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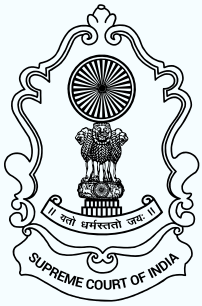

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[2024] 9 S.C.R. 313 : 2024 INSC 683

Jaseela Shaji
v.
The Union of India & Ors.

(Criminal Appeal No. 3083 of 2024)

12 September 2024

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

Issue for Consideration

Issue arose as to whether the non-supply of the statement of the person stating about the detenu's dealing in foreign exchange to the detenu, has affected the right of the detenu to make an effective representation u/Art. 22(5); and whether non-receipt of the representation and the delay in deciding the representation by the Detaining Authority and the Central Government would affect the right of detenu u/Art.22(5) of the Constitution.

Headnotes†

Constitution of India – Art. 22(5) – Protection against arrest and detention – Right of the detenu to make an effective representation – Detention order u/s. 3(1) of the COFEPOSA directing detention of the detenu to prevent him from acting in any manner prejudicial to the augmentation of foreign exchange in future – Non-supply of the statement of the person stating about the detenu's dealing in foreign exchange, to the detenu – Also, non-receipt of the representation and the delay in deciding the representation by the Detaining Authority and the Central Government – Effect of, on right of the detenu u/Art. 22(5):

Held: Though it may not be necessary to furnish copies of each and every document to which a casual or passing reference has been made by the Detaining Authority in making the order of detention, it is imperative that every such document which has been relied on by the Detaining Authority and which affects the right of the detenu to make an effective representation u/Art. 22(5) has to be supplied to the detenu – Failure to furnish copies

* Author

of such documents as relied on by the Detaining Authority would amount to violation of the fundamental right guaranteed u/Art. 22(5) – Eight factual aspects were taken into consideration by the Detaining Authority while arriving at its subjective satisfaction that the detenu has been engaging himself in activities which adversely affected the augmentation of foreign exchange resources of the country – Statement of the said person is a vital link for transactions involving the detenu – It cannot be said that the statements of the said person are just a casual or a passing reference, on the contrary, they formed the basis for arriving at a subjective satisfaction by the Detaining Authority – Documents relied on by the Detaining Authority which form the basis of the material facts which have been taken into consideration to form a chain of events could not be severed and the High Court was not justified in coming to a finding that despite eschewing of certain material taken into consideration by the Detaining Authority, the detention order can be sustained by holding that the Detaining Authority would have arrived at such a subjective satisfaction even without such material – Non-supply of the statements of the said person affected the right of the detenu to make an effective representation u/Art. 22(5) and as such, the detention is vitiated on the said ground – As regards, non-receipt of the representation and delay in deciding the representation by the Detaining Authority and the Central Government, on account of casual, callous and negligent approach of the Prison Authorities, the representation of the detenu could not reach to the Detaining Authority and the Central Government within a reasonable period – There was about nine months' delay in deciding the representation – Even otherwise, there has been a delay of 27/20 days on the part of the Central Government and the Detaining Authority in deciding the representation when it was called from the Prison Authorities after notice was issued – No explanation as to what caused such a delay in deciding the said representations – On mere casual or callous and, negligent approach on the part of the Jail Authorities in communicating the representation of the detenu, the valuable right available to detenu to have his representation decided expeditiously cannot be denied – Prison Authorities to ensure that the representations are sent to Competent Authorities immediately after the receipt thereof – In the present era of technological development, the representation can be sent through email within a day –

Competent Authority to decide the representation with utmost expedition so that the valuable right guaranteed to detenu u/ Art. 22(5) is not denied – Thus, detention order liable to be quashed and set aside – Judgment and order of the High Court quashed and set aside – Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 – S.3(1). [Paras 25, 33, 36, 39, 40, 42, 44, 58, 63, 68-72].

Constitution of India – Art. 22(5) – Protection against arrest and detention – Importance of personal liberty and individual freedom:

Held: Though the concept of personal liberty and individual freedom can be curtailed by preventive detention laws, the Courts have to ensure that the right to personal liberty and individual freedom is not arbitrarily taken away even temporarily without following the procedure prescribed by law – In the matters pertaining to personal liberty of the citizens, the Authorities are enjoined with a constitutional obligation to decide the representation with utmost expedition – Each day's delay matters in such a case – When a detention order is passed all the material relied upon by the detaining authority in making such an order must be supplied to the detenu to enable him to make an effective representation – This is required in order to comply with the mandate of Art. 22 (5), irrespective of whether the detenu had knowledge of such material or not. [Para 32]

Judicial deprecation – Detention order – Prompt transmission of the representation of the detenu to the Authorities concerned – Breach of:

Held: Practice of the Prison authorities in dealing with the valuable right of the detenu in such a casual manner is deprecated – State Government must gear up its own machinery to ensure that the representation is transmitted quickly; it reaches the Central Government as quickly as possible and is decided expeditiously – On facts, the law laid down by this Court has been given a go-bye – Though the Jail Authorities informed that the representations of the detenu were sent through ordinary post, the same were neither received by the Detaining Authority nor the Central Government – Jail Authorities ought to have ensured that the representation of the detenu reaches the concerned Authorities at the earliest. [Paras 65-67]

Case Law Cited

Ameena Begum v. State of Telangana and others [2023] 11 SCR 958 : **(2023) 9 SCC 587;** *M. Ahamedkutty v. Union of India and another* [1990] 1 SCR 209 : **(1990) 2 SCC 1;** *Radhakrishnan Prabhakaran v. State of T.N. and others* **(2000) 9 SCC 170;** *J. Abdul Hakeem v. State of T.N. and others* **(2005) 7 SCC 70;** *State of Tamil Nadu and another v. Abdullah Kadher Batcha and another* [2008] 15 SCR 1099 : **(2009) 1 SCC 333;** *Union of India v. Ranu Bhandari* [2008] 13 SCR 582 : **(2008) 17 SCC 348;** *Tara Chand v. State of Rajasthan and others* **(1981) 1 SCC 416;** *Rattan Singh v. State of Punjab and others* [1982] 1 SCR 1010 : **(1981) 4 SCC 481;** *Vijay Kumar v. State of Jammu & Kashmir and others* [1982] 3 SCR 522 : **(1982) 2 SCC 43;** *Aslam Ahmed Zahire Ahmed Shaik v. Union of India and others* [1989] 2 SCR 415 : **(1989) 3 SCC 277;** *B. Alamelu v. State of T.N. and others* **(1995) 1 SCC 306;** *Vakil Singh v. The State of J & K and another* **(1975) 3 SCC 545;** *A. Sowkath Ali v. Union of India and others* [2000] Supp. 2 SCR 48 : **(2000) 7 SCC 148;** *L.M.S. Ummu Saleema v. B.B. Gujaral* [1981] 3 SCR 647 : **(1981) 3 SCC 317– referred to.**

List of Acts

Constitution of India; Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974.

List of Keywords

Right of the detenu to make an effective representation u/Art. 22(5); Non-receipt of the representation; Delay in deciding the representation by Detaining Authority and Central Government; Detention order; Augmentation of foreign exchange; Violation of the fundamental right; Subjective satisfaction by Detaining Authority; Casual, callous and negligent approach of Prison Authorities; Technological development; Importance of personal liberty and individual freedom; Judicial deprecation; Valuable right of detenu.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 3083 of 2024

From the Judgment and Order dated 04.03.2024 of the High Court of Kerala at Ernakulam in WPCRL No. 1271 of 2023

Appearances for Parties

Shinoj K. Narayanan, Vishnu Pazhanganat, Abid Ali Beeran, K. Rajeev, Ms. Niveditha R Menon, Pranav Krishna, Aditya Verma, Tarun Kumar, Advs. for the Appellant.

Nachiketa Joshi, Sr. Adv., Gurmeet Singh Makker, Siddharth Sinha, Santosh Kumar, Aditya Shankar Dixit, Mukesh Kumar Maroria, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

B.R. Gavai, J.

1. The appellant, who is the wife of one Appisseril Kochu Mohammed Shaji (Shaji A.K.),[1] has approached this Court being aggrieved by the judgment and order dated 4th March 2024 passed by the Division Bench of the High Court of Kerala at Ernakulam in Writ Petition (Criminal) No. 1271 of 2023,[2] vide which it has dismissed the said habeas corpus petition filed by the appellant for production of the detenu, who was detained pursuant to the order of detention dated 31st August 2023[3] passed under the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974.[4]

2. By order dated 31st of July 2024, this Court allowed the present appeal; quashed and set aside the impugned judgment and order of the High Court dated 4th March 2024 in Writ Petition (Criminal) No. 1271 of 2023 so also the order dated 31st August 2023 passed by the Joint Secretary (COFEPOSA), COFEPOSA Unit, Central Economic Intelligence Bureau, Department of Revenue, Ministry of Revenue, Government of India[5] to the Government of India directing the detention of the detenu and the order dated 28th November 2023 passed by the Under Secretary, COFEPOSA Wing, Central Economic Intelligence Bureau, Department of Revenue, Ministry of

1 Hereinafter referred to as "detenu".

2 "habeas corpus petition"

3 Hereinafter referred to as "detention order"

4 Hereinafter referred to as "COFEPOSA"

5 Hereinafter referred to as "Detaining Authority"

Finance, Government of India[6] confirming the detention order of the detenu. We have directed that the detenu be released forthwith, if not required in any other case. The reasons for the same are as under:

3. Shorn of details, the facts giving rise to the present appeal are as under:

3.1 The detention order dated 31st August 2023 was passed by the Detaining Authority under Section 3(1) of the COFEPOSA, thereby directing detention of the detenu with a view to prevent him from acting in any manner prejudicial to the augmentation of foreign exchange in future.

3.2 The detenu was taken into custody on 2nd September 2023 and put in detention in Central Prisons, Poojapura, Trivandrum, Kerala.

3.3 The grounds of detention and the relied upon documents were served on the detenu on 6th September 2023.

3.4 A perusal of the grounds of detention served on the detenu would reveal that there are 12 grounds on the basis of which the detention order dated 31st August 2023 came to be passed. The Detaining Authority has relied on the following material for arriving at its subjective satisfaction:

a) Statements of the detenu recorded on 20th June 2023, 11th July 2023 and 17th July 2023 under Section 37 of FEMA;

b) Statement of Shri Suresh Babu recorded on 7th July 2023;

c) WhatsApp chats, voice calls, images recovered from the mobile phone as also 'paper slips' allegedly recovered from the detenu;

d) Statements of Ms. Preetha Pradeep recorded on 5th July 2023 and 6th July 2023.

3.5 In the grounds of detention, the detenu was further informed about his right to make representation to the Detaining Authority as well as the Chairman, COFEPOSA, Advisory Board, High Court of Kerala[7] and the Central Government through Jail Authorities.

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6 Hereinafter referred to as "Central Government"

7 Hereinafter referred to as "Advisory Board"

3.6 Accordingly, the detenu had made representations to the concerned Authorities i.e. the Detaining Authority, the Central Government and the Advisory Board. It appears that the Jail Authorities sent the said representations to the concerned Authorities through the ordinary post. However, neither the Detaining Authority nor the Central Government received the said representations. Insofar as the representation made by the detenu to the Advisory Board is concerned, the Advisory Board opined that there was sufficient cause for detention of the detenu. Hence the Central Government vide order dated 28th November 2023 confirmed the detention order and further directed that the detenu be detained for a period of one year from the date of his detention i.e. from 2nd September 2023.

3.7 Being aggrieved by the detention of the detenu, the appellant herein approached the Kerala High Court by way of habeas corpus petition being Writ Petition (Criminal) No. 1271 of 2023. By the impugned judgment and order dated 4th March 2024, the said writ petition came to be rejected.

3.8 Being aggrieved thereby, the appellant has approached this Court by way of present Appeal by special leave.

4. We have heard Shri Gaurav Aggarwal, learned Senior Counsel appearing for the appellant and Shri Nachiketa Joshi, learned Senior Counsel appearing for the respondent(s).

5. Shri Gaurav Aggarwal, learned Senior Counsel, submits that in the present case, the material against the detenu could not have led any reasonable person to come to the conclusion that there was a case made out against the detenu to detain him. The Detaining Authority has not applied his/her mind to the material in proper perspective resulting in an unsustainable order of preventive detention. The learned Senior Counsel in this respect relied on the judgment of this Court in the case of ***Ameena Begum vs. State of Telangana and others***.[8]

6. Shri Gaurav Aggarwal further submits that a perusal of the grounds of detention dated 31st August 2023 would clearly show that the

8 [2023] 11 SCR 958 : (2023) 9 SCC 587

statements of Ms. Preetha Pradeep were relied upon by the Detaining Authority while arriving at its subjective satisfaction. He submits that the said statements were admittedly not provided to the detenu. It is, therefore, submitted that non-supply of the material on which the subjective satisfaction was arrived at would affect the right of the detenu guaranteed under Article 22(5) of the Constitution of India to make an effective representation. It is, therefore, submitted that the detention order is liable to be set aside on the said ground. The learned Senior Counsel in this respect has relied on the following judgments of this Court in the cases of:

(i) ***M. Ahamedkutty vs. Union of India and another;***[9]

(ii) ***Radhakrishnan Prabhakaran vs. State of T.N. and others;***[10]

(iii) ***J. Abdul Hakeem vs. State of T.N. and others***[11]

(iv) ***State of Tamil Nadu and another vs. Abdullah Kadher Batcha and another;***[12] *and*

(v) ***Union of India vs. Ranu Bhandari.***[13]

7. Shri Gaurav Aggarwal further submits that the detenu had submitted his representation on 27th September 2023 to the Jail Authorities for onward transmission to the Detaining Authority and the Central Government. He submits that a perusal of the counter affidavit of the respondents would reveal that the Jail Authorities sent the representations of the detenu by ordinary post, which could not be traced. He submits that, in the counter affidavit it is admitted that the said representations dated 27th September 2023 were not received by the Detaining Authority and the Central Government, but after notice was issued in the present matter, records were called for from the Jail Authorities and the representations were rejected on 11th June 2024 and 12th June 2024 respectively. He submits that the delay in transmitting the representations as well as the delay caused in deciding the representations would also adversely affect the right of the detenu for effective and speedy disposal of the representations

9 [1990] 1 SCR 209 : (1990) 2 SCC 1

10 (2000) 9 SCC 170

11 (2005) 7 SCC 70

12 [2008] 15 SCR 1099 : (2009) 1 SCC 333

13 [2008] 13 SCR 582 : (2008) 17 SCC 348

and on this count also the detention order is liable to be set aside. In support of his submission, the learned Senior Counsel relied on the following judgments of this Court:

(i) Tara Chand vs. State of Rajasthan and others;[14]

(ii) Rattan Singh vs. State of Punjab and others;[15]

(iii) Vijay Kumar vs. State of Jammu & Kashmir and others;[16]

(iv) Aslam Ahmed Zahire Ahmed Shaik vs. Union of India and others;[17]

(v) B. Alamelu vs. State of T.N. and others;[18]

8. Shri Gaurav Aggarwal further submits that a perusal of the Memorandum passed by the Central Government rejecting the representation of the detenu would show that there was no real and proper consideration. He submits that no reasons are recorded in the Memorandum and, therefore, it does not reflect that there was a real or proper consideration by the Government. He, therefore, submits that the impugned order is liable to be quashed and set aside.

9. Shri Aggarwal further submits that the High Court has erroneously held that the Detaining Authority could have arrived at its subjective satisfaction even after the statement of said Ms. Preetha Pradeep was eschewed. It is submitted that the statement of Ms. Preetha Pradeep was a pertinent material which, from the perusal of the detention order would reveal, was duly taken into consideration by the Detaining Authority. He, therefore, submits that the High Court has erred in holding that non-supply of the statements of Ms. Preetha Pradeep to the detenu did not vitiate the detention order. The learned Senior Counsel, therefore, submits that the impugned judgment and order is liable to be quashed and set aside.

10. Shri Nachiketa Joshi, learned Senior Counsel appearing for the respondents, on the contrary, submits that the Detaining Authority after taking into consideration the statement of Suresh Babu and the

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14 (1981) 1 SCC 416

15 [1982] 1 SCR 1010 : (1981) 4 SCC 481

16 [1982] 3 SCR 522 : (1982) 2 SCC 43

17 [1989] 2 SCR 415 : (1989) 3 SCC 277

18 (1995) 1 SCC 306

exchange of WhatsApp messages between Suresh Babu and the detenu has rightly come to a subjective satisfaction that the detenu was engaged in illegal transactions by way of purchase and sale of illegally collected foreign currencies from NRIs and other foreign exchange dealers. He submits that the perusal of the material on record would show that the detenu has indulged himself in hawala dealings, illegal purchase, sale and carriage of foreign currencies.

11. Shri Nachiketa Joshi further submits that as per the provisions contained in Section 8(b) of the COFEPOSA, the case of detention of the detenu was referred to the State Advisory Board, Kerala High Court. The Advisory Board, after hearing the detenu and considering the material, had opined that there were sufficient grounds for the detention of the detenu.

12. The learned Senior Counsel submits that the High Court has rightly held that even if the statements of Preethi Pradeep is eschewed, the Detaining Authority could have arrived at the subjective satisfaction that the detention of the detenu was necessary.

13. The learned Senior Counsel relies on the judgment of this Court in the case of ***Vakil Singh vs. The State of J & K and another***[19] in support of his submission that the grounds must contain the pith and substance of primary facts but not subsidiary facts or evidential details.

14. The learned Senior Counsel further submits that in view of Section 5A of the COFEPOSA, even if the detention order was not sustainable on one ground, if it can be sustained on other grounds, the detention order would not be vitiated. In this respect, he relies on the judgment of this Court in the case of ***A. Sowkath Ali vs. Union of India and others***.[20]

15. Shri Nachiketa Joshi further submits that it is not necessary to furnish copy of each and every documents to which casual or passing reference may be made in the course of narration of facts and which are not relied upon by the Detaining Authority in making the order of detention. In this respect, he relies on the judgment of this Court in the case of ***L.M.S. Ummu Saleema vs. B.B. Gujaral***.[21]

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19 (1975) 3 SCC 545

20 [2000] Supp. 2 SCR 48 : (2000) 7 SCC 148

21 [1981] 3 SCR 647 : (1981) 3 SCC 317

16. Insofar as the delay in deciding the representation by the Detaining Authority and the Central Government is concerned, Shri Nachiketa Joshi, learned Senior Counsel submits that representations made by the detenu on 27th September 2023 were never received by the Detaining Authority and the Central Government. However, after the notice was issued by this Court in the present matter, the record was called from the Jail Authorities and they decided the representations on 11th June 2024 and 12th June 2024 respectively. He, therefore, submits that there is no delay in deciding the representations by the Detaining Authority or the Central Government.

CONSIDERATION

17. Though the detention order is assailed on several grounds, we propose to consider only two grounds, viz.,

(a) As to whether the non-supply of the statements of Ms. Preetha Pradeep has affected the right of the detenu to make an effective representation under Article 22(5) of the Constitution of India.

(b) As to whether non-receipt of the representation and the delay in deciding the representation by the Detaining Authority and the Central Government would also affect the right of the detenu under Article 22(5) of the Constitution.

(a) As to whether the non-supply of the statement of Ms. Preetha Pradeep has affected the right of the detenu to make an effective representation under Article 22(5) of the Constitution of India

18. In the case of ***M. Ahamedkutty vs. Union of India and another*** (supra), this Court was considering the issue as to whether non-supply of the copies of the bail application and the bail order vitiated the right of the detenu under Article 22(5) of the Constitution of India. After taking the survey of the earlier judgments, this Court observed thus:

> "**19.** The next submission is that of non-supply of the bail application and the bail order. This Court, as was observed in *Mangalbhai Motiram Patel* v. *State of Maharashtra* [(1980) 4 SCC 470: 1981 SCC (Cri) 49: (1981) 1 SCR 852] has 'forged' certain procedural safeguards for citizens under preventive detention. ***The***

constitutional imperatives in Article 22(5) are twofold: (1) The detaining authority must, as soon as may be, i.e. as soon as practicable, after the detention communicate to the detenu the grounds on which the order of detention has been made, and (2) the detaining authority must afford the detenu the earliest opportunity of making the representation against the order of detention. The right is to make an effective representation and when some documents are referred to or relied on in the grounds of detention, without copies of such documents, the grounds of detention would not be complete. The detenu has, therefore, the right to be furnished with the grounds of detention along with the documents so referred to or relied on. If there is failure or even delay in furnishing those documents it would amount to denial of the right to make an effective representation. This has been settled by a long line of decisions: *Ramachandra A. Kamat* v. *Union of India* [(1980) 2 SCC 270 : 1980 SCC (Cri) 414 : (1980) 2 SCR 1072], *Frances Coralie Mullin* v. *W.C. Khambra* [(1980) 2 SCC 275 : 1980 SCC (Cri) 419 : (1980) 2 SCR 1095], *Ichhu Devi Choraria* v. *Union of India* [(1980) 4 SCC 531 : 1981 SCC (Cri) 25 : (1981) 1 SCR 640], *Pritam Nath Hoon* v. *Union of India* [(1980) 4 SCC 525 : 1981 SCC (Cri) 19 : (1981) 1 SCR 682], *Tushar Thakker* v. *Union of India* [(1980) 4 SCC 499 : 1981 SCC (Cri) 13], *Lallubhai Jogibhai Patel v. Union of India* [(1981) 2 SCC 427 : 1981 SCC (Cri) 463], *Kirit Kumar Chaman Lal Kundaliya v. Union of India* [(1981) 2 SCC 436 : 1981 SCC (Cri) 471] and *Ana Carolina D'Souza* v. *Union of India* [1981 Supp SCC 53 (1) : 1982 SCC (Cri) 131 (1)].

20. It is immaterial whether the detenu already knew about their contents or not. In *Mehrunissa* v. *State of Maharashtra* [(1981) 2 SCC 709 : 1981 SCC (Cri) 592] it was held that the fact that the detenu was aware of the contents of the documents not furnished was immaterial and non-furnishing of the copy of the seizure list was held to be fatal. To appreciate this point one has to bear in mind that the detenu is in jail and has no access to his own

> documents. In *Mohd. Zakir* v. *Delhi Administration* [(1982) 3 SCC 216 : 1982 SCC (Cri) 695] it was reiterated that it being a constitutional imperative for the detaining authority to give the documents relied on and referred to in the order of detention pari passu the grounds of detention, those should be furnished at the earliest so that the detenu could make an effective representation immediately instead of waiting for the documents to be supplied with. The question of demanding the documents was wholly irrelevant and the infirmity in that regard was violative of constitutional safeguards enshrined in Article 22(5)."
>
> [emphasis supplied]

19. It can thus be seen that this Court, in unequivocal terms, has held that the constitutional requirements under Article 22(5) of the Constitution of India are twofold, viz., (1) the Detaining Authority must, as soon as practicable, after the detention communicate to the detenu the grounds on which the order of detention has been made, and (2) the Detaining Authority must afford the detenu the earliest opportunity of making the representation against the order of detention. It has further been held that the right is to make an effective representation and when some documents are referred to or relied on in the grounds of detention, without copies of such documents, the grounds of detention would not be complete. In unequivocal terms, it has been held that the detenu has the right to be furnished with the grounds of detention along with the documents so referred to or relied on. It has been held that failure or even delay in furnishing those documents would amount to denial of the right to make an effective representation.

20. This Court further went on to hold that it is immaterial whether the detenu already knew about their contents or not. This Court reiterated the position that it being a constitutional imperative for the detaining authority to give the documents relied on and referred to in the order of detention pari passu the grounds of detention. It has been held that there is no question of demanding the documents.

21. The High Court in the impugned judgment and order has relied on the judgments of this Court in the cases of ***Vakil Singh vs. State of J. & K. and another*** *(supra) and* ***L.M.S. Ummu Saleema vs. B.B. Gujaral*** (supra).

22. Insofar as the judgment of this Court in the case of ***Vakil Singh*** (supra) is concerned, the detention order was challenged on the following grounds:

(i) The impugned order was passed without application of mind;

(ii) Neither the grounds of detention nor the confirmation thereof were communicated and explained to the detenu;

(iii) The grounds are vague; and

(iv) The order of detention, assuming it was served, was a colourable act as the petitioner was already in jail.

23. It could thus be seen that the said case was not concerned with the issue with regard to non-supply of the material which was relied on by the Detaining Authority in the grounds of detention. As such the said judgment would not be of any assistance to the case of the respondents.

24. Insofar as the reliance on the judgment of this Court in the case of ***L.M.S. Ummu Saleema*** (supra) is concerned, the High Court relied on the following observations of this Court:

> "**5.** ….It is only failure to furnish copies of such documents as were relied upon by the detaining authority, making it difficult for the detenu to make an effective representation, that amounts to a violation of the fundamental rights guaranteed by Article 22(5). In our view it is unnecessary to furnish copies of documents to which casual or passing reference may be made in the course of narration of facts and which are not relied upon by the detaining authority in making the order of detention."

25. There can be no doubt that it is not necessary to furnish copies of each and every document to which a casual or passing reference may be made in the narration of facts and which are not relied upon by the Detaining Authority in making the order of detention. However, failure to furnish copies of such document/documents as is/are relied on by the Detaining Authority which would deprive the detenu to make an effective representation would certainly amount to violation of the fundamental right guaranteed under Article 22(5) of the Constitution of India.

26. We may also gainfully refer to the following observations of this Court in the case of ***Radhakrishnan Prabhakaran*** (supra):

> "**8.** We may make it clear that there is no legal requirement that a copy of every document mentioned in the order shall invariably be supplied to the detenu. What is important is that copies of only such of those documents as have been relied on by the detaining authority for reaching the satisfaction that preventive detention of the detenu is necessary shall be supplied to him…"

27. It could thus be seen that though this Court held that a copy of every document mentioned in the order is not required to be supplied to the detenu, copies of only such of those documents as have been relied on by the detaining authority for reaching the satisfaction that preventive detention of the detenu is necessary are required to be supplied to him.

28. In the case of ***J. Abdul Hakeem*** (supra), the position was reiterated by this Court by observing thus:

> "**8.** …From the aforesaid authorities it is clear that the detenu has a right to be supplied with the material documents on which reliance is placed by the detaining authority for passing the detention order but the detention order will not be vitiated, if the document although referred to in the order is not supplied which is not relied upon by the detaining authority for forming of its opinion or was made the basis for passing the order of detention. The crux of the matter lies in whether the detenu's right to make a representation against the order of detention is hampered by non-supply of the particular document."

29. In the case of ***Abdullah Kadher Batcha and another*** (supra), again the position was reiterated by this Court thus:

> "**7.** The court has a duty to see whether the non-supply of any document is in any way prejudicial to the case of the detenu. The High Court has not examined as to how the non-supply of the documents called for had any effect on the detenu and/or whether the non-supply was prejudicial to the detenu. Merely because copies of some documents have (*sic* not) been supplied, they cannot by any stretch of imagination be called as relied upon documents. While

examining whether non-supply of a document would prejudice a detenu, the court has to examine whether the detenu would be deprived of making an effective representation in the absence of a document. Primarily, the copies which form the ground for detention are to be supplied and non-supply thereof would prejudice the detenu. But documents which are merely referred to for the purpose of narration of facts in that sense cannot be termed to be documents without the supply of which the detenu is prejudiced."

30. This Court reiterated that, primarily, the copies which form the ground for detention are to be supplied and non-supply thereof would prejudice the detenu. It has been further held that the documents which are merely referred to for the purpose of narration of facts in that sense cannot be termed to be documents without the supply of which the detenu is prejudiced.

31. In the case of ***Ranu Bhandari*** (supra), this Court observed thus:

"**25.** Keeping in mind the fact that of all human rights the right to personal liberty and individual freedom is probably the most cherished, we can now proceed to examine the contention advanced on behalf of the parties in the facts and circumstances of this case. But before we proceed to do so, it would be apposite to reproduce hereinbelow a verse from a song which was introduced in the cinematographic version of Joy Adamson's memorable classic *Born Free* which in a few simple words encapsulates the essence of personal liberty and individual freedom and runs as follows:

"Born free, as free as the wind blows,

As free as the grass grows,

Born free to follow your heart.

Born free and beauty surrounds you,

The world still astounds you,

Each time you look at a star.

Stay free, with no walls to hide you,

You're as free as the roving tide,

So there's no need to hide.

Born free and life is worth living,

It's only worth living, if you're born free."

The aforesaid words aptly describe the concept of personal liberty and individual freedom which may, however, be curtailed by preventive detention laws, which could be used to consign an individual to the confines of jail without any trial, on the basis of the satisfaction arrived at by the detaining authority on the basis of material placed before him. The courts which are empowered to issue prerogative writs have, therefore, to be extremely cautious in examining the manner in which a detention order is passed in respect of an individual ***so that his right to personal liberty and individual freedom is not arbitrarily taken away from him even temporarily without following the procedure prescribed by law.***

26. We have indicated hereinbefore that the consistent view expressed by this Court in matters relating to preventive detention is that while issuing an order of detention, the detaining authority must be provided with all the materials available against the individual concerned, both against him and in his favour, to enable it to reach a just conclusion that the detention of such individual is necessary in the interest of the State and the general public.

27. ***It has also been the consistent view that when a detention order is passed all the material relied upon by the detaining authority in making such an order, must be supplied to the detenu to enable him to make an effective representation against the detention order in compliance with Article 22(5) of the Constitution, irrespective of whether he had knowledge of the same or not.*** These have been recognised by this Court as the minimum safeguards to ensure that preventive detention laws, which are an evil necessity, do not become instruments of oppression in the hands of the authorities concerned or to avoid criminal proceedings which would entail a proper investigation."

[emphasis supplied]

32. A perusal of the aforesaid judgment would reveal that for emphasizing the importance of personal liberty and individual freedom, this Court has reproduced Joy Adamson's memorable classic Born Free. This Court observed that though the concept of personal liberty and individual freedom can be curtailed by preventive detention laws, the Courts have to ensure that the right to personal liberty and individual freedom is not arbitrarily taken away even temporarily without following the procedure prescribed by law. It has been held that when a detention order is passed all the material relied upon by the detaining authority in making such an order must be supplied to the detenu to enable him to make an effective representation. This Court held that this is required in order to comply with the mandate of Article 22 (5) of the Constitution, irrespective of whether the detenu had knowledge of such material or not.

33. It is thus a settled position that though it may not be necessary to furnish copies of each and every document to which a casual or passing reference has been made, it is imperative that every such document which has been relied on by the Detaining Authority and which affects the right of the detenu to make an effective representation under Article 22(5) of the Constitution has to be supplied to the detenu.

34. In the light of this legal position, let us examine the impugned order.

35. The grounds on which the detention order dated 31st August 2023 has been made read thus:

> "***The following facts have been brought to my attention by the Sponsoring Authority of this COFEPOSA proposal i.e. the Directorate of Enforcement, Kochi Zonal Unit and I have gone through the facts presented by the Sponsoring Authority as mentioned below***:-
>
> i. A search was conducted on 19-06-2023 at the residence of Shri Appisseril Kochu Muhammed Shaji @ Payasam Shaji i.e you, Appisseril House, Nadakkal PO, Erattupetta, Kottayam 686121 from where Shri Appisseril Kochu Muhammed Shaji i e. you are operating your foreign currency exchange business. You stated that you were doing trading of fruits to nearby areas. During the course of

search, unaccounted Indian currency amounting to Rs 6,70,100/-, unaccounted Gold in the form of coins and biscuits weighing 110 35 Grams valued at Rs.6,08,028.5/-, unaccounted Silver weighing 1781 Grams in the form of balls and pieces valued to Rs 136246.5/- totally valuing to the tune of Rs 14,14,375/- (Fourteen Lakh Fourteen Thousand Three Hundred Seventy Five Only) were found and seized under the FFMA, 1999.

ii. During the course of search, statement of you i.e. Shri Shaji A K was recorded on 20.06.2023 under Section 37 of Foreign Exchange Management Act, 1999, wherein Mr. Shaji A.K. i.e. you have admitted that the cash in Indian currencies which was seized from your house are unaccounted and the paper slips were taken from your residence in which you noted the details of forex transactions of your work as a carrier of foreign currencies; that you were working as a commission agent for various Foreign Exchange Racketeers and handed over the illegally collected foreign currencies as well as Indian currencies to various persons inside and outside Kerala mainly at Chennai; that you were collecting foreign currencies from your customers and clients without obtaining KYC details, licenses and no invoices were generated against receipts of foreign currency; that you are doing these illegal activities on behalf of various Foreign Exchange Racketeers; that you were only concerned about the commissions which you received from such illegal activities; that the most part of your income was generated out of these illegal transactions by way of purchase and sale of illegally collected foreign currencies from NRIs and other forex dealers mainly from Suresh Babu at Kottayam, who was also operating the unaccounted foreign currency business.

iii. Further, Shri Suresh Babu in his statement recorded on 07.07.2023 also admitted having illegal foreign currency dealings with Shri Shaji A.K. i.e. you.

Furthermore, corroborative evidences in respect of illegal foreign exchange transactions between Shri Suresh Babu and Shri Shaji A.K. i.e. you have been recovered by way of analysis of WhatsApp chat, voice calls and images recovered from Shri Shaji A.K.'s i.e. your mobile which was seized during search. Shri Suresh Babu in his statement recorded on 07.07.2023 has inter alia stated that after fixing the rates through phone call, Shaji i.e. you or the person appointed by you will come to the office and collect FC with Shri Suresh Babu and also give the equivalent INR for the currency; that you also purchase FC kept by him; usually you purchase in month interval and having transaction worth of 30 lakhs for the past 2 years; that within these 2 years you had transactions worth of 2 Crores.

iv. During the Statement of Smt. Preetha Pradeep recorded on 05.07.2023, on being asked about Shaji or Payasam Shaji, a native of Eratupetta, she replied that Shaji's person will come to the shop and that they will pay him the required currency which will be collected from Suresh sir's house through Binu; that mostly the same person will come; that's why she can recognize him; that without any doubt, they will pay the cash; that Suresh sir will arrange everything; that mostly she or Binu will receive the amount brought by Shaji; that they collect that and later it will be counted; that if any shortages are found in the bundle that will be informed to Suresh sir, that not only the person who goes there with the money but many others, who came to return the money to their office through Shaji; that it is about 20 lakh rupees sent to Shaji and Rs 30 lakhs is the maximum amount Shaji brought to their office.

v. Statement of Preetha Pradeep was recorded on 06.07.2023, wherein she replied that M/s Suresh Forex Services Pvt Ltd receives INRs minimum 2 times in a month from Mr. Shaji; that each transactions contains approximately Rs 20 Lakhs to 30 Lakhs; that in return

to that Suresh will give one packet and direct her to hand over the same to the representative of Mr. Shaji.

vi. Statement of Shri Shaji A.K. i.e. you were recorded on 11.0.7.2023 wherein you, inter-alia, stated that you buy foreign currencies from foreign currency dealers and buy from people who are NRI's in Kerala when they come home; that these are done without any documents; that you mainly purchase foreign currency from traders like Suresh of Suresh Forex at Kottayam, Native of Parur Shambu, Simon from Kottayam, etc.; that you have also given currencies to people going abroad from Kerala; that mainly you sell currency to Khader from Chennai; that the currency collected from Kerala will be sent to Chennai via Madhurai by bus; that this will be given to Khader's shop or you will inform Khader that you reached Chennai and he will come to the lodge where you are staying, or Khader's people will come and collect the foreign currency from you and give you the equivalent INR; that these are also done without any documents; that other than Khader, you used to sell to Anas; that Khader's firm is at Chennai Paris and Burma Bazar, that to date, you purchased around Rs 25 crores worth of foreign currency from Kerala and sold that to Khader, that usually you used to go to Chennai; that other than you, your son Hyder Shaji, Anas Erattupetta, Siraj Erattupetta, etc. are the carries of foreign currency to Chennai by bus; that this will be given to Khader, that all these are done without keeping any accounts and documents; that the calculations prepared for your knowledge will be destroyed after the transaction is completed; that was the foreign currency transaction you made and its calculations; that the first page indicates the value of Indian currency equivalent to the rate of foreign currency; that the second page indicates the details of the persons who carry foreign currency to Chennai and the quantity of currency sent; that those were written on white paper and took its images; that

1416 means your niece Faris, next photo is Anas from Erattupetta, both of them will carry currency for you to Chennai; that the third page indicates the images of Rs 500 notes, those are damaged notes, that the next one marked us 16-6 means the transaction of Rs 9,12,167/- dated 16.06.2023; that the next page indicates the transaction done by you on 17.6.2023 and the value of INR equivalent to the foreign currency trading, that the thing written as Faris indicates the amount of Rs 24,25,750/- that Faris exchanged from Chennai and its value in INR, that SR mean the amount of Rs. 15 lakhs, you paid as per the instructions of Suresh Babu of Suresh Forex at Kottayam to SANGVI STEEL at Chennai, that this amounts you received from the staff Preetha at Suresh Forex as per the instructions of Suresh Babu; that Hyder 34 indicates the amount of Rs 34 lakhs worth of foreign currency he exchanged from Chennai; that this foreign currency was given by you; that Siraj 24 means the value of the foreign currency exchanged by Siraj from Chennai.

vii. Another statement of you i.e. Shaji A.K. was recorded on 17.07.2023, wherein you, inter-alia, stated as under:

Answer 1: I heard the voice calls in above said Hash value marked as CD-36. The voice in this call which belongs to Suresh Babu and myself. The first number in call details which was the mobile number of Suresh Babu and this number belongs to me.

Answer 2 : I heard the voice calls in above said Hash value marked as CD-37. The voice in this call which belongs to Suresh Babu and myself. The first number in call details which was the mobile number of Suresh Babu and this number belongs to me.

Answer 3: I heard the voice calls in above said Hash value marked as CD-38. The voice in this call which belongs to Suresh Babu and myself. The first number

in call details which was the mobile number of Suresh Babu and this number belongs to me.

Answer 4 : I heard the voice calls in above said Hash value marked as CD-32. The voice in this call which belongs to Suresh Babu and myself. The first number in call details which was the mobile number of Suresh Babu and this number belongs to me.

Question 5 : To whom you are selling the illegal foreign currency received from Kerala other than Khader from Chennai you mentioned in your previous statement?

Answer 5 : I sell the collected illegal foreign currency from Kerala to a person named Manikannan from Thrishnapalli in Tamil Nadu other the Khader in Chennai.

Question 6 : Do you have any authorized license or permit or acknowledgement to carry foreign currency exchange business?

Answer 6 : I don't have any authorized license, permit, acknowledgement to carry foreign currency exchange business.

viii. Further Shri Shaji A.K. @ Payasam Shaji i.e. you have disclosed the names of other carriers i.e. (i) Hyder Shaji (your son) (ii) Shri Anas from Erattupetta, (iii) Shri Siraj from Erattupetta. You further disclosed that they used to go Chennai on your directions with unaccounted foreign currencies where they handed over the currency to the Chennai based racketeers and in exchange of foreign currency, they receive Indian currency. All these transactions are unaccounted as per your admission and the records were disposed of once the transactions were completed. The entire illegal transactions to the tune of Rs 25 Crores were carried out by Shri Shaji A.K. @ Payasam Shaji i.e. you with the help of your close relatives and friends.

ix. Thus, Shri Appisseril Kochu Muhammed Shaji @ Payasam Shaji i.e. you have indulged yourself in

hawala dealings, illegal purchase, sale and carriage of foreign currencies.

x. Chapter II of Foreign Exchange Management Act, 1999 provides for "Regulation and Management of Foreign Exchange". Section 3 of Foreign Exchange Management Act, 1999, specifically prohibits dealing in foreign exchange without the general or special permission of the Reserve Bank of India. It reads thus:

"3 Dealing in foreign exchange, etc. Save as otherwise provided in this Act, rules or regulations made there under, or with the general or special permission of the Reserve Bank, no person shall-(a) deal in or transfer any foreign exchange or foreign security to any person not being an authorized person;

(b) make any payment to or for the credit of any person resident outside India in any manner;

(c) receive otherwise through an authorized person, any payment by order or on behalf of any person resident outside India in any manner.

Explanation- For the purpose of this clause, where any person in, or resident in, India receives any payment by order or on behalf of any person resident outside India through any other person (including an authorized person) without a corresponding inward remittance from any place outside India, then, such person shall be deemed to have received such payment otherwise than through an authorized person;

(d) enter into any financial transaction in India as consideration for or in association with acquisition or creation or transfer of a right to acquire, any asset outside India by any person

Explanation- For the purpose of this clause "financial transaction" means making any payment to, or for the credit of any person, or receiving any payment for, by order or on behalf of any person, or drawing, issuing or negotiating any bill of exchange or promissory note,

or transferring any security or acknowledging any debt. 4 Holding of foreign exchange, etc. -Save as otherwise provided in this Act, no person resident in India shall acquire, hold, own, possess or transfer any foreign exchange, foreign security or any immovable property situated outside India."

xi. Further, Section 4 of Foreign Exchange Management Act, 1999, specifically provides that no person resident in India shall acquire, hold, own or possess or transfer any foreign exchange, foreign security or any immovable property situated outside India, except as otherwise provided under the Act. For the contravention of the Act, rules and regulations, penalty is provided under Section 13 of the Act. This would mean that dealing in foreign exchange de hors the statutory provisions, rules and regulations would be illegal. For violation of foreign exchange regulations, penalty can believe (*sic*) and such activity is certainly an illegal activity, which is prejudicial to conservation or augmentation of foreign exchange.

xii. Shri Appisseril Kochu Muhammed Shaji @ Payasam Shaji i.e. you have indulged yourself in hawala dealings, purchase and sale of foreign currencies from retail customers without raising any invoice and has generated unaccounted income in Indian rupees and foreign currencies to the tune of Rs 25 crores. Thus, you have contravened the Section 3 and Section 4 of Foreign Exchange Management Act, 1999 and indulged in the act prejudicial to the conservation or augmentation of foreign exchange.

2. ***In view of the foregoing, I have no hesitation in arriving at the conclusion that you have been engaging yourself in activities, which have adversely affected the augmentation of foreign exchange resources of the country.*** Considering the nature and gravity of the activities, your role therein and the well-laid out manner in which you have been indulging in such prejudicial activities, all of which reflect your high potentiality and propensity of engaging yourself in such prejudicial activities in future, I

> am satisfied that unless detained, you are likely to continue to engage in the aforesaid prejudicial activities in future also. Therefore, it is necessary to detain you under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 with a view to prevent you in future from acting in any manner which is prejudicial to the augmentation of foreign exchange."
>
> [emphasis supplied]

36. It could thus be seen that 8 factual aspects have been taken into consideration by the Detaining Authority while arriving at its subjective satisfaction that the detenu has been engaging himself in activities which have adversely affected the augmentation of foreign exchange resources of the country.

37. A perusal of the narration at clauses (iv) and (v) would reveal that the said clauses refer to the statements of Preetha Pradeep recorded on 5th July 2023 and 6th July 2023. In the said statements, she has stated that Shaji's person will come to the shop and that they will pay him the required currency which will be collected from Suresh sir's house through Binu. She has further stated that mostly the same person will come; that's why she can recognize him. She has further stated that, without any doubt, they will pay the cash and that Suresh sir will arrange everything. She has stated that mostly she or Binu will receive the amount brought by Shaji. She has further stated that M/s Suresh Forex Services Pvt. Ltd. receives INRs minimum 2 times in a month from Mr. Shaji and that each transaction contains approximately Rs.20 Lakhs to Rs. 30 Lakhs. She further stated that in return to that Suresh will give one packet and direct her to handover the same to the representative of Mr. Shaji.

38. It could thus be seen that apart from the above two statements of Preetha Pradeep dated 5th July 2023 and 6th July 2023, the Detaining Authority has taken into consideration one statement of Suresh Babu recorded on 7th July 2023; three statements of the detenu recorded on 20th June 2023, 11th July 2023 and 17th July 2023; and two other factual aspects respectively.

39. It could thus also be seen that the said Preetha Pradeep is a vital link for transactions between the said Suresh Babu and the detenu. It, therefore, cannot be said that the statements of Preetha Pradeep are just a casual or a passing reference. On the contrary, the said

statements, as has been seen from the preamble of the grounds of detention as well as the beginning of paragraph 2 of the detention order dated 31st August 2023, formed the basis for arriving at a subjective satisfaction by the Detaining Authority. It is difficult to determine as to whether in the absence of the said statements of Preetha Pradeep the subjective satisfaction arrived at by the Detaining Authority could have been arrived at or not. However, the very recording of the factum of the statements of Preetha Pradeep make them a relevant aspect taken into consideration by the Detaining Authority for arriving at its subjective satisfaction.

40. Insofar as the reliance placed by the learned Senior Counsel appearing for the respondents on the provisions of section 5A of the COFEPOSA is concerned, no doubt that if the detention order is made on several grounds and if the said order is vitiated on one of the grounds and it can be sustained on the other grounds, the detention would not be vitiated. However, a distinction will have to be drawn between the detention order passed on various grounds and the detention order passed on one ground relying on various materials. If the detention order is passed on one ground taking into consideration 8 factual aspects, the question would be as to whether non-supply of the material containing the factual aspects relied on by the Detaining Authority would vitiate the detention order or not. The question, therefore, for our consideration is as to whether though the grounds of detention could be severed, whether the materials which have been relied on by the Detaining Authority for arriving at its subjective satisfaction could also be severed.

41. No doubt, as has been reiterated time and again by this Court, it may not be necessary to supply each and every document to which a passing or casual reference is made. However, all such material which has been relied on by the Detaining Authority while arriving at its subjective satisfaction will imperatively have to be supplied to the detenu.

42. In our view, the documents relied on by the Detaining Authority which form the basis of the material facts which have been taken into consideration to form a chain of events could not be severed and the High Court was not justified in coming to a finding that despite eschewing of certain material taken into consideration by the

Detaining Authority, the detention order can be sustained by holding that the Detaining Authority would have arrived at such a subjective satisfaction even without such material.

43. In this respect, we may gainfully refer to the following observation of this Court in the case of ***A. Sowkath Ali*** (supra):

> "**27.** …Section 5-A applies where the detention is based on more than one ground, not where it is based on a single ground. Same is also the decision of this Court in the unreported decision of *Prem Prakash* v. *Union of India* [Crl. A. No. 170 of 1996 dated 7-10-1996 (see below at p. 163)] decided on 7-10-1996 relying on *K. Satyanarayan Subudhi* v. *Union of India* [1991 Supp (2) SCC 153 : 1991 SCC (Cri) 1013]. Coming back to the present case we find really it is a case of one composite ground. ***The different numbers of the ground of detention are only paragraphs narrating the facts with the details of the document which is being relied on but factually, the detention order is based on one ground, which is revealed by Ground (1)(xvi) of the grounds of detention which we have already quoted hereinbefore. Thus on the facts of this case Section 5-A has no application in the present case***".
>
> [emphasis supplied]

44. In that view of the matter, we have come to a considered conclusion that non-supply of the statements of Preetha Pradeep has affected the right of the detenu to make an effective representation under Article 22(5) of the Constitution of India and as such, the detention is vitiated on the said ground.

(b) As to whether non-receipt of the representation and the delay in deciding the representation by the Detaining Authority and the Central Government would also affect the right of the detenu under Article 22(5) of the Constitution.

45. It is undisputed position that the detenu has submitted his representation on 27th September 2023 to the Jail Authorities for onward transmission of the same to the Detaining Authority and the Central Government.

46. It will be relevant to refer to certain averments made in the counter affidavit filed on behalf of respondents Nos. 1 and 2, which would show that how the representation of the detenu was dealt with.

> "The contents of the ground C taken in the instant petition are incorrect and denied. It is submitted that the office of Director General (DG), CEIB never received any representation from or on behalf of the detenu/the husband of the petitioner. However, after receipt of this petition, the office of the jail authorities was contacted. The jail authorities informed that three representations dated 27.09.2023 addressed to the Joint Secretary (COFEPOSA), Director General, CEIB and the Chairman, COFEPOSA Advisory Board were submitted by the detenu/the husband of the petitioner. The jail authorities sent the said representations to the concerned authorities through Ordinary Post. However, neither the Joint Secretary (COFEPOSA) nor the Director General, CEIB received the said representations. Since the said representations were sent by the ordinary post, they cannot be tracked to know where the said ordinary posts have stuck. Hence the question of non-disposal of the representations by the concerned authorities do not arise."

47. It is thus clear that the detenu had made representations on 27th September 2023, addressed to the Detaining Authority, Central Government and the Advisory Board. The Jail Authorities had merely forwarded the said representations through ordinary post. The said representations neither reached the Detaining Authority nor the Central Government. The perusal of the statements made in the counter affidavit would clearly show that since the said representations were sent by ordinary post, they also could not be tracked. It is further stated in the counter affidavit that after the notice was issued by this Court in the present matter, the ground with regard to non-disposal of the representations of the detenu came to the notice of the concerned Authorities. As such, the representations were sought from the Jail Authorities through email. After receiving the same from the Jail Authorities, the same were placed before the concerned authorities, which were rejected on 11th June 2024 and 12th June 2024 respectively. It is further averred in the counter affidavit that

the Memoranda dated 12th June 2024 to that effect were sent to the detenu/the husband of the appellant.

48. It is thus clear that the representations dated 27th September 2023 of the detenu was rejected by the Detaining Authority and the Central Government on 11th June 2024 and 12th June 2024 respectively i.e. after a period of almost 9 months from the date of making the same.

49. In this respect, it will be apposite to refer to the observation of this Court in the case of ***Tara Chand vs. State of Rajasthan and others***[22] wherein this Court was considering the delay of one month and five days in communicating the representation of the detenu from the jail to the detaining authority. This Court observed that:

> "**9.** In spite of these evasive answers contained in para 21, it is clear that the representation dated February 23, 1980 of the detenu made by him through the jail authorities reached the detaining authority only on March 27, 1980. It was substantially in the same terms as the representation addressed to the Central Government for revocation of the detention under Section 11. ***This delay of one month and five days in communicating the representation of the detenu from the jail to the detaining authority demonstrates the gross negligence and extreme callousness with which the representation made by the detenu was dealt with by the respondents or their agents.*** Even after this huge delay, the representation was sent to the Collector for comments, and no intimation has been sent to the detenu about the fate of his representation dated February 23, 1980, addressed to the detaining authority. In fact, as it appears from the counter, the detaining authority refused to consider the same merely because the detenu had requested that this representation be forwarded to the Advisory Board, also. ***The mere fact that the meeting of the Advisory Board had been held earlier was not a valid excuse for the detaining authority in not considering the representation of the detenu at all.***

22 (1981) 1 SCC 416

> **10. It is well settled that in case of preventive detention of a citizen, Article 22(5) of the Constitution enjoins that the obligation of the appropriate Government or of the detaining authority to afford the detenu the earliest opportunity to make a representation and to consider that representation speedily is distinct from the Government's obligation to constitute a Board and to communicate the representation, amongst other materials, to the Board to enable it to form its opinion and to obtain such opinion. In the instant case, there has been a breach of these constitutional imperatives**."
>
> [emphasis supplied]

50. This Court in unequivocal terms held that the delay of one month and five days in communicating the representation of the detenu from the jail to the detaining authority demonstrates the gross negligence and extreme callousness with which the representation made by the detenu was dealt with by the respondents or their agents. It has been further held that Article 22(5) of the Constitution enjoins that the obligation of the appropriate Government or of the detaining authority to afford the detenu the earliest opportunity to make a representation and to consider that representation speedily is distinct from the Government's obligation to constitute a Board and to communicate the representation, amongst other materials, to the Board to enable it to form its opinion and to obtain such opinion.

51. It is thus clear that merely because the Advisory Board opined that the order of detention was sustainable, it does not absolve the agents of the Detaining Authority/the Central Government to immediately forward the representation to the Competent Authority and the Detaining Authority or the Central Government to consider and decide such a representation speedily.

52. In the case of ***Rattan Singh vs. State of Punjab and others*** (supra), this Court found that the representation of the detenu made to the State Government was decided expeditiously. However, insofar as the said representation made to the Central Government is concerned, either it was not forwarded or someone tripped somewhere. The inevitable result was that the detenu was deprived of a valuable right to defend and assert his fundamental right to personal liberty. Chief Justice Y.V. Chandrachud, speaking for the Bench, observed thus:

"**4.** There is no difficulty insofar as the representation to the Government of Punjab is concerned. But the unfortunate lapse on the part of the authorities is that they overlooked totally the representation made by the detenu to the Central Government. The representations to the State Government and the Central Government were made by the detenu simultaneously through the Jail Superintendent. The Superintendent should either have forwarded the representations separately to the Governments concerned or else he should have forwarded them to the State Government with a request for the onward transmission of the other representation to the Central Government. Someone tripped somewhere and the representation addressed to the Central Government was apparently never forwarded to it, with the inevitable result that the detenu has been unaccountably deprived of a valuable right to defend and assert his fundamental right to personal liberty. Maybe that the detenu is a smuggler whose tribe (and how their numbers increase) deserves no sympathy since its activities have paralysed the Indian economy. But the laws of preventive detention afford only a modicum of safeguards to persons detained under them and if freedom and liberty are to have any meaning in our democratic set-up, it is essential that at least those safeguards are not denied to the detenus. Section 11(1) of COFEPOSA confers upon the Central Government the power to revoke an order of detention even if it is made by the State Government or its officer. That power, in order to be real and effective, must imply the right in a detenu to make a representation to the Central Government against the order of detention. The failure in this case on the part either of the Jail Superintendent or the State Government to forward the detenu's representation to the Central Government has deprived the detenu of the valuable right to have his detention revoked by that Government. The continued detention of the detenu must therefore be held illegal and the detenu set free.

5. In *Tara Chand* v. *State of Rajasthan* [(1980) 2 SCC 321 : 1980 SCC (Cri) 441] it was held by this Court that even

> an inordinate delay on the part of the Central Government in consideration of the representation of a detenu would be in violation of Article 22(5) of the Constitution, thereby rendering the detention unconstitutional. In *Shyam Ambalal Siroya v. Union of India* [(1980) 2 SCC 346 : 1980 SCC (Cri) 447] this Court held that when a properly addressed representation is made by the detenu to the Central Government for revocation of the order of detention, a statutory duty is cast upon the Central Government under Section 11, COFEPOSA to apply its mind and either revoke the order of detention or dismiss the petition and that a petition for revocation of an order of detention should be disposed of with reasonable expedition. Since the representation was left unattended for four months, the continued detention of the detenu was held illegal. In our case, the representation to the Central Government was not forwarded to it at all."

53. This Court observed that, maybe the detenu was a smuggler whose tribe (and how their numbers increase) deserved no sympathy since its activities had paralysed the Indian economy, but the laws of preventive detention afforded only a modicum of safeguards to persons detained under them. It has been observed that it was essential that at least those safeguards are not denied to the detenus. This Court observed that the failure in that case either on the part of the Jail Superintendent or the State Government to forward the detenu's representation to the Central Government had deprived the detenu of the valuable right to have his detention revoked by that Government.

54. Relying on the earlier judgments, this Court held that since the representation was left unattended for four months, the continued detention of the detenu was illegal.

55. In the case of ***Vijay Kumar vs. State of Jammu & Kashmir and others*** (supra), this Court observed thus:

> "**13.** ….There are two time-lags which may be noticed. Representation admittedly handed in to the Superintendent of Jail on July 29, 1981, at Jammu reached Srinagar, the summer capital of the State on August 12, 1981, which shows a time-lag of 14 days. The second time-lag is, from

> our point of view, more glaring. Even though the concerned office was made aware of the fact by the wireless message of the Superintendent of Jail, Jammu, dated July 29, 1981, that a representation of the detenu has been sent by post, the first query about its non-receipt came as per the wireless message dated August 6, 1981. That can be overlooked, but it has one important message. The concerned office was aware of the fact that a representation has already been made and a duplicate was sent for. With the background of this knowledge trace the movement of the representation from the date of its admitted receipt being August 12, 1981. If the representation was received on August 12, 1981, and the same office disposed it of on August 31, 1981, there has been a time-lag of 19 days and the explanation in that behalf in the affidavit of Shri Salathia is far from convincing. In our opinion, in the facts of this case this delay, apart from being inordinate, is not explained on any convincing grounds."

56. This Court found that the delay of 14 days in transmitting the representation from Jammu to Srinagar and 19 days in deciding the same vitiated the detention order.

57. In the case of ***Aslam Ahmed Zahire Ahmed Shaik vs. Union of India and others*** (supra), this Court was again considering a similar factual scenario. The detenu had handed over the representation to the Superintendent of Central Prison on 16th June 1988, who callously ignored it and left the same unattended for a period of seven days and forwarded the same to the Government on 22nd June 1988. This Court surveyed the earlier decisions and observed thus:

> **"5.** This Court in *Sk. Abdul Karim v. State of W.B.* [(1969) 1 SCC 433] held: (SCC p. 439, para 8)
>
> > "The right of representation under Article 22(5) is a valuable constitutional right and is not a mere formality."
>
> **6.** This view was reiterated in *Rashid Sk.* v. *State of W.B.* [(1973) 3 SCC 476 : 1973 SCC (Cri) 376] while dealing with the constitutional requirement of expeditious consideration of the petitioner's representation by the Government as

spelt out from Article 22(5) of the Constitution observing thus: (SCC p. 478, para 4)

> "The ultimate objective of this provision can only be the most speedy consideration of his representation by the authorities concerned, for, without its expeditious consideration with a sense of urgency the basic purpose of affording earliest opportunity of making the representation is likely to be defeated. This right to represent and to have the representation considered at the earliest flows from the constitutional guarantee of the right to personal liberty — the right which is highly cherished in our Republic and its protection against arbitrary and unlawful invasion."

7. It is neither possible nor advisable to lay down any rigid period of time uniformly applicable to all cases within which period the representation of detenu has to be disposed of with reasonable expedition but it must necessarily depend on the facts and circumstances of each case. The expression "reasonable expedition" is explained in *Sabir Ahmed v. Union of India* [(1980) 3 SCC 295 : 1980 SCC (Cri) 675] as follows: (SCC p. 299, para 12)

> "What is 'reasonable expedition' is a question depending on the circumstances of the particular case. No hard and fast rule as to the measure of reasonable time can be laid down. But it certainly does not cover the delay due to negligence, callous inaction, avoidable red-tapism and unduly protracted procrastination."

8. See also *Vijay Kumar v. State of J&K* [(1982) 2 SCC 43 : 1982 SCC (Cri) 348] and *Raisuddin* v. *State of U.P.* [(1983) 4 SCC 537 : 1984 SCC (Cri) 16] .

9. Thus when it is emphasised and re-emphasised by a series of decisions of this Court that a representation should be considered with reasonable expedition, it is imperative on the part of every authority, whether in

merely transmitting or dealing with it, to discharge that obligation with all reasonable promptness and diligence without giving room for any complaint of remissness, indifference or avoidable delay because the delay, caused by slackness on the part of any authority, will ultimately result in the delay of the disposal of the representation which in turn may invalidate the order of detention as having infringed the mandate of Article 22(5) of the Constitution.

10. A contention similar to one pressed before us was examined by this Court in *Vijay Kumar case* [(1982) 2 SCC 43 : 1982 SCC (Cri) 348] wherein the facts were that the representation of the detenu therein dated 29-7-1981 was forwarded to Government by the Superintendent of Jail on the same day by post followed by a wireless message, but according to the Government, the representation was not received by them. Thereafter, a duplicate copy was sent by the Jail Superintendent on being requested and the same was received by the Government on 12-8-1981. Considering the time lag of 14 days in the given circumstances of that case, this Court though overlooked the same and allowed the writ petition on the subsequent time lag, made the following observation: (SCC pp. 49-50, para 12)

> "The jail authority is merely a communicating channel because the representation has to reach the Government which enjoys the power of revoking the detention order. The intermediary authorities who are communicating authorities have also to move with an amount of promptitude so that the statutory guarantee of affording earliest opportunity of making the representation and the same reaching the Government is translated into action. The corresponding obligation of the State to consider the representation cannot be whittled down by merely saying that much time was lost in the transit. If the Government enacts a law like the present Act empowering certain

> authorities to make the detention order and also simultaneously makes a statutory provision of affording the earliest opportunity to the detenu to make his representation against his detention, to the Government and not the detaining authority, of necessity the State Government must gear up its own machinery to see that in these cases the representation reaches the Government as quickly as possible and it is considered by the authorities with equal promptitude. Any slackness in this behalf not properly explained would be denial of the protection conferred by the statute and would result in invalidation of the order."

11. Reverting to the instant case, we hold that the above observation in *Vijay Kumar case* [(1982) 2 SCC 43 : 1982 SCC (Cri) 348] will squarely be applicable to the facts herein. Indisputably the Superintendent of Central Prison of Bombay to whom the representation was handed over by the detenu on 16-6-1988 for mere onward transmission to the Central Government has callously ignored and kept it in cold storage unattended for a period of seven days, and as a result of that, the representation reached the Government eleven days after it was handed over to the Jail Superintendent. Why the representation was retained by the Jail Superintendent has not at all been explained in spite of the fact that this Court has permitted the respondent to explain the delay in this appeal, if not before the High Court.

12. In our view, the supine indifference, slackness and callous attitude on the part of the Jail Superintendent who had unreasonably delayed in transmitting the representation as an intermediary, had ultimately caused undue delay in the disposal of the appellant's representation by the Government which received the representation eleven days after it was handed over to the Jail Superintendent by the detenu. This avoidable and unexplained delay has resulted in rendering the continued detention of the appellant illegal and constitutionally impermissible."

58. It could thus be seen that this Court in unequivocal terms held that the intermediary authorities who are communicating authorities are also required to move with an amount of promptitude so that the statutory guarantee of affording earliest opportunity of making the representation and the same reaching the Government is translated into action. This Court expressed the need of the State Government to gear up its own machinery to see that in these cases the representation reaches the Government as quickly as possible and it is considered by the authorities with equal promptitude. It has been held that any slackness in this behalf not properly explained would be denial of the protection conferred by the statute and would result in invalidation of the order.

59. The position of law as laid down in the case of ***Aslam Ahmed Zahire Ahmed Shaik*** (supra) was reiterated by a bench of 3 learned Judges of this Court in the case of ***B. Alamelu vs. State of T.N. and others*** (supra).

60. In the present case, it is an admitted position that though the detenu had made a representation on 27th September 2023 to the Jail Authorities for onward transmission of the same to the Detaining Authority and the Central Government, it is merely stated in the counter affidavit that the Jail Authorities informed that the representations dated 27th September 2023 were submitted by the detenu. The Jail Authorities had sent the said representations to the concerned authorities through ordinary post. It is stated that however, neither the Detaining Authority nor the Central Government received the said representations. It is further stated that the said representations were sent by the ordinary post and since the said representations were sent by ordinary post, they could not be tracked to know where the said ordinary posts have stuck. It is further averred that only after a notice was issued in the present matter, the said representations were sought from the Jail Authorities and the same came to be rejected on 11th June 2024 and 12th June 2024 respectively.

61. Memoranda dated 12th June 2024 further show that the Director General, CEIB being the Central Government received the representation of the detenu through Superintendent, Central Prison & Correctional Home, TVPM-12 vide his letter dated 11th May 2024 and the representation was received by the Detaining Authority through email on 22nd May 2024. However, there is no mention in the counter

affidavit as to when the said representations were in fact received by the Central Government and the Detaining Authority. Presumably, if it is held that the representation would have been received by the Central Government within 2 or 3 days from the date of dispatch thereof that will bring the date of receipt on 14/15th May 2024.

62. Even if it is presumed that the said representations were received on 15th May 2024 and 22nd May 2024 respectively, even then there is a delay of about 27 days in deciding the said representation by the Central Government and 20 days by the Detaining Authority.

63. No explanation as to what caused such a delay in deciding the said representations of the detenu is offered in the counter affidavit.

64. Firstly, we find that the Superintendent of the Central Prison & Correctional Home has acted in a thoroughly callous and casual manner. In spite of there being catena of judgments by this Court that it is the duty of the transmitting authorities to transmit the representation of the detenu promptly and it is the corresponding duty of the concerned authorities to consider the said representation and to decide it swiftly, the same has been followed only in breach in the present matter.

65. In the present case, it has been casually stated that though the Jail Authorities had informed that the representations of the detenu were sent through ordinary post, the same were neither received by the Detaining Authority nor the Central Government. We deprecate the practice of the Prison Authorities in dealing with the valuable right of the detenu in such a casual manner.

66. In spite of this Court clearly observing in the case of ***Vijay Kumar*** (supra) that the State Government must gear up its own machinery to ensure that the representation is transmitted quickly; it reaches the Central Government as quickly as possible and is decided expeditiously. In the present case, the law laid down by this Court has been given a go-bye.

67. The Jail Authorities ought to have ensured that the representation of the detenu reaches the concerned Authorities at the earliest. In the present era of technological advancement, the Jail Authorities could have very well sent the copies of the representation to the Detaining/Appropriate Authority either by email or at least a physical copy could have been sent by Speed Post (acknowledgment due)

so that there could have been some evidence of the said being sent to the competent authority and could have been tracked.

68. We are of the considered view that merely because there has been a casual or callous and, in fact, negligent approach on the part of the Jail Authorities in ensuring that the representation of the detenu is communicated at the earliest, the valuable right available to the detenu to have his representation decided expeditiously cannot be denied.

69. As already discussed herein above, there has been a delay of almost about 9 months in deciding the representations made by the detenu. Even otherwise, from the Memoranda dated 12th June 2024, as already discussed herein above, there would be at least 27/20 days' delay on the part of the Central Government and the Detaining Authority in deciding the representation of the detenu after it reached them subsequent to the filing of the present appeal.

70. We may only reiterate what has been laid down in the earlier judgments of this Court that the Prison Authorities should ensure that the representations are sent to the Competent Authorities immediately after the receipt thereof. In the present era of technological development, the said representation can be sent through email within a day. It is further needless to reiterate that the Competent Authority should decide such representation with utmost expedition so that the valuable right guaranteed to the detenu under Article 22(5) of the Constitution is not denied. In the matters pertaining to personal liberty of the citizens, the Authorities are enjoined with a constitutional obligation to decide the representation with utmost expedition. Each day's delay matters in such a case.

71. In the present matter, we find that on account of casual, callous and negligent approach of the Prison Authorities, the representation of the detenu could not reach to the Detaining Authority and the Central Government within a reasonable period. There has been about 9 months' delay in deciding the representation. Even otherwise, accepting the stand of the respondents as made in the counter affidavit, there has been a delay of 27/20 days on the part of the Central Government and the Detaining Authority in deciding the representation when it was called from the Prison Authorities after notice was issued in the present matter. We further find that the detention order is liable to be quashed and set aside on this ground also.

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

(i) The appeal is allowed;

(ii) The judgment and order of the High Court dated 4th March 2024 in Writ Petition (Criminal) No. 1271 of 2023 is quashed and set aside.

(iii) The order dated 31st August 2023 passed by the Joint Secretary (COFEPOSA) to the Government of India directing the detention of the detenu is quashed and set aside.

(iv) The order dated 28th November 2023 passed by the Under Secretary, Government of India confirming the detention order of the detenu – Appisseril Kochu Mohammed Shaji (Shaji A.K.) is quashed and set aside.

(v) The detenu is directed to be released forthwith, if not required in any other case.

Result of the Case: Appeal allowed.

†*Headnotes prepared by:* Nidhi Jain

[2024] 9 S.C.R. 354 : 2024 INSC 689

Kimneo Haokip Hangshing
v.
Kenn Raikhan & Ors.

(Civil Appeal No. 10549 of 2024)

13 September 2024

[Sudhanshu Dhulia* and Ahsanuddin Amanullah, JJ.]

Issue for Consideration

Issue arose as to whether the Court can dismiss an election petition at the very threshold on an application u/Ord. VII r. 11 CPC or that the petition needs a detailed consideration by the Court.

Headnotes†

Representation of the People Act, 1951 – ss. 83, 86 – Contents of the petition – Trial of election petition – Appellant elected in the General Elections to the State Legislative Assembly – Election petition by the respondent-contestant from the same seat, challenging the election of the appellant alleging that the appellant did not disclose her assets in her nomination papers and had indulged in corrupt practices in the election – Application u/Ord. VII r. 11 CPC read with s. 86 for rejection of the election petition by the appellant – Dismissed by the High Court holding that the election petition discloses a cause of action and that there is substantial compliance of the requirements provided under provisions of RPA and thus the election petition cannot be dismissed u/Ord. VII r. 11 application – Interference with:

Held: Not called for – Perusal of s. 83 shows that an election petition should, inter alia, contain a concise statement of material facts and particulars of any corrupt practices which is alleged against the returned candidate, etc. – Proviso to s. 83(1) requires that the election petition to be accompanied by an affidavit in prescribed form to support the allegations of corrupt practices – Election petition should not be rejected at the very threshold where there is a "substantial compliance" of the provisions – In the election petition, the respondent pleaded

* Author

there was non- compliance with the requirement of furnishing true and correct information by the appellant – On a perusal of the petition as a whole, including the averments stated, it is clear that a cause of action has been disclosed by the respondent – Whether the appellant has concealed her investments and her income, and thus her nomination has been improperly accepted, is a triable issue – Also, affidavit, which is required as per the proviso to s. 83(1)(c) has to be given in Form 25 as per the Conduct of Election Rules, 1961 – Code of Civil Procedure, 1908 – Ord. VII r. 11. [Paras 6, 8, 9, 12]

Case Law Cited

G.M. Siddeshwar v. Prasanna Kumar [2013] 4 SCR 1107 **: (2013) 4 SCC 776;** *Thangjam Arunkumar v. Yumkham Erabot Singh* [2023] 11 SCR 392 **: 2023 SCC OnLine SC 1058 – referred to.**

List of Acts

Code of Civil Procedure, 1908; Representation of the People Act, 1951; Conduct of Election Rules, 1961.

List of Keywords

Non disclosure of assets in nomination papers; Corrupt practices; Rejection of the election petition; Cause of action; Election Petition to be accompanied by affidavit in prescribed form; Substantial compliance; Nomination.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 10549 of 2024

From the Judgment and Order dated 05.07.2023 of the High Court of Manipur at Imphal in MC (El.Pet.) No. 66 of 2022 in El. Pet. No. 34 of 2022.

Appearances for Parties

D N Goburdhan, Sr. Adv., B. Krishna Prasad, Mrs. Rajani K Prasad, Mrs. Sunita Rani Singh, Advs. for the Appellant.

Ahanthem Henry, Ahanthem Rohen Singh, Tadup Tana Tara, Mohan Singh, Aniket Rajput, Ms. Khoisnam Nirmala Devi, Kumar Mihir, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Sudhanshu Dhulia, J.

Leave granted.

2. The appellant before this Court is a Member of Legislative Assembly (hereinafter **"MLA"**) and was elected from the 46-Saikul Assembly Constituency in the 12th General Elections to the Manipur Legislative Assembly, which were held in 2022.

The respondent, who was also a contestant from the same seat, filed an Election Petition before the High Court of Manipur challenging the result of the election on the grounds that the appellant has not disclosed her assets in her nomination papers and that she had indulged in "corrupt practices" in the election. The appellant filed an application under Order VII Rule 11 of the Code of Civil Procedure, 1908 (**"CPC"**) read with Section 86 of the Representation of the People Act, 1951 (**"RPA"**) for rejection of the petition, which was dismissed. The application dismissed by the High Court on 05.07.2023 is presently under challenge before this Court.

3. The respondent in his Election Petition *inter alia* raised the following grounds in challenge to the election of the appellant:

> "(1) Because the [appellant] has been declared as the returned/successful candidate by improperly accepting the nomination paper despite the concealment of the asset and investment of about Rs. 2 crore for land development in the said property of land and construction inside the agricultural land mentioned in her Form 26 affidavit…
>
> (2) Because the [appellant] had concealed her total income for Financial Year 2021-22 and shown as Rs. 0 even though she was serving as Committee Officer at Secretariat of Manipur Legislative Assembly till 31.12.2021."

4. Before the High Court, the present appellant then moved an application under Order VII Rule 11 for rejection of the petition on the grounds that it does not disclose any cause of action as it does not specify any corrupt practices alleged to have been committed by the appellant, nor is there any averment regarding concealment

of her income/assets. Therefore, the Election Petition does not comply with the requirements of Section 83 of RPA and ought to be dismissed at the threshold.

5. The High Court vide the impugned order held that whether the appellant had any income or not and whether he had given a wrong declaration at the time of his nomination needs to be looked into in trial for which evidence has to be led by the parties and examined by the Court. The petition cannot be dismissed under Order VII Rule 11 application. Consequently, the application under Order VII Rule 11 filed by the appellant was dismissed. Aggrieved, the appellant is now before us.

6. Section 83 of the RPA is reproduced below:

> "(1) An election petition—
>
> (a) shall contain a concise statement of the material facts on which the petitioner relies;
>
> (b) shall set forth full particulars of any corrupt practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice; and
>
> (c) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (5 of 1908) for the verification of pleadings:
>
> Provided that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof.
>
> (2) Any schedule or annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition."
>
> (emphasis supplied)

A perusal of the section shows that an Election Petition should, *inter alia,* contain a concise statement of material facts and particulars of any corrupt practices which is alleged against the returned candidate, etc. Further, the Proviso to Section 83(1) of the Act requires that

the Election Petition shall also be accompanied by an affidavit in prescribed form to support the allegations of corrupt practices.

7. Over the years, Election Petitions have been filed invariably on the grounds which are similar to the ones raised before this Court.

The only question is whether the Court can dismiss such a petition at the very threshold on an application under Order VII Rule 11 CPC or that the petition needs a detailed consideration by the Court. The answer to this will depend upon what kind of statutory compliances have been made in the Election Petition.

The case of the present appellant before this Court is that if the provisions as referred above, wherein material details have to be given by the respondent and particularly the details of corrupt practices etc., has to be strictly construed and any deviation by the respondent on this requirement shall make the petition liable to be dismissed at the very threshold.

All the same, this is not what is the requirement of law. Rather the settled position of law here is that an Election Petition should not be rejected at the very threshold where there is a "substantial compliance" of the provisions.

8. Thus, we will have to see whether "substantial compliance" of Section 83(1)(a) and 83(1)(b) has been done by the respondent.

In para 15 of the Election Petition, the respondent has pleaded that construction worth approx. Rs. 2 crores has taken place on agricultural land of the appellant, however, the column for investment in land through construction has been left empty by the appellant. Thereafter, the respondent has also pleaded that the appellant was serving as a Committee Officer in the Assembly Secretariat, Manipur Legislative Assembly till 31.12.2021, yet, she has shown her income for FY 2021-22 as Rs.0/-, which is untrue.

In para 16 of the Election Petition, the respondent has referred to Section 33 of RPA and alleged non-compliance with the requirement of furnishing true and correct information by candidates. Further, in ground A (as reproduced above) it is asserted that since the appellant has concealed her investment of Rs. 2 crores in her land, her nomination papers ought to have been rejected.

On a perusal of the petition as a whole, including the averments reproduced above, it is clear that a cause of action has been disclosed by the respondent. Whether the appellant has concealed her investments and her income, and thus her nomination has been improperly accepted, is a triable issue.

9. Secondly, the affidavit, which is required as per the proviso to Section 83(1)(c) of RPA has to be given in Form 25 as per the Conduct of Election Rules, 1961, where Rule 94A reads as under:

> **"94A. Form of affidavit to be filed with election petition.—** The affidavit referred to in the proviso to subsection (1) of section 83 shall be sworn before a magistrate of the first class or a notary or a commissioner of oaths and shall be in Form 25."

The relevant portion of Form 25 is also reproduced below:

> I, _____, the petitioner in the accompanying election petition calling in question the election of Shri/Shrimati _____ (Respondent No.__) in the said petition) make solemn affirmation/oath and say—
>
> (a) that the statements made in paragraphs _____ of the accompanying election petition about the commission of the corrupt practice of _____ and the particulars of such corrupt practice mentioned in paragraphs _____ of the same petition and in paragraphs _____ of the Schedule annexed thereto are true to my knowledge;
>
> (b) that the statements made in paragraphs _____ of the said petition about the commission of the corrupt practice of _____ and the particulars of such corrupt practice given in paragraphs _____ of the said petition and in paragraphs _____ of the Schedule annexed thereto are true to my information…

10. A question had come up before a three Judge Bench of this Court in ***G.M. Siddeshwar v. Prasanna Kumar*** ***(2013) 4 SCC 776*** as to whether an Election Petition is liable to be dismissed at the very threshold even if the allegations of corrupt practices of a returned candidate have not been given by a petitioner in terms of the proviso in Section 83(1)(c) of RPA. The finding of this Court was

that this cannot be done even if an affidavit is not filed in terms of the proviso. What is mandatory, however, is that there should be substantial compliance. In other words, if substantial compliance in terms of furnishing all that is required under the law has been given, the petition cannot be summarily dismissed.

11. In a more recent case also from Manipur (***Thangjam Arunkumar v. Yumkham Erabot Singh*****, 2023 SCC OnLine SC 1058),** this Court upheld the dismissal of the returning candidate's Order VII Rule 11 application by the Manipur High Court in an Election Petition. The Court after referring to and applying the test laid down in ***Siddeshwar (supra)*** held as follows:

> "14. The position of law that emerges for the above referred cases is clear. The requirement to file an affidavit under the proviso to Section 83(1)(c) is not mandatory. It is sufficient if there is substantial compliance. As the defect is curable, an opportunity may be granted to file the necessary affidavit."

12. In view of the reasons stated above, we see no reason to interfere with the finding of the High Court of Manipur that the Election Petition discloses a cause of action and that there is substantial compliance of the requirements provided under provisions of RPA and thus the petition cannot be dismissed under Order VII Rule 11 CPC.

13. The appeal is, therefore, dismissed.

14. Interim order(s), if any, shall stand vacated.

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

Result of the Case: Appeal dismissed.

†*Headnotes prepared by:* Nidhi Jain

[2024] 9 S.C.R. 361 : 2024 INSC 681

Raghuveer Sharan
v.
District Sahakari Krishi Gramin Vikas Bank & Anr.

(Criminal Appeal No(s). 2764 of 2024)

10 September 2024

[Prashant Kumar Mishra* and Prasanna Bhalachandra Varale, JJ.]

Issue for Consideration

Whether in the facts and circumstances of the case, the appellant is entitled for protection under Section 132 of the Evidence Act, 1872 as his statement was recorded earlier at the pre-summoning stage as a witness for the complainant/respondent bank.

Headnotes†

Evidence Act, 1872 – s.132 – Code of Criminal Procedure, 1973 – s. 319 – A criminal complaint was filed, the appellant was also examined as one of the witnesses of the respondent bank, wherein he admitted having changed the tenure of the Fixed Deposit from 3 years to 10 years and later on to 15 years – This statement of the appellant was recorded at the pre-summoning stage on 19.03.2016 – Subsequently, during trial, PW-1 was examined in-chief on 31.03.2022 wherein he made the statement that it was the appellant who made the interpolation in the Fixed Deposit document – Thereafter, the respondent-bank submitted an application u/s. 319 Cr.P.C. for arraying the appellant as additional accused and same was allowed – Appellant preferred criminal revision petition, which was dismissed – Correctness:

Held: In the instant case, the appellant was summoned as an additional accused u/s. 319 of the Cr.P.C. not only on the basis of his pre-summoning statement but on the basis of the statement of PW-1 who was examined as a witness on 31.03.2022 – Had the appellant been proposed as an additional accused on the basis of his statement, he would have been summoned immediately after his pre-summoning statement was recorded on 19.03.2016 – Thus, the present is a case where the appellant has been summoned as an additional accused on the basis of the statement of PW1 –

* Author

The proviso to Section 132 offers statutory immunity against self-incrimination providing that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution or be proved against him in any criminal proceedings except a prosecution for giving false evidence by such answer – Thus, the only protection available is, a witness cannot be subjected to prosecution on the basis of his own statement – It nowhere provides that there is complete and unfettered immunity to a person even if there is other substantial evidence or material against him proving his prima facie involvement – Reverting to the issue as to whether there is *prima facie* material against the appellant for summoning him as an accused in exercise of power u/s. 319 Cr.P.C. – It is to be seen that in his statement during trial recorded on 31.03.2022, PW-1 has categorically stated in para 5 of the examination-in-chief that the interpolations by applying fluid have been made under the initials and signatures of the appellant – Thus, there is *prima facie* material for exercise of power u/s. 319 Cr.P.C. [Paras 24, 25, 27]

Evidence Act, 1872 – Proviso to Section 132:

Held: The proviso to Section 132 of the Act is based on the maxim *nemo Tenetur prodere seipsum* i.e. no one is bound to criminate himself and to place himself in peril – In this regard the law in England, (with certain exceptions) is that a witness need not answer any question, the tendency of which is to expose the witness, or to feed hand of the witness, to any criminal charge, penalty or forfeiture – The privilege is based on the principle of encouraging all persons to come forward with evidence, by protecting them, as far as possible, from injury or needless annoyance in consequence of so doing – This absolute privilege, in some cases tended to bring about a failure of justice, for the allowance of the excuse, particularly when the matter to which the question related was in the knowledge solely of the witness, deprived the court of the information which was essential to its arriving at a right decision – In order to avoid this inconvenience, Section 132 of the Act, withdrew this absolute privilege and affords only a qualified privilege – The witness is deprived of the privilege of claiming excuse from testifying altogether; but, while subjecting him to compulsion, the legislature, in order to remove any inducement to falsehood, declared that evidence so obtained should not be used against him, except for the purpose in the Act declared. [Paras 12, 13]

Evidence Act, 1872 – s.132 – Whether the qualified privilege under the proviso to Section 132 of the Act, grants complete

immunity to a person who has deposed as a witness (and made statements incriminating himself), notwithstanding the availability of other material with the prosecution:

Held: The qualified privilege under the proviso to Section 132 of the Act, is intended to ensure that all the evidence is placed before the Court to reach a just conclusion – In view of this Court, it is not fathomable that a provision in the Evidence Act, the primary purpose of which was to ensure that all the material is before the Court and ensure that the ends of justice are met, could itself grant a blanket immunity to a witness (albeit complicit) – Such an interpretation would be unsustainable – Needless to say, that his statement cannot be used for any purpose whatsoever for the purposes of bringing such witness to trial – Thus, the qualified privilege under the proviso to Section 132 of the Act does not grant complete immunity from prosecution to a person who has deposed as a witness (and made statements incriminating himself). [Para 20]

Evidence Act, 1872 – Code of Criminal Procedure, 1973 – What is the course available to a Court, which in the course of trial is confronted with evidence, other than the statement of the witness (against whom incriminating material is available); Whether the Court can rely upon the statement of the witness for invoking the provisions of Section 319 Cr.P.C.; Whether reference to any statement tendered by the witness would vitiate the order under Section 319 Cr.P.C.:

Held: There cannot be an absolute embargo on the Trial Court to initiate process under Section 319 Cr.P.C., merely because a person, who though appears to be complicit has deposed as a witness – The finding to invoke Section 319 Cr.P.C., must be based on the evidence that has come up during the course of Trial – There must be additional, cogent material before the Trial Court apart from the statement of the witness – An order for initiation of process under Section 319 Cr.P.C. against a witness, who has deposed in the trial and has tendered evidence incriminating himself, would be tested on the anvil that whether only such incriminating statement has formed the basis of the order under Section 319 Cr.P.C. – At the same time, mere reference to such statement would not vitiate the order – The test would be as to whether, even if the statement of witness is removed from consideration, whether on the basis of other incriminating material, the Court could have proceeded under Section 319 Cr.P.C. [Paras 22, 23]

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R. Dinesh Kumar alias Deena v. State represented by Inspector of Police and another [2015] 5 SCR 605 **: (2015) 7 SCC 497;** *Sashi Jena and Others v. Khadal Swain and another* [2004] 2 SCR 260 **: (2004) 4 SCC 236;** *The Queen v. Gopal Doss & Anr.* **ILR 3 Mad 271 – referred to.**

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List of Acts

Evidence Act, 1872; Code of Criminal Procedure, 1973; Constitution of India.

List of Keywords

Section 132 of Evidence Act,1872; Section 319 of Code of Criminal Procedure, 1973; Statement of witness at pre-summoning stage; Interpolation in the document; Additional accused; *Nemo Tenetur prodere seipsum*; Absolute privilege; Qualified privilege; Blanket immunity to witness; Incriminating evidence; Additional material; Cogent material.

Case Arising From

CRIMINAL APPELLATE/INHERENT JURISDICTION: Criminal Appeal No(s). 2764 of 2024

From the Judgment and Order dated 09.11.2023 of the High Court of M.P. Principal Seat at Jabalpur in CRR No. 1925 of 2023

With

Contempt Petition (C) No. 508 of 2024 In Criminal Appeal No(s). 2764 of 2024

Appearances for Parties

Vivek K Tankha, Sr. Adv., Ms. Kajal Sharma, Rajiv Bakshi, Vipul Tiwari, Advs. for the Appellant.

Saurabh Mishra, Anoop George Chowdhary, Mrs. June Chowdhary, Sr. Advs., Abhinav Shrivastava, Shivang Rawat, Ms. Amrita Kumari, Sarvam Ritam Khare, Akash Shukla, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Prashant Kumar Mishra, J.

CRIMINAL APPEAL NO(s). 2764 OF 2024

1. The appellant seeks to challenge the judgment and order dated 09.11.2023 passed by the High Court of Madhya Pradesh in Criminal Revision No. 1925 of 2023 whereby the High Court has dismissed the appellant's revision application affirming the order passed by the Special Court MP/MLA) Gwalior on 17.04.2023 in exercise of power under Section 319 of the Code of Criminal Procedure, 1973[1] to summon the appellant as an accused.

2. The facts of the case, briefly stated, are that in the year 1998, one Rajendra Bharti was the President of the complainant/respondent no. 1[2] which is now under liquidation. At the relevant time, accused Savitri Shyam (since deceased), (mother of the accused Rajendra Bharti), moved an application on 24.08.1998 for creating a Fixed Deposit of Rs. 10,00,000/- for a period of 3 years with the respondent bank, in her capacity as the President of Shyam Sunder Shyam Sansthan, Datia, Madhya Pradesh. The amount was deposited with the respondent bank vide 2 separate deposits of Rs. 8.5 Lakhs and Rs. 1.5 Lakhs respectively. However, subsequently, these challans were interpolated under the initial of the appellant who was working as the Cashier of the respondent bank at the relevant time. Due to the interpolation, the Fixed Deposit for 3 years was converted to Fixed Deposit for 10 years by committing forgery. In the bank ledger also interpolation and forgery were made by striking off the period of "3 years" to make "15 years" under the initial of the appellant.

3. When the criminal complaint was filed, the appellant was also examined as one of the witnesses of the respondent bank, wherein he admitted having changed the tenure of the Fixed Deposit from 3 years to 10 years and later on to 15 years. This statement of the appellant was recorded at the pre-summoning stage on 19.03.2016. However, subsequently, during trial, PW-1/Narendra Singh Parmar

1 'Cr.P.C.'

2 'respondent bank'

was examined-in-chief on 31.03.2022 wherein he made the statement that it was the appellant who made the interpolation in the Fixed Deposit document.

4. After the statement of PW-1/ Narendra Singh Parmar was recorded, the respondent bank submitted application under Section 319 Cr.P.C. for arraying the appellant and one Rakesh Bharti (brother of Rajendra Bharti) as additional accused.

5. The trial court vide its order dated 17.04.2023 allowed the application partly by summoning the appellant, while rejecting the same qua Rakesh Bharti. Pursuant to the summoning, charges have already been framed against the appellant on 15.06.2023.

6. The trial court's order dated 17.04.2023 was challenged before the High Court. However, under the impugned judgment and order, the High Court dismissed the criminal revision petition preferred by the appellant.

SUBMISSIONS

7. Mr. Vivek K. Tankha, learned senior counsel appearing for the appellant has argued that the appellant was entitled to the benefit under Section 132 of the Indian Evidence Act, 1872[3] and he could not be held accountable for the statement made by him. It is also argued that the evidence available on record do not make out any prima facie case against the appellant for summoning him as an accused under Section 319 Cr.P.C. It is further submitted that the power under Section 319 Cr.P.C. can be exercised only in a case when there is prima facie material giving rise to grave suspicion against the person with respect to commission of offence. Reference is made to **R. Dinesh Kumar alias Deena v. State represented by Inspector of Police and another**.[4]

8. Per contra, Mr. Saurabh Mishra, learned senior counsel appearing for the respondent bank would argue that since the appellant is made accused on the basis of statement made by PW-1/Narendra Singh Parmar recorded in course of trial on 31.03.2022 and not on the basis of appellant's pre-summoning statement recorded on

3 'of the Act'

4 [2015] 5 SCR 605 : (2015) 7 SCC 497

19.03.2016, therefore, Section 132 of the Act, has no application in the facts and circumstances of the case. It is also argued that the statement recorded at the pre-summoning stage is not admissible in evidence as held by this Court in **Sashi Jena and Others v. Khadal Swain and another**.[5]

ANALYSIS

9. The issue to be decided herein is whether in the facts and circumstances of the case, the appellant is entitled for protection under Section 132 of the Act, as his statement was recorded earlier at the pre-summoning stage as a witness for the complainant/ respondent bank.

10. Before proceeding further, it would be appropriate to refer and reproduce the provisions contained in Section 132 of the Indian Evidence Act, 1872 as under: -

> "**132. Witness not excused from answering on ground that answer will criminate. -**
>
> A witness shall not be excused from answering any question, as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind:
>
> Proviso:- Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him, in any criminal proceeding, except a prosecution for giving false evidence by such answer."

11. In order to have clear understanding of the sweep and import of the provisions contained in Section 132 of the Act and the proviso, in particular, it is necessary to dwell on the principle on which the provision is introduced in the statute.

12. The proviso to Section 132 of the Act is based on the maxim nemo *Tenetur prodere seipsum* i.e. no one is bound to criminate himself

5 [2004] 2 SCR 260 : (2004) 4 SCC 236

and to place himself in peril. In this regard the law in England, (with certain exceptions) is that a witness need not answer any question, the tendency of which is to expose the witness, or to feed hand of the witness, to any criminal charge, penalty or forfeiture.[6] The privilege is based on the principle of encouraging all persons to come forward with evidence, by protecting them, as far as possible, from injury or needless annoyance in consequence of so doing.[7] This absolute privilege, in some cases tended to bring about a failure of justice, for the allowance of the excuse, particularly when the matter to which the question related was in the knowledge solely of the witness, deprived the court of the information which was essential to its arriving at a right decision.

13. In order to avoid this inconvenience, Section 132 of the Act, withdrew this absolute privilege and affords only a qualified privilege. The witness is deprived of the privilege of claiming excuse from testifying altogether; but, while subjecting him to compulsion, the legislature, in order to remove any inducement to falsehood, declared that evidence so obtained should not be used against him, except for the purpose in the Act declared.

14. It must also be borne in mind that the proviso to Section 132 of the Act is also an extension of the protection enshrined under Article 20(3) of the Constitution of India which confers a fundamental right that "no person accused of any offence shall be compelled to be a witness against himself". Under the constitutional scheme, the right is available only to a person who is accused of an offence, the proviso to Section 132 of the Act, in extension, creates a statutory immunity in favour of a witness who in the process of giving evidence in any suit or in any civil or criminal proceeding makes a statement which criminates himself. It is settled that the proviso to Section 132 of the Act is a necessary corollary to the principle enshrined under Article 20(3) of the Constitution of India which confers a fundamental right that "no person accused of any offence shall be compelled to be a witness against himself ".[8]

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6 *See Woodroffe & Amir Ali, Law of Evidence, Twenty-first edition, 2020 pp.4377 (Syn 132.1) R v. Gopal Dass, (1881) 3 Mad 271*

7 *WM Best, A Treatise on the Principles of Evidence, 4th Edn, H Sweet, London, 1866, p 126*

8 *Laxmipat Choraria v. State of Maharashtra AIR 1968 SC 938*

15. A perusal of the legislative history would reveal that the object of the law is to secure evidence which could not have been obtained. The purpose for granting such a statutory immunity was to enable the court to reach a just conclusion (and thus assisting the process of law).

16. In **R. Dinesh Kumar alias Deena** (supra), the two judges Bench of this Court observed, after referring to Justice Muttusami Ayyar's opinion in the matter of "**The Queen vs. Gopal Doss & Anr**."[9] that the policy under Section 132 of the Act appears to be to secure the evidence from whatever sources it is available for doing justice in a case brought before the court. In the course of securing such evidence, if a witness who is under obligation to state the truth because of the Oath taken by him makes any statement which will criminate or tend to expose such a witness to a "penalty or forfeiture of any kind etc.", the proviso grants immunity to such a witness by declaring that "no such answer given by the witness shall subject him to any arrest or prosecution or be proved against him in any criminal proceeding". This Court in **R. Dinesh Kumar alias Deena** (supra) further observed in para 47 that no prosecution can be launched against the maker of a statement falling within the sweep of Section 132 of the Act on the basis of the "answer" given by a person while deposing as a "witness" before a Court. We are in agreement with the view taken by this Court in **R. Dinesh Kumar alias Deena** (supra). However, the facts of the present case compel us to consider the matter in a different perspective as to when apart from his own statement made by a witness, he is still protected under the proviso of Section 132 of the Act when there is other material against him for summoning as an accused. In **R. Dinesh Kumar alias Deena** (supra) a witness examined as PW-64 during trial was sought to be summoned by moving an application under Section 319 Cr.P.C. The Trial Court dismissed the application, and the High Court affirmed the dismissal order. The High Court, in the said case, observed in para 64 that PW-64 cannot be prosecuted by summoning him as an additional accused under Section 319 Cr.P.C. on the basis of his evidence in the Sessions Case. However, the High Court held that PW-64 could be separately prosecuted for an offence under Section 120B

9 ILR 3 Mad 271

of the Indian Penal Code, 1860[10] read with Section 302 of IPC if independent evidence other than the statement under Section 164 Cr.P.C. of PW-64 and his evidence in Sessions Case are available to prosecute him along with other accused.

17. This Court in **R. Dinesh Kumar alias Deena** (supra) refused to consider the issue as to whether a witness protected under the proviso of Section 132 of the Act could be separately prosecuted if independent evidence is also available by observing thus in paras 7 & 52:

> "7. In our opinion, the second conclusion recorded by the High Court contained in para 64 extracted above, is really uncalled for in the context of the issue before the High Court. The question before the High Court was whether the Sessions Court was justified in declining to summon PW 64 in exercise of its authority under Section 319 of the Cr.P.C. as an additional accused in Sessions Case No. 73 of 2009. We, therefore, will examine only the question whether on the facts mentioned earlier the Sessions Court is obliged to summon PW 64 as an additional accused exercising the power under Section 319 of the Cr.P.C.
>
> 52. In the light of the above two decisions, the proposition whether the prosecution has a liberty to examine any person as a witness in a criminal prosecution notwithstanding that there is some material available to the prosecuting agency to indicate that such a person is also involved in the commission of the crime for which the other accused are being tried, requires a deeper examination."

18. In other words, if the privilege made available to a witness under the proviso to Section 132 of the Act is interpreted as a complete immunity, notwithstanding availability of other evidence, it is capable of abuse. In a particular case, a dishonest Investigating officer could cite a person as a witness in the report under Section 173 of the Cr.P.C, being fully aware that there is incriminating material against such person. Similarly, a man complicit of an offence, could very well institute a complaint under Section 200 Cr.P.C., examine himself as

10 'IPC'

a witness, make statements incriminating himself and claim immunity from prosecution. It could also be so that an investigating officer, under an honest mistake examines a man complicit of an offence as a witness in the case, the Court upon examining the other evidence, could conclude that the witness was complicit in the offence, the question then would be whether there would be complete bar on the Court to prosecute such witness for the offence on the basis of such other material.

19. The question that would then arise is whether the qualified privilege under the proviso to Section 132 of the Act, grants complete immunity to a person who has deposed as a witness (and made statements incriminating himself), notwithstanding the availability of other material with the prosecution?

a. Whether a Court while trying an offence, is barred from initiating process under Section 319 of the Cr.P.C, against a witness in the said proceeding on the basis of other material on record?

20. As noted above, the qualified privilege under the proviso to Section 132 of the Act, is intended to ensure that all the evidence is placed before the Court to reach a just conclusion. In our view, it is not fathomable that a provision in the Evidence Act, the primary purpose of which was to ensure that all the material is before the Court and ensure that the ends of justice are met, could itself grant a blanket immunity to a witness (albeit complicit). Such an interpretation in our opinion would be unsustainable. Needless to say, that his statement cannot be used for any purpose whatsoever for the purposes of bringing such witness to trial. As such we hold that the qualified privilege under the proviso to Section 132 of the Act does not grant complete immunity from prosecution to a person who has deposed as a witness (and made statements incriminating himself).

21. However, the next question that would arise is what is the course available to a Court, which in the course of trial is confronted with evidence, other than the statement of the witness (against whom incriminating material is available)? Whether the Court can rely upon the statement of the witness for invoking the provisions of Section 319 Cr.P.C? Whether reference to any statement tendered by the witness would vitiate the order under Section 319 Cr.P.C?

22. There cannot be an absolute embargo on the Trial Court to initiate process under Section 319 Cr.P.C., merely because a person, who

though appears to be complicit has deposed as a witness. The finding to invoke Section 319 Cr.P.C., must be based on the evidence that has come up during the course of Trial. There must be additional, cogent material before the Trial Court apart from the statement of the witness.

23. An order for initiation of process under Section 319 Cr.P.C against a witness, who has deposed in the trial and has tendered evidence incriminating himself, would be tested on the anvil that whether only such incriminating statement has formed the basis of the order under Section 319 Cr.P.C. At the same time, mere reference to such statement would not vitiate the order. The test would be as to whether, even if the statement of witness is removed from consideration, whether on the basis of other incriminating material, the Court could have proceeded under Section 319 Cr.P.C.

24. In the case at hand, the appellant has been summoned as an additional accused under Section 319 of the Cr.P.C. not only on the basis of his pre-summoning statement but on the basis of the statement of PW-1/Narendra Singh Parmar who was examined as a witness on 31.03.2022. Had the appellant been proposed as an additional accused on the basis of his statement, he would have been summoned immediately after his pre-summoning statement was recorded on 19.03.2016. Thus, the present is a case where the appellant has been summoned as an additional accused on the basis of the statement of PW-1/Narendra Singh Parmar.

25. The proviso to Section 132 offers statutory immunity against self-incrimination providing that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution or be proved against him in any criminal proceedings except a prosecution for giving false evidence by such answer. Thus, the only protection available is, a witness cannot be subjected to prosecution on the basis of his own statement. It nowhere provides that there is complete and unfettered immunity to a person even if there is other substantial evidence or material against him proving his prima facie involvement. If this complete immunity is read under the proviso to Section 132 of the Act, an influential person with the help of a dishonest Investigating Officer will provide a legal shield to him by examining him as a witness even though his complicity in the offence is writ large on the basis of the material available in the case.

26. As earlier stated, **R. Dinesh Kumar alias Deena** has not examined the issue discussed in the preceding paragraph, therefore, **R. Dinesh Kumar alias Deena** (supra) is of no assistance to the appellant.

27. Reverting to the issue as to whether there is prima facie material against the appellant for summoning him as an accused in exercise of power under Section 319 Cr.P.C. It is to be seen that in his statement during trial recorded on 31.03.2022, PW-1/Narendra Singh Parmar has categorically stated in para 5 of the examination-in-chief that the interpolations by applying fluid have been made under the initials and signatures of the appellant. Thus, there is prima facie material for exercise of power under Section 319 Cr.P.C.

28. For the foregoing, the criminal appeal deserves to be and is hereby dismissed.

CONTEMPT PETITION (C) NO. 508 OF 2024 IN CRIMINAL APPEAL NO(s). 2764 OF 2024 @ SPECIAL LEAVE PETITION (CRL.) NO. 3419 OF 2024.

29. In view of the above judgment passed in Criminal Appeal, the proceedings in this Contempt Petition stand closed and the interim order passed therein is vacated. The Contempt Petition is disposed of.

Result of the Case: Appeal dismissed.
Contempt petition disposed of.

†*Headnotes prepared by:* Ankit Gyan

[2024] 9 S.C.R. 374 : 2024 INSC 682

Pune Municipal Corporation
v.
Sus Road Baner Vikas Manch and Others

(Civil Appeal Nos. 258-259 of 2021)

12 September 2024

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

Issue for Consideration

National Green Tribunal, Principal Bench, New Delhi disposed of the OA preferred by the Sus Road Baner Vikas Manch, respondent No. 1 herein, by directing the Pune Municipal Corporation to close the Garbage Processing Plant (GPP) operated by Noble Exchange Environment Solution Pune LLP, at Baner, Pune and to shift the same to an alternate location in terms of the guidelines issued by the Central Pollution Control Board.

Headnotes†

Municipal Solid Waste (Management and Handling) Rules, 2000 – Solid Waste Management Rules, 2016 – Sus Road Baner Vikas Manch, respondent No. 1 sought to restrain the respondent-Concessionaire from operating the GPP at Survey No. 48/2/1 at Baner, Pune since the same had been established without following the procedure prescribed by law.

Held: A perusal of the proposed Land Use Map for village Balewadi, Baner which was notified on 31.12.2002 would reveal that in the said Plan, Plot No. 48/2/1 was reserved for GPP – The commencement certificates insofar as all other buildings are also after the Draft Development Plan was sanctioned by the State Government – It is clear that the commencement certificates in respect of all the buildings are after the date on which the Plot was reserved for GPP – In the instant case, the application for authorization, the grant of authorization, the grant of Environment Clearance by the SEIAA and the commencement of the GPP all have taken place prior to 08.04.2016 i.e. the date on which the 2016 Rules came into force – As such, the Tribunal has grossly erred in observing that the GPP in question was covered by the 2016 Rules – A perusal of the Minutes of the 11th Consent Committee Meeting of 2015-

* Author

16 held on 09.11.2015 would clearly reveal that the MPCB was following the practice of granting authorization under the 2000 Rules which covers all the aspects of the consent – The MPCB started granting Consent only after 06.09.2021 and prior to that, it was only issuing a composite authorization – The Tribunal has failed to take this into consideration – Also, a perusal of the Checklist issued by the MPCB which was published in 2003 would reveal that the requirement of no-development zone or a buffer zone is only with regards to landfill sites – The contention of the respondent No. 1 that under the 2000 Rules, a buffer zone is required to be maintained for GPP is without substance – The finding of the Tribunal that initially the plot where GPP was constructed was reserved for Bio-diversity Park is also erroneous and factually incorrect – As discussed, the plot in question has been reserved for the GPP since inception and it is only the adjoining plot which was reserved for the Bio-diversity Park – Apart from that, the closure of the GPP in question rather than subserving the public interest, would be detrimental to public interest – If the GPP in question is closed, the organic waste generated in the western part of Pune city would be required to be taken all the way throughout the city to Hadapsar which is in the eastern part of the city – This will undoubtedly lead to foul odour and nuisance to the public – Therefore of the considered view that the impugned judgment and order of the Tribunal deserves to be quashed and set aside – However, the appellant-Corporation as well as the respondent-Concessionaire is cautioned that they should take necessary steps so that the residents residing in the nearby buildings do not have to suffer on account of foul odour – The appellant-Corporation and the respondent-Concessionaire are directed to ensure that all the suggestions/recommendations made by NEERI should be strictly complied with. [Paras 26, 34, 35, 38, 39, 40, 41, 42, 47, 50]

Case Law Cited

State of Punjab v. Harnek Singh [2002] 1 SCR 1060 **: (2002) 3 SCC 481 : (2002) INSC 84 – relied on.**

Bhavya Height Co-operative Housing Society Ltd. v. Mumbai Metropolitan Region Development Authority and Others **(2019) SCC OnLine Bom 1075 – referred to.**

List of Acts

Municipal Solid Waste (Management and Handling) Rules, 2000; Solid Waste Management Rules, 2016.

List of Keywords

Garbage Processing Plant (GPP); Public interest; Organic waste; Foul odour; Nuisance to public; Odour control system; Slurry sampling; Waste processing; Recycling; Treatment; Right to clean environment.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 258-259 of 2021

From the Judgment and Order dated 27.10.2020 and 22.12.2020 of the National Green Tribunal, Principal Bench at New Delhi in Original Application No.210 of 2020 and Review Application No.49 of 2020 in Original Application No. 210 of 2020 respectively

With

Civil Appeal Nos. 265-266 of 2021

Appearances for Parties

Ms. Aishwarya Bhati, A.S.G., K. Parameshwar, A. N. S. Nadkarni, Rahul Kaushik, Sr. Advs., Aman Varma, Dhaval Mehrotra, Rahul Garg, Adith Deshmukh, Ms. Aditi Desai, Ms. Riya Wasade, Ms. Nishtha Kumar, Shrom Sethi, Ms. Pallavi Mohan, S. S. Rebello, Ms. Deepti Arya, Ms. Arzu Paul, Ninad Laud, Saurabh Kulkarni, Ivo D'Costa, Guru Prasad Naik, Ms. Ishani Shekhar, Ms. Anshula Vijay Kumar Grover, Mukesh Verma, Pankaj Kumar Singh, Kamal Kumar Pandey, Ms. Vatsala Tripathi, Pawan Kumar Shukla, Shashank Singh, Devanshu Gupta, Krishna Prakash Dubey, Avijit Roy, Gurmeet Singh Makker, Ms. Swarupma Chaturvedi, Piyush Beriwal, Mohdd. Akhil, Ishaan Sharma, Ms. Ruchi Kohli, Rohan Gupta, Aaditya Aniruddha Pande, Siddharth Dharmadhikari, Shrirang B. Varma, Bharat Bagla, Sourav Singh, Aditya Krishna, Ms. Preet S. Phanse, Adarsh Dubey, Advs. for the appearing parties.

Judgment / Order of the Supreme Court

Judgment

B.R. Gavai, J.

1. These Civil Appeals challenge the judgment and order dated 27th October 2020 passed by the National Green Tribunal, Principal Bench,

New Delhi[1] in Original Application[2] No. 210 of 2020[3] wherein the Tribunal disposed of the OA preferred by the Sus Road Baner Vikas Manch, Respondent No. 1 herein, by directing the Pune Municipal Corporation[4] to close the Garbage Processing Plant[5] operated by Noble Exchange Environment Solution Pune LLP,[6] at Baner, Pune and to shift the same to an alternate location in terms of the guidelines issued by the Central Pollution Control Board,[7] within 4 months from the date of the order. Having directed the closure of the GPP, the Tribunal further granted liberty to the Maharashtra Pollution Control Board[8] to recover environmental compensation on the basis of 'polluter pays' principle from the GPP for the entirety of the period during which the environmental norms were violated by the GPP. Seeking a review of the aforesaid order, the respondent-Concessionaire, the operator of the aforementioned GPP, filed a Review Application being No. 49 of 2020 which came to be dismissed by the Tribunal vide order dated 22nd December 2020. The said order is also under challenge in these present appeals.

2. We have two Civil Appeals before us. The first set of Civil Appeals being CA Nos. 258-259 of 2021 have been filed by the Pune Municipal Corporation. The second set of Civil Appeals being CA Nos. 265-66 of 2021 have been filed by Noble Exchange Environment Solution Pune LLP. For the sake of clarity and to avoid confusion, the parties will be referred to according to their positions in the first set of civil appeals.

3. The facts which give rise to the present appeals are as under:

3.1. Upon the municipal limits of the appellant-Corporation being extended to include Baner Balewadi, a Development Plan was drawn up in 2002 wherein land situated at Survey No. 48/2/1 in Baner Balewadi, Pune was reserved for the purpose

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1 Hereinafter referred to as the 'Tribunal'.

2 Hereinafter referred to as OA

3 Earlier OA No. 34 of 2019 (WZ). Initially the OA was preferred before the Tribunal, Western Zone, and was subsequently transferred to the Principal Bench, New Delhi.

4 Hereinafter referred to as the 'appellant-Corporation'.

5 Hereinafter referred to as the 'GPP'.

6 Hereinafter referred to as the 'respondent-Concessionaire'.

7 Hereinafter referred to as the "CPCB".

8 Hereinafter referred to as the "MPCB".

of a GPP. In 2004, a public hearing was conducted for the purpose of drawing up a new development plan, subsequent to which, the Planning Committee of the appellant-Corporation submitted its report on 30th December 2004 to the General Body of the appellant-Corporation earmarking the aforesaid land for a GPP in the Draft Development Plan of 2005. The said Plan was submitted to the Government of Maharashtra on 29th November 2005 whereafter the Plan came to be sanctioned by the State Government vide Notification dated 18th September, 2008.

3.2. In the interregnum, while the aforesaid Plan was pending approval, in 2005, permission was sought for constructing a residential building being Tarai Heights at a site which was approximately 100 metres away from the earmarked land in Survey No. 48/2/1 and subsequently, in 2008, permission was sought for constructing another residential building being 52 Green Woods at a site which was approximately 140 metres away from the aforesaid earmarked land. In said fashion, over the years, permission for construction of similar such residential projects were sought in and around the earmarked portion of land. The last such permission was sought in 2019 for the construction of a residential building being Platinum 9.

3.3. Subsequent to the Development Plan of 2005 being sanctioned, the appellant-Corporation and the respondent-Concessionaire, Respondent No. 7 in the first appeal, entered into a Concession Agreement on 30th March 2015 for setting up an Organic Waste Processing Plant at the land situated at Survey No. 48/2/1. The purpose of the Concession Agreement was to set up an operational waste-processing facility where pre-segregated, non-compacted organic waste received from the appellant-Corporation would be crushed into a slurry, after removing any non-biodegradable material, and the said slurry would be transported to a facility in Talegaon where raw biogas would be generated from the slurry. The Concession Agreement was for a period of 30 years.

3.4. Subsequently, in compliance of the notification dated 14th August 2006, for the setting up of GPP, the respondent-Concessionaire sought Environment Clearance from the State

Level Environment Impact Assessment Authority[9] on 13th August 2015. Thereafter, pursuant to a public hearing the SEIAA granted Environment Clearance to the respondent-Concessionaire for establishment of Organic Waste Management Plant on 1st February 2016. The Environment Clearance accorded was to be valid for a period of 7 years.

3.5. In the meanwhile, on 2nd December 2015, the MPCB, Respondent No. 2 herein, granted authorization to the respondent-Concessionaire to set up and operate a solid waste processing/disposal plant in accordance with the Municipal Solid Waste (Management and Handling) Rules, 2000.[10] The said authorization was valid till 31st December 2016.

3.6. The authorization granted by the MPCB was subsequently renewed on two occasions. On 4th May 2017, the MPCB further granted authorization to the appellant-Corporation to set up and operate waste processing/recycling/treatment/disposal facilities at various sites, 48 in total, including at the concerned site i.e. Survey No. 48/2/1, at Baner, Pune. The said authorization was to be valid till 31st December 2021. The authorization was renewed once again on 3rd August 2022 and the same is valid up till 31st July 2027.

3.7. In 2019, Respondent No.1-Sus Road Baner Vikas Manch, a registered Trust that had been established to protect the interests of the citizens residing at the Sus Road and Baner areas in Pune, preferred an OA being No. 34 of 2019 before the National Green Tribunal, Western Zone, seeking to restrain the respondent-Concessionaire from operating the aforementioned GPP at Survey No. 48/2/1 at Baner, Pune since the same had been established without following the procedure prescribed by law.

3.8. Deeming it appropriate to verify the factual details set out in the OA, the Tribunal vide its order dated 5th September 2019 constituted an expert committee comprising of the CPCB and the MPCB to inspect the GPP and the area in question, and to submit a report within a month.

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9 Hereinafter referred to as 'SEIAA'.

10 Hereinafter referred to as the '2000 Rules'.

3.9. In compliance of the aforesaid order, the CPCB and the MPCB conducted a joint inspection of the GPP and area in question. Subsequently, a report was submitted before the Tribunal wherein the joint inspection team had made several observations about the operational capacity of the GPP, its authorization status and certain procedural shortcomings.

3.10. Based on the Joint Inspection Report, the Tribunal vide the first impugned order dated 27th October 2020 held that the GPP was in violation of the right to clean environment of the inhabitants and was against the statutory norms. In that view of the matter, the Tribunal disposed of the OA in the aforementioned terms. While directing a shut-down of the plant, the Tribunal further directed that the site in question might be used for the purpose of developing a bio-diversity park, for which purpose the site had been originally designated. The Tribunal further constituted a Joint Committee comprising of the CPCB, the MPCB, District Magistrate of Pune and the Municipal Corporation of Pune to monitor the subsequent course of action in light of the aforesaid decision.

3.11. Aggrieved thereby, the respondent-Concessionaire filed a Review Application before the Tribunal being Review Application No. 49 of 2020 which came to be dismissed vide second impugned order dated 22nd December 2020.

3.12. Being aggrieved thereby, the present statutory appeals have been filed under Section 22 of the National Green Tribunal Act, 2010.[11]

4. We have heard Shri A.N.S. Nadkarni, learned Senior Counsel appearing on behalf of the appellant in CA Nos. 258-259 of 2021, Shri K. Parameshwar, learned Senior Counsel appearing on behalf of the appellant in CA Nos. 265-266 of 2021 and on behalf of respondent No.7 in CA Nos.258-259 of 2021, Shri Ninad Laud, learned counsel appearing on behalf of respondent No.1 in both the matters and Shri Rahul Kaushik, learned Senior Counsel appearing on behalf of respondent No.2-MPCB in both the appeals.

11 Hereinafter referred to as the "NGT Act".

5. Shri Nadkarni submitted that the Draft Development Plan 2002 for Pune city was sanctioned on 18th September 2008. He submitted that this was done after inviting and hearing objections under Section 28 of the Maharashtra Regional and Town Planning Act, 1966.[12] He submitted that, at that stage, no objection was raised by anyone. He further submitted that the advertisement inviting Expression of Interest for setting up Waste Segregation and Processing Unit was published on 4th March 2014. He submitted that the Concession Agreement was entered into on 30th March 2015. It is submitted that the Waste Segregation Unit is set up within Pune city limits and the Processing Plant is situated at Talegaon that is outside the city limits. It is further submitted that the MPCB granted its authorization to set up and operate on 2nd December 2015 and the Environmental Clearance was also issued on 1st February 2016.

6. Shri Nadkarni submitted that the respondent No. 1 herein despite having knowledge of the reservation in the Development Plan, EC and grant of authorization for the Waste Segregation and Processing Unit, filed an OA seeking cancellation and revocation of EC only on 2nd March 2019. It is therefore submitted that the OA was filed belatedly almost after a period of three years from the date of grant of EC. It is therefore submitted that the OA was filed much beyond the period prescribed under Section 16 of the NGT Act. As such, the OA ought to be dismissed on the ground of limitation alone.

7. Shri Nadkarni further submitted that the learned Tribunal had mixed up the facts. Whereas the GPP reservation is in Plot No. 48/2/1 under the Development Plan, the Bio-diversity Park is in Plot No. 49 which is an adjoining plot. As such, the direction issued by the learned Tribunal to use Plot No. 48/2/1 for Bio-diversity Park is unsustainable.

8. Shri Nadkarni further submitted that the reservation for the GPP in the Draft Development Plan is since 2002 which was subsequently sanctioned in 2008. The residential buildings had come up at a much later point in time. He submitted that only one project was commenced on 27th December 2005 whereas the second project was commenced on 25th March 2008 and all other projects that is 17 in number were commenced only from 2010 onwards that is much after sanction of the Development Plan.

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12 Hereinafter referred to as the "MRTP Act".

9. Shri Nadkarni further submitted that the Environmental Clearance for the GPP was received on 1st February 2016 and the Plant was set up and commenced in the same year. He submitted that, at the relevant time, the 2000 Rules were in force. It is submitted that the Solid Waste Management Rules, 2016[13] granted two years period for the migration and upgrading of the existing Plant to the 2016 Rules and as such, the provisions pertaining to the waste disposal came into force on 8th April 2018 i.e. after two years from the date of notification of the 2016 Rules.

10. Shri Nadkarni further submitted that the provisions as regards the buffer zones around waste processing and disposal facility came into force in 2017 and as such, would not apply to a plant which was conceived, set up and became functional in 2016. It is submitted that, even the 2016 Rules envisage decentralization of the process i.e. segregation at source. It is submitted that the present location of the GPP conforms to the requirement of the 2016 Rules inasmuch as only the waste generated from surrounding areas alone is segregated and crushed at the Baner Plant.

11. Shri Nadkarni further submitted that in pursuance of the observations made by this Court, the appellant-Corporation took steps to look for an alternative site, but it has not been possible to find out an alternative site on account of variety of reasons.

12. Shri Nadkarni further submitted that the reasoning given by the learned Tribunal that there was no consent of MPCB for establishment of the GPP is also unsustainable. It is submitted that, at the relevant time, the MPCB was not issuing a separate "consent to establish" under the Water Act, 1974 or the Air Act, 1981 but was issuing a composite authorization to "set up and operate" across the State. It is submitted that the circular issued by the MPCB dated 6th September 2021 would clarify this position. It is further submitted that the said practice was followed throughout the State. Shri Nadkarni relies on the proceedings of the Minutes of the Consent Committee Meeting dated 9th November 2015.

13. Shri Nadkarni submitted that, since initially the authorization granted by MPCB on 2nd December 2015 was valid till 31st December 2016, the appellant-Corporation and the respondent-Concessionaire applied

13 Hereinafter referred to as the "2016 Rules".

for renewal and the authorization, vide communication of the MPCB dated 4th May 2017, was renewed for a period of five years i.e. till 31st December 2021. It is submitted that, before the expiry of five years period which was to expire on 31st December 2021, the appellant-Corporation and the respondent-Concessionaire again applied for renewal of the authorization to set up and operate on 26th October 2021 and vide communication dated 3rd August 2022, the authorization to set up and operate was renewed till 31st July 2027. Not only that, but on 1st November 2022, consent to operate was also obtained as per notification dated 6th September 2021. The consent to operate has been further renewed till 30th September 2025.

14. Shri Nadkarni further submitted that the Joint Inspection Committee appointed by the learned Tribunal erroneously applied the 2016 Rules which did not apply to the GPP which was conceived and became functional prior to 2016.

15. Insofar as the finding of the learned Tribunal regarding buffer zone is concerned, Shri Nadkarni submitted that the said buffer zone of 500 meters is to be maintained from land fill sites and does not apply to Waste Segregation Plant. Shri Nadkarni further submitted that the continuation of the Project was in the larger public interest. It is submitted that the GPP processes the organic waste generated in the western part of the city i.e., Aundh, Baner, Kothrud, Sinhagad road and Katraj. It is submitted that, prior to commencement of the said Plant, the organic waste generated in the western part of the city was taken all the way to Hadapsar which is in the eastern part of the city. It is submitted that this led to foul odour and nuisance to public. It is therefore submitted that the impugned order of the learned Tribunal rather than subserving in public interest, would be detrimental to the public interest.

16. Shri Nadkarni submitted that, in any case, in order to address the concern of the respondents, the appellant-Corporation is in the process of installing portable compactors with hook lifting mechanism to ensure that the reject waste generated does not touch the ground. It is submitted that the tenders for the same have already awarded to one M/s Global Waste Management and the installation of the machinery would be completed by December 2024. He further submitted that the construction of shed to cover the reject area would also be completed by December 2024. Shri Nadkarni further submitted that the appellant-Corporation would construct bitumen road to the Waste

Segregation Plant and concrete the Reject Area immediately. This will in turn enhance the clean transfer of waste and avoid accumulation of water around the Waste Segregation Plant. He submitted that though the appellant-Corporation desired to do it earlier, it could not be done since the appellant-Corporation was facing objections from protestors due to pendency of the present proceedings.

17. Shri Parameshwar, learned Senior Counsel appearing on behalf of the respondent-Concessionaire also supported the submissions made on behalf of the appellant-Corporation. He submitted that the respondent-Concessionaire specializes in processing food waste with cutting edge anaerobic digestion technology – a process in which microorganisms break down biodegradable waste to produce biogas and organic manure. He submitted that, when cleaned and purified to 96% purity, Bio CNG/CBG can replace fossil fuels such as LPG, diesel, petrol, etc. It is further submitted that the anaerobic digestion is an efficient and controlled biological process that productively utilises waste in an enclosed space, rather than dumping it in a landfill, which causes environmental harm through leaching, contamination of groundwater, risk of fires, etc. It is further submitted that Indian food waste is unique in its composition, with a high concentration of antibacterial ingredients like turmeric and spices, and greases such as ghee that cannot be broken down using conventional enzymes and cultures. He submitted that the respondent-Concessionaire, through years of research and experience, has successfully developed enzymes, cultures, and processes to biologically break down Indian food. It is submitted that the Project commissioned by the respondent-Concessionaire, as a matter of fact, is environment friendly inasmuch as it converts the food waste into biogas which has also been used to run public transport buses in Pune City.

18. Shri Parameshwar submitted that, in order to carry out the conversion of food waste into biogas, the respondent-Concessionaire has established two plants – one in Baner and one in Talegaon. He submitted that the site at Baner is a waste processing facility where pre-segregated, non-compacted organic waste is received from the appellant-Corporation. The waste is segregated again to remove any non-biodegradable materials, and the residual organic waste is crushed to make a slurry. The slurry produced is then transported to a different site in Talegaon, which is about 34 kms away from Pune City, where raw biogas is generated from the slurry.

19. Shri Parameshwar submitted that though the reservation in the Draft Development Plan is of 2002 which was sanctioned in 2008, no challenge has been made in the OA challenging the reservation of this Plot as GPP. He therefore joins Shri Nadkarni in submitting that the impugned order passed by the learned Tribunal is not sustainable in law.

20. Shri Ninad Laud, learned counsel appearing on behalf of respondent No.1 in both the matters submitted that the checklist prescribed by the MPCB in 2003 would also apply to waste processing facility and the same is not restricted to landfill sites. He submitted that, as per the said checklist, no development zone of 500 meters is prescribed for Municipal Solid Waste Processing Plants and Landfill sites. He further submitted that a mere reservation in the municipal land will not absolve the appellant-Corporation of the environmental obligation. He submitted that the appellant-Corporation itself has sanctioned the plans of the buildings where the residents of respondent No.1 reside. Having sanctioned the Plans, the appellant-Corporation cannot run away from its duty of preventing pollution in the area on account of GPP.

21. Insofar as the contention that the MPCB was only granting authorization and not consent, Shri Laud submitted that merely because the MPCB was following a particular practice, it cannot absolve the appellant-Corporation of obtaining consent under the Water Act, 1974 or the Air Act, 1981 which are statutory requirements. Shri Laud submitted that the 2003 checklist is traceable to 2000 Rules.

22. Shri Laud further submitted that, a perusal of the Joint Inspection Committee Report itself would reveal that the Joint Inspection officials felt prevalence of odour in and around the plant premises. He further submitted that the Joint Inspection Committee also found that the segregation rejects has been transported in open truck without any cover. He has submitted that the said Report also suggests that such open carriage would cause nuisance during transportation. He therefore submitted that it is clear that the GPP was causing pollution in the area thereby making the life of the residents of respondent No. 1 miserable. He submitted that, not only that even the suggestions which are given by the National Engineering and Environment Research Institute[14] have also not been implemented.

14 Hereinafter referred to as the "NEERI".

23. Shri Laud, in the alternative, submitted that, in the event this Court is inclined to hold that the GPP is entitled to continue its operations, the Court should issue stringent directions so that the residents are not compelled to suffer the pollution.

24. Shri Kaushik, learned Senior Counsel appearing on behalf of the MPCB also accepts the position that, at the relevant time i.e. when the GPP commenced, the MPCB was following the practice of only granting authorization and only after its circular dated 6th September 2021, it has started granting consent. He therefore submitted that accordingly, the first consent was granted on 1st November 2022 and the second consent has been granted on 16th March 2024.

25. We have heard the learned counsel for the parties and also perused the materials placed on record.

26. A perusal of the proposed Land Use Map for village Balewadi, Baner which was notified on 31st December 2002 would reveal that in the said Plan, Plot No. 48/2/1 has been reserved for GPP. Plot Nos. 49/289/50 and 7 have been shown in Green Belt. The Draft Development Plan was published under Section 28(4) of the MRTP Act on 30th November 2005. In the said Plan also, Plot No. 48/2/1 has been shown as reserved for GPP. Plot Nos. 49/289/50 and 7 have been reserved for Bio-diversity Park (BDP). The Government of Maharashtra vide notification dated 18th September 2008 sanctioned the said Draft Development Plan. It could thus clearly be seen that right from 2002, the Plot in question has been reserved for GPP. As already observed hereinabove, the first building was granted commencement certificate on 27th December 2005 whereas the second was granted commencement certificate on 25th March 2008 and all other, that is 17 buildings, have been granted commencement certificate only after 2008. It is thus clear that the commencement certificate insofar as the first building is concerned is also after the Draft Development Plan was statutorily notified. The commencement certificates insofar as all other buildings are also after the Draft Development Plan was sanctioned by the State Government. It is thus clear that the commencement certificates in respect of all the buildings are after the date on which the Plot was reserved for GPP.

27. The learned Tribunal while allowing OA of respondent No.1 has also come to a conclusion that the GPP is also in violation of Rule 20 of 2016 Rules. For considering the correctness of the said finding

of the learned Tribunal, we will have to first consider as to which of the Rules are to be applicable to the said GPP.

28. It is the contention of the appellant-Corporation that the GPP would be covered by the 2000 Rules whereas it is the contention of the respondent No. 1 that the same would be covered by the 2016 Rules.

29. As per sub-rule (2) of Rule 1 of the 2016 Rules, the Rules were to be given effect from the date of their publication in the Official Gazette. The 2016 Rules were notified on 8th April 2016. As per Entry No. 7 under Rule 22 of the 2016 Rules, the time frame for establishment of necessary infrastructure for implementation of these Rules was to be created by the local bodies and other concerned authorities within a period of two years from the date of the said Rules coming into force. It is further to be noted that the application for authorization as per sub-rule (2) of Rule 4 of the 2000 Rules was made by the appellant-Corporation on 10th August 2015 in Form-I and the authorization was granted in Form-III of the 2000 Rules on 2nd December 2015. The processing plant also became operational on 17th December 2015. It is also to be noted that the SEIAA granted Environment Clearance in respect of the Organic Waste Management Plant at Talegaon, Dabhade after public hearing on 1st February 2016. The GPP and the Organic Waste Management Plant at Talegoan, Dabhade are part of the same Concession Agreement which was entered into between the appellant-Corporation and the respondent-Concessionaire on 30th March 2015. It could thus clearly be seen that the application for grant of authorization, grant of authorization, grant of Environment Clearance by the SEIAA and the commencement of the project was all prior to 8th April 2016 i.e. the date on which the 2016 Rules came into force.

30. It will also be relevant to refer to the Preamble of the said 2016 Rules, which reads thus:

> "Now, therefore, in exercise of the powers conferred by sections 3, 6 and 25 of the Environment (Protection) Act, 1986 (29 of 1986) and in supersession of the Municipal Solid Waste (Management and Handling) Rules, 2000, except as respect things done or omitted to be done before such supersession, the Central Government hereby makes the following rules for management of Solid Waste, namely:-"

31. It could thus clearly be seen that the Preamble itself states that though the 2016 Rules are in supersession of the 2000 Rules, they will apply except as respect things done or omitted to be done before such supersession.

32. It will be relevant to refer to the following observations of this Court in the case of ***State of Punjab v. Harnek Singh***,[15] wherein this Court after considering the earlier decisions has observed thus:

> "**16.** The words "anything duly done or suffered thereunder" used in clause (*b*) of Section 6 are often used by the legislature in saving clause which is intended to provide that unless a different intention appears, the repeal of an Act would not affect anything duly done or suffered thereunder. This Court in *Hasan Nurani Malak* v. *S.M. Ismail, Asstt. Charity Commr., Nagpur* [AIR 1967 SC 1742] has held that the object of such a saving clause is to save what has been previously done under the statute repealed. The result of such a saving clause is that the pre-existing law continues to govern the things done before a particular date from which the repeal of such a pre-existing law takes effect. In *Universal Imports Agency* v. *Chief Controller of Imports and Exports* [AIR 1961 SC 41 : (1961) 1 SCR 305] this Court while construing the words "things done" held that a proper interpretation of the expression "things done" was comprehensive enough to take in not only the things done but also the effect of the legal consequence flowing therefrom."

33. It can thus be seen that this Court has in unequivocal terms held that the term "things done" was comprehensive enough to take in not only the things done but also the effect of the legal consequences flowing therefrom.

34. In the present case, as already discussed hereinabove, the application for authorization, the grant of authorization, the grant of Environment Clearance by the SEIAA and the commencement of the GPP all have taken place prior to 8th April 2016 i.e. the date on which the 2016 Rules came into force. As such, we hold that the learned Tribunal has grossly erred in observing that the GPP in question was covered by the 2016 Rules.

15 [2002] 1 SCR 1060 : (2002) 3 SCC 481 : 2002 INSC 84

35. The next finding of the learned Tribunal is with regard to the consent under the Water Act or the Air Act. A perusal of the Minutes of the 11th Consent Committee Meeting of 2015-16 held on 9th November 2015 would clearly reveal that the MPCB was following the practice of granting authorization under the 2000 Rules which covers all the aspects of the consent. As such, MPCB did not find it necessary to cover such processing plant for the consent management.

36. It will be relevant to refer to the Circular issued by the MPCB dated 6th September 2021, which reads thus:

> "Board is receiving applications from solid waste Management Facilities and ULBs for grant of consent for installation and operation of the facility. As there is no comprehensive categorization of all Solid waste processing operations/activities in modified CPCB categorization for Solid Waste Management, Board is not granting the consent for Solid Waste Management Facility/operations/activities.
>
> Presently, Board is granting authorization under The Solid Waste Management rules, 2016, for setting up and operation of solid waste management facilities.
>
> The Board in its 176th meeting held on 25/O2/2O2I passed resolution on consent management for solid waste processing plants / facilities and decided to grant Consent to Establish/Operate for Solid Waste Management facilities.
>
> The Consent fees is charged as per Env. Dept. GoM GR dated 25.8.2011 to individual/Integrated Solid Waste Management facility depending upon type of ULB. The term of consent for Red, Orange, and Green category of Industry is one, two and three years respectively".
>
> Local Bodies to pay the consent fees to the Board as per the statement given below.
>
> - Urban Local Bodies-

Sr. No.	Urban Local Body	Fees
1.	Municipal Corporation	Rs.1,00,000/-
2.	Municipal Council Class-A	Rs.50,000/-
3.	Municipal Council Class-B	Rs.5,000/-
4.	Municipal Council Class-C	Rs.2,000/-

- Other than Local Body-

Individual Operator/ Industry installing MSW based processing plant.	Based on gross capital investment as per prevailing rules for industries.

Delegation of powers to various authorities for grant of consent will be as per "revised delegation of powers for consent Management" issued vide Office Order No. 12, Dated- 23/12/2O2O.

Therefore, all Ros and SROs are hereby directed to communicate all local Bodies/Cantonment Boards of Concern area of jurisdiction for submission of application to obtain Consent to Establish/Operate for setting up and operation of existing as well as proposed solid waste management facilities."

37. It could thus be seen that prior to 6th September 2021, the MPCB was not granting Consent for Solid Waste Management facility/ operations/activities. The MPCB was granting authorization for setting up and operation of solid waste management facilities. Only in the meeting dated 25th February 2021, a Resolution was passed on consent management and it was decided to grant Consent to operate for Solid Waste Management Facilities. Vide the said communication, all ROs and SROs were directed to communicate to all local Bodies/Cantonment Boards of concerned areas for submission of applications to obtain Consent to establish/operate for setting up and operation of existing as well as proposed Solid Waste Management Facilities.

38. Admittedly, after the said date i.e. 6th September 2021, the Consent to Operate was granted by the MPCB on 1st November 2022. The said Consent to Operate has been further renewed till 30th September 2025 and authorization to set up and operate has been granted till 31st July 2027. It can thus clearly be seen that the MPCB started granting Consent only after 6th September 2021 and prior to that, it was only issuing a composite authorization. We find that the learned Tribunal has failed to take this into consideration and as such, the finding in that regard also deserves to be set aside.

39. The next contention is that the Checklist issued by the MPCB which was published in 2003 would also apply to the GPP. The learned

counsel for respondent No. 1 submitted that the said Checklist specifically prescribes that no development zone of 500 metres was required to be kept from the boundary of the landfill site. Further relying on the Checklist, the learned counsel submitted that the buffer zone of 500 metres was required to be kept from the Solid Waste Processing Plant as well. A perusal of the said Checklist would reveal that the requirement of no-development zone or a buffer zone is only with regards to landfill sites. It can further be seen that the Schedules framed under Rules 6 (1)(3) and 7 (2) of the 2000 Rules prescribe separate Schedules for landfill sites on one hand and Composting, Treated Leachates and Incineration by waste processing or disposal facilities on the other hand. From the said Schedule-III which is applicable to landfill sites, it can be seen that under clause 9, a buffer zone of no-development is required to be maintained around the landfill site and the same shall be incorporated in the Town Planning Department's land use plans. However, insofar as the Standards for Composting, Treated Leachates and Incineration are concerned, the same read as under:

> "3. In order to prevent pollution problems from compost plant and other processing facilities, the following shall be complied with, namely :-
>
> > i. The incoming wastes at site shall be maintained prior to further processing. To the extent possible, the waste storage area should be covered. If, such storage is done in an open area, it shall be provided with impermeable base with facility for collection of leachate and surface water run-off into lined drains leading to a leachate treatment and disposal facility;
> >
> > ii. Necessary precautions shall be taken to minimise nuisance of odour, flies, rodents, bird menace and fire hazard;
> >
> > iii. In case of breakdown or maintenance of plant, waste intake shall be stopped and arrangements be worked out for diversion of wastes to the landfill site;
> >
> > iv. Pre-process and post-process rejects shall be

removed from the processing facility on regular basis and shall not be allowed to pile at the site. Recyclables shall be routed through appropriate vendors. The non-recyclables shall be sent for well designed landfill site(s).

v. In case of compost plant, the windrow area shall be provided with impermeable base. Such a base shall be made of concrete or compacted clay, 50 cm thick, having permeability coefficient less than 10 –7 cm/sec. The base shall be provided with 1 to 2 per cent slope and circled by lined drains for collection of leachate or surface run-off;

vi. Ambient air quality monitoring shall be regularly carried out particularly for checking odour nuisance at down-wind direction on the boundary of processing plant."

40. We are therefore of the considered view that the contention of the learned counsel for respondent No. 1 that under the 2000 Rules, a buffer zone is required to be maintained insofar as the GPP is concerned is without substance.

41. We further find that the finding of the learned Tribunal that initially the plot where GPP was constructed was reserved for Bio-diversity Park is also erroneous and factually incorrect. As discussed hereinabove, the plot in question has been reserved for the GPP since inception and it is only the adjoining plot which was reserved for the Bio-diversity Park.

42. We are therefore of the considered view that the learned Tribunal has erred in allowing the OA of the respondent No. 1 and directing closure of the GPP. Apart from that, we find that the closure of the GPP in question rather than subserving the public interest, would be detrimental to public interest. If the GPP in question is closed, the organic waste generated in the western part of Pune city would be required to be taken all the way throughout the city to Hadapsar which is in the eastern part of the city. This will undoubtedly lead to foul odour and nuisance to the public.

43. It will be relevant to refer to clauses (q) and (v) of Rule 15 of the 2016 Rules, which read thus:

"**15.** Duties and responsibilities of local authorities and village Panchayats of census towns and urban agglomerations.- The local authorities and Panchayats shall,-

……..

(q) transport segregated bio-degradable waste to the processing facilities like compost plant, bio-methanation plant or any such facility. Preference shall be given for on site processing of such waste;

……

(v) facilitate construction, operation and maintenance of solid waste processing facilities and associated infrastructure on their own or with private sector participation or through any agency for optimum utilization or various components of solid waste adopting suitable technology including the following technologies and adhering to the guidelines issued by the Ministry of Urban Development from time to time and standards prescribed by the Central Pollution Control Board. Preference shall be given to decentralized processing to minimize transportation cost and environmental impacts such as-

a) bio-methanation, microbial composting, vermi-composting, anaerobic digestion or any other appropriate processing for bio-stabilisation of biodegradable waste;

b) waste to energy processes including refused derived fuel for combustible fraction of waste or supply as feedstock to solid waste based power plants or cement kilns;"

44. It can thus be seen that the 2016 Rules also give preference to the on-site processing of the waste. It also emphasizes preference to be given to decentralized processing to minimize transportation cost and environmental impact. It has been submitted on behalf of the appellant-Corporation that 48 such GPPs have been commissioned throughout the city of Pune wherein the non-compacted, organic waste is segregated to remove any non-biodegradable materials and the residual organic waste is crushed to make a slurry. The said

slurry is then transported to a site in Talegaon where raw biogas is generated from the slurry. At the Talegaon plant, biogas is produced which is used for providing fuel to the public transport buses. As such, the entire Project is environmentally friendly.

45. The approach of respondent No. 1 appears to be that such a Facility though could be established in the vicinity of the other buildings, it should not be established in their backyard. The Division Bench of the Bombay High Court in the case of ***Bhavya Height Co-operative Housing Society Ltd. v. Mumbai Metropolitan Region Development Authority and Others***[16] had an occasion to consider a similar situation, wherein the High Court observed thus:

> "**36.** …….. To this affidavit there are sketch plans annexed prepared by the Petitioner's architects. These propose that the Monorail Station staircase be shifted to a point to the south, *directly in front of Rehab Building No. 5*. In other words, it would prima facie seem that this is the classic NIMBY principle — Not In My Back Yard. For what the Petitioner seems to be suggesting is that it is perfectly all right if the lives of the residents of the seven-storey slum rehab building (all previously slum dwellers) are endangered by the same staircase, but the Petitioner's members' interest must remain paramount. We cannot and do not countenance any such submission."

46. We agree with the said observations of the High Court.

47. We are therefore of the considered view that the impugned judgment and order of the learned Tribunal deserves to be quashed and set aside and the OA of the respondent No. 1 is to be dismissed.

48. In the result, the appeals are allowed. The impugned judgments and orders dated 27th October 2020 passed by the learned Tribunal in OA No. 210 of 2020 and dated 22nd December 2020 in Review Application being No. 49 of 2020 are quashed and set aside. OA No. 210 of 2020 filed by respondent No. 1 is also dismissed.

49. However, before we part with the judgment, we find it necessary to caution the appellant-Corporation as well as the respondent-

16 2019 SCC OnLine Bom 1075

Concessionaire that they should take necessary steps so that the residents residing in the nearby buildings do not have to suffer on account of foul odour. The NEERI, in its Report, had made the following recommendations:

> "**Recommendations:**
>
> Based on the observations and good engineering practices, following suggestions are offered:
>
> **Plant A:**
>
> - The slurry making area needs proper cover in the hopper area to reduce odour / foul smell,
> - A suitable odour control system / misting system (e.g carbon filters, etc) needs to be installed immediately,
> - Better material of construction and design could be employed to avoid corrosion problems and frequent shut downs,
> - The space is too congested for capacity enhancement. PMC may think of additional/alternative space,
> - The food bags need to be stored properly before using them.
> - Slurry sampling and analysis needs to be done frequently to understand the decomposition of food waste and control it to the level so that maximum methane can be produced in the Talegaon plant.
> - The technology provider must also look into reducing the transporting cost between slurry making facility at Baner and Talegaon plant by finding an optimum slurry density."

50. We direct the appellant-Corporation and the respondent-Concessionaire to ensure that all the aforesaid suggestions made by NEERI should be strictly complied with. We further direct the appellant-Corporation to install the portable compactors with hook mechanisms so as to ensure that the reject waste does not touch the ground by 31st December 2024.

51. The appellant-Corporation is further directed to construct bitumen road to the Waste Segregation Plant and concrete the reject area

which will enhance clean transfer of waste and avoid accumulation of water around the Waste Segregation Plant.

52. We further direct the appellant-Corporation as well as the respondent-Concessionaire to construct a shed so as to cover the reject area by 31st December 2024.

53. We further direct the appellant-Corporation/respondent-Concessionaire to carry out plantation with thick density so that there would be a green cover on all the sides of the GPP.

54. A perusal of the sanctioned plan would reveal that, on one side, there is a reservation for the Bio-diversity Park. As such, the plantation would be required to be done to cover the three sides.

55. Insofar as the Bio-diversity Park is concerned, we direct the State Government to consider the possibility of growing Miyawaki forests so as to provide green lungs to the nearby areas.

56. We further direct the NEERI to conduct an environmental audit of the GPP every six months and in turn, the appellant-Corporation and the respondent-Concessionaire are directed to ensure that the suggestions made in the said audit are strictly complied with.

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

Result of the Case: Appeals allowed.

†*Headnotes prepared by:* Ankit Gyan

[2024] 9 S.C.R. 397 : 2024 INSC 684

Ravinder Kumar
v.
State of Haryana

(Criminal Appeal No. 3747 of 2024)

12 September 2024

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

Issue for Consideration

FIR under Section 23 of the Pre Conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 and a complaint under Section 28(1) was filed against the appellant and co-accused persons. The allegation was of indulging in the illegal activity of sex determination using ultrasound. In the facts of the case, when there was no legal decision by the Appropriate Authority in terms of sub-section (1) of Section 30 to search for the appellant's clinic and the decision to carry out the search was an individual decision of the Civil Surgeon-Chairman of the concerned Appropriate Authority, whether the search conducted would be illegal; meaning to be assigned to the expression "has reason to believe" under sub-section (1) of Section 30.

Headnotes†

Pre Conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 – ss.30(1), 17, 2(a) – "has reason to believe" – Interpretation:

Held: s.30 is a very drastic provision granting power to the Appropriate Authority or any officer authorized by it to enter a Genetic Laboratory, a Genetic Clinic, or any other place to examine the record found therein, to seize and seal the same – The first part of sub-section (1) of s.30 safeguards these centres or laboratories from arbitrary search and seizure action – The condition precedent for the search of a clinic is that the Appropriate Authority must have reason to believe that an offence under the 1994 Act has been or is being committed – Interpretation of "reason to believe" will depend on the context in which it is used in a particular legislation – Under the 1994 Act, there is a power to initiate action under the statute if the authority has reason to believe that certain facts exist – Thus, the test is whether a reasonable man, under the circumstances

* Author

placed before him, would be propelled to take action under the statute – Considering the object of the 1994 Act, the expression "reason to believe" cannot be construed in a manner which would create a procedural roadblock – The reason is that once there is any material placed before the Appropriate Authority based on which action of search is required to be undertaken, if the action is delayed, the very object of passing orders of search would be frustrated – Therefore, the complaint or other material received by the appropriate authority or its members should be immediately made available to all its members – After examining the same, the Appropriate authority must expeditiously decide whether there is a reason to believe that an offence under the 1994 Act has been or is being committed and it is not required to record reasons for the same but, there has to be a rational basis to form that belief – However, the decision to take action under sub-section (1) of s.30 must be of the Appropriate Authority and not of its individual members otherwise the decision will be illegal – The Appropriate Authority for the district consisted of the Civil Surgeon, the District Program Officer of the Women and Child Development Department and the District Attorney – On facts, no legal decision was made by the Appropriate Authority in terms of sub-section (1) of s.30 to search for the appellant's clinic and the decision to carry out the search was an individual decision of the Civil Surgeon-Chairman of the concerned Appropriate Authority – Thus, the action of search is itself vitiated – FIR and complaint were based on the material seized during the raid and since, the search itself is entirely illegal, continuing prosecution based on such an illegal search will be abuse of the process of law – Impugned judgment set aside – FIR and complaint quashed. [Paras 10-14, 16, 17]

Case Law Cited

Aslam Mohammad Merchant v. Competent Authority & Ors. **[2008] 10 SCR 332 : (2008) 14 SCC 186 – referred to.**

List of Acts

Pre Conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994; Penal Code, 1860.

List of Keywords

Sex determination of a foetus; Racket; Medical termination of the pregnancy; Illegal activity; Ultrasound; Decoy patient; Raid; Appropriate Authority; Clinic; Search of a clinic; Civil Surgeon;

Appropriate Authority, Search and seizure action; Search and seize records; "has reason to believe"; Reasonable man; Illegal search; Abuse of the process of law; FIR; Complaint; Quashing.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 3747 of 2024

From the Judgment and Order dated 13.01.2023 of the High Court of Punjab & Haryana at Chandigarh in CRM-M No.13495 of 2018.

Appearances for Parties

Vineet Bhagat, Kewal Singh, Mrs. Manju Bhagat, Mrs. Archna Midha, Aksveer Singh Saggu, Advs. for the Appellant.

Deepak Thukral, A.A.G., Samar Vijay Singh, Saurabh Sachdeva, Sandeep Saxena, Ms. Sabarni Som, Fateh Singh, T. V. Surendranath, Prakhar Garg, Makrand Pratap Singh, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Judgment

Abhay S. Oka, J.

FACTUAL ASPECTS

1. The appellant claims that he has been practising as a general Physician since 2001 and as a Radiologist since 2007. On 27th April 2017, a team comprising four officers raided the appellant's clinic. Based on the complaint against one woman, Dhanpati (accused no.1), that she is running a racket of sex determination and medical termination of pregnancy, a decoy patient was selected. The allegation is that Dhanpati was contracted to do the medical termination of the pregnancy of the decoy patient. The decoy patient and shadow witness, S.I. Usha Rani, informed Dhanpati that they knew the sex of the foetus. Dhanpati called the decoy patient on 27th April 2017 at 8 am for MTP. The shadow witness informed Dhanpati that family members of the decoy patient were suggesting reconfirming the sex of the foetus through ultrasound. Dhanpati called the shadow witness on 27th April 2017 at 7 am and stated that the Doctor who would perform the ultrasound would charge Rs.20,000/- but ultimately, she fixed the deal at Rs.15,000/-.

2. Accordingly, the decoy patient was given a sum of Rs.15,000/-. The members of the search party, along with the police staff as well as the shadow witness and decoy patient, went to the Gurugram bus stand where Dhanpati asked for Rs.15,000/- which amount was handed over to her. After that, a nurse, Anju (accused no.2), was called by Dhanpati, and a part of the amount of Rs.15,000/- was given to her. Thereafter, the decoy patient and others entered the appellant's clinic, known as the Divine Diagnostic Centre at Gurugram. The decoy patient was taken inside. When the decoy patient and Anju came out of the diagnostic centre, the police caught them. The search team entered the diagnostic centre. The cash amount was seized, and the team recovered even the USG report for the decoy patient. It was alleged that the appellant had signed the said report.

3. A first information report was registered on 27th April 2017 in the Police Station, Gurugram, alleging the commission of an offence punishable under Section 23 of the Pre-Conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (for short, 'the Act of 1994'). It was followed by a complaint filed by the District Appropriate Authority under Section 28(1) of the Act of 1994 before the learned Chief Judicial Magistrate, Gurugram, alleging the commission of punishable offences against the appellant, the said Dhanpati and Anju. The allegation against the appellant and the co-accused was of indulging in the illegal activity of sex determination of a foetus by using ultrasound.

4. The appellant filed a petition for quashing the complaint and the FIR before the High Court. By the impugned judgment, the High Court declined to quash both the complaint and FIR.

SUBMISSIONS

5. Learned counsel appearing for the appellant invited our attention to the provisions of the 1994 Act. He pointed out a notification issued on 7th November 2013 by the Government of Haryana under sub-section (2) read with clause (b) of sub-section (3) of Section 17 of the 1994 Act by which Appropriate Authorities were constituted for each District consisting of Civil Surgeon, District Programme Officer, Women and Child Development Department and District Attorney. He submitted that the search /raid purportedly conducted under the orders of the Appropriate Authority of the District under Section 30(1) of the 1994 Act was completely illegal as there was no order

passed by the Appropriate Authority authorising the conduct of the raid. He submitted that only the Civil Surgeon signed the order authorising officers to conduct the raid. But, two other members of the Appropriate Authority did not sign the said order. He pointed out an affidavit filed by Dr. Virender Yadav, the Chairman of the District Appropriate Authority-cum-Civil Surgeon, Gurugram. He stated that the Civil Surgeon accepted that he alone constituted the raiding team vide order dated 27th April 2017 and issued the order authorising the search. He submitted that the so-called raid under Section 30(1) is the only basis of the FIR and the complaint. He submitted that the raid was completely illegal as it was not conducted by the officers authorised by the Appropriate Authority.

6. The learned counsel appearing for the State did not dispute that the order appointing officers to conduct the raid was issued and signed only by the Civil Surgeon, the Appropriate Authority's Chairman. He submitted that as there was an emergency, the Civil Surgeon had to take action. He submitted that the complaint under sub-Section (1) of Section 28 has been filed by an officer authorised by the Appropriate Authority. The decision to file the complaint is made by the Appropriate Authority. The learned counsel appearing for the respondent would, therefore, submit that even if there is a defect in the procedure adopted while appointing the officers to conduct the raid, it does not amount to illegality, but it is a curable irregularity which has been cured by subsequent order of the Appropriate Authority to file a complaint.

CONSIDERATION OF SUBMISSIONS

7. To appreciate the submissions, we must refer to relevant provisions of the 1994 Act. Section 23 of the 1994 Act, which is a penal provision, reads thus:

> **"23. Offences and penalties**.- (1) Any medical geneticist, gynaecologist, registered medical practitioner or any person who owns a Genetic Counselling Centre, a Genetic Laboratory or a Genetic Clinic or is employed in such a Centre, Laboratory or Clinic and renders his professional or technical services to or at such a Centre, Laboratory or Clinic, whether on an honorary basis or otherwise, and who contravenes any of the provisions of this Act or rules made thereunder shall be punishable with imprisonment

for a term which may extend to three years and with fine which may extend to ten thousand rupees and on any subsequent conviction, with imprisonment which may extend to five years and with fine which may extend to fifty thousand rupees.

2. The name of the registered medical practitioner shall be reported by the appropriate authority to the State Medical Council concerned for taking necessary action including suspension of the registration if the charges are framed by the court and till the case is disposed of and on conviction for removal of his name from the register of the Council for a period of five years for the first offence and permanently for the subsequent offence.

3. Any person who seeks the aid of a Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic or ultrasound clinic or imaging clinic or of a medical geneticist, gynaecologist, sonologist or imaging specialist or registered medical practitioner or any other person for sex selection or for conducting pre- natal diagnostic techniques on any pregnant women for the purposes other than those specified in sub-section (2) of section 4, he shall, be punishable with imprisonment for a term which may extend to three years and with fine which may extend to fifty thousand rupees for the first offence and for any subsequent offence with imprisonment which may extend to five years and with fine which may extend to one lakh rupees.

4. For the removal of doubts, it is hereby provided, that the provisions of sub-section (3) shall not apply to the woman who was compelled to undergo such diagnostic techniques or such selection."

8. The procedure for cognizance is incorporated in Section 28, which reads thus:

"28. Cognizance of offences. -

1. No court shall take cognizance of an offence under this Act except on a complaint made by—

(a) the appropriate authority concerned, or any officer authorised in this behalf by the Central Government or State Government, as the case may be, or the appropriate authority; or

(b) a person who has given notice of not less than fifteen days in the manner prescribed, to the appropriate authority, of the alleged offence and of his intention to make a complaint to the court.

Explanation.—For the purpose of this clause, "person" includes a social organisation.

2. No court other than that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under this Act.

3. Where a complaint has been made under clause (b) of subsection (1), the court may, on demand by such person, direct the appropriate authority to make available copies of the relevant records in its possession to such person.

9. Section 30(1) deals with the power to search and seize records, which reads thus:

"30. Power to search and seize records, etc. – (1) If the Appropriate Authority has reason to believe that an offence under this Act has been or is being committed at any Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic or any other place, such Authority or any officer authorised thereof in this behalf may, subject to such rules as may be prescribed, enter and search at all reasonable times with such assistance, if any, as such authority or officer considers necessary, such Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic or any other place and examine any record, register, document, book, pamphlet, advertisement or any other material object found therein and seize and seal the same if such Authority or officer has reason to believe that it may furnish evidence of the commission of an office punishable under this Act.

.. .. .."

(emphasis added)

10. The condition precedent for the search of a clinic is that the Appropriate Authority must have reason to believe that an offence under the 1994 Act has been or is being committed. The Appropriate Authority, as defined under Section 2(a), is the Appropriate Authority appointed under Section 17. Sub-sections (1) to (3) of Section 17 read thus: -

> **"17. Appropriate Authority and Advisory Committee. -**
> 1. The Central Government shall appoint, by notification in the Official Gazette, one or more Appropriate Authorities for each of the Union territories for the purposes of this Act.
>
> 2. The State Government shall appoint, by notification in the Official Gazette, one or more Appropriate Authorities for the whole or part of the State for the purposes of this Act having regard to the intensity of the problem of pre-natal sex determination leading to female foeticide.
>
> 3. The officers appointed as Appropriate Authorities under sub-section (1) or sub-section (2) shall be,—
>
> (a) when appointed for the whole of the State or the Union territory, consisting of the following three members:-
>
> i) an officer of or above the rank of the Joint Director of Health and Family Welfare - Chairperson;
>
> ii) an eminent woman representing women's organization; and
>
> iii) an officer of Law Department of the State or the Union territory concerned:
>
> Provided that it shall be the duty of the State or the Union territory concerned to constitute multimember State or Union territory level appropriate authority within three months of the coming into force of the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002:
>
> Provided further that any vacancy occurring therein shall be filled within three months of that occurrence.
>
> (b) when appointed for any part of the State or the Union territory, of such other rank as the State Government or the Central Government, as the case may be, may deem fit.
>
> .. .. "

11. Now, coming back to Section 30, it is a very drastic provision which grants power to the Appropriate Authority or any officer authorized by it to enter a Genetic Laboratory, a Genetic Clinic, or any other place to examine the record found therein, to seize the same and even seal the same. The first part of sub-section (1) of Section 30 safeguards these centres or laboratories from arbitrary search and seizure action. The safeguard is that search and seizure can be authorized only if the Appropriate Authority has a reason to believe that an offence under the 1994 Act has been committed or is being committed.

12. The question is what meaning can be assigned to the expression "has reason to believe". Section 26 of the Indian Penal Code defines the expression "reason to believe", which reads thus:

> **"26. "Reason to believe".—** A person is said to have "reason to believe" a thing, if he has sufficient cause to believe that thing but not otherwise."

In the case of ***Aslam Mohammad Merchant v. Competent Authority & Ors.,***[1] this Court had an occasion to interpret the same expression. In paragraph 41, this Court held thus:

> **"41.** It is now a trite law that whenever a statute provides for "reason to believe", either the reasons should appear on the face of the notice or they must be available on the materials which had been placed before him."

However, interpretation of the expression will depend on the context in which it is used in a particular legislation. In some statutes like the present one, there is a power to initiate action under the statute if the authority has reason to believe that certain facts exist. The test is whether a reasonable man, under the circumstances placed before him, would be propelled to take action under the statute. Considering the object of the 1994 Act, the expression "reason to believe" cannot be construed in a manner which would create a procedural roadblock. The reason is that once there is any material placed before the Appropriate Authority based on which action of search is required to be undertaken, if the action is delayed, the very object of passing orders of search would be frustrated. Therefore,

1 [2008] 10 SCR 332 : (2008) 14 SCC 186

what is needed is that the complaint or other material received by the appropriate authority or its members should be immediately made available to all its members. After examining the same, the Appropriate authority must expeditiously decide whether there is a reason to believe that an offence under the 1994 Act has been or is being committed. The Appropriate Authority is not required to record reasons for concluding that it has reason to believe that an offence under the 1994 Act has been or is being committed. But, there has to be a rational basis to form that belief. However, the decision to take action under sub-section (1) of Section 30 must be of the Appropriate Authority and not of its individual members.

13. Under the notification dated 7th November 2013, the Appropriate Authority for the district consists of the Civil Surgeon, the District Program Officer of the Women and Child Development Department, and the District Attorney. The Civil Surgeon is the Chairman of the appropriate authority. Looking at the object of sub-section (1) of Section 30 and the express language used therein, only the Chairman or any other member acting alone cannot authorise search under sub-section (1) of Section 30. It must be a decision of the Appropriate Authority. If a single member of the Appropriate Authority authorises a search, it will be completely illegal being contrary to sub-section (1) of Section 30. If the law requires a particular thing to be done in a particular manner, the same shall be done in that manner only. In the present case, going by the affidavit filed by Dr Virender Yadav, the Chairman of the District Appropriate Authority cum-Civil Surgeon, Gurugram, the decision to conduct a search by appointing three officers by order dated 27th April 2017 was only his decision purportedly taken in his capacity as the Chairman of the Appropriate Authority. Admittedly, the other two members of the appropriate authority are not parties to the said decision. The Civil Surgeon has given the excuse of urgency. The Appropriate authority doesn't need to have a physical meeting. The Civil Surgeon could have held a video meeting with the other two members. However, when a video meeting is held, every member must be made aware of the complaint or the material on which a decision will be made. It was a matter of a few minutes.

14. Therefore, in the facts of the case, no legal decision was made by the Appropriate Authority in terms of sub-section (1) of Section 30 to search for the appellant's clinic. As stated earlier, sub-section (1)

of Section 30 provides a safeguard by laying down that only if the Appropriate Authority has reason to believe that an offence under the 1994 Act has been committed or is being committed that a search can be authorized. In this case, there is no decision of the Appropriate Authority, and the decision to carry out the search is an individual decision of the Civil Surgeon, who was the Chairman of the concerned Appropriate Authority. Therefore, the action of search is itself vitiated.

15. There is another factual aspect of the case. The seizure Memo dated 27th April 2017 (Annexure P-4) contains the names of three persons. The Seizure Memo records that on 27th April 2017, the District Appropriate Authority constituted a team comprising three members whose names were stated in the seizure memo. However, a letter dated 27th April 2017 (annexure P-3) addressed by Deputy Civil Surgeon Rewari to Deputy Civil Surgeon Gurugram records that the team comprised four members, and the raid was conducted by the said four members.

16. A perusal of the impugned FIR and impugned complaint shows that its foundation is the material seized during the raid on 27th April 2017. Except for what was found in the search and the seized documents, there is nothing to connect the accused with the offence punishable under Section 23 of the 1994 Act. As the search itself is entirely illegal, continuing prosecution based on such an illegal search will amount to abuse of the process of law. The High Court ought to have noticed the illegality we have pointed out.

17. Therefore, the appeal is allowed, and the impugned judgment dated 13th January 2023 is set aside. FIR No.408, dated 27th April 2017, registered in the Police Station, Gurugram at Gurugram, is hereby quashed. The complaint bearing no. COMA No.40 of 2018, pending before the court of learned Chief Judicial Magistrate, Gurugram, also stands quashed.

Result of the Case: Appeal allowed.

†*Headnotes prepared by:* Divya Pandey

[2024] 9 S.C.R. 408 : 2024 INSC 699

Sahil Bhargava & Ors.
v.
State of Uttarakhand & Ors.

(Special Leave Petition (C) No. 19953 of 2024)

09 September, 2024

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

Issue for Consideration

Issue arose as regards the fixation of the fee for the undergraduate medical degree course offered by college.

Headnotes†

Education/Educational Institutions – Medical admission – Undergraduate medical degree course – Fixation of fee – Students granted admission in 2018 to the medical UG course and completed the same in 2023 – At the time of admission, fee was Rs five lakhs p.a. for the All India quota seats and Rs four lakhs p.a. for the State quota seats subject to the final decision in the writ petitions pending before the High Court – In 2019, the fees revised for the academic years 2019-2022 at Rs 13.22 lakhs p.a. for the All India quota and Rs 9.78 lakhs p.a. for the State quota which was later charged for the academic year 2018-19 also – Writ petitions by the students seeking direction to the respondents to issue undergraduate degrees to them without insistence on any extra payment of tuition fee – High Court directed the students to deposit the fees in installments, and in the subsequent interim order directed that on the payment of the first installment, provisional certificate for completion of the course would be issued, and the students would be permitted to begin their internships – Challenge to, whereby, this Court permitted the students to continue the internship programme subject to deposit of two installments and the High Court to dispose of the pending writ petition expeditiously – Thereafter, the High Court admitted the writ petitions and posted the matter for March 2025, directing that subject to the deposit of the fee, original documents submitted by students to the university would be returned:

Held: Order of this Court sought to remove such an imbroglio by issuing a direction for the deposit of two installments of fees and requested the High Court to dispose of the petition – Instead of doing so, the High Court simply admitted the petition and posted it to March 2025 – No early resolution of the dispute seems likely – Students cannot be left in the lurch to an uncertain future – Students have paid approximately Rs 34 lakhs per student for the All-India quota seats and Rs 28 lakhs per student for the State quota seats, inclusive of the security deposit and remaining installments – In view thereof, students to be returned their original documents, to pursue their postgraduate studies and practice medicine, on the deposit of Rs 7.50 lakhs each over and above the amounts already deposited – Students to file an undertaking to pay the balance amount on the final disposal of the pending writ petitions – Interim order of the High Court modified in the said terms. [Paras 12-16]

List of Acts

Uttarakhand Unaided Private Professional Educational Institutions (Regulation of Admission and Fixation of Fee) Act; Shri Guru Ram Rai University Act 2016

List of Keywords

Medical admission; Undergraduate medical degree course; Fixation of fee; Extra payment of tuition fee; Provisional certificate for completion of the course; Internships; Original documents submitted by students.

Case Arising From

EXTRA-ORDINARY CIVIL JURISDICTION: Special Leave Petition (C) No. 19953 of 2024

From the Judgment and Order dated 06.08.2024 of the High Court of Uttarakhand at Nainital in WPMS No. 775 of 2023

Appearances for Parties

Gaurav Agrawal, Sr. Adv., Ms. Tanvi Dubey, Raghav Sabharwal, Mekala Ganesh Kumar Reddy, Aditya Nema, Advs. for the Petitioners.

Gopal Sankaranarayanan, Sr. Adv., Sagar Gaur, Ankit Shah, Dilip Annasaheb Taur, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Order

1. The dispute in the present case relates to the fixation of the fee for the undergraduate medical degree course offered by a college in the State of Uttarakhand. The petitioners are students who were granted admission in 2018 to the undergraduate medical degree course administered by the third respondent - Shri Guru Ram Rai Institute of Medical and Health Sciences College. The students completed the course in 2023. The second respondent is the Shri Guru Ram Rai University, a university governed by an Act of the state legislature,[1] of which the third respondent is a constituent college.

2. The state legislature enacted the Uttarakhand Unaided Private Professional Educational Institutions (Regulation of Admission and Fixation of Fee) Act in 2006. The Act applies to "unaided private professional educational institutions in the state which are affiliated to state-funded universities, councils, boards or other bodies established under law, excluding minority institutions".[2] The Act establishes an 'Admission and Fee Regulatory Committee', which *inter alia* determines the fees for admission to professional courses of private institutions.[3] The Act also provides for the constitution of an appellate authority to hear appeals against the orders of the Admission and Fee Regulatory Committee.[4]

3. On 4 April 2018, a nodal agency appointed by the State Government prescribed the fee structure for the undergraduate medical courses of seven medical colleges, including the third respondent. The fee structure as posted by the nodal agency on their website (Annexure P-2) prescribed a fee of rupees four lakhs for State quota seats and rupees five lakhs for the All India quota seats.

4. These fees and allied issues were the subject matter of writ petitions filed by the second and third respondents before the

1 Shri Guru Ram Rai University Act 2016, Uttarakhand Act No. 03 of 2017.

2 S.2, Uttarakhand Unaided Private Professional Educational Institutions (Regulation of Admission & Fixation of Fee) Act.

3 S.4, *Ibid.*

4 S.12, *Ibid.*

Uttarakhand High Court.[5] The High Court, by an interim order directed that admissions may be carried out and the fee collected will be subject to the final outcome of the Writ petition.

5. In March 2019, the Admission and Fee Regulatory Committee fixed the fees for the academic years 2019-2020, 2020-2021 and 2021-2022 at Rs 13.22 lakhs per annum for the All India quota and Rs 9.78 lakhs per annum for the State quota. The principal of the third-respondent college preferred an appeal before the appellate authority contending *inter alia* that the committee had erred by failing to fix the same fee for the academic year 2018-19 for the undergraduate medical degree course. By an Order dated 25 February 2023, the appellate authority affirmed the fee structure and further directed that the same fees also be charged for the academic year 2018- 2019.

6. Letters were addressed by the college principal on 1 March 2023 asking all the petitioners to pay outstanding fees of Rs. 36.99 lakhs for the All India quota students and Rs 26.01 lakhs for the State quota students, in accordance with the revised fees fixed by the committee and affirmed by the appellate authority.

7. The petitioners instituted Writ Petitions before the High Court challenging the order of the appellate authority, the letter dated 1 March 2023 and seeking a direction to the respondents to issue undergraduate degrees to the petitioners without insistence on any extra payment of tuition fee.[6] On 22 March 2023, the High Court rejected the prayer to stay the order of the appellate authority and directed the petitioners to deposit the fees in three equal installments. By a subsequent interim order dated 3 April 2023, the High Court directed the petitioners to deposit the amount in nine equal installments instead of three installments. The order also records the statement of the counsel, that on the payment of the first installment, the second and third respondents would issue a provisional certificate for completion of the undergraduate medical degree course to the petitioners, and they would be permitted to begin their internships.

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5 WPMS No. 933/2018; WPMS No. 1789/2018.

6 WPMS No. 755/2023.

8. The interim order of the High Court dated 3 April 2023 was challenged by the petitioners before this Court. An order dated 28 April 2023 was passed in SLP (C) No 8760 of 2023 permitting the petitioners to continue the internship programme subject to the deposit of two installments in terms of the interim order of the High Court. The High Court was, however, requested to dispose of the pending Writ Petition as expeditiously as possible, preferably within three months from the date of the order.

9. When the petition came up before the High Court on 26 August 2024, by the impugned order, the High Court admitted the Writ Petitions. The High Court posted the matter to be listed in March 2025 and further directed that subject to the deposit of the fee, the original documents submitted by the petitioners to the university at the time of admission, would be returned.

10. We have heard Mr Gaurav Aggarwal, senior counsel appearing on behalf of ninety- one petitioners before this Court in these proceedings and Mr Gopal Sankarnarayanan, senior counsel appearing on behalf of the second and third respondents.

11. The original fee when the students took admission was Rs five lakhs per annum for the All India quota seats and Rs four lakhs per annum, for the State quota seats. The fee structure as posted by the nodal agency on their website (Annexure P-2) indicated that this fee was subject to the final decision in the writ petitions which were pending before the High Court.

12. The challenge to the fixation of fees is yet to attain finality since the students' petitions have been admitted by the High Court. In the meantime, it is common ground that the petitioners have paid an amount of approximately Rs 34 lakhs per student for the All-India quota seats and approximately Rs 28 lakhs per student for the State quota seats.

13. Mr Gaurav Aggarwal, senior counsel states that the above figure, as indicated to the court, is inclusive of:

    (i) The security deposit of Rs three lakhs which has been adjusted; and

    (ii) Two installments which were paid in pursuance of the order of this Court dated 28 April 2023.

14. At this stage, bearing in mind the above amounts which have been paid, we are of the view that an equitable interim order which will apply during the pendency of proceedings before the High Court should be passed so as to enable the students to obtain the return of their original documents to pursue their postgraduate studies and practice medicine. Absent such a direction, the students, despite having completed their undergraduate medical studies and internship, would not be able to either pursue medicine or secure admission for higher studies. The order of this Court dated 28 April 2023 sought to obviate such an imbroglio by issuing a direction for the deposit of two installments of fees and requested the High Court to dispose of the petition. Instead of doing so, the High Court simply admitted the petition and posted it to March 2025. No early resolution of the dispute seems likely. The students cannot be left in the lurch to an uncertain future.

15. We accordingly direct that conditional on the petitioners depositing an amount of Rs 7.50 lakhs each with the second and third respondents over and above the amounts which have already been deposited, they shall be entitled to a return of their original documents submitted at the time of obtaining admission. This is subject to the condition that the petitioners shall file an undertaking to pay the balance amount in the event that they are called upon to do so at the final disposal of the pending writ petitions.

16. The interim order of the High Court shall stand modified in the above terms. It is clarified that this order does not express any opinion on the merits of the underlying writ petitions pending before the High Court.

17. The Special Leave Petition is accordingly disposed of.

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

Result of the Case: Special Leave Petition disposed of.

†*Headnotes prepared by:* Nidhi Jain

[2024] 9 S.C.R. 414 : 2024 INSC 685

M/s Sitaram Enterprises
v.
Prithviraj Vardichand Jain

(Contempt Petition (Civil) Nos. 196-197 of 2024)
In
(Special Leave Petition (Civil) Nos. 12081-12082 of 2023)

09 September 2024

[J.K. Maheshwari and Rajesh Bindal, JJ.]

Issue for Consideration

Eviction decree was passed against the respondent-tenant (contemnor). Supreme Court dismissed the SLP filed by him vide order dtd. 06.06.2023 and he was granted nine months time expiring on 06.03.2024 to vacate the suit premises subject to filing of undertaking/affidavit. Undertaking/affidavit was filed belatedly and the contemnor continued to litigate filing Review Petitions and applications seeking extension of time which were dismissed. He deliberately did not appear in the Court despite specific directions issued for personal appearance or on service of bailable/non-bailable warrant. Fresh non-bailable warrants issued, contemnor was produced in the court. Possession of the suit premises not delivered to the landlord in compliance with the order dtd. 06.06.2023. Whether the contemnor deliberately and willfully did not comply with the order of this Court dated 06.06.2023 and thus, guilty of the contempt of Court.

Headnotes†

Contempt of Court – Contemnor, if guilty of deliberate and willful non-compliance of the directions of this Court dated 06.06.2023 to deliver vacant possession of the suit premises to the landlord:

Held: Yes – Contemnor was unable to explain his conduct – He also sought a month's time to vacate the suit premises – After dismissal of the SLP, Review Petitions and applications for extension of time to vacate the suit premises, said prayer is unreasonable and a deliberate attempt to not to comply the directions issued by this Court to which he furnished an undertaking at a later stage – Contemnor deliberately and willfully did not comply with the order of this Court dated 06.06.2023 and flouted the same and thus,

guilty for non-compliance of the directions of this Court – However, contemnor being an old aged person, in the interest of justice a week's time granted to hand over the vacant and peaceful possession of the suit premises to the landlord, otherwise the order dated 06.06.2023 be complied with by taking forceful possession from him – Further directions issued. [Paras 13-15, 17]

Constitution of India – Article 129 – Contempt powers:

Held: Power to punish for Contempt of Court's order is vital to safeguard the authority and efficiency of the judicial system – Contempt powers are integral to maintaining the sanctity of judicial proceedings-power of this Court to punish for contempt is a cornerstone of its authority, integral to the administration of justice and the maintenance of its own dignity – This power is essential for upholding the rule of law and ensuring due compliance by addressing actions that undermine its authority, obstruct its proceedings, or diminish the public trust and confidence in the judicial system. [Para 2]

List of Acts

Contempt of Courts Act, 1971; Constitution of India.

List of Keywords

Article 129 of the Constitution of India; Contempt of Court; Contempt powers; Eviction; Landlord; Tenant; Contemnor; Deliberate, Willful non-compliance of the directions of Court; Willful disobedience; Contemptuous conduct; Undertaking/affidavit Personal appearance; Bailable/non-bailable warrant.

Case Arising From

INHERENT JURISDICTION: Contempt Petition (Civil) Nos. 196-197 of 2024

In

Special Leave Petition (Civil) Nos. 12081-12082 of 2023

From the Judgment and Order dated 06.06.2023 of the Supreme Court of India, Delhi in SLP (C) No. 12081-12082 of 2023

With

Contempt Petition (Civil) Nos. 198-199 of 2024 in Special Leave Petition (Civil) Nos. 12083-12084 of 2023

Appearances for Parties

Aniruddha Joshi, Sr. Adv., Rajeev Maheshwaranand Roy, Advs. for the Petitioner.

Nityanand Singh, Ashutosh Kumar Mishra, Ms. Radhika Goel, V. V. Manoharam, Ms. Joohi, Saurabh Upadhyay, Prakash Kumar Singh, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Order

"Disregarding a Court's order may seem bold, but the shadows of its consequences are long and cold."

1. Contempt of court is a serious legal infraction that strikes at the very soul of justice and the sanctity of legal proceedings. It goes beyond from mere defiance of a Court's authority, but also denotes a profound challenge to the principles that underpin the rule of law. At its core, it is a profound disavowal of the respect and adherence to the judicial process, posing a concerning threat to integrity of judicial system. When a party engages in contempt, it does more than simply refusing to comply with a Court's order. By failing to adhere to judicial directives, a contemnor not only disrespects the specific order, but also directly questions the Court's ability to uphold the rule of law. It erodes the public confidence in the judicial system and it's ability to deliver justice impartially and effectively. Therefore, power to punish for Contempt of Court's order is vital to safeguard the authority and efficiency of the judicial system. By addressing and penalizing contemptuous conduct, the legal system reinforces its own legitimacy and ensures that judicial orders and proceedings are taken seriously. This deterrent effect helps to maintain the rule of law and reinforces public's faith in the judicial process, ensuring that Courts can function effectively without undue interference or disrespect.

2. Contempt powers are integral to maintaining the sanctity of judicial proceedings. The ability to address contempt ensures that the authority of the court is respected and that the administration of justice is not hampered by willful disobedience. In the said context, the power of this Court to punish for contempt is a cornerstone of its authority, integral to the administration of justice and the maintenance

of its own dignity. Enshrined in Article 129 of the Constitution of India, this power is essential for upholding the rule of law and ensuring due compliance by addressing actions that undermine its authority, obstruct its proceedings, or diminish the public trust and confidence in the judicial system.

3. The Courts ordinarily take lenient approach in a case of some delay in compliance of the orders, unless the same is deliberate and willful, on confronting the conduct of the contemnor that strikes the very heart of judicial authority. Undoubtedly, this appalling breach of legal decorum has in its face challenged the sanctity of the orders passed by this Court and hence we are constrained to examine Contemnor/ tenant's willful and deliberate act of non-compliance of the order and also the undertaking furnished by him as directed.

4. In the case at hand, the present petitioner/landlord (in the contempt petitions) filed suits[1] before the Court of Small Causes at Bombay (Bandra Branch) seeking eviction of the respondent/tenant (contemnor) from a Shop No. 3 and Room No. 4 of the properties belonging to the petitioner/landlord being Municipal House Nos. 427, 430 and 431 C.T.S. Nos. 38, 38/1 to 13 and T.P.S. Plot No.23 (part) of Village Kanhari, Taluka Borivali B.S.D. situated at Corner of 9 Kasturba Road, Borivali (East), Mumbai – 400066 on the ground of bona fide need and also due to non-payment of rent and arrears against the respondent/tenant.

   4.1 The said suits were decreed by the Trial Court vide Judgment dated 21.08.2015. Aggrieved against the same, the respondent/ tenant preferred appeals[2] before the Appellate Bench of the Court of Small Causes at Bandra, Mumbai. The same were dismissed vide judgment dated 25.08.2022.

   4.2 Being dissatisfied, the respondent/tenant challenged the judgment and decree of the Appellate Court before the High Court[3] by filing Civil Revisions,[4] which were dismissed vide order dated 12.10.2022. It appears that the intention of the

1 R.A.E. & R. Suit Nos.43/137 & 111/300 of 2003

2 Appeal Nos.39 and 40 of 2015

3 High Court of Judicature at Bombay

4 Civil Revision Application Nos.453 of 2022 and 454 of 2022

respondent/tenant was to prolong the litigation, he filed review petitions,[5] which were also dismissed by the High Court vide order dated 07.12.2022.

4.3 As the litigation was not to end there only, the respondent/tenant challenged the aforesaid common order passed by the High Court by filing the Special Leave Petitions[6] before this Court.

4.4 When the matter was listed before this Court on 06.06.2023, the petitioner/landlord appeared on caveat. After hearing learned counsel for the respondent/tenant, this Court did not find any merit in the Special Leave Petitions and accordingly, the same were dismissed and granted nine (9) months' time to vacate the premises subject to filing of undertaking and affidavit by tenant before this Court. Till vacation of the said premises, the respondent/tenant was liable to pay charges for use and occupation equivalent to the monthly rent. The order specifically mention that breach of undertaking might give rise to contempt proceedings.

4.5 The respondent/tenant failed to furnish the undertaking as envisaged in the order passed by this Court on 06.06.2023, and filed the Review Petitions[7] which were also dismissed by this Court on 07.02.2024.

4.6 It appears that contemnor intended to retain possession, hence, he had filed applications seeking extension of time to vacate the premises, and only at that time he furnished the undertaking/ affidavit dated 22.02.2024. Those applications were registered as M.A. Nos. 405-406 of 2024 & M.A. Nos. 407-408 of 2024, and were dismissed on 04.03.2024. This Court has not allowed extension of time as prayed and the nine months period granted by this Court was to expire on 06.03.2024.

5. The petitioner-landlord in this fact situation got a notice[8] issued to the respondent/tenant calling upon him to hand over the physical

5 Review Petition Nos.9 and 10 of 2022

6 Special Leave Petition (C) No. 12081-12082 of 2023

7 Review Petitions arising out of R.P. Diary No.26984 of 2023

8 Dated 04.03.2024

possession of the suit premises on 06.03.2024 by 11:00 a.m. and vacate the same. Yet the possession of the premises in dispute was not handed over, therefore, the present contempt petitions were filed.

6. Upon issuing notice on 26.04.2024 returnable on 09.07.2024, it was directed that the alleged contemnor will remain present in the Court. On the date fixed, Mr. Chander Prakash Mishra, Advocate, appeared on his behalf, but he himself did not appear, though as per Office Report, service on respondent/tenant was not complete. The counsel representing him sought two weeks' time to file counter affidavit on the pretext that the respondent is hospitalized. As prayed time was allowed upto 29.07.2024 with direction to contemnor to remain present in Court on the next date of hearing.

7. The Office Report dated 27.07.2024 indicates that the counsel who had put appearance on behalf of the respondent on 09.07.2024 had neither filed the vakalatanama nor counter affidavit, therefore, while directing the physical presence of contemnor, all the facts were noticed in detail in the proceedings dated 29.07.2024. Again contemnor had neither filed the counter affidavit nor appeared to show respect and comply the orders of this Court. On the said date, new counsel, Mr. Prakash Kumar Singh had put in appearance on his behalf and said that Curative Petitions have been filed, which are pending and the contemnor is hospitalized. He sought time.

8. Noticing all the above said facts and his conduct, this Court was *prima-facie* convinced that the respondent is deliberately and willfully disobeying the orders, and despite specific directions issued earlier, failed to appear in person. Thus, to secure his attendance bailable warrant for his presence on the next date i.e., 12.08.2024 was issued.

9. As per the proceedings dated 12.08.2024, it is clear that despite service of bailable warrant, respondent/contemnor neither appeared nor filed any application seeking exemption from personal appearance clearly stating the reasons for his absence. In the said sequel of events, this Court was constrained to issue non-bailable warrant of arrest for securing his presence and for compliance of the orders to vacate the suit premises, fixing the matter on 02.09.2024. As per office report, non-bailable warrant issued could not be served on his address for the reason that the son of contemnor who was found present at the shop and the wife at home informed the police officials that the respondent/contemnor has gone to Delhi in connection with the case.

10. In addition the conduct of the respondent/contemnor was unveiled by his earlier counsel Shri Prakash Kumar Singh present in Court on 02.09.2024, who informed that he has received the message from contemnor not to appear on his behalf and as stated by him, it was recorded in the order. The order dated 02.09.2024 is relevant to show his conduct, therefore, extracted below for ready reference:

> *"5. Shri Prakash Kumar Singh, Advocate on Record, who was appearing on behalf of the respondent-contemnor, has stated that he has received a telephonic call on his Mobile No. 9891223681 from Mobile No. 9146553252 supposed to be a mobile of contemnor or his son and received the messages. One of the messages regarding his disengagement and non-appearance on next date is reproduced as under:*
>
> > *"To,*
> >
> > *Mr. Prakash Singh Tomar.*
> >
> > *From, Prithviraj Vardichand Jain.*
> >
> > *Date: 01/09/2024*
> >
> > *Sir, as I have informed you earlier that you will not be appear in my matter, which is listed on 2nd September, therefore I am sending reminder to you that please don't appear in my case & I have appointed a new Advocate for pursuing my case. So pls take note for the same."*
>
> *6. The photocopy of the said scanned message and other connected communications have been placed on record of this file.*
>
> *7. We request learned counsel to save these messages in his mobile number in original form and may not be deleted until further orders of this Court.*
>
> *8. Mr. Prakash Kumar Singh, Advocate on Record, in view of the said message seeks discharge from appearing in the matter. We discharge him from appearance but at present, we are not disassociating from this case.*
>
> *9. The new Advocate on Record Mr. Ashutosh Kumar Mishra, is not present in the Court as informed by the*

learned counsel Mr. Nityanand Singh now appearing for contemnor. He states that Mr. Anil Kumar, son of the contemnor, has visited to his office at Delhi and met him. On his instructions, he has engaged the AOR Mr. Ashutosh Kumar Mishra and now he is appearing for the respondent-contemnor. The son of contemnor has stated that his father is bed ridden and not in a position to come and appear in the Court. No application has been filed on behalf of the contemnor indicating all these facts seeking exemption and asking date for his appearance in terms of the previous orders.

10. In view of the factual scenario as indicated hereinabove, it is clear that the contemnor and his son both are aware of the proceedings of the Court and watching it thoroughly. It is also clear that contemnor has not come to Delhi and his son Anil came and contacted Mr. Nityanand Singh, Advocate, as stated before us. Therefore, the information furnished to the ASI by his son Mr. Rajesh and his wife Ms. Mangibai is incorrect and on the basis of such incorrect information, service of non-bailable warrant of arrest has been returned back to the Registrar of the Supreme Court only by the Police Inspector without supervising it by the Superintendent of the Police/ACP of the concerned area."

11. In view of the above and for the reasons recorded, fresh non-bailable warrant was issued against respondent/contemnor for securing his physical presence in Court, clearly specifying that non execution of warrant may cause appearance of Assistant Commissioner as well as the Inspector of the police of the area.

12. Today, when the matter was taken up, the respondent/contemnor has been produced in custody by Mr. Devidas Sadashiv Pokale, Sub-Inspector of Mumbai Police, accompanied with Mr. Sumer Singh (D-5896) Sub-Inspector and Mr. Akash Yadav (2426/DAP) Head Constable, both of Delhi Police posted at Tihar Jail. On appearance of contemnor, no doubt he appears to be a senior citizen, however, to gain sympathy of the Court started shedding tears. He showcased difficulty in standing, however, the Court offered him a chair and a glass of water. On being asked why he has not yet complied the orders, it was submitted by him that he is a poor person with large

family to support, and apologised for his conduct and later sought pardon. In the same breath he said that the Curative Petitions filed by him are still pending, and until those are decided, time may be granted. Then, he pleaded that, he has no other place to shift his large family and requested to grant him at least one month time to vacate the suit premises. His newly engaged counsel also argued in same line to grant time to hand over the possession of the subject property.

13. From the above facts, on the cost of repetition, it is necessary to observe that while dismissing the Special Leave Petitions on 6.6.2023 being meritless, nine months' time to vacate and handover the peaceful possession of the suit property was allowed. The contemnor was required to furnish an undertaking in this regard, which was not initially submitted by him. The contemnor continued to litigate and filed Review Petitions, which were also dismissed on 7.2.2024. Thereafter, he had chosen to file applications seeking extension of time of nine months to vacate the suit premises. On dismissal of said applications on 4.3.2024, the contemnor has not vacated the suit premises though he was required to do so on or before 6.3.2024. Even after filing of Contempt Petition and appearance of the advocate in the matter on his behalf, peaceful possession was not delivered to the landlord. On an endeavour made by this Court to call him for delivery of peaceful possession as directed by this Court on 6.6.2023, he deliberately did not appear despite specific direction issued at least three times for his personal appearance in the Court. On service of bailable warrant for his presence, he did not appear on the date so fixed. On issuance of the non-bailable warrants of arrest, he and his family members mislead the police official on account of which the said non-bailable warrants could not be executed, as reflects and extracted above in the order dated 02.09.2024. However, when the second order was passed by this Court issuing fresh non-bailable warrants, he was produced in the court. The contemnor was unable to explain his conduct, as noticed above and made a request that time to vacate the premises may be extended till decision of the Curative Petition.

14. It is needless to observe that the Curative Petition is to be decided in Chamber and the said recourse is not permissible as a matter of right to the contemnor. Later, he sought a month's time to vacate

the suit premises. In our view, after dismissal of the Special Leave Petitions, Review Petitions and applications for extension of time to vacate the suit premises, said prayer is wholly unreasonable and a deliberate attempt to not to comply the directions issued by this Court to which he furnished an undertaking at a later stage. It is to observe that on dismissal of Special Leave Petitions on 6.6.2023 and lapse of nine months' time on 6.3.2024, possession of the suit premises has not been delivered to the petitioner landlord complying the order of this Court. From the date of expiry of time to hand over the possession i.e., 6.3.2024, six months' further period has elapsed, even then compliance is not reported till today.

15. Considering all the facts and attending circumstances narrated above, we are of the view that it is a case in which the contemnor has deliberately and willfully not complied the order of this Court dated 6.6.2023 and flouted the same. Therefore, we are constrained to hold him guilty for non-compliance of the directions of this Court. We also find no substance in the explanation furnished by him, as discussed above.

16. Upon holding the contemnor guilty of the contempt of order of this Court, we had granted an opportunity to him before we pass any order on sentence. Again the contemnor submits that being old aged person, having many illness and to support a large family, he may be granted pardon and be allowed a week time to vacate the suit premises.

17. From the discussion made hereinabove, we were reluctant to grant further time to vacate the suit premises, but in the interest of justice, we grant a week's time to hand over the vacant and peaceful possession of the suit premises to the petitioner-landlord, otherwise, we direct that the order passed by this Court on 6.6.2023 shall be complied with taking forceful possession from him.

18. Accordingly, we dispose-of these petitions with following directions –

    18.1 The respondent/contemnor shall hand over vacant possession of both the properties to M/s Sitaram Enterprises as undertaken in furtherance to the order dated 06.06.2023 passed by this Court in SLP(C) Nos. 12081-12082/2023 (Diary No.41124/2022) and SLP(C) Nos. 12083-12084/2023 (Diary No.41118/2022) within a period of seven days.

18.2 In case of failure, within next seven days on a warrant of possession issued by the 68th Judicial Magistrate, First Class, Borivali West, Mumbai, the possession of the properties in question shall be taken with the police help in the presence of a Court Commissioner, who shall prepare inventory of the material lying in the premises and handover the same to the respondent/contemnor against receipt. Fee of the Court Commissioner to be paid and the cost of police help also shall be borne by the respondent/contemnor.

18.3 Appropriate order in this regard shall be passed by the said executing Court. After taking the possession from the respondent/contemnor the same shall be handed over to the petitioner/landlord and a report be sent to this Court.

18.4 Considering the age and health condition of the contemnor, instead of sending him jail, he is sentenced till rising of the Court and released as per the order passed in the proceeding. It is further directed that amount spent by the state exchequer in execution of the non-bailable warrants and to produce the contemnor before this Court in the Contempt Petitions and in execution of Court order shall be borne by contemnor and recoverable against him. The details of the amount spent shall be informed by the competent authority to the contemnor and the executing court within four weeks from today which shall be deposited by the contemnor within four weeks thereafter.

19. Pending application if any, shall also stand disposed-of.

Result of the Case: Contempt Petitions disposed of.

†*Headnotes prepared by:* Divya Pandey

[2024] 9 S.C.R. 425 : 2024 INSC 706

Sushma
v.
Nitin Ganapati Rangole & Ors.

(Civil Appeal No(s). 10648 of 2024)

19 September 2024

[Pamidighantam Sri Narasimha and Sandeep Mehta,* JJ.]

Issue for Consideration

The core issue involved in these appeals centres around the deduction of 50% compensation awardable to the appellant-claimants, who have assailed the concurrent findings of the Courts below on the aspect of contributory negligence whereby, the driver of the car, who also died in the accident, was held jointly responsible for causing the collision.

Headnotes†

Motor Vehicles Act, 1988 – A car collided with a 14-wheeler trailer truck which was left abandoned in the middle of the highway without any warning signs in the form of indicators or parking lights – The collision resulted into the death of the passengers of the car and the driver – Only one passenger-S survived – The injured S and the legal heirs of the deceased occupants of the car filed separate claim petitions – The Tribunal directed reduction of the compensation awarded by 50% on account of contributory negligence by driver of the car – The High Court approved the Tribunal observation with respect to contributory negligence – Correctness:

Held: On a holistic analysis of the material available on record, it is established beyond the pale of doubt that the offending truck was parked in the middle of the road without any parking lights being switched on and without any markers or indicators being placed around the stationary vehicle so as to warn the incoming vehicular traffic – This omission by the person in control of the said truck was in clear violation of law – The accident took place on a highway where the permissible speed limits are fairly high – In such a situation, it would be imprudent to hold that the driver of a vehicle, travelling through the highway in the dead of the night in pitch dark conditions, would be able to make out a stationary vehicle lying in the middle of the road within a reasonable

* Author

distance so as to apply the brakes and avoid the collision – The situation would be compounded by the headlights of the vehicles coming from the opposite direction and make the viewing of the stationary vehicle even more difficult – Thus, the conclusion drawn by the Courts below that the driver of the car could have averted the accident by applying the brakes and hence, he was equally negligent and contributed to the accident on the application of principle of last opportunity is ex-facie perverse and cannot be sustained – As a consequence, the deduction of 50% of compensation awarded to the appellant-claimants on account of contributory negligence, as directed by the Tribunal and affirmed by the High Court, cannot be sustained. [Paras 40, 42]

Case Law Cited

Sukhbiri Devi v. Union of India [2022] 13 SCR 523 **: 2022 SCC OnLine SC 1322;** *Mekala Sivaiah v. State of A.P* [2022] 6 SCR 989 **: (2022) 8 SCC 253;** *Union of India v. United India Insurance Co. Ltd.* [1997] Supp. 4 SCR 643 **: (1997) 8 SCC 683;** *Archit Saini and Another v. Oriental Insurance Company Limited and Others* [2018] 1 SCR 626 **: (2018) 3 SCC 365 – relied on.**

Pramodkumar Rasikbhai Jhaveri v. Karmasey Kunvargi Tak **(2002) 6 SCC 455 – referred to.**

Astley v. Austrust Ltd **(1999) 73 ALJR 403;** *Swadling v. Cooper* **1931 AC 1 – referred to.**

List of Acts

Motor Vehicles Act, 1988; Rules of Road Regulations, 1989; Constitution of India.

List of Keywords

Motor Vehicle Accident claim; Compensation; Reduction of Compensation awarded by 50% on account of contributory negligence; Contributory negligence.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 10648 of 2024

From the Judgment and Order dated 07.04.2021 of the High Court of Karnataka Circuit Bench at Dharwad in MFA No. 102775 of 2016

With

Civil Appeal Nos. 10649, 10650, 10651, 10652-10653 of 2024

Appearances for Parties

Nitin Tambwekar, Seshatalpa Sai Bandaru, Ms. Supreeta Sharanagouda, Sharanagouda Patil, Jyotish Pandey, Advs. for the Appellant.

Atul Nanda, Sr. Adv., Ms. Rameeza Hakeem, Rajeev Maheshwaranand Roy, P. Srinivasan, Ms. Vartika, Manish Kumar, Ishwar Singh, Gopal Singh, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Mehta, J.

Civil Appeals @ SLP(Civil) Nos. 21172 of 2021

Civil Appeals @ SLP(Civil) Nos. 1023 of 2022

Civil Appeals @ SLP(Civil) Nos. 21248 of 2021

Civil Appeals @ SLP(Civil) Nos. 337 of 2022

1. Leave granted.

2. The appellant-claimants have preferred these appeals being aggrieved by the common judgment dated 7th April, 2021 passed by the Division Bench of High Court of Karnataka in MAC appeals[1] filed by the appellant-claimants and respondent No.2-Reliance General Insurance Limited (for short the 'Insurer') under Section 173(1) of the Motor Vehicles Act, 1988 (for short the 'Act'). The Division Bench of the High Court disposed of the appeals in the following manner: -

"ORDER

1. Miscellaneous First Appeals filed by both the Insurance Company and the Claimants are disposed of;

2. The modified compensation in all the appeals is as follows:

1 In Miscellaneous First Appeal Nos. 102776, 102549, 102775, 102546, 102773, 102547, 102777 & 102550 of 2016 and 100204 of 2017.

MFA No.	Amount (Rs.)
102773 of 2016 (MVC 2277 of 2013)	**21,81,718.00**
102774 of 2016 (MVC 2278 of 2013)	**74,720.00**
102775 of 2016 (MVC 2279 of 2013)	**59,54,392.00**
102776 of 2016 (MVC 2280 of 2013)	**7,01,400.00**
102777 of 2016 (MVC 2281 of 2013)	**15,000.00**

3. Insurance company shall satisfy the award within four weeks from the date of receipt of certified copy of this order;

4. Apportionment and disbursement of the compensation amount shall be as per the award of the Tribunal;

5. The amount in deposit, if any, be transmitted to the Tribunal forthwith, for disbursement to the claimants."

3. Brief facts relevant and essential for the disposal of the present appeals are that on 18th August, 2013, a car bearing registration No. MH-09/BX-4073 (for short 'the car') collided with a 14-wheeler trailer truck bearing registration No. MH-09/CA-0389 (for short 'the offending truck') which was left abandoned in the middle of the highway without any warning signs in the form of indicators or parking lights. The collision resulted into the death of the passengers of the car, namely, Sunita, Ashtavinayak Patil, Deepali and the driver Saiprasad Karande at the spot. One of the passengers, namely, Smt. Sushma (wife of deceased- Ashtavinayak Patil) survived the accident, however, sustaining grievous injuries. The car was insured by respondent No. 4-IFFCO-TOKIO General Insurance Co. Ltd. (for short the 'Insurance Company'), whereas, the offending truck was insured by respondent No.2-Insurer.

4. The injured Smt. Sushma and the legal heirs of the deceased occupants of the car filed separate claim petitions under Section 166 of the Act before the VI Additional District and Sessions Judge and Member, Additional Motor Accident Claims Tribunal, Belagavi (hereinafter being referred to as 'Tribunal') claiming compensation from the owner of offending truck i.e. respondent No. 1 and the insurer of the offending truck i.e. respondent No.2-Insurer. No relief was sought by the claimants against the owner and the insurer of the car. The claimants alleged that since the offending truck was left

abandoned in the middle of the highway without switching on the parking lights or indicators or without taking any other precautionary measures to warn the incoming traffic, the person in control of the said vehicle was fully responsible for the accident.

5. The Tribunal, while deciding the claims held that it was a case of contributory negligence by the drivers of both the vehicles. The Tribunal observed that the driver of the car had contributed to the accident because he failed to take appropriate preventive measures so as to avoid collision with the offending truck which was parked in the middle of the road.

6. As the appellant-claimants had not claimed compensation from owner of the car, i.e., respondent No.3-Shri Vasant Ravan Jadhawar and respondent No.4-Insurance Company of the car, these respondents were exonerated and the claims against them were dismissed.

7. The Tribunal computed the compensation as below: -

MVC No.	Amount(Rs.)
2277 of 2013	**22,25,000.00**
2278 of 2013	**30,000.00**
2279 of 2013	**66,02,500.00**
2280 of 2013	**87,500.00**
2281 of 2013	**12,500.00**

8. The Tribunal held the owner of the offending truck, respondent No.1 and the respondent No. 2-Insurer jointly and severally responsible to indemnify the claims of the appellant-claimants and at the same time directed reduction of the compensation awarded by 50% on account of contributory negligence.

9. Aggrieved by the quantum of compensation awarded and the reduction on account of contributory negligence, the appellant-claimants filed appeals under Section 173(1) of the Act before the High Court of Karnataka.

10. Upon hearing arguments advanced on behalf of the parties and appreciating the material available on record, the Division Bench of the High Court of Karnataka applied the rule of last opportunity and held that had the driver of the car been cautious, he could have avoided the accident. The High Court gave imprimatur to

the Tribunal's observation with respect to contributory negligence, however, it modified and enhanced compensation awarded by the Tribunal while disposing of the appeals *vide* judgment dated 7th April, 2021 *(supra)*. The High Court affirmed the direction of the Tribunal holding the respondent No.2-Insurer responsible to indemnify the claims to the extent of 50%.

11. The appellant-claimants have preferred these appeals by special leave primarily aggrieved by the deduction of the compensation awarded to them on account of contributory negligence.

12. Thus, the core issue involved in these appeals centres around the deduction of 50% compensation awardable to the appellant-claimants, who have assailed the concurrent findings of the Courts below on the aspect of contributory negligence whereby, the driver of the car, i.e. Saiprasad Karande (deceased), was held jointly responsible for causing the collision.

13. The challenge in these appeals is against the concurrent findings of the Courts below. The scope of interference by this Court in such concurrent finding while exercising jurisdiction under Article 136 of the Constitution of India is well-established. In the case of ***Sukhbiri Devi v. Union of India***,[2] this Court noted:

> **"3.** At the outset, it is to be noted that the challenge in this appeal is against concurrent findings by three Courts, as mentioned hereinbefore. The scope of an appeal by special leave under Article 136 of the Constitution of India against the concurrent findings is well settled. In *State of Rajasthan* v. *Shiv Dayal*[3] reiterating the settled position, this Court held that a concurrent finding of fact is binding, unless it is infected with perversity. It was held therein: —
>
> > "**When any concurrent finding of fact is assailed in second appeal, the appellant is entitled to point out that it is bad in law because it was recorded *de hors* the pleadings or it was based on no evidence or it was based on misreading of material**

2 [2022] 13 SCR 523 : 2022 SCC OnLine SC 1322

3 (2019) 8 SCC 637

> **documentary evidence or it was recorded against any provision of law and lastly, the decision is one which no Judge acting judicially could reasonably have reached.** (see observation made by learned Judge Vivian Bose, J. as His Lordship then was a Judge of the Nagpur High Court in *Rajeshwar Vishwanath Mamidwar* v. *Dashrath Narayan Chilwelkar*, AIR 1943 Nag 117 Para 43)."
>
> **4.** Thus, evidently, the settled position is that **interference with the concurrent findings in an appeal under Article 136 of the Constitution is to be made sparingly, that too when the judgment impugned is absolutely perverse**. On appreciation of evidence another view is possible also cannot be a reason for substitution of a plausible view taken and confirmed. We will now, bearing in mind the settled position, proceed to consider as to whether the said appellate power invites invocation in the case on hand."
>
> (emphasis supplied)

14. This Court while dealing with the exercise of power under Article 136 to interfere with concurrent findings in ***Mekala Sivaiah v. State of A.P.,***[4] expounded: -

> **"15.** It is well settled by judicial pronouncement that Article 136 is worded in wide terms and powers conferred under the said Article are not hedged by any technical hurdles. This overriding and exceptional power is, however, to be exercised sparingly and only in furtherance of cause of justice. Thus, when the judgment under appeal has resulted in grave miscarriage of justice by some misapprehension or misreading of evidence or by ignoring material evidence then this Court is not only empowered but is well expected to interfere to promote the cause of justice.
>
> **16.** It is not the practice of this Court to re-appreciate the evidence for the purpose of examining whether the findings of fact concurrently arrived at by the trial court

4 [2022] 6 SCR 989 : (2022) 8 SCC 253

and the High Court are correct or not. **It is only in rare and exceptional cases where there is some manifest illegality or grave and serious miscarriage of justice on account of misreading or ignoring material evidence, that this Court would interfere with such finding of fact.**

…

18. In *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat* [*Bharwada Bhoginbhai Hirjibhai v. State of Gujarat*, (1983) 3 SCC 217 : 1983 SCC (Cri) 728] , a two-Judge Bench of this Court held that this Court does not interfere with the concurrent findings of fact unless it is established:

18.1. That the finding is based on no evidence.

18.2. That the finding is perverse, it being such as no reasonable person could arrive at even if the evidence was taken at its face value.

18.3. The finding is based and built on inadmissible evidence which evidence, excluded from vision, would negate the prosecution case or substantially discredit or impair it.

18.4. Some vital piece of evidence which would tilt the balance in favour of the convict has been overlooked, disregarded or wrongly discarded."

(emphasis supplied)

15. In view of the above precedents, it is clear that this Court in exercise of its jurisdiction under Article 136 of the Constitution of India has the power to interfere, even if the Courts below have concurrently reached to a common conclusion with respect to a certain factual aspect, subject to the condition that such a conclusion is so perverse that no reasonable person could arrive at such a conclusion even if the evidence was taken at its face value.

16. Having considered the submissions advanced by learned counsel for the parties and after going through the impugned judgements passed by the High Court and the Tribunal as well as upon appreciating the material placed on record, we feel that the contentious finding whereby, the driver of the car, namely, Saiprasad Karande (deceased)

was held jointly responsible for causing the accident along with the driver/owner of the offending truck leading to the claims of the passenger-Sushma & dependants of the deceased-passengers being deducted by 50% on the principle of contributory negligence is perverse on the face of the record.

17. In addition, we hold that the finding of the Courts below, which reduced the claims of the legal heirs of the deceased and the injured, other than the legal heirs of the driver-Saiprasad Karande (deceased) is also invalid in the eyes of law. The Courts below uniformly applied the principle of contributory negligence while directing deduction from the compensation awarded to the respective appellant-claimants, *i.e.* the dependents of passengers and the injured as well as the dependents of the driver-Saiprasad Karande @ 50%. Thus, the contributory negligence of the driver of the car was vicariously applied to the passengers which is *prima facie* illegal and impermissible.

18. In the case of ***Union of India v. United India Insurance Co. Ltd.***,[5] this Court dealt with the question whether the driver's negligence in any manner vicariously attaches to the passengers of the motor vehicle of which he was the driver, and it was held as below: -

> **"10.** There is a well-known principle in the law of torts called the "doctrine of identification" or "imputation". It is to the effect that the defendant can plead the contributory negligence of the plaintiff or of an employee of the plaintiff where the employee is acting in the course of employment. But, it has been also held in *Mills v. Armstrong* [(1888) 13 AC 1, HL] (also called The Bernina case) that principle is not applicable to a passenger in a vehicle in the sense that the negligence of the driver of the vehicle in which the passenger is travelling, cannot be imputed to the passenger. (Halsbury's Laws of England, 4th Ed., 1984 Vol. 34, p. 74; Ratanlal and Dhirajlal, Law of Torts, 23rd Ed., 1997, p. 511; Ramaswamy Iyer, Law of Torts, 7th Ed., p. 447.) The Bernina case [(1888) 13 AC 1, HL] in which this principle was laid in 1888 related to passengers in a steamship. In that case a member of the crew and a passenger in the ship Bushire were drowned on account

5 [1997] Supp. 4 SCR 643 : (1997) 8 SCC 683

> of its collision with another ship Bernina. It was held that even if the navigators of the ship Bushire were negligent, the navigators' negligence could not be imputed to the deceased who were travelling in that ship. This principle has been applied, in latter cases, to passengers travelling in a motor vehicle whose driver is found guilty of contributory negligence. **In other words, the principle of contributory negligence is confined to the actual negligence of the plaintiff or of his agents. There is no rule that the driver of an omnibus or a coach or a cab or the engine driver of a train, or the captain of a ship on the one hand and the passengers on the other hand are to be "identified" so as to fasten the latter with any liability for the former's contributory negligence. There cannot be a fiction of the passenger sharing a "right of control" of the operation of the vehicle nor is there a fiction that the driver is an agent of the passenger. A passenger is not treated as a backseat driver.** (Prosser and Keeton on Torts, 5th Ed., 1984, pp. 521-22.) It is therefore clear that even if the driver of the passenger vehicle was negligent, the Railways, if its negligence was otherwise proved — could not plead contributory negligence on the part of the passengers of the vehicle. What is clear is that qua the passengers of the bus who were innocent, — the driver and owner of the bus and, if proved, the Railways — can all be joint tortfeasors."
>
> (emphasis supplied)

19. It is clear from the ratio of the above judgment that the contributory negligence on the part of a driver of the vehicle involved in the accident cannot be vicariously attached to the passengers so as to reduce the compensation awarded to the passengers or their legal heirs as the case may be.

20. Thus, we have no hesitation in holding that the Courts below committed gross error in law while reducing the compensation awarded to the appellant-claimants, being the dependents of the deceased-passengers and Smt. Sushma as the claims of these claimants cannot be truncated by attaching the vicarious liability with the driver. However, the claim of the dependents of the deceased driver Saiprasad Karande would stand on a different footing.

21. We shall now proceed to discuss whether the Courts below were justified in fastening partial liability on the driver of the car on the basis of contributory negligence in causing the accident.

22. The High Court, after adverting to the evidence available on record, made the following observations on the aspect of contributory negligence: -

> **"12.** The Investigation Officer has filed charge sheet against the driver of the car as also the driver of truck. Exhibit P4-spot *mahazar* establishes the fact that the offending truck was parked on the middle of the road. Undisputedly, accident took place at 9.10 pm and the truck is a Heavy Goods Vehicle. Exhibit P6-Photograph of the place of accident substantiate that the offending truck was fourteen wheeled heavy truck which was parked on the middle of the road. Though Shri G.N. Raichur, learned counsel submitted that the truck was parked on the extreme left of the road, **however, perusal of the photographs would clearly substantiate the fact that the truck was parked on the middle of the road and on the other hand, the learned counsel for the claimants submitted that there was fog at the time of the accident.** There are no eye-witnesses to the incident. Taking into consideration the facts in totality, it may be stated that if the driver of the car was cautious, he would have avoided the accident and accordingly, the rule of last opportunity would be squarely applicable to the facts of the case and therefore, the finding recorded by the Tribunal fastening 50% contributory negligence on the drivers of both the vehicles in question, is just and proper. In view of the same, the finding recorded by the Tribunal on issue No.1 is, hereby, affirmed and the appeals filed by the Insurance Company challenging the liability are required to be rejected, accordingly rejected."
>
> (emphasis supplied)

23. On going through the above extract from the impugned judgment, it is evident that the High Court recorded an affirmative finding that the offending truck was parked in the middle of the road. This finding as borne out from the evidence is not under challenge and has attained finality. The accident took place on 18th August, 2013 which as per

the Hindu calendar fell on *Shukla Paksha Dwadashi*, and thus, there was not even a remote possibility that the road would be illuminated by moonlight at the time of the accident. The discussion of evidence by the Tribunal and the High Court makes no reference to availability of streetlights at the collision site and hence, there is no doubt that at the time of the accident, the conditions on the road would have been pitch dark making it virtually impossible for the incoming vehicles to sight the stationary offending truck within a reasonable distance.

24. Learned counsel for the appellant-claimants, urged that there is neither any evidence nor any finding by the Courts below that the offending truck was parked on the road after taking due care and caution i.e. either by switching on the parking lights or by putting any prominent markers around the vehicle so as to warn the passing vehicles. Apparently thus, the offending truck was left abandoned in the middle of the highway (as concurrently held by both the Courts below) without taking due care and caution to switch on the parking lights or to put in place any other precautionary measures to warn the vehicles traversing the highway in the dead of the night.

25. Common sense requires that no vehicle can be left parked and unattended in the middle of the road as it would definitely be a traffic hazard posing risk to the other road users.

26. We shall briefly refer to the statutory provisions applicable to the situation at hand.

27. A highway or a road is a public place as defined in Section 2(34) of the Act: **-**

> "**2(34)** "public place" means a road, street, way or other place, whether a thoroughfare or not, to which the public have a right of access, and includes any place or stand at which passengers are picked up or set down by a stage carriage;"

28. Section 121 of the Act provides that the driver of a motor vehicle shall make such signals and, on such occasions, as may be prescribed by the Central Government.

29. Section 122 of the Act provides that no person in charge of a motor vehicle shall cause or allow the vehicle or any trailer to be abandoned or to remain at rest on any "public place" in such a position or in

such a condition or in such circumstances so as to cause or likely to cause danger, obstruction or undue inconvenience to other users of the public place or to the passengers.

30. Section 126 of the Act provides that no person driving or in charge of a motor vehicle shall cause or allow the vehicle to remain stationary in any public place.

31. Section 127(2) of the Act provides that where any abandoned, unattended, wrecked, burnt or partially dismantled vehicle is creating a traffic hazard, because of its position in relation to the public place, or its physical appearance is causing the impediment to the traffic, its immediate removal from the public place by a towing service may be authorised by a police officer having jurisdiction.

32. Regulation 15 of the Rules of Road Regulation, 1989 which were prevailing on the date of the incident provides that every driver of a motor vehicle shall park the vehicle in such a way that it does not cause or is not likely to cause danger, obstruction or undue inconvenience to other road users. It casts a duty on the drivers of a motor vehicle stating that the vehicle shall not be parked at or near a road crossing or in a main road.

33. These legal provisions leave no room for doubt that the person in control of the offending truck acted in sheer violation of law while abandoning the vehicle in the middle of the road and that too without taking precautionary measures like switching on the parking lights, reflectors or any other appropriate steps to warn the other vehicles travelling on the highway. Had the accident taken place during the daytime or if the place of accident was well illuminated, then perhaps, the car driver could have been held equally responsible for the accident by applying the rule of last opportunity. But the fact remains that there was no illumination at the accident site either natural or artificial. Since the offending truck was left abandoned in the middle of the road in clear violation of the applicable rules and regulations, the burden to prove that the placement of the said vehicle as such was beyond human control and that appropriate precautionary measures taken while leaving the vehicle in that position were essentially on the person in control of the offending truck. However, no evidence was led by the person having control over the said truck in this regard. Thus, the entire responsibility for the negligence leading to the accident was of the truck owner/driver.

34. In view of the above discussion, the view expressed by the High Court that if the driver of the car had been vigilant and would have driven the vehicle carefully by following the traffic rules, the accident may have been avoided is presumptuous on the face of the record as the same is based purely on conjectures and surmises. Nothing on record indicates that the car was being driven at an excessively high speed or that the driver failed to follow the traffic rules. The High Court recorded an incongruous finding that if the offending truck had not been parked on the highway, the accident would not have happened even if the car was being driven at a very high speed. Therefore, the reasoning of the High Court on the issue of contributory negligence is riddled with inherent contradictions and is paradoxical.

35. The Courts below erred in concluding that it is a case of contributory negligence, because in order to establish contributory negligence, some act or omission which materially contributed to the accident or damage should be attributed to the person against whom it is alleged.

36. In the case of ***Pramodkumar Rasikbhai Jhaveri v. Karmasey Kunvargi Tak***,[6] this Court while referring to a decision of the High Court of Australia in ***Astley v. Austrust Ltd.***,[7] went on to hold that: -

> *"… where, by his negligence, if one party places another in a situation of danger which compels that other to act quickly in order to extricate himself, it does not amount to contributory negligence, if that other acts in a way which, with the benefit of hindsight is shown not to have been the best way out of the difficulty."*

37. In the very same judgment, this Court also referred to and approved the view taken in ***Swadling v. Cooper***,[8] as below: -

> "**Mere failure to avoid the collision by taking some extra ordinary precaution, does not in itself constitute negligence**."
>
> (emphasis supplied)

6 (2002) 6 SCC 455

7 (1999) 73 ALJR 403

8 1931 AC 1

38. A three Judge Bench of this Court in the case of ***Archit Saini and Another v. Oriental Insurance Company Limited and Others***,[9] had the occasion to consider an identical fact scenario, and after analysing the evidence available on record, it was held:-

> **"8.** After having perused the evidence of PW7, Site Map (Ext. P-45) and the detailed analysis undertaken by the Tribunal, we have no hesitation in taking the view that the approach of the High Court in reversing the conclusion arrived at by the Tribunal on issue No.1 has been very casual, if not cryptic and perverse. Indeed, the appeal before the High Court is required to be decided on fact and law. That, however, would not permit the High Court to casually overturn the finding of fact recorded by the Tribunal. As is evident from the analysis done by the Tribunal, it is a well-considered opinion and a plausible view. The High Court has not adverted to any specific reason as to why the view taken by the Tribunal was incorrect or not supported by the evidence on record. It is well settled that the nature of proof required in cases concerning accident claims is qualitatively different from the one in criminal cases, which must be beyond any reasonable doubts. The Tribunal applied the correct test in the analysis of the evidence before it. Notably, the High Court has not doubted the evidence of PW7 as being unreliable nor has it discarded his version that the driver of the Maruti Car could not spot the parked Gas Tanker due to the flashlights of the oncoming traffic from the front side. Further, the Tribunal also adverted to the legal presumption against the driver of the Gas Tanker of having parked his vehicle in a negligent manner in the middle of the road. The Site Plan (Ext. P-45) reinforces the version of PW7 that the Truck (Gas Tanker) was parked in the middle of the road but the High Court opined to the contrary without assigning any reason whatsoever. In our view, the Site Plan (Ext. P-45) filed along with the chargesheet does not support the finding recorded by the High Court that the Gas Tanker was not parked in the middle of the road. Notably,

9 [2018] 1 SCR 626 : (2018) 3 SCC 365

the High Court has also not doubted the claimant's plea that the Gas Tanker/offending vehicle was parked without any indicator or parking lights. The fact that PW7 who was standing on the opposite side of the road at a distance of about 70 feet, could see the Gas Tanker parked on the other side of the road does not discredit his version that the Maruti Car coming from the opposite side could not spot the Gas Tanker due to flashlights of the oncoming traffic from the front side. It is not in dispute that the road is a busy road. In the cross-examination, neither has any attempt been made to discredit the version of PW7 nor has any suggestion been made that no vehicle with flashlights on was coming from the opposite direction of the parked Gas Tanker at the relevant time.

9. Suffice it to observe that the approach of the High Court in reversing the well-considered finding recorded by the Tribunal on the material fact, which was supported by the evidence on record, cannot be countenanced.

10. Accordingly, we have no hesitation in setting aside the said finding of the High Court. As a result, the appellants would be entitled to the enhanced compensation as determined by the High Court in its entirety without any deduction towards contributory negligence. In other words, we restore the finding of the Tribunal rendered on issue No.1 against the respondents and hold that respondent no.1 negligently parked the Gas Tanker/offending vehicle in the middle of the road without any indicator or parking lights."

39. We are of the view that the aforesaid decision applies to the case at hand on all fours and thus, the appellant-claimants cannot be denied their rightful compensation on the ground that the driver of the car, namely Saiprasad Karande (deceased), was jointly responsible for the accident with the person in control of the offending truck and hence, their claims should be reduced on the principle of contributory negligence.

40. On a holistic analysis of the material available on record, it is established beyond the pale of doubt that the offending truck was parked in the middle of the road without any parking lights being

switched on and without any markers or indicators being placed around the stationary vehicle so as to warn the incoming vehicular traffic. This omission by the person in control of the said truck was in clear violation of law. The accident took place on a highway where the permissible speed limits are fairly high. In such a situation, it would be imprudent to hold that the driver of a vehicle, travelling through the highway in the dead of the night in pitch dark conditions, would be able to make out a stationary vehicle lying in the middle of the road within a reasonable distance so as to apply the brakes and avoid the collision. The situation would be compounded by the headlights of the vehicles coming from the opposite direction and make the viewing of the stationary vehicle even more difficult. Thus, the conclusion drawn by the Courts below that the driver of the car could have averted the accident by applying the brakes and hence, he was equally negligent and contributed to the accident on the application of principle of last opportunity is *ex-facie* perverse and cannot be sustained. Hence, it is a fit case warranting exercise of this Court's powers under Article 136 of the Constitution of India to interfere with the concurrent finding of facts.

41. We, therefore, hold that the person in control of the offending truck insured by respondent No. 2-Insurer, was fully responsible for the negligence leading to the accident.

42. As a consequence, the deduction of 50% of compensation awarded to the appellant-claimants on account of contributory negligence, as directed by the Tribunal and affirmed by the High Court, cannot be sustained. The finding recorded by the Courts below on this issue is reversed as being perverse and unsustainable in the facts as well as in law. Resultantly, it is directed that there shall be no deduction from the compensation payable to the appellant-claimants who shall be entitled to the full compensation as assessed by the Tribunal and modified by the High Court by the impugned judgment.

43. It is further directed that respondent No. 2-Insurer shall be jointly and severally liable along with the owner of the offending truck to indemnify the awards.

44. The appeals are accordingly allowed. No costs.

Civil Appeals @ SLP(Civil) Nos. 17692-17693 of 2023

45. Leave granted.

46. In these appeals, the appellant-Malutai[10] has challenged the apportionment of the compensation awarded by the Tribunal between the appellant and the co-claimant.[11] Modification in the apportionment is sought on the ground that the co-claimant Smt. Sushma has remarried after the claim was decided and thus, she cannot claim equal share in the compensation.

47. Having considered the submissions advanced on behalf of the parties, we are not inclined to interfere in the apportionment of the compensation between the appellant-Malutai and co-claimant (respondent No.5), as directed by the Tribunal and affirmed by the High Court. Thus, the said prayer of the appellant-Malutai is declined.

48. However, we reiterate the findings recorded in Civil Appeal @ SLP (Civil) No. 21172 of 2021 and connected matters and direct that the claimants, being the mother and wife of the deceased-Ashtavinayak Patil, shall be entitled to full compensation without any deduction on account of contributory negligence.

49. The respondent No.2-Insurer shall be liable to indemnify the award, however, the apportionment of the compensation *inter se* between the claimants as directed by the Tribunal shall not be disturbed.

50. The appeals are accordingly disposed of. No costs.

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

Result of the Case: Appeals disposed of.

†*Headnotes prepared by:* Ankit Gyan

10 Mother of the deceased-Ashtavinayak Patil

11 Smt. Sushma, wife of the deceased-Ashtavinayak Patil (respondent No. 5 in the present appeals)

[2024] 9 S.C.R. 443 : 2024 INSC 709

M/s Ultra-Tech Cement Ltd.
v.
Mast Ram & Ors.

(Civil Appeal No. 10662 of 2024)

20 September 2024

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

Issue for Consideration

Whether the subject land and all other liabilities associated with it were transferred to the Appellant in terms of the Scheme; Whether it was the Appellant or JAL who was legally obliged to pay the compensation amount determined under the Supplementary Award; Whether the land in terms of Section 101 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 can be returned to the Respondent Nos. 1-6 at this stage under the scheme of the Act; In other words, what is the scope of Section 101; Whether the State of Himachal Pradesh, being a welfare state, had the responsibility to ensure full payment of compensation amount determined under the Supplementary Award dated 02.05.2022.

Headnotes†

Land Acquisition Act, 1894 – Land Acquisition, Rehabilitation and Resettlement Act, 2013 – The High Court allowed the writ petition filed by the Respondent Nos. 1 to 6 herein (original petitioners) and directed the Appellant herein to pay the requisite amount towards compensation as determined in the Supplementary Award dated 02.05.2022 passed by the Land Acquisition Collector (LAC) (Respondent No. 10) in the first instance with liberty to recover the same from JAL (Respondent No. 11) if permissible under the legal relationship between the two companies – Correctness:

Held: An analysis of the Scheme agreed between the Appellant and JAL is the key to determine who should pay the amount determined under the Supplementary Award dated 02.05.2022 – Clause 1.1 (o) defines the "Effective Date" as the date on which the Scheme becomes effective in accordance with its terms, which shall be the Closing Date [defined in Clause 1.1(k) and Clause

* Author

10.1] – The said date was decided to be 29.06.2017 among the parties – The parties by way of Clause 1.1(w)(ix) agreed that all litigations pertaining to the business and assets being transferred to the Appellant that arose before or on the Closing Date would not be transferred to the Appellant and will remain with JAL – Clause 7.1 of the Scheme states without any ambiguity that any legal or other proceeding by or against JAL or its unit operating the cement project relating to the JAL Business as defined in Clause 1.1(w), initiated on or arising and pending before the Effective Date shall remain with JAL – The facts indicate that the land acquisition proceedings had commenced before the Effective Date of the Scheme (i.e. 29.06.2017) and the compensation remained undetermined as on the Effective Date – These facts attract the application of Clause 7.1 of the Scheme as the acquisition proceedings and the liability to pay compensation associated with it squarely falls within the meaning of 'other proceedings' as intended by the parties under the said Clause – JAL has also not disputed that it had made payment of the amount determined under the Award of 2018 i.e., Rs. 10,77,53,842/- after the Effective Date of the Scheme – The said amount has already been disbursed to the landowners – After the LAC determined the amount under the Award dated 08.06.2018, JAL paid the same without any protest or reference to the Scheme – Therefore, at the stage of the Supplementary Award pertaining to the same land and same original landowners, JAL cannot be allowed to take the plea that the payments with respect to the subject land were required to be made by the Appellant. [Paras 21, 22, 24, 26, 27, 28, 29]

Land Acquisition, Rehabilitation and Resettlement Act, 2013 – s.101 – It is the case of JAL that the substantial delay in acquisition of the subject land has frustrated its purpose, and it could not make any use of the land – It was submitted that if the Appellant does not require the said land, then it should be returned to the original landowners and the amount of Rs. 10,77,53,842/- paid under the Award of 2018 should be refunded to JAL:

Held: The necessary conditions for the application of Section 101 are: (1) the land should be unutilized; and (2) the period it remains not in use should be at least five years from the date of taking of possession – There is no merit in the contention of JAL that the land be returned to the original landowners –

While period of five years has elapsed from the date of taking of possession by JAL, the first condition that the land should remain unutilized is not fulfilled – The subject land was acquired for the purpose of providing a safety zone to the mining area of the cement plant – No other use except that the subject land may pose hazard to the residents was envisaged during the acquisition proceedings – JAL cannot pray for return of the land as that would result in endangering the lives and property of the original landowners – It is also found that the subject land has been in use all throughout the operation of the cement project by serving as a safety zone and the condition of being unutilized is not satisfied – It is not in dispute that the Supplementary Award had to be passed as the compensation for standing crops, structures and other damages for the subject land which could not be fixed and evaluated under the Award No. 1 dated 08.06.2018 – The passing of Supplementary Award was not a fresh exercise but rather a continuation/extension of the Award of 2018 – Therefore, when JAL has already paid the compensation amount as determined under the previous Award without any demur, it cannot be allowed to question its liability under the Supplementary Award and make a plea for return of the land at this stage on the ground that the purpose of the land is frustrated due to delay in acquisition proceedings. [Paras 35, 36, 37, 38, 39]

Land Acquisition, Rehabilitation and Resettlement Act, 2013 – s.101 – Scope of:

Held: The instant section was introduced in the 2013 Act for the first time as a beneficial provision for the landowners whose lands were usurped but remained unutilized or were not used in accordance with the purpose stated in the notifications under Section 4 – However, the application of the Section is warranted only in the circumstances where the return of the land would benefit the landowners – The party which has failed to utilize the land cannot plead for the return of the land and consequent refund of the compensation paid, as that would tantamount to taking advantage of its own wrong or default. [Para 40]

Constitution of India – Art.300-A – Role of the State under Article 300-A of the Constitution – Responsibility of State to ensure full payment of compensation determined:

Held: It is settled that once the compensation has been determined, the same is payable immediately without any requirement of a

representation or request by the landowners and a duty is cast on the State to pay such compensation to the land losers, otherwise there would be a breach of Article 300-A of the Constitution – In the instant case, the Government of Himachal Pradesh as a welfare State ought to have proactively intervened in the matter with a view to ensure that the requisite amount towards compensation is paid at the earliest – The State cannot abdicate its constitutional and statutory responsibility of payment of compensation by arguing that its role was limited to initiating acquisition proceedings under the MOU signed between the Appellant, JAL and itself – This Court finds that the delay in the payment of compensation to the landowners after taking away ownership of the subject land from them is in contravention to the spirit of the constitutional scheme of Article 300A and the idea of a welfare State – The State Government, in peculiar circumstances, was expected to make the requisite payment towards compensation to the landowners from its own treasury and should have thereafter proceeded to recover the same from JAL – Instead of making the poor landowners to run after the powerful corporate houses, it should have compelled JAL to make the necessary payment – Also, the State of Himachal Pradesh, being a welfare state, did not ensure payment of compensation to the Respondent Nos. 1-6 before taking possession of their land – A bare reading of Section 38 of the 2013 Act indicates that the payment of full and final compensation to the land owners is a precursor to taking possession of the land sought to be acquired from such persons – In fact, the landowners had to approach the High Court to seek directions to the LAC for passing of the supplementary award which was finally passed on 02.05.2022 that is, after a period of almost four years from the date of passing of the Award of 2018 – Further, Section 41 of 1894 Act necessitates an agreement between the appropriate government and the company for whose purpose the land is being acquired – One of the purposes of such an agreement is to ensure that payment towards the cost of acquisition is made by the company to the appropriate government and it is only upon such payment that the land is transferred to the company – Thus, it can be said that JAL was mandated to make the requisite payment to the State of Himachal Pradesh prior to the subject land being transferred to it – However, even before the amount of compensation could be determined by way of a supplementary award as stipulated in the Award dated 08.06.2018, the subject land stood transferred to

JAL – This is in contravention of Section 38 of the 2013 Act and Section 41 of the 1894 Act respectively – Thus, the Respondent Nos. 7 (State of Himachal Pradesh) and 10 (LAC) are directed to pay the compensation amount of Rs. 3,05,31,095/- – The total amount paid by the State shall be recovered from the Respondent No. 11 (JAL). [Paras 47, 48, 50, 52, 54, 55, 58]

Case Law Cited

Kolkata Municipal Corporation & Anr. v. Bimal Kumar Shah & Ors. [2024] 5 SCR 831 **: 2024 SCC OnLine SC 968 – relied on.**

Roy Estate v. State of Jharkhand [2009] 7 SCR 343 **: (2009) 12 SCC 194;** *Union of India v. Mahendra Girji* **(2010) 15 SCC 682;** *Mansaram v. S.P. Pathak* [1984] 1 SCR 139 **: (1984) 1 SCC 125;** *Dharnidhar Mishra (D) and Another v. State of Bihar and Others* [2024] 6 SCR 714 **: 2024 SCC OnLine SC 932;** *State of Haryana v. Mukesh Kumar* [2011] 14 SCR 211 **: (2011) 10 SCC 404;** *Tukaram Kana Joshi and Ors. thr. Power of Attorney Holder v. M.I.D.C. and Ors.* [2012] 13 SCR 29 **: (2013) 1 SCC 353;** *Kukreja Construction Company & Ors. v. State of Maharashtra & Ors.,* **2024 SCC OnLine SC 2547;** *Premlal & Ors. v. State of Himachal Pradesh & Ors.,* **CWP No. 481 of 2010 – referred to.**

List of Acts

Land Acquisition Act, 1894; Land Acquisition, Rehabilitation and Resettlement Act, 2013; Companies Act, 1956; Constitution of India.

List of Keywords

Section 101 of Land Acquisition, Rehabilitation and Resettlement Act, 2013; Section 38 of Land Acquisition, Rehabilitation and Resettlement Act, 2013; Section 41 of Land Acquisition Act, 1894; Sections 391-394 of the Companies Act, 1956; Article 300-A of the Constitution of India; Payment of compensation; Return of acquired land; Agreement with appropriate government; Power to take possession of land to be acquired.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 10662 of 2024

From the Judgment and Order dated 12.07.2022 of the High Court of Himachal Pradesh at Shimla in CWP No.2350 of 2018

Appearances for Parties

Navin Pahwa, Sr. Adv., Mahesh Agarwal, Rishi Agrawala, Ankur Saigal, Victor Das, Ms. Geetika Sharma, Sudipto Sicar, Ms. Manavi Agarwal, E. C. Agrawala, Advs. for the Appellant.

Puneet Rajta, A.A.G., Ranjit Kumar, Sr. Adv., Subhash Chandran Kr, Virender Thakur, Ms. Krishna Lr, Biju P Raman, Himanshu Tyagi, Vikrant Narayan Vasudeva, Sarthak Chiller, Rohit Lochav, Ms. Sharmila Upadhyay, Pawan R Upadhyay, Sarvjit Pratap Singh, M/s. Unuc Legal Llp, 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: -

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

1. Leave Granted.

2. This appeal arises from the order passed by the High Court of Himachal Pradesh at Shimla dated 12.07.2022 in Civil Writ Petition No. 2350/2018 filed by the Respondent Nos. 1 to 6 herein (original petitioners) by which the High Court allowed the writ petition and directed the Appellant herein to pay the requisite amount towards compensation as determined in the Supplementary Award dated 02.05.2022 passed by the Land Acquisition Collector, Arki ("**LAC**") (Respondent No. 10) in the first instance with liberty to recover the same from M/s Jaiprakash Associates Limited ("**JAL**") (Respondent No. 11) if permissible under the legal relationship between the two companies.

I. FACTUAL MATRIX

3. The State of Himachal Pradesh (Respondent No. 7) issued a notification dated 25.07.2008 under Section 4 of the Land Acquisition Act, 1894 (the "**1894 Act**") through its Department of Industries declaring its intention to acquire the subject land admeasuring 56-14 bigha, situated at Mauza Bhalag, Tehsil Arki, District Solan, Himachal Pradesh (the "**subject land**") in favour of Jaypee Himachal Cement project, a unit of JAL, invoking special powers in cases of urgency as provided under Section 17 of the 1894 Act. It appears that the purpose for acquiring the subject land was to create a safety zone surrounding the mining area. In other words, the subject land was situated in the vicinity of the leasehold area of the mining project and could not have been otherwise used for residential purposes or creation of any other structures. Subsequently notifications were also issued under Sections 6 and 7 respectively of the 1894 Act.

4. It appears from the materials on record that during the acquisition proceedings, some of the landowners, including the Respondent Nos.

1-6 herein did not allow the authorities to undertake the evaluation of their houses, trees, structures, etc., standing on the subject land for the purpose of determination of compensation.

5. The acquisition proceedings ultimately came to be challenged by some of the landowners before the High Court by way of CWP No. 2949 of 2009 titled as ***Premlal & Ors.*** **v.** ***State of Himachal Pradesh & Ors.*** and CWP No. 481 of 2010 titled as ***Chunni Lal & Ors.*** **v.** ***State of Himachal Pradesh & Ors.*** *inter alia,* on the ground that sub-section (4) of Section 17 of the 1894 Act could not have been invoked as the acquisition was not for any public purpose. The High Court passed an *ad interim* order dated 14.12.2011 granting stay on the acquisition proceedings.

6. The High Court by a common judgment dated 23.06.2016 dismissed the writ petitions referred to above *inter alia,* on the ground that acquisition of the lands in question was for a public purpose as the said land contained vital raw material (limestone) for the manufacturing of cement and the usage of such mineral wealth would advance the public purpose of infrastructure development.

7. As the writ petitions stood dismissed, the Land Acquisition Collector, Arki proceeded to pass the Award No. 1/2018 dated 08.06.2018 as per Section 11(1) of the 1894 Act and Section 24(1)(a) of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (the "**2013 Act**") determining the compensation to the tune of Rs. 10,77,53,842.27/- (Rupees Ten Crore Seventy Seven Lakh Fifty Three Thousand Eight Hundred and Forty Two and Twenty Seven paisa Only) along with the incidental charges @ 2% amounting to Rs. 9,09,315.12/-. The LAC clarified in the award passed by him that the compensation amount towards the houses and other structures constructed prior to the date of notification under Section 4, whose survey was not allowed by the landowners during the acquisition proceedings would be considered in the supplementary award that may be passed separately after the reports regarding the valuation of structures were received.

8. The amount as determined under the Award dated 08.06.2018 was deposited by JAL and disbursed to the landowners. The possession certificate dated 07.06.2019 in respect of the subject land was issued in favour of JAL. Subsequently, the entries in the revenue record of the subject land in favour of JAL came to be mutated on 12.11.2020.

9. Being dissatisfied with the Award dated 08.06.2018, the Respondent Nos. 1-6 herein filed writ petition no. 2350 of 2018 before the High Court on 16.09.2018, praying for a direction to the LAC to pass a supplementary award after quantifying the compensation for the damage caused to the structures and standing crops on the subject land for the period between 2008 and 2018 as well as for a direction to the LAC to pass a fresh award under the provisions of the 2013 Act to provide additional amount @ 12% on market value with effect from the date of notification under Section 4 till the date of Award dated 18.06.2018. On 12.07.2019, the Respondent Nos. 1-6 also filed a Reference Petition under the 2013 Act praying *inter alia* for the enhancement of the amount of compensation determined under the Award dated 08.06.2018.

10. On 24.11.2021, the High Court passed an order directing the LAC to pass a supplementary award in accordance with law. On 23.05.2022, the High Court recorded that the supplementary award dated 02.05.2022 had been passed in compliance with its order dated 24.11.2021 under which an additional amount of Rs. 3,02,75,605/- along with incidental charges @ 2% of total assessment value was to be paid by JAL. Thus, the total additional amount determined was Rs. 3,05,31,095/- (Rupees Three Crore Five Lakh Thirty One Thousand and Ninety Five). However, the High Court recorded on 20.06.2022 that the said amount had not been deposited in terms of its order dated 23.05.2022.

11. During the pendency of the acquisition proceedings, JAL entered into an agreement with the Appellant herein for the transfer of the cement project in question. In this regard, a Scheme of Arrangement was signed between the Appellant, JAL and Jaypee Cement Corporation Ltd. (the unit of JAL operating the cement project) (the "**Scheme**") under the relevant provisions of the Companies Act, 1956. The Scheme was approved by the National Company Law Tribunal ("**NCLT**") Mumbai Bench on 15.02.2017 and NCLT Allahabad Bench on 02.03.2017.

12. On 21.06.2017, the Director of Industries, Department of Industries, Government of Himachal Pradesh issued a letter to JAL and the Appellant acknowledging the approval given by the Joint Secretary to the Government of Himachal Pradesh as regards the transfer of the cement plant, as per the Scheme approved by the NCLT and as per the Tripartite Agreement between the Appellant, JAL and Government of Himachal Pradesh respectively, entered into on 29.06.2017.

13. In such circumstances, the High Court examined the relationship between the Appellant and JAL and also referred to the Scheme for the purpose of determining the issue as to who should pay the compensation amount determined under the Supplementary Award to the Respondent Nos. 1-6 respectively.

14. On 12.07.2022, the High Court relying on Clause 7.1 of the Scheme, passed the impugned order, directing the Appellant to pay the compensation amount at the first instance and left it open for the Appellant to recover the same from JAL later, if permissible in law.

15. In view of the aforesaid, the Appellant is before this Court with the present appeal.

II. SUBMISSIONS ON BEHALF OF THE APPELLANT

16. Mr. Navin Pahwa, the learned senior counsel appearing for the Appellant made the following submissions:

    a. The High Court, in its impugned order, erred in directing the Appellant to pay the compensation amount determined under the Supplementary Award because the initial Award dated 08.06.2018 as well as the Supplementary Award dated 02.05.2022 were passed by the LAC fixing the liability to pay compensation on JAL.

    b. The High Court failed to consider that under the Scheme between the Appellant and JAL, as sanctioned by NCLT, Mumbai on 15.02.2017 and NCLT, Allahabad on 02.03.2017, all contingent liabilities pertaining to matters relating to the "JAL Business" (as defined in Clause 1.1(w) of the Scheme), including those of pending litigations where the disputed claims were not crystallized on or before the effective date, i.e., 29.06.2017, would be the sole liability of JAL. Since the acquisition proceedings for the subject land were initiated by a notification under Section 4 of the 1894 Act dated 25.07.2008, therefore, the litigation was pending as on 29.06.2017 (the "**Effective Date**") and the disputed claim was not crystallized till the passing of the Supplementary Award dated 02.05.2022.

    c. The High Court erred in recording that the Appellant had made the payment under the Award dated 08.06.2018, whereas factually, it was JAL who had paid the compensation amount

under the said Award. The High Court also failed to consider that by making the payment under the Award dated 08.06.2018, JAL had accepted its liability for claims arising out of the acquisition proceedings.

d. The subject land was acquired for JAL. Accordingly, the LAC had issued a possession certificate dated 07.06.2019 in favour of JAL and handed over spot possession of the subject land to it under Section 16 of the 1894 Act. The subject land was duly mutated in the name of JAL vide Mutation No. 232 dated 12.11.2020. The High Court failed to take into consideration the fact that the subject land had not been transferred as an asset to the Appellant under the Scheme. To establish the same, the Appellant had placed on record and referred to a Chart of Comparison of Khasra Numbers under the Scheme and the Khasra Numbers which were transferred to JAL under the Award dated 08.06.2018 contending that none of the Khasra Numbers of the subject land or portions thereof overlap with the Khasra Numbers of the land/assets transferred under the Scheme. Therefore, since the Appellant was not enjoying the possession or benefit, if any, of the subject land, the liability of paying the compensation under the Supplementary Award could not have been fastened on it.

e. As per the Scheme, the Appellant only purchased certain assets listed in the Schedule-I and Schedule-IA thereof on a *"slump exchange basis"* and did not take over JAL. Mr. Pahwa clarified that JAL is a surviving entity and the High Court had erred in understanding that JAL stood merged or transferred with the Appellant.

f. Mr. Pahwa also brought our attention to the order passed by this Court dated 16.12.2019 in ***Ultratech Cement Ltd.*** **v.** ***Tonnu Ram,*** SLP (C) (Diary) No. 42997 of 2019 wherein this Court clarified that the impugned judgment of the High Court of Himachal Pradesh could not have been construed as permitting third party to pursue claim for recovery against the Appellant in disregard of the Scheme and the executing court would be duty-bound to examine the purport of the Scheme and pass orders strictly in consonance therewith.

The relevant observations made by this Court in ***Tonnu Ram* (supra)** are reproduced below:

> "*…It cannot be construed as permitting third party to pursue claim for recovery against the petitioner in disregard of the scheme of arrangement propounded by the NCLT in respect of respondent No.4- M/s. Jaiprakash Industries.*
>
> *Despite this clear position, if any third party intends to pursue remedy against the petitioner,* ***the Executing Court would be duty bound to examine the purport of the stated scheme propounded by the NCLT and pass orders strictly in consonance therewith****. It would be open to the petitioner to invite attention of the Executing Court or any other Forum about the relevant provisions in the scheme in support of the argument that the liability to pay the dues will remain that of respondent No.4- M/s. Jaiprakash Industries as per the stated scheme."*
>
> **[Emphasis supplied]**

g. The senior counsel also submitted that JAL had made a declaration on oath in Form-16A under Order XXI Rule 41(2) of the Code of Civil Procedure, 1908 dated 04.12.2023 in Civil Revision Petition No. 174 of 2022 titled ***Tohnu Ram (Deceased)* v. *M/s Ultratech Cement Ltd.*** before the High Court of Himachal Pradesh which read as follows:

> *"…(e) Other Property: List of Property of Jaiprakash Associates Ltd., i.e. Land measuring 56-14 bigha, situate at village bhalag, PO Kandhar, Tehsil Arki, Distt. Solan (HP), vide which the Mutation was attested on 12.11.2020 in favour of Jaiprakash Associates Ltd…"*

Therefore, in view of the above, the subject land remained in ownership of JAL and the Appellant had no connection with the subject land, directly or indirectly and that the subject land was neither acquired for the benefit of the Appellant nor was it transferred under the Scheme to the Appellant.

III. SUBMISSIONS ON BEHALF OF THE RESPONDENT NOS. 1-6

17. Mr. Biju P. Raman, the learned counsel appearing for the Respondent Nos. 1-6 made the following submissions:

a. The subject land forms a part of the safety zone area meant for the cement plant that was being operated by the cement unit of JAL. The District Administration acquired 56.14 bhigas of land and the Award for the same was passed on 08.06.2018 by the LAC, Arki.

b. The plant/project had been taken over by the Appellant herein by acquiring all the assets and liabilities of JAL in the year 2017 and all movable and immovable assets and liabilities ancillary thereto were transferred to the Appellant, which was affirmed by a tripartite Memorandum of Understanding signed between the Appellant, JAL and the Government of Himachal Pradesh (the "**MOU**") dated 29.06.2017.

c. The High Court vide order dated 12.07.2022 recorded the submission of the Respondent Nos. 1-6 that the payment towards the Award No. 1 of 2018 pertaining to the subject land was deposited by the Appellant.

d. The Appellant and JAL are trying to escape from their legal obligation and liability to pay the compensation amount as determined under the Supplementary Award to the Respondents and are in collusion with each other creating an inter-se dispute with the intention of depriving the original landowners of their legitimate right to receive compensation due to them.

e. The subject land was acquired for public purpose and was being utilized by the Appellant for its purposes.

IV. SUBMISSIONS ON BEHALF OF THE RESPONDENT NO. 10

18. Mr. Puneet Rajta, the learned Additional Advocate General appearing for the Respondent No. 10 i.e., the Land Acquisition Collector, Arki made the following submissions:

a. The subject land was acquired in the year 2018 for providing a safety zone to the cement plant which had already been taken over by the Appellant in the year 2016.

b. The acquired land is being utilized by the Appellant as a safety zone for the cement plant being run by them. However, the land is recorded in the name of JAL.

c. The role of the State was limited to the extent of initiating the acquisition proceedings and as per the MOU signed with the Government of Himachal Pradesh, all costs pertaining to the acquisition/transfer of land would be borne by the company only. It was clarified that the State had no role to play in the business of manufacturing or running the cement plant of the company and all payments under the Award No. 1 of 2018 dated 08.06.2018 stood paid to the landowners by JAL.

d. The Supplementary Award was passed on 02.05.2022 in accordance with the direction of the High Court dated 16.09.2018 in CWP No. 2350 of 2018 and the High Court through a separate order dated 12.07.2022 directed the Appellant to make the payment to the landowners and recover the said amount from JAL. The said order was challenged by the Appellant and this Court while issuing notice vide order dated 22.08.2022 directed that there shall be a stay of operation and implementation of the impugned order of the High Court.

e. The land is being used by the Appellant for the purpose of operating the cement plant however, they are raising disputes only with the view to deny the rights of the landowners. Therefore, the liability for payment of compensation be fixed as against the Appellant or JAL. It was submitted that if the State was directed to compensate the landowners, it would have to do so out of public funds and seek reimbursement.

V. SUBMISSIONS ON BEHALF OF THE RESPONDENT NO. 11

19. Mr. Ranjit Kumar, the learned senior counsel appearing for the Respondent No. 11 i.e., M/s Jaiprakash Associates Limited (JAL) made the following submissions:

a. During the process of passing of the Supplementary Award dated 02.05.2022, JAL had clarified that that it had handed over the cement project to the Appellant on 29.06.2017 and the subject land was acquired for the purpose of mining activities and safety zone. It was asserted that the subject land was an integral part of the cement project. Therefore, whosoever was

operating the cement plant and carrying out the mining activities was responsible for maintaining the safety zone. Accordingly, it was the duty of the Appellant to pay the amount determined under the Supplementary Award.

b. During the course of the hearing of the Writ Petition No. 2350 of 2018, the Appellant had stated that it did not require the subject land for its projects. The Counsel contended that since JAL had already handed over the cement project to the Appellant and the subject land was acquired for the purpose of safety zone for the said project, the Appellant cannot say that they never had any need for this particular land.

c. Although the State Government had handed over the symbolic possession of the subject land in favour of JAL on 07.06.2019 yet the physical possession of this land remained with the villagers/ landowners including Respondent Nos. 1-6 who had illegally occupied the subject land and had constructed houses/structures on the same even after the deliverance of the Award dated 08.06.2018 and the Supplementary Award dated 02.05.2022.

d. It was submitted that the substantial delay in the issuance of the Award by the LAC had frustrated the purpose of acquisition for JAL. Since the entire project has been under the custody and possession of the Appellant, it is the appropriate party to address the issue of the requirement of the subject land for the purpose of Mining Activities & Safety Zone. If the Appellant is not interested in the subject land, then the same should be returned to the original landowners (Respondent Nos. 1-6 herein) and the amount deposited as an award of Rs. 10,77,53,842/- in the year 2018 should be refunded to JAL.

e. Mr. Kumar contended that according to the statement provided by the Appellant to the High Court, it can be reasonably concluded that the Appellant does not require the land in question, which was acquired for the purpose of Mining Activities and Safety Zone for the Cement project. Therefore, the Appellant may proceed to submit an application in this regard to the Government of Himachal Pradesh, as submitted before the High Court.

f. The Counsel reiterated that JAL had sold out and handed over the entire cement project to the Appellant in the year 2017, which included the acquired private land and government land

diverted for this purpose. It was submitted that the subject land was required for an entity involved in cement production in the area, therefore, the responsibility for maintaining the Safety Zone of the cement project was with the Appellant. If the Appellant is not interested in the acquired subject land, then the same may be returned and the amount of Rs. 10,77,53,842/- deposited as award in the year 2018 be refunded to JAL.

VI. ISSUES FOR DETERMINATION

20. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the following four questions fall for our consideration: -

i. Whether the subject land and all other liabilities associated with it were transferred to the Appellant in terms of the Scheme?

ii. Whether it was the Appellant or JAL who was legally obliged to pay the compensation amount determined under the Supplementary Award?

iii. Whether the land in terms of Section 101 of the 2013 Act can be returned to the Respondent Nos. 1-6 at this stage under the scheme of the Act? In other words, what is the scope of Section 101?

iv. Whether the State of Himachal Pradesh, being a welfare state, had the responsibility to ensure full payment of compensation amount determined under the Supplementary Award dated 02.05.2022?

VII. ANALYSIS

A. Scheme of Arrangement between the Appellant and JAL under Sections 391 to 394 respectively of the Companies Act, 1956

21. An analysis of the Scheme agreed between the Appellant and JAL as sanctioned by the NCLT, Mumbai and NCLT, Allahabad respectively is the key to determine who should pay the amount determined under the Supplementary Award dated 02.05.2022. With respect to the Scheme, the following questions need to be looked into:

i. Whether the dispute pertaining to payment of the requisite amount under the Supplementary Award arose before or after the “Effective Date” fixed in the Scheme?

ii. Whether the subject land is an integral part of the cement project and the liability of paying compensation under the Supplementary Award for the said land can be imposed on the Appellant despite the said land not being in its name?

22. Clause 1.1 (o) defines the "Effective Date" as the date on which the Scheme becomes effective in accordance with its terms, which shall be the Closing Date [defined in Clause 1.1(k) and Clause 10.1]. The said date was decided to be 29.06.2017 among the parties.

23. Clause 1.1(w) defines the business and assets transferred by JAL to the Appellant. The definition of the same is reproduced below:

> "*...(w) "**JAL Business**" means the business of manufacturing, sale and distribution of cement and clinker manufactured at the JAL Cement Plants, including all rights to operate such business, its movable or immovable assets, captive power plants, DG sets, coal linkages, rights, privileges, liabilities, guarantees, land, leases, licenses, permits, mining leases, prospecting licenses for mining of limestone, letters of intent for mining of limestone, tangible or intangible assets, goodwill, all statutory or regulatory approvals, logistics, marketing, warehousing, selling and distribution networks (marketing employees, offices, depots, guest houses and ether related facilities for the JAL Business), employees, existing contracts including fly-ash contracts, railway sidings, fiscal incentives in relation to the JAL Business, more particularly described in Schedule I hereto, but does not include*
>
> *(i) construction equipment and such assets to be listed in Schedule II.*
>
> *(ii) any liability including contingent liability disclosed in the balance sheet of JAL Business on the Closing Date provided to the Transferee, other than those included in the JAL Financial Indebtedness and JAL Net Working Capital;*
>
> *(iii) any guarantee or deposits for any disputes;*
>
> *(iv) the JAL Excluded Employees;*
>
> *(v) JAL Non Moving Stores, Doubtful Receivables of the JAL Business, non-recoverable debtors, loans*

or advances in the books of the Transferor1. For this purpose, non-recoverable debtors; loans or advances shall refer to such debtors; loans or advances for which Transferor1 has not received any confirmation for the receivables as mentioned in Clause 9.1 (i);

(vi) coal mitting block - Mandla (North) and the related guarantees, deposits etc;

(vii) fiscal incentives in relation to the JAL Business that accrue up to the Closing Date;

(viii) any intellectual property of Transferor1;

(ix) ***litigations pertaining to the JAL Business as of the Closing Date;***

(x) freehold plot of land admeasuring about 1087 square metres at Varanasi and land admeasuring 24.7 acres outside the Balaji plant in Krishna, Andhra Pradesh;

(xi) 180 megawatt power plant at Churk, Uttar Pradesh;

(xii) railway siding in Turki, Rewa, Madhya Pradesh;

(xiii) Related Party payables or receivables; and

(xiv) Ghurma limestone mine, Padrach limestone mine and Bari dolomite mine

It is clarified that the guarantee listed in Schedule III B, which shall be updated as of the Closing Date, shall be the only guarantees which shall be taken over by the Transferee on the Closing Date…"

[Emphasis Supplied]

24. The parties by way of Clause 1.1(w)(ix) agreed that all litigations pertaining to the business and assets being transferred to the Appellant that arose before or on the Closing Date would not be transferred to the Appellant and will remain with JAL.

25. The aforesaid aspect has been further elaborated under Clause 7 of the Scheme which is reproduced below:

"7. LEGAL PROCEEDINGS

7.1 ***All legal or other proceedings (whether civil or criminal, including before any statutory or judicial or quasi-judicial authority or tribunal) by or against the Transferor1 and /or the Transferor2, initiated on or arising and pending before the Effective Date, and relating to the JAL Business and the JCCL Business shall remain with the Transferor1 and/or the Transferor2, as the case may be****.*

7.2 In the event any case or matter pertaining to contingent liabilities being in the nature of disputed claims, not crystallized on the Closing Date or guarantees listed in Schedule III A and Schedule XI A or any similar instrument by whatsoever name called which have been advance against disputes related to the JAL Business or the JCCL Business existing on the Closing Date, or pertaining to NPV of afforestation charges in respect of mining land being Block 1, 2, 3, 4 and Ningha of Dalla Plant and Jaypee Super Plant, by force of law are transferred to the Transferee, then the Transferor1 and the Transferor 2, shall have full control in respect of the defence of such proceedings including filing the necessary appeals, revisions, etc.. provided that the Transferor1 and the Transferor2, as the case may be, shall not, take any action that is detrimental to the operation of the JAL Business and the JCCL Business. Provided that in respect of such cases pertaining to immovable properties which are part of the JAL Business or the JCCL Business, as the case may be the Transferee shall have a right to participate in such proceedings to ensure that no action detrimental to the operation of JAL Business and the JCCL Business is taken. It is clarified that: (a) any liabilities in respect of cases or matter referred to in this Clause 7.2 shall be paid by the Tranferor1 or the Transferor2 and if paid by the Transferee, the same shall be reimbursed by the Transferor1 or the Transferor2 within 7 (seven) days of such payment; and (b) the aforesaid bank guarantees provided by the Transferor1 and the Transferor2 in respect of the contingent liabilities being in the nature of disputed claims related to the JAL Business or the JCCL Business

shall continue wherever required and the Transferee shall have no obligation to replace such bank guarantees on the Closing Date and in the event the period of any such bank guarantee expires after the Closing Date, the Transferor1 and /or the Transferor2, as the case may be, shall renew or replace such guarantees wherever required.

7.3 The Transferor1, the Transferor2 and the Transferee shall give full and timely cooperation to each other for the pursuit of such case or matter. The Transferee shall promptly give necessary authorization, power of attorney, board resolution, etc. for pursuit of such case or matter to the Transferor1 and the Transferor2. "

[Emphasis Supplied]

26. Clause 7.1 of the Scheme states without any ambiguity that any legal or other proceeding by or against JAL or its unit operating the cement project relating to the JAL Business as defined in Clause 1.1(w), initiated on or arising and pending before the Effective Date shall remain with JAL.

27. It is pertinent to note that the subject land was acquired under the compulsory provisions of the 1894 Act to provide a safety zone for the cement plant and mining areas. Therefore, the land was acquired in connection with the JAL Business. The acquisition proceedings began with the notification issued under Section 4 dated 25.07.2008 which was stayed by the High Court of Himachal Pradesh on 14.12.2011. After the disposal of the writ petitions filed by the original landowners, the operation of the stay on the acquisition proceedings came to an end on 23.06.2016. As the next step towards the proceedings, an Award dated 08.06.2018 was passed. The facts indicate that the land acquisition proceedings had commenced before the Effective Date of the Scheme (i.e. 29.06.2017) and the compensation remained undetermined as on the Effective Date. To our understanding, these facts attract the application of Clause 7.1 of the Scheme as the acquisition proceedings and the liability to pay compensation associated with it squarely falls within the meaning of 'other proceedings' as intended by the parties under the said Clause.

28. JAL has also not disputed that it had made payment of the amount determined under the Award of 2018 i.e., Rs. 10,77,53,842/- after

the Effective Date of the Scheme. The said amount has already been disbursed to the landowners. There is nothing on record to show that the payment of compensation amount at that time was contested by JAL.

29. Further, the exercise of determination of compensation amount which is a part of the acquisition proceedings remained pending even after the Effective Date of the Scheme. After the LAC determined the amount under the Award dated 08.06.2018, JAL paid the same without any protest or reference to the Scheme. Therefore, at the stage of the Supplementary Award pertaining to the same land and same original landowners, JAL cannot be allowed to take the plea that the payments with respect to the subject land were required to be made by the Appellant.

30. As regards the contention of JAL that the subject land formed an integral part of the cement project transferred to the Appellant for the purpose of payment of compensation determined under the Supplementary Award, we find it difficult to accept the same. The subject land was acquired as a safety zone for the cement project and in light of the several safety hazards as stated in the Award No. 1 of 2018, the land had to be acquired to safeguard the lives and property of the original landowners.

31. However, we take notice of the fact that the subject land was not covered under the list of assets transferred to the Appellant under the Scheme and remains in the ownership of the JAL till date. While we agree that the acquisition of the subject land was done for the purposes of the cement project, we cannot accept the contention of JAL that the liabilities arising out of the said land should be fastened upon the Appellant without any such liabilities being covered by the Scheme, not even on the strength of the argument that the subject land was integral to the cement project.

32. We may only say that the issue regarding the ownership of the subject land may be decided between the parties i.e., the Appellant and JAL amongst themselves. In our considered view, disputes regarding the ownership of the subject land, if any cannot be an impediment to the legitimate rights of the original landowners to receive compensation. Therefore, the contention of JAL that the Appellant should pay the amount as determined under the Supplementary Award because the subject land was integral to the cement project is rejected.

B. Return of acquired land under the 2013 Act

33. It is the case of JAL that the substantial delay in acquisition of the subject land has frustrated its purpose, and it could not make any use of the land. It was submitted that if the Appellant does not require the said land, then it should be returned to the original landowners and the amount of Rs. 10,77,53,842/- paid under the Award of 2018 should be refunded to JAL.

34. The return of acquired land is governed by Section 101 of the 2013 Act which is reproduced below:

> "***101. Return of unutilised land.***– *When any land acquired under this Act remains* ***unutilised for a period of five years from the date of taking over the possession****, the same shall be returned to the original owner or owners or their legal heirs, as the case may be, or to the Land Bank of the appropriate Government by reversion in the manner as may be prescribed by the appropriate Government.*
>
> *Explanation.—For the purpose of this section, "Land Bank" means a governmental entity that focuses on the conversion of Government owned vacant, abandoned, unutilised acquired lands and tax-delinquent properties into productive use."*
>
> **[Emphasis Supplied]**

35. The necessary conditions for the application of Section 101 are: (1) the land should be unutilized; and (2) the period it remains not in use should be at least five years from the date of taking of possession.

36. We do not find any merit in the contention of JAL that the land be returned to the original landowners. While we agree that a period of five years has elapsed from the date of taking of possession by JAL, the first condition that the land should remain unutilized is not fulfilled.

37. The subject land was acquired for the purpose of providing a safety zone to the mining area of the cement plant. The objective for acquiring the subject land mentioned in the Award of 2018 is reproduced below:

> *"…3. Compulsory Acquisition by invoking the provisions of Section 17 (4)*

During the process of Notification issued under Section - 4 of the Land Acquisition Act, the matter was taken up for compulsory acquisition U/s 17(4) of Land Acquisition, Act, 1894 with the Govt. or Himachal Pradesh ***for the reasons that the land area under acquisition fell just below the mine leasehold area and was necessarily required as Mining Area Safety Zone. As the land area under acquisition cannot be allowed for any residential purpose in view of safety reasons and because the land proposed for acquisition is located just along the bank or Bhalag Nallah and most of the residents of village Bhalag had been constructing structures in large numbers on the right Bank of Nallah in Bhalag village, therefore provisions of compulsory acquisition needed to be invoked.***

Furthermore, to invoke the provisions of compulsory acquisition, it was submitted vide this office letter No. 2766 dated 06.01.2009 to Pr. Secretary (Industries) GoHP that ***the main dumping site of the project at Baga - Sehnali is situated above village Bhalag and during the unprecedented l l heavy rain season of 2007 – 08, muck had over flown into the Bhalag Nallah endangering the Safety Zone area under proposed acquisition****…"*

[Emphasis Supplied]

38. Therefore, the acquisition of the subject land was done as a safety measure for the residents of the area and not to be used actively in the cement project. No other use except that the subject land may pose hazard to the residents was envisaged during the acquisition proceedings. JAL cannot pray for return of the land as that would result in endangering the lives and property of the original landowners. We find that the subject land has been in use all throughout the operation of the cement project by serving as a safety zone and the condition of being unutilized is not satisfied.

39. It is not in dispute that the Supplementary Award had to be passed as the compensation for standing crops, structures and other damages for the subject land which could not be fixed and evaluated under the Award No. 1 dated 08.06.2018. The same was also recorded in the Award of 2018. We find that the passing of Supplementary

Award was not a fresh exercise but rather a continuation/extension of the Award of 2018. Therefore, when JAL has already paid the compensation amount as determined under the previous Award without any demur, it cannot be allowed to question its liability under the Supplementary Award and make a plea for return of the land at this stage on the ground that the purpose of the land is frustrated due to delay in acquisition proceedings.

40. At this stage, it is necessary for us to discuss the purport of Section 101 of the 2013 Act. The instant section was introduced in the 2013 Act for the first time as a beneficial provision for the landowners whose lands were usurped but remained unutilized or were not used in accordance with the purpose stated in the notifications under Section 4. However, the application of the Section is warranted only in the circumstances where the return of the land would benefit the landowners. The party which has failed to utilize the land cannot plead for the return of the land and consequent refund of the compensation paid, as that would tantamount to taking advantage of its own wrong or default.

C. Impugned Order of the High Court

41. The High Court directed the Appellant herein to pay compensation amount determined under the Supplementary Award at the first instance and if permissible, recover the same from JAL.

42. We find that the High Court's reasoning for passing such a direction is unsustainable for the following reasons:

    i. The High Court has referred to Clause 7.1 of the Scheme but has not applied it correctly in any manner, thereby ignoring the Scheme of Arrangement between the parties.

    ii. The High Court has also recorded that JAL has been taken over by the Appellant herein and that the Appellant had made payment of compensation under the Award No. 1 of 2018 dated 08.06.2018. We find that these are incorrect facts on the basis of the materials presented to us by the parties to this appeal.

    JAL has only transferred the cement project and clinkerisation business to the Appellant by way of the Scheme and is still existing independently of the Appellant's control in respect of its other functions.

The documents on record also show that it was JAL that had made payments under the Award of 2018 and not the Appellant.

iii. The High Court failed to consider that the ownership of the subject land continued to be with JAL despite the Scheme being brought into effect on 29.06.2017. The Appellant cannot be directed to make payment of the amount determined by the Supplementary Award for the portions of land which are neither in its ownership nor possession.

iv. The High Court also failed to consider the order of this Court in ***Tonnu Ram*** **(supra)** dated 16.12.2019 which imposed a duty on the executing court to examine the purport of the Scheme propounded by the NCLT and pass orders strictly in consonance therewith. It was held that it would be open to the Appellant to take support of the relevant provisions of the Scheme in support of the argument that the liability to pay the dues remains with JAL as per the stated scheme.

D. Role of the State under Article 300-A of the Constitution

43. The Right to Property in our country is a net of intersecting rights which has been explained by this Court in ***Kolkata Municipal Corporation & Anr.*** **v.** ***Bimal Kumar Shah & Ors.*****, 2024 SCC OnLine SC 968**. A division bench of this Court identified seven non-exhaustive sub-rights that accrue to a landowner when the State intends to acquire his/her property. The relevant observations of this Court under the said judgment are reproduced below:

> *"…27.*
>
> *… Seven such sub-rights can be identified, albeit non-exhaustive. These are: i) duty of the State to inform the person that it intends to acquire his property – the right to notice, ii) the duty of the State to hear objections to the acquisition – the right to be heard, iii) the duty of the State to inform the person of its decision to acquire – the right to a reasoned decision, iv) the duty of the State to demonstrate that the acquisition is for public purpose – the duty to acquire only for public purpose,* ***v) the duty of the State to restitute and rehabilitate – the right of restitution or fair compensation, vi) the duty of the State to conduct the process of acquisition efficiently***

> ***and within prescribed timelines of the proceedings – the right to an efficient and expeditious process,*** *and vii) final conclusion of the proceedings leading to vesting – the right of conclusion…"*
>
> **[Emphasis Supplied]**

This Court held that a fair and reasonable compensation is the *sine qua non* for any acquisition process.

44. In ***Roy Estate v. State of Jharkhand*****, (2009) 12 SCC 194**; ***Union of India* v. *Mahendra Girji*****, (2010) 15 SCC 682** and ***Mansaram v. S.P. Pathak*****, (1984) 1 SCC 125**, this Court underscored the importance of following timelines prescribed by the statutes as well as determining and disbursing compensation amount expeditiously within reasonable time.

45. The subject land came to be acquired by invoking special powers in cases of urgency under Section 17(4) of the 1894 Act. The invocation of Section 17(4) extinguishes the statutory avenue for the landowners under Section 5A to raise objections to the acquisition proceedings. These circumstances impose onerous duty on the State to facilitate justice to the landowners by providing them with fair and reasonable compensation expeditiously. The seven sub-rights of the landowners identified by this Court in ***Kolkata Municipal Corporation*** **(supra)** are corresponding duties of the State. We regret to note that the amount of Rs. 3,05,31,095/- determined as compensation under the Supplementary Award has not been paid to the landowners for a period of more than two years and the State of Himachal Pradesh as a welfare State has made no effort to get the same paid at the earliest.

46. This Court has held in ***Dharnidhar Mishra (D) and Another v. State of Bihar and Others*****, 2024 SCC OnLine SC 932** and ***State of Haryana v. Mukesh Kumar*****, (2011) 10 SCC 404** that the right to property is now considered to be not only a constitutional or statutory right, but also a human right. This Court held in ***Tukaram Kana Joshi and Ors. thr. Power of Attorney Holder v. M.I.D.C. and Ors.*****, (2013) 1 SCC 353** that in a welfare State, the statutory authorities are legally bound to pay adequate compensation and rehabilitate the persons whose lands are being acquired. The non-fulfilment of such obligations under the garb of industrial development, is not permissible for any

welfare State as that would tantamount to uprooting a person and depriving them of their constitutional/human right.

47. That time is of the essence in determination and payment of compensation is also evident from this Court's judgment in ***Kukreja Construction Company & Ors.*** **v*. State of Maharashtra & Ors.*, 2024 SCC OnLine SC 2547** wherein it has been held that once the compensation has been determined, the same is payable immediately without any requirement of a representation or request by the landowners and a duty is cast on the State to pay such compensation to the land losers, otherwise there would be a breach of Article 300-A of the Constitution.

48. In the present case, the Government of Himachal Pradesh as a welfare State ought to have proactively intervened in the matter with a view to ensure that the requisite amount towards compensation is paid at the earliest. The State cannot abdicate its constitutional and statutory responsibility of payment of compensation by arguing that its role was limited to initiating acquisition proceedings under the MOU signed between the Appellant, JAL and itself. We find that the delay in the payment of compensation to the landowners after taking away ownership of the subject land from them is in contravention to the spirit of the constitutional scheme of Article 300A and the idea of a welfare State.

49. Acquisition of land for public purpose is undertaken under the power of eminent domain of the government much against the wishes of the owners of the land which gets acquired. When such a power is exercised, it is coupled with a bounden duty and obligation on the part of the government body to ensure that the owners whose lands get acquired are paid compensation/awarded amount as declared by the statutory award at the earliest.

50. The State Government, in peculiar circumstances, was expected to make the requisite payment towards compensation to the landowners from its own treasury and should have thereafter proceeded to recover the same from JAL. Instead of making the poor landowners to run after the powerful corporate houses, it should have compelled JAL to make the necessary payment.

51. Although the requirement to pass a supplementary award for the purpose of determining additional compensation for the standing

trees, damaged structures, houses, etc. had been envisaged and recorded in the Award dated 08.06.2018, yet the possession of the subject land came to be handed over to JAL vide the possession certificate dated 07.06.2019 without passing such a supplementary award. We are of the considered view that the omission or lapse to complete such exercise before taking possession of the land could be said to be in contravention of the mandate of Section 38(1) of the 2013 Act. The relevant portion of Section 38 is reproduced below:

> *"38.* ***Power to take possession of land to be acquired.*** *–*
>
> *(1)* ***The Collector shall take possession of land after ensuring that full payment of compensation*** *as well as rehabilitation and resettlement entitlements are paid or tendered to the entitled persons within a period of three months for the compensation and a period of six months for the monetary part of rehabilitation and resettlement entitlements listed in the Second Schedule commencing from the date of the award made under section 30: Provided that the components of the Rehabilitation and Resettlement Package in the Second and Third Schedules that relate to infrastructural entitlements shall be provided within a period of eighteen months from the date of the award: Provided further that in case of acquisition of land for irrigation or hydel project, being a public purpose, the rehabilitation and resettlement shall be completed six months prior to submergence of the lands acquired…"*
>
> **[Emphasis supplied]**

52. A bare reading of Section 38 as reproduced above indicates that the payment of full and final compensation to the land owners is a precursor to taking possession of the land sought to be acquired from such persons. It is clear from the facts that the acquisition proceedings herein failed to confirm to this statutorily mandated sequence of events. It is regrettable that the State of Himachal Pradesh, being a welfare state, did not ensure payment of compensation to the Respondent Nos. 1-6 before taking possession of their land. In fact, the landowners had to approach the High Court to seek directions to the LAC for passing of the supplementary award which was finally passed on 02.05.2022 that is, after a period of almost four years from the date of passing of the Award of 2018.

53. Further, the acquisition proceedings for the subject land had commenced vide the notification under Section 4 dated 25.07.2008. In such circumstances it is necessary to consider the relevant provisions of the 1894 Act, more particularly Section 41 thereof which pertains to the process required to be followed in cases of acquisition of land for companies. The relevant portion of Section 41 of the 1894 Act is reproduced below:

> *"**41. Agreement with appropriate Government.** –*
>
> *If the appropriate Government is satisfied [after considering the report, if any, of the Collector under section 5A, sub-section (2), or on the report of the officer making an inquiry under section 40 that the proposed acquisition is for any of the purposes referred to in clause (a) or clause (aa) or clause (b) of sub-section (1) of section 40,* ***it shall require the Company to enter into an agreement with the appropriate Government, providing to the satisfaction of the appropriate Government for the following matters, namely :-***
>
> ***(1) the payment to the appropriate Government of the cost of the acquisition;***
>
> ***(2) the transfer, on such payment, of the land to the Company….***"
>
> **[Emphasis supplied]**

54. Section 41 necessitates an agreement between the appropriate government and the company for whose purpose the land is being acquired. One of the purposes of such an agreement is to ensure that payment towards the cost of acquisition is made by the company to the appropriate government and it is only upon such payment that the land is transferred to the company. Thus, it can be said that JAL was mandated to make the requisite payment to the State of Himachal Pradesh prior to the subject land being transferred to it.

55. However, as discussed in the foregoing paragraphs, even before the amount of compensation could be determined by way of a supplementary award as stipulated in the Award dated 08.06.2018, the subject land stood transferred to JAL. This, in our view, is in contravention of Section 38 of the 2013 Act and Section 41 of the 1894 Act respectively.

56. Thus, we deem it appropriate to direct the Respondent Nos. 7 and 10 that is, the State of Himachal Pradesh and the Land Acquisition Collector, Arki, to pay the amount of Rs. 3,05,31,095/- to the Respondent Nos. 1-6 for expeditious conclusion of the acquisition proceedings. However, we clarify that the State shall recover the said amount from JAL as the liability to pay the cost of acquisition of the subject land ultimately falls on JAL in view of the aforesaid discussion.

VIII. CONCLUSION

57. For all the foregoing reasons, this appeal succeeds and is hereby allowed in the aforesaid terms. The impugned order dated 12.07.2022 passed by the High Court is set aside.

58. The Respondent Nos. 7 and 10 are directed to pay the compensation amount of Rs. 3,05,31,095/- (Rupees Three Crore Five Lakh Thirty-One Thousand and Ninety-Five Only) along with 9% interest thereupon from the date of passing of the Supplementary Award i.e., 02.05.2022 till the date of realization, within a period of fifteen days from today. The total amount paid by the State shall be recovered from the Respondent No. 11 (JAL).

Result of the Case: Appeal allowed.

†*Headnotes prepared by:* Ankit Gyan

[2024] 9 S.C.R. 473 : 2024 INSC 686

Rohan Builders (India) Private Limited
v.
Berger Paints India Limited

(Civil Appeal No. 10620 of 2024)

12 September 2024

[Sanjiv Khanna* and R. Mahadevan, JJ.]

Issue for Consideration

Whether an application for extension of time under Section 29A, Arbitration and Conciliation Act, 1996 can be filed after the expiry of the period for making of the arbitral award.

Headnotes†

Arbitration and Conciliation Act, 1996 – s.29A(4) – 'terminate' – Interpretation – Arbitration and Conciliation (Amendment) Act, 2015 – Arbitration and Conciliation (Amendment) Act, 2019 – Application for extending the time to pass an arbitral award u/s.29A(4) r/w s.29A(5), if maintainable after the expiry of the twelve-month or the extended six-month period – Contrary views taken by different High Courts:

Held: Yes, an application for extension of the time period for passing an arbitral award u/s.29A(4) r/w s.29A(5) is maintainable even after the expiry of the twelve-month or the extended six-month period, as the case may be – Such extension applicationsto be decided on the principle of sufficient cause and extensions not to be granted mechanically – View taken by the High Courts of Delhi, Jammu and Kashmir and Ladakh, Bombay, Kerala, Madras and the High Court at Calcutta in Ashok Kumar Gupta, accepted – Reasoning of the High Court at Calcutta in Rohan Builders, is fallacious and unacceptable – The word "terminate" in s.29A(4) should not be read as an isolated word with a strict dictionary meaning, but rather in conjunction with the surrounding words and expressions which evinces the legislative intent – The legislative preference for the term "terminate" over "suspend" is apparent, since the word "suspend" could cause incongruity and a legal conundrum if no party files an application for an extension of time – The legislature by using the word "terminate" intends to affirm the principle of

* Author

party autonomy – The word "terminate" in s.29A(4) makes the arbitral tribunal functus officio, but not in absolute terms – The true purport of the word "terminate" must be understood in light of the syntax of the provision – Absence of a full stop after the word "terminate" is noteworthy – The word "terminate" is followed by the connecting word "unless", which qualifies the first part with the subsequent limb of the section, i.e. "unless the court has, either prior to or after the expiry of the period so specified, extended the period" – The expression "prior to or after the expiry of the period so specified" has to be understood with reference to the power of the court to grant an extension of time – Termination of the arbitral mandate is conditional upon the non-filing of an extension application and cannot be treated as termination stricto sensu – The word "terminate" in the contextual form does not reflect termination as if the proceedings have come to a legal and final end, and cannot continue even on filing of an application for extension of time – Giving a narrow and restrictive meaning to s.29A(4), would be indulging in judicial legislation by incorporating a negative stipulation of a bar of limitation, which has a severe annulling effect – Arigid interpretation would amount to legislating and prescribing a limitation period for filing an application u/s.29A, when the section does not state so – Consequences of restrictive and narrow interpretation, enumerated. [Paras 9-12, 15, 19]

Interpretation of Statutes – Literal construction vis-à-vis purposive interpretation – Arbitration and Conciliation Act, 1996 – s.29A(4):

Held: While interpreting a statute, an interpretation which produces an unreasonable result is not to be imputed to a statute if there is some other equally possible construction which is acceptable, practical and pragmatic – An interpretive exercise must be conducted with careful consideration of both the text and the context of the provision – Therefore, sometimes the court eschews a literal construction if it produces manifest absurdity or unjust results – An interpretive process must recognize the goal or purpose of the legal text – s.29A intends to ensure the timely completion of arbitral proceedings while allowing courts the flexibility to grant extensions when warranted – Prescribing a limitation period, unless clearly stated in words or necessary, should not be accepted – Bar by limitation has penal and fatal consequences. [Paras 9, 13, 18]

Case Law Cited

Eastern Chemicals Industries (P) Ltd. and Another v. Ashok Paper Mill (Assam) Ltd. and Another [2023] 15 SCR 821 **: 2023 SCC OnLine SC 1649 – relied on.**

Rohan Builders (India) Pvt. Ltd. v. Berger Paints India Limited, **AP/328/2023 – disapproved.**

ATC Telecom Infrastructure Pvt. Ltd. v. Bharat Sanchar Nigam Ltd, **2023 : DHC : 8078;** *Wadia Techno-Engineering Services Limited v. Director General of Married Accommodation Project and Another,* **2023 SCC OnLine Del 2990;** *Nikhil H. Malkan and Others v. Standard Chartered Investment and Loans (India) Limited* **2023 : BHC-OS : 14063;** *Hiran Valiiyakkil Lal and Others v. Vineeth M.V. and Others* **2023 SCC OnLine Ker 5151;** *G.N.Pandian v. S. Vasudevan and Others,* **2020 SCC OnLine Mad 737;** *H.P. Singh v. G.M. Northern Railways and Others,* **2023 SCC OnLine J&K 1255;** *Ashok Kumar Gupta v. M.D. Creations and Others,* **2024 SCC OnLine Cal 6909 – approved.**

South Bihar Power Distribution Company Limited v. Bhagalpur Electricity Distribution Company Private Limited, **Civil Writ Jurisdiction Case No. 20350 of 2021 – referred to.**

Books and Periodicals cited

176th Report of the Law Commission of India.

List of Acts

Arbitration and Conciliation Act, 1996; Arbitration and Conciliation (Amendment) Act, 2015; Arbitration and Conciliation (Amendment) Act, 2019; Arbitration Act, 1940.

List of Keywords

Extension of time; Application for extension of time; Extension applications; Extending the time to pass an arbitral award; Application for extending the time to pass arbitral award; Expiry of the period for making of the arbitral award; Termination of the arbitral mandate; 'Terminate'; 'Termination'; "Suspend"; Expiry; Arbitral mandate; Bar of limitation; Limitation period; Interpretation of Statutes; Literal construction; Purposive interpretation; Rigid interpretation; Narrow interpretation; Restrictive meaning/ interpretation; Sufficient cause.

Case Arising From

CIVIL APPELLATE JURISDICTION: Special Leave Petition (Civil) No. 23320 of 2023

From the Judgment and Order dated 06.09.2023 of the High Court at Calcutta in AP No. 328 of 2023

With

Special Leave Petition (Civil) Nos. 24489, 26938, 26990-26991 and 27353 of 2023 and Special Leave Petition (Civil) Nos. 1344, 2115, 8131, 12170 and 13975-13976 of 2024

Appearances for Parties

Nakul Dewan, Gopal Jain, Siddharth Bhatnagar, Neeraj Kishan Kaul, Shyam Divan, Harin P. Raval, Sr. Advs., Nirav Shah, Soumya Ray Chowdhury, Bhushan Panse, Satyender Saharan, Sathvik Chandrashekar, Ms. Udita Singh, Raunak Dhillon, Ms. Madhavi Khanna, Ms. Isha Malik, Ms. Niharika Shukla, M/s. Cyril Amarchand Mangaldas, Samrat Sengupta, Udayaditya Banerjee, Soumya Dutta, Parag Chaturvedi, Rajat Joseph, Ms. Deeplaxmi Subhash Matwankar, Dr. Ravindra Chingale, Ms. Preetika Dwivedi, Karthik Nayar, Abhisek Mohanty, Sanjay Baid, Arindam Ghosh, Swarnendu Chatterjee, Nilay Sengupta, Sujit Banerjee, Ankit Agarwal, Ms. Deepakshi Garg, Mrs. Vanita Bhargava, Ajay Bhargava, Ms. Wamika Trehan, Ms. Raddhika Khanna Tandon, M/s. Khaitan & Co., Umesh Kumar Khaitan, Deepak Khurana, Ms. Manali Singhal, Ms. Nishtha Wadhwa, Santosh Sachin, Ms. Shreya Singhal, Deepak Rawat, Milind Kumar, Vikas Mehta, Apoorv Khator, Ashish Batra, Sebin Michael Joseph, Ms. Madhumita Bhattacharjee, Ms. Srija Choudhury, Anant, Ms. Sajal Bhardwaj, Ms. Aanchal Basur, Ivan, Advs. for the appearing parties.

Judgment / Order of the Supreme Court

Judgment

Sanjiv Khanna, J.

Leave granted.

2. This common judgment decides whether an application for extension of time under Section 29A of the Arbitration and Conciliation Act,

1996[1] can be filed after the expiry of the period for making of the arbitral award. The High Court at Calcutta in *Rohan Builders (India) Pvt. Ltd.* v. *Berger Paints India Limited*[2] has held that the application for extension of time under Sections 29A(4) and 29A(5) of the A & C Act can only be entertained if filed before the expiry of the mandate of the arbitral tribunal. The High Court at Calcutta held that once the mandate of the arbitral tribunal is terminated by afflux of time of twelve months, or when so consented to by the parties after a further six-month extension, the power of the court to extend time under Section 29A(4) cannot be invoked. A similar view has been taken by a Division Bench of the High Court of Judicature at Patna in *South Bihar Power Distribution Company Limited* v. *Bhagalpur Electricity Distribution Company Private Limited*.[3] However, a catena of judgments from other High Courts have taken an opposite view. The High Court of Delhi in *ATC Telecom Infrastructure Pvt. Ltd.* v. *Bharat Sanchar Nigam Ltd.*,[4] *Wadia Techno-Engineering Services Limited* v. *Director General of Married Accommodation Project and Another*,[5] and some other cases;[6] the High Court of Judicature at Bombay in *Nikhil H. Malkan and Others* v. *Standard Chartered Investment and Loans (India) Limited*;[7] the High Court of Kerala in *Hiran Valiiyakkil Lal and Others* v. *Vineeth M.V. and Others*;[8] the High Court of Madras in *G.N.Pandian* v. *S. Vasudevan and Others*;[9] and the High Court of Jammu and Kashmir and Ladakh in *H.P.Singh* v. *G.M. Northern Railways and Others*,[10] have held that an application for extension of time limit for arbitral award can be filed by a party even after the expiry of the term of twelve months or the extended period of six months. Recently, the High Court at Calcutta in a subsequent decision

1 For short, "A & C Act".

2 AP/328/2023 and other connected matters decided on 06.09.2023.

3 Civil Writ Jurisdiction Case No. 20350 of 2021 and other connected matters decided on 26.04.2023.

4 2023:DHC:8078.

5 2023 SCC OnLine Del 2990.

6 *ATS Infrastructure Ltd. and Another* v. *Rasbehari Traders,* 2023 SCC OnLine Del 8645, *M/s Power Mech Projects Ltd.* v. *M/s Doosan Power Systems India Pvt. Ltd.*, 2024:DHC:3769, *KMP Expressways Ltd.* v. *IDBI Bank Ltd.*, 2024 SCC OnLine Del 2617, *Reliance Infrastructure Limited* v. *Madhyanchal Vidyut Vitran Nigam Limited*, 2023:DHC:5745 et al.

7 2023:BHC-OS:14063.

8 2023 SCC OnLine Ker 5151.

9 2020 SCC OnLine Mad 737.

10 2023 SCC OnLine J&K 1255.

of the single Judge in *Ashok Kumar Gupta* v. *M.D. Creations and Others*,[11] on elaborated examination, has concurred with this view.[12]

3. For the reasons recorded below, we accept the view taken by the High Courts of Delhi, Jammu and Kashmir and Ladakh, Bombay, Kerala, Madras, and the subsequent view expressed by the High Court at Calcutta in *Ashok Kumar Gupta* (supra). However, before we elucidate our reasons, it would be appropriate to first quote Section 29A of the A & C Act as it stands today:

> "29-A. Time limit for arbitral award.—(1) The award in matters other than international commercial arbitration shall be made by the arbitral tribunal within a period of twelve months from the date of completion of pleadings under sub-section (4) of Section 23:
>
> Provided that the award in the matter of international commercial arbitration may be made as expeditiously as possible and endeavour may be made to dispose of the matter within a period of twelve months from the date of completion of pleadings under sub-section (4) of Section 23.
>
> (2) If the award is made within a period of six months from the date the arbitral tribunal enters upon the reference, the arbitral tribunal shall be entitled to receive such amount of additional fees as the parties may agree.
>
> (3) The parties may, by consent, extend the period specified in sub-section (1) for making award for a further period not exceeding six months.
>
> (4) If the award is not made within the period specified in sub-section (1) or the extended period specified under sub-section (3), the mandate of the arbitrator(s) shall terminate unless the court has, either prior to or after the expiry of the period so specified, extended the period:
>
> Provided that while extending the period under this

11 2024 SCC OnLine Cal 6909.

12 This Court while issuing notice in the Civil Appeal a/o SLP (C) No. 2115 of 2024 had granted a stay on the operation of the common judgment in *Rohan Builders (India) Pvt. Ltd.* (supra).

sub-section, if the court finds that the proceedings have been delayed for the reasons attributable to the arbitral tribunal, then, it may order reduction of fees of arbitrator(s) by not exceeding five per cent for each month of such delay:

Provided further that where an application under sub-section (5) is pending, the mandate of the arbitrator shall continue till the disposal of the said application:

Provided also that the arbitrator shall be given an opportunity of being heard before the fees is reduced.

(5) The extension of period referred to in sub-section (4) may be on the application of any of the parties and may be granted only for sufficient cause and on such terms and conditions as may be imposed by the court.

(6) While extending the period referred to in sub-section (4), it shall be open to the court to substitute one or all of the arbitrators and if one or all of the arbitrators are substituted, the arbitral proceedings shall continue from the stage already reached and on the basis of the evidence and material already on record, and the arbitrator(s) appointed under this section shall be deemed to have received the said evidence and material.

(7) In the event of arbitrator(s) being appointed under this section, the arbitral tribunal thus reconstituted shall be deemed to be in continuation of the previously appointed arbitral tribunal.

(8) It shall be open to the court to impose actual or exemplary costs upon any of the parties under this section.

(9) An application filed under sub-section (5) shall be disposed of by the court as expeditiously as possible and endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party."

4. Earlier, the Arbitration Act, 1940, stipulated in its First Schedule that the arbitral award must be made within four months from the date of reference, or from the date the arbitrator was called upon to act

by notice, or within any extended time granted thereafter.[13] Section 28(1) of the Arbitration Act, 1940, empowered the court to extend the time for making an award, irrespective of whether the original time had expired or whether the award had already been made. As per Section 28(2) of the Arbitration Act, 1940, parties could extend the time for making an award by mutual consent.[14] Prior to the enactment of Section 29A, the A & C Act did not specify a time limit for making an arbitral award. This was deliberate, given the fact that the First Schedule and Section 28 of the Arbitration Act, 1940 led to litigation and delay. Section 29A, as quoted above, was inserted by Act No. 3 of 2016[15] with retrospective effect from 23.10.2015. The

13 Paragraph 3 to the First Schedule of the Arbitration Act, 1940 reads:
"3. The arbitrators shall make their award within four months after entering on the reference or after having been called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the Court may allow."

14 "28. Power to Court only to enlarge time for making award.—
(1) The Court may, if thinks fit, whether the time for making the award has expired or not and whether the award has been made or not, enlarge from time to time the time for making the award.
(2) Any provision in an arbitration agreement whereby the arbitrators or umpire may except with the consent of all the parties to the agreement, enlarge the time for making the award, shall be void and of no effect."

15 Section 29A was inserted in the A & C Act *vide* the Arbitration and Conciliation (Amendment) Act, 2015 (Act No. 3 of 2016) which read:
"15. Insertion of new Sections 29-A and 29-B.— After Section 29 of the principal Act, the following new sections shall be inserted, namely—
'29-A. Time limit for arbitral award.—
(1) The award shall be made within a period of twelve months from the date the arbitral tribunal enters upon the reference.
Explanation.— For the purpose of this sub-section, an arbitral tribunal shall be deemed to have entered upon the reference on the date on which the arbitrator or all the arbitrators, as the case may be, have received notice, in writing, of their appointment.
(2) If the award is made within a period of six months from the date the arbitral tribunal enters upon the reference, the arbitral tribunal shall be entitled to receive such amount of additional fees as the parties may agree.
(3) The parties may, by consent, extend the period specified in sub-section (1) for making award for a further period not exceeding six months.
(4) If the award is not made within the period specified in sub-section (1) or the extended period specified under sub-section (3), the mandate of the arbitrator(s) shall terminate unless the Court has, either prior to or after the expiry of the period so specified, extended the period:
Provided that while extending the period under this sub-section, if the court finds that the proceedings have been delayed for the reasons attributable to the arbitral tribunal, then, it may order reduction of fees of arbitrator(s) by not exceeding five per cent for each month of such delay.
(5) The extension of period referred to in sub-section (4) may be on the application of any of the parties and may be granted only for sufficient cause and on such terms and conditions as may be imposed by the court.
(6) While extending the period referred to in sub-section (4), it shall be open to the court to substitute one or all of the arbitrators and if one or all of the arbitrators are substituted, the arbitral proceedings shall continue from the stage already reached and on the basis of the evidence and material already on record, and the arbitrator(s) appointed under this section shall be deemed to have received the said evidence and material.
(7) In the event of arbitrator(s) being appointed under this section, the arbitral tribunal thus reconstituted shall be deemed to be in continuation of the previously appointed arbitral tribunal.

Arbitration and Conciliation (Amendment) Act, 2015 aimed to ensure that arbitration proceedings are completed without unnecessary adjournments and delay.

5. Section 29A envisages two time limits for making of an arbitral award. First, Section 29A(1) states that an award shall be made by the arbitral tribunal within a period of twelve months. Secondly, Section 29A(3) stipulates that the parties by consent can extend the time for making the award beyond twelve months, up to an additional period of six months. Extension beyond six months, even by consent of the parties, is not permitted. In terms of the Arbitration and Conciliation (Amendment) Act, 2019 (Act No. 33 of 2019),[16] the time-limit for making an arbitral award under Section 29A(1) is not applicable to international commercial arbitration. As per the amendment made by Act No. 33 of 2019, the twelve-month period commences from the date of completion of pleadings under Section 23(4) of the A & C Act. Earlier, Section 29A(1) had stipulated that the twelve-month period would begin from the date the arbitral tribunal enters upon reference. Section 29A(2) states that if the award is made within six months, the arbitral tribunal will be entitled to receive such amount as additional fees as the parties may agree.

6. Section 29A(4) is the provision which requires interpretation. It states that where the award is not made within the specified period of twelve or eighteen[17] months, the mandate of the arbitral tribunal

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(8) It shall be open to the Court to impose actual or exemplary costs upon any of the parties under this section.

(9) An application filed under sub-section (5) shall be disposed of by the court as expeditiously as possible and endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party.' "

16 Section 29A was further amended *vide* the Arbitration and Conciliation (Amendment) Act, 2019 (Act No. 33 of 2019) which read:

"6. Amendment of Section 29-A.— In Section 29-A of the principal Act,—

(a) for sub-section (1), the following sub-section shall be substituted, namely:—

'(1) The award in matters other than international commercial arbitration shall be made by the arbitral tribunal within a period of twelve months from the date of completion of pleadings under sub-section (4) of Section 23:

Provided that the award in the matter of international commercial arbitration may be made as expeditiously as possible and endeavour may be made to dispose of the matter within a period of twelve months from the date of completion of pleadings under sub-section (4) of Section 23.';

(b) in sub-section (4), after the proviso, the following provisos shall be inserted, namely:—

'Provided further that where an application under sub-section (5) is pending, the mandate of the arbitrator shall continue till the disposal of the said application:

Provided also that the arbitrator shall be given an opportunity of being heard before the fees is reduced.'"

17 This includes the period of twelve months under Section 29A(1) and the extended period of six months under Section 29A(3).

will terminate. However, this provision does not apply if the court has extended the period, either before or after the expiry of the initial or the extended term. In other words, Section 29A(4) empowers the court to extend the period for making of the arbitral award beyond a period of twelve months or eighteen months, as the case may be. The expression "either prior to or after the expiry of the period so specified" is unambiguous. It can be deduced by the language that the court can extend the time where an application is filed after the expiry of the period under sub-section (1) or the extended period in terms of sub-section (3). The court has the power to extend the period for making an award at any time before or after the mandated period.

7. Section 29A(5) states that a party to the arbitration proceedings can file an application in court for an extension of time for making the award. As per the second proviso to Section 29A(4), where an application for an extension of time under Section 29A(5) has been filed and is pending, the mandate of the arbitral tribunal shall continue till the disposal of the application. Thus, the second proviso to Section 29A(4), by specific mandate, allows the arbitration proceedings to continue during the pendency of the extension application under Section 29A(5) before the court. Lastly, the extension of time is to be granted by the court only for 'sufficient cause' and on such terms and conditions as may be imposed by the court. We will elaborate on the last aspect, and why this interpretation is preferable. First, we will refer to the ratio and reasoning in *Rohan Builders (India) Pvt. Ltd.* (supra).

8. The core of the ratio and reasoning of *Rohan Builders (India) Pvt. Ltd.* (supra) is based on the use of the expression "terminate" in Section 29A(4). The judgment relies on the recommendations made by the 176th Report of the Law Commission of India, which had suggested using the term "suspend". Juxtaposing the words "terminate" and "suspend", it is noted that the use of the expression "terminate" reflects the legislative intent of terminating the mandate of the arbitral tribunal upon the expiry of the specified period. Therefore, the reasoning observes that on the termination of the mandate, the arbitral tribunal becomes *de jure* incapable of performing its function. Along the same lines, it is argued before us that, as a sequitur, and in view of Sections 14, 15, 29A and 32 of the A & C Act, a party must file an application for an extension of time to make an arbitral award before the culmination of the initial twelve-month period or the extended six-month period.

9. In our opinion, the aforesaid reasoning is fallacious and unacceptable. Language serves as a means to express thoughts and intentions.[18] Words can have various meanings and connotations; thus, an interpretive exercise must be conducted with careful consideration of both the text and the context of the provision. Therefore, sometimes the court eschews a literal construction if it produces manifest absurdity or unjust results.[19]

10. The word "terminate" in Section 29A(4) has to be read in the context of the said provision.[20] It should not be read as an isolated word with a strict dictionary meaning, but rather in conjunction with the surrounding words and expressions which warrant recognition and consideration. This evinces the legislative intent. Secondly, the legislative preference for the term "terminate" over "suspend" is apparent, since the word "suspend" could cause incongruity and a legal conundrum if no party files an application for an extension of time. In such a scenario, the arbitral proceedings would stand suspended *ad infinitum*. Therefore, the legislature by using the word "terminate" intends to affirm the principle of party autonomy. Resultantly, if neither party moves an application for an extension of time for making the award, the arbitration proceedings are terminated. Consequences follow. Clearly, the use of the word "suspension" would have led to infeasible ramifications.

11. The word "terminate" in Section 29A(4) makes the arbitral tribunal *functus officio*, but not in absolute terms. The true purport of the word "terminate" must be understood in light of the syntax of the provision. The absence of a full stop after the word "terminate" is noteworthy. The word "terminate" is followed by the connecting word "unless", which qualifies the first part with the subsequent limb of the section, i.e. "*unless* the court has, either prior to or after the expiry of the period so specified, extended the period." The expression "prior to

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18 *Oswal Agro Mills Ltd. and Others* v. *Collector of Central Excise and Others*, 1993 Supp (3) SCC 716.

19 *Babu Manmohan Das Shah and Others* v. *Bishun Das*, (1967) 1 SCR 836.

20 This Court in *Renaissance Hotel Holdings Inc.* v. *B. Vijaya Sai and Others*, (2022) 5 SCC 1 at ¶66 held that

"It is thus trite law that while interpreting the provisions of a statute, it is necessary that the textual interpretation should be matched with the contextual one. The Act must be looked at as a whole and it must be discovered what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation.(…)"

or after the expiry of the period so specified" has to be understood with reference to the power of the court to grant an extension of time.

12. Accordingly, the termination of the arbitral mandate is conditional upon the non-filing of an extension application and cannot be treated as termination *stricto sensu*. The word "terminate" in the contextual form does not reflect termination as if the proceedings have come to a legal and final end, and cannot continue even on filing of an application for extension of time. Therefore, termination under Section 29A(4) is not set in stone or absolutistic in character.[21]

13. An interpretive process must recognize the goal or purpose of the legal text.[22] Section 29A intends to ensure the timely completion of arbitral proceedings while allowing courts the flexibility to grant extensions when warranted. Prescribing a limitation period, unless clearly stated in words or necessary, should not be accepted. Bar by limitation has penal and fatal consequences. This Court in ***North Eastern Chemicals Industries (P) Ltd. and Another v. Ashok Paper Mill (Assam) Ltd. and Another***[23] observed:

> "When no limitation stands prescribed it would be inappropriate for a Court to supplant the legislature's wisdom by its own and provide a limitation, more so in accordance with what it believes to be the appropriate period."

Courts should be wary of prescribing a specific period of limitation in cases where the legislature has refrained from doing so.[24] If we give a narrow and restrictive meaning to Section 29A(4), we would be indulging in judicial legislation by incorporating a negative stipulation of a bar of limitation, which has a severe annulling effect. Such an interpretation will add words to widen the scope of legislation and amount to modification or rewriting of the statute. If the legislature intended such an outcome, it could have stated in the statute that – "the Court may extend the period only if the application is filed before the expiry of the mandate of the arbitrator, not after". Indeed, there would have been no need to use the phrase "after the expiry of the period" in the statute.

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21 *Supra* note 11.

22 *Shailesh Dhairyawan* v. *Mohan Balkrishna Lulla*, (2016) 3 SCC 619.

23 [2023] 15 SCR 821 : 2023 SCC OnLine SC 1649.

24 *Ajaib Singh* v. *Sirhind Cooperative Marketing-cum-Processing Service Society Ltd. and Another*, (1999) 6 SCC 82.

In other words, a rigid interpretation would amount to legislating and prescribing a limitation period for filing an application under Section 29A, when the section does not conspicuously so state. Rather, the expression and intent of the provision are to the contrary.

14. In our opinion, a restrictive interpretation would lead to rigour, impediments and complexities. A party would have to rush to the court even when the period of arbitral mandate of twelve months has not expired, notwithstanding the possibility of a consent-based extension of six months under Section 29A(3). Narrow interpretation presents an additional challenge by relegating a faultless party to a fresh reference or appointment of an arbitrator under the A & C Act,[25] thereby impeding arbitration rather than facilitating it.[26] The legislature *vide* the 2015 Amendment envisions arbitration as a litigant-centric process by expediting disposal of cases and reducing the cost of litigation.[27] A narrow interpretation will be counterproductive. The intention is appropriately captured in the following observations made in the 176th Report of the Law Commission of India :

> "2.21.1 (…) But the omission of the provision for extension of time and therefore the absence of any time limit has given rise to another problem, namely, that awards are getting delayed before the arbitral tribunal even under the 1996 Act. One view is that this is on account of the absence of a provision as to time limit for passing an award.
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> xx xx xx
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> 2.21.3 (…) The time limit can be more realistic subject to extension only by the court. Delays ranging from five years

25 We have not examined and pronounced on the legal consequence when the proceedings "terminate" in terms of Section 29A of the A & C Act and the legal remedy available to the parties.

26 This Court in *Interplay Between Arbitration Agreements under Arbitration and Conciliation Act, 1996 & Stamp Act, 1899, In re*, (2024) 6 SCC 1 at para ¶94 held:
"The Arbitration Act represents the principles of modern arbitration, which seeks to give effect to the mutual intention of the parties to resolve their disputes by a neutral third-party Arbitral Tribunal, whose decision is final and binding on all the parties. Arbitration law allows the parties to design arbitral procedures, which ensures efficiency and expediency of the arbitration process. One of the reasons that business and commercial entities prefer arbitration is because it obviates cumbersome judicial processes, which can often prove expensive, complex and interminable. (…) It is the duty of this Court to interpret the Arbitration Act in a manner which gives life to the principles of modern arbitration in India."

27 *See* Statement of Objects and Reasons of the Arbitration and Conciliation (Amendment) Bill, 2015 inserting Section 29A.

to even fourteen years in a single arbitration have come to the Commission's notice. The Supreme Court of India has also referred to these delays of the arbitral tribunal. The point here is that these delays are occurring even in cases where there is no court intervention during the arbitral process. The removal of the time limit is having its own adverse consequences. There can be a provision for early disposal of the applications for extension, if that is one of the reasons for omitting a provision prescribing a time limit, say one month. Parties can be permitted to extend time by one year. Pending the application for extension, we propose to allow the arbitration proceedings to continue.(…)

xx xx xx

2.21.4 It is, therefore, proposed to implement the recommendation made in the 76th Report of the Law Commission with the modification that an award must be passed at least within one year of the arbitrators entering on the reference. The initial period will be one year. Thereafter, parties can, by consent, extend the period upto a maximum of another one year. Beyond the one year plus the period agreed to by mutual consent, the court will have to grant extension. Applications for extension are to be disposed of within one month. While granting extension, the court may impose costs and also indicate the future procedure to be followed by the tribunal . There will, therefore, be a further proviso, that further extension beyond the period stated above should be granted by the Court. We are not inclined to suggest a cap on the power of extension as recommended by the Law Commission earlier. There may be cases where the court feels that more than 24 months is necessary. It can be left to the court to fix an upper limit. It must be provided that beyond 24 months, neither the parties by consent, nor the arbitral tribunal could extend the period. The court's order will be necessary in this regard. But in order to see that delay in disposal of extension applications does not hamper arbitration, we propose to allow arbitration to continue pending disposal of the application.

> 2.21.5 One other important aspect here is that if there is a delay beyond the initial one year and the period agreed to by the parties (with an upper of another one year) and also any period of extension granted by the Court, there is no point in terminating the arbitration proceedings. We propose it as they should be continued till award is passed. Such a termination may indeed result in waste of time and money for the parties after lot of evidence is led. In fact, if the proceedings were to terminate and the claimant is to file a separate suit, it will even become necessary to exclude the period spent in arbitration proceedings, if he was not at fault, by amending sec. 43(5) to cover such a situation. But the Commission is of the view that there is a better solution to the problem.
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> The Commission, therefore, proposes to see that an arbitral award is ultimately passed even if the above said delays have taken place. In order that there is no further delay, the Commission proposes that after the period of initial one year and the further period agreed to by the parties (subject to a maximum of one year) is over, the arbitration proceedings will nearly stand suspended and will get revived as soon as any party to the proceedings files an application in the Court for extension of time. In case none of the parties files an application, even then the arbitral tribunal may seek an extension from the Court. From the moment the application is filed, the arbitration proceedings can be continued. When the Court takes up the application for extension, it shall grant extension subject to any order as to costs and it shall fix up the time schedule for the future procedure before the arbitral tribunal. It will initially pass an order granting extension of time and fixing the time frame before the arbitral tribunal and will continue to pass further orders till time the award is passed. This procedure will ensure that ultimately an award is passed."

15. *Rohan Builders (India) Pvt. Ltd.* (supra) highlights that an interpretation allowing an extension application post the expiry period would encourage rogue litigants and render the timeline for making the award inconsequential. However, it is apposite to note that under

Section 29A(5), the power of the court to extend the time is to be exercised only in cases where there is sufficient cause for such extension. Such extension is not granted mechanically on filing of the application. The judicial discretion of the court in terms of the enactment acts as a deterrent against any party abusing the process of law or espousing a frivolous or vexatious application. Further, the court can impose terms and conditions while granting an extension. Delay, even on the part of the arbitral tribunal, is not countenanced.[28] The first proviso to Section 29A(4) permits a fee reduction of up to five percent for each month of delay attributable to the arbitral tribunal.

16. Lastly, Section 29A(6) does not support the narrow interpretation of the expression "terminate". It states that the court – while deciding an extension application under Section 29A(4) – may substitute one or all the arbitrators. Section 29A(7) states that if a new arbitrator(s) is appointed, the reconstituted arbitral tribunal shall be deemed to be in continuation of the previously appointed arbitral tribunal. This obliterates the need to file a fresh application under Section 11 of the A & C Act for the appointment of an arbitrator. In the event of substitution of arbitrator(s), the arbitral proceedings will commence from the stage already reached. Evidence or material already on record is deemed to be received by the newly constituted tribunal. The aforesaid deeming provisions underscore the legislative intent to effectuate efficiency and expediency in the arbitral process. This intent is also demonstrated in Sections 29A(8) and 29A(9). The court in terms of Section 29A(8) has the power to impose actual or exemplary costs upon the parties. Lastly, Section 29A(9) stipulates that an application for extension under sub-section (5) must be disposed of expeditiously, with the endeavour of doing so within sixty days from the date of filing.

17. As per the second proviso to Section 29A(4), the mandate of the arbitral tribunal continues where an application under sub-section (5) is pending. However, an application for extension of period of the arbitral tribunal is to be decided by the court in terms of sub-section (5), and sub-sections (6) to (8) may be invoked. The power to extend time period for making of the award vests with the court, and not with the arbitral tribunal. Therefore, the arbitral tribunal may

28 *Supra* note 10.

not pronounce the award till an application under Section 29A(5) of the A & C Act is *sub-judice* before the court. In a given case, where an award is pronounced during the pendency of an application for extension of period of the arbitral tribunal, the court must still decide the application under sub-section (5), and may even, where an award has been pronounced, invoke, when required and justified, sub-sections (6) to (8), or the first and third proviso to Section 29A(4) of the A & C Act.

18. While interpreting a statute, we must strive to give meaningful life to an enactment or rule and avoid cadaveric consequences that result in unworkable or impracticable scenarios.[29] An interpretation which produces an unreasonable result is not to be imputed to a statute if there is some other equally possible construction which is acceptable, practical and pragmatic.

19. In view of the above discussion, we hold that an application for extension of the time period for passing an arbitral award under Section 29A(4) read with Section 29A(5) is maintainable even after the expiry of the twelve-month or the extended six-month period, as the case may be. The court while adjudicating such extension applications will be guided by the principle of sufficient cause and our observations in paragraph 15 of the judgment.

20. We, accordingly, answer the question in the aforesaid terms. The appeals are directed to be listed in the week commencing 30.09.2024 for final hearing and disposal.

Result of the Case: Appeals to be listed for final hearing and disposal.

[†]*Headnotes prepared by:* Divya Pandey

29 *Franklin Templeton Trustee Services (P) Ltd. and Another* v. *Amruta Garg and Others*, (2021) 6 SCC 736.

[2024] 9 S.C.R. 490 : 2024 INSC 711

OPG Power Generation Private Limited
v.
Enexio Power Cooling Solutions India Private Limited & Anr.

(Civil Appeal Nos. 3981-3982 of 2024)

20 September 2024

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

Issue for Consideration

Issue arose as to whether the arbitral award is in conflict with the public policy of India, or/and is vitiated by patent illegality appearing on the face of the award; whether the holding company could have been subjected to arbitration and made jointly and severally liable along with the project beneficiary-appellant for the award; whether respondent's claim for the outstanding principal amount barred by limitation; whether the counter claim, in respect of cost of repair/replacement of gear boxes and fan modules, could be treated as barred by time when the other side's claim, arising out of same contractual relationship, was found within limitation; whether arbitral award for payment of the outstanding principal amount with interest is perverse; whether the reasoning of the arbitral tribunal is flawed and vitiated by adopting different yardstick for adjudging the counterclaim than what was adopted for adjudging the claim; if so, whether it vitiated the award and rendered it vulnerable to a challenge u/s. 34 of the Arbitration and Conciliation Act, 1996.

Headnotes†

Arbitration and Conciliation Act, 1996 – s. 34(2)(b)(ii) – Arbitral Award – Challenge to – Arbitral award, if in conflict with the public policy of India, or/and vitiated by patent illegality appearing on the face of the award – Appellant company floated composite tender for design, manufacture and commissioning of an air-cooled condenser unit, however, supply and erection orders issued by its holding company – Appellant later confirmed those orders – Respondent had bid for the project – Dispute between parties as regards declaration qua invalidity of debit notes, outstanding principal amount and

* Author

interest – Respondent invoked arbitration – Arbitral award passed an award in favour of the respondent, holding that the holding company and appellant jointly and severally liable; that declaratory relief sought by respondent qua debit notes-towards liquidated damages and customs duty beyond the period of limitation, however, claim for unpaid dues payable under the contract within the period of limitation – Single Judge of the High Court set aside the award, however the Division Bench restored the same – Justification:

Held: Division Bench of the High Court justified in setting aside the judgment and order of the Single Judge and restoring the arbitral award – No palpable error in the arbitral award as to be termed 'patently illegal'/'perverse', or in conflict with public policy of India – Though the ACC Unit /project was of the appellant, the holding company of the appellant actively participated in the formation of the contract for the project – They not only acted as a single economic entity but as agents of each other – Hence, the arbitral tribunal justified in holding that holding company was bound by the arbitration agreement and jointly and severally liable along with appellant to pay the awarded amount – Claim of the respondent was an indivisible claim for compensation in lieu of goods supplied, and work done, based on breach of the contract, thus limitation for the claim governed by Art. 55, and not by Arts. 14, 18 and 113, of the Schedule to the 1963 Act – Claimant's claim for the outstanding principal amount matured on 19 March 2016, thus, limitation started to run from that date – However, even if limitation is counted from 21 September 2015, deemed date of completion of the supply/work (as found by the tribunal) it would have no material bearing on the award – Limitation for the claim as well as counterclaim, other than those relating to cost of repair/ replacement of gear boxes and fan modules, stood extended, u/s. 18 of the 1963 Act, on the basis of acknowledgement made in the minutes of meeting, and, thus, those were within limitation and rightly considered on merit – Counterclaims qua cost of repair /replacement of gear boxes and fan modules rightly held barred by time as in respect thereof there was no recital in the minutes of meeting – Rejection of prayer to declare debit notes invalid, on ground of limitation, had no adverse impact on the claimant's claim for compensation, which was well within the extended period of limitation – Also, the arbitral tribunal did not

adopt different yardstick, the reasoning of the arbitral tribunal not flawed or perverse – Limitation Act, 1963 – Arts. 14, 18 and 55 of the Schedule. [Paras 150, 151]

Arbitration and Conciliation Act, 1996 – Holding company of appellant, if could be subjected to arbitral proceedings and made jointly and severally liable along with appellant for the dues of claimant:

Held: Holding company bound by the arbitration agreement and thus, jointly and severally liable along with the appellant for the dues payable to the claimant – Arbitral tribunal found that the holding company of the appellant had issued the Purchase Orders and had actively participated in the formation of the contract even though the ACC unit was of the appellant; initial 10% of the purchase price was provided by the holding company; subsequent Purchase Orders issued by the appellant were on similar terms and were issued by way of affirmation to obviate technical l issues – Said circumstances had a material bearing for invocation of Group of Companies doctrine to bind holding company with the arbitration agreement and fasten it with liability, jointly and severally with the appellant, in respect of the Purchase Orders relating to ACC Unit – Thus, no reason to interfere with the findings of the arbitral tribunal more so when it is based on a possible view of the matter. [Para 81]

Limitation Act, 1963 – Art. 14, 18, 55 of the Schedule – Claim in respect of declaration qua invalidity of debit notes; outstanding principal amount; and interest – Applicability of Art. 14, 18, 55 to the claim – Limitation for the claim:

Held: On facts, there is an indivisible claim in respect of the outstanding principal amount for the goods supplied and the work done – Moreover, the payments under the supply purchase order were to be on pro rata basis, and full payment for the supplies was dependent on supporting documents, including certificates, to be provided by the purchaser, which were not provided – Thus, when full payments under the supply/erection purchase orders were dependent on certificates relating to completion/commissioning/ guaranteed performance etc., the claimant waited till successful completion/commissioning/guaranteed performance of the project to file a composite claim for the balance amount payable under both the purchase orders – Thus, Art. 14 not applicable to the

claim as framed – As regards applicability of Art. 18, since the payments under the contract were to be made on pro rata basis, dependent on work done and certificates issued, which were not issued, hence, the claimant was entitled to make a composite claim for the goods supplied and the work done after the project was successfully complete-when the Unit was commissioned followed by guaranteed performance because it is only then, when the outstanding amount, as per the Bills/Invoices raised, became due and payable to the claimant in terms of the contract, thus, Art. 18 would also not apply – Art. 55 was applicable since the claim was for compensation which includes a specified amount payable under a contract, in respect of the goods supplied and the work done under a contract – Claim was based on a breach of the contractual obligation as, according to the findings returned by the tribunal, the appellants failed to fulfil their obligations of making payment of the outstanding principal amount payable under the contract despite raising of bills/invoices by the claimant – Thus, the claim for the outstanding principal amount not barred by limitation. [Paras 105-107]

Limitation Act, 1963 – Starting point of limitation for the claim – Date from which the limitation period is to be counted:

Held: Under Art. 55, the limitation period begins to run when the contract is broken or where there are successive breaches, when the breach in respect of which the suit is instituted occurs, or where the breach is continuing, when it ceases – Claim is for the outstanding principal amount due to the claimant on discharge of his obligations under the contract – Thus, the cause of action for the claim is appellants' failure to make payment of the outstanding principal amount to the claimant despite discharge of contractual obligations by it – Nothing brought to the notice that there was any fixed date, or period of credit, for payment of the balance amount – Starting point of limitation should be the date when the claimant had fulfilled all its obligations under the contract and was entitled for release of the outstanding amount payable under the contract – Tribunal concluded that commissioning took place in the month of May 2015; technical issues were resolved by 21 September 2015; and performance guarantee period expired on 19 March 2016 – Final payment of the principal outstanding amount was dependent on meeting the requirement of performance guarantee, the cause of action for the claim, as made, matured on

expiry of that stipulated period of 180 days within which, despite request, the appellants failed to undertake the performance guarantee test – Thus, even though there might be several bills/ invoices raised/issued by the claimant during execution of the contract, the claim of the claimant for the outstanding principal amount matured on expiry of 180 days from the date of the notice given by the claimant to the appellants to undertake the performance guarantee test – Thus, limitation for the claim started to run from 19 March 2016. [Paras 109-113]

Limitation Act, 1963 – s. 18 – Limitation extended by acknowledgement – By virtue of acknowledgment, if any, the claimant, if entitled to extension of the period of limitation:

Held: s. 18 deals with the effect of acknowledgement in writing – Sub-section (1) thereof provides that where, before the expiration of the prescribed period for a suit or application in respect of any right, an acknowledgement of liability in respect of such right has been made in writing signed by the party against whom such right is claimed, a fresh period of limitation to be computed from the time when the acknowledgment was so signed – Explanation to s. 18 provides that an acknowledgment may be sufficient though it omits to specify the exact nature of the right or avers that the time for payment has not yet come or is accompanied by a refusal to pay, or is coupled with a claim to set off, or is addressed to a person other than a person entitled to the right – On facts, the limitation period started to run from 19 March 2016 – Within three years therefrom, in the minutes of meeting dated 19 April 2018 there was a clear acknowledgement that the amount claimed by the claimant is the balance amount payable, though subject to debit, by way of set off, against various claims made by the appellant upon the claimant – Such an acknowledgment was sufficient to extend the limitation period as it admitted the existing liability of the appellants qua the balance amount payable to the claimant under the contract – Benefit of such an acknowledgement would not be lost merely because a set off is claimed – Thus, minutes of meeting dated 19 April 2018, though claims a set off, is a valid acknowledgement of the existing liability within the ambit of s. 18 and it extends the period of limitation for a period of 3 years from the date it was made – Thus, the claim made on 2 May 2019, within the period of limitation. [Paras 116, 119]

OPG Power Generation Private Limited v.
Enexio Power Cooling Solutions India Private Limited & Anr.

Arbitration and Conciliation Act, 1996 – s. 23 (2A) – Counter claim – Nature of – Counterclaim in respect of cost of repair/ replacement of gear box and fan modules, if barred by time:

Held: Counterclaim is a claim made by a defendant in a suit against the plaintiff – It is a claim, independent of and separable from the plaintiff's claim, which can be enforced by a cross action – Counterclaim preferred by the defendant in a suit is a cross suit and even if the suit is dismissed, counterclaim shall remain alive for adjudication – Purpose of the scheme relating to counterclaim is to avoid multiplicity of proceedings – s. 23 (2A) gives respondent to a claim a right to submit a counterclaim or plead a set off, which shall be adjudicated upon by the arbitral tribunal, if such counterclaim or set off falls within the scope of the arbitration agreement – Counterclaim is like a cross suit, or a separate suit, and the limitation of a counterclaim is to be counted from the date of accrual of the cause of action which it seeks to espouse – As a logical corollary thereof, it is quite possible that even though a suit or a claim is within the period of limitation, the counterclaim may well be barred by limitation, if the cause of action espoused therein accrued beyond the prescribed period of limitation – On facts, the counterclaim in respect of cost of repair/replacement of gear box and fan modules, barred by time – Tribunal took 21 September 2015 as the start point of limitation for the counterclaim on the premise that it would be the date when the Takeover Certificate is deemed to have been issued, the supplier had fulfilled its obligations – On basis thereof, the tribunal found counterclaims as regards cost of repair/replacement of gear boxes and of fan modules barred by time as the counterclaim was filed on 15 July 2019 i.e., more than three years later, and there existed no acknowledgement in respect thereof – However, for other issue, 19 March 2016 is found as the start point of limitation for the claim because that is the date when 180 days period of guaranteed performance, part of supplier's liability, expired – Whether the limitation period is counted from 21 September 2015 or 19 March 2016, the counterclaim filed on 15 July 2019 was beyond the prescribed period of three years inasmuch as its cause of action could not have arisen after 19 March 2016. [Paras 120, 122, 124, 125, 128, 129]

Limitation Act, 1963 – s. 18 – Effect of acknowledgment in writing – Extension of the period of limitation – Minutes of meeting, if extended the limitation of counterclaims:

Held: To extend the period of limitation with the aid of s. 18, the acknowledgment must involve an admission of a subsisting jural relationship between the parties and a conscious affirmation of an intention of continuing such relationship regarding an existing liability – Such intention can be gathered from the nature of the admission – Admission need not be express, or regarding a precise amount, but must be made in circumstances and in words from which the court can reasonably infer that the person making the admission intended to refer to a subsisting liability as on the date of the statement – However, where an acknowledgement is in respect of a specified sum of money or a specific right only, and not in general terms, it would extend the period of limitation only in respect thereof, and not of other claims which, though may have arisen out of same jural relationship, are not specified therein – On facts, minutes of meeting did not extend the limitation of counterclaims – Minutes of meeting made no reference to the items referable to counterclaims-cost of repair/replacement of Gear Box and Fan Modules – Also no acknowledgment in general terms in regard to liabilities subsisting under the contract – Said minutes could not be treated as acknowledgment for the purpose of extending limitation of the counterclaims not specified therein – Thus, when the counterclaims were otherwise barred by limitation on the date of filing of counterclaim, the tribunal justified in rejecting them as barred by limitation. [Paras 137, 138]

Limitation Act, 1963 – Rejection of claimant's prayer to declare debit notes invalid, if had adversely affected the claim for the outstanding principal amount in respect of the goods supplied/ work done under the contract :

Held: Rejection of prayer to declare debit notes invalid did not affect respondent's claim for the outstanding principal amount – Relief for declaratory relief was rightly held barred by limitation by the tribunal – Rejection of declaratory relief did not impact relief for compensation, since relief for compensation was not a consequential relief, dependent on debit notes being declared invalid because issuance of debit notes was a unilateral act of the employer which on its own did not extinguish the right of the contractor – No doubt, where the relief sought is consequential to the declaration, and declaratory relief is found barred by time, the prayer for consequential relief will also fail – But where declaration is just an optional relief-on which the main relief is not dependent,

rejection of it as barred by limitation would not extinguish the claim in respect of which substantive relief is sought – In such circumstances, it was open for the contractor to sue for its dues without seeking a declaration qua the debit notes – Thus, rejection of the declaratory relief as barred by limitation, did not have a material bearing on respondent's claim against the appellants' for the outstanding principal amount payable under the contract – Amount, as shown debited in the debit notes, was not to be automatically adjusted against the principal outstanding amount payable to respondent – While deciding the claim of respondent, the tribunal was well within its remit to adjudicate upon the issue whether such amount should be adjusted or not against the outstanding principal amount payable to respondent – No perversity in the award on this count. [Paras 139, 141]

Arbitration and Conciliation Act, 1996 – ss. 34, 37 – Arbitral award – Setting aside of – Plea that the arbitral tribunal adopted different yardstick for adjudicating the claim than what was adopted for the counterclaim; and the reasoning is completely flawed and perverse :

Held: Distinction would have to be drawn between an arbitral award where reasons are either lacking/unintelligible or perverse and an arbitral award where reasons are there but appear inadequate or insufficient – In a case where reasons appear insufficient or inadequate, if, on a careful reading of the entire award, coupled with documents recited/relied therein, the underlying reason, factual or legal, that forms the basis of the award, is discernible/intelligible, and the same exhibits no perversity, the court need not set aside the award while exercising powers u/s. 34 or s. 37, rather it may explain the existence of that underlying reason while dealing with a challenge laid to the award – In doing so, the court does not supplant the reasons of the arbitral tribunal but only explains it for a better and clearer understanding of the award – On facts, the arbitral tribunal did not adopt different yardstick for adjudicating the claim than what was adopted for the counterclaim and the reasoning of the arbitral tribunal is not flawed or perverse – Though reasons recorded in the award at first blush appear insufficient, or a bit confusing, but, when those reasons are examined in the context of the documents placed and the arguments advanced, the underlying reasons, which form basis of the conclusion, are not only intelligible but sound – Mistake, if any, committed by

the arbitral tribunal in using the words 'ongoing negotiations' in place of acknowledgement is trivial does not go to the root of the matter as to have a material bearing on the conclusion – Thus, for this mistake alone, the award is not liable to be set aside – Furthermore, it cannot be said that the arbitral tribunal was obliged to accept the admission contained in the minutes of meeting qua liquidated damages and customs duties, because it relied on it for extending the limitation – Tribunal was well within its jurisdiction in drawing a conclusion that the claimant was not liable in respect of those items which formed part of the counterclaim, based on consideration of the entire evidence, at variance with the recitals in the acknowledgement – Such conclusion is a plausible view and cannot be termed perverse – Single Judge of the High Court erred in law while interfering with the arbitral award – Furthermore, as regards the plea that the appellate court-Division Bench of the High Court exceeded its jurisdiction while providing its own reasons to support the conclusion in the award, the appellate court took pains, and rightly so, to understand and explain the underlying reason on which the claim of the respondent was found within limitation – Appellate court was well within its jurisdiction to explain the underlying legal principle which the arbitral tribunal had applied; and in doing so, it did not supplant the reasons provided in the award – Impugned order of the Division Bench does not suffer from any legal infirmity. [Paras 144-149]

Arbitration and Conciliation Act, 1996 – s. 34(2)(b)(ii) – Arbitral Award – Challenge to – Award may be set aside when in conflict with the public policy of India – Scope of public policy:

Held: For an award to be against public policy of India a mere infraction of the municipal laws of India not enough – There must be, inter alia, infraction of fundamental policy of Indian law including a law meant to serve public interest or public good. [Para 36]

Arbitration and Conciliation Act, 1996 – ss. 34 and 48 (as amended by the Amendment, 2015) – Amendment, 2015 adding Explanations to s. 34(2)(b)(ii) and s. 48(2)(b), in place of the earlier Explanation, wherein Explanation 1 clause (ii) to s. 34(2)(b)(ii) and s. 48(2)(b), specifies that an arbitral award is in conflict with the public policy of India, only if, it is in contravention with the fundamental policy of Indian law – Expression "in contravention with the fundamental policy of Indian law" – Meaning of:

Held: After the '2015 amendments' in s. 34 (2)(b)(ii) and s. 48(2)(b), the phrase "in conflict with the public policy of India" must be accorded a restricted meaning in terms of Explanation – Expression "in contravention with the fundamental policy of Indian law" by use of the word 'fundamental' before the phrase 'policy of Indian law' makes the expression narrower in its application than the phrase "in contravention with the policy of Indian law", which means mere contravention of law is not enough to make an award vulnerable – To bring the contravention within the fold of fundamental policy of Indian law, the award must contravene all or any of such fundamental principles that provide a basis for administration of justice and enforcement of law in this country – Violation of the principles of natural justice; disregarding orders of superior courts in India or the binding effect of the judgment of a superior court; and violating law of India linked to public good or public interest, are considered contravention of the fundamental policy of Indian law – However, while assessing whether there has been a contravention of the fundamental policy of Indian law, the extent of judicial scrutiny must not exceed the limit as set out in Explanation 2 to s. 34(2)(b)(ii). [Para 52]

Arbitration and Conciliation Act, 1996 – ss. 34 and 48 (as amended by the Amendment, 2015) – Explanation 1 clause (iii) to s. 34(2)(b)(ii) and s. 48(2)(b) inserted by 2015 Amendment, that an award is in conflict with the public policy of India, inter alia, if it conflicts with the 'most basic notions of morality or justice' – Most basic notions of 'morality' – Explanation:

Held: It would cover such agreements as are not illegal but would not be enforced given the prevailing mores of the day – Interference on this ground would be only if something shocks the court's conscience. [Para 59]

Arbitration and Conciliation Act, 1996 – ss. 34 and 48 (as amended by the Amendment, 2015) – Explanation 1 clause (iii) to s. 34(2)(b)(ii) and s. 48(2)(b) inserted by 2015 Amendment, that an award is in conflict with the public policy of India, inter alia, if it conflicts with the 'most basic notions of morality or justice' – Most basic notions of 'justice' – Explanation:

Held: Term 'legal justice' is not used in Explanation 1, thus, simple conformity or non-conformity with the law is not the test to determine whether an award is in conflict with the public policy of India in terms of Explanation 1 – Test is that it must conflict with the most

basic notions of justice – For lack of any objective criteria, it is difficult to enumerate the 'most basic notions of justice' – More so, justice to one may be injustice to another – As regards justice being done, it is about rendering, in accord with law, what is right and equitable to one who has suffered a wrong – Dispensation of justice in its quality may vary, dependent on person who dispenses it – Thus, the placement of words "most basic notions" before "of justice" in Explanation 1 has its significance – Object of inserting Explanations 1 and 2 in place of earlier explanation to s. 34(2)(b)(ii) was to limit the scope of interference with an arbitral award, thus the amendment consciously qualified the term 'justice' with 'most basic notions' of it – Giving a broad dimension to this category would be deviating from the legislative intent – Thus, considering that the concept of justice is open-textured, and notions of justice could evolve with changing needs of the society, it would not be prudent to cull out "the most basic notions of justice" – They ought to be such elementary principles of justice that their violation could be figured out by a prudent member of the public who may, or may not, be judicially trained, which means, that their violation would shock the conscience of a legally trained mind – This ground would be available to set aside an award, if the award conflicts with such elementary/fundamental principles of justice that it shocks the conscience of the Court. [Paras 55, 58]

Arbitration and Conciliation Act, 1996 – s. 34 (2-A) (as inserted by the Amendment, 2015) –Sub-section (2-A) of s. 34 providing that the Court may also set aside an arbitral award if it is vitiated by patent illegality appearing on the face of the award – Patent illegality appearing on the face of the award – Meaning of:

Held: Proviso to sub-section (2-A) states that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence – Thus, an award could be set aside if it is patently illegal – However, illegality must go to the root of the matter and if the illegality is of trivial nature, it cannot be held that award is against public policy. [Para 60]

Arbitration and Conciliation Act, 1996 – s. 34 –Arbitral Award – Scope of interference – Perversity as a ground for setting aside an arbitral award:

Held: Interference with an arbitral award is only on limited grounds as set out in s. 34 – Possible view by the arbitrator on facts is to be respected as the arbitrator is the ultimate master of the quantity

and quality of evidence to be relied upon – Arbitral decision must not be perverse or so irrational that no reasonable person would have arrived at the same – If an award is perverse, it would be against the public policy of India – It is only when an arbitral award could be categorized as perverse, that on an error of fact an arbitral award may be set aside – Mere erroneous application of the law or wrong appreciation of evidence by itself is not a ground to set aside an award as is clear from the provisions of sub-section (2-A) of s. 34. [Paras 63, 68]

Arbitration and Conciliation Act, 1996 – s. 31 – Forms and contents of arbitral award – Scope of interference – Ground of insufficient, or improper/erroneous or lack of reasons:

Held: Arbitral award on the ground of improper or inadequate reasons, or lack of reasons, can be placed in three categories, (1) where no reasons are recorded, or the reasons recorded are unintelligible; (2) where reasons are improper, that is, they reveal a flaw in the decision-making process; and (3) where reasons appear inadequate – Awards falling in category (1) are vulnerable as they would be in conflict with the provisions of s. 31(3), thus, liable to be set aside u/s. 34, unless the parties have agreed that no reasons are to be given, or the award is an arbitral award on agreed terms u/s. 30 – Awards falling in category (2) are amenable to a challenge on ground of impropriety or perversity, strictly in accordance with the grounds set out in s. 34 – In a challenge to award falling in category (3), before taking a decision the Court must take into consideration the nature of the issues arising between the parties in the arbitral proceedings and the degree of reasoning required to address them – If reasons are intelligible and adequate on a fair-reading of the award and, in appropriate cases, implicit in the documents referred to therein, the award is not to be set aside for inadequacy of reasons – However, if gaps are such that they render the reasoning in support of the award unintelligible, or lacking, the Court exercising power u/s. 34 may set aside the award. [Paras 71.3, 71.6]

Arbitration and Conciliation Act, 1996 – Arbitral award – Scope of interference with the interpretation/construction of a contract accorded in the award :

Held: Arbitral tribunal must decide in accordance with the terms of the contract – In a case where an arbitral tribunal passes an award against the terms of the contract, the award would be patently

illegal – However, an arbitral tribunal has jurisdiction to interpret a contract having regard to terms and conditions of the contract, conduct of the parties including correspondences exchanged, circumstances of the case and pleadings of the parties – If the conclusion of the arbitrator is based on a possible view of the matter, the Court should not interfere – But where, on a full reading of the contract, the view of the arbitral tribunal on the terms of a contract is not a possible view, the award would be considered perverse and as such amenable to interference. [Para 72]

Arbitration – Arbitration agreement/contract – Unexpressed term, if can be read into a contract as an implied condition:

Held : Ordinarily, terms of the contract are to be understood in the way the parties wanted and intended them to be – In agreements of arbitration, where party autonomy is the *grund norm*, how the parties worked out the agreement, is one of the indicators to decipher the intention, apart from the plain or grammatical meaning of the expressions used – However, reading an unexpressed term in an agreement would be justified on the basis that such a term was always and obviously intended by the parties thereto – Unexpressed term can be implied if, and only if, the court finds that the parties must have intended that term to form part of their contract – It is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them – Rather, it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, although tacit, forms part of the contract – But before an implied condition, not expressly found in the contract, is read into a contract, by invoking the business efficacy doctrine, it must be reasonable and equitable; it must be necessary to give business efficacy to the contract, that is, a term will not be implied if the contract is effective without it; it must be obvious, it must be capable of clear expression; and it must not contradict any terms of the contract. [Paras 73, 75]

Limitation Act, 1963 – Arts. 14, 18 and 55 of the Schedule – Applicability to the claim, when:

Held: Art. 14 applies where the suit/ claim is for the price of goods sold and delivered; and no fixed period of credit is agreed upon whereas Art.18 applies where the suit/claim is for the price of work done by the plaintiff/claimant for the defendant at his request; and no time has been fixed for payment – Thus, where a suit is for

goods supplied and work done by the plaintiff (a contractor) and the price of materials and the price of work is separately mentioned, and the time for payment is not fixed by the contract, Art. 14 will apply to the former claim, and Art. 18 to the latter – But where a claim is made for a specific sum of money as one indivisible claim on the contract, without mentioning any specific sum as being the price of goods or price of the work done, neither Art. 14 nor Art. 18 would apply, but only Art. 55, which provides for all actions based on a contract, not otherwise provided for, would apply – Art. 55 is a residuary Article in respect of all actions based on a contract not otherwise specially provided for – For the applicability of Art. 55, the suit should be based on a contract, there must be breach of the contract, the suit should be for compensation and the suit should not be covered by any other Article specially providing for it – Phrase 'compensation for breach of contract', as occurring in Art. 55 would comprehend also a claim for money due under a contract – Thus, even a suit for recovery of a specified amount, based on a contract, is a suit for compensation, and if the suit is a consequence of defendant breaching the contract or not fulfilling its obligation(s) thereunder, the limitation for institution of such a suit would be covered by Art. 55, provided the suit is not covered by any other Art. specially providing for it. [Paras 91, 92, 95, 98]

Words and phrases – Expression 'public policy' – Meaning and scope of. [Paras 30-40]

Words and phrases – Term 'justice' – Meaning of:

Held: Justice is the virtue by which the society/court/tribunal gives a man his due, opposed to injury or wrong – Justice is an act of rendering what is right and equitable towards one who has suffered a wrong – Thus, while tempering justice with mercy, the court must be very conscious, that it has to do justice in exact conformity with some obligatory law, for the reason that human actions are found to be just or unjust on the basis of whether the same are in conformity with, or in opposition to, the law – Thus, in 'judicial sense', justice is nothing more nor less than exact conformity to some obligatory law; and all human actions are either just or unjust as they are in conformity with, or in opposition to, the law. [Para 54]

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List of Acts

Arbitration and Conciliation Act, 1996; Commercial Courts Act, 2015; Amended Letters Patent, 1865; Limitation Act, 1963; Contract Act, 1872; Foreign Awards (Recognition and Enforcement) Act, 1961.

List of Keywords

Arbitral award; Conflict with the public policy of India; Patent illegality; Holding company; Jointly and severally liable; Barred by limitation; Counter claim; Contractual relationship; Limitation; Outstanding principal amount with interest; Perverse; Adopting different yardstick for adjudging counterclaim; Composite tender; Declaration qua invalidity of debit notes; Liquidated damages; Customs duty; Arts. 14, 18 and 113, of the Schedule to Limitation

Act, 1963; Acknowledgement; Claim for compensation; Purchase orders; Group of companies doctrine; Starting point of limitation; Date from which the limitation period to be counted; Cause of action; Discharge of contractual obligations; Performance guarantee test; Breach of the contract; Limitation extended by acknowledgement; Extension of the period of limitation; Acknowledgement in writing; Claim to set off; Valid acknowledgement; Minutes of meeting; Avoid multiplicity of proceedings; Takeover certificate; Subsisting jural relationship; Declaratory relief; Mistake; Ongoing negotiations; Scope of public policy; Infraction of municipal laws of India; Infraction of fundamental policy of Indian law; Public interest or public good; In contravention with fundamental policy of Indian law; Administration of justice; Enforcement of law; Principles of natural justice; Disregarding orders of superior courts; Judicial scrutiny; Most basic notions of morality or justice; Legal justice; Dispensation of justice; Judicial mind; Patent illegality appearing on face of award; International commercial arbitrations; Erroneous application of law; Re-appreciation of evidence; Improper or inadequate reasons; Lack of reasons; Reasons recorded unintelligible; Impropriety or perversity; Degree of reasoning; Fair-reading of award; Inadequacy of reasons; Interpretation/construction of contract accorded in award; Unexpressed term; Party autonomy; Grund norm; Implied condition; Business efficacy doctrine.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 3981-3982 of 2024

From the Judgment and Order dated 01.09.2021 of the High Court of Judicature at Madras in OSA (CAD) Nos. 174 and 175 of 2021

With

Civil Appeal Nos. 3983-3984 of 2024

Appearances for Parties

Abhimanyu Bhandari, Aman Gupta, Arjun Sayal, Shreyan Das, Advs. for the Appellant.

Gaurab Banerjee, Sr. Adv., Mayank Mishra, Sarvesh Singh Baghel, Ms. Ayshwarya Chandra, Ms. Anukriti Kudesia, Arun Pratap Singh Rajawat, Advs. for the Respondents.

OPG Power Generation Private Limited v.
Enexio Power Cooling Solutions India Private Limited & Anr.

Judgment / Order of the Supreme Court

Judgment

Manoj Misra, J.

1. These two appeals are directed against a common judgment and order of the High Court[1] dated 1 September 2021 passed in OSA (CAD) Nos. 174-175 of 2021, whereby, exercising powers under Section 37 of the Arbitration and Conciliation Act, 1996[2] read with Section 13(1) of the Commercial Courts Act, 2015[3] and Clause 15 of Amended Letters Patent, 1865 read with Order XXXVI Rule 9 of O.S. Rules, the Division Bench of the High Court allowed the appeals, set aside the judgment and order of the Single Judge dated 23 December 2020 and restored the arbitral award dated 13 July 2020.

THE CONTRACT

2. OPG Power Generation Private Ltd (in short OPG -the appellant in the leading appeal), a subsidiary of Gita Power and Infrastructure Private Limited (in short Gita Power – Respondent No.2 (R-2) in the leading appeal, and appellant in the connected appeal), floated a composite tender for design, manufacture, supply, erection and commissioning of air-cooled condenser unit (ACC Unit) with auxiliaries for 160 MW Coal Based Thermal Power Plant (Project) at Gummidipoondi in the State of Tamil Nadu. Enexio Power Cooling Solutions (in short Enexio - Respondent No.1 (R-1) in the leading appeal) bid for the project. After a series of correspondences /negotiations, on 4 March 2013, R-2 issued two separate orders: (i) for design, engineering and supply of one ACC Unit with auxiliaries for 160 MW Coal Based Power Project at Gummidipoondi (in short, Supply Purchase Order); and (ii) for erection and commissioning of one unit of ACC with auxiliaries for 160 MW Coal Based Power Project at Gummidipoondi (in short, Erection Purchase Order). Interestingly, the tender was floated by OPG but the supply and erection orders were issued by its holding company (Gita Power - R-2) on 4 March 2013. However,

1 High Court of Judicature at Madras

2 1996 Act

3 2015 Act

later, in the month of July 2013, OPG confirmed those orders by issuing two separate orders with same terms and bearing the same date i.e. 4 March 2013.

3. The supply / erection purchase orders with its enclosures contained an arbitration clause in the following terms:

> "**Clause 21. ARBITRATION**
>
> 21.1. In the event of any dispute or difference arising under the Order or in connection therewith including any question relating to existence, meaning and interpretation of the Order or any alleged breach thereof that cannot be amicably settled between the Parties, the same shall be referred to the arbitration.
>
> 21.2. Arbitration shall be conducted under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by three arbitrators appointed in accordance with said rules. The place of arbitration will be at Chennai. The arbitration proceedings shall be conducted in the English language.
>
> 21.3. The arbitrators shall take into consideration the will of the Parties as expressed in the Order, the evidence presented, the principles of equity and good faith. The decision(s) of the arbitrators shall be final and both Parties undertake to fulfil and execute the said decision(s).
>
> 21.4. Notwithstanding any dispute between the parties, Parties shall not be entitled to withhold/ delay/defer their obligations under the Order and same shall be carried out strictly in accordance with the terms and conditions of the Order."

4. Clause 6 of the supply purchase order provided:

> "**6-Tax and duties:**
>
> 6.1. Taxes, duties and levies payable and charged by the competent authority such as Excise Duty, Sales Tax, Cess will be borne and paid by the Purchaser.
>
> 6.2. The Purchaser shall issue Central Sales Tax Form C or any other Form as applicable for interstate sale."

5. Likewise, clause 6 of the erection purchase order provided:

> "**6-Tax and duties:**
>
> 6.1. All taxes duties and local levies payable and charged by the Competent Authority for the Services, such as Service Tax, cess, work order tax and other charges which could be levied in connection with and during the Order, whether deducted at source or not, will be borne and paid by the Purchaser.
>
> 6.2. Any statutory variation due to implication of new taxes and duties shall be paid by Purchaser."

THE DISPUTE BETWEEN PARTIES

6. The intended completion/ commissioning date, as originally contemplated, was 31 March 2014. However, commissioning took place in May 2015. The total amount billed by Enexio (R-1) for the aforesaid two orders was Rs. 46,71,04,493 but the amount paid to it was Rs. 39,59,19,629 only. This gave rise to a dispute. According to Enexio (R-1), Rs.6,75,15,631 remained payable to it. Whereas, according to the appellant, nothing was due as from the remaining amount, following sums were deductible:

> "(i) Rs.3,30,00,000, *vide* debit note dated 24.08.2015, towards liquidated damages for delay in supply and erection.
>
> (ii) Rs.5,94,06,693, *vide* debit note dated 16.01.2016, towards customs duty.
>
> (iii) Rs. 1,72,854 towards dismantling modification - TG building.
>
> (iv) Rs. 27,40,161 towards ACC duct fabrication. Totaling Rs. 9,53,19,708."

7. On 19 April 2018 a meeting took place between the representatives of the parties. Minutes of that meeting were drawn in the following terms:

> "Minutes of meeting with M/s. OPG Power Generation Pvt. Ltd. and M/s. ENEXIO Power Cooling Solutions (I) Pvt. Ltd. dated 19.04.2018.

Members Present:

OPGS	ENEXIO
1. Mr. S. Swaminathan	1. Mr. Parasuram
2. Mrs. C. Kiruthiga	2. Mr. Ravi Rengasamy

Sub.: Supply of Air-cooled condenser with auxiliaries for 160 MW Coal based Power Project of OPG Power Generation Pvt. Ltd. (OPGPG) – Debit Notes.

Ref.: 1. Order No. OPGPG/ED/P-III/SUPPLY/008, dated 04.03.2013.

2. Order No. OPGPG/ED/P-III/ ERECTION /009, dated 04.03.2013

Description	**Amount in Rs.**
Total Billed Amount	467,104,493
Amount Paid	395,919,629
Balance Payable incl Retention	67,515,618
OPGPG Debit	
LD- Delay in Supply	30,900,000
LD- Delay in Erection	2,100,000
Customs Duty	59,406,693
Dismantling Modification – TG Building	172,854
ACC duct Fabrication (Debit raised for Rs.63,40,161/- against which GEA have accepted for Rs.36,00,000/- that is reduced from payable)	2,740,161
Total OPGPS Debit	95,319,708
Final Payable by Enexio	27,804,090

The above figures are validated by respective Projects and Finance departments.

However, we request that the CD, CVD and LD's be looked at leniently and mutually settled. The Contract calls for all taxes such as ED, ST to be reimbursed and CVD is equivalent to Excise duty.

> LD is not only due to our ENEXIO's fault. In any case, this did not cause for any delay in Plant commissioning. We have had huge losses due to US dollar increase during Project stage to the tune of Rs.1.82 crores.
>
> ENEXIO requested that the above amount of Rs.2,78,04,090/- payable by them to M/s. OPG Power Generation Pvt. Ltd. be adjusted against the amount to be received by M/s. ENEXIO Power Cooling Solutions (I) Pvt. Ltd. from M/s. OPGS Power Gujarat Pvt. Ltd."

8. According to Enexio (R-1), in that meeting, the parties were *ad idem* regarding the outstanding principal amount payable to Enexio (R-1) and there was no consensus on any other item mentioned in the minutes of the meeting.

9. On 26 May 2018 OPG extended an offer of Rs. 300 lacs to Enexio (R-1) as full and final settlement of the account. This was not accepted by Enexio. Hence, the claim.

ENEXIO'S (R-1's) CLAIM

10. On 2 May 2019 Enexio (R-1) invoked the arbitration clause, under the extant ICC Rules, raising the following claims:

S.No.	Claim	Amount (in INR)
A	Outstanding principal amount as due under the Purchase Orders	6,75,15,631
B	Declaration that the Debit Note Nos. 076/2015-16 and 077/2015-16, both dated 24.08.2015, issued by the Employer, claiming deduction of aggregate amount of INR 3,30,00,000/- towards Liquidated Damages for the delay, are unlawful and unsustainable.	-
C	Declaration that the Debit Note No.032/2015-16 dated 12.01.2016, issued by the Employer, claiming deduction of Rs.5,94,06,693/- towards Customs Duty, including CVD and SAD, is unlawful and unsustainable.	-

D	Interest on outstanding principal amount calculated @ 18% p.a. from respective due date(s) of payments till 31.03.2019.	3,51,43,446
E	Interest on outstanding principal amount calculated @ 18% p.a. for further period starting from 01.04.2019 till the date of payment.	-
F	Damages under the Purchase Orders	8,00,00,000
G	Costs of arbitration	

THE COUNTERCLAIM

11. On 15 July 2019 OPG submitted its defense, and raised counterclaims in respect of: (a) liquidated damages for delay; (b) customs duties; (c) cost of erection of horizontal and vertical exhaust through external agency; (d) cost of repair/ replacement of gear boxes; and (e) cost of repair/ replacement of fan modules.

The Award

12. On 13 July 2020 ICC Arbitral Tribunal, comprising of three members, delivered a unanimous award, whereunder OPG and Gita Power, who have separately filed these two appeals, were required to pay, jointly and severally, to the claimant (R-1 - Enexio):

    (i) Rs. 6,11,75,470/- towards outstanding principal amount due under the purchase orders;

    (ii) Rs. 95,27,533/- towards ICC Administrative Costs and the Tribunal fees and expenses incurred in the arbitration; and

    (iii) Rs. 40,65,515/- towards claimant's legal fees and expenses.

    In addition to the above, OPG and Gita Power were directed to pay simple interest at a rate of 10% per annum on: (a) Rs. 6,11,75,470/- from 30 October 2015 until the date of payment; (b) Rs.95,27,533/- from the date of the award till the date of payment; and (c) Rs. 40,65,515/- from the date of the award till the date of payment.

However, all other claims including counterclaims were rejected.

KEY FINDINGS IN THE AWARD

13. The key findings of the Arbitral Tribunal were:

(a) Gita Power and OPG are jointly and severally liable – Gita Power, being the holding company of OPG, had actively participated in the negotiations and had placed the purchase orders, which were later confirmed by OPG. In fact, they both acted as a single economic enterprise. Therefore, mere issuance of another set of purchase orders by OPG with same terms and conditions would not relieve Gita Power of its obligations, rather both would be jointly and severally liable to the claimant (Enexio).

(b) Claimant is entitled to the unpaid principal amount with interest – Principal amount of Rs. 6,75,15,631/- is due and payable to the claimant (Enexio) under the terms of the purchase orders, subject to reconciliation of Rs.63,40,161 spent on vertical duct erection. Thus, net amount payable to the claimant is Rs. 6,11,75,470 plus interest.

(c) No Damages are payable by Enexio to OPG/ Gita Power for the delay – The claimant was entitled to extension up to the date of completion i.e., 21 September 2015. Therefore, Enexio has no liability towards liquidated damages for the delay. Moreover, all the completion requirements were achieved by that date.

(d) No liability of Enexio to pay customs duty – Clause 6 of the Supply / Erection Purchase orders stipulated that all taxes, duties and local levies payable would be borne and paid by the purchaser. Therefore, liability to pay customs duty would fall upon the purchaser/ employer.

(e) Limitation -

(i) Declaratory relief sought by Enexio *qua* the debit notes (i.e., towards liquidated damages and customs duty) is beyond the period of limitation prescribed by Article 58 of the Limitation Act, 1963;[4]

4 1963 Act

(ii) However, Enexio's claim for unpaid dues payable under the contract is within the period of limitation; and

(iii) OPG's counterclaim for cost of repair/replacement of gearboxes and fan modules is barred by limitation.

Reasoning of the Arbitral Tribunal on limitation:

14. Regarding the finding on limitation, the Arbitral Tribunal (in short the "Tribunal") observed that the declaratory relief *qua* the debit notes (i.e., towards: (a) Liquidated damages for the delay; and (b) Customs duty) was sought beyond three years from the date when the right to sue first accrued, therefore it was beyond the limitation period prescribed by Article 58 of the Schedule to the 1963 Act. The Tribunal noticed that the debit note for liquidated damages was issued on 24 August 2015; the claimant acknowledged its receipt *vide* letter dated 28 August 2015; whereas the request for arbitration was received by ICC Secretariat on 2 May 2019. Likewise, the debit note for customs duty was issued on 12 January 2016 that is, beyond three years from the date of request for arbitration.

15. Insofar as the relief for recovery of the unpaid amount under the purchase orders was concerned, the Tribunal opined that it was not barred by limitation because meaningful negotiations were ongoing between the parties as evidenced by the minutes of meeting dated 19 April 2018, which was followed by a written offer of the purchaser/employer, dated 26 May 2018, to pay Rupees three crores to the claimant as full and final settlement of the account. The relevant observations in that regard are found in paragraph 16.03 (d) of the award, which is extracted below:

> "16.03 (d) Based on the arguments of the Parties' respective Counsel and with reference to the case law and statutes cited during the oral hearing in this arbitration, the Tribunal finds that as long as meaningful negotiations were ongoing between the parties the period of limitation of three years had not begun to run. Following the meeting held between the parties on 19th April 2018 the respondents made a written offer to settle the matter on 26th May 2018. Thus, the Tribunal finds that the period of limitation had not commenced until 26th May 2018 and consequently had not expired when the Request for Arbitration was received

> by the ICC Secretariat on 2nd May 2019. Accordingly, the Tribunal finds that items A, D, E and F claiming payment of money are not time barred."

16. Regarding the counterclaim for cost of repair/ replacement of gearboxes and fan modules as barred by limitation, the Tribunal reasoned thus:

> "16.04 Time Bar in relation to the Respondents' counterclaims for the cost of repair/replacement of gearboxes and fan modules.
>
> There is no evidence that these counterclaims were included in the ongoing negotiations. The Tribunal has found that the Taking Over Certificate is deemed to have been issued on 21st September 2015. (See Section 13.13 above). On that date the Claimant is deemed to have completed its obligations and thus, that is the latest date from which the limitation period of three years must run. The Claimant's liabilities are barred by limitation on or earlier than 21st September 2018. The Counterclaim was delivered on 15th July 2019 and is, thus, barred by limitation……."

CHALLENGE TO THE AWARD U/S 34 OF THE 1996 ACT

17. Two applications, namely, O.P. Nos. 533 and 562 of 2020, were filed by OPG (the appellant in the leading Civil Appeal) and Gita Power (appellant in the connected appeal and R-2 in the leading appeal) respectively, under Section 34 of the 1996 Act, for setting aside the award dated 13 July 2020.

Grounds of Challenge

18. OPG and Gita Power laid challenge to the arbitral award, *inter alia*, on the following grounds:

    (i) Enexio's (R-1's) claim was made beyond the period of limitation prescribed by Articles 14 and 18 of the Schedule to the 1963 Act. The arbitration clause was invoked on 2 May 2019, well beyond three years from the date (i.e., 31 March 2014) when the work ought to have been completed as per the contract. It was also beyond three years from the deemed date of completion (i.e., 21 September 2015).

(ii) Different yardstick was adopted in computing the limitation period of the claim than what was adopted for the counterclaim, which was not at all justified as both arose out of same contractual relationship.

(iii) One part of the minutes of meeting dated 19 April 2018 that supported the counterclaim was discarded, while the other part, which favored the claimant, was accepted. This is nothing but perverse.

(iv) The time for completion of the work under the contract was extended without any basis.

(v) Findings in the award are self-contradictory in as much as, if challenge to the debit note for damages on account of the delay was beyond limitation, there was no logic in denying adjustment of those damages against the unpaid dues payable to Enexio under the purchase orders.

(vi) Material evidence *qua* liability for customs duty was ignored.

SINGLE JUDGE'S ORDER U/S 34 OF THE 1996 ACT

19. The learned Single Judge in its judgment and order on the application, under Section 34 of the 1996 Act, charted the undisputed dates as follows:

Date	Events
31.03.2014	Said work ought to have been completed by Enexio.
24.08.2015	Debit note pertaining to liquidated damages was raised by Gita and OPG
21.09.2015	Deemed date of completion of said work
12.01.2016	Debit note regarding customs duty was raised by Gita and OPG
19.04.2018	Talks between adversaries namely Enexio on one side and Gita/OPG on the other side culminated in minutes of meeting (Ex.C.78)
26.05.2018	Gita/OPG offered to settle at Rs. 300 lacs as full and final settlement (Ex. C. 79)
22.08.2018	Gita/OPG sent communication enclosing cheque for Rs. 25 lakhs as part of Rs. 3 Crores in full quit (Ex. C. 80)
29.10.2018	Enexio returned Rs. 25 lakhs cheque (Ex. C. 82)

02.05.2019	Arbitral institution, namely, ICC request for arbitration (to be noted, both parties agreed that this is the date of commencement of arbitration within the meaning of section 21 of A and C Act)
15.07.2019	Gita/OPG made counter claim vide its pleadings before AT

20. After charting the relevant dates, and perusing the arbitral award, in paragraph 25 of the judgment, the learned Single Judge observed:

> "25. There is a clear dichotomy in impugned award regarding the legal drill of testing limitation. AT has taken 26.05.2018 as the reckoning date, that being the date on which written offer to settle the matter was made by Gita/ OPG vide Ex. C. 79, but for testing the counter claim of Gita/OPG, AT has taken 21.09.2015 as the reckoning date or starting point of limitation, that being the date of deemed completion of said work. This Court is constrained to observe that this dichotomy is akin to classical division between science and mysticism. Therefore, this Court unhesitatingly holds that this is patently illegal and an implausible view. To be noted, this dichotomy is not a mere erroneous application of law, and it needs no reappreciation of evidence. It is also an infract of section 18 of A and C Act which provides for equal treatment of parties. More importantly, the law of limitation being based on public policy, as already delineated supra, infract of the same would clearly vitiate the impugned award as one being in conflict with public policy of India."

21. The learned Single Judge thereafter proceeded to observe that the counterclaim and heads of claim were so intertwined with each other that a decision on one, with no decision on the other, would vitiate the entire award. Further, it was observed, if the arbitral tribunal had taken the date of joint meeting (i.e., 19 April 2018), and the follow up offer dated 26 May 2018, as the starting point of limitation for the claim, the same would be the starting point of limitation for the counterclaim as well. And if the starting point of limitation is taken as 21 September 2015 (i.e., the date of completion of the work), the claim, which was filed on 2 May 2019, was well beyond three years and as such barred by limitation. Thus, according to the learned Single

Judge there was inherent contradiction in the arbitral award which made it vulnerable to a challenge under Section 34 of the 1996 Act. Consequently, the learned Single Judge set aside the arbitral award.

22. Aggrieved by the judgment and order of the learned Single Judge, dated 23 December 2020, Enexio (R-1 herein) filed two appeals, namely, O.S.A. (CAD) Nos. 174 and 175 of 2021, before the Division Bench of the High Court, which came to be allowed by the impugned judgment.

IMPUGNED JUDGMENT

23. The Division Bench of the High Court, *inter alia*, took the view that the minutes of meeting dated 19 April 2018, read with e-mail dated 26 May 2018, amounted to an acknowledgment of the dues payable to Enexio, thereby satisfying the ingredients of Section 18 of the 1963 Act for a fresh period of limitation to run from that date. It observed that when the last part of the minutes' dated 19 April 2018 is read with subsequent communication dated 26 May 2018, it belies the stand of the counterclaimant that the counterclaims were admitted to the claimant. Thus, the Division Bench, *inter alia*, held that the view taken by the arbitral tribunal was a possible view and there was no patent illegality in the award meriting interference under Section 34 of the 1996 Act. Consequently, the order of the learned Single Judge was set aside, and the arbitral award was restored.

24. We have heard Mr. Abhimanyu Bhandari for the appellants; Mr. Gaurab Banerjee for the claimant-respondent and have perused the record.

SUBMISSIONS ON BEHALF OF APPELLANT(S)

25. The learned counsel for the appellants, *inter alia*, submitted:

(i) The Arbitral Tribunal, in paragraph 16.03(d) of the award *qua* claims (i), (iv), (v) and (vi) (corresponding claim numbers A, D, E and F) of the claimant-respondent, observed:

> "As long as meaningful negotiations were ongoing between the parties, the period of limitation of three years had not begun to run. Following the meeting held between the parties on 19th April, 2018 the respondents made a written offer to settle the matter on 26 May 2018. Thus, the Tribunal finds that the period of limitation had not commenced until 26

> May 2018 and consequently had not expired when the request for arbitration was received by the ICC Secretariat on 2 May 2019."

The afore-quoted observations are in teeth of decisions of this Court in (i) **Bharat Sanchar Nigam Limited v. Nortel Networks Pvt. Ltd.**[5] and (ii) **B & T AG v. Ministry of Defence**[6] where it has been held that mere negotiations will not postpone the cause of action for the purpose of limitation.

(ii) The period of limitation for the claim would have to be counted as three years from the date of completion i.e., 21 September 2015, which got over before 2 May 2019 i.e., the date when request was received for arbitration. Once the claim is barred by limitation, the award allowing the claim would be deemed to be violative of fundamental policy of Indian law and, therefore, vulnerable in the light of the law declared in (i) **Ssangyong Engg. & Construction Co. Ltd. v. NHAI**[7] and (ii) **Associate Builders v. Delhi Development Authority**.[8]

(iii) The Arbitral Tribunal applied different yardstick for computing limitation of the claim than what was adopted for the counterclaim. For example, the start point of limitation for the claim was taken as 26 May 2018 whereas for the counterclaim it was taken as 21 September 2015. This amounted to unequal treatment of the parties more so when claim as well as counterclaim arose from the same contractual relationship.

(iv) Once the declaratory relief *qua* Debit Notes dated 24 August 2015 (i.e. in respect of Rs. 3,30,00,000 towards liquidated damages for the delay in supply and erection under the purchase orders) and 12 January 2016 (i.e. in respect of Rs. 5,94,06,693/- towards Customs Duties) was held barred by limitation, the amount reflected in the Debit Notes ought to have been deemed payable by the claimant and that amount ought to have been adjusted against any amount payable to the claimant.

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5 [2021] 2 SCR 644 : (2021) 5 SCC 738, paragraphs 20 and 21

6 [2023] 7 SCR 599 : (2024) 5 SCC 358, paragraph 73

7 [2019] 7 SCR 522 : (2019) 15 SCC 131

8 [2014] 13 SCR 895 : (2015) 3 SCC 49

(v) The Division Bench erroneously relied on the minutes dated 19 April 2018 to apply Section 18 of the 1963 Act for extending the period of limitation of the claim when it was nobody's case that limitation stood extended thereby. Further, if the minutes dated 19 April 2018 were to be relied, it ought to have been relied in toto and not in part. That is, it should have been taken as an admission of liability of the claimant towards liquidated damages for the delay as well as customs duty.

(vi) In paragraph 13 of the impugned judgment, the Division Bench sought to appreciate the evidence i.e. the minutes of meeting dated 19 April 2018, which was beyond the scope of powers exercisable under Section 37 read with Section 34 of the 1996 Act. In this regard, reliance was placed on: (i) **UHL Power Company limited v. State of Himachal Pradesh;**[9] (ii) **Dyna Technologies Pvt. Ltd. v. Crompton Greaves Lt.;**[10] (iii) **Heidelbergh Cement India Ltd. v. The Indure Pvt. Ltd.;**[11] (iv) **MMTC Ltd. v. Vedanta Ltd.;**[12] (v) **Ssangyong Engg (supra); and** (vi) **Haryana Tourism Ltd. v. Kandhari Beverages Ltd.**[13]

(vii) The learned Single Judge justifiably set aside the award that was self-contradictory and perverse.

(viii) Counterclaims for cost of repair/ replacement of gear boxes, which were defective, ought to have been adjudicated. In absence thereof, the arbitral award is rendered bad in law.

(ix) The Division Bench of the High Court misconstrued the ratio of the decision of this Court in **Geo Miller & Co. (P) Ltd. v. Rajasthan Vidyut Utpadan Nigam Ltd**[14] for treating the claim within, and the counterclaim beyond, the period of limitation.

(x) The subsequent purchase orders issued by OPG replaced the earlier purchase orders issued by Gita Power, and the supply/

9 [2022] 1 SCR 1 : (2022) 4 SCC 116, paragraphs 16 to 21

10 [2019] 15 SCR 295 : (2019) 20 SCC 1, paragraphs 27-43

11 2022/DHC/003952

12 [2019] 3 SCR 1023 : (2019) 4 SCC 163, paragraphs 11 to 13

13 [2022] 2 SCR 316 : (2022) 3 SCC 237, paragraphs 7 & 8

14 [2019] 11 SCR 1108 : (2020) 14 SCC 643 (para 28)

work was in respect of an OPG project, therefore Gita Power could not have been dragged into arbitration and made jointly and severally liable with OPG.

SUBMISSIONS ON BEHALF OF FIRST RESPONDENT/ENEXIO

26. The learned counsel for the first respondent, *inter alia,* submitted:

(i) The findings in the award are factually correct. There is no patent illegality, as alleged, or otherwise, which may warrant interference under Section 34 of the 1996 Act. Therefore, the Division Bench of the High Court was justified in setting aside the order of the Single Judge and restoring the award.

(ii) The appellant's case that all counterclaims were treated as barred by limitation and, therefore, not considered on merits, is factually incorrect. In all five counterclaims were there. Out of those five, counterclaims towards: (i) liquidated damages for the delay in supply and erection; (ii) customs duty; and (iii) cost of erection of horizontal and vertical exhaust duct through an external agency, were considered and decided on merits. The counterclaims for liquidated damages and customs duty were rejected whereas counterclaim for cost of erection of vertical duct was allowed. Only two counterclaims towards (i) cost of repair/ replacement of Gear Boxes, due to alleged defective supply, amounting to Rs.9,76,000, and (ii) cost of repair/ replacement of Fan Modules, due to alleged defective supply, amounting to Rs.14,80,802, were dismissed as barred by limitation. The finding that these two counterclaims were barred by limitation is premised on there being no material to indicate that they were included in the ongoing negotiation.

(iii) The arbitral tribunal considered the three counterclaims on merit by adopting the same yardstick *qua* limitation as applied to the claims. These three counterclaims were not treated as barred by limitation as they were cited in the minutes of the meeting dated 19 April 2018 wherein the principal amount due to OPG was also acknowledged. It is thus incorrect to state that the arbitral tribunal adopted different yardstick on the point of limitation while deciding counterclaims than what was adopted to decide the claims.

(iv) Enexio's claim of the balance amount was not barred by limitation even if the limitation period is counted from the date of completion of the project i.e., 21 September 2015, because before expiry of the period of limitation of three years, that is before 20 September 2018, *vide* minutes of the meeting dated 19 April 2018, OPG had acknowledged in writing its liability towards the balance of the principal amount (i.e., Rs. 6,75,15,631) albeit subject to deductions. Thus, by virtue of Section 18 of the 1963 Act, from the date of written acknowledgment, which was followed by written communication dated 26 May 2018, fresh period of limitation of three years began to run.

(v) Inference drawn from the minutes of the meeting as well as subsequent conduct of the parties to conclude lack of consent on Enexio's part for deductions in the outstanding amount, is a decision within the remit of the arbitral tribunal. Therefore, any error, if at all, would be an error within its jurisdiction, which is not amenable to interference under Section 34 of the 1996 Act. Because, while examining the validity of an award under Section 34, the Court exercises supervisory and not appellate jurisdiction **(*vide:* (i) Steel Authority of India Ltd. versus Gupta Brothers Steel Tubes Ltd.;[15] (ii) Associated Builders (supra); (iii) Ssangyong Engg (supra); and (iv) Delhi Airport Metro Express Pvt. Ltd. v. DMRC Ltd.[16])**.

(vi) The learned Single Judge had erred in observing:

(a) *That any infract qua limitation would violate public policy and attract Section 34 (2) (b) (ii) read with Explanation 1 of the 1996 Act.*' Because limitation is a mixed question of fact and law and if its determination depends on interpretation / appreciation of evidence / materials on record, any error, *ipso facto,* would not render the award amenable to interference as is clear from the Proviso to sub-section (2-A) of Section 34 of the 1996 Act.

(b) *'That different dates could not have been taken for determining limitation of the claim and the counterclaim,*

15 [2009] 14 SCR 253 : (2009) 10 SCC 63

16 [2022] 3 SCR 716 : (2022) 1 SCC 131

when both were intertwined and had arisen from a common supply/works contract.' Because three out of five counterclaims were decided on merits and not on limitation. The remaining two were rejected on limitation as they were not reflected in the minutes of meeting dated 19 April 2018. Therefore, benefit of Section 18 of the 1963 Act was not available *qua* those counterclaims. Moreover, there cannot be a general rule that limitation for claims and counterclaims must have a common run because counterclaim is a separate action which must stand on its own legs, as has been held by this Court in **Oil and Natural Gas Corporation Ltd. v. Afcons Gunanusa JV**.[17]

(vii) The counterclaim for the cost of repair/ replacement of gearboxes and fan modules was rightly rejected by the arbitral tribunal as barred by limitation as regarding it there was no recital in the minutes of meeting dated 19 April 2018. Moreover, it was not intertwined with the claim for the balance amount as the cause of action for the two were different. One arose from supply and erection, and the other arose subsequently, post commissioning/ completion of the project, on account of alleged defect in the material supplied.

(viii) Gita Power being the holding company of OPG and having actively participated in the formation of the contract as also in issuance of purchase orders for the supply/ works, which carried the arbitration clause, was bound by the arbitration agreement and also liable jointly and severally along with OPG for the dues.

ISSUES

27. Upon consideration of the rival submissions, the **core issue** which falls for our determination is:

> "Whether the arbitral award is in conflict with the public policy of India, or/ and is vitiated by patent illegality appearing on the face of the award?"

28. The answer to the above issue would depend, *inter alia*, on our determination of the following **sub-issues**:

17 [2022] 10 SCR 660 : (2024) 4 SCC 481

(a) Whether Gita Power (R-2) could have been subjected to arbitration and made jointly and severally liable along with OPG for the award, when the project beneficiary was OPG?

(b) Whether Enexio's claim for the outstanding principal amount barred by limitation?

(c) Whether the counter claim, in respect of cost of repair / replacement of gear boxes and fan modules, could be treated as barred by time when the other side's claim, arising out of same contractual relationship, was found within limitation?

(d) Whether arbitral award for payment of the outstanding principal amount with interest is perverse because it makes no adjustment for debit note(s) entries even though the prayer to declare them as invalid was rejected as barred by time?

(e) Whether the reasoning of the arbitral tribunal is flawed and vitiated by adopting different yardstick for adjudging the counterclaim than what was adopted for adjudging the claim? If so, whether it vitiated the award and rendered it vulnerable to a challenge under Section 34 of the 1996 Act?

RELEVANT LEGAL PRINCIPLES GOVERNING A CHALLENGE TO AN ARBITRAL AWARD

29. Before we delve into the issue/ sub-issues culled out above, it would be useful to have a look at the relevant legal principles governing a challenge to an arbitral award. Recourse to a Court against an arbitral award may be made through an application for setting aside such award in accordance with sub-sections (2), (2-A) and (3) of Section 34 of the 1996 Act.[18] Sub-section (2) of Section 34 has

18 **Section 34. Application for setting aside arbitral award. ---** (1) …….
(2) An arbitral award may be set aside by the Court only if---
(a) the party making the application establishes on the basis of the record of the arbitral tribunal that---
(i) a party was under some incapacity; or
(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or
(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
(iv) the arbitral award deals with the dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:
Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on

two clauses, (a) and (b). Clause (a) has five sub-clauses which are not relevant to the issues raised before us. Insofar as clause (b) is concerned, it has two sub-clauses, namely, (i) and (ii). Sub-clause (i) of clause (b) is not relevant to the controversy in hand. Sub-clause (ii) of clause (b) provides that if the Court finds that the arbitral award is in conflict with the public policy of India, it may set aside the award.

Public Policy

30. "Public policy" is a concept not statutorily defined, though it has been used in statutes, rules, notification etc. since long, and is also a part of common law. Section 23[19] of the Contract Act, 1872 uses the expression by stating that the consideration or object of an

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matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with the provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that –

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation 1. — For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if, –

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2-- For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law, shall not entail a review on the merits of the dispute.

(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:
Provided that an award shall not be set aside, merely on the ground of an erroneous application of the law or by reappreciation of evidence.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:
Provided that if the court is satisfied that the applicant was prevented by sufficient cause from making the application within the set period of three months it may entertain the application within a period of 30 days, but not thereafter.

19 **Section 23.-- What consideration and objects are lawful, and what not. --** The consideration or object of an agreement is lawful, unless –
it is forbidden by law; or
is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or
involves or implies, injury to the person or property of another; or
the court regards it as immoral, or opposed to public policy.
In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is wide.

agreement is lawful, unless, *inter alia*, opposed to public policy. That is, a contract which is opposed to public policy is void.

31. In **Chitty on Contracts,**[20] scope of public policy, largely accepted across jurisdictions for invalidation of contracts, has been summarized in the following terms:

> "Objects which on grounds of public policy invalidate contracts may, for convenience, be generally classified into five groups: first, objects which are illegal by common law or by legislation; secondly, objects injurious to good government either in the field of domestic or foreign affairs; thirdly, objects which interfere with the proper working of the machinery of justice; fourthly, objects injurious to marriage and morality; and, fifthly, objects economically against the public interest, viz contracts in restraint of trade….."

32. In **Gherulal Parakh v. Mahadeodas Maiya and others**,[21] a three-Judge Bench of this Court, in the context of Section 23 of the Contract Act, summarized the doctrine of public policy as follows:

> "Public policy or the policy of the law is an elusive concept; it has been described as untrustworthy guide, variable quality, uncertain one, unruly horse, etc; the primary duty of a court of law is to enforce a promise which the parties have made and to uphold the sanctity of contracts which formed the basis of society, but in certain cases, the court may relieve them of their duty on a rule founded on what is called the public policy; for want of better words Lord Atkin describes that something done contrary to public policy is a harmful thing, but the doctrine is extended not only to harmful cases but also to harmful tendencies; this doctrine of public policy is only a branch of common law, and, just like any other branch of common law, it is governed by precedents; the principles have been crystallized under different heads and though it is permissible for courts to expound and apply them to different situations, it should only be invoked in clear and incontestable cases of harm

20 Volume 1, 35th Edition, paragraph 19-112

21 [1959] Supp. 2 SCR 406 : AIR 1959 SC 781

> to the public; Though the heads are not closed and though theoretically it may be permissible to evolve a new head under exceptional circumstances of a changing world, it is advisable in the interest of stability of society not to make any attempt to discover new heads in these days.
>
> (Emphasis supplied)

33. In **Central Inland Water Transport Corporation v. Brojo Nath Ganguly**,[22] this Court observed that the expressions 'public policy', 'opposed to public policy', or 'contrary to public policy' are incapable of precise definition. It was observed that public policy is not the policy of a particular government. Rather it connotes some matter which concerns the public good and the public interest. It was observed:

> "92.……what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time. As new concepts take the place of old, transactions which were once considered against public policy are now being upheld by the courts and, similarly, where there has been a well- recognized head of public policy, the courts have not shirked from extending it to new transactions and changed circumstances and have at times not even flinched from inventing a new head of public policy."
>
> (Emphasis supplied)

34. In **Renusagar Power Co. Ltd. v. General Electric Co.,**[23] a three-Judge Bench of this Court observed that the doctrine of public policy is somewhat open- textured and flexible. By citing earlier decisions, it was observed that there are two conflicting positions which are referred to as the "narrow view" and the "broad view". According to the narrow view, courts cannot create new heads of public policy whereas the broad view countenances judicial law making in these areas. In the field of private international law, it was pointed out, courts refuse to apply a rule of foreign law or recognize a foreign judgment or a foreign arbitral award if it is found that the same is contrary to the public policy of the country in which it is sought to be invoked

22 [1986] 2 SCR 278 : (1986) 3 SCC 156, paragraph 92

23 [1993] Supp. 3 SCR 22 : 1994 Supp (1) SCC 644

or enforced. However, it was clarified, a distinction is to be drawn while applying the rule of public policy between a matter governed by domestic law and a matter involving conflict of laws. It was observed that the application of the doctrine of public policy in the field of conflict of laws is more limited than that in the domestic law and the courts are slower to invoke public policy in cases involving a foreign element than when a purely municipal legal issue is involved. It was held that contravention of law alone will not attract the bar of public policy, and something more than contravention of law is required.

35. In fact, in **Renusagar (supra),** this Court was dealing with the enforceability of a foreign award. For that end, it had to interpret the expression "contrary to public policy" in the context of Section 7(1)(b)(ii) of Foreign Awards (Recognition and Enforcement) Act, 1961.[24] While doing so, this Court held that -- (a) contravention of law alone will not attract the bar of public policy, and something more than contravention of law is required;[25]and (b) the expression 'public policy' must be construed in the sense the doctrine of public policy is applied in the field of private international law. Applying the said criteria, it was held that enforcement of a foreign award could be refused on the ground of being contrary to public policy if such enforcement would be contrary to (a) fundamental policy of Indian law or (b) the interests of India or (c) justice or morality.[26] The Court thereafter proceeded to hold that a contravention of the provisions of the Foreign Exchange Regulation Act would be contrary to the public policy of India as that statute is enacted for the national economic interest to ensure that the nation does not lose foreign exchange which is essential for the economic survival of the nation.[27]

36. What is clear from above is that for an award to be against public policy of India a mere infraction of the municipal laws of India is not enough. There must be, *inter alia*, infraction of fundamental policy of Indian law including a law meant to serve public interest or public good.

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24 **Section 7. Conditions for enforcement of foreign awards**. – (1) A foreign award may be enforced under this Act—

****

(b) if the court dealing with the case is satisfied that –

****

(ii) the enforcement of the award will be contrary to the public policy.

25 paragraph 65 of Renusagar (supra)

26 paragraph 66 of Renusagar (supra)

27 paragraph 75 of Renusagar (supra)

37. In **Oil and Natural Gas Corporation (ONGC) v. Saw Pipes Ltd.**[28] a two-Judge Bench of this Court, in the context of a challenge to a domestic arbitral award under Section 34(2)(b)(ii) of the 1996 Act as it stood prior to 2015 amendment, ascribed wider meaning to the expression 'public policy of India' in the following terms:

> "31. ……. the phrase public policy of India used in section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/ judgment/ decision is likely to adversely affect the administration of justice. Hence, in our view, in addition to narrower meaning given to the term "public policy" in *Renusagar* case, it is required to be held that the award could be set aside if it is patently illegal. The result would be – award could be set aside if it is contrary to:
>
> (a) fundamental policy of Indian law; or
>
> (b) the interest of India; or
>
> (c) justice or morality, or
>
> (d) in addition, if it is patently illegal.
>
> Illegality must go to the root of the matter and if the illegality is of trivial nature, it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void.
>
> (Emphasis supplied)

38. Following the expansive view of the concept "contrary to public policy", in **D.D.A v. M/s. R.S. Sharma & Co.,**[29] which related to a

28 [2003] 3 SCR 691 : (2003) 5 SCC 705

29 [2008] 12 SCR 785 : (2008) 13 SCC 80

matter arising from a proceeding under Section 34, as it stood prior to 2015 amendment, a two-Judge Bench of this Court, on the scope of the power to set aside an arbitral award, summarized the general principles as follows:

> "21. …
>
> (a) An award, which is
>
> (i) contrary to substantive provisions of law; or
>
> (ii) the provisions of the arbitration and Conciliation Act, 1996; or
>
> (iii) against the terms of the respective contract; or
>
> (iv) patently illegal; or
>
> (v) prejudicial to the rights of the parties;
>
> Is open to interference by the court under Section 34(2) of the Act.
>
> (b) The award could be set aside if it is contrary to:
>
> (a) fundamental policy of Indian law; or
>
> (b) the interest of India; or
>
> (c) justice or morality.
>
> (c) The award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.
>
> (d) It is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to public policy of India."

39. In **Oil and Natural Gas Corporation Limited v. Western Geco International Limited**,[30] which also related to the period prior to 2015 amendment of Section 34 (2)(b)(ii),[31] a three-Judge Bench of this Court, after considering the decision in **Saw Pipes (supra),**

30 [2014] 12 SCR 1 : (2014) 9 SCC 263 paragraphs 35, 38 and 39

31 See Footnote 18

without exhaustively enumerating the purport of the expression 'fundamental policy of Indian law', observed that it would include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. The Court thereafter illustratively referred to three fundamental juristic principles, namely, (a) that in every determination that affects the rights of a citizen or leads to any civil consequences, the court or authority or quasi-judicial body must adopt a judicial approach, that is, it must act bona fide and deal with the subject in a fair, reasonable and objective manner and not actuated by any extraneous consideration; (b) that while determining the rights and obligations of parties the court or tribunal or authority must act in accordance with the principles of natural justice and must apply its mind to the attendant facts and circumstances while taking a view one way or the other; and (c) that its decision must not be perverse or so irrational that no reasonable person would have arrived at the same.

40. In **Associate Builders (supra)**, a two-Judge Bench of this Court, held[32] that *audi alteram partem* principle is undoubtedly a fundamental juristic principle in Indian law and is enshrined in Sections 18[33] nand 34 (2)(a)(iii)[34] of the 1996 Act. In addition to the earlier recognized principles forming fundamental policy of Indian law, it was held that disregarding: (a) orders of superior courts in India; and (b) the binding effect of the judgment of a superior court would also be regarded as being contrary to the fundamental policy of Indian law.[35] Further, elaborating upon the third juristic principle (i.e., *qua* perversity), as laid down in **Western Geco (supra),** it was observed that where: (i) a finding is based on no evidence; or (ii) an arbitral tribunal takes into account something irrelevant to the decision which it arrives at; or (iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.[36] To this a caveat was added by observing that when a court applies the 'public policy test' to an arbitration award, it does not act as a court of appeal and,

32 See paragraph 30 of the judgment in Associate Builders (supra)

33 **Section 18. Equal treatment of parties.** -- The parties shall be treated with equality and each party shall be given a full opportunity to present his case.

34 See Footnote 18

35 See paragraph 27 of the judgment in Associate Builders (supra)

36 Paragraph 31 of the judgment in Associate Builders (supra)

consequently, errors of fact cannot be corrected; and a possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. It was also observed that an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on that score. Thus, once it is found that the arbitrator's approach is not arbitrary or capricious, it is to be taken as the last word on facts.[37]

2015 Amendment in Sections 34 and 48

41. The afore-mentioned judicial pronouncements were all prior to 2015 Amendment. Notably, prior to the Amendment, 2015 the expression "in contravention with the fundamental policy of Indian law" was not used by the legislature in either Section 34(2)(b)(ii) or Section 48(2)(b). The pre-amended Section 34(2)(b)(ii) and its Explanation read:

> "**S.34. Application for setting aside arbitral award—**
>
> (1) *******
>
> (2) An arbitral award may be set aside by the court only if—
>
> ******
>
> (b) the court finds that –
>
> ******
>
> (ii) the arbitral award is in conflict with the public policy of India.
>
> Explanation.-- Without prejudice to the generality of sub-clause (ii) it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81.
>
> Whereas pre-amended Section 48(2)(b) and its Explanation read:

37 Paragraph 33 of the judgment in Associate Builders (supra)

> **S. 48. Conditions for enforcement of foreign awards. –**
>
> (1) ********
>
> (2) Enforcement of an arbitral award may also be refused if the court finds that—
>
> (a). ******
>
> (b) the enforcement of the award would be contrary to the public policy of India.
>
> Explanation. – Without prejudice to the generality of sub-clause (b) of this section, it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption.

42. By the Amendment, 2015, in place of the old Explanation to Section 34(2)(b)(ii), *Explanations 1 and 2* were added to remove any doubt as to when an arbitral award is in conflict with the public policy of India.

43. At this stage, it would be pertinent to note that we are dealing with a case where the application under Section 34 of the 1996 Act was filed after the Amendment, 2015, therefore the newly substituted/ added *Explanations* would apply.[38]

44. The Amendment, 2015 adds two explanations to each of the two sections, namely, Section 34(2)(b)(ii)[39] and Section 48(2)(b),[40] in place of the earlier Explanation. The significance of the newly inserted *Explanation 1* in both the sections is two-fold. First, it does away with the use of words: (a) *"without prejudice to the generality of sub-clause (ii)"* in the opening part of the pre-amended Explanation to Section 34(2)(b)(ii); and (b) "*without prejudice to the generality of clause (b) of this section*" in the opening part of the pre-amended Explanation

38 Ssangyong Engineering & Construction Co. Ltd (supra)

39 See footnote 18

40 Section 48(2)(b).--
Explanation 1. — For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if ,--
the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or
it is in contravention with the fundamental policy of Indian law; or
it is in conflict with the most basic notions of morality or justice.
Explanation 2.-- For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

to Section 48(2)(b); secondly, it limits the expanse of public policy of India to the three specified categories by using the words *"only if".* Whereas, *Explanation 2* lays down the standard for adjudging whether there is a contravention with the fundamental policy of Indian law by providing that a review on merits of the dispute shall not be done. This limits the scope of the enquiry on an application under either Section 34(2)(b)(ii) or Section 48(2)(b) of the 1996 Act.

45. The Amendment, 2015 by inserting sub-section (2-A)[41] in Section 34, carves out an additional ground for annulment of an arbitral award arising out of arbitrations other than international commercial arbitrations. Sub-section (2-A) provides that the Court may also set aside an award if that is vitiated by patent illegality appearing on the face of the award. This power of the Court is, however, circumscribed by the Proviso, which states that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence.

46. *Explanation 1* to Section 34(2)(b)(ii), specifies that an arbitral award is in conflict with the public policy of India, *only if*,- (i) the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81; or (ii) it is in contravention with the fundamental policy of Indian law; or (iii) it is in conflict with the most basic notions of morality or justice.

47. In the instant case, there is no allegation that the making of the award was induced or affected by fraud or corruption, or was in violation of Section 75 or Section 81. Therefore, we shall confine our exercise in assessing as to whether the arbitral award is in contravention with the fundamental policy of Indian law, and/ or whether it conflicts with the most basic notions of morality or justice. Additionally, in the light of the provisions of sub-section (2-A) of Section 34, we shall examine whether there is any patent illegality on the face of the award.

48. Before undertaking the aforesaid exercise, it would be apposite to consider as to how the expressions (a) "in contravention with the fundamental policy of Indian law"; (b) "in conflict with the most basic notions of morality or justice"; and (c) "patent illegality" have been construed.

41 See Footnote 18

In contravention with the fundamental policy of Indian law

49. As discussed above, till the Amendment, 2015 the expression "in contravention with the fundamental policy of Indian law" was not found in the 1996 Act. Yet, in **Renusagar (supra)**, in the context of enforcement of a foreign award, while construing the phrase "contrary to the public policy", this Court held that for a foreign award to be contrary to public policy mere contravention of law would not be enough rather it should be contrary to: (a) the fundamental policy of Indian law; and /or (b) the interest of India; and/ or (c) justice or morality.

50. In the judicial pronouncements that followed **Renusagar (supra),** already discussed above, the domain of what could be considered contrary to the 'public policy of India'/ 'fundamental policy of Indian law' expanded, resulting in much greater interference with arbitral awards than what the lawmakers intended. This led to the Amendment, 2015 in the 1996 Act.

51. In **Ssangyong Engineering (supra)**, this Court dealt with the effect of the Amendment, 2015. While doing so, it took note of a supplementary report of February 2015 of the Law Commission of India made in the context of the proposed 2015 amendments. The said supplementary report has been extracted in paragraph 30 of that judgment. The key features of it are summarized below:

    (a) Mere violation of law of India would not be a violation of public policy in cases of international commercial arbitrations held in India.

    (b) The proposed 2015 amendments in 1996 Act (i.e., in Sections 34(2)(b)(ii) and 48(2)(b) including insertion of sub-section (2-A) in Section 34) were on the assumption that the terms, such as, "fundamental policy of Indian law" or conflict with "most basic notions of morality or justice" would not be widely construed.

    (c) The power to review an award on merits is contrary to the object of the Act and international practice.

    (d) The judgment in ***Western Geco (supra)*** would expand the court's power, contrary to international practice. Hence, a clarification needs to be incorporated to ensure that the term 'fundamental policy of Indian law' is narrowly construed. The

applicability of *Wednesbury* principles to public policy will open the floodgates. Hence, Explanation 2 to Section 34(2)(b)(ii) has been proposed.

After taking note of the supplementary report, the statement of objects and reasons of the Amendment Act, 2015, and the amended provisions of Sections 28, 34 and 48, this Court held:

> "34. What is clear, therefore, is that the expression public policy of India, whether contained in section 34 or in section 48, would now mean the fundamental policy of Indian law as explained in paras 18 and 27 of *Associate Builders* i.e. the fundamental policy of Indian law would be relegated to *Renusagar's* understanding of this expression. This would necessarily mean that *Western Geco* expansion has been done away with. In short, *Western Geco*, as explained in Paras 28 and 29 of *Associate Builders*, would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach the court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, in so far as principles of natural justice are concerned, as contained in sections 18 and 34(2)(a) (iii) of the 1996 Act, these continue to be the grounds of challenge of an award, as is contained in para 30 of *Associate Builders*.
>
> 35.*****
>
> 36******
>
> 37. In so far as domestic awards made in India are concerned, an additional ground is now available under sub-section (2-A), added by the Amendment Act, 2015 to section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter, but which does not amount to mere erroneous application of the law. In short, what is not subsumed within the fundamental policy of Indian law, namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the back door when it comes to setting aside an award on the ground of patent illegality.

38. Secondly, it is also made clear that reappreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.

39. To elucidate, para 42.1 of *Associate Builders*, namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Para 42.2 of *Associate Builders*, however, would remain, for if an arbitrator gives no reasons for an award and contravenes section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.

40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in *Associate Builders*, namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with the matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34 (2-A).

41. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of *Associate Builders*, while no longer being a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterized as perverse.

********* ******* *******

> 69. We therefore hold, following the aforesaid authorities, that in the guise of misinterpretation of the contract, and consequent errors of jurisdiction, it is not possible to state that the arbitral award would be beyond the scope of submission to arbitration if otherwise the aforesaid misinterpretation [which would include going beyond the terms of the contract], could be said to have been fairly comprehended as disputes within the arbitration agreement or which were referred to the decision of the arbitrators as understood by the authorities above. If an arbitrator is alleged to have wandered outside the contract and dealt with matters not allotted to him, this would be a jurisdictional error which could be corrected on the ground of patent illegality, which, as we have seen, would not apply to international commercial arbitrations that are decided under Part II of the 1996 Act. To bring in by the back door grounds relatable to Section 28 (3) of the 1996 Act to be matters beyond the scope of submission to arbitration under section 34(2)(a)(iv) would not be permissible as this ground must be construed narrowly and so construed, must refer only to matters which are beyond the arbitration agreement or beyond the reference to the arbitral tribunal."

52. The legal position which emerges from the aforesaid discussion is that after the '2015 amendments' in Section 34 (2)(b)(ii) and Section 48(2)(b) of the 1996 Act, the phrase "in conflict with the public policy of India" must be accorded a restricted meaning in terms of *Explanation 1*. The expression "in contravention with the fundamental policy of Indian law" by use of the word 'fundamental' before the phrase 'policy of Indian law' makes the expression narrower in its application than the phrase "in contravention with the policy of Indian law", which means mere contravention of law is not enough to make an award vulnerable. To bring the contravention within the fold of fundamental policy of Indian law, the award must contravene all or any of such fundamental principles that provide a basis for administration of justice and enforcement of law in this country. Without intending to exhaustively enumerate instances of such contravention, by way of illustration, it could be said that (a)

violation of the principles of natural justice; (b) disregarding orders of superior courts in India or the binding effect of the judgment of a superior court; and (c) violating law of India linked to public good or public interest, are considered contravention of the fundamental policy of Indian law. However, while assessing whether there has been a contravention of the fundamental policy of Indian law, the extent of judicial scrutiny must not exceed the limit as set out in *Explanation 2* to Section 34(2)(b)(ii).

Most basic notions of morality and justice

53. In **Renusagar (supra)** this Court held that an arbitral award is in conflict with the public policy of India if it is, *inter alia*, contrary to "justice and morality". Explanation 1, inserted by 2015 Amendment, makes it clear that an award is in conflict with the public policy of India, *inter alia*, if it conflicts with the 'most basic notions of morality or justice'.

Justice

54. Justice is the virtue by which the society/ court / tribunal gives a man his due, opposed to injury or wrong. Justice is an act of rendering what is right and equitable towards one who has suffered a wrong. Therefore, while tempering justice with mercy, the court must be very conscious, that it has to do justice in exact conformity with some obligatory law, for the reason that human actions are found to be just or unjust on the basis of whether the same are in conformity with, or in opposition to, the law.[42] Therefore, in 'judicial sense', justice is nothing more nor less than exact conformity to some obligatory law; and all human actions are either just or unjust as they are in conformity with, or in opposition to, the law.[43]

55. But, importantly, the term 'legal justice' is not used in *Explanation 1*, therefore simple conformity or non-conformity with the law is not the test to determine whether an award is in conflict with the public policy of India in terms of *Explanation 1*. The test is that it must conflict with the most basic notions of justice. For lack of any objective criteria, it is difficult to enumerate the 'most basic notions

42 Union of India v. Ajeet Singh, (2013) 4 SCC 186, paragraph 26.

43 P. Ramanatha Aiyar's Advanced Law Lexicon, 6th Edition, Volume III, page 2621.

of justice'. More so, justice to one may be injustice to another. This difficulty has been acknowledged by many renowned jurists, as is reflected in the observations of this Court in **Delhi Administration v. Gurdip Singh Uban**,[44] extracted below:

> "23. The words 'justice' and 'injustice', in our view, are sometimes loosely used and have different meanings to different persons particularly to those arrayed on opposite sides. *One man's justice is another's injustice* [Raplph Waldo Emerson: Essays (1803-82), First Series, 1841, "Circles]. Justice Cardozo said: "The web is entangled and obscure, shot through with a multitude of shades and colors, the skeins irregular and broken. Many hues that seem to be simple, are found, when analyzed, to be a complex and uncertain blend. *Justice* itself, which we are wont to appeal to what as a test as well as an ideal, *may mean different things to different minds* and at different times. Attempts to objectify its standards or even to describe them have never wholly succeeded (*Selected Writings of Cardozo*, pp 223-224, Falcon Publications, 1947)."

56. In **Associate Builders (supra)**, while this Court was dealing with the concept "public policy of India", in the context of a Section 34 challenge prior to 2015 amendment, it was held that an award can be said to be against justice only when it shocks the conscience of the court.[45] The Court illustrated by stating that where an arbitral award, without recording reasons, awards an amount much more than what the claim is restricted to, it would certainly shock the conscience of the court and render the award vulnerable and liable to be set aside on the ground that it is contrary to justice.

57. In **Ssyangyong (supra)**, which dealt with post 2015 amendment scenario, it was observed that an argument to set aside an award on the ground of being in conflict with 'most basic notions of justice', can be raised only in very exceptional circumstances, that is, when the conscience of the court is shocked by infraction of some fundamental principle of justice. Notably, in that case the majority award created a new contract for the parties by applying a unilateral circular, and

44 [1999] Supp. 1 SCR 650 : (2000) 7 SCC 296

45 See paragraph 36 of the judgment in Associate Builders (supra)

by substituting a workable formula under the agreement by another, *dehors* the agreement. This, in the view of the Court, breached the fundamental principles of justice, namely, that a unilateral addition or alteration of a contract can never be foisted upon an unwilling party, nor can a party to the agreement be liable to perform a bargain not entered with the other party.[46] However, a note of caution was expressed in the judgment by observing that this ground is available only in very exceptional circumstances and under no circumstance can any court interfere with an arbitral award on the ground that justice has not been done in the opinion of the court because that would be an entry into the merits of the dispute.

58. In the light of the discussion above, in our view, when we talk about justice being done, it is about rendering, in accord with law, what is right and equitable to one who has suffered a wrong. Justice is the virtue by which the society/ court / tribunal gives a man his due, opposed to injury or wrong. Dispensation of justice in its quality may vary, dependent on person who dispenses it. A trained judicial mind may dispense justice in a manner different from what a person of ordinary prudence would do. This is so, because a trained judicial mind is likely to figure out even minor infractions of law/ norms which may escape the attention of a person with ordinary prudence. Therefore, the placement of words "most basic notions" before "of justice" in *Explanation 1* has its significance. Notably, at the time when the 2015 Amendment was brought, the existing law with regard to grounds for setting aside an arbitral award, as interpreted by this Court, was that an arbitral award would be in conflict with public policy of India, if it is contrary to: (a) the fundamental policy of Indian law; (b) the interest of India; (c) justice or morality; and /or is (d) patently illegal. As we have already noticed, the object of inserting *Explanations 1 and 2* in place of earlier explanation to Section 34(2)(b)(ii) was to limit the scope of interference with an arbitral award, therefore the amendment consciously qualified the term 'justice' with 'most basic notions' of it. In such circumstances, giving a broad dimension to this category[47] would be deviating from the legislative intent. In our view, therefore, considering that the concept of justice is open- textured, and notions of justice could evolve with changing needs of the society, it would

46 See paragraph 76 of the judgment in Ssyanyong (supra)

47 in conflict with most basic notions of morality or justice

not be prudent to cull out "the most basic notions of justice". Suffice it to observe, they[48] ought to be such elementary principles of justice that their violation could be figured out by a prudent member of the public who may, or may not, be judicially trained, which means, that their violation would shock the conscience of a legally trained mind. In other words, this ground would be available to set aside an arbitral award, if the award conflicts with such elementary/ fundamental principles of justice that it shocks the conscience of the Court.

Morality

59. The other ground is of morality. On the question of morality, in **Associate Builders (supra),** this Court, after referring to the provisions of Section 23 of the Contract Act, 1872; earlier decision of this Court in *Gherulal (supra);* and *Indian Contract Act* by Pollock and Mulla, held that judicial precedents have confined morality to sexual morality. And if 'morality' were to go beyond sexual morality, it would cover such agreements as are not illegal but would not be enforced given the prevailing mores of the day. The court also clarified that interference on this ground would be only if something shocks the court's conscience.[49]

Patent Illegality

60. Sub-section (2-A) of Section 34 of the 1996 Act, which was inserted by 2015 Amendment, provides that an arbitral award not arising out of international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is visited by patent illegality appearing on the face of the award. The proviso to sub-section (2-A) states that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence. In **Saw Pipes (supra),** while dealing with the phrase 'public policy of India' as used in Section 34, this court took the view that the concept of public policy connotes some matter which concerns public good and public interest. If the award, on the face of it, patently violates statutory provisions, it cannot be said to be in public interest. Thus, an award could also be set aside if it is patently illegal. It was, however, clarified that illegality must go to the root of

48 most basic notions of justice

49 See paragraph 39 of Associate Builders (supra)

the matter and if the illegality is of trivial nature, it cannot be held that award is against public policy.

61. In **Associate Builders (supra)**, this Court held that an award would be patently illegal, if it is contrary to:

(a) substantive provisions of law of India;

(b) provisions of the 1996 Act; and

(c) terms of the contract.[50]

The Court clarified that if an award is contrary to the substantive provisions of law of India, in effect, it is in contravention of Section 28(1)(a)[51] of the 1996 Act. Similarly, violating terms of the contract, in effect, is in contravention of Section 28(3) of the 1996 Act.

62. In **Ssangyong (supra)** this Court specifically dealt with the 2015 Amendment which inserted sub-section (2-A) in Section 34 of the 1996 Act. It was held that "patent illegality appearing on the face of the award" refers to such illegality as goes to the root of matter, but which does not amount to mere erroneous application of law. It was also clarified that what is not subsumed within "the fundamental policy of Indian law", namely, the contravention of a statute not linked to 'public policy' or 'public interest', cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.[52] Further, it was observed, reappreciation of evidence is not permissible under this category of challenge to an arbitral award.[53]

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50 See also three-Judge Bench decision of this Court in State of Chhattisgarh v. SAL Udyog (P) Ltd. (2022) 2 SCC 275

51 **Section 28. -- Rules applicable to substance of dispute**. — (1) Where the place of arbitration is situated in India,--

(a) In an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India

****

(2) *****

(3) while deciding and making an award, the arbitral tribunal shall, in all cases, take into account the terms of the contract and trade usages applicable to the transaction. **(As substituted by Act 3 of 2016 w.e.f 23.10.2015)**

Prior to substitution by Act 3 of 2016, sub-section (3) of Section 28 read as under:

"(3) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

52 See paragraph 37 of Ssyangyong (supra)

53 See paragraph 38 of Ssyangyong (supra)

Perversity as a ground of challenge

63. Perversity as a ground for setting aside an arbitral award was recognized in **Western Geco (supra)**. Therein it was observed that an arbitral decision must not be perverse or so irrational that no reasonable person would have arrived at the same. It was observed that if an award is perverse, it would be against the public policy of India.

64. In **Associate Builders (supra)** certain tests were laid down to determine whether a decision of an arbitral tribunal could be considered perverse. In this context, it was observed that where: (i) a finding is based on no evidence; or (ii) an arbitral tribunal takes into account something irrelevant to the decision which it arrives at; or (iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse. However, by way of a note of caution, it was observed that when a court applies these tests it does not act as a court of appeal and, consequently, errors of fact cannot be corrected. Though, a possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon. It was also observed that an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on that score.

65. In **Ssangyong (supra)**, which dealt with the legal position post 2015 amendment in Section 34 of the 1996 Act, it was observed that a decision which is perverse, while no longer being a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. It was pointed out that an award based on no evidence, or which ignores vital evidence, would be perverse and thus patently illegal. It was also observed that a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence in as much as such decision is not based on evidence led by the parties, and therefore, would also have to be characterized as perverse.[54]

54 See Paragraph 41 of Ssyangyong (supra).

66. The tests laid down in **Associate Builders (supra)** to determine perversity were followed in **Ssyanyong (supra)** and later approved by a three-Judge Bench of this Court in **Patel Engineering Limited v. North Eastern Electric Power Corporation Limited**.[55]

67. In a recent three-Judge Bench decision of this Court in **Delhi Metro Rail Corporation Ltd. v. Delhi Airport Metro Express Pvt. Ltd.**,[56] the ground of patent illegality /perversity was delineated in the following terms:

> "40. In essence, the ground of patent illegality is available for setting aside a domestic award, if the decision of the arbitrator is found to be perverse, or so irrational that no reasonable person would have arrived at it; or the construction of the contract is such that no fair or reasonable person would take; Or, that the view of the arbitrator is not even a possible view. A finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside under the head of patent illegality. An award without reasons would suffer from patent illegality. The arbitrator commits a patent illegality by deciding a matter not within its jurisdiction or violating a fundamental principle of natural justice."

Scope of interference with an arbitral award

68. The aforesaid judicial precedents make it clear that while exercising power under Section 34 of the 1996 Act the Court does not sit in appeal over the arbitral award. Interference with an arbitral award is only on limited grounds as set out in Section 34 of the 1996 Act. A possible view by the arbitrator on facts is to be respected as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon. It is only when an arbitral award could be categorized as perverse, that on an error of fact an arbitral award may be set aside. Further, a mere erroneous application of the law or wrong appreciation of evidence by itself is not a ground to set aside an award as is clear from the provisions of sub-section (2-A) of Section 34 of the 1996 Act.

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55 [2020] 4 SCR 156 : (2020) 7 SCC 167

56 [2024] 4 SCR 473 : 2024 INSC 292

69. In **Dyna Technologies (supra)**, a three-Judge Bench of this Court held that Courts need to be cognizant of the fact that arbitral awards are not to be interfered with in a casual and cavalier manner, unless the court concludes that the perversity of the award goes to the root of the matter and there is no possibility of an alternative interpretation that may sustain the arbitral award. It was observed that jurisdiction under Section 34 cannot be equated with the normal appellate jurisdiction. Rather, the approach ought to be to respect the finality of the arbitral award as well as party's autonomy to get their dispute adjudicated by an alternative forum as provided under the law.

70. Now, we shall examine the scope of interference with an arbitral award on ground of insufficient, or improper/erroneous, or lack of, reasons.

Reasons for the Award – When reasons, or lack of it, could vitiate an arbitral award.

71. Section 31 (3)[57] of the 1996 Act provides that an arbitral award shall state reasons upon which it is based, unless (a) the parties have agreed that no reasons are to be given, or (b) the award is an arbitral award on agreed terms under Section 30.

71.1 As to the form of a reasoned award, in **Russell on Arbitration** (24th Edition, page 304) it is stated thus:

> "6.032. No particular form is required for a reasoned award although 'the giving of clearly expressed reasons responsive to the issues as they were debated before the arbitrators reduces the scope for the making of unmeritorious challenges'. When giving a reasoned award the tribunal need only set out what, on its view of the evidence, did or did not happen and explain succinctly why, in the light of what happened, the tribunal has reached its decision, and state what that decision is. In order to avoid being vulnerable to challenge, the tribunal's reasons must deal with all the issues that were put to it. It should set out its findings of fact and its reasoning so as to

57 **Section 31. Form and contents of arbitral award. –** (1) ….. (2)….
(3) The arbitral award shall state the reasons upon which it is based, unless –
(a) the parties have agreed that no reasons are to be given, or
(b) the award is an arbitral award on agreed terms under section 30.

> enable the parties to understand them and state why particular points were decisive. It should also indicate the tribunal's findings and reasoning on issues argued before it but not considered decisive, so as to enable the parties and the court to consider the position with respect to appeal on all the issues before the tribunal. When dealing with controversial matters, it is helpful for the tribunal to set out not only its view of what occurred, but also to make it clear that it has considered any alternative version and has rejected it. Even if several reasons lead to the same result, the tribunal should still set them out. That said, so long as the relevant issues are addressed there is no need to deal with every possible argument or to explain why the tribunal attached more weight to some evidence than to other evidence. The tribunal is not expected to recite at great length communications exchanged or submissions made by the parties. Nor is it required to set out each step by which it reached its conclusion or to deal with each and every point made by the parties. It is sufficient that the tribunal should explain what its findings are and the evidential route by which it reached its conclusions.

71.2 On the requirement of recording reasons in an arbitral award and consequences of lack of, or inadequate, reasons in an arbitral award, this Court in **Dyna Technologies (supra)** held:

> "34. The mandate under section 31 (3) of the Arbitration Act is to have reasoning which is intelligible and adequate and, which can in appropriate cases be even implied by the courts from a fair reading of the award and documents referred to thereunder, if need be. The aforesaid provision does not require an elaborate judgment to be passed by the arbitrators having regard to the speedy resolution of dispute.
>
> 35. When we consider the requirement of a reasoned order, three characteristics of a reasoned order can be fathomed. They are: proper, intelligible and adequate. If the reasonings in the order are improper,

they reveal a flaw in the decision-making process. If the challenge to an award is based on impropriety or perversity in the reasoning, then it can be challenged strictly on the grounds provided in section 34 of the Arbitration Act. If the challenge to an award is based on the ground that the same is unintelligible, the same would be equivalent of providing no reasons at all. Coming to the last aspect concerning the challenge on adequacy of reasons, the court while exercising jurisdiction under section 34 has to adjudicate the validity of such an award based on the degree of particularity of reasoning required having regard to the nature of issues falling for consideration. The degree of particularity cannot be stated in a precise manner as the same would depend on the complexity of the issue even if the court comes to a conclusion that there were gaps in the reasoning for the conclusions reached by the tribunal, the court needs to have regard to the document submitted by the parties and the contentions raised before the tribunal so that awards with inadequate reasons are not set aside in casual and cavalier manner. On the other hand, ordinarily unintelligible awards are to be set aside, subject to party autonomy to do away with the reasoned award. Therefore, the courts are required to be careful while distinguishing between inadequacy of reasons in an award and unintelligible awards."

71.3 We find ourselves in agreement with the view taken in **Dyna Technologies (supra)**, as extracted above. Therefore, in our view, for the purposes of addressing an application to set aside an arbitral award on the ground of improper or inadequate reasons, or lack of reasons, awards can broadly be placed in three categories:

(1) where no reasons are recorded, or the reasons recorded are unintelligible;

(2) where reasons are improper, that is, they reveal a flaw in the decision- making process; and

(3) where reasons appear inadequate.

71.4 Awards falling in category (1) are vulnerable as they would be in conflict with the provisions of Section 31(3) of the 1996 Act. Therefore, such awards are liable to be set aside under Section 34, unless (a) the parties have agreed that no reasons are to be given, or (b) the award is an arbitral award on agreed terms under Section 30.

71.5 Awards falling in category (2) are amenable to a challenge on ground of impropriety or perversity, strictly in accordance with the grounds set out in Section 34 of the 1996 Act.

71.6 Awards falling in category (3) require to be dealt with care. In a challenge to such award, before taking a decision the Court must take into consideration the nature of the issues arising between the parties in the arbitral proceedings and the degree of reasoning required to address them. The Court must thereafter carefully peruse the award, and the documents referred to therein. If reasons are intelligible and adequate on a fair-reading of the award and, in appropriate cases, implicit in the documents referred to therein, the award is not to be set aside for inadequacy of reasons. However, if gaps are such that they render the reasoning in support of the award unintelligible, or lacking, the Court exercising power under Section 34 may set aside the award.

Scope of interference with the interpretation / construction of a contract accorded in an arbitral award.

72. An arbitral tribunal must decide in accordance with the terms of the contract. In a case where an arbitral tribunal passes an award against the terms of the contract, the award would be patently illegal. However, an arbitral tribunal has jurisdiction to interpret a contract having regard to terms and conditions of the contract, conduct of the parties including correspondences exchanged, circumstances of the case and pleadings of the parties. If the conclusion of the arbitrator is based on a possible view of the matter, the Court should not intefere.[58] But where, on a full reading of the contract, the view of

58 See: Steel Authority of India Ltd. v. Gupta Brother Steel Tubes Limited, (2009) 10 SCC 63; Pure Helium India (P) Ltd v. ONGC, (2003) 8 SCC 593; McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181; MMTC Ltd. v. Vedanta Ltd., (2019) 4 SCC 163

the arbitral tribunal on the terms of a contract is not a possible view, the award would be considered perverse and as such amenable to interference.[59]

Whether unexpressed term can be read into a contract as an implied condition.

73. Ordinarily, terms of the contract are to be understood in the way the parties wanted and intended them to be. In agreements of arbitration, where party autonomy is the *grund norm*, how the parties worked out the agreement, is one of the indicators to decipher the intention, apart from the plain or grammatical meaning of the expressions used.[60]

74. However, reading an unexpressed term in an agreement would be justified on the basis that such a term was always and obviously intended by the parties thereto. An unexpressed term can be implied if, and only if, the court finds that the parties must have intended that term to form part of their contract. It is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them. Rather, it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, although tacit, forms part of the contract.[61]

75. But before an implied condition, not expressly found in the contract, is read into a contract, by invoking the business efficacy doctrine, it must satisfy following five conditions:

    a. it must be reasonable and equitable;

    b. it must be necessary to give business efficacy to the contract, that is, a term will not be implied if the contract is effective without it;

    c. it must be obvious that "it goes without saying";

    d. it must be capable of clear expression;

    e. it must not contradict any terms of the contract.[62]

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59 South East Asia Marine Engg. & Construction Ltd. (SEAMEC Ltd.) v. Oil India Ltd., (2020) 5 SCC 164

60 Bharat Aluminium Co. V. Kaiser Aluminium Technical Services Inc., (2016) 4 SCC 126.

61 Adani Power (Mundra) Ltd. v. Gujarat ERC, (2019) 19 SCC 9

62 Nabha Power Limited (NPL) v. Punjab State Power Corporation Limited (PSPCL) and Another, (2018) 11 SCC 508, followed in Adani Power (supra)

ANALYSIS/ DISCUSSION

76. Having noticed the legal principles governing a challenge to an arbitral award, we shall now proceed to address the issues culled out above, which arise for our consideration in these appeals.

GITA POWER (R-2) BOUND BY THE ARBITRATION AGREEMENT AND THEREFORE JOINTLY AND SEVERALLY LIABLE

77. To have a clear understanding of the issue as to whether Gita Power (R-2), the appellant in the connected appeal, could be subjected to arbitral proceedings and made jointly and severally liable along with OPG for the dues of Enexio, a look at the facts relating to formation of the contract including the conduct of the parties would be apposite.

78. The relevant facts in this regard, which find mention in the award, are as follows:

(a) There were two companies, namely, Gita Power (R-2) and OPG (appellant). Gita Power is the holding company of OPG. Two Tenders were floated. One by a Gujarat Company in the same group, which related to design, manufacture, delivery to site, erection testing and commissioning of two ACC units with auxiliaries for a thermal power plant in Gujarat (for short Gujarat Unit). The other was issued by OPG in respect of design, manufacture, delivery to site, erection testing and commissioning of an ACC unit with auxiliaries for a thermal power plant at Gummidipoondi in Tamil Nadu (for short T.N. Unit).

(b) Enexio (R-1 – the claimant) submitted a single unpriced techno-commercial offer covering both projects. Following negotiations, a revised techno commercial offer covering both projects was submitted in August 2012. Thereafter, following further negotiations, another technical offer covering both projects was submitted by Enexio on 6 October 2012.

(c) On 5 November 2012, with reference to the techno offers, OPG addressed a letter to Enexio, in respect of T.N. Unit, stating thus:

> "Design, Engineering, Supply, Installation, Testing and Commissioning of Air Cooled Condenser with auxiliaries for 1 X 160 MW (Phase III) Coal Based Power Project at Gummudipoondi.

> We refer to your offer GCTQD/ OPG - Gujarat – Gummidipoondi /4239/12 / Rev 2 dated October 6, 2012 and technical and commercial discussions we had with you of date. We have pleasure in informing you of our intent to award a contract for Air Cooled Condenser with auxiliaries in conformance to the discussions you had with us.
>
> Price: The price for the total scope is Rs. 44,00,00,000/- (Forty four crores only).
>
> Price basis: F.O.R. destination (Power Project site at Gummidipoondi)
>
> Taxes and Duties: Extra at actuals, but inclusive of port handling charges.
>
> Delivery schedule: The overall agreed time for takeover of equipment will be March 2014."

(d) On 4 March 2013, Gita Power (R-2), holding company of OPG, issued two separate Purchase Orders for:

(i) Design, Engineering and Supply of 1 Unit of ACC with Auxiliaries for 160 MW Coal Based project at Gummidipoondi (Supply Purchase Order); and

(ii) Erection and Commissioning of 1 Unit of ACC with Auxiliaries for 160 MW Coal Based Power project at Gummidipoondi (Erection Purchase Order).

(e) Pursuant to these purchase orders, on 1 April 2013 Enexio (R-1) submitted a Work Schedule. As per which, commissioning of the ACC Unit was planned on 31 March 2014.

(f) On 13 June 2013, the foundations for the ACC Unit were handed over to Enexio (R-1) by OPG.

(g) On 4 July 2013 Enexio received 10% of the Order price and on 23 July 2013 second payment of 10% of the Order price was received by Enexio. Both payments were made by Gita Power (R-2).

(h) While the work was in progress, OPG issued two separate Purchase Orders, namely, supply purchase order and erection purchase order, on similar terms and with similar references as were there in the Purchase Orders issued by R-2 (Gita Power).

(i) In the statement of defense, it was stated that when the purchase orders were ready for issue, since Gita Power (R-2) was the holding company of OPG, it was felt that in the commercial interest of the project, the order for supply and erection of ACC Unit should be placed on the claimant by R-2. The statement of defense further states that soon after issuance of the purchase orders in the beginning of April 2013, OPG and R-2 were advised that as the project was being set up by OPG, and it had all the required registrations, etc. it would be advisable that the Purchase Orders placed on the claimant by R-2 for supply and erection of ACC Unit be substituted/ replaced by Purchase Orders in the name of OPG. In addition to above, OPG pleaded that the substitution/ replacement of purchase orders maintained the continuity of the rights and obligations undertaken from 4 March 2013.

79. Based on the above-noted facts, and the evidence brought on record during the arbitral proceedings, the Tribunal concluded that the 'Group of Companies' doctrine is applicable, as OPG and R-2 have represented themselves as a single economic entity which could switch duties and obligations from one to the other. The Tribunal held that – (a) R-2 is a proper party; (b) both OPG and R-2 were bound by the arbitration agreements, which gave rise to the arbitral proceedings; and (c) OPG and R-2 were jointly and severally liable to the claimant for complying with the award.

80. In **Cox & Kings Ltd. v. SAP India (P) Ltd.**,[63] a Constitution Bench of this Court held that by interpreting the express language employed by the parties in the record of agreement, coupled with surrounding circumstances of its formation, performance, and discharge of the contract, a Court or Arbitral Tribunal is empowered to determine whether a non-signatory is a party to an arbitration agreement. It was held that 'Group of Companies' doctrine is premised on ascertaining

63 [2023] 15 SCR 621 : (2024) 4 SCC 1

the intention of the non- signatory to be party to an arbitration agreement. The doctrine requires the intention to be gathered from additional factors such as direct relationship with the signatory parties, commonality of subject matter, composite nature of the transaction, and performance of the contract.

81. In the instant case, the Arbitral Tribunal has found that: (a) Gita Power is the holding company of OPG; (b) Gita Power had issued the Purchase Orders and had actively participated in the formation of the contract even though the ACC unit of Gummudipoondi was of OPG; (c) initial 10% of the purchase price was provided by Gita Power (R-2); (d) the subsequent Purchase Orders issued by OPG were on similar terms and were issued by way of affirmation to obviate technical issues. In our view, the above circumstances had a material bearing for invocation of "Group of Companies doctrine" to bind Gita Power (R-2) with the arbitration agreement and fasten it with liability, jointly and severally with OPG, in respect of the Purchase Orders relating to ACC Unit of Gummudipoondi project. Thus, bearing in mind that an arbitral tribunal has jurisdiction to interpret a contract having regard to the terms and conditions of the contract and conduct of the parties including correspondences exchanged, and, further, taking into account the provisions of sub-section (2-A) of Section 34 of the 1996 Act limiting the scope of interference with a finding returned in an arbitral award, we do not find a good reason to interfere with the above findings of the Arbitral Tribunal more so when it is based on a possible view of the matter. We, therefore, reject the argument on behalf of R-2 that it was not bound by the arbitration agreement and that it ought not to have been made jointly and severally liable along with OPG for the dues payable to Enexio. Sub-issue (a) is decided in the aforesaid terms.

ENEXIO'S CLAIM NOT BARRED BY LIMITATION.

82. On the issue as to whether Enexio's claim was barred by time, the submissions of the appellants, *inter alia*, are:

    (a) The date fixed by the contract for completion of the obligations of supply of goods and erection of ACC unit is 31 March 2014. Hence, the date of reckoning for the purposes of limitation ought to be 31 March 2014.

(b) The contract was a mixture of supply of goods and services (i.e., works). Therefore, Article 14 of the Schedule to the 1963 Act applied for the price of goods supplied, and Article 18 applied for the price of works provided, for computing the limitation period of the claim. In either case, the limitation period of three years would commence to run, not later than, from 31 March 2014.

(c) Even if it is assumed that the deemed date of completion was 21 September 2015 (as held by the arbitral tribunal), the claim being filed on 2 May 2019, was well beyond 3 years from that date.

(d) Once the period of limitation started to run, in terms of Articles 14 and 18, mere negotiations could not have extended the period of limitation. Therefore, the award, which takes a contrary view, is patently illegal.

83. Before proceeding further, we must remind ourselves that sub-section (1) of Section 43[64] of the 1996 Act makes the Limitation Act, 1963 (in short, 1963 Act) applicable to arbitrations as it applies to proceedings in Court. Sub-section (2) of Section 43 provides that unless otherwise agreed by the parties, an arbitral proceeding shall be deemed to have commenced on the date specified in Section 21.[65] On a conjoint reading of sub-sections (1) and (2) of Section 43 of the 1996 Act

64 **Section 43. Limitations. –** (1) The Limitation Act, 1963 (36 of 1963) shall apply to arbitrations as it applies to proceedings in Court.

(2) For the purposes of this section and the Limitation Act, 1963 (36 of 1963), an arbitration shall be deemed to have commenced on the date referred in section 21.

(3) Where an arbitration agreement to submit future disputes to arbitration provides that any claim to which the agreement applies shall be barred unless some step to commence arbitral proceedings is taken within the time specified by the agreement, and a dispute arises to which the agreement applies, the court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper.

(4) Where the Court orders that an arbitral award be set aside, the period between the commencement of the declaration and the date of the order of the court shall be excluded in computing the time prescribed by the Limitation Act, 1963 (36 of 1963), for the commencement of the proceedings (including arbitration) with respect to the dispute so submitted.

65 **Section 21. Commencement of arbitral proceedings. --** Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

along with Sections 3[66] and 2 (j)[67] of the 1963 Act it is clear that if on the date of commencement of the arbitral proceeding, as referred to in Section 21 of the 1996 Act, the claim(s) is/are barred by limitation, as per the provisions of the 1963 Act, the Arbitral Tribunal will have to reject such claim(s) as barred by limitation.[68]

84. In the case in hand there is no dispute between the parties that the arbitral proceedings, in terms of Section 21 of the 1996 Act, commenced on 2 May 2019. Therefore, our exercise would be to determine whether the period of limitation got over prior to that date or not. For that purpose, it would be necessary to ascertain as to which Article of the Schedule was applicable to the claim. And if more than one applied, which one applied to which part of the claim.

85. According to the appellant(s) (i.e., OPG and Gita Power – appellant in the connected appeal), Articles 14 and 18 of the Schedule to the 1963 Act applied to the claim. Importantly, the award does not specify the Article(s) which were applied except Article 58 which was applied to the declaratory relief sought in the claim and which was found barred by time. However, as the claim is based on a contract, we will also consider the applicability of Article 55 and the residuary Article 113 of the Schedule,[69] if none other Article(s) were applicable to the claim.

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66 **Section 3. — Bar of limitation. –** (1) Subject to the provisions contained in sections 4 to 24 inclusive, every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed, although limitation has not been set up as a defense.

(2) For the purposes of this Act –

(a) a suit is instituted –

(i) in an ordinary case, when the plaint is presented to the proper officer;

(ii) in the case of a pauper, when his application for leave to sue as a pauper is made; and

(iii) in the case of a claim against the company which is being wound up by the court, when the claimant first sends in his claim to the official liquidator;

(b) any claim by way of a set-off or a counter claim, shall be treated as a separate suit and shall be deemed to have been instituted –

(i) in the case of a set off, on the same date as the suit in which the set off is pleaded;

(ii) in the case of a counter claim, on the date on which the counter claim is made in court;

(c) an application by notice of motion in a High Court is made when the application is presented to the proper officer of that court.

67 **Section 2. Definitions. –** In this Act, unless the context otherwise requires, --

(j) '**period of limitation**' means the period of limitation prescribed for any suit, appeal or application by the Schedule, and '**prescribed period**' means the period of limitation computed in accordance with the provisions of this Act.

68 **State of Goa v. Praveen Enterprises, (2012) 12 SCC 581, paragraph 16**.

69 The Schedule (PERIODS OF LIMITATION) See sections 2(j) and 3:
PART II - SUITS RELATING TO CONTRACTS

Facts having material bearing on limitation

86. For a proper determination of the aforesaid issue, we need to have a close look at the material facts relevant to the issue of limitation. In our view, the material facts,[70] *inter alia*, are:

(a) There was a composite Tender inviting offer for design, manufacture, delivery to site, erection, testing and commissioning of an ACC unit with auxiliaries for a thermal power plant.

(b) Enexio submitted a composite unpriced techno-commercial offer for the project.

(c) On 5 November 2012, with reference to the techno offer, OPG addressed a letter[71] expressing intent to award contract for the project at a composite cost of 44 crores. This letter also sets out a tentative date for completion / takeover of the project i.e., March 2014.

Article No.	Description of Suit	Period of Limitation	Time from which period begins to run
14.	For the price of goods sold and delivered where no fixed period is agreed upon	Three years	The date of the delivery of the goods
18.	For the price of work done by the plaintiff for the defendant at his request, where no time has been fixed for payment.	Three years	When the work is done.
55.	For compensation for the breach of any contract, express or implied not herein specially provided for.	Three years	When the contract is broken or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs or (where the breach is continuing) when it ceases.
PART III – SUITS RELATING TO DECLARATIONS			
58.	To obtain any other Declaration	Three years	When the right to sue first accrues.
PART X – SUITS FOR WHICH THERE IS NO PRESCRIBED PERIOD			
113.	Any suit for which no period of limitation is provided elsewhere in this Schedule	Three years	When the right to sue accrues.

70 As gathered from paragraph 7 (including sub paragraphs 7.01 to 7.76) of the Arbitral Award under the title 'Background to the Dispute'

71 Quoted in paragraph 79 (c) above

(d) In that backdrop, on 4 March 2013, Gita Power (R-2) issued two separate orders, one, for Design, Engineering and Supply of 1 Unit of ACC with Auxiliaries (Supply Purchase Order) and, second, for Erection and Commissioning of it (Erection Purchase Order).

(e) Pursuant to these purchase orders, on 1 April 2013, Enexio (R-1) submitted a Work Schedule. As per which, commissioning of the ACC Unit was planned on 31 March 2014. In furtherance thereof, Enexio received 10% of the order price in advance on 4 July 2013, and another 10% on 23 July 2013. Both the advance payments were received from Gita Power (R-2).

(f) While the work was in progress, in July 2013 OPG issued two orders replicating those that were issued by Gita Power (R-2) with insignificant variation.

(g) As per the Supply Purchase Order, payments were to be made in the following order:

Payments:

(i) 10% of Order Price as advance money on submission of request for advance and advance payment bank guarantee for 10% of the Order Price, valid until completion of supply;

(ii) 10% against approval of Engineering Documentation;

(iii) 65% of the Order Price on Pro Rata basis along with 100% taxes after receipt of material at site;

(iv) 5% of the Order Price upon submission of (a) invoice, and (b) certificate on completion of punch points duly signed by Parties;

(v) 5% of the Contract Price upon submission of (a) invoice, (b) take over certificate of Equipment issued by Purchaser; and (iii) warranty bond for 10% of the contract valid up to the end of warranty period;

(vi) 5% of the Contract Price upon submission of (a) invoice, (b) certificate of completion of performance test of equipment by purchaser;

(vii) Payments to be made within 25 days of submission of invoice/ request for payment and other documents

(h) Annexure A of the Supply Purchase Order carried commercial conditions, *inter alia*, providing for Performance Guarantee Test in the following terms:

(1) The Performance Guarantee Test of the equipment shall be carried out immediately after takeover of the equipment but in no case later than two months from the date of takeover.

(2) Performance guarantee test will be carried out by the representatives and manpower of the purchaser under the supervision of the supplier's engineer.

(3) In case the performance guarantee test is not carried out due to reasons outside supplier's control within 180 days from the date of takeover, the guaranteed performance shall be deemed to have been achieved and all liabilities of supplier with respect to the performance guarantee test shall be over. Within these said 180 days, the supplier remains liable for the guaranteed performance of the equipment.

(4) The Erection Purchase Order repeated most of the clauses of the supply purchase order and provided for payment in the following manner:

Payment

(i) 80% against progress of work on pro rata basis and against certification by site officials.

(ii) 10% after mechanical completion / Punch list.

(iii) 10% of the contract price after Commissioning against bank guarantee in favor of the owner for equivalent value and valid for the entire warranty period.

(j) Enexio (R-1) asserted that it finished its work under the contract on or about February 2015. However, on 12 March 2015, OPG complained to Enexio in writing that certain work remained and, therefore, Enexio must instruct its team to complete the pending work.

(k) Enexio claimed that successful operation of the vacuum pump was carried out on 21 May 2015, which implies commissioning of the ACC unit. In response OPG asserted that three components of the ACC unit were defective.

(l) On 2 July 2015, OPG issued a debit note towards modifications to the turbine generator building. Thereafter, on 24 August 2015, OPG issued two debit notes: (i) towards work related to lifting of the vertical duct; and (ii) towards liquidated damages permissible under the Supply Purchase Order and Erection Purchase Order for the delay in execution.

(m) On 28 August 2015 Enexio wrote to OPG questioning the debit notes.

(n) On 21 September 2015 Enexio informed OPG that the turbine generator was running at full load and, thereby, requested OPG to arrange for Performance Guarantee Test (PG Test). This request was repeated by e-mails dated 3 October 2015 and 8 October 2015. Later, on 9 October 2015, Enexio sent a letter to OPG attaching six protocols confirming commissioning of all relevant segments of the project. Not only that, on 20 October 2015, Enexio sent a procedure for the PG Test. But the PG Test was not undertaken.

(o) On 12 January 2016, OPG issued debit note against OPG's account for customs duty.

(p) On 22 August 2016 OPG informed Enexio that fan assembly had detached. On 20 January 2017 Enexio sent an e-mail to OPG, saying:

"Sir,

This is further to our visit to your site on 7/1/2016.

Considering the time availability and on the interest of closing the issue, we suggest the following:

1. Using in-situ machining agency, the shaft dia variation can be machined out after dismantling the hub and blade assembly alone. Gearbox will not be disturbed at all. We already obtained offer for this.

2. To match the machined out shaft dia and key way, existing fan hub bore and key way can be rebuild and machined after machining out existing bore by 5mm.

3. To start the work, the spare gearbox supplied by us at free of cost can be used and remaining seven gear boxes can be attended one or two at a time.

4. You being a valuable customer to us, we wish to execute the correction work even though this failure happened after our guarantee. We will depute our engineer to site for entire work.

5. But we could not bear the commercial implications since we already suffered loss and our money is also locked up in this project due to various reasons cited in our various earlier letters.

6. Hence, we request you to pay the correction cost and not to deduct the same from us.

We request you for above proposal."

(q) On 2 March 2017 Enexio requested OPG to provide certificates for completion of Gummudipoondi as well as Gujarat project. The format of the desired certificate was sent by Enexio to OPG. Therein it was mentioned that ACC Unit was commissioned during May 2015 and was performing satisfactorily since then.

(r) On 6 March 2017 OPG confirmed that it would issue the required certificate for marketing purpose and that certificate would not absolve the claimant from its contractual obligations under the purchase orders which, according to OPG, were yet to be fulfilled.

(s) Following further exchanges between the parties, a meeting was held on 19 April 2018. The minutes[72] of that meeting, *inter alia*, reflected that the principal amount outstanding towards Enexio under the contract was the one that was claimed by

72 See Paragraph 7 of this judgment.

Enexio in the claim. However, the minutes indicated that it was not payable because of certain deductions claimed by OPG. According to Enexio, those deductions (i.e. towards customs duty and liquidated damages) were incorrectly recorded in the minutes even though there was no agreement in respect thereof.

(t) On 26 May 2018, on reiteration of demand by Enexio, OPG responded, *vide* communication dated 26 May 2018, and offered Rs.3 crores to Enexio as full and final settlement of the account. This offer was rejected by Enexio. Whereafter, arbitration proceeding commenced.

Material Observations in the Award.

87. We shall now extract few observations/ findings in the award which, in our view, would be useful in determining the limitation issue. These observations/ findings, with their corresponding paragraph number in the award, are extracted below:

> "1). On 1st April 2013 the Claimant prepared its L1 Network Schedule which indicated the final activities leading to commissioning ..:
>
> Hook up with TG: 8-Mar-14 to 14-Mar-14
>
> Commissioning 22-Mar-14 to 31-Mar-14.
>
> ……(para 13.02 of the award)
>
> 2). The Purchase Orders are silent on the mode of payment of the Claimant's invoices except to note that:
>
> 7.3. 65% of the Order Price shall be paid on Pro rata basis along with 100% Taxes and Duties after receipt of material at site.
>
> 7.7 Payments will be made within twenty-five days of submission of Invoice/ request for payment and other documents.
>
> ….. (para 13.08 (b) of the award)
>
> 3). No indication is given in the Purchase Orders as to what 'other documents are required.
>
> …..(para 13.08 (c) of the award)

4). The claimant asserts that until November 2013 payments were made to the claimant initially by Respondent no.2 and subsequently by Respondent no.1 by cheque/ RTGS but from 12th November 2013 all subsequent payments were made by letter of credit. In order to receive payment by this method the claimant asserts that additional documentation was required which created delays in payment.

……(para 13.08 (d) of the award)

5). Respondent no.1 denies that there was delay in clearing payments to the claimant and asserts that all payments validly due to the claimant were made in time. Respondent no.1 asserts that:

(i) Invoices were submitted by the claimant later than the date on the face of the invoice;

(ii) To compute the period in which payment of an invoice is to be made the start date is the date on which the invoice, complete with all supporting documents, is received by Respondent no.1 which must be after receipt of the relevant material at site; and

(iii) In many cases, invoices were not accompanied by the required backup documents and the payment of the invoice could not be released until these backup documents were submitted by the claimant.

……(para 13.08 (e) of the award)

6). The tribunal accepts that delays by the Claimant in submitting its invoices, in providing the backup materials and in crediting payment to its account would be included in the times computed by the claimant between the date of the invoice and the date of payment as included in its tabulation of its invoices. However, examination of Exhibit C-21 indicates that for invoices paid before 12 November 2013, over 90%, were paid in less than 50 days from the invoice date. Whereas, for invoices paid after 12 November only about 30% were paid within 50 days. Indeed, about 25% of the invoices dated after 12 November 2013 were not paid for 100 days or longer. These percentages satisfy

the tribunal that the introduction of payment by letter of credit, as it was arranged by Respondent no.1, was more onerous than could reasonably have been anticipated by the claimant when it entered into the contracts.

…..(para 13.08 (g) of the award)

7). Respondent no.1 decided that the original design of the Hot well drain pump was unnecessarily large and changed the specified pump to a smaller pump on 21st November 2013. As a result, both the pump and the electric motor, which was required to drive the pump, had to be re-ordered. The claimant asserts, and respondent no.1 does not deny, that the original pump and motor would have been delivered to site on or about 17th February 2014.

……..(para 13.10 (a) of the award)

8). It was agreed at the hearing in this arbitration that the actual delivery date of the motors (which arrived a few days after the pump) could be taken as on or about 7th May 2014. Thus, there was a delay of approximately 79 days in delivery.

……(para 13.10 (b) of the award).

9). On balance, the Tribunal is satisfied that the drain pump together with its motor, although a low value component, was a necessary part of the ACC unit and the decision by Respondent no. 1 to replace it at a late stage risked delaying the project. The time elapsed between the original estimated delivery date, and the assumed actual delivery date was 79 days.

…….(para 13.10 (e) of the award)

10). The tribunal finds the following facts to be significant:

(i) The ACC unit could not be connected to the turbine generator flange until the turbine generator was in place to have the connection made. Thus, welding of the ACC unit to the turbine flange was dependent on both completion of the horizontal duct and pressure balancing bellows by the claimant and the installation of the turbine on behalf of Respondent no.1.

(ii) The ACC unit could not be commissioned, nor could the PG test be conducted without a flow of turbine exhaust steam. The turbine must be operational to provide the necessary flow of exhaust steam. Thus, both commissioning and the PG test were dependent on both the ACC unit and the turbine being operational.

(iii) Up until the claimant was ready to erect the first part of the horizontal duct there is no evidence that the claimant was delayed by any other construction activity on site. The claimant states that the vertical duct erection was completed on 15th July 2014. The vertical duct should have been completed on 7th February 2014. Thus, the tribunal finds that at 15th July 2014 the claimant was 158 days behind its program which is not attributable to non-readiness of Respondent no.1.

(iv) The tribunal is satisfied that steam flowing (steam blowing) was being conducted by the turbine generator contractor in early February 2015 which would have been likely to have prevented the welding of the duct to the turbine flange. This process also indicates that the turbine was not operational.

(v) On the basis of Mr. Parasuram's evidence, the tribunal finds that the claimant had completed the connection between the horizontal duct and the turbine generator flange around February 2015 but that commissioning of the ACC unit did not start until April 2015. Mr. Parasuram attributes the delay between February and April 2015 to Respondent no.1's other contractors having outstanding work. Thus, completion of the Hook-up as described in the L1 network Schedule which should have taken place on 14th March 2014 did not take place until mid- February 2015 by which time the ACC unit construction was about 343 days behind schedule. On the evidence presented to the tribunal it is not possible to apportion the further delay of about 158

> days which occurred between 15th July 2014 and mid- February 2015 between slow progress by the claimant and hindrance to the claimant's work by the ongoing turbine generator installation. However, the tribunal is satisfied that at least part of this delay was not attributable to the claimant.
>
> ……..(para 13.13 (c) of the award)

11). The tribunal now considers when, if at all, the ACC system was completed. There are three certificates which are referred to in the erection purchase order. These are:

A certificate on competition of punch points;

A Take Over Certificate of Equipment; and

A certificate of competition of performance test.

None of these certificates have been issued.

……(para 13.13 (d) of the award)

12). The only certificate issued by the respondents was dated 2nd March 2017. In separate correspondence, Respondent no.1 stated that this certificate was issued for marketing purposes and did not absolve the claimant from its contractual obligation under the Purchase Orders.

……..(para 13.13 (e) of the award)

13). Notwithstanding the respondents' caveat, the issuance by the respondents of the 2nd March 2017 certificate is considered significant by the tribunal. The respondents knew the purpose for which the certificate was required by the claimant and, if it did not believe in the veracity of what it was certifying, even for marketing purposes, then it behaved dishonestly. The tribunal has no basis for assuming that the respondents would have acted in such a dishonest manner and thus, concludes that the respondents must have believed that the ACC unit was operating satisfactorily when it issued that certificate. The certificate states that the ACC unit was operating satisfactorily from May 2015. However, the tribunal does

not rely on this date as it was not material to the purpose for which the certificate was required and was the date included in the draft certificate provided by the claimant.

…….(para 13.13 (f) of the award)

14). The tribunal concludes that all the criteria for issuing all three of the certificates listed above would have to be met before the ACC unit could be certified to be operating satisfactorily. The last alleged defects notified by Respondent no.1 in 2015, which has been exhibited, is dated 4th July 2015. (The fan assembly detached more than a year later, and that event could not have been the basis for withholding the relevant certificates through 2015). In its e-mail of 4th July 2015, Respondent no.1 notes gearbox defects but gave no details nor is the tribunal provided with any information about what action, if any, was taken in relation to the alleged gearbox defect. However, the tribunal is satisfied that on 4th July 2015 the ACC units were not yet in fit condition to merit the issue of the three relevant certificates.

…….(para 13.13 (g) of the award)

15). The first indication that the claimant thought it was ready for a performance guarantee test was in its e-mail dated 21st September 2015. There is no evidence to suggest that both the certificate on completion of punch points and takeover certificate of equipment should not have been issued on or before 21st September 2015. In the absence of any evidence from Respondent no.1 that there were any remaining punch points or that the ACC system was not capable of being taken over, the tribunal finds that these certificates are deemed to have been issued on 21st September 2015 a delay from the planned date of 539 days.

……(para 13.13 (h) of the award)

16). Equally, there is no further indication that the ACC unit was not capable of passing the PG test on 21st September 2015. However, a PG test can only be deemed satisfactory

if it is not carried out within 180 days of the issue of the taking over certificate. Accordingly, the PG test would be deemed to have been carried out satisfactorily only after a further 180 days had elapsed. Thus, the tribunal finds that the deemed achievement of Supplier's liability in respect to Performance Guarantee Test pursuant to Clause 10.5 of Annexure A of the Erection Purchase Order only became effective on 19th March 2016. As the claimant was still requesting a PG test as late as 20th May 2016 the tribunal is satisfied that the deeming provisions apply and the ACC unit is deemed to have passed the PG test. The Erection Purchase Order states that, where the PG test is deemed to have been carried out, the respondents remained liable for the guaranteed performance during the 180 days. However, it is silent on whether the deemed achievement of supplier's liability in respect to Performance Guarantee test is retrospective to the date when the performance can be said to have been achieved. The tribunal finds that for the purposes of determining the delay caused by the failure to arrange a PG test it would be just to consider that the required performance was achieved on 21st September 2015 - the date on which the tribunal has found that the ACC unit was deemed to have been taken over.

.....(para 13.13 (i) of the award)

17). Respondent no.1 did not issue the takeover certificate of equipment or a certificate of completion nor did it arrange a PG test. However, it has offered no evidence of any defects in the ACC unit that it has shown existed on 21st September 2015. Accordingly, the tribunal is satisfied, on the balance of probabilities, that respondent no.1 delayed issuing the said certificates and the PG test because it was not in a position, due to other factors beyond the Claimant's control, to properly commission the ACC unit. Therefore, the tribunal is satisfied that at 21st September 2015, Respondent no.1 had delayed completion by 539 days and the claimant is entitled to 539 days' extension of time.

.....(para 13.13 (j) of the award)

18). Summary of Delays

Delay in payment	Nil
Delay in handing over site	Nil
Due to change of specification of the Drain Pump	79 days
Delay in BBU approval	Nil
Staircase and pipe rack Hindrance	Nil
Non-readiness of Respondent no.1	539 days

The tribunal finds that these delays are not cumulative but parallel. The effect of the drain pump being changed would have occurred before mid-February 2014 when the tribunal found that the project was delayed by 158 days. Thus, the delay at that point for which the claimant was responsible was 158 days less 79 days allowed for the change of drain pump. Thus, the claimant was in culpable delay of 79 days in mid-February. The delay in commissioning occurred after mid-February 2014. Thus, the total extension of time granted by the tribunal is 539 days.

…….(para 13.14 of the award)

19). Liquidated Damages

As the tribunal has granted an extension of time for completion of the ACC unit to 21st September 2015 and has also found that the requirements for completion of the ACC units were achieved on that date, the tribunal finds that the claimant has no liability for liquidated damages….

……(para 13.15 of the award)"

Relevant Article(s) of the Schedule to the Limitation Act, 1963 applicable to the claim

88. Having taken note of the relevant facts as well as material observations in the arbitral award, we shall now consider as to which Article, or Articles(s), if more than one is applicable, of the Schedule to the 1963 Act would apply to the claim(s) of Enexio. Notably, the claim

was in respect of: (a) declaration *qua* invalidity of Debit note(s); (b) outstanding principal amount; and (c) interest. Insofar as relief *qua* declaration was concerned, it was found barred by time prescribed by Article 58, and there is no serious challenge to that finding. As regards claim for the outstanding principal amount, it was a composite claim for the balance amount payable for supplies made and work done under the Supply Purchase Order and the Erection Purchase Order respectively, which was found within limitation.

89. According to the appellant(s), Article 14 is applicable to the claim in respect of balance amount for the price of the goods supplied under the Supply Purchase Order; and Article 18 would apply to the claim for the work done under the Erection Purchase Order. It is their case that if the project was to be completed by 31 March 2014, three years period should be counted from that date and, therefore, claim would be barred by limitation as on 2 May 2019 i.e., the date of commencement of the arbitral proceeding.

90. Per contra, Enexio's case is that it is a composite contract for design, manufacture, supply, erection and commissioning of air-cooled condenser unit (ACC Unit) with auxiliaries for 160 MW Coal Based Thermal Power Plant (Project) at Gummidipoondi in the State of Tamil Nadu whereunder payments were to be made on pro rata basis, and final payment was to be made only on completion of the work, subject to issuance of relevant certificates. The completion of work got delayed due to reasons beyond the control of Enexio, as held by the Tribunal, therefore, 539 days of extension, up to the deemed date of completion of the project i.e., 21 September 2015, was granted. In between, the contract was not repudiated by either party. Hence, the limitation period of three years would have to be counted from the date of completion of the work, that is, from 21 September 2015. It is also their case that before expiry of the prescribed period of three years, a written acknowledgment of the outstanding amount was made *vide* minutes of the meeting dated 19 April 2018. Therefore, by virtue of Section 18[73] of the 1963 Act, a fresh

73 **Section 18. Effect of acknowledgment in writing.—** (1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgement of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.
(2) Where the writing containing the acknowledgement is undated, oral evidence may be given of the

period of three years would start from the date of acknowledgement, which got further extended, by virtue of the provisions of Section 19[74] of the 1963 Act, on account of the offer made on 26 May 2018 to pay Rs. 3 crores as full and final settlement of all dues. Hence, as on 2 May 2019, the claim was not barred by limitation.

91. A plain reading of Article 14 of the Schedule to the 1963 Act, which is *pari materia* Article 52[75] of the First Schedule to the Limitation Act, 1908 (in short 1908 Act), would indicate that it applies where: (a) the suit/ claim is for the price of goods sold and delivered; and (b) no fixed period of credit is agreed upon. Whereas Article 18 of the Schedule, which is *pari materia* Article 56[76] of the First Schedule of the 1908 Act, applies where: (a) the suit/claim is for the price of work done by the plaintiff/ claimant for the defendant at his request; and (b) no time has been fixed for payment. Thus, where a suit is for goods supplied and work done by the plaintiff (a contractor) and the price of materials and the price of work is separately mentioned, and the time for payment is not fixed by the contract, Article 14 will apply to the former claim, and Article 18 to the latter. But where a claim is made for a specific sum of money as one indivisible claim on the contract, without mentioning any

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time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872 (1 of 1872), oral evidence of its content shall not be received.

Explanation.-- for the purposes of this section, --

(a) an acknowledgement may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set off, or is addressed to a person other than a person entitled to the property or right;

(b) the word 'signed' means signed either personally or by an agent duly authorized in this behalf; and

(c) an application for the execution of a decree or order shall not be deemed to be an application in respect of any property or right.

74 **Section 19. Effect of payment on account of debt or of interest on legacy.---** Where payment on account of a debt or of interest on a legacy is made before the expiration of the prescribed period by the person liable to pay the debt or legacy or by his agent duly authorized in this behalf, a fresh period of limitation shall be computed from the time when the payment was made:

Provided that, save in the case of payment of interest made before the 1st day of January, 1928, an acknowledgement of the payment appears in the handwriting of, or in writing signed by, the person making the payment.

Explanation. — For the purposes of this section, --

(a) where mortgage land is in the possession of the mortgagee, the receipt of the rent or produce of such land shall be deemed to be a payment;

(b) 'debt' does not include money payable under a decree or order of a court.

75 See Footnote 83

76 See Footnote 84

specific sum as being the price of goods or price of the work done, neither Article 14 nor Article 18 will apply, but only Article 55, which provides for all actions *ex contractu* (i.e., based on a contract) not otherwise provided for, would apply.[77]

92. Article 55, which is a combination of erstwhile Articles 115[78] and 116[79] of the First Schedule to the 1908 Act, is a residuary Article in respect of all actions based on a contract not otherwise specially provided for. For the applicability of Article 55, four requirements should be satisfied, namely, (1) the suit should be based on a contract; (2) there must be breach of the contract; (3) the suit should be for compensation; and (4) the suit should not be covered by any other Article specially providing for it.

93. A breach of a contract may be by non-performance, or by repudiation or by both.[80] In Anson's Law of Contract (29th Oxford Edition), under the heading 'Forms of Breach Which Justify Discharge', it is stated thus:

> "The right of a party to be treated as discharged from further performance may arise in any one of three ways: the other party to the contract (a) may renounce its liabilities under it; (b) may by its own act make it impossible to fulfil them, (c) may fail to perform what it has promised. Of these forms of breach, the first two may take place not only in the course of performance but also while the contract is still wholly executory i.e., before either party is entitled to demand a performance by the other of the other's promise. In such a case the breach is usually termed an anticipatory breach. The last can only take place at or during the time for performance of the contract."

94. Thus, failure of a party to a contract in performing its obligation(s) thereunder could be considered a breach of contract for the purpose of bringing an action against it by the other party. In such an event, the other party can claim compensation or damages, or/ and, in certain cases, obtain specific performance.

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77 See U. N. Mitra's Law of Limitation and Prescription, Sixteenth Edition, Volume 1, at page 1063, published by LexisNexis.

78 See Footnote 86

79 See Footnote 87

80 P. Ramanatha Aiyar's Advanced Law Lexicon, 4th Edition at page 596

95. The phrase 'compensation for breach of contract', as occurring in Article 55 of the Schedule to the 1963 Act, would comprehend also a claim for money due under a contract. 'Compensation' is a general term comprising any payment which a party would be entitled to claim on account of any loss or damage arising from a breach of a contract, and the expression has not been limited only to a claim for unliquidated damages. The expression is wide enough to include a claim for payment of a certain sum.[81]

96. In **Mahomed Ghasita v. Siraj-ud-Din and others**,[82] the plaintiff was to supply Italian marble and other stone required for flooring and was also to do all the work necessary for constructing the floor. The plaintiff sued for the balance of the money due to him based on this contract and the plaint made no mention of the price of the materials as distinct from the price of the work. The matter came before a Full Bench of the then Lahore High Court. Before the Full Bench the question was, what Article of the Limitation Act, 1908 is applicable to the suit. Sir Shadi Lal C.J., as His Lordship then was, speaking for the Bench held:

> "The action brought by the plaintiff was for the recovery of the balance of the money due to him on the strength of the contract described above; and the question for consideration is what article of the Limitation Act governs the claim. Our attention has been invited, in the first instance, to article 52,[83] which prescribes a period of three years (enlarged to six years by the Punjab Loans Limitation Act of 1904) for the recovery of the price of goods sold and delivered to the defendant; and also to article 56,[84] which lays down a period of three years for a suit to recover the price of work done by the plaintiff for

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81 See U. N. Mitra's Law of Limitation and Prescription, Sixteenth Edition, Volume 2, at pages 1342 & 1343, published by LexisNexis.

82 AIR 1922 Lah 198 (FB) : ILR (1921) 2 Lah 376 (FB) : 1921 SCC OnLine Lah 303

83 **First Schedule of Limitation Act, 1908**

Article	Description of Suit	Period of Limitation	Time from which Period begins to run
52	For the price of goods sold and delivered, where no fixed period of credit is agreed upon.	Three years	The date of the delivery of the goods.

84 **First Schedule of Limitation Act, 1908**

the defendant. Now, as stated above, the plaintiff supplied not only the materials, but also the labour, and it is clear that neither of the aforesaid articles governs the suit in its entirety. It is, however, urged that the action comprises two claims, one for the price of the material supplied by the plaintiff, and the other relating to the price of the work done by him, and that these two claims should be dealt with separately, and that they are governed by article 52 and article 56, respectively. The rule of law is no doubt firmly established that a combination of several claims in one action does not deprive each claim of its specific character and description. The Code of Civil Procedure allows a plaintiff, in certain circumstances, to combine in one action two or more distinct and independent claims, and it is quite possible that one of the claims may be barred by limitation, and the other may be within time; though both of them arise out of one and the same cause of action. In a case of that description there is no reason why the court should not apply to each claim the rule of limitation specially applicable thereto. It is nowhere laid down that only one article should govern the whole of the suit, though it may consist of several independent claims, and that the suit should not be split up into its component parts for the purpose of the law of limitation.

The question, however, is whether the action as brought by the plaintiff can be treated as a combination of two distinct claims. Now, the plaint makes no mention of the price of the materials as distinct from the price of the work and contains no reference whatsoever to two claims. There is only one indivisible claim, and that is for the balance of the money due to the plaintiff on the basis of a contract, by which he was to be paid for everything supplied and

Article	Description of Suit	Period of Limitation	Time from which Period begins to run
56	For the price of work done by the plaintiff for the defendant at his request where no time has been fixed for payment.	Three years	When the work is done.

done by him in connection with the flooring of the building at a comprehensive rate. The claim, as laid in the plaint is an indivisible one; it cannot be split up into two portions. We must, therefore, hold that it falls neither under article 52, nor under article 56.

The learned advocate for the plaintiff contends that as neither of the above articles governs the claim, it should come within article 120.[85] The judgment in Radha Kishen v. Basant Lal, which is relied upon in support of this contention, no doubt, related to a suit for the recovery of a sum of money alleged to be due for the work performed and material supplied by the plaintiff to the defendant under a contract, and the learned judges held that neither article 52 nor article 56 was applicable to the entire claim. They then made the following observation –

> "There is no other articles specially applicable, and hence the only article which can be applied is article 120."

Now with all deference to the learned judges we are unable to hold that there is no other article governing a claim of that character. It seems that their attention was not drawn to article 115,[86] which governs every

85 **First Schedule of Limitation Act, 1908**

Article	Description of Suit	Period of Limitation	Time from which Period begins to run
120	Suit for which no period of limitation is provided elsewhere in this Schedule.	Six years	When the right to sue accrues.

86 **First Schedule of Limitation Act, 1908**

Article	Description of Suit	Period of Limitation	Time from which Period begins to run
115	For compensation for the breach of any contract, express or implied, not in writing registered and not herein specially provided for.	Three years	When the contract is broken, or (where there are successive breaches) when the breach in in respect of which the suit is Instituted occurs, or (where the breach is continuing) when it ceases.

suit for compensation for the breach of a contract not in writing registered and not specially provided for in the Limitation Act. It is beyond doubt that this article is a general provision applying to all actions *ex contractu* not specially provided for otherwise; and the present claim certainly arises out of a contract entered into between the parties. The word 'compensation' in article 115 as well as in article 116[87] has the same meaning as it has in section 73[88] of the Indian Contract Act and denotes a sum of money payable to a person on account of the loss or damage caused to him by the breach of a contract. It has been held, and we consider rightly, that a suit to recover a specified sum of money on a contract is a suit for compensation within articles 115 and 116 --- *vide* Nobocoomar Mookhopadhaya v. Siru Mullick[89] and Husain Ali Khan v. Hajiz Ali Khan.[90]

We are accordingly of opinion that the present claim must be regarded as one for compensation for the breach of a contract, and that there is no special provision in the

87 **First Schedule of Limitation Act, 1908**

Article	Description of Suit	Period of Limitation	Time from which Period begins to run
116	For compensation for the breach of a contract in writing registered.	Six years	When the period of limitation would begin to run against a suit brought on a similar contract not registered.

88 **The Indian Contract Act, 1872.**

Section 73. Compensation for loss or damage caused by breach of contract.-- When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, would be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract.---When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

Explanation.-- In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account

89 (1890) ILR 6 Cal 94

90 (1881) ILR 3 All 600 (FB)

> Act which governs the claim. It must, therefore, come under the general provision contained in article 115, which governs every action arising out of contract, not otherwise specially provided for."
>
> (Emphasis supplied)

97. In **Dhapia v. Dalla**[91] before a Full Bench of the Allahabad High Court the question was, what Article of the First Schedule to the 1908 Act would apply to a suit for recovery of a specified sum under a contract. In that suit, the plaintiff had made defendant(s) partner to one half of the fishery rights in the tank arising from a *Theka*, on the condition that they would pay him half the *Theka* money. The allegations made in the plaint showed that the defendant(s) had already worked out the *Theka* in respect of their share in it. As that suit was not filed within three years from the date of breach, it was dismissed by the trial court as barred by limitation by applying Article 115[92] of the First Schedule to the 1908 Act. The plaintiff preferred appeal, which was allowed on the finding that Article 120[93] of the First Schedule to the 1908 Act applied, whereunder the limitation was six years. When the matter travelled to the High Court, an argument was raised that neither Article 115 nor Article 120 could apply, rather Article 113[94] would apply. It was contended before the High Court that Article 113 should apply as the claim is nothing but for specific performance. Rejecting this submission and holding that Article 115 of the First Schedule to 1908 Act would apply, the Full Bench held:

> "8. In our opinion there is no force in this argument. It is true that there was a contract between the parties inasmuch as the plaintiff gave to the defendants one half of the fishery

91 1969 All LJ 718 : AIR 1970 All 206 : 1969 SCC OnLine All 79

92 See Footnote 86

93 See Footnote 85

94 **First Schedule of Limitation Act, 1908**

Article	Description of Suit	Period of Limitation	Time from which Period begins to run
113	For specific performance of contract	Three years	The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused.

rights in the tank, on the condition that they would pay him half the *theka* money. The allegations made in the plaint show that the defendants had already worked out the *theka* in respect of their share in it. All that remained to be done was to pay the proportionate *theka* money to the plaintiff. In such circumstances no suit for specific performance of contract could be filed: only a suit to enforce the agreement so far as it related to the payment of the proportionate *theka* money could be, and has been filed.

9. The relevant portion of section 12 of the Specific Relief Act (Act 1 of 1877) reads as follows:

> "… The specific performance of any contract may in the discretion of the court be enforced—
>
> (a) When the act agreed to be done is in the performance, wholly or partly, of a trust;
>
> (b) When there exists no standard for ascertaining the actual damages caused by the non-performance of the act agreed to be done;
>
> (c) When the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief, or
>
> (d) When it is probable that pecuniary compensation cannot be got for the non- performance of the act agreed to be done……"

10. A suit for the recovery of a specified sum under a contract cannot be said to be a suit of the nature where pecuniary compensation would not afford adequate relief. We are, therefore, of the opinion that the suit out of which this civil revision arises cannot be said to be a suit for the specific performance of a contract and will not be governed by Article 113 of the First Schedule to the Indian Limitation Act, 1908

xxxxx xxxxx

13. We now proceed to consider why Article 115 of the First Schedule to the Limitation Act should apply to the facts of the present case. Article 115 applies when there is a breach of contract, and suit is for compensation for the loss suffered by the innocent party. A breach of contract 'occurs where a party repudiates or fails to perform one or more of the obligations imposed upon him by the contract': (*vide* Cheshire and Fifoot, p 484). 'If one of two parties to a contract breaks the obligation which the contract imposes, a new obligation will in every case arise – a right of action conferred upon the party injured by the breach' (*vide* Anson's Law of Contract, p 412). Admittedly, in the present case, there was a contract and according to the plaintiff and the findings of the court a breach of contract had occurred inasmuch as the defendants failed to pay the stipulated amount upon the date fixed under the contract.

14. Difficulty can, however, be caused by the word 'compensation' used in Article 115. It can be argued that the words compensation for breach of contract point rather to a claim for unliquidated damages than to the payment of a certain sum, and, therefore, where the suit is for the recovery of a specified sum, and not for the determination of unliquidated damages, this article should not apply. In our opinion this contention would be wholly untenable because it was not accepted by this court in the Full Bench case of *Hussain Ali Khan versus Hafiz Ali Khan*[95] and by the Privy Council in the case of *Tricomdas Coovarji Bhoja versus Sri Gopinath Jiu Thakur*.[96] In the case of Husain Ali Khan Article 116 of Schedule II of the Limitation Act (Act XV of 1877) was the subject of interpretation. Articles 115 and 116 of Schedule II of Act XV of 1877 have been reproduced verbatim in the Indian Limitation Act, 1908. Article 115 deals with the breach of contracts not in writing and registered while Article 116 provided for breach of contracts in writing and registered.

95 I.L.R. 3 All 600

96 AIR 1916 PC 182

It is, therefore, obvious, that the meaning which has to be given to the words 'compensation for breach of contract' occurring in both the Articles will have to be the same.

xxx xxx xxx

16. In the case of *Tricomdas Cooverji Bhoja* the argument that the words 'compensation for breach of a contract' point rather to a claim of unliquidated damages than to the claim of payment of certain sum was not accepted because the word compensation has been used in the Indian Contract Act in a very wide sense.

17. The relevant portion of section 73 of the Indian Contract Act reads as follows:

> '73. When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.
>
> Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach……
>
> Illustrations
>
> ……..
>
> (n) A contracts to pay a sum of money to B on a day specified. A does not pay the money on that day; B, in consequence of not receiving the money on that day is unable to pay his debts, and is totally ruined. A is not liable to make good to B anything except the principal sum he contracted to pay, together with interest up to the day of payment.'

18. It is, therefore, clear that the word compensation has been used, in section 73 of the Indian Contract Act in a very wide sense and the present case would be covered by it.

> 19. We see no reason why the words 'compensation for breach of contract' as used in Article 115 should be given a meaning different from the same words as used in Article 116. Article 115 being a residuary Article for suits based on breach of contract, it is obvious that the suit out of which this revision arises would be governed by the said Article."
>
> (Emphasis supplied)

98. On a consideration of the aforesaid decisions as well as the provisions of Section 73 of the Contract Act and Article 55 of the Schedule to the 1963 Act, we are of the view that even a suit for recovery of a specified amount, based on a contract, is a suit for compensation, and if the suit is a consequence of defendant breaching the contract or not fulfilling its obligation(s) thereunder, the limitation for institution of such a suit would be covered by Article 55 of the Schedule to the 1963 Act, provided the suit is not covered by any other Article specially providing for it.

99. In the instant case, there is no dispute that the claim is based on a contract. The finding of the Arbitral Tribunal in paragraph 13.13 (i)[97] of the award is that the appellant(s) herein had failed to undertake the performance guarantee test, despite request of the claimant, within the period specified therefor. The final payment of the bill(s) / invoice(s) was dependent on issuance of certificate(s) including one relating to successful completion of the performance guarantee test (PG Test). Further, the contract provided that if the performance guarantee is not undertaken by the purchaser (appellant(s) herein), it could be deemed that the supplier (claimant -R-1) had fulfilled its obligation of providing a guaranteed performance of the project under the contract. In these circumstances, when, despite request of the contractor /supplier, the employer/ purchaser failed to undertake the PG Test, the Arbitral Tribunal justifiably concluded that even though the supplier (claimant) had fulfilled its obligations under the contract, the purchaser (appellant(s) herein) had failed in fulfilling its obligation of making payment of the outstanding principal amount to the claimant, which had become due and payable under the contract. In our view, therefore, the claim being one for 'compensation' (which

97 Extracted in paragraph 88 (16) of this judgment.

term includes a specified outstanding amount), based on breach of a contract, the limitation for the claim would fall within the ambit of Article 55 of the Schedule to the 1963 Act unless demonstrated that the claim is specially covered by any other Article of the Schedule.

100. In **Geo Miller (supra)**[98] a three-Judge Bench of this Court held that in a commercial dispute, though mere failure to pay may not give rise to a cause of action, once the applicant has asserted their claim and the respondent fails to respond to such claim, such failure will be treated as a denial of the applicant's claim giving rise to a dispute and, therefore, a cause of action for reference to arbitration would come into existence. It was also observed that it would not lie in the mouth of the claimant to plead that it waited to refer the dispute to arbitration because it was making representations and sending reminders to the respondent to settle the matter.

101. In **Major (Retd.) Inder Singh Rekhi v. Delhi Development Authority**,[99] in the context of commencement of the period of limitation for making a reference application under Section 20 of the erstwhile Arbitration Act, 1940, it was held by this Court that to be entitled to have an order of reference under Section 20, it is necessary that there should be an arbitration agreement and secondly, differences must arise to which the agreement applied. Once there is an assertion of claim by the appellant and silence as well as refusal in respect of the same by the respondent, a dispute would arise regarding non-payment of the alleged dues. The Court thereafter went on to observe:

> "4. ……. The High Court proceeded on the basis that the work was completed in 1980 and therefore, the appellant became entitled to the payment from that date, and the cause of action under article 137 arose from that date. But in order to be entitled to ask for the reference under section 20 of the Act there must not only be an entitlement to money but there must be a difference, or dispute must arise. It is true that on completion of the work a right to get payment would normally arise but where the final bills as in this case have not been prepared as appears from

98 See paragraph 29 of the judgment in Geo Miller (supra)

99 (1988) 2 SCC 338

> the record and when the assertion of the claim was made on 28.2.1983 and there was non- payment, the cause of action arose from that date, that is to say, 28.2.1983. It is also true that a party cannot postpone the approval of cause of action by writing reminders or sending reminders but where the bill had not been finally prepared, the claim made by a claimant is the accrual of the cause of action. A dispute arises where there is a claim and a denial and repudiation of the claim. The existence of dispute is essential for appointment of an arbitrator under Section 8 or reference under section 20 of the Act. There should be dispute and there can only be a dispute when a claim is asserted by one party and denied by the other on whatever grounds. Mere failure or inaction to pay does not lead to the inference of the existence of dispute. Dispute entails a positive element and assertion of denying, not merely inaction to accede to a claim or a request. Whether in a particular case a dispute has arisen or not has to be found out from the facts and circumstances of the case."

102. Interpreting the decision of this Court in **Inder Singh Rekhi (supra)**, in **B & TG AG (supra)** it was, *inter alia*, held that three principles of law are discernible from the aforesaid decision: (1) ordinarily, on the completion of the work, the right to receive the payment begins; (2) a dispute arises when there is a claim on one side and its denial/ repudiation by the other; and (3) a person cannot postpone the accrual of cause of action by repeatedly writing letters, or sending reminders. In other words, bilateral discussions for an indefinite period would not save the situation so far as the accrual of cause of action and the right to apply for appointment of arbitrator is concerned.

103. In the case in hand, the award reveals that in respect of payment of Claimant's invoices, the Purchase Orders provided that 65% of the Order Price was to be paid on pro rata basis along with 100% taxes and duties after receipt of material at site, within 25 days of submission of Invoice/ request for payment, and other documents.[100] The award recites that there is no indication in the Purchase Orders as to what

100 Paragraph 13.08 (b) of the Award

'other documents' were required.[101] Not only that, payment, including balance payment, was dependent on issuance of: (i) certificate on completion of punch points signed by parties; (ii) take over certificate of equipment (to be issued by the Purchaser); and (iii) certificate of completion of performance test of equipment (to be issued by the Purchaser).[102] But none of these certificates was issued.[103] In these circumstances, the Arbitral Tribunal had to consider various facts and circumstances to come to a definite conclusion that the work was completed on 21 September 2015. In holding so, Tribunal relied on: (a) an e-mail sent by the claimant on 21 September 2015 showing its readiness to a performance guarantee test; and (b) the fact that there was no evidence to suggest that the certificates on completion, as ought to have been issued, should not have been issued on or before 21 September 2015.[104] The Tribunal also took note of the terms and conditions of the contract which were to the effect that the performance guarantee test can be deemed satisfactory if, despite request, it is not carried out within 180 days of the issue of the taking over certificate. The Tribunal noticed that *vide* certificate dated 2 March 2017 the appellant(s) admitted that unit was commissioned in May 2015 and there was a request of the claimant dated 21 September 2015 to undertake performance guarantee test.[105] Taking all of this into account, the Tribunal held that the "deemed achievement of supplier's liability in respect to performance guarantee", pursuant to clause 10.5 of Annexure A of the Erection Purchase Order, became effective on 19 March 2016.[106]

104. From the discussion thus far, following dates emerge which, in our view, would be relevant for determining the start point of limitation for the claim:

    (a) 21 September 2015 i.e., the deemed date of completion of the supply/ work undertaken by the claimant under the Purchase Orders/ contract; and

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101 Paragraph 13.08 (c) of the Award

102 Paragraph 7.32 of the Award

103 Paragraph 13.13 (d) of the Award

104 Paragraph 13.13 (h) of the Award.

105 See Paragraph 88 (16) above including paragraph 13.13 (f) of the Award.

106 Paragraph 13.13 (i) of the Award.

(b) 19 March 2016 i.e., the deemed date by which the supplier (Claimant) had fulfilled its liability under the contract relating to guaranteed performance of the Unit concerned.

105. Now, we shall consider whether Articles 14 and 18 of the Schedule to the 1963 Act were applicable or not. Article 14 applies where the suit is for the price of the goods sold and delivered, and there is no fixed period of credit agreed upon. Here, there is an indivisible claim in respect of the outstanding principal amount for the goods supplied and the work done. Moreover, the payment(s) under the supply purchase order were to be on pro rata basis, and full payment for the supplies was dependent on supporting documents, including certificates, to be provided by the purchaser, which were not provided. Thus, when full payment(s) under the supply/erection purchase order(s) were dependent on certificates relating to completion/ commissioning /guaranteed performance etc., the claimant waited till successful completion / commissioning / guaranteed performance of the project to file a composite claim for the balance amount payable under both the purchase orders. In our view, therefore, Article 14 is not applicable to the claim as framed.

106. Insofar as Article 18 is concerned, it is to apply where the suit is for the price of the work done by the plaintiff for the defendant at his request, and where no time has been fixed for payment. In the instant case, there is an indivisible claim for the outstanding amount in respect of goods supplied and the work done. As already noticed above, the payment(s) under the contract were to be made on pro rata basis, dependent on work done and certificates issued, which, as per the finding in the award, were not issued. Hence, the claimant was entitled to make a composite claim for the goods supplied and the work done after the project was successfully complete i.e., when the Unit was commissioned followed by guaranteed performance. Because it is only then, when the outstanding amount, as per the Bills / Invoices raised, became due and payable to the claimant in terms of the contract. Thus, in our view, Article 18 would also not apply.

107. As it is not demonstrated that any other Article of the Schedule specially providing for the claim, as was made by R-1, was applicable, in our view, Article 55 of the Schedule was applicable to the claim, *inter alia,* for the following reasons:

(a) The claim was for compensation (in as much as the term 'compensation' includes a specified amount payable under a contract[107]) in respect of the goods supplied and the work done under a contract; and

(b) The claim was based on a breach of the contractual obligation as, according to the findings returned by the Arbitral Tribunal, the respondents to the claim (appellant(s) herein) had failed to fulfil their obligation(s) of making payment of the outstanding principal amount payable under the contract despite raising of bills / invoices by the claimant.

Starting Point of Limitation for the Claim

108. Having determined that limitation for the claim would be governed by Article 55 of the Schedule to the 1963 Act, we shall now ascertain the date from which the limitation period is to be counted.

109. Under Article 55, the limitation period begins to run when the contract is broken or where there are successive breaches, when the breach in respect of which the suit is instituted occurs, or where the breach is continuing, when it ceases.

110. In the case in hand, it is nobody's case that either party repudiated the contract. Further, the claim is not in respect of non-payment of any specific bill or invoice during execution of the contract. Rather, it is for the outstanding principal amount due to the claimant on discharge of his obligations under the contract. No doubt, list of unpaid bills / invoices was placed on record of the arbitral proceedings to demonstrate that bills / invoices were raised / issued, but the same was by way of evidence to support the claim, which was for the entire outstanding principal amount payable to the claimant on discharge of its obligations under the contract. Thus, simply put, the cause of action for the claim in question is appellant(s)' failure to make payment of the outstanding principal amount to the claimant despite discharge of contractual obligations by it.

111. At this stage, we would like to put on record that nothing was brought to our notice that there was any fixed date, or period of credit, for payment of the balance amount. In the above circumstances, in our view, the starting point of limitation should be the date when

107 See our discussion in paragraphs 96 to 98 of this judgment

the claimant had fulfilled all its obligations under the contract and was entitled for release of the outstanding amount payable under the contract.

112. As per the contract, if, after takeover, the purchaser (appellant(s) herein) fails to undertake the performance guarantee test, within 180 days from the date of request for it by the supplier (i.e., claimant), it is to be deemed that the supplier has fulfilled its liability in respect of the guaranteed performance. Apparently, passing the performance guarantee test was last of the supplier's (claimant's) obligations, whereafter the supplier was entitled for release of the balance amount. The Tribunal has found: (a) that as per certificate dated 2 March 2017, the commissioning took place in May 2015; (b) at that time there were certain technical issues, which were resolved later; (c) on 21 September 2015, claimant sent request to the appellant(s) to undertake performance guarantee test, but there was no response to the request; and (d) the period of 180 days, counted from 21 September 2015, expired on 19 March 2016. In the light of the above findings, the Tribunal concluded that commissioning took place in the month of May 2015; technical issues were resolved by 21 September 2015; and performance guarantee period expired on 19 March 2016.

113. Based on the above, while bearing in mind that final payment of the principal outstanding amount was dependent on meeting the requirement of performance guarantee, in our view, the cause of action for the claim, as made, matured on expiry of that stipulated period of 180 days within which, despite request, the appellant(s) (i.e., purchaser) failed to undertake the performance guarantee test. Thus, even though there might be several bills/ invoices raised/ issued by the claimant during execution of the contract, the claim of the claimant for the outstanding principal amount matured on expiry of 180 days from the date of the notice given by the claimant to the appellant(s) (i.e., respondents to the claim) to undertake the performance guarantee test. We, therefore, conclude that limitation for the claim started to run from 19 March 2016.

114. At this stage, we may notice, only to reject, an alternative submission made on behalf of the appellant, which is, that if Article 55 was applicable, the breach of the contract occurred when the claimant failed to complete the project by 31 March 2014, as promised, therefore, the period of limitation should be counted from that date.

This argument, in our view, is not sustainable, because time was not the essence of the contract in as much as there was a clause for liquidated damages for delay in completion (See Clause 13 of Annexure A of the Supply Purchase Order as extracted in paragraph 7.32 of the award). Moreover, there is no material on record to indicate that the contract was repudiated by the appellant on any date for non-completion of the project by the date stipulated. Rather, the materials on record, as recited in the award, indicate that parties continued to engage with each other and accepted performance of contractual obligations even beyond the stipulated date. Further, there is a clear finding in the award that the claimant was entitled to extension of 539 days. For the above reasons, we reject the alternative submission made on behalf of the appellant(s).

Limitation Extended by Acknowledgement dated 19.04.2018 under Section 18 of the 1963 Act

115. As the limitation period of three years prescribed by Article 55, if counted from 19 March 2016, expired before the date of commencement of the arbitral proceeding (i.e., 2 May 2019), we will have to consider whether, by virtue of acknowledgment, if any, the claimant was entitled to extension of the period of limitation.

116. Section 18[108] of the 1963 Act deals with the effect of acknowledgement in writing. Sub-section (1) thereof provides that where, before the expiration of the prescribed period for a suit or application in respect of any right, an acknowledgement of liability in respect of such right has been made in writing signed by the party against whom such right is claimed, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed. The Explanation to this section provides that an acknowledgment may be sufficient though it omits to specify the exact nature of the right or avers that the time for payment has not yet come or is accompanied by a refusal to pay, or is coupled with a claim to set off, or is addressed to a person other than a person entitled to the right.

117. In **Khan Bahadur Shapoor Fredom Mazda v. Durga Prasad Chamaria and others**[109] while dealing with Section 19 of the 1908 Act, which is *pari materia* Section 18 of the 1963 Act, this Court held

108 See Footnote 73

109 [1962] 1 SCR 140 : AIR 1961 SC 1236

that for a valid acknowledgement, under the provision, the essential requirements are: (a) it must be made before the relevant period of limitation has expired; (b) it must be in regard to the liability in respect of the right in question; and (c) it must be made in writing and must be signed by the party against whom such right is claimed. In paragraph 6 of the judgment, it was observed:

> "6. ….. The statement on which a plea of acknowledgement is based must relate to a present subsisting liability though the exact nature or the specific character of the said liability may not be indicated in words. Words used in the acknowledgment must, however, indicate the existence of jural relationship between the parties such as that of debtor and creditor, and it must appear that the statement is made with the intention to admit such jural relationship. Such intention can be inferred by implication from the nature of the admission, and need not be expressed in words. If the statement is fairly clear then the intention to admit jural relationship may be implied from it. The admission in question need not be express but must be made in circumstances and in words from which the court can reasonably infer that the person making the admission intended to refer to a subsisting liability as at the date of the statement. In construing words used in the statements made in writing on which a plea of acknowledgment rests oral evidence has been expressly excluded but surrounding circumstances can always be considered. Stated generally courts lean in favor of a liberal construction of such statements though it does not mean that where no admission is made one should be inferred, or where a statement was made clearly without intending to admit the existence of jural relationship such intention could be fastened on the maker of the statement by an involved or far-fetched process of reasoning……
>
> 7. …… The effect of the words used in a particular document must inevitably depend upon the context in which the words are used and would always be conditioned by the tenor of the said document……."
>
> (Emphasis supplied)

118. In **J.C. Budhraja v. Chairman Orissa Mining Corporation Ltd. and Others**,[110] following the decision in **Khan Bahadur Shapoor (supra)**, a three-Judge Bench of this Court held:

> "21. It is now well settled that a writing to be an acknowledgement of liability must involve an admission of a subsisting jural relationship between the parties and a conscious affirmation of an intention of continuing such relationship in regard to an existing liability. The admission need not be in regard to any precise amount nor by expressed words. If a defendant writes to the plaintiff requesting him to send his claim for verification and payment, it amounts to an acknowledgment. But if the defendant merely says, without admitting liability, it would like to examine the claim or the accounts, it may not amount to acknowledgment. In other words, a writing, to be treated as an acknowledgement of liability should consciously admit his liability to pay or admit his intention to pay the debt. Let us illustrate. If a creditor sends a demand notice demanding payment of Rs.1,00,000 due under a promissory note executed by the debtor and the debtor sends a reply stating that he would pay the amount due, without mentioning the amount, it will still be an acknowledgment of liability. If a writing is relied on as an acknowledgement for extending the period of limitation in respect of the amount or right claimed in the suit, the acknowledgement should necessarily be in respect of the subject matter of the suit. If a person executes a work and issues a demand letter making a claim for the amount due as per the final bill and the defendant agrees to verify the bill and pay the amount, the acknowledgement will save limitation for a suit for recovery of only such bill amount, but will not extend the limitation in regard to any fresh or additional claim for damages made in the suit, which was not a part of the bill or the demand letter. ..... What can be acknowledged is a present subsisting liability. An

110 [2008] 1 SCR 821 : (2008) 2 SCC 444

> acknowledgement made with reference to a liability, cannot extend limitation for a time-barred liability or a claim that was not made at the time of acknowledgement or some other liability relating to other transactions. Any admission of jural relationship in regard to the ascertained sum due or a pending claim, cannot be an acknowledgment for a new additional claim for damages.
>
> (Emphasis supplied)

119. In the instant case, as found above, the limitation period started to run from 19 March 2016. Within three years therefrom, in the minutes of meeting dated 19 April 2018[111] there was a clear acknowledgement that the amount claimed by Enexio (as is there in the claim) is the balance amount payable, though subject to debit, by way of set off, against various claims made by the appellant(s) herein upon the claimant. In our view, such an acknowledgment is sufficient to extend the limitation period as it admits the existing liability of the appellant(s) *qua* the balance amount payable to the claimant under the contract. Benefit of such an acknowledgement would not be lost merely because a set off is claimed, inasmuch as clause (a) of the Explanation to Section 18, *inter alia*, provides that an acknowledgement for the purposes of this Section may be sufficient though it is accompanied by a refusal to pay, or is coupled with a claim to set off. This would imply that, subject to fulfilment of other conditions of Section 18, once the defendant acknowledges that he owes a certain sum to the plaintiff there would be sufficient acknowledgment within the meaning of Section 18, even though he states that he is entitled to set off against this sum another sum which the plaintiff owes him. Thus, in our view, the minutes of meeting dated 19 April 2018, though claims a set off, is a valid acknowledgement of the existing liability within the ambit of Section 18 of the 1963 Act and it extends the period of limitation for a period of 3 years from the date it was made. In consequence, the claim of Enexio, made on 2 May 2019, was well within the period of limitation. Sub-issue (b) is decided in the aforesaid terms.

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111 Minutes are quoted in paragraph 7 of this judgment

APPELLANT(S) COUNTERCLAIM IN RESPECT OF COST OF REPAIR/ REPLACEMENT OF GEAR BOX AND FAN MODULES BARRED BY TIME

120. Now, we shall consider whether the counterclaim was barred by limitation. Before that, we must understand the true nature of a counterclaim. A counterclaim is a claim made by a defendant in a suit against the plaintiff. It is a claim, independent of and separable from the plaintiff's claim, which can be enforced by a cross action. Counterclaim preferred by the defendant in a suit is a cross suit and even if the suit is dismissed, counterclaim shall remain alive for adjudication. The purpose of the scheme relating to counterclaim is to avoid multiplicity of proceedings.[112]

121. In **Afcons Gunanusa JV (supra)**, after considering a plethora of precedents and authoritative texts, this Court summarized the legal principles relating to counterclaims, in the context of arbitral proceedings, as under:

> "168. On our analysis of the statutory framework of the Arbitration Act and the CPC, related academic discourse and judicial pronouncements, the following conclusions emerge:
>
> (i) Claims and counter-claims are independent and distinct proceedings;
>
> (ii) A counter-claim is not a defense to a claim and its outcome is not contingent on the outcome of the claim;
>
> (iii) Counter-claims are independent claims which could have been raised in separate proceedings but are permitted to be raised in the same proceeding as a claim to avoid a multiplicity of proceedings; and
>
> (iv) the dismissal of proceedings in relation to the original claim does not affect the proceedings in relation to the counter-claim."

112 Rajni Rani v. Khairati Lal, (2015) 2 SCC 682, paragraph 9.6.

122. Section 23 (2A)[113] of the 1996 Act gives respondent to a claim a right to submit a counterclaim or plead a set off, which shall be adjudicated upon by the arbitral tribunal, if such counterclaim or set off falls within the scope of the arbitration agreement. Section 43 (1)[114]of the 1996 Act provides that the 1963 Act shall apply to arbitrations as it applies to proceedings in court. Section 3(2)(b)[115] of the 1963 Act provides that any claim by way of set off or a counterclaim, shall be treated as a separate suit and shall be deemed to have been instituted – (i) in the case of a set off, on the same date as the suit in which the set off is pleaded; (ii) in the case of a counterclaim, on the date on which the counterclaim is made in court. It is thus clear that a counterclaim is to be treated as a separate suit for the purposes of limitation and, to ascertain whether it is within limitation, the date of reckoning is the date when the counterclaim is filed and not when the claim/ suit is filed. At this stage, it be noted that Section 21 of the 1996 Act is not relevant for determining the date of institution of a counterclaim as it is for a claim. There is however one exception. Where the respondent against whom a claim is made, had also made a claim against the claimant and sought arbitration by serving a notice to the claimant but subsequently raises that claim as a counterclaim in the arbitration proceedings initiated by the claimant, instead of filing a separate application under Section 11 of the 1996 Act, the limitation for such counterclaim should be computed, as on the date of service of notice of such claim on the claimant and not on the date of filing of the counterclaim.[116]

123. In **Thomas Mathew v. KLDC Ltd.**[117] this Court, in the context of a claim referable to Article 55 of the Schedule to the 1963 Act, by relying on Section 3 (2)(b) of the 1963 Act, held that a

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113 **Section 23. Statement of claim and defence.—**
(1) .....
(2) .....
(2-A) The respondent, in support of his case, may also submit a counter-claim or plead set-off, which shall be adjudicated by the arbitral tribunal, if such counter-claim or set-off falls within the scope of the arbitration agreement.

114 See Footnote 64

115 See Footnote 66

116 See State of Goa v. Praveen Enterprises, (2012) 12 SCC 581, paragraph 20; and Voltas Ltd. v. Rolta India Ltd., (2014) 4 SCC 516.

117 (2018) 12 SCC 560, paragraph 9

counterclaim is required to be treated as a separate suit and the period of limitation would be three years from the date of accrual of the cause of action.

124. It is therefore well settled that a counterclaim is like a cross suit, or a separate suit, and the limitation of a counterclaim is to be counted from the date of accrual of the cause of action which it seeks to espouse. As a logical corollary thereof, it is quite possible that even though a suit or a claim is within the period of limitation, the counterclaim may well be barred by limitation, if the cause of action espoused therein accrued beyond the prescribed period of limitation.

125. In the instant case, the counterclaims were for: (a) liquidated damages for the delay in supply and erection; (b) reimbursement of customs duties; (c) cost of erection of horizontal and vertical exhaust duct through an external agency; (d) cost of repair/ replacement of Gear Box, due to alleged defective supply; and (e) cost of repair/ replacement of Fan Modules, due to alleged defective supply. Out of the above five counterclaims, three counterclaims, namely, (a), (b) and (c), were dealt by the Arbitral Tribunal on merits, as they stood recited in the minutes of meeting dated 19 April 2018. Whereas the remaining two, namely, (d) and (e), were treated as barred by limitation because in respect thereof there was no recital / material to show that they were subject matter of negotiation between the parties. The counterclaim (a) (i.e., relating to liquidated damages for the delay) was rejected because the Tribunal found the claimant entitled to extension of time as the ACC Unit project envisaged Hook-up / connection to the turbine generator flange which could took place only in February 2015 as turbine generator installation, which was being done by another contractor employed by OPG, got delayed.[118] The counterclaim (b) (i.e., reimbursement of customs duties) was rejected because, according to the Tribunal, as per the Supply Purchase Order, all Taxes, duties and levies were to be borne by the purchaser (appellant(s) herein).[119] Insofar as counterclaim (c) was concerned, it was allowed and the counterclaimant was allowed set off in respect thereof. The summary of how each of the counterclaims were dealt with, is found in paragraph 17 of the Award.

118 See paragraphs 13.13 (c) and 13.15 of the Award, extracted in 88 (10) and 88 (19) above.

119 Paragraph 14 of the Award.

126. We have, therefore, to consider whether the two counterclaims (d) and (e) were justifiably held time-barred or not. More particularly, because claimant's claim which arose out of same contract was found within limitation.

127. Since counterclaim is to be treated as a separate suit or a cross-suit, its limitation would have to be determined independent of the claim, based on the cause of action espoused therein. Therefore, we would have to determine as to when the right to seek for the counterclaims (d) and (e) accrued. In this context, while dealing with the previous issue i.e., regarding the claim being within limitation, we noticed a few dates which, in our view, would be helpful in determining the present issue. These dates are:

    (a) May 2015 - when ACC Unit got commissioned and was operating satisfactorily, as per certificate dated 2 March 2017 issued by OPG.

    (b) 21 September 2015 – deemed date of takeover of the project i.e., when all alleged defects were removed by the claimant, and a request was made by the claimant to the purchaser (appellant(s) herein) to undertake performance guarantee test.

    (c) 19 March 2016 – when the period of 180 days of guaranteed performance expired. This date is important because, as per the contract, if, within the aforesaid period, the performance guarantee test is not undertaken, despite request of the supplier, it is to be deemed that the supplier has discharged its liability of a guaranteed performance of 180 days.

128. The Tribunal takes 21 September 2015 as the start point of limitation for the counterclaim on the premise that it would be the date when the Takeover Certificate is deemed to have been issued. That is, the supplier had fulfilled its obligations. On basis thereof, the Tribunal found counterclaims (d) and (e) barred by time as the counterclaim was filed on 15 July 2019 i.e., more than three years later, and there existed no acknowledgement in respect thereof.

129. However, while dealing with the previous issue, we found 19 March 2016 as the start point of limitation for the claim because that is the date when 180 days period of guaranteed performance, which was part of supplier's liability, expired. Be that as it may, whether we count the limitation period from 21 September 2015 or 19 March

2016, the counterclaim which was filed on 15 July 2019 was beyond the prescribed period of three years inasmuch as its cause of action could not have arisen after 19 March 2016 because by 19 March 2016, the supplier / contractor had fulfilled its obligation of guaranteed performance for 180 days.

Minutes of meeting dated 19 April 2018 did not extend limitation of counterclaims (d) and (e)

130. In these circumstances, the question that falls for our consideration is whether the minutes of meeting dated 19 April 2018 extended the period of limitation for counterclaim(s)[120] (d) and (e) as it did for the claim as well as counterclaims (a) (b) and (c). The contention on behalf of the appellant(s) is that the claim and the counterclaim arose out of same contractual relationship, therefore, if the acknowledgment dated 19 April 2018 extends limitation of one part of the claim/ counterclaim, it would automatically extend limitation of the remaining part of the claim / counterclaim. Per contra, learned counsel for Enexio (R-1) contended that there could be multiple claims arising out of the same contract, if the acknowledgment extending limitation under Section 18 of 1963 Act relates to only few, limitation for the rest would not get extended. Thus, the Tribunal committed no such error which may warrant interference under Section 34 of the 1996 Act.

131. We have given our thoughtful consideration to the rival submissions. The minutes of meeting dated 19 April 2018 was drawn within three years of accrual of the cause of action for the claim, whether we count limitation from 19 March 2016 (as determined by us) or 21 September 2015 (as determined by the Tribunal). Therefore, the crucial question, which we must consider and decide, is whether those minutes could be considered as an acknowledgment of subsisting liability *qua* counterclaims (d) and (e).

132. The minutes[121] of meeting dated 19 April 2018 incorporates a table giving specific description of the items and their corresponding value on which parties, purportedly, admitted their respective liabilities. Interestingly, the balance amount payable to the contractor (Enexio - R-1) finds mention there and so does contractor's liability towards

120 For description of counterclaims (a) to (e), see paragraph 126 of this judgment.

121 Extracted in paragraph 7 of this judgment

liquidated damages, customs duty, dismantling – TG Building and ACC Duct fabrication, which have all been addressed on merits in the Award. But, there is no mention of items referable to counterclaims (d) and (e), which have been held time barred. Further, the minutes do not state that parties acknowledge, or are willing to settle, any other, or all their rights/ obligations, arising from, or under, the contract. Thus, the acknowledgment is specific and in respect of certain items only.

133. In **J.C. Budhraja (supra)** this Court held that a writing to be an acknowledgement of liability must involve an admission of a subsisting jural relationship between the parties and conscious affirmation of an intention of continuing such relationship regarding existing liability. The Court added that the admission need not be in respect of any precise amount nor by expressed words. However, it was clarified that any admission of jural relationship in regard to a certain sum due, or a pending claim, cannot be an acknowledgement for a new additional claim for damages.[122] That apart, in **J.C. Budhraja** (supra), this Court rejected an argument that if there was acknowledgment of any liability in regard to a contract, then one was at liberty to make any claim in regard to the contract. Relevant portion of the judgment is extracted below:

> "27. The appellant next contended, relying on Section 18 of the Limitation Act, that as there was acknowledgement of liability in regard to Contract no. 30/F-2 in the letter dated 28-10-1978, and the notice invoking arbitration was issued on 4-6-1980 within three years from 28-10-1978, he was at liberty to make any claim in regard to the contract before the arbitrator even though such claims had not been made earlier and all such claims have to be treated as being within the period of limitation. Such a contention cannot be countenanced. As noticed above, the cause of action arose on 14-4-1977. But for the acknowledgement on 28-10-1978, on the date of invoking arbitration 4-6-1980, the claims could have been barred by time as being beyond the period of limitation. The limitation is extended only in regard to the liability which was acknowledged in the letter

122 See paragraph 21 of J.C. Budhraja (supra) extracted in paragraph 119 of this judgment.

> dated 28-10-1978. It is not in dispute that either on 28-10-1978 or on 4-3-1980, the contractor had not made the fresh claims aggregating to Rs.67,64,488 and the question of such claims made in future for the first time on 27-6-1986, being acknowledged by OMC on 28-10-1998 did not arise."
>
> (Emphasis supplied)

134. On the question of extension of limitation, where only a part of the liability, or a specific amount, is acknowledged during the period of limitation, there are long-standing decisions of various High Courts upholding the same principle as is discernible from the decision in **J.C. Budhraja (supra)**. Some of these decisions are being noticed below.

135. In **Bans Gopal v. Mewa Ram**[123] in the context of applicability of Section 19 of the 1908 Act, which is *pari materia* Section 18 of the 1963 Act, the question before the Allahabad High Court was, whether a creditor could recover Rs.585 when acknowledgment was in respect of Rs.200 only. One of the arguments was that acknowledgment of a sum of Rs.200 cannot be taken as an acknowledgment of a sum of Rs.585. Accepting the argument, the Court held:

> "4. ….. It is true that if no definite sum had been mentioned and there had been an acknowledgement in general terms the amount of the debt would have been discovered from the evidence as mentioned in Explanation 1, Section 19 of the Limitation Act. In the present case, however, there is a definite acknowledgement of Rs.200 and if this is to be used to save limitation, it could be done only with respect to the sum acknowledged, and not with respect to any sum that may be proved to be due on that date."
>
> (Emphasis supplied)

136. In **Kali Das Chaudhuri v. Drapaudi Sundari Dassi**[124] for the purpose of seeking the benefit of extension of limitation, the letter sought to be relied by the plaintiff as an acknowledgement made by solicitor of the defendant stated thus:

123 AIR 1930 All 461 : 1929 SCC OnLine All 152

124 AIR 1918 Cal 294: 1917 SCC OnLIne Cal 23

> "Your client Babu Hari Prasad Saha was the *gomoshta* at Calcutta in the employ of the firm of Dwarka Nath Makhan Lal Saha, remunerated by a share of the profits, and being liable for a proportionate share of the losses. He was struck by paralysis in the Bengali year 1307, from which time he could not do active work. He, however, continued to be in Calcutta till 1311 when he left Calcutta and went away to his home at Urapara. Our clients have all along been ready and willing to have the accounts duly taken up to this time that your client retired from Calcutta. Your client as the managing *gomostha* has to make up and explain the accounts up to that time. Our clients will offer every facility in the matter of the adjustment of accounts. …… It is not the fact that your client retired on 27th June 1910. He ceased to do active work in 1307 and retired in 1311. Our clients have no recollection of any notice from Messrs Dutta and Guha. Our clients are ready to pay to your client whatever may be found due on an adjustment of the accounts up to 1311."

Interpreting the aforesaid letter, in the context of plaintiff's argument that it be treated as an acknowledgment of subsistence of relationship up to 27 June 1910, the Calcutta High Court held:

> "Now, as I read that letter, that contains three material statements: it contains a statement that plaintiff was *gomostha* of the defendants; the second statement is that he was employed up to 1311 (BS) (corresponding with 1904 - 1905], and no longer; and the third statement is that the defendants were willing and ready to pay to the plaintiff whatever might be found due to him on an adjustment of the accounts up to 1311. Now, what is the claim of the plaintiff in this case? He brought his suit in order to establish his right to have the accounts taken upon the basis that he was a partner, and that he was entitled to have the accounts taken down to June 1910. The defendants' solicitors wrote that he was not a partner and that he was not entitled to have the accounts taken up to 1910, but that he was only entitled to have the accounts up to 1311 (BS) (corresponding with 1904 –

> 1905). I cannot understand how that can be taken to be an acknowledgement of the right which the plaintiff was endeavoring to substantiate in his plaint. I can understand it being said and argued with considerable force that it was an acknowledgement of some part of the plaintiffs claim, inasmuch as his claim was to have the accounts taken up to June 1910, and inasmuch as the defendants admitted that he was entitled to have the accounts taken up to 1904 - 1905: to that extent it is an acknowledgment, but in my judgment it is not an acknowledgement of the right alleged by the plaintiff, namely, that he was entitled to have the accounts taking up to June 1910."
>
> (Emphasis supplied)

137. Having considered the judicial precedents on the subject, in our view, to extend the period of limitation with the aid of Section 18, the acknowledgment must involve an admission of a subsisting jural relationship between the parties and a conscious affirmation of an intention of continuing such relationship regarding an existing liability. Such intention can be gathered from the nature of the admission. In other words, the admission in question need not be express, or regarding a precise amount, but must be made in circumstances and in words from which the court can reasonably infer that the person making the admission intended to refer to a subsisting liability as on the date of the statement. However, where an acknowledgement is in respect of a specified sum of money or a specific right only, and not in general terms, it would extend the period of limitation only in respect thereof, and not of other claims which, though may have arisen out of same jural relationship, are not specified therein. In other words, where an acknowledgement of liability is made only with reference to a portion of the claim put forward by the plaintiff/ claimant, it would extend limitation only in respect of such portion, and not of the entire claim of the plaintiff.

138. Reverting to the case in hand, the minutes of meeting dated 19 April 2018 made no reference to the items referable to counterclaims (d) and (e). There is also no acknowledgment in general terms in regard to liabilities subsisting under the contract. Therefore, in our view, the said minutes could not be treated as an acknowledgment for the purpose of extending limitation of counterclaims (d) and

(e), which were not specified therein. In consequence, when counterclaims (d) and (e) were otherwise barred by limitation on the date of filing of counterclaim, the Tribunal was legally justified in rejecting them as barred by limitation. Sub-issue (c) is decided in the aforesaid terms.

REJECTION OF PRAYER TO DECLARE DEBIT NOTES INVALID DID NOT AFFECT ENEXIO'S CLAIM FOR THE OUTSTANDING PRINCIPAL AMOUNT.

139. We shall now consider whether rejection of Enexio's prayer to declare debit notes invalid, had adversely affected the claim for the outstanding principal amount in respect of the goods supplied/ work done under the contract. In this regard, at the outset, we must bear in mind that it is trite that limitation bars the remedy but does not extinguish the right, save in a case which is covered by Section 27 of the 1963 Act.[125] It is equally settled that in a suit or a claim, multiple reliefs may be claimed by virtue of Order II Rule 3 of the Code of Civil Procedure, 1908,[126] that is, the plaintiff may unite in the same suit several causes of action against the same defendant(s). The period of limitation is prescribed by the Schedule to the 1963 Act.[127] The Schedule to the 1963 Act is divided into three Divisions. The First Division, which deals with suits, is relevant for the purposes of this case inasmuch as by virtue of Section 43 (1) of the 1996 Act the provisions of the 1963 Act apply to arbitrations as they apply to proceedings in Court. The First Division of the Schedule comprises of ten (X) Parts. Each Part deals with suit(s) of a different nature. The period of limitation, including its start point, is dependent on its nature as well as event, if any, as specified in the Article(s) of the Schedule. Therefore, when CPC, in certain circumstances, permits combining in one action two or more distinct and independent claims, it is quite possible that one of the claims may be barred by limitation and the other may be within time.[128]

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125 Prem Singh & Ors v. Birbal & Ors., (2006) 5 SCC 353, paragraphs 11 and 12.

126 **Order II Rule 3, CPC.— Joinder of causes of action.—** (1) Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit.

(2) Where causes of action are united, the jurisdiction of the Court as regards the suit shall depend on the amount or value of the aggregate subject-matter at the date of instituting the suit.

127 See Section 2(j) of the Limitation Act, 1963.

128 See Mohamed Ghasita v. Siraj-ud-Din and Ors. (supra), extracted in paragraph 97 of this judgment.

140. In the instant case, as already held, the claim for compensation i.e., recovery of outstanding principal amount was covered by Article 55 of the Schedule and the start point of limitation was 19 March 2016; whereas for the relief of declaration, Article 58 was applicable. For which, the start point of limitation was the date when the debit note was communicated to Enexio i.e., the claimant. According to the arbitral tribunal, one debit note was issued on 24 August 2015, which was acknowledged by the claimant *vide* letter dated 28 August 2015, and the other was issued on 12 January 2016. Therefore, the period of limitation i.e., three years expired before 2 May 2019, that is, when request for arbitration was received by ICC Secretariat. In these circumstances, the relief for declaratory relief was held barred by limitation, and rightly so, by the arbitral tribunal.

141. Now, the question is whether rejection of declaratory relief impacted the relief for compensation. Answer to it, in our view, is obviously no. The reason is that the relief for compensation was not a consequential relief i.e., dependent on debit note(s) being declared invalid because issuance of debit note(s) was a unilateral act of the employer which on its own did not extinguish the right of the contractor. No doubt, where the relief sought is consequential to the declaration, and declaratory relief is found barred by time, the prayer for consequential relief will also fail.[129] But where declaration is just an optional relief i.e., on which the main relief is not dependent, rejection of it as barred by limitation would not extinguish the claim in respect of which substantive relief is sought. In the instant case, debit note was unilaterally issued by the employer of the contractor. It, therefore, did not bind the contractor. In such circumstances, it was open for the contractor to sue for its dues without seeking a declaration *qua* the debit notes. Consequently, rejection of the declaratory relief as barred by limitation, in our considered view, did not have a material bearing on Enexio's claim against the appellant(s) herein for the outstanding principal amount payable under the contract. And, further, that amount, as shown debited in the debit note(s), was not to be automatically adjusted against the principal outstanding amount payable to Enexio. In our view, while deciding the claim of Enexio, the arbitral tribunal was well within its remit to adjudicate upon the

129 See Padhiyar Prahladji Chenaji v. Maniben Jagmalbhai & Ors., (2022) 12 SCC 128, paragraph 17

issue whether such amount should be adjusted or not against the outstanding principal amount payable to Enexio. For the reasons aforesaid, there is no perversity in the award on this count. Sub-issue (d) is decided accordingly.

THE ARBITRAL TRIBUNAL DID NOT ADOPT DIFFERENT YARDSTICK / REASONING OF THE ARBITRAL TRIBUNAL IS NOT FLAWED OR PERVERSE

142. The next argument on behalf of the appellant(s) is that the arbitral tribunal adopted different yardstick for adjudicating the claim than what was adopted for the counterclaim; and the reasoning is completely flawed and perverse. By referring to paragraphs 16.03 (d)[130] and 16.04[131] of the award it was submitted:

    (a) If negotiations could extend limitation for the claim, it would extend limitation for the counterclaim as well, because both arise from same contractual relationship. Moreover, it is well settled that negotiations by themselves do not extend limitation as held by this Court in **Geo Miller (supra)** and **B & T AG (supra)**.

    (b) If the minutes of meeting dated 19 April 2018 could be relied on to hold that appellant(s) had admitted their liability *qua* the claim for the outstanding principal amount, it ought to have been relied also for upholding Enexio's liability *qua* liquidated damages for delay and customs duty.

143. At first blush, the above arguments appear attractive, but, when we test them by reading the award in its entirety, we find that the tribunal did not reject the counterclaims *qua* liquidated damages and custom duties as barred by limitation. Rather, rejected them on merit. Liquidated damages were denied because Enexio was entitled to 539 days extension for completion; and customs duties were found payable by the purchaser. The findings thereon are based on construction of the terms of the contract with reference to the conduct of the parties, therefore, it does not call for interference under Section 34 of the 1996 Act.

130 See paragraph 15 of this judgment wherein paragraph 16.03(d) of the award has been extracted.

131 See paragraph 16 of this judgment wherein paragraph 16.04 of the award has been extracted.

144. As far as extension of limitation by negotiation is concerned, a careful look at paragraph 16.03(d) of the arbitral award would indicate that there is a reference to two more aspects, 'apart from meaningful negotiations', to conclude that limitation for the claim was saved. These are: (a) the minutes of meeting dated 19 April 2018; and (b) the written offer of OPG (respondent(s) to the claim) dated 26 May 2018 to settle the matter. We have already found, while deciding sub-issues (b) and (c), that the minutes of meeting dated 19 April 2018 tantamounted to an acknowledgment under Section 18 of the 1963 Act *qua* the items mentioned therein. We also noticed that it carried no mention regarding those items on which counterclaims were based, and therefore, they were rejected as barred by limitation. In these circumstances, though paragraph 16.03(d) of the award gives the impression that limitation was extended because negotiations were ongoing in respect of items related to the claim, the limitation was extended by applying the principle of acknowledgment as enshrined in Section 18 of the 1963 Act on basis of two documents i.e., the minutes of meeting dated 19 April 2018; and the offer letter dated 26 May 2018. Importantly, the principle of extension of limitation by acknowledgement was applied in respect of only those claims regarding which a mention was there in the minutes of meeting dated 19 April 2018. In respect of claims regarding which there was no recital in the minutes, the tribunal observed that they were not part of the negotiations. Thus, though the term used in paragraph 16.03(d) of the award is 'negotiation(s)', the tribunal, by referring to minutes dated 19 April 2018 and settlement offer dated 26 May 2018, indicated the underlying legal principle / rationale behind its conclusion. We, therefore, conclude that though reasons recorded in the award at first blush appear insufficient, or a bit confusing, but, when those reasons are examined in the context of the documents placed and the arguments advanced, the underlying reasons, which form basis of the conclusion, are not only intelligible but sound. For the aforesaid reasons and in the light of the law expounded in paragraph 71.6 above, we reject the submission of the appellant(s)' counsel that the reasoning of the arbitral tribunal is flawed/perverse or that the award is vitiated by adopting different yardstick for adjudging the claim than what was adopted for the counterclaim. Even otherwise, the mistake, if any, committed by the arbitral tribunal in using the words 'ongoing negotiations' in place of acknowledgement is trivial does not go to the root of the matter as to have a material bearing

on the conclusion. Therefore, for this mistake alone, the award is not liable to be set aside.

145. The other submission on behalf of the appellant that the arbitral tribunal was obliged to accept the admission contained in the minutes of meeting dated 19 April 2018 *qua* liquidated damages and customs duties, because it relied on it for extending the limitation, is equally unacceptable. Reason being that acknowledgment is just a piece of evidence, like an admission. An admission can always be explained. Therefore, even if it is used for extending the limitation, it cannot be regarded as conclusive proof of either the claim or the counterclaim regarding which there is an acknowledgement. Because the Court or the Tribunal would have to decide the claim or the counterclaim, if within limitation, upon consideration of the entire evidence led before it. No doubt, in that process, the acknowledgement would also have to be considered as a piece of evidence. Thus, in our view, the tribunal was well within its jurisdiction in drawing a conclusion, based on consideration of the entire evidence, at variance with the recitals in the acknowledgement.

146. Otherwise also, as is clear from the award, the claimant had challenged the recital in the minutes i.e., regarding its liability for liquidated damages and customs duties, by claiming that it was economically coerced into making such admission. Circumstances, proven on record, indicated that (a) soon after the meeting dated 19 April 2018, the claimant had sent a denial of its liability; and (b) later, on 26 May 2018, the appellant(s) herein had made an offer of Rs.3 crores to Enexio towards full and final settlement of all its claim. In these circumstances, based on the evidence led by the parties, the tribunal was well within its remit to conclude that the claimant was not liable in respect of those items which formed part of the counterclaim. Such conclusion, which is based on proven circumstances, is a plausible view and cannot be termed perverse. Hence, it is not amenable to interference in a challenge under Section 34 of the 1996 Act. In our view, therefore, the learned Single Judge of the High Court erred in law while interfering with the arbitral award.

147. Before closing discussion on the issue, it would be necessary to address an alternative submission raised on behalf of the appellants. It was argued that the learned Single Judge and the Division Bench of the High Court, admittedly, were exercising jurisdiction under

Sections 34 and 37, respectively, of the 1996 Act. As, while exercising jurisdiction under Section 34, the Court does not sit in appeal over the award, it cannot substitute the reasoning in the award with its own. Likewise, the appellate court exercising power under Section 37 cannot have greater power than what a Court possesses under Section 34. Consequently, it was argued, the appellate court (i.e., the Division Bench of the High Court) exceeded its jurisdiction while providing its own reasons to support the conclusion in the award. It was also urged that in absence of proper reasons in the award, the only course available was to set aside the award with liberty to the parties to undertake fresh arbitration.

148. We have given due consideration to the above submission. In our view, a distinction would have to be drawn between an arbitral award where reasons are either lacking/unintelligible or perverse and an arbitral award where reasons are there but appear inadequate or insufficient.[132] In a case where reasons appear insufficient or inadequate, if, on a careful reading of the entire award, coupled with documents recited/ relied therein, the underlying reason, factual or legal, that forms the basis of the award, is discernible/ intelligible, and the same exhibits no perversity, the Court need not set aside the award while exercising powers under Section 34 or Section 37 of the 1996 Act, rather it may explain the existence of that underlying reason while dealing with a challenge laid to the award. In doing so, the Court does not supplant the reasons of the arbitral tribunal but only explains it for a better and clearer understanding of the award.

149. In the instant case, the appellate court took pains, and rightly so, to understand and explain the underlying reason on which the claim of Enexio was found within limitation. As noticed above, paragraph 16.03 (d) of the award contains the reason based on which the arbitral tribunal concluded that Enexio's claim was within limitation. However, in paragraph 16.03 (d), the arbitral tribunal failed to state, in so many words, that it was treating the minutes of meeting dated 19 April 2018 as an acknowledgment within the meaning of Section 18 of the 1963 Act. This omission on the part of the arbitral tribunal was trivial and did not travel to the root of the award, therefore, in our

132 See paragraphs 71.2 to 71.6 of this judgment.

view, the appellate court was well within its jurisdiction to explain the underlying legal principle which the arbitral tribunal had applied; and in doing so, it did not supplant the reasons provided in the award. In this view of the matter, the impugned order of the Division Bench does not suffer from any legal infirmity. Sub-issue (e) is decided in the aforesaid terms.

SUMMARY OF OUR CONCLUSIONS

150. In the light of the analysis above, we summarize our conclusions as follows:

(i) Though the ACC Unit /project was of OPG, Gita Power, as the holding company of OPG, had actively participated in the formation of the contract for the project. Not only did it place purchase order(s) on Enexio but made advance payment(s) thereunder to Enexio, which were subsequently affirmed by OPG. The two, therefore, not only acted as a single economic entity but as agents of each other. Hence, the arbitral tribunal was justified in holding that Gita Power was bound by the arbitration agreement and jointly and severally liable along with OPG to pay the awarded amount.

(ii) The claim of Enexio was an indivisible claim for compensation in lieu of goods supplied, and work done, based on breach of the contract, therefore limitation for the claim was governed by Article 55, and not by Articles 14, 18 and 113, of the Schedule to the 1963 Act.

(iii) The claimant's claim for the outstanding principal amount matured on 19 March 2016. Therefore, limitation started to run from that date. However, even if we count limitation from 21 September 2015 (as found by the Tribunal) it will have no material bearing on the award for the reason indicated below.

(iv) The limitation for the claim as well as counterclaim(s), other than those relating to cost of repair/replacement of gear boxes and fan modules, stood extended, under Section 18 of the 1963 Act, on the basis of acknowledgement made in the minutes of meeting dated 19 April 2018, and, therefore, those were within limitation as on the date of : (a) commencement of arbitration (i.e. 2 May 2019); and (b) the date of filing counterclaim (i.e. 15 July 2019) and were rightly considered on merit.

(v) The counterclaims *qua* cost of repair /replacement of gear boxes and fan modules were rightly held barred by time as in respect thereof there was no recital in the minutes of meeting dated 19 April 2018.

(vi) Rejection of prayer to declare debit notes invalid, on ground of limitation, had no adverse impact on the claimant's claim for compensation, which was well within the extended period of limitation.

151. Based on our conclusions above, we are of the view that there is no palpable error in the arbitral award as to be termed 'patently illegal' / 'perverse', or in conflict with public policy of India. Therefore, the Division Bench of the High Court was justified in setting aside the judgment and order of the Single Judge and restoring the arbitral award. Accordingly, the appeal(s) fail and are hereby dismissed. Parties to bear their own costs.

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

Result of the Case: Appeal dismissed.

†*Headnotes prepared by:* Nidhi Jain