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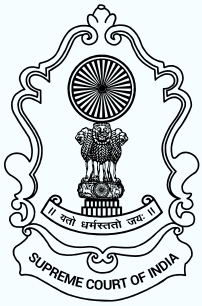

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Contents

[2024] 8 S.C.R. 929 : 2024 INSC 740

Dinesh Sahu Alias Dinnu
v.
The State of Madhya Pradesh

(Criminal Appeal No(s). 960 of 2021)

22 August 2024

[Bela M. Trivedi* and Satish Chandra Sharma, JJ.]

Issue for Consideration

Concurrent conviction of the appellant for the offence punishable under Section 302 read with Section 34 of the Penal Code, 1860, if justified. Whether the prosecution was able to prove the guilt of the appellant beyond reasonable doubt.

Headnotes†

Penal Code, 1860 – s.302 r/w s.34 – Concurrent conviction under – If to be interferred with:

Held: No – Evidence of witnesses cannot be totally discarded merely because they turned hostile to the case of prosecution during the course of trial – One of the panch witnesses duly supported the case of the prosecution as regards the recovery of the alleged weapon/article, Khukri, from the house of the appellant – Merely because the said witness knew the deceased, it cannot be said that he was an interested witness or an unreliable witness – Doctor who carried the post-mortem of the deceased, also opined that the injuries on the body of the deceased were possible with the alleged weapon khukri – Futher, as per the FSL report, the blood group of the deceased was present on the khukri – Courts below discussed the evidence in detail and found the appellant guilty – Prosecution succeeded in proving the guilt of the appellant beyond reasonable doubt. [Paras 10, 13]

List of Acts

Penal Code, 1860.

List of Keywords

Section 302 read with Section 34 of the Penal Code, 1860; Concurrent conviction; Guilt proved beyond reasonable doubt; Evidence; Witnesses; Hostile witnesses; Panch witnesses;

* Author

Recovery of the alleged weapon/article; Khukri; Interested witness; Unreliable witness; Material witnesses; Blood group of the deceased.

Case Arising From

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 960 of 2021

From the Judgment and Order dated 04.07.2019 of the High Court of M.P. Principal Seat at Jabalpur in CRA No. 1867 of 2007

Appearances for Parties

Ms. Sangeeta Kumar, Adv. for the Appellant.

Ms. Mrinal Gopal Elker, Adv. for the Respondent.

Judgment / Order of the Supreme Court

Judgment

Bela M. Trivedi, J.

1. The instant appeal arises out of the impugned judgment and order dated 04.07.2019, passed by the High Court of Madhya Pradesh, Principal Seat at Jabalpur in Criminal Appeal No. 1867 of 2007, whereby the High Court has confirmed the judgment and order dated 16.08.2007, passed by the Court of 3rd Additional Sessions Judge, Bhopal in S.T. No.43 of 2007, convicting the present appellant *Dinesh Sahu alias Dinnu* and the co-accused *Raju Sharma alias Awadhesh Sharma alias Naresh Sharma,* for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code and sentenced them to suffer Life Imprisonment along with a fine of Rs.3,000/-, in default thereof to undergo further rigorous imprisonment for six months.

2. The case of the prosecution in a nutshell was that, one *Vinod Sai (since deceased)* was running a light refreshment stall under the name and style of Ajay Tea Stall Baba Board Chowraha. There was a previous enemity between the said *Vinod Sai (since deceased)* and *Raju Sharma alias Awadhesh Sharma alias Naresh Sharma.* On 10.09.2004, a quarrel took place between the above parties and both lodged reports against each other. Driven by the same,

on 11.11.2006 at 07:00 p.m., when *Kamal Sanwale (PW-6)* and *Vinod Sai (since deceased)* were at the shop, the said *Raju Sharma alias Awadhesh Sharma alias Naresh Sharma* armed with sword *and Dinesh Sahu alias Dinnu* (the appellant herein) armed with a *khukri,* came on the spot. Both of them inflicted several blows on *Vinod Sai. A*s a result, thereof, he fell down and died on the spot.

3. According to the further case of the prosecution, on hearing the ruckus, Kamal, Kalim, Anil, Salman and Santosh rushed to the spot to save *Vinod Sai* but the appellant- *Dinesh Sahu alias Dinnu* threatened them by showing *khukri,* and thereafter both the accused, namely, *Raju Sharma and Dinesh Sahu,* fled away from the spot. At that time, Shashi Bai (PW-13), the mother of *Vinod Sai* was coming to the shop of her son to take charge of the shop and she witnessed the entire incident.

4. At the instance of the informant *Kamal Sanwale (PW-6),* Dehati Nalisi (Ex.P/1) was prepared by Arvind Singh Raghuvanshi, who was the Investigating Officer of the case and a temporary Crime bearing No. 0/06 was registered for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code. *Dehati Nalisi* was sent to the Police Station, Habibganj for registration, where it was registered as Crime No.1100/2006. After the completion of the investigation, charge-sheet was filed against both the accused.

5. The Trial Court, after recording the evidence of the witnesses examined by the prosecution and on appreciating the evidence on record, convicted the accused, namely, *Raju Sharma alias Awadhesh Sharma alias Naresh Sharma* for the offence punishable under Section 302 of the IPC and *Dinesh Sahu alias Dinnu,* for the offence punishable under Section 302 read with Section 34 of the IPC.

6. Being aggrieved by the said judgment and order of conviction and sentence, both the accused preferred the Criminal Appeal No.1867 of 2007 before the High Court, which dismissed the appeal and confirmed the judgment and order passed by the Trial Court.

7. The present appellant (*Dinesh Sahu alias Dinnu*), being aggrieved by the said judgment and order passed by the High Court, has preferred the instant appeal.

8. The learned counsel, Ms. Sangeeta Kumar, appearing for the appellant, taking the Court to the record of the case, more

particularly, the evidence of the witnesses, strenuously urged that all the material witnesses had turned hostile including the informant Kamal Singh (PW-6). She further submitted that neither the evidence of Pratap Singh (PW-14), in whose presence the alleged recovery of *khukri* was made from the house of the appellant, was reliable nor the evidence of the mother of the deceased, Shashi Bai (PW-13), was reliable. According to her, even the very presence of Shashi Bai (PW-13) was doubtful inasmuch as, her statement was recorded three days after the alleged incident took place. She further submitted that the appellant has already undergone incarceration for a period of more than 11 years (as on the date) and that there being no evidence on record against the appellant to show that the appellant had shared the same intention as his co-accused-*Raju Sharma to kill Vinod Sai,* the appellant should be given benefit of doubt.

9. However, the learned counsel Ms. Mrinal Gopal Elker, appearing for the respondent-State would vehemently submit that there being concurrent finding of facts recorded by the two Courts below, this Court in exercise of the powers under Article-136 of the Constitution of India, should not interfere with the same, more particularly, when the prosecution had proved the charges levelled against the present appellant beyond reasonable doubt. She has placed heavy reliance on the evidence of Dr. C.S. Jain (PW-17), who had carried out the post-mortem of the deceased, who had opined in his post-mortem report that the cause of death of the appellant was due to several injuries sustained by him and that such injuries are possible with the weapon recovered from the appellant-accused.

10. Having regard to the submissions made by the learned counsel for the parties, and to the evidence available on record, it appears that the guilt of the appellant was sought to be established by the prosecution by examining as many as seventeen witnesses, including the informant Kamal Singh and the other eye-witnesses, as also the Shashi Bai (PW-13), who was the mother of the deceased. It is true that except the two witnesses, namely, Pratap Singh (PW-14) and Shashi Bai (PW-13), the other material witnesses had turned hostile. Nonetheless, it is pertinent to note that the evidence of witnesses cannot be totally discarded, merely because they have turned hostile to the case of prosecution during the course of trial.

The informant, Kamal Singh (PW-6), had admitted his signatures on the Dehati Nalisi (Ex.P/1), which was recorded immediately after the incident in question involving both the accused in the alleged incident. It is further required to be noted that one of the panch witnesses, namely, Pratap Singh (PW-14) has duly supported the case of the prosecution as regards the recovery of the alleged weapon, *Khukri,* from the house of the present appellant. Though the said witness was thoroughly cross-examined by the defense counsel, nothing significant adverse to the case of prosecution has come on record. Of course, the learned counsel for the appellant had tried to impeach the credibility of the said witness by submitting that he was an interested witness as he was known to the deceased *Vinod Sai*, and also since he had come to the Court in a drunken condition, the said fact was taken into consideration by the Trial Court at the time of recording his deposition by noting that though, the witness was drunk, he was perfectly in sound state of mind to understand the questions put to him and was able to give his deposition. Merely because the said witness knew the deceased, it cannot be said that he was an interested witness or an unreliable witness.

11. The mother of the deceased, Shashi Bai (PW-13), was also thoroughly cross-examined by the defense and nothing adverse to the case of prosecution had come on record, which would help the case of the appellant.

12. It is also pertinent to note that Dr. C.S. Jain (PW-17), who had carried the post-mortem of the deceased, had also opined that the injuries on the body of the deceased were possible with the alleged weapon/ article *khukri*, which was recovered from the house of the present appellant. The said weapon *khukri*, seized/ recovered from the house of the appellant was also sent to Forensic Science Laboratory (FSL) and as per its report, the human blood of 'Group B' was present on it, which was the blood group of the deceased.

13. In view of the above evidence, we are of the opinion that the prosecution had succeeded in proving the guilt of the appellant beyond reasonable doubt. Even the two Courts below have also discussed the said evidence in detail and found him guilty of the charges levelled against him.

14. We do not see any good ground to interfere with the said concurrent findings of facts recorded by the Courts below.

15. In that view of the matter, the present appeal is dismissed.

16. Pending application(s), if any, shall stand closed.

Result of the case: Appeal dismissed.

†*Headnotes prepared by:* Divya Pandey

[2024] 8 S.C.R. 935 : 2024 INSC 600

Mahendra Kumar Sonker
v.
The State of Madhya Pradesh

(Criminal Appeal No. 520 of 2012)

12 August 2024

[B.R. Gavai, K.V. Viswanathan* and Nongmeikapam Kotiswar Singh, JJ.]

Issue for Consideration

Whether the conviction of the appellant under s.353 of the Indian Penal Code, 1860 (IPC) can be sustained without proving assault and use of criminal force.

Headnotes†

Indian Penal Code – s.353 IPC – Complaint against appellant filed regarding demand of Rs. 500/- as illegal gratification – Trap proceedings organised – Appellant charged for offences under ss.7, 13(1)(d) r/w 13(2) of the Prevention of Corruption Act, 1988 along with ss.201 and 353 IPC – Special Judge, Sagar convicted appellant for offence u/s.353 IPC and sentenced him to undergo simple imprisonment for six months and imposed Rs. 1000/- fine – Appeal dismissed by High Court – Present appeal only concerned with conviction u/s.353 IPC – Allegation regarding charge u/s.353 IPC was that appellant, in collusion with his wife, with an intention to obstruct members of the trap team in performing their pubic duty during trap proceedings, attacked them or exercised criminal force on them:

Held: Use of criminal force or assault necessary ingredients of s.353 IPC – Use of force to any person without that person's consent in order to the committing of any offence required to establish criminal force as defined u/s.350 IPC – Force defined u/s.349 IPC – Assault u/s.351 IPC would mean whoever makes any gesture, or any preparation intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person – On facts – Upon considering oral and medical evidence, prosecution unable to establish that appellant assaulted or used criminal force against trap party –

* Author

Attempt was made by appellant to wriggle out when apprehended – Jostling and pushing appears to have happened in process of extricating himself from arrest – None of the ingredients of assault or criminal force attracted – Jostling and pushing by appellant with attempt to wriggle out was not with intention to assault or use of criminal force – No evidence to indicate that accused assaulted or used criminal force on the trap party in execution of their duties or for the purpose of preventing or deterring them in discharging their duties. [Paras 15-18, 28-29]

List of Acts

Penal Code, 1860; Prevention of Corruption Act, 1988.

List of Keywords

Penal Code, 1860 – s.353; Criminal force; Assault; Intentional use of force; Public servant; Discharge of duty; Trap proceedings.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 520 of 2012

From the Judgment and Order dated 14.10.2009 of the High Court of M.P. at Jabalpur in CRLA No. 1949 of 2007

Appearances for Parties

Siddharth Aggarwal, Sr. Adv., Ms. Garima Bajaj, Advs. for the Appellant.

Arjun Garg, Aakash Nandolia, Ms. Sagun Srivastava, Ms. Kriti Gupta, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Judgment

K.V. Viswanathan, J.

1. The present appeal calls in question the judgment dated 14.10.2009 passed by the High Court of Judicature at Jabalpur, Madhya Pradesh in Criminal Appeal No. 1949 of 2007. By the said judgment, the appellant's conviction under Section 353 of the Indian Penal Code, 1860 (for short 'the IPC') and sentence of six months simple

imprisonment and fine of Rs. 1,000/- imposed by the Special Judge, Sagar has been confirmed. Aggrieved, the appellant is in Appeal.

2. Originally, the appellant along with his wife Mamta stood trial. While the appellant was charged for offences under Sections 7, 13(1)(d) read with 13(2) of the Prevention of Corruption Act, 1988 (for short 'the Act') as well as Sections 201 and 353 of the IPC, his wife Mamta was charged under Section 353 and 201 of the IPC.

3. We are, in this appeal, concerned only with the conviction of the appellant under Section 353 of the IPC. The appellant has been acquitted of other charges and his wife Mamta has been completely acquitted including for the offence under Section 353 of the IPC. Accordingly, only those aspects of the facts which have a bearing on the present appeal are set out hereinbelow.

Brief Facts:

4. The complainant in the original corruption case is one Babulal Ahirwar (PW-1). It appears that on his complaint to the Collector about the irregularities in the work of construction of the Education Guarantee Building, the then President of the Committee constituted for the purpose of construction, Santosh Ahirwar was removed from the President's post.

5. The appellant, who was posted as Patwari in Circle No. 89, Village Naryaoli, District Sagar had been entrusted with the inquiry into a complaint against the said Babulal Ahriwar to the effect that he had made a false complaint against Santosh Ahirwar. It transpires that the appellant, in the inquiry, found the charge against Babulal Ahirwar to be false. When Babulal Ahirwar sought a copy of the report from the appellant, the case of the prosecution is that the appellant demanded a sum of Rs. 500/- as illegal gratification.

6. The said Babulal Ahirwar, on 28.06.2004, filed a complaint with the Superintendent of Police, Special Police Establishment Lokayukt, Sagar against the appellant in this regard. An FIR was registered under Section 7 of the Act and trap proceedings were organized. O.P. Tiwari (PW-4) and M.K. Choubey were co-opted along with the trap party which consisted of Head Constable Niranjan Singh, Constable Raj Kumar, Constable Shiv Shanker Dube and Inspector N.K. Parihar. The case set up by the prosecution was that they

waited for the accused-appellant and when he arrived at his house, Babulal Ahirwar accosted him and handed over the currency to the appellant and signaled to the trap party. The trap party arrived there to apprehend the appellant.

7. We are directly concerned with what transpired at this point since the only surviving Section under which the appellant has been convicted is Section 353 of the IPC. We will deal with this aspect in detail a little later in the judgment.

8. Special Case No. 20 of 2005 was registered against the appellant and his wife for the offences mentioned hereinabove. The appellant and his wife denied the charges and claimed trial. Prosecution examined thirteen witnesses and the defence examined three witnesses.

9. By the judgment of 05.09.2007, the learned Special Judge, Sagar while acquitting the appellant for offences under Sections 7, 13(1)(d) read with 13(2) of the Act and Section 201 of the IPC, convicted him for the offence under Section 353 of IPC and sentenced him to undergo simple imprisonment for six months. Additionally, a fine of Rs. 1000/- was imposed and the appellant's wife was acquitted of all the charges.

10. Aggrieved, the appellant preferred an appeal to the High Court which has since been dismissed.

11. Insofar as the charge under Section 353 of the IPC was concerned, the allegation was that the appellant in collusion with his wife with an intention to obstruct the members of the trap team in performing their public duty during the trap proceeding, attacked them or exercised criminal force on them. It is this part of the case which has been believed by the courts below.

12. We have heard Mr. Siddharth Aggarwal, learned senior counsel for the appellant and Mr. Arjun Garg, learned counsel for the respondent State.

CONTENTIONS:

13. Mr. Siddharth Aggarwal, learned senior counsel contended that the courts below were not justified in recording the conviction under Section 353 of IPC; that on the same evidence the wife of the appellant, Mamta has been acquitted; that the evidence of PW-1

Babulal Ahirwar, PW-4 O.P. Tiwari, PW-8 N.K. Parihar, PW-9 Niranjan Singh read with the evidence of PW-13 Dr. H.L. Bhuria, do not make out a case for conviction under Section 353 of IPC against the appellant and that none of the ingredients required to maintain a conviction under Section 353 of IPC have been established. Mr. Arjun Garg, learned counsel for the State defended the conviction and prayed that no case for interference with the concurrent conviction is made out.

14. We have carefully considered the arguments of the parties and have perused the records of the case, including the original records.

15. At the outset, we extract hereinbelow Section 353 of the IPC:

> "**353.-Assault or criminal force to deter public servant from discharge of his duty.** - Whoever assaults or uses criminal force to any person being a public servant in the execution of his duty as such public servant, or with intent to prevent or deter that person from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by such person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

A perusal of Section 353 indicates that whoever assaults or uses criminal force (a) to any person being a public servant in the execution of his duty as such public servant, or (b) with intent to prevent or deter that person from discharging his duty as such public servant, or (c) in consequence of anything done or attempted to be done by such person in the lawful discharge of his duty as such public servant, shall be punished with the imprisonment of either description for a term which may extend to two years, or with fine, or with both.

16. It is important at this stage to notice the definition of criminal force as defined in Section 350 of the IPC.

> "**350. Criminal force.**- Whoever intentionally uses force to any person, without that person's consent, in order to the committing of any offence, or intending by the use of such force to cause, or knowing it to be likely that by the

> use of such force he will cause injury, fear or annoyance to the person to whom the force is used, is said to use criminal force to that other."

As would be clear, what is required to establish criminal force is intentional use of force to any person without that person's consent in order to the committing of any offence.

17. Section 349 of the IPC which defines force is extracted hereinbelow :

> "**349. Force.**- A person is said to use force to another if he causes motion, change of motion, or cessation of motion to that other, or if he causes to any substance such motion, or change of motion, or cessation of motion as brings that substance into contact with any part of that other's body, or with anything which that other is wearing or carrying, or with anything so situated that such contact affects that other's sense of feeling: Provided that the person causing the motion, or change of motion, or cessation of motion, causes that motion, change of motion, or cessation of motion in one of the three ways hereinafter described.
>
> *First*. - By his own bodily power.
>
> *Secondly*. - By disposing any substance in such a manner that the motion or change or cessation of motion takes place without any further act on his part, or on the part of any other person.
>
> *Thirdly*. - By inducing any animal to move, to change its motion, or to cease to move."

18. Assault under Section 351 of the IPC would mean whoever makes any gesture, or any preparation intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person.

19. In this background, if we peruse the evidence on record, insofar as the charge under Section 353 of the IPC is concerned, it will transpire that none of the ingredients required for convicting a person under Section 353 of IPC were attracted.

20. PW-1 Babulal Ahirwar, insofar as this part of the event that transpired is concerned deposed as under:

> "6. ….The name and address was asked from the accused and the accused was caught. On being asked from the accused about the money he became uncontrolled and tried to run from there. Taking advantage of the dark, the accused threw away those notes.
>
> 7. With much difficulty the accused could be won over. The wife of the accused also came at that time and crowd had also gathered there. Wife of the accused was striking her head on the jeep….."
>
> (Emphasis supplied)

21. PW-4 O.P. Tiwari has deposed as under:

> "3. ….When we caught hold of the accused he was not having money. The applicant then told that the accused has thrown the money in the dark. Thereafter the Inspector started searching the money by starting the torch. The Inspector found in the light of the torch, one 50 rupees note lying. Inspector Parihar took that note up and gave it to me and asked me to keep it. Other notes were also searched there but notes could not be found there.
>
> 4. After that we tried to apprehend the accused patwari and forced him to sit in the vehicle to take him to police station Naryaoli but the accused Patwari objected to it. In spite of the objection taken by the accused anyhow the accused was made to sit in the vehicle. At the same time the wife of the accused arrived and lay down before the vehicle. In such a condition the vehicle was reversed and turned back and we had to go to police station. When the vehicle moved the wife of the accused started her head striking with the bonnet of the vehicle. Other persons present there, caught hold of the wife of the accused and removed her from there only then we people took the vehicle and started for police station Naryaoli…."
>
> (Emphasis supplied)

22. PW-8 N.K. Parihar has deposed as under:

> "6. ….Therefore the trap team surrounded the accused and tried to apprehend him. The accused objected to it forcefully so they could not catch him all of a sudden.
>
> 7. The accused had shouted so crowd had assembled there. In the meanwhile the accused took out the bribe notes from his pocket and had thrown them. The accused was apprehended. On searching the notes on the ground only one note of Rs.50/- was seen which panch witness Shri Tiwari picked up. Looking to the opposition, we took accused to police station Naryaoli where solution of sodium carbonate was prepared, which was colouring less….
>
> xxx xxx xxx
>
> 9. ….I had given one application in regard to the incident to Station House Officer Naryaoli, photocopy of which is enclosed. On 30.6.2004 I had filled MLC form for getting medically examined the head constable Niranjan Singh, myself & Rajkumar Sen, on which I had signed which are P-22 to P-25 respectively. After that I had handed over the case for investigation to D.S.P. Shri Ranjan Tiwari."
>
> (Emphasis supplied)

23. We have also perused the original record insofar as the application given to the Station House Officer is concerned, the translated portion obtained officially reads as under:

> "To
>
> The PS In-charge
>
> Sic Narayavali (Madhya Pradesh)
>
> Subject - Regarding the accused Mahendra Kumar of trap.(Sic)
>
> Shri Mahendra Sonkar was caught taking bribes on 29/06/03 at 8 O'clock. He called out to his wife. The woman clung to her husband to free him. She put her head on the jeep sic and grabbed the accused's hand and started pulling him out of the jeep. The accused also

grabbed her hand so that he could escape from the case by taking shelter of his wife. He also threw bribe notes but only one note was recovered in the trap sic. The accused created a lot of ruckus which disrupted the work. Please investigate this case.

Sd/-illegible 29.6.04

Sd/-illegible

29.6.04

(Shyam Bihari Mishra H.C.)"

(Emphasis supplied)

This document however does not appear to have been exhibited.

24. We have also seen Exh.P-22 to Exh.P-25. The translated portions of which read as under:

"**Exh.P-22:**

To

The Medical Officer,

District Hospital Sagar District

Sagar

Subject: Regarding medical examination of the injuries sustained by Head Constable Niranjan Singh, Special Police Establishment, Lokayukta, Sagar Division, Sagar and submitting a report

During the trap proceedings dated 29-6-2004 in Crime No.0/04 under Section 7, 13(1) 13(2) PC Act 1988, when accused Mahendra Kumar Sonkar and his wife tried to resist, Head Constable Niranjan Singh sustained the following injuries. Please examine and submit a report.

1. Injury with swelling near the right eye

2. Injury with swelling on the ankle of the right foot

Sd/-illegible

30.6.04

SPL No.20/05

Ex P 22

PW8

21.11.06

(Satyendra Kumar Singh)

Special Judge and

First Additional Session Judge, Sagar

(Emphasis supplied)

Exh.P-23:

To

The Medical Officer

District Hospital

Sir,

It is requested that Mahendra Sonkar accused of Crime No.0/04 and his wife opposed the proceedings, as a result Inspector N.K. Sic sustained injuries in the middle finger of left hand causing swelling. Kindly examine and send report.

Sd/-

30.6.24

SPL No.20/05

Ex P23

PW8

21.11.06

Sd/-

(Satyendra Kumar Singh)

Special Judge and

First Addl Sessions Judge, Sagar

Exh.P-24:

Illegible

Subject : Constable Rajkumar illegible

It is requested that in Case Crime No. sic 7, 13(1) D, 13(2) PC Act, Mahendra Kumar Sonkar and his wife tried to sic avoid the proceedings and resisted and hence the constable has suffered the following injuries to examine & give the report.

1. Swelling in the wrist of the right hand

2. Small scratches on both hands

3. Many sic injuries

Sd/-illegible

30.6.04

SPL NO.20/05

Ex P24

PW8

21.11.06

(Satyendra Kumar Singh)

Special Judge and

First Additional Session Judge, Sagar

(Emphasis supplied)

Exh.P-25

Sic District

Subject: Constable Shivshankar sic

In the proceedings of Crime No.0/04 u/s 7, 13(1)D, sic PC Act, accused Mahendra Kumar Sonkar sic and his wife resisted in which constable sustained following injuries. Examine and give the report.

1. There is swelling in the little finger of the right hand.

2. There is pain in the chest and back.

Sd/-illegible

30.6.04

SPL NO.20/05

Ex P.25

P.628

21.11.06

(Satyendra Kumar Singh)

Special Judge and First

Additional Session Judge, Sagar"

(Emphasis supplied)

25. PW-9 Niranjan Singh has deposed as under:

"2. …After some time the non-applicant Patwari came by his motorcycle and he contacted with the applicant in front of his residence. The applicant gave the amount of bribe to the accused Patwari. He took it in his hand and placed it in the pocket of his shirt.

3. During this time constable Shivshanker and Rajkumar suddenly tried to catch and the accused patwari tried to run away and constable Shivshanker and Rajkumar caught him. At the same time taking advantage of the darkness, the accused threw away the bribe money on the ground and the accused began to swing and jerk ('jhooma-jhatki' as available from the Hindi version). At the same time wife of the accused came out of the residence and began to cry. Enough crowds assembled at the spot of incident and patwari was doing too much swing and jerk….

During the incident I had suffered injuries near my right eye and at the ankle of the right leg. In this regard my medical examination was also done at District hospital Tili Sagar"

(Emphasis supplied)

26. We have also examined the evidence of Dr. H.L. Bhuria PW-13, who recorded the injuries as mentioned hereinabove and stated that the injuries might have been caused with hard and blunt object.

(Emphasis supplied)

27. We have also carefully perused the defence witnesses including the evidence of DW-2 Sitaram Chourasia who generally states that three to four persons came and there was pushing and shoving ('dhakka mukki' as is evident from the Hindi deposition) between the accused and those persons.

28. Having considered the oral evidence and the medical evidence, we are constrained to conclude that the prosecution has not established that the appellant has assaulted or used criminal force against the trap party. In fact, what transpires is that when the appellant was apprehended there appears to have been an attempt by the appellant to wriggle out and jostling and pushing appears to have happened, in the process of the appellant trying to extricate himself from the arrest. None of the ingredients of assault or criminal force have been attracted.

29. Further, there is absolutely no evidence to show that the accused used any hard and blunt object. PW-13 Dr. H.L. Bhuria had deposed that the injuries on PW-9 Niranjan Singh, PW-8 N.K. Parihar, Constable Raj Kumar and Constable Shivshankar might have been caused by hard and blunt object. In view of the above, there is no evidence to indicate that the accused assaulted or used criminal force on the trap party in execution of their duties or for the purpose of preventing or deterring them in discharging their duties. In short, none of the ingredients of Section 353 are attracted. The jostling and pushing by the accused with an attempt to wriggle out, as is clear from the evidence, was not with any intention to assault or use criminal force.

30. In fact, it will be interesting here to contrast Section 353 of the IPC with Section 186 of the IPC under which Section the appellant has not been charged. Section 186 of the IPC reads as follows.

> **"186. Obstructing public servant in discharge of public functions.-** Whoever voluntarily obstructs any public servant in the discharge of his public functions, shall be

punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both."

31. To take cognizance of Section 186, the procedure under Section 195(1)(a)(i) of the Cr.P.C. ought to have been followed. There is not even a complaint by the officer against the appellant for any offence having been committed under Section 186 of the IPC.

32. In view of the above, we have no hesitation in setting aside the judgment of the High Court. The result would be that the appellant would stand acquitted for the offence under Section 353 of the IPC. The Conviction under Section 353 of the IPC and the sentence imposed are set aside. The appeal is allowed. The bail bonds shall stand discharged.

Result of the case: Appeal Allowed.

†*Headnotes prepared by:* Aandrita Deb, Hony. Associate Editor
(*Verified by:* Shadan Farasat, Sr. Adv.)

[2024] 8 S.C.R. 949 : 2024 INSC 594

In Re: Order of Punjab and Haryana High Court dated 17.07.2024 and Ancillary Issues

(Suo Motu Writ (Civil) No. 8 of 2024)

07 August 2024

[Dr Dhananjaya Y Chandrachud,* CJI, Sanjiv Khanna, B.R. Gavai, Surya Kant and Hrishikesh Roy, JJ.]

Issue for Consideration

Whether gratuitous observations passed by a Judge of a High Court regarding previous orders of the Supreme Court, undermine the authority of the Supreme Court and should therefore be expunged?

Headnotes†

***Suo moto* proceedings initiated by Supreme Court – Observations made in an order by Judge of the High Court of Punjab and Haryana on the Supreme Court found to be a matter of grave concern – Totally unnecessary for the ultimate order passed – Gratuitous observations on previous orders passed by the Supreme Court or for that matter in the course of the same proceedings absolutely unwarranted – Observations to be expunged from the order – Greater caution to be exercised in the future while dealing with orders of the Supreme Court and by the Division Bench of the High Court:**

Held: 1. In an order dated 17.01.2024, a Judge of the High Court of Punjab and Haryana made certain observations regarding the Supreme Court of India – These observations were found to be a matter of grave concern and totally unnecessary for the ultimate order passed – Held that such observations tend to bring the entire judicial machinery into disrepute, and affects not only the dignity of the Supreme Court, but of the High Courts as well – Necessity of judicial discipline and respect for the hierarchical structure of the judiciary underscored – Intended to preserve the dignity of all institutions, whether at the level of District, High Court or Supreme Court. [Paras 4 and 6]

2. Compliance with orders passed by the Supreme Court is not a matter of choice, but a matter of bounden constitutional obligation, given the structure of the Indian legal system and the authority of

* Author

the Supreme Court which heads the process of judicial adjudication of the country. [Para 4]

3. Plain function of the Supreme Court to set right any attempt to dislocate the sanctity of judicial authority and maintenance of judicial discipline – Observations made by Judge in order dated 17.07.2024 expunged – Greater caution expected to be exercised in the future while dealing with orders of the Supreme Court and of the Division Bench of the High Court. [Para 8]

4. Whether individual judges are in agreement with the merits or otherwise of an order passed by a superior court is beside the point – Every Judge is bound by the discipline which the hierarchical nature of the judicial system imposes within the system – No Judge is personally affected by the orders passed either by the Division Bench of the High Court or, as the case may be, by the Supreme Court. [Para 8]

5. In an age where there is widespread reporting of every Court proceeding, particularly in the context of live streaming which is intended to provide access to justice to citizens, it is all the more necessary that Judges should exercise due restraint and responsibility in the observations which are made in the course of proceedings sanctity of judicial process can be caused incalculable harm. [Para 9]

Notice not issued to Judge as it would put him in a situation of being subject to a judicial adjudication or inquiry by this Court. [Para 10]

Case Law Cited

Tirupati Balaji Developers (P) Ltd. v. State of Bihar **(2004) 5 SCC 1 – followed.**

List of Keywords

Contempt of Court; Contempt Proceeding; Judicial Discipline; Hierarchical Nature; Gratuitous Observation; Bounden Constitutional Obligation; Suo Motu Notice; Judicial Authority; Access to Justice; Sanctity of Judicial Process.

Case Arising From

CIVIL ORIGINAL JURISDICTION: Suo Motu Writ (Civil) No. 8 of 2024

(Under Article 32 of The Constitution of India)

In Re: Order of Punjab and Haryana High Court dated 17.07.2024 and Ancillary Issues

Appearances for Parties

By Courts Motion.

R. Venkataramani, Attorney General, Tushar Mehta, SG, Lokesh Sinhal, Sr. AAG, Kanu Agrawal, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Judgment

Dr Dhananjaya Y Chandrachud, CJI

1. The Court has taken up these proceedings *suo motu* in the context of an order dated 17 July 2024 passed by Justice Rajbir Sehrawat, Judge of the High Court of Punjab and Haryana, while entertaining a contempt proceeding titled **Naurty Ram** v **Devender Singh IAS and Anr.**[1]

2. The underlying facts which gave rise to the contempt proceeding do not need to engage the attention of this Court. However, while dealing with the contempt proceedings, Justice Sehrawat has made observations in regard to the Supreme Court of India. Those observations are a matter of grave concern. Since the order forms part of the public record of the High Court, it is unnecessary for this Court to extract those observations, particularly, given the course of action which this Court proposes to adopt.

3. The principles governing the comity between the High Courts, on one hand, and the Supreme Court as the apex judicial institution of the country, on the other, are dealt with in numerous decisions of this Court. We may only reiterate the principles which have been laid down in the decision of this Court in **Tirupati Balaji Developers (P) Ltd** v **State of Bihar**.[2]

4. Judicial discipline in the context of the hierarchical nature of the judicial system is intended to preserve the dignity of all institutions, whether at the level of District, High Court or Supreme Court. The observations in the order of the Single Judge dated 17 July 2024 were totally unnecessary for the ultimate order which was passed. Gratuitous

1 COCP-87-2022 (O&M)

2 (2004) 5 SCC 1

observations in regard to previous orders passed by the Supreme Court or for that matter in the course of the same proceedings are absolutely unwarranted. Compliance with the orders passed by the Supreme Court is not a matter of choice, but a matter of bounden constitutional obligation, bearing in mind the structure of the Indian legal system and the authority of the Supreme Court which heads the process of judicial adjudication of the country. In passing its orders, including orders of the nature that gave rise to the observations of the Single Judge, this Court discharges its plain duty. Parties may be aggrieved by an order. Judges are never aggrieved by an order which is passed by a higher constitutional or appellate forum.

5. The Attorney General for India and the Solicitor General, while dilating on the background of the case which led to the passing of the order dated 17 July 2024, have submitted that the order of the Single Judge has affected the dignity not only of this Court, but of the High Court as well.

6. This Court is constrained to take *suo motu* notice of the contents of the order dated 17 July 2024 passed by the Single Judge in view of the fact that such observations tend to bring the entire judicial machinery into disrepute. This affects not only the dignity of this Court, but of the High Courts as well. We are accordingly of the view that such observations were wholly unnecessary for the conduct of the judicial proceedings before the High Court and ought to have been eschewed. Though there is a merit in the submission which has been urged by the Attorney General and the Solicitor General, we are inclined to exercise a degree of restraint in pursuing a further course of action based on the observations of the Single Judge.

7. The Court is apprised of the fact that the Division Bench of the High Court presided over by the Chief Justice has taken *suo motu* notice[3] of the observations made by the Single Judge and stayed the operation of the order of the Single Judge.

8. Notwithstanding the aforesaid exercise which has been carried out *bona fide* by the Bench presided over by the Chief Justice, we are of the view that in a situation where the authority of this Court is

3 CWP-19068-2024 (O&M) dated 7 August 2024

undermined by gratuitous observations made by the Single Judge, it is the plain function of this Court to set right any attempt to dislocate the sanctity of judicial authority and maintenance of judicial discipline. We accordingly expunge the observations which have been made by Justice Rajbir Sehrawat in the order dated 17 July 2024 and expect that greater caution should be exercised in the future while dealing with orders of the Supreme Court and, for that matter, the orders passed by the Division Bench of the High Court. Whether individual judges are in agreement with the merits or otherwise of an order passed by a superior court is besides the point. Every Judge is bound by the discipline which the hierarchical nature of the judicial system imposes within the system. No Judge is personally affected by the orders passed either by the Division Bench of the High Court or, as the case may be, by the Supreme Court.

9. The order dated 17 July 2024 is compounded by a video which has been circulating indicating random, gratuitous and unwarranted remarks made by Justice Rajbir Sehrawat during the course of the hearing. In an age where there is widespread reporting of every proceeding which takes place in the Court, particularly in the context of live streaming which is intended to provide access to justice to citizens, it is all the more necessary that Judges should exercise due restraint and responsibility in the observations which are made in the course of proceedings. Observations of the nature which have proliferated in the video of the proceedings of the Single Judge can cause incalculable harm to the sanctity of the judicial process. We hope and trust that circumspection shall be exercised in the future.

10. We are not inclined to issue notice to the Single Judge of the High Court whose observations form the subject matter of the order dated 17 July 2024. Doing so would place the Judge in a situation of being subject to a judicial adjudication or inquiry by this Court, which we are inclined to desist from doing, at this stage. However, this Court in the exercise of its affirmative obligations as the custodian of the adjudicatory process would be failing in its duty if it were not to intervene by expunging the remarks which were made in the order dated 17 July 2024. The observations in the order dated 17 July 2024 are accordingly expunged with an expression of caution. We hope that it would not be necessary for this Court to intervene any such

matter in the future either in relation to the same Judge or any other Judge in the country.

10. The present proceedings are accordingly disposed of.

Result of the case: Proceedings Disposed of.

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

[2024] 8 S.C.R. 955 : 2024 INSC 637

Prem Prakash
v.
Union of India Through The Directorate of Enforcement

(Criminal Appeal No. 3572 of 2024)

28 August 2024

[B.R. Gavai and K.V. Viswanathan,* JJ.]

Issue for Consideration

When a person is in judicial custody/custody in another case investigated by the same Investigating Agency, whether the statements recorded (in the present case, the statements dated 03.08.2023, 04.08.2023, 11.08.2023) for a new case in which his arrest is not yet shown, and which are claimed to contain incriminating material against the maker, would be admissible under Section 50, Prevention of Money Laundering Act, 2002.

Headnotes†

Prevention of Money Laundering Act, 2002 – s.50 – Evidence Act, 1872 – s.25 – Appellant was in judicial custody from 25.08.2022 in connection with another ECIR and while he was in aforesaid judicial custody his arrest was shown in the present ECIR on 11.08.2023 – Statement of the appellant recorded while he was in custody, if admissible u/s.50:

Held: No – When an accused is in custody under PMLA irrespective of the case for which he is under custody, any statement under Section 50 PMLA to the same Investigating Agency is inadmissible against the maker – The person in custody pursuant to the proceeding investigated by the same Investigating Agency is not a person operating with a free mind and it will be extremely unsafe to render such statements admissible against the maker – Statement of the appellant if to be considered as incriminating against him, will be hit by Section 25 of the Evidence Act since he gave the statement whilst in judicial custody, pursuant to another proceeding instituted by the same Investigating Agency – As the appellant was taken from the judicial custody to record the statement, it will be a travesty of justice to render the statement admissible against him – Since the words 'procedure established

* Author

by law' occurring in Article 21 has to be a reasonable and valid procedure – The statement of the appellant under Section 50 cannot be relied upon against him in ECIR No. 5 of 2023 even though the appellant was at that point in custody in ECIR No. 4 of 2022 – Further, statements of the co-accused will not have the character of substantive evidence and the law laid down under Section 30 of the Evidence Act by this Court while dealing with the confession of the co-accused will apply – Statement of the co-accused does not prima facie indicate anything about the role of the appellant in the forgery of sale deed and other documents or being involved in the offence of money laundering – Appellant satisfied the twin conditions under Section 45 – There are reasonable grounds for believing that the appellant is not guilty of the offence of money laundering as alleged under Sections 3 and 4 of the PMLA and the appellant is not likely to commit any offence, if enlarged on bail – Impugned order quashed and set aside – Appellant granted bail. [Paras 27, 32, 34, 37, 45, 49]

Prevention of Money Laundering Act, 2002 – s.45 – Twin conditions under, discussed – Scope of enquiry – "reasonable grounds for believing" – Meaning:

Held: Court while dealing with the application for grant of bail in PMLA need not delve deep into the merits of the case and only a view of the Court based on the available material available on record is required – The words used in Section 45 are "reasonable grounds for believing" which means that the Court has to see only if there is a genuine case against the accused and the prosecution is not required to prove the charge beyond reasonable doubt. [Para 13]

Prevention of Money Laundering Act, 2002 – Bail application – Counter/response in the original Court – Significance:

Held: In cases where the Public Prosecutor takes a considered decision to oppose the bail application, the counter affidavit of the Investigating Agency should make out a cogent case specifically crystallizing albeit briefly the material sought to be relied upon to establish prima facie the three foundational facts in the given case to help the Court at the bail application stage to arrive at a conclusion within the framework laid down in Vijay Madanlal Choudhary case – It is only thereafter the presumption under Section 24 would arise and the burden would shift on the accused. [Para 15]

Prem Prakash v. Union of India Through The Directorate of Enforcement

Case Law Cited

Vijay Madanlal Choudhary and Ors. v. Union of India and Ors. [2022] 6 SCR 382 **: (2022) SCC OnLine SC 929;** *Ramkripal Meena v. Directorate of Enforcement* **SLP (Crl.) No. 3205;** *Javed Gulam Nabi Shaikh v. State of Maharashtra and Another*, **2024 SCC online 1693;** *Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra and Another* [2005] 3 SCR 345 **: (2005) 5 SCC 294;** *Rajaram Jaiswal v. State of Bihar,* **AIR 1964 SC 828;** *Nandini Satpathy v. P.L. Dani and Another* [1978] 3 SCR 608 **: (1978) 2 SCC 424;** *Kashmira Singh v. State of Madhya Pradesh* [1952] SCR 526 **– relied on.**

In Re Elukuri Seshapani Chetti, **ILR 1937 Mad 358;** *Kodangi v. Emperor,* **AIR 1932 Mad 24 – referred to.**

List of Acts

Prevention of Money Laundering Act, 2002; Evidence Act, 1872; Penal Code, 1860.

List of Keywords

Section 50 of the Prevention of Money Laundering Act, 2002; Section 45 of the Prevention of Money Laundering Act, 2002; Section 25 of the Evidence Act, 1872; Article 21 of the Constitution of India; Money laundering; Forgery of sale deed; Judicial custody; Person in judicial custody/custody in another case investigated by the same Investigating Agency; Admissibility of statements recorded; Incriminating material against the maker; Confession of the co-accused; Statements of the co-accused; Bail; 'procedure established by law'; "reasonable grounds for believing".

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 3572 of 2024

From the Judgment and Order dated 22.03.2024 of the High Court of Jharkhand at Ranchi in BA No. 9863 of 2023

Appearances for Parties

Ranjit Kumar, Siddharth Agarwal, Sr. Advs., Indrajit Sinha, Ms. Sneh Singh, Ms. Anusuya Sadhu Sinha, Sowjhanya Shankar, Harsh Yadav, Siddharth Naidu, M/s. KSN & Co., Advs. for the Appellant.

S.V. Raju, ASG, Zoheb Hussain, Annam Venkatesh, Kanu Agrawal, Mrigank Pathak, Ms. Aakriti Mishra, Arvind Kumar Sharma, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Judgment

K.V. Viswanathan, J.

1. Leave granted.

2. The present appeal challenges the judgment dated 22.03.2024 of the High Court of Jharkhand at Ranchi in B.A. No. 9863 of 2023. By the said judgment, the High Court dismissed the bail application of the appellant. The appellant sought for regular bail in connection with ECIR Case No. 5 of 2023 in ECIR-RNZO/10/2023 (hereinafter referred to as ECIR Case No. 5 of 2023) registered for the offence under Sections 3 and 4 of the Prevention of Money Laundering Act, 2002 (hereinafter referred to as 'PMLA') and pending before the Court of Special Judge, PMLA, Ranchi.

Brief Facts

3. The predicate offence on the basis of which ECIR No. 5 of 2023 was recorded on 07.03.2023 is an FIR bearing Sadar P.S. Case No. 399 of 2022 registered on 08.09.2022 for offences punishable under Sections 406, 420, 467, 468, 447, 504, 506, 341, 323 and 34 of the Indian Penal Code, 1860 (for short 'IPC'). The appellant was not named as an accused there.

4. In view of Section 420 and 467 of IPC, being Scheduled Offences, ECIR No. 5 of 2023 was registered and investigation under the PMLA was initiated. Even here the appellant was not named though the ECIR did mention certain unknown persons being involved. It is alleged that the investigation revealed falsification of the original records in the Circle Office, Bargain, Ranchi and the Office of Registrar of Assurances, Kolkata respectively and as such custody of the original registers were taken in accordance with law.

5. The substratum of the allegation leading to the complaint lodged under PMLA are as follows:- Umesh Kumar Gope complained that Rajesh Rai, Imtiaz Ahmad, Bharat Prasad, Lakhan Singh, Punit Bhargava and Bishnu Kumar Agarwal fraudulently acquired one

acre of land situated at Plot No. 28, Khata No. 37 Village Gari, Cheshire Home Road P.S. Sadar, Ranchi. The allegation was that accused Rajesh Rai S/o Jagdish Rai illegally and fraudulently made a Power of Attorney in the name of Imtiaz Ahmad and accused Bharat Prasad and on the basis of said Power of Attorney prepared a forged sale deed and sold the above-mentioned parcel of land to accused Punit Bhargava, an accomplice of the appellant for an amount of Rs. 1,78,55,800/-. It is further alleged that the said land was transferred by accused Punit Bhargava to accused Bishnu Kumar Agarwal vide two sale deeds dated 01.04.2021 for a total amount of Rs. 1,80,00,000/- (Rs.1,02,60,000/- and Rs.77,40,000). According to the Enforcement Directorate, accused Bishnu Kumar Agarwal paid Rs. 1,78,20,000/- to accused Punit Bhargava in the account of his firm Shiva Fabcons (Proprietorship firm of accused Punit Bhargava) and out of which Rs. 1,01,57,400/- was transferred to M/s Jamini Enterprises, which according to the respondent-Investigating Agency, was a firm whose beneficial owner is the appellant. The appellant was arrayed as Accused No.8 in the Prosecution Complaint of the Investigating Agency.

6. According to the Investigating Agency, it was confirmed by the Directorate of Forensic Science that Deed No. 184 of 1948, a purported sale deed, by which the property was transferred by the predecessors of Umesh Gope to Jagdish Rai, father of Rajesh Rai was forged. A separate FIR bearing No. 137 of 2023 dated 10.05.2023 for offences under Sections 120-B, 465, 467, 468 and 471 of IPC came to be registered at Hare Street Police Station Kolkata on the basis of the report of the Fact Finding Committee of the Registrar of Assurances, Kolkata. It is stated that the said FIR was also merged into ECIR No. 5 of 2023.

7. It is alleged that it was on the directions of the appellant that the sale deed was executed in favor of Punit Bhargava by Rajesh Rai for an amount of Rs. 1,78,55,800/-; that only Rs. 25 lakhs were transferred from Shiva Fabcons (Proprietorship firm of Punit Bhargava) to Rajesh Rai although the consideration amount was Rs. 1,78,55,800/- and it was shown to have been paid in the sale deed; that out of the aforesaid sum of Rs. 25 lakhs, an amount of Rs. 18 lakhs were transferred from the Bank account of Rajesh Rai to the Bank account of Green Traders (Partnership firm under the control of Md. Saddam

Hussain); that Rs. 7 lakh cash was withdrawn through cheques by Rajesh Rai; that on the directions of the appellant, mutation of the property was done in the name of Punit Bhargava, who was an accomplice of the appellant; that Punit Bhargava sold the property to the Bishnu Kumar Agarwal within a span of two months for Rs. 1.80 crore; that an amount of Rs.56,62,600/- was paid from the account of M/s Chalice Real Estate (Company of Bishnu Kumar Agarwal) on 05.04.2021 to Punit Bhargava's bank account and on 24.06.2021 an amount of Rs. 1,01,57,400/- was transferred from the account of Adarsh Heights Pvt Ltd (Company of Bishnu Agarwal) to Punit Bhargav's bank account; that the entire payment was made in the month of April and June, 2021 but the registration was done on 1st April, 2021 before the receipt of consideration. Finally, it is alleged that an amount of Rs.1,01,57,400/- was transferred to the Bank account of M/s Jamini Enterprises, which is alleged to be a firm controlled and beneficially owned by appellant - Prem Prakash.

8. It is alleged that the appellant conspired with the other accused persons, namely, Afshar Ali @ Afsu Khan, Rajesh Rai, Lakhan Singh, Imtiaz Ahmad, Bharat Prasad, Saddam Hussain, Punit Bhargava, Chhavi Ranjan and Bishnu Kumar Agarwal in the acquisition of proceeds of crime in the form of landed property. It is specifically alleged that the appellant being an accomplice of Bishnu Kumar Agarwal used his connections to assist Bishnu Kumar Agarwal in acquiring the land and that Bishnu Kumar Agarwal transferred the money to Punit Bhargava and the amount was further transferred to Jamini Enterprises.

9. The appellant was taken into custody on 11.08.2023. He was already in custody from 25.08.2022 in ECIR No. 4 of 2022. His application for bail was rejected by the Special Judge on 20.09.2023. He preferred a bail application before the High Court. The High Court has declined bail to the appellant. Aggrieved, the appellant is before us.

10. We have heard Mr. Ranjit Kumar, Learned Senior counsel for the appellant, ably assisted by Mr. Indrajit Sinha and Mr. Siddharth Naidu, learned advocates. We have also heard Mr. S.V. Raju, Learned Additional Solicitor General, ably assisted by Mr. Zoheb Hussain and Mr. Kanu Agarwal for the respondents. Learned Senior Counsels on both sides have placed their respective contentions and also filed detailed written submissions.

SECTION 45 PMLA-CONTOURS

11. Considering that the present is a bail application for the offence under Section 45 of PMLA, the twin conditions mentioned thereof become relevant. Section 45(1) of PMLA 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."

In ***Vijay Madanlal Choudhary and Ors. Vs Union of India and Ors.*** reported in (2022) SCC OnLine SC 929, this Court categorically held that while Section 45 of PMLA restricts the right of the accused to grant of bail, it could not be said that the conditions provided under Section 45 impose absolute restraint on the grant of bail. Para 131 is extracted hereinbelow:-

> **"131.** It is important to note that the twin conditions provided under Section 45 of the 2002 Act, though restrict the right of the accused to grant of bail, but it cannot be said that the conditions provided under Section 45 impose absolute restraint on the grant of bail. The discretion vests in the court, which is not arbitrary or irrational but judicial, guided by the principles of law as provided under Section 45 of the 2002 Act. …"

These observations are significant and if read in the context of the recent pronouncement of this Court dated 09.08.2024 in Criminal Appeal No. 3295 of 2024 [***Manish Sisodia (II)*** Vs. ***Directorate of Enforcement***], it will be amply clear that even under PMLA the governing principle is that "*Bail is the Rule and Jail is the Exception*". In para 53 of [***Manish Sisodia (II)***, this Court observed as under:-

> "53…..From our experience, we can say that it appears that the trial courts and the High Courts attempt to play safe in matters of grant of bail. The principle that bail is a rule and refusal is an exception is, at times, followed in breach. On account of non-grant of bail even in straight forward open and shut cases, this Court is flooded with huge number of bail petitions thereby adding to the huge pendency. It is high time that the trial courts and the High Courts should recognize the principle that "bail is rule and jail is exception."

All that Section 45 of PMLA mentions is that certain conditions are to be satisfied. The principle that, "*bail is the rule and jail is the exception*" is only a paraphrasing of Article 21 of the Constitution of India, which states that no person shall be deprived of his life or personal liberty except according to the procedure established by law. Liberty of the individual is always a Rule and deprivation is the exception. Deprivation can only be by the procedure established by law, which has to be a valid and reasonable procedure. Section 45 of PMLA by imposing twin conditions does not re-write this principle to mean that deprivation is the norm and liberty is the exception. As set out earlier, all that is required is that in cases where bail is subject to the satisfaction of twin conditions, those conditions must be satisfied.

12. Independently and as has been emphatically reiterated in ***Manish Sisodia (II) (supra)*** relying on ***Ramkripal Meena*** Vs ***Directorate***

of Enforcement (SLP (Crl.) No. 3205 of 2024 dated 30.07.2024) and ***Javed Gulam Nabi Shaikh*** Vs. ***State of Maharashtra and Another,*** 2024 SCC online 1693, where the accused has already been in custody for a considerable number of months and there being no likelihood of conclusion of trial within a short span, the rigours of Section 45 of PMLA can be suitably relaxed to afford conditional liberty. Further, ***Manish Sisodia (II) (supra)*** reiterated the holding in ***Javed Gulam Nabi Sheikh (Supra)***, that keeping persons behind the bars for unlimited periods of time in the hope of speedy completion of trial would deprive the fundamental right of persons under Article 21 of the Constitution of India and that prolonged incarceration before being pronounced guilty ought not to be permitted to become the punishment without trial. In fact, ***Manish Sisodia (II) (Supra)*** reiterated the holding in ***Manish Sisodia (I)*** Vs. ***Directorate of Enforcement*** (judgment dated 30.10.2023 in Criminal Appeal No. 3352 of 2023) where it was held as under:-

> "28. Detention or jail before being pronounced guilty of an offence should not become punishment without trial. If the trial gets protracted despite assurances of the prosecution, and it is clear that case will not be decided within a foreseeable time, the prayer for bail may be meritorious. While the prosecution may pertain to an economic offence, yet it may not be proper to equate these cases with those punishable with death, imprisonment for life, ten years or more like offences under the Narcotic Drugs and Psychotropic Substances Act, 1985, murder, cases of rape, dacoity, kidnaping for ransom, mass violence, etc. Neither is this a case where 100/1000s of depositors have been defrauded. The allegations have to be established and proven. The right to bail in cases of delay, coupled with incarceration for a long period, depending on the nature of the allegations, should be read into Section 439 of the Code and Section 45 of the PML Act. The reason is that the constitutional mandate is the higher law, and it is the basic right of the person charged of an offence and not convicted, that he be ensured and given a speedy trial. When the trial is not proceeding for reasons not attributable to the accused, the court, unless there are good reasons, may well be guided to exercise

> the power to grant bail. This would be truer where the trial would take years."

It is in this background that Section 45 of PMLA needs to be understood and applied. Article 21 being a higher constitutional right, statutory provisions should align themselves to the said higher constitutional edict.

Scope of Inquiry under Section 45 of PMLA

13. Coming back to the scope of inquiry under Section 45, ***Vijay Madanlal Choudhary*** ***(Supra),*** while reiterating and agreeing with the holding in ***Ranjitsing Brahmajeetsing Sharma vs. State of Maharashtra and Another*** reported in (2005) 5 SCC 294, held that the Court while dealing with the application for grant of bail in PMLA need not delve deep into the merits of the case and only a view of the Court based on the available material available on record is required. It held that the Court is only required to place its view based on probability on the basis of reasonable material collected during investigation. The words used in Section 45 are "*reasonable grounds for believing*" which means that the Court has to see only if there is a genuine case against the accused and the prosecution is not required to prove the charge beyond reasonable doubt. We deem it fit to extract the relevant portion (Para 131) from ***Vijay Madanlal Choudhary*** ***(supra):***

> "131. It is important to note that the twin conditions provided under section 45 of the 2002 Act, though restrict the right of the accused to grant of bail, but it cannot be said that the conditions provided under section 45 impose absolute restraint on the grant of bail. The discretion vests in the court which is not arbitrary or irrational but judicial, guided by the principles of law as provided under section 45 of the 2002 Act. While dealing with a similar provision prescribing twin conditions in MCOCA, this court in Ranjitsing Brahmajeetsing Sharma (supra), held 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 the 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 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"

We are in agreement with the observation made by the court in Ranjitsing Brahmajeetsing Sharma (supra). The

court while dealing with the application for grant of bail need not delve deep into the merits of the case and only a view of the court based on available material on record is required. The court will not weigh the evidence to find the guilt of the accused which is, of course, the work of Trial Court. The court is only required to place its view based on probability on the basis of reasonable material collected during investigation and the said view will not be taken into consideration by the Trial court in recording its finding of the guilt or acquittal during trial which is based on the evidence adduced during the trial. As explained by this court in Nimmagadda Prasad (supra), the words used in section 45 of the 2002 Act are "reasonable grounds for believing" which means the court has to see only if there is a genuine case against the accused and the prosecution is not required to prove the charge beyond reasonable doubt."

(emphasis supplied)

Importance of the foundational facts-under Section 24 PMLA

14. In ***Vijay Madanlal Choudhary*** ***(supra)*** dealing with Section 24 of the PMLA, the three-Judge Bench held as under:-

"97. Be that as it may, we may now proceed to decipher the purport of section 24 of the 2002 Act. In the first place, it must be noticed that the legal presumption in either case is about the involvement of proceeds of crime in money-laundering. This fact becomes relevant, only if, the prosecution or the authorities have succeeded in establishing at least three basic or foundational facts. **First, that the criminal activity relating to a scheduled offence has been committed. Second, that the property in question has been derived or obtained, directly or indirectly, by any person as a result of that criminal activity. Third, the person concerned is, directly or indirectly, involved in any process or activity connected with the said property being proceeds of crime. On establishing the fact that there existed proceeds of crime and the person concerned was involved in any process or activity connected therewith, itself, constitutes offence of money-laundering.** The nature

of process or activity has now been elaborated in the form of Explanation inserted vide Finance (No. 2) Act, 2019. On establishing these foundational facts in terms of section 24 of the 2002 Act, a legal presumption would arise that such proceeds of crime are involved in money-laundering. The fact that the person concerned had no causal connection with such proceeds of crime and he is able to disprove the fact about his involvement in any process or activity connected therewith, by producing evidence in that regard, the legal presumption would stand rebutted.

99. Be it noted that the legal presumption under section 24(a) of the 2002 Act, would apply when the person is charged with the offence of money-laundering and his direct or indirect involvement in any process or activity connected with the proceeds of crime, is established. The existence of proceeds of crime is, therefore, a foundational fact, to be established by the prosecution, including the involvement of the person in any process or activity connected therewith. Once these foundational facts are established by the prosecution, the onus must then shift on the person facing charge of offence of money-laundering-to rebut the legal presumption that the proceeds of crime are not involved in money-laundering, by producing evidence which is within his personal knowledge. In other words, the expression "presume" is not conclusive. It also does not follow that the legal presumption that the proceeds of crime are involved in money-laundering is to be invoked by the Authority or the court, without providing an opportunity to the person to rebut the same by leading evidence within his personal knowledge.

100. Such onus also flows from the purport of section 106 of the Evidence Act. Whereby, he must rebut the legal presumption in the manner he chooses to do and as is permissible in law, including by replying under section 313 of the 1973 Code or even by cross-examining prosecution witnesses. The person would get enough opportunity in the proceeding before the Authority or the court, as the case may be. He may be able to discharge his burden by showing that he is not involved in any process or activity

> connected with the proceeds of crime. In any case, in terms of section 114 of the Evidence Act, it is open to the court to presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case. Considering the above, the provision under consideration [section 24(a)] by no standards can be said to be unreasonable much less manifestly arbitrary and unconstitutional."
>
> (Emphasis supplied)

Importance of the counter to the bail application – filed in the original Court

15. In view of the importance of the three basic foundational facts that the prosecution needs to establish, the counter/response to the bail application in the original Court is very significant in PMLA bail matters. In cases where the Public Prosecutor takes a considered decision to oppose the bail application, the counter affidavit of the Investigating Agency should make out a cogent case as to how the three foundational facts set out hereinabove are prima facie established in the given case to help the Court at the bail application stage to arrive at a conclusion within the framework laid down in ***Vijay Madanlal Choudhary (supra)***. It is only thereafter the presumption under Section 24 would arise and the burden would shift on the accused. The counter to the bail application should specifically crystallize albeit briefly the material sought to be relied upon to establish prima facie the three foundational facts. It is after the foundational facts are set out that the accused will assume the burden to convince the court within the parameters of the enquiry at the Section 45 stage that for the reasons adduced by him there are reasonable grounds to believing that he is not guilty of such offence.

Analysis and Reasons

16. The contention of the prosecution is that (i) the appellant connived with accused persons, namely, Afshar Ali, Saddam Hussain and others who created a forged Sale Deed No. 184 of 1948, and on the strength of the sale deed the property was sold by Rajesh Rai (associate of Afshar Ali) to Punit Bhargava a close associate of

the appellant; (ii) that Rs. 25 lakhs were transferred to the bank account of Rajesh Rai and later Rs. 18 lakh (out of the 25 lakhs) was transferred to the bank account of M/s Green Traders, a firm controlled by Md. Saddam Hussain even though the sale consideration was Rs. 1,78,55,800/-; (iii) that the appellant is aware of the forgery committed by Afshar Ali & others and intentionally acquired the property in the name of Punit Bhargava, who later sold the property within 2 months to Bishnu Agarwal for Rs. 1.80 crore and out of the said amount, Rs. 1,01,57,400/- was transferred by Punit Bhargava to M/s Jamini Enterprises, a firm controlled and beneficially owned by the appellant; (iv) that the accused persons had full knowledge of the transaction, inasmuch as though the sale deed was executed in favor of Punit Bhargava through accused Rajesh Rai on 06.02.2021, payment was made on 12.02.2021 and that only 25 lakh was paid to Rajesh Rai and mutation was done and thereafter sold to Bishnu Agarwal and all payments were received by Punit Bhargava; (v) that no subsequent payments were to be made further, as according to the prosecution, all concerned knew that the deeds were fake, and (vi) that Bishnu Agarwal made the payment in the month of April and June 2021, but the registration was done on 1st April, 2021 and as such the registration was done before consideration.

(Emphasis supplied)

17. The prosecution relies on the statements under Section 50 of the PMLA of Afshar Ali, Rajdeep Kumar, Md. Saddam Hussain, Punit Bhargava and of the appellant himself. They also rely on the call detail records of the other accused, namely, Afshar Ali and Rajdeep Kumar. They also alleged that the appellant, with the help of another accused person Chhavi Ranjan, by influencing the circle officials got the land mutated and hence, according to the prosecution, the role of the appellant is pivotal.

18. Learned ASG for the respondent has taken us through summary of the statements of the persons mentioned hereinabove, as adverted to in the complaint, filed by the Enforcement Directorate.

Admissibility of the Statement of the Appellant

19. In the oral submissions and also as elaborated in the detailed written submissions by the respondent-Enforcement Directorate, reliance is sought to be placed on the statements of the appellant. This is stoutly

resisted on the side of the appellant by contending that the appellant was in custody from 25th August 2022 in ECIR No. 4/2022; that his arrest was shown in the present case on 11th August 2023 and it is submitted that statements recorded while in custody (although in ECIR No.4/2022) will not be admissible and will be hit by Section 25. The statement of the appellant-Prem Prakash, the summary of which, as given in the complaint, reads as under:-

> "**8.23 Prem Prakash** - In his statement dated 04.08.2023 (RUD No.41) recorded in judicial custody at Birsa Munda Central Jail, Hotwar, Ranchi, he stated that he knows Bishnu Kumar Agarwal as a businessman and sometimes, he has met him during marriage events. He further stated that Punit Bhargava is like his younger brother and he is from his native place, so he knows him since childhood.
>
> From his statement dated 03.08.2023, (RUD No.40) it reveals those three persons including Afshar Ali used to visit him for the Cheshire Home Road property. He introduced them with Rajdeep Kumar and got the property verified. After some time, with the consent of Punit Bhargava, he got the property registered in the name of Punit Bhargava and later this property was sold to Bishnu Kumar Agarwal at a consideration price of Rs. 1.78 crores. His statement also reveals that Rajdeep used to visit Chhavi Ranjan on his instructions for the landed properties. However, in his statement dated 15.08.2023, he started concealing facts regarding meeting between Afshar Ali, Md. Saddam Hussain and others with Chhavi Ranjan.
>
> It may be mentioned that Rajdeep is a person who worked under Prem Prakash as his employee and had visited the office of the accused Chhavi Ranjan on directions of Prem Prakash with the accused persons Afshar All and Md. Saddam Hussain. This fact has also been admitted by Rajdeep Kumar in his statement under section 50 of PMLA, 2002 recorded on 24.04.2023. (RUD No. 76) Further, several calls have also been identified to have taken place during the scrutiny of the CDR which have also been mentioned below in the relevant para."
>
> (Emphasis supplied)

20. In his statement of 04.08.2023, he stated that he knew Bishnu Kumar Agarwal and has met him during Marriage Events; that Punit Bhargava was like his younger brother who hailed from his native place, and he had known him since childhood. That in his statement of 03.08.2023, he stated that persons including Afshar Ali used to visit him for the Cheshire Home property and that he introduced him to Rajdeep Kumar and got the property verified. That with the consent of Punit Bhargava, he got the property registered in the name of Punit Bhargava and later the property was sold to Bishnu Kumar Agarwal at a consideration of Rs. 1.78 crore. The statement, as summarized, taken as it is does not prima facie make out a case of money laundering against the appellant. It also does not point to the involvement of the appellant prima facie in the forgery.

21. Independent of the above, there is one important issue which arises in this case. It has to be pointed out that the appellant has been in judicial custody from 25.08.2022 in connection with another ECIR, namely, ECIR No. 4 of 2022 and while in judicial custody his arrest was shown in the current ECIR, namely, ECIR No. 5 on 11.08.2023. The statements of the appellant were recorded on 03.08.2023, 04.08.2023, 11.08.2023, 12.08.2023, 14.08.2023, 15.08.2023 and 30.08.2023.

22. The question that arises is when a person is in judicial custody/custody in another case investigated by the same Investigating Agency, whether the statements recorded (in this case the statements dated 03.08.2023, 04.08.2023, 11.08.2023) for a new case in which his arrest is not yet shown, and which are claimed to contain incriminating material against the maker, would be admissible under Section 50?

23. In ***Vijay Madanlal Choudhary*** ***(supra),*** addressing the scope of Section 50, following has been held:-

> **"159….However, if his/her statement is recorded after a formal arrest by the ED official, the consequences of Article 20(3) or Section 25 of the Evidence Act may come into play to urge that the same being in the nature of confession, shall not be proved against him.'**
>
> **(Emphasis supplied)**

The three-judge Bench in ***Vijay Madanlal Choudhary*** ***(supra)*** has apart from Article 20(3) also adverted to Section 25 of the Evidence Act. Section 25 of the Evidence Act reads as under:-

> **"25. Confession to police officer not to be proved.**- No confession made to a police officer shall be proved as against a person accused of any offence.

24. ***Vijay Madanlal Choudhary*** ***(supra)*** though held that the authorities under the PMLA are not police officers, did anticipate a scenario where in a given case, the protection of Section 25 of the Evidence Act may have to be made available to the accused. The Court observed that such situations will have to be examined on a case-to-case basis. We deem it appropriate to extract Para 172 of ***Vijay Madanlal Choudhary*** ***(supra).***

> "172. In other words, there is stark distinction between the scheme of the NDPS Act dealt with by this court in Tofan Singh (supra) and that in the provisions of the 2002 Act under consideration. **Thus, it must follow that the authorities under the 2002 Act are not police officers.** Ex-consequenti, the statements recorded by the authorities under the 2002 Act, of persons involved in the commission of the offence of money-laundering or the witnesses for the purposes of inquiry/investigation, cannot be hit by the vice of article 20(3) of the Constitution or for that matter, article 21 being procedure established by law. **In a given case, whether the protection given to the accused who is being prosecuted for the offence of money-laundering, of section 25 of the Evidence Act is available or not, may have to be considered on case-to-case basis being rule of evidence."**
>
> (Emphasis supplied)

25. This Court in ***Vijay Madanlal Choudhary*** ***(supra)*** anticipated the myriad situations that may arise in the recording of the Section 50 statement and discussed the parameters for dealing with them. In ***Rajaram Jaiswal*** vs. ***State of Bihar***, AIR 1964 SC 828, a judgment quoted in extenso in ***Vijay Madanlal Choudhary*** ***(supra),*** this Court observed that the expression "police officer " in Section 25 of the Evidence Act is not confined to persons who are members of the regularly constituted police force. Further, setting out the test for determining whether an officer is a "police officer " for the purpose of Section 25 of the Evidence Act, this Court in ***Rajaram Jaiswal (supra)*** held (quoted from para 165 of ***Vijay Madanlal Choudhary*** ***(supra)***

"165(ii) It may well be that a statute confers powers and imposes duties on a public servant, some of which are analogous to those of a police officer. But by reason of the nature of other duties which he is required to perform he may be exercising various other powers also. It is argued on behalf of the State that where such is the case the mere conferral of some only of the powers of a police officer on such a person would not make him a police officer and, therefore, what must be borne in mind is the sum total of the powers which he enjoys by virtue of his office as also the dominant purpose for which he is appointed. The contention thus is that when an officer has to perform a wide range of duties and exercise correspondingly a wide range of powers, the mere fact that some of the powers which the statute confers upon him are analogous to or even identical with those of a police officer would not make him a police officer and, therefore, if such an officer records a confession it would not be hit by S. 25 of the Evidence Act. **In our judgment what is pertinent to bear in mind for the purpose of determining as to who can be regarded a 'police officer' for the purpose of this provision is not the totality of the powers which an officer enjoys but the kind of powers which the law enables him to exercise**. The test for determining whether such a person is a "police officer" for the purpose of S. 25 of the Evidence Act would, in our judgment, be whether the powers of a police officer which are conferred on him or which are exercisable by him because he is deemed to be an officer in charge of police station establish a direct or substantial relationship with the prohibition enacted by S. 25, that is, the recording of a confession. **In other words, the test would be whether the powers are such as would tend to facilitate the obtaining by him of a confession from a suspect or delinquent. If they do, then it is unnecessary to consider the dominant purpose for which he is appointed or the question as to what other powers he enjoys. These questions may perhaps be relevant for consideration where the powers of the police officer conferred upon him are of a very limited character**

and are not by themselves sufficient to facilitate the obtaining by him of a confession."

(Emphasis supplied)

26. Four decades ago, V.R. Krishna Iyer, J. in his inimitable style, speaking for this Court in ***Nandini Satpathy Vs P.L. Dani and Another*** (1978) 2 SCC 424 observed as under:-

> "50. We, however, underscore the importance of the specific setting of a given case for judging the tendency towards guilt. **Equally emphatically, we stress the need for regard to the impact of the plurality of other investigations in the offing or prosecutions pending on the amplitude of the immunity. "To be witness against oneself" is not confined to particular offence regarding which the questioning is made but extends to other offences about which the accused has reasonable apprehension of implication from his answer. This conclusion also flows from "tendency to be exposed to a criminal charge". "A criminal charge" covers any criminal charge then under investigation or trial or which imminently threatens the accused.**"
>
> (Emphasis supplied)
>
> "57. We hold that Section 161 enables the police to examine the accused during investigation. The prohibitive sweep of Article 20(3) goes back to the stage of police interrogation- not, as contended, commencing in court only. In our judgment, the provisions of Article 20(3) and Section 161(1) substantially cover the same area, so far as police investigations are concerned. **The ban on self-accusation and the right to silence, while one investigation or trial is under way, goes beyond that case and protects the accused in regard to other offences pending or imminent, which may deter him from voluntary disclosure of criminatory matter. We are disposed to read 'compelled testimony' as evidence procured not merely by physical threats or violence but by psychic torture, atmospheric pressure, environmental coercion tiring interrogative prolixity,**

> **overbearing and intimidatory methods and the like** – not legal penalty for violation. So, the legal perils following upon refusal to answer, or answer truthfully, cannot be regarded as compulsion within the meaning of Article 20(3). The prospect of prosecution may lead to legal tension in the exercise of a constitutional right, but then, a stance of silence is running a calculated risk. **On the other hand, if there is any mode of pressure, subtle or crude, mental or physical, direct or indirect, but sufficiently substantial, applied by the policeman for obtaining information from an accused strongly suggestive of guilt, it becomes 'compelled testimony', violative of Article 20(3).**"
>
> (Emphasis supplied)

27. In the facts of the present case, we hold that the statement of the appellant if to be considered as incriminating against the maker, will be hit by Section 25 of the Evidence Act since he has given the statement whilst in judicial custody, pursuant to another proceeding instituted by the same Investigating Agency. Taken as he was from the judicial custody to record the statement, it will be a travesty of justice to render the statement admissible against the appellant.

28. The appellant accused cannot be told that after all while giving this statement:- "*you were wearing a hat captioned 'ECIR 5/2023' and not the hat captioned 'ECIR 4/2022'".*

29. A complete reading of ***Vijay Madanlal Choudhary*** ***(supra),*** particularly, paragraphs 159, 165 and 172 mandate us to ask ourselves the query: Is a reasonable inference legitimately possible that, due to the vulnerable position in which the appellant was placed and the dominating position in which the Investigating Agency was situated, in view of the arrest in the other proceeding that, there obtained a conducive atmosphere to obtain a confession? We certainly think so. The question is not whether it actually happened. The question is could it have been possible.

30. We are supported in this view by two old judgments of the Madras High Court. In Re *Elukuri Seshapani Chetti* (ILR 1937 Mad 358) Justice Mockett following the judgment of Justice Jackson *In Kodangi V. Emperor (AIR 1932 Mad 24.)* held as under:-

> **"In my judgment this is clearly a confession, as I have already said, and, as has been pointed out by Jackson J. *In Kodangi V. Emperor (AIR 1932 Mad 24.)* a confession made to the Police in the course of investigating crime A, although it relates to another crime B, is equally inadmissible. The whole spirit of section 25 of the Indian Evidence Act is to exclude confessions to the police and, the moment a statement is found to amount to a confession, I do not think it matters in the slightest of what crime it is said to be a confession."**
>
> (Emphasis supplied)

31. We feel that the principle laid down there on is applicable. In fact, the three-Judge Bench in ***Vijay Madanlal Choudhary*** ***(supra),*** in the para extracted hereinabove, expressly refers to Section 25 of the Evidence Act while dealing with statements recorded when the person is in custody.

32. We have no hesitation in holding that when an accused is in custody under PMLA irrespective of the case for which he is under custody, any statement under Section 50 PMLA to the same Investigating Agency is inadmissible against the maker. The reason being that the person in custody pursuant to the proceeding investigated by the same Investigating Agency is not a person who can be considered as one operating with a free mind. It will be extremely unsafe to render such statements admissible against the maker, as such a course of action would be contrary to all canons of fair play and justice.

33. We also draw support from the way Section 50 is structured. Section 50 reads as under:-

> "**Section 50. Powers of authorities regarding summons, production of documents and to give evidence, etc**.
>
> (1) The Director shall, for the purposes of section 13, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908) while trying a suit in respect of the following matters, namely:--
>
> (a) discovery and inspection;

(b) enforcing the attendance of any person, including any officer of a reporting entity and examining him on oath;

(c) compelling the production of records;

(d) receiving evidence on affidavits;

(e) issuing commissions for examination of witnesses and documents; and

(f) any other matter which may be prescribed.

(2) The Director, Additional Director, Joint Director, Deputy Director or Assistant Director shall have power to summon any person whose attendance he considers necessary whether to give evidence or to produce any records during the course of any investigation or proceeding under this Act.

(3) All the persons so summoned shall be bound to attend in person or through authorised agents, as such officer may direct, and shall be bound to state the truth upon any subject respecting which they are examined or make statements, and produce such documents as may be required.

(4) Every proceeding under sub-sections (2) and (3) shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code (45 of 1860).

(5) Subject to any rules made in this behalf by the Central Government, any officer referred to in sub-section (2) may impound and retain in his custody for such period, as he thinks fit, any records produced before him in any proceedings under this Act:

Provided that an Assistant Director or a Deputy Director shall not--

(a) impound any records without recording his reasons for so doing; or

(b) retain in his custody any such records for a period exceeding three months, without obtaining the previous approval of the Joint Director."

Section 50 (1)(b) speaks of enforcing the attendance of any person, Section 50 (2) speaks of the authorized officials having the power to summon any person whose attendance they consider necessary whether to give evidence or to produce any records during the course of any investigation or proceeding under the Act. Section 50 (3) states that all persons so summoned shall be bound to attend in person or through authorized agents, as such officer may direct, and shall be bound to state the truth upon any subject respecting which they are examined or make statements, and produce such documents and Section 50(4) states that every proceeding under sub-Sections (2) and (3) shall be deemed to be in judicial proceeding. A person in judicial custody being not a free person cannot be summoned and any statement to be recorded will be after obtaining the permission of the Court which has remanded him to the judicial custody in the other case.

34. In view of the above and keeping the salutary principle of Article 21 in mind, we hold that since the words '*procedure established by law*' occurring in Article 21 has to be a reasonable and valid procedure, the statement of the appellant under Section 50 cannot be relied upon against the appellant in ECIR No. 5 of 2023 even though the appellant was at that point in custody in ECIR No. 4 of 2022.

Statement of Afshar Ali - Co-accused

35. The appellant was not named in FIR No. 399 of 2023. It appears from the complaint of the respondent-Enforcement Directorate at para 6 that Afshar Ali, Saddam Hussain, Imtiaz Ahmad were arrested on 14.04.2023 in ECIR/RNZO/18/2022 though in the summary of the statements at para 8.12 it is mentioned that Afshar Ali was arrested on 14.04.2023 read with prayer (c) of the complaint it appears that the arrest that is referred to in para 8.12 is the arrest in ECIR/RNZO/18/2022.

36. Accused Afshar Ali was arrested on 14.04.2023 in ECIR/RNZO/18/2022 (a different ECIR) and his statement was recorded on 17.04.2023 in the present ECIR. Afshar Ali is supposed to have stated that since he came to know that the land was under vigilance by the Police and the land had certain disputes. He met with the appellant and the appellant was informed about the disputes and the vigilance of the Police. According to the statement of Afshar Ali, the appellant took stock of the status of the land and called the then Deputy Commissioner - Chhavi Ranjan and told him that the registry of

the Cheshire Home property was to be done after removing the vigilance observed by the Police. Thereafter, the appellant fixed the consideration of Rs. 1.5 crores and after accepting the consideration as fixed, he requested the appellant to arrange for unblocking the two plots of land, which were blocked by the Deputy Commissioner Office. That the appellant demanded Rs. 1 crore for the above work and the amount was adjusted in the said consideration and that it was appellant who asked to do the registration in the name of Punit Bhargava. He also stated that it was the appellant who fixed the deal with Bishnu Kumar Agarwal.

37. Being a co-accused with the appellant, his statement against the appellant assuming there is anything incriminating against the present appellant will not have the character of substantive evidence. The prosecution cannot start with such a statement to establish its case. We hold that, in such a situation, the law laid down under Section 30 of the Evidence Act by this Court while dealing with the confession of the co-accused will continue to apply. In ***Kashmira Singh* vs. *State of Madhya Pradesh*** [1952] SCR 526, this Court neatly summarized the principle as under:-

> "…. The proper way to approach a case of this kind is, first, to marshal the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed, a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event the judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept."

Hence, insofar as Afshar Ali's statement is concerned, the Investigating Agency will have to first marshal the other evidence and can at best look at the statement for lending assurance.

Independently, the statement of Afshar Ali does not prima facie indicate anything about the role of the appellant in the forgery of sale deed and other documents or being involved in the offence of money laundering.

Statement of Rajdeep Kumar

38. We have perused the statement, as summarized in the complaint, of Rajdeep Kumar. Rajdeep Kumar merely states that he worked for the appellant and has met Afshar Ali after the appellant introduced him at the house of the appellant regarding dealing of a land situated at Cheshire Home. He further states that he has met Saddam Hussain at the house of the appellant on the above stated land. He further adds that he has also seen Imtiaz Ahmed and Bharat Prasad, close associates of Afshar Ali and Saddam Hussain. Prima facie, we conclude that there is hardly any evidence to implicate the appellant for the offence under Section 3 and 4 of PMLA.

Statement of Md. Saddam Hussain – Co-accused

39. Md. Saddam Hussain was arrested on 14.04.2023 also in ECIR/RNZO/18/2022 (a different ECIR), in his statement of 26.04.2023, in the present ECIR he only speaks of knowing Rajdeep Kumar and meeting him for the purpose of unblocking a piece of land measuring 3.81 acres and about Rajdeep Kumar arranging a meeting with the then Deputy Commissioner - Chhavi Ranjan. His statement like that of Afshar Ali will not have the status of being a substantive evidence and will be of the same character as Afshar's insofar as the co-accused are concerned. In the complaint, the prosecution infers that it was Rajdeep Kumar who was the link between the Deputy Commissioner, Chhavi Ranjan and Prem Prakash and who acted on the instructions of the appellant - Prem Prakash and helped Saddam Hussain for unblocking the land. Prima facie, in our opinion, this statement carries the case of the prosecution no further. The corroboration drawn from his further statement of 29.08.2023 recorded in judicial custody of the above statement adds nothing further to support the prosecution apart from the fact that the statement of 29.08.2023 lacked the character of substantive evidence.

Statement of Punit Bhargava

40. Insofar as the statement of Punit Bhargava is concerned, it was recorded on 09.12.2022. He is supposed to have stated that he knew Bishnu Agarwal since March, 2021 when on the directions of appellant, he sold 1 acre of land to Bishnu Agarwal. He is supposed to have further stated that he had bought the piece of land under

the supervision of Prem Prakash and that under the instructions of Prem Prakash, he acquired a land in his name and accordingly on the instructions of the appellant, he sold it to Bishnu Kumar Agarwal. He stated that on the directions of the appellant, he gave Rs. 25 lakhs to Rajesh Rai through cheque after which the registration and mutation of the property was done but, further added that six post-dated cheques were given for encashing the balance amount later. He is supposed to have stated further that he was not aware as to why rest of the payment was not made even after the registration and mutation and that appellant could perhaps, give a reply. On being asked as to why the property was purchased in his name when it was sold within two months to Bishnu Agarwal, he stated that it was only done on the instructions of Prem Prakash.

41. The statement mentions that apart from 25 lakhs, six post-dated cheques were also given. Thereafter, it only speaks of the appellant advising the purchase and sale of the land. Prima facie, they do not detract from the reasonable grounds of belief that we entertain to the effect that the appellant is not guilty of the offence under Section 3 and 4.

Bishnu Kumar Agarwal (A9) on bail – Order has attained finality

42. We, prima facie, find that from the statements of the appellant and also from the other statements and other material relied upon by the investigating agency, there is nothing to indicate that the petitioner was involved in the creation of the forged deed nor had any knowledge of the forged sale deed of 1948. In the order enlarging Bishnu Kumar Agarwal on bail it was observed that-it was a plausible view to hold that Bishnu Kumar Agarwal was a bonafide purchaser of the property concerned in the present matter. It has also been held therein that no criminality could have been found against Bishnu Kumar Agarwal in the making of the sale consideration later and registration of the sale earlier. Support has been drawn from Section 54 of the Transfer of Property Act. The same order also makes a reference to para 10.6.6 of the complaint filed by the ED where it has been mentioned that the investigation of the Enforcement Directorate has revealed that complainant in FIR No. 399 of 2022, Umesh Kumar Gope was himself frivolously exerting his claim over the said property. Be that as it may, the order of bail granted to Bishnu Kumar Agarwal has attained finality.

43. Moreover, there is no material placed on record to show as to on what basis it is claimed that the beneficial interest in M/s Jamini Enterprises lies with the appellant. Hence, the statements relied upon do not prima facie make out a case of money laundering against the appellant.

44. The complaint also adverts to two other transactions with which Bishnu Kumar Agarwal is being investigated. Nothing can be elicited from the record about the involvement of the appellant and as to the initiation of any proceeding against him with regard to the other transactions with which Bishnu Kumar Agarwal is involved.

45. In this scenario, we hold that the appellant has satisfied the twin conditions under Section 45. Inasmuch as from the material on record, this Court is satisfied that there are reasonable grounds for believing that the appellant is not guilty of the offence of Money Laundering as alleged under Sections 3 and 4 of the PMLA and the Court is further satisfied that the appellant is not likely to commit any offence, if enlarged on bail.

Arguments about criminal antecedents.

46. The Investigating Agency have also referred to ECIR No. 4 as a criminal antecedent. A reference was made to ECIR No. 4 of 2022 pertaining to illegal Stone Mining and related activities in Saheb Ganj, Jharkhand, where the petitioner was arrested on 25.08.2022 and the prosecution complaint was filed on 16.09.2022. Insofar as the bail pertaining to ECIR No. 4 of 2022, which is pending in this Court in SLP (Criminal) No. 691 of 2023, at the after notice stage, the merits of the bail in that case will be independently examined. Having examined the facts of the present case arising out of ECIR No. 5 of 2023 and in view of the findings recorded hereinabove, we do not think that the appellant can be denied bail based on the pendency of the other matter. We say so in the facts and circumstances of the present case as we do not find any justification for his continued detention. The appellant has already been in custody for over one year. The Trial is yet to commence. There is a reference to one more ECIR which the Investigating Agency refers to in their counter, namely, ECIR/RNZO/18/2022 but nothing is available from the record as to whether any proceedings have been taken against the appellant.

Allegation of misuse of Jail facilities by the Appellant

47. Elaborate contentions have been made on the conduct of the appellant about certain facilities having been extended to him in jail. We do not comment on them and if at all there is any violation of the prison Rules, the Investigating Agency ought to take up with the higher officials of the Jail. On the facts of the present case, they are not reasons enough to deny the appellant his liberty.

48. For the reasons stated above, while allowing the appeal, we set aside the judgment dated 22.03.2024 of the High Court of Jharkhand at Ranchi in B.A. No. 9863 of 2023. We clarify that the observations made in this judgment are only for the purpose of disposing of the bail application and they shall not influence the Trial Court, which would proceed in accordance with law and on the basis of the evidence on record.

Conclusion

49. In the result, we pass the following order:-

(i) The appeal is allowed and impugned order dated 22.03.2024 is quashed and set aside.

(ii) The Trial Court is directed to release the appellant on bail in connection with ED Case No. ECIR No. 5 of 2023 on furnishing bail bonds for a sum of Rs. 5 lakh with 2 sureties of the like amount.

(iii) The appellant shall surrender his passport with the Trial Court and the appellant shall report to the Investigating Officer on every Monday and Thursday between 10 and 11 A.M.

(iv) The appellant shall not make any attempt to influence the witnesses and tamper with the evidence.

Pending applications shall stand disposed of.

Result of the case: Appeal allowed.

†*Headnotes prepared by:* Divya Pandey

[2024] 8 S.C.R. 984 : 2024 INSC 704

Bidyut Sarkar & Anr.

v.

Kanchilal Pal (Dead) Through Lrs. & Anr.

(Civil Appeal Nos. 10509-10510 of 2013)

28 August 2024

[Vikram Nath and Prasanna B. Varale, JJ.]

Issue for Consideration

Issue arose as regards admissibility of the insufficiently stamped agreement to sell.

Headnotes†

Stamp Act, 1899 – ss.35, 36, 40 and 42 – Instruments not duly stamped inadmissible in evidence, etc. – Suit for specific performance of contract based on agreement to sell, filed by the respondent no. 1 against the defendant no. 1-owner of the property – Trial court dismissed the suit on the finding that the agreement to sell not admissible in evidence being insufficiently stamped – Appeal thereagainst by the respondent no. 1 allowed by the High Court – Appellants, in whose favour the defendant no. 1 had executed the sale deed filed cross objections against the findings of the trial court recorded against them, dismissed by the High Court – However, as regards admissibility of the agreement to sell it was held that as the respondent no. 1 had accepted that he would pay the deficient stamp duty and penalty as assessed by the collector, the trial court erred in dismissing the suit on the ground that the agreement to sell, could not be enforced being executed on insufficiently stamped paper – Correctness:

Held: No reason to disagree with the findings of the trial court regarding the inadmissibility of the agreement to sell – Document, being insufficiently stamped, was rightfully barred from being admitted as evidence in the absence of the requisite stamp duty and penalty being paid and certified by the Collector – As the document was found to be insufficiently stamped and was marked as exhibit with objection and that objection having not been removed or cured, no benefit of s.36 could be extended to the respondent no.1 – High Court did not consider the statutory provisions and only proceeded to rely upon the statement of the respondent

no.1 that he had accepted to deposit the deficiency in stamp duty and penalty, if any, imposed by the Collector – Even till date, the respondent no.1 has not made any efforts before the Collector to get the deficiency and penalty determined on the impounded document and to clear the same – As a result, the document remains inadmissible in evidence under the express bar imposed by s.35 – Failure to resolve the deficiency in stamp duty prevents the document from being considered as admissible and valid in evidence – Thus, until the necessary stamp duty and penalty are duly paid and endorsed by the Collector, the instrument remains legally barred from being admitted in evidence – High Court failed to recognize that an insufficiently stamped document can only be admitted into evidence after the deficiency in stamp duty and any applicable penalty has been duly paid and cleared – This lapse of procedure not properly addressed by the High Court – As the document is foundational to the suit, the failure to comply with the statutory requirements renders the entire claim unenforceable – Respondent no. 1 cannot claim relief on the basis of a document that has not satisfied the legal requirements for admissibility – Thus, the impugned order of the High Court set aside and that of the trial court dismissing the suit restored. [Paras 21-27, 30, 32, 33]

Case Law Cited

Ram Rattan (dead) by L.Rs. v. Bajrang Lal and Others, **AIR 1978 SC 1393;** *Javer Chand and others v. Pukhraj Surana,* **AIR 1961 SC 1655 – referred to.**

List of Acts

Stamp Act, 1899.

List of Keywords

Instruments not duly stamped; Admissible in evidence; Suit for specific performance of contract; Agreement to sell; Insufficiently stamped; Cross objections; Deficient stamp duty and penalty.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 10509-10510 of 2013

From the Judgment and Order dated 05.12.2008 of the High Court of Calcutta in FA No. 282 of 2006 and COT No. 2304 of 2005

Appearances for Parties

Subrata Dutt, Ms. Shipra Ghose, Advs. for the Appellants.

Shubhayu Roy, Rohit Dutta, Ms. Shalini Kaul, Ms. Priyata Chakraborty, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Order

1. These appeals, by defendant nos.2 and 3, have been filed assailing the correctness of the judgment and order dated 05.12.2008 whereby the Division Bench of Calcutta High Court allowed the First Appeal No.282 of 2006, titled Kanchilal Pal vs. Sashti Charan Banerjee & Others, and after setting aside the judgment of the Trial Court dismissing the suit of the respondent no.1, proceeded to decree the suit for specific performance of the contract in favour of plaintiff-respondent no.1. Hereinafter will deal with the parties as they have been referred in the Trial Court.

2. Relevant facts giving rise to the present appeals are as follows:

   2.1. Sashti Charan Banerjee-respondent no.2, was admittedly the owner of the property in dispute. According to the appellants, respondent no.1 filed a suit for specific performance registered as Title Suit No.123 of 1999, Kanchilal Pal vs. Sashti Charan Banerjee and two others in the Court of Civil Judge (Senior Division), Barasat, for a decree of specific performance of contract dated 29.03.1999. The plaint allegations are as follows:

      a) Defendant no.1 is the owner of property in question being Premises No.126, Rajkumar Mukherjee Road, Calcutta, 700035, within the JL No.5, Paragana Calcutta, Khatian No.2292 bearing Plot Nos. 2477 and 2478 measuring about 7 cottahs, $7_{1/2}$ Chittack of land, including the structures thereon.

      b) Defendant no.1 intended to sell the premises in question for which the plaintiff agreed to purchase the same for a consideration of Rs.3,00,000/- (Rupees three lakhs only). The plaintiff was required to develop the property/premises in question while dividing into plots and to sell the same to different persons within the period of one year and,

after realizing sale consideration from the proposed purchasers, shall pay the balance amount of Rs.2,90,000/- (Rupees two lakhs ninety thousand only) whereupon defendant no.1 would transfer the land in favour of the plaintiff or his nominees, as the case would be.

c) An advance amount of Rs.10,000/- (Rupees ten thousand only) is said to have been paid in cash to defendant no.1. The plaintiff was also empowered to make a settlement for ejectment of the tenants residing in the premises in question and take possession from them. The plaintiff was also authorized to carry out development work and to make construction of common passage, drain, etc. in the meantime and to collect money from the proposed buyers of the plots to be developed.

2.2. In due course, a sale deed would be executed by defendant no.1 in favour of the nominees or the plaintiff and in such sales, the plaintiff would be a confirming party. The said exercise was to be completed within one year. In case defendant no.1 fails to execute the sale deed, the plaintiff or his nominees would be at liberty to file a suit for specific performance.

2.3. It was further provided in the agreement that, in case the plaintiff fails to pay the amount as agreed within the time stipulated i.e. one year, the agreement to sell would be treated as cancelled.

2.4. Further, according to the plaint, the plaintiff has spent an amount of Rs.2,00,000/- (Rupees two lakhs only) for construction of common passage, drain, etc. and has also contacted with the tenants to purchase part of the property in question measuring three cottahs and that they would pay an amount of Rs.1,20,000/- (Rupees one lakh twenty thousand only), out of which the plaintiff had received Rs.50,000/- (Rupees fifty thousand only) from one of the tenants. The plaintiff also claimed to be in possession. He also requested defendant no.1 to deliver the original title deeds, which defendant no.1 did not oblige.

2.5. The tenants, on 20.05.1999, came to the plaintiff and showed him letter of an advocate and, after going through the same, the plaintiff learnt that defendant no.1 had already transferred the property in question vide sale deed dated 03.05.1999 in favour of defendant nos.2 and 3 (appellants). The plaintiff thereafter

made inquiries and again approached defendant nos.1 to 3 to execute the sale deed in his favour but as they declined, he was compelled to institute the suit on 21.05.1999.

2.6. It is also averred in the plaint in paragraph 10 that the plaintiff was always ready and willing to perform his part of the contract.

3. Defendant no.1 filed his written statement denying the plaint allegations. A separate written statement was filed by defendant nos.2 and 3. Defendant no.1 in his written statement stated that he had entered into an agreement to sell dated 10.03.1999 in favour of defendant nos.2 and 3 and had also executed a registered deed of conveyance on 03.05.1999 in favour of defendant nos.2 and 3 for valuable consideration received by him and, also handed over possession to them. Thereafter, a letter of atonement dated 18.05.1999 was served on the tenant of the premises in question on behalf of all the three defendants through their advocates which was duly received by them informing them about the transfer of title from defendant no.1 to defendant nos.2 and 3.

4. It is further stated in the written statement of defendant no.1 that plaintiff approached him on 24.03.1999 with a proposal to purchase the said property, however, defendant no.1 declined the said proposal informing him that he had already entered into an agreement to sell with defendant nos.2 and 3. The plaintiff, however, continued with his insistence to purchase the property and in that respect on 29.03.1999 at about 04:30 PM, the plaintiff compelled defendant no.1 to accompany him to the machine shop of Ajit Bhattacharjee, where under threat and pressure and surrounded by about ten persons, he was compelled to sign some papers against his will. He was not even allowed to read the papers, and he was threatened not to disclose such incident to any person, including police. Despite the same, defendant no.1 reported the matter to the police on the basis of which G.D. Entry no.713 was made at the Talatola Police Station on 07.04.1999. The plaintiff, along with his men and agents, tried to cut the trees over the property in question on 03.04.1999, which being illegal and unlawful, was again reported to the police station at Baranagar and registered vide G.D. Entry no.496 dated 04.09.1999.

5. Defendant no.1 also moved an application under section 144(2) Code of Criminal Procedure, 1973, before the Executive Magistrate at Barrackpore, which was registered as M.P. Case No.894 of 1999.

The defendant also informed the Chairperson, Baranagar Municipality, through advocates' letter dated 12.04.1999, against the illegal acts of the plaintiff over the suit property.

6. Further, defendant no.1 also lodged a criminal case no. C/1335 of 1999 before the Chief Metropolitan Magistrate under sections 384/341/34 Indian Penal Code, 1860 which was still pending at the time of filing of the written statement. It was further stated in the written statement of defendant no.1 that on 23.04.1999, the plaintiff came to his house and threw some xerox copies of papers with a bundle of currency notes of Rs.10,000/- (Rupees ten thousand only) and threatened him with dire consequences if he discloses anything to the police. It was only then that defendant no.1 came to know of the alleged agreement to sell dated 29.03.1999, which he was compelled to sign under circumstances already stated above.

7. It is also averred in the written statement that defendant no.1 tried to return the amount of Rs.10,000/- (Rupees ten thousand only) to the plaintiff by way of cheque which he received but later returned. Despite best efforts, defendant no.1 could not return the amount of Rs.10,000/- (Rupees ten thousand only) to the plaintiff.

8. It was further averred that plaintiff was land speculator and promoter. He wanted to grab the suit property by hook or crook. The plaintiff joined hands with the tenants and tried to create obstructions from inspecting the premises in question by defendant nos. 2 and 3. Defendant nos.2 and 3 also lodged a complaint in that regard, being G.D. entry no.1434 dated 03.04.1999 at the Baranagar Police Station.

9. In para-wise reply, defendant no.1 denied the plaint allegations, however, accepted the execution of sale deed dated 03.05.1999 in favour of defendant nos.2 and 3. On such averments defendant no.1 sought that suit deserves to be dismissed.

10. Defendant nos. 2 and 3 in their written statement also denied the plaint allegations and more or less reiterated the same facts as pleaded in the written statement of defendant no.1. In addition, it was stated that defendant nos. 2 and 3 filed Title suit No.235 of 1999 in the Court of Civil Judge (Junior Division), Sealdah, against the plaintiff of which the plaintiff had full knowledge.

11. Based upon the pleadings of the parties, the Trial Court framed the following issues:

"ISSUES

1) Is the suit maintainable in its present form and law?

2) Has the plaintiff any cause of action to file this suit?

3) Is the suit barred by limitation?

4) Was there any concluded contract in between the plaintiff and the defendant no.1 on 29.03.1999 regarding sale of the 'A' schedule property by defendant no.1 in favour of the plaintiff?

5) Was the defendant no.1 compelled to put signature under threat and compulsion by the plaintiff and his associates at Dharamtala Street, Kolkata?

6) Are the defendant nos. 2 & 3 bonafide purchasers for value of the suit premises without notice?

7) Is the agreement of sale dated 29.03.1999 which has marked as Exbt.1 with objection be admitted in evidence?

8) Is the plaintiff entitled to get the benefit of section 36 of the Indian Stamp Act?

9) Is the plaintiff ready and willing to perform his part of the contract inviting Section 16(c) of the specific Relief Act?

10) Was there any part performance of the said contract?

11) Is the plaintiff entitled to get relief as prayed for?

12) To what other relief/reliefs, if any, is the plaintiff entitled?"

12. The parties led evidence, both documentary and oral. The plaintiff examined himself as PW-1 and proved the agreement to sell dated 29.03.1999 which was although marked as Exhibit-1 but with objections, as defendant no.1 had raised an objection regarding the said agreement to sell being not properly stamped. On behalf of the defendants, defendant no.1 examined himself as DW-1, whereas on behalf of defendant nos.2 and 3, their father entered the witness box as DW-2. Various documents on behalf of the defendants were proved by the respective witnesses.

13. The Trial Court decided all the issues relating to maintainability of the suit, cause of action, limitation, validity of agreement to sell dated 29.03.1999, defendant nos.2 and 3 being *bona fide* purchasers or not, readiness and willingness of the plaintiff to perform his part of the contract, in favour of the plaintiff and against the defendants. However, the Trial Court dealt in detail with regard to the admissibility of the agreement to sell dated 29.03.1999 and whether the plaintiff was entitled to get the benefit of section 36 of Indian Stamp Act, 1899[1]. The Trial Court dismissed the suit of the plaintiff on the finding that the agreement to sell dated 29.03.1999 was not admissible in evidence as the defendants had raised objections regarding the same. Once the same was held not admissible, the suit for enforcement of the same was held liable to be dismissed.

14. Aggrieved by the same, the plaintiff filed an appeal under section 96 of the Code of Civil Procedure, registered as Appeal from Original Decree No.282 of 2006. Further, defendant nos.2 and 3 filed cross-objections against the findings of the Trial Court recorded against them, which was registered as COT No.2304 of 2005. The Division Bench of the Calcutta High Court allowed the First Appeal and dismissed the cross-objections. The Division Bench affirmed the findings recorded by the Trial Court on all issues already decided in favour of the plaintiff and accordingly dismissed the cross-objections. However, with regard to issue of admissibility of the agreement to sell dated 29.03.1999, the Division Bench was of the view that as the plaintiff had accepted that he would pay the deficient stamp duty and penalty as may be assessed by the competent authority/collector, the Trial Court had erred in dismissing the suit on the ground that Ex.-1-the agreement to sell, could not be enforced being executed on insufficiently stamped paper.

15. Aggrieved, the present appeals have been preferred by defendant nos.2 and 3 against the judgment of the High Court in allowing the first appeal of the plaintiff and further on dismissing their cross-objections.

16. Learned counsel for the appellants has not only challenged the findings of the High Court on the admissibility of the agreement to sell dated 29.03.1999 but also the concurrent findings of both the

1 The Stamp Act

courts on other issues regarding the validity of agreement to sell, circumstances under which it was executed and defendants 2 and 3 not being *bona fide* purchasers for value.

17. Upon considering the submissions, we are of the view that the findings of the High Court regarding the admissibility of the agreement to sell dated 29.03.1999 were neither based on a detailed consideration of the relevant statutory provisions nor supported by established legal principles. It appears that the High Court, without thoroughly examining the applicable legal provisions, cursorily concluded that the document would be admissible simply because the plaintiff had expressed willingness to pay the deficient stamp duty and any penalty imposed by the competent authority or the Collector. However, it is evident that the plaintiff made no concrete effort to initiate or pursue the necessary proceedings before the competent authority or the Collector to determine the deficient stamp duty and penalty. The High Court, therefore, failed to recognize that an insufficiently stamped document can only be admitted into evidence after the deficiency in stamp duty and any applicable penalty has been duly paid and cleared. This lapse of procedure was not properly addressed in the High Court's judgment.

18. At the time of deposition of the plaintiff on 07.03.2003, he stated in his examination-in-chief while referring to the agreement to sell dated 29.03.1999, that this was the original agreement to sell executed by defendant no.1 Sashti Charan Banerjee in his favour in respect of the suit property and it had the signature of defendant no.1 on all pages which he had signed in his presence. The agreement to sell was drafted by Prasanta Pal and typed by Neel Kamal Mallick in his presence. He paid Rs.10,000/- (Rupees ten thousand only) to defendant no.1 as per the said agreement and it was marked as Ex.-1 with objection. He further stated that he was ready to deposit the deficient stamp duty as per order of the Collector. The Trial Court marked the document as Ex.-1 with objection which is also reflected in the Exhibit list similarly. Simultaneously, the Trial Court in the order sheet dated 07.03.2003 noted the said document as Ex.-1 with objection and had further issued notice to the Collector to assess the deficient stamp duty and penalty as per the provisions of section 40 of the Stamp Act and to submit the report accordingly. Further, a copy of the order dated 07.03.2003, along with xerox copy of the disputed agreement to sell dated 29.03.1999, was sent to the

Collector vide letter no.63 dated 28.03.2003. However, no reply was received from the Collector till the date the judgment was delivered by the Trial Court.

19. The Trial Court thereafter proceeded to consider the statutory provisions of the Stamp Act namely sections 35, 36, 40 and 42. After discussing the same in detail, it proceeded to hold that the document was inadmissible in evidence, as the plaintiff failed to further pursue the proceedings before the Collector resulting into non-determination of the deficiency and the penalty and consequently, the non-deposit of the deficiency and penalty, which could have been determined by the Collector. The High Court, unfortunately, has not considered the statutory provisions and only proceeded to rely upon the statement of the plaintiff that he had accepted to deposit the deficiency in stamp duty and penalty, if any, imposed by the Collector. It would be worthwhile to mention here that even till date, the plaintiff has not made any efforts before the Collector to get the deficiency and penalty determined on the impounded document and to clear the same.

20. The relevant provisions of the Stamp Act, namely, sections 35, 36, 40 and 42 are reproduced hereunder:

> "**35. Instruments not duly stamped inadmissible in evidence, etc. —**
>
> No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped:
>
> Provided that—
>
> (a) any such instrument [shall] be admitted in evidence on payment of the duty with which the same is chargeable, or, in the case of any instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty of five rupees, or, when ten times the amount of the proper duty or deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion;

(b) where any person from whom a stamped receipt could have been demanded, has given an unstamped receipt and such receipt, if stamped, would be admissible in evidence against him, then such receipt shall be admitted in evidence against him on payment of a penalty of one rupee by the person tendering it;

(c) Where a contract or agreement of any kind is effected by correspondence consisting of two or more letters and any one of the letters bears the proper stamp, the contract or agreement shall be deemed to be duly stamped;

(d) nothing herein contained shall prevent the admission of any instrument in evidence in any proceeding in a Criminal Court, other than a proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure 1898 (5 of 1898);

(e) nothing herein contained shall prevent the admission of any instrument in any Court when such instrument has been executed by or on behalf of [(the) (Government)], or where it bears the certificate of the Collector as provided by section 32 or any other provision of this Act.

36. Admission of instrument where not to be questioned. —

Where an instrument has been admitted in evidence, such admission shall not, except as provided in section 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not duly stamped.

xxx xxx xxx

40. Collectors power to stamp instruments impounded. —

(1) When the Collector impounds any instrument under section 33, or receives any instrument sent to him under section 38, sub-section (2), not being an instrument chargeable [with a duty not exceeding ten naye paise]

only or a bill of exchange or promissory note, he shall adopt the following procedure: —

(a) if he is of opinion that such instrument is duly stamped or is not chargeable with duty, he shall certify by endorsement thereon that it is duly stamped, or that it is not so chargeable, as the case may be;

(b) if he is of opinion that such instrument is chargeable with duty and is not duly stamped, he shall require the payment of the proper duty or the amount required to make up the same, together with a penalty of five rupees; or, if he thinks fit, [an amount not exceeding] ten times the amount of the proper duty or of the deficient portion thereof, whether such amount exceeds or falls short of five rupees:

Provided that, when such instrument has been impounded only because it has been written in contravention of section 13 or section 14, the Collector may, if he thinks fit, remit the whole penalty prescribed by this section.

(2) Every certificate under clause (a) of sub-section (1) shall, for the purposes of this Act, be conclusive evidence of the matters stated therein.

(3) Where an instrument has been sent to the Collector under section 38, sub-section (2), the Collector shall, when he has dealt with it as provided by this section, return it to the impounding officer.

xxx xxx xxx

42. Endorsement of instruments in which duty has been paid under sections 35, 40 or 41—

(1) When the duty and penalty (if any) leviable in respect of any instrument have been paid under section 35, section 40 or section 41, the person admitting such instrument in evidence or the Collector, as the case may be, shall certify by endorsement thereon that the proper duty or, as the case may be, the proper duty and penalty (stating the amount of each) have been levied in respect thereof, and the name and residence of the person paying them.

(2) Every instrument so endorsed shall thereupon be admissible in evidence, and may be registered and acted upon and authenticated as if it had been duly stamped, and shall be delivered on his application in this behalf to the person from whose possession it came into the hands of the officer impounding it, or as such person may direct:

Provided that—

(a) no instrument which has been admitted in evidence upon payment of duty and a penalty under section 35, shall be so delivered before the expiration of one month from the date of such impounding, or if the Collector has certified that its further detention is necessary and has not cancelled such certificate;

(b) nothing in this section shall affect the Code of Civil Procedure,1882 (14 of 1882), section 144 clause 3."

21. According to the language of the section 35 of the Stamp Act, instruments not duly stamped would be inadmissible in evidence, and any instrument chargeable with duty would be admissible in evidence only and only if such instrument is duly stamped. The proviso gives illustration as to how the instrument would become admissible upon payment of duty with which it was chargeable or in case of instruments insufficiently stamped, the payment is made to make up such duty along with penalty mentioned therein. It also refers to exceptions where a document could be admissible in evidence under a given situation. As elaborated in clauses (b), (c), (d) and (e) of the proviso, the instrument in question i.e. agreement to sell dated 23.03.1999 does not fall under any exception.

22. Section 36 of the Stamp Act provides for admissibility of an instrument not being questioned if the same had been admitted in evidence on the ground that it is not duly stamped except as provided under section 61 of the Stamp Act. In the present case, the instrument in question was admitted subject to objection as noted in the deposition of the plaintiff (PW-1) and recorded in the order sheet of the Trial Court dated 07.03.2003. As such section 36 of the Stamp Act will not come to the rescue of the plaintiff.

23. Section 40 of the Stamp Act gives power to the Collector to stamp such instruments which have been impounded. The Collector will

determine the proper duty payable on such instrument along with penalty as provided in clause (b) of section 41.

24. Section 42 of the Stamp Act provides that when duty and penalty, if any, leviable in respect of any instrument has been paid under sections 35, 40 or 41 upon endorsement by the Collector that such duty has been paid, instrument shall thereupon be admissible in evidence.

25. In the present case, the agreement to sell dated 29.03.1999 was found by the Trial Court to be insufficiently stamped. Consequently, the matter was referred to the Collector for determination of proper stamp duty and any applicable penalty. As per the provisions of Section 42 of the Stamp Act, such a document can only become admissible in evidence after deficiency in stamp duty and the penalty, if any, have been assessed by the Collector, and the requisite amounts have been paid. Once the deficiency and penalty are cleared, the Collector is required to certify the document by endorsement, indicating that the required duty and penalty have been paid. Only upon such certification can the document be admitted into evidence and acted upon legally.

26. Despite the Trial Court's referral of the matter to the Collector, no determination regarding the deficiency in stamp duty or penalty was made by the Collector under Section 40 of the Samp Act. As a result, the document remains inadmissible in evidence under the express bar imposed by Section 35 of the Stamp Act. Failure to resolve the deficiency in stamp duty prevents the document from being considered as admissible and valid in evidence. Therefore, until the necessary stamp duty and penalty are duly paid and endorsed by the Collector, the instrument remains legally barred from being admitted in evidence.

27. The argument advanced on behalf of the plaintiff-respondent no.1 is that he would be entitled to get benefit of section 36 of the Stamp Act as the document had been exhibited and admitted in evidence, holds no ground in as much as the document was found to be insufficiently stamped and was marked as exhibit with objection and that objection having not been removed or cured, no benefit of section 36 of the Stamp Act could be extended to the plaintiff-respondent no.1.

28. In this connection, following cases are cited:

Ram Rattan (dead) by L.Rs. vs. **Bajrang Lal and others;**[2]

Javer Chand and others vs. Pukhraj Surana;[3]

29. The Trial Court had placed reliance upon the aforesaid two judgments and had also extracted the relevant part from the said judgments. The facts in the 1978 case of **Ram Rattan (dead) by L.Rs**.(supra) were quite similar wherein an instrument had been exhibited with objection but therein also the said objection had not been removed or cured. This Court held that such an instrument would not be admissible in evidence and section 36 of the Stamp Act would not be attracted. The relevant paras of this judgement are reproduced below:

> **"6.** When the document was tendered in evidence by the plaintiff while in witness box, objection having been raised by the defendants that the document was inadmissible in evidence as it was not duly stamped and for want of registration, it was obligatory upon the learned trial Judge to apply his mind to the objection raised and to decide the objects in accordance with law. Tendency sometimes is to postpone the decision to avoid interruption in the process of recording evidence and, therefore, a very convenient device is resorted to, of marking the document in evidence subject to objection. This, however would not mean that the objection as to admissibility on the ground that the instrument is not duly stamped is judicially decided; it is merely postponed. In such a situation at a later stage before the suit is finally disposed of it would none-the-less be obligatory upon the court to decide the objection. If after applying mind to the rival contentions the trial court admits a document in evidence, Section 36 of the Stamp Act would come into play and such admission cannot be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped. The court, and of necessity it would be trial court before which the objection is taken about

2 AIR 1978 SC 1393

3 AIR 1961 SC 1655

admissibility of document on the ground that it is not duly stamped, has to judicially determine the matter as soon as the document is tendered in evidence and before it is marked as an exhibit in the case and where a document has been inadvertently admitted without the court applying its mind as to the question of admissibility, the instrument could not be said to have been admitted in evidence with a view to attracting Section 36 (see *Javer Chand* v. *Pukhraj Surana*) [AIR 1961 SC 1655] . **The endorsement made by the learned trial Judge that "Objected, allowed subject to objection", clearly indicates that when the objection was raised it was not judicially determined and the document was merely tentatively marked and in such a situation Section 36 would not be attracted.**

7. Mr Desai then contended that where an instrument not duly stamped or insufficiently stamped is tendered in evidence, the court has to impound it as obligated by Section 33 and then proceed as required by Section 35 viz. to recover the deficit stamp duty along with penalty. **Undoubtedly, if a person having by law authority to receive evidence and the civil court is one such person before whom any instrument chargeable with duty is produced and it is found that such instrument is not duly stamped, the same has to be impounded. The duty and penalty has to be recovered according to law. Section 35, however, prohibits its admission in evidence till such duty and penalty is paid. The plaintiff has neither paid the duty nor penalty till today. Therefore, *stricto sensu* the instrument is not admissible in evidence.** Mr Desai, however, wanted us to refer the instrument to the authority competent to adjudicate the requisite stamp duty payable on the instrument and then recover the duty and penalty which the party who tendered the instrument in evidence is in any event bound to pay and, therefore, on this account it was said that the document should not be excluded from evidence. The duty and the penalty has to be paid when the document is tendered in evidence and an objection is raised. The difficulty in this case arises from the fact that

> the learned trial Judge declined to decide the objection on merits and then sought refuge under Section 36. The plaintiff was, therefore, unable to pay the deficit duty and penalty which when paid subject to all just exceptions, the document has to be admitted in evidence. In this background while holding that the document Ext. I would be inadmissible in evidence as it is not duly stamped, we would not decline to take it into consideration because the trial court is bound to impound the document and deal with it according to law."
>
> [emphasis added]

30. We find no reason to disagree with the findings of the Trial Court regarding the inadmissibility of the agreement to sell dated 29.03.1999. The document, being insufficiently stamped, was rightfully barred from being admitted as evidence in the absence of the requisite stamp duty and penalty being paid and certified by the Collector. The High Court, in treating this document as admissible without resolving the stamp duty deficiency, overlooked the statutory mandate under the Stamp Act. As the document is foundational to the suit, the failure to comply with the statutory requirements renders the entire claim unenforceable. Consequently, the suit must be dismissed, as it is based on an instrument that is legally inadmissible as evidence. The plaintiff cannot claim relief on the basis of a document that has not satisfied the legal requirements for admissibility.

31. We need not deal with other arguments on merits regarding the validity of the instrument dated 29.03.1999 and deal with the issue of coercion as alleged by defendant no.1.

32. Accordingly, the appeals are liable to be allowed. The amount of Rs.10,000/- (Rupees ten thousand only) admittedly received by defendant no.1 although under abnormal conditions as alleged by defendant no.1 in the interest of the parties would be liable to be returned to the plaintiff. The said amount has remained with defendant no.1 for almost 25 years right from 1999 till the present. Now that the appellants have purchased the property from defendant no.1, we fasten the liability on the appellants to return the amount to the plaintiff. We quantify the said amount to be a rounded of figure at Rs.5,00,000/- (Rupees five lakhs only) to be paid within a period of three months.

33. In view of the above the appeals are allowed, the impugned order of the High Court is set aside and that of the Trial Court dismissing the suit is restored. Additionally, it is directed that the appellants shall pay Rs.5,00,000/-(Rupees five lakhs only) to the plaintiff-respondent no.1 within three months from today.

Result of the case: Appeals Allowed.

†*Headnotes prepared by:* Nidhi Jain

[2024] 8 S.C.R. 1002 : 2024 INSC 640

A.B. Govardhan
v.
P. Ragothaman

(Civil Appeal No(s). 9975-9976 of 2024)

29 August 2024

[Hima Kohli and Ahsanuddin Amanullah,* JJ.]

Issue for Consideration

Whether the respondent-defendant by way of the agreement agreed to create equitable mortgage by depositing the title deeds for the loan obtained by him from the appellant-plaintiff; whether there was redemption of the mortgage; whether the Single Judge rightly held the agreement to be a mortgage in view of Section 58(f) of the Transfer of Property Act, 1882.

Headnotes†

Transfer of Property Act, 1882 – s.58 – Mortgage – Loan obtained by the respondent-defendant from the appellant-plaintiff – Under the agreement in question, the respondent produced title document of his property as security towards debt and agreed to register the Sale Deed as and when demanded – However, later neither the respondent executed the Sale Deed nor paid the balance sum – Agreement, if was a mortgage – Whether the respondent by way of the agreement created a equitable mortgage by deposit of title deeds:

Held: Yes – There was no redemption of this mortgage – Division Bench erred in holding that the plaint averments did not conclude that there was a valid mortgage entitling the appellant-plaintiff to sue for a mortgage decree – Single Judge correctly held the agreement to be a mortgage in view of s.58(f) of the 1882 Act – Respondent admitted execution of the agreement (Exhibit P-1) however, claimed coercion but led no evidence to support this plea – Further, the agreement only recorded what had happened and did not create/extinguish rights/liabilities and therefore covered by para 14.3 of Narvir Singh and did not require registration – Impugned orders set aside – Judgment of the Single Judge restored with modification. [Paras 22, 29, 33]

Pleadings – Evidence – Every fact pleaded has to be substantiated:

* Author

Held: For every pleaded fact, there has to be evidence, oral or documentary, to substantiate the same – A bald averment or mere statement by a defendant bereft of evidentiary material to back up such averment/statement takes such defendant's case nowhere. [Para 24]

Delay – Condonation – Liberal approach – Discussed.

Case Law Cited

State of Haryana v Narvir Singh [2013] 9 SCR 949 **: (2014) 1 SCC 105 – relied on.**

Kalyan Kumar Gogoi v Ashutosh Agnihotri [2011] 1 SCR 796 **: (2011) 2 SCC 532;** *Syndicate Bank v Estate Officer & Manager, APIIC Ltd.* [2007] 9 SCR 619 **: (2007) 8 SCC 361;** *Syndicate Bank v Estate Officer and Manager (Recoveries), Andhra Pradesh Industrial Infrastructure Corporation Limited* **(2021) 3 SCC 736;** *Collector, Land Acquisition, Anantnag v. Mst Katiji* [1987] 2 SCR 387 **: (1987) 2 SCC 107;** *Esha Bhattacharjee v. Managing Committee of Raghunathpur Nafar Academy* [2013] 9 SCR 782 **: (2013) 12 SCC 649;** *N L Abhyankar v Union of India* **(1995) 1 MhLJ 503;** *M/s Dehri Rohtas Light Railway Company Limited v District Board, Bhojpur* [1992] 2 SCR 155 **: (1992) 2 SCC 598;** *Municipal Council, Ahmednagar v Shah Hyder Beig* [1999] Supp. 5 SCR 197 **: (2000) 2 SCC 48;** *Mool Chandra v Union of India,* **2024 SCC OnLine SC 1878 – referred to.**

List of Acts

Transfer of Property Act, 1882.

List of Keywords

Mortgage; Mortgage deed; Equitable mortgage by depositing title deeds; Loan; Redemption of the mortgage; Mortgage decree; Promissory notes; Registration; Delay condonation; Liberal approach; Pleadings; Evidence.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 9975-9976 of 2024

From the Judgment and Order dated 12.07.2018 and 22.02.2017 of the High Court of Judicature at Madras in CMP No. 10107 of 2017 and OSA No. 189 of 2011 respectively

Appearances for Parties

Narendra Kumar, V. Balaji, Atul Sharma, Asaithambi MSM, R. Mohan, A. Krishna Kumar, C. Kannan, Rakesh K. Sharma, Advs. for the Appellant.

V Prabhakar, Sr. Adv., S. Rajappa, Ms. Jyoti Singh, R Gowrishankar, N J Ramchandar, Ms. Jyoti Parasher, Rakesh Ranjan, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Judgment

Ahsanuddin Amanullah, J.

Heard Mr. Narendra Kumar, learned counsel for the appellant and Mr. V. Prabhakar, learned Senior counsel for the respondent.

2. Leave granted. The pending applications shall be dealt with in the final pages of this judgment.

3. The present appeals germinate from the:

3.1. Final Judgment and Order dated 22.02.2017 (hereinafter referred to as the "First Impugned Order")[1] passed by a Division Bench of the High Court of Judicature at Madras (hereinafter referred to as the "High Court") in Original Side Appeal[2] No.189 of 2011, whereby the appeal filed by the respondent was allowed and Judgment dated 01.04.2010 passed by a Single Judge of the High Court in Civil Suit No.701 of 2005 (hereinafter referred to as the "suit") was set aside.

3.2. Order dated 12.07.2018 (hereinafter referred to as the "Second Impugned Order") passed by the same Division Bench, whereby Civil Miscellaneous Petition[3] No.10107 of 2017 in OSA No.189 of 2011 filed by the appellant seeking to "*set aside*" the First Impugned Order and restore the main appeal for fresh hearing, was dismissed.

1 2017 SCC OnLine Mad 11918 | (2017) 3 CTC 777 | (2017) 3 Mad LJ 522 | (2017) 4 LW 421.

2 Hereinafter abbreviated to "OSA".

3 Hereinafter abbreviated to "CMP".

BRIEF FACTS:

4. The respondent (defendant in the suit) and his wife are engaged in business of building materials. As per the appellant (plaintiff in the suit), the respondent approached him in February, 1995 seeking a loan for his business. The appellant advanced a loan of Rs.10,00,000/- (Rupees Ten Lakhs) to the respondent on the security of his properties.

5. Since the respondent could not pay Stamp Duty on the Mortgage Deed, it was agreed between the parties that the said sum be split into two registered mortgages and the balance in four promissory notes. Accordingly, the respondent executed the following:

   i) Mortgage Deed dated 16.03.1995 for Rs.1,00,000/- (Rupees One Lakh) agreeing to repay the same together with interest at 36% *per annum*;[4]

   ii) Mortgage Deed dated 17.04.1995 for Rs.50,000/- (Rupees Fifty Thousand) agreeing to repay the same together with interest at 36% p.a., and;

   iii) Four promissory notes for the balance amount of Rs.8,50,000/- (Rupees Eight Lakhs Fifty Thousand).

6. Besides the two mortgages *supra*, the respondent borrowed the remaining Rs.8,50,000/- (Rupees Eight Lakhs Fifty Thousand) in four promissory notes on different dates. Since there was default in payment of interest, the appellant demanded repayment of the amount due under the four promissory notes. The respondent thereupon, in various *panchayats*, promised to repay the amounts. Ultimately, in the *panchayat* dated 24.06.2000, the respondent produced title document of his property as security towards debt under the four promissory notes, which has been noted in the Agreement dated 24.06.2000 (hereinafter referred to as the "Agreement"). This Agreement, in essence, is the root of the instant *lis*.

7. The Agreement notes that the respondent owed a total amount of Rs.11,00,000/- (Rupees Eleven Lakhs) to the appellant and in settlement thereof, the respondent handed over the title deeds pertaining to the property situated at No.33, Avvai Thirunagar, Chennai-600111, admeasuring 1300 square feet of land together with

4 Hereinafter abbreviated to "p.a.".

700 square feet building (hereinafter referred to as the "schedule property"), which was valued at Rs.9,00,000/- (Rupees Nine Lakhs). Per the Agreement, the respondent agreed to register the Sale Deed as and when demanded. Further, for re-paying the balance sum of Rs.2,00,000/- (Rupees Two Lakhs), it was agreed that the respondent will redeem the mortgaged property from the appellant and re-mortgage it elsewhere.

8. After the Agreement was entered into between the parties, the promissory notes were returned which were torn-out in the *panchayat*. Thereafter, the respondent neither executed a Sale Deed nor paid the balance sum of Rs.2,00,000/- (Rupees Two Lakhs). As a result, the appellant-plaintiff, filed the suit before the High Court, praying for:

> "*(I) granting a usual preliminary mortgage decree of the Schedule mentioned property against the defendant for the recovery of Rs.23,96,000/- together with interest at 36% p.a. on Rs.11,00,000/- till the date of realization;*
>
> *And pass a final decree thereafter for sale of the Mortgaged property;*
>
> *(II) for costs of this suit; and for such other equitable reliefs as may deem fit and proper in the circumstances of the case and render justice.*"
>
> (sic)

9. The Single Judge, after perusing the evidence on record and hearing the parties, passed judgment dated 01.04.2010 holding that the respondent-defendant had agreed to "*create equitable mortgage by depositing the title deeds*". Finding thus, the Single Judge decreed the suit. Aggrieved, the respondent filed an intra-court appeal being OSA No.189 of 2011 along with Miscellaneous Petition[5] No.1 of 2011, which was an application seeking condonation of delay of 176 days. The appellant through his advocate, Mr. V. Manohar received notice and filed a counter-affidavit opposing the said condonation of delay application. On 18.04.2011, the Division Bench was pleased to condone the delay, subject to payment of cost of Rs.1,000/- (Rupees One Thousand) to the appellant.

5 Hereinafter abbreviated to "MP".

10. The Division Bench *vide* the First Impugned Order allowed the appeal, holding that the appellant had failed to prove that there was a mortgage executed by the respondent. It is to be noted that none appeared for the appellant in the appeal. Subsequently, the appellant filed CMP No.10107 of 2017 in OSA No.189 of 2011, praying therein to "*set aside*" the First Impugned Order and for restoration of the main appeal for fresh hearing. The appellant contended that his erstwhile counsel (Mr. V. Manohar) was authorized only to appear in the MP filed to condone the delay [MP No.1 of 2011] and that there was no notice issued to him after registering of the appeal. The Division Bench *vide* the Second Impugned Order dismissed the CMP.

SUBMISSIONS BY THE APPELLANT-PLAINTIFF:

11. At the outset, the learned counsel for the appellant submitted that the Division Bench of the High Court gravely erred in holding that the plaint averments were not sufficient to conclude that there was a valid mortgage entitling him to sue for a mortgage decree. It was submitted that the plaint, read as a whole, alongwith the Agreement, the Proof Affidavits and evidence of PW-1/appellant and DW1/respondent clearly evince the fact that a loan was secured by the respondent by mortgaging the schedule property. The amount in the Agreement pertains to loan transactions for which the mortgage was created by the Respondent. It was submitted that in such circumstances, the findings in the First Impugned Order are highly erroneous.

12. It was submitted by learned counsel that the Single Judge has rightly arrived at the conclusion that the present case is one where the respondent agreed to create a mortgage by depositing the title deed. There was an actionable debt and the respondent had fully intended that the deed ought to be the security for the debt. The Single Judge had also noted that the respondent in his evidence as DW1, had agreed to deposit the title deed to create an "*equitable mortgage*" for the loan amount obtained by him from the appellant. Thus, the Single Judge had rightly decreed the appellant's suit and passed preliminary decree of mortgage.

13. It was further submitted that the Division Bench in the First Impugned Order had erred in holding that there was no stipulation to pay interest in the Agreement and that therefore the rate of interest as granted by the Single Judge could not have been so granted. It was submitted that various loans were advanced by the appellant to the

respondent categorically stipulating interest at the rate of 36% p.a. on repayment. Once this contractual rate of interest was agreed upon by the parties, there was no scope for the Division Bench to state that there was no stipulation to pay interest in the Agreement. The Agreement had to be read in conjunction with various promissory notes and documents evidencing the mortgage and repayment of the loan with interest. Learned counsel contended that the Division Bench erred in holding that there was no prayer for grant of a personal decree against the respondent. It was submitted that the prayer clause of the plaint would show to the contrary.

14. On the Second Impugned Order, learned counsel for the appellant submitted that the Division Bench went wrong in not appreciating that the appellant had never authorized his counsel to represent him in the OSA and his *vakalatnama* was confined to the MP filed by the respondent seeking condonation of delay of 176 days. The MP was allowed by the Division Bench *vide* order dated 18.04.2011. Thereafter, the appellant, claims learned counsel, was not served with any notice in the OSA. The appellant submits that he was neither informed by his counsel, Mr. V. Manohar or by the Registry of the High Court about the status of the appeal.

15. It was further submitted that the Division Bench gravely erred in holding that the *vakalatnama* was given to Mr. V. Manohar for appearing in the MP for condonation of delay, the main appeal as also this Court. It was submitted that Mr. V. Manohar, counsel, was practicing only in the High Court. There was no question of the appellant authorizing any counsel for taking up the case in this Court as and when a case would come up. It was urged that a blanket printed statement on a *vakalatnama* can never constitute the intention of a litigant authorizing his/her/their counsel to represent the litigant in question in all courts and all proceedings.

16. Learned counsel contended that the appellant's advocate Mr. Sukumar, who was appearing for the appellant in the Court at Tiruvannamalai, called the appellant and informed him that a judgment showing the appellant's name was published in one of the law reports under the citation **2017 (3) MLJ 521** and it also showed that he went unrepresented therein. The appellant categorically submits that it was only then that the appellant came to know that the OSA arising from the suit had been decided against him *ex-parte*. Prayer was made to allow the appeals.

SUBMISSIONS BY THE RESPONDENT-DEFENDANT:

17. *Per contra*, learned senior counsel for the respondent submitted that there is no merit in the present appeals and the impugned orders do not call for any interference by this Court under Article 136 of the Constitution of India (hereinafter referred to as the "Constitution"). It was submitted that the Agreement does not refer to any mortgage having been created, since the recitals therein make it clear that the Agreement was to sell the schedule property to the appellant, and for the said purpose alone, the title deed of the property was handed over to the appellant. It was submitted that when the very genesis of the suit is the Agreement and the Agreement *per se* does not disclose the creation of any mortgage, a suit for foreclosure cannot be maintained and the Division Bench had rightly held so. The findings in the First Impugned Order that no mortgage has been created, stands justified in view of the contents of the Agreement.

18. Next, it was advanced that the plaint claims that Rs.23,96,000/- (Rupees Twenty Three Lakhs Ninety Six Thousand) was due as per the Agreement by including interest @ 36% p.a. till the date of institution of the suit. It was submitted that no particulars have been set forth in the plaint as to how this amount of Rs.23,96,000/- (Rupees Twenty Three Lakhs Ninety Six Thousand) was arrived at. While the cause of action pleaded in the suit makes reference only to the Agreement, the appellant makes a claim in respect of the mortgages dated 16.03.1995 and 17.04.1995, while also reserving the right to take separate action. Thus, it was submitted that the appellant has not put forth any specific case but has attempted to intermingle the mortgages and/or promissory notes with the Agreement. It was submitted that the mortgages dated 16.03.1995 and 17.04.1995 as also the promissory notes have been merged to arrive at the figure of Rs.11,00,000/- (Rupees Eleven Lakhs), which is being claimed as due from the respondent. It was further submitted that the promissory notes have not been exhibited in the suit.

19. Learned Senior counsel also pointed out that in respect of the two mortgages dated 16.03.1995 and 17.04.1995, the High Court in Second Appeal[6] No.1235 of 2014 (which emanated from a suit for redemption filed by the respondent) passed an interim order

6 Hereinafter abbreviated to "SA".

dated 25.08.2022, directing the respondent to pay the appellant a sum of Rs.10,00,000/- (Rupees Ten Lakhs), being the principal and interest on both the mortgages. Subsequently, the High Court, by way of its final order dated 24.01.2023 in the said SA, noted the payments made by the respondent to the appellant, the return of the original Mortgage Deeds and also the cancellation of the mortgages. Thus, as the decree in the redemption suit had been complied with, it dismissed the second appeal as having become infructuous. Payment had been made and, after receiving the same, the appellant had returned the original title deeds to the respondent in respect of the property which was the subject-matter of the two mortgages dated 16.03.1995 and 17.04.1995.

20. It was further submitted that in the criminal case filed by the appellant against the respondent under Section 138 of the Negotiable Instruments Act, 1881, this Court dismissed Special Leave Petition (Criminal) No.994 of 2019,[7] confirming the acquittal of the respondent. As regards the Second Impugned Order, it was submitted that the facts recorded therein speak for themselves and the appellant did not deserve any indulgence. Based on the above pleas, the respondent has sought dismissal of the instant appeals.

ANALYSIS, REASONING & CONCLUSION:

21. Having given our anxious thought to the *lis*, we find that the Orders impugned need interference.

22. In our view, the Single Judge had appreciated the bundle of facts in the correct perspective, that is, the respondent had, by way of the Agreement, created a mortgage by deposit of title deeds. There was no redemption of this mortgage. The Division Bench fell in error in concluding that "*The plaint averments are self-contradictory, vague and does not make out a clear case of mortgage.*" (sic). Moreover, the plea of the respondent that the mortgage was redeemed is factually

7 Order dated 28.08.2023 reads as below:
"*Heard learned counsel for the petitioner.*
After having perused the evidence of the petitioner- complainant, we are satisfied that the acquittal of the respondent is a possible conclusion, which could have been recorded by the High Court.
Though, something can be said about the manner in which the findings have been recorded by the High Court, we are recording our findings after having perused the evidence of the complainant. Hence, we concur with the ultimate order of the High Court and accordingly, the special leave petition stands dismissed.
Pending application(s), if any, shall stand disposed of."

incorrect. Another point not noted by the Division Bench is that the mortgage which took care of the return of Rs.8,50,000/- (Rupees Eight Lakhs Fifty Thousand), was never redeemed and initially, only *re* the two previous mortgages, the principal amount of Rs.1,50,000/- (Rupees One Lakh Fifty Thousand) was returned, without the agreed interest. As noted above, subsequent to the passing of the Impugned Orders, in SA No.1235 of 2014, interim Order dated 25.08.2022 had directed the respondent to pay the appellant a sum of Rs.10,00,000/- (Rupees Ten Lakhs), being the principal and interest on both the mortgages. This stood complied with and the SA was dismissed as having become infructuous on 24.01.2023.

23. However, the Agreement envisaged property worth Rs.9,00,000/- (Rupees Nine Lakhs) out of the total claimed due of Rs. 11,00,000/- (Rupees Eleven Lakhs), being registered in favour of the appellant or his nominee. The Agreement also stipulated that after redeeming the earlier/previous mortgages, the respondent would re-mortgage for the purpose of raising Rs.2,00,000/- (Rupees Two Lakhs). Thereafter, the said sum of Rs.2,00,000/- (Rupees Two Lakhs) would be paid to the appellant. The said condition was not followed through i.e., no Sale Deed was executed and registered, nor was the sum of Rs.2,00,000/- (Rupees Two Lakhs) paid. We are of the view that in such a case, it was well-within the competence of the appellant to move the Court, which he did by instituting the suit.

24. Another factor is that the appellant was not heard in the appeal, as recorded in the First Impugned Order itself. Undoubtedly, in the face of non-appearance by the appellant before it, the Division Bench was free to proceed with final hearing of the appeal, as it did. However, what seems to have transpired is that in the absence of the appellant, what was averred by the respondent in the appeal was accepted as correct by the Division Bench. Fact remained that the respondent admitted to having executed Exhibit P-1 (the Agreement) and that the signature(s) thereon were his, in the Proof Affidavit dated 01.03.2010 as also cross-examination dated 08.03.2010. No doubt, he (respondent) has denied its voluntary execution and contended that it was under coercion and threat, but no evidence was brought or led by him to support this plea. The Division Bench opined, correctly, that "*It is true that there was no supporting evidence adduced by him to show as to how he was threatened and forced to execute Ex.P1.*" Pausing here, we may emphasise that for every fact

which is pleaded, there has to be evidence, either oral or documentary, to substantiate the same. A bald averment or mere statement by a defendant bereft of evidentiary material to back up such averment/ statement takes such defendant's case nowhere. While deciding a statutory appeal under Section 116A of the Representation of the People Act, 1951 against an order of the Gauhati High Court rejecting an Election Petition, this Court in ***Kalyan Kumar Gogoi v Ashutosh Agnihotri*** **(2011) 2 SCC 532** commented that the term 'evidence' is used colloquially in different senses:

> "***33.*** *The word "evidence" is used in common parlance in three different senses: (a) as equivalent to relevant, (b) as equivalent to proof, and (c) as equivalent to the material, on the basis of which courts come to a conclusion about the existence or non-existence of disputed facts. Though, in the definition of the word "evidence" given in Section 3 of the Evidence Act one finds only oral and documentary evidence, this word is also used in phrases such as best evidence, circumstantial evidence, corroborative evidence, derivative evidence, direct evidence, documentary evidence, hearsay evidence, indirect evidence, oral evidence, original evidence, presumptive evidence, primary evidence, real evidence, secondary evidence, substantive evidence, testimonial evidence, etc.*"
>
> (emphasis supplied)

25. However, we see in the facts at hand that there is no dispute *qua* execution of the Agreement. The respondent claims/pleads coercion etc. *Arguendo*, such was the case, what would assume relevance would be the steps taken immediately thereafter by the respondent. Admittedly, no steps whatsoever were taken, in law, by the respondent to resile from the Agreement or to revoke it for at least half a decade i.e., from the date of the Agreement till the suit came to be instituted. The respondent did not even lodge appropriate legal proceedings and hence, it does not lie in his mouth to take the plea that the Agreement was not signed voluntarily. If such coercion etc. had actually occurred, the respondent has no explanation to offer as to why he did not avail of any civil law remedy (to have the Agreement nullified or voided) or take recourse to criminal law (filing a complaint or registering a First Information Report). What seems clear to us

is that the *panchayat* tried to resolve the dispute and that led to the Agreement between the parties.

26. It would be profitable to refer to some decisions, after looking at the relevant provisions of the Transfer of Property Act, 1882 (hereinafter referred to as the "Act"). Chapter IV of the Act is entitled "*Of Mortgages Of Immovable Property And Charges*" and the relevant Section is quoted below:

> "***58. "'Mortgage', 'mortgagor', 'mortgagee', 'mortgage-money' and 'mortgage-deed'" defined.***—*(a) A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.*
>
> *The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any), by which the transfer is effected is called a mortgage-deed.*
>
> *(*b) Simple mortgage.—*Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.*
>
> *(*c) Mortgage by conditional sale.—*Where the mortgagor ostensibly sells the mortgaged property—*
>
> *on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or*
>
> *on condition that on such payment being made the sale shall become void, or*
>
> *on condition that on such payment being made the buyer shall transfer the property to the seller,*

the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale:

Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.

*(*d*)* Usufructuary mortgage*.—Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest or partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.*

*(*e*)* English mortgage*.—Where the mortgagor binds himself to re-pay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.*

*(*f*)* Mortgage by deposit of title-deeds*.—Where a person in any of the following towns, namely, the towns of Calcutta, Madras, and Bombay, and in any other town which the State Government concerned may, by notification in the Official* Gazette*, specify in this behalf, delivers to a creditor or his agent documents of title to immoveable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds.*

*(*g*)* Anomalous mortgage*.—A mortgage which is not a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, an English mortgage or a mortgage by deposit of title-deeds within the meaning of this section is called an anomalous mortgage."*

(emphasis supplied)

27. In ***Syndicate Bank v Estate Officer & Manager, APIIC Ltd.*** **(2007) 8 SCC 361**, this Court held:

> "***28.*** *The requisites of an equitable mortgage are : (i) a debt; (ii) a deposit of title deeds; and (iii) an intention that the deeds shall be security for the debt. The existence of the first and third ingredients of the said requisites is not in dispute. The territorial restrictions contained in the said provision also does not stand as a bar in creating such a mortgage. The principal question, which, therefore, requires consideration is as to whether for satisfying the requirements of Section 58(f) of the Transfer of Property Act, it was necessary to deposit documents showing complete title or good title and whether all the documents of title to the property were required to be deposited. A fortiori the question which would arise for consideration is as to whether in all such cases, the property should have been acquired by reason of a registered document.*
>
> *xxx*
>
> ***38.*** *In K.J. Nathan v. S.V. Maruty Reddy [AIR 1965 SC 430: (1964) 6 SCR 727] this Court held: (AIR pp. 435-36, para 10)*
>
> > *"10. The foregoing discussion may be summarised thus: Under the Transfer of Property Act a mortgage by deposit of title deeds is one of the forms of mortgages whereunder there is a transfer of interest in specific immovable property for the purpose of securing payment of money advanced or to be advanced by way of loan. Therefore, such a mortgage of property takes effect against a mortgage deed subsequently executed and registered in respect of the same property. The three requisites for such a mortgage are, (i) debt, (ii) deposit of title deeds; and (iii) an intention that the deeds shall be security for the debt. Whether there is an intention that the deeds shall be security for the debt is a question of fact in each case. The said fact will have to be decided just like any other fact on presumptions and on oral, documentary or circumstantial evidence. There is no presumption of law that the mere deposit of title deeds*

constitutes a mortgage, for no such presumption has been laid down either in the Evidence Act or in the Transfer of Property Act. But a court may presume under Section 114 of the Evidence Act that under certain circumstances a loan and a deposit of title deeds constitute a mortgage. But that is really an inference as to the existence of one fact from the existence of some other fact or facts. Nor the fact that at the time the title deeds were deposited there was an intention to execute a mortgage deed in itself negatives, or is inconsistent with, the intention to create a mortgage by deposit of title deeds to be in force till the mortgage deed was executed. The decisions of English Courts making a distinction between the debt preceding the deposit and that following it can at best be only a guide; but the said distinction itself cannot be considered to be a rule of law for application under all circumstances. Physical delivery of documents by the debtor to the creditor is not the only mode of deposit. There may be a constructive deposit. A court will have to ascertain in each case whether in substance there is a delivery of title deeds by the debtor to the creditor. If the creditor was already in possession of the title deeds, it would be hypertechnical to insist upon the formality of the creditor delivering the title deeds to the debtor and the debtor redelivering them to the creditor. What would be necessary in those circumstances is whether the parties agreed to treat the documents in the possession of the creditor or his agent as delivery to him for the purpose of the transaction."

The question which arose therein was that what would be the extent of subject-matter of mortgage; the entire property forming the subject-matter of mortgage or a part thereof."

(emphasis supplied)

28. In the interest of completeness, we may note that the Bench of 2 learned Judges in ***Syndicate Bank*** (*supra*) had referred to a larger Bench, the question as to whether a property could be equitably mortgaged by deposit of documents other than the title

deeds or registered title document. However, the 3-Judges Bench in ***Syndicate Bank v Estate Officer and Manager (Recoveries), Andhra Pradesh Industrial Infrastructure Corporation Limited*** **(2021) 3 SCC 736** was "*of the opinion that the reference need not be answered in the peculiar facts and circumstances of the case since in our opinion the State of Andhra Pradesh and its successor viz. APIIC and Telangana Industrial Infrastructure Ltd., are estopped from challenging the validity of the mortgage.*" In ***State of Haryana v Narvir Singh*** **(2014) 1 SCC 105**, this Court observed:

> "***11.*** *A mortgage inter alia means transfer of interest in the specific immovable property for the purpose of securing the money advanced by way of loan. Section 17(1)(c) of the Registration Act provides that a non-testamentary instrument which acknowledges the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extension of any such right, title or interest, requires compulsory registration. A mortgage by deposit of title deeds in terms of Section 58(f) of the Transfer of Property Act surely acknowledges the receipt and transfer of interest and, therefore, one may contend that its registration is compulsory. However, Section 59 of the Transfer of Property Act mandates that every mortgage other than a mortgage by deposit of title deeds can be effected only by a registered instrument. In the face of it, in our opinion, when the debtor deposits with the creditor title deeds of the property for the purpose of security, it becomes a mortgage in terms of Section 58(f) of the Transfer of Property Act and no registered instrument is required under Section 59 thereof as in other classes of mortgage. The essence of a mortgage by deposit of title deeds is the handing over, by a borrower to the creditor, the title deeds of immovable property with the intention that those documents shall constitute security, enabling the creditor to recover the money lent. After the deposit of the title deeds the creditor and borrower may record the transaction in a memorandum but such a memorandum would not be an instrument of mortgage. A memorandum reducing other terms and conditions with regard to the deposit in the form of a document, however, shall require*

registration under Section 17(1)(c) of the Registration Act, but in a case in which such a document does not incorporate any term and condition, it is merely evidential and does not require registration.

12. *This Court had the occasion to consider this question in Rachpal Mahraj v. Bhagwandas Daruka [1950 SCC 195 : AIR 1950 SC 272] and the statement of law made therein supports the view we have taken, which would be evident from the following passage of the judgment: (AIR p. 273, para 4)*

> *"4. A mortgage by deposit of title deeds is a form of mortgage recognised by Section 58(f) of the TP Act, which provides that it may be effected in certain towns (including Calcutta) by a person 'delivering to his creditor or his agent documents of title to immovable property with intent to create a security thereon'. That is to say, when the debtor deposits with the creditor the title deeds of his property with intent to create a security, the law implies a contract between the parties to create a mortgage, and no registered instrument is required under Section 59 as in other forms of mortgage. But if the parties choose to reduce the contract to writing, the implication is excluded by their express bargain, and the document will be the sole evidence of its terms. In such a case the deposit and the document both form integral parts of the transaction and are essential ingredients in the creation of the mortgage. As the deposit alone is not intended to create the charge and the document, which constitutes the bargain regarding the security, is also necessary and operates to create the charge in conjunction with the deposit, it requires registration under Section 17 of the Registration Act, 1908, as a non-testamentary instrument creating an interest in immovable property, where the value of such property is one hundred rupees and upwards. The time factor is not decisive. The document may be handed over to the creditor along with the title deeds and yet may not be registrable."*

13. *This Court while relying on the aforesaid judgment in United Bank of India Ltd. v. Lekharam Sonaram & Co. [AIR 1965 SC 1591] reiterated as follows: (AIR p. 1593, para 7)*

> *"7. … It is essential to bear in mind that the essence of a mortgage by deposit of title deeds is the actual handing over by a borrower to the lender of documents of title to immovable property with the intention that those documents shall constitute a security which will enable the creditor ultimately to recover the money which he has lent. But if the parties choose to reduce the contract to writing, this implication of law is excluded by their express bargain, and the document will be the sole evidence of its terms. In such a case the deposit and the document both form integral parts of the transaction and are essential ingredients in the creation of the mortgage. It follows that in such a case the document which constitutes the bargain regarding security requires registration under Section 17 of the Registration Act, 1908, as a non-testamentary instrument creating an interest in immovable property, where the value of such property is one hundred rupees and upwards. If a document of this character is not registered it cannot be used in the evidence at all and the transaction itself cannot be proved by oral evidence either."*

xxx

14.2. *But the question is whether a mortgage by deposit of title deeds is required to be done by an instrument at all. In our opinion, it may be effected in a specified town by the debtor delivering to his creditor documents of title to immovable property with the intent to create a security thereon. No instrument is required to be drawn for this purpose. However, the parties may choose to have a memorandum prepared only showing deposit of the title deeds. In such a case also registration is not required. But in a case in which the memorandum recorded in writing creates rights, liabilities or extinguishes those, the same requires registration.*

> ***14.3.*** *In our opinion, the letter of the Finance Commissioner would apply in cases where the instrument of deposit of title deeds incorporates the terms and conditions in addition to what flows from the mortgage by deposit of title deeds. But in that case there has to be an instrument which is an integral part of the transaction regarding the mortgage by deposit of title deeds. A document merely recording a transaction which is already concluded and which does not create any rights and liabilities does not require registration.*
>
> ***14.4.*** *Nothing has been brought on record to show existence of any instrument which has created or extinguished any right or liability. In the case in hand, the original deeds have just been deposited with the Bank. In the face of it, we are of the opinion that the charge of mortgage can be entered into revenue record in respect of mortgage by deposit of the title deeds and for that, an instrument of mortgage is not necessary. A mortgage by deposit of the title deeds further does not require registration. Hence, the question of payment of registration fee and stamp duty does not arise.*
>
> xxx
>
> ***14.5.*** *By way of abundant caution and at the cost of repetition we may, however, observe that when the borrower and the creditor choose to reduce the contract into writing and if such a document is the sole evidence of the terms between them, the document shall form an integral part of the transaction and the same shall require registration under Section 17 of the Registration Act.*"
>
> (emphasis supplied)

29. We are of the opinion that the Single Judge has appreciated the law correctly as far as the Agreement is concerned to hold it to be a mortgage in view of Section 58(f) of the Act. We have read and re-read the Agreement. We have also minutely considered the exposition of law made in ***Narvir Singh*** (*supra*). We are of the opinion that the Agreement only records what has happened and does not create/extinguish rights/liabilities. It would, therefore, be covered by para 14.3 of ***Narvir Singh*** (*supra*), as highlighted hereinbefore. The reasoning of the Division Bench proceeds as under:

> "***10.*** *…The recitals of the document marked as Ex.P1 and duly extracted in the judgment does not contain any, clear admission that a mortgage was created on the property. The document proceeds as if the appellant agreed to pay a sum of Rs.11 lakhs in full and final settlement. There is nothing to show that a mortgage was created. Even in the evidence given by the respondent as P.W.1, it was his case that the parent document was handed over only as a security. Such being the evidence on record, the learned single Judge was not correct in giving a finding that mortgage was created and the title deed was given in furtherance of the mortgage. We are therefore of the view that there is no evidence adduced by the respondent to show that a mortgage deed was executed by the appellant and as such, he is entitled to a mortgage decree. …*"
>
> (sic)

30. Quite evidently, the Division Bench did not account for Section 58(f) of the Act. Indubitably, the respondent pleaded threat and coercion whilst executing/signing the Agreement, yet having accepted that he did sign the same in his own hand, the burden was on him to prove such threat/coercion. Looked at from any angle, the First Impugned Order suffers from legal errors, and cannot withstand the scrutiny of law. At the cost of repetition, it is to be stated that the Single Judge has rightly considered the factual prism and focused on the core issue without reference to facts which were irrelevant and not germane to the issue(s) before her.

31. The Second Impugned Order raises serious questions about how and why the appellant went into slumber. If we may say so, a 'fantastic' plea was taken that the appellant had engaged a counsel only for the delay condonation MP and not to argue the main appeal. Such a contention is noted only for the purpose of outright rejection. This 'fantastic' plea has been dealt with correctly by the Division Bench and no legal infirmity can be found therein.

32. Alas, only if things were as simple as they seemed! We have already indicated that the First Impugned Order has to be set aside. In order to do justice, quashing of the First Impugned Order would necessarily mean that the effect of the Second Impugned Order would get nullified, for all practical purposes, despite this Court being of the

view that on its own merits, the Second Impugned Order cannot be faulted. However, for such legal misadventure resulting in wastage of precious judicial time of the High Court, which could have been better spent answering the call of justice raised by the teeming millions, we impose costs of Rs.1,20,000/- (Rupees One Lakh Twenty Thousand) on the appellant. Such cost shall be deposited within 6 weeks with the Registry of the High Court, to be utilised as follows:

i. Rs.40,000 for juvenile welfare in a manner to be decided by the Juvenile Justice Monitoring Committee;

ii. Rs.40,000 for welfare of the Advocate-Clerks in a manner to be decided by Hon'ble the Acting Chief Justice, and;

iii. Rs.40,000 for legal aid in a manner to be decided by the High Court Legal Services Committee.

Receipt of deposit be filed in the Registry of this Court soon thereafter. In case of non-compliance, the matter will be placed before us with appropriate Office Report.

33. Accordingly, both Impugned Orders stand set aside. The Judgment dated 01.04.2010 passed by the Single Judge stands restored with a slight modification i.e., reduction in the rate of interest which has been claimed by and allowed to the appellant. Interest at the rate of 36% p.a. is on the excessive side and we pare down the same to 12% p.a. in the interest of justice. Hence, simple interest will run only @ 12% p.a. from 24.06.2000 till the date of realisation.

34. The appeals are allowed in the above terms.

35. I.A. No.16204/2019 for exemption from filing Certified Copy of the Impugned Judgment(s) is allowed. I.A. No.180367/2019 for permission to file Additional Documents is allowed.

36. I.A. No.16203/2019 seeks condonation of delay in filing the petitions. There is a delay of 589 days in filing the petition against the First Impugned Order. The petition against the Second Impugned Order is also delayed by approximately 84 days. We are cognizant that the appellant had moved the Division Bench seeking a fresh hearing of the main appeal, which led to passing of the Second Impugned Order. In ***Collector, Land Acquisition, Anantnag v Mst Katiji*** **(1987) 2 SCC 107**, the Court noted that it had been adopting a justifiably liberal approach in condoning delay and that "*justice on*

merits" is to be preferred as against what "*scuttles a decision on merits*". Albeit, while reversing an order of the High Court therein condoning delay, principles to guide the consideration of an application for condonation of delay were culled out in ***Esha Bhattacharjee v Managing Committee of Raghunathpur Nafar Academy*** **(2013) 12 SCC 649**. One of the factors taken note of therein was that substantial justice is paramount.[8]

37. In ***N L Abhyankar v Union of India*** **(1995) 1 MhLJ 503**, a Division Bench of the Bombay High Court at Nagpur considered, though in the context of delay *vis-à-vis* Article 226 of the Constitution, the decision in ***M/s Dehri Rohtas Light Railway Company Limited v District Board, Bhojpur*** **(1992) 2 SCC 598**, and held that "*The real test for sound exercise of discretion by the High Court in this regard is not the physical running of time as such, but the test is whether by reason of delay there is such negligence on the part of the petitioner, so as to infer that he has given up his claim or whether before the petitioner has moved the Writ Court, the rights of the third parties have come into being which should not be allowed to be disturbed unless there is reasonable explanation for the delay.*"[9] The Bombay High Court's eloquent statement of the correct position in law found approval in ***Municipal Council, Ahmednagar v Shah Hyder Beig*** **(2000) 2 SCC 48** and ***Mool Chandra v Union of India*****, 2024 SCC OnLine SC 1878**.

38. In the wake of the authorities above-mentioned, taking a liberal approach subserving the cause of justice, we condone the delay and allow I.A. No.16203/2019, subject to payment of costs of Rs.20,000/- (Rupees Twenty Thousand) by the appellant to the respondent.

Result of the case: Appeals allowed.

†*Headnotes prepared by:* Divya Pandey

8 Para 21.3 of ***Esha Bhattacharjee*** (*supra*).

9 Emphasis supplied.

[2024] 8 S.C.R. 1024 : 2024 INSC 631

Bangalore Electricity Supply Company Limited
v.
Hirehalli Solar Power Project LLP & Others

(Civil Appeal No. 7595 of 2021)

27 August 2024

[Pamidighantam Sri Narasimha* and Pankaj Mithal, JJ.]

Issue for Consideration

Whether the extension of the Scheduled Commissioning Date (SCD) was occasioned under the force majeure clause of the Power Purchase Agreement (PPA), and consequently, whether the reduction in tariff payable to the respondents is justified.

Headnotes†

Electricity Act, 2003 – State of Karnataka introduced a policy dated 26.08.2014 to identify and promote solar energy projects by land-owning farmers – These solar power plants of 1-3 MW capacity would generate and sell power to the State Electricity (Distribution) Supply Companies at the tariff determined by the Karnataka Electricity Regulatory Commission (KERC) – Respondent no. 2-farmer applied under the policy – Respondent No.1 is a special purpose vehicle (SPV) to undertake the solar power project – In the year 2015, the appellant entered into a PPA with respondent no. 2 and the same was approved by KERC – The SPV had to achieve commercial operation within 18 months from the effective date – Several farmers, including the respondent, raised concerns regarding delay in the execution of the project on account of delay in getting land use conversion, delay in getting evacuation approvals, demonetisation, and other reasons – KERC rejected the various causes of delay put forth by the respondents and held that the force majeure clause must be strictly interpreted – KERC reduced the tariff payable to the respondent to Rs. 4.36 per unit for the term of the PPA by relying on Article 5.1 of the PPA – However, the APTEL found that the respondents had taken all necessary care and caution and acted with due diligence and held that respondents are entitled to the benefit of the force majeure clause and an extension of time – Also held that reduction in

* Author

tariff from Rs. 8.40 to Rs. 4.36 per unit would adversely affect them – Hence, it directed the appellant to pay the difference in per unit tariff along with the late payment surcharge as provided under Article 6.4 of the PPA – Correctness:

Held: The KERC's appreciation of the evidence has led it to the conclusion that the delay in commissioning was due to the respondents' delay in making the applications, despite the approval of the PPA – However, the APTEL has taken note of certain additional factors affecting the time taken to secure the approvals that were not considered by the KERC – These include the time taken by the government to provide the PTCL that is required for approval of land conversion, and the delay caused by the authority in evacuation approval – Considering these additional factors, the APTEL has re-appreciated the evidence to find that the delay was not attributable to the respondents but to the government bodies and relevant authorities – There is no error in the APTEL's approach, and it is reasonable in its re-appreciation of evidence – In light of the above findings of fact by the APTEL that the delay is not attributable to the respondents and that the force majeure clause is applicable, it rightly held that the extension of time under Article 2.5 is warranted and the commissioning of the project on 24.08.2017 is within the extended period of 24 months – Consequently, the APTEL also rightly held that there is no occasion for the imposition of liquidated damages under Articles 2.2 and 2.5.7 or for the reduction of tariff under Article 5.1 of the PPA. [Paras 10.4, 12]

Electricity Act, 2003 – s.125 – Scope and ambit of appellate jurisdiction:

Held: The position that emerges in this case, it is a little more restrictive as the requirement under Section 125 is not merely a 'question of a law' but a 'substantial question of law' – The restrictive scope of appellate jurisdiction is a product not only of the statutory preconditions, but also a necessary measure to enable freedom to statutory regulator and Tribunal to develop sectorial laws through a principled and consistent approach. [Paras 1, 7.4]

Contract Act, 1872 – Chapter III – ss.32 and 56 – Power Purchase Agreement – Force Majeure:

Held: The law on force majeure, specifically in the context of PPAs, has been comprehensively dealt with by this Court in Energy Watchdog v. Central Electricity Regulatory Commission – The Court delved into contractual jurisprudence on force majeure

clauses and frustration of contracts – It held that Sections 32 and 56 of the Indian Contract Act, 1872 govern the law on force majeure – When the contract contains an express or implied force majeure clause, it is governed under Chapter III of the Contract Act, specifically Section 32 – In such cases, the 'doctrine of frustration' in Section 56 does not apply and the court must interpret the force majeure clause contained in the contract – It held that a force majeure clause must be narrowly construed. [Para 10.1]

Case Law Cited

Chennamangathihalli Solar Power Project LLP v. BESCOM, **2020 SCC OnLine APTEL 75;** *SEBI v. Mega Corporation Limited* **[2022] 2 SCR 546 : 2022 SCC OnLine SC 361;** *Energy Watchdog v. Central Electricity Regulatory Commission* **[2017] 3 SCR 153 : (2017) 14 SCC 80 – referred to.**

List of Acts

Electricity Act, 2003; Contract Act, 1872.

List of Keywords

Section 125 of Electricity Act, 2003; Section 32 and section 56 of Contract Act, 1872; Power Purchase Agreement; Force Majeure; Reduction in tariff; Frustration of contract; Question of law; Substantial question of law; Solar Power Project.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 7595 of 2021

From the Judgment and Order dated 12.08.2021 of the Appellate Tribunal for Electricity, New Delhi in Appeal No. 38 of 2019

With

Civil Appeal Nos. 7608 and 6386 of 2021

Appearances for Parties

K.M. Nataraj, ASG, Yasobant Das, Sr. Adv., Ms. Garima Jain, Arnav Khanna, Tushar Mahindroo, Mohit Singh, Arunav Patnaik, Ms. Bhabna Das, Advs. for the Appellants.

Prateek K. Chadha, A.A.G., Basava Prabhu Patil, Sr. Adv., Ms. Prerna Priyadarshini, Syed Faraz Alam, Atharva Gaur, Aayushman Aggarwal, Ujjal Banerjee, Anmol Sehgal, V. N. Raghupathy, Sreekar Aechuri, Advs. for the Respondent.

**Bangalore Electricity Supply Company Limited v.
Hirehalli Solar Power Project LLP & Others**

Judgment / Order of the Supreme Court

Table of Contents*

Judgment

Pamidighantam Sri Narasimha, J.

1. The short issue arising from these appeals is whether the extension of the Scheduled Commissioning Date[1] was occasioned under the force majeure clause of the Power Purchase Agreement,[2] and consequently, whether the reduction in tariff payable to the respondents is justified. While upholding the decision of the Appellate Tribunal for Electricity[3] we have examined the scope and ambit of our appellate jurisdiction under Section 125 of the Electricity Act, 2003.[4] We have held that the restrictive scope of appellate jurisdiction is a product not only of the statutory preconditions, but also a necessary measure to enable freedom to statutory regulator and Tribunal to develop sectorial laws through a principled and consistent approach.

2. *Facts*: Since the facts and the PPAs are similar in all three appeals, we will deal with the facts in the lead Civil Appeal No. 7595/2021, where the most relevant facts are as follows:

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

1 Hereinafter "SCD".

2 Hereinafter "PPA".

3 Hereinafter "APTEL".

4 Hereinafter "the Act".

2.1 State of Karnataka introduced a policy dated 26.08.2014 to identify and promote solar energy projects by land-owning farmers. These solar power plants of 1-3 MW capacity would generate and sell power to the State Electricity (Distribution) Supply Companies[5] at the tariff determined by the Karnataka Electricity Regulatory Commission.[6]

2.2 Respondent no. 2 is one of the many farmers who applied under the policy and is recognised as a solar power developer[7] under the policy. Respondent No.1 is a special purpose vehicle to undertake the solar power project in Chitradurga district in Karnataka.

2.3 Pursuant to a Letter of Award dated 28.08.2015, the appellant entered into a PPA with respondent no. 2 on 29.08.2015. This PPA was approved by the KERC on 07.09.2015. The relevant clauses of the PPA will be discussed later, but an important aspect to note at this juncture is that the SPV must achieve commercial operation within 18 months from the effective date as per Article 1.1(xxviii) read with Article 4.1(c) of the PPA. Effective date is defined under Article 1.1(xii) as the date of signing the PPA. Hence, the SCD for the project was 28.02.2017 as per these clauses.

2.4 The SPV (respondent no. 1) was incorporated on 05.02.2016. The respondents then submitted an application for land conversion on 16.02.2016. On 10.03.2016, they paid the evacuation approval processing fee. On 27.12.2016, they paid the land conversion processing fee, and the approval for conversion was granted on 07.01.2017. The evacuation scheme was provisionally approved on 13.05.2016, and the final approval was on 22.08.2016.

2.5 Several farmers, including the respondent, raised concerns regarding delay in the execution of the project on account of delay in getting land use conversion, delay in getting evacuation approvals, demonetisation, and other reasons. Hence, the

5 Hereinafter "DISCOMs".

6 Hereinafter "KERC".

7 Hereinafter "SPD".

Government of Karnataka by a letter dated 24.11.2016 directed all DISCOMs to set up 3-member committees to examine each request for extension.

2.6 The present respondents requested a 6-month extension under Article 2.5 of the PPA on 03.12.2016. This was approved by the appellant through a letter dated 02.03.2017.

2.7 However, by a letter dated 05.04.2017, KERC directed the DISCOMs that all requests for extensions must be filed before it. Pursuant to this letter, the respondents filed a petition before the KERC seeking extension of time for the commercial operation of the project and invoked the force majeure clause in the PPA (Article 8.3).

2.8 During the pendency of the petition, the respondents' solar power project was commissioned on 24.08.2017, within the extended period of 24 months.

3. *KERC's order*: In its order dated 18.09.2018, the KERC rejected the various causes of delay put forth by the respondents and held that the force majeure clause must be strictly interpreted. First, delay in approval of the PPA by KERC was held to have no bearing on the initial obligations of the SPD in applying for approvals, loans, etc as the respondents had not proved the same. Second, it found that the respondent had applied for conversion of land only on 18.02.2016, over five months after signing the PPA and paid the charges only on 27.12.2016, after which it was allowed on 07.01.2017. Hence, the delay in conversion of land use was attributed to the respondent. Third, the delay in disbursement of loan also did not delay the implementation as the respondent had commenced implementation from its own funds. Fourth, the respondent applied for the evacuation approval only on 25.02.2016, and the regular approval was finally granted on 22.08.2016. Hence, the respondent delayed the application and cannot attribute the same to the authorities. Similarly, the KERC also rejected delay on other grounds such as time taken for delivery of the breaker, and inspection of the project and grant of safety approval.

3.1 It also found that the respondents had not submitted a notice as contemplated under Article 8.3(b)(i) and hence, they are not entitled to invoke force majeure and claim an extension of time under Article 2.5. Since the KERC found that the delay in

securing approvals and the consequent delay in commissioning was attributable to the respondents, it imposed liquidated damages under Articles 2.2 and 2.5.7 of the PPA.

3.2 Lastly, the KERC reduced the tariff payable to the respondent to Rs. 4.36 per unit for the term of the PPA by relying on Article 5.1 of the PPA.

4. *APTEL's impugned order*: The respondent's appeal against the order of the KERC was allowed by the APTEL by the order impugned before us. The APTEL dealt with each ground of delay raised by the respondents. First, it took note that the respondent's application for land conversion was on 16.02.2016, after which it had to procure several documents, including a PTCL certificate, as provided under Rule 106A of the Karnataka Land Revenue Act. Further, these documents must be secured from various government departments, which is a laborious process. The PTCL certificate was issued by the government only on 04.10.2016, although the respondent had applied for it even before signing the PPA. Hence, it found that the respondent could not be blamed for the delay in getting approval for land use conversion.

4.1 Further, the APTEL also took note of the State Government's opinion to grant deemed conversion in such projects due to the number of SPDs facing similar issues. However, the APTEL observed, the guidelines to revenue authorities were unclear and hence the SPDs could not benefit from the same. The delay in the issuance of these guidelines and the confusion among authorities regarding deemed conversion had also resulted in a delay in obtaining land use conversion, which the respondents cannot be faulted for.

4.2 Second, the APTEL found that although the application for grid connectivity and evacuation approval were submitted on 25.02.2016, the final approval was only given on 22.08.2016, after a lapse of 5 months. Until this approval is given, the authorities will not prepare the bay SLD and layout drawings with estimation of bay erection. The bay intimation notice was received by the respondents only a few days before the original SCD, and it was 170 days after the grant of final evacuation approval. Hence, there was a delay in the construction of the bay that was not caused by the respondents.

4.3 Relying on other decisions by the APTEL, it held that the date of signing the PPA will not be the effective date, as provided in Article 1.1(xxviii). Rather, the PPA becomes effective only when it is approved by the KERC, which in this case was on 07.09.2015. Hence, 18 months must be calculated from this date.

4.4 The APTEL observed that the appellant had itself approved the extension of time by 6 months after a Technical Committee constituted by it had scrutinised all relevant documents. Hence, the appellant could not take the stance that the respondents were not diligent. Even before the KERC, the appellant had not objected to the grounds raised by the respondents, and hence they could not take a contrary stance at this stage.

4.5 Considering the delay in obtaining the PTCL certificate and approval for land conversion, the approval for evacuation, and construction of the bay, the APTEL found that the respondents had taken all necessary care and caution and acted with due diligence. Hence, it held that the respondents could not be blamed for the delay as the time taken by government authorities to provide approvals was not within their control and they had taken all the measures that they could. Consequently, the APTEL found that the respondents are entitled to the benefit of the force majeure clause and an extension of time, as was already approved by the appellant. The respondents were able to commission the project on 24.08.2017, which falls within the extended period of 24 months from 07.09.2015.

4.6 With regard to the reduction in tariff by the KERC, APTEL considered that the government scheme, under which these PPAs were signed, was intended to create opportunity and benefit for farmers by establishing solar power plants. The farmers had invested huge amounts, sometimes through loans, in these projects and a reduction in tariff from Rs. 8.40 to Rs. 4.36 per unit would adversely affect them. Hence, it directed the appellant to pay the difference in per unit tariff along with the late payment surcharge as provided under Article 6.4 of the PPA.

4.7 Lastly, it also set aside the imposition of liquidated damages under the PPA as it found that there was no delay in securing approvals and commissioning the project.

5. *Submissions*: We have heard Mr. K.M. Nataraj, ASG and Mr. Yasobant Das, senior advocate appearing for the appellants, and Mr. Basava Prabhu Patil, senior advocate for the respondents. The learned counsels have, through the course of their submissions, emphasised on whether or not the delay in the present matter would be covered under the force majeure clause of the PPA.

   5.1 Learned ASG argued that a force majeure clause must be strictly interpreted. There must be a specific pleading by the party claiming force majeure and the burden is on him to prove the same. In this regard, he made two primary submissions: *first*, there was no force majeure event that warrants an extension of time under Article 2.5 of the PPA; and *second*, the respondents have not complied with the requirement of submitting a written notice invoking force majeure as required under Article 8.3(b)(i). Further, he has also argued that the APTEL was not justified in granting late payment surcharge to the respondent as the same was not pleaded before the KERC or in appeal.

   5.2 In regard the argument on force majeure, Mr. Nataraj has taken us through the various dates concerning approval for change in land use and the evacuation approval. He has submitted that the delay in securing these approvals is attributable to the respondents, who were required to obtain these permissions within the contractually stipulated period of 365 days under Article 2.1 of the PPA, and to finally commission the project within a period of 18 months. Despite being aware of these timelines, he submits that the respondents delayed the applications and payment of requisite fees. The government departments provided the approvals within a few days from the time when the respondents fulfilled all requirements. He therefore submits that the delay is attributable to the respondents and hence, as per Article 8.3(b)(iv), they cannot claim benefit of force majeure. Consequently, the tariff must be reduced as per Article 5.1 as a higher tariff increases the burden on consumers and hence, affects public interest.

   5.3 Mr. Das supplemented these submissions by arguing that in Civil Appeal No. 6386 of 2021, the respondents therein had also raised the ground of demonetisation as a reason for delay in commissioning. He submits that Article 8.3 of the PPA does not cover such a ground as a force majeure event.

6. Mr. Patil, appearing for the respondents, has submitted that there are three primary factors, among several others, that caused the delay – (i) time taken for converting the land; (ii) time taken for the KERC to approve the PPA; and (iii) time taken for the evacuation approval. He submits that these concerns have been raised by not only the respondents in the present case but in several other cases. Due to the extent to which SPDs were facing these issues, the government directed DISCOMs to set up committees to look into the same and consider the facts of each case individually. It is pursuant to this direction that the respondents' case was considered by the appellant, who granted a 6-month extension on 02.03.2017 by exercising its power under Article 2.5 read with Article 8.3 of the PPA. He submits that it was incorrect for the KERC to then require the respondents to file a separate petition to seek extension as the same is not as per the terms of the PPA. He further submits that the KERC had perversely appreciated the evidence regarding delay and that it should not have rejected the petition when the appellant had already granted the extension. Further, he submitted that the respondents were able to complete the project within the extended time period.

   6.1 Mr. Patil also took us through several orders of this Court[8] that dismiss appeals arising out of similar orders by the APTEL. He has specifically referred to the APTEL's decision in *Chennamangathihalli Solar Power Project LLP v. BESCOM*[9] and has submitted that this decision has been relied on by the APTEL in several subsequent decisions arising out of similar facts, including the present impugned order. This Court has dismissed the appeal arising out of *Chennamangathihalli* (supra)[10] and appeals from other APTEL orders relying on it. Mr. Nataraj, in his written submissions, has sought to differentiate these cases from the present matter on facts.

7. *Scope of Supreme Court's appellate jurisdiction under Section 125 of the Act*: Before we deal with the submissions of the learned counsels, we must take note of the scope of our appellate jurisdiction under Section 125, which reads:

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8 In Civil Appeal No. 3958/2020; Civil Appeal No. 897/2022; Civil Appeal No. 5134/2021; Civil Appeal Diary Nos. 32980/2022, 33053/2022 and 33572/2022.

9 2020 SCC OnLine APTEL 75.

10 In Civil Appeal No. 3958/2020.

"***Section 125. (Appeal to Supreme Court):***

Any person aggrieved by any decision or order of the Appellate Tribunal, may, file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal, to him, on any one or more of the grounds specified in section 100 of the Code of Civil Procedure,1908…"

7.1 Section 100 of the CPC restricts the High Court's jurisdiction in second appeals to cases that involve '*substantial questions of law*'. There are two components to this requirement – (i) there must be a 'question of law'; and (ii) such question of law must be 'substantial'.

7.2 In *SEBI v. Mega Corporation Limited*,[11] this Court analysed the meaning of 'question of law' to determine the scope of its appellate jurisdiction under Section 15Z of the SEBI Act, 1992.[12] It held that this phrase is open textured and must be interpreted by looking at the words in their context.[13] The relevant portions are extracted:

> "***17.*** *The jurisdiction of the Supreme Court under Section 15Z to consider any question of law arising from the orders of the Tribunal should therefore be seen in the 'context' of the powers and jurisdiction of the Tribunal under Sections 15K, 15L, 15M, 15T, 15U and 15Y of the Act. It is in the functioning of the Tribunal to re-examine all questions of fact at the appellate stage while exercising jurisdiction under Section 15T of the Act. In Clariant and National Securities Depository, this Court had an occasion to examine the jurisdiction of the Tribunal and explain that the Tribunal has wide powers. Being a permanent body, apart from acting as an appellate*

11 [2022] 2 SCR 546 : 2022 SCC OnLine SC 361

12 Section 15Z of the SEBI Act, 1992 reads:
"***15Z. Appeal to Supreme Court.***-- *Any person aggrieved by any decision or order of the Securities Appellate Tribunal may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Securities Appellate Tribunal to him on any question of law arising out of such order…*" (emphasis supplied)

13 ibid, para 16.

Tribunal on fact, the Tribunal routinely interprets the Act, Rules and Regulations made thereunder and evolves a legal regime, systematically developed over a period of time. The advantage and benefit of this process is consistency and structural evolution of the sectorial laws.

18. *It is in the above-referred context that the Supreme Court while exercising appellate jurisdiction under Section 15Z of the Act would be measured in its approach while entertaining any appeal from the decision of the Tribunal. This freedom to evolve and interpret laws must belong to the Tribunals to subserve the regulatory regime for clarity and consistency and it is with this perspective that the Supreme Court will consider appeals against judgment of the Tribunals on questions of law arising from its orders.*

19. *It is in this very context that the UK Supreme Court in the case of Jones v. First Tier Tribunal, formulated certain principles for appellate courts to interfere against the orders of Tribunals on the ground of existence of questions of law. The Court held as under:*

> *"16 … It is primarily for the tribunals, not the appellate courts, to develop a consistent approach to these issues [of law and fact], bearing in mind that they are peculiarly well fitted to determine them. A pragmatic approach should be taken to the dividing line between law and fact, so that the expertise of tribunals at the first tier and that of the Upper Tribunal can be used to best effect. An appeal court should not venture too readily into this area by classifying issues as issues of law which are really best left for determination by the specialist appellate tribunals."*

20. *The scope of appeal under Section 15Z may be formulated as under:*

20.1 The Supreme Court will exercise jurisdiction only when there is a question of law arising for consideration from the decision of the Tribunal. A question of law may arise when there is an erroneous construction of the legal provisions of the statute or the general principles of law. In such cases, the Supreme Court in exercise of its jurisdiction of Section 15Z may substitute its decision on any question of law that it considers appropriate.

20.2 However, not every interpretation of the law would amount to a question of law warranting exercise of jurisdiction under Section 15Z. The Tribunal while exercising jurisdiction under Section 15T, apart from acting as an appellate authority on fact, also interprets the Act, Rules and Regulations made thereunder and systematically evolves a legal regime. These very principles are applied consistently for structural evolution of the sectorial laws. This freedom to evolve and interpret laws must belong to the Tribunal to subserve the Regulatory regime for clarity and consistency. These are policy and functional considerations which the Supreme Court will keep in mind while exercising its jurisdiction under Section 15Z."

7.3 The above understanding of 'question of law' as a precondition to this Court's exercise of appellate jurisdiction under regulatory statutes is extremely pertinent to the present matter. The Act envisages the establishment of State Electricity Regulatory Commissions and the Central Electricity Regulatory Commission as expert and specialised bodies that discharge advisory, regulatory, and adjudicatory functions.[14] It has established the APTEL as an appellate body to hear appeals against orders of the adjudicating officers or the Appropriate Commission.[15] Hence, while delineating the contours of this Court's interference in

14 The functions of the Central Commission are enlisted in Section 79 of the Act. Similarly, Section 86 provides the functions of the State Commissions.

15 Section 110 establishes the APTEL. Section 111 provides the scope of appellate jurisdiction of the APTEL and Section 120 sets out the procedure to be followed by the APTEL and the powers of the APTEL.

appeal under Section 125, we must be mindful and measured so as to enable a systematic and coherent development of electricity law by the Commissions and the APTEL.

7.4 Having examined the scope of this Court's exercise of appellate jurisdiction when there is a 'question of law' under Section 15Z of the SEBI Act, the position that emerges in this case, it is a little more restrictive as the requirement under Section 125 is not merely a 'question of a law' but a '*substantial* question of law'.[16]

8. *Analysis on merits*: The above discussion provides the context in which we decide the present appeals. We take note of several orders of this Court that have dismissed appeals arising out of similar orders and similar facts.[17] We find it necessary to state our reasons for dismissing the present appeals, to finally settle this issue. We will therefore analyse the submissions of the learned counsels in light of the scope of our jurisdiction and the reasoning and findings of the impugned order.

8.1 At the outset, it is necessary to state that the learned ASG and learned senior counsel for the appellant have not proposed a substantial question of law for this Court to consider. Rather, they have argued on facts as to whether or not the delay is attributable to the respondents, and consequently whether force majeure is applicable. We will analyse the impugned order, as well as the KERC's order, to determine whether there is any substantial question of law that calls for our interference.

9. *Clauses of the Power Purchase Agreement (PPA)*: Before discussing the orders of the KERC and the APTEL, it is necessary to identify the relevant clauses of the PPA. Article 2.1 of the PPA imposes the obligation on the SPD to secure necessary approvals, clearances, and permits within 365 days. Liquidated damages can be imposed on the SPD under Article 2.2 in case of delay, provided that the delay is not attributable to the appellant or due to a force majeure event.

16 The requirement of 'substantial question of law' for this Court to exercise appellate jurisdiction under Section 125 has also been recognised in *BSES Rajdhani Power Limited v. Delhi Electricity Regulatory Commission* (2023) 4 SCC 788.

17 In Civil Appeal No. 3958/2020; Civil Appeal No. 897/2022; Civil Appeal No. 5134/2021; Civil Appeal Diary Nos. 32980/2022, 33053/2022 and 33572/2022.

9.1 Article 2.5.1 permits the extension of the SCD in case the SPD is unable to fulfil its contractual obligations due to the appellant's default or there are force majeure events that affect either the appellant or the SPD. The list of force majeure events is set out in Article 8.3(a), and sub-clause (vi) is the most relevant for us. A party can invoke the force majeure clause subject to the conditions set out in Article 8.3(b).

9.2 Article 2.5.7 provides that *subject to the other provisions* of the PPA, the SPD is liable to pay liquidated damages if it is unable to supply power to the appellant by the SCD. Therefore, the payment of damages under this clause is subject to an extension of time under Article 2.5.1. Article 5.1 provides for the tariff rate payable to the SPD as Rs. 8.40 per unit. However, in cases of delay, *subject to extension of time under Article 2.5*, it provides that the lower of Rs. 8.40 per unit and the varied tariff applicable as on the date of commercial operation will apply. A plain reading of Article 5.1 makes it clear that the lower tariff will not apply if there is an extension of time under Article 2.5.

9.3 The relevant clauses of the PPA are reproduced for ready reference:

"Article 2.1: Conditions Precedent

The obligations of BESCOM and the SPD under this Agreement are conditional upon the occurrence of the following in full within 365 days from the effective date.

2.1.1

(i)The SPD shall obtain all permits, clearances and approvals (whether Statutory or otherwise) as required to execute and operate the Protect hereinafter referred to as "Approvals"):

(ii) The Conditions Precedent required to be satisfied by the SPD shall be deemed to have been fulfilled when the SPD shall submit:

a. The DPR to BESCOM and achieve financial closure and provide a certificate to BESCOM from the lead banker to this effect;

b. All Consents, Clearances and Permits required for supply of power to BESCOM as per the terms of this Agreement; and

c. Power evacuation approval from Karnataka Power Transmission Company Limited or BESCOM, as the case maybe.

2.1.2 SPD shall make all reasonable endeavors to satisfy the Conditions Precedent within the time stipulated and BESCOM shall provide to the SPD all the reasonable cooperation as may be required to the SPD for satisfying the Conditions Precedent.

2.1.3 The SPD shall notify BESCOM in writing at least once a month on the progress made in satisfying the Conditions Precedent. The date, on which the SPD fulfills any of the Conditions Precedent pursuant to Clause 2.1.1, it shall promptly notify BESCOM of the same."

"Article 2.2: Damages for delay by the SPD:

"*2.2.1 In the event that the SPD does not fulfill any or all of the Conditions Precedent set forth in Clause 2.1 within the period of 365 days and the delay has not occurred for any reasons attributable to BESCOM or due to Force Majeure, the SPD shall pay to BESCOM damages in an amount calculated at the rate of 0.2% (zero point two per cent) of the Performance Security for each day's delay until the fulfillment of such Conditions Precedent, subject to a maximum period of 60 (Sixty) days. On expiry of the said 60 (Sixty) days, BESCOM at its discretion may terminate this Agreement.*"

Article 2.5: Extension of Time

"2.5.1 In the event that the SPD is prevented from performing its obligations under Clause 4.1 by the Scheduled Commissioning Date due to:

a. Any BESCOM Event of Default; or

b. Force Majeure Events affecting BESCOM; or

c. Force Majeure Events affecting the SPD,

2.5.2 The Scheduled Commissioning Date and the Expiry Date shall be deferred, subject to the reasons and limits prescribed in Clause 2.5.1 and Clause 2.5.3 for a reasonable period but not less than 'day for day' basis, to permit the SPD or BESCOM through the use of due diligence, to overcome the effects of the Force Majeure Events affecting the SPD or BESCOM, or till such time such Event of Default is rectified by BESCOM.

2.5.3. In case of extension occurring due to reasons specified in clause 2.5.1 (a), any of the dates specified therein can be extended, subject to the condition that the Scheduled Commissioning Date would not be extended by more than 6 (six) months.

…

2.5.6. As a result of such extension, the Scheduled Commissioning Date and the Expiry Date newly determined date shall be deemed to be the Scheduled Commissioning Date and the Expiry Date for the purposes of this Agreement.

2.5.7. Liquidated damages for delay in commencement of supply of power to BESCOMs.

Subject to the other provisions of this agreement, if the SPD is unable to commence supply of power to BESCOM by the scheduled commissioning date, the SPD shall pay to BESCOM, liquidated damages for the delay in such commencement of supply of power as follows:

(a) For the delay up to one month-amount equivalent to 20% of the performance security.

(b) For the delay of more than one month up to three months-amount equivalent to 40% of the performance security.

(c) For the delay of more than three months up to six months-amount equivalent to 100% of the performance security.

For avoidance of doubt, in the event of failure to pay the above mentioned damages by the SPD, the BESCOM entitled to encash the performance Security."

Article 5: Rates and Charges:

"5.1 Tariff payable: The SPD shall be entitled to receive the Tariff of Rs. 8.40 per kwh based on the KERC tariff order S/03/1 dated 10.10.2013 in respect of SPD's Solar PV projects in terms of this agreement for the period between COD and the Expiry Date. However, subject to Clause 2.5, if there is a delay in commissioning of the Project beyond the Scheduled Commissioning Date and during such period such period there is a variation in the KERC Tariff, then the applicable Tariff for the projects shall be the lower of the following:

(i) Rs.8.40 per kwh

(ii) varied tariff applicable as on the date of Commercial Operation…"

Article 8: *Force Majeure*

"8.3 Force Majeure Events:

a) Neither Party shall be responsible or liable for or deemed in breach hereof because of any delay or failure in the performance of its obligations hereunder (except for obligations to pay money due prior to occurrence of Force Majeure events under this Agreement) or failure to meet milestone dates due to any event or circumstance (a "Force Majeure Event") beyond the reasonable control of the Party affected by such delay or failure, including the occurrence of any of the following:

i. Acts of God;

ii. Typhoons, floods, lightning, cyclone, hurricane, drought, famine, epidemic, plague or other natural calamities;

iii. Strikes, work stoppages, work slowdowns or other labor dispute which affects a Party's ability to perform under this Agreement;

iv. Acts of war (whether declared or undeclared), invasion or civil unrest;

v. Any requirement, action or omission to act pursuant to any judgment or order of any court or judicial authority in

India (provided such requirement, action or omission to act is not due to the breach by the SPD or BESCOM, of any Law or any of their respective obligations under this Agreement);

vi. Inability despite complying with all legal requirements to obtain, renew or maintain required licenses or Legal Approvals;

vii. Fire, Earthquakes, explosions, accidents, landslides;

viii. Expropriation and/or compulsory acquisition of the Project in whole or in part;

ix. Chemical or radioactive contamination or ionizing radiation; or

x. Damage to or breakdown of transmission facilities of either Party;

b) The availability of the above item (a) to excuse a Party's obligations under this Agreement due to a Force Majeure Event shall be subject to the following limitations and restrictions:

(i) The non-performing Party gives the other Party written notice describing the particulars of the Force Majeure Event as soon as practicable after its occurrence;

(ii) The suspension of performance is of no greater scope and of no longer duration than is required by the Force Majeure Event.

(iii) The non-performing Party is able to resume performance of its obligations under this Agreement, it shall give the other Party written notice to that effect;

(iv) The Force Majeure Event was not caused by the non performing Party's negligent or intentional acts, errors or omissions, or by its negligence/failure to comply with any material Law, or by any material breach or default under this Agreement;

(v) In no event shall a Force Majeure Event excuse the obligations of a Party that are required to be completely performed prior to the occurrence of a Force Majeure Event."

10. *Re: Applicability of the force majeure clause*: The primary issue for our consideration is whether the delay in this case is due to a force majeure event as defined under Article 8.3, and consequently whether the respondents were entitled to an extension of time under Article 2.5. If the answer to these questions is affirmative, the tariff cannot be lowered under Article 5.1 and liquidated damages cannot be imposed under Articles 2.2 and 2.5.7.

    10.1 The law on force majeure, specifically in the context of PPAs, has been comprehensively dealt with by this Court in *Energy Watchdog v. Central Electricity Regulatory Commission*.[18] The Court delved into contractual jurisprudence on force majeure clauses and frustration of contracts. It held that Sections 32 and 56 of the Indian Contract Act, 1872[19] govern the law on force majeure. When the contract contains an express or implied force majeure clause, it is governed under Chapter III of the Contract Act, specifically Section 32. In such cases, the 'doctrine of frustration' in Section 56 does not apply and the court must interpret the force majeure clause contained in the contract.[20] It held that a force majeure clause must be narrowly construed.[21]

    10.2 The present case is clearly one where the PPA contains an explicit force majeure clause in Article 8.3, which has already been extracted above. The question is whether the delay in commissioning falls within the ambit of this clause. Article 8.3(a)(vi) is the most relevant force majeure event that would apply to the facts here. It reads:

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18 [2017] 3 SCR 153 : (2017) 14 SCC 80

19 Section 32 reads:
"***32. Enforcement of contracts contingent on an event happening***.—*Contingent contracts to do or not to do anything if an uncertain future event happens, cannot be enforced by law unless and until that event has happened.*
If the event becomes impossible, such contracts become void."
Section 56 reads:
"***56. Agreement to do impossible act***.—*An agreement to do an act impossible in itself is void.*
Contract to do act afterwards becoming impossible or unlawful.—*A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.*
Compensation for loss through non-performance of act known to be impossible or unlawful.—*Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.*"

20 *Energy Watchdog* (supra), para 47.

21 ibid, para 45.

> "*vi. Inability despite complying with all legal requirements to obtain, renew or maintain required licenses or Legal Approvals*"

Article 8.3(b)(iv) disentitles a party from claiming force majeure when the event was caused by its own negligence, intentional act, or omission. It reads:

> "*b) The availability of the above item (a) to excuse a Party's obligations under this Agreement due to a Force Majeure Event shall be subject to the following limitations and restrictions:*
>
> *…*
>
> *(iv) The Force Majeure Event was not caused by the non performing Party's negligent or intentional acts, errors or omissions, or by its negligence/failure to comply with any material Law, or by any material breach or default under this Agreement…*"

10.3 When these clauses are read together, it is clear that the SPD would be entitled to the benefit of Article 8.3(a)(vi) when it is unable to secure the necessary approvals and licenses required under the PPA, provided that there is no negligence or intentional act or omission on its part that caused this situation.

10.4 The entire dispute before the KERC and the APTEL revolves on a question of fact – whether the respondents were negligent or not diligent in securing approvals and hence, is the delay in commissioning attributable to them. The KERC's appreciation of the evidence has led it to the conclusion that the delay in commissioning was due to the respondents' delay in making the applications, despite the approval of the PPA. However, the APTEL has taken note of certain additional factors affecting the time taken to secure the approvals that were not considered by the KERC. These include the time taken by the government to provide the PTCL that is required for approval of land conversion, and the delay caused by the authority in evacuation approval. Considering these additional factors, the APTEL has reappreciated the evidence to find that the delay was not attributable to the respondents but to the government

bodies and relevant authorities. We find that there is no error in the APTEL's approach, and it is reasonable in its reappreciation of evidence.

10.5 Further, the APTEL also correctly took note of the fact that a large number of SPDs have raised similar issues, and the government has responded to the same by requiring DISCOMs to set-up committees to look into these cases. The large number of cases that raise similar grounds and the government's response show that the delay was not faced by the respondents alone, and hence cannot be entirely blamed on them. The government has itself acknowledged that the land use conversion process is a long and arduous one, which led it to deem conversion for solar power projects under the present scheme. However, due to lapses in the implementation of the deemed conversion, the SPDs were unable to avail the same. The APTEL has rightly appreciated these facts to hold that the respondents acted diligently and with care and caution to secure approvals, and hence their claims cannot be rejected through recourse to Article 8.3(b)(iv).

11. Finally, we have also considered the letter by the appellant dated 02.03.2017 that granted a 6-month extension to the respondents after considering its individual facts and circumstances. This grant of extension must be seen in light of the government's direction to DISCOMs dated 24.11.2016 to set up 3-member committees to consider each request for extension. This shows that the appellant, after considering the specific case of the respondents, has itself accepted that they are entitled to the benefit of Article 2.5 read with Article 8.3 of the PPA. Even before the KERC, the appellant did not challenge the respondents' contentions. Therefore, at the appellate stage before the APTEL and this Court, they cannot be permitted to take a contrary stance and raise the plea that the delay was attributable to the respondents and not covered by the force majeure clause or that there was non-compliance with the notice requirement under Article 8.3(b)(i). We therefore reject the contentions of the appellant that force majeure does not apply in this case.

12. In light of the above findings of fact by the APTEL that the delay is not attributable to the respondents and that the force majeure clause is applicable, it rightly held that the extension of time under Article 2.5

is warranted and the commissioning of the project on 24.08.2017 is within the extended period of 24 months. Consequently, the APTEL also rightly held that there is no occasion for the imposition of liquidated damages under Articles 2.2 and 2.5.7 or for the reduction of tariff under Article 5.1 of the PPA.

13. *Conclusion*: After considering the learned counsels' submissions in light of the above findings of the APTEL, we find that no substantial question of law arises in the present case. The APTEL has primarily decided a question of fact as to the attributability of the delay, and from the above, it is clear that the APTEL's findings are neither illegal nor unreasonable. Hence, we find no reason to interfere with the same.

14. Lastly, we also reject the appellant's contention that the APTEL's direction to pay late payment surcharge to the respondents is unjustified since the same was not pleaded. As we have already held, the APTEL rightly restored the tariff of Rs. 8.4 per unit and directed the appellant to pay the difference amount. The direction to pay the late payment surcharge on this amount is explicitly rooted in the PPA, and hence, is in furtherance of the intention of the parties. There is no reason to set aside the same.

15. With the above reasons, we dismiss the present appeals.

16. No order as to costs.

Result of the case: Appeals dismissed.

†*Headnotes prepared by:* Ankit Gyan

[2024] 8 S.C.R. 1047 : 2024 INSC 613

In Re: Alleged Rape and Murder Incident of a Trainee Doctor in R.G. Kar Medical College and Hospital, Kolkata and Related Issues Versus

(SMW (Crl) No. 2 of 2024)

20 August 2024

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

Issue for Consideration

R.G. Kar Hospital trainee doctor alleged rape and murder case. Lack of institutional safety standards in health care establishments; systemic issues for healthcare across the nation addressed; directions issued for formation of a National Task Force.

Headnotes†

R.G. Kar trainee doctor murder and alleged rape case – Lack of institutional safety norms for medical professionals (doctors, medical students undergoing compulsory rotating medical internship (CRMI) in the MBBS course, resident doctors, senior resident doctors and nurses including nursing interns) – Systemic issues for healthcare – Women medical professionals in particular face risk of sexual and non-sexual violence – Cognizance taken suo motu – Directions issued for constitution of a National Task Force (NTF):

Held: Lack of institutional safety norms at medical establishments against both violence and sexual violence against medical professionals is a matter of serious concern – Preserving safe conditions of work is central to realizing equality of opportunity to every working professional – Safety of doctors and their well-being as health providers is a matter of national interest – Though States such as Maharashtra, Kerala, Karnataka, Telangana, West Bengal etc. have enacted legislation to protect healthcare service professionals from violence and damage to property, however these enactments do not address the institutional and systemic causes that underlie the problem – Lack of various institutional safety standards in health care establishments highlighted – A National Task Force (NTF) constituted with members of the medical profession having diverse experience in healthcare institutions – NTF to consult all stake-holders and formulate

recommendations concerning safety, working conditions and well-being of medical professionals and other matters as highlighted and prepare an action-plan w.r.t preventing violence, including gender-based violence against medical professionals and and providing safe working conditions for interns, residents, senior residents, doctors, nurses and all medical professionals, as detailed – NTF to submit interim report within three weeks and the final report within two months from the date of this order – Union Government also to submit data as directed – CBI and State of West Bengal respectively to submit status report on the progress in the investigation of the murder and alleged rape of the doctor and on the progress of the investigation on the acts of vandalism in the aftermath thereof. [Paras 7-12, 14-17]

Websites

https://medicaldialogues.in/news/health/doctors/mob-attack-2-surgeons-brutally-attacked-afterpatient-death-admitted-in-icu-128063;https://timesofindia.indiatimes.com/india/pregnant-womans-death-sparks-violence-by-kin-nursethrown-off-1st-floor-of-bihar-nursing-home/articleshow/110475737.cms;https://indianexpress.com/article/cities/hyderabad/hyderabad-doctor-attacked-in-hospital-byattendants-after-patient-dies-8604280/.

List of Acts

Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013; Maharashtra Medicare Service Persons and Medicare Service Institutions (Prevention of violence and damage or loss to property) Act 2010; Kerala Healthcare Service Persons and Healthcare Service Institutions (Prevention of Violence and Damage to property) Act 2012; The Karnataka Prohibition of Violence Against Medicare Service Personnel and Damage to Property in Medicare Service Institutions Act 2009; Telangana Medicare Service Persons and Medicare Service Institutions (Prevention of Violence and Damage to Property) Act 2008; West Bengal Medicare Service Persons and Medicare Service Institutions (Prevention of Violence and Damage to Property) Act 2009; Andhra Pradesh Medicare Service Persons and Medicare Service Institutions (Prevention of Violence and Damage to Property) Act 2008; Tamil Nadu Medicare Service Persons and Medicare Service Institutions (Prevention of Violence and Damage or Loss to Property) Act 2008.

In Re: Alleged Rape and Murder Incident of A Trainee Doctor In R.G. Kar Medical College and Hospital, Kolkata and Related Issues Versus

List of Keywords

R.G. Kar Hospital Case; Trainee doctor; Rape; Murder; Health care establishments; Institutional safety standards; Medical professionals; Doctors, Women medical professionals; Healthcare; National Task Force; Healthcare service professionals; Violence; Damage to property; Safety of doctors; Health providers; Investigation transferred to CBI; Vandalization of hospital.

Case Arising From

CRIMINAL ORIGINAL JURISDICTION: SMW (Criminal) No. 2 of 2024

(Under Article 32 of The Constitution of India)

Appearances for Parties

By Courts Motion.

Tushar Mehta, SG, Kapil Sibal, Dr. Menaka Guruswamy, Maninder Singh, Sr. Advs., Madhav Sinhal, Arkaj Kumar, Ms. Swati Ghildiyal, M.K. Maroria, Sanjay Basu, Ms. Astha Sharma, Srisatya Mohanty, Nipun Saxena, Ms. Anju Thomas, Ms. Aparajita Jamwal, Sanjeev Kaushik, Ms. Mantika Haryani, Shreyas Awasthi, Utkarsh Pratap, Ms. Pratibha Yadav, Ms. Lihzu Shiney Konyak, Ms. Ripul Swati Kumari, Lavkesh Bhambhani, Ms. Arunima Das, Devadipta Das, Archit Adlakha, Aditya Raj Pandey, Mehreen Garg, Prabhas Bajaj, Rishav Rai, Rithvik Mathur, Advs. for the Respondent.

Ms. Aparajita Singh, Vijay Hansaria, Sanjay Hegde, Ms. Karuna Nundy, Bikash Ranjan Bhattacharya, Ms. Shashi Kiran, Raghenth Basant, Mahesh Jethmalani, Sr. Advs.,Ms. Vrinda Bhandari, Ms. Pragya Barsaiyan, Ms. Anandita Rana, Ms. Vanshita Gupta, Madhav Aggarwal, Ms. Sayantani Basak, Ms. Sneha Kalita, Ms. Kavya Jhawar, Ms. Nandini Rai, Omana Kuttan KK, Ms. Rambha Singh, Akhilesh Kr Mishra, Satayam Singh, Sanjeev Gupta, Thomas Oommen, Rajiv Ranjan, Mudrika Tomar, Amit Kumar Sharma, Tusharika Sharma, Sheetal Rajput, Samim Ahmed, Supratik Sarkar, Arnab Sinha, Bikram Banerjee, Imtiaz Ahmed, Sudipto Dasgupta, R.M. Patnaik, Arvind, Rohit Pandey, Ujjawal Gaur, Ms. Munisha, Ms. Astha Srivastava, Amit Mishra, Ms. Sangeeta Bhalla, Ravi Raghunath, Ms. Kaushitaki Sharma, Shoumendu Mukherji, Ms. Mohini Priya, Jamshed Mistry, Sunil Khattri, Firdous Samin, Gopa Biswas, Ms. Jhuma Sen, Anirudh Sanganeria, Phiroze Edulje, Anjan Datta, Ms. Ishitta Srivastava, Vishal Arun Mishra, Ms. Sumon Pathak, V.J. Pushpakumar, Ibrahim Ahmed, Adarsh Kumar, Vishal Tiwari, Advs. for the Intervenors.

Judgment / Order of the Supreme Court

Order

1. On 9 August, 2024, a thirty-one year old postgraduate doctor at RG Kar Medical College Hospital, Kolkata who was on a thirty six hour duty shift was murdered and allegedly raped inside the seminar room of the hospital. As horrific details have emerged in the course of media reportage, the brutality of the sexual assault and the nature of the crime have shocked the conscience of the Nation. The name and graphic images of the deceased have been widely circulated on social media without regard to her privacy or dignity.

2. Writ petitions were instituted before the Calcutta High Court seeking among other things, a court-monitored investigation of the crime and the conduct of the hospital authorities, including the role of the Principal of the medical college and other officials by a special team of investigating officers. It has been alleged that the parents of the deceased were initially informed that their daughter had committed suicide; they were permitted to see the dead body after several hours and a first information report in regard to the murder was registered belatedly by the police after several hours.

3. By its order dated 13 August 2024, the High Court transferred the investigation to the Central Bureau of Investigation.

4. Following the incident, agitations and protests were called by doctors' associations, student bodies and civic groups across the country. On the eve of Independence Day, several areas in Kolkata saw protests spurred by the 'Reclaim the Night' campaign. At 12.30 am on 15 August, when a protest was underway at the hospital, a large mob assembled at the premises of the RG Kar Medical College Hospital and vandalized the Emergency Ward and other departments of the hospital. Following the acts of wanton destruction and vandalism, the Indian Medical Association (a private and voluntary organization of doctors in India) called for a nation-wide withdrawal of medical services, except emergency services, for twenty-four hours on 17 August 2024.

5. In the aftermath of the brutal incident and the demonstrations which followed, the State Government was expected to ensure the deployment of the state machinery to prevent a breach of law and

order. It was all the more necessary to do so since investigation of the crime which took place in the precincts of the hospital was under way. We are unable to comprehend how the State was not prepared to deal with the incident of vandalization of the premises of the hospital.

6. Nation-wide protests following the brutal incident in RG Kar Medical College Hospital have brought the issue of the lack of institutional safety for doctors to the forefront. Medical Associations have consistently raised issues of the lack of workplace safety in health care institutions. Medical professionals in the performance of their duties have been unfortunate targets of various forms of violence. Hospitals and medical care facilities are open throughout the day and night. Medical professionals - doctors, nurses and paramedic staff - work round the clock. Unrestricted access to every part of healthcare institutions has made healthcare professionals susceptible to violence. Patients of relatives in anguish are quick to attribute untoward results to the negligence of medical professionals. Such allegations are immediately followed by violence against medical professionals. In May 2024, two on-duty doctors were allegedly attacked by relatives of a patient who died during treatment in a hospital in West-Bengal.[1] In another incident in May 2024 in Bihar, following the death of a twenty-five year old pregnant patient, a nurse was allegedly pushed off the first floor of the building by the kin of the patient.[2] In August 2024, a final year resident in a hospital in Hyderabad was allegedly assaulted by a patient's attendants after the patient died due to medical conditions.[3] These incidents of violence are a few amongst the many that have been unleashed against members of the medical community in the recent past. They are portents of a systemic failure to protect doctors, nurses and para medical staff in the confines of hospitals. With few or no protective systems to ensure their safety, medical professionals have become vulnerable to violence. With the involvement of systemic issues for healthcare across the nation, this court has had to intervene.

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1 https://medicaldialogues.in/news/health/doctors/mob-attack-2-surgeons-brutally-attacked-after-patient-death-admitted-in-icu-128063

2 https://timesofindia.indiatimes.com/india/pregnant-womans-death-sparks-violence-by-kin-nurse-thrown-off-1st-floor-of-bihar-nursing-home/articleshow/110475737.cms

3 https://indianexpress.com/article/cities/hyderabad/hyderabad-doctor-attacked-in-hospital-by-attendants-after-patient-dies-8604280/

7. Women are at particular risk of sexual and non-sexual violence in these settings. Due to ingrained patriarchal attitudes and biases, relatives of patients are more likely to challenge women medical professionals. In addition to this, female medical professionals also face different forms of sexual violence at the workplace by colleagues, seniors and persons in authority. Sexual violence has had its origins even within the institution, the case of Aruna Shanbag being a case in point. There is a hierarchy within medical colleges and the career advancement and academic degrees of young professionals are capable of being affected by those in the upper echelons. The lack of institutional safety norms at medical establishments against both violence and sexual violence against medical professionals is a matter of serious concern. While gendered violence is the source of the more malevolent manifestations of the structural deficiencies in public health institutions, the lack of safety is of concern to all medical professionals. Preserving safe conditions of work is central to realizing equality of opportunity to every working professional. This is not just a matter of protecting doctors. Their safety and well-being as health providers is a matter of national interest. As more and more women join the work force in cutting edge areas of knowledge and science, the nation has a vital stake in ensuring safe and dignified conditions of work. The constitutional value of equality demands nothing else and will not brook compromises on the health, well being and safety of those who provide health care to others. The nation cannot await a rape or murder for real changes on the ground.

8. Several States, such as Maharashtra,[4] Kerala,[5] Karnataka,[6] Telangana,[7] West Bengal,[8] Andhra Pradesh[9] and Tamil Nadu[10] have

4 See Maharashtra Medicare Service Persons and Medicare Service Institutions (Prevention of violence and damage or loss to property) Act 2010

5 See Kerala Healthcare Service Persons and Healthcare Service Institutions (Prevention of Violence and Damage to property) Act 2012

6 See The Karnataka Prohibition of Violence Against Medicare Service Personnel and Damage to Property in Medicare Service Institutions Act 2009

7 See Telangana Medicare Service Persons and Medicare Service Institutions (Prevention of Violence and Damage to Property) Act 2008

8 See West Bengal Medicare Service Persons and Medicare Service Institutions (Prevention of Violence and Damage to Property) Act 2009

9 See Andhra Pradesh Medicare Service Persons and Medicare Service Institutions (Prevention of Violence and Damage to Property) Act 2008

10 See Tamil Nadu Medicare Service Persons and Medicare Service Institutions (Prevention of Violence and Damage or Loss to Property) Act 2008

enacted legislation to protect healthcare service professionals from violence and damage to property. All these enactments prohibit any act of violence against medical professionals. The offence is non-bailable and punishable with three years of imprisonment. However, these enactments do not address the institutional and systemic causes that underlie the problem. An enhanced punishment without improving institutional safety standards falls short of addressing the problem effectively.

9. We have attempted to flag here the ground reality indicating the lack of institutional safety standards in health care establishments. A non-exhaustive formulation is set out below:

   a. Medical professionals who are posted for night-duties are not provided adequate resting spaces. More often, doctors rest in the patients' room or in available public spaces. Duty rooms are scant. Separate duty rooms for male and female medical professionals are conspicuous by their absence in most health care establishments;

   b. Interns, residents and senior residents are made to perform thirty-six hour shifts in conditions where even basic needs of sanitation, nutrition, hygiene and rest are lacking. There is an absence of uniformity in terms of a standard national protocol. The fear of retribution prevents most health care professionals from questioning the absence of facilities for basic well-being;

   c. Lack of security personnel in medical care units is more of a norm than an exception. More often than not, medical professionals, which includes young resident doctors, interns and nurses are left to handle unruly attenders. Open access to healthcare facilities leaves medical professionals vulnerable to undesirable elements;

   d. Medical care facilities do not have sufficient toilet. Most often there is only one common toilet for medical professionals in one department;

   e. The hostels or places of stay for medical professionals are situated far from the hospital. Doctors and nurses who have to travel to and from the hospital are not provided transport facilities by the institution. Even within the precincts of the sprawling

spaces of public hospitals there is either inadequate or no transportation facilities for the safe commute of professionals;

f. There is an absence or lack of properly functioning CCTV cameras to monitor ingress and egress to the hospital and to control access to sensitive areas;

g. The patients and their attenders have unrestricted access to all places within the hospital, including Intensive Care Units and the doctors resting rooms;

h. Lack of screening for arms and weapons at the entrance of the hospitals;

i. Dingy and ill-lit places within the hospitals;

j. Medical professionals have to shoulder the responsibility of being both medical and 'emotional' caregivers to patients and their relatives. There are no supportive facilities and no training in communication skills; and

k. Certain spaces within hospitals such as the Intensive Care Unit and the Emergency Wards are prone to a greater risk of violence because of the severity of medical conditions of patients in these departments.

10. We have in this backdrop formed the view that a national consensus must be evolved - after due consultation with all stake-holders - on the urgent need to formulate protocols governing the issues which this order has highlighted. We have attempted to compose for this purpose a diverse body of persons with experience in healthcare institutions. A National Task Force (NTF) with the following members of the medical profession is constituted:

a. Surgeon Vice Admiral Arti Sarin, AVSM, VSM, Director General, Medical Services (Navy);

b. Dr D Nageshwar Reddy, Chairman and Managing Director, Asian Institute of Gastroenterology and AIG Hospitals, Hyderabad;

c. Dr M Srinivas, Director, All India Institute of Medical Sciences (AIIMS), Delhi;

d. Dr Pratima Murthy, Director, National Institute of Mental Health and Neurosciences (NIMHANS), Bengaluru;

e. Dr Goverdhan Dutt Puri, Executive Director, All India Institute of Medical Sciences, Jodhpur;

f. Dr Saumitra Rawat, Chairperson, Institute of Surgical Gastroenterology, GI and HPB Onco-Surgery and Liver Transplantation and Member, Board of Management, Sir Ganga Ram Hospital, New Delhi ; Member, Court of Examiners, Royal College of Surgeons, England;

g. Professor Anita Saxena, Vice-Chancellor, Pandit B D Sharma Medical University, Rohtak. Formerly Dean of Academics, Chief-Cardiothoracic Centre and Head Cardiology Department at All India Institute of Medical Sciences (AIIMS), Delhi;

h. Dr Pallavi Saple, Dean, Grant Medical College and Sir JJ Group of Hospitals, Mumbai; and

i. Dr Padma Srivastava, formerly Professor at the Department of Neurology, AIIMS Delhi. Currently serving as the Chairperson of Neurology at Paras Health Gurugram.

11. The following shall be the *ex-officio* members of the NTF:

a. Cabinet Secretary, Government of India;

b. Home Secretary, Government of India;

c. Secretary, Ministry of Health and Family Welfare, Government of India;

d. Chairperson, National Medical Commission; and

e. President, National Board of Examinations.

12. The NTF shall formulate effective recommendations to remedy the issues of concern pertaining to safety, working conditions and well-being of medical professionals and other cognate matters highlighted in the above segments of this order. The NTF shall while doing so, consider the following aspects to prepare an action-plan. The action plan may be categorized under two heads (I) Preventing violence, including gender-based violence against medical professionals; and (II) Providing an enforceable national protocol for dignified and safe working conditions for interns, residents, senior residents, doctors, nurses and all medical professionals.

I. Prevention of violence against medical professionals and providing safe working conditions

a. *Ensuring due security in medical establishments:*

i. Triaging departments and places within the hospital based on the degree of volatility and the possibility of violence. Areas such as the emergency rooms and the Intensive Care Units are prone to a greater degree of violence and may possibly need additional security in place to deal with any untoward incident;

ii. A baggage and person screening system at every entrance of the hospital to ensure that arms are not carried inside the medical establishment;

iii. Preventing intoxicated persons from entering the premises of the medical establishment, unless they are patients; and

iv. Training security personnel employed at Hospitals to manage crowds and grieving persons.

b. *Infrastructural development:*

i. Provision of separate resting rooms and duty rooms in each Department for (a) male doctors; (b) female doctors; (c) male nurses; (d) female nurses; and (e) a gender-neutral common resting space. The room must be well-ventilated, have sufficient bed spaces, and provide a facility for drinking water. Access to these rooms must be restricted through installation of security devices;

ii. Adopting appropriate technological intervention to regulate access to critical and sensitive areas including through use of bio-metric and facial recognition;

iii. Ensuring adequate lighting at all places in the hospital and, if it is a hospital attached to a medical college, all places within the campus;

iv. Installation of CCTV cameras at all the entrance and exit points of the hospitals, and the corridors leading up to all patient rooms; and

v. If the hostels or rooms of the medical professionals are away from the hospital, provision of transport between 10 pm to 6 am to those who wish to travel to or from their place of stay to the Hospital.

c. Employment of social workers trained in grief and crisis counselling at all medical establishments;

d. Conducting workshops for all employees of medical establishments including doctors, nurses and helpers on handling grief and crisis;

e. Constitution of "Employees Safety Committees" composed of doctors, interns, residents and nurses at every medical establishment to conduct quarterly audits on institutional safety measures;

f. Including additional requirement(s) on institutional safety measures for medical professionals as a criteria for accreditation of healthcare establishments by the National Accreditation Board for Hospitals & Healthcare Providers; and

g. The possibility of establishing police posts in medical facilities commensurate with the footfall, bed strength and facilities.

II. Prevention of sexual violence against medical professionals:

a. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013 applies to hospitals and nursing homes[11] (including private health providers[12]). In terms of the provisions of the Act, an Internal Complaints Committee must be constituted in all hospitals and nursing homes;

b. The duties of an employer listed under Section 19 of the Sexual Harassment of Women at Workplace (Prevention,

11 See Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013; Section 2(o)(iii)

12 See Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013; Section 2(o)(ii)

Prohibition and Redressal) Act 2013 which includes organizing sensitization programmes and providing a safe working space must be discharged; and

c. Ensuring for every medical institution a helpline number for medical professionals which is open 24 x 7 and emergency distress facilities.

13. It is clarified that the phrase medical professionals used in this judgment encompasses every medical professional including doctors, medical students who are undergoing their compulsory rotating medical internship (CRMI) as a part of the MBBS course, resident doctors and senior resident doctors and nurses (including those who are nursing interns). The phrases Medical Establishments/Hospitals/ Medical Institutions are interchangeably used.

14. The NTF shall be at liberty to make recommendations on all aspects of the action-plan highlighted above and any other aspects which the members seek to cover. They are at liberty to make additional suggestions, where appropriate. The NTF shall also suggest appropriate timelines by which the recommendations could be implemented based on the existing facilities in Hospitals. The NTF is requested to consult all stake-holders. Bearing in mind the gravity and urgency of the situation we have included the heads of the National Medical Commission and the National Board of Examinations as Ex-officio members of the NTF. Bearing in mind the national concerns which have been raised over the issue and the high priority which must be given to the creation of safe working conditions in healthcare institutions, we request the Cabinet Secretary to the Union Government to associate with the work of the NTF. The Home Secretary of the Union Government has also been made a member of the NTF in order to facilitate proper co-ordination with the State Governments. The Secretary to the Ministry of Health and Family Welfare of the Government of India will be the Member-Secretary of the NTF. The Ministry of Health and Family Welfare will provide all logistical support including making arrangements for travel, stay and secretarial assistance and bear the expenses of the members of the NTF.

15. The NTF is requested to submit an interim report within three weeks and the final report within two months from the date of this order.

16. All State Governments and UT Governments, through their Secretaries, in the Ministries of Health and Family Welfare and the Central Government, through the Secretary, Union Ministry of Health and Family Welfare must collate information from all hospitals run by the State and the Central Government, respectively on the following aspects:

    a. How many security personnel are employed at each Hospital and each department;

    b. Whether there is a baggage and person screening mechanism in place at the entrance of the medical establishment;

    c. The total number of resting/duty rooms in the Hospital and specific details of the number in each Department;

    d. The facilities provided in the resting/duty rooms;

    e. Information on whether all areas of the hospital are accessible to the general public and if so, with or without any security restrictions;

    f. Whether there are CCTV cameras in the hospital. If there are, how many and in which locations;

    g. Whether the institution provides medical professionals training to appropriately handle the grief of patients. If so, the details of the training must be provided;

    h. Whether social workers who specialize in handling grief of families of the patients are employed at the hospital. If so, the total number of social workers must be provided;

    i. Whether there are police posts within the premises of the Hospital or the Medical College Hospital campus;

    j. Whether an Internal Complaints Committee in terms of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013 has been constituted; and

    k. Whether the employer of the establishment has discharged the duties prescribed by Section 19 of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013. If so, details of it.

    The data as submitted shall be tabulated and filed with an affidavit by the Union Government within one month of this order.

17. The Central Bureau of Investigation shall submit a status report to this Court by 22 August 2024 on the progress in the investigation of the crime at RG Kar Medical College Hospital. The State of West Bengal shall also file a status report by 22 August 2024 on the progress of the investigation on the acts of vandalism which took place at the Hospital in the aftermath of the incident.

18. The matter shall be listed on 22 August 2024.

Result of the case: Directions issued.

†*Headnotes prepared by:* Divya Pandey

[2024] 8 S.C.R. 1061 : 2024 INSC 595

Manish Sisodia
v.
Directorate of Enforcement

(Criminal Appeal No. 3295 of 2024)

09 August 2024

[B.R. Gavai* and K.V. Viswanathan, JJ.]

Issue for Consideration

Appellant was incarcerated for around 17 months, trial yet to commence. Bail denied. Whether the trial court and the High Court correctly considered the observations made by this Court with regard to right to speedy trial and prolonged period of incarceration. The claim of the appellant was rejected applying the triple test contemplated under Section 45, Prevention of Money Laundering Act, 2002. Whether the right to bail in cases of delay coupled with incarceration for a long period should be read into Section 439, Code of Criminal Procedure, 1973 and Section 45 of the PMLA. Whether the appellant was deprived of his right to speedy trial and if entitled to grant of bail.

Headnotes†

Prevention of Money Laundering Act, 2002 – s.45 – Code of Criminal Procedure, 1973 – s.439 – Delhi's Excise Policy Cases, irregularities alleged in the framing and implementation – Cases by CBI and ED, appellant arrested – Previously two rounds of litigation, present is the third round – Incarceration for a long period – Delay in trial, bail rejected – Right to bail – Right to speedy trial – Right to bail in cases of delay coupled with incarceration for a long period, if should be read into Section 439 CrPC, 1973 and Section 45 of the PMLA:

Held: Yes – Right to bail in cases of delay coupled with incarceration for a long period, depending on the nature of the allegations, should be read into Section 439 Cr.P.C. and Section 45 of the PMLA – It is the basic right of the person charged of an offence and not convicted that he be ensured and given a speedy trial – When the trial is not proceeding for reasons not attributable to the accused, the court, unless there are good reasons would

* Author

exercise the power to grant bail – Provisions of Section 45 of the PMLA would not come in the way of consideration of the application of the appellant for grant of bail – On account of a long period of incarceration for around 17 months and the trial even not having been commenced, the appellant was deprived of his right to speedy trial – On facts, in view of the first order of this Court, the appellant was entitled to renew his request – 493 witnesses were named in the ED and the CBI matter – The case involves thousands of pages of documents and over a lakh pages of digitized documents – There is not even the remotest possibility of the trial being concluded in the near future – Appellant would be deprived of his fundamental right to liberty under Article 21 if kept behind the bars for an unlimited period of time in the hope of speedy completion of trial – Impugned judgment of the High Court quashed and set aside – Appellant granted bail in both ED and the CBI case on the conditions imposed. [Paras 37-39, 43, 49, 54, 58]

Criminal Law – Right to fair trial – Right of the accused to inspect documents including "un-relied upon documents":

Held: Accused has the right to fair trial, cannot be denied the right to have inspection of the documents including the "un-relied upon documents". [Para 47]

Bail – To be granted as a rule, jail is exception – Non-observance by Courts, deprecated:

Held: Bail is not to be withheld as a punishment – Trial courts and High Courts play safe in matters of grant of bail and the principle that bail is a rule and refusal is an exception is, at times, followed in breach – It is high time that the trial courts and the High Courts should recognize the principle that "bail is rule and jail is exception". [Para 53]

Special Leave Petitions (SLPs) – Preliminary objection as regards the maintainability of the second set of SLPs – Delhi's Excise Policy Cases, irregularities alleged in the framing and implementation – Cases by CBI and ED, appellant arrested – Previously two rounds of litigation, present is the third round before this Court – In earlier rounds of litigation, liberty was granted to the appellant to move a fresh application for bail in case of change in circumstances or in case the trial was

protracted – Preliminary objection was raised as regards the maintainability of the present appeals on account of the second order of this Court, contending that the second set of SLPs cannot be filed to challenge the order of the High Court when the earlier SLPs arising out of the same order were disposed of:

Held: Rejected – This Court was concerned about the prolonged period of incarceration suffered by the appellant – Assurance was given by the prosecution that the trial shall be concluded by taking appropriate steps within next 6-8 months however, far from the trial being concluded within a period of 6-8 months, it is even yet to commence – Liberty was granted to the appellant to revive his prayer after filing of the chargesheet – Relegating the appellant to again approach the trial court and thereafter the High Court when they have already taken a view would be an empty formality – Right to speedy trial is a fundamental right within the broad scope of Article 21 – Liberty reserved by this Court vide its second order, to revive the request of the appellant was a liberty given by this Court to revive his prayer afresh after filing of the final complaint/charge-sheet – Undisputedly, the present appeals were filed after the final complaint/charge-sheet were filed by the respondents. [Paras 29, 32, 43]

Case Law Cited

Kunhayammed and Others v. State of Kerala and Others [2000] Supp. 1 SCR 538 **: (2000) 6 SCC 359;** *P. Ponnusamy v. State of Tamil Nadu* [2022] 15 SCR 265 **: (2022) SCC OnLine SC 1543;** *Vijay Madanlal Choudhary and Others v. Union of India and Others* [2022] 6 SCR 382 **: (2022) SCC OnLine SC 929;** *Prabir Purkayastha v. State (NCT of Delhi)* [2024] 6 SCR 666 **: (2024) SCC OnLine SC 934;** *Ramkripal Meena v. Directorate of Enforcement* **(SLP (Crl.) No. 3205 of 2024 dated 30.07.2024);** *Javed Gulam Nabi Shaikh v. State of Maharashtra and Another* **(2024) SCC OnLine SC 1693;** *Gudikanti Narasimhulu and Others v. Public Prosecutor, High Court of Andhra Pradesh* [1978] 2 SCR 371 **: (1978) 1 SCC 240;** *Shri Gurbaksh Singh Sibbia and Others v. State of Punjab* [1980] 3 SCR 383 **: (1980) 2 SCC 565;** *Hussainara Khatoon and Others (I) v. Home Secretary, State of Bihar* [1979] 3 SCR 169 **: (1980) 1 SCC 81;** *Union of India v. K.A. Najeeb* [2021]

1 SCR 443 : (2021) 3 SCC 713; *Satender Kumar Antil v. Central Bureau of Investigation and Another* **[2022] 10 SCR 351 : (2022) 10 SCC 51 – referred to.**

List of Acts

Prevention of Money Laundering Act, 2002; Code of Criminal Procedure, 1973; Prevention of Corruption Act, 1988; Penal Code, 1860.

List of Keywords

Section 45 of the Prevention of Money Laundering Act, 2002; Triple test under Section 45, Prevention of Money Laundering Act, 2002; Section 439 of the Code of Criminal Procedure, 1973; Article 21 of the Constitution of India; Delhi's Excise Policy Cases; Incarceration for a long period; Prolonged period of incarceration; Trial delayed; Delay in trial; Right to speedy trial; Bail rule, jail exception; Right to fair trial; Right to Life and Personal Liberty; Second set of Special Leave Petitions (SLPs); Preliminary objection; Inspection of documents; Un-relied upon documents.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 3295 of 2024

From the Judgment and Order dated 21.05.2024 of the High Court of Delhi at New Delhi in BA No. 1557 of 2024

With

Criminal Appeal No. 3296 of 2024

Appearances for Parties

Dr. Abhishek Manu Singhvi, Vikram Chaudhari, Sr. Advs., Vivek Jain, Mohd. Irshad, Amit Bhandari, Karan Sharma, Rajat Jain, Sadiq Noor, Mohit Siwach, Shailesh Chauhan, Advs. for the Appellant.

Suryaprakash V. Raju, A.S.G., Mukesh Kumar Maroria, Zoheb Hussain, Annam Venkatesh, Vivek Gaurav, Hitarth Raja, Ms. Abhipriya, Ms. Sweta Desai, Vivek Gurnani, Ms. Aakriti Mishra, Arvind Kumar Sharma, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Judgment

B.R. Gavai, J.

1. Leave granted. Appeals heard on merits.

2. The present appeals challenge the judgment and order dated 21st May 2024 passed by the learned Single Judge of the High Court of Delhi at New Delhi in Bail Application Nos. 1557 and 1559 of 2024, thereby rejecting the said applications filed by the present appellant for grant of bail. The aforesaid two applications were filed seeking bail in connection with ED Case No. HIU-II/14/2022 registered against the appellant by the Directorate of Enforcement (for short, 'ED') and First Information Report (FIR) No. RC0032022A0053 of 2022 registered against the appellant by the Central Bureau of Investigation (for short, 'CBI').

3. FIR No. RC0032022A0053 of 2022 came to be registered by the CBI on 17th August 2022, and ED Case No. HIU-II/14/2022 came to be registered by the ED on 22nd August 2022.

4. Since both the cases arise out of similar facts, the latter being the predicate offence and the former being a case registered on the basis of the predicate offence, both these appeals are heard and decided together.

FACTS IN BRIEF:

5. The present case travelled two rounds before the trial court, the High Court and this Court. This is now the third round before this Court wherein the appellant is seeking bail in connection with the aforesaid two cases.

6. On the basis of a letter dated 20th July 2022 addressed by Shri Vinai Kumar Saxena, the Lieutenant Governor of Delhi, alleging irregularities in the framing and implementation of Delhi's Excise Policy for the year 2021-22, the Director, Ministry of Home Affairs had directed an enquiry into the said matter vide Office Memorandum dated 22nd July 2022. On 26th February 2023, the appellant came to be arrested by the CBI. Subsequently, the appellant was arrested by the ED on 9th March 2023.

7. After investigation, CBI filed charge-sheet on 25th April 2023 for the offences punishable under Sections 7, 7A, 8 and 12 of the Prevention of Corruption Act, 1988 (for short, 'PC Act') read with Sections 420, 201 and 120B of the Indian Penal Code, 1860 (for short, 'IPC'). Upon completion of investigation, the ED filed a complaint under Section 3 of the Prevention of Money Laundering Act, 2002 (for short, 'PMLA') on 4th May 2023.

8. The first application for regular bail of the appellant in CBI matter came to be rejected by the High Court on 30th May 2023. Subsequently, the first application for regular bail of the appellant in ED matter came to be rejected by the High Court on 3rd July 2023. This Court, vide common order dated 30th October 2023 (hereinafter referred to as "the first order of this Court") rejected the regular bail applications of the appellant in the CBI matter and the ED matter, with certain observations which we will refer to in the subsequent paragraphs.

9. Subsequently, in view of the liberty granted by this Court, the appellant filed second bail application before the trial court on 27th January 2024. In the said proceedings, the appellant was granted interim protection. However, by an order dated 30th April 2024, the trial court rejected the said bail application on the ground that there was no change in the circumstances.

10. The appellant thereafter filed second bail application before the High Court on 2nd May 2024. Vide impugned judgment and order dated 21st May 2024, the learned Single Judge of the High Court rejected the said bail application also.

11. Being aggrieved thereby, the appellant had approached this Court by filing Special Leave Petition (Criminal) Nos. 7795 and 7799 of 2024.

12. The matter was heard on 4th June 2024. This Court, in the said order (hereinafter referred to as "the second order of this Court") recorded the submissions of the learned Solicitor General that the investigation would be concluded and final complaint/charge-sheet would be filed expeditiously and at any rate on or before 3rd July 2024 and immediately thereafter, the trial court would be free to proceed with the trial. This Court recorded the submissions made by the learned Solicitor General and observed that having regard to the fact that the period of "6-8 months" fixed by this Court by order dated 30th October 2023 had not yet come to an end, disposed of the said

petition with liberty to revive his prayer afresh after filing of the final complaint/charge-sheet.

13. Accordingly, after filing of the final complaint/charge-sheet, the appellant has approached this Court by way of the present appeals. This Court, vide order dated 16th July 2024 had issued notice. In response thereto, counter affidavit has been filed on behalf of the ED as well as the CBI opposing the present appeals.

SUBMISSIONS:

14. We have extensively heard Dr. Abhishek Manu Singhvi, learned Senior Counsel appearing on behalf of the appellant and Shri Suryaprakash V. Raju, learned Additional Solicitor General (ASG) appearing on behalf of the respondents.

15. A preliminary objection has been raised on behalf of the learned ASG that the appellant cannot be permitted to file second set of SLPs to challenge the order of the High Court dated 21st May 2024 when the earlier SLPs arising out of the same order were disposed of. He submitted that the liberty granted by this Court vide order dated 4th June 2024 has to be construed as a liberty to apply to the trial court afresh. It is submitted that, only after the appellant approaches the trial court and in the event he does not succeed before the trial court, thereafter he approaches the High Court and in the event he also does not succeed before the High Court, then only he would be entitled to approach this Court. He therefore submitted that the present appeals deserve to be rejected thereby relegating the appellant to approach the trial court afresh. To buttress his submission, Shri Raju relied on the judgment of this Court in the case of ***Kunhayammed and Others v. State of Kerala and Others***.[1]

16. The said preliminary objection has been opposed by Dr. Singhvi, learned Senior Counsel appearing on behalf of the appellant contending that this Court had specifically, vide its first order dated 30th October 2023, granted liberty to the appellant to move a fresh application for bail in case the trial does not conclude within next 6-8 months and also in case the trial is protracted and proceeds at

1 [2000] Supp. 1 SCR 538 : (2000) 6 SCC 359 : 2000 INSC 339

a snail's pace in next three months. He submitted that, admittedly, the trial has not been concluded within a period of 6-8 months from the date of the first order of this Court. He further submitted that the record would show that the trial was protracted and proceeded at a snail's pace in the period of three months after the first order of this Court was passed. He submitted that the second order of this Court clearly reserves the right of the appellant to revive the request afresh after filing of the final complaint/charge-sheet as assured by the learned Solicitor General. Dr. Singhvi therefore prays for rejection of the preliminary objection.

17. On merits, Dr. Singhvi submitted that this Court, vide its first order dated 30th October 2023, has given various findings in favour of the appellant. It is submitted that, a perusal of the same would clearly reveal that at number of places, this Court has given findings which would show that the respondents have not been in a position to make out a *prima facie* case. Dr. Singhvi further submitted that a perusal of the record would reveal that even the investigation in the case is not complete. He therefore submitted that unless the investigation is complete, the trial cannot proceed. He submitted that three more supplementary complaints have been filed on 10th May 2024, 17th May 2024 and 20th June 2024 in the ED matter and as on 27th July 2024, there were 40 persons who have been arrayed as accused in the proceedings with more than 8 complaints. He further submitted that, in the ED matter, the ED has cited 224 witnesses and produced 32,000 pages of documents. He further submitted that, in the CBI matter, the CBI has cited 269 witnesses and produced around 37,000 pages of documents. It is therefore submitted that in all there are 493 witnesses, excluding the ones in the 4th Supplementary Charge-sheet filed by the CBI, who will have to be examined and that in total the documents are running into around 69,000 pages.

18. Dr. Singhvi submitted that the ED has deliberately concealed the documents it acquired during investigation by putting documents exculpating the accused persons in the category of "un-relied upon documents". It is submitted that, as such, it was necessary for the appellant to inspect such "un-relied upon documents". He further submitted that there was an inordinate delay on the part of the ED and the CBI in producing the list of "un-relied upon documents".

19. Dr. Singhvi submitted that, taking into consideration the voluminous number of witnesses and documents, there is no possibility of the trial seeing the light of the day and therefore the appeals filed by the appellant deserve to be allowed.

20. Shri Raju vehemently opposed the present appeals. He submitted that this Court, in its first order, after enumerating various factors on merits of the matter in paragraph 25 has held that the Court was not inclined to accept the prayer for grant of bail. It is therefore submitted that the appeals of the present appellant on merits were specifically rejected.

21. Shri Raju further submitted that, though the Court granted liberty to file a fresh application in the circumstances enumerated in paragraph 29, it was held that the same would be considered by the trial court on merits without being influenced by the dismissal of the earlier bail applications including the said first order. It is therefore submitted that the trial court as well as the High Court were required to take into consideration the merits of the matter. However, the present appellant opposed the consideration of the application on merits and insisted on consideration of the application only on the ground of delay in trial. It is therefore submitted that both the courts have rightly considered the merits of the matter and after considering the merits, found that the appellant was not entitled to grant of bail. He submitted that no interference would be warranted.

22. Shri Raju submitted that the trial court and the High Court have specifically come to a finding that the appellant has delayed the pre-charge proceedings by taking recourse to the provisions of Section 207 of Criminal Procedure Code, 1973 (for short, 'Cr.P.C.'). He submitted that more than hundred applications have been filed out of which many are under Section 207 Cr.P.C. These applications have been filed only for the purpose of delaying the trial. It is submitted that though in view of the law laid down by this Court in the case of ***P. Ponnusamy v. State of Tamil Nadu***,[2] such applications could have been filed only after framing of the charges, the same have been intentionally filed at a pre-charge stage of the trial, so as to delay the framing of the charges. He submitted that though the appellant

2 [2022] 15 SCR 265 : 2022 SCC OnLine SC 1543 : 2022 INSC 1175

is entitled to file an application for discharge, the same has not been filed only in order to protract the trial. He submitted that the totality of the circumstances would reveal that it is the appellant who has been protracting the trial. It is submitted that as the appellant himself is responsible for protracting the trial, he cannot be permitted to take the benefit of the same.

23. The learned ASG submitted that unless the triple conditions as stipulated under Section 45 of the PMLA are satisfied, no person accused of an offence shall be released on bail. It is submitted that, in the present case, this Court itself by the first order has found that the appellant was not entitled for bail on merits and as such, the second condition stipulated under Section 45 of the PMLA that there are reasonable grounds for believing that he is not guilty of such offence, would not be satisfied in the present case.

24. The learned ASG further submitted that the appellant is a very influential person having occupied the office of Deputy Chief Minister of Delhi when the crime was committed. He submitted that if the appellant is released on bail, there is every possibility of him influencing the witnesses or tampering with the evidence.

25. Dr. Singhvi, in rejoinder, has submitted that the contention that the trial is being delayed due to the applications being filed by the appellant under Section 207 Cr.P.C. is totally incorrect. He submitted that the said applications were required to be filed since the prosecution had not placed on record the documents exculpating the accused persons by placing the same in the category of "un-relied upon documents". He submitted that in order to avail the right of a fair trial and in adherence to the principles of natural justice as encapsulated in Section 207 Cr.P.C., the appellant was forced to file such applications. However, each of these applications were vehemently opposed by the prosecution. It is submitted that the said material ought to have been placed on record by the prosecution themselves, however, for the reasons best known to the prosecution, they have not done so. He submitted that the appellant has filed only 14 applications in ED case and 13 applications in CBI case and that all these applications have been allowed by the learned trial judge. He lastly submitted that even as per the prosecution, if the entire "un-relied upon documents" are to be supplied in digital form, it will take a long time. To support his submission, Dr. Singhvi places reliance on the compliance report

dated 7th May 2024 filed by the Assistant Director of ED which would fortify this position.

CONSIDERATION OF PRELIMINARY OBJECTION:

26. We will first deal with the preliminary objection of the learned ASG with regard to the filing of the second set of appeals before this Court challenging the order of the High Court dated 21st May 2024 i.e., on the point of maintainability.

27. Undisputedly, the appellant had earlier challenged the same order dated 21st May 2024 vide SLP (Criminal) Nos. 7795 and 7799 of 2024. On doing so, a Division Bench of this Court passed the order dated 4th June 2024. It will be apposite to refer to the observations made by this Court in the said order, which read thus:

> "Though, elaborate arguments have been made, we do not propose to go into the said arguments or dwell upon it and then record our reasons for the simple reason that Co-ordinate Bench while dismissing the appeals vide order dated 30.10.2023, as noticed hereinabove has granted liberty to the appellant, i.e., the petitioner herein to move a fresh application for bail by placing reliance on the assurance given on behalf of the prosecution that they would conclude the trial by taking appropriate steps within next 6-8 months and as such the liberty was extended to the petitioner herein to move a fresh application in case of change in circumstances, or in case the trial is protracted and proceeds at a snail's pace in next three months. It was also observed that if such an application is filed in the aforesaid circumstances, the same would be considered by the trial court on merits without being influenced by the dismissal of the earlier bail application including the judgment of this Court.
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> Shri Tushar Mehta, learned Solicitor General on instructions would submit that the investigation would be concluded and final complaint/charge sheet would be filed expeditiously and at any rate on or before 03.07.2024 and immediately thereafter, the trial court will be free to proceed with trial. In the light of the said submissions made and having regard to the fact that the period of "6-8 months" fixed by

this Court by Order dated 30.10.2023 having not come to an end, it would suffice to dispose of these petitions with liberty to the petitioner to revive his prayer afresh after filing of the final complaint/Charge-sheet as assured by learned Solicitor General. Needless to state that in the event of such an application being filed, the same would be considered on its own merits as already observed by this Court vide paragraph 29 (supra). Contentions of both parties kept open.

Accordingly, these petitions stand disposed of. All pending applications consigned to record."

28. Before considering the submissions of the learned ASG with regard to maintainability of the present appeals on account of the second order of this Court, it will be apposite to refer to certain observations made by this Court in its first order, which read thus:

"**26.** However, we are also concerned about the prolonged period of incarceration suffered by the appellant – Manish Sisodia. In ***P. Chidambaram v. Directorate of Enforcement*** (2020) 13 SCC 791, the appellant therein was granted bail after being kept in custody for around 49 days [***P. Chidambaram v. Central Bureau of Investigation*** (2020) 13 SCC 337], relying on the Constitution Bench in ***Shri Gurbaksh Singh Sibbia and Others v. State of Punjab*** (1980) 2 SCC 565, and ***Sanjay Chandra v. Central Bureau of Investigation*** (2012) 1 SCC 40, that even if the allegation is one of grave economic offence, it is not a rule that bail should be denied in every case. Ultimately, the consideration has to be made on a case to case basis, on the facts. The primary object is to secure the presence of the accused to stand trial. The argument that the appellant therein was a flight risk or that there was a possibility of tampering with the evidence or influencing the witnesses, was rejected by the Court. Again, in ***Satender Kumar Antil v. Central Bureau of Investigation and Another*** (2022) 10 SCC 51, this Court referred to ***Surinder Singh Alias Shingara Singh v. State of Punjab*** (2005) 7 SCC 387 and ***Kashmira Singh v. State of Punjab***

(1977) 4 SCC 291, to emphasise that the right to speedy trial is a fundamental right within the broad scope of Article 21 of the Constitution. In ***Vijay Madanlal Choudhary*** (supra), this Court while highlighting the evil of economic offences like money laundering, and its adverse impact on the society and citizens, observed that arrest infringes the fundamental right to life. This Court referred to Section 19 of the PML Act, for the in-built safeguards to be adhered to by the authorised officers to ensure fairness, objectivity and accountability. [See also ***Pankaj Bansal v. Union of India and Ors.*** 2023 SCC OnLine SC 1244] ***Vijay Madanlal Choudhary*** (supra), also held that Section 436A of the Code can apply to offences under the PML Act, as it effectuates the right to speedy trial, a facet of the right to life, except for a valid ground such as where the trial is delayed at the instance of the accused himself. In our opinion, Section 436A should not be construed as a mandate that an accused should not be granted bail under the PML Act till he has suffered incarceration for the specified period. This Court, in ***Arnab Manoranjan Goswami v. State of Maharashtra and Others*** (2021) 2 SCC 427, held that while ensuring proper enforcement of criminal law on one hand, the court must be conscious that liberty across human eras is as tenacious as tenacious can be.

27. The appellant – Manish Sisodia has argued that given the number of witnesses, 294 in the prosecution filed by the CBI and 162 in the prosecution filed by the DoE, and the documents 31,000 pages and 25,000 pages respectively, the fact that the CBI has filed multiple charge sheets, the arguments of charge have not commenced. The trial court has allowed application of the accused for furnishing of additional documents, which order has been challenged by the prosecution under Section 482 of the Code before the High Court. It was stated at the Bar, on behalf of the prosecution that the said petition under Section 482 will be withdrawn. It was also stated at the Bar, by the prosecution that the trial would be concluded within next six to eight months.

28. Detention or jail before being pronounced guilty of an offence should not become punishment without trial. If the trial gets protracted despite assurances of the prosecution, and it is clear that case will not be decided within a foreseeable time, the prayer for bail may be meritorious. While the prosecution may pertain to an economic offence, yet it may not be proper to equate these cases with those punishable with death, imprisonment for life, ten years or more like offences under the Narcotic Drugs and Psychotropic Substances Act, 1985, murder, cases of rape, dacoity, kidnaping for ransom, mass violence, etc. Neither is this a case where 100/1000s of depositors have been defrauded. The allegations have to be established and proven. The right to bail in cases of delay, coupled with incarceration for a long period, depending on the nature of the allegations, should be read into Section 439 of the Code and Section 45 of the PML Act. The reason is that the constitutional mandate is the higher law, and it is the basic right of the person charged of an offence and not convicted, that he be ensured and given a speedy trial. When the trial is not proceeding for reasons not attributable to the accused, the court, unless there are good reasons, may well be guided to exercise the power to grant bail. This would be truer where the trial would take years.

29. In view of the assurance given at the Bar on behalf of the prosecution that they shall conclude the trial by taking appropriate steps within next six to eight months, we give liberty to the appellant – Manish Sisodia to move a fresh application for bail in case of change in circumstances, or in case the trial is protracted and proceeds at a snail's pace in next three months. If any application for bail is filed in the above circumstances, the same would be considered by the trial court on merits without being influenced by the dismissal of the earlier bail application, including the present judgment. Observations made above, re.: right to speedy trial, will, however, be taken into consideration. The appellant – Manish Sisodia may also file an application for interim bail in case of ill health and medical emergency due to illness of his wife. Such application would be also examined on its own merits."

29. A perusal of the aforesaid would reveal that this Court was concerned about the prolonged period of incarceration suffered by the appellant. After considering various earlier pronouncements, this Court emphasised that the right to speedy trial is a fundamental right within the broad scope of Article 21 of the Constitution. Relying on ***Vijay Madanlal Choudhary and Others v. Union of India and Others***,[3] this Court observed that Section 436A Cr.P.C. should not be construed as a mandate that an accused should not be granted bail under the PMLA till he has suffered incarceration for the specified period. This Court recorded the assurance given by the prosecution that they shall conclude the trial by taking appropriate steps within next 6-8 months. This Court, after recording the said submissions, granted liberty to the appellant to move a fresh application for bail in case of change in circumstances or in case the trial was protracted and proceeded at a snail's pace in next three months. This Court observed that if any application was filed, the same would be considered by the trial court on merits without being influenced by the dismissal of the earlier bail applications including its own judgment. It further observed that the observations made regarding the right to speedy trial will be taken into consideration.

30. Since the trial proceeded at a snail's pace in the period after three months of the first order of this Court, the appellant filed the second application for bail before the trial court. The same came to be rejected by the trial court on 30th April 2024. It can thus be seen that it took a period of almost three months for the trial court to decide the said application. By the time the appellant approached the High Court, a period of more than six months had elapsed from the date on which the first order of this Court was passed. The same also came to be rejected on 21st May 2024.

31. When the appellant approached this Court in the second round and when the second order was passed by this Court on 4th June 2024, a period of 7 months and 4 days had elapsed from the date of the first order of this Court. However, this Court took into consideration the statement of the learned Solicitor General that the investigation would be concluded and final complaint/charge-sheet would be filed expeditiously and at any rate on or before 3rd July 2024 and

3 [2022] 6 SCR 382 : (2022) SCC OnLine SC 929 : 2022 INSC 756

thereafter, the trial court would be free to proceed with the trial. It, after observing that "having regard to the fact that the period of 6-8 months fixed by this Court in its first order having not come to an end", disposed of the petitions with liberty to the appellant to revive his prayer afresh after filing of the final complaint/charge-sheet.

32. It could thus be seen that this Court had granted liberty to the appellant to revive his prayer after filing of the charge-sheet. Now, relegating the appellant to again approach the trial court and thereafter the High Court and only thereafter this Court, in our view, would be making him play a game of "Snake and Ladder". The trial court and the High Court have already taken a view and in our view relegating the appellant again to the trial court and the High Court would be an empty formality. In a matter pertaining to the life and liberty of a citizen which is one of the most sacrosanct rights guaranteed by the Constitution, a citizen cannot be made to run from pillar to post.

33. A careful reading of the second order of this Court dated 4th June 2024 would show that this Court recorded that they did not propose to go into the arguments or dwell upon it in view of the liberty granted in the first order of this Court. Thereafter, this Court noticed the assurance of the learned Solicitor General that the investigation would be concluded and final complaint/charge-sheet would be filed at any rate on or before 3rd July 2024. This Court further observed in its second order that since the period of 6-8 months fixed by it in its first order had not come to an end, it was inclined to dispose of this petition with liberty to the appellant to revive his prayer. It will be a travesty of justice to construe that the carefully couched order preserving the right of the appellant to revive his prayer for grant of special leave against the High Court order, to mean that he should be relegated all the way down to the trial court. The memorable adage, that procedure is a hand maiden and not a mistress of justice rings loudly in our ears.

34. In this respect, we may also gainfully refer to one of the recent pronouncements by a bench of this Court to which one of us (B.R. Gavai, J.) was a member in the case of ***Prabir Purkayastha v. State (NCT of Delhi)***,[4] which reads thus:

4 [2024] 6 SCR 666 : 2024 SCC OnLine SC 934 : 2024 INSC 414

> "**21.** The Right to Life and Personal Liberty is the most sacrosanct fundamental right guaranteed under Articles 20, 21 and 22 of the Constitution of India. Any attempt to encroach upon this fundamental right has been frowned upon by this Court in a catena of decisions. In this regard, we may refer to following observations made by this Court in the case of *Roy V.D.* v. *State of Kerala*[3]:—
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> **"7.** The life and liberty of an individual is so sacrosanct that it cannot be allowed to be interfered with except under the authority of law. It is a principle which has been recognised and applied in all civilised countries. In our Constitution Article 21 guarantees protection of life and personal liberty not only to citizens of India but also to aliens.""

35. In our view, the liberty reserved by this Court vide its second order, to revive the request of the appellant will have to be construed as a liberty given by this Court to revive his prayer afresh after filing of the final complaint/charge-sheet. Undisputedly, the present appeals have been filed after the final complaint/charge-sheet has been filed by the respondents. In that view of the matter, we are not inclined to entertain the preliminary objection and the same is rejected.

CONSIDERATION AS TO WHETHER THE APPELLANT IS ENTITLED FOR BAIL:

36. Having rejected the preliminary objection, we will proceed to consider as to whether in the facts and circumstances of the present case, the appellant is entitled to grant of bail or not.

37. Insofar as the contention of the learned ASG that since the conditions as provided under Section 45 of the PMLA are not satisfied, the appellant is not entitled to grant of bail is concerned, it will be apposite to refer to the first order of this Court. No doubt that this Court in its first order in paragraph 25, after recapitulating in paragraph 24 as to what was stated in the charge-sheet filed by the CBI against the appellant, observed that, in view of the aforesaid discussion, the Court was not inclined to accept the prayer for grant of bail at that stage. However, certain paragraphs of the said order cannot be read in isolation from the other paragraphs. The order will have to be read in its entirety. In paragraph 28 of the said order, this Court observed that the right to bail in cases of delay, coupled with incarceration for

a long period, depending on the nature of the allegations, should be read into Section 439 Cr.P.C. and Section 45 of the PMLA. The Court held that the constitutional mandate is the higher law, and it is the basic right of the person charged of an offence and not convicted that he be ensured and given a speedy trial. It further observed that when the trial is not proceeding for reasons not attributable to the accused, the court, unless there are good reasons, would be guided to exercise the power to grant bail. The Court specifically observed that this would be true where the trial would take years. It could thus clearly be seen that this Court, in the first round of litigation between the parties, has specifically observed that in case of delay coupled with incarceration for a long period and depending on the nature of the allegations, the right to bail will have to be read into Section 45 of PMLA.

38. A Division Bench of this Court in the case of ***Ramkripal Meena v. Directorate of Enforcement***[5] was considering an application of the petitioner therein who was to receive a bribe of rupees five crore and from whom, an amount of Rs.46,00,000/- was already recovered. In the said case, the petitioner was arrested on 26th January 2022 in connection with FIR No. 402/2021 registered against him for the offences punishable under Sections 406, 420, 120B of IPC and Section 4/6 of the Rajasthan Public Examination (Prevention of Unfair Means) Act, 1992. He was released on bail by this Court vide order dated 18th January 2023. Thereafter, the petitioner was arrested by the ED on 21st June 2023. The Court observed thus:

> "**7.** Adverting to the prayer for grant of bail in the instant case, it is pointed out by learned counsel for ED that the complaint case is at the stage of framing of charges and 24 witnesses are proposed to be examined. The conclusion of proceedings, thus, will take some reasonable time. The petitioner has already been in custody for more than a year. Taking into consideration the period spent in custody and there being no likelihood of conclusion of trial within a short span, coupled with the fact that the petitioner is already on bail in the predicate offence, and keeping in view the peculiar facts and circumstances of this case,

5 SLP(Crl.) No. 3205 of 2024 dated 30.07.2024

> it seems to us that the rigours of Section 45 of the Act can be suitably relaxed to afford conditional liberty to the petitioner. Ordered accordingly."

39. In the light of the specific observations of this Court in paragraph 28 of the first order, we are not inclined to accept the submission of the learned ASG that the provisions of Section 45 of the PMLA would come in the way of consideration of the application of the appellant for grant of bail.

40. From the first order of this Court, it would be clear that an assurance was given at the Bar on behalf of the prosecution that they shall conclude the trial by taking appropriate steps within next 6-8 months. In view of the said statement, this Court did not consider the application of the appellant for bail at that stage, however, granted liberty to the appellant to move a fresh application for bail in case of change in circumstances, or in case the trial is protracted and proceeded at a snail's pace in next three months. Though, this Court observed that if any application for bail was filed on the grounds mentioned in paragraph 29, the same would be considered by the trial court without being influenced by the dismissal of the earlier bail applications including the present judgment, however, it clarified that the observations made by the Court with regard to right to speedy trial would be taken into consideration. The liberty was also granted to the appellant to file an application for interim bail in case of ill-health and medical emergency due to illness of his wife.

41. A perusal of the impugned judgment and order would reveal that though the learned Single Judge of the High Court has dismissed the applications for bail on merits, on medical grounds, it has permitted the appellant to visit his residence to meet his wife in custody once every week.

42. It could thus clearly be seen that this Court expected the trial to be concluded within a period of 6-8 months. The liberty was reserved to approach afresh if the trial did not conclude within the period of 6-8 months. The liberty was also granted in case the trial proceeded at a snail's pace in next three months.

43. A perusal of the material placed on record would clearly reveal that far from the trial being concluded within a period of 6-8 months, it is even yet to commence. Though in the first order of this Court,

liberty was reserved to move afresh for bail if the trial proceeded at a snail's pace within a period of three months from the date of the said order, the commencement of the trial is yet to see the light of the day. In these circumstances, in view of the first order of this Court, the appellant was entitled to renew his request. When the appellant renewed his request, the learned Special Judge (trial court) as well as the High Court was required to consider the said applications in the light of the observations made by this Court in paragraphs 28 and 29 of the first order. In paragraph 29 of the first order, this Court specifically observed that though the observations on the aspect of merit were not binding, the observations of right to speedy trial were required to be taken into consideration.

44. The learned Special Judge and the learned Single Judge of the High Court have considered the applications on merits as well as on the grounds of delay and denial of right to speedy trial. We see no error in the judgments and orders of the learned Special Judge as well as the High Court in considering the merits of the matter. In view of the observations made by this Court in the first order, they were entitled to consider the same. However, the question that arises is as to whether the trial court and the High Court have correctly considered the observations made by this Court with regard to right to speedy trial and prolonged period of incarceration. The courts below have rejected the claim of the appellant applying the triple test as contemplated under Section 45 of the PMLA. In our view, this is in ignorance of the observations made by this Court in paragraph 28 of the first order wherein this Court specifically observed that right to bail in cases of delay coupled with incarceration for a long period should be read into Section 439 Cr.P.C. and Section 45 of the PMLA.

45. The trial court, in its order, has held that the appellant individually and along with different accused persons have been filing one or the other applications/making oral submissions frequently. It further observed that some of them were frivolous. It was observed that this was apparently done as a concerted effort for accomplishing the shared purpose of causing delay in the matter. The trial court therefore rejected the contention of the appellant that he had not contributed to delay in proceedings or that the case has been proceeding at a snail's pace. However, in the very subsequent paragraph i.e., paragraph 80, the court observed that, in order to avoid any delay and considering the time being taken by the counsel for the accused

in inspecting the "un-relied upon documents", it had vide order dated 18th April 2024 put a query to the prosecution if the entire "un-relied upon documents" can be provided to the accused persons in a digitized form. It further recorded that the ED accepted the suggestion that it would expedite the proceedings. However, some time was sought to consider the same. A perusal of the compliance report filed by the Assistant Director of ED dated 7th May 2024 which could be found at page 757 of the paperbook, would reveal that the Cyber Lab has informed that it would take 70-80 days to prepare one copy (cloning) of the data contained in the said unrelied digital devices.

46. It could further be seen that, though it has been submitted on behalf of the ED that hundreds of applications have been filed for supply of "un-relied upon documents", the record would not substantiate the said position. Though various applications have been filed by different accused persons, insofar as the present appellant is concerned, he has filed only 13 applications in the CBI matter and 14 in the ED matter. It would reveal that some of the applications are for seeking permission to meet his wife or permission to file vakalatnama, to put signature on the documents, seeking permission to sign a cheque etc. Most of the applications are for supply of missing documents and legible copies under Section 207/208 Cr.P.C. Some of the applications are for inspection of the "un-relied upon documents". It is pertinent to note that all these applications have been allowed by the learned trial court. It is further pertinent to note that some of these orders were also challenged before the High Court wherein stay was granted. However, a statement was made on behalf of the prosecution before this Court when the first order was passed that the said petitions filed under Section 482 Cr.P.C would be withdrawn. The said statement is recorded in paragraph 27 of the first order of this Court. We may state that, when we specifically asked the learned ASG to point out any order wherein the learned trial judge found any of the applications of the appellant to be frivolous, not a single order could be pointed out.

47. In that view of the matter, we find that the finding of the learned trial judge that it is the appellant who is responsible for delaying the trial is not supported by the record. The learned Single Judge of the High Court endorses the finding of the trial court on the ground that the accused persons have taken three months' time from 19th October 2023 to 19th January 2024 for inspection of "un-relied upon documents" despite

repeated directions from the learned trial court to conclude the same expeditiously. It is to be noted that there are around 69,000 pages of documents involved in both the CBI and the ED matters. Taking into consideration the huge magnitude of the documents involved, it cannot be stated that the accused is not entitled to take a reasonable time for inspection of the said documents. In order to avail the right to fair trial, the accused cannot be denied the right to have inspection of the documents including the "un-relied upon documents".

48. It is further to be noted that a perusal of the second order of this Court would itself reveal that this Court recorded the submissions of the learned Solicitor General, which were made on instructions, that the investigation would be concluded and final complaint/charge-sheet would be filed expeditiously and at any rate on or before 3rd July 2024. Accordingly, 8th charge-sheet has been filed on 28th June 2024 by the ED. It could thus be seen that, even according to the respondents, the investigation was to be concluded on or before 3rd July 2024. In that view of the matter, we find that the contention raised by the learned ASG is self-contradictory. If the investigation itself was to conclude on or before 3rd July 2024, the question is how could the trial have commenced prior to that? If the investigation itself was to conclude after a period of 8 months from the date of the first order of this Court, there was no question of the trial being concluded within a period of 6-8 months from the date of the first order of this Court. We find that both the High Court and the trial court have failed to take this into consideration.

49. We find that, on account of a long period of incarceration running for around 17 months and the trial even not having been commenced, the appellant has been deprived of his right to speedy trial.

50. As observed by this Court, the right to speedy trial and the right to liberty are sacrosanct rights. On denial of these rights, the trial court as well as the High Court ought to have given due weightage to this factor.

51. Recently, this Court had an occasion to consider an application for bail in the case of ***Javed Gulam Nabi Shaikh v. State of Maharashtra and Another***[6] wherein the accused was prosecuted under the

6 [2024] 7 SCR 992 : 2024 SCC OnLine SC 1693

provisions of the Unlawful Activities (Prevention) Act, 1967. This Court surveyed the entire law right from the judgment of this Court in the cases of ***Gudikanti Narasimhulu and Others v. Public Prosecutor, High Court of Andhra Pradesh***,[7] ***Shri Gurbaksh Singh Sibbia and Others v. State of Punjab***,[8] ***Hussainara Khatoon and Others (I) v. Home Secretary, State of Bihar***,[9] ***Union of India v. K.A. Najeeb***[10] ***and Satender Kumar Antil v. Central Bureau of Investigation and Another***.[11] The Court observed thus:

> "**19.** If the State or any prosecuting agency including the court concerned has no wherewithal to provide or protect the fundamental right of an accused to have a speedy trial as enshrined under Article 21 of the Constitution then the State or any other prosecuting agency should not oppose the plea for bail on the ground that the crime committed is serious. Article 21 of the Constitution applies irrespective of the nature of the crime."

52. The Court also reproduced the observations made in ***Gudikanti Narasimhulu*** (supra), which read thus:

> "**10.** In the aforesaid context, we may remind the trial courts and the High Courts of what came to be observed by this Court in *Gudikanti Narasimhulu* v. *Public Prosecutor, High Court* reported in (1978) 1 SCC 240. We quote:
>
> *"What is often forgotten, and therefore warrants reminder, is the object to keep a person in judicial custody pending trial or disposal of an appeal. Lord Russel, C.J., said* [R *v.* Rose, *(1898) 18 Cox]:*
>
> *"I observe that in this case bail was refused for the prisoner. It cannot be too strongly impressed on the, magistracy of the country that bail is not to be withheld as a punishment, but that the requirements as to bail are merely to secure the attendance of the prisoner at trial.""*

7 [1978] 2 SCR 371 : (1978) 1 SCC 240 : 1977 INSC 232

8 [1980] 3 SCR 383 : (1980) 2 SCC 565 : 1980 INSC 68

9 [1979] 3 SCR 169 : (1980) 1 SCC 81 : 1979 INSC 34

10 [2021] 1 SCR 443 : (2021) 3 SCC 713 : 2021 INSC 50

11 [2022] 10 SCR 351 : (2022) 10 SCC 51 : 2022 INSC 690

53. The Court further observed that, over a period of time, the trial courts and the High Courts have forgotten a very well-settled principle of law that bail is not to be withheld as a punishment. From our experience, we can say that it appears that the trial courts and the High Courts attempt to play safe in matters of grant of bail. The principle that bail is a rule and refusal is an exception is, at times, followed in breach. On account of non-grant of bail even in straight forward open and shut cases, this Court is flooded with huge number of bail petitions thereby adding to the huge pendency. It is high time that the trial courts and the High Courts should recognize the principle that "bail is rule and jail is exception".

54. In the present case, in the ED matter as well as the CBI matter, 493 witnesses have been named. The case involves thousands of pages of documents and over a lakh pages of digitized documents. It is thus clear that there is not even the remotest possibility of the trial being concluded in the near future. In our view, keeping the appellant behind the bars for an unlimited period of time in the hope of speedy completion of trial would deprive his fundamental right to liberty under Article 21 of the Constitution. As observed time and again, the prolonged incarceration before being pronounced guilty of an offence should not be permitted to become punishment without trial.

55. As observed by this Court in the case of ***Gudikanti Narasimhulu*** (supra), the objective to keep a person in judicial custody pending trial or disposal of an appeal is to secure the attendance of the prisoner at trial.

56. In the present case, the appellant is having deep roots in the society. There is no possibility of him fleeing away from the country and not being available for facing the trial. In any case, conditions can be imposed to address the concern of the State.

57. Insofar as the apprehension given by the learned ASG regarding the possibility of tampering the evidence is concerned, it is to be noted that the case largely depends on documentary evidence which is already seized by the prosecution. As such, there is no possibility of tampering with the evidence. Insofar as the concern with regard to influencing the witnesses is concerned, the said concern can be addressed by imposing stringent conditions upon the appellant.

CONCLUSION:

58. In the result, we pass the following order:

(i) The appeals are allowed;

(ii) The impugned judgment and order dated 21st May 2024 passed by the High Court of Delhi in Bail Application Nos. 1557 and 1559 of 2024 is quashed and set aside;

(iii) The appellant is directed to be released on bail in connection with ED Case No. HIU-II/14/2022 registered against the appellant by the ED and FIR No. RC0032022A0053 of 2022 registered against the appellant by the CBI on furnishing bail bonds for a sum of Rs.10,00,000/- with two sureties of the like amount;

(iv) The appellant shall surrender his passport with the Special Court;

(v) The appellant shall report to the Investigating Officer on every Monday and Thursday between 10-11 AM; and

(vi) The appellant shall not make any attempt either to influence the witnesses or to tamper with the evidence.

59. Pending application(s), if any, shall stand disposed of in the above terms.

Result of the case: Appeals allowed.

†*Headnotes prepared by:* Divya Pandey

[2024] 8 S.C.R. 1086 : 2024 INSC 625

Shajan Skaria
v.
The State of Kerala & Anr.

(Criminal Appeal No. 2622 of 2024)

23 August 2024

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

Issue for Consideration

Whether Section 18 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 imposes an absolute bar on the grant of anticipatory bail in cases registered under the said Act; when can it be said that a prima facie case is made out in a given FIR/complaint; whether the averments in the FIR/complaint in question disclose commission of any offence under Section 3(1)(r) or under Section 3(1)(u) of the 1989 Act; whether mere knowledge of the caste identity of the complainant is sufficient to attract the offence under Section 3(1)(r) of the 1989 Act.

Headnotes†

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 – s.18 – Bar on the grant of anticipatory bail, if absolute:

Held: No – s.18 does not impose an absolute bar on the power of the courts to examine whether a prima facie case attracting the provisions of the 1989 Act is made out or not – The bar created by ss.18 and 18-A(i) shall not apply, if the complaint does not make out a prima facie case for applicability of the provisions of the 1989 Act and thus, the Court would not be precluded from granting pre-arrest bail to the accused persons – s.18 bars anticipatory bail only in those cases where a valid arrest of the accused person can be made as per Section 41 read with Section 60A of CrPC. [Paras 35, 41]

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 – "prima facie" – When can a prima facie case be said to be made out in a given FIR/complaint – Bar of s.18, when not applicable:

Held: Prima facie, a Latin term translates to "at first sight" or "based on first impression" – The expression "where no prima

* Author

facie materials exist warranting arrest in a complaint or FIR" means "when based on first impression, no offence is made out as shown in the FIR or the complaint" – Thus, when the necessary ingredients to constitute the offence under the 1989 Act are not made out upon the prima facie reading of the complaint or FIR, no case can be said to exist prima facie and the bar of Section 18 would not apply and the courts would not be absolutely precluded from granting pre-arrest bail to the accused persons on its own merits – However, if the complaint has all the ingredients necessary for constituting the offence, then the remedy of anticipatory bail will not be available to the accused – Courts should conduct a preliminary inquiry to determine if the narration of facts in the complaint/FIR in fact discloses the essential ingredients required to constitute an offence under the 1989 Act to ensure that no unnecessary humiliation is caused to the accused – Words "having committed an offence under this Act" denote that it is only when the accusation in the complaint clearly points towards the commission of an offence under the 1989 Act that the bar of Section 18 would apply. [Paras 48-52]

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 – s.3(1)(r), 3(1)(u) – Appellant, Editor of an online news channel published a video on YouTube allegedly making derogatory statements and levelling various allegations against the complainant – Ingredients necessary to constitute offences under Sections 3(1)(r) and 3(1)(u), if prima face disclosed in the FIR – Offence under Sections 3(1)(r) and 3(1)(u), if made out:

Held: No – All insults or intimidations to a member of the Scheduled Caste or Scheduled Tribe will not amount to an offence under the 1989 Act, unless such insult or intimidation is on the ground that the victim belongs to Scheduled Caste or Scheduled Tribe – Offence under Section 3(1)(r) is not established merely on the fact that the complainant is a member of a Scheduled Caste or a Scheduled Tribe, unless there is an intention to humiliate such a member for the reason that he belongs to such community – In the present case, there is nothing in the transcript of the video in question to indicate even prime facie that the allegations were made by the appellant only on account of the fact that the complainant belongs to a Scheduled Caste – Allegations made by the appellant show that he is at inimical terms with the complainant and his intention may be to malign or defame him but not on the ground

or for the reason that the complainant belongs to a Scheduled Caste – At best, the appellant could be said to have prima facie committed the offence of defamation punishable under Section 500, IPC for which the complainant can prosecute the appellant – A prima facie conjoint reading of the transcript of the video and the complaint does not disclose that the actions of the appellant were impelled by the caste identity of the complainant for which he could invoke the provisions of the 1989 Act – Further, even the offence under Section 3(1)(u) will come into play only when any person is trying to promote ill feeling or enmity against the members of the scheduled castes or scheduled tribes as a group and not as individuals – There is nothing to even prima facie indicate that the appellant by publishing the video on YouTube promoted or attempted to promote feelings of enmity, hatred or ill-will against the members of Scheduled Castes or Scheduled Tribes – The video had nothing to do in general with the members of Scheduled Caste or the Scheduled Tribe – Appellant's target was just the complainant alone – Impugned order passed by the High Court declining to grant anticipatory bail to the appellant, set aside – If arrested, the appellant be released on bail on the terms and conditions, which the Investigating Officer may deem fit to impose. [Paras 58, 74, 77, 89]

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 s.3(1)(r) – Mere knowledge of the caste identity of the complainant, if sufficient to attract the offence under:

Held: No – Wherever the legislature intended that mere knowledge of the fact that the victim is a member of Scheduled Caste or Scheduled Tribe would be sufficient to constitute an offence under the 1989 Act, it has specified the same for instance, u/ss.3(1)(w)(i), (ii), (2)(v), (va) whereas, the words in Section 3(1)(r) of the 1989 Act are altogether different. [Para 79]

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 – s.3(1)(r) – "with intent to humiliate" – Meaning:

Held: Section 3(1)(r) should be seen in the context of Section 7(1)(d) of the Protection of Civil Rights Act, 1955 wherein any insult against a member of a Scheduled Caste or Scheduled Tribe on the ground of "untouchability" was punishable with imprisonment for a maximum term of six months – However, Civil Rights Act could not adequately tackle caste-based offences and

the practice of "untouchability", leading to the enactment of the 1989 Act introducing more stringent provisions for combating such practices – The words "with an intent to humiliate a member of a Scheduled Caste or Scheduled Tribe" are thus, inextricably linked to the caste identity of the person who is subjected to intentional insult or intimidation and are inseparable from the underlying idea of "untouchability" which is sought to be remedied and punished by the 1989 Act – Not every intentional insult or intimidation of a member of a SC/ST community will result into a feeling of caste- based humiliation – It is only in those cases where the intentional insult or intimidation takes place either due to the prevailing practice of untouchability or to reinforce the historically entrenched ideas like the superiority of the "upper castes" over the "lower castes/untouchables", the notions of 'purity' and 'pollution', etc. that it could be said to be an insult or intimidation as envisaged by the 1989 Act – The expression "intent to humiliate" in Section 3(1)(r) must be construed in the larger context in which the concept of humiliation of the marginalised groups has been understood by various scholars – It is not ordinary insult or intimidation which would amount to 'humiliation' that is sought to be made punishable under the 1989 Act – Humiliations based on different grounds and identities existing in the society targeted in different legislations like the Protection of Women from Domestic Violence Act, 2005, the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, discussed. [Paras 61, 72]

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 – Cases where complaints/FIRs are based on YouTube videos, digital materials on social media platforms – Courts to look into said materials alongwith the complaint:

Held: Courts should have the discretion to look into the materials based upon which the complaint has been registered, in addition to verifying the averments made in the complaint – If on a prima facie reading of the such materials referred to in the complaint and the complaint itself, the ingredients necessary for constituting the offence are not made out, then the bar of Section 18 would not be applicable. [Para 52]

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 – Code of Criminal Procedure, 1973 – ss.438, 482 – Constitution of India – Article 226 – Cases of malicious prosecution due to political/private vendetta:

Held: Such cases can be considered only by the High Court in exercise of its inherent powers under Section 482 of the Code or in exercise of its extraordinary jurisdiction under Article 226 of the Constitution – Powers under Section 438 of the CrPC cannot be exercised once the contents of the complaint/FIR disclose a prima facie case. [Para 49]

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 – s.18 – "arrest of any person" – Significance – Code of Criminal Procedure, 1973 – ss.41, 60A:

Held: s.18 bars anticipatory bail only in cases where a valid arrest of the accused person can be made as per Section 41 read with Section 60A of CrPC – An arrest cannot be made merely because it is lawful to do so – An arrest can be effected if there is a reasonable complaint, credible information or reasonable suspicion and the police officer has a reason to believe that such offence has been committed by the accused person and the arrest is necessary – The term 'arrest' appearing in the text of Section 18 is to be construed and understood in the larger context of the powers of police to effect an arrest and the restrictions imposed by the statute and the courts on the exercise of such power – Thus, the bar under Section 18 would apply only to those cases where prima facie materials exist pointing towards the commission of an offence under the 1989 Act because it is only when a prima facie case is made out that the pre-arrest requirements as stipulated under Section 41 of CrPC could be said to be satisfied. [Paras 41, 43, 44, 46]

Interpretation of Statutes – Penal Statutes – Strict interpretation – Principles of statutory interpretation:

Held: A penal statute must receive strict construction – A principle of statutory interpretation embodies the policy of the law which is based on public policy – The court presumes, unless the contrary intention appears, that the legislator intended to conform to this legal policy – A principle of statutory interpretation is a principle of legal policy formulated as a guide to the legislative intention. [Para 82]

Code of Criminal Procedure, 1973 – s.438 – Evolution of, purpose – Discussed.

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 – Words and phrases – "Humiliation" – Social context – Humiliations in different social structures – Works of various scholars – Discussed.

Case Law Cited

Hitesh Verma v. State of Uttarakhand [2020] 9 SCR 593 **: (2020) 10 SCC 710;** *Ramesh Chandra Vaishya v. State of Uttar Pradesh & Anr.* [2023] 6 SCR 643 **: (2023) SCC OnLine SC 668;** *Prathvi Raj Chauhan v. Union of India* [2020] 2 SCR 727 **: (2020) 4 SCC 727;** *Siddharam Satlingappa Mhetre v. State of Maharashtra and Others* [2010] 15 SCR 201 **: (2011) 1 SCC 694;** *State of Madhya Pradesh v. Ram Krishna Balothia* [1995] 1 SCR 897 **: (1995) 3 SCC 221;** *Satender Kumar Antil v. CBI* [2022] 10 SCR 351 **: (2022) 10 SCC 51;** *Arnesh Kumar v. State of Bihar and Another* [2014] 8 SCR 128 **: (2014) 8 SCC 273 – relied on.**

Dr. Subhash Kashinath Mahajan v. State of Maharashtra and Another [2018] 4 SCR 877 **: (2018) 6 SCC 454;** *Vilas Pandurang Pawar and Another v. State of Maharashtra and Others* [2012] 8 SCR 270 **: (2012) 8 SCC 795;** *Rahna Jalal v. State of Kerala* [2020] 13 SCR 621 **: (2021) 1 SCC 733;** *Hitendra Vishnu Thakur and Others v. State of Maharashtra and Others* [1994] Supp. 1 SCR 360 **: (1994) 4 SCC 602 – referred to.**

Amir Chand v. The Crown **(1949) SCC OnLine Punj 20;** *XXX v. State of Kerala* **ILR 2022 4 Ker. 620;** *State of Kerala v. Hassan* **2002 (2) KLT 505 – referred to.**

U.S. v. Wiltberger **[5 L Ed 37 : 18 US (5 Wheat.) 76 (1820)];** *Tuck & Sons v. Priester* **(1887) 19 QBD 629 (CA);** *London and Country Commercial Properties Investments Ltd. v. Attorney General* **(1953) 1 WLR 312 : (1953) 1 All ER 436;** *Willis v. Thorp* **(1875) LR 10 QB 383 – referred to.**

Books and Periodicals Cited

41st Law Commission of India report dated September 24, 1969; Law Commission 48th Report (1972); Bereft of Being: The Humiliations of Untouchability, Humiliation: Claims and Context, Oxford University Press, First Edition (2009), pp. 95-107 by V. Geetha; Humiliation: Claims and Context, pp. 1-22, by Gopal Guru; Logic of Humiliation, Humiliation: Claims and Context, pp. 23-40 by Bhikhu Parekh; The Interpretation of Statutes (12th Edn.) by Maxwell; Statute Law (7th Edn. at p. 530) by William F. Craies **– referred to.**

List of Acts

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989; Code of Criminal Procedure, 1973; Kerala Police Act; Constitution of India; Protection of Civil Rights Act, 1955.

List of Keywords

Section 18 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989; Anticipatory bail; Pre-arrest bail; Bar on grant of anticipatory bail; Absolute bar; "prima facie"; Caste; Caste identity; Scheduled Caste or Scheduled Tribe; Member of the Scheduled Caste or Scheduled Tribe; Caste-based humiliation; Insults or intimidations; Malicious prosecution; Political/private vendetta; Arrest; Humiliation; Video published on YouTube; Transcript of video; "with intent to humiliate"; Intention to humiliate; Untouchability; Digital materials; Internet; Social media; Social media platforms.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 2622 of 2024

From the Judgment and Order dated 30.06.2023 of the High Court of Kerala at Ernakulam in CRLA No.906 of 2023

Appearances for Parties

Sidharth Luthra, Gaurav Agrawal, Sr. Advs., Abhay Anil Anturkar, Dhruv Tank, Aniruddha Awalgaonkar, Sarthak Mehrotra, Ayush Kaushik, Bhagwant Deshpande, Ms. Surbhi Kapoor, Advs. for the Appellant.

P.V. Dinesh, Sr. Adv., Nishe Rajen Shonker, Mrs. Anu K Joy, Alim Anvar, Ms. Anna Oommen, Ms. Urvashi Chauhan, Haris Beeran, Azhar Assees, Anand B. Menon, Radha Shyam Jena, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

J.B. Pardiwala, J.

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

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

1. This appeal arises from the judgment and order dated 30.06.2023 passed by the High Court of Kerala at Ernakulam in Criminal Appeal No. 906 of 2023 filed by the appellant herein by which the High Court dismissed the appeal and thereby affirmed the order dated 16.06.2023 passed by the Special Judge for Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, Ernakulam Division declining to grant anticipatory bail to the appellant herein in connection with the First Information Report No. 899 of 2023 lodged by the complainant (Respondent No. 2) at the Elamakkara Police Station, District Ernakulam for the offence punishable under

Sections 3(1)(r) and 3(1)(u) respectively of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (the **"Act, 1989"**).

A. FACTUAL MATRIX

2. On 24.05.2023, the appellant herein, in his capacity as the Editor of an online news channel named "Marunandan Malayali" published a video on YouTube, an online video sharing platform, levelling certain allegations against the complainant. The English translation of the video transcript is reproduced hereinbelow: -

> *"Thumb*
>
> *Every one's afraid of P.V. Srinijan who grew up like a mafia don!*
>
> *Title*
>
> *Who made P.V. Srinijan a mafia don?*
>
> *Content*
>
> *It was before a few days; the outside world knew about the news. The pride of Kerala, Kerala blasters was holding a selection trial which was for children under the age of 17. Children and parents had to wait for hours in front of the stadium at Panampally Nagar, Ernakulam which was owned by the Sports Council.*
>
> *The Stadium was closed, because P.V. Srinijan, District Sports Council President and MLA of Kunnathunad had alleged that Kerala blasters had a debt to clear with Kerala Sports Council. Media took on the news and people got furious over it. With hesitation the gates were finally opened. Yesterday evening Srinijan said sorry, he said that he knew nothing about the incident and he was being targeted. Former National Sports Star and present Sports Council President, Sharaf Ali came out with strong stand that; one, Kerala blasters didn't owe any money. Two, even if they owed money it's a matter for the sports council to deal with. The most important fact is that there is not any due, because all the grounds belong to the State Sports Council, the District Sports Council doesn't have any relation. Sharaf Ali also said that P.V. Srinijan doesn't have a say in it.*

There are no arrears in the contract between Kerala Blasters and Kerala Sports Council. The Kerala State Sports Council has informed the Council in writing. The District Sports Council has no right to block.

So why did Srinijan do the dirty work, who gave him the right to do so? Today evening another news came out. Including the sports hostel at Ernakulam, Panampalli Nagar and district sports development is being obstructed by Srinijan, the former Sports Council President and the National Sports Star Olympian Mercy Kutty said.

The hostel at Panampally Nagar Sports Academy was one of the biggest sports hostels in Kerala. With arrival of Srinijan and the present President the administration got completely changed. After that food was also not served at the hotel. Now vigilance investigation is going on. All the bills are fakes and the Sports Council's investigation is being piled up.

Who should Kerala believe, Sharaf Ali, Mercy Kuttan or Srinijan? Sharaf Ali and Mercy Kuttan have shown their skills. They are national sports stars and are responsible and know how to act according to the situation at hand. They aren't political, so Kerala is more likely to believe these sports stars.

Srinijan is lying, it's the latest example Srinijan's dramatic moves to slowly bring it under his control. My question isn't this, whenever a scandal, corruption or illegal activities take place we will find Srinijan name under it. Srinijan is infamous, still the CPM which made Srinijan a candidate should remember he wasn't even a communist. He was a leader of the youth congress. The footage of the DYFI demonstration against Srinijan's relation to corruption and black money transactions are still available.

First, CPM gives seat to him. Secondly, the people of the locality elect him. The MLA Post is the best example that the people of Kerala would allow any corrupt and black money dealer to become a leader. By being at the MLA position, Srinijan has only done damage to the state.

We know that it is hard for Kerala to invite industries over, because here political parties will raise red flags against it. Therefore, even those industries in Kerala are leaving. There are only a few industries who are born here and pays taxes correctly to the State. One such industry is the Kitex run by Kitex Sabu. The one who made Kitex Sabu to move to Telangana from Kerala was Srinijan.

It was with Srinijan's consent that authorities used to pester Kitex and being a close friend to the CM Pinarayi Vijayan, Sabu had to come out to deal with the issue which made Sabu to leave the state and move his entire industry into Telangana. This is the situation of an entrepreneur who gave jobs to millions and Srinijan is solely responsible for it. To destroy the enterprise, he made the employees get arrested in false charges, killed a person. The authorities were haunting the enterprise. It is said as Kadambrayar waste water, but investigation hasn't been fruitful. But we know that the waste is being generated from the Bhramapuram Plant which was later burnt. Now the dust and ashes are going to the Kadambrayar Lake. No one has a complaint about it. He made a businessman to move out of the State who was providing jobs to millions. Srinijan has many other allegations against him.

Srinijan's father-in-law was the Chief Justice of Supreme Court. There are allegations that during those days he made crores illegally which were even raised by the CPM.

Reason for Srinijan's sudden growth in wealth is due to corruption has been come to knowledge. But no one has the guts to start an investigation against him. Because he has high connections even in the judiciary. Even an audio clip came out that he had used his relations in judiciary to bring down the Kitex Industry. The first was the account of Srinijan's destruction of the sports sector in order to bring it under his jurisdiction. The second was the conspiracy to drive out a businessman out of the State.

Viewers might remember the news I have given out about Prithviraj where it talked about the legal notice he had sent me. After receiving the legal notice, I have studied

in depth about the film industry. From what I have learnt, there are some shocking facts related to it. I am just waiting for more proof. Knowingly or unknowingly Srinijan has a presence in the film industry.

It is not as we thought, we can see Srinijan at most film sites. Srinijan is the middle man in film industry for many. Which means he is the one who provides funds the most in the film industry.

But he does this with legal security. We are gathering evidences and as we find it true we will publish it.

Just focus on one thing. When Srinijan gave affidavit for participating in the competition he had to struggle to gather money because he had lots of black money. If he were to use it, he would get caught. So, he needed money in his account, so it is said that he borrowed money from some movie producers to show in record. I investigated some of the movie producers listed in the records. These producers borrow from others including Srinijan to make movies.

In short, Srinijan acts as a young mafia don. Srinijan has presence in movie industry, sports sector and politics. Srinijan will go to any extreme to eliminate those who dares to stand against him. Srinijan has high connections in judiciary. We shouldn't question judiciary. But there are some judicial officers who are corrupt and Srinijan aids them. But no one is bold enough to question him.

CPM has given Srinijan more power. Even the opposition is afraid to stand up against him. Even the judiciary is turning a blind eye. Even Kitex Sabu who fought against this leaves at one point.

Why is everyone afraid of him? Why is Kerala letting Srinijan to grow as a young mafia don?"

3. The complainant who is a Member of the Kerala Legislative Assembly representing the Kunnathunad constituency, a seat reserved for the members of the Scheduled Castes, aggrieved by the publication of the aforesaid video, filed a written complaint before the ACP, Central Police Station, Ernakulam alleging inter alia that the video was published by the appellant in order to publicise, abuse and insult the

complainant, who is a member of a Scheduled Caste. The contents of the complaint are reproduced as under:

> *"I am the elected candidate for the Kunnathunad Assembly Constituency. Shri Sajan Skaria (Editor, News Reader and Publisher), Smt. Ann Mary George (Managing Editor & CEO), Shri Riju (Chief Editor) are using the online TV Channel named Marunadan Malayali (TC 17/3164 (11) Pattom Palace P.O., Pattom Thiruvananthapuram, PIN 695004) & are continuously concocting and spreading false news against me through different social media, which have no basis of any kind. Such false news are created and spread in order to ridicule and humiliate me, as a member of the Scheduled Caste Pulaya Community.*
>
> *Shajan Skaria and aforesaid persons used my photo and uploaded a defamatory video against me through the Youtube Channel named Marunadan Malayali on 24.03.2023 with the title reading 'PV Sreenijan, who rose so suddenly as a Mafia Don' and the same was shared through other social media as well.*
>
> *He raised a false allegation against me, who is the President of District Sports Council that there is a vigilance inquiry going on against me regarding running of a sports hostel. Besides he also alleged that I am trying to destroy the business ventures and I have falsely implicated and jailed the employees of Kitex. He also made a very serious allegations against me that I have murdered one person.*
>
> *Shajan Skaria and the aforesaid persons are making efforts through their channel and other social media to me as a murderer, without any basis. That after the aforesaid video was uploaded, many people have shared the same on different social media platforms. On seeing this video, many persons from within the State of Kerala outside telephoned me and talked about this matter and raised doubts as to whether I am such a person or not. I doubt that the above actions of Shajan Skaria, Smt. Ann Mary George and Shri Riju is a part of their efforts to intentionally destroy the public faith that I enjoy in the society.*

The video published through the Online News Channel Marunadan Malayali on 24.05.2023 containing only false news and false averments, is knowingly made with the knowledge that I belong to Scheduled Caste Pulaya community and thus only to deliberately humiliate and ridicule me among the general public. Shajan Skaria, Smt. Ann Mary George, Shri Riju who belongs to Christian Community, knowing it fully well that I belong to Scheduled Caste Pulaya Community, has uploaded and spread the video as aforesaid with the deliberate intention of humiliating, ridiculing me among the general public. The same is an offence and is punishable under Section 3(r) and 3(u) of the Scheduled Caste and the Scheduled Tribes (Prevention of Atrocities) Act, 1989.

That I faced severe humiliation, loss and damages due to the aforesaid actions of Shajan Skaria, Smt. Ann Mary George and Shri Riju. Hence it is prayed that necessary legal action be taken against Shajan Skaria, Smt. Ann Mary George and Shri Riju against creating and spreading of false news through online channel and other social media under the Sections of the Scheduled Caste and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, sections of IT Act and Sections of IPC.

Sd/xx P.V. Sreenijan

Attaching the CD."

4. On the basis of the aforesaid complaint, FIR No. 899 of 2023 dated 09.06.2023 came to be registered against the appellant and two other persons, who are not parties to the present appeal, for offences punishable under Section 120(o) of the Kerala Police Act (the **"KP Act"**) and Sections 3(1)(r) and 3(1)(u) respectively of the Act, 1989.

5. A plain reading of the FIR would indicate that the appellant is not a member of the Scheduled Caste and he is alleged to have published and disseminated a video containing disparaging content about the complainant with a view to publicise, abuse and insult the complainant. The complainant has alleged that the video has caused him a lot of humiliation, mental pain and agony. The complainant has also alleged that the video was uploaded by the appellant with

the intention to humiliate and ridicule him among the general public with the knowledge that the complainant is a member of the Pulaya community, which is a Scheduled Caste.

6. Apprehending his arrest, the appellant went before the Court of Special Judge for Scheduled Castes and Scheduled Tribes (Prevention of Atrocities Act), 1989, Ernakulam Division, praying for grant of anticipatory bail under Section 438 of the Criminal Procedure Code, 1973 (the **"CrPC"**). The Special Judge, *vide* order dated 16.06.2023, rejected the anticipatory bail application of the appellant, holding that the allegations in the FIR are *prima facie* sufficient to attract the offence under the Act, 1989 and the bar of Section 18 of the said Act prohibits the court from exercising powers under Section 438 of the CrPC.

7. The appellant challenged the order passed by the Special Judge before the High Court of Kerala, wherein the High Court, *vide* order dated 30.06.2023 (**"impugned order"**), affirmed the order passed by the Special Judge and refused to grant anticipatory bail to the appellant. Relevant observations made by the High Court in the impugned order are extracted hereinbelow: -

> *"8. Now the question arises whether the offence under Section 3(1)(r) will be attracted, in the absence of reference to the caste status of the second respondent in the news item. In my opinion that question cannot be decided, oblivious of the object behind the enactment and the reason for amending the Act in 2019. The Act was brought into force for preventing the commission of atrocities against members of the Scheduled Castes and Scheduled Tribes and to establish Special Courts for the trial of such offences and provide relief and rehabilitation to the victims of such offences. The Act was amended on finding that, despite various measures to improve the socio-economic conditions of the scheduled Castes and Scheduled Tribes, they still remained vulnerable. Of course, as held by the Apex Court in Hitesh Verma and Ramesh Chandra Vaishya (supra), all insults or intimidation will not be an offence under the Act, unless such insult or intimidation is on account of the victim belonging to the Scheduled Castes or Scheduled Tribes. As observed earlier, materials on record do*

indicate that the video is intended to insult and humiliate the second respondent. At this stage, the court can only go by the allegations in the complaint and the attendant circumstances. The allegation is specific to the effect that the appellant has been insulting and humiliating the second respondent ***only for the reason that he belongs to the Scheduled Caste****. The attendant circumstances are the wanton nature of the allegations and the repeated news items published against the second respondent. Going by the wording of Section 3(1)(r), reference to the caste name of the victim is not necessary for attracting the offence. This is clear from the distinction between the wording of Section 3(1) (r) and 3(1)(s). As such, it is not possible to hold that there are no prima facie materials to attract the offence under Section 3(1)(r).*

In view of the finding on Section 3(1)(r), I am not venturing to decide whether the offence under Section 3(1)(u) is attracted or not. For the aforementioned reasons, the impugned order of the Special Court is upheld.

In the result, the Criminal Appeal is dismissed."

(Emphasis supplied)

8. In view of the aforesaid, the appellant is before this Court with the present appeal.

B. SUBMISSIONS ON BEHALF OF THE APPELLANT

9. Mr. Sidharth Luthra and Mr. Gaurav Agrawal, the learned Senior Counsel appearing for the appellant made the following submissions:

   a. The appellant had no intention to insult the complainant and merely stated the facts without mentioning the name of the complainant's caste or community. The appellant being a journalist, had published facts gathered through research and sources.

   b. The High Court failed to take into consideration that the complainant has not alleged that the appellant intentionally insulted or intimidated him with an intent to humiliate him as a member of the Scheduled Caste or Scheduled Tribe community. A perusal of the telecast makes it clear that the appellant did

not refer to the caste or community of the complainant. Even if the statements made in the video are said to be defamatory, the same by itself is not sufficient to attract an offence under the Act, 1989.

c. The complainant has not alleged that the appellant by words, either written or spoken, had promoted or attempted to promote feelings of enmity, hatred or ill-will against the members of the Scheduled Castes or Scheduled Tribes. Thus, no offence under Section 3(1)(u) of the Act 1989 is made out against the appellant.

d. The High Court failed to consider the judgments of the co-ordinate benches in ***XXX v. State of Kerala*** reported in **ILR 2022 4 Ker. 620** and ***State of Kerala v. Hassan*** reported in **2002 (2) KLT 505**, wherein it has been reiterated that the offence under Section 3(1)(u) of the Act, 1989 would be attracted only if the feelings of enmity, hatred or ill-will are promoted or attempted to be promoted against members of the Scheduled Castes or Scheduled Tribes as a class and not on criticizing an individual member.

e. The decision of this Court in ***Hitesh Verma v. State of Uttarakhand*** reported in **(2020) 10 SCC 710** held that an offence under Section 3(1)(r) is not established merely on the fact that the victim is a member of the Scheduled Caste, unless there is an intention to humiliate a member of the Scheduled Caste or Schedule Tribe for the reason that the victim belongs to such caste.

f. The decision of this Court in ***Ramesh Chandra Vaishya v. State of Uttar Pradesh & Anr.*** reported in **2023 SCC OnLine SC 668** held that every insult or intimidation would not amount to an offence under Section 3(1)(x) of the Act, 1989 unless, such insult or intimidation is targeted at the victim because he is a member of a particular Scheduled Caste or Scheduled Tribe.

g. The High Court failed to consider the decision of this Court in ***Prathvi Raj Chauhan v. Union of India*** reported in **(2020) 4 SCC 727** wherein it was held that if the complaint does not make out a *prima facie* case for applicability of the provisions of the Act, 1989 then the bar created by Section 18 and Section 18A(i) would not apply.

C. SUBMISSIONS ON BEHALF OF THE COMPLAINANT

10. Mr. Haris Beeran, the learned counsel appearing on behalf of the complainant/Respondent No.2 made the following submissions:

a. The appellant is a habitual offender in creating controversies by intentionally propagating false and defamatory campaigns against respectable members of society with the sole purpose of attracting subscriptions to his web platform.

b. The Act, 1989 was enacted with the object to prevent the commission of offences and atrocities against the members of the Scheduled Caste and Scheduled Tribes. Section 3(1)(r) of the Act, 1989 underscores the crucial aspect of intentional insult and intimidation with the specific intent to humiliate a member of the Scheduled Caste or Scheduled Tribe. The primary aim of the Act, 1989 is to ameliorate the socio-economic conditions of the community as they have been historically deprived of numerous civil rights. Therefore, an offence under the Act, 1989 is established when a member of these vulnerable sections of society is subjected to humiliation and harassment.

c. The appellant had wilfully disseminated the news against the complainant, containing false assertions, deliberately aimed at portraying the complainant in poor light in society on the ground that he was a member of a Scheduled Caste.

d. The false and derogatory remarks were spread with full awareness of the complainant's status as a person belonging to the Scheduled Caste, having been elected as an MLA in 2021 from a seat reserved for members of the Scheduled Caste community. The appellant's deliberate actions of insult and humiliation undeniably constitute the offence under Section 3(1)(r) of the Act, 1989.

e. The appellant himself has stated that the complainant is an MLA representing the Kunnathunad Constituency. This makes his intentions clear as it is common knowledge that the said constituency is reserved for members belonging to the Scheduled Castes.

f. The complainant has been singled out by the appellant for the sole reason that he belongs to a Scheduled Caste. The Appellant

has made unsubstantiated allegations and aspersions against the complainant and has gone to the extent of calling him a 'murderer' and 'mafia don'.

g. The appellant has not spared even the former Chief Justice of India who happens to be the father-in-law of the complainant and a person belonging to a Scheduled Caste. The appellant has intentionally humiliated the father-in-law of the complainant, assassinating his character as he also belongs to the Scheduled Caste community. The appellant has not even spared the judiciary by levelling defamatory allegations.

h. The act of the appellant, as alleged, constitutes an offence under Sections 3(1)(r) and 3(1)(u) respectively of the Act, 1989 and anticipatory bail cannot be granted in view of the bar under Section 18 of the Act, 1989.

i. Despite many notices issued by the investigating officers, the appellant has failed to turn up for the purpose of interrogation.

j. The appellant could be said to have exhibited a pattern of wilful non-compliance of the court orders, thereby showcasing a flagrant disregard for the courts. In a different case where anticipatory bail was granted to him, the appellant subsequently stopped attending the court proceedings and failed to cooperate in the investigation. The High Court took note of such behaviour and warned the appellant that his anticipatory bail could be revoked. Therefore, there is a substantial risk in granting anticipatory bail to the appellant.

D. SUBMISSIONS ON BEHALF OF THE STATE

11. Mr. P.V. Dinesh, the learned Senior Counsel appearing on behalf of the State (Respondent No. 1 herein) made the following submissions:

a. The complainant is an MLA from Kunnathunad constituency which is reserved for members of the Scheduled Caste and the telecast of the video was with a clear knowledge that the complainant belongs to a Scheduled Caste community.

b. To constitute an offence under Section 3(1)(r) of the Act, 1989, it is not necessary to mention the caste of the person. The video was uploaded with the intention to cause insult and humiliate the complainant and thereby promote feelings of hatred and ill will.

c. The appellant has filed a petition before the Kerala High Court to quash the FIR and the same is currently pending.

E. RELEVANT STATUTORY PROVISIONS

12. Before adverting to the rival submissions canvassed on either side, it is necessary for us to look into few relevant provisions of the Act, 1989, the CrPC and the KP Act:

Section 3 of the Act 1989:

Punishments for offences of atrocities.—

(1) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe,—

…

….

….

(r) intentionally insults or intimidates with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe in any place within public view;

…

(u) by words either written or spoken or by signs or by visible representation or otherwise promotes or attempts to promote feelings of enmity, hatred or ill-will against members of the Scheduled Castes or the Scheduled Tribes;

Shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to five years and with fine

Section 18 of the Act 1989:

Section 438 of the Code not to apply to persons committing an offence under the Act.—

Nothing in Section 438 of the Code shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence under this Act.

Section 438 of the CrPC:

Direction for grant of bail to person apprehending arrest.—

[(1) Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, inter alia, the following factors, namely:–

(i) the nature and gravity of the accusation;

(ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

(iii) the possibility of the applicant to flee from justice; and.

(iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested,

either reject the application forthwith or issue an interim order for the grant of anticipatory bail:

Provided that, where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer in-charge of a police station to arrest, without warrant the applicant on the basis of the accusation apprehended in such application.

(1A) Where the Court grants an interim order under sub-section (1), it shall forthwith cause a notice being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court,

(1B) The presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the Court, if on an application made to it by the Public Prosecutor, the

Court considers such presence necessary in the interest of justice.]

(2) When the High Court or the Court of Session makes a direction under sub-section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may think fit, including–

(i) a condition that the person shall make himself available for interrogation by a police officer as and when required;

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

(iii) a condition that the person shall not leave India without the previous permission of the Court;

(iv) such other condition as may be imposed under sub-section (3) of section 437, as if the bail were granted under that section.

(3) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail; and if a Magistrate taking cognizance of such offence decides that a warrant should be issued in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under sub-section (1).

[(4) Nothing in this section shall apply to any case involving the arrest of any person on accusation of having committed an offence under sub-section (3) of section 376 or section 376AB or section 376DA or section 376DB of the Indian Penal Code (45 of 1860).]

Section 120 of the KP Act:

Penalty for causing nuisance and violation of public order.—

If any person,—

…

(o) causing, through any means of communication, a nuisance of himself to any person by repeated or undesirable or anonymous call, letter, writing, message, e-mail or through a messenger ;

…

shall, on conviction, be punishable with imprisonment which may extend to one year or with fine which may extend to five thousand rupees or with both.

F. ISSUES FOR DETERMINATION

13. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the following issues fall for our consideration:

a. Whether Section 18 of the Act, 1989 imposes an absolute bar on the grant of anticipatory bail in cases registered under the said Act?

b. When can it be said that a prima facie case is made out in a given FIR/complaint?

c. Whether the averments in the FIR/complaint in question disclose commission of any offence under Section 3(1)(r) of the Act, 1989?

d. Whether any offence under Section 3(1)(u) of the Act, 1989 could be said to have been prima facie made out in the FIR/complaint in question?

e. Whether mere knowledge of the caste identity of the complainant is sufficient to attract the offence under Section 3(1)(r) of the Act, 1989?

G. ANALYSIS

i. Evolution of the concept of anticipatory bail

14. The Code of Criminal Procedure, 1898 did not contain any specific provision analogous to Section 438 of the CrPC. In ***Amir Chand v. The Crown,*** reported in **1949 SCC OnLine Punj 20**, the question before the Full Bench was whether Section 498 of the Criminal Procedure

Code, 1898 empowered the High Court or the Sessions Court to grant bail to a person who had not been placed under restraint by arrest or otherwise. The Full Bench answered the reference as under:

> *"…The very notion of bail presupposes some form of previous restraint. Therefore, bail cannot be granted to a person who has not been arrested and for whose arrest no warrants have been issued. Section 498, Criminal Procedure Code, does not permit the High Court or the Court of Session to grant bail to anyone whose case is not covered by sections 496 and 497, Criminal Procedure Code. It follows, therefore, that bail can only be allowed to a person who has been arrested or detained without warrant or appears or is brought before a Court. Such person must be liable to arrest and must surrender himself before the question of bail can be considered. In the case of a person who is not under arrest, but for whose arrest warrants have been issued, bail can be allowed if he appears in Court and surrenders himself. No bail can be allowed to a person at liberty for whose arrest no warrants have been issued. The petitioners in the present case are, therefore, not entitled to bail. The question referred to the Full Bench is, therefore, answered in the negative."*
>
> (Emphasis supplied)

15. Under the 1898 Code, the concept of anticipatory or pre-arrest bail was absent and the need for introduction of a new provision in the CrPC empowering the High Court and Court of Session to grant anticipatory bail was pointed out by the 41st Law Commission of India in its report dated September 24, 1969. The report pointed out the necessity of introducing a provision in the CrPC enabling the High Court and the Court of Session to grant anticipatory bail. It observed in para 39.9 of its report (Volume I):

> *Anticipatory bail*
>
> *"39.9 The suggestion for directing the release of a person on bail prior to his arrest (commonly known as "anticipatory bail") was carefully considered by us. Though there is a conflict of judicial opinion about the power of a Court to grant anticipatory bail, the majority view is that there is no such power under the existing provisions of the Code.*

The necessity for granting anticipatory bail arises mainly because sometimes influential persons try to implicate their rivals in false causes for the purpose of disgracing them or for other purposes by getting detained in jail for some days. In recent times, the accentuation of political rivalry, this tendency is showing signs of steady increase. Apart from false cases, where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there seems no justification to require him first to submit to custody, remain in prison for some days and then apply for bail"

We recommend the acceptance of this suggestion. We are further of the view that this special power should be conferred only on the High Court and the Court of Session, and that the order should take effect at the time of arrest or thereafter.

In order to settle the details of this suggestion, the following draft of a new section is placed for consideration:

'497-A. (1) When any person has a reasonable apprehension that he would be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section. That court may, in its discretion, direct that in the event of his arrest, he shall be released on bail.

(2) A Magistrate taking cognizance of an offence against that person shall, while taking steps under Section 204(1), either issue summons or a bailable warrant as indicated in the direction of the court under sub-section (1).

(3) If any person in respect of whom such a direction is made is arrested without warrant by an officer in charge of a police station on an accusation of having committed that offence, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, such person shall be released on bail.'

We considered carefully the question of laying down in the statute certain conditions under which alone anticipatory

bail could be granted. But we found that it may not be practicable to exhaustively enumerate those conditions; and moreover, the laying down of such conditions may be construed as prejudging (partially at any rate) the whole case. Hence we would leave it to the discretion of the court and prefer not to fetter such discretion in the statutory provision itself. Superior courts will, undoubtedly, exercise their discretion properly, and not make any observations in the order granting anticipatory bail which will have a tendency to prejudice the fair trial of the accused."

(Emphasis supplied)

16. The suggestion made by the Law Commission was, in principle, accepted by the Central Government which introduced clause 447 in the Draft Bill of the Code of Criminal Procedure, 1970 with a view to conferring express power on the High Court and the Court of Session to grant anticipatory bail. The said clause of the draft bill was enacted with certain modifications and became Section 438 of the CrPC.

17. The Law Commission, in paragraph 31 of its 48th Report (1972), made the following comments on the aforesaid clause:

"The Bill introduces a provision for the grant of anticipatory bail. This is substantially in accordance with the recommendation made by the previous Commission. We agree that this would be a useful addition, though we must add that it is in very exceptional cases that such a power should be exercised.

We are further of the view that in order to ensure that the provision is not put to abuse at the instance of unscrupulous petitioners, the final order should be made only after notice to the Public Prosecutor. The initial order should only be an interim one. Further, the relevant section should make it clear that the direction can be issued only for reasons to be recorded, and if the court is satisfied that such a direction is necessary in the interests of justice.

It will also be convenient to provide that notice of the interim order as well as of the final orders will be given to the Superintendent of Police forthwith."

(Emphasis supplied)

18. It is apparent on a plain reading of the Statement of Objects and Reasons accompanying the Bill for introducing Section 438 in the CrPC that the legislature felt that it was imperative to evolve a device by which an alleged accused is not compelled to face ignominy and disgrace at the instance of influential people who try to implicate their rivals in false cases. The purpose behind incorporating Section 438 in CrPC was to recognise the importance of personal liberty and freedom in a free and democratic country. A careful reading of this section reveals that the legislature was keen to ensure respect for the personal liberty by pressing in service the age-old principle that an individual is presumed to be innocent till he is found guilty by the court. [See: ***Siddharam Satlingappa Mhetre v. State of Maharashtra and Others*** reported in **(2011) 1 SCC 694**]

19. Discussing in the context of anticipatory bail, this Court, in ***Siddharam*** *(supra)*, discussed the relevance and importance of personal liberty as under:

> *"**36.** All human beings are born with some unalienable rights like life, liberty and pursuit of happiness. The importance of these natural rights can be found in the fact that these are fundamental for their proper existence and no other right can be enjoyed without the presence of right to life and liberty. Life bereft of liberty would be without honour and dignity and it would lose all significance and meaning and the life itself would not be worth living. That is why "liberty" is called the very quintessence of a civilised existence.*
>
> ***37.*** Origin of "liberty" can be traced in the ancient Greek civilisation. The Greeks distinguished between the liberty of the group and the liberty of the individual. In 431 BC, an Athenian statesman described that the concept of liberty was the outcome of two notions, firstly, protection of group from attack and secondly, the ambition of the group to realise itself as fully as possible through the self-realisation of the individual by way of human reason. Greeks assigned the duty of protecting their liberties to the State. According to Aristotle, as the State was a means to fulfil certain fundamental needs of human nature and was a means for development of individuals› personality in association of fellow citizens so it was natural and necessary to man. Plato

found his "republic" as the best source for the achievement of the self-realisation of the people.

xxx xxx xxx

43. A distinguished former Attorney General for India, M.C. Setalvad in his treatise War and Civil Liberties observed that the French Convention stipulates common happiness as the end of the society, whereas Bentham postulates the greatest happiness of the greatest number as the end of law. Article 19 of the Indian Constitution averts to freedom and it enumerates certain rights regarding individual freedom. These rights are vital and most important freedoms which lie at the very root of liberty. He further observed that the concept of civil liberty is essentially rooted in the philosophy of individualism. According to this doctrine, the highest development of the individual and the enrichment of his personality are the true function and end of the State. It is only when the individual has reached the highest state of perfection and evolved what is best in him that society and the State can reach their goal of perfection. In brief, according to this doctrine, the State exists mainly, if not solely, for the purpose of affording the individual freedom and assistance for the attainment of his growth and perfection. The State exists for the benefit of the individual.

xxx xxx xxx

49. An eminent English Judge, Lord Alfred Denning observed:

> *"By personal freedom I mean freedom of every law-abiding citizen to think what he will, to say what he will, and to go where he will on his lawful occasion without hindrance from any person…. It must be matched, of course, with social security by which I mean the peace and good order of the community in which we live."*

50. An eminent former Judge of this Court, Justice H.R. Khanna in a speech as published in 2 IJIL, Vol. 18 (1978), p. 133 observed that

"... Liberty postulates the creation of a climate wherein there is no suppression of the human spirits, wherein, there is no denial of the opportunity for the full growth of human personality, wherein head is held high and there is no servility of the human mind or enslavement of the human body.""

ii. Whether Section 18 of the Act, 1989 imposes an absolute bar on the grant of anticipatory bail in cases registered under the said Act?

20. The Statement of Objects and Reasons accompanying the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Bill, 1989 is extracted hereinbelow:

"Statement of Objects and Reasons.

1. Despite various measures to improve the socio-economic conditions of the Scheduled Castes and the Scheduled Tribes, they remain vulnerable. They are denied number of civil rights. They are subjected to various offences, indignities, humiliations and harassment. They have, in several brutal incidents, been deprived of their life and property. Serious crimes are committed against them for various historical, social and economic reasons.

2. Because of the awareness created amongst the Scheduled Castes and the Scheduled Tribes through spread of education, etc. they are trying to assert their rights and this is not being taken very kindly by the others. When they assert their rights and resist practices of untouchability against them or demand statutory minimum wages or refuse to do any bonded and forced labour, the vested interests try to cow them down and terrorise them. When the Scheduled Castes and the Scheduled Tribes try to preserve their self-respect or honour of their women, they become irritants for the dominant and the mighty. Occupation and cultivation of even the Government allotted land by the Scheduled Castes and the Scheduled Tribes is resented and more often these people become victims of attacks by the vested interests. Of late, there has been an increase in the disturbing trend of commission of certain

atrocities like making the Scheduled Castes persons eat inedible substances like human excreta and attacks on and mass killings of helpless Scheduled Castes and the Scheduled Tribes and rape of women belonging to the Scheduled Castes and the Scheduled Tribes. Under the circumstances, the existing laws like the Protection of Civil Rights Act, 1955 and the normal provisions of the Penal Code, 1860 have been found to be inadequate to check these crimes. A special legislation to check and deter crimes against them committed by non-Scheduled Castes and non-Scheduled Tribes has, therefore, become necessary.

3. The term 'atrocity' has not been defined so far. It is considered necessary that not only the term 'atrocity' should be defined but stringent measures should be introduced to provide for higher punishments for committing such atrocities. It is also proposed to enjoining on the States and the Union territories to take specific preventive and punitive measures to protect the Scheduled Castes and the Scheduled Tribes from being victimised and where atrocities are committed, to provide adequate relief and assistance to· rehabilitate them."

21. It is evident from the aforesaid that the purpose of the Act, 1989 is to prevent the commission of offences of atrocities against the members of the Scheduled Castes and Scheduled Tribes, to provide for establishment of special courts for the trial of such offences and to make provisions for the relief and rehabilitation of the victims of such offences.

22. The Act, 1989 could be said to have been enacted to improve the social and economic conditions of the vulnerable sections of the society as they have been historically subjected to various indignities, humiliations and harassment besides deprivation of life and property on account of their caste identity. The legislation, thus, intends to punish the acts committed against the vulnerable sections of the society for the reason that they belong to a particular community.

23. Section 18 of the Act, 1989 which makes the remedy of anticipatory bail unavailable in cases falling under the Act, 1989 reads thus:

"18. Section 438 of the Code not to apply to persons committing an offence under the Act.—

Nothing in Section 438 of the Code shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence under this Act."

24. It is manifest from a plain reading of Section 18 referred to above that it bars the applicability of Section 438 of the CrPC in respect of offences under the Act, 1989. The legislature in its wisdom thought fit that the benefit of anticipatory bail should not be made available to the accused in respect of offences under the Act, 1989, having regard to the prevailing social conditions which give rise to such offences and the apprehension that the perpetrators of such atrocities are likely to threaten and intimidate the victims and prevent or obstruct them in the prosecution of such offences, if they are allowed to avail the benefit of anticipatory bail.

25. The constitutional validity of Section 18 of the Act, 1989 fell for the consideration of this Court in ***State of Madhya Pradesh v. Ram Krishna Balothia*** reported in **(1995) 3 SCC 221**. The challenge essentially was on the following two grounds:

    a. Section 18 is violative of Article 14 of the Constitution as the benefit of Section 438 of the CrPC is available to an accused for offences under the Indian Penal Code, 1860 ("**IPC**") but the same is not available for offences under the Act, 1989.

    b. Section 18 is also violative of Article 21 of the Constitution which protects the life and personal liberty of every person in this country.

26. The Respondents in the aforesaid case had filed writ petitions before the High Court of Madhya Pradesh, challenging the constitutional validity of certain provisions of the Act, 1989. Although the High Court negatived some part of the challenge, yet it held that Section 18 of the Act, 1989 was unconstitutional as it was violative of Articles 14 and 21 respectively of the Constitution of India.

27. The aforesaid decision of the High Court was challenged before this Court which allowed the appeals and held that Section 18 of the Act, 1989 cannot be considered as violative of Articles 14 and 21 respectively of the Constitution. It was held that the offences enumerated under the Act, 1989 fall into a separate and special category. The Court considered Article 17 of the Constitution which expressly deals with abolition of "untouchability" and forbids its practice in any form and took the view that the offences enumerated under

Section 3(1) of the Act, 1989 arise out of the practice of "untouchability". Having regard to the same, it was held that Section 18 of the Act, 1989 does not violate Article 14 of the Constitution in any manner.

28. On the aspect of Article 21 of the Constitution, it was held by this Court that although Article 21 protects the life and personal liberty of every person in this country, which also includes the right to live with dignity, yet it cannot be said that Section 438 of the CrPC is an integral part of Article 21. The Court took notice of the fact that there was no provision similar to Section 438 in the Criminal Procedure Code, 1898 and ultimately concluded that anticipatory bail is not granted as a matter of right. It is essentially a statutory right conferred long after the coming into force of the Constitution. Therefore, it was observed, that the non-application of Section 438 to a certain distinct category of offences cannot be considered as violative of Article 21 of the Constitution. Relevant observations made by the Court are reproduced hereinbelow:

> *"6. It is undoubtedly true that Section 438 of the Code of Criminal Procedure, which is available to an accused in respect of offences under the Penal Code, is not available in respect of offences under the said Act. But can this be considered as violative of Article 14? The offences enumerated under the said Act fall into a separate and special class. Article 17 of the Constitution expressly deals with abolition of 'untouchability' and forbids its practice in any form. It also provides that enforcement of any disability arising out of 'untouchability' shall be an offence punishable in accordance with law. The offences, therefore, which are enumerated under Section 3(1) arise out of the practice of 'untouchability'. It is in this context that certain special provisions have been made in the said Act, including the impugned provision under Section 18 which is before us. The exclusion of Section 438 of the Code of Criminal Procedure in connection with offences under the said Act has to be viewed in the context of the prevailing social conditions which give rise to such offences, and the apprehension that perpetrators of such atrocities are likely to threaten and intimidate their victims and prevent or obstruct them in the prosecution of these offenders, if the offenders are allowed to avail of anticipatory bail. In*

this connection we may refer to the Statement of Objects and Reasons accompanying the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Bill, 1989, when it was introduced in Parliament. [….] The above statement graphically describes the social conditions which motivated the said legislation. It is pointed out in the above Statement of Objects and Reasons that when members of the Scheduled Castes and Scheduled Tribes assert their rights and demand statutory protection, vested interests try to cow them down and terrorise them. In these circumstances, if anticipatory bail is not made available to persons who commit such offences, such a denial cannot be considered as unreasonable or violative of Article 14, as these offences form a distinct class by themselves and cannot be compared with other offences.

7. We have next to examine whether Section 18 of the said Act violates, in any manner, Article 21 of the Constitution which protects the life and personal liberty of every person in this country. Article 21 enshrines the right to live with human dignity, a precious right to which every human being is entitled; those who have been, for centuries, denied this right, more so. We find it difficult to accept the contention that Section 438 of the Code of Criminal Procedure is an integral part of Article 21. In the first place, there was no provision similar to Section 438 in the old Criminal Procedure Code. […] Looking to the cautious recommendation of the Law Commission, the power to grant anticipatory bail is conferred only on a Court of Session or the High Court. Also, anticipatory bail cannot be granted as a matter of right. It is essentially a statutory right conferred long after the coming into force of the Constitution. It cannot be considered as an essential ingredient of Article 21 of the Constitution. And its non-application to a certain special category of offences cannot be considered as violative of Article 21.

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9. Of course, the offences enumerated under the present case are very different from those under the Terrorists

and Disruptive Activities (Prevention) Act, 1987. However, looking to the historical background relating to the practice of 'untouchability' and the social attitudes which lead to the commission of such offences against Scheduled Castes and Scheduled Tribes, there is justification for an apprehension that if the benefit of anticipatory bail is made available to the persons who are alleged to have committed such offences, there is every likelihood of their misusing their liberty while on anticipatory bail to terrorise their victims and to prevent a proper investigation. It is in this context that Section 18 has been incorporated in the said Act. It cannot be considered as in any manner violative of Article 21.

10. It was submitted before us that while Section 438 is available for graver offences under the Penal Code, it is not available for even "minor offences" under the said Act. This grievance also cannot be justified. The offences which are enumerated under Section 3 are offences which, to say the least, denigrate members of Scheduled Castes and Scheduled Tribes in the eyes of society and prevent them from leading a life of dignity and self-respect. Such offences are committed to humiliate and subjugate members of Scheduled Castes and Scheduled Tribes with a view to keeping them in a state of servitude. These offences constitute a separate class and cannot be compared with offences under the Penal Code.

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12. In the premises, Section 18 of the said Act cannot be considered as violative of Articles 14 and 21 of the Constitution."

(Emphasis supplied)

29. However, over a period of time, the courts across the country started taking notice of the fact that the complaints were being lodged under the Act, 1989 out of personal and political vendetta. The courts took notice of the fact that the provisions of the Act, 1989 were being misused to some extent for purposes not intended by the legislation. To

overcome the bar of Section 18 of the Act, 1989, the persons against whom such complaints were being lodged started invoking the writ jurisdiction of the High Court under Article 226 of the Constitution.

30. Taking note of the aforesaid, this Court in ***Dr. Subhash Kashinath Mahajan v. State of Maharashtra and Another*** reported in **(2018) 6 SCC 454**, while quashing the proceedings instituted against the appellant therein under the provisions of the Act, 1989 thought fit to issue the following directions:

> *"79.1. Proceedings in the present case are clear abuse of process of court and are quashed.*
>
> *79.2. There is no absolute bar against grant of anticipatory bail in cases under the Atrocities Act if no prima facie case is made out or where on judicial scrutiny the complaint is found to be prima facie mala fide.*
>
> *79.3. In view of acknowledged abuse of law of arrest in cases under the Atrocities Act, arrest of a public servant can only be after approval of the appointing authority and of a non-public servant after approval by the SSP which may be granted in appropriate cases if considered necessary for reasons recorded. Such reasons must be scrutinised by the Magistrate for permitting further detention.*
>
> *79.4. To avoid false implication of an innocent, a preliminary enquiry may be conducted by the DSP concerned to find out whether the allegations make out a case under the Atrocities Act and that the allegations are not frivolous or motivated.*
>
> *79.5. Any violation of Directions 79.3 and 79.4 will be actionable by way of disciplinary action as well as contempt.*
>
> *79.6. The above directions are prospective."*

31. The Parliament took notice of the aforesaid directions and thought fit to carry out certain amendments in the Act, 1989 vide the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2018. The relevant portion is extracted hereinbelow:

> *"2. After section 18 of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, the following section shall be inserted, namely:—*
>
> *"18A. (1) For the purposes of this Act,—*
>
> *(a) preliminary enquiry shall not be required for registration of a First Information Report against any person; or*
>
> *(b) the investigating officer shall not require approval for the arrest, if necessary, of any person, against whom an accusation of having committed an offence under this Act has been made and no procedure other than that provided under this Act or the Code shall apply.*
>
> *(2) The provisions of section 438 of the Code shall not apply to a case under this Act, notwithstanding any judgment or order or direction of any Court.".*

32. The provisions inserted by way of carving out Section 18-A of the Act, 1989 referred to above were made the subject matter of challenge in ***Prathvi Raj Chauhan*** *(supra)*. In the said case, it was argued before a three-Judge Bench of this Court that Section 18-A inserted by way of amendment was only with a view to nullify the judgment of this Court in ***Subhash Kashinath*** *(supra)* referred to above. This Court noted that it was not in dispute that the bar of Section 18-A in the Act, 1989 had been enacted because of the judgment passed by this Court in ***Subhash Kashinath*** *(supra)* more particularly in view of the directions contained in paragraphs 79.3 and 79.5 therein. The court also noted that the review petitions filed by the Union of India in ***Subhash Kashinath*** *(supra)* were allowed and the directions contained in paragraphs 79.3 to 79.5 referred to above were ordered to be recalled.

33. In such circumstances, this Court observed that the examination of the Constitutional validity of Section 18-A brought by way of the amendment had been rendered academic. However, the Bench proceeded to look into the matter. Justice Arun Mishra, speaking for himself and Justice Vineet Saran held as under:

> *"10. Section 18-A(i) was inserted owing to the decision of this Court in* ***Subhash Kashinath*** *[Subhash Kashinath Mahajan v. State of Maharashtra (2018) 6 SCC 454 : (2018)*

3 SCC (Cri) 124], which made it necessary to obtain the approval of the appointing authority concerning a public servant and the SSP in the case of arrest of accused persons. This Court has also recalled that direction on Review Petition (Crl.) No. 228 of 2018 decided on 1-10-2019 [Union of India v. State of Maharashtra (2020) 4 SCC 761] . Thus, the provisions which have been made in Section 18-A are rendered of academic use as they were enacted to take care of mandate issued in Subhash Kashinath [Subhash Kashinath Mahajan v. State of Maharashtra (2018) 6 SCC 454 : (2018) 3 SCC (Cri) 124] which no more prevails. The provisions were already in Section 18 of the Act with respect to anticipatory bail.

11. Concerning the applicability of provisions of Section 438 CrPC, it shall not apply to the cases under the 1989 Act. However, if the complaint does not make out a prima facie case for applicability of the provisions of the 1989 Act, the bar created by Sections 18 and 18-A(i) shall not apply. We have clarified this aspect while deciding the review petitions.

12. The Court can, in exceptional cases, exercise power under Section 482 CrPC for quashing the cases to prevent misuse of provisions on settled parameters, as already observed while deciding the review petitions. The legal position is clear, and no argument to the contrary has been raised.

13. The challenge to the provisions has been rendered academic. In view of the aforesaid clarifications, we dispose of the petitions."

34. Justice S. Ravindra Bhat, while concurring with the judgment rendered by Justice Mishra, assigned his own reasons which are reproduced hereinbelow:

"32. As far as the provision of Section 18-A and anticipatory bail is concerned, the judgment of Mishra, J. has stated that in cases where no prima facie materials exist warranting arrest in a complaint, the court has the inherent power to direct a pre-arrest bail.

> *33. I would only add a caveat with the observation and emphasise that while considering any application seeking pre-arrest bail, the High Court has to balance the two interests : i.e. that the power is not so used as to convert the jurisdiction into that under Section 438 of the Criminal Procedure Code, but that it is used sparingly and such orders made in very exceptional cases where no prima facie offence is made out as shown in the FIR, and further also that if such orders are not made in those classes of cases, the result would inevitably be a miscarriage of justice or abuse of process of law. I consider such stringent terms, otherwise contrary to the philosophy of bail, absolutely essential, because a liberal use of the power to grant pre-arrest bail would defeat the intention of Parliament."*

35. Thus, the decision in ***Prathvi Raj Chauhan*** *(supra)* makes it abundantly clear that even while upholding the validity of Section 18-A of the Act, 1989, this Court observed that if the complaint does not make out a *prima facie* case for applicability of the provisions of the Act, 1989 then the bar created by Sections 18 and 18-A(i) shall not apply and thus the court would not be precluded from granting pre-arrest bail to the accused persons.

36. Justice Ravindra Bhat, in his concurring judgment, observed that while considering any application seeking pre-arrest bail in connection with an offence alleged to have been committed under the provisions of the Act, 1989, the courts should balance two interests – On one hand they should ensure that the power is not exercised akin to the jurisdiction under Section 438 of the CrPC while on the other hand they should ensure that the power is used sparingly in exceptional cases where no *prima facie* offence is made out as shown in the FIR or the complaint. It was observed that in cases where no *prima facie* materials exist in a complaint which would warrant the arrest of the accused, the court would have the inherent power to direct a pre-arrest bail.

37. The applicability of Section 438 of the CrPC to cases registered under the Act, 1989 was also dealt with by a two-Judge Bench of this Court in ***Vilas Pandurang Pawar and Another v. State of Maharashtra and Others*** reported in **(2012) 8 SCC 795**. The specific issue framed and answered by this Court was whether an accused charged with various offences under the IPC along with offences

under the Act, 1989 would be entitled for an anticipatory bail under Section 438 of CrPC.

38. It was observed by this Court that although Section 18 of the Act, 1989 creates a bar for invoking Section 438 of the CrPC yet the courts are entrusted with a duty to verify the averments in the complaint and to find out whether an offence under the Act, 1989 is *prima facie* made out or not. It was further observed that while considering the application for anticipatory bail, the scope for appreciation of evidence and other material is limited and the courts are not expected to undertake an intricate evidentiary inquiry of the materials on record. The relevant observations are reproduced hereinbelow:

> *"9. Section 18 of the SC/ST Act creates a bar for invoking Section 438 of the Code. However, a duty is cast on the court to verify the averments in the complaint and to find out whether an offence under Section 3(1) of the SC/ST Act has been prima facie made out. In other words, if there is a specific averment in the complaint, namely, insult or intimidation with intent to humiliate by calling with caste name, the accused persons are not entitled to anticipatory bail.*
>
> *10. The scope of Section 18 of the SC/ST Act read with Section 438 of the Code is such that it creates a specific bar in the grant of anticipatory bail. When an offence is registered against a person under the provisions of the SC/ST Act, no Court shall entertain application for anticipatory bail, unless it prima facie finds that such an offence is not made out. Moreover, while considering the application for bail, scope for appreciation of evidence and other material on record is limited. Court is not expected to indulge in critical analysis of the evidence on record. When a provision has been enacted in the Special Act to protect the persons who belong to the Scheduled Castes and the Scheduled Tribes and a bar has been imposed in granting bail under Section 438 of the Code, the provision in the Special Act cannot be easily brushed aside by elaborate discussion on the evidence."*
>
> (Emphasis supplied)

39. A three-Judge Bench of this Court in ***Rahna Jalal v. State of Kerala*** reported in **(2021) 1 SCC 733** while discussing in the context of Section 7 of the Muslim Women (Protection of Rights on Marriage) Act, 2019, elaborated on the requirement of the existence of a *prima facie* case under Section 18 of the Act, 1989 for the bar of anticipatory bail to become applicable, as follows:

> *"25. Thus, even in the context of legislation, such as the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989, where a bar is interposed by the provisions of Section 18 and Sub-section (2) of Section 18-A on the application of Section 438 of the CrPC, this Court has held that the bar will not apply where the complaint does not make out "a prima facie case" for the applicability of the provisions of the Act. A statutory exclusion of the right to access remedies for bail is construed strictly, for a purpose. Excluding access to bail as a remedy, impinges upon human liberty. Hence, the decision in Chauhan (supra) held that the exclusion will not be attracted where the complaint does not prima facie indicate a case attracting the applicability of the provisions of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989."*
>
> (Emphasis supplied)

40. This Court, in ***Hitendra Vishnu Thakur and Others v. State of Maharashtra and Others*** reported in **(1994) 4 SCC 602**, while discussing a similarly worded provision in the Terrorist and Disruptive Activities (Prevention) Act, 1985, held as follows:

> *"13. We would, therefore, at this stage like to administer a word of caution to the Designated Courts regarding invoking the provisions of TADA merely because the investigating officer at some stage of the investigation chooses to add an offence under same (sic some) provisions of TADA against an accused person, more often than not while opposing grant of bail, anticipatory or otherwise. The Designated Courts should always consider carefully the material available on the record and apply their mind to see whether the provisions of TADA are even prima facie attracted."*
>
> (Emphasis supplied)

a. Significance of the expression "arrest of any person" appearing in Section 18 of the Act, 1989

41. It is clear from the aforesaid discussion that Section 18 of the Act, 1989 does not impose an absolute fetter on the power of the courts to examine whether a *prima facie* case attracting the provisions of the Act, 1989 is made out or not. As discussed, Section 18 stipulates that in any case which involves the arrest of any person on the accusation of having committed an offence under the Act, 1989, the benefit of anticipatory bail under Section 438 of CrPC would not be available to the accused. We have deliberated on the significance of the expression "*arrest of any person*" appearing in the text of Section 18 of the Act, 1989 and are of the view that Section 18 bars the remedy of anticipatory bail only in those cases where a valid arrest of the accused person can be made as per Section 41 read with Section 60A of CrPC.

42. Section 60A of CrPC provides that no arrest shall be made except in accordance with the provisions of CrPC or any other law for the time being in force and providing for arrest. Section 41 of CrPC confers upon the police the power to arrest without warrant in certain situations as specified therein. Sections 41(1)(b) and 41(1)(ba) respectively of CrPC read as follows:

> *"**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—*
>
> ***xxx xxx xxx***
>
> *(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 officer 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."

43. A plain reading of the above provision shows that an arrest can be effected if there is a reasonable complaint, credible information or reasonable suspicion and the police officer has a reason to believe that such offence has been committed by the accused person and the arrest is necessary. It is worth noting that the words 'complaint', 'information' and 'suspicion' are qualified by the adjectives 'reasonable', 'credible' and 'reasonable' respectively. Similarly, the police officer is required to have a 'reason to believe' based on the information he has received that the accused person has committed the alleged offence.

44. It is settled law that arrest cannot be made merely because it is lawful to do so. The exercise of the power to arrest has been qualified by a twofold requirement – *first*, of having a reasonable belief that the accused person has committed the offence and *secondly*, that there is a need to arrest the accused person. This Court in ***Satender Kumar Antil v. CBI*** reported in **(2022) 10 SCC 51** held that non-observance of the requirements stipulated under Sections 41 and 41A of CrPC respectively before effecting arrest would entitle the accused to be enlarged on bail. The relevant paragraphs are reproduced hereinbelow:

> *"25. The consequence of non-compliance with Section 41 shall certainly inure to the benefit of the person suspected of the offence. Resultantly, while considering the application for enlargement on bail, courts will have to satisfy themselves on the due compliance of this provision. Any non-compliance would entitle the accused to a grant of bail."*

45. In ***Arnesh Kumar v. State of Bihar and Another*** reported in **(2014) 8 SCC 273**, this Court laid emphasis on the phrases "credible information" and "reasonable suspicion" as they appear in Section 41 of CrPC and held as follows:

> *"5. Arrest brings humiliation, curtails freedom and casts scars forever. Lawmakers know it so also the police. There is a battle between the lawmakers and the police and it seems that the police has not learnt its lesson: the lesson implicit and embodied in CrPC. It has not come out of its colonial image despite six decades of Independence, it is largely considered as a tool of harassment, oppression and surely not considered a friend of public. The need for caution in exercising the drastic power of arrest has been emphasised time and again by the courts but has not yielded desired result. Power to arrest greatly contributes to its arrogance so also the failure of the Magistracy to check it. Not only this, the power of arrest is one of the lucrative sources of police corruption. The attitude to arrest first and then proceed with the rest is despicable. It has become a handy tool to the police officers who lack sensitivity or act with oblique motive.*
>
> *6. Law Commissions, Police Commissions and this Court in a large number of judgments emphasised the need to*

maintain a balance between individual liberty and societal order while exercising the power of arrest. Police officers make arrest as they believe that they possess the power to do so. As the arrest curtails freedom, brings humiliation and casts scars forever, we feel differently. We believe that no arrest should be made only because the offence is non-bailable and cognizable and therefore, lawful for the police officers to do so. The existence of the power to arrest is one thing, the justification for the exercise of it is quite another. Apart from the power to arrest, the police officers must be able to justify the reasons thereof. 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 and wise for a police officer that no arrest is made without a reasonable satisfaction reached after some investigation as to the genuineness of the allegation. Despite this legal position, the legislature did not find any improvement. Numbers of arrest have not decreased. Ultimately, Parliament had to intervene and on the recommendation of the 177th Report of the Law Commission submitted in the year 2001, Section 41 of the Code of Criminal Procedure (for short "CrPC"), in the present form came to be enacted. It is interesting to note that such a recommendation was made by the Law Commission in its 152nd and 154th Report submitted as back in the year 1994. The value of the proportionality permeates the amendment relating to arrest.

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7.3. In pith and core, the police officer before arrest must put a question to himself, why arrest? Is it really required? What purpose it will serve? What object it will achieve? It is only after these questions are addressed and one or the other conditions as enumerated above is satisfied, the power of arrest needs to be exercised. In fine, before arrest first the police officers should have reason to believe on the basis of information and material that the accused has committed the offence. Apart from this, the police officer has to be satisfied further that the arrest is necessary for

one or the more purposes envisaged by sub-clauses (a) to (e) of clause (1) of Section 41 CrPC.

xxx xxx xxx

10. We are of the opinion that if the provisions of Section 41 CrPC which authorises the police officer to arrest an accused without an order from a Magistrate and without a warrant are scrupulously enforced, the wrong committed by the police officers intentionally or unwittingly would be reversed and the number of cases which come to the Court for grant of anticipatory bail will substantially reduce. We would like to emphasise that the practice of mechanically reproducing in the case diary all or most of the reasons contained in Section 41 CrPC for effecting arrest be discouraged and discontinued."

(Emphasis supplied)

46. The aforesaid discussion indicates that the term 'arrest' appearing in the text of Section 18 of the Act, 1989 should be construed and understood in the larger context of the powers of police to effect an arrest and the restrictions imposed by the statute and the courts on the exercise of such power. Seen thus, it can be said that the bar under Section 18 of the Act, 1989 would apply only to those cases where *prima facie* materials exist pointing towards the commission of an offence under the Act, 1989. We say so because it is only when a *prima facie* case is made out that the pre-arrest requirements as stipulated under Section 41 of CrPC could be said to be satisfied.

iii. When can it be said that a *prima facie* case is made out in a given FIR/complaint?

47. *Prima facie* is a Latin term that translates to "at first sight" or "based on first impression". The expression "where no *prima facie* materials exist warranting arrest in a complaint or FIR" should be understood as "when based on first impression, no offence is made out as shown in the FIR or the complaint". This means that when the necessary ingredients to constitute the offence under the Act, 1989 are not made out upon the reading of the complaint, no case can be said to exist *prima facie*.

48. As a sequitur, if the necessary ingredients to constitute the offence under the Act, 1989 are not disclosed on the *prima facie* reading

of the allegations levelled in the complaint or FIR, then in such circumstances, as per the consistent exposition by various decisions of this Court, the bar of Section 18 would not apply and the courts would not be absolutely precluded from granting pre-arrest bail to the accused persons.

49. In our opinion, the aforesaid is the only test that the court should apply, when an accused prays for anticipatory bail in connection with any offence alleged to have been committed under the provisions of the Act, 1989. In a given case, an accused may argue that although the allegations levelled in the FIR or the complaint do disclose the commission of an offence under the Act, 1989, yet the FIR or the complaint being palpably false on account of political or private vendetta, the court should consider the plea for grant of anticipatory bail despite the specific bar of Section 18 of the Act, 1989. However, if the accused puts forward the case of malicious prosecution on account of political or private vendetta then the same can be considered only by the High Court in exercise of its inherent powers under Section 482 of the Code or in exercise of its extraordinary jurisdiction under Article 226 of the Constitution. However, powers under Section 438 of the CrPC cannot be exercised once the contents of the complaint/FIR disclose a *prima facie* case. In other words, if all the ingredients necessary for constituting the offence are borne out from the complaint, then the remedy of anticipatory bail becomes unavailable to the accused.

50. The duty to determine *prima facie* existence of the case is cast upon the courts with a view to ensure that no unnecessary humiliation is caused to the accused. The courts should not shy away from conducting a preliminary inquiry to determine if the narration of facts in the complaint/FIR in fact discloses the essential ingredients required to constitute an offence under the Act, 1989. It is expected of the courts to apply their judicial mind to determine whether the allegations levelled in the complaint, on a plain reading, satisfy the ingredients constituting the alleged offence. Such application of judicial mind should be independent and without being influenced by the provisions figuring in the complaint/FIR. The aforesaid role of the courts assumes even more importance when a *prima facie* finding on the case has the effect of precluding the accused person from seeking anticipatory bail, which is an important concomitant of personal liberty of the individual.

51. The aforesaid position is also apparent from a plain construction of the text of Section 18 of the Act, 1989. The words "having committed an offence under this Act" denote that it is only when the accusation in the complaint clearly points towards the commission of an offence under the Act, 1989 that the bar of Section 18 would apply. The minimum threshold for determining whether an offence under the Act has been committed or not is to ascertain whether all the ingredients which are necessary to constitute the offence are *prima facie* disclosed in the complaint or not. An accusation which does not disclose the necessary ingredients of the offence on a *prima facie* reading cannot be said to be sufficient to bring into operation the bar envisaged by Section 18 of the Act, 1989. Holding otherwise would mean that even a plain accusation, devoid of the essential ingredients required for constituting the offence, would be enough for invoking the bar under Section 18. In our considered view, such an approach would not be in line with the dictum as laid by this Court while upholding the Constitutionality of Sections 18 and 18-A respectively of the Act, 1989.

52. Having said so, we would also like to state that the case at hand is of a unique nature and one that falls in a separate category. With the advent of internet and social media, cases like the one we are dealing with are likely to come up more frequently. In the present case, the basis of the FIR is the YouTube video and some other digital materials alleged to have been published by the appellant in the public domain. It is not the case of the complainant that the appellant subjected him to insults or humiliations in some public gathering, the details of which can only be gathered by recording the statements of witnesses. The entire incriminatory material based upon which the complaint came to be lodged was available in the public domain by virtue of having been uploaded on social media platforms. We had the occasion to threadbare go through the transcript of the YouTube video. We may only say that in cases like the one in hand, the courts should have the discretion to look into the materials based upon which the complaint has been registered, in addition to verifying the averments made in the complaint. If on a *prima facie* reading of the materials referred to in the complaint and the complaint itself, the ingredients necessary for constituting the offence are not made out, then the bar of Section 18 would not be applicable and it would be open to the courts to consider the plea for the grant pre-arrest bail on its own merits.

iv. Whether the averments in the FIR/complaint in question disclose commission of any offence under Section 3(1)(r) of the Act, 1989?

53. It is the case of the complainant as well as the State that considering the rash and derogatory statements alleged to have been made by the appellant herein, he could be said to have *prima facie* committed the offence under Sections 3(1)(r) and 3(1)(u) respectively of the Act, 1989.

54. We shall first proceed to examine whether the necessary ingredients to constitute the offence under Section 3(1)(r) of the Act, 1989 are *prima face* disclosed on a plain reading of the FIR. Section 3(1)(r) reads thus:

> "*Section 3 of the Act 1989:*
>
> *Punishments for offences of atrocities.— [(1) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe,—*
>
> *XXX XXX XXX*
>
> *(r) intentionally insults or intimidates with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe in any place within public view;*"
>
> *(Emphasis supplied)*

55. The basic ingredients to constitute the offence under Section 3(1)(r) of the Act, 1989 are:

a. Accused person must not be a member of the Scheduled Caste or Scheduled Tribe;

b. Accused must intentionally insult or intimidate a member of a Scheduled Caste or Scheduled Tribe;

c. Accused must do so with the intent to humiliate such a person; and

d. Accused must do so at any place within public view.

56. It is relevant to note that Section 3(1)(r) of the Act, 1989 is similarly worded as the erstwhile Section 3(1)(x) of the Act, 1989 which was in force prior to its substitution with effect from 26.01.2016.

57. In the case at hand, the appellant is alleged to have published a video on YouTube, containing a slew of reckless statements in the form of allegations levelled against the complainant. We are not supposed to look into the veracity or the truthfulness of such allegations as contained in the video. We are only trying to understand that even if all the statements alleged to have been made by the appellant are believed to be true whether any offence under Section 3(1)(r) of the Act, 1989 could be said to have been *prima facie* committed. In our opinion, the answer should be in the negative.

58. We say so for the reason that all insults or intimidations to a member of the Scheduled Caste or Scheduled Tribe will not amount to an offence under the Act, 1989 unless such insult or intimidation is on the ground that the victim belongs to Scheduled Caste or Scheduled Tribe. There is nothing in the transcript of the uploaded video to indicate even *prime facie* that those allegations were made by the appellant only on account of the fact that the complainant belongs to a Scheduled Caste. From the nature of the allegations made by the appellant, it appears that he is at inimical terms with the complainant. His intention may be to malign or defame him but not on the ground or for the reason that the complainant belongs to a Scheduled Caste.

59. In the aforesaid context, we may refer to and rely upon a three-Judge Bench decision of this Court in ***Hitesh Verma*** *(supra)*. The relevant observations are reproduced below:

> *"13. The offence under Section 3(1)(r) of the Act would indicate the ingredient of intentional insult and intimidation with an intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe. All insults or intimidations to a person will not be an offence under the Act unless such insult or intimidation is on account of victim belonging to Scheduled Caste or Scheduled Tribe. The object of the Act is to improve the socio-economic conditions of the Scheduled Castes and the Scheduled Tribes as they are denied number of civil rights. Thus, an offence under the Act would be made out when a member of the vulnerable section of the society is subjected to indignities, humiliations and harassment. The assertion of title over the land by either of the parties is not due to either the indignities, humiliations or harassment. Every citizen has a right to avail their remedies in accordance with law. Therefore,*

if the appellant or his family members have invoked jurisdiction of the civil court, or that Respondent 2 has invoked the jurisdiction of the civil court, then the parties are availing their remedies in accordance with the procedure established by law. Such action is not for the reason that Respondent 2 is a member of Scheduled Caste.

xxx xxx xxx

17. In another judgment reported as Khuman Singh v. State of M.P. [Khuman Singh v. State of M.P. (2020) 18 SCC 763 : 2019 SCC OnLine SC 1104] , this Court held that in a case for applicability of Section 3(2)(v) of the Act, the fact that the deceased belonged to Scheduled Caste would not be enough to inflict enhanced punishment. This Court held that there was nothing to suggest that the offence was committed by the appellant only because the deceased belonged to Scheduled Caste. The Court held as under:

> *"15. As held by the Supreme Court, the offence must be such so as to attract the offence under Section 3(2)(v) of the Act. The offence must have been committed against the person on the ground that such person is a member of Scheduled Caste and Scheduled Tribe. In the present case, the fact that the deceased was belonging to "Khangar" Scheduled Caste is not disputed. There is no evidence to show that the offence was committed only on the ground that the victim was a member of the Scheduled Caste and therefore, the conviction of the appellant-accused under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act is not sustainable."*

18. Therefore, offence under the Act is not established merely on the fact that the informant is a member of Scheduled Caste unless there is an intention to humiliate a member of Scheduled Caste or Scheduled Tribe for the reason that the victim belongs to such caste. In the present case, the parties are litigating over possession of the land. The allegation of hurling of abuses is against a

person who claims title over the property. If such person happens to be a Scheduled Caste, the offence under Section 3(1)(r) of the Act is not made out."

(Emphasis supplied)

60. Thus, the dictum as laid aforesaid is that the offence under Section 3(1)(r) of the Act, 1989 is not established merely on the fact that the complainant is a member of a Scheduled Caste or a Scheduled Tribe, unless there is an intention to humiliate such a member for the reason that he belongs to such community. In other words, it is not the purport of the Act, 1989 that every act of intentional insult or intimidation meted by a person who is not a member of a Scheduled Caste or Scheduled Tribe to a person who belongs to a Scheduled Caste or Scheduled Tribe would attract Section 3(1)(r) of the Act, 1989 merely because it is committed against a person who happens to be a member of a Scheduled Caste or Scheduled Tribe. On the contrary, Section 3(1)(r) of the Act, 1989 is attracted where the reason for the intentional insult or intimidation is that the person who is subjected to it belongs to a Scheduled Caste or Scheduled Tribe. We say so because the object behind the enactment of the Act, 1989 was to provide stringent provisions for punishment of offences which are targeted towards persons belonging to the SC/ST communities for the reason of their caste status.

a. Meaning of the expression "intent to humiliate" appearing in Section 3(1)(r) of the Act, 1989

61. The words "with intent to humiliate" as they appear in the text of Section 3(1)(r) of the Act, 1989 are inextricably linked to the caste identity of the person who is subjected to intentional insult or intimidation. Not every intentional insult or intimidation of a member of a SC/ST community will result into a feeling of caste-based humiliation. It is only in those cases where the intentional insult or intimidation takes place either due to the prevailing practice of untouchability or to reinforce the historically entrenched ideas like the superiority of the "upper castes" over the "lower castes/untouchables", the notions of 'purity' and 'pollution', etc. that it could be said to be an insult or intimidation of the type envisaged by the Act, 1989.

62. We would like to refer to the observations of this Court in ***Ram Krishna Balothia*** *(supra)* to further elaborate upon the idea of "humiliation" as it has been used under the Act, 1989. It was observed in the said

case that the offences enumerated under the Act, 1989 belong to a separate category as they arise from the practice of 'untouchability' and thus the Parliament was competent to enact special laws treating such offences and offenders as belonging to a separate category. Referring to the Statements of Objects and Purposes of the Act, 1989 it was observed by this Court that the object behind the introduction of the Act, 1989 was to afford statutory protection to the Scheduled Castes and the Scheduled Tribes, who were terrorised and subjected to humiliation and indignations upon assertion of their civil rights and resistance to the practice of untouchability. For this reason, mere fact that the person subjected to insult or intimidation belongs to a Scheduled Caste or Scheduled Tribe would not attract the offence under Section 3(1)(r) unless it was the intention of the accused to subject the concerned person to caste-based humiliation.

63. V. Geetha in her paper titled ***Bereft of Being: The Humiliations of Untouchability***[1] describes humiliation as an experience that is *"felt, held and savoured in the very gut of our existence."* Humiliation, in her understanding, can either be suffered as a one-time occurrence which bruises the self-esteem or pride of an individual, or it can be *"suffered as a condition that is degrading and wounding."* In the words of Gopal Guru, humiliation is not so much a physical injury but is in the nature of a psychological injury that leaves a permanent scar on the heart.

64. Explaining the social structures that perpetuate humiliation, Gopal Guru, in an introduction to his book[2] writes that *"humiliation is almost endemic to social life that is active basically through asymmetries of intersecting sects of attitudes – arrogance and obeisance, self-respect and servility and reverence and repulsion.* Discussing on how the basis of humiliation varies in different societies, depending upon the social context, he observes that the idea and practice of humiliation *"continues to survive in different forms depending upon the specific nature of the social context. For example, in the West it is the attitude of race that is at the base of humiliation. In the East, it is the notion of untouchability that foregrounds the form and content of humiliation."*

1 Humiliation: Claims and Context, Oxford University Press, First Edition (2009), pp. 95-107

2 Humiliation: Claims and Context (supra), pp. 1-22

65. While Gopal Guru makes the aforesaid observation in the context of different societies in relation to one another, such as the East and the West, in our opinion the observations are equally applicable to specific individual societies as well wherein multiple varying grounds of humiliation like gender, caste, race, etc. can co-exist and apply to the same or different individuals and groups.

66. Bhikhu Parekh in his paper titled ***Logic of Humiliation***[3] attempts to differentiate humiliation from other concepts that it is generally confused with. He gives the example of the ticket inspector who threw Gandhi off the train in South Africa to argue that humiliation might, but need not, involve physical cruelty. On the contrary, he contends that a man who starves another to death and tortures him, shows cruelty but does not necessarily humiliate him. He argues the same regarding the difference between insult and humiliation and observes that although humiliation generally involves insult, yet insult alone is not sufficient to constitute humiliation.

67. On the social context of humiliation, Parekh writes that *"organised or institutionalized humiliation exists when social institutions and practices embody disrespect for, and systematically violate the self-respect of, groups of individuals."* Drawing a distinction between systemic and regimented humiliation on the one hand as distinguished from isolated incidents of humiliation on the other, he observes that while the latter is present in modern liberal societies, the former is found in societies structured on the basis of slavery, racial segregation, untouchability, caste system, hierarchical status, etc. According to him, the reason for the same is that the modern liberal societies, though marked by deep economic, political and other inequalities, allow for vertical mobility owing to the fluid nature of the inequalities. Whereas, societies based on race, caste system, etc. are grounded in inequalities like colour, birth, ethnicity, etc. which are unalterable and deeply entrenched in the very foundational fabric of such a society. The inflexible nature of the basis of inequalities leads to the existence of a more structural and systemic form of humiliation, as the perpetrator is assured of its place in the structure of the society owing to its immobility. Since no one can be assured of the same in a modern liberal society which is marked by vertical mobility in the

3 Humiliation: Claims and Context (supra), pp. 23-40

social structure, there is no incentive for anyone to have a regimented system of humiliation.

68. Resistance is internal to humiliation, and some scholars have argued that humiliation is only defined on the basis of the claims made against it. Thus, those who are humiliated also inherently possess the capacity to protest against it. However, those who protest also run the risk of inciting opposition from those who want to push the traditionally humiliated groups to the margins. This apprehension of opposition and push back from the dominant against the marginalised is also evident from the Statements of Objects of the Act, 1989, as discussed by this Court in ***Ram Krishna Balothia*** *(supra)*.

69. What appears from the aforesaid discussion is that the expression "intent to humiliate" as it appears in Section 3(1)(r) of the Act, 1989 must necessarily be construed in the larger context in which the concept of humiliation of the marginalised groups has been understood by various scholars. It is not ordinary insult or intimidation which would amount to 'humiliation' that is sought to be made punishable under the Act, 1989. The Parliament, by way of different legislations, has over the years sought to target humiliation based on different grounds and identities which exist in the society. The Protection of Women from Domestic Violence Act, 2005 seeks to punish humiliation based on gender inequalities by specifically including the term 'humiliation' in the definition of "domestic violence". Similarly, The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 includes treatment causing humiliation to a female employee and which may likely affect her health and safety within the definition of sexual harassment.

70. In our considered view, it is in a similar vein that the term 'humiliation' as it appears in Section 3(1)(r) of the Act, 1989 must be construed, that is, in a way that it deprecates the infliction of humiliation against members of the Scheduled Castes and Scheduled Tribes wherein such humiliation is intricately associated with the caste identity of such members.

71. We would also like to refer to Section 7(1)(d) of The Protection of Civil Rights Act, 1955 ("**Civil Rights Act**") at this juncture to give a more meaningful construction to Section 3(1)(r) of the Act, 1989. The provision reads as follows:

> *"7. Punishment for other offences arising out of "untouchability".—(1) Whoever—*
>
> *xxx xxx xxx*
>
> *(d) insults or attempts to insult, on the ground of "untouchability", a member of a Scheduled Caste;*
>
> *shall be punishable with imprisonment for a term of not less than one month and not more than six months, and also with fine which shall be not less than one hundred rupees and not more than five hundred rupees."*

72. It is clear from a plain reading of the aforesaid provision that any insult against a member of a Scheduled Caste or Scheduled Tribe on the ground of "untouchability" was punishable with imprisonment for a maximum term of six months under the Civil Rights Act. With the passage of time, it was realised by the legislature that the Civil Rights Act was not adequately sufficient to tackle caste-based offences and the practice of "untouchability", leading to the enactment of the Act, 1989 introducing more stringent provisions for combating such practices. Section 3(1)(r) of the Act, 1989 should, thus, be seen in the context of Section 7(1)(d) of the Civil Rights Act. Seen thus, the words "with an intent to humiliate a member of a Scheduled Caste or Scheduled Tribe" become inseparable from the underlying idea of "untouchability" which is sought to be remedied and punished by the Act, 1989.

73. A two-Judge Bench of this Court in ***Ramesh Chandra Vaishya*** *(supra)* explained that for an act of intentional insult to attract the offence under erstwhile Section 3(1)(x) of the Act, 1989 (which is identical to Section 3(1)(r) of the Act, 1989) it was necessary that the insult is laced with casteist remarks. Relevant observations is extracted hereinbelow:

> *"18. […] The legislative intent seems to be clear that every insult or intimidation for humiliation to a person would not amount to an offence under section 3(1)(x) of the SC/ST Act unless, of course, such insult or intimidation is targeted at the victim because of he being a member of a particular Scheduled Caste or Tribe. If one calls another an idiot (bewaqoof) or a fool (murkh) or a thief (chor) in any place within public view, this would obviously constitute*

an act intended to insult or humiliate by user of abusive or offensive language. Even if the same be directed generally to a person, who happens to be a Scheduled Caste or Tribe, per se, it may not be sufficient to attract section 3(1)(x) unless such words are laced with casteist remarks. […]"

74. Having regard to the reprehensible conduct and the nature of the derogatory statements made, the appellant, at best could be said to have *prima facie* committed the offence of defamation punishable under Section 500 of the IPC. If that be so, it is always open for the complainant to prosecute the appellant accordingly. However, the complainant could not have invoked the provisions of the Act, 1989 only on the premise that he is member of Scheduled Caste, more so, when a *prima facie* conjoint reading of the transcript of the video and the complaint fails to disclose that the actions of the appellant were impelled by the caste identity of the complainant.

v. Whether any offence under Section 3(1)(u) of the Act, 1989 is prima facie made out in the FIR/complaint in question?

75. Section 3(1)(u) of the Act, 1989 reads thus:

"Punishments for offences of atrocities.— (1) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe,—

xxx xxx xxx

(u) by words either written or spoken or by signs or by visible representation or otherwise promotes or attempts to promote feelings of enmity, hatred or ill-will against members of the Scheduled Castes or the Scheduled Tribes;

xxx xxx xxx

Shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to five years and with fine"

(Emphasis supplied)

76. The basic ingredients for constituting an offence under Section 3(1)(u) of the Act, 1989 are:

a. Accused should not be a member of the Schedule Caste or Scheduled Tribe;

b. Accused should by words, either written or spoken, or by signs or by visible representation or otherwise;

c. Promote or attempt to promote feelings of enmity, hatred or ill-will against members of the Scheduled Caste or the Scheduled Tribes.

77. In our opinion, there is nothing to even *prima facie* indicate that the appellant by publishing the video on YouTube promoted or attempted to promote feelings of enmity, hatred or ill-will against the members of Scheduled Castes or Scheduled Tribes. The video has nothing to do in general with the members of Scheduled Caste or the Scheduled Tribe. His target was just the complainant alone. The offence under Section 3(1)(u) will come into play only when any person is trying to promote ill feeling or enmity against the members of the scheduled castes or scheduled tribes as a group and not as individuals.

vi. Whether mere knowledge of the caste identity of the complainant is sufficient to attract the offence under Section 3(1)(r) of the Act, 1989?

78. It was also sought to be argued that the appellant knew very well that the complainant belongs to a Scheduled Caste and despite such knowledge if he went on to make derogatory utterances in the video then the offence under Sections 3(1)(r) and 3(1)(u) respectively of the Act, 1989 could be said to have been *prima facie* made out.

79. We find no merit in the aforesaid submission. Wherever the legislature intended that mere knowledge of the fact that the victim is a member of Scheduled Caste or Scheduled Tribe would be sufficient to constitute an offence under the Act, 1989, it has said so in so many words. We may reproduce some of the relevant provisions where knowledge that the complainant belongs to the Scheduled Castes or Scheduled Tribes is sufficient in itself to constitute the offence:

> *"3. **Punishments for offences atrocities.**-(1)*
>
> *xxx xxx xxx*
>
> *(w)(i) intentionally touches a woman belonging to a Scheduled Caste or a Scheduled Tribe, knowing that she belongs to a Scheduled Caste or a Scheduled Tribe, when such act of touching is of a sexual nature and is without the recipient's consent;*

(ii) uses words, acts or gestures of a sexual nature towards a woman belonging to a Scheduled Caste or a Scheduled Tribe, knowing that she belongs to a Scheduled Caste or a Scheduled Tribe."

xxx xxx xxx

(2) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe,—

xxx xxx xxx

(v) commits any offence under the Indian Penal Code (45 of 1860) punishable with imprisonment for a term of ten years or more against a person or property [knowing that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member], shall be punishable with imprisonment for life and with fine;

(va) commits any offence specified in the Schedule, against a person or property, knowing that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with such punishment as specified under the Indian Penal Code (45 of 1860) for such offences and shall also be liable to fine;]"

(Emphasis supplied)

80. At the cost of repetition, the words in Section 3(1)(r) of the Act, 1989 are altogether different. Mere knowledge of the fact that the victim is a member of the Scheduled Caste or Scheduled Tribe is not sufficient to attract Section 3(1)(r) of the Act, 1989. As discussed earlier, the offence must have been committed against the person on the ground or for the reason that such person is a member of Scheduled Caste or Scheduled Tribe. When we are considering whether *prima facie* materials exist, warranting arrest of the appellant, there is nothing to indicate that the allegations/statements alleged to have been made by the appellant were for the reason that the complainant is a member of a Scheduled Caste.

81. The High Court in its impugned order has observed "*materials on record do indicate that the video is intended to insult and humiliate the second respondent.*" The High Court may be right in observing that the intention of the appellant could have been to insult and

humiliate the complainant but the High Court failed to consider whether such insult or humiliation was on account of or for the reason that the complainant belongs to Scheduled Caste. Is it the case of the complainant that had he not belonged to a Scheduled Caste, the appellant would not have levelled the allegations? The answer lies in the question itself.

82. A penal statute must receive strict construction. A principle of statutory interpretation embodies the policy of the law, which is in turn based on public policy. The court presumes, unless the contrary intention appears, that the legislator intended to conform to this legal policy. A principle of statutory interpretation can, therefore, be described as a principle of legal policy formulated as a guide to the legislative intention.

83. Maxwell in The Interpretation of Statutes (12th Edn.) has observed that "*the strict construction of penal statutes seems to manifest itself in four ways: in the requirement of express language for the creation of an offence; in interpreting strictly words setting out the elements of an offence; in requiring the fulfilment to the letter of statutory conditions precedent to the infliction of punishment; and in insisting on the strict observance of technical provisions concerning criminal procedure and jurisdiction*."

84. William F. Craies in Statute Law (7th Edn. at p. 530) while referring to ***U.S. v. Wiltberger*** [5 L Ed 37 : 18 US (5 Wheat.) 76 (1820)] observes thus:

> *"The distinction between a strict construction and a more free one has, no doubt, in modern times almost disappeared, and the question now is, what is the true construction of the statute? I should say that in a criminal statute you must be quite sure that the offence charged is within the letter of the law. This rule is said to be founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislature, and not in the judicial department, for it is the legislature, not the court, which is to define a crime and ordain its punishment."*
>
> (Emphasis supplied)

85. In ***Tuck & Sons v. Priester*** reported in **(1887) 19 QBD 629 (CA)**, which was followed in ***London and Country Commercial Properties***

Investments Ltd. v. Attorney General reported in **(1953) 1 WLR 312 : (1953) 1 All ER 436**, it was observed thus:

> *"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. Unless penalties are imposed in clear terms, they are not enforceable. Also, where various interpretations of a section are admissible it is a strong reason against adopting a particular interpretation if it shall appear that the result would be unreasonable or oppressive."*
>
> (Emphasis supplied)

86. Blackburn, J. in ***Willis v. Thorp*** reported in **(1875) LR 10 QB 383** observed that "*when the legislature imposes a penalty, the words imposing it must be clear and distinct*."

87. We have construed Section 18 of the Act, 1989 keeping in mind the aforesaid principles of statutory construction. We are of the view that taking any other view than the one taken by us would be unreasonable, oppressive and not in tune with the consecrated principles of our Constitution.

H. CONCLUSION

88. For all the foregoing reasons, this appeal succeeds and is hereby allowed. The impugned order passed by the High Court is hereby set aside.

89. We direct that in the event of arrest of the appellant by police in connection with the First Information Report No. 899 of 2023 lodged at the Elamakkara Police Station, he shall be released on bail subject to terms and conditions, which the Investigating Officer may deem fit to impose.

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

Result of the case: Appeal allowed.

†*Headnotes prepared by:* Divya Pandey

[2024] 8 S.C.R. 1146 : 2024 INSC 623

M/s Karnataka Emta Coal Mines Limited and Another
v.
Central Bureau of Investigation

(Criminal Appeal Nos. 1659-1660 of 2024)

23 August 2024

[Hima Kohli* and Ahsanuddin Amanullah, JJ.]

Issue for Consideration

The present appeals challenge the Order on Charge dated 24.12.2021 and Order framing Charges dated 03.03.2022 passed by the Special Judge (Prevention of Corruption Act) Central Bureau of Investigation registered u/s.120-B r/w. ss.409/420 of the IPC and ss.13(1)(d)/ 13(2) of the Prevention of Corruption Act, 1988. The appellants before this Court are M/s Karnataka Emta Coal Mines Limited (KECML) arrayed as accused No. 12 in the chargesheet and Chairman and Managing Director of Emta Coal Limited and former Managing Director of accused No. 12, arrayed as accused No. 6 in the chargesheet.

The issues which arose for consideration are: Did CBI Primarily Rely on the Audit Report of the Comptroller and Auditor General (CAG) or independently investigated the matter; Could the Audit Report of the CAG fasten any liability on KECML; What is the import of the Judgment dated 24.03.2016 of the Karnataka High Court; What is the sanctity of an Audit Report in Law; What is the effect of the absence of any strategy in the Mining plan to dispose off the coal rejects; Was KECML required to account for the coal rejects; Can KECML be blamed for not setting up the coal washery at the pithead; Did the coal rejects have any useful calorific value making it a saleable commodity; Does the Aryan Energy case has a persuasive value; Inherent Jurisdiction of the High Court under Section 482, Cr.PC; Extraordinary powers of the Supreme Court under Article 136 of the Constitution of India; Application of mind at the stage of Section 277, Cr.PC.

Headnotes†

Prevention of Corruption Act, 1988 – ss.13(1)(d)/13(2) – Penal Code, 1860 – s.120-B r/w. ss.409/420 – Mines and Minerals (Development & Regulation) Act, 1957 – Did CBI Primarily Rely

* Author

on the Audit Report of the Comptroller and Auditor General (CAG) or independently investigated the matter:

Held: The file produced by the respondent-CBI reveals that premised on the Source Information Report (SIR) submitted by an Inspector from the Department pertaining to some irregularities in the allocation of coal blocks under the Government Dispensation Category allegedly in connivance with public servants, the matter was taken up by CBI for verification – The notings in the file states that it was not possible to verify the allegations discretely – Therefore, the SIR was directed to be registered as a PE – These records falsifies the suggestion made by the respondent-CBI that there was a SIR that disclosed irregularities in the Joint Venture Agreement (JVA) executed between M/s. Karnataka Power Corporation Limited (KPCL) and KECML – The stand of the respondent-CBI that PE-5 was registered well before the Audit Report of the CAG and originated independently thereof, is also factually misleading because CBI's own record shows that the scope of enquiry in respect of PE-5 registered on 28.09.2012, was entirely different and had no relationship with the JVA and other agreements executed by KPCL and KECML – Thus, the plea of the respondent-CBI that it conducted an investigation in the present case during the course of the inquiry in respect of PE-5 registered by it in the year 2012 is belied as the Source Information Report (SIR) was on a completely different aspect – CBI only got activated only on stumbling upon the Audit Report of the CAG submitted in 2013 – There is nothing brought on record to show to the contrary. [Paras 8.3, 21.2(a)]

Prevention of Corruption Act, 1988 – ss.13(1)(d)/ 13(2) – Penal Code, 1860 – s.120-B r/w. ss.409/420 – Mines and Minerals (Development & Regulation) Act, 1957 – Could the Audit Report of the CAG fasten any liability on KECML:

Held: The Supreme Court having already dismissed the appeal filed by KPCL against the judgment of the Karnataka High Court, having held in clear terms that the CAG Report could not form the basis for launching proceedings against the appellants and further, having upheld the findings returned by the Karnataka High Court that the CAG Report appears to have been the starting point for the entire disputes between the parties who till then, were smoothly discharging their obligations under various agreements, there is no reason to take a different view only on the ground that the

respondent-CBI was not a party in the aforesaid proceedings – Further, the CAG Report had not attained finality inasmuch as its recommendations have not been tabled before the Parliament or accepted so far – The said report at best, has a persuasive value but no more. [Paras 9.5, 21.2(b)]

Prevention of Corruption Act, 1988 – ss.13(1)(d)/13(2) – Penal Code, 1860 – s.120-B r/w. ss.409/420 – Mines and Minerals (Development & Regulation) Act, 1957 – What is the import of the Judgment dated 24.03.2016 of the Karnataka High Court:

Held: The decision dated 24.03.2016 of the Karnataka High Court in a writ petition filed by KECML against KPCL has been wrongly overlooked – The High Court had an occasion to scrutinize the very same agreements and the CAG report that formed the basis of the investigation conducted by the respondent-CBI to return positive findings in favour of the appellants – The view taken by the Karnataka High Court has been upheld by this Court in a judgment rendered on 20.05.2022 which was just a few days after Charges were framed by the Special Judge, CBI on 03.03.2022. [Para 21.2(f)]

Mines and Minerals (Development & Regulation) Act, 1957 – What is the sanctity of an Audit Report in Law:

Held: The CAG Report is subject to scrutiny by the Parliament and the Government can always offer its views on the said report – Merely because the CAG is an independent constitutional functionary does not mean that after receiving a report from it and on the PAC scrutinizing the same and submitting its report, the Parliament will automatically accept the said report – The Parliament may agree or disagree with the Report – It may accept it as it is or in part – In the instant case, it is not in dispute that the Audit Report of the CAG has not been tabled before the Parliament for soliciting any comments from the PAC or the respective Ministries – Therefore, the views taken by the CAG to the effect that tremendous loss had been caused to the public exchequer on account of the coal rejects being disposed of by the KPCL and KECML remains a view point but cannot be accepted as decisive – The respondent-CBI has largely relied on the findings and the conclusions drawn in the Audit Report of the CAG to launch the prosecution against the appellants on an assumption that the said Report has the seal of approval of the Parliament and has attained finality, which is not the case. [Para 11.5]

M/s Karnataka Emta Coal Mines Limited and Another v. Central Bureau of Investigation

Prevention of Corruption Act, 1988 – ss.13(1)(d)/13(2) – Penal Code, 1860 – s.120-B r/w. ss.409/420 – Mines and Minerals (Development & Regulation) Act, 1957 – What is the effect of the absence of any strategy in the Mining plan to dispose off the coal rejects:

Held: The explanation offered by the appellants that at that point in time, the Central Government had not come out with any specific plan to dispose off the coal rejects is validated by the reply furnished by the Minister of State, MoC, in the Lok Sabha in response to an unstarred question seeking an answer from the Government of India as to whether it had framed any National Policy for exploitation of the coal rejects – The reply given was that the Government had not framed any National Policy for exploitation of coal rejects and the same was still under consideration – That being the position, it was left to KPCL and KECML to devise a satisfactory and safe method to dispose off the coal rejects – This was done in terms of Article 5(2)(b) of the JVA that required KECML to dispose off the rejects in a manner that would ensure that there was no threat to the environment – This Court does not find any irregularity in the route adopted to dispose off the coal rejects. [Para 13.2]

Prevention of Corruption Act, 1988 – ss.13(1)(d)/13(2) – Penal Code, 1860 – s.120-B r/w. ss.409/420 – Mines and Minerals (Development & Regulation) Act, 1957 – Was KECML required to account for the coal rejects:

Held: The clauses of the JVA and FSA clearly indicate that KECML was only obliged to provide a specified grade of washed coal (Grade – D) having a specific GCV in the range of 4200-4940 Kcal/kg – When coal has been defined in the JVA and FSA as "washed coal with guaranteed value" and one that satisfied the parameters laid down in Annex-1 attached to the JVA and FSA and further, KECML was required to ensure that all "shales/stones" are removed from the coal before making the supply, there was no occasion for KECML to account for the rejects – All that KPCL was required to do was to buy from KECML, the washed coal with a particular guaranteed value and one that would satisfy the specified quality parameters, at a predetermined price – The agreement governing the parties required KECML to dispose off the rejects safely – KECML was not required to account for the coal rejects to KPCL. [Para 14.3]

Prevention of Corruption Act, 1988 – ss.13(1)(d)/13(2) – Penal Code, 1860 – s.120-B r/w. ss.409/420 – Mines and Minerals (Development & Regulation) Act, 1957 – Can KECML be blamed for not setting up the coal washery at the pithead:

Held: KECML could not be faulted for failing to set up the coal washery at the pithead, in terms of the JVA as that was for reasons beyond its control which included a prolonged litigation between the MoC and CIPCO in relation to the very same coal blocks allocated to KPCL which in turn delayed the project considerably – Production of coal could only commence in September, 2008 when the curtains were drawn on the aforesaid litigation – The Board of KPCL consciously acceded to the proposal made by KECML that a MoU be executed with GCWL for washing of mined coal at its washery – Pertinently, GCWL was not an unknown entity to KPCL as the latter had prior dealings with the said Company for washing of mined coal in another project – This decision taken by the parties in their commercial wisdom has been sought to be selectively tainted with criminal intention attributed to the appellants, without any basis. [Para 21.2 (k)]

Prevention of Corruption Act, 1988 – ss.13(1)(d)/13(2) – Penal Code, 1860 – s.120-B r/w. ss.409/420 – Mines and Minerals (Development & Regulation) Act, 1957 – Did the coal rejects have any useful calorific value making it a saleable commodity:

Held: The Detailed Washability Report of the Government Laboratory namely, CIMFR, Nagpur – The said Report stated in so many words that the rejects did not contain any useful calorific value Reliance placed by the respondent-CBI on the revised Mining Plan submitted by the appellants to the MoC in 2010, that mentions a new technology for utilization of rejects for its carbon value, namely FBC is of no consequence as the said technology had not even been introduced when MoC approved the original Mining Plan, submitted by KECML in the year 2004 – Even otherwise, it is not in dispute that for applying the said technology, a plant was required to be established after obtaining necessary approvals from several agencies. [Para 16.1]

Prevention of Corruption Act, 1988 – ss.13(1)(d)/13(2) – Penal Code, 1860 – s.120-B r/w. ss.409/420 – Mines and Minerals (Development & Regulation) Act, 1957 – Does the Aryan Energy case has a persuasive value:

Held: An interpretation of the very same clauses in the agreement relating to the manner of disposal off the coal rejects came up for consideration before the Karnataka High Court in a writ petition filed by Aryan Energy against KPCL – Having scrutinized the clauses forming a part of the agreement executed between the parties vide judgment dated 22.07.2021, the Karnataka High Court clearly observed that KPCL did not have any claim over the coal rejects generated during washing of the coal – The submissions made by the respondent-CBI that the aforesaid judgment came much after institution of the chargesheet by the, respondent-CBI is of no consequence – Even if that was so, nothing prevented the Special Judge, CBI from taking into consideration the view expressed in the said judgement at the time of framing charges, particularly, when the clause relating to disposal of the coal rejects in an environment friendly manner incorporated in the agreement between KPCL and Aryan Energy was identical to the one contained in the agreement between KPCL and KECML. [Para 21.2(g)]

Code of Criminal Procedure, 1973 – s.482 – Inherent Jurisdiction of the High Court:

Held: Section 482 Cr.P.C recognizes the inherent powers of the High Court to quash initiation of prosecution against the accused to pass such orders as may be considered necessary to give effect to any order under the Cr.P.C or to prevent abuse of the process of any court or otherwise to secure the ends of justice – It is a statutory power vested in the High Court to quash such criminal proceedings that would dislodge the charges levelled against the accused and based on the material produced, lead to a firm opinion that the assertions contained in the charges levelled by the prosecution deserve to be overruled – While exercising the powers vested in the High Court under Section 482, Cr.P.C, whether at the stage of issuing process or at the stage of committal or even at the stage of framing of charges, which are all stages that are prior to commencement of the actual trial, the test to be applied is that the Court must be fully satisfied that the material produced by the accused would lead to a conclusion that their defence is based on sound, reasonable and indubitable facts – The material relied on by the accused should also be such that would persuade a reasonable person to dismiss the accusations levelled against them as false. [Paras 18.7, 18.8]

Constitution of India – Art.136 – Extraordinary powers of the Supreme Court under Article 136:

Held: Article 136 can be invoked by a party in a petition for special leave to appeal from any judgement, decree, determination, sentence or order in any cause or matter passed or made by a Court or Tribunal within the territory of India – The reach of the extraordinary powers vested in this Court under Article 136 of the Constitution of India is boundless – Such unbridled powers have been vested in Court, not just to prevent the abuse of the process of any court or to secure the ends of justice as contemplated in Section 482, Cr.P.C, but to ensure dispensation of justice, correct errors of law, safeguard fundamental rights, exercise judicial review, resolve conflicting decisions, inject consistency in the legal system by settling precedents and for myriad other to undo injustice, wherever noticed and promote the cause of justice at every level – The fetters on this power are self imposed and carefully tampered with sound judicial discretion. [Para 19.6]

Code of Criminal Procedure, 1973 – s.277 – Application of mind at the stage of s.227 of Cr.PC – discussed.

Constitution of India – Art. 136 – Prevention of Corruption Act, 1988 – ss.13(1)(d)/13(2) – Penal Code, 1860 – s.120-B r/w. ss.409/420 – Mines and Minerals (Development & Regulation) Act, 1957 – The Special Judge, CBI passed an order on charge dated 24.12.2021 and the order framing charges dated 03.03.2022 *qua* appellants – Sustainability:

Held: This Court is of the opinion that the respondent-CBI embarked on a roving and fishing inquiry on the strength of the Audit Report of the CAG and then started working backwards to sniff out criminal intent against the appellants – The underpinnings of what was a civil dispute premised on a contract between the parties, breach whereof could at best lead to determination of the contract or even the underlying lease deed, has been painted with the brush of criminality without any justification – This criminal intent has been threaded into the dispute by the respondent-CBI by misinterpreting the clauses of the agreements governing the parties and by heavily banking on the observations made in the Audit Report of the CAG that has not attained finality till date – In view of the glaring infirmities, the impugned orders deserve interference in exercise of the powers vested in this court under Article 136 of the Constitution of India – The order on charge dated 24.12.2021 and the order framing charges dated 03.03.2022 passed by the Special Judge, CBI qua the appellants before this Court are unsustainable and accordingly quashed and set aside. [Paras 21.3, 21.4]

M/s Karnataka Emta Coal Mines Limited and Another v. Central Bureau of Investigation

Case Law Cited

P.S.R. Sadhanantham v. Arunachalam [1980] 2 SCR 873 : **(1980) 3 SCC 141 – followed.**

Uttam Chand v. ITO **(1982) 2 SCC 543;** *G.L. Didwania v. ITO* **(1995) Supp(2) 724;** *Arun Kumar Aggarwal v. Union of India* [2013] 3 SCR 508 : **(2013) 7 SCC 1;** *Rajiv Thapar and Others v. Madan Lal Kapoor* [2013] 3 SCR 52 : **(2013) 3 SCC 330;** *State of Orissa v. Debendra Nath Padhi* [2004] Supp. 6 SCR 460 : **(2005) 1 SCC 568;** *Anand Kumar Mohatta and Another v. State (NCT of Delhi), Department of Home and Another* [2018] 13 SCR 1028 : **(2019) 11 SCC 706;** *State of Karnataka v. L. Munniswamy* [1977] 3 SCR 113 : **(1977) 2 SCC 699;** *Arunachalam v. P.S.R. Sadhanantham and Another* [1979] 3 SCR 482 : **(1979) 2 SCC 297;** *Khoday Distilleries Limited and Others v. Mahadeshwara S.S.K. Limited* [2019] 3 SCR 411 : **(2012) 12 SCC 291;** *Mekala Sivaiah v. State of Andhra Pradesh* [2022] 6 SCR 989 : **(2022) 8 SCC 253;** *Union of India v. Prafulla Kumar Samal and Another* [1979] 2 SCR 229 : **(1979) 3 SCC 4;** *State of Tamil Nadu v. N. Suresh Rajan and Others* [2014] 1 SCR 135 : **(2014) 11 SCC 709 – relied on.**

CBI v. S.M. Jaamdar & Others; *M.L. Sharma v. The Principal Secretary and Others* [2014] 12 SCR 110 : **(2014) 9 SCC 614;** *Girish Kumar Suneja v. CBI* [2017] 9 SCR 544 : **(2017) 14 SCC 809;** *KPCL v. Aryan Energy Private Limited and Others,* **COMAP No. 12, 13, 14 and 15 and 2020 decided on 22nd July, 2021;** *Centre for Public Interest Litigation v. Union of India* [2012] 3 SCR 147 : **(2012) 3 SCC 1;** *Pathan Mohammed Suleman Rehmatkhan v. State of Gujarat* [2013] 12 SCR 446 : **(2014) 4 SCC 156;** *Radheshyam Kejriwal v. State of West Bengal and Another* [2011] 4 SCR 889 : **(2011) 3 SCC 581;** *Ashoo Surendranath Tewari v. Deputy Superintendent of Police, EOW, CBI and Another* **(2020) 9 SCC 636;** *J Sekar alias Sekar Reddy v. Directorate of Enforcement* [2022] 3 SCR 698 : **(2022) 7 SCC 370;** *Prem Raj v. Poonamma Menon & Another* [2024] 4 SCR 29 : **(2024) SCC OnLine SC 483;** *B. Jayaraj v. State of Andhra Pradesh* [2014] 4 SCR 554 : **(2014) 13 SCC 55;** *P. Satyanarayana Murthy v. District Inspector of Police, State of Andhra Pradesh and Another* **(2015) 10 SCC 152;** *State through Central Bureau of Investigation v. Dr Anup Kumar Srivastava* [2017] 9 SCR 341 : **(2017) 15 SCC 560;** *K. Shanthamma v. State of Telangana* **(2022) 4 SCC 574;** *Neeraj Dutta v. State (NCT of Delhi)* [2023] 2 SCR 997 : **(2023) 4 SCC 731;** *Soundarajan v. State Rep. by the Inspector of Police Vigilance Anticorruption Dindigul*

[2023] 4 SCR 133 : (2023) SCC OnLine SC 424; *M.S Associates and Others v. Union of India* (2005) SCC Online Gau 308; (2005) 275 ITR 502; *The King Emperor v. Khawaja Nazir Ahmed,* AIR (1945) PC 18; *Niranjan Singh Karam Singh v. Jitendra Bhimraj Bijjaya And Others* [1990] 3 SCR 633 : (1990) 4 SCC 76; *State of Maharashtra v. Som Nath Thapa* [1996] Supp. 1 SCR 189 : (1996) 4 SCC 659; *State of Bihar v. Ramesh Singh* [1978] 1 SCR 257 : (1977) 4 SCC 39; *K.G. Premshanker v. Inspector of Police and Another* [2002] Supp. 2 SCR 350 : (2002) 8 SCC 87; *Manohar Lal Sharma v. Principal Secretary and Another* [2014] 8 SCR 446 : (2014) 9 SCC 516; *Standard Chartered Bank(1) v. Directorate of Enforcement* [2006] 2 SCR 709 : (2006) 4 SCC 278; *Collector of Customs v. L.R. Melwani,* AIR 1970 SC 962; *K.C. Builders v. CIT* [2004] 1 SCR 1134 : (2004) 2 SCC 731; *Rukmini Narvekar v. Vijaya Satardekar and Others* [2008] 14 SCR 271: (2008) 14 SCC 1; *State of Punjab and Others v. Rafiq Masih (White Washer) Others* [2014] 13 SCR 1343 : AIR (2015) 1267 – referred to.

List of Acts

Coal Mines (Nationalization) Act, 1973; Mines and Minerals (Development & Regulation) Act, 1957; Prevention of Corruption Act, 1988; (Duties, Powers and Conditions of Service) Act, 1971; Evidence Act, 1872; Comptroller and Auditor General (Duties, Powers and Conditions of Service) Act, 1971; Penal Code, 1860; Code of Criminal Procedure, 1973.

List of Keywords

Joint Venture Agreement; Fuel Supply Agreement; Washability Report; Audit Report; Coal Rejects; Coal block allocation; Calorific Value; Aryan Energy Case; Section 482 of Code of Criminal Procedure, 1973; Inherent Jurisdiction of the High Court; Extraordinary powers of the Supreme Court; Section 227 of Code of Criminal Procedure, 1973; Application of mind u/s.227 of Cr.PC.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal Nos. 1659-1660 of 2024

From the Judgment and Order dated 24-12-2021 in CN No. CBI/317/2019 and Order dated 03-03-2022 in CN No. CBI/317/2019 passed by the Special Judge (PC Act), CBI, Rouse Avenue District Court

M/s Karnataka Emta Coal Mines Limited and Another v. Central Bureau of Investigation

Appearances for Parties

Ranjit Kumar, Sr. Adv., Abhimanyu Bhandari, Ms. Rooh-e-hina Dua, Ayush Aggarwal, Sangram S. Saron, Arav Pandit, Advs. for the Appellants.

R.S. Cheema, Sr. Adv., Ms. Tarannum Cheema, Akshay Nagrajan, Akash Singh, Mukesh Kumar Maroria, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Judgment

Hima Kohli, J.

INDEX*

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

CITATIONS

S. No.	Title	Citation
1	'CBI vs. S.M. Jaamdar & Others'	
2	M.L. Sharma v. The Principal Secretary and Others	(2014) 9 SCC 614
3	Girish Kumar Suneja v. CBI	(2017) 14 SCC 809
4	KPCL v. Aryan Energy Private Limited[1] and Others	COMAP No. 12, 13, 14 and 15 and 2020 decided on 22nd July, 2021
5	Centre for Public Interest Litigation v. Union of India	(2012) 3 SCC 1
6	Arun Kumar Aggarwal v. Union of India	(2013) 7 SCC 1
7	Pathan Mohammed Suleman Rehmat khan v. State of Gujarat	(2014) 4 SCC 156
8	Radheshyam Kejriwal v. State of West Bengal and Another	(2011) 3 SCC 581
9	Ashoo Surendranath Tewari v. Deputy Superintendent of Police, EOW, CBI and Another	(2020) 9 SCC 636
10	J Sekar alias Sekar Reddy v. Directorate of Enforcement	(2022) 7 SCC 370
11	Prem Raj v. Poonamma Menon & Another	2024 SCC OnLine SC 483

12	Neeraj Dutta v State (NCT of Delhi)	(2023) 4 SCC 731
13	B. Jayaraj v State of Andhra Pradesh	(2014) 13 SCC 55
14	P. Satyanarayana Murthy v District Inspector of Police, State of Andhra Pradesh and Another	(2015) 10 SCC 152
15	K. Shanthamma v State of Telangana	(2022) 4 SCC 574
16	State through Central Bureau of Investigation v Dr Anup Kumar Srivastava	(2017) 15 SCC 560
17	Soundarajan v State Rep. by the Inspector of Police Vigilance Anticorruption Dindigu	(2023) SCC OnLine SC 424
18	M.S Associates and others v. Union of India	(2005) SCC Online Gau 308; (2005) 275 ITR 502
19	The King Emperor v. Khawaja Nazir Ahmand	AIR (1945) PC 18
20	Manohar Lal Sharma vs. Principal Secretary and Another	(2014) 9 SCC 516

GLOSSARY

Abbreviations of Acts

Act of 1973	Coal Mines (Nationalization) Act, 1973
CAG Act	Comptroller and Auditor General (Duties, Powers and Conditions of Service) Act, 1971
Cr.P.C	Code Criminal Procedure, 1973
CVC	Central Vigilance Commission
IPC	Indian Penal Code
MMDR Act,	Mines and Minerals (Development & Regulation) Act, 1957
P.C. Act	Prevention of Corruption Act

M/s Karnataka Emta Coal Mines Limited and Another v. Central Bureau of Investigation

Abbreviations of Companies

AEPL	M/s Aryan Energy Private Limited
EMTA	M/s Eastern Mineral and Trading Agency
GCWL	M/s Gupta Coalfields and Washeries Limited
KECML	M/s Karnataka Emta Coal Mines Limited
KPCL	M/s Karnataka Power Corporation Limited
SAS	M/s. SAS India Private Limited

Abbreviations of Government Organizations

CAG	Comptroller and Auditor General
CBI	Central Bureau of Investigation
CIMFR	Central Institute of Mining and Fuel Research
CIPCO	M/s. Central India Power Company
DoPT	Department of Personnel and Training
MoC	Ministry of Coal
MoEF&CC	Ministry of Environment, Forest and Climate Change
MoPPP	Ministry of Personnel, Public Grievances and Punishment

Abbreviations of terms

BTPS	Bellary Thermal Power Station
CV	Calorific Value
FBC	Fluidized Bed Combustion
FSA	Fuel Supply Agreement
GCV	Gross Calorific Value
IBOCM	Integrated Baranj Open Cast Mines
JVA	Joint Venture Agreement
JVC	Joint Venture Company
MoU	Memorandum of Understanding
MT	Metric Tones
PE	Preliminary Enquiry
SIR	Source Information Report

Hima Kohli, J.

A. PREFACE

1. The present appeals challenge the Order on Charge dated 24th December, 2021 and Order framing Charges dated 03rd March, 2022 passed by the learned Special Judge (Prevention of Corruption Act[1]) Central Bureau of Investigation,[2] Coal Block Case No.-01, Rouse Avenue District Court, Delhi[3] in a case[4] registered under Section 120-B read with Sections 409/420 of the Indian Penal Code[5] and Sections 13(1)(d)/ 13(2) of the P.C. Act, 1988 titled '***CBI vs. S.M. Jaamdar & Others'***. The appellants before this Court are M/s Karnataka Emta Coal Mines Limited[6] arrayed as accused No. 12 in the chargesheet and Shri Ujjal Kumar Upadhaya, Chairman and Managing Director of Emta Coal Limited and former Managing Director of accused No. 12, arrayed as accused No. 6 in the chargesheet.

2. It may be noted at the outset that a challenge has been laid to the impugned orders passed by the learned Special Judge directly before this Court in the light of the directions issued in ***M.L. Sharma v. The Principal Secretary and Others***[7] *vide* order dated 25th July, 2014 and upheld in ***Girish Kumar Suneja v. CBI***[8] *vide* Judgement dated 13th July, 2017 wherein directions have been issued that this Court alone shall have the jurisdiction to entertain cases relating to coal block allocation across the country, in particular, cases where the parties seek a stay of the investigation/trial in a matter relating to coal.

B. FACTUAL BACKDROP

3. The contours of the case being intricately intertwined with several documents including Agreements, Memorandum of Understandings,[9] correspondence etc. referred to by both sides, the factual narrative

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1 In short 'P.C. Act'

2 In short CBI

3 Hereinafter referred to as 'learned Special Judge, CBI'

4 Case No. CBI/317 /2019; CNR No. DLCT11-001312-2019 in RC No. 220-2015- E-0002; Branch: CBI/ EOU-IV, EO-II/New Delhi

5 In short 'IPC'

6 In short "KECML"

7 [2014] 12 SCR 110 : (2014) 9 SCC 614

8 [2017] 9 SCR 544 : (2017) 14 SCC 809

9 In short 'MoU'

must be delineated chronologically at some length to appreciate the context of the case.

3.1. **JOINT VENTURE AGREEMENT**

3.1.1 A Joint Venture Agreement[10] was executed between Karnataka Power Corporation Limited[11] and M/s Eastern Mineral and Trading Agency[12] for a period of 25 years for the development of captive coal mines and supply of coal to the Thermal Power Plant operated by KPCL namely, Bellary Thermal Power Station[13] with the tentative date of commissioning scheduled in December, 2005. KPCL was allocated three coal blocks by the Government of India under the Western Coalfield Limited command area situated in the State of Maharashtra for the development/operation of coal mines dedicated to feeding BTPS.

3.1.2 The JVA was executed between KPCL and EMTA on 13th September, 2002 which gave birth to the Joint Venture Company[14] namely, M/s KECML. The shareholding of EMTA in the JVC was to the extent of 76 per cent and that of KPCL was 24 per cent. In the JVA, it was agreed that there would be five directors from each of the two companies and the nominee of KPCL would be the Chairman of KECML who would have the right to cast vote. The relevant clauses of the JVA referred to and relied upon by the parties are extracted hereinbelow:

> **"AGREEMENT ON CAPTIVE COAL MINING PROJECT THROUGH A JOINT VENTURE**
>
> xxxxx
>
> "**COAL**" means washed coal with guaranteed values as per article-6 clause 3 C and satisfies quality parameter laid down in Annexure-1 attached to this agreement.
>
> xxxxx

10 In short 'JVA'

11 In short 'KPCL'

12 In short 'EMTA'

13 In short 'BTPS'

14 In short 'JVC'

"**KPCL Coal Mines**" means the coal mine(s) to be allotted to KPCL by Ministry of Coal, Government of India in which mining rights shall be given to the Company and which shall be developed/operated through the Company for captive use of KPCL.

Xxxxx

"**GCV (ADB)"** Gross Calorific value on 'Air dried basis' in kcal/kg determined through a Bomb Calorimeter as measured at BTPS as per IS 1350(part -I)

xxxxx

"**D Grade Coal**" means "Non-long flame coal" having Useful Heat Value(UHV) in the range of 4200 to 4940 Kcal/Kg as per GOI notification.

xxxxx

ARTICLE 2

THE COMPANY AND ITS OBJECTIVES

1. The Parties of this agreement shall form and incorporate the Company as a Public Limited Company under the Companies Act, 1956 having its registered office at Bangalore.

2. The Company shall be named **KARNATAKA EMTA COAL MINES LIMITED**; or in case such name is not available, any other name which may be mutually acceptable to the Parties.

3. **The main object of the Company shall be to develop the captive coal mines of KPCL and produce coal from KPCL coal mines and to supply, transport and deliver such coal wholly and exclusively to KPCL.**

4. For achieving the above main object, EMTA on behalf of the Company shall, inter-alia,

take up the following activities with regard to the KPCL Coal Mines:

(a) survey and preparation of plans for mining;

(b) drilling and prospecting;

(c) mining either in open cast process or underground or both;

xxxxx

(e) raising coal and stacking the same on surface;

xxxxx

(g) Establishing coal washery of adequate capacity at the pit head and supply of coal of the required specification to the power plant of KPCL by Rail mode;

xxxxx

(m) preparation of plans, obtention of approval of Site Clearance from Ministry of Environment & Forest Govt. of India;

(n) preparation of Mining Plan and its approval from Ministry of Coal, Govt. of India;

xxxxx

(r) arrangement of approval for coal linkage from KPCL Coal Mines to the power stations of KPCL;

(s) arrangement of railway siding nearest to the KPCL Coal Mines, and

xxxxx

(u) undertake all other allied jobs for coal mining & washery operations.

ARTICLE 5

BUSINESS OF THE COMPANY

To achieve the main objects of the Company as mentioned in clause 3 of Article 2, EMTA shall be responsible for development, operation of KPCL coal mines and delivery of coal to BTPS or any other thermal power station under KPCL, the terms and conditions of which shall be governed by an agreement to be executed by and between Company and EMTA.

EMTA's Scope of work shall comprise as follows:

1. Development and Operation of KPCL coal mines

2. Establishing coal washery at Pit head

a) EMTA shall ensure establishment of coal washery at the pit head so that the coal to be supplied by the company should meet the required specification of KPCL and KPCL is not liable to pay any additional charges towards washing of coal.

b) EMTA shall take all the clearances required for the setting up the coal washery from the concerned authorities and to properly dispose off the coal rejects to the satisfaction of environmental regulation.

c) EMTA shall keep liaison with the concerned railway authorities and organise railway siding at nearest distance from mines/ washery area for movement of coal to BTPS by rail.

3. Arranging transportation of coal to BTPS

xxxxx

6. Quantity

a. The total quantity of coal required to be supplied to BTPS is approximately 2 Million Tonnes (+)/(-) 10% per annum.

7. Quality

a) The quality of coal shall be determined by drawing coal samples from railway wagons on receipt at KPCL power plants before unloading.

b) A third party agency shall be appointed jointly by the parties of the agreement for sampling and analysis of coal received at BTPS end. The third party agency shall carry out the sampling and analysis of coal in the presence of the representative of the parties……..

xxxxx

d) An independent inspection agency shall supervise and certify the quality of coal received at BTPS and the result of analysis certified by the independent inspection agency as per the procedure stated above shall be binding to all concerned for all commercial purposes.

xxxxx

9. Delivery Period

a. The delivery of coal to BTPS shall commence one month prior to the scheduled date of synchronisation of first unit with coal at BTPS. The tentative date of commissioning maybe taken as Dec. 2005.

xxxxx

13. The company shall provide an undertaking to the Ministry of Coal, Government of India that the coal produced from the KPCL Coal Mines shall be wholly and exclusively supplied, transported and delivered to KPCL.

ARTICLE – 6

COMMERCIAL TERMS

Fuel supply agreement shall be executed between KPCL and Company to record the terms and conditions of coal supply from KPCL coal mines to KPCL which shall be governed by the following commercial terms :

1. **Price**

a) KPCL shall purchase the entire quantity of specified coal supplied to BTPS at a price of Rs. 1650.47 per tonne, the detailed break up of which is as per Annexure - II attached to this agreement

xxxxx

c) **The price shall be firm at the agreed price i.e. Rs.1650.47 per MT for a quantity of one million tonnes in the first year of BTPS - operation subject to price variation** as per clause 3.D(b)-I(a) but limited to 50% increase in base price only. And 100% variation in statuary charges as per clause 3.D(a).

xxxxx

2. **Basis of payment and price adjustment**

KPCL shall pay the price of coal for the quantity and quality of coal on receipt at BTPS on rake to rake basis as detailed herein below:

A) QUANTITY …

B) QUALITY …

C) PRICE ADJUSTMENT

The size of coal, ash content, and GCV of coal would be checked and compared with the guaranteed values as indicated below:

(a)	**GCV (ARB)**	**4500 in Kcal/KG**
(b)	**Permissible variation**	**Max. 4500 Kcal/Kg & Min. 4000 Kcal/Kg.**
(c)	**Ash content (ADB)**	**0 to 25 mm with fines (upto-2 mm) not exceeding 20%**

Suitable price adjustment would be carried out be KPCL for variation in properties compared to the guaranteed value as indicated in the following paragraphs.

i) ASH CONTENT(ADB)…

ii) GCV (ARB)

a) No Pro rata price adjustment is allowed for the GCV over and above 4500 Kcal/Kg.

b) In case the GCV is between 4200 to 4500 Kcal/Kg the price adjustment will be on the Base Price on Pro rata basis.

c) In ease the GCV of the coal supplied falls between 4000-4200 Kcal/Kg, the price payable is restricted to 50% of the Base Price.

d) In case the· GCV is below 4000 Kcal/Kg KPCL shall not require to pay for such supplies including freight and other incidental charges.

xxxx

D) Price Variation....

4. **Penalty**

a) The delivery period stipulated in Clause No 9 of Article 5 for the supply of coal shall be the essences of the contract. In the event of failure to commence the delivery of coal within the stipulated time specified in Clause 9 of Article 5 KPCL shall impose a penalty at a rate of l/2% of initial contract value of Rs.330.09 Crores i.e. Rs.l.65 crores for every week's delay subject to a maximum of 10% of the contract value of Rs.330.09 crores i.e. Rs.33.00 crores

b) In the event of delay in commencement of mining operation or washery or due to non-availability o(railway siding or for any other reason, Company shall arrange coal supply from any other source with the same specification as indicated under 3 c) of above….

xxxxx

5. **Fuel Supply Agreement shall be executed between KPCL and the company on the terms and conditions stipulated in the L.O.A. dated 8.7.2002 and relevant clauses as agreed upon between the parties under this agreement.**

xxxxx

ARTICLE 9

OBLIGATIONS OF THE PARTIES

The parties shall at their own cost and expense observe, undertake, comply with and perform in addition to and not in derogation of their obligations elsewhere set out in this Agreement, the following:

Obligation of KPCL

1. It shall apply to the Central and the relevant state governments for the allotment of the KPCL coal mines.

2. It shall purchase the Coal supplied to it as per the terms agreed to in the Fuel Supply Agreement.

Obligation of EMTA

1. It shall arrange for the identification of mining block(s) for present and future requirement, the acquisition of private land and allotment of vested lands by the State Government required for mining operation and KPCL will render assistance, if required.

2. **It shall ensure supply of coal from KPCL coal mines to KPCL power plants as per the guaranteed values indicated in 3 c) of Article 6 and specification stated in Annexure - I attached to this agreement.**

xxxx

6. It shall establish Washery at the pit head and get all clearances required for setting up the washery to effect washing of coal to meet the specification."

xxxx

[emphasis added]

3.1.3 Annexure–I appended to the aforesaid JVA specifies the desired characteristics of the coal and contains a computed statement relating to the expected coal quality with the range for the maximum and minimum. The calorific value[15]

15 In short 'C.V.'

in Gross Calorific Value[16] has been mentioned in the first column under the head 'Description' and in the column of "Expected Product Coal" that states as follows:

'DESIRED CHARACTERISTICS OF WCL COAL

EXPECTED COAL QUALITY WITH THE RANGE FOR MAXIMUM & MINIMUM				
DESCRIPTION	**UNITS**	**EXPECTED PRODUCT COAL**	**RANGE**	
			MINUMUM	**MAXIMUM**
Gross C.V.	Kcal/K.gm	4995		
xxxxxx				
Size of Coal	mm		0-25 mm (0-2 mm fines not>20%	

3.1.4 Annexure–II that prescribes the price schedule for mining, washing and delivery of washed coal to BTPS, specifies amongst others, the total price of coal at the pit head as follows:

PRICE SCHEDULE
FOR
MINING, WASHING AND DELIVERY OF
WASHED COAL TO BTPS

Sl. No.	**Particulars**	**Price Per Metric tonne**
1.	xxxxx	
	f) Total price of coal at pit head (Railway Siding) (a+b+c+d-e)	860.70
	xxxx	
7.	Railway Freight from captive mines to BTPS	608.90
	xxxx	
9.	**Landed cost per MT of washed coal at BTPS including Sales Tax**	**1650.47**

3.2. **CORRESPONDENCE**

3.2.1 *Vide* letter dated 10th November, 2003, the Ministry of Coal,[17] Union of India allocated three coal blocks to

16 In short 'G.C.V.'

17 In short 'MoC'

KPCL for power generation for the proposed Thermal Power Station at Bellary, Karnataka.[18] As much emphasis has been laid on the contents of the said letter by the respondent-CBI, the same is reproduced hereinbelow for ready reference :

'No. 47011/1(1)/2002-CPAM/CA

GOVERNMENT OF INDIA

MINISTRY OF COAL

....

New Delhi, dated the 10th November, 2003

'To,

M/s. Karnataka Power Corporation Ltd.,
Shakti Bhavan No. 82,
Race Course Road,
Bangalore - 560 00l,
KARNATAKA.

'Subjet: **Allocation of Kiloni, Manoradeep and Baranj I-IV captive coal blocks for power generation to M/s KPCL for their proposed 1000 MW(2x500 MW) TPS at Bellary, Karnataka.**

.....

The Screening Committee has agreed to identify Baranj I-IV. Manoradeep and Kiloni under the command area of WCL in the State of Maharashtra to meet the requirement of coal for the exclusive use in the proposed TPS at Bellary. Karnataka. The allocation of these blocks are subject to the following conditions :-

(i) The coal mined from the blocks shall exclusively be used by the company to meet the requirement of coal in their proposed TPS.

18 at Kiloni, Manoradeep and Beranj I to IV blocks

(ii) Synchronization/commissioning of the end use plant should be December, 2006.

(iii) The setting up of the proposed TPS should be completed by the Company before coal production starts from the captive mine. The bar chart for the coal production should be modified suitably.

(iv) The coal mining will be done in accordance with the provisions of Mines & Minerals (Development & Regulation) Act, 1957 and Mineral Concession Rules, 1960 and subject to the provisions of other relevant statutes.

(v) Allocation of coal block may be cancelled in case of unsatisfactory progress of implementation of their proposed end use plant, development of captive coal mine or any of them.

3. The allotment of the captive blocks will also be subject to the following conditions:

(i) The end use for which coal mined from the captive block should be utilized and all the conditions imposed by the Central Government mentioned in this letter conveying offer by the Screening Committee of captive block to M/s. Karnataka Power Corporation Ltd, may be clearly specified in the mining lease.

(ii) All the conditions imposed by the Central Government while conveying the previous approval to the State Government under Section 5(1) of the Mines and Minerals (Development & Regulation) Act, 1957 for grant of mining lease in favour of captive mining party should clearly form part of the lease deed to be executed between the concerned State Government and the party.

(iii) In case the captive block has been offered for washing-cum-end use, the deed must clearly specify that the beneficiated coal from the washery will exclusively be used for the end use (power generation) as approved by the Central Government and not for commerce or otherwise. Tailings, middlings or rejects, as the case may be, shall be used for captive consumption only by the applicant as approved by the Central Government.

(iv) The allocattee would furnish to this Ministry detailed plan for disposal of unusable containing carbon materials obtained during the process of mining or any process thereafter including washing etc. so as to avoid any need for disposal of the same through sale etc. at a later stage, within 30 days of receipt of this letter or submission of mining plan whichever is earlier.

(v) No coal shall be sold, delivered, transferred or disposed of except for the stated captive mining purpose (power generation) except with the previous approval of the Central Government in writing.

(vi) There should be complete synchronization between the captive coal mining operations and the development of end-use (power generation) plant so that no situation arises where the company is left with coal extracted from the captive block when the end-use plant is yet to be operational.

(vii) Approval of mining plan shall be considered only after financial closure for the end use project is achieved.

(viii) Existing coal linkage from CIL/SCCL, would not be disturbed in any way with the coal

mined from the allocated blocks. The coal linkage of 2.5 mtpa provided for the TPS from MCL shall continue.

(ix) Further, detailed exploration of the block, if required, shall be carried out by CMPDIL or under its direct supervision, on payment basis by the applicant.

(x) Violation of any of the conditions will render the allocation of the block/ grant of the lease as the case may be liable for cancellation.

4. The progress in the end use project and the development of the allocated blocks should be reported to this Ministry every 3 months from date of issuance of this letter.

5. The company may approach CIL for more detailed information, geological report etc. and contract the State Government authorities concerned for completing the necessary formalities for attaining mining lease rights and related matters. The company will be required to apply for mining lease within a period of six months. The arrangement of transport of coal, if any, etc. will have to be worked out by the company in consultation with the Ministry of Railways/Ministry of Surface Transport depending on the mode of transport.

Yours faithfully,

(S. Gulati)

Director"

(emphasis added)

3.2.2. On 16th April, 2004, the Ministry of Coal and Mines issued a Gazette Notification under Section 3(3)(a)(III)(4) of the Coal Mines (Nationalization) Act, 1973[19] stating as below:

19 For short '1973 Coal Act

"MINISTRY OF COAL AND MINES

(Department of Coal)

NOTIFICATION

New Delhi, the 16th July, 2004

S.O. 824(E) - In exercise of the powers conferred by item(4) of subclause (III) of clause (a) of Sub-section (3) of Section 3 of the Coal Mines (Nationalisation) Act, 1973 (26 of 1973) the Central Government hereby specifies as an end use the supply of coal from the coal mines of Kiloni, Manoradeep and Baranj I-IV blocks by the Karnataka EMTA Coal Mines Limited on an exclusive basis to the Karnataka Power Corporation Limited for generation of thermal power in their proposed 1000 MW (2 x 500 MW) TPS at Ballary, Karnataka subject to condition that the Karnataka Power Corporation Limited holds at least 26 per cent of voting equity share capital of the Karnataka EMTA Coal Mines Limited at all times.

[F.No. 13016/33/2003-CA]

APVN Sarma, Jt. Secy."

3.2.3 On 08th December, 2004, the MoC, Government of India issued a letter to KECML approving the Mining Plan submitted by it for the Baranj Open Pit Project under Section 5(2)(b) of the Mines and Mineral (Development & Regulation) Act, 1957[20]. The appellants herein have taken a plea that the Mining Plan did not contain any provision contrary to the JVA with respect to the rejects and what KECML was required to do to dispose off the rejects, was stipulated under Clause 5(2)(b) of the JVA which required it to dispose off the rejects in an environment friendly manner. It was submitted that there was no clause in the Mining Plan that ran contrary to the JVA. The said plea has however been disputed by the respondent-CBI.

20 For short 'MMDR Act'

3.3 FUEL SUPPLY AGREEMENT

3.3.1 Article 6 of the JVA stipulated execution of an Agreement between KPCL and EMTA for supply of washed coal, described as the 'Fuel Supply Agreement[21]. The FSA was executed on 09th May, 2007 and its relevant clauses are as below:

FUEL SUPPLY AGREEMENT

'THIS AGREEMENT made this ninth day of May two thousand seven between KARNATAKA EMTA COAL MINES LIMITED, …… called the "Supplier"…….of the First Part and

KARNATAKA POWER CORPORATION LIMITED, …. called the "Purchaser'….of the Second Part.

WITNESSETH AS FOLLOWS

a) WHEREAS Purchaser inter alia is engaged in the business of generating power through its various thermal, hydel, wind power stations and is taking up a new thermal power plant named as Bellary Thermal Power Station (hereinafter referred to as BTPS), with an initial capacity of 500 MW likely date of commissioning is July, 2007.

b) AND WHEREAS the annual requirement of coal at BTPS will be approximately 2 million tonnes.

c) AND WHEREAS pursuant to the policy of Govt. of India of leasing out coal mines to power generating agencies for use as captive coalmine(s) for their own consumption, the Purchaser has been allocated mining block(s) identified as Baranj I-IV, Manoradeep & Kiloni vide allotment Letter No.47011/1(1)12002-CPAM/CA dated 10.11.2003 . The Purchaser has assigned and entrusted the responsibility

21 For short 'FSA'

to develop and operate the said coal mines to the Supplier. For this purpose, the Purchaser has entered into a Joint Venture Agreement dated 13.9.2002 with, M/s. Eastern Minerals & Trading Agency (in short EMTA hereinafter), to form a joint venture company (hereinafter' called the "Supplier") for development and operation of such coal) mines. **The entire amount of coal produced from such coal mines shall be sold, transported and delivered by the Supplier exclusively to the Purchaser for use at BTPS in accordance with the provisions of this Agreement.**

xxxxx

ARTICLE 1

DEFINITIONS

xxxxx

"Coal" means washed coal with guaranteed values as per Article-6 and satisfies quality parameter laid down in Annexure -I attached to this agreement.

xxxxx

"**GCV (ADB)" means Gross Calorific value on air dried basis in Kcal/Kg determined through a Bomb Calorimeter as measured at BTPS as per IS 1350 (Part- II).**

xxxxx

"Joint Venture Agreement" means the agreement dated 13.09.2002 entered into between the Purchaser and M/s. Eastern Minerals & Trading Agency to form a joint venture company.

xxxxx

"Specified Coal" means washed coal as defined in the Schedule of Specification (Annexure I) of this Agreement.

xxxxx

ARTICLE 4

CONDITIONS PRECEDENT

4.1 The respective obligations of the Parties under this Agreement shall be subject to the satisfaction in full of each of the following conditions precedent prior to Commencement Date:

i) The Purchaser has assigned the mining rights in favour of the Supplier

ii) The Supplier has obtained all the necessary clearances and approvals required from the concerned authorities regarding operation of the Designated Coal Mines and submitted a copy of same to the Purchaser.

iii) The Supplier has registered this Agreement with the relevant authority at the time and in the manner stipulated in the Monopolies and Restrictive Trade Practices Act, 1969 as amended from time to time, to the extent the provisions are required to be registered.

xxxxx

ARTICLE 5

QUANTITY AND QUALITY

5.1 QUANTITY

The Supplier shall supply and the Purchaser shall take coal in quantities of 2 Million Tonnes (+)/(-) 10% per annum. The quantity may increase depending on requirement of the Purchaser.……

5.2 QUANTITY

5.2.1 The Supplier shall ensure that it shall supply the Washed Coal with guaranteed value as per Article – 6 and satisfies quality parameter laid down in Annexure-I attached to this agreement to the Delivery Points without any interruption and shall maintain quality of

supply as required. The following procedure is indicated in respect of Joint Sampling.

a) third party agency shall be appointed jointly by the parties of the agreement for sampling and analysis of coal received at BTPS end….

b) The third party agency shall be required to undertake sampling and analysis of coal as per the provision of ISI/ BIS or mutually agreed procedure.

c) The payment to the third party agency shall be borne by the supplier.

d) In the absence of certification by the independent Inspection agency for any rake, KPCL is not liable for payment for such rake.

5.2.2 The Supplier shall take all reasonable steps to ensure that shales/stones are removed from the coal and no lumpy and/ or oversized coal is supplied and the quality of coal shall fall within the parameters indicated in the Annexure - I. The methodology for verifying the incidence of stones/shales shall be mutually agreed to between the Purchaser and the Supplier. The size of coal shall be less than 25 mm (0-2 mm fine not >20%).

xxxxx

ARTICLE 6

CONTRACT PRICE OF COAL

6.1 The Purchaser shall purchase the entire quantity of Specified Coal supplied to it at the commercial terms and conditions stated herein below:

6.1.1 Price

a) Purchaser shall purchase the entire quantity of specified coal supplied to BTPS at a price of Rs. l 650.47 per tonne, the detailed break

up of which is as per Annexure - II attached to this agreement.

xxxxx

6.1.3 Basis of payment and price adjustment

xxxxx

C) PRICE ADJUSTMENT

The size of coal, ash content and GCV of coal would be checked and compared with the guaranteed values as indicated below:

(a)	**GCV (ARB)**	**4500 in Kcal/KG**
(b)	**Permissible variation**	**max. 4500 Kcal/Kg.&**
(c)	**Ash content**	**32% maximum**
(d)	**Size of coal**	**0 to 25 mm with fines (upto-2mm) not exceeding 20%**
(e)	**Total moisture**	**6% minimum; 15 maximum**

Suitable price adjustment would be carried out by Purchaser for variation in properties compared to the guaranteed value as indicated in the following paragraphs.

xxxxx

ii) GCV (ARB)

a) No Pro rata price adjustment is allowed for the OCV over and above 4500 Kcal/kg.

b) In case the GCV is between 4200 to 4500 Kcal/Kg the price adjustment will be on the Base Price on Pro rata basis.

c) In case the GCV of the coal supplied falls between 4000-4200 Kcal/Kg, the price payable is restricted to 50% of the Base Price.

d) In case the GCV is below 4000 Kcal/Kg Purchaser shall not be required to pay for such supplies including freight and other incidental charges. The coal supplied having GCV of below 4000 Kcal/Kg will be consumed.

Adjusted rate per Mt. is calculated as per formula defined in Annexure-III

iii) The size of coal shall not exceed 0 to 25mm with fines (0-2 mm) not exceeding 20%.....

xxxxx

ARTICLE 8

SAMPLING OF COAL AND ANALYSIS OF QUALITY

8.1 The quality of coal shall be determined by drawing coal samples from railway wagons on receipt at KPCL power plants before unloading.

8.2 A third party agency shall be appointed jointly by the parties of the agreement for sampling and analysis of coal received at BTPS end. The third party agency shall carry out the sampling and analysis of coal in the presence of the representative of the parties.

8.3 The third party agency shall be required to undertake sampling and analysis of coal as per the provision of ISI/BIS or mutually agreed procedure.

8.4 The payment to the third party agency shall be borne by the Supplier.

xxxxx

ARTICLE 10

PENALTY

10.1 The Supplier has agreed to commence supply of coal to BTPS on commissioning which has been rescheduled July 2007.

10.2 The delivery period stipulated in 10.1 above for the supply of coal as envisaged in Article 5 shall be the essence of the contract. In the event of failure to commence the delivery of coal within the stipulated time specified above, Purchaser shall impose a penalty at a rate of

l/2% of initial contract value of Rs.330.09 crores i.e. Rs 1.65 crores for every week's delay subject to a maximum of 10% of the contract value of Rs.330.09 crores i.e. Rs.33.00 crores.

(emphasis added)

3.3.2 In terms of Articles 2 and 5 of the FSA, a Tripartite Agreement was executed between KECML, KPCL and M/s SGS India Private Limited[22] on 20th June, 2008. M/s SGS was appointed as a third-party agency for purposes of sampling and analysis of the coal to be received at BTPS.

3.3.3 For the sake of completion of narration, it may be noted here that although the MoC had approved the Mining Plan submitted by KECML on 08th December, 2004 and the FSA referred to above was executed on 09th May, 2007, the actual mining and coal production could be commenced by KECML only in September, 2008 on account of the litigation initiated by M/s Central India Power Company[23] against the MoC in relation to the coal block allocated to KPCL. In July, 2003 CIPCO filed a writ petition[24] before the Nagpur Bench of the Bombay High Court seeking reallocation of coal blocks allocated to KPCL. On 21st May, 2006, a *status quo* order was passed by the High Court in the said petition and KECML and KPCL were also made parties. The said petition was finally dismissed by the High Court on 10th August, 2006 which dismissal order was upheld by this Court on 05th January, 2007. Due to the *status quo* order operating in all this duration, the coal production could commence at site only in September, 2008 and washed coal was supplied by KECML to the BTPS w.e.f. December, 2008. Due to non-supply of washed coal by KPCL as stipulated in Article 6(4) of the JVA and Article 10 of the FSA, KPCL imposed penalties on KECML for the delay.

22 In short 'SGS'

23 Hereinafter referred to as 'CIPCO'

24 Writ Petition No. 2923 of 2003

3.4 MEMORANDUM OF UNDERSTANDING

3.4.1 Since Article 5(2) of the JVA required the appellants to establish a coal washery at the pithead to supply coal of the required specification for the consumption of BTPS and there were several layers of clearances required from the authorities to establish the washery at the pithead, it is the stand of the appellants that KECML entered into a Memorandum of Understanding[25] with M/s Gupta Coalfields and Washeries Limited[26] for washing of the mined coal, transportation of raw coal, transportation of washed coal from the washery to Majri Railway siding of KECML and loading into the railway wagons for onward despatch to BTPS. For the said purpose, GCWL agreed to dedicate its Majri washery to KECML. Following are the relevant terms of the aforesaid MoU:

"MEMORANDUM OF UNDERSTANDING'

"This **MEMORANDUM OF UNDERSTANDING** is made and executed on this 20th May of December, 2008

BETWEEN

KARNATKA EMTA COAL MNINES LIMITED, ……. through its Director, Shri Bikash Mukherjee herein after referred as 'KECML', …… assigns of the FIRST PART.

AND

GUPTA COALFILEDS & WASHERIES LTD., …… through its Managing Director, Shri Padmesh Gupta ……. assigns of the SECOND PART

xxxxx

NOW BOTH THE PARTIES HAVE AGREED TO SIGN AN MOU TO UNDERTAKE THE ABOVE ACTIVITIES WITHNESSETH AS UNDER –

25 For short 'MoU'

26 Hereinafter referred to as 'GCWL'

1. KECML has entered into a Coal Purchase Agreement with KPCL dated 9th May, 2007, whereby KECML shall require to supply coal from the above designated coal mines with the following parameters

a)	**GCV (ARB)**	**4500 Kcal/Kg**
b)	**Permissible variation**	**Max 4500 Kcal/Kg & Min 4000 Kcal/Kg**
c)	**Size**	**0-50 mm with fines (upto -2 mm) not exceeding 20%**
d)	**Total moisture**	**6% minimum, 15% maximum**

Suitable price adjustment (CIFD BTPS basis) would be earned out for variation in properties compared to the guaranteed values as follows

xxxxx

It has been agreed by the parties hereto that the above parameters shall be maintained by GCWL for onward supply of coal to BTPS of KPCL by KECML

2. KECML has agreed to provide minimum 2 mtpa (Min 8000 tonnes on daily average basis) raw coal to Majri washery of GCWL from their Raw Coal Dump Yard. **It shall be GCWL's responsibility to arrange/transport Raw Coal from the mines to MAJRI washery process the coal to achieve agreed specifications of the washed coal, transportation of washed coal to Majri railway siding to load minimum two rakes daily, supervise the loading of washed coal, onward delivery at BTPS power plant and co-ordination.**

xxxxx

4. GCWL has agreed to deliver washed coal of following specifications –

Ash (ABD)	Less than 32 %
GCV (ARB)	4500 Kcal/Kg
Size	0-5 mm

5. Yield Parameters GCWL shall ensure, broadly, of 90% if the ash content of the raw coal is 35% to 36% and in the event ash content of the raw coal is found to be 40%, the yield shall be 80%. However, after analysis of the full seam of coal available from the mine the yield percentage will be settled on suitable terms.

xxxxx

7. **KECML shall pay Rs. 90/- Per MT (excluding all taxes as applicable) of raw coal towards washing charges including charges for loading washed coal to dumpers for transportation to railway siding.** All taxes and duties are applicable shall be reimbursed by KECML at actual. The above charges will remain firm for 3 years ….

8. **It will be the responsibility of GCWL to transport raw coal from mines to washery and washed coal from washery to KECML siding and supervise the loading onto railway wagons**. The transportation rates shall be decided mutually by both the parties which shall be reimbursed by KECML at actual KECML shall place indents with railways and make rail freight payments etc, as per RR on actual

xxxxx

12. **That the rejects shall be the joint property of KECML and GCWL and it shall be disposed**

off/sold jointly at mutually agreed terms, subject to compliance of rules/ regulations/ guidelines of Ministry of Coal, Government of India, if applicable.

xxxxx"

3.4.2 The appellants have stated that the draft MoU was sent to KPCL for its approval by Mr. Murlidhar Rao, the then Director (Technical) of KPCL and Director of KECML and after deliberations between 18th December, 2008 and 12th January, 2009, the same was finally approved and ratified by the Board of KECML on 13th January, 2009. In the meeting of the Board of Directors of KECML held on 13th January, 2009, those who had participated included Mr. S.M Jaamdar, the then Managing Director of KPCL and Chairman of KECML, Mr. R. Balasubramanian, the then Executive Director and Company Secretary of KPCL and Director of KECML, Mr. D.C. Sreedhar, the then Director (Finance) of KPCL and Director of KECML, Mr. U.K. Upadhyaya, Chairman and Managing Director of EMTA and former MD of KECML (appellant No. 2 in the appeals). In the Meeting held on 23rd February, 2010, the Board of Directors of KECML subsequently concluded that washing of raw coal was necessary since a specific grade of coal was required by the BTPS for generation of power and therefore, washed coal should continue to be supplied on the same basis. The appellants have also pointed out that GCWL was known to KPCL that had earlier entered into an agreement with GCWL along with two other washery operators for washing of coal mined by Western Coalfields Limited. However, the respondent-CBI has questioned the execution of the MoU between KECML and GCWL, in particular, Clause 12 thereof.

3.5 WASHABILITY REPORT OF THE CENTRAL INSTITUTE OF MINING AND FUEL RESEARCH, NAGPUR

3.5.1 In the year 2009, to check the statistics of the coal mine, the appellants approached a Government Laboratory,

namely, Central Institute of Mining and Fuel Research[27] for testing of the Integrated Baranj Open Cast Mines[28]. The team of officers from CIMFR visited the site, collected 100 MT of coal for testing and furnished a Detailed Washability Report. The report states that the rejects did not contain any useful c.v. as the GCV of the rejects was 1094 Kcal/Kg and the useful heat value was negative.

3.6 REVISED MINING PLAN

3.6.1 After the mining continued for about two years in terms of the original Mining Plan submitted in the year 2004, KPCL decided to increase the capacity of BTPS from 2.5 Mty to 5 Mty. As a result, the appellants were required to prepare a revised Mining Plan for supplying the increased mining demands. On 20th December, 2010, the appellants addressed a letter to the MoC for seeking approval of the revised Mining Plan. At that stage, a new technology for utilization of the rejects for its carbon value was introduced, described as the Fluidised Bed Combustion[29]. The letter issued by the appellants to the MoC mentioned that the rejects generated could be gainfully utilized for its carbon content by generating power through FBC/CFBC power plants of appropriate capacity. It is not in dispute that the new technology of FBC could have been put to use only when a plant in respect of the same was set up for which several approvals would be required from various departments besides the process of acquiring land for setting up the plant spreading over four to five years, as a power plant could not be installed within the mining lease area. The appellants have pleaded that KPCL could not have started using the rejects immediately upon receiving approval of the revised Mining Plan and that the rejects having optimum useful heat value/GCV i.e. 2500 Kcal/kg, could have been used only by applying the FBC technology after such a facility was set up.

27 In short 'CIMFR'

28 In short 'IBOCM'

29 For short FBC.

3.6.2 *Vide* letter dated 24th August, 2011, the MoC approved the revised Mining Plan submitted by KECML whereafter the process of obtaining preliminary approvals including environmental clearance from the Ministry of Environment, Forest and Climate Change, Government of India[30] for the enhanced capacity of 5 MTPA coal from 2.5 MTPA was initiated. While the Terms of Reference was granted by the MoEF&CC, the mandatory public hearing required to obtain environment clearance could not be conducted since this Court passed an order in the year 2014 deallocating all captive coal blocks. Before that, due to disputes that had arisen between KECML and GCWL, washing of coal was stopped at the washery of GCWL w.e.f. 22nd May, 2012.

3.7 INFORMATION SUBMITTED BY KECML TO THE COAL CONTROLLER

3.7.1 On 14th December, 2012, the Office of the Coal Controller that falls under the MoC called upon the KECML to furnish details in terms of the prescribed formats in respect of the production, stock, despatch of coal to the washery etc. *Vide* letter dated 16th January, 2013, KECML furnished the detailed data as per the prescribed format. The said letter stated that from December, 2008 to December, 2012, approximately 3,61,000 MT of rejects was generated at the washery; that the ash content of the raw coal varied from 35 per cent to 37 per cent and the content of the washed coal varied from 32 per cent to 34 per cent; that the yield of the washery was about 95 per cent to 96 per cent and the residual 4 per cent of the raw coal were rejects whose ash content was over 90 per cent and was therefore not marketable. It was further stated that the quality of the rejects was so poor that no records were maintained regarding its utilization. However, the rejects were used to fill up low land area of siding and road between coal blocks to the washery and for pit dumping near the washery.

30 In short 'MoEF&CC'

3.7.2 To substantiate the statement made that the yield of the washery was 95 to 96 per cent, the appellants relied on the Washability Report prepared by CIMFR, Nagpur unit dated 01st August, 2009 which records that IBOCM coal is amenable to wash with yield varying from 90 to 98 per cent at the desired ash level of 32 per cent. The Report has recorded that the GCV of the mined coal fit for transporting to BPTS is 4464 Kcal/kg and that of the rejects is 1094 Kcal/kg. The data prepared in a format and submitted in a tabulated format by KECML to the Coal Controller for the period between the year 2008-09 and 2012-13 is extracted below:

Sl. No.	Year	Production	QTY OF COAL DIRECTYLY DESPTACHED TO SIDING	QTY OF COAL DESPATCHED TO WASHERY	WASHED COAL PRODUCED	REJECTS PRODUCED	REJECTS CONSUMED (APPROX.)
1	2	3	4	5	6	7	8
1	2008 09	990839	7744	90436	860367	40069	30000
2	2009 10	2252358	0	2216334	21177107	98627	70000
3	2010 11	2274995	0	2368455	2263059	105396	70000
4	2011 12	2189869	0	2205395	2108000	97395	50000
5	2012 13	1832770	1606343	225056	205200	19856	20000
Total		9539831	1614087	7915676	7554333	361343	240000

Ash % of Raw coal varies from 35% to 37%

Ash % of wash coal varies from 32% to 34%

% age of yield of washed coal varies from 95-96%

7915676 X (35+37)/2 = 7554333 X (32+34)/2 + 361343 X (A)

where A= Ash% of Rejects,

Hence A = (284964336 - 249292989)/ 361343 = 98.7%

The quality of rejects is as good as stone and not saleable

Pertinently, the data regarding despatch of coal for washing has been furnished only upto May, 2012 since a dispute had arisen between KECML and GCWL thereafter. The second last column mentions the total rejects produced at IBOCM as 3,61,343 MT[31] and the rejects consumed as 2,40,000 MT.

31 Metric Tonnes

3.8 AUDIT OBJECTIONS RAISED BY THE COMPTROLLER AND AUDITOR GENERAL[32]

3.8.1 On 31st October, 2013, the Office of the Principal Accountant General (E&RSA), Karnataka raised an audit inquiry on KPCL on the subject of non-utilization of the washery rejects and the resultant undue benefit of ₹ 53.37 crores to a private company. The audit inquiry noted that KECML had engaged a third party agency namely, GCWL through a MoU for washing of coal and Clause 12 of the MoU stipulated that rejects should be the joint property of KECML and GCWL which ought to be disposed of/sold jointly at mutually agreed terms subject to compliance of the relevant rules, regulations/ guidelines issued by the MoC, if applicable. It was stated that KECML had executed the MoU with GCWL to dispose off the rejects without the concurrence of KPCL and KPCL did not demand the washery rejects from KECML either for its captive consumption or for its disposal. Further, it was stated that no coal could be sold/delivered/disposed of except for captive mining purpose, i.e., power generation and with the previous written approval of the Central Government.

3.8.2 The observations made by the CAG in Audit Inquiry No. 18 are extracted below:

"We observed that

- Depending on the type of coal being washed and the requirement of the captive user, the rejects and middlings are generated from washery. A study report indicates that washing of D-grade coal generates rejects and middling of F and G-grade, and such low quality coal was also being used in power generation.
- The purpose of allocation of coal blocks for captive use under section 3(3) of the Coal Mines (Nationalisation) Act, 1973 is not to enable free trading of coal by private

32 For short "CAG"

companies. The basic concept of captive mining permitted under the aforesaid Act is that the coal obtained from a captive block shall be used entirely and exclusively for the specified and approved end use by the allocatee Company and, therefore, the production of surplus coal should not result in any undue advantage to the captive block allocatee as the coal block is allotted to them for use in their end-use plant only and any additional production from the block should be made available to the Government for utilization.

- While allocating the coal block in November 2003, the Government directed the Company to use the rejects for its own captive consumption.
- In reply to the clarification sought (October 2003) by the Ministry of Coal regarding detailed plan about the use of middling, tailings and rejects etc, the Company informed (October 2003) that the same was proposed to be used for power generation with fluidized-bed boilers.

Thus, the inaction on the part of the Company resulted in the KECML/EMTA disposing the coal rejects without transferring the revenue to KPCL. Considering the coal rejects as G-grade based on GCV undue benefit afforded to the KECML/EMTA worked out to Rs. 52.37 crore, as detailed below:

Year	Coal produced at Baranj OCP (in Tonnes)	Minimum quantity of rejects as per MOU (10%)	Average CIL rate of G grade coal (Rs.)	Loss (₹)
2008-09	990839.026	99083.903	590	58459502.53
2009-10	2252358.28	225235.83	620	139646213.05
2010-11	2274994.46	227499.45	650	147874639.58
2011-12	2188869	218886.9	650	142276485.00
2012-13 (up to June 2012)	570869.3	57086.93	620	35393896.60
				52,36,50,736.76

Facts and Figures may be confirmed"

3.8.3 *Vide* letter dated 17th December, 2013, KPCL submitted the following reply to Audit Inquiry No. 18:

<table>
<tr><th>"Sl. No.</th><th>Question</th><th>KPCL Reply</th></tr>
<tr><td>1.</td><td>Audit Inquiry No. 18
Sub: Non-utilisation of washery rejects by the company and resultant undue benefit of Rs 52.37crores to private company.
In November 2003, Government of India allocated captive coal blocks in Wardha Valley region to the Company to develop it as source of supply to its thermal power plant al Bellary. In accordance with the requirement of the Company, the JV Company (KECML) engaged (December 2008) a third party agency, M/s Gupta Coalfields and Washeries Limited (GCWL), Nagpur through a Memorandum of Understanding for washing of coal. Clause 12 of the MOU stipulated that the rejects should be the joint property of KECML and GCWL and it should be disposed off/ sold jointly at mutually agreed terms, subject to compliance of rules/regulations/guidelines of Ministry of Coal, Government of India, if applicable.
The washing of coal was carried out till the end of June 2012 before it was discontinued due to dispute between the parties to the MOU.
KECML entered into MOU with GCWL to dispose of the rejects without the concurrence of the Company. Despite the fact that the Company holds the right on the captive coal blocks, no provision was made in the FSA made by the Company with KECML for supply of rejects/middling. It did not demand the washery rejects from KECML either for its captive consumption or for its disposal by its own means with the approval of Central Government.
The conditions of allocation inter-alia included that if the coal was being washed, tailings, middling or rejects, as the case may be, from washery should be used for captive consumption only by the Company as approved by the Central Government. Further, no coal shall be sold, delivered, transferred or disposed of except for the stated captive mining purpose (power generation) and with the previous approval of the Central Government in writing.
We observed that:
> Depending on the type of coal being washed and the requirement of the captive user, the rejects and middling are generated from washery. A study report indicates that</td><td>The Audit objection is raised as if the entire rejects have been appropriated by KECML and that the rejects have a market value of Rs. 52.37 crores. These are factually incorrect in view of the following : -
a) The assessment of washery rejects does not have any direct co-relation with the quantity of coal produced at Integrated Baranj OCP, rather, the quantity sent to washery and the quantity actually dispatched to the thermal power stations of KPCL after the processing in the washery are the two important quantities giving idea of reject generation at the washery. We are furnishing below the year-wise quantity of coal sent to washery from Integrated Baranj OCP, the quantity of rejects generation and the quantity of coal finally dispatched to KPCL.
<table><tr><th>Year</th><th>Coal produced at Baranj OCP (in Tonnes)</th><th>Minimum quantity of rejects as per MOU (10%)</th><th>Average CIL rate of G grade coal (Rs.)</th><th>Loss (Rs.)</th></tr><tr><td>2008-09</td><td>990839.026</td><td>99083.903</td><td>590</td><td>58459502.53</td></tr><tr><td>2009-10</td><td>2252358.28</td><td>225235.83</td><td>620</td><td>139646213.05</td></tr><tr><td>2010-11</td><td>2274994.46</td><td>227499.45</td><td>650</td><td>147874639.58</td></tr><tr><td>2011-12</td><td>2188869</td><td>218886.9</td><td>650</td><td>142276485.00</td></tr><tr><td>2012-13 (up to May 2012)</td><td>570869.3</td><td>57086.93</td><td>620</td><td>35393896.60</td></tr><tr><td></td><td></td><td></td><td></td><td>52,36,50,736.76</td></tr></table>b) It may be noted that the said rejects are only Stones / Boulders not consistent with the size of coal : (- 25 mm) for which the boiler is designed, hardly have</td></tr>
</table>

washing of D-grade coal generates rejects and middling of F and G-grade, and such low quality coal was also being used in power generation.

> The purpose of allocation of coal blocks for captive use under section 3(3) of the Coal Mines' (Nationalization) Act, 1973 is not to enable free trading of coal by private companies. The basic concept of captive mining permitted under the aforesaid Act is that the coal obtained from a captive block shall be used entirely and exclusively for the specified and approved end use by the allocatee Company and, therefore, the production, of surplus coal should not result in any undue advantage to the captive block allocatee as the coal block is allotted to them for use in their end-use plant only and any additional production from the block should be made available to the Government for utilization.

While allocating the coal block in November 2003, the Government directed the Company to use the rejects for its own captive consumption.

> In reply to the clarification sought (October 2003) by the Ministry of Coal regarding detailed plan about the use of middling, tailings and rejects, etc, the Company informed (October 2003) that the same was proposed to be used for power generation with fluidized-bed boilers.

Thus, the inaction on the part of the Company resulted in the KECML / EMTA disposing the coal rejects without transferring the revenue to KPCL Considering the coal rejects as G-grade base on GCV undue benefit afforded to the KECML / EMTA worked out to Rs.52.37 crore, as detailed below.

Year	Quantity sent to Washery from integrated Baranj OCP	Quantity of rejects generation	Quantity of coal finally dispatched to KPCL
2008-09	9,31,195.026	98,940.003	8,08,871.000
2009-10	22,16,334.815	71,891.838	21,68,827.000
2010-11	23,68,121.815	1,24,137.309	22,12,460.790
2011-12	23,68,121.995	33,081.099	21,63,569.650
2012-13 (up to June 2012)	2,25,035.600	34,978.967	2,11,206.350
	79,46,082.736	3,63,023.216	75,63,934.800

any calorific value. Therefore the said rejects have been used for leveling, piling etc. towards facilitating Integrated Baranj OCP.

c) The Audit comment is a generalized observation without any factual support and as such cannot be concluded that the washery rejects irrespective of the geological location of the source of coal would have Useful Heat Value (UHV) to cater to the generation requirement. In fact, the rejects generated in the present case are only shale and non- coal matter. Hence the conclusion drawn by Audit that the rejects are G- grade is not only arbitrary but also not based on the ground geological realties.

Thus, the abandonment of rejects at the collieries end has been resorted to based on its utility, as otherwise its transportation would have imposed additional burden on the Company.

The abandonment of rejects is, therefore, in order.

Though KPCL requested the CAG to drop the audit objection in view of its clarification, it is a matter of record that the CAG did not accept the explanation offered by KPCL. Instead, CAG observed in its Audit Report for the year ending March, 2013 that coal rejects

worth ₹52.37 crore had been misappropriated by KECML and GCWL on account of the inaction on the part of the KPCL.

3.9 PRELIMINARY INQUIRY REGISTRED BY RESPONDENT-CBI

3.9.1 On receiving the Report from the Office of the CAG, KPCL dashed off a letter dated 31st July, 2014 to KECML seeking an account of the rejects generated by washing of coal and demanded reimbursement of the cost of the rejects. KECML responded *vide* letter dated 14th August, 2014 reiterating therein that the percentage of rejects generated at the washery were only 4.39 per cent of the total coal produced at the IBOCM and the said rejects did not possess any c.v. having no carbon and only being stones/boulders. Therefore, the same had been used at the site for levelling, piling etc. for facilitation of smooth mining operations at the IBOCM.

3.9.2 In the meantime, based on a Source Information Report[33] pertaining to some irregularities committed in the allocation of coal blocks under the 'Government Dispensation' category, failure to follow the due procedure resulting in large private companies having connived with public servants and gaining undue benefit a Preliminary Inquiry[34] was registered by the Superintendent of Police, CBI on 28th September, 2012. In all, three Preliminary Inquiries were registered namely, PE 2, PE 4 and PE 5. The FIR[35] subject matter of the present appeal was registered by the respondent-CBI on 13th March, 2013[36] under Section 120-B read with Sections 409 and 420, IPC and under Section 13(2) read with 13(1)(d) of the PC Act alleging substantive offences against the appellants and other co-accused. Following are the fourteen persons/entities who have been arrayed as accused by the respondent-CBI:

33 'SIR-03/12

34 PE 5/2012-BS&FC, Delhi Coal Block Cases

35 FIR No. RC: 220 2015 E 0002

FUNCTIONARIES OF KPCL	
A-1	SM Jaamdar, (Rtd IAS and the then Managing Director Karnataka Power Corporation Limited "(KPCL") and Chairman of Karnataka EMTA Coal Mines Ltd ("KECML")
A-2	Balasubramanium, then Executive Director and Company Secretary, KPCL and Director KECML
A-3	Muralidhar Rao, Director (Technical) KPCL, Director – KECML
A-4	DC Sreedharan, Director (Technical) KPCL and Director KECML
A-5	H.N. Narayana Prasad, the then Director (Technical) KPCL, and Former Director KECML
FUNCTIONIARIES OF KECML	
A-6	Ujjal Kumar Upadhyay, Chairman and MD EMTA Coal Ltd and Managing Director of KECML
A-7	Bikash Mukherjee, Director EMTA and Former Director of KECML
A-8	Bishwanath Dutta, Director EMTA and Director KECML
A-9	Purajit Roy, Executive Director and CFO M/s EMTA Coal Ltd
A-10	Ashok Tooley, Director KECML
FUNCTIONARIES OF GCWL	
A-11	Padmesh Gupta, CMD Gupta Coal Washeries Limited
CORPORATE ENTITIES & FUNCTIONARIES	
A-12	Karnataka EMTA Coal Mines Ltd. (KECML)
A-13	M/s Eastern Minerals and Trading Agency (EMTA)
A-14	Gupta Coal Washeries Limited

Though the appellants have asserted that the respondent-CBI has registered the complaint on coming across the Report of the CAG, the said submission has been refuted by the respondent-CBI who has pleaded that it had conducted an independent investigation after registering the PE which was followed by registering of the FIR.

3.10 LITIGATION BETWEEN KPCL AND KECML

3.10.1 Aggrieved by the letter dated 31st July, 2014 addressed by KPCL to KECML, KECML filed two writ petitions[37] before the High Court of Karnataka praying *inter alia* for quashing of the letters dated 31st July, 2014 and 24th December, 2014 issued by KPCL. In the writ

37 Writ Petition 2995 to 2996 of 2016 (GM-MMS) c/w Writ Petition Nos. 2997 to 2998 of 2016 (GM-MMS)

petitions[38] EMTA and KECML assailed a demand of ₹ 52,37,00,000/- (Rupees Fifty two crore thirty seven lakh only) raised by KPCL towards the value of the coal rejects, as arbitrary. Challenge was also laid to the decision taken by KPCL to deduct ₹ 90 (Rupees Ninety) per MT towards non-washing of coal, in terms of its communications dated 23rd November, 2013 and 29th January, 2014. *Vide* Judgment dated 24th March, 2016 the Division Bench of the High Court allowed both the writ petitions[39] and quashed the communications issued by KPCL to KECML. Further, KPCL was restrained from initiating any demand against KECML on the basis of the report of the CAG and called upon to reimburse the amounts already deducted by KPCL towards non-washing of coal.

3.10.2 For the sake of completion of the narrative pertaining to the aforesaid litigation, it is pertinent to note that the aforesaid judgement dated 24th March, 2016, was challenged by KPCL before this Court by preferring Petitions for Special Leave to Appeal.[40] *Vide* Judgment dated 20th May, 2022, both the Civil Appeals[41] were dismissed.

3.10.3 On 31st July 2017, the respondent-CBI submitted a request to the Ministry of Personnel Public Grievances and Pension,[42] Government of India for grant of sanction to prosecute Mr. Yogendra Tripathi (IAS), Managing Director, KPCL and Mr. R. Nagaraja, Director (Finance) of KPCL and nominee Director on the Board of KECML under Section 19 of the PC Act. However, the Board of KPCL, which was the Sanctioning Authority, refused sanction for prosecution of Mr. R. Nagaraja by passing a detailed order.

3.10.4 After examining the order passed by the Board of KPCL refusing to grant sanction to prosecute Mr. R. Nagaraja,

38 Ibid

39 ibid

40 Petition for Special Leave to Appeal (C) No. 26367-26370/2016

41 Civil Appeal Nos. 5401-5404/2017

42 For short 'MoPP&P'

the Department of Personnel & Training,[43] Government of India addressed a letter dated 16th September, 2018 to the respondent–CBI stating that the Competent Authority i.e., the Central Government had denied sanction for prosecution of Mr. Yogendra Tripathi, the then Managing Director of KPCL. It is a matter of record that the respondent–CBI did not take any steps to challenge the decision taken by the Sanctioning Authority and the Competent Authority refusing permission to grant sanction for the prosecution of Mr. R. Nagaraja and Mr. Yogendra Tripathi.

3.10.5 The Charge-sheet was finally filed by the respondent–CBI against 14 persons/entities alleging that they had illegally disposed of the coal rejects in IBOCM. A Supplementary Chargesheet was filed on 4th November, 2019. Out of the two charges, one charge relating to allegations of recovery of payment for washing charges was dropped by the respondent-CBI.

3.10.6 On 1st September, 2021, the appellants filed an application before the learned Single Judge under Section 227 read with Section 239 of the Criminal Procedure Code[44] for discharging them in the case. By the common impugned order dated 24th December, 2021, the said application was dismissed and charges were framed against them on 3rd March, 2022, under Section 409 IPC and 120 (B) r/w Section 13(1)(c), 13(1)(d) r/w Section 13(2) PC Act i.e. resulting in filing of the present appeals.

C. SUBMISSIONS

4. ARGUMENTS BY COUNSEL FOR THE APPELLANTS

Following are the arguments advanced by Mr. Ranjit Kumar, learned Senior Advocate appearing for the appellant No.1 and Mr. Abhimanyu Bhandari, learned counsel appearing for the appellant No.2 :-

4.1 That KPCL did not have any right over the rejects produced from the mine and therefore, cannot claim any entitlement

43 For short 'DoPT'

44 In short 'Cr.P.C'

thereto. The terms and conditions stipulated in the JVA dated 13th September, 2002, in particular Articles 5(1)(b), 5(2)(b), 5(13) and 6(3)(c) and Annexure I, when read together, would demonstrate that the obligation cast on the KECML was limited to providing KPCL specified quality of "washing coal" containing a guaranteed value and having a specified heat value and KECML was only required to dispose off the rejects to avoid any environmental hazards.

4.2 That the original Mining Plan which was submitted by KECML and was approved by the MoC in the year 2004, did not contain any specific provision relating to how the rejects were to be disposed off and nor did the allocation letter issued by the MoC to KPCL state anything in this regard. For this, reliance has been placed on the reply furnished by the Minister of State, MoC, in the Lok Sabha in response to an unstarred question seeking an answer from the Government of India as to whether it had framed any National Policy for exploitation of coal rejects. The reply furnished by the Minister was in the negative along with a clarification given that formulation of a policy of disposal of surplus coal, by-products and middling stock rejects from coal blocks was under the consideration of the Government.

4.3 Citing Clauses 5.2 and 5.2.2 of the FSA dated 09th May, 2007 and the definition clauses in respect of the expressions, "Purchaser" and "specified coal", it has been urged that none of the clauses in the FSA have stated that KPCL would purchase or claim rights over the rejects and that KECML was to ensure that "shales/stones" are removed from the coal and the quality of coal meets the parameters indicated in Annexure I.

4.4. To fortify the submission that KECML was only required to dispose off the coal rejects in an environment friendly manner and that KPCL would have no right over the rejects or claim any entitlement over them, reference has been made to the decision of the Division Bench of the Karnataka High Court in the case of ***KPCL v. Aryan Energy Private Limited[45] and Others[46]*** and the clause in the Agreement governing KPCL

45 In short 'AEPL'

46 COMAP No. 12, 13, 14 and 15 and 2020 decided on 22nd July, 2021

and AEPL to contend that it was similar to the present case inasmuch as like KECML, AEPL was also required to dispose off the rejects in a manner that would satisfy environmental regulations. In the above case the Karnataka High Court has held that the clauses of the Agreement between the parties appearing before it showed that coal rejects were the property of AEPL and KPCL had no claim over it and that the term regarding disposal of coal rejects was imposed by KPCL only to ensure compliance of the environmental regulations.

4.4.1 Notably, the aforesaid judgement of the High Court was challenged by KPCL before this Court by way of petition for special leave to appeal[47]. The said petition was disposed of by this Court on 26th April, 2024, noting that during the pendency of the petitions, the parties had settled their disputes amongst themselves and part of the decretal amount deposited by KPCL to discharge its liability towards supply of washed coal by AEPL along with interest etc. was directed to be released in favour of AEPL in terms of the Compromise Deed.

4.5. That the Washability Report of CIMFR, Nagpur for the year 2009 had stated that the rejects had a GCV of 1094 Kcal/kg and less and therefore, the same could not have been utilized in the BTPS. For the said reason, KECML had used the rejects for captive consumption of the mine i.e. for levelling, piling etc. The very same Report was also referred to by KPCL in its reply to the audit objections raised by CAG to state that no loss has been caused to KPCL since the rejects were in the nature of stones and boulders and did not have useful heat value.

4.6. To substantiate their submission that the rejects did not have the requisite GCV for being utilized in the BTPS, learned counsel have quoted a Circular issued by the NITI Aayog in the year 2020 which states that coal rejects having GCV of 1500 Kcal/kg are to be used in back filling of mines and can be used in construction of highways, roads etc. whereas rejects having GCV in the range of 1500 Kcal/kg to 2200 Kcal/Kg, can be used in FPC Boilers.

47 Petition for Special Leave to Appeal (Civil) No. 395-398 of 2022

4.7. That at the time of filing the chargesheet on 04th January, 2018, the respondent-CBI completely ignored the judgement dated 24th March, 2016 passed by the Karnataka High Court in the writ petition filed by the appellants against KPCL wherein it has been clearly held that KPCL does not have any right over the rejects generated during the process of mining and resultantly, the demand letter dated 31th July, 2014, issued by KPCL was set aside. The said judgement has also been upheld by this Court *vide* judgement dated 20th May, 2022.

4.8. That KPCL has been blowing hot and cold. First, it had filed objections to the quantification of coal rejects as recorded by the CAG in its Report but when its objections were rejected by the CAG, it changed its stand and proceeded to raise an illegal demand on the appellants on the basis of the very same CAG Report, which has been quashed by the High Court.

4.9. That both, the Karnataka High Court and this Court having quashed the demands made by KPCL in respect of the value of rejects to the tune of ₹ 52 Crore, no case has been made out by the respondent-CBI to prosecute the appellants particularly when on the advice of the Central Vigilance Commission,[48] the Central Government refused to grant sanction for the prosecution of Mr. Yogendra Tripathi (IAS), Managing Director, KPCL and Mr. R. Nagaraja, Director (Finance) of KPCL and nominee Director on the Board of KECML. A different treatment cannot be meted out to the appellants.

4.10. That the respondent-CBI has solely relied on the Report of the CAG of 2013 to launch its prosecution in the year 2015. However, the Report of the CAG has not been approved by the Parliament in accordance with the procedure prescribed under Section 19(A) and other provisions of the Comptroller and Auditor General's (Duties, Powers and Conditions of Service) Act, 1971[49] read with Articles 148 to 151 of the Constitution of India.

48 In short 'CVC'

49 In short 'CAG Act'

4.11. That the analysis of the rejects and the manner in which loss was allegedly caused to KPCL, has primarily been arrived at by the respondent – CBI from the Report of the CAG and once this Court has held that the Report of CAG cannot be the basis for launching prosecution against the appellants, the entire basis of launching the prosecution is eroded.

4.12. Stating that contrary to the prescribed procedure that contemplates that the Report of the CAG in relation to the accounts of a Government Company shall be submitted to the Government and the Central Government/State Government, as the case may be, shall place the said Report before each House of the Parliament/State Legislature and the Public Accounts Committee/the Joint Parliamentary Committee is required to scrutinize the said Report. In the instant case, the Report of the CAG has not been accepted either by the Public Accounts Committee or by the Committee of Public Undertakings or by the Joint Parliamentary Committee nor has it been tabled before each House of the Parliament. It is only when the Report is tabled in the Parliament and duly scrutinized and the Government offers its view on the Report, can it form the basis for initiating any action. Decisions in ***Centre for Public Interest Litigation v. Union of India***,[50] ***Arun Kumar Aggarwal v. Union of India***[51] and ***Pathan Mohammed Suleman Rehmatkhan v. State of Gujarat***[52] have been cited to bring home the argument that when the Report of the CAG is subject to scrutiny by the Public Accounts Committee/Joint Parliamentary Committee, it would not be proper to refer to its findings or the conclusions drawn therein.

4.13. That the learned Special Judge, CBI has blindly accepted the charge levelled by the respondent-CBI quantifying the loss purportedly caused to KPCL on account of illegal sale of rejects at ₹49,03,54,159/- (Rupees Forty nine crore three lakh fifty four thousand one hundred and fifty nine only). The observations made in para 104 of the impugned judgement to the effect that

50 [2012] 3 SCR 147 : (2012) 3 SCC 1

51 [2013] 3 SCR 508 : (2013) 7 SCC 1

52 [2013] 12 SCR 446 : (2014) 4 SCC 156

the respondent-CBI has quantified the rejects on the basis of the documents of KECML and has calculated the loss on the basis of the rate of the lowest grade of coal prevailing at the relevant point of time is therefore, devoid of merits. Reliance has been placed on the information in the Coal Directory of India published by the MoC for the year 2010-2011 that has categorized coal and coke and clarified that w.e.f. January, 2011, by virtue of a notification issued by the MoC, there has been a switchover from the existing Useful Heat Value[53] based system of grading and pricing of non-coking coal produced in India to fully variable GCV system.

4.13.1. Under the JVA/FSA, KECML was required to supply Grade 'D' coal to KPCL. As per the Coal Directory of India, 2010-2011, Grade 'D' coal in terms of the old grades of non-coking coal would be equivalent to Grade 'G-7' and 'G-8' under the new grades of non-coking coal. The GCV range in respect of Grade 'G-7' coal has been fixed between 5201 Kcal/kg and 5500 Kcal/kg and in respect of Grade 'G-8' coal, between 4901 Kcal/kg and 5200 Kcal/kg. In the instant case, even as per the Report of the CIFMR, Nagpur, the coal rejects were found to be below either of the aforesaid grades of non-coking coal, having been pegged at a GCV of 1094 Kcal/kg. Therefore, it is contended that the chargesheet filed by the respondent-CBI quantifying the loss suffered by KPCL at ₹49,03,54,159/- (Rupees Forty nine crore three lakh fifty four thousand one hundred and fifty nine only), is without any basis and contrary to the records.

4.14. That the Coal Controller did not raise any issue with regard to the disposal of the rejects and the respondent-CBI has neither made the Coal Controller a witness or an accused in the present case.

4.15. The judgements in ***Radheshyam Kejriwal v. State of West Bengal and Another***;[54] ***Ashoo Surendranath Tewari v.***

53 In short UHV

54 [2011] 4 SCR 889 : (2011) 3 SCC 581

Deputy Superintendent of Police, EOW, CBI and Another;[55] ***J Sekar alias Sekar Reddy v. Directorate of Enforcement;***[56] and ***Prem Raj v. Poonamma Menon & Another***[57] have been cited to argue that it is settled law that where a party has been exonerated on merits in civil adjudication, criminal prosecution cannot be permitted to continue on the same set of facts and circumstances.

4.16. That the respondent – CBI has failed to produce any document to demonstrate that the accused Nos.1 to 5 had made any demand for illegal gratification or there was acceptance of any such demand made. In the absence of proof of demand and acceptance of illegal gratification by the public servant, no offence is made out under Section 13(1)(d) of the PC Act. For this proposition, reliance has been placed on ***B. Jayaraj v State of Andhra Pradesh;***[58] ***P. Satyanarayana Murthy v District Inspector of Police, State of Andhra Pradesh and Another;***[59] ***State through Central Bureau of Investigation v Dr Anup Kumar Srivastava***;[60] ***K. Shanthamma v State of Telangana***;[61] ***Neeraj Dutta v State (NCT of Delhi)***;[62] ***Soundarajan v State Rep. by the Inspector of Police Vigilance Anticorruption Dindigul.***[63]

4.17. Lastly, it has been strenuously argued that sanction to prosecute Mr. Yogendra Tripathi and Mr. R. Nagaraja[64] having been denied by the Sanctioning Authority i.e. the Board of Directors of KPCL and the CVC and the said orders having been upheld by the DoPT and no steps having been taken by the respondent – CBI to challenge the said decision, a different yardstick cannot be adopted in respect of the appellants. The matter having attained finality, the appellants deserve to be discharged.

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55 (2020) 9 SCC 636

56 [2022] 3 SCR 698 : (2022) 7 SCC 370

57 [2024] 4 SCR 29 : 2024 SCC OnLine SC 483

58 [2014] 4 SCR 554 : (2014) 13 SCC 55

59 (2015) 10 SCC 152

60 [2017] 9 SCR 341 : (2017) 15 SCC 560

61 (2022) 4 SCC 574

62 [2023] 2 SCR 997: (2023) 4 SCC 731

63 [2023] 4 SCR 133 : (2023) SCC OnLine SC 424

64 (both of who were serving officers in KPCL at the relevant point of time)

5. ARGUMENTS BY COUNSEL FOR THE RESPONDENT-CBI

5.1 Mr. Cheema, learned Senior Advocate appearing for the respondent – CBI has refuted each and every argument advanced by learned counsel for the appellants. He submitted that the appellants have unduly placed heavy reliance on the fact that the original Mining Plan was approved by the MoC on 08th December, 2004 and the said Mining Plan did not contain any specific clause for disposal of rejects. Similarly, unnecessary reference has been made by the appellants to Rule 22(5) of the Mineral Concession Rules, 1960 to demonstrate what information is required to be disclosed in a Mining Plan. It is submitted that the argument advanced by the appellants that in the absence of any stipulation in the Mining Plan regarding disposal of the rejects, there could be no inference of commission of any offence or a shadow cast on the conduct of the appellants, is flawed.

5.2 Learned counsel for the respondent-CBI has canvassed that there was a latent error in the assumption of the appellants that it was for the MoC to incorporate a clause regarding disposal of the rejects in the Mining Plan and in the absence of any such clause, KPCL or KECML could not be held responsible for the disposal of the rejects, which was done in an illegal manner or that when the Mining Plan was silent regarding the manner in which the rejects were to be disposed of, it was for KPCL and KECML to deal with the rejects in an appropriate manner. The aforesaid presumptions are stated to be without any basis and opposed to the letter dated 10th November, 2003, addressed by the MoC to KPCL that lays down the conditions of allotment of the captive coal blocks in para 3 that specifically states in sub-para (iv) as follows:

> "3 The allotment of the captive blocks will also be subject to the following conditions:·
>
> xxxxx
>
> (iv) The allocattee would furnish to this Ministry detailed plan for disposal of unusable containing carbon material obtained during the process of a mining or any process thereafter including washing etc. so as to avoid any need

for disposal of the same through sale etc. at a later stage, within 30 days of receipt of this letter or submission of mining plan whichever is earlier."

5.3 As per the respondent-CBI, it was the duty of KPCL to furnish the detailed plan for the disposal of the rejects to the Ministry within 30 days of the receipt of the letter dated 10th November, 2003 or submission of the Mining Plan, whichever is earlier and this requirement was independent of the Mining Plan. Therefore, absence of any plans mentioned in the Mining Plan to deal with the rejects would not exonerate the appellants who remained under an obligation to furnish a detailed plan for the disposal of the rejects in terms of the Allocation letter dated 10th November, 2003 issued by the MoC.

5.4 Referring to the letter dated 31st January, 2006 addressed by the MoC to the Secretary, Industries, Energy and Labour Department, State of Maharashtra, learned counsel for the respondent-CBI submitted that the appellants were aware of the fact that the rejects could not have been disposed of by KECML since the said letter had conveyed the approval of the Central Government to grant mining lease for coal in three coal blocks in favour of KECML with certain stipulations, one of which was as follows:

"ii) No coal mined from the allocated blocs shall be sold, delivered, transferred of disposed of except for the aforestated captive mining purposes except with the previous approval of the Central Government"

5.5 To reinforce the above plea, reliance has also been placed on the statement of Dr. Manmohan Seam, cited as witness No. 12 who had prepared the Mining Plan in question and stated that in case of washing of coal the allocatees are required to obtain an approval from the MoC in terms of the letter of allotment and since the MoC has not allocated any coal block for washing of coal alone, the expression used in para 3 (iii) of the letter dated 10th November, 2003 written by the MoC has to be read and understood to mean 'washing-cum-end use'. Therefore, emphasis on non-incorporation of a detailed plan for the disposal of the rejects in the original Mining Plan has no relevance and cannot offer any defence to the appellants.

5.6 It has next been submitted that the order refusing grant of sanction to prosecute Mr. Yogendra Tripathi (IAS), Managing Director, KPCL and Mr. R. Nagaraja, Director (Finance) of KPCL and nominee Director on the Board of KECML by the Sanctioning Authority and the Competent Authority is not a relevant circumstance at the stage of consideration and framing of charge and no benefit can be given to the appellants on that basis. The orders passed by the Competent Authority refusing to grant sanction are sought to be described as mere administrative orders. Learned counsel argued that in any event, the two officers mentioned above were public servants and the factum of the Competent Authority having refused to grant sanction to prosecute them cannot enure to the benefit of the appellants herein who are not public servants and cannot seek any parity with public servants.

5.7 Learned counsel for the respondent-CBI points out that the Order on Charge impugned by the appellants herein was also challenged by the accused No. 1 to 5 (functionaries of KPCL who had since retired), by filing a Petition for Special Leave to Appeal[65] in this Court which was dismissed as withdrawn *vide* order dated 09th February, 2024.

5.8 It is submitted that at the stage of framing of charges, the trial Court must confine itself to the material brought on record by way of the chargesheet filed under Section 173 Cr.P.C and merely because some other Authority has taken a different view with regard to the complicity of some co-accused who are public servants and denied the request made by the respondent-CBI for sanctioning their prosecution, is irrelevant.

5.9 As for case law cited by learned counsel for the appellants to substantiate their submission that sanction under Section 197 Cr.P.C is mandatory for prosecuting public servants (A-1 to A-5 in the instant case), the submission made is that for the said purpose, facts and circumstances of each case have to be examined and there cannot be any universal findings in this regard.

65 SLP (Crl.) Dy No. 20094/2023 titled ***S.M. Jaamdar & Others v. CBI***

5.10 Learned counsel for the respondent – CBI has strenuously disputed as incorrect, the argument advanced on behalf of the appellants that the respondent – CBI has filed the Chargesheet solely on the basis of the CAG Report and submitted that a reading of the FIR dated 31st March, 2015 would demonstrate that this case was not triggered by the Report of the CAG. In fact, PE 5/2012 was registered on 28th September, 2012 in connection with the irregularities noticed in the allocation of coal blocks under the Government Dispensation route for the period between 1993 and 2006. Asserting that PE 5 did not emanate from the CAG Report and originated independently thereof, learned counsel submitted that during the course of the preliminary enquiry, several documents including the CAG Report were examined by the respondent – CBI. In fact, the respondent – CBI had conducted its own independent enquiry into the allegations for arriving at a conclusion relating to the commission of the offence or quantification of the extent of misappropriation. In view of the aforesaid submission, the contentions of the appellants based on a reading of the provisions of the CAG Act and the Constitution of India are stated to be extraneous to the controversy raised before this Court just as the case law cited by them regarding the nature of the CAG Report. Learned counsel has cited the judgment of the Gauhati High Court *in* ***M.S Associates and others v. Union of India***[66] to urge that even if the CAG Report has not been placed before the Parliament/State Legislature, contents thereof can serve as information for starting an investigation into a criminal offence.

5.11 Coming next to the judgement passed by the Karnataka High Court in the case of ***Aryan Energy (supra)*** and cited by the other side***,*** it is submitted on behalf of the respondent-CBI that the said judgment was passed on 22nd July, 2021, much after institution of the chargesheet by the respondent–CBI in the present case. Learned counsel submits that the said judgement addresses a situation where no criminal case has been registered against any of the parties appearing before the High Court. The main dispute in that matter was relating to the entitlement of KPCL to the value of the coal rejects. The Commercial Court had

66 (2005) SCC Online Gau 308; (2005) 275 ITR 502

decreed the suits in favour of AEPL by holding that as per the contractual stipulations between the parties, AEPL was only required to dispose off the coal rejects in a manner that would satisfy environmental regulations and KPCL was not entitled to the value of the coal rejects. Learned counsel submits that the terminology used in the contract governing the parties was different and therefore the said judgement does not have any relevance to the facts of the instant case.

5.12 Learned counsel for the respondent-CBI goes on to argue that even the judgement dated 24th March, 2016, passed by the Karnataka High Court in a writ petition filed by KECML against KPCL cannot be of any assistance to the appellants for the reason that the respondent – CBI had not been impleaded as a party in the said proceedings and the said judgement has confined itself to the demands made by KPCL for recovery of amounts from KECML towards the value of the coal rejects. Further, the FIR in the present case was registered on 13th March, 2015 whereas the judgement was delivered by the Karnataka High Court one year later, on 24th March, 2016. By the time the appeal preferred by KPCL against the judgment of the High Court was dismissed by this Court on 20th May, 2022, Charges had already been framed by the learned Special Judge, CBI against the appellants on 24th December, 2021.

5.13 Learned counsel for the respondent–CBI has emphatically argued that Clause 12 of the MoU dated 20th December, 2008 executed between KECML and GCWL states that the rejects shall be the joint property of KECML and GCWL and it shall be disposed of/sold jointly at mutually agreed terms. It is contended that the above clause clearly demonstrates the underlying intent of the appellants to conspire with GCWL to sell the rejects in the market and cause monetary loss to KPCL by depriving it of the value of the rejects.

5.14 The attention of this Court has also been drawn to the letter dated 10th September, 2009, issued by KECML to GCWL enclosing therewith a Debit Note of even date for a sum of ₹ 4,30,38,500/- (Rupees Four crore thirty lakh thirty eight thousand five hundred only) towards “disposal of foreign material during washing” and it has been argued that the said Debit Note was raised on the

instructions of Mr. Purujit Roy (accused No. 9), as stated by Mr. N.K. Ganorkar (PW 26) who was one of the two signatories of the said Debit Note and Mr. S.K. Gupta, an employee of GCWL (PW 16).

5.15 Learned counsel for the respondent–CBI also referred to a Certificate dated 12th July, 2010 issued by Mr. Avijit Sarkar who was working in the Finance and Accounts Department of KECML. The said Certificate refers to the MoU dated 20th December, 2008 and states that the rejects generated in the process of washing of coal undertaken by GCWL at their washery at Majiri during 2009-10, is owned by GCWL.

5.16 Lastly, learned counsel for the respondent-CBI has canvassed that the findings returned in a civil proceeding are not binding in a prosecution founded on similar allegations and it is for the criminal Court to arrive at any decision on its own and not to reach any conclusion by reference to any previous decisions relating to the parties which cannot be treated as binding upon it. In support of the said submission, he has cited ***The King Emperor v. Khawaja Nazir Ahmed.***[67] It has thus been argued by the respondent-CBI that the present appeals are devoid of merits and deserve to be dismissed.

5.17 On the scope of Section 227, Cr.P.C. and the power of the Special Judge to pass an order of discharge, learned counsel for the respondent-CBI has cited the decisions in ***Union of India v. Prafulla Kumar Samal and Another***[68] *and* ***Niranjan Singh Karam Singh v. Jitendra Bhimraj Bijjaya And Others.***[69] The decisions in ***State of Maharashtra v. Som Nath Thapa,***[70] ***State of Tamil Nadu v. N. Suresh Rajan and Others***[71] have been relied on to make a point that at the stage of framing of charges, the Court cannot appraise the evidence as is done at the time of trial and the Court must proceed on an assumption that the materials brought on record by the prosecution are

67 AIR (1945) PC 18

68 [1979] 2 SCR 229 : (1979) 3 SCC 4

69 [1990] 3 SCR 633 : (1990) 4 SCC 76

70 [1996] Supp. 1 SCR 189 : (1996) 4 SCC 659

71 [2014] 1 SCR 135 : (2014) 11 SCC 709

true. Alluding to the judgment in ***State of Bihar v. Ramesh Singh***,[72] learned counsel submitted that at the initial stage of the trial, if there is a strong suspicion that gives an impression to the Court for drawing a presumption that the accused has committed an offence, it is not open for the Court to state that there is insufficient ground for proceeding against the accused.

5.18 Both sides have also relied on ***K.G. Premshanker v. Inspector of Police and Another***[73] which discusses the effect of a decision of a civil Court on criminal proceedings against the same person pertaining to the same cause in the context of Sections 40 to 43 of the Indian Evidence Act, 1872 as to which judgments of the courts are relevant and the extent of the relevance.

6. REJOINDER ARGUMENTS BY COUNSEL FOR THE APPELLANTS

In their rejoinder arguments, learned counsel for the appellants have disputed the submissions made on behalf of the respondent-CBI and reiterated the pleas taken by them. We do not propose to repeat the said submissions except for touching on the aspects which were not addressed earlier.

6.1 It has been stated that the MoU dated 20th December, 2008 was executed to meet the urgent requirement of coal for BTPS. The purpose of incorporating Clause 12 was to keep a check on the rejects generated by GCWL during the washing of coal. The said clause specifically mentions that any disposal/sale of the rejects would be subject to compliances of the relevant rules and regulations. Learned counsel submitted that it is the case of the respondent-CBI itself that GCWL sold the rejects by mixing it with good coal at their washery. There is no document produced by the respondent-CBI to connect the rejects sold by GCWL to the appellants. The appellants cannot be roped in on the bald statements made by the functionaries of GCWL connecting them with the coal purchased in e-auction from WCL and sold off.

6.2 As for the Debit Note dated 21st March, 2009, it is submitted that the same was recovered from GCWL and not KECML.

72 [1978] 1 SCR 257 : (1977) 4 SCC 39

73 [2002] Supp. 2 SCR 350 : (2002) 8 SCC 87

The said Debit Note was neither acted upon nor approved by the Board of Directors of KECML and there is no supporting correspondence relating to the Debit Note to demonstrate any complicity on the part of the appellants.

6.3 The appellants have disputed the Certificate dated 12th July, 2010, purportedly issued by Mr. Avijit Sarkar to GCWL stating that the email was despatched by the said employee from his personal email id and not from the official email id of KECML and he was not authorized by the Board of Directors of KECML to issue any such email. Even otherwise, the Certificate runs contrary to Clause 12 of the MoU, as it purports to give 100% entitlement of the rejects to GCWL.

6.4 During the course of rejoining, arguments have also been advanced on the quantum of the rejects which as per the appellants, has been wrongly quantified by the respondent–CBI at 8,03,859.277 MT. Learned counsel contended that the said figure has been pulled out by the respondent-CBI from the CAG Report though it claims it has not relied on it to register the PE, followed by registration of the FIR. The attention of this Court has been drawn to the mismatch between the quantity of rejects for a period of two months (April and May of the year, 2012-13) claimed to be 207,837.117 MT by referring to a Certificate dated 07th June, 2016 issued by Mr. S.N. Roy, Statutory Auditor of KECML *vis-à-vis* the quantity of rejects generated for a period of twelve months for the previous year (2011-2012) that came to only 74,511.709 MT. Learned counsel submitted that in reply to the Audit query raised by the CAG, KECML had specifically stated that the total production of coal upto May, 2012 was 79,46,082.736 MT which included coal and rejects. This figure has not been disputed by the respondent – CBI. The quantity of the rejects upto May, 2012 was 75,63,934.800 MT of the washed coal which figure has also not been disputed by the respondent-CBI. An inference would therefore have to be drawn that, at best, the difference between both the aforesaid figures would be the extent of the rejects of coal. It has been urged that once the extent of production and the quantum of coal sent to KPCL has not been disputed, there is no question of inflating the quantum of rejects, as alleged. The respondent–CBI has therefore blindly accepted the version put forth by GCWL that it

had supplied good coal to KPCL from its own pocket, which suits its purpose because when the washing activity was stopped at Majri on 22nd May, 2012, disputes had arisen between KECML and GCWL, that are pending adjudication before the Arbitration Tribunal and GCWL has inflated its claims to raise exorbitant demands on KECML.

D. DISCUSSION AND ANALYSIS

7.1 We have given our anxious consideration to the arguments advanced by learned counsel for the parties, gone through the records and perused the impugned orders. The grievance of the appellants arises from the decision taken by the learned Special Judge, CBI to reject the application moved by them for seeking discharge in the matter and proceeding to frame charges against them alongwith the other co-accused for having entered into a criminal conspiracy with an object to facilitate illegal sale of coal rejects by GCWL that were generated during washing of coal and to have gained undue pecuniary advantage therefrom.

7.2 The genesis of the investigation conducted by the respondent–CBI in respect of the coal block allocation lies in the judgement of this Court dated 25th August 2014 rendered in ***Manohar Lal Sharma vs. Principal Secretary and Another***.[74] The petitioner therein filed a petition under Article 32 of the Constitution of India and challenged the allocation of coal blocks to Private Companies for the period between 1993 and 2011 on the ground that they violated the principles of trusteeship of natural resources by giving away precious resources as largesse without complying with the mandatory provisions of the MMDR Act and 1973 Coal Act. After a detailed scrutiny, this Court declared that the entire allocation of coal blocks as per the recommendations made by the Screening Committee from the year 1993 onwards through the Government dispensation route suffered from arbitrariness, and that no fair and transparent procedure had been adopted.

7.3 In the course of the proceedings in the aforesaid matter, the respondent–CBI registered a Preliminary inquiry to investigate

74 [2014] 8 SCR 446 : (2014) 9 SCC 516

the irregularities in allocation of coal blocks under the Government Dispensation Route and to State PSUs, who were allowed to form JVA by joining hands with Private Companies for purposes of development and operation of coal mines. PE 5 was registered on 28th September, 2012. It related to all the coal block allocations made during the year 1993 to 2006. It is not in dispute that the coal allocation in favour of KPCL was also a subject matter of investigation, but nothing untoward was noticed in that. The JVA between KPCL and KECML also withstood the test of scrutiny. As a result, allocation of coal blocks made in favour of KPCL were not interfered with.

8. DID CBI PRIMARILY RELY ON THE AUDIT REPORT OF THE CAG?

8.1 We shall first examine the submission made by the appellants that the respondent–CBI solely relied on the Audit report of the CAG of 2013 to launch its prosecution in the year 2015. This contention has been strongly refuted by the respondent–CBI that has asserted that the Department had on its own initiative, come across several documents including the CAG Report which exposed commission of the offence and the extent of misappropriation of money by the appellants and the other co-accused and it had not solely relied on the CAG Report to commence the investigation.

8.2 In the course of hearing, this Court had directed learned counsel for the respondent–CBI to produce the files of the Department on the basis whereof, three Preliminary Inquiries were registered – PE-2/2012/EO-I,[75] PE-4/2012/EO-I[76] and PE-5/2012/EO-I.[77] It transpires from the said records that PE-2 was registered on 02nd June, 2012 on the directions issued by the CVC that had forwarded a complaint received by it alleging irregularities in the allotment of coal blocks to Private Companies during the period 2006 to 2009 and in awarding a contract by State owned PSUs for the development of coal blocks allocated to them under the Government dispensation. Subsequently, two more references were received by the respondent–CBI from the CVC and *vide* OM

75 In short PE-2

76 In short PE-3

77 In short PE-4

dated 19th September, 2012, the CVC forwarded a third complaint received from seven Members of Parliament (Lok Sabha) and directed the respondent – CBI to conduct a preliminary inquiry.

8.3 The file produced by the respondent–CBI reveals that premised on the Source Information Report[78] submitted by an Inspector from the Department pertaining to some irregularities in the allocation of coal blocks under the Government Dispensation Category allegedly in connivance with public servants, the matter was taken up by CBI for verification. The notings in the file states that it was not possible to verify the allegations discretely. Therefore, the SIR was directed to be registered as a PE. These records falsifies the suggestion made by the respondent–CBI that there was a SIR that disclosed irregularities in the JVA executed between KPCL and KECML. The stand of the respondent – CBI that PE-5 was registered well before the Audit Report of the CAG and originated independently thereof, is also factually misleading because CBI's own record shows that the scope of enquiry in respect of PE-5 registered on 28th September, 2012, was entirely different and had no relationship with the JVA and other agreements executed by KPCL and KECML. No other documents have been filed by the respondent – CBI to demonstrate that it had initiated an independent inquiry into the mining operations of KPCL or that it was during the course of its inquiry into the affairs of KPCL and KECML that it had stumbled upon some irregularities in the MoU executed between KECML with GCWL. Quite clearly, the respondent–CBI made the Audit Report of the CAG submitted in 2013, a launching pad for initiating the prosecution of the appellants in respect of the allegations levelled in the present case and subsequently sought to substantiate them by delving into the records maintained by KPCL, KECML and GCWL. In other words, there was no move within the Department to investigate KPCL or KECML before 2015. The PE's registered in the year 2012 did not inculpate the appellants in any manner. The entire focus of the said PE's was on the larger issue of irregularities in the allocation of coal blocks through the Government dispensation route. In this background, the respondent–CBI cannot be heard to state

78 For short 'SIR'

that CBI was independently investigating the matter at hand well before 2015 or the Audit Report of the CAG of 2013 was not the trigger point for commencing the investigation.

9. COULD THE AUDIT REPORT OF THE CAG FASTEN ANY LIABILITY ON KECML?

9.1 Coming next to the CAG Report, as much hinges on the said Report, we may note that the same was considered by the Division Bench of the High Court of Karnataka in its judgement dated 24th March, 2016, wherein, it was noticed that there was no dispute between KPCL and KECML regarding the obligations cast on them under the contracts for the development of captive coal blocks and for supply of coal for consumption at the Thermal Power Station (BPCL) located in the State of Karnataka until the CAG submitted an Audit Report for the year ending March, 2013. The High Court took note of the Report of the CAG which stated that the total production of coal from one of the open cast mines between 2008-09 and June 2012 was 80.78 lacs MT and a minimum quantity of coal rejects ought to be 10% of the total production which would come to 8.28 lacs MT which financially translated into ₹52,37,00,000/- (Rupees Fifty Two Crores Thirty Seven Lacs only). Based on the above analysis, the CAG raised an audit objection and called upon KPCL to explain the loss of ₹52,37,00,000/- (Rupees Fifty Two Crores Thirty Seven Lacs only) allegedly caused to the public exchequer, on account of the rejects being disposed of in terms of a MoU executed between KECML and GCWL. The stand taken by KPCL was also noted by the court. KPCL submitted its Audit Objections to the said Report stating *inter alia* that the valuation of the rejects was erroneous; that assessment of washery rejects did not have any co-relation with the quantity of coal produced at the open coal mines; that the rejects generated in the mining operation were only stones and boulders and could not be used for generation of electricity at BPCL and lastly, that all the rejects were used for levelling and piling work within the mines for better mining operations. However, all the said objections were rejected by the CAG that maintained its stand in the final Report.

9.2 The High Court observed that at that stage, KPCL did a sudden summersault. Faced with the Audit Report of the CAG,

KPCL proceeded to raise a demand on the appellants seeking reimbursement to the tune of ₹52,37,00,000/- (Rupees Fifty two crores thirty seven lacs only) as cost of the rejects and threatened KECML that in case of default of payment, recovery would commence from their running bills. This made KECML file two writ petitions, which were allowed by the High Court with the following observations:

xxxxxxx

"36. We find that the report of CAG cannot be the sole basis for any liability being caused or for that matter the sole basis for the prosecution to be launched. However, mere drawing up of FIR by the CBI against unknown officials of KPCL, EMTA and KEMTA cannot provide legal basis or impetus for unilateral demand by KPCL for recovery of ₹52,37,00,000/- (Rupees Fifty Two Crores Thirty Seven Lakh) only. We hold that such action is arbitrary and unsustainable in law."

9.3. The aforesaid judgement was assailed by KPCL by approaching this Court. The said appeals were dismissed by a three Judges Bench of this Court of which one of us (Hon'ble Ms. Hima Kohli, J) was a member with the observations that the Audit Report of the CAG appeared to have been the starting point for the entire dispute between the parties. When the CAG Report was first submitted, KPCL had itself raised objections to the quantification of the coal rejects by the CAG but on its objections being turned down, KPCL raised a demand on KECML seeking reimbursement on the basis of very same CAG Report to which it had not so long ago, filed objections.

9.4. The observations made by this Court in the captioned decision are germane and are extracted below:

"13. The present matter pertains to a tender that was awarded by the appellant to EMTA nearly twenty years ago, in the year 2002. The CAG report that appears to have been the starting point for the entire dispute between the parties is dated March, 2013, close to a decade back. In such circumstances, to even advert to arguments on the maintainability of the writ petitions would be unjust to the parties involved.

> 14. Coming to the merits of the appeal, from the facts, it appears that in the first instance, when the CAG report was first submitted, the appellant itself had raised objections to the quantification of coal rejects arrived at by the CAG. However, when the audit objections were rejected by the CAG, and the final report was made available, the appellant demanded reimbursement from KEMTA based on the same CAG report to which it had filed objections. Such a change of stand by the appellant has not been sufficiently explained.
>
> 15. Additionally, a bare perusal of the clauses contained in the various agreements entered into between the parties does not indicate that such deductions could be made for the purposes of washing charges. There does not appear to be any specification laid down as to the method required to be adopted for washing of coal.
>
> 16. No material has been placed on record by the appellant to suggest that there was ever any problem with respect to the quality of coal being supplied by KEMTA to the appellant. Rather, the impugned order suggests that coal supplied by KEMTA was utilized by the appellant in its thermal power plants in order to generate electricity.
>
> 17. Taking into consideration the above facts and circumstances, we are of the opinion that no material has been brought to the notice of this Court that would compel us to interfere with the impugned common judgment passed by the High Court in exercise of our jurisdiction under Article 136 of the Constitution.
>
> 18. Accordingly, the Civil Appeals filed by the appellant are dismissed."

9.5. We are therefore of the opinion that this Court having already dismissed the appeal filed by KPCL against the judgment of the Karnataka High Court, having held in clear terms that the CAG Report could not form the basis for launching proceedings against the appellants and further, having upheld the findings returned by the Karnataka High Court that the CAG Report

appears to have been the starting point for the entire disputes between the parties who till then, were smoothly discharging their obligations under various agreements, there is no reason to take a different view only on the ground that the respondent–CBI was not a party in the aforesaid proceedings. The chronology of the events speak for themselves and need no further elaboration.

10. IMPORT OF THE JUDGMENT DATED 24TH MARCH, 2016 OF THE KARNATAKA HIGH COURT

10.1. Coming next to the submission made by learned counsel for the respondent that the judgement dated 24th March, 2016 passed by the Karnataka High Court in a writ petition filed by KECML against KPCL is of no consequence, as the said judgment was confined to examining the demands made by KPCL on KECML for reimbursement towards the value of the coal rejects, the same is found to be erroneous. It is well-settled that in a case of exoneration on merits in relation to adjudication proceedings in a civil matter where the allegations are found to be unsustainable and the party is held as innocent, criminal prosecution on the same set of facts and circumstances cannot be permitted to continue. In ***Radheshyam Kejriwal*** ***(supra)***, a three judges Bench of this Court reconciled the conflict between the view taken in ***Standard Chartered Bank(1) v. Directorate of Enforcement***[79] and ***Collector of Customs v. L.R. Melwani***[80] on the one hand where it was held that adjudication proceedings and criminal proceedings are two independent proceedings and both can go on simultaneously and findings in the adjudication proceedings is not binding on the criminal proceedings and the judgments in ***Uttam Chand v. ITO,***[81] ***G.L. Didwania v. ITO,***[82] ***K.C. Builders v. CIT***[83] where the view taken was that when there is a categorical finding in the adjudication proceedings exonerating a person which is binding and conclusive, the prosecution cannot be allowed to

79 [2006] 2 SCR 709 : (2006) 4 SCC 278

80 AIR 1970 SC 962

81 (1982) 2 SCC 543

82 (1995) Supp(2) 724

83 [2004] 1 SCR 1134 : (2004) 2 SCC 731

stand, this Court summarized the ratio of the decisions in the following words:

> "38. The ratio which can be culled out from these decisions can broadly be stated as follows:
>
> (i) Adjudication proceedings and criminal prosecution can be launched simultaneously;
>
> (ii) Decision in adjudication proceedings is not necessary before initiating criminal prosecution;
>
> (iii) Adjudication proceedings and criminal proceedings are independent in nature to each other;
>
> (iv) The finding against the person facing prosecution in the adjudication proceedings is not binding on the proceeding for criminal prosecution;
>
> (v) Adjudication proceedings by the Enforcement Directorate is not prosecution by a competent court of law to attract the provisions of Article 20(2) of the Constitution or Section 300 of the Code of Criminal Procedure;
>
> (vi) The finding in the adjudication proceedings in favour of the person facing trial for identical violation will depend upon the nature of finding. If the exoneration in adjudication proceedings is on technical ground and not on merit, prosecution may continue; and
>
> (vii) In case of exoneration, however, on merits where the allegation is found to be not sustainable at all and the person held innocent, criminal prosecution on the same set of facts and circumstances cannot be allowed to continue, the underlying principle being the higher standard of proof in criminal cases.
>
> **39. In our opinion, therefore, the yardstick would be to judge as to whether the allegation in the adjudication proceedings as well as the proceeding for prosecution is identical and the exoneration of the person concerned in the adjudication proceedings is on merits. In case it is found on merit**

that there is no contravention of the provisions of the Act in the adjudication proceedings, the trial of the person concerned shall be an abuse of the process of the court."

[emphasis added]

The aforesaid view also finds resonance in ***Ashoo Surendranath Tewari (supra)*** and ***J Sekar alias Sekar Reddy(supra).***

10.2. We are of the view that if there was any breach of contract or default on the part of KECML, KPCL was well empowered to determine the lease. However, KPCL did not do so. Instead, on being confronted with the Audit Objections taken by CAG, it raised a demand on KECML for the value of the coal rejects. This demand was quashed and set aside by the Karnataka High Court and this Court.

10.3. On applying the decisions cited above to the facts of the instant case, this Court cannot turn a blind eye to the view taken in the judgement dated 24th March, 2016 passed by the Division Bench of the High Court of Karnataka in a dispute directly arising between KPCL and KECML pertaining to the very same cause of action based on the obligations cast on both the parties under various agreements executed for the development of captive coal blocks and for supply of coal, which was finally upheld by this Court *vide* judgement dated 20th May, 2022. The said judgments have cleared KECML of any blame. On the same set of facts and logic, we are of the opinion that no criminality can be attributed to the appellants.

11. SANCTITY OF AN AUDIT REPORT IN LAW

11.1. As the sanctity of the Audit Report of the CAG of 2013 has been questioned by the appellants, we propose to examine this aspect. Before the year 1971, the CAG used to function under the Government of India (Audit and Accounts Order), 1936 as adopted by the Government of India (Provisional Constitution) Order, 1947. This was followed by the promulgation of the Comptroller and Auditor General's (Duties, Powers and Conditions of Service) Act, 1971[84]. By virtue of Section 26 of the

84 For short 'the CAG Act'

CAG Act, the earlier Order of 1936 was repealed. Section 10 of the CAG Act requires the CAG to compile the accounts of the Union and the States and on the basis of the said accounts, to prepare an annual account for being submitted to the President of India or the Governor of the State/Administrator of the Union Territory, as the case may be. The scope of the audit of the Union and the States has been stated in Section 13 of the CAG Act.

11.2. Article 149 of the Constitution of India defines the duties and powers of the CAG and provides thus:

> "149. **Duties and powers of the Comptroller and Auditor-General**
>
> The Comptroller and Auditor-General shall perform such duties and exercise such powers in relation to the "accounts of the Union and of the States and of any other authority or body as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, shall perform such duties and exercise such powers in relation to the accounts of the Union and of the States as were conferred on or exercisable by the Auditor-General of India immediately before the commencement of this Constitution in relation to the accounts of the Dominion of India and of the Provinces respectively."

11.3 The duties of the CAG have been described and discussed at some length in the ***Arun Kumar Aggarwal*** ***(supra)*** in the following words:

> "60. The audit of the Union and the States is under Section 13 of the Act. The scope of the audit extends to the audit of all expenditure so as to ascertain whether the monies shown in the accounts as having been disbursed were legally available for such disbursement and whether the expenditure conforms to the authority which governs it. The CAG has to satisfy himself that the rules and procedures designed to secure an effective check on the assessment, collection and proper allocation of revenue are being duly observed under

Section 16. The CAG also has to examine decisions which have financial implications including the propriety of the decision making.

61. The reports of the CAG are required to be submitted to the President, who shall cause them to be laid before each House of Parliament, as provided under Article 151(1). In relation to the States, reports are submitted to the Governor, who shall cause them to be laid before the legislature of the State, as per Article 151(2) of the Constitution. When reports are received in Parliament, they are scrutinised by the Public Accounts Committee (PAC).

62. The PAC is established in accordance with Rule 308 of the Rules of Procedure and Conduct of Business in Lok Sabha. The function of the PAC is to examine the accounts of the Union and the report of the CAG. The PAC shall be principally concerned whether the policy is carried out efficiently, effectively and economically, rather than with the merits of government policy. Its main functions are to see that public monies are applied for the purposes prescribed by Parliament, that extravagance and waste are minimised and that sound financial practices are encouraged in estimating and contracting, and in administration generally. The PAC also has the power to receive evidence, the power to send for persons, papers and record and can receive oral evidence on solemn affirmation. Once the report is prepared, the report of the PAC is presented to the House.

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68. **We may, however, point out that since the report is from a constitutional functionary, it commands respect and cannot be brushed aside as such, but it is equally important to examine the comments what respective Ministries have to offer on the CAG's Report. The Ministry can always point out, if there is any mistake in the CAG's report or the CAG has inappropriately appreciated the various**

> **issues. For instance, we cannot as such accept the CAG report in the instant case**."
>
> [emphasis added]

A similar view has been expressed in ***Pathan Mohammed Suleman Rehmatkhan*** ***(supra)*** and ***Centre for Public Interest Litigation*** ***(supra).***

11.4. It is, therefore, evident that the recommendations of the PAC are premised on the response that is received from the concerned Ministries and the Action Taken Reports which includes the replies furnished by the Government and the comments of the PAC to the said replies. Finally, it is for the Parliament to comment on the CAG's Report after it receives the report of the PAC.

11.5. In the instant case, admittedly the aforesaid procedure has not been followed. As noticed above, the CAG Report is subject to scrutiny by the Parliament and the Government can always offer its views on the said report. Merely because the CAG is an independent constitutional functionary does not mean that after receiving a report from it and on the PAC scrutinizing the same and submitting its report, the Parliament will automatically accept the said report. The Parliament may agree or disagree with the Report. It may accept it as it is or in part. It is not in dispute that the Audit Report of the CAG has not been tabled before the Parliament for soliciting any comments from the PAC or the respective Ministries. Therefore, the views taken by the CAG to the effect that tremendous loss had been caused to the public exchequer on account of the coal rejects being disposed of by the KPCL and KECML remains a view point but cannot be accepted as decisive. The respondent–CBI has largely relied on the findings and the conclusions drawn in the Audit Report of the CAG to launch the prosecution against the appellants on an assumption that the said Report has the seal of approval of the Parliament and has attained finality, which is not the case.

12. DENIAL OF SANCTIONS BY THE SANCTIONING AUTHORITIES AND THE EFFECT ON THE APPELLANTS

12.1. It is relevant to note that the very same Audit objections taken by the CAG and relied upon by the respondent–CBI to allege

conspiracy and loss to the public exchequer were thoroughly examined and found to be meritless by two separate set of Sanctioning Authorities. When it came to Mr. R. Nagaraja, the then Director (Finance) of KPCL and the nominee Director on the Board of KECML, the Sanctioning Authority, i.e., the Board of KPCL went through several documents during its deliberations including the MoU between the KECML and GCWL forwarded by the respondent–CBI for seeking sanction to prosecute him. The reasons for holding that the CAG Report was without any factual basis, were elaborately dealt with as below:

> **"DETAILED REPORT OF THE BOARD OF KPCL IN RELATION TO THE CBI REPORT DATED 28.07.2017 AS REGARDS SHRI R. NAGARAJA**
>
> xxxxx
>
> 1.8 There is an Memorandum of Understanding dated 20.12.2008 between Gupta Coal Fields and Washeries Ltd ('GCWL') and KECML under which GCWL was required to wash and supply the coal of required specification to the Power Plant of KPCL in respect of coal mined by KECML. Clause 12 of the said MoU stipulates that "the rejects generated shall be the joint property of KECML and GCWL and can be disposed off / sold at mutually agreed terms subject to compliance of rules / regulations / guidelines of Ministry of Coal, Government of India, if applicable". KPCL allowed KECML to sign an MoU with Gupta under which rejects belonging to KPCL was put under the joint ownership of Gupta and KECML by virtue of Clause 12. Gupta has sold those rejects resulting in an illegal gain of Rs.52.37 crores to Gupta (as per CAG) and loss to KPCL. The Board of KECML which conspired to insert Clause 12 of the MoU did not take any protective / mitigative measures to prevent the loss despite it being raised at a lower level. The facts in relation to the above offence are elaborated in detail herein below.
>
> xxxxx

B. Consideration of the report of CBI dated 27.07.2017 (along with annexures) by the Board of KPCL and their Report thereon

2. The entire matter including the 344 documents produced along with the Report and the witness statements of 67 witnesses have been perused by the members of the Board. The Board has also considered the applicable law on the point.

3. The offence is complained of by Shri R. Nagaraja in his capacity as a nominee of KPCL in the Board of KECML. It is the matter of fact that the nominees of KPCL who have been appointed to the Board of KECML are not persons well versed in mining matters. As KPCL was not capable of handling mining operations, a joint Venture Company was formed. The Board of KECML and the nominees of KPCL on the Board entirely depended on the inputs provided by the Managing Director, Statutory Auditor and other personnel for making their decisions.

4. **The Mining Plan for the operationalization of the mine was prepared by Dr. Seam who was a Ministry of Coal official and not an employee of KECML or KPCL. The Mining Plan was approved by the Ministry of Coal when it did not contain any provisions for disposal of the rejects. In such a situation, the Board of Directors of KECML and especially the KPCL nominees (A-1 to A-7) could not be blamed for the non-compliance of the Allotment Letter and there is no act of omission or commission on the part of KPCL's employees including Shri R. Nagaraja**.

5. A perusal of the KPCL Office Notes (Document No.199 to 202) for the period indicates that by way of letter dated 12.01.2009, the Managing Director of KPCL had specifically raised the issue of whether washing of coal is required or not. If washing was

not necessary, then the question of generation of rejects would not arise at all. Therefore, after taking into account the office note generated by Shri Purushottam, Shri R. Nagaraja had sought to examine whether washing is required at all. Hence, Shri R. Nagaraja has acted with great prudence to ensure that no loss is caused to KPCL under the directions of Dr. S.M. Jaamdar, MD, KPCL.

6. If washing of coal was not required, then the MoU with Gupta was not required to be approved inasmuch as the main purpose of the agreement was to start the washing process. Although the MoU was ratified, it could not be operationalized specifically Clause 12 of the MoU was not ratified by the Board of KECML. Conditional ratification of MoU does not mean that the Board has dishonestly refrained from protecting the interest of KPCL. (See Board minutes of KECML at Document No.232)

7. **From the reading of the Clause 12, it appears that the fact that there was no concluded contract vis-à-vis of rejects inasmuch it was understood that it was to be sold on 'mutually agreed terms' and 'subject to legal clearances'. This implies that GCWL and KECML had to mutually agree for the terms of the sale and same had to be approved by Ministry of Coal.** Given the fact that the MoU was only conditionally ratified, it was incumbent upon the officials of KECML that before they agree to any terms for the sale of the rejects that they had to bring the matter up to the Board of KECML. The subsequent events indicate that even the officials of KECML were of the same understanding.

8. **Even assuming that the Clause 12 of the MoU was approved, another aspect of the matter which has to be noted is that Clause 12 of the MoU does not violate the terms of the**

Allotment Letter inasmuch as it specifically required that the approval of the Ministry of Coal be obtained before such a disposal. A bare reading of the Clause 12 does not indicate any illegality a sought to be alleged by the CBI. Therefore, the approval of the MoU in the Board Meeting on 13.01.2009 cannot be said to be an act of negligence or error in judgment and no imputation of any wrongdoing can be imposed any KPCL nominee present in the Board Meeting on 13.01.2009.

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10. **Additionally, KECML wrote a letter wherein it sought for a waiver from meeting the specification if raw coal was supplied. The difficulty for the Management of KPCL was that if the raw coal did not match the specification, it would not be utilization for the generation of power. This would result in stoppage of generation resulting in power crisis in the State of Karnataka**. The better alternative would have been to wait for the certificate of the Coal Controller regarding whether the raw coal met the requirements of KPCL of not. Hence, no confirmation was given. This was a managerial decision taken in the best interest of the State of Karnataka as the power generation could not be compromised to save washing cost. **The cost of procurement of power would be tremendous and outweighed any temporary disadvantage caused by not abiding by the Board Minutes of 13.06.2009. This decision was vindicated by the letter issued by the Coal Controller's Office on 09.12.2009 wherein it concluded that to obtain the agreed parameter of coal quality, washing would be required. Therefore, it cannot be said that there was an act of omission or negligence or error in judgment on part of the KPCL nominees on the Board of KECML. The**

decision was taken keeping the best interests of KPCL in mind and cannot be faulted.

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16. The contention of CBI that there is a violation of the allotment order that tailings and rejects are the property of KPCL and should be utilized only for its end use of power generation appears to be based on a strict interpretation of the allotment conditions. Technically, Bellary Thermal Plant of 500 MW capacity is designed to use pulverized coal for firing and coal of reasonable quality. **As such the condition that middlings, tailings & rejects should be used for power generation by KPCL is neither feasible nor appropriate. On the other hand, since disposal of rejects is an environmental issue, KPCL has insisted that the same should be subject to compliance of environmental norms. When KPCL was not in a position to use the reject for power generation, the onus is on the mining operator to dispose of the same as permitted under law**. Given the facts as stated above, there cannot be any act of negligence on part of the nominees of KPCL in this regard as well.

17. **The CAG report is without factual basis for the following reasons:**

i) The quantum of rejects is assumed as 10% of the coal based on MoU whereas as per actuals it was 4.39% as evident from the Coal Controller's certificate, Statements of inward and outward movements of Coal as submitted by GCWL.

ii) Without even knowing the calorific value of the rejects, it has been assumed to be G Grade coal. Even going by the statement of Shri Padmesh Gupta of GCWL, the rejects were of such a low calorific value that it could not be sold without blending. Hence, it could not

have been of G grade. Hence, the basis of the calculation is wrong.

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20. **The assumption of the CBI that the exact quantity of rejects that have been sold off cannot be ascertained is a self-serving statement inasmuch as for the purpose of blending of coal, Gupta has to purchase the raw coal / washed coal and pay royalty / sales tax on the same whereas there is no sales tax / royalty paid on the rejects**. With this number, it is easily possible to arrive at the exact quantity of reject coal. **As the quantity of reject coal generated / available at Majri Washery as per the Stock statement far exceeds the reject coal quantity claimed to be generated by the washing of KECML's coal, in order to divert other rejects as KECML's rejects, the absurdly high amount has been claimed**. Hence, there is absolutely no evidence to show that any reject has been sold and if so, what is the quantity of rejects sold. **In such a situation, there is no basis for assuming that KPCL has suffered any unlawful loss or that GCWL has gained unlawfully during this process**.

21. CBI has produced a Debit Note No.KECML/DN/08-09/09 dated 31.03.2009 for Rs.4,30,38,500/- which was recovered at GCWL (and not at KECML) and there is a statement from GCWL that this Debit Note was not honoured. **An examination of the Debit Note, Annual Accounts of KECML for 2008-09 and other documents produced along with the Report would indicate that this Debit Note is a fabricated document** for the following reasons:

a. The Note is generated as on the last date of the financial year 2008-2009 but is forwarded only in the next financial year in September 2009 indicating that it is an afterthought.

b. This Debit Note does not find a mention in the Annual Accounts of 2008-2009 i.e. it should have created an income stream for KECML.

c. If the Debit Note was a genuine document, then KECML had to classify the sales of washer rejects of 86,077 MT as "other income" in the Annual Accounts. However, it is shown as washing loss.

d. There are no corresponding Debit Notes of this nature (viz. For foreign material) amongst the several admitted Debit Notes and no mention of this Debit Note or such an arrangement for subsequent years.

e. KECML officials have written emails asking for accounts of the stock and Gupta has stated that the rejects are still lying with them.

22. **There are two types of rejects as reflected in the Annual accounts. One is the rejects lost due to stones, boulders etc. for which no royalty was paid. These rejects were not even transported to Gupta and are not classified as 'washery loss'. The washery loss is evident from the Coal Controller's certificates**.

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38. To say the least, there is no evidence whatsoever that is collected by the investigator that would indicate that there was either any request or a demand by the public servant concerned for a valuable thing or a pecuniary advantage at any point of time upon the beneficiary for any reason whatsoever. A mere omission on the part of the public servant or a negligent act on his part which has enured to the beneficiary cannot be said to act of misconduct on the part of the public servant to bring him within the ambit of Section 13(1) (d) of the Prevention of Corruption Act, 1988.

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48. **Shri R. Nagaraja has an impeccable and unblemished service record in his 27 years of service as an officer and he has held many important and sensitive posts during his service span in KPCL. Any action against him on the basis of a charge devoid of any merit and substance would not only tarnish his otherwise impeccable reputation but will also have a bearing on the morale of the public services**.

49. **For the reasons enumerated in para 3 to 48 above, we, the Board of KPCL, hereby exercising our powers under Section 19 of the Prevention of Corruption Act, 1988 refuse to grant sanction to prosecute Shri R. Nagaraja for the offences alleged to have been committed under Sections 120B r/w 409 and 420 of the Indian Penal Code, 1860 and Sections 13(2) read with 13(1)(d) of the Prevention of Corruption Act, 1988**."

12.2. It is apparent from the above that after Sanctioning Authority had scrutinized all the relevant documents and the depositions as many as of 67 witnesses submitted by the respondent-CBI, it observed that there was no evidence to show that any rejects generated by washing of coal had been sold or that KPCL had suffered an unlawful loss during the process. As a result, the Board of KPCL refused to grant sanction to the respondent-CBI to prosecute Mr. R. Nagaraja for offences alleged to have been committed by him. It is noteworthy that no appeal has been filed by the respondent – CBI against denial of sanction.

12.3. Similarly, the request made by the respondent-CBI for seeking sanction to prosecute Mr. Yogendra Tripathi, the then Managing Director, KPCL was denied by the Competent Authority in the Central Government in terms of the letter dated 16th April, 2018, issued by the DoPT. The order passed by the DoPT shows that it took note of the Report of the respondent-CBI, the records submitted by it along with the Report, the advice received from the CVC and then summarized the allegations levelled by the respondent-CBI that formed the basis of its proposal to seek

sanction for prosecution of the aforesaid officer. The said request was finally rejected by the Competent Authority in the Central Government with the following observations:

"xxxxx

12. AND WHEREAS the debit note recovered at GCWL and the certificate are contradictory to each other in as much as debit note imposes a realizable value on the rejects and the certificate claims that it has been written off. Neither document is supported by the annual accounts. Hence, they are extraneous and fabricated as an afterthought.

13. AND WHEREAS washery loss and loss due to stone bounders etc. are different. The certificate combines the two losses and claims them as washing loss. The rejects quantified as 8.03. MT only reproduces what is disclosed in the accounts as processed wastage.

14. AND WHEREAS on examination of records, statement of witnesses etc, it was seen that there is no evidence of any purported conspiracy between the accused officer and GCWL or any *quid pro quo* in this regard. The reason for deferring the agenda in 41st Board Meeting have been explained in the detailed note of M/s KPCL and appear to be reasonable. It has been mentioned that the revised mining plan was approved in the Board Meeting of the Joint Venture KECML by which a new technology was to be implemented which could have been issued of rejection irrelevant.

15. **AND WHEREAS the comments of the Govt. of Karnataka have been obtained. They have stated that there is no material to support the allegation that he conspired to illegally dispose off the rejects and therefore deferred the agenda. Hence, no criminal intent can be attributed to Shri Yogendra Tripathi and have recommended declining of sanction for**

prosecution U/s 120B r/w 409 and 420 of IPC and Section 13 of the Prevention of Corruption Act, 1988.

16. **AND WHEREAS the proposal was sent to the CVC for their advice. The CVC advised declining of sanction for prosecution against Shri Yogendra Tripathi**, IAS(KN:1985), the then Managing Director Karnataka Power Corporation Ltd. (KPCL), Bangalore, in case RC:2202015 E0002 dated 13.03.2015.

17. **AND WHEREAS all case records sent by the investigating agency were sent to the Hon'ble Prime Minister, who is the Competent Authority in the Central Government, to decide sanction for prosecution in respect of the IAS officers**.

18. **AND THEREFORE The Competent Authority, in view of the above position and after carefully considering the facts and circumstances of the case and considering all other relevant material/ documents, including evidence submitted by the Investigating Agency with the proposal, has approved the proposal to decline sanction for prosecution against Shri Yogendra Tripathi, IAS (KN:85) in the instant case, under Section 19 of the Prevention of Corruption Act, 1988**."

12.4. The aforesaid order reveals that before applying its mind, the Competent Authority in the Central Government had sought comments from the Government of Karnataka who had stated that there was no material produced by the respondent-CBI in support of the allegation that Mr. Yogendra Tripathi had conspired to illegally dispose off the coal rejects or with *malafide* intention deferred the agenda in the 41st Board Meeting of the KPCL. The Competent Authority separately sent the said proposal submitted by the respondent-CBI to the CVC for seeking advice. After examining all the records sent by the investigation agency including the evidence submitted by it, the Office of the Prime Minister who is the Competent Authority in the Central Government, approved the proposal to decline the sanction for

prosecuting Mr. Yogendra Tripathi. Yet again, no appeal has been filed by the respondent – CBI before the court questioning the said decision.

12.5. The respondent-CBI having accepted the decision taken by the Sanctioning Authority in respect of Mr. R. Nagaraja and the decision of the Competent Authority in the Central Government in respect of Mr. Yogendra Tripathi, both senior most serving officers of KPCL and were also on the Board of KECML, cannot be permitted to argue that these were merely administrative decisions and even if permission to prosecute the aforesaid officers has been denied, the Department can still proceed against the appellants based on the very same set of material/documents/evidence etc. that have been minutely scrutinized by different authorities at the highest level and they have independently arrived at an identical conclusion of refusing to grant sanction to prosecute senior functionaries of KPCL. Simply because the said senior functionaries of KPCL were public servants, does not detract from the fact that the respondent-CBI has described them as co-accused in a criminal conspiracy and attributed similar motives to them as the appellants herein. If they have been let off the hook and the respondent-CBI has not challenged the said decisions, there is no reason to proceed against the appellants herein on the basis of the very same set of facts and material gathered during the course of investigation.

13. EFFECT OF THE ABSENCE OF ANY STRATEGY IN THE MINING PLAN TO DISPOSE OFF THE COAL REJECTS

13.1. Coming next to the stand taken by the respondent-CBI that absence of any plan mentioned in the Mining Plan to deal with the rejects could not exonerate the appellants who werebound by the terms and conditions of the letter dated 10th November, 2003 issued by the MoC, we may note the assertion of the respondent-CBI that the Mining Plan of the coal blocks in question did not contain any plan for disposal of rejects, usable, tailings, middlings, etc., that would be generated on account of mining/ washing of coal, is contrary to the records. Article 5(2)(b) of the JVA required EMTA to take all clearances for setting up the coal washery from the concerned authorities and properly

dispose off the coal rejects to the satisfaction of environmental regulations.

13.2. The explanation offered by the appellants that at that point in time, the Central Government had not come out with any specific plan to dispose off the coal rejects is validated by the reply furnished by the Minister of State, MoC, in the Lok Sabha in response to an unstarred question seeking an answer from the Government of India as to whether it had framed any National Policy for exploitation of the coal rejects. The reply given was that the Government had not framed any National Policy for exploitation of coal rejects and the same was still under consideration. That being the position, it was left to KPCL and KECML to devise a satisfactory and safe method to dispose off the coal rejects. This was done in terms of Article 5(2)(b) of the JVA that required KECML to dispose off the rejects in a manner that would ensure that there was no threat to the environment. We do not find any irregularity in the route adopted to dispose off the coal rejects.

14. WAS KECML REQUIRED TO ACCOUNT FOR THE COAL REJECTS?

14.1. Much emphasis has been laid by the respondent-CBI on the contents of the allocation letter dated 10th November, 2003 issued by the MoC, Government of India to KPCL to canvass that the coal mined from the allocated blocks was to be exclusively used to meet the requirements of coal in the proposed thermal power station namely, BTPS and on the condition that no coal was to be sold /delivered/transferred/disposed of except for the purpose of power generation and with the previous approval of the Central Government. We are afraid, the said letter cannot be read in isolation and out of context for the very same reasons as have been noted above.

14.2. When the Central Government did not formulate any National Policy for exploitation of coal rejects, it is fallacious on the part of the respondent-CBI to argue that the conditions imposed by the Central Government while conveying its approval to the State Government for grant of mining lease in favour of KPCL ought to have formed a part of the lease deed to be executed. Fact of the matter is that there was no such condition imposed in the Notification dated 16th July, 2004, issued by the MoC. The said notification simply specified the end use of

the coal from the allocated coal blocks for supply to KPCL to generate thermal power in the proposed BPCL. The original Mining Plan of September, 2004 submitted by KECML to the MoC for its approval also did not elucidate the manner in which the coal rejects were to be disposed of. The said Mining Plan had the approval of the MoC which did not raise any objection relating to the absence of any condition for dealing with the coal rejects. The inevitable conclusion is that disposal of the coal rejects was to be undertaken by KECML strictly in terms of Article 5(2)(b) of the JVA and no more.

14.3. Moreover, a closer look at the clauses of the JVA and FSA clearly indicate that KECML was only obliged to provide a specified grade of washed coal (Grade – D) having a specific GCV in the range of 4200-4940 Kcal/kg.[85] When coal has been defined in the JVA and FSA as *"washed coal with guaranteed value"* and one that satisfied the parameters laid down in Annex-1 attached to the JVA and FSA[86] and further, KECML was required to ensure that all *"shales/stones"* are removed from the coal before making the supply,[87] there was no occasion for KECML to account for the rejects. All that KPCL was required to do was to buy from KECML, the washed coal with a particular guaranteed value and one that would satisfy the specified quality parameters, at a predetermined price.[88] The agreement governing the parties required KECML to dispose off the rejects safely. KECML was not required to account for the coal rejects to KPCL. KPCL itself understood the clauses in the JVA and the FSA to mean the same and it was satisfied with the manner in which KECML was discharging its obligations under the agreements till Audit Objections were raised by the CAG in October, 2013. That's when KPCL did a complete flip flop and for the first time, raised a demand on KECML seeking reimbursement towards the value of the coal rejects, a decision that was successfully assailed by the appellants in the High

85 'Grade D Coal' as defined under 'Definition and Interpretation' clause of the JVA dt 13th September, 2002.

86 'Coal' as defined under 'Definition and Interpretation' clause of the JVA dt. 13th September, 2002 and Article 1 of FSA dt. 09th May, 2007

87 Article 5.2.2 of the FSA

88 Annexure-II of the JVA and Article 6.1.1 of the FSA

Court and the challenge laid by KPCL to the said judgement was repelled by this Court.

15. CAN KECML BE BLAMED FOR NOT SETTING UP THE COAL WASHERY AT THE PITHEAD?

15.1. As for the allegation levelled by the respondent–CBI that KECML violated the terms of Articles 2(4)(g) and 5(2)(b) of the JVA having failed to setup the coal washery at the pithead, the sequence of events narrated above, shows that the fault does not lie at the door of the appellants. It was on account of some litigation between CIPCO and MoC in relation to the coal blocks allocated to KPCL wherein interim orders were granted by the High Court in favour of CIPCO, that the project got delayed. Production of coal could commence only in September, 2008 after the aforesaid litigation came to an end. By then, much time was lost. The conditions stipulated in the agreements governing KPCL and KECML placed an obligation on KECML to supply washed coal with a definite GCV and specified parameters for the consumption of the Thermal Power Station at Bellary and failure to deliver coal within the stipulated time, attracted penalties.

15.2. It was in this background that KECML executed the MoU with GCWL for washing of the mined coal at its washery at Majri, transportation of the raw coal from the mines and washed coal to the Railway Siding for delivery to BTPS. Records reveal that the draft of MoU was duly deliberated upon by the Board of Directors of KECML and finally approved and ratified on 13th January, 2009. Subsequently, in the meeting held on 23rd February, 2010, the Board of Directors of KECML concluded that washing of raw coal was a prerequisite to meet the specified grade of coal with a defined GCV for generation of power at BTPS. The necessity of supplying washed coal to obtain the agreed parameter of coal quality was also recognized by the office of the Coal Controller in its letter dated 9th December, 2009. This fact finds mention in the detailed Report of the Board of KPCL that refused permission to the respondent-CBI to prosecute Mr. R. Nagaraja.

15.3. It is clear from the above that the decision of KECML to enter into a MoU with GCWL for washing of coal was actuated by

compelling circumstance faced by it and KPCL had taken a calibrated decision in its commercial wisdom to duly concur with the said decision knowing very well that non-supply of a specified grade of washed coal by KECML would have serious consequences of stoppage of generation of power at BTPS and a cascading effect of resulting in a power crisis in the State of Karnataka.

15.4. We do not propose to Labour much on the contention of the respondent-CBI that allocation of the coal block was in favour of KPCL and not in favour of KECML as stands adequately explained on a perusal of the Notification dated 16th July, 2024 which shows that the Central Government did recognize the fact that it was KECML who was required to supply coal from the coal mines allocated to KPCL and end use of the said coal was specified for generation of Thermal Power Station at Bellary, Karnataka. In our view, having regard to the aforesaid notification, nothing much turns on the submission made by the respondent-CBI that the coal block allocation was only in favour of KPCL and it ought to have a right over the rejects to the exclusion of KECML and others.

16. DID THE COAL REJECTS HAVE ANY USEFLUL CALORIFIC VALUE MAKING IT A SALEABLE COMMODITY?

16.1. We find that the Detailed Washability Report of the Government Laboratory namely, CIMFR, Nagpur has been ignored by the respondent-CBI. It was the said Report that formed the basis of the information furnished by KECML with respect to production, stock, despatch of coal to the washery etc., as was demanded by the office of the Coal Controller, a department that falls under the MoC. The said Report stated in so many words that the rejects did not contain any useful c.v. Reliance placed by the respondent-CBI on the revised Mining Plan submitted by the appellants to the MoC in 2010, that mentions a new technology for utilization of rejects for its carbon value, namely FBC is of no consequence as the said technology had not even been introduced when MoC approved the original Mining Plan, submitted by KECML in the year 2004. Even otherwise, it is not in dispute that for applying the said technology, a plant was required to be established after obtaining necessary approvals from several agencies. The plant could not be established by

KECML for the reason that the revised Mining Plan submitted by it was approved by the MoC only on 24th August, 2011. Consequent steps that were required to be taken by KECML for obtaining necessary approvals from the MoEF&CC and other govt. agencies came to a grinding halt when an order was passed by this Court in the year 2014, deallocating all captive coal blocks, including those allocated to KPCL. Therefore, any reference by the respondent-CBI to the revised Mining Plan is of no consequence.

17. PERSUASIVE VALUE OF THE ARYAN ENERGY CASE

17.1 KPCL's entitlement over the coal rejects has been separately tested by the High Court of Karnataka in the case of ***Aryan Energy (supra)***. Pertinently, in that case the clauses forming a part of the Agreement between KPCL and Aryan Energy particularly with respect to the disposal of the coal rejects is the same as in the instant case. Aryan Energy was also required to dispose off the coal rejects by making compliance of the environmental regulations. In the said case, the High Court of Karnataka returned a finding that KPCL did not have any claim over the coal rejects generated during washing of coal. The view taken was that as long as disposal of the coal rejects was in line with the environmental regulations, KPCL did not have any role to play in the disposal of the coal rejects. It was specifically observed by the High Court that the agreement between KPCL and Aryan Energy included a condition that KPCL would only buy washed coal at a predetermined price and that it was not entitled to lay a claim on the coal rejects generated during the processing of raw coal. In view of the terms and conditions of the agreement between the parties, the High Court concluded that KPCL could not have raised any demand on Aryan Energy claiming reimbursement for the value of the coal rejects. It is a matter of record that although KPCL had challenged the judgement and order dated 22nd July, 2021 passed by the High Court of Karnataka[44] before this court, the said petitions were disposed of on 26th April, 2014 noting that the parties had settled their *inter se* disputes amongst themselves in terms of a Compromise Deed and as a result, part of the decretal amount deposited by KPCL before the Commercial Court was agreed to be released in favour of Aryan Energy.

17.2 We do not see why the aforesaid decision would not have any persuasive value when the clauses in the agreement between KPCL and KECML for disposing off the coal rejects are identical. On going through the agreements executed between KPCL and Aryan Energy, the High Court had shot down the plea of KPCL that it was entitled to the coal rejects. Though KPCL assailed the said decision before this Court, it settled its dispute with Aryan Energy and the appeals preferred by it were disposed of as compromised. The contention of the respondent-CBI that the order of the High Court of Karnataka is not relevant for the present case since there was no criminal case registered therein, cannot be a distinguishing feature when the terms and conditions of the contract between KPCL and Aryan Energy on the aspect of disposal of the coal rejects is *pari materia.* We are of the opinion that the judgment in the case of Aryan Energy does have persuasive value.

18. INHERENT JURISDICTION OF THE HIGH COURT UNDER SECTION 482, Cr.P.C

18.1. For seeking quashing of the chargesheet and the order framing charges, learned counsel for the appellants has cited decisions of this court that lay down the proposition of law relating to quashing of criminal proceedings by a High Court under Section 482, Cr.P.C. In ***Rajiv Thapar and Others v. Madan Lal Kapoor***,[89] this court held as under:

> "29. The issue being examined in the instant case is the jurisdiction of the High Court under Section 482 CrPC, if it chooses to quash the initiation of the prosecution against an accused at the stage of issuing process, or at the stage of committal, or even at the stage of framing of charges. These are all stages before the commencement of the actual trial. The same parameters would naturally be available for later stages as well. The power vested in the High Court under Section 482 CrPC, at the stages referred to hereinabove, would have far-reaching consequences inasmuch as it would negate the prosecution's/complainant's case without allowing

89 [2013] 3 SCR 52 : (2013) 3 SCC 330

> the prosecution/complainant to lead evidence. Such a determination must always be rendered with caution, care and circumspection. **To invoke its inherent jurisdiction under Section 482 CrPC the High Court has to be fully satisfied that the material produced by the accused is such that would lead to the conclusion that his/their defence is based on sound, reasonable, and indubitable facts; the material produced is such as would rule out and displace the assertions contained in the charges levelled against the accused; and the material produced is such as would clearly reject and overrule the veracity of the allegations contained in the accusations levelled by the prosecution/complainant. It should be sufficient to rule out, reject and discard the accusations levelled by the prosecution/complainant, without the necessity of recording any evidence.** For this the material relied upon by the defence should not have been refuted, or alternatively, cannot be justifiably refuted, being material of sterling and impeccable quality. **The material relied upon by the accused should be such as would persuade a reasonable person to dismiss and condemn the actual basis of the accusations as false. In such a situation, the judicial conscience of the High Court would persuade it to exercise its power under Section 482 CrPC to quash such criminal proceedings, for that would prevent abuse of process of the court, and secure the ends of justice."**
>
> [emphasis added]

18.2 In the captioned case, this court had further observed that the discretion vested in the High Court under Section 482 Cr.P.C can be exercised *suo moto* to prevent abuse of the process of a Court, and/or to secure the ends of justice. After listing the factors that ought to weigh with the High Court to make a just and rightful choice, it was observed thus:

> "30. Based on the factors canvassed in the foregoing paragraphs, we would delineate the following steps to

determine the veracity of a prayer for quashment raised by an accused by invoking the power vested in the High Court under Section 482 CrPC:

30.1. Step one: whether the material relied upon by the accused is sound, reasonable, and indubitable i.e. the material is of sterling and impeccable quality?

30.2. Step two: whether the material relied upon by the accused would rule out the assertions contained in the charges levelled against the accused i.e. the material is sufficient to reject and overrule the factual assertions contained in the complaint i.e. the material is such as would persuade a reasonable person to dismiss and condemn the factual basis of the accusations as false?

30.3. Step three: whether the material relied upon by the accused has not been refuted by the prosecution/ complainant; and/or the material is such that it cannot be justifiably refuted by the prosecution/complainant?

30.4. Step four: whether proceeding with the trial would result in an abuse of process of the court, and would not serve the ends of justice?

30.5. If the answer to all the steps is in the affirmative, the judicial conscience of the High Court should persuade it to quash such criminal proceedings in exercise of power vested in it under Section 482 CrPC. Such exercise of power, besides doing justice to the accused, would save precious court time, which would otherwise be wasted in holding such a trial (as well as proceedings arising therefrom) specially when it is clear that the same would not conclude in the conviction of the accused."

[emphasis added]

18.3 In ***State of Orissa v. Debendra Nath Padhi***,[90] the powers of the High Court under Section 482, Cr.P.C and Article 226 of the Constitution of India were highlighted and the court observed that:

90 [2004] Supp. 6 SCR 460 : (2005) 1 SCC 568

> "29. Regarding the argument of the accused having to face the trial despite being in a position to produce material of unimpeachable character of sterling quality, **the width of the powers of the High Court under Section 482 of the Code and Article 226 of the Constitution is unlimited whereunder in the interests of justice the High Court can make such orders as may be necessary to prevent abuse of the process of any court or otherwise to secure the ends of justice within the parameters laid down in Bhajan Lal case[91] [1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426]."**
>
> [emphasis added]

18.4 In ***Rukmini Narvekar v. Vijaya Satardekar and Others***,[92] this Court has observed that the width of the powers of the High Court under Section 482, Cr.P.C and under Article 226 of the Constitution of India are unlimited, that the High Court could make such orders as may be necessary to prevent abuse of the process of any Court or otherwise to secure the ends of justice. In a concurring order passed in the very same case, it was observed in addition that in exercising jurisdiction under Section 482, Cr.P.C, the High Court is free to consider even material that may be produced on behalf of the accused to arrive at a decision whether charge as framed could be maintained.

18.5 In ***Anand Kumar Mohatta and Another v. State (NCT of Delhi), Department of Home and Another***,[93] referring to the provisions of Section 482, Cr.P.C, this Court held as follows:

> 16. There is nothing in the words of this section which restricts the exercise of the power of the Court to prevent the abuse of process of court or miscarriage of justice only to the stage of the FIR. It is settled principle of law that the High Court can exercise jurisdiction under Section 482 CrPC even when the discharge application

91 (1992) Supp (1) SCC 335

92 [2008] 14 SCR 271 : (2008) 14 SCC 1

93 [2018] 13 SCR 1028 : (2019) 11 SCC 706

is pending with the trial court **[**G. Sagar Suri v. State of U.P., (2000) 2 SCC 636, para 7 : 2000 SCC (Cri) 513. Umesh Kumar v. State of A.P., (2013) 10 SCC 591, para 20 : (2014) 1 SCC (Cri) 338 : (2014) 2 SCC (L&S) 237] . **Indeed, it would be a travesty to hold that proceedings initiated against a person can be interfered with at the stage of FIR but not if it has advanced and the allegations have materialised into a charge-sheet. On the contrary it could be said that the abuse of process caused by FIR stands aggravated if the FIR has taken the form of a charge-sheet after investigation. The power is undoubtedly conferred to prevent abuse of process of power of any court.**

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28. **In** State of Haryana v. Bhajan Lal [State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426], this Court has set out the categories of cases in which the inherent power under Section 482 CrPC can be exercised. Para 102 of the judgment reads as follows : (SCC pp. 378-79)

> "102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the Act concerned (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the Act concerned, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding

is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

18.6. In State of Karnataka vs. L. Munniswamy,[94] Y.V. Chandrachud, J. as he then was (speaking for a three Judge Bench) observed thus:

"7. … In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. **The saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice."**

[emphasis added]

18.7 As can be gathered from the above, Section 482 Cr.P.C recognizes the inherent powers of the High Court to quash initiation of prosecution against the accused to pass such orders as may be considered necessary to give effect to any order under the Cr.P.C or to prevent abuse of the process of any court or otherwise to secure the ends of justice. It is a statutory power vested in the High Court to quash such criminal proceedings that would dislodge the charges levelled against the accused and based on the material produced, lead to a firm opinion that the assertions contained in the charges levelled by the prosecution deserve to be overruled.

94 [1977] 3 SCR 113 : (1977) 2 SCC 699

18.8 While exercising the powers vested in the High Court under Section 482, Cr.P.C, whether at the stage of issuing process or at the stage of committal or even at the stage of framing of charges, which are all stages that are prior to commencement of the actual trial, the test to be applied is that the Court must be fully satisfied that the material produced by the accused would lead to a conclusion that their defence is based on sound, reasonable and indubitable facts. The material relied on by the accused should also be such that would persuade a reasonable person to dismiss the accusations levelled against them as false.

19. EXTRAORDINARY POWERS OF THIS COURT UNDER ARTICLE 13 OF THE CONSTITUTION OF INDIA

19.1. When it comes to invocation of the powers vested in this Court under Article 136 of the Constitution of India, unlike Section 482 Cr.P.C that has a statutory flavour, Article 136 confers plenary powers on this Court to interfere in suitable cases. In ***Arunachalam v. P.S.R. Sadhanantham and Another***,[95] this court has expounded on the amplitude of its powers under Article 136 in the following words:

> "4. ……**Article 136 of the Constitution of India invests the Supreme Court with a plentitude of plenary, appellate power over all Courts and Tribunals in India. The power is plenary in the sense that there are no words in Article 136 itself qualifying that power. But, the very nature of the power has led the Court to set limits to itself within which to exercise such power.** It is now the well established practice of this Court to permit the invocation of the power under Article 136 only in very exceptional circumstances, as when a question of law of general public importance arises or a decision shocks the conscience of the Court**. But, within the restrictions imposed by itself, this Court has the undoubted power to interfere even with findings of fact, making no distinction between judgments of acquittal and conviction, if the High Court, in arriving at those findings, has acted**

95 [1979] 3 SCR 482 : (1979) 2 SCC 297

"perversely or otherwise improperly". (See **State of Madras v. A. Vaidyanatha Iyer** [AIR 1958 SC 61 : [1958] SCR 580 : 1958 Cri LJ 232] and **Himachal Pradesh Administration v. Om Prakash** [(1972) 1 SCC 249 : [1972] 2 SCR 765])……."

5. A doubt has been raised about the competence of a private party, as distinguished from the State, to invoke the jurisdiction of this Court under Article 136 of the Constitution against a judgment of acquittal by the High Court. We do not see any substance in the doubt**. Appellate power vested in the Supreme Court under Article 136 of the Constitution is not to be confused with ordinary appellate power exercised by appellate courts and Appellate Tribunals under specific statutes.As we said earlier, it is a plenary power, 'exercisable outside the purview of ordinary law' to meet the pressing demands of justice (vide Durga Shankar Mehta v. Thakur Raghuraj Singh [AIR 1954 SC 520 : [1955] 1 SCR 267 : 1954 SCJ 723]). Article 136 of the Constitution neither confers on anyone the right to invoke the jurisdiction of the Supreme Court nor inhibits anyone from invoking the Court's jurisdiction. The power is vested in the Supreme Court but the right to invoke the Court's jurisdiction is vested in no one**. The exercise of the power of the Supreme Court is not circumscribed by any limitation as to who may invoke it. …….. Appeals under Article 136 of the Constitution are entertained by special leave granted by this Court, whether it is the State or a private party that invokes the jurisdiction of this Court, special leave is not granted as a matter of course but only for good and sufficient reasons, as well established by the practice of this Court."

[emphasis added]

19.2. In ***P.S.R. Sadhanantham v. Arunachalam***,[96] a Constitution Bench of five judges elaborated the content and character

96 [1980] 2 SCR 873 : (1980) 3 SCC 141

of Article 136 *vis-à-vis* Article 21 and made the following observations:

"7. Specificity being essential to legality, let us see if the broad spectrum spread out of Article 136 fills the bill from the point of view of "procedure established by law". **In express terms, Article 136 does not confer a right of appeal on a party as such but it confers a wide discretionary power on the Supreme Court to interfere in suitable cases.** The discretionary dimension is considerable but that relates to the power of the court. The question is whether it spells by implication, fair a procedure as contemplated by Article 21. In our view, it does. **Article 136 is a special jurisdiction. It is residuary power; it is extraordinary in its amplitude, its limit, when it chases injustice, is the sky itself. This Court functionally fulfils itself by reaching out to injustice wherever it is and this power is largely derived in the common run of cases from Article 136**. Is if merely a power in the court to be exercised in any manner it fancies? Is there no procedural limitation in the manner of exercise and the occasion for exercise? Is there no duty to act fairly while hearing a case under Article 136, either in the matter of grant of leave or, after such grant, in the final disposal of the appeal? **We have hardly any doubt that here is a procedure necessarily implicit in the power vested in the summit court. It must be remembered that Article 136 confers jurisdiction on the highest court. The founding fathers unarguably intended in the very terms of Article 136 that it shall be exercised by the highest judges of the land with scrupulous adherence to judicial principles well established by precedents in our jurisprudence. Judicial discretion is canalised authority, not arbitrary eccentricity**....

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10. **Once we hold that Article 136 is a composite provision which vests a wide jurisdiction and, by the very fact of entrusting this unique jurisdiction in the**

> **Supreme Court, postulates, inarticulately though, the methodology of exercising that power, nothing more remains in the objection of the petitioner.** It is open to the court to grant special leave and the subsequent process of hearing are (*sic* is) well-established. Thus, there is an integral provision of power-cum-procedure which answers with the desideratum of Article 21 justifying deprivation of life and liberty.
>
> [emphasis added]

In a concurring judgement in the captioned case, it was further observed that:

> 21. **Plainly, the jurisdiction conferred by Article 136 seeks to confer on this Court the widest conceivable range of judicial power, making it perhaps among the most powerful courts in the world. The judicial power reaches out to every judgment, decree, determination, sentence or order affecting the rights and obligations of persons in civil matters, of life and liberty in criminal matters as well as matters touching the Revenues of the State.** It is an attempt to ensure that the foundations of the Indian Republic, which have been laid on the bedrock of justice, are not undermined by injustice anywhere in the land, **Bharat Bank Ltd. v. Employees of these Bharat Bank Ltd** [1950 SCC 470 : AIR 1950 SC 188 : [1950] SCR 459, 474 : 1950 LLJ 21 : (1950-51) 2 FJR 1] . As the court observed **in Durga Shankar Mehta v. Thakur Raghuraj Singh** [AIR 1954 SC 520 : [1955] 1 SCR 267, 272 : 9 ELR 494] Article 136 "vests in the Supreme Court a plenary jurisdiction in the matter of entertaining and hearing appeals by grant of special leave".
>
> 22. Nonetheless, there is a limitation which, in our opinion, is of immediate relevance. It is a limitation in-built in to the jurisdiction of the court and flows from the nature and character of the case intended to be brought before the court. It is a limitation which requires compliance despite the apparent plenitude of power vested in the court. When a petition is presented to the

court under Article 136, the court will have due regard to the nature and character of the case sought to be brought before it when entertaining and disposing of the petition.

[emphasis added]

19.3 In ***Khoday Distilleries Limited and Others v. Mahadeshwara S.S.K. Limited***,[97] this Court observed that Article 136 commences with a *non-obstante* clause, the words are of overriding effect and clearly indicate the intention of the framers of the Constitution that it is a special jurisdiction and a repository of residuary powers unfettered by any Statute or any provisions of Chapter IV of Part V of the Constitution of India. It was also observed that the jurisdiction under Article 136 of the Constitution cannot be barred by the Statute since it is an extraordinary power.

19.4 In ***State of Punjab and others v. Rafiq Masih (White Washer) others***,[98] in the same strain, this Court has held that Article 136 is a special jurisdiction and can be described as a *'residuary power, extraordinary in its amplitude, its limits when it chases injustice, is the sky itself'*. It is a corrective jurisdiction that vests a discretion in this Court to settle the law clearly and makes the law operational thereby making it a binding precedent for the future instead of keeping it vague.

19.5 In ***Mekala Sivaiah v. State of Andhra Pradesh***,[99] this Court commented on the circumstances in which the power under Article 136 is exercised and held thus:

"14. Before adverting to the merits of the contention raised, it is important to reiterate that **Article 136 of the Constitution of India is an extraordinary jurisdiction which this Court exercises when it entertains an appeal by special leave and this jurisdiction, by its very nature, is exercisable only when this Court is satisfied that it is necessary to interfere in order to prevent grave or serious miscarriage of justice.**

97 [2019] 3 SCR 411 : (2012) 12 SCC 291

98 [2014] 13 SCR 1343 : AIR (2015) 1267

99 [2022] 6 SCR 989 : (2022) 8 SCC 253

> 15. It is well settled by judicial pronouncement that Article 136 is worded in wide terms and powers conferred under the said Article are not hedged by any technical hurdles. This overriding and exceptional power is, however, to be exercised sparingly and only in furtherance of cause of justice. **Thus, when the judgment under appeal has resulted in grave miscarriage of justice by some misapprehension or misreading of evidence or by ignoring material evidence then this Court is not only empowered but is well expected to interfere to promote the cause of justice.**"
>
> [emphasis added]

19.6 From the aforesaid discussion, it is apparent that Article 136 can be invoked by a party in a petition for special leave to appeal from any judgement, decree, determination, sentence or order in any cause or matter passed or made by a Court or Tribunal within the territory of India. The reach of the extraordinary powers vested in this Court under Article 136 of the Constitution of India is boundless. Such unbridled powers have been vested in Court, not just to prevent the abuse of the process of any court or to secure the ends of justice as contemplated in Section 482, Cr.P.C, but to ensure dispensation of justice, correct errors of law, safeguard fundamental rights, exercise judicial review, resolve conflicting decisions, inject consistency in the legal system by settling precedents and for myriad other to undo injustice, wherever noticed and promote the cause of justice at every level. The fetters on this power are self imposed and carefully tampered with sound judicial discretion.

19.7 Coming back to the case in hand, ordinarily, a party aggrieved by the filing of a chargesheet or framing of charges ought to first approach the High Court in a petition under Section 482, Cr.P.C. Though such a route would have been available to the appellants herein as well, but in view of the categorical directions issued by this court in ***M.L. Sharma*** ***(supra)*** that this Court alone shall have the jurisdiction to entertain cases relating to allocation of coal blocks including cases for staying

the investigation or trial in a matter relating to coal, one rung of an appeal before the High Court for quashing the chargesheet or interfering in the order on charge by invoking the inherent jurisdiction under Section 482 Cr.P.C. stands fore closed. The appellants were left with only one chance of directly invoking Article 136 of the Constitution of India and filing a petition for special leave before this court to challenge the impugned orders passed by the learned Special Judge, CBI framing charges against them and dismissing their application for seeking discharge.

19.9 Given the broad amplitude of the extraordinary powers of this Court under Article 136 of the Constitution of India, the respondent-CBI cannot be heard to urge that since a Chargesheet has already been filed against the appellants and charges framed, the appellants should be left to take all the pleas available to them before the learned Special Judge, CBI during the course of the trial and that no interference is called for by this Court at this stage. Such an approach does not commend itself to this Court in the facts and circumstances of this case.

20. APPLICATION OF MIND AT THE STAGE OF SECTION 227, Cr.P.C

20.1 We may note that there is no quarrel with the broad proposition canvassed by learned counsel for the respondent- CBI that at the stage of Section 227, Cr.P.C., the Special Judge, CBI had to sift the evidence to find out whether there was sufficient ground for proceedings against the appellants. That exercise would include taking a *prima facie* view on the nature of the evidence recorded by the CBI and the documents placed before the court so as to frame any charge. At the same time, one must be mindful of the language used in Section 227 of the Cr.P.C, which is extracted below:

> "227. **Discharge.**—If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing."

20.2. As observed in **Prafulla Kumar Samal (supra)** the expression "*not sufficient ground for proceeding against the accused*" clearly shows that the Judge is not a mere post office to frame the charge at the behest of the prosecution. The Judge must exercise the judicial mind to the facts of the case in order to determine whether a case for trial has been made out by the prosecution. The principles governing the scope of Section 227, Cr.P.C. have been succinctly summarized in the caption case as below:

> "**10.** Thus, on a consideration of the authorities mentioned above, the following principles emerge:
>
> (*1*) That the Judge while considering the question of framing the charges under Section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out.
>
> (*2*) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial.
>
> (*3*) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.
>
> **(*4*) That in exercising his jurisdiction under Section 227 of the Code the Judge which under the present Code is a senior and experienced court cannot act merely as a Post Office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros**

and cons of the matter and weigh the evidence as if he was conducting a trial."

[emphasis added]

20.3. To the same effect is the view expressed in **Niranjan Singh KS Punjabi (supra)** where this court has observed as follows:

"5. Section 227, introduced for the first time in the new Code, confers a special power on the Judge to discharge an accused at the threshold if 'upon consideration' of the record and documents he considers 'that there is not sufficient ground' for proceeding against the accused. In other words his consideration of the record and document at that stage is for the limited purpose of ascertaining whether or not there exists sufficient grounds for proceeding with the trial against the accused. If he comes to the conclusion that there is sufficient ground to proceed, he will frame a charge under Section 228, if not he will discharge the accused. **It must be remembered that this section was introduced in the Code to avoid waste of public time over cases which did not disclose a prima facie case and to save the accused from avoidable harassment and expenditure.**

6. **The next question is what is the scope and ambit of the 'consideration' by the trial court at that stage.**.....**It is obvious that since he is at the stage of deciding whether or not there exists sufficient grounds for framing the charge, his enquiry must necessarily be limited to deciding if the facts emerging from the record and documents constitute the offence with which the accused is charged. At that stage he may sift the evidence for that limited purpose but he is not required to marshal the evidence with a view to separating the grain from the chaff. All that he is called upon to consider is whether there is sufficient ground to frame the charge and for this limited purpose he must weigh the material on record as well as the documents relied on by the prosecution."**

[emphasis Added]

20.4. In **N. Suresh Rajan (supra),** the following view was expressed as to the role of the trial Court at the time of considering an application for discharge.

> "29. We have bestowed our consideration to the rival submissions and the submissions made by Mr Ranjit Kumar commend us. **True it is that at the time of consideration of the applications for discharge, the court cannot act as a mouthpiece of the prosecution or act as a post office and may sift evidence in order to find out whether or not the allegations made are groundless so as to pass an order of discharge**. It is trite that at the stage of consideration of an application for discharge, the court has to proceed with an assumption that the materials brought on record by the prosecution are true and evaluate the said materials and documents with a view to find out whether the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. At this stage, probative value of the materials has not to be gone into and the court is not expected to go deep into the matter and hold that the materials would not warrant a conviction. **In our opinion, what needs to be considered is whether there is a ground for presuming that the offence has been committed and not whether a ground for convicting the accused has been made out.To put it differently, if the court thinks that the accused might have committed the offence on the basis of the materials on record on its probative value, it can frame the charge; though for conviction, the court has to come to the conclusion that the accused has committed the offence. The law does not permit a mini trial at this stage."**
>
> [emphasis added]

20.5 The aforesaid parameters had to be kept in mind by the learned Special Judge, CBI at the time of considering the records/ documents submitted by the respondent-CBI and the material

produced by the appellants. In our view, the said consideration is lacking in the impugned orders for the reasons noticed above.

21. CONCLUSION

21.1 Though multiple arguments have been advanced by learned counsel for the appellants to assail the impugned orders passed by the learned Special Judge, CBI, including a plea that no offence is made out under Section 13(1)(d) of the P.C. Act for various reasons, this Court has consciously elected to confine itself only to those aspects that in our opinion, would be sufficient to arrive at a *prima facie* view that the allegations levelled against the appellants have pre-dominant contours of a dispute of a civil nature, does not have the makings of a criminal offence and on an overall conspectus of the case, would persuade any reasonable person to dismiss the accusations levelled. Therefore, this court declines to go into the nitty gritties of the documents/evidence, or the contrasting data produced by the parties to test their probative value.

21.2 The *prima facie* findings of this Court, based on the documents and material placed before us are as follows:

(a) The plea of the respondent-CBI that it conducted an investigation in the present case during the course of the inquiry in respect of PE-5 registered by it in the year 2012 is belied as the SIR was on a completely different aspect. CBI only got activated only on stumbling upon the Audit Report of the CAG submitted in 2013. There is nothing brought on record to show to the contrary.

(b) The CAG Report had not attained finality inasmuch as its recommendations have not been tabled before the Parliament or accepted so far. The said report at best, has a persuasive value but no more.

(c) The Sanctioning Authority namely, the Board of Directors of KPCL in respect of Mr. R Nagarajan, the then Finance Director of KPCL and nominee Director of the Board of KECML had the occasion to thoroughly scrutinize all the relevant documents including the MoU dated 20th December, 2008 executed between KECML and GCWL as also the depositions of 67 witnesses submitted by

the respondent-CBI. Only thereafter, did it arrive at a conclusion that there was nothing to demonstrate that any rejects generated by washing of the coal had been sold by the appellants or that KPCL had suffered an unlawful loss due to the same.

(d) The Competent Authority in the Central Government who was approached by the respondent-CBI for sanction to prosecute Mr. Yogendra Tripathi, the then Managing Director of KPCL sought comments from two separate sources. The Government of Karnataka opined that no criminal intent could be attributed to the said officer. A proposal was also sent to the CVC for their advice. The CVC too recommended that the sanction for prosecuting the officer ought to be declined. The Competent Authority in the Central Government after going through the entire documents and material including the evidence submitted by the respondent-CBI and the opinions solicited, declined sanction for the prosecution of the aforesaid officer.

(e) The respondent-CBI did not approach the Court to challenge the aforesaid decisions. Having accepted the decision taken by the Sanctioning Authority/Competent Authority in the Central Government and dropping the charges against the seniormost functionaries in KPCL, who were also holding positions in the Board of KECML, there is no justification to press charges against the appellants herein whose role is similar to them.

(f) The decision dated 24th March, 2016 of the Karnataka High Court in a writ petition filed by KECML against KPCL has been wrongly overlooked. The High Court had an occasion to scrutinize the very same agreements and the CAG report that formed the basis of the investigation conducted by the respondent–CBI to return positive findings in favour of the appellants. The view taken by the Karnataka High Court has been upheld by this Court in a judgment rendered on 20th May, 2022 which was just a few days after Charges were framed by the learned Special Judge, CBI on 3rd March, 2022.

(g) Yet again, an interpretation of the very same clauses in the agreement relating to the manner of disposal off the coal rejects came up for consideration before the Karnataka High Court in a writ petition filed by Aryan Energy against KPCL. Having scrutinized the clauses forming a part of the agreement executed between the parties *vide* judgment dated 22nd July, 2021, the Karnataka High Court clearly observed that KPCL did not have any claim over the coal rejects generated during washing of the coal. The submissions made by the respondent – CBI that the aforesaid judgment came much after institution of the chargesheet by the, respondent-CBI is of no consequence. Even if that was so, nothing prevented the learned Special Judge, CBI from taking into consideration the view expressed in the said judgement at the time of framing charges, particularly, when the clause relating to disposal of the coal rejects in an environment friendly manner incorporated in the agreement between KPCL and Aryan Energy was identical to the one contained in the agreement between KPCL and KECML.

(h) Perusal of the relevant clauses of the JVA read in conjunction with the terms and conditions stipulated in the FSA leave no manner of doubt that all that KPCL required KECML to do was to provide it a specified grade of washed coal having a specific GCV to be purchased at a predetermined price for being supplied to BPCL for generation of power. The agreement between the parties did not contemplate that KPCL would be entitled to claim the 'shales/stones' that were required to be removed from the coal before supplies were made by KECML. Under the agreements governing the parties KECML was required to dispose off the coal rejects properly, to the satisfaction of environmental regulation, as prescribed in Article 5(2)(b) of the JVA.

(i) The MoC did not impose any condition in the Notification dated 16th July, 2004 which required KECML to hand over the coal rejects to KPCL; nor did the MoC issue any Guidelines as to the manner in which the coal rejects were to be disposed of. Once the Mining Plan of

September, 2004 submitted by KECML was approved by the MoC, nothing further was required to be done by KECML except for following the conditions imposed on it.

(j) The Central Government had not come up with any specific plan to dispose off the coal rejects, as is apparent from a perusal of the reply submitted by the Minister of State, MoC in the Lok Sabha, stating that the Government had not framed any National Policy for exploitation of coal rejects and the same was still under consideration. In the absence of a policy to dispose off the coal rejects, the appellants cannot be blamed for complying with the terms and conditions stipulated in the JVA.

(k) KECML could not be faulted for failing to set up the coal washery at the pithead, in terms of the JVA as that was for reasons beyond its control which included a prolonged litigation between the MoC and CIPCO in relation to the very same coal blocks allocated to KPCL which in turn delayed the project considerably. Production of coal could only commence in September, 2008 when the curtains were drawn on the aforesaid litigation. The Board of KPCL consciously acceded to the proposal made by KECML that a MoU be executed with GCWL for washing of mined coal at its washery. Pertinently, GCWL was not an unknown entity to KPCL as the latter had prior dealings with the said Company for washing of mined coal in another project. This decision taken by the parties in their commercial wisdom has been sought to be selectively tainted with criminal intention attributed to the appellants, without any basis.

(l) There was no getting around the process of washing of raw coal which was the predominant prerequisite to meet the specified grade of coal with the defined GCV for generation of power at BTPS. Failure to supply washed coal to KPCL not only invited heavy penalties on KECML in terms of the JVA, it would have had serious consequences of stoppage of generation of power at BTPS, resulting in power outages in the State of Karnataka.

(m) The Washability Report submitted by CIMFR, Nagpur, a Government Laboratory stated in so many words that

the coal rejects did not contain any useful c.v. Therefore, the entire edifice of criminality and conspiracy built by the respondent-CBI on the premise that the coal rejects had a commercial c.v. with an assertion that the appellants had profited from the sale thereof in the open market and pocketed the sale proceeds, flies in the face of the Washability Report.

(n) The Revised Mining Plan submitted by the appellants to the MoC in the year 2010 and approved in 2011, could not have been relied on by the respondent-CBI for pressing charges against the appellants on a plea that had the new technology for utilizing the coal rejects been put to use, the losses could have been mitigated. It is not in dispute that the new technology namely, FBC was not even in vogue when the MoC had approved the original Mining Plan submitted by KECML in the year 2004. Besides that, before putting the new technology to use, there were several steps required to be undertaken, which included obtaining approvals from different government agencies and establishment of a plant. None of that could take place as an order was passed by this court in the year 2014, deallocating all captive coal mines.

21.3 In the light of the aforesaid discussion, we are of the opinion that the respondent–CBI embarked on a roving and fishing inquiry on the strength of the Audit Report of the CAG and then started working backwards to sniff out criminal intent against the appellants. The underpinnings of what was a civil dispute premised on a contract between the parties, breach whereof could at best lead to determination of the contract or even the underlying lease deed, has been painted with the brush of criminality without any justification. This criminal intent has been threaded into the dispute by the respondent-CBI by misinterpreting the clauses of the agreements governing the parties and by heavily banking on the observations made in the Audit Report of the CAG that has not attained finality till date. In view of the glaring infirmities mentioned hereinabove, the impugned orders deserve interference in exercise of the powers vested in this court under Article 136 of the Constitution of India.

21.4 For all the reasons enumerated above, the present appeals succeed. The order on charge dated 24th December, 2021 and the order framing charges dated 3rd March, 2022 passed by the learned Special Judge, CBI *qua* the appellants before this Court are unsustainable and accordingly quashed and set aside.

Result of the case: Appeals allowed.

†*Headnotes prepared by:* Ankit Gyan

[2024] 8 S.C.R. 1263 : 2024 INSC 659

V.S. Palanivel
v.
P. Sriram, CS, Liquidator, Etc.

(Civil Appeal Nos. 9059-9061 of 2022)

28 August 2024

[Hima Kohli* and Ahsanuddin Amanullah, JJ.]

Issue for Consideration

(i) Whether the Tribunal was right in accepting the view taken by the Adjudicating Authority that Covid-19 lockdown was a valid reason for extension of time to deposit the balance sale consideration; (ii) Whether the appellant was justified in alleging that the subject property was under-valued; (iii) Whether it was incumbent for the Liquidator to constitute a Stakeholders' Consultation Committee; (iv) Whether Liquidator had violated Regulation 33 of the IBBI Regulations, 2016; (v) What is the import of the order of attachment issued by the Income Tax Authorities in respect of the auctioned property.

Headnotes†

Insolvency and Bankruptcy Code, 2016 – Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 – Regulation 47A – Whether the Tribunal was right in accepting the view taken by the Adjudicating Authority that Covid-19 lockdown was a valid reason for extension of time to deposit the balance sale consideration:

Held: The Notice for sale of assets issued by the Liquidator for conducting the e-auction of the land and building owned by the Corporate Debtor that declared the reserve price of the subject property as ₹29,55,96,375/- – The e-auction of the subject property took place on 23.12.2019 – Going by the Notice for sale issued by the Liquidator, the period of 90 days available to the Auction Purchaser to deposit the balance sale consideration, if reckoned from 24.12.2019, the date when the Liquidator informed that it was the successful bidder, would have expired on 23.03.2020 – However, the Letter of Intent issued by the Liquidator on 24.12.2019, was received by the Auction Purchaser on 26.12.2019 – The period of 90 days reckoned from 26.12.2019 would have expired on

* Author

25.03.2020 – Admittedly, the balance sale consideration was not paid by the Auction Purchaser within the aforesaid timeline – The said amount was deposited by the Auction Purchaser through RTGS only on 24.08.2020 – The Supreme Court in a Sou Motu writ petition took cognizance of the situation arising out of the challenge faced by the country on account of Covid-19 virus and extended limitation w.e.f 15.03.2020 – The Auction Purchaser has also invoked Regulation 47A of the IBBI Regulations, 2016 – The submission made on behalf of the appellant that the word 'Litigants' used in the order dated 23.03.2020 passed in the Suo Moto Writ Petition ought to be given a narrow interpretation so as to exclude a party like the Auction Purchaser herein as *stricto sensu,* cannot be accepted – The appellant cannot be heard to state that when the entire country was engulfed by the Covid-19 pandemic and a countrywide lockdown was imposed on 25.03.2020 that was extended from time to time, the Auction Purchaser ought to have deposited the balance sale consideration within the stipulated 90 days – In such a situation, a lenient view would have to be taken by the Court – In the present case, as noticed, the period of 90 days for depositing the balance sale consideration had expired just after the crucial date, i.e., 23.03.2020 – There is no merit in the submission made by the appellant that the Tribunal ought not to have accepted the view taken by the Adjudicating Authority that Covid-19 lockdown was a valid reason for extension of time to deposit the balance sale consideration. [Paras 32.2, 32.3, 32.5, 32.6, 32.12]

Insolvency and Bankruptcy Code, 2016 – Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 – Whether the appellant was justified in alleging that the subject property was under-valued:

Held: If the appellant was so confident that the subject property would have fetched a much higher price, nothing precluded him from identifying a bidder who was willing to offer a better price – In fact, such a suggestion was made by the Liquidator in his reply dated 15.11.2019 to the objection taken by the appellant to the estimated value of the subject property in his letter dated 08.11.2019 – Again, the Liquidator wrote a letter dated 27.11.2019 to the appellant suggesting that ask eligible parties willing to offer a better price to participate in the auction process – The appellant did not follow up after that – Therefore, the appellant

cannot be permitted to argue that since the tax value of the subject property was estimated by the Registered Valuers at above ₹48 crores, the Liquidator ought not to have fixed the reserve price at ₹39,41,28,500/- for the simple reason that though the reports of the Registered Valuers mentioned the tax value of the subject property at a little above ₹48 crores, but the liquidation value in both the reports was much lower and the Liquidator arrived at the average of the two estimated liquidation values to fix the reserve price of the subject property. [Paras 33.5, 33.6]

Insolvency and Bankruptcy Code, 2016 – Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 – Regulation 31A – Whether it was incumbent for the Liquidator to constitute a Stakeholders' Consultation Committee:

Held: By virtue of the Notification dated 28.04.2022, an Explanation was appended at the foot of Regulation 31A which clarifies that the requirement of constituting a Stakeholders' Consultation Committee shall apply only to those liquidation processes that were to commence on/after the date of commencement of the IBBI Regulation, 2016 – In the present case, the liquidation process in respect of the company had commenced on 17.07.2019 and therefore, the submission made by the appellant that the Liquidator has breached Regulation 31A of the IBBI Regulations, 2016 by not constituting a Stakeholders' Consultation Committee, is devoid of merits – That apart, the record reveals, that the Liquidator had sent a reply on 15.11.2019 to a written objection taken by the appellant on the Valuation reports submitted by the Registered Valuers on 08.11.2019, wherein, it was stated that neither he nor the other ex-Directors of the company had responded to the Liquidator's suggestion for calling a meeting of the CoC – Despite this, neither the appellant nor the other ex-Directors of the company took any step to depute a person from amongst them to be a part of the Stakeholders' Consultation Committee – In view of the aforesaid facts, the objection taken by the appellant that the Liquidator has breached Regulation 31A, does not hold any water –Nor is the Court inclined to examine the submission made at the instance of the appellant that in the absence of any explanation appended to Regulation 31A as it stood before 25.07.2019, it was incumbent for the Liquidator to have constituted a Stakeholders' Consultation Committee. [Para 34.3]

Insolvency and Bankruptcy Code, 2016 – S. 35 – Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 – Regulation 33, Schedule I, Rule 12 – National Company Law Tribunal Rules, 2016 – R.11 – Whether Liquidator had violated Regulation 33 of the IBBI Regulations, 2016:

Held: Schedule I under Regulation 33 lays down the manner in which the assets of the Corporate Debtor are to be sold by the Liquidator – Rule 12 under Schedule I, would have to be treated as mandatory in character for the reason that it contemplates a consequence in the event of non-payment of the balance sale consideration by the highest bidder within the stipulated timeline of 90 days, which is cancellation of the sale by the Liquidator – To that extent, there is substance in the submission made on behalf of the appellant that since the second proviso under Rule 12 contemplates a consequence of cancellation of the auction on non-payment of the balance sale consideration within 90 days, the Liquidator was not empowered to extend the timeline – In the present case, records reveal that when the Auction Purchaser had approached the Liquidator seeking extension of time to deposit the balance sale consideration – The Liquidator had rightly expressed his inability to do so and indicated that such a power vests only in the Adjudicating Authority – On receiving the aforesaid response, the Auction Purchaser did take steps to move the Adjudicating Authority for seeking extension of time for making the payments – It is a matter of record that the said application was allowed by the Adjudicating Authority on 05.05.2020 and time was granted to the Auction Purchaser to pay the balance sale consideration on the Central Government/State Government lifting the lockdown – The said order was passed by the Adjudicating Authority in exercise of its inherent powers under Rule 11 of the NCLT Rules, 2016 – In the facts of the present case, the Adjudicating Authority exercised statutory powers under Section 35 of the IBC read with its inherent powers under Rule 11 of the NCLT Rules, 2016 for extending the time to deposit the balance sale consideration on sufficient cause being shown, i.e., in view of the countrywide lockdown due to the Covid-19 pandemic – This latitude that was given in the aforesaid extraordinary circumstances to meet the ends of justice, cannot be faulted. [Paras 35.1, 35.11, 35.14, 35.16]

Insolvency and Bankruptcy Code, 2016 – Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 – Schedule I, Rule 12 and Rule 13 – What is the import of

the order of attachment issued by the Income Tax Authorities in respect of the auctioned property:

Held: Rule 12 is held to be mandatory in character because non-payment within the timeline has consequences attached to it – However, in contrast thereto, there are no adverse consequences spelt out in Rule 13 for it to be treated as mandatory – The said Rule lays down the procedure for completion of the sale and would have to be treated as directory since some procedural steps have been set out for purposes of completion of the sale process, but nothing beyond that – This Court is therefore not inclined to accept the submissions made by the respondents that none of the activities as contemplated in Rule 12 could have been completed unless and until the attachment order passed by the Income Tax Authorities was lifted or that the Liquidator was not in a position to complete the sale under Rule13 on that count – On an overall conspectus of the facts of the present case which brings out the glaring default on the part of the Auction Purchaser in making deposit of the balance sale consideration even after permission was granted by the Adjudicating Authority on 10.02.2020 to lift the attachment order, the only question that needs to be answered is as to whether this Court should proceed to set aside the auction and as a sequence thereto, declare as null and void, the sale certificate issued by the Liquidator in favour of the Auction Purchaser, as has been pleaded by the appellant – The Subject land is now an operational hospital – Huge amounts have been pumped into the project by the Auction Purchaser – In contrast, the appellant has not been a vigilant litigant – He has dragged his feet at every stage – It took 19 months for the appellant to prefer an appeal before the Tribunal against the order passed by the Adjudicating Authority – Also, it is a well settled legal position that once auction is confirmed, it ought to be interfered with on fairly limited grounds – In the given facts, the sale deed cannot be declared void. [Paras 36.9, 36.12, 36.14]

Case Law Cited

Sharifud-din v. Abdul Gani Lone [1980] 1 SCR 1177 **: (1980) 1 SCC 403;** *Vidarbha Industries Power Limited v. Axis Bank Limited* [2022] 12 SCR 139 **: (2022) 8 SCC 352;** *C.N. Paramasivan and Another v. Sunrise Plaza through Partner and Others* [2013] 4 SCR 1 **: (2013) 9 SCC 460;** *State of Bihar v. Bihar Rajya Bhumi Vikas Bank Samiti* [2018] 7 SCR 1147 **: (2018) 9 SCC 472 – relied on.**

GPR Power Solutions Pvt. Ltd. v. Supriyo Chaudhuri **(2021) 17 SCC 312;** *Sagufa Ahmed v. Upper Assam Polywood Products Pvt. Ltd,* [2020] 9 SCR 472 **: (2021) 2 SCC 317;** *Standard Surfa Chem India Private Limited v. Kishore Gopal Somani,* **2022 SCC Online NCLAT 305***; Prakash Chandra Kapoor v. Vijay Kumar Iyer,* **2021 SCC Online NCLAT 622***; Union Bank of India v. Rajat Infrastructure Private Limited and Others,* **2020 SCC Online SC 1491;** *Pioneer Urban Land and Infrastructure Limited and Another v. Union of India and Others* [2019] 10 SCR 381 : **(2019) 8 SCC 416;** *Prakash Chandra Kapoor and Another v. Vijay Kumar Iyer and Another,* **2021 SCC Online NCLAT 622;** *Swiss Ribbons (P) Ltd. and Another v. Union of India and Another* [2019] 3 SCR 535 **: (2019) 4 SCC 17;** *Yashowanta Narayan Dixit v. Orient Insurance Company Limited* **(2022) 15 SCC 569;** *Union Bank of India v. Rajat Infrastructure Private Limited and Other* [2023] 14 SCR 666 **: (2023) 10 SCC 232;** *Bombay Mercantile CIVIL APPEAL NOS. 9059-9061 OF 2022 Page 23 of 57 Corporative Bank Limited v. U.P. Gun House and Others* **(2024) 3 SCC 517;** *R.K. Industries (Unit-II) LLP v. H.R. Commercials Private Limited and Others* [2022] 12 SCR 667 **: (2024) 4 SCC 166;** *Arun Kumar Jagatramka v. Jindal Steel and Power Limited* [2021] 3 SCR 114 **: (Refer Para 81) (2021) 7 SCC 474;** *Valji Khimji and Co. v. Hindustan Nitro Product (Gujarat) Ltd. (Official Liquidator)* [2008] 12 SCR 1 **: (2008) 9 SCC 299**; *Celir LLP v. Bafna Motors (Mumbai) Private Limited and others* [2023] 13 SCR 53 **: (2024) 2 SCC 1;** *K. Kumara Gupta v. Sri Markendaya and Sri Omkareswara Swamy Temple and Others* [2022] 8 SCR 968 : **(2022) 5 SCC 710 – referred to.**

List of Acts

Insolvency and Bankruptcy Code, 2016; Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016; National Company Law Tribunal Rules, 2016.

List of Keywords

Covid-19 Pandemic; Lockdown; Auction; E-Auction; Sale consideration; Regulation 47A of IBBI Regulations, 2016; Under-valuation of Property; Stakeholders Consultation Committee; Regulation 33 of IBBI Regulations, 2016; Mandatory; Directory; Rule 12 of Schedule I of IBBI Regulations, 2016; Rule 13 of Schedule I of IBBI Regulations, 2016; Attachment order by Income Tax Authorities; Vigilant litigant; Extension of time; Auction Purchaser; Public Auction.

V.S. Palanivel v. P. Sriram, CS, Liquidator, Etc.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 9059-9061 of 2022

From the Judgment and Order dated 16.09.2022 of the National Company Law Appellate Tribunal, Chennai in CAAT (CH) (I) Nos. 336, 339 and 343 of 2021

Appearances for Parties

P Chidambaram, Sr. Adv., B Ragunath, Prassana Venkat, Mrs. NC Kavitha, Sriram P., Advs. for the Appellant.

C. U. Singh, Arvind Datar, Sr. Advs., K. V. Vijayakumar, K V Sriwas Narayanan, K V Vibu Prasad, Sathiyanarayanan, V Balachandran, Siddharth Naidu, Prithvi Raj JS, M/s. KSN & Co., Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Hima Kohli, J.

A. BACKDROP

1. The appellant - V.S. Palanivel (shareholder/former Managing Director of M/s Sri Lakshmi Hotel Private Limited) has filed the present appeals against the judgment and order dated 16th September, 2022, passed by the National Company Law Appellate Tribunal, Chennai Bench[1] in three Company Appeals[2] preferred by him. The details of the said Company Appeals are (i) Company Appeal No. 336 of 2021 (subject matter of Civil Appeal No. 9059 of 2022) filed against the common judgment dated 17th November, 2021 passed by the National Company Law Tribunal, Chennai Bench[3] rejecting an application[4] moved by the appellant praying *inter alia* that directions be issued to the Liquidator, Sri Lakshmi Hotel Private Limited to stall all proceedings in respect of the e-auction conducted by him on 23rd December, 2019, to work

1 In short 'Tribunal'

2 Company Appeal (AT) (CH) (Ins} No. 336 of 2021; Company Appeal (AT) (CH) (Ins) No. 339 of 2021 and Company Appeal (AT) (CH) (Ins) No. 343 of 2022

3 In short 'Adjudicating Authority'

4 MA No. 120 of 2020

on an alternative manner of dividing the property put to auction and sell only a part of the land and for grant of sufficient time to make payment to the financial creditor. (ii) Company Appeal No. 339 of 2021 (subject matter of Civil Appeal No. 9060 of 2022) arose from the common order dated 17th November, 2021 passed by the Adjudicating Authority on an Interim Application[5] seeking recall of its order dated 05th May, 2020 passed on an application[6] filed by the appellant. (iii) Company Appeal No. 343 of 2021 (subject matter of Civil Appeal No. 9061 of 2022) filed by the appellant on 27th October, 2021 under Section 61 of the Insolvency and Bankruptcy Code, 2016[7] against order dated 05th May, 2020 passed by the Adjudicating Authority allowing an application moved by the successful bidder, M/s KMC Speciality Hospitals (India) Limited[8] for extension of time to deposit the balance sale consideration after the Central/State lockdown was lifted. All the aforesaid appeals were dismissed by the Tribunal under the impugned judgment and order dated 16th September, 2022.

2. It may be noted at the outset that Civil Appeal No. 9059 of 2022 does not survive inasmuch as the auction proceedings have already been concluded and upon the Auction Purchaser depositing the sale amount, the Liquidator has executed a Sale Deed in its favour. Therefore, the scope of the present judgment is confined to Civil Appeals No. 9060 and 9061 of 2022.

B. SEQUENCE OF EVENTS

3. The facts of the case lie in a narrow compass. Sri Lakshmi Hotels Private Limited,[9] a family held concern having four shareholders namely, the appellant herein, his wife, his son and his daughter-in-law purchased an immovable property[10] at Tiruchirappalli measuring 67,533 sq. ft. The company started running a hotel and a bar from the said premises. In the year 2006, the company took a loan from a financial creditor to the tune of ₹1,57,25,000/- (Rupees One crore fifty seven lakh twenty five thousand only). When disputes arose between the company and the financial creditor, the latter invoked

5 IA SR No. 944 of 2020 on 25th September, 2020

6 IA 335 of 2020 in MA/689/2019 in CP/1140/IB/2018

7 In short 'IBC'

8 In short 'Auction Purchaser'

9 In short 'company/Corporate Debtor'

10 situated at Old No. 3A, New No. 27, Alexandria Road, Cantonment, Tiruchirappalli-620001

the arbitration clause governing the parties. The Arbitral Tribunal passed an award on 27th December, 2014, for a sum of ₹2,21,08,244/- (Rupees Two crore twenty one lakh eight thousand two hundred and forty four only) in favour of the financial creditor along with interest at the rate of 24 % per annum from the date of claim petition till the date of realisation. The company challenged the said award[11] under Section 34 of the Arbitration and Conciliation Act, 1996, but the said petition was dismissed by the High Court of Madras *vide* order dated 16th November, 2017.[11]

4. On non-payment of the amounts awarded under the Arbitral Award, the financial creditor filed an application[12] under Section 7 of the IBC before the Adjudicating Authority for initiating corporate insolvency resolution process against the company. The said petition was admitted on 28th February, 2019 and the respondent No. 2 was appointed as an Interim Resolution Professional.[13] Later on, he was confirmed as a Resolution Professional and finally, as a Liquidator. As per the records, no resolution plan for revival of the Corporate Debtor was received and the Committee of Creditors[14] recommended that the company be liquidated. The said recommendations were accepted by the Adjudicating Authority, *vide* order dated 17th July, 2019.

5. Pursuant to the above, the Liquidator engaged two Registered Valuers to give an estimate of the valuation of the subject property. The Valuers submitted their Reports as follows:

S. No.	Name of the Valuer	Tax Value	Liquidation Value
1.	Ms. Vijayalakshmi	Rs.48,03,00,000	Rs.40,82,57,000
2.	Mr. R.S. Babu Rajendran	Rs.48,48,00,000	Rs.38,00,00,000
	Average Liquidation Value for the purpose of E- auction Upset Price		**Rs.39,41,28,500**

Based on the above Reports, the Liquidator arrived at the average value of the subject property, i.e., ₹39,41,28,500/- (Rupees Thirty nine crore forty one lakh twenty eight thousand five hundred only)

11 Original Petition No.137 of 2015

12 CP/1140/(IB)/CB/2018

13 In short 'IRP'

14 In short 'CoC'

and scheduled an auction on 25th November, 2019, with a reserve price set at the above figure. *Vide* letter dated 08th November, 2019, the appellant objected to fixation of the reserve price. The Liquidator replied to the said communication and turned down his objections. He also requested the appellant to nominate a person in the Stakeholders Committee, which the appellant failed to do.

6. When the Liquidator did not receive any bid in the first auction, he published a notice scheduling a second auction on 23rd December, 2019. This time, the reserve price was reduced by 25% i.e. it came down from ₹39,41,28,500/- (Rupees Thirty nine crore forty one lakh twenty eight thousand five hundred only) to ₹29,55,96,375/- (Rupees Twenty nine crore, fifty five lakh ninety six thousand three hundred and seventy five only). M/s KMC Speciality Hospitals (India) Limited was the sole bidder in the second auction process and on depositing an earnest amount of ₹2,95,59,698/- (Rupees Two crore ninety five lakh fifty nine thousand six hundred and ninety eight only), it emerged as the successful bidder.

7. In terms of Rule 12 of Schedule-I under Regulation 33 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016,[15] the successful bidder was required to pay the balance sale consideration within 90 days from the date of demand. The Liquidator despatched a letter dated 24th December, 2019 to the Auction Purchaser demanding the balance sale amount. Though arguments were initially advanced on behalf of the appellant that the period of 90 days for paying the balance amount ought to be reckoned from 24th December, 2019 and not from 26th December, 2019, the date on which the Auction Purchaser received the communication from the Liquidator, later on the said plea was not seriously pressed. If one takes the outer limit for calculating the period of 90 days for the Auction Purchaser to pay the balance sale consideration reckoned from 26th December, 2019, the date when the Auction Purchaser received the letter despatched by the Liquidator, the said period would have expired on 25th March, 2020. It is not in dispute that the balance sale consideration was not paid by the Auction Purchaser within the period of 90 days. The said amount was paid only on 24th August, 2020.

15 IBBI Regulations, 2016

8. The appellant filed a Miscellaneous Application[4] before the Adjudicating Authority for setting aside the auction proceedings. The said application was dismissed by the Adjudicating Authority, *vide* common order dated 17th November, 2021. In the meantime, due to the onset of the Covid-19 pandemic, Government of India imposed a countrywide lockdown on 25th March, 2020. On 22nd April, 2020, the Auction Purchaser moved an application[6] before the Adjudicating Authority for extension of time for making payment of the balance sale consideration. Besides taking the plea of the onset of Covid 19 pandemic, one of the grounds taken by the Auction Purchaser for extension of time was that the Income Tax Authority had passed an order attaching the auctioned property. The said application was allowed by the Adjudicating Authority3, *vide* order dated 05th May, 2020 and the time granted for depositing the balance sale consideration was deferred till the lockdown was lifted by the Central Government/ State Government, respectively.

9. Dissatisfied with the aforesaid order, the appellant filed a Company Appeal,[16] after 19 months, on 27th October, 2021. Well before that, the Auction Purchaser paid the balance sale consideration in respect of the auctioned property on 24th August, 2020 and a Sale Deed was executed by the Liquidator in favour of the Auction Purchaser on 28th August, 2020. One month after completion of the sale transaction, the appellant filed an application on 25th September, 2020,[5] seeking recall of the order dated 05th May, 2020, passed by the Adjudicating Authority and challenging the execution of the Sale Deed. By virtue of the common order dated 17th November, 2021, the Adjudicating Authority dismissed both the applications filed by the appellant, one for stalling the e-auction that was conducted on 23rd December, 2019[4] and the other for setting aside the Sale Deed dated 28th August, 2020. The said orders were carried in appeal by the appellant before the Tribunal. *Vide* common judgment and order dated 16th September, 2022, the Tribunal dismissed the appeals filed by the appellant, giving rise to the present appeals.

C. ARGUMENTS ADVANCED ON BEHALF OF THE APPELLANT

10. Mr. P. Chidambaram, learned Senior advocate appearing for the appellant submitted that the Tribunal failed to appreciate that the

16 Company Appeal (AT) (INS) No. 334 of 2021

auction conducted by the Liquidator was in violation of the provisions of the IBBI Regulations, 2016 particularly, Regulation 31A that requires a Liquidator to constitute a Stakeholders' Consultation Committee and Regulation 33 that prescribes the mode of sale of the assets of the Corporate Debtor through an auction in the manner specified in Schedule I. Relying on the decision in ***C.N. Paramasivam and Another v. Sunrise Plaza through Partner and Others***,[17] it has been contended that Schedule I, Rule 12 of the IBBI Regulations, 2016 is mandatory and any non-compliance thereof should result in cancellation of the sale. The decision in ***Sharif-ud-din v. Abdul Gani Lone***[18] was cited by learned counsel to make a point that when the rule provides a consequence for failure to comply, then it ought to be treated as mandatory and not directory in character. It was argued that having regard to the mandatory character of the regulations, the Tribunal has erred in failing to appreciate that the Auction Purchaser could neither have sought extension of time to deposit the balance sale consideration nor could such an indulgence have been granted to it. Dovetailed to the above, is the submission that the Liquidator was selective in applying the amended provisions of the IBBI Regulations, 2016, based on a Circular dated 26th August, 2019.

11. The second submission made by learned senior counsel appearing for the appellant was that the Tribunal ought not to have concurred with the Adjudicating Authority to hold that the extension granted to the Auction Purchaser to deposit the balance sale consideration on account of the Covid-19 lockdown, was valid. It was submitted that since banks were functioning during that time, the Auction Purchaser had all the opportunity to deposit the balance sale consideration. Therefore, it had no defence for not making the payment on time. It was further submitted that the order passed by the this Court and relied on by the Auction Purchaser in ***GPR Power Solutions Pvt. Ltd. v. Supriyo Chaudhuri***,[19] as also the order dated 02nd March, 2020 and the order dated 12th May, 2020 passed in Civil Appeal No. 1902 of 2020,[20] could not have enured to its benefit for the reason that the said orders applied to filing of petitions, applications, suits, appeals

17 [2013] 4 SCR 1 : (2013) 9 SCC 460

18 [1980] 1 SCR 1177 : (1980) 1 SCC 403

19 (2021) 17 SCC 312

20 Union Bank of India v. Rajat Infrastructure Pvt. Ltd. and Others

or other proceedings within the prescribed period of limitation. Citing the decision in ***Sagufa Ahmed v. Upper Assam Polywood Products Pvt. Ltd.***[21] learned senior counsel submitted that the order passed by this Court on 23rd March, 2020 in *Suo Moto* Writ Petition (Civil) No. 3/2020, was only intended for the benefit of vigilant litigants who were prevented from initiating proceedings within the period of limitation due to the pandemic and the lockdown. The Auction Purchaser was not a litigant before the Court and could not have availed of the said order. The Auction Purchaser was neither required to approach the Adjudicating Authority, nor to file any petition before the Tribunal for remitting the balance sale consideration.

12. It was next canvassed on behalf of the appellant that the order of attachment by the Income Tax Authorities in respect of the auctioned property is an irrelevant consideration insofar as it relates to deposit of the balance sale consideration by the Auction Purchaser within 90 days. Alluding to the terms and conditions of the auction, learned counsel argued that the e-auction was conducted on an '*As Is Where Is'* basis and clause 12 of the said Notice of auction clearly stated that the sale would be subject to the IBC and the IBBI Regulations, 2016. Therefore, the Auction Purchaser cannot be heard to state that it was unaware of the Income Tax attachment order. Having bid for the subject property and agreed to the condition that the balance sale amount had to be deposited within 90 days, the Auction Purchaser was under an obligation to comply with the terms of the auction and on failure to do so, the Liquidator ought to have cancelled the sale instead of accommodating the Auction Purchaser.

13. Lastly, learned counsel submitted that even assuming that the last date for making the payment towards the balance sale consideration was 25th March, 2020, as was urged by the other side, the period of limitation would have recommenced on 23rd July, 2020, since the Liquidator had moved an application[22] seeking exclusion of the period between 23rd March, 2020 and 23rd July, 2020. In view of the above, there was no justification for the Auction Purchaser to have made the payment on 24th August, 2020 i.e. after a period of one month reckoned from the date when the exclusion period had ended.

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21 [2020] 9 SCR 472 : (2021) 2 SCC 317

22 IA No. 202 of 2021 in CP/1140/IB/20181.

D. ARGUMENTS ADVANCED BY LEARNED SENIOR COUNSEL FOR THE AUCTION PURCHASER

14. Rebutting the submissions made by learned counsel for the appellant, Mr. Arvind Datar, Senior Advocate appearing for the Auction Purchaser submitted that the time to complete all actions under the IBC stood extended from 15th March, 2020 onwards in view of the Covid-19 circulars and orders passed by this Court in the *Suo Motu* Writ Petition[23] initiated by this Court read in conjunction with Regulation 47A of IBBI Regulations, 2016. Therefore, there was no default on the part of the Auction Purchaser in making payment of the balance sale consideration at a later date. Referring to the decision of this Court in ***GPR Power Solutions Private Limited*** *(supra)* learned senior counsel submitted that the extension orders were applied by this Court even to submissions of claims by creditors to the resolution professionals. For this reason, it would be erroneous to state that extension could apply only to litigants before courts and Tribunals, as sought to be urged by the other side. The decisions in ***Standard Surfa Chem India Private Limited v. Kishore Gopal Somani***[24] *and* ***Prakash Chandra Kapoor v. Vijay Kumar Iyer***[25] were cited by learned counsel to argue that timelines prescribed under the IBBI Regulations, 2016 are directory and not mandatory in character. Learned counsel submitted that reliance placed by the appellant on ***C.N. Paramasivam*** *(supra)* to contend that the timeline of 90 days is absolute, is misplaced for the reason that the provisions governing the Debt Recovery Tribunal[26] and the Adjudicating Authority are not *pari materia.* Learned senior counsel submitted that unlike DRT's, Adjudicating Authority has special inherent powers under Rule 11 of the National Company Law Tribunal Rules, 2016.[27] Furthermore, even in cases initiated under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act,[28] this Court had granted extension to an Auction Purchaser to deposit the balance sale consideration in view of the Covid-19 lockdown

23 Suo Motu Writ Petition (C) No.3 of 2020 in 'Cognizance for Extension of Limitation, In Re', reported as (2020) 19 SCC 10

24 2022 SCC Online NCLAT 305

25 2021 SCC Online NCLAT 622

26 For short 'DRT'

27 For short 'NCLT Rules, 2016'

28 For short 'SARFAESI Act'

situation. For this, learned senior counsel referred to the order dated 12th May, 2020[29] passed by this Court in ***Union Bank of India v. Rajat Infrastructure Private Limited and Others***.[30] Similarly, he submitted that the ***Sagufa Ahmed*** case *(supra)* referred to on behalf of the appellant, cannot apply to the facts of the instant case for the reason that in the captioned case, the timeline for filing an appeal before the Tribunal had expired before 15th March, 2020, which was not so here as the timeline for the Auction Purchaser to deposit the balance sale consideration had expired after declaration of the COVID-19 lockdown by the Government of India on 22nd March, 2020.

15. Learned senior counsel clarified that the Auction Purchaser had applied to the Liquidator on 28th February, 2020, for extension of time to deposit the balance sale consideration after the Income Tax attachment orders were lifted. The Liquidator responded to the said communication only on 02nd April, 2020 stating that he did not have the powers to extend the time and for which, an application would have to be moved before the Adjudicating Authority after it resumed functioning partially. For purposes of clarification, it may be noted that Adjudicating Authority had issued a notification that it would hear only urgent matters between 16th March, 2020 and 27th March, 2020. On 22nd March, 2020, the Adjudicating Authority announced closure in the light of the lockdown and it was clarified that liquidation matters would not be considered as urgent. The Auction Purchaser filed an application[31] before the Adjudicating Authority seeking extension of time. *Vide* order dated 5th May, 2020, the Adjudicating Authority allowed the said application and granted extension of time to the Auction Purchaser to deposit the balance sale consideration. It is submitted that the appellant did not take any steps to prefer an appeal against the aforesaid order within the period prescribed in Section 61 of the IBC. Instead, after the entire sale transaction was completed, the appellant filed an application for review, which was dismissed by the Adjudicating Authority. After waiting for 15 months, the appellant filed an appeal on 27th October, 2021. Even at that stage, the appellant did not seek any interim orders before the Adjudicating Authority or the Tribunal. As a result, the Auction Purchaser proceeded to construct

29 Order dated 12th May, 2020 passed in Civil Appeal No.1902 of 2020

30 2020 SCC Online SC 1491

31 IA No. 335/IB/2020 in MA No.689 of 2019 in CP No./1140/IB/CB/2018

a 200-bed Mother and child hospital at the auctioned property after demolishing the existing building on which a sum of ₹1,70,00,000/- (Rupees One crore and seventy lakhs only) has been invested. The said hospital is now complete and fully functional and is stated to cater to the needs of seven surrounding districts in the area.

16. Coming next to the submission made on behalf of the appellant that the order of attachment issued by the Income Tax authorities in respect of the auctioned property is not a relevant consideration when it came to depositing the balance sale consideration by the Auction Purchaser within 90 days, learned senior counsel for the Auction Purchaser sought to urge that sale of properties that are the subject matter of Income Tax attachment orders, must be treated on a different footing. Such sale transactions cannot be completed because of the bar placed under the Income Tax Act, 1961.[32] A specific reference in this regard has been made to Sections 222 and 281 read with Rule 48 Part-III, Schedule 2 of the IT Act. Several decisions of the Adjudicating Authority[33] have been cited by the learned senior counsel to canvass that in such circumstances, the Liquidator has no option but to approach the Adjudicating Authority for appropriate directions. Even in the present case, the Liquidator had to move an application before the Adjudicating Authority for appropriate directions. The said application was allowed on 10th February, 2020. However, the order passed on 10th February, 2020 was received by the Liquidator only on 14th May, 2020. Due to several hindrances on account of the COVID-19 situation, the actual attachment of the subject property was lifted only on 27th August, 2020. Just a few days before that, the Auction Purchaser deposited the balance sale consideration on 24th August, 2020 and the sale transaction was finally completed on 28th August, 2020.

17. Countering the submission made on behalf of the appellant that Clause 12 of Schedule I under Regulation 33 of the IBBI Regulations, 2016 requires the successful bidder to pay the balance sale consideration within 90 days from the date of the demand which

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32 For short 'IT Act'

33 ***BMM Ispat Ltd. v. Ramdas Ispat***, 2019 SCC Online NCLT 21322, ***Allahabad Bank v. Biotor***, 2019 SCC Online NCLT 26716, ***Sanjay Kr. Agarwal v. Tax Recovery Officer***, 2019 SCC Online NCLT 28888, ***Abhudaya Coop. Bank v. Shivkripa***, 2020 SCC Online NCLT, 11935, ***UBI v. Guruashish Construction***, 2020 SCC Online NCLT 14829, ***Ashok Kr. Dewan v. AC of IT***, 2021 SCC Online 4368, ***Mauritius Commercial Bank v. Varun Corporation***, 2021 SCC Online NCLT 6814, ***Milind Kasodekar v. P. Mahajan***, 2021 SCC Online NCLT 11616.

timeline could not be extended, learned senior counsel for the Auction Purchaser argued that the time limit fixed under Rule 12 of Schedule I has to be read in conjunction with Rule 13 of the IBBI Regulations, 2016 and in cases of attachment, the full amount has to be paid simultaneously with the completion and execution of the Sale Deed. In the present case, the said steps could be taken only after the attachment was lifted by the Income Tax authorities.

18. Learned senior counsel relied on ***Pioneer Urban Land and Infrastructure Limited and Another v. Union of India and Others***[34] and ***Prakash Chandra Kapoor and Another v. Vijay Kumar Iyer and Another***,[35] to contend that the model timeline for the liquidation process contemplated under Regulation 47 of the IBBI Regulations, 2016 for completing the liquidation process, are only directory in nature.

19. Learned senior counsel for the Auction Purchaser concluded by highlighting the conduct of the appellant and stated that he had repeatedly failed to pay the monies due; he attempted to stall the auction process; he refused to remove the bar operating from the subject premises and police assistance had to be taken to take over physical possession of the subject property. Therefore, concurrent findings returned by the Adjudicating Authority and the Tribunal being well reasoned, do not deserve interference. Lastly, learned counsel submitted that without prejudice to the above submission, in the event this Court is of the opinion that the provisions of Rule 12 of Schedule I of the IBBI Regulations, 2016 are mandatory and the Adjudicating Authority was not empowered to extend the timelines for paying the balance sale consideration, then this Court may exercise its powers under Article 142 of the Constitution of India to do complete justice but the auction sale may not be set aside.

E. ARGUMENTS ADVANCED ON BEHALF OF THE RESPONDENT NO.1- LIQUIDATOR

20. Mr. C.U. Singh, Senior Advocate appearing on behalf of the respondent No.1 - Liquidator supported the arguments advanced by learned senior counsel for the Auction Purchaser. He submitted that the appellant has made unfounded allegations regarding valuation

34 [2019] 10 SCR 381 : (2019) 8 SCC 416

35 2021 SCC Online NCLAT 622

of the subject property at ₹39,41,28,500/- (Rupees Thirty nine crore forty one lakh twenty eight thousand and five hundred only). The said allegations were responded to by the Liquidator, *vide* letter dated 15th November, 2019 clearly stating *inter alia* that the reserve price was based on the average liquidation value arrived at by the registered Valuers. Contradicting the claim of the appellant that the subject property ought to have been valued at ₹1,00,00,00,000/- (Rupees One hundred crore only), it was submitted that no bidder had stepped forward to participate in the auction even with the reserve price of ₹39,41,00,000/- (Rupees Thirty nine crore and forty one lakh only). Reference was made to Regulation 33 read with para 4A of the Schedule I to the IBBI Regulations, 2016 to state that the second auction was conducted on 23rd December, 2019 with a permissible reduction of 25% in the reserve price that was set at ₹29,95,96,375/- (Rupees Twenty nine crore ninety five lakh ninety six thousand three hundred and seventy five only). This fact was duly intimated to the appellant who too could have made efforts to get a better bid for the subject property, but he didn't take any such step.

21. Refuting the submission made by the other side that the auction was conducted by the Liquidator without constituting a Stakeholders' Consultation Committee, learned counsel submitted that there was no such requirement at the relevant point in time, which position has been clarified in the Explanation appended to Section 31A, that was inserted in the Regulations, *vide* Notification dated 25th July, 2019. In the present case, the liquidation process had commenced earlier to issuance of the said Notification. Further, the Tribunal has clarified that the amendment to Rule 12 of Schedule I under Regulation 33 of the IBBI Regulations, 2016 made by virtue of the same Notification would apply to pending liquidation process.[36] Learned senior counsel submitted that in any event, such an objection was taken by the appellant for the first time in the recall application filed by him on 25th September, 2020 by which date, the entire process of sale stood concluded. It was submitted that the appellant is estopped from taking such an objection for the reason that despite repeated requests made to him by the Liquidator to nominate a person in the Stakeholders' Consultation Committee, he had not done so.

36 Reliance has been placed ***In the matter of Sundaresh Bhat***, 2021 SCC Online NCLAT 624

22. Learned senior counsel for the Liquidator submitted that the COVID-19 pandemic had caused an extraordinary disruption leading to a nationwide lockdown from 20th March, 2020 onwards. The Auction Purchaser had moved an application for extension of time to deposit the balance sale consideration, which was duly allowed by the Adjudicating Authority, *vide* order dated 5th May, 2020, extending the time until the lifting of the lockdown by the Centre/ State Government. The balance sale consideration was deposited by the Auction Purchaser on 24th August, 2020. On receiving the said amount, the Liquidator had settled the outstanding claim of the Income Tax Department on 27th August, 2020 whereafter, the Income Tax attachment was lifted and the Liquidator executed and registered the Sale Deed in favour of the Auction Purchaser on 28th August, 2020. It was pointed out that the appellant decided to challenge the order dated 5th May, 2020 passed by the Adjudicating Authority, 14 months after the Sale Deed was executed and registered in favour of the Auction Purchaser, which shows his non-seriousness. Further, learned counsel cited the decision in ***Pioneer Urban Land and Infrastructure Limited and Another v. Union of India and Others***,[37] wherein it has been held that the timeline prescribed in Sections 7(5), 9(5) and 10 (4) of the IBC are directory and not mandatory in character.

23. Learned counsel for the Liquidator supported the submissions made on behalf of the Auction Purchaser on the aspect of extension of the period of limitation and submitted that the expressions "*litigation*" and "*litigant*" appearing in the *Suo Moto* Writ petition must be given the widest import so as to cover all proceedings, including liquidation proceedings. In the absence of any explicit bar, the said order would also apply to the auction process conducted in liquidation proceedings carried out under the IBC more so, when the Liquidator has been held to be a *quasi judicial* authority by this Court in ***Swiss Ribbons (P) Ltd. and Another v. Union of India and Another***.[38] Reliance has also been placed on ***GPR Power Solutions Pvt. Ltd.*** *(supra)* to urge that exclusion of time on account of the COVID-19 pandemic was allowed even in cases where claims were to be filed before the resolution professionals.

37 [2019] 10 SCR 381 : (2019) 8 SCC 416

38 [2019] 3 SCR 535 : (2019) 4 SCC 17

F. REJOINDER ARGUMENTS ON BEHALF OF THE APPELLANT

24. In his rejoinder arguments, learned counsel for the appellant sought to distinguish the judgments of this Court relied on by the other side including in the case of ***Yashowanta Narayan Dixit v. Orient Insurance Company Limited***[39] and the orders passed on 2nd March, 2020 and 12th May, 2020 in Civil Appeal No. 1902 of 2020. Relying on the decision in ***Union Bank of India v. Rajat Infrastructure Private Limited and Others***,[40] learned counsel submitted that this Court had noted that under Rule 9 (4) of the Security Interest (Enforcement) Rules, 2002,[41] the balance of the purchase price payable had to be paid in the said case on or before the fifteenth day of the confirmation of sale and even if a liberal construction is given to the said sub-Rule, and the orders passed by the Court from time to time, the time to deposit the balance amount with interest could extend only upto 30th April, 2022 and no further extension of time could have been granted thereafter. This Court has also observed that Article 142 of the Constitution of India cannot be used to depart from the substantive law. It was submitted that even if the Auction Purchaser was permitted to take the benefit of the order dated 17th November, 2021 passed by the Adjudicating Authority, it could take the last date for deposit upto 23rd July, 2020 whereas, the Auction Purchaser did not deposit the balance sale consideration till 24th August, 2020.

25. Coming next to the submission made by learned senior counsel for the respondents that model timelines for the liquidation process under Regulation 47 of the IBBI Regulations, 2016 are directory in character and not mandatory, learned senior counsel for the appellant submitted that the decisions cited by the respondents to substantiate the said submission, are distinguishable on facts. It was contended that this Court has itself held in ***Pioneer Urban Land and Infrastructure Limited*** *(supra)* that the timelines mentioned in Sections 7(5), 9(5) and 10(4) of the IBC are directory in nature because they do not provide for any consequence if the period so mentioned is exceeded. However, the word used in Rule 12 of Schedule I under Regulation 33 of the IBBI Regulations, 2016 is *"shall".* The second *proviso* under

39 (2022) 15 SCC 569

40 [2023] 14 SCR 666 : (2023) 10 SCC 232

41 For short 'SIE Rules, 2002'

Rule 12 provides for a consequence that in the event the amount is not paid within 90 days, the sale shall be cancelled. The decision in the case of ***Prakash Chandra Kapoor*** *(supra)* is also sought to be distinguished on the same grounds. Learned senior counsel submitted that in all the Rules under Schedule I, except for Rule 11, the word "*shall*" has been used and it has been held in ***Vidarbha Industries Power Limited v. Axis Bank Limited***,[42] that if one provision uses the word "*may*", and another provision uses the word *"shall"*, then wherever the word *"shall"* has been used, will have to be treated as mandatory. Applying the said principle to the instant case, it was mandatory for the Auction Purchaser to have deposited the balance sale consideration in respect of the auctioned property within 90 days and at the outer date, on or before 23rd of July, 2020 when the period of the lockdown had come to an end.

26. As for the submission made by the Auction Purchaser that the Income Tax attachment was lifted only on 27th August, 2020 and therefore, there was no occasion for it to have paid the balance sale consideration before the attachment was lifted, learned senior counsel for the appellant submitted that the Adjudicating Authority had passed an order on 10th February, 2020, directing the Income Tax Department to lift the attachment and the said order having been pronounced in open court, ought to have been in the knowledge of the respondents who cannot take a plea that the said order was communicated to them much later and therefore, they were oblivious thereto. It was further argued that the amount attached by the Income Tax Department was actually paid on 3rd August, 2020, from out of the earnest money deposited by the Auction Purchaser. While the Income Tax Department passed an order lifting the attachment in respect of the subject property only on 27th August, 2020, the Auction Purchaser did not wait until then to pay the balance amount. The balance sale consideration was deposited by the Auction Purchaser through RTGS on 24th August, 2020, which was three days before the date the Income Tax Department passed the order on 27th August, 2020. That being the position, the balance amount could have easily been paid by the Auction Purchaser in a similar manner (through RTGS) on or before 25th March, 2020, on the expiry of the period of 90 days, which it miserably failed to do.

42 [2022] 12 SCR 139 : (2022) 8 SCC 352

27. Refuting the plea taken by the Auction Purchaser that under Section 281 of the IT Act, a sale shall be treated as void against any claim by the Income Tax Department which was a reason offered by it not to have paid the balance amount, learned counsel for the appellant submitted that such a plea is baseless inasmuch as the Auction Purchaser could have paid the balance amount by obtaining prior permission from the assessing officer. The Income Tax attachment did not stand in the way of payment of the balance sale consideration. A distinction was sought to be drawn between the expression 'payment of sale consideration' and 'execution of sale deed'. The attention of the Court was also drawn to the letter dated 9th December, 2019 issued by the Liquidator to the Auction Purchaser in response to its communication dated 9th December, 2019 well before the date of auction, seeking a clarification. The Liquidator had clearly stated that the subject property was being sold under the IBC and the Income Tax Department could not have a priority in claim. In any case, the income tax dues were limited to a sum of ₹2,44,00,000/- crores (Rupees Two crore and forty four lakhs only) and the said amount could have been deposited with the Income Tax Department from out of the sale proceeds. It was on the basis of the aforesaid clarification furnished by the Liquidator that the Auction Purchaser had participated in the auction process and once having succeeded in the bid, it was under an obligation to deposit the balance sale consideration within 90 days from the date of the auction.

28. Questioning the stand taken by the respondents that Regulation 31A that requires constitution of a Stakeholders' Consultation Committee by the Liquidator to advise on matters specified in the said Regulation, including sale of assets under Regulation 32, manner of sale, reserved price, amount of earnest money deposit, etc., was amended w.e.f. 25th July, 2019 and the Explanation in Regulation 31A made the said Regulation prospective, learned senior counsel for the appellant argued that the Liquidator could not have had the foresight to know that such an Explanation would be appended to Regulation 31A much later, *vide* Notification dated 28th April, 2022. In other words, as the said Regulation stood in the year 2019, it was incumbent for the Liquidator to have constituted the Stakeholders' Consultation Committee and the explanation now offered, is a sheer afterthought.

29. Another argument advanced is that if it is assumed that the Auction Purchaser could take refuge of the order dated 23rd March, 2020

passed by this Court in the *Suo Moto* Writ Petition on account of the lockdown due to the Covid-19 pandemic read with Regulation 47A of the IBBI Regulations, 2016, in the light of the order dated 17th November, 2021 passed by the Adjudicating Authority, the last date for making the deposit by the Auction Purchaser could be extended upto 23rd July, 2020 and not beyond that.

30. Learned senior counsel concluded by vehemently contesting the submission made by the other side that the appellant's conduct showed that he was obstructing the liquidation process. He sought to distinguish the judgment in ***Bombay Mercantile Corporative Bank Limited v. U.P. Gun House and Others***[43] cited by the other side on facts and submitted that *vide* order dated 5th December, 2023, that this Court had passed in the present Appeals, the Auction Purchaser was restrained from creating any third-party rights. It was argued that had the sale been cancelled under Rule 12, second *proviso* to Schedule I under Regulation 33 of the IBBI Regulations, 2016 and the subject property put to auction once again, there was a strong possibility that the same would have fetched a much higher amount. But due to the casual manner in which the respondents have conducted themselves, the appellant and the shareholders have lost the valuable property and suffered a huge loss. Without prejudice to the submission made above, learned counsel submitted that should the Court be inclined to accept the pleas taken by the respondents in opposition to the appeals, then it would only be fair to direct the Auction Purchaser to compensate the appellant for the loss of the value of the property which was assessed by the registered Valuers in the year 2019, at ₹48,00,00,000/- (Rupees Forty eight crores only).

G. DISCUSSION AND ANALYSIS

31. This Court has given its thoughtful consideration to the arguments advanced by learned counsel for the parties, perused the records and the judgments cited on both sides. We shall now deal with the contentions raised by learned counsel for the appellant *ad seriatim.*

32. COVID-19 PANDEMIC AND ITS IMPACT ON LIMITATION

32.1 The ball was set rolling on the Notice for sale of assets issued by the Liquidator for conducting the e-auction of the land

43 (2024) 3 SCC 517

and building owned by the Corporate Debtor that declared the reserve price of the subject property as ₹29,55,96,375/- (Rupees Twenty nine crore fifty five lakh ninety six thousand three hundred and seventy five only). The intending bidders were required to deposit 10 per cent of the reserve price as earnest money amount which came to ₹2,95,59,638/- (Rupees Two crore ninety five lakh fifty nine thousand six hundred and thirty eight only). Some of the relevant terms and conditions of the e-auction are extracted below:

> "1. E-Auction will be conducted on "AS IS WHERE IS", "AS IS WHAT IS" and "WHATEVER THERE IS BASIS" through approved service provider M/S E-Procurement Technologies Limited (Auction Tiger).
>
> 2. The intending bidders, prior to submitting their bid, should make their independent inquiries and inspect the property at their own expenses and satisfy themselves. ….
>
> xxxx
>
> 8. The EMD of the Successful Bidder shall be retained towards part sale consideration and The EMD of unsuccessful bidders shall be refunded. The EMD shall not bear any interest. The Liquidator will issue a Letter of Intent (LOD) to the Succes Bidder and the Successful Bidder shall have to deposit the balance amount (Successful Bid Amount-Ex Amount) within 90 on issuance of the LOI by the Liquidator Provided that payments made after thirty days shall attract interest at the rate of 12%. Default in deposit of the balance amount by the successful bidder within the time limit as mentioned in the LOI would entail forfeiture of the 10% of the amount deposited (EMD) by the Successful Bidder.
>
> xxxxx
>
> 10. The Liquidator has the absolute right to accept or reject any or all offer(s) or adjourn/postpone/

> cancel the e-Auction or withdraw any property or portion thereof from the auction proceeding at any stage without assigning any reason thereof.
>
> xxxxx
>
> 12. The sale shall be subject to provisions of Insolvency and bankruptcy code 2016 and regulations made thereunder.
>
> xxxxx"

32.2 The e-auction of the subject property took place on 23rd December, 2019. Going by the Notice for sale issued by the Liquidator, the period of 90 days available to the Auction Purchaser to deposit the balance sale consideration, if reckoned from 24th December, 2019, the date when the Liquidator informed that it was the successful bidder, would have expired on 23rd March, 2020. However, the Letter of Intent[44] issued by the Liquidator on 24th December, 2019, was received by the Auction Purchaser on 26th December, 2019. The period of 90 days reckoned from 26th December, 2019 would have expired on 25th March, 2020. Admittedly, the balance sale consideration was not paid by the Auction Purchaser within the aforesaid timeline. The said amount was deposited by the Auction Purchaser through RTGS only on 24th August, 2020.

32.3 For explaining the delay in depositing the balance sale consideration, the Auction Purchaser has sought to take shelter of the order dated 23rd March, 2020, passed by this Court in the *Suo Moto* Writ Petition wherein it was directed as under:

Order

> "1. This Court has taken suo motu cognizance of the situation arising out of the challenge faced by the country on account of Covm-19 virus and resultant difficulties that may be faced by litigants across the country in filing their petitions/applications/suits/ appeals/all other proceedings within the period of limitation prescribed under the general law of

44 In short 'LOI'

limitation or under special laws (both Central and/ or State).

2. To obviate such difficulties and to ensure that lawyers/litigants do not have to come physically to file such proceedings in respective courts/tribunals d across the country including this Court, it is hereby ordered that a period of limitation in all such proceedings, irrespective of the limitation prescribed under the general law or special laws whether condonable or not shall stand extended w.e.f. 15-3-2020 till further order(s) to be passed by this Court in present proceedings.

3. We are exercising this power under Article 142 read with Article 141 of the Constitution of India and declare that this order is a binding order within the meaning of Article 141 on all courts/tribunals and authorities.

4. This order may be brought to the notice of all the High Courts for being communicated to all subordinate courts/tribunals within their respective jurisdiction…."

32.4 For the sake of completion, we may note that the aforesaid *Suo Moto* Writ Petition was disposed of *vide* order dated 08th March, 2021. The operative para of the said order is extracted below:

"*1*. … We are of the opinion that the order dated 23-3-2020 has served its purpose and in view of the changing scenario relating to the pandemic, the extension of limitation should come to an end.

2. We have considered the suggestions of the learned Attorney General for India regarding the future course of action. We deem it appropriate to issue the following directions:

2.1. In computing the period of limitation for any suit, appeal, application or proceeding, the period from 15-3-2020 till 14-3-2021 shall stand excluded. Consequently, the balance period of limitation

remaining as on 15-3-2020, if any, shall become available with effect from 15-3-2021.

2.2. In cases where the limitation would have expired during the period between 15-3-2020 till 14-3-2021, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 15-3-2021. In the event the actual balance period of limitation remaining, with effect from 15-3-2021, is greater than 90 days, that longer period shall apply.

2.3. The period from 15-3-2020 till 14-3-2021 shall also stand excluded in computing the periods prescribed under Sections 23(4) and 29-A of the Arbitration and Conciliation Act, 1996, Section 12-A of the Commercial Courts Act, 2015 and provisos (*b*) and (*c*) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings.

2.4. The Government of India shall amend the guidelines for containment zones, to state:

'Regulated movement will be allowed for medical emergencies, provision of essential goods and services, and other necessary functions, such as, time-bound applications, including for legal purposes, and educational and job-related requirements.'

3. The suo motu writ petition is disposed of accordingly."

32.5 The Auction Purchaser has also invoked Regulation 47A of the IBBI Regulations, 2016, that was inserted on 20th April, 2020 and made effective from 17th April, 2020.[45] Regulation 47A provides for exclusion of the period of lockdown and reads as under:

45 Vide Notification No. IBBI/2020- 21/GN/REG059 dated 20.04.2020

> **"Exclusion of period of lockdown**
>
> **47A**. Subject to the provisions of the Code, the period of lockdown imposed by the Central Government in the wake of Covid-19 outbreak shall not be counted for the purposes of computation of the time-line for any task that could not be completed due to such lockdown, in relation to any liquidation process."

32.6 It is evident from a perusal of Regulation 47A, that the benefit of the said regulation was made available not only for initiation of any litigation, but also for computation of the timeline for completing any task in connection with a liquidation process that could not be completed on account of declaration of the lockdown. We are not inclined to accept the submission made on behalf of the appellant that the word *'Litigants'* used in the order dated 23rd March, 2020 passed in the *Suo Moto* Writ Petition ought to be given a narrow interpretation so as to exclude a party like the Auction Purchaser herein as *stricto sensu,* it was not a litigant who was required to file any petition/application/suit/appeal or other proceeding before any Court/Tribunal/Authority within the period of limitation prescribed under a general law of limitation or under the special laws. It must be emphasised that a judgment can neither be read like a Statute nor can the expressions used in a judgment be assigned a narrow meaning or curtailed. In the larger contextual background of the Covid-19 breakout, a liberal interpretation would have to be adopted and the Auction Purchaser would be entitled to the benefit of the order dated 23rd March, 2020 read with Regulation 47A of the IBBI Regulations, 2016. The appellant cannot be heard to state that when the entire country was engulfed by the Covid-19 pandemic and a countrywide lockdown was imposed on 25th March, 2020 that was extended from time to time, the Auction Purchaser ought to have deposited the balance sale consideration within the stipulated 90 days. In such a situation, a lenient view would have to be taken by the Court.

32.7 The factual matrix of the case also needs to be kept in mind. The Covid-19 pandemic had broken out in the month of March, 2020. A curfew was clamped by the Central Government on 22nd March, 2020, restricting the movement of the public.

The Adjudicating Authority had issued a notification that only urgent matters would be taken up between 16th March, 2020 and 27th March, 2020. Before completion of the aforesaid period, the Central Government had declared a nationwide lockdown for 21 days till 14th April, 2020, which period was subsequently extended till 03rd May, 2020. In this backdrop, came the order of this Court on 23rd March, 2020 extending the period of limitation w.e.f. 15th March, 2020 till further orders, which order was extended from time to time. The Governing Board of the Insolvency and Bankruptcy Board of India also decided on 17th April, 2020 to amend the IBBI Regulations, 2016 due to nationwide lockdown and incorporated Regulation 47A.

32.8 On 28th February, 2020, the Auction Purchaser approached the Liquidator for seeking extension of time to deposit the balance sale consideration. It was stated that the balance sale consideration would be paid on the date of registration of the subject property and a request was made not to levy any interest. On 02nd April, 2020, the Liquidator informed the Auction Purchaser that he was not empowered to relax the timelines for depositing the balance sale consideration and it ought to approach the Adjudicating Authority for appropriate relief. In view of the aforesaid response received from the Liquidator, the Auction Purchaser filed an application before the Adjudicating Authority on 22nd April 2020,[46] seeking extension of the time for making payment of the balance sale consideration on various grounds that included a plea that there was an income tax attachment order in respect of the subject property and the Covid-19 pandemic had caused a lot of disruption. It was this application that was allowed by the Adjudicating Authority *vide* order dated 05th May, 2020 granting the Auction Purchaser time to pay the balance sale consideration until the Central Government/State Government lifted the lockdown.

32.9 In ***GPR Power Solutions*** *(supra),*a case cited by learned counsel for the Auction Purchaser, the appellant therein was a creditor of the Corporate Debtor who filed a belated claim under Regulation 7of the IBBI Regulations, 2016 which was rejected by the Resolution Professional on the ground of delay.

46 MA/335/2020 in MA/689/2019 in CP/1140/2018

The said delay was neither condoned by the Adjudicating Authority nor by the Tribunal. Both the orders were overturned by this Court in the light of the orders passed in the *Suo Moto* Writ Petition. We decline to draw a distinction between the appellant in the captioned case and the Auction Purchaser herein on a plea that the Auction Purchaser was not required to file any petition/application/suit/appeal or other proceeding that was circumscribed by period of limitation. The spirit of the order passed in the *Suo Moto* Writ Petition was to overcome the challenges thrown by the lockdown clamped down on account of the Covid-19 pandemic. In our opinion, such an order would also extend to any action required to be taken in respect of a liquidation process, as contemplated in Regulation 47A of the IBBI Regulations, 2016.

32.10 The decision in ***Sagufa Ahmed*** *(supra)* relied on by learned counsel for the appellant to urge that the Auction Purchaser cannot claim the benefit of the order passed by this Court on 23rd March, 2020, is distinguishable on facts. In the said case, the statutory period of 45 days available to the appellant therein to prefer an appeal against an order passed by the Adjudicating Authority had expired on 02nd February, 2020 and the additional period of 45 days that could have been condoned by the Tribunal by virtue of the *proviso* to Section 421(3) of the Companies Act, 2013 had expired on 18th March, 2020 whereas the appeal was actually preferred on 20th July, 2020. Noting that the lockdown was imposed on 24th March, 2020 and there was no impediment for the appellant in the aforesaid case to have filed the appeal before 18th March, 2020, this Court had refused to permit the party to take refuge of the order dated 23rd March, 2020, passed in the *Suo Moto* Writ Petition and had opined that the said order was intended to benefit those who were vigilant about their rights.

32.11 The decision in ***Rajat Infrastructure Private Limited*** *(supra)* alluded to by learned senior counsel for the appellant is also based on its own peculiar facts where successive applications were moved by the applicant – Auction Purchaser therein for extension of time to pay the balance sale price of the subject property. Despite a long rope given by the Court by granting

enlargement of time, the applicant kept on dragging its feet and committing defaults. In view of the aforesaid conduct, the Court referred to sub-rule (4) and (6) of Rule 9 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (Enforcement) Rules 2002[47] that prescribes time of sale, issue of sale certificate and delivery of possession and observed that even if a liberal construction is given to the said sub–rules, in view of successive orders passed by the Court on applications moved by the applicant – Auction Purchasers, it was not permissible to extend the timeline under the substantive statutory provisions dealing with the subject. The facts of the present case being on a different footing, the appellant cannot take advantage of the aforesaid decision.

32.12 In the present case, as noticed above, the period of 90 days for depositing the balance sale consideration had expired just after the crucial date, i.e., 23rd March, 2020. We do not find any merit in the submission made by the appellant that the Tribunal ought not to have accepted the view taken by the Adjudicating Authority that Covid-19 lockdown was a valid reason for extension of time to deposit the balance sale consideration.

33. ALLEGATIONS REGARDING UNDER-VALUATION OF THE SUBJECT PROPERTY

33.1 The contention of the learned senior counsel for the appellant is that the Liquidator ought not to have auctioned the subject property by fixing a reserve price below the valuation submitted by the Registered valuers. To consider the said submission, it is necessary to examine the scheme of the IBBI Regulation, 2016 that applies to the Corporate Insolvency Resolution Process. Chapter VI of the Regulations titled '*Realisation of Assets'* includes a list of regulations relating to sale of assets (Regulation 32), sale of a Corporate debtor as a going concern (Regulation 32A), mode of sale (Regulation 33), preparation of an asset memorandum (Regulation 34), valuation of assets or businesses intended

47 SARFAESI Rules, 2002

to be sold (Regulation 35), preparation of the Asset Sale Report (Regulation 36), realization of security interest by secured creditor (Regulation 37), assignment of not readily realizable assets (Regulation 37A), distribution of unsold assets (Regulation 38), recovery of monies due (Regulation 39) and realization of uncalled capital/unpaid capital contribution (Regulation 40). It can be seen that all the aforesaid regulations that fall under Chapter VI, are primarily concerned with realization of assets and the Liquidator has been tasked with several duties related to the said realization.

33.2 Regulation 33 stipulates that a Liquidator shall ordinarily sell the assets of the Corporate Debtor through an auction in the manner specified in Schedule I. Regulation 35 permits the Liquidator to appoint two Registered valuers to determine the realizable value of the assets or businesses listed in Regulation 32. On the Registered Valuers conducting a physical verification of the assets of the Corporate Debtor and submitting the estimate of the realizable value of the asset/ business, the average of the two estimates received are to be taken as the value of the asset/business. It was in the light of the said Regulations that the Liquidator herein had engaged two Registered Valuers to give an estimate of the valuation of the subject property and the average of the two estimates was fixed by him at ₹39,41,28,500/- (Rupees Thirty nine crore forty one lakh twenty eight thousand five hundred only) for purposes of conducting the e-auction.

33.3 The objection taken by the appellant to the Liquidator slashing the reserve price by 25 per cent and bringing it down to ₹29,55,96,375/- (Rupees Twenty nine crore, fifty five lakhs ninety six thousand three hundred seventy five only), is answered in Rule 4A of Schedule I under Regulation 33 of the IBBI Regulations, 2016, that states as follows:

> "(4A) Where an auction fails at the reserve price, the liquidator may reduce the reserve price by up to twenty- five percent of such value to conduct subsequent auction."

32.4 Admittedly, in the first round of the Notice for sale through e-auction published by the Liquidator on 25th November, 2019,

he did not receive any bid. As a result, the Liquidator reduced the reserve price of the subject property by 25 per cent to conduct a second auction on 23rd December, 2019 wherein the Auction Purchaser was declared as the successful bidder. In our view, the Liquidator cannot be faulted for having exercised the discretion vested in him under Rule 4A of Schedule I when the auction scheduled earlier, did not bear any positive result. In fact, Rule 4B empowers the Liquidator to reduce the reserve price fixed under Rule 4A for subsequent auctions with a rider that the price shall not be reduced to more than 10 per cent at a time. The said eventuality did not arise in the present case since the Auction Purchaser was declared as the successful bidder in the second round of auction.

32.5 If the appellant was so confident that the subject property would have fetched a much higher price, nothing precluded him from identifying a bidder who was willing to offer a better price. In fact, such a suggestion was made by the Liquidator in his reply dated 15th November, 2019 to the objection taken by the appellant to the estimated value of the subject property in his letter dated 8th November, 2019. The Liquidator had stated that *"If you are confident enough that the property may fetch for more than Rs. 100.00 Crores you are at liberty to bring the proposed buyers and ask them to participate in the bidding process."* Again, the Liquidator wrote a letter dated 27th November, 2019 to the appellant suggesting that ask eligible parties willing to offer a better price to participate in the auction process. The appellant did not follow up after that.

32.6 Therefore, the appellant cannot be permitted to argue that since the tax value of the subject property was estimated by the Registered Valuers at above ₹48 crores, the Liquidator ought not to have fixed the reserve price at ₹39,41,28,500/- (Rupees Thirty nine crore forty one lakh twenty eight thousand five hundred only) for the simple reason that though the reports of the Registered Valuers mentioned the tax value of the subject property at a little above ₹48 crores, but the liquidation value in both the reports was much lower and the Liquidator arrived at the average of the two estimated liquidation values to fix the reserve price of the subject property.

34. **NON-CONSTITUTION OF A STAKEHOLDERS CONSULTATION COMMITTEE AND ITS EFFECT**

34.1 It has been argued that the Liquidator has violated Regulation 31A of the IBBI Regulations, 2016 that requires him to constitute a Stakeholders' Consultation Committee. For purposes of ready-reference, Regulation 31A is reproduced below:

> "**31A. Stakeholders' consultation committee.**
>
> (1) The liquidator shall constitute a consultation committee within sixty days from the liquidation commencement date, based on the list of stakeholders prepared under regulation 31, to advise him on matters relating to-
>
> (a) appointment of professionals and their remuneration under regulation 7;
>
> (b) sale under regulation 32, including manner of sale, pre-bid qualifications, reserve price, amount of earnest money deposit, and marketing strategy: Provided that the decision(s) taken by the liquidator prior to the constitution of consultation committee shall be placed before the consultation committee for information in its first meeting.
>
> xxxxx
>
> (5) Subject to the provisions of the Code and these regulations, representatives in the consultation committee shall have access to all relevant records and information as may be required to provide advice to the liquidator under sub-regulation (1).
>
> xxxxx
>
> (8) The liquidator shall place the recommendation of committee of creditors made under subregulation (1) of regulation 39C of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, before the consultation committee for its information.
>
> (9) The consultation committee shall advise the liquidator, by a vote of not less than sixty-six percent

> of the representatives of the consultation committee, present and voting.
>
> (10) The advice of the consultation committee shall not be binding on the liquidator: Provided that where the liquidator takes a decision different from the advice given by the consultation committee, he shall record the reasons for the same in writing.

34.2 Regulation 31A that was inserted on the amendment of the IBBI Regulations, 2016 by virtue of the Notification[48] dated 25th July, 2019, requires a Liquidator to constitute a Stakeholders' Consultation Committee within a period of sixty days from the date of commencement of the liquidation process. The Stakeholders' Consultation Committee is to be drawn from the list of stakeholders on a category-wise basis, as prescribed under Regulation 31. The purpose of constituting a Stakeholders' Consultation Committee is to advice the Liquidator on matters relating to appointment of professionals and their renumeration as also in relation to sale of assets under Regulation 32. However, it was observed by this Court in ***R.K. Industries (Unit-II) LLP v. H.R. Commercials Private Limited and Others***,[49] that the advice offered by the Stakeholders' Consultation Committee is not binding on the Liquidator. The safeguard provided in the Regulation is that if the Liquidator arrives at a decision which is at variance with the advice given by the Stakeholders' Consultation Committee, he must record in writing reasons for doing so and mention it in the next progress report. We may usefully extract the following para of the captioned case:

> **"55.** On a conjoint reading of the aforesaid provisions of IBC and the Liquidation Regulations, it is evident that the liquidator is authorised to sell the immovable and movable property of the corporate debtor in liquidation through a public auction or a private contract, either collectively, or in a piecemeal manner. The underlying object of the statute is to protect

48 No. IBBI/2019-20/GN/REG047

49 [2022] 12 SCR 667 : (2024) 4 SCC 166

and preserve the assets of the corporate debtor in liquidation and proceed to sell them at the best possible price. Towards this object, the provisions of IBC have empowered the liquidator to go in for a public auction or a private contract as a mode of sale. Besides reporting the progress made, the liquidator can also apply to the adjudicating authority (NCLT) for appropriate orders and directions considered necessary for liquidation of the corporate debtor. The liquidator is permitted to consult the stakeholders who are entitled to distribution of the sale proceeds. However, the proviso to Section 35(2) IBC makes it clear that the opinion of the stakeholders would not be binding on the liquidator. Regulation 8 of the Liquidation Regulations refers to the consultative process with the stakeholders, as specified in Section 35(2) IBC and states that they shall extend all necessary assistance and cooperation to the liquidator for completing the liquidation process. Regulation 31-A has introduced a stakeholders' Consultation Committee that may advise the liquidator regarding sale of the assets of the corporate debtor and must be furnished all relevant information to provide such advice. Though the advice offered is not binding on the liquidator, he must give reason in writing for acting against such advice."

34.3 By virtue of the Notification dated 28th April, 2022, an Explanation was appended at the foot of Regulation 31A which clarifies that the requirement of constituting a Stakeholders' Consultation Committee shall apply only to those liquidation processes that were to commence on/after the date of commencement of the IBBI Regulation, 2016. In the present case, the liquidation process in respect of the company had commenced on 17th July, 2019 and therefore, the submission made by the appellant that the Liquidator has breached Regulation 31A of the IBBI Regulations, 2016 by not constituting a Stakeholders' Consultation Committee, is devoid of merits. Even otherwise, the appellant cannot have a grouse on this count because the record reveals that the Liquidator had sent a reply on 15th

November, 2019 to a written objection taken by the appellant on the Valuation reports submitted by the Registered Valuers on 08th November, 2019, wherein, it was stated that neither he nor the other ex-Directors of the company had responded to the Liquidator's suggestion for calling a meeting of the CoC. Despite this, neither the appellant nor the other ex-Directors of the company took any step to depute a person from amongst them to be a part of the Stakeholders' Consultation Committee. In view of the aforesaid facts, the objection taken by the appellant that the Liquidator has breached Regulation 31A, does not hold any water. Nor is the Court inclined to examine the submission made at the instance of the appellant that in the absence of any explanation appended to Regulation 31A as it stood before 25th July, 2019, it was incumbent for the Liquidator to have constituted a Stakeholders' Consultation Committee in view of his own conduct noticed above. Further, such an objection was taken for the first time at the stage the appellant filed a recall application before Adjudicating Authority on 25th September, 2020 by which time the entire sale transaction was over.

35. **ALLEGATION OF VIOLTION OF REGULATION 33 OF THE IBBI REGULATIONS, 2016 AND ITS EFFECT**

35.1 The appellant has raised serious objections regarding violation of Regulation 33 of the IBBI Regulation, 2016 by the Liquidator. Regulation 33 that deals with the mode of sale of assets has already been extracted above. Schedule I under Regulation 33 lays down the manner in which the assets of the Corporate Debtor are to be sold by the Liquidator. Schedule I is sub-divided into two segments, the first part deals with sale of an asset through auction and the manner in which such a sale shall be conducted by the Liquidator and the second part deals with private sales. The relevant clauses of Schedule I for purposes of the present discussion are as follows:

"SCHEDULE I

MODE OF SALE

(Under Regulation 33 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016)

1. AUCTION

(1) Where an asset is to be sold through auction, a liquidator shall do so the in the manner specified herein.

xxxxx

(3) The liquidator shall prepare terms and conditions of sale, including reserve price, earnest money deposit as well as pre-bid qualifications, if any.

xxxxx

(6) The liquidator shall provide all assistance necessary for the conduct of due diligence by interested buyers.

xxxxx

(12) On the close of the auction, the highest bidder shall be invited to provide balance sale consideration within ninety days of the date of such demand:

Provided that payments made after thirty days shall attract interest at the rate of 12%.

Provided further that the sale shall be cancelled if the payment is not received within ninety days.

(13) On payment of the full amount, the sale shall stand completed, the liquidator shall execute certificate of sale or sale deed to transfer such assets and the assets shall be delivered to him in the manner specified in the terms of sale.

(emphasis added)

35.2 Originally, Rule 12 read as follows :

"(12) On the close of the auction, the highest bidder shall be invited to provide balance sale consideration within fifteen days of the date when he is invited to provide the balance sale consideration. On payment of the full amount, the sale shall stand completed, the liquidator shall execute certificate of sale or sale

> deed to transfer such assets and the assets shall be delivered to him in the manner specified in the terms of sale."

Vide notification dated 25th July, 2019,[50] two Rules were carved out from Rule 12, i.e., Rule 12 and Rule 13 that have been extracted above.

35.3 It is the submission of learned senior counsel for the appellant that Rule 12, Schedule I as above, is mandatory and non-adherence to the timelines set down in the said rule would result in cancellation of the sale. It has been argued that the period of 90 days available to the Auction Purchaser to provide the balance sale consideration had expired on 25th March, 2020. The first *proviso* to Rule 12 stipulates that if the payment is made after 30 days, then the successful bidder would have to pay interest on the amount payable at the rate of 12 per cent. The second *proviso* to Rule 12 stipulates the outer limit for payment and states that if the payment is not received within 90 days, then the sale shall stand cancelled.

35.4 To test the argument advanced by learned counsel for the appellant that the word used in Rule 12 of Schedule I is *"shall"* and not *"may"* and therefore, the prescriptions laid down in Rule 12 ought to be treated as mandatory and not directory in character, we may usefully refer to the observations made in ***Sharif-ud-din*** *(supra*) where a distinction was drawn between a mandatory rule and a directory rule in the following words:

> **"9. The difference between a mandatory rule and a directory rule is that while the former must be strictly observed, in the case of the latter substantial compliance may be sufficient to achieve the object regarding which the rule is enacted.** Certain broad propositions which can be deduced from several decisions of courts regarding the rules of construction that should be followed in determining whether a provision of law is directory or mandatory may be summarised thus: **The fact that the statute uses the word "shall" while**

50 Notification No.IBBI/2019-20/GN/REG.047

laying down a duty is not conclusive on the question whether it is a mandatory or directory provision. In order to find out the true character of the legislation, the court has to ascertain the object which the provision of law in question has to subserve and its design and the context in which it is enacted. If the object of a law is to be defeated by non-compliance with it, it has to be regarded as mandatory. But when a provision of law relates to the performance of any public duty and the invalidation of any act done in disregard of that provision causes serious prejudice to those for whose benefit it is enacted and at the same time who have no control over the performance of the duty, such provision should be treated as a directory one. Where, however, a provision of law prescribes that a certain act has to be done in a particular manner by a person in order to acquire a right and it is coupled with another provision which confers an immunity on another when such act is not done in that manner, the former has to be regarded as a mandatory one. **A procedural rule ordinarily should not be construed as mandatory if the defect in the act done in pursuance of it can be cured by permitting appropriate rectification to be carried out at a subsequent stage unless by according such permission to rectify the error later on, another rule would be contravened. Whenever a statute prescribes that a particular act is to be done in a particular manner and also lays down that failure to comply with the said requirement leads to a specific consequence, it would be difficult to hold that the requirement is not mandatory and the specified consequence should not follow.**"

(emphasis added)

35.5 This Court was called upon to interpret the expression *"may"* used in Section 7(5)(a) of the IBC *vis-a-via* the expression "shall" deployed in Section 9(5)(a), in ***Vidarbha Industries Power Limited*** *(supra),* and it was held thus:

"63. The meaning and intention of Section 7(5)(*a*) IBC is to be ascertained from the phraseology of the provision in the context of the nature and design of the IBC. This Court would have to consider the effect of the provision being construed as directory or discretionary.

64. Ordinarily the word "may" is directory. The expression "may admit" confers discretion to admit. In contrast, the use of the word "shall" postulates a mandatory requirement. The use of the word "shall" raises a presumption that a provision is imperative. However, it is well settled that the prima facie presumption about the provision being imperative may be rebutted by other considerations such as the scope of the enactment and the consequences flowing from the construction.

65. It is well settled that the first and foremost principle of interpretation of a statute is the rule of literal interpretation, as held by this Court in ***Lalita Kumari* v. *State of U.P.*** [(2014) 2 SCC 1, para 14 : (2014) 1 SCC (Cri) 524] If Section 7(5)(*a*) IBC is construed literally the provision must be held to confer a discretion on the adjudicating authority (NCLT).

xxxx

74. Sub-section (5) of Section 9 IBC provides that the adjudicating authority (NCLT) shall, within 14 days of the receipt of an application of an operational creditor under sub-section (2) of Section 9, admit the application and communicate the decision to the operational creditor and the corporate debtor, provided, the conditions stipulated in clauses (*a*) to (*e*) of Section 9(5)(*i*) IBC are satisfied. The adjudicating authority (NCLT) must reject the application of the operational creditor in the circumstances specified in clauses (*a*) to (*e*) of Section 9(5)(*ii*) IBC.

75. Significantly, the legislature has in its wisdom used the word "may" in Section 7(5)(*a*) IBC in

respect of an application for CIRP initiated by a financial creditor against a corporate debtor but has used the expression "shall" in the otherwise almost identical provision of Section 9(5) IBC relating to the initiation of CIRP by an operational creditor.

76. The fact that the legislature used "may" in Section 7(5)(*a*) IBC but a different word, that is, "shall" in the otherwise almost identical provision of Section 9(5)(*a*) shows that "may" and "shall" in the two provisions are intended to convey a different meaning. It is apparent that the legislature intended Section 9(5)(*a*) IBC to be mandatory and Section 7(5)(*a*) IBC to be discretionary. An application of an operational creditor for initiation of CIRP under Section 9(2) IBC is mandatorily required to be admitted if the application is complete in all respects and in compliance of the requisites of the IBC and the rules and regulations thereunder, there is no payment of the unpaid operational debt, if notices for payment or the invoice have been delivered to the corporate debtor by the operational creditor and no notice of dispute has been received by the operational creditor. The IBC does not countenance dishonesty or deliberate failure to repay the dues of an operational creditor."

(emphasis added)

35.6 In ***C.N. Paramasivan*** *(supra),* one of the questions that fell for consideration before this court was whether the phrase "*as far as possible*" used in Recovery of Debts due to Banks and Financial Institutions Act, 1993[51] that contemplates certain provisions of the Income Tax Act to apply with the modification to the amount due under the Debt Recovery Act instead of the Income Tax Act, referring the Rule 57 of the Income Tax Rules which mandates deposit of 25 per cent of the purchase amount of an immovable property by a purchaser and contemplates

51 In short Debt Recovery Act, 1993

the consequence of resale in such a default of deposit, this Court held thus:

> **"27.** There is nothing in the provisions of Section 29 of the RDDB Act or the scheme of the Rules under the Income Tax Act to suggest that a discretion wider than what is explained above was meant to be conferred upon the Recovery Officer under Section 29 of the RDDB Act or Rule 57 of the Income Tax Rules which reads as under:
>
> > "**57.*Deposit by purchaser and resale in default*.—(1) On every sale of immovable property, the person declared to be the purchaser shall pay, immediately after such declaration, a deposit of twenty-five per cent on the amount of his purchase money, to the officer conducting the sale; and, in default of such deposit, the property shall forthwith be resold.
> >
> > (2) The full amount of purchase money payable shall be paid by the purchaser to the Tax Recovery Officer on or before the fifteenth day from the date of the sale of the property."
> >
> > **It is clear from a plain reading of the above that the provision is mandatory in character. The use of the word "shall" is both textually and contextually indicative of the making of the deposit of the amount being a mandatory requirement.**
>
> **28.** The provisions of Rules 57 and 58 of the Income Tax Rules have their equivalent in Order 21 Rules 84, 85 and 86 CPC which are *pari materia* in language, sweep and effect and have been held to be mandatory by this Court in ***Manilal Mohanlal Shah v. Sardar Sayed Ahmed Sayed Mahmad*** [AIR 1954 SC 349] in the following words: (AIR pp. 351-52, paras 8-9 & 11)
>
> > "*8.* The provision regarding the deposit of 25 per cent by the purchaser other than the decree-holder is mandatory as the language of the

rule suggests. The full amount of the purchase money must be paid within fifteen days from the date of the sale but the decree-holder is entitled to the advantage of a set-off. The provision for payment is, however, mandatory … (Rule 85). If the payment is not made within the period of fifteen days, the court has the discretion to forfeit the deposit, and there the discretion ends but the obligation of the court to resell the property is imperative. A further consequence of non-payment is that the defaulting purchaser forfeits all claim to the property … (Rule 86).

9. … **These provisions leave no doubt that unless the deposit and the payment are made as required by the mandatory provisions of the Rules, there is no sale in the eye of the law in favour of the defaulting purchaser and no right to own and possess the property accrues to him.**

***

11. **Having examined the language of the relevant Rules and the judicial decisions bearing upon the subject we are of the opinion that the provisions of the Rules requiring the deposit of 25% of the purchase money immediately on the person being declared as a purchaser and the payment of the balance within 15 days of the sale are mandatory and upon non-compliance with these provisions there is no sale at all.** The Rules do not contemplate that there can be any sale in favour of a purchaser without depositing 25% of the purchase money in the first instance and the balance within 15 days. When there is no sale within the contemplation of these Rules, there can be no question of material irregularity in the conduct of the sale. **Non-payment of the price on the part of the defaulting purchaser renders the sale proceedings as a complete**

> **nullity.** The very fact that the court is bound to resell the property in the event of a default shows that the previous proceedings for sale are completely wiped out as if they do not exist in the eye of the law. We hold, therefore, that in the circumstances of the present case there was no sale and the purchasers acquired no rights at all."

29. Relying on ***Manilal Mohanlal case*** [AIR 1954 SC 349] Rules 84, 85 and 86 of Order 21 were also held to be mandatory in ***Sardara Singh* v. *Sardara Singh*** [(1990) 4 SCC 90]. Similarly in ***Balram* v. *Ilam Singh*** [(1996) 5 SCC 705] this Court reiterated the legal position in the following words: (SCC p. 711, para 7)

> "*7.* … it was clearly held [in ***Manilal Mohanlal*** [AIR 1954 SC 349]] that Rule 85 being mandatory, its non-compliance renders the sale proceedings a complete nullity requiring the executing court to proceed under Rule 86 and property has to be resold unless the judgment-debtor satisfies the decree by making the payment before the resale. The argument that the executing court has inherent power to extend time on the ground of its own mistake was also expressly rejected."

30. We may also refer to the decisions of this Court in ***Rao Mahmood Ahmad Khan* v. *Ranbir Singh*** [1995 Supp (4) SCC 275], ***Gangabai Gopaldas Mohata* v. *Fulchand*** [(1997) 10 SCC 387], ***Himadri Coke & Petro Ltd.* v. *Soneko Developers (P) Ltd.*** [(2005) 12 SCC 364] and ***Shilpa Shares and Securities* v. *National Coop. Bank Ltd.*** [(2007) 12 SCC 165], wherein the same position has been taken.

31. In the light of the above we see no reason to hold that Rules 57 and 58 of the Income Tax Rules are anything but mandatory in nature, so that a breach of the requirements under those Rules will render the auction non est in the eye of the law."

(emphasis added)

35.7 In ***State of Bihar v. Bihar Rajya Bhumi Vikas Bank Samiti***,[52] referring to Section 34(5) of the Arbitration and Conciliation Act, 1996, this Court has held that the absence of any consequences for infraction of a procedural provision implies that such a provision ought to be interpreted to be directory and not mandatory. Following are the observations made in the captioned decision :

> **"19.** It will thus be seen that Section 34(5) does not deal with the power of the Court to condone the non-compliance thereof. It is imperative to note that the provision is procedural, the object behind which is to dispose of applications under Section 34 expeditiously. One must remember the wise observation contained in *Kailash* [***Kailash* v. *Nanhku***, (2005) 4 SCC 480], where the object of such a provision is only to expedite the hearing and not to scuttle the same. All rules of procedure are the handmaids of justice and if, in advancing the cause of justice, it is made clear that such provision should be construed as directory, then so be it.
>
> xxxx
>
> **21. Section 80, though a procedural provision, has been held to be mandatory as it is conceived in public interest, the public purpose underlying it being the advancement of justice by giving the Government the opportunity to scrutinise and take immediate action to settle a just claim without driving the person who has issued a notice having to institute a suit involving considerable expenditure and delay. This is to be contrasted with Section 34(5), also a procedural provision, the infraction of which leads to no consequence. To construe such a provision as being mandatory would defeat the advancement of justice as it would provide the consequence of dismissing an application filed without adhering to the**

52 [2018] 7 SCR 1147 : (2018) 9 SCC 472

requirements of Section 34(5), thereby scuttling the process of justice by burying the element of fairness."

(emphasis added)

35.8 It can be discerned from the aforesaid discussion that when the law prescribes that a certain act has to be done in a particular manner for a party to acquire a right, then it ought to be treated as mandatory in character more so, when the Statute prescribes a consequence for failure to comply with the requirements laid down.

35.9 The words *"may"* and *"shall"* used in different provisions of Schedule I of the IBBI Regulations, 2016 go to show that the legislature intended to ascribe different meanings to the said words depending on the steps required to be taken by the Liquidator for the sale of the assets of a Corporate Debtor. A perusal of the Rules under Schedule I demonstrate that a play in the joints has been given to the Liquidator only in particular circumstances relating to the sale of an asset through auction. Wherever the underlying intention is to maximize realization from the sale of assets, discretion has been vested in the Liquidator to sell the asset through auction in the best interest of the creditors, but not otherwise. For the rest of the steps towards sale of an asset, the mandate of the Statute is in the affirmative. In other words, a particular step if prescribed, is necessarily required to be taken by the Liquidator in the manner prescribed in the Rules under Schedule I. He is not left with any discretion to condone the delay.

35.10 When broken down, Rule 12 states that (a) the highest bidder in an auction shall be called upon to provide the balance sale consideration within 90 days from the date of such a demand; (b) any payments made after 30 days from such a demand shall attract interest at the rate of 12 per cent; (c) if the payment is not received within the period of 90 days, the sale shall be cancelled. The word *'shall'* has been used thrice in Rule 12. Coming next to Rule 13, the same states that (a) the sale shall stand completed on the payment of the full amount; (b) the Liquidator shall execute a sale certificate/ sale deed to transfer such an asset(s); (c) the asset(s) shall be delivered in the manner prescribed in terms of the sale.

The word *"shall"* has again been used thrice in Rule 13. It is noticed that except for Rules 4A, 4B, 8 and Rule 11A where the word *"may"* has been used and it vests a discretion in the Liquidator to reduce the reserve price more than once and conduct multiple rounds of auctions with the purpose of maximizing realization from the sale of assets in the best interest of the creditors, in the remaining Rules, the word *"shall"* features prominently and without an exception. But that is not to say that wherever the word *"shall"* has been used in the Rules under Schedule I, it attains a mandatory nature. The Rule could still be construed as purely procedural if its infraction does not entail any serious or prejudicial consequence. Much will depend on the connotation and the textual context of the Rule.

35.11 In view of the analysis undertaken above, Rule 12 would have to be treated as mandatory in character for the reason that it contemplates a consequence in the event of non-payment of the balance sale consideration by the highest bidder within the stipulated timeline of 90 days, which is cancellation of the sale by the Liquidator. To that extent, there is substance in the submission made on behalf of the appellant that since the second proviso under Rule 12 contemplates a consequence of cancellation of the auction on non-payment of the balance sale consideration within 90 days, the Liquidator was not empowered to extend the timeline.

35.12 Reliance placed by learned counsel for the Liquidator on the decision in ***Pioneer Urban Land and Infrastructure Limited and Another v. Union of India and Others***[53] to contend that the timeline prescribed under Schedule 1 of the IBBI Regulations 2016 are directory and not mandatory in character, is misplaced. The said decision holds that timelines available to operational creditors under the IBC are directory and not mandatory because no consequence is provided if the period is not extended or after the extension expires and it is in this context that the following observations have been made:

> **"58.** This Court, while dealing with timelines provided qua operational creditors, in ***Surendra Trading Co.***

53 [2019] 10 SCR 381 : (2019) 8 SCC 416

> **[*Surendra Trading Co.* v. *Juggilal Kamlapat Jute Mills Co. Ltd.*, (2017) 16 SCC 143 : (2018) 2 SCC (Civ) 730], held that the timelines contained in the provisos to Sections 7(5), 9(5) and 10(4) of the Code are all directory and not mandatory. This is for the obvious reason that no consequence is provided if the periods so mentioned are exceeded. Though this decision is not in the context of the 14-day period provided by Section 7(4), we are of the view that this judgment would apply squarely on all fours so that the period of 14 days given to NCLT for decision under Section 7(4) would be directory. We are conscious of the fact that under Section 64(1) of the Code, NCLT President or the Chairperson of Nclat may, after taking into account reasons by NCLT or Nclat for exceeding the period mentioned by statute, extend the period of 14 days by a period not exceeding 10 days. We may note that even this provision is directory, in that no consequence is provided either if the period is not extended, or after the extension expires. This is also for the good reason that an act of the court cannot harm the litigant before it. Unfortunately, both NCLT and Nclat do not have sufficient members to deal with the flood of applications and appeals that is before them. The time taken in the queue by applicants who knock at their doors cannot, for no fault of theirs, be put against them."**

35.13 Nor can the decisions of the Tribunal in ***Standard Surfa Chem India Private Limited*** *(supra) and* ***Prakash Chandra Kapoor*** *(supra)* referred to by learned senior counsel for the Liquidator, be read in favour of the respondents. A sweeping observation that all the timelines prescribed in Regulation 47 are directory, is impermissible. The consequences of non-compliance of the specific rule would have to be individually examined to decide as to whether the said rule has a directory flavour or is mandatory in character.

35.14 In the present case, records reveal that when the Auction Purchaser had approached the Liquidator seeking extension of time to deposit the balance sale consideration. The Liquidator had rightly expressed his inability to do so and

indicated that such a power vests only in the Adjudicating Authority. On receiving the aforesaid response, the Auction Purchaser did take steps to move the Adjudicating Authority for seeking extension of time for making the payments. It is a matter of record that the said application was allowed by the Adjudicating Authority on 5th May, 2020 and time was granted to the Auction Purchaser to pay the balance sale consideration on the Central Government/State Government lifting the lockdown. The aforesaid order dated 5th May, 2020, was passed by the Adjudicating Authority in exercise of its inherent powers under Rule 11 of the NCLT Rules, 2016 which states as follows :

> "**Rule 11 of NCLT Rules, 2016**
>
> **Inherent Powers** - Nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the Tribunal to make such orders as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Tribunal."

35.15 The aforesaid Rule is not to be read in isolation but in conjunction with Section 35 of the IBC that deals with the powers and duties of the Liquidator and states that the Liquidator shall have the powers and duties specified in clauses (a) to (o) of sub-section 1 including the power to sell an immovable/movable property of the Corporate Debtor in liquation by public auction/private sale as per clause (f), subject to the directions of the NCLT. Pertinently, it has been observed in ***Arun Kumar Jagatramka v. Jindal Steel and Power Limited***[54] that "*the Liquidator exercises several functions which are quasi-judicial in nature and character. Section 35(1) itself enunciated that the powers and duties which are entrusted to the Liquidator are "subject to the directions of the Adjudicating Authority". The Liquidator, in other words, exercises functions which have been made amenable to the jurisdiction of NCLT, acting as the Adjudicating Authority…..*".

35.16 In the facts of the present case, the Adjudicating Authority exercised statutory powers under Section 35 of the IBC read

54 [2021] 3 SCR 114 : (2021) 7 SCC 474 (Refer Para 81)

with its inherent powers under Rule 11 of the NCLT Rules, 2016 for extending the time to deposit the balance sale consideration on sufficient cause being shown, i.e., in view of the countrywide lockdown due to the Covid-19 pandemic. This latitude that was given in the aforesaid extraordinary circumstances to meet the ends of justice, cannot be faulted.

36. **IMPACT OF THE ATTACHMENT ORDER BY THE INCOME TAX AUTHORITIES ON THE SALE OF THE AUCTIONED PROPERTY**

36.1 All things even, having held that there was sufficient reason to grant extension of time to the Auction Purchaser to deposit the balance sale consideration in terms of orders passed by this Court in the *Suo Moto* Writ Petition read with the provisions of Regulation 47A of the IBBI Regulations, 2016, and having regard to the view expressed above that the Adjudicating Authority was empowered in law to extend the time on sufficient cause being shown, the matter ought to have rested there. But there is something more to be said in this case that revolves around the arguments advanced by learned counsel for the appellant regarding the import of the order of attachment issued by the Income Tax Authorities in respect of the auctioned property and its effect.

36.2 It has been strenuously argued by learned senior counsel for the appellant that the attachment order could not be used as an excuse by the Auction Purchaser for belatedly depositing the balance sale consideration. The terms and conditions of the Notice of Sale as extracted in this judgement go to show that the Liquidator had declared that e-auction of the subject property was being conducted on an "AS IS WHERE IS", "AS IS WHAT IS" and "WHATEVER THERE IS" basis. It was further clarified that the intending bidders must undertake their own independent inquiries, inspect the subject property and satisfy themselves before submitting their bids.

36.3 The fact that the Auction Purchaser was aware of the income tax attachment order in respect of the subject property is borne out from the correspondence exchanged by it with the Liquidator, that forms a part of the records. On certain queries being raised by the Auction Purchaser, the Liquidator had replied, *vide* letter dated 9th December, 2019 and stated that :

> "if the property is sold under IBC, income tax will not have any priority claim and the property can be registered with NCLT order, apart from this the Income tax dues are very less hence it can also be paid out of the proceeds and no objection can be taken."
>
> In a subsequent letter dated 17th December, 2019 addressed by the Auction Purchaser to the Liquidator, which was well before the date the auction was scheduled, among other issues raised, one of the requests made to the Liquidator was to ensure that the income tax attachment/ prohibitory order on the subject property is lifted by the Income Tax Department. In his reply dated 19th December, 2019 to the aforesaid letter, the Liquidator had informed the Auction Purchaser that:
>
> "3. As regards to the Income Tax attachment/ prohibitory order passed. I would like to clarify that Income tax already filed claim before me and shall be paid in order of priority as provided under Insolvency & Bankruptcy Code 2016 and the registration of property on successful bidding has no relevance to the same. In case of any objection from the SRO the same shall be brought before the Tribunal and suitable order shall be obtained by the Liquidator so as to proceed with the registration."

36.4 It can be seen from the two clarifications given by the Liquidator to the Auction Purchaser that registration of the subject property in favour of the successful bidder was not to be linked with the income tax attachment order for the reason that the Income Tax Department had already lodged a claim before the Liquidator and payment was to be released to the Department in the order of priority, as stipulated under the IBC. Despite that, the Auction Purchaser did not proceed further.

36.5 In the light of the Notice for sale and the replies furnished to the Auction Purchaser well before the bidding process had commenced, we are of the considered view that it was for the Auction Purchaser as an intending bidder to have conducted a due diligence at its own end, gather all the relevant information pertaining to the subject property which included the status

of the property and the liabilities attached to it, weigh all the pros and cons and only thereafter participate in the auction process. After having participated in the e-auction with its eyes wide open, the Auction Purchaser cannot be heard to state that payment of the balance sale consideration was linked with the lifting of the attachment order passed by the Income Tax Department when it knew all along that the auction was being conducted on an "AS IS WHERE IS", "AS IS WHAT IS" and "WHATEVER THERE IS" basis.

36.6 To fortify the submission that the sale transaction could not have been completed on account of the embargo placed under the IT Act, learned counsel for the Auction Purchaser has referred to Sections 222 and 281 of the IT Act read with Rule 48 Part III, Schedule 2 of the IT Act. Section 222 of the IT Act, empowers the Tax Recovery Officer to draw up a statement specifying the amount of arrears due from an assessee who has defaulted in payment of tax and thereafter proceed to recover the said arrears by attaching and selling the assessee's movable/immovable properties. Section 281 of the IT Act declares that if an assessee creates a charge or parts with the possession of any of his assets, such charge/ transfer would be treated as void against a claim in respect of tax payable by the assessee. However, the second *proviso* to Section 281 clarifies that such a charge/transfer will not be void if it is made with the previous permission of the assessing officer. As for Rule 48 falling under Part III Schedule 2 of the IT Act, it contemplates attachment of an immovable property of the defaulter, prohibiting the defaulter from transferring/ charging the property and prohibiting all other persons from taking benefit from such a transfer/charge.

36.7 The sequence of the events as unravelled from the records reveal that the Income Tax Department had already filed a claim before the Liquidator who had in turn moved the Adjudicating Authority for appropriate directions relating to the subject property that was under the attachment order passed by the Income Tax Authorities. The said application was disposed of by the Adjudicating Authority *vide* order dated 10th February, 2020 wherein, directions were issued to lift the attachment order subject to the conditions that may be specified in an Escrow

account where the sale consideration would be deposited by the Liquidator. The said order passed in open Court was duly conveyed by the Liquidator to the Auction Purchaser, though it is the stand of the latter that a physical copy of the said order passed on 10th February, 2020, was received by it much later, in the month of May, 2020. The escrow account[55] was created on 3rd August, 2020 and the entire tax arrears amounting to ₹2,44,01,603/- (Rupees Two crore forty four lakhs one thousand six hundred and three only) were deposited in the escrow account on 24th August, 2020, though the income tax department lifted the attachment order three days later, on 27th August, 2020. This was duly conveyed to the office of the Sub-Registrar at Trichy on the same date. The second *proviso* to Section 281 of the IT Act did provide a window to the Auction Purchaser to approach the assessing officer for prior permission to transfer the subject property. But that option was exercised when the Liquidator moved an application for appropriate permission before the Adjudicating Authority which was granted on 10th February, 2020 under intimation to the Auction Purchaser.

36.8 The contention of the learned counsel for the Auction Purchaser is that Rule 13, Schedule I of the IBBI Regulation, 2016 must be read in conjunction with Rule 12 and only on payment of the full amount, could the sale transaction be treated to have been completed in all respects. Since the full amount could not be paid till the attachment order was lifted, the Liquidator could not have executed a certificate for sale/sale deed to transfer the subject property in favour of the Auction Purchaser.

36.9 We are afraid, such an assumption does not stand to reason. Rule 12 is not interlinked with Rule 13. Both the Rules cover different situations. The first *proviso* to Rule 12 gives a leeway to the successful bidder to make payment of the balance sale consideration after thirty days subject to paying interest at the rate of 12%. However, the second *proviso* to Rule 12 is unequivocal and declares that the sale itself will be treated as

55 Escrow Account No. 50200050623451

cancelled if the payment is not received within the outer limit of 90 days. It is only on completion of the steps contemplated in Rule12 that Rule 13 can come in. Reference to Rule 13 that starts with the expression "*on payment of the full amount*" would naturally be understood to mean on payment of the full amount within the period prescribed in Rule 12. We have already held Rule 12 to be mandatory in character because non-payment within the timeline has consequences attached to it. However, in contrast thereto, there are no adverse consequences spelt out in Rule 13 for it to be treated as mandatory. The said Rule lays down the procedure for completion of the sale and would have to be treated as directory since some procedural steps have been set out for purposes of completion of the sale process, but nothing beyond that. We are therefore not inclined to accept the submissions made by the respondents that none of the activities as contemplated in Rule 12 could have been completed unless and until the attachment order passed by the Income Tax Authorities was lifted or that the Liquidator was not in a position to complete the sale under Rule13 on that count.

36.10 In any event, the Liquidator had taken timely steps to move the Adjudicating Authority for appropriate permission which was obtained as long back as on 10th February, 2020, i.e. about a month and a half before the nationwide lockdown was declared. Moreover, the Auction Purchaser was well aware of the fact that the entire tax arrears amounted to ₹2,44,01,603/- (Rupees Two crore forty four lakh one thousand six hundred and three only), which could have easily been paid out of the earnest money of ₹2,95,59,638/- (Rupees Two crore ninety five lakh fifty nine thousand six hundred and thirty eight only) deposited by it, still leaving some surplus funds. The Liquidator had also taken steps to apprise the Auction Purchaser of the said position and the order of priority that was to be given to the claim of the Income Tax Department. Yet the Auction Purchaser did not deposit the balance sale consideration. In view of the above, the plea taken by the Auction Purchaser that the income tax attachment order was a serious and an insurmountable impediment in completion of the sale and the subject property could not have been validly transferred in its favour by the Liquidator, is rather tenuous and not persuasive

36.11 The anxiety of the Auction Purchaser was adequately addressed on the Adjudicating Authority passing an order on 10th February, 2020, lifting the attachment order. This order was communicated by the Liquidator to the Auction Purchaser well in time. Mere not receipt of a copy of the said order cannot be a ground for the Auction Purchaser to have delayed deposit of the entire balance sale consideration. The spectre of Covid-19 was nowhere on the horizon at that time. It spiralled only in the last week of March, 2020. If the Auction Purchaser was serious, it could have easily deposited at least some amount out of the balance sale consideration of ₹26,60,36,677/- (Rupees Twenty six crore sixty lakh thirty six thousand six hundred and seventy seven only) much earlier, but it elected not to deposit a penny till the end of August, 2020. When the first *proviso* to Rule 12, Schedule I of the IBBI Regulations, 2016 permits payment of sale consideration after expiry of 30 days from the date of demand subject to payment of interest @ 12% p.a., there was no question of the Auction Purchaser going scot free, when its conduct has not been blemishless.

36.12 On an overall conspectus of the facts of the present case which brings out the glaring default on the part of the Auction Purchaser in making deposit of the balance sale consideration even after permission was granted by the Adjudicating Authority on 10th February, 2020 to lift the attachment order, the only question that needs to be answered is as to whether this Court should proceed to set aside the auction and as a sequence thereto, declare as null and void, the sale certificate issued by the Liquidator in favour of the Auction Purchaser, as has been pleaded by the appellant.

36.13 In our opinion, such an order would be too harsh. Much water has flown under the bridge by now. The subject land has been utilized by the Auction Purchaser to build a 200-bed Mother and Child hospital which is operational. Huge amounts have been pumped into the project by the Auction Purchaser. The hospital is fully functional providing medical facilities to seven surrounding districts. In contrast, the appellant has not been a vigilant litigant. His conduct shows that he has dragged his

feet at every stage. Records reveal that belated applications have been filed by him for seeking recall of the orders passed by the Adjudicating Authority granting extension of time to the Auction Purchaser. For reasons best known to him, it took 19 months for the appellant to prefer an appeal before the Tribunal against the order passed by the Adjudicating Authority, as provided for in the IBC. Furthermore, the appellant resisted handing over possession of the subject property to the respondents thereby causing more delay.

36.14 This Court must underscore the well settled legal position that once an auction is confirmed, it ought to be interfered with on fairly limited grounds. **(*Refer:* *Valji Khimji and Co. v. Hindustan Nitro Product (Gujarat) Ltd. (Official Liquidator)*[56] and *Celir LLP v. Bafna Motors (Mumbai) Private Limited and others*[57]*)***. Repeated interferences in public auction also results in causing uncertainty and frustrates the very purpose of holding auctions. (*Refer : K. Kumara Gupta v. Sri Markendaya and Sri Omkareswara Swamy Temple and others*[58]*)*. Unless there are some serious flaws in the conduct of the auction as for example perpetration of a fraud/collusion, grave irregularities that go to the root of such an auction, courts must ordinarily refrain from setting them aside keeping in mind the domino effect such an order would have. Given the facts noted above, we shall refrain from cancelling the sale or declaring the Sale Deed as void. Instead, it is deemed appropriate to balance the equities by directing the Auction Purchaser to pay an additional amount in respect of the subject property.

CONCLUSION

36.15 For arriving at a just and fair figure, we propose to take into consideration the estimated value of the subject property in terms of the Reports submitted by the Registered Valuers appointed by the Liquidator. Based on their Reports, the Liquidator had fixed ₹39,41,28,800/- (Rupees Thirty nine

56 [2008] 12 SCR 1 : (2008) 9 SCC 299

57 [2023] 13 SCR 53 : (2024) 2 SCC 1

58 [2022] 8 SCR 968 : (2022) 5 SCC 710

crore forty one lakh twenty eight thousand and eight hundred only) as the average liquidation value of the subject property for the purpose of e-auction. This figure was brought down by 25% in the second round of auction which came to ₹29,55,96,375/- (Rupees Twenty nine crore fifty five lakh ninety six thousand three hundred and seventy five only). The difference in the two figures mentioned above comes to ₹10,00,00,000/- (Rupees Ten crore only) approximately. Keeping in mind the fact that the Auction Purchaser managed to retain the balance sale consideration for over six months reckoned from 10th February, 2020 and about five months reckoned from 25th March, 2020, we deem it appropriate to direct it to deposit 50% of the differential figure, i.e., an additional sum of ₹5,00,00,000/- (Rupees Five crore only) with the Liquidator along interest @ 9 % p.a. reckoned from 26th March, 2020 till date of actual payment. The said amount shall be deposited by the Auction Purchaser with the Liquidator within eight weeks from today. Thereafter, the Liquidator shall disburse the amount received in terms of the orders passed/may be passed by the Adjudicating Authority, as contemplated under the IBC.

36.16 The appeals are partly allowed on the above terms. Parties shall bear their own expenses.

Result of the case: Appeals Partly allowed.

†*Headnotes prepared by:* Ankit Gyan