where a person required to file a declaration under this sub-section does not have the capacity to enter into a contract, such declaration may be filed on his behalf by any person competent under the law for the time being in force to act on his behalf.

(7) Nothing in sub-sections (2) to (6) shall apply in relation to any person—

(a) who, immediately before the commencement of the Citizenship (Amendment) Act, 1985 (65 of 1985), is a citizen of India;

(b) who was expelled from India before the commencement of the Citizenship (Amendment) Act, 1985, under the Foreigners Act, 1946 (31 of 1946).

(8) Save as otherwise expressly provided in this section, the provisions of this section shall have effect notwithstanding anything contained in any other law for the time being in force."

25. From the aforesaid, it is clear that a cut-off date of 25.03.1971 was fixed with regard to deciding the status of persons who had come to Assam on or after 01.01.1966 but before 25.03.1971 from the "specified territory"[4] and from the date of entry have been ordinarily resident in Assam and been detected to be foreigners. Such persons were required to register themselves with the Registering Authority in accordance with rules made by the Central Government under Section 18 of the Citizenship Act.

26. In the Explanation to Sub-section (3) of Section 6A of the Citizenship Act, it has been provided that the opinion of the Tribunal constituted

4 Section 6A(1)(c) of the Citizenship Act states: '*"specified territory" means the territories included in Bangladesh immediately before the commencement of the Citizenship (Amendment) Act, 1985 (65 of 1985)*'

under the 1964 Order holding the person to be a foreigner shall be deemed sufficient proof of the requirement under clause (c) of the sub-section aforesaid [*viz*. Section 6A(3)(c), Citizenship Act] and the same would also suffice for any other requirement of the Sub-section. If a question arises as to whether the person complies with any other requirement under this Sub-section, and the opinion of the Tribunal contains a finding *qua* such other requirement, the Registering Authority will decide the question in accordance with the opinion of the Tribunal. However, the Registering Authority is required to refer the matter to the Tribunal, if the opinion of the Tribunal is silent as to the other requirements, and thereupon the question is to be decided by the Registering Authority in conformity with the opinion received from the Tribunal.

27. The very initiation of the proceeding was under the 1964 Order. It is worthwhile to point out that the 1964 Order has been subjected to multiple amendments. Para 3 of the 1964 Order has also undergone variation – a different version was in existence when the Tribunal examined the matter. However, as we are expounding the law, it is deemed appropriate to refer to the position as it prevails on date. Para 3 of the 1964 Order, last amended by GSR dated 30.08.2019, reads as under:

> "*3. Procedure for disposal of questions.—(1) The Tribunal shall serve on the person to whom the question relates,* ***a copy of the main grounds[5] on which he is alleged to be a foreigner*** *and give him a reasonable opportunity of making a representation and producing evidence in support of his case and after considering such evidence as may be produced and after hearing such persons as may desire to be heard, the Tribunal shall submit its opinion to the officer or authority specified in this behalf in the order of reference.*
>
> *(2) The Foreigners Tribunal shall serve a show-cause notice on the person to whom the question relates, that is, the proceedee.*

5 This was brought in by GSR dated 30.09.1965 and has remained since then. In other words, when notice was served on the appellant, this portion of the 1964 Order was in existence.

(3) The notice referred to in sub-para (2) shall be served within ten days of the receipt of the reference of such question by the Central Government or any competent authority.

(4) The notice shall be served in English and also in the official language of the State indicating that the burden is on the proceedee to prove that he or she is not a foreigner.

(5)(a) The notice shall be served at the address where the proceedee last resided or reportedly resides or works for gain, and in case of change of place of residence, which has been duly intimated in writing to the investigating agency by the alleged person, it shall be served at such changed address by the Foreigners Tribunal.

(b) if the proceedee is not found at the address at the time of service of notice, the notice may be served on any adult member of the family of the proceedee and it shall be deemed to be served on the proceedee;

(c) where the notice is served on the adult member of the family of the proceedee, the process server shall obtain the signature or thumb impression of the adult member on the duplicate of the notice as a token of proof of the service;

(d) if the adult member of the family of the proceedee refuses to put a signature or the thumb impression, as the case may be, the process server shall report the same to the Foreigners Tribunals;

(e) if the proceedee or an available adult member of his or her family refuses to accept the notice, the process server shall give a report to the Foreigners Tribunal in that regard along with the name and address of a person of the locality, who was present at the time of making such an effort to get the notices served, provided such person is available and willing to be a witness to such service and the process server shall obtain the signature or thumb impression of such witness, if he or she is present and willing to sign or put his or her thumb impression, as the case may be;

(f) if the proceedee has changed the place of residence or place of work, without intimation to the investigating agency, the process server shall affix a copy of the notice on the outer door or some other conspicuous part of the house in which the proceedee ordinarily resides or last resided or reportedly resided or personally worked for gain or carries on business, and shall return the original to the Foreigners Tribunal from which it was issued with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did do, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed;

(g) where the proceedee or any adult member of his or her family or her is not found at the residence, a copy of the notice shall be pasted in a conspicuous place of his or her residence, witnessed by one respectable person of the locality, subject to his or her availability and willingness to be a witness in that regard and the process server shall obtain the signature or the thumb impression of that person in the manner in which such service is affected;

(h) where the proceedee resides outside the jurisdiction of the Foreigners Tribunal, the notice shall be sent for service to the officer incharge of the police station within whose jurisdiction the proceedee resides or last resided or is last known to have resided or worked for gain and the process server shall then cause the service of notice in the manner as provided hereinabove;

(i) if no person is available or willing to be the witness of service of notice or refuses to put his or her signature or thumb impression the process server shall file a signed certificate or verification to that effect, which shall be sufficient proof of such non-availability, unwillingness and refusal;

(j) on receipt of the signed certificate or verification referred to in clause (i) the Foreigners Tribunals shall return such references with such directions as it thinks fit to the

competent authority for tracing out the proceedee and produce before the said Tribunal.

(6) Where the proceedee appears or is brought before the Foreigners Tribunal and he produces the documents in support of his claim, the Foreigners Tribunal may release such person on bail and decide the matter accordingly.

(7) In case where notice is duly served, the proceedee shall appear before the Foreigners Tribunal in person or by a counsel engaged by him or her, as the case may be, on every hearing before the Foreigners Tribunal.

(8) The Foreigners Tribunal shall give the proceedee ten days time to give reply to the show-cause notice and further ten days time to produce evidence in support of his or her case.

(9) The Foreigners Tribunal may refuse a prayer for examination of witnesses on Commission for production of documents if, in the opinion of the Foreigners Tribunal, such prayer is made to delay the proceedings.

(10) The Foreigners Tribunal shall take such evidence as may be produced by the concerned Superintendent of Police.

(11) The Foreigners Tribunal shall hear such persons as, in its opinion, are required to be heard.

(12) The Foreigners Tribunal may grant adjournment of the case on any plea sparingly and for reasons to be recorded in writing.

(13) Where the proceedee fails to produce any proof in support of his or her claim that he or she is not a foreigner and also not able to arrange for bail in respect of his or her claim, the proceedee shall be detained and kept in internment or detention centre;

(14) The Foreigners Tribunal shall dispose of the case within a period of sixty days of the receipt of the reference from the competent authority.

(15) After the case has been heard, the Foreigners Tribunal shall submit its opinion as soon thereafter as may be

> *practicable, to the officer or the authority specified in this behalf in the order of reference.*
>
> *(16) The final order of the Foreigners Tribunal shall contain its opinion on the question referred to which shall be a concise statement of facts and the conclusion.*"
>
> (emphasis supplied)

28. The case against the appellant was initiated in the year 2004 alleging that the appellant illegally migrated to India after 25.03.1971 from Village- Dorijahangirpur, Police Station - Torail, District- Mymansingh, Bangladesh and was living in Village Kasimpur, Police Station, District - Nalbari in the State of Assam in S.P. Reference No.948/2004. It appears that the State examined a Sub-Inspector of Police Sh. Bipin Dutta, who was the Investigating Officer in the case and in his evidence, has stated that on 12.05.2004, he was posted at Nalbari Police Station when the S.P. (B) Nalbari, directed him to enquire into the nationality of the appellant pursuant to which on 17.05.2004, he opened a Case Diary and went to the house of the appellant, informed him about the enquiry and filled up Form No.I. This reference was made by the Superintendent of Police under Section 8(1) of the Illegal Migrants (Determination by Tribunals) Act, 1982 (hereinafter referred to as the "IMDT Act"), suspecting the appellant to be an illegal migrant on the ground that on being asked, he could not produce any documentary evidence in support of his/her entry into India, prior to 01.01.1966.

29. Thus, IMDT Case No.692/05 was registered before the then IMD Tribunal, Nalbari. The same case was re-registered under the 1964 Order as F.T.(Nal) Case No.(N)1096/06 upon the IMDT Act being declared unconstitutional by this Court in ***Sarbananda Sonowal I*** (*supra*) on 12.07.2005.

30. Consequently, the notice issued under Section 8(1), IMDT Act became a nullity and therefore F.T.(Nal) Case No.(N) 1096/06 was started and a reference was made to the Tribunal. The Tribunal answered the reference by order dated 19.03.2012 as under:

> "*This is a reference u/s 2(1) of the Foreigner's Tribunal (Order) 1964 for opinion whether O.P. Md. Rahim Ali son of Late Solimuddin Ali of Village Kasimpur Police Statin and District nalbari, Assam is a foreigner or not. The*

reference is that O.P. Ms. Rahim Ali illegally migrated to India after 25th March, 1971 from village Darijahangirpur Police Station Tarail District Mymansingh Bangladesh and is living in village Kasimpur Police Station and District nalbari, Assam.

Notice was serve upon the O.P. and the O.P. appeared in the case and prayed time for filing written statement by submitting petition. Thereafter 0.P. became absent without step for which the case preceded ex-parte.

State examined S.I. of police Sri Bipin Dutta who is I/O of this case and he deposed in his evidence that on 12.5.04 he was at Nabari Police Station and on that day, S.P. (B) Nalbari, directed him to enquire the nationality of suspect Ms. Rahim Ali of village Kasimpur Police Station Nalbari. On 17.5.04 he opened the Case Diary and went to the house of suspect Rahim Ali with staff. He met the suspect in his house and informed, him about the enquiry and filled up Form No.I as per version of suspect. Then we asked the suspect to show the documents regarding his India nationality. Then suspect told him that he has no documents in his hand and he can show the documents if time allowed. Then he recorded the statement of suspect Rahim Ali and witness Samin Bore and kept in the Case Diary. He gave 7 days time to the suspect to show the documents but, the suspect failed to do so. Then he filled up Form No.II and submitted his report to the authority with the case diary. Form enquiry it reveals that suspect. Rahim Ali illegally migrated to Assam from Bangladesh after 25th march, 1971.

O.P. has failed to discharges his burden U/s 9 of the Foreigner's Act and failed to prove that he is not a foreigner.

Considering the above, I am of the opinion that O.P. Md. Rahim Ali is a foreigner.

Sd/- B.K. Sarma
Member, F.T. Balbari"
(sic)

31. Some repetition in narration is inescapable. As obvious from the above, the initiation of the case against the appellant was based on the report submitted by the Sub-Inspector Sh. Bipin Dutta which in turn was based on the fact that in his deposition he had stated that upon being directed by the S.P. (B), Nalbari, he had undertaken an inquiry against the appellant and asked him to show the documents regarding his Indian nationality, whereupon the appellant had asked for time and was given 7 days' time, but did not show any document(s) and thus, Sh. Bipin Dutta filled up Form No.II and submitted his report along with the case diary before the authority.

32. It is further stated that from such inquiry it is revealed that the appellant had illegally migrated to Assam from Bangladesh after 25.03.1971 and based on the same, the opinion given was that the appellant was a foreigner.

33. Section 9 of the Act stipulates if in a case not falling under Section 8 of the Act, any question arises as to whether a person is or is not a foreigner or is or is not a foreigner of a particular class, the person concerned must prove that he/she is not a foreigner or not a foreigner of that particular class. This provision prevails notwithstanding anything in the Indian Evidence Act, 1872.

34. However, the question is that does Section 9 of the Act empower the Executive to pick a person at random, knock at his/her/their door, tell him/her/they/them 'We suspect you of being a foreigner.', and then rest easy basis Section 9? Let us contextualise this to the facts at hand. The originating point of inquiry is the S.P. (B) Nalbari's direction to Sub-Inspector Dutta on 12.05.2004. The pleadings and the record are silent as to what was the basis of the S.P. (B) Nalbari's direction? What materials or information had come to his knowledge or possession that warranted his direction? Obviously, the State cannot proceed in such manner. Neither can we as a Court countenance such approach.

35. First, it is for the authorities concerned to have in their knowledge or possession, some material basis or information to suspect that a person is a foreigner and not an Indian. In the present case, though it is mentioned that from inquiry it was revealed that the appellant had migrated illegally to the State of Assam from Bangladesh after 25.03.1971 but nothing has come on record to indicate even an *iota* of evidence against him, except for the bald allegation that

he had illegally migrated to India post 25.03.1971. It is also not known as to who, if any person, had alleged that the appellant had migrated to India after 25.03.1971 from Village - Dorijahangirpur, Police Station - Torail, District - Mymansingh in Bangladesh. It needs no reiteration that a person charged or accused would generally not be able to prove to the negative, if he/she is not aware of the evidence/material against him/her which leads to the person being labelled suspect. *Ipso facto* just an allegation/accusation cannot lead to shifting of the burden to the accused, unless he/she is confronted with the allegation as also the material backing such allegation. Of course, at such stage, the evidentiary value of the material would not be required to be gone into, as the same would be done by the Tribunal in the reference. However, mere allegation, that too, being as vague as to mechanically reproduce simply the words which mirror the text of provisions in the Act cannot be permitted under law. Even for the person to discharge the burden statutorily imposed on him by virtue of Section 9 of the Act, the person has to be intimated of the information and material available against him, such that he/she can contest and defend the proceedings against him.

36. In the present case, it was specifically alleged that the appellant had come to Assam from Village - Dorijahangirpur, Police Station - Torail, District - Mymansingh in Bangladesh while making a reference to the Tribunal. Hence, it was incumbent on the authority making the reference to provide details as to how it had received such information as also its *bona fide* belief of such factum being true. In other words, the authority had been, as claimed, able to trace the appellant's place of origin. Surely then, the authority had some material to back its assertion. The record does not show such material was given either to the appellant or the Tribunal by the authority.

37. In the absence of the basic/primary material, it cannot be left to the untrammelled or arbitrary discretion of the authorities to initiate proceedings, which have life-altering and very serious consequences for the person, basis hearsay or bald and vague allegation(s). In neither round of the proceedings before the Tribunal, whether it be the initial *ex-parte* one, or even after the matter was referred by this Court to the Tribunal to hear the appellant and pass an order, has it been revealed as to how and from where such specific allegation, down to the alleged village of origin of the appellant in Bangladesh

was brought to or came to the knowledge of the authorities. Nor do we locate any supporting material.

38. In the present case, clearly the authorities concerned have gravely faulted by construing the words '*a copy of the main grounds on which he is alleged to be a foreigner*' in Para 3(1) of the 1964 Order to mean the allegations levelled against the person. This error at the very inception stage is enough to render a fatal blow to the entire exercise undertaken. The term '*main grounds*' is not synonymous or interchangeable with the term 'allegation(s)'. There is no, and there cannot be any, ambiguity that '*main grounds*' is totally distinct and different from the 'allegation' of being '*a foreigner*'.

39. For avoidance of doubt, we may restate that this does not imply that strict proof of such allegation has to be given to the accused person but the material on which such allegation is founded has to be shared with the person. For obvious reasons and as pointed out hereinbefore, at this stage, the question of the evidentiary nature of the material and/or its authenticity is not required. However, under the garb of and by taking recourse to Section 9 of the Act, the authority, or for that matter, the Tribunal, cannot give a go-by to the settled principles of natural justice. *Audi alteram partem* does not merely envisage a fair and reasonable opportunity of being heard. In our opinion, it would encompass within itself the obligation to share material collected with the person/accused concerned. It is no longer *res integra* that principles of natural justice need to be observed even if the statute is silent on that aspect, as laid down in ***Mangilal v State of Madhya Pradesh*** **(2004) 2 SCC 447**:

> '***10***. *Even if a statute is silent and there are no positive words in the Act or the Rules made thereunder, there could be nothing wrong in spelling out the need to hear the parties whose rights and interest are likely to be affected by the orders that may be passed, and making it a requirement to follow a fair procedure before taking a decision, unless the statute provides otherwise. The principles of natural justice must be read into unoccupied interstices of the statute, unless there is a clear mandate to the contrary. No form or procedure should ever be permitted to exclude the presentation of a litigant's defence or stand. Even in the absence of a provision in procedural laws, power inheres in*

every tribunal/court of a judicial or quasi-judicial character, to adopt modalities necessary to achieve requirements of natural justice and fair play to ensure better and proper discharge of their duties. Procedure is mainly grounded on the principles of natural justice irrespective of the extent of its application by express provision in that regard in a given situation. It has always been a cherished principle. Where the statute is silent about the observance of the principles of natural justice, such statutory silence is taken to imply compliance with the principles of natural justice where substantial rights of parties are considerably affected. The application of natural justice becomes presumptive, unless found excluded by express words of statute or necessary intendment. Its aim is to secure justice or to prevent miscarriage of justice. Principles of natural justice do not supplant the law, but supplement it. These rules operate only in areas not covered by any law validly made. They are a means to an end and not an end in themselves. …'

(emphasis supplied)

40. The initial infirmity of there being nothing on record as regards what grounds or material were actually available with the authorities to question the appellant's status as to his nationality, is fatal to the projected case. The appellant had obtained documents/certificates from various officers with regard to his/his parents' continuous presence in India much prior to the date 25.03.1971, which were produced before the Tribunal and have been noted by the Tribunal in its report dated 16.11.2017. Another relevant aspect is the prevalent situation on the ground where uninformed/illiterate persons or persons not being well-informed, in the absence of any requirement to obtain and hold an official document and without possessing property in their own names, would not have any official document issued by the government, State or Central. It is neither difficult nor inconceivable to fathom such scenario amongst the rural populace, including within Assam.

41. The evidence produced before the Tribunal by the appellant to indicate that his parents had been resident in India much prior to 01.01.1966 whereas his siblings and he himself much prior to 25.03.1971, has been disbelieved only on the ground of mismatch of actual

English spelling of the names and discrepancy in dates. As far as the discrepancy(ies) in dates and spellings are concerned, we are of the view that the same are minor in nature. Variation in name spelling is not a foreign phenomenon in preparation of the Electoral Roll. Further, the Electoral Roll has no acceptance in the eyes of law insofar as proof of date of birth is concerned. A casual entry by the enumerators when noting and entering the name(s) and dates of birth(s) as also the address(es) of the person(s) while making preparatory surveys for the purposes of preparing the Electoral Rolls cannot visit the appellant with dire consequences. Moreover, in our country, sometimes a title is prefixed or suffixed to a name such that the same person may be known also by one or two aliases. The Tribunal seems to have been totally oblivious to all this.

42. The State of Assam, as per the Census 2011, boasts of 72.19% literacy rate, with females at 66.27% and males at 77.85%. However, this was not the case during the 1960s or even 1970s. Not just in Assam but in many States, it is seen that names of people, even on important government documents can have and do have varied spellings depending on them being in English or Hindi or Bangla or Assamese or any other language, for that matter. Moreover, names of persons which are written either by the persons preparing the Voters List or by the personnel making entries into different Government records, the spelling of the name, based upon its pronunciation, may take on slight variations. It is not uncommon throughout India that different spellings may be written in the regional/vernacular language and in English. Such/same person will have a differently spelt name in English and the local language. This is more pronounced where due to specific pronunciation habits or styles there can be different spellings for the same name in different languages *viz*. English/Hindi/Urdu/Assamese/Bangla etc.

43. The appellant had produced a document showing that his father and mother had been resident of Village Dolur Pather since 1965; that his sibling had also been declared not to be a foreigner by the Tribunal, and; his elder brother and he were both voters as per the 1985 Electoral Roll relating to 41 Bhabanipur Legislative Assembly Constituency. Further, upon his marriage, the appellant came to Village Kasimpur in District - Nalbari, Assam where his name appeared in the Electoral Roll of 1997 for 61 Dharmapur Legislative Assembly Constituency.

44. From an overall discussion on the Report/opinion of the Tribunal dated 16.11.2017, it is clear that there are minor discrepancy(ies) in the appellant's documents, however their authenticity is not in doubt. In the considered opinion of this Court, the same would further buttress the appellant's claim, that not being in the wrong, and being an ignorant person, he, truthfully and faithfully produced the official records as they were in his possession. We do not see any attempt by the appellant to get his official records prepared meticulously without any discrepancy. The conduct of an illegal migrant would not be so casual.

45. The debate has long been settled that penal statutes must be construed strictly [***Tolaram Relumal v State of Bombay*** **(1955) 1 SCR 158** at Para 8;[6] ***Krishi Utpadan Mandi Samiti v Pilibhit Pantnagar Beej Ltd.*** **(2004) 1 SCC 391** at Paras 57-58;[7] ***Govind Impex Pvt. Ltd. v Appropriate Authority, Income Tax Dept.***

---

6 '***8.*** *The question that needs our determination in such a situation is whether Section 18(1) makes punishable receipt of money at a moment of time when the lease had not come into existence, and when there was a possibility that the contemplated lease might never come into existence. It may be here observed that the provisions of Section 18(1) are penal in nature and it is a well-settled rule of construction of penal statutes that if two possible and reasonable constructions can be put upon a penal provision, the court must lean towards that construction which exempts the subject from penalty rather than the one which imposes penalty. It is not competent to the court to stretch the meaning of an expression used by the legislature in order to carry out the intention of the legislature. As pointed out by Lord Macmillan in London and North Eastern Railway Co. v. Berriman [1946 AC 278, 295] "where penalties for infringement are imposed it is not legitimate to stretch the language of a rule, however, beneficient its intention, beyond the fair and ordinary meaning of its language".*'

7 '***57.*** *Although the dictionary meaning of business may be wide, in our opinion, for the purpose of considering the same in the context of regulatory and penal statute like the Act, the same must be read as carrying on a commercial venture in agricultural produce. The rule of strict construction should be applied in the instant case. The intention of the legislature in directing the trader to obtain licence is absolutely clear and unambiguous insofar as it seeks to regulate the trade for purchase and sale. Thus a person who is not buying an agricultural produce for the purpose of selling it whether in the same form or in the transformed form may not be a trader. Furthermore, it is well known that construction of a statute will depend upon the purport and object of the Act, as has been held in Sri Krishna Coconut case [AIR 1967 SC 973] itself. Therefore, different provisions of the statute which have the object of enforcing the provisions thereof, namely, levy of market fee, which was to be collected for the benefit of the producers, in our opinion, is to be interpreted differently from a provision where it requires a person to obtain a licence so as to regulate a trade. It is now well known that in case of doubt in construction of a penal statute, the same should be construed in favour of the subject and against the State.*

58. *In the case of London and North Eastern Rly. Co. v. Berriman [1946 AC 278 : (1946) 1 All ER 255 (HL)] , Lord Simonds quoted with approval (at All ER p. 270 C-D) the following observations of Lord Esher, M.R. in the case of Tuck & Sons v. Priester [(1887) 19 QBD 629 : 56 LJ QB 553 (CA)], QBD at p. 638:*

> *"We must be very careful in construing that section, because it imposes a penalty. If there is a reasonable interpretation which will avoid the penalty in any particular case we must adopt that construction. If there are two reasonable constructions we must give the more lenient one. That is the settled rule for the construction of penal sections."*

It is trite that fiscal statute must not only be construed literally, but also strictly. It is further well known that if in terms of the provisions of a penal statute a person becomes liable to follow the provisions thereof it should be clear and unambiguous so as to let him know his legal obligations and liabilities thereunder.'

(2011) 1 SCC 529 at Para 11,[8] and; ***Commissioner of Customs (Import), Mumbai v Dilip Kumar & Company*** **(2018) 9 SCC 1** at Para 24[9]]. Equally, '*If special provisions are made in derogation to the general right of a citizen, the statute, in our opinion, should receive strict construction. …*'[10] The consequences which would befall the person declared as a foreigner are no doubt penal and severe. The moment a person is declared to be a foreigner, he/she is liable to be detained and deported to the country of his/her origin. Thus, the same would necessarily pre-suppose existence of material to (a) prove the person is not an Indian national, and (b) establish or identify his/her country of origin. Herein, on the facts, the authorities have not been able to succeed either on (a) or on (b). Another possibility is that if the foreign country refuses to accept the foreigner, he would be rendered stateless, and languish for the remainder of his life in confinement.

46. Notably, under the Constitution of India, Part III [Fundamental Rights] distinguishes between citizens and non-citizens. Articles 14, 20, 21, 22, 25 and 27 are available to all persons. We have kept in mind Articles 14[11] and 21[12] of the Constitution while penning down this judgment.

---

8 '***11.*** *Mr Salve submits that a statute providing for penal prosecution has to be construed strictly. He refers to Clause 12 aforesaid and contends that it shall govern the field. Mr Bhatt submits that it is Clause 1 of the lease deed which shall govern the issue. We do not have the slightest hesitation in accepting the broad submission of Mr Salve that a penal statute which makes an act a penal offence or imposes penalty is to be strictly construed and if two views are possible, one favourable to the citizen is to be ordinarily preferred but this principle has no application in the facts of the present case. There is no serious dispute in regard to the interpretation of Explanation to Section 269-UA(f) of the Act and in fact, we are proceeding on an assumption that it will cover only such cases where exists provision for extension in lease deed.*'

9 '***24.*** *In construing penal statutes and taxation statutes, the Court has to apply strict rule of interpretation. The penal statute which tends to deprive a person of right to life and liberty has to be given strict interpretation or else many innocents might become victims of discretionary decision-making. Insofar as taxation statutes are concerned, Article 265 of the Constitution [*"***265. Taxes not to be imposed save by authority of law***.— No tax shall be levied or collected except by authority of law."] prohibits the State from extracting tax from the citizens without authority of law. It is axiomatic that taxation statute has to be interpreted strictly because the State cannot at their whims and fancies burden the citizens without authority of law. In other words, when the competent Legislature mandates taxing certain persons/certain objects in certain circumstances, it cannot be expanded/interpreted to include those, which were not intended by the legislature.*'

10 ***Karnataka State Financial Corporation v N Narasimhaiah*** **(2008) 5 SCC 176** at Para 18.

11 '***14. Equality before law.***— *The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.*'

12 '***21. Protection of life and personal liberty.***— *No person shall be deprived of his life or personal liberty except according to procedure established by law.*'

47. In ***Mukesh Singh v State (Narcotic Branch of Delhi)*** **(2020) 10 SCC 120**, a Bench of 5 learned Judges held:

> '***11.3.*** *Now so far as the observations made by this Court in para 13 in Mohan Lal [Mohan Lal v. State of Punjab (2018) 17 SCC 627 : (2019) 4 SCC (Cri) 215] that in the nature of reverse burden of proof, the onus will lie on the prosecution to demonstrate on the face of it that the investigation was fair, judicious with no circumstance that may raise doubt about its veracity, it is to be noted that the presumption under the Act is against the accused as per Sections 35 and 54 of the NDPS Act. Thus, in the cases of reverse burden of proof, the presumption can operate only after the initial burden which exists on the prosecution is satisfied. At this stage, it is required to be noted that the reverse burden does not merely exist in special enactments like the NDPS Act and the Prevention of Corruption Act, but is also a part of the IPC — Section 304-B and all such offences under the Penal Code are to be investigated in accordance with the provisions of CrPC and consequently the informant can himself investigate the said offences under Section 157 CrPC.*'
>
> (emphasis supplied)

48. Before ***Mukesh Singh*** (*supra*), 2 learned Judges of this Court, in ***Noor Aga v State of Punjab*** **(2008) 16 SCC 417**, had examined the imposition of a reverse burden, on an accused, under the Narcotic Drugs and Psychotropic Substances Act, 1985. While holding the provisions concerned imposing reverse burden as not *ultra vires* the Constitution, it was held:

> '***54.*** *Provisions imposing reverse burden, however, must not only be required to be strictly complied with but also may be subject to proof of some basic facts as envisaged under the statute in question.*
>
> *xxx*
>
> ***56.*** *The provisions of the Act and the punishment prescribed therein being indisputably stringent flowing from elements such as a heightened standard for bail, absence of any provision for remissions, specific provisions for grant of*

minimum sentence, enabling provisions granting power to the court to impose fine of more than maximum punishment of Rs 2,00,000 as also the presumption of guilt emerging from possession of narcotic drugs and psychotropic substances, the extent of burden to prove the foundational facts on the prosecution i.e. "proof beyond all reasonable doubt" would be more onerous. A heightened scrutiny test would be necessary to be invoked. It is so because whereas, on the one hand, the court must strive towards giving effect to the parliamentary object and intent in the light of the international conventions, but, on the other, it is also necessary to uphold the individual human rights and dignity as provided for under the UN Declaration of Human Rights by insisting upon scrupulous compliance with the provisions of the Act for the purpose of upholding the democratic values. It is necessary for giving effect to the concept of "wider civilisation". The court must always remind itself that it is a well-settled principle of criminal jurisprudence that more serious the offence, the stricter is the degree of proof. A higher degree of assurance, thus, would be necessary to convict an accused. In State of Punjab v. Baldev Singh [(1999) 6 SCC 172: 1999 SCC (Cri) 1080] it was stated: (SCC p. 199, para 28)

"28. … It must be borne in mind that severer the punishment, greater has to be the care taken to see that all the safeguards provided in a statute are scrupulously followed."

(See also Ritesh Chakarvarti v. State of M.P. [(2006) 12 SCC 321: (2007) 1 SCC (Cri) 744])

***57.** It is also necessary to bear in mind that superficially a case may have an ugly look and thereby, prima facie, shaking the conscience of any court but it is well settled that suspicion, however high it may be, can under no circumstances, be held to be a substitute for legal evidence.*

***58.** Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place the burden of proof*

in this behalf on the accused; but a bare perusal of the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, would the legal burden shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of the accused on the prosecution is "beyond all reasonable doubt" but it is "preponderance of probability" on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established.

xxx

***63.** Placing persuasive burden on the accused persons must justify the loss of protection which will be suffered by the accused. Fairness and reasonableness of trial as also maintenance of the individual dignity of the accused must be uppermost in the court's mind.*'

(emphasis supplied)

49. In ***Sarbananda Sonowal v Union of India*** **(2007) 1 SCC 174** [hereinafter referred to as ***Sarbananda Sonowal II***], it was held:

*'**55.** There cannot, however, be any doubt whatsoever that adequate care should be taken to see that no genuine citizen of India is thrown out of the country. A person who claims himself to be a citizen of India in terms of the Constitution of India or the Citizenship Act is entitled to all safeguards both substantive and procedural provided for therein to show that he is a citizen.*

***56.** Status of a person, however, is determined according to statute. The Evidence Act of our country has made provisions as regards "burden of proof". Different statutes also lay down as to how and in what manner burden is to be discharged. Even some penal statutes contain provisions that burden of proof shall be on the accused.*

Only because burden of proof under certain situations is placed on the accused, the same would not mean that he is deprived of the procedural safeguard.

57. *In Hiten P. Dalal v. Bratindranath Banerjee [(2001) 6 SCC 16: 2001 SCC (Cri) 960] this Court categorically opined: (SCC pp. 24-25, paras 22-23)*

"22. … Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter, all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact.

23. In other words, provided the facts required to form the basis of a presumption of law exist, no discretion is left with the court but to draw the statutory conclusion, but this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary. A fact is said to be proved when,

'after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists'.

Therefore, the rebuttal does not have to be conclusively established but such evidence must be adduced before the court in support of the defence that the court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the 'prudent man'."

xxx

60. *Having regard to the fact that the Tribunal in the notice to be sent to the proceedee is required to set out the main grounds; evidently the primary onus in relation thereto would be on the State. However, once the Tribunal*

satisfied itself about the existence of grounds, the burden of proof would be upon the proceedee.

61. *In Sonowal I [(2005) 5 SCC 665] this Court clearly held that the burden of proof would be upon the proceedee as he would be possessing the necessary documents to show that he is a citizen not only within the meaning of the provisions of the Constitution of India but also within the provisions of the Citizenship Act.*'

(emphasis supplied)

50. Evidently, our understanding and exposition of the law in the preceding paragraphs can be read with ***Sarbananda Sonowal I*** (*supra*) and ***Sarbananda Sonowal II*** (*supra*). It embodies meaning as to what is expected of the authorities till the stage of Section 9 of the Act arrives. The statutory burden would kick in thereafter.

51. 5 learned Judges of this Court in ***Union of India v Ghaus Mohammad*, 1961 SCC OnLine SC 2** held:

'***6.*** *Section 9 of this Act is the one that is relevant. That section so far as is material is in these terms:*

"xxx"

It is quite clear that this section applies to the present case and the onus of showing that he is not a foreigner was upon the respondent. The High Court entirely overlooked the provisions of this section and misdirected itself as to the question that arose for decision. It does not seem to have realised that the burden of proving that he was not a foreigner, was on the respondent and appears to have placed that burden on the Union. This was a wholly wrong approach to the question.'

52. However, the above conclusion was premised on what the Court noted in the preceding paragraph in ***Ghaus Mohammad*** (*supra*):

'***2.*** *The High Court observed that: "There must be prima facie material on the basis of which the authority can proceed to pass an order under Section 3(2)(c) of the Foreigners Act, 1946. No doubt if there exists such a material and then the order is made which is on the face of it a valid order, then this Court cannot go into the*

> *question whether or not a particular person is a foreigner or, in other words, not a citizen of this country because according to Section 9 of the Citizenship Act, 1955, this question is to be decided by a prescribed authority and under the Citizenship Rules, 1956, that authority is the Central Government". The High Court then examined the materials before it and held, "in the present case there was no material at all on the basis of which the proper authority could proceed to issue an order under Section 3(2)(c) of the Foreigners Act, 1946". In this view of the matter the High Court quashed the order.*'

53. We need not be detained on ***Ghaus Mohammad*** (*supra*) as it is clear that therein, the Punjab High Court (Circuit Bench) at Delhi had conflated the Act with the Citizenship Act. ***Fateh Mohd. v Delhi Administration*****,** **1963 Supp (2) SCR 560** by a 4-Judge Bench and ***Masud Khan v State of Uttar Pradesh*** **(1974) 3 SCC 469** [3-Judge Bench] followed ***Ghaus Mohammad*** (*supra*). We are of the opinion that the facts therein were also different than what stares us in the case at hand. No doubt the principles of law stand, yet we see no real difficulty in our formulations hereinabove harmonising with what has been held in the gamut of case-law. As such, the burden under Section 9 of the Act would operate in the manner delineated by us, factoring in the imperative to maintain consistency amongst ***Ghaus Mohammad*** (*supra*), ***Sarbananda Sonowal I*** (*supra*), ***Sarbananda Sonowal II*** (*supra*), ***Mukesh Singh*** (*supra*) and this judgment.

54. For and on the strength of the totality of reasons afore-indicated, this Court finds that the report/opinion of the Tribunal dated 16.11.2017, as sought by this Court through order dated 28.07.2017,[13] is wholly unsustainable. Accordingly, the report/opinion dated 16.11.2017 is quashed. As the report/opinion dated 16.11.2017 has been examined threadbare by us, we have no hesitation in setting aside the Tribunal's order dated 19.03.2012 as also the Impugned Judgment

---

13 '*In the peculiar facts of the case, we would request the Foreign Tribunal, Nalbari, to examine the documents filed by the petitioner on the basis of which the petitioner is claiming that he is not a foreigner but a national of this country. The petitioner shall appear before the Tribunal on 21.08.2017 and give the copies of the documents which are filed along with this petition. The Tribunal shall thereafter undertake an inquiry into those documents and submit its report.*
List the matter after four months.
In the meantime, the petitioner shall not be deported.'

dated 23.11.2015 passed by the High Court. In any event, once this Court had passed the order dated 28.07.2017 (*supra*) calling for a fresh report/opinion, the sequitur logically would translate into the Tribunal's order dated 19.03.2012 and the Impugned Judgment becoming susceptible to being quashed. It is so ordered.

55. This Court has found that the inferences drawn by the Tribunal do not falsify the appellant's claim. In view of detailed analysis, the discrepancy(ies) in the material produced by the appellant can be termed minor. The same were not sufficient to lead the Tribunal to doubt and disbelieve the appellant and the version put forth by him. Thus, we are not inclined to remand the matter to the Tribunal for another round of consideration. Putting an authoritative *quietus* to the issue, the appellant is declared an Indian citizen and not a foreigner.

56. Necessary consequences in law shall follow.

57. The appeal would, accordingly, stand allowed on the aforementioned terms, without any order as to costs.

58. Let a copy of the judgment be circulated to the Tribunals constituted under the 1964 Order by the Registrar General of the High Court.

Result of the case: Appeal allowed.

†*Headnotes prepared by:* Ankit Gyan

[2024] 7 S.C.R. 2363 : 2024 INSC 512

Arvind Kejriwal
v.
Directorate of Enforcement

(Criminal Appeal No. 2493 of 2024)

12 July 2024

[Sanjiv Khanna* and Dipankar Datta, JJ.]

Issue for Consideration

Validity of arrest of the appellant under Section 19 of the Prevention of Money Laundering Act, 2002; scope and ambit of the Courts to examine the legality of the arrest under Section 19; whether the Court while examining the validity of arrest in terms of Section 19(1) of the PML Act will also go into and examine the necessity and need to arrest; whether interim bail ought to be granted to the appellant.

Headnotes†

Prevention of Money Laundering Act, 2002 – s.19(1) – "need and necessity to arrest", if a separate ground to be considered beyond the conditions stipulated in s.19(1) – Appellant challenged his arrest by ED in the Excise Policy case wherein he was described as the key conspirator in formulation of the said policy framed for the sale of liquor in NCT of Delhi, which allegedly favoured certain persons in exchange for kickbacks from liquor businessmen and resulted in huge losses to the government exchequer – It was further *inter alia* alleged that the appellant was involved in the use of proceeds of crime generated in the Goa election campaign of Aam Aadmi Party – Arrest was challenged as illegal contending that he was arrested in violation of s.19(1), the "reasons to believe" did not mention and record reasons for "necessity to arrest" and there was no necessity to arrest the appellant on 21.03.2024 as the RC (by CBI)/ECIR (by ED) were registered in August 2022 and also most of the material relied upon in the "reasons to believe" were prior to July 2023 – Whether mere satisfaction of the formal parameters to arrest sufficient or is the satisfaction of necessity and need to arrest, beyond mere formal parameters required:

* Author

Held: Such review might be conflated with stipulations in s.41 of the Code of Criminal Procedure, 1973 which lays down certain conditions for the police to arrest without warrant – However, s.19(1) does not permit arrest only to conduct investigation – Conditions of s.19(1) have to be satisfied – Clauses (a), (c), (d) and (e) to s.41(1)(ii) of the CrPC, apart from other considerations, may be relevant – Vijay Madanlal Choudhary, a three Judge Bench decision states that the safeguards provided as pre-conditions in s.19(1) of the PML Act have to be fulfilled by the designated officer before affecting arrest – The safeguards are of a higher standard and ensure that the designated officer does not act arbitrarily, and is made accountable for their judgment about the 'necessity to arrest' the person alleged to be involved in the offence of money laundering, at the stage before the complaint is filed – "necessity to arrest" is not mentioned in s.19(1) however, it has been judicially recognised in Arnesh Kumar laying down that "necessity to arrest" must be considered by an officer before arresting a person – Power to arrest must be exercised cautiously to prevent severe repercussions on the life and liberty of individuals and such power must be restricted to necessary instances and must not be exercised routinely – Right to life and liberty is sacrosanct, and the appellant has suffered incarceration of over 90 days and as the questions of law *inter alia* as regards whether the "need and necessity to arrest" is a separate ground to challenge the arrest u/s.19(1) of the PML Act is referred to larger Bench, the appellant is granted interim bail in the ECIR recorded by respondent-ED, on the conditions as imposed, which may be extended/recalled by the larger Bench. [Paras 18, 67, 74, 84, 85]

Prevention of Money Laundering Act, 2002 – s.19(1) – Validity of arrest – "Need and necessity to arrest" – Parameters to be considered – Questions of law referred to larger Bench:

Held: Questions as regards whether the"need and necessity to arrest" is a separate ground to be considered beyond the conditions stipulated in s.19(1); whether it refers to the satisfaction of formal parameters to arrest and take a person into custody, or it relates to other personal grounds and reasons regarding necessity to arrest a person; and if questions (a) and (b) are affirmatively answered, what are the parameters and facts to be taken into consideration while examining the question of "need and necessity to arrest". [Para 85]

Prevention of Money Laundering Act, 2002 – s.19(1) – Preconditions to arrest under – Power to arrest – Judicial review – Plea of the respondent-Directorate of Enforcement that there should not be judicial scrutiny of the power to arrest as it will interfere with the investigation:

Held: Rejected – The exercise of the power to arrest is not exempt from the scrutiny of courts – A decision-making error u/s.19(1) can lead to the arrest and deprivation of liberty of the arrestee – Courts have the power of judicial review and must examine that the exercise of the power to arrest meets the statutory conditions – The legislature imposed strict conditions as preconditions to arrest and was aware that the arrest may be before or prior to initiation of the criminal proceedings/prosecution complaint and did not exclude the examination of the said preconditions being satisfied in a particular case – This flows from the mandate of s.19(3) which requires that the arrestee must be produced within 24 hours and taken to the Special Court, or court of judicial/metropolitan magistrate having jurisdiction – The power of judicial review remains both before and after the filing of criminal proceedings/ prosecution complaint. [Paras 21, 61]

Prevention of Money Laundering Act, 2002 – s.19(1) – Penal Code, 1860 – s.26 – "reasons to believe" – Rights of the accused – Whether the arrestee is entitled to be supplied with a copy of the "reasons to believe":

Held: Yes – Providing the written "grounds of arrest", though a must, does not in itself satisfy the compliance requirement – The authorized officer's genuine belief and reasoning based on the evidence that establishes the arrestee's guilt is also the legal necessity – As the "reasons to believe" are accorded by the authorised officer, the onus to establish satisfaction of the said condition will be on the ED and not on the arrestee – s.26 defines the expression "reason to believe" as sufficient cause to believe a thing and not otherwise – "reasons to believe" are the reasons for the formation of the belief which must have a rational connection with or an element bearing on the formation of belief – The reason should not be extraneous or irrelevant for the purpose of the provision – Existence and validity of the "reasons to believe" goes to the root of the power to arrest – The subjective opinion of the arresting officer must be founded and based upon fair and objective consideration of the material available on the date of arrest – On the reading of the "reasons to believe" the court must form the

'secondary opinion' on the validity of the exercise undertaken for compliance of s.19(1) when the arrest was made – The "reasons to believe" that the person is guilty of an offence under the PML Act should be founded on the material in the form of documents and oral statements – Accused is entitled to challenge his arrest u/s.19(1) – Not furnishing a copy of the "reasons to believe" would prevent the accused from challenging their arrest, questioning the "reasons to believe", violating the personal liberty – The "reasons to believe" should be furnished to the arrestee to enable him to exercise his right to challenge the validity of arrest – However, in a one-off case, ED may claim redaction and exclusion of specific particulars and details however, the onus to justify redaction would be on the ED – This requires consideration and decision by the court and ED is not the sole judge. [Paras 28, 29, 33, 34, 36, 37]

Prevention of Money Laundering Act, 2002 – s.19(1) – Legality of arrest – Judicial review – Scope and ambit:

Held: Judicial review of arrest u/s.19(1) which is based on the opinion of the designated/authorised officer who records in writing, their "reasons to believe" that the arrestee is 'guilty' of an offence under the PML Act, is not merit based review – Judicial review does not amount to a mini-trial or a merit review – The exercise is confined to ascertain whether the "reasons to believe" are based upon material which 'establish' that the arrestee is guilty of an offence under the PML Act and to ensure that the ED acted in accordance with the law – The courts scrutinize the validity of the arrest in exercise of power of judicial review – In-depth judicial scrutiny is required when the reasons recorded by the authority are not clear and lucid – Arrest is to be made on the basis of the valid "reasons to believe", meeting the parameters prescribed by the law. [Paras 39, 44]

Prevention of Money Laundering Act, 2002 – s.19(1) – "reasons to believe" – Chats retrieved after the arrest of the appellant, not mentioned in the "reasons to believe" were referred in the additional note of ED – Examination of validity of the arrest of the appellant u/s.19(1) on basis thereof:

Held: Chats being retrieved after the arrest of the appellant and not being mentioned in the "reasons to believe" cannot be examined to determine the validity of the arrest in terms of s.19(1) – The legality of the "reasons to believe" have to be examined based on what is mentioned and recorded therein and the material on

record – However, the officer acting u/s.19(1) cannot ignore or not consider the material which exonerates the arrestee – An officer cannot be allowed to selectively pick and choose material implicating the person to be arrested – The power to arrest u/s.19(1) cannot be exercised as per the whims and fancies of the officer – The opinion of the officer is subjective, but formation of opinion should be in accordance with the law. [Paras 54-56]

Prevention of Money Laundering Act, 2002 – s.19(1) – Code of Criminal Procedure, 1973 – s.41 – Distinction:

Held: Arrest u/s.41 can be made on the grounds mentioned in clauses (a) to (i) of s.41(1) which include a reasonable complaint, credible information or reasonable suspicion that a person has committed an offence, or the arrest is necessary for proper investigation of the offence, etc. – Grounds mentioned in s.41 are different from the juridical preconditions for exercise of power of arrest u/s.19(1) of the PML Act – s.19(1) conditions are more rigid and restrictive and the two provisions cannot be equated. [Para 40]

Prevention of Money Laundering Act, 2002 – s.19(1) – "reasons to believe" – Power of judicial review to set aside the "reasons to believe" is limited – Contents of the "reasons to believe" records the subjective satisfaction that the appellant is guilty *inter alia* stating the role of the appellant as the kingpin in formulation of the policy; his involvement in the use of proceeds of crime generated in the Goa election campaign of Aam Aadmi Party; being guilty as an individual as a part of the conspiracy in the formulation of the excise policy, and, also vicariously as the in-charge of AAP; and not cooperating with the investigation despite nine summons being issued to him – "reasons to believe" also referred to the "material" to show appellant's involvement in the offence of money laundering – However, the appellant contended that the "reasons to believe" did not mention and evaluate "all" or "entire" material and selectively referred to "incriminating" material and ignored the exculpatory material:

Held: Though the arguments raised on behalf of the appellant as against the "reasons to believe", are worthy of consideration, but are in the nature of propositions or deductions – The power of judicial review to set aside and quash the "reasons to believe" is limited and accepting the arguments raised would be equivalent to undertaking a merits review. [Para 65]

Prevention of Money Laundering Act, 2002 – Policy on arrest by ED – Lack of uniformity, consistency – Data on the website of ED as regards the number of ECIRs recorded and the arrests made, raise questions as regards the policy on arrest by ED as to when a person involved in offences committed under the PML Act should be arrested:

Held: ED should act uniformly, consistent in conduct, confirming one rule for all. [Para 79]

Prevention of Money Laundering Act, 2002 – Fundamental rights – Right to life and liberty – Review – Principle of proportionality test, discussed.

Prevention of Money Laundering Act, 2002 – ss.19, 45 – Distinction between.

Prevention of Money Laundering Act, 2002 – s.45 – Right to bail under, if dependant on the stage of the proceedings:

Held: No – The power of the court u/s.45 is unrestricted with reference to the stage of the proceedings – s.45 does not stipulate the stage when the accused may move an application for bail and it can be submitted at any stage, either before or after the complaint is filed – It is immaterial whether the charge is framed or evidence is recorded or not recorded – All material and evidence that can be led in the trial and admissible, whether relied on by the prosecution or not, and can be examined – On the question of burden of proof, s.24 of the PML Act can be relied on by the prosecution. [Para 46]

Word and Phrases – "material", "reason to believe", and "guilty of the offence" – Interpretation.

Word and Phrases – "reasons to believe" and "suspicion" – Discussed.

Case Law Cited

Dukhishyam Benupani, Asst. Director, Enforcement Directorate (FERA) v. Arun Kumar Bajoria [1997] Supp. 5 SCR 566 **: (1998) 1 SCC 52;** *State of Bihar and another v. J.A.C. Saldanha and others* [1980] 2 SCR 16 **: (1980) 1 SCC 554;** *M.C. Abraham and another v. State of Maharashtra and others* [2002] Supp. 5 SCR 677 **: (2003) 2 SCC 649 – held inapplicable.**

The King Emperor v. Khawaja Nazir Ahmad **AIR 1945 PC 18 – held inapplicable.**

Vijay Madanlal Choudhary and others v. Union of India and others [2022] 6 SCR 382 **: (2022) SCC OnLine SC 929;** *Pankaj Bansal v. Union of India and others* [2023] 12 SCR 714 **: 2023 SCC Online SC 1244;** *V. Senthil Balaji v. State and others* [2023] 12 SCR 853 **: (2024) 3 SCC 51;** *Prabir Purkayastha v. State (NCT of Delhi)* **(2024) SCC OnLine SC 934;** *Union of India v. Padam Narain Aggarwal and others* [2008] 14 SCR 179 **: (2008) 13 SCC 305;** *Dr. Partap Singh and Another v. Director of Enforcement, Foreign Exchange Regulation Act and others* [1985] 3 SCR 969 **: (1985) 3 SCC 72 – relied on.**

Roy V.D. v. State of Kerala [2000] Supp. 4 SCR 539 **: (2000) 8 SCC 590;** *Ramesh Chandra Mehta v. State of West Bengal* [1969] 2 SCR 461**;** *In the matter of Madhu Limaye and others* [1969] 3 SCR 154 **: (1969) 1 SCC 292;** *Barium Chemicals Ltd. and another v. Company Law Board and others* [1966] Supp. 1 SCR 311 **: AIR 1967 SC 295;** *Joseph Kuruvilla Vellukunnel v. Reserve Bank of India and others* [1962] Supp. 3 SCR 632 **: AIR 1962 SC 1371;** *Joti Parshad v. State of Haryana* **(1993) Supp 2 SCC 497;** *A.S. Krishnan and others v. State of Kerala* [2004] 3 SCR 44 **: (2004) 11 SCC 576;** *Gurcharan Singh and others v. State (Delhi Administration)* [1978] 2 SCR 358 **: (1978) 1 SCC 118;** *Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra and another* [2005] 3 SCR 345 **: (2005) 5 SCC 294;** *State of Orissa v. Debendra Nath Padhi* [2004] Supp. 6 SCR 460 **: (2005) 1 SCC 568;** *M. Ravindran v. Intelligence Officer, Directorate of Revenue Intelligence* [2020] 12 SCR 915 **: (2021) 2 SCC 485;** *Amarendra Kumar Pandey v. Union of India and others* [2022] 12 SCR 223 **: (2022) SCC Online SC 881;** *Centre for PIL and another v. Union of India and another* [2011] 4 SCR 445 **: (2011) 4 SCC 1;** *Ram Manohar Lohia v. State of Bihar and another* [1966] 1 SCR 709 **: AIR 1966 SC 740;** *Moti Lal Jain v. State of Bihar and others* [1968] 3 SCR 587 **: AIR 1968 SC 1509;** *Uttamrao Shivdas Jankhar v. Ranjitsinh Vijaysinh Mohite Patil* [2009] 9 SCR 538 **: (2009) 13 SCC 131;** *Manish Sisodia v. Central Bureau of Investigation* [2023] 15 SCR 480 **: 2023 SCC OnLine SC 1393;** *Arnesh Kumar v. State of Bihar* [2014] 8 SCR 128 **: (2014) 8 SCC 273;** *Mohammed Zubair v. State of NCT of Delhi* [2022] 18 SCR 494 **: (2022) SCC OnLine SC 897;** *Joginder Kumar v. State of Uttar Pradesh* [1994] 3 SCR 661 **: (1994) 4 SCC 260;** *Siddharth v. State of Uttar Pradesh* **(2022) 1 SCC 676;**

P. Chidambaram v. Directorate of Enforcement [2019] 12 SCR 172 **: (2019) 9 SCC 24;** *Chairman, All India Railway Recruitment Board v. K. Shyam Kumar* [2010] 6 SCR 291 **: (2010) 6 SCC 614;** *State of Uttar Pradesh v. Lal* [2006] 2 SCR 656 **: (2006) 3 SCC 276;** *Modern Dental College & Research Centre v. State of Madhya Pradesh* [2016] 3 SCR 575 **: (2016) 4 SCC 346;** *K.S. Puttaswamy (Retired) and Anr. (Aadhar) v. Union of India and Anr.* [2015] 9 SCR 99 **: (2019) 1 SCC 1;** *Anuradha Bhasin v. Union of India and Others* [2020] 1 SCR 812 **: (2020) 3 SCC 637;** *Association for Democratic Reforms v. Union of India* [2024] 2 SCR 420 **: (2024) 5 SCC 1 – referred to.**

Gifford v. Kelson **(1943) 51 Man. R 120;** *Nakkuda Ali v. Jayaratne* **1951 AC 66;** *Council of Civil Services Union v. Minister of State for Civil Services* **(1984) 3 All. ER 935;** *R v. Secretary of State* **(1991) 1 All ER 710 – referred to.**

List of Acts

Prevention of Money Laundering Act, 2002; Code of Criminal Procedure, 1973; Penal Code, 1860.

List of Keywords

Section 19 of the Prevention of Money Laundering Act, 2002; Validity of arrest; Necessity and need to arrest; Delhi excise policy; Liquor; Excise policy; Excise Policy case; Kickbacks; Bribes; Enforcement Directorate; ECIR; "reasons to believe"; Preconditions to arrest; Proceeds of crime; Aam Aadmi Party; Formal parameters to arrest; Grounds of arrest; Money laundering; Principles of Wednesbury reasonableness; Principle of proportionality; Proportionality test; Judicial review.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 2493 of 2024

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

Appearances for Parties

Dr. Abhishek Manu Singhvi, Amit Desai, Vikram Chaudhari, Sr. Advs., Vivek Jain, Mohd. Irshad, Rajat Bhardwaj, Karan Sharma,

Amit Bhandari, Shadan Farasat, Rajat Jain, Sadiq Noor, Mohit Siwach, Kaustubh Khanna, Gopal Shenoy, Shailesh Chauhan, Advs. for the Appellant.

Tushar Mehta, Solicitor General, Suryaprakash V Raju, A.S.G., Mukesh Kumar Maroria, Kanu Agarwal, Annam Venkatesh, Zoheb Hussain, Vivek Gurnani, Hitarth Raja, Ms. Shweta Desai, Ms. Nidhi Saini, Ms. Abhipriya, Ms. Agrimaa Singh, Kartik Sabarwal, Vivek Gaurav, Samrat Goswami, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Judgment

Sanjiv Khanna, J.

This appeal filed by the appellant – Arvind Kejriwal assails the judgment and order dated 09.04.2024 passed by the single Judge of the High Court of Delhi whereby the Criminal Writ Petition filed by Arvind Kejriwal under Articles 226 and 227 of the Constitution of India read with Section 482 of the Code of Criminal Procedure, 1973,[1] challenging his arrest by the Directorate of Enforcement,[2] *vide* the arrest order dated 21.03.2024, on the ground of violation of Section 19 of the Prevention of Money Laundering Act, 2002,[3] and the proceedings pursuant thereto including the order of remand dated 22.03.2024 to the custody of DoE passed by the Special Judge, has been rejected.

2. At the outset, we must clarify that this is not an appeal against refusal or grant of bail. Instead, this appeal impugns the validity of arrest under Section 19 of the PML Act. It raises a pivotal question regarding the scope and ambit of the trial court/courts to examine the legality of the arrest under Section 19. The issue is legal in nature, and with the ratio being propounded in detail, the decision becomes complex and legalistic.[4]

---

1 For short, the "Code".

2 For short, "DoE".

3 For short, the "PML Act".

4 While introducing the Prevention of Money Laundering (Amendment) Bill, 2012 in the Rajya Sabha on 17.12.2012, the then Finance Minister, Mr. P Chidambaram, stated, "Firstly, we must remember that money-laundering is a very technically-defined offence. It is not the way we understand 'money-laundering in a colloquial sense." This has been quoted with approval in *Vijay Madanlal Choudhary and others* v. *Union of India and others*, (2022) SCC OnLine SC 929, at paragraph 35.

3. On 17.08.2022, the Central Bureau of Investigation[5] registered RC No. 0032022A0053 for the offences punishable under Section 120B read with Section 477A of the Indian Penal Code, 1860[6] and Section 7 of the Prevention of Corruption Act, 1988. The registration was based on a complaint dated 20.07.2022, made by the Lieutenant Governor of the Government of National Capital Territory[7] of Delhi, and on the directions of the competent authority conveyed by the Director, Ministry of Home Affairs, Government of India.

4. Later, on 25.11.2022, the CBI filed a chargesheet. Thereafter, on 25.04.2023 and 08.07.2023, two supplementary chargesheets were filed. On 15.12.2022, the Special Court took cognisance of the offences. The chargesheets *inter alia* allege that the excise policy, framed for the sale of liquor in NCT of Delhi, was a product of criminal conspiracy. It was hatched by a cartel of liquor manufacturers, wholesalers and retailers and it provided undue pecuniary gain to public servants and other accused in the conspiracy. It resulted in huge losses to the government exchequer and ultimately to the public. Arvind Kejriwal is not an accused in the said chargesheets.

5. On 22.08.2022, the DoE recorded ECIR No. HIU-II/14/2022 based on offences detailed under the RC registered by CBI. The offences under the RC are the predicate offence for investigation/inquiry into the scheduled offences under the PML Act. On 26.11.2022, the DoE filed the first prosecution complaint. On 20.12.2022, the Special Court took cognisance. Since then, the DoE has filed seven supplementary prosecution complaints. In the last complaint, that is, the Seventh Supplementary Prosecution Complaint dated 17.05.2024, Arvind Kejriwal has been named as an accused.

6. On 30.10.2023, Arvind Kejriwal was issued notice under Section 50 of the PML Act for his appearance and recording of statement. Thereafter, eight summons were issued till his arrest on 21.03.2024. DoE states that Arvind Kejriwal failed to appear and join the investigation. Arvind Kejriwal claims that the summons and notices under Section 50 were illegal, bad in law and invalid.[8]

---

5 For short, "CBI".

6 For short, "IPC".

7 For short, "NCT".

8 We are not directly examining the question of validity of the summons and notices, though the effect and failure to appear is one of the aspects which will be noticed subsequently.

7. The cardinal ground taken in the present appeal is that Arvind Kejriwal was arrested in violation of Section 19(1) of the PML Act. It is contended that the arrest was illegal, which makes the order of remand to custody of the DoE passed by the Special Court dated 01.04.2024 also illegal. Therefore, it would be apt to begin by referring to Section 19 and elucidating how the Courts have interpreted and applied the section.

8. Section 19 of the PML Act reads:

> "**19. Power to arrest**.—(1) If the Director, Deputy Director, Assistant Director or any other officer authorised in this behalf by the Central Government by general or special order, has on the basis of material in his possession, reason to believe (the reason for such belief to be recorded in writing) that any person has been guilty of an offence punishable under this Act, he may arrest such person and shall, as soon as may be, inform him of the grounds for such arrest.
>
> (2) The Director, Deputy Director, Assistant Director or any other officer shall, immediately after arrest of such person under sub-section (1), forward a copy of the order along with the material in his possession, referred to in that sub-section, to the Adjudicating Authority, in a sealed envelope, in the manner as may be prescribed and such Adjudicating Authority shall keep such order and material for such period, as may be prescribed.
>
> (3) Every person arrested under sub-section (1) shall, within twenty-four hours, be taken to a Special Court or Judicial Magistrate or a Metropolitan Magistrate, as the case may be, having jurisdiction:
>
> Provided that the period of twenty-four hours shall exclude the time necessary for the journey from the place of arrest to the Special Court or Magistrate's Court."

9. A bare reading of the section reflects, that while the legislature has given power to the Director, Deputy Director, Assistant Director, or an authorised officer to arrest a person, it is fenced with preconditions and requirements, which must be satisfied prior to the arrest of a person. The conditions are –

⇒ The officer must have material in his possession.

⇒ On the basis of such material, the authorised officer should form and record in writing, "reasons to believe" that the person to be arrested, is guilty of an offence punishable under the PML Act.

⇒ The person arrested, as soon as may be, must be informed of the grounds of arrest.

These preconditions act as stringent safeguards to protect life and liberty of individuals. We shall subsequently interpret the words "material", "reason to believe", and "guilty of the offence". Before that, we will refer to some judgments of this Court on the importance of Section 19(1) and the effect on the legality of the arrest upon failure to comply with the statutory requirements.

10. In ***Pankaj Bansal*** v. ***Union of India and others***,[9] interpreting Section 19 of the PML Act with reference to Article 22(1) of the Constitution of India,[10] this Court has observed:

> "32. In this regard, we may note that Article 22(1) of the Constitution provides, *inter alia*, that no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest. This being the fundamental right guaranteed to the arrested person, the mode of conveying information of the grounds of arrest must necessarily be meaningful so as to serve the intended purpose. It may be noted that Section 45 of the Act of 2002 enables the person arrested under Section 19 thereof to seek release on bail but it postulates that unless the twin conditions prescribed thereunder are satisfied, such a person would not be entitled to grant of bail. The twin conditions set out in the provision are that, firstly, the Court must be satisfied, after giving an opportunity to the public prosecutor to oppose the application for release, that there are reasonable grounds

9 [2023] 12 SCR 714 : 2023 SCC Online SC 1244

10 "22. Protection against arrest and detention in certain cases.—(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice."

> to believe that the arrested person is not guilty of the offence and, secondly, that he is not likely to commit any offence while on bail. To meet this requirement, it would be essential for the arrested person to be aware of the grounds on which the authorized officer arrested him/her under Section 19 and the basis for the officer's 'reason to believe' that he/she is guilty of an offence punishable under the Act of 2002. It is only if the arrested person has knowledge of these facts that he/she would be in a position to plead and prove before the Special Court that there are grounds to believe that he/she is not guilty of such offence, so as to avail the relief of bail. Therefore, communication of the grounds of arrest, as mandated by Article 22(1) of the Constitution and Section 19 of the Act of 2002, is meant to serve this higher purpose and must be given due importance."

In the Court's view, Section 19 includes inbuilt checks that designated officers must adhere to. First, the "reasons to believe" of the alleged involvement of the arrestee have to be recorded in writing. Secondly, while affecting the arrest, the reasons shall be furnished to the arrestee. Lastly, a copy of the order of arrest along with the material in possession have to be forwarded to the safe custody of the adjudicating authority. This ensures fairness, objectivity and accountability of the designated officer while forming their opinion, regarding the involvement of the arrestee in the offence of money laundering.

11. Arrest under Section 19(1) of the PML Act may occur prior to the filing of the prosecution complaint and before the Special Judge takes cognizance.[11] Till the prosecution complaint is filed, there is no requirement to provide the accused with a copy of the ECIR.[12] The ECIR is not a public document. Thus, to introduce checks and balances, Section 19(1) imposes safeguards to protect the rights and liberty of the arrestee. This is in compliance with the mandate of Article 22(1) of the Constitution of India.

---

11 See *Tarsem Lal* v. *Directorate of Enforcement, Jalandhar Zonal Office* (2024) SCC Online SC 971.

12 It appears that in several cases multiple complaints in same ECIR are filed. Whether a copy of the ECIR must be supplied to an accused has been examined in *Vijay Madanlal Choudhary* (supra) which has been referred to subsequently.

12. ***V. Senthil Balaji*** v. ***State and others***[13] similarly states that the designated officer can only arrest once they record "reasons to believe" in writing, that the person being arrested is guilty of the offence punishable under the PML Act. It is mandatory to record the "reasons to believe" to arrive at the opinion that the arrestee is guilty of the offence, and to furnish the reasons to the arrestee. This ensures an element of fairness and accountability.

13. The decision in ***V. Senthil Balaji*** (supra) has also examined the interplay between Section 19 of the PML Act and Section 167 of the Code. The magistrate is expected to do a balancing act as the investigation is to be concluded within 24 hours as a matter of rule. Therefore, the investigating agency has to satisfy the magistrate with adequate material on the need for custody of the arrestee. Magistrates must bear this crucial aspect in mind while examining and passing an order on the DoE's prayer for custodial remand. More significantly, the magistrate is under the bounden duty to ensure due compliance with Section 19(1) of the PML Act. Any failure to comply would entitle the arrestee to be released. Section 167 of the Code, therefore, enjoins upon the magistrate the necessity to satisfy due compliance of the law by perusing the order passed by the authority under Section 19(1) of the PML Act. Upon such satisfaction, the magistrate may consider the request for custodial remand.

14. ***Pankaj Bansal*** (supra) reiterates ***V. Senthil Balaji*** (supra) to hold that the magistrate/court has the duty to ensure that the conditions in Section 19(1) of the PML Act are duly satisfied and that the arrest is valid and lawful. This is in lieu of the mandate under Section 167 of the Code. If the court fails to discharge its duty in right earnest and with proper perspective, the remand order would fail on the ground that the court cannot validate an unlawful arrest made under Section 19(1). The Court relied on ***In the matter of Madhu Limaye and others***,[14] which held that it is necessary for the State to establish that, at the stage of remand, while directing detention in custody, the magistrate has applied their mind to all relevant matters. If the arrest itself is unconstitutional *viz.* Article 22(1) of the Constitution, the remand would not cure the constitutional infirmities attached

13 [2023] 12 SCR 853 : (2024) 3 SCC 51

14 [1969] 3 SCR 154 : (1969) 1 SCC 292

to such arrest. The principle stands expanded, as the violation of Section 19(1) of the PML Act will equally vitiate the arrest.

15. In ***Pankaj Bansal*** (supra), one of the contentions raised by the DoE was that the legality of arrest is rendered immaterial once the competent court passes an order of remand. Reliance was placed on certain judgments. However, these judgments were distinguished on the ground that they primarily addressed writs of *habeas corpus* following remand orders by the jurisdictional court. Therefore, the ratios therein are not applicable to this scenario. In the context of statutory compliance, the Court observed in clear terms that if the arrest is not in conformity with Section 19(1) of the PML Act, the mere passing of an order of remand, in itself, would not be sufficient to validate the person's arrest. Thus, notwithstanding the order of remand, the issue whether the arrest of the person is lawful at its inception, is open for consideration and must be answered.

16. Recently, in ***Prabir Purkayastha*** v. ***State (NCT of Delhi)***,[15] this Court reiterated the aforesaid principles expounded in ***Pankaj Bansal*** (supra). The said principles were applied to the *pari materia* provisions[16] of the Unlawful Activities (Prevention) Act, 1967. The Court explained that Section 19(1) of the PML Act is meant to serve a higher purpose, and also to enforce the mandate of Article 22(1) of the Constitution. The right to life and personal liberty is sacrosanct, a fundamental right guaranteed under Article 21 and protected by Articles 20 and 22 of the Constitution. Reference was made to the observations of this Court in ***Roy V.D.*** v. ***State of Kerala***[17] that the right to be informed about the grounds of arrest flows from Article 22(1) of the Constitution and any infringement of this fundamental right vitiates the process of arrest and remand. The fact that the chargesheet has been filed in the matter would not validate the otherwise illegality and unconstitutionality committed at the time of arrest and grant of remand custody of the accused. Reference is also made to the principle behind Article 22(5) of the Constitution. Thus, this Court held that not complying with the constitutional mandate under Article 22(1) and the statutory mandate of the UAPA, on the requirement to

15 2024 SCC OnLine SC 934

16 Sections 43A, 43B and 43C of the UAPA.

17 [2000] Supp. 4 SCR 539 : (2000) 8 SCC 590

communicate grounds of arrest or grounds of detention, would lead to the custody or detention being rendered illegal.

17. In ***Vijay Madanlal Choudhary and others*** v. ***Union of India and others***,[18] a three Judge Bench of this Court distinguished between the stringent requirements stipulated in Section 19(1) of the PML Act, and the power of arrest given to the police in cognisable offences under Section 41 of the Code.[19] Reference was made to Section 104 of the Customs Act, 1962,[20] which was elucidated and considered

18 [2022] 6 SCR 382 : (2022) SCC Online SC 929

19 "41. When police may arrest without warrant. — (1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person—
(*a*) who commits, in the presence of a police officer, a cognizable offence;
(*b*) against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years whether with or without fine, if the following conditions are satisfied, namely:—
(*i*) the police officer has reason to believe on the basis of such complaint, information, or suspicion that such person has committed the said offence;
(*ii*) the police office is satisfied that such arrest is necessary—
(*a*) to prevent such person from committing any further offence; or
(*b*) for proper investigation of the offence; or
(*c*) to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner; or
(*d*) to prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police officer; or
(*e*) as unless such person is arrested, his presence in the Court whenever required cannot be ensured, and the police officer shall record while making such arrest, his reasons in writing.
Provided that a police officer shall, in all cases where the arrest of a person is not required under the provisions of this sub-section, record the reasons in writing for not making the arrest.
(*ba*) against whom credible information has been received that he has committed a cognizable offence punishable with imprisonment for a term which may extend to more than seven years whether with or without fine or with death sentence and the police officer has reason to believe on the basis of that information that such person has committed the said offence;
(*c*) who has been proclaimed as an offender either under this Code or by order of the State Government; or
(*d*) in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing; or
(*e*) who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody; or
(*f*) who is reasonably suspected of being a deserter from any of the Armed Forces of the Union; or
(*g*) who has been concerned in, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been concerned in, any act committed at any place out of India which, if committed in India, would have been punishable as an offence, and for which he is, under any law relating to extradition, or otherwise, liable to be apprehended or detained in custody in India; or
(*h*) who, being a released convict, commits a breach of any rule made under sub-section (5) of Section 356; or
(*i*) for whose arrest any requisition, whether written or oral, has been received from another police officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition."

20 For short, "Customs Act".

by the Constitution Bench of this Court in ***Ramesh Chandra Mehta*** v. ***State of West Bengal***,[21] and in ***Union of India*** v. ***Padam Narain Aggarwal and others***.[22] On the safeguards against the abuse of the power of arrest in case of the Customs Act, ***Padam Narain Aggarwal*** (supra) observes that the power to arrest by a customs os anfficer is statutory in character. Such power can be exercised only in cases where the customs officer has the "reason to believe" that the person sought to be arrested is guilty of the offence punishable under the prescribed sections. ***Padam Narain Aggarwal*** (supra) observes:

> "36. From the above discussion, it is amply clear that power to arrest a person by a Customs Officer is statutory in character and cannot be interfered with. Such power of arrest can be exercised only in those cases where the Customs Officer has "reason to believe" that a person has been guilty of an offence punishable under Sections 132, 133, 135, 135-A or 136 of the Act. Thus, the power must be exercised on *objective facts* of *commission of an offence* enumerated and the Customs Officer has *reason to believe* that a person sought to be arrested has been guilty of commission of such offence. The power to arrest thus is circumscribed by objective considerations and cannot be exercised on whims, caprice or fancy of the officer.
>
> 37. The section also obliges the Customs Officer to inform the person arrested of the grounds of arrest *as soon as may be*. The law requires such person to be produced before a Magistrate *without unnecessary delay*.
>
> 38. The law thus, on the one hand, allows a Customs Officer to exercise power to arrest a person who has committed certain offences, and on the other hand, takes due care to ensure individual freedom and liberty by laying down norms and providing safeguards so that the power of arrest is not abused or misused by the authorities. It is keeping in view these considerations that we have to decide correctness or otherwise of the directions issued by a Single Judge of the High Court. "Blanket" order of

21 [1969] 2 SCR 461

22 [2008] 14 SCR 179 : (2008) 13 SCC 305

bail may amount to or result in an invitation to commit an offence or a passport to carry on criminal activities or to afford a shield against any and all types of illegal operations, which, in our judgment, can never be allowed in a society governed by the rule of law."

18. ***Vijay Madanlal Choudhary*** (supra) affirms the aforesaid ratio, and states that the safeguards provided as preconditions in Section 19(1) of the PML Act have to be fulfilled by the designated officer before affecting arrest. The safeguards are of a higher standard. They ensure that the designated officer does not act arbitrarily, and is made accountable for their judgment about the 'necessity to arrest' the person[23] alleged to be involved in the offence of money laundering, at the stage before the complaint is filed. Paragraph 89 reads as under:

> "89…The safeguards provided in the 2002 Act and the preconditions to be fulfilled by the authorised officer before effecting arrest, as contained in section 19 of the 2002 Act, are equally stringent and of higher standard. Those safeguards ensure that the authorised officers do not act arbitrarily, but make them accountable for their judgment about the necessity to arrest any person as being involved in the commission of offence of money-laundering even before filing of the complaint before the Special Court under section 44(1)(b) of the 2002 Act in that regard. If the action of the authorised officer is found to be vexatious, he can be proceeded with and inflicted with punishment specified under section 62 of the 2002 Act. The safeguards to be adhered to by the jurisdictional police officer before effecting arrest as stipulated in the 1973 Code, are certainly not comparable. Suffice it to observe that this power has been given to the high-ranking officials with further conditions to ensure that there is objectivity and their own accountability in resorting to arrest of a person even before a formal complaint is filed under section 44(1)(b) of the 2002 Act. Investing of power in the high-ranking officials in this regard has stood

23 The aspect of necessity to arrest, has been independently examined later.

> the test of reasonableness in Premium Granites (supra), wherein the court restated the position that requirement of giving reasons for exercise of power by itself excludes chances of arbitrariness. Further, in Sukhwinder Pal Bipan Kumar (supra), the court restated the position that where the discretion to apply the provisions of a particular statute is left with the Government or one of the highest officers, it will be presumed that the discretion vested in such highest authority will not be abused. Additionally, the Central Government has framed Rules under section 73 in 2005, regarding the forms and the manner of forwarding a copy of order of arrest of a person along with the material to the Adjudicating Authority and the period of its retention. In yet another decision in Ahmed Noormohmed Bhatti (supra), this court opined that the provision cannot be held to be unreasonable or arbitrary and, therefore, unconstitutional merely because the authority vested with the power may abuse his authority. (Also see Manzoor Ali Khan (supra)."

We respectfully agree with the ratio of the decisions in ***Pankaj Bansal*** (supra) and ***Prabir Purkayastha*** (supra), which enrich and strengthen the view taken in ***Vijay Madanlal Choudhary*** (supra), on the interpretation of Section 19 of the PML Act. Power to arrest a person without a warrant from the court and without instituting a criminal case is a drastic and extreme power. Therefore, the legislature has prescribed safeguards in the form of exacting conditions as to how and when the power is exercisable. The conditions are salutary and serve as a check against the exercise of an otherwise harsh and pernicious power.

19. Given that the legislature has prescribed preconditions to prevent abuse and unauthorised use of statutory power, the wielding of such power by an authorized person or authority cannot be conclusive. The exercise of the power and satisfaction of the conditions must and should be put to judicial scrutiny and examination, if the arrestee specifically challenges their arrest. If we do not hold so, then the restraint prescribed by the legislature would, in fact and in practice, be reduced to a mere formal exercise. Given the conditions imposed, the nature of the power and the effect on the rights of the individuals, it is nobody's case, and not even argued by the DoE, that the

authorised officer is entitled to arrest a person without following the statutory requirements.

20. However, it has been argued by the DoE that the power to arrest is neither an administrative nor a quasi-judicial power as the arrest is made during investigation. Judicial scrutiny is not permissible as it will interfere with investigation, or at best should be limited to subversive abuse of law. Discretion and right to arrest vests with the competent officer, whose subjective opinion should prevail.

21. We do not agree and must reject this argument. We hold that the power of judicial review shall prevail, and the court/magistrate is required to examine that the exercise of the power to arrest meets the statutory conditions. The legislature, while imposing strict conditions as preconditions to arrest, was aware that the arrest may be before or prior to initiation of the criminal proceedings/prosecution complaint. The legislature, neither explicitly nor impliedly, excludes the court surveillance and examination of the preconditions of Section 19(1) of the PML Act being satisfied in a particular case. This flows from the mandate of Section 19(3) which requires that the arrestee must be produced within 24 hours and taken to the Special Court, or court of judicial/metropolitan magistrate having jurisdiction. The exercise of the power to arrest is not exempt from the scrutiny of courts. The power of judicial review remains both before and after the filing of criminal proceedings/prosecution complaint. It cannot be said that the courts would exceed their power, when they examine the validity of arrest under Section 19(1) of the PML Act, once the accused is produced in court in terms of Section 19(3) of the PML Act.

22. Before we examine the scope and width of the jurisdiction of the court when it examines validity of arrest under Section 19(1) of the PML Act, we must take on record and deal with the argument of the DoE relying on the paragraphs 176 to 179 in ***Vijay Madanlal Choudhary*** (supra) under the heading 'ECIR vis-a-vis FIR'. The submission is that there is difference between the "reasons to believe", and the "grounds of arrest", the latter is mandated to be furnished to the arrestee, but the former is an internal and confidential document, the furnishing of which may be detrimental to investigation. Therefore, it is urged that "reasons to believe" need not be supplied to the arrestee. Paragraphs 178 and 179 of ***Vijay Madanlal Choudhary*** (supra) read:

"178. The next issue is: whether it is necessary to furnish copy of ECIR to the person concerned apprehending arrest or at least after his arrest? section 19(1) of the 2002 Act postulates that after arrest, as soon as may be, the person should be informed about the grounds for such arrest. This stipulation is compliant with the mandate of article 22(1) of the Constitution. Being a special legislation and considering the complexity of the inquiry/ investigation both for the purposes of initiating civil action as well as prosecution, non-supply of ECIR in a given case cannot be faulted. The ECIR may contain details of the material in possession of the Authority and recording satisfaction of reason to believe that the person is guilty of money-laundering offence, if revealed before the inquiry/ investigation required to proceed against the property being proceeds of crime including to the person involved in the process or activity connected therewith, may have deleterious impact on the final outcome of the inquiry/investigation. So long as the person has been informed about grounds of his arrest that is sufficient compliance of mandate of article 22(1) of the Constitution. Moreover, the arrested person before being produced before the Special Court within twenty-four hours or for that purposes of remand on each occasion, the court is free to look into the relevant records made available by the Authority about the involvement of the arrested person in the offence of money-laundering. In any case, upon filing of the complaint before the statutory period provided in 1973 Code, after arrest, the person would get all relevant materials forming part of the complaint filed by the Authority under section 44(1)(b) of the 2002 Act before the Special Court.

179. Viewed thus, supply of ECIR in every case to person concerned is not mandatory. From the submissions made across the Bar, it is noticed that in some cases ED has furnished copy of ECIR to the person before filing of the complaint. That does not mean that in every case same procedure must be followed. It is enough, if ED at the time of arrest, contemporaneously discloses the grounds of such arrest to such person. Suffice it to observe that

ECIR cannot be equated with an FIR which is mandatorily required to be recorded and supplied to the accused as per the provisions of 1973 Code. Revealing a copy of an ECIR, if made mandatory, may defeat the purpose sought to be achieved by the 2002 Act including frustrating the attachment of property (proceeds of crime). Non-supply of ECIR, which is essentially an internal document of ED, cannot be cited as violation of constitutional right. Concededly, the person arrested, in terms of section 19 of the 2002 Act, is contemporaneously made aware about the grounds of his arrest. This is compliant with the mandate of article 22(1) of the Constitution. It is not unknown that at times FIR does not reveal all aspects of the offence in question. In several cases, even the names of persons actually involved in the commission of offence are not mentioned in the FIR and described as unknown accused. Even, the particulars as unfolded are not fully recorded in the FIR. Despite that, the accused named in any ordinary offence is able to apply for anticipatory bail or regular bail, in which proceeding, the police papers are normally perused by the concerned court. On the same analogy, the argument of prejudice pressed into service by the petitioners for non-supply of ECIR deserves to be answered against the petitioners. For, the arrested person for offence of money-laundering is contemporaneously informed about the grounds of his arrest and when produced before the Special Court, it is open to the Special Court to call upon the representative of ED to produce relevant record concerning the case of the accused before him and look into the same for answering the need for his continued detention. Taking any view of the matter, therefore, the argument under consideration does not take the matter any further."

23. The paragraphs in ***Vijay Madanlal Choudhary*** (supra), while recording that there is a difference between ECIR and FIR, hold that the ECIR need not to be furnished to the accused, unlike an FIR recorded under Section 154 of the Code. The PML Act, a special legislation for the offence of money laundering, creates a unique mechanism for inquiry/investigation into the offence. An analogy

cannot be drawn with the provisions of the Code. ECIR is an internal document for initiating penal action or prosecution. Having held so in paragraphs 178 and 179, it is observed that Section 19(1) of the PML Act postulates that after arrest, as soon as may be, the arrestee should be contemporaneously informed of the grounds of arrest to ensure compliance with Article 22(1) of the Constitution. Non-supply of ECIR is not to be faulted. ECIR may contain details of material in possession of the authority, which if revealed before the inquiry/ investigation, may have a deleterious impact on the final outcome of the inquiry/investigation. The judgment states that the accused, upon filing of the prosecution complaint, will get all relevant materials forming part of the complaint. For the same reason, it is argued by the DoE that the accused is entitled to the "grounds of arrest" and not the "reasons to believe". Grounds of arrest may only summarily refer to the reasons given for arrest.

24. In the present case, we are examining Section 19(1) of the PML Act and the rights of the accused. We are not concerned with the ECIR. The relevant question arising is – whether the arrestee is entitled to be supplied with a copy of the "reasons to believe"? Paragraph 89 in ***Vijay Madanlal Choudhary*** (supra) refers to the importance of recording the "reasons to believe" in writing, and states this is mandatory. Further, both ***Pankaj Bansal*** (supra) and ***Prabir Purkayastha*** (supra) hold that the failure to record "reasons to believe" in writing will result in the arrest being rendered illegal and invalid. Paragraph 131 of ***Vijay Madanlal Choudhary*** (supra), which has been quoted subsequently, states that Section 19(1) requires in-depth scrutiny by the designated officer. A higher threshold is required for making an arrest, necessitating a review of the material available to demonstrate the person's guilt. Production of the "reasons to believe" before the Special Court/magistrate, cannot be construed and is not the same as furnishing or providing the "reasons to believe" to the arrestee who has a right to challenge his arrest in violation of Section 19(1) of the PML Act.[24]

25. On the aspect of the checks on the power to arrest under the PML Act, we would like to quote from the submission made on behalf

24 The arrestee may also challenge his arrest under Section 19(1) of the PML Act on the basis of the "grounds of arrest."

of the DoE, as recorded in ***Vijay Madanlal Choudhary*** (supra). Specific reliance was placed on a Canadian judgment in the case of ***Gifford*** v. ***Kelson***.[25] The relevant paragraphs in ***Vijay Madanlal Choudhary*** (supra) read:

> "16(liii). …Secondly, there must be material in possession with the Authority before the power of arrest can be exercised as opposed to the Cr. P. C. which gives the power of arrest to any police officer and the officer can arrest any person merely on the basis of a complaint, credible information or reasonable suspicion against such person. Thirdly, there should be reason to believe that the person being arrested is guilty of the offence punishable under the PMLA in contrast to the provision in Cr. P. C., which mainly requires reasonable apprehension/suspicion of commission of offence. Also, such "reasons to believe" must be reduced in writing. Fifthly, as per the constitutional mandate of article 22(1), the person arrested is required to be informed of the grounds of his arrest. It is submitted that the argument of the other side that the accused or arrested persons are not even informed of the case against them, is contrary to the plain language of the Act, as the Act itself mandates that the person arrested is to be informed of the ground of his arrest…
>
> xx xx xx
>
> 16(lix). Reliance is then placed on the decision of this court in Union of India v. Padam Narain Aggarwal, wherein the court examined the power to arrest under section 104 of the 1962 Act. Relying on the decision, it was stated that the power to arrest is statutory in character and cannot be interfered with and can only be exercised on objective considerations free from whims, caprice or fancy of the officer. The law takes due care to ensure individual freedom and liberty by laying down norms and providing safeguards so that the authorities may not misuse such power. It is submitted that the requirement of "reason to believe" and "recording of such reasons in writing" prevent arbitrariness and makes

25 (1943) 51 Man. R 120

> the provision compliant with article 14. This is reinforced from the fact that only 313 arrests have been made under the PMLA in 17 years of operations of the PMLA.
>
> 16(lx). Canadian judgment in Gifford v. Kelson was also relied on to state that "reason to believe" conveys conviction of the mind founded on evidence regarding the existence of a fact or the doing of an act, therefore, is of a higher standard than mere suspicion. Reliance has been further placed on Premium Granites v. State of T. N. to urge that the requirement of giving reasons for exercise of the power by itself excludes chances of arbitrariness…"

26. We will reproduce what has been held in ***Gifford*** (supra):

> "A suspicion or belief may be entertained, but suspicion and belief cannot exist together. Suspicion is much less than belief; belief includes or absorbs suspicion.
>
> xx xx xx
>
> When, we speak of "reason to believe" we mean a conclusion arrived at as to the existence of a fact. Of course "reason to believe" does not amount to positive knowledge nor does it mean absolute certainty but it does convey conviction of the mind founded on evidence regarding the existence of a fact or the doing of an act. Suspicion, on the other hand, rings uncertainty. It lives in imagination. It is inkling. It is mistrust. It is chalk. 'Reason to believe' is not. It is cheese."

27. ***Gifford*** (supra) accurately explains the difference between the "reasons to believe" and "suspicion". "Suspicion" requires lower degree of satisfaction, and does not amount to belief. Belief is beyond speculation or doubt, and the threshold of belief "conveys conviction founded on evidence regarding existence of a fact or doing of an act". Given that the power of arrest is drastic and violates Article 21 of the Constitution, we must give meaningful, true and full play to the legislative intent.[26]

---

26 We would subsequently examine the expressions "reason to believe ", "guilty of an offence punishable under this Act" and "material" in some detail.

28. Providing the written "grounds of arrest", though a must, does not in itself satisfy the compliance requirement. The authorized officer's genuine belief and reasoning based on the evidence that establishes the arrestee's guilt is also the legal necessity. As the "reasons to believe" are accorded by the authorised officer, the onus to establish satisfaction of the said condition will be on the DoE and not on the arrestee.

29. On the necessity to satisfy the preconditions mentioned in Section 19(1) of the PML Act, we have quoted from the judgment of this Court in ***Padam Narain Aggarwal*** (supra) and also referred to and quoted from the Canadian judgment in ***Gifford*** (supra). Existence and validity of the "reasons to believe" goes to the root of the power to arrest. The subjective opinion of the arresting officer must be founded and based upon fair and objective consideration of the material, as available with them on the date of arrest. On the reading of the "reasons to believe" the court must form the 'secondary opinion' on the validity of the exercise undertaken for compliance of Section 19(1) of the PML Act when the arrest was made. The "reasons to believe" that the person is guilty of an offence under the PML Act should be founded on the material in the form of documents and oral statements.

30. Referring to the legal position, this Court in ***Dr. Partap Singh and Another*** v. ***Director of Enforcement, Foreign Exchange Regulation Act and others***[27] has observed:

> "9. When an officer of the Enforcement Department proposes to act under Section 37 undoubtedly, he must have reason to believe that the documents useful for investigation or proceeding under the Act are secreted. The material on which the belief is grounded may be secret, may be obtained through Intelligence or occasionally may be conveyed orally by informants. It is not obligatory upon the officer to disclose his material on the mere allegation that there was no material before him on which his reason to believe can be grounded. The expression "reason to believe" is to be found in various statutes. We may take note of one such. Section 34 of Income Tax Act, 1922 *inter alia*

27 [1985] 3 SCR 969 : (1985) 3 SCC 72

provides that the Income Tax Officer must have "reason to believe" that the incomes, profits or gains chargeable to income tax have been underassessed, then alone he can take action under Section 34. In *S. Narayanappa* v. *CIT* the assessee challenged the action taken under Section 34 and amongst others it was contended on his behalf that the reasons which induced the Income Tax Officer to initiate proceedings under Section 34 were justiciable, and therefore, these reasons should have been communicated by the Income Tax Officer to the assessee before the assessment can be reopened. It was also submitted that the reasons must be sufficient for a prudent man to come to the conclusion that the income escaped assessment and that the Court can examine the sufficiency or adequacy of the reasons on which the Income Tax Officer has acted. Negativing all the limbs of the contention, this Court held that

> "if there are in fact some reasonable grounds for the Income Tax Officer to believe that there had been any non-disclosure as regards any fact, which could have a material bearing on the question of under-assessment, that would be sufficient to give jurisdiction to the Income Tax Officer to issue notice under Section 34."

The Court in terms held that whether these grounds are adequate or not is not a matter for the court to investigate.

10. The expression "reason to believe" is not synonymous with subjective satisfaction of the Officer. The belief must be held in good faith; it cannot merely be a pretence. In the same case, it was held that it is open to the court to examine the question whether the reasons for the belief have a rational connection or a relevant bearing to the formation of the belief and are not extraneous or irrelevant to the purpose of the section. To this limited extent the action of the Income Tax Officer in starting proceedings under Section 34 is open to challenge in a court of law. (See *Calcutta Discount Co. Ltd.* v. *ITO).* In *R.S. Seth Gopikrishan Agarwal* v. *R.N. Sen*, *Assistant Collector of*

> *Customs* this Court repelled the challenge to the validity of the search of the premises of the appellant and the seizure of the documents found therein. The search was carried out under the authority of an authorisation issued under Rule 126(L)(2) of the Defence of India (Amendment) Rules, 1963 (Gold Control Rules) for search of the premises of the appellant. The validity of the authorisation was challenged on the ground of mala fides as also on the ground that the authorisation did not expressly employ the phrase 'reason to believe' occurring in Section 105 of the Customs Act. Negativing both the contentions, Subba Rao, C.J. speaking for the Court observed that the subject underlying Section 105 of the Customs Act which confers power for issuing authorisation for search of the premises and seizure of incriminating articles was to search for goods liable to be confiscated or documents secreted in any place, which are relevant to any proceeding under the Act. The legislative policy reflected in the section is that the search must be in regard to the two categories mentioned in the section. The Court further observed that though under the section, the officer concerned need not give reasons if the existence of belief is questioned in any collateral proceedings he has to produce relevant evidence to sustain his belief. A shield against the abuse of power was found in the provision that the officer authorised to search has to send forthwith to the Collector of Customs a copy of any record made by him. Sub-section (2) of Section 37 of the Act takes care for this position inasmuch as that where an officer below the rank of the Director of Enforcement carried out the search, he must send a report to the Director of Enforcement. The last part of the submission does not commend to us because the file was produced before us and as stated earlier, the Officer issuing the search warrant had material which he rightly claimed to be adequate for forming the reasonable belief to issue the search warrant."

This decision relates to the power of authorised officers to conduct search and seizure operations under Section 37 of the Foreign Exchange Regulation Act, 1973. The aforesaid observations would

be equally relevant, though in the context of the power to arrest, a power which is more drastic and intrusive. Thus, the nature of inquiry to be undertaken by the courts has to be in-depth and detailed.

31. In ***Barium Chemicals Ltd. and another*** v. ***Company Law Board and others***,[28] the Constitution Bench of this Court had referred to and quoted from the decision of the Privy Council in ***Nakkuda Ali*** v. ***Jayaratne***,[29] wherein Lord Radcliffe had observed:

> "After all words such as these are commonly found when a legislature or law making authority confers powers on a minister or official. However read, they must be intended to serve in some sense as a condition limiting the exercise of an otherwise arbitrary power. But if the question whether the condition has been satisfied is to be conclusively decided by the man who wields the power the value of the intended restraint is in effect nothing. No doubt he must not exercise the power in bad faith; but the field in which this kind of question arises is such that the reservation for the case of bad faith is hardly more than a formality."

While agreeing with the first part of the aforesaid quotation, the Constitution Bench went on to refer to ***Joseph Kuruvilla Vellukunnel*** v. ***Reserve Bank of India and others***,[30] wherein Hidayatullah, J., speaking for the majority, had observed:

> "It is enough to say that the Reserve Bank in its dealings with banking companies does not act on suspicion but on proved facts."

Thereafter, it was further observed:

> "But this seems certain that the action (winding up) would not be taken up without scrutinising all the evidence and checking and re-checking all the findings."

32. Accordingly, in ***Barium Chemicals Ltd.*** (supra), it was held that the expression "reason to believe" is not a subjective process altogether, not lending itself even to a limited scrutiny of the court that such "reason to believe" or opinion is not formed on relevant facts or within the limits.

---

28 [1966] Supp. 1 SCR 311 : AIR 1967 SC 295

29 1951 A C 66

30 [1962] Supp. 3 SCR 632 : AIR 1962 SC 1371

33. Section 26 of the IPC, defines the expression "reason to believe" as sufficient cause to believe a thing and not otherwise. ***Joti Parshad*** v. ***State of Haryana***,[31] referring to Section 26 of the IPC, has observed:

> "5… "Reason to believe" is not the same thing as "suspicion" or "doubt" and mere seeing also cannot be equated to believing. "Reason to believe" is a higher level of state of mind. Likewise "knowledge" will be slightly on a higher plane than "reason to believe". A person can be supposed to know where there is a direct appeal to his senses and a person is presumed to have a reason to believe if he has sufficient cause to believe the same. Section 26 IPC explains the meaning of the words "reason to believe" thus:
>
> > "26. '*Reason to believe*'.— A person is said to have 'reason to believe' a thing, if he has sufficient cause to believe that thing but not otherwise."
>
> In substance what it means is that a person must have reason to believe if the circumstances are such that a reasonable man would, by probable reasoning, conclude or infer regarding the nature of the thing concerned. Such circumstances need not necessarily be capable of absolute conviction or inference; but it is sufficient if the circumstances are such creating a cause to believe by chain of probable reasoning leading to the conclusion or inference about the nature of the thing…"

34. Use of the expression 'not otherwise', in Section 26 of the IPC, refers to contrary evidence or material which would not support the "reason to believe". The definition extends and puts a more stringent condition in the context of penal enactment as compared to the civil law. Clearly, "reason to believe" has to be distinguished and is not the same as grave suspicion. It refers to the reasons for the formation of the belief which must have a rational connection with or an element bearing on the formation of belief. The reason should not be extraneous or irrelevant for the purpose of the provision.

31 1993 Supp (2) SCC 497

35. As explained in ***A.S. Krishnan and others*** v. ***State of Kerala***,[32] Section 26 of the IPC in substance means that the person must have "reason to believe" if the circumstances are such that a reasonable man would, by probable reasoning, conclude or infer regarding the nature of things concerned. Such circumstances need not necessarily be capable of absolute conviction or inference; but it is sufficient if the circumstances are such that it creates a chain of probable reasoning leading to the conclusion or inference about the nature of the thing.[33]

36. Once we hold that the accused is entitled to challenge his arrest under Section 19(1) of the PML Act, the court to examine the validity of arrest must catechise both the existence and soundness of the "reasons to believe", based upon the material available with the authorised officer. It is difficult to accept that the "reasons to believe", as recorded in writing, are not to be furnished. As observed above, the requirements in Section 19(1) are the jurisdictional conditions to be satisfied for arrest, the validity of which can be challenged by the accused and examined by the court. Consequently, it would be incongruous, if not wrong, to hold that the accused can be denied and not furnished a copy of the "reasons to believe". In reality, this would effectively prevent the accused from challenging their arrest, questioning the "reasons to believe". We are concerned with violation of personal liberty, and the exercise of the power to arrest in accordance with law. Scrutiny of the action to arrest, whether in accordance with law, is amenable to judicial review. It follows that the "reasons to believe" should be furnished to the arrestee to enable him to exercise his right to challenge the validity of arrest.

37. We would accept that in a one-off case, it may not be feasible to reveal all material, including names of witnesses and details of documents, when the investigation is in progress. This will not be the position in most cases. DoE may claim redaction and exclusion of specific particulars and details. However, the onus to justify redaction would be on the DoE. The officers of the DoE are the authors of the "reasons to believe" and can use appropriate wordings, with details of the material, as are necessary in a particular case.

---

32 [2004] 3 SCR 44 : (2004) 11 SCC 576

33 Wednesbury unreasonableness strikes at irrationality when a decision is so outrageous in its defiance of logic or of accepted standards that no sensible person who had applied his mind to the question to be decided would have arrived at it. See *Council of Civil Services Union* v. *Minister of State for Civil Services*, (1984) 3 All. ER 935.

As there may only be a small number of cases where redaction is justified for good cause, this reason is not a good ground to deny the accused's access to a copy of the "reasons to believe" in most cases. Where the non-disclosure of the "reasons to believe" with redaction is justified and claimed, the court must be informed. The file, including the documents, must be produced before the court. Thereupon, the court should examine the request and if they find justification, a portion of the "reasons to believe" and the document may be withheld. This requires consideration and decision by the court. DoE is not the sole judge.

38. Section 173(6) of the Code, permits the police officer not to furnish statements or make disclosures to the accused when it is inexpedient in public interest. In such an event, the police officer is to indicate the specific part of the statement and append a note requesting the magistrate to exclude that part from the copy given to the accused. He has to state the reasons for making such request. The same principle will apply.

39. We now turn to the scope and ambit of judicial review to be exercised by the court. Judicial review does not amount to a mini-trial or a merit review. The exercise is confined to ascertain whether the "reasons to believe" are based upon material which 'establish' that the arrestee is guilty of an offence under the PML Act. The exercise is to ensure that the DoE has acted in accordance with the law. The courts scrutinize the validity of the arrest in exercise of power of judicial review. If adequate and due care is taken by the DoE to ensure that the "reasons to believe" justify the arrest in terms of Section 19(1) of the PML Act, the exercise of power of judicial review would not be a cause of concern. Doubts will only arise when the reasons recorded by the authority are not clear and lucid, and therefore a deeper and in-depth scrutiny is required. Arrest, after all, cannot be made arbitrarily and on the whims and fancies of the authorities. It is to be made on the basis of the valid "reasons to believe", meeting the parameters prescribed by the law. In fact, not to undertake judicial scrutiny when justified and necessary, would be an abdication and failure of constitutional and statutory duty placed on the court to ensure that the fundamental right to life and liberty is not violated.

40. At this stage, we must consider the arguments presented by the DoE, which rely on judgments regarding the scope of judicial interference in investigations, including the power of arrest. Reference in this

regard was made to ***The King Emperor*** v. ***Khawaja Nazir Ahmad***,[34] ***Dukhishyam Benupani, Asst. Director, Enforcement Directorate (FERA)*** v. ***Arun Kumar Bajoria***,[35] ***State of Bihar and another*** v. ***J.A.C. Saldanha and others***,[36] and ***M.C. Abraham and another*** v. ***State of Maharashtra and others***.[37] In our opinion, these decisions do not apply to the present controversy, as the power of arrest in this case is governed by Section 19(1) of the PML Act. These decisions restrict the courts from interfering with the statutory right of the police to investigate, provided that no legal provisions are violated. Investigation and crime detection vests in the authorities by statute, albeit, these powers differ from the Court's authority to adjudicate and determine whether an arrest complies with constitutional and statutory provisions. As indicated above, the power to arrest without a warrant for cognizable offences is exercised by the police officer in terms of Section 41 of the Code.[38] Arrest under Section 41 can be made on the grounds mentioned in clauses (a) to (i) of Section 41(1) of the Code, which include a reasonable complaint, credible information or reasonable suspicion that a person has committed an offence, or the arrest is necessary for proper investigation of the offence, etc. The grounds mentioned in Section 41 are different from the juridical preconditions for exercise of power of arrest under Section 19(1) of the PML Act. Section 19(1) conditions are more rigid and restrictive. As such, the two provisions cannot be equated. The legislature has deliberately avoided reference to the grounds mentioned in Section 41 and considered it appropriate to impose strict and stringent conditions that act as a safeguard. The same reasoning will apply to the contention raised by the DoE relying upon the provisions of Section 437 of the Code and the judgment of this Court in ***Gurcharan Singh and others*** v. ***State (Delhi Administration)***.[39] Section 437 of the Code applies when an accused suspected of committing a non-bailable offence is arrested or detained without warrant by a police officer in charge of a police station or is brought before a court, other than the High Court or the Court of Sessions. It is

34 AIR 1945 PC 18

35 [1997] Supp. 5 SCR 566 : (1998) 1 SCC 52

36 [1980] 2 SCR 16 : (1980) 1 SCC 554

37 [2002] Supp. 5 SCR 677 : (2003) 2 SCC 649

38 Refer footnote 18 above.

39 [1978] 2 SCR 358 : (1978) 1 SCC 118

observed that the accused would be released on bail, except for in cases specified in clauses (i) and (ii) of Section 437(1) of the Code. Section 437(1)(i) applies at the stage of initial investigation where a person has been arrested for an offence punishable with death or imprisonment for life. Section 437(1)(ii) imposes certain fetters on the power of granting bail in specified cases when the offence is cognizable and the accused has been previously convicted with death, imprisonment for life, or 7 years or more, or has previously been convicted on two or more occasions for non-bailable and cognizable offences. The power under Section 437(1) of the Code is exercised by the court, other than the High Court or the Sessions Court. In other cases, Section 437(3) of the Code will apply. ***Gurcharan Singh*** (supra) distinguishes between the language of two sub-sections of Section 437 – Section 437(1) and 437(7). It is observed that 437(7) does not apply at the investigation stage, but rather after the conclusion of trial and before the court delivers its judgment. Thus, the use of the expression 'not guilty' pertains to releasing the accused who is in custody, on a bond without surety, for appearance to hear the judgment delivered. Notably, Section 437(6) states that if the trial of a person accused of a non-bailable offence is not completed within sixty days from the first date fixed for taking evidence, the magistrate to their satisfaction shall release such person on bail, provided they have been in custody throughout this period. The magistrate may direct otherwise only for reasons recorded in writing. Section 439 of the Code, which relates to the power of the High Court or the Sessions Court to grant bail, remains free from the legislative constraints applicable in cases covered by Section 437(1) of the Code. However, Section 437(3) of the Code when applicable applies.

41. DoE has drawn our attention to the use of the expression 'material in possession' in Section 19(1) of the PML Act instead of 'evidence in possession'. Though etymologically correct, this argument overlooks the requirement that the designated officer should and must, based on the material, reach and form an opinion that the arrestee is guilty of the offence under the PML Act. Guilt can only be established on admissible evidence to be led before the court, and cannot be based on inadmissible evidence. While there is an element of hypothesis, as oral evidence has not been led and the documents are to be proven, the decision to arrest should be rational, fair and as per law. Power to arrest under Section 19(1) is not for the purpose of investigation.

Arrest can and should wait, and the power in terms of Section 19(1) of the PML Act can be exercised only when the material with the designated officer enables them to form an opinion, by recording reasons in writing that the arrestee is guilty.

42. DoE relies upon the language of Sections 227 and 228 of the Code, pertaining to discharge and framing of charge, respectively. Section 227 uses the words – 'sufficient grounds for proceeding against the accused'. Section 228 uses – 'grounds of presuming that the accused has committed an offence'. Thus, DoE contends that grave suspicion is sufficient to frame a charge and put the accused to trial. This contention should not be accepted, since we are not dealing with the trial, framing of charge or recording the evidence. The issue before us, which has to be examined and answered, is whether the arrest of the person during the course of investigation complies with the law. The language of Section 19(1) is clear, and should not be disregarded to defeat the legislative intent – to provide stringent safeguards against pre-trial arrest during pending investigations. Framing of the charge and putting the accused on trial cannot be equated with the power to arrest. A person may face the charge and trial even when he is on bail. Notably, Section 439 of the Code does not impose statutory restrictions, except under Section 437(3) when applicable, on the court's power to grant bail. However, Section 45 of the PML Act prescribes specific fetters in addition to the stipulations under the Code.

43. At this stage, it is important to distinguish between Section 19(1) and Section 45 of the PML Act. We have already quoted Section 19, but would like to quote Section 45 which reads as under:

> "**45. Offences to be cognizable and non-bailable**.—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no person accused of an offence under this Act shall be released on bail or on his own bond unless—
>
> (*i*) the Public Prosecutor has been given an opportunity to oppose the application for such release; and
>
> (*ii*) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail:

Provided that a person, who, is under the age of sixteen years, or is a woman or is sick or infirm or is accused either on his own or along with other co-accused of money-laundering a sum of less than one crore rupees, may be released on bail, if the Special Court so directs:

Provided further that the Special Court shall not take cognizance of any offence punishable under Section 4 except upon a complaint in writing made by—

(*i*) the Director; or

(*ii*) any officer of the Central Government or a State Government authorised in writing in this behalf by the Central Government by a general or special order made in this behalf by that Government.

(1-A) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), or any other provision of this Act, no police officer shall investigate into an offence under this Act unless specifically authorised, by the Central Government by a general or special order, and, subject to such conditions as may be prescribed.

(2) The limitation on granting of bail specified in sub-section (1) is in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail.

Explanation.—For the removal of doubts, it is clarified that the expression "Offences to be cognizable and non-bailable" shall mean and shall be deemed to have always meant that all offences under this Act shall be cognizable offences and non-bailable offences notwithstanding anything to the contrary contained in the Code of Criminal Procedure, 1973 (2 of 1974), and accordingly the officers authorised under this Act are empowered to arrest an accused without warrant, subject to the fulfilment of conditions under section 19 and subject to the conditions enshrined under this section."

44. In our opinion, the key distinction between Section 19(1) and Section 45 is the authority undertaking the exercise, in each case.

Under Section 19(1), it is the designated/authorised officer who records in writing, their "reasons to believe" that the arrestee is 'guilty' of an offence under the PML Act. Thus, the arrest is based on the opinion of such officer, which opinion is open to judicial review, however not merits review, in terms of the well-settled principles of law. Contrastingly, under Section 45, it is the Special Court which undertakes the exercise. The Special Court independently examines pleas and contentions of both the accused and the DoE, and arrives at an objective opinion. The Special Court is not bound by the opinion of the designated/authorised officer recorded in the "reasons to believe". A court's opinion is different and cannot be equated to an officer's opinion. While the Special Court's opinion is determinative, and is only subject to appeal before the higher courts, the DoE's opinion is not in the same category as it is open to judicial review.

45. In ***Vijay Madanlal Choudhary*** (supra), the three Judge Bench has in paragraph 131 referred to the decision in ***Ranjitsing Brahmajeetsing Sharma*** v. ***State of Maharashtra and another***,[40] a case of Maharashtra Control of Organised Crime Act, 1999,[41] which observes as under:

> "44. The wording of Section 21(4), in our opinion, does not lead to the conclusion that the court must arrive at a positive finding that the applicant for bail has not committed an offence under the Act. If such a construction is placed, the court intending to grant bail must arrive at a finding that the applicant has not committed such an offence. In such an event, it will be impossible for the prosecution to obtain a judgment of conviction of the applicant. Such cannot be the intention of the legislature. Section 21(4) of MCOCA, therefore, must be construed reasonably. It must be so construed that the court is able to maintain a delicate balance between a judgment of acquittal and conviction and an order granting bail much before commencement of trial. Similarly, the Court will be required to record a finding as to the possibility of his committing a crime after grant of bail. However, such an offence in futuro must be

40 [2005] 3 SCR 345 : (2005) 5 SCC 294

41 For short, "MCOCA".

> an offence under the Act and not any other offence. Since it is difficult to predict the future conduct of an accused, the court must necessarily consider this aspect of the matter having regard to the antecedents of the accused, his propensities and the nature and manner in which he is alleged to have committed the offence.
>
> 45. It is, furthermore, trite that for the purpose of considering an application for grant of bail, although detailed reasons are not necessary to be assigned, the order granting bail must demonstrate application of mind at least in serious cases as to why the applicant has been granted or denied the privilege of bail.
>
> 46. The duty of the court at this stage is not to weigh the evidence meticulously but to arrive at a finding on the basis of broad probabilities. However, while dealing with a special statute like MCOCA having regard to the provisions contained in sub-section (4) of Section 21 of the Act, the court may have to probe into the matter deeper so as to enable it to arrive at a finding that the materials collected against the accused during the investigation may not justify a judgment of conviction. The findings recorded by the court while granting or refusing bail undoubtedly would be tentative in nature, which may not have any bearing on the merit of the case and the trial court would, thus, be free to decide the case on the basis of evidence adduced at the trial, without in any manner being prejudiced thereby"

This Court in ***Vijay Madanlal Choudhary*** (supra) had agreed with the aforesaid observations.

46. Two more legal aspects need to be addressed. Section 45 of the PML Act does not stipulate the stage when the accused may move an application for bail. A bail application can be submitted at any stage, either before or after the complaint is filed. Whether the charge is framed or evidence is recorded or not recorded, is immaterial. Clearly, the fact that the prosecution complaint has not been filed, the charge has not been framed, or evidence is either not recorded or partly recorded, will not prevent the court from examining the application for bail within the parameters of Section 45 of the PML Act. As the

issue would relate to grant or denial of bail, the parameters or the stipulation in ***State of Orissa*** v. ***Debendra Nath Padhi***,[42] which states that evidence or material not relied by the prosecution cannot be examined at the stage of charge, will not apply. The reason is simple and straightforward. Right to bail under Section 45 of the PML Act is not dependant on the stage of the proceedings. The power of the court under Section 45 is unrestricted with reference to the stage of the proceedings. All material and evidence that can be led in the trial and admissible, whether relied on by the prosecution or not, and can be examined.[43] On the question of burden of proof, Section 24 of the PML Act can be relied on by the prosecution. However, at the same time, the observations of this Court in ***Vijay Madanlal Choudhary*** (supra) with reference to clauses (a) and (b) of Section 24, as well as the burden of proof placed on the prosecution to the extent indicated in paragraph 57 refer to at least three foundational facts. These foundational facts are – criminal activity relating to the scheduled offence has been committed; property in question has been derived or obtained directly or indirectly by any person as a result of that criminal activity; and the person concerned is directly or indirectly involved in any process or activity connected with the said property being proceeds of crime, have to be established. It is only on establishing the three facts that the offence of money laundering is committed. When the foundational facts of Section 24 are met, a legal presumption would arise that the proceeds of crime are involved in money laundering. The person concerned who has no causal connection with such proceeds of crime can disprove their involvement in the process or activity connected therewith by producing evidence or material in that regard. In that event, the legal presumption would be rebutted.

47. We now turn to the facts of the present case. At the outset we must record that the DoE has produced the "reasons to believe" to invoke Section 19(1) of the PML Act. We have examined the contents thereof and the contents of the "grounds of arrest" furnished to Arvind Kejriwal upon his arrest. They are identical.[44]

---

42 [2004] Supp. 6 SCR 460 : (2005) 1 SCC 568

43 It goes without saying that the oral evidence when recorded in the Court can be taken into consideration.

44 The reasons to believe are enclosed at pages 19 to 34 of Volume I of the convenience compilation filed by the DoE. The grounds of arrest are to be found at pages 35 to 62 of the same compilation.

48. We would briefly refer to the contents of the "reasons to believe":

- CBI has registered an RC regarding framing and implementation of the excise policy by the Govt. of NCT of Delhi for the year 2021-22 with the intent to procure undue favours from the licensee post the tender. Contents of the FIR have been elaborated.
- DoE has registered an ECIR on the basis of the aforesaid predicate offence. Upon investigation by the DoE, several searches have been conducted and statements have been recorded.
- Salient features of the excise policy that establish criminality are:
    - o The wholesale entity should not be a manufacturer/winery/brewery/bottler of liquor in India or abroad either directly or through any sister entities;
    - o The manufacturer/winery/brewery/bottler of liquor has to choose a distributor holding wholesale license for supply of Indian and foreign liquor as an exclusive distributor;
    - o The wholesale licensee shall not directly or indirectly have any retail wings. The retail license holder shall not be a manufacturer/winery/brewery/bottler of liquor in India or abroad either directly or through any sister concerns/related entities;
    - o The final price to the retailer shall be fixed by the excise commissioner as per the formula prescribed which will include the profit margin of 12% for the wholesale license holders.
- A cartel was formed wherein one group/person effectively would be controlling manufacturing, wholesale and retail entitles of liquor business in return for bribes/kickbacks.
- The excise policy 2021 was implemented on 17.11.2021, which continued till 31.08.2022, after which the government discontinued the policy and went back to the old regime.
- The role of Arvind Kejriwal is elaborated. He has been described as the kingpin/key conspirator in formulation of the policy, which favoured certain persons in exchange for kickbacks from liquor businessmen. Further, Arvind Kejriwal was involved in the use of proceeds of crime generated in the Goa election campaign

of Aam Aadmi Party,[45] in which he is the convenor and the ultimate decision maker.

- C. Arvind, the then Secretary of Manish Sisodia, in his statement dated 07.12.2022, has stated that the policy was given to him in the form of a draft report of the Group of Ministers[46] by Manish Sisodia at the residence of Arvind Kejriwal. Satyender Jain was also present at that time. The details mentioned in the draft document on wholesale profit margin of 12%, etc., had not been discussed earlier in the meetings of the GoM. He had prepared the policy on the basis of the draft which was submitted to the cabinet on 22.03.2021.

- Statement of Butchi Babu dated 23.03.2023, the then Chartered Accountant of K. Kavitha, is referred. Butchi Babu had revealed that Vijay Nair who was working for Arvind Kejriwal and Manish Sisodia was in touch with Arun Pillai. Vijay Nair was involved in policy formulation, for ensuring that the policy favours K. Kavitha. This is corroborated by WhatsApp chats which were retrieved from the mobile phone of Butchi Babu, wherein certain terms of the excise policy, two days before it was finalised by the GoM, were found.

- Association of Arvind Kejriwal with Vijay Nair is elaborated. Vijay Nair has been described as a broker/liaison/middleman on behalf of top leaders of AA Party, who wanted bribes/kickbacks from the stakeholders. Vijay Nair had threatened those opposing and not agreeing to his demands. Vijay Nair was staying in the official residence allotted to Kailash Gehlot, a cabinet minister and a close associate of Arvind Kejriwal.

- Vijay Nair on behalf of Arvind Kejriwal and AA Party had received kickbacks to the tune of Rs.100 crores from the group/cartel who had been favoured.

- The permanent members of the liquor group/cartel were Magunta Srinivasulu Reddy, Raghav Magunta, and K. Kavitha. The group/cartel was also represented by Abhishek Boinpally, Arun Pillai and Butchi Babu.

---

45 For short, "AA Party".

46 For short, "GoM".

- P. Sarath Reddy in his statement dated 25.04.2023 under Section 50 of the PML Act had revealed having expressed his desire to meet top political leaders in Delhi, that is, Arvind Kejriwal and Manish Sisodia, through Arun Pillai. Arun Pillai had assured him and had coordinated with Vijay Nair. Later on he met Arvind Kejriwal in a brief meeting of 10 minutes or so in which Vijay Nair was also present. He was told by Arvind Kejriwal to trust Vijay Nair who was very smart and could handle big and small issues. Arvind Kejriwal spoke about the new liquor policy which would be a win-win for all.

- On Arvind Kejriwal's role of demanding kickbacks, reference is made to the statement of Magunta Srinivasulu Reddy dated 16.07.2023 recorded under Section 50 of the PML Act; and his statement dated 17.07.2023 recorded under Section 164 of the Code. K. Kavitha had offered to pay Rs. 100 crore to AA Party for the excise policy. She had spoken and interacted with Arvind Kejriwal. She had asked Magunta Srinivasulu Reddy to arrange Rs. 50 crores. He had his son Raghav Magunta to further deal with K. Kavitha. Raghav Magunta had agreed to pay Rs.30 Crores. Raghav Magunta had paid Rs. 25 crores in cash to Butchi Babu and Abhishek Boinpally.

- Raghav Magunta in his statement dated 26.07.2023 recorded under Section 50 of the PML Act, and statement dated 27.07.2023 recorded under Section 164 of the Code, has accepted that he had paid Rs.25 crores in cash to Abhishek Boinpally and Butchi Babu in view of the agreement between him, his father – Magunta Srinivasulu Reddy and K. Kavitha. Raghav Magunta's father – Magunta Srinivasulu Reddy had met Arvind Kejriwal in mid-March 2021. Arvind Kejriwal had invited him to do business under the new excise policy, and in turn Arvind Kejriwal wanted funding for the upcoming elections in Punjab and Goa.

- Proceeds of crime of about Rs.45 Crores, a part of the bribes received, were used in the election campaign at Goa in 2021-22. AA Party is the real beneficiary of the proceeds of crime.

- The *hawala* transfer of approximately Rs. 45 crores is substantiated by the CBI in its second supplementary chargesheet.

- Dinesh Arora in his statement dated 01.10.2022 has stated that he had, on instructions of Vijay Nair coordinated the *hawala* transfer of Rs.31 Crores with Abhishek Boinpally, Rajesh Joshi and Sudhir. Dinesh Arora is a close associate of Manish Sisodia. Sudhir is a close associate of Vijay Nair. Rajesh Joshi is the proprietor of M/s Chariot Productions Media Pvt. Ltd.,[47] who were engaged by AA Party for its election campaign in Goa.
- The details of transfer of money from Mumbai to Goa by *hawala* transfers are stated with names and particulars including the amounts. *Angadiyas* based out of Mumbai made such transfers to the entities including Chariot, Islam Qazi etc. engaged by AA Party in Goa are elaborated with names and figures. Payments for the activities/work was partly in cash.
- Chariot had itself received such *hawala* payments and had also engaged several vendors for campaign of AA Party to whom part cash payments were paid. These are proven through various statements by employees of vendors, CDR records and data seized by the Income Tax department.
- Use of cash in Goa elections is also corroborated by one of the candidates of AA Party.
- Arvind Kejriwal is guilty as an individual, being a part of the conspiracy in the formulation of the excise policy, and, also vicariously as the person in-charge and responsible for AA Party. Reference is made to Section 70 of the PML Act relating to offences by 'companies'. Arvind Kejriwal, as National Convenor of AA Party and member of the Political Affairs Committee and National Executive, is ultimately responsible for the funds being used in the election expenses, including its generation. Thus, he is both individually and vicariously liable for generation and utilisation of the proceeds of crime.
- Lastly, Arvind Kejriwal was afforded multiple opportunities to cooperate with the investigation. In spite of summons being issued to him on nine occasions, he wilfully disobeyed them by not appearing.

47 For short, "Chariot"

49. If we go by the narration of facts and assertions made in the "reasons to believe", the subjective satisfaction that Arvind Kejriwal is guilty, on the basis of the material relied is clearly recorded. The "reasons to believe" refer to the "material" to show involvement of Arvind Kejriwal in the offence of money laundering.

50. However, the assertion on behalf of Arvind Kejriwal is that the "reasons to believe" do not mention and evaluate "all" or "entire" material. It selectively refers to "incriminating" material by giving it a semblance of good faith exercise. In reality, the reasons are a sham, and the exercise is undertaken in a pre-determined and biased manner. The expression "material" in Section 19(1) of the PML Act refers to the "all" or "entire" material in possession of the DoE. Thus, "all" or "entire" material must be examined and considered by the designated/ authorised officer to determine the guilt or innocence of the person. The following aspects are highlighted:

- P. Sarath Chandra Reddy was arrested on 10.11.2022. In his statements before the DoE on 16.09.2022 and 09.11.2022, which were recorded before his arrest, he did not make any allegation or comment against Arvind Kejriwal. On the contrary, in his statement dated 09.11.2022, on being questioned whether Rs.100 crores in cash was transferred from Hyderabad to Delhi (Vijay Nair), through Abhishek Boinpally and Dinesh Arora, he has denied having transferred any amount to Vijay Nair, Dinesh Arora or Abhishek Boinpally. After his arrest, in his statements recorded on 9 occasions, from 11.11.2022 to 25.12.2022, he did not make any allegation against Arvind Kejriwal.

- P. Sarath Chandra Reddy's application for regular bail was dismissed by the Special Judge on 16.02.2023. However, on 01.04.2023, in spite of opposition from the DoE, he was granted interim bail as his wife was indisposed. On 19.04.2023, he moved an application before the Delhi High Court for regular bail. After a few days, on 25.04.2023, P. Sarath Chandra Reddy made a statement under Section 50 of the PML Act implicating Arvind Kejriwal. Thereafter, interim bail granted to him was extended in view of the request made by DoE seeking time to file reply and verify documents. On 29.04.2023, P. Sarath Chandra Reddy made a statement under Section 164 of the Code to the Magistrate, in which he implicated Arvind

Kejriwal. On 08.05.2023, he filed an affidavit before the High Court wherein he cited health issues and claimed that he is sick and infirm. The High Court granted him regular bail as it was not objected to by the DoE. On 29.05.2024, P. Sarath Chandra Reddy was granted pardon.

- Magunta Srinivasulu Reddy in his statement recorded on 16.09.2022 did not implicate Arvind Kejriwal. In his statement recorded on 24.03.2023, on being asked whether he had met Arvind Kejriwal in the context of Delhi liquor business, Magunta Srinivasulu Reddy had stated that he had met Arvind Kejriwal in his office in 2021 to discuss whether the trust of Magunta family could be given land in Delhi for their charitable trust. The meeting had lasted for 5-6 minutes. Thus, he had not spoken about the Delhi liquor business.

- Raghav Magunta, son of Magunta Srinivasuly Reddy, was arrested on 11.02.2023. Raghav Magunta in his first statement recorded before his arrest on 16.09.2022 and 5 statements recorded between 10.02.2023 and 17.02.2023 did not implicate or make any assertion against Arvind Kejriwal. Regular bail application filed by Raghav Magunta was dismissed by the Special Judge on 20.04.2023. Raghav Magunta's wife attempted suicide on 01.05.2023, and on this ground he sought interim bail. The interim bail application was dismissed by the Special Judge on 08.05.2023. Thereupon, Raghav Magunta had moved the High Court on 11.05.2023 for grant of interim bail, which application was withdrawn on 29.05.2023. While doing so, certain observations made by the Special Judge in the order dated 08.05.2023 were expunged. On 07.06.2023, the maternal grandmother of Raghav Magunta suffered injuries and was admitted to an Intensive Care Unit. The High Court granted an interim bail to Raghav Magunta for a period of 15 days on this ground. This order was challenged by the DoE before this Court. This Court *vide* order dated 09.06.2023 reduced the interim bail period from 15 days to 6 days. On 16.07.2023 and 17.07.2023, Magunta Srinivasulu Reddy gave statements under Section 50 of the PML Act and Section 164 of the Code respectively, implicating and naming Arvind Kejriwal. On 18.07.2023, the High Court extended the interim bail granted to Raghav Magunta recording that the DoE had no objection. On 26.07.2023 and

27.07.2023, Raghav Magunta gave statements under Section 50 of the PML Act and Section 164 of the Code respectively, implicating and naming Arvind Kejriwal. On 10.08.2023, the interim bail granted to Raghav Magunta was made absolute, recording that the DoE had no objection to the grant of bail. On 03.10.2023, Raghav Magunta was granted pardon. Magunta Srinivasulu Reddy was never arrested. He is a Member of Parliament from Andhra Pradesh.

- Statement of Butchi Babu is hearsay and it is not evidence. Besides the statement was made by Butchi Babu while he was in the custody of CBI, and to escape his arrest by the DoE. He was not arrested by the DoE, despite being an accused in the CBI case. Butchi Babu had contradicted as well as corrected his earlier statements dated 28.02.2023, wherein he had stated that he does not know when K. Kavitha and Vijay Nair met. Hearsay evidence is inadmissible as per the Indian Evidence Act, 1872.[48]

- C. Arvind has not made any allegation against Arvind Kejriwal or linked and referred to the role of Arvind Kejriwal in the proceeds of crime. Mere presence of Arvind Kejriwal, the Chief Minister, when files were handed over to him would not implicate Arvind Kejriwal. The "reasons to believe" do not take into account the fact that the statements of the co-accused relied upon, cannot in terms of Section 30 of the Evidence Act, be the starting point for ascertainment of the guilt of the accused. The statements made earlier in point of time which do not implicate Arvind Kejriwal have been ignored. The statements are also contradictory. Factually, no incriminating document involving Arvind Kejriwal has been recovered during the course of investigation, which commenced in August 2022. The statements also do not establish involvement of Arvind Kejriwal in activities related to commission of a predicate offence as well as act of concealment, possession, acquisition or utilisation of proceeds of crime, which are penal offences under Section 3 of the PML Act.

- The statements of persons stated to be engaged with *Angadiyas* in Mumbai do not in any way implicate and link Arvind Kejriwal

48 For short, "Evidence Act".

to the crime. The statements are not of such sterling quality as to justify arrest of the Chief Minister, who is a prominent leader of a national political party and an opposition leader. There is no documentary proof to show that AA Party has received kickback from the funds received from the cartel, let alone utilising them in the Goa election campaign. Rajesh Joshi of Chariot was granted bail by the Special Judge *vide* order dated 06.05.2023 as huge amount of Rs.20-30 crores alleged to have been transferred was not established. The payment alleged to have been made for election related to jobs of meagre amount in lakhs.

- Contention of the DoE that P. Sarath Reddy, Magunta Srinivasulu Reddy, Raghav Magunta, and Butchi Babu in their earlier statements were quiet and did not link Arvind Kejriwal is contested on the ground that the statements were recorded by the officers of DoE who had the discretion to put questions and also in recording the contents.

51. Arvind Kejriwal submits that the "reasons to believe" selectively refer to the implicating material, and ignore the exculpatory material. Thus, there is no attempt to evaluate the entire material and evidence on record. The co-accused, in view of prolonged incarceration, strong-arm tactics and threats have been coerced to accept the DoE's version of facts. In support, it is highlighted that the DoE changed their position, *viz*. the co-accused conspirators, who were granted bail post the statements implicating Arvind Kejriwal. This establishes and shows prejudice and malicious intent.

52. In response, the DoE submits that the investigation in the present case is complicated. As it is a case of political corruption, independent witnesses are not available, and the co-accused were initially reluctant to name and blame the top political stakeholders. Admissibility or veracity of the approver/witness statements cannot be dealt with in the present proceedings, as credibility of the witnesses is to be tested during trial. Statements under Section 164 of the Code were recorded before the Magistrate. That apart, the statements are corroborated by material evidence or by statement of other witnesses. Reliance is placed upon Section 145 of the Evidence Act which permits cross-examination of witnesses on previous statements made by them.

53. At this juncture, we would like to reiterate and clarify that we are not deciding an appeal against an order rejecting the prayer/application

for grant of bail under Section 45 of the PML Act. We are examining the question of the legality of arrest of Arvind Kejriwal on 21.03.2024. While doing so, we would be exercising the power of judicial review and not merit based review.

54. We must also state that the DoE in their additional note filed before us has referred to certain retrieved WhatsApp chats which, as per the allegation made, show that Arvind Kejriwal was known to Vinod Chauhan, who was involved in the *hawala* transfer of money through *Angadiyas* from Mumbai to Goa. These chats were retrieved after the arrest of Arvind Kejriwal and is not mentioned in the "reasons to believe". Thus, it cannot be examined by us to determine the validity of the arrest in terms of Section 19(1) of the PML Act.

55. The legality of the "reasons to believe" have to be examined based on what is mentioned and recorded therein and the material on record. However, the officer acting under Section 19(1) of the PML Act cannot ignore or not consider the material which exonerates the arrestee. Any such non-consideration would lead to difficult and unacceptable results. First, it would negate the legislative intent which imposes stringent conditions. As a general rule of interpretation, penal provisions must be interpreted strictly.[49] Secondly, any undue indulgence and latitude to the DoE will be deleterious to the constitutional values of rule of law and life and liberty of persons. An officer cannot be allowed to selectively pick and choose material implicating the person to be arrested. They have to equally apply their mind to other material which absolves and exculpates the arrestee. The power to arrest under Section 19(1) of the PML Act cannot be exercised as per the whims and fancies of the officer.

---

49 See *Vijay Madanlal Choudhary* (supra) at paragraph 31 – "The 'proceeds of crime' being the core of the ingredients constituting the offence of money-laundering, that expression needs to be construed strictly. In that, all properties recovered or attached by the investigating agency in connection with the criminal activity relating to a scheduled offence under the general law cannot be regarded as proceeds of crime. There may be cases where the property involved in the commission of scheduled offence attached by the investigating agency dealing with that offence, cannot be wholly or partly regarded as proceeds of crime within the meaning of section 2(1)(u) of the 2002 Act—so long as the whole or some portion of the property has been derived or obtained by any person 'as a result of' criminal activity relating to the stated scheduled offence…"
Also see *M. Ravindran* v. *Intelligence Officer, Directorate of Revenue Intelligence*, (2021) 2 SCC 485 at paragraph 17.9. – "Additionally, it is well-settled that in case of any ambiguity in the construction of a penal statute, the courts must favour the interpretation which leans towards protecting the rights of the accused, given the ubiquitous power disparity between the individual accused and the State machinery. This is applicable not only in the case of substantive penal statutes but also in the case of procedures providing for the curtailment of the liberty of the accused."

56. Undoubtedly, the opinion of the officer is subjective, but formation of opinion should be in accordance with the law. Subjectivity of the opinion is not a *carte blanche* to ignore relevant absolving material without an explanation. In such a situation, the officer commits an error in law which goes to the root of the decision making process, and amounts to legal malice.

57. A contention raised by the DoE, and accepted in ***Vijay Madanlal Choudhary*** (supra), was that the order of arrest under Section 19(1) of the PML Act is a decision taken by a high ranking officer. Thus, it is expected that the high ranking officer is conscious of the obligation imposed by Section 19(1) of the PML Act before passing an order of arrest. We are of the opinion that it would be incongruous to argue that the high ranking officer should not objectively consider all material, including exculpatory material.

58. A wrong application of law or arbitrary exercise of duty leads to illegality in the process. The court can exercise their judicial review to strike down such a decision. This would not amount to judicial overreach or interference with the investigation, as has been argued by the DoE. The court only ensures that the enforcement of law is in accordance with the statute and the Constitution. An adverse decision would only help in ensuring better compliance with the statute and the principles of the Constitution.

59. Having said so, we accept that a question would arise – does judicial review mean a detailed merits review? We have already referred to the contours of judicial review expounded in ***Padam Narain Aggarwal*** (supra), and ***Dr. Pratap Singh*** (supra). We have also referred to the principles of Wednesbury reasonableness.[50]

60. In ***Amarendra Kumar Pandey*** v. ***Union of India and others***,[51] this Court elaborated on the different facets of judicial review regarding subjective opinion or satisfaction. It was held that the courts should not inquire into correctness or otherwise of the facts found except where the facts found existing are not supported by any evidence at all or the finding is so perverse that no reasonable man would say that the facts and circumstances exist. Secondly, it is permissible to

50 See *supra* note 33.

51 [2022] 12 SCR 223 : (2022) SCC Online SC 881

inquire whether the facts and circumstances so found to exist have a reasonable nexus with the purpose for which the power is to be exercised. In simple words, the conclusion has to logically flow from the facts. If it does not, then the courts can interfere, treating the lack of reasonable nexus as an error of law. Thirdly, jurisdictional review permits review of errors of law when constitutional or statutory terms, essential for the exercise of power, are misapplied or misconstrued. Fourthly, judicial review is permissible to check improper exercise of power. For instance, it is an improper exercise of power when the power is not exercised genuinely, but rather to avoid embarrassment or for wreaking personal vengeance. Lastly, judicial review can be exercised when the authorities have not considered grounds which are relevant or has accounted for grounds which are not relevant.

61. Error in decision making process can vitiate a judgment/decision of a statutory authority. In terms of Section 19(1) of the PML Act, a decision-making error can lead to the arrest and deprivation of liberty of the arrestee. Though not akin to preventive detention cases, but given the nature of the order entailing arrest – it requires careful scrutiny and consideration. Yet, at the same time, the courts should not go into the correctness of the opinion formed or sufficiency of the material on which it is based, albeit if a vital ground or fact is not considered or the ground or reason is found to be non-existent, the order of detention may fail.[52]

62. In ***Centre for PIL and another*** v. ***Union of India and another***,[53] this Court observed that in judicial review, it is permissible to examine the question of illegality in the decision-making process. A decision which is vitiated by extraneous considerations can be set aside. Similarly, in ***Uttamrao Shivdas Jankhar*** v. ***Ranjitsinh Vijaysinh Mohite Patil***,[54] elaborating on the expression "decision making process", this Court held that judicial interference is warranted when there is no proper application of mind on the requirements of law. An error in the decision making process crops up where the authority fails to consider a relevant factor and considers irrelevant factors to decide the issue.

---

52 *Ram Manohar Lohia* v. *State of Bihar and another*, AIR 1966 SC 740 and *Moti Lal Jain* v. *State of Bihar and others*, AIR 1968 SC 1509

53 [2011] 4 SCR 445 : (2011) 4 SCC 1

54 [2009] 9 SCR 538 : (2009) 13 SCC 131

63. In the present case, as noticed above, the "reasons to believe" have recorded several facts and grounds. One of the grounds for arrest relates to the formulation of the excise policy with the intent to obtain kickbacks/bribes. What has been discussed above in the arguments raised by Arvind Kejriwal relates to corruption amounting Rs. 45 crores to facilitate Goa elections for the AA Party. However, the "reasons to believe" also refer to the policy itself and that it was vitiated on the ground of criminality, *viz.* to promote cartelization and benefit from those providing bribes or kickbacks. We have briefly referred to the terms of the excise policy, albeit for clarity we would like to reproduce the findings recorded in the case of ***Manish Sisodia*** v. ***Central Bureau of Investigation***,[55] a judgment authored by one of us (Sanjiv Khanna, J.), the relevant portion of which reads as under:

> "**22.** However, there is one clear ground or charge in the complaint filed under the PML Act, which is free from perceptible legal challenge and the facts as alleged are tentatively supported by material and evidence. This discussion is equally relevant for the charge-sheet filed by the CBI under the PoC Act and IPC. We would like to recapitulate the facts as alleged, which it is stated establish an offence under Section 3 of the PML Act and the PoC Act. These are:
>
> - In a period of about ten months, during which the new excise policy was in operation, the wholesale distributors had earned Rs. 581,00,00,000 (rupees five hundred eighty one crores only) as the fixed fee.
> - The one time licence fee collected from 14 wholesale distributors was about Rs. 70,00,00,000 (rupees seventy crores only).
> - Under the old policy 5% commission was payable to the wholesale distributors/licensees.
>
> The difference between the 12%; minus 5% of the wholesale profit margin *plus* Rs. 70,00,00,000/-; it is submitted, would constitute proceeds of crime, an offence punishable under the PML Act. The proceeds

55 [2023] 15 SCR 480 : 2023 SCC OnLine SC 1393

of crime were acquired, used and were in possession of the wholesale distributors who have unlawfully benefitted from illegal gain at the expense of the government exchequer and the consumers/ buyers. Relevant portion of the criminal complaint filed by the DoE dated 04.05.2023, reads:

"One of the reasons given by Sh Manish Sisodia is to compensate the wholesaler for increased license fee from Rs. 5 lacs to Rs. 5 Cr. During this policy period, 14 LI licences were given by Excise Department, by raising the license fee for LI to Rs. 5 Cr in the entire period of operation of the Delhi Excise Policy 2021-2022, the Govt. has earned Rs. 75.16 Cr from the license fee of LI (as per Excise department communication dated 11.04.2023) (RUD 34). On the other hand the excess profit earned by the wholesalers during this period is to the tune of Rs. 338 Cr. (7% additional profit earned due to increase from 5% to 12%, Rs. 581 Cr being the total profit of LI as informed by Excise department). Therefore there is no logical correlation between the license fee increase and the profit margin increase. Whereas this excess profit margin benefit could have been passed on to the consumers in form of lower MRP. Contrary to the claim that the policy was meant to benefit the public or the exchequer, it was rather a conspiracy to ensure massive illegal gains to a select few private players/individuals/entities."

23. The charge-sheet under the PoC Act includes offences for unlawful gains to a private person at the expense of the public exchequer. Reference in this regard is made to the provisions of Sections 7, 7A, 8 and 12 of the PoC Act.

24. Clauses (a) and (b) to Section 7 of the PoC Act apply : (a) when a public servant obtains, accepts or intends to obtain from another person undue advantage with the intent to perform or fail to improperly or to forbear or cause forbearance to cause by himself or by another person; (b) obtains or accepts or attempts to obtain undue advantage

from a person as a reward or dishonest performance of a public duty or forbearance to perform such duty, either by himself or by another public servant. Explanation (2) construes the words and expression, "obtains, accepts or attempts to obtain", as to cover cases where a public servant obtains, accepts or intends to obtain any undue advantage by abusing his position as a public servant or by using his personal interest over another public servant by any other corrupt or illegal means. It is immaterial whether such person being a public servant accepts or attempts to obtain the undue advantage directly or through a third party.

25. On this aspect of the offences under the PoC Act, the CBI has submitted that conspiracy and involvement of the appellant - Manish Sisodia is well established. For the sake of clarity, without making any additions, subtractions, or a detailed analysis, we would like to recapitulate what is stated in the chargesheet filed by the CBI against the appellant - Manish Sisodia:

- The existing excise policy was changed to facilitate and get kickbacks and bribes from the wholesale distributors by enhancing their commission/fee from 5% under the old policy to 12% under the new policy. Accordingly, a conspiracy was hatched to carefully draft the new policy, deviating from the expert opinion/views to create an eco-system to assure unjust enrichment of the wholesale distributors at the expense of government exchequer or the consumer. The illegal income (proceeds of crime, as per the DoE) would partly be recycled and returned in the form of bribes.
- Vijay Nair, who was the middleman, a go-between, a member of AAP, and a co-confident of the appellant - Manish Sisodia, had interacted with Butchi Babu, Arun Pillai, Abhishek Boinpally and Sarath Reddy, to frame the excise policy on conditions and terms put forth and to the satisfaction and desire of the liquor group.
- Vijay Nair and the members of the liquor group had meetings on different dates, including 16.03.2021,

and had prepared the new excise policy, which was handed over to Vijay Nair. Thereupon, the commission/fee, which was earlier fixed at minimum of 5%, was enhanced to fixed fee of 12% payable to wholesale distributor.

- The appellant - Manish Sisodia was aware that three liquor manufacturers have 85% share in the liquor market in Delhi. Out of them two manufacturers had 65% liquor share, while 14 small manufacturers had 20% market share. As per the term in the new excise policy - each manufacturer could appoint only one wholesale distributor, through whom alone the liquor would be sold. At the same time, the wholesale distributors could enter into distribution agreements with multiple manufacturers. This facilitated getting kickbacks or bribes from the wholesale distributors having substantial market share and turnover.
- The licence fee payable by the wholesale distributor was a fixed amount of Rs. 5,00,00,000/- (rupees five crores only). It was not dependant on the turnover. The new policy facilitated big wholesale distributors, whose outpour towards the licence fee was fixed.
- The policy favoured and promoted cartelisation. Large wholesale distributors with high market share because of extraneous reasons and kickbacks, were ensured to earn exorbitant profits.
- Mahadev Liquor, who was a wholesale distributor for 14 small manufacturers, having 20% market share, was forced to surrender the wholesale distributorship licence.
- Indo Spirit, the firm in which the liquor group had interest, was granted whole distributor licence, in spite of complaints of cartelisation etc. which were overlooked. The complainant was forced to take back his complaint.
- The excess amount of 7% commission/fee earned by the wholesale distributors of Rs. 338,00,00,000/-

(rupees three hundred thirty eight crores only) constitute an offence as defined under Section 7 of the PoC Act, relating to a public servant being bribed. (As per the DoE, these are proceeds of crime). This amount was earned by the wholesale distributors in a span of ten months. This figure cannot be disputed or challenged. Thus, the new excise policy was meant to give windfall gains to select few wholesale distributors, who in turn had agreed to give kickbacks and bribes.

- No doubt, VAT and excise duty was payable separately. However, under the new policy the VAT was reduced to mere 1%.
- Vijay Nair had assured the liquor group that they would be made distributor of Pernod Ricard, one of the biggest players in the market. This did happen."

64. During the course of arguments, we had specifically asked the learned counsel appearing for Arvind Kejriwal to address arguments on facts. He did not, however, address arguments on the said aspect.[56] As noticed above, the arrest of Arvind Kejriwal is on several counts, which are independent and separate from each other.

65. Arguments raised on behalf of Arvind Kejriwal, which tend to dent the statements and material relied upon by the DoE in the "reasons to believe", though worthy of consideration, are in the nature of propositions or deductions. They are a matter of discussion as they intend to support or establish a point of view on the basis of inferences drawn from the material. It is contended that the statements relied upon by the DoE have been extracted under coercion, a fact that is contested and has to be examined and decided. This argument does not persuade us, given the limited power of judicial review, to set aside and quash the "reasons to believe". Accepting this argument would be equivalent to undertaking a merits review.

66. Arvind Kejriwal can raise these arguments at the time when his application for bail is taken up for hearing. In bail hearings, the court's

56 It was also submitted on behalf of Arvind Kejriwal that he would not like to argue on the question of applicability of Section 70 of the PML Act to political parties or the issue whether he can be prosecuted being the person in-charge and responsible.

jurisdiction is wider, though the fetters in terms of Section 45 of the PML Act have to be met. Special Court would have to independently apply its mind, without being influenced by the opinion recorded in the "reasons to believe". To adjudicate on a bail application, pleas and arguments of Arvind Kejriwal and the DoE, including the material that can be relied on and the inferences possible shall be examined. The court will have to undertake the balancing exercise.

67. It has been strenuously urged on behalf of Arvind Kejriwal that the arrest would falter on the ground that the "reasons to believe" do not mention and record reasons for "necessity to arrest". The term "necessity to arrest" is not mentioned in Section 19(1) of the PML Act. However, this expression has been given judicial recognition in ***Arnesh Kumar*** v. ***State of Bihar***,[57] which lays down that "necessity to arrest" must be considered by an officer before arresting a person. This Court observed that the officer must ask himself the questions – why arrest?; is it really necessary to arrest?; what purpose would it serve?; and what object would it achieve?

68. This Court in ***Mohammed Zubair*** v. ***State of NCT of Delhi***,[58] has held that power to arrest is not unbridled. The officer must be satisfied that the arrest is necessary. Where the power is exercised without application of mind, and by disregarding the law, it amounts to abuse of the law.

69. In ***Joginder Kumar*** v. ***State of Uttar Pradesh***,[59] the distinction between the power to arrest and the necessity and need to arrest,[60] is explained in the following terms:

> "20…No arrest can be made because it is lawful for the police officer to do so. The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. The police officer must be able to justify the arrest apart from his power to do so. Arrest and detention in police lock-up of a person can cause incalculable harm

57 [2014] 8 SCR 128 : (2014) 8 SCC 273

58 [2022] 18 SCR 494 : (2022) SCC OnLine SC 897

59 [1994] 3 SCR 661 : (1994) 4 SCC 260

60 Necessity to arrest is not a precondition and safeguard mentioned in Section 19 of the PML Act, albeit treated as a part of the general law and exercise of the power to arrest. The legislature being aware of this interpretation has not excluded the application of this principle in Section 19 of the PML Act.

> to the reputation and self-esteem of a person. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a police officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter. The recommendations of the Police Commission merely reflect the constitutional concomitants of the fundamental right to personal liberty and freedom. A person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the officer effecting the arrest that such arrest is necessary and justified. Except in heinous offences, an arrest must be avoided if a police officer issues notice to person to attend the Station House and not to leave the Station without permission would do."

70. Recently, ***Siddharth*** v. ***State of Uttar Pradesh***,[61] relied on ***Joginder Kumar*** (supra), to observe:

> "10. We may note that personal liberty is an important aspect of our constitutional mandate. The occasion to arrest an accused during investigation arises when custodial investigation becomes necessary or it is a heinous crime or where there is a possibility of influencing the witnesses or accused may abscond. Merely because an arrest can be made because it is lawful does not mandate that arrest must be made. A distinction must be made between the existence of the power to arrest and the justification for exercise of it [Joginder Kumar v. State of U.P., (1994) 4 SCC 260 : 1994 SCC (Cri) 1172] . If arrest is made routine, it can cause incalculable harm to the reputation and self-esteem of a person. If the investigating officer has no

61 (2022) 1 SCC 676

> reason to believe that the accused will abscond or disobey summons and has, in fact, throughout cooperated with the investigation we fail to appreciate why there should be a compulsion on the officer to arrest the accused."

Thus, time and again, courts have emphasised that the power to arrest must be exercised cautiously to prevent severe repercussions on the life and liberty of individuals. Such power must be restricted to necessary instances and must not be exercised routinely or in a cavalier fashion.

71. In ***Vijay Madanlal Choudhary*** (supra), a substantive threshold test is not laid down on the 'necessity to arrest'. However, in paragraph 88 of the judgment, the Court has observed that the safeguard provided in Section 19(1) of the PML Act is to ensure fairness, objectivity and accountability of the authorised officer in forming opinion, as recorded in writing, regarding necessity to arrest a person involved in the offence of money laundering. Similar observations are made in paragraphs 15 and 22 of ***Pankaj Bansal*** (supra).

72. However, we must observe that in paragraph 32 of ***V. Senthil Balaji*** (supra), it is held that an authorised officer is not bound to follow the rigours of Section 41A of the Code as there is already an exhaustive procedure contemplated under the PML Act containing sufficient safeguards in favour of the arrestee. Thereafter, in paragraph 40 of ***V. Senthil Balaji*** (supra), it is observed:

> "40. To effect an arrest, an officer authorised has to assess and evaluate the materials in his possession. Through such materials, he is expected to form a reason to believe that a person has been guilty of an offence punishable under the PMLA, 2002. Thereafter, he is at liberty to arrest, while performing his mandatory duty of recording the reasons. The said exercise has to be followed by way of an information being served on the arrestee of the grounds of arrest. Any non-compliance of the mandate of Section 19(1) of the PMLA, 2002 would vitiate the very arrest itself. Under sub-section (2), the authorised officer shall immediately, after the arrest, forward a copy of the order as mandated under sub-section (1) together with the materials in his custody, forming the basis of his belief, to the adjudicating authority, in a sealed envelope.

> Needless to state, compliance of sub-section (2) is also a solemn function of the arresting authority which brooks no exception."

73. In ***Prabir Purkayastha*** (supra), this Court went beyond the rigours of the PML Act/UAPA. Drawing a distinction between "reasons to arrest" and "grounds for arrest", it held that while the former refers to the formal parameters, the latter would require all such details in the hands of the investigating officer necessitating the arrest. Thus, the grounds of arrest would be personal to the accused.

74. Therefore, the issue which arises for consideration is whether the court while examining the validity of arrest in terms of Section 19(1) of the PML Act will also go into and examine the necessity and need to arrest. In other words, is the mere satisfaction of the formal parameters to arrest sufficient? Or is the satisfaction of necessity and need to arrest, beyond mere formal parameters, required? We would concede that such review might be conflated with stipulations in Section 41 of the Code which lays down certain conditions for the police to arrest without warrant:

    - Section 41(1)(ii)(a) – preventing a person from committing further offence.
    - Section 41(1)(ii)(b) – proper investigation of the offence.
    - Section 41(1)(ii)(c) – preventing a person from disappearing or tampering with evidence in any manner.
    - Section 41(1)(ii)(d) – preventing the person from making any inducement or threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the court or police.
    - Section 41(1)(ii)(e) – to ensure presence of the person in the Court, whenever required, which without arresting cannot be ensured.

    However, Section 19(1) of the PML Act does not permit arrest only to conduct investigation. Conditions of Section 19(1) have to be satisfied. Clauses (a), (c), (d) and (e) to Section 41(1)(ii) of the Code, apart from other considerations, may be relevant.

75. In ***Vijay Madanlal Choudhary*** (supra), this Court has held that when a person applies for bail or anticipatory bail under the PML

Act, the conditions stipulated in Section 437/438/439 of the Code would equally apply, in addition to Section 45 of the PML Act. Therefore, it is urged that necessity to arrest, in the case of arrest under Section 19(1), would be an additional factor required to be considered beyond the conditions and factors stipulated in Section 19(1) of the PML Act.

76. DoE submits that the test of "necessity to arrest" is satisfied in view of Arvind Kejriwal failing to appear despite the issuance of 9 summons dated 30.10.2023, 18.12.2023, 22.12.2023, 12.01.2024, 31.01.2024, 14.02.2024, 21.02.2024, 26.02.2024, and 16.03.2024. It is also submitted that arrest is a part and parcel of investigation intended to secure evidence, leading to discovery of material facts and relevant information as held in ***P. Chidambaram*** v. ***Directorate of Enforcement***.[62]

77. On behalf of Arvind Kejriwal, it is submitted that there was no necessity to arrest on 21.03.2024. The RC/ECIR were registered in the month of August 2022. Further, most of the material relied upon in the "reasons to believe" are prior to July 2023. The statements under Section 50 of the PML Act and under Section 164 of the Code, or otherwise, of Magunta Srinivasulu Reddy, Raghav Magunta, Siddharth Reddy, etc., relate to the period prior to July 2023. Thus, it was not necessary to arrest Arvind Kejriwal on 21.03.2024 based on the said material. Lastly, in ***Pankaj Bansal*** (supra), this Court observed:

> "28. Mere non-cooperation of a witness in response to the summons issued under Section 50 of the Act of 2002 would not be enough to render him/her liable to be arrested under Section 19…"

78. As per the data available on the website of the DoE, as on 31.01.2023,[63] 5,906 ECIRs were recorded. However, search was conducted in 531 ECIRs by issue of 4,954 search warrants. The total number of ECIRs recorded against ex-MPs, MLAs and MLCs was 176. The number of persons arrested is 513. Whereas the number of prosecution complaints filed is 1,142. The data raises a number of questions, including the question whether the DoE has

62 [2019] 12 SCR 172 : (2019) 9 SCC 24

63 The data post 31.01.2023 has not been updated

formulated a policy, when they should arrest a person involved in offences committed under the PML Act.

79. We are conscious that the principle of parity or equality enshrined under Article 14 of the Constitution cannot be invoked for repeating or multiplying irregularity or illegality. If any advantage or benefit has been wrongly given, another person cannot claim the same advantage as a matter of right on account of the error or mistake. However, this principle may not apply where two or more courses are available to the authorities. The doctrine of need and necessity to arrest possibly accepts the said principle. Section 45 gives primacy to the opinion of the DoE when it comes to grant of bail. DoE should act uniformly, consistent in conduct, confirming one rule for all.

80. One of the developments in the last decade is acceptance of the principle of proportionality, especially when fundamental rights such as right to life and liberty are involved. This Court in ***Chairman, All India Railway Recruitment Board*** v. ***K. Shyam Kumar***[64] referred to a decision of the House of Lords in ***R*** v. ***Secretary of State***,[65] wherein the House of Lords had stressed that when human rights issues are concerned, proportionality is an appropriate standard of review.

81. The proportionality test[66] is more precise and sophisticated than other traditional grounds of review. The court is required to assess the balance struck by the decision maker, not merely whether it is within the range of rational or reasonable decisions. In this manner, proportionality goes further than the traditional grounds of review as it requires attention to the relative weight according to interest and considerations. ***State of Uttar Pradesh*** v. ***Lal***,[67] which refers to several other cases, states that the proportionality test safeguards fundamental rights of citizens to ensure a fair balance between individual rights and public interest. It requires the court to judge

64 [2010] 6 SCR 291 : (2010) 6 SCC 614

65 (1991) 1 All ER 710

66 The test of proportionality comprises four steps: (i) The first step is to examine whether the act/measure restricting the fundamental right has a legitimate aim (legitimate aim/purpose). (ii) The second step is to examine whether the restriction has rational connection with the aim (rational connection). (iii) The third step is to examine whether there should have been a less restrictive alternate measure that is equally effective (minimal impairment/necessity test). (iv) The last stage is to strike an appropriate balance between the fundamental right and the pursued public purpose (balancing act).

67 [2006] 2 SCR 656 : (2006) 3 SCC 276

whether the action taken was really needed and whether it was within the range of courses of action which could be reasonably followed. Proportionality is more concerned with the aims and intentions of the decision maker and whether the decision maker has achieved more or less the correct balance or equilibrium.

82. The principle of proportionality has been followed by this Court in several decisions such as ***Modern Dental College & Research Centre*** v. ***State of Madhya Pradesh***,[68] ***K.S. Puttaswamy (Retired) and Anr. (Aadhar)*** v. ***Union of India and Anr.*** (5J),[69] and ***Anuradha Bhasin*** v. ***Union of India and Others***[70]

83. Recently, the Constitution Bench applied the doctrine of proportionality to strike down the Electoral Bond Scheme in ***Association for Democratic Reforms*** v. ***Union of India***.[71] In a way, the present case also relates to funding of elections, an issue which was examined in some depth in ***Association for Democratic Reforms*** (supra).

84. In view of the aforesaid discussion, and as ***Vijay Madanlal Choudhary*** (supra) is a decision rendered by a three Judge Bench, we deem it appropriate to refer the following questions of law for consideration by a larger Bench:

(a) Whether the "need and necessity to arrest" is a separate ground to challenge the order of arrest passed in terms of Section 19(1) of the PML Act?

(b) Whether the "need and necessity to arrest" refers to the satisfaction of formal parameters to arrest and take a person into custody, or it relates to other personal grounds and reasons regarding necessity to arrest a person in the facts and circumstances of the said case?

(c) If questions (a) and (b) are answered in the affirmative, what are the parameters and facts that are to be taken into consideration by the court while examining the question of "need and necessity to arrest"?

68 [2016] 3 SCR 575 : (2016) 4 SCC 346

69 [2015] 9 SCR 99 : (2019) 1 SCC 1

70 [2020] 1 SCR 812 : (2020) 3 SCC 637

71 [2024] 2 SCR 420 : (2024) 5 SCC 1

85. As we are referring the matter to a larger Bench, we have to, despite our findings on "reasons to believe", consider whether interim bail should be granted to Arvind Kejriwal. Given the fact that right to life and liberty is sacrosanct, and Arvind Kejriwal has suffered incarceration of over 90 days, and that the questions referred to above require in-depth consideration by a larger Bench, we direct that Arvind Kejriwal may be released on interim bail in connection with case ECIR No. HIU-II/14/2022 dated 22.08.2022, on the same terms as imposed *vide* the order dated 10.05.2024 which reads:

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

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

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

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

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

    The interim bail may be extended, or recalled by the larger Bench.

86. We are conscious that Arvind Kejriwal is an elected leader and the Chief Minister of Delhi, a post holding importance and influence. We have also referred to the allegations. While we do not give any direction, since we are doubtful whether the court can direct an elected leader to step down or not function as the Chief Minister or as a Minister, we leave it to Arvind Kejriwal to take a call. Larger Bench, if deemed appropriate, can frame question(s) and decide the conditions that can be imposed by the court in such cases.

87. Accordingly, the Registry is directed to place the matter before the Hon'ble Chief Justice of India for constitution of an appropriate Bench, and if appropriate, a Constitution Bench, for consideration of the aforesaid questions. The questions framed above, if required, can be reformulated, substituted and added to.

88. The observations made in this judgment are for deciding the present appeal and will not be construed as findings on merits of the case/ allegations. Facts, as alleged, have to be established and proved. Application for regular bail, if pending consideration or required to be decided, shall be decided on its own merits.

Result of the case: Interim bail granted to the appellant.
Questions of law referred to a larger Bench.

†*Headnotes prepared by:* Divya Pandey

[2024] 7 S.C.R. 2427 : 2024 INSC 514

Chief Conservator of Forest & Ors.
v.
Virendra Kumar & Ors.

(Civil Appeal No. 7414 of 2024)

10 July 2024

[Vikram Nath* and Satish Chandra Sharma, JJ.]

Issue for Consideration

Validity of forfeiture by forest department of the security deposit made by successful auction bidder due to failure to comply with work mandate, considered.

Headnotes†

Auction – Conditions of sale – Forfeiture of security deposit – Respondent emerged as successful bidder in auction conducted by forest department, Gorakhpur (U.P.) in 1998 for certain forest produce – Parties executed an Agreement in terms of relevant Conditions of Sale – However despite being informed about last date to deposit the bid amount and complete the work, followed by two subsequent reminder letters/notices, Respondent failed to comply with the said mandate – Resulting in forfeiture of Respondent's security deposit and re-auctioning – Forfeiture challenged in High court on the ground that department's approval was not given within stipulated time, and hence Respondent applied for withdrawing its bid – In its support, Respondent relied on Condition of Sale Manual applicable in 1980-81 overwritten as "1997-98" since auction took place in 1998 and argued that concerned provision mandated communicating approval/ disapproval within 40 days from auction – High Court allowed the writ petition – Decision challenged in this SLP:

Held: 1. High Court erred while relying on Manual applicable in 1980-81 because the year in this manual was overwritten as "1997-98" without bearing any signature – A fact noted by High Court but not given due weightage. [Para 14]

2. Court accepted Appellant's argument that no manual was published after 1987-88 and hence it will prevail over previous

* Author

edition of 1980-81 that Respondent sought to reply on – As 1987-88 edition did not contain provision regarding above-noted 40 days' time period, and required the successful bidder to enquire about the status of acceptance of contract if no formal communication is received by him within 35 days, and provided for deemed approval in absence for formal approval within stipulated time-period of 35 days, the Respondent could not escape the consequences of withdrawing from auction. [Para 15-16]

3. On facts, Respondent did not comply with the initial letter and subsequent reminders which reflected its non-diligent and lackadaisical approach that couldn't be overlooked and thus the forfeiture of security deposit of Respondents was valid. [Para 17-18]

List of Acts

Conditions of Sale Manuals.

List of Keywords

Forest Department; Auction; Security amount; Forfeiture; Lackadaisical approach; Re-auction.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 7414 of 2024

From the Judgment and Order dated 11.01.2011 of the High Court of Judicature at Allahabad in WC NO. 55072 of 2000

Appearances for Parties

Ms. Garima Prashad, Sr. A.A.G., Sudeep Kumar, Ms. Manisha, Advs. for the Appellants.

Amit Sharma, R.C. Kohli, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Vikram Nath, J.

1. Leave granted.

2. This appeal by special leave is against the judgment and order dated 11.01.2011 passed by the High Court of Judicature at Allahabad in Writ Petition (C) No. 55072 of 2000. The said Writ Petition in the

High Court was filed by the Respondents herein challenging the notice dated 17.01.2000 passed by the Divisional Forest Officer, Gorakhpur forfeiting the security amount of the Respondents. For the sake of convenience, we will refer to the parties as per their instant status before this Court.

3. Brief facts of the matter are that the Forest Department had issued a public notice dated 05.03.1998 inviting registered contractors for participation in a sale auction. In pursuance of the said notice, sale auction was completed on 27.03.1998 as per prescribed procedure and the Respondents offered the highest bids in respect of the various lots. On being declared as the successful bidders, an agreement was executed between the Appellant and the Respondent on the same date with respect to the lot No. 195 (38-H Nasirabad, Bankee Range). On the following day itself, a proposal was sent to the Conservator of Forests and Regional Director, Eastern Circle, Gorakhpur, U.P. by the Divisional Forest Officer for approval of the auction proceedings. The said approval was granted by the Regional Director on 14.05.1998.

4. Post approval of the auction proceedings, the Divisional Forest Officer addressed a letter to the Respondent on 15.09.1998 calling upon him to deposit the bid amount of Rs. 2,92,000/- against the respective lots latest by 25.09.1998, obtain their work orders and conclude the work latest by 08.10.1998. It was further stated that in case, the work is not completed within the stipulated time as aforesaid, the security amount deposited with reference to the said auction shall be forfeited and auction proceedings shall be quashed. Even after the issuance of the aforesaid letter, the Respondents did not complete their work and accordingly, a public Notice dated 26.10.1998 was issued by the Forest Department directing the Respondent once again to deposit the bid money and conclude the work. Another notice dated 23.04.1999 was issued to the Respondent stating that the entire work should be completed latest by 15.05.1999, failing which, the amount of security deposited shall be forfeited and the lots in question shall be put to fresh auction. Respondent failed to take action and accordingly on 17.01.2000, the Divisional Forest Officer issued a letter to the Respondent communicating that for non-compliance of the directions given to them, the security amount deposited by them is being forfeited and the lot is being put to re-auction.

5. As mentioned at the outset earlier, the Respondents, being aggrieved by the communication dated 17.01.2000, filed the Writ Petition before the High Court praying for directions to the Appellants to refund the security amount deposited by the Respondent. Before the High Court, the Respondents argued that since the approval to the auction was not granted within the stipulated period, they had applied to withdraw from the auction and were not bound by the said offer made in the auction and accordingly, security amount could not have been forfeited.

6. The agreements between the parties were executed in terms of conditions of sale of the various forest produce. There were two Conditions of Sale Manuals produced before the High Court. The first manual was published in the year 1980-81 and the second manual was published in the year 1987-88. The High Court, in its judgment, observed that there is cutting over the dates of both the manuals relating to application of the order mentioned therein. In the first manual, in place of year 1980-81, it has been cut and made enforced for 1997-98 and in the second manual, in place of 1987-88, it has been cut and made enforced for 1989-90. High Court also noted that the cuttings do not bear any signatures.

7. The Respondents, for their argument of non-forfeiture of security amount, relied heavily on sub-clause (viii) of Clause 10 of 1980-81 Terms & Conditions of Sale and Auction of Jungle Wood wherein it was provided that if the acceptance or rejection of sale of lots is not informed to the contractor after 40 days, then the contractor will not be bound to take the contract on the accepted bid. Whereas, the Appellants relied on the conditions contained in sub-clause (viii) of Clause 10 of 1987-88 Conditions of Sale, wherein it has been provided that if the approval of the concerned officer is not received within the stipulated period and if the competent authority approves the bid of the lot, then it will be deemed that the lot has been approved.

8. The High Court observed that the Respondents were relying on the conditions made applicable in 1997-98 while the Appellants were relying on the conditions made applicable in 1989-90 and since the auction was held in the year 1998, the conditions applicable in the year 1997-98 will govern the sale by auction pursuant to which agreements have been executed. Accordingly, since the Respondents/ contractors were not communicated about the approval or disapproval

of sale of lots within 40 days, they were not bound by the said offer made in the said auction and could withdraw themselves. Thereby, it was held that the recovery sought to be made from the Respondents was illegal as being contrary to the Conditions of Sale contained in sub-clause (viii) of Clause 10 of the Terms & Conditions of Sale applicable in the year 1997-98. The Writ Petition was allowed by the High Court, setting aside the Appellant's order dated 17.01.2000 and directing the Appellants to refund the forfeited amount.

9. Aggrieved by the impugned order, the Appellants are before us. An interim stay of the impugned order of the High Court was granted by this Court vide order dated 08.08.2011.

10. The case of the Appellants, largely, is that the relevant Manual operative in the Financial Year 1997-98 is that on which the Financial Year 1987-88 is printed. As per this Manual, the Clause 10 (viii) was amended and the condition of communicating the approval of the auction within 40 days was deleted. It was provided that if no communication regarding approval of the auction is received within the prescribed period, it shall be deemed that the approval of the lots had been accorded by the competent authority. In the absence of any Manual published after the year 1987-88, the said Manual with printed year 1987-88, being the latest Edition, shall prevail over the earlier Edition of the Manual with printed year as 1980-81.

11. Further, it was argued that the Respondents are bound by the terms and conditions as per Agreement dated 27.03.1998 executed by it with the Appellants immediately after the conclusion of the auction proceedings. In this regard, it was also highlighted that Condition No. 2-D of the said agreement clearly provides that if any purchaser fails to deposit the installments as agreed upon, the Forest Officer is entitled to cancel the auction and forfeit the amount of security deposited, amongst other things.

12. Learned Addl. Advocate General appearing for the Appellants has also drawn the Court's attention to sub-clause (vii) of Clause 10 of 1987-88 Conditions of Sale wherein it is provided that if the buyer does not receive any information regarding acceptance of the contract within 35 days from the date of auction, then he should contact the Deputy Conservator of Forests/Conservator of Forests and get information in this regard. The Forest Department will not bear any responsibility for not receiving timely information.

13. We have heard learned Counsel for the parties and perused the relevant documents on record.

14. We are unable to bring ourselves to agree with the observations made by the High Court. The High Court specifically noted that the cutting over the dates of both the manuals of Conditions of Sale do not bear any signature and yet, went ahead with considering the over-writing as valid and weighed the applicability of respective Manuals based on such over-writing. In the absence of signatures according any sanction to such over-writing, we believe that the High Court has seriously erred by making a finding that the Manual for Year 1980-81 will supersede the Manual for Year 1987-88 and will be applicable for an auction held in the year 1998.

15. Since these are the only two Conditions of Sale Manuals produced before us as well as the High Court, we find force with the Appellants' argument that in the absence of any Manual published after the year 1987-88, the said Manual with printed year 1987-88, being the latest Edition, shall prevail over the earlier Edition of the Manual and be applicable to the instant auction.

16. The Manual of 1987-88 seems to have brought in amendments in the form of sub-clauses (vii) and (viii) of Clause 10, as mentioned above, which impose the responsibility on the contractor to enquire about the acceptance of the contract if no information is received within 35 days and also grants a deemed approval in cases where the approval is not received within the stipulated period. Once, it has been determined that the Manual of 1987-88 will be relevant for the instant case, it follows that the liability rested on the shoulders of the Respondents to enquire about the status of approval, and they could not have withdrawn from the auction after executing the agreement without bearing its consequences. The said consequences were clearly stated in Clause 2-D of the agreement dated 27.03.1998 and include forfeiture of security amount.

17. There is yet another relevant consideration that we have taken into account while reaching the final decision. It is the fact that in spite of repeated notices by the Appellants calling upon the Respondents to complete the work within a stipulated period, the Respondents failed to come forward and do the needful. Respondents came forward by filing a Writ Petition, only after the communication dated 17.01.2000 forfeiting the security amount. It reflects on the non-diligent and

lackadaisical approach adopted by the Respondents which cannot be overlooked by this Court.

18. We thus hold that the security amount deposited by the Respondents rightly deserves to be forfeited by the Appellants.

19. Accordingly, the appeal is allowed. The impugned order dated 11.01.2011 is, hereby, set aside and the notice issued by the Appellants dated 17.01.2000 is upheld as valid.

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

Result of the case: Appeal allowed.

†*Headnotes prepared by:* Niti Richhariya, Hony. Associate Editor
(*Verified by:* Abhinav Mukerji, Sr. Adv.)

[2024] 7 S.C.R. 2434 : 2024 INSC 518

The State of Punjab and Ors.
v.
Bhagwantpal Singh Alias Bhagwant Singh (Deceased) Through Lrs.

(Civil Appeal No. 7379 of 2024)

10 July 2024

[Vikram Nath* and K.V. Viswanathan, JJ.]

Issue for Consideration

Whether the suit for possession filed by the respondents was barred by limitation; whether the burden of proof of ownership would lie on the person challenging the ownership of the person in possession; whether the continued name of the Plaintiff/Respondent in the revenue records would confer title upon him; whether the plaint lacked/deliberately omitted necessary and material particulars to surpass the bar of limitation.

Headnotes†

Limitation Act, 1963 – Article 65 – Suit for possession barred by limitation – Civil Suit filed by deceased Respondent for possession of the land in suit in 2001 as they alleged to have come to know about construction of the hospital only in 2000 – Appellant/State claiming that the land in suit had been donated by original owner i.e., father of the Plaintiff, in 1958 for establishing a Veterinary Hospital and possession was delivered – Appellant/State constructed the hospital from the funds of the State Government in 1958-1959 and since then, the same has been functional:

Held: Article 65 of the Limitation Act clearly stipulates that in a suit for possession of immovable property, the period of limitation will be twelve years from when the possession of the defendant becomes averse to the plaintiff – Fact remains and has been duly established from the record that the hospital had been constructed on the land belonging to the original owner i.e., father of the plaintiff sometime in the year 1958-59 – At that time, the owner of the said land was alive, and he did not object to it, which clearly indicates that he had donated the land in suit for construction

* Author

of Veterinary Hospital – Further, it is evidenced by the letter dt 24.04.1981 wherein the Plaintiff had made an enquiry from the concerned Tehsildar regarding the exact location of the Veterinary Hospital that the Plaintiff was aware of its existence in 1981, if not before – If the plaintiff's case was that it was never donated but still the hospital had been constructed, then the plaintiff should have instituted a suit for possession within 12 years – Having not done so, the suit was clearly barred by time for the relief of possession. [Paras 21, 22, 23]

Adverse Possession – Claim of – State could not claim adverse possession, not applicable in present case:

Held: The argument of Plaintiff that the State could not claim adverse possession is not germane to the present case – It is unfortunate that after 43 years, his son filed the suit for possession without seeking declaration, as in case, he would have sought relief of declaration, the suit would have been further barred by time for the said relief also by virtue of Article 58 of Limitation Act – Period of limitation being three years. [Para 24]

Practice and Procedure – Plaintiff cannot be allowed to surpass limitation by way of vague and clever drafting:

Held: It is evident that the plaintiff purposely drafted/filed a vague plaint which lacked the essential details of when the hospital was constructed, when the plaintiff became aware of such construction, when the right of ownership devolved upon the plaintiff, when his father passed away, his letter of 24.04.1981 to the Tehsildar etc; the first date and document mentioned in the plaint is of the legal notice dated 09.11.2000 – It is nothing but a clear attempt by Respondent at surpassing the bar under limitation law for filing the suit since the existence of the hospital was a fact well known to him since long ago. [Paras 16, 17, 18]

Suit for possession – Burden of proof lies on the Plaintiff:

Held: As per Section 110 of the Evidence Act, 1872, the burden of proof as to ownership of a property lies on the person challenging the ownership of the person in possession – In view of the clear finding that the hospital is functioning on the suit land since 1958, the Trial Court as well as the High Court have wrongly shifted the proof of ownership on the Appellant, whereas it lay on the Respondent by virtue of Section 110. [Paras 30, 31, 32]

Revenue Record – Entry in revenue records would not confer any title on the Plaintiff – Rights conferred on the Appellant/State under the gift deed cannot be taken away:

Held: Merely because the name of the Plaintiff continued in the revenue records (Jama Bandis), it would not confer any title upon him – Revenue records are only entries for the purpose of realising tax by the Municipal Corporations or land revenue by Gram Sabhas – The documents exhibited by the defendants could not be ignored as they were public documents, copies of which were filed and duly proved that the hospital was functional much before 1981 – Even if the gift deed was not placed on record, due explanation was given – The lethargy/carelessness on the part of the State in not getting the revenue records corrected on the basis of the gift deed would not take away the rights conferred on the State under the gift deed.[Paras 27, 28]

Case Law Cited

Chuharmal v. CIT [1988] 3 SCR 788 : **(1988) 3 SCC 588;** *Ramchandra Sakharam Mahajan v. Damodar Trimbak Tanksale (D)* [2007] 8 SCR 178 : **(2007) 6 SCC 737;** *Anathula Sudhakar v. P. Buchi Reddy* [2008] 5 SCR 331 : **(2008) 4 SCC 594;** *T.V. Ramakrishna Reddy v. M. Mallappa* **(2021) 13 SCC 135;** *Guru Amarjit Singh v. Rattan Chand* [1993] Supp. 1 SCR 523 : **(1993) 4 SCC 349;** *Sawarni v. Inder Kaur* [1996] Supp. 5 SCR 165 : **(1996) 6 SCC 223;** *Jattu Ram v. Hakam Singh* [1993] Supp. 2 SCR 321 : **(1993) 4 SCC 403;** *State of Kerala v. Joseph* [2023] 11 SCR 264 : **(2023) SCC Online SC 961;** *State of Haryana v. Mukesh Kumar and Ors.* [2011] 14 SCR 211 : **(2011) 10 SCC 404;** *Karnataka Board of Wakf v. Government of India* [2004] Supp. 1 SCR 255 : **(2004) 10 SCC 779;** *Partap Singh v. Shiv Ram* [2020] 1 SCR 694 : **(2020) 11 SCC 242;** *Vishwa Vijai Bharti v. Fakhrul Hasan and Ors.,* **AIR 1976 SC 1485;** *State of Madhya Pradesh v. Bherulal* [2020] 8 SCR 912 : **(2020) 10 SCC 654;** *Office of the Chief Post Master General and Others v. Living Media India Ltd. & Anr.* [2012] 1 SCR 1045 : **(2012) 3 SCC 563 – referred to.**

List of Acts

Limitation Act, 1963; Evidence Act, 1872.

The State of Punjab and Ors. v.
Bhagwantpal Singh Alias Bhagwant Singh (Deceased) Through Lrs.

List of Keywords

Limitation Act; Article 65; Article 58; Burden of Proof; Adverse Possession; Revenue Records; Drafting plaint; Practice and Procedure; Section 110 of Evidence Act; Gift Deed; Ownership; Title.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 7379 of 2024

From the Judgment and Order dated 14.09.2018 of the High Court of Punjab & Haryana at Chandigarh in RSA No. 447 of 2004

Appearances for Parties

Ms. Bhakti Pasrija, D.A.G., Sanjay Hegde, Sr. Adv., Karan Sharma, Moksh Pasrija, Advs. for the Appellants.

Sidharth Luthra, Sr. Adv., Ms. Supriya Juneja, Kartikeya Dang, Rudraditya Khare, Sahir Seth, Arjun Varma, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Judgment

Vikram Nath, J.

1. Delay condoned.

2. Leave granted.

3. This appeal, by the State of Punjab assails the correctness of the judgment and order dated 14.09.2018 passed in RSA No.447 of 2004 (O & M), whereby the High Court of Punjab & Haryana at Chandigarh allowed the second appeal of the plaintiff-respondent, set aside the judgment and decree of the First Appellate Court, and restored the judgment and decree of the Trial Court decreeing the suit for possession.

4. The dispute relates to land admeasuring 2176.6 sq. yards located in Khewat No.702/1146/Khasra No.116/26/2/15 situated at Samana, Tehsil-Samana, District-Patiala (hereinafter referred to as the "land in suit"). According to the appellant, the land in suit belonged to one Shri Inder Singh, predecessor in interest of the respondents. Shri Inder Singh had donated the land in suit to the appellants for the construction of a Veterinary Hospital in 1958 and had also handed

over the possession of the same. The appellant-State constructed a veterinary hospital over the land in suit in 1958-1959. The Veterinary Hospital has been existing and is functional over the land in suit ever since. During his lifetime, Shri Inder Singh never objected or filed any suit alleging trespass or unauthorized occupation by the State. However, after the death of Shri Inder Singh, his son Shri Bhagwantpal Singh (since deceased) filed a suit for possession of the land in suit in the year 2001, that is after almost 43 years of it being donated to the State. The suit was registered as Civil Suit No.98 of 2001 before the Additional Civil Judge (Sr. Division), Samana.

5. The appellant filed written statement denying the plaint allegations and also raising plea regarding the suit being barred by limitation and also urged that since no relief for declaration had been sought and the suit was only for relief for possession, it was not maintainable. It was specifically averred in the written statement that the land in suit had been donated by Shri Inder Singh for the purpose of establishing a Veterinary Hospital in the year 1958, and possession was also delivered. The State thereafter, from the funds of the State Government, constructed a Veterinary Hospital soon thereafter in the year 1958-59, and since then, the same has been functional.

6. On the basis of the pleadings, the Trial Court framed the following issues: -

> *"1. Whether the plaintiff is owner of the suit land? OPP*
>
> *2. If issue No.1 is proved, whether the plaintiff is entitled to the decree for possession of the suit land? OPP*
>
> *3. Whether the suit as framed is not maintainable? OPD*
>
> *4. Whether the suit is within time ? OPP*
>
> *5. Relief."*

7. The parties led evidence based on which the Trial Court decreed the suit vide order dated 20.05.2003. The findings recorded by the Trial Court are as follows:

(i) As the defendant had raised the plea of adverse possession, therefore, they admitted the ownership of the plaintiffs;

(ii) There being no document regarding the alleged gift, the same does not stand proved;

(iii) The mere resolutions of the Municipal Council are not sufficient to prove that the land had been donated by the father of the plaintiff.

8. The Appellant-State preferred an appeal which was registered as C.A. No.44 of 2003. The Additional District Judge allowed the appeal of the appellant-State setting aside the judgment of the Trial Court and dismissed the suit. The findings recorded by the Appellate Court are as follows:

(i) The fact that the Veterinary Hospital had been established in 1958-59 and it was being run ever since then, the filing of the suit after more than four decades was barred by time.

(ii) The owner of the property having allowed the State to take possession, construct the Veterinary Hospital, and run the same over the land in suit since 1958-59 itself proves that the land had been actually donated by Shri Inder Singh, father of the original plaintiff.

(iii) Shri Inder Singh, during his lifetime, having never agitated about the construction of the hospital or the existence of the hospital building over the land in suit, also reflects that he had, in fact, donated the land in suit.

(iv) The plaintiff, having admitted that, he had been witnessing the Veterinary Hospital being run over the land in suit since 1981 but did not take any steps thereafter also proves that, in fact, ownership had been transferred to the State in 1958 itself.

9. Aggrieved by the same, the plaintiff-respondent preferred a second appeal before the High Court registered as RSA No.447 of 2004. By the impugned order, the High Court has allowed the appeal, set aside the judgment of the First Appellate Court, and restored that of the Trial Court. The findings recorded by the High Court are as follows:

(i) The Appellant-State failed to establish possession over the land in suit.

(ii) The basic ingredients for claiming adverse possession were neither pleaded nor any evidence led in that regard.

(iii) The pleadings in the written statement filed by the appellant-State did not mention the details regarding the date of possession, date of knowledge to the whole world, duration of possession, and much less *Animus Possidendi*.

10. It is this judgment of the High Court which is under challenge in the present appeal.

11. Sri Sanjay R. Hegde, learned Senior Counsel appearing for the appellant made the following submissions:-

(i) The suit for possession filed by the respondents, was clearly barred by time in view of Article 65 of the Limitation Act, 1963, which provides the limitation for a suit for possession of an immovable property based on title to be 12 years. In the present case, the possession of the appellants was since 1958, even the admitted position by the respondents to their knowledge was from 1981. As such, the suit filed in the year 2001 was hopelessly barred by time from both the dates i.e. 1958 as also 1981.

(ii) The burden to prove ownership would lie on the person challenging the ownership of the person in possession in view of Section 110 of the Indian Evidence Act, 1872. In the present case, the respondents admitted the possession of the appellants and were only challenging the ownership of the appellants. As such, the burden was cast upon the respondents to prove their ownership.

(iii) The appellants had claimed to be in possession of the land in suit since 1958 and had also asserted that it had constructed a Veterinary Hospital soon thereafter, for which it had also filed documentary evidence. Sri Inder Singh, the predecessor in interest of the plaintiff-respondent, who had donated the land in suit for construction of Veterinary Hospital, never challenged the same nor ever objected to the constructions being raised over it. He was the owner in possession of the suit land. The appellants, being in clear and continuous possession of the suit land since 1958, had perfected its rights as owners.

(iv) In support of his submission, Sri Hegde, relied upon the following judgments:-

(1) **Chuharmal Vs. CIT;**[1]

(2) **Ramchandra Sakharam Mahajan Vs. Damodar Trimbak Tanksale (D);**[2]

1 [1988] 3 SCR 788 : (1988) 3 SCC 588

2 [2007] 8 SCR 178 : (2007) 6 SCC 737

(3) **Anathula Sudhakar Vs. P. Buchi Reddy;**[3]

(4) **T.V. Ramakrishna Reddy Vs. M. Mallappa;**[4]

(5) **Guru Amarjit Singh Vs. Rattan Chand;**[5]

(6) **Sawarni Vs. Inder Kaur;**[6]

(7) **Jattu Ram Vs. Hakam Singh;**[7]

12. Mr. Hegde, thus, submitted that the impugned judgment of the High Court deserves to be set-aside.

13. Mr. Sidharth Luthra, learned Senior Counsel appearing for the respondents made the following submissions:-

(i) The impugned judgment of the High Court did not suffer from any perversity, as such, did not warrant any interference by this Court.

(ii) The plea of adverse possession was neither pleaded nor proved, as such the High Court rightly set aside the judgment of the First Appellate Court which was based on the plea of adverse possession.

(iii) The State Government cannot claim adverse possession for which reliance was placed upon the following judgments:-

(1) **State of Kerala Vs. Joseph;**[8]

(2) **State of Haryana Vs. Mukesh Kumar and Ors.;**[9]

(3) **Karnataka Board of Wakf Vs. Government of India;**[10]

(iv) No written deed of gift, much less registered, was placed on record by the appellants to support its claim of donation/gift by Sri Inder Singh.

---

3 [2008] 5 SCR 331 : (2008) 4 SCC 594

4 (2021) 13 SCC 135

5 [1993] Supp. 1 SCR 523 : (1993) 4 SCC 349

6 [1996] Supp. 5 SCR 165 : (1996) 6 SCC 223

7 [1993] Supp. 2 SCR 321 : (1993) 4 SCC 403

8 [2023] 11 SCR 264 : (2023) SCC Online SC 961

9 [2011] 14 SCR 211 : (2011) 10 SCC 404

10 [2004] Supp. 1 SCR 255 : (2004) 10 SCC 779

(v) The suit is not barred by limitation, in as much as, the respondents came to know of the construction only in September, 2000 and, thereafter, they immediately gave legal notice and filed the suit for possession.

(vi) The revenue records *(Jama bandis)* established the ownership rights of the respondents. The submission to the contrary by the appellants is contrary to law. The revenue records carried presumption of correctness unless rebutted. In the present case, the appellants failed to rebut the said presumption. He relied upon the following judgments in support of the said submission: -

(1) **Partap Singh Vs. Shiv Ram;**[11]

(2) **Vishwa Vijai Bharti Vs. Fakhrul Hasan and Ors;**[12]

(vii) Lastly, it was submitted by Sri Luthra that the appeal was filed with a delay of 492 days without any satisfactory explanation. As such, the appeal was liable to be dismissed on the ground of delay itself. In support of the said submission, he relied upon the following two judgments:-

(1) **State of Madhya Pradesh Vs. Bherulal;**[13]

(2) **Office of the Chief Post Master General and Others Vs. Living Media India Ltd. & Anr.;**[14]

14. Having considered the submissions and having perused the material available on record, our analysis runs as under.

15. A copy of the plaint filed by the respondents is filed as **Annexure (P-18)**. It is as vague as possible and is very brief running into ten paragraphs. Its contents are briefly referred to hereunder:-

(a) The plaint schedule property is described in the beginning of the plaint. Paragraph-1 states that plaintiff is owner of the land in dispute, for which, Jama Bandi of the year 1996-97 is filed. Paragraph-2 states that defendants without consent of plaintiff have constructed a veterinary hospital illegally and

11 [2020] 1 SCR 694 : (2020) 11 SCC 242

12 [1976] Supp. 1 SCR 519 : AIR 1976 SC 1485

13 [2020] 8 SCR 912 : (2020) 10 SCC 654

14 [2012] 1 SCR 1045 : (2012) 3 SCC 563

unauthorizedly over the suit land. Paragraph-3 states that the defendants neither purchased the said land from the plaintiff nor paid any compensation to the plaintiff, as such, their possession is unauthorized and illegal. The plaintiff being its owner is entitled to vacant possession. Paragraph 4 states that despite repeated request to hand over vacant possession by removing the debris *(malba),* no heed has been paid to the said request. Paragraph-5 mentions that a registered notice dated 09.11.2000 was served upon the defendants calling upon them to hand over possession, but no reply was received in response to the same. Copy of the notice and acknowledgement of receipt were attached with the plaint. Paragraph-6 states that cause of action arose on 1st March, 2001 as the defendants did not give any reply to the notice. Paragraph-7 states that suit property was situated within the jurisdiction of the Court. Paragraph-8 mentions regarding the valuation and the court fee paid. Paragraph-9 mentions that there was no prior litigation pending between the parties regarding the subject matter. Paragraph-10 is the relief clause wherein it was prayed that suit of plaintiff for possession of the suit property be decreed.

16. The plaint, to our opinion ought to have been rejected on the ground of being vague and not carrying necessary and material particulars. The plaintiff very conveniently avoided stating in the plaint as to when the defendants constructed the Veterinary Hospital; they also did not mention any details of the period when request was said to have been made for delivering vacant possession; the first date and document mentioned in the plaint is of the legal notice dated 09.11.2000.

17. In the case of **Ram Singh Vs. Gram Panchayat Mehal Kalan,**[15] this Court observed and held that when the suit is barred by any law, the plaintiff cannot be allowed to circumvent that provision by means of clever drafting so as to avoid mention of those circumstances, by which the suit is barred by law of limitation.

18. Herein, it is evident that the plaintiff purposely drafted/filed a vague plaint which lacked the essential details of when the hospital was constructed, when the plaintiff became aware of such construction,

15 (1986) 4 SCC 364

when the right of ownership devolved upon the plaintiff, when his father passed away, his letter of 24.04.1981 to the Tehsildar etc. It is nothing but a clear attempt by Respondent at surpassing the bar under limitation law for filing the suit since the existence of the hospital was a fact well known to him since long ago.

19. The appellants filed their written statement denying the plaint allegations; three preliminary objections were also raised to the effect that suit was not maintainable in its form; the appellants were in continuous possession over the suit land and; the suit was time barred. It was further specifically stated that the land in suit was donated by Sri Inder Singh in 1958 for construction of Government Veterinary Hospital and, further, Municipal Council, Samana and the State of Punjab had made financial contribution for construction of the building of the hospital in the year 1959 and since then, the hospital is functioning, which is well known to the public of Samana as also to the plaintiff. In support of the fact that the hospital was constructed and that the possession was with the State-appellant, various resolutions of 1958-59, other revenue records were filed. It was also specifically stated that as the land had been donated, there was no question of payment of consideration or compensation to the plaintiff.

20. A replication was filed by the plaintiff-respondent.

21. Plaintiff examined himself as P.W.-1 and filed documentary evidence which were exhibited. On the other hand, the State examined Dr. Rajendra Kumar Goyal as D.W-1 and Jagdish Chand as D.W.- 2 and had also filed several documents relating to resolutions passed by the Municipal Council in the year 1958-59, also the correspondence between the Veterinary Officer and the Executive Officer of the Municipal Council sometimes in 1981, as also the documents to show that the plaintiff was aware of the existence of the Veterinary Hospital in the year 1981 as he had made an enquiry from the concerned Tehsildar regarding the exact location of the Veterinary Hospital.

22. A perusal of all such documents (Ex's- DW2/C, DW2/B, D-2, D-3, D-4 and D-5) filed by the defendant-State clearly establishes that the land had been donated by Sri Inder Singh, father of the plaintiff in the year 1958-1959 and, thereafter, after arranging for funds from various sources, the hospital had been constructed in 1959 and has,

eversince then, been functional. The above documents are resolutions of the Municipal Council of 1958-59 and also Utilization Certificates of funds utilized for construction of the hospital. The document (Ex DW2/A) also goes to prove that there was a communication from the Executive Officer of the Municipal Council dated 01.07.1981 giving details of the allotment, the construction, the finances and also the functionality of the hospital. This communication further mentions that somebody had destroyed the file of the gift and the construction of the hospital for which an enquiry was pending. Nevertheless, the facts stated therein clearly reflect that there was a hospital in existence much before 1981. Another document filed by the defendant-appellant was Ext.-D (8), which is a letter written by the plaintiff dated 24.04.1981 requiring the Tehsildar, Samana to verify and give a report regarding location of the Veterinary Hospital. The said letter also bears endorsement of the Tehsildar and other Revenue Officials and also contains the signature of the plaintiff. This letter clearly shows that the plaintiff was aware of the existence of the Veterinary Hospital in 1981. Thus, he had made a false and incorrect statement in his deposition that the hospital was constructed only two years ago. Another fact worth mentioning here would be that, during cross examination, the plaintiff stated that he did not remember as to whether the hospital was in existence since 1958-59 or not.

23. Considering this letter dated 24.04.1981, even if we assume that the Respondent became aware of the hospital's existence on this date for the very first time, yet the suit filed by him shall not fall within the limitation period. Article 65 of the Limitation Act clearly stipulates that in a suit for possession of immovable property, the period of limitation will be twelve years from when the possession of the defendant becomes adverse to the plaintiff. In the facts and circumstances of the case, the Respondent-plaintiff's suit is clearly barred by limitation.

24. The argument that State could not claim adverse possession is not germane to the present case. Fact remains and has been duly established from the record that the hospital had been constructed on the land belonging to the predecessor in interest of the plaintiff sometime in the year 1958-59. At that time, Sri Inder Singh, father of the plaintiff who was the owner of the said land was alive and he did not object to it, which clearly indicates that he had donated the land

for construction of Veterinary Hospital in Tehsil, Samana. In those good old times, it used to be a usual practice of big landlords donating their lands for public cause. It is unfortunate that after 43 years, his son filed the suit for possession without seeking declaration, as in case, he would have sought relief of declaration, the suit would have been further barred by time for the said relief also. The defendant having been in possession without any hindrance since 1958, the suit filed would only be a mockery of justice if decreed. If the plaintiff's case was that it was never donated but still the hospital had been constructed, then the plaintiff should have instituted a suit for possession within 12 years. Having not done so, the suit was clearly barred by time for the relief of possession.

25. As already discussed above, various documents were filed and proved by the defendant-appellant regarding the donation, the transfer of possession, the construction of the Veterinary Hospital and its functionality since more than 40 years before the suit was filed. In fact, the evidence establishes that the donation was documented, and possession transferred and acted upon and for the very purpose, for which the donation was made.

26. The title of the land in suit had passed on to the State after the donation and transfer of possession and after construction, the hospital continued for more than four decades before filing of the suit. The plaintiff, son of the donor, also waited for 20 years despite admitted knowledge of the hospital running over the land in suit and did not take any action.

27. Article 65 under the Schedule to the Limitation Act provides limitation of 12 years for filing a suit for possession based on title. In the present case, merely because the name of the plaintiff continued in the revenue records *(Jama Bandis),* it would not confer any title upon him. Revenue records *(Jama* Bandis*)* are only entries for the purpose of realising tax by the Municipal Corporations or land revenue by Gram Sabhas. The plaintiff having failed to claim relief of declaration, the suit itself would not be maintainable. Further, for a suit for declaration, period of limitation would be three years under Article 58 of the Schedule to the Limitation Act, which in the present case was long lost.

28. There is nothing on record available from the cross-examination of defendants 1 and 2 that the documents which they proved

were either incorrect, doubtful or suspicious. The documents exhibited by the defendants could not be ignored as they were public documents, copies of which were filed and duly proved. Even if the deed was not placed on record but due explanation was given, the facts of the case and the evidence on record clearly established the case of the defendant-appellant that the land in suit had been donated by Sri Inder Singh, father of the plaintiff way back in 1958. The lethargy/carelessness on the part of the State in not getting the revenue records corrected on the basis of the gift deed would not take away the rights conferred on the State under the gift deed.

29. The case-laws relied upon by Sri Luthra on the question of State not being entitled to claim adverse possession as also the presumption of revenue records being correct, have no application and are of no help to the respondents in the light of the discussion made above.

30. It is settled law that in a suit for possession, the burden of proof lies on the plaintiff. As per Section 110 of the Evidence Act, 1872, the burden of proof as to ownership of a property lies on the person challenging the ownership of the person in possession. Section 110 of Evidence Act is produced as follows:

> "**110. Burden of proof as to ownership-** When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner."

31. This Court had summarized the provision in **Chuharmal v. CIT (supra)** as follows:

> "6. …Section 110 of the Evidence Act is material in this respect and the High Court relied on the same which stipulates that when the question is whether any person is owner of anything of which he is shown to be in possession, the onus of proving that he is not the owner, is on the person who affirms that he is not the owner. In other words, it follows from well settled principle of law that normally, unless contrary is established, title always follows possession."

32. In view of the clear finding that the hospital is functioning on the suit land since 1958, the Trial Court as well as the High Court have wrongly shifted the proof of ownership on the Appellant, whereas it lay on the Respondent by virtue of Section 110 of the Evidence Act.

33. In view of the above discussion, the appeal deserves to be allowed and is, accordingly, allowed.

34. The impugned judgment of the High Court is set aside and that of the First Appellate Court dismissing the suit of the plaintiff-respondent is confirmed.

Result of the case: Appeal Allowed.

†*Headnotes prepared by:* Raghav Bhatia, Hony. Associate Editor
(*Verified by:* Liz Mathew, Sr. Adv.)