ISSN: 3048-4839 (Online)

DIGITAL SUPREME COURT REPORTS

The Official Law Report
Fortnightly

2024 | Volume 9 | Part 1

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

Digitally Published by
Supreme Court of India

DIGITAL SUPREME COURT REPORTS

The Official Law Report
Fortnightly

2024 | Volume 9 | Part 1

Digitally Published by
Supreme Court of India

Editorial Board

Digitally Published by
Supreme Court of India

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

Contents

[2024] 9 S.C.R. 1 : 2024 INSC 651

Ishwar (Since Deceased) Thr. Lrs & Ors.
v.
Bhim Singh & Anr.

Civil Appeal No. 10193 of 2024

03 September 2024

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

Issue for Consideration

Issue arose as to whether the execution court had jurisdiction to deal with the application for rescission of contract and extension of time to deposit the balance sale consideration; and if execution court had the jurisdiction, whether those applications ought to have been decided as one in the suit on original side, if yes, then, whether, in the facts of the case, on that ground alone, the impugned order warrants interference in exercise of jurisdiction Art 136 of the Constitution.

Headnotes†

Specific Relief Act, 1963 – s. 28 – Rescission in certain circumstances of contracts for the sale or lease of immovable property, the specific performance of which has been decreed – Application for rescission of contract and extension of time to deposit the balance sale consideration – Jurisdiction of the execution court:

Held: Bare reading of s. 28 gives an impression that the power to extend time to deposit, or to rescind the contract on failure of deposit vests in the Court which passed the decree – Expression "may apply in the same suit in which the decree is made" as used in u/s. 28 must be accorded an expansive meaning so as to include the court of first instance even though the decree under execution is passed by the appellate court, because the decree is in the same suit – Thus, an application u/s. 28, either for rescission of contract or for extension of time, can be entertained and decided by the execution court, provided it is the court which passed the decree in terms of s. 37 CPC – On facts, the Court of first instance, (where the civil suit was instituted) and the execution application was filed before the Court of Additional Civil Judge

* Author

(Senior Division) – Application u/s 28 was disposed of by the Court of Civil Judge (Senior Division) – Thus, by virtue of s. 37 CPC, the execution court being the Court of first instance with reference to the suit in which the decree was passed had jurisdiction to deal with the application u/s. 28 of the Act – Thus, the objection as regards the jurisdiction of the execution court to deal with the application for extension of time/rescission of the court u/s. 28(1) is rejected. [Paras 15, 18, 19]

Specific Relief Act, 1963 – s. 28 – Rescission in certain circumstances of contracts for the sale or lease of immovable property, the specific performance of which has been decreed – Execution court to decide the application u/s. 28 as an application on the original side (as an application in the suit) or on the execution side (as an application in the execution proceedings):

Held: Application seeking rescission of contract, or extension of time, u/s. 28 (1), must be decided as an application in the original suit wherein the decree was passed even though the suit has been disposed of – Thus, even if the execution court is the Court of first instance with reference to the suit wherein the decree under execution was passed, it must transfer the application filed u/s. 28 to the file of the suit before dealing with it. [Para 22]

Constitution of India – Art. 136 – Jurisdiction under – Exercise of – Suit for specific performance of agreement by respondents against appellants, partly decreed, directing the appellants to refund the earnest money – Appeal thereagainst, allowed by the appellate court, directing the appellants to execute the sale deed in favour of the respondent on payment of balance sale consideration within the stipulated period, failing which the respondents could get the sale deed executed through the court – Application for execution of the decree and deposit of balance sale price by the respondents – During pendency, appellants filed second appeal which was dismissed – Respondent's then filed application before the execution court seeking permission to deposit the balance consideration in the court, whereas the appellant filed application u/s. 28 to rescind the contract – However, the execution court rejected the appellant's application and permitted the respondents to deposit the balance consideration – Aggrieved appellant, then filed revision which was dismissed – Interference with:

Held: Not called for – Court does not exercise its jurisdiction u/Art. 136 only because it is lawful to do so – For the purpose of doing complete justice to the parties, the Court may not interfere with the order even if it suffers from some legal error – Court may deny relief to a party having regard to its conduct and may, in a given situation, mould the relief to do complete justice to the parties – On facts, the respondents had all throughout shown their intention to pay the balance consideration for execution of the sale deed whereas the appellants appeared interested only in challenging the decree before higher Courts – Execution court justifiably exercised its discretion in favour of the decree holder by allowing them to deposit the balance consideration – Thus, substantial justice has been done to the parties and if the impugned order is interfered with only on the technical ground that the application was not dealt with as one on the original side, grave injustice would be caused to the decree holder – More so, when the judgment-debtor themselves applied to the execution court for rescinding the contract, and raised no such jurisdictional issue either before the Execution Court or the High Court – Furthermore, the plea that there was no proper prayer for condonation of delay in making the deposit of the balance consideration, or that there was no proper application for extension of time to make deposit cannot be accepted because, in the execution application itself, which was promptly filed after expiry of 60 days from the date of the appellate court decree, the decree holder had sought permission to make deposit; and the application filed after dismissal of second appeal also sought permission to make deposit – Prayer to extend the time to make deposit was thus implicit in the prayer to permit the decree holder to make deposit of the balance consideration. [Paras 24, 27-30]

Case Law Cited

Ramankutty Guptan v. Avara [1994] 1 SCR 542 **: (1994) 2 SCC 642;** *V.S. Palanichamy Chettiar Firm v. C. Alagappan and Anr* [1999] 1 SCR 349 **: (1999) 4 SCC 702;** *Sanjay Shivshankar Chitkote v. Bhanudas Dadarao Bokade (Died) through L.Rs* **Civil Appeal No. 8022 of 2023 @ SLP (C) No. 24720 of 2023 decided on 08.12.2023;** *Chanda v. Rattni* [2007] 4 SCR 402 **: (2007) 14 SCC 26;** *Lajpat Rai Mehta v. Govt. of Punjab (Deptt. of Irrigation & Power)* [2008] 17 SCR 657 **: (2009) 3 SCC 260 – referred to.**

List of Acts

Specific Relief Act, 1963; Constitution of India.

List of Keywords

Execution court; Application for rescission of contract; Application for extension of time to deposit the balance sale consideration; Suit on original side; Jurisdiction of the execution court; Court of first instance; Suit for specific performance of agreement; Refund the earnest money; Payment of balance sale consideration; Discretionary jurisdiction; Condonation of delay.

Case Arising From

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 10193 of 2024

From the Judgment and Order dated 11.01.2017 of the High Court of Punjab & Haryana at Chandigarh in CR No. 8105 of 2016

Appearances for Parties

B. S Bedi, Ms. Simar Bedi, Dinesh Verma, Subhasish Bhowmick, Advs. for the Appellants.

Sanchar Anand, Devendra Singh, Anant K Vatsya, Dr. Ravinder Kumar Anand, Aman Kumar Thakur, Arjun Rana, Mrs. Rita Vasisth, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Manoj Misra, J.

1. Leave granted.

2. This appeal impugns an order of the High Court of Punjab and Haryana at Chandigarh[1] dated 11.01.2017 passed in Civil Revision No. 8105 of 2016, whereby the revision preferred by the appellant(s) against the order of the Civil Judge (Senior Division), Kaithal[2] dated 03.11.2016 was dismissed.

1 High Court

2 Execution Court

FACTUAL MATRIX

3. A suit for specific performance was instituted by the respondents against the appellant(s) (which would include their predecessor in interest) for enforcement of an agreement to sell dated 18.05.2005. In the plaint, *inter alia*, it was alleged that the appellant(s) had agreed to sell the property in dispute at a total consideration of Rs.18 lacs, out of which Rs. 9.77 lacs was paid in advance, yet, despite service of notice requesting execution of sale deed, the appellants failed to execute the same.

4. The trial court (i.e., the Court of Additional Civil Judge (Senior Division), Kaithal), *vide* judgment and decree dated 28.02.2011, decreed the suit in part whereunder the appellant(s) were directed to refund the earnest money with interest, etc.

5. Aggrieved by rejection of the prayer for specific performance of the agreement, the respondents went in appeal. The appellate court (i.e., the Court of Additional District Judge, Kaithal (for short ADJ)) allowed the appeal *vide* judgment and decree dated 12.01.2012 and accepted the prayer for specific performance of the agreement. While doing so, it directed the appellants herein to execute the sale deed in favour of the respondents herein on payment of balance sale consideration within a period of two months from the date of the decree, failing which, liberty was given to the decree holder(s) to get the sale deed executed through Court.

6. On 20.03.2012, the respondents (i.e. decree holders) filed an execution application before the Court of first instance (i.e., the trial court) praying thus:

> "It is therefore, prayed that the sale deed as per the decree passed in Civil Appeal No. 53 of 2011 may kindly be got executed and registered in favour of the decree holders by the appointment of the local commissioner and possession may kindly be got delivered to the decree holder and the balance sale price may kindly be got deposited in the Court for payment to the J.Ds and cost for the suit and the appeal and this execution may also be got recovered from the J.Ds."

7. While the application for execution of the decree was pending, the appellant(s) (i.e., the judgment debtor(s)) challenged the appellate

court decree by filing Second Appeal No. 3730 of 2012 before the High Court, which came to be dismissed on 07.11.2013.

8. Upon dismissal of the Second Appeal, the respondents (i.e., decree-holders) filed an application before the Execution Court on 24.03.2014 seeking permission to deposit the balance consideration in Court. Opposing this prayer of the decree holder, in the execution proceeding itself, the appellant(s) (i.e. the judgment-debtors) submitted an application under Section 28[3] of the Specific Relief Act, 1963 (in short "the 1963 Act") to rescind the contract on the ground that decree-holder(s) had failed to make deposit within two months, as directed by the first appellate court.

9. The Execution Court, however, rejected the application of the judgment-debtor(s) for rescission of the contract *vide* order dated 03.11.2016 and, simultaneously, permitted the decree-holder(s) to make deposit of the balance consideration.

10. Aggrieved by the aforesaid order of the Execution Court, the appellant(s) (i.e., the judgment-debtors) filed a Civil Revision before the High Court, which came to be dismissed by the impugned order.

---

3 **28. Rescission in certain circumstances of contracts for the sale or lease of immovable property, the specific performance of which has been decreed.—**

(1) Where in any suit a decree for specific performance of a contract for the sale or lease of immovable property has been made and the purchaser or lessee does not, within the period allowed by the decree or such further period as the court may allow, pay the purchase money or other sum which the court has ordered him to pay, the vendor or lessor may apply in the same suit in which the decree is made, to have the contract rescinded and on such application the court may, by order, rescind the contract either so far as regards the party in default or altogether, as the justice of the case may require.

(2) Where a contract is rescinded under sub-section (1), the court—

(a) shall direct the purchaser or the lessee, if he has obtained possession of the property under the contract, to restore such possession to the vendor or lessor, and

(b) may direct payment to the vendor or lessor of all the rents and profits which have accrued in respect of the property from the date on which possession was so obtained by the purchaser or lessee until restoration of possession to the vendor or lessor, and, if the justice of the case so requires, the refund of any sum paid by the vendee or the lessee as earnest money or deposit in connection with the contract.

(3) If the purchase or lessee pays the purchase money or other sum which he is ordered to pay under the decree within the period referred to in sub-section (1), the court may, on application made in the same suit, award the purchaser or lessee such further relief as he may be entitled to, including in appropriate cases all or any of the following reliefs, namely:—

(a) the execution of a proper conveyance or lease by the vendor or lessor;

(b) the delivery of possession, or partition and separate possession, of the property on the execution of such conveyance or lease.

(4) No separate suit in respect of any relief which may be claimed under this section shall lie at the instance of a vendor, purchaser, lessor or lessee, as the case may be.

(5) The costs of any proceedings under this section shall be in the discretion of the court.

11. We have heard Shri Subhasish Bhowmick for the appellant(s); Mr. Devendra Singh for the respondents; and have perused the materials on record.

SUBMISSIONS ON BEHALF OF THE APPELLANT(S)

12. The learned counsel for the appellants submitted:

(i) The Execution Court held no jurisdiction to extend the time for depositing the balance consideration as the decree under execution was passed by the appellate court.

(ii) The decree was executable on payment of balance sale consideration within two months. No application for extension of time to make deposit was made within the aforesaid period, therefore the Court had no power to extend the time for deposit.

(iii) The Execution Court committed grave error in extending the time to make deposit of the balance amount after four years of the appellate court's decree, when, otherwise, it was to be paid within two months from the date of the decree.

SUBMISSIONS ON BEHALF OF RESPONDENTS

13. *Per contra*, the learned counsel for the respondents submitted:

(i) The execution application was filed in the same Court where the original suit was instituted, therefore, the Court had jurisdiction to extend the time to make deposit;

(ii) The decree under execution did not specifically fix the mode of payment and there was no direction to deposit the balance consideration in Court, therefore, except to file for execution of the decree and seek permission of the Court to deposit the balance consideration, there was no other method by which decree holder could have paid the balance amount, more so, when the judgment debtor was not interested in abiding by the decree;

(iii) The judgment – debtor(s) were offered balance consideration within time, and the execution application was also filed within time, but, instead of executing the sale deed, the judgment–debtor(s) chose to prefer a second appeal before the High Court. Not only that, after the second appeal was dismissed, the judgment-debtor(s) preferred a Special Leave Petition (in short

SLP) before this Court, which, too, was dismissed on 07.11.2016. Thus, it is clear that the decree-holders were throughout ready and willing to perform their part under the contract / decree whereas the judgment-debtor(s) avoided execution of the sale deed. In these circumstances and having regard to the facts of the case, the Execution Court was justified in allowing the application for extension of time and rejecting the application for rescission of the contract.

ISSUES

14. Having noticed the rival contentions, in our view, the following issues arise for our consideration:

(i) Whether the Execution Court had jurisdiction to deal with the application(s) for (a) recission of contract and (b) extension of time to deposit the balance sale consideration?

(ii) If Execution Court had the jurisdiction, whether those applications ought to have been decided as one in the suit (i.e., original side)? If yes, then, whether, in the facts of the case, on that ground alone, the impugned order warrants interference in exercise of jurisdiction under Article 136 of the Constitution of India?

ANALYSIS

A. The Execution Court had jurisdiction

15. A bare reading of Section 28(1) of the 1963 Act gives an impression that the power to extend time to deposit, or to rescind the contract on failure of deposit, vests in the Court which passed the decree in as much as the words used in Section 28 (1) are:

> "The vendor or lessor may apply in the same suit in which the decree is made, to have the contract rescinded and on such application the court may, by order, rescind the contract either so far as regards the party in default or altogether, as the justice of the case may require."

16. In **Ramankutty Guptan Vs. Avara**,[4] this Court answered two questions. One, whether an application under Section 28 of the 1963 Act is maintainable in the Court of first instance when the decree has

4 [1994] 1 SCR 542 : (1994) 2 SCC 642

been passed by the appellate court. Second, whether the Execution Court in which the original suit was filed can entertain an application under Section 28 of the 1963 Act. After taking note of the provisions of Section 37[5] of the CPC, this Court held:

> "8. ……..Therefore, it is clear that the decree of the appellate court would be construed to be the decree passed by the court of first instance. It is settled law that an appeal is a continuation of the suit. Therefore, when a decree for specific performance has been dismissed by the trial court, but decreed by the appellate court, it should be construed to be in the same suit. When the decree specifies the time for performance of the conditions of the decree, on its failure to deposit the money, Section 28(1) itself gives power to the court to extend the time on such terms as the Court may allow to pay the purchase money or other sum which the court has ordered him to pay. In *K. Kalpana Saraswathi Vs. P.S.S. Somasundaram Chettiar*,[6] this Court held that on an oral prayer made by the counsel for the plaintiff for permission to deposit the entire amount as directed by the trial court this Court directed the appellant to deposit the amount within six months from that date together with interest and other conditions mentioned therein. An application for extension of time for payment of balance consideration may be filed even in the court of first instance or in the appellate court in the same suit as the decree of the trial court stands merged with that of the appellate court which decree is under execution. It is to be seen that the procedure is the handmaid for justice and unless the procedure touches upon jurisdictional issue, it should be moulded to subserve substantial justice. Therefore, technicalities would not stand in the way to subserve substantive justice. Take a

5 **37. Definition of the court which passed a decree** – The expression "Court which passed a decree", or words to that effect, shall, in relation to the execution of decrees, unless there is anything repugnant in the subject or context, be deemed to include-

(a) Where the decree to be executed has been passed in the exercise of appellate jurisdiction, the Court of first instance, and

(b) Where the court of first instance has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit.

6 [1980] 2 SCR 293 : (1980) 1 SCC 630

> case where the decree is transferred for execution to a transferee executing court, then certainly the transferee court is not the original court and execution court is not the "same court" within the meaning of Section 28 of the Act. But when an application has been made in the court in which the original suit was filed and the execution is being proceeded with, then certainly an application under Section 28 is maintainable in the same Court."
>
> (Emphasis supplied)

17. Following the view taken in **Ramankutty Guptan** ***(Supra),*** in **V.S. Palanichamy Chettiar Firm Vs. C. Alagappan and Anr.**[7] this Court held:

> "16. In view of the decision of this Court in *Ramankutty Guptan* case when the trial court and the executing court are the same, the executing court can entertain the application for extension of time though the application is to be treated as one filed in the same suit. On the same analogy, the vendor judgment-debtor can also seek rescission of the contract of sale or take up this plea in defence to bar the execution of the decree. ……."
>
> (Emphasis supplied)

18. Having regard to the aforesaid decisions, in our view, the expression *"may apply in the same suit in which the decree is made"* as used in Section 28 of the 1963 Act must be accorded an expansive meaning so as to include the court of first instance even though the decree under execution is passed by the appellate court. This is so, because the decree is in the same suit and, according to Section 37 of the CPC, the expression "the court which passed a decree", or words to that effect, in relation to the execution of decrees, unless there is anything repugnant in the subject or context, would include:

(a) the court of first instance even though the decree to be executed has been passed in the exercise of appellate jurisdiction; and

(b) where the court of first instance has ceased to exist, or to have jurisdiction to execute it, the Court which, if the suit wherein

7 [1999] 1 SCR 349 : (1999) 4 SCC 702

> the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit.

Thus, an application under Section 28 of the 1963 Act, either for recission of contract or for extension of time, can be entertained and decided by the Execution Court provided it is the Court which passed the decree in terms of Section 37 of the CPC.

19. In the instant case, the Court of first instance (i.e., where the civil suit was instituted) was the Court of Additional Civil Judge (Senior Division), Kaithal, as would appear from the decree-sheet placed on record as Annexure P-1. The execution application was also filed before the Court of Additional Civil Judge (Senior Division), Kaithal, as would appear from Annexure P-2. Paragraph No.1 of the impugned order indicates that the order dated 03.11.2016 by which the application under Section 28 was disposed of was passed by the Court of Civil Judge (Senior Division), Kaithal. Thus, by virtue of Section 37 of the CPC, the Execution Court being the Court of first instance with reference to the suit in which the decree was passed had jurisdiction to deal with the application under Section 28 of the 1963 Act. We, therefore, reject the objection as regards jurisdiction of the Execution Court to deal with the application for extension of time / rescission of the contract under Section 28 (1) of the 1963 Act. Issue (i) is decided in the aforesaid terms.

B. Execution Court ought to have decided the Application under Section 28 of the 1963 Act as an application in the Suit

20. The next question which falls for our consideration is whether the application under Section 28 of the 1963 Act ought to have been dealt with as an application on the original side (i.e., as an application in the suit) or on the execution side (i.e., as an application in the execution proceedings). This issue is no longer *res integra* as it has been answered by this Court in **Ramankutty Guptan** ***(Supra)*** in the following terms:

> "9. The question then emerges is whether it should be on the original side or execution side. Section indicates that it should be "in the same suit". It would obviously mean in the suit itself and not in the execution proceedings. It is equally settled law that after passing the decree for specific performance, the Court does not cease to have

> any jurisdiction. The Court retains control over the decree even after the decree has been passed. It was open to the Court to exercise the power under Section 28(1) of the Act either for extension of time or for rescinding the contract as claimed for. Since the execution application has been filed in the same court in which the original suit was filed, namely, the court of first instance, instead of treating the application on the execution side, it should have as well been numbered as an interlocutory application on the original side and disposed of according to law. In this view, we feel that the judgment of the Bombay High Court laid down the law correctly and that of the Andhra Pradesh High Court is not correct. The High Court, therefore, is not right in dismissing the application treating it to be on execution side, instead of transferring it on the original side for dealing with it according to law."
>
> (Emphasis supplied)

21. The above view was followed in **Sanjay Shivshankar Chitkote Vs. Bhanudas Dadarao Bokade (Died) through L.Rs.**[8] wherein, upon finding that the applications under Section 28 were dealt with on the execution side, this Court set aside the order of the execution court and directed that the applications shall be transferred to the file of the civil suit so that they could be numbered as an application in the suit.

22. The law is, therefore, settled that an application seeking rescission of contract, or extension of time, under Section 28 (1) of the 1963 Act, must be decided as an application in the original suit wherein the decree was passed even though the suit has been disposed of. As a sequitur, even if the Execution Court is the Court of first instance with reference to the suit wherein the decree under execution was passed, it must transfer the application filed under Section 28 to the file of the suit before dealing with it. Issue (ii) is partly decided in the aforesaid terms.

C. Not a Fit Case for Interference Under Article 136 of the Constitution

23. Now, the question which survives for our consideration is whether, in the facts of the case, the order impugned is liable to be interfered

8 Civil Appeal No.8022 of 2023 @ SLP (C) No.24720 of 2023 decided on 08.12.2023

with only because the Court which passed the order dealt with the application on the execution side and not on the original side (i.e., as an application in the suit).

24. Before we examine facts relevant to the issue, we must reiterate that the jurisdiction of this Court under Article 136 of the Constitution is a discretionary jurisdiction to advance the cause of justice. The Court does not exercise its jurisdiction under Article 136 only because it is lawful to do so.[9] For the purpose of doing complete justice to the parties, the Court may not interfere with the order even if it suffers from some legal error. Not only that, the Court may deny relief to a party having regard to its conduct and may, in a given situation, mould the relief to do complete justice to the parties.[10]

25. In **Chanda v. Rattni**,[11] this Court held that the power to rescind the contract under Section 28 of the 1963 Act is discretionary in nature and is to do complete justice to the parties. The Court does not cease to have the power to extend the time even though the decree may have directed that payment of balance price is to be made by a certain date. While exercising discretion in this regard, the Court is required to take into account facts of the case so as to ascertain whether the default was intentional or not. If there is a bona fide reason for the delay/ default, such as where there appears no fault on the part of the decree holder, the Court may refuse to rescind the contract and may extend the time for deposit of the defaulted amount.

26. We shall now consider whether the impugned order does substantial justice to the parties. For this end, it would be apposite to have a close look at the facts of the case as it would help us in determining whether discretion to extend the time for depositing the balance consideration was justifiably exercised in favour of the decree holder.

27. In the instant case, the agreement, of which specific performance was sought, is of the year 2005. The suit for specific performance was filed in the year 2006. The trial court partly decreed the suit, *inter alia*, for refund of the earnest money in the year 2011. The plaintiff(s) (respondents herein) being aggrieved by rejection of their prayer for specific performance of the agreement, filed an appeal

---

9 See C.K. Prahalada v. State of Karnataka (2008) 15 SCC 577

10 See Lajpat Rai Mehta v. Govt. of Punjab (Deptt. of Irrigation & Power) (2009) 3 SCC 260

11 [2007] 4 SCR 402 : (2007) 14 SCC 26

before the appellate court. The appellate court allowed the appeal on 12.1.2012 and directed the defendants (appellants herein) to execute the sale deed on payment of balance consideration within two months from the date of the appellate court order, failing which the plaintiff(s) were entitled to get the sale deed executed through Court. Notably, the mode of payment of the balance consideration was not specified in the decree and there was no direction upon the plaintiff(s) to deposit the balance consideration in Court. Further, the decree did not spell out consequences of non-payment within the stipulated period. Rather, right was given to the decree holder to get the sale deed executed through Court if it was not executed upon payment within two months. As the mode of payment was not specified in the decree, what course the decree holder could have adopted in case the judgment-debtor refused to abide by the decree becomes a relevant consideration for the purposes of exercise of discretion in one way or the other.

28. In the instant case, admittedly, the decree attained finality upon dismissal of second appeal on 7.11.2013, and, finally, SLP on 7.11.2016. In between, pursuant to the order of the Execution Court dated 3.11.2016, as claimed by the respondents in their written submission, the balance sale consideration was deposited on 13.11.2016. Before that, the decree-holder(s) had promptly filed for execution of the decree immediately after expiry of 60 days from the date of the appellate court decree. Not only that, as no specific mode for payment/ deposit of the balance consideration was provided for in the decree, the decree holder(s) sought a direction from the Court to permit them to deposit the amount in Court so as to get the decree executed through its intervention. This application, however, remained pending as challenge to the decree was being considered by higher courts. In the meantime, as soon as the Second Appeal was dismissed, the decree-holder(s) applied for fresh permission to deposit the balance consideration. Ultimately, when permission was granted by the Execution Court, the deposit was made, as noted above. In these circumstances, the decree holder(s) had all throughout displayed their intention to pay the balance consideration and there appears no intentional or deliberate fault on their part so as to deprive them of the fruits of the decree.

29. The contention of the learned counsel for the appellant(s) that there was no proper prayer for condonation of delay in making the deposit

of the balance consideration, or that there was no proper application for extension of time to make deposit, is unworthy of acceptance. Because, in the execution application itself, which was promptly filed after expiry of 60 days from the date of the appellate court decree, the decree holder had sought permission to make deposit. Not only that, the application filed after dismissal of second appeal also sought permission to make deposit. The prayer to extend the time to make deposit was therefore implicit in the prayer to permit the decree holder to make deposit of the balance consideration. In this view of the matter, we reject the submission of the appellants that as there was no proper application for extension of time to make deposit, the Court held no jurisdiction to extend the same.

30. In light of the discussion above and on an overall assessment of the facts, we are of the considered view that the respondents had all throughout shown their intention to pay the balance consideration for execution of the sale deed whereas the appellants appeared interested only in challenging the decree before higher Courts. In these circumstances, taking note of all the events, the Execution Court justifiably exercised its discretion in favour of the decree-holder(s) by allowing them to deposit the balance consideration. In our view, therefore, substantial justice has been done to the parties and if we interfere with the impugned order only on the technical ground that the application was not dealt with as one on the original side, grave injustice would be caused to the decree holder(s). More so, when the judgment-debtor(s) themselves applied to the Execution Court for rescinding the contract under Section 28(1) of the 1963 Act, and raised no such jurisdictional issue either before the Execution Court or the High Court. Therefore, in our view, no interference with the impugned order is called for in exercise of our discretionary jurisdiction under Article 136 of the Constitution.

31. For the reasons above, the appeal is dismissed. Interim order, if any, stands discharged. Parties to bear their own costs.

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

Result of the Case: Appeal dismissed.

†*Headnotes prepared by:* Nidhi Jain

[2024] 9 S.C.R. 16 : 2024 INSC 652

Vaibhav Jain
v.
Hindustan Motors Pvt. Ltd.

Civil Appeal No. 10192/2024

03 September 2024

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

Issue for Consideration

Whether as a mere dealer of M/s Hindustan Motors, the appellant could be considered owner of the vehicle and as such liable, jointly and severally with M/s Hindustan Motors, to pay the compensation as directed by the Tribunal/High Court; whether clauses 3 (b) and 4 of the Dealership Agreement absolved M/s Hindustan Motors of its liability to pay compensation as an owner; whether M/s Hindustan Motors, even without preferring an appeal against the award of the Tribunal, could question its liability under the award by relying on the provisions of Order 41, Rule 33 of the CPC.

Headnotes†

Motor Vehicles Act, 1988 – Compensation – Liability of the dealer, if any – "ownership/owner" of the vehicle – Dealership Agreement between M/s Vaibhav Motors-appellant, the dealer and M/s Hindustan Motors, manufacturer of the vehicle – Accidental death when the vehicle was taken out for a test-drive by the employees of M/s Hindustan Motors from the dealership of the appellant – Prior to the accident, if M/s Hindustan Motors had sold the offending vehicle to the appellant – If not, whether the dealer would be liable for the compensation, jointly and severally with M/s Hindustan Motors:

Held: 'owner' of a vehicle is not limited to the categories specified in s. 2(30) of the 1988 Act – If the context so requires, even a person at whose command or control the vehicle is, could be treated as its owner for the purposes of fixing tortious liability for payment of compensation – There is no evidence that the vehicle was sold to the appellant-dealer – At the time of accident only two persons were present in the vehicle (the driver and the deceased) both of whom were employees of M/s Hindustan Motors and had taken the vehicle from the appellant-dealer for the test drive –

* Author

Dealer had no authority to deny them the permission to take the vehicle for the test drive more so, when they were representatives of the owner of the vehicle, i.e. M/s Hindustan Motors – At the time of accident the vehicle was not only under the ownership of M/s Hindustan Motors but also under its control and command through its employees – Therefore, the appellant, being just a dealer of M/s Hindustan Motors was not liable for compensation as an owner of the vehicle – At the time of accident, the vehicle was being driven by an employee of M/s Hindustan Motors, thus, apart from the driver, M/s Hindustan Motors alone was liable for the compensation awarded. [Paras 19, 20, 23]

Motor Vehicles Act, 1988 – Compensation – Dealership Agreement between M/s Vaibhav Motors-appellant, the dealer and M/s Hindustan Motors, manufacturer of the vehicle – M/s Hindustan Motors was held jointly and severally liable to pay compensation – It contended that Clauses 3 (b) and 4 the Agreement shifted the tortious liability to the appellant-dealer and it was not liable for payment of compensation:

Held: Rejected – Clauses 3(b) and 4 in the Agreement limited the company's liability in respect of any defect in the motor vehicle to the company's obligations under the warranty clause – The use of the words "and the company will have no other liability and all liabilities other than one under warranty as aforesaid shall be to the account of the Dealer", in absence of specific exclusion of tortious liability arising from use of such vehicle, cannot absolve the owner of the motor vehicle of its liability under the Motor Vehicles Act and shift it on to the dealer when the vehicle at the time of accident was under the control and command of the owner i.e. M/s Hindustan Motors through its own employees. [Para 27]

Code of Civil Procedure, 1908 – Order 41, Rule 33 – Tribunal held M/s Hindustan Motors jointly and severally liable to pay the compensation – However, no appeal was filed by M/s Hindustan Motors against the award of the Tribunal – It relied upon Order 41, Rule 33 to challenge that portion of the award which made it jointly and severally liable:

Held: For exercise of the power under Rule 33 of Order 41 the overriding consideration is achieving the ends of justice – One of the limitations on exercise of the power is that part of the decree which essentially ought to have been appealed against, or objected to, by a party and which that party has permitted to

achieve a finality cannot be reversed to the advantage of such party – In the instant case, the Tribunal returned a finding on that M/s Hindustan Motors had provided no evidence to show that the vehicle manufactured and owned by it was sold by it to the dealer – Admittedly, its own employees/officers were in control of the vehicle at the time of accident and, therefore, M/s Hindustan Motors was held jointly and severally liable for the compensation awarded – This part of the award operated against it and was backed by a finding of ownership – M/s Hindustan Motors allowed it to attain finality by not challenging the same through an appeal or cross-objection – Therefore, it cannot be allowed to question the same now. [Para 32]

Case Law Cited

M/s Tata Motors Limited v. Antonio Paulo Vaz and Anr. [2021] 1 SCR 625 **: (2021) 18 SCC 545;** *Bihar Supply Syndicate v. Asiatic Navigation & Ors.* [1993] 2 SCR 425 **: (1993) 2 SCC 639;** *Sri Chandre Prabhuji Jain Temple & Ors. v. Harikrishna & Anr.* [1974] 1 SCR 442 **: (1973) 2 SCC 665 – referred to.**

Rajasthan State Road Transport Corporation v. Kailash Nath Kothari & Ors. [1997] Suppl. 3 SCR 724 **: (1997) 7 SCC 481;** *Godavari Finance Company v. Degala Satyanarayanamma & Ors.* [2008] 6 SCR 231 **: (2008) 5 SCC 107;** *National Insurance Co. Ltd. v. Deepa Devi & Ors.* [2007] 13 SCR 134 **: (2008) 1 SCC 414;** *Guru Govekar v. Filomena F. Lobo* [1988] Suppl. 1 SCR 170 **: (1988) 3 SCC 1;** *Ramesh Mehta v. Sanwal Chand Singhvi & Ors.* [2004] Suppl. 1 SCR 418 *:* **(2004) 5 SCC 409;** *Banarasi & Ors. v. Ram Phal* [2003] 2 SCR 22 **: (2003) 9 SCC 606 – relied on.**

List of Acts

Motor Vehicles Act, 1988; Code of Civil Procedure, 1908.

List of Keywords

Accidental death; Offending vehicle; Compensation; Liability to pay compensation; Liability of the dealer; Jointly and severally liable to pay compensation; "owner" of the vehicle; At the time of accident; Dealership Agreement; Dealer; Dealership; Manufacturer of the vehicle; Test-drive; Death during test-drive; In control or command of the vehicle; In constructive possession of the vehicle; Employees of owner of the vehicle; Tortious liability; Finding achieved finality; Appeal; Cross-objection.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 10192 of 2024

From the Judgment and Order dated 15.11.2017 of the High Court of Chhattisgarh at Bilaspur in MA No. 1306 of 2007

Appearances for Parties

Arup Banerjee, Amit Poddar, Priyanshu Raj, R. K. Dey, Rajiv Agnihotri, Sanjeev Sharma, Advs. for the Appellant.

Ms. Purti Gupta, Ms. Henna George, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Judgment

Manoj Misra, J.

1. Leave granted.

2. This appeal impugns the judgment and order of the High Court of Chhattisgarh at Bilaspur[1] dated 15.11.2017, whereby Miscellaneous Appeal (Civil) No. 1306 of 2007 filed by the appellant was dismissed and Miscellaneous Appeal (Civil) No. 1147/2017 filed by the claimant(s) was allowed thereby enhancing the compensation already awarded to them.

3. At the outset, we would like to put on record that the Special Leave Petition (SLP) against the impugned order was filed by impleading six respondents. Respondents 1 to 4 (R-1 to R-4) were heirs and legal representatives of the deceased Pranay Kumar Goswami on whose accidental death the claim arose. Respondent no. 5 (R-5), namely, Shubhashish Pal, was the person who drove the vehicle at the time of accident; and Respondent no.6 (R-6), namely, M/s Hindustan Motors, was the manufacturer of the vehicle. However, on 23.10.2018, this Court issued notice only to the manufacturer (R-6) (i.e., M/s Hindustan Motors) and the SLP was dismissed *qua* R-1 to R-5 by observing that the question raised in the matter is about the liability of the dealer (i.e., the appellant). Therefore, in our view, the impugned award has attained finality insofar as the rights of the

1 High Court

claimant-respondents are concerned. In consequence, it appears, the Registry has shown M/s Hindustan Motors as the sole respondent though, initially, there were six respondents. Be that as it may to have a clear understanding of the matter, we shall describe the parties as they were described in the SLP at the time of its presentation.

FACTUAL MATRIX

4. A claim petition for death compensation was filed before the Tribunal by claimant-respondents (R-1 to R-4) (i.e., legal heirs of the deceased who died in the accident), under Section 166 of the Motor Vehicles Act, 1988,[2] against driver of the offending vehicle (R-5); M/s. Hindustan Motors Private Limited (R-6) (i.e., manufacturer of the vehicle); and Vaibhav Jain (i.e., Proprietor of M/s Vaibhav Motors - the dealer of R-6) (the appellant herein). The deceased was R-6's Territory Manager whereas the driver of the vehicle was R-6's Service Engineer. Thus, the driver and the deceased were employees of R-6 (i.e., M/s Hindustan Motors). The accident took place when the vehicle was taken out for a test drive from the dealership of the appellant.

5. On the pleadings of the parties, five issues were framed by the Tribunal. Out of those five, the issue relevant for the purposes of this appeal is:

> Whether prior to the accident M/s. Hindustan Motors had sold the offending vehicle to M/s. Vaibhav Motors (i.e., the dealer)? If not, whether the dealer can be held liable for the compensation, jointly and severally, with M/s. Hindustan Motors?

6. As regards issue of ownership of the vehicle, the Tribunal held that on the day of accident, M/s. Hindustan Motors was the owner of the vehicle though Vaibhav Motors was in possession of the vehicle as its dealer. Based on that, the Tribunal held M/s. Hindustan Motors as well as M/s. Vaibhav Motors (the appellant) jointly and severally liable for the compensation awarded.

7. Aggrieved by quantum of the compensation awarded, the claimants (R-1 to R-4) preferred Miscellaneous Appeal (Civil) No. 1147/2017 before the High Court; whereas *vide* Miscellaneous Appeal (Civil)

2 M.V. Act

No. 1306/2007, the dealer (i.e., the appellant herein) questioned the award to the extent it made him jointly and severally liable for payment of the compensation.

8. Both the aforesaid appeals were heard simultaneously and disposed of by the impugned order. The claimants' appeal was allowed, and the compensation was enhanced. However, the appellant's appeal was dismissed.

9. We have heard Shri Arup Banerjee for the appellant and Ms. Purti Gupta for M/s Hindustan Motors; and have also perused the materials on record.

Submissions on behalf of the appellant

10. The learned counsel for the appellant submitted:

(i) On the date of accident, the owner of the offending vehicle was its manufacturer M/s. Hindustan Motors (R-6) in whose name the vehicle was temporarily registered and there was no evidence that the vehicle was transferred to the appellant.

(ii) The driver of the vehicle and the deceased were both employees of M/s Hindustan Motors and they took the vehicle from the dealership for a test drive, therefore, the vehicle, at the time of accident, was in the control and possession of M/s Hindustan Motors through its employees.

(iii) The liability for compensation is of the owner of the vehicle including the driver. Section 2(30) of the M.V. Act defines the "owner" as a person in whose name a motor vehicle stands registered, and where such person is a minor, the guardian of such minor, and in relation to a motor vehicle which is the subject of a hire-purchase agreement, or an agreement of lease or an agreement of hypothecation, the person in possession of the vehicle under that agreement.

(iv) The Dealership Agreement between the appellant and M/s. Hindustan Motors is neither an agreement of hire-purchase nor of lease or hypothecation, therefore, even if the dealer is taken to be in constructive possession of the vehicle, the dealer would not be its owner within the meaning of Section 2(30) of the M.V. Act.

(v) Clauses 3 (b) and 4 of the Dealership Agreement, relied to fasten liability on the appellant, are in respect of defects in the vehicle and not in respect of any claim for compensation arising from an accident involving the vehicle. The concept of possessory owner as obtaining under section 2(19)[3] of the Motor Vehicles Act, 1939 is no longer available under the M.V. Act, 1988 since the definition of owner has undergone a sea change.

(vi) The judgment of this Court in "**Rajasthan State Road Transport Corporation vs. Kailash Nath Kothari & Ors.**"[4] was based on the definition of owner as obtaining under the old Act hence it would not be of any help to decide ownership of a vehicle under the new M.V. Act, 1988.

(vii) Once it is established that appellant is neither owner nor driver of the vehicle, it cannot be made liable for the compensation.

Submissions on behalf of M/s Hindustan Motors (R-6)

11. Per contra, learned counsel for M/s Hindustan Motors submitted:

(i) M/s. Hindustan Motors had sold the vehicle to the appellant *vide* challan *cum* invoice No. 20302564 for an amount of Rs. 7,73,475/. Pursuant thereto, the car bearing temporary registration No. CG04RPRTC-0478 was delivered to the appellant on principal-to-principal basis. As the sale stood complete in all respects, the appellant was owner of the vehicle on the date of accident. (To buttress the above submission, reliance was placed on a decision of this Court in "**M/s. Tata Motors Limited vs. Antonio Paulo Vaz and Anr.**"[5])

(ii) Assuming that the deceased as well the driver was an employee of M/s Hindustan Motors, once the vehicle was sold and delivered to the dealer, the driver and the dealer alone would be liable for compensation. More so, because clause 3(b) of the Dealership Agreement absolved M/s Hindustan Motors of its liability by providing as follows:

3 "owner" means, where the person, in possession of a motor vehicle is a minor, the guardian of such minor, and in relation to a motor vehicle which is the subject of a hire purchase agreement, the person in possession of the vehicle under that agreement.

4 [1997] Suppl. 3 SCR 724 : (1997) 7 SCC 481

5 [2021] 1 SCR 625 : (2021) 18 SCC 545

> "3(b) After the motor vehicles are dispatched /delivered the Company's liability in respect of any defect in the motor vehicle will be limited to the Company's obligations under the warranty clause and the Company will have no other liability and all liability other than the one under warranty as aforesaid shall be to the account of the Dealer."
>
> (Emphasis supplied)

(iii) The dealer being the possessory owner was rightly held liable in the light of the decision of this Court in **Rajasthan State Road Transport Corporation** (*supra*).

(iv) Even if M/s. Hindustan Motors did not file an appeal against the impugned award, this Court can absolve M/s. Hindustan Motors of its liability by modifying the award in exercise of its power under Order 41 Rule 33 of the Civil Procedure Code, 1908 (for short CPC) as expounded by this Court in "**Bihar Supply Syndicate vs. Asiatic Navigation & Ors.**"[6] and "**Sri Chandre Prabhuji Jain Temple & Ors. vs. Harikrishna & Anr.**[7]

ISSUES

12. Having noticed the rival submissions, in our view, following issues fall for our consideration: -

(i) Whether, as a mere dealer of M/s Hindustan Motors, the appellant could be considered owner of the vehicle and as such liable, jointly and severally with M/s Hindustan Motors, to pay the compensation as directed by the Tribunal/ High Court?

(ii) Whether clauses 3(b) and 4 of the Dealership Agreement absolved M/s Hindustan Motors of its liability to pay compensation as an owner?

(iii) Whether M/s Hindustan Motors, even without preferring an appeal against the award of the Tribunal, could question its liability under the award by relying on the provisions of Order 41 Rule 33 of the CPC?

---

6 [1993] 2 SCR 425 : (1993) 2 SCC 639

7 [1974] 1 SCR 442 : (1973) 2 SCC 665

Issue No.(i)

13. Before we delve into the afore-stated issues, we must have a look at the concept of 'ownership' of a vehicle as obtaining under the M.V. Act for fixing liability in respect of compensation. Section 166[8] of the M.V. Act enumerates the persons who may file an application for compensation before the Claims Tribunal whereas Section 168(1)[9] of the M.V. Act speaks about the award of the Tribunal. Interestingly, Section 166, though specifies the persons who may file an application for compensation, omits to specify person(s) against whom the application is to be filed. However, sub-section (1) of Section 168 by providing that the Claims Tribunal shall specify the amount which shall be paid by the insurer or owner or driver of the vehicle involved in the accident, gives sufficient indication on whom the liability for compensation would fall.

---

8 **Section 166. Application for compensation. –** (1) An application for compensation arising out of an accident of the nature specified in sub-section (1) of section 165 may be made –

(a) by the person who has sustained the injury; or
(b) by the owner of the property; or
(c) where death has resulted from the accident, by all or any of the legal representatives of the deceased; or
(d) by any agent duly authorized by the person injured or all or any of the legal representatives of the deceased, as the case may be,

Provided that where all the legal representatives of the deceased have not joined in any such application for compensation, the application shall be made on behalf of or for the benefit of all the legal representatives of the deceased and the legal representatives who have not so joined, shall be impleaded as respondents to the application.

Provided further that where a person accepts compensation under section 164 in accordance with the procedure provided under section 149, his claims petition before the claims tribunal shall lapse.

(2) Every application under sub-section (1) shall be made, at the option of the claimant, either to the claims tribunal having jurisdiction over the area in which the accident occurred, or to the claims tribunal within the local limits of whose jurisdiction the claimant resides or carries on business or within the local limits of whose jurisdiction the defendant resides, and shall be in such form and contains such particulars as may be prescribed.

(3) No application for compensation shall be entertained unless it is made within six months of the occurrence of the accident.

(4) The claims tribunal shall treat any report of accident forwarded to it under section 159 as an application for compensation under this Act.

(5) Notwithstanding anything in this Act or any other law for the time being in force, the right of a person to claim compensation for injury in an accident shall, upon the death of the person injured, survive to his legal representatives, irrespective of whether the cause of death is relatable to or had any nexus with the injury or not.

9 **Section 168.- Award of the Claims Tribunal. –** (1) On receipt of an application for compensation made under section 166, the claims tribunal shall, after giving notice of the application to the insurer and after giving the parties including the insurer an opportunity of being heard, hold and inquiry into the claim or, as the case may be, each of the claims and, subject to the provisions of section 162 may make an award determining the amount of compensation which appears to it be just and specifying the person or persons to whom compensation shall be paid and in making the award the claims tribunal shall specify the amount which shall be paid by the insurer or owner or driver of the vehicle involved in the accident or by all or any of them, as the case may be:..

14. In **Godavari Finance Company v. Degala Satyanarayanamma & Ors.**[10] a question arose whether a financier would be an owner of a motor vehicle within the meaning of Section 2(30)[11] of the M. V. Act, 1988. In that case, the accident took place on 29.5.1995 and, admittedly, the vehicle was not in control of the financier though its name was entered in the registration book of the vehicle. The extract of the registration book, however, revealed that the vehicle was registered in the name of fourth respondent therein (i.e., not the financier) and that the hire-purchase agreement with the financier had also been cancelled on 10.11.1995. In that context, while holding that financier was not liable, interpreting the definition of 'owner', as provided in Section 2(30), this Court observed:

> "12. Section 2 of the Act provides for interpretation of various terms enumerated therein. It starts with the phrase unless the context otherwise requires. The definition of owner is a comprehensive one. The interpretation clause itself states that the vehicle which is the subject matter of a hire purchase agreement, the person in possession of vehicle under that agreement shall be the owner. Thus, the name of financier in the registration certificate would not be decisive for determination as to who was the owner of the vehicle. We are not unmindful of the fact that ordinarily the person in whose name the registration certificate stands should be presumed to be the owner, but such a presumption can be drawn only in the absence of any other material brought on record or unless the context otherwise requires.
>
> 13. In case of a motor vehicle which is subjected to a hire purchase agreement, the financier cannot ordinarily be treated to be the owner. The person who is in possession of the vehicle, and not the financier being the owner would be liable to pay damages for the motor accident.

10 [2008] 6 SCR 231 : (2008) 5 SCC 107

11 **Section 2. –** In this Act, unless the context otherwise requires, --
(30) "owner" means the person in whose name a motor vehicle stands registered, and while such person is a minor, the guardian of such minor, and in relation to a motor vehicle which is the subject of a hire purchase agreement, or an agreement of lease or an agreement of hypothecation, the person in possession of the vehicle under that agreement.

> 15. An application for payment of compensation is filed before the Tribunal constituted under Section 165 of the Act for adjudicating upon the claim for compensation in respect of accident involving the death of, or bodily injury to, persons arising out of the use of motor vehicles, or damages to any property of a third party so arising, or both. Use of the motor vehicle is a sine qua non for entertaining a claim for compensation. Ordinarily if driver of the vehicle would use the same, he remains in possession or control thereof. Owner of the vehicle, although may not have anything to do with the use of vehicle at the time of the accident, actually he may be held to be constructively liable as the employer of the driver. What is, therefore, essential for passing an award is to find out the liabilities of the persons who are involved in the use of the vehicle or the persons who are vicariously liable. The insurance company becomes a necessary party to such claims as in the event the owner of the vehicle is found to be liable, it would have to reimburse the owner in as much as a vehicle is compulsorily insurable so far as the third party is concerned, as contemplated under section 147 thereof. Therefore, there cannot be any doubt whatsoever that the possession or control of a vehicle plays a vital role."
>
> (Emphasis supplied)

15. In **Rajasthan State Road Transport Corporation (in short RSRTC) (supra)**, the vehicle along with services of the driver were hired by RSRTC from its registered owner. The issue which arose for consideration by this Court was whether RSRTC, which had hired the vehicle along with services of the driver from the registered owner of the vehicle, could be held vicariously liable for the accident caused by use of that vehicle. Answering the question in the affirmative, this Court, on the principle of vicarious liability of RSRTC for the tort committed by a person under its control and command, held:

> "17. ….. The general proposition of law and the presumption arising therefrom that an employer, that is the person who has the right to hire and fire the employee, is generally responsible vicariously for the tort committed by the employee concerned during the course of his employment

> and within the scope of his authority, is a rebuttable presumption. If the original employer is able to establish that when the servant was lent, the effective control over him was also transferred to the hirer, the original owner can avoid his liability and the temporary employer or the hirer, as the case may be, must be held vicariously liable for the tort committed by the employee concerned in the course of his employment while under the command and control of the hirer notwithstanding the fact that the driver would continue to be on the payroll of the original owner……..."

16. In that backdrop, this Court while construing the definition of "owner", as provided in Section 2(19) of the old Motor Vehicles Act, 1939,[12] held that (a) the definition of "owner" under section 2 (19) of the Act is not exhaustive; (b) it has to be construed in a wider sense based on the facts and circumstances of a given case; and (c) it must include, in a given case, the person who has the actual possession and control of the vehicle and under whose direction and command the driver is obliged to operate the same. It was also observed that to confine the meaning of owner to the registered owner only would not be proper where the vehicle is in the actual possession and control of the hirer at the time of the accident.

17. In **National Insurance Co. Ltd. v. Deepa Devi & Ors.**[13] the question was as to who would be liable to pay compensation if the offending vehicle at the time of accident is under requisition for election. From the claimant's side, by relying on the decision of this Court in **Guru Govekar v. Filomena F. Lobo**,[14] it was argued that regardless of the vehicle being in possession of some other person, the owner would be liable. Negativing this argument, this Court held that when a vehicle is requisitioned for State duty, the owner of the vehicle has no other alternative but to hand over the possession to the statutory authority and, therefore, the case would be distinguishable from the one where the owner gives the vehicle to someone else on his own free will. Holding so, it was observed:

12 See Footnote 3

13 [2007] 13 SCR 134 : (2008) 1 SCC 414

14 [1988] Suppl. 1 SCR 170 : (1988) 3 SCC 1

> "10. …. While the vehicle remains under requisition, the owner does not exercise any control there over. The driver may still be the employee of the owner of the vehicle but he has to drive it as per the direction of the officer of the State, who is put in charge thereof. Save and except for legal ownership, for all intent and purport, the registered owner of the vehicle loses entire control thereover. He has no say as to whether the vehicle should be driven at a given point of time or not. He cannot ask the driver not to drive a vehicle on a bad road. He or the driver could not possibly say that the vehicle would not be driven in the night. The purpose of requisition is to use the vehicle. For the period the vehicle remains under the control of the State and /or its officers, the owner is only entitled to payment of compensation therefor in terms of the Act, but he cannot exercise any control thereupon. In a situation of this nature, this court must proceed on the presumption that Parliament while enacting the 1988 Act did not envisage such a situation. If in a given situation, the statutory definitions contained in the 1988 Act cannot be given effect to in letter and spirit, the same should be understood from the common sense point of view."
>
> (Emphasis supplied)

18. While observing as above, this Court noticed that the clause defining "owner" is prefaced with the expression "unless the context otherwise requires" and, therefore, in the light of an earlier decision of this Court in **Ramesh Mehta v. Sanwal Chand Singhvi & Ors.**,[15] it was held that where the context makes the definition given in the interpretation clause inapplicable, the same meaning cannot be assigned.

19. What is clear from the decisions noticed above, is that 'owner' of a vehicle is not limited to the categories specified in Section 2(30) of the M.V. Act. If the context so requires, even a person at whose command or control the vehicle is, could be treated as its owner for the purposes of fixing tortious liability for payment of compensation.

15 [2004] Suppl. 1 SCR 418 : (2004) 5 SCC 409, paragraph 27

In this light, we shall now examine whether at the time of accident the vehicle in question was under the command and control of the appellant (i.e., the dealer).

20. According to the Tribunal, M/s. Hindustan Motors was admittedly the manufacturer of the vehicle and there was no evidence that the vehicle was sold to the dealer. The finding is that no sale letter was produced from its side to show that the car was sold to M/s. Vaibhav Motors. At the time of accident only two persons were present in the vehicle, and they were none other than employees of M/s. Hindustan Motors, namely, Pranav Kumar Goswami (the deceased) and Shubhashish Pal (the driver). Based on that, the Tribunal observed:

> "……*therefore, it is inferred that Hindustan Motors had given the Lancer car to Vaibhav Motors for the purpose of selling it. And the entire supervision was that of Pranav Kumar and Shubhashish Pal of Hindustan Motors. It is not proved that Hindustan Motors had sold the said Lancer car to Vaibhav Motors. Accordingly, the issue no.3 is held to be not proved*."

21. However, the Tribunal held all non-applicants, namely, Shubhashish Pal (i.e., driver of the vehicle); M/s. Hindustan Motors (owner of the vehicle); and M/s. Vaibhav Motors (the dealer), jointly and severally liable for the compensation.

22. Against the award, the appellant (i.e., the dealer) filed an appeal but no appeal was preferred by M/s. Hindustan Motors even though a categorical finding was returned by the Tribunal that no evidence of sale of the vehicle to the dealer was produced by M/s Hindustan Motors. In view thereof, it does not lie in the mouth of M/s. Hindustan Motors to canvass that it was not the owner of the vehicle. We have, therefore, to consider whether M/s. Vaibhav Motors (the appellant), being in constructive possession of the vehicle as a dealer, could be held liable, particularly when M/s. Hindustan Motors was its owner and, at the time of accident, the vehicle was being driven by an employee of M/s Hindustan Motors.

23. As per the finding of the Tribunal, which remained undisturbed, the aforesaid two employees of M/s. Hindustan Motors took the vehicle from M/s Vaibhav Motors (the appellant) for a test drive. None of the employees of the dealer was present in the vehicle. Rather, at

the time of accident, the driver and the co-passenger of that vehicle were employees of M/s. Hindustan Motors. There is nothing on record to suggest that the dealer had the authority to deny those two persons permission to take the vehicle for a test drive. More so, when they were representatives of the owner of the vehicle. In these circumstances, we can safely conclude that at the time of accident the vehicle was not only under the ownership of M/s. Hindustan Motors but also under its control and command through its employees. Therefore, in our view, the appellant, being just a dealer of M/s Hindustan Motors, was not liable for compensation as an owner of the vehicle.

24. The issue no.(i) is decided in the aforesaid terms.

Issue No. (ii)

25. Now, we shall consider whether by virtue of clauses 3 (b) and 4 of the Dealership Agreement, M/s Hindustan Motors was absolved of its tortious liability, that is, whether the tortious liability shifted to the dealer (i.e., the appellant).

26. Clauses 3 (b) and 4 of the Dealership Agreement have been extracted in paragraph 14 of the judgment of the High Court. They read as under:

> "3 (b) After the motor vehicles are dispatched/ delivered the Company's liability in respect of any defect in the motor vehicle will be limited to the Company's obligations under the warranty clause and the Company will have no other liability and all liabilities other than the one under warranty as aforesaid shall be to the account of the Dealer.
>
> 4. After the motor vehicles are delivered, the Company's liability in respect of any defect in the motor vehicle will be limited to the Company's obligation under the warranty clause and the Company will have no other liability. All liabilities other than the one under warranty as aforesaid shall be to the account of the Dealer."

27. A careful reading of the aforesaid clauses would indicate that they deal with company's (M/s. Hindustan Motors') liability in respect of any defect in the motor vehicle. They limit the company's liability in respect of any defect in the motor vehicle to the company's

obligations under the warranty clause. The use of the words "*and the company will have no other liability and all liabilities other than one under warranty as aforesaid shall be to the account of the Dealer*", in absence of specific exclusion of tortious liability arising from use of such vehicle, cannot absolve the owner of the motor vehicle of its liability under the Motor Vehicles Act and shift it on to the dealer when the vehicle at the time of accident was under the control and command of the owner (i.e., M/s Hindustan Motors) through its own employees as found above. We, therefore, reject the submission of the learned counsel for M/s. Hindustan Motors that it cannot be saddled with liability for payment of compensation in view of clauses 3 (b) and 4 of the Dealership Agreement.

28. Issue no.(ii) is decided in the aforesaid terms.

Issue No.(iii)

29. The issue as to whether M/s Hindustan Motors, without filing a separate appeal, or cross-objection, could take recourse to the provisions of Order 41 Rule 33 of the Code of Civil Procedure, 1908[16] to challenge that portion of the award which made it liable, jointly and severally, for the compensation awarded is rendered academic in view of our findings on issues (i) and (ii). However, we propose to address the said issue.

30. In **Banarasi & Ors. V. Ram Phal**[17] this Court dealt with the scope of Order 41 Rule 22[18] CPC (post 1976 amendment) and the power

16 **Order 41 Rule 33. CPC. – Power of Court of Appeal --** The appellate court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favor of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decrease are passed in one suit, be exercised in respect of all or any of the decrees, although any appeal may not have been filed against such decrees:
Provided that the Appellate Court shall not make any order under section 35A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order.
Illustration
A claims a sum of money as due to him from X or Y, and in a suit against both obtains a decree against X. X, appeals and A & Y are respondents. The appellate court decides in favor of X. It has power to pass a decree against Y.

17 [2003] 2 SCR 22 : (2003) 9 SCC 606

18 **Order 41 Rule 22 CPC. – Upon hearing respondent may object to decree as if he had preferred a separate appeal..—**
(1) Any respondent, though he may not have appealed from any part of the decree, may not only

of an appellate court under Order 41 Rule 33 CPC. While dealing with the scope of Rule 22 of Order 41, the Court observed:

> "10. …. There may be three situations:
>
> (i) The impugned decree is partly in favour of the appellant and partly in favour of the respondent.
>
> (ii) The decree is entirely in favour of the respondent though an issue has been decided against the respondent.
>
> (iii) The decree is entirely in favour of the respondent and all the issues have also been answered in favour of the respondent but there is a finding in the judgment which goes against the respondent.
>
> 11. In the type of case (i) it was necessary for the respondent to file an appeal or take cross-objection against that part of the decree which is against him if he seeks to get rid of the same though that part of the decree which is in his favor he is entitled to support without taking any cross-objection. The law remains so post amendment too. In the type of cases (ii) and (iii) pre-amendment CPC did not entitle nor permit the respondent to take any cross-objection as he was not the person aggrieved by the decree. Under the amended CPC, read in the light of the explanation, though it is still not necessary for the respondent to take any cross- objection laying challenge

---

support the decree but may also state that the finding against him in the court below in respect of any issue ought to have been in his favour; and may also take any cross-objection to the decree which he could have taken by way of appeal provided he has filed such objection in the appellate court within one month from the date of service on him or his pleader of notice of the day fix for hearing the appeal, or within such further time as the appellate court may deem fit to allow.
Explanation.-- A respondent aggrieved by a finding of the court in the judgment on which the decree appealed against is based may, under this rule, file cross objection in respect of the decree insofar as it is based on that finding, notwithstanding that by reason of the decision of the court on any other finding which is sufficient for the decision of the suit, the decree, is, wholly or in part, in favor of that respondent.

(2) **Form of objection and provisions applicable thereto. ---** Such cross objection shall be in the form of a memorandum, and the provisions of rule 1, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.

(3) Omitted (by Act 46 of 1999, w.e.f. 1.7.2002)

(4) Where, in any case in which any respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit.

(5) The provisions relating to appeals by indigent persons shall, so far as they can be made applicable, apply to an objection under this rule.

to any finding adverse to him as the decree is entirely in his favor and he may support the decree without his cross objection; the amendment made in the text of sub-rule (1), read with the explanation newly inserted, gives him a right to take cross-objection to a finding recorded against him either while answering an issue or while dealing with an issue. The advantage of preferring such cross-objection is spelled out by sub-rule (4). In spite of the original appeal having been withdrawn or dismissed for default the cross objection taken to any finding by the respondent shall still be available to be adjudicated upon on merits which remedy was not available to the respondent under the unamended CPC. In the pre- amendment era, the withdrawal or dismissal for default of the original appeal disabled the respondent to question the correctness or otherwise of any finding recorded against the respondent.

12. The fact remains that to the extent to which the decree is against the respondent and he wishes to get rid of it he should have either filed an appeal of his own or taken cross objection failing which the decree to that extent cannot be insisted on by the respondent for being interfered, set aside or modified to his advantage……"

In respect of the power of an appellate court under Order 41 Rule 33 CPC, the Court, after observing that the true scope of the power could be best understood when read along with Rule 4[19] of Order 41, held:

"15. Rule 4 seeks to achieve one of the several objects sought to be achieved by Rule 33, that is, avoiding a situation of conflicting decrees coming into existence in the same suit. The above said provisions confer power of the widest amplitude on the appellate court so as to do complete justice between the parties and such power is

19 **Order 41 Rule 4 CPC. – One of several plaintiffs or defendants may obtain reversal of whole decree where it proceeds on ground common to all. --** Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole degree, and thereupon the appellate court may reverse or vary the decree in favor of all the plaintiffs or defendants, as the case may be.

unfettered by consideration of facts like what is the subject matter of the appeal, who has filed the appeal and whether the appeal is being dismissed, allowed or disposed of by modifying the judgment appealed against. While dismissing an appeal and though confirming the impugned decree, the appellate court may still direct passing of such decree or making of such order which ought to have been passed or made by the court below in accordance with the findings of fact and law arrived at by the court below and which it would have done had it been conscious of the error committed by it and noticed by the appellate court. While allowing the appeal or otherwise interfering with the decree or order appealed against, the appellate court may pass or make such further or other, decree or order, as the case would require being done, consistent with the findings arrived at by the appellate court. The object sought to be achieved by conferment of such power on the appellate court is to avoid inconsistency, inequity, inequality in reliefs granted to similarly placed parties and unworkable decree or order coming into existence. The overriding consideration is achieving the ends of justice. Wider the power, higher the need for caution and care while exercising the power. Usually, the power under Rule 33 is exercised when the portion of the decree appealed against or the portion of the decree held liable to be set aside or interfered by the appellate court is so inseparably connected with the portion not appealed against or left untouched that for the reason of the latter portion being left untouched either injustice would result or inconsistent decrees would follow. The power is subject to at least three limitations: first, the power cannot be exercised to the prejudice or disadvantage of a person not a party before the court; secondly, a claim given up or lost cannot be revived; and thirdly, such part of the decree which essentially ought to have been appealed against or objected to by a party and which that party has permitted to achieve a finality cannot be reversed to the advantage of such party. A case where there are two relief prayed for and one is refused while the other one is granted and the former is not inseparably connected

> with or necessarily depending on the other, in an appeal against the latter, the former relief cannot be granted in favor of the respondent by the appellate court exercising power under Rule 33 of Order 41."
>
> (Emphasis supplied)

31. From the decision above, which has been consistently followed, it is clear that for exercise of the power under Rule 33 of Order 41 CPC the overriding consideration is achieving the ends of justice; and one of the limitations on exercise of the power is that that part of the decree which essentially ought to have been appealed against, or objected to, by a party and which that party has permitted to achieve a finality cannot be reversed to the advantage of such party.

32. In the instant case, the Tribunal had returned a finding on issue no.3 that M/s. Hindustan Motors had provided no evidence to show that the vehicle manufactured and owned by it was sold by it to the dealer. Admittedly, its own employees /officers were in control of the vehicle at the time of accident and, therefore, M/s. Hindustan Motors was held jointly and severally liable for the compensation awarded. This part of the award operated against it and was backed by a finding of ownership. By not challenging the same, through an appeal or cross-objection, M/s Hindustan Motors has allowed it to attain finality. Therefore, in our view, M/s Hindustan Motors cannot be allowed to question the same now. Issue no. (iii) is decided in the aforesaid terms.

CONCLUSION

33. In view of our conclusion that the appellant was neither the owner nor in control/ command of the vehicle at the time of accident, and the vehicle was being driven by an employee of M/s. Hindustan Motors, we are of the view that apart from the driver, M/s. Hindustan Motors alone was liable for the compensation awarded. Thus, the appellant should not have been burdened with liability to pay compensation.

RELIEF

34. However, as *vide* order dated 23.10.2018 the SLP was dismissed *qua* the claimant-respondents, we are unable to set aside the award to the extent it enables the claimant-respondents to recover the awarded compensation, jointly or severally, from the owner, dealer and driver

of the vehicle. But we make it clear that if the awarded amount, or any part thereof, has been paid, or is paid, by the appellant, the appellant shall be entitled to recover the same from M/s. Hindustan Motors along with interest at the rate of 6% p.a., with effect from the date of payment till the date of recovery.

35. The appeal is allowed to the extent above.

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

Result of the case: Appeal allowed.

†*Headnotes prepared by:* Divya Pandey

[2024] 9 S.C.R. 37 : 2024 INSC 655

Nitya Nand
v.
State of U.P. & Anr.

(Criminal Appeal No. 1348 of 2014)

04 September 2024

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

Issue for Consideration

Whether the prosecution could prove the charges against the appellant under Sections 148 and 302/149 IPC beyond reasonable doubt. Whether the appellant was a part of the unlawful assembly and if he actually took part in the crime or not.

Headnotes†

Penal Code, 1860 – ss.149, 148 – Appellant alongwith others was convicted for the murder of his Uncle – Whether the appellant was a part of the unlawful assembly – Plea of the appellant that both the courts below erred in convicting him as the allegation against him was that he was carrying a country- made pistol, however, neither were there any firearm injuries nor recovery of any country-made pistol or empty cartridge:

Held: Appellant was roped in by virtue of ss.148 and 149 – PW-1 and PW-2 (sons of the deceased) were eyewitnesses – Appellant was carrying a country-made pistol in his hand – Neither PW-1 nor PW-2 stated that the appellant had fired at them or at the deceased – The role attributed to the appellant was helping the other accused persons and himself flee from the crime scene by frightening the people including PW-1 and PW-2 when they were about to reach the crime scene, by firing from his country-made pistol into the air – Factum of causing injury or not causing injury would not be relevant when an accused is roped in with the aid of s.149 – Further, though, neither any country-made pistol nor any cartridge, empty or otherwise, was recovered however, as the appellant was roped in with the aid of s.149 IPC, no overt act is required to be imputed to a particular person when the charge is u/s.149; the presence of the accused as part of the

* Author

unlawful assembly is sufficient for conviction – Appellant was a part of the unlawful assembly which had the common object of eliminating the deceased by criminal force – Therefore, being a member of the unlawful assembly, he was also guilty of the murder committed in prosecution of the common object – Charges against the appellant u/ss.148 and 302/149 proved beyond reasonable doubt. [Paras 22, 24, 25, 30.1, 32]

Penal Code, 1860 – s.149 – Liability under – Discussed.

Case Law Cited

Krishnappa v. State of Karnataka [2012] 6 SCR 1068 **: (2012) 11 SCC 237;** *Vinubhai Ranchhodbhai Patel v. Rajivbhai Dudabhai Patel* [2018] 6 SCR 1050 **: (2018) 7 SCC 743;** *Yunis alias Kariya Vs. State of M.P.* **(2003) 1 SCC 425 – relied on.**

List of Acts

Penal Code, 1860.

List of Keywords

Unlawful assembly; Part of the unlawful assembly; Member of the unlawful assembly; Common object; In prosecution of the common object; Murder; Charges proved beyond reasonable doubt; Firearm injuries; Country-made pistol; Cartridge, Empty cartridge; Lacunae in the prosecution; Scribe not examined; Non-recovery of country-made pistol; Overt act; Property dispute; Old enmity.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 1348 of 2014

From the Judgment and Order dated 27.09.2012 of the High Court of Judicature at Allahabad in CRLA No. 340 of 1997

Appearances for Parties

P. K. Jain, Saurabh Jain, S.P. Singh Rathore, P.K. Goswami, Jagannath Jha, Arunansh Bharti Goswami, Advs. for the Appellant.

Goutham Shivhankar, Ms. Ruchira Goel, Adit Jayeshbhai Shah, Sharanya Sinha, Ms. Manju Jetley, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Ujjal Bhuyan, J.

This appeal is directed against the judgment and order dated 27.09.2012 passed by the Allahabad High Court upholding the conviction of the appellant alongwith others under Sections 148 and 302/149 of the Indian Penal Code, 1860 (IPC).

2. It may be mentioned that learned Sessions Judge, Etah *vide* the judgment and order dated 20.01.1997 passed in Sessions Trial No. 17 of 1993 convicted the appellant alongwith three others under Sections 148 and 302/149 IPC and sentenced each of them to undergo rigorous imprisonment (RI) for two years and to pay fine of Rs. 2,000.00 for the conviction under Section 148 IPC with a default stipulation and further sentenced to undergo imprisonment for life under Section 302/149 IPC. Another accused Shree Dev was convicted for the offences punishable under Sections 147 and 302/149 IPC. He was sentenced to undergo RI for two years and to pay fine of Rs. 2,000.00 with a default stipulation for the offence committed under Section 147 IPC and to suffer imprisonment for life under Section 302/149 IPC.

3. Being aggrieved by the aforesaid conviction and sentence, all the five accused persons including the appellant herein preferred criminal appeal under Section 374 of the Code of Criminal Procedure, 1973 (Cr.P.C.) before the Allahabad High Court (High Court) which was registered as Criminal Appeal No. 340 of 1997. By the judgment and order dated 27.09.2012, a division bench of the High Court affirmed the conviction and sentence of all the accused persons including that of the appellant and dismissed the criminal appeal.

4. The appellant then preferred petition for special leave to appeal before this Court being SLP(Criminal) No. 750/2013. This Court *vide* the order dated 04.02.2013 had issued notice on the special leave petition as well as on the application for bail. On 30.06.2014, this Court granted leave but rejected the prayer for bail. It was thereafter that Criminal Appeal No. 1348 of 2014 came to be registered.

5. We have heard learned counsel for the parties.

6. Prosecution case in brief is that informant Sarwan Kumar, son of late Satya Narain, had lodged a written report (First Information Report) i.e. FIR before Police Station Soron, District Etah on 08.09.1992 at 05:10 PM. He stated that on 08.09.1992 at about 04:30 PM, he and his father Satya Narain as well as his uncle Laxmi Narain as per their daily routine, came to Ganga ghat near Ambhagarh Akhada, after easing themselves, for taking bath. At around the same time, from the side of Dhimaro Ka Mohalla, Bhola Shankar and Kuldeep Kumar Tiwari came. He and his uncle proceeded ahead while talking with Bhola Shankar and Kuldeep Kumar Tiwari. This way they had reached the temple of Govardhan Nath Ji. In the meantime, from the southern side of Tulsi Park, Shree Dev and his four sons, viz., Munna Lal, Raju, Nitya Nand and Uchchav @ Pappu, resident of Mohalla Tiraha, Chodah Pore, P.S. Soron, armed with kanta, knives and country-made pistol confronted his father Satya Narain. All the accused persons caught hold of his father and started assaulting him with kanta and knives. On hearing the cries of his father, informant Sarwan Kumar and others dashed towards Satya Narain to save him. It was then that appellant Nitya Nand fired from his country-made pistol whereafter all the accused persons made good their escape from the south-western side. When the informant and others reached the spot, his father Satya Narain had already succumbed to the multiple injuries which he had suffered on his body.

   6.1. A written report of the incident scribed by Kuldeep Kumar Tiwari i.e., the FIR was submitted by Sarwan Kumar at 05:10 PM on the same day at P.S. Soron.

   6.2. It was mentioned that Shree Dev, deceased Satya Narain, and Laxmi Narain were the three brothers. Laxmi Narain, who was the youngest of the three, had no issue; so he had executed a will in favour of Satya Narain's sons. Shree Dev and his sons including the appellant Nitya Nand were enraged by this disposition of property by Laxmi Narain. This led to filing of several cases between them. Due to such litigation, there was an old enmity and for that reason, the accused persons had fatally assaulted Satya Narain on that fateful day.

7. On the basis of the FIR, Crime No. 237/1992 was registered at P.S. Soron under Sections 147, 148, 149 and 302 IPC. The investigating officer had carried out investigation of the case. The post-mortem

report indicated multiple *ante-mortem* injuries on the person of the deceased. On completion of the investigation, charges under Sections 148 and 302/149 IPC were framed against the accused Munna, Raju, Uchchav @ Pappu and Nitya Nand. Similarly, charges under Sections 147 and 302/149 IPC were framed against the accused Shree Dev.

8. The accused persons denied the charges and claimed to be tried.

9. To prove its case, the prosecution examined a total of five witnesses. After closure of the prosecution evidence, statements of the accused persons were recorded under Section 313 Cr.P.C.

10. The trial court on an appreciation of the evidence adduced and considering the materials on record, convicted the accused Shree Dev under Sections 147 and 302/149 IPC and also convicted the appellant and the other sons of Shree Dev i.e. Munna Lal, Raju and Uchchav @ Pappu under Sections 148 and 302/149 IPC. All the accused were thereafter sentenced as indicated above.

11. In appeal, the High Court observed that the eyewitness account of the incident stood fully corroborated by the medical evidence. Prosecution had proved its case beyond all reasonable doubt against each of the accused. Therefore, while upholding the conviction and sentence, the High Court dismissed the appeal.

12. Learned counsel for the appellant submits that both the trial court and the High Court committed a manifest error in convicting the appellant under Sections 148 and 302/149 IPC. He submits that allegation against the appellant was that he was carrying a country-made pistol. As the informant and others tried to rush towards Satya Narain on hearing his cries as he was being assaulted by the other accused persons, appellant Nitya Nand fired from his country-made pistol thereby threatening the informant and the others who tried to rescue Satya Narain. As the appellant fired from his country-made pistol, all the accused persons made good their escape from the crime scene. However, neither were there any firearm injuries on the person of the deceased nor on anyone else. That apart, there was no recovery of any country-made pistol or empty cartridge from the crime scene or from anywhere else. In the absence thereof, both the courts below were not justified in so convicting the appellant.

    12.1. Learned counsel for the appellant further submits that Laxmi Narain, who was with the deceased and who had walked ahead

along with the informant while talking with Bhola Shankar and Kuldeep Kumar Tiwari, was not examined by the prosecution as a witness. This is a crucial omission as because only due to gifting of the property by Laxmi Narain to the sons of the deceased Satya Narain which led to such bad blood between the brothers leading to the fatal incident. Learned counsel also emphasized that another crucial omission on the part of the prosecution is that Kuldeep Kumar Tiwari was not examined as a witness. Such glaring omission has cast uncertain shadows over the prosecution case. Omission to examine Kuldeep Kumar Tiwari as a prosecution witness has completely punctured the prosecution case because it was he who had written the FIR lodged by the informant besides being an eyewitness.

12.2. Learned counsel for the appellant finally submits that appellant has been convicted solely on the basis of suspicion. In a criminal trial, the conviction must be based on hard evidence and not on mere suspicion. Even if there is an iota of doubt as to the culpability of an accused, as in the present case, he has to be given the benefit of the doubt. That being the position, the impugned conviction and sentence of the appellant should be interfered with by this Court.

13. Learned counsel for respondent No. 1, State of U.P., has vehemently argued that conviction and sentence of the appellant is fully justified. There is no reason to interfere with the same.

13.1. He submits that there was a clear motive for the accused persons, including the appellant, to have caused the murder of Satya Narain. According to him, the accused Shree Dev, deceased Satya Narain, and Laxmi Narain were the three brothers, Laxmi Narain being the youngest of the three. Since Laxmi Narayan had no issue, he executed a will in favour of the sons of Satya Narain. Shree Dev and his sons, including the appellant, were unable to come to terms with this development. They were highly agitated which led to filing of several cases by and between them. This was the real intention behind the plot to kill Satya Narain.

13.2. Learned counsel for respondent No. 1 submits that the appellant was very much a part of the unlawful assembly as one of the persons at the place of occurrence which was mentioned in

the FIR itself. That apart, in their evidence, PW-1 and PW-2, categorically stated that appellant was carrying a country-made pistol from which he fired in the air with the intent to frighten the informant and others who tried to come to the rescue of the deceased. Taking advantage of the situation, the accused persons escaped from the crime scene.

13.3. The evidence of PW-1 and PW-2 in this regard is unflinching. Therefore, non-recovery of the country-made pistol or any cartridge fired therefrom cannot be fatal to the prosecution case.

13.4. The very act of the appellant in firing from his country-made pistol to enable the accused persons to escape is clearly an overt act whereby he became part of the unlawful assembly with a common object to cause the death of the deceased. The evidence on record clearly provides that appellant was part of the unlawful assembly having the common object to kill the deceased.

13.5. Learned counsel for respondent No. 1 State submits that it is a case of direct evidence which clearly establish the involvement of the appellant in the killing of Satya Narain. The ocular evidence is fully supported by the medical evidence. That apart, the post incident conduct of the appellant is also a significant factor. Laxmi Narain, who could have been an important eyewitness, was killed on 25.10.1993. In that case, appellant herein along with others were named as accused. Therefore, it was not possible for the prosecution to present Laxmi Narain as a prosecution witness.

13.6. He, therefore, submits that there is no merit in the criminal appeal which should be dismissed.

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

15. Question for consideration is whether the prosecution could establish the culpability of the appellant in the murder of Satya Narain beyond any reasonable doubt? In other words, whether the prosecution could prove the charges against the appellant under Sections 148 and 302/149 IPC beyond any reasonable doubt?

16. To answer the aforesaid question it is necessary to briefly analyse the evidence on record. PW-1 is Shri Sarwan Kumar S/o Late Satya

Narain. He is the informant in the case. In his examination in chief, PW-1 stated that his father Late Satya Narain was one of the three brothers, Shree Dev being the eldest and Laxmi Narain alias Daroga being the younger. Shree Dev had four sons viz. Munna Lal, Raju, Nitya Nand (appellant) and Uchchav alias Pappu. His uncle Laxmi Narain was issueless and was residing with Satya Narain. Laxmi Narain gifted all his property to the informant and his brothers i.e. to the sons of Satya Narain. This was not to the liking of the accused persons which resulted in litigation and enmity.

16.1. He further stated that on the fateful day at about 04:30 PM his father Satya Narain, uncle Laxmi Narain and himself after easing themselves at about 04:30 PM, had reached Ambhagarh Akhada, Har Ki Pauri. At the same time from the side of Dhimaro Ka Mohalla, Shri Kuldeep S/o Ram Prakash and Bhola Shankar S/o Siaram came. Informant and his uncle Laxmi Narain started a conversation with the above two persons and while talking with the two persons went ahead and reached the temple of Goverdhan Nath Ji. Father of PW-1 Satya Narain had got down from the stairs for bathing in the Ganga at Har Ki Pauri. In the meanwhile, from the southern side of Tulsi Park, the accused persons came. While Shree Dev was armed with a danda, Munna Lal was armed with kanta. Raju and Uchchav were armed with knives. Appellant Nitya Nand was carrying a country-made pistol in his hand. As they confronted Satya Narain, Shree Dev exhorted the other accused persons to kill him. Thereafter, the accused persons caught hold of his father and started assaulting him with knives and kanta. As Satya Narain cried for help, Bhola Shankar, Kuldeep, Laxmi Narain and PW-1 rushed to help him. They had reached the Bharoji temple when appellant Nitya Nand fired a shot in the air from his country-made pistol to frighten PW-1 and the others. Taking advantage of the situation, the accused persons made good their escape from the crime scene through the south-western side.

16.2. As PW-1 went near his father, he found that his father had received multiple injuries inflicted by knives and kanta on his head, cheek, neck, back and ribs. His father Satya Narain had died on the spot with half of his body inside the water. While blood was splattered on the spot, sandal of his father

was lying on the stairs with stick in the water. PW-1 stated that he had dictated a report of the incident on the spot to Kuldeep Kumar Tiwari S/o Ram Prakash who had scribed the same. After he had completed writing down what was dictated, scribe Kuldeep Kumar Tiwari read over the same to PW-1 and thereafter took his signature. PW-1 stated that he along with his uncle Laxmi Narain went to the police station in a tricycle (rickshaw) and handed over the report to the incharge of the police station who registered a case and handed over a copy of the same to PW-1.

17. In his cross-examination PW-1 stated that after hearing the cries of his father, he had rushed back to the spot. About five-six nearby people had also gathered there but he could not remember their names. Regarding Bhola Shankar, PW-1 stated that he came after the incident.

    17.1. When PW-1 tried to go near his father, appellant Nitya Nand had fired in the air to stop him and thereafter he ran away. No fire was shot for causing injury either to PW-1 or to the deceased. People did not find any cartridge or empty cartridge on the spot.

    17.2. He admitted that because of his uncle Laxmi Narain gifting all his property to the sons of Satya Narain including himself there was enmity between the two sides.

    17.3. Regarding the deceased, PW-1 stated that he had taken his last meal between 02.00 to 02.30 PM when he had taken dal and roti. His father's daily routine was to go to Har ki Pauri for taking a bath in the Ganga. On the fateful day, his father went to ease himself first and then went for bathing.

    17.4. PW-1 stated that his uncle Shree Dev had exhorted the other accused persons to kill his father. This fact however is not mentioned in the FIR.

    17.5. PW-1 stated that he was at the crime scene for about half an hour. During this period, about 100-200 people had gathered. After intimation was sent to home about the incident, people from home had also arrived. After getting the report written, PW-1 proceeded to the police station in a rickshaw and submitted the same.

17.6. PW-1 denied the suggestion that the incident as reported in the FIR had not happened at the time mentioned therein and that the accused persons were falsely implicated due to previous enmity. He also denied the suggestion that the FIR (Ex.1) was not written in the handwriting of Kuldeep.

18. Bhola Shankar, son of Satya Narain, deposed as PW-2. While reiterating what was stated by PW-1 leading to the incident, he further stated that Satya Narain had cried out for help to save him when he was being assaulted by the accused persons. He stated that he alongwith other people rushed to the spot when appellant Nitya Nand fired from his country-made pistol. He asserted that he alongwith the other people had seen the accused assaulting Satya Narain. After the accused persons escaped towards the south-western side, they came to the spot where Satya Narain was lying. By that time, he was already dead with half of his body inside the water.

18.1. In his cross-examination, PW-2 stated that he had seen the incident with his own eyes. FIR was written by Kuldeep Kumar and his statement was also recorded by the police. He further stated that he had seen Satya Narain falling down the stairs and crying for help. At that time, PW-1 was also near him and he had also witnessed the assault.

18.2. He denied the suggestion that he was not present at the time of the incident and that he was not witness to the writing and lodging of the FIR. He further denied the suggestion that he was deposing falsely due to his friendship with the informant.

19. Dr. Satya Mitra, who was serving in the District Hospital, Etah, deposed as PW-3. He had carried out the post-mortem examination on the dead body of Satya Narain on 09.09.1992, following which he found the following *ante-mortem* injuries on the body of the deceased:

1. Incised wound 10 cm x 1 cm x brain matter deep over right side and back of head at left of back of upper and of right external ear. Skin muscle (scalp) bone meninges and brain cut.

2. Multiple incised wound in an area 10 cm x 7 cm on the right side cheek and upper part of neck measuring

1 cm x 0.3 cm muscle deep to 3 cm x 0.7 cm x bone deep. Mandible on right side fractured.

3. Stab wound 3 cm x 1 cm x thoracic cavity deep over right side lateral side of chest 8 cm below axillary crease. On discussion subcostal muscle underlying rib, pleura right side, lung right side, cut direction right to left transverse.

4. Stab wound 3.5 cm x 1 cm x thoracic cavity deep on left side chest 6 cm below left nipple. Skin, muscle underlying the 8th rib, left pleura, left lung and pericardium part are cut. Direction left to right and slightly upwards.

5. Multiple incised wound in an area 10 cm x 5 cm on the left side chest above nipple measuring 2 cm x 0.3 cm x skin deep to 3 cm x 0.5 cm x muscle and rib deep.

6. Multiple incised wound over back of chest in an area 20 cm x 20 from base of neck above measuring 2 cm x 0.2 cm. Muscle deep to 3 cm x 0.5 cm x thoracic cavity deep. Right scapula cut. Right pleura and right lung cut at places.

7. Multiple incise wound in an area 10 cm x 6 cm over front and external aspect of left upper arm 3 cm below the left shoulder joint.

19.1. He opined that death was possibly caused due to shock and haemorrhage as a result of the injuries. The injuries were caused by sharp-edged weapons like kanta, knives etc.

19.2. PW-3 proved the post-mortem report which was in his handwriting as well as his signature thereon.

20. At the relevant point of time, Ramesh Chandra Sharma served as Inspector at Soron Police Station. He deposed as PW-4. He has stated that investigation of the case was started by Shri Devi Dayal Prajapati from whom he had taken over the investigation on 23.09.1992. On completion of investigation, he had submitted the chargesheet on 13.10.1992.

20.1. In his cross-examination, he has stated that he did not record the statement of any of the witnesses. On the basis of the

statements recorded by his predecessor Shri Devi Dayal Prajapati, and after perusal of other documents, the chargesheet was submitted against the accused persons.

21. Shri Devi Dayal Prajapati deposed as PW-5. He has stated that on the date of receipt of the first information, he had recorded the statements of Laxmi Narain, Bhola Shankar, Kuldeep Kumar and the witnesses of the panchnama. Despite search, the accused persons were not found and, therefore, they could not be arrested. Thereafter, investigation was taken over by PW-4.

    21.1. In his cross-examination, he admitted that though he had taken blood sample from the stairs where the dead body of Satya Narain was found, he did not send the sampled blood for chemical examination. Though he had recorded the statement of the informant, the latter did not mention in his statement that his uncle Shree Dev had exhorted the other accused persons to kill his father and that he should not be spared as he had grabbed the property of his younger brother. Again, he did not mention in the case diary that Bhola Shankar was present on the spot. That apart, Bhola Shankar did not mention the names of any assailant.

22. From the evidence tendered on behalf of the prosecution, it is clear that PW-1 and PW-2 are the eyewitnesses. When PW-1 Satya Narain and Laxmi Narain had reached Har Ki Pauri at Ambhagarh Akhada, they were joined by Kuldeep and Bhola Shankar (PW-2). PW-1 and Laxmi Narain went ahead talking with Kuldeep and PW-2. Satya Narain was walking down the steps for a dip in the river. At that time, the accused persons arrived at the scene from the southern side of Tulsi Park. Both PW-1 and PW-2 were categorical in their evidence that Shree Dev was armed with a danda, Munna Lal was armed with kanta and Raju and Uchchav were armed with knives. Appellant Nitya Nand was carrying a country-made pistol in his hand. Though the appellant did not assault Satya Narain, the other accused persons actively participated in the assault. Hearing the cries of Satya Narain, PW-1, PW-2, Kuldeep and Laxmi Narain rushed back. When they had reached near the crime scene, appellant Nitya Nand fired a shot in the air from his country-made pistol to frighten PW-1 and the others. As the appellant fired in the air, all the accused persons escaped from the crime scene.

23. At this stage, we may mention that PW-2 was categorical in his cross-examination that he had seen the incident with his own eyes and that PW-1 was also with him then.

24. Neither PW-1 nor PW-2 has stated that appellant had fired at them nor he had fired at the deceased. The role attributed to the appellant was helping the other accused persons and himself flee from the scene of crime by frightening the people including PW-1 and PW-2 when they were about to reach the crime scene by firing from his country-made pistol into the air. The fact that the death of Satya Narain was homicidal has been fully established by the post-mortem report as well as by the evidence of PW-3 i.e. the doctor. The ocular evidence supported by the medical evidence clearly establish that it was a case of murder of the deceased by the other accused persons under Section 302 IPC.

25. Appellant has been roped in by virtue of Sections 148 and 149 IPC. Appellant was a part of the unlawful assembly which had the common object of eliminating Satya Narain by means of criminal force and, therefore, being a member of the unlawful assembly, he was also guilty of the offence committed in prosecution of the common object i.e. the offence under Section 302 IPC.

26. At this juncture, we may briefly survey the relevant legal provisions.

27. Section 141 IPC defines unlawful assembly. It says an assembly of five or more persons is designated as unlawful assembly if the common object of the persons composing that assembly is to commit an illegal act by means of criminal force.

28. As per Section 148 IPC which deals with rioting armed with deadly weapon, whoever is guilty of rioting, being armed with a deadly weapon or with anything which, used as weapon of offence, is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both. Rioting is defined in Section 146 IPC. As per the said definition, whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting.

29. This brings us to the pivotal section which is Section 149 IPC. Section 149 IPC says that every member of an unlawful assembly shall be guilty of the offence committed in prosecution of the common object. Section 149 IPC is quite categorical. It says that if an offence is

committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of committing of that offence, is a member of the said assembly; is guilty of that offence. Thus, if it is a case of murder under Section 302 IPC, each member of the unlawful assembly would be guilty of committing the offence under Section 302 IPC.

30. In *Krishnappa Vs. State of Karnataka*,[1] this Court while examining Section 149 IPC held as follows:-

> **20.** It is now well-settled law that the provisions of Section 149 IPC will be attracted whenever any offence committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or when the members of that assembly knew that offence is likely to be committed in prosecution of that object, so that every person, who, at the time of committing of that offence is a member, will be also vicariously held liable and guilty of that offence. Section 149 IPC creates a constructive or vicarious liability of the members of the unlawful assembly for the unlawful acts committed pursuant to the common object by any other member of that assembly. This principle ropes in every member of the assembly to be guilty of an offence where that offence is committed by any member of that assembly in prosecution of common object of that assembly, or such members or assembly knew that offence is likely to be committed in prosecution of that object.
>
> **21.** The factum of causing injury or not causing injury would not be relevant, where the accused is sought to be roped in with the aid of Section 149 IPC. The relevant question to be examined by the court is whether the accused was a member of an unlawful assembly and not whether he actually took active part in the crime or not.

30.1. Thus, this Court held that Section 149 IPC creates a constructive or vicarious liability of the members of the unlawful assembly for the unlawful acts committed pursuant to the common object

1 [2012] 6 SCR 1068 : (2012) 11 SCC 237

> by any other member of that assembly. By application of this principle, every member of an unlawful assembly is roped in to be held guilty of the offence committed by any member of that assembly in prosecution of the common object of that assembly. The factum of causing injury or not causing injury would not be relevant when an accused is roped in with the aid of Section 149 IPC. The question which is relevant and which is required to be answered by the court is whether the accused was a member of an unlawful assembly and not whether he actually took part in the crime or not.

31. As a matter of fact, this Court in *Vinubhai Ranchhodbhai Patel Vs. Rajivbhai Dudabhai Patel*[2] has reiterated the position that Section 149 IPC does not create a separate offence but only declares vicarious liability of all members of the unlawful assembly for acts done in common object. This Court has held:

> **20.** In cases where a large number of accused constituting an "unlawful assembly" are alleged to have attacked and killed one or more persons, it is not necessary that each of the accused should inflict fatal injuries or any injury at all. Invocation of Section 149 is essential in such cases for punishing the members of such unlawful assemblies on the ground of vicarious liability even though they are not accused of having inflicted fatal injuries in appropriate cases if the evidence on record justifies. The mere presence of an accused in such an "unlawful assembly" is sufficient to render him vicariously liable under Section 149 IPC for causing the death of the victim of the attack provided that the accused are told that they have to face a charge rendering them vicariously liable under Section 149 IPC for the offence punishable under Section 302 IPC. Failure to appropriately invoke and apply Section 149 enables large number of offenders to get away with the crime.
>
> * * * * *
>
> **22.** When a large number of people gather together (assemble) and commit an offence, it is possible that only some of the members of the assembly commit the

2 [2018] 6 SCR 1050 : (2018) 7 SCC 743

> crucial act which renders the transaction an offence and the remaining members do not take part in that "crucial act" — for example in a case of murder, the infliction of the fatal injury. It is in those situations, the legislature thought it fit as a matter of legislative policy to press into service the concept of vicarious liability for the crime. Section 149 IPC is one such provision. It is a provision conceived in the larger public interest to maintain the tranquility of the society and prevent wrongdoers (who actively collaborate or assist the commission of offences) claiming impunity on the ground that their activity as members of the unlawful assembly is limited.
>
> * * * * *
>
> **34.** For mulcting liability on the members of an unlawful assembly under Section 149, it is not necessary that every member of the unlawful assembly should commit the offence in prosecution of the common object of the assembly. Mere knowledge of the likelihood of commission of such an offence *by the members of the assembly* is sufficient. For example, if five or more members carrying AK 47 rifles collectively attack a victim and cause his death by gunshot injuries, the fact that one or two of the members of the assembly did not in fact fire their weapons does not mean that they did not have the knowledge of the fact that the offence of murder is likely to be committed.

32. It is true that there are certain lacunae in the prosecution. The scribe Kuldeep was not examined. Similarly, the younger brother Laxmi Narain was not examined though it has come on record that Laxmi Narain was killed in the year 1993 and in that case one of the accused is the appellant himself. It is also true that neither any country-made pistol was recovered nor any cartridge, empty or otherwise, recovered. However, the appellant has been roped in with the aid of Section 149 IPC. Therefore, as held by this Court in *Yunis alias Kariya Vs. State of M.P.,*[3] no overt act is required to be imputed to a particular person when the charge is under Section 149 IPC; the presence of the accused as part of the unlawful assembly

3 (2003) 1 SCC 425

is sufficient for conviction. It is clear from the evidence of PW-1 and PW-2 that the appellant was part of the unlawful assembly which committed the murder. Though they were extensively cross-examined, their testimony in this regard could not be shaken.

33. In view of what we have discussed above, we have no doubt in our mind that the trial court had rightly convicted the appellant under Section 148 IPC read with Section 302/149 IPC and that the High Court was justified in confirming the same. The question framed in paragraph 15 above is therefore answered in the affirmative.

34. Thus, we see no merit in the appeal which is accordingly dismissed.

Result of the case: Appeal dismissed.

†*Headnotes prepared by:* Divya Pandey

[2024] 9 S.C.R. 54 : 2024 INSC 662

Baccarose Perfumes and Beauty Products Pvt. Ltd
v.
Central Bureau of Investigation & Anr.

(Criminal Appeal No. 3216 of 2024)

06 September 2024

[Abhay S. Oka and Augustine George Masih,* JJ.]

Issue for Consideration

Whether the High Court was justified in dismissing the Revision Application against the rejection of the discharge application moved by the appellant-Company.

Headnotes†

Companies Act, 1956 – Central Excise Act, 1944 – Code of Criminal Procedure, 1973 – Immunity from the prosecution – Grant of – Allegations against the appellant-Company that it cleared its goods into the Indian Market on payment of Countervailing Duty-CVD on the invoice value of the concerned goods, rather than the payment of the CVD on the Maximum Retail Price of the said goods, thereby caused a wrongful gain to themselves and a corresponding wrongful loss to the Government exchequer – Show Cause Notice issued to the company under Customs Act, CE Act and CA Act – Pursuant thereto, registration of FIR under IPC and PC Act – Thereafter, the appellant granted immunity from the prosecution, however, order passed by the trial court taking cognizance – Discharge application by the appellant – Rejected by the Special Judge – High Court upheld the same – Justification:

Held: Both the provisions-section 127H of the CA Act and section 32 K of the CE Act, provide for an explicit bar from prosecution on grant of immunity in cases where the proceedings for any offence have been instituted subsequent to the date of receipt of the application seeking such immunity under the relevant law – Furthermore, mere registration of FIR cannot be interpreted to mean that it constitutes the initiation of such proceedings – Registration of FIR necessitates an investigation by a competent

* Author

officer – It is only after a Final Report/Challan/Chargesheet is submitted as per the compliance of s. 173(2) CrPC, cognizance for the offence is taken – However, the court is not bound by the said report – On facts, on remand to the Assessing Authority for decision afresh on the liability, it had observed that the appellant-Company was entitled to a refund of INR 1.39 Crores out of the INR 1.51 crores paid by it to the Revenue Authorities as per the demand made earlier for the purpose of clearance of the concerned goods – Said Order attained finality – Furthermore, the appellant-Company had successfully claimed immunity from prosecution under the CA 1962, CE Act 1944, and IPC – As such, there was no fiscal liability on the appellant-Company, and accordingly, the order passed by Special Judge, taking cognizance against the appellant-Company, ought not to have sustained – As the very basis of the allegation of offence against the appellant-Company was found to be non-existent, it would have amounted to misuse rather abuse of the process of law – In view thereof, application for discharge ought to have been accepted by the Special Judge – Thus, the proceedings against the appellant-Company quashed by setting aside the impugned order passed by the High Court and the order passed by the Special Judge – Customs Tariff Act, 1975 – Customs Act, 1962 – Prevention of Corruption Act, 1998 – Penal Code, 1860. [Paras 18, 19, 21-23]

Case Law Cited

General Officer Commanding, Rashtriya Rifles v. CBI and Another [2012] 5 SCR 599 **: (2012) 6 SCC 228;** *Jamuna Singh and Others v. Bhadai Shah* [1964] 5 SCR 37 **: 1963 SCC OnLine SC 263;** *Devarapalli Lakshminarayana Reddy and Others v. V. Narayana Reddy and Others* [1976] Supp. 1 SCR 524 **: (1976) 3 SCC 252;** *H.N. Rishbud v. State* [1955] 1 SCR 1150 **: (1954) 2 SCC 934;** *Abhinandan Jha and Others v. Dinesh Mishra* [1967] 3 SCR 668 **: 1967 SCC OnLine SC 107;** *State of Orissa v. Habibullah Khan,* **2003 SCC OnLine SC 141;** *Hira Lal Hari Lal Bhagwati v. CBI, New Delhi* [2003] 3 SCR 1118 **: (2003) 5 SCC 257– referred to.**

List of Acts

Code of Criminal Procedure, 1973; Companies Act, 1956; Standards of Weights and Measures Act, 1976; Customs Tariff Act, 1975; Central Excise Act, 1944; Customs Act, 1962; Prevention of Corruption Act, 1998; Penal Code, 1860.

List of Keywords

Revision; Discharge application; Immunity from the prosecution; Countervailing duty on the invoice value of goods; Payment of countervailing duty on maximum retail price of goods; Wrongful gain; Wrongful loss; Government exchequer; Registration of FIR; Investigation; Final Report/Challan/Chargesheet; Abuse of the process of law.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 3216 of 2024

From the Judgment and Order dated 15.09.2023 of the High Court of Gujarat at Ahmedabad in CRA No. 783 of 2017

Appearances for Parties

Kapil Sibal, Sr. Adv., Shamik Shirishbhai Sanjanwala, Raheel Patel, Prabhakar Yadav, Advs. for the Appellant.

Mrs. Chitrangda Rastavara, Ms. Shagun Thakur, Shantanu Sharma, Rajat Nair, Ms. Rajeshwari Shankar, Akshaja Singh, Mukesh Kumar Maroria, Ms. Swati Ghildiyal, Prashant Bhagwati, Ms. Devyani Bhatt, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Augustine George Masih, J.

1. The Appellant (hereinafter referred to as "Appellant-Company") is assailing the Order dated 15.09.2023, wherein the High Court of Gujarat dismissed the Criminal Revision Application No. 783 of 2017 (hereinafter referred to as "CRA No. 783 of 2017") moved under Section 397 read with Section 401 of Code of Criminal Procedure, 1973 (hereinafter referred to as "CrPC 1973") against the rejection of discharge application moved by the Appellant-Company. The said application was dismissed by the learned Special Judge (CBI) at Ahmedabad (hereinafter referred to as "Special Judge") vide Order dated 19.07.2017.

2. It is alleged by the Central Bureau of Investigation, being Respondent No. 01 (hereinafter referred to as "Respondent-Agency"), that the

Appellant-Company had entered into a criminal conspiracy with Shri Yogendra Garg, Joint Development Commissioner, Kandla Special Economic Zone, Kandla (hereinafter referred to as "KASEZ"), and Shri V.N. Jahagirdar, Deputy Commissioner of Customs, KASEZ, between the period from March 2001 to August 2004. It is alleged that the latter officials perverted their official positions and allowed the Appellant-Company to clear its goods into the Indian Market on payment of Countervailing Duty (hereinafter referred to as "CVD") on the invoice value of the concerned goods, rather than the payment of the CVD on the Maximum Retail Price (hereinafter referred to as "MRP") of the said goods, thereby causing a wrongful gain to themselves and a corresponding wrongful loss to the Government exchequer to the tune of INR 8,00,00,000/- (Rupees Eight Crores only).

3. Before pursuing the aftermath of the allegations by the Respondent-Agency, it is crucial to delve into the backdrop in which the allegations arose against the Appellant-Company.

4. The Appellant-Company claims to be a private limited company duly incorporated under the Companies Act, 1956, which is engaged in manufacturing and exporting of cosmetics and toilet preparations and having one of its units in KASEZ. As per the Appellant-Company, its products get cleared from the KASEZ Unit into the Domestic Tariff Area (hereinafter referred to as "DTA") in consonance with the necessary permissions granted to it by the appropriate authority. It is its case that it had effected the following three kinds of clearances from its KASEZ Unit into the DTA, being (a) Clearances of goods weighing or containing less than 20 gram or 20 millilitre, (b) products containing alcohol, and (c) other goods in "Wholesale Packs".

5. From August 2004 onwards, Officers of the Kandla Customs (hereinafter referred as "Revenue Authorities") moved against the Appellant-Company, alleging that they had escaped payment of CVD on the aforementioned clearances on account of non-disclosure of MRP as per the provisions of the Standards of Weights and Measures Act, 1976 (hereinafter referred to as "SWM Act 1976") as they had declared only the invoice value of the said goods. This was a violation of the proviso to Section 3(2) of the Customs Tariff Act, 1975 (hereinafter referred to as "CT Act 1975") read with Section 4A(2) of the Central Excise Act, 1944 (hereinafter referred to as

"CE Act 1944"), and on the said ground, goods being cleared by the Appellant-Company into the DTA were intercepted. The Revenue Authorities issued Show Cause Notices dated 03.11.2004, 10.11.2004, and 10.02.2005 (along with Corrigendum dated 11.03.2005) under Section 28 of the Customs Act, 1962 (hereinafter referred to as "CA 1962"), under Section 11A of the CE Act 1944, and under Section 124 of CA 1962 respectively.

6. Thereafter, pursuant to the said allegation based on source information to Respondent-Agency, First Information Report bearing number RC-6(A)/2005-GNR under Section 120B read with Section 420 of the Indian Penal Code, 1860 (hereinafter referred to as "IPC 1860") and Section 13(1)(d) of the Prevention of Corruption Act, 1998 (hereinafter referred to as "PCA 1998") was registered on 04.04.2005 at Gandhinagar branch of Respondent-Agency (hereinafter referred to as "the FIR"). A raid is also claimed to have been conducted on the KASEZ Unit of the Appellant-Company by the Respondent-Agency.

7. Eventually, Assessment Orders were passed observing the non-declaration of MRP on the concerned goods by the Appellant-Company. These Assessment Orders were assailed by the Appellant-Company before the Commissioner of Customs (Appeals), Kandla by filing of appeals, which resulted in the passing of Orders dated 09.05.2005 and 30.06.2005. The Commissioner of Customs (Appeals), Kandla observed that the concerned goods were ought to be assessed under Section 3(2) of the CT Act 1975 as opposed to the proviso to the said provision. Furthermore, declaration of MRP is necessary on packages intended for retail sale and not for bigger packages for wholesale trade. The Revenue Authorities were directed to consider the case of the concerned goods of the Appellant-Company afresh in light of the observations made in the said Orders.

8. In the meanwhile, a clarification was sought from the Office of the Collector of Legal Metrology and Director of Consumer Affairs by the Appellant-Company in the said regard and it was responded vide Letter dated 04.01.2006 wherein, the view taken by the Appellant-Company by placing reliance on Rule 29 of the Standards of Weights and Measures (Packaged Commodities) Rules, 1977 (hereinafter referred to as "Packaged Commodities Rules 1977") was affirmed.

9. Placing reliance on the Letter dated 04.01.2006 and other materials on record, the Appellant-Company moved three applications before

the Settlement Commission and immunity was granted to it under the CE Act 1944, CA 1962, and IPC 1860 vide Common Order No. 248/Final Order/CEX/KNA/2007 dated 21.08.2007.

10. The Investigation Officer, thereafter, was pleased to move a Closure Report dated 05.03.2008 before the learned Special Judge. The Court, however, rejected the said Closure Report vide order dated 01.06.2010, and instead directed for registration of a Special Case against the accused persons, including the Appellant-Company. This case came to be registered as CBI Special Case No. 48 of 2010.

11. The Appellant-Company moved the High Court of Gujarat by filing a Special Criminal Application challenging the above Order which was dismissed on 12.12.2011. Aggrieved, the Appellant-Company moved this Court through filing of Special Leave Petition (Criminal) No. 14430 of 2013. This Court was pleased to condone the delay in filing, but while dismissing the petition vide Order dated 26.07.2013 observed that only cognizance had been taken by the learned Special Judge and directed issuance of summons to the Appellant-Company, and thereby, it was not an appropriate stage to interfere. However, liberty was granted to the Appellant-Company to pursue and plead for discharge at the time of hearing of charges.

12. In pursuance of the said liberty, the Appellant-Company moved an application for discharge before the learned Special Judge. One of the grounds was that the Appellant-Company had been granted immunity under the CE Act 1944, CA 1962, and IPC 1860 through Order dated 20.08.2007 passed by the competent authority, i.e., the Settlement Commission and pressed into service the observations made by this Court in ***General Officer Commanding, Rashtriya Rifles v. CBI[1] and Another***, ***Jamuna Singh and Others v. Bhadai Shah***,[2] and ***Devarapalli Lakshminarayana Reddy and Others v. V. Narayana Reddy and Others***[3] to the effect that mere filing of FIR with the police, which is subsequently forwarded to the Court, does not amount to institution of prosecution. Furthermore, that the Appellant-Company is not a "public servant" *vis-à-vis* Section 13(1)(b) read with Section 13(2) of the PCA 1998. Besides this, the Court had already refused to accept contentions of the Respondent-Agency

1 [2012] 5 SCR 599 : (2012) 6 SCC 228

2 [1964] 5 SCR 37 : 1963 SCC OnLine SC 263

3 [1976] Supp. 1 SCR 524 : (1976) 3 SCC 252

against Shri Yogendra Garg for sanction under Section 197 of the CrPC 1973, and henceforth, the Appellant-Company cannot be prosecuted alone for the charge under Section 120B of IPC 1860, and it finally put forth that the offences under Section 420 read with Section 120B of IPC 1860 are not made out as against the Appellant.

13. The learned Special Judge, however, disagreed Company and dismissed the said application vide Order dated 19.07.2017. To substantiate its dismissal, the Court with reference to the CE Act 1944, observed that as per Section 4A(1), it transpires that the retail price of the concerned goods is to be declared, which through reliance on Circular dated 01.03.2001 and the concerned provisions of law, is interpreted as declaration of MRP.

14. It is against the said Order dated 19.07.2017 that the Appellant-Company had moved the High Court of Gujarat in CRA No. 783 of 2017 which eventually led to the passing of the Impugned Order dated 15.09.2023. During the pendency of the CRA No. 783 of 2017, the High Court of Gujarat stayed further proceedings before the Special Judge while issuing notice to the Respondent-Agency vide Order dated 18.08.2017. It was brought to the attention of the High Court that the Appellant-Company had paid a total of INR 1,51,45,378/- (Rupees One Crore Fifty One Lakhs Forty Five Thousand Three Hundred and Seventy Eight only) during the investigation by the Revenue Authorities and admittedly, in light of the Orders dated 09.05.2005 and 30.06.2005, the Appellant-Company had become entitled to a refund instead.

15. While passing the Impugned Order dated 15.09.2023, the High Court of Gujarat disagreed with the contentions of the Appellant-Company, and affirmed the contentions of the Respondent-Agency.

16. It is in this backdrop that the Appellant-Company moved this Court in Special Leave Petition (Civil) No. 13422 of 2023 by reiterating its earlier contentions. On the first date of hearing, our attention was drawn to the Order dated 09.05.2005 of the Office of Commissioner of Customs (Appeals) which had directed that the matter be remanded to the assessing authority for fresh assessment. No further development is there in the case of the Appellant-Company. Accordingly, vide Order dated 16.10.2023, proceedings before the Trial Court were stayed. The Respondent-Agency, too, filed their contentions as part of its Counter Affidavit dated 19.04.2024.

17. Having heard the counsels for both the parties at length, it is pertinent to consider the concerned provisions of law before we delve into the legal and factual facet.

18. Predominantly, the argument of the Appellant-Company pertained to having been granted immunity by Settlement Commission vide Order dated 20.08.2007 as per Section 32K of the CE Act 1944. A perusal of the powers of the Settlement Commission leads us to equivalent provision under the CA 1962 through Section 127H. Both the provisions are *pari materia* to each other and bear the same text. These sections provide for an explicit bar from prosecution on grant of immunity in cases where the proceedings for any offence have been instituted subsequent to the date of receipt of the application seeking such immunity under the relevant law.

19. A perusal of the scheme of the CrPC 1973 allows us to infer that mere registration of FIR cannot be interpreted to mean that it constitutes the initiation of such proceedings. A registration of FIR necessitates an investigation by a competent officer as per the detailed process outlined in Sections 155 to 176. It is only after a Final Report (or as referred in the common parlance, a Challan or a Chargesheet) is submitted as per the compliance of Section 173(2) of CrPC 1973, cognizance for the offence(s) concerned is taken. However, undoubtedly, the Court is not bound by the said report.

    The cardinal principle that investigation and taking of cognizance operate in parallel channels, without an intermingling, and in different areas was also laid down by this Court in ***H.N. Rishbud v. State (Delhi Admn.)***[4] and further elaborated and reiterated in ***Abhinandan Jha and Others v. Dinesh Mishra***[5] and ***State of Orissa v. Habibullah Khan***.[6]

20. In ***Hira Lal Hari Lal Bhagwati v. CBI, New Delhi***,[7] even though the subject matter of the dispute pertained to Kar Vivad Samadhan Scheme, 1998 (hereinafter referred to as "KVSS 1998"), the observations of this Court came to the rescue of the Assessee-Company therein. As per the said factual matrix, the case of the

4 [1955] 1 SCR 1150 : (1954) 2 SCC 934

5 [1967] 3 SCR 668 : 1967 SCC OnLine SC 107

6 2003 SCC OnLine SC 1411

7 [2003] 3 SCR 1118 : (2003) 5 SCC 257

Assessee-Company therein was settled under the KVSS 1998 on 10.02.1999 by the Designated Authority and as per the terms of the settlement, the Assessee-Company therein withdrew the appeal before this Court on 16.03.1999 and a certificate for full and final settlement was issued on 19.07.1999. Despite that, on 06.01.1999, a case was registered as against the Appellant therein in capacity as the office bearer of the Assessee-Company. It was held by this Court that continuation of such a prosecution would be inconsistent with the intent and provisions of the law. The Appellant therein was also obliged to withdraw the appeal before this Court, which might have had also impacted the merits of the criminal proceedings as against them.

21. The above ratio, as laid down by this Court, would be fully applicable to the case-at-hand, especially when it is not in dispute that the Commissioner of Customs (Appeals), Kandla returned a finding that the Appellant-Company was not required to pay the CVD on the basis of MRP, but as per the invoice value. This is in consonance with the submission of the Appellant-Company.

On remand to the Assessing Authority for decision afresh on the liability, it had observed that the Appellant-Company was entitled to a refund of INR 1.39 Crores out of the INR 1,51,45,378/- (Rupees One Crore Fifty One Lakhs Forty Five Thousand and Three Hundred Seventy Eight only) paid by it to the Revenue Authorities as per the demand made earlier for the purpose of clearance of the concerned goods. This position is also admitted by the Respondent-Agency in its Counter Affidavit dated 19.04.2024. Moreover, the said Order was never challenged by the Revenue Authorities, and has, thus, attained finality.

22. Furthermore, the Appellant-Company had successfully claimed immunity from prosecution under the CA 1962, CE Act 1944, and IPC 1860 vide Order dated 21.08.2007. In such a circumstance, there was no fiscal liability on the Appellant-Company, and accordingly, the Order dated 01.08.2010 passed by learned Special Judge, taking cognizance against the Appellant-Company, ought not to have sustained. As the very basis of the allegation of offence against the Appellant-Company was found to be non-existent, it would have amounted to misuse rather abuse of the process of law. It may be added here that the prosecution sanction as sought against the

officials of KASEZ, who were said to have committed the offences under PCA 1988, stood declined. In the light of this additional fact, the application for discharge, as moved by the Appellant-Company, ought to have been accepted by the learned Special Judge.

23. In light of the above, the present Appeal is allowed. The proceedings against the Appellant-Company are quashed by setting aside the Impugned Order dated 15.09.2023 passed by the High Court of Gujarat in CRA No. 783 of 2017 and the Order dated 01.06.2010 passed by the Special Judge in RC6(A)/2005.

24. Pending applications, if any, stand disposed of.

Result of the case: Appeal Allowed

†*Headnotes prepared by:* Nidhi Jain

[2024] 9 S.C.R. 64 : 2024 INSC 664

Somprabha Rana & Ors.
v.
The State of Madhya Pradesh & Ors.

(Criminal Appeal No. 3821 of 2023)

06 September 2024

[Abhay S. Oka* and Augustine George Masih, JJ.]

Issue for Consideration

High Court, if justified in disturbing the custody of the child, aged one year and five months at the time of passing the order, by handing over the custody of the child to her father and paternal side relatives from the custody of her maternal side relatives.

Headnotes†

Constitution of India – Art. 226 – Writ of Habeas Corpus under, seeking custody of minor – Minor child aged 11 months, in custody of maternal side relatives after the unatural death of her mother – Arrest of father in connection with mother's death, however later released on bail – Habeas Corpus petition, wherein the High Court directed the maternal relatives to hand over custody of the child to the father and his family – Correctness:

Held: When the Court deals with the issue of habeas corpus regarding a minor, the court cannot treat the child as a movable property and transfer custody without even considering the impact of the disturbance of the custody on the child – Such issues cannot be decided mechanically – Court has to act based on humanitarian considerations – Court cannot ignore the doctrine of parens patriae – On facts, High Court did not deal with and consider the issue of the welfare of the child – High Court disturbed the child's custody based only on the father's right as a natural guardian – Child had been in the custody of the appellants-maternal side relatives from the tender age of 11 months after her mother's death, for more than one and a half years – Thus, not a case where custody of the child could be disturbed in a petition u/Art. 226 – At this tender age, if custody of the child is immediately transferred to the father and grandparents, the child would become miserable as she has not met them for a considerably long time – Moreover,

* Author

no allegation that the child is not being looked after properly by the appellants – Even assuming that the father is not entitled to custody, at this stage, he is entitled to have access to meet the child, in the child's best interest that she knows her father and grandparents and remains with them for some time to begin with – Father has shown unwillingness to apply for custody, orders of the Court regarding custody not final – Thus, it is proposed to permit the appellants or any of them to apply for custody to the Regular Court under the GW Act – Impugned judgment and order set aside – Writ Petition dismissed not on merits but on the ground that the discretion could not have been exercised u/ Art. 226 to disturb the custody at this stage – Appellants to give access to the father and paternal grandparents of the child to meet the child once a fortnight – Order of access to continue for stipulated period, thereafter, would be open to be modified by the trial court – Guardians and Wards Act, 1890. [Paras 8-14]

Writ – Writ of Habeas Corpus – Nature of – Custody of the minor:

Held: Writ of Habeas corpus is a prerogative writ – It is an extraordinary and discretionary remedy – High Court always has the discretion not to exercise the writ jurisdiction depending upon the facts of the individual cases – Even if the High Court, in a petition of Habeas Corpus, finds that custody of the child by the respondents was illegal, in a given case, the High Court can decline to exercise jurisdiction u/Art. 226 if the High Court is of the view that at the stage at which the Habeas Corpus was sought, it would not be in the welfare and interests of the minor to disturb his/her custody – As regards, the custody of the minor children, the only paramount consideration is the welfare of the minor – Parties' rights cannot be allowed to override the child's welfare. [Para 6]

Custody matters – Custody of minor – Procedings before the Regular Civil/Family Court:

Held: Only in substantive proceedings under the GW Act can the appropriate Court decide the issue of the child custody and guardianship – Regular Civil/Family Court dealing with child custody cases is in an advantageous position – Court can frequently interact with the child – Practically, all Family Courts have a child centre/play area – Child can be brought to the play centre, where the judicial officer can interact with the child – Access can be given to the parties to meet the child at the same place – Moreover, the Court dealing with custody matters can record

evidence – Court can appoint experts to make the psychological assessment of the child – If an access is required to be given to one of the parties to meet the child, the Civil Court or Family Court is in a better position to monitor the same. [Paras 10]

Case Law Cited

Tejaswini Gaud & Ors. v. Shekhar Jagdish Prasad Tewari & Ors. [2019] 7 SCR 335 **: (2019) 7 SCC 45;** *Swaminathan Kunchu Acharya v. The State of Gujarat* [2022] 6 SCR 727 **: (2022) 8 SCC 804;** *Gautam Kumar Das v. NCT of Delhi & Others* [2024] 8 SCR 451 **: (2024) INSC 610;** *Nirmala v. Kulwant Singh and Others* **(2024) SCC OnLine SC 758 – referred to.**

List of Acts

Constitution of India; Penal Code, 1860; Dowry Prohibition Act, 1961; Guardians and Wards Act, 1890.

List of Keywords

Custody; Custody of minor; Writ of Habeas Corpus u/Art. 226; Habeas corpus; Humanitarian considerations; Welfare of the child; Child custody and guardianship; Order of access to child; Psychological assessment of the child; Prerogative writ; Extraordinary and discretionary remedy; Doctrine of parens patriae.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 3821 of 2023

From the Judgment and Order dated 23.06.2023 of the High Court of M.P. at Indore in WP No. 11004 of 2023

Appearances for Parties

Gagan Gupta, Sr. Adv., Nikhil Jain, Saurabh Singh, Divyansh Singh, Advs. for the Appellants.

P.S. Patwalia, Sr. Adv., Pashupathi Nath Razdan, Ajay Sharma, Mirza Kayesh Begg, Ms. Maitreyee Jagat Joshi, Astik Gupta, Ms. Akanksha Tomar, Argha Roy, Ms. Ojaswini Gupta, Ms. Ruby, Zartab Anwar, Santosh Kumar, Rishiraj Trivedi, Madhurendra Sharma, Rajiv R. Mishra, Ms. Suruchi Yadav, Aditi Shivadhatri, Yadav Narender Singh, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Abhay S. Oka, J.

FACTUAL ASPECTS

1. This appeal arises from a very unfortunate dispute about the custody of a female child (for short, 'the child') whose present age is two years and seven months. The mother of the child unfortunately died an unnatural death on 27th December 2022. It is alleged that the death of the mother was by hanging. The 4th respondent is the father of the child. The 2nd and 3rd respondents are the paternal grandparents of the child. The 5th respondent is the sister-in-law of the 4th respondent (his brother's wife). The 1st to 3rd appellants are the real sisters of the deceased mother. The 4th and 5th appellants are the child's maternal grandparents, who were not the parties before the High Court. The 5th respondent is also a real sister of the child's mother. The 5th respondent is the wife of the 4th respondent's brother.

2. The 2nd to 4th respondents invoked the jurisdiction of the Madhya Pradesh High Court by filing a petition seeking a writ of Habeas Corpus under Article 226 of the Constitution of India. A case made out in the petition was that the 4th respondent and the mother of the child were residing in Indore, where the unnatural death of the mother occurred. A First Information Report was registered against the 2nd and 4th respondents for offences punishable under Sections 304-B and 498-A of the Indian Penal Code and Sections 3 and 4 of the Dowry Prohibition Act, 1961. According to the case of the 2nd to 5th respondents, the 2nd and 3rd appellants came to Indore on 28th December 2022. When the 4th respondent was busy completing the formalities of the post-mortem, without the consent of the 4th respondent, the 2nd and 3rd appellants took away the minor child. The 4th respondent - the father, was arrested in connection with the offence on 19th February 2023 and was granted bail after filing the charge sheet on 19th April 2023. The petition under Article 226 filed by the 2nd to 5th respondents proceeded on the allegation that the 2nd and 3rd appellants illegally took over custody of the child. It must be noted here that on the date of death of the mother, the age of the child was 11 months.

3. By the impugned judgment dated 23rd June 2023, the Division Bench of the High Court of Madhya Pradesh at Indore allowed the writ petition. It issued a writ of Habeas corpus directing the appellants to hand over custody of the child to the 2nd to 5th respondents. On 7th July 2023, this Court issued notice and granted a stay of the operation of the impugned judgment. On 5th December 2023, this Court granted leave and continued the stay. However, this Court observed that it would be open for the husband to apply for custody before the appropriate Court. As of this date, the husband has not applied for custody by filing proceedings under the Guardians and Wards Act, 1890 (for short, "the GW Act"). The appellants made such an application under the GW Act, but it was withdrawn later. This is the statement made by the learned counsel for the appellants. Now, the question is whether the High Court was justified in disturbing the custody of the child, whose age was one year and five months at the time of passing the impugned judgment.

SUBMISSIONS

4. The learned senior counsel appearing for the appellants urged that by the impugned judgment, without making any inquiry, the High Court has ordered the child's custody to be disturbed based only on the legal rights of the child's father and grandparents. He submitted that in the facts of the case, the High Court ought not to have entertained a petition for Habeas Corpus. He submitted that even if the petition was to be entertained, it was the duty of the Court to see what was in the best interests of the minor and custody could not have been disturbed at such tender age without considering the question of the welfare of the minor child.

5. Learned senior counsel appearing for the respondents extensively relied upon decisions of this Court in the cases of ***Tejaswini Gaud & Ors. v. Shekhar Jagdish Prasad Tewari & Ors.***,[1] ***Swaminathan Kunchu Acharya v. The State of Gujarat***[2] and ***Gautam Kumar Das v. NCT of Delhi & Others***.[3] Learned senior counsel would urge that the case of ***Gautam Kumar Das***[3] is identical on facts where the High Court had declined to entertain the petition for Habeas corpus

1 [2019] 7 SCR 335 : (2019) 7 SCC 45

2 [2022] 6 SCR 727 : (2022) 8 SCC 804

3 [2024] 8 SCR 451 : (2024) INSC 610

by expressing a view that statutory remedy should be adopted for seeking custody. However, this Court interfered and granted the father custody of the minor child. He submitted that the father and his parents reside together and, therefore, are in a position to take the best possible care of the child. He submitted that the appellants have not allowed the father to see even the face of the child. The learned senior counsel appearing for the appellants relied upon a decision of this Court in the case of ***Nirmala v. Kulwant Singh and Others***.[4]

CONSIDERATION OF SUBMISSIONS

6. After having perused various decisions of this Court, the broad propositions of settled law on the point can be summarised as follows:

a. Writ of Habeas corpus is a prerogative writ. It is an extraordinary remedy. It is a discretionary remedy;

b. The High Court always has the discretion not to exercise the writ jurisdiction depending upon the facts of the case. It all depends on the facts of individual cases;

c. Even if the High Court, in a petition of Habeas Corpus, finds that custody of the child by the respondents was illegal, in a given case, the High Court can decline to exercise jurisdiction under Article 226 of the Constitution of India if the High Court is of the view that at the stage at which the Habeas Corpus was sought, it will not be in the welfare and interests of the minor to disturb his/her custody; and

d. As far as the decision regarding custody of the minor children is concerned, the only paramount consideration is the welfare of the minor. The parties' rights cannot be allowed to override the child's welfare. This principle also applies to a petition seeking Habeas Corpus concerning a minor.

7. Now, we come to the impugned judgment. The reasons given by the Division Bench are found only in two paragraphs, namely, paragraphs nos. 10 and 11, which read thus:

> **"10**. From perusal of the Tejaswini Gaud & Ors. (supra), the Habeas Corpus proceeding is not to justify or examine

4 (2024) SCC OnLine SC 758

> the legality of the custody. In the present case, the only thing which is required to be considered is whether the detention of the minor child by the parents or others was illegal and without any authority of law. It is the settled proposition of law that the Writ of Habeas Corpus is maintainable only if the person is able to prove that the Corpus is in illegal custody or is kept in illegal confinement. **In the present case, admittedly the petitioners would have precedence over the respondent Nos. 3 and 4 who are the relatives from the maternal side whereas the petitioner No. 3 is the biological father of the Corpus, therefore, the writ of Habeas Corpus is maintainable as well as the petitioners would have precedence for custody of the minor child *qua* the respondent Nos. 3 and 4.**
>
> **11.** The writ of the Habeas Corpus for seeking custody of minor child is maintainable only if the Corpus is in illegal custody. **In the present case, the custody/detention of a minor child by the respondent Nos. 3 and 4 who are not the natural guardian of the Corpus, are not entitled to her legal custody.** Accordingly, the respondent Nos.3 and 4 are directed to hand over the custody of the minor child namely XXXX to the petitioners within 15 days from the date of receipt of certified copy of the order."
>
> (emphasis added)

8. It is apparent that the High Court has not dealt with and considered the issue of the welfare of the child. The High Court has disturbed the child's custody based only on the father's right as a natural guardian.

9. The High Court was dealing with the custody of the child, whose age at that time was one year and five months. The child had been in the custody of the appellants from the tender age of 11 months after her mother died. The child, at present, has been in the custody of the appellants for more than one and a half years. When the Court deals with the issue of Habeas Corpus regarding a minor, the Court cannot treat the child as a movable property and transfer custody without even considering the impact of the disturbance of the custody on the child. Such issues cannot be decided mechanically. The Court has to act based on humanitarian considerations. After all, the Court

cannot ignore the doctrine of *parens patriae*. Learned senior counsel appearing for the 2nd to 5th respondents submitted that if the Court is of the view that there is no proper consideration by the High Court, the order of remand may be passed to the High Court.

10. We believe that considering the peculiar facts of the case and the child's tender age, this is not a case where custody of the child can be disturbed in a petition under Article 226 of the Constitution of India. Only in substantive proceedings under the GW Act can the appropriate Court decide the issue of the child custody and guardianship. Regular Civil/Family Court dealing with child custody cases is in an advantageous position. The Court can frequently interact with the child. Practically, all Family Courts have a child centre/play area. A child can be brought to the play centre, where the judicial officer can interact with the child. Access can be given to the parties to meet the child at the same place. Moreover, the Court dealing with custody matters can record evidence. The Court can appoint experts to make the psychological assessment of the child. If an access is required to be given to one of the parties to meet the child, the Civil Court or Family Court is in a better position to monitor the same.

11. Coming to the facts of the case, at this stage, it will be very difficult to decide whether the welfare of the minor child requires custody of the maternal aunts to be disturbed. The child has not seen the father and grandparents for over a year. At the tender age of two years and seven months, if custody of the child is immediately transferred to the father and grandparents, the child will become miserable as the child has not met them for a considerably long time. Moreover, even the contesting respondents have not alleged that the child is not being looked after properly by the appellants. Whether the father is entitled to custody or not is a matter to be decided by a competent court, but surely, even assuming that the father is not entitled to custody, at this stage, he is entitled to have access to meet the child. It is in the child's best interest that she knows her father and grandparents and remains with them for some time to begin with.

12. We repeatedly asked the learned senior counsel representing the husband whether the husband was willing to apply for custody. However, he has shown unwillingness to apply for custody. The husband is a member of the Bar practising at the Indore Bench of

the Madhya Pradesh High Court. Even he was personally present during the hearing. However, the learned senior counsel appearing for the appellants stated that the appellants or any of them would apply for claiming declaration as a guardian and retaining the custody. The earlier application filed by the appellants has been withdrawn. However, orders of the Court regarding custody are never final. Therefore, we propose to permit the appellants or any of them to apply for custody to the Regular Court under the GW Act. Even in the petition filed by the appellants, the competent Court can permit the father to take over the custody if it is satisfied that the welfare of the minor requires custody to be granted to the father.

13. We propose to direct the appellants to give access to the father and paternal grandparents of the child to meet the child once a fortnight. To begin with, access can be provided in the office of the secretary of the District Legal Service Authority so that the secretary can supervise the access. We propose to direct the secretary of the District Legal Service Authority to take assistance from a child psychologist or a psychiatrist (preferably female) attached to a local public hospital. If no such expert is available with the local public hospital, such an expert can be appointed at the appellants' cost. The expert will ensure that the child responds to the father and grandparents and interacts with them. The order of access shall continue for four months. After that, it will be open for the concerned Trial Court to modify this order of access in all respects. When the child becomes comfortable with his father and grandparents, the Court can also consider granting overnight access to the father and the grandparents.

14. Hence, we pass the following order:

a. Impugned judgment and order dated 23rd June, 2023 is set aside, and Writ Petition No. 11004 of 2023 is hereby dismissed. We make it clear that the Writ Petition is dismissed not on merits but on the ground that on facts, the discretion could not have been exercised under Article 226 of the Constitution of India to disturb the custody of the appellants at this stage;

b. On every 1st, 3rd and 5th Saturdays starting from 21st September 2024, the appellants shall take the child to the office of the secretary of the District Legal Service Authority at district Panna in the State of Madhya Pradesh at 03.00 p.m. Under the supervision of the secretary of the District Legal Service

Authority, the father and grandparents of the child shall be permitted to meet the child till 05.00 p.m.;

c. The secretary of the District Legal Service Authority shall take the assistance of a child psychologist or a psychiatrist (preferably female) working in any local public hospital. If such experts are unavailable, the secretary shall privately engage one such expert at the appellants' cost. The appellants will pay necessary charges as and when called upon by the secretary. The payment will be subject to the outcome of the proceedings for grant of custody;

d. The expert so appointed shall remain present at the time of access. The expert's duty will be to persuade the child to interact with her father and grandparents. As regards the mode and manner of allowing the father and grandparents to meet the child, the parties and the secretary of the District Legal Service Authority shall be guided by the opinion of the expert;

e. As assured to the Court, the appellants or some of them shall file a petition seeking a declaration of guardianship and permanent custody of the child under the provisions of the GW Act before the competent Court within a maximum period of two months from today;

f. The concerned Court in which the application will be filed shall pass further orders regarding the grant of access and/or overnight custody to the husband and the grandparents. Further interim directions regarding access, overnight access, etc., shall be issued by the competent Court in which the appellants apply for custody. To enable the said court to pass an appropriate interim order, we direct that the interim arrangement made as above for the grant of access to the father and the grandparents will continue to operate for four months from today. Thereafter, the competent Court will deal with the prayer for interim relief on its own merits. Needless to add, in the event the husband and/or grandparents apply for custody, the application filed by them and the application filed by the appellants shall be heard together, and

g. In the event of failure of both parties to apply to the competent Court, the parties will be free to apply to this Court for appropriate directions.

15. The appeal is, accordingly, partly allowed on the above terms.

16. We direct the registry to immediately forward a copy of this judgment to the secretary of the District Legal Service Authority at District Panna, State of Madhya Pradesh, who shall act upon the copy of the judgment provided by the registry of this Court. If the secretary of the District Legal Service Authority needs any further directions from this Court, it will be open for him to submit a report to the Registrar (Judicial) of this Court, who shall immediately place the same before this Bench and/or the appropriate Bench.

17. There will be no orders as to costs.

Result of the case: Appeal partly allowed

†*Headnotes prepared by:* Nidhi Jain

[2024] 9 S.C.R. 75 : 2024 INSC 663

Andhra Pradesh State Road Transport Corporation & Ors.
v.
V.V. Brahma Reddy & Anr.

(Civil Appeal No. 5267 of 2024)

06 September 2024

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

Issue for Consideration

The appellant issued a notification dated 08.06.2017 repatriating employees who were on deputation, including the present respondents, to their parent cadres in TSRTC, i.e., to the zones in which they were initially appointed. The respondents challenged the notification. In writ appeals, taking note of the guidelines for allocation formulated by both Corporations (APSRTC and TSRTC), the High Court passed an interim order dated 18.04.2018 suspending the order of the Single judge of the High Court and directing the respondents to report in their parent zones under the TSRTC, where they were initially appointed, as the guidelines for allocation of employees were jointly finalised by APSRTC and TSRTC. In continuation of the said order, this time the High Court took a different view of the matter and directed permanent allocation of the respondents in their deputational posts falling in the State of Andhra Pradesh.

Headnotes†

Andhra Pradesh Reorganisation Act, 2014 – s.77 and s.82 – Whether the High Court's reliance on Section 77 is correct as it applies to state government employees, and whether it is Section 82 that governs the services of the respondents as it relates to employees of Public Sector Undertakings:

Held: From the text of the provisions, it is evident that Section 77 applies to state government employees – Section 82 clearly states that the Corporations shall determine the modalities for distributing their employees between the successor states – Pursuant to this, the Board prepared the Agenda Note dated 16.08.2017 that sets out the allocation of various kinds of employees between APSRTC and TSRTC – Upon going through the Agenda Note, it is found

* Author

that the Board had decided that Class III and Class IV employees, who are appointed at the regional level, are to be allocated to the Corporation in which the region falls after bifurcation – There is no dispute about the fact that the respondents were recruited at the regional level and belong to the successor state Corporation in which the region falls – In this view of the matter, following the statutory mandate of Section 82 read with the Agenda Note dated 16.08.2017, the respondents will continue their employment in the same region, which is under the present TSRTC – The High Court has incorrectly relied on Section 77 of the Act and has in fact failed to notice Section 82 and the follow-up action taken thereunder – The High Court also ignored the correct enunciation of the applicable law in the order dated 18.04.2018, whereunder the respondents were directed to report at their parental zones as per the guidelines – There is no dispute about the applicability of Section 82 – The division bench of the High Court failed to note that the respondents who were on deputation were not absorbed in the deputed posts – In fact, their seniority is continued in their parental zones – The High Court also did not consider the subsequent development when the respondents were in fact repatriated to their parent cadre as a consequence of the order passed by the division bench on 18.04.2018 – It is for this reason that this Court had, at the stage of admission, stayed the judgment of the division bench on 05.10.2020, which stay is continuing till date – The consequence is that the respondents have returned to this parent cadre in the State of Telangana – For the reasons stated, the judgment of the Division Bench of the High Court is unsustainable. [Paras 11, 12, 13, 14, 15, 16]

List of Acts

Andhra Pradesh Reorganisation Act, 2014; Constitution of India.

List of Keywords

Section 77 of Andhra Pradesh Reorganisation Act, 2014; Section 82 of Andhra Pradesh Reorganisation Act, 2014; Bifurcation of State; Andhra Pradesh State Road Transport Corporation (APSRC); Telangana State Road Transport Corporation (TSRTC); Class III and Class IV employees; Validity of repatriation orders; Zones of initial appointment; Repatriating employees; Allocation of employees; Parent zone.

**Andhra Pradesh State Road Transport Corporation & Ors. v.
V.V. Brahma Reddy & Anr.**

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 5267 of 2024

From the Judgment and Order dated 21.11.2019 of the High Court of Andhra Pradesh at Amravati in WA No. 260 of 2018

With

Civil Appeal Nos. 5268, 5269 5270, 5271, 5272, 5273, 5274, 5275, 5276, 5277, 5278, 5279, 5280, 5281, 5282, 5283, 5284, 5285, 5286, 5287, 5288, 5289, 5290 and 5291 of 2024

Appearances for Parties

Gourab Banerji, Sr. Adv., Ashish Kumar Tiwari, Anurag Tiwari, Sahib Patel, Advs. for the Appellants.

Vivek Sharma, GVR Choudary, Peram Ravi Teja, Vivek Sharma, Manoj Tomar, Sri Ruma Sarasani, Krishna Kumar Singh, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Pamidighantam Sri Narasimha, J.

1. These appeals are against the common judgment of the High Court of Andhra Pradesh dated 21.11.2019 dismissing the writ appeals filed by the appellant herein and upholding the order of the single judge of the High Court allowing the respondents' writ petitions and quashing orders repatriating them to their parental zones. Relevant and necessary facts are as follows.

2. The State of Telangana was formed under Section 3 of the Andhra Pradesh Reorganisation Act, 2014[1] comprises of territories mentioned therein, and by virtue of Section 4, remaining the territories constituted the State of Andhra Pradesh. The bifurcation of states came into effect on 02.06.2014 and this is declared to be the appointed date under the Act.

   2.1 Prior to bifurcation of the erstwhile State of Andhra Pradesh, the Andhra Pradesh State Road Transport Corporation (APSRC)[2]

1 Hereinafter "the Act".

2 Hereinafter "APSRTC".

functioned in the unified State of Andhra Pradesh. After state reorganisation, the Corporation was bifurcated and the Telangana State Road Transport Corporation (TSRTC),[3] respondent no. 2 herein, was formed w.e.f. 02.06.2015 (appointed date for the Corporations) to function in the State of Telangana, while APSRTC continued to function in the residual part of State of Andhra Pradesh.

2.2 The respondents in these appeals were Class III and Class IV employees who were working as conductors, drivers and shramiks. They were appointed between 2014 to 2017 in districts, and more particularly zones carved out under the Presidential Order, read with Article 371D of the Constitution, that formed part of Telangana, which areas now fall within the State of Telangana. These respondents were temporarily deputed to zones which now form part of the bifurcated State of Andhra Pradesh. The orders of deputation were extended by way of several notifications issued from time to time, some deputations were made even after the bifurcation of the Corporations, pending finalisation of guidelines for permanent allocation of employees. We may mention at this very stage that the issue in these appeals is about validity of the repatriation orders that were passed by the appellant APSRTC, relegating the respondents to the zones of their initial appointment.

3. Returning to the chronology of facts, it needs to be noted that on 18.06.2015 the Government of India reconstituted the APSRTC Board of Directors with members from the central government, State of Andhra Pradesh, and State of Telangana to determine the permanent allocation of employees between the Corporations. On 16.08.2017, the Board prepared a detailed Agenda Note, which was approved on 24.08.2017. The Agenda Note sets out the modalities for allocation of state cadre, zonal and regional cadre of employees of the Corporations.

4. Before the finalisation of the Agenda Note, the appellant issued a notification dated 08.06.2017 repatriating employees who were on deputation, including the present respondents, to their parent cadres in TSRTC, i.e., to the zones in which they were initially appointed.

3 Hereinafter "TSRTC".

The respondents challenged this notification and the consequent repatriation orders passed by Depot Managers by filing writ petitions before the High Court.

5. The writ petitions were heard and allowed by the Single Judge by an order dated 10.11.2017 on the ground that, upon bifurcation of the two Corporations the guidelines for allocation of employees between them had not been finalised. Thus, the single judge set aside the repatriation orders.

6. The appellant filed the writ appeals and brought the Agenda Note dated 16.08.2017 and its approval dated 24.08.2017 to the notice of the division bench. Taking note of the guidelines for allocation formulated by both Corporations, the High Court passed an interim order dated 18.04.2018 suspending the order of the single judge and directing the respondents to report in their parent zones under the TSRTC, where they were initially appointed, as the guidelines for allocation of employees were jointly finalised by APSRTC and TSRTC. The matter was listed for further hearing on the issue of payment of salaries. The relevant portion of the order is extracted herein:

> "*We are informed that the posts, with which we are concerned in this batch of cases, are not State level posts and the orders of repatriation, which were subjected to challenge, merely sought to send back the employees concerned who were on transfer in zones other than the zones in which they were appointed. As the posts were only zonal posts, the question of allocation of the employees occupying such posts between the two new States would not arise.*
>
> *We are also informed that the Andhra Pradesh State Road Transport Corporation (APSRTC) and the Telangana State Road Transport Corporation (TSRTC) have come out with guidelines jointly with regard to the employees of the erstwhile APSRTC and allocation and apportionment of such employees. In the light of the order passed by the learned Judge setting aside the repatriation orders, the employees, who are on transfer in Zones 1 to 4 of Andhra Pradesh, though they were appointed either in Zone 5 or in Zone 6 in the State of Telangana, are still working at*

the transferred location. This situation cannot be allowed to continue in the light of the subsequent guidelines formulated by both the Corporations.

Sri N. Praveen Reddy, learned counsel appearing for the TSRTC, would inform this Court that his client is ready and willing to accept the employees sought to be repatriated by the present APSRTC.

In that view of the matter, there shall be interim suspension as prayed for. The employees covered by the repatriated orders, the Respondents in these appeals, shall forthwith report in their parent zones under the TSRTC where they were appointed. The issue of payment of salaries to the Respondents-employees will be considered on the next date of hearing.

Learned Advocate General for the State of Andhra Pradesh appearing for the APSRTC undertakes to use his good offices to see that the issue as to payment of salaries is resolved amicably.

Post on 13.06.2018."

7. In continuation of the above-referred order, the High Court of Andhra Pradesh at Amaravati took up the writ appeals and passed the order impugned before us. This time, the High Court took a different view of the matter and directed permanent allocation of the respondents in their deputational posts falling in the State of Andhra Pradesh. The High Court also ruled on their seniority. In coming to this conclusion, the High Court drew an analogy with the 3rd proviso to Section 77(2) of the Act. It held that even though Section 77 applies to state government employees, an analogy must be adopted by the appellant for allocation of its own employees. Hence, local, district, zonal, and multi-zonal cadre employees, even of corporations, will be deemed to be allotted to the successor state where they are serving on the appointed date. Since the respondents were posted and serving under the appellant on 02.06.2015, it was directed that they shall be deemed to be permanently allocated to the APSRTC in the zones where they were working.

8. Mr. Gourab Banerji, learned senior counsel, appearing for the appellant has submitted that the High Court's analogy with Section

77 is incorrect and that it has not taken note of Section 82 of the Act or properly considered the guidelines framed by the Corporations for allocation of Class III and Class IV employees. He has taken us through the Agenda Note dated 16.08.2017, which provides that Class III and Class IV employees are recruited at a regional level and belong to the respective Corporation in which the region falls after bifurcation. Hence, the Board found that there is no necessity for formulating guidelines for the allotment of these employees between the two Corporations. He submits that this decision has not been challenged and is hence final. He has also submitted that pursuant to the interim order dated 18.04.2018, the respondents have already reported at their parent zones falling under TSRTC. Sri Ruma Sarasani, learned counsel appearing for TSRTC, respondent no. 2 supports the appellant's case.

8.1 On the other hand, Mr. G.V.R. Choudary, learned counsel appearing for the respondents supports the impugned order and also submits that the approval of the Agenda Note dated 24.08.2017 is only with respect to allocation of state-cadre employees, and does not extend to Class III and Class IV employees. Hence, the modalities for allocation have not been decided as required under Section 82.

9. Having heard the parties, the issue before us if whether the High Court's reliance on Section 77 is correct as it applies to state government employees, and whether it is Section 82 that governs the services of the respondents as it relates to employees of Public Sector Undertakings.

10. In order to appreciate the rival contentions, it is necessary to consider Section 77 as well as Section 82 of the Act. Examination of the scope and ambit of these provisions sufficiently indicates the correct answer to the question arising for consideration. The provisions are extracted herein:

> "***Section 77. Provisions relating to other services.***— *(1) Every person who immediately before the appointed day is serving on substantive basis in connection with the affairs of the existing State of Andhra Pradesh shall, on and from that day provisionally continue to serve in connection with the affairs of the State of Andhra Pradesh*

unless he is required, by general or special order of the Central Government to serve provisionally in connection with the affairs of the State of Telangana:

Provided that every direction under this sub-section issued after the expiry of a period of one year from the appointed day shall be issued with the consultation of the Governments of the successor States.

(2) As soon as may be after the appointed day, the Central Government shall, by general or special order, determine the successor State to which every person referred to in sub-section (1) shall be finally allotted for service, after consideration of option received by seeking option from the employees, and the date with effect from which such allotment shall take effect or be deemed to have taken effect:

Provided that even after the allocation has been made, the Central Government may, in order to meet any deficiency in the service, depute officers of other State services from one successor State to the other:

Provided further that as far as local, district, zonal and multi-zonal cadres are concerned, the employees shall continue to serve, on or after the appointed day, in that cadre:

Provided also that the employees of local, district, zonal and multi-zonal cadres which fall entirely in one of the successor States, shall be deemed to be allotted to that successor State:

Provided also that if a particular zone or multi-zone falls in both the successor States, then the employees of such zonal or multi-zonal cadre shall be finally allotted to one or the other successor States in terms of the provisions of this sub-section.

(3) Every person who is finally allotted under the provisions of sub-section (2) to a successor State shall, if he is not already serving therein, be made available for serving in the successor State from such date as may be agreed

upon between the Governments of the successor States or, in default of such agreement, as may be determined by the Central Government: Provided that the Central Government shall have the power to review any of its orders issued under this section.

***

Section 82. Provision for employees of Public Sector Undertakings, etc.—*On and from the appointed day, the employees of State Public Sector Undertakings, corporations and other autonomous bodies shall continue to function in such undertaking, corporation or autonomous bodies for a period of one year and during this period the corporate body concerned shall determine the modalities for distributing the personnel between the two successor States.*"

(emphasis supplied)

11. From the text of these provisions, it is evident that Section 77 applies to state government employees. Section 82 clearly states that the Corporations shall determine the modalities for distributing their employees between the successor states. Pursuant to this, the Board prepared the Agenda Note dated 16.08.2017 that sets out the allocation of various kinds of employees between APSRTC and TSRTC. Upon going through the Agenda Note, we find that the Board has decided that Class III and Class IV employees, who are appointed at the regional level, are to be allocated to the Corporation in which the region falls after bifurcation. We are extracting the relevant portion here:

"*Regional Level Recruitments: The Class III and IV cadres like Drivers, Conductors, Mechanics, Artisans, etc., are recruited at Regional Level i.e., Revenue District wise. There are 12 regions in 13 revenue districts of residual AP state since Srikakulam and Vizianagaram districts are considered as North East Coast Region. There were 10 districts in Telangana area prior to the appointed day i.e., on 02.06.2014. the seniority of these posts is also maintained at Regional level. The presidential order of making recruitment in the ratio of 80% of the posts to local*

district candidates and 20% to non (illegible) candidates is followed in such recruitments. Since the recruitments and seniority levels are at regional level, the distribution of these employees between two entities i.e., in 67,868 posts in residual APSRTC and 61,864 to TSRTC should not be an issue as they were recruited at Regional level (local cadre) and belong to the respective successor state/corporation in which the region falls after bifurcation irrespective of their place of birth or domicile or schooling etc."

(emphasis supplied)

12. There is no dispute about the fact that the respondents were recruited at the regional level and belong to the successor state Corporation in which the region falls.

13. In this view of the matter, following the statutory mandate of Section 82 read with the Agenda Note dated 16.08.2017, the respondents will continue their employment in the same region, which is under the present TSRTC.

14. The High Court has incorrectly relied on Section 77 of the Act and has in fact failed to notice Section 82 and the follow-up action taken thereunder. The High Court also ignored the correct enunciation of the applicable law in the order dated 18.04.2018, whereunder the respondents were directed to report at their parental zones as per the guidelines. As there is no dispute about the applicability of Section 82 even at the bar, the submission of Mr. G.V.R. Choudary that the modalities for allocation have not been decided cannot be accepted in light of the Agenda Note dated 16.08.2017.

15. We have also gone through the prayer in the writ petition of Mr. V.V. Brahma Reddy (respondent no. 1 in Civil Appeal No. 5267/2024), under which there is no challenge to the Agenda Note and its approval. The division bench of the High Court failed to note that the respondents who were on deputation were not absorbed in the deputed posts. In fact, their seniority is continued in their parental zones.

16. The High Court also did not consider the subsequent development when the respondents were in fact repatriated to their parent cadre as a consequence of the order passed by the division bench on 18.04.2018. It is for this reason that this Court had, at the stage of

admission, stayed the judgment of the division bench on 05.10.2020, which stay is continuing till date. The consequence is that the respondents have returned to this parent cadre in the State of Telangana.

17. For the reasons as indicated hereinabove, the decision of the division bench is unsustainable. We therefore, allow Civil Appeal Nos. 5267, 5268, 5269, 5270, 5271, 5272, 5273, 5274, 5275, 5276, 5277, 5278, 5279, 5280, 5281, 5282, 5283, 5284, 5285, 5286, 5287, 5288, 5289, 5290 and 5291 of 2024 and set aside the judgment and order passed by the High Court in Writ Appeal Nos. 260, 290, 291, 292, 303, 304, 306, 311, 312, 313, 318, 320, 321, 322, 323, 325, 328, 329, 354, 355, 356, 360, 386, 389 and 568 of 2018 dated 21.11.2019 and dismiss the Writ Petition Nos. 25880, 25881, 25886, 25196, 25198, 25201, 25214, 24825, 24849, 24870, 24872, 24874, 24891, 24941, 24987, 25139, 25170, 24605, 24609, 24690, 24697, 24723, 24773, 489 and 6065 of 2017 dated 10.11.2017.

18. There shall be no order as to costs.

Result of the case: Matters disposed of.

†*Headnotes prepared by:* Ankit Gyan

[2024] 9 S.C.R. 86 : 2024 INSC 666

Mandakini Diwan and Anr.
v.
The High Court of Chhattisgarh & Ors.

(Criminal Appeal No. 3738 of 2024)

06 September, 2024

[Vikram Nath* and Prasanna Bhalachandra Varale, JJ.]

Issue for Consideration

Matter pertains to investigation as regards the suspicious death of the wife of senior judicial officer.

Headnotes†

Constitution of India – Arts. 226, 136 – Investigation by independent agency – Death of the wife of senior judicial officer – Case of the appellants-mother and the brother of the deceased that the death was suspicious and was not a case of simple suicide, and apprehended that the husband being a senior judicial officer had managed the post mortem in which the cause of death was shown to be suicide by hanging – Several complaints by appellants – Neither FIR registered nor fair investigation carried out – Writ petition by the appellants, remained pending for seven years, and thereafter, dismissed holding that the appellants had adequate statutory remedy available u/s. 156(3) CrPC – Challenge to:

Held: Power to direct CBI to conduct investigation is to be exercised sparingly and such orders should not be passed in routine manner – On facts, the aggrieved party raised allegations of bias and undue influence on the police machinery of the State – Considering the fact that the husband is a senior judicial officer any doubt or apprehension in the minds of the appellants who have lost their family member may be dispelled by the investigation being carried out by CBI – This may result into doing complete justice and enforcing the fundamental right of getting a fair investigation – Thus, the impugned order passed by the High Court is set aside – CBI directed to carry out complete and fair investigation and proceed in accordance with law into the incident and that too expeditiously considering the fact that the incident is of 2016 and submit a report to this Court – If CBI finds that FIR needs to be registered, it may

* Author

itself do so and proceed accordingly and bring such complaint to a logical conclusion – However, if the CBI comes to the conclusion that there is no material which it could collect which is not sufficient in ordinary course to submit a chargesheet, it would close the proceedings. [Paras 12, 14, 15]

Case Law Cited

Awungshi Chirmayo vs. Government of NCT of Delhi **(2022) SCC Online SC 1452 – referred to.**

List of Acts

Code of Criminal Procedure, 1973; Constitution of India.

List of Keywords

Investigation by independent agency; Suicide; Post mortem; Fair investigation; Statutory remedy; Direct CBI to conduct investigation.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 3738 of 2024

From the Judgment and Order dated 10.05.2023 of the High Court of Chhattisgarh at Bilaspur in WPCR No. 197 of 2016

Appearances for Parties

Dinesh Jotwani, Dhawesh Pahuja, Bhargava Baisoya, Ms. Ekta Gambhir, Ms. Shruti Singh, Ms. Shivalika Midha, Narendra Bahadur Tiwari, Nilesh Sharma, Saket Gogia, Advs. for the Appellants.

Tushar Mehta, Solicitor General, Mrs. Aishwarya Bhati, A.S.G., Avdhesh Kumar Singh, A.A.G., Ms. Anjana Prakash, Mrs. Swarupama Chaturvedi, Sr. Advs., Prashant Singh, Rajat Nair, Mrs. Prerna Dhall, Piyush Yadav, Ms. Akanksha Singh, Alok Sahay, Himanshu Shekhar, Parth Shekhar, Ms. Ambali Vedasen, Shubham Singh, Ms. Rachna Ranjan, Ms. Sarita Kumari, Ritesh Kumar Gupta, T.V. Surendranath, Atul Arvind, Sudip Patra, Ms. Kamlika Samadder, Arvind Kumar Tomar, Mukesh Kumar Maroria, Ms. Ruchi Kohli, Ms. Shagun Thakur, Ms. Ruchi Gaur Narula, Santosh Kumar, Navanjay Mahapatra, Apoorv Kurup, Ms. Nidhi Mittal, Ms. Gauri Goburdhun, Ms. Aanchal, Akhil Hasija, Gurjas Singh Narula, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Vikram Nath, J.

1. Leave granted.

2. This appeal assails the correctness of the order dated 10.05.2023 passed by the Division Bench of High Court of Chhattisgarh in W.P.Cr. No.197 of 2016 titled as Mandakini Diwan & Anr. vs. High Court of Chhattisgarh and seven others whereby the writ petition was dismissed with liberty to the petitioners therein (appellants herein) to avail the appropriate remedy before the appropriate forum.

3. Before referring to the facts we wish to make it clear that we are not entering into the detailed facts and submissions as advanced by the parties because any observation made by us on such submissions and detailed facts may result into influencing a fair investigation which we are inclined to direct in the present case by an independent agency.

4. The facts giving rise to the present appeal are:

   4.1. The respondent no. 7 had applied in the Higher Judicial Services of the State of Chhattisgarh against the advertisement issued in the year 2012. Pursuant to which he was selected and appointed in June 2013 as Addl.District Judge, Geedam at Dantewada. Respondent no. 7 got married to the deceased on 15.02.2014. However, they had known each other since 2010. The deceased was working as Asstt. District Prosecution Officer. At the relevant time they were posted at Dantewada.

   4.2. On 12.05.2016, in the evening at about 10:30 PM the appellants who are mother and the brother of the deceased received a phone call that Ms. Ranjana Diwan had committed suicide. Immediately they rushed from Bilaspur to Dantewada and tried to figure out as to what had happened. According to the appellants they were not provided with the post mortem report.

   4.3. It is the case of the appellants that there was something fishy in the death of Ms. Ranjana Diwan and it was not a case of simple suicide. It was also their apprehension that respondent no. 7 having sufficient influence being a senior judicial officer had managed the post mortem in which the cause of death was shown to be suicide by hanging.

4.4. The post-mortem report further indicated that the deceased had six ante-mortem injuries on her body. The information of suicide was given to the Dantewada Police Station, a Merg was registered under section 174 of Code of Criminal Procedure, 1973.[1] On 13.05.2016, the police made recoveries, the copy of which is filed as Annexure -P/2. The post-mortem was conducted on 13.05.2016 at 06:30 PM. The cause of death was reported to be asphyxia due to hanging. Further, six ante-mortem injuries were reported which are as follows:

"Injuries:

1) A contusion present over back of right hand ~ 3.5 cm x 3 cm bluish.

2) A contusion present over left ring finger over proximal phalanx palmer aspect, ~ 1.5 cm x 1 cm, bluish.

3) A contusion present over right leg~ 3 cm below knee~ 4 cm x 3.5 cm, bluish.

4) A contusion present over the left foot dorsal aspect ~ 1.5 cm x 1.5 cm bluish.

5) A contusion present over left thigh ~ 17 cm below groin, ~ 4 cm x 4.3 cm bluish.

6) Ligature mark: A brown parchment like hard ligature mark present over neck above the level of thyroid cartilage, obliquely extending upward toward chin, from behind, grooved at places. Maximum breadth ~ 4.5 cm on the backside. Peeling of skin evident in marks at places. Mark is situated 1.5 cm below tip of chin, 5.5 cm below tip of left mastoid, & 4 cm below tip of right mastoid, 10 cm below occiput. Mark is faint for ~3 cm on the right side. On dissection corresponding under the surface of skin is glistering white. Hyoid bone and thyroid cartilage intact.

   All the injuries are ante mortem and are of within 06 hours of death. Injury no. 6 is sufficient to cause instantaneous death in the ordinary course of nature.

   Metallic rings in each 2nd toe."

1 CrPC

4.5. According to the appellants, the Police filed the closure report treating it to be a case of suicide. The appellants repeatedly continued to represent to the authorities for a fair investigation after registering First Information Report. All the complaints made by the appellants to the authorities did not result in the registering of FIR against respondent no. 7. All the complaints though were inquired into but were ultimately closed as a result of the influence exerted by the respondent no. 7. Till date, neither FIR has been registered on the several complaints made by the appellants nor a fair investigation has been carried out in order to find out the truth.

4.6. Left with no alternative, the appellants filed writ petition under Article 226 of the Constitution of India registered as W.P. Crl. No. 197 of 2016 praying for the following reliefs:

"10.1 That, this Hon'ble Court may be kind enough in issuing a writ in the nature of mandamus, certiorari of likewise any other appropriate writ commanding and directing the respondents to produce all the records related with the case of the petitioners for just and proper decision of this case.

10.2 That, this Hon'ble Court may be kind enough in issuing a writ in the nature of mandamus, certiorari or likewise any other appropriate writ, commanding and directing the respondent No. 8 to lodge a separate FIR or to take investigation of merg No. 24/16 of the Police Station, Geedam, District Dantewada and after due investigation the report may kindly be submitted before the Hon'ble Court.

10.3 That, this' Hon'ble Court may be kind enough to issuing a writ in the nature of mandamus, certiorari or likewise any other appropriate writ, commanding and directing respondents No. 2 to 6 to hand over all the records related with the case of death of deceased Ranjana Diwan, wife of Manvendra Singh, the respondent No. 7 for just and proper investigation, enquiry into the matter.

10.4 That, this Hon'ble Court may be kind enough in issuing a writ in the nature of mandamus, certiorari

or likewise any other appropriate writ, commanding and directing the respondent No. 1 to keep the respondent No. 7 out of the job till the final decision of the case so that there may be no influence In the investigation by the respondent No. 7.

10.5 Any other relief, which the Hon'ble Court deems fit and proper looking to the facts and circumstances of the case, may also be granted."

4.7. In the petition before the High Court, respondent no. 1 is the High Court of Chhattisgarh, respondent no. 2 is State of Chhattisgarh through Secretary, Department of Home, respondent no. 3 is the Director General of Police, respondent no. 4 is Inspector General of Police Headquarters, respondent no. 5 is Superintendent of Police, Dantewada, respondent no. 6 is Station House Officer, Police Station Geedam, District Dantewada, respondent no. 7 is the husband of the deceased and respondent no. 8 is the Central Bureau of Investigation.

4.8. The said petition remained pending for about seven years. By the impugned order the High Court has dismissed the said petition. According to the High Court the appellants had adequate statutory remedy available under section 156(3) of the Cr.P.C. by approaching the Magistrate concerned.

5. The submissions advanced by the counsel for the appellants is that it is true that appellant had a remedy of filing a complaint under section 156(3) Cr.P.C. but considering the fact that the respondent no. 7 is senior judicial officer and had already exercised his influence on the administration in ensuring that FIR is not registered and no free and fair investigation be carried out, they had little hope rather no hope of getting any justice from the Court of a Magistrate who would be an officer subordinate to respondent no. 7. It is for this reason that they had approached the High Court under Article 226 of the Constitution of India.

6. Before us, detailed arguments have been advanced by the appellants to show the high handedness of the respondent no. 7 in influencing the administration in not registering the FIR despite there being suspicious circumstances resulting in the death of daughter of the appellant no. 1 and sister of appellant no. 2, more particularly there

being no explanation for the six ante mortem injuries. It was therefore submitted that this Court may direct for an independent agency to investigate into the matter.

7. On the other hand, learned counsel appearing for State of Chhattisgarh submitted that detailed inquiry was carried out and statements of more than 50 witnesses were recorded; that every complaint filed by the appellant was enquired into at the highest level but when no evidence could be found against respondent no. 7, the complaints were closed. It is also his submission that the appellants are unnecessarily doubting the credibility of the investigating agency of the State of Chhattisgarh and it also amounts to putting a blame not only on the respondent no. 7 but also on the entire police machinery of the State of Chhattisgarh.

8. Learned counsel also referred to the details as to how the complaints have been dealt with. It was thus submitted that the appeal be dismissed and the appellants be left at liberty to approach the Magistrate under section 156(3) Cr.P.C.

9. Learned senior counsel appearing for the respondent no. 7 also had similar submissions as were made on behalf of the State of Chhattisgarh. In addition, it was submitted that respondent no. 7 being a judicial officer having a good reputation is being unnecessarily targeted by the appellants for ulterior motives. A very thorough and fair inquiry was carried out in which no complicity of the respondent no. 7 could be found.

10. It was further submitted that in all the enquiries made, no incriminating material could be collected against the respondent no. 7 and as such the complaints were rightly closed. By filing the writ petition and the present appeal the only attempt of the appellants is to somehow or the other not only tarnish the image of the respondent no. 7 but also cause unnecessary harassment and jeopardize his service. Further, a direction to appoint CBI to investigate is also not warranted in the present case and the appeal deserves to be dismissed.

11. Shri Tushar Mehta, learned Solicitor General appearing for the CBI submitted that whatever order the Court passes the same would be complied with. He also suggested that the Court may consider appointing a high-level Special Investigation Team or in the alternative may direct the CBI to investigate the matter as this will provide

credibility and instill confidence not only in the aggrieved party but also in the society at large.

12. Considering the fact that the respondent no. 7 is a senior judicial officer any doubt or apprehension in the minds of the appellants who have lost their family member may be dispelled by the investigation being carried out by CBI. This may result into doing complete justice and enforcing the fundamental right of getting a fair investigation.

13. In the case of **Awungshi Chirmayo** vs**. Government of NCT of Delhi**[2] this Court directed CBI to hold enquiry in the criminal matter related to murder of two cousins due to certain puzzling facts including inconclusive post mortem report. It held as follows:

"13. In a seminal judgment reported as State of West Bengal v. Committee for Protection of Democratic Rights, West Bengal (2010) 3 SCC 571, this Court has discussed in detail inter alia the circumstances under which the Constitutional Courts would be empowered to issue directions for CBI enquiry to be made. This Court noted that the power to transfer investigation should be used sparingly, however, it could be used for doing complete justice and ensuring there is no violation of fundamental rights. This is what the Court said in Para 70:

> "Insofar as the question of issuing a direction to CBI to conduct investigation in a case is concerned, although no inflexible guidelines can be laid down to decide whether or not such power should be exercised but time and again it has been reiterated that such an order is not to be passed as a matter of routine or merely because a party has levelled some allegations against the local police. This extraordinary power must be exercised sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility and instil confidence in investigations or where the incident may have national and international ramifications or where such an order may be necessary for doing

2 (2022) SCC Online SC 1452

complete justice and enforcing the fundamental rights…"

14. The powers of this Court for directing further investigation regardless of the stage of investigation are extremely wide. This can be done even if the chargesheet has been submitted by the prosecuting agency. In the case of Bharati Tamang v. Union of India (2013) 15 SCC 578, this Court allowed the Writ Petition filed by the widow of late Madan Tamang who was killed during a political clash and directed investigation by the CBI which would be monitored by the Joint Director, CBI. The following observations were made in Para 44:

"44. Whether it be due to political rivalry or personal vengeance or for that matter for any other motive a murder takes place, it is the responsibility of the police to come up to the expectation of the public at large and display that no stone will remain unturned to book the culprits and bring them for trial for being dealt with under the provisions of the criminal law of prosecution. Any slackness displayed in that process will not be in the interest of public at large and therefore as has been pointed out by this Court in the various decisions, which we have referred to in the earlier paragraphs, we find that it is our responsibility to ensure that the prosecution agency is reminded of its responsibility and duties in the discharge of its functions effectively and efficiently and ensure that the criminal prosecution is carried on effectively and the perpetrators of crime are duly punished by the appropriate court of law."

15. This Court has expressed its strong views about the need of Courts to be alive to genuine grievances brought before it by ordinary citizens as has been held in Zahira Habibulla H. Sheikh v. State of Gujarat (2004) 4 SCC 158.

16. It is to observe that unresolved crimes tend to erode public trust in institutions which have been established for maintaining law and order. Criminal investigation must be both fair and effective. We say nothing on the

> fairness of the investigation appears to us, but the fact that it has been ineffective is self evident. The kith and kin of the deceased who live far away in Manipur have a real logistical problem while approaching authorities in Delhi, yet they have their hope alive, and have shown trust and confidence in this system. We are therefore of the considered view that this case needs to be handed over to CBI, for a proper investigation and also to remove any doubts in the minds of the appellants, and to bring the real culprits to justice.
>
> 17. In view of the discussion made above, the order of the Delhi High Court dated 18.05.2018, dismissing the prayer of the present appellants to transfer the investigation to CBI is hereby set aside. The appeal is hereby allowed and we direct that CBI to hold enquiry in the matter. The case shall be transferred from SIT to the CBI. The SIT, which has so far conducted the investigation in the matter, will hand over all the relevant papers and documents to CBI for investigation. After a thorough investigation, CBI will submit its complete investigation report or charge sheet before the concerned court as expeditiously as possible.""

14. It is true that power to direct CBI to conduct investigation is to be exercised sparingly and such orders should not be passed in routine manner. In the present case, the aggrieved party has raised allegations of bias and undue influence on the police machinery of the State of Chhattisgarh. Coupled with the fact that the thorough, fair and independent investigation needs to be carried out to find out the truth about the whole incident and in particular about the ante mortem injuries. We are of the view that such a direction needs to be issued in the present case.

15. We accordingly allow this appeal, set aside the impugned order passed by the High Court and further direct the CBI-respondent no. 8 to carry out complete and fair investigation and proceed in accordance to law into the incident and that too expeditiously considering the fact that the incident is of 2016 and submit a report to this Court. If the CBI finds that an FIR needs to be registered, it may itself do so and proceed accordingly and bring such complaint to a logical conclusion. However, if the CBI comes to the conclusion that there

is no material which it could collect which is not sufficient in ordinary course to submit a chargesheet, it would close the proceedings. The State of Chhattisgarh is directed to extend all cooperation to the CBI in conducting the investigation and provide all necessary papers and other strategic support to the CBI as may be required.

16. We make it clear that we have not made any observation on merit. However, still we clarify that any observation made in this judgment will not influence the investigation by the CBI. The appeal is accordingly allowed.

Result of the case: Appeal Allowed.

†*Headnotes prepared by:* Nidhi Jain

[2024] 9 S.C.R. 97 : 2024 INSC 667

Dharmendra Sharma
v.
Agra Development Authority

(Civil Appeal Nos. 2809-2810 of 2024)

06 September 2024

[Vikram Nath* and Prasanna Bhalachandra Varale, JJ.]

Issue for Consideration

Whether the possession as offered by Agra Development Authority on 04.12.2014 should be taken as a valid offer of possession even if there was no completion certificate and whether the firefighting clearance certificate was available with the ADA or not. Absence of these documents, if vitiated the offer of possession made by the ADA.

Headnotes†

Consumer Protection – Deficiency in service – UP Apartment (Promotion of Construction, Ownership & Maintenance) Act, 2010 – s.4(5) – RERA Act, 2016 – s.19(10) – Offer of possession made without completion certificate and firefighting clearance certificate, if valid and lawful:

Held: No – Appellant consistently raised this issue asserting that a valid offer of possession cannot be made without these documents – s.4(5) of the UP Apartment (Promotion of Construction, Ownership & Maintenance) Act, 2010 and s.19(10) of the RERA Act, 2016 mandate that a developer must obtain these certificates before offering possession – Despite the appellant's repeated requests, ADA failed to produce these certificates, rendering its offer of possession incomplete and legally invalid – ADA's failure to provide the required certificates justifies the appellant's refusal to take possession – Thus, appellant entitled to additional compensation to compensate for the delay caused by ADA's breach of its statutory obligations – On facts, in view of the shortcomings on the part of both the appellant and the ADA, compensation provided to the appellant apart from what was awarded by NCDRC – Therefore, apart from the refund of the entire amount deposited by the appellant @ 9% interest p.a. from 11.07.2020 (the date of the complaint) till the date of refund, ADA to pay an additional compensation amount of

* Author

Rs. 15,00,000/- to the appellant – ADA also to return the non-judicial stamp worth Rs. 3,99,100/- back to the appellant. [Paras 20, 21]

Consumer Protection – Limitation Act, 1963 – ss.18, 19 – Complaint of the appellant, if was barred by limitation – Plea of the respondent-Agra Development Authority (ADA) that the complaint was filed by the appellant in 2020 after six years from the date of offering possession in 2014 and as such was barred by limitation:

Held: The complaint was not barred by limitation – The ongoing interactions between the parties, including ADA's acceptance of part payment in 2019 and the reminders sent, effectively extended the limitation period – NCDRC correctly applied ss.18 and 19 of the Limitation Act, 1963, which extend the limitation period where part payments or acknowledgments are made – Thus, cause of action continued to exist and the filing of the complaint in July 2020 was within the limitation period. [Paras 16, 17]

Consumer Protection Act, 1986 – Pecuniary jurisdiction – Value of the claim – Determination – Objection raised by the respondent-Agra Development Authority as regards the pecuniary jurisdiction of the NCDRC contending that as the amount deposited by the appellant was only Rs. 59,91,000/- i.e. less than Rs. 1 crore, the complaint ought to have been filed before the State Consumer Disputes Redressal Commission and the NCDRC would have no pecuniary jurisdiction to entertain the complaint with a value of less than Rs. 1 crore:

Held: No merit in this argument – In consumer disputes, the value of the claim is determined not just by the amount deposited but by the aggregate relief sought, which includes compensation and other claims – Claim made by the appellant was not limited to the deposit amount alone but also included compensation for mental agony, harassment, and loss of income, which brought the total claim well above Rs. 1 crore – NCDRC rightly held that it had the requisite pecuniary jurisdiction to entertain the complaint. [Para 19]

Case Law Cited

Debashis Sinha & Ors. v. R.N.R. Enterprise **(2023) 3 SCC 195;** *Pioneer Urban Land and Infrastructure Limited v. Union of India & Ors.* **[2019] 10 SCR 381 : (2019) 8 SCC 416;** *Treaty Construction v. Ruby Tower Cooperative Housing Society Ltd* **[2019] 9 SCR 606 : (2019) 8 SCC 157 – relied on.**

Ghaziabad Development Authority v. Balbir Singh [2004] 3 SCR 68 : **(2004) 5 SCC 65;** *Rishab Singh Chandel & Anr. v. Parsvnath Developers Ltd. & Anr.* **Civil Appeal No.3053 of 2023;** *Lucknow Development Authority v. M.K.Gupta* [1993] Suppl. 3 SCR 615 : **(1994) 1 SCC 243;** *Marvel Omega Builders Pvt. Ltd. v. Shri Hari Gokhale & Ors.* [2019] 10 SCR 375 : **(2020) 16 SCC 226;** *Experion Developers Pvt. Ltd. v. Sushma Ashok Shierror* [2022] 5 SCR 590 : **(2022) 6 SCALE 16 – referred to.**

List of Acts

Consumer Protection Act, 1986; UP Apartment (Promotion of Construction, Ownership & Maintenance) Act, 2010; RERA Act, 2016; Limitation Act, 1963; Supreme Court Rules.

List of Keywords

Agra Development Authority; Offer of possession; Completion certificate; Firefighting clearance certificate; Deficiency in service; Refusal to take possession; Complaint not barred by limitation; Additional compensation; Limitation period extended; Part payments or acknowledgments; Cause of action continued to exist; Pecuniary jurisdiction.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 2809-2810 of 2024

From the Judgment and Order dated 15.09.2023 and 30.10.2023 of the National Consumers Disputes Redressal Commission, New Delhi in CC No.600 of 2020 and RA No.335 of 2023 respectively

Appearances for Parties

Vipin Sanghi, Sr. Adv., Om Prakash, Vikas Singh Jangra, Sudhir Kulshreshtha, Advs. for the appearing parties.

Judgment / Order of the Supreme Court

Judgment

Vikram Nath, J.

1. Civil Appeals 2809-2810 of 2024, by the appellant filed under Section 23 of the Consumer Protection Act, 1986,[1] read with Order XXIV of

1 CPA, 1986

the Supreme Court Rules, assail the correctness of the final judgment and order dated 15.09.2023 passed by the National Consumer Disputes Redressal Commission[2] in CC No.600/2020 as also the order dated 30th October, 2023 passed on the Review Application No.335/2023. By the aforesaid orders, the NCDRC allowed the CC No.600/2020 partly to the extent that it directed refund of the entire amount deposited by the Complainant (appellant) (except non-judicial stamp paper worth Rs. 3,99,100/- deposited on 15.02.2014) along with interest @9% p.a. from the date of the complaint i.e. 11.07.2020 till the date of refund within a period of two months from the date of the order.

2. Further, Civil Appeal No. 6344 of 2024 has been filed by the Agra Development Authority[3] assailing the correctness of the same judgment of the NCDRC dated 15.09.2023 partly allowing the complaint.

3. The appellant-Dharmendra Sharma had applied for allotment and purchase of an apartment (residential flat) in the category of Super Deluxe 2 on 28.07.2011 and had deposited the booking amount of Rs. 4,60,000/- along with the application. This application was submitted pursuant to an advertisement issued by the ADA for a group housing project lodged in the name of ADA Heights, Taj Nagari, Phase II at Fatehabad Road, near Taj Express Way, Ring Road, Agra. The allotment was done by lottery system on 29.08.2011 whereby the appellant was allotted Flat No.DT-1/1204 which was communicated vide letter dated 19.09.2011, according to which the tentative price of the apartment was Rs. 56,54,000/- which could be deposited in 24 equal quarterly instalments or could be paid in full with certain other relaxations. The appellant, opted for full payment and accordingly vide letter dated 21.10.2011, attached two cheques, one by the appellant of Rs. 6.94 lakhs and the other of Rs. 45 lakhs issued by the LIC Housing Finance Limited. Possession was to be given within six months under the scheme.

4. Upon completion of six months, the appellant requested for possession vide communication dated 03.04.2012. Apparently, the construction was not completed and, in any case, not ready for

2 NCDRC

3 ADA

delivery of possession, as such no possession was delivered even after six months. The appellant thereafter received a communication dated 04.02.2014 offering possession subject to further payment of Rs. 3,43,178/- along with non-judicial stamp paper for execution of the deed amounting to Rs. 3,99,100/-. The demand so raised was under the following three heads:

i) Rs. 84,300/- for solar system;

ii) Rs. 46,878/- as leased premium; and

iii) Rs. 2,12,000/- for covered parking area.

5. On receipt of the said letter, the appellant visited the site as also the office of ADA on 15.02.2014. He deposited the non-judicial stamp papers as required of Rs. 3,99,100/-. But after inspection of the site, he found various deficiencies in the construction which were reported to the Assistant Engineer of the ADA with the request that once the deficiencies are removed, he may be communicated for taking over possession. ADA sent reminders dated 22.09.2014 and 20/21.11.2014 for depositing the balance amount of Rs. 3,82,748/-. The appellant, on the other hand, was demanding for completion certificate. There is a further communication by the ADA dated 17.01.2018 demanding an amount of Rs. 6,11,575/- and for taking possession after depositing the same and getting the deed executed. On the other hand, the appellant, vide communication dated 02.04.2018, requested for waiver of interest on the balance amount and also sought confirmation whether the flat was ready for physical possession.

6. It was thereafter that the appellant along with letter dated 04.06.2019, sent a cheque dated 01.06.2019 for Rs. 3,43,178/- and again requested for confirmation of the date of possession. The ADA encashed the said cheque but did not inform any date for handing over possession. It looks like the appellant got the loan transferred to the State Bank of India[4] whereupon the SBI is writing letters demanding the title deed of the apartment vide communications dated 14.03.2017, 25.06.2019 and 19.10.2019. These communications further mention that in case the title deed is not deposited, then penal interest @2% p.a. would be levied. The appellant again reiterated his earlier request for waiver of interest on balance amount vide reminder dated 18.09.2019 and

4 SBI

again requested for confirmation whether the flat was ready for physical possession. The appellant again visited the office of ADA on 23.11.2019 and requested for completion certificate and firefighting clearance certificate, which were not provided. He again visited the site and found that the apartment was not in a habitable condition. The appellant thus proceeded to institute a complaint before the NCDRC on 10.07.2020 alleging deficiency in service as also unfair trade practice on the part of ADA.

7. The ADA filed its reply in which the amounts as deposited by the appellant, as noted above, were admitted. Further, according to ADA, the construction was ready and possession was offered on 04.02.2014 along with demand of Rs. 3,43,178/- which the appellant did not pay and continued to claim for waiver of interest and had ultimately paid the said amount on 04.06.2019 vide cheque dated 01.06.2019. According to ADA, after adjustment there was still an outstanding amount of Rs. 4,71,159/- as on 05.02.2021. It was also stated in the written statement that in 2011, at the time of allotment, the tentative price was Rs. 56,54,000/- and under Clause 45 of the Registration and Allotment Rules, it was clearly mentioned that the price could vary upto 10%. Further, according to ADA, the demand raised by the letter dated 04.02.2014 of solar system, lease premium and car parking were apart from the cost of the flat and not due to increased cost. The appellant had unnecessarily delayed payment of the demand raised on 04.02.2014. It was also stated in the written statement that out of the 582 apartments built under the project in question, except for 20 allottees, all other allottees had taken possession. The ADA further pleaded that the complaint was barred by time and secondly, that as the total payment made by the appellant was Rs. 59,97,178/-, as such it would not fall within the pecuniary limit of the NCDRC, and therefore, the complaint was liable to be dismissed for the above two reasons also.

8. The parties led their evidence. The NCDRC rejected technical objections raised by the ADA regarding limitation as also the pecuniary jurisdiction. In so far as the limitation is concerned, the NCDRC held that as subsequent demand and reminders were sent by the ADA and the ADA even accepted the cheque of Rs. 3,43,178/- in 2019, it was not open for the ADA to raise the plea of limitation. In so far as the pecuniary jurisdiction is concerned, the NCDRC held that the claim was of more than Rs. 2 crores as such the said

objection was also not sustainable. The NCDRC, however, held that the additional demand made by the ADA vide communication dated 04.02.2014 although was other than additional cost of 10% which was permissible but, in any case, it was within the 10% admissible clause, as such could not be held to be illegal. The NCDRC also held that if the possession was delayed beyond two years, the appellant would be entitled for a refund but in the present case, Clause 27 of the Registration and Allotment Rules would not be applicable. The NCDRC further held that although the appellant had deposited the non-judicial stamps worth Rs. 3,99,100/- on 15.02.2014 but he continued to delay payment of additional demand of Rs. 3,43,178/- and was continuously requesting for waiver of interest resulting into the presumption that he was avoiding payment of the balance amount. On such finding the NCDRC denied to grant interest from the date of deposit but made it applicable from the date of the filing of the complaint. In so far as the deficiency in construction was concerned, the NCDRC found that only bald allegations have been made by the appellant and he never made any effort to get a report from the Commissioner and allowed the apartment in question to remain locked for six years.

9. After considering the pleadings and evidence on record and in view of the above findings, the complaint was partly allowed by the NCDRC on 15.09.2023.

10. The appellant preferred a Review Application which was dismissed by the NCDRC by its order dated 30th October, 2023. In the Review Application also, the NCDRC reiterated that the review was liable to be rejected as while offering possession, the ADA vide letter dated 04.12.2014 had made a further demand which amount was not deposited within the time and it was only deposited in 2019 and that too without interest and the complaint was made after six years and, therefore, the appellant would not be entitled to interest from the date of deposit.

11. In the two appeals filed by the appellant, the relief claimed is to the extent that the payment of interest be awarded from the date of deposit while refunding the same and not from the date of the complaint. Whereas in the appeal filed by the ADA, it is submitted that in view of the fact that the petition had been filed after six years from the date of offering possession, as such it was barred by limitation and also as the amount deposited was only Rs. 59,91,000/- i.e. less

than Rs. 1 crore, the complaint ought to have been filed before the State Consumer Disputes Redressal Commission and the NCDRC would have no pecuniary jurisdiction to entertain the complaint with a value of less than Rs. 1 crore.

12. We have heard Shri Vipin Sanghi, learned senior counsel appearing for the appellant and Shri Sudhir Kulshreshtha, learned counsel for the ADA in all the three appeals.

13. The facts as recorded above are not disputed. Even the NCDRC did not find any contradiction in the factual aspect. The only issue is as to whether the possession as offered on 04.12.2014 should be taken as a valid offer of possession even if there was no completion certificate and also whether the firefighting clearance certificate was available with the ADA or not. Despite specific requests and demands by the appellant for providing the completion certificate and firefighting clearance, the ADA failed to produce the same. Senior Counsel for the appellant has relied upon the following judgments in support of his submission that offer for possession would be invalid where the completion certificate and firefighting clearance certificate have not been obtained by the developer i.e. ADA:

(a) **Debashis Sinha & Ors.** vs. **R.N.R. Enterprise**[5]

(b) **Pioneer Urban Land and Infrastructure Limited** vs. **Union of India & Ors.**[6]

(c) **Treaty Construction** vs. **Ruby Tower Cooperative Housing Society Ltd.**[7]

It is then submitted that even before the NCDRC the completion certificate and the firefighting clearance certificate could not be produced by the respondent -ADA.

14. It is also submitted on behalf of the appellant that under the provisions of RERA Act, 2016 as also the UP (Promotion of Apartment and Ownership and Maintenance) Act, 2010 offer of possession would be valid only after a developer obtains the completion certificate, which had not been done so far by the developer ADA in the present case. On behalf of the appellant, it is also argued that the demand

5 (2023) 3 SCC 195

6 [2019] 10 SCR 381 : (2019) 8 SCC 416

7 [2019] 9 SCR 606 : (2019) 8 SCC 157

of Rs. 3,43,178/- along with alleged offer of possession dated 14.02.2014 was totally unjustified and illegal. It was also submitted that the appellant having deposited the amount of approximately Rs. 60 lakhs and that too after taking loan from financial institutions, cannot be deprived of counting the interest from the date of deposit rather than from the date of filing of the complaint. In support of this submission, reliance has been placed upon the following judgments:

(a) **Ghaziabad Development Authority** vs. **Balbir Singh**[8]

(b) **Rishab Singh Chandel & Anr.** vs. **Parsvnath Developers Ltd. & Anr.**[9]

(c) **Lucknow Development Authority** vs. **M.K.Gupta**[10]

(d) **Marvel Omega Builders Pvt. Ltd.** vs. **Shri Hari Gokhale & Ors.**[11]

(e) **Experion Developers Pvt. Ltd.** vs. **Sushma Ashok Shierror**[12]

15. On such submissions it was prayed by the appellant that his appeals be allowed and the interest be awarded from the date of deposit and to that extent the impugned judgment and order of NCDRC be modified. Further that the appeal filed by the respondent be dismissed.

16. Having considered the submissions of both parties, we are of the opinion that both have contributed to delays at various stages. The respondent ADA raised an objection that the complaint was barred by limitation, claiming that the complaint was filed on 10.07.2020, well beyond the statutory limitation period prescribed under Section 24A of the Consumer Protection Act, 1986, which mandates that a complaint must be filed within two years from the date on which the cause of action arises. ADA argued that the offer of possession made on 04.02.2014 should have triggered the limitation period. However, the NCDRC, in its impugned order, rightly rejected this argument by considering that the respondent ADA issued reminders to the appellant on 22.09.2014, 21.11.2014, and 17.01.2018. Additionally, ADA accepted the appellant's payment of Rs. 3,43,178/- on 20.06.2019

8 [2004] 3 SCR 68 : (2004) 5 SCC 65

9 Civil Appeal No.3053 of 2023

10 [1993] Suppl. 3 SCR 615 : (1994) 1 SCC 243

11 [2019] 10 SCR 375 : (2020) 16 SCC 226

12 (2022) 6 SCALE 16

without any reservations. Given these facts, the NCDRC correctly applied Sections 18 and 19 of the Limitation Act, 1963, which extend the limitation period where part payments or acknowledgments are made. Consequently, the cause of action continued to exist, and the filing of the complaint in July 2020 is within the limitation period.

17. This Court concurs with the NCDRC's reasoning and affirms that the complaint was not barred by limitation. The ongoing interactions between the parties, including ADA's acceptance of part payment in 2019 and the reminders sent, effectively extended the limitation period under established legal principles. However, while the complaint is within limitation, we also recognize that the appellant delayed making the balance payment of Rs. 3,43,178/- for over five years, from 2014 to 2019. This delay was largely due to the appellant's requests for a waiver of interest, which, while understandable, contributed significantly to the delay in finalizing the transaction.

18. In light of these circumstances, while the appellant is entitled to a refund along with interest, it would be inequitable to award interest from the date of the original payment in 2011 given the appellant's role in the delay.

19. The respondent ADA has also challenged the pecuniary jurisdiction of the NCDRC, contending that the total payment made by the appellant amounted to Rs. 59,97,178/-, which was less than Rs. 1 crore. As such, ADA argued that the complaint should have been filed before the State Consumer Disputes Redressal Commission and not the NCDRC, which has jurisdiction over matters exceeding Rs. 1 crore as per Section 21(a)(i) of the Consumer Protection Act, 1986. This Court finds no merit in ADA's argument. The NCDRC, in its impugned order, correctly observed that the claim made by the appellant was not limited to the deposit amount alone but also included compensation for mental agony, harassment, and loss of income, which brought the total claim well above Rs. 1 crore. In consumer disputes, the value of the claim is determined not just by the amount deposited but by the aggregate relief sought, which includes compensation and other claims. Therefore, the NCDRC rightly held that it had the requisite pecuniary jurisdiction to entertain the complaint, and this Court affirms that finding.

20. The appellant's key contention regarding the absence of the completion certificate and firefighting clearance certificate merits

serious consideration. The appellant consistently raised this issue, asserting that a valid offer of possession cannot be made without these documents. Section 4(5) of the UP Apartment (Promotion of Construction, Ownership & Maintenance) Act, 2010 and Section 19(10) of the RERA Act, 2016 mandate that a developer must obtain these certificates before offering possession. Despite the appellant's repeated requests, ADA failed to produce these certificates, rendering its offer of possession incomplete and legally invalid.

21. The appellant has rightly cited relevant precedents to bolster this argument. In **Debashis Sinha** v. **R.N.R. Enterprise (2023**),[13] this Court held that possession offered without the requisite completion certificate is illegal, and a purchaser cannot be compelled to take possession in such circumstances. The Court in that case held:

> *"20. Finally, we cannot resist but comment on the perfunctory approach of Ncdrc while dealing with the appellants' contention that it was the duty of the respondents to apply for and obtain the completion certificate from KMC and that the respondents ought to have been directed to act in accordance with law. The observation made by Ncdrc of the respondents having successfully argued that it was not their fault, that no completion certificate of the project could be obtained, is clearly contrary to the statutory provisions.*
>
> *21. Sub-section (2) of Section 403 of the KMC Act was referred to by Ncdrc in the impugned order [Debashis Sinha v. R.N.R. Enterprise, 2020 SCC OnLine NCDRC 429] . Sub-section (1) thereof, which finds no reference therein, requires every person giving notice under Section 393 or Section 394 or every owner of a building or a work to which the notice relates to send or cause to be delivered or sent to the Municipal Commissioner a notice in writing of completion of erection of building or execution of work within one month of such completion/erection, accompanied by a certificate in the form specified in the rules made in this behalf as well as to give to the Municipal Commissioner all necessary facilities for inspection of such building or work.*

13 (2023) 3 SCC 195

> *22. Section 393 mandates every person, who intends to erect a building, to apply for sanction by giving notice in writing of his intention to the Municipal Commissioner in such form and containing such information as may be prescribed together with such documents and plans. Similarly, Section 394 also mandates every person who intends to execute any of the works specified in clause (b) to clause (m) of sub-section (1) of Section 390 to apply for sanction by giving notice in writing of his intention to the Municipal Commissioner in such form and containing such information as may be prescribed.*
>
> *23. It is, therefore, evident on a conjoint reading of Sections 403, 390 and 394 of the KMC Act that it is the obligation of the person intending to erect a building or to execute works to apply for completion certificate in terms of the Rules framed thereunder. It is no part of the flat owner's duty to apply for a completion certificate. When the respondents had applied for permission/sanction to erect, the Calcutta Municipal Corporation Buildings Rules, 1990 (hereafter "the 1990 Rules" for short) were in force. Rule 26 of the 1990 Rules happens to be the relevant Rule. In terms of sub-rules (1) to (3) of Rule 26 thereof, the obligation as cast was required to be discharged by the respondents. Evidently, the respondents observed the statutory provisions in the breach."*

This position is supported by other decisions, including **Pioneer Urban Land and Infrastructure Ltd.** (supra) and **Treaty Construction** (supra), where the absence of these certificates was found to constitute a deficiency in service. In the present case, the ADA's failure to provide the required certificates justifies the appellant's refusal to take possession. This strengthens the appellant's claim for additional compensation to compensate for the delay caused by ADA's breach of its statutory obligations.

22. This Court is of the considered view that both parties have exhibited lapses in their respective obligations. On the one hand, the appellant, despite having paid the tentative price of Rs. 56,54,000/- in 2012, failed to remit the additional amount of Rs. 3,43,178/-, as demanded by the ADA, even after being repeatedly reminded. Instead, the appellant persistently sought a waiver of the penal interest on the

delayed payment, eventually settling the amount only on 04.06.2019, a significant delay that cannot be overlooked and that too without the interest component which had further accrued over a period of about five years. On the other hand, the ADA, despite making an offer of possession in 2014, did not fulfil its statutory obligations by providing the requisite completion certificate and firefighting clearance certificate, both of which are essential for a valid and lawful offer of possession. The absence of these documents, which were also not furnished before the NCDRC, unquestionably vitiates the offer of possession made by the ADA.

23. In light of the aforementioned observations and taking into account the shortcomings on the part of both the appellant and the ADA, this Court deems it appropriate to provide a compensation of Rs. 15,00,000/- (Fifteen Lakhs only) apart from what was awarded by the NCDRC. Therefore, apart from the refund of the entire amount deposited by the appellant @ 9% interest per annum from 11.07.2020 till the date of refund, the ADA is directed to pay an additional amount of Rs. 15,00,000/- (Fifteen Lakhs only) to the appellant. The entire amount should be rendered to the appellant within three months of this order. We also order the ADA to return the non-judicial stamp worth Rs. 3,99,100/- back to the appellant.

24. Furthermore, we refrain from imposing any exemplary costs on either party, recognizing that both have contributed to the situation at hand. It is also to be noted that the ADA, being a civic body tasked with serving the public and operating on a non-profit basis, should not be unduly penalized in a manner that could impede its functioning.

25. The Civil Appeals 2809-2810 of 2024 are disposed of accordingly.

26. The appeal filed by the ADA i.e. Civil Appeal No. 6344 of 2024 stands dismissed, as its primary arguments regarding both limitation and pecuniary jurisdiction are found to be without merit.

Result of the case: Civil Appeal Nos. 2809-2810 disposed of;
Civil Appeal No. 6344 of 2024 dismissed.

[†]*Headnotes prepared by:* Divya Pandey

[2024] 9 S.C.R. 110 : 2024 INSC 668

Abhishek Banerjee & Anr.
v.
Directorate of Enforcement

(Criminal Appeal Nos. 2221-2222 of 2023)

09 September 2024

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

Issue for Consideration

Matter pertains to seeking quashing of the summons issued to the appellants by the Enforcement Directorate, seeking their personal appearance in New Delhi with the documents sought for, pertaining to the FIR registered in respect of alleged illegal excavation and theft of Coal, against the accused.

Headnotes†

Prevention of Money Laundering Act, 2002 – s. 50 – Power of authorities regarding summons, production of documents and to give evidence – Registration of FIR in respect of alleged illegal excavation and theft of Coal in leasehold areas of Coalfields – Issuance of repeated summons to the appellants u/s. 50 by the Enforcement Directorate seeking their personal appearance in New Delhi with the documents sought for, however, they failed to remain present, though appellant no. 1 appeared once – Meanwhile, complaint filed by the ED against appellant no. 2 for non-compliance of summons – Writ Petition by the appellants seeking quashing of the summons issued to them by the ED and seeking further direction against the ED not to issue any summons to the appellants for their appearance in New Delhi, rather than their hometown-Kolkata – Also miscellaneous case by appellant no 2 seeking quashing of the complaint and the order taking cognizance of the complaint, as also the summoning order – Dismissal of the writ petitions and the miscellaneous case – Challenge to:

Held: Present ECIR is recorded at the Headquaters Investigation Unit, which is not restricted to any territorial jurisdiction – Further, as per the specific case of the ED in the complaint, filed against the accused persons before the Special Court, PMLA New Delhi, Rs.168 Crores were allegedly received by the Inspector from the

* Author

co-accused to be delivered to his political bosses, and the said Rs. 168 Crores were transferred through vouchers to Delhi and Overseas, which clearly established adequate nexus of the offence and the offenders with the territory of Delhi – Thus, no illegality in the summons issued by the ED summoning the appellants to its Office at Delhi, which also has the territorial jurisdiction, a part of the offence having been allegedly committed by the accused persons as alleged in the complaint – Also appellant No. 1 being a Member of Parliament has also an official residence at Delhi – In view thereof, no substance in the challenge made by the appellants to the Summons issued to the appellants u/s. 50 – Furthermore, though the appellant No. 2 before the High Court had challenged the order taking cognizance of the complaint and the order summoning her before the Court, she did not even bother to produce the said Orders before this Court – Since the said complaint is pending before the Court of Chief Judicial Magistrate, no opinion/ expressed on the merits of the said complaint – No illegality found in the said orders passed by the concerned court and that the said complaint to be proceeded further by the said court in accordance with law. [Paras 20-22]

Prevention of Money Laundering Act, 2002 – Object and scope of:

Held: Provisions of PMLA are not only to investigate into the offence of money laundering but more importantly to prevent money laundering and to provide for confiscation of property derived from or involved in money laundering and the matters connected therewith and incidental thereto – PMLA is a self-contained Code and the dispensations envisaged thereunder, must prevail in terms of s. 71 thereof, which predicates that the provisions of the Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force, which includes provisions of the Cr.P.C – s. 65 predicates that the provisions of the Cr.P.C. shall apply insofar as they are not inconsistent with the provisions of the PMLA in respect of arrest, search and seizure, attachment, confiscation, investigation, prosecution and all other proceedings under the Act – Thus, having regard to the conjoint reading of s. 71 and s. 65 of the PMLA as also s. 4(2) and s. 5 CrPC, the provisions of PMLA will have the effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force, including the provisions of the Cr.P.C. [Para 13]

Prevention of Money Laundering Act, 2002 – Power to investigate under – Application of the provisions of Chapter XII CrPC:

Held: Dispensation regarding Prevention of Money Laundering, Attachment of Proceeds of Crime, and Inquiry/Investigation of offence of Money Laundering including issuing summons, recording of statements, calling upon persons for production of documents etc. upto filing of the Complaint in respect of offence u/s. 3 of PMLA is fully governed by the provisions of the said Act itself – Jurisdictional police who is governed by the regime of Chapter XII CrPC, cannot register the offence of money laundering, nor can investigate into it, in view of the special procedure prescribed under the PMLA with regard to the registration of offence and inquiry/investigation thereof, and that the special procedure must prevail in terms of s. 71 PMLA – Submission that the sweep of s. 160 Cr.P.C would extend to summoning any person irrespective of whether that person is an accused of that offence or a mere witness, cannot be accepted since the provisions of Chapter XII CrPC (under which s. 160 falls) do not apply in all respects to deal with information derived relating to the commission of money laundering offence much less investigation thereof. [Paras 14, 15]

Prevention of Money Laundering Act, 2002 – s. 50 – Power of authorities regarding summons, production of documents and to give evidence – Code of Criminal Procedure, 1973 – s.160/161 – Police officer's power to require attendance of witnesses and examination of witnesses by police – Glaring inconsistencies between s. 50 PMLA and s. 160/161 Cr.P.C:

Held: Apart from the fact that s. 50 is a gender neutral, as it does not make any distinction between a man and a woman, there are glaring inconsistencies between the provisions contained in s. 50 PMLA and s.160/161 Cr.P.C – Chapter XII Cr.P.C pertains to the "Information to the Police and their Powers to Investigate" wherein s.160 empowers the Police Officer making an investigation under the said Chapter to require any person to attend within the limits of his own or adjoining station who, from the information given or otherwise appears to be acquainted with the facts and circumstances of the case – Whereas, the process envisaged by s. 50 PMLA is in the nature of an inquiry against the proceeds of crime and is not "Investigation" in strict sense of the term for initiating prosecution; and the authorities referred to in s. 48 PMLA are not the Police Officers – Statements recorded by the

authorities u/s. 50 PMLA are not hit by Art. 20(3) or Art. 21 of the Constitution, rather such statements recorded by the authority in the course of inquiry are deemed to be the Judicial proceedings in terms of s. 50(4), and are admissible in evidence, whereas the statements made by any person to a Police Officer in the course of an investigation under Chapter XII CrPC could not be used for any purpose, except for the purpose stated in the proviso to s. 162 CrPC – In view of such glaring inconsistencies between s. 50 PMLA and s. 160/161 Cr.P.C, the provisions of s. 50 PMLA would prevail in terms of s. 71 read with s. 65 thereof. [Para 16]

Prevention of Money Laundering Act, 2002 – s. 50 – Power of authorities regarding summons, production of documents and to give evidence – Procedure prescribed u/r. 11 of the Rules, 2005 – Following of, by the Summoning Officer – Requirement:

Held: R. 11 of the Rules 2005, requires the Summoning Officer to follow the procedure as prescribed therein, i.e., to issue Summons in Form V appended to the said Rules – Prescribed Form V requires Summoning Officer to mention not only the Name, Designation and Address of the Summoning Officer but also the details of the persons summoned as also the documents sought therein – Foot note of Form V also mentions that the proceedings shall be deemed to be judicial proceedings, and if the person summoned fails to give evidence as mentioned in the Schedule, he would be liable to penal proceedings under the Act – Thus, there being specific procedure prescribed under the Statutory Rules of 2005 for summoning the person under sub-sections (2) and (3) of s. 50 of the Act, the same would prevail over any other procedure prescribed under the Code, particularly the procedure contemplated in s. 160/161 CrPC, as also the procedure for production of documents contemplated in s. 91 of the Code, in view of the overriding effect given to the PMLA over the other Acts including the Cr.P.C. u/s. 71 r/w s. 65 of the PMLA – Prevention of Money-Laundering (Forms, Search and Seizure or Freezing and the Manner of Forwarding the Reasons and Material to the Adjudicating Authority, Impounding and Custody of Records and the Period of Retention) Rules, 2005. [Para 17]

Prevention of Money Laundering Act, 2002 – s. 50 – Power of authorities regarding summons, production of documents and to give evidence – At the stage of issue of summons, protection u/Art. 20(3) of the Constitution, if can be claimed by the person:

Held: s. 50 enables the authorized Authority to issue summon to any person whose attendance he considers necessary for giving evidence or to produce any records during the course of the proceedings under the Act, and that the persons so summoned is bound to attend in person or through authorized agent, and to state truth upon the subject concerning which he is being examined or is expected to make statement and produce documents as may be required by virtue of sub-section (3) of s. 50 – At the stage of issue of summons, the person cannot claim protection u/Art. 20(3) of the Constitution, the same being not "testimonial compulsion" – At the stage of recording of statement of a person for the purpose of inquiring into the relevant facts in connection with the property being proceeds of crime, is not an investigation for prosecution as such – Summons can be issued even to witnesses in the inquiry so conducted by the authorized officers – Consequences of Art. 20(3) or s. 25 of the Evidence Act may come into play only if the involvement of such person is revealed and his or her statements is recorded after a formal arrest by the ED official. [Para 19]

Case Law Cited

Vijay Madanlal Choudhary and Others v. Union of India and Others [2022] 6 SCR 382 **: (2022) SCC OnLine SC 929 – relied on.**

Rana Ayyub v. Directorate of Enforcement [2023] 3 SCR 892 **: (2023) 4 SCC 357 – referred to**

List of Acts

Prevention of Money Laundering Act, 2002; Prevention of Money-Laundering (Forms, Search and Seizure or Freezing and the Manner of Forwarding the Reasons and Material to the Adjudicating Authority, Impounding and Custody of Records and the Period of Retention) Rules, 2005; Penal Code 1860; Prevention of Corruption Act, 1988; Code of Criminal Procedure, 1973; Constitution of India.

List of Keywords

Quashing of summons; Enforcement Directorate; Personal appearance; Illegal excavation and theft of Coal; Territorial jurisdiction; Offence of money laundering; Prevent money laundering; Confiscation of property; Dispensations; Arrest; Search and seizure; Attachment; Investigation; Attendance of witnesses; Examination of witnesses by police; Information to the Police and their Powers to Investigate; Judicial proceedings; Testimonial compulsion; Procedure established by law.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal Nos. 2221-2222 of 2023

From the Judgment and Order dated 11.03.2022 of the High Court of Delhi at New Delhi in WPCRL No. 1808 of 2021 and CRLMC No. 2442 of 2021

Appearances for Parties

Tushar Mehta, SG, Suryaprakash V. Raju, A.S.G., Kapil Sibal, Gopal Sankaranarayanan, Dr. Abhishek Manu Singhvi, Sr. Advs., Mukesh Kumar Maroria, Adit Pujari, Amit Bhandari, Ms. Aprajita Jamwal, Ms. Arshiya Ghose, Vishwajeet Singh Bhatti, Ms. Shubhangi Pandey, Udayaditya Banerjee, Zoheb Hussain, Annam Venkatesh, Guntur Pramod Kumar, A.K. Panda, Rajat Nair, Ms. Nisha Bagchi, Harish Pandey, Ms. Aakriti Mishra, Arvind Kumar Sharma, Sanchit Garga, Madhav Gupta, Shashwat Jaiswal, Ms. Astha Sharma, Nipun Saxena, Sanjeev Kaushik, Advs. for the appearing parties.

Judgment / Order of the Supreme Court

Judgment

Bela M. Trivedi, J.

1. Both these Appeals are arising out of the Common Impugned Order dated 11.03.2022 passed by the High Court of Delhi in W.P (Crl.) No. 1808 of 2021 and Crl. M.C. No. 2442 of 2021, filed by the Appellants (Original Petitioners), whereby the High Court has dismissed the same.

2. The Writ Petition (Crl.) No. 1808 of 2021 was filed by the Appellants-Abhishek Banerjee and Rujira Banerjee seeking quashing of the Summons dated 10.09.2021 issued to them by the Respondent – ED under Section 50 of the Prevention of Money Laundering Act, 2002 (hereinafter referred to as the "PMLA"), and seeking further direction against the Respondent not to issue any Summons under Section 50 of the said Act to the Appellants for their appearance in New Delhi, rather than their hometown/ place of domicile i.e. Kolkata. The Crl. M.C. No. 2442 of 2021 was filed by the Appellant - Rujira Banerjee seeking quashing of the Complaint dated 13.09.2021 filed by the respondent-ED against her for the offence under Section 174 of India Penal Code (IPC), and for quashing the Order dated 18.09.2021

passed by the Chief Metropolitan Magistrate (CMM), Patiala House, New Delhi taking cognizance of the complaint, as also the Order dated 30.09.2021 summoning her, passed by the said Court.

3. The facts in the nutshell are that an FIR/R.C. bearing No. RC0102020A0022 came to be registered by the CBI, ACB, Kolkata on 27.11.2020 for the offences under Section 120B and 409 of IPC and Section 13(2) r/w 13(1)(a) of the Prevention of Corruption Act, 1988 (hereinafter referred to as the "PC Act"), in respect of alleged illegal excavation and theft of Coal taking place in the leasehold areas of Eastern Coalfields Limited (ECL) by one Anup Majee *alias* Lala with the active connivance of certain employees of ECL. Based on the said FIR, on 28.11.2020, an ECIR bearing No. 17/HIU/2020 came to be registered by the Respondent at their Head Investigative Unit situated at New Delhi.

4. During the course of investigation of the FIR in respect of theft of Coal and illegal excavation being done by the criminal elements in the leasehold area of ECL, a large number of vehicles/ equipments used in the illegal coal mining and its transportation were seized. It was also found that the said case involved money laundering to the tune of Rs. 1300 Crores. According to the Respondent – ED one of the accused Vikas Mishra was arrested on 16.03.2021 and another accused Inspector Ashok Mishra of Bankura Police Station was arrested on 03.04.2021, who had become part of illegal Coal mafia and had helped in laundering several hundred crores of rupees. It was also found during the course of investigation that Inspector Ashok Kumar Mishra had allegedly received Rs. 168 crores in just 109 days from the co-accused Anup Majee, to be delivered to his political bosses including co-accused Vinay Mishra. The said Rs. 168 crores were allegedly transferred through vouchers to Delhi and Overseas.

5. On 22.07.2021, the Respondent issued Summons to the Appellant No. 1 under Section 50 of PMLA seeking his personal appearance on 03.08.2021 in New Delhi with the documents sought for. Again on 04.08.2021, another Summons were issued to the Appellant No. 1 seeking the same documents as sought in Summons dated 22.07.2021 for remaining present on 12.08.2021 in New Delhi. The Appellant No. 2 was also issued Summons on 04.08.2021 under Section 50 of PMLA for her personal appearance in New Delhi on 13.08.2021 along with the documents/records stated in the said

Summons. Both the Appellants did not remain present as directed and furnished their respective replies on 12.08.2021 seeking time to comply with the said Summons. The Respondent again issued Summons on 18.08.2021 requiring the Appellant No. 1 to remain present in New Delhi on 06.09.2021 and Appellant No. 2 to remain present in New Delhi on 01.09.2021. The Appellant No. 2 replied to the Summons dated 18.08.2021 requesting the Respondent to examine her at Kolkata as there was a functional office of the Respondent in Kolkata and the alleged cause of action had arisen in West Bengal. The Appellant No. 1 in due compliance to the Summons dated 18.08.2021 appeared before the Respondent – ED on 06.09.2021 at New Delhi, however he was again issued Summons on the same day seeking his personal appearance along with the documents in New Delhi on 08.09.2021. The Appellant No. 1 did not appear before the respondent however, submitted a reply on 08.09.2021 requesting for four weeks' time to collect and collate the documents sought. The Appellant No. 1 was further served with another Summons dated 10.09.2021 seeking his appearance in New Delhi on 21.09.2021. The said summons came to be challenged by the appellants by filing the W.P. (Crl.) No. 1808/2021 before the High Court.

6. On 13.09.2021, the Respondent filed a Complaint against the Appellant No. 2 in the Court of Chief Metropolitan Magistrate, Patiala House, New Delhi under Section 190 (1)(a) r/w Section 200 Cr.P.C. r/w Section 63(4) PMLA, alleging the commission of the offence under Section 174 of IPC for non-compliance of the Summons dated 04.08.2021 and 18.08.2021. The said Court vide the Order dated 18.09.2021 took cognizance of the impugned offence and issued Summons to the Appellant No. 2 for her personal appearance on 30.09.2021. The Appellant No. 2 on 30.09.2021 appeared virtually and sought exemption from personal appearance. The Learned CMM passed an Order allowing the exemption application for that day only, and directed the Appellant No. 2 to remain personally present before the Court on 12.10.2021. The said complaint filed by the respondent and the said orders passed by the CMM Court came to be challenged by the Appellant Rujira by filing the Crl. M.C No. 2442 of 2021 before the High Court.

7. As stated earlier, both the W.P. (Crl.) No. 1808/2021 and Crl. M.C. No. 2442/2021 came to be dismissed by the High Court vide the impugned order.

8. The Learned Senior Counsel Mr. Kapil Sibal, appearing for the Appellant No. 1 – Abhishek Banerjee made lengthy submissions, the crux of which may be stated as under: -

i. Section 50 of the PMLA merely indicates the substantive power of ED to summon but does not provide the procedure for exercise of such power.

ii. The procedure relating to territoriality of investigation, or power to summon sick, or infirm/ women/ children and record their statements has not been provided under Section 50 PMLA, as it is provided under Section 160 and 161 Cr.P.C.

iii. Power without guidance for manner in which it is to be exercised could not be said to be fair, just and reasonable procedure established by law under Article 21 of the Constitution.

iv. A combined reading of Section 4(2) Cr.P.C. and Section 65 PMLA would show that the application of the Code is not barred as long as the provisions of the Code are consistent with the PMLA.

v. The Judgment of this Court in ***Vijay Madanlal Choudhary and Others vs. Union of India and Others***[1] has not dealt with the issue of procedure for summoning under Section 50 of the PMLA.

vi. The Cr.P.C. provides that the existence of the territorial nexus to the commission of a crime is a jurisdictional threshold for the exercise of powers of investigation by a police officer. However, the Respondent – ED has not demonstrated as to how it could be prejudiced by calling the Appellant No. 1 to its office in Kolkata where the ED has the Zonal Office.

vii. The Department of Revenue, Ministry of Finance has issued administrative instructions consistent with Section 51 of PMLA that demarcate the specific territorial jurisdiction of various Zonal Offices of the ED. The said instructions must be strictly complied with by the ED in consonance with Article 21 of the Constitution of India.

viii. The Appellant No. 1 is a permanent resident of Kolkata and being Member of Parliament has a residence in Delhi, which however does not alter his permanent residence at Kolkata.

1 [2022] 6 SCR 382 : (2022) SCC OnLine SC 929

ix. Section 91 of Cr.P.C. only deals with summons for production of documents, whereas the summons issued to the Appellant No. 1 under PMLA are for personal appearance before the Respondent at New Delhi is nothing but an abuse of process of law.

9. In addition to the above submissions, Learned Senior Counsel Mr. Abhishek Manu Singhvi along with Learned Senior Counsel Mr. Gopal Sankaranarayanan appearing for the Appellant No. 2 broadly made following submissions: -

i. The Appellant No. 2 has been summoned to appear in New Delhi despite she being a home maker and a mother of two children. The ED has created Zonal Offices and has an office at Kolkata. Therefore, summoning the Appellant No. 2 in Delhi is illegal and reeks mala fide.

ii. The Appellant No. 2 is neither an accused in the predicate offence nor in the money laundering offence.

iii. Protection of woman provided under Section 160 of Cr.P.C would be applicable to the PMLA also.

iv. Section 65 of PMLA makes provisions of Cr.P.C. applicable in so far as they are not inconsistent with the provisions of PMLA with regard to arrest, search and seizure, attachment, confiscation, investigation, prosecution and all other proceedings under the said Act. Therefore, in the absence of any specific procedure for summoning of witnesses the Cr.P.C. will apply.

v. Article 21 of the Constitution provides that a person's life and liberty can be curtailed by State only in accordance with the procedure established by law, and therefore the procedure for Summons curtailing the right of the Appellant No. 2 to life and liberty must be just and reasonable.

10. The Learned Senior Counsel, Mr. S.V. Raju also made elaborate submissions on behalf of the Respondent – ED which may be summarized as under: -

i. Section 91 Cr.P.C. neither encompasses any territorial jurisdictional limit nor does it contain any proviso for women, minors or elderly akin to Section 160 Cr.P.C. A police officer has to resort to Section 91 Cr.P.C. to mandate the provision of any document. Hence, Section 91 Cr.P.C. cannot be equated with the powers under Section 50 of PMLA.

ii. Section 160 Cr.P.C. applies to a Police Officer who is making an investigation under Chapter XII of Cr.P.C., whereas the process envisaged by Section 50 of PMLA is in the nature of an inquiry and is not an Investigation in the strict sense of the term as held in case of ***Vijay Madanlal*** (supra).

iii. ED has the power to summon any person whose attendance is considered necessary whether to give evidence or to produce any record as contemplated in Section 50 of the PMLA. A statement made under Section 50 is admissible in evidence, whereas the statement made under Section 161 is inadmissible as provided under Section 162 Cr.P.C.

iv. There are stark inconsistencies between Section 50 PMLA and Section 160 Cr.P.C., and therefore Section 160 Cr.P.C would not apply to the proceedings under Section 50 of PMLA.

v. The procedure to exercise power under Section 50 PMLA is laid down in the Rules called the Prevention of Money Laundering (Forms, Search and Seizure or Freezing and the Manner of Forwarding the Reasons and Material to the Adjudicating Authority, Impounding and Custody of Records and the Period of Retention) Rules, 2005.

vi. The Appellant No. 1 had attempted to mislead the Court by suppressing the fact that he had residence in New Delhi also.

vii. The statement made under Section 50 of PMLA would not infringe any fundamental right of the person contained in Article 20(3) inasmuch as the person making the statement is not an accused at the time when the statement under Section 50 is recorded.

viii. As regards territorial jurisdiction, it is submitted in the alternative that as per the case of ED, the proceeds of crime to the tune of Rs. 168 Crores were transferred through vouchers to Delhi and Overseas, and therefore, there was adequate nexus with the territory of Delhi with the alleged offence. Even a prosecution complaint could have been filed in Delhi, which would be consistent with the law laid down by this Court in ***Rana Ayyub vs. Directorate of Enforcement***.[2]

2 [2023] 3 SCR 892 : (2023) 4 SCC 357

ix. The Regional Offices created in the Directorate of Enforcement are for administrative convenience and do not in any manner limit the scope of enquiry of those concerned offices or officers, if the offence of money laundering spreads over multiple States.

x. Section 5 r/w Section 4 (2) of Cr.P.C. itself contemplates that nothing contained in the Code of 1973 would apply or affect any special law in force regulating the manner of place of investigation, inquiring into or dealing with such special offences.

xi. There was no illegality in summoning the Appellant No. 2 to New Delhi, as according to the ED the proceeds of crime had travel to New Delhi, which would be the area in which part of the offence has been allegedly committed.

xii. Section 50 of PMLA is gender neutral as it does not make any distinction between a man and a woman. The Court cannot carve out an exception in favour of women in Section 50, when there is none. Whenever the legislature felt the need to carve out an exception in favour of women, it has done so as evident from the proviso to Section 45 of PMLA. Therefore, there cannot be any presumption that a casus omissus exists in Section 50.

11. For the sake of convenience, let us refer to some of the provisions of Cr.P.C and PMLA, relevant for the purpose of deciding these Appeals, as also relied upon by the learned counsels for the parties.

Relevant Provisions of Cr.P.C.:

4. Trial of offences under the Indian Penal Code and other laws. —

(1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.

(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.

5. Saving. —Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any

special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force.

91. Summons to produce document or other thing. —

(1) Whenever any Court or any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order.

(2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same.

(3) Nothing in this section shall be deemed—

(a) to affect sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), or the Bankers' Books Evidence Act, 1891 (13 of 1891), or

(b) to apply to a letter, postcard, telegram or other document or any parcel or thing in the custody of the postal or telegraph authority.

160. Police officer's power to require attendance of witnesses. —

(1) Any police officer making an investigation under this Chapter may, by order in writing, require the attendance before himself of any person being within the limits of his own or any adjoining station who, from the information given or otherwise, appears to be acquainted with the facts and circumstances of the case; and such person shall attend as so required:

Provided that no male person [under the age of fifteen years or above the age of sixty-five years or a woman or a mentally or physically disabled person] shall be required to attend at any place other than the place in which such male person or woman resides.

(2) The State Government may, by rules made in this behalf, provide for the payment by the police officer of the reasonable expenses of every person, attending under sub-section (1) at any place other than his residence."

Relevant Provisions of PMLA:

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 banking company or a financial institution or a company, 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 Director.

51. Jurisdiction of Authorities. —

(1) The authorities shall exercise all or any of the powers and perform all or any of the functions conferred on, or, assigned, as the case may be, to such authorities by or under this Act or the rules framed thereunder in accordance with such directions as the Central Government may issue for the exercise of powers and performance of the functions by all or any of the authorities.

(2) In issuing the directions or orders referred to in sub-section (1), the Central Government may have regard to any one or more of the following criteria, namely: —

(a) territorial area;

(b) classes of persons;

(c) classes of cases; and

(d) any other criterion specified by the Central Government in this behalf

63. Punishment for false information or failure to give information, etc.—

(I) Any person wilfully and maliciously giving false information and so causing an arrest or a search to be made under this Act shall on conviction be liable for imprisonment for a term which may extend to two years or with fine which may extend to fifty thousand rupees or both.

(2) If any person,—

(a) being legally bound to state the truth of any matter relating to an offence under section 3, refuses to answer any question put to him by an authority in the exercise of its powers under this Act; or

(b) refuses to sign any statement made by him in the course of any proceedings under this Act, which an authority may legally require to sign; or

(c) to whom a summon is issued under section 50 either to attend to give evidence or produce books of account or other documents at a certain place and time, omits to attend or produce books of account or documents at the place or time,

he shall pay, by way of penalty, a sum which shall not be less than five hundred rupees but which may extend to ten thousand rupees for each such default or failure.

(3) No order under this section shall be passed by an authority referred to in sub-section (2) unless the person on whom the penalty is proposed to be imposed is given an opportunity of being heard in the matter by such authority.

(4) Notwithstanding anything contained in clause (c) of sub-section (2), a person who intentionally disobeys any direction issued under section 50 shall also be liable to be proceeded against under section 174 of the Indian Penal Code (45 of 1860).

65. Code of Criminal Procedure, 1973 to apply. —The provisions of the Code of Criminal Procedure, 1973 (2 of 1974) shall apply, in so far as they are not inconsistent with the provisions of this Act, to arrest, search and seizure, attachment, confiscation investigation, prosecution and all other proceedings under this Act.

> **71. Act to have overriding effect. —**The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

12. In exercise of the powers conferred by sub-Section (1) read with clause (a), clause (m), clause (n), clause (o), clause (pp) and clause (w) of sub-section (2) of Section 73 of the PMLA, 2002, the Central Government has also framed the Rules called "the Prevention of Money-Laundering (Forms, Search and Seizure or Freezing and the Manner of Forwarding the Reasons and Material to the Adjudicating Authority, Impounding and Custody of Records and the Period of Retention) Rules, 2005". As per Rule 11 of the said Rules, the Summoning Officer, while exercising the powers under sub-section (2) and (3) of Section 50 of the PMLA, has to issue Summons in Form V, appended to the said Rules. Rule 11 of the said Rules reads as under: -

> **"Rule 11: - Forms of records**. - The Summoning Officer shall, while exercising powers under sub-sections (2) and (3) of Section 50 of the Act, issue summons in Form V appended to these rules."

13. At the outset, it may be noted that as well settled by now, the provisions of PMLA are not only to investigate into the offence of money laundering but more importantly to prevent money laundering and to provide for confiscation of property derived from or involved in money laundering and the matters connected therewith and incidental thereto. As held by the Three-Judge Bench in ***Vijay Madanlal*** (supra), the PMLA is a self-contained Code and the dispensations envisaged thereunder, must prevail in terms of Section 71 thereof, which predicates that the provisions of the Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force, which includes provisions of the Cr.P.C. The Section 65 of the Act predicates that the provisions of the Cr.P.C. shall apply insofar as they are not inconsistent with the provisions of the PMLA in respect of arrest, search and seizure, attachment, confiscation, investigation, prosecution and all other proceedings under the Act. It is pertinent to note that Section 4(2) of the Code states that all offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to

the same provisions but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences. Further, Section 5 of the Code states that nothing contain in the Code shall, in absence of specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force. Thus, having regard to the conjoint reading of Section 71 and Section 65 of the PMLA as also Section 4(2) and Section 5 of the Code, there remains no shadow of doubt that the provisions of PMLA will have the effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force, including the provisions of the Cr.P.C.

14. Though, it was sought to be vehemently submitted by the learned counsels for the appellants that the sweep of Section 160 of Cr.P.C. would extend to summoning any person irrespective of whether that person is an accused of that offence or a mere witness, the said submission deserves to be discarded outrightly in view of the specific observations made by the three-Judge Bench in ***Vijay Madanlal***, to the effect that the provisions of Chapter XII of the Code (under which Section 160 falls) do not apply in all respects to deal with information derived relating to the commission of money laundering offence much less investigation thereof. The precise observations made by the Court in ***Vijay Madanlal***, while considering the issue, whether an ECIR could be equated with an FIR under the 1973 Code or not, are reproduced as under: -

> **"456**…. Considering the scheme of the 2002 Act, though the offence of money-laundering is otherwise regarded as cognizable offence (cognizance whereof can be taken only by the authorities referred to in Section 48 of this Act and not by jurisdictional police) and punishable under Section 4 of the 2002 Act, special complaint procedure is prescribed by law. This procedure overrides the procedure prescribed under 1973 Code to deal with other offences (other than money-laundering offences) in the matter of registration of offence and inquiry/investigation thereof. This special procedure must prevail in terms of Section 71 of the 2002 Act and also keeping in mind Section 65 of the same Act. In other words, the offence of money-

> laundering cannot be registered by the jurisdictional police who is governed by the regime under Chapter XII of the 1973 Code. The provisions of Chapter XII of the 1973 Code do not apply in all respects to deal with information derived relating to commission of money-laundering offence much less investigation thereof. The dispensation regarding prevention of money-laundering, attachment of proceeds of crime and inquiry/investigation of offence of money laundering upto filing of the complaint in respect of offence under Section 3 of the 2002 Act is fully governed by the provisions of the 2002 Act itself. To wit, regarding survey, searches, seizures, issuing summons, recording of statements of concerned persons and calling upon production of documents, inquiry/investigation, arrest of persons involved in the offence of money-laundering including bail and attachment, confiscation and vesting of property being proceeds of crime. Indeed, after arrest, the manner of dealing with such offender involved in offence of money-laundering would then be governed by the provisions of the 1973 Code - as there are no inconsistent provisions in the 2002 Act in regard to production of the arrested person before the jurisdictional Magistrate within twenty-four hours and also filing of the complaint before the Special Court within the statutory period prescribed in the 1973 Code for filing of police report, if not released on bail before expiry thereof."

15. In view of the above, it is abundantly clear that the dispensation regarding Prevention of Money Laundering, Attachment of Proceeds of Crime, and Inquiry/Investigation of offence of Money Laundering including issuing summons, recording of statements, calling upon persons for production of documents etc. upto filing of the Complaint in respect of offence under Section 3 of PMLA is fully governed by the provisions of the said Act itself. The jurisdictional police who is governed by the regime of Chapter XII of the Code, can not register the offence of money laundering, nor can investigate into it, in view of the special procedure prescribed under the PMLA with regard to the registration of offence and inquiry/investigation thereof, and that the special procedure must prevail in terms of Section 71 of the PMLA.

16. Apart from the fact that Section 50 is a gender neutral, as it does not make any distinction between a man and a woman, there are glaring inconsistencies between the provisions contained in Section 50 of PMLA and Section 160/161 of Cr.P.C. The Chapter XII of Cr.P.C. pertains to the "Information to the Police and their Powers to Investigate". Section 160 which falls under Chapter XII empowers the Police Officer making an investigation under the said Chapter to require any person to attend within the limits of his own or adjoining station who, from the information given or otherwise appears to be acquainted with the facts and circumstances of the case, whereas, the process envisaged by Section 50 of the PMLA is in the nature of an inquiry against the proceeds of crime and is not "Investigation" in strict sense of the term for initiating prosecution; and the Authorities referred to in Section 48 of PMLA are not the Police Officers as held in ***Vijay Madanlal***. It has been specifically laid down in the said decision that the statements recorded by the Authorities under Section 50 of PMLA are not hit by Article 20(3) or Article 21 of the Constitution, rather such statements recorded by the authority in the course of inquiry are deemed to be the Judicial proceedings in terms of Section 50(4), and are admissible in evidence, whereas the statements made by any person to a Police Officer in the course of an investigation under Chapter XII of the Code could not be used for any purpose, except for the purpose stated in the proviso to Section 162 of the Code. In view of such glaring inconsistencies between Section 50 PMLA and Section 160/161 Cr.P.C, the provisions of Section 50 PMLA would prevail in terms of Section 71 read with Section 65 thereof.

17. So far as the procedure to be followed by the Summoning Officer while exercising the powers under sub-section (2) and (3) of Section 50 of the PMLA is concerned, it is pertinent to note that Rule 11 of the said Rules 2005, requires the Summoning Officer to follow the procedure as prescribed therein, i.e., to issue Summons in Form V appended to the said Rules. The said prescribed Form V requires Summoning Officer to mention not only the Name, Designation and Address of the Summoning Officer but also the details of the persons summoned as also the documents sought therein. The foot note of Form V also mentions that the proceedings shall be deemed to be judicial proceedings within the meaning of Section 193 and Section 228 of the IPC, and if the person summoned fails to give evidence as

mentioned in the Schedule, he would be liable to penal proceedings under the Act. Thus, there being specific procedure prescribed under the Statutory Rules of 2005 for summoning the person under sub-sections (2) and (3) of Section 50 of the Act, the same would prevail over any other procedure prescribed under the Code, particularly the procedure contemplated in Section 160/161, as also the procedure for production of documents contemplated in Section 91 of the Code, in view of the overriding effect given to the PMLA over the other Acts including the Cr.P.C. under Section 71 r/w Section 65 of the PMLA.

18. The submission made on behalf of Learned Counsels for the Appellants that the conferment of power upon the Authority under Section 50 of PMLA excluding the procedural safeguards would be contrary to the standard of "procedure established by law" under Article 21 of the Constitution, is also thoroughly misconceived. The validity of Section 50 was sought to be challenged in ***Vijay Madanlal*** on the ground of being violative of Article 20(3) and Article 21 of the Constitution and the Court upholding the validity observed as under: -

> "**425.** Indeed, sub-section (2) of Section 50 enables the Director, Additional Director, Joint Director, Deputy Director or Assistant Director to issue summon to any person whose attendance he considers necessary for giving evidence or to produce any records during the course of any investigation or proceeding under this Act. We have already highlighted the width of expression "proceeding" in the earlier part of this judgment and held that it applies to proceeding before the Adjudicating Authority or the Special Court, as the case may be. Nevertheless, sub-section (2) empowers the authorised officials to issue summon to any person. We fail to understand as to how Article 20(3) would come into play in respect of process of recording statement pursuant to such summon which is only for the purpose of collecting information or evidence in respect of proceeding under this Act. Indeed, the person so summoned, is bound to attend in person or through authorised agent and to state truth upon any subject concerning which he is being examined or is expected to make statement and produce documents as may be required by virtue of sub-section (3) of Section 50 of the 2002 Act….
>
> **426 to 430**…..

431. In the context of the 2002 Act, it must be remembered that the summon is issued by the Authority under Section 50 in connection with the inquiry regarding proceeds of crime which may have been attached and pending adjudication before the Adjudicating Authority. In respect of such action, the designated officials have been empowered to summon any person for collection of information and evidence to be presented before the Adjudicating Authority. It is not necessarily for initiating a prosecution against the noticee as such. The power entrusted to the designated officials under this Act, though couched as investigation in real sense, is to undertake inquiry to ascertain relevant facts to facilitate initiation of or pursuing with an action regarding proceeds of crime, if the situation so warrants and for being presented before the Adjudicating Authority. It is a different matter that the information and evidence so collated during the inquiry made, may disclose commission of offence of money-laundering and the involvement of the person, who has been summoned for making disclosures pursuant to the summons issued by the Authority. At this stage, there would be no formal document indicative of likelihood of involvement of such person as an accused of offence of money laundering. If the statement made by him reveals the offence of money -laundering or the existence of proceeds of crime, that becomes actionable under the Act itself. To put it differently, at the stage of recording of statement for the purpose of inquiring into the relevant facts in connection with the property being proceeds of crime is, in that sense, not an investigation for prosecution as such; and in any case, there would be no formal accusation against the noticee. Such summons can be issued even to witnesses in the inquiry so conducted by the authorised officials. However, after further inquiry on the basis of other material and evidence, the involvement of such person (noticee) is revealed, the authorised officials can certainly proceed against him for his acts of commission or omission. In such a situation, at the stage of issue of summons, the person cannot claim protection under Article 20(3) of the Constitution. 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. Further, it would not preclude the prosecution from proceeding against such a person including for consequences under Section 63 of the 2002 Act on the basis of other tangible material to indicate the falsity of his claim. That would be a matter of rule of evidence."

19. The above ratio laid down in ***Vijay Madanlal*** clinches the contentions raised by the learned counsels for the appellants with regard to the provisions of Section 50 being violative of Article 20(3) or Article 21 of the Constitution, and we need not further elaborate the same, nor do we need to deal with the decisions of this Court on the said issue which have already been dealt with in ***Vijay Madanlal.*** Suffice it to say that Section 50 enables the authorized Authority to issue summon to any person whose attendance he considers necessary for giving evidence or to produce any records during the course of the proceedings under the Act, and that the persons so summoned is bound to attend in person or through authorized agent, and to state truth upon the subject concerning which he is being examined or is expected to make statement and produce documents as may be required by virtue of sub-section (3) of Section 50. At the stage of issue of summons, the person cannot claim protection under Article 20(3) of the Constitution, the same being not "testimonial compulsion". At the stage of recording of statement of a person for the purpose of inquiring into the relevant facts in connection with the property being proceeds of crime, is not an investigation for prosecution as such. The summons can be issued even to witnesses in the inquiry so conducted by the authorized officers. The consequences of Article 20(3) of the Constitution or Section 25 of the Evidence Act may come into play only if the involvement of such person (noticee) is revealed and his or her statements is recorded after a formal arrest by the ED official. In our opinion, the learned counsels for the appellants have sought to reagitate the issues which have already been settled in ***Vijay Madanlal***.

20. Much reliance has been placed by the Learned Counsels for the Appellants on the Annual Report of Ministry of Finance, GOI, which according to them has stated about the Organizational Structure of Directorate of Enforcement, demarcating the territorial jurisdiction of

various Zonal Office of the ED. According to them, such instructions by the Department of Revenue are for exercise of powers of investigation by the ED as mandated by Section 51 PMLA and therefore must be strictly complied with. The said submission also being fallacious cannot be accepted. Apart from the fact that the document relied upon is an Annual Report by the Ministry of Finance, showing the Organizational Structure of the ED, the same could not be construed as the directions issued by the Central Government for the purpose of exercise of powers and performance of the functions by the Authorities as contemplated in Section 51 of the said Act. As stated in the said Report, the said Offices of the Directorate of Enforcement all over India are set up to ensure that the Money Laundering offences are investigated in an effective manner and they act as deterrence for the potential offenders of the Money Launderers. Pertinently, the Headquarters Investigation Unit (HIU) has not been restricted to any territorial jurisdiction in the said Organizational Structure. The present ECIR bearing ECIR/17/HIU/2020 is recorded at the HIU. Further, as per the specific case of the ED in the complaint, filed against the accused persons before the Special Court, PMLA, Rouse Avenue Courts, New Delhi, Rs. 168 Crores were allegedly received by the Inspector Ashok Kumar Mishra from the co-accused Anup Majee to be delivered to his political bosses, and the said Rs. 168 Crores were transferred through vouchers to Delhi and Overseas, which clearly established adequate nexus of the offence and the offenders with the territory of Delhi. We therefore do not find any illegality in the summons issued by the respondent-ED summoning the Appellants to its Office at Delhi, which also has the territorial jurisdiction, a part of the offence having been allegedly committed by the accused persons as alleged in the complaint. It is also not disputed that the Appellant No. 1 being a Member of Parliament has also an official residence at Delhi.

21. In that view of the matter, we do not find any substance in the challenge made by the Appellants to the Summons issued to the Appellants under Section 50 of the PMLA. As contemplated in the sub-section (3) of Section 50, all the persons summoned are bound to attend in person or through authorized agents as the officer may direct and are bound to state the truth upon any subject respecting which they are examined or make statements, and to produce the documents as may be required. As per sub-section (4) thereof

every proceeding under sub-sections (2) and (3) is deemed to be a Judicial proceeding within the meaning of Section 193 and Section 228 of the IPC. As per sub-section (4) of Section 63, a person who intentionally disobeys any direction issued under Section 50 is liable to be proceeded against under Section 174 of the IPC.

22. As transpiring from the Status Report submitted by the Deputy Director, Directorate of Enforcement, New Delhi, pursuant to the Order passed by this Court on 18.07.2024, the Appellant No. 2 – Rujira Banerjee had not appeared and not produced the documents as required vide the Summons dated 04.08.2021 and 18.08.2021. The ED therefore had filed the Complaint in the Court of Chief Judicial Magistrate, Patiala House Courts, New Delhi against her under Section 63 PMLA r/w Section 174 IPC. It is also pertinent to note that though the Appellant No. 2 by filing the Crl. M.C. No. 2442 of 2021 before the High Court had challenged the Order dated 18.09.2021 passed by the said Court taking cognizance of the said Complaint and the Order dated 30.09.2021 summoning her before the Court, she has not even bothered to produce the said Orders before this Court in the instant Appeals. Since the said Complaint is pending before the concerned Court of Chief Judicial Magistrate, we do not express any opinion on the merits of the said Complaint. Suffice it to say that we do not find any illegality in the said orders passed by the concerned court and that the said complaint shall be proceeded further by the said Court in accordance with law.

23. For the reasons stated above, both the Appeals being devoid of merits are dismissed.

Result of the case: Appeals dismissed

†*Headnotes prepared by:* Nidhi Jain

[2024] 9 S.C.R. 135 : 2024 INSC 673

Anantdeep Singh
v.
The High Court of Punjab and Haryana at Chandigarh & Anr.

Miscellaneous Application No. 267 of 2024
in
(Civil Appeal No. 3082 of 2022)

06 September 2024

[Vikram Nath* and Prasanna Bhalachandra Varale, JJ.]

Issue for Consideration

Miscellaneous application is filed by the appellant seeking direction to reinstate him into service as civil judge with all the consequential benefits in view of the order dated 20.04.2022 passed by the Supreme Court in C.A.No. 3082 of 2022.

Headnotes†

Judicial Service – Matrimonial discord between appellant and his wife – Allegations against the appellant of having an illicit relationship with a lady judicial officer – The Full Court of the High Court accepted the report of the Committee of Judges dated 04.12.2009 and appellant along with the lady judicial officer were terminated from the services – Aggrieved, both appellant and lady judicial officer filed separate writ petitions – The writ petition filed by the lady judicial officer was allowed and her termination order was set aside – However, the writ petition filed by the appellant was dismissed – Assailing the correctness of the judgment, appellant filed SLP – On 20.04.2022, this Court set aside the impugned judgment of the High Court dated 25.10.2018 and termination order dated 17.12.2009 and directed the Full Court of the High Court to reconsider the matter – The Full Court of High Court in its meeting dated 03.08.2023 reiterated its earlier decision of terminating appellant – Correctness:

Held: Once the termination order is set aside and judgment of the High Court dismissing the writ petition challenging the said

* Author

termination order has also been set aside, the natural consequence is that the employee should be taken back in service and thereafter proceeded with as per the directions – Once the termination order is set aside then the employee is deemed to be in service – There is no justification in the inaction of the High Court and also the State in not taking back the appellant into service after the order dated 20.04.2022 – No decision was taken either by the High Court or by the State of taking back the appellant into service and no decision was made regarding the back wages from the date the termination order had been passed till the date of reinstatement which should be the date of the judgment of this Court – During the pendency of the said M.A., the State of Punjab passed an order dated 02.04.2024 terminating the services of the appellant with retrospective effect i.e. 17.12.2009 – In any case, the appellant was entitled to salary from the date of judgment dated 20.04.2022 till fresh termination order was passed on 02.04.2024 – Insofar as the period from 18.12.2009 i.e., after the termination order of 17.12.2009 was passed till 19.04.2022 the date prior to the judgment and order of this Court, the ends of justice would be served by directing that the appellant would be entitled to 50 percent of the back wages treating him to be in service continuously – Such back wages to be calculated with all benefits admissible under law to the appellant as if he was in service – Insofar as the challenge to the resolution of the Full Court of the High Court dated 03.08.2023 and termination order dated 02.04.2024 is concerned, the appellant would be at liberty to challenge the same by way of a writ petition before the High Court which may be decided on its own merits. [Paras 21, 22, 23]

Case Law Cited

State Bank of Patiala and another v. Ramniwas Bansal (dead) through Lrs. [2014] 3 SCR 984 **: (2014) 12 SCC 106;** *State of Punjab v. Balbir Singh* [2004] Supp. 4 SCR 368 **: (2004) 11 SCC 743;** *State of Punjab and others v. Sukhwinder Singh* [2005] Supp. 1 SCR 580 **: (2005) 5 SCC 569;** *State of Punjab and others v. Rajesh Kumar* [2006] Supp. 9 SCR 208 **: (2006) 12 SCC 418;** *Bishan Lal Gupta v. State of Haryana* [1978] 2 SCR 513 **: (1978) 1 SCC 202;** *State of Punjab v. Sukh Raj Bahadur* [1968] 3 SCR 234**;** *High Court of Patna v. Pandey Madan Mohan* **(1997) 10 SCC 409 – referred to.**

Anantdeep Singh v.
The High Court of Punjab and Haryana at Chandigarh & Anr.

List of Acts

Punjab Civil Services (General and Common Conditions of Service) Rules, 1994.

List of Keywords

Judicial service; Matrimonial discord; Illicit relationship; Termination of services; Reinstatement; Consequential benefits; Back wages.

Case Arising From

CIVIL APPELLATE JURISDICTION: Miscellaneous Application No. 267 of 2024

In

Civil Appeal No. 3082 of 2022

From the Judgment and Order dated 20.04.2022 of the Supreme Court of India in C. A. No. 3082 of 2022

Appearances for Parties

P.S. Patwalia, Sr. Adv., Ashok K. Mahajan, Advs. for the Appellant.

Gaurav Dhama, A.A.G., Nidhesh Gupta, Sr. Adv., Rahul Gupta, Ms. Nupur Kumar, Ms. Niharika Tanwar, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Vikram Nath, J.

1. Miscellaneous Application No. 267 of 2024 has been filed by the appellant Anantdeep Singh praying for the following reliefs:

> "i) direct the respondents to reinstate the appellant/ applicant into service as Civil Judge with all consequential benefits in view of the order dated 20.04.2022 passed by this Hon'ble Court in Civil Appeal No. 3082 of 2022 arising out of Special Leave Petition (Civil) No. 33435 of 2018;
>
> ii) Pass any other order or orders as this Hon'ble Court may deem fit and proper in the interest of justice."

2. Before we deal with the aforesaid application, it would be necessary to refer to the relevant facts giving rise to the present application:

2.1. The appellant was a judicial officer with the Punjab Civil Services (Judicial Branch) since 2006. Under the Punjab Civil Services (General and Common Conditions of Service) Rules, 1994, period of probation under Rule 7 thereof is for three years which was to continue till December 2009. At the time of joining the service in December 2006, the appellant was already married, however, the marriage was not going very smoothly and quite often there would be disputes between the appellant and his wife. In order to avoid the situation getting worse, the appellant left the official accommodation and shifted to a private accommodation. His wife and mother-in-law continued to reside in the official accommodation. Sometime in November/December 2008, the wife of the appellant made a complaint as a result of which the appellant was called by not only the District Judge but also the Administrative Judge concerned in December 2008 and February 2009. The appellant explained his position and clarified why he was residing in a private accommodation. No written explanation was called from the appellant regarding the complaint made by his wife at that stage.

2.2. It was only vide communication dated 06.04.2009, that the appellant was called upon to answer as to whether he was residing in the official accommodation. Immediately, the appellant responded vide letter dated 07.04.2009 and a further letter dated 20.04.2009 stating that he had moved out of his official accommodation apprehending danger to his life and to avoid any undue incident and was residing with his maternal uncle. On 22.04.2009, the appellant filed a petition seeking a decree of divorce. At the same time, the appellant -mother-in-law, who was also a government servant working as Principal of a Government College at Faridkot, met the District and Sessions Judge and complained about the appellant with regard to the dispute with his wife. The District and Sessions Judge, Faridkot forwarded his report on 20.05.2009 to the Registrar General of the High Court mentioning the matrimonial dispute of the appellant.

2.3. In November 2009, reports were called regarding the review of work of all judicial officers on probation by the Committee

of Judges In Charge of review of work and conduct of the probationers. The report is said to have been sent by the District and Sessions Judge on 27.11.2009 stating that the work and conduct of the appellant was satisfactory. Thereafter, it appears that the Registrar General of the High Court again wrote to the District and Sessions Judge, Faridkot to send a detailed report regarding the appellant in particular, concerning the allegations against the appellant of having an illicit relationship with a lady judicial officer. The Administrative Judge on the same day i.e. 01.12.2009, gave his remarks based on the report of the District and Sessions Judge dated 20.05.2009. The Committee of the Judges overseeing the work and conduct of the probationers, gave its opinion that the appellant was not fit to continue in service and further, decided that the lady judicial officer, with whom the appellant was said to be having a relationship, be identified and she may also be confronted with the said allegations.

2.4. On 02.12.2009, the District and Sessions Judge after recording the statement of the appellant's wife and the alleged lady judicial officer, forwarded his report in which it was stated that wife of the appellant had clearly alleged that her husband was having an illicit relationship with a lady judicial officer who was then posted at Phagwada because of which the appellant used to harass his wife. The Committee of Judges overseeing the work and conduct of the probationers on 04.12.2009 recommended that the appellant and also the lady judicial officer were not fit to be retained in the service.

2.5. The Full Court of the High Court in its meeting dated 07.12.2009 accepted the report of the Committee of Judges dated 04.12.2009 and resolved that the services of not only the appellant but also the lady judicial officer were to be terminated by an order of Termination Simpliciter. The work was withdrawn from the appellant on 07.12.2009. The resolution of the Full Court dated 07.12.2009 was accepted by the State of Punjab and an order was passed on 17.12.2009 dispensing with the services of the appellant. On the same day, another order was passed by the State of Punjab dispensing the services of the lady judicial officer.

2.6. Aggrieved by the said termination, the appellant filed CWP No. 9003 of 2010 before the High Court. Similarly, the lady judicial officer filed a separate petition registered as CWP No. 8250 of 2010 challenging her termination. The Division Bench of the High Court, vide judgment and order dated 25.10.2018, dismissed the writ petition of the appellant. On the very next day i.e., 26.10.2018, the same Division Bench of the High Court allowed the writ petition of the lady judicial officer, set aside the termination order, after disbelieving the allegations of an illicit relationship.

2.7. The High Court of Punjab and Haryana preferred SLP (Civil) No. 4894 of 2019 assailing the correctness of the judgment dated 26.10.2018 passed in the case of the lady judicial officer which came to be dismissed vide order dated 01.07.2019. Thereafter, the lady judicial officer was reinstated and is working.

2.8. The appellant preferred SLP (Civil) 33435 of 2018 assailing the correctness of the judgment dated 25.10.2018 passed by the High Court dismissing the writ petition. The SLP filed by the appellant was taken up on 03.03.2022 and after hearing the parties to some extent, the matter was adjourned. However, the Court required the counsel for the High Court of Punjab and Haryana to obtain further instructions in the matter after orally observing that it was prima facie of the view that the appellant also deserves to be reinstated in service.

2.9. The counsel for the High Court of Punjab and Haryana communicated the observations made by this Court to the Registrar General, vide communication dated 04.03.2022. However, the Registrar General of the High Court replied vide communication dated 11.03.2022 with the instructions that the matter may be argued on merits.

2.10. On 20.04.2022, when the matter came up before the Court, after hearing the learned senior counsel for the parties, this Court granted leave and allowed the appeal after setting aside the impugned judgment of the High Court dated 25.10.2018 and the Termination Order dated 17.12.2009. It further requested the Full Court of the High Court to reconsider the matter. The order dated 20.04.2022 is reproduced below:

> "Leave granted.
>
> We have heard Mr. P.S.Patwalia, learned senior counsel for the appellant and Mr. Nidhesh Gupta, learned senior counsel for the respondent-High Court of Punjab and Haryana and perused the relevant material placed on record.
>
> We are of the considered view that the Full Court of the High Court of Punjab and Haryana at Chandigarh needs to reconsider this matter.
>
> Therefore, the impugned order dated 25th October, 2018 and the order passed by the Principal Secretary to Government, Punjab, Department of Home Affairs and Justice on 17th December, 2009 terminating the services of the appellant herein are set aside.
>
> We, however, request the Full Court of the High Court of Punjab and Haryana to reconsider the matter without being influenced by any of the observations made by the Division Bench of the High Court in the impugned order.
>
> The appeal accordingly stands disposed of in terms aforesaid."

2.11. No consequential orders were passed by the State after the order dated 20.04.2022 whereby the termination order of the appellant dated 17.12.2009 passed by the State Government was set aside. The High Court however, took up the matter on the administrative side. The Full Court in its meeting dated 16.09.2022 referred the matter to the Recruitment and Promotion Committee (RPC). Seven months thereafter, the RPC reiterated its earlier decision dated 04.12.2009, relying upon the note of the Administrative Judge dated 01.12.2009 and also the report of the District and Sessions Judge dated 20.05.2009. The recommendation of the RPC dated 12.04.2023 is reproduced hereunder:

> "...Reconsideration of Hon'ble Full Court decision dated 07.12.2009 regarding dispensing with the services of Sh. Anantdeep Singh, former member of

P.C.S. (J.B.), in view of judgment dated 20.04.2022 passed by Hon'ble Supreme Court in the Special Leave Petition (Civil) No. 33435 of 2018 titled as "Anantdeep Singh Vs. The High Court of Punjab and Haryana at Chandigarh & Anr."

Sh. Anantdeep Singh, had joined P.C.S. (J.B.) on 12.12.2006. On the recommendation of this Court, his services were dispensed with, during probation, vide Punjab Government order dated 17.12.2009. The officer relinquished charge on 24.12.2009. The CWP No. 9003 of 2010 filed by him, against the order dated 17.12.2009 of Punjab Government, was dismissed by Hon'ble Division Bench of this Court. vide judgment dated 25.10.2018. Thereafter, Sh. Anantdeep Singh had filed SLP (Civil) No. 33435 of 2018 titled as "Sh. Anantdeep Singh vs. the High Court of Punjab and Haryana at Chandigarh and Another" against the judgment dated 25.10.2018 of this Court. While disposing of the appeal, Hon'ble Supreme Court, vide judgment dated 20.4.2022, had set aside the impugned order dated 25th October 2018 and the order passed by the Principal Secretary to Government, Punjab, Department of Home Affairs and Justice on 17th December, 2009 terminating the services of the appellant and requested the Full Court of this Court to reconsider the matter.

The matter was reconsidered by Hon'ble Full Court in its meeting held on 16.09.2022 and it was resolved that the matter be referred to Hon'ble Recruitment and Promotion Committee (Subordinate Judicial Services) for examining the same and report. After thoroughly re-examining the matter in entirety particularly the observations of the then Administrative Judge contained in note dated 01.12.2009 as also the report of District and Sessions Judge dated 20.05.2009 and the fact that the officer was merely a probationer and the decision was taken within the prescribed period, at this stage the Committee is not in a position to come to any different conclusion on the basis of material

> on record. Thus, the Committee reiterates its earlier decision dated 04.12.2009."

2.12. As the matter was further delayed and no decision was being taken and that the appellant had not been taken back in service despite the termination order having been set aside, the appellant filed M.A. No. 655 of 2023, which was disposed of by order dated 04.05.2023, requesting the Full Court of the High Court to decide the matter within three months. It was thereafter that the Full Court of the High Court in its meeting dated 03.08.2023 resolved to reiterate its earlier decision dated 07.12.2009, terminating the services of the appellant.

2.13. The appellant filed a petition before this Court under Article 32 of the Constitution of India registered as W.P.(Civil) No. 976 of 2023 which was allowed to be withdrawn with liberty to explore other legal options which may be available to move before the High Court vide order dated 22.09.2023. The said order is reproduced hereunder:

> "Mr. P.S. Patwalia, learned senior counsel does not wish to press this writ petition under Article 32 of the Constitution and would explore other legal options which may be available to move the High Court.
>
> Taking note of the above submission of the learned senior counsel, the writ petition stands dismissed as not pressed, reserving the liberty as aforesaid."

2.14. The appellant in the meantime approached the High Court under Right to Information Act, 2005 requesting for a copy of the letter dated 04.03.2022 written by the counsel for the High Court to the Registrar General. This letter was made available on 11.10.2023. It was thereafter that the present M.A. was filed on 31.10.2023.

2.15. During the pendency of the said M.A. and when the State of Punjab was also called upon to be served with the copy of M.A., vide order dated 29.01.2024 and with the matter being listed on several occasions, the State of Punjab passed an order dated 02.04.2024 terminating the services of the appellant with retrospective effect i.e. 17.12.2009. The said order dated 02.04.2024 has been filed along with I.A. No. 110912 of 2024.

3. It is on the above set of facts that we have heard Shri P.S. Patwalia, learned senior counsel appearing for the appellant, Shri Nidhesh Gupta, learned senior counsel appearing for High Court of Punjab and Haryana and Shri Gaurav Dhama, learned Additional Advocate General for the State of Punjab.

4. The submissions advanced by Shri P.S. Patwalia are to the effect that the judgment and order of this Court dated 20.04.2022 has not been complied with by the respondents. The respondents ought to have taken back the appellant in service and thereafter proceeded to take the decision as directed by this Court. Further it was submitted that it took almost two years for the respondents to take a fresh decision. During this period, the appellant has neither been reinstated in service nor been paid any salary, no arrears have been paid from 17.12.2009, the date of the earlier termination order even though the same had been set aside by this Court.

5. It was also submitted by Mr. P.S. Patwalia that this Court in all its humility had not quashed the decision of the Full Court but having given serious thought to it, had clearly observed that this Court was of the considered view that the Full Court of the High Court of Punjab and Haryana needs to reconsider this matter which in itself is a clear indication that this Court had expressed its view on the resolution of the Full Court regarding termination of the appellant's service to be not sustainable. It was thereafter that this Court had set aside the judgment of the High Court dated 25.10.2018 and the Termination order dated 17.12.2009.

6. It is also submitted on behalf of the appellant that the RPC and also the Full Court of the High Court have simply reiterated their earlier resolutions and as such there has been no reconsideration of the matter, the resolutions placed on record are also non-speaking.

7. It is also the submission of Mr. Patwalia that the complaint against the appellant was given by his wife and his mother-in-law. The entire contents of the reports submitted by the District and Sessions Judge and also the Administration Judge and the Review Committee are based on the complaint made by the wife and his mother-in-law. No independent enquiry was conducted, nor any show cause notice was issued to the appellant calling upon him to give a response to the complaint made by his wife and mother-in-law.

8. It was also submitted that the main allegations made by the wife and mother-in-law relates to the appellant carrying on an illicit relationship with the lady judicial officer. The other complaints alleged were of residing outside the official accommodation and of using a private car, which did not belong to him. It was also alleged in the complaint that the appellant had threatened and assaulted his wife. All the other allegations apart from the main allegations of illicit relationship with the lady judicial officer, were linked to the aforesaid main allegation.

9. The High Court, on the judicial side in the case of the lady judicial officer, found that there was not even any remote evidence regarding their illicit relationship and that the statement of the wife could not be taken as a gospel truth to throw the said lady judicial officer out of service, and it was found to be totally unjust. The findings recorded by the High Court in the judgment dated 26.10.2018 with respect to the illicit relationship is reproduced hereunder:

> "At the outset, we are at a loss to find even remote evidence about any illicit relationship from the above except use of the word "illicit relations". That apart, her mere statement/ perception like a gospel truth could not be acted upon to throw the appellant out of service. That was totally unjust"

10. It was submitted that once the complaint of the wife and mother-in-law of the appellant were not found to be credible and truthful with respect to the allegations of an illicit relationship, any reliance placed upon the said complaints with respect to minor allegations of using a private car not belonging to the appellant and of threatening and assaulting cannot be relied upon without there being any further corroboration. No reliance can be placed on the said complaints at all.

11. Mr. Patwalia thus submitted that this Court may not only allow the M.A. as prayed but may also consider setting aside the Termination order now passed on 02.04.2024 with retrospective effect from 17.12.2009 and reinstate the appellant back in service with full back wages and all consequential benefits.

12. It is also submitted that there could not have been any backdating of the Termination order being made effective from a previous date. The Termination order can be effective only from the date it is served on the employee. As such the order dated 02.04.2024 deserves to be quashed.

13. Mr. Patwalia has relied upon the judgment of this Court in **State Bank of Patiala and another vs. Ramniwas Bansal (dead) through Lrs.;**[1] for the proposition that the dismissal order cannot be made with retrospective effect, and it would only have prospective effect.

14. Before we deal with the submissions of Mr. Nidhesh Gupta, learned senior counsel appearing for the High Court, we may mention the response of the State as put forth by Additional Advocate General. According to Mr. Gaurav Dhama the State did not pass any consequential order after the order dated 20.04.2022. He further submitted that the order dated 02.04.2024 has been passed as per the resolution of the Full Court of the High Court. He, however, did not address the issue as to whether the termination order could have been passed making it effective from an earlier date.

15. Mr. Nidhesh Gupta, learned senior counsel appearing for the High Court justified not only the subsequent compliance affected by the High Court and also the resolution of the Full Court of the High Court to terminate the service of the appellant w.e.f. the earlier date and also the termination order issued by the State Government on 02.04.2024. On a specific query as to how the High Court could have proceeded against an officer who was not taken into service by passing a resolution of terminating the services from the previous date, he has sought to mix the issue by submitting that as the appellant was a probationer and his services were terminated as a probationer, if he was taken back in service during the period, the High Court was to take a fresh decision as required by this Court, then he would be treated as a regular employee because the period of probation under the Rules is only for a limited period of maximum three years and not beyond.

16. Mr. Gupta also had no answer as to why the High Court took one and half years to take the decision. He however expressed his inability to explain the delay on the part of the State for issue of termination order after eight months of the resolution of the Full Court of the High Court. Mr. Gupta further addressed the Court raising the point that any preliminary enquiry conducted to ascertain the suitability of a probationer and if termination follows without giving an opportunity, it will not be bad and will be a case of motive. In effect, the submission

1 [2014] 3 SCR 984: (2014) 12 SCC 106

is that the probationer's service could be dispensed with without holding a formal enquiry or giving an opportunity to the probationer and the employer was well within his right to dispense the service of the probationer by conducting the preliminary enquiry to ascertain the suitability. In this connection, he has placed reliance upon the following judgments:

i **State of Punjab** vs. **Balbir Singh**;[2]

i **State of Punjab and others** *vs.* **Sukhwinder Singh**;[3]

iii. **State of Punjab and others** vs. **Rajesh Kumar**;[4]

iv. **Bishan Lal Gupta** vs. **State of Haryana**;[5]

v. **State of Punjab** vs. **Sukh Raj Bahadur**;[6] and

vi. **High Court of Patna** vs. **Pandey Madan Mohan**.[7]

17. Mr. Gupta, while further addressing on merits, submitted that it was not just the allegation of having illicit relationship with lady judicial officer but there were other very serious allegations which were unbecoming of a judicial officer and since the appellant was a probationer, the Full Court of the High Court found him unsuitable for continuing in service and accordingly he was dismissed from the service.

18. He further submitted that in the case of the lady judicial officer whose petition was allowed by the High Court and has since been reinstated to the service, the only allegation against the said lady judicial officer was of carrying on an illicit relationship with the appellant which the High Court found was without any basis or supporting material. According to him, in the present case, the High Court in the judgment dated 25.10.2018 had clearly held that it was omitting the allegations of illicit relation with the lady judicial officer from consideration and further relied upon other allegations of misconduct or unsuitability against the appellant and therefore, the appellant cannot claim any advantage or benefit from the judgment in the case of the lady judicial officer.

---

2 [2004] Supp. 4 SCR 368 : (2004) 11 SCC 743

3 [2005] Supp. 1 SCR 580 : (2005) 5 SCC 569

4 [2006] Supp. 9 SCR 208 : (2006) 12 SCC 418

5 [1978] 2 SCR 513 : (1978) 1 SCC 202

6 [1968] 3 SCR 234 : (1968) 3 SCR 234

7 (1997) 10 SCC 409

19. Having considered the submissions advanced, at the outset, we make it clear that we are not entering into the merits of the matter i.e., the reconsideration by the High Court in the Full Court meeting held on 03.08.2023 and the termination letter issued by the State on 02.04.2024. These orders could be tested before the High Court by way of a fresh writ petition to be filed by the appellant and such liberty having been granted by this Court in the writ petition under Article 32 of the Constitution of India filed by the appellant which was withdrawn on 22.09.2023. For the above reason, the case laws relied upon by Mr. Gupta are not being dealt with nor are we dealing with the case laws relied upon by Mr. Patwalia.

20. We are only dealing with the M.A. No. 267 of 2024 where the appellant has prayed that he should be reinstated into service as Civil Judge with all consequential benefits in view of the order dated 20.04.2022 passed by this Court allowing the appeal.

21. Once the termination order is set aside and judgment of the High Court dismissing the writ petition challenging the said termination order has also been set aside, the natural consequence is that the employee should be taken back in service and thereafter proceeded with as per the directions. Once the termination order is set aside then the employee is deemed to be in service. We find no justification in the inaction of the High Court and also the State in not taking back the appellant into service after the order dated 20.04.2022. No decision was taken either by the High Court or by the State of taking back the appellant into service and no decision was made regarding the back wages from the date the termination order had been passed till the date of reinstatement which should be the date of the judgment of this Court. In any case, the appellant was entitled to salary from the date of judgment dated 20.04.2022 till fresh termination order was passed on 02.04.2024. The appellant would thus be entitled to full salary for the above period to be calculated with all benefits admissible treating the appellant to be in continuous service.

22. Insofar as the period from 18.12.2009 i.e., after the termination order of 17.12.2009 was passed till 19.04.2022 the date prior to the judgment and order of this Court, we are of the view that ends of justice would be served by directing that the appellant would be entitled to 50 percent of the back wages treating him to be in service continuously. Such back wages to be calculated with all benefits admissible under law to the appellant as if he was in service.

23. Insofar as the challenge to the resolution of the Full Court of the High Court dated 03.08.2023 and termination order dated 02.04.2024 is concerned, the appellant would be at liberty to challenge the same by way of a writ petition before the High Court which may be decided on its own merits totally uninfluenced by any observations made in this order. The facts and observations made are only with respect to the disposal of the M.A. No. 267 of 2024.

24. M.A. stands disposed of accordingly.

Result of the case: M.A. disposed of.

†*Headnotes prepared by:* Ankit Gyan

[2024] 9 S.C.R. 150 : 2024 INSC 660

Chirag Bhanu Singh & Anr.
v.
High Court of Himachal Pradesh & Ors.

(Writ Petition (C) No. 312 of 2024)

06 September 2024

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

Issue for Consideration

Writ petition filed by two seniormost District and Sessions Judges in the State of Himachal Pradesh aggrieved with the non-consideration of their names by the High Court Collegium for elevation as Judges of the High Court and recommendation of names of two officers junior to them for elevation, in ignorance of the directions of reconsideration given by the Collegium of the Supreme Court. Whether the present writ petition is maintainable; whether elevation for judgeship in the High Court has to be considered collectively by the High Court Collegium or whether the Chief Justice acting individually can reconsider the same.

Headnotes†

Judiciary – Higher Judiciary – Appointment of Judges of High Court – Judicial Review – Absence of consultation amongst the members of the Collegium – Recommendation by the Supreme Court Collegium for reconsideration of the names of the two petitioners for elevation as Judges of the High Court – Whether the reconsideration of the proposal for the elevation of the petitioners was jointly made by the Collegium members of the High Court, following the Supreme Court Resolution dated 04.01.2024 – Maintainability of the present writ petition:

Held: The writ petition is maintainable as it questions the lack of effective consultation – The Chief Justice of a High Court cannot individually reconsider a recommendation and it can only be done by the High Court Collegium acting collectively – The process of judicial appointments to a superior court is not the prerogative of a single individual – It is a collaborative and participatory process involving all Collegium members and must reflect the collective wisdom that draws from diverse perspectives

* Author

and ensures that principles of transparency and accountability are maintained – The recommendation by the Supreme Court Collegium for reconsideration is not expected to be addressed individually to all the members of the High Court Collegium – Such communications are naturally addressed to the Chief Justice of the concerned High Court however, the letter addressed to the Chief Justice will not enable the Chief Justice to act without participation by the other two Collegium members – In the present case, there was no collective consultation and deliberations amongst the members of the High Court Collegium, the three Constitutional functionaries of the High Court i.e. the Chief Justice and the two senior-most companion judges – The procedure adopted in the matter of reconsideration of the two petitioners is inconsistent with the law laid down in the Second Judges and the Third Judges case – The decision of the Chief Justice of the High Court on the suitability of the two petitioners as conveyed in his letter dated 06.03.2024 is an individual decision and therefore, vitiated – High Court Collegium to reconsider the names of the two petitioners for elevation as Judges of the High Court following the Supreme Court Collegium decision dated 04.01.2024 and the Law Minister's letter dated 16.01.2024. [Paras 18, 25, 27, 30-32]

Constitution of India – Article 217 (1), (2) – Appointment of judges of High Court – Judicial Review – Scope – 'Lack of effective consultation'; 'eligibility'; 'suitability':

Held: 'Lack of effective consultation' and 'eligibility' falls within the scope of judicial review whereas 'suitability' is non-justiciable and resultingly, the 'content of consultation' falls beyond the scope of judicial review. [Para 15]

Judiciary – Higher Judiciary – Appointment of judges of High Court – Confidentiality – Protection of sensitive informations:

Held: There is a need to protect certain sensitive information in matters involving appointment of judges – While transparency is necessary to ensure fairness and accountability, it must be carefully balanced with the need to maintain confidentiality – Disclosing sensitive information would compromise not only the privacy of the individual but also the integrity of the process. [Para 29]

Judiciary – Higher Judiciary – Appointment of Judges of High Court – Process of appointment of judges – Departure in the process, pre and post-1990 after emergence of the Collegium system – Discussed.

Case Law Cited

Mahesh Chandra Gupta v. Union of India [2009] 10 SCR 921 : **(2009) 8 SCC 273;** *M. Manohar Reddy v. Union of India* [2013] 1 SCR 711 **: (2013) 3 SCC 99;** *Anna Mathews v. Supreme Court of India* [2023] 1 SCR 463 **: (2023) 5 SCC 661;** *Supreme Court Advocates-on-Record Assn. v. Union of India* [1993] Supp. 2 SCR 659 **: (1993) 4 SCC 441;** *Registrar General, Madras High Court v. R. Gandhi* [2014] 4 SCR 77 **: (2014) 11 SCC 547;** *Common Cause v. Union of India* [2017] 11 SCR 154 **: (2018) 12 SCC 377;** *Special Reference No. 1 of 1998, Re* [1998] Supp. 2 SCR 400 **: (1998) 7 SCC 739 – referred to.**

Books and Periodicals Cited

Abhinav Chandrachud, 'The Fictional Concurrence of the Chief Justice' in Supreme Whispers, Conversations with Judges of the Supreme Court 1980-1989 (OUP 2018) 162-166; Law Commission of India, 'The Method of Appointment of Judges' (80th Report, August 1979) **– referred to.**

List of Acts

Constitution of India.

List of Keywords

Appointment of judges; Judicial Review; Elevation as Judges of the High Court; High Court Collegium; Collegium system; Directions of reconsideration given by the Collegium of the Supreme Court; Elevation for judgeship in the High Court; Absence of consultation amongst the members of the Collegium; Lack of effective consultation; Chief Justice of a High Court; Judicial appointments; Recommendation by Supreme Court Collegium for reconsideration; Second Judges case; Third Judges case; 'Eligibility'; 'Suitability'; Transparency; Fairness; Accountability; Confidentiality; Sensitive information.

Case Arising From

CIVIL ORIGINAL JURISDICTION: Writ Petition (Civil) No. 312 of 2024

(Under Article 32 of The Constitution of India)

Chirag Bhanu Singh & Anr. v.
High Court of Himachal Pradesh & Ors.

Appearances for Parties

Arvind P. Datar, Sr. Adv., Ms. Bina Madhavan, S. Udaya Kumar Sagar, Ms. Shreyasi Kunwar, Ms. Shubhangi Arora, Ms. Niharika Tanneru, M/s. Lawyer S Knit & Co., Advs. for the Petitioners.

S. Muralidhar, Sr. Adv., K. Parameshwar, Ms. Kanti, Shreenivas Patil, Ms. Chitransha Singh Sikarwar, Ms. Raji Gururaj, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Hrishikesh Roy, J.

1. Heard Mr. Arvind P. Datar, the learned Senior Counsel appearing for the writ petitioners. The High Court of Himachal Pradesh is represented by Dr. S. Muralidhar, the learned Senior Counsel.

2. This writ petition under Article 32 of the Constitution of India has been filed by the two seniormost District and Sessions Judges serving in the State of Himachal Pradesh. The prayer in the writ petition reads thus:

> "(a) Issue writ/writs including a writ in the nature of certiorari calling for the minutes of meeting of the collegium of the Hon'ble High Court of Himachal Pradesh whereby names of officers junior to the present petitioners have been recommended for elevation as Judges of the Hon'ble High Court ignoring the directions of reconsideration given by the Hon'ble Collegium of Hon'ble Supreme Court of India.
>
> (b) Issue writ/writs, order or direction, writ being in the nature of mandamus, directing the Respondent No. 1 to consider the names of the Petitioners as directed by the Hon'ble Collegium of the Hon'ble Supreme Court of India vide Resolution dated 4.1.2024.."

FACTS

3. The petitioners i.e. Chirag Bhanu Singh and Arvind Malhotra were recommended by the then Collegium of the High Court on 6th December 2022 for elevation as judges of the Himachal Pradesh High Court. On 12th July 2023, the Supreme Court Collegium,

however, deferred their consideration. Thereafter, on 4th January, 2024, the Supreme Court Collegium in its wisdom resolved that the proposal for the elevation of both be remitted for reconsideration to the Chief Justice of the Himachal Pradesh High Court. In the letter dated 16th January, 2024, addressed by the Minister for Law and Justice to the Chief Justice of the Himachal Pradesh, in reference to the Supreme Court Collegium Resolution dated 4th January, 2024, a request was made that fresh recommendations be sent for the two officers against the available service quota vacancies in the Himachal Pradesh High Court.

4. The grievance of the writ petitioners is that the High Court Collegium without first reconsidering the two petitioners in terms of the Supreme Court Collegium Resolution dated 4th January, 2024 as communicated in the Law Minister's letter dated 16th January, 2024 had recommended two other judicial officers for elevation. The argument is that if the latter recommended persons are considered for appointment ahead of the two petitioners, it would amount to ignoring their seniority and long-standing unblemished service.

5. On 13th May, 2024, adverting to the contentions raised, this Court issued notice only to the Registrar General of the Himachal Pradesh High Court with the following order:

> "1. Heard Mr. Arvind Datar, learned senior counsel appearing for the petitioners.
>
> 2. The counsel would submit that the two petitioners are the senior most judicial officers serving in the State of Himachal Pradesh. Their names were recommended for elevation to High Court Judgeship in December, 2022. The Supreme Court Collegium on 12.07.2023 however resolved to defer consideration for the two petitioners for the present with the observation that it will be taken up by the Collegium at an appropriate stage. The senior counsel then submits that the persons who were recommended in December, 2022 along with the petitioners have since been appointed as Judges of the High Court on 28.07.2023.
>
> 3. The Supreme Court thereafter on 04.01.2024 resolved that the proposal for elevation of the two petitioners be remitted to the Chief Justice

of the Himachal Pradesh High Court for fresh recommendation by the High Court. This decision is reflected in the communication dated 16.01.2024 addressed by the Minister for Law and Justice to the Chief Justice of the Himachal Pradesh High Court where request is made that fresh recommendations be sent for the two officers i.e., Chirag Bhanu Singh and Arvind Malhotra against the unfilled vacancies from service quota in the Himachal Pradesh High Court.

4. Projecting the grievances of the petitioners, Mr. Datar would submit that the Himachal Pradesh High Court Collegium on 23.04.2024 has recommended the names of two other Judicial Officers for elevation as High Court Judges without first acting on the recommendations of the Supreme Court Collegium and the 16.01.2024 letter of the Law Minister, for reconsideration of the two petitioners. Since both petitioners are the senior most judicial officers, Mr. Datar contends that if recently recommended judicial officers are considered for elevation, it will cause serious prejudice to the expectations of the petitioners who have unblemished service record as Judicial Officers.

5. Issue notice only to the Registrar General of the Himachal Pradesh High Court so that appropriate information can be obtained on whether the High Court Collegium had reconsidered the cases of the two petitioners, pursuant to the Supreme Court Resolution dated 04.01.2024 and the Law Minister's Communication dated 16.01.2024."

6. Following the above notice, a Report in sealed cover was filed by the Registrar General of the Himachal Pradesh High Court. The Report was perused and was also furnished to the learned Counsel for the writ Petitioners.

7. The Report of the Registrar General, reflected that the Resolution of the Supreme Court Collegium (dated 4th January, 2024) was never received by the Chief Justice of the High Court. It was further

stated that the Chief Justice of the High Court had written to the Chief Justice of India on 11th December 2023 seeking guidance on whether the Collegium of the Supreme Court needed further inputs about the suitability of the two officers for elevation as High Court judges. On 6th March 2024, the Chief Justice of the High Court individually addressed a letter to the Supreme Court Collegium on the suitability of the petitioners. This is projected to be in full compliance of the resolution dated 4th January, 2024 of the Supreme Court Collegium. The report also notes that a representation was made by one of the Petitioners to the Chief Justice of India against non-consideration for elevation. This letter, it is alleged was contemptuous.

8. When the present matter was next heard on 23rd July, 2024, this Court called for the Supreme Court Resolution dated 4th January, 2024 as the parties wanted to be sure of the same, to make further submissions. A copy of the Supreme Court resolution was then produced before this Court and was allowed to be perused by the respective counsel for the parties.

SUBMISSIONS

9.1. Mr. Datar, the learned Senior Counsel projected that the two petitioners were direct recruits and the seniormost district judges in the State of Himachal Pradesh. Over the last two decades, both have had a blemish-free record and all their 17 ACRs have either been 'Outstanding' or 'Excellent'. It was then submitted that as the two seniormost judges, they have a constitutional right for reconsideration of their names. Referring to paragraph-10 of the Registrar General's Report, the senior counsel argues that the issue of elevation has to be collectively considered by the High Court Collegium and not by the Chief Justice acting alone. As regards the letter written by one of the judicial officers to the Chief Justice of India, it was submitted that it only highlights his judicial journey and the anguish for not being considered for elevation despite 17 years of exemplary service. According to Mr. Datar, the letter does not contain any insinuation against members of the Supreme Court Collegium and is not contemptuous or disrespectful or in bad taste as is alleged in the Report of the Registrar General.

9.2. On maintainability, it was submitted that the present writ petition is limited to 'lack of effective consultation' and hence is maintainable.

Reliance has been placed on the decisions of this Court in *Mahesh Chandra Gupta v. Union of India*[1] (for short "Mahesh Chandra Gupta"), where it was held that the issues of 'eligibility' and 'effective consultation' would be within the realm of judicial review. This was followed in *M. Manohar Reddy v. Union of India*[2] and reiterated recently in *Anna Mathews v. Supreme Court of India*[3] where it was held that judicial review is restricted to 'eligibility' and not 'suitability' or 'content of consultation'. It was also submitted that the consideration by the Collegium collectively is an in-built check against the likelihood of arbitrariness or bias.

9.3. On the other hand, Dr. S. Muralidhar, Learned Senior Counsel appearing for the High Court of Himachal Pradesh argued that the present writ petition is not maintainable. The prayer for reconsideration is, in effect, a request for judicial review over the 'suitability' of the candidates. To highlight the limited scope of judicial review, reliance has been placed on the decisions of this Court in *Supreme Court Advocates-on-Record Assn. v. Union of India*[4] (for short "Second Judges case"), *Mahesh Chandra Gupta (supra)*,[5] *M. Manohar Reddy v. Union of India*,[6] *Registrar General, Madras High Court v. R. Gandhi*,[7] *Common Cause v. Union of India*[8] and *Anna Mathews v. Supreme Court of India*.[9]

9.4. As regards the Chief Justice of the High Court individually taking a decision and addressing the letter to the Chief Justice of India, it was argued by Dr. Muralidhar that the resolution of the Supreme Court Collegium (4.01.2024) did not specify that the reconsideration of the petitioners' names was to be in consultation with the other members of the High Court Collegium. Therefore, the High Court Chief Justice according to the learned counsel, could have made the reconsideration all by himself.

---

1 [2009] 10 SCR 921 : (2009) 8 SCC 273
2 [2013] 1 SCR 711 : (2013) 3 SCC 99
3 [2023] 1 SCR 463 : (2023) 5 SCC 661
4 [1993] Supp. 2 SCR 659 : (1993) 4 SCC 441 (Para 482)
5 Para 39-41, 43-44 and 71, 74
6 [2013] 1 SCR 711 : (2013) 3 SCC 99 (Para 17-20)
7 [2014] 4 SCR 77 : (2014) 11 SCC 547 (Para 25-26)
8 [2017] 11 SCR 154 : (2018) 12 SCC 377 (Para 17)
9 [2023] 1 SCR 463 : (2023) 5 SCC 661 (Para 10)

ISSUES

10. Going by the above submissions, the following questions arise for our consideration:

A) Whether the writ petition is maintainable?

B) Whether elevation for judgeship in the High Court has to be considered collectively by the High Court Collegium or whether the Chief Justice acting individually can reconsider the same?

Issue A

11. At the outset, it is apposite to address the issue of maintainability of the writ petition and the limited scope of judicial review in such matters. This aspect was addressed by a nine-judge bench of this Court in *Supreme Court Advocates-on-Record Association. v. Union of India*[10] (for short *"Second Judges case"*). It was observed therein that the scope of judicial review in appointment of judges is limited as it introduces the 'judicial element' in the process and further judicial review is not warranted apart from some exceptions such as want of consultation amongst the named constitutional functionaries. In this regard, the following passage from the *Second Judges case (supra)* bears consideration:

> "**482**. This is also in accord with the public interest of excluding these appointments and transfers from litigative debate, to avoid any erosion in the credibility of the decisions, and to ensure a free and frank expression of honest opinion by all the constitutional functionaries, which is essential for effective consultation and for taking the right decision. The growing tendency of needless intrusion by strangers and busybodies in the functioning of the judiciary under the garb of public interest litigation, in spite of the caution in S.P. Gupta [1981 Supp SCC : (1982) 2 SCR 365] while expanding the concept of locus standi, was adverted to recently by a Constitution Bench in Krishna Swami v. Union of India [(1992) 4 SCC 605]. It is, therefore, necessary to spell out clearly the limited scope of judicial review in such matters, to avoid similar situations

10 [1993] Supp. 2 SCR 659 : (1993) 4 SCC 441

> in future. *Except on the ground of* ***want of consultation*** *with the named constitutional functionaries* ***or lack of any condition of eligibility*** *in the case of an appointment, or of a transfer being made without the recommendation of the Chief Justice of India, these matters are not justiciable on any other ground,* ***including that of bias****, which in any case is excluded by the element of plurality in the process of decision-making."*
>
> [emphasis supplied]

12. Thereafter in *Special Reference No. 1 of 1998, Re*[11] (for short "*Third Judges case*"), it was noted as under:

> **"32.** Judicial review in the case of an appointment or a recommended appointment, to the Supreme Court or a High Court is, therefore, available if the recommendation concerned is not a decision of the Chief Justice of India and his seniormost colleagues, which is constitutionally requisite. They number four in the case of a recommendation for appointment to the Supreme Court and two in the case of a recommendation for appointment to a High Court. Judicial review is also available if, in making the decision, the views of the seniormost Supreme Court Judge who comes from the High Court of the proposed appointee to the Supreme Court have not been taken into account. Similarly, if in connection with an appointment or a recommended appointment to a High Court, the views of the Chief Justice and senior Judges of the High Court, as aforestated, and of Supreme Court Judges knowledgeable about that High Court have not been sought or considered by the Chief Justice of India and his two seniormost puisne Judges, judicial review is available. Judicial review is also available when the appointee is found to lack eligibility."

13. Subsequently, a two-judge bench speaking through S.H. Kapadia J laid down important principles in *Mahesh Chandra Gupta (supra)*. This Court distinguished between 'eligibility' and 'suitability' and

11 [1998] Supp. 2 SCR 400 : (1998) 7 SCC 739

noted that Article 217(1) of the Constitution of India pertains to the 'suitability' of an individual, whereas Article 217(2) concerns the 'eligibility' of a person to become a Judge. While 'eligibility' is an objective criterion, 'suitability' is a subjective one. The bench further observed that decisions regarding who should be elevated, which primarily involve considerations of "suitability, are not subject to judicial review. It held as under:

> "**44**. At this stage, we may highlight the fact that there is a vital difference between judicial review and merit review. Consultation, as stated above, forms part of the procedure to test the fitness of a person to be appointed a High Court Judge under Article 217 (1). Once there is consultation, the content of that consultation is beyond the scope of judicial review, though lack of effective consultation could fall within the scope of judicial review. This is the basic ratio of the judgment of the Constitutional Bench of this Court in Supreme Court Advocates-on-Record Assn. [(1993) 4 SCC 441] and Special Reference No. 1 of 1998, Re [(1998) 7 SCC 739]."

14. The above view where the Court distinguished between 'eligibility' and 'suitability' has been consistently followed[12] in subsequent decisions of this Court including in the recent decision in *Anna Mathews v Supreme Court of India*[13] where it was noted as under:

> "**10**. We are clearly of the opinion that this Court, while exercising power of judicial review cannot issue a writ of certiorari quashing the recommendation, or mandamus calling upon the Collegium of the Supreme Court to reconsider its decision, as this would be contrary to the ratio and dictum of the earlier decisions of this Court referred to above, which are binding on us. To do so would violate the law as declared, as it would amount to evaluating and substituting the decision of the Collegium, with individual or personal opinion on the suitability and merits of the person."

12 Manohar Reddy and Anr. v. Union of India (2013) 3 SCC 99, Registrar General, Madras High Court v. R. Gandhi (2014) 11 SCC 547, Common Cause v. Union of India (2018) 12 SCC 377

13 [2023] 1 SCR 463 : (2023) 5 SCC 661

15. The following position emerges as a result of the above:

i) '*Lack of effective consultation'* and '*eligibility*' falls within the scope of judicial review.

ii) '*Suitability*' is non-justiciable and resultingly, the '*content of consultation'* falls beyond the scope of judicial review.

16. The above legal position clearly suggests that the absence of consultation amongst the members of the Collegium would be within the limited purview of judicial review. Proceeding on this understanding, this Court had issued notice to the Registrar General to ascertain whether the High Court Collegium adhered to the procedural requirement of an 'effective consultation' for the reconsideration exercise. The Chief Justice of the High Court, it was submitted had never received the Resolution of the Supreme Court Collegium. It was therefore argued that perusing the Resolution of the Supreme Court was essential for the respective counsel to make their submissions. As earlier noted, a copy of the resolution (dated 4th January 2024) was produced in Court and the same was allowed to be perused by the respective counsel for the parties.

17. The aforesaid re-consideration resolution was requisitioned only for factual determination as to whether 'effective consultation' was made, in terms of the resolution of the SC Collegium. This scrutiny has nothing to do with the 'merits' or the 'suitability' of the officers in question but to verify whether 'effective consultation' was made. Such scrutiny is permissible within the limited scope of judicial review as discussed before. Therefore, the present writ petition for this limited scrutiny is found to be maintainable.

Issue B

18. The second issue that falls for our consideration is whether elevation for judgeship in the High Court has to be considered collectively by the Collegium of the High Court or whether the Chief Justice acting individually can reconsider the same. The process of judicial appointments to a superior court is not the prerogative of a single individual. Instead, it is a collaborative and participatory process involving all Collegium members. The underlying principle is that the process of appointment of judges must reflect the collective wisdom that draws from diverse perspectives. Such a process ensures that principles of transparency and accountability are maintained.

19. Mr. Datar, the learned Senior Counsel earnestly submitted that the Chief Justice of a High Court individually cannot reconsider a recommendation. To appreciate the legal basis for such a contention, we may refer to the following judgments discussed below.

20. This Court in the *Second Judges case (supra)* noted as under:

> "**468**. The rule of law envisages the area of discretion to be the minimum, requiring only the application of known principles or guidelines to ensure non-arbitrariness, but to that limited extent, discretion is a pragmatic need. Conferring discretion upon high functionaries and, whenever feasible, introducing the element of plurality by requiring a collective decision, are further checks against arbitrariness. This is how idealism and pragmatism are reconciled and integrated, to make the system workable in a satisfactory manner."

21. Again, in the *Third Judges case (supra)*, it was observed that "the element of plurality of judges in formation of the opinion of the Chief Justice of India, effective consultation in writing and prevailing norms to regulate the area of discretion are sufficient checks against arbitrariness."

22. Mr. Datar placed reliance on the following passage from the decision in *Mahesh Chandra (supra)* to buttress his submission:

> "**73.** The concept of plurality of Judges in the formation of the opinion of the Chief Justice of India is one of inbuilt checks against the likelihood of arbitrariness or bias. At this stage, we reiterate that "lack of eligibility" as also "lack of effective consultation" would certainly fall in the realm of judicial review. However, when we are earmarking a joint venture process as a participatory consultative process, the primary aim of which is to reach an agreed decision, one cannot term the Supreme Court Collegium as superior to High Court Collegium. The Supreme Court Collegium does not sit in appeal over the recommendation of the High Court Collegium. Each Collegium constitutes a participant in the participatory consultative process. The concept of primacy and plurality is in effect primacy of the opinion of the Chief Justice of

> India *formed collectively*. The discharge of the assigned role by each functionary helps to transcend the concept of primacy between them."

23. What was emphasized above is that collaborative deliberations bring in transparency in the process, as decisions are deliberated, debated, and recorded. This contributes to public trust in the judiciary, as it demonstrates that appointments are being made based on thorough consideration.

24. Tracing the departure in the process of appointment of judges pre and post-1990 after the emergence of the Collegium system, a legal Scholar[14] notes that the *Second Judges case (supra)* effectively ended the 'primacy' or the 'preponderating voice' of the Chief Justice over senior colleagues. Contrasting the observations of the Law Commission, in its 80th Report in 1979[15] with the current system, the author observes that while the Commission recommended that a Chief Justice of a High Court should consult his two seniormost colleagues before recommending names to the government for judicial appointments, it *did not* mandate that these recommendations be unanimous or binding. However, the collegium system introduced through the *Second Judges case (supra),* institutionalized the practice of consulting senior colleagues, making it *binding* on the chief justice.

25. With the above judgments holding the field, it is difficult to accept the contention of the learned Senior Counsel, Dr. Muralidhar who argued that the Chief Justice of the High Court can individually reconsider a candidate based on how Resolutions are worded. To substantiate this argument, various Supreme Court Resolutions were placed before us to show that there is a difference in language and in the present case, it was specifically addressed to the Chief Justice of the High Court. It was contended that this wide power of the Collegium to direct reconsideration individually by the Chief Justice may not be curtailed. We are disinclined to accept this view as it is well-settled that the Supreme Court Collegium does not sit in appeal over the

---

14 Abhinav Chandrachud, 'The Fictional Concurrence of the Chief Justice' in Supreme Whispers, Conversations with Judges of the Supreme Court 1980-1989 (OUP 2018) 162-166

15 Law Commission of India, 'The Method of Appointment of Judges' (80th Report, August 1979) Available at https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/20220805100-2.pdf, <Last accessed on 5.9.2024>

High Court Collegium.[16] It is a participatory process where each of the Constitutional functionaries have a role to play. In our opinion, the language therein by itself cannot be understood as permitting the Chief Justice of the High Court to act on his own, in matters of recommendation or even reconsideration, for elevation to the High Court bench. The recommendation by the Supreme Court Collegium for reconsideration, is not expected to be addressed individually to all the members of the High Court Collegium. Such communications are naturally addressed to the Chief Justice of the concerned High Court but as noted earlier, the letter addressed to the Chief Justice will not enable the Chief Justice to act without participation by the other two Collegium members.

26. In this case, the Court is not concerned with the aspects of 'suitability' of the petitioners for elevation as judges of the High Court or even the 'content of consultation'. Our scrutiny is limited to whether the reconsideration of the proposal for the elevation of the two petitioners, was jointly made by the Collegium members of the High Court, following the Supreme Court Resolution dated 4th January 2024.

27. This Court is mindful of the limited scope of interference in such matters. But this appears to be a case where there was no collective consultation amongst the three Constitutional functionaries of the High Court i.e. the Chief Justice and the two senior-most companion judges. The absence of the element of plurality, in the process of reconsideration as directed by the Supreme Court Collegium, is clearly discernible.

28. At this juncture, we must also address the submissions on the letter written by one of the petitioners, as referenced in the Report of the Registrar General and argued before this Court. It was contended that the letter contained contemptuous remarks directed at the Supreme Court Collegium. We have perused the letter. It is definitely an expression of hurt by the judicial officer, but will not bring the letter into the contemptuous category.

29. Before parting, it needs to be stated that there is also a need to protect certain sensitive information in matters involving appointment of judges. While transparency is necessary to ensure fairness and

16 Mahesh Chandra Gupta v. Union of India (2009) 8 SCC 273

accountability, it must be carefully balanced with the need to maintain confidentiality. Disclosing sensitive information would compromise not only the privacy of the individual but also the integrity of the process.

30. In the case before us, the procedure adopted in the matter of reconsideration of the two petitioners is found to be inconsistent with the law laid down in the *Second Judges (supra)* and the *Third Judges case (supra)*. There was no collective consultation and deliberations by the members of the High Court Collegium. The decision of the Chief Justice of the High Court, on the suitability of the two petitioners as conveyed in his letter dated 6th March 2024, appears to be an individual decision. The same therefore stand vitiated both procedurally and substantially.

31. The final finding from the above is as follows:-

i) The writ petition is maintainable as it questions the lack of effective consultation;

ii) The Chief Justice of a High Court cannot individually reconsider a recommendation and it can only be done by the High Court Collegium acting collectively.

32. In light of the above, the High Court Collegium should now reconsider the names of Mr. Chirag Bhanu Singh and Mr. Arvind Malhotra for elevation as Judges of the High Court, following the Supreme Court Collegium decision dated 4th January, 2024 and the Law Minister's letter dated 16th January, 2024. It is ordered accordingly.

33. The matter stands allowed in above terms.

Result of the case: Writ petition allowed.

†*Headnotes prepared by:* Divya Pandey

[2024] 9 S.C.R. 166 : 2024 INSC 650

Seetharama Shetty
v.
Monappa Shetty

(Civil Appeal Nos. 10039-40 of 2024)

02 September 2024

[Hrishikesh Roy and S.V.N. Bhatti,* JJ.]

Issue for Consideration

Scope of Sections 33, 34, 37, 39 of the Karnataka Stamp Act, 1957; whether the agreement of sale dated 29.06.1999, with a recital on delivery of possession to the appellant, conforms to the definition of conveyance under Section 2(d) read with Article 20(1) of the Schedule of the Act or not; whether in the facts and the circumstances of the case, the penalty determined by the trial Court on the instrument instead of sending the instrument to the District Registrar for determination and collection of penalty as may be applicable is legal; whether, the said order of trial court as confirmed by the impugned orders of the High Court are legal and valid or call for interference by this Court.

Headnotes†

Karnataka Stamp Act, 1957 – ss.33, 34, 39 – Appellant sought perpetual injunction restraining the respondent from interfering with his possession of the plaint schedule property which he claimed was given to him as part performance under the suit agreement between them – Respondent denying the execution of the aforesaid agreement of sale inter alia claimed that the document was insufficiently stamped and thus, inadmissible in evidence – Filed application u/s.33 for impounding of the suit agreement – Eventually, trial court directed the appellant to pay the deficit stamp duty and ten times penalty on the agreement of sale – Penalty determined by the Court on the instrument instead of sending the instrument to the District Registrar for determination and collection of penalty, if legal:

Held: No – Before the stage of admission of the instrument in evidence, the respondent raised an objection on the deficit stamp duty – Therefore, it was the respondent who required the suit agreement to be impounded and then sent to the District Registrar to be dealt with u/s.39 – Respondent desired the impounding of the

* Author

suit agreement and collect the deficit stamp duty and penalty – The trial court is yet to exercise its jurisdiction u/s.34 – On the contrary, the trial court called for a report from the District Registrar, so for all purposes, the suit instrument is still at one or the other steps summed up in paragraph 21 of the present judgment – Therefore, going by the request of the respondent, the option is left for the decision of the District Registrar – Contrary to these admitted circumstances, though the suit instrument is insufficiently stamped, still the penalty of ten times u/s.34 was imposed through the impugned orders – The imposition of penalty of ten times at this juncture in the facts and circumstances of this case is illegal and contrary to the steps summed up in paragraph 21 – The instrument is sent to the District Registrar, thereafter the District Registrar in exercise of his jurisdiction u/s.39, decides the quantum of stamp duty and penalty payable on the instrument – The appellant is denied this option by the impugned orders – Appellant must pay what is due, but as is decided by the District Registrar and not the Court u/s.34 – The direction to pay ten times the penalty of the deficit stamp duty set aside. [Paras 22, 23]

Karnataka Stamp Act, 1957 – ss.33-35, 37, 39 – Scope – Insufficiently stamped instrument – Admission procedure – Steps explained and summed up. [Paras 21-21.8]

Karnataka Stamp Act, 1957 – s.2(d), Article 5, Article 20(1) of the Schedule of the Act – 'conveyance':

Held: Article 5 of the Schedule of the Act deals with an agreement of sale coupled with possession and the requirement of paying the ad valorem stamp duty – If an instrument conforms to the requirements of conveyance u/s.2(d) r/w Article 20(1) of the Schedule of the Act, the applicable stamp duty is ad valorem – In the present case, the appellant did not argue on the applicability of the clause dealing with possession in the agreement and requirement to pay ad valorem stamp duty and the relief of injunction was sought on the basis of delivery of possession by the respondent under the suit agreement. [Para 14]

Karnataka Stamp Act, 1957 – Object of the Act – Discussed. [Para 17]

Karnataka Stamp Act, 1957 – ss.34, 39 – Distinction and discretion under – Distinction in the discretion available to Every Person/Court; discretionary jurisdiction conferred on the District Registrar – Discussed.

Case Law Cited

Gangappa and another v. Fakkirappa [2018] 13 SCR 603 **– relied on.**

Trustees of H.C. Dhanda Trust v. State of Madhya Pradesh and others [2020] 11 SCR 268**;** *Chilakuri Gangulappa v. Revenue Divisional Officer, Madanpalle* [2001] 2 SCR 419 **: (2001) 4 SCC 197;** *Hindustan Steel Limited v. Dilip Construction Company* [1969] 3 SCR 736 **: (1969) 1 SCC 597;** *District Registrar and Collector v. Canara Bank* [2004] Suppl. 5 SCR 833 **: (2005) 1 SCC 496;** *State of Maharashtra v. National Organic Chemical Industries Limited* [2024] 4 SCR 340 **: (2024) SCC OnLine SC 497;** *Chiranji Lal v. Haridas* [2005] Supp. 1 SCR 359 **: (2005) 10 SCC 746;** *Petiti Subba Rao v. Anumala S. Narendra* **(2002) 10 SCC 427– referred to.**

Digambar Warty and others v. District Registrar Bangalore Urban District and another **ILR 2013 KAR 2099;** *K. Amarnath v. Smt. Puttamma* **ILR 1999 KAR 4634;** *Suman v. Vinayaka and others* **(2013) SCC OnLine Kar 10138;** *Niyaz Ahmed Siddique v. Sanganeria Company Private Limited* **(2023) SCC OnLine Cal 1391;** *United Precision Engineers Private Limited v. KIOCL Limited* **(2016) SCC OnLine Kar 1077;** *Sri. K. Govinde Gowda v. Smt. Akkayamma and others* **ILR 2011 KAR 4719 – referred to.**

List of Acts

Karnataka Stamp Act, 1957; Stamp Act, 1899.

List of Keywords

Stamp duty; Deficit stamp duty; Deficit stamp duty and penalty; Penalty; Levy of stamp duty and penalty; Agreement of sale; Ad valorem stamp duty; Suit instrument insufficiently stamped; Ten times penalty on the agreement of sale; Delivery of possession; Conveyance; Collection of penalty; Insufficiently stamped instrument; Inadmissible in evidence; District Registrar/Deputy Commissioner; Perpetual injunction; Part performance under the suit agreement; Impounding of the suit agreement.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 10039-40 of 2024

From the Judgment and Order dated 23.08.2019 and 14.09.2021 of the High Court of Karnataka at Bengaluru in WP No. 30734 of 2019 and RP No. 340 of 2019 respectively

Appearances for Parties

Ms. Liz Mathew, Sr. Adv. (Amicus Curiae), Ms. Mallika Agarwal, Ms. Bagavathy V., Advs.

Parikshit Angadi, Anirudh Sanganeria, Advs. for the Appellant.

Judgment / Order of the Supreme Court

Judgment

S.V.N. Bhatti, J.

1. Leave granted.

2. The Civil Appeals arise from an order dated 14.09.2021 in Review Petition No. 340 of 2019 and Writ Petition No. 30734 of 2019.

3. In these Civil Appeals, the scope of Sections 33, 34, 37, and 39 of the Karnataka Stamp Act, 1957 (for short, '**the Act**') arises for consideration.

I. Factual Matrix

4. The appellant filed O.S. No. 295 of 2013 for perpetual injunction restraining the respondent from interfering with the appellant's peaceful possession and enjoyment of the plaint schedule property. The plaint schedule property consists of agricultural land in Kavoor village of Mangalore taluk. The prayer for injunction rests on the plea that the respondent entered into the agreement of sale dated 29.06.1999 with the appellant. The appellant claims to have been put in possession of the plaint schedule property as part performance under the agreement of sale dated 29.06.1999 by the respondent. The other clauses covered by the agreement are not adverted to as part of the narrative, for they are of little relevance for disposing of the Civil Appeals.

5. It is alleged that the respondent, contrary to the possession given as part performance under the suit agreement, tried to dispossess the appellant. This led to exchange of notices between the parties. The sheet anchor in the appellant's narrative is that the agreement of sale dated 29.06.1999 exists between the parties, and in part performance thereunder, the appellant was put in possession of the plaint schedule property by the respondent. Contrary to the *ad idem* of the parties in putting the appellant in possession, the respondent was trying to dispossess the appellant from the plaint schedule property.

Therefore, the suit was filed for the relief of perpetual injunction. Briefly narrated, the possession claimed under the agreement of sale is sought to be protected through the prayer for perpetual injunction.

6. The respondent denies the execution of the agreement of sale dated 29.06.1999. The appellant, since claims possession through the agreement of sale, the suit agreement shall be treated as a conveyance. The suit agreement is insufficiently stamped. Therefore, the document is inadmissible in evidence unless the document is made compliant with the requirements of the Act.

6.1. The respondent filed an application before the trial court under Section 33 of the Act to impound the suit agreement to collect the deficit stamp duty and penalty in accordance with the Act. By order dated 10.11.2016, the trial court sent the agreement of sale dated 29.06.1999 to the District Registrar for determination of requisite stamp duty and penalty payable on the agreement of sale. The record discloses that the District Registrar expressed inability to determine the deficit stamp duty and penalty payable on the suit agreement for want of the name of the village, hence, returned the instrument to the trial court. Thereafter, the appellant filed a memo dated 26.04.2017 purporting to clarify the name of the village in the schedule of the agreement of sale. The said effort was opposed by the respondent, namely ex-post-facto incorporation of material details into the suit agreement; gaps in the agreement are not filled up by the appellant to the detriment of the respondent. The trial court, agreeing with the respondent's objection, rejected the memo dated 26.04.2017. The appellant filed Writ Petition No. 8506 of 2018 challenging the trial court's order dated 12.08.2017 before the High Court of Karnataka. On 10.08.2018, the Writ Petition was disposed of, and the operative portion reads thus:

> *"Accordingly, in modification of the impugned order dated 12.08.2017, it is directed that a copy of the memo filed by the plaintiff may be sent by the Trial Court to the office of the District Registrar for appropriate proceedings in accordance with law.*
>
> *However, it is made clear that the order and proposition with reference to the name of the village mentioned by the plaintiff/petitioner shall have relevance only*

> *for the purpose of calculation of deficit stamp duty and other charges but shall have no bearing on the merit consideration of the submissions of the parties, including the submissions of the defendant/ respondent about the genuineness and the validity of the document in question and the corresponding right of the plaintiff/petitioner to contest such objections."*

7. The District Registrar, through report dated 10.11.2016, determined the deficit stamp duty payable on the instrument at Rs. 71,200/-. The trial court, by order dated 23.01.2019, directed the appellant to pay the deficit stamp duty of Rs. 71,200/- and ten times penalty on the agreement of sale dated 29.06.1999. Thus, the total levy of stamp duty and penalty is Rs. 7,83,200/-. The appellant assailed the order dated 23.01.2019 in O.S. NO. 295 of 2013 in Writ Petition No. 30734 of 2019 before the High Court. The Writ Petition was dismissed, and the appellant was granted four months' time for payment of deficit stamp duty and the penalty. The appellant filed Review Petition No. 340 of 2019, and through the impugned order dated 14.09.2021, the Review Petition was dismissed. Hence, the Civil Appeals have been filed questioning the orders dated 23.01.2019 and 14.09.2021.

8. The learned Single Judge has, in great detail, referred to all the attending circumstances, appreciated their implication *vis-à-vis* the statutory obligation under the Act to pay *ad valorem* stamp duty on an agreement of sale satisfying the definition of a conveyance under the Act and dismissed the Review Petition. The findings, in brief, are as follows:

8.1. Section 33 of the Act requires the adjudicating authorities to impound and determine the duty payable on the suit agreement.

8.2. Section 34 of the Act provides for levy of deficit stamp duty and penalty. The Section employs the expression "ten times the amount of the proper duty or deficit portion thereof." Therefore, there is no discretion granted to the adjudicating authorities to waive or reduce the penalty.

8.3. Only on the payment of deficit stamp duty along with ten times penalty, the suit agreement is relied in evidence.

8.4. The text used in Sections 34 and 39 of the Act cannot be linguistically approximated, as the legislature has not vested

the discretion given to the Deputy Commissioner under Section 39 of the Act in the same way to the adjudicating authorities under Section 34 of the Act.

8.5. Relying on case law, the impugned order noted that the adjudicating authorities do not have the discretion to disobey the legislative command to waive or reduce the penalty in any circumstance. The discretion however extends to the grant of a reasonable time for the payment of duty and penalty.

8.6. Thus, through the Impugned Order, the Learned Single judge concluded that the Review Petition fails, and the appellant was granted a period of six months' time to pay the deficit stamp duty along with ten times penalty.

9. Hence, the Civil Appeals.

10. We have heard the learned counsel and also Ms. Liz Mathew, who was appointed as Amicus Curiae to assist the Court.

II. Submissions

11. Learned counsel for the appellant firstly contends that the suit document conforms to the requirements of the Act and the suit was for injunction. Considering the total circumstances, it is argued that even if the suit document is not stamped correctly but having regard to the orders dated 12.08.2017 and 10.08.2018, the trial court ought not to have decided the deficit stamp duty and penalty under Section 34 of the Act. Instead, the trial court ought to have sent the impounded instrument to the District Registrar for determining the stamp duty and the penalty. Thereupon, the District Registrar would have exercised his discretionary jurisdiction under Section 39 of the Act and determined the quantum of penalty payable by the appellant. In the case on hand, the dispute arose on the application filed by the respondent requesting to send the suit document to the District Registrar for determination of duty and penalty. The District Registrar has sent a report on the stamp duty payable but has not collected the deficit stamp duty or levied the penalty on the suit agreement. It is argued that the case falls under Section 37(2) of the Act, and the impugned orders have denied the appellant the option to have the penalty decided by the District Registrar. Therefore, the trial court and the High Court have committed an illegality by exercising the jurisdiction under Section 34 of the Act.

12. The learned Amicus Curie places reliance on ***Gangappa and another v. Fakkirappa***,[1] ***Trustees of H.C. Dhanda Trust v. State of Madhya Pradesh and others***,[2] ***Digambar Warty and others v. District Registrar, Bangalore Urban District and another***,[3] ***K. Amarnath v. Smt. Puttamma***,[4] ***Suman v. Vinayaka and others***,[5] ***Niyaz Ahmed Siddique v. Sanganeria Company Private Limited***,[6] ***United Precision Engineers Private Limited v. KIOCL Limited***,[7] ***Chilakuri Gangulappa v. Revenue Divisional Officer, Madanpalle***,[8] and ***Sri. K. Govinde Gowda v. Smt. Akkayamma and others***,[9] and contends that the scope of jurisdiction in receiving in evidence insufficiently stamped instruments by every person, having by law or consent of parties, authority to receive evidence and every person in charge of a public office on the one hand and the Deputy Commissioner/District Registrar on the other hand, is fairly well-settled by the binding precedents. The scope of discretion available in two distinct forums covered by Sections 34 and 39 of the Act is fairly well settled and defined.

12.1. It is further argued that the ratio in ***Chilakuri Gangulappa*** (supra) is not applicable to the facts and circumstances of this case. The trial court while considering the prayer for an injunction by relying on the suit document, exercised its jurisdiction under Section 34 of the Act. The procedure under Section 37(2) of the Act arises in the cases not attracting Section 37(1) of the Act. The discretionary jurisdiction under Section 39 of the Act is exclusive to the District Registrar/ Deputy Commissioner while exercising the powers under the Act. Thus, expecting the court to exercise the discretion of Section 39 of the Act is untenable.

---

1 [2018] 13 SCR 603 : (2019) 3 SCC 788

2 [2020] 11 SCR 268 : (2020) 9 SCC 510

3 ILR 2013 KAR 2099

4 ILR 1999 KAR 4634

5 (2013) SCC OnLine Kar 10138

6 (2023) SCC OnLine Cal 1391

7 (2016) SCC OnLine Kar 1077

8 [2001] 2 SCR 419 : (2001) 4 SCC 197

9 ILR 2011 KAR 4719

III. Analysis

13. We have perused the record and noted the rival submissions. The following points arise in the Civil Appeals:

I. Whether the agreement of sale dated 29.06.1999, with a recital on delivery of possession to the appellant, conforms to the definition of conveyance under Section 2(d) read with Article 20(1) of the Schedule of the Act or not?

II. Whether, in the facts and circumstances of the case, the order dated 23.01.2019 of trial court, as confirmed by the impugned orders dated 23.08.2019 and 14.09.2021, are legal and valid or call for interference by this Court under Article 136 of the Constitution of India?

Point I

14. Agreement of sale dated 29.06.1999, among other clauses, refers to the alleged delivery of possession in favour of the appellant by the respondent. Article 5 of the Schedule of the Act deals with an agreement of sale coupled with possession and the requirement of paying the *ad valorem* stamp duty. If an instrument conforms to the requirements of conveyance under Section 2(d) read with Article 20(1) of the Schedule of the Act, the applicable stamp duty is *ad valorem.* In other words, *ad valorem* stamp duty is paid on such instruments. The learned counsel appearing for the appellant has not argued on the applicability of the clause dealing with possession in the agreement and requirement to *ad valorem* pay stamp duty. The relief of injunction is sought on the basis of delivery of possession by the respondent under the suit agreement. The following Judgments are relevant and are close in circumstance to the case on hand and are referred to.

14.1. ***Gangappa's case*** (supra), analysed a situation on an insufficiently stamped document produced before a court, and compared Sections 34 and 39 of the Act and held that the discretion conferred by the provision is different by the text and the context of these provisions. This Court upheld the ratio laid in ***Digambar Warty*** (supra) and held that even though no discretion was provided to the court to impose a reduced penalty, Section 38 of the Act empowered the Deputy Collector to refund the duty so collected. In paragraph 18 of the Judgment, it is recorded that:

> *"18. The above view of the Karnataka High Court that there is no discretion vested with the authority impounding the document in the matter of collecting duty under Section 33, is correct. The word used in the said proviso is "shall". Sections 33 and 34 clearly indicate that penalty imposed has to be 10 times. The Division Bench of the Karnataka High Court in Digambar Warty [Digambar Warty v. Bangalore Urban District, 2012 SCC OnLine Kar 8776 : ILR 2013 KAR 2099] has rightly interpreted the provisions of Sections 33 and 34 of the Act. We, thus, are of the view that the High Court in the impugned judgment [Fakkirappa v. Gangappa, 2014 SCC OnLine Kar 12775] did not commit any error in relying on the judgment of the Division Bench in Digambar Warty [Digambar Warty v. Bangalore Urban District, 2012 SCC OnLine Kar 8776 : ILR 2013 KAR 2099]. We thus have to uphold the above view expressed in the impugned judgment [Fakkirappa v. Gangappa, 2014 SCC OnLine Kar 12775].*
>
> However, as a one-time measure, this Court allowed closing the matter by confirming the payment of deficit duty with the double penalty as imposed by the trial court. The precedent interpreted the discretionary limits under Section 34 of the Act.

14.2. In ***United Precision Engineers Private Limited*** (supra), the question arose as to the extent of power exercised by Deputy Commissioner under Section 37(2) of the Act. The Court observed that the phrase "in every other case" contained in Section 37(2) of the Act will have to be understood to include not only an instrument which is merely impounded and referred but also an instrument impounded, relating to which duty and penalty determined but not paid by the party. The court observed that as per the combined reading of the sections, if the impounding authority determined the penalty under Section 37(1) of the Act, and thereafter, sends the document to Deputy Commissioner under Section 37(2) of the Act, then the Deputy Commissioner will have the power to reduce the penalty under Section 38 of the Act. The ratio deals with the interplay between Sections 37 and 38 of the Act.

15. The impugned order, in fact, refers to these judgments. The High Court has correctly distinguished the jurisdiction vested in every person or a person in the public office on the one hand and on the other hand the District Registrar in determining the penalty payable on insufficiently stamped instrument. The ratio in all fours is applicable to the circumstances of the case. Therefore, by relying on the above judgments, it is held that the appellant, with a view to produce in evidence the agreement of sale in the suit, must pay the deficit stamp duty and penalty. We are confirming the findings of the High Court in this behalf. The next question for consideration is whether in the facts and the circumstances of the case, the penalty determined by the Court on the instrument instead of sending the instrument to the District Registrar for determination and collection of penalty as may be applicable is legal.

Point II

16. Chapter IV of the Act is both mandatory and regulatory. Section 33 mandates every person having by law or consent of parties authority to receive evidence and every person in charge of public office (for short, '**Every Person/Court**') when an instrument insufficiently stamped is produced, the person is mandated to impound the insufficiently stamped instrument. In law, the word impound means to keep in custody of the law.[10] Having taken legal custody of the insufficiently stamped document, the inter-play available between Sections 33, 34, 37, 38 and 39 of the Act, as the case may be, would start operating. Sub-section (2) of Section 33 of the Act fastens an obligation to examine the instrument on the duty payable, value etc. of the instrument. Unless it is duly stamped, Section 34 of the Act, prohibits Every Person/Court from admitting in evidence or act upon an insufficiently/improperly stamped instrument. The *proviso* to Section 34 of the Act, subject to deposit, of deficit stamp duty and penalty enables receipt of an instrument in evidence which is otherwise prohibited by Section 34 of the Act.

17. The object of the Act is not to exclude evidence or to enable parties to avoid obligations on technical grounds. Rather, the object is to obtain revenue even from such instruments which are at the first

10 (2003) 3 SCC 674

instance unstamped or insufficiently stamped. The said objective has the twin elements of recovering the due stamp duty and penalty, and also the public policy of binding parties to the agreed obligations. It is apposite to refer to the declaration of law by a seven-judge bench's judgement of this Court on the object of the Indian Stamp Act, 1899.

17.1. In ***Re: Interplay Between Arbitration Agreements under Arbitration and Conciliation Act, 1996 and Stamp Act, 1899,***[11] a Seven-Judge Bench of this Court noted that Section 35 of the Indian Stamp Act, 1899 (analogous to Section 34 of the Act) unambiguously requires an instrument chargeable with stamp duty to only be "admitted in evidence" if it is properly stamped. This Court further noted that improperly stamping the instrument does not render that instrument void or invalid. On the contrary, it is a defect which is curable upon payment of requisite stamp duty and penalty. The relevant paragraph reads thus:

> *"54. Section 35 of the Stamp Act is unambiguous. It stipulates, "No instrument chargeable with duty shall be admitted in evidence…" The term "admitted in evidence" refers to the admissibility of the instrument. Sub-section (2) of Section 42, too, states that an instrument in respect of which stamp-duty is paid and which is endorsed as such will be "admissible in evidence." The effect of not paying duty or paying an inadequate amount renders an instrument inadmissible and not void. Non-stamping or improper stamping does not result in the instrument becoming invalid. The Stamp Act does not render such an instrument void. The non-payment of stamp duty is accurately characterised as a curable defect. The Stamp Act itself provides for the manner in which the defect may be cured and sets out a detailed procedure for it. It bears mentioning that there is no procedure by which a void agreement can be "cured."*

11 (2024) 6 SCC 1

17.2. In ***Hindustan Steel Limited v. Dilip Construction Company***,[12] this Court held that the Indian Stamp Act, 1899 is a fiscal measure intended to raise revenue, and the stringent provisions of the Stamp Act cannot be used as a weapon to defeat the cause of the opponent. The relevant paragraph reads thus:

> *"7. The Stamp Act is a fiscal measure enacted to secure revenue for the State on certain classes of instruments: It is not enacted to arm a litigant with a weapon of technicality to meet the case of his opponent. The stringent provisions of the Act are conceived in the interest of the revenue once that object is secured according to law, the party staking his claim on the instrument will not be defeated on the ground of the initial defect in the instrument. Viewed in that light the scheme is clear."*

17.3. The ratio in ***District Registrar and Collector v. Canara Bank***[13] and ***State of Maharashtra v. National Organic Chemical Industries Limited***[14] and ***Chiranji Lal v. Haridas***[15] reiterated that the Indian Stamp Act, 1899 is a piece of fiscal legislation, and not a remedial statute enacted on demand of the permanent public policy to receive a liberal interpretation. The principles for interpreting a fiscal provision/law are fairly settled. There is no scope for equity or judiciousness if the letter of law is clear and unambiguous in method, mode and manner of levy and collection. The decisions further held that the act authorises involuntary extraction of money, and therefore, is in the nature fiscal statute which has to be interpreted strictly.

17.4. Section 37 of the Act stipulates the procedure on how the instrument impounded is dealt with. The plain reading of Section 37(1) of the Act discloses that the person impounding the instrument under Section 33 of the Act and after receiving the penalty under Section 34 of the Act or duty under Section 36 of the Act, shall send to the Deputy Commissioner an

12 [1969] 3 SCR 736 : (1969) 1 SCC 597

13 [2004] Suppl. 5 SCR 833 : (2005) 1 SCC 496

14 [2024] 4 SCR 340 : (2024) SCC OnLine SC 497

15 [2005] Supp. 1 SCR 359 : (2005) 10 SCC 746

authenticated copy of such instrument together with the amount of duty and penalty so levied and collected. Section 37(2) of the Act deals with an instrument not subjected to the procedure of Sections 34 or 36 of the Act. According to Section 37(2) of the Act, the instrument is sent to the Deputy Commissioner for enquiry and decision at his end. The Deputy Commissioner gets jurisdiction under Section 39 of the Act and then decides the duty and also the penalty leviable on the insufficiently stamped instrument. In this background, we take note of the principle laid down on the distinction in the discretion available to Every Person/Court and the discretionary jurisdiction conferred on the District Registrar. *See,* ***United Precision Engineers*** (supra) and ***Gangappa*** (supra).

The settled distinction and discretion available under Sections 34 and 39 of the Act is no more *res integra.*

18. The above consideration does not actually address the appellant's argument under Section 37(2) read with Section 39 of the Act. Appellant contends that the respondents by filing an application for impounding the instrument, preferred to have deficit stamp duty and the penalty collected exclusively by the District Registrar because the admissibility or otherwise of the suit document is not yet considered by the trial court for any purpose. From the record, it appears that the instrument is likely to be considered at the interlocutory stage for granting or refusing temporary injunction. Therefore, the option available under Section 33 read with Section 37 of the Act is set in motion, resulting in the instrument being sent to the District Registrar, and calling for a report.

19. A Three-Judge Bench of this Court in ***Trustees of HC Dhandha Trust v State of Madhya Pradesh***[16] held that in case of deficiency of Stamp Duty the Collector of Stamps cannot impose ten times penalty under Section 40(1)(b) of the Indian Stamp Act, 1899 (analogous to Section 39(1)(b) of the Act) automatically or mechanically. The relevant paragraph reads thus:

> *"22. The purpose of penalty generally is a deterrence and not retribution. When a discretion is given to a public*

16 [2020] 11 SCR 268 : (2020) SCC OnLine SC 753

authority, such public authority should exercise such discretion reasonably and not in oppressive manner. The responsibility to exercise the discretion in reasonable manner lies more in cases where discretion vested by the statute is unfettered. ***Imposition of the extreme penalty i.e. ten times of the duty or deficient portion thereof cannot be based on the mere factum of evasion of duty.*** *The reason such as fraud or deceit in order to deprive the Revenue or undue enrichment are relevant factors to arrive at a decision as to what should be the extent of penalty under Section 40(1)(b).*

(Emphasis supplied)*"*

20. Further, in ***Petiti Subba Rao v. Anumala S. Narendra***,[17] this Court notes on the discretionary limits while interpreting analogous provisions[18] in the Indian Stamp Act,1899 that:

"6. The Collector has the power to require the person concerned to pay the proper duty together with a penalty amount which the Collector has to fix in consideration of all aspects involved. The restriction imposed on the Collector in imposing the penalty amount is that under no circumstances the penalty amount shall go beyond ten times the duty or the deficient portion thereof. ***That is the farthest limit which meant only in very extreme situations the penalty need be imposed up to that limit.*** *It is unnecessary for us to say that the Collector is not required by law to impose the maximum rate of penalty as a matter of course whenever an impounded document is sent to him. He has to take into account various aspects including the financial position of the person concerned.*

(Emphasis supplied)"

17 (2002) 10 SCC 427

18

Karnataka Stamp Act, 1957	§33	§34	§35	§36	§37	§38	§39
Indian Stamp Act, 1899	§33	§35	§36	§37	§38	§39	§40

21. As per the steps taken under Sections 33,[19] 34,[20] 35,[21] 37,[22] and 39[23]

19 **Section 33**: Examination and impounding of instruments.- (1) Every person having by law or consent of parties authority to receive evidence, and every person in charge of a public office, except an officer of police, before whom any instrument, chargeable in his opinion, with duty, is produced or comes in the performance of his functions, shall, if it appears to him that such instrument is not duly stamped, impound the same. (2) For that purpose every such person shall examine every instrument so chargeable and so produced or coming before him, in order to ascertain whether it is stamped with a stamp of the value and description required by the law in force in the 1[State of Karnataka]1 when such instrument was executed or first executed: *[1. Adapted by the Karnataka Adaptations of Laws Order, 1973 w.e.f. 1.11.1973.]* Provided that,— (a) nothing herein contained shall be deemed to require any Magistrate or Judge of a Criminal Court to examine or impound, if he does not think fit so to do, any instrument coming before him in the course of any proceeding other than a proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898; (b) in the case of a Judge of the High Court, the duty of examining and impounding any instrument under this section may be delegated to such officer as the Court appoints in this behalf. (3) For the purposes of this section, in cases of doubt, the Government may determine,— (a) what offices shall be deemed to be public offices; and (b) who shall be deemed to be persons in charge of public offices.

20 **Section 34**: Instruments not duly stamped inadmissible in evidence, etc.- No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped: Provided that,— (a) any such instrument not being an instrument chargeable 1[with a duty not exceeding fifteen naye paise]1 only, or a mortgage of crop [Article 1[35]1 (a) of the Schedule] chargeable under clauses (a) and (b) of section 3 with a duty of twenty-five naye paise shall, subject to all just exceptions, be admitted in evidence on payment of the duty with which the same is chargeable, or, in the case of an instrument insufficiently stamped, or 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; *[1. Substituted by Act 29 of 1962 w.e.f. 1.10.1962.]* (b) 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; (c) 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; (d) 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 1[Deputy Commissioner]1 as provided by section 32 or any other provision of this Act 2[and such certificate has not been revised in exercise of the powers conferred by the provisions of Chapter VI]2. *[1. Substituted by Act 29 of 1962 w.e.f. 1.10.1962.] [2. Inserted by Act 29 of 1962 w.e.f. 1.10.1962.]*

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

22 **Section 37:** Instruments impounded how dealt with.- (1) When the person impounding an instrument under section 33 has by law or consent of parties authority to receive evidence and admits such instrument in evidence upon payment of a penalty as provided by section 34 or of duty as provided by section 36, he shall send to the 1[Deputy Commissioner]1 an authenticated copy of such instrument, together with a certificate in writing, stating the amount of duty and penalty levied in respect thereof, and shall send such amount to the 1[Deputy Commissioner]1 or to such person as he may appoint in this behalf. *[1. Substituted by Act 29 of 1962 w.e.f. 1.10.1962.]* (2) In every other case, the person so impounding an instrument shall send it in original to the 1[Deputy Commissioner]1. *[1. Substituted by Act 29 of 1962 w.e.f. 1.10.1962.]*

23 **Section 39:** 1[Deputy Commissioner]1's power to stamp instruments impounded.- (1) When the 1[Deputy Commissioner]1 impounds any instrument under section 33, or receives any instrument sent to him under sub-section (2) of section 37, not being an instrument chargeable 1[with a duty not exceeding fifteen naye paise]1 only or a mortgage of crop [Article 1[35]1 (a) of the Schedule] chargeable under clause (a) or (b) of section 3 with a duty of twenty-five naye paise, he shall adopt the following procedure:— *[1. Substituted by Act 29 of 1962 w.e.f. 1.10.1962.]* (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

under Chapter IV of the Act, the position in law is well-established, and axiomatic by the letter of law and precedents of this Court. However, there are a few misgivings in the sequence of its application. For the benefit of practice and procedure, we sum up the steps as follows.

21.1. Section 33 of the Act is titled *examination and impounding of instruments*. The object of the provision is to disable persons from withdrawing the instruments produced by them on being told that proper stamp duty and penalty should be paid.

21.1.1. The person who intends to rely on an insufficiently/ improperly stamped instrument has option to submit to the scope of Section 34 of the Act, pay duty and penalty. The party also has the option to directly move an application under Section 39 of the Act before the District Registrar and have the deficit stamp duty and the penalty as may be imposed collected. In either of the cases, after the deficit stamp duty and the penalty are paid, the impounding effected under Section 35 of the Act is released and the instrument available to the party for relying as evidence. In the event, a party prefers to have the document sent to the deputy commissioner for collecting the deficit stamp duty and penalty, the Court/Every Person has no option except to send the document to the District Registrar. The caveat to the above is that, before the Court/Every Person exercises the jurisdiction under Section 34 of the Act, the option must be exercised by a party.

21.2. Section 34 of the Act is titled *instruments not duly stamped inadmissible in evidence*. This provision bars the admission of

---

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 1[Deputy Commissioner]1 may, if he thinks fit, remit the whole penalty prescribed by this section. *[1. Substituted by Act 29 of 1962 w.e.f. 1.10.1962.]* (2) 1[Subject to any orders made under Chapter VI, every certificate]1 under clause (a) of sub- section (1) shall, for the purposes of this Act be conclusive evidence of the matters stated therein. *[1. Substituted by Act 29 of 1962 w.e.f. 1.10.1962.]* (3) Where an instrument has been sent to the 1[Deputy Commissioner]1 under sub-section (2) of section 37, the 1[Deputy Commissioner]1 shall, when he has dealt with it as provided by this section, return it to the impounding officer. *[1. Substituted by Act 29 of 1962 w.e.f. 1.10.1962.]*

an instrument in evidence unless adequate stamp duty and the penalty are paid. Every person so authorised to collect deficit stamp duty and penalty has no discretion except to levy and collect ten times the penalty of deficit stamp duty.

21.3. Section 35 of the Act is titled *admission of instrument where not to be questioned*. Section 35 prohibits questioning the admission of an insufficiently stamped instrument in evidence.

21.4. Section 37 of the Act is titled *instruments impounded, how dealt with*. This Section arises when the party pays the deficit duty and penalty, the Court is to impound the instrument under Section 33 of the Act and has to forward the instrument to the Deputy Commissioner/District Registrar. Sub-section (2) of Section 37 of the Act deals with cases not falling under Section 34 and 36, and the person impounding an instrument shall send it in original to the Deputy Commissioner. This includes the exigencies set out in paragraph 21.1.1.

21.5. Being a regulatory and remedial statute, a party who follows the regulation, and pays the stamp duty and penalty, as per Sections 34 or 39 of the Act, the legal objection emanating from Section 33 of the Act alone is effaced and the document is admitted in evidence. In other words, the objection under the Stamp Act is no more available to a contesting party.

21.6. Section 39 of the Act is titled *deputy commissioner's power to stamp instruments impounded*. This Section provides the procedure to be followed by the Deputy Commissioner/District Registrar while stamping instruments that are impounded under Section 33 of the Act. As per Section 39(1)(b) of the Act, the penalty may extend to ten times the stamp duty payable; however, ten times is the farthest limit which is meant only for very extreme situations. Therefore, the Deputy Commissioner/District Registrar has discretion to levy and collect commensurate penalty.

21.7. The above steps followed and completed by paying/depositing the deficit duty and penalty would result in the instrument becoming compliant with the checklist of the Act. The finality is subject to the just exceptions envisaged by the Act addressing different contingencies.

21.8. The scheme does not prohibit a party to a document to first invoke directly the jurisdiction of the District Registrar and present the instrument before Court/Every Person after complying with the requirement of duty and penalty. In such an event, the available objection under Sections 33 or 34 of the Act is erased beforehand. The quantum of penalty is primarily between the authority/court and the opposing party has little role to discharge.

22. Reverting to the circumstances of the case by keeping in perspective the steps summarised in the preceding paragraph, we notice that, before the stage of admission of the instrument in evidence, the respondent raised an objection on the deficit stamp duty. Therefore, it was the respondent who required the suit agreement to be impounded and then sent to the District Registrar to be dealt with under Section 39 of the Act. In this case, the respondent desired the impounding of the suit agreement and collect the deficit stamp duty and penalty. The trial court is yet to exercise its jurisdiction under Section 34 of the Act. On the contrary, the trial court has called for a report from the District Registrar, so for all purposes, the suit instrument is still at one or the other steps summed up in paragraph 21. Therefore, going by the request of the respondent, the option is left for the decision of the District Registrar. Contrary to these admitted circumstances, though the suit instrument is insufficiently stamped, still the penalty of ten times under Section 34 of the Act is imposed through the impugned orders. The imposition of penalty of ten times at this juncture in the facts and circumstances of this case is illegal and contrary to the steps summed up in paragraph 21. The instrument is sent to the District Registrar, thereafter the District Registrar in exercise of his jurisdiction under Section 39 of the Act, decides the quantum of stamp duty and penalty payable on the instrument. The appellant is denied this option by the impugned orders. It is trite law that the appellant must pay what is due, but as is decided by the District Registrar and not the Court under Section 34 of the Act.

23. Hence, for the above reasons, the direction to pay ten times the penalty of the deficit stamp duty merits interference and accordingly is set aside. The trial court is directed to send the agreement of sale dated 29.06.1999 to the District Registrar to determine the deficit stamp duty and penalty payable. Upon receipt of the compliance certificate from the District Registrar, without reference to an

objection under the Act, the suit document be received in evidence. All objections available to the respondents except the above are left open for consideration.

24. Appeals are allowed in part, as indicated above.

Result of the case: Appeals partly allowed.

†*Headnotes prepared by:* Divya Pandey

[2024] 9 S.C.R. 186 : 2024 INSC 672

Union of India & Ors.
v.
Lt. Col. Rahul Arora

(Civil Appeal No. 2459 of 2017)

09 September 2024

[Prashant Kumar Mishra* and Prasanna Bhalachandra Varale, JJ.]

Issue for Consideration

Legality of the appointment of Judge Advocate who was admittedly junior to the respondent.

Headnotes†

Service Law – Army Medical Corps – Respondent was charge-sheeted for: (i) extraneous consideration declaring an army recruit as 'fit' after previously declaring him 'unfit'; (ii) absenting himself without leave from 11.04.2004 to 19.04.2004; (iii) conduct of unbecoming of an officer and the character expected of his position – Upon conclusion of trial by General Court Martial and two of the three charges proven, he was dismissed from service – Armed Forces Tribunal upheld the findings of guilt – However, the High Court allowed the writ petition preferred by the respondent solely on the ground that an officer junior to the respondent has acted as Judge Advocate in GCM:

Held: Before the High Court, two different convening orders were produced – One by the appellant and the other one by the respondent – While the documents submitted by the appellant contained the reasons for appointing a junior as the Judge Advocate whereas in the convening order submitted by the respondent no such reason was mentioned – After comparing the documents, the High Court recorded a finding that the convening order Annexure R-I (produced by the appellant before the High Court) has been altered after the same was dispatched and received by the Headquarters Artillery Centre – The High Court specifically observed that once a document has been put in the course of transmission by the General Officer Commanding, Andhra Pradesh, Tamil Nadu,

* Author

Karnataka and Kerala area, the same could not be changed/altered or modified except after recording that there was a mistake, which needs correction – Once dispatched by the officer signing the same, the communication of the document is complete and any alteration in the document is unauthorised – It is quite apparent that the reason for culling out exception as held permissible by this Court in Charanjit Singh Gill case, was not mentioned in the document while the same was dispatched by the issuing authority and supplied to the respondent – Subsequent mentioning of the reason in the other document, after putting signatures by the issuing authority, was unauthorised and impermissible, the High Court has correctly held that the convening order suffers from incurable defect as held by this Court in Charanjit Singh Gill case – The legal position is thus well settled in Charanjit Singh Gill case that non recording of reasons of appointment of an officer junior in rank as a Judge Advocate in the convening order invalidates the Court Martial proceedings – The High Court has not committed any error of law in holding so in the facts and circumstances of the case. [Paras 8, 9]

Case Law Cited

Union of India & Anr. v. Charanjit Singh Gill **[2000] 3 SCR 245 : (2000) 5 SCC 742 – relied on.**

Union of India v. S.P.S. Rajkumar and Ors. **[2007] 5 SCR 521 : (2007) 6 SCC 407 – referred to.**

List of Acts

Army Act; Army Rules.

List of Keywords

Service Law; Army Medical Corps; Dismissal from service; Appointment of Judge Advocate; Convening orders; Alteration in document; Incurable defect in convening order; Non-recording of reasons in convening order; Court Martial Proceedings.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2459 of 2017

From the Judgment and Order dated 21.05.2014 of the High Court of Punjab & Haryana at Chandigarh in CWP No. 20380 of 2012

Appearances for Parties

R Bala, Sr. Adv., Mukesh Kumar Maroria, Ashok Panigrahi, Ishaan Sharma, Aaditya Dixit, Advs. for the Appellants.

G.S. Ghuman, Harkirat Singh, Jatinder Pal Singh, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Judgment

Prashant Kumar Mishra, J.

This appeal is directed against the order dated 21.05.2014 passed by the High Court of Punjab & Haryana in CWP No. 20380 of 2012. Under the said order, the High Court has set-aside the order passed by the Armed Forces Tribunal, Chandigarh,[1] which has dismissed the appeal of the respondent and upheld the findings and sentence awarded by the General Court Martial.[2]

2. The respondent was first commissioned in the Army Medical Corps[3] as medical officer from 29.05.1978 to 31.07.1983. He was again commissioned as regular officer in AMC on 25.02.1987. In 1996, he was designated as Graded ENT Specialist and was then upgraded as classified Specialist ENT in the year 2001. In the month of February, 2002, the respondent was posted with Military Hospital, Secunderabad wherein he was required to examine new recruits being forwarded by various training centres.

3. In September, 2002 one Recruit/Soldier/GD K. Siddaiah alleged that the respondent paid money for reviewing its remarks "*unfit*" to "*review after 15 days*". The statement of the recruit was recorded by one Major Mrs. R.M.B. Mythilly who initiated AFMSF-7. The respondent was charge-sheeted, and three charges were framed against him, namely:

(i) The respondent, an ENT Specialist at a Military Hospital, had, for extraneous consideration declared an Army recruit, K. Siddaiah, as 'fit' after previously declaring him 'unfit'. Consequently, the first charge against him was under Section 57(c) of the Army

1 'AFT'

2 'GCM'

3 'AMC'

Act for knowingly and with intent to defraud altering a document/ remarks in the AFMSF-7.

(ii) The second charge was under Section 39(a) of the Army Act for absenting himself without leave from 11.04.2004 to 19.04.2004.

(iii) The third charge was under Section 45 of the Army Act for conduct unbecoming of an officer and the character expected of his position.

4. Upon conclusion of trial by GCM and upon finding two out of three charges proven, the respondent was dismissed from service against which he preferred proceedings before AFT, which upheld the findings of guilt and the sentence of dismissal from service as awarded by the GCM. It is this order of the AFT which was assailed by the respondent before the High Court. The High Court allowed the writ petition preferred by the respondent solely on the ground that an officer junior to the respondent has acted as Judge Advocate in the GCM contrary to the law laid down by this Court in **Union of India & Anr. vs. Charanjit Singh Gill**.[4]

5. Assailing the impugned order of the High Court, Shri R. Bala, learned Senior Advocate for the appellant/Union of India has argued that there is no blanket prohibition on appointing an officer of lower rank than the charged officer to serve as Judge Advocate in a Court Martial. He would strenuously urge that in **Charanjit Singh Gill** (supra), this court has carved out an exception to the effect that "*a Judge Advocate appointed with the Court Martial should not be an officer of a rank lower than that of the officer facing the trial unless the officer of such rank is not (having due regard to the exigencies of public service) available and the opinion regarding non-availability is specifically recorded in the convening order".* According to learned senior counsel, the present case falls within the above exception inasmuch as non-availability of an officer of equivalent or higher rank was specifically recorded in the convening order. It is also argued, referring to Army Rule 103 that a Court Martial shall not be invalid merely by reason of any invalidity in the appointment of the Judge Advocate officiating thereat. Reference is made to **Union of India vs. S.P.S. Rajkumar and Ors**.[5]

4 [2000] 3 SCR 245 : 2000 (5) SCC 742

5 [2007] 5 SCR 521 : 2007 (6) SCC 407

6. Per contra, Shri G.S. Ghuman, learned counsel appearing for the respondent would submit that one Major Rajiv Dutta was appointed as a Judge Advocate in the Court Martial, who was junior in rank to the respondent. This was informed to the respondent by forwarding certified copy of the convening order under the Army Rules 33 (7) and 34 and the same was also received by the respondent on 07.10.2014. Both the copies were filed with the written statement. In these orders, the prerequisites of bringing the appointment of an officer equivalent or junior to the rank of the respondent was not mentioned, therefore, the High Court has taken the correct view in the matter by referring to **Charanjit Singh Gill** (supra).

7. In the present appeal, we are only concerned with the legality of the appointment of Judge Advocate who was admittedly junior to the respondent, therefore, we are not dwelling on the facts of the case or merits of the charges.

8. Before the High Court, two different convening orders were produced. One by the appellant and the other one by the respondent. While the documents submitted by the appellant contained the reasons for appointing a junior as the Judge Advocate whereas in the convening order submitted by the respondent no such reason was mentioned. After comparing the documents, the High Court has recorded a finding that the convening order Annexure R-I (produced by the appellant before the High Court) has been altered after the same was dispatched and received by the Headquarters Artillery Centre, Hyderabad. The High Court noted that Annexure P-I is identically worded, but in the second page, the words "*in my opinion having due regard to the exigencies of public service an officer of equal or superior rank to the accused is not available to act as Judge Advocate*" are additional. The High Court specifically observed that once a document has been put in the course of transmission by the General Officer Commanding, Andhra Pradesh, Tamil Nadu, Karnataka and Kerala area, the same could not be changed/altered or modified except after recording that there was a mistake, which needs correction. Once dispatched by the officer signing the same, the communication of the document is complete and any alteration in the document is unauthorised.

9. In the above circumstances, it is quite apparent that the reason for culling out exception as held permissible by this Court in **Charanjit**

Singh Gill (supra), was not mentioned in the document while the same was dispatched by the issuing authority and supplied to the respondent. Subsequent mentioning of the reason in the other document, after putting signatures by the issuing authority, was unauthorised and impermissible, the High Court has correctly held that the convening order suffers from incurable defect as held by this Court in Charanjit Singh Gill (supra) in the following words:

> **"16**. It is true that a Judge Advocate theoretically performs no function as a Judge but it is equally true that he is an effective officer of the Court conducting the case against the accused under the Act. It is his duty to inform the Court of any defect or irregularity in the charge and in the constitution of the Court or in the proceedings. The quality of the advice tendered by the Judge Advocate is very crucial in a trial conducted under the Act. With the role assigned to him a Judge Advocate is in a position to sway the minds of the Members of the Court Martial as his advice or verdict cannot be taken lightly by the persons composing the Court who are admittedly not law-knowing persons. It is to be remembered that the Courts Martial are not part of the judicial system in the country and are not permanent courts.
>
> **18**. In view of what has been noticed hereinabove, it is apparent that if a "fit person" is not appointed as a Judge Advocate, the proceedings of the Court Martial cannot be held to be valid and its finding legally arrived at. Such an invalidity in appointing an "unfit" person as a Judge Advocate is not curable under Rule 103 of the Rules. If a fit person possessing requisite qualifications and otherwise eligible to form part of the General Court Martial is appointed as a Judge Advocate and ultimately some invalidity is found in his appointment, the proceedings of the Court Martial cannot be declared invalid. A "fit person" mentioned in Rule 103 is referable to Rules 39 and 40. It is contended by Shri Raval, learned Additional Solicitor General that a person fit to be appointed as Judge Advocate is such officer who does not suffer from any ineligibility or disqualification in terms of Rule 39 alone. It is further contended that Rule 40 does not refer to disqualifications.

> We cannot agree with this general proposition made on behalf of the appellant inasmuch as sub-rule (2) of Rule 40 specifically provides that Members of a Court Martial for trial of an officer should be of a rank not lower than that of the officer facing the trial unless such officer is not available regarding which specific opinion is required to be recorded in the convening order. Rule 102 unambiguously provides that "an officer who is disqualified for sitting on a Court Martial, shall be disqualified for acting as a Judge Advocate at that Court Martial". A combined reading of Rules 39, 40 and 102 suggests that an officer, who is disqualified to be a part of a Court Martial, is also disqualified from acting and sitting as a Judge Advocate at the Court Martial. It follows, therefore, that if an officer lower in rank than the officer facing the trial cannot become a part of the Court Martial, the officer of such rank would be disqualified for acting as a Judge Advocate at the trial before a GCM. Accepting a plea to the contrary would be invalidating the legal bar imposed upon the composition of the Court in sub-rule (2) of Rule 40.
>
> **20.** The purpose and object of prescribing the conditions of eligibility and qualification along with desirability of having Members of the Court Martial of the rank not lower than the officer facing the trial is obvious. The law-makers and the rule-framers appear to have in mind the respect and dignity of the officer facing the trial till guilt is proved against him by not exposing him to the humiliation of being subjected to trial by officers of lower rank. The importance of the Judge Advocate as noticed earlier being of a paramount nature requires that he should be such person who inspires confidence and does not subject the officer facing the trial to humiliation because the accused is also entitled to the opinion and services of the Judge Advocate. Availing of the services or seeking advice from a person junior in rank may apparently be not possible ultimately resulting in failure of justice."

10. The legal position is thus well settled in **Charanjit Singh Gill** (supra) that non recording of reasons of appointment of an officer junior in rank as a Judge Advocate in the convening order invalidates the

Court Martial proceedings. The High Court has not committed any error of law in holding so in the facts and circumstances of the case.

11. The next argument raised by the appellant taking shelter of Army Rule 103 is referred only to be rejected for the reason that the protection under this rule is available only where a fit person has been appointed as a Judge Advocate. If the person so appointed is not fit to act and perform the duties of the Judge Advocate as held in **Charanjit Singh Gill** (supra), Rule 103 would not come to the rescue of the appellant. Moreover, such argument has already been rejected by this Court in paragraph 18 of the report in **Charanjit Singh Gill** (supra).

12. In view of the forgoing discussion, we find no substance in this Civil Appeal which deserves to be and is hereby dismissed.

Result of the case: Appeal dismissed.

†*Headnotes prepared by:* Ankit Gyan

[2024] 9 S.C.R. 194 : 2024 INSC 674

Ashok Kumar Sharma & Ors
v.
Union of India

(Writ Petition (Civil) No. 551 of 2024)

09 September 2024

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

Issue for Consideration

Whether the Court under Article 32 can issue a writ to the Union Government to cancel existing licences and halt the issuance of new licences for the export of arms and military equipments to Israel.

Headnotes†

Constitution of India – Art. 32 – The petition seeks directions to the Union Government to cancel existing licences/permissions and to halt the grant of new licences to companies in India for the export of arms and military equipment to Israel during the ongoing conflict in Gaza:

Held: First, the conduct of an independent sovereign nation namely, Israel is not and cannot be made amenable to the jurisdiction of this Court – To consider the grant of the reliefs as sought, it would inevitably become necessary to enter a finding in regard to the allegations which have been leveled by the petitioners against the State of Israel – Absent jurisdiction over a sovereign State, it would be impermissible for this Court to entertain the grant of reliefs of this nature – The second aspect of the matter which requires to be noticed is that the petition seeks a cancellation of the existing licences and prohibition on the issuance of new licences for the export of arms and military equipments by Indian companies – Some of these licenses may be governed by contracts with international entities, including within the State of Israel – The grant of injunctive relief by this Court would necessarily implicate a judicial direction for breach of international contracts and agreements – The fall out of such breaches cannot be appropriately assessed by this Court and would lay open Indian companies which have firm commitments to proceedings for damages which may affect their own financial viability – Third, the statutory provisions of our law confer sufficient power on the Union Government if it decides to

act in such cases – For instance, prohibitions can be imposed by the Union of India under the Foreign Trade (Regulation and Development Act) as well as under the provisions of the Customs Act, 1962 – Whether in a given case, any such action is warranted is a matter which has to be decided by the Union Government bearing in mind economic, geo-political and other interests of the nation in the conduct of international relations – The self-imposed restraint on Courts entering into areas of foreign policy is, thus, grounded in sound rationale which has been applied across time – For the above reasons, the reliefs which have been sought in these proceedings are not amenable to the exercise of judicial remedies under Article 32 of the Constitution. [Paras 7, 8, 9, 10, 11]

List of Acts

Constitution of India; Foreign Trade (Regulation and Development Act); Customs Act, 1962.

List of Keywords

Article 32 of the Constitution of India; Sovereign nation; Licenses for export of arms and military equipment; Permissions; Conflict in gaza; International law obligations; International contracts and agreements; International relations; Self-imposed restraints on Courts; Foreign Policy.

Case Arising From

CIVIL ORIGINAL JURISDICTION: Writ Petition (Civil) No. 551 of 2024

(Under Article 32 of The Constitution of India)

Appearances for Parties

Prashant Bhushan, Ms. Cheryl Dsouza, Ms. Ria Yadav, Luma Kanta Bhandari, Ms. Sulekha Agarwal, Prasanna S, Advs. for the Petitioners.

Barun Kumar Sinha, Mrs. Pratibha Sinha, Sneh Vardhan, Abhishek, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Judgment

1. The petition, invoking Article 32 of the Constitution, has been instituted by former civil servants, scholars, activists and experts in fields such as International Relations, Human Rights and Policy Analysis.

2. The petition seeks directions to the Union Government to cancel existing licences/permissions and to halt the grant of new licences to companies in India for the export of arms and military equipment to Israel during the ongoing conflict in Gaza. These companies, as the petitioners describe, include a Public Sector Enterprise in the Ministry of Defence and private companies which have allegedly been granted licenses after October 2023. The petitioners claim a violation of India's international law obligations and of Articles 14, 21 and 51(c) of the Constitution.

3. Supporting the submissions of the petitioners, Mr Prashant Bhushan, counsel has relied on the rulings of the International Court of Justice allegedly into the conduct of Israel in Palestinian territories. The submission is that India is bound by international treaties which disallow the supply of military weapons to states who have engaged in war crimes/genocide.

4. In other words, the submission is that the continuation of the export licences would constitute action complicit against the Genocide Convention and other international obligations which India has assumed.

5. The fundamental objection to the maintainability of a petition of the nature that is before the Court lies in the fact that the authority and jurisdiction in relation to the conduct of foreign affairs is vested with the Union Government under Article 73 of the Constitution. Apart from Article 73, the provisions of Article 253 of the Constitution stipulate that Parliament has the power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.

6. There is a presumption that international law is a part and parcel of the law of the nation unless the application of a principle of international law is excluded expressly or by necessary implication by the competent legislature. However, the basic issue which falls for consideration in the present proceedings is whether the Court under Article 32 can issue a writ to the Union Government to cancel existing licences and halt the issuance of new licences for the export of arms and military equipments to Israel. We are affirmatively of the view that the answer to this question must be in the negative for more than one reason.

7. First any grant of relief in the present proceedings is presaged on the submission of the petitioners in regard to the conduct of an independent sovereign nation namely, Israel in the conduct of its operations in Gaza. The sovereign nation of Israel is not and cannot be made amenable to the jurisdiction of this Court. Hence, for this Court to consider the grant of the reliefs as sought, it would inevitably become necessary to enter a finding in regard to the allegations which have been leveled by the petitioners against the State of Israel. Absent jurisdiction over a sovereign State, it would be impermissible for this Court to entertain the grant of reliefs of this nature.

8. The second aspect of the matter which requires to be noticed is that the petition seeks a cancellation of the existing licences and prohibition on the issuance of new licences for the export of arms and military equipments by Indian companies. Some of these licenses may be governed by contracts with international entities, including within the State of Israel. The grant of injunctive relief by this Court would necessarily implicate a judicial direction for breach of international contracts and agreements. The fall out of such breaches cannot be appropriately assessed by this Court and would lay open Indian companies which have firm commitments to proceedings for damages which may affect their own financial viability.

9. Third, the statutory provisions of our law confer sufficient power on the Union Government if it decides to act in such cases. For instance, prohibitions can be imposed by the Union of India under the Foreign Trade (Regulation and Development Act) as well as under the provisions of the Customs Act, 1962. Whether in a given case, any such action is warranted is a matter which has to be decided by the Union Government bearing in mind economic, geo-political and other interests of the nation in the conduct of international relations. In taking an appropriate decision, the Government bears into account all relevant considerations including the commitments of the nation at the international level.

10. The danger in the Court taking over this function is precisely that it would be led into issuing injunctive reliefs without a full and comprehensive analysis or backdrop of the likely consequences of any such action. The self-imposed restraint on Courts entering into areas of foreign policy is, thus, grounded in sound rationale which has been applied across time.

11. For the above reasons, we have come to the conclusion that the reliefs which have been sought in these proceedings are not amenable to the exercise of judicial remedies under Article 32 of the Constitution.

12. We clarify that the observations which have been made in the earlier part of this judgment are not intended to reflect any opinion by this Court either in the conduct of foreign policy by the Government of India, or for that matter, by any sovereign nation which is not subject to the jurisdiction of this Court.

13. The Writ Petition shall accordingly stand dismissed for the above reasons.

14. Pending applications, if any, including the application for intervention/ impleadment stand disposed of.

Result of the case: Writ petition dismissed.

†*Headnotes prepared by:* Ankit Gyan

[2024] 9 S.C.R. 199 : 2024 INSC 670

Cox & Kings Ltd.
v.
Sap India Pvt. Ltd. & Anr.

(Arbitration Petition No. 38 of 2020)

09 September 2024

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

Issue for Consideration

Whether the application of the petitioner for the appointment of an arbitrator deserves to be allowed. Whether the requirement of *prima facie* existence of an arbitration agreement, as stipulated u/s. 11 of the Act, 1996, is satisfied. Whether the respondent no. 2 is a party to the arbitration agreement or not.

Headnotes†

Arbitration and Conciliation Act, 1996 – s.11(6) r/w. s.11(12)(a) – Petitioner has filed the present petition in terms of s.11(6) r/w.s.11(12)(a) of the Act, seeking appointment of an arbitrator for the adjudication of disputes and claims in terms of clause 15.7 of the Services General Terms and Conditions Agreement dated 30.10.2015 entered into between the Petitioner and respondent no. 1 – The petitioner had also arrayed respondent no. 2 in the arbitration notice – Respondents have contended that respondent no. 2 has neither impliedly nor explicitly consented to the arbitration agreement between the petitioner and respondent no. 1:

Held: It is settled that the arbitral tribunal is the preferred first authority to look into the questions of arbitrability and jurisdiction, and the courts at the referral stage should not venture into contested questions involving complex facts – The respondents have raised a number of objections against the present petition, however, none of the objections raised question or deny the existence of the arbitration agreement under which the arbitration has been invoked by the petitioner in the present case – Thus, the requirement of prima facie existence of an arbitration agreement, as stipulated u/s. 11 of the Act, 1996, is satisfied – Once the arbitral tribunal is constituted, it shall be open for the respondents to raise all the

* Author

available objections in law, and it is only after (and if) the preliminary objections are considered and rejected by the tribunal that it shall proceed to adjudicate the claims of the petitioner – Further, on the issue of impleadment of respondent no. 2, which is not a signatory to the arbitration agreement, elaborate submissions have been made on both the sides, placing reliance on terms of the agreements, email exchanges, etc – In view of the complexity involved in the determination of the question as to whether the respondent no. 2 is a party to the arbitration agreement or not, this Court is of the view that it would be appropriate for the arbitral tribunal to take a call on the question after taking into consideration the evidence adduced before it by the parties and the application of the legal doctrine as elaborated in the decision in Cox and Kings – Thus, petition is allowed and an arbitrator is appointed. [Paras 30, 32, 33, 34, 35]

Case Law Cited

Cox and Kings Ltd. v. SAP India Pvt. Ltd. **[2023] 15 SCR 621 : 2023 INSC 1051;** *In Re: Interplay Between Arbitration Agreements under the Arbitration and Conciliation Act, 1996 and the Stamp Act* **[2023] 15 SCR 1081 : 1899 2023 INSC 1066 – followed.**

Lombardi Engg. Ltd. v. Uttarakhand Jal Vidyut Nigam Ltd. **[2023] 13 SCR 943 : 2023 INSC 976;** *SBI General Insurance Co. Ltd. v. Krish Spinning* **2024 INSC 532 – relied on.**

Chloro Controls India (P) Ltd v. Severn Trent Water Purification Inc **[2012] 13 SCR 402 : (2013) 1 SCC 641 – referred to.**

List of Acts

Arbitration and Conciliation Act, 1996.

List of Keywords

Arbitrator; Appointment of an arbitrator; Arbitration agreement; Existence of arbitration agreement; Arbitral Tribunal; Available objections in law; Impleadment of party; Party not signatory to arbitration agreement; Referral stage; Complex questions involving complex facts.

Case Arising From

CIVIL ORIGINAL JURISDICTION: Arbitration Petition No. 38 of 2020

Under Section 11(6) read with Section 11(12)(a) of the Arbitration and Conciliation Act 1996

Appearances for Parties

Nagarkatti Kartik Uday, Hiroo Advani, Divyakant Lahoti, Ms. Vindhya Mehra, Ms. Madhur Jhavar, Ms. Praveena Bisht, Kartik Lahoti, Navdeep Dahiya, Kumar Vinayakam Gupta, Ms. Mallika Luthra, Saksham Barsaiyan, Karandeep Dahiya, Ms. Surbhi Saran, Ms. Ria Garg, Rahul Maheshwari, Advs. for the Petitioner.

Ritin Rai, Sr. Adv., Farhad Sorabjee, Dheeraj Nair, Kumar Kislay, Pratik Pawar, Siddhesh Pradhan, Ms. Shanaya Cyrus Irani, Anirudh Krishnan, Shiva Krishnamurti, Balaji Srinivasan, George Pothan Poothicote, Ms. Manisha Singh, Ms. Jyoti Singh, Ashu Pathak, Arunava Mukherjee, Debesh Panda, Pallav Mongia, Ajay Bhargava, Aseem Chaturvedi, Mrs. Trishala Trivedi, M/s. Khaitan & Co., Ujjwal A. Rana, Himanshu Mehta, M/s. Gagrat and Co., Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

J.B. Pardiwala, J.

1. Cox & Kings Ltd. (hereinafter referred to as the **"petitioner"**) has filed the present petition in terms of Section 11(6) read with Section 11(12)(a) of the Arbitration & Conciliation Act, 1996 (for short **"the Act, 1996"**), seeking appointment of an arbitrator for the adjudication of disputes and claims in terms of clause 15.7 of the Services General Terms and Conditions Agreement dated 30.10.2015 entered into between the Petitioner and SAP India Pvt. Ltd. (hereinafter referred to as the **"respondent no. 1"**)

A. FACTUAL MATRIX

2. The petitioner is a company registered under the Companies Act, 1956 and is engaged in the business of providing tourism packages and hospitality services to its customers.

3. Respondent no. 1 is also a company registered under the Companies Act, 1956 and is engaged in the business of providing business software solution services. It is a wholly-owned subsidiary of SAP SE GMBH (Germany) (hereinafter referred to as the **"respondent no. 2"**), a company incorporated under the laws of Germany.

4. The petitioner and respondent no. 1 entered into a SAP Software End User License Agreement & SAP Enterprise Support Schedule

(for short **"License Agreement"**) on 14.12.2010 under which the petitioner was made a licensee of certain Enterprise Resource Planning ("**ERP**") software developed and owned by the respondents. The License Agreement is a mandatory pre-requisite for all customers of the respondents who intend to enter into any software agreement with the respondents.

5. It is the case of the petitioner that while it was developing its own software for e-commerce operations in 2015, it was approached by respondent no. 1 who recommended their 'Hybris Solution' (hereinafter referred to as the "**SAP Hybris Software**") for use by the petitioner. It is the case of the petitioner that respondent no. 1 had, at the relevant point in time, represented that the SAP Hybris Software would be suitable and 90% compatible to the requirements of the petitioner. It was further represented that the customisation of the balance 10% would take about 10 months from the date of execution of an agreement and that the customisation of the SAP Hybris Software would take lesser time than the time the petitioner may take in developing its own technological solution.

6. The transaction for the purchase, customisation and use of the SAP Hybris Software was divided into three separate agreements entered into between the petitioner and respondent no. 1:

   i. First, Software License and Support Agreement Software Order Form no. 3 (for short **"Order Form no. 3"**) dated 30.10.2015 for the purchase of SAP Hybris Software License by the petitioner.

   ii. Second, the Services General Terms and Conditions Agreement (for short **"GTC agreement"**) dated 30.10.2015 containing the terms and conditions governing the implementation of the SAP Hybris Software.

   iii. Third, SAP Global Service and Support Agreement, Order Form no. 1 dated 16.11.2015 (for short "**Order Form no. 1**") which was executed pursuant to the signing of the GTC agreement and contained the terms of payment between the parties for the services being rendered.

7. It is the case of the petitioner that as it had already entered into the License Agreement with respondent no. 1 in 2010, it was not required to do so again for the purpose of purchasing the SAP Hybris Software. The GTC agreement, Order Form no. 3 and Order Form

no. 1 were all executed pursuant to the License Agreement. The said three agreements are ancillary to the License Agreement and have a similar underlying commercial purpose.

8. It is pertinent to note that in terms of Clause 15.7 of the GTC agreement, in the event of any dispute, the parties agreed to resolve their disputes through arbitration. Clause 15.7 of GTC agreement reads as under:

> *"**15.7 Dispute Resolution:** In the event of any dispute or difference arising out of the subject matter of this Agreement, the Parties shall undertake to resolve such disputes amicably. If disputes and differences cannot be settled amicably then such disputes shall be referred to bench of three arbitrators, where each party will nominate one arbitrator and the two arbitrators shall appoint a third arbitrator. Arbitration award shall be binding on both parties. The arbitration shall be held in Mumbai and each party will bear the expenses of their appointed arbitrator. The expense of the third arbitrator shall be shared by the parties. The arbitration process will be governed by the Arbitration & Conciliation Act, 1996."*

9. Certain issues arose between the parties regarding the timely completion and implementation of the SAP Hybris Software. After several queries from the petitioner, respondent no. 1 vide e-mail dated 24.04.2016, informed about certain challenges in the execution of the SAP Hybris Software project. Thereafter, a series of emails were exchanged between respondent no. 1 and the petitioner regarding the completion of the project.

10. Subsequently, as there was no response from respondent no. 1 to the e-mails sent by the petitioner, the latter, vide e-mail dated 31.08.2016 contacted respondent no. 2, i.e., the German parent company of respondent no. 1 and apprised them of the issues being faced by the petitioner in the execution and delivery of the SAP Hybris Software. Respondent no. 2 was informed of the various shortcomings in the execution of the project and the negative ramifications being caused to the petitioner's business as a result thereof. In response to the concerns raised by the petitioner, respondent no. 2, vide e-mail dated 01.09.2016, assured to provide a framework for resolution of the challenges and completion of the project.

11. Respondent no. 2 vide email dated 07.10.2016 assured the petitioner that it would monitor the execution of the project and requested the petitioner for an opportunity to agree on the revised plan and delivery. As per the minutes of the meeting dated 14.11.2016, one of the suggestions given by respondent no. 2 as part of the revised proposal for the execution of the project was that a substantial part of the project work would be outsourced to the more experienced global team, and one representative of respondent no. 2 would overlook the progress of the project at the execution level.

12. Unable to resolve the issues, the contract for the SAP Hybris Software project ultimately came to be rescinded on 15.11.2016. In response to this, respondent no. 2, vide e-mail dated 23.11.2016, requested the petitioner for one last opportunity to complete the project, which the petitioner declined vide email dated 24.11.2016.

13. Respondent no. 2, vide email dated 09.12.2016 sent to the petitioner, communicated that there were shortcomings at the petitioner's end as well and the respondents could not be said to be solely responsible for the collapse of the SAP Hybris Software project.

14. Despite several correspondences and meetings, the matter could not be settled amicably between the parties. On 29.10.2017, respondent no. 1 issued a notice invoking arbitration under Clause 15.7 of the GTC agreement for the alleged wrongful termination of the contract between the parties and non-payment of Rs. 17 Crore. Upon failure of the petitioner to nominate an arbitrator in response to the aforesaid notice, a Section 11(6) petition was instituted by respondent no. 1 before the Bombay High Court. The said petition came to be allowed vide order dated 30.11.2018 and an arbitral tribunal was constituted to adjudicate the disputes between the parties. The petitioner filed its Statement of Defence and counterclaims on 31.07.2019 for an amount of Rs. 45,99,71,098/-.

15. It may not be out of place to state at this stage that respondent no. 2 was not made a party to the aforesaid arbitration proceedings. In the course of the said proceedings, the petitioner filed an application under Section 16 of the Act, 1996 before the arbitral tribunal, contending that the four agreements entered into between the parties were part of a composite transaction and for this reason the agreements should be made a part of a singular proceeding.

16. During the pendency of the aforesaid application, on 22.10.2019, the NCLT, Mumbai admitted an application filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for short **"the Insolvency Code"**) against the petitioner and appointed an Interim Resolution Professional. Vide Public Announcement dated 25.10.2019, the Interim Resolution Professional ordered for the commencement of the Corporate Insolvency Resolution Process (**'CIRP'**). On 05.11.2019, the NCLT passed an order adjourning the arbitration proceedings *sine die* due to initiation of the CIRP.

17. Meanwhile, upon seeking permission of the Interim Resolution Professional, the petitioner sent a fresh notice to the respondents on 07.11.2019 invoking arbitration under Clause 15.7 of the GTC agreement. Pertinently, the petitioner arrayed respondent no. 2 in the said arbitration notice. The petitioner appointed Dr. Justice Arijit Pasayat, former Judge of this Court, as its nominated arbitrator and called upon the respondents to appoint their arbitrator for the constitution of the tribunal. However, upon failure of the respondents to appoint an arbitrator in terms of the said notice, the petitioner has preferred the present petition.

B. REFERENCE ORDER

18. This petition was heard by a three-Judge Bench of this Court. By an order dated 06.05.2022, Chief Justice N.V Ramana (as he then was) speaking for himself and Justice A.S. Bopanna doubted the correctness of the application of the Group of Companies doctrine by the Indian courts. Chief Justice Ramana criticised the approach of a three-Judge Bench of this Court in ***Chloro Controls India (P) Ltd v. Severn Trent Water Purification Inc*** reported in **(2013) 1 SCC 641** which relied upon the phrase "claiming through or under" appearing in Section 45 of the Act, 1996 to adopt the Group of Companies doctrine. He noted that the subsequent decisions of this Court read the doctrine into Sections 8 and 35 of the Act, 1996 without adequately examining the interpretation of the phrase "claiming through or under" appearing in those provisions. He also observed that economic concepts such as tight group structure and single economic unit alone cannot be utilized to bind a non-signatory to an arbitration agreement in the absence of an express consent. Consequently, he referred the matter to the larger bench to seek clarity on the interpretation of the phrase "claiming through or under"

appearing under Sections 8, 35 and 45 respectively of the Act, 1996. The following two questions were formulated by him for reference:

i. Whether the phrase "claiming through or under" in Sections 8 and 11 respectively of the Act, 1996 could be interpreted to include the Group of Companies doctrine; and

ii. Whether the Group of Companies doctrine as expounded by ***Chloro Controls*** *(supra)* and subsequent judgments is valid in law?

19. Justice Surya Kant, in a separate opinion, observed that the decisions of this Court before ***Chloro Controls*** *(supra)* adopted a restrictive approach by placing undue emphasis on formal consent. Justice Surya Kant traced the evolution of the Group of Companies doctrine to observe that it had gained a firm footing in Indian jurisprudence. However, he opined that this Court has adopted inconsistent approaches while applying the doctrine in India, which needed to be clarified by a larger bench. Accordingly, he highlighted the following questions of law for determination by the larger Bench:

i. Whether the Group of Companies Doctrine should be read into Section 8 of the Act, 1996 or whether it can exist in Indian jurisprudence independent of any statutory provision;

ii. Whether the Group of Companies Doctrine should continue to be invoked on the basis of the principle of 'single economic reality';

iii. Whether the Group of Companies Doctrine should be construed as a means of interpreting implied consent or intent to arbitrate between the parties; and

iv. Whether the principles of alter ego and/or piercing the corporate veil can alone justify pressing the Group of Companies Doctrine into operation even in the absence of implied consent?

C. SUBMISSIONS ON BEHALF OF THE APPELLANT

20. Mr. Hiroo Advani, the learned counsel appearing on behalf of the petitioner, submitted at the outset that the GTC agreement, Order Form no. 1, Order Form no. 3 and the License Agreement are interlinked and form part of a composite transaction. The said four agreements cannot be performed in isolation and have to be read coherently for achieving the common object underlying the agreements.

21. The counsel submitted that respondent no. 1 is indisputably a fully owned subsidiary of respondent no. 2 and the customisation of the SAP Hybris Software to meet the requirements of the petitioner was not feasible without the aid, execution and performance of respondent no. 2. He submitted that for such reason, it could be said that there exists a direct commercial relationship between the petitioner and both the respondents.

22. The counsel further submitted that the various emails exchanged between the petitioner and respondent no. 2 are indicative of the intention of respondent no. 2 to monitor the execution of the SAP Hybris Software project and to ensure the compliance of the contractual obligations on behalf of respondent no. 1. The counsel adverted to the contents of many such emails in support of his contention.

23. The counsel placed reliance on certain clauses of the License Agreement, Order Form no. 3 and GTC agreement to submit that although respondent no. 2 may not have been a signatory to the agreements, yet it had been entrusted with certain liabilities and obligations under the agreements entered into between the petitioner and respondent no. 1, thereby making it a veritable party to the transaction.

24. In the last, the counsel submitted that as per the decision of the Constitution Bench of this Court in ***Cox and Kings Ltd. v. SAP India Pvt. Ltd. & Anr.*** reported in **2023 INSC 1051** the court at the stage of referral is only required to look *prima facie* into the validity and existence of an arbitration agreement and should leave the questions relating to the involvement of the non-signatory to the arbitral tribunal.

D. SUBMISSIONS ON BEHALF OF THE RESPONDENTS

25. Mr. Ritin Rai, the learned senior counsel appearing on behalf of the respondents made the following submissions which can be broadly divided into four categories:

i. Contentions and claims sought to be raised by the petitioner are pending adjudication before another arbitral tribunal constituted under the same dispute resolution clause

- The same contentions and claims as sought to be advanced in the present petition have already been raised and are pending adjudication before an arbitral tribunal constituted

under the GTC Agreement. In the said proceedings, the Bombay High Court appointed an arbitrator and the same was affirmed by this Court.

- The claims of the petitioner pertaining to the GTC agreement read with Order Form no. 1 (collectively referred to as the "**Service Agreement**") are already *sub-judice* and cannot be permitted to be reagitated. The petitioner has already filed its counterclaims for an amount of Rs. 45,99,71,098/- before the arbitral tribunal presided by Justice Madan B. Lokur (Retd.).
- Allowing parallel arbitration proceedings emanating from the same agreement and transaction would entail a risk of conflicting judgments on the same subject matter including the analogous set of facts in evidence. As such, the principles of *res sub-judice and res judicata* would be attracted to the second arbitration proceedings and consequently the present petition.

ii. Respondent no. 2 has neither impliedly nor explicitly consented to the arbitration agreement between the petitioner and respondent no. 1

- The agreements in question have been executed only between the petitioner and respondent no. 1. Respondent no. 2 is not a signatory to any of the agreements between the petitioner and respondent no. 1.
- Respondent no. 2 has been unnecessarily and disingenuously made a party to the present proceedings. Not a single limb of the transaction between the petitioner and respondent no. 1 was to be performed by or has been performed by respondent no. 2. Respondent no. 2 was never part of the negotiation process between the petitioner and respondent no. 1. Respondent no. 2 did not by its conduct, agree, either impliedly or explicitly, to be bound by the terms and conditions of the agreements between respondent no. 1 and the petitioner.
- It is preposterous to suggest that by trying to address the concerns of a customer of the subsidiary company (who had voluntarily reached out), respondent no. 2 would become

liable under the contracts executed solely between the petitioner and respondent no. 1.

- Respondent no. 2 entered the fray only when the petitioner, of its own accord, approached it and levelled certain allegations and raised issues concerning the SAP Hybris Software project with its management in August, 2016.
- There is nothing on record either in the contractual framework or otherwise to indicate that the project was to be performed by respondent no. 2. The only communication with respondent no. 2 in respect of the SAP Hybris Software project arose after the escalation emails in August, 2016 where the petitioner itself requested the management of respondent no. 2 company to help with the alleged issues plaguing the SAP Hybris Software project. It was neither the intention of the petitioner nor that of respondent no. 1 to bind respondent no. 2 to the agreements.
- The references to respondent no. 2 in the License Agreement only indicate that respondent no. 1 has obtained a license from respondent no. 2. No part of the License Agreement between the petitioner and respondent no. 1 was to be performed by respondent no. 2 and it is only in such circumstances that the parties chose not to make respondent no. 2 a party thereto. The references to respondent no. 2 in the License Agreement are standard references used by global software licensing companies. These references cannot bind a foreign owner of such licenses. Any finding to the contrary would completely upset the well-established commercial practice in this sector and would set a dangerous precedent.

iii. Claims raised by the petitioners are beyond the ambit of Clause 15.7 of the GTC agreement

- There exists no commonality between the four agreements entered into between the petitioner and respondent no. 1. The contention of the petitioner that the four agreements form part of a "single composite transaction" is incorrect as the License Agreement and Order Form no. 3 bear no significance to the implementation of the software, which is covered by the Services Agreement comprising of the

GTC agreement and Order Form no. 1. Implementation is an exercise *de hors* the purchase of the license of the software.

- The claims raised by the petitioner are beyond the ambit of the Services Agreement. As the License Agreement read with Order Form no. 3 is distinct and independent from the Services Agreement, it naturally follows that the arbitration agreement contained under the GTC agreement read with Order Form no. 1 does not apply to the License Agreement read with Order Form no. 3.

- As the arbitration clause under the License Agreement read with Order Form no. 3 has not been invoked till date by either of the parties, it stands to reason that any alleged claims pertaining to the License Agreement read with Order Form no. 3 as mentioned in the notice of arbitration are time-barred and cannot be adjudicated upon. On this ground alone, the present Petition is liable to be dismissed.

iv. The present petition is not *bona fide* and the petitioners have suppressed material facts from this Court

- The present proceedings are a belated and misconceived attempt on the part of the petitioner to inflate amounts that it claims are due from respondent no. 1 and respondent no. 2. This is sought to be done by the petitioner to portray and provide a false view of its financial position to the creditors and subvert the due process of law through colourable actions. The petitioner is indulging in forum-shopping by once again attempting to appoint an arbitrator under the GTC agreement, a right which both the Bombay High Court and this Court, in two separate lengthy proceedings, under Sections 11 and 14 respectively of the Act, 1996, had decisively held to be forfeited by the petitioner for all times to come.

- The petitioner failed to disclose that respondent no. 1 had challenged the notice of arbitration before the NCLT, Mumbai.

E. SUBMISSIONS ON BEHALF OF THE INTERVENOR, UNCITRAL NATIONAL COORDINATION COMMITTEE FOR INDIA (UNCCI)

26. Mr George Pothan Poothicote and Ms Manisha Singh, the learned counsel appearing on behalf of the intervenors in I.A. no. 69863 of 2023, made the following submissions:

    i. UNCITRAL Model Law on International Commercial Arbitration ("**model law**") was amended in 2006 to address the concerns about the formal requirements necessary for constituting an arbitration agreement. The amendment was adopted by the United Nations General Assembly vide Resolution 61/33 dated 04.12.2006. Post the amendment, Article 7 of the model law provides two options to the member states – the first option requires the arbitration agreement to be in the form of a clause in a contract or a separate agreement, both of which must be in writing; the second option is silent on the requirement of a written agreement and thus the contract law applicable in a specific jurisdiction remains available for the determination of the level of consent necessary for a party to become bound by an arbitration agreement allegedly made by reference. Section 7 of the Act, 1996 is similar to (but not the same as) the first option.

    ii. As per the Constitution Bench decision in ***Cox and Kings*** *(supra)*, the court, at the referral stage, is not bound to go into the merits of the case to decide if the non-signatory is bound by the arbitration agreement. On the contrary, the referral court should leave it to the arbitral tribunal to decide such an issue.

F. ANALYSIS

27. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the short question that falls for our consideration is whether the application of the petitioner for the appointment of an arbitrator deserves to be allowed.

28. On the scope of powers of the referral court at the stage of Section 11(6), it was observed by us in ***Lombardi Engg. Ltd. v. Uttarakhand Jal Vidyut Nigam Ltd.*** reported in **2023 INSC 976** as follows:

> *"26. Taking cognizance of the legislative change, this Court in Duro Felguera, S.A. v. Gangavaram Port Ltd. [Duro Felguera, S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764], noted that post 2015 Amendment, the jurisdiction of the Court under Section 11(6) of the 1996 Act is limited to examining whether an*

arbitration agreement exists between the parties — "nothing more, nothing less.""

(Emphasis supplied)

29. A Constitution Bench of this Court in ***In Re: Interplay Between Arbitration Agreements under the Arbitration and Conciliation Act, 1996 and the Stamp Act, 1899*** reported in **2023 INSC 1066**, speaking through one of us (Dr. D.Y. Chandrachud, CJI), considered the scope of judicial interference by the referral court in a Section 11 application. A few relevant observations made therein are reproduced hereinbelow:

> *"81. One of the main objectives behind the enactment of the Arbitration Act was to minimise the supervisory role of Courts in the arbitral process by confining it only to the circumstances stipulated by the legislature. For instance, Section 16 of the Arbitration Act provides that the Arbitral Tribunal may rule on its own jurisdiction "including ruling on any objection with respect to the existence or validity of the arbitration agreement". The effect of Section 16, bearing in view the principle of minimum judicial interference, is that judicial authorities cannot intervene in matters dealing with the jurisdiction of the Arbitral Tribunal. Although Sections 8 and 11 allow Courts to refer parties to arbitration or appoint arbitrators, Section 5 limits the Courts from dealing with substantive objections pertaining to the existence and validity of arbitration agreements at the referral or appointment stage. A Referral Court at Section 8 or Section 11 stage can only enter into a prima facie determination. The legislative mandate of prima facie determination ensures that the Referral Courts do not trammel the Arbitral Tribunal's authority to rule on its own jurisdiction."*

30. In a recent decision in ***SBI General Insurance Co. Ltd. v. Krish Spinning*** reported in **2024 INSC 532**, it was observed by us that the arbitral tribunal is the preferred first authority to look into the questions of arbitrability and jurisdiction, and the courts at the referral stage should not venture into contested questions involving complex facts. A few relevant paragraphs of the said decision are extracted hereinbelow:

> *"98. What follows from the negative facet of arbitral autonomy when applied in the context of Section 16 is that the national courts are prohibited from interfering in matters pertaining to the jurisdiction of the arbitral tribunal, as exclusive jurisdiction on those aspects vests with the arbitral tribunal. The legislative mandate of prima facie determination at the stage of Sections 8 and 11 respectively ensures that the referral courts do not end up venturing into what is intended by the legislature to be the exclusive domain of the arbitral tribunal.*
>
> ***xxx xxx xxx***
>
> *114. In view of the observations made by this Court in In Re: Interplay (supra), it is clear that the scope of enquiry at the stage of appointment of arbitrator is limited to the scrutiny of prima facie existence of the arbitration agreement, and nothing else. […]*
>
> ***xxx xxx xxx***
>
> *125. We are also of the view that ex-facie frivolity and dishonesty in litigation is an aspect which the arbitral tribunal is equally, if not more, capable to decide upon the appreciation of the evidence adduced by the parties. We say so because the arbitral tribunal has the benefit of going through all the relevant evidence and pleadings in much more detail than the referral court. If the referral court is able to see the frivolity in the litigation on the basis of bare minimum pleadings, then it would be incorrect to doubt that the arbitral tribunal would not be able to arrive at the same inference, most likely in the first few hearings itself, with the benefit of extensive pleadings and evidentiary material."*
>
> (Emphasis supplied)

31. Further, on the scope of enquiry at the referral stage for the determination of whether a non-signatory can be impleaded as a party in the arbitration proceedings, it was observed by the Constitution Bench in ***Cox and Kings*** *(supra)* as follows:

> *"158. Section 16 of the Arbitration Act enshrines the principle of competence-competence in Indian arbitration*

law. The provision empowers the Arbitral Tribunal to rule on its own jurisdiction, including any ruling on any objections with respect to the existence or validity of arbitration agreement. Section 16 is an inclusive provision which comprehends all preliminary issues touching upon the jurisdiction of the Arbitral Tribunal. [Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd., (2020) 2 SCC 455 : (2020) 1 SCC (Civ) 570] The doctrine of competence-competence is intended to minimise judicial intervention at the threshold stage. The issue of determining parties to an arbitration agreement goes to the very root of the jurisdictional competence of the Arbitral Tribunal.

xxx xxx xxx

160. In Pravin Electricals (P) Ltd. v. Galaxy Infra & Engg. (P) Ltd. [Pravin Electricals (P) Ltd. v. Galaxy Infra & Engg. (P) Ltd., (2021) 5 SCC 671 : (2021) 3 SCC (Civ) 307] , a Bench of three Judges of this Court was called upon to decide an appeal arising out of a petition filed under Section 11(6) of the Arbitration Act for appointment of sole arbitrator. The issue before the Court was the determination of existence of an arbitration agreement on the basis of the documentary evidence produced by the parties. This Court prima facie opined that there was no conclusive evidence to infer the existence of a valid arbitration agreement between the parties. Therefore, the issue of existence of a valid arbitration agreement was referred to be decided by the Arbitral Tribunal after conducting a detailed examination of documentary evidence and cross-examination of witnesses.

161. The above position of law leads us to the inevitable conclusion that at the referral stage, the Court only has to determine the prima facie existence of an arbitration agreement. If the referral court cannot decide the issue, it should leave it to be decided by the Arbitral Tribunal. The referral court should not unnecessarily interfere with arbitration proceedings, and rather allow the Arbitral Tribunal to exercise its primary jurisdiction. In Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd. [Shin-Etsu

Chemical Co. Ltd. v. Aksh Optifibre Ltd., (2005) 7 SCC 234], this Court observed that there are distinct advantages to leaving the final determination on matters pertaining to the validity of an arbitration agreement to the Tribunal : (Shin-Etsu Chemical Co. case [Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd., (2005) 7 SCC 234] , SCC p. 267, para 74)

> *"74. … Even if the Court takes the view that the arbitral agreement is not vitiated or that it is not valid, inoperative or unenforceable, based upon purely a prima facie view, nothing prevents the arbitrator from trying the issue fully and rendering a final decision thereupon. If the arbitrator finds the agreement valid, there is no problem as the arbitration will proceed and the award will be made. However, if the arbitrator finds the agreement invalid, inoperative or void, this means that the party who wanted to proceed for arbitration was given an opportunity of proceeding to arbitration, and the arbitrator after fully trying the issue has found that there is no scope for arbitration."*

xxx xxx xxx

164. In case of joinder of non-signatory parties to an arbitration agreement, the following two scenarios will prominently emerge: first, where a signatory party to an arbitration agreement seeks joinder of a non-signatory party to the arbitration agreement; and second, where a non-signatory party itself seeks invocation of an arbitration agreement. In both the scenarios, the referral court will be required to prima facie rule on the existence of the arbitration agreement and whether the non-signatory is a veritable party to the arbitration agreement. In view of the complexity of such a determination, the referral court should leave it for the Arbitral Tribunal to decide whether the non-signatory party is indeed a party to the arbitration agreement on the basis of the factual evidence and application of legal doctrine. The Tribunal can delve

> *into the factual, circumstantial, and legal aspects of the matter to decide whether its jurisdiction extends to the non-signatory party. In the process, the Tribunal should comply with the requirements of principles of natural justice such as giving opportunity to the non-signatory to raise objections with regard to the jurisdiction of the Arbitral Tribunal. This interpretation also gives true effect to the doctrine of competence-competence by leaving the issue of determination of true parties to an arbitration agreement to be decided by the Arbitral Tribunal under Section 16.*
>
> *165. In view of the discussion above, we arrive at the following conclusions:*
>
> ***... ... ...***
>
> *(l) At the referral stage, the referral court should leave it for the Arbitral Tribunal to decide whether the non-signatory is bound by the arbitration agreement […]"*
>
> (Emphasis supplied)

32. As discussed above, the respondents have raised a number of objections against the present petition, however, none of the objections raised question or deny the existence of the arbitration agreement under which the arbitration has been invoked by the petitioner in the present case. Thus, the requirement of *prima facie* existence of an arbitration agreement, as stipulated under Section 11 of the Act, 1996, is satisfied.

33. Once the arbitral tribunal is constituted, it shall be open for the respondents to raise all the available objections in law, and it is only after (and if) the preliminary objections are considered and rejected by the tribunal that it shall proceed to adjudicate the claims of the petitioner.

34. Further, on the issue of impleadment of respondent no. 2, which is not a signatory to the arbitration agreement, elaborate submissions have been made on both the sides, placing reliance on terms of the agreements, email exchanges, etc. In view of the complexity involved in the determination of the question as to whether the respondent no. 2 is a party to the arbitration agreement or not, we are of the view that it would be appropriate for the arbitral tribunal to take a call on the question after taking into consideration the evidence adduced

before it by the parties and the application of the legal doctrine as elaborated in the decision in ***Cox and Kings*** *(supra).*

35. In view of the aforesaid, the present petition is allowed. We appoint Shri Justice Mohit S. Shah, former Chief Justice of the High Court of Judicature at Bombay to act as the sole arbitrator. The fees of the arbitrator including other modalities shall be fixed in consultation with the parties.

36. It is made clear that all the rights and contentions of the parties are left open for adjudication by the learned arbitrator.

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

Result of the case: Petition allowed.

†*Headnotes prepared by:* Ankit Gyan

[2024] 9 S.C.R. 218 : 2024 INSC 675

Manilal
v.
The State of Rajasthan & Ors.

(Civil Appeal No. 10440 of 2024)

10 September 2024

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

Issue for Consideration

Matter pertains to the appointment of the appellant to the post of Teacher Grade-III for TSP Area.

Headnotes†

Service law – Appointment – Post of Teacher Grade III Level II in the Scheduled Area (TSP) – Eligibiity was graduation with minimum 45% marks and one year Bachelor of Education (B.Ed) – However, candidates who had taken admission in B.Ed course after issuance of notification dated 31.8.09 of National Council for Teacher Education, had to secure minimum 50 % at graduation level or equivalent examination – Appellant applied for the post, he had 44.58% marks in his graduation and had taken admission in the B.Ed course on 23.10.2009-after the cut-off date – Appellant, being from the reserved category, qualifying percentage for admission to the B.Ed Course was 40% marks in graduation (45% for general category) – Rejection of appellant's candidature since he had secured less than 45% marks in his graduation – Appellant and similarly situated candidate filed writ petitions, which were dismissed – Appellant then filed an appeal – Meanwhile, notification by NCTE that minimum percentage of marks in graduation shall not be applicable to those incumbents who had already taken admission to B.Ed or equivalent course prior to 29.07.2011 – Interim order passed directing the respondents to accord appointment to the appellant and pursuant thereto, the appellant was appointed – However, the Division Bench relying on a matter, dismissed the appeal, and thereafter his appointment was cancelled, though the appeal filed by the similarly situated candidate had already been allowed:

* Author

Held: It would be improper to discriminate inter se among a homogenous group of students admitted for the academic session 2009-10 – It could not be that those students admitted in the first round of counselling would be eligible, even with less than 50% marks in graduation, while the others admitted in the subsequent rounds of counselling would not be – It was on this reasoning that an identically situated student who had taken B.Ed admission after the appellant, was given relief – One person or situation should be treated the same as another – Judgment of the High Court is set aside – Authorities directed to treat the appointment given to the appellant, pursuant to the interim order of the Division Bench, as a regular appointment and after reinstating the appellant, grant him consequential benefits – Rajasthan Panchayati Raj Act, 1994 – Rajasthan Panchayati Raj Rules, 1996. [Paras 15, 16]

Case Law Cited

Neeraj Kumar Rai and Ors. v. State of U.P. and Others [2017] 6 SCR 444 **– referred to.**

List of Acts

Rajasthan Panchayati Raj Act, 1994; Rajasthan Panchayati Raj Rules, 1996.

List of Keywords

Appointment; Post of Teacher Gade-III for TSP Area; Graduation with minimum 45% marks and One year Bachelor of Education (B.Ed); Reserved category; Discriminate inter se among homogenous group of students; Back wages; Fitment of pay.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 10440 of 2024

From the Judgment and Order dated 27.04.2022 of the High Court of Judicature for Rajasthan at Jodhpur in DBSAW No. 997 of 2019

Appearances for Parties

Nishant Bishnoi, Saurabh Ajay Gupta, Ms. Srishti Prabhakar, Advs. for the Appellant.

Divyank Panwar, Milind Kumar, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

K.V. Viswanathan, J.

1. Leave granted.

2. The present appeal calls in question the correctness of the judgment of the Division Bench of the High Court of Judicature for Rajasthan at Jodhpur dated 27.04.2022 in D.B. Special Appeal Writ No. 997 of 2019. By the said judgment, the Division Bench dismissed the appeal of the appellant and confirmed the order dated 27.11.2018 of the learned Single Judge dismissing the writ petition of the appellant.

3. We have heard Mr. Nishant Bishnoi, learned counsel for the appellant and Mr. Milind Kumar, learned counsel for the respondent-State and perused the records of the case. We have also considered the written submissions filed by the parties.

4. The facts lie in a very narrow compass. The respondent-authorities under the provisions of the Rajasthan Panchayati Raj Act, 1994 and the Rajasthan Panchayati Raj Rules, 1996, on 11.09.2017, issued an advertisement inviting applications for the post of Teacher Grade III Level II in the Scheduled Area (TSP). A total of 1455 posts were advertised. The relevant clauses of the advertisement were as under:-

> "**6. MINIMUM EDUCATIONAL QUALIFICATIONS:-**
>
> Under sub-section (1) of section (23) of the Free and Compulsory Education Act 2009, the notification of the National Council of Teacher Education vide notification dated 23 August 2010 and 29 July 2011 and given by the Hon'ble High Court in the order of instructions and according to the notification dated 29.08.2017 of the State Government, the minimum qualifications and minimum percentage for various categories to be included in Rajasthan Teacher Recruitment 2016 (Revised) will be as follows:
>
> 6.1 For Class 6 to 8 (Level-II):
>
> General Education (Class 6 to 8):

A. Graduation and 2-year Diploma in Elementary Education (by whatever name known) Graduation and 2-year Diploma in Elementary Education (by whatever name known).

OR

Graduation with minimum 50% marks and one year Bachelor in Education (B.Ed) Graduation with at least 50% marks and 1-year Bachelor in Education (B.Ed).

OR

Graduation with minimum 45% marks and One year Bachelor of Education (B.Ed) obtained in accordance with the National Council for Teacher Education (Recognition Norms and Procedure) Regulations issued from time to time in this regard.

OR

Senior Secondary (or its equivalent) with at least 50% marks and 4 year Bachelor in Elementary Education (B.El.Ed).

OR

Senior Secondary (or its equivalent) with at least 50% marks and 4-year B.A/B.Sc.Ed. or B.A.Ed./B.Sc.Ed.

OR

Graduation with minimum 50% marks and one year B.Ed. (Special Education)

xxx xxx

"6.3 In seriatim of the judgment dated 20.5.2011 passed in various petitions by the Division Bench of Hon'ble High Court, Jodhpur, according to School Education Department, Rajasthan letter number F 7(1)/Plan/2011 dated 17th June 2011, the following candidates would also be eligible to participate in Rajasthan High Primary School Teachers Direct Recruitment 2016 (amended):-

(I) All such candidates who have taken admission in teacher training courses before issuance of notification dated 27.09.07 by the National Teachers Education

Council; for them there is no binding to secure minimum percentage in graduation level or equivalent examination.

(2) All such candidates who have after issuance of notification dated 27.09.07 by the National Teachers Education Council; but before issuance of notification dated 31.8.09, for them it is binding to secure minimum 45 percent at graduation level or equivalent examination.

(3) All such candidates who had taken admission in various teachers training courses after issuance of notification dated 31.8.09 of National Council for Teacher Education, for them it is binding to secure minimum 50 percent at graduation level or equivalent examination."

(Emphasis supplied)

5. The appellant applied for the post of Teacher under the said advertisement. It is undisputed that the appellant had 44.58% marks in his graduation. It is also undisputed that the appellant secured admission in the Bachelor of Education (B.Ed) course on 23.10.2009 i.e. the date on which he deposited the fee. This fact is admitted in the counter affidavit of the State filed before this Court in Para 7 and in the written submissions filed by the State in Para 1. The appellant, being admittedly from the reserved category, the qualifying percentage required for admission to the B.Ed Course was 40% marks in graduation (45% for general category) as is clear from the 12.04.2019 Press Release. The appellant fulfilled this criteria and obtained admission.

6. When the matter stood thus, the appellant's name did not appear in the provisional list of selected candidates despite securing 44.58% marks, which was way above the cut-off marks. The appellant contends that he was informed that his candidature was rejected for the reason that he had secured less than 45% marks in his graduation.

7. Being aggrieved, the appellant filed S.B. Civil Writ No. 16005 of 2018 and one Rakesh Gaur, who was similarly situated, also filed S.B. Civil Writ No. 14129 of 2018 [***Rakesh Gaur*** vs. ***The State of Rajasthan***]. Both the writ petitions were dismissed on 27.11.2018. Undeterred, the appellant filed D.B. Spl. Appl. Writ No. 997 of 2019. Rakesh Gaur filed D.B. Spl. Appl. Writ No. 224 of 2019.

8. At this stage, on 13.11.2019, the National Council for Teacher Education [NCTE] issued a clarification by way of a supplementary notification which stated that minimum percentage of marks in graduation shall not be applicable to those incumbents who had already taken admission to the Bachelor of Education or Bachelor of Elementary Education or equivalent course prior to 29th July, 2011. It further stated that the notification of 13.11.2019 was to be made applicable from 29.07.2011. The relevant extracts of the notification is as follows:-

> "(B). After clause (b), at the end, the following proviso shall be inserted namely:
>
> "Provided that minimum percentage of marks in graduation shall not be applicable to those incumbents who had already taken admission to the Bachelor of Education or Bachelor of Elementary Education or equivalent course prior to the 29th July, 2011.
>
> 2. This notification shall be deemed to have come into force on the 29th July, 2011.
>
> Sanjay Awasthi,
> Member Secy
> (Advt III/4/ Exty/304/19)
>
> **Note**: The principal notification was published in the Gazette of India, Extraordinary, Part III, Section 4, Vide number F.No. 61-3/20/2010 NCTE (N & S) dated the 23rd August, 2010 and was subsequently amended vide number F.No. 61- 1/2011 NCTE (N & S) dated the 29th July, 2011.
>
> **Explanatory Memorandum**
>
> The amendment notification number F.No. 61-1/2011 NCTE (N & S) dated the 29th July, 2011 issued by the National Council for Teacher Education was challenged before the Supreme Court in the case of Neeraj Kumar Rai and others Vs. State of U.P. and Ors. in Civil Appeal No. 9732 of 2017 and the Hon'ble Court vide its order dated the 25th July, 2017 had directed the National Council for Teacher Education to issue a clarification by way of a supplementary notification regarding the percentage of

> marks specified therein. Necessary amendment is required to be made retrospectively from the date of notification of the said rules. It is certified that none will be adversely affected by the retrospective effect being given to the amendment rules.
>
> (Emphasis supplied)

9. The supplementary notification of 13.11.2019 was a sequel to the judgment of this Court in ***Neeraj Kumar Rai and Ors. Vs. State of U.P. and Others*** [Civil Appeal No. 9732 of 2017 decided on 25.07.2017].

10. It was noticed by this Court in ***Neeraj Kumar Rai*** ***(supra)*** that the 2009 Norms and Standards for Secondary Teacher Education Programme through Open and Distance Learning System leading to B.Ed. did not provide for any minimum percentage of marks in Bachelor's degree. Thereafter, this Court noticed that in the NCTE notification dated 23.08.2010, the requirement of prescribed percentage of marks in graduation was laid down and on that basis the said requirement was incorporated in the 29.07.2011 notification. The appellants in ***Neeraj Kumar Rai*** ***(supra)*** relying on the judgments delivered by a Division Bench of the Rajasthan High Court in D.B. Civil Writ Petition No. 3964 of 2011 etc. [***Sushil Sompura and Ors.*** Vs. ***State (Education) and Ors.***] and the learned Single Judge of the Uttarakhand High Court in Writ Petition No. 772(SS) of 2011 etc. [***Baldev Singh and Ors.*** Vs. ***State of Uttarakhand and Ors***.] respectively contended that in case the admission to the B.Ed. course had been obtained prior to the prescription of the minimum qualifying marks by NCTE in Bachelor's Degree, the minimum qualifying marks in graduation ought not to be insisted. Recording the submission of the learned Additional Solicitor General to the effect that the appellants therein are to be treated on par, this Court granted relief to the appellants therein on par with the relief granted by the Rajasthan and Uttarakhand High Courts.

11. Independently, in the matter of ***State of Rajasthan*** vs. ***Ankul Singhal*** - D.B. Special Appeal Writ No. 545 of 2020, by an order dated 08.09.2020, the Division Bench, while dismissing the appeal of the State, had the following to say insofar as the facts in Ankul Singhal were concerned:

"Admission to the said post was initiated in terms of advertisement issued in the month of April, 2009. Eligibility for admission was 45% marks at graduation level. Respondent had secured 49.61% marks in his graduation examination. Respondent cleared the Pre-Shiksha Shastri test. Counseling for allotment of colleges on merit cum-preference was notified on 04.07.2009. The respondent deposited the necessary fee on 07.07.2009. First round of counseling was held between 31.07.2009 and 03.08.2009. Second round of counseling was held between 26.08.2009 and 28.08.2009. As per notification dated 21.08.2009, respondent was allotted college for pursuing Shiksha Shastri course 2009-10 and was admitted on 04.09.2009.

Clauses 9.3(ii) and 9.3(iii) of the advertisement dated 31.07.2018 read as under:

9.3 The Hon'ble High Court of Rajasthan, Jodhpur Division Bench, in order of judgment dated 20.05.2011 passed in various petitions, according to School Education Department, Rajasthan letter number F 7(1) E.E/ Plan/2011 dated 17 June, 2011 and clarification dated 16.09.2013, the following candidates would be eligible to participate in Rajasthan Primary and Upper Primary School Teachers Direct Recruitment, 2018:-

(i) All such candidates who have taken admission in teacher training courses before issuance of notification dated 27.09.2007 of the National Teachers Education Council, they are not obliged to obtain minimum percentage marks at bachelors level or equivalent examination.

(ii) All such candidates who have taken admission in teacher training courses after issuance of notification dated 27.09.2007 of National Teachers Education Council but before issuance of notification dated 31.08.2009 in teaching training courses, for them it is compulsory to obtain minimum 45 percent marks at graduation level or equivalent examination.

(iii) All such candidates who had taken admission in teachers training courses after issuance of notification of National Teachers Education Council dated 31.08.2009, for them it is compulsory to obtain minimum 50 percent marks at graduation level or equivalent examination.

Learned Single Judge rightly observed that the admission of the respondent in the course would relate back to the date of admission after the first round of counselling which took place before 31.08.2009. If that is not so, then an absurd classification of homogeneous group of students admitted in Shiksha Shastri course in the academic session 2009-10 would arise and the same would have no nexus to be achieved. Thus, some students in respondent's class admitted after first round of counseling would be eligible, even with less than 50% marks in graduation, to be appointed as Teacher Grade-III, Level-II while the respondent who was also from the same class and admitted through the same process would not be eligible for appointment for the reason of less than 50% marks in graduation.

Learned Single Judge rightly held that the said uneven and discriminatory situation between equals (students of Shiksha Shastri class of 2009-10) would be unsustainable and was liable to be declared ultra vires Article 14 of the Constitution of India.

Learned Single Judge then rightly drew the conclusion that Clause 9.3(iii) read with clause 9.3(ii) of the advertisement dated 31.07.2018 entitling eligibility for those with 45% marks at graduation who had substantially undergone the admission process to Shiksha Shastri course and were allotted college for the purpose before 31.08.2009 though admitted later and the case of the respondent would fall in the said category as he had taken admission to Shiksha Shastri course pursuant to advertisement in April, 2009 when notification dated 27.09.2007 was operative and as per the said notification eligibility criteria was 45% marks in graduation course.

> Hence, the learned Single Judge rightly held that the case of the respondent was liable to be considered for appointment as Teacher Grade-III, Level-II as per his competitive merit in the category subject to his fulfilling other requirements eligibility on his application in pursuance of advertisement dated 31.07.2018."
>
> (Emphasis supplied)

The Special Leave Petition (C) No. 15793/2020 filed by the State against the judgment in ***Ankul Singhal (supra)*** was dismissed by this Court on 01.02.2021.

12. By an order of 23.10.2021, in the appellant's D.B. Spl. Appl. Writ No. 997 of 2019, relying on the NCTE notification of 13.11.2019, an interim order was passed directing the respondents to accord appointment to the appellant on the post of Teacher Gade-III pursuant to the Advertisement No. 02 of 2017 in question for TSP Area (English subject), if otherwise eligible. It is not disputed that the appellant has, pursuant to the interim order was appointed. Thereafter, it is contended that after the impugned order, the appellant's appointment was cancelled on 07.06.2022.

13. On 10.03.2022, the D.B. Spl. Appl. Writ No. 224 of 2019 of ***Rakesh Gaur (supra)***, who was identically situated, was allowed by relying on the Division Bench judgment in ***Ankul Singhal (supra)***. In fact, the said Rakesh Gaur has taken admission on 05.11.2009, after the appellant herein.

14. However, when the appeal of the appellant came up on 27.04.2022, by relying on D.B. Civil Special Appeal (Writ) No. 1205 of 2019 (***Dinesh Chandra Damor*** vs. ***State of Rajasthan***), the appeal was dismissed. The appellant herein had joined the course on 23.10.2009 whereas as is clear from the facts of ***Dinesh Chandra Damor (supra)*** that candidate has joined on 20.10.2010 i.e. one year and two months (approx.) after the cut-off date of 31.08.2009.

15. The appellant's case was more akin to the case of ***Rakesh Gaur (supra)***, who had taken admission on 05.11.2009. We are clearly of the opinion on the special facts of this case that the Division Bench erred in applying the case of ***Dinesh Chandra Damor (supra)*** instead of applying the reasoning in the judgment in ***Ankul Singhal (supra)*** and ***Rakesh Gaur (supra)*** to the facts of this case. As was held in

Ankul Singhal (supra), it will be improper to discriminate *inter se* among a homogenous group of students admitted for the academic session 2009-10. As was pointed out therein, it could not be that those students admitted in the first round of counselling would be eligible, even with less than 50% marks in graduation, while the others admitted in the subsequent rounds of counselling would not be. It was on this reasoning that ***Rakesh Gaur (supra)*** was given relief. ***Rakesh Gaur (supra)*** was a case identically situated with the case of the appellant. What is sauce for the goose should be sauce for the gander too.

16. In view of the same, we allow the appeal and set aside the impugned judgment of the High Court dated 27.04.2022 in D.B. Spl. Appl. Writ No. 997 of 2019. We direct the respondent-authorities to treat the appointment given to the appellant, pursuant to the interim order of the Division Bench dated 23.10.2021, as a regular appointment and after reinstating the appellant grant consequential benefits. We direct that except for the period the appellant actually worked, he shall not be entitled to any back wages. However, fitment of pay shall be granted. Necessary orders shall be passed within a period of four weeks from today. No order as to costs.

Result of the case: Appeal allowed.

†*Headnotes prepared by:* Nidhi Jain

[2024] 9 S.C.R. 229 : 2024 INSC 691

Choudappa & Anr.
v.
Choudappa since Deceased by Lrs. & Ors.

(Special Leave Petition (Civil) No. 3056 of 2023)

03 September 2024

[Pankaj Mithal and R. Mahadevan, JJ.]

Issue for Consideration

In 2014, an application purported to be u/s. 141 CPC or under Order XX Rule 12 CPC was filed by the respondents for the determination of the mesne profits as directed by the judgment, order and decree dated 12.07.1973. Whether such an application is barred by limitation.

Headnotes†

Code of Civil Procedure, 1908 – Or.XX, r.12 and s.141 – A suit for recovery of possession and for correction of mutation entries was filed by respondents in the year 1963 and it was decreed on 12.07.1973 – The said judgment, order and decree specifically directs for holding an inquiry regarding mesne profits from the date of the suit i.e., 24.09.1963 in accordance with Order XX Rule 12, CPC – Respondents applied for execution and were put into possession of the suit land property in the year 2005 – Thereafter, in 2014 an application was filed by respondents for the determination of the mesne profits – Petitioners moved an application u/Or.VII, r.11(d) CPC contending that such an application was hopelessly barred by limitation – Application u/Or.VII, r.11 (d) CPC rejected by the trial Court – Revision filed against the said order was dismissed by the High Court – Propriety:

Held: The Court of first instance while passing the judgment and order dated 12.07.1973 had specifically stated for holding an inquiry regarding mesne profits from the date of the suit i.e., 24.09.1963 in accordance with Order XX Rule 12, CPC – Such an inquiry is nothing but a continuation of the suit and is in the nature of preparation of the final decree and as such, it cannot be said that any application moved as a reminder for completing the inquiry is barred by limitation or is liable to be dismissed on the ground of delay or laches – It is settled that in a situation where no limitation stands provided either by specific applicability of the Limitation Act or by the special statute governing the dispute, the

Trial Court must undertake a holistic assessment of the facts and circumstances of the case to examine the possibility of delay – When no limitation stands prescribed, it would be inappropriate for a Court to supplement the legislature's wisdom by its own and provide a limitation – No limitation as an absolute rule could be provided in such matters and it depends upon the facts and circumstances of each case whether the proceedings have been initiated in a fairly reasonable time – In the instant case, the two Courts below having held that the proceedings are not barred by limitation and that actually the proceedings are not in the nature of a fresh proceedings, rather than a continuation of the old suit in the form of a preparation of the final decree – No fault can be found in the said decisions. [Paras 12, 13, 15, 16, 17]

Case Law Cited

Kattukandi Edathil Krishnan and Anr. v. Kattukandi Edathil Valsan and Ors. [2022] 7 SCR 1120 **: (2022) 16 SCC 71 : AIR Online 2022 SC 2841;** *M/s. North Eastern Chemicals Industries (P) Ltd. & Anr. v. M/s. Ashok Paper Mill (Assam) Ltd. & Anr.* [2023] 15 SCR 821 [C.A.No. 2669 of 2013, dated 11.12.2023 passed by the Supreme Court] **– referred to.**

List of Acts

Code of Civil Procedure, 1908.

List of Keywords

Order XX Rule 12 of Code of Civil Procedure, 1908; Mesne profits; Determination of mesne profits; Limitation; Inquiry regarding mesne profits; Continuation of old suit; Preparation of final decree; Reminder for completing inquiry.

Case Arising From

EXTRA-ORDINARY APPELLATE JURISDICTION: Special Leave Petition (Civil) No. 3056 of 2023

From the Judgment and Order dated 22.07.2022 of the High Court of Karnataka at Kalaburagi in CRP No. 200017 of 2022

Appearances for Parties

C. Nageswara Rao, Sr. Adv., Vikram Hegde, Chitwan Sharma, Advs. for the Petitioners.

Ameet Deshpande, Sr. Adv., Akshat Shrivastava, Satvic Mathur, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Order

Heard learned senior counsel for the parties.

The challenge in the present special leave petition is to the revisional order dated 22nd July, 2022 passed by the High Court dismissing the revision of the petitioners arising from the rejection of their application alleged to have been filed under Order VII Rule 11(d) of the Code of Civil Procedure, 1908 (for short, 'C.P.C.').

A suit for recovery of possession and for correction of mutation entries was filed by the respondents in the year, 1963 and it was decreed on 12.07.1973. The said judgment, order and decree specifically directs for holding an inquiry regarding mesne profits from the date of the suit i.e., 24.09.1963 in accordance with Order XX Rule 12, C.P.C. The aforesaid judgment, order and decree of the Court of first instance attained finality with the dismissal of the appeal filed by the petitioners in the year, 1980.

The respondents applied for the execution so as to obtain possession of the suit land sometime in the year, 1993 and after going through the entire exercise of execution, issuance of warrant for possession, the respondents were put into possession of the suit land property in the year, 2005.

It appears that sometime in 2014, an application purported to be under Section 141 C.P.C. or under Order XX Rule 12 C.P.C. was filed by the respondents for the determination of the mesne profits as directed by the judgment, order and decree dated 12.07.1973. Once such an application was filed, the petitioners moved application under Order VII Rule 11(d) C.P.C. contending that such an application is hopelessly barred by limitation and as such, it should be rejected outright.

The aforesaid application filed under Order VII Rule 11(d) C.P.C. was rejected by the Trial Court and the revision thereof also met the same fate at the hands of the High Court. Thus, the Special Leave Petition.

Learned counsel for the petitioners has argued that the application allegedly moved by the respondents for an inquiry for mesne profits is in the nature of a second execution and since, it has been filed

decades after the decree has attained finality, it is liable to be dismissed on the ground of limitation.

Learned counsel for the respondents on the other hand contends that the aforesaid application is not in a nature of a second execution or in the form of a fresh suit or a plaint, rather it is only a reminder to the Court to complete the process of inquiry with regard to determination of mesne profits as has been directed by the Court of first instance vide judgment and order dated 12.07.1973. The said proceedings are actually proceedings under Order XX Rule 12 C.P.C. wherein the Court is obliged to hold an inquiry with regard to determination of the mesne profits from the date of institution of the suit and till the delivery of the possession.

Admittedly, the said inquiry has not been conducted and completed and that the law nowhere provides for any specific time limit for initiation of such proceedings rather the Court is obliged to undertake this exercise on its own.

In *Kattukandi Edathil Krishnan and Anr. Vs. Kattukandi Edathil Valsan and Ors.*,[1] the Court while dealing with the matter regarding a preliminary decree and the final decree in connection with the decree passed in a suit for partition opined that fundamentally there is a distinction between a preliminary and a final decree and that proceedings for final decree can be initiated at any point of time as there is no limitation for initiation of such proceedings. Either of the parties to the suit can move an application for preparation of the final decree or the Court may take action in this regard *suo moto.* In fact, after the passing of the preliminary decree, the Trial Court is obliged to proceed for the preparation of the final decree and should not adjourn the matter *sine die.* There is no need to file any separate application for the preparation of the final decree.

The aforesaid analogy with regard to the preparation of the final decree pursuant to the preliminary decree for partition can very well be applied to the cases where a decree is passed with a direction to hold an inquiry with regard to determination of mesne profits. This is evident from the plain reading of Order XX Rule 12 C.P.C. For the sake of convenience, Order XX Rule 12 C.P.C. is reproduced herein below:-

1 [2022] 7 SCR 1120 : 2022 (16) SCC 71 : AIR Online 2022 SC 2841

> "12. Decree for possession and mesne profits.—
>
> (1) Where a suit is for the recovery of possession of immovable property and for rent or *mesne* profits, the Court may pass a decree—
>
> (a) for the possession of the property;
>
> (b) for the rents which have accrued on the property during the period prior to the institution of the suit or directing an inquiry as to such rent;
>
> (ba) for the *mesne* profits or directing an inquiry as to such mesne profits;
>
> (c) directing an inquiry as to rent or *mesne* profits from the institution of the suit until—
>
> (i) the delivery of possession to the decree-holder,
>
> (ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court, or
>
> (iii) the expiration of three years from the date of the decree, whichever, event first occurs.
>
> (2) Where an inquiry is directed under clause (b) or clause (c), a final decree in respect of the rent or *mesne* profits shall be passed in accordance with the result of such inquiry."

It is in the light of the aforesaid provision that the Court of first instance while passing the judgment and order dated 12.07.1973 had specifically stated as under: -

> "An inquiry be held regarding future mesne profits of the said suit lands from the date of the suit, that is 24-9-1963 under Order 20 Rule 12(a) C.P.C."

Now, such an inquiry is nothing but a continuation of the suit and is in the nature of preparation of the final decree and as such, it cannot be said that any application moved as a reminder for completing the inquiry is barred by limitation or is liable to be dismissed on the ground of delay or laches.

Learned counsel for the petitioners has placed reliance upon a recent decision of this Court in *M/s. North Eastern Chemicals Industries (P) Ltd. & Anr. Vs. M/s. Ashok Paper Mill (Assam) Ltd. & Anr.* passed in

Civil Appeal No. 2669 of 2013 on 11th December, 2023 to contend that where no limitation is provided, steps ought to be taken for initiation of proceedings within a reasonable time and not decades later.

In the aforesaid relied upon decision, the Court has clearly stated that in a situation where no limitation stands provided either by specific applicability of the Limitation Act or by the special statute governing the dispute, the Trial Court must undertake a holistic assessment of the facts and circumstances of the case to examine the possibility of delay. When no limitation stands prescribed, it would be inappropriate for a Court to supplement the legislature's wisdom by its own and provide a limitation.

In view of the aforesaid decision also, no limitation as an absolute rule could be provided in such matters and it depends upon the facts and circumstances of each case whether the proceedings have been initiated in a fairly reasonable time.

The two Courts below having held that the proceedings are not barred by limitation and that actually the proceedings are not in the nature of a fresh proceedings, rather than a continuation of the old suit in the form of a preparation of the final decree, we cannot find fault with the said decisions. We are not inclined to grant any indulgence in the matter. The present petition is, accordingly, dismissed.

The petitioners are set at liberty to participate in the inquiry before the Trial Court in so far as the determination of mesne profits are concerned.

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

Result of the case: Petition dismissed.

†*Headnotes prepared by:* Ankit Gyan

[2024] 9 S.C.R. 235 : 2024 INSC 671

Chalasani Udaya Shankar and others
v.
M/s. Lexus Technologies Pvt. Ltd. and others

(Civil Appeal Nos. 5735-5736 of 2023)

09 September 2024

[Sanjiv Khanna and Sanjay Kumar,* JJ.]

Issue for Consideration

NCLT and NCLAT, if justified in dismissing the company petition by the appellant seeking rectification of the Register of Members of respondent No.1-Company by entering their names therein u/ss. 59 and 88 of the Companies Act, 2013, and to initiate action against respondent Nos. 2, 3 and 4, for oppression and mismanagement, and criminal proceedings u/ss. 447 and 448 of the 2013 Act, for committing fraud.

Headnotes†

Companies Act, 2013 – ss. 59 and 88 – Rectification of registrar of members – Allegations of fraudulent transfer of shares and mismanagement in the company – Company petition by the appellant seeking rectification of the Register of Members of respondent No.1-Company by entering their names therein u/ss. 59 and 88, and to initiate action against respondent Nos. 2-4, for oppression and mismanagement, as also criminal proceedings u/ss. 447 and 448 for committing fraud – Dismissed by the NCLT – Appeal thereagainst and IA also dismissed – Correctness:

Held: National Company Law Tribunal exercising jurisdiction u/s. 59 has to examine the factual issues to ascertain the substance of the issue before it – Expression 'rectification' connotes something that ought to have been done but, by error, was not done, or what ought not to have been done but was done, requiring correction – Phrase 'sufficient cause' in s. 59 is to be tested in relation to the statutory mandate thereof-anything done or omitted to be done in contravention of the Act of 2013 or the Rules framed thereunder – If, on facts, an open-and-shut case of fraud is made out in favour of the person seeking rectification, the NCLT would be entitled to exercise such power u/s. 59 – Proper verification of

* Author

the assertions made by the parties was a sine qua non – Acting President of the NCLT, by failing to carry out the said exercise, failed to discharge the mandate of law – Exercise of power u/s. 59 is to be undertaken in right earnest by examining the material, evidence, and the facts on record – This was not done, rather, a narrow view was taken without calling upon respondent No. 2 to prove the veracity of the contrary story put forth by him, despite receiving monies from the appellants – Facts, material, and evidence had to be examined in the context of the underlying facts, which would have included the receipt of monies, the signatures on the transfer deeds, etc. – Questions of fact must be decided on the principle of preponderance of probabilities, giving due weight to the specific facts, as found, so as to draw the conclusion that a reasonable person, acquainted with the relevant field, would draw on the basis of the same facts – Interim order passed by the Member (Judicial) of the NCLT indicated, in clear terms, the issues that arose for consideration and the inquiry required to determine the same – However, the President of the NCLT ignored the said interim order, and chose to summarily dismiss the petition, without considering the material already placed on record and without further evidence being adduced – Also, the NCLAT did not even get the facts right – Judgment in Company Petition, in Company Appeal and I.A. set aside – Company Petition restored to the file of the NCLT, for consideration afresh on merits and in accordance with law, upon proper appreciation of evidence – Companies Act, 1956 – s. 155 (s.111A thereafter) – National Company Law Tribunal Rules, 2016 – r. 70(5).

Case Law Cited

Ammonia Supplies Corporation (P) Ltd. v. Modern Plastic Containers Pvt. Ltd. and others [1998] Supp. 1 SCR 413 **: (1998) 7 SCC 105;** *High Court of Judicature at Bombay through its Registrar v. Udaysingh and others* [1997] 3 SCR 803 **: (1997) 5 SCC 129;** *Jai Mahal Hotels Private Limited v. Devraj Singh and others* [2015] 11 SCR 323 **: (2016) 1 SCC 423;** *Adesh Kaur v. Eicher Motors Limited and others* [2018] 5 SCR 200 **: (2018) 7 SCC 709;** *Dhulabhai v. State of Madhya Pradesh and another* [1968] 3 SCR 662 **– relied on.**

Standard Chartered Bank v. Andhra Bank Financial Services Limited [2006] Supp. 2 SCR 1 **: (2006) 6 SCC 94;** *Shashi Prakash Khemka (Dead) through legal representatives and another v. NEPC MICON (Now NEPC India Limited) and others* **(2019) 18 SCC 569;** *IFB*

Chalasani Udaya Shankar and others v.
M/s. Lexus Technologies Pvt. Ltd. and other

Agro Industries Limited v. SICGIL India Limited and others [2023] 1 SCR 527 **: (2023) 4 SCC 209;** *Smiti Golyan and others v. Nulon India Ltd. and others* **Company Appeal (AT) No. 222 of 2018, decided on 25.03.2019 – referred to.**

List of Acts

Companies Act, 2013; Companies Act, 1956; National Company Law Tribunal Rules, 2016.

List of Keywords

Company petition; Rectification of the Register of Members; Oppression and mismanagement; Fraud; Fraudulent transfer of shares; Rectification; Sufficient cause; Jurisdiction of the civil court; Verification of the assertions made by parties; Principle of preponderance of probabilities; Interim order.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos.5735-5736 of 2023

From the Judgment and Order dated 10.04.2023 of the National Company Law Appellate Tribunal, Chennai in CA(AT) (CH) No.44 of 2021 and IA No.548 of 2021

Appearances for Parties

Dhruv Mehta, Sr. Adv., P B A Srinivasan, V. Aravind, Keith Varghese, Ms. Srishti Bansal, Sumit Swami, Ms. Aanchal Pundir, Amit K. Nain, Advs. for the Appellants.

Mrs. Aishwarya Bhati, A.S.G., Byrapaneni Suyodhan, Ms. Tatini Basu, Kumar Shashank, Ruchi Kohli, Navanjay Mahapatra, Shiv Mangal Sharma, Prasenjeet Mahapatra, Ms. BLN Shivani, Amrish Kumar, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Sanjay Kumar, J.

1. Orders alike, dismissing their claims, having been passed by the original and appellate forums, Chalasani Udaya Shankar, Sripathi Sreevana Reddy and Yalamanchilli Manjusha are in appeal under Section 423 of the Companies Act, 2013 [for brevity, 'the Act of 2013'].

2. The appellants had approached the National Company Law Tribunal, Hyderabad/Amaravati Bench [for brevity, 'the NCLT'], by way of Company Petition No. 667/59 & 241/HDB/2018, seeking rectification of the Register of Members of M/s. Lexus Technologies Pvt. Ltd., Vijayawada, Andhra Pradesh, respondent No.1, by entering their names therein under Sections 59 and 88 of the Act of 2013, and to initiate action against Mantena Narasa Raju, Appa Rao Mukkamala and Suresh Anne, respondent Nos. 2,3 and 4, for oppression and mismanagement, apart from criminal proceedings under Sections 447 and 448 of the Act of 2013 for committing fraud.

3. Their case, as set out in the Company Petition, was as follows: M/s. Lexus Technologies Pvt. Ltd. was incorporated under the provisions of the Companies Act, 1956, on 28.03.2000. Its authorized share capital was ₹1,50,00,000/-, divided into 15,00,000 equity shares of ₹10/- each. The issued, subscribed and paid-up capital of the company was ₹1,10,96,230/-, divided into 11,09,623 equity shares of ₹10 each. The company is in the business of software development and ancillary activities and it acquired land at Chinnakakani Village in Guntur District in January, 2002, for establishing its infrastructure. On 09.03.2004, Mantena Narasa Raju, respondent No.2, had entered into a share purchase agreement with one C. Suresh, shareholder of the company, and acquired 10,51,933 equity shares, representing 94.8% of the equity share capital of the company. Thereafter, Mantena Narasa Raju and Appa Rao Mukkamala, respondent Nos. 2 and 3, were appointed as Directors of the Company on 02.03.2004. Suresh Anne, respondent No.4, became a Director of the company on 30.09.2004. While so, on 18.04.2015, the appellants acquired the equity shares held by Mantena Narasa Raju, respondent No.2, i.e., 10,51,933 equity shares, by executing Securities Transfer Deeds in Form No. SH-4. Chalasani Udaya Shankar, appellant No.1, acquired 3,51,933 equity shares, representing 31.72% of the shareholding, while Sripathi Sreevana Reddy, appellant No.2, and Yalamanchilli Manjusha, appellant No.3, acquired 3,50,000 equity shares each, representing their 31.54% individual shareholding. Share certificates were issued to them, signed and authenticated by Appa Rao Mukkamala and Suresh Anne, respondent Nos. 3 and 4. The appellants claim to have paid consideration of ₹14,67,41,557/- to Mantena Narasa Raju, respondent No.2, towards the acquisition of their shares - Chalasani Udaya Shankar, appellant No.1, paid ₹4,90,91,557/- while Sripathi

Sreevana Reddy and Yalamanchilli Manjusha, appellant Nos.2 and 3, each paid ₹4,88,25,000/- individually.

4. It is the further case of the appellants that they shared a very congenial and cordial relationship with Mantena Narasa Raju, Appa Rao Mukkamala and Suresh Anne, respondent Nos.2, 3 and 4, and they left the complete managerial control with them despite being the majority shareholders. They claim that they had no suspicion whatsoever against the said persons, but due to their failure in conducting Annual General Meetings during the financial years 2014-15, 2015-16 and 2016-17, the Registrar of Companies struck off the name of M/s. Lexus Technologies Pvt. Ltd. from the Register of Companies on 21.07.2017, in exercise of power under Section 248 of the Act of 2013. The appellants claim that, it was only upon browsing the online portal, they came to know that the said persons had thereafter filed annual returns and financial statements for the years in question with false information, by erasing their shareholding from the records of the company. The appellants allege that the aforesaid persons committed various acts of oppression with the intention of grabbing the company property. They, accordingly, prayed for rectification of the Register of Members of the company, by entering their names, and to initiate appropriate action against respondent Nos. 2, 3 and 4. Allegations were also made against V. Vasudev Reddy, respondent No.5, the Chartered Accountant associated with the company, to the effect that he was a co-conspirator and action was sought against him. The appellants also sought various interim reliefs pending disposal of the Company Petition. In the first instance, the NCLT directed *status quo* to be maintained as regards the company's assets and invited objections from the other side.

5. The company, respondent No.1, filed a counter opposing the grant of interim reliefs. Therein, it contended that the appellants could not allege oppression and mismanagement as they were not members of the company and were, in fact, seeking rectification of the Register of Members in that regard. The transfer of shares, as claimed by the appellants, was denied and, in consequence, their *locus* to maintain the company petition was challenged. Issue of limitation was also raised as the appellants' claim was that they had acquired the shares on 18.04.2015 but the company petition was filed only on 09.11.2018, i.e., after the lapse of over three years. The company alleged that it had received emails from respondent Nos. 3 and 4 stating that

the appellants had forged their signatures on the purported share certificates and the company asserted that the NCLT would have no jurisdiction to adjudicate such allegations of fraud and only the competent civil court could decide the same.

6. A reply was also filed by Mantena Narasa Raju, respondent No.2, contesting the interim reliefs sought. While reiterating the contentions of the company in its counter, he disputed the appellants' ownership of the shares. He asserted that he never sold any shares to the appellants and that they were complete strangers to him. He claimed that he had borrowed a sum of ₹5.66 crore from one L. Ramesh, his friend, who agreed to lend him the money through banking channels, by arranging for a total sum of ₹14.66 crore, out of which he would take back ₹9 crore and the balance ₹5.66 crore could be retained by respondent No.2. He further claimed that L. Ramesh arranged for his known persons to remit the amounts in his bank account and it was in this context that the appellants deposited the total sum of ₹14,66,39,400/- in his account. He further claimed that he returned the sum of ₹9 crore, as per the instructions of L. Ramesh, to one Swarna Bhaskar H. (₹7.5 crore) and to one Venkata Surya R (₹1.5 crore), i.e., in all, ₹9 crore. He further claimed that L. Ramesh forcibly obtained his signatures on several documents, including white papers, letter heads, blank non-judicial stamp papers and green sheets, at that time. He alleged that those blank papers might have been handed over to the appellants by L. Ramesh and they fabricated the documents. He pointed out that the share transfer deeds put forth by the appellants projected a total consideration of ₹14,67,41,557/-, but only the sum of ₹14,66,39,400/- had been remitted, leaving a balance of ₹1,02,157/-. He also alleged that the format of the appellants' share certificates was not that of the company and the folio numbers therein were different, indicating that they had been fabricated by the appellants.

7. The appellants filed separate rejoinders to the replies filed by respondent Nos. 1 and 2. Therein, they reiterated their claims and asserted that their petition was within time. They denied the financial transactions allegedly arranged by L. Ramesh and the alleged fabrication of documents by them. They pointed out that the signature of respondent No.2 appeared in the share transfer forms at the correct place, manifesting that the same were not fabricated on signed blank papers. As regards the shortfall in the consideration,

they asserted that a portion of the stamp duty on the transfer was to be borne by respondent No.2 and it was accordingly adjusted, leading to the lesser sum of ₹14,66,39,465/- being paid.

8. Thereupon, the NCLT, through the Member (Judicial), passed an interim order on 27.06.2019. Having considered the matter, the NCLT noted as follows: Respondent No.2 had addressed letter dated 29.12.2014 (Annexure A-1) to the Board of Directors of the company expressing his intention to sell his shareholding therein. A Board Meeting was held on 24.01.2015 to consider his request and it was found that there was no buyer within the existing shareholders who was willing to purchase the shares of respondent No. 2. This was stated to have been communicated to respondent No.2 leaving it open to him to make his own arrangement for sale of his shares to outsiders. It was in these circumstances that the appellants purchased the shares of respondent No.2. By e-mail dated 20.04.2015 (Annexure A-4), respondent No.3 sought the approval of the other shareholders for sale of these shares in favour of the appellants. A meeting was held on 27.04.2015 in this regard and share certificates were also issued on the said date to the appellants. These share certificates were signed by respondent Nos. 3 and 4 as Directors of the company. It was noted that respondent No. 2 had contested this claim, by asserting that respondent Nos. 3 and 4 were not even in India on the said date and that the share certificates were fabricated. Various discrepancies were pointed out by him in the said certificates, including absence of the signature of the company secretary. The NCLT, however, noted that respondent No.2 did not dispute the receipt of monies from the appellants. Further, the NCLT also noted that respondent No.2 did not dispute his signatures appearing in the share certificates and share transfer forms but his attempt was to explain the same, by claiming that L. Ramesh had obtained blank papers from him which had been misused. Noting the details of the financial transactions sought to be put forth by respondent No.2 in relation to the receipt of ₹14.66 crore, the NCLT observed that this aspect needed to be probed as the undisputed fact remained that the said sum was remitted into the account of respondent No.2. The NCLT observed that it was necessary to go into the issue as to whether this amount was actually remitted at the instance of L. Ramesh as there was no evidence at that point of time in proof of the claims of respondent No.2 in that regard. The NCLT noted that it was a question to be

enquired into as to whether respondent No.2 has returned ₹5.66 crore, which he claimed to have received as a loan, and this was a question to be thoroughly looked into during a full inquiry. The NCLT further noted that on the strength of these oral contentions, it was not possible to accept at that stage that the said monies were given to him only as a loan and not for the sale of his shares. His further claim that he had signed various blank papers, judicial stamp papers, letter heads, etc. also required to be examined at the time of final disposal of the matter. It was noted that respondent No.2 was a doctor by profession. The NCLT went on to observe that Form SH-4 was a printed form, as were the share certificates, and it was not believable that the same could have been fabricated on signed blank papers. Dealing with the contention that respondent Nos. 3 and 4 were not even in the country on the date in question, the NCLT noted that none had appeared on their behalf and they had not chosen to file any counter in support of the stand taken by them. As on that date, *per* the NCLT, respondent No.2 relied upon the communication allegedly received by him from respondent Nos. 3 and 4, but the authenticity of the same still remained to be proved, as respondent Nos. 3 and 4 had not filed any affidavit. The NCLT also noted that there were conflicting materials produced by both sides and at that stage, it could not be decided whether the signatures in the share certificates did not belong to respondent Nos. 3 and 4 and the issue required to be thoroughly examined at the time of final hearing.

9. Dealing with the issue of limitation, the NCLT observed that the case of the appellants was that they came to know of their names being excluded only after the company filed financial accounts and statements for the years 2014-15, 2015-16 and 2016-17, and the petition was filed within three years from the date of such knowledge. Opining that limitation was a mixed question of fact and law, the NCLT stated that it needed to be examined at the final hearing stage, after the parties filed all their documents. The NCLT also rejected the contention of the respondents that it had no jurisdiction to try the petition as it involved issues of fraud, etc. The NCLT, therefore, observed that an interim order restraining the company and respondent Nos. 2 to 4 from either disposing of or creating encumbrances over the assets of the company would not affect either of the parties, pending disposal of the main petition, and accordingly granted an interim order to that effect.

10. This being the tone and tenor of the NCLT's interim order, the final order dated 21.08.2021 passed by the NCLT, dismissing the Company Petition, makes for an interesting reading. Be it noted that the interim order was passed by the Member (Judicial) of the NCLT and the final order came to be passed over two years later by its Acting President. Significantly, no reference whatsoever was made to the 46-page interim order in the body of the final order. It is as if the Acting President of the NCLT was completely oblivious of what had transpired in the matter earlier, though a passing reference was made by him to an interim order passed on 22.10.2019, impleading three more respondents in the Company Petition.

11. Respondent Nos. 1 and 2 again filed counters in the main Company Petition essentially replicating the stands taken by them in their earlier counters. The appellants also filed their rejoinder thereto along with several documents. Having referred to the facts, as set out in the Company Petition, the Acting President of the NCLT noted that separate counters had been filed by respondent Nos. 1 and 2, on the one hand, and by the newly impleaded respondent Nos. 8 to 10, who claimed independent rights in the same shareholding. Respondent Nos. 3 and 4 had filed Memos adopting the counter filed by the company, respondent No.1. Perusal of the judgment dated 21.08.2021 reflects that the Acting President of the NCLT extracted the gist of the pleadings of the parties and went on to reproduce the caselaw cited by them at great length. His actual findings commence from paragraph 9 at page 60 of his 67-page order. The points that fell for consideration were set out by him in paragraph 9.1, which reads as under:

> '(1) Whether the Petition filed is well within the time.
>
> (2) Whether purported transfer of shares is in accordance with the provisions of the Companies Act and in accordance with clauses of the Articles of Association.
>
> (3) Whether the amount purportedly paid should be treated as consideration to the shareholders of the Company, by the Petitioners.
>
> (4) Whether the share certificates purportedly issued to the Petitioners are genuine.
>
> (5) Whether any relief can be granted to the Petitioners or whether the petition is maintainable.'

12. On the issue of limitation in point No.1, the Acting President baldly summed up that filing of the petition by the appellants was an afterthought and, therefore, the question of limitation did not arise, as the petition was not filed within the limitation period of three years. This cryptic approach in para 9.2 was not in keeping with the observation of the Member (Judicial) of the NCLT in the interim order that limitation, being a mixed question of law and fact, required to be examined fully.

13. On point No.2, the Acting President rejected the case of the appellants, by way of brief para 9.3, completely ignoring the points set out by the Member (Judicial) in the interim order and the material placed on record, such as the share transfer forms, share certificates and emails/ correspondence, which supported the case of the appellants. His categorical finding that 'not a single document existed between the parties to show that there was a transfer of shares and not a single document was filed to show that the existing shareholders were given an opportunity to buy the shares' was clearly contrary to the material available on record, viz., the emails, transfer forms, share certificates, etc. No doubt, the genuineness of these documents required to be verified but without even venturing to do so, they could not have been dismissed thus.

14. As regards point No.3, the Acting President observed that there was no covering letter or correspondence to support the claim that the amount transferred into the account of respondent No.2 was for purchase of shares. He noted the discrepancy in the sale consideration amount to the extent of ₹1,02,157/- and the claim of respondent No.2 that one L. Ramesh was also involved. He then went on to surmise that there were some other transactions between the parties and the company had been entangled in the dispute for reasons best known to the parties. On that basis, he strangely concluded that it could not be accepted that the monies transferred into the account of respondent No.2 were for purchase of shares. The version put forth by respondent No.2, as rightly pointed out in the interim order, required to be proved and could not have been taken to be the truth straightaway in this abrupt and self-serving manner.

15. As regards point No.4, the Acting President opined that the appearance of the share certificates was dubious and the numbers therein were also completely different. He held that, without going deep into the aspect, it could be concluded that the share certificates were not

genuine and were fabricated. Again, no evidence whatsoever was led or considered on the issue. Surprisingly so, as the appellants produced the original share certificates given to them along with their rejoinder and filed applications for production of the original record of shareholders of the company and their share certificates of 2004, Board Resolutions, Minutes of Meetings, etc.

16. On point No.5, the Acting President concluded that the appellants had failed to prove their case and had not bothered to realize their rights as shareholders, if at all they had considered themselves to be so. He observed that the very manner and conduct of the appellants indicated that the transaction which seems to have taken place between the parties was completely different, without involving the company, and for no reason, the company had been entangled in the dispute. The case of the appellants was held to be fraudulent in nature and devoid of fact and law. He, accordingly, dismissed the case with costs of ₹5,00,000/-.

17. Aggrieved by the dismissal of their petition, the appellants approached the National Company Law Appellate Tribunal, Chennai Bench (NCLAT), by way of Company Appeal (AT) (CH) No. 44 of 2021. They also filed I.A. No. 548 of 2021 therein for interim relief pending its disposal. However, the NCLAT dismissed their appeal and I.A. by judgment dated 10.04.2023. Speaking for the Bench, the Member (Technical) referred to the facts of the case; the contentions of the parties; the points for consideration set out by the NCLT and its findings thereon. Thereafter, the relevant provisions of the Act of 2013 were extracted at length and again, reference was made to the contentions of both sides. Having done so, the NCLAT curiously concluded that L. Ramesh had remitted through his 'known persons' the sum of ₹14,66,39,400/- into the bank account of respondent No. 2. The NCLAT then strangely observed as follows:

> 'First of all, the money has not been transferred by the 'Appellants' in favour of the 'Respondents'. Secondly, as admitted in the averments as well as recorded clearly in the 'impugned order' that, Mr. Lingamaneni Ramesh gave Rs. 14,67,41,557/- and took back Rs. 9 Crores from the 'Respondents' as such prima-facie this does not seem to be a clear transaction of payment of money towards acquisition of shares and consequently allotment of shares in favour of the 'Appellants' is also not established.'

18. Significantly, the three persons named by the NCLAT in the table in the very same paragraph as the 'known persons' who paid the monies are none other than appellant Nos. 2 and 3 and Ms. Vahini Surya Chalasani, the joint-account holder of appellant No. 1. Therefore, the conclusion of the NCLAT that the money was not transferred by the appellants was factually incorrect. Further, the story put forth by respondent No. 2 as to his friend, L. Ramesh, playing a role in the transaction was taken to be the biblical truth by the NCLAT though it was very much in dispute and required to be proved, even as per the interim order passed by NCLT. As regards the issue of limitation, the NCLAT simply went by the date of purchase of the shares and the date of the institution of the Company Petition and concluded that the same was barred by limitation, without reference to the issue highlighted by the NCLT in its initial interim order that limitation, being a mixed question of law in fact, required further examination as to when the clock would start ticking. The further finding of the NCLAT that the appellants had not furnished any documentary proof of their claims was equally bereft of foundation as material had been produced by them, which was duly taken note of in the NCLT's interim order, which led it to the opinion that further inquiry was needed on those aspects. To further compound the patent lack of application of mind on its part, the NCLAT observed that the appellants failed to produce their original share certificates pursuant to the NCLT's order dated 18.02.2021, overlooking the fact that the original share certificates and other documents were, in fact, filed by the appellants along with their rejoinder dated 22.03.2021. Concluding that the appellants had failed to cross the first hurdle of *locus*, the NCLAT held that they could not maintain the allegation of oppression and mismanagement which would be available only to a person who is a member of the company. The NCLAT accordingly dismissed the appeal and the I.A. as devoid of merit, leading to the filing of these appeals.

19. IA Nos. 171771 and 168458 of 2023 filed in one of these appeals by the appellants seeking permission to file additional documents are allowed and the said documents are taken on record. IA No. 72990 of 2024 is also allowed at the sole risk and peril of the appellants, permitting deletion of the name of respondent No. 6 from the array of parties.

20. While ordering notice in these appeals on 01.09.2023, this Court raised certain questions, which the appellants were required to answer. The questions read as follows:

'1. Why, after acquiring the shares, the appellants did not come on the Board of Directors?

2. Why the appellants did not attend or call upon the Directors to hold the Annual General Meeting(s)?

3. Why the appellants did not take steps as the annual accounts were not audited and submitted to them and with the Registrar of Companies.'

The appellants were directed to file an affidavit dealing with the aforesaid aspects. Pursuant thereto, Affidavit of Compliance dated 08.12.2023 was filed by the appellants. Therein, apropos the first query as to why the appellants did not come onto the Board of Directors after acquiring the shares, they stated that they had purchased the shares for investment purpose and hence, initially, they did not take interest in the affairs of the company. They further stated that they had long-standing business and personal relations with respondents 3 and 4, who were the Directors of the company, and in such circumstances, a fiduciary relationship existed between them. According to them, they did not come onto the Board of Directors due to these reasons and trusted that respondents 3 and 4 would continue to run the affairs of the company in accordance with law.

21. As regards the second query posed by this Court as to why they did not attend Annual General Meetings or call upon the Directors to hold such meetings, the appellants stated that the name of the company was struck off by the Registrar of Companies on 21.07.2017 owing to failure in filing of Annual Returns for the financial years 2014-15, 2015-16 and 2016-17. It was only on coming to know of this that the appellants claim to have inquired with the Directors and were informed that the issue would be settled shortly. The Directors are stated to have informed them orally that there was a complaint filed against the Directors and the Auditor of the company in Machavaram Police Station at Vijayawada on 30.12.2013, by one of the shareholders, and the Directors promised that all issues would be settled and the Annual Returns would be updated with the Registrar of Companies along with the names of the investors. They further stated that they could not file a company petition when the name of the company was struck off from the rolls of the Registrar of Companies. They asserted that the name of the company was restored in August, 2017, but the company filed Annual Returns for the years 2014-15 to 2016-

17 only on 12.06.2018. It was after this event that the appellants claim to have found that their names were not in the shareholders' list and questioned the Directors about such non-inclusion. They further claim that the Directors assured them that after the police case was closed, the names of the appellants would be added but the appellants found out that even after the closure of the case on 30.06.2018, their names were not shown as shareholders. It was in these circumstances that the company petition was filed before the NCLT. The appellants asserted that it was due to these reasons that they could not call for an Annual General Meeting, as they were not shown as shareholders of the company.

22. In response to the third query as to why they did not take steps when the annual accounts were not audited and submitted to them or with the Registrar of Companies, the appellants stated that, as they were informed that there was a police case against the Auditor of the company, they could not take any steps to get the accounts audited and submitted to them. They further stated that due to the fiduciary relationship between respondents 2 to 4 and the appellants, they never suspected that the respondents were not holding Annual General Meetings and were mis-managing the affairs of the company. Further, the Directors are stated to have promised that the issue would be settled and that the Annual Returns would be updated with the Registrar of Companies and that the investors' names would be updated. However, despite such assurances by the Directors, the appellants deemed it prudent to inspect the records of the company by accessing its master data on the MCA portal in 2017 and were shocked to find that the affairs of the company were being run contrary to law, as a result of which the name of the company was struck off by the Registrar of Companies. The appellants also came to know that their shareholding was not reflected in the Register of Members and they accordingly filed a composite petition before the NCLT under Sections 59 and 241 of the Act of 2013.

23. Satisfactory answers having been furnished by the appellants as aforestated, it would be appropriate at this stage to take note of the statutory provisions and precedential law relating thereto. Originally, Section 155 of the Companies Act, 1956, dealt with rectification proceedings in connection with entry of names in the Register of Members of a company. Section 155 was omitted with effect from 31.05.1991. Section 111 and Section 111-A were inserted in the

Companies Act, 1956, with effect from 31.05.1991 and 20.09.1995 respectively. These provisions corresponded to erstwhile Section 155. Presently, Section 59 of the Act of 2013 and Rule 70(5) of the National Company Law Tribunal Rules, 2016, deal with rectification. Rule 70(5) is in *pari materia* with Section 111(7) of the Companies Act, 1956.

24. In ***Ammonia Supplies Corporation (P) Ltd. vs. Modern Plastic Containers Pvt. Ltd. and others***,[1] the short question for consideration was framed thus by this Court: 'Whether in the proceedings under Section 155 of the Companies Act, 1956, the Court has exclusive jurisdiction in respect of all the matters raised therein or has only summary jurisdiction?' It was observed that the very word 'rectification' in Section 155 of the Companies Act, 1956, connotes something that ought to have been done but by error was not done or ought not to have been done but was done, requiring correction. It was held that the Court has discretion to find out whether the dispute raised is really for rectification or is of such a nature that, unless decided first, it would not come within the purview of rectification. It was further held that, if it is truly a case of rectification, all matters raised in that connection should be decided under Section 155, but if it finds adjudication of any matter not falling under it, the Court may direct a party to get his right adjudicated by a civil court. Noting that there was nothing in the Companies Act, 1956, expressly barring the jurisdiction of the civil court, it was observed that where the 'Court' as defined under the Act is exercising its powers under various sections, where it has been vested with exclusive jurisdiction, the jurisdiction of the civil court is impliedly barred. It was, therefore, held that to the extent the 'Court' has exclusive jurisdiction under Section 155, the jurisdiction of the civil court is impliedly barred. But for what is not covered as aforesaid, the civil court would have jurisdiction. Noting that the jurisdiction of the 'Court' under Section 155 is summary in nature, it was held that it would be appropriate for the 'Court' to see for itself whether any document alleged to be forged is said to be so, only to exclude the jurisdiction of the 'Court' or it is genuinely so. As the High Court, exercising jurisdiction under Section 155 of the Companies Act, 1956, had not examined the case in this light, this Court remanded the matter to the High Court for decision afresh.

1 [1998] Supp. 1 SCR 413 : (1998) 7 SCC 105

The observations in paragraph 26 of the judgment are of relevance in this regard and are extracted below:

> "26. The proviso gave discretion to the court to direct an issue of law to be tried, if raised. By this deletion, submission is that the Company Court now itself has to decide any question relating to the rectification of the Register including the law and not to send one to the civil court. There could be no doubt any question raised within the peripheral field of rectification, it is the court under Section 155 alone which would have exclusive jurisdiction. However, the question raised does not rest here. In case any claim is based on some seriously disputed civil rights or title, denial of any transaction or any other basic facts which may be the foundation to claim a right to be a member and if the court feels such claim does not constitute to be a rectification but instead seeking adjudication of basic pillar some such facts falling outside the rectification, its discretion to send a party to seek his relief before the civil court first for the adjudication of such facts, it cannot be said such right of the court to have been taken away merely on account of the deletion of the aforesaid proviso. Otherwise under the garb of rectification one may lay claim of many such contentious issues for adjudication not falling under it. Thus in other words, the court under it has discretion to find whether the dispute raised is really for rectification or is of such a nature that unless decided first it would not come within the purview of rectification. The word "rectification" itself connotes some error which has crept in requiring correction. Error would only mean everything as required under the law has been done yet by some mistake the name is either omitted or wrongly recorded in the Register of the company. ..."

25. In ***Standard Chartered Bank vs. Andhra Bank Financial Services Limited***,[2] a 3-Judge Bench of this Court affirmed the view taken in ***Ammonia Supplies Corporation (P) Ltd.*** (*supra*) that the jurisdiction exercised by a Company Court under Section 155 of the Companies

2 [2006] Supp. 2 SCR 1 : (2006) 6 SCC 94

Act, 1956 (Section 111, thereafter), was somewhat summary in nature and that, if a seriously disputed question of title arose, the Company Court should relegate the parties to a suit, which was the more appropriate remedy for investigation and adjudication of such seriously disputed questions of title.

26. In ***Jai Mahal Hotels Private Limited vs. Devraj Singh and others***,[3] this Court again held that issues which truly relate to 'rectification' of the Register fall within the summary jurisdiction of the Company Law Board and only complex questions of title fall outside its jurisdiction. It was observed that there is a thin line in appreciating the scope of jurisdiction of the Company Court and the jurisdiction is exclusive, if the matter truly relates to 'rectification', but if the issue is alien to 'rectification', such matter may not be within the exclusive jurisdiction of the Company Court.

27. In ***Adesh Kaur vs. Eicher Motors Limited and others***,[4] this Court found, on facts, that it was an open-and-shut case of fraud, in which the appellant who had applied for rectification had been the victim, and held that the appellate tribunal was not correct in relegating the appellant to the civil court on the ground that a criminal complaint and a SEBI investigation were pending and in holding that it was not proper for the National Company Law Tribunal to exercise power to rectify the Register under Section 59 of the Companies Act, 2013.

28. In ***Shashi Prakash Khemka (Dead) through legal representatives and another vs. NEPC MICON (Now NEPC India Limited) and others***,[5] this Court again had occasion to deal with exercise of power under Section 111-A of the Companies Act, 1956. The Company Law Board's view had been reversed by the Madras High Court in appeal, whereby the appellants were relegated to the remedy of a civil suit in relation to the issue raised *qua* the transfer of shares. This Court took note of the earlier judgment in ***Ammonia Supplies Corporation (P) Ltd.*** (*supra*) but noted that Section 430 of the Act of 2013 barred the jurisdiction of the civil court and opined that the effect thereof is that, in matters in respect of which power has been conferred on the National Company Law Tribunal, the jurisdiction

3 [2015] 11 SCR 323 : (2016) 1 SCC 423

4 [2018] 5 SCR 200 : (2018) 7 SCC 709

5 (2019) 18 SCC 569

of the civil court is completely barred. This Court observed that it is not in dispute that, were a dispute to arise today, remedy of a civil suit would be completely barred and the power would vest with the National Company Law Tribunal under Section 59 of the Companies Act, 2013. Noting that the cause of action in that case had arisen at a stage prior to enactment of the Act of 2013, this Court was of the view that relegating the parties to a civil suit would not be the appropriate remedy, considering the manner in which Section 430 of the Act of 2013 was widely worded.

29. ***Shashi Prakash Kemka*** (*supra*) was followed by the National Company Law Appellate Tribunal, New Delhi, in ***Smiti Golyan and others vs. Nulon India Ltd. and others***[6] whereby, the decision of the National Company Law Tribunal, Principal Bench, in relation to rectification proceedings was upheld without relegating the parties to the civil court. Civil Appeal No. 4639 of 2019 filed before this Court against ***Smiti Golyan*** (*supra*) was dismissed on 03.07.2019 and this Court observed that the findings recorded by the National Company Law Appellate Tribunal were absolutely proper and no ground was made out to interfere with the same.

30. Thereafter, in ***IFB Agro Industries Limited vs. SICGIL India Limited and others***,[7] this Court considered the appropriate forum for adjudication and determination of violations and consequential action thereon under the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997, and the Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 1992. It was observed that the Securities and Exchange Board of India (SEBI) was conferred with regulatory jurisdiction, which included *ex-ante* powers to predict possible violations and take preventive measures. This Court held that the role of SEBI as a regulator could not be circumvented by applying for rectification under Section 111-A of the Act of 1956 and that, such an approach would be impermissible as scrutiny and examination of a transaction allegedly conducted in violation of the Regulations has to be processed through the rules and remedies provided in the Regulations themselves. This Court emphasized that when Constitutional Courts are called upon to interpret provisions

6 Company Appeal (AT) No. 222 of 2018, decided on 25.03.2019

7 [2023] 1 SCR 527 : (2023) 4 SCC 209

affecting exercise of powers and jurisdiction by regulatory bodies, it is the duty of the Court to ensure that transactions falling within the province of the regulators are necessarily subjected to their scrutiny and regulation. It was pointed out that this would ensure that the regulatory body charged with the duty to protect the consumers has real-time control over the sector, thereby realizing the purpose of its constitution. It was, therefore, held that the purpose of these regulations could not be short-circuited by making an application to the Company Court under Section 111-A of the Act of 1956, on the ground that the provision bestowed jurisdiction parallel to the SEBI. It is in this context that this Court, in ***IFB Agro Industries Limited*** (*supra*), examined Sections 155 and 111-A of the Act of 1956 and Section 59 of the Act of 2013. The judgment heavily relied upon and extensively quoted from the earlier judgment in ***Ammonia Supplies Corporation (P) Ltd.*** (*supra*), which we have already referred to hereinabove and also quoted.

31. The judgment in ***Ammonia Supplies Corporation (P) Ltd.*** (*supra*), as noted, states that the provisions relating to rectification give discretion to the Company Court to examine whether, under the garb of rectification, one is laying claim for an adjudication of such contentions and issues which do not fall within the realm of 'rectification' and consequently, within the jurisdiction of the Company Court. However, if the Company Court finds that the dispute relates to the field of 'rectification' or its peripheral aspects, it will have exclusive jurisdiction to address the claim under Section 155 of the Act of 1965. When the Court is, however, of the opinion that the contentious issues that are raised before it for adjudication do not fall within that sphere and, in consequence, its jurisdiction under that provision, the power of rectification should not be exercised. Thus, if the application for rectification, in effect, includes projected claims which do not come within the purview of rectification and the Company Court feels that the civil court/regulatory body would be the more appropriate forum, jurisdiction under Section 155 of the Act of 1965 would not be exercised.

32. This would mean that the National Company Law Tribunal exercising jurisdiction under Section 59 of the Act of 2013 has to examine the factual issues to ascertain the substance of the issue before it after removing the cloak of the form of the application. The expression 'rectification', as already pointed out, connotes something that ought

to have been done but, by error, was not done, or what ought not to have been done but was done, requiring correction. The phrase 'sufficient cause' in Section 59 of the Act of 2013 is to be tested in relation to the statutory mandate thereof, i.e., anything done or omitted to be done in contravention of the Act of 2013 or the Rules framed thereunder.

33. Significantly, the earlier decision in ***Shashi Prakash Khemka*** (*supra*) had concluded that the jurisdiction of the civil court would be barred by referring to the provisions of Section 430 of the Act of 2013. Neither this provision nor this decision was noticed by this Court in ***IFB Agro Industries Limited*** (*supra*). However, it would be wrong to hold that, for the said reason, there is a conflict between these two decisions. The jurisdiction of the civil court or for that matter, any other forum, would be barred only when the subject matter of the dispute squarely falls within the domain and jurisdiction of the court/forum constituted under the provisions of the Act of 1956/Act of 2013. When and where the Act of 1956/Act of 2013 does not confer such exclusive jurisdiction on the court/forum constituted thereunder or the dispute falls outside the realm of that particular provision of the Act of 1956/Act of 2013, the jurisdiction of the civil court would not be completely barred (See ***Dhulabhai vs. State of Madhya Pradesh and another***[8]). Notably, the edict in ***Ammonia Supplies Corporation (P) Ltd.*** (*supra*) was also to this effect and it was followed and affirmed in the decisions that followed thereafter. In ***Adesh Kaur*** (*supra*), this Court observed that if, on facts, an open-and-shut case of fraud is made out and the person seeking rectification was the victim, the National Company Law Tribunal would be entitled to exercise such power under Section 59 of the Act of 2013. This Court rejected the contention that, as criminal proceedings had been initiated, there was a serious dispute and it was not correct for the National Company Law Tribunal to exercise power under Section 59 of the Act of 2013. The contention that the shares had been dematted and were in the name of another person and, therefore, the power of rectification should not have been exercised, was also rejected.

34. In the present case, proper verification of the assertions made by the parties was a *sine qua non.* The Acting President of the NCLT, by

8 [1968] 3 SCR 662

failing to carry out the said exercise, failed to discharge the mandate of law. Exercise of power under Section 59 of the Act of 2013 is to be undertaken in right earnest by examining the material, evidence, and the facts on record. This has not been done. Rather, a narrow view was taken without calling upon respondent No. 2 to prove the veracity of the contrary story put forth by him, despite receiving monies from the appellants. The facts, material, and evidence had to be examined in the context of the underlying facts, which would have included the receipt of monies, the signatures on the transfer deeds, etc. Needless to state, questions of fact must be decided on the principle of preponderance of probabilities, giving due weight to the specific facts, as found, so as to draw the conclusion that a reasonable person, acquainted with the relevant field, would draw on the basis of the same facts. (See ***High Court of Judicature at Bombay through its Registrar vs. Udaysingh and others*** [9]).

35. Neither the Acting President of the NCLT nor the NCLAT examined, with any seriousness, the issues raised before them to come to a cogent conclusion as to whether the disputes raised by the respondents were mere moonshine. Notably, in ***Ammonia Supplies Corporation (P) Ltd.*** (*supra*), this Court held to that effect in the context of Section 155 of the Companies Act, 1956. Thereafter, in ***Aadesh Kaur*** (*supra*) also, this Court affirmed that if, on facts, an open-and-shut case of fraud is made out in favour of the person seeking rectification, the National Company Law Tribunal would be entitled to exercise such power under Section 59 of the Act of 2013. Therefore, verification of this aspect was essential but the NCLT failed to discharge this mandate.

36. Another crucial fact that needs to be noted is that the interim order passed on 27.06.2019 by the Member (Judicial) of the NCLT had indicated, in clear terms, the issues that arose for consideration and the inquiry required to determine the same. However, ignoring the said interim order, the Acting President of the NCLT chose to summarily dismiss the petition, without considering the material already placed on record and without further evidence being adduced. The documents that were referred to and attached to the Company Petition and the appellants' rejoinder were glossed over

9 [1997] 3 SCR 803 : (1997) 5 SCC 129

or were completely ignored. Compounding the error of the Acting President of the NCLT, the NCLAT did not even get the facts right. Production of the original share certificates by the appellants and their argument, relying on Section 46 of the Act of 2013, that the signatures thereon by two Directors was sufficient in the eye of law, was totally lost sight of by the NCLAT. Further, the NCLAT blindly accepted the story put forth by respondent No. 2 to such an extent that it totally overlooked the fact that it was the appellants who had paid ₹14,66,39,400/- to respondent No. 2. Neither the NCLT nor the NCLAT chose to labour over the actual issues for consideration by looking at the documentary evidence already placed on record or by calling for further evidence in that regard.

37. On the above analysis, these appeals deserve to be and are, accordingly, allowed. The judgment in Company Petition No. 667/59 & 241/HDB/2018 and the judgment in Company Appeal (AT) (CH) No. 44 of 2021 & I.A. No. 548 of 2021 are set aside. Company Petition No. 667/59 & 241/HDB/2018 is restored to the file of the National Company Law Tribunal, Amaravati Bench, for consideration afresh on merits and in accordance with law, upon proper appreciation of evidence. Given the passage of time since the institution of the petition, we would request the National Company Law Tribunal, Amaravati Bench, to give priority to the same and endeavour to dispose it of as expeditiously as possible.

Pending I.A.s, if any, shall stand disposed of.

Parties shall bear their own costs.

Result of the case: Appeals allowed.

†*Headnotes prepared by:* Nidhi Jain

[2024] 9 S.C.R. 257 : 2024 INSC 669

Dhanraj Aswani
v.
Amar S. Mulchandani & Anr.

(Criminal Appeal No. 2501 of 2024)

09 September 2024

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

Issue for Consideration

Whether an application for anticipatory bail under Section 438 of the Code of Criminal Procedure, 1973 is maintainable at the instance of an accused while he is already in judicial custody in connection with his involvement in a different case.

Headnotes†

Code of Criminal Procedure, 1973 – s.438 – Accused already in judicial custody in connection with one case, if can apply for anticipatory bail in a different case – Maintainability of such anticipatory bail applications – Divergent opinions expressed by different High Courts:

Held: An anticipatory bail application filed at the instance of an accused already in judicial custody in a different offence is maintainable – An accused is entitled to seek anticipatory bail in connection with an offence so long as he is not arrested in relation to that offence – Once he is arrested, the only remedy available to him is to apply for regular bail either u/s.437 or s.439, as the case may be – There is no express or implied restriction in the CrPC or in any other statute that prohibits the Court of Session or the High Court from entertaining and deciding an anticipatory bail application in relation to an offence, while the applicant is in custody in relation to a different offence – No restriction can be read into s.438 to preclude an accused from applying for anticipatory bail in relation to an offence while he is in custody in a different offence, as that would be against the purport of the provision and the intent of the legislature – The only restriction on the power of the court to grant anticipatory bail u/s.438 is the one prescribed u/s.438(4) and in other statutes like the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, etc. – While a person already

* Author

in custody in connection with a particular offence apprehends arrest in a different offence, then, the subsequent offence is a separate offence for all practical purposes – Thus, all rights conferred by the statute on the accused as well as the investigating agency in relation to the subsequent offence are independently protected – For the purpose of interrogation/investigation in an offence, the investigating agency can seek remand of the accused whilst he is in custody in connection with a previous offence so long as no order granting anticipatory bail has been passed in relation to the subsequent offence – Under s.438, the pre-condition for a person to apply for pre-arrest bail is a "reason to believe that he may be arrested on an accusation of having committed a non-bailable offence" – Therefore, the only pre-condition for exercising the said right is the apprehension of the accused that he is likely to be arrested – Custody in one case does not have the effect of taking away the apprehension of arrest in a different case – Right of an accused to protect his personal liberty u/Article 21 of the Constitution of India with the aid of the provision of anticipatory bail u/s.438 cannot be defeated or thwarted without a valid procedure established by law – Such procedure should also pass the test of fairness, reasonableness and manifest non-arbitrariness u/Article 14. [Paras 60, 66]

Code of Criminal Procedure, 1973 – s.46 – 'Arrest how made'– "reason to believe" – Prisoner Transit Warrant (P.T. Warrant) u/s.267 – "other proceedings" – Whether a person, while in custody for a particular offence, can have a "reason to believe" that he may be arrested in relation to some other non-bailable offence – High Court of Rajasthan in Sunil Kallani reasoned that once a person is taken in custody in relation to an offence, thereafter it is not possible to arrest him in relation to a different offence as one of the essential conditions for arrest is placing the body of the accused in custody of the police authorities by means of actual touch or confinement – As there cannot be any actual touch or confinement while a person is in custody, he cannot have a "reason to believe" that he may be arrested in relation to a different offence:

Held: Such view not agreed with – There are two fundamental fallacies in the reasoning adopted by the Rajasthan High Court – First, the High Court failed to consider the possibility of arrest of the person in custody in relation to a different offence immediately after he is set free from the custody in the first offence – The

second fallacy in the reasoning of the High Court is that there can be no arrest of an accused in relation to a different offence while he is already in custody in relation to some offence – Ways by which a person who is already in custody may be arrested, enumerated – Incorrect to hold that a person, while in custody, cannot have a "reason to believe" that he may be arrested in relation to a different offence – Though a plain reading of s.46 makes it clear that arrest involves actual touch or confinement of the body of the person sought to be arrested however, arrest can also be effected without actual touch if the person sought to be arrested submits to the custody by words or action – A lawful arrest can be made even without actually seizing or touching the body – Actions or words which successfully bring to the notice of the accused that he is under a compulsion and thereafter cause him to submit to such compulsion will also be sufficient to constitute arrest – This is in conformity with the modality of the arrest contemplated u/s.46 – Procedure followed in cases where a person already in custody is required to be arrested in relation to a different offence, explained – When a person in custody is confronted with a P.T. Warrant obtained in relation to a different offence, such a person has no choice but to submit to the custody of the police officer who has obtained the P.T. Warrant – Thus, although there is no confinement to custody by touch, yet there is submission to the custody by the accused based on the action of the police officer in showing the P.T. Warrant to the accused – Thereafter, on production of the accused before the jurisdictional Magistrate, like in the case of arrest of a free person who is not in custody, the accused can either be remanded to police or judicial custody, or he may be enlarged on bail and sent back to the custody in the first offence – s.267 can be invoked to require production of the accused before the jurisdictional Magistrate, who can thereafter remand him to the custody of the investigating agency – Such an interpretation of the provision would give true effect to the words "other proceedings" as they appear in s.267, which cannot be construed to exclude proceedings at the stage of investigation – Contrary to the view taken by the Rajasthan, Allahabad and Delhi High Courts, a person, while in custody in relation to an offence, can be arrested in relation to a different offence, either after getting released from custody in the first offence, or even while remaining in custody in the first offence. [Paras 38, 40-42, 46, 49, 51-53]

Arrest – Subsequent arrest – Effect on accused – Plea of the appellant that as the object of s.438, CrPC was to prevent an accused from the humiliation of arrest, its protection would not include within its ambit a person who is already in custody:

Held: Rejected – Each arrest a person faces compounds their humiliation and ignominy – Each subsequent arrest underscores a continued or escalating involvement in legal troubles that can erode the dignity of the person and their public standing – When a subsequent arrest occurs, it intensifies the emotional and social burden, amplifying the perception of their criminality and reinforcing negative judgments from society – Subsequent arrest in relation to different offences, while the individual is in custody in a particular offence, further alienates the individual from their community and adversely affects their personal integrity – Each additional arrest exacerbates the person's shame making the cumulative impact of such legal entanglements increasingly devastating. [Para 58]

Criminal Law – Procedural laws – Rights conferred under – Importance – Discussed.

Code of Criminal Procedure, 1973 – s.438 – Anticipatory bail – Concept – Evolution – Discussed.

Case Law Cited

Narinderjit Singh Sahni v. Union of India [2001] Supp. 4 SCR 114 **: (2002) 2 SCC 210 – distinguished.**

Sunil Kallani v. State of Rajasthan **(2021) SCC OnLine Raj 1654;** *Rajesh Kumar Sharma v. CBI* **(2022) SCC OnLine All 832;** *Bashir Hasan Siddiqui v. State (GNCTD)* **(2023) SCC OnLine Del 7544 – disapproved.**

Kartar Singh v. State of Punjab [1994] 2 SCR 375 **: (1994) 3 SCC 569;** *Gurbaksh Singh Sibbia v. State of Punjab* [1980] 3 SCR 383 **: (1980) 2 SCC 565;** *Sushila Aggarwal v. State (NCT of Delhi)* [2020] 2 SCR 1 **: (2020) 5 SCC 1;** *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;** *Central Bureau of Investigation Special Investigation Cell-I New Delhi v. Anupam J. Kulkarni* [1992] 3 SCR 158 **: (1992) 3 SCC 141;** *Tejesh Suman v. State of Rajasthan* **(2023) SCC OnLine SC 76;** *State of U.P. v. Deoman Upadhyaya* [1961] 1 SCR 14 **: AIR (1960) SC 1125;** *Tusharbhai Rajnikantbhai Shah v. State of Gujarat* [2024] 8 SCR 235 **: (2024) SCC OnLine**

SC 1897; *A.R. Antulay v. R. S. Nayak* **[1988] Suppl. 1 SCR 1 : (1988) 2 SCC 602;** *State of West Bengal v. Anwar Ali Sarkar* **[1952] 1 SCR 284 : (1952) 1 SCC 1 – referred to.**

Alnesh Akil Somji v. State of Maharashtra **(2021) SCC OnLine Bom 5276;** *Sanjay Kumar Sarangi v. State of Odisha* **(2024) SCC OnLine Ori 1334;** *Amir Chand v. The Crown* **(1949) SCC OnLine Punj 20;** *S. Harsimran Singh v. State of Punjab* **(1984) Cri LJ 253;** *State v. K.N. Nehru* **(2011) SCC OnLine Mad 1984;** *Roshan Beevi and others v. Joint Secretary to Government of Tamil Nadu and others* **(1983) SCC OnLine Mad 163;** *C. Natesan v. State of Tamil Nadu and Others* **(1998) SCC OnLine Mad 931;** *Ranjeet Singh v. State of Uttar Pradesh* **(1995) Cri LJ 3505;** *State of Maharashtra v. Yadav Kohachade* **(2000) Cri LJ 959 – referred to.**

Alderson v. Booth **(1969) 2 All ER 271 – referred to.**

Books and Periodicals Cited

Law Commission's 48th Report (1972); Law Commission's 41st Report; Black's Law Dictionary (5th Edition, 1979) **– referred to.**

List of Acts

Code of Criminal Procedure, 1973; Constitution of India.

List of Keywords

Section 438 of the Code of Criminal Procedure, 1973; Anticipatory bail; Police custody; Judicial custody; Accused already in judicial custody; Anticipatory bail in a different case; "reason to believe"; Arrest; Subsequent arrest; Custody; Regular bail; Arrest apprehended; Apprehension of arrest; Apprehension of arrest in a different case/offence; Likely to be arrested; First offence; Custody in the first offence; Different offence; Subsequent offence; Remand of the accused; Previous offence; Pre-condition for pre-arrest bail; Arrest in relation to some other non-bailable offence; Actual touch or confinement; Formal arrest; Possibility of arrest of the person in custody; Prisoner Transit Warrant; Jurisdictional Magistrate.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 2501 of 2024

From the Judgment and Order dated 31.10.2023 of the High Court of Judicature at Bombay in ABA No. 2801 of 2023

Appearances for Parties

Sidharth Luthra, Sr. Adv., Prashant S. Kenjale, Amol Nirmalkumar Suryawanshi, Ms. Srishty Pandey, Ashutosh Chaturvedi, Ms. Gayatri Virmani, Shubham Gavande, Advs. for the Appellant.

Siddharth Dave, Sr. Adv., Shantanu Phanse, SS Bedekar, Prastut Dalvi, Ms. Vidhi Thaker, Siddhant Sharma, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

J.B. Pardiwala, J.

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

1. A short question of general public importance on which there is great divergence of judicial opinion that falls for the consideration of this Court is as under:

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

> "Whether an application for anticipatory bail under Section 438 of the Code of Criminal Procedure, 1973 (for short, "**CrPC**") is maintainable at the instance of an accused while he is already in judicial custody in connection with his involvement in a different case?"

2. This appeal arises from the judgment and order dated 31.10.2023 passed by the High Court of Judicature at Bombay in Anticipatory Bail Application No. 2801 of 2023 by which the High Court overruled the objection raised by the appellant herein (original complainant) as regards the maintainability of the anticipatory bail application filed by respondent no. 1 (original accused) in connection with CR No. 806 of 2019 registered with Pimpri Police Station for the offences punishable under Sections 406, 409, 420, 465, 467, 468, 471 respectively read with Section 34 of the Indian Penal Code (for short, "**IPC**") and thereby took the view that although respondent no.1 herein may already be in custody in connection with ECIR No. 10 of 2021, yet he would be entitled to pray for anticipatory bail in connection with a different case.

3. It appears from the materials on record that respondent no. 1 herein came to be arrested in connection with ECIR No. 10 of 2021.While in custody, he apprehended arrest in connection with CR No. 806 of 2019 registered against him at the instance of the appellant herein. In such circumstances, he prayed for anticipatory bail before the High Court. The appellant herein intervened in the proceedings of said anticipatory bail application and raised an objection that as respondent no. 1 herein is already in custody in connection with ECIR No. 10 of 2021, he cannot pray for anticipatory bail in connection with CR No. 806 of 2019. The objection raised by the appellant herein in his capacity as the complainant came to be overruled and the High Court proceeded to hold that although respondent no. 1 herein may be in custody in one case, yet the same would not preclude him from seeking pre-arrest bail in connection with a different case. Since the objection was overruled, the appellant is now before this Court.

A. SUBMISSIONS ON BEHALF OF THE APPELLANT

4. Mr. Sidharth Luthra, the learned Senior counsel appearing for the appellant canvassed the following submissions:

i. The High Court committed a serious error in taking the view that although a person might be in custody after his arrest in one case, yet such a person can apply for the grant of pre-arrest bail under Section 438 of the CrPC in connection with a different case.

ii. The essential part of arrest is placing the corpus (body of the person) in custody of the police authorities. The natural corollary, therefore, is that a person who is already in custody cannot have reasons to believe that he would be arrested as he already stands arrested. The pre-condition to invoke Section 438 CrPC is that the accused should have a reason to believe that he "may be arrested". If the accused is already in custody, then he can have no reason to believe that he "may be arrested".

iii. The salutary provision of Section 438 of the CrPC was enshrined with a view to see that the liberty of any individual concerned is not put in jeopardy on frivolous grounds at the instance of unscrupulous or irresponsible person or officers who may be in charge of the prosecution. If such is the objective behind the enactment of Section 438 of the CrPC, then for a person who is already arrested there is no question of any humiliation being caused.

iv. If an accused while being in custody in connection with one case, is granted anticipatory bail under Section 438 of the CrPC in connection with a different case, then it would not be possible for him to fulfill the requirement of the condition that may be imposed under Section 438(2)(i) of the CrPC i.e. to make himself/herself available for interrogation as and when required. In other words, a person in custody would not be able to meet or comply with the condition that may be imposed under Section 438(2)(i) of the CrPC. This being a material consideration for grant of anticipatory bail, it would be illogical to permit a person to seek anticipatory bail if he is unable to satisfy conditions that may be imposed under Section 438(2)(i) of the CrPC.

v. If a person who is already in custody in connection with one case apprehends arrest in connection with a different case, then he is not remediless. In such circumstances, he can seek to

surrender and pray for regular bail on the principle of "deemed custody" both in Magistrate as well as Sessions triable cases.

5. Mr. Luthra, with a view to fortify his aforesaid submissions, placed strong reliance on the following decisions:

   i. ***Kartar Singh v. State of Punjab***, [1994] 2 SCR 375, (1994) 3 SCC 569

   ii. ***Gurbaksh Singh Sibbia v. State of Punjab***, [1980] 3 SCR 383, (1980) 2 SCC 565

   iii. ***Sushila Aggarwal v. State (NCT of Delhi)***, [2020] 2 SCR 1, (2020) 5 SCC 1

   iv. ***Sunil Kallani v. State of Rajasthan***, 2021 SCC OnLine Raj 1654

   v. ***Rajesh Kumar Sharma v. CBI***, 2022 SCC OnLine All 832

   vi. ***Tejesh Suman v. State of Rajasthan***, 2023 SCC OnLine SC 76

   vii. ***Bashir Hasan Siddiqui v. State (GNCTD),*** (2023) SCC OnLine Del 7544

   viii. ***Narinderjit Singh Sahni v. Union of India***, [2001] Supp. 4 SCR 114, (2002) 2 SCC 210.

6. In such circumstances referred to above, the learned Senior counsel prayed that there being merit in his appeal, the same may be allowed and the impugned order passed by the High Court be set aside.

B. SUBMISSIONS ON BEHALF OF THE RESPONDENT NO. 1 (ORIGINAL ACCUSED)

7. Mr. Siddharth Dave, the learned Senior counsel appearing for the original accused, vehemently opposed the present appeal and canvassed the following submissions:

   i. The legal maxim *ubi jus ibi remedium* i.e. where there is a right, there is a remedy, is recognised as a basic principle of jurisprudence. A Constitution Bench of this Court in ***Anita Kushwaha v. Pushap Sudan*** reported in (**2016) 8 SCC 509** held that the right to access justice is so inalienable, that no system of governance can possibly ignore its significance, leave alone afford to deny the same to its citizens. It was

also held that the ancient Roman jurisprudential maxim *ubi jus ibi remedium* has contributed to the acceptance of access to justice as a basic and inalienable human right, which all civilized societies recognise and enforce.

ii. The right of an accused to apply for pre-arrest bail under Section 438 of the CrPC is intrinsically linked to his right to access the competent courts to avail his remedies under the law. A person would thus be entitled to apply for pre-arrest bail under Section 438 of the CrPC in one case, even though he may be in custody in connection with some other case.

iii. The right of an accused to protect his personal liberty within the contours of Article 21 of the Constitution of India, by applying for pre-arrest bail under Section 438 CrPC cannot be eliminated without a procedure established by law. Further, such procedure should also pass the test of fairness, reasonableness and manifest non-arbitrariness on the touchstone of Article 14 of the Constitution of India.

iv. Under Section 438 of the CrPC, the pre-condition for a person to apply for pre-arrest bail is a *"reason to believe that he may be arrested on accusation of having committed a non-bailable offence"*. Therefore, the only pre-condition for exercising the said right is the apprehension of the accused that he may be arrested.

v. The arrest of an accused in one case cannot foreclose his right to apply for pre-arrest bail in a different case, since there is no such stipulation in the language of Section 438 of the CrPC. The restrictions on the exercise of power to grant pre-arrest bail under Section 438 of the CrPC are prescribed under Section 438(4) of the CrPC which provides that the provisions of Section 438 shall not apply to cases involving arrest under Sections 376(3), 376AB, 376DA or 376DB respectively of the IPC.

vi. A Constitution Bench of this Court, in ***Sushila Aggarwal*** *(supra)* while considering the statutory restrictions on Section 438 of the CrPC held that where the Parliament intended to exclude or restrict the powers of the Court under Section 438 of the CrPC, it did so in categorical terms (such as Section 438(4)). The omission on the part of the legislature to restrict the right

of any person accused of having committed a non-bailable offence to seek anticipatory bail can lead one to assume that neither a blanket restriction can be read into the text of Section 438 CrPC by this Court, nor can inflexible guidelines in the exercise of discretion be insisted as that would amount to judicial legislation.

vii. A statutory restriction on the right to apply for pre-arrest bail is also found under Sections 18 and 18A(2) respectively of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short, "**the Act, 1989**"). The said provisions provide that Section 438 of the CrPC shall not apply to cases under the Act, 1989. That despite the statutory bar under Sections 18 and 18A(2) respectively of the Act, 1989 a three-Judge Bench of this Court in ***Prathvi Raj Chauhan v. Union of India*** reported in **(2020) 4 SCC 727** held that if a complaint does not make out a *prima facie* case for applicability of the Act, 1989 the bar under Sections 18 and 18A(2) respectively of the said Act shall not apply. The aforesaid judgment indicates the judicial approach of adopting an interpretation in favour of personal liberty.

8. In such circumstances referred to above, Mr. Dave prayed that there being no merit in the appeal, the same may be dismissed.

C. VIEWS OF DIFFERENT HIGH COURTS ON THE ISSUE IN QUESTION

9. In ***Sunil Kallani*** *(supra)*, a learned Single Judge of the High Court of Rajasthan took the view that an application for anticipatory bail would not be maintainable at the instance of a person who is already arrested and is in police custody or judicial custody in relation to a different case. The line of reasoning adopted by the High Court in taking such a view was that a person who is already in custody cannot have a reason to believe that he would be arrested as he already stood arrested, albeit in a different case. The High Court observed that arrest means to actually touch or confine the body of the person to the custody of a police officer and an essential part of arrest is placing the corpus, that is the body of the person, in custody of the police authorities. In light of this essential requirement to constitute an arrest, a person who is already in custody cannot have a reason to believe that he may be arrested as he stood already

arrested. The High Court tried to fortify its view by relying on some of the observations made by this Court in ***Narinderjit Singh Sahni*** *(supra).* A few relevant observations made by the High Court are extracted hereinbelow:

> *"17. The Scheme of Code of Criminal Procedure does not define the word arrest. In Chapter V of Code of Criminal Procedure, Section 41 lays down when police may arrest without warrant. Section 41B lays down procedure of arrest and duties of officer. Section 46 mentions how arrest is to be made.*
>
> *18. Upon reading Section 46 Cr.P.C. (supra), it is apparent that arrest would mean to actually touch or confine the body of the person to custody of the police officer. Section 167 Cr.P.C. lays down that the custody may be given to the police for the purpose of investigation (called as remand) or be sent to jail (called as judicial custody). Thus the essential part of arrest is placing the corpus, body of the person in custody of the police authorities whether of a police station or before him or in a concerned jail.*
>
> *19. The natural corollary is therefore that a person who is already in custody cannot have reasons to believe that he shall be arrested as he stands already arrested. In view thereof, the precondition of bail application to be moved under Section 438 Cr.P.C. i.e. reasons to believe that he may be arrested" do not survive since a person is already arrested in another case and is in custody whether before the police or in jail.*
>
> *xxx xxx xxx*
>
> *23. As pointed out by learned counsel for the petitioner that there may be cases where a person who has already been arrested in a particular case may be faced with registering of several FIRs by the persons who do not want him to be released from jail and in the said circumstances only option available is to take anticipatory bail in other FIRs as the police would seek his arrest in all the cases. It may be subsequently registered against him for non-bailable Offences and in such an event, there would be infraction*

of his personal liberty. However this Court does not agree to the submissions noticed as above. Once the FIR has been registered in relation to an offence committed against any person by an accused he cannot claim to be protected from offences which he may have committed with other persons who have their individual right of registering an FIR against such an accused. The accused will have to face investigation and subsequent trial in relation to each and every case individually. The question whether he may be punished separately or jointly for other cases is a completely different question altogether and need not be gone into the present case.

24. However, keeping in view observations in Narinderjit Singh Sahni, (supra) and considering that the purpose of preventive arrest by a direction of the court on an application under Section 438 Cr.P.C. would be an order in vacuum. As a person is already in custody with the police this Court is of the view that such an anticipatory bail application under Section 438 Cr.P.C. would not lie and would be nothing but travesty of justice in allowing anticipatory bail to such an accused who is already in custody.

25. Examining the issue from another angle if such an application is held to be maintainable the result would be that if an accused is arrested say for an offence committed of abduction and another case is registered against him for having committed murder and third case is- registered against him for having stolen the car which was used for abduction in a different police station and the said accused is granted anticipatory bail in respect to the offence of stealing of the car or in respect to the offence of having committed murder the concerned Police Investigating Agency where FIRs have been registered would be prevented from conducting individual investigation and making recoveries as anticipatory bail once granted would continue to operate without limitation as laid down by the Apex Court in Sushila Aggarwal, (supra). The concept of. anticipatory bail, as envisaged under-Section 438 Cr.P.C. would stand frustrated. The provisions of grant of

anticipatory bail are essentially to prevent the concerned person from litigation initiated with the object of injuring and humiliating the applicant by haying him so arrested and for a person who stands already arrested, such a factor does not remain available.

26. In view of above discussion, this Court holds that the anticipatory bail would not lie and would not be maintainable if a person is already arrested and is in custody of police or judicial custody in relation to another criminal case which may be for similar offence or for different offences."

(Emphasis supplied)

10. In the case of ***Rajesh Kumar Sharma*** *(supra)*, a learned Single Judge of the High Court of Allahabad followed the view taken by the High Court of Rajasthan referred to above.

11. In ***Bashir Hasan Siddiqui*** *(supra)*, a learned Single Judge of the High Court of Delhi, relying on ***Sunil Kallani*** *(supra)* and ***Rajesh Kumar Sharma*** *(supra)*, took a similar view that an application seeking anticipatory bail would not be maintainable at the instance of a person who apprehends arrest if such a person is already arrested and is in custody in connection with a different offence. The relevant observations made by the High Court in paragraph 6 of the said decision are extracted as under:

"6. Therefore, keeping in view the entire facts and circumstances and also taking into account the judgment passed by the Rajasthan High Court in Sunil Kallani (supra) and subsequently judgment passed by Allahabad High Court in Rajesh Kumar Sharma (supra), this Court is in consonance with the opinions of both the High Court that since the accused is in custody in another FIR, the anticipatory bail in other FIR is not maintainable. As a result, the present petition stands dismissed."

(Emphasis supplied)

12. In ***Alnesh Akil Somji v. State of Maharashtra*** reported in **2021 SCC OnLine Bom 5276,** a learned Single Judge of the High Court of Judicature at Bombay formulated the following question of law for its consideration:

> *"Whether an anticipatory bail application would be maintainable by an accused who is already arrested and is in magisterial custody in relation to another crime?"*

13. The Bombay High Court also took notice of the decision of the High Court of Rajasthan in ***Sunil Kallani*** *(supra)*. The decision of this Court in the case of ***Narinderjit Singh Sahni*** *(supra)* was also looked into and ultimately it was held that an accused has every right, even if he is arrested in a number of cases, to move the courts for anticipatory bail in each of the offence registered against him, irrespective of the fact that he is already in custody in relation to a different offence. The High Court was of the view that the application(s) under Section 438 of the CrPC would have to be heard and decided on merits independent of the other cases in which he is already in custody. We may refer to some of the observations made by the High Court as under:

> *"8. A plain reading of the provision would show that the only restriction provided is under Section 438 (4) of the Cr. PC, which says that the provision will not apply to accusations of offences which are stated in Section 438 (4) of the Cr.P.C. Similarly, certain special statutes have excluded the operation of Section 438 of the Cr.P.C. for accusation of offences punishable under those special statutes, for example Section 18A of the Schedule Caste and Schedule Tribes (Prevention of Atrocities) Act, 1989 bars exercise of powers under Section 438 of the Cr.P.C.*
>
> *9. The Hon'ble Apex Court in the case of Sushila A Aggarwal and others (supra), while dealing with the scope of Section 438 of the Cr.P.C has followed the decision in the case of Shri Gurbaksh Singh Sibbia and others Versus State of Punjab and regarding the bar or restriction on the exercise of power to grant anticipatory bail, the Hon'ble Apex Court has held as follows:*
>
> > *"62. […] In this background, it is important to notice that the only bar, or restriction, imposed by Parliament upon the exercise of the power (to grant anticipatory bail) is by way of a positive restriction i.e. in the case where accused are alleged to have committed offences punishable under Section 376 (3) or Section*

376-AB or Section 376-DA or Section 376-DB of the Penal Code. In other words, Parliament has now denied jurisdiction of the court (i.e. Court of Session and High Courts) from granting anticipatory bail to those accused of such offences. The amendment [Code of Criminal Procedure Amendment Act, 2018 introduced Section 438 (4)] reads as follows:

> *"438. (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 376-AB or Section 376-DA or Section 376-DB of the Indian Penal Code".*

63. Clearly, therefore, where Parliament wished to exclude or restrict the power of courts, under Section 438 of the Code, it did so in categorical terms. Parliament's omission to restrict the right of citizens, accused of other offences from the right to seek anticipatory bail, necessarily leads one to assume that neither a blanket restriction can be read into by this Court, nor can inflexible guidelines in the exercise of discretion, be insisted upon- that would amount to judicial legislation".

10. Similarly, the Hon'ble Apex Court has made following observations in the case of Shri Gurbaksh Singh Sibbia and others (supra):

> *"39. Fifthly, the provisions of Section 438 cannot be invoked after the arrest of the accused. The grant of "anticipatory bail" to an accused who is under arrest involves a contradiction in terms, insofar as the offence or offences for which he is arrested, are concerned. After arrest, the accused must seek his remedy under Section 437 or Section 439 of the Code, if he wants to be released on bail in respect of the offence or offences for which he is arrested".*

11. It is thus very clear, according to Hon'ble Apex Court, that anticipatory bail will not be maintainable in case a person is in custody in the same offence for which

pre-arrest bail is sought, the restriction, if any, upon maintainability of prearrest bail will be there only if a person is in custody in that particular offence itself.

12. From the above pronouncements, two things are clear. First, there is no such bar in Cr.P.C or any statute which prohibits Session or the High Court from entertaining and deciding an anticipatory bail, when such person is already in judicial or police custody in some other offence. Second, the restriction cannot be stretched to include arrest made in any other offence as that would be against the purport of the provision.

xxx xxx xxx

14. I may point out here that the case of Narinderjit Singh Sahni and Another (supra) was in respect of maintainability of Article 32 wherein relief in the nature of Section 438 was sought. Even, the said judgment does not hold in very clear terms that a person arrested in one offence cannot seek the relief provided under Section 438 of Cr.PC in another offence merely on the ground that he stands arrested in another district offence.

15. In my considered opinion, there was no proper interpretation of Section 438 of the Cr.PC at the hands of learned Additional Sessions Judge. Accused has every right, even if he is arrested in number of cases, to move in each of offence registered against him irrespective of the fact that he is already in custody but for different offence, for the reason that the application (s) will have to be heard and decided on merits independent of another crime in which he is already in custody.

16. One cannot and must not venture, under the garb of interpretation, to substantiate its own meaning than the plain and simple particular though provided by statute. What has not been said cannot be inferred unless the provision itself gives room for speculation. If the purpose behind the intendment is discernible sans obscurity and ambiguity, there is no place for supposition."

(Emphasis supplied)

14. In ***Sanjay Kumar Sarangi v. State of Odisha*** reported in **2024 SCC OnLine Ori 1334**, a learned Single Judge of the High Court of Orissa took the view that there is no statutory bar for an accused in custody in connection with a case to pray for grant of anticipatory bail in a different case registered against him. The court, upon perusal of the relevant provisions, took the view that arrest means physical confinement of a person with or without the order of the Court. The Court noted that Section 167(2) of the CrPC, which governs 'remand', is applicable to a case where the accused is already arrested, and charge-sheet has not been filed. The Court observed that there is no specific provision in the CrPC which governs a situation where a person is required to be arrested/ remanded in connection with a new case when he is already in custody in connection with some other case and in such a situation, the accused can only be remanded in connection with the new case on the order of the competent court. Answering the question whether such order of remand by the court can be equated with an act of arrest, the Court held that the purpose of remand as in the case of arrest is to collect evidence during investigation, and thus both amount to one and the same thing.

15. The High Court proceeded to explain that if a new case is registered against a person already in custody in connection with one case, the police in such circumstances can either seek an order of remand from the court or arrest the accused, as and when he is released from custody in connection with the other case. The Court explained that it is only in the latter scenario that an order of anticipatory bail under Section 438 of the CrPC would become effective because it is only after the accused is released from custody that he can be arrested in relation to the subsequent case. The Court said that the anticipatory bail operates at a future time. After being released from custody in the former case, if he is sought to be arrested in relation to the subsequent case, there is no reason why he should be precluded from approaching the court beforehand with the necessary protection in the form of anticipatory bail.

16. The court clarified that a person cannot be arrested if he is already in custody in connection with some case, however, his right to obtain an anticipatory bail in connection with a different case cannot be curtailed having regard to the scheme of the CrPC. The anticipatory bail, if granted, shall however be effective only if he is arrested in

connection with the subsequent case consequent upon his release from custody in the previous case.

17. Lastly, the Court observed that there is nothing in the CrPC which takes away the right of the accused to seek his liberty or of the investigating agency to investigate the case only because the accused is in custody in a different case. The Court observed that an accused can exercise his right of moving the court for anticipatory bail just as the investigating agency can exercise its right to investigate the subsequent case by seeking remand of the accused from the court having jurisdiction over the case. Both the rights can co-exist and operate at their respective and appropriate times. The court held that if the application of the investigating agency, seeking remand of the accused whilst he is in custody in connection with the former case, is allowed, the accused can no longer pray for anticipatory bail in the subsequent case, as then he could be said to be technically in custody in connection with the subsequent case also. In such a scenario, the accused can only seek regular bail. The Court further elaborated that the grant of anticipatory bail does not clothe the accused with a licence to avoid investigation or claim any immunity therefrom.

18. We may refer to some of the relevant observations made by the learned Single Judge as under:

> *"13. To illustrate, a person is in custody in connection with a case and a new case is registered against him for commission of some other offence. Two recourses are available to the police in such a situation - firstly to seek an order of remand from the Court if the presence of the accused is required for investigation or secondly, to arrest him, as and when he is released from custody in connection with the previous case. It is only in the second scenario that an order of anticipatory bail can become effective because only then can he be 'arrested'. It is trite law that the distinction between an order in case of custody bail and anticipatory bail is that the former is passed when the accused is already arrested and in custody and operates as soon as it is passed (subject to submission of bail bonds etc), while the latter operates at a future time-when the person not being in custody, is*

arrested. This, according to the considered view of this Court, is the crux of the issue. To amplify, since an order granting anticipatory bail becomes effective only when the person is arrested and as it is not possible to arrest a person already in custody, it follows that when, on being released from custody in the former case, he is sought to be arrested in the new case, there is no reason why he shall be restrained from moving the Court beforehand to arm himself with necessary protection in the form of anticipatory bail to protect himself from such a situation. If such an order is passed by the Court in his favour, it shall become effective if and when he is arrested as normally happens. The only catch is, he cannot be arrested as long as he is in custody in the first-mentioned case. So, his right to obtain an order in the new case beforehand that can be effective only upon his release from the first-mentioned case cannot be denied under the scheme of the Code.

14. Another aspect must also be taken into consideration - when a person is in custody in connection with a case and a new case gets registered against him, it is, for all practical purposes a separate case altogether. This implies all rights conferred by the statute on the accused consequent upon registration of a case against him as well as the investigating agency are independently protected. There is no provision in the Code that takes away the right of the accused to seek his liberty or of the investigating agency to investigate into the case only because he is in custody in another case. As already stated, the accused can exercise his right of moving the court for anticipatory bail which would of course be effective only upon his release from the earlier case and in the event of his arrest in the subsequent case. Similarly, the right of the investigating agency to investigate/interrogate in the subsequent case can be exercised by seeking remand of the accused from the court in the subsequent case. Both these scenarios are not mutually exclusive and can operate at their respective and appropriate times. The investigating agency, if it feels

necessary for the purpose of interrogation/investigation can seek remand of the accused whilst he is in custody in connection with the previous case and if such prayer is allowed, the accused can no longer pray for grant of anticipatory bail as then he would be technically in custody in connection with the subsequent case also. Then, he can only seek regular or custody bail. It is also to be considered that if the prosecution has the power to register a case against a person who is in custody in connection with another case how can the accused be deprived of his right to seek protection of his liberty in such case? This would militate against the very principle underlying Article 21 of the Constitution as also Section 438 of the Code.

15. This takes the court to the reasoning adopted by the learned single judge of Rajasthan High Court in the case of Sunil Kallani (supra) that "…..the concerned Police Investigating Agency where FIRs have been registered would be prevented from conducting individual investigation and making recoveries as anticipatory bail once granted would continue to operate without limitation as laid down by the Apex Court in Sushila Aggarwal, (supra)…."

With great respect, this Court is unable to persuade itself to agree with the above-quoted reasoning in view of the fact that grant of anticipatory bail does not and cannot grant the accused a licence to avoid investigation or clothe him with any immunity there-from. In fact, sub-section (2) of Section 438 holds the answer to this question as follows:

> *(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;*
> >
> > *xxx xxx xxx*

It is needless to mention that an order under subsection (1) can be passed only upon hearing the Public Prosecutor. Hence, the prosecution can always insist upon inclusion of such a condition by the court in the order grating anticipatory bail. And in so far as 'recoveries' are concerned, as already stated, it is always open to the investigating agency to pray for remand of the accused, as long as he is in custody, for such purpose and an order granting anticipatory bail has not been passed. […]

xxx xxx xxx

17. From a conspectus of the analysis made hereinbefore thus, this Court holds as follows:

(i) There is no statutory bar for an accused in custody in connection with a case to pray for grant of anticipatory bail in another case registered against him;

(ii) Anticipatory bail, if granted, shall however be effective only if he is arrested in connection with the subsequent case consequent upon his release from custody in the previous case;

(iii) The investigating agency, if it feels necessary for the purpose of interrogation/investigation can seek remand of the accused whilst he is in custody in connection with the previous case and in which no order granting anticipatory bail has yet been passed. If such order granting remand is passed, it would no longer be open to the accused to seek anticipatory bail but he can seek regular bail.

18. In the cases at hand, the prosecution has not sought for nor obtained any order from the Court for remand of the petitioners in the subsequent cases registered against them. Thus, this Court holds that the Anticipatory Bail applications are maintainable..."

(Emphasis supplied)

19. Thus, it appears from the aforesaid discussion that there are divergent opinions expressed by different High Courts of the country. The Rajasthan, Delhi and Allahabad High Courts have taken the view that an anticipatory bail application would not be maintainable if the

accused is already arrested and is in custody in connection with some offence. On the other hand, the Bombay and Orissa High Courts have taken the view that even if the accused is in custody in connection with one case, anticipatory bail application at his instance in connection with a different case is maintainable.

D. ANALYSIS

i. Evolution of the concept of anticipatory bail

20. The Code of Criminal Procedure, 1898 (for short, "**the 1898 Code**") 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 1898 Code empowered the High Court or the Court of Session 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)

21. 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. It observed thus in para 39.9 of the said 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)

22. 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 confer 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.

23. 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)

24. Section 438 of the CrPC reads thus:

***"Discretion 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).”

25. The Statement of Objects and Reasons accompanying the bill for introducing Section 438 in the CrPC indicates 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 the 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 of individuals 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**].

26. In the context of anticipatory bail, this Court, in ***Siddharam Satlingappa Mhetre*** *(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.""*

27. In ***Kartar Singh*** *(supra),* a Constitution Bench of this Court held that there is no constitutional or fundamental right to seek anticipatory bail. In the said case, this Court was called upon to consider the constitutional validity of sub-section (7) of Section 20 of the Terrorists and Disruptive Activities (Prevention) Act, 1987. The Constitution Bench also looked into the validity of Section 9 of the Code of Criminal Procedure (U.P. Amendment) Act, 1976 which deleted the operation of Section 438 of the CrPC in the State of Uttar Pradesh with effect from 28.11.1975. In the aforesaid context, Justice Ratnavel Pandian speaking for himself and on behalf of four other Judges observed as under:

> *"326. The High Court of Punjab and Haryana in Bimal Kaur [AIR 1988 P&H 95 : (1988) 93 Punj LR 189 : 1988 Cri LJ 169] has examined a similar challenge as to the vires of Section 20(7) of TADA Act, and held thus:*
>
> > *"In my opinion Section 20(7) is intra vires the provision of Article 14 of the Constitution in that the persons charged with the commission of terrorist act fall in a category which is distinct from the class of*

persons charged with commission of offences under the Penal Code and the offences created by other statutes. The persons indulging in terrorist act form a member of well organised secret movement. The enforcing agencies find it difficult to lay their hands on them. Unless the Police is able to secure clue as to who are the persons behind this movement, how it is organised, who are its active members and how they operate, it cannot hope to put an end to this movement and restore public order. The Police can secure this knowledge only from the arrested terrorists after effective interrogation. If the real offenders apprehending arrest are able to secure anticipatory bail then the police shall virtually be denied the said opportunity."

327. It is needless to emphasise that both the Parliament as well as the State Legislatures have got legislative competence to enact any law relating to the Code of Criminal Procedure. No provision relating to anticipatory bail was in the old Code and it was introduced for the first time in the present Code of 1973 on the suggestion made of the Forty-first Report of the Law Commission and the Joint Committee Report. It may be noted that this section is completely omitted in the State of Uttar Pradesh by Section 9 of the Code of Criminal Procedure (Uttar Pradesh Amendment) Act, 1976 (U.P. Act No. 16 of 1976) w.e.f. 28-11-1975. In the State of West Bengal, proviso is inserted to Section 438(1) of the Code w.e.f. 24-12-1988 to the effect that no final order shall be made on an application filed by the accused praying for anticipatory bail in relation to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than seven years, without giving the State not less than seven days' notice to present its case. In the State of Orissa, by Section 2 of Orissa Act 11 of 1988 w.e.f. 28-6-1988, a proviso is added to Section 438 stating that no final order shall be made on an application for anticipatory bail without giving the State notice to present its case for offence punishable with death, imprisonment

for life or imprisonment for a term of not less than seven years.

xxx xxx xxx

329. Further, at the risk of repetition, we may add that Section 438 is a new provision incorporated in the present Code creating a new right. If that new right is taken away, can it be said that the removal of Section 438 is violative of Article 21. In Gurbaksh Singh [(1980) 2 SCC 565 : 1980 SCC (Cri) 465 : (1980) 3 SCR 383] , there is no specific statement that the removal of Section 438 at any time will amount to violation of Article 21 of the Constitution."

(Emphasis supplied)

28. The aforesaid decision was discussed in the course of the hearing of this case for the limited proposition that there is no constitutional or fundamental right to seek anticipatory bail. Section 438 of the CrPC is just a statutory right.

29. In ***Gurbaksh Singh Sibbia*** *(supra),* a Constitution Bench of this Court (speaking through Justice Y.V. Chandrachud, Chief Justice, as his Lordship then was) undertook an extensive analysis of the provision of anticipatory bail. This Constitution Bench decision can be termed as a profound and passionate essay on how personal liberty under the Constitution can be consistent with needs of investigations and why this Court should avoid any generalisation that would take away the discretion of the courts dealing with a new set of facts in each case. Chief Justice Y.V. Chandrachud observed thus:

"8. […] Attendant upon such investigations, when the police are not free agents within their sphere of duty, is a great amount of inconvenience, harassment and humiliation. That can even take the form of the parading of a respectable person in handcuffs, apparently on way to a Court of justice. The foul deed is done when an adversary is exposed to social ridicule and obloquy, no matter when and whether a conviction is secured or is at all possible. It is in order to meet such situations, though not limited to these contingencies, that the power to grant anticipatory bail was introduced into the Code of 1973.

xxx xxx xxx

12. […] The legislature conferred a wide discretion on the High Court and the Court of Session to grant anticipatory bail because it evidently felt, firstly, that it would be difficult to enumerate the conditions under which anticipatory bail should or should not be granted and secondly, because the intention was to allow the higher courts in the echelon a somewhat free hand in the grant of relief in the nature of anticipatory, bail. That is why, departing from the terms of Sections 437 and 439, Section 438(1) uses the language that the High Court or the Court of Session "may, if it thinks fit" direct that the applicant be released on bail. Sub-section (2) of Section 438 is a further and clearer manifestation of the same legislative intent to confer a wide discretionary power to grant anticipatory bail. It provides that the High Court or the Court of Session, while issuing a direction for the grant of anticipatory bail, "may include such conditions in such directions in the light of the facts of the particular case, as it may think fit", including the conditions which are set out in Clauses (i) to (iv) of Sub-section(2).

xxx xxx xxx

14. Generalisations on matters which rest on discretion and the attempt to discover formulae of universal application when facts are bound to differ from case to case frustrate the very purpose of conferring discretion. No two cases are alike on facts and therefore, courts have to be allowed a little free play in the joints if the conferment of discretionary power is to be meaningful. There is no risk involved in entrusting a wide discretion to the Court of Session and the High Court in granting anticipatory bail because, firstly, these are higher courts manned by experienced persons, secondly, their orders are not final but are open to appellate or revisional scrutiny and above all because, discretion has always to be exercised by courts judicially and not according to whim, caprice or fancy. On the other hand, there is a risk in foreclosing categories of cases in which anticipatory bail may be allowed because life throws up unforeseen possibilities and offers new challenges. Judicial discretion has to be

free enough to be able to take these possibilities in its stride and to meet these challenges.

15. […] While laying down cast-iron rules in a matter like granting anticipatory bail, as the High Court has done, it is apt to be overlooked that even judges can have but an imperfect awareness of the needs of new situations. Life is never static and every situation has to be assessed in the context of emerging concerns as and when it arises."

30. As regards making out a 'special case' to seek anticipatory bail, this Court in ***Gurbaksh Singh Sibbia*** *(supra)* said:

"21. […] A wise exercise of judicial power inevitably takes care of the evil consequences which are likely to flow out of its intemperate use. Every kind of judicial discretion, whatever may be the nature of the matter in regard to which it is required to be exercised, has to be used with due care and caution. In fact, an awareness of the context in which the discretion is required to be exercised and of the reasonably foreseeable consequences of its use, is the hallmark of a prudent exercise of judicial discretion. One ought not to make a bugbear of the power to grant anticipatory bail.

xxx xxx xxx

27. […] An accused person who enjoys freedom is in a much better position to look after his case and to properly defend himself than if he were in custody. As a presumably innocent person he is therefore entitled to freedom and every opportunity look after his own case. A presumably innocent person must have his freedom to enable him to establish his innocence."

31. In ***Gurbaksh Singh Sibbia*** *(supra)*, this Court emphasized that the applicant must have a tangible reason to believe. Vague apprehension will not do. Secondly, it held that the High Court or the Court of Session should not ask an applicant to go before the Magistrate to try his luck under Section 437 of the CrPC. It was also observed that once the accused is arrested, Section 438 of the CrPC ceases to play any role with reference to the offence or

offences for which he is arrested. This Court also cautioned against passing a blanket order for anticipatory bail.

32. The following principles of law as regards the grant of anticipatory bail can be discerned from ***Gurbaksh Singh Sibbia*** *(supra)*:

    i. The applicant must genuinely show the "reason to believe" that he may be arrested for a non-bailable offence. Mere fear is not belief and the grounds on which the belief of the applicant is based must be capable of being examined by the Court objectively. Specific events and facts must be disclosed to enable the Court to judge the reasonableness of belief or likelihood of arrest, the existence of which is the *sine qua non* in the exercise of the power to grant anticipatory bail.

    ii. The High Court or the Court of Session must apply its mind to the question of anticipatory bail and should not leave it to the discretion of the Magistrate under Section 437 CrPC.

    iii. Filing of the FIR is not a condition precedent. However, imminence of a likely arrest founded on the reasonable belief must be shown.

    iv. Anticipatory bail can be granted so long as the applicant is not arrested in connection with that case/offence.

    v. Section 438 of the CrPC cannot be invoked by the accused in respect of the offence(s)/case in which he has been arrested. The remedy lies under Section 437 or 439 of the CrPC, as the case may be, for the offence for which he is arrested.

    vi. The normal rule is to not limit the operation of the order in relation to a period of time.

33. On account of various decisions of benches of lesser strength than in ***Gurbaksh Singh Sibbia*** *(supra)* taking a view curtailing the scope of the findings in the said case, the scope of Section 438 of the CrPC came to be considered yet again in ***Siddharam Satlingappa Mhetre*** *(supra)*. A two-Judge Bench in ***Siddharam Satlingappa Mhetre*** *(supra)* held that the intervening decisions between 1980 and 2011 curtailing the scope of ***Gurbaksh Singh Sibbia*** *(supra)* were *per incuriam*.

34. However, since ***Siddharam Satlingappa Mhetre*** *(supra)* was delivered by a coram of two Judges, the matter again reached the

Constitution Bench in the judgment rendered in the case of ***Sushila Aggarwal*** *(supra)* laying down the following principles:

i. An application for anticipatory bail should be based on concrete facts (and not vague or general allegations). It is not essential that an application should be moved only after an FIR is filed.

ii. It is advisable to issue a notice on the anticipatory bail application to the Public Prosecutor.

iii. Nothing in Section 438 of the CrPC compels or obliges courts to impose conditions limiting relief in terms of time. The courts would be justified – and ought to impose conditions spelt out in Section 437(3) of the CrPC [by virtue of Section 438(2)]. The need to impose other restrictive conditions would have to be judged on a case-to-case basis.

iv. Courts ought to be generally guided by considerations such as the nature and gravity of the offences, the role attributed to the applicant, and the facts of the case, while considering whether to grant anticipatory bail or not.

v. Once granted, Anticipatory bail can, depending on the conduct and behaviour of the accused, continue after filing of the chargesheet till the end of trial.

vi. An order of anticipatory bail should not be a "blanket" order and should be confined to a specific incident.

vii. An order of anticipatory bail does not limit the rights of the police to conduct investigation.

viii. The observations in ***Gurbaksh Singh Sibbia*** *(supra)* regarding "limited custody" or "deemed custody" would be sufficient for the purpose of fulfilling the provisions of Section 27 of the Indian Evidence Act, 1872.

ix. The police can seek cancellation of anticipatory bail under Section 439(2) of the CrPC.

x. The correctness of an order granting bail can be considered by the appellate or superior court.

35. The aforesaid principles as regards the grant of anticipatory bail discernible from the decision of this Court in ***Sushila Aggarwal*** *(supra)* are general and may not have a direct bearing on the

question we are called upon to consider and answer. What is important to be taken note of in the decision in ***Sushila Aggarwal*** *(supra)* is the following:

> *"62. … In this background, it is important to notice that the only bar, or restriction, imposed by Parliament upon the exercise of the power (to grant anticipatory bail) is by way of a positive restriction i.e. in the case where accused are alleged to have committed offences punishable under Section 376 (3) or Section 376-AB or Section 376-DA or Section 376-DB of the Penal Code. In other words, Parliament has now denied jurisdiction of the courts (i.e. Court of Session and High Courts) from granting anticipatory bail to those accused of such offences. […]*
>
> *63. Clearly, therefore, where Parliament wished to exclude or restrict the power of courts, under Section 438 of the Code, it did so in categorical terms. Parliament's omission to restrict the right of citizens, accused of other offences from the right to seek anticipatory bail, necessarily leads one to assume that neither a blanket restriction can be read into by this Court, nor can inflexible guidelines in the exercise of discretion, be insisted upon-that would amount to judicial legislation".*
>
> (Emphasis supplied)

36. What has been conveyed in the aforesaid decision is that the court, on its own, should not try to read any other restriction as regards the exercise of its power to consider the plea for grant of anticipatory bail. Wherever parliament intends or desires to exclude or restrict the power of courts, it does so in categorical terms. This is very much evident from the plain reading of sub-section (4) of Section 438 of the CrPC itself. The dictum as laid is that the court should not read any blanket restriction nor should it insist for some inflexible guidelines as that would amount to judicial legislation.

ii. Whether a person, while in custody for a particular offence, can have a "reason to believe" that he may be arrested in relation to some other non-bailable offence?

37. The line of reasoning adopted by the High Court of Rajasthan in ***Sunil Kallani*** *(supra)* was that once a person is taken in custody in relation to an offence, it is not possible thereafter to arrest him in relation to a different offence as one of the essential conditions for arrest is placing the body of the accused in custody of the police authorities by means of actual touch or confinement. As there cannot be any actual touch or confinement while a person is in custody, he cannot have a "reason to believe" that he may be arrested in relation to a different offence.

38. However, there are two fundamental fallacies in the reasoning adopted by the Rajasthan High Court. First, the High Court failed to consider the possibility of arrest of the person in custody in relation to a different offence immediately after he is set free from the custody in the first offence. In such a scenario, if it is held that the application seeking anticipatory bail in relation to an offence, filed during the period when the applicant is in custody in relation to a different offence, would not be maintainable, then it would amount to precluding the applicant from availing a statutory remedy which he is otherwise entitled to and which he can avail as soon as he is released from custody in the first offence. Thus, in cases where the accused has a "reason to believe" that he may be arrested in relation to an offence different from the one in which he is in custody immediately upon his release, the view taken by the Rajasthan High Court, if allowed to stand, would deprive him of his statutory right of seeking anticipatory bail because it is quite possible that before such a person is able to exercise the aforesaid right, he may be arrested.

39. In our opinion, no useful purpose would be served by depriving the accused of exercising his statutory right to seek anticipatory bail till his release from custody in the first offence. We find force in the submission of the respondent that if the accused is not allowed to obtain a pre-arrest bail in relation to a different offence, while being in custody in one offence, then he may get arrested by the police immediately upon his release in the first case, even before he gets the opportunity to approach the competent court and file an application for the grant of anticipatory bail in relation to the said particular offence. This practical shortcoming in the approach taken by the Rajasthan High Court is prone to exploitation by investigating agencies for the purpose of putting the personal liberty of the accused in peril.

40. The second fallacy in the reasoning of the High Court is that there can be no arrest of an accused in relation to a different offence while he is already in custody in relation to some offence. Although there is no specific provision in the CrPC which provides for the arrest of an accused in relation to an offence while he is already in judicial custody in a different offence, yet this Court explained in ***Central Bureau of Investigation, Special Investigation Cell-I, New Delhi v. Anupam J. Kulkarni*** reported in **(1992) 3 SCC 141** that even if an accused is in judicial custody in connection with the investigation of an earlier case, the investigating agency can formally arrest him in connection with his involvement in a different case and associate him with the investigation of that other case. In other words, this Court clarified that even when a person is in judicial custody, he can be shown as arrested in respect of any number of other crimes registered elsewhere in the country. Reliance was placed by this Court on the decision of Punjab & Haryana High Court in ***S. Harsimran Singh v. State of Punjab*** reported in **1984 Cri LJ 253** wherein it was held that there is no inflexible bar under the law against the re-arrest of a person who is already in judicial custody in relation to a different offence. The High Court held that judicial custody could be converted into police custody by an order of the Magistrate under Section 167(2) of the CrPC for the purpose of investigating the other offence. The relevant paragraphs of ***Anupam J. Kulkarni*** *(supra)* are extracted hereinbelow:

> *"11. A question may then arise whether a person arrested in respect of an offence alleged to have been committed by him during an occurrence can be detained again in police custody in respect of another offence committed by him in the same case and which fact comes to light after the expiry of the period of first fifteen days of his arrest. The learned Additional Solicitor-General submitted that as a result of the investigation carried on and the evidence collected by the police the arrested accused may be found to be involved in more serious offences than the one for which he was originally arrested and that in such a case there is no reason as to why the accused who is in magisterial custody should not be turned over to police custody at a subsequent stage of investigation when the information discloses his complicity*

in more serious offences. We are unable to agree. In one occurrence it may so happen that the accused might have committed several offences and the police may arrest him in connection with one or two offences on the basis of the available information and obtain police custody. If during the investigation his complicity in more serious offences during the same occurrence is disclosed that does not authorise the police to ask for police custody for a further period after the expiry of the first fifteen days. If that is permitted then the police can go on adding some offence or the other of a serious nature at various stages and seek further detention in police custody repeatedly, this would defeat the very object underlying Section 167. However, we must clarify that this limitation shall not apply to a different occurrence in which complicity of the arrested accused is disclosed. That would be a different transaction and if an accused is in judicial custody in connection with one case and to enable the police to complete their investigation of the other case they can require his detention in police custody for the purpose of associating him with the investigation of the other case. In such a situation he must be formally arrested in connection with other case and then obtain the order of the Magistrate for detention in police custody. The learned Additional Solicitor-General however strongly relied on some of the observations made by Hardy, J. in Mehar Chand case [(1969) 5 DLT 179] extracted above in support of his contention namely that an arrested accused who is in judicial custody can be turned over to police custody even after the expiry of first fifteen days at a subsequent stage of the investigation in the same case if the information discloses his complicity in more serious offences. We are unable to agree that the mere fact that some more offences alleged to have been committed by the arrested accused in the same case are discovered in the same case would by itself render it to be a different case. All these offences including the so-called serious offences discovered at a later stage arise out of the same transaction in connection with which the accused was arrested. Therefore there is a marked difference between the two situations. The

occurrences constituting two different transactions give rise to two different cases and the exercise of power under Sections 167(1) and (2) should be in consonance with the object underlying the said provision in respect of each of those occurrences which constitute two different cases. Investigation in one specific case cannot be the same as in the other. Arrest and detention in custody in the context of Sections 167(1) and (2) of the Code has to be truly viewed with regard to the investigation of that specific case in which the accused person has been taken into custody. In S. Harsimran Singh v. State of Punjab [1984 Cri LJ 253 : ILR (1984) 2 P&H 139] a Division Bench of the Punjab and Haryana High Court considered the question whether the limit of police custody exceeding fifteen days as prescribed by Section 167(2) is applicable only to a single case or is attracted to a series of different cases requiring investigation against the same accused and held thus: (p. 257, para 10-A)

> *"We see no inflexible bar against a person in custody with regard to the investigation of a particular offence being either re-arrested for the purpose of the investigation of an altogether different offence. To put it in other words, there is no insurmountable hurdle in the conversion of judicial custody into police custody by an order of the Magistrate under Section 167(2) of the Code for investigating another offence. Therefore, a re-arrest or second arrest in a different case is not necessarily beyond the ken of law."*

This view of the Division Bench of the Punjab and Haryana High Court appears to be practicable and also conforms to Section 167. We may, however, like to make it explicit that such re-arrest or second arrest and seeking police custody after the expiry of the period of first fifteen days should be with regard to the investigation of a different case other than the specific one in respect of which the accused is already in custody. A literal construction of Section 167(2) to the effect that a fresh remand for police custody of a person already in judicial custody during investigation of a specific case cannot under any

circumstances be issued, would seriously hamper the very investigation of the other case the importance of which needs no special emphasis. The procedural law is meant to further the ends of justice and not to frustrate the same. It is an accepted rule that an interpretation which furthers the ends of justice should be preferred. It is true that the police custody is not the be-all and end-all of the whole investigation but yet it is one of its primary requisites particularly in the investigation of serious and heinous crimes. The legislature also noticed this and permitted limited police custody. The period of first fifteen days should naturally apply in respect of the investigation of that specific case for which the accused is held in custody. But such custody cannot further held to be a bar for invoking a fresh remand to such custody like police custody in respect of an altogether different case involving the same accused.

xxx xxx xxx

13. … There cannot be any detention in the police custody after the expiry of first fifteen days even in a case where some more offences either serious or otherwise committed by him in the same transaction come to light at a later stage. But this bar does not apply if the same arrested accused is involved in a different case arising out of a different transaction. Even if he is in judicial custody in connection with the investigation of the earlier case he can formally be arrested regarding his involvement in the different case and associate him with the investigation of that other case and the Magistrate can act as provided under Section 167(2) and the proviso and can remand him to such custody as mentioned therein during the first period of fifteen days and thereafter in accordance with the proviso as discussed above. …"

(Emphasis supplied)

41. It was submitted on behalf of the appellant that a person already in judicial custody in relation to an offence, cannot have a "reason to believe" that he may be arrested on the accusation of having committed a different offence. However, we do not find any merit in

the aforesaid submission. There are two ways by which a person, who is already in custody, may be arrested –

a. First, no sooner than he is released from custody in connection with the first case, the police officer can arrest and take him into custody in relation to a different case; and

b. Secondly, even before he is set free from the custody in the first case, the police officer investigating the other offence can formally arrest him and thereafter obtain a Prisoner Transit Warrant ("**P.T. Warrant**") under Section 267 of the CrPC from the jurisdictional magistrate for the other offence, and thereafter, on production before the magistrate, pray for remand;

OR

Instead of effecting formal arrest, the investigating officer can make an application before the jurisdictional magistrate seeking a P.T. Warrant for the production of the accused from prison. If the conditions required under 267 of the CrPC are satisfied, the jurisdictional magistrate shall issue a P.T. Warrant for the production of the accused in court. When the accused is so produced before the court in pursuance of the P.T. Warrant, the investigating officer will be at liberty to make a request for remanding the accused, either to police custody or judicial custody, as provided in Section 167(1) of the CrPC. At that time, the jurisdictional magistrate shall consider the request of the investigating officer, peruse the case diary and the representation of the accused and then, pass an appropriate order, either remanding the accused or declining to remand the accused. [See: ***State v. K.N. Nehru*** reported in **2011 SCC OnLine Mad 1984**]

42. As arrest in both the aforesaid circumstances is permissible in law, it would be incorrect to hold that a person, while in custody, cannot have a "reason to believe" that he may be arrested in relation to a different offence. As a logical extension of this, it can also be said that when procedural law doesn't preclude the investigating agency from arresting a person in relation to a different offence while he is already under custody in some previous offence, the accused too cannot be precluded of his statutory right to apply for anticipatory bail only on the ground that he is in custody in relation to a different offence.

43. The procedure for arrest of the accused in relation to an offence after he is released from custody in the first offence would be similar to the procedure of arrest which is required to be followed in any other cognizable offence. However, we think it is necessary to shed some light on the procedure to effect arrest in the second category of cases, that is, where the investigating agency arrests the accused in relation to an offence while he is in custody in relation to a different offence.

44. As discussed in the preceding paragraphs, an accused could be arrested either when he is free or when he is in custody in some offence. Similarly, an arrest can be made by a police officer either without a warrant or with a warrant issued by a court. Thus, the following possibilities emerge:

    a. If an accused is arrested without a warrant while he is free and not in custody, then he has to be produced before the nearest Magistrate, who may remand him to police or judicial custody or may grant bail if applied for by the accused.

    b. If an accused is arrested with a warrant while he is free and not in custody, then Section 81 of the CrPC permits the production of such a person before the court issuing the warrant.

    c. If an accused is arrested with or without a warrant while he is already in custody in one offence, then it is only under Section 267 of the CrPC that he can be removed from such custody and produced before the Magistrate under whose territorial jurisdiction the other offence is registered.

45. Section 46(1) of the CrPC reads as under:

> *"46. Arrest how made.—(1) In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action.*
>
> *Provided that where a woman is to be arrested, unless the circumstances indicate to the contrary, her submission to custody on an oral intimation of arrest shall be presumed and, unless the circumstances otherwise require or unless the police officer is a female, the police officer shall not touch the person of the woman for making her arrest."*

46. Thus, the plain reading of the aforesaid makes it clear that arrest involves actual touch or confinement of the body of the person sought to be arrested. However, arrest can also be effected without actual touch if the person sought to be arrested submits to the custody by words or action.

47. The term 'arrest' is not defined either in the procedural Acts or in the various substantive Acts, though Section 46, CrPC, lays down the mode of arrest to be effected. Black's Law Dictionary (5th Edition, 1979) defines arrest as follows:

> *"To deprive a person of his liberty by legal authority. Taking, under real or assumed authority, custody of another for the purpose of holding or detaining him to answer a criminal charge or civil demand. Arrest involves the authority to arrest, the assertion of that authority with the intent to effect an arrest, and the restraint of the person to be arrested. All that is required for an 'arrest' is some act by officer indicating his intention to detain or take person into custody and thereby subject that person to the actual control and will of the officer, as formal declaration of arrest is required."*

48. Similarly, the term 'custody' too is not defined either in the CrPC or the IPC. The *Corpus Juris Secondum* (Vol. 25 at Page 69) defines 'custody' as follows:

> *"When it is applied to persons, it implies restraint and may or may not imply physical force sufficient to restrain depending on the circumstances and with reference to persons charged with crime, it has been defined as meaning on actual confinement or the present means of enforcing it, the detention of the person contrary to his will. Applied to things, it means to have a charge or safe-keeping, and connotes control and includes as well, although it does not require, the element of physical or manual possession, implying a temporary physical control merely and responsibility for the protection and preservation of the thing in custody. So used, the word does not connote dominion or supremacy of authority. The said term has been defined as meaning the keeping, guarding, care, watch, inspection, preservation or security*

> *of a thing, and carries with it the idea of the thing being within the immediate personal care and control of the prisoner to whose custody it is subjected; charge; charge to keep, subject to order or direction; immediate charge and control and not the final absolute control of ownership."*

[See: ***Roshan Beevi and others v. Joint Secretary to Government of Tamil Nadu and others***, 1983 SCC OnLine Mad 163]

49. The Rajasthan High Court proceeded on the assumption that there can be no arrest while a person is in judicial custody because it is not possible for the police officer to arrest him without actual touch or confinement while such person is under custody. However, we are unable to agree with the view taken by the High Court for the reason that a lawful arrest can be made even without actually seizing or touching the body. Actions or words which successfully bring to the notice of the accused that he is under a compulsion and thereafter cause him to submit to such compulsion will also be sufficient to constitute arrest. This Court in ***State of U.P. v. Deoman Upadhyaya*** reported in **AIR 1960 SC 1125** held that submission to the custody by word or action by a person is sufficient so as to constitute arrest under Section 46 of the CrPC.

50. In the aforesaid context, we may also refer to and rely upon the decision of the Queen's Bench in ***Alderson v. Booth*** reported in [**1969] 2 All ER 271**. The relevant observations are as under:

> *"There are a number of cases, both ancient and modern, as to what constitutes an arrest, and whereas there was a time when it was held that there could be no lawful arrest unless there was an actual seizing or touching, it is quite clear that is no longer the law. There may be an arrest by mere words, by saying "I arrest you" without any touching, provided of course that the accused submits and goes with the police officer. Equally it is clear, as it seems to me, that an arrest is constituted when any form of words in used which, in the circumstances, of the case, were calculated to bring to the accused's notice, and did bring to the accused's notice, that he was under compulsion and thereafter he submitted to that compulsion."*
>
> (Emphasis supplied)

51. The aforesaid decision fortifies the view that the actual seizing or touching of the body of the person to be arrested is not necessary in a case where the arrester by word brings to the notice of the accused that he is under compulsion and thereafter the accused submits to that compulsion. This is in conformity with the modality of the arrest contemplated under Section 46 of the CrPC wherein also it is provided that the submission of a person to be arrested to the custody of the arrester by word or action can amount to an arrest. The essence of the decision in ***Alderson*** *(supra)* is that there must be an actual seizing or touching, and in the absence of that, it must be brought to the notice of the person to be arrested that he is under compulsion, and as a result of such notice, the said person should submit to that compulsion, and then only the arrest is consummated.

52. As pointed out in the preceding paragraphs, a police officer can formally arrest a person in relation to an offence while he is already in custody in a different offence. However, such formal arrest doesn't bring the accused in the custody of the police officer as the accused continues to remain in the custody of the Magistrate who remanded him to judicial custody in the first offence. Once such formal arrest has been made, the police officer has to make an application under Section 267 of the CrPC before the Jurisdictional Magistrate for the issuance of a P.T. Warrant without delay. If, based on the requirements prescribed under Section 267 of the CrPC, a P.T. Warrant is issued by the jurisdictional Magistrate, then the accused has to be produced before such Magistrate on the date and time mentioned in the warrant, subject to Sections 268 and 269 respectively of the CrPC. Upon production before the jurisdictional Magistrate, the accused can be remanded to police or judicial custody or be enlarged on bail, if applied for and allowed. The only reason why we have delineated the procedure followed in cases where a person already in custody is required to be arrested in relation to a different offence is to negate the reasoning of the Rajasthan, Delhi and Allahabad High Courts that once in custody, it is not possible to re-arrest a person in relation to a different offence. When a person in custody is confronted with a P.T. Warrant obtained in relation to a different offence, such a person has no choice but to submit to the custody of the police officer who has obtained the P.T. Warrant. Thus, in such a scenario, although there is no confinement to custody by

touch, yet there is submission to the custody by the accused based on the action of the police officer in showing the P.T. Warrant to the accused. Thereafter, on production of the accused before the jurisdictional Magistrate, like in the case of arrest of a free person who is not in custody, the accused can either be remanded to police or judicial custody, or he may be enlarged on bail and sent back to the custody in the first offence. A number of decisions have held that although Section 267 of the CrPC cannot be invoked to enable production of the accused before the investigating agency, yet it can undoubtedly be invoked to require production of the accused before the jurisdictional Magistrate, who can thereafter remand him to the custody of the investigating agency. Such an interpretation of the provision would give true effect to the words "other proceedings" as they appear in the text of Section 267 of the CrPC, which cannot be construed to exclude proceedings at the stage of investigation. [See: ***C. Natesan v. State of Tamil Nadu and Others***, 1998 SCC OnLine Mad 931; ***Ranjeet Singh v. State of Uttar Pradesh***, 1995 Cri LJ 3505; ***State of Maharashtra v. Yadav Kohachade***, 2000 Cri LJ 959]

53. Thus, contrary to the view taken by the Rajasthan, Allahabad and Delhi High Courts, a person, while in custody in relation to an offence, can be arrested in relation to a different offence, either after getting released from custody in the first offence, or even while remaining in custody in the first offence. In such circumstances, it follows that a person, while in custody in relation to an offence, can have "reason to believe" that he may be arrested in relation to a different cognizable offence. We find no restriction in the text of Section 438 or the scheme of the CrPC precluding a person from seeking anticipatory bail in relation to an offence while being in custody in relation to another offence. In the absence of any such restriction, we find no valid reason to read any prohibition in the text of Section 438 of the CrPC, to preclude a person in custody from seeking anticipatory bail in relation to different offences.

54. The option of applying for anticipatory bail in relation to an offence, while being in custody in relation to a different offence, will only be available to the accused till he is arrested by the police officer on the strength of the P.T. Warrant obtained by him from the court concerned. We must clarify that mere formal arrest (on-paper arrest) would not extinguish the right of the accused to apply for

anticipatory bail. We say so because a formal arrest would not result in the submission of the accused, who is already in custody, to the custody of the police officer effecting a formal arrest in the subsequent case. However, if after effecting a formal arrest, the police officer on the strength of the same procures a P.T. Warrant from the jurisdictional Magistrate, the accused would have no other choice but to submit to that compulsion and the right of the accused to apply for anticipatory bail would thereafter get extinguished.

55. If an accused is granted anticipatory bail in relation to an offence, while being in custody in a different offence, then it shall no longer be open to the police officer in the first case to apply under Section 267 of the CrPC for the production of the accused before the jurisdictional Magistrate for the purpose of remanding him to police or judicial custody. However, it shall be open to the jurisdictional Magistrate to require the production of accused under Section 267(1) for any other purpose mentioned under the said section except for the purpose of remanding him to police or judicial custody. [See: ***Tusharbhai Rajnikantbhai Shah v. State of Gujarat***, reported in **2024 SCC OnLine SC 1897**]

56. We would also like to observe that contrary to the submission of the appellant that grant of anticipatory bail to the accused would prevent the investigating authorities from conducting investigation and discoveries, etc., it is always open to the concerned investigating officer to apply before the Magistrate in whose custody the accused is in relation to a different offence, seeking permission of such Magistrate to interrogate the accused in relation to the particular offence which he is investigating.

57. It was also submitted by the appellant that as the object of Section 438 of the CrPC was to prevent an accused from the humiliation of arrest, the protective cover of the provision would not include within its ambit a person who is already in custody. In other words, a person once arrested in relation to an offence, cannot be said to suffer further humiliation for any subsequent arrest which may take place, and thus, the relief of anticipatory bail should not be made available to a person who is already in custody.

58. We are unable to accept the aforesaid contention of the appellant. Each arrest a person faces compounds their humiliation and ignominy. We say so because each subsequent arrest underscores a

continued or escalating involvement in legal troubles that can erode the dignity of the person and their public standing. The initial arrest itself often brings a wave of social stigma and personal distress, as the individual struggles with the implications of their legal predicament. When a subsequent arrest occurs, it intensifies this emotional and social burden, amplifying the perception of their criminality and reinforcing negative judgments from society. Subsequent arrest in relation to different offences, while the individual is in custody in a particular offence, further alienates the individual from their community and adversely affects their personal integrity. For this reason, it is incorrect to assume that subsequent arrests diminish the level of humiliation. On the contrary, each additional arrest exacerbates the person's shame making the cumulative impact of such legal entanglements increasingly devastating.

iii. Illustrative Examples

59. The discrimination that would be caused if the submissions canvassed on behalf of the appellant were to be accepted can be understood with the aid of the following illustrations:

Illustration A

(1) 'A' is in custody for a case under Section 420 of the IPC, and is enlarged on bail on a particular date. On the same day, 'A's' wife registers a case under Section 498A IPC against him. Here, if the appellant's argument is accepted, 'A' would be able to apply for anticipatory bail.

(2) 'B' is in custody under Section 420 of the IPC, and he has applied for bail. However, the order releasing him on bail is yet to be passed. While so, 'B's' wife files a case under Section 498A of the IPC against him. Here, if the appellant's argument is accepted. 'B' would not be able to apply for anticipatory bail while in custody for a case under Section 420. He can apply for anticipatory bail in relation to the case under Section 498A only if he is not arrested immediately after his release in the case under Section 420. If he is arrested immediately in the case under Section 498A after being released in the case under Section 420, then the only remedy left for him would be to seek regular bail.

If the interpretation sought to be put forward by the appellant is accepted, two persons who are accused of similar offences are

entitled to different sets of rights. While one is permitted to avail the right under Section 438 of the CrPC, the other is deprived of it, merely on the basis of the point in time when the FIR gets lodged.

Illustration B

(1) 'X' is in custody for an offence under Section 302 of the IPC punishable by life imprisonment or death, and subsequently an FIR is registered against him for an offence under Section 376 of the IPC which is punishable with imprisonment which may extend for life. Here, if the appellant's argument is accepted, then 'X' would not be able to apply for anticipatory bail in the subsequent case, since he is in custody for the earlier case under Section 302 of the IPC.

(2) 'Y' is in custody for an offence under Section 384 of the IPC [extortion – punishable with imprisonment for 3 years], and while in custody for this offence, an FIR is registered against him for an offence under Section 406 of the IPC [criminal breach of trust – punishable with imprisonment for 3 years]. In this example as well, if the argument of the appellant is accepted, 'Y' would not be able to apply for anticipatory bail, even though the offence is punishable with imprisonment for 3 years.

'Y', therefore, would be placed at par with a person who has committed a serious crime and would ordinarily not be granted anticipatory bail. However, by prohibiting 'Y' from even applying for anticipatory bail for an offence punishable by imprisonment for a maximum of 3 years [i.e. Section 406 of the IPC], 'Y' is placed in the same class as 'X'.

E. CONCLUSION

60. Our examination of the matter has led us to the following conclusions:

i. An accused is entitled to seek anticipatory bail in connection with an offence so long as he is not arrested in relation to that offence. Once he is arrested, the only remedy available to him is to apply for regular bail either under Section 437 or Section 439 of the CrPC, as the case may be. This is evident from para 39 of ***Gurbaksh Singh Sibbia*** *(supra).*

ii. There is no express or implied restriction in the CrPC or in any other statute that prohibits the Court of Session or the High Court from entertaining and deciding an anticipatory bail

application in relation to an offence, while the applicant is in custody in relation to a different offence. No restriction can be read into Section 438 of the CrPC to preclude an accused from applying for anticipatory bail in relation to an offence while he is in custody in a different offence, as that would be against the purport of the provision and the intent of the legislature. The only restriction on the power of the court to grant anticipatory bail under Section 438 of the CrPC is the one prescribed under sub-section (4) of Section 438 of the CrPC, and in other statutes like the Act, 1989, etc.

iii. While a person already in custody in connection with a particular offence apprehends arrest in a different offence, then, the subsequent offence is a separate offence for all practical purposes. This would necessarily imply that all rights conferred by the statute on the accused as well as the investigating agency in relation to the subsequent offence are independently protected.

iv. The investigating agency, if it deems necessary for the purpose of interrogation/investigation in an offence, can seek remand of the accused whilst he is in custody in connection with a previous offence so long as no order granting anticipatory bail has been passed in relation to the subsequent offence. However, if an order granting anticipatory bail in relation to the subsequent offence is obtained by the accused, it shall no longer be open to the investigating agency to seek remand of the accused in relation to the subsequent offence. Similarly, if an order of police remand is passed before the accused is able to obtain anticipatory bail, it would thereafter not be open to the accused to seek anticipatory bail and the only option available to him would be to seek regular bail.

v. We are at one with Mr. Dave that the right of an accused to protect his personal liberty within the contours of Article 21 of the Constitution of India with the aid of the provision of anticipatory bail as enshrined under Section 438 of the CrPC cannot be defeated or thwarted without a valid procedure established by law. He is right in his submission that such procedure should also pass the test of fairness, reasonableness and manifest non-arbitrariness on the anvil of Article 14 of the Constitution of India.

vi. Under Section 438 of the CrPC, the pre-condition for a person to apply for pre-arrest bail is a "reason to believe that he may be arrested on an accusation of having committed a non-bailable offence". Therefore, the only pre-condition for exercising the said right is the apprehension of the accused that he is likely to be arrested. In view of the discussion in the preceding paragraphs, custody in one case does not have the effect of taking away the apprehension of arrest in a different case.

vii. If the interpretation, as sought to be put forward by Mr. Luthra is to be accepted, the same would not only defeat the right of a person to apply for pre-arrest bail under Section 438 of the CrPC but may also lead to absurd situations in its practical application.

61. Before we part with the matter, we would like to underscore the importance of the rights conferred under the procedural laws as noted by a Constitution Bench of this Court in ***A.R. Antulay v. R. S. Nayak*** reported in **(1988) 2 SCC 602**. It was observed therein that no man can be denied of his rights under the Constitution and the laws. He has a right to be dealt with in accordance with the law, and not in derogation of it. This Court held that a denial of equal protection of laws, by being singled out for a special procedure not provided under the law, caused denial of rights under Article 14 of the Constitution of India. A few relevant observations are extracted hereinbelow:

> *"41. In the aforesaid view of the matter and the principle reiterated, it is manifest that the appellant has not been ordered to be tried by a procedure mandated by law, but by a procedure which was violative of Article 21 of the Constitution. That is violative of Articles 14 and 19 of the Constitution also, as is evident from the observations of the Seven Judges Bench judgment in Anwar Ali Sarkar case [(1952) 1 SCC 1 : AIR 1952 SC 75 : 1952 SCR 284 : 1952 Cri LJ 510] where this Court found that even for a criminal who was alleged to have committed an offence, a special trial would be per se illegal because it will deprive the accused of his substantial and valuable privileges of defence which, others similarly charged, were able to claim.*
>
> *xxx xxx xxx*

81. […] We proclaim and pronounce that no man is above the law, but at the same time reiterate and declare that no man can be denied his rights under the Constitution and the laws. He has a right to be dealt with in accordance with the law and not in derogation of it. This Court, in its anxiety to facilitate the parties to have a speedy trial gave directions on 16-2-1984 as mentioned hereinbefore without conscious awareness of the exclusive jurisdiction of the Special Courts under the 1952 Act and that being the only procedure established by law, there can be no deviation from the terms of Article 21 of the Constitution of India. That is the only procedure under which it should have been guided. By reason of giving the directions on 16-2-1984 this Court had also unintentionally caused the appellant the denial of rights under Article 14 of the Constitution by denying him the equal protection of law by being singled out for a special procedure not provided for by law. […]"

(Emphasis supplied)

62. Similarly, a Constitution Bench of this Court in ***State of West Bengal v. Anwar Ali Sarkar*** reported in **(1952) 1 SCC 1**, held that procedural law confers very valuable rights on a person, and their protection must be as much the object of a Court's solicitude as those conferred under the substantive law. Few pertinent observations are extracted hereinbelow:

"27. The argument that changes in procedural law are not material and cannot be said to deny equality before the law or the equal protection of the laws so long as the substantive law remains unchanged or that only the fundamental rights referred to in Articles 20 to 22 should be safeguarded is, on the face of it, unsound. The right to equality postulated by Article 14 is as much a fundamental right as any other fundamental right dealt with in Part III of the Constitution. Procedural law may and does confer very valuable rights on a person, and their protection must be as much the object of a court's solicitude as those conferred under substantive law."

(Emphasis supplied)

63. It was also sought to be argued by Mr. Luthra that the issue at hand has already been dealt with and decided by a three-Judge Bench of this Court in ***Narinderjit Singh Sahni*** *(supra)*. It was contended that the dictum laid therein is that an anticipatory bail application filed by an accused in a different case, while he is in custody in one case, would not be maintainable. However, we are unable to agree with such submission of the appellant. In the said case, the Petitioners therein, who were arrayed as accused in multiple FIRs registered at various police stations across the country, had invoked the jurisdiction of this Court under Article 32 praying for an order for bail in the nature as prescribed under Section 438 of the CrPC. The crux of the grievance of the Petitioners was that although they had secured an order of bail in one case yet they were being detained in prison on the strength of a production warrant in another matter. This, according to the petitioners, was violative of Article 21 as they were deprived of their liberty despite having been granted bail in one of the cases.

64. The aforesaid contention of the Petitioners in the said case was ultimately rejected by this Court on the ground that even if the Petitioners could be said to have been deprived of their liberty, such deprivation was in accordance with the due process of law. Having observed thus, this Court dismissed the Writ Petition filed by the Petitioners as no infraction of Article 21 was established.

65. Evidently, this Court in the aforesaid case had no occasion to go into the question of maintainability of an application for grant of anticipatory bail by an accused who is already in judicial custody in relation to some offence. On the contrary, this Court in ***Narinderjit Singh Sahni*** *(supra)* examined the issue whether a blanket order in the nature of anticipatory bail could be passed by this Court in exercise of its Writ Jurisdiction, wherein the Petitioner was arrayed as an accused in multiple criminal proceedings.

66. On the other hand, in the present case, we have decided the issue of maintainability of an anticipatory bail application filed at the instance of an accused who is already in judicial custody in a different offence and have reached the conclusion that such an application is maintainable under the scheme of the CrPC. However, it is clarified that each of such applications will have to be decided by the competent courts on their own merits.

67. In view of the aforesaid discussion, the present appeal must fail and the same is thereby dismissed.

68. The High Court of Judicature at Bombay shall now proceed to decide the anticipatory bail application filed by the respondent accused on its own merits.

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

70. The Registry shall forward one copy each of this judgment to all the High Courts across the country.

Result of the case: Appeal dismissed.

†*Headnotes prepared by:* Divya Pandey