

**Navratan Lal Sharma  
v.  
Radha Mohan Sharma & Ors.**  
(Civil Appeal No. 14328 of 2024)

12 December 2024

**[Pamidighantam Sri Narasimha\* and Manoj Misra, JJ.]**

**Issue for Consideration**

Issue arose as regards the right of a party to get the first appeal restored if compromise decree specifically does not give such liberty.

**Headnotes<sup>†</sup>**

**Code of Civil Procedure, 1908 – Ord.23 r.3 – Compromise of suit – Suit for declaration and injunction by the appellant – Dismissed by trial court – Appellant filed first appeal – During pendency, compromise reached between parties and in terms thereof, the High Court disposed the first appeal – However, failure of the respondent to comply with compromise terms – Application to restore the appeal filed by the appellant alleging fraud – High Court dismissed the same on the ground that parties not given liberty to restore the appeal while recording compromise – Correctness:**

**Held:** Explanation to Ord.23 r.3 clearly states that void and voidable agreements under the Contract Act shall not be deemed to be lawful – By alleging fraud in his recall application, the appellant is effectively impugning the legality of the compromise as proving the same would render the agreement voidable under the Contract Act – When the court disposes of a proceeding pursuant to a compromise u/Ord.23, r.3, it bears the duty to examine this issue and be satisfied that the agreement or compromise is lawful – Said issue can be agitated by way of a recall application even after the compromise decree has been passed – High Court dismissed the application solely on the ground that the order recording the compromise does not grant liberty to restore the appeal – This is not the correct approach, as it defeats the statutory right and remedy available to the appellant under the CPC – Only the court that entertains the petition of compromise can determine its legality,

---

\* Author

## Digital Supreme Court Reports

at the time of recording the compromise or when it is questioned by way of a recall application – No other remedy is available to the party who is aggrieved by the compromise decree as appeal or fresh suit not maintainable – High Court not correct in curtailing the statutory remedy available to the appellant – When there is a statutory remedy available to a litigant, no question of a court granting liberty to avail of such remedy – No occasion for the court to deny liberty to file for restoration and the consequent dismissal of the recall application by the impugned order on this ground alone does not arise – As a matter of public policy courts must not curtail statutorily provisioned remedial mechanisms available to parties – Compromise deed itself recognises the parties' right to approach the court to question its validity – Order of the High Court set aside – Matter remanded to High Court for deciding application for recall. [Paras 13-17]

### Case Law Cited

*Banwari Lal v. Chando Devi* [[1992 Supp. 3 SCR 524](#)] : (1993) 1 SCC 581; *Pushpa Devi v. Rajinder Singh* [[2006 Supp. 3 SCR 370](#)] : (2006) 5 SCC 566 – relied on.

*Bhanu Kumar Jain v. Archana Kumar* [[2004 Supp. 6 SCR 1104](#)] : (2005) 1 SCC 787; *Shiv Shakti Coop. Housing Society, Nagpur v. Swaraj Developers* [[2003\] 3 SCR 762](#)] : (2003) 6 SCC 659; *R. Rajanna v. S.R. Venkataswamy* [[2014\] 14 SCR 535](#)] : (2014) 15 SCC 471; *Triloki Nath Singh v. Anirudh Singh* [[2020\] 4 SCR 650](#)] : (2020) 6 SCC 629; *R. Janakiammal v. S.K. Kumaraswamy* [[2021\] 6 SCR 333](#)] : (2021) 9 SCC 114; *Sree Surya Developers & Promoters v. N. Sailesh Prasad* [[2022\] 3 SCR 1081](#)] : (2022) 5 SCC 736; *Basavaraj v. Indira* [[2024\] 2 SCR 935](#)] : (2024) 3 SCC 705 – referred to.

### List of Acts

Contract Act, 1872; Code of Civil Procedure, 1908.

### List of Keywords

Right of party to get the first appeal restored; Compromise decree; Compromise of suit; Void and voidable agreements; Fraud in recall application; Statutory right and remedy; Restoration; Remedial mechanisms; Compromise deed.

**Navratan Lal Sharma v. Radha Mohan Sharma & Ors.****Case Arising From**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 14328  
of 2024

From the Judgment and Order dated 19.10.2023 of the High Court  
of Judicature for Rajasthan at Jaipur in SBCMA No. 162 of 2022

**Appearances for Parties**

Varinder Kumar Sharma, Adv. for the Appellant.

Ms. Surabhi Guleria, Ms. Megha Karnwal, Advs. for the Respondents.

**Judgment / Order of the Supreme Court****Judgment****Pamidighantam Sri Narasimha, J.**

1. Leave granted.
2. The appellant initially filed a suit for declaration and injunction, which was dismissed by the Trial Court. The appellant then filed a first appeal. During its pendency, the parties reached a compromise, agreeing to dispose of the appeal based on its terms. On 14.07.2022, the High Court decided the appellant's application under Order 23, Rule 3 of the Code of Civil Procedure, 1908<sup>1</sup> and disposed of the first appeal in terms of the compromise. However, when the respondent failed to comply with the compromise terms, the appellant filed an application to restore the appeal. Unfortunately, this application was dismissed by the order impugned before us, citing that the High Court had not granted liberty for restoration of the appeal while recording the compromise.
3. After careful consideration of the statutory framework and Order 23, Rules 3 and 3A, as informed by relevant judicial precedents, we have allowed the appeal. We have directed that, in such circumstances, restoration is the sole remedy, which the aggrieved party may exercise as a statutory right.
4. The short facts are that the appellant is the owner of the suit property. He filed a suit against the respondents for cancellation of

<sup>1</sup> Hereinafter "CPC".

**Digital Supreme Court Reports**

the power of attorney dated 19.07.2010 and 27.07.2010, sale deeds dated 31.08.2010 and 15.09.2010, and grant of permanent and mandatory injunction on the ground that respondent no. 1 forged the abovementioned power of attorney and subsequently entered into the abovementioned sale deeds for the suit property in favour of respondent no. 2. The Trial Court dismissed the suit on 17.02.2014, and the appellant preferred a first appeal before the Rajasthan High Court.

5. During the pendency of the first appeal, the appellant and respondent no. 2 entered into a compromise, recorded in deed dated 18.05.2022 and corrigendum compromise dated 08.07.2022. The compromise contemplated development of the suit property, as per which certain amounts were to be paid by respondent no. 2 to the appellant. Paras 4 and 7 of the compromise deed dated 18.05.2022 are relevant and extracted hereinbelow for ready reference:

*“(4) That there is a first appeal no. between the parties in the Honourable State High Court. 210/2014 is pending. The said compromise will be presented in other cases and both the parties will be able to get them resolved on the basis of the compromise, but if the terms of the compromise are violated then the second party will have the right to get the said appeal number 210/2014 reinstated by submitting an application.*

\*\*\*

*(7) That the first party issued a check dated 18/5/22 to the second party, check no. 160711 amount of Rs 11,00,000/- has been given today itself, payment can be taken by presenting the check in the bank on the date written in it. After giving the lease of the developed land, an amount equal to the value of the said amount will be transferred to Khasra No. Out of 11, the second party will give it to the first party. If any check is dishonoured, the agreement will be considered void.”*

6. The parties filed an application under Order 23, Rule 3 of the CPC for disposal of the first appeal as per the compromise, wherein it was stated that respondent no. 1 does not have any objection to the compromise and that the appellant can file for restoration of the

**Navratan Lal Sharma v. Radha Mohan Sharma & Ors.**

appeal if the agreed payment is not completed and the cheques are dishonoured.

7. By order dated 14.07.2022, the High Court disposed of the first appeal by taking the compromise dated 18.05.2022 and the corrigendum compromise dated 08.07.2022 on record and making them a part of its order. However, it also held that the parties do not have liberty to get the first appeal restored. The relevant portion of the order reads:

*"5. This Court, without entering into the merits of appeal but without giving any liberty to get restored the first appeal, is of considered opinion that when both parties have entered into the terms of compromise and have agreed to abide by the terms of compromise, this appeal deserves to be disposed of accordingly.*

*6. Hence the compromise dated 18.05.2022 along with corrigendum compromise dated 08.07.2022 is taken on record and the first appeal is disposed of in terms of compromise.*

*7. The compromise dated 18.05.2022 along with corrigendum compromise dated 08.07.2022 shall be treated as part of this order."*

(emphasis supplied)

8. When the cheques issued by respondent no. 2, said to be in furtherance of the compromise were dishonoured, the appellant moved the High Court for restoration of the appeal alleging fraud and illegal interference with his possession and attempts to get the land converted without paying the agreed amounts. By the order impugned before us, the High Court dismissed the application on the only ground that in its order dated 14.07.2022, the Court clearly recorded that the parties were not given liberty to restore the appeal. The High Court observed that since the order dated 14.07.2022 was a consensual order and the parties were aware that there was no liberty to get the first appeal restored, the application for restoration was not entertainable even if the compromise is not acted upon. The short order of the High Court dated 19.10.2023 is extracted hereinbelow:

*"1. Instant misc. application has been filed by the appellant-plaintiff seeking to restore S.B. Civil First Appeal NO.210/2014 by recalling the order dated 14.07.2022*

**Digital Supreme Court Reports**

*whereby and whereunder the first appeal was disposed of in terms of compromise dated 18.05.2022 arrived at between parties.*

*2. It has been stated in the application that cheques issued by respondents in terms of the compromise have been dishonoured and respondents have not adhered to the terms of the compromise, hence the first appeal be restored to be heard on merits.*

*3. By perusal of the order dated 14.07.2022, more particularly para No.5, it stands clear that this Court while disposing of the first appeal in terms of the compromise has clearly observed that parties would be not at liberty to get restore this first appeal. The order dated 14.07.2022 is consensual order and both parties were well aware that no liberty to restore the first appeal is available, even though the compromise may or may not be acted upon. Therefore, the application for restoration of first appeal is not entertainable.*

*4. Thus, in view of above, the prayer for restoration of the first appeal is uncalled for. In case, the terms of the compromise dated 18.05.2022 have not been complied with, the applicant-plaintiff is at liberty to take appropriate steps in accordance with law.*

*5. With aforesaid observations, without recalling of the order dated 14.07.2022, the misc. application stands disposed of.*

*6. Stay application and any other pending application, if any, stand disposed of.”*

9. We have heard the learned counsels for the parties.

10. The relevant provisions under the CPC that govern compromise decrees are contained in Order 23, Rules 3 and 3A, which are extracted hereunder:

**“3. Compromise of suit. — Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties or where the defendant satisfied the plaintiff in respect to the whole or any part of the subject-matter of the suit, the Court shall order such**

**Navratan Lal Sharma v. Radha Mohan Sharma & Ors.**

*agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the parties to the suit, whether or not the subject matter of the agreement, compromise or satisfaction is the same as the subject-matter of the suit:*

*Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the Court shall decide the question; but not adjournment shall be granted for the purpose of deciding the question, unless the Court, for reasons to be recorded, thinks fit to grant such adjournment.*

*Explanation.— An agreement or compromise which is void or voidable under the Indian Contract Act, 1872 (9 of 1872), shall not be deemed to be lawful within the meaning of this rule.*

**3A. Bar to suit.**—*No suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful.”*

11. This Court in *Banwari Lal v. Chando Devi*<sup>2</sup> has laid down the law on the disposal of a proceeding in accordance with a compromise between the parties and on recall of a compromise decree. It held that under Order 23, Rule 3, the Court must be satisfied upon applying judicial mind that the agreement between the parties is lawful before accepting the same and disposing the suit. Further, the proviso and the Explanation to Order 23, Rule 3 mandate that the court must “decide the question” of whether an adjustment or satisfaction has been arrived at, and it is clarified that void and voidable agreements under the Indian Contract Act, 1872<sup>3</sup> shall be deemed to be not lawful.<sup>4</sup> Upon such reading of the provision, it held that the court recording the compromise can examine the legality of the agreement, in accordance with the provisions of the Contract Act, even after the compromise decree is passed and when a party moves an application for recall.<sup>5</sup>

2 [1992] Supp. 3 SCR 524 : (1993) 1 SCC 581

3 Hereinafter “the Contract Act”.

4 *Banwari Lal* (supra), paras 11-13.

5 ibid, para 14.

## Digital Supreme Court Reports

12. The law on the issue is summarised in *Pushpa Devi Bhagat v. Rajinder Singh*.<sup>6</sup> In this case, the Court also took note of Section 96(3) of the CPC<sup>7</sup> and the deletion of Order 43, Rule 1(m) of the CPC by way of an amendment in 1976, as well as Order 23, Rule 3A. The consequence of these is that an appeal against a consent decree and an order recording (or refusing to record) a compromise is not maintainable, nor can a fresh suit be filed for setting aside such decree. Hence, the only remedy available to the aggrieved party is to approach the court that recorded the compromise under the proviso to Order 23, Rule 3. The Court held:

*"17. The position that emerges from the amended provisions of Order 23 can be summed up thus:*

*(i) No appeal is maintainable against a consent decree having regard to the specific bar contained in Section 96(3) CPC.*

*(ii) No appeal is maintainable against the order of the court recording the compromise (or refusing to record a compromise) in view of the deletion of clause (m) of Rule 1 Order 43.*

*(iii) No independent suit can be filed for setting aside a compromise decree on the ground that the compromise was not lawful in view of the bar contained in Rule 3-A.*

*(iv) A consent decree operates as an estoppel and is valid and binding unless it is set aside by the court which passed the consent decree, by an order on an application under the proviso to Rule 3 Order 23.*

*Therefore, the only remedy available to a party to a consent decree to avoid such consent decree, is to approach the court which recorded the compromise and made a decree in terms of it, and establish that there was no compromise. In that event, the court which recorded the compromise will itself consider and decide the question as to whether*

6 [2006] Supp. 3 SCR 370 : (2006) 5 SCC 566

7 Section 96(3) of the CPC reads:

**"96. Appeal from original decree.—**

(3) No appeal shall lie from a decree passed by the Court with the consent of parties."

**Navratan Lal Sharma v. Radha Mohan Sharma & Ors.**

*there was a valid compromise or not. This is so because a consent decree is nothing but contract between parties superimposed with the seal of approval of the court. The validity of a consent decree depends wholly on the validity of the agreement or compromise on which it is made..."*

(emphasis supplied)

13. In the present case, the appellant has alleged fraud by the respondents in his recall application, which he bears the burden to prove.<sup>8</sup> The Explanation to Order 23, Rule 3 clearly states that void and voidable agreements under the Contract Act shall not be deemed to be lawful. By alleging fraud in his recall application, the appellant is effectively impugning the legality of the compromise as proving the same would render the agreement voidable under the Contract Act.<sup>9</sup> When the court disposes of a proceeding pursuant to a compromise under Order 23, Rule 3, it bears the duty to examine this issue and be satisfied that the agreement or compromise is lawful. The proviso explicitly obligates the court that entertains the petition of compromise to determine this issue, and as per the law laid down by this Court in *Banwari Lal* (supra), this issue can be agitated by way of a recall application even after the compromise decree has been passed.
14. By the impugned order, the High Court dismissed the application solely on the ground that the order dated 14.07.2022 recording the compromise does not grant liberty to restore the appeal. We are of the opinion that this is not the correct approach, as it defeats the statutory right and remedy available to the appellant under the CPC. This Court in *Pushpa Devi Bhagat* (supra), as well as several other cases,<sup>10</sup> has held that only the court that entertains the petition of compromise can determine its legality, at the time of recording the compromise or when it is questioned by way of a recall application. No other remedy is available to the party who is aggrieved by the

8 *Shanti Budhiya Vesta Patel v. Nirmala Jayprakash Tiwari* (2010) 5 SCC 104; *K. Srinivasappa v. M. Mallamma* (2022) 17 SCC 460.

9 Section 19 of the Contract Act provides that when consent to an agreement is caused by fraud, it is voidable at the option of the party whose consent was so caused.

10 *R. Rajanna v. S.R. Venkataswamy* (2014) 15 SCC 471, para 11; *Triloki Nath Singh v. Anirudh Singh* (2020) 6 SCC 629, paras 17 and 18; *R. Janakiammal v. S.K. Kumaraswamy* (2021) 9 SCC 114; *Sree Surya Developers & Promoters v. N. Sailesh Prasad* (2022) 5 SCC 736, para 9; *Basavaraj v. Indira* (2024) 3 SCC 705, para 9.

**Digital Supreme Court Reports**

compromise decree as an appeal and fresh suit are not maintainable under the CPC.

15. In view of this legal position, the High Court was not correct in curtailing the statutory remedy available to the appellant in the first place.<sup>11</sup> In fact, when there is a statutory remedy available to a litigant, there is no question of a court granting liberty to avail of such remedy as it remains open to the party to work out his remedies in accordance with law.<sup>12</sup> Therefore, there was no occasion for the court to deny liberty to file for restoration by its order dated 14.07.2022 and the consequent dismissal of the recall application by the impugned order on this ground alone does not arise. Further, as a matter of public policy, courts must not curtail statutorily provisioned remedial mechanisms available to parties.
16. It is also relevant that para 4 of the compromise deed dated 18.05.2022 recognises the appellant's right to file for restoration of appeal in case of non-compliance. Further, para 7 stipulates that the compromise will be considered void in case of non-payment. Reading these clauses together, it is clear that the compromise deed itself recognises the parties' right to approach the court to question its validity in certain circumstances. These clauses are in line with the public policy consideration of access to justice reflected in Section 28 of the Contract Act that stipulates that agreements which restrain a party from enforcing his rights through legal remedies are void.
17. In this view of the matter, we allow the appeal, set aside the impugned order dated 19.10.2023, and remand the matter to the High Court to decide the application for recall on its own merits. Needless to say that we have not expressed any opinion on the merits of the matter.
18. No order as to costs. Pending applications, if any, stand disposed of.

*Result of the case:* Appeal allowed.

<sup>11</sup>Headnotes prepared by: Nidhi Jain

11 See *Bhanu Kumar Jain v. Archana Kumar* (2005) 1 SCC 787, paras 28 and 36.

12 See *Shiv Shakti Coop. Housing Society, Nagpur v. Swaraj Developers* (2003) 6 SCC 659, para 36.

**Basudev Dutta**  
v.  
**The State of West Bengal & Ors.**  
(Civil Appeal No. 13919 of 2024)  
05 December 2024  
**[J.K. Maheshwari and R. Mahadevan,\* JJ.]**

**Issue for Consideration**

Issue arose as regards the correctness of the termination order of the appellant-employee after rendering 26 years of service, based on the police verification report that he was considered ‘unsuitable’ for employment to the post.

**Headnotes<sup>†</sup>**

**Service law – Termination of service – Suitability for employment to the post – Employee-Ophthalmic Assistant with the State Government, terminated from service after rendering 26 years of service, based on the police verification report that he was considered as ‘unsuitable’ for employment to the post – Termination order set aside by the tribunal – High Court restored the order of termination – Correctness:**

**Held:** Order of termination passed against the appellant is arbitrary, illegal and in violation of the principles of natural justice and cannot be sustained – Claim of the appellant as regards his nationality as Indian on the strength of the migration certificate issued in favour of his father is accepted – His grandparents are Indian citizens because of their birth and s.4 of the 1955 Act entitles the appellant’s father to be treated as a citizen by descent – Also, the appellant entitled to citizenship by registration as per s.5 of the 1955 Act – In all the documents, including the memorandum, show cause notice, no reason mentioned as to why the appellant was considered as ‘unsuitable’ for employment to the post of Ophthalmic Assistant – Alleged police verification report not served on the appellant, as such, he was unable to make his defense with supportive materials, as a result was terminated from service – Even in the termination order, there was nothing about the unsuitability of the appellant for employment

---

\* Author

**Basudev Dutta v. The State of West Bengal & Ors.**

to the Government service – That apart, before passing the termination order, no opportunity of personal hearing provided to the appellant to defend his stand effectively – Tribunal was right in observing that without following the principles of natural justice and without affording any opportunity to explain his case before the authority, appellant was terminated and thus, termination order cannot be sustained in the eye of law; and set it aside – However, the High Court erroneously set aside the order of the tribunal by observing that the action of the authorities in issuing show cause notice and inviting reply therefrom and the availing of such opportunity by the appellant, is in adherence with the principles of natural justice – Furthermore, the appellant joined the post of Ophthalmic Assistant in 1985 upon production of satisfactory report of medical examination and police verification roll – Yet, the police verification report, which was supposed to have been filed within three months from the date of initial appointment of the appellant, was filed after 25 years of service and just two months prior to the date of his retirement and relying on the same, he was terminated from service – In view of the enormous delay on the part of the authorities in submission of the verification report, the appellant was rendered ineligible to receive his pensionary benefits, though he had put in 26 years of unblemished service – Authorities in their reply affidavit categorically admitted about the inordinate delay occasioned to ascertain the unsuitability of the appellant for appointment to the Government service – However, they did not assign any reason much less valid reason for the same – Such callous and lackadaisical attitude on the part of the authorities cannot be accepted – Thus, the order of the High Court set aside and that of the tribunal restored – Order of the tribunal granting liberty to the authority to proceed against the appellant in accordance with the principles of natural justice, after 14 years from the date of retirement, would not serve any purpose – Thus, the appellant entitled to receive all the service benefits duly payable to him – Citizenship Act, 1955. [Paras 11.3, 12, 12.1, 12.3, 12.6, 12.8, 13, 14]

**Judgment/order – Reasoned order – Necessity:**

**Held:** Every administrative or quasi-judicial order must contain the reasons – Such reasons go a long way in not only ensuring that the authority has applied his mind to the facts and the law, but also provide the grounds for the aggrieved party to assail the

## Digital Supreme Court Reports

order in the manner known to law – In the absence of any reasons, it also possesses a difficulty for the judicial authorities to test the correctness of the order or exercise its power of judicial review – Reasons are heartbeat of every order and every notice must specify the grounds on which the administrative or quasi-judicial authority intends to proceed; if any document is relied upon to form the basis of enquiry, such document must be furnished to the employee; it is only then a meaningful reply can be furnished; and the failure to furnish the documents referred and relied in the notice would vitiate the entire proceedings as being arbitrary and in violation of the principles of natural justice; and before taking any adverse decision, the aggrieved person must be given an opportunity of personal hearing. [Paras 12.2, 12.6]

### **Service law – Appointment – Verification of the credentials of the candidates:**

**Held:** Issuance of direction to the police officials of all the States to complete the enquiry and file report as regards the character, antecedents, nationality, genuineness of the documents produced by the candidates selected for appointment to the Government service, etc., within a stipulated time provided in the statute/G.O., or in any event, not later than six months from the date of their appointment – Only upon verification of the credentials of the candidates, their appointments will have to be regularized so as to avoid further complications. [Para 13]

#### **Case Law Cited**

*Nirma Industries Ltd. v. Securities and Exchange Board of India* [\[2013\] 3 SCR 662](#) : (2013) 8 SCC 20; *State of UP v. Sudhir Kumar Singh* [\[2020\] 13 SCR 571](#) : (2021) 19 SCC 706; *Dharampal Satyapal Ltd v. Deputy Commissioner of Central Excise, Gauhati and Others* [\[2015\] 6 SCR 437](#) : (2015) 8 SCC 519; *Sarbananda Sonowal v. Union of India* [\[2006\] Suppl. 10 SCR 167](#) : (2007) 1 SCC 174; *Lal Babu Hussein v. Electoral Registration Officer* [\[1995\] 1 SCR 877](#) : (1995) 3 SCC 100; *Kranti Associates (P) Ltd. v. Masood Ahmed Khan* [\[2010\] 10 SCR 1070](#) : (2010) 9 SCC 496 : (2010) 3 SCC (Civ) 852 : 2010 SCC OnLine SC 987 – referred to.

#### **List of Acts**

Citizenship Act, 1955; Foreigners Act, 1946; Income Tax Act, 1961; Evidence Act, 1872; Government of India Act, 1935; Constitution of India.

**Basudev Dutta v. The State of West Bengal & Ors.****List of Keywords**

Termination order; Police verification report; ‘Unsuitable’ for employment to the post; Ophthalmic Assistant with the State Government; Principles of natural justice; Migration certificate; Citizen by descent; Citizenship by registration; Memorandum; Show cause notice; Employment to Government service; Quasi-judicial authority; Opportunity of hearing; Delay; Callous and lackadaisical attitude on the part of the authorities; Service benefits; Reasoned order; Verification of the credentials of the candidates.

**Case Arising From**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 13919 of 2024

From the Judgment and Order dated 16.08.2023 of the High Court at Calcutta in WPST No. 106 of 2013

**Appearances for Parties**

Raj Kumar Gupta, Mayank Agrahari, Shekhar Kumar, Advs. for the Appellant.

Biswajit Deb, Sr. Adv., Anando Mukherjee, Shwetank Singh, Advs. for the Respondents.

**Judgment / Order of the Supreme Court****Judgment**

**R. Mahadevan, J.**

Leave granted.

2. Assailing the final judgment and order dated 16.08.2023 passed by the High Court of Calcutta<sup>1</sup> in W.P.S.T. No. 106 of 2013, the appellant has come up with this appeal. *Vide* the said order, the High Court set aside the order dated 28.08.2012 passed by the West Bengal State Administrative Tribunal at Calcutta<sup>2</sup> in O.A.No.331 of 2011,<sup>3</sup> in which, the order of termination passed against the appellant herein

<sup>1</sup> Hereinafter shortly referred to as “the High Court”

<sup>2</sup> Hereinafter shortly referred to as “the Tribunal”

<sup>3</sup> Basudev Dutta v. The State of West Bengal and Others

**Digital Supreme Court Reports**

was set aside, however, the authority concerned was granted liberty to proceed against the appellant in accordance with law, following the principles of natural justice.

3. According to the appellant, when he was aged about 16 years, he along with his father by name Hariananda Dutta, came to India from East Pakistan (now Bangladesh) and his father was issued with a Migration Certificate being No.D/65/69 dated 19.05.1969 by the authority concerned. Subsequently, the appellant joined Bangabasi College, Calcutta and passed the Pre-University Examination in Science in May, 1971 under the University of Calcutta. Thereafter, he got admission in Regional Institute of Ophthalmology, Calcutta and successfully completed Ophthalmic Assistant Course in 1984. Later, he participated in the selection process and was appointed as Para Medical Ophthalmic Assistant by the Director of Health Services, Government of West Bengal, *vide* order dated 21.02.1985 and in terms of the said appointment order, the appellant joined at Kadambini Block Primary Health Centre, Monteswar, Burdwan on 06.03.1985. The Department received satisfactory report of the medical examination and Police Verification Roll from the concerned authorities. He continued in service and was granted yearly increment and other consequential service benefits. While so, based on the secret verification report dated 25.05.2010 of the Government of West Bengal, which was communicated by the police to the department on 07.07.2010, the appellant was served with a memo dated 23.08.2010, stating that he is 'unsuitable' for employment and directing him to submit his defense, within 10 days from the date of receipt of the memo. In response, the appellant sent the details of his candidature on 09.09.2010. However, by order dated 11.02.2011 passed by the Director of Health Services, Government of West Bengal, the appellant was terminated from service with immediate effect without any enquiry. Challenging the said order of termination, the appellant preferred Original Application No.331 of 2011, which was allowed by the Tribunal, by order dated 28.08.2012. Aggrieved by the same, the State filed a writ petition being W.P.S.T.No.106 of 2013 and the High Court by the order impugned herein, allowed the same by setting aside the order passed by the Tribunal and affirming the order of termination passed by the authority concerned. Therefore, the appellant is before us with the present appeal.

**Basudev Dutta v. The State of West Bengal & Ors.**

4. The learned counsel for the appellant strenuously argued that on the basis of migration certificate issued in favour of the appellant's father, in which, the appellant's name also finds place, the appellant is a citizen of India with effect from 19.05.1969; he was issued with ration card, Voter Identity Card and Aadhaar Card by the Government of India and he participated in all local Assembly and Parliamentary elections; and he is also an assessee under the Income Tax Act and is regularly submitting his returns. Adding further, it is contended that upon participating in the selection process, the appellant was appointed as Ophthalmic Assistant, on 21.02.1985 and he joined the service upon submission of the satisfactory report of medical examination and police verification roll. After having rendered 26 years of unblemished service, the appellant was terminated from service, based on the secret verification report of the Government. While passing such order, the appellant was not given an opportunity of personal hearing and was not furnished the alleged verification report. Therefore, the order of termination passed against the appellant is arbitrary, illegal and in violation of the principles of natural justice.
  - 4.1. The learned counsel for the appellant also emphatically submitted that it is mandatory on the part of the police authority to submit the police verification report within a period of three months from the date of appointment. Whereas, in the present case, though the appellant joined the service on 06.03.1985, the verification report was communicated by the police to the department only on 07.07.2010, that too, just two months prior to the date of retirement of the appellant. Hence, there was inordinate delay on the part of the police authority for submission of verification report to the appointing authority.
  - 4.2. Ultimately, the learned counsel for the appellant submitted that considering the facts and circumstances of the case, the Tribunal rightly set aside the order of termination. However, the High Court erred in allowing the writ petition filed by the State by setting aside the order of the Tribunal. Therefore, the learned counsel prayed for allowing this appeal by setting aside the order of the High Court.
5. On the contrary, the learned senior counsel for the respondent(s) submitted that except the migration certificate, the appellant did not produce any document to prove that he is an Indian national.

**Digital Supreme Court Reports**

Migration certificate does not recognize him as a citizen of India and he has to register his citizenship with the authority concerned. Though the appellant stated that he applied for citizenship certificate and the Government of West Bengal issued no objection certificate to him with respect to his citizenship, no such document was placed on record. The Aadhaar Card, voter ID and Pan Card are not the conclusive proof of evidence for citizenship or nationality as held by this Court. Thus, the appellant being a non-citizen, he cannot claim employment against the post reserved for the Indian citizen.

- 5.1. Elaborating further, the learned senior counsel for the respondent(s) submitted that it was clearly stated in the appointment order that the same is subject to satisfactory reports of police verification and medical examination; though the appellant cleared the medical examination, his police verification report was still awaited; upon receipt of the communication from the Deputy Inspector General of Police, Intelligence Branch, Kolkata, *vide Memo No.1899/S.231-04/SA-I/VR* dated 07.07.2010, pursuant to the secret verification report dated 25.05.2010 of the Government, to the effect that the appellant was considered as 'unsuitable' for employment to the post in question, the Director of Health Services, Government of West Bengal, issued a show cause notice by way of memo dated 23.08.2010, calling upon the appellant to submit his defence; accordingly, the appellant submitted his reply on 09.09.2010; being dissatisfied with the same, the authority concerned terminated the appellant from service with immediate effect on 11.02.2011. Thus, according to the learned counsel, only after receipt of the reply submitted by the appellant and upon considering the same, the termination order came to be issued and hence, there was no violation of the principles of natural justice.
- 5.2. Referring to the decisions of this court in *Nirma Industries Ltd. v. Securities and Exchange Board of India*;<sup>4</sup> *State of UP v. Sudhir Kumar Singh*;<sup>5</sup> and *Dharampal Satyapal Ltd v. Deputy*

4 [2013] 3 SCR 662 : (2013) 8 SCC 20

5 [2020] 13 SCR 571 : (2021) 19 SCC 706

**Basudev Dutta v. The State of West Bengal & Ors.**

*Commissioner of Central Excise, Gauhati and Others*,<sup>6</sup> wherein, it was observed that '*the principles of natural justice means, a fair hearing should be given to the concerned person and the same would not necessarily imply oral hearing*', the learned senior counsel for the respondent(s) submitted that merely because the appellant was not given an opportunity of hearing, that by itself is not sufficient to quash the proceedings, unless and until it is pointed out by him that he was prejudiced by the order, which was passed behind his back and therefore, the denial of personal hearing before passing the termination order would not amount to violation of the principles of natural justice.

- 5.3. Adding further, the learned senior counsel for the respondent(s) submitted that police verification is essential for joining any service and it is a settled principle of law that any act contrary to law cannot be given the sanctity of being legal under law by mere passage of time and hence, the delay in submission of the verification report, cannot be a ground to quash the termination order passed against the appellant.
- 5.4. Therefore, the learned senior counsel for the respondent(s) submitted that the High Court correctly set aside the order of the Tribunal and restored the termination order passed against the appellant herein, by a reasoned order, which does not call for any interference by this court.
6. By way of reply, the learned counsel for the appellant submitted that the grandfather of the appellant was a permanent resident of Calcutta and the father of the appellant was born in the year 1911 at Calcutta and through migration certificate, the appellant came to India along with his father in the year 1969, before creation of Bangladesh (Formerly East Pakistan) and hence, he is a citizen of India. Further, the police department has no authority to neutralize the citizenship of a person. However, based on the information provided by the police authority and without ascertaining the veracity of the same and without any report / order following the provisions of the Citizenship Act, 1955 and the Foreigners Act, 1946 (31 of 1946) and the Foreigners (Tribunal) Order, 1964, the authority concerned terminated the appellant from service with immediate effect, that

**Digital Supreme Court Reports**

too, without affording an opportunity of hearing to the appellant to adjudicate his claim of nationality. Though the Tribunal set aside the said order of termination, the High Court erred in reversing the same, by the order impugned in this appeal. It is also submitted by the learned counsel that the right guaranteed under Articles 14 and 21 of the Constitution of India is seriously violated, in view of the State not taking proper steps to continue the service of the appellant and in failing to sanction and disburse the pensionary benefits to him, after having served nearly 26 years of service.

7. Heard the learned senior counsel/counsel appearing for the parties and also perused the materials available on record.
8. It cannot be disputed that as per the interim order of the High Court, the appellant received the amount of general provident fund, group insurance and leave Salary. However, the authority concerned did not disburse the pension, gratuity and arrears of salary.
9. As indicated earlier, by order dated 11.02.2011, the appellant was terminated from service after rendering 26 years of service, based on the police verification report that he was considered as 'unsuitable' for employment to the post of Ophthalmic Assistant. The said termination order was set aside by the Tribunal, by order dated 28.08.2012 in O.A.No.331 of 2011. However, the High Court reversed the order of the Tribunal and restored the order of termination passed by the authority concerned, by the order impugned herein.
10. The contentions raised by the learned counsel for the appellant, assailing the order of termination passed by the authority concerned, as affirmed by the High Court, are three-fold, though interlinked and intertwined. Firstly, the appellant claimed his nationality as Indian on the strength of the migration certificate dated 19.05.1969 issued in favour of his father. Secondly, in the show cause notice, there was no mention as to why the appellant was declared as 'unsuitable' for employment to the Government service; the alleged secret police verification report was not served on the appellant; and no opportunity of personal hearing was provided to the appellant to defend his stand and hence, there was total violation of the principles of natural justice. Thirdly, the appellant joined the service in the year 1985, but the police verification report, which was supposed to have been filed, within a period of three months from the date of appointment, was submitted to the department only in the year 2010 and thus,

**Basudev Dutta v. The State of West Bengal & Ors.**

there was inordinate and unexplained delay on the part of the police authority in submission of the same.

### **ANALYSIS**

11. Let us consider the first contention. According to the appellant, he is an Indian citizen. Section 9 of the Foreigners Act, 1946 mandates that the onus of proving citizenship of a person is upon that person who claims to be a citizen of India. For better appreciation, Section 9 of the Foreigners Act, 1946, is extracted below:

*"9. Burden of proof.—If in any case not falling under section 8 any question arises with reference to this Act or any order made or direction given thereunder, whether any person is or is not a foreigner of a particular class or description the onus of proving that such person is not a foreigner or is not a foreigner of such particular class or description, as the case may be, shall, notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872), lie upon such person."*

- 11.1. In *Sarbananda Sonowal v. Union of India*,<sup>7</sup> this Court pointed out that 'there is good and sound reason for placing the burden of proof upon the person concerned who asserts to be a citizen of a particular country. In order to establish one's citizenship, normally he may be required to give evidence of his date of birth, place of birth, name of his parents, their place of birth and citizenship. Sometimes the place of birth of his grandparents may also be relevant. All these facts would necessarily be within the personal knowledge of the person concerned and not of the authorities of the State'.
- 11.2. In *Lal Babu Hussein v. Electoral Registration Officer*,<sup>8</sup> it was held by this Court that 'the question whether a person is a foreigner, is a question of fact which would require careful scrutiny of evidence since the enquiry is quasi-judicial in character'.
- 11.3. In the instant case, the appellant claimed that his grandparents are Indian citizens because of their birth. The provisions relating

---

7 [2006] Supp. 10 SCR 167 : (2007) 1 SCC 174

8 [1995] 1 SCR 877 : (1995) 3 SCC 100

**Digital Supreme Court Reports**

to citizenship are enshrined in Part II of the Constitution of India under Articles 5 to 11. Section 4 of the Indian Citizenship Act, 1955, entitles the appellant's father to be treated as a citizen by descent. The appellant is also entitled to citizenship by registration as per Section 5 of the Act. As per Section 5(1)(a), a person of Indian origin who has been an ordinary resident in India for seven years prior to the application and as per 5(1)(b), a person of Indian origin who is an ordinary resident of any country or place outside undivided India is entitled to citizenship. "Undivided India" has been defined in Section 2 (h) as "India, as defined in the Government of India Act, 1935" as originally enacted. The intention of the Central Government to award citizenship to minorities from neighboring countries has been spelled out by way of amendment to Section 2, by introducing Proviso in Section 2 *vide* Amendment Act No.47 of 2019 with effect from 10.01.2020, which states that the persons like the appellant herein are not be treated as "illegal migrants". Once an application has been submitted, the authority concerned has to take appropriate decision within a reasonable time by taking into consideration all the applicable laws and the documents produced by the appellant. However, no decision has been taken against the appellant. Therefore, we answer the first contention in favour of the appellant.

12. *Qua* the second contention, we have carefully considered the documents placed before us. *Vide* Memo No. 944-P.S. dated 25.05.2010, the Assistant Secretary to the Government of West Bengal, Home (Political) Department, Secret Section, Kolkata, informed to the Additional Director General of Police, Intelligence Branch, West Bengal, Kolkata, that the Government considered the appellant 'unsuitable' for employment to the post of Ophthalmic Assistant under the Chief Municipal Officer of Health, Burdwan. *Vide* Memo No.1899/S.231-04/SA-I/VR dated 07.07.2010, the said information was communicated by the Deputy Inspector General of Police, Intelligence Branch, West Bengal to the Chief Municipal Officer of Health, Burden. Subsequently, by memo dated 04.11.2010, the Director of Health Services, Government of West Bengal, Kolkata, informed to the Special Superintendent of Police(C), Intelligence Branch, West Bengal, that the case of the appellant was referred to the Government to decide over the suitability or otherwise of the

**Basudev Dutta v. The State of West Bengal & Ors.**

verification of his employment under the Chief Municipal Officer of Health, Burdwan, because the nationality of the appellant could not be determined as Indian national, during enquiry; and finally, the appellant was considered ‘unsuitable’ by the Government. Pursuant to the same, the Director of Health Service, West Bengal, sent the show cause notice styled as ‘Memorandum’ dated 23.08.2010 directing the appellant to submit his defense within a period of 10 days. For better appreciation, the contents of the said Memorandum are reproduced below:

*“Whereas Shri Basudev Dutta, S/o.Hari Ananda Dutta of 30/C Buildings, Bonhoogly, Alambazar, Kolkata-700035 was offered appointment to the post of “Ophthalmic Assistant” vide order No.A 6012 dated 21-02-1985 along with 32 other incumbents subject to satisfactory reports of Police Verification and Medical Examination;*

*And whereas the said Shri Basudev Dutta joined in the forenoon of 06-03-1985 at Kadambini P.H.C., Monteswar, Burdwan;*

*And whereas the Dy. Inspector General of Police, Intelligence Branch, 13, Lord Sinha Road, Kolkata -71 in his No.1899/S. 231-04/SA-I/VR dated 07-07-2010 has informed that the Government under his No.944-PS dated 25-05-2010 of Home (Pol) Department, Government of West Bengal has declared Shri Basudev Dutta “UNSUITABLE” for employment to the post of Ophthalmic Assistant;*

*And whereas the case of Shri Basudev Dutta, Ophthalmic Assistant, attached to Kurmun B.P.H.C., Burdwan, has since been reviewed in the light of terms and condition laid down in the order of appointment bearing No.A 6012 dated 21-02-1985 and also declaring Shri Basudev Dutta “UNSUITABLE” for employment to the Government service;*

*And as such, on going through the relevant papers / documents in respect of the case of Shri Basudev Dutta and applying my full mind on to it, I, the D.H.S., West Bengal, being the appointing and disciplinary authority in respect of the post held by Shri Basudev Dutta, Ophthalmic Assistant, hold the view that the said Shri Basudev Dutta*

## Digital Supreme Court Reports

*does not have any right to continue further in Government service and accordingly propose that the service of Shri Basudev Dutta may be terminated with immediate effect;*

*Shri Basudev Dutta is hereby directed to say, if any, in his defence within 10 (ten) days from the date of receipt of the memorandum through the C.M.O.H., Burdwan, positively failing which it may be presumed that he has nothing to say and decision will be taken against him without any further reference to him.”*

- 12.1. Curiously, in all these documents, including the show cause notice, no reason was mentioned as to why the appellant was considered as ‘unsuitable’ for employment to the post of Ophthalmic Assistant. Furthermore, the alleged police verification report was not served on the appellant. As such, the appellant was unable to make his defense with supportive materials. Resultantly, he was terminated from service *vide* order dated 11.02.2011 of the Director of Health Services, West Bengal. Even in the termination order, there was nothing about the unsuitability of the appellant for employment to the Government service.
- 12.2. It is settled law that every administrative or quasi-judicial order must contain the reasons. Such reasons go a long way in not only ensuring that the authority has applied his mind to the facts and the law, but also provide the grounds for the aggrieved party to assail the order in the manner known to law. In the absence of any reasons, it also possesses a difficulty for the judicial authorities to test the correctness of the order or in other words, exercise its power of judicial review. In this context, it will be useful to refer to the judgment of this Court in *Kranti Associates (P) Ltd. v. Masood Ahmed Khan*,<sup>9</sup> wherein after a detailed analysis of various judgments, it was held as follows:

**“27. In *Rama Varma Bharathan Thampuram v. State of Kerala* [(1979) 4 SCC 782 : AIR 1979 SC 1918] V.R. Krishna Iyer, J. speaking for a three-Judge Bench held that the functioning of the Board was quasi-judicial in character. One of the attributes of quasi-judicial functioning is the**

<sup>9</sup> [2010] 10 SCR 1070 : (2010) 9 SCC 496 : (2010) 3 SCC (Civ) 852 : 2010 SCC OnLine SC 987

**Basudev Dutta v. The State of West Bengal & Ors.**

*recording of reasons in support of decisions taken and the other requirement is following the principles of natural justice. The learned Judge held that natural justice requires reasons to be written for the conclusions made (see SCC p. 788, para 14 : AIR p. 1922, para 14).*

**28.** In Gurdial Singh Fiji v. State of Punjab [(1979) 2 SCC 368 : 1979 SCC (L&S) 197] this Court, dealing with a service matter, relying on the ratio in Capoor [(1973) 2 SCC 836 : 1974 SCC (L&S) 5 : AIR 1974 SC 87], held that “rubber-stamp reason” is not enough and virtually quoted the observation in Capoor (*supra*), SCC p. 854, para 28, to the extent that:

“28. ... Reasons are the links between the materials on which certain conclusions are based and the actual conclusions.” (See AIR p. 377, para 18.)

**29.** In a Constitution Bench decision of this Court in H.H. Shri Swamiji of Shri Amar Mutt v. Commr., Hindu Religious and Charitable Endowments Deptt. [(1979) 4 SCC 642 : 1980 SCC (Tax) 16 : AIR 1980 SC 1] while giving the majority judgment Y.V. Chandrachud, C.J. referred to (SCC p. 658, para 29) *Broom's Legal Maxims* (1939 Edn., p. 97) where the principle in Latin runs as follows:

“*Cessante ratione legis cessat ipsa lex.*”

**30.** The English version of the said principle given by the Chief Justice is that : (H.H. Shri Swamiji case [(1979) 4 SCC 642 : 1980 SCC (Tax) 16 : AIR 1980 SC 1], SCC p. 658, para 29)

“29. ... ‘reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself.’” (See AIR p. 11, para 29.)

.....

**33.** In Star Enterprises v. City and Industrial Development Corpn. of Maharashtra Ltd. [(1990) 3 SCC 280] a three-Judge Bench of this Court held that in the present day set-up judicial review of administrative action has

**Digital Supreme Court Reports**

*become expansive and is becoming wider day by day and the State has to justify its action in various fields of public law. All these necessitate recording of reason for executive actions including the rejection of the highest offer. This Court held that disclosure of reasons in matters of such rejection provides an opportunity for an objective review both by superior administrative heads and for judicial process and opined that such reasons should be communicated unless there are specific justifications for not doing so (see SCC pp. 284-85, para 10).*

.....

**46.** *The position in the United States has been indicated by this Court in S.N. Mukherjee [(1990) 4 SCC 594 : 1990 SCC (Cri) 669 : 1991 SCC (L&S) 242 : (1991) 16 ATC 445 : AIR 1990 SC 1984] in SCC p. 602, para 11 : AIR para 11 at p. 1988 of the judgment. This Court held that in the United States the courts have always insisted on the recording of reasons by administrative authorities in exercise of their powers. It was further held that such recording of reasons is required as “the courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review”. In S.N. Mukherjee [(1990) 4 SCC 594 : 1990 SCC (Cri) 669 : 1991 SCC (L&S) 242 : (1991) 16 ATC 445 : AIR 1990 SC 1984] this Court relied on the decisions of the US Court in *Securities and Exchange Commission v. Chenery Corpn.* [87 L Ed 626 : 318 US 80 (1942)] and *Dunlop v. Bachowski* [44 L Ed 2d 377 : 421 US 560 (1974)] in support of its opinion discussed above.*

**47.** *Summarising the above discussion, this Court holds:*

- (a) *In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.*
- (b) *A quasi-judicial authority must record reasons in support of its conclusions.*
- (c) *Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.*

**Basudev Dutta v. The State of West Bengal & Ors.**

- (d) *Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.*
- (e) *Reasons reassure that discretion has been exercised by the decision-maker on relevant grounds and by disregarding extraneous considerations.*
- (f) *Reasons have virtually become as indispensable a component of a decision-making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.*
- (g) *Reasons facilitate the process of judicial review by superior courts.*
- (h) *The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the lifeblood of judicial decision-making justifying the principle that reason is the soul of justice.*
- (i) *Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.*
- (j) *Insistence on reason is a requirement for both judicial accountability and transparency.*
- (k) *If a judge or a quasi-judicial authority is not candid enough about his/her decision-making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.*
- (l) *Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or "rubber-stamp reasons" is not to be equated with a valid decision-making process.*

**Digital Supreme Court Reports**

- (m) *It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision-making not only makes the judges and decision-makers less prone to errors but also makes them subject to broader scrutiny. (See David Shapiro in Defence of Judicial Candor [(1987) 100 Harvard Law Review 731-37]).*
  - (n) *Since the requirement to record reasons emanates from the broad doctrine of fairness in decision-making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg Jurisprudence. See Ruiz Torija v. Spain [(1994) 19 EHRR 553] EHRR, at 562 para 29 and Anya v. University of Oxford [2001 EWCA Civ 405 (CA)], wherein the Court referred to Article 6 of the European Convention of Human Rights which requires, “adequate and intelligent reasons must be given for judicial decisions”.*
  - (o) *In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of “due process”.*
- 12.3. That apart, before passing the termination order, no opportunity of personal hearing was provided to the appellant to defend his stand effectively. In *Mazharul Islam Hashmi v. State of U.P.*,<sup>10</sup> it was categorically held by this Court that ‘personal hearing should be given, before termination of employee from service’. The relevant paragraph of the same is quoted below for ready reference:

*“25. It was observed in that case that it is a fundamental rule of law that no decision must be taken which will affect the rights of any person without first giving him an opportunity of putting forward his case. The main requirements of a fair hearing, as pointed out*

**Basudev Dutta v. The State of West Bengal & Ors.**

*by this Court earlier, are: (i) A person must know the case that he is to meet; and (ii) he must have an adequate opportunity of meeting that case. These rules of natural justice, however, operate in voids of a statute. Their application can be expressly or implicitly excluded by the legislature. But, such is not the case here. On the contrary, the two circulars issued by the State Government, to which a reference has been made earlier, expressly imported these principles of natural justice and required that in all cases in which the services of an officer or servant were to be determined on the ground of his unsuitability, they must be given an opportunity of personal hearing by the Committee. The whole purpose of the personal interview was that, when it was proposed to declare an official unsuitable for absorption, the Committee had to afford him an opportunity to appear before it and clear up his position. Since it is nobody's case that such an opportunity was afforded to the appellant, we would hold that the order dated August 26, 1967 (of termination of his services passed by the State) suffers from a serious legal infirmity and must be quashed. He will, therefore, have to be treated as having continued in service till the age of superannuation and entitled to all the benefits incidental to such a declaration.*

12.4. In S.Govindaraju v. Karnataka State Road Transport Corporation<sup>11</sup> again, this Court held thus:

*"7.....There is no dispute that the appellant's services were terminated on the ground of his being found unsuitable for the appointment and as a result of which his name was deleted from the select list, and he forfeited his chance for appointment. Once a candidate is selected and his name is included in the select list for appointment in accordance with the Regulations, he gets a right to be considered for appointment as and when vacancy arises. On*

**Digital Supreme Court Reports**

*the removal of his name from the select list serious consequences entail as he forfeits his right to employment in future. In such a situation even though the Regulations do not stipulate for affording any opportunity to the employee, the principles of natural justice would be attracted and the employee would be entitled to an opportunity of explanation, though no elaborate enquiry would be necessary. Giving an opportunity of explanation would meet the bare minimal requirement of natural justice. Before the services of an employee are terminated, resulting in forfeiture of his right to be considered for employment, opportunity of explanation must be afforded to the employee concerned. The appellant was not afforded any opportunity of explanation before the issue of the impugned order; consequently the order is rendered null and void being inconsistent with the principles of natural justice..."*

12.5. This Court in *Aureliano Fernandes v. State of Goa*,<sup>12</sup> in an unequivocal terms observed as follows:

*"73.....This Court has repeatedly observed that even when the rules are silent, principles of natural justice must be read into them.*

*74. In its keen anxiety of being fair to the victim / complainants and wrap up the complaints expeditiously, the Committee has ended up being grossly unfair to the appellant. It has completely overlooked the cardinal principle that justice must not only be done, but should manifestly be seen to be done. The principles of audi alteram partem could not have been thrown to the winds in this cavalier manner."*

12.6. It is manifestly clear from the above judgments that reasons are heartbeat of every order and every notice must specify the grounds on which the administrative or quasi-judicial authority intends to proceed; if any document is relied upon to form

**Basudev Dutta v. The State of West Bengal & Ors.**

the basis of enquiry, such document must be furnished to the employee; it is only then a meaningful reply can be furnished; and the failure to furnish the documents referred and relied in the notice would vitiate the entire proceedings as being arbitrary and in violation of the principles of natural justice; and before taking any adverse decision, the aggrieved person must be given an opportunity of personal hearing. In the light of the same, we have no hesitation to hold that the order of termination passed against the appellant is arbitrary, illegal and violative of the principles of natural justice and it cannot be sustained.

12.7. Though we are in agreement with the proposition laid down in the decisions cited on the side of the respondent(s), the same does not apply to the present case, which factually differs.

12.8. Thus, in the ultimate analysis, we find that the Tribunal was right in observing that without following the principles of natural justice and without affording any opportunity to explain his case before the authority, the appellant was terminated and hence, his termination order cannot be sustained in the eye of law; and accordingly, set aside the order of termination. However, the High Court erroneously allowed the writ petition filed by the State and set aside the order of the Tribunal by observing that the action of the authorities in issuing a show cause notice and inviting a reply therefrom and the availing of such opportunity by the appellant, is in adherence with the principles of natural justice. Hence, we are inclined to set aside the order of the High Court and restore the order of the Tribunal to that extent.

13. As far as the third contention is concerned, it appears to us that the appellant joined the post of Ophthalmic Assistant on 06.03.1985 upon production of satisfactory report of medical examination and police verification roll. Yet, the police verification report, which was supposed to have been filed within three months from the date of initial appointment of the appellant, was filed only in the year 2010, i.e., after 25 years of service and just two months prior to the date of his retirement. Placing reliance on such report, he was terminated from service. In view of the enormous delay on the part of the respondent authorities in submission of the verification report, the appellant has been rendered ineligible to receive his pensionary benefits, though he had put in 26 years of unblemished service. The respondents

**Digital Supreme Court Reports**

in their reply affidavit categorically admitted about the inordinate delay occasioned to ascertain the unsuitability of the appellant for appointment to the Government service. However, they did not assign any reason much less valid reason for the same. Such a callous and lackadaisical attitude on the part of the respondent authorities cannot be countenanced by us. As held by us in paragraph 12.6 *supra*, the order of termination passed against the appellant is arbitrary, illegal and in violation of the principles of natural justice and it cannot be sustained. In view of the same, the second limb of the order of the Tribunal granting liberty to the authority to proceed against the appellant in accordance with the principles of natural justice, after a period of 14 years from the date of retirement, would not serve any purpose. Hence, the appellant is entitled to receive all the service benefits that are duly payable to him.

- 13.1. The given factual matrix would also compel this Court to issue a direction to the police official(s) of all the States to complete the enquiry and file report as regards the character, antecedents, nationality, genuineness of the documents produced by the candidates selected for appointment to the Government service, etc., within a stipulated time provided in the statute/G.O., or in any event, not later than six months from the date of their appointment. It is made clear that only upon verification of the credentials of the candidates, their appointments will have to be regularized so as to avoid further complications, as in the case on hand.
14. With the aforesaid observations and directions, this appeal is allowed and the order of the High Court is set aside. As a sequel, the service benefits which remain unpaid as on date, be paid to the appellant within a period of three months from the date of receipt of a copy of this judgment. There is no order as to costs. Pending application(s), if any, shall stand closed.

*Result of the case:* Appeal allowed.

<sup>†</sup>Headnotes prepared by: Nidhi Jain

**Goqii Technologies Private Limited**  
v.  
**Sokrati Technologies Private Limited**

(Civil Appeal No. 12234 of 2024)

07 November 2024

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

**Issue for Consideration**

Issue arose, as to the correctness of the order passed by the High Court dismissing the appellant's application u/s.11 of the Act, 1996, seeking appointment of an arbitrator to adjudicate disputes and claims in terms of Clause 18.12 of the Master Services Agreement executed between the parties.

**Headnotes<sup>†</sup>**

**Arbitration and Conciliation Act, 1996 – s.11 – Scope of inquiry under – Standard of judicial scrutiny – Master Services Agreement between the appellant and the respondent – Dispute between parties – Application by the appellant u/s.11 of the Act, seeking appointment of an arbitrator to adjudicate disputes and claims in terms of Clause 18.12 of the Master Services Agreement – Rejected by the High Court holding that although the audit report highlighted poor returns on investment and inconsistent metrics, yet it did not support the assertions made by the appellant regarding fraudulent practices of the respondent – Correctness:**

**Held:** Scope of inquiry u/s.11 is limited to ascertaining the *prima facie* existence of an arbitration agreement – On facts, the High Court exceeded this limited scope by undertaking a detailed examination of the factual matrix – High Court erroneously proceeded to assess the auditor's report in detail and dismissed the arbitration application – Such an approach does not give effect to the legislative intent behind the 2015 amendment to the 1996 Act, which limited the judicial scrutiny at the stage of s.11 – Frivolity in litigation too is an aspect which the referral

\* Author

### **Goqii Technologies Private Limited v. Sokrati Technologies Private Limited**

court should not decide at the stage of s.11 as the arbitrator is equally, if not more, competent to adjudicate the same – Limited jurisdiction of the referral Courts u/s.11 must not be misused by parties in order to force other parties to the arbitration agreement to participate in a time-consuming and costly arbitration process – Existence of the arbitration agreement in Clause 18.12 of the MSA not disputed by the respondent – Question whether there exists a valid dispute to be referred to arbitration can be addressed by the Arbitral Tribunal as a preliminary issue – Order passed by the High Court set aside. [Paras 18-21]

#### **Case Law Cited**

*Indian Oil Corporation v. NCC Ltd.* [\[2022\] 13 SCR 660 : \(2023\) 2 SCC 539](#); *B & T AG v. Ministry of Defence* [\[2023\] 7 SCR 599 : 2023 SCC OnLine SC 657](#); *Sushma Shiv Kumar Daga & Anr. v. Madhur Kumar Ramkrishnaji Bajaj & Ors* [\[2023\] 15 SCR 909 : 2023 SCC OnLine SC 1683](#); *In Re: Interplay between Arbitration Agreements under the Arbitration and Conciliation Act 1996 and the Indian Stamp Act 1899* [\[2023\] 15 SCR 1081 : 2023 INSC 1066](#); *SBI General Insurance Co. Ltd. v. Krish Spinning* [\[2024\] 7 SCR 840 : 2024 INSC 532 – referred to.](#)

#### **List of Acts**

Arbitration and Conciliation Act, 1996; Stamp Act, 1899; Insolvency and Bankruptcy Code, 2016.

#### **List of Keywords**

Scope of inquiry u/s.11 of the Arbitration and Conciliation Act, 1996; Standard of judicial scrutiny; Master Services Agreement; Appointment of arbitrator; Fraudulent practices; *Prima facie* existence of arbitration agreement; Arbitration application; Frivolity in litigation; Limited jurisdiction of the referral Courts; Arbitration agreement; Time-consuming and costly arbitration process; Judicial interference; Referral Courts; Arbitral Tribunal.

#### **Case Arising From**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 12234 of 2024  
From the Judgment and Order dated 30.04.2024 of the High Court of Judicature at Bombay in CAA No. 6 of 2024

**Digital Supreme Court Reports****Appearances for Parties**

H.D. Thanvi, Nikhil Kumar Singh, Achal Singh Bule, Rishi Matoliya, Advs. for the Appellant.

Ms. Shweta Bharti, Jyoti Kumar Chaudhary, Nicholas Choudhury, Jatin Chaddha, Vineet Dwivedi, Advs. for the Respondent.

**Judgment / Order of the Supreme Court****Judgment****J.B. Pardiwala, J.**

1. Leave granted.
2. This appeal arises from the final judgment and order dated 30.04.2024 ("**impugned judgment**") passed by the High Court of Judicature at Bombay in Commercial Arbitration Application No. 6 of 2024. The High Court dismissed the application preferred by Goqii Technologies Private Limited ("**the appellant**") under Section 11 of the Arbitration and Conciliation Act, 1996 ("**the Act, 1996**") seeking appointment of an arbitrator to adjudicate disputes and claims in terms of Clause 18.12 of the Master Services Agreement ("**MSA**") executed between the appellant and Sokrati Technologies Private Limited ("**the respondent**").

**A. FACTUAL MATRIX**

3. The appellant, a technology-based wellness venture *inter alia* providing life style consultancy services, executed the MSA with the respondent, an entity engaged in digital marketing services, and a subsidiary of Dentsu International Limited, to manage its digital advertising campaigns. The MSA was subsequently extended on 29.04.2022 for a period of three years, with certain amendments.
4. Between August 2021 and April 2022, the appellant paid a sum of Rs 5,53,26,690/- to the respondent for the services rendered by it. It is the case of the appellant that for the subsequent 10 invoices raised between 12.05.2022 and 07.10.2022, the appellant was in the process of initiating and making payments when, in September 2022, certain media reports alleged malpractices in the advertising industry implicating major players. It was later discovered by the appellant that the Economic Offences Wing, Mumbai had lodged a complaint

**Goqii Technologies Private Limited v.  
Sokrati Technologies Private Limited**

(EOW CR No. 08 of 2022) against Dentsu International Limited, the parent company of the respondent, and its senior officials alleging serious irregularities and malpractices in their service.

5. In light of the aforesaid developments, the appellant engaged an independent auditor in November 2022 to prepare a report on the activities of the respondent from April 2021 to 31.12.2022. The auditor submitted its report in February 2023. The conclusion given by the auditor is extracted hereinbelow:

***"CONCLUSION***

*The average ROI for the campaigns analyzed has been abysmally low at 0.35x compared to industry benchmark of 3x to 4x. We estimate an overcharge of ₹4,48,53,580.*

*The audit identified significant areas of concern within the media plan, including but not limited to:*

- *Media buying cost of inventory, from different publishers at various points during the engagements have been found to be significantly more than the industry benchmarks.*
- *Traffic was poor and exposed to the wrong audience.*
- *Number of times the ad was shown (Frequency) has been increased as the reach numbers were being achieved, this only shows that the targeting of the customer/audience has been poor.*
- *The clicks generated were fraudulent.*
- *The leads garnered were junk.*
- *Cost of acquisition was higher than the category competition.*

*We also recommend further detailed investigation across all the media campaigns by Sokrati."*

6. On 22.02.2023, the respondent served a demand notice on the appellant under Section 8 of the Insolvency and Bankruptcy Code, 2016 ("IBC") seeking Rs 6,25,67,060/- towards the outstanding invoices. In response, on 04.03.2023, the appellant rejected the demand, citing the audit findings, and invoked arbitration under

**Digital Supreme Court Reports**

Clause 18.12 of the MSA. The appellant also filed a counter claim, demanding a refund of Rs 5,53,26,690/- with 18% interest per annum and an additional Rs 6 crore by way of damages towards the alleged misrepresentations by the respondent.

7. Subsequently, upon failure of the respondent to comply with the arbitration notice, the appellant filed Commercial Arbitration Application No. 06 of 2024 before the High Court, seeking appointment of a sole arbitrator to adjudicate the disputes between the parties. However, on 05.10.2023, while the application was pending, the respondent filed Company Petition (IB) No. 27 of 2024 under Section 9 of the IBC before the National Company Law Tribunal, Mumbai (NCLT, Mumbai) for initiating the corporate insolvency resolution process of the appellant.
8. The High Court *vide* the impugned judgment, dismissed the application seeking the appointment of an arbitrator, observing that it lacked in merit and substance. The High Court noted that the independent audit report revealed significant concerns regarding the performance of the digital marketing campaigns executed by the respondent. The High Court was of the view that although the report highlighted poor returns on investment and inconsistent metrics, yet it did not support the assertions made by the appellant regarding fraudulent practices of the respondent. Further, the High Court observed that the appellant failed to demonstrate any substantial discrepancies in the report that would justify withholding payment for the invoices raised. It observed that while further investigation was suggested in the report, the appellant's attempt to invoke arbitration based on non-existent disputes constituted a manifestly dishonest claim and therefore dismissed the application. The relevant observations from the impugned judgment are extracted hereinbelow:

*"19. It can be well understood that upon the further investigation, being directed to be carried out as indicated in the report, if it is concluded that the services were not rendered at all or they were deficient and the invoices do not deserve to be cleared, the demand of the money due and payable could have been resisted, but without any justification, by projecting the report of the independent auditor to be its shield to avoid the payment, the attempt on part of the applicant can only be described as 'dishonest'.*

**Goqii Technologies Private Limited v.  
Sokrati Technologies Private Limited**

*A manifestly dishonest claim or a contest, which is sought to be raised to a lawful demand of the money due and payable under the MSA, particularly, when, while availing the services, at no point of time, any deficiency in services is pointed out, but only by way of defence to the invoices raised, an independent agency's report is being projected, as a support to canvass the deficiency in service, by attributing fraudulent acts to the respondent which, in fact, is not the finding of the independent auditor.*

*Nonetheless, it is open for the applicant to follow the pursuit of detail investigation across all the media campaigns by Sokrati, as suggested in the report, however, without doing so, in order to avoid its liability for the claims under the invoices, the assertion of an arbitrable dispute, is an attempt to defeat the proceedings, which may be instituted on behalf of Sokrati before the Company Law Tribunal under the IBC.*

*Drawing guidance from the observations of the Apex Court in case of NTPC Ltd (*supra*) that the limited scrutiny through the eye of the needle is necessary and compelling, as it is the duty of the referral code to protect the parties from being forced to arbitrate, when the matter is demonstrably non- arbitrable. I am convinced that an attempt is made to create a dispute when there exist none at this stage. It is not just for the sake of invoking the arbitration clause, because the agreement between the parties provide so, the parties shall resort to arbitration, premised on the basis of a purported dispute, which infact, do not exist.*

*For the aforesaid reason, I am not inclined to consider the request of appointing an Arbitrator in exercise of power conferred on this Court, merely because the arbitration has been invoked by the applicant and it intend to take a non-existent dispute for arbitration. Being unconvinced with the submissions of Mr. Kanade, the application seeking appointment of Arbitrator is dismissed being found without any merit and substance.”*

**Digital Supreme Court Reports**

9. Aggrieved by the aforesaid order refusing to appoint an arbitrator for adjudicating the disputes between the parties, the appellant has come up before this Court with the present appeal.

**B. SUBMISSION ON BEHALF OF THE APPELLANT**

10. Mr. H.D. Thanvi, the learned counsel appearing for the appellant, submitted that the scope of interference by a referral court acting in exercise of its jurisdiction under Section 11 of the Act, 1996 is limited. At this stage, the court is required to conduct a preliminary inquiry for the purpose of ascertaining whether a *prima facie* case exists for referring the dispute to arbitration. Contrary to this narrow scope, in the present case the High Court proceeded to erroneously undertake a full review of the contested facts, thereby exceeding in its jurisdiction at this stage.
11. He further submitted that the High Court failed to take into account the nature of the services rendered by the respondent, along with the technical details contained in the Audit Report, which require subject-matter expertise for accurate determination of the disputes. Given the technical complexity of the issues involved, the High Court ought to have referred the parties to arbitration.
12. He submitted that the finding of the High Court as regards the alleged dishonesty of the appellant rests on the erroneous assumption that the appellant had not raised any dispute prior to issuing the demand notice dated 22.02.2023. It was contended that this finding overlooks the sequence of events and also the undisputed fact that the Audit Report was provided to the appellant only in February 2023, i.e., the same month in which the Demand Notice was issued. Consequently, the appellant had no prior opportunity to raise the disputes, as they only came to light upon receiving the Audit Report in February 2023. The appellant argued that even otherwise, it had sent multiple emails to the respondent raising various objections regarding the invoices issued to the appellant prior to the issuance of the Audit Report.

**C. SUBMISSION ON BEHALF OF THE RESPONDENT**

13. Ms. Shweta Bharti, the learned counsel appearing for the respondent, on the other hand, submitted that it is settled law that before referring the parties to arbitration, the High Court must reach to a *prima facie* satisfaction that a genuine dispute exists between the parties.

**Goqii Technologies Private Limited v.  
Sokrati Technologies Private Limited**

Furthermore, the mere inclusion of an arbitration clause in a contract or agreement does not render a matter automatically arbitrable and a *prima facie* case establishing the existence of a dispute must first be made. The Court must apply a *prima facie* test to weed out and dismiss claims that are *ex facie* meritless, frivolous, or dishonest. She submitted that seen thus the dispute raised in the present petition is nothing more than an afterthought. The counsel placed reliance on the decision of this Court in *Indian Oil Corporation vs. NCC Ltd.*,<sup>1</sup> *B&T AG v. Ministry of Defence*,<sup>2</sup> and *Sushma Shiv Kumar Daga & Anr. vs. Madhur Kumar Ramkrishnaji Bajaj & Ors*<sup>3</sup> to fortify her submission.

14. She further submitted that the appellant is not entitled to any damages or refund for the alleged overcharges on the services rendered by the respondent as the appellant had previously not raised any concerns or identified deficiencies while utilizing these services. Furthermore, the claim now raised by the appellant is unfounded, vague, and lacks supporting documentation.
15. She submitted that the appellant has filed the present petition with a *mala fide* intent and has approached this Court with unclean hands, being fully aware of the ongoing legal proceedings before the NCLT, Mumbai. The petition of the appellant is an attempt to create duplicative legal proceedings aimed at evading liability for admitted dues and disrupting the CIRP process.

#### **D. ANALYSIS**

16. Having heard the learned counsels appearing for the parties and having gone through the materials on record, the short question that falls for our consideration is whether the High Court committed any error in dismissing the appellant's application under Section 11 of the Act, 1996.
17. In a recent pronouncement, relying on the Constitution Bench judgment of this Court in *In Re: Interplay between Arbitration Agreements under the Arbitration and Conciliation Act 1996 and the Indian*

---

1 [2022] 13 SCR 660 : (2023) 2 SCC 539

2 [2023] 7 SCR 599 : 2023 SCC OnLine SC 657

3 [2023] 15 SCR 909 : 2023 SCC OnLine SC 1683

**Digital Supreme Court Reports**

**Stamp Act 1899**,<sup>4</sup> this Court in **SBI General Insurance Co. Ltd. vs. Krish Spinning** reported in **2024 INSC 532**, summarised the law on the scope and standard of judicial scrutiny that an application under Section 11(6) of the Act, 1996 can be subjected to. The relevant parts are produced herein below:

*"114. In view of the observations made by this Court in *In Re: Interplay* (supra), it is clear that the scope of enquiry at the stage of appointment of arbitrator is limited to the scrutiny of *prima facie* existence of the arbitration agreement, and nothing else. For this reason, we find it difficult to hold that the observations made in *Vidya Drolia* (supra) and adopted in *NTPC v. SPML* (supra) that the jurisdiction of the referral court when dealing with the issue of "accord and satisfaction" under Section 11 extends to weeding out ex-facie non-arbitrable and frivolous disputes would continue to apply despite the subsequent decision in *In Re: Interplay* (supra).*

**xxx xxx xxx**

*125. We are also of the view that ex-facie frivolity and dishonesty in litigation is an aspect which the arbitral tribunal is equally, if not more, capable to decide upon the appreciation of the evidence adduced by the parties. We say so because the arbitral tribunal has the benefit of going through all the relevant evidence and pleadings in much more detail than the referral court. If the referral court is able to see the frivolity in the litigation on the basis of bare minimum pleadings, then it would be incorrect to doubt that the arbitral tribunal would not be able to arrive at the same inference, most likely in the first few hearings itself, with the benefit of extensive pleadings and evidentiary material."*

- 18.** The scope of inquiry under Section 11 of the Act, 1996 is limited to ascertaining the *prima facie* existence of an arbitration agreement. In the present case, the High Court exceeded this limited scope by undertaking a detailed examination of the factual matrix. The

**Goqii Technologies Private Limited v.  
Sokrati Technologies Private Limited**

High Court erroneously proceeded to assess the auditor's report in detail and dismissed the arbitration application. In our view, such an approach does not give effect to the legislative intent behind the 2015 amendment to the Act, 1996 which limited the judicial scrutiny at the stage of Section 11 solely to the *prima facie* determination of the existence of an arbitration agreement.

19. As observed in *Krish Spinning* (*supra*), frivolity in litigation too is an aspect which the referral court should not decide at the stage of Section 11 as the arbitrator is equally, if not more, competent to adjudicate the same.
20. Before we conclude, we must clarify that the limited jurisdiction of the referral Courts under Section 11 must not be misused by parties in order to force other parties to the arbitration agreement to participate in a time-consuming and costly arbitration process. This is possible in instances, including but not limited to, where the claimant canvasses the adjudication of non-existent and *mala fide* claims through arbitration. With a view to balance the limited scope of judicial interference of the referral Courts with the interests of the parties who might be constrained to participate in the arbitration proceedings, the Arbitral Tribunal may direct that the costs of the arbitration shall be borne by the party which the Tribunal ultimately finds to have abused the process of law and caused unnecessary harassment to the other party to the arbitration. Having said that, it is clarified that the aforesaid is not to be construed as a determination of the merits of the matter before us, which the Arbitral Tribunal will rightfully be equipped to determine.

**E. CONCLUSION**

21. The existence of the arbitration agreement in Clause 18.12 of the MSA has not been disputed by the respondent. The question whether there exists a valid dispute to be referred to arbitration can be addressed by the Arbitral Tribunal as a preliminary issue.
22. As a result, the appeal filed by the appellant is allowed and the impugned order passed by the High Court of Bombay is hereby set aside.
23. We appoint Mr. S.J. Vazifdar, former Chief Justice of the Punjab & Haryana High Court, as the sole arbitrator to adjudicate the disputes between the parties.

**Digital Supreme Court Reports**

24. All legal contentions, including objections, if any, available to the respondent, are kept open to be taken up before the learned Arbitrator.
25. Pending application(s), if any, shall stand disposed of.

*Result of the case:* Appeal allowed.

<sup>†</sup>*Headnotes prepared by:* Nidhi Jain

**P.J. Dharmaraj**  
v.  
**Church of South India & Ors.**  
(Civil Appeal No. 14029 of 2024)  
06 December 2024  
**[Vikram Nath\* and Prasanna B.Varale, JJ.]**

**Issue for Consideration**

Matter pertains to the claim of the appellant seeking retirement age as sixty five years.

**Headnotes<sup>†</sup>**

**Service law – Retirement age – Age of superannuation, enhancement to 65 years – Appellant appointed as Director in CSIIT, affiliated with University governed by the laws applicable in the State of Telangana – At the time of issuance of the appointment letter, the age of superannuation according to the All India Council For Technical Education-AICTE and University Grants Commission-UGC Regulations was sixty years – Subsequently, the regulations were revised and the age of superannuation for teachers in Technical Institution enhanced to sixty-five years – Writ petition by the appellant seeking retirement age as sixty five years – Dismissed by the Single Judge as also the Division Bench of the High Court – Interference with:**

**Held:** Not called for – If the State Government itself has not adopted the amended regulations, the same cannot be applicable to the CSIIT – Even CSIIT has not determined the age of retirement of teachers to be 65 years – Merely because the UGC and AICTE regulations were subsequently amended in 2010 and the age of superannuation for teachers in Technical Institutions was increased to sixty-five years, the same benefit would not automatically extend to the appellant – Government of Andhra Pradesh (now Telangana) decided to not adopt the amendment increasing the age of superannuation to sixty-five in their universities or colleges – Respondent No.2 Institute is a self-financing, Minority Educational Institution administered by the respondent No.1, and

---

\* Author

### P.J. Dharmaraj v. Church of South India & Ors.

is neither run nor funded by Central Government – Regulations governing the age of superannuation throughout the State, the JNT University and its affiliated colleges including CSIIT is sixty years of age and thus, when the teachers of the University are only to continue up to the age of sixty years, the appellant cannot be given special consideration – Teachers of CSIIT cannot have their age of retirement more than that of the teachers of the affiliating University – It would create a serious anomaly, discrimination and inequality – After the appellant was given his notice for superannuation, he continued to make representations for retiral benefits, which shows that the appellant accepted his retirement at the age of sixty – Also, the appellant not a teacher and was only involved in administrative work with CSIIT – Appellant not led any evidence to prove that he qualifies as a teacher after becoming Director – AICTE and UGC regulations are applicable only to those who qualify as teachers and are discharging classroom teaching duties – Furthermore, the appellant has already retired, and respondent No.4 appointed in place of the appellant, is discharging his duties as Director. [Paras 9, 10]

#### Case Law Cited

*Islamic Academy of Education and Ors. v. State of Karnataka and Ors.* [\[2003\] Supp. 2 SCR 474](#) : (2003) 6 SCC 697; *Sreejith P.S. v. Rajasree M.S. and Ors.* [\[2022\] 18 SCR 252](#) : 2022 SCC OnLine SC 1473; *Kalyani Mathivanan v. K.V. Jeyaraj and Ors.* [\[2015\] 3 SCR 467](#) : (2015) 6 SCC 363; *Janet Jeyapaul v. SRM University and Ors.* [\[2015\] 10 SCR 1049](#) : (2015) 16 SCC 530; *T.M.A Pai Foundation and Ors. v. State of Karnataka and Ors.* [\[2002\] Supp. 3 SCR 587](#) : (2002) 8 SCC 481 – distinguished.

#### List of Keywords

Retirement age as sixty five years; Retirement age; Age of superannuation for teachers; Anomaly; Discrimination; Inequality; Leave encashment and gratuity.

#### Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 14029 of 2024

From the Judgment and Order dated 22.11.2021 of the High Court for the State of Telangana at Hyderabad in WA No. 753 of 2019

**Digital Supreme Court Reports****Appearances for Parties**

Gopal Sankaranarayanan, Sr. Adv., Ms. Aditi Gupta, Mandeep Kalra, Ms. Anushna Satapathy, Ms. Chitrangada Singh, Ms. Radhika Jalan, Yashas J, Ms. Arushi Kulshrestha, Ms. Widaphi Lyngdoh, Advs. for the Appellant.

Vinay Navare, J. Prabhakar, Sr. Advs., A. Sreenivas, Abhijeet Sinha, Sarthak Gaurav, Ms. Rimmi Bharadwaj, Ravinder Agarwal, Lekh Raj Singh, Amit Gaurav Singh, Harish Pandey, Anil Soni, Advs. for the Respondents.

**Judgment / Order of the Supreme Court****Judgment****Vikram Nath, J.**

1. Leave granted.
2. The present appeal before us is arising out of a judgement passed by the High Court of Telangana on 22.11.2021 in Writ Appeal 753 of 2019 whereby the Division Bench of the High Court has upheld the decision of the Single Judge of the High Court dated 04.09.2019 in W.P.No.45297 of 2018 whereby the Appellant's Writ Petition was dismissed wherein he was contesting his retirement from the Respondent No.2 Institute which took effect from 14.08.2018 and the appointment of Respondent No.4 in his place. Aggrieved by this, the Appellant is before us.
3. The facts of the case are such that the Appellant before us was initially appointed as Lecturer in Jawaharlal Nehru Technological (JNT) University in 1985. He was eventually promoted as Reader in 1995. CSI Institute of Technology (CSIIT), Respondent No.2 issued an advertisement dated 25.09.1998 for the post of Director. The Appellant applied against the said advertisement and was selected and appointed as Director vide appointment letter dated 26.11.1998. At the time that the appointment letter was issued to the Appellant, the age of superannuation according to the All India Council For Technical Education (AICTE) and University Grants Commission (UGC) Regulations was sixty years. These regulations were revised vide AICTE notification dated 22.01.2010 and UGC regulations dated 18.09.2010 wherein the age of superannuation for teachers in Technical Institution was enhanced to sixty-five years.

**P.J. Dharmaraj v. Church of South India & Ors.**

4. During his stint of Director at CSIIT the appellant claims to have been promoted to the post of Professor. On 14.08.2018, the Appellant was relieved from the post of Director and Respondent No.4 was appointed in his place. Two days later, on 16.08.2018, the Appellant made a representation praying that he be continued in service until the age of sixty-five. Appellant filed Writ Petition No.39511 of 2018 before the High Court against the entrustment of work to Respondent No.4. The High Court vide order dated 02.11.2018 disposed of this Writ Petition directing CSIIT to consider and pass orders on Appellant's representation dated 16.08.2018. CSIIT in compliance of the order ultimately rejected the Appellant's representation on 03.12.2018. Aggrieved, the Appellant filed Writ Petition No.45297 of 2018 which was dismissed by the Single Judge vide order dated 04.09.2019 primarily on the ground that CSIIT is affiliated with JNT University which is following sixty years to be the age of superannuation and therefore the Appellant cannot expect to be continued in service up to sixty-five years of age. This order was further challenged by the Appellant before the Division Bench of the High Court in Writ Appeal No.753 of 2019 which was dismissed vide impugned order dated 22.11.2021.
5. We have heard Shri Gopal Sankaranarayanan, learned senior counsel appearing for the appellant and learned senior counsels, Shri Vinay Navare and Shri J.Prabhakar appearing on behalf of Respondent Nos.1 and 2 and learned counsels Shri Ravinder Agarwal and Shri Harish Pandey appearing for Respondent No.3 and Respondent No.6 respectively.
6. The submissions advanced for the Appellant are that he has been retired from service on a premature and illegal basis as effected by Respondent Nos.1 and 2. It is contended that when the Appellant was appointed to the post of Director in the year 1998, his age of superannuation was determined as per the AICTE and UGC regulations prevailing at that time, which was sixty years of age. However, seeing that in 2010, AICTE and UGC issued amended regulations, wherein the age of superannuation was revised up to sixty-five years of age, the same benefit should be extended to the Appellant now as professional institutes cannot depart from such binding regulations. This stand has been corroborated by AICTE; Respondent No.6 vide their Counter Affidavit as well. To establish that UGC regulations are not merely recommendatory, reliance has been placed on the following judgements:

## Digital Supreme Court Reports

- i. [Islamic Academy of Education and Ors. vs. State of Karnataka and Ors<sup>1</sup>](#)
  - ii. [Sreejith P.S. vs. Rajasree M.S. and Ors<sup>2</sup>](#)
  - iii. [Kalyani Mathivanan vs. K.V. Jeyaraj and Ors<sup>3</sup>](#)
  - iv. [Janet Jeyapaul vs. SRM University and Ors<sup>4</sup>](#)
  - v. [T.M.A Pai Foundation and Ors. vs. State of Karnataka and Ors<sup>5</sup>](#)
7. On the other hand, it is contended on behalf of Respondent Nos.1 and 2 that the Respondent No.2 Institute is a Private Unaided Minority Educational Institution, administered by Respondent No.1, Church of South India and affiliated to the State University in the State of Telangana. The subsequent amendment to the UGC regulations has not been adopted by the State of Telangana and the revised age of sixty-five years for superannuation does not prevail as the norm in the State and in the JNT University with which CSIIT is affiliated.
8. It is also submitted that the Appellant was never involved in teaching and was only working on the post of Director with administrative duties and if the AICTE regulations were applicable at all, the benefits would still not extend to the Appellant as the said regulation uses the term “Teacher” and “Principal” distinctly which does not apply to the present Appellant as he discharged no teaching duties. It is further contended that the Appellant was due for retirement at the end of February 2018 and until August 2018, the Appellant was making representations urging that he be given academic duties and was negotiating for his retiral benefits. This goes to show that the Appellant himself accepted his retirement at sixty years of age.
9. Having considered the submissions advanced, we do not find merit in the contention that merely because the UGC and AICTE regulations were subsequently amended in 2010 and the age of superannuation for teachers in Technical Institutions was increased

---

1 [\[2003\] Supp. 2 SCR 474](#) : (2003) 6 SCC 697

2 [\[2022\] 18 SCR 252](#) : 2022 SCC OnLine SC 1473

3 [\[2015\] 3 SCR 467](#) : (2015) 6 SCC 363

4 [\[2015\] 10 SCR 1049](#) : (2015) 16 SCC 530

5 [\[2002\] Supp. 3 SCR 587](#) : (2002) 8 SCC 481

**P.J. Dharmaraj v. Church of South India & Ors.**

to sixty-five years, the same benefit would automatically extend to the Appellant. The Appellant was working as Director in CSIIT which is affiliated with JNT University which is governed by the laws applicable in the State of Telangana. In this case, the Government of Andhra Pradesh (now Telangana) has decided to not adopt the amendment increasing the age of superannuation to sixty-five in their universities or colleges vide G.O.Ms.No.40, Higher Education & UE-II Department, dated 28.06.2012. The Respondent No.2 Institute is a self-financing, Minority Educational Institution administered by the Respondent No.1 Church of South India, and it is neither run nor funded by the Central Government. The regulations governing the age of superannuation throughout the State, the JNT University and its affiliated colleges including CSIIT is sixty years of age and therefore, when the teachers of JNT University are only to continue up to the age of sixty years, the Appellant cannot be given special consideration. CSIIT is an affiliated Institute of JNT University. Its teachers cannot have their age of retirement more than that of the teachers of the affiliating University. It would create a serious anomaly, discrimination and inequality. If the State Government itself has not adopted the amended regulations, the same cannot be applicable to the CSIIT. Even CSIIT has not determined the age of retirement of teachers to be 65 years.

10. We have also considered the submission that after the Appellant was given his notice for superannuation, he continued to make representations for retiral benefits such as leave encashment and gratuity etc. This clearly goes to show that the Appellant has accepted his retirement at the age of sixty. Any other way, the Appellant is not a teacher and was only involved in administrative work with CSIIT. The Appellant has not led any evidence until now to prove that he qualifies as a teacher after becoming Director. AICTE and UGC regulations are applicable only to those who qualify as teachers and are discharging classroom teaching duties.
11. Regarding the judgements relied upon by the Appellant to establish that the amended UGC regulations are not merely recommendatory, we have considered them and find those to be distinguishable on fact and as such we are not dealing with them.
12. In view of the above and the fact that the Appellant has already retired, and Respondent No.4 is discharging his duties as Director

**Digital Supreme Court Reports**

of Respondent No.2 Institute, we find no reason to interfere with the impugned judgement passed by the High Court.

13. Accordingly, the present appeal stands dismissed.
14. Pending applications, if any, shall stand disposed of.

*Result of the case:* Appeal dismissed.

<sup>†</sup>*Headnotes prepared by:* Nidhi Jain

**Union of India & Ors.**

v.

**Rohit Nandan**

Civil Appeal No(s). 14394 of 2024

13 December 2024

**[Pamidighantam Sri Narasimha\* and Manoj Misra, JJ.]**

**Issue for Consideration**

Issue arose as regards entitlement of respondent-employee's claim to the benefit of Scheduled Caste category, when the respondent appointed on the basis of his 'Tanti' Caste Certificate, the 'Tanti' caste was deleted from the list of OBCs and merged with Pan/Swasi caste in the list of Scheduled Castes.

**Headnotes<sup>†</sup>**

**Constitution of India – Art.341 – Scheduled Castes list – Merging of caste “Tanti” with the caste ‘Pan/Sawasi’ in the list of Scheduled Castes – Entitlement of employee’s claim to the benefit of Scheduled Caste category – Appointment of the respondent-employee under the Other Backward Classes category on the basis of ‘Tanti’ caste certificate – State Government vide notification deleted ‘Tanti’ caste from the list of OBCs and merged it with ‘Pan/Swasi’ caste in the list of Scheduled Castes – Respondent obtained Scheduled Caste Certificate as a member of ‘Pan/Swasi’ caste and necessary changes made in the Service Record – Meanwhile, the respondent applied for promotion as a Scheduled Caste candidate, however, his name not approved since he was held not entitled to claim benefit of Scheduled Caste category – Tribunal dismissed the respondent’s application, however, the High Court allowed the writ petition – Correctness:**

**Held:** During pendency of this appeal, the same issue was decided by this Court in *Dr. Bhim Rao Ambedkar's case* holding that the exercise of taking out 'Tanti' from Extremely Backward Classes list issued and its merger with the Scheduled Caste list is bad, illegal and unsustainable – In view thereof, the respondent cannot claim the benefits of the Scheduled Caste category – After the decision of this Court in the case of *Dr. Bhim Rao Ambedkar*, the issue as

\* Author

## Digital Supreme Court Reports

regards the claim of reservation as Scheduled Caste candidate does not subsist – Furthermore, the earlier decisions stand on different footing wherein long standing appointments continued over a period of time, because of which court felt, on equitable considerations, not to disturb their employment – On facts, the respondent was appointed to said promotional post in December 2023 – Benefit of his illegal categorisation as a Scheduled Caste candidate, accrued to him was for a short period of less than a year and that too during the pendency of the said appeal – No equities in favour of the respondent like that of the candidates in earlier cases – Order cannot be passed directing continuation of the respondent on the basis of the illegal certification as Scheduled Caste – Judgment of the High Court set aside and that of the tribunal restored. [Paras 8, 9, 12, 13, 15, 16]

### Case Law Cited

*Dr. Bhim Rao Ambedkar Vichar Manch Bihar v. State of Bihar* [\[2024\] 7 SCR 796 : 2024 INSC 528](#); *K. Nirmala v. Canara Bank* [\[2024\] 8 SCR 868 : 2024 INSC 634](#) – Distinguished.

*State of Maharashtra v. Milind & Ors* [\[2000\] Supp. 5 SCR 65](#) : [\(2001\) 1 SCC 4](#) – referred to.

### List of Acts

Bihar Reservation of Vacancies in Posts and Services (For Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1991.

### List of Keywords

Art.341 Constitution of India; List of Scheduled Castes; Tanti caste; Pan/Swasi caste; Equity jurisdiction; Benefit of Scheduled Caste category; ‘Tanti’ Caste Certificate; Merging of caste “Tanti” with the caste ‘Pan/Sawasi’ in list of Scheduled Castes; Extremely Backward Classes; *Bhim Rao Ambedkar’s* case; Equitable considerations; Illegal categorisation as Scheduled Caste candidate; Illegal certification as Scheduled Caste.

### Case Arising From

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 14394 of 2024

From the Judgment and Order dated 19-01-2023 of the High Court of Judicature at Patna in CWJC No. 12096 of 2022

**Union of India & Ors. v. Rohit Nandan****Appearances for Parties**

K.M. Nataraj, A.S.G., Ms. R. Bala, Sr. Adv., Amrish Kumar, Ms. Shradha Deshmukh, Ms. Aakanksha Kaul, Sarthak Karol, Rohit Khare, Piyush Beriwal, Advs. for the Appellants.

Anilendra Pandey, Rajeev Kumar Ranjan, Ms. Priya Kashyap, Nadeem Hussain, M/s. Ranjan and Company, Advs. for the Respondent.

**Judgment / Order of the Supreme Court****Judgment**

**Pamidighantam Sri Narasimha, J.**

1. Leave granted.
2. The Union of India is in appeal against the judgment of the Division Bench of the High Court of Judicature at Patna<sup>1</sup> allowing the writ petition filed by the respondent challenging the order of the Central Administrative Tribunal dismissing his Original Application filed against the decision of the Government disentitling his claim under the Scheduled Caste category. Following the recent decision of this Court in *Dr. Bhim Rao Ambedkar Vichar Manch Bihar v. State of Bihar*,<sup>2</sup> we have allowed the appeal and directed that the respondent will continue to be of the OBC Category, belonging to Tanti caste and shall not to be treated as Scheduled Caste as per the notification of State Government dated 02.07.2015.
3. The short facts are that the respondent was appointed as a Postal Assistant in the year 1997 under the Other Backward Caste (OBC) Category on the basis of his 'Tanti' Caste Certificate.
4. The State Government vide Gazette Notification dated 02.07.2015 deleted 'Tanti' caste from the list of OBCs to enable members of the said community to avail benefits of Scheduled Caste (SC) category by merging it with Pan/Swasi caste which figures in the list of Scheduled Castes.

<sup>1</sup> In CWJC No. 12096 of 2022 dated 19.01.2023.

<sup>2</sup> [2024] 7 SCR 796 : 2024 INSC 528.

**Digital Supreme Court Reports**

5. Following the gazette notification, the respondent obtained a Scheduled Caste certificate as member of the Pan/Swasi caste from the office of District Magistrate, Patna on 29.09.2015 and requested the Chief Post Master General, Patna on 23.06.2016 for change of his category from OBC to Scheduled Caste in his Service Book in terms of the new caste certificate and the aforesaid Gazette notification. In the meanwhile, the respondent applied for promotion to the Postal Service Group 'B' through Limited Departmental Competitive Examination (LDCE) as notified on 07.10.2016, as a Scheduled Caste candidate and appeared in the examination held on 18.12.2016. Though he was declared successful in the examination vide communication dated 16.04.2018, his name was not approved for promotion and his result was put on hold for further consideration vide notification dated 06.09.2018. Meanwhile, the office of the Postmaster General, East Region, Bihar, ordered on 17.08.2018 to change the category of respondent to Scheduled Caste in his Service Book.
6. Finally, the Department of Posts, after consulting the Department of Social Justice and Empowerment, ordered vide communication dated 14.02.2019 that the respondent was not entitled to the benefit of Scheduled Caste category as he does not belong to scheduled caste and deleted his name from the list of candidates successful in the examination. Being aggrieved by the aforesaid order dated 14.02.2019, the respondent filed OA/050/00289/2019 before the Central Administrative Tribunal, which was dismissed on 01.04.2022.
7. The decision of the Tribunal was challenged before the High Court in a Writ Petition and the High Court allowed the same on 19.01.2023 by the order impugned before us. The High Court proceeded on the following premise:

*"9. It is not a case that the State Government has amended the Presidential order without any authority of law and has included a particular caste in the category of Scheduled Caste or Scheduled Tribe, but the State Government has only deleted one of the most backward castes from the State list on account of the fact that it is a Scheduled Caste already notified in the Presidential order and, therefore, to enable them to take the benefit of the Presidential order the circular has been issued as a clarification .*

**Union of India & Ors. v. Rohit Nandan**

*10. Moreover, the petitioner has been issued a caste certificate of SC category by a competent authority and the same has not been challenged or cancelled. Hence, for all practical purposes, the petitioner is a person belonging to the SC category.*

*11. In the light of discussion made hereinabove and under the facts and circumstances of the case, the present writ petition deserves to be allowed and is accordingly allowed. The order of learned CAT dated 01.04.2022 and the order dated 14.02.2019 issued by the respondent no.3 are quashed and set aside.”*

8. During the pendency of the appeal before us and after notice was issued by this Court on 25.08.2023, an important development occurred. The very same question was taken up and decided by this Court on 15.07.2024 in *Dr. Bhim Rao Ambedkar* (supra). Therein, it has been held that the exercise of taking out ‘Tanti’ from the EBC (‘Extremely Backward Classes’) list issued under the Bihar Reservation of Vacancies in Posts and Services (For Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1991 and its merger with the Scheduled Caste list is bad, illegal and unsustainable. The relevant portions of the decision are as follows:

*“36. Having considered the submissions advanced, we have no hesitation in holding that the Resolution dated 01.07.2015 was patently illegal, erroneous as the State Government had no competence/ authority/power to tinker with the lists of Scheduled Castes published under Article 341 of the Constitution. The submission of the respondent-State that Resolution dated 01.07.2015 was only clarificatory is not worth considering for a moment and deserves outright rejection. Whether or not it was synonymous or integral part of the Entry-20 of the lists of Schedule Castes, it could not have been added without any law being made by the Parliament. The State knew very well that it had no authority and had accordingly forwarded its request to the Union of India in the year 2011. The said request was not accepted and returned for further comments/justification/review. Ignoring the same, the State proceeded to issue the Circular dated 01.07.2015. The State may be justified in deleting “Tanti-*

**Digital Supreme Court Reports**

*Tantwa" from the Extremely Backward Classes list on the recommendation of the State Backward Commission, but beyond that to merge "Tanti-Tantwa" with 'Pan, Sawasi, Panr' under Entry 20 of the list of Scheduled Castes was nothing short of mala fide exercise for whatever good, bad or indifferent reasons, the State may have thought at that moment. Whether synonymous or not, any inclusion or exclusion of any caste, race or tribe or part of or group within the castes, races or tribes has to be, by law made by the Parliament, and not by any other mode or manner.*

*37. The submission that the recommendation of the Commission for Extremely Backward Classes was binding on the State, is not a question to be determined here, inasmuch as, even if we accept the submission, such recommendation could relate only to the Extremely Backward Classes. Whether or not to include or exclude any caste in the list of Extremely Backward Class would be within the domain of the Commission. The Commission would have no jurisdiction to make recommendation with respect to any caste being included in the Scheduled Castes lists and, even if it makes such a recommendation, right or wrong, the State has no authority to proceed to implement the same when it was fully aware that the Constitution does not permit it to do so. The Provisions of Article 341 sub-clause 1 and sub-Clause 2 are very clear and discrete. There is no ambiguity or vagueness otherwise requiring any interpretation other than what is mentioned therein. The State of Bihar has tried to read something in order to suit its own ends for whatever reason, we are not commenting on the same.*

*38. The High Court fell in serious error in upholding the said Notification on a completely wrong premise without referring to Article 341 of the Constitution."*

9. While the present case deals with the removal of the Tanti caste from the OBC list instead of the EBC List, the decision of this Court in Bhim Rao Ambedkar (supra) covers the issue and the notification of the State Government adding to the list of Scheduled Class is illegal and unlawful. The respondent cannot claim the benefits of the Scheduled Caste Category since the merger of the Tanti caste

**Union of India & Ors. v. Rohit Nandan**

with the Scheduled Caste list is bad in law in light of *Bhim Rao Ambedkar* (supra). The learned counsel for the respondent has not even argued this point.

10. However, the learned counsel submitted that despite illegality in the notification, this Court in *Bhim Rao Ambedkar* (supra) had protected those who had come to occupy the posts. The relevant portion is also reproduced for convenience:

*"39. Now comes the question with regard to protecting those Members of "Tanti-Tantwa" community who were extended benefit of Scheduled Castes pursuant to the Resolution dated 01.07.2015. In the present case, the action of the State is found to be mala fide and de hors the constitutional provisions. The State cannot be pardoned for the mischief done by it. Depriving the members of the Scheduled Castes covered by the lists under Article 341 of the Constitution is a serious issue. Any person not deserving and not covered by such list if extended such benefit for deliberate and mischievous reasons by the State, cannot take away the benefit of the members of the Scheduled Castes. Such appointments would under law on the findings recorded would be liable to be set aside. However, as we have found fault with the conduct of the State and not of any individual member of the "Tanti- Tantwa" community, we do not wish to direct that their services may be terminated or that recovery may be made for illegal appointments or withdrawal of other benefits which may have been extended. We are of the view that all such posts of the Scheduled Castes reserved quota which have been extended to the members of the "Tanti-Tantwa" community appointed subsequent to the Resolution dated 01.07.2015 be returned to the Scheduled Castes Quota and all such members of the "Tanti-Tantwa" community, who have been extended such benefit may be accommodated under their original category of Extremely Backward Classes, for which the State may take appropriate measures.*

[...]

**Digital Supreme Court Reports**

*42. It is further directed that such posts of the Scheduled Castes Quota which had been filled up by members of "Tanti-Tantwa" community availing benefit on the basis of Resolution dated 01.07.2015 may be returned to the Scheduled Castes category and such candidates of "Tanti-Tantwa" community be accommodated by the State in their original category of Extremely Backward Classes by taking appropriate measures."*

11. Learned counsel has also relied on the decision of this Court in K. Nirmala v. Canara Bank<sup>3</sup> wherein the appellants were granted protection despite the State Government notification treating them as members belonging to Scheduled Caste and Scheduled Tribe was withdrawn by the State Government after the decision of the Supreme Court in a case of State of Maharashtra v. Milind & Ors.<sup>4</sup> The relevant portion of the said order is as under:

*"35. In wake of the discussion made above, we conclude that the appellants are entitled to protection of their services by virtue of the Government circular dated 29<sup>th</sup> March, 2003 issued by the Government of Karnataka as ratified by communication dated 17<sup>th</sup> August, 2005 issued by the Ministry of Finance. The circular dated 29<sup>th</sup> March, 2003 issued by the Government of Karnataka specifically extended protection to various castes, including those which were excluded in the earlier Government circular dated 11<sup>th</sup> March, 2002. This subsequent circular covered the castes such as Kotegara, Kotekshathriya, Kotevara, Koteyar, Ramakshathriya, Sherugara and Sarvegara, thus, ensuring that individuals of these castes, holding Scheduled Castes certificates issued prior to de-scheduling, would be entitled to claim protection of their services albeit as unreserved candidates for all future purposes. Additionally, the communication issued by the Ministry of Finance dated 17<sup>th</sup> August, 2005 reinforced the protective umbrella to the concerned bank employees and also saved them from departmental and criminal action."*

3 2024 INSC 634 : [2024] 8 SCR 868

4 [2000] Supp. 5 SCR 65 : (2001) 1 SCC 4

**Union of India & Ors. v. Rohit Nandan**

12. Having considered the matter in detail, we are of the opinion that after the decision of this Court in the case of *Bhim Rao Ambedkar* (supra), the issue of the appellant claiming reservation as Scheduled Caste candidate does not subsist. As indicated earlier, it is not even the argument of the respondent that the said judgment will not apply.
13. The decisions of this Court in *Bhim Rao Ambedkar* (supra) and in *K. Nirmala* (supra) exercising equity jurisdiction stand on a different footing and they can be distinguished on facts. Those judgments dealt with long standing appointments, continued over a period of time, because of which court felt, on equitable considerations, not to disturb the employment of the appellants therein. The facts in this case are completely different and the following will clarify the position.
14. The respondent was in service of the Union on the basis of reservation claimed by him as an OBC candidate. It was only on 02.07.2015 that the State Government issued a notification shifting the caste Tanti from the OBC to that of Scheduled Caste and the necessary change in the service record was brought only on 17.08.2018. In the meanwhile, an advertisement was issued on 07.10.2016 for a Limited Departmental Competitive Examination, and the respondent applied as a Scheduled Caste candidate.
15. When the Government refused appointment to the respondent to the post as he does not belong to Scheduled Caste, he approached the Tribunal and filed an Original Application which came to be dismissed on 01.04.2022. However, the respondent's writ petition was allowed by the High Court only on 19.01.2023. We are informed that during the pendency of the matter before this Court, the respondent was appointed to the said promotional post only on 14.12.2023. Even assuming that the respondent was given benefit of his illegal categorisation as a Scheduled Caste candidate, the benefit that accrued to him was for a short period of less than a year and that too during the pendency of this appeal. Therefore, there are no equities in favour of the respondent like that of the candidates in the case of *Bhim Rao Ambedkar* or *K. Nirmala* (supra). In view of the clear position of law, coupled with lack of equities based on the facts and circumstances of the case, we cannot direct continuation of the respondent on the basis of the illegal certification as Scheduled Caste.

**Digital Supreme Court Reports**

16. In view of the above, we allow the appeal, set aside the judgment of the High Court in CWJC No. 12096 of 2022 dated 19.01.2023 and restore the judgment and order of the Central Administrative Tribunal dated 01.04.2022 dismissing the Original Application filed by the respondent. There shall be no order as to costs.

*Result of the case:* Appeal allowed.

<sup>†</sup>*Headnotes prepared by:* Nidhi Jain

**Kunhimuhammed@Kunheethu**

v.

**The State of Kerala**

(Criminal Appeal No. 5097 of 2024)

06 December 2024

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

#### **Issue for Consideration**

Whether appellant had the intention to commit murder; whether the appellant's act can be brought under section 304, IPC in light of the offence being committed in exercise of private defense and thereby exceeding the power given under the law, that is under exception 2 to section 300, IPC; whether appellant's sentence should be reduced on the grounds of parity with his co-accused.

#### **Headnotes<sup>†</sup>**

**Penal Code, 1860 – ss.302, 324 and 326/34 – The sympathizers of two political groups fought against each other – Appellant along with other accused committed murder of victim-S and injured CW-1 – Trial Court held appellant guilty u/ss.302, 324 and 326/34 of IPC and sentenced him to life imprisonment and the same was upheld by the High Court – Correctness:**

**Held:** The severity of the injuries inflicted on the deceased has been central to the Courts' conclusion that the act qualifies as murder under Section 300 of the IPC – As per the post-mortem report, the deceased sustained both external and internal ante-mortem injuries that were identified as being inflicted by a sharp-edged knife – The prosecution established beyond doubt that these injuries were inflicted by the appellant-accused no. 1 using a knife, which was recovered during the investigation based on the appellant's disclosure statement – Further, the doctor PW-6 has stated that these injuries were sufficient to cause death in the ordinary course of nature – Cross-examination of these witnesses did not reveal any inconsistencies that could undermine the credibility of the evidence – Consequently, the courts have rightly concluded that the fatal injuries inflicted by the appellant were the direct cause of the deceased's death – As far as intention of appellant to commit

---

\* Author

**Kunhimuhammed@Kunheethu v. The State of Kerala**

murder is concerned, the injuries were concentrated on the vital parts of the deceased's body, such as the chest and ribs, which house critical organs like the heart and lungs – The deliberate targeting of these areas indicates a clear intent to cause harm that could lead to death – There is also the testimony of the injured witnesses that accused used considerable force while stabbing – The other co-accused were reportedly armed with sticks, the appellant-accused no. 1 was in possession of a sharp knife, which was used to inflict severe injuries – The decision to carry and use such a weapon during the scuffle reflects a readiness to escalate violence beyond a mere physical altercation – The third clause of Section 300, IPC defines murder as the act of causing death by causing such bodily injury as is likely to result in death in the ordinary course of nature – In the instant case, the appellant's actions satisfy these criteria – The appellant was armed with a knife, which he used to inflict multiple injuries on vital organs – The fatal nature of these injuries, as confirmed by medical evidence, and the circumstances of the attack clearly point to an intent to cause death or at least an intention to inflict injuries with the knowledge that they were likely to result in death – Even if it is presumed that the appellant-accused no. 1 did not have an intention to cause such bodily injury, the act of causing injuries with knife to vital parts is reflective of the knowledge that causing such injuries is likely to cause death in the ordinary course.

[Paras 25.1, 25.7, 25.8, 25.16]

**Penal Code, 1860 – s.304 – Whether the appellant's act can be brought under section 304, IPC in light of the offence being committed in exercise of private defense and thereby exceeding the power given under the law, that is under exception 2 to section 300, IPC:**

**Held:** The courts below have made a categorical finding that the appellant-accused no.1 and his co-accused were the aggressors in the altercation – The attack was initiated by the accused group, who were armed with sticks and a knife, with the intent to intimidate or harm the victim and his companions – This fact is substantiated by the testimony of PW-1, an injured eyewitness, who described the sequence of events leading up to the stabbing – Even if it were assumed that the appellant-accused no. 1 acted in self-defense, the evidence overwhelmingly demonstrates that the force used was excessive and disproportionate – The act of stabbing the deceased

**Digital Supreme Court Reports**

multiple times in vital organs such as the chest and heart goes far beyond what is permissible under the right of private defense – In the post-mortem report and corroborated by the testimony of PW-6 (the police surgeon), the injuries inflicted on the deceased were severe and intentional, including a fatal wound to the heart – In light of the above findings, the plea of exceeding the right of private defense under Exception 2 to Section 300, IPC, is not applicable to the appellant's case. [Paras 26.5, 26.6, 26.7]

**Penal Code, 1860 – ss.302, 324 and 326/34 – Appellant-accused no.1 was convicted u/ss.302, 324 and 326/34 of IPC and sentenced to life imprisonment – Whereas, accused no.2 was found guilty of offences punishable u/s.326 and u/ss.324/34 of IPC and he was sentenced to six years imprisonment u/s.326 and two years rigorous imprisonment u/s.324 of IPC – The third accused was also awarded the same sentence as accused no.2 – The sentences were to run concurrently – All the three accused filed separate appeals before the High Court, which were dismissed – The second and third accused preferred a separate SLP, wherein this Court extended benefit of doubt to accused no.3 whereas accused no.2's conviction was upheld, however, his sentence u/s.326 for six years was reduced to three years – Whether appellant's sentence should be reduced on the grounds of parity with his co-accused:**

**Held:** The doctrine of parity ensures fairness in sentencing when co-accused persons are similarly situated and share the same level of culpability – However, parity is not an automatic entitlement; the role, intent, and actions of each accused must be individually assessed to determine their degree of involvement in the crime – In the instant case, the courts have carefully evaluated the evidence against each accused and tailored their sentences accordingly – The appellant's argument for parity fails to recognize the qualitative differences in their roles and the gravity of their actions – The appellant's actions were not only more severe but also demonstrated a clear intent to cause death – The fatal injuries inflicted on the deceased, as detailed in the post-mortem report, leave no room for doubt about the appellant-accused no. 1's culpability – The courts below have correctly observed that the appellant's role in the crime is incomparable to that of his co-accused – The principle of parity does not apply in the present case, as the appellant's

### Kunhimuhammed@Kunheethu v. The State of Kerala

actions were materially different from those of his co-accused.  
[Paras 27.2, 27.6, 27.7]

**Penal Code, 1860 – ss.302, 324 and 326/34 – Appellant convicted u/ss.302, 324 and 326/34 of IPC and sentenced to life imprisonment – Plea of old age and deteriorating health:**

**Held:** A murder committed with the intent to target vital organs, particularly in a group setting, reflects a level of intent and cruelty that demands an appropriate punitive response – To reduce the sentence in such a case would risk undermining the seriousness of the crime and the sanctity of life itself, principles that the judicial system is duty-bound to uphold – While the Court acknowledges the appellant's advanced age and medical condition, these factors cannot outweigh the need for justice and the imperative to uphold the rule of law – When the minimum sentence itself is life imprisonment, then grounds like parity, leniency, old age, health concerns, etc. shall not be of any aid to the accused while seeking reduction of sentence – Therefore, the appellant herein has been granted the minimum sentence for committing the offence of murder. [Paras 28.4, 28.5, 29]

#### Case Law Cited

*Manubhai Atabhai v. State of Gujarat* [2007] 7 SCR 1115 : (2007) 10 SCC 358; *Arun Nivalaji More v. State of Maharashtra* [2006] Supp. 4 SCR 301 : (2006) 12 SCC 613; *Nishan Singh v. State of Punjab* [2008] 4 SCR 500 : (2008) 17 SCC 505; *Vinod Kumar v. Amritpal* [2021] 11 SCR 954 : (2021) 19 SCC 181; *Balkar Singh v. State of Uttarakhand* [2009] 5 SCR 242 : (2009) 15 SCC 366; *Darshan Singh v. State of Punjab* [2010] 1 SCR 642 : (2010) 2 SCC 333; *V. Subramani v. State of Tamil Nadu* [2005] 2 SCR 536 : (2005) 10 SCC 358; *Sone Lal v. State of U.P.* [1981] 3 SCR 352 : (1981) 2 SCC 531 – referred to.

#### List of Acts

Evidence Act, 1872; Penal Code, 1860; Code of Criminal Procedure, 1973.

#### List of Keywords

Third clause of Section 300, IPC; Injuries were sufficient to cause death in the ordinary course of nature; Exception 2 to section 300, IPC; Private defence; Doctrine of parity; Reduction of sentence; Old age of accused; Deteriorating health of accused.

**Digital Supreme Court Reports****Case Arising From**

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 5097 of 2024

From the Judgment and Order dated 18.09.2018 of the High Court of Kerala at Ernakulam in CRLA No. 1477 of 2012

**Appearances for Parties**

Nikhil Goel, Sr. Adv., Haris Beeran, Azhar Assees, Anand B. Menon, Ms. Maneesha Sunilkumar, Radha Shyam Jena, Advs. for the Appellant.

P.V. Dinesh, Sr. Adv., Nishe Rajen Shonker, Mrs. Anu K Joy, Alim Anvar, Ms. Anna Oommen, Ms. Urvashi Chauhan, Advs. for the Respondent.

**Judgment / Order of the Supreme Court****Judgment****Vikram Nath, J.**

1. Leave granted.
2. This appeal assails the correctness of the judgment and order dated 18.09.2018 whereby the appeal of the appellant-accused no.1, against his conviction under sections 302, 324 and 326/34 of Indian Penal Code, 1860<sup>1</sup> has been dismissed. The prosecution story in brief is:
  - 2.1. On 10.04.2006, the sympathizers of United Democratic Front (UDF) and Left Democratic Front (LDF) fought against each other in connection with the dispute regarding the drawing of their election symbol at a place near a library in Kunnappalli, Pathaikkara Village. A criminal case with non-bailable offences was registered against the sympathisers of UDF in connection with the above incident.
  - 2.2. On 11.04.2006, The appellant along with the other accused who are sympathisers of Indian Union Muslim League on

---

<sup>1</sup> IPC

**Kunhimuhammed@Kunheethu v. The State of Kerala**

account of above enmity and with the intention to commit murder of deceased Subrahmannian and CW-1 Vasudevan Ramachandra, waited at Mukkilaplavu Junction for their arrival and at about 08:45 PM when the deceased along with Vasudevan Ramachandra reached at the above-mentioned place, the first accused attempted to beat the deceased with a tamarind stick, on his head. The deceased saved himself from the said attack and snatched the stick from the first accused and started assaulting the first accused on his forehead and back with the same stick. At this stage, the first accused took out a knife from his hip region and stabbed the deceased on the left side of chest, back of the head and the left shoulder. On seeing the above incident, CW-1 made an attempt to obstruct the first accused from assaulting the deceased, however, the first accused stabbed him on the left side of the buttock of CW-1 with the same knife. When CW-1 fell on the ground, the second accused caused a fracture on the right foot bone of CW-1 by beating him with another tamarind stick. Thereafter, the third accused assaulted CW-1 by beating on his right chest with a wooden stick.

- 2.3. After the said incident, the injured and the deceased were taken to the Maulana Hospital where Additional Sub-Inspector CW-32 reached and recorded the statement of CW-1 on the basis of which the First Information Report was registered as Crime No.260 of 2006 against the three accused under sections 302/324 read with section 34 IPC. The accused were thereafter arrested. The Investigating Officer prepared the inquest report, spot map, and recovered the knife under the seizure memo on the basis of the disclosure statement made by the first accused.
- 2.4. After completing the investigation, the charge sheet was submitted under sections 302/307 read with section 34 IPC. The Magistrate took cognizance and committed the case for trial to the Sessions Court. The Trial Court framed the charges under the aforesaid sections and read them over to the accused who denied the same and claimed trial.
3. The Prosecution examined 19 witnesses and filed 28 Exhibits and 18 material objects. The statements of the accused under section 313

**Digital Supreme Court Reports**

of Code of Criminal Procedure, 1973<sup>2</sup> were recorded wherein again they claimed that they were innocent and had nothing to do with the said incident. They claimed to have been falsely implicated on account of political rivalry at the instance of the leaders of Communist Party of India (Marxist) (CPI(M)).

4. The Trial Court after appreciating the evidence led by the parties held that the appellant was found guilty of offences punishable under sections 302, 324 and 326/34 IPC and accordingly sentenced him to life imprisonment with a fine of Rs.1 Lakh under section 302, IPC, six years rigorous imprisonment with a fine of Rs.25,000/- under section 326, IPC, and two years imprisonment under section 324, IPC. Accused no.2 was found guilty of offences punishable under section 326 and under sections 324/34 IPC and he was sentenced to six years imprisonment under section 326, IPC with a fine of Rs.25,000/- and two years rigorous imprisonment under section 324 IPC. The third accused was also awarded the same sentence as accused no.2. The sentences were to run concurrently.
5. Three appeals were preferred before the High Court by the three accused separately. The High Court by the impugned order dismissed all the three appeals. The second accused and the third accused had preferred a separate SLP registered as SLP(Crl.) No.2822 of 2019. In the said SLP, leave was granted, and it was partly allowed vide judgment and order dated 29.07.2019. This Court extended benefit of doubt to accused no.3 whereas accused no.2's conviction was upheld, however, his sentence under section 326 for six years was reduced to three years.
6. We have heard Shri Nikhil Goel, learned senior counsel appearing for the appellant and Shri P.V. Dinesh, learned senior counsel appearing for the State of Kerala and perused the material on record. The submissions of Shri Goel are limited to the extent that this was not a case of premeditated pre planned murder. There was no *mens rea* for committing culpable homicide amounting to murder. The intention was only of assaulting with the stick but later on during the fight as the deceased overpowered the appellant and started assaulting him with the same stick after snatching it from the appellant, the appellant pulled out the knife from his back and stabbed the deceased and

**Kunhimuhammed@Kunheethu v. The State of Kerala**

also the injured to save him. He has drawn attention to the evidence on record as also to the judgment of the Trial Court wherein specific finding was recorded to that extent by the Trial Court but despite the same, the Trial Court proceeded to record conviction under section 302 IPC and not section 304 IPC.

7. He also submitted that the appellant is aged 67 years and is suffering from multiple ailments and that having undergone almost twelve and half years of actual sentence, this Court may consider reducing the sentence by converting the conviction to under section 304 IPC Part II.
8. On the other hand, Mr. P.V. Dinesh, learned senior counsel appearing for the respondent-State submitted that the Trial Court and the High Court have both dealt with this aspect of the matter and have concurrently found that this was a case of culpable homicide amounting to murder. The fact that the appellant was carrying a knife and the number of assaults made by him on the deceased as also the injury would clearly show that the intention was to commit murder.
9. Having heard the learned counsels for the parties, we find it imperative to look into the evidence, witness testimonies, and injury reports to better understand and analyse the incident to see whether the culpable homicide in the present case amounts to murder or not. A meticulous analysis of the evidence on record is necessary to check whether the appellant had the intention to kill the deceased or if he can be given the benefit of reduction of sentence on the grounds pleaded in the appeal. To understand the evidence and their probative value in establishing the offence, it is necessary to look at the categorical findings of both the courts below.

**FINDINGS OF THE TRIAL COURT**

10. The Trial Court found appellant guilty of offences under Sections 302, 326, and 324, IPC. The Trial Court's findings were primarily based on the direct testimony of PW1, an eyewitness who was also injured in the incident, and corroborative evidence from medical and forensic reports.
11. The evidence of PW1 was crucial to the prosecution's case. The Trial Court carefully analyzed his testimony and found it credible, reliable, and consistent with the injuries sustained by the deceased and PW1, as recorded in the medical reports. Although the defense argued

**Digital Supreme Court Reports**

that PW1 was an interested witness and highlighted omissions and contradictions in his testimony, the Trial Court concluded that these discrepancies were minor and did not affect the core narrative. The Trial Court also noted that PW1's statements were corroborated by PW2, who arrived at the scene shortly after the incident and observed the accused fleeing. PW2's account was deemed trustworthy and supported the prosecution's version.

12. The recovery of the murder weapon (a knife, marked as MO1) at the instance of appellant was a significant factor in the Trial Court's findings. The knife was recovered under Section 27 of the Indian Evidence Act, 1872 based on information provided by appellant during his custodial interrogation. Forensic examination confirmed that the knife bore human blood matching the deceased's blood group. This finding provided compelling corroboration of PW1's testimony regarding the role of Accused No. 1 in the fatal assault. Additional physical evidence, such as blood-stained sticks recovered from the crime scene, further substantiated the prosecution's case.
13. Medical evidence also played a vital role. The postmortem report of the deceased, prepared by PW-6 (a police surgeon), confirmed that the cause of death was multiple stab injuries inflicted with a sharp-edged weapon like MO1. PW6 identified specific fatal injuries to the heart and lungs, which were consistent with the prosecution's narrative of the assault. Similarly, the wound certificate of PW1 corroborated his account of the injuries he sustained during the attack. The Trial Court observed that the injuries detailed in the medical reports aligned with the testimonies of PW1 and PW2, reinforcing the prosecution's case.
14. The defense attempted to argue that the incident occurred in the exercise of private defense, claiming that the accused were attacked by CPI(M) workers, including the deceased and PW1. However, the Trial Court rejected this claim, finding it unsubstantiated and improbable. The injuries on appellant, documented in the wound certificate, were deemed minor and inconsistent with the defense's narrative of a large-scale attack. The Court concluded that the accused were the aggressors and were not entitled to claim the right of private defense.
15. Ultimately, the Trial Court held that the prosecution had proved beyond reasonable doubt that appellant intentionally caused the death of

**Kunhimuhammed@Kunheethu v. The State of Kerala**

Subrahmannian and grievously injured PW1. The recovery of the murder weapon, corroborative forensic and medical evidence, and the reliable testimony of PW1 and PW2 were central to this conclusion. Accordingly, appellant was convicted under Sections 302, 326, and 324 IPC and sentenced to life imprisonment for the murder charge, along with additional terms for the other offenses.

**FINDINGS OF THE HIGH COURT**

16. The High Court of Kerala meticulously analyzed the roles and culpability of each accused based on the evidence presented during the trial. The findings highlight the distinct involvement of each accused in the crime, with a particular focus on the actions of appellant. This comprehensive assessment ensures that the degree of liability is proportionate to their individual actions and intentions as discerned from the evidence on record.
17. The High Court affirmed the findings of the Trial Court that Accused No. 1 played a pivotal role in the murder. The evidence of PW-1, an injured eyewitness, was central to establishing the sequence of events. PW-1 testified that appellant first beat the deceased with a wooden stick, causing injuries to his left shoulder. When the deceased tried to flee, appellant – accused no. 1 drew the knife and inflicted a stab wound to his back. As PW-1 intervened to protect the deceased, appellant-turned on him, stabbing him in the buttock. This act of aggression was corroborated by medical evidence, which indicated that PW-1 sustained injuries consistent with the use of the weapon recovered during the investigation. Despite PW-1's injuries, appellant resumed his attack on the deceased, stabbing him multiple times in the chest and other vital areas.
18. The High Court emphasized the significance of the post-mortem report, which revealed eight incised wounds on the deceased, including fatal injuries to the chest, heart, and lungs. PW-6, the police surgeon, testified that these injuries were consistent with the knife recovered and that the fatal wounds were sufficient in the ordinary course of nature to cause death. The chemical analysis linking the knife to appellant was further corroborated by the presence of human blood matching the deceased's blood group on the weapon. The recovery of the knife, facilitated by a disclosure statement from appellant, lent further credence to the prosecution's case.

**Digital Supreme Court Reports**

19. The High Court also addressed the appellant's argument that the testimony of PW-1 was unreliable due to alleged embellishments regarding the number of stab injuries. The Court rejected this contention, noting that minor omissions in the First Information Statement (FIS) could not undermine the credibility of PW-1's account, especially given the traumatic circumstances under which the FIS was recorded. The court reasoned that PW-1, having sustained a stab injury himself, may not have been able to provide exhaustive details at the time but consistently identified appellant – accused no. 1 as the primary assailant. The testimony of PW-2, an independent eyewitness, corroborated PW-1's account, further strengthening the prosecution's case against appellant.
20. The High Court concluded that the actions of appellant demonstrated clear intent to cause death. The deliberate targeting of vital organs with a sharp weapon indicated premeditation or, at the very least, the formation of intent during the incident. The court observed that while the altercation may have initially involved the use of sticks, appellant's decision to escalate the violence by drawing and using a knife was an intentional and unilateral act. This conduct set him apart from the other accused, whose actions were limited to assaulting the victims with sticks.
21. In contrast, accused nos. 2 and 3 were found guilty of lesser offenses under Section 326 IPC for causing grievous hurt to PW-1. The evidence established that they used sticks to beat PW-1, resulting in non-fatal injuries, including a fracture to his leg. The High Court concurred with the Trial Court's finding that there was insufficient evidence to prove that Accused Nos. 2 and 3 shared a common intention with appellant to commit murder. The court noted that there was no evidence to suggest that they were aware of the knife concealed by appellant or his intent to use it. This lack of knowledge precluded the application of Section 34, IPC to hold them vicariously liable for the murder.
22. The High Court underscored the principle that liability must be determined based on the specific actions and intentions of each accused. While accused nos. 2 and 3 were complicit in the assault, their participation did not extend to the homicidal attack perpetrated by accused no. 1. The court further noted that the initial assault with sticks did not indicate a pre-arranged plan to kill the deceased. Had

**Kunhimuhammed@Kunheethu v. The State of Kerala**

there been such an intention, the attack would have begun with the use of the knife rather than sticks.

23. The High court also dismissed the appellant's plea for leniency based on parity with the co-accused. It emphasized that the role of appellant was materially different and far more culpable than that of accused Nos. 2 and 3. The fatal injuries inflicted by appellant on the deceased were deliberate, targeted, and intended to cause death, whereas the actions of the co-accused were confined to non-fatal assaults on PW-1. The principle of parity, therefore, did not apply in this case.
24. The High Court upheld the conviction of appellant under Section 302 IPC for the murder of Subrahmannian. The court noted that the evidence against him was overwhelming, including eyewitness testimonies, medical reports, and forensic findings. The sentences imposed on Accused Nos. 2 and 3 under Section 326 IPC were also affirmed, as they appropriately reflected their limited roles in the incident.

---

**FINDINGS ON THE GROUNDS FOR REDUCTION OF SENTENCE**

25. **SCUFFLE AND LACK OF INTENT:** The appellant's counsel has argued that the incident arose out of a scuffle between two rival factions, during which the act of stabbing and killing the deceased was not premeditated but rather occurred spontaneously in the heat of the moment. According to the appellant, there was no deliberate intent to commit murder, and the unfortunate event resulted from a confrontation that escalated during the altercation. However, this submission has been closely examined and dismissed by both the Trial Court and the High Court, based on substantial evidence presented during the proceedings.

**A. Fatal Injuries:**

- 25.1 The severity of the injuries inflicted on the deceased has been central to the Courts' conclusion that the act qualifies as murder under Section 300 of the IPC. As per the post-mortem report, the deceased sustained both external and internal ante-mortem injuries that were identified as being inflicted by a sharp-edged knife. These injuries, detailed in the Trial Court's order, include multiple incised penetration wounds to vital regions such as the chest, rib cage, lungs, and heart.

**Digital Supreme Court Reports**

25.2 The evidence of PW-6, the police surgeon who conducted the post-mortem examination, was instrumental in establishing the fatal nature of the injuries. He testified that the death resulted from multiple injuries, including several incised wounds caused by the knife recovered during the investigation. The injuries sustained by the deceased, as per the report, were as follows:

**External Antemortem Injuries:**

1. (a) Incised wound 4x2x0.5cm involving back of right side of head, horizontal, upper inner end at 2 cm below occiput and 2 cm outer to midline back, with tapering ends.
2. Incised penetrating wound 12x3x1-2cm involving top and back of left shoulder, extending vertically downwards and backwards, upper inner end at 17 cm outer to mid line front and on top of shoulder.
3. (a) Incised penetrating wound (stab wounds) 3x2x3.5cm involving front of left chest, oblique, upper end near to midline front than lower, upper inner end at 12 cm outer to midline front and 11 cm below middle of collar bone, directed downwards. backwards and right wards, with tapering ends, and contusion of margins.
4. (a) Incised penetrating wound (stab wound) 2x1.5x3.5cm including front of right chest, oblique, upper end away from midline front than lower end, upper inner end at 10 cm outer to midline front and 17 cm below middle of collar bone, directed downwards, backwards and leftwards, with tapering ends and contusion of margins.
5. Incised wound 2x0.8x0.5cm involving dorsum of left hand at the root of middle finger.

**Internal Antemortem Injuries:**

1. (b) Contusions of scalp 17x10 em involving front half and 5x3cm involving right side of back. Inter one is. under neath and around the injury No. 1-(a).
2. (b) (i) contusion 23x9cm involving left front chest wall upper inner end at collar bone and in midline front.

**Kunhimuhammed@Kunheethu v. The State of Kerala**

- (ii) Incised penetrating wound 8x0.5x 1 cm involving left front chest wall (rib cage and inter costal muscles), oblique, which penetrates into chest cavity, with fracture separation of 3rd and 4th ribs and contusion of edges the upper inner end at 10 cm outer to midline front and 9 cm below middle of collar bone.
  - (iii) Incised penetrating wound 7x2x1.5 em involving left atrium and upper part of left ventricle of heart, which penetrates through entire thickness of antero lateral wall into cavity, tearing mitral valve leaflets, with contusion at the edges of the wound.
  - (iv) Laceration of left lung 4x1x0.5cm involving outer aspect of upper lobe and 2x2x0.5cm including outer aspect of lower lobe and contusion 6x3 cm involving outer aspect of lower lobe just below the previous injury  
Injury No. 3 (b) is underneath and corresponds with and continuation of injury no. (3) (a), and total depth of both injuries taken together is 6 cm.
4. (b) (i) Contusion 10x7 cm involving right front chest wall upper inner end at 13 cm below collar bone and in midline front.
- (ii) Incised penetrating wound 4x2x2cm involving right front chest wall (rib cage and intercostale muscles), oblique, penetrates into the chest cavity, with fracture separation of 5th rib, the upper inner end at 9 cm outer to midline front and 20 cm below middle of collar bone, with contusion of edges.
  - (iii) Laceration of right lung 2x1x0.5 cm involving outer aspect of middle lobe.  
Injury No. (4) (b) is underneath, corresponds with and continuation of injury No. (4) (a) and the total depth of both injuries taken together is 5 cm.

25.3 Among the injuries, some were specifically identified as fatal, including:

**Digital Supreme Court Reports**

- i. Penetrating wounds to the chest and rib cage. These injuries caused significant trauma to the internal organs, including the lungs and heart.
  - ii. Laceration of the heart. The most critical injury involved a penetrating wound measuring 7x2x1.5 cm in the left atrium and the upper part of the left ventricle, which extended through the entire thickness of the anterolateral wall of the heart. This injury also tore the mitral valve leaflets and caused contusions at the edges of the wound. The medical expert opined that this particular injury was sufficient to cause death in the ordinary course of nature. Additionally, other injuries inflicted on the deceased were of such severity that they compounded the fatal outcome.
- 25.4 This Court held in [Virsa Singh vs. State of Pepsu](#),<sup>3</sup> that to see whether the injury intended and thus caused by the accused was sufficient in the ordinary course of nature to cause death or not, it must be examined in each case on the basis of the facts and circumstances. In that case, the injury was caused with a knife blow to the stomach and it was inflicted with such force that the knife penetrated the abdomen of the deceased and caused injuries to the bowel. The expert opinion of the doctor therein stated on record that such an injury was sufficient in the ordinary course of nature to cause death. Further, in the absence of any evidence or circumstances to prove that the injury was accidental or unintentional, it was presumed that the accused had intended to cause such injury, thus making it fall under clause 3 of Section, 300 IPC.
- 25.5 It has been held by this Court in several cases such as [Manubhai Atabhai vs. State of Gujarat](#),<sup>4</sup> and [Arun Nivalaji More vs. State of Maharashtra](#),<sup>5</sup> that when the ocular evidence of eye witnesses are reliable and well corroborated by medical, and other evidence also inspires the confidence

3 [1958] SCR 1495

4 [2007] 7 SCR 1115 : (2007) 10 SCC 358

5 [2006] Supp. 4 SCR 301 : (2006) 12 SCC 613

**Kunhimuhammed@Kunheethu v. The State of Kerala**

that the accused had the intention to cause such fatal injuries, then such evidence is enough to prove the charge of murder beyond reasonable doubt. This intention is to be gathered from a number of circumstances and evidence like the place of injury the nature of the weapon, the force applied while inflicting the injury, and other such considerations. Whether the accused had any intention to kill the deceased has to be judged upon taking into consideration the facts of each case.

- 25.6 This position has been elaborated by this Court in the case of Nishan Singh vs. State of Punjab,<sup>6</sup> where the accused person had snatched the weapon carried by someone else and brutally inflicted injuries on the deceased. The Court stated that in such a case it cannot be said that he did not have the intention to cause death.
- 25.7 The prosecution established beyond doubt that these injuries were inflicted by the appellant–accused no. 1 using a knife, which was recovered during the investigation based on the appellant's disclosure statement. PW-18, the Investigating Officer, corroborated this recovery, and the seizure report was further attested by PW-16, an independent witness. Further, the doctor PW-6 has stated that these injuries are sufficient to cause death in the ordinary course of nature. Cross-examination of these witnesses did not reveal any inconsistencies that could undermine the credibility of the evidence. Consequently, the courts have rightly concluded that the fatal injuries inflicted by the appellant were the direct cause of the deceased's death.

**B. Intention to Commit Murder**

- 25.8 The appellant's primary defence has been the absence of intent to commit murder. However, intent can be inferred from the circumstances surrounding the act, including the nature and location of the injuries inflicted, the weapon used, and the actions of the appellant during the incident. The injuries were concentrated on the vital parts of the deceased's body, such as the chest and ribs, which house critical organs like

**Digital Supreme Court Reports**

the heart and lungs. The deliberate targeting of these areas indicates a clear intent to cause harm that could lead to death. According to the testimony of the injured eyewitness, the appellant stabbed the deceased with considerable force, further corroborating the prosecution's argument that the injuries were inflicted intentionally or at least with the knowledge of their natural consequence. While other co-accused were reportedly armed with sticks, the appellant—accused no. 1 was in possession of a sharp knife, which was used to inflict severe injuries. The decision to carry and use such a weapon during the scuffle reflects a readiness to escalate violence beyond a mere physical altercation. Even if the appellant did not have a prior intention to murder the deceased, the circumstances demonstrate that such injuries were caused which were sufficient in the ordinary course to cause death. The deliberate act of stabbing vital parts of the body, coupled with the force used, indicates that the appellant must have been aware of the likely fatal consequences of his actions. Under the provisions of Section 300 IPC, an intention to cause such injuries that are sufficient in the ordinary course of nature to cause death qualifies as murder, and even if ingredients other than intention to cause murder are proved, mere knowledge of the result of fatal actions is enough to ascribe culpability to the accused person.

- 25.9 The lower courts have also dismissed the appellant's argument that the act was not premeditated. While the attack may not have been planned in advance, intent can emerge in the heat of the moment, particularly during a violent confrontation. The appellant's decision to use a lethal weapon and the precise targeting of the victim's vital organs are sufficient to establish the requisite intent for murder or at least knowledge of the possible consequences of one's actions and to hold the appellant liable for death of the deceased as per clause 3 of Section 300, IPC.
- 25.10 This Court held in *Virsa Singh (Supra)*, that the prosecution must prove that there was an intention to inflict that particular injury, that is to say that the injury was not accidental or unintentional or that some other kind of injury was intended,

**Kunhimuhammed@Kunheethu v. The State of Kerala**

and that particular injury was sufficient in the ordinary course of nature to cause death.

25.11 The third clause of section 300 speaks of an intention to cause bodily injury which is sufficient in the ordinary course of nature to cause death. This Court in the above-mentioned judgment held that to bring the case under this part of the section the prosecution must establish objectively:

1. That a bodily injury is present;
2. That the nature of injury must be proved;
3. It must be proved that there was an intention to inflict that particular bodily injury;
4. That the injury inflicted is sufficient to cause death in the ordinary course of the nature.

25.12 The Court further held that:

"13. Once these four elements are established by the prosecution (and, of course, the burden is on the prosecution throughout) the offence is murder under S. 300, "Thirdly. It does not matter that there was no intention to cause death. It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (not that there is any real distinction between the two). It does not even matter that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death. No one has a licence to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If they inflict injuries of that kind, they must face the consequences; and they can only escape if it can be shown, or reasonably deduced that the injury was accidental or otherwise unintentional."

**Digital Supreme Court Reports**

25.13 This position has further been upheld by this Court recently in the case of *Vinod Kumar vs. Amritpal*,<sup>7</sup> wherein the bench observed that:

“24. Once the prosecution establishes the existence of the three ingredients forming a part of “thirdly” in Section 300, it is irrelevant whether there was an intention on the part of the accused to cause death. Further, it does not matter that there was no intention even to cause the injury of a kind that is sufficient to cause death in ordinary course of nature. Even the knowledge that an act of that kind is likely to cause death is not necessary to attract “thirdly”.”

25.14 This Court in the case of *Balkar Singh vs. State of Uttarakhand*,<sup>8</sup> while following the judgment in *Virsa Singh (Supra)* further elaborated the position of law and laid down that culpable homicide is murder if two conditions are fulfilled:

- a. the act which caused death is done with the intention of causing death or is done with the intention of causing a bodily injury; and
- b. the injury intended to be inflicted is sufficient in the ordinary course of nature to cause death.

25.15 The Court in the above-mentioned judgment clarified that even if the intention of accused was limited to inflicting a bodily injury sufficient to cause death in the ordinary course of nature, the offence of murder would still be made out.

25.16 The third clause of Section 300, IPC defines murder as the act of causing death by causing such bodily injury as is likely to result in death in the ordinary course of nature. In the present case, the appellant's actions satisfy these criteria. The appellant was armed with a knife, which he used to inflict multiple injuries on vital organs. The fatal nature of these injuries, as confirmed by medical evidence, and the circumstances of

7 [2021] 11 SCR 954 : (2021) 19 SCC 181

8 [2009] 5 SCR 242 : (2009) 15 SCC 366

**Kunhimuhammed@Kunheethu v. The State of Kerala**

the attack clearly point to an intent to cause death or at least an intention to inflict injuries with the knowledge that they were likely to result in death. Even if it is presumed that the appellant – accused no. 1 did not have an intention to cause such bodily injury, the act of causing injuries with knife to vital parts is reflective of the knowledge that causing such injuries is likely to cause death in the ordinary course.

- 25.17 The defence's argument that the incident was a spontaneous scuffle does not absolve the appellant of liability. While the scuffle may have triggered the attack, the appellant's use of a lethal weapon and the manner in which the injuries were inflicted elevate the act from culpable homicide to murder. Courts have consistently held that intent can be inferred from the nature and severity of injuries, as well as the choice of weapon and the manner of its use. The use of a lethal weapon and the deliberate targeting of vital parts of the body are strong indicators of such intent.
- 25.18 In light of the evidence and the legal principles involved, the appellant's plea for leniency on the grounds of spontaneity and lack of premeditation cannot be sustained. The nature and location of the injuries inflicted, the choice of weapon, and the circumstances of the attack unequivocally establish the liability of the appellant for causing the death of Subrahmannian. The argument that the act was committed in the spur of the moment does not diminish the gravity of the offence or the appellant's culpability.
26. **Plea of Private Defence:** The appellant's counsel has invoked the right of private defence arguing that the act of stabbing was carried out under a perceived threat to the appellant–accused no. 1's life. It is further contended that the appellant exceeded the bounds of lawful defence, thereby bringing the act within the ambit of Exception 2 to Section 300, IPC, which reads:

“Culpable homicide is not murder if the offender, in the exercise of good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right.”

**Digital Supreme Court Reports**

26.1 To bring the appellant's act under section 304, IPC in light of the offence being committed in exercise of private defense and thereby exceeding the power given under the law, that is under exception 2 to section 300, IPC – the ingredients therein must be proved. The ingredients for this exception are:

1. The accused must be free from fault in bringing about the encounter;
2. There must be an impending peril to life or of great bodily harm, either real or apparent;
3. Injuries received by the accused;
4. The injuries caused by the accused;
5. The accused did not have time or opportunity to take recourse to public authorities.

26.2 This Court in **Darshan Singh v. State of Punjab**,<sup>9</sup> held that the law provides for the right of private defense to citizens to enable them to protect themselves when confronted with imminent danger or unlawful aggression. But such protection must not be misused or extend beyond the necessities of the case.

26.3 The counsel for the appellant has argued that the appellant acted under a genuine belief of impending harm. However, this argument falls short upon scrutiny of the injuries sustained by the appellant during the altercation. As per the wound certificate, the appellant suffered only minor injuries:

- i. A contusion on the back of the buttock.
- ii. An abrasion over the forehead.

26.4 The medical evidence confirms that these injuries were superficial and did not pose any real or imminent threat to the appellant's life or safety. The courts below have rightly concluded that the appellant's perception of danger was neither reasonable nor proportional to the force he employed in response. It is a settled position of law that the number of injuries on the accused side by itself may not be sufficient to establish right of private defense,

### Kunhimuhammed@Kunheethu v. The State of Kerala

as has been held by this Court in [\*\*V. Subramani vs. State of Tamil Nadu\*\*](#).<sup>10</sup> But it has further been held that an overall view of the case has to be taken to check whether a case for private defense is made out from the evidence on record.

- 26.5 Even if the appellant claims to have acted in defense, his role in bringing about the altercation cannot be overlooked. The appellant cannot benefit from the exception when he was instrumental in creating the circumstances that led to the confrontation. It has been held in the case of [\*\*Sone Lal vs. State of U.P.\*\*](#),<sup>11</sup> that when the aggressors, even if they receive injuries from the victims of their aggression, cannot have the right of private defence. The courts below have made a categorical finding that the appellant–accused no.1 and his co-accused were the aggressors in the altercation. The attack was initiated by the accused group, who were armed with sticks and a knife, with the intent to intimidate or harm the victim and his companions. This fact is substantiated by the testimony of PW-1, an injured eyewitness, who described the sequence of events leading up to the stabbing. Even if it were assumed that the appellant–accused no. 1 acted in self-defense, the evidence overwhelmingly demonstrates that the force used was excessive and disproportionate. The act of stabbing the deceased multiple times in vital organs such as the chest and heart goes far beyond what is permissible under the right of private defense.
- 26.6 As noted in the post-mortem report and corroborated by the testimony of PW-6 (the police surgeon), the injuries inflicted on the deceased were severe and intentional, including a fatal wound to the heart. The appellant's actions cannot be justified as a defensive response to the minor injuries he sustained.
- 26.7 In light of the above findings, the plea of exceeding the right of private defense under Exception 2 to Section 300, IPC, is not applicable to the appellant's case. The courts below have rightly rejected this argument, holding that the appellant was not under any imminent peril and that his actions were deliberate and excessive.

10 [2005] 2 SCR 536 : (2005) 10 SCC 358

11 [1981] 3 SCR 352 : (1981) 2 SCC 531

**Digital Supreme Court Reports****27. Parity with Other Accused Persons:**

- 27.1 The appellant has further contended that his sentence should be reduced on the grounds of parity with his co-accused. It is argued that since one co-accused had his sentence reduced, and another was acquitted by this Court, the appellant should be afforded similar leniency. The appellant is seeking similar leniency on the ground that the circumstances and involvement of all accused were substantially similar.
- 27.2 The doctrine of parity ensures fairness in sentencing when co-accused persons are similarly situated and share the same level of culpability. However, parity is not an automatic entitlement; the role, intent, and actions of each accused must be individually assessed to determine their degree of involvement in the crime.
- 27.3 The evidence presented during the trial clearly establishes that the appellant played a distinct and more culpable role in the incident. While the co-accused were armed with sticks and caused non-fatal injuries to the victims, the appellant alone was armed with a knife and used it to inflict fatal injuries on the deceased. The testimony of PW-1 reveals that the appellant stabbed the deceased after his stick was snatched during the altercation. This sequence of events demonstrates a deliberate escalation by the appellant, who resorted to using a deadly weapon with the intent to cause grievous harm.
- 27.4 Nothing has been brought on record to show that the other accused persons had knowledge of appellant being in possession of the knife. Thus, there is no evidence to show that the other accused persons shared a common intention with the appellant to commit murder. The courts below have meticulously analyzed the evidence and concluded that the co-accused did not share a common intention to commit murder. While the group acted in concert to assault the victims, the fatal stabbing by the appellant was an independent and unilateral act. This finding is crucial in distinguishing the appellant's culpability from that of his co-accused. The absence of common intention among the co-accused precludes the application of vicarious liability under Section 34, IPC, for the act of murder.

**Kunhimuhammed@Kunheethu v. The State of Kerala**

- 27.5 The sentence of Accused No. 2 was reduced from six years to three years on the grounds that he caused only grievous hurt with a stick and did not participate in the stabbing and was also unaware of the knife in possession of appellant. Accused no.3 was given the benefit of doubt and was acquitted due to lack of evidence linking him to the assault.
- 27.6 The courts have carefully evaluated the evidence against each accused and tailored their sentences accordingly. The appellant's argument for parity fails to recognize the qualitative differences in their roles and the gravity of their actions. The appellant's actions were not only more severe but also demonstrated a clear intent to cause death. The fatal injuries inflicted on the deceased, as detailed in the post-mortem report, leave no room for doubt about the appellant – accused no. 1's culpability. The courts below have correctly observed that the appellant's role in the crime is incomparable to that of his co-accused.
- 27.7 The principle of parity does not apply in the present case, as the appellant's actions were materially different from those of his co-accused. The sentence imposed on the appellant reflects the gravity of his offense and his individual culpability.

**28. Plea of old age and deteriorating health:**

- 28.1 Another ground taken by the appellant for reduction in sentence is that he is a senior citizen and has severe health concerns necessitating continuous treatment and physiotherapy. This Court had once previously granted interim bail to the appellant on medical grounds owing to the fact that he had suffered a stroke and partial paralysis as a result.
- 28.2 The Court is cognizant of the appellant's advanced age and deteriorating medical condition, considerations that warrant a humane and compassionate approach to justice. These factors, when presented in cases of serious offences, often invite the judiciary to weigh individual circumstances against the broader interest of justice. However, the Court is also tasked with balancing these personal hardships against the severity and nature of the offence, as well as its impact on the rule of law and societal harmony.

**Digital Supreme Court Reports**

- 28.3 In the present case, the appellant has been convicted of murder, committed in the course of a group attack fueled by political rivalry. The act was not one of sudden provocation or impulse but arose from a premeditated and collective intent to harm the victim, even if the initial intention was to cause hurt. The evidence unequivocally establishes that the appellant actively participated in the attack, which culminated in the brutal stabbing of the victim in vital parts of the body, leading to his death. Such an act, carried out with the clear objective to eliminate the victim, underscores its heinous nature and deliberate execution.
- 28.4 While this Court has carefully considered the appellant's plea for leniency on account of old age and a medical condition, these factors alone cannot absolve or mitigate the responsibility for a crime of this magnitude. A murder committed with the intent to target vital organs, particularly in a group setting, reflects a level of intent and cruelty that demands an appropriate punitive response. To reduce the sentence in such a case would risk undermining the seriousness of the crime and the sanctity of life itself, principles that the judicial system is duty-bound to uphold.
- 28.5 Furthermore, the offence occurred in a context of political rivalry, a factor that exacerbates its gravity. Crimes rooted in such motives often have far-reaching consequences beyond the immediate loss of life, contributing to social unrest and weakening public confidence in the rule of law. The Court must therefore ensure that its decisions reinforce the principle of accountability and deter the recurrence of such violent acts, particularly those that disrupt public order. The medical evidence, corroborated by eyewitness testimony and the recovery of the weapon, leaves no room for doubt. While the Court acknowledges the appellant's advanced age and medical condition, these factors cannot outweigh the need for justice and the imperative to uphold the rule of law.
- 28.6 In light of the above, while we empathize with the appellant's personal circumstances, we find no compelling justification to interfere with the sentence imposed by the lower Court. The nature of the offence, its deliberate execution, and its societal implications necessitate that the punishment reflects the seriousness of the crime.

**Kunhimuhammed@Kunheethu v. The State of Kerala**

29. Lastly, once conviction under Section 302 of IPC is confirmed by all the Courts, then the minimum sentence is imprisonment for life, as provided under the provision itself. Thus, no ground or reason for granting a lesser sentence arises. When the minimum sentence itself is life imprisonment, then grounds like parity, leniency, old age, health concerns, etc. shall not be of any aid to the accused while seeking reduction of sentence. Therefore, the appellant herein has been granted the minimum sentence for committing the offence of murder.
30. After thoroughly examining the appellant's submissions and the evidence presented in the case, the Court concludes that the appeal against conviction and the request for a reduction in sentence are without merit. The findings of both the Trial Court and the High Court are well-founded and supported by compelling evidence.
31. The courts below have rightly concluded that the appellant's actions amount to murder under Section 300, IPC and thus punishable under Section 302, IPC. Accordingly, the appeal for reduction of the sentence is dismissed. The conviction and sentence are upheld.

*Result of the case:* Appeal dismissed.

<sup>†</sup>Headnotes prepared by: Ankit Gyan

**Birma Devi & Ors.**

v.

**Subhash & Anr.**

(Special Leave Petition(Civil) No. 29397 of 2024)

06 December 2024

**[J.B. Pardiwala and R. Mahadevan, JJ.]**

**Issue for Consideration**

Whether the relief of possession may be granted by the executing court in a case where the suit has been decreed for specific performance simpliciter and no express relief for the transfer of possession of the suit property has been granted.

**Headnotes<sup>†</sup>**

**Specific Relief Act, 1963 – s.22 – Executing court declined to handover the possession of the suit property to the respondents-plaintiffs (decree holders) holding that though there was a decree for specific performance no relief as regards putting the plaintiffs in possession of the suit property was granted – Order set aside by High Court – Challenged by subsequent purchasers:**

**Held:** In cases where the possession of the suit property is exclusively with the contracting party, then a decree for specific performance simpliciter, without specifically providing for delivery of possession, may give complete relief to the decree holder – However, in cases where the relief of possession cannot be effectively granted to the decree-holder without specifically claiming relief for possession, for example, in cases where the property agreed to be conveyed is jointly held by the defendant with other persons, or cases where after the contract the property has passed in possession of a third person, then the plaintiff, in order to obtain complete and effective relief, must claim the relief of transfer of possession over the property – Section 22 allows the plaintiff to amend the plaint to include a claim for the relief of possession, partition, etc. at “any stage of the proceeding” including the stage of execution of the decree by the executing court – Special Leave Petition dismissed – Transfer of Property Act, 1882 – s.55.  
[Paras 13, 16]

**Birma Devi & Ors. v. Subhash & Anr.****Case Law Cited**

*Babu Lal v. Hazari Lal Kishori Lal* [1982] 3 SCR 94 : (1982) 1 SCC 525; *Rohit Kochhar v. Vipul Infrastructure Developers Ltd. & Ors.*, 2024 INSC 920 – relied on.

**List of Acts**

Specific Relief Act, 1963; Transfer of Property Act, 1882.

**List of Keywords**

Agreement of sale; Decree for specific performance; Executing court; Relief of possession; Suit decreed for specific performance simpliciter; No express relief for the transfer of possession of the suit property; Possession of the suit property not handed over; Delivery of possession; Contracting party; Complete relief to the decree holder; Relief of possession; Property passed in possession of a third person; Subsequent purchasers; Stage of execution of the decree; Amend the plaint; “any stage of the proceeding”.

**Case Arising From**

EXTRAORDINARY APPELLATE JURISDICTION: Special Leave Petition (Civil) No. 29397 of 2024

From the Judgment and Order dated 11.07.2023 of the High Court of Judicature for Rajasthan at Jaipur in SBCWP No. 4982 of 2020

**Appearances for Parties**

Jasbir Singh Malik, Ms. Rhythm Bharadwaj, Narender Kumar Sharma, Ms. Suman Sharma, Varun Punia, Advs. for the Petitioners.

Ashish Kumar Upadhyay, Ms. Chavi Kalla, Ms. Maitri Goal, V. Sibi Kargil, Advs. for the Respondents.

**Judgment / Order of the Supreme Court****Order**

1. Application seeking permission to file the Special Leave Petition is granted.
2. Delay condoned.

**Digital Supreme Court Reports**

3. This petition arises from the order passed by the High Court of Judicature for Rajasthan, Bench at Jaipur in SB Civil Writ Petition No.4982/2020, by which the High Court allowed the petition filed by the respondents – herein (original plaintiffs and decree holders) and set aside the order passed by the Additional District Judge, Bansur, District Alwar (Rajasthan) in Execution No.06/2018.
4. The facts of this case in brief are that the petitioners– herein claim to be the subsequent purchasers of the suit property. The plaintiffs instituted a suit for specific performance of contract based on an agreement of sale with the original defendants. The plaintiffs have succeeded in the suit. The Trial Court passed a decree for specific performance in favour of the plaintiffs.
5. It appears that since the original defendant who had executed the agreement of sale is no longer interested in the matter as he seems to have sold the suit property to the petitioners – herein, there has been no further challenge to the judgment and decree passed by the Trial Court.
6. However, in the execution proceedings, the executing court took the view that although there is a decree for specific performance yet the decree does not say anything as regards putting the plaintiffs in possession of the suit property.
7. In such circumstances, the executing court declined to handover the possession of the suit property to the respondents – herein.
8. The order passed by the executing court came to be challenged by the respondents – herein - decree holder.
9. The High Court vide order dated 11-7-2023 allowed the petition in the following terms:-

*“14. Considering the view of the Hon'ble Courts in the cases referred to above, it is very safe to say that in the case of suit for specific performance even no decree for possession has been sought and the suit for specific performance is decreed, the Executing Court is under an obligation to see that the possession of the suit property as decreed is handed over to the decree-holder.*

*15. Taking into consideration the facts and the circumstances of the case and the view of the Hon'ble Courts in the*

**Birma Devi & Ors. v. Subhash & Anr.**

*cases referred to above, this Court is of the view that the decree of specific performance and the resultant execution and registration of the sale deed at the instance of the Executing court in favour of the plaintiff-decree holder entailed an implied right of the plaintiff-decree holder to be in possession of the property so conveyed. Since such a right has been denied by the impugned order by the Executing Court failing to exercise its jurisdiction, this Court set asides the impugned order dated 12.03.2019 passed by the Executing court.*

*16. Resultantly, the writ petition is allowed. The order dated 12.03.2019 passed by the Executing Court is set aside and the Executing court is directed to issue a warrant of possession of the suit property in favour of plaintiff - decree holder.*

*17. In view of the order passed in the main petition, the stay application and pending application/s, if any, also stand disposed of.”*

10. The petitioners – herein who claim to be the subsequent purchasers of the suit property seek to challenge the order of the High Court in this petition.
11. We have heard Mr. Jasbir Singh, the learned counsel appearing for the petitioners and Mr. Ashish Kumar Upadhyay, the learned counsel appearing for the respondents.
12. The short question that falls for our consideration is whether the relief of possession may be granted by the executing court in a case where the suit has been decreed for specific performance simpliciter and no express relief for the transfer of possession of the suit property has been granted.
13. The position of law on the issue has been settled by this Court in the case of Babu Lal v. Hazari Lal Kishori Lal reported in (1982) 1 SCC 525 wherein the Court while elaborating on Section 22 of the Specific Relief Act, 1963 laid down the law for the following two situations that may arise:
  - a. *First, in cases where the possession of the suit property is exclusively with the contracting party, then a decree for specific*

**Digital Supreme Court Reports**

*performance simpliciter, without specifically providing for delivery of possession, may give complete relief to the decree holder. This, the Court held, was in consonance with Section 55(1) of the Transfer of Property Act, 1882, which binds the seller, on being so required, to transfer to the buyer or such other person as he directs, such possession of the property as its nature admits.*

- b. *Secondly, in cases where the relief of possession cannot be effectively granted to the decree-holder without specifically claiming relief for possession, for instance, in cases where the property agreed to be conveyed is jointly held by the defendant with other persons, or cases where after the contract the property has passed in possession of a third person, then the plaintiff, in order to obtain complete and effective relief, must claim the relief of transfer of possession over the property defendant along with the relief of partition, etc., if required.*
14. For the second category of cases, the Court observed that Section 22, which was introduced by the legislature to avoid multiplicity of proceedings, allows the plaintiff to amend the plaint to include a claim for the relief of possession, partition, etc. at any stage of the proceeding. The Court further held that the expression “any stage of the proceeding” includes the stage of execution of the decree by the executing court. The relevant paragraphs from the said decision are reproduced hereinbelow:

*“13. The expression in sub-section (1) of Section 22 “in an appropriate case” is very significant. The plaintiff may ask for the relief of possession or partition or separate possession “in an appropriate case”. As pointed out earlier, in view of Order 2 Rule 2 of the Code of Civil Procedure, some doubt was entertained whether the relief for specific performance and partition and possession could be combined in one suit; one view being that the cause of action for claiming relief for partition and possession could accrue to the plaintiff only after he acquired title to the property on the execution of a sale deed in his favour and since the relief for specific performance of the contract for sale was not based on the same cause of action as the relief for partition and possession, the two reliefs could*

**Birma Devi & Ors. v. Subhash & Anr.**

*not be combined in one suit. Similarly, a case may be visualised where after the contract between the plaintiff and the defendant the property passed in possession of a third person. A mere relief for specific performance of the contract of sale may not entitle the plaintiff to obtain possession as against the party in actual possession of the property. As against him, a decree for possession must be specifically claimed or such a person is not bound by the contract sought to be enforced. In a case where exclusive possession is with the contracting party, a decree for specific performance of the contract of sale simpliciter, without specifically providing for delivery of possession, may give complete relief to the decree-holder. In order to satisfy the decree against him completely he is bound not only to execute the sale deed but also to put the property in possession of the decree-holder. This is in consonance with the provisions of Section 55(1) of the Transfer of Property Act which provides that the seller is bound to give, on being so required, the buyer or such person as he directs, such possession of the property as its nature admits.*

*14. There may be circumstances in which a relief for possession cannot be effectively granted to the decree-holder without specifically claiming relief for possession viz. where the property agreed to be conveyed is jointly held by the defendant with other persons. In such a case the plaintiff in order to obtain complete and effective relief must claim partition of the property and possession over the share of the defendant. It is in such cases that a relief for possession must be specifically pleaded.*

xxx xxx xxx

*17. The word “proceeding” is not defined in the Act. Shorter Oxford Dictionary defines it as “carrying on of an action at law, a legal action or process, any act done by authority of a court of law; any step taken in a cause by either party”. The term “proceeding” is a very comprehensive term and generally speaking means a prescribed course of action for enforcing a legal right. It is not a technical expression*

**Digital Supreme Court Reports**

*with a definite meaning attached to it, but one the ambit of whose meaning will be governed by the statute. It indicates a prescribed mode in which judicial business is conducted. The word 'proceeding' in Section 22 includes execution proceedings also. In Rameshwari Nath v. U.P. Union Bank Ltd. [AIR 1956 All 586 : 1956 All LJ 470 : 1956 All WR HC 450] such a view was taken. It is a term giving the widest freedom to a court of law so that it may do justice to the parties in the case. Execution is a stage in the legal proceedings. It is a step in the judicial process. It marks a stage in litigation. It is a step in the ladder. In the journey of litigation there are various stages. One of them is execution.*

xxx xxx xxx

*20. It is thus clear that the legislature has given ample power to the court to allow amendment of the plaint at any stage, including the execution proceedings. In the instant case the High Court granted the relief of possession and the objection raised on behalf of the petitioner is that this was not possible at the execution stage and in any case the court should have allowed first an amendment in the plaint and then an opportunity should have been afforded to the petitioner to file an objection."*

15. The aforesaid position of law has been recently reiterated by us in a recent order passed in the case of *Rohit Kochhar v. Vipul Infrastructure Developers Ltd. & Ors.* reported in 2024 INSC 920 wherein we have observed thus:

*"23. This Court in Babu Lal (supra), upon a combined reading of Sections 22 and 28(3) of the Specific Relief Act respectively and Section 55 of the Transfer of Property Act, observed that it was only "in an appropriate case" that the plaintiff was required to separately seek the relief of possession, partition, or separate possession, as the case may be, along with the relief of specific performance. The Court observed that in other cases, say for example a case where the exclusive possession of the suit property is with the contracting party, a decree for specific performance of the contract of sale simpliciter, without specifically providing*

**Birma Devi & Ors. v. Subhash & Anr.**

*for delivery of possession, may give complete relief to the decree-holder. This, the Court observed, was the mandate flowing from Section 55 of the Transfer of Property Act."*

16. The Special Leave Petition is, accordingly, dismissed.
17. Pending applications, if any, also stand disposed of.

*Result of the case:* Special Leave Petition dismissed.

<sup>†</sup>*Headnotes prepared by:* Divya Pandey

**Devendra Kumar & Ors.**

v.

**State of Chhattisgarh**

(Criminal Appeal No. 328 of 2015)

06 November 2024

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

**Issue for Consideration**

Whether the conviction would fall for the offence punishable u/s.302 IPC or under a lesser offence.

**Headnotes<sup>†</sup>**

**Penal Code, 1860 – ss. 304 Part I, 302, 307 read with s.34 –  
Punishment for culpable homicide not amounting to murder –  
Previous enmity between the families of the appellants and  
the victim – Appellants assaulted the victim with weapons  
after making a threat that they would kill him and later the  
victim succumbed to his injuries – Courts below convicted  
the appellants u/s.302 and s.307 rw s.34 and sentenced  
accordingly – Interference with:**

**Held:** Evidence of the medical expert that the death of the deceased was homicidal death does not call for interference – In view of the credible testimony of the eyewitnesses, no reason to interfere with the finding of the courts below that it is on account of the injuries caused by the appellants that the deceased had died – There was previous enmity between the parties – From the evidence of Sarpanch of the village it is clear that there was a quarrel between the appellants and the deceased – Weapons used by the accused persons are axe and sticks, which are commonly used by the agriculturists – No material on record to show that there was any premeditation – Taking into consideration all these aspects, the possibility of offence being committed by the appellants without premeditation in a sudden fight in a heat of passion upon a sudden quarrel cannot be ruled out – From the nature of the injuries sustained by the deceased, it cannot be said that the appellants have taken undue advantage or acted in

\* Author

## Digital Supreme Court Reports

a cruel or unusual manner – Thus, appellants entitled to benefit of doubt – Conviction of appellants u/s.302 altered to the one under Part I of s.304 – Appellants sentenced to the period already undergone. [Paras 18, 19, 20, 21, 23]

### List of Acts

Penal Code, 1860.

### List of Keywords

Previous enmity; Making threat of killing; Evidence; Medical expert; Homicidal death; Credible testimony; Eyewitnesses; Quarrel; Premeditation; Premeditation in a sudden fight in a heat of passion upon a sudden quarrel; Undue advantage; Acted in cruel or unusual manner; Benefit of doubt.

### Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 328 of 2015

From the Judgment and Order dated 04.10.2010 of the High Court of Chhattisgarh at Bilaspur in CRLA No. 15 of 2004

### Appearances for Parties

Vikrant Narayan Vasudeva (A.C.), Adv. for the Appellants.

Ravi Kumar Sharma, D.A.G., Mrs. Prerna Dhall, Piyush Yadav, Ms. Akanksha Singh, Praphull Kumar, Prashant Singh, Advs. for the Respondent.

### Judgment / Order of the Supreme Court

#### Judgment

**B.R. Gavai, J.**

1. This appeal challenges the judgment and order dated 4<sup>th</sup> October, 2010 passed by the Division Bench of the High Court of Chhattisgarh at Bilaspur in Criminal Appeal No. 15 of 2004 whereby the High Court dismissed the Criminal Appeal preferred by the present appellants and upheld the order of conviction and sentence dated 17<sup>th</sup> October, 2003 passed by the Additional Sessions Judge (FTC), Kawardha (CG)<sup>1</sup> in S.T. No. 50 of 2003.

<sup>1</sup> Hereinafter referred to as the 'trial court'.

**Devendra Kumar & Ors. v. State of Chhattisgarh**

**2.** The facts leading to the present appeal are as follows:-

- 2.1** On 20<sup>th</sup> December 2002, at about 11 a.m., a complaint was lodged by one Dhannu Das (PW-2), the shopkeeper of a betel shop at Village Chhirha who had witnessed an incident near his shop wherein the appellants had assaulted the deceased, namely Bahal, with lathis, a rod and an axe after making a threat that they would kill him. On the receipt of the complaint, the Police Station at Kawardha registered a First Information Report<sup>2</sup> being Crime No. 262 of 2002 under Section 307 read with Section 34 of the Indian Penal Code, 1860<sup>3</sup> against the appellants.
- 2.2** Pertinently, prior to the occurrence of the incident which ultimately led to this criminal appeal, a land dispute relating to certain agricultural land and crops therein was pending between the families of the present appellants and the deceased. In the pending *l/s*, the Sub-Divisional Magistrate had passed an order in Criminal Case No. 216 of 2003 titled Bahalram v. Devendra on 17<sup>th</sup> December 2002, thereby closing the proceedings under Section 145 of the Code of Criminal Procedure, 1973 in view of the order passed by the High Court of Chhattisgarh at Bilaspur, directing the maintenance of status quo in respect of the agricultural fields which were in the possession of the present appellants.
- 2.3** According to the prosecution story, at about 9 a.m. on 20<sup>th</sup> December 2002, Rajni Bai (PW-1) and her son Bahal, the deceased, reached Village Chhirha, having walked their way from Kawardha. Upon reaching Village Chhirha, the deceased stopped near the betel shop of Dhannu Das (PW-2). The deceased was showing the order passed by the Sub-Divisional Magistrate dated 17<sup>th</sup> December 2002 to Ghurwaram Patel (PW-4), the Sarpanch of Village Chhirha, when the present appellants arrived at the scene. Appellant No.1-Devendra and Appellant No. 2-Rohit were armed with lathis whereas Appellant No. 3-Banauram was carrying an axe and Appellant No.4-Kuleshwar was carrying a rod. After warning the deceased that they would kill him that day since he always quarreled in the

---

2 "FIR" for short

3 "IPC" for short

**Digital Supreme Court Reports**

land matter and created litigation, the appellants engaged in a mar-peet with the deceased, resulting in several injuries being caused to the deceased. On seeing this, Rajni Bai (PW-1) intervened which led the appellants to fight with her as well whereupon she sustained several injuries as well. On the same day, at about 1:15 p.m., during the course of the treatment, the deceased succumbed to his injuries.

- 2.4** Subsequently, the post-mortem was conducted wherein it was concluded that cause of death was coma caused by internal haemorrhage which was in turn caused by a fracture in the head leading to a brain injury.
- 2.5** Upon the conclusion of the investigation, a chargesheet was filed before the Court of the Chief Judicial Magistrate, Kawardha. Since the case was exclusively triable by the Sessions Court, the same came to be committed to the trial court.
- 2.6** Charges came to be filed by the trial court under Section 302 read with Section 34 of the IPC and in the alternate, Section 307 read with Section 34 of the IPC. The appellants pleaded not guilty and claimed to be tried.
- 2.7** The prosecution examined 15 witnesses to bring home the guilt of the appellants. In their defence, the appellants denied the charges and stated that they had been falsely implicated owing to the agricultural land dispute.
- 2.8** At the conclusion of the trial, the trial court found that the prosecution had proved the case against the appellants and accordingly, convicted them under Section 302 and Section 307 read with Section 34 of the IPC and sentenced them to undergo imprisonment for life.
- 2.9** Being aggrieved thereby, the appellants preferred a Criminal Appeal before the High Court. The High Court vide the impugned judgment and order dismissed the Criminal Appeal and confirmed the order of conviction and sentence awarded by the trial court.
- 3.** Being aggrieved thereby, the present appeal.
- 4.** We have heard Mr. Vikrant Narayan Vasudeva, learned Amicus Curiae, and Mr. Ravi Kumar Sharma, learned Deputy Advocate General appearing on behalf of the respondent-State of Chhattisgarh.

**Devendra Kumar & Ors. v. State of Chhattisgarh**

5. Learned Amicus Curiae submits that it is an admitted fact that there has been a previous enmity between the family of the appellants and the family of the deceased. It is submitted that admittedly the appellants were in possession of the disputed land. However, the deceased was making an attempt to dispossess the appellants from the said land. It is submitted that one month prior to the date of the incident, the wife of the appellant No.1-Devendra Kumar lodged an FIR against the deceased with regard to forcible dispossession. It is, therefore, submitted that the appellants are entitled to be acquitted.
6. Learned Amicus Curiae, in the alternative, submitted that the possibility of the deceased trying to dispossess the appellants from the land in question and the appellants committing the crime without premeditation in a sudden fight in the heat of passion upon a sudden quarrel cannot be denied. It is, therefore, submitted that the offence, at the most, would fall under Part I or Part II of Section 304 IPC.
7. Learned counsel for the respondent-State, on the contrary, submits that both the learned trial court as well as the High Court, on correct appreciation of the evidence, have convicted the appellants for the offences punishable under Section 302 of the IPC. It is, therefore, submitted that no interference would be warranted.
8. It is further submitted that the present case is a case of direct evidence wherein a number of eyewitnesses have supported the prosecution version.
9. With the assistance of the learned counsel for the parties, we have perused the evidence placed on record.
10. From the evidence of the medical expert Dr. N.K. Yadu (PW-6), we do not find that any interference is warranted with the finding that the death of the deceased Bahal was homicidal death. The only question would be as to whether the conviction would fall for the offence punishable under Section 302 IPC or under a lesser offence.
11. Rajni Bai (PW-1) is the mother of the deceased Bahal. She has stated that on the date of the incident, when the deceased was showing the case related documents to Sarpanch, she saw the accused persons assaulting her son. She has also stated that the accused Devendra Kumar (Appellant No.1 herein) had assaulted her with bamboo stick.

**Digital Supreme Court Reports**

12. The fact regarding the previous enmity and the ongoing dispute between the husband of Rajni Bai (PW-1) and the accused No. 1-Devendra Kumar and others has not been denied by her. She has also admitted in her cross-examination that the fight took place between her son and the appellants herein near the cart.
13. Rajni Bai's (PW-1's) evidence is corroborated by Dhannu Das (PW-2). He has stated in his cross-examination that his shop and the field of Devendra Kumar and others are adjacent to it. He has also admitted the fact regarding Devendra Kumar and others were cultivating the land adjacent to his shop.
14. Pusau (PW-3)-mason has also supported the prosecution version.
15. Ghurwaram (PW-4)-Sarpanch of the village has also supported the prosecution version. He has admitted in his cross-examination that when the deceased had come to him, he had read out the order of the SDO Rasandigoth and told him that he will harvest the crop of half the land.
16. In view of the credible testimony of the eyewitnesses, we have no reason to interfere with the finding of the trial court as well as the High Court that it is on account of the injuries caused by the appellants that the deceased had died.
17. The next question that requires to be considered is whether the case would fall under Section 302 IPC or not.
18. It is not in dispute that there was previous enmity between the parties. The accused persons were in possession of the land in question. A month prior to the date of the incident, an FIR was lodged by the wife of the appellant No.1-Devendra Kumar against the deceased since he had tried to dispossess the appellants.
19. From the evidence placed on record, specifically the evidence of Dhannu Das (PW-2) in the presence of whom the incident has occurred, it is clear that the place of the incident is adjacent to the field in possession of the appellants. From the evidence of Ghurwaram (PW4)-the Sarpanch of the village also it is clear that there was a quarrel between the appellants and the deceased. The weapons used by the accused persons are axe and sticks, which are commonly used by the agriculturists. There is no material on record to show that there is any premeditation.

**Devendra Kumar & Ors. v. State of Chhattisgarh**

20. Taking into consideration all these aspects, the possibility of offence being committed by the appellants without premeditation in a sudden fight in a heat of passion upon a sudden quarrel cannot be ruled out. From the nature of the injuries sustained by the deceased, it cannot be said that the appellants have taken undue advantage or acted in a cruel or unusual manner.
21. In that view of the matter, we find that the appellants would be entitled to benefit of doubt and the conviction under Section 302 IPC needs to be altered to the one under Part I of Section 304 IPC.
22. We are, therefore, inclined to partly allow the present appeal.
23. In the result, we pass the following order:
  - (i) The appeal is partly allowed.
  - (ii) The conviction of the appellants under Section 302 IPC is altered to the one under Part I of Section 304 IPC.
  - (iii) The appellants have already undergone a sentence of more than 12 years prior to their release on bail by the order of this Court dated 17<sup>th</sup> February 2015. We find that the said sentence would subserve the ends of justice. Therefore, the appellants are sentenced to the period already undergone.
  - (iv) The bail bonds, if any shall stand discharged.
24. We place on record our deep appreciation to Mr. Vikrant Narayan Vasudeva, learned Amicus Curiae for the valuable assistance rendered.

*Result of the case:* Appeal partly allowed.

<sup>†</sup>Headnotes prepared by: Nidhi Jain

**Commissioner of Customs**

v.

**M/s Canon India Pvt. Ltd.**

(Review Petition No. 400 of 2021)

In

(Civil Appeal No. 1827 of 2018)

07 November 2024

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

**Issue for Consideration**

Issue arose whether there was an “error apparent on the face of the record” for the purpose of entertaining the review petition; whether law laid down in Canon India’s case as regards the power of the DRI to issue show cause notices could be said to be the correct statement of law; whether officers of DRI are the proper officers for the purposes of s.28 of the Customs Act, 1962; whether the introduction of s.28(11) vide the Validation Act of 2011 which retrospectively validates the show cause notices issued u/s.28 with effect from 06.07.2011, is discriminatory and arbitrary for not curing the defect highlighted in Sayed Ali’s case and, thus, is violative of Art.14 of the Constitution; whether the judgment delivered by the High Court in the case of Mangali Impex’s case expounds the correct interpretation of s.28(11) and whether s.97 of the Finance Act, 2022, which retrospectively validates the show cause notices with effect from 01.04.2023, is manifestly arbitrary and thus, violative of Art.14 of the Constitution of India.

**Headnotes<sup>†</sup>**

**Customs Act, 1962 – ss.2(34), 28, 17 – Proper officer – Directorate of Revenue Intelligence – DRI officers, if proper officers u/s.28 – Review of judgement in Canon India’s case which held DRI officers were not proper officers u/s.28 and thus lacked the jurisdiction to issue show cause notice in terms of s.28, since only officers directly involved in assessment u/s.17 could initiate show cause notice proceedings u/s.28 – Maintainability:**

\*Author

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

**Held:** DRI officers are ‘proper officers’ to issue show cause notice u/s.28 – Review petition seeking review of the decision in Canon India's case allowed – DRI officers came to be appointed as the officers of customs vide Notification No. 19/90-Cus (N.T.) dated 26.04.1990 – This notification later came to be superseded by Notification No. 17/2002 dated 07.03.2002, to account for administrative changes – Circular No. 4/99-Cus dated 15.02.1999 which empowered the officers of DRI to issue show cause notices u/s.28 as well as Notification No. 44/2011 dated 06.07.2011 which assigned the functions of the proper officer for the purposes of ss.17 and 28 respectively to the officers of DRI were not brought to the notice of this Court during the proceedings in Canon India's case, thus the judgment was rendered without looking into the circular and the notification thereby seriously affecting the correctness of the same – Decision in Canon India's case failed to consider the statutory scheme of ss.2(34) and 5 respectively, thus the decision erroneously recorded the finding that since DRI officers were not entrusted with the functions of a proper officer for the purposes of s.28 in accordance with s.6, they did not possess the jurisdiction to issue show cause notices for the recovery of duty u/s.28 – Reliance placed in Canon India's on the decision in Sayed Ali's case is misplaced – Decision in Canon India's case is reviewed only to the extent that the jurisdiction of the DRI officers to issue show cause notices u/s.28 – Officers of Directorate of Revenue Intelligence, Commissionerates of Customs (Preventive), Directorate General of Central Excise Intelligence and Commissionerates of Central Excise and other similarly situated officers are proper officers for the purposes of s.28 and are competent to issue show cause notice thereunder – Any challenge made to the maintainability of the show cause notices issued by this particular class of officers, on the ground of want of jurisdiction for not being the proper officer, which remain pending before various forums, to be dealt with in the manner stipulated. [Para 168]

**Customs Act, 1962 – ss.17 and 28 – Issue as regards the proper officer to issue show cause notice in terms of s.28 – Sayed Ali's case held that the Commissioner of Customs (Preventive) is not a “proper officer” as defined in s.2(34) and thus, did not have the jurisdiction to issue a show cause notice in terms of s.28; and that only such officers who are vested with the power of assessment u/s.17 can be empowered to issue show**

**Digital Supreme Court Reports**

**cause notices u/s.28 or else this would result in a state of chaos and confusion – Reconsideration of Sayed Ali's case:**

**Held:** Decision in Sayed Ali proceeds on the assumption that for the “proper officer” to exercise the functions u/s.28, such officer must necessarily possess the power of assessment and reassessment u/s.17 – However, a plain reading of ss.17 and 28 does not bring out any such inter-dependence between the two provisions – Observations pertaining to interlinkage between ss.17 and 28 respectively made in Sayed Ali's case do not lay down the correct position of law – Even otherwise, decision in Sayed Ali's case could have been arrived at without deciding on the interdependence of ss.17 and 28 as the Customs (Preventive) officers, whose jurisdiction to issue show cause notices was under challenge in that case, were not assigned the functions of the “proper officer” for the purposes of s.28 through a notification issued by the appropriate authority – Assignment of functions is a mandatory requirement for the exercise of jurisdiction by the “proper officer” – Observations made in Sayed Ali's case on the connection between ss.17 and 28 are obiter dicta and do not constitute the binding ratio decidendi of that judgment – Sayed Ali's case could not have been relied upon in Canon India's case as it could not have been applied for the period subsequent to 08.04.2011 since s.17 has undergone a radical change by virtue of the amendments made by the Finance Act, 2011. [Paras 81-83]

**Customs Act, 1962 – s.17 – Assessment of duty – Changes to s.17 w.e.f. 11.04.2011 – Amendment altered the method of assessment of bills of entry and shipping bills – Functions of the proper officer u/s.17 also underwent changes, the assessment of bill of entry and shipping bill no longer the task of the “proper officer”, they were to be self-assessed, which is to be accepted or rejected by the proper officer subject to verification in certain cases – Said changes not brought to the notice of this Court while Canon India's case was heard – Effect:**

**Held:** On basis of the amendment to s.17, the competence of the proper officer to conduct “assessment” was completely taken away by the legislature – New s.17 empowers the proper officer to perform the functions of verification of self-assessment and subsequent re-assessment, if found necessary – However, such re-assessment

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

is not a mandatory function on the same footing as “assessment” under the old s.17 – Thus, the scope of the functions of the proper officer under the new s.17 is limited – However, the attention of this Court in Canon India's case not drawn to the important changes brought to s.17 vide s.38 of the Finance Act, 2011 with effect from 08.04.2011 – Conclusion that an officer who did the assessment, could only undertake reassessment u/s.28(4) was arrived at without taking note of the amendment to s.17 – Judgment in Canon India's case also recorded an erroneous finding that the function of re-assessment is with reference to s.28(4) when in fact it is an exercise of function u/s.17 – In Canon India's case the show cause notice was dated 19.09.2014 in respect of the Bill of Entry filed on 20.03.2012 – This Court erroneously applied the provisions of s.17, as they stood prior to 08.04.2011 as opposed to the amended s.17 which ought to have been applied. [Paras 90-94]

**Customs Act, 1962 – ss.17 and 28 – Assessment of duty – Notice for payment of duties, interest – Scheme of ss.17 and 28:**

**Held:** s.17 read with ss.46 and 47 deals with the assessment and re-assessment at the first instance that is, upon entry of the consignments and clearance of bills of entry – Amendment to s.17 introduces the process of self-assessment and subsequent re-assessment upon verification by the proper officer, if so required, for undertaking a check at the first instance – Proceedings u/s.28 are subsequent to the completion of the process set out in s.17 – Procedure envisaged u/s.28 is in the nature of a quasi-judicial proceeding with the issuance of the show cause notice by the proper officer followed by adjudication of such notices by the field customs officers – In the case of DRI, the proceedings u/s.28 start only after an investigation has been undertaken by DRI – This is reaffirmed by Circular No. 4/99-Cus dated 15.02.1999 and Circular No. 44/2011-Customs dated 23.11.2011 – Thus, the nature of review u/s.28 significantly different from the nature of assessment and reassessment u/s.17 – Ambit of s.28 has also been restricted to the review of assessments and re-assessments done u/s.17 for ascertaining if there has been a short-levy, non-levy, part payment, non-payment or erroneous refund – Scheme of ss.17 and 28 indicates that there cannot be a mandatory condition linking the two provisions and the interpretation of this Court in the Sayed Ali's case and Canon India's case that vesting of the functions of assessment and re-assessment u/s.17 is a threshold, mandatory

**Digital Supreme Court Reports**

condition for proper officer to perform functions u/s.28, patently erroneous. [Paras 95-99]

**Customs Act, 1962 – s.28 – Notice for payment of duties, interest – Use of article ‘the’ in the expression “the proper officer” – Interpretation:**

**Held:** In Canon India's case it was held that the Parliament had employed the article “the” instead of “a/an” in s.28 so as to give effect to its intention of specifying that the proper officer referred to in s.28 is the same officer as the one referred to in s.17 and the use of a definite article instead of an indefinite article is indicative of the fact that the proper officer referred to in s.28 is not “any” proper officer but “the” proper officer assigned with the function of assessment and reassessment u/s.17 – There was an error apparent in the said view – Definite article “the” has been used before “proper officer” with a view to limit the exercise of powers u/s.28 by a specific proper officer and not any proper officer – However, in the absence of any statutory linkage between ss.17 and 28 respectively, there was no legal footing for this Court in Canon India's case to hold that “the proper officer” in s.28 must necessarily be the same proper officer referred to u/s.17 – Statutory scheme of the 1962 Act necessitates that an officer of Customs can only perform the functions u/s.28 if such officer has been designated as “the proper officer” for the purposes of s.28 by an appropriate notification – Use of the article “the” in the expression “the proper officer” should be read in the context of that proper officer who has been conferred with the powers of discharging the functions u/s.28 by conferment u/s.5 – Proper officer is qua the function or power to be discharged or exercised – Use of article “the” in s.28 has no apparent relation with the proper officer referred to u/s.17. [Paras 100-103]

**Customs Act, 1962 – s.2(34) – Proper officer – DRI officers as proper officers u/s 2(34):**

**Held:** In Canon India's case, this Court erroneously concluded that officer from the Directorate of Revenue Intelligence (DRI) was not an officer of customs and thus, cannot function as a “Proper Officer” – Finding that the power conferred by the Board under Notification No. 40/2012-Customs (N.T.) dated 02.05.2012 was ill-founded is an error apparent – By way of Notification No. 40/2012-Customs

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

(N.T.), the Board appointed several persons including the Officers of Directorate of Revenue Intelligence (DRI) as “Proper Officers” u/s.2(34) – Notification No. 40/2012-Customs (N.T.) issued u/s.2(34) cannot be read in isolation – It has to be read in conjunction with s.4(1) and the Notification issued thereunder – View that the “Proper Officer” for the purpose of s.28 and other provisions of the 1962 Act could only mean the person who cleared the goods or the officer who succeeds such officer and not any other officer from any other department requires reconsideration in view of the changes to the 1962 Act vide the Finance Act, 2011 and s.4 and the notification issued thereunder – Court in Canon India's case proceeded on the footing that under the provisions of the Act, 1962, the Board has no power to appoint “Proper Officers” – As per s.4(1), the Board is vested with the power to appoint such persons as it thinks fit to be “officers of customs”, u/s.4(2) the Board can even authorize a Chief Commissioner of Customs or a Joint or Assistant or Deputy Commissioner of Customs to appoint any officers below the rank of Assistant Commissioner of Customs as an “officer of customs” – This aspect was not brought to the notice in Canon India's case. [Paras 106-113]

**Customs Act, 1962 – s.4 – Appointment of “Officers of Customs:**

**Held:** It is only an officer of customs, appointed u/s.4(1) who can be designated as the “proper officer” as defined in s.2(34) by a notification – Notifications issued u/ss.2(34) and 4(1) are nothing but an internal arrangement for the purpose of allocation of work among the officers of customs. [Para 115]

**Customs Act, 1962 – s.6 – Entrustment of functions of Board and customs officers on certain other officers – Application of s.6:**

**Held:** s.6 contemplates the entrustment of the functions of the Board or any officer of customs under the Act to any of the officers of the Central or the State Government or a local authority – Such entrustment could be either conditional or unconditional – Object of this Section is to confer powers of search, seizure, arrest and recording of statements, to the officers working in border states as also officers working in the coast guard or the navy as they may be involved in anti smuggling operations – Plain reading of

**Digital Supreme Court Reports**

s.6 makes it abundantly clear that it applies only to officers from departments other than the officers of the customs u/s.4 – Officers of DRI are not any other officers of the Central Government or the State Government or the local authority to be entrusted with the functions of the Board and the Customs Officers – Post 07.03.2002, a notification of the Central Government u/s.6 is not required to recognise the officers from DRI as officers of customs – Assignment of functions of proper officers as mentioned in s.2(34) and entrustment of functions of customs officers as mentioned in s.6 operate on different planes – Assignment of functions of proper officer is to be done only to officers of customs (whether appointed u/s.4 or entrusted with certain functions u/s.6) – There may be some overlap between assignment of functions of proper officers u/s.2(34) rw s.5 and entrustment of functions of officers of customs u/s.6 in some instances but there can be no scenario where it can be held that “functions” u/s.6 and s.2(34) are congruent – One of the basis for the decision in Canon India's case was that no entrustment of functions u/s.6 was done in favour of DRI officers, which is a misapplication of s.6 and is in ignorance of the applicable law, ss.2(34) rw s.5 of the Act. [Paras 120-122, 125, 129, 130]

**Customs Act, 1962 – s.28 (11) – Recovery of duties not levied or short-levied or erroneously refunded – Constitutional validity of s.28(11) – Introduction of s.28(11) vide the Validation Act of 2011 which retrospectively validates the show cause notices issued u/s.28 with effect from 06.07.2011, if discriminatory and arbitrary for not curing the defect highlighted in Sayed Ali's case and, thus, violative of Art.14 of the Constitution of India:**

**Held:** s.28(11) is constitutionally valid and its application is not limited to the period between 08.04.2011 and 16.09.2011 – None of the changes made by the amendments to s.28 has any impact on the competence of the proper officer for the purposes of fulfilment of functions u/s.28 – Only major change that warrants the clarification provided under Explanation 2 is the distinction with respect to the limitation period for the issuance of show cause notices – Thus, the application of sub-section (11), which pertains only to the empowerment of proper officers to issue show cause notices u/s.28, cannot be said to be limited only to new s.28 but also to the provision as it stood prior to 08.04.2011 – Legislative intent is that sub-section (11) was meant to apply to s.28 without

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

any restriction as to time – Enactment of sub-section (11) of s.28 cures the defect pointed out in [Sayed Ali's](#) case. [Paras 147, 148, 151, 154, 155]

**Customs Act, 1962 – ss.17 and 28 – Proper officer to issue show cause notice in terms of s.28 – Judgment by the High Court in the case of Mangali Impex', if expounds the correct interpretation of s.28(11):**

**Held:** High Court in Mangali Impex's case observed that s.28(11) could not be said to have cured the defect pointed out in [Sayed Ali's](#) case as the possibility of chaos and confusion would continue to subsist despite the introduction of the said section with retrospective effect – High Court declined to give retrospective operation to s.28(11) for the period prior to 08.04.2011 by harmoniously construing it with Explanation 2 to s.28 of the 1962 Act – Decision in Mangali Impex's case failed to take into account the policy being followed by the Customs department since 1999 which provides for the exclusion of jurisdiction of all other proper officers once a show cause notice by a particular proper officer is issued – It could be said that this policy provides a sufficient safeguard against the apprehension of the issuance of multiple show cause notices to the same assessee u/s.28 – Further, the High Court could not have applied the doctrine of harmonious construction to harmonise s.28(11) with Explanation 2 because s.28(11) and Explanation 2 operate in two distinct fields and no inherent contradiction can be said to exist between the two – Thus, the decision in Mangali Impex's case set aside. [Para 168]

**Finance Act, 2022 – s.97, Amendments made by Finance Act – Constitutional validity of ss.86, 87, 88, 94 and 97 – s.97 which retrospectively validates the show cause notices with effect from 01.04.2023, if manifestly arbitrary and thus, violative of Art.14 of the Constitution of India:**

**Held:** s.97 which, inter-alia, retrospectively validated all show cause notices issued u/s.28 of the Act, 1962 cannot be said to be unconstitutional – It cannot be said that s.97 fails to cure the defect pointed out in [Canon India's](#) case nor is it manifestly arbitrary and discriminatory and is not disproportional to the object sought to be achieved by it. [Para 168]

**Digital Supreme Court Reports****Constitution of India – Art.137 – Review of judgments or orders by the Supreme Court – Grounds of review as stipulated by the statute:**

**Held:** Grounds of review are discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the petitioner or could not be produced by him at the time when the decree was passed or order made; mistake or error apparent on the face of the record; or any other sufficient reason – Thus, when a court disposes of a case without due regard to a provision of law or when its attention was not invited to a provision of law, it may amount to an error analogous to one apparent on the face of record sufficient to bring the case within the purview of Ord. XLVII r.1 CPC – If a court is oblivious to the relevant statutory provisions, the judgment would in fact be per incuriam – In such circumstances, a judgment rendered in ignorance of the applicable law must be reviewed – Code of Civil Procedure, 1908 – Ord. XLVII r.1 – Supreme Court Rules, 2013 – Ord. XLVII Part IV. [Paras 60, 67]

**Legislation – Validation of legislation to validate earlier acts declared illegal – Power of:**

**Held:** Legislature is empowered to enact validating legislations to validate earlier acts declared illegal and unconstitutional by courts by removing the defect or lacuna which led to the invalidation of the law – With the removal of the defect or lacuna resulting in the validation of any act held invalid by a competent court, the act may become valid, if the validating law is lawfully enacted – Possibility of misuse or abuse of a law which is otherwise valid cannot be a ground for invalidating it. [Paras 152, 160]

**Case Law Cited**

*Sunil Gupta v. Union of India and Others (2014) SCC Online Bom 1742 – approved.*

*Mangali Impex Ltd. v. Union of India (2016) SCC Online Del 2597 – disapproved.*

*Commissioner of Customs v. Sayed Ali and Another [2011] 2 SCR 1045 : (2011) SCC 537; Union of India and Another v.*

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

*Godrej and Boyce Manufacturing, SLP (C) No. 1513/2022; Daikin Air Conditioning India Pvt. Ltd v. Union of India, W.P. (C) 526 of 2022; S.K. Srivastava v. Union of India, 1971 SCC OnLine Del 134; Consolidated Coffee Ltd. and Anr. v. Coffee Board, Bangalore [1980] 3 SCR 625 : 1980 AIR 1468; Collector of Customs v. Nathella Sampathu Chetty [1962] 3 SCR 786 : 1962 SCC OnLine SC 30; Shreya Singhal v. Union of India [2015] 5 SCR 963 : (2015) 5 SCC 1; Commissioner of Customs v. Dilip Kumar & Co. [2018] 7 SCR 1191 : (2018) 9 SCC 1; Goodyear India Ltd. v. State of Haryana [1989] Supp. 1 SCR 510 : (1990) 2 SCC 71; Col. Avtar Singh Sekhon v. Union of India [1981] 1 SCR 168 : (1980) Supp SCC 562; Lily Thomas v. Union of India [2000] 3 SCR 1081 : (2000) 6 SCC 224; Champsey Bhara & Co. v. Jivraj Balloo Spinning and Weaving Co. Ltd. (1923) SCC OnLine PC 10; State of Telangana v. Mohd. Abdul Qasim [2024] 5 SCR 81 : (2024) 6 SCC 461; Chhajju Ram v. Neki, 1922 SCC OnLine PC 11; Moran Mar Basselios Catholicos v. Mar Poulose Athanasius [1955] 1 SCR 520 : 1954 SCC OnLine SC 49; Tinkari Sen v. Dulal Chandra Das, 1966 SCC OnLine Cal 103; Girdhari Lal Gupta v. D. H. Mehta [1971] 3 SCR 748 : (1971) 3 SCC 189; M/s Northern India Caterers (India) Ltd. v. LT. Governor of Delhi [1979] 1 SCR 557 : (1980) 2 SCC 167; Yashwant Sinha v. CBI [2019] 5 SCR 638 : (2020) 2 SCC 338; Sow Chandra Kant and Anr. v. Sheikh Habib [1975] 3 SCR 933 : (1975) 1 SCC 674; M/s. N.C. Alexander v. The Commissioner of Customs, Chennai, W.P. Nos. 33099 of 2015; State of Andhra Pradesh v. Ganeswara Rao [1964] 3 SCR 297 : AIR 1963 SC 1850; Management, S.S.L. Rly. Co. v. S.S.R.W. Union [1969] 2 SCR 131 : AIR 1969 SC 513; Dish TV India Ltd. v. Union of India and Ors., WP (C) No. 520 of 2022; Empire Industries Ltd. v. Union of India [1985] Supp. 1 SCR 292 : (1985) 3 SCC 314; Indian Aluminium Company Co. v. State of Kerala [1996] 2 SCR 23 : (1996) 7 SCC 637; Bhavesh D. Parish v. Union and India [2000] Supp. 1 SCR 291 : (2000) 5 SCC 471; Shri Prithvi Cotton Mills Ltd. and Ors. v. Broach Borough Municipality & Ors. [1970] 1 SCR 388 : (1969) 2 SCC 283; Vivek Narayan v. Union of India [2023] 1 SCR 1 : (2023) 3 SCC 1; Abhiram Singh v. C.D. Commachen (Dead) By Lrs. & Ors. [2017] 1 SCR 158 : (2017) 2 SCC 629 – referred to.*

## Digital Supreme Court Reports

### Books and Periodicals Cited

Craies on Statute Law 17<sup>th</sup> Ed., Page 83 – referred to.

### List of Acts

Customs Act, 1962; Finance Act, 2022; Customs (Amendment and Validation) Act, 2011; Finance Act, 1995; Central Sales Tax Act, 1956; Finance Act, 2011; Finance Act, 2022; Central Board of Revenue Act, 1963; Customs Act, 1878; Supreme Court Rules, 2013; Code of Civil Procedure, 1908.

### List of Keywords

Error apparent on face of record; Review petition; [Canon India's](#) case; Power of DRI to issue show cause notice; Officers of Directorate of Revenue Intelligence-DRI, if proper officers for s.28 of Customs Act, 1962; Retrospectively validating show cause notices; [Sayed Ali's](#) case; Mangali Impex's case; s.97 of the Finance Act, 2022; Proper officer; Review of judgement in [Canon India's](#) case; Notification No. 19/90-Cus (N.T.) dated 26.04.1990; Notification No. 17/2002 dated 07.03.2002; Administrative changes; Circular No. 4/99- Cus dated 15.02.1999; Proper officer to issue show cause notice in terms of s.28; Commissioner of Customs (Preventive) not “proper officer”; Reconsideration of [Sayed Ali's](#) case; Inter-dependence between two provisions; Assessment of duty; Method of assessment of bills of entry and shipping bills; Assessment; Verification of self-assessment; Re-assessment; Notice for payment of duties, interest; Entry of consignments and clearance of bills of entry; Quasi-judicial proceeding; Circular No. 44/2011-Customs dated 23.11.2011; Short-levy, non-levy, part payment, non-payment or erroneous refund; Notice for payment of duties, interest; Use of article ‘the’ in the expression “the proper officer”; DRI officers as proper officers u/s 2(34); Notification No. 40/2012-Customs (N.T.) dated 02.05.2012; Finance Act, 2011; Appointment of “Officers of Customs; Entrustment of functions of Board and customs officers on certain other officers; Recovery of duties not levied or short-levied or erroneously refunded; Constitutional validity of s.28(11); Review of judgments or orders by the Supreme Court; Grounds

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

of review; Validation of legislation to validate earlier acts declared illegal; Possibility of misuse or abuse of law.

**Case Arising From**

INHERENT JURISDICTION: Review Petition (Civil) No. 400 of 2021

In

Civil Appeal No. 1827 of 2018

From The Judgment And Order Dated 09.03.2021 of The Supreme Court of India In C.A. No. 1827 of 2018

With

C.A. Nos. 6142, 6161, 6160 and 6159 of 2019, C.A. No. 8828 of 2016, C.A. Nos. 6157 and 6158 of 2019, C.A. No. 9313 and 9406 of 2016, C.A. No. 6153 of 2019, C.A. Nos. 9315, 10140, 9436, 9317, 10012, 10739, 10422, 10421, 10991, 10952 and 12345 of 2016, C.A. No. 6149-6152 of 2019, C.A. No. 430 of 2017, C.A. No. 8749 of 2016, C.A. No. 6127 of 2019, C.A. No. 8752 of 2017, C.A. Nos. 6139-6140, 6143, 6148, 6248, 6156 and 7292 of 2019, C.A. No. 2666-2695 of 2020, C.A. No. 1738 of 2021, R.P.(C) No. 402 of 2021 In C.A. No. 1875 of 2018, R.P.(C) No. 403 of 2021 In C.A. No. 1832 of 2018, R.P.(C) No. 401 of 2021 In C.A. No. 3213 of 2018, SLP(C) No. 2504 of 2022, C.A. No. 2367-2368 of 2022, C.A. No. 10788 of 2024, C.A. No. 3253 of 2017, C.A. Nos. 10873 and 10819 of 2024, C.A. No. 4559 of 2022, SLP(C) No. 12970 of 2022, W.P.(C) Nos. 501, 499, 502, 504, 522, 507, 526, 534, 537, 548, 575, 566 and 568 of 2022, C.A. Nos. 10698, 10693, 10752, 10697, 10753, 10754, 10755, 10712, 10756, 10757, 10710 – 10711, 10758, 10759, 10760, 10709, 10761, 10762, 10763, 10764, 10765, 10766, 10767, 10768, 10769, 10770, 10771, 10772 and 10774 of 2024, C.A. No. 4566 of 2022, Diary No. 33597 of 2022, C.A. Nos. 10707 - 10708, 10781, 10854 and 10694-10695 of 2024, R.P.(C) No. 155 of 2022 In C.A. No. 3411 of 2020, R.P.(C) No. 1289 of 2021 In C.A. No. 5053 of 2021, C.A. Nos. 10782, 10784, 10785, 10706 and 10705 of 2024, Diary No. 30895 of 2022, C.A. Nos. 10699 - 10704, 10786, 10787 of 2024, Diary. No. 38691 of 2022, C.A. Nos. 10845 and 10809 of 2024, T.P.(C) No. 1576-1597/2023 and WP (C) D. No. 37678 and 37700 of 2024

**Digital Supreme Court Reports****Appearances for Parties**

N. Venkataraman, A.S.G., A. K. Panda, S. Nandakumar, Arshad Hidayatullah, Rupesh Kumar, Dr. Purvish Malkan, R.K. Sanghi, Sr. Advs., Gurmeet Singh Makker, Kartikeya Asthana, Ms. Nisha Bagchi, Merusagar Samantaray, Shovan Mishra, Ms. Charanya Lakshmikumaran, Mukesh Kumar Maroria, Ms. Sharmila Upadhyay, Sarvjit Pratap Singh, Pawan R Upadhyay, Ms. Shobha Ramamoorthy, Shilp Vinod, Gokulakrisnan, Ms. Deepika Nandakumar, Naresh Kumar, Raja S, Aakash Elango, Ms. Rohini Musa, B. Krishna Prasad, Brajesh Kumar, Deepak Agrawal, Shivam Singh, Shubham Janghu, Gopal Singh, S. Hariharan, Ms. Jaikriti S. Jadeja, Shivang Goel, K M Kalidharun, Ishaan Aggarwal, A.R. Madhav Rao, Mukunda Rao Angara, Krishna Rao, Tushar Joshi, Siddhant Buxy, Ms. Pankhuri Shrivastava, Ms. Neelam Sharma, Makarand Joshi, Alekshendra Sharma, Shariq Ahmed, Tariq Ahmed, Vinay Vats, Sunil Kumar Verma, Shekhar Vyas, Ms. Mrinal Kanwar, Ms. Neha Warrier, Vaibhav, Pulkit Srivastava, Ms. Khushboo Aakash Sheth, Ms. Dharita Malkan, Alok Kumar, Kush Goel, Suraj Pandey, Ms. Qurratulain, Ms. Aakriti Mathur, Ms. Shagun Mishra, V Lakshmikumaran, Ms. Apeksha Mehta, Ms. Umang Motiyani, Ms. Neha Choudhary, Ms. Falguni Gupta, S Vasudevan, Ayush Agarwal, Rachit Jain, Dhruv Matta, Nikhil Jain, Ram Krishna, Rahul Yadav, Dinesh Bahadur Singh, Nitish Messy, Ms. Rashi Bansal, Ravi Bharuka, Prateek Gattani, Rohit Agarwal, Mrs. Vanita Bhargava, Ajay Bhargava, Ms. Nandita Chauhan, Ms. Tijil Thakur, M/s. Khaitan & Co., Ms. Shilpa Singh, Jitendra Singh, Saurabh Suman Sinha, Chitray Parande, M/s. Ap & J Chambers, Somanadri Goud Katam, Ashok K. Mahajan, Rameshwar Prasad Goyal, Satyendra Kumar, Ambuj Ojha, Rajeev Singh, Manoj Chauhan, Vikramaditya Singh, Ujjawal Parmar, Ms. Neha Raj Singh, Sajal Singhai, Hardeep, Yashika Gupta, Ms. Poornima Ojha, K. Paari Vendhan, Pawanshree Agrawal, Kumar Visalaksh, Rahul Khurana, Udit Jain, Arihant Tater, Ms. Akanksha Dikshit, Abhishek Vikas, M. P. Devanath, T. L. Garg, Rajat Bose, Ankit Sachdeva, Ms. Shohini Bhattacharya, Neeladri Chakrabarty, S. S. Shroff, Raj Bahadur Yadav, Ms. Manju Jetley, Prasannan Namboodiri, Ms. Prathiibha Namboodiri, Deepak Goel, Ms. Alka Goyal, Aditya Goel, Mrs. Anjali Jha Manish, Rajat Mittal, Suprateek Neogi, Vivek Singh, Ritik Dwivedi, Rajesh Kumar Chaurasia, Sahil Tagotra, Prabhakar Mishra, Sujay Jain, Advs. for the appearing parties.

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.****Judgment / Order of the Supreme Court****Judgment****J.B. Pardiwala, J.**

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

**INDEX\***

|  |            |
|--|------------|
| <b>A. FACTUAL BACKGROUND OF THE REVIEW PETITION.....</b>   | <b>10</b>  |
| <b>B. SUBMISSIONS ON BEHALF OF THE DEPARTMENT.....</b>   | <b>18</b>  |
| i. Error apparent in the judgment under review.....  | 18         |
| ii. Why the decision in <u>Sayed Ali</u> (supra) requires reconsideration.....   | 30         |
| iii. The decision in Mangali Impex (supra) is liable to be set aside and the decision in Sunil Gupta (supra) ought to be affirmed..... | 36         |
| iv. Changes introduced by the Finance Act, 2022 are in the nature of surplusage.....   | 42         |
| <b>C. SUBMISSIONS ON BEHALF OF THE RESPONDENTS.....</b>  | <b>48</b>  |
| <b>D. ISSUES FOR CONSIDERATION.....</b>  | <b>57</b>  |
| <b>E. ANALYSIS.....</b>  | <b>59</b>  |
| i. Review jurisdiction.....  | 59         |
| ii. The decision in <u>Commissioner of Customs v. Sayed Ali</u> .....  | 74         |
| iii. Changes to Section 17 w.e.f. 11.04.2011 – the assessment of bill(s) of entry and shipping bill(s).....                            | 78         |
| iv. Scheme of Sections 17 and 28 of the Act, 1962.....   | 90         |
| v. Use of the article ‘the’ in the expression “the proper officer” .....   | 93         |
| vi. DRI officers as proper officers under section 2(34).....   | 96         |
| vii. Section 4 of the Act, 1962.....   | 98         |
| viii. Section 6 of the Act, 1962.....  | 106        |
| ix. Observations on the constitutional validity of Section 28(11) of the Act, 1962.....  | 114        |
| x. Bombay High Court decision in Sunil Gupta (supra).....  | 123        |
| xi. Amendments made by the Finance Act, 2022.....  | 138        |
| <b>F. CONCLUSION.....</b>  | <b>154</b> |

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

**Digital Supreme Court Reports**

1. Since the pivotal question of law involved in all the captioned petitions is the same, they were taken up for hearing analogously and are being disposed of by this common judgment and order.
2. For the sake of convenience, the Review Petition No. 400 of 2021 filed by the Customs Department is treated as the lead matter.
3. This Review Petition has been filed by the Customs Department through the Commissioner of Customs, New Delhi (the “**Department**”) under Order XLVII of the Supreme Court Rules, 2013 seeking review of the judgment and order dated 09.03.2021 passed by this Court in Civil Appeal No. 1827 of 2018 titled ***M/s Canon India Private Ltd. v. Commissioner of Customs.***

**A. FACTUAL BACKGROUND OF THE REVIEW PETITION**

4. A two-Judge Bench of this Court in the case of ***Commissioner of Customs v. Sayed Ali and Another*** reported in (2011) SCC 537, had held that the Commissioner of Customs (Preventive) is not a “proper officer” as defined in Section 2(34) of the Customs Act, 1962 (“**the Act, 1962**”) and therefore did not have the jurisdiction to issue a show cause notice in terms of Section 28 of the Act, 1962. The Court observed that while all proper officers must be “officers of customs”, all “officers of customs” are not proper officers. It also held that only those officers of customs who were assigned the functions of assessment, which would include re-assessment, working under the jurisdictional collectorate within whose jurisdiction the bills of entry or baggage declarations had been filed and consignments had been cleared for home consumption, would have the jurisdiction to issue show cause notice under Section 28 or else it would lead to a situation of utter chaos and confusion, in as much as all officers of customs in a particular area, be it under the Collectorate of Customs (Imports) or the Preventive Collectorate, would fall under the definition of “proper officers”. Section 2(34) is extracted below:

*“(34) proper officer in relation to any functions to be performed under this Act, means the officer of customs who is assigned those functions by the Board or the Principal Commissioner of Customs or Commissioner of Customs”*

5. As a result of the decision in ***Sayed Ali*** (*supra*), the Central Board of Excise and Customs (the “**Board**”) issued Notification No. 44/2011-Cus-NT dated 06.07.2011 under Section 2(34) of the

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

Act, 1962, assigning the functions of the “proper officers” to the Commissioners of Customs (Preventive), Directorate of Revenue Intelligence (“**DRI**”), Directorate General of Anti Evasion (“**DGAE**”) and Officers of Central Excise. The notification specified that it would operate prospectively. With a view to account for the past periods, Section 28(11) was introduced *vide* the Customs (Amendment and Validation) Act, 2011 (Act No.14 of 2011) dated 16.09.2011 by virtue of which all persons appointed as Officers of Customs under sub-section (1) of Section 4 before the 06.07.2011 were deemed to have and always had the power of assessment under Section 17 and were deemed to be and always have been “proper officers” for the purpose of the said section.

6. The constitutional validity of Section 28(11) of the Act, 1962, came to be challenged before the High Court of Delhi in the case of **Mangali Impex Ltd. v. Union of India** reported in **(2016) SCC Online Del 2597** and a batch of matters were disposed of by the High Court *vide* a common judgment on 03.05.2016.
7. The High Court held that although Section 28(11) of the Act, 1962 begins with a *non-obstante* clause, it neither explicitly nor implicitly seeks to overcome the legal position brought about by Explanation 2 which states that the cases of non-levy, short-levy or erroneous refund prior to 08.04.2011 would continue to be governed by the unamended Section 28 of the Act, 1962 as it stood prior to said date. On this basis, it held that the newly enacted Section 28(11) would not empower officers of DRI or DGAE to either to adjudicate the show-cause notices already issued by them for the period prior to 08.04.2011 or to issue fresh show-cause notices for said period.
8. The High Court also held that Section 28(11) of the Act, 1962 is overbroad in as much as it confers jurisdiction on a plurality of officers on the same subject matter which may result in utter chaos, unnecessary harassment and conflicting decisions. It held that such untrammeled power would be arbitrary and violative of Article 14 of the Constitution. The issue as to the constitutional validity and effect of Section 28(11) of the Act, 1962 was answered accordingly. The Department preferred an appeal against the decision in **Mangali Impex (supra)** in Civil Appeal No. 6142 of 2019 before this Court and *vide* order dated 01.08.2016, a two-Judge Bench of this Court stayed the operation of that decision.

**Digital Supreme Court Reports**

9. The constitutional validity of Section 28(11) of the Act, 1962 was also challenged before the High Court of Bombay in the case of ***Sunil Gupta v. Union of India and Others*** reported in **(2014) SCC Online Bom 1742**. The two-Judge Bench *vide* its Judgement dated 03.11.2014 held thus:

*"25. As a result of the above discussion and finding that Explanation 2 has not been dealing with the case, which was specifically dealt with by sub- section (11) of section 28 of the Act, that we are of the opinion that the challenge in the writ petition is without any merit. The Explanation removes the doubts and states that even those cases which are governed by section 28 and whether initiated prior to the Finance Bill 2011 receiving the assent of the President shall continue to be governed by section 28, as it stood immediately before the date on which such assent is received. The reference to the Finance Bill therein denotes the Bill by the section itself was substituted by Act 8 of 2011 with effect from April 8, 2011. Prior to this Bill by which the section was substituted receiving the assent of the President of India, some cases were initiated and section 28 was resorted to by the authorities. Explanation 2 clarifies that they will proceed in terms of the unamended provision. The position dealt with by insertion of section 28(11) is distinct and that is about competence of the officer. The officers namely those from the Directorate of Revenue Intelligence having been entrusted and assigned the functions as noted above, they are deemed to have been possessing the authority, whether in terms of section 28 unamended or amended and substituted as above. In these circumstances, for these additional reasons as well, the challenge to this sub-section must fail."*

10. Since the decision in ***Sunil Gupta*** (*supra*) was anterior in time, the same was relied upon by the Department before the High Court of Delhi during the hearing in ***Mangali Impex*** (*supra*). However, the High Court of Delhi did not agree with the view taken therein.
11. A batch of four statutory appeals came to be decided by this Court on 09.03.2021 in ***Canon India*** (*supra*) wherein this Court decided

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

the following two issues – *first*, whether the officers of DRI would be “proper officers” under Section 2(34) for the purposes of Sections 17 and 28 of the Act, 1962 respectively; and *second*, whether such officers are empowered to issue show cause notices demanding customs duty under section 28 of the Act, 1962. To elaborate:

- (a) Whether the Directorate of Revenue Intelligence (DRI) had the legal authority to issue a show cause notice under Section 28(4) of the Act, 1962, when the goods were cleared for import by a Deputy Commissioner of Customs (who had decided that the goods are exempted from being taxed on import)?
  - (b) Whether an Additional Director General of DRI, who has been appointed as an “officer of Customs” under the Notification dated 07.03.2002, has been entrusted with the functions of “the proper officer” for the purpose of Section 28 of the Act, 1962?
12. This Court while disposing of the aforesaid batch of matters proceeded to reiterate the principles laid down in *Sayed Ali* (*supra*) that only such officers who are vested with the power of assessment under Section 17 can be empowered to issue show cause notices under Section 28 or else this would result in a state of chaos and confusion. It also held that unless it is shown that the officers of DRI are at the first instance, customs officers under the Act, 1962 and are entrusted with the functions of a proper officer under Section 6 of the Act, 1962, they would not be competent to issue show-cause notices. It was held that, since no entrustment was made under Section 6 of the Act, 1962, the officers of DRI who were not otherwise officers of customs, could not have been assigned as the “proper officers”.
13. It also observed that from a conjoint reading of Section 2(34) and Section 28 respectively of the Act, 1962, it is manifest that only such a custom officer who has been assigned the specific functions of assessment and reassessment in the jurisdictional area where the import concerned has been affected, either by the Board or the Commissioner of Customs, in terms of Section 2(34) of the Act, 1962, was competent to issue notice under Section 28 of the Act, 1962.
14. It appears from the decision in *Canon India* (*supra*) that the Notification No. 44/2011-Cus-NT dated 06.07.2011 designating officers of DRI

**Digital Supreme Court Reports**

as “proper officers” for the purposes of both Sections 17 and 28 of the Act, 1962 respectively; the introduction of Section 28(11) *vide* the Validation Act, 2011 introducing Section 28(11) empowering such officers for the period prior to 06.07.2011; the statutory scheme as envisaged under Sections 3, 4, 5 and 2(34) of the Act, 1962 respectively; and the pendency of the appeal against the decision in ***Mangali Impex (supra)*** and the stay of the operation of the said decision by this Court was either not noticed or not brought to the notice of the Court.

15. The Department preferred the present Review Petition against the judgement delivered in ***Canon India (supra)*** on 09.03.2021. This judgement was followed in other cases adjudicated by this Court and the High Courts, resulting in various other Review Petitions, Special Leave Petitions and Civil Appeals. This Court *vide* order dated 15.02.2022 in the present Review Petition allowed an open court hearing to be conducted and after hearing the parties, issued notice on the Review Petition *vide* order dated 19.05.2022. A co-ordinate Bench of this Court later in ***Union of India and Another v. Godrej and Boyce Manufacturing (SLP (C) No. 1513/2022)*** through order dated 11.02.2022 also issued notice.
16. The aforesaid developments led to a hiatus. As a result, the appeals pending before the Tribunals and other authorities could not be decided. This necessitated the introduction of the following provisions by Parliament: Sections 86, 87 and 88 in the Finance Act, 2022 (Act No. 6 of 2022) to amend Sections 2(34), 3 and 5 of the Act, 1962 respectively. Further, Sections 94 and 97 of the Finance Act, 2022 introduced a new Section 110AA and a validation enactment respectively. These amendments came to be challenged before this Court in ***W.P. (C) 526 of 2022*** titled ***Daikin Air Conditioning India Pvt. Ltd v. Union of India.***
17. The present batch comprises of three clusters of matters:
  - (i) The Review Petitions in the ***Canon India (supra)*** batch;
  - (ii) The ***Mangali Impex (supra)*** appeal and other appeals pending before this Court on the issue of whether the officers of DRI would be proper officers in light of Section 28(11); and
  - (iii) The petitions challenging the constitutional validity of Section 97 of the Finance Act, 2022.

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.****B. SUBMISSIONS ON BEHALF OF THE DEPARTMENT**

18. Mr. N. Venkataraman, the learned Additional Solicitor General of India, made extensive submissions on the following broad issues –
- (i) The Review Petitions filed in the case of *Canon India* (*supra*) are maintainable as there is an error apparent on the face of the record.
  - (ii) The decision rendered by this Court in *Sayed Ali* (*supra*) requires reconsideration.
  - (iii) The decision rendered by the Delhi High Court in *Mangali Impex* (*supra*) should be overruled and the view expressed by the Bombay High Court in *Sunil Gupta* (*supra*) should be upheld.
  - (iv) The changes introduced by the Finance Act, 2022 are merely clarificatory in nature and the crux of the issue before the Court can be answered without reference to and reliance upon the changes introduced by the said Act.
- i. **Error apparent in the judgment under review**
19. It was submitted that the judgement rendered by this Court in *Canon India* (*supra*) requires review as there are errors apparent on the face of the record. The Ld. ASG submitted that it is equally important that the legality and validity of the decision rendered by the High Court of Delhi in *Mangali Impex* (*supra*) which is a part of the present batch of pending appeals be considered since the issues in both *Canon India* (*supra*) and *Mangali Impex* (*supra*) are one and the same. He submitted that the fact that an appeal against *Mangali Impex* (*supra*) was pending before this Court and that the operation of the said judgement was stayed went unnoticed in *Canon India* (*supra*). He submitted that this would have a direct bearing both in the review and in the batch of appeals before this Court.
20. He submitted that *Canon India* (*supra*) proceeded on the assumption that DRI officers are not officers of Customs and therefore need to be entrusted with such powers under Section 6 of the Act, 1962 and only upon such entrustment, the functions of a proper officer can be assigned to them. This, he submitted, is in the teeth of the provisions of the Act, 1962 more particularly Sections 3, 4, and 5 thereof. He further submitted that there is no discussion worth the name on

**Digital Supreme Court Reports**

these provisions as regards its applicability to the DRI officers who are none other than a class of officers of customs under Section 3 appointed pursuant to Section 4 and consequently, no entrustment is required under Section 6. He submitted that Section 6 would come into play for such of those officers of the Central or State Government or Local Authority, who are not a class of officers of customs under Section 3 appointed in accordance with Section 4 of the Act, 1962. He explained this clear distinction between the two provisions by relying on the notifications issued under Section 4 of the Act, 1962 proclaiming DRI officers to be a class of officers of Customs under Section 3 of the Act.

21. He submitted that this Court erred in not taking into consideration Sections 3, 4 and 5 of the Act, 1962 respectively and its interplay, if any, with Section 6, as duly indicated by the notifications issued from time to time. More particularly, the Court did not take into account the origin and history of the DRI and how it was always a part of the Ministry of Finance since its inception except for a brief period between 1970 and 1977.
22. He adverted to Sections 3, 4, 5 and 6 of the Act, 1962 respectively along with the relevant notifications issued under the respective provisions. The provisions and relevant notifications are reproduced hereinbelow:

**Section 3 as introduced in 1962:**

*"3. There shall be the following classes of officers of custom namely: —*

- (a) *Collectors of Customs;*
- (b) *Appellate Collectors of Customs;*
- (c) *Deputy Collectors of Customs;*
- (d) *Assistant Collectors of Customs; and*
- (e) *such other class of officers of customs as may be appointed for the purposes of this Act."*

The provision was amended by the Finance Act, 1995 and underwent only one change wherein the expression 'collector' was replaced by the expression 'commissioner'. The amended provision reads as under:

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

*"3. Classes of officers of customs.-*

*There shall be the following classes of officers of customs, namely.-*

- (a) *Chief Commissioners of Customs;*
- (b) *Commissioners of Customs;*
- (c) *Commissioners of Customs (Appeals);*
- (d) *Deputy Commissioners of Customs;"*

23. He submitted that Section 3 refers to the class of officers of customs. All officers of the same rank irrespective of the functions and roles they play would fall under Section 3 as class of officers of customs. Class in this sense would refer to the same rank.

24. Sections 4 and 5 of the Act, 1962 are extracted below:

**Section 4:**

- "(1) The Board may appoint such persons as it thinks fit to be officers of customs.*
- (2) Without prejudice to the provisions of sub-section (7), the Board may authorise a Commissioner of Customs or a Deputy or Assistant Commissioner of Customs to appoint officers of customs below the rank of Assistant Commissioner of Customs."*

**Section 5:**

- "(1) Subject to such conditions and limitations as the Board may impose, an officer of customs may exercise the powers and discharge custom the duties conferred or imposed on him under this Act.*
- (2) An officer of customs may exercise the powers and discharge the duties conferred or imposed under this Act on any other officer of customs who is subordinate to him.*
- (3) Notwithstanding anything contained in this section, an Appellate Collector of Customs shall not exercise the powers and discharge the duties conferred or imposed on an officer of customs other than those specified in Chapter XV and section 108."*

**Digital Supreme Court Reports**

25. Section 4 relates to appointment of officers of customs and Section 5 deals with the powers and duties of officers of customs. There is only one significant change carried out in Section 4 on 11.05.2002. Prior to that date, the appointing Authority was the Central Government and post 11.05.2002, the Board became the appointing Authority.
26. Some of the relevant notifications issued under Sections 4 and 5 of the Act, 1962 respectively are reproduced below:

***"G.S.R. 214-In exercise of the powers conferred by sub-section (1) of Section 4 of the Customs Act, 1962 (52 of 1962), the Central Government hereby appoints—***

- (a) *the officers specified below to be Collectors of Customs within their respective jurisdictions, namely:—*
  1. *Director, Directorate of Revenue Intelligence.*
  2. *Collector of Customs and Central Excise, Cochin.*
  3. *Collectors of Land Customs and Central Excise, Delhi, Calcutta and Shillong.*
  4. *Collectors of Central Excise, Baroda, Bombay, Poona, Bangalore, Madras, Hyderabad, Calcutta, Nagpur, Patna, Allahabad and Kanpur.*
- (b) *the Deputy Collectors posted under the Collectors specified in clause (a) to be Deputy Collectors of Customs within their respective jurisdictions;*
- (b) *the Assistant Collectors posted under the Collectors specified in clause (a) to be Assistant Collectors of Customs within their respective jurisdictions.*

[No. 37/F. No. 4/1/63-CAR]

***G.S.R. 215-In exercise of the powers conferred by sub-section (1) of section 4 of the Customs Act, 1962 (52 of 1962), the Central Government hereby appoints the following persons to be officers of Customs, namely:—***

1. *Principal Appraisers, Appraisers, Examiners, Chief Inspectors, Additional Chief Inspectors, Inspectors, Preventive Officers, Women*

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

*searches, Ministerial officers and Class IV officer in the Customs Department at Bombay, Calcutta, Madras, Cochin, Visakhapatnum and Kandla.*

2. *Reverificadors, Verificadores, Appraisers, Preventive Inspectors, Preventive Officers, Officials Probationary Officials, Fiscal Guards, Cabos, Sub-Chefes, and Auxiliaries of the Technical Cadre, borne on the establishment of Customs and Central Excise Administration, Goa.*
3. *Superintendents, Deputy Superintendent, Inspectors, Sub-Inspectors, women searchers, Ministerial staff and Class IV staff of Central Excise Department, who are for the time being posted to a Customs-port, Customs-airport, land-customs station, coastal port, Customs Preventive post, Customs Intelligence post or a Customs warehouse.*
4. *Superintendents, Duty Superintendents and Inspectors of Central Excise Department in any place in India.*
5. *All officers of the Directorate of Revenue Intelligence.*

[No. 38/F. No. 4/1/63-CAR.]”

27. Our attention was specifically drawn to S. No. 1 of GSR 214 as extracted above wherein the Central Government appointed the Director, Directorate of Revenue Intelligence as an officer of customs and also to S. No. 5 of GSR 215 by which the Central Government appointed all the officers of DRI as officers of customs.
28. He also placed before us the origin and history of the DRI as a part of the Ministry of Finance. From 04.12.1957 till 24.06.1970, DRI was with the Ministry of Finance. From 25.06.1970 to 28.07.1970, it was with the Ministry of Home Affairs. Between 29.07.1970 and 06.04.1977, it was with the Cabinet Secretariat and from 07.04.1977 onwards, DRI has remained with the Ministry of Finance.

**Digital Supreme Court Reports**

29. Placing reliance on the decision of the Delhi High Court in the case of **S.K. Srivastava v. Union of India** reported in **1971 SCC OnLine Del 134**, he submitted that DRI was always a part of the Customs Department, working under a common Board and the Ministry of Finance. The relevant paragraphs from this decision are extracted below:

*"(2) Therefore, on 3-12-1970 the order dated 27-7-1970 was cancelled.*

*(3) On 16-12-1970 the President was pleased to order that the petitioner "be posted as Collector of Central Excise, Hyderabad".*

*The petitioner however refused to join his posting at Hyderabad and has filed the present writ petition challenging his transfer from the post of Director of Revenue Intelligence to the post of Collector of Customs as being illegal and unconstitutional.*

*Let us first consider the legality of the transfer. Under Article 310 of the Constitution, the petitioner held office during the pleasure of the President. The conditions of service of the petitioner could be regulated by Parliament by legislation under Article 309 of the Constitution. In the absence of such legislation the President could also frame rules to do so under the proviso to Article 309. But neither any such legislation nor any such rules exist. The formation of the Indian Customs and Central Excise Service Class I was itself brought about by purely executive action. It is well-established that the administration of service by the Government of India can be carried on by executive instructions and executive action even though no statute or statutory rules may have been made.*

**The distinction between the personnel forming a Service and the posts which may be manned by the members of such a Service has to be noted at the outset in this case. The petitioner along with others belong to the Indian Customs and Central Excise Service Class I. The members of this Service stood in relation to each other in a particular order of seniority.**

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

**There was no statute or rules, however, restricting the appointments of the members of the Service to any particular post. Initially the officers of the Collectorate of Customs and Excise working under the Ministry of Finance, Department of Revenue, used to do all the work relating to customs and excise. In 1939, the work of inspection in the Departments of Customs and Central Excise which was till then performed by the departments themselves as carved out and given to a separate Directorate of Inspection (Customs and Central Excise) as a part of the office of the Central Board of Revenue which was formed by an Act of 1924 and which was split later by an Act of 1963 into two Boards, namely:—**

- (a) *Board of Direct Taxes under which functions the Department of Income-tax;*
- (b) *The Central Board of Excise and Customs under which functioned the Collectorates of Customs and Central Excise, Directorate of Inspection and Directorate of Revenue Intelligence.*

**It was in 1957 that the intelligence work till then performed by the Central Revenue Intelligence Bureau functioning as a unit in the Directorate of Inspection, was constituted as a third unit in the Department of Revenue, Ministry of Finance styled as Directorate of Revenue, Intelligence. All this and more information is contained in the Government publication Organisation Set-up and Functions of the Ministries/Departments of the Government of India “, 4th Edition, 1968, pages 68-70 (Annexure R XIII).**

**As the work of Directorates of Inspection and Revenue Intelligence has been carved out from the work originally performed by the Collectorates of Customs and Central Excise and as no separate personnel was recruited to man the posts in these two Directorates, the members of the Indian Customs and Central Excise Service Class I have been manning those posts. There have been therefore numerous transfers**

**Digital Supreme Court Reports**

*of officers of the Indian Customs and Central Excise Service Class I from their posts in the Collectorates to the subsequently created posts in the Directorates. Equally frequently these officers have been transferred back to the posts in the Collectorates. The important fact to be noted is that only one set of personnel originally recruited for the Customs and Central Excise Collectorates has been used to fill the posts not only in the Collectorates but also in the Directorates. The reason is obvious. The Central Board of Excise and Customs in 1963 and prior to that the Central Board of Revenue functioning as a part of the Department of Revenue, Ministry of Finance of the Government of India administered and controlled the work of the Collectorates of Customs and Central Excise as well as of the Directorates of Inspection and Revenue Intelligence. These three units form one whole working under the Board and the Ministry. This position is reflected in the following documents:—*

(1) *The Central Civil Services [Revised Pay Rules, 1960 (Annexure R xiv)] have a Schedule in which the various posts which could be manned by the Central Civil Services are shown with the emoluments attached to those posts. In this Schedule section 10 forms the Ministry of Finance (Department of Revenue)....”*

[emphasis supplied]

30. Having adverted to Sections 3, 4 and 5 of the Act, 1962, he submitted that the officers of DRI would fall under Section 3 as “class of officers” and under Section 4 as “officers of customs” and that the Board is empowered to assign and fix powers and assign duties to such DRI officers similar to other classes of officers and officers of customs.
31. In the aforesaid context, he submitted that having failed to advert to these three sections and the various notifications referred to above, this Court erred in placing sole reliance on Section 6 of the Act, 1962 to conclude that DRI officers are not officers of customs as they belong to a different department and require specific entrustment under Section 6 of the Act, 1962 by the Central Government before

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

the powers of a proper officer under Section 2(34) of the Act, 1962 can be assigned to them. Section 6 is reproduced below:

*“(6) The Central Government may, by notification in the Official Gazette, entrust either conditionally or unconditionally to any officer of the Central or the State Government or a local authority any functions of the Board or any officer of customs under this Act.”*

32. He submitted that the question of entrustment would arise only in relation to an officer of Central or State Government or Local Authority who does not fall within the class of officers of customs under Section 3 appointed under Section 4 of the Act, 1962. Some instances of the Central Government entrusting such functions of customs officers under Section 6 are M.F. (D.R.) Notification No. 161-Cus dated 22.06.1963 and M.F.(D.R.&I.) Notification No. 33-Cus., dated 27.04.1974 which entrusted functions of customs officer to police officers in a particular jurisdiction and officers of the Border Security Force respectively. However, in the case of DRI officers, they would clearly fall under Sections 3, 4 and 5 of the Act, 1962 and the notifications conferring powers and duties are already on record.
33. Our attention was also drawn to Notification 161-Cus dated 22.06.1963 issued under Section 6 entrusting powers of search to DRI officers. As per Notifications GSR 214 and GSR 215 issued in the same year under Section 4 of the Act, 1962, all officers of DRI were appointed as officers of customs. Therefore, an inadvertent reference to Section 6 under Notification No. 161 dated 22.06.1963 should not lead to the drawing of any adverse inferences as at the highest, it may only be a case of misquoting of a Section. Secondly, till 11.05.2002, it was the Central Government which was the appointing authority under Section 4 for officers of customs as well as for entrustment under Section 6. It is only from 11.05.2002 that the powers under Section 4 were delegated to the Board since Notification No. 161 dated 22.06.1963 was issued prior to 11.05.2002 and the authority being the Central Government under both Sections, any incorrect reference to a provision would be totally inconsequential.
34. He submitted that by virtue of the aforesaid and also without reference to the Notification No. 44/2011 – Cus (N.T.) dated 06.07.2011, erroneous conclusions came to be rendered in paragraphs 17 to 23

**Digital Supreme Court Reports**

of the decision under review. The findings in *Canon India* (*supra*) in paragraphs 13 and 14 respectively that DRI officers belong to a different department and therefore cannot become proper officers under Section 28, and if done so, would result in anarchical and unruly operation of the statute, too, is erroneous in light of the aforesaid submissions.

35. He further submitted that despite being a conceded position that issuance of a show cause notice under Section 28 is a quasi-judicial exercise of power, this Court fell in error in holding the same to be an administrative review in paragraph 15. The Court also erred in concluding that the expression “the proper officer” can only signify an officer empowered to undertake assessment and re-assessment under Section 17, by placing unfounded reliance on the decision in *Consolidated Coffee Ltd. and Anr. v. Coffee Board, Bangalore* reported in **1980 AIR 1468** as it relates to a totally different scenario envisaged under Article 286 read with Section 5 of the Central Sales Tax Act, 1956.
36. After pointing out the aforesaid aspects as errors apparent on the face of the record, he prayed that the present review petition be allowed.

**ii. Why the decision in *Sayed Ali* (*supra*) requires reconsideration**

37. He submitted that there are two fundamental errors in the dictum laid in *Sayed Ali* (*supra*) –
  - (i) *Firstly*, it casts an obligation that an officer of customs who is empowered to undertake assessment or reassessment under Section 17 alone is qualified to become a proper officer under Section 28 for the purpose of raising demand of short levy, non-levy or erroneous refund. No other officer can be assigned the functions of the proper officer under Section 28.
  - (ii) *Secondly*, the judgment was rendered in connection with officers of the Customs (Preventive), who were not assigned the powers and duties of a proper officer, and no notifications to this effect were produced or brought to the notice of this Court.
38. It was pointed out by him that *Sayed Ali* (*supra*) did not deal with DRI officers who were indeed vested with the powers of proper

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

officers *vide* the Circular No. 437/9/98-Cus.IV dated 15.02.1999 issued by the Board in terms of Section 2(34). Under Section 2(34), the power of assigning functions of a proper officer to an officer of customs vests with the Board or the Commissioner of Customs. Since the Board issued this assignment, the DRI officers became proper officers with effect from 15.02.1999. As a result, the decision rendered in Sayed Ali (*supra*) which was with reference to only Customs (Preventive) would have no application to the DRI and DGAE officers. The circular dated 15.02.1999 is reproduced hereinbelow:

**"F. No. 437/9/98-Cus.IV**

**Circular No. 4/99-Cus  
Dated 15/2/1999**

*Government of India  
Ministry of Finance  
(Department of Revenue)  
Central Board of Excise & Customs, New Delhi*

***Subject: Issuance of Show Cause Notice by the Officers  
of Directorate of Revenue Intelligence -regarding-***

*A doubt has been recently raised as to whether the Officers of Directorate of Revenue Intelligence could issue show cause notices in cases investigated by them – a practice started last year apparently in tune with the practice of the Directorate General of Anti Evasion. The matter has been examined in the Board.*

*2. It has been observed that in terms of Customs Notification No. 19/90-Cus (NT.), dated 26.4.90, as amended from time to time, the Officers of Directorate of Revenue Intelligence of different categories have been notified and appointed as Commissioners of Customs, Deputy Commissioners of Customs or Assistant Commissioners of Customs for the areas specified. These officers, therefore, can legally be entrusted with discharge of functions normally performed by Commissioners, Deputy Commissioners or Assistant Commissioners of Customs in their jurisdiction, as the case may be. Board can no doubt subject these powers/functions*

**Digital Supreme Court Reports**

*to certain restrictions/limitations as may be imposed, as provided under section 5(1) of the Customs Act.*

*3. Directorate of Revenue Intelligence Officer are, therefore, to undertake investigations of cases detected by them, and to issue the Show Cause Notices on completion of investigations. In line with the instructions issued (vide F.No. 208/23/97-CX-8, dated 20.1.98) in respect of Officers of Directorate General Anti Evasion, Board has decided that in impact of cases investigated by the Directorate General of Revenue intelligence, the officers of said Directorate will be competent to and may issue show cause notices in cases investigated by them – though these will continue to be adjudicated by the concerned jurisdictional Commissioners, Additional Commissioners, Deputy Commissioners or Assistant Commissioners of Customs, as the case may be.*

*4. The Board has also decided that these instructions may kindly be brought to the notice of all departmental officers by issuing suitable standing orders.*

Sd/-

(Rajendra Singh)

*Under Secretary to the Government of India”*

39. As regards the observations in Sayed Ali (*supra*) on the *inter se* link between Sections 17 and 28 of the Act, 1962 respectively, he submitted that no such mandate flows from either of the two sections and reading any such linkage into the scheme of the Act, 1962 would directly undermine the powers of search, seizure and investigation of the DRI officers under the Act, 1962 along with the assignment of functions as proper officers to issue show cause notices post such search and investigation. Although no disability is to be found in any provisions of the Act, 1962, yet Sayed Ali (*supra*) creates such an embargo and also proceeds to hold that empowering such officers to issue show cause notices would result in multiple persons dealing with the same issue leading to utter chaos and confusion. He submitted that the Board has been issuing circulars and notifications from time to time with a view to ensure that no such overlap occurs. He also argued that the respondents have not adduced any evidence

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

or empirical statistics to even remotely indicate that an importer has been visited with either multiple show cause notices or adjudication orders on the same subject.

40. He further submitted that the Board had vested DRI with the power to issue only show cause notices and the adjudication orders in furtherance of the show cause notices were to be passed by the respective port officers. In cases involving multiple ports, common adjudicators were assigned powers by the Board and later also by the DRI and these adjudicators never involved themselves either in the investigation of the case or in the issuance of show cause notices. In such circumstances, he submitted that both the findings in Sayed Ali (*supra*) require reconsideration.
41. He further drew our attention to Circular No. 18/2015 – Customs dated 09.06.2015 issued by the Board pertaining to the appointment of common adjudicating authority and the mode and manner of assignment of functions for adjudication with a view to avoid multiplicity or plurality. The same is extracted below:

*"Circular No. 18/2015- Customs*

*F.No. 450/145/2014- Cus IV*

*Government of India*

*Ministry of Finance*

*Department of Revenue*

*Central Board of Excise and Customs*

*To*

*All Chief Commissioner of Customs / Customs (Preventive)*

*All Chief Commissioners of Customs and Central Excise*

*All Commissioners of Customs*

*All Commissioners of Customs and Central Excise*

*Sir / Madam,*

***Subject: Appointment of common adjudicating authority -regarding***

*Reference is invited to Notification No 60/2015-Customs (N.T.), dated 04.06.2015 whereby the power to appoint*

**Digital Supreme Court Reports**

*common adjudicating authority in cases investigated by DRI upto the level of Commissioner of Customs has been delegated to Principal Director General of Directorate of Revenue Intelligence in terms of section 152 of the Customs Act, 1962. This notification was issued in the interest of expediting decision making with resultant benefits to both trade and revenue in terms of faster settlement of outstanding disputes. These appointments were done hitherto by the Central Board of Excise and Customs under sections 4 and 5 of the Customs Act 1962.*

*2. In the light of the aforementioned notification, all cases of appointment of common adjudicating authority in respect of cases investigated by DRI will be handled by Principal DG, DRI. In this regard, the Board has prescribed the following guidelines for Principal DG, DRI:*

- (a) *The following cases initiated by DRI shall be assigned to Additional Director General (Adjudication), DRI:*
  - (i) *Cases involving duty of Rs.5 crores and above;*
  - (ii) *Group of cases on identical issues involving aggregate duty of Rs.5 crores or more;*
  - (iii) *Cases involving seizure value of Rs.5 crores or more;*
  - (iv) *Cases of over-valuation irrespective of value involved; and*
  - (v) *Existing DRI cases with erstwhile Commissioner (Adjudication).*
- (b) *Cases other than at (a) above involving more than one Customs Commissionerate would be assigned to the jurisdictional Commissioner of Customs on the basis of the maximum duty evaded;*
- (c) *Cases other than at (a) above involving a single Customs Commissionerate would be assigned to the jurisdictional Commissioner of Customs;*
- (d) *Non-DRI cases pending with erstwhile Commissioner (Adjudication) would be assigned to Additional Director General (Adjudication), DRI;*

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

- (e) *Past DRI cases pending for adjudication with jurisdictional Commissioners of Customs would continue with these officers;*
- (f) *Remand cases would be decided by the original adjudicating authority.*

*3. All other cases of appointment of common adjudicator i.e. other than the cases mentioned in paragraph 2 above would continue to be dealt by the Board. This would include cases made by Commissionerates or cases made by DRI wherein the adjudicating officer is an officer below the level of Additional Director General (Adjudication), DRI.*

*4. Board has also decided that all the pending cases where common adjudicating authorities have not been appointed so far or where the common adjudicating authorities have been appointed but adjudications have not been done should be disposed of expeditiously in terms of aforementioned guidelines. However, while doing so in regard to the latter category of cases, Principal DG, DRI will take into consideration the fact whether or not personal hearings have taken place and the stage of passing the adjudication order. This is to ensure that cases about to be finalized are not reallocated to another adjudicating authority thereby defeating the objective of expediting the finalization of disputes.*

*5. Difficulty faced, if any, may be brought to the notice of the Board at an early date.*

*Yours faithfully  
(Pawan Khetan)*

*OSD (Customs IV)"*

42. He also brought to our notice similar notifications and circulars issued subsequently to plead that all steps have been taken with a view to ensure that there is no overlap of jurisdiction. In the absence of any evidence or proof adduced by the importer, the dictum as laid in Sayed Ali (*supra*) declaring that this would result in utter chaos and confusion and only such officers vested with the power of assessment and re-assessment can issue notices under Section 28, requires reconsideration.

**Digital Supreme Court Reports**

- iii. **The decision in *Mangali Impex (supra)* is liable to be set aside and the decision in *Sunil Gupta (supra)* ought to be affirmed**
43. He submitted that the decision in *Mangali Impex (supra)* too observed that the assignment of powers to DRI officers for issuing show cause notices under Section 28 of the Act, 1962 would create a situation of utter confusion and chaos and declared Section 28(11) of the Act, 1962 to be unconstitutional for being violative of Article 14 owing to its inherent arbitrariness. The decision also directed the Department to issue suitable instructions and ensure avoidance of multiplicity or plurality of proceedings. He submitted that the instructions have been scrupulously followed and complied with since 1999 through various notifications and Board circulars, thereby avoiding any overlap. He submitted that it was because of this reason that the importers were not able to produce any material to support such adverse inferences. Thus, he submitted that the decision in *Mangali Impex (supra)* also deserved to be set aside.
44. On the correctness of the decision in *Mangali Impex (supra)*, he further submitted that the reasoning in the decision i.e., the Validation Act, 2011 does not extend its non-obstante clause to anything contained elsewhere in the same statute or in any other law for the time being in force, is incorrect and not legally unsustainable. On the finding of the High Court that since Explanation 2 remains on the statute even after the insertion of Section 28(11), it places an embargo for the period prior to 08.04.2011, for the application of Section 28(11). The Ld. ASG submitted that Explanation 2, in no way, had interfered or can interfere with the validating power introduced *vide* Section 28(11). He delineated the sequence of events leading to the insertion of Section 28(11) in the Act, 1962 to make good his submission.
- (i) This Court delivered the judgment in *Sayed Ali (supra)* on 18.02.2011.
- (ii) Parliament *vide* the Finance Act, 2011 introduced certain amendments to Section 28 on 08.04.2011.
- (iii) On 06.07.2011, the Central Government issued Notification 44/2011 assigning the functions of proper officers to officers of Customs (Preventive), DRI, DGAE and officers of Commissioner of Central Excise. The same is extracted below:

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

***“Proper officers for Customs Sections 17 and 28***

*In exercise of the powers conferred by sub-section (34) of section 2 of the Customs Act, 1962 (52 of 1962), the Central Board of Excise and Customs hereby assigns the functions of the proper officer to the following officers mentioned in column (2) of the Table below, for the purposes of section 17, section 28, section 28AAA and second proviso to Section 124 of the said Act, namely:-*

TABLE

| <b>Sl.No.</b> | <b><i>Designation of the officers</i></b>   |
|---------------|---|
| <b>(1)</b>    | <b>(2)</b>  |
| 1.            | <i>Additional Director Generals, Additional Directors or Joint Directors, Deputy Directors or Assistant Directors in the Directorate General of Revenue Intelligence.</i>                       |
| 2.            | <i>Commissioners of Customs (Preventive), Additional Commissioners or Joint Commissioners of Customs (Preventive), Deputy Commissioners or Assistant Commissioners of Customs (Preventive).</i> |
| 3.            | <i>Additional Director Generals, Additional Directors or Joint Directors, Deputy Directors or Assistant Directors in the Directorate General of Central Excise Intelligence.</i>                |
| 4.            | <i>Commissioners of Central Excise, Additional Commissioners or Joint Commissioners of Central Excise, Deputy Commissioners or Assistant Commissioners of Central Excise.”</i>                  |

[Notification No. 44/2011-Cus. (N.T.), dated 6-7-2011]

- (iv) The Validation Bill, 2011, introducing Section 28(11) along with the Statement of Reasons came to be issued on 02.08.2011 and the same is extracted below:

***“Introduction of Sub-section 11 in Section 28 as per the Customs (Amendment And Validation) Bill, 2011***

**Digital Supreme Court Reports**

*"(11) Notwithstanding anything to the contrary contained in any judgment, decree or order of any court of law, tribunal or other authority, all persons appointed as officers of Customs under sub-section (1) of section 4 before the 6th day of July, 2011 shall be deemed to have and always had the power of assessment under section 17 and shall be deemed to have been and always had been the proper officers for the purposes of this section."*

**STATEMENT OF OBJECTS AND REASONS**

*The Customs Act, 1962 consolidates and amends the law relating to customs. Clause (34) of section 2 of the said Act defines the expression "proper officer" in relation to the functions under the said Act to mean the officer of customs who is assigned those functions by the Central Board of Excise and Customs or the Commissioner of Customs. Recently, a question has arisen as to whether the Commissioner of Customs (Preventive) is competent to exercise and discharge the powers of a proper officer for issue of a notice for the demand of duty. The Hon'ble Supreme Court of India in Commissioner of Customs versus Sayed Ali and Anr. (Civil Appeal Nos. 4294-4295 of 2002) held that only a customs officer who has been specifically assigned the duties of assessment and re-assessment in the jurisdiction area is competent to issue a notice for the demand of duty as a proper officer. As such the Commissioner of Customs (Preventive) who has not been assigned the function of a "proper officer" for the purposes of assessment or re-assessment of duty and issue of show cause Notice to demand Customs duty under Section 17 read with Section 28 of the Act in respect of goods entered for home consumption is not competent to function as a proper officer which has not been the legislative intent.*

*2. In view of the above the Show Cause Notices issued over the time by the Customs officers such as those of the Commissionerates of Customs (Preventive),*

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

*Directorate General of Revenue Intelligence and others, who were not specifically assigned the functions of assessment and re-assessment of customs duty may be construed as invalid. The result would be huge loss of revenue to the exchequer and disruption in the revenue already mobilized in cases already adjudicated. However, having regard to the urgency of the matter, the Government issued notification on 6th July, 2011 specifically declaring certain officers as proper officers for the aforesaid purposes.*

*3. In the circumstances, it has become necessary to clarify the true legislative intent that Show Cause Notices issued by Customs officers, i.e., officers of the Commissionerates of Customs (Preventive), Directorate General of Revenue Intelligence (DRI), Directorate General of Central Excise Intelligence (DGCEI) and Central Excise Commissionerates for demanding customs duty not levied or short levied or erroneously refunded in respect of goods imported are valid, irrespective of the fact that any specific assignment as proper officer was issued or not. It is, therefore, proposed to amend the Customs Act, 1962 retrospectively and to validate anything done or any action taken under the said Act in pursuance of the provisions of the said Act at all material times irrespective of issuance of any specific assignment on 6th July, 2011.*

*4. The Bill seeks to achieve the above objects."*

- (v) Finally, the Validation Act came to be passed on 16.09.2011 and Sub-Section (11) became part of Section 28.
- 45. He contended that Explanation 2 and the introduction of Section 28(11) are for distinct purposes and are not connected to each other in any way. Prior to 08.04.2011, the period of limitation available under the statute for demanding short levy, non-levy or erroneous refund was six months. Whereas after 08.04.2011, it was enhanced to one year. As the amendment substituted the then-existing Section 28, it provided a saving provision to protect the notices issued

**Digital Supreme Court Reports**

prior to 08.04.2011 from the extension of limitation period from 6 months to one year. He submitted that the purport of Explanation 2 was only to ensure that those rights envisaged under old Section 28 stand preserved. Explanation 2 did not deal with the jurisdictional exercise of the power of DRI officers in issuing show cause notices under Section 28, whereas, the Validation Act, 2011, introducing Section 28(11) addressed precisely only that issue.

46. He submitted that the conclusion drawn in ***Mangali Impex* (supra)** was legally incorrect for holding that Section 28(11) is overbroad in assuming every officer of customs to be deemed as proper officers both for Sections 17 and 28. The Validation Act, 2011, was enacted to regularize only past actions and not future actions, which are governed by Notification No. 44/2011 dated 06.07.2011 which even according to the High Court is valid and proper. Consequently, the validation has a very limited role to play as it travels back only to empower such of those officers of customs who had issued show cause notices in the past and vesting them also with the power under Section 17.
47. He submitted that the decision in ***Sunil Gupta* (supra)** clarifies the correct legal position and should be held to be so by this Court.

**iv. Changes introduced by the Finance Act, 2022 are in the nature of surplusage**

48. Lastly, he referred to the amendments brought about by the Finance Act, 2022, *vide* Sections 86, 87, 88, 94 and 97. The same are extracted below:

**Section 86 - Amendment of section 2 of the Act, 1962**

*"86. In the Customs Act, 1962 (52 of 1962), (hereinafter referred to as the Customs Act), in section 2, in clause (34), after the words "Principal Commissioner of Customs or Commissioner of Customs", the words and figure "under section 5" shall be inserted."*

**Section 87 - Substitution of new section for section 3 of the Act, 1962**

*"87. For section 3 of the Customs Act, the following section shall be substituted, namely:*

*3. Classes of officers of customs.-*

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

*"There shall be the following classes of officers of customs, namely:--*

- (a) *Principal Chief Commissioner of Customs or Principal Chief Commissioner of Customs (Preventive) or Principal Director General of Revenue Intelligence;*
- (b) *Chief Commissioner of Customs or Chief Commissioner of Customs (Preventive) or Director General of Revenue Intelligence;*
- (c) *Principal Commissioner of Customs or Principal Commissioner of Customs (Preventive) or Principal Additional Director General of Revenue Intelligence or Principal Commissioner of Customs (Audit);*
- (d) *Commissioner of Customs or Commissioner of Customs (Preventive) or Additional Director General of Revenue Intelligence or Commissioner of Customs (Audit);*
- (e) *Principal Commissioner of Customs (Appeals);*
- (f) *Commissioner of Customs (Appeals);*
- (g) *Additional Commissioner of Customs or Additional Commissioner of Customs (Preventive) or Additional Director of Revenue Intelligence or Additional Commissioner of Customs (Audit);*
- (h) *Joint Commissioner of Customs or Joint Commissioner of Customs (Preventive) or Joint Director of Revenue Intelligence or Joint Commissioner of Customs (Audit);*
- (i) *Deputy Commissioner of Customs or Deputy Commissioner of Customs (Preventive) or Deputy Director of Revenue Intelligence or Deputy Commissioner of Customs (Audit);*
- (j) *Assistant Commissioner of Customs or Assistant Commissioner of Customs (Preventive) or Assistant Director of Revenue Intelligence or Assistant Commissioner of Customs (Audit);*

**Digital Supreme Court Reports**

(k) such other class of officers of customs as may be appointed for the purposes of this Act."

**Section 88 - Amendment of section 5 of the Act, 1962**

"88. In section 5 of the Customs Act,--

(a) after sub-section (1), the following sub-sections shall be inserted, namely:--

"(1A) Without prejudice to the provisions contained in sub-section (1), the Board may, by notification, assign such functions as it may deem fit, to an officer of customs, who shall be the proper officer in relation to such functions.

(1B) Within their jurisdiction assigned by the Board, the Principal Commissioner of Customs or Commissioner of Customs, as the case may be, may, by order, assign such functions, as he may deem fit, to an officer of customs, who shall be the proper officer in relation to such functions.";

(b) after sub-section (3), the following sub-sections shall be inserted, namely:-

"(4) In specifying the conditions and limitations referred to in sub-section (1), and in assigning functions under sub-section (1A), the Board may consider any one or more of the following criteria, including, but not limited to--

- (a) territorial jurisdiction;
- (b) persons or class of persons;
- (c) goods or class of goods;
- (d) cases or class of cases;
- (e) computer assigned random assignment;
- (f) any other criterion as the Board may, by notification, specify.

(5) The Board may, by notification, wherever necessary or appropriate, require two or more officers of customs (whether or not of the same class) to have concurrent powers and functions to be performed under this Act."

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.****Section 94 - Insertion of new section 110AA to the Act, 1962**

*"94. After section 110A of the Customs Act, the following section shall be inserted, namely:--*

*110AA. Action subsequent to inquiry, investigation or audit or any other specified purpose.-*

*"Where in pursuance of any proceeding, in accordance with Chapter XIIA or this Chapter, if an officer of customs has reasons to believe that--*

- (a) *any duty has been short-levied, not levied, short-paid or not paid in a case where assessment has already been made;*
- (b) *any duty has been erroneously refunded;*
- (c) *any drawback has been erroneously allowed; or*
- (d) *any interest has been short-levied, not levied, short-paid or not paid, or erroneously refunded, then such officer of customs shall, after causing inquiry, investigation, or as the case may be, audit, transfer the relevant documents, along with a report in writing.*
  - (i) *to the proper officer having jurisdiction, as assigned under section 5 in respect of assessment of such duty, or to the officer who allowed such refund or drawback; or*
  - (ii) *in case of multiple jurisdictions, to an officer of customs to whom such matter is assigned by the Board, in exercise of the powers conferred under section 5, and thereupon, power exercisable under sections 28, 28AAA or Chapter X, shall be exercised by such proper officer or by an officer to whom the proper officer is subordinate in accordance with sub-section (2) of section 5."*

**Section 97 - Validation of certain actions taken under the Act, 1962**

*"97. Notwithstanding anything contained in any judgment, decree or order of any court, tribunal, or other authority, or*

**Digital Supreme Court Reports**

*in the provisions of the Customs Act, 1962 (52 of 1962), (hereinafter referred to as the Customs Act):-*

- (i) *anything done or any duty performed or any action taken or purported to have been taken or done under Chapters V, VAA, VI, IX, X, XI, XII, XIIA, XIII, XIV, XVI and XVII of the Customs Act, as it stood prior to its amendment by this Act, shall be deemed to have been validly done or performed or taken;*
- (ii) *any notification issued under the Customs Act for appointing or assigning functions to any officer shall be deemed to have been validly issued for all purposes, including for the purposes of section 6;*
- (iii) *for the purposes of this section, sections 2, 3 and 5 of the Customs Act, as amended by this Act, shall have and shall always be deemed to have effect for all purposes as if the provisions of the Customs Act, as amended by this Act, had been in force at all material times.*

*Explanation. -- For the purposes of this section, it is hereby clarified that any proceeding arising out of any action taken under this section and pending on the date of commencement of this Act shall be disposed of in accordance with the provisions of the Customs Act, as amended by this Act."*

49. He submitted that the amendments carried out in the Act, 1962 vide Sections 87 and 88 of the Finance Act, 2022 respectively are a mere surplusage done *ex abundanti cautela* and are clarificatory in nature. He further submitted that Section 3 deals with classes of officers and officers of the same rank will constitute the same class. The amended Section 5 only expands the very same class with designation and functions and nothing more.
50. He submitted that Section 94 of the Finance Act, 2022 introducing Section 110AA to the Act, 1962 is only a way forward for the future wherein post search and investigation by the DRI, certain category of cases have now been directed to be handed over to the port authorities for issuing necessary show cause notices and this, in no way, can vitiate notices issued by DRI earlier especially in the absence of a constitutional or statutory embargo.

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

51. Finally, he submitted that a provision of law should appear arbitrary or abusive to be declared illegal or unconstitutional or invalid. A possible misuse of the provision by the authorities or a perceived misuse or mere presumptions and conjectures of a possible misuse cannot constitute basis to hold that a provision is arbitrary and violative of Article 14. He relied on the following decisions to fortify his submission:

- a. *Collector of Customs v. Nathella Sampathu Chetty*, 1962 SCC OnLine SC 30
- b. *Shreya Singhal v. Union of India* (2015) 5 SCC 1
- c. *Commissioner of Customs v. Dilip Kumar & Co.* (2018) 9 SCC 1
- d. *Goodyear India Ltd. v. State of Haryana* (1990) 2 SCC 71

**C. SUBMISSIONS ON BEHALF OF THE RESPONDENTS**

52. Mr. Mukul Rohatgi, Mr. Arvind Datar and Mr. V. Lakshmikumaran, learned Senior Counsel appeared on behalf of the various importers and vehemently objected to the review of *Canon India* (*supra*) and also contended that both *Sayed Ali* (*supra*) and *Mangali Impex* (*supra*) are correct in their conclusions and need no interference.
53. Mr. Mukul Rohatgi contended that the power of review is extremely circumscribed and limited. It is not a means to provide a second innings to anyone. The Department in the guise of a review is seeking to re-argue the whole matter. Even if a different view is possible, the same cannot give rise to a review. He relied on the following decisions:
- (i) *Col. Avtar Singh Sekhon v. Union of India* (1980) Supp SCC 562
  - (ii) *Lily Thomas Vs Union of India* (2000) 6 SCC 224
  - (iii) *Champsey Bhara & Co. v. Jivraj Balloo Spinning and Weaving Co. Ltd.* (1923) SCC OnLine PC 10
  - (iv) *State of Telangana v. Mohd. Abdul Qasim* (2024) 6 SCC 461.
54. Mr. Arvind Datar too submitted that the scope of review is extremely limited and further contended that Section 97 of the Finance Act, 2022 is a clear overreach and needs to be considered separately.

**Digital Supreme Court Reports**

55. Mr. V. Lakshmikumaran made the following submissions:

- (i) The scheme of the Act, 1962 clearly indicates that Sections 17, 46, 47 and 28 of the Act, 1962 respectively are interlinked to and inter-dependent on each other. These provisions involve a sequential flow of events to be processed by a single officer, and therefore, empowering DRI officers who are not connected to this scheme, is illegal.
- (ii) Section 17 deals with assessment and reassessment. Section 46 obligates filing of bills of entries. Section 47 allows clearance of goods for home consumption post the assessment under Section 17 and Section 28 pertains to demand of duty in the nature of short levy, short paid and erroneously refunded. Since all these statutory action points are interrelated, it is the same proper officer who should be empowered to perform all of these four functions and the same cannot be assigned to different sets of officers.
- (iii) The amendment to Section 17 in 2011 allowing self-assessment is inconsequential since the power to assess and reassess and allow clearances is still with the officer of customs.
- (iv) On the issue of whether there are any statutory limitations to the assignment of powers under Section 28 only to those officers who do assessment or re-assessment under Section 17, he submitted that the scheme of the Act, 1962 as explained in *Sayed Ali* (*supra*) and *Mangali Impex* (*supra*), clearly indicates that Sections 17 and 28 of the Act, 1962 respectively are interconnected and interdependent.
- (v) *Canon India* (*supra*) is correct in holding that DRI officers should be entrusted with the functions under Section 6 of the Act, 1962. Since the Central Government has not done so, they cannot be assigned the functions of proper officer.
- (vi) Section 5 of the Act, 1962 deals only with powers and duties but not the functions, whereas, Section 6 deals with functions and thus, a notification under Section 6 is necessary. He emphasised on the different consequences arising from the use of the words “powers” and “duties” in Section 5 and use of the word “functions” in Section 6.

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

- (vii) It was contended that Section 28 deals with short levy, non-levy and erroneous refund. Levy means determination of duty through a process of assessment/reassessment. Section 28 therefore involves rendering a finding that the earlier assessment was not correct. Section 28 is intended to revise or upset the original assessment done under Section 17 and once an order gets passed under Section 28, the original assessment would not survive and therefore, the same officer can issue the show cause notice.
- (viii) The Board's Circular dated 15.02.1999 cannot come to the rescue of the Department because there was no assignment of function of assessment/reassessment as required by *Sayed Ali* (*supra*). According to the learned counsel, both Notification No. 44/2011 dated 06.07.2011 and Section 28(11) were brought to the notice of this Court in *Canon India* (*supra*).
- (ix) Having accepted the principles laid down in *Sayed Ali* (*supra*) on the interlinkage between Sections 17 and 28 of the Act, 1962 respectively, both *vide* Section 28(11) and Notification No. 44/2011 dated 06.07.2011, it is not open to the Department to now contend the contrary as reaffirmed in *Canon India* (*supra*).
- (x) All proper officers are officers of customs, but all officers of customs are not proper officers. Mere conferment of power or assignment of functions of assessment/reassessment under Sections 17 and 28 of the Act, 1962 respectively is not enough. Out of the various proper officers who have been empowered under Sections 17 and 28, only that proper officer who had actually carried out the assessment will be the proper officer. There can be concurrent conferment of power but there cannot be concurrent exercise of powers as the same may result in chaos and utter confusion.
- (xi) The decision rendered by the High Court in *Mangali Impex* (*supra*) is correct and need not be disturbed for the following reasons:
- Section 28(11) does not validate the show cause notices issued by various officers. It merely deems all officers who were appointed as officers of customs under Section 4(1) to

**Digital Supreme Court Reports**

have always had the powers under Sections 17 and 28 the Act, 1962 respectively. This would not automatically revive the show cause notices issued by such officers of customs.

- b. In order to hold that Section 28(11) validates past actions, this Court will have to insert words in the statute, that too in a taxing statute which imposes liabilities on assessee, that too retrospectively.
- c. Several unintended consequences may arise if it is held that show cause notices issued by other officers of customs will be revived. There are instances wherein many show cause notices have been issued after the *Sayed Ali* (*supra*) judgment by the jurisdictional commissionate wherever the limitation period permitted for demands to be made. In those cases, assessees will be faced with two show cause notices. He laid emphasis on the need to take an undertaking from the Department to avoid such a situation if it were to arise.
- d. The High Court has correctly held that Section 28(11) perpetrates the very chaos that the judgment in *Sayed Ali* (*supra*) sought to prevent.
- e. Explanation 2 to Section 28 should be given a plain meaning. It was in the statute before Section 28(11) was introduced, hence the framers of the statute were well aware of the implications of the Explanation 2.
- f. On 08.4.2011, Section 28 of the Act, 1962 underwent a drastic change and not just a mere change in terms of time period being changed from six months to one year. The mode & manner of issuing the show cause notice, the manner of adjudication and payment of duty, etc. have been amended making it more beneficial to the assessee. That is the reason why the old notices were to be dealt with under the old Section.
- g. It is impossible to read Section 28(11) and Explanation 2 together as validating any action prior to 08.04.2011. Such is the plain meaning and only such an interpretation is warranted in the present case.

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

- (xii) Section 97 of the Finance Act, 2022 is liable to be struck down as manifestly arbitrary and thus violative of Article 14. According to him, the Finance Act, 2022 does not cure the defects pointed out by this Court in its decision rendered in *Canon India* (*supra*) for the following reasons:
- a. The amendments introduced *vide* the Finance Act, 2022 continue to violate the principles laid down in the judgment of this Court in *Sayed Ali* (*supra*) wherein it was held that granting jurisdiction to multiple officers will create utter chaos and confusion. He highlighted that the review filed against the decision in *Sayed Ali* (*supra*) has already been dismissed.
  - b. The validation of past actions by way of Section 97(i) of the Finance Act, 2022 violates the principles enshrined in the judgment of *Canon India* (*supra*) since it will lead to a very anarchical and unruly operation of a statute which was sought to be avoided in *Canon India* (*supra*).
  - c. A Validation Act can only validate the law but cannot validate a fact. Once a particular officer has exercised the function of assessment, it is a jurisdictional fact that has occurred to the exclusion of all other groups in the Customs Department. Thereafter, only that officer or his superiors (known as the Customs group) who had undertaken assessment under Section 17 in the first place shall have the jurisdiction to issue notices for recovery of duty under Section 28.
  - d. This Court in its judgment in *Canon India* (*supra*) found that factually the assessments were initially not undertaken by officers of DRI and such a defect cannot be cured retrospectively by a validating law. Therefore, the present amendments seek to validate and effectively change a judicially determined fact, which cannot be done by a legislation.
- (xiii) The Finance Act, 2022 also introduced a provision, i.e. Section 110AA, providing a mechanism for actions to be taken subsequent to inquiry, investigation or audit by any officer of

**Digital Supreme Court Reports**

customs. Section 110AA operates only prospectively. This provision is Parliament's recognition of the importance of maintaining the jurisdiction for issuing show cause notices within the assessing group.

(xiv) Further, by retrospectively modifying the scheme of appointment and assignment of functions to officers of customs, a larger lacuna has been created as there exist no valid notifications for assignment of functions of a 'proper officer' under Section 5 for the period prior to 01.04.2022. Thus, all actions performed by any officer of Customs prior to 01.04.2022 have in fact been performed without jurisdiction. In such circumstances referred to above, it was prayed that there being no merit in the Review Petition filed by the Department, the same may be dismissed.

**D. ISSUES FOR CONSIDERATION**

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

- (i) Whether there is an "error apparent on the face of the record" for the purpose of entertaining the review petition?
- (ii) If the answer to the aforesaid question is in the affirmative, then whether the exposition of law propounded by this Court in *Canon India (supra)* as regards the power of the DRI to issue show cause notices could be said to be the correct statement of law?

This would entail addressal of the following questions:

- a. Whether officers of DRI are the proper officers for the purposes of Section 28 of the Act, 1962?
- b. What would be the extent, scope and domain of Section 6 of the Act, 1962 *vis-à-vis* Section 2(34), Section 3, Section 4 and Section 5 of the Act, 1962 and whether an entrustment by the Central Government under Section 6 of the Act, 1962 is mandatory to empower the Officers of the DRI for the purpose of issuing show cause notices?
- c. Whether the power under Section 28 can be exercised only by someone who is empowered to exercise the power

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

under Section 17 of the Act, 1962 for the goods in question? In other words, how best the meaning of the expression “proper officer” should be construed for the purposes of exercise of functions under Section 28?

- d. Whether “the proper officer” in Section 28 must necessarily be the same proper officer referred to under Section 17 of the Act, 1962? If no, whether the use of the definite article “the” in the expression “the proper officer” in Section 28 is in the context of that proper officer who has been assigned the powers of discharging the functions under Section 28 by virtue of powers conferred under Section 5 of the Act, 1962?
- e. Whether issuance of show cause notices followed by adjudication under Section 28 of the Act, 1962 is an administrative review as held in *Canon India* (*supra*) or a quasi-judicial exercise of power under administrative law?
- (iii) Whether the introduction of Section 28(11) *vide* the Validation Act of 2011 which retrospectively validates the show cause notices issued under Section 28 with effect from 06.07.2011, is discriminatory and arbitrary for not curing the defect highlighted in *Sayed Ali* (*supra*) and, therefore, is violative of Article 14 of the Constitution of India?
- (iv) Whether the judgment delivered by the High Court of Delhi in the case of *Mangali Impex* (*supra*) expounds the correct interpretation of Section 28(11)?
- (v) Whether Section 97 of the Finance Act, 2022, which retrospectively validates the show cause notices with effect from 01.04.2023, is manifestly arbitrary and therefore, violative of Article 14 of the Constitution of India?

**E. ANALYSIS**

i. *Review jurisdiction*

57. Article 137 of the Constitution of India provides for review of judgments or orders by the Supreme Court. It reads as under:

***“137. Review of judgments or orders by the Supreme Court. — Subject to the provisions of any law made***

**Digital Supreme Court Reports**

*by Parliament or any rules made under Article 145, the Supreme Court shall have power to review any judgment pronounced or order made by it.”*

58. Further, Part IV Order XLVII of the Supreme Court Rules, 2013 deals with the review and consists of five rules. Rule 1 is relevant for our purposes. It reads as under:

*“1. The Court may review its judgment or order, but no application for review will be entertained in a civil proceeding except on the ground mentioned in Order 47 Rule 1 of the Code and in a criminal proceeding except on the ground of an error apparent on the face of the record.”*

59. Order XLVII Rule 1(1) of the Code of Civil Procedure, 1908 provides for an application for review which reads as under:

**“1. Application for review of judgment.** — Any person considering himself aggrieved—

- (a) *by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,*
- (b) *by a decree or order from which no appeal is allowed, or*
- (c) *by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the court which passed the decree or made the order.”*

60. Thus, in view of the above, the following grounds of review are maintainable as stipulated by the statute:

- (i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

- of the petitioner or could not be produced by him at the time when the decree was passed or order made;
- (ii) Mistake or error apparent on the face of the record; or
  - (iii) Any other sufficient reason.
61. The words “any other sufficient reason” have been interpreted by the Privy Council in the case of ***Chhajju Ram v. Neki*** reported in **1922 SCC OnLine PC 11** and approved by this Court in ***Moran Mar Basselios Catholicos v. Mar Poulose Athanasius*** reported in **1954 SCC OnLine SC 49** to mean a reason sufficient on grounds, at least analogous to those specified in the rule.
62. In the case of ***Tinkari Sen v. Dulal Chandra Das*** reported in **1966 SCC OnLine Cal 103**, the Calcutta High Court held that if the court overlooks or fails to consider a legal provision that grants it the authority to act in a specific manner, this may amount to an error analogous to one apparent on the face of the record. Such an oversight would fall within the scope of Order XLVII, Rule 1 of the Code of Civil Procedure, 1908 which allows for reviews. Relevant parts are extracted below:

“18. Consider, in this context, *Sir Hari Sankar Pal v. Anath Nath Mitter*, AIR 1949 FC 106. Mr. Chittatosh Mookerjee refers me to Mukherjee, J. (as his Lordship then was), observed, Kania C.J. Fazl Ali, Patanjali Sastri and Mahajan, JJ. (as their Lordships then were) agreeing:

**That a decision is erroneous in law is certainly no ground for ordering review. If the Court has decided a point and decided it erroneously, the error could not be one apparent on the face of the record or even analogous to it** “When, however, the Court disposes of a case without advertizing to or applying its mind to a provision of law which gives it jurisdiction to act in a particular way that may amount to an error analogous to one apparent on the face of the record sufficient to bring the case within the purview of Order 47, rule 1 of the CPC.”

[Emphasis supplied]

## Digital Supreme Court Reports

63. In *Girdhari Lal Gupta v. D. H. Mehta* reported in (1971) 3 SCC 189, this Court allowed the review on the ground that its attention was not given to a particular provision of the statute. The relevant observations read as follows:

**"15. The learned counsel for the respondent State urges that this is not a case fit for review because it is only a case of mistaken judgment. But we are unable to agree with this submission because at the time of the arguments our attention was not drawn specifically to sub-section 23-C(2) and the light it throws on the interpretation of sub-section (1).**

**16. In the result the review petition is partly allowed and the judgment of this Court in Criminal Appeal No. 211 of 1969 modified to the extent that the sentence of six months' rigorous imprisonment imposed on Girdharilal is set aside. The sentence of fine of Rs 2000 shall, however, stand."**

[Emphasis supplied]

64. In *M/s Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi* reported in (1980) 2 SCC 167, the scope of the power of review was explained by this Court wherein it was held that:

**"8. It is well-settled that a party is not entitled to seek a review of a judgment delivered by this Court merely for the purpose of a rehearing and a fresh decision of the case. The normal principle is that a judgment pronounced by the Court is final, and departure from that principle is justified only when circumstances of a substantial and compelling character make it necessary to do so: Sajjan Singh v. State of Rajasthan [AIR 1965 SC 845 : (1965) 1 SCR 933, 948 : (1965) 1 SCJ 377]. For instance, if the attention of the Court is not drawn to a material statutory provision during the original hearing, the Court will review its judgment: G.L. Gupta v. D.N. Mehta [(1971) 3 SCC 189 : 1971 SCC (Cri) 279 : (1971) 3 SCR 748, 750]. The Court may also reopen its judgment if a manifest wrong has been done and it is necessary to pass an order to do full and effective justice: O.N. Mohindroo v. Distt. Judge, Delhi [(1971) 3 SCC 5 : (1971) 2 SCR 11, 27]. ....**

[Emphasis supplied]

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

65. This Court in ***Yashwant Sinha v. CBI*** reported in **(2020) 2 SCC 338**, has observed that if a relevant law has been ignored while arriving at a decision, it would make the decision amenable to review. The relevant observations read as follows:

***"78. The view of this Court, in Girdhari Lal Gupta [Girdhari Lal Gupta v. D.H. Mehta (1971) 3 SCC 189 : 1971 SCC (Cri) 279 : AIR 1971 SC 2162 : (1971) 3 SCR 748] as also in Deo Narain Singh [Deo Narain Singh v. Daddan Singh, 1986 Supp SCC 530] , has been noticed to be that if the relevant law is ignored or an inapplicable law forms the foundation for the judgment, it would provide a ground for review. If a court is oblivious to the relevant statutory provisions, the judgment would, in fact, be per incuriam. No doubt, the concept of per incuriam is apposite in the context of its value as the precedent but as between the parties, certainly it would be open to urge that a judgment rendered, in ignorance of the applicable law, must be reviewed. The judgment, in such a case, becomes open to review as it would betray a clear error in the decision."***

[Emphasis supplied]

66. In ***Sow Chandra Kant and Anr. v. Sheikh Habib*** reported in **(1975) 1 SCC 674**, this Court held:

***"1. Mr Daphtary, learned counsel for the petitioners, has argued at length all the points which were urged at the earlier stage when we refused special leave thus making out that a review proceeding virtually amounts to a re-hearing. May be, we were not right in refusing special leave in the first round; but, once an order has been passed by this Court, a review thereof must be subject to the rules of the game and cannot be lightly entertained. A review of a judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. A mere repetition, through different counsel, of old and overruled arguments, a second trip over ineffectually covered ground or minor mistakes of inconsequential import are obviously insufficient. The***

**Digital Supreme Court Reports**

*very strict need for compliance with these factors is the rationale behind the insistence of counsel's certificate which should not be a routine affair or a habitual step. It is neither fairness to the Court which decided nor awareness of the precious public time lost what with a huge backlog of dockets waiting in the queue for disposal, for counsel to issue easy certificates for entertainment of review and fight over again the same battle which has been fought and lost. The Bench and the Bar, we are sure, are jointly concerned in the conservation of judicial time for maximum use. We regret to say that this case is typical of the unfortunate but frequent phenomenon of repeat performance with the review label as passport. Nothing which we did not hear then has been heard now, except a couple of rulings on points earlier put forward. May be, as counsel now urges and then pressed, our order refusing special leave was capable of a different course. The present stage is not a virgin ground but review of an earlier order which has the normal feature of finality."*

**[Emphasis supplied]**

67. Thus, the decisions referred to above make it abundantly clear that when a court disposes of a case without due regard to a provision of law or when its attention was not invited to a provision of law, it may amount to an error analogous to one apparent on the face of record sufficient to bring the case within the purview of Order XLVII Rule 1 of the Code of Civil Procedure, 1908. In other words, if a court is oblivious to the relevant statutory provisions, the judgment would in fact be *per incuriam*. In such circumstances, a judgment rendered in ignorance of the applicable law must be reviewed.
68. From here onwards, our endeavour is to ascertain whether the relevant provisions of law including the notifications issued by the Board from time to time were brought to the notice of the Court while deciding ***Canon India*** (*supra*).
69. A three-Judge Bench in ***Canon India*** (*supra*) examined whether officers of the DRI are proper officers for the purpose of issuing recovery notices under the provisions of Section 28 of the Act, 1962.

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

70. The Court while deciding the aforesaid question held as under:

**“11. There are only two articles “a (or an)” and “the”. “A (or an)” is known as the indefinite article because it does not specifically refer to a particular person or thing. On the other hand, “the” is called the definite article because it points out and refers to a particular person or thing. There is no doubt that, if Parliament intended that any proper officer could have exercised power under Section 28(4), it could have used the word “any”.**

**12. Parliament has employed the article “the” not accidentally but with the intention to designate the proper officer who had assessed the goods at the time of clearance. It must be clarified that the proper officer need not be the very officer who cleared the goods but may be his successor in office or any other officer authorised to exercise the powers within the same office. In this case, anyone authorised from the Appraisal Group. Assessment is a term which includes determination of the dutiability of any goods and the amount of duty payable with reference to, inter alia, exemption or concession of customs duty vide Section 2(2)(c) of the Customs Act, 1962 [“**2. Definitions.**—In this Act, unless the context otherwise requires—\*\*\***(2) “assessment” means determination of the dutiability of any goods and the amount of duty, tax, cess or any other sum so payable, if any, under this Act or under the Customs Tariff Act, 1975 (51 of 1975) (hereinafter referred to as the Customs Tariff Act) or under any other law for the time being in force, with reference to—(a)-(b)\*\*\***(c)** exemption or concession of duty, tax, cess or any other sum, consequent upon any notification issued therefor under this Act or under the Customs Tariff Act or under any other law for the time being in force;”].****

**13. The nature of the power to recover the duty, not paid or short-paid after the goods have been assessed and cleared for import, is broadly a power to review the earlier decision of assessment. Such a power is not inherent in any authority. Indeed, it has been conferred**

**Digital Supreme Court Reports**

*by Section 28 and other related provisions. The power has been so conferred specifically on “the proper officer” which must necessarily mean the proper officer who, in the first instance, assessed and cleared the goods i.e. the Deputy Commissioner Appraisal Group. Indeed, this must be so because no fiscal statute has been shown to us where the power to reopen assessment or recover duties which have escaped assessment has been conferred on an officer other than the officer of the rank of the officer who initially took the decision to assess the goods.*

*14. Where the statute confers the same power to perform an act on different officers, as in this case, the two officers, especially when they belong to different departments, cannot exercise their powers in the same case. Where one officer has exercised his powers of assessment, the power to order reassessment must also be exercised by the same officer or his successor and not by another officer of another department though he is designated to be an officer of the same rank. In our view, this would result into an anarchical and unruly operation of a statute which is not contemplated by any canon of construction of statute.”*

71. The aforesaid observations are in line with the decision of this Court in Sayed Ali (*supra*). However, it is relevant to note that when Sayed Ali (*supra*) was decided, Section 17 read differently and the true purport of Section 4 of the Act, 1962 was not considered. We shall deal with this aspect subsequently.

72. The Court further held as under:

*“16. At this stage, we must also examine whether the Additional Director General of the DRI who issued the recovery notice under Section 28(4) was even a proper officer. The Additional Director General can be considered to be a proper officer only if it is shown that he was a Customs officer under the Customs Act. In addition, that he was entrusted with the functions of the*

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

*proper officer under Section 6 of the Customs Act. The Additional Director General of the DRI can be considered to be a Customs officer only if he is shown to have been appointed as Customs officer under the Customs Act.* 17. *Shri Sanjay Jain, Learned Additional Solicitor General, relied on a Notification No. 17/2002-Customs (N.T.), dated 7-3-2002 to show all Additional Directors General of the DRI have been appointed as Commissioners of Customs. At the relevant time, the Central Government was the appropriate authority to issue such a notification. This notification shows that all Additional Directors General, mentioned in Column (2), are appointed as Commissioners of Customs.*

*18. The next step is to see whether an Additional Director General of the DRI who has been appointed as an officer of Customs, under the notification dated 7-3-2002, has been entrusted with the functions under Section 28 as a proper officer under the Customs Act. In support of the contention that he has been so entrusted with the functions of a proper officer under Section 28 of the Customs Act, Shri Sanjay Jain, Learned Additional Solicitor General relied on a Notification No. 40/2012, dated 2-5-2012 issued by the Central Board of Excise and Customs. The notification confers various functions referred to in Column (3) of the notification under the Customs Act on officers referred to in Column (2). The relevant part of the notification reads as follows :-*

*"[To be published in the Gazette of India,  
Extraordinary, Part I, Section 3, Sub-section (i)]*

*Government of India*

*Ministry of Finance*

*(Department of Revenue)*

*Notification No. 40/2012-Customs (N.T.)*

*New Delhi, dated the 2nd May, 2012*

## Digital Supreme Court Reports

*S.O. (E). - In exercise of the powers conferred by subsection (34) of section 2 of the Customs Act, 1962 (52 of 1962), the Central Board of Excise and Customs, hereby assigns the officers and above the rank of officers mentioned in Column (2) of the Table below, the functions as the proper officers in relation to the various sections of the Customs Act, 1962, given in the corresponding entry in Column (3) of the said Table :-*

| Sl. No. | Designation of the officers  | Functions under Section of the Customs Act, 1962  |
|---------|--|---|
| (1)     | (2)  | (3)   |
|         | <i>Commissioner of Customs</i>   | <i>(i) Section 33</i>   |
|         | <i>Additional Commissioner or Joint Commissioner of Customs</i>                    | <i>(i) Sub-section (5) of section 46; and<br/>(ii) Section 149</i>                              |
|         | <i>Deputy Commissioner or Assistant Commissioner of Customs and Central Excise</i> | <i>(i) ..... (ii) ..... (iii)<br/>..... (iv)..... (v) .....<br/>(vi) Section 28;<br/>....."</i> |

19. It appears that a Deputy Commissioner or Assistant Commissioner of Customs has been entrusted with the functions under Section 28, vide Sl. No. 3 above. By reason of the fact that the functions are assigned to officers referred to in Column (3) and those officers above the rank of officers mentioned in Column (2), the Commissioner of Customs would be included as an officer entitled to perform the function under Section 28 of the Act conferred on a Deputy Commissioner or Assistant Commissioner but the notification appears to be ill-founded. The notification is purported to have been issued in exercise of powers under sub-section (34) of Section 2 of the Customs Act. This section does not confer any powers on any authority to entrust any functions to officers. The sub-Section is part of the definitions clause of the Act, it merely defines a proper officer, it reads as follows :-

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

*"2. Definitions. - In this Act, unless the context otherwise requires, - ... 136/163 https://www.mhc.tn.gov.in/judis W.P.Nos.33099 of 2015 & etc., (34) 'proper officer', in relation to any functions to be performed under this Act, means the officer of customs who is assigned those functions by the Board or the Principal Commissioner of Customs or Commissioner of Customs."*

*20. Section 6 is the only Section which provides for entrustment of functions of Customs officer on other officers of the Central or the State Government or local authority, it reads as follows:-*

*"6. Entrustment of functions of Board and customs officers on certain other officers. - The Central Government may, by notification in the Official Gazette, entrust either conditionally or unconditionally to any officer of the Central or the State Government or a local authority any functions of the Board or any officer of customs under this Act."*

*21. If it was intended that officers of the Directorate of Revenue Intelligence who are officers of Central Government should be entrusted with functions of the Customs officers, it was imperative that the Central Government should have done so in exercise of its power under Section 6 of the Act. The reason why such a power is conferred on the Central Government is obvious and that is because the Central Government is the authority which appoints both the officers of the Directorate of Revenue Intelligence which is set up under the Notification dated 4-12-1957 issued by the Ministry of Finance and Customs officers who, till 11- 5-2002, were appointed by the Central Government. The notification which purports to entrust functions as proper officer under the Customs Act has been issued by the Central Board of Excise and Customs in exercise of non-existing power under Section 2(34) of the Customs Act. The notification is*

**Digital Supreme Court Reports**

*obviously invalid having been issued by an authority which had no power to do so in purported exercise of powers under a section which does not confer any such power.*

22. In the above context, it would be useful to refer to the decision of this Court in the case of Commissioner of Customs v. Sayed Ali and Another [(2011) 3 SCC 537 = 2011 (265) E.L.T. 17 (S.C.)] wherein the proper officer in respect of the jurisdictional area was considered. The consideration made is as hereunder :-

*"16. It was submitted that in the instant case, the import manifest and the bill of entry were filed before the Additional Collector of Customs (Imports), Mumbai; the bill of entry was duly assessed, and the benefit of the exemption was extended, subject to execution of a bond by the importer which was duly executed undertaking the obligation of export. The Learned Counsel argued that the function of the preventive staff is confined to goods which are not manifested as in respect of manifested goods, where the bills of entry are to be filed, the entire function of assessment, clearance, etc. is carried out by the appraising officers functioning under the Commissioner of Customs (Imports)."*

*17. Before advertiring to the rival submissions, it would be expedient to survey the relevant provisions of the Act. Section 28 of the Act, which is relevant for our purpose, provides for issue of notice for payment of duty that has not been paid, or has been short-levied or erroneously refunded, and provides that :*

***"28. Notice for payment of duties, interest, etc. - (1) When any duty has not been levied or has been short-levied or erroneously refunded, or when any interest payable has not been paid, part paid or erroneously refunded, the proper officer may, -***

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

(a) *in the case of any import made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital, within one year;*

(b) *in any other case, within six months, from the relevant date, serve notice on the person chargeable with the duty or interest which has not been levied or charged or which has been so short-levied or part paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice :*

*Provided that where any duty has not been levied or has been short-levied or the interest has not been charged or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful misstatement or suppression of facts by the importer or the exporter or the agent or employee of the importer or exporter, the provisions of this sub-section shall have effect as if for the words ‘one year’ and ‘six months’, the words ‘five years’ were substituted.”*

18. *It is plain from the provision that the ‘proper officer’ being subjectively satisfied on the basis of the material that may be with him that customs duty has not been levied or short levied or erroneously refunded on an import made by any individual for his personal use or by the Government or by any educational, research or charitable institution or hospital, within one year and in all other cases within six months from the relevant date, may cause service of notice on the person chargeable, requiring him to show cause why he should not pay the amount specified in the notice. It is evident that*

**Digital Supreme Court Reports**

*the notice under the said provision has to be issued by the ‘proper officer’.*

19. *Section 2(34) of the Act defines a ‘proper officer’, thus :*

*‘2. Definitions. –*

.....  
*(34)‘proper officer’, in relation to any functions to be performed under this Act, means the officer of customs who is assigned those functions by the Board or the Commissioner of Customs;’*

*It is clear from a mere look at the provision that only such officers of customs who have been assigned specific functions would be ‘proper officers’ in terms of Section 2(34) of the Act. Specific entrustment of function by either the Board or the Commissioner of Customs is therefore, the governing test to determine whether an ‘officer of customs’ is the ‘proper officer’.*

20. *From a conjoint reading of Sections 2(34) and 28 of the Act, it is manifest that only such a Customs Officer who has been assigned the specific functions of assessment and reassessment of duty in the jurisdictional area where the import concerned has been affected, by either the Board or the Commissioner of Customs, in terms of Section 2(34) of the Act is competent to issue notice under section 28 of the Act. Any other reading of Section 28 would render the provisions of Section 2(34) of the Act otiose inasmuch as the test contemplated under Section 2(34) of the Act is that of specific conferment of such functions.”*

23. *We, therefore, hold that the entire proceeding in the present case initiated by the Additional Director General of the DRI by issuing show cause notices in all the matters before us are invalid without any authority of law and liable to be set aside and the ensuing demands are also set aside.”*

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

73. It is not in dispute that *Canon India* (*supra*) is based on the decision of this Court in *Sayed Ali* (*supra*). We say so because in *Canon India* (*supra*), the petitioner had not questioned the jurisdiction of the officers of DRI either before the departmental authorities or before the Tribunal. We must, therefore, first look into the judgment rendered in *Sayed Ali* (*supra*).

**ii. The decision in Commissioner of Customs v. Sayed Ali**

74. In *Sayed Ali* (*supra*), a show cause notice dated 28.08.1991 was issued by the Assistant Collector of Customs (Preventive), Mumbai, alleging a violation of the provisions of Section 111(d) of the Act, 1962. It culminated in an order dated 03.02.1993 which was appealed before the Collector of Customs (Appeals). An order was passed by the Collector of Customs (Appeals) on 14.12.1993. The Collector of Customs (Appeals) allowed the appeal by holding that the matter involved demand of duty beyond a period of six months and therefore the show cause notice could have been issued only by the Collector and not by the Assistant Collector of Customs (Preventive). At that point of time, there were circulars of the Board, which stipulated pecuniary limits for officers to exercise powers under various provisions of the Act. Thus, the Collector (Appeals) granted liberty to the department to re-adjudicate the case by issuing a proper show cause notice.
75. The Collector of Customs (Preventive) thus issued a show cause notice dated 16.04.1994, calling upon the importer to show cause as to why the goods seized should not be confiscated, why the customs duty amounting to Rs.5,07,274/- should not be levied in terms of Section 28(1) of the Act, 1962, by invoking the extended period of limitation, and why the penalties under Sections 112(a) and (b)(i) and (ii) of the Act, 1962, should not be imposed on the said importer.
76. The jurisdiction of the Collector of Customs (Preventive) to issue the show cause notice was questioned in the reply to the show cause notice by referring to Notification No. 251/83 and Notification No.250/83. The Collector of Customs (Preventive) rejected the submission on the point of jurisdiction. The demand was thus affirmed by the Collector of Customs (Preventive) *vide* Order dated 19.08.1996.

**Digital Supreme Court Reports**

The matter was taken up before the Tribunal, which held that the Commissioner of Customs (Preventive) had no jurisdiction to issue the show cause notice and therefore did not have the jurisdiction to adjudicate the matter when the imports had taken place within the Bombay Customs House.

77. This Court, after referring to Section 28 of the Act, 1962 as it stood during the period in dispute, concluded that from a conjoint reading of Section 2(34) and Section 28 of the Act, 1962, it is manifest that only such a customs officer who has been assigned the specific functions of assessment and re-assessment of duty in the jurisdictional area where the import concerned has been effected, either by the Board or the Commissioner of Customs, in terms of Section 2(34) of the Act, 1962, was competent to issue notice under Section 28 of the Act, 1962.
78. This Court further held that “*...any other reading of Section 28 would render the provisions of Section 2(34) of the Act otiose in as much as the test contemplated under Section 2(34) of the Act of the Act is that of specific conferment of such functions*”. It further held that “*Moreover, if the Revenue’s contention that once territorial jurisdiction is conferred, the Collector of Customs (Preventive) becomes a “proper officer” in terms of Section 28 of the Act, 1962 is accepted, it would lead to a situation of utter chaos and confusion, in as much as all officers of customs, in a particular area be it under the Collectorate of Customs (Imports) or the Preventive Collectorate, would be “proper officers”*”.
79. This Court concluded that “*It is only the officers of customs, who are assigned the functions of assessment, which of course, would include re- assessment, working under the jurisdictional Collectorate within whose jurisdiction the bills of entry or baggage declarations had been filed and the consignments had been cleared for home consumption, will have the jurisdiction to issue notice under Section 28 of the Act*”. Thus, the proceedings impugned therein were set aside.
80. Thereafter, a Review Petition was filed by the Department in the aforesaid case. This Court dismissed the Review Petition on the ground of delay in filing the review.

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

81. The decision in *Sayed Ali* (*supra*) proceeds on the assumption that for the “proper officer” to exercise the functions under Section 28 of the Act, 1962, such officer must necessarily possess the power of assessment and reassessment under Section 17. However, a plain reading of Sections 17 and 28 of the Act, 1962 does not bring out any such inter-dependence between the two provisions. Having looked into the statutory scheme of the Act, 1962, we are of the view that the observations pertaining to the interlinkage between Sections 17 and 28 respectively of the Act, 1962 made in *Sayed Ali* (*supra*) do not lay down the correct position of law.
82. Even otherwise, the decision in *Sayed Ali* (*supra*) could have been arrived at without deciding on the interdependence of Section 17 and Section 28 of the Act, 1962 as the Customs (Preventive) officers, whose jurisdiction to issue show cause notices was under challenge in that case, were not assigned the functions of the “proper officer” for the purposes of Section 28 through a notification issued by the appropriate authority. As we have observed in the foregoing parts of this judgment, assignment of functions is a mandatory requirement for the exercise of jurisdiction by the “proper officer”. The observations made in *Sayed Ali* (*supra*) on the connection between Sections 17 and 28 of the Act, 1962 are *obiter dicta* at best and do not constitute the binding *ratio decidendi* of that judgment.
83. Further, *Sayed Ali* (*supra*) could not have been relied upon by this Court in *Canon India* (*supra*) as it could not have been applied for the period subsequent to 08.04.2011 in view of the fact that Section 17 of the Act, 1962 has undergone a radical change by virtue of the amendments made by the Finance Act, 2011.

iii. **Changes to Section 17 w.e.f. 11.04.2011 – the assessment of bill(s) of entry and shipping bill(s)**

84. Section 17 of the Act, 1962 was amended by Section 38 of the Finance Act, 2011 with effect from 08.04.2011. The amendment altered the method of assessment of bill(s) of entry and shipping bill(s). This change appears not to have been brought to the notice of this Court while *Canon India* (*supra*) was heard.
85. We note that with effect from 08.04.2011, the functions of the proper officer under Section 17 also underwent certain changes. One such

**Digital Supreme Court Reports**

change is that the assessment of bill(s) of entry and shipping bill(s) was no longer the task of the “proper officer”. With effect from 08.04.2011, Bill(s) of Entry and/or Shipping Bill(s) are self-assessed. This self-assessment is to be accepted or rejected by the proper officer subject to verification in certain cases.

86. The “proper officer” appointed for the purpose of Section 17 of the Act, 1962 under a notification issued under Section 2(34) of the Act, 1962 could only make a re-assessment of the bill(s) of entry and shipping bill(s) in case they did not agree with the self-assessment of the importer or the exporter as the case may be.
87. The purport of Section 17 as it stood before 08.04.2011 and after 08.04.2011 was analysed by a learned Single Judge of the Madras High Court in the case of ***M/s. N.C. Alexander v. The Commissioner of Customs, Chennai*** in W.P. Nos. 33099 of 2015. The relevant paragraphs of the judgment are reproduced below:

*“207. Thus, there was a paradigm shift in the method of assessment with effect from 08.04.2011. Till 07.4.2011, the assessment of Bill of Entry(s) or the Shipping Bill(s) was by a “proper officer” appointed for that purpose under Section 2(34) of the Custom Act, 1962. The assessment was left to the Group ‘B’ Gazetted Officers and it is only such officers were appointed as “proper officers” for assessment under Section 17.*

*208. However, after 08.04.2011, Bill(s) of Entry (in the case of import) or Shipping Bill(s) (in the case of export) are to be self assessed by an importer or an exporter under Sections 46 and 50 of the Customs Act, 1962 respectively. The changes are shown in bold in the above Table.*

*209. A “proper officer” has to merely verify the entries made in the Bill(s) of Entry under Section 46 (in case of import) or Shipping Bill(s) under Section 50 (in case of export). The “Proper Officer” may examine or test imported goods or export goods or such part thereof as may be necessary. If required, such an officer can only re-assess the goods under Section 17 of the Act. Thus, a “Proper Officer” under Section 17(1) & 17(4) of*

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

**the Act is merely required to re-assess the imported goods or export goods where he differs with the self assessment of an importer or an exporter. This important change was not brought to the attention of the Hon'ble Supreme Court in [Canon India Pvt Ltd Case.](#)**

210. As mentioned above, an importer or an exporter is merely required to make a self-assessment in the Bill(s) of Entry or Shipping Bill(s) as may be in the case of import or export respectively and file the same.

211. Officers who are appointed as “Proper Officers” for the purpose of Section 17 of the Customs Act, 1962 are “Officers of Customs” like any “Officer of Customs” as per Section 3 and 4 read with notification issued under these provisions. There is delegation of functions by the Board and senior officers to different class of officers by the Board. This is an internal arrangement with a view for better tax administration. Thus, officers of Directorate of Revenue Intelligence are also one among the class “Officers of Customs” like any Officer of Customs as per Section 3 and 4 read with notification issued for the said purpose are competent to issue show cause notice. **The “proper officer” at the Port at the time of clearance of import or export, merely reassess the self-assessment already made on the Bill(s) of Entry and/or Shipping Bill(s). They are normally not assigned with the function to adjudicate Show Cause Notices and/or Demand Notices under the various provisions of the Customs Act, 1962.**

212. With effect from, 08.04.2011, there was no question of assessment of Bill(s) of Entry /Shipping Bill(s) by a “proper officer”. There is only self assessment by an importer or an exporter. There could be only re-assessment of Bill of Entry(s) or the Shipping Bill(s) by the “proper officer” under Section 17 of the Customs Act,1962.

213. If the “proper officer” was inclined to disagree with the self assessment made by an importer or an

**Digital Supreme Court Reports**

*exporter as the case may be, the “proper officer” could make a re-assessment and pass a speaking order under Section 17(5) of the Customs Act, 1962.*

*214. If the self assessment is accepted, the “proper officer” appointed under Section 17 of the Customs Act, 1962 becomes “functus officio” under the scheme of the Act and the Notification issued for the aforesaid purpose.*

*215. Likewise, where there was a re-assessment, again such an officer becomes “functus officio”, after such an order of re-assessment and a speaking order under Section 17(5) of the Customs Act, 1962 is passed.*

*216. An importer or an exporter aggrieved by such an order of reassessment and the speaking order is entitled to file an appeal under Section 128 of the Custom Act, 1962 before the Appellate Commissioner. Only circumstances, where such an officer who makes an order of reassessment can re-visit the re-assessment and/or speaking order is under Section 28 (if specifically authorized) or under Section 149 or under Section 154 of the Customs Act, 1962.*

*217. The power to issue Show Cause Notice whether under Section 28 or under Chapter XIV of Customs Act, 1962 or under any other provisions and to pass orders has been by and large exercised by the Superior Officers from Group ‘A’ Cadre Officer of the Custom Department in terms of Notification issued under Section 2(34) of the Act. The Officers from the Directorate of Revenue Intelligence (DRI) being “Officers of Custom” have been recognized as a “Proper Officer” for the aforesaid purpose.*

**218. The “proper officer” who is/was involved at the stage of assessment under Section 17 of the Act upto 08.04.2011 and reassessment after 08.04.2011 have rarely been involved in collateral adjudication of notices issued under Section 28 of the Act.**

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

*However, once again at the stage of recovery of duty or penalty under other provision of the Customs Act, 1962 or redemption fine under Section 125 of the Customs Act, 1962, they are authorized.*

*219. Mostly, at the time of clearance of imported goods or export goods for the purpose of assessment under Section 17 of the Custom Act, 1962, it is the Superintendent/Appraisers of Customs from Group ‘B’ Executive - Gazetted Officers who act as “proper officers”. They are merely required to verify the entries made in the Bill(s) of Entry filed under Section 46 of the Act (in case of import) and/or Shipping Bill(s) filed under Section 50 of the Act (in case of export). As “proper officers” are required to merely examine or test any imported or export goods or such parts thereof. Such Officer of Customs under the Scheme of the Act and Notification issued thereunder can only re-assess the self-assessment made by the importer or the exporter.*

**220. Earlier, the Officers from the Directorate of Revenue Intelligence (DRI) were mostly confined with the task of investigation. Over a period of time, they were empowered to issue Show Cause Notices and/or Demand Notices under various provisions of the Customs Act. Adjudication of the Show Cause Notices/Demand Notices were however left to the senior officer of customs from Group ‘A’ cadre of the Customs Department. However, they are empowered to act as “proper officers” not only for issuance of Show Cause Notice and/or Demand Notices but also for adjudication of such Show Cause Notices and/or Demand Notices.”**

[Emphasis supplied]

88. In case of re-assessment, such a “proper officer” is bound to pass a “Speaking Order” to enable the aggrieved party to file an appeal. Section 17 as it read before 08.04.2011 and after 08.04.2011 is reproduced below to better appreciate the nuances of the issue:

## Digital Supreme Court Reports

| <b>Section 17: Assessment of Duty</b>   |   |
|---|---|
| <b>Before 08.04.2011</b>  | <b>Between 08.04.2011 and 28.03.2018</b>  |
| <p>(1) After an importer has entered any imported goods under section 46 or an exporter has entered any export goods under section 50, the imported goods or the export goods, as the case may be, or such part thereof as may be necessary may, without undue delay, be examined and tested by the proper officer.</p>   | <p>(1) An importer entering any imported goods under section 46, or an exporter entering any export goods under section 50, shall, save as otherwise provided in section 85, self-assess the duty, if any, leviable on such goods.</p>  |
| <p>(2) After such examination and testing, the duty, if any, leviable on such goods shall, save as otherwise provided in section 85, be assessed.</p>   | <p>(2) The proper officer may verify the <b>self-assessment</b> of such goods and for this purpose, examine or test any imported goods or export goods or such part thereof as may be necessary.</p>  |
| <p>(3) For the purpose of assessing duty under sub-section (2), the proper officer may require the importer, exporter or any other person to produce any contract, broker's note, policy of insurance, catalogue or other document whereby the duty leviable on the imported goods or export goods, as the case may be, can be ascertained, and to furnish any information required for such ascertainment which is in his power to produce or furnish, and thereupon the importer, exporter or such other person shall produce such document and furnish such information.</p> | <p>(3) For verification of self-assessment under sub-section (2), the proper officer may require the importer, exporter or any other person to produce any contract, broker's note, insurance policy, catalogue or other document, whereby the duty leviable on the imported goods or export goods, as the case may be, can be ascertained, and to furnish any information required for such ascertainment which is in his power to produce or furnish, and thereupon, the importer, exporter or such other person shall produce such document or furnish such information.</p> |

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

|   |   |
|---|---|
| <p>(4) Notwithstanding anything contained in this section, imported goods or export goods may, prior to the examination or testing thereof, be permitted by the proper officer to be assessed to duty on the basis of the statements made in the entry relating thereto and the documents produced and the information furnished under sub-section (3); but if it is found subsequently on examination or testing of the goods or otherwise that any statement in such entry or document or any information so furnished is not true in respect of any matter relevant to the assessment, the goods may, without prejudice to any other action which may be taken under this Act, be re-assessed to duty.</p> | <p>(4) Where it is found on verification, examination or testing of the goods or otherwise that the self-assessment is not done correctly, the proper officer may, without prejudice to any other action which may be taken under this Act, reassess the duty leviable on such goods. Amendment of section 18.</p>  |
| <p>(5) Where any assessment done under sub-section (2) is contrary to the claim of the importer or exporter regarding valuation of goods, classification, exemption or concessions of duty availed consequent to any notification therefor under this Act, and in cases other than those where the importer or the exporter, as the case may be, confirms his acceptance of the said assessment writing, the proper officer shall pass a speaking order within fifteen days from the date of assessment of the bill of entry or the shipping bill, as the case may be.</p>  | <p>(5) Where any re-assessment done under sub-section (4) is contrary to the self-assessment done by the importer or exporter regarding valuation of goods, classification, exemption or concessions of duty availed consequent to any notification issued therefor under this Act and in cases other than those where the importer or exporter, as the case may be, confirms his acceptance of the said re-assessment in writing, the proper officer shall pass a speaking order on the re-assessment, within fifteen days from the date of re-assessment of the bill of entry or the shipping bill, as the case may be.</p> |

**Digital Supreme Court Reports**

|  |  |
|--|--|
|  | <p><i>[(6) Where re-assessment has not been done or a speaking order has not been passed on re-assessment, the proper officer may audit the assessment of duty of the imported goods or export goods at his office or at the premises of the importer or exporter, as may be expedient, in such manner as may be prescribed.] * Explanation.— For the removal of doubts, it is hereby declared that in cases where an importer has entered any imported goods under section 46 or an exporter has entered any export goods under section 50 before the date on which the Finance Bill, 2011 receives the assent of the President, such imported goods or export goods shall continue to be governed by the provisions of section 17 as it stood immediately before the date on which such assent is received.”</i></p> |
|--|--|

89. The examination of Section 17, as amended *vide* the Finance Act, 2011 vis-à-vis the provisions of the old Section 17 as it stood prior to 08.04.2011, highlights the following major changes:

- (a) **Self-assessment of duty:** The concept of self-assessment of duty was introduced by way of the amendment to Section 17 wherein there is no role of the proper officer to assess the duty at the first instance. The onus for providing the duty leviable has been shifted to the assessee itself.
- (b) **Discretion to verify:** Sub-section (2) of the new Section 17 states that “*The proper officer may verify the self-assessment of the goods...*”. The use of the word “may” indicates two things:

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

- (i) that the actions to be taken by the proper officer under the old Section 17 are no longer compulsory. The proper officer may choose to accept the self-assessment made by the assessee, thereby becoming *functus officio* and there is no compulsion on him or her to examine or test any goods for reaching a first instance assessment;
- (ii) The proper officer is not involved in the assessment of duty under Section 17 at the first instance except for his or her role in accepting or not accepting the self-assessed duty. There can be three situations that may result from such limited role of the proper officer:
  - The proper officer accepts the self-assessed duty without verification of such duty under sub-section (2) of the new Section 17,
  - The proper officer accepts the self-assessed duty after verifying the same in accordance with sub-sections (2) and (3) of the new Section 17,
  - The proper officer does not accept the self-assessed duty after verifying the same in accordance with sub-sections (2) and (3) of the new Section 17, in which case, the re-assessment of duty will be undertaken by the proper officer as per sub-sections (4) and (5) of the new Section 17.

In the first two cases, the scope of the function of the proper officer is limited. Such proper officer is not entitled to exercise the function of the assessment of duty, which is a noteworthy deviation from the earlier procedure.

The proper officer is entitled to exercise his or her functions of re-assessment of duty only if the verification process shows that the self-assessment done by the assessee was incorrect.

- (c) **Condition precedent for re-assessment:** It is worthwhile to note that the old Section 17 allowed for self-assessment of duty, only under sub-section (4) and that too with the permission of the proper officer. However, upon a subsequent finding that the statements made by the assessee were not true, the proper officer was entitled to re-assess the duty so levied. Therefore,

**Digital Supreme Court Reports**

re-assessment was allowed under both the old and the new Section 17 only after a self-assessment by the assessee. The only point of difference with respect to re-assessment is that self-assessment was not a matter of course prior to the amendment and was possible only upon the proper officer permitting for the same. After 08.04.2011, self-assessment is *ipso jure* the procedure and has replaced the assessment process previously undertaken by the proper officer.

- (d) **Scheme of Section 17(5):** The old Section 17(5) requires the proper officer to provide a speaking order within 15 days of the date of assessment of duty if the same is contrary to the claim of the assessee or is not accepted in writing by the assessee. The new Section 17(5) is analogous to the old sub-section (5) except that it requires a speaking order within 15 days from the date of the “re-assessment” of duty. Such change shows the legislative intent to transfer the process of “assessment” under the old Section 17 to the stage of “re-assessment” under the new Section 17 and replace the “assessment” to be done by the proper officer under the old Section 17 with the process of “self-assessment”.
90. These changes highlight that the competence of the proper officer to conduct “assessment” is completely taken away by the legislature *vide* the amendment to Section 17. The new Section 17 empowers the proper officer to perform the functions of verification of self-assessment and subsequent re-assessment, if found necessary. However, such re-assessment is not a mandatory function on the same footing as “assessment” under the old Section 17. Therefore, in our considered view the scope of the functions of the proper officer under the new Section 17 is limited.
91. It is evident from the aforesaid that the attention of this Court in *Canon India* (*supra*) was not drawn to the important changes brought to Section 17 of the Act, 1962 *vide* Section 38 of the Finance Act, 2011 with effect from 08.04.2011.
92. The observation in paragraph 13 in *Canon India* (*supra*) that “*where one officer has exercised his powers of assessment, the power to order reassessment must also be exercised by the same officer or his successor and not by another officer of another department though he is designated to be an officer of the same rank*” has been made

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

without taking note of the changes to Section 17 of the Act, 1962 with effect from 08.04.2011.

93. Similarly, the observation in paragraph 14 in *Canon India* (*supra*) is erroneous. The relevant paragraph is reproduced below:

*"We find it completely impermissible to allow an officer, who has not passed the original order of assessment, to re-open the assessment on the grounds that the duty was not paid/not levied, by the original officer who had decided to clear the goods and who was competent and authorised to make the assessment. The nature of the power conferred by Section 28(4) to recover duties which have escaped assessment is in the nature of an administrative review of an act. The section must therefore be construed as conferring the power of such review on the same officer or his successor or any other officer who has been assigned the function of assessment."*

In other words, the conclusion that an officer who did the assessment, could only undertake reassessment under Section 28(4) was arrived at without taking note of the abovementioned amendment to Section 17 of the Act, 1962 with effect from 08.04.2011 *vide* Section 38 of the Finance Act, 2011. The judgment in *Canon India* (*supra*) also recorded an erroneous finding that the function of re-assessment is with reference to Section 28(4) when in fact it is an exercise of function under Section 17.

94. Further, in *Canon India* (*supra*) the subject show cause notice was dated 19.09.2014 in respect of the Bill of Entry filed on 20.03.2012. This Court appears to have erroneously applied the provisions of Section 17 of the Act, 1962, as they stood prior to 08.04.2011 as opposed to the amended Section 17 which ought to have been applied.

**iv. Scheme of Sections 17 and 28 of the Act, 1962**

95. Section 17 read with Sections 46 and 47 of the Act, 1962 deals with the assessment and re-assessment at the first instance that is, upon entry of the consignments and clearance of bill(s) of entry. The amendment to Section 17 introduces the process of

**Digital Supreme Court Reports**

self-assessment and subsequent re-assessment upon verification by the proper officer, if so required, for undertaking a check at the first instance.

96. The proceedings under Section 28 are subsequent to the completion of the process set out in Section 17 of the Act, 1962. The procedure envisaged under Section 28 is in the nature of a quasi-judicial proceeding with the issuance of the show cause notice by the proper officer followed by adjudication of such notices by the field customs officers. It is also worth noting that in the case of DRI, the proceedings under Section 28 start only after an investigation has been undertaken by DRI. This is reaffirmed by Circular No. 4/99-Cus dated 15.02.1999 and Circular No. 44/2011-Customs dated 23.11.2011. Therefore, the nature of review under Section 28 is significantly different from the nature of assessment and re-assessment under Section 17. The ambit of Section 28 has also been restricted to the review of assessments and re-assessments done under Section 17 for ascertaining if there has been a short-levy, non-levy, part-payment, non-payment or erroneous refund.
97. Keeping this statutory scheme in mind, we are unable to subscribe to the view taken in both *Sayed Ali* (*supra*) and *Canon India* (*supra*), namely, that the vesting of the functions of assessment and re-assessment under Section 17 is a threshold, mandatory condition for a proper officer to perform functions under Section 28. This scheme does not flow from the scheme of the statute and was judicially read in to avoid the possibility of chaos and confusion due to the potential for multiple proper officers exercising jurisdiction under Section 28. We find that such apprehensions of misuse are unfounded considering that no substantial empirical evidence has been brought forth by the respondents in this case to support such a view. Regardless, the parameters under Section 28 cannot be reduced to an administrative review of assessment/re-assessment done under Section 17.
98. We are conscious of the fact that Section 110AA of the Act, 1962, which has been introduced by the Finance Act, 2022, stipulates that a show cause notice under Section 28 of the Act, 1962 can only be issued by that “proper officer” who has been conferred with the jurisdiction, by an assignment of functions under Section 5 of the Act, 1962,

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

to conduct assessment under Section 17 of the Act in respect of such duty. However, we are of the view that the introduction of Section 110AA doesn't alter the statutory scheme of Sections 17 and 28 of the Act, 1962 as it stood prior to the introduction of Section 110AA. The legislature in its wisdom may introduce certain new provisions keeping in mind the exigencies of administration and taking into account the evolution of law. However, this would not by itself mean that the procedure which was being followed prior to the introduction of such changes was incorrect or in contravention of the law. The legality and correctness of an action has to be adjudged based on the statutory scheme prevailing at the time when such action took place, and incorrectness or invalidity cannot be imputed to it on the basis of subsequent changes in law. Seen thus, the contention of the respondents that Section 110AA of the Act, 1962 amounts to an admission by the petitioner on the invalidity of the legal position existing prior to its introduction, deserves to be rejected.

99. Therefore, in our considered view, the scheme of Sections 17 and 28 of the Act, 1962 indicates that there cannot be a mandatory condition linking the two provisions and the interpretation of this Court in the cases of *Sayed Ali* (*supra*) and *Canon India* (*supra*) is patently erroneous.

**v. Use of the article ‘the’ in the expression “the proper officer”**

100. This Court in *Canon India* (*supra*), while laying much emphasis on the use of the expression “the proper officer” observed that the Parliament had employed the article “the” instead of “a/an” in Section 28 of the Act, 1962 so as to give effect to its intention of specifying that the proper officer referred to in Section 28 is the same officer as the one referred to in Section 17. The Court further observed that the use of a definite article instead of an indefinite article is indicative of the fact that the proper officer referred to in Section 28 is not “any” proper officer but “the” proper officer assigned with the function of assessment and reassessment under Section 17.
101. However, there is an error apparent in the aforesaid view. Undoubtedly, a definite article “the” has been used before “proper officer” with a view to limit the exercise of powers under Section 28 by a specific proper officer and not any proper officer. But, in the absence of any statutory linkage between Sections 17 and 28 of the

**Digital Supreme Court Reports**

Act, 1962 respectively, there was no legal footing for this Court in Canon India (*supra*) to hold that “the proper officer” in Section 28 must necessarily be the same proper officer referred to under Section 17 of the Act, 1962.

102. As we have discussed in the foregoing parts of this judgment, the statutory scheme of the Act, 1962 necessitates that a proper officer can only perform specific functions under the Act if he has been assigned as “the proper officer” to perform such functions by an appropriate notification issued by the competent authority. Seen thus, it becomes clear that an officer of Customs can only perform the functions under Section 28 of the Act, 1962 if such officer has been designated as “the proper officer” for the purposes of Section 28 by an appropriate notification. The use of the article “the” in the expression “the proper officer” should be read in the context of that proper officer who has been conferred with the powers of discharging the functions under Section 28 by conferment under Section 5. In other words, the proper officer is *qua* the function or power to be discharged or exercised.
103. Thus, the definite article “the” in Section 28 refers to a “proper officer” who has been conferred with the powers to discharge functions under Section 28 by virtue of a notification issued by the competent authority under Section 5. In other words, the use of article “the” in Section 28 has no apparent relation with the proper officer referred to under Section 17. The proper officer under Section 28 could be said to be determinable only in the sense that he is a proper officer who has been empowered to perform the functions under Section 28 by means of a notification issued under Section 5 of the Act, 1962.
104. In Canon India (*supra*), this Court held that DRI officers did not have the power of issuing show cause notices under Section 28 as they did not fall within the meaning of the expression “the proper officers” used in Section 28 for the reason that they did not possess the power of assessment under Section 17 of the Act, 1962. However, as we have discussed in the previous parts of this judgment, contrary to the aforesaid observations of the Court, DRI officers were notified as “the proper officer” for the purposes of Sections 17 and 28 of

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

the Act, 1962 respectively *vide* Notification No. 44/2011-Cus-N.T. dated 06.07.2011 issued by the Central Government. Hence, those officers of DRI who were designated as “the proper officer” for the purpose of Section 28 by the aforesaid notification were competent to issue show cause notices under Section 28.

105. Craies on Statute Law<sup>1</sup> has stated that “*the language of statutes is not always that which a rigid grammarian would use, it must be borne in mind that a statute consists of two parts, the letter and the sense*”. It was observed by this Court in **State of Andhra Pradesh v. Ganeswara Rao**, reported in **AIR 1963 SC 1850** that the aforesaid rule of construction that the provisions of a statute are to be read together and given effect to and that it is the duty of the court to construe a statute harmoniously has gained general acceptance. In **Management, S.S.L. Rly. Co. v. S.S.R.W. Union** reported in **AIR 1969 SC 513**, this Court observed that the principle that literal meaning of the word in a statute is to be preferred is subject to the exception that if such literal sense would give rise to any anomaly or would result in something which would defeat the purpose of the Act, a strict grammatical adherence to the words should be avoided as far as possible. The above principles would help us to desist from affording undue stress on the definite article “the” used before the expression “proper officer” in Section 28 of the Act, 1962.

**vi. DRI officers as proper officers under section 2(34)**

106. In **Canon India** (*supra*), this Court erroneously concluded that an officer from the Directorate of Revenue Intelligence (DRI) was not an officer of customs and therefore cannot function as a “Proper Officer”. The finding of the Court that the power conferred by the Board under Notification No. 40/2012-Customs (N.T.) dated 02.05.2012 was ill-founded is an error apparent.
107. By way of Notification No. 40/2012-Customs (N.T.) dated 02.05.2012, the Board appointed several persons including the Officers of Directorate of Revenue Intelligence (DRI) as “Proper Officers” under Section 2(34) of the Act, 1962.

## Digital Supreme Court Reports

108. Section 2(34) of the Act, 1962 also stood amended under the Finance Act, 2022. Section 2(34) of the Act, 1962 together with the amendment is reproduced below:

| <b><i>Section 2(34) of the Customs Act, 1962 till passing of Finance Act, 2022</i></b>   | <b><i>Section 2(34) of the Customs Act, 1962 after amendment vide Finance Act, 2022</i></b>   |
|--|---|
| <i>"Proper Officer", in relation to any functions to be performed under this Act, means the officer of customs who is assigned those functions by the Board or the Principal Commissioner of Customs or Commissioner of Section 2(34) of the Customs Act, 1962 till passing of Finance Act, 2022</i> | <i>"Proper Officer", in relation to any functions to be performed under this Act, means the officer of customs who is assigned those functions by the Board or the Principal Commissioner of Customs or Commissioner of Section 2(34) of the Customs Act, 1962 after amendment vide Finance Act, 2022</i> |
| <i>Customs.</i>  | <i>Customs under Section 5.</i>   |

109. The Notification No. 40/2012-Customs (N.T.) dated 02.05.2012, issued under Section 2(34) of the Act, 1962 cannot be read in isolation. It has to be read in conjunction with Section 4(1) of the Act, 1962 and the Notification issued thereunder.
110. The view that the "Proper Officer" for the purpose of Section 28 and other provisions of the Act, 1962 could only mean the person who cleared the goods or the officer who succeeds such officer and not any other officer from any other department requires reconsideration in view of the changes to the Act, 1962 *vide* the Finance Act, 2011 and also in the light of Section 4 and the notification issued thereunder.
111. This Court in paragraphs 11 to 15 of *Canon India* (*supra*) proceeded on the footing that under the provisions of the Act, 1962, the Board has no power to appoint "Proper Officers".
112. As per Section 4 of the Act, 1962, the Board constituted under the provisions of Central Board of Revenue Act, 1963 is vested with the power to appoint such persons as it thinks fit to be "officers of customs".

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

113. Under sub-section (1) to Section 4(1) of the Act, 1962, the Board may appoint such person as Officers of Customs as it thinks fit. Under Section 4(2) of the Act, 1962 the Board can even authorize a Chief Commissioner of Customs or a Joint or Assistant or Deputy Commissioner of Customs to appoint any officers below the rank of Assistant Commissioner of Customs as an “officer of customs”. It appears that this aspect was also not brought to the notice of this Court in *Canon India* (*supra*).

**vii. Section 4 of the Act, 1962**

114. For an easy reference, Section 4 of the Act, 1962 is reproduced below:

“*Section 4 : Appointment of “Officers of Customs”.*”

- 1) *The Board may appoint such persons as it thinks fit to be Officers of Customs.*
- 2) *Without prejudice to the provisions of sub-section (1), [Board may authorise a Principal Chief Commissioner of Customs or a Chief Commissioner of Customs Principal Commissioner of Customs or Commissioner of Customs) or Joint or Assistant Commissioner of Customs or Joint or Assistant Commissioner of Customs or Deputy Commissioner of Customs to appoint officers of customs below the rank of Assistant Commissioner of Customs.]*

115. It is relevant to note that it is only an officer of customs, appointed under Section 4(1) of the Act, 1962 who can be designated as the “proper officer” as defined in Section 2(34) of the Act, 1962 by a notification. The notifications issued under Section 2(34) and 4(1) of the Act, 1962 are nothing but an internal arrangement for the purpose of allocation of work among the officers of customs.

116. In *M/s. N.C. Alexander* (*supra*), the High Court has extensively explained how officers of the DRI are officers of customs. We quote the relevant observations:

“*236. The officers of the Directorate of Revenue Intelligence (DRI) have already been appointed as “Officers of Customs” under Notification issued under Section 4(1) of the Customs Act, 1962 vide Notification of the Government of*

**Digital Supreme Court Reports**

*India in the Ministry of Finance (Department of Revenue) No.186-Cus, dated 4 th August, 1981. The said Notification was later superseded by Notification No.19/90- Cus (N.T.), dated 26.04.1990.*

*237. By Notification No.19/90- Cus (N.T.), dated 26.04.1990, the officers from the Directorate of Revenue Intelligence (DRI) were appointed as Collectors and Assistant Collectors of Customs in the area mentioned in Column-I of the said notification.*

*238. Notification No.19/90- Cus (N.T.), dated 26.04.1990 was later superseded by Notification No.17/2002-Cus. (N.T.) dated 07.03.2002, whereby, various officers from the Directorate General of Revenue Intelligence and Directorate of Revenue Intelligence were appointed as Commissioner of Customs and as Additional Commissioner and Joint Commissioner of Customs and Deputy Commissioner/ Assistant Commissioner of Customs. Thus, they were appointed as Officers of Customs. Relevant portion Notification No.17/2002-Cus. (N.T.), dated 07.03.2002 is reproduced below:- Directorate of Revenue Intelligence (D.R.I.) Officers appointed as Customs Officers – Notification No.19/90 - Cus. (N.T.) superseded. In exercise of the powers conferred by sub-section (1) of Section 4 of the Customs Act, 1962 (52 of 1962) and in supersession of notification of the Government of India in the Ministry of Finance (Department of Revenue) No.19/90- Customs (N.T.), dated the 26th April, 1990, the Central Government appoints the officers mentioned in Column (2) of the Table below to the Commissioner of Customs, the officers mentioned in column (3) thereof to be the Additional Commissioners or Joint Commissioners of Customs and Officers mentioned in column(4) thereof to be the Deputy Commissioners or Assistant Commissioners of Customs for the areas mentioned in the corresponding entry in column(1) of the said Table with effect from the date to be notified by the Central Government in the Official Gazette:-*

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

| <b><i>Area of Jurisdiction</i></b> | <b><i>Designation of the Officers</i></b>  |  |  |
|------------------------------------|--|--|--|
| <b>(1)</b>                         | <b>(2)</b>   | <b>(3)</b>   | <b>(4)</b>   |
| <i>Whole of India</i>              | <i>Additional Director</i>   | <i>Additional Directors or Joint</i>   | <i>Deputy Directors, or</i>  |
|                                    | <i>General, Directorate General of Revenue Intelligence posted at Headquarters and Zonal/ regional units</i> | <i>Directors, of Directorate of Revenue Intelligence posted at Headquarters and Zonal/ regional units.</i> | <i>Assistant Directors of Directorate of Revenue Intelligence posted at Headquarters and Zonal/ regional units</i> |

239. Notification No. 17/2002-Cus. (N.T.), dated 07.03.2002 came into force on 25.10.2002 vide Notification No.63/2002-Cus. (N.T.) dated 03.10.2002. Notification No.17/2002-Cus. (N.T.), dated 07.03.2002 was further amended by Notification No.82/2014-Cus. (N.T.), dated 16.09.2014.

240. Thus, the officers from the Directorate of Revenue Intelligence have been appointed as “Officers of Customs” under Section 4 of the Customs Act, 1962 and therefore they are “Proper Officers” for the purpose of Section 2(34) of the Customs Act, 1962. This aspect was not brought to the attention of the Hon’ble Supreme Court in Canon India Private Ltd. case referred to supra.

241. With a view to streamline the allocation of work and for the purposes of Section 17 and Section 28 of the Customs Act, 1962, Notification No. 44/2011-Cus. (N.T.), dated 06.07.2011 was issued by the Board under Section 2(34) of the Act.

242. Notification No.44/2011-Cus. (N.T.), dated 06.07.2011 was issued under Section 2(34) of the Customs Act, 1962 for the purpose of identifying officers of customs for exercising the power and function under the Customs Act, 1962.

## Digital Supreme Court Reports

*243. Notification No.44/2011-Cus. (N.T.), dated 06.07.2011 was later amended by Notification No.53/2012-Cus. (N.T.) dated 21.06.2012 and still later by Notification No.43/2019-Cus. (N.T.) dated 18.06.2019 and eventually has been rescinded/superseded by Notification No.25/2022-Cus. (N.T.) dated 31.03.2022 in tune with the amendment proposed in the Finance Bill, 2022 and passed by Finance Act, 2022.*

*244. Among various officers of the Customs, following officers were also assigned to act and function as the “Proper Officer” under Notification No.44/2011 – Cus. (N.T.) dated 06.07.2011:-*

**TABLE**

| <b>Sl.No.</b> | <b>Designation of the officers</b>  |
|---------------|---|
| <b>(1)</b>    | <b>(2)</b>  |
| 1.            | <i>Additional Director Generals, Additional Directors or Joint Directors, Deputy Directors or Assistant Directors in the Directorate General of Revenue Intelligence.</i>                       |
| 2.            | <i>Commissioners of Customs (Preventive), Additional Commissioners or Joint Commissioners of Customs (Preventive), Deputy Commissioners or Assistant Commissioners of Customs (Preventive).</i> |
| 3.            | <i>Additional Director Generals, Additional Directors or Joint Directors, Deputy Directors or Assistant Directors in the Directorate General of Central Excise Intelligence.</i>                |
| 4.            | <i>Commissioners of Central Excise, Additional Commissioners or Joint Commissioners of Central Excise, Deputy Commissioners or Assistant Commissioners of Central Excise.</i>                   |

*245. Thus, over a period of time, the officers of Directorate of Revenue Intelligence (DRI) who are primarily drawn from the Customs Department were also given the task*

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

*of issuing show cause notice and adjudicating the same in terms of Notifications issued as “Proper Officer”, as defined in Section 2(34) of the Customs Act, 1962.*

246. Now, under the amended Section 2(34), the word “under Section 5” has been inserted. Thus, what was implicit in the Customs Act, 1962 has now been made explicit in the amendment to the Customs Act, 1962 vide Finance Act, 2022.

247. As per Section 5(1) of the Act, an “Officer of Customs” may exercise the powers and discharge the duties conferred or imposed on him under the Customs Act, 1962, subject to such conditions and limitations as the Board may impose.

248. The power to be exercised may be subject to such conditions and limitations as the Board may impose on such an “Officer of Customs”. Such officers can also exercise the powers and discharge the duties conferred or imposed on any other officers of customs who is subordinate to such officers. This aspect was also not brought to the attention of the Hon’ble Supreme Court in Canon India Private Limited Vs. Commissioner of Customs case referred to supra.

249. Only exception that has been provided was in Sub-Section (3) to Section 5 of the Act. As per Sub-Section 3 to Section 5 of the Act, a Commissioner (Appeals) cannot exercise the power and discharge the duties conferred or imposed on an “Officer of Customs” other than those specified in Section 108 of the Act and Chapter XV deals with the Appeals and Revisions.

250. Section 5 of the Customs Act, 1962 has also been amended in the Finance Act, 2022. Sub-Section (1A), (1B) and Sub-Section (4) and (5) to Section 5 of the Customs Act, 1962 have been now inserted. Section 5 as it stood prior to amendment and as it stands after amendment read as under:-

**Digital Supreme Court Reports**

**TABLE**

| <b>5. Powers of Officers of Customs of the Customs Act, 1962</b>  |  |
|---|--|
| <b>Before the amendment Section</b>   | <b>After the 2022 amendment</b>  |
| (1) Subject to such conditions and limitations as the Board may impose, an officer of customs may exercise the powers and discharge the duties conferred or imposed on him under this Act.  | <i>(1A) : Without prejudice to the provisions contained in subsection (1), the Board may, by notification, assign such functions as it may deem fit, to an officer of customs, 91 who shall be the proper officer in relation to such functions.</i>   |
|   | <i>(1B) Within their jurisdiction assigned by the Board, the Principal Commissioner of Customs or Commissioner of Customs, as the case may be, may, by order, assign such functions, as he may deem fit, to an "Officer of Customs", who shall be the "Proper Officer" in relation to such functions."</i> |
| (2) An Officer of Customs may excise the powers and discharge the duties conferred or imposed under this Act on any other officer of Customs who is subordinate to him.   |  |
| (3) Notwithstanding anything contained in this Section, a Commissioner (Appeals) shall not exercise the powers and discharge the duties conferred or imposed on an officer of customs other than those specified in Chapter XV and Section 108. |  |
|   | <i>"(4) In specifying the conditions and limitations referred to in sub-section (1), and in assigning functions under sub-section (1A),</i>  |

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

|  |   |
|--|---|
|  | <i>the Board may consider any one or more of the following criteria, including, but not limited to—<br/>a) territorial jurisdiction; b) persons or class of persons; c) goods or class of goods; d) cases or class of cases; e) computer assigned random assignment; f) any other criterion as the Board may, by notification, specify.</i> |
|  | <i>(5) The Board may, by notification, wherever necessary or appropriate, require two or more officers of customs (whether or not of the same class) to have concurrent powers and functions to be performed under this Act.”.</i>  |

**251. During the interregnum in 2012, a more comprehensive notification was issued vide Notification No.40/2012-Cus. (N.T.), dated 02.05.2012. This notification fell for consideration in [Canon India Private Limited Vs. Commissioner of Customs, 2021 \(376\) E.L.T.3\(S.C\)](#). However, No.40/2012-Cus. (N.T.), dated 02.05.2012 cannot be read in isolation. It had to be read along with notifications issued under Section 4 of the Customs Act, 1962.**

**252. Notification No.40/2012-Cus. (N.T.), dated 02.05.2012 was also amended from time to time and has now been eventually rescinded/superseded by Notification No.26/2022-Cus. (N.T.), dated 31- 3-2022 in tune with the amendment proposed in the Finance Bill, 2022 and passed by Finance Act, 2022.**

**253. Both Notification No.44/2011-Cus. (N.T.), dated 06.07.2011 and Notification No. 40/2012-Cus. (N.T.), dated 02.05.2012 as amended from time to time have also not been challenged directly by any of the petitioners.**

## Digital Supreme Court Reports

**254. Although, the vires of Notification No.40/2012-Cus. (N.T.), dated 02.05.2012 was neither challenged or questioned before the Court in *Canon India Private Limited Vs. Commissioner of Customs*, 2021 (376) E.L.T.3(S.C) nor the issue of jurisdiction was canvassed before the Tribunal, the Hon'ble Supreme has held that the officers of the Directorate of Revenue Intelligence were not "Proper Officers" as they are not Officers of Customs and therefore there had to be issue of an independent Notification under Section 6 of the Customs Act, 1962."**

[Emphasis supplied]

### viii. Section 6 of the Act, 1962

117. This Court in *Canon India* (supra) made certain observations on the purport of Section 6 of the Act, 1962 and held that the Notification No. 40/2012 dated 02.05.2012 which empowered the DRI officers to perform functions under Section 28 was invalid. The relevant portion of the judgment is reproduced below:

**"21. If it was intended that officers of the Directorate of Revenue Intelligence who are officers of Central Government should be entrusted with functions of the Customs officers, it was imperative that the Central Government should have done so in exercise of its power under Section 6 of the Act. The reason why such a power is conferred on the Central Government is obvious and that is because the Central Government is the authority which appoints both the officers of the Directorate of Revenue Intelligence which is set up under the Notification dated 04.12.1957 issued by the Ministry of Finance and Customs officers who, till 11.5.2002, were appointed by the Central Government. The notification which purports to entrust functions as proper officer under the Customs Act has been issued by the Central Board of Excise and Customs in exercise of non-existing power under Section 2(34) of the Customs Act. The notification is obviously invalid having been**

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

**issued by an authority which had no power to do so in purported exercise of powers under a section which does not confer any such power.”**

**[Emphasis supplied]**

118. It was held that Section 6 is the only section which provides for the entrustment of the functions of customs officers to other officers of the Central or State Government or local authority. As a result of the judgment in *Canon India* (*supra*), the respondents herein vociferously argued that Section 5 of the Act, 1962 only deals with the powers and duties and not functions and it is Section 6 which refers to functions. Such argument proceeded on the erroneous footing that any notification empowering the DRI should have been issued under Section 6 of the Act, 1962 and not having been done so, the show cause notice issued by the DRI was without jurisdiction.

119. Section 6 of the Act, 1962 reads thus:

**“6. Entrustment of functions of Board and customs officers on certain other officers.—The Central Government may, by notification in the Official Gazette, entrust either conditionally or unconditionally to any officer of the Central or the State Government or a local authority any functions of the Board or any officer of customs under this Act.”**

**[Emphasis supplied]**

120. It is evident on a plain reading of Section 6 of the Act, 1962 referred to above that the same contemplates the entrustment of the functions of the Board or any officer of customs under the Act, 1962 to any of the officers of the Central or the State Government or a local authority. Such entrustment could be either conditional or unconditional. As per Section 6 of the Act, 1962, the Central Government may by notification in the Official Gazette entrust the functions of the Board or the officers of Customs to any of the following officers, namely, any officer of:

- (i) The Central Government; or
- (ii) The State Government; or
- (iii) A local authority.

**Digital Supreme Court Reports**

121. Section 6 replaced Section 8 of the erstwhile Sea Customs Act, 1878 under which the powers of officers of customs, at places where there is no Customs House, are exercised by the land revenue officers of the district. This is no longer necessary as the Central Excise officers are available all over the country. Further the powers of customs officers at times need to be conferred on other officers, like police officers. Section 6, therefore, makes a general provision empowering the Central Government to entrust the functions of the Board or an officer of customs to any officer of the Central or State government or a local authority.
122. The object of this Section is to confer powers of search, seizure, arrest and recording of statements, to the officers working in border states like officers of police service, Border Security Force, Tehsildar, Indo Tibet Border Police Force and others. Similarly, officers working in the coast guard or the navy may also be given such powers as they may be involved in anti-smuggling operations.
123. The Board has notified entrustment of powers to various officers working in different departments either under the State services or Central services from time to time. An illustration of this is M.F.(D.R.) Notification No. 161-Cus. dated the 22.06.1963 which empowered specified officers of DRI with the power to search premises. It is worth noting that this notification under Section 6 was issued prior to the notification no. 17/2002 dated 07.03.2002.
124. Notification No. 17/2002 dated 07.03.2002 was issued under Section 4(1) of the Act appointing DRI officers as officers of customs. The powers of officers of customs to discharge duties under the Act is derived from Section 5.
125. A plain reading of Section 6 of the Act, 1962 referred to above, makes it abundantly clear that it applies only to officers from departments other than the officers of the customs under Section 4 of the Act, 1962. The officers of DRI are not any other officers of the Central Government or the State Government or the local authority to be entrusted with the functions of the Board and the Customs Officers. It has been rightly observed by the High Court of Madras in *M/s N.C. Alexander (supra)* that post 07.03.2002, a notification of the Central Government under Section 6 is not required to recognise the officers from DRI as officers of customs.

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

126. The observations of the High Court in *M/s N.C. Alexander (supra)* in the aforesaid context with which we are in complete agreement are reproduced hereinbelow:

**“269. By such entrustment, these officers of other Departments do not become Officers of Customs. They can merely function as such officers. Since entrustment under Section 6 is on the officers from other department, the Parliament by design has given the powers to the Central Government and not to the Board.”**

270. As the Officers from the Directorate of Revenue Intelligence, Ministry of Finance (MOF) are already “Officers of Customs” before their induction and deputation to the Board in various Directorates, there is no impediment on their being appointed as proper officers for the purpose of Section 2(34) of the Customs Act, 1962.

271. Merely because the Officers of the Customs and Central Excise Department are selected and are deputed in the respective Directorates does not mean that they cease to be Officers of the respective Departments as these Directorates are created only to assist the Board to implement the object of respective fiscal enactments. It is an internal arrangement within the Ministry of Finance, Department of Revenue (DRI).

272. If Section 3 and Section 4 of the Act and the Notification issued thereunder referred to supra were perhaps brought to the attention of the Hon’ble Supreme Court in *Canon India Private Limited Vs. Commissioner of Customs*, 2021 (376) E.L.T.3(S.C.), the Hon’ble Supreme Court would have given a different interpretation. In any event, these discussion are academic in the light of the validation in Section 97 of the Finance Act, 2022.

273. It must also be remembered that the “Officers of Customs” in Section 3(1)(a) to (h) of the Customs Act, 1962 (as amended under Section 3(1) (a) to (j) after 2022 amendment) are Officers from Group ‘A’ Cadre of the Customs Department (IRS) like their counterparts from

## Digital Supreme Court Reports

*the Central Excise Department as Central Tax Officers under GST.*

**274. A reading of Section 2(34) with Section 4 of the Customs Act, 1962 also makes it clear that the expression “proper officer” means the “Officer of Customs” who has been assigned those functions either by the Board or by the Principal Commissioner of Customs or by Commissioner of Customs in relation to any function to be performed under the Act.**

**275. Notifications which have been issued to appoint these officers from Directorate of Revenue Intelligence (DRI) to act as “Proper Officers” are enabling Notification notwithstanding the fact that they are already “Officers of Customs” under Notification issued under Section 4(1) of the Customs Act, 1962.**

276. Further, the Board can also authorize the Principal Commissioner of Customs or Chief Commissioner of Customs or Principal Chief Commissioner or Commissioner of Customs or Joint or Assistant or Deputy Commissioner of Customs, to appoint Officers of Customs below the rank of Assistant Commissioner of Customs. Thus, the following Group ‘B’ Executive - Gazetted and Non-Gazetted Officers assist in the initial stage of assessment of goods as:-

| Sl. No. | Group ‘B’ Executive Gazetted Officer          | Group ‘B’ Executive Non – Gazetted Officer |
|---------|---|--|
| 1       | <i>Superintendent of Customs (Preventive)</i> | <i>Preventive Officers (Customs)</i>       |
| 2       | <i>Appraiser of Customs</i>                   | <i>Examiner (Customs)</i>                  |

277. As mentioned above, assessment is neither by the Group ‘B’ Executive – Gazetted Officer nor by Group ‘B’ Executive – Non-Gazetted Officer after 08.04.2011. Only, prior to 08.04.2011, the assessment of goods at the port was vested with the Group ‘B’ Executive – Gazetted Officer. However, after the said date, the fundamental of assessment has undergone a sea change and changed permanently as mentioned above.

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

*278. These fundamental changes brought to the manner of the assessment under the Customs Act, 1962 with effect from 08.04.2011 appear to have not been brought to the attention of the Hon'ble Supreme Court and therefore the assumption in the paragraph Nos.12 to 15 in the case of Canon India Private Limited Vs. Commissioner of Customs, 2021 (376) E.L.T.3(S.C.) may require a re-consideration insofar as pending cases before the Hon'ble Supreme Court and other Courts.”*

**[Emphasis supplied]**

127. Mr. N. Venkataraman, the Ld. ASG is correct in his submission that the distinction sought to be made between Section 5 and Section 6 of the Act, 1962 (powers and duties *vis-à-vis* functions) could be said to be imaginary and may have very serious legal implications.
128. The assignment of functions of the proper officer for the purposes of any section under the Act to an officer of customs is expressly mentioned in Section 2(34). Section 5 empowers the customs officer to discharge the duties of proper officer so conferred. Even prior to the amendment to Sections 2(34) and 5, this could be the only understanding with respect to the question of entrustment of functions of the proper officer to a customs officer.
129. In our view, the assignment of functions of proper officers as mentioned in Section 2(34) and entrustment of functions of customs officers as mentioned in Section 6 operate on different planes. The assignment of functions of the proper officer is to be done only to officers of customs (whether they be appointed under Section 4 or entrusted with certain functions under Section 6). There may be some overlap between the assignment of functions of proper officers under Section 2(34) read with Section 5 and the entrustment of functions of officers of customs under Section 6 in some instances but there can be no scenario in which we can hold that the “functions” under Section 6 and Section 2(34) are congruent.
130. One of the bases for the decision in Canon India (*supra*) was that no entrustment of functions under Section 6 was done in favour of the DRI officers. This, however, is a glaring misapplication of Section 6 of the Act and is in ignorance of the applicable law which is in fact Sections 2(34) read with Section 5 of the Act, 1962. Therefore, in light

**Digital Supreme Court Reports**

of the judgment of this Court in *[Yashwant Sinha \(supra\)](#)*, we find that it is necessary to allow this review petition to do complete justice.

**ix. Observations on the constitutional validity of Section 28(11) of the Act, 1962**

131. The question as to who are the “proper officers” for the purpose of issuance of show cause notices under Section 28 was raised before the High Court of Delhi in the case of *[Mangali Impex \(supra\)](#)*. The specific challenge therein was to the constitutional validity of Section 28(11) of the Act which was inserted by the Customs (Amendment and Validation) Act, 2011 (the “Validation Act”) with effect from 16.09.2011.
132. A Division Bench of the High Court held that sub-section (11) of Section 28 could not validate the show cause notices issued by the DRI officers prior to 08.04.2011, i.e., the date when Section 28 was amended.
133. With a view to understanding the true purport of Section 28(11) and the issues pertaining thereto, it is necessary to first examine the changes to Section 28 that were introduced prior to the Validation Act. Section 28 as it stood prior to the Finance Bill 2011 is reproduced below:

**“28. Notice for payment of duties, interest, etc.** (1) When any duty has not been levied or has been short-levied or erroneously refunded, or when any interest payable has not been paid, part paid or erroneously refunded, the proper officer may,-

(a) in the case of any import made by any individual for his personal use or by government or by any educational, research or charitable institution or hospital, within one year;

(b) in any other case, within six months,

from the relevant date, serve notice on the person chargeable with the duty or interest which has not been levied or charged or which has been short-levied or part paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

*Provided that where any duty has been levied or has been short-levied or the interest has not been charged or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts by the importer or the exporter or the agent or employee of the importer or exporter, the provisions of this sub-section shall have effect as if for the words "one year" and "six months", the words "five years" were substituted.*

*Provided further that where the amount of duty which has not been levied or has been short-levied or erroneously refunded or the interest payable has not been paid, part paid or erroneously refunded is one crore rupees or less, a notice under this sub-section shall be served by the Commissioner of Customs or with his prior approval by any officer sub-ordinate to him:*

*Provided also that where the amount of duty has not been levied or has been short-levied or erroneously refunded or the interest payable thereon has not been paid, part paid or erroneously refunded is more than one crore rupees, no notice under this subsection shall be served except with the prior approval of the Chief Commissioner of Customs.*

*Explanation : Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of one year or six months or five years, as the case may be.*

*(2) The proper officer, after considering the representation, if any, made by the person on whom notice is served under sub-section (1), shall determine the amount of duty or interest due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined.*

*(2A) Where any notice has been served on a person under sub-section (1), the proper officer –*

*(i) in case any duty has not been levied or has been short-levied, or the interest has not been paid or*

**Digital Supreme Court Reports**

*has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts, where it is possible to do so, shall determine the amount of such duty or the interest, within a period of one year: and*

- (ii) *in any other case, where it is possible to do so, shall determine the amount of duty which has not been levied or has been short-levied or erroneously refunded or the interest payable which has not been paid, part paid or erroneously refunded, within a period of six months,*

*from the date of service of the notice on the person under sub-section (1).*

*(2B) Where any duty has not been levied, or has been short-levied or erroneously refunded, or any interest payable has not been paid, part paid or erroneously refunded, the person, chargeable with the duty or the interest, may pay the amount of duty or interest before service of notice on him under sub-section (1) in respect of the duty or the interest, as the case may be, and inform the proper officer of such payment in writing, who, on receipt of such information, shall not serve any notice under sub-section (1) in respect of the duty or the interest so paid:*

*Provided that the proper officer may determine the amount of short-payment of duty or interest, if any, which in his opinion has not been paid by such person and, then, the proper officer shall proceed to recover such amount in the manner specified in this section, and the period of "one year" or "six months" as the case may be, referred to in sub-section (1) shall be counted from the date of receipt of such information of payment.*

*Explanation 2. For the removal of doubts, it is hereby declared that the interest under Section 28AB shall be payable on the amount paid by the person under this sub-section and also on the amount of short-payment of duty, if any, as may be determined by the proper officer, but for this sub-section.*

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

*(2C) The provisions of sub-Section (2B) shall not apply to any case where the duty or the interest had become payable or ought to have been paid before the date on which the Finance Bill 2001 receives the assent of the President.*

*(3) For the purposes of sub-section (1), the expression "relevant date" means,-*

- (a) in a case where duty is not levied, or interest is not charged, the date on which the proper officer makes an order for the clearance of the goods;*
- (b) in a case where duty is provisionally assessed under section 18, the date of adjustment of duty after the final assessment thereof;*
- (c) in a case where duty or interest has been erroneously refunded, the date of refund;*
- (d) in any other case, the date of payment of duty or interest."*

134. Thereafter, Section 28 was re-cast and a new scheme of the section was introduced *vide* the Finance Act, 2011 promulgated with effect from 08.04.2011. Section 28, as it stands after the amendment, is reproduced below:

***"28. Recovery of duties not levied or short-levied or erroneously refunded.***

*(1) Where any duty has not been levied or has been short-levied or erroneously refunded, or any interest payable has not been paid, part-paid or erroneously refunded, for any reason other than the reasons of collusion or any wilful mis-statement or suppression of facts,-*

- (a) the proper officer shall, within one year from the relevant date, serve notice on the person chargeable with the duty or interest which has not been so levied or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice;*

**Digital Supreme Court Reports**

- (b) *the person chargeable with the duty or interest, may pay before service of notice under clause (a) on the basis of,-*
- (i) *his own ascertainment of such duty; or*
  - (ii) *the duty ascertained by the proper officer, the amount of duty along with the interest payable thereon under section 28AA or the amount of interest which has not been so paid or part-paid.*
- (2) *The person who has paid the duty along with interest or amount of interest under clause (b) of sub-section (1) shall inform the proper officer of such payment in writing, who, on receipt of such information shall not serve any notice under clause (a) of that sub-section in respect of the duty or interest so paid or any penalty leviable under the provisions of this Act or the rules made thereunder in respect of such duty or interest.*
- (3) *Where the proper officer is of the opinion that the amount paid under clause (b) of sub-section (1) falls short of the amount actually payable, then, he shall proceed to issue the notice as provided for in clause (a) of that sub-section in respect of such amount which falls short of the amount actually payable in the manner specified under that sub-section and the period of one year shall be computed from the date of receipt of information under sub-section (2).*
- (4) *Where any duty has not been levied or has been short-levied or erroneously refunded, or interest payable has not been paid, part-paid or erroneously refunded, by reason of,-*
- (a) *collusion; or*
  - (b) *any wilful mis-statement; or*
  - (c) *suppression of facts,*
- by the importer or the exporter or the agent or employee of the importer or exporter, the proper officer shall, within five years from the relevant date, serve notice on the person*

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

*chargeable with duty or interest which has not been so levied or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice.*

*(5) Where any duty has not been levied or has been short-levied or the interest has not been charged or has been part-paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts by the importer or the exporter or the agent or the employee of the importer or the exporter, to whom a notice has been served under sub- section (4) by the proper officer, such person may pay the duty in full or in part, as may be accepted by him, and the interest payable thereon under section 28AA and the penalty equal to twenty five per cent. of the duty specified in the notice or the duty so accepted by that person, within thirty days of the receipt of the notice and inform the proper officer of such payment in writing.*

*(6) Where the importer or the exporter or the agent or the employee of the importer or the exporter, as the case may be, has paid duty with interest and penalty under sub-section (5), the proper officer shall determine the amount of duty or interest and on determination, if the proper officer is of the opinion-*

- (i) that the duty with interest and penalty has been paid in full, then, the proceedings in respect of such person or other persons to whom the notice is served under sub-section (1) or sub- section (4), shall, without prejudice to the provisions of sections 135, 135A and 140 be deemed to be conclusive as to the matters stated therein; or*
- (ii) that the duty with interest and penalty that has been paid falls short of the amount actually payable, then the proper officer shall proceed to issue the notice as provided for in clause (a) of sub-section (1) in respect of such amount which falls short of the amount*

**Digital Supreme Court Reports**

*actually payable in the manner specified under that sub-section and the period of one year shall be computed from the date of receipt of information under sub-section (5).*

(7) *In computing the period of one year referred to in clause (a) of sub-section (1) or five years referred to in sub-section (4), the period during which there was any stay by an order of a court or tribunal in respect of payment of such duty or interest shall be excluded.*

(8) *The proper officer shall, after allowing the concerned person an opportunity of being heard and after considering the representation, if any, made by such person, determine the amount of duty or interest due from such person not being in excess of the amount specified in the notice.*

(9) *The proper officer shall determine the amount of duty or interest under sub-section (8),- (a) within six months from the date of notice in respect of cases falling under clause (a) of sub- section (1); (b) within one year from the date of notice in respect of cases falling under sub-section (4).*

(10) *Where an order determining the duty is passed by the proper officer under this section, the person liable to pay the said duty shall pay the amount so determined along with the interest due on such amount whether or not the amount of interest is specified separately.*

*Explanation 1 – For the purposes of this section, “relevant date” means,-*

- (a) *in a case where duty is not levied, or interest is not charged, the date on which the proper officer makes an order for the clearance of goods;*
- (b) *in a case where duty is provisionally assessed under section 18, the date of adjustment of duty after the final assessment thereof;*
- (c) *in a case where duty or interest has been erroneously refunded, the date of refund;*

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

(d) *in any other case, the date of payment of duty or interest.*

*Explanation 2. - For the removal of doubts, it is hereby declared that any non-levy, short-levy or erroneous refund before the date on which the Finance Bill, 2011 receives the assent of the President, shall continue to be governed by the provisions of Section 28 as it stood immediately before the date on which such assent is received."*

135. Parliament, therefore, made changes to the scheme of Section 28 and added the Explanation 2 which stated that any non-levy, short-levy or erroneous refund before the date of presidential assent to the Finance Bill, 2011 shall be governed by the provisions of Section 28 as it stood prior to the amendment.
136. On 06.07.2011, Customs Notification No. 44/2011 was issued under Section 2(34), which designated *inter alia* DRI officers as proper officers for the purposes of Sections 17 and 28 of the Act, 1962 and empowered such officers to perform functions under Section 28 including the function of issuing show cause notices.
137. Subsequently, on 16.09.2011, sub-section (11) of Section 28 came to be enacted *vide* the Validation Act. It provided that:
 

*"(11) Notwithstanding anything to the contrary contained in any judgment, decree or order of any court of law, tribunal or other authority, all persons appointed as officers of Customs under sub-section (1) of section 4 before the 6th day of July, 2011 shall be deemed to have and always had the power of assessment under section 17 and shall be deemed to have been and always had been the proper officers for the purposes of this section."*
138. As stated in the foregoing extract, sub-section (11) was introduced in the statute to remedy the defects highlighted by this Court in the case of Sayed Ali (*supra*) and the same retrospectively empowered all officers of customs appointed under Section 4(1) before 06.07.2011 to conduct assessments under Section 17 of the Act and to be proper officers for the purpose of Section 28.

**Digital Supreme Court Reports**

139. The Statement of Objects and Reasons of the Validation Act explained that the introduction of Section 28(11) was necessary because the position of law on the functions of proper officers as interpreted by this Court in *Sayed Ali* (*supra*) and the consequent invalidation of show cause notices issued by the Commissionerates of Customs (Preventive), DRI and others, was not the legislative intent. Parliament clarified that show cause notices issued by officers of the Commissionerates of Customs (Preventive), DRI, Directorate General of Central Excise Intelligence (DGCEI) and Central Excise Commissionerates for demanding customs duty not levied or short levied or erroneously refunded under Section 28 in respect of goods imported are valid, irrespective of whether any specific assignment as proper officer was issued.
140. The Validation Act was first challenged before the High Court of Bombay in the case of *Sunil Gupta* (*supra*) on the grounds that it is violative of Articles 14, 19 and 21 of the Constitution and that it fails to take note of Explanation 2 to Section 28. Relying on *Sayed Ali* (*supra*), the petitioners therein challenged the Validation Act on the ground that it is only the officers of customs who are assigned functions of assessment including the reassessment and they alone are competent to issue notice under Section 28.

**x. Bombay High Court decision in Sunil Gupta (supra)**

141. Similar grounds were taken by the petitioners before the High Court of Delhi in the case of *Mangali Impex* (*supra*) wherein it was submitted that there was an apparent conflict between Explanation 2 and Section 28(11) which rendered the Validation Act inapplicable to show cause notices issued prior to 08.04.2011 i.e., the date on which the new Section 28 came into force. It was further submitted that Section 28(11), by conferring powers of the proper officer to multiple sets of customs officers without any territorial or pecuniary jurisdictional limit, would result in utter chaos and confusion as envisaged in *Sayed Ali* (*supra*) and therefore, does not cure the defects pointed out therein.
142. The very same argument has been canvassed before us by the respondents herein. To comprehensively address the submissions

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

made before us, we find it necessary to address the following three issues:

- (i) What is the scope of Explanation 2 to Section 28?
- (ii) Whether the field of operation of Section 28(11) and Explanation 2 overlaps? In other words, what is the scope of the non-obstante clause in sub-section (11)?
- (iii) Whether Section 28(11) cures the defect pointed out in *Sayed Ali (supra)*?

143. Explanation 2 was introduced as a part of the new Section 28 enacted by the Finance Act, 2011 with effect from 08.04.2011. Explanation 2 to Section 28 reads as follows:

*“Explanation 2. - For the removal of doubts, it is hereby declared that any non-levy, short-levy or erroneous refund before the date on which the Finance Bill, 2011 receives the assent of the President, shall continue to be governed by the provisions of section 28 as it stood immediately before the date on which such assent is received.”*

144. It was vehemently argued on behalf of the respondents that reading Section 28(11) with Explanation 2 narrows down the period for the purposes of retrospective validation of the show cause notices issued and limits the application of sub-section (11) to the period from 08.04.2011 (enactment of new Section 28) to 16.09.2011 (enactment of the Validation Act). This challenge is based on the reasoning that the non-obstante clause contained in Section 28(11) is limited to “...judgment, decree or order of any court of law, tribunal or other authority...” and does not oust the application of other provisions of the Act including Explanation 2. It was argued that the phrase “...this section...” in sub-section (11) when read harmoniously with Explanation 2 refers to the new Section 28 only and will not be applicable to the old provision as it stood prior to 08.04.2011.

145. The determination of the soundness of the aforesaid argument necessitates a comparison of Section 28, prior to the amendment and subsequent to the amendment.

## Digital Supreme Court Reports

| Provisions of old<br>Section 28<br>[running in continuation from<br>sub-sections (1) to (3)]   | Corresponding<br>provisions of new<br>Section 28  | Comparison and<br>Remarks   |
|--|---|---|
| <b><i>28. Notice for payment of<br/>duties, interest, etc.</i></b>   | <b><i>28. Recovery of duties<br/>not levied or short-levied<br/>or erroneously refunded.</i></b>  |   |
| <p>(1) When any duty has not been levied or has been short-levied or erroneously refunded, or when any interest payable has not been paid, part paid or erroneously refunded, the proper officer <u>may</u>,</p> <p>(a) in the case of any import made by any individual for his personal use or by government or by any educational, research or charitable institution or hospital, within one year;</p> <p>(b) in any other case, <u>within six months</u>, from the relevant date, serve notice on the person chargeable with the duty or interest which has not been levied or charged or which has been short-levied or part paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:</p> | <p>(1) Where any duty has not been levied or has been short-levied or erroneously refunded, or any interest payable has not been paid, part-paid or erroneously refunded, for any reason other than the reasons of collusion or any wilful mis-statement or suppression of facts,</p> <p>(a) the proper officer <u>shall</u>, within <u>one year</u> from the relevant date, serve notice on the person chargeable with the duty or interest which has not been so levied or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice;</p> | <p>The legislature vide the amendment, has removed the distinction between the purposes for which the imports are to be used. Sub-section (1)(b) of the old Section 28 is analogous to the sub-section (1)(a) of the new Section 28. The only change that has been made herein is the period of limitation for service of show cause notice which has been increased from six months to one year.</p> |
| <p>Provided that where any duty has been levied or has been short-levied or the interest has not been charged or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts by the importer or the exporter or the agent or employee of the importer or exporter, the</p>   | <p>(4) Where any duty has not been levied or has been short-levied or erroneously refunded, or interest payable has not been paid, part-paid or erroneously refunded, by reason of,-</p> <p>(a) collusion; or</p> <p>(b) any wilful mis-statement; or</p>   | <p>In respect of the provision relating to issuance of show cause notice for non-levy, short-levy, not-paid, part-paid and erroneous refund of duty by reasons of collusion, wilful mis-statement or suppression of facts, no change</p>  |

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

|  |  |   |
|--|--|---|
| <p><i>provisions of this sub-section shall have effect as if for the words "one year" and "six months", the words "five years" were substituted.</i></p> | <p><i>(c) suppression of facts, by the importer or the exporter or the agent or employee of the importer or exporter, the proper officer shall, within five years from the relevant date, serve notice on the person chargeable with duty or interest which has not been so levied or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice.</i></p> <p><i>(5) Where any duty has not been levied or has been short-levied or the interest has not been charged or has been part- paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts by the importer or the exporter or the agent or the employee of the importer or the exporter, to whom a notice has been served under sub- section (4) by the proper officer, such person may pay the duty in full or in part, as may be accepted by him, and the interest payable thereon under section 28AA and the penalty equal to twenty- five per cent of the duty specified in the notice or the duty so accepted by that person, within thirty</i></p> | <p>has been made and the time period of five years for service of notice has been retained.</p> <p>The legislature has further clarified the procedure following the service of notice.</p> <p>Sub-section (5) of the new Section 28 provides for the levy of interest on the amount due and permits part-payment of the amount mentioned in the notice to the extent that the short-fall in duty has been accepted by the notice.</p> <p>Sub-section (6) of the new Section 28 lays down the manner in which the proceedings following the service of the show cause notice will be either closed on payment of the full amount mentioned. The legislature has removed the pecuniary distinction and the consequent approvals from different authorities for issuance of show cause notices.</p> |
|--|--|---|

**Digital Supreme Court Reports**

*days of the receipt of the notice and inform the proper officer of such payment in writing.*

*(6) Where the importer or the exporter or the agent or the employee of the importer or the exporter, as the case may be, has paid duty with interest and penalty under sub-section (5), the proper officer shall determine the amount of duty or interest and on determination, if the proper officer is of the opinion-*

*(i) that the duty with interest and penalty has been paid in full, then, the proceedings in respect of such person or other persons to whom the notice is served under sub-section (1) or sub-section (4), shall, without prejudice to the provisions of sections 135, 135A and 140 be deemed to be conclusive as to the matters stated therein; or*

*(ii) that the duty with interest and penalty that has been paid falls short of the amount actually payable, then the proper officer shall proceed to issue the notice as provided for in clause (a) of sub-section (1) in respect of such amount which falls short of the amount actually payable in the manner specified under that sub-section and the*

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

|   |   |  |
|---|---|--|
|   | <p><i>period of one year shall be computed from the date of receipt of information under sub-section (5).</i></p>   |  |
| <p><i>Provided further that where the amount of duty which has not been levied or has been short-levied or erroneously refunded or the interest payable has not been paid, part paid or erroneously refunded is one crore rupees or less, a notice under this sub-section shall be served by the Commissioner of Customs or with his prior approval by any officer sub-ordinate to him:</i></p> <p><i>Provided also that where the amount of duty has not been levied or has been short-levied or erroneously refunded or the interest payable thereon has not been paid, part paid or erroneously refunded is more than one crore rupees, no notice under this sub- section shall be served except with the prior approval of the Chief Commissioner of Customs.</i></p> |   | <p>The legislature has removed the pecuniary distinction and the consequent approvals from different authorities for issuance of show cause notices.</p> |
| <p><i>Explanation : Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of one year or six months or five years, as the case may be.</i></p>  | <p>(7) In computing the period of one year referred to in clause (a) of sub-section (1) or five years referred to in sub-section (4), the period during which there was any stay by an order of a court or tribunal in respect of payment of such duty or interest shall be excluded.</p> | <p>This is an analogous provision.</p>   |

## Digital Supreme Court Reports

|   |   |   |
|---|---|---|
| <p>(2) <i>The proper officer, after considering the representation, if any, made by the person on whom notice is served under sub-section (1), shall determine the amount of duty or interest due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined.</i></p>  | <p>(8) <i>The proper officer shall, after allowing the concerned person an opportunity of being heard and after considering the representation, if any, made by such person, determine the amount of duty or interest due from such person not being in excess of the amount specified in the notice.</i></p>   | <p>This is an analogous provision and pertains to the adjudication / determination of the amount specified in the show-cause notice when issued under sub-section (1) of the new Section 28.</p>  |
| <p>(2A) <i>Where any notice has been served on a person under sub- section (1), the proper officer -</i></p> <p>(i) <i>in case any duty has not been levied or has been short-levied, or the interest has not been paid or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts, where it is possible to do so, shall determine the amount of such duty or the interest, within a period of one year: and</i></p> <p>(ii) <i>in any other case, where it is possible to do so, shall determine the amount of duty which has not been levied or has been short-levied or erroneously refunded or the interest payable which has not been paid, part paid or erroneously refunded, within a period of six months, from the date of service of the notice on the person under sub- section (1).</i></p> | <p>(9) <i>The proper officer shall determine the amount of duty or interest under sub-section (8),-</i></p> <p>(a) <i>within six months from the date of notice in respect of cases falling under clause (a) of sub-section (1);</i></p> <p>(b) <i>within one year from the date of notice in respect of cases falling under sub-section (4).</i></p> | <p>This is an analogous provision.</p> <p>Sub-section (9)(a) of the new Section 28 is analogous to sub-section (2A)(ii) of the old provision and provides for a time period of six months for adjudication of notices issued under new Section 28(1)(a).</p> <p>Sub-section (9)(b) of the new Section 28 is analogous to sub-section (2A)(i) of the old provision and provides for a time period of one year for adjudication of notices issued in cases of collusion, wilful mis-statement and suppression of facts.</p> |

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

|   |  |  |
|---|--|--|
| <p><i>(2B) Where any duty has not been levied, or has been short-levied or erroneously refunded, or any interest payable has not been paid, part paid or erroneously refunded, the person, chargeable with the duty or the interest, may pay the amount of duty or interest before service of notice on him under sub-section (1) in respect of the duty or the interest, as the case may be, and inform the proper officer of such payment in writing, who, on receipt of such information, shall not serve any notice under sub-section (1) in respect of the duty or the interest so paid:</i></p> | <p>(1) ...<br/>         (a) ...<br/> <i>(b) the person chargeable with the duty or interest, may pay before service of notice under clause (a) on the basis of,-</i><br/> <u><i>(i) his own ascertainment of such duty; or</i></u><br/> <u><i>(ii) the duty ascertained by the proper officer, the amount of duty along with the interest payable thereon under section 28AA or the amount of interest which has not been so paid or part-paid.</i></u><br/> <i>(2) The person who has paid the duty along with interest or amount of interest under clause (b) of sub-section (1) shall inform the proper officer of such payment in writing, who, on receipt of such information shall not serve any notice under clause (a) of that sub-section in respect of the duty or interest so paid or any penalty leviable under the provisions of this Act or the rules made thereunder in respect of such duty or interest.</i></p> | <p>In both the old and new Section 28, the law has provided an opportunity to the person chargeable with duty or interest to make payment before the show cause notice is issued to him and inform the proper officer of such payment in writing.<br/>         The legislature, in the new Section 28(1)(b) has clarified the basis for ascertainment of amount to be paid prior to issuance of show cause notice.</p> |
| <p><i>Provided that the proper officer may determine the amount of short-payment of duty or interest, if any, which in his opinion has not been paid by such person and, then, the proper officer shall proceed to recover such amount in the</i></p>   | <p><i>(3) Where the proper officer is of the opinion that the amount paid under clause (b) of sub-section (1) falls short of the amount actually payable, then, he shall proceed to issue the notice as provided for in</i></p>  | <p>These provisions are analogous.</p>   |

## Digital Supreme Court Reports

|   |   |  |
|---|---|--|
| <p><i>manner specified in this section, and the period of “one year” or “six months” as the case may be, referred to in sub-section (1) shall be counted from the date of receipt of such information of payment.</i></p>   | <p><i>clause (a) of that subsection in respect of such amount which falls short of the amount actually payable in the manner specified under that subsection and the period of one year shall be computed from the date of receipt of information under sub-section (2).</i></p>  |  |
| <p><i>Explanation 2. For the removal of doubts, it is hereby declared that the interest under Section 28AB shall be payable on the amount paid by the person under this sub-section and also on the amount of short-payment of duty, if any, as may be determined by the proper officer, but for this sub-section.</i></p>  | <p><i>(10) Where an order determining the duty is passed by the proper officer under this section, the person liable to pay the said duty shall pay the amount so determined along with the interest due on such amount whether or not the amount of interest is specified separately.</i></p>  | <p>This provision is for the recovery of interest.</p>   |
| <p><i>(2C) The provisions of sub-Section (2B) shall not apply to any case where the duty or the interest had become payable or ought to have been paid before the date on which the Finance Bill 2001 receives the assent of the President.</i></p>   |   |  |
| <p><i>(3) For the purposes of sub-section (1), the expression “relevant date” means,-</i></p> <p><i>(a) in a case where duty is not levied, or interest is not charged, the date on which the proper officer makes an order for the clearance of the goods;</i></p> <p><i>(b) in a case where duty is provisionally assessed under section 18, the date of adjustment of duty after the final assessment thereof;</i></p> | <p><i>Explanation 1 - For the purposes of this section, “relevant date” means,-</i></p> <p><i>(a) in a case where duty is not levied, or interest is not charged, the date on which the proper officer makes an order for the clearance of goods;</i></p> <p><i>(b) in a case where duty is provisionally assessed under section 18, the date of adjustment of duty after the final assessment thereof;</i></p> | <p>This provision is identical to the old provision.</p> |

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

|  |  |   |
|--|--|---|
| <p><i>(c) in a case where duty or interest has been erroneously refunded, the date of refund;</i><br/> <i>(d) in any other case, the date of payment of duty or interest.”</i></p> | <p><i>(c) in a case where duty or interest has been erroneously refunded, the date of refund;</i><br/> <i>(d) in any other case, the date of payment of duty or interest.</i></p>  |   |
|  | <p><i>Explanation 2. - For the removal of doubts, it is hereby declared that any non-levy, short-levy or erroneous refund before the date on which the Finance Bill, 2011 receives the assent of the President, shall continue to be governed by the provisions of Section 28 as it stood immediately before the date on which such assent is received.”</i></p> | <p>The Explanation 2 was added to the new Section 28 to demarcate the date from which the said section shall become applicable and any recoveries of duty prior to such date would be governed by the old Section 28.</p> |

146. What is discernible from the aforesaid modifications made by the Parliament is as under:

- (a) **Distinction in the time-period:** In sub-section (1) of new Section 28, the difference in the purpose of the duty has been removed and for all cases of short-levy, non-levy, part-payment, non-payment and erroneous refund except for cases falling under new Section 28(4), the period of one year has been provided for the service of the show cause notice, which under the old provision was six months.
- (b) **Additional provision in respect of short-levy, non-levy, part-payment, non-payment and erroneous refund by reasons of collusion, willful misstatement and suppression of facts:** An additional provision has been inserted by way of Section 28(5) stipulating that, to the extent the amount mentioned in the show cause notice has been accepted by the person chargeable with payment of such duty, the payment of a part of such amount is allowed.
- (c) **Self-ascertainment of recovery amount before the issuance of a show cause notice:** Parliament introduced the mechanism

**Digital Supreme Court Reports**

of self-ascertainment of the recovery amount by the person chargeable with the payment of duty and payment of such amounts before the service of a show cause notice, subject to final adjudication or determination by the proper officer.

- (d) **Insertion of Explanation 2:** For the removal of doubts regarding the applicable provision for recoveries of duty arising before and after the enactment of new Section 28, Parliament added Explanation 2 to clarify that recoveries arising prior to 08.04.2011 shall be governed by old Section 28 of the Act.
147. Having analysed the aforesaid modifications made by Parliament to old Section 28, we can say with certainty that none of the changes made by the amendments to Section 28 has any impact on the competence of the proper officer for the purposes of fulfilment of functions under Section 28. In our considered view, the only major change that warrants the clarification provided under Explanation 2 is the distinction with respect to the limitation period for the issuance of show cause notices.
148. Therefore, the application of sub-section (11), which pertains only to the empowerment of proper officers to issue show cause notices under Section 28, cannot be said to be limited only to new Section 28 but also to the provision as it stood prior to 08.04.2011. The legislative intent is that sub-section (11) was meant to apply to Section 28 without any restriction as to time. This is apparent from the Statement of Objects and Reasons of the Validation Act. Therefore, the contention of the respondent that the phrase "...*this section...*" in sub-section (11) means only new Section 28, which was also accepted by the High Court of Delhi in ***Mangali Impex (supra)***, is erroneous.
149. Since, there is no overlap in the field of operation of Section 28(11) and Explanation 2, the interpretation of the non-obstante clause in Section 28(11) and the consequent harmonious construction of the two provisions in ***Mangali Impex (supra)*** is otiose.
150. Thus, we are in complete agreement with the view taken by the High Court of Bombay in the case of ***Sunil Gupta (supra)*** with respect to the first two questions raised by us in this case. The relevant portion of that judgment is reproduced below:

*"25. As a result of the above discussion and finding that Explanation 2 has not been dealing with the case, which*

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

*was specifically dealt with by sub-section (11) of section 28 of the Act, that we are of the opinion that the challenge in the writ petition is without any merit. The Explanation removes the doubts and states that even those cases which are governed by section 28 and whether initiated prior to the Finance Bill 2011 receiving the assent of the President shall continue to be governed by section 28, as it stood immediately before the date on which such assent is received. The reference to the Finance Bill therein denotes the Bill by the section itself was substituted by Act 8 of 2011 with effect from April 8, 2011. Prior to this Bill by which the section was substituted receiving the assent of the President of India, some cases were initiated and section 28 was resorted to by the authorities.*

**Explanation 2 clarifies that they will proceed in terms of the unamended provision. The position dealt with by insertion of section 28 (11) is distinct and that is about competence of the officer. The officers namely those from the Directorate of Revenue Intelligence having been entrusted and assigned the functions as noted above, they are deemed to have been possessing the authority, whether in terms of section 28 unamended or amended and substituted as above. In these circumstances, for these additional reasons as well, the challenge to this sub-section must fail.”**

[Emphasis supplied]

151. Further, the finding in ***Mangali Impex*** (*supra*) that Section 28(11) is overbroad and confers the powers of the proper officer to multiple sets of customs officers without any territorial or pecuniary jurisdictional limit which in turn may lead to “utter chaos and confusion” as highlighted in ***Sayed Ali*** (*supra*), is misconceived in our view. The apprehension of the petitioner therein was that plurality of proper officers empowered under Section 28 would result in more than one show cause notice and a consequent misuse of the provision, which would be detrimental to the interests of the persons chargeable with the payment of duty. Although, ***Mangali Impex*** (*supra*) declared Section 28(11) to be invalid on this ground, it suggested that the Board should issue instructions in its administrative capacity that once a show cause notice is issued specifying an adjudicating authority

**Digital Supreme Court Reports**

subject to such an officer being the proper officer for the purposes of Section 28, then he or she alone should proceed to adjudicate that particular show cause notice to the exclusion of all other officers who may have power in relation to that subject matter. We find this to be a reasonable construal of the import and application of Section 28(11).

152. It is a settled position of law that the possibility of misuse or abuse of a law which is otherwise valid cannot be a ground for invalidating it. This principle of law has been expounded by this Court in the case of *Shreya Singhal v. Union of India* reported in (2015) 5 SCC 1. The relevant portion of the judgment is reproduced below:

*"In The Collector of Customs, Madras v. Nathella Sampathu Chetty & Anr., [1962] 3 S.C.R. 786, this Court observed: "...This Court has held in numerous rulings, to which it is unnecessary to refer, that the possibility of the abuse of the powers under the provisions contained in any statute is no ground for declaring the provision to be unreasonable or void. Commenting on a passage in the judgment of the Court of Appeal of Northern Ireland which stated:*

*"If such powers are capable of being exercised reasonably it is impossible to say that they may not also be exercised unreasonably" and treating this as a ground for holding the statute invalid Viscount Simonds observed in Belfast Corporation v. O.D. Commission [ 1960 AC 490 at pp. 520-521] : "It appears to me that the short answer to this contention (and I hope its shortness will not be regarded as disrespect) is that the validity of a measure is not to be determined by its application to particular cases.... If it is not so exercised (i.e. if the powers are abused) it is open to challenge and there is no need for express provision for its challenge in the statute."*

*The possibility of abuse of a statute otherwise valid does not impart to it any element of invalidity. The converse must also follow that a statute which is otherwise invalid as being unreasonable cannot be saved by its being administered in a reasonable manner. The constitutional validity of*

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

*the statute would have to be determined on the basis of its provisions and on the ambit of its operation as reasonably construed. If so judged it passes the test of reasonableness, possibility of the powers conferred being improperly used is no ground for pronouncing the law itself invalid and similarly if the law properly interpreted and tested in the light of the requirements set out in Part III of the Constitution does not pass the test it cannot be pronounced valid merely because it is administered in a manner which might not conflict with the constitutional requirements." (at page 825)"*

[Emphasis supplied]

153. We were apprised by the learned Additional Solicitor General during the course of the hearing that the Customs department has been following the protocol suggested in ***Mangali Impex*** (*supra*) since 1999. Further, no substantial empirical evidence of the misuse of Section 28(11) which was enacted over a decade ago, was presented by the parties. Therefore, we are inclined to accept the policy of the Customs department that once a show cause notice is issued, the jurisdiction of other empowered proper officers shall be excluded for such notice. We find that such policy acts as a sufficient safeguard against the apprehension of chaos or confusion or misuse.
154. Thus, we are of the considered view that the enactment of sub-section (11) of Section 28 cures the defect pointed out in ***Sayed Ali*** (*supra*) and the judgment in ***Mangali Impex*** (*supra*) deserves to be set aside.
155. It follows from the above discussion that sub-section (11) of Section 28 is constitutionally valid, and its application is not limited to the period between 08.04.2011 and 16.09.2011.
156. For the reasons in the foregoing paragraphs, we hold that the Bombay High Court judgment in ***Sunil Gupta*** (*supra*) lays down the correct position of law, whereas the Delhi High Court decision in ***Mangali Impex*** (*supra*) is incorrect and is consequently set aside.

**xii. Amendments made by the Finance Act, 2022**

157. The third cluster of the present batch of cases relates to the challenge to the constitutional validity of Sections 86, 87, 88, 94 and 97 of the

**Digital Supreme Court Reports**

Finance Act, 2022 respectively. We take this opportunity to consider this issue as the constitutional validity of the said provisions has been challenged with specific reference to the findings made in *Canon India* (*supra*), which is the judgment under review herein.

158. The validation amendment *vide* Section 97 has been challenged before this Court specifically in **WP (C) 526 of 2022** titled *Daikin Air Conditioning India Pvt. Ltd. v. Union of India*. The respondent herein has canvassed the following grounds for declaring the provision unconstitutional on the touchstone of Article 14 of the Constitution:

- (i) The Finance Act, 2022 does not cure the defect pointed out in *Canon India* (*supra*) and no notification or amendment of law deeming DRI officers to be the proper officers would cure the defect of ouster of jurisdiction of DRI once the original act of assessment has been undertaken by a different group of officers. The Finance Act, 2022 is manifestly arbitrary as no attempt has been made to cure the defect highlighted in *Canon India* (*supra*).
- (ii) This Court in *Canon India* (*supra*) made a determination of fact that the DRI officers did not have jurisdiction to perform functions under Section 28 of the Act, 1962. Such judicial determination of fact relating to actual exercise of jurisdiction cannot be retrospectively overruled.
- (iii) The legislature has selectively adhered to the legal findings made in *Canon India* (*supra*) only for future actions by enactment of Section 110AA and has proceeded to ignore the findings for past show cause notices by validating the same *vide* Section 97 of the Finance Act, 2022. Such a distinction creates two classes of assessee without any reasonable basis for this differentiation.
- (iv) Section 97 of the Finance Act, 2022 fails the test of proportionality as it is a sweeping validation of all acts under the chapters specified in the section and does not provide certainty to the assessee as to which rights have been abrogated.
- (v) The writ petitioner in the **WP (C) No. 520 of 2022** titled *Dish TV India Ltd. v. Union of India and Ors.* has also challenged the application of Section 97 on the ground that Section 97(iii) of the Finance Act, 2022 gives the amendments made to Sections 2, 3 and 5 retrospective effect which would make sub-sections (4) and (5) of Section 5 applicable to the show cause notices issued

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

in the past. It is the case of the writ petitioner that Customs Notifications Nos. 44/2011 dated 06.07.2011 and 40/2012 dated 02.05.2012 do not in any way satisfy the mandatory and salutary criteria laid down in Sections 5(4) and 5(5).

159. From the grounds summarized above, we find that the writ petitioners have challenged the constitutionality of the validation of past actions by Section 97 of the Finance Act, 2022. Therefore, we shall limit our ruling to this provision alone.
160. It is a settled position of law that the legislature is empowered to enact validating legislations to validate earlier acts declared illegal and unconstitutional by courts by removing the defect or lacuna which led to the invalidation of the law. With the removal of the defect or lacuna resulting in the validation of any act held invalid by a competent court, the act may become valid, if the validating law is lawfully enacted.
161. This Court in the case of *Empire Industries Ltd. v. Union of India* reported in (1985) 3 SCC 314 observed that:

*“51. In the view we have taken of the expression “manufacture”, the concept of process being embodied in certain situation in the idea of manufacture, the impugned legislation is only making “small repairs” and that is a permissible mode of legislation. In 73rd vol. of Harvard Law Review p. 692 at p. 795, it has been stated as follows:*

***“It is necessary that the Legislature should be able to cure inadvertent defects in statutes or their administration by making what has been aptly called “small repairs”. Moreover, the individual who claims that a vested right has arisen from the defect is seeking a windfall since had the legislature’s or administrator’s action had the effect it was intended to and could have had, no such right would have arisen. Thus, the interest in the retroactive curing of such a defect in the administration of government outweighs the individual’s interest in benefiting from the defect .... The Court has been extremely reluctant to override the legislative judgment as to the necessity for retrospective taxation, not only because of***

## Digital Supreme Court Reports

*the paramount governmental interest in obtaining adequate revenues, but also because taxes are not in the nature of a penalty or a contractual obligation but rather a means of apportioning the costs of government among those who benefit from it..."*

**[Emphasis supplied]**

162. This Court has laid down the tests for determining whether a validating law is enacted within permissible limits in the case of [Indian Aluminium Company Co. vs. State of Kerala](#) reported in (1996) 7 SCC 637 and the relevant observations therein are reproduced below:

**"56. From a resume of the above decisions the following salient principles would emerge:**

...

**(3) In a democracy governed by rule of law, the Legislature exercises the power under Articles 245 and 246 and other companion Articles read with the entries in the respective Lists in the Seventh Schedule to make the law which includes power to amend the law.**

**(4) The Court, therefore, need to carefully scan the law to find out: (a) whether the vice pointed out by the Court and invalidity suffered by previous law is cured complying with the legal and constitutional requirements; (b) whether the Legislature has competence to validate the law; (c) whether such validation is consistent with the rights guaranteed in Part III of the Constitution.**

**(5) The Court does not have the power to validate an invalid law or to legalise impost of tax illegally made and collected or to remove the norm of invalidation or provide a remedy. These are not judicial functions but the exclusive province of the Legislature. Therefore, they are not an encroachment on judicial power.**

**(6) In exercising legislative power, the Legislature by mere declaration, without anything more, cannot directly overrule, revise or override a judicial decision. It can render judicial decisions ineffective by enacting valid law on the topic within its legislative field,**

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

*fundamentally altering or changing its character retrospectively. The changed or altered conditions are such that the previous decision would not have been rendered by the Court, if those conditions had existed at the time of declaring the law as including power to amend the law.* It is also empowered to give effect to retrospective legislation with a deeming date or with effect from a particular date.”

**[Emphasis supplied]**

163. We shall now proceed to determine whether the enactment of Section 97 of the Finance Act, 2022 fulfils the tests laid down by this Court for a validation Act to be legally sustainable. The first leg of such determination would be to satisfy ourselves as to whether Section 97 cures the defect pointed out by this Court in *Canon India* (*supra*). In this respect, the following aspects are relevant:

a) The Coordinate Bench in *Canon India* (*supra*) observed that:

*“14. It is well known that when a statute directs that the things be done in a certain way, it must be done in that way alone. As in this case, when the statute directs that “the proper officer” can determine duty not levied/not paid, it does not mean any proper officer but that proper officer alone. We find it completely impermissible to allow an officer, who has not passed the original order of assessment, to re-open the assessment on the grounds that the duty was not paid/not levied, by the original officer who had decided to clear the goods and who was competent and authorised to make the assessment. The nature of the power conferred by Section 28(4) to recover duties which have escaped assessment is in the nature of an administrative review of an act. The section must therefore be construed as conferring the power of such review on the same officer or his successor or any other officer who has been assigned the function of assessment. In other words, an officer who did the assessment, could only undertake re-assessment [which is involved in Section 28(4)]”*

**[Emphasis supplied]**

**Digital Supreme Court Reports**

- b) According to *Canon India* (*supra*), only “the proper officer” empowered to undertake the exercise of assessment or re-assessment under Section 17 in a jurisdictional area can perform the functions of “the proper officer” under Section 28 of the Act, 1962 as the exercise involved in Section 28 is the re-assessment of duty. The defect pointed out by the Court in *Canon India* (*supra*) is that the DRI officers were not “the proper officers” who undertook the exercise of assessment under Section 17. Hence, they lacked the jurisdiction to issue show cause notices under Section 28. The reasoning given by the Court was that any other reading of the expression “proper officers” would lead to a multiplicity of proper officers competent to perform functions under Section 28, which would result in the perpetuation of chaos and confusion as pointed out in *Sayed Ali* (*supra*).
- c) However, the apprehension expressed is unfounded in our opinion especially in context of the Customs department’s policy of exclusion of jurisdiction of other competent proper officers once a particular proper officer empowered to issue a show cause notice under Section 28 has issued it. Such a policy acts as an adequate safeguard in our view.
- d) We find that the ouster of jurisdiction of DRI to issue show cause notices under Section 28 once an assessment has been done under Section 17 is not a defect at all in light of Notification No. 44/2011 dated 06.07.2011 and new Section 17 as amended by the Finance Act, 2011. We have already recorded a finding in the foregoing segments of this judgment that these facts were not considered in *Canon India* (*supra*) and therefore, become the basis of the review petition herein.
- e) Notification No. 44/2011 dated 06.07.2011 specifically assigned the functions of the proper officers under Sections 17 and 28 to DRI officers. Such assignment of functions of assessment is sufficient for the DRI officers to fall in the category of “any other officer who has been assigned the function of assessment” as mentioned in *Canon India* (*supra*).
- f) Furthermore, as discussed previously, the functions of assessment and re-assessment under Section 17 and recovery

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

of duty under Section 28 are distinct. *Canon India* (*supra*) held erroneously that Section 28(4) involves the function of re-assessment. The function of recovery of short-levy, non-levy, part-paid, non-paid and erroneous refund under Section 28 is not the same as the assessment or re-assessment of the bill(s) of entry. It necessarily has to be a process subsequent to the completion of functions under Section 17. Further, such function of determining duty to be recovered requires application of judicial mind and therefore, cannot be an administrative review of an act. This is especially so after the introduction of self-assessment in Section 17 *vide* the Finance Act, 2011.

- g) Therefore, the validating provision under Section 97 of the Finance Act, 2022 is a mere surplusage with respect to validation of the show cause notices issued by DRI officers under Section 28. It cannot be challenged on the ground that it does not cure the defect pointed out in *Canon India* (*supra*) when no defect can be made out therein as a result of this review petition.
164. The contention that Section 97 could not have overruled the finding of fact relating to the actual exercise of jurisdiction in *Canon India* (*supra*) is untenable for the following reasons:
- The argument that once a particular officer has exercised the function of assessment, it is a jurisdictional fact that has occurred to the exclusion of all other groups in the Customs Department and therefore, only that officer or his superiors, who had undertaken assessment under Section 17 in the first place, shall have the jurisdiction to issue notices for recovery of duty under Section 28, does not hold water.
  - As discussed above, the functions of assessment and re-assessment under Section 17 and the recovery of duty under Section 28 are distinct. Therefore, the exercise of functions under Section 17 can only act as a “jurisdictional fact” for the purpose of excluding the jurisdiction of other proper officers empowered under that section for the exercise of the rest of the functions specified therein. Similarly, the exercise of the function of issuing show cause notices under Section 28 by a particular proper officer serves as a jurisdictional fact which would exclude the jurisdiction of other proper officers empowered under Section 28.

**Digital Supreme Court Reports**

- (c) ***Canon India* (supra)** proceeded on an erroneous assumption that the jurisdiction of the proper officer under Sections 17 and 28 is linked. This is due to the erroneous understanding of the provisions of Act, 1962 that functions under Section 28 involve re-assessment.
- (d) Therefore, the very basis of the determination of jurisdictional fact for exercise of functions under Section 28 has been clarified by us. Thus, we are of the considered view that the challenge to Section 97, on the ground of inability of a validating Act to overrule a finding of fact, is unfounded and liable to be dismissed.

165. While challenging the constitutional validity, it was argued that the insertion of Section 110AA for future actions while validating the past actions (which in words of the writ petitioners was contrary to the intent of Section 110AA) does not create a reasonable classification as there is no intelligible differentia. It was further argued that Section 97 is manifestly arbitrary and fails the test of proportionality under Article 14. In our view, these submissions are not tenable in law for the following reasons:

- a) It is a settled position of law that matters of economic policy are best left to the wisdom of the legislature and in policy matters, the accepted principle is that the courts should not interfere. This principle has been laid down in the case of ***Bhavesh D. Parish v. Union and India*** reported in (2000) 5 SCC 471, wherein this Court held that:

*"26. The services rendered by certain informal sectors of the India economy could not be belittled. However, in the path of economic progress, if the informal system was sought to be replaced by a more organised system, capable of better regulation and discipline, then this was an economic philosophy reflected by the legislation in question. Such a philosophy might have its merits and demerits. But these were matters of economic policy. They are best left to the wisdom of the legislature and in policy matters the accepted principle is that the courts should not interfere. Moreover in the context of the changed economic*

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

**scenario the expertise of people dealing with the subject should not be lightly interfered with.**

The consequences of such interdiction can have large-scale ramifications and can put the clock back for a number of years. The process of rationalisation station of the infirmities in the economy can be put in serious jeopardy and, therefore, it is necessary that while dealing with economic legislations, this Court, while not jettisoning its jurisdiction to curb arbitrary action or unconstitutional legislation, should interfere only in those few cases where the view reflected in the legislation is not possible to be taken at all.”

[Emphasis supplied]

- b) A Constitution Bench of this Court in the case of **Shri Prithvi Cotton Mills Ltd. and Ors. v. Broach Borough Municipality & Ors.**, reported in (1969) 2 SCC 283 set out the modus of validation of tax through validating statutes and observed as follows:

“4. ...

Validation of a tax so declared illegal may be done only if the grounds of illegality or invalidity are capable of being removed and are in fact removed and the tax thus made legal. **Sometimes this is done by providing for jurisdiction where jurisdiction had not been properly invested before. Sometimes this is done by re-enacting retrospectively a valid and legal taxing provision and then by fiction making the tax already collected to stand under the re-enacted law. Sometimes the Legislature gives its own meaning and interpretation of the law under which tax was collected and by legislative fiat makes the new meaning binding upon courts.** The Legislature may follow any one method or all of them and while it does so it may neutralise the effect of the earlier decision of the court which becomes ineffective after the change of the law. Whichever method is adopted it must be

**Digital Supreme Court Reports**

*within the competence of the legislature and legal and adequate to attain the object of validation. If the Legislature has the power over the subject-matter and competence to make a valid law, it can at any time make such a valid law and make it retrospectively so as to bind even past transactions. The validity of a Validating Law, therefore, depends upon whether the Legislature possesses the competence which it claims over the subject-matter and whether in making the validation it removes the defect which the courts had found in the existing law and makes adequate provisions in the Validating Law for a valid imposition of the tax."*

[Emphasis supplied]

- c) We are of the opinion that the introduction of Section 110AA was a valid exercise of legislative power to amend the provisions of the Act, 1962 and it was done with the objective of following the principle of comity to give effect to the suggestions of this Court in *Sayed Ali* (*supra*) and *Canon India* (*supra*). However, we clarify that a change in law, which the legislature was competent to enact, having prospective application cannot be a ground for the writ petitioners to question the sanctity and wisdom of the legislature in following a different mechanism to assess/re-assess bills of entry(s) and recover duty under Sections 17 and 28 respectively.
- d) No occasion arises for us to discuss the validity of Section 97 with respect to the test of reasonable classification as the introduction of Section 110AA does not create a class of assessees to whom the law would apply differentially to, at the same point in time. The differential mechanism for the exercise of functions under Section 28 is not for a different class of assessees but rather for the show cause notices issued during different periods of time that is, prior to the Finance Act, 2022 and after its enactment.
- e) On the strength of such reasoning, we are of the view that Section 97 is not manifestly arbitrary and discriminatory and is not disproportional to the object sought to be achieved by it.

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

166. It is also the contention of the writ petitioners that Section 97(iii) gives retrospective effect to the amendments made in Section 5 thereby making previous show cause notices subject to the provisions of the newly inserted provisions, i.e., sub-sections (4) and (5) of Section 5. It is their case that the previous notifications empowering DRI officers to issue show cause notices under Section 28 do not fulfil the mandate of Section 5(4) as they cannot be placed in any of the criteria envisaged therein. We find no merit in the said contention:

- a) Section 5(4) reads as follows:

*"(4) In specifying the conditions and limitations referred to in sub-section (1), and in assigning functions under sub-section (1A), the Board **may** consider any one or more of the following criteria, including, **but not limited to***

- (a) *territorial jurisdiction;*
- (b) *persons or class of persons;*
- (c) *goods or class of goods;*
- (d) *cases or class of cases;*
- (e) *computer assigned random assignment;*
- (f) ***any other criterion as the Board may, by notification, specify."***

[Emphasis supplied]

- b) From a plain reading of the above-referred sub-section, we find that the Board has been entrusted with wide powers in respect of determination of criteria and the use of the word "may" is indicative of the Board's discretion in this regard. Therefore, the writ petitioners are wrong in construing the sub-section as a mandatory provision for the purpose of invalidation of the show cause notices issued.
- c) A purposive interpretation of Section 97 indicates that clause (i) therein is the object of its enactment and clause (iii) is an extension thereof to further clarify that any deficiencies in law under Sections 2, 3 and 5 of the Act, 1962 as they stood prior to the Finance Act, 2022 would not be an obstacle to the validating act under clause (i).

**Digital Supreme Court Reports**

- d) Therefore, the retrospective application of Sections 2, 3 and 5 of the Act, 1962 respectively is not stand-alone but is restricted to achievement of the ultimate object of validation under clause (i) of Section 97. Any interpretation of the amended Sections 2, 3 and 5 arising from the retrospective application thereof, which is contrary to or not in furtherance of the Section 97(i) would not hold good in law.
- e) This Court in the case of Vivek Narayan v. Union of India reported in **(2023) 3 SCC 1** has held that:

*"140. The principle of purposive interpretation has also been expounded through a catena of judgments of this Court. A Constitution Bench of this Court in M. Pentiah v. Muddala Veeramallappa [M. Pentiah v. Muddala Veeramallappa (1961) 2 SCR 295 : AIR 1961 SC 1107] was considering a question, as to whether the term prescribed in Section 34 would apply to a member of a "deemed" committee under the provisions of the Hyderabad District Municipalities Act, 1956. An argument was put forth that, upon a correct interpretation of the provisions of Section 16, the same would be permissible. Rejecting the said argument, K. Subba Rao, J., observed thus : (AIR pp. 1110-11, para 6)*

*"6. Before we consider this argument in some detail, it will be convenient at this stage to notice some of the well-established rules of construction which would help us to steer clear of the complications created by the Act. Maxwell on the Interpretation of Statutes, 10th Edn., says at p. 7 thus:*

**'... if the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate**

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

**only for the purpose of bringing about an effective result.'..."**

[Emphasis supplied]

- f) A seven-Judge Bench of this Court in the case of Abhiram Singh v. C.D. Commachen (Dead) By Lrs. & Ors., reported in (2017) 2 SCC 629 has held that:

**"36. The conflict between giving a literal interpretation or a purposive interpretation to a statute or a provision in a statute is perennial. It can be settled only if the draftsman gives a long-winded explanation in drafting the law but this would result in an awkward draft that might well turn out to be unintelligible. The interpreter has, therefore, to consider not only the text of the law but the context in which the law was enacted and the social context in which the law should be interpreted. This was articulated rather felicitously by Lord Bingham of Cornhill in R. (Quintavalle) v. Secy. of State for Health [R. (Quintavalle) v. Secy. of State for Health, 2003 UKHL 13 : (2003) 2 AC 687 : (2003) 2 WLR 692 (HL)] when it was said : (AC p. 695 C-H, paras 8-9)**

**"8. The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach not only encourages immense prolixity in drafting, since the draftsman will feel obliged to provide expressly for every contingency which may possibly arise. It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute. Every statute other than**

**Digital Supreme Court Reports**

***a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."***

[Emphasis supplied]

- g) Thus, we are of the opinion that the retrospective application of Section 5(4) cannot be the basis for the challenge to the validity of Section 97 of the Finance Act, 2022.
167. For the foregoing reasons, we hold that the challenge to the constitutional validity of the Finance Act, 2022 and more particularly Section 97 thereof, being unfounded should fail. We say so more particularly in light of the judgment in the review of Canon India (*supra*) and the various judicial pronouncements of this Court. Therefore, we hold that Section 97 of the Finance Act, 2022 is constitutionally valid and the challenge to it is rejected accordingly.

**F. CONCLUSION**

168. In view of the aforesaid discussion, we conclude that:

- (i) DRI officers came to be appointed as the officers of customs *vide* Notification No. 19/90-Cus (N.T.) dated 26.04.1990 issued by the Department of Revenue, Ministry of Finance, Government of India. This notification later came to be superseded by Notification No. 17/2002 dated 07.03.2002 issued by the Department of Revenue, Ministry of Finance, Government of India, to account for administrative changes.
- (ii) The petition seeking review of the decision in Canon India (*supra*) is allowed for the following reasons:
- a. Circular No. 4/99-Cus dated 15.02.1999 issued by the Central Board of Excise & Customs, New Delhi which empowered the officers of DRI to issue show cause notices

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

under Section 28 of the Act, 1962 as well as Notification No. 44/2011 dated 06.07.2011 which assigned the functions of the proper officer for the purposes of Sections 17 and 28 of the Act, 1962 respectively to the officers of DRI were not brought to the notice of this Court during the proceedings in *Canon India* (*supra*). In other words, the judgment in *Canon India* (*supra*) was rendered without looking into the circular and the notification referred to above thereby seriously affecting the correctness of the same.

- b. The decision in *Canon India* (*supra*) failed to consider the statutory scheme of Sections 2(34) and 5 of the Act, 1962 respectively. As a result, the decision erroneously recorded the finding that since DRI officers were not entrusted with the functions of a proper officer for the purposes of Section 28 in accordance with Section 6, they did not possess the jurisdiction to issue show cause notices for the recovery of duty under Section 28 of the Act, 1962.
  - c. The reliance placed in *Canon India* (*supra*) on the decision in *Sayed Ali* (*supra*) is misplaced for two reasons – *first*, *Sayed Ali* (*supra*) dealt with the case of officers of customs (Preventive), who, on the date of the decision in *Sayed Ali* (*supra*) were not empowered to issue show cause notices under Section 28 of the Act, 1962 unlike the officers of DRI; and *secondly*, the decision in *Sayed Ali* (*supra*) took into consideration Section 17 of the Act, 1962 as it stood prior to its amendment by the Finance Act, 2011. However, the assessment orders, in respect of which the show cause notices under challenge in *Canon India* (*supra*) were issued, were passed under Section 17 of the Act, 1962 as amended by the Finance Act, 2011.
- (iii) This Court in *Canon India* (*supra*) based its judgment on two grounds: (1) the show cause notices issued by the DRI officers were invalid for want of jurisdiction; and (2) the show cause notices were issued after the expiry of the prescribed limitation period. In the present judgment, we have only considered and reviewed the decision in *Canon India* (*supra*) to the extent that it pertains to the first ground, that is, the jurisdiction of the DRI officers to issue show cause notices under Section 28. We clarify that the observations made by this Court in *Canon India*

**Digital Supreme Court Reports**

(*supra*) on the aspect of limitation have neither been considered nor reviewed by way of this decision. Thus, this decision will not disturb the findings of this Court in *Canon India* (*supra*) insofar as the issue of limitation is concerned.

- (iv) The Delhi High Court in *Mangali Impex* (*supra*) observed that Section 28(11) could not be said to have cured the defect pointed out in *Sayed Ali* (*supra*) as the possibility of chaos and confusion would continue to subsist despite the introduction of the said section with retrospective effect. In view of this, the High Court declined to give retrospective operation to Section 28(11) for the period prior to 08.04.2011 by harmoniously construing it with Explanation 2 to Section 28 of the Act, 1962. We are of the considered view that the decision in *Mangali Impex* (*supra*) failed to take into account the policy being followed by the Customs department since 1999 which provides for the exclusion of jurisdiction of all other proper officers once a show cause notice by a particular proper officer is issued. It could be said that this policy provides a sufficient safeguard against the apprehension of the issuance of multiple show cause notices to the same assessee under Section 28 of the Act, 1962. Further, the High Court could not have applied the doctrine of harmonious construction to harmonise Section 28(11) with Explanation 2 because Section 28(11) and Explanation 2 operate in two distinct fields and no inherent contradiction can be said to exist between the two. Therefore, we set aside the decision in *Mangali Impex* (*supra*) and approve the view taken by the High Court of Bombay in the case of *Sunil Gupta* (*supra*).
- (v) Section 97 of the Finance Act, 2022 which, *inter-alia*, retrospectively validated all show cause notices issued under Section 28 of the Act, 1962 cannot be said to be unconstitutional. It cannot be said that Section 97 fails to cure the defect pointed out in *Canon India* (*supra*) nor is it manifestly arbitrary, disproportionate and overbroad, for the reasons recorded in the foregoing parts of this judgment. We clarify that the findings in respect of the *vires* of the Finance Act, 2022 is confined only to the questions raised in the petition seeking review of the judgment in *Canon India* (*supra*). The challenge to the Finance Act, 2022 on grounds other than those dealt with herein, if any, are kept open.

**Commissioner of Customs v. M/s Canon India Pvt. Ltd.**

- (vi) Subject to the observations made in this judgment, the officers of Directorate of Revenue Intelligence, Commissionerates of Customs (Preventive), Directorate General of Central Excise Intelligence and Commissionerates of Central Excise and other similarly situated officers are proper officers for the purposes of Section 28 and are competent to issue show cause notice thereunder. Therefore, any challenge made to the maintainability of such show cause notices issued by this particular class of officers, on the ground of want of jurisdiction for not being the proper officer, which remain pending before various forums, shall now be dealt with in the following manner:
- a. Where the show cause notices issued under Section 28 of the Act, 1962 have been challenged before the High Courts directly by way of a writ petition, the respective High Court shall dispose of such writ petitions in accordance with the observations made in this judgment and restore such notices for adjudication by the proper officer under Section 28.
  - b. Where the writ petitions have been disposed of by the respective High Court and appeals have been preferred against such orders which are pending before this Court, they shall be disposed of in accordance with this decision and the show cause notices impugned therein shall be restored for adjudication by the proper officer under Section 28.
  - c. Where the orders-in-original passed by the adjudicating authority under Section 28 have been challenged before the High Courts on the ground of maintainability due to lack of jurisdiction of the proper officer to issue show cause notices, the respective High Court shall grant eight weeks' time to the respective assessee to prefer appropriate appeal before the Customs Excise and Service Tax Appellate Tribunal (CESTAT).
  - d. Where the writ petitions have been disposed of by the High Court and appeals have been preferred against them which are pending before this Court, they shall be disposed of in accordance with this decision and this Court shall grant eight weeks' time to the respective assessee to prefer appropriate appeals before the CESTAT.

**Digital Supreme Court Reports**

- e. Where the orders of CESTAT have been challenged before this Court or the respective High Court on the ground of maintainability due to lack of jurisdiction of the proper officer to issue show cause notices, this Court or the respective High Court shall dispose of such appeals or writ petitions in accordance with the ruling in this judgment and restore such notices to the CESTAT for hearing the matter on merits.
  - f. Where appeals against the orders-in-original involving issues pertaining to the jurisdiction of the proper officer to issue show cause notices under Section 28 are pending before the CESTAT, they shall now be decided in accordance with the observations made in this decision.
169. In view of the aforesaid, we allow the Review Petition No. 400/2021 titled ***Commissioner of Customs v. M/s Canon India Pvt. Ltd.*** and the connected Review Petition Nos. 401/2021, 402/2021 and 403/2021 insofar as the issue of jurisdiction of the proper officer to issue show cause notice under Section 28 is concerned. As discussed, the findings of this Court in ***Canon India*** (*supra*) in respect of the show cause notices having been issued beyond the limitation period remain undisturbed.
170. We set aside the decision of the High Court of Delhi rendered in the case of ***Mangali Impex*** (*supra*) and uphold the view taken by the High Court of Bombay in the case of ***Sunil Gupta*** (*supra*). We also uphold the constitutional validity of Section 97 of the Finance Act, 2022.
171. The Registry shall take steps to list the connected civil appeals and writ petitions before the appropriate Bench and they shall be disposed in terms of the observations made in this judgment.
172. The review petitions are accordingly disposed of.

*Result of the case:* Review petitions disposed of.

<sup>†</sup>*Headnotes prepared by:* Nidhi Jain

**M/s Bajaj Alliance General Insurance Co. Ltd.**

v.

**Rambha Devi & Ors.**

(Civil Appeal No. 841 of 2018)

06 November 2024

**[Dr Dhananjaya Y Chandrachud, CJI, Hrishikesh Roy,\*  
Pamidighantam Sri Narasimha, Pankaj Mithal and  
Manoj Misra, JJ.]**

#### **Issue for Consideration**

- (i) Whether a driver holding a Light Motor Vehicle (LMV) license (for vehicles with a gross vehicle weight of less than 7,500 kgs) as per Section 10(2)(d), which specifies 'Light Motor Vehicle', can operate a 'Transport Vehicle' without obtaining specific authorization under Section 10(2)(e) of the MV Act, specifically for the 'Transport Vehicle' class; (ii) whether the second part of Section 3(1) which emphasizes the necessity of a driving license for a 'Transport Vehicle' overrides the definition of LMV in Section 2(21) of MV Act? Is the definition of LMV contained in Section 2(21) of MV Act unrelated to the licensing framework under the MV Act and the MV Rules; (iii) whether the additional eligibility criteria prescribed in the MV Act and MV Rules for 'transport vehicles' would apply to those who are desirous of driving vehicles weighing below 7,500 kgs and have obtained a license for LMV class under Section 10(2)(d) of the MV Act; (iv) what is the effect of the amendment made by virtue of Act 54 of 1994 w.e.f. 14.11.1994 which substituted four classes under clauses (e) to (h) in Section 10 with a single class of 'Transport Vehicle' in Section 10(2)(e); (v) whether the decision in Mukund Dewangan (2017) is per incuriam for not noticing certain provisions of the MV Act and MV Rules.

#### **Headnotes†**

**Motor Vehicle Act, 1988 – ss.10(2)(d), 10(2)(e), 2(21), 2(47) – On reference, 3-Judge Bench in Mukund Dewangan v. Oriental Insurance Co. Ltd. [2017] 7 SCR 765 [Mukund Dewangan (2017)] held that the holder of a license for a 'Light Motor Vehicle' (LMV) class need not have a separate endorsement to drive a 'transport vehicle' if it falls under the 'Light Motor Vehicle'**

\* Author

**Digital Supreme Court Reports**

class i.e. below 7,500 kgs – However, two-judge Bench in *M/s Bajaj Alliance General Insurance Co. Ltd. v. Rambha Devi & Ors.* (2019) 12 SCC 816 observed that [Mukund Dewangan \(2017\)](#) did not consider certain important provisions of the MV Act and MV Rules, referred the matter to a larger bench of three judges for reconsideration of the ratio in [Mukund Dewangan \(2017\)](#) – Said three judge Bench further referred the matter to a larger bench of five judges – A driver holding a Light Motor Vehicle (LMV) license for vehicles with a gross vehicle weight of less than 7,500 kgs, if can operate a ‘Transport Vehicle’ without obtaining specific authorization therefor:

**Held:** Yes – For licensing purposes, LMVs and Transport Vehicles are not entirely separate classes and both overlap – Thus, a driver holding a license for L MV class u/s.10(2)(d) for vehicles with a gross vehicle weight under 7,500 kg, is permitted to operate a ‘Transport Vehicle’ without needing additional authorization u/s.10(2)(e) specifically for the ‘Transport Vehicle’ class – In the absence of any obtrusive omission, the decision in [Mukund Dewangan \(2017\)](#) is not per incuriam even if did not consider certain provisions of the MV Act and MV Rules and is upheld. [Paras 131(I), (II)]

**Motor Vehicle Act, 1988 – ss.2(10), 3, 10(e) to (h), Chapter II-s.10(2)(e) – Central Motor Vehicles Rules, 1989 – r.14 – Form 4 – ‘Transport Vehicle’ in s.3 – Purpose – 1994 amendment substituted four classes of ‘medium goods vehicle’, ‘medium passenger vehicle’, ‘heavy goods vehicle’, and ‘heavy passenger vehicle’ under clauses (e) to (h) in s.10 with a single class of ‘Transport Vehicle’ in s.10(2)(e) – Effect – Plea of insurance companies that in view of the ‘transport vehicle’ having been specifically mentioned after the amendment, a separate endorsement would be necessary to drive a ‘transport vehicle’ and that even before the 1994 amendment, the second part of s.3 always provided that a separate endorsement would be necessary:**

**Held:** The specific authorization does not mean that a person holding an L MV license which covers ‘Transport vehicle’, would be disentitled to drive a ‘Transport Vehicle’ – The emphasis in the second part of Section 3 is in relation to Medium and Heavy Vehicles in the statutory scheme even prior to the 1994 amendment – Second part of Section 3 pertains to a driving license for those driving ‘medium goods vehicle’, ‘medium passenger vehicle’,

**M/s Bajaj Alliance General Insurance Co. Ltd. v.  
Rambha Devi & Ors.**

‘heavy goods vehicle’, and ‘heavy passenger vehicle’ – Such an interpretation is logical because medium and heavy vehicles would require greater maneuverability and skill as compared to drivers of the LMV class – The subsequent amendment in Section 10 makes this position even clearer – ‘Transport Vehicle’ primarily targets vehicles exceeding 7,500 kgs, for the purpose of license regime – The intention of the legislature was to simplify the licensing framework for larger commercial vehicles and at the same time not interdict a LMV license holder to also drive a transport vehicle – National Insurance Co. Ltd. v. Annappa Irappa Nesaria [2008] 1 SCR 1061 holding that the 1994 amendment had a prospective operation, partially overruled – ‘Transport Vehicle’, does not exclude transport vehicles already classified as ‘LMV’, under Section 10 – Thus, ‘Transport vehicles’ mentioned in Section 10 would cover only those vehicles whose gross vehicle weight is above 7,500 kgs – Such an interpretation aligns with the broader purpose of the amendments and ensures that the licensing regime remains efficient and practical for vehicle owners and drivers – Section 10 is to be read with Section 2(21) which defines a ‘Light Motor Vehicle’. [Paras 41, 42, 44.3, 45]

**Motor Vehicle Act, 1988 – Central Motor Vehicles Rules, 1989 – Whether the additional eligibility criteria prescribed in the MV Act and MV Rules for ‘transport vehicles’ would apply to those who are desirous of driving vehicles weighing below 7,500 kgs:**

**Held:** No – The additional eligibility criteria specified in the MV Act and MV Rules will apply only to such vehicle ('medium goods vehicle', 'medium passenger vehicle', 'heavy goods vehicle' and 'heavy passenger vehicle'), whose gross weight exceeds 7,500 Kg – This interpretation on how the licensing regime is to operate for drivers under the statutory scheme will not compromise the road safety concerns and will also effectively address the livelihood issues for drivers operating Transport Vehicles in legally operating “Transport vehicles” (below 7,500 Kg), with their LMV driving license. [Paras 131(III), 130]

**Motor Vehicle Act, 1988 – ss.3(1), 2(21), 10 – Harmonious construction – Various provisions were cited to contend that the legislature had placed LMVs and Transport Vehicles under separate classes and that the holder of a LMV license cannot drive a Transport Vehicle without a separate endorsement – Whether the second part of s.3(1) which emphasizes the**

**Digital Supreme Court Reports**

**necessity of specific requirement of a driving license for a ‘Transport Vehicle’ overrides the definition of LMV in s.2(21) :**

**Held:** No – Section 3 is not a special provision overriding the strict and emphatic definition of LMV, given in Section 2(21) and the separate class of ‘Light Motor Vehicle’ provided in Section 10 – Section 2(21) uses the term ‘means’ and there is an affirmation of certainty in the wordings of the definition and it is to be recognized *sensu stricto* in a technical sense and must not be understood loosely – Section 3 does not disentitle the LMV license holders to drive transport vehicles of the permissible weight category – To say otherwise would be incompatible and would render the strict definition clause, sterile and a ‘dead letter’ – In view of a harmonious construction of both sections, for LMV licence holders, a separate endorsement under ‘Transport Vehicle’ class would be unnecessary for driving LMV class of vehicles – Additional licensing requirements will have no application for the LMV class of vehicles but will be needed only for such ‘Transport Vehicles’, which by virtue of their gross weight fall in the Medium and Heavy category – This construction also fulfills the legislative purpose to ensure road safety – Age restrictions outlined in Section 4, the requirement of a medical certificate, and the criteria under Section 7 should reasonably apply only for the medium and heavy transport vehicles whose gross weight will be above 7500 Kg – A person holding a LMV license is equally competent to drive a Transport Vehicle whose gross weight does not exceed 7,500 kgs – The reference to ‘transport vehicle’ in Section 3(1) and other sections of the Act and Rules apply to only those vehicles which fall beyond the scope of the *sensu stricto* definition under Section 2(21) – This interpretation would ensure that no provision or word is rendered otiose and the licensing regime remains coherent with the legislative intent. [Paras 74, 85]

**Motor Vehicle Act, 1988 – The ratio in Mukund Dewangan v. Oriental Insurance Co. Ltd. [2017] 7 SCR 765 [Mukund Dewangan (2017)], if per incuriam for not noticing inter alia ss.4(1), 7, 14, second proviso to s.15, ss.180, 181 of the Motor Vehicle Act, 1988 and Central Motor Vehicles Rules, 1989:**

**Held:** No – Answering the reference, 3 Judge Bench in Mukund Dewangan (2017) analysed key provisions of the Act and Rules and rightly concluded inter alia that the holder of a license for a

**M/s Bajaj Alliance General Insurance Co. Ltd. v.  
Rambha Devi & Ors.**

‘Light Motor Vehicle’ class need not have a separate endorsement to drive a transport vehicle or omnibus, the gross vehicle weight of which does not exceed 7500 kg or a motor car or tractor or road-roller, the unladen weight of which does not exceed 7500 kg – Though, the judgment did not analyse the provisions that distinguish transport and non-transport vehicles however, the statutory scheme of Motor Vehicle Act is more nuanced than the simple weight-based distinction made in the said judgment – The Court also failed to notice ss.31(2) and (3) which specify ‘Transport’ and ‘Non-Transport’ vehicles however, the judgment gave due consideration to the important statutory provisions – The overlooked provisions would not alter the eventual pronouncement – There are no glaring error or omission that would alter the outcome of the case. [Paras 113-115]

**Motor Vehicle Act, 1988 – s.2(21) – Light Motor Vehicle (LMV)  
‘means’ a ‘Transport Vehicle’ – ‘means’ – Meaning:**

**Held:** As per the definition clause of LMV, it inter-alia ‘means’ a ‘Transport Vehicle’ – The use of the word ‘means’ suggests specifics – When the statute says that a word or a phrase shall “mean” (instead of say “include”), it is quite certainly a ‘hard and fast’, strict and exhaustive definition – There is no distinction between the two classes of vehicles – Such a definition is an explicit statement of the full connotation of a term and there is no ambiguity. [Para 32]

**Interpretation of Statutes – Importance of definition sections – Discussed.**

**Motor Vehicle Act, 1988 – Purpose and objective – Discussed.**

**Interpretation of Statutes – Motor Vehicle Act, 1988 – Social welfare legislation – Interpretation:**

**Held:** 1988 Act is fundamentally a social welfare legislation providing a mechanism for victims and their families to seek compensation for loss or injury resulting from road accidents – Also, its provisions regarding licensing and penalties for traffic violations serve the broader purpose of promoting road safety – Thus, any interpretation of its provisions must ensure a mechanism for timely compensation and relief for victims of road accidents and also promote overall road safety. [Para 15]

## Digital Supreme Court Reports

### **Motor Vehicle Act, 1988 – s.2(21) – Strict interpretation of:**

**Held:** A light motor vehicle would mean a transport vehicle, omnibus, road roller, tractor, or motor car, provided the weight does not exceed 7,500 kgs. [Para 35]

### **Interpretation of Statutes – Principles of statutory interpretation – Discussed.**

### **Motor Vehicle Act, 1988 – Compensation – Accidents involving ‘transport vehicles’ operated by individuals holding licenses to drive ‘light motor vehicles’ – Payment of claims disputed by insurance companies:**

**Held:** Compensation must not be denied for minor technical breaches of the licensing conditions – The emphasis on ‘Transport Vehicle’ in the licensing scheme has to be understood only in the context of the ‘medium’ and ‘heavy’ vehicles – This harmonious construction also aligns with the objective of the 1994 amendment in Section 10(2) to simplify the licensing procedure – This would prevent insurance companies from taking a technical plea to defeat a legitimate claim for compensation involving an insured vehicle weighing below 7,500 kgs driven by a person holding a driving license of a ‘Light Motor Vehicle’ class. [Paras 76, 126, 127]

### **Judgments – Per incuriam – When:**

**Held:** A decision is per incuriam only when the overlooked statutory provision or legal precedent is central to the legal issue in question and might have led to a different outcome if those overlooked provisions were considered – It must be an inconsistent provision and a glaring case of obtrusive omission – The doctrine of *per incuriam* applies strictly to the *ratio decidendi* and not to *obiter dicta* – If a court doubts the correctness of a precedent, the appropriate step is to either follow the decision or refer it to a larger Bench for reconsideration – It has to be shown that some part of the decision was based on a reasoning which was demonstrably wrong, for applying the principle of per incuriam – In exceptional cases, where by obvious inadvertence or oversight, a judgment fails to notice a plain statutory provision or obligatory authority running counter to the reasoning and result reached, the principle of per incuriam may apply. [Para 111]

### **Motor Vehicle Act, 1988 – Impact of Mukund Dewangan (2017) that allowed Light Motor Vehicle (LMV) license holders to drive**

**M/s Bajaj Alliance General Insurance Co. Ltd. v.  
Rambha Devi & Ors.**

**Transport Vehicles below 7500 Kg, on road safety, if any – Plea of Insurance Companies that if Mukund Dewangan (2017) is not interfered with, unfit drivers will start plying Transport Vehicles putting at risk the lives of thousands of people:**

**Held:** Rejected – No empirical data was produced to show that road accidents in India have increased as a direct result of drivers with LMV license, plying a transport vehicle of LMV class of vehicles whose gross weight is within 7500 Kg – Road safety is indeed an important objective of the MV Act but Court's reasoning must not be founded on unverified assumptions without any empirical data – While the Court is mindful of issues of road safety, the task of crafting policy lies within the domain of the legislature – Court cannot dictate policy decisions or rewrite laws. [Para 117]

**Motor Vehicle Act, 1988 – Whether a driver holding a license for a ‘Light motor vehicle’ can operate a ‘Transport Vehicle’ without obtaining a specific endorsement – Various conflicting judgments for over 25 years:**

**Held:** Judgments in Ashok Gangadhar Maratha, Nagashetty, S. Iyapan and Kulwant Singh holding that a separate endorsement for a ‘transport vehicle’ are not necessary are upheld however, judgments in Prabhu Lal, Roshanben Rahemansha Fakir and Angad Kol which held otherwise are overruled. [Para 96.3]

**Words and Phrases – “per incuriam” – Discussed.**

**Case Law Cited**

*New India Assurance Company v. Prabhu Lal* **[2007] 12 SCR 724** : (2008) 1 SCC 696; *New India Assurance Co. Ltd. v. Roshanben Rahemansha Fakir* **[2008] 8 SCR 328** : (2008) 8 SCC 253; *Oriental Insurance Co. Ltd. v. Angad Kol* **[2009] 2 SCR 695** : (2009) 11 SCC 356 – overruled.

*National Insurance Co. Ltd. v. Annappa Irappa Nesaria* **[2008] 1 SCR 1061** : (2008) 3 SCC 464 – partially overruled.

*Mukund Dewangan v. Oriental Insurance Co. Ltd.* **[2017] 7 SCR 765** : (2017) 14 SCC 663; *Ashok Gangadhar Maratha v. Oriental Insurance Co. Ltd.* **[1999] Supp. 2 SCR 202** : (1999) 6 SCC 620; *Nagashetty v. United India Insurance Co* **[2001] Supp. 1 SCR 656** : (2001) 8 SCC 56; *S. Iyapan v. United India Insurance Co. Ltd* **[2013] 7 SCR 45** : (2013) 7 SCC 62; *Kulwant Singh v. Oriental Insurance Co. Ltd* (2015) 2 SCC 186 – affirmed.

**Digital Supreme Court Reports**

*Mukund Dewangan v. Oriental Insurance Co. Ltd.* [2016] 3 SCR 1075 : (2016) 4 SCC 298; *M/s Bajaj Alliance General Insurance Co. Ltd. v. Rambha Devi & Ors.* (2019) 12 SCC 816; *Bajaj Alliance General Insurance Co. Ltd. v. Rambha Devi* [2023] 12 SCR 241 : (2023) 4 SCC 723; *Bajaj Alliance General Insurance Co. Ltd. v. Rambha Devi* (2024) 1 SCC 818; *Nathi Devi v. Radha Devi Gupta* [2004] Supp. 6 SCR 1141 : (2005) 2 SCC 271; *Aphali Pharmaceuticals Ltd. v. State of Maharashtra* [1989] Supp. 1 SCR 129 : (1989) 4 SCC 378; *Skandia Insurance Co. Ltd. v. Kokilaben Chandravadan* [1987] 2 SCR 752 : AIR 1987 SC 1184; *Sohan Lal Passi v. Sesh Reddy* [1996] Supp. 3 SCR 647 : AIR 1996 SC 2627; *Gurmej Singh S v. Sardar Pratap Singh Kairon* AIR 1960 SC 122; *R S Raghunath v. State of Karnataka* [1991] Supp. 1 SCR 387 : AIR 1992 SC 81; *Union of India v. Elphinstone Spg. and Wvg. Co. Ltd.* [2001] 1 SCR 221 : (2001) 4 SCC 139; *Rajasthan SRTC v. Santosh* [2013] 3 SCR 720 : (2013) 7 SCC 107; *P. Kasilingam v. PSG College of Technology* [1995] 2 SCR 1061 : AIR 1995 SC 1395; *Punjab Land Development and Reclamation Corpn Ltd. v. Presiding Officer, Labour Court* [1990] 3 SCR 111 : (1990) 3 SCC 682; *Sultana Begum v. Prem Chand Jain* [1996] Supp. 9 SCR 707 : 1997 (1) SCC 373; *Lord Herschell LC in Institute of Patent Agents & Ors. v. Joseph Lockwood* 1894 A.C. 347 at 360; *National Insurance Co. Ltd. v. Swaran Singh Jaivir Chand* [1988] Supp. 3 SCR 983 : (1989) 1 SCC 264; *Life Insurance Corporation v. Escorts* [1985] Supp. 3 SCR 909 : 1986 (2) SCC 264; *Bengal Immunity Co. Ltd. v. State of Bihar* AIR 1955 SC 661; *Mamleshwar Prasad v. Kanhaiya Lal* [1975] 3 SCR 834 : (1975) 2 SCC 232; *A.R. Antulay v. R.S. Nayak* [1988] Supp. 1 SCR 1 : (1988) 2 SCC 602; *MCD v. Gurnam Kaur* [1988] Supp. 2 SCR 929 : (1989) 1 SCC 101; *Punjab Land Development & Reclamation Corpn. Ltd. v. Labour Court* [1990] 3 SCR 111 : (1990) 3 SCC 682; *N.Bhargavan Pillai v. State of Kerala* [2004] Suppl. 1 SCR 444 : (2004) 13 SCC 217; *State of M.P. v. Narmada Bachao Andolan* [2011] 11 SCR 678 : (2011) 7 SCC 639; *Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.* [2001] 3 SCR 479 : (2001) 6 SCC 356; *State of Bihar v. Kalika Kuer* [2003] 3 SCR 919 : (2003) 5 SCC 448; *Sundeep Kumar Bafna v. State of Maharashtra* [2014] 4 SCR 486 : (2014) 16 SCC 623; *Shah Faesal v. Union of India* [2020] 3 SCR 1115 : (2020) 4 SCC 1 – referred to.

**M/s Bajaj Alliance General Insurance Co. Ltd. v.  
Rambha Devi & Ors.**

*Powdrill v. Watson (1995) 2 AC 394; Young v. Bristol Aeroplane Co. Ltd. 1944 KB 718 at 729 : (1944) 2 All ER 293 at 300; Lancaster Motor Co. (London) Ltd. v. Bremith Ltd. (1941) 1 KB 675 : (1941) 2 All ER; Bryers v. Canadian Pacific Steamships Ltd. (1957) 1 QB 134 : (1956) 3 All ER 560 (CA) Per Singleton; Canadian Pacific Steamships Ltd. v. Bryers 1958 AC 485 : (1957) 3 All ER 572; A. and J. Mucklow Ltd. v. IRC, 1954 Ch 615 : (1954) 2 All ER 508 (CA); Morelle Ltd. v. Wakeling, (1955) 2 QB 379 : (1955) 1 All ER 708 (CA); Bonsor v. Musicians' Union 1954 Ch 479 : (1954) 1 All ER 822 (CA); Morelle LD v. Wakeling, (1955) 2 QB 379; Gough v. Gough [(1891) 2 QB 665 : 65 LT 110] – referred to.*

**Books and periodicals cited**

George Carlin, 'Carlin on Campus' (HBO, 1984); Law Commission of India; Law Commission of India, Access of Exclusive Forum for Victims of Motor Accidents under the Motor Vehicles Act, 1939 (119<sup>th</sup> Report, February, 1987); Justice G.P. Singh: Principles of Statutory Interpretation (Lexis Nexis, 2016); Halsbury's Laws of England (4<sup>th</sup> Edn.) Vol. 26: Judgment and Orders: Judicial Decisions as Authorities (pp. 297-98, para 578); Essays in Honour of the Supreme Court of India (Oxford University Press 2000); Anuj Bhuwania, 'Courting the People—Public Interest Litigation in Post Emergency India' (Cambridge University Press 2017); P.J. Fitzgerald(Ed), 'Salmond on Jurisprudence' (12<sup>th</sup> edn, Sweet and Maxwell 1966); Motor Vehicle Aggregator Guidelines, 2020 – referred to.

**List of Acts**

Motor Vehicles Act, 1939; Central Motor Vehicles Rules, 1989; Motor Vehicles Act, 1988; English Road Traffic Act, 1930.

**List of Keywords**

Light Motor Vehicle (LMV) license; Vehicles with gross vehicle weight of less than/below 7,500 kgs; Transport Vehicle; Driving license; Learner's licenses; Licensing; 1994 amendment; Separate endorsement; Specific authorization; Additional authorization; Driver; Reference; Per incuriam; 'medium goods vehicle'; 'medium passenger vehicle'; 'heavy goods vehicle'; 'heavy passenger vehicle'; Commercial vehicles; Harmonious construction; Stare decisis; Road safety; Public welfare; Motor vehicles; Social welfare legislation; Compensation; Road accidents; Insured vehicles; Insurance companies; Policy domain; Transportation policy; Transportation sector.

**Digital Supreme Court Reports****Case Arising From**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 841 of 2018

From the Judgment and Order dated 04.08.2017 of the High Court of Judicature for Rajasthan at Jodhpur in SBCMA No. 5127 of 2011

With

SLP(C) Nos. 10918, 9604 and 9613 of 2018, Diary Nos. 24834 and 25256 of 2018, SLP(C) No. 24671 of 2018, Diary Nos. 32753, 32756, 37055 and 39059 of 2018, SLP(C) No. 426 of 2019, SLP(C) Nos. 505-506 of 2019, SLP(C) No. 17506 of 2018, Diary Nos. 23638, 24137, 24530 and 24534 of 2018, SLP(C) Nos. 5958, 8918-8919 and 11503-11504 of 2019, SLP(C) No. 8277 of 2020, SLP(C) Nos. 8123-8124 of 2022, SLP(C) Nos. 14645-14646 and 35472-35473 of 2017, SLP(C) No. 6055 of 2018, SLP(C) Nos. 18849, 20449, 21547 and 23017-23018 of 2019, Civil Appeal Nos. 8001-8002 of 2024, SLP(C) No. 766 of 2020, SLP(C) Nos. 24545 and 30601 of 2019, SLP(C) No. 696 of 2021, Civil Appeal Nos. 1477, 842, 1479, 483, 1506 and 1478 of 2018, Diary No. 40406 of 2017, Civil Appeal No. 1476 of 2018, Diary No. 41949 of 2017, SLP(C) Nos. 2684-2685, 597 and 524 of 2018, Diary No. 2524 of 2018, SLP(C) Nos. 19242-19244 of 2018, Diary No. 23636 of 2018, SLP(C) No. 28906 of 2018, 13315, 14523-14524 of 2019, Diary No. 37270 of 2017, Civil Appeal No. 1475 of 2018, SLP(C) No. 5065, 10459, 9908 and 6668 of 2018, Diary No. 4869, 6119 and 6264 of 2018, SLP(C) Nos. 8816, 9607, 9610, 9612, 9606 and 9609 of 2018, Diary Nos. 9963, 9970 and 990 of 2018, SLP(C) Nos. 5193, 5188, 9611, 9608 and 9605 of 2018, SLP(C) Nos. 20221, 19921 and 28961 of 2023

**Appearances for Parties**

Tushar Mehta, SG, Jayant Bhushan, Ms. Archana Pathak Dave, Anand Sanjay M. Nuli, Ms. Anita Shenoy, Sr. Advs., Ashutosh Ghade, Nimit Bhimjiyani, Ms. Sneha Balapure, Ms. Sakshi Mittal, Navneet Kumar, Harsh Sharan, Saurabh Tiwari, Parijat Kishore, Amit Kumar Singh, Ms. K Enatoli Sema, Ms. Chubalemia Chang, Prang Newmai, Abhishek Gola, Viresh B. Saharya, Rishabh Mathur, Akshat Agarwal, P.K. Seth, Ms. Manjeet Chawla, Mrs. Usha Pant Kukreti, Ms. Meenakshi Midha, Ms. Garv Singh, Aditya Parashar, Chander Shekhar Ashri, Ms. Hetu Arora Sethi, Rahul Jain, Anirudh Bhat, Rajeev Maheshwaranand Roy, Dr. Meera Agarwal, Ramesh Chandra Mishra, Anil Kumar, Sandeep Jha,

**M/s Bajaj Alliance General Insurance Co. Ltd. v.  
Rambha Devi & Ors.**

Ram Ekbal Roy, Ms. Priyanka Das, Ms. Neha Das, Aman Nihal, Ravi Shankar Ravi, Vikas Bharti, Binay Kumar Das, Raj Kishor Choudhary, Shakeel Ahmed, Paras Nath Singh, Ms. Pratibha Singh, Abhishek Kumar Gola, Ramneek Singh, Roop Chaudhary, Arun Kumar Nagar, Ms. Savita, Ms. Supriya, Sudhir Naagar, Ms. Amrreeta Swaarup, Gaurav Malhotra, Rajesh Kumar Gupta, Ms. Jyoti Kaushik, Manjunath Meled, Sandeep Sharma, Mrs. Vijayalaxmi Udapudi, Ganesh Kumar R., Sukant Vikram, Yojit Mehra, Amartya Bhushan, Tushar Bhushan, Ketan Paul, Sanjay Kumar Dubey, Shuchi Singh, Rakesh Kumar Tewari, Krishna Kant Dubey, Ujjwal Kumar Dubey, Vivek Kumar Pandey, Aman Kumar, Jainendra Kumar, Nirmit Bhalla, Devendra Kumar Mishra, Yasharth Kant, Ms. Sonal Kushwah, Suryaansh Kishan Razdan, Jagdish Chandra, Niteen Kumar Sinha, Vishal Meghwali, Ms. Aishwarya Sinha, Ms. Kirti Sinha, Ms. Ankita Chaudhary, Parmod Kumar Vishnoi, Kumar Prashant, Avnish Dave, Vaibhav Dwivedi, Raghav Sharma, Shreyas Balaji, Ram Lal Roy, Shiv Singh Yadav, Salil Paul, Sahil Paul, Sandeep Dayal, Ms. Kanupriya Mehta, Niranjan Sahu, Uma Kanta Mishra, Ms. Apoorva Sharma, Debabrata Dash, Anilendra Pandey, Manoj Kumar, Rajeev Kumar Ranjan, Ms. Priya Kashyap, Brijesh Pandey, Mallikarjun S. Mylar, Ashok Bannidinni, Ms. Betsara Mylliemngap, Tripurari Ray, Balwant Singh Billowria, Nithyananda Murthy P, Ms. Banu Prabha, Vivekanand Singh, Anirudh Ray, Rajinder Singh, Ms. Shilpa Singh, Ms. Shalini Kaul, Pushpinder Singh, Kumar Kartikay, Sukhmandeep Singh, Harsh Wadhwani, Nishanth Patil, Ayush P Shah, Vignesh Adithiya S, Sushil Kumar Sharma, Pahlad Singh Sharma, Virendra Kumar, Vikas Kakkar, Ms. Ankhi Sarkar, Ms. Akhila Wali, Suraj Kaushik, Nanda Kumar K. B., Dharm Singh, Shiva Swaroop, M/s. Nuli & Nuli, Devvrat, Ms. Harshita Sharma, Ms. Swati Setia, Ms. Charu Sangwan, Anup Kumar, Abhijit Banerjee, Devesh Kumar Agnihotri, Nitin Jain, Ms. Tanya Swarup, Shivam Singh, Manish Kumar, Ms. Bahuli Sharma, Ishwar Singh, Ms. Shaswati Parhi, Suyash Vyas, Divyansh Mishra, Gopal Singh, Subhro Sanyal, Kaustubh Shukla, C.B. Gururaj, Prakash Ranjan Nayak, Animesh Dubey, Debasis Jena, Apoorv Nautiyal, Anuj Bhandari, Rajat Gupta, Gaurav Jain, Mrs. Disha Bhandari, Mrs. Anjali Doshi, Sharangouda Patil, Mrs. Supreeta Patil, M/s. S-legal Associates, K.R. Karthik, Pradeep Gaur, Amit Gaur, Ms. Sweta Sinha, Rameshwar Prasad Goyal, Ms. Fauzia Shakil, Vivek Mathur, Siddharth Agarwal, Ms. Mohini Priya, Ms. Namrata Sarah Caleb, Ms. Parita, Ms. Ayushma Awasthi, C. George Thomas, P.B. Suresh, Advs. for the appearing parties.

## Digital Supreme Court Reports

### Judgment / Order of the Supreme Court

#### Judgment

**Hrishikesh Roy, J.**

|  | <b>Title*</b> | <b>Page No.</b> |
|--|---------------|-----------------|
| A. Background  | ... 6         |                 |
| B. Submissions on behalf of Insurance Companies  | ... 15        |                 |
| C. Submissions on behalf of Claimants  | ... 22        |                 |
| D. Issues  | ... 26        |                 |
| E. Discussion  | ... 27        |                 |
| (i) The Purpose of MV Act  |               |                 |
| (ii) Brief Overview of MV Act & MV Rules   |               |                 |
| (iii) Construing Section 2(21), 3 & 10 of MV Act   |               |                 |
| (iv) Whether the interpretation in <i>Mukund Dewangan (2017)</i> renders most provisions of the MV Act & MV Rules otiose?  |               |                 |
| (a) Harmonious Construction  |               |                 |
| (b) Interpretation must not lead to impractical outcomes   |               |                 |
| (v) Discussion on the 8 Conflicting judgments  |               |                 |
| (vi) Is <i>Mukund Dewangan (2017)</i> <i>per incuriam</i> ?  |               |                 |
| F. Impact on Road Safety   | ... 114       |                 |
| G. Conclusion  | ... 121       |                 |
| 1. On the perception of the capability of drivers on the road, the comedian George Carlin made the humorous observation to the effect that: ' <i>Have you ever noticed that anybody driving slower than you is an idiot, and anyone going faster than you is a maniac?</i> ' <sup>1</sup> Concerns about road safety are often shaped by individual biases without the opinion being founded on any empirical data. It is easy to overlook the full spectrum of factors that contribute to road safety. In this context, |               |                 |

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

1 George Carlin, 'Carlin on Campus' (HBO, 1984) <<https://www.primevideo.com/detail/George-Carlin-Carlin-On-Campus/0ND548YT8ZBNFE9A56MJVHZ8PK>> accessed 2 November 2024

**M/s Bajaj Alliance General Insurance Co. Ltd. v.  
Rambha Devi & Ors.**

the pivotal legal issue that this Constitution bench of five judges has to decide is whether under the existing legal framework of the *Motor Vehicle Act, 1988* (for short “MV Act”) and the *Central Motor Vehicles Rules, 1989* (for short, “MV Rules”), a person holding a license for a ‘Light Motor Vehicle’ class, can drive a ‘Transport Vehicle’ without a specific endorsement, provided the ‘Gross Vehicle Weight’ of the vehicle does not exceed 7,500 kgs?. Besides road safety, the livelihood concern of a large number of drivers of transport vehicles in India also requires an answer from the bench. In this judgment, let us name our driver Sri, who is a ‘Transport Vehicle’ driver. As can be appreciated, Sri spends maximum hours behind the driving wheels and is arguably the most experienced one amongst Indian drivers, carrying goods and people, from destination A to B and so on.

#### **A. BACKGROUND**

2. Before we set out the relevant provisions, a brief overview of the legal journey that has led us to the above quest would be appropriate. The vexed question was first noticed by a 2-judge Bench of Justice Kurian Joseph and Justice Arun Mishra in *Mukund Dewangan v. Oriental Insurance Co. Ltd.*<sup>2</sup> (for short “Mukund Dewangan(2016)”). It took note of the conflicting views in 8 different judgments of this Court and framed the following questions for determination by a 3-judge bench:

“59.1. What is the meaning to be given to the definition of “light motor vehicle” as defined in Section 2(21) of the MV Act? Whether transport vehicles are excluded from it?

59.2. Whether “transport vehicle” and “omnibus” the “gross vehicle weight” of either of which does not exceed 7500 kg would be a “light motor vehicle” and also motor car or tractor or a roadroller, “unladen weight” of which does not exceed 7500 kg and holder of licence to drive class of “light motor vehicle” as provided in Section 10(2)(d) would be competent to drive a transport vehicle or omnibus, the “gross vehicle weight” of which does not exceed 7500 kg or a motor car or tractor or roadroller, the “unladen weight” of which does not exceed 7500 kg?

**Digital Supreme Court Reports**

59.3. What is the effect of the amendment made by virtue of Act 54 of 1994 w.e.f. 14-11-1994 while substituting clauses (e) to (h) of Section 10(2) which contained “medium goods vehicle”, “medium passenger motor vehicle”, “heavy goods vehicle” and “heavy passenger motor vehicle” by “transport vehicle”? Whether insertion of the expression “transport vehicle” under Section 10(2)(e) is related to the said substituted classes only or it also excluded transport vehicle of light motor vehicle class from the purview of Sections 10(2)(d) and 2(41) of the Act?

59.4. What is the effect of amendment of Form 4 as to operation of the provisions contained in Section 10 as amended in the year 1994 and whether procedure to obtain driving licence for transport vehicle of class of “light motor vehicle” has been changed?”

3. Speaking through Justice Arun Mishra, the reference was answered by a 3-Judge Bench of Justice Arun Mishra, Justice Amitava Roy, and Justice Sanjay Kishan Kaul in Mukund Dewangan v. Oriental Insurance Co. Ltd.<sup>3</sup> (for short “*Mukund Dewangan (2017)*”). The Bench concluded that the holder of a license for a ‘Light Motor Vehicle’ class need not have a separate endorsement to drive a ‘transport vehicle’ if it falls under the ‘Light Motor Vehicle’ class i.e. below 7,500 kgs. The reference was answered as under:

“60.1 ‘Light motor vehicle’ as defined in section 2(21) of the Act would include a transport vehicle as per the weight prescribed in section 2(21) read with section 2(15) and 2(48). Such transport vehicles are not excluded from the definition of the light motor vehicle by virtue of Amendment Act No.54/1994.

60.2. A transport vehicle and omnibus, the gross vehicle weight of either of which does not exceed 7500 kg. would be a light motor vehicle and also motor car or tractor or a road roller, ‘unladen weight’ of which does not exceed 7500 kg. and holder of a driving licence to drive class of “light motor vehicle” as provided in section 10(2)(d) is

---

3 [2017] 7 SCR 765 : (2017) 14 SCC 663

**M/s Bajaj Alliance General Insurance Co. Ltd. v.  
Rambha Devi & Ors.**

competent to drive a transport vehicle or omnibus, the gross vehicle weight of which does not exceed 7500 kg. or a motor car or tractor or road-roller, the “unladen weight” of which does not exceed 7500 kg. **That is to say, no separate endorsement on the licence is required to drive a transport vehicle of light motor vehicle class as enumerated above.** A licence issued under section 10(2) (d) continues to be valid after Amendment Act 54/1994 and 28.3.2001 in the form.

60.3. The effect of the amendment made by virtue of Act No.54/1994 w.e.f. 14.11.1994 while substituting clauses (e) to (h) of section 10(2) which contained “medium goods vehicle” in section 10(2)(e), medium passenger motor vehicle in section 10(2)(f), heavy goods vehicle in section 10(2)(g) and “heavy passenger motor vehicle” in section 10(2)(h) with expression ‘transport vehicle’ as substituted in section 10(2)(e) related only to the aforesaid substituted classes only. It does not exclude transport vehicle, from the purview of section 10(2)(d) and section 2(41) of the Act i.e. light motor vehicle.

60.4. The effect of amendment of Form 4 by insertion of “transport vehicle” is related only to the categories which were substituted in the year 1994 and the procedure to obtain driving licence for transport vehicle of class of “light motor vehicle” continues to be the same as it was and has not been changed and there is no requirement to obtain separate endorsement to drive transport vehicle, and **if a driver is holding licence to drive light motor vehicle, he can drive transport vehicle of such class without any endorsement to that effect.”**

[emphasis supplied]

4. However, the above pronouncement did not put the matter to rest. On 3.5.2018, a two-judge Bench comprising Justice Kurian Joseph & Justice Mohan M. Shantanagoudar in *M/s. Bajaj Alliance General Insurance Co. Ltd. v. Rambha Devi & Ors.*<sup>4</sup> noted that while deciding

**Digital Supreme Court Reports**

the vexed question in *Mukund Dewangan (2017)*, the 3 Judge-bench had not considered important provisions of the *MV Act* and *MV Rules*. The bench noted that the following significant provisions were not placed before the Court in *Mukund Dewangan (2017)*:

“3. It is the submission of Shri Jayant Bhushan and Shri Joy Basu, learned Senior Counsel that certain distinct provisions pertaining specifically to transport vehicles have unfortunately not been brought to the notice of the Court:

1. Section 4(1) of the Motor Vehicles Act, 1988 (hereinafter referred to as “the Act”) provides that the minimum age of holding a driving licence for a motor vehicle is 18 years. Section 4(2) provides that no person under the age of 20 years shall drive a transport vehicle in a public place.

2. Section 7 provides that no person can be granted a learner’s licence to drive a transport vehicle unless he has held a driving licence to drive a light motor vehicle for at least one year.

3. Section 14 deals with the currency of licence to drive motor vehicles. A driving licence issued or renewed under this Act, in case a licence to drive a transport vehicle will be effective for a period of three years. The proviso to Section 14(2)(a) provides that in case of a licence to drive a transport vehicle carrying goods of dangerous or hazardous nature, it shall be effective for a period of one year. However, in case of any other licence, it would be effective for a period of 20 years.

4. Rule 5 of the Central Motor Vehicles Rules, 1989 (hereinafter referred to as “the Rules”) makes a medical certificate issued by a registered medical practitioner mandatory in case of a transport vehicle, whereas for a non-transport vehicle, only a self-declaration is sufficient.

5. Rule 31, specifically sub-rules (2), (3) and (4) provide for a difference in the syllabus and duration of training between transport and non-transport vehicles.

It is also submitted that in these provisions, there does not appear to be any exception carved out for transport vehicles which come in the light motor vehicle category.”

**M/s Bajaj Alliance General Insurance Co. Ltd. v.  
Rambha Devi & Ors.**

5. Being a two-judge bench, the Court deemed it appropriate to refer the prayer itself for reconsideration of the ratio in *Mukund Dewangan (2017)* to a larger bench of three judges. Subsequently, a three-Judge bench of Justice U.U. Lalit, Justice S. Ravindra Bhat, and Justice P.S. Narasimha on 8.3.2022<sup>5</sup> noted that the referral order rightly observed that certain provisions of the *MV Act* and *MV Rules* were not noticed in *Mukund Dewangan (2017)*. The 3-judge bench flagged certain additional provisions that were not noticed in *Mukund Dewangan (2017)*. Since such a view was expressed by a Bench of equal strength, it was considered appropriate to refer the matter to a larger bench of five judges. The reference order reads as under:

“5. Mr. Jayant Bhushan, Mr. Gopal Sankaranaryanan, Mr. Siddhartha Dave, learned Senior Advocates as well as Mr. Amit Singh, Ms. Archana Pathak Dave, Mr. Kaustubh Shukla, Ms. Meenakshi Midha and Mr. Rajesh Kumar Gupta, learned Advocates, appearing for Insurance Companies have invited our attention to few other provisions, namely, the second proviso to Section 15 and Sections 180 and 181 of the Motor Vehicles Act, 1988 apart from those mentioned in the referral order. It is submitted that though Section 3 was quoted in the decision in *Mukund Dewangan* (supra), the latter part of Section 3 and the effect thereof was not noticed by the Court. The latter part of said Section 3 stipulates that “no person shall so drive a transport vehicle other than the motor cab or motor cycle hired for his own use or rented under any scheme made under any scheme made under sub-section (2) of Section 75 unless his driving licence specifically entitles him so to do.”

6. It is thus submitted that the provisions contemplate different regimes for those having licence to drive Light Motor Vehicles as against those licensed to drive Transport Vehicles.

7. Having bestowed our attention to the contentions raised by the learned counsel and the issues which fall for consideration, in our view, the referral order was right

**Digital Supreme Court Reports**

in stating that certain provisions were not noticed by this Court in its decision in Mukund Dewangan (supra). We are *prima facie* of the view that in terms of the referral order, the controversy in question needs to be re visited. Sitting in a combination of Three Judges, we deem it appropriate to refer the matters to a larger bench of more than Three Judges as the Hon'ble the Chief Justice of India may deem appropriate to constitute”

6. For the benefit of the claimants, the reference order also pertinently notes that:

“9. Before we part, we must note that all the learned counsel appearing for the Insurance companies have fairly submitted that the compensation in terms of the directions issued by the Courts below, that is to say, in following the principles laid down in Mukund Dewangan (supra) has either been paid in full or shall be paid in terms of such directions. Their statements are recorded.”

7. Thus, the correctness of Mukund Dewangan (2017) is to be evaluated during this reference. At this juncture, we may note that during the final stage of hearing before this Court on 20.7.2023, it was brought to our notice that the Union Government had accepted the decision in Mukund Dewangan (2017), by issuing notifications dated 16.4.2018 and 31.3.2021. The Rules were also amended to bring them in conformity with the said judgment. Considering such compliance, we sought the assistance of the learned Attorney General, Mr. R. Venkataramani and desired to elicit the specific stand of the Union Government on the issue. When the matter was next heard on 13.9.2023,<sup>6</sup> the following order was passed by this 5-judge bench:

“8. Mr. R Venkataramani, Attorney General for India, has appeared in response to the request of the Court and submitted a written note. The note submitted by the Attorney General indicates that:

- (i) Application of the ratio in Mukund Dewangan (supra) enables a person holding a licence for a light motor vehicle to drive a transport vehicle on the strength

**M/s Bajaj Alliance General Insurance Co. Ltd. v.  
Rambha Devi & Ors.**

of that licence without a separate transport vehicle licence; and

- (ii) This interpretation of the provisions of the statute and the Rules in Mukund Dewangan (supra) does not appear to be in accord with the legislative intent.

9. The note also indicates that the letter dated 16 April 2018 was issued by the Union government taking note of the judgment in Mukund Dewangan (supra) as the law declared by this Court. Resultantly, the notification dated 31 March 2021 was issued to further amend the Rules to bring them in conformity with the judgment. However, the Attorney General has submitted that this may not be treated as a policy declaration by the Union Government and, as such, the letter and the notification may not have any bearing or conclusiveness on the state of law to be clarified.

10. At the same time, it has been submitted that the Union of India is open to the need, if any, to issue guidelines/regulations to address the perceived gaps in law as understood in the judgment of this Court in Mukund Dewangan (supra).

11. Apart from the specific submission of the Union Government during the course of hearing, that it is open to re-evaluate the position in law, we are of the considered view that it would be necessary for the Union Government to have a fresh look at the matter. We are inclined to take this view for the following reasons:

- (i) Since the enactment of the Motor Vehicles Act 1988, there has been a rapid evolution of the transport sector, particularly in the last few years with the emergence of new infrastructure and new arrangements for putting into place private transport arrangements;
- (ii) Any interpretation or formulation of the law must duly take into account valid concerns of road safety bearing on the safety of users of public transport facilities;

**Digital Supreme Court Reports**

- (iii) Any change in the position of law as expressed in *Mukund Dewangan* (supra) would undoubtedly have an impact on persons who have obtained insurance relying on the law declared by this Court and who may be driving commercial vehicles with LMV licences. A large number of persons would be dependent on the sector for earning their livelihood; and
- (iv) The decision in *Mukund Dewangan* (supra) has held the field for nearly six years and the impact of the reversal of the decision, at this stage, particularly on the social sector, is a facet which would have to be placed in balance by the policy arm of the Government.

12. The considerations which have been flagged above do not necessarily weigh in the same direction. However, all of them do raise important issues of policy which must be assessed and evaluated by the Union Government. Whether a change in the law is warranted is a matter which has to be determined by the Union Government after taking a considered decision bearing in mind the diverse considerations which fall within its remit in making policy choices and decisions.

13. Having regard to these features, we are of the view that the issue of interpretation which has been referred to the Constitution Bench by the referral order dated 8 March 2022 should await a careful evaluation of the policy considerations which may weigh with the Government in deciding as to whether the reversal of the decision as it obtains in *Mukund Dewangan* (supra) is warranted and, if so, the way forward that must be adopted bearing in mind the diverging interests, some of which have been noted in the earlier part of the order.

14. Hence, in view of the consequences which may arise by the reversal of the judgment in *Mukund Dewangan* (supra), it would be appropriate if the entire matter is evaluated by the Government before this Court embarks upon the interpretative exercise. Once the Court is apprised of the considered view of the Union Government, the proceedings before the Constitution Bench can be taken up.

**M/s Bajaj Alliance General Insurance Co. Ltd. v.  
Rambha Devi & Ors.**

15. We request the Union Government to carry out this exercise within a period of two months.
16. We clarify that we have not expressed any opinion on the merits of the referral order dated 8 March 2022 or on the correctness of the decision in [Mukund Dewangan](#) (*supra*) which would await further arguments once the considered view of the Union Government is placed before this Court.”
8. In view of the consultative exercise being carried out by the government, the matter was deferred multiple times. On 16.4.2024, a note on the proposed set of amendments to the *MV Act* was submitted before this Court. On 21.8.2024, the learned Attorney General, R. Venkataramani had suggested that the matter be either deferred till the amendments are tabled before Parliament or the Court may conclude the pending hearing. We then proceeded to hear the part-heard matter on 21.8.2024.

**B. SUBMISSIONS ON BEHALF OF INSURANCE COMPANIES**

9. We have heard Mr. Tushar Mehta, learned Solicitor General; learned Senior Counsel Mr. Siddhartha Dave, Mr. Jayant Bhushan; Ms. Archana Pathak Dave, Mr. Neeraj Kishan Kaul, learned Senior Counsel; Mr. Amit Kumar Singh and Mr. Shivam Singh, Learned Counsel on behalf of the Insurance Companies. Mr. PB Suresh appeared as a supporting Intervenor for the ‘The Society against Drunk Driving’.
- 9.1. Mr. Siddhartha Dave, learned Senior Counsel took us through those provisions of the *MV Act* and *MV Rules* that create a distinction between ‘Light Motor Vehicles’ and ‘Transport Vehicles’.
- 9.2. The Counsel drew the Court’s attention to Section 3 of the *MV Act* which stipulates the ‘necessity for a driving license’ to drive a motor vehicle. He referred to the second part of the provision which states that ‘*no person shall so drive a transport vehicle...unless his driving license specifically entitles him so to do.*’ It was contended that [Mukund Dewangan \(2017\)](#) overlooked that there was a specific mention of ‘transport vehicle’ in Section 3 which would indicate that a license for a ‘light motor vehicle’ cannot be used for driving a ‘transport vehicle’.

**Digital Supreme Court Reports**

- 9.3.** Mr. Dave further argued that the eligibility for obtaining a license for transport vehicles is more stringent than for Light Motor Vehicles. Since transport vehicles are primarily utilized for carrying passengers and goods, the additional requirements are essential for ensuring road safety. Adverting to Section 4 of the *MV Act*, which sets out the age limit, the Counsel highlighted that the minimum age for securing a driving license for ‘motor vehicles’ is 18 years but for driving ‘transport vehicles’, Section 4(2) provides that the minimum age would be 20. Moreover, to qualify even for a learner’s license to drive a ‘transport vehicle’, Section 7(1) stipulates that a candidate must have held a driving license for a ‘Light Motor Vehicle’, for at least one year.
- 9.4.** Section 8(3) mandates that an individual applying for a learner’s license for a transport vehicle, must submit a medical certificate from a registered medical practitioner, attesting to the applicant’s physical fitness to operate a transport vehicle. However, such a requirement is absent in the case of a Light Motor Vehicle for which only a self-declaration is sufficient. Additionally, the second proviso to Section 15 of *MV Act* stipulates that a medical certificate is also necessary for the renewal of a driving license for ‘transport vehicles’. Section 9(4) requires that the applicant for a ‘transport vehicle’ license must possess a driving certificate from a driving school or establishment. It was further submitted that the 1994 amendment to Section 10 merged four classes of (i) ‘medium goods vehicle’, (ii) ‘medium passenger vehicle’, (iii) ‘heavy goods vehicle’ and (iv) ‘heavy passenger vehicle’, into a single class of ‘transport vehicle’ under Section 10(2)(e) of *MV Act*. Section 10(2)(d) on the other hand provides for a separate class of ‘Light Motor Vehicle’. Therefore, the retention of the separate classes of ‘transport vehicle’ and ‘light motor vehicle’ under Section 10(2) by the 1994 Amendment, implies that the two classes are not co-equals, and the license holder of a ‘Light Motor Vehicle’ is not eligible to drive a ‘Transport Vehicle’. A separate license would be mandatory is the argument of the counsel.
- 9.5.** Mr. Jayant Bhushan, learned Senior Counsel argued that *Mukund Dewangan (2017)* erred in two significant respects. The judgment overlooked Section 3, which mandates a separate

**M/s Bajaj Alliance General Insurance Co. Ltd. v.  
Rambha Devi & Ors.**

endorsement for driving a ‘transport vehicle’. Reliance was placed on the decision in *Nathi Devi v. Radha Devi Gupta*,<sup>7</sup> where it was held that ‘effort should be made to give effect to each and every word used by the Legislature.’ Therefore, it was projected that the Court should not disregard any part of Section 3 in its interpretation.

- 9.6.** The other reason why *Mukund Dewangan (2017)* was incorrect according to Mr. Bhushan, was because it focused on the general law, rather than the special provisions within the *MV Act*. It was therefore argued that it is a well-known principle that the general will not override the special (*Generalia Specialibus Non Derogant*) and the special will override the general (*Specialia Generalibus Derogant*). It was pointed out that Section 10(2) explicitly distinguishes between ‘Transport Vehicles’ and LMV, treating them as separate categories. *Mukund Dewangan (2017)* erroneously subsumed ‘transport vehicles’ under the broader category of ‘Light Motor Vehicles’. It was also contended that the requirements for obtaining a transport vehicle license are distinct and more rigorous because the drivers of transport vehicles are entrusted with the safety of passengers including school children and strangers, who repose their trust in the driver of the transport vehicle.
- 9.7.** In his turn, Mr. Neeraj Kishan Kaul, learned Senior Counsel emphasized that the classification of transport vehicles under 7500 kg within the definition of Light Motor Vehicles under Section 2(21) is a broad definition, based on weight. He contended that this classification does not imply that the licensing regime under the *MV Act* is also determined by weight. According to the Counsel, licensing under the *MV Act* is linked to the intended ‘use’ of the vehicle. Specific attention was drawn to the definition of a Transport Vehicle in Section 2(47), which refers to a ‘public service vehicle’, a ‘goods carriage’, an ‘educational institution bus’ or a ‘private service vehicle’. Mr. Kaul argued that in the separate definition for each of these categories, one common factor is discernible as each provision uses words like ‘use’, ‘used or adapted to

**Digital Supreme Court Reports**

be used', 'constructed or adapted for use'. This shows that the licensing scheme is based on usage and not the weight of the vehicle.

- 9.8. Mr. Tushar Mehta, Learned Solicitor General submitted that the definition under Section 2(21) which includes transport vehicles is for a different regime, set under Section 113 and 115 of *MV Act*. These sections are contained in Chapter VII which is titled 'Control of Traffic' and pertain to 'limits of weight and limitations on use' and 'power to restrict the use of vehicles'. In this context, vehicles of specific weight may be prohibited from certain roads or areas thereby, making weight a relevant factor. Under the said definition of LMV, 'weight' has been kept as a factor for demarcation between 'LMV' and 'Transport' vehicles only for the purposes of determining the 'road tax'. Rule 31(2) and Rule 31(3) of the Rules prescribe the syllabus for training drivers for 'Non-Transport' and 'Transport' vehicles respectively. It was submitted that the said syllabuses are not the same. Also, the *MV Act* provides that the minimum period of training shall not be less than 21 days for 'Non-Transport' vehicles, as opposed to 'Transport' vehicles, for which the minimum period of training shall not be less than 30 days.
- 9.9. In her turn, Ms. Archana Pathak Dave, learned Senior Counsel presented to the Bench a photograph of a bus weighing 7450 kg, just below the limit of 7500 kg. She argued that if a school bus is operated by someone holding a Light Motor Vehicle license, it could be very risky. It was asserted that weight should not be a determining factor for licensing, rather it may be relevant in contexts such as taxes, permits, and other regulatory considerations. Ms. Dave pointed out that Mukund Dewangan (2017) failed to acknowledge the necessity of a Form 7 endorsement for LMV license holders to drive transport vehicles. This endorsement is crucial, as LMV license holders cannot legally drive transport vehicles without it. Furthermore, Section 9(6) requires competence testing, specific to the type of vehicle, necessitating separate licenses for LMV and Transport Vehicles to maintain the *MV Act's* regulatory coherence.
- 9.10. Mr. P.B. Suresh, learned Counsel representing the Intervenor-The Society Against Drunken Driving, an NGO argued that road

**M/s Bajaj Alliance General Insurance Co. Ltd. v.  
Rambha Devi & Ors.**

safety is considered a fundamental right. He argued that the decision in *Mukund Dewangan (2017)* has led to unsafe roads by permitting untrained drivers to operate transport vehicles. It was submitted that Section 7 of the *MV Act* requires an individual to hold a driver's license for at least one year to obtain a learner's license for a transport vehicle, which is a critical safety measure.

- 9.11.** Mr. Shivam Singh, learned Counsel argued that motor vehicle insurance policies had ensured adequate risk coverage only when accidents were caused by vehicles for which, drivers had valid licenses. However, in *Mukund Dewangan (2017)*, this court referred to the weight of the vehicle, rather than vehicle usage, as a relevant marker for statutory purposes. Consequently, insurance coverage through judicial decisions had to be extended to cases where drivers with LMV licenses were driving vehicles outside their licensing permits.

**C. SUBMISSIONS ON BEHALF OF CLAIMANTS**

- 10.** On behalf of the Claimants, we have heard learned Senior Counsel, Ms. Anitha Shenoy, and the respective submissions of Mr. Devvrat, Mr. Kaustubh Shukla and Mr. Anuj Bhandari learned Counsel. While supporting the interpretation in *Mukund Dewangan (2017)* the Counsel would contend that the vehicles under the *MV Act* are differentiated according to their weight. They argue that the definition of 'light motor vehicle' in Section 2(21) is an inclusive definition which encompasses multiple variety of vehicles including transport vehicles, the weight of which does not exceed 7500 kg.

- 10.1.** The learned Counsel, Mr. Devvrat contended that the licensing system under the *MV Act*, categorises motor vehicles into two primary groups i.e. Light and Heavy categories—LMV and HMV respectively. It was argued that if a motorcycle used for hire, weighing less than 200kg falls under the class of transport vehicles, countless drivers operating on platforms like Rapido, a bike-or-hire service, would be required to obtain fresh licenses if *Mukund Dewangan (2017)* is overruled.

- 10.2.** Mr. Anuj Bhandari, learned Counsel arguing for the Claimants, took us through the history of the inclusion of "transport vehicles" as a class, under the *MV Act*. It was submitted that for the last

**Digital Supreme Court Reports**

34 years, licenses have been granted in the country on the basis of weight of the vehicle. Even today, Form 2 specifies the grant of licenses based on weight, with exceptions being made for vehicles like road rollers, e-rickshaws, or a motorcycle. He pointed out that the original legislation identified four types of vehicles: (i) medium goods vehicles, (ii) medium passenger vehicles, (iii) heavy goods vehicles and (iv) heavy passenger vehicles. With the 1994 amendments to the *MV Act*, these categories were clubbed into a single classification of “transport vehicles.” Building on this, Mr. Bhandari contended that “transport vehicles” under the *MV Act* meant medium and heavy vehicles. Therefore, individuals with an LMV license were entitled to drive a light transport vehicle weighing less than 7500 kilograms. Whereas, additional requirements of a medical certificate and experience would apply only to those medium and heavy transport vehicles which exceed the weight limit of 7,500 kgs. It was argued that the Parliament changed the nomenclature by merging the four categories into a single class of ‘Transport Vehicles’, to ‘simplify’ the licensing scheme.

**10.3.** Mr. Kaustubh Shukla, Learned Counsel projected that careful reading of all the definitions in Section 2 would make it clear that the definitions were primarily bifurcated as follows:

- “a. ‘Class of vehicle,’ which mandatorily referred to weight: LMV [Sec. 2(21)] up to 7500 KG, HMV (Passenger/Goods) [Sec. 2(16) & Sec. 2(17)] exceeding 12000 KG, MMV (Passenger/Goods) [Sec. 2(23) & Sec. 2(24)] between 7500 to 12000 KG.
- b. ‘Kind or Name’ (Description) of vehicle, which had no reference to weight: [Sec. 2(7), 2(11), 2(14), 2(22), 2(25), 2(27), 2(28), 2(29), 2(33), 2(39), 2(40), 2(43), 2(44), 2(46), 2(47)].”

The legislature, according to the counsel, intended to demarcate vehicles depending upon the weight of the vehicle and not their description. Thus, according to him, the entire licensing scheme must take into account the weight classification, to ensure clarity. The earlier unamended act set the weight limit at 6000 kg which was further raised to 7500 kg by way of the 1994 amendment. Therefore,

**M/s Bajaj Alliance General Insurance Co. Ltd. v.  
Rambha Devi & Ors.**

the legislature intended to demarcate vehicles depending on the weight and not the description of vehicle. It was further argued that in the event of a conflict between the Act and the Rules, Schedules, or Forms, the provisions of the Act will take precedence. Reliance was placed on the decision of this Court in *Aphali Pharmaceuticals Ltd. v. State of Maharashtra*.<sup>8</sup>

**10.4.** Ms. Anitha Shenoy, Learned Senior Counsel additionally argued that on the strength of *Mukund Dewangan (2017)*, the auto drivers were permitted to operate taxis and motorcabs while holding a driving licence for LMV for the past 6 years. Reconsideration of the same is not merely an issue of insurance coverage, rather it would directly impact the livelihood of those driving transport vehicles with an LMV license. Their rights under Article 19(1)(g) of the Constitution of India should also be factored in for the interpretative exercise.

#### **D. ISSUES**

- 11.** From the above submissions, the following specific issues fall for our consideration:
- (i) Whether a driver holding an LMV license (for vehicles with a gross vehicle weight of less than 7,500 kgs) as per Section 10(2)(d), which specifies ‘Light Motor Vehicle’, can operate a ‘Transport Vehicle’ without obtaining specific authorization under Section 10(2)(e) of the *MV Act*, specifically for the ‘Transport Vehicle’ class;
  - (ii) Whether the second part of Section 3(1) which emphasizes the necessity of a driving license for a ‘Transport Vehicle’ overrides the definition of LMV in Section 2(21) of *MV Act*? Is the definition of LMV contained in Section 2(21) of *MV Act* unrelated to the licensing framework under the *MV Act* and the *MV Rules*;
  - (iii) Whether the additional eligibility criteria prescribed in the *MV Act* and *MV Rules* for ‘transport vehicles’ would apply to those who are desirous of driving vehicles weighing below 7,500 kgs and have obtained a license for LMV class under Section 10(2)(d) of the *MV Act* ;

**Digital Supreme Court Reports**

- (iv) What is the effect of the amendment made by virtue of Act 54 of 1994 w.e.f. 14.11.1994 which substituted four classes under clauses (e) to (h) in Section 10 with a single class of 'Transport Vehicle' in Section 10(2)(e)?
- (v) Whether the decision in *Mukund Dewangan (2017)* is *per incuriam* for not noticing certain provisions of the *MV Act* and *MV Rules*?

**E. DISCUSSION****(I) *The Purpose of the MV Act, 1988***

12. Prior to the enactment of the *MV Act 1988*, the legal framework governing motor vehicles was based on the *Motor Vehicle Act, 1939* which was incorporated from the English *Road Traffic Act, 1930*. In January 1984, a working group was constituted to review all provisions of the *Motor Vehicle Act, 1939* and to propose necessary amendments. This culminated in the enactment of the *MV Act, 1988* which has since undergone several amendments. The Statement of Objects and Reasons of the *MV Act, 1988* is extracted below for ready reference:

"2. Various Committees, like, National Transport Policy Committee, National Police Commission, Road Safety Committee, Low Powered Two - Wheelers Committee, as also the Law Commission have gone into different aspects of road transport. They have recommended updating, simplification and rationalization of this law. Several Members of Parliament have also urged for comprehensive review of the Motor Vehicles Act, 1939, to make it relevant to the modern - day requirements.

3. A Working Group was, therefore, constituted in January, 1984 to review all the provisions of the Motor Vehicles Act, 1939 and to submit draft proposals for a comprehensive legislation to replace the existing Act. This Working Group took into account the suggestions and recommendations earlier made by various bodies and institutions like Central Institute of Road Transport (CIRT), Automotive Research Association of India (ARAI), and other transport organisations including, the manufacturers and the general public. Besides, obtaining comments of State Governments on the recommendations of the Working Group, these were discussed in a specially convened meeting of Transport

**M/s Bajaj Alliance General Insurance Co. Ltd. v.  
Rambha Devi & Ors.**

Ministers of all States and Union territories. Some of the more important modifications so suggested related for taking care of –

- (a) the fast increasing number of both commercial vehicles and personal vehicles in the country ;
- (b) the need for encouraging adoption of higher technology in automotive sector;
- (c) the greater flow of passenger and freight with the least impediments so that islands of isolation are not created leading to regional or local imbalances;
- (d) concern for road safety standards, and pollution-control measures, standards for transportation of hazardous and explosive materials;
- (e) simplification of procedure and policy liberalization for private sector operations in the road transport field ; and
- (f) need for effective ways of tracking down traffic offenders.”

**13.** As per the Statement of Objects and Reasons, the important provisions addressed the following:

- "(a) rationalization of certain definitions with additions of certain new definitions of new types of vehicles;
- (b) stricter procedures relating to grant of driving licences and the period of validity thereof;
- (c) laying down of standards for the components and parts of motor vehicles;
- (d) standards for anti-pollution control devices;
- (e) provision for issuing fitness certificates of vehicles also by the authorised testing stations;
- (f) enabling provision for updating the system of registration marks;
- (g) liberalised schemes for grant of stage carriage permits on non nationalised routes, all-India Tourist permits and also national permits for goods carriages;

## Digital Supreme Court Reports

- (h) administration of the Solatium Scheme by the General Insurance Corporation;
- (i) provision for enhanced compensation in cases of “no fault liability” and in hit and run motor accidents;
- (j) provision for payment of compensation by the insurer to the extent of actual liability to the victims of motor accidents irrespective of the class of vehicles;
- (k) maintenance of State registers for driving licences and vehicle registration;
- (l) constitution of Road Safety Councils.

6. The Bill also seeks to provide for more deterrent punishment in the cases of certain offences.”

14. The above would suggest that the enactment of the *MV Act, 1988* was driven, *inter alia*, by the rapidly increasing number of vehicles in the country, the development of the road sector and the need to promote the adoption of advanced technology in the automotive sector. It is also essential to note that the Law Commission, in particular, had made various recommendations concerning provisions of the *MV Act, 1939* and *MV Act, 1988* in its Report Nos. 85,<sup>9</sup> 106,<sup>10</sup> 119<sup>11</sup> and 149.<sup>12</sup> To further understand the objective of the *MV Act, 1988*, we may refer to the 149<sup>th</sup> Report of the Law Commission titled ‘Removing Certain Deficiencies in the Motor Vehicle Act, 1988’ which noted the challenges faced by victims and their families in seeking compensation under the *MV Act, 1988* and the rising frequency of road accidents in the following words:-

“ The frequency of accidents caused by motor vehicles and the pitiable plight of the victims of such accidents and dependants have been the subject matter of comment by

<sup>9</sup> Law Commission of India, ‘Claims for compensation under Chapter 8 of the Motor Vehicles Act, 1939’(85<sup>th</sup> Report, 1980)

<sup>10</sup> Law Commission of India, ‘Section 103A, Motor Vehicles Act, 1939: effect of Transfer of a Motor Vehicle on Insurance’ (106<sup>th</sup> Report, November, 1984)

<sup>11</sup> Law Commission of India, Access of Exclusive Forum for Victims of Motor Accidents under the Motor Vehicles Act, 1939 (119<sup>th</sup> Report, February, 1987)

<sup>12</sup> Law Commission of India, Removing Certain Deficiencies in the Motor Vehicles Act, 1988(149<sup>th</sup> Report, 1994)

**M/s Bajaj Alliance General Insurance Co. Ltd. v.  
Rambha Devi & Ors.**

the Supreme Court in a number of cases. During recent years, the number of road accidents in the country have increased more alarmingly. Almost every day one finds in the newspapers, sad tales of road accidents. .... There is therefore an urgent need for streamlining the mechanism through which the victims or their legal representatives are compensated for their loss in such accidents so that they may be able to receive expeditiously an appropriate amount as compensation for the damages sustained by them. It is felt all round that victims of motor accidents and their legal representatives, where the accident is fatal, besides having grievously suffered as a result of the unfortunate event, are subjected to the agonies and uncertainties of a legal battle for a number of years for receiving the damages due to them through the process of Court. Of late, Lok Adalats have been settling the cases of such nature but it has been found that the victims or their legal representatives are compelled to be satisfied with a paltry sum out of the damages claimed by them. Such persons have no other option but to settle the dispute because they do not know for how many more years they will have to litigate for receiving the damages. In the backdrop of these and other related matters, the law commission has suo moto taken up the exercise of finding a solution to some of the problems relating to the Motor Vehicle Act and giving their appropriate recommendations thereon."

15. The *MV Act, 1988* is fundamentally a social welfare legislation<sup>13</sup> enacted with the objective of providing a mechanism for victims and their families to seek compensation for loss or injury resulting from road accidents. Additionally, its provisions regarding licensing and penalties for traffic violations serve the broader purpose of promoting road safety. Being a welfare legislation, it must be interpreted in a manner so as not to deprive the claimants of the benefit of the legislation. Any interpretation of its provisions must reflect the *dual* purpose, of not only as a mechanism for ensuring timely compensation and relief for victims of road accidents but also in promoting overall road safety.

---

13 [Skandia Insurance Co. Ltd. v. Kokilaben Chandravadan](#), AIR 1987 SC 1184; [Sohan Lal Passi v. Sesh Reddy](#), AIR 1996 SC 2627

**Digital Supreme Court Reports**

16. The issue in this reference is whether an individual holding an LMV license can legally drive a transport vehicle if it falls within the stipulated weight limit of 7,500 kgs. The genesis of the issue stems from disputes regarding the payment of claims by insurance companies for accidents involving ‘transport vehicles’ operated by individuals holding licenses to drive ‘light motor vehicles’. The question before this Court is not one of statutory interpretation but also involves concerns of road safety and public welfare. In interpreting any statute, it is always prudent to keep an eye on the object and purpose of the statute, as well as the underlying reason and the spirit behind it. However, we are conscious of not overstepping into the policy domain which is essentially the prerogative of the legislature. The legislature is uniquely positioned to examine the broader social, economic and safety considerations that underlie transportation policy and any changes to the law must be rooted in comprehensive public discourse and analysis. Having noted the broader objective of the MV Act, let us now discuss the statutory scheme.

**(II) Brief Overview of the MV Act and MV Rules**

17. It is a fundamental principle of statutory interpretation that ‘construction is to be made of all the parts together and not of one part only by itself’.<sup>14</sup> When attempting to discern the meaning of a certain provision in a statute, it is essential to consider that provision within the broader context of the entire legislative framework. The context encompasses several other critical dimensions. First, it involves reading the statute as a whole. Second, it is also crucial to take into account any previous statutes that are in *pari materia*. Third, a comprehensive understanding of the general scope and purpose of the statute is essential. Finally, a critical aspect of interpreting any statutory provision also involves identifying the mischief that the legislation intended to address.<sup>15</sup> Therefore, a nuanced and thorough interpretation would lend clarity and consistency in the application of legal principles.
18. In this regard, Justice GP Singh in his seminal treatise on Interpretation of Statutes<sup>16</sup> had this to say:

14 Subba Rao J in Gurmej Singh S v. Sardar Pratap Singh Kairon, AIR 1960 SC 122

15 [R S Raghunath v. State of Karnataka](#), AIR 1992 SC 81; [Union of India v. Elphinstone Spg. and Wvg. Co. Ltd.](#) (2001) 4 SCC 139; Powdrill v. Watson (1995) 2 AC 394

16 Justice G.P. Singh: *Principles of Statutory Interpretation* (LexisNexis, 2016)

**M/s Bajaj Alliance General Insurance Co. Ltd. v.  
Rambha Devi & Ors.**

“It is a rule now firmly established- that the intention of the Legislature must be found by reading the statute as a whole. The rule is referred to as an “elementary rule” by Viscount Simonds; a “compelling rule” by Lord Somervell of Harrow; . and a “settled rule” by BK Mukherjee. “I agree”, said Lord Halsbury, “that you must look at the whole instrument inasmuch as there may be inaccuracy and inconsistency; you must, if you can, ascertain what is the meaning of the instrument taken as a whole in order to give effect, if it be possible to do so, to the intention of the framer of it.”

19. Let us now start by noting and understanding the statutory framework of the *MV Act* and the MV Rules. A snapshot of all the chapters of *MV Act* is listed below:

**Chapter I-Definitions**

**Chapter II-Licensing of drivers of motor vehicles**

Chapter III-Licensing of Conductors of Stage Carriages.

**Chapter IV-Registration of motor vehicles.**

**Chapter V-Control of Transport Vehicles**

Chapter VI-Special provisions relating to State Transport Undertakings

Chapter VII-Construction, Equipment and Maintenance of motor vehicles.

**Chapter VIII-Control of Traffic**

Chapter IX-Motor Vehicles temporarily leaving or visiting India

**Chapter XI- Insurance of Motor Vehicles against third party risks**

Chapter XII-Claims Tribunals

**Chapter XIII-Offences, Penalties and Procedure**

Chapter XIV-Miscellaneous

20. The MV Rules contain the following chapters:

Chapter I-Preliminary

**Chapter II-Licensing of Drivers of Motor Vehicles**

Chapter III-Registration of Motor Vehicles

**Chapter IV-Control of Transport Vehicles**

**Digital Supreme Court Reports**

Chapter V-Construction, Equipment and Maintenance of Motor Vehicles

**Chapter VI-Control of Traffic**

Chapter VII-Insurance of Motor Vehicles Against Third Party Risks

Chapter VIII-Offences, Penalties and Procedure

Chapter IX-Examination of Good Samaritan and Enquiry

21. This court, to effectively address the issue, is primarily concerned with Chapter II of the *MV Act* and the *MV Rules* which relates to licensing of drivers of motor vehicles. The Forms concerning driving license appended to the MV Rules, may also bear a reference. Chapter II of the MV Act contains the provisions dealing with the necessity for a driving license, age limit, responsibility of owners of motor vehicles, restrictions on the holding of driving licenses and the restrictions on the grant of learner's licenses for certain vehicles. Section 8 and Section 9 contain provisions concerning the application for grant of a learner's license and driving license respectively. Section 10 which is important for our purpose deals with 'forms and contents of licenses to drive'. Chapter II also contains provisions for additions to the driving license, the licensing and regulation of schools or establishments for imparting instruction in driving of motor vehicles, the validity period of license, renewal, and revocation. Additionally, it also contains provisions concerning orders refusing or revoking driving licenses, driving licenses to drive motor vehicles belonging to Central Government, power of licensing authority to disqualify from holding a driving license or revoke such license, the power of Court to disqualify, suspend driving license in certain cases, the effect of the disqualification order, endorsement, and the maintenance of National and State Registers of Driving licenses. Finally, it also contains provisions relating to the power of Central and State Government to make Rules.
22. The *MV Rules* contain the procedure concerning driving licenses in Chapter II. It covers, inter alia, general provisions, evidence as to the correctness of address and age, medical certificate, educational qualifications, preliminary test, application for a driving license, driving test, form of driving license, renewal, driving schools and establishments, duration of license, duplicate license as well as the training syllabus.
23. The MV Act and MV Rules work in tandem, like two wheels in the same axle, to form a comprehensive legal framework governing

**M/s Bajaj Alliance General Insurance Co. Ltd. v.  
Rambha Devi & Ors.**

motor vehicles in India. While the Act provides the backbone, the Rules provide specific provisions for implementation.

**(III) Construing Section 2(21), Section 3 and Section 10**

24. To understand the divergent interpretations on the core issue of whether a holder of a LMV license can operate a ‘transport vehicle’ weighing less than 7,500 kgs, it will be necessary to first consider the relevant definition(s) contained in Section 2 of the *MV Act*. The definitions deserving scrutiny are noted below for ready reference. The definition of Section 2 interestingly begins with the clarificatory preface, ‘unless the context otherwise requires’:

- 2(10) “**driving licence**” means the licence issued by a competent authority under Chapter II authorising the person specified therein to drive, otherwise than as a learner, a motor vehicle or a motor vehicle of any specified class or description.”
- 2(15) “**gross vehicle weight**” means in respect of any vehicle the total weight of the vehicle and load certified and registered by the registering authority as permissible for that vehicle;”
- 2(16) “**heavy goods vehicle**” means any goods carriage the gross vehicle weight of which, or a tractor or a road-roller the unladen weight of either of which, exceeds 12,000 kilograms;”
- 2(17) “**heavy passenger motor vehicle**” means any public service vehicle or private service vehicle or educational institution bus or omnibus the gross vehicle weight of any of which; or a motor-car the unladen weight of which, exceeds 12,000 kilograms;”
- 2(21) “**light motor vehicle**” means a transport vehicle or omnibus the gross vehicle weight of either of which or a motorcar or tractor or road-roller the unladen weight of any of which, does not exceed 7,500 kilograms;”
- 2(22) “**maxicab**” means any motor vehicle constructed or adapted to carry more than six passengers, but not more than twelve passengers, excluding the driver, for hire or reward;
- 2(23) “**medium goods vehicle**” means any goods carriage other than a light motor vehicle or a heavy goods vehicle;”

**Digital Supreme Court Reports**

- 2(24) “**medium passenger motor vehicle**” means any public service vehicle or private service vehicle, or educational institution bus other than a motor-cycle, invalid carriage, light motor vehicle or heavy passenger motor vehicle;”
- 2(25) “**motorcab**” means any motor vehicle constructed or adapted to carry not more than six passengers excluding the driver for hire or reward.
- 2(26) “**motor-car**” means any motor vehicle other than a transport vehicle, omnibus, road-roller, tractor, motor-cycle or invalid carriage.
- 2(27) “**motor cycle**” means a two-wheeled motor vehicle, inclusive of any detachable side-car having an extra wheel, attached to the motor vehicle.
- 2(28) “**motor vehicle**” or “**vehicle**” means any mechanically propelled vehicle adapted for use upon roads whether the power of propulsion is transmitted thereto from an external or internal source and includes a chassis to which a body has not been attached and a trailer; but does not include a vehicle running upon fixed rails or a vehicle of a special type adapted for use only in a factory or in any other enclosed premises or a vehicle having less than four wheels fitted with engine capacity of not exceeding1 [twenty-five cubic centimetres];
- 2(29) “**omnibus**” means any motor vehicle constructed or adapted to carry more than six persons excluding the driver.”
- 2(44) “**tractor**” means a motor vehicle which is not itself constructed to carry any load (other than equipment used for the purpose of propulsion); but excludes a road-roller;”
- 2(48) “**unladen weight**” means the weight of a vehicle or trailer including all equipments ordinarily used with the vehicle or trailer when working, but excluding the weight of a driver or attendant; and where alternative parts or bodies are used the unladen weight of the vehicle means the weight of the vehicle with the heaviest such alternative part or body;”
25. The term ‘Transport Vehicle’ is defined in Section 2(47) of the *MV Act* and each of the terms contained in the definition is separately defined in Sections 2(35),2(14), 2(11), 2(33) of the *MV Act*:

**M/s Bajaj Alliance General Insurance Co. Ltd. v.  
Rambha Devi & Ors.**

2(47) “**transport vehicle**” means a **public service vehicle**, a **goods carriage**, an **educational institution bus** or a **private service vehicle**;”

[emphasis supplied]

2(35) “**public service vehicle**” means any motor vehicle used or adapted to be used for the carriage of passengers for hire or reward, and includes a maxi-cab, a motor-cab, contract carriage, and stage carriage;”

2(14) “**goods carriage**” means any motor vehicle constructed or adapted for use solely for the carriage of goods, or any motor vehicle not so constructed or adapted when used for the carriage of goods;”

2(11) “**educational institution bus**” means an omnibus, which is owned by a college, school or other educational institution and used solely for the purpose of transporting students or staff of the educational institution in connection with any of its activities;”

2(33) “**private service vehicle**” means a motor vehicle constructed or adapted to carry more than six persons excluding the driver and ordinarily used by or on behalf of the owner of such vehicle for the purpose of carrying persons for, or in connection with, his trade or business otherwise than for hire or reward but does not include a motor vehicle used for public purposes

26. Rule 2 of the MV Rules provides certain additional definitions. For instance, Rule 2(c) defines an ‘agricultural tractor’ as under:

“agricultural tractor” means any mechanically propelled 4-wheel vehicle designed to work with suitable implements for various field operations and/or trailers to transport agricultural materials. *Agricultural tractor is a non-transport vehicle’*

[emphasis supplied]

27. Significantly, a non-transport vehicle is defined in Rule 2(h):

““non-transport vehicle” means a motor vehicle which is not a transport vehicle”

## Digital Supreme Court Reports

28. The definition of ‘e-cart’,<sup>17</sup> ‘e-rickshaw’,<sup>18</sup> ‘Battery operated vehicle’,<sup>19</sup> ‘road ambulance’,<sup>20</sup> ‘school bus’,<sup>21</sup> ‘special purpose vehicle’,<sup>22</sup> ‘motor caravan’,<sup>23</sup> ‘puller tractor’<sup>24</sup> and different categories of vehicles such as ‘Category L’<sup>25</sup> and ‘Category M’<sup>26</sup> are also provided in the MV Rules.
29. The above definition(s) in the MV Act and MV Rules would indicate that they focus on various aspects including reference by (i) *weight* such as light motor vehicle and heavy goods vehicle; (ii) the *intended use* such as educational institution bus, public service or private service and also (iii) the vehicle *types* such as omnibuses and motor cars. Therefore, the scheme of the Act is not exactly either user-based or weight-based but is a combination of both. It also takes into account the evolving transportation sector which is reflected in the introduction of new categories of vehicles through various amendments such as adapted vehicles, e-carts, and e-rickshaws. Notably, the Supreme Court has also recognized<sup>27</sup> that hybrid rickshaws, commonly referred to as ‘jugaad’ in India, fall under the definition of Motor Vehicle u/s 2(28) of the MV Act.
30. For our discussion, much turns on the definition of LMV contained in Section 2(21) of the MV Act:

“light motor vehicle” means a **transport vehicle** or **omnibus** the **gross vehicle weight** of either of which or a **motorcar** or **tractor** or **road-roller** the **unladen weight** of any of which, does not exceed 7,500 kilograms.”

[emphasis supplied]

31. The term ‘transport vehicle’, ‘gross vehicle weight’, ‘motor car’, ‘tractor’, ‘road roller’, ‘unladen weight’ and ‘gross vehicle weight’ are also separately defined in the *MV Act* as noted earlier. In the

17 Rule 2(cc)

18 Rule 2(cb)

19 Rule 2(u)

20 Rule 2(zb)

21 Rule 2(zc)

22 Rule 2(zd)

23 Rule 2(za)

24 Rule 2(y)

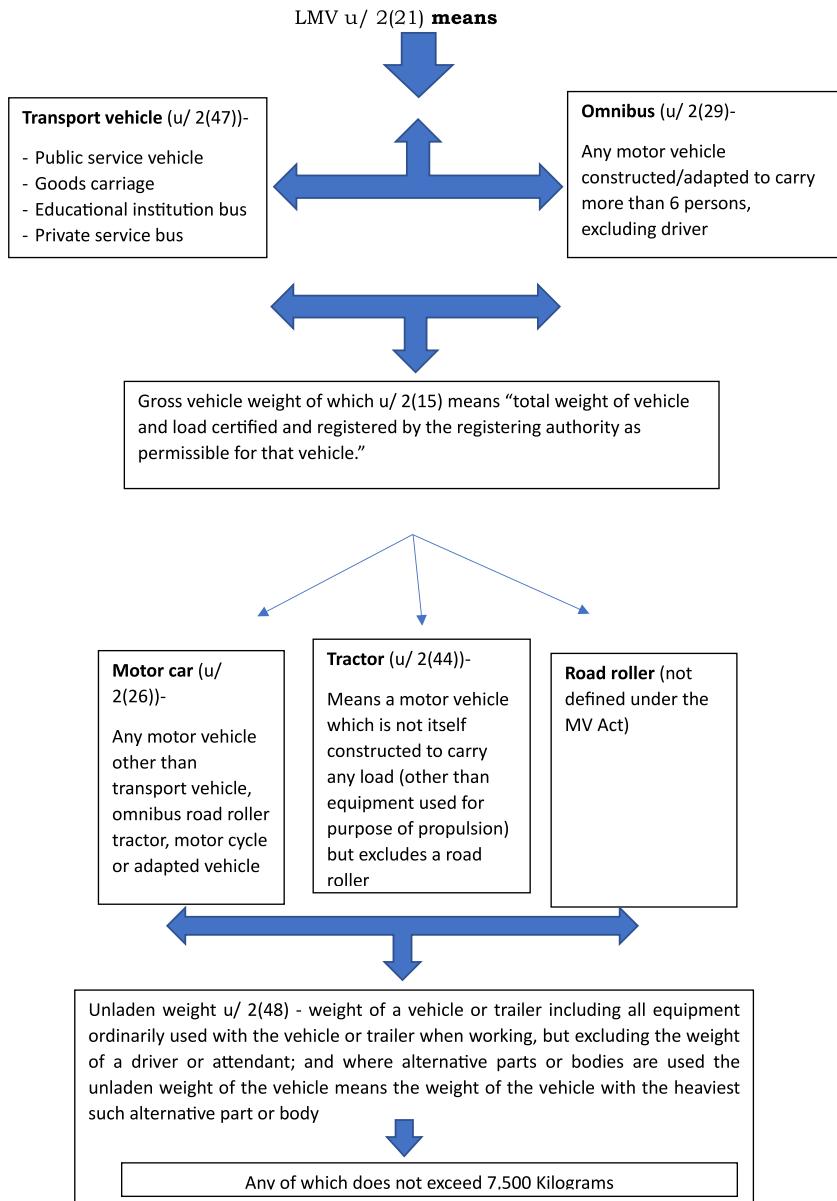
25 Rule 2(i)

26 Rule 2(k)

27 Rajasthan SRTC v. Santosh (2013) 7 SCC 107

**M/s Bajaj Alliance General Insurance Co. Ltd. v.  
Rambha Devi & Ors.**

context, Mr. Dave, Learned Senior Counsel appearing for one of the insurance companies presented to us a visual 1 page representation of the definition of LMV which being useful, is reproduced below:



## Digital Supreme Court Reports

- 32.** A plain reading of the definition clause of LMV as is also clear from the diagram above shows that LMV, inter-alia, ‘means’ a ‘Transport Vehicle’. The use of the word ‘means’ is crucial here which suggests specifics. When the statute says that a word or a phrase shall “mean” (instead of say “include”), it is quite certainly a ‘hard and fast’, strict and exhaustive definition. Such a definition is an explicit statement of the full connotation of a term.<sup>28</sup> It is a clear signal that the legislature did not wish to maintain a distinction between the two classes of vehicles. Such an explicit and specific definition leaves no room for ambiguity.
- 33.** On the importance of definition sections, G.P. Singh in Interpretation of Statutes<sup>29</sup> has the following to say:-

“In spite of severe criticism as to utility of definitions section or interpretation clauses, it is common to find in a statute “Definitions” of certain words and expressions used elsewhere in the body of the statute. The object of such a definition is to avoid the necessity of frequent repetitions in describing all the subject matter to which the word or expression so defined is intended to apply. For instance, the Supreme Court held that when the word “securities” has been defined under the Securities Contracts (Regulation) Act, 1956, its meaning would not vary when the same word is used at more than one place in the same statute, **as otherwise it will defeat the very object of the definitive section.**”

[emphasis supplied]

- 34.** As noticed earlier, Section 2 also begins with the phrase ‘unless the context otherwise requires’. However, any contention based on a contrary context must avoid the risk of making the explicit definition, redundant or useless. Here we may usefully extract the following :-

<sup>28</sup> *Gough v. Gough* [(1891) 2 QB 665 : 65 LT 110] referred in *P. Kasilingam v. PSG College of Technology*, AIR 1995 SC 1395; See also *Punjab Land Development and Reclamation Corp Ltd. v. Presiding Officer, Labour Court* (1990) 3 SCC 682

<sup>29</sup> Justice G.P. Singh: *Principles of Statutory Interpretation* (LexisNexis,2016)

**M/s Bajaj Alliance General Insurance Co. Ltd. v.  
Rambha Devi & Ors.**

“..However, it is incumbent on those who contend that the definition given in the interpretation clause does not apply to a particular section to show that the context in fact so requires. **An argument based on contrary context which will make the inclusive definition inapplicable to any provision in the Act cannot be accepted as it would make the definition entirely useless.** Repugnancy of a definition arises only when the definition does not agree with the subject or context; any action not in conformity with the definition will not obviously make it repugnant to subject or context of the provision containing the term defined under which such action is purported to have been taken. When the application of the definition to a term in a provision containing that term makes it unworkable and otiose, it can be said that the definition is not applicable to that provision because of contrary context.”<sup>30</sup>

[emphasis supplied]

- 35. Considering the emphatic nature of the definition given in Section 2(21) which would suggest a strict interpretation, it would be logical to conclude that a light motor vehicle would *mean a transport vehicle*, omnibus, road roller, tractor, or motor car, provided the weight does not exceed 7,500 kgs. The definition as understood, has an important bearing on the issuance of licenses and permits.
- 36. The term “driving license”, which is relevant for the present discussion, is defined under Section 2(10) of the *MV Act* as a license authorizing a person to operate a motor vehicle of “*any specified class or description*”. Let us now read Section 10(2) titled, ‘form and Contents of Licenses to drive’ which lists the different classes of motor vehicles. It is contained in Chapter II which deals with ‘Licensing of Drivers of Motor Vehicles’. A key amendment was carried out in the Section by deleting clauses (e), (f), (g) and (h) and all these were clubbed under a single head of “*transport vehicle*”.

---

30 Justice G.P. Singh, Principles of Statutory Interpretation (LexisNexis,2016)

## Digital Supreme Court Reports

| <b>MV Act (pre amendment of 14.11.1994)</b>   | <b>MV Act (post amendment of 14.11.1994)</b>  |
|---|---|
| <p>10. Form and contents of licences to drive.—(1) Every learner's licence and driving licence, except a driving licence issued under section 18, shall be in such form and shall contain such information as may be prescribed by the Central Government.</p> <p>(2) A learner's licence or, as the case may be, driving licence shall also be expressed as entitling the holder to drive a motor vehicle of <b>one or more of the following classes</b>, namely:— (a) motor cycle without gear; (b) motor cycle with gear;</p> <p>(c) invalid carriage;</p> <p>(d) <i>light motor vehicle</i>;</p> <p><b>(e) medium goods vehicle</b></p> <p><b>(f)medium passenger vehicle;</b></p> <p><b>(g)heavy goods vehicle;</b></p> <p><b>(h) heavy passenger vehicle.</b></p> | <p>10. Form and contents of licences to drive.—(1) Every learner's licence and driving licence, except a driving licence issued under section 18, shall be in such form and shall contain such information as may be prescribed by the Central Government. (2) A learner's licence or, as the case may be, driving licence shall also be expressed as entitling the holder to drive a motor vehicle of <b>one or more of the following classes</b>, namely:—</p> <p>(a) motor cycle without gear;</p> <p>(b) motor cycle with gear;</p> <p>(c) invalid carriage1 ;</p> <p>(d) <i>light motor vehicle</i>;</p> <p><b>(e) transport vehicle;</b></p> <p><b>(e) deleted</b></p> <p><b>(f) deleted</b></p> <p><b>(g) deleted</b></p> <p><b>(h) deleted</b></p> <p>(i) road-roller;</p> <p>(j)motor vehicle of a specified description</p> |

37. In the context of the deletion of the classes of 'medium goods vehicle', 'medium passenger vehicle', 'heavy goods vehicle', and 'heavy passenger vehicle' and the introduction of a separate class of 'transport vehicle' through the 1994 amendment, the counsel for the insurance companies contended that a specific mention of

**M/s Bajaj Alliance General Insurance Co. Ltd. v.  
Rambha Devi & Ors.**

‘transport vehicle’ after the amendment would suggest that a separate endorsement would be necessary to drive a ‘transport vehicle’. It was further submitted that even before the 1994 amendment, the second part of Section 3 always provided that a separate endorsement would be necessary.

- 38.** Section 3 is titled ‘Necessity for driving license’ and reads as under:

“3. Necessity for driving licence.— (1) No person shall drive a motor vehicle in any public place unless he holds an effective driving licence issued to him authorising him to drive the vehicle; **and no person shall so drive a transport vehicle** [other than a motor cab or motor cycle hired for his own use or rented under any scheme made under sub-section (2) of section 75] **unless his driving licence specifically entitles him so to do.**

(2) The conditions subject to which sub-section (1) shall not apply to a person receiving instructions in driving a motor vehicle shall be such as may be prescribed by the Central Government.”

[emphasis supplied]

- 39.** To deal with the above submission, let us take the hypothetical example of Sri - who let us say is desirous of driving an auto in the year 1990. The following option(s) of classes of vehicles would be available to Sri, as per unamended Section 10:

- (a) motor cycle without gear;
- (b) motor cycle with gear;
- (c) invalid carriage;
- (d) light motor vehicle;
- (e) medium goods vehicle
- (f) medium passenger vehicle;
- (g) heavy goods vehicle;
- (h) heavy passenger vehicle.

- 40.** The applicant Sri would be required to fill the Form 4, prescribed under Rule 14 of MV Rules which was prevalent before 28.3.2001. The Form 4 is extracted below:-

**Digital Supreme Court Reports****"FORM 4****[See Rule 14]****Form of application for licence to drive a motor vehicle**

To,

The licensing authority,

.....

[Passport  
size photograph]

I apply for a licence to enable me to drive vehicles of the following description—

- (a) Motorcycle without gear
- (b) Motorcycle with gear
- (c) Invalid carriage
- (d) Light motor vehicle
- (e) Medium goods vehicle
- (f) Medium passenger motor vehicle
- (g) Heavy goods vehicle
- (h) Heavy passenger motor vehicle
- (i) Roadroller
- (j) Motor vehicle of the following description:

\*\*\*

**Certificate of test of competence to drive**

The applicant has passed the test prescribed under Rule 15 of the Central Motor Vehicles Rules, 1989. The test was conducted on (here enter the registration mark and description of the vehicle) ..... on (date) .....

The applicant has failed in the test.

(The details of deficiency to be listed out)

Date: .....

**Signature of Testing Authority**

.....

**Full name and designation****Two specimen signatures of applicant:****Strike out whichever is inapplicable."**

**M/s Bajaj Alliance General Insurance Co. Ltd. v.  
Rambha Devi & Ors.**

41. Form 4 above indicates that there is no mention of 'Transport Vehicle' for the purpose of obtaining a driving license. Moreover, there is no mention of a 'light goods vehicle' or a 'light passenger vehicle'. Therefore, if Sri applies for a 'Light Motor Vehicle' license, which already *means* a 'Transport Vehicle' as per the definition of LMV contained in 2(21), can it be said that Sri cannot drive a 'Transport Vehicle' because '*his driving license specifically*' does not '*entitle him so to do*' as provided in the second part of Section 3? We think not. The specific authorization should not be understood to mean that Sri holding an LMV license which covers 'Transport vehicle', would be disentitled to drive a 'Transport Vehicle'. A question would then arise about the purpose of explicitly mentioning 'Transport Vehicle' in Section 3 (and other provisions as we will discuss later)? We may notice that there is no mention of the term 'light **goods** vehicle' or a 'light **passenger** vehicle' in Section 10 or in the definition section. On the other hand, a separate mention of 'medium **goods** vehicle', 'medium **passenger** vehicle', 'heavy **goods** vehicle' and 'heavy **passenger** vehicle' as incorporated in the Section 10 would suggest that it is primarily targeted towards 'Transport Vehicles' as opposed to a 'Light Motor Vehicle', which as earlier noticed could also be a 'Non-Transport Vehicle'. The emphasis in the second part of Section 3 should therefore be understood in relation to Medium and Heavy Vehicles in the statutory scheme even prior to the 1994 amendment. The reasonable interpretation of the second part of Section 3 should therefore pertain to a driving license for those driving 'medium goods vehicle', 'medium passenger vehicle', 'heavy goods vehicle', and 'heavy passenger vehicle'. Such an interpretation and understanding would be logical because medium and heavy vehicles would require greater maneuverability and skill as compared to drivers of the LMV class. The subsequent amendment in Section 10 makes this position even clearer. The relevant portion of the Statement of Objects and Reasons of the Amendment Act 54 of 1994 may also guide us here and is reproduced below:

- (a) The introduction of newer type of vehicles and fast increasing number of both commercial and personal vehicles in the country.
- (b) Providing adequate compensation to victims of road accidents without going into longdrawn procedure;

**Digital Supreme Court Reports**

- (c) Protecting consumers' interest in Transport Sector;
- (d) Concern for road safety standards, transport of hazardous chemicals and pollution control;
- (e) Delegation of greater powers to State Transport Authorities and rationalising the role of public authorities in certain matters;
- (f) **The simplification of procedures** and policy liberalisation in the field of Road Transport;
- (g) Enhancing penalties for traffic offenders.

The Bill inter alia provides for –

- (a) modification and amplification of certain definitions of new type of vehicles ;
- (b) **simplification of procedure for grant of driving licences;**
- (c) putting restrictions on the alteration of vehicles;
- (d) certain exemptions for vehicles running on non-polluting fuels;
- (e) ceilings on individuals or company holdings removed to curb "benami" holdings;
- (f) states authorised to appoint one or more State Transport Appellate Tribunals;
- (g) punitive checks on the use of such components that do not conform to the prescribed standards by manufacturers, and also stocking / sale by the traders;
- (h) increase in the amount of compensation of the victims of hit and run cases;
- (i) removal of time limit for filling of application by road accident victims for compensation;
- (j) punishment in case of certain offences is made stringent;

**M/s Bajaj Alliance General Insurance Co. Ltd. v.  
Rambha Devi & Ors.**

- (k) a new pre-determined formula for payment of compensation to road accident victims on the basis of age/income, which is more liberal and rational.”

[emphasis supplied]

- 42.** The classes of ‘medium goods vehicle’, ‘medium passenger vehicle’, ‘heavy goods vehicles’, and ‘heavy passenger vehicles’ as earlier noted in the table, were subsumed under the class of ‘Transport vehicle’. It can logically be inferred that the term ‘Transport Vehicle’ primarily targets vehicles exceeding 7,500 kgs, for the purpose of license regime. The intention of the legislature was to simplify the licensing framework for larger commercial vehicles and at the same time not interdict a LMV license holder to also drive a transport vehicle. The additional requirements for medium and heavy vehicles are also evident from unamended sub-section 1 of Section 7 which reads as under:

“Restrictions on the granting of learner’s license for certain vehicles-

- (1) No person shall be granted a learner’s license-
  - (a) *to drive a heavy goods vehicle unless he has held a driving license for atleast 2 years to drive a light motor vehicle or for at least one year to drive a medium goods vehicle.*
  - (b) *to drive a medium goods vehicle or a medium passenger vehicle unless he has held a driving license for atleast one year to drive a light motor vehicle.”*

[emphasis supplied]

- 43.** The amended Section 7(1) however, states that:

‘7. Restrictions on the granting of learner’s licences for certain vehicles:-

- [(1) No person shall be granted a **learner’s licence** to drive a **transport vehicle** unless he has held a driving licence to drive a **light motor vehicle** for at **least one year**:]

## Digital Supreme Court Reports

Therefore, the classes of medium and heavy vehicles stood subsumed under ‘transport vehicles’. Our view on the LMV licence holder’s capability to drive a transport vehicle is also fortified by the unamended and amended Rule 10 of the MV Rules:

| <b>Rule 10 (pre-amendment)</b>  | <b>Rule 10 (post-amendment)</b>  |
|---|--|
| <p>“10. Application for learner’s licence.—</p> <p>An application for the grant of a learner’s licence shall be made in Form 2 and shall be accompanied by,—</p> <ul style="list-style-type: none"> <li>(a) save as otherwise provided in rule 6, a medical certificate in [Form 1-A].</li> <li>(b) three copies of the applicant’s recent 28 [passport size photograph]</li> <li>(c) appropriate fee as specified in rule 32,</li> <li>(d) in the case of an application for <b>medium goods vehicle, a medium passenger motor vehicle, a heavy goods vehicle or a heavy passenger vehicle, the driving license held by the applicant.</b>”</li> </ul> | <p>10. Application for learner’s licence.—</p> <p>An application for the grant of a learner’s licence shall be made in Form 2 and shall be accompanied by,—</p> <ul style="list-style-type: none"> <li>(a) save as otherwise provided in rule 6, a medical certificate in [Form 1-A].</li> <li>(b) three copies of the applicant’s recent 28 [passport size photograph],</li> <li>(c) appropriate fee as specified in rule 32,</li> <li>(d) in the case of an application for <b>transport vehicle</b> excluding E-rickshaw or E-Cart, the driving licence held by the applicant]</li> <li>[e) proof of residence</li> <li>(f) proof of age</li> </ul> |

44. The insertion of a separate class of ‘Transport Vehicle’ has led to some confusion in legal interpretation. In *National Insurance Co. Ltd. v. Annappa Irappa Nesaria*<sup>31</sup> (for short “Annappa Irappa Nesaria”), the issue before this Court was whether the driver of a Matador van weighing 3,500 kgs which had a ‘goods carriage’ permit could drive a ‘transport vehicle’, if he had a LMV license. The van, which was insured by the appellant, met with an accident on 9.12.1999, causing

**M/s Bajaj Alliance General Insurance Co. Ltd. v.  
Rambha Devi & Ors.**

the death of respondent's wife. It was brought to the notice of the Court that the 1994 amendment to the MV Act, replaced "medium goods vehicle" and "heavy goods vehicle", with "transport vehicle." The 2-judge bench observed as under:

"19. "Light motor vehicle" is defined in Section 2(21) and, therefore, in view of the provision, as then existed, **it included a light transport vehicle.** xx

20. From what has been noticed hereinbefore, it is evident that "transport vehicle" has now been substituted for "medium goods vehicle" and "heavy goods vehicle". The light motor vehicle continued, at the relevant point of time to cover both "light passenger carriage vehicle" and "light goods carriage vehicle". A driver who had a valid licence to drive a light motor vehicle, therefore, was authorised to drive a light goods vehicle as well."

[emphasis supplied]

- 44.1.** In the pertinent judgment, this Court held that the amendments carried out in 1994 had a prospective operation and at the time of the accident (pre-amendment), a driver holding a valid license to drive a 'Light Motor Vehicle' was also authorised to drive a 'light goods vehicle'. However, post-amendment, a separate endorsement would be necessary. Thus, the insurance company was held liable to remit the compensation since the accident occurred before the change in law.
- 44.2.** The above interpretation on prospective application in the context of the 1994 amendment, however does not seem to be correct since the mention of the term 'Transport Vehicle', does not exclude transport vehicles that are already classified as 'LMV', under Section 10. If this interpretation were accepted, it would imply that medium or heavy vehicles would no longer require 'specific' endorsements, as those classes were removed by the amendment. This would lead to impractical outcomes.
- 44.3.** The contention that since Light Motor Vehicles and Transport Vehicles are mentioned separately, those Transport Vehicles which (weighing less than 7,500 kg) fall within the class of LMV would require the driver to have a separate driving license or

**Digital Supreme Court Reports**

an endorsement does not appeal well to our understanding. This would be contrary to the legislative intent. The classes mentioned therein do not appear like watertight compartments and some degree of overlap is discernible. An LMV license which typically covers two-wheelers may also be used for commercial activities like small-scale deliveries and the driver may not be required to obtain a separate endorsement for the 'Transport Vehicle' class. It is difficult to accept the argument that a driving license issued for a particular class is limited and the intention of the legislature was to exclude the Transport Vehicles falling within the LMV class. According to our understanding, the correct way to view the legal implication would be that 'transport vehicles' mentioned in Section 10 would cover only those vehicles whose gross vehicle weight is above 7,500 kgs. Such an interpretation aligns with the broader purpose of the amendments and ensures that the licensing regime remains efficient and practical for vehicle owners and drivers. We therefore partially overrule the decision in *Annappa Irappa Nesaria* (*supra*) for the view taken w.r.t the post-1994 amendment position.

45. Significantly, Section 10(2) states that a driving license 'shall also be expressed as entitling the holder to drive a motor vehicle of *one or more* of the following classes'. Therefore, the driver of a 'Light Motor Vehicle' is not per se disentitled to acquire a license for a 'Transport Vehicle' class, for driving vehicles above the weight of 7,500 kgs or those classes which do not fall in the definition of Light Motor Vehicle under Section 2(21). As rightly noted in *Mukund Dewangan* (*supra*), Section 10 has to be read with Section 2(21) which defines a Light Motor Vehicle.

**III. Whether the interpretation in *Mukund Devangan*(2017) would render most provisions of the MV Act and MV Rules otiose?**

46. For the Insurance Companies, it was argued with much emphasis that sole reliance on Section 2(21) r/w Section 10 as held in *Mukund Dewangan* (2017) would render otiose, many provisions of the MV Act and this can have far-reaching implications. To appreciate this contention, a careful examination of the identified provisions is necessary. Is it correct to say that in order to drive a transport

**M/s Bajaj Alliance General Insurance Co. Ltd. v.  
Rambha Devi & Ors.**

vehicle, an LMV license holder will require by law, an additional endorsement because the scheme of the Act provides a clear distinction between ‘Light Motor Vehicle’ and ‘Transport Vehicle’? The following table marking the distinction was placed before the Court for consideration:

| Sr. No.                       | Differentiating Factor                                     | Provision Under M.V. Act / Rules | Light Motor Vehicle License   | Transport Vehicle License  |
|-------------------------------|--|----------------------------------|---|--|
| <b>Age / Time Requirement</b> |  |                                  |   |  |
| (i)                           | Age limit For Driving                                      | Sec. 4                           | 18 years and above [S.4(1)]   | 20 years and above [S.4(2)]  |
| (ii)                          | Restriction on grant of Learner's License                  | Sec. 7(1)                        | No minimum requirement to obtain License for Light Motor Vehicle.   | Must hold a Driving License for a Light Motor Vehicle for at least 1 year, to obtain Learner's License for Transport Vehicle.<br><br>[S. 7(1)] |
| (iii)                         | Training Period for Obtaining License                      | Rule 31                          | Not less than 21 days [Rule 31(2)]<br>(+)<br><br>Actual Hours of Driving shall not be less than 10 hours.<br>[Rule 31(4)] | Not less than 30 days [Rule 31(3)]<br>(+)<br><br>Actual Hours of Driving shall not be less than 15 hours.<br>[Rule 31(4)]                      |
| <b>Medical Certificates</b>   |  |                                  |   |  |
| (iv)                          | Requirement of Medical for Certificate Learner's License   | Sec. 8(3)                        | No requirement of Medical Certificate   | Application for Grant of Learner's License must be accompanied by a Medical Certificate [S.8(3)]   |
| (v.)                          | Requirement Of Medical Certificate For Renewal Of Licenses | Sec. 15                          | No requirement of Medical Certificate prior to attaining the age of 40 years. <b>[Second Proviso to S.15(1)]</b>          | Application Shall be accompanied by a Medical Certificate <b>[Second Proviso to S.15(1)]</b>   |

## Digital Supreme Court Reports

|  |   |                |   |  |
|--|---|----------------|---|--|
| (vi)                                       | <i>Self-Declaration Of Fitness Or Medical Certificate For License</i>                                   | Rule 5         | <i>Requirement of Self Declaration as to Physical Fitness. [Rule 5(1)]</i>    | <i>Requirement Of Medical Certificate by a Registered Medical Practitioner. [Rule 5(1)]</i>  |
| <b>Driving Certificates</b>                |   |                |   |  |
| (vii)                                      | <i>Requirement Of Obtaining Driving Certificate from a Driving School for Obtaining Driving License</i> | Sec. 9(4)      | <i>No requirement of obtaining Driving Certificate from a Driving School.</i> | <i>Application for grant of License Must be accompanied by a Driving Certificate Issued By a School or Establishment referred to in S.12 of M.V. Act. [S.9(4)]</i> |
| (viii)                                     | <i>Addition to Driving License to be supported by Driving Certificate</i>                               | Rule 17(1) (b) | <i>No such requirement</i>  | <i>Application for Addition of Transport Vehicle shall be accompanied by a Driving Certificate in Form 5 of the Rules. [Rule 17(1)(b)]</i>                         |
| <b>Separate Vehicle / Separate License</b> |   |                |   |  |
| (ix)                                       | <i>Necessity for Permits</i>  | Sec. 66        | <i>No requirement of a Permit.</i>  | <i>Permit from the Regional, or State Transport Authority is required to use a vehicle as Transport Vehicle.</i>   |
| (x)  | <i>Necessity for Driving License</i>  | Sec. 3         | <i>Effective License holder may drive.</i>                                    | <i>Driving License must specifically entitle the Driver to drive the Transport Vehicle.</i>  |
| (xi)                                       | <i>Separate Class of Vehicles</i>   | Sec.10(2)      | <u><i>Section 10(2)</i></u><br><u><i>(d) – Light Motor Vehicle.</i></u>       | <u><i>Section 10(2)(e) – Transport Vehicle.</i></u>  |

**M/s Bajaj Alliance General Insurance Co. Ltd. v.  
Rambha Devi & Ors.**

| <b>Validity of Driving License</b>   |                                   |         |  |   |
|--------------------------------------|-----------------------------------|---------|--|---|
| (xii)                                | Validity of Driving License.      | Sec. 14 | Valid for – <b>[S.14(2)(b)]</b><br><br>(i) Who has not attained 30 years of age on the date of issue / renewal – Valid till such person attains 40 years of age;<br>(ii) Who has attained 30 years, but not attained 50 yrs. of age – Valid for 10 years;<br>(iii) Who has attained 50 years, but not attained 55 yrs. of age – Valid till such person attains 60 years of age;<br>(iv) Who has attained 55 years – Valid for 5 years. | Valid for 5 years<br><b>[S.14(2)(a)]</b>  |
| <b>Other Differentiating Factors</b> |                                   |         |  |   |
| (xiii)                               | Requirement of Uniform and Badges | Sec. 28 | No such requirement  | State Govt. may make Rules prescribing Badges and Uniform to be worn by Drivers of Transport Vehicles.<br><b>[S.28(2)(d)]</b>                           |
| (xiv)                                | Duties, Functions and Conduct     | Sec. 28 | No such requirement  | State Govt. may make Rules prescribing Duties and Conduct of such persons to whom license is issued to drive Transport Vehicles.<br><b>[S.28(2)(h)]</b> |
| (xv)                                 | Syllabus for obtaining License    | Rule 31 | Syllabus Part A, B, C, F, G and K<br><b>[Rule 31(2)]</b>   | Syllabus Part E, F, G, H, I, J and K<br><b>[Rule 31(3)]</b>   |

**Digital Supreme Court Reports**

47. Analysis of the above provisions is now apposite. Chapter II addresses ‘Licensing of Drivers of Motor Vehicles’. We have already noticed Section 3 earlier that covers the ‘Necessity for Driving License’ and specifically mentions ‘Transport Vehicle’. Section 4, in sequence, is titled ‘Age limit in connection with driving of motor vehicles’. Section 18 referred to in Section 4(2) concerns ‘*Driving Licenses to drive motor vehicles, belonging to the Central Government*’. Section 4(2) in its current form reads as under:

“(1) No person under the age of eighteen years shall drive a motor vehicle in any public place:

Provided that [a motor cycle with engine capacity not exceeding 50cc] may be driven in a public place by a person after attaining the age of sixteen years.

(2) Subject to the provisions of section 18, no person under the age of twenty years shall drive a **transport vehicle** in any public place.

(3) No learners licence or driving licence shall be issued to any person to drive a vehicle of the class to which he has made an application unless he is eligible to drive that class of vehicle under this section.”

[emphasis supplied]

48. Section 5 deals with the ‘Responsibility of owners of motor vehicles for contravention of Section 3 and 4’ and declares that:

“No owner or person in charge of a motor vehicle shall cause or permit any person who does not satisfy the provisions of section 3 or section 4 to drive the vehicle.”

49. At this stage, we must also note the penal provisions i.e. Section 180 and Section 181 of Chapter XIII which deals with ‘Offences, Penalties and Procedure’:

“180. *Allowing unauthorised persons to drive vehicles.*— Whenever, being the owner or person in charge of a motor vehicle, causes, or permits, any other person who does not satisfy the provisions of section 3 or section 4 to drive the vehicle shall be punishable with imprisonment for a term which may extend to three months, or with fine which may extend to one thousand rupees, or with both.”

**M/s Bajaj Alliance General Insurance Co. Ltd. v.  
Rambha Devi & Ors.**

*“181. Driving vehicles in contravention of section 3 or section 4.—Whoever, drives a motor vehicle in contravention of section 3 or section 4 shall be punishable with imprisonment for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.”*

50. Section 6 deals with '*Restrictions on the holding of driving licenses*' and imposes, *inter alia*, general restrictions to prevent individuals from allowing others to use their driving license. Section 7(1) is important and provides that a Learner's license for a **transport vehicle** can only be issued to a person who has held a driving license for a Light Motor Vehicle for atleast one year. The amended section reads as under:

“7. Restrictions on the granting of learner's licences for certain vehicles.—

[(1) No person shall be granted a **learner's licence** to drive a **transport vehicle** unless he has held a driving licence to drive a **light motor vehicle** for at **least one year**:]

[Provided that nothing contained in this sub-section shall apply to an e-cart or e-rickshaw.]

(2) No person under the age of eighteen years shall be granted a learner's licence to drive a motor cycle without gear except with the consent in writing of the person having the care of the person desiring the learner's licence.”

[emphasis supplied]

51. Section 8 deals with the 'Grant of Learner's license'. The requirement of medical certificate is contained in Section 8(3), Section 15 and Rule 5 of the MV Rules. Sub-section (3) of Section 8 as amended mandates that an application for a Learner's License for a *Transport Vehicle* must be accompanied by a Medical Certificate by a registered medical practitioner. However, the unamended Section 8 did not mention 'Transport Vehicle':

“—8(1) Any person who is not disqualified under section 4 for driving a motor vehicle and who is not for the time being disqualified for holding or obtaining a driving licence may, subject to the provisions of section 7, apply to the licensing authority having jurisdiction in the area—

**Digital Supreme Court Reports**

(i) in which he ordinarily resides or carries on business, or (ii) in which the school or establishment referred to in section 12 from where he intends to receive instruction in driving a motor vehicle is situate, for the issue to him of a learner's licence.

(2) Every application under sub-section (1) shall be in such form and shall be accompanied by such documents and with such fee as may be prescribed by the Central Government.

(3) Every application under sub-section (1) shall be accompanied by a medical certificate in such form as may be prescribed by the Central Government and signed by such registered medical practitioner, as the State Government or any person authorised in this behalf by the State Government may, by notification in the Official Gazette, appoint for this purpose:

XX]"

52. The amended 8(3) reads as under:

(3) Every application [to drive a transport vehicle made] under sub-section (1) shall be accompanied by a medical certificate in such form as may be prescribed by the Central Government and signed by such registered medical practitioner, as the State Government or any person authorised in this behalf by the State Government may, by notification in the Official Gazette, appoint for this purpose."

[emphasis supplied]

53. Rule 5(1) of the amended MV Rules titled 'Medical Certificate' reiterates such a requirement. While for other vehicles, there is a requirement of a self-declaration of fitness, a Medical certificate by a registered Medical practitioner is necessary for driving a 'Transport Vehicle'. The *unamended Rule 5* which does not mention 'Transport Vehicle' reads as under:

"5. "Medical Certificate- Every application for the issue of a learner's licence or a driving licence or for making addition of another class or description of motor vehicle to a driving licence or for renewal of learner license or a driving license,

**M/s Bajaj Alliance General Insurance Co. Ltd. v.  
Rambha Devi & Ors.**

shall be accompanied by a medical certificate in Form 1 issued by a registered medical practitioner referred to in sub-section (3) of section 8””

54. The *amended Rule 5* is also extracted below:

“5. Medical Certificate- Every application for the issue of a learner’s licence or a driving licence or for making addition of another class or description of a motor vehicle to a driving licence or for renewal of a driving licence to drive a vehicle other than a **transport vehicle** shall be accompanied by a self-declaration as to the physical fitness as in Form 1 and every such application for a licence to drive a **transport vehicle** shall be accompanied by a medical certificate in Form 1-A issued by a registered medical practitioner referred to in sub-section (3) of section 8”

[emphasis supplied]

55. Section 15 titled ‘Renewal of driving licenses’, outlines the requirements for renewal within the time period provided therein. The second proviso to Section 15(1), mandates the requirement of a medical certificate for ‘Transport Vehicle’ and for those who are above the age of 40 years. The second proviso therein reads as under:

“Provided further that where the application is for the renewal of a licence to drive a **transport vehicle** or where in any other case the applicant has attained the age of forty years, the same shall be accompanied by a medical certificate in the same form and in the same manner as is referred to in sub-section (3) of section 8, and the provisions of sub-section (4) of section 8 shall, so far as may be, apply in relation to every such case as they apply in relation to a learner’s licence.”

[emphasis supplied]

56. Section 9 titled ‘Grant of driving license’ provides a comprehensive procedure for granting driving licenses. Section 9(1) addresses the jurisdiction involved in the licensing process. Under Section 9(2), anyone not disqualified from holding or obtaining a driving license may apply, using a form prescribed by the Central Government.

**Digital Supreme Court Reports**

The applicant must also pass a test as specified in Section 9(3). Additionally, for those seeking a **Transport Vehicle** license, Section 9(4) mandates a minimum educational qualification set by the Central Government. Section 9(5) pertains to the requirement for re-taking the test after 7 days. Meanwhile, 9(6) states that the test of competence to drive must be carried out in a vehicle of the *type* to which the application refers. Section 9(7) deals with disqualification and Section 9(8) provides, *inter alia*, that the licensing authority may refuse to issue a licence to a habitual criminal or a habitual drunkard or who is habitually addicted to any narcotic drug or psychotropic substance or whose license had been revoked earlier. Section 9(4) which is relevant for our purpose is extracted below:

“(4) Where the application is for a licence to drive a **transport vehicle**, no such authorisation shall be granted to any applicant unless he possesses such minimum educational qualification as may be prescribed by the Central Government and a driving certificate issued by a school or establishment referred to in section 12.”

[emphasis supplied]

57. Rule 17(1)(b) of the *MV Rules* stipulates that any application for adding a class of “Transport Vehicle” to a Driving License must be accompanied by a Driving Certificate:

**“17. Addition to driving licence.—(1)** An application for the addition of another class or description of motor vehicle to the driving licence shall be made in [Form 2] to the licensing authority and shall be accompanied by— (a) an effective learner’s licence and driving licence held by the applicant;

(b) the driving certificate in Form 5, in the case of an application for addition of a **transport vehicle**, excluding E-rickshaw or E-cart.”

[emphasis supplied]

58. Section 14 of the Motor Vehicles Act outlines the validity period of driving licenses, distinguishing between those for ‘transport vehicles’ and ‘transport vehicles carrying goods,’ while also considering the age of the license holder. According to the amended section, individuals

**M/s Bajaj Alliance General Insurance Co. Ltd. v.  
Rambha Devi & Ors.**

under 30 years of age will have their license valid until they reach 40 years, while those aged 30 to 49 will enjoy a 10-year validity period. For individuals aged 50 to 54, the license remains valid until they turn 60, and for those aged 55 and older, the validity is set at 5 years. This framework reflects the understanding that driving capabilities and experience may vary with age. The relevant part of Section 14 is extracted below:

“14. Currency of licences to drive motor vehicles.—

(1) A learner’s licence issued under this Act shall, subject to the other provisions of this Act, be effective for a period of six months from the date of issue of the licence.

(2) A driving licence issued or renewed under this Act shall,— (a) in the case of a licence to drive a **transport vehicle**, be effective for a period of **three years**: 1 \*\*\* 2 [Provided that in the case of licence to drive a **transport vehicle carrying goods of dangerous or hazardous nature** be effective for a period of one year and renewal thereof shall be subject to the condition that the driver undergoes one day refresher course of the prescribed syllabus; and;]

xxxxxxxxxxxxxxxxxxxxxxxxxxxxx”

[emphasis supplied]

**59.** Rule 10 is titled ‘Application for Learner’s license’. The unamended Rule 10 stated as under:

“10. Application for learner’s licence.—

An application for the grant of a learner’s licence shall be made in Form 2 and shall be accompanied by,—

(a) save as otherwise provided in rule 6, a medical certificate in [Form 1-A].

(b) three copies of the applicant’s recent 28 [passport size photograph],

(c) appropriate fee as specified in rule 32,

[(d) in the case of an application for **medium goods vehicle, a medium passenger motor vehicle, a heavy**

**Digital Supreme Court Reports**

**goods vehicle or a heavy passenger vehicle, the driving license held by the applicant.”**

[emphasis supplied]

- 60.** The amended Rule 10 replaces these highlighted terms with the single term ‘Transport Vehicle’:

10. Application for learner’s licence.—

An application for the grant of a learner’s licence shall be made in Form 2 and shall be accompanied by,—

(a) save as otherwise provided in rule 6, a medical certificate in [Form 1-A].

(b) three copies of the applicant’s recent 28 [passport size photograph],

(c) appropriate fee as specified in rule 32,

**[(d) in the case of an application for transport vehicle excluding E-rickshaw or E-Cart, the driving licence held by the applicant]**

**[(e) proof of residence**

**(f) proof of age”**

[emphasis supplied]

- 61.** Section 27 concerns the power of Central Government to make Rules. Section 28 which deals with the power of the State Government to make rules provides specifically w.r.t. transport vehicles in sub-section 2(d) and 2(h) the following :-

“(d) the badges and uniform to be worn by drivers of **transport vehicles** and the fees to be paid in respect of badges”

(h) the duties, functions and conduct of such persons to whom licences to drive **transport vehicles** are issued

[emphasis supplied]

- 62.** Rule 31(2) and (3) which deal with the syllabus provides as under:

31. Syllabus for imparting instructions, in driving of motor vehicles.—

**M/s Bajaj Alliance General Insurance Co. Ltd. v.  
Rambha Devi & Ors.**

(1) The syllabus for imparting instructions in driving of motor vehicles of the schools or establishments shall be as follows (see tables below):

[(2) The lessons for training drivers of **non-transport vehicles** shall cover Parts A, B, C, F, G and K of the syllabus referred to in sub-rule (1) and the training period shall not be less than twenty-one days: Provided that in case of motorcycles, it shall be sufficient compliance of the provisions, if portion of Part C of syllabus as applicable to such vehicles are covered.

(3) The lessons for training drivers of **transport vehicles** shall cover Parts E, F, G, H, I, J and K of the syllabus referred to in sub-rule (1) and the training period shall not be less than thirty days”

[emphasis supplied]

- 63.** Chapter V of the MV Act specifically deals with ‘Control of Transport Vehicles’. Section 66 deals with ‘Necessity for Permits’ and prohibits an owner of a motor vehicle to use or to permit the use of the motor vehicle as a *transport vehicle* in any public place save in accordance with the conditions of permit, granted by an appropriate authority:

“66. Necessity for permits.—(1) No owner of a motor vehicle shall use or permit the use of the vehicle as a **transport vehicle** in any public place whether or not such vehicle is actually carrying any passengers or goods save in accordance with the conditions of a permit granted or countersigned by a Regional or State Transport Authority or any prescribed authority authorising him the use of the vehicle in that place in the manner in which the vehicle is being used:....”

[emphasis supplied]

- 64.** The necessity for a permit and the need for driving license are two different requirements and the distinctions thereof must be borne in mind.
- 65.** The aforesaid provisions are pressed into service to contend that the legislature has placed LMVs and Transport Vehicles under separate classes. For each class of vehicle, varying degrees of scrutiny are

**Digital Supreme Court Reports**

provided and the argument on behalf of Insurance Companies is that the holder of a LMV license is disentitled to drive a Transport Vehicle and a separate endorsement would be necessary for driving a vehicle of the other class.

66. Reading the various provisions as noticed above appears to pull the reader into two distinct spheres and this might make the legal implications unworkable. The principle of harmonious constructions of statutes should guide us to unravel this vexed question.

(a) *Harmonious Construction*

67. In *Sultana Begum v. Prem Chand Jain*,<sup>32</sup> this Court examined the relevant precedents of this Court and articulated the following principles on harmonious construction of statutes:

- "a. It is the duty of the courts to avoid a head-on clash between two sections of the Act and to construe the provisions which appear to be in conflict with each other in such a manner as to harmonise them;
- b. The provisions of one section of a statute cannot be used to defeat the other provisions unless the court, in spite of its efforts, finds it impossible to effect reconciliation between them;
- c. When there are two conflicting provisions in an Act, which cannot be reconciled with each other, they should be so interpreted that, if possible, effect should be given to both. This is the essence of the rule of harmonious construction;
- d. *The courts have also to keep in mind that an interpretation which reduces one of the provisions to a "dead letter" or "useless lumber" is not harmonious construction; and*
- e. *To harmonize is not to destroy any statutory provision or to render it otiose."*

[emphasis supplied]

---

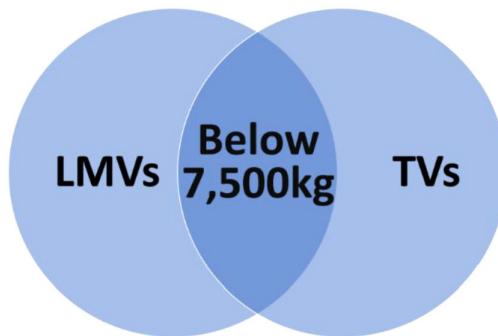
32 [1996] Supp. 9 SCR 707 : (1997) 1 SCC 373

**M/s Bajaj Alliance General Insurance Co. Ltd. v.  
Rambha Devi & Ors.**

68. Keeping the above principles in mind, let us proceed further. The relevant provisions of the *MV Act* and the *MV Rules* would show that the term ‘Transport Vehicle’ is frequently referenced in various Sections and Rules. Most of these provisions were not noticed in Mukund Dewangan (2017). It is true that the legislature has imposed additional requirements for ‘Transport Vehicles’. But should it be enough to say that a ‘Light Motor Vehicle’ license holder is legally incapable of driving a transport vehicle although its gross vehicle weight is below 7500 kg, as is suggested by the counsel for the insurance companies? In our view, such a manner of interpretation would render superfluous and otiose the precise and compact definition of LMV given in Section 2(21) which so significantly uses the expression ‘means’. When questions on the relevance of Section 2(21) was raised, the following points were made:-
- (a) Section 2(21) which includes Transport Vehicles is for a different regime, set under Section 113 which places limitation both on weight and usage of the vehicle. Section 115 empowers the authority to restrict the driving of any vehicle of a specified class or description. These sections are contained in Chapter VII which is titled ‘Control of Traffic’ and pertain to ‘limits of weight and limitations on use’ and ‘power to restrict the use of vehicles’. Vehicles of specific weight may be prohibited from certain roads or areas making weight a relevant factor. Under the said definition of LMV, ‘weight’ has been kept as a factor for demarcation between ‘LMV’ and ‘Transport’ vehicles primarily for the purposes of determining the ‘road tax’.
- (b) Section 41(4) outlines the necessity of specifying the exact type of vehicle—including its design, construction, and intended use—during the registration process. It was contended that this is where weight becomes a critical factor.
- (c) Weight is considered in Section 44(ae) of the *Income Tax Act 1961*, which concerns incomes derived from transport vehicles.
69. The above submissions which mention the weight of the vehicle are in different context and can’t be used to render section 2(21) i.e. the definition, a dead letter. If the definition clause was worded differently, one might possibly argue that a distinction could be made between Transport Vehicles and LMVs. But the use of the word

**Digital Supreme Court Reports**

'means', points towards the categorical intent of the legislature. When a Court is faced with two interpretations, one of which would have the effect of rendering a provision a 'dead letter', the interpretation that allows for such violence to the key words in the statute must be avoided. An attempt at harmonization would therefore be in order. Let us analyse the issue further by considering the following overlapping diagram:



70. The above illustration indicates that all Transport Vehicles are not Light Motor Vehicles but some may fall within the *class* of LMVs which is represented by the overlapping section. The inference therefore is that if the transport vehicle falls under the definition of Light Motor Vehicle in Section 2(21), the additional requirements as outlined in the provisions noticed above, need not be satisfied by a person holding a driving licence for a 'Light Motor Vehicle' *class*. Consequently, a separate endorsement of a Transport Vehicle is not necessary as the LMV license would suffice for vehicles below 7500 kg weight. Such an interpretation would harmonize the statutory provisions by requiring the additional factors only for those Transport vehicles whose gross weight exceeds 7500 kg.
71. It was additionally argued that the principle of *generalia specialibus non derogant* would apply in this case. Section 2(21) is a general provision defining a Light Motor Vehicle which includes a 'Transport Vehicle,' whereas Section 3 is a specific provision that prohibits driving a 'transport vehicle' without a separate license endorsement. According to Mr. Jayant Bhushan, Section 3 should take precedence, requiring a separate endorsement under the 'Transport Vehicle' class.

**M/s Bajaj Alliance General Insurance Co. Ltd. v.  
Rambha Devi & Ors.**

- 72.** To address the argument, let us consider the following passage by Lord Herschell LC in *Institute of Patent Agents & Ors. v. Joseph Lockwood*<sup>33</sup>:

“Well, there is a conflict sometimes between two sections to be found in the same Act. You have to try and reconcile them as best you may. If you cannot, you have to determine which is the leading provision and which the subordinate provision, and which must give way to the other.”

- 73.** The important thing to note is that one provision must give way to the other *only when* reconciliation is not possible. However, when it is possible to harmonize the two, the Court need not determine which is the leading provision. As regards the argument of rendering second part of Section 3(1) otiose, let us again notice Section 3:

“3. *Necessity for driving licence.*—(1) No person shall drive a motor vehicle in any public place unless he holds an effective driving licence issued to him authorising him to drive the vehicle; *and no person shall so drive a transport vehicle (other than a motor cab or motorcycle hired for his own use or rented under any scheme made under sub-section (2) of Section 75) unless his driving licence specifically entitles him so to do.*”

[emphasis supplied]

- 74.** Section 3 refers to ‘Transport Vehicles’, like many other provisions in the *MV Act* and the *MV Rules*. Section 3 cannot however be construed as a special provision that would override the strict and emphatic definition of LMV, given in Section 2(21) and the separate class of ‘Light Motor Vehicle’ provided in Section 10. Section 2(21) uses the term ‘means’ as earlier emphasized and there is an affirmation of certainty in the wordings of the definition and it is to be recognized *sensu stricto* in a technical sense and must not be understood loosely. To say that Section 3 would disentitle the LMV license holders to drive transport vehicles of the permissible weight category, would be incompatible and would render the strict definition clause, sterile and a ‘dead letter’. A harmonious construction of

**Digital Supreme Court Reports**

both sections can however reach us to a conclusion that for LMV licence holders, a separate endorsement under 'Transport Vehicle' class would be unnecessary for driving LMV class of vehicles. In our interpretation and understanding, it would be logical to hold that the additional licensing requirements will have no application for the LMV class of vehicles but will be needed only for such 'Transport Vehicles', which by virtue of their gross weight fall in the Medium and Heavy category. Such a construction would also fulfill the legislative purpose which is to ensure road safety by requiring only those individuals who intend to operate medium and heavy vehicles, to satisfy the additional licensing criteria. In our view, the age restrictions outlined in Section 4, the requirement of a medical certificate, and the criteria under Section 7 should reasonably apply only for the medium and heavy transport vehicles whose gross weight will be above 7500 Kg. Such an interpretation would fulfill the objective of the MV Act to provide compensation to victims of road accidents while maintaining a commensurate licensing regime for drivers.

75. At this stage, it needs to be borne in mind that the genesis of the present reference arises from compensation claims. A reference to the judgment in *National Insurance Co. Ltd. v. Swaran Singh*<sup>34</sup> may therefore be apposite. A 3-judge bench of this Court noted that the liability of the insurance company in relation to the owner depends on several factors. The issue of lack of valid driving license was discussed as under:

"7. If a person has been given a licence for a particular type of vehicle as specified therein, he cannot be said to have no licence for driving another type of vehicle which is of the same category but of different type. As for example, when a person is granted a licence for driving a light motor vehicle, he can drive either a car or a jeep and it is not necessary that he must have driving licence both for car and jeep separately.

89. Section 3 of the Act casts an obligation on a driver to hold an effective driving licence for the type of vehicle

**M/s Bajaj Alliance General Insurance Co. Ltd. v.  
Rambha Devi & Ors.**

which he intends to drive. Section 10 of the Act enables the Central Government to prescribe forms of driving licences for various categories of vehicles mentioned in sub-section (2) of the said section. The various types of vehicles described for which a driver may obtain a licence for one or more of them are: (a) motorcycle without gear, (b) motorcycle with gear, (c) invalid carriage, (d) light motor vehicle, (e) transport vehicle, (f) road roller, and (g) motor vehicle of other specified description. The definition clause in Section 2 of the Act defines various categories of vehicles which are covered in broad types mentioned in sub-section (2) of Section 10. They are “goods carriage”, “heavy goods vehicle”, “heavy passenger motor vehicle”, “invalid carriage”, “light motor vehicle”, “maxi-cab”, “medium goods vehicle”, “medium passenger motor vehicle”, “motor-cab”, “motorcycle”, “omnibus”, “private service vehicle”, “semi-trailer”, “tourist vehicle”, “tractor”, “trailer” and “transport vehicle”. In claims for compensation for accidents, various kinds of breaches with regard to the conditions of driving licences arise for consideration before the Tribunal as a person possessing a driving licence for “motorcycle without gear”, [*sic* may be driving a vehicle] for which he has no licence. Cases may also arise where a holder of driving licence for “light motor vehicle” is found to be driving a “maxi-cab”, “motor-cab” or “omnibus” for which he has no licence. In each case, on evidence led before the Tribunal, a decision has to be taken whether the fact of the driver possessing licence for one type of vehicle but found driving another type of vehicle, was the main or contributory cause of accident. If on facts, it is found that the accident was caused solely because of some other unforeseen or intervening causes like mechanical failures and similar other causes having no nexus with the driver not possessing requisite type of licence, **the insurer will not be allowed to avoid its liability merely for technical breach of conditions concerning driving licence.**

90. We have construed and determined the scope of sub-clause (ii) of sub-section (2) of Section 149 of the Act.

**Digital Supreme Court Reports**

**Minor breaches of licence conditions, such as want of medical fitness certificate, requirement about age of the driver and the like not found to have been the direct cause of the accident, would be treated as minor breaches of inconsequential deviation in the matter of use of vehicles.** Such minor and inconsequential deviations with regard to licensing conditions would not constitute sufficient ground to deny the benefit of coverage of insurance to the third parties.”

[emphasis supplied]

76. The upshot of the above is that compensation must not be denied for minor technical breaches of the licensing conditions. It was submitted before this Court that the decision in *Mukund Dewangan (2017)* is *per incuriam* for not considering Para 89 of the judgment. It is true that the Court pertinently notes therein that “*Cases may also arise where a holder of driving licence for “light motor vehicle” is found to be driving a “maxi-cab”, “motor-cab” or “omnibus” for which he has no licence.*” However, such an observation cannot be considered a conclusive determination by the Court to hold that a separate license for each of these vehicles would be necessary. Therefore, we are disinclined to accept such an argument.

**b) Interpretation must not result in impractical outcomes**

77. It is well-settled that a statute should be interpreted in a manner that avoids leading to unworkable or impractical outcomes.<sup>35</sup> If a statutory interpretation results in confusion, impracticability or creates burden that the legislature could not have intended, such an interpretation should be avoided. Mr. Jayant Bhushan, Learned Senior Counsel, placed reliance on Section 9(6) of MV Act and Rule 15(2) of MV Rules to argue that if one wants an endorsement of a ‘transport vehicle’ class, the person has to be *tested* on a ‘transport vehicle’ and not a ‘Maruti-800 car’. Let us test this argument by again taking the hypothetical example of Sri who holds an LMV license and is desirous of operating an auto for commercial purposes and as such applies separately for a license of a ‘Transport Vehicle’ class.

**M/s Bajaj Alliance General Insurance Co. Ltd. v.  
Rambha Devi & Ors.**

Crucially, Section 9 dealing with ‘Grant of driving license’ provides in sub-section (6) as under:

“(6) The test of competence to drive shall be carried out in a vehicle of the **type** to which the application refers.”

**78.** Sub-section (2) of Rule 15 of MV Rules titled ‘Driving Test’ read thus:

“(2) The test of competence to drive referred to in sub-section (3) of section 9 shall be conducted by the licensing authority or such other person as may be authorised in this behalf by the State Government in a vehicle of the **type** to which the application relates.”

- 79.** The type of the vehicle referred above, under the ‘Transport Vehicle’ class could therefore either be a three-wheeler weighing less than 7,500 kgs or a heavy passenger vehicle of more than 12,000 kgs, if the class for which Sri applied is broadly taken as a ‘transport Vehicle’, with no distinction between heavy, medium or light category. Then our hypothetical driver Sri, although will be tested to drive an ‘auto’, could end up driving a heavy passenger vehicle using the ‘Transport Vehicle’ license. Such a conclusion on valid authority would be incompatible in the context.
- 80.** Let us also look at the syllabus that would be prescribed for Sri for his application to drive a ‘Transport Vehicle’. As noted earlier, for ‘Transport Vehicles’, the syllabus as per Rule 31 is contained in Part E, F, G, H, I, J and K:

Part A: Driving Theory-I

Part B: Traffic Education-I

Part C: Light Vehicles Driving Practice

Part D: Vehicle Mechanism and Repairs

**Part E:** *Medium and Heavy Vehicle Driving:* Driving Theory-II

Part F: Traffic Education—II

Part G. Public Relations For Drivers

**Part H.** *Heavy Vehicle Driving Practice*

Part I. Fire Hazards

**Digital Supreme Court Reports**

Part J. Vehicle Maintenance

Part K. First Aid

the syllabus is contained in Part E, F, G, H, I, J and K:

81. Our hypothetical Sri, who wants to drive an auto would then be imparted training for the syllabus outlined in Parts E, F, G, H, I, J & K. These parts primarily pertain to 'Medium and Heavy Vehicle Driving'. The extensive syllabus covers topics such as fire hazards, heavy vehicle maintenance, cross-country practice and hill driving but those would hardly be germane for Sri who is desirous of driving only an auto rickshaw falling within the Light Motor Vehicle class. The legislature in its wisdom had stipulated such a wide-ranging syllabus to augment the safety measures as considered apposite for operating medium and heavy motor vehicles. To apply this extensive level of learning for the auto driver Sri, would defy logic although auto is a 'transport vehicle' but of a light weight class. To avoid such an illogical outcome, the argument of Mr. Bhushan has to be rejected. It would therefore be appropriate to interpret the provision to declare that the additional requirements outlined in the *MV Act* for 'Transport Vehicle', would not cover the LMV class but would be applicable only for the heavy and medium class vehicles. Such an interpretation would align with our harmonious interpretation, as explained earlier. If the alternate interpretation as suggested by the counsel for the insurance companies is accepted, it would mean that Sri's driving skills may be tested on an autorickshaw but he would also be legally entitled to drive a heavy multi axle truck because of the broad class of 'Transport Vehicle'. Such an absurd result should not be permitted.
82. The requirement of uniforms and badges for 'transport vehicle' and the duties and conduct of such persons under Section 28(2)(d) and 28(2)(h) are not directly related to the licensing regime. Similarly misplaced here is the reliance on necessity for Permit under Section 66 as also Rule 62 dealing with the 'Certificate of Fitness' of the vehicle. Rule 62 is extracted:-
- "62. Validity of certificate of fitness.—(1) A certificate of fitness in respect of a **transport vehicle** granted under section 56 shall be in Form 38 and such certificate

**M/s Bajaj Alliance General Insurance Co. Ltd. v.  
Rambha Devi & Ors.**

when granted or renewed shall be valid for the period as indicated below:—

|   |  |
|---|--|
| (a) new transport vehicle   | Two years  |
| (b) renewal of certificate of fitness in respect of vehicles mentioned in {a) above}          | One year   |
| [(ba) renewal of certificate of fitness in respect of E-rickshaw and E-cart                   | Three years  |
| renewal of certificate of fitness in respect of vehicles covered under rule 82 of these rules | One year   |
| d) fresh registration of important vehicles   | same period as in the case of vehicles manufactured in India having regard to the date of manufacture: |

[emphasis supplied]

83. The apprehension about a person with a license of a light motor vehicle class being able to drive an e-rickshaw, e-cart, a vehicle carrying hazardous goods or even a road roller is also misplaced. This is for the reason that legislature has carved out exceptions for these special kinds of vehicles in the *MV Act* and the *MV Rules* which is discernible from the following:—
- (i) Section 28 deals with the power of State Government to make Rules. Clause (h) provides for “the exemption of drivers of **road rollers** from all or any of the provisions of this Chapter or of the rules made thereunder”
  - (ii) An exception is carved out in Section 7, 9 and 27 of *MV Act* for e-cart or e-rickshaw. For instance, the proviso to Section 7 states that “Provided that nothing contained in this section shall apply to an **e-cart or e-rickshaw**”.
  - (iii) Similarly, Rule 8A provides for minimum training for driving E-rickshaw or E-cart. Rule 9 provides for educational qualifications for drivers of goods carriage carrying dangerous or hazardous goods.

**Digital Supreme Court Reports**

Therefore, the present interpretation will not have any impact for such vehicles.

84. It was also argued that the form of the driving license provides for the validity period for 'Transport' and 'Non Transport Vehicle'. On this contention, we can benefit by the following words of Justice O. Chinnappa Reddy in *Life Insurance Corporation v. Escorts*,<sup>36</sup> where for a similar insistence on form, the Judge opined as under:-

"Surely, the Form cannot control the Act, the Rules or the directions. As one learned Judge of the Madras High Court was fond of saying it is the dog that wags the tail and not the tail that wags the dog. We may add what this Court had occasion to say in Vasudev Ramchandra Shelat v. Pranlal Jayanand Thakar [(1975) 1 S.C.R. 534 : AIR 1974 SC 1728 : 1974 (2) SCC 323 : 1975 (45) Com. Cas. 43.] :

"The subservience of substance of a transaction to some rigidly prescribed form required to be meticulously observed, sevours of archaic and outmoded jurisprudence."

85. A harmonious interpretation of various sections would lead us to conclude that a person holding a LMV license is equally competent to drive a Transport Vehicle, provided of course the vehicle's gross weight does not exceed 7,500 kgs. The reference to 'transport vehicle' in Section 3(1) and other sections of the Act and Rules should therefore be understood as applying to only those vehicles which fall beyond the scope of the *sensu stricto* definition, under Section 2(21). This interpretation would ensure that no provision or word is rendered otiose and the licensing regime remains coherent with the legislative intent. Such an interpretation would also avoid illogical outcomes as discussed above.

#### **V. Discussion on the 8 Conflicting decisions**

86. The legal landscape surrounding the issue of whether a driver holding a license for a 'Light motor vehicle' can operate a 'Transport Vehicle' without obtaining a specific endorsement has been marked by a myriad of conflicting judgments. The genesis of the present reference stems from eight conflicting decisions which were thereafter

36 [1985] Supp. 3 SCR 909 : (1986) 2 SCC 264

**M/s Bajaj Alliance General Insurance Co. Ltd. v.  
Rambha Devi & Ors.**

referred to a 3-judge bench in *Mukund Dewangan (2017)*. On the issue of Transport Vehicles of the LMV class being driven by a driver with a LMV License, in the event of an accident involving an insured vehicle, some opinions have held the insurance company liable to pay compensation while few others have noted that the driver did not have a valid license for a ‘transport vehicle’ although he was possessing a LMV license. On a few occasions, this Court had exercised its power under Article 142 to grant compensation despite noting that the driver did not possess a valid ‘transport vehicle’ license. Before proceeding any further, a short discussion of these decisions in chronological order would be appropriate for aiding clarity to the discussion.

87. The earliest decision on the issue was in 1999, in *Ashok Gangadhar Maratha v. Oriental Insurance Co. Ltd.*<sup>37</sup> (for short “Ashok Gangadhar Maratha”). The definition of LMV at that time stipulated a weight limit of 6000 kgs. The facts in that case was that the appellant who was the holder of a LMV license, owned a Swaraj Mazda truck weighing 5,920 kgs, which got damaged in an accident on 26.11.1991. When the insurer refuted the claim, questioning the validity of the LMV driving license, the appellant filed a complaint before the Consumer Forum. The case traveled to the Supreme Court where a two-judge bench of this Court pertinently observed that a holder of a LMV license can drive a ‘transport vehicle’, without a specific endorsement and accordingly, compensation was granted to the claimants. The Supreme Court, *inter alia*, gave an important interpretation to Section 2(21) of the *MV Act* as well as Rule 2(e) of the *MV Rules* which defines a “non-transport vehicle”. In Para 10, the Court pertinently observed as under:

“10. The definition of “light motor vehicle” as given in clause (21) of Section 2 of the Act can apply only to a “light goods vehicle” or a “light transport vehicle”. A “light motor vehicle” otherwise has to be covered by the definition of “motor vehicle” or “vehicle” as given in clause (28) of Section 2 of the Act. A light motor vehicle cannot always mean a light goods carriage. Light motor vehicle can be a non-transport vehicle as well.”

**Digital Supreme Court Reports**

88. The Court supplemented its reasoning in Para 11 as under:

“11. To reiterate, since a vehicle cannot be used as a transport vehicle on a public road unless there is a permit issued by the Regional Transport Authority for that purpose and since in the instant case there is neither a pleading to that effect by any party nor is there any permit on record, the vehicle in question would remain a light motor vehicle. The respondent also does not say that any permit was granted to the appellant for plying the vehicle as a transport vehicle under Section 66 of the Act. Moreover, on the date of the accident, the vehicle was not carrying any goods and though it could be said to have been designed to be used as a transport vehicle or a goods carrier, it cannot be so held on account of the statutory prohibition contained in Section 66 of the Act.”

89. The Court additionally noted that if one accepts the contention of the insurer, “there can never be any light motor vehicle and there can never be any driving licence for driving a light motor vehicle. We cannot put such a construction on clause (21) of Section 2 of the Act so as to exclude a light motor vehicle from the Act altogether.”

89.1. Looking at the scheme of the *MV Act*, the above conclusion was the correct one declaring that an LMV would include a ‘light good vehicle’ or a ‘light transport vehicle’. While the Court supplemented its reasoning by stating that a vehicle cannot be used as a transport vehicle on a public road unless there is a permit, we must understand that a ‘license’ is different from a ‘permit’. The observations of the Court on the legal issue of a driving license, aligns with our own interpretation.

90. In *Nagashetty v. United India Insurance Co.*<sup>38</sup> the vehicle involved was a tractor with a trailer attached, filled with stones. The case revolved around an accident that occurred on 4.12.1995, when a tractor driven by the driver lost control and hit two pedestrians, resulting in the death of one person. The LRs of the deceased filed a compensation claim before the Motor Accident Claims Tribunal (MACT), which ruled in their favor and awarded compensation of ₹2,07,000 making the Insurance company liable for the insured

38 [2001] Supp. 1 SCR 656 : (2001) 8 SCC 56

**M/s Bajaj Alliance General Insurance Co. Ltd. v.  
Rambha Devi & Ors.**

tractor. The Insurance Company appealed before the High Court, contending that the driver only had a licence to operate a tractor and not a ‘goods vehicle’, as a trailer filled with stones was attached to the tractor, classifying it as a ‘transport vehicle’. Deciding in favour of the Insurance Company, the High Court held that the licence was invalid for driving a ‘transport vehicle’, and therefore, the Insurance Company was not liable to pay the compensation to the claimants.

- 90.1.** Setting aside the decision of the High Court, the Supreme Court held that a person having a valid driving license to drive a particular category of vehicle, does not become unauthorised to drive that category of vehicle, merely because a trailer is attached to it. Interpreting the terms of the Insurance Policy, it was held that if the submission of the Insurance Co. is accepted, then every time, an owner of a private car, who has a license to drive an LMV, attaches a roof carrier to his car, and carries goods thereon, the LMV would become a Transport Vehicle, and the owner would then be deemed to have no valid license, to drive that vehicle.
- 90.2.** It was rightly held in the above decision and as noted in *Mukund Dewangan (2017)*, that a vehicle cannot be readily classified as a ‘transport vehicle’ requiring a separate endorsement in the driving license. Although the Court supported its reasoning by referencing the insurance policy terms, the legal position remains that the term ‘transport vehicle’ overlaps with other vehicle classes.
- 91.** Before this Court, reliance was placed on the judgment in *New India Assurance Company v. Prabhu Lal*<sup>39</sup>(for short “Prabhu Lal”). The decision would now require our careful consideration. In this case, the accident which occurred on 17.4.1998 involved a Roadways bus (weighing 4,100 kgs) which was being driven by one M. This was however disputed by the insurance company who claimed that the vehicle was driven by the complainant’s own brother, who held a ‘Light Motor Vehicle’ license but not a ‘transport vehicle’ license. The District Forum held that a “goods carrier” weighing 4,100 kgs defined under Section 2(14) of the MV Act was driven by an individual with a LMV license and hence this was a Transport Vehicle under

## Digital Supreme Court Reports

Section 2(47) of the MV Act for which, a separate endorsement was necessary. The State Commission however held that the principle laid down in the 1999 decision in *Ashok Gangadhar (supra)* would apply and since the gross weight of the vehicle was only 6,800 kgs, it did not exceed the permissible limits for LMV category vehicles. Accordingly, the Insurance company was held liable. The National Commission upheld the said decision of the State Commission, favouring the claimants.

**91.1.** Reversing the concurrent decisions of the State and National Commissions, the Supreme Court however restored the decision of the District Forum which held that at the time of the accident, complainant's brother was driving the insured vehicle. On the validity of the LMV driving license holder driving the bus weighing 4100 kg, this Court held that a separate endorsement was necessary to drive the Transport Vehicle. It was observed as under:

“**33.** In our considered view, the State Commission was wrong in reversing the finding recorded by the District Forum. So far as *Ashok Gangadhar* [(1999) 6 SCC 620 : 1999 SCC (Cri) 1170] is concerned, we will deal with the said decision little later but from the documentary evidence on record and particularly, from the permit issued by the Transport Authority, it is amply clear that the vehicle was a “goods carrier” [Section 2(14)]. If it is so, obviously, it was a “transport vehicle” falling under Clause (47) of Section 2 of the Act. The District Forum was, therefore, right in considering the question of liability of the Insurance Company on the basis that Tata 709 which met with an accident was “transport vehicle”.

**91.2.** The Court in Para 40 and Para 41 also distinguished the 1999 judgement in *Ashok Gangadhar Maratha (supra)* with the following discussion:

“**40.** It is no doubt true that in *Ashok Gangadhar* [(1999) 6 SCC 620 : 1999 SCC (Cri) 1170] in spite of the fact that the driver was holding valid driving licence to ply light motor vehicle (LMV), this Court upheld the claim and ordered the Insurance Company

**M/s Bajaj Alliance General Insurance Co. Ltd. v.  
Rambha Devi & Ors.**

to pay compensation. But, in our considered opinion, the learned counsel for the Insurance Company is right in submitting that it was because of the fact that there was neither pleading nor proof as regards the permit issued by the Transport Authority. In absence of pleading and proof, this Court held that, it could not be said that the driver had no valid licence to ply the vehicle which met with an accident and he could not be deprived of the compensation. This is clear if one reads para 11 of the judgment, which reads thus: (SCC p. 626)

*“11. To reiterate, since a vehicle cannot be used as a transport vehicle on a public road unless there is a permit issued by the Regional Transport Authority for that purpose and since in the instant case there is neither a pleading to that effect by any party nor is there any permit on record, the vehicle in question would remain a light motor vehicle.* The respondent also does not say that any permit was granted to the appellant for plying the vehicle as a transport vehicle under Section 66 of the Act. Moreover, on the date of the accident, the vehicle was not carrying any goods and though it could be said to have been designed to be used as a transport vehicle or a goods carrier, it cannot be so held on account of the statutory prohibition contained in Section 66 of the Act.”

41. In our judgment, Ashok Gangadhar [(1999) 6 SCC 620 : 1999 SCC (Cri) 1170] did not lay down that the driver holding licence to drive a light motor vehicle need not have an endorsement to drive transport vehicle and yet he can drive such vehicle. It was on the peculiar facts of the case, as the Insurance Company neither pleaded nor proved that the vehicle was transport vehicle by placing on record the permit issued by the Transport Authority that the Insurance Company was held liable.”

**Digital Supreme Court Reports**

- 91.3. In *Prabhu Lal* (*supra*), this Court correctly noted that the vehicle was a ‘goods carrier’ under Section 2(14) and fell within the definition of ‘transport vehicle’. But then it strikingly overlooked that a ‘transport vehicle’ below 7500 kg unladen weight, would also be covered within the definition of LMV, under Section 2(21). This vital aspect was not discussed and the definition of Section 2(21) was also not adverted to in the judgment. The relevant portion of *Ashok Gangadhar Maratha* (*supra*) where it was held that the definition of ‘light motor vehicle’ can apply to ‘light goods vehicle’ as well as a ‘light transport vehicle’, was also overlooked. Instead the Court distinguished the judgment in *Ashok Gangadhar Maratha* (*supra*) on the basis of evidence and pleadings in that case. We have already noted earlier that the reasoning in *Ashok Gangadhar Maratha* (*supra*) w.r.t evidence and pleadings was only an additional observation. We must not confuse ‘permit’ with a ‘driving license’ to drive a ‘Transport Vehicle’. The Supreme Court in *Prabhu Lal* (*supra*) should have followed the decision in *Ashok Gangadhar Maratha* (*supra*) which clearly stated the legal position that a ‘light motor vehicle’ would include a ‘light goods vehicle’.
92. The issue in *Annapappa Irappa Nesaria* (*supra*), as we have already discussed in Part III of the judgment, was whether a driver of a Matador van weighing 3,500 kgs, with a “goods carriage” permit, could drive a “transport vehicle” with just a LMV license. The van met with an accident before the 1994 amendments to the MV Act, when there was no separate class for “transport vehicle.” The Court ruled that since the accident occurred before the amendment, the driver’s LMV license was valid for the transport vehicle, and the insurance company was liable to pay compensation. However, the Court held that post-amendment, a separate endorsement for driving transport vehicles is required. We are disinclined to accept such a view as we have already discussed in our judgment earlier that both before and after the 1994 amendment, the enhanced requirements for ‘Transport Vehicles’ applied primarily for medium and heavy vehicles, particularly following the 1994 amendment. We have also discussed the unworkability of the broad class of ‘Transport Vehicles’ and the inconsistency this creates with the other provisions of the MV Act and MV Rules, if such an interpretation is adopted.

**M/s Bajaj Alliance General Insurance Co. Ltd. v.  
Rambha Devi & Ors.**

- 93.** In *New India Assurance Co. Ltd. v. Roshanben Rahemansha Fakir*<sup>40</sup> (for short “*Roshanben Rahemansha Fakir*”), the case involved an autorickshaw, classified as a three-wheeled transport vehicle, used for goods delivery. In this case, insurance company resisted the accident claim and argued that the driver did not have a valid driving licence for a ‘transport vehicle’. The Supreme Court however reversed the decision of the Gujarat High Court and the MACT and noted that under *Section 14(2)(a)* of the *MV Act*, the renewal period for Transport Vehicle licences is three years, compared to twenty years for other vehicle categories. Based on this reasoning, the Court held that the driver was not authorised to drive the autorickshaw as he lacked the appropriate endorsement on his LMV License.
- 93.1.** The above faulty conclusion was reached primarily because the Court failed to take into account Section 2(21), which defines a Light Motor Vehicle (LMV). Since an autorickshaw falls within the weight limit of an LMV, the driver’s LMV licence should have been deemed sufficient. The presumption on account of the validity of license for 20 years could be relevant only for such vehicles which are covered within Medium or Heavy categories.
- 94.** In *Oriental Insurance Co. Ltd. v. Angad Kol*<sup>41</sup> (for short “*Angad Kol*”), the legal heirs of the deceased victim filed claim before the MACT, alleging that the deceased was fatally injured by a mini door auto (a goods carriage vehicle) on 31.10.2004 while she was standing at a location known as ‘Hardi Turning’. The Insurance Company resisted the claim by contending that the driver did not possess a valid and effective licence to operate the vehicle. The Tribunal allowed the claim and directed the payment of Rs. 1,83,000/- holding that the driver’s Light Motor Vehicle (LMV) licence was sufficient. This view was upheld by the High Court.
- 94.1.** Setting aside the above decisions favouring the claim, a two-judge bench of this Court held that the holder of a LMV license must also obtain a separate endorsement for a transport vehicle. It noted that the definition of LMV under Section 2(21) of MV Act would bring within its umbrage a Transport Vehicle but a distinction exists between the two as per Section 3 which

40 [2008] 8 SCR 328 : (2008) 8 SCC 253

41 [2009] 2 SCR 695 : (2009) 11 SCC 356

**Digital Supreme Court Reports**

deals with the necessity of a driving license. It was thus noted in Para 15 and 16 of the judgment:

“15. Section 9 provides for “grant of driving licence”. Section 10 prescribes the form and contents of licences to drive which is to the following effect:

“10. *Form and contents of licences to drive.*—

(1) Every learner’s licence and driving licence, except a driving licence issued under Section 18, shall be in such form and shall contain such information as may be prescribed by the Central Government.

(2) A learner’s licence or, as the case may be, driving licence shall also be expressed as entitling the holder to drive a motor vehicle of one or more of the following classes, namely:

(a)-(c)\*\*\*

(d) light motor vehicle;

(e) transport vehicle; [ Substituted for clauses (e) to (h) by Act 54 of 1994, Section 8 (w.e.f. 14-11-1994).]

(i) road roller;

(j) motor vehicle of a specified description.”

*The distinction between a “light motor vehicle” and a “transport vehicle” is, therefore, evident. A transport vehicle may be a light motor vehicle but for the purpose of driving the same, a distinct licence is required to be obtained.*

16. The distinction between a “transport vehicle” and a “passenger vehicle” can also be noticed from Section 14 of the Act. Sub-section (2) of Section 14 provides for duration of a period of three years in case of an effective licence to drive a “transport vehicle” whereas in case of any other licence, it may remain effective for a period of 20 years.”

[emphasis supplied]

**M/s Bajaj Alliance General Insurance Co. Ltd. v.  
Rambha Devi & Ors.**

- 94.2.** Relying on the judgment in *Prabhu Lal* (*supra*) which distinguished *Ashok Gangadhar Maratha* (*supra*), the Court in *Angad Kol* held that a driver of the mini goods carriage auto holding a LMV license, need not have a license for a Transport Vehicle. The Court also referred to *Annappa Irappa Nesaria* (*supra*) to note that the amendment (applicable prospectively) specifically introduced the term ‘Transport Vehicle’ in Section 10. Following this amendment, a specific endorsement for driving a Transport Vehicle would be necessary. It was also noted that since the license was granted for 20 years, a presumption arose that it was for a vehicle other than a transport vehicle. It was ultimately held that the driver did not have a valid driving license, for driving a ‘goods vehicle’ and breach of conditions of the insurance policy was found apparent on the face of record. However, exercising its power under Article 142, this Court directed the Insurance Company to deposit the compensation amount before the Tribunal with liberty to the claimants to withdraw the same providing the right of recovery to the Insurance Company to recover the deposited sum from the owner and the driver of the vehicle.
- 94.3.** Before this Court, the Counsel for the Insurance Companies placed reliance on the above decision in *Angad Kol* (*supra*) to argue that there is a clear distinction between ‘transport vehicle’ and ‘light motor vehicle’. Let us examine if such argument deserves our endorsement.
- 94.4.** The decision in *Angad Kol* (*supra*) was rendered when *Prabhu Lal* (*supra*) and *Annappa Irappa Nesaria* (*supra*) held the field. However, as we have noticed earlier, *Prabhu Lal* (*supra*) conspicuously failed to notice the definition of LMV in Section 2(21) even though it considered the definition of Transport Vehicle. It also wrongly distinguished *Ashok Gangadhar Maratha* (*supra*), where the legal position was clearly stated as under:

“10. The definition of “light motor vehicle” as given in clause (21) of Section 2 of the Act can apply only to a “light goods vehicle” or a “light transport vehicle”. A “light motor vehicle” otherwise has to be covered by the definition of “motor vehicle” or “vehicle” as

**Digital Supreme Court Reports**

given in clause (28) of Section 2 of the Act. A light motor vehicle cannot always mean a light goods carriage. Light motor vehicle can be a non-transport vehicle as well.”

- 94.5.** The Court in *Angad Kol* (*supra*) overlooked the crucial legal analysis in Para 9 and 10 and instead distinguished *Ashok Gangadhar Maratha* (*supra*) by relying on Para 11 where the Court only provided additional reasoning on the requirement of a ‘permit’. A ‘driving license’ is different from a ‘permit’. The conflation of the two terms led to the confusion. While a driving license relates to a driver’s qualification, a ‘permit’ relates to the vehicle’s operational classification.
- 94.6.** The Court in *Angad Kol* (*supra*) also relied on *Annappa Irappa Nesaria* (*supra*), which held that the introduction of Transport Vehicles post-amendment would imply that a specific endorsement would be needed for Transport Vehicles. At the cost of repetition, even otherwise, a comprehensive reading of the MV Act and Rules shows that the specific mention of the term Transport Vehicle in different places of the Act and Rules for the purpose of driving license would reasonably be applicable only for those Transport Vehicles, that fall above the weight limit prescribed in Section 2(21) for LMVs.
- 95.** In *S. Iyyapan v. United India Insurance Co. Ltd.*,<sup>42</sup> the 2-judge bench relied on inter alia, *Ashok Gangadhar Maratha* (*supra*) and *Annappa Irappa Nesaria* (*supra*). The case stemmed from an accident involving a Mahindra Maxi Cab (a light motor vehicle) that led to the death of one person. The deceased’s wife filed a claim before the Motor Accidents Claims Tribunal. The Tribunal awarded Rs. 2,42,000/- in compensation and held that a person holding a LMV License was entitled to drive a Mahindra Maxi Cab. The High Court, however reversed this decision noting that the vehicle was used as a taxi and hence it was a commercial vehicle. It held that a separate license is necessary for driving a commercial vehicle. The Supreme court however restored the decision of MACT stating that the driver with a LMV license was legally competent to drive the Maxi Cab, used as a taxi. The Court additionally considered Sections 146, 147, and 149 of

**M/s Bajaj Alliance General Insurance Co. Ltd. v.  
Rambha Devi & Ors.**

the MV Act and noted that under certain circumstances, insurers could limit their liability, but they were still bound to pay compensation to third parties. The right of third parties to compensation was protected by law, and the insurer could later recover the amount from the insured if any policy violation occurred. The Supreme Court categorically held that since the driver had a valid LMV licence, and the Mahindra Maxi Cab was classified as an LMV, the insurance company was liable to pay the compensation. The following was the relevant discussion for what appears to be the correct conclusion in *S. Iyyappan* (*supra*):-

“18. In the instant case, admittedly the driver was holding a valid driving licence to drive light motor vehicle. There is no dispute that the motor vehicle in question, by which accident took place, was Mahindra Maxi Cab. Merely because the driver did not get any endorsement in the driving licence to drive Mahindra Maxi Cab, which is a light motor vehicle, the High Court has committed grave error of law in holding that the insurer is not liable to pay compensation because the driver was not holding the licence to drive the commercial vehicle. The impugned judgment [ Civil Misc. Appeal No. 1016 of 2002, order dated 31-10-2008 (Mad)] is, therefore, liable to be set aside.”

- 96.** Similarly, in *Kulwant Singh v. Oriental Insurance Co. Ltd.*<sup>43</sup> the question for consideration was whether the Insurance Company had recovery rights for breach of conditions of insurance policy when the driver possesses a valid driving licence for driving light vehicle but fails to obtain endorsement for driving goods vehicle? In that case, the L/Rs of the deceased had filed a claim before the MACT following a road accident death on 8.10.2005. The deceased was driving a tempo which was hit by a Tata-407 Tempo. The tribunal held that the claimants were entitled to compensation. The High Court, however, held that there was a breach of policy conditions and the insurance company was entitled to recover the compensation amount from the owner of the vehicle.
- 96.1.** The 2-judge bench of the Supreme Court opined that the issue stands covered by the judgment in *S. Iyyapan* (*supra*). It therefore held that the insurance company could not

## Digital Supreme Court Reports

avoid liability merely because, the driver did not have an endorsement to drive a commercial vehicle.

- 96.2. In view of the reasons assigned by us and as rightly noted in *Mukund Dewangan (2017)*, the decisions in *S. Iyyapan* (*supra*) and *Kulwant Singh* (*supra*) were decided correctly. However, as regards the reliance on *Annappa Irappa Nesaria* (*supra*), post-amendment in Section 10 also, the law continues to be the same for vehicles falling within the LMV category.
- 96.3. Therefore, the judgments where the Court has held that a separate endorsement for a ‘transport vehicle’ may not be necessary i.e. in *Ashok Gangadhar Maratha* (*supra*), *Nagashetty* (*supra*), *S. Iyyapan* (*supra*) and *Kulwant Singh* (*supra*) are found to align with our reasoning and interpretation and they are therefore upheld. In consequence, the three judgments which concluded otherwise i.e. *Prabhu Lal* (*supra*), *Roshanben Rahemansha Fakir* (*supra*) and *Angad Kol* (*supra*) are overruled based on the reasoning provided by us in this judgment. The decision in *Annappa Irappa Nesaria* (*supra*) is partially overruled to the extent that the position even post-amendment would remain the same.

### VI. Is *Mukund Dewangan (2017)* per incuriam?

- 97. Shifting gears, we may recall that the decision in *Mukund Dewangan (2017)* was doubted for not noticing certain provisions of the MV Act and MV Rules. These include, inter alia, Section 4(1), 7, 14, the second proviso to Section 15 and Section 180 and 181 of the MV Act. It was therefore argued before this Court that the said decision is per incuriam. To begin with, it is useful to refer to some decisions that have expounded on the principle of per incuriam.
- 98. The term *per incuriam* is a Latin term which means ‘by inadvertence’ or ‘lack of care’. English Courts have developed this principle in relaxation of the rule of stare decisis. In *Halsbury’s Laws of England*,<sup>44</sup> the concept of *per incuriam* was explained as under:

---

<sup>44</sup> Halsbury’s Laws of England (4th Edn.) Vol. 26: *Judgment and Orders: Judicial Decisions as Authorities* (pp. 297-98, para 578)

**M/s Bajaj Alliance General Insurance Co. Ltd. v.  
Rambha Devi & Ors.**

“A decision is given per incuriam when the court has acted in ignorance of a previous decision of its own or of a court of coordinate jurisdiction which covered the case before it, in which case it must decide which case to follow;<sup>45</sup> or when it has acted in ignorance of a House of Lords decision, in which case it must follow that decision; or when the decision is given in ignorance of the terms of a statute or rule having statutory force.<sup>46</sup> A decision should not be treated as given per incuriam, however, simply because of a deficiency of parties,<sup>47</sup> or because the court had not the benefit of the best argument,<sup>48</sup> and, as a general rule, the only cases in which decisions should be held to be given per incuriam are those given in **ignorance of some inconsistent statute or binding authority**.<sup>49</sup> Even if a decision of the Court of Appeal has misinterpreted a previous decision of the House of Lords, the Court of Appeal must follow its previous decision and leave the House of Lords to rectify the mistake.”

[emphasis supplied]

- 99.** Lord Evershed in *Morelle Ld. V. Wakeling*<sup>50</sup> (for short “Morelle”) explained the concept as under:

“As a general rule the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some **inconsistent statutory provision** or of some authority binding on the court concerned; so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong”

[emphasis supplied]

45 *Young v. Bristol Aeroplane Co. Ltd.*, 1944 KB 718 at 729 : (1944) 2 All ER 293 at 300

46 *Lancaster Motor Co. (London) Ltd. v. Bremith Ltd.* (1941) 1 KB 675 : (1941) 2 All ER

47 *Morelle Ltd. v. Wakeling* (1955) 2 QB 379 : (1955) 1 All ER 708 (CA)

48 *Bryers v. Canadian Pacific Steamships Ltd.* (1957) 1 QB 134 : (1956) 3 All ER 560 (CA) Per Singleton, L.J., affirmed in *Canadian Pacific Steamships Ltd. v. Bryers* 1958 AC 485 : (1957) 3 All ER 572.]

49 A. and J. Mucklow Ltd. v. IRC, 1954 Ch 615 : (1954) 2 All ER 508 (CA), *Morelle Ltd. v. Wakeling* (1955) 2 QB 379 : (1955) 1 All ER 708 (CA), see also *Bonsor v. Musicians' Union*, 1954 Ch 479 : (1954) 1 All ER 822 (CA)

50 *Morelle LD v. Wakeling* (1955) 2 QB 379 (Court of Appeal).

## Digital Supreme Court Reports

**100.** A few months after the decision in *Morelle (supra)*, the Constitution Bench of this Court in *Bengal Immunity Co. Ltd. v. State of Bihar*<sup>51</sup> adopted the *per incuriam* principle. It held that while Article 141 states that the Supreme Court's decisions are "binding on all courts within the territory of India," this does not extend to binding the Supreme Court itself, which remains free to reconsider its judgments in appropriate cases.

**101.** In *Mamleshwar Prasad v. Kanhaiya Lal*,<sup>52</sup> reflecting on the principle of *per incuriam*, this Court speaking through Krishna Iyer J. held thus:

"7. Certainty of the law, consistency of rulings and comity of courts — all flowering from the same principle — converge to the conclusion that a decision once rendered must later bind like cases. We do not intend to detract from the rule that, in exceptional instances, where by obvious inadvertence or oversight a judgment fails to notice a plain statutory provision or obligatory authority running counter to the reasoning and result reached, it may not have the sway of binding precedents. **It should be a glaring case, an obtrusive omission.** No such situation presents itself here and we do not embark on the principle of judgment *per incuriam*."

[emphasis supplied]

**102.** In *A.R. Antulay v. R.S. Nayak*,<sup>53</sup> the Constitution Bench of this Court made the following observations:

"42. It appears that when this Court gave the aforesaid directions on 16-2-1984, for the disposal of the case against the appellant by the High Court, the directions were given oblivious of the relevant provisions or law and the decision in *Anwar Ali Sarkar case [State of W.B. v. Anwar Ali Sarkar (1952) 1 SCC 1 : AIR 1952 SC 75 : 1952 Cri LJ 510]*. See *Halsbury's Laws of England*, 4th Edn., Vol. 26, p. 297, para 578 and p. 300, the relevant Notes 8, 11 and 15; *Dias on Jurisprudence*, 5th Edn., pp.

51 AIR 1955 SC 661

52 [1975] 3 SCR 834 : (1975) 2 SCC 232

53 [1988] Supp. 1 SCR 1 : (1988) 2 SCC 602

**M/s Bajaj Alliance General Insurance Co. Ltd. v.  
Rambha Devi & Ors.**

128 and 130; *Young v. Bristol Aeroplane Co. Ltd.* [*Young v. Bristol Aeroplane Co. Ltd.*, 1944 KB 718 (CA)] Also see the observations of Lord Goddard in *Moore v. Hewitt* [*Moore v. Hewitt*, 1947 KB 831] and *Nicholas v. Penny* [*Nicholas v. Penny* (1950) 2 KB 466].

*“Per incuriam” are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that in such cases some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong. See Morelle Ltd. v. Wakeling [Morelle Ltd. v. Wakeling (1955) 2 QB 379 : (1955) 2 WLR 672 (CA)]. Also see State of Orissa v. Titaghur Paper Mills Co. Ltd. [State of Orissa v. Titaghur Paper Mills Co. Ltd., 1985 Supp SCC 280 : 1985 SCC (Tax) 538]* We are of the opinion that in view of the clear provisions of Section 7(2) of the Criminal Law Amendment Act, 1952 and Articles 14 and 21 of the Constitution, these directions were legally wrong.”

**103.** In *MCD v. Gurnam Kaur*,<sup>54</sup> A 3-Judge bench of this Court held that:

“11. ... A decision should be treated as given per incuriam when it is given in ignorance of the terms of a statute or of a rule having the force of a statute.”

**104.** In *Punjab Land Development & Reclamation Corpn. Ltd. v. Labour Court*,<sup>55</sup> a five-judge bench of this Court said the following in the context of the principle of *per incuriam* for ignoring statutory provisions :-

“43. As regards the judgments of the Supreme Court allegedly rendered in ignorance of a relevant constitutional provision or other statutory provisions on the subjects covered by them, it is true that the Supreme Court may not be said to “declare the law” on those subjects if the relevant provisions were not really present to its mind. But in this case Sections 25-G and 25-H were not directly

54 [1988] Supp. 2 SCR 929 : (1989) 1 SCC 101

55 [1990] 3 SCR 111 : (1990) 3 SCC 682

## Digital Supreme Court Reports

attracted and even if they could be said to have been attracted in laying down the major premise, they were to be interpreted consistently with the subject or context. *The problem of judgment per incuriam when actually arises, should present no difficulty as this Court can lay down the law afresh, if two or more of its earlier judgments cannot stand together.*

[emphasis supplied]

- 105.** In *N.Bhargavan Pillai v. State of Kerala*,<sup>56</sup> a two-judge bench speaking through Arijit Pasayat J. noted that a judgment cannot be treated as a binding precedent, if it fails to notice a specific statutory bar:

“14. Coming to the plea relating to benefits under the Probation Act, it is to be noted that Section 18 of the said Act clearly rules out application of the Probation Act to a case covered under Section 5(2) of the Act. Therefore, there is no substance in the accused-appellant’s plea relating to grant of benefit under the Probation Act. The decision in Bore Gowda case [(2000) 10 SCC 260 : 2000 SCC (Cri) 1244] does not even indicate that Section 18 of the Probation Act was taken note of. In view of the specific statutory bar the view, if any, expressed without analysing the statutory provision cannot in our view be treated as a binding precedent and at the most is to be considered as having been rendered per incuriam. Looked at from any angle, the appeal is sans merit and deserves dismissal which we direct.”

- 106.** In *State of M.P. v. Narmada Bachao Andolan*,<sup>57</sup> this Court reiterated:

“67. Thus, “per incuriam” are those decisions given in ignorance or forgetfulness of some statutory provision or authority binding on the W.P.(C)Nos.7785, 7851, court concerned, or a statement of law caused by inadvertence or conclusion that has been arrived at without application of mind or proceeded without any reason so that in such a case some part of the decision or some step in the

---

56 [2004] Suppl. 1 SCR 444 : (2004) 13 SCC 217

57 [2011] 11 SCR 678 : (2011) 7 SCC 639

**M/s Bajaj Alliance General Insurance Co. Ltd. v.  
Rambha Devi & Ors.**

reasoning on which it is based, is found, on that account to be demonstrably wrong.”

- 107.** Subsequently, in *Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.*<sup>58</sup> this Court observed:

“A prior decision of the Supreme Court on identical facts and law binds the Court on the same points of law in a later case. In exceptional instances, where by obvious inadvertence or oversight a judgment fails to notice a plain statutory provision or obligatory authority **running counter to the reasoning and result reached**, the principle of per incuriam may apply. **Unless it is a glaring case of obtrusive omission**, it is not desirable to depend on the principle of judgment ‘per incuriam’. It has to be shown that some part of the decision was based on a reasoning which was demonstrably wrong, for applying the principle of per incuriam.”

[emphasis supplied]

- 108.** In *State of Bihar v. Kalika Kuer*,<sup>59</sup> the legal dilemma was noted as under:

“10. ... Easy course of saying that earlier decision was rendered per incuriam is not permissible and the matter will have to be resolved only in two ways — either to follow the earlier decision or refer the matter to a larger Bench to examine the issue, in case it is felt that earlier decision is not correct on merits.”

- 109.** In *Sundeept Kumar Bafna v. State of Maharashtra*,<sup>60</sup> the Court expanded the definition of per incuriam in the Indian context and noted that:

“A decision or judgment can also be per incuriam if it is not possible to reconcile its ratio with that of a previously pronounced judgment of a Co-equal or Larger Bench; or if the decision of a High Court is not in consonance with the

58 [2001] 3 SCR 479 : (2001) 6 SCC 356

59 (2003) 5 SCC 448

60 [2014] 4 SCR 486 : (2014) 16 SCC 623

**Digital Supreme Court Reports**

views of this Court. It must immediately be clarified that the *per incuriam* rule is strictly and correctly applicable to the *ratio decidendi* and not to *obiter dicta*."

- 110.** In a recent decision in *Shah Faesal v. Union of India*,<sup>61</sup> a five judge bench of this Court reiterated that the principle of *per incuriam* only applies on the ratio of the case.
- 111.** After having examined the above decisions, when dealing with the ignorance of a statutory provision, we may bear in mind the following principles. These may not however be exhaustive:
- (i) A decision is *per incuriam* only when the overlooked statutory provision or legal precedent is central to the legal issue in question and might have led to a different outcome if those overlooked provisions were considered. It must be an inconsistent provision and a glaring case of obtrusive omission.
  - (ii) The doctrine of *per incuriam* applies strictly to the *ratio decidendi* and does not apply to *obiter dicta*.
  - (iii) If a court doubts the correctness of a precedent, the appropriate step is to either follow the decision or refer it to a larger Bench for reconsideration.
  - (iv) It has to be shown that some part of the decision was based on a reasoning which was demonstrably wrong, for applying the principle of *per incuriam*. In exceptional instances, where by obvious inadvertence or oversight, a judgment fails to notice a plain statutory provision or obligatory authority running counter to the reasoning and result reached, the principle of *per incuriam* may apply.
- 112.** Applying the above principles to the case at hand, let us now apply our mind to the reference made in the context of the decision in *Mukund Dewangan (2017)*. The following questions were referred:

- "1. What is the meaning to be given to the definition of "light motor vehicle" as defined in Section 2(21) of the MV Act? Whether transport vehicles are excluded from it?

**M/s Bajaj Alliance General Insurance Co. Ltd. v.  
Rambha Devi & Ors.**

2. Whether “transport vehicle” and “omnibus” the “gross vehicle weight” of either of which does not exceed 7500 kg would be a “light motor vehicle” and also motor car or tractor or a roadroller, “unladen weight” of which does not exceed 7500 kg and holder of a licence to drive the class of “light motor vehicle” as provided in Section 10(2)(d) would be competent to drive a transport vehicle or omnibus, the “gross vehicle weight” of which does not exceed 7500 kg or a motor car or tractor or roadroller, the “unladen weight” of which does not exceed 7500 kg?
  3. What is the effect of the amendment made by virtue of Act 54 of 1994 w.e.f. 14-11-1994 while substituting clauses (e) to (h) of Section 10(2) which contained “medium goods vehicle”, “medium passenger motor vehicle”, “heavy goods vehicle” and “heavy passenger motor vehicle” by “transport vehicle”? Whether insertion of expression “transport vehicle” under Section 10(2)(e) is related to said substituted classes only or it also excluded transport vehicle of light motor vehicle class from the purview of Sections 10(2)(d) and 2(41) of the Act?
  4. What is the effect of amendment of Form 4 as to the operation of the provisions contained in Section 10 as amended in the year 1994 and whether the procedure to obtain the driving licence for transport vehicle of the class of “light motor vehicle” has been changed?”
- 113.** The judgment in Mukund Dewangan (2017), shows that the 3 Judge Bench considered Section 2(21), 2(47) read with Section 10 of MV Act. The Court also examined the legislative intent behind the 1994 amendment to Section 10, noting that while the amendment introduced the term “transport vehicle” under Section 10(2)(e), it did not amend the definition of LMVs under Section 2(21). It was further observed that the newly inserted provision of Section 10(2)(e) would only subsume those classes of vehicles that were contained in Sections 10(2)(e) to 10(2)(h) of the un-amended Act i.e. medium goods vehicle, medium passenger vehicle, heavy goods vehicle and

**Digital Supreme Court Reports**

heavy passenger vehicle, and which now stand deleted by virtue of the amendment of 1994. Since no amendment was carried out in Section 10(2)(d) of the Act which contains the class for 'Light Motor Vehicles', the scope of Section 10(2)(d) would remain intact as is contained in Section 2(21) of the Act, which is to say that LMV would include 'Transport Vehicles' in cases where the gross weight of such vehicle is less than 7500 Kgs. It further noted that the syllabus does not provide separate training for transport vehicles but includes them under the relevant vehicle class based on the vehicle's weight. It considered Rule 75 which deals with 'State Register of motor vehicles' as provided in Form 41. Form 41 categorizes vehicles on the basis of, *inter alia*, gross vehicle weight, unladen weight etc. Likewise, the Court observed that Section 41, pertaining to registration, mandates the inclusion of relevant information as specified in Form 20, which outlines details such as the class of vehicle, gross vehicle weight, and unladen weight, among other factors.

**114.** The court analysed those key provisions of the Act and Rules and reached a conclusion which is aligned with the discussion and opinion in this judgment. It rightly concluded as under:

- (i) 'Light motor vehicle' as defined in section 2(21) of the Act would include a transport vehicle as per the weight prescribed in section 2(21) read with section 2(15) and 2(48). Such transport vehicles are not excluded from the definition of the light motor vehicle by virtue of Amendment Act No.54/1994.
- (ii) A transport vehicle and omnibus, the gross vehicle weight of either of which does not exceed 7500 kg. would be a light motor vehicle and also motor car or tractor or a road roller, 'unladen weight' of which does not exceed 7500 kg. and holder of a driving licence to drive class of "light motor vehicle" as provided in section 10(2)(d) is competent to drive a transport vehicle or omnibus, the gross vehicle weight of which does not exceed 7500 kg. or a motor car or tractor or road-roller, the "unladen weight" of which does not exceed 7500 kg. That is to say, no separate endorsement on the licence is required to drive a transport vehicle of light motor

**M/s Bajaj Alliance General Insurance Co. Ltd. v.  
Rambha Devi & Ors.**

vehicle class as enumerated above. A licence issued under section 10(2)(d) continues to be valid after Amendment Act 54/1994 and 28.3.2001 in the form.

- (iii) The effect of the amendment made by virtue of Act No.54/1994 w.e.f. 14.11.1994 while substituting clauses (e) to (h) of section 10(2) which contained “medium goods vehicle” in section 10(2)(e), medium passenger motor vehicle in section 10(2)(f), heavy goods vehicle in section 10(2)(g) and “heavy passenger motor vehicle” in section 10(2)(h) with expression ‘transport vehicle’ as substituted in section 10(2)(e) related only to the aforesaid substituted classes only. It does not exclude transport vehicle, from the purview of section 10(2)(d) and section 2(41) of the Act i.e. light motor vehicle.
  - (iv) The effect of amendment of Form 4 by insertion of “transport vehicle” is related only to the categories which were substituted in the year 1994 and the procedure to obtain driving licence for transport vehicle of class of “light motor vehicle” continues to be the same as it was and has not been changed and there is no requirement to obtain separate endorsement to drive transport vehicle, and if a driver is holding licence to drive light motor vehicle, he can drive transport vehicle of such class without any endorsement to that effect.”
115. It is true that *Mukund Dewangan (2017)* did not analyse the provisions that distinguish transport and non-transport vehicles, as noted in the reference orders. The statutory scheme of MV is more nuanced than the simple weight-based distinction made in the said judgment. Moreover, the Court failed to notice Section 31(2) and 31(3) which specify ‘Transport’ and ‘Non-Transport’ vehicles. However, the judgment gave due consideration to the important statutory provisions. We have carefully looked at the relevant and the wide ranging provisions in our analysis in this decision. A harmonious interpretation, as we have explained earlier, would lead us to the same conclusion but fortified with some additional reasoning based on the consideration of all the relevant provisions. The overlooked

**Digital Supreme Court Reports**

provisions would not, in our considered opinion, alter the eventual pronouncement. Importantly, we do not notice any glaring error or omission that would alter the outcome of the case. Therefore, the ratio in Mukund Dewangan (2017) should not be disturbed by applying the principles of *per incuriam*.

**F. IMPACT ON ROAD SAFETY**

- 116.** The counsel for the insurance Companies raised concerns regarding road safety, arguing that if the present law in Mukund Dewangan (2017) is not interfered with, unfit drivers will start plying Transport Vehicles putting at risk the lives of thousands of people. One of the supporting Intervenors placed reliance on Para 57 of the decision of this Court in *Savelife Foundation v. Union of India*<sup>62</sup> where this Court while exercising its public interest litigation jurisdiction under Article 32 of the Constitution of India held that the Right to life under Article 21 also includes the right to safety of persons travelling on the road. Per contra, in the intervention application filed on behalf of auto drivers, it was argued that the members of the Applicant Intervenor have been permitted to operate taxis and motorcabs while holding an LMV licence for the past almost 6 years. Reconsideration of the same is not merely an issue of insurance coverage, rather it directly pertains to the livelihood of those operating transport vehicles of the LMV class, thereby giving rise to a fair consideration of their rights under Article 19(1)(g). It was submitted that if this Court upsets Mukund Dewangan (2017), which it should not, a transition period of 12-24 months be provided.
- 117.** The above submissions will now require our consideration. It is true that in its PIL jurisdiction, this Court has passed orders in a myriad of cases including elevating the right of road safety to a fundamental right. It has also taken over policy areas<sup>63</sup> by appointing Commissioners to gather facts or to take expert advice in the form of reports. However, this Court should be conscious that this is neither a Public Interest Litigation jurisdiction nor is the Court testing the constitutional validity of any of the provisions. Moreover, no empirical

---

62 (2016) 7 SCC 194

63 See Ashok H Desai and S Muralidhar, 'Public Interest Litigation: Potential and Problems' in B.N Kirpal and others (eds), *Supreme but not Infallible – Essays in Honour of the Supreme Court of India* (Oxford University Press 2000)

**M/s Bajaj Alliance General Insurance Co. Ltd. v.  
Rambha Devi & Ors.**

data has been produced before us to show that road accidents in India have increased as a direct result of drivers with LMV license, plying a transport vehicle of LMV class of vehicles whose gross weight is within 7500 Kg. Road safety is indeed an important objective of the *MV Act* but our reasoning must not be founded on unverified assumptions without any empirical data. The dangers of reasoning without empirical data<sup>64</sup> and beyond the statutory scheme of the Act must be avoided. While we are mindful of issues of road safety, the task of crafting policy lies within the domain of the legislature. As a constitutional court, it is not our role to dictate policy decisions or rewrite laws. We must be mindful of the institutional limitation to address such concerns.

- 118.** The complexities surrounding the question of whether the Court should examine not only the existing laws and definitions, but also the broader underlying issues of policy have been vividly captured in the following words from Salmond on Jurisprudence<sup>65</sup>:

“Rules, which are originally designed to fit social needs, develop into concepts, which then proceed to take on a life of their own to the detriment of legal development. The resulting “jurisprudence of concepts” produces a slot-machine approach to law whereby new points posing questions of social policy are decided, not by reference to the underlying social situation, but by reference to the meaning and definition of the legal concepts involved. This formalistic a priori approach confines the law in a strait-jacket instead of permitting it to expand to meet the new needs and requirements of changing society. .....In such cases Courts should examine not only the existing laws and legal concepts, but also the broader underlying issues of policy. In fact presently, judges are seen to be paying increasing attention to the possible effects of their decision one way or the other..... Such an approach is to be welcomed, but it also warrants two comments. *First, judicial inquiry into the general effects of a proposed decision tends itself to be of a fairly speculative nature.*

64 Anuj Bhuwania, ‘Courting the People— Public Interest Litigation in Post-Emergency India’ (Cambridge University Press 2017).

65 P.J. Fitzgerald(Ed), ‘Salmond on Jurisprudence’ (12<sup>th</sup> edn, Sweet and Maxwell 1966)

**Digital Supreme Court Reports**

*Secondly, Too much regard for policy and too little for legal consistency may result in a confusing and illogical complex of contrary decisions; and while it is true that ‘the life of the law has not been logic, it has been experience’ and that we should not wish it otherwise, nevertheless we should remember that ‘no system of law can be workable if it has not got logic at the root of it’*

[emphasis supplied]

119. What follows from the above is that wherever possible, the Court must attempt to be consistent in its approach. The principle of *stare decisis*, which mandates that courts adhere to established precedents, plays a crucial role in maintaining legal stability and predictability. The finding in Mukund Dewangan (2017) need not be disturbed owing to speculative concerns of road safety that intersect with broader policy issues.
120. We may recall that during the course of the present proceeding, the Central Government was arrayed and the learned Attorney General was requested to obtain instructions on whether the legislative wing would wish to examine and undertake an appropriate amendment on the legal question of whether a person holding a driving license for a light motor vehicle is entitled to legally drive a ‘transport vehicle’ of a specified weight. An order to this effect was passed in light of the possible social impact of the reference, particularly on road safety and the livelihood issue. Pursuant to this, the learned Attorney General submitted a note, *inter alia*, suggesting multiple amendments including a further classification of LMVs into LMV Class 1 and LMV Class 2, each with different weight thresholds.
121. Had the Parliament acted sooner to amend the *MV Act* and clearly differentiated between classes, categories and types, much of the uncertainty surrounding driving licenses could have been addressed, reducing the need for frequent litigation and an unclear legal terrain. The confusion and inconsistency in judicial decisions continued to persist for 25 years starting from the 1999 decision in Ashok Gangadhar Maratha (supra).
122. Road safety is a serious public health issue globally. It is crucial to mention that in India, over 1.7 lakh persons<sup>66</sup> were killed in road

66 Dipak K Dash, Accidents killed 474 on daily average in 2023 (October 20, 2024) <<https://timesofindia.indiatimes.com/india/accidents-killed-474-daily-on-average-in-2023/articleshow/114384171.cms>>

**M/s Bajaj Alliance General Insurance Co. Ltd. v.  
Rambha Devi & Ors.**

accidents in 2023. The causes of such accidents are diverse, and assumptions that they stem from drivers operating light transport vehicles with an LMV license are unsubstantiated. Factors<sup>67</sup> contributing to road accidents include careless driving, speeding, poor road design, and failure to adhere to traffic laws. Other significant contributors are mobile phone usage, fatigue, and non-compliance with seat belt or helmet regulations.

- 123.** Driving a motor vehicle is a complex task requiring both practical skills and theoretical knowledge. Safe driving involves not only technical vehicle control<sup>68</sup> but also proficiency in various road conditions, including managing speed,<sup>69</sup> turns, and spatial awareness relative to other vehicles. Additionally, handling road gradients demands skill, particularly with brakes<sup>70</sup> and maneuvering. Effective driving requires awareness of road signs, adherence to traffic rules,<sup>71</sup> and a focus on the road free from distractions. The core skills expected of all drivers apply universally, regardless of whether the vehicle falls into transport or non-transport categories.
- 124.** At this juncture, it is also essential to note the scheme<sup>72</sup> devised in accordance with Section 75 of *MV Act* whereby the pre-requisites in the form of ‘General Conditions’ to be maintained by the ‘holder of license’ ensure safety and compliance. Certain guidelines<sup>73</sup> have also been enacted in so far as aggregators are concerned whereby chapters outlining ‘Conditions for grant of licence for Aggregator’, ‘Compliance with regard to Drivers’, ‘Compliance with regard to Vehicles’ as also ‘Compliances to ensure safety’ further address the speculative concerns raised on behalf of the counsel for insurance companies.

#### **G. CONCLUSION**

- 125.** The licensing regime under the *MV Act* and the *MV Rules*, when read as a whole, does not provide for a separate endorsement for

67 WHO(2023) Global Status Report on Road Safety India 2023 Country profile <https://www.who.int/publications/m/item/road-safety-ind-2023-country-profile>

68 See MV Rules, Rule 31, Part D Vehicle Mechanism and Repairs

69 See MV Act, Section 112 Limits of Speed

70 See MV rules, Rule 31, Part A-Driving Theory-I,

71 See MV Rules, Rule 31, Part B-Traffic Education-I and Part F-Traffic Education-II

72 Rent a Cab Scheme, 1989; Vide S.O. 437 (E), dated 12th June, 1989, published in the Gazette of India, Extra. Pt. II, Sec. 3(ii), dated 12th June, 1989

73 Motor Vehicle Aggregator Guidelines, 2020

**Digital Supreme Court Reports**

operating a ‘Transport Vehicle’, if a driver already holds a LMV license. We must however clarify that the exceptions carved out by the legislature for special vehicles like e-carts and e-rickshaws,<sup>74</sup> or vehicles carrying hazardous goods,<sup>75</sup> will remain unaffected by the decision of this Court.

- 126.** As discussed earlier in this judgment, the definition of LMV under Section 2(21) of the *MV Act* explicitly provides what a ‘Transport Vehicle’ ‘means’. This Court must ensure that neither provision i.e. the definition under Section 2(21) or the second part of Section 3(1) which concerns the necessity for a driving license for a ‘Transport Vehicle’ is reduced to a dead letter of law. Therefore, the emphasis on ‘Transport Vehicle’ in the licensing scheme has to be understood only in the context of the ‘medium’ and ‘heavy’ vehicles. This harmonious reading also aligns with the objective of the 1994 amendment in Section 10(2) to simplify the licensing procedure.<sup>76</sup>
- 127.** The above interpretation also does not defeat the broader twin objectives of the *MV Act* i.e. road safety and ensuring timely compensation and relief for victims of road accidents. The aspect of road safety is earlier discussed at length. An authoritative pronouncement by this Court would prevent insurance companies from taking a technical plea to defeat a legitimate claim for compensation involving an insured vehicle weighing below 7,500 kgs driven by a person holding a driving license of a ‘Light Motor Vehicle’ class.
- 128.** In an era where autonomous or driver-less vehicles are no longer tales of science fiction and app-based passenger platforms are a modern reality, the licensing regime cannot remain static. The amendments that have been carried out by the Indian legislature may not have dealt with all possible concerns. As we were informed by the Learned Attorney General that a legislative exercise is underway, we hope that a comprehensive amendment to address the statutory lacunae will be made with necessary corrective measures.

<sup>74</sup> See Rule 8A of MV Rules, ‘Minimum training required for driving E-rickshaw or E-cart’

<sup>75</sup> See Rule 9 of MV Rules, ‘Educational Qualification for drivers of goods carriages carrying dangerous or hazardous goods’

<sup>76</sup> The classes medium goods vehicle[10(2)(e)], medium passenger vehicle[10(2)(f)], heavy goods vehicle[10(2)(g)] and heavy passenger vehicle [10(2)(h)] were deleted and a new class ‘Transport Vehicle’ was introduced in Section 10(2)(e).

**M/s Bajaj Alliance General Insurance Co. Ltd. v.  
Rambha Devi & Ors.**

- 129.** Just to flag one concern, the legislature through the 1994 amendment in Section 10(2)(e) in order to introduce ‘transport vehicle’ as a separate class could not have intended to merge light motor vehicle (which continued as a distinct class) along with medium, and heavy vehicles into a single class. Else, it would give rise to a situation in which Sri (our hypothetical character), wanting to participate in the *cycling* sport, is put through the rigorous training relevant only for a multisport like *Triathlon*, which requires a much higher degree of endurance and athleticism. The effort therefore should be to ensure that the statute remains practical and workable.
- 130.** Now harking back to the primary issue and noticing that the core driving skills (as enunciated in the earlier paragraphs), expected to be mastered by all drivers are universal – regardless of whether the vehicle falls into “Transport” or “Non-Transport” category, it is the considered opinion of this Court that if the gross vehicle weight is within 7,500 kg - the quintessential common man’s driver Sri, with LMV license, can also drive a “Transport Vehicle”. We are able to reach such a conclusion as none of the parties in this case has produced any empirical data to demonstrate that the LMV driving licence holder, driving a ‘Transport Vehicle’, is a significant cause for road accidents in India. The additional eligibility criteria as specified in *MV Act* and *MV Rules* as discussed in this judgment will apply only to such vehicle (‘medium goods vehicle’, ‘medium passenger vehicle’, ‘heavy goods vehicle’ and ‘heavy passenger vehicle’), whose gross weight exceeds 7,500 Kg. Our present interpretation on how the licensing regime is to operate for drivers under the statutory scheme is unlikely to compromise the road safety concerns. This will also effectively address the livelihood issues for drivers operating Transport Vehicles (who clock maximum hours behind the wheels), in legally operating “Transport vehicles” (below 7,500 Kg), with their LMV driving license. Perforce Sri must drive responsibly and should have no occasion to be called either a maniac or an idiot (as mentioned in the first paragraph), while he is behind the wheels. Such harmonious interpretation will substantially address the vexed question of law before this Court.
- 131.** Our conclusions following the above discussion are as under:-
- (I) A driver holding a license for Light Motor Vehicle (LMV) *class*, under Section 10(2)(d) for vehicles with a gross vehicle weight

**Digital Supreme Court Reports**

under 7,500 kg, is permitted to operate a ‘Transport Vehicle’ without needing additional authorization under Section 10(2) (e) of the *MV Act* specifically for the ‘Transport Vehicle’ class. For licensing purposes, LMVs and Transport Vehicles are not entirely separate classes. An overlap exists between the two. The special eligibility requirements will however continue to apply for, *inter alia*, e-carts, e-rickshaws, and vehicles carrying hazardous goods.

- (II) The second part of Section 3(1), which emphasizes the necessity of a specific requirement to drive a ‘Transport Vehicle,’ does not supersede the definition of LMV provided in Section 2(21) of the *MV Act*.
  - (III) The additional eligibility criteria specified in the *MV Act* and *MV Rules* generally for driving ‘transport vehicles’ would apply only to those intending to operate vehicles with gross vehicle weight exceeding 7,500 kg i.e. ‘medium goods vehicle’, ‘medium passenger vehicle’, ‘heavy goods vehicle’ and ‘heavy passenger vehicle’.
  - (IV) The decision in *Mukund Dewangan (2017)* is upheld but for reasons as explained by us in this judgment. In the absence of any obtrusive omission, the decision is not *per incuriam*, even if certain provisions of the *MV Act* and *MV Rules* were not considered in the said judgment.
132. The reference is answered in the above terms. The Registry is directed to list the matters before the appropriate Bench after obtaining directions from Hon’ble the Chief Justice of India.

*Result of the case:* Reference answered.

<sup>†</sup>Headnotes prepared by: Divya Pandey

**Tej Prakash Pathak & Ors.**  
v.  
**Rajasthan High Court & Ors.**

(Civil Appeal No. 2634 of 2013)

07 November 2024

**[Dr Dhananjaya Y Chandrachud, CJI, Hrishikesh Roy,  
Pamidighantam Sri Narasimha, Pankaj Mithal and  
Manoj Misra,\* JJ.]**

**Issue for Consideration**

- (a) When the recruitment process commences and comes to an end; (b) Basis of the doctrine that ‘rules of the game’ must not be changed during the course of the game, or after the game is played; (c) Whether the decision in [K. Manjusree](#) is at variance with earlier precedents on the subject; (d) Whether recruiting bodies can devise an appropriate procedure for concluding recruiting process; (e) Whether the procedure prescribed in the Extant Rule can be violated; (f) Whether appointment could be denied even after placement in select list.

**Headnotes<sup>†</sup>**

**Service Law – Recruitment – Commencement and end of the recruitment process:**

**Held:** The process of recruitment begins with the issuance of advertisement and ends with the filling up of notified vacancies – It consists of various steps like inviting applications, scrutiny of applications, rejection of defective applications or elimination of ineligible candidates, conducting examinations, calling for interview or *viva voce* and preparation of list of successful candidates for appointment. [Para 13]

**Service Law – Recruitment – Basis of the doctrine that ‘rules of the game’ must not be changed during the course of the game, or after the game is played:**

**Held:** The doctrine proscribing change of rules midway through the game, or after the game is played, is predicated on the rule against arbitrariness enshrined in Article 14 of the Constitution – Article 16 is only an instance of the application of the concept of

\* Author

**Tej Prakash Pathak & Ors. v. Rajasthan High Court & Ors.**

equality enshrined in Article 14 – In other words, Article 14 is the genus while Article 16 is a species – Article 16 gives effect to the concept of equality in all matters relating to public employment – These two articles strike at arbitrariness in State action and ensure fairness and equality of treatment – Eligibility criteria for being placed in the Select List, notified at the commencement of the recruitment process, cannot be changed midway through the recruitment process unless the extant Rules so permit, or the advertisement, which is not contrary to the extant Rules, so permit – Even if such change is permissible under the extant Rules or the advertisement, the change would have to meet the requirement of Article 14 of the Constitution and satisfy the test of non-arbitrariness. [Paras 14, 42(2)]

**Service Law – Recruitment – Whether the decision in K. Manjusree is at variance with earlier precedents on the subject:**

**Held:** K. Manjusree case is not at variance with earlier precedents – The decision in K. Manjusree does not proscribe setting of benchmarks for various stages of the recruitment process but mandates that it should not be set after the stage is over, in other words after the game has already been played – This view is in consonance with the rule against arbitrariness enshrined in Article 14 of the Constitution and meets the legitimate expectation of the candidates as also the requirement of transparency in recruitment to public services and thereby obviates malpractices in preparation of select list – The decision in K. Manjusree case lays down good law and is not in conflict with the decision in Subash Chander Marwaha case – Subash Chander Marwaha deals with the right to be appointed from the Select List whereas K. Manjusree deals with the right to be placed in the Select List – The two cases therefore deal with altogether different issues. [Paras 18, 30, 42(3)]

**Service Law – Recruitment – Whether recruiting bodies can devise an appropriate procedure for concluding recruiting process:**

**Held:** Recruiting bodies, subject to the extant Rules, may devise appropriate procedure for bringing the recruitment process to its logical end provided the procedure so adopted is transparent, non-discriminatory/non-arbitrary and has a rational nexus to the object sought to be achieved. [Para 42(4)]

## Digital Supreme Court Reports

### **Service Law – Recruitment – Whether the procedure prescribed in the Extant Rule can be violated:**

**Held:** Procedure prescribed in the Extant Rule cannot be violated – Extant Rules having statutory force are binding on the recruiting body both in terms of procedure and eligibility – Where there are no Rules or the Rules are silent on the subject, administrative instructions may be issued to supplement and fill in the gaps in the Rules – In that event administrative instructions would govern the field provided they are not *ultra vires* the provisions of the Rules or the Statute or the Constitution – But where the Rules expressly or impliedly cover the field, the recruiting body would have to abide by the Rules. [Paras 39, 42(5)]

### **Service Law – Name in select list – Right to appointment – Whether appointment could be denied even after placement in select list:**

**Held:** Appointment may be denied even after placement in select list – A candidate placed in the select list gets no indefeasible right to be appointed even if vacancies are available – But there is a caveat – The State or its instrumentality cannot arbitrarily deny appointment to a selected candidate – Therefore, when a challenge is laid to State's action in respect of denying appointment to a selected candidate, the burden is on the State to justify its decision for not making appointment from the Select List. [Para 40]

### **Service Law – Recruitment – Legitimate Expectation – Discretion of Public Authority – Public Interest:**

**Held:** Candidates participating in a recruitment process have legitimate expectation that the process of selection will be fair and non-arbitrary – The basis of doctrine of legitimate expectation in public law is founded on the principles of fairness and non-arbitrariness in government dealings with individuals – However, the doctrine of legitimate expectation does not impede or hinder the power of the public authorities to lay down a policy or withdraw it – The public authority has the discretion to exercise the full range of choices available within its executive power – The public authority often has to take into consideration diverse factors, concerns, and interests before arriving at a particular policy decision – The courts are generally cautious in interfering with a *bona fide* decision of public authorities which denies legitimate expectation provided such a decision is taken in the larger public interest – Thus, public

### Tej Prakash Pathak & Ors. v. Rajasthan High Court & Ors.

interest serves as a limitation on the application of the doctrine of legitimate expectation – Courts have to determine whether the public interest is compelling and sufficient to outweigh the legitimate expectation of the claimant. [Para 16]

#### Case Law Cited

*K. Manjusree v. State of A.P.* [\[2008\] 2 SCR 1025](#) : (2008) 3 SCC 512 – held good law.

*Sivanandan CT & Ors. v. High Court of Kerala & Ors.* [\[2023\] 11 SCR 674](#) : 2023 INSC 709 – followed.

*Ramesh Kumar v. High Court of Delhi* [\[2010\] 2 SCR 256](#) : (2010) 3 SCC 104; *K. H. Siraj v. High Court of Kerala & Ors.* [\[2006\] Supp. 2 SCR 790](#) : (2006) 6 SCC 395; *M.P. Public Service Commission v. Navnit Kumar Potdar* [\[1994\] Supp. 3 SCR 665](#) : (1994) 6 SCC 293; *Union of India v. T. Sundararaman* [\[1997\] 3 SCR 792](#) : (1997) 4 SCC 664; *Tridip Kumar Dingal v. State of W.B.* [\[2008\] 15 SCR 194](#) : (2009) 1 SCC 768; *Salam Samarjeet Singh v. The High Court of Manipur at Imphal & Anr.* [\[2024\] 8 SCR 885](#) : 2024 INSC 647 – relied on.

*State of Haryana v. Subash Chander Marwaha* [\[1974\] 1 SCR 165](#) : (1974) 3 SCC 220; *Tej Prakash Pathak & Others v. Rajasthan High Court and Others* (2013) 4 SCC 540; *Shankar K. Mandal v. State of Bihar* [\[2003\] 3 SCR 796](#) : (2003) 9 SCC 519; *Mohd. Sohrab Khan v. Aligarh Muslim University and Others* [\[2009\] 2 SCR 907](#) : (2009) 4 SCC 555; *A.P. Public Service Commission v. B. Sarat Chandra* [\[1990\] 2 SCR 463](#) : (1990) 2 SCC 669; *Rakhi Ray v. High Court of Delhi* [\[2010\] 2 SCR 239](#) : (2010) 2 SCC 637; *E.P. Royappa v. State of T.N.* [\[1974\] 2 SCR 348](#) : (1974) 4 SCC 3; *State of Jharkhand v. Brahmputra Metallics Ltd.* [\[2020\] 14 SCR 45](#) : (2023) 10 SCC 634; *Shankarsan Dash v. Union of India* [\[1991\] 2 SCR 567](#) : (1991) 3 SCC 47; *All India SC & ST Employees Association v. A. Arthur Jeen & Others* [\[2001\] 2 SCR 1183](#) : (2001) 6 SCC 380; *M. Ramesh v. Union of India* [\[2018\] 6 SCR 763](#) : (2018) 16 SCC 195; *P.K. Ramachandra Iyer v. Union of India* [\[1984\] 2 SCR 200](#) : (1984) 2 SCC 141; *Hemani Malhotra v. High Court of Delhi* [\[2008\] 5 SCR 1066](#) : (2008) 7 SCC 11; *Ashok Kumar Yadav v. State of Haryana* [\[1985\] Supp. 1 SCR 657](#) : (1985) 4 SCC 417; *Lila Dhar v. State of Rajasthan and Others* [\[1982\] 1 SCR 320](#) : (1981) 4 SCC 159; *Santosh Kumar Tripathi v. U.P. Power Corporation* (2009) 14 SCC 210; *Banking Service Recruitment Board, Madras v. V. Ramalingam* (1998) 8 SCC 523 – referred to.

## Digital Supreme Court Reports

### Books and Periodicals Cited

United Nations Handbook of Civil Service Laws and Practices.

### List of Acts

Constitution of India; Rajasthan High Court Staff Service Rules 2002; Kerala Judicial Service Rules, 1991.

### List of Keywords

Service Law; Recruitment; Appointment; 'Rules of the game'; Recruiting bodies; Appropriate procedure; Recruiting process; Name in select list; Right to appointment; Procedure prescribed in the Extant Rule; Recruiting process; Article 14 of the Constitution; Article 16 of the Constitution; Article 309 of the Constitution; Transparent; Non-discriminatory; Non-arbitrary; Eligibility criteria; Select List; Extant Rule; Principle of fairness; Legitimate expectation; Rule against arbitrariness.

### Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2634 of 2013

From the Judgment and Order dated 11.03.2011 of the High Court of Rajasthan at Jodhpur in DBCWP No. 2174 of 2010

With

Civil Appeal Nos. 2635 And 2636 of 2013

### Appearances for Parties

Dr. Ritu Bhardwaj, Mohan Kumar, Anurag Katarki, Amit Kumar, Ms. Neetu Singh, Ms. Asia Beg, Mrs. Haripriya Padmanabhan, Kuriakose Varghese, V. Shyamohan, Shrutanjaya Bhardwaj, Ms. Aishwarya Hariharan, Vishal Sinha, Akshat Gogna, Ms. Isha Ghai (for M/s. Kmnp Law), Raghenth Basant, Ms. Liz Mathew, Ms. Aakashi Lodha, Ms. Mallika Agarwal, P. V. Dinesh, Ms. Oommen Anna A, Ms. Urvashi Chauhan, Chetan Garg, Ranjit Kumar, Ajay Vikram Singh, Advs. for the Appellants.

K.M. Nataraj, ASG, Vijay Hansaria, Sr. Adv., Pawanshree Agrawal, Sunil Kumar Jain, Ms. Rashika Swarup, Ms. Tanya Agarwal, Anil Kumar, Maibam Nabaghanashyam Singh, Mahesh Thakur, Shakti K Pattanaik, Advs. for the Respondents.

**Tej Prakash Pathak & Ors. v. Rajasthan High Court & Ors.****Judgment / Order of the Supreme Court****Judgment****Manoj Misra, J.***The ideal in recruitment is to do away with unfairness<sup>1</sup>***REFERENCE**

1. A three-Judge Bench of this Court while accepting the salutary principle that once the recruitment process commences the State or its instrumentality cannot tinker with the “rules of the game” insofar as the prescription of eligibility criteria is concerned, wondered whether that should apply also to the procedure for selection. In that context, doubting the correctness of a coordinate Bench decision in *K. Manjusree*<sup>2</sup> for not having noticed an earlier decision in *Subash Chander Marwaha*,<sup>3</sup> vide order<sup>4</sup> dated 20 March 2013, it was directed that the matter be placed before the Chief Justice for constituting a larger Bench for an authoritative pronouncement on the subject.

**THE FACTUAL CONTEXT FOR THE REFERENCE**

2. The relevant facts giving rise to the reference are as follows:
  - (a) The Rajasthan High Court<sup>5</sup> vide notification dated 17 September 2009 invited applications from amongst Judicial Assistants and Junior Judicial Assistants, having an experience of three years in the establishment of the High Court and possessing degree of M. A. in English Literature, for appointment on 13 posts of Translators. Preference was to be accorded to law graduates.
  - (b) At the relevant time, ‘The Rajasthan High Court Staff Service Rules 2002’<sup>6</sup> framed by the Chief Justice of the High Court under Article 229 (2) of the Constitution of India<sup>7</sup> governed the appointments.

1 UNITED NATIONS HANDBOOK OF CIVIL SERVICE LAWS AND PRACTICES.

2 *K. Manjusree v. State of A.P.* (2008) 3 SCC 512

3 *State of Haryana v. Subash Chander Marwaha* (1974) 3 SCC 220

4 Tej Prakash Pathak & Others v. Rajasthan High Court and Others (2013) 4 SCC 540

5 The High Court.

6 2002 Rules.

7 Constitution.

**Digital Supreme Court Reports**

- (c) Under the 2002 Rules, the Chief Justice of the High Court *vide* Office Order dated 5 December 2002, *inter alia*, specified the qualifications as well as the method of recruitment for the post of 'Translator' (Ordinary Scale) in the following terms:

**"TRANSLATORS (ORDINARY SCALE)**

Recruitment to the post of Translators (Ordinary Scale) shall be made on the recommendation of a Committee nominated by the Appointing Authority on the criteria of selection from amongst the graduate Upper Division Clerks or officials in equivalent or above grade but below the grade of Translators (Ordinary Scale), with Hindi or English Literature as one of the optional subject in Graduation or Lower Division Clerks with Hindi or English Literature as subject in post-graduation and having minimum experience of five years.

**COMPETITIVE EXAMINATION**

A qualifying examination shall be held to test the ability of the candidates of translation from English to Hindi and Hindi to English.

Paper-I English to Hindi translation      100 marks

Paper-II Hindi to English translation      100 marks

Explanation: For the qualifying examination the officials appearing therein shall be given passages for translation from English to Hindi and Hindi to English from the judgment and records.

**Personal Interview:**

There shall be a personal interview  
of the candidate.                                50 marks

Note: A candidate who secures in aggregate 75% marks and minimum 60% marks in each paper shall only be called for interview."

- (d) Later, *vide* Office Order dated 24 July 2004, amendments were made in the Office Order dated 5 December 2002 thereby substituting the provision relating to recruitment of Translators (Ordinary Scale) by the following:

**Tej Prakash Pathak & Ors. v. Rajasthan High Court & Ors.****"TRANSLATORS**

Recruitment shall be made from amongst the judicial assistants or junior judicial assistants having experience of 3 years by holding a test in English and Hindi translation. Candidates shall be given passages in English from the judgments and records and shall be asked to translate them into Hindi. Similarly passages in Hindi from the records or from some other books etc. shall be given and the candidates shall be asked to translate them into English.

Minimum qualification shall be Graduate

Preference shall be given to a Law Graduate”

- (e) Thereafter, on 8 September 2009, the Office Order dated 5 December 2002 was further amended to substitute the specified minimum qualification with the following:

“Minimum qualification shall be Post Graduate in English Literature from any recognized University established by law in India”

- (f) On 19 December 2009 examination was held. Twenty-one aspirants appeared in the examination. Result was declared on 20 February 2010, wherein only 3 candidates were declared successful. This was so, because the Chief Justice of the High Court ordered that only those candidates who secured a minimum of 75% marks will be selected to fill up the posts in question. As only three candidates could secure a minimum of 75% marks, the list of successful candidates comprised of only three candidates.
- (g) Some of the unsuccessful candidates filed writ petition before the High Court questioning the decision of the Chief Justice of the High Court in fixing the cut off at 75% on the ground that it amounted to “changing the rules of the game after the game is played”. The High Court on its administrative side defended the decision of the Chief Justice by claiming it to have been taken in good faith for appointing a suitable candidate.
- (h) The writ petition came to be dismissed by the High Court *vide* judgment under appeal dated 11 March 2011. The High Court

**Digital Supreme Court Reports**

took the view that on mere placement in the select list no indefeasible right accrues to a candidate for appointment. The employer may fix a higher benchmark to ensure that a person suitable to the post is appointed.

- (i) On a special leave petition challenging the judgment of the High Court, while granting leave, *vide* order dated 20 March 2013, the matter was referred for an authoritative pronouncement by a larger Bench of this Court.

**RELEVANT EXTRACTS FROM THE REFERENCE ORDER**

3. To have a clear understanding of the scope of the reference, the relevant paragraphs of the reference order are extracted below:

“5. Admittedly, the requirement of securing the minimum qualifying marks of 75% is not a stipulation of the Service Rules (referred to earlier) of the first respondent High Court as on the date of initiation of the recruitment process in question (i.e. 17-9-2009). It appears that such a prescription had existed earlier under the Rules, but by an amendment, the said prescription was dropped with effect from 14-7-2004.

6. Therefore, the appellants challenged the selection process on the ground that the decision of the Chief Justice to select only those candidates who secured a minimum of 75% marks would amount to “changing the rules of the game after the game is played”—a cliché whose true purport is required to be examined notwithstanding the declaration of this Court in *Manjusree case* [*K. Manjusree v. State of A.P.* (2008) 3 SCC 512 at p. 524, para 27 : (2008) 1 SCC (L&S) 841] that it is “clearly impermissible”.

7. The question whether the “rules of the game” could be changed was considered by this Court on a number of occasions in different circumstances. Such question arose in the context of employment under the State which under the scheme of our Constitution is required to be regulated by “law” made under Article 309 or employment under the

**Tej Prakash Pathak & Ors. v. Rajasthan High Court & Ors.**

instrumentalities of the State which could be regulated either by statute or subordinate legislation. In either case the “law” dealing with the recruitment is subject to the discipline of Article 14.

**8.** The legal relationship between employer and employee is essentially contractual. Though in the context of employment under the State the contract of employment is generally regulated by statutory provisions or subordinate legislation which restricts the freedom of the employer i.e. the “State” in certain respects.

**9.** In the context of the employment covered by the regime of Article 309, the “law”—the recruitment rules in theory could be either prospective or retrospective subject of course to the rule of non-arbitrariness. However, in the context of employment under the instrumentalities of the State which is normally regulated by subordinate legislation, such rules cannot be made retrospectively unless specifically authorised by some constitutionally valid statute.

**10.** Under the scheme of our Constitution an absolute and non-negotiable prohibition against retrospective law-making is made only with reference to the creation of crimes. Any other legal right or obligation could be created, altered, extinguished retrospectively by the sovereign law-making bodies. However, such drastic power is required to be exercised in a manner that it does not conflict with any other constitutionally guaranteed rights, such as, Articles 14 and 16, etc. Changing the “rules of game” either midstream or after the game is played is an aspect of retrospective law-making power.

**11.** Those various cases [ (a) *C. Channabasavaih v. State of Mysore*, AIR 1965 SC 1293; *State of Haryana v. Subash Chander Marwaha* (1974) 3 SCC 220 : 1973 SCC (L&S) 488; *P.K. Ramachandra Iyer v. Union of India* (1984) 2 SCC 141 : 1984 SCC (L&S) 214; *Umesh Chandra Shukla v. Union of India* (1985) 3 SCC 721 : 1985

**Digital Supreme Court Reports**

SCC (L&S) 919; *Durgacharan Misra v. State of Orissa* (1987) 4 SCC 646 : 1988 SCC (L&S) 36 : (1987) 5 ATC 148; *State of U.P. v. Rafiquddin*, 1987 Supp SCC 401 : 1988 SCC (L&S) 183 : (1987) 5 ATC 257; *Maharashtra SRTC v. Rajendra Bhimrao Mandve* (2001) 10 SCC 51 : 2002 SCC (L&S) 720; *Pitta Naveen Kumar v. Narasaiah Zangiti* (2006) 10 SCC 261 : (2007) 1 SCC (L&S) 92; *K. Manjusree v. State of A.P.* (2008) 3 SCC 512 : (2008) 1 SCC (L&S) 841; *Hemani Malhotra v. High Court of Delhi* (2008) 7 SCC 11 : (2008) 2 SCC (L&S) 203; *K.H. Siraj v. High Court of Kerala* (2006) 6 SCC 395 : 2006 SCC (L&S) 1345; *Ramesh Kumar v. High Court of Delhi* (2010) 3 SCC 104 : (2010) 1 SCC (L&S) 756; *Rakhi Ray v. High Court of Delhi* (2010) 2 SCC 637 : (2010) 1 SCC (L&S) 652; *Hardev Singh v. Union of India* (2011) 10 SCC 121 : (2012) 1 SCC (L&S) 390 — Where procedural rules were altered.(b) *P. Mahendran v. State of Karnataka* (1990) 1 SCC 411 : 1990 SCC (L&S) 163 : (1990) 12 ATC 727; *M.P. Public Service Commission v. Navnit Kumar Potdar* (1994) 6 SCC 293 : 1994 SCC (L&S) 1377 : (1994) 28 ATC 286; *Gopal Krishna Rath v. M.A.A. Baig* (1999) 1 SCC 544 : 1999 SCC (L&S) 325; *Umrao Singh v. Punjabi University* (2005) 13 SCC 365 : 2006 SCC (L&S) 1071; *Mohd. Sohrab Khan v. Aligarh Muslim University* (2009) 4 SCC 555 : (2009) 1 SCC (L&S) 917 — Where the eligibility criteria were altered.] deal with situations where the State sought to alter (1) the eligibility criteria of the candidates seeking employment, or (2) the method and manner of making the selection of the suitable candidates. The latter could be termed as the procedure adopted for the selection, such as, prescribing minimum cut-off marks to be secured by the candidates either in the written examination or viva voce as was done in *Manjusree* [*K. Manjusree v. State of A.P.* (2008) 3 SCC 512 at p. 524, para 27 : (2008) 1 SCC (L&S) 841] or the present case or calling upon the candidates to undergo some test relevant to the nature of the employment (such as driving test as was in *Maharashtra SRTC* [*Maharashtra*

**Tej Prakash Pathak & Ors. v. Rajasthan High Court & Ors.**

*SRTC v. Rajendra Bhimrao Mandve* (2001) 10 SCC 51 at pp. 55-56, para 5 : 2002 SCC (L&S) 720] ).

**12.** If the principle of *Manjusree case* [*K. Manjusree v. State of A.P.* (2008) 3 SCC 512 at p. 524, para 27 : (2008) 1 SCC (L&S) 841] is applied strictly to the present case, the respondent High Court is bound to recruit 13 of the “best” candidates out of the 21 who applied irrespective of their performance in the examination held. In such cases, theoretically it is possible that candidates securing very low marks but higher than some other competing candidates may have to be appointed. In our opinion, application of the principle as laid down in *Manjusree case* [*K. Manjusree v. State of A.P.* (2008) 3 SCC 512 at p. 524, para 27 : (2008) 1 SCC (L&S) 841] without any further scrutiny would not be in the larger public interest or the goal of establishing an efficient administrative machinery.

**13.** This Court in *State of Haryana v. Subash Chander Marwaha* [(1974) 3 SCC 220 : 1973 SCC (L&S) 488] while dealing with the recruitment of Subordinate Judges of the Punjab Civil Services (Judicial Branch) had to deal with the situation where the relevant rule prescribed minimum qualifying marks. The recruitment was for filling up of 15 vacancies. 40 candidates secured the minimum qualifying marks (45%). Only 7 candidates who secured 55% and above marks were appointed and the remaining vacancies were kept unfilled. The decision of the State Government not to fill up the remaining vacancies in spite of the availability of candidates who secured the minimum qualifying marks was challenged. The State Government defended its decision not to fill up posts on the ground that the decision was taken to maintain the high standards of competence in judicial service. The High Court upheld the challenge and issued a mandamus. In appeal, this Court reversed and opined that the candidates securing minimum qualifying marks at an examination held for the purpose of recruitment into the service of the State have no legal right to be appointed. In the context, it was held: (*Subash Chander Marwaha*

**Digital Supreme Court Reports**

case [(1974) 3 SCC 220 : 1973 SCC (L&S) 488] , SCC p. 227, para 12)

"12. ... In a case where appointments are made by selection from a number of eligible candidates it is open to the Government with a view to maintain high standards of competence to fix a score which is much higher than the one required for mere (sic mere) eligibility."

**14.** Unfortunately, the decision in Subash Chander Marwaha [(1974) 3 SCC 220 : 1973 SCC (L&S) 488] does not appear to have been brought to the notice of Their Lordships in Manjusree [K. Manjusree v. State of A.P. (2008) 3 SCC 512 at p. 524, para 27 : (2008) 1 SCC (L&S) 841]. This Court in Manjusree [K. Manjusree v. State of A.P. (2008) 3 SCC 512 at p. 524, para 27 : (2008) 1 SCC (L&S) 841] relied upon P.K. Ramachandra Iyer v. Union of India [(1984) 2 SCC 141 : 1984 SCC (L&S) 214], Umesh Chandra Shukla v. Union of India [(1985) 3 SCC 721 : 1985 SCC (L&S) 919] and Durgacharan Misra v. State of Orissa [(1987) 4 SCC 646 : 1988 SCC (L&S) 36]. In none of the cases, was the decision in Subash Chander Marwaha [(1974) 3 SCC 220 : 1973 SCC (L&S) 488] considered.

**15.** No doubt it is a salutary principle not to permit the State or its instrumentalities to tinker with the "rules of the game" insofar as the prescription of eligibility criteria is concerned as was done in C. Channabasavaih v. State of Mysore [AIR 1965 SC 1293], etc. in order to avoid manipulation of the recruitment process and its results. Whether such a principle should be applied in the context of the "rules of the game" stipulating the procedure for selection more particularly when the change sought is to impose a more rigorous scrutiny for selection requires an authoritative pronouncement of a larger Bench of this Court. We, therefore, order that the matter be placed before the Hon'ble Chief Justice of India for appropriate orders in this regard."

(Emphasis supplied)

**Tej Prakash Pathak & Ors. v. Rajasthan High Court & Ors.****SCOPE OF THE REFERENCE**

4. Public services broadly fall in two categories. One, where services are in connection with the affairs of the State/ Union. Second, where services are under the instrumentalities of the State. In either category, law governing recruitment must conform to the overarching principles enshrined in Articles 14 and 16 of the Constitution.
5. In various judicial pronouncements, the law governing recruitment to public services has been colloquially termed as ‘the rules of the game’. The ‘game’ is the process of selection and appointment. Courts have consistently frowned upon tinkering with the rules of the game once the recruitment process commences. This has crystallised into an oft-quoted legal phrase that “the rules of the game must not be changed mid-way, or after the game has been played”. Broadly-speaking these rules fall in two categories. One which prescribes the eligibility criteria (i.e., essential qualifications) of the candidates seeking employment; and the other which stipulates the method and manner of making the selection from amongst the eligible candidates.
6. Cut-off date with reference to which eligibility has to be determined is the date appointed by the relevant service rules; where no such cut-off date is provided in the rules, then it will be the date appointed in the advertisement inviting applications; and if there is no such date appointed, then eligibility criteria shall be applied by reference to the last date appointed by which the applications were to be received.<sup>8</sup>
7. The law is settled that after commencement of the recruitment process the eligibility criteria is not to be altered because candidates even if eligible under the altered criteria might not apply by the last date under the belief that they are not eligible as per the advertised criteria.<sup>9</sup> Such alteration/ change, therefore, deprives a person of the guarantee of equal opportunity in matters of public employment provided by Article 16 of the Constitution. The reference order therefore acknowledges this legal position and in clear terms accepts that ‘the rules of the game’ cannot be changed after commencement of the recruitment process insofar as the eligibility criteria is concerned.

8 [Shankar K. Mandal v. State of Bihar](#) (2003) 9 SCC 519

9 [Mohd. Sohrab Khan v. Aligarh Muslim University and others](#) (2009) 4 SCC 555

## Digital Supreme Court Reports

8. However, in regard to changing the rules of the game *qua* method or procedure for selection, the three-Judge Bench in the reference order doubted the correctness of the decision in *K. Manjusree* (supra) *inter alia* on the ground that it failed to notice an earlier decision in *Subash Chander Marwaha* (supra). Accordingly, the reference order seeks an authoritative pronouncement in that regard from a larger Bench of this Court. The scope of the reference is therefore limited to (a) whether *K. Manjusree* (supra) lays down the correct law; and (b) whether the rules of the game *qua* method and manner of making selection can be changed or altered after commencement of the recruitment process.

### **SUBMISSIONS**

9. We have heard a battery of counsels both in support as well as against the strict applicability of the doctrine. During their arguments, they have either questioned or supported the decision of the High Court. For an effective analysis of their submissions and to properly adjudicate upon the issues which would arise while addressing the reference, we deem it appropriate to segregate their submissions into two parts. One which propounds that after commencement of the recruitment process, the stipulated procedure (i.e., rules of the game) for selection cannot be changed mid-way, or after the game is played, and the other which propounds that it is permissible to change / alter the stipulated procedure or method for selection to ensure that the most meritorious person, who is suitable for the post, gets appointed.

### **SUBMISSIONS AGAINST CHANGE**

10. Submissions propounding that ‘rules of the game’ *qua* the procedure for selection must not be changed in the midst of the game, or after the game is played, are summarised below:
  - (a) Equality of opportunity in matters of public employment and fairness in State action are guaranteed by Articles 16 and 14, respectively, of the Constitution which proscribe a change in the rules of the game *qua* selection criteria, once the game has begun. These rights would be infringed if candidates, otherwise eligible, are excluded from the zone of consideration based on a *post facto* change in the selection criteria.

**Tej Prakash Pathak & Ors. v. Rajasthan High Court & Ors.**

- (b) Candidates have a right to know, before the selection process commences, the standards/ criteria on which they will be assessed/ evaluated so that they could modulate their level of preparedness accordingly.
- (c) A change in the advertised cut off marks for eligibility to be placed in the select list, after the game is played, may seriously prejudice a candidate on two counts. First, the candidate may not put in effort more than required for achieving the advertised cut off marks. Second, the interviewer or evaluator may unknowingly place the candidate in a non-eligible category while imagining that he has been placed in an eligible category. Thus a change in the eligibility cut off, after evaluation is done, denies the evaluator an opportunity to modulate the marks for placing the candidate in a category to which he/she, in the view of the evaluator, is entitled to be placed.
- (d) If eligibility cut-off marks is to be prescribed, it should be done before the test or the interview so that both the examinee and the examiner are aware as to how many marks would qualify a candidate for further consideration.
- (e) Recruitment to public services must not only be fair but must appear to be so. A change in the selection criteria mid-way would create an impression that the State is not acting fairly and the change is to favour certain individuals. It thus violates transparency in decision making process, which is fundamental to rule out arbitrariness, and fosters nepotism.
- (f) Discretion is antithesis to the Rule of law which is the hallmark of our Constitution. Rule of law suffers when rules of the game are left to be altered at the discretion of the employer.
- (g) K. Manjusree (supra) is not in conflict with Subash Chander Marwaha (supra). Subash Chander Marwaha proceeds on the principle that existence of vacancies does not confer a right to a candidate placed in the select list to be appointed. K. Manjusree on the other hand deals with a situation where a candidate is denied placement in the select list only because after the interviews were over, minimum marks for the interviews, not prescribed earlier, were prescribed. The two decisions, therefore, operate in different fields.

**Digital Supreme Court Reports****SUBMISSIONS PROPOUNDING CHANGE IS PERMISSIBLE**

11. Submissions propounding that change in the selection procedure or criteria is permissible even in the midst of the recruitment process are summarised below:
- (a) In absence of service rules, or the advertisement, prescribing or proscribing a cut off, employer has discretion to fix cut-off as may be considered necessary to appoint a candidate suitable to the post.
  - (b) Even if no cut-off is stipulated for eligibility *qua* placement in the merit list, the employer may choose to appoint only such of those from the merit list who are higher than a particular cut-off and such cut-off may be fixed later. This is so, because no selected candidate has an indefeasible right to be appointed.
  - (c) Considering the nature of the post, cut-off even if not prescribed by the Rules or the advertisement can be prescribed to appoint a person suitable to the post. Fixation of such cut-off would not be deemed arbitrary, as efficiency in service is the paramount consideration for the employer.
  - (d) A change in the selection criteria which does not bear on the merit list but only affects appointment based thereupon, would not fall foul of either Article 16 or Article 14 of the Constitution if such a change is in the larger interest of efficiency in the service.

**ANALYSIS**

12. To effectively analyse and adjudicate upon the questions referred, we would divide our discussion into following parts:
- (a) When the recruitment process commences and comes to an end;
  - (b) Basis of the doctrine that ‘rules of the game’ must not be changed during the course of the game, or after the game is played;
  - (c) Whether the decision in *K. Manjusree* (supra) is at variance with earlier precedents on the subject;
  - (d) Whether the above doctrine applies with equal strictness *qua* method or procedure for selection as it does *qua* eligibility criteria;

## Tej Prakash Pathak & Ors. v. Rajasthan High Court & Ors.

- (e) Whether procedure for selection stipulated by Act or Rules framed either under the proviso to Article 309<sup>10</sup> of the Constitution or a Statute could be given a go-bye;
- (f) Whether appointment could be denied by change in the eligibility criteria after the game is played.

### **(A) COMMENCEMENT-END OF THE RECRUITMENT PROCESS**

- 13.** The process of recruitment begins with the issuance of advertisement and ends with the filling up of notified vacancies. It consists of various steps like inviting applications, scrutiny of applications, rejection of defective applications or elimination of ineligible candidates, conducting examinations, calling for interview or viva voce and preparation of list of successful candidates for appointment.<sup>11</sup>

### **(B) BASIS OF THE DOCTRINE**

- 14.** The doctrine proscribing change of rules midway through the game, or after the game is played, is predicated on the rule against arbitrariness enshrined in Article 14<sup>12</sup> of the Constitution. Article 16<sup>13</sup> is only an

**10 Article 309. Recruitment and conditions of service of persons serving the Union or a State.**— Subject to the provisions of this Constitution, Acts of the appropriate legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State.

Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act.

**11 A.P. Public Service Commission v. B. Sarat Chandra** (1990) 2 SCC 669; and **Rakhi Ray v. High Court of Delhi** (2010) 2 SCC 637

**12 Article 14. Equality before law.** - The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

**13 Article 16. Equality of opportunity in matters of public employment.** - (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. (2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State. (3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, or State or Union territory, any requirement as to residents within that State or Union territory prior to such employment or appointment.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favor of any backward class of citizens which, in the opinion of the state, is not adequately represented in the services under the State.

(4-A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

## Digital Supreme Court Reports

instance of the application of the concept of equality enshrined in Article 14. In other words Article 14 is the genus while Article 16 is a species. Article 16 gives effect to the concept of equality in all matters relating to public employment. These two articles strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on valid relevant principles alike to all similarly situate and not to be guided by any extraneous or irrelevant considerations.<sup>14</sup> In all its actions, the State is bound to act fairly, in a transparent manner. This is an elementary requirement of the guarantee against arbitrary State action which Article 14 of the Constitution adopts. A deprivation of the entitlement of private citizens and private business must be proportional to a requirement grounded in public interest.<sup>15</sup>

15. The principle of fairness in action requires that public authorities be held accountable for their representations. Good administration requires public authorities to act in a predictable manner and honour the promises made or practices established unless there is good reason not to do so.<sup>16</sup>
16. Candidates participating in a recruitment process have legitimate expectation that the process of selection will be fair and non-arbitrary. The basis of doctrine of legitimate expectation in public law is founded on the principles of fairness and non-arbitrariness in government dealings with individuals. It recognises that a public authority's promise or past conduct will give rise to a legitimate expectation. This doctrine is premised on the notion that public authorities, while

(4-B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4-A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the sealing of 50% reservation on total number of vacancies of that year.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

(6) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favor of any economically weaker sections of citizens other than the classes mentioned in clause (4) in addition to the existing reservation and subject to a maximum of 10% of the posts in each category.

14 [E. P. Royappa v. State of T.N.](#) (1974) 4 SCC 3

15 [State of Jharkhand v. Brahmaputra Metallics Ltd.](#) (2023) 10 SCC 634

16 [Sivanandan CT & Ors. v. High Court of Kerala & Ors.](#), 2023 INSC 709

**Tej Prakash Pathak & Ors. v. Rajasthan High Court & Ors.**

performing their public duties, ought to honour their promises or past practices. The legitimacy of an expectation can be inferred if it is rooted in law, custom, or established procedure.<sup>17</sup> However, the doctrine of legitimate expectation does not impede or hinder the power of the public authorities to lay down a policy or withdraw it. The public authority has the discretion to exercise the full range of choices available within its executive power. The public authority often has to take into consideration diverse factors, concerns, and interests before arriving at a particular policy decision. The courts are generally cautious in interfering with a bona fide decision of public authorities which denies legitimate expectation provided such a decision is taken in the larger public interest. Thus, public interest serves as a limitation on the application of the doctrine of legitimate expectation. Courts have to determine whether the public interest is compelling and sufficient to outweigh the legitimate expectation of the claimant. While performing a balancing exercise, courts have to often grapple with the issues of burden and standard of proof required to dislodge the claim of legitimate expectation.<sup>18</sup>

17. In *Sivanandan CT*,<sup>19</sup> the Constitution Bench, speaking through one of us (Dr. D.Y. Chandrachud, CJ), held that for a public authority to frustrate a claim of legitimate expectation, it must objectively demonstrate by placing relevant material before the court that its decision was in the public interest. This standard is consistent with the principles of good administration which require that State actions must be held to scrupulous standards to prevent misuse of public power and ensure fairness to citizens. It was also highlighted that the doctrine of legitimate expectation lays emphasis on predictability and consistency in decision-making which is a facet of non-arbitrariness. In addition, the Court observed:

"43. The underlying basis for the application of the doctrine of legitimate expectation has expanded and evolved to include the principles of good administration. .... The principles of good administration require that the decisions of public authorities must withstand the test of consistency,

---

17 [Sivanandan CT](#) (supra), paragraph 18.

18 [Sivanandan CT](#) (supra), paragraph 37.

19 See Footnote 13, paragraph 38.

**Digital Supreme Court Reports**

transparency, and predictability to avoid being regarded as arbitrary and therefore violative of Article 14.”

**(C) K. MANJUSREE IS NOT AT VARIANCE WITH EARLIER PRECEDENTS**

18. In *K. Manjusree* (supra) the recruitment exercise was for selection and appointments to the posts of District & Sessions Judges (Grade II). The extant rules prescribed the eligibility qualifications but were silent on the procedure for selection. The manner and method of selection was therefore to be decided by the High Court for every selection as and when the vacancies were notified for selection. The vacancies were notified by the State Government. As per the advertisement for selection a written examination followed by an interview were to be held. By a resolution dated 30.11.2004, the Administrative Committee of the High Court resolved to conduct written examination for 75 marks and interview for 25 marks. It was also resolved that the minimum qualifying marks for the OC,<sup>20</sup> BC,<sup>21</sup> SC<sup>22</sup> and ST<sup>23</sup> candidates shall be as prescribed earlier. Following the High Court’s direction, written examination was held on 30.1.2005, and its results were declared on 24.2.2005 wherein 83 candidates were successful. Interviews were held in March 2006. Thereafter, the marks obtained by those 83 candidates were aggregated and a consolidated merit list was prepared in the order of merit on the basis of the aggregate marks. The merit list *inter alia* contained marks secured in the written examinations out of 100; marks secured in the interview out of 25; and the total marks secured in the written examination and interview out of 125. Based on that list, the Administrative Committee approved the selection of ten candidates as per merit and reservation. However, the Full Court did not agree with the select list prepared. Consequently, the Chief Justice constituted a Committee of Judges for preparing a fresh list. The Committee recommended that in place of 100 marks for the written examination and 25 marks for the interview, the candidates should be evaluated with reference to 75 marks for the written examination and 25 marks

20 Open Category or Unreserved Category.

21 Backward Class Category.

22 Scheduled Caste Category.

23 Scheduled Tribe Category.

**Tej Prakash Pathak & Ors. v. Rajasthan High Court & Ors.**

for the interview in line with earlier resolution dated 30.11.2004. The Committee also recommended that the minimum pass percentage applied for the written examination to determine the eligibility of the candidates for appearance in the interview should also be applied for interview marks, and those who failed to secure such minimum marks in the interview should be considered as having failed. Based on the recommendation of the Committee, the minimum percentage for passing the written examination (i.e., 50% for OC, 40% for BC, and 35% for SC and ST) was applied for interview and, therefore, only those candidates who secured the minimum of 12.5 marks in OC, 10 marks in BC and 8.7 marks in SC and ST were considered as having succeeded in the interview. As a result, only 31 candidates were found to have qualified both in the written examination and interview. In consequence, a revised merit list of only 31 successful candidates was prepared wherein few candidates, earlier selected, were ousted and few others who did not find place in the earlier select list gained entry. However, out of those 31 candidates only 9 were recommended for appointment.

19. In that factual context, two candidates whose names found mention in the first list, and who got excluded in the second list, filed writ petitions by claiming that High Court's decision to prepare selection list by prescribing minimum qualifying marks for the interview was arbitrary and illegal. They thus sought a direction to the High Court to redraw the select list without adopting minimum qualifying marks for the interview. The writ petitions were dismissed by the High Court. Being aggrieved, the writ petitioners preferred SLPs<sup>24</sup> before this Court. This Court while granting leave and allowing the appeal of the writ petitioners held that the High Court, though was correct in scaling down marks of written examination from 100 to 75, was not legally justified in directing that only those candidates would be placed in the merit list who obtained such minimum marks in the interview as was specified by the Committee. Key observations of this Court in *K. Manjusree* (supra) are being extracted below:

"22. ... the interview Committee conducted the interviews on 13.3.2006 ... on the understanding that there were no minimum marks for interviews, that the marks awarded

---

24 Special Leave Petitions.

**Digital Supreme Court Reports**

by them would not by itself have the effect of excluding or ousting any candidate from being selected, and that marks awarded by them in the interviews will merely be added to the written examination marks, for preparation of the merit list and selection list. We are referring to this aspect, as the matter of conducting interviews and awarding marks in interviews, by five members of the interviewing committee would have been markedly different if they had to proceed on the basis that there were minimum marks to be secured in the interview for being considered for selection and that the marks are awarded by them would have the effect of barring or ousting any candidate from being considered for selection. Thus, the entire process of selection – from the stage of holding the examination, holding interviews and finalising the list of candidates to be selected – was done by the Selection Committee on the basis that there was no minimum marks for the interview. To put it differently the game was played under the rule that there was no minimum marks for the interview.

27. ...Therefore, introduction of the requirement of minimum marks for interview, after the entire selection process consisting of written examination and interview was completed, would amount to changing the rules of the game after the game was played which is clearly impermissible.

33. ...We may clarify that prescription of minimum marks for any interview is not illegal. We have no doubt that the authority making rules regulating the selection, can prescribe by rules, the minimum marks both for written examination and interviews, or prescribe minimum marks for written examination but not for interview, or may not prescribe any minimum marks for either written examination or interview. Where the rules do not prescribe any procedure, the Selection Committee may also prescribe the minimum marks, as stated above. But if the Selection Committee wants to prescribe minimum marks for interview, it should do so before the commencement of selection process. If the Selection committee prescribe minimum marks only for the written examination, before the commencement

**Tej Prakash Pathak & Ors. v. Rajasthan High Court & Ors.**

of selection process, it cannot either during the selection process or after the selection process, add an additional requirement that the candidates should also secure minimum marks in the interview. What we have found to be illegal, is changing the criteria after completion of the selection process, when the entire selection proceeded on the basis that there will be no minimum marks for the interview."

(Emphasis supplied)

20. The discernible ratio in *K. Manjusree* (supra) is that the criterion for selection is not to be changed after completion of the selection process, though in absence of rules to the contrary the Selection Committee may fix minimum marks either for written examination or for interview for the purposes of selection. But if such minimum marks are fixed, it must be done before commencement of selection process. This view has been followed by another three-Judge Bench of this Court in *Ramesh Kumar v. High Court of Delhi*<sup>25</sup> wherein the law on the issue has been summarized thus:

"15. ... in case the statutory rules prescribe a particular mode of selection, it has to be given strict adherence accordingly. In case, no procedure is prescribed by the rules and there is no other impediment in law, the competent authority while laying down the norms for selection may prescribe for the tests and further specify the minimum benchmarks for written tests as well as for viva voce."

21. What is important in *K. Manjusree* (supra) is that the minimum marks for the interview was fixed after the interviews were over. In that context, it was observed (a) that the game was played under the rule that there was no minimum marks for the interview, therefore introduction of the requirement of minimum marks for interview, after the entire selection process consisting of written examination and interview was completed, would amount to changing the rules of the game after the game was played; and (b) if the interviewers had to proceed on the basis that there were minimum marks to be secured in the interview for being considered for selection and

<sup>25</sup> [2010] 2 SCR 256 : (2010) 3 SCC 104

## Digital Supreme Court Reports

that the marks awarded by them would have the effect of barring or ousting any candidate from being considered for selection, the awarding of marks might have been markedly different. The above observation (b) lends credence to the submission made before us that a change in the eligibility cut off, after evaluation is done, denies the evaluator an opportunity to modulate the marks for placing the candidate in a category to which he/she, in the view of the evaluator, is entitled to be placed.

22. In the reference order the correctness of the decision in *K. Manjusree* has been doubted on two counts: (a) if the principle laid down in *K. Manjushree* is applied strictly, the High Court would be bound to recruit 13 of the “best” candidates out of the 21 who applied irrespective of their performance in the examination held, which would not be in the larger public interest or the goal of establishing an efficient administrative machinery; and (b) the decision of this Court in *Subash Chander Marwaha* (supra) was neither noticed in *K. Manjusree* nor in the decisions relied upon in *K. Manjusree*.
23. Insofar as the first reason to doubt *K. Manjusree* is concerned, we are of the view that the apprehension expressed in the referring order that all selected candidates regardless of their suitability to the establishment would have to be appointed, if the principle laid down in *K. Manjusree* is strictly applied, is unfounded. Because *K. Manjusree* does not propound that mere placement in the list of selected candidates would confer an indefeasible right on the empanelled candidate to be appointed. The law in this regard is already settled by a Constitution Bench of this Court in *Shankarsan Dash*<sup>26</sup> in the following terms:

"7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire

---

26 *Shankarsan Dash v. Union of India* (1991) 3 SCC 47, which has been consistently followed. See also *All India SC & ST Employees Association v. A. Arthur Jeen & Others* (2001) 6 SCC 380; *M. Ramesh v. Union of India* (2018) 16 SCC 195; and *Rakhi Ray and Others v. High Court of Delhi and Others* (2010) 2 SCC 637

**Tej Prakash Pathak & Ors. v. Rajasthan High Court & Ors.**

any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the license of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken *bona fide* for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted”.

24. As regards the second reason (i.e., K. Manjusree not considering earlier decision in Subash Chander Marwaha), it would be appropriate for us to first examine the facts of Marwaha's case. In Subash Chander Marwaha (supra) against 15 vacancies in Haryana Civil Service (Judicial Branch) a select list of 40 candidates, who obtained minimum 45% or more marks in the competitive examination, was prepared. The State Government, however, which was the appointing authority, made only 7 appointments from amongst top seven in the select list. Candidates who were ranked 8, 9 and 13 filed writ petitions in the High Court for a direction to the State Government to fill up the remaining vacancies as per the order of merit in the select list. State Government contested the petitions by claiming that in its view, to maintain high standards of competence in judicial service, candidates getting less than 55% marks in the examination were not suitable to be appointed as subordinate judges. The High Court allowed the writ petition by taking a view that the State Government was not entitled to impose a new standard of 55% of marks for selection as that was against the rule which provided for a minimum of 45% only.
25. After taking note of the relevant extant rules (i.e., Rules 8 and 10)<sup>27</sup> this Court allowed State's appeal with the following observations:

"10. ... The mere fact that a candidate's name appears in the list will not entitle him to a mandamus that he be

---

27 Rule 8. -No candidate shall be considered to have qualified unless he obtains 45% marks in the aggregate of all the papers and at least 33% marks in the language paper, that is, Hindi (in Devnagri script).

Rule 10.- (i) The result of the examination will be published in the Punjab Government Gazette;  
 (ii) Candidates will be selected for appointment strictly in the order in which they have been placed by the Punjab Public Service Commission in the list of those who have qualified under Rule 8;...."

**Digital Supreme Court Reports**

appointed. Indeed, if the State Government while making the selection for appointment had departed from the ranking given in the list, there would have been a legitimate grievance on the ground that the State Government had departed from the rules in this respect. The true effect of Rule 10 ..... is that if and when the State Government propose to make appointments of Subordinate Judges the State Government (i) shall not make such appointments by travelling outside the list, and (ii) shall make the selection for appointments strictly in the order the candidates have been placed in the list published in the Government Gazette. In the present case neither of these two requirements is infringed by the Government. They have appointed the first seven persons in the list as Subordinate Judges. Apart from these constraints on the power to make the appointments, Rule 10 does not impose any other constraint. There is no constraint that the Government shall make an appointment of a Subordinate Judge either because there are vacancies or because a list of candidates has been prepared and is in existence.

**11.** It must be remembered that the petition is for a mandamus. This Court has pointed out in *Dr Rai Shivendra Bahadur v. Governing Body of the Nalanda College* [AIR 1962 SC 1210 : [1962 Supp \(2\) SCR 144](#) : (1962) 2 SCJ 208 : (1962) 1 Lab LJ 247 : (1962) 4 FIR 507.] that in order that mandamus may issue to compel an authority to do something, it must be shown that the statute imposes a legal duty on that authority and the aggrieved party has a legal right under the statute to enforce its performance. Since there is no legal duty on the State Government to appoint all the 15 persons who are in the list and the petitioners have no legal right under the rules to enforce its performance the petition is clearly misconceived.

**12.** It was, however, contended by Dr Singhvi on behalf of the respondents that since Rule 8 ..... makes candidates who obtained 45% or more in the competitive examination eligible for appointment, the State Government had no right to introduce a new rule by which they can restrict the appointments to only those who have scored not less than

**Tej Prakash Pathak & Ors. v. Rajasthan High Court & Ors.**

55%. It is contended that the State Government have acted arbitrarily in fixing 55% as the minimum for selection and this is contrary to the rule referred to above. The argument has no force. Rule 8 is a step in the preparation of a list of eligible candidates with minimum qualifications who may be considered for appointment. The list is prepared in order of merit. The one higher in rank is deemed to be more meritorious than the one who is lower in rank. It could never be said that one who tops the list is equal in merit to the one who is at the bottom of the list. Except that they are all mentioned in one list, each one of them stands on a separate level of competence as compared with another. That is why Rule 10(ii) .... speaks of "selection for appointment". Even as there is no constraint on the State Government in respect of the number of appointments to be made, there is no constraint on the Government fixing a higher score of marks for the purpose of selection. In a case where appointments are made by selection from a number of eligible candidates it is open to the Government with a view to maintain high standards of competence to fix a score which is much higher than the one required for mere eligibility. As shown in the letter of the Chief Secretary already referred to, they fixed a minimum of 55% for selection as they had done on a previous occasion. There is nothing arbitrary in fixing the score of 55% for the purpose of selection, because that was the view of the High Court also previously intimated to the Punjab Government on which the Haryana Government thought fit to act. That the Punjab Government later on fixed a lower score is no reason for the Haryana Government to change their mind. This is essentially a matter of administrative policy and if the Haryana State Government think that in the interest of judicial competence persons securing less than 55% of marks in the competitive examination should not be selected for appointment, those who got less than 55% have no right to claim that the selections be made of also those candidates who obtained less than the minimum fixed by the State Government. In our view the High Court was in error in thinking that the State Government had somehow contravened Rule 8 of .....”

**Digital Supreme Court Reports**

26. A close reading of the judgment in *Subash Chander Marwaha* (supra) would disclose that there was no change in the rules of the game *qua* eligibility for placement in the select list. There the select list was prepared in accordance with the extant rules. But, since the extant rules did not create any obligation on the part of the State Government to make appointments against all notified vacancies, this Court opined that the State could take a policy decision not to appoint candidates securing less than 55% marks. With that reasoning and by taking into account that appointments made were of top seven candidates in the select list, who had secured 55% or higher marks, this Court found no merit in the petition of the writ petitioners. On the other hand, in *K. Manjusree* (supra), the eligibility criteria for placement in the select list was changed after interviews were held which had a material bearing on the select list. Thus, *Subash Chander Marwaha* (supra) dealt with the right to be appointed from the select list whereas *K. Manjusree* (supra) dealt with the right to be placed in the select list. The two cases therefore dealt with altogether different issues. For the foregoing reasons, in our view, *K. Manjusree* (supra) could not have been doubted for having failed to consider *Subash Chander Marwaha* (supra).
27. In *K. H. Siraj v. High Court of Kerala & Ors.*<sup>28</sup> the High Court of Kerala invited applications for appointment to the post of Munsif Magistrate in the Kerala Judicial Service. Out of more than 1800 candidates who had applied, 1292 applications were found valid. 118 candidates passed the written examination. Out of the said candidates, 88 passed the interview and select list was prepared from amongst these 88 candidates. Candidates who were not selected as they had not secured the prescribed minimum marks in the interview filed writ petitions contending that in the absence of specific legislative mandate prescribing cut-off marks in interviews, the fixing of separate minimum cut-off marks in the interview for further elimination of candidates after a comprehensive written test touching the required subjects in detail, was violative of the statute. The writ petitions were allowed by a single judge of the High Court against which intra-court appeal was filed before division bench of the High Court. The division bench set aside the order of the learned single judge against which appeals came before this Court. While

28 [2006] Supp. 2 SCR 790 : (2006) 6 SCC 395

**Tej Prakash Pathak & Ors. v. Rajasthan High Court & Ors.**

dismissing the appeals upon interpretation of Rule 7 of the Kerala Judicial Service Rules, 1991,<sup>29</sup> this Court held:

"50. What the High Court has done by the notification dated 26.3.2001 is to evolve a procedure to choose the best available talent. It cannot for a moment be stated that prescription of minimum pass marks for the written examination or for the oral examination is in any manner irrelevant or not having any nexus to the object sought to be achieved. The merit of a candidate and his suitability are always assessed with reference to his performance at the examination and it is a well-accepted norm to adjudge the merit and suitability of any candidate for any service, whether it be the Public Service Commission (IAS, IFS, etc) or any other. Therefore, the powers conferred by Rule 7 fully justified the prescription of the minimum eligibility condition in Rule 10 of the notification dated 26.3.2001. The very concept of examination envisaged by Rule 7 is a concept justifying prescription of a minimum as benchmark for passing the same. In addition, further requirements are necessary for assessment of suitability of the candidate and that is why power is vested in a high-powered body like the High Court to evolve its own procedure as it is the best judge in the matter.....

xxx

xxx

xxx

62. Thus it is seen that apart from the amplitude of the power under rule 7 it is clearly open for the High Court to prescribe benchmarks for the written test and oral test in order to achieve the purpose of getting the best available talent. There is nothing in the rules barring such a procedure from being adopted. It may also be mentioned

---

29 **Rule 7.- Preparation of lists of approved candidates and reservation of appointments.** – (1) The High Court of Kerala shall, from time to time, hold examinations, written and oral, after notifying the probable number of vacancies likely to be filled up and prepare a list of candidates considered suitable for appointment to category 2. The list shall be prepared after following such procedure as the High Court deems fit and by following the rules relating to reservation of appointments contained in Rules 14 to 17 of part 2 of the Kerala State and Subordinate Services Rules, 1958.  
 (2) The list consisting of not more than double the number of probable vacancies notified shall be forwarded for the approval of the Governor. The list approved by the Governor shall come into force from the date of the approval and shall remain in force for a period of two years or until a fresh approved list is prepared, whichever is earlier.

## Digital Supreme Court Reports

that executive instructions can always supplement the rules which may not deal with every aspect of a matter. Even assuming that Rule 7 did not prescribe any particular minimum, it was open to the High Court to supplement the rule with a view to implement them by prescribing relevant standards in the advertisement for selection.”

After observing as above, in *K.H. Siraj* (supra), this Court distinguished its earlier decision in *P.K. Ramachandra Iyer v. Union of India*<sup>30</sup> with the following reasoning:

“65. .... In *Ramachandra Iyer* case Rule 14 (....) mandated that the marks at the written test and the oral examination have to be aggregated and the merit list prepared on the basis of such aggregation of marks. Therefore, the marks obtained at the written test and the oral test were both relevant whatever be the percentage, in the preparation of the merit list. Nevertheless, the examining board prescribed minimum for viva voce test and eliminated those who failed to get the minimum. Resultantly, candidates who would have found a place in the rank list based on the aggregate of the marks for the two tests stood eliminated because they did not get the minimum in the test. This was contrary to Rule 14 and that was the reason why the prescription of minimum marks for viva voce test was held invalid in *Ramachandra Iyer* case.”

28. The decision in *K.H. Siraj* (supra) makes it clear that if the rules governing recruitment provides latitude to the competent authority to devise its procedure for selection it may do so subject to the rule against arbitrariness enshrined in Article 14 of the Constitution. Even *K. Manjusree* (supra) does not proscribe fixing minimum marks for either the written test, or the interview, as an eligibility criterion for selection. What *K. Manjusree* (supra) does is to regulate the stage at which it could be done. This is clear from the decision of this Court in *Hemani Malhotra v. High Court of Delhi*.<sup>31</sup> In *Hemani* (supra) a contention was raised that the decision in *K. Manjusree* (supra)

30 [1984] 2 SCR 200 : (1984) 2 SCC 141

31 [2008] 5 SCR 1066 : (2008) 7 SCC 11

**Tej Prakash Pathak & Ors. v. Rajasthan High Court & Ors.**

should be regarded as per incuriam for not having noticed earlier decisions in *Ashok Kumar Yadav v. State of Haryana*<sup>32</sup> as well as *K.H. Siraj* (supra). Rejecting the contention, this Court observed:

"16. ... what is laid down in the decisions relied upon by the learned counsel for the respondent is that it is always open to the authority making the rules regulating the selection to prescribe the minimum marks both for examination and interview. The question whether introduction of the requirement of minimum marks for interview after the entire selection process was completed was valid or not, never fell for consideration of this Court in the decisions referred to by the learned counsel for the respondent. While deciding the case of *K Manjusree* the Court noticed the decisions in *P K Ramachandra Iyer v. Union of India*, Umesh Chandra Shukla v. Union of India and *Durgacharan Misra v. State of Orissa*, and has thereafter laid down the proposition of law..... . On the facts and in the circumstances of the case this Court is of the opinion that the decisions rendered by this court in *K. Manjusree* can neither be regarded as judgment per incuriam nor good case is made out by the respondent for referring the matter to the larger Bench for reconsidering the said decision."

29. The ultimate object of any process of selection for entry into a public service is to secure the best and the most suitable person for the job, avoiding patronage and favoritism. Selection based on merit, tested impartially and objectively, is the essential foundation of any useful and efficient public service. So, open competitive examination has come to be accepted almost universally as the gateway to public services.<sup>33</sup> It is now well settled that while a written examination assesses a candidate's knowledge and intellectual ability, an interview test is valuable to assess a candidate's overall intellectual and personal qualities. While written examination has certain distinct advantages over the interview test there are yet no written tests which can evaluate a candidate's initiative, alertness, resourcefulness, dependableness, cooperativeness, capacity for clear

32 [1985] Supp. 1 SCR 657 : (1985) 4 SCC 417

33 *Lila Dhar v. State of Rajasthan and Others* (1981) 4 SCC 159 paragraph 4.

**Digital Supreme Court Reports**

and logical presentation, effectiveness in discussion, effectiveness in meeting and dealing with others, adaptability, judgment, ability to make decision, ability to lead, intellectual and moral integrity.<sup>34</sup> Thus, the written examination assesses the man's intellect and the interview test the man himself and "the twain shall meet" for a proper selection.<sup>35</sup>

30. What is clear from above is that the object of any process of selection for entry into a public service is to ensure that a person most suitable for the post is selected. What is suitable for one post may not be for the other. Thus, a degree of discretion is necessary to be left to the employer to devise its method/ procedure to select a candidate most suitable for the post *albeit* subject to the overarching principles enshrined in Articles 14 and 16 of the Constitution as also the Rules/ Statute governing service and reservation. Thus, in our view, the appointing authority/ recruiting authority/ competent authority, in absence of Rules to the contrary, can devise a procedure for selection of a candidate suitable to the post and while doing so it may also set benchmarks for different stages of the recruitment process including written examination and interview. However, if any such benchmark is set, the same should be stipulated before the commencement of the recruitment process. But if the extant Rules or the advertisement inviting applications empower the competent authority to set benchmarks at different stages of the recruitment process, then such benchmarks may be set any time before that stage is reached so that neither the candidate nor the evaluator/ examiner/ interviewer is taken by surprise. The decision in *K. Manjusree* (supra) does not proscribe setting of benchmarks for various stages of the recruitment process but mandates that it should not be set after the stage is over, in other words after the game has already been played. This view is in consonance with the rule against arbitrariness enshrined in Article 14 of the Constitution and meets the legitimate expectation of the candidates as also the requirement of transparency in recruitment to public services and thereby obviates mal practices in preparation of select list.

---

34 See paragraph 5 of *Lila Dhar* (supra)

35 See paragraph 6 of *Lila Dhar* (supra)

**Tej Prakash Pathak & Ors. v. Rajasthan High Court & Ors.**

**(D) RULE DOES NOT APPLY WITH EQUAL STRICTNESS TO STEPS FOR SELECTION**

31. As already noticed in Section (A), a recruitment process *inter alia* comprises of various steps like inviting applications, scrutiny of applications, rejection of defective applications or elimination of ineligible candidates, conducting examinations, calling for interview or viva voce and preparation of list of successful candidates for appointment. Subject to the rule against arbitrariness, how tests or viva voce are to be conducted, what questions are to be put, in what manner evaluation is to be done, whether a short listing exercise is needed are all matters of procedure which, in absence of rules to the contrary, may be devised by the competent authority. Often advertisement(s) inviting applications are open-ended in terms of these steps and leave it to the discretion of the competent authority to adopt such steps as may be considered necessary in the circumstances *albeit* subject to the overarching principle of rule against arbitrariness enshrined in Article 14 of the Constitution.
32. To elucidate the above proposition we shall notice few instances where the procedure devised by the recruiting body has been approved by this Court. In ***Santosh Kumar Tripathi v. U.P. Power Corporation***,<sup>36</sup> this Court was required to consider whether the Rule enabling Service Commission to examine, interview, select and recommend suitable candidates would include power to hold written examination. This Court accepted the High Court's view that power to 'examine' would include holding of written examination.
33. In ***M.P. Public Service Commission v. Navnit Kumar Potdar***<sup>37</sup> the question which arose before this Court was as to whether in the process of short-listing, the Commission has altered or substituted the criteria or the eligibility of a candidate to be considered for being appointed against the post of Presiding Officer, Labour Court. In that context it was observed:

"6. ... It may be mentioned at the outset that whenever applications are invited for recruitment to the different posts, certain basic qualifications and criteria are fixed and the

<sup>36</sup> (2009) 14 SCC 210

<sup>37</sup> [\[1994\] Supp. 3 SCR 665](#) : (1994) 6 SCC 293

**Digital Supreme Court Reports**

applicants must possess those basic qualifications and criteria before their applications can be entertained for consideration. The Selection Board or the Commission has to decide as to what procedure is to be followed for selecting the best candidates from amongst the applicants. In most of the services, screening tests or written tests have been introduced to limit the number of candidates who have to be called for interview. Such screening tests or written tests have been provided in the concerned statutes or prospectus which govern the selection of the candidates. But where the selection is to be made only on basis of interview, the Commission or the Selection Board can adopt any rational procedure to fix the number of candidates who should be called for interview. It has been impressed by the courts from time to time that where selections are to be made only on the basis of interview, then such interviews / viva voce tests must be carried out in a thorough and scientific manner in order to arrive at a fair and satisfactory evaluation of the personality of the candidate.”

34. Likewise in *Union of India v. T. Sundararaman*<sup>38</sup> where the eligibility conditions referred to a minimum of 5 years' experience, the selection committee was held justified in shortlisting those candidates with more than 7 years' experience having regard to the large number of applicants compared to the vacancies to be filled. The relevant observations are being extracted below:

"4. ....Note 21 to the advertisement expressly provides that if a large number of applications are received the Commission may shortlist candidates for interview on the basis of higher qualifications although all applicants may possess the requisite minimum qualifications. In the case of *M.P. Public Service Commission v. Navnit Kumar Potdar* [(1994) 6 SCC 293 : 1994 SCC (L&S) 1377 : (1994) 28 ATC 286 : JT (1994) 6 SC 302] this Court has upheld shortlisting of candidates on some rational and reasonable basis. In that case, for the purpose of shortlisting, a longer

**Tej Prakash Pathak & Ors. v. Rajasthan High Court & Ors.**

period of experience than the minimum prescribed was used as a criterion by the Public Service Commission for calling candidates for an interview. This was upheld by this Court. In the case of *Govt. of A.P. v. P. Dilip Kumar* [(1993) 2 SCC 310 : 1993 SCC (L&S) 464 : (1993) 24 ATC 123 : JT (1993) 2 SC 138] also this Court said that it is always open to the recruiting agency to screen candidates due for consideration at the threshold of the process of selection by prescribing higher eligibility qualification so that the field of selection can be narrowed down with the ultimate objective of promoting candidates with higher qualifications to enter the zone of consideration. The procedure, therefore, adopted in the present case by the Commission was legitimate....”

35. Similarly, in *Tridip Kumar Dingal v. State of W.B.*<sup>39</sup> it was held that shortlisting is permissible on the basis of administrative instructions provided the action is *bona fide* and reasonable. The relevant observations in the judgment are extracted below:

“38. ... The contention on behalf of the State Government that written examination was for shortlisting the candidates and was in the nature of “elimination test” has no doubt substance in it in view of the fact that the records disclose that there were about 80 posts of Medical Technologists and a huge number of candidates, approximately 4000 applied for appointment. The State authorities had, therefore, no other option but to “screen” candidates by holding written examination. It was observed that no recruitment rules were framed in exercise of the power under the proviso to Article 309 of the Constitution and hence no such action could be taken. In our opinion, however, even in absence of statutory provision, such an action can always be taken on the basis of administrative instructions—for the purpose of “elimination” and “shortlisting” of huge number of candidates provided the action is otherwise *bona fide* and reasonable.”

39 [2008] 15 SCR 194 : (2009) 1 SCC 768

**Digital Supreme Court Reports**

36. Another example is in respect of fixing different cutoffs for different subjects having regard to the relative importance of the subjects and their degree of relevance.<sup>40</sup> These instances make it clear that this Court has been lenient in letting recruiting bodies devise an appropriate procedure for successfully concluding the recruitment process provided the procedure adopted has been transparent, non-discriminatory/ non-arbitrary and having a rational nexus to the object sought to be achieved.

**(E) PROCEDURE PRESCRIBED IN THE EXTANT RULE NOT TO BE VIOLATED**

37. In *Sivanandan C.T.* (supra) the issue before the Constitution Bench was whether for selection minimum marks could be prescribed contrary to the extant rules and the advertisement. Answering in the negative, the Constitution Bench, speaking through one of us (Dr. D.Y. Chandrachud, CJ), held:

"15. The Administrative Committee of the High Court decided to impose a cut off for the viva-voce examination actuated by the bona fide reason of ensuring that candidates with requisite personality assume judicial office. However laudable that approach of the Administrative Committee may have been, such a change would be required to be brought in by a substantive amendment to the rules which came in much later as noticed above. This is not a case where the rules of the scheme of the High Court were silent. Where the statutory rules are silent, they can be supplemented in a manner consistent with the object and spirit of the Rules by an administrative order.

16. In the present case, the statutory rules expressly provided that the select list would be drawn up on the basis of the aggregate marks obtained in the written examination and the viva-voce. This was further elaborated in the scheme of examination which prescribed that there would be no cut off marks for the viva-voce. This position is also reflected in the notification of the High Court dated 30 September 2015. In this backdrop we have come to

---

40 Banking Service Recruitment Board, Madras v. V. Ramalingam (1998) 8 SCC 523

**Tej Prakash Pathak & Ors. v. Rajasthan High Court & Ors.**

the conclusion that the decision of the High Court suffered from its being *ultra vires* the 1961 Rules besides being manifestly arbitrary."

38. Following *Sivanandan CT* (supra), a three-Judge Bench of this Court in *Salam Samarjeet Singh v. The High Court of Manipur at Imphal & Anr.*<sup>41</sup> held:

"31. ... Prescribing minimum marks for viva-voce segment may be justified for the holistic assessment of a candidate, but in the present case such a requirement was introduced only after commencement of the recruitment process and in violation of the statutory rules. The decision of the Full Court to depart from the expected exercise of preparing the merit list as per the unamended rules is clearly violative of the substantive legitimate expectation of the petitioner. It also fails the tests of fairness, consistency and predictability and hence is violative of Article 14 of the Constitution of India."

39. There can therefore be no doubt that where there are no Rules or the Rules are silent on the subject, administrative instructions may be issued to supplement and fill in the gaps in the Rules. In that event administrative instructions would govern the field provided they are not *ultra vires* the provisions of the Rules or the Statute or the Constitution. But where the Rules expressly or impliedly cover the field, the recruiting body would have to abide by the Rules.

**(F) APPOINTMENT MAY BE DENIED EVEN AFTER PLACEMENT IN SELECT LIST.**

40. In Section (C) above, we have already noticed the Constitution Bench decision of this Court in *Shankarsan Das* (supra) where it was held:

"Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the license of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken *bona fide* for appropriate reasons. And if the vacancies or any of them are filled up,

## Digital Supreme Court Reports

the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted."

41. Thus, in light of the decision in *Shankarsan Das* (supra), a candidate placed in the select list gets no indefeasible right to be appointed even if vacancies are available. Similar was the view taken by this Court in *Subash Chander Marwaha* (supra) where against 15 vacancies only top 7 from the select list were appointed. But there is a caveat. The State or its instrumentality cannot arbitrarily deny appointment to a selected candidate. Therefore, when a challenge is laid to State's action in respect of denying appointment to a selected candidate, the burden is on the State to justify its decision for not making appointment from the Select List.

## CONCLUSIONS

42. We, therefore, answer the reference in the following terms:
- (1) Recruitment process commences from the issuance of the advertisement calling for applications and ends with filling up of vacancies;
  - (2) Eligibility criteria for being placed in the Select List, notified at the commencement of the recruitment process, cannot be changed midway through the recruitment process unless the extant Rules so permit, or the advertisement, which is not contrary to the extant Rules, so permit. Even if such change is permissible under the extant Rules or the advertisement, the change would have to meet the requirement of Article 14 of the Constitution and satisfy the test of non-arbitrariness;
  - (3) The decision in *K. Manjusree* (supra) lays down good law and is not in conflict with the decision in *Subash Chander Marwaha* (supra). *Subash Chander Marwaha* (supra) deals with the right to be appointed from the Select List whereas *K. Manjusree* (supra) deals with the right to be placed in the Select List. The two cases therefore deal with altogether different issues;
  - (4) Recruiting bodies, subject to the extant Rules, may devise appropriate procedure for bringing the recruitment process to its logical end provided the procedure so adopted is transparent, non-discriminatory/ non-arbitrary and has a rational nexus to the object sought to be achieved.

**Tej Prakash Pathak & Ors. v. Rajasthan High Court & Ors.**

- (5) Extant Rules having statutory force are binding on the recruiting body both in terms of procedure and eligibility. However, where the Rules are non-existent, or silent, administrative instructions may fill in the gaps;
  - (6) Placement in the select list gives no indefeasible right to appointment. The State or its instrumentality for bona fide reasons may choose not to fill up the vacancies. However, if vacancies exist, the State or its instrumentality cannot arbitrarily deny appointment to a person within the zone of consideration in the select list.
- 43.** Let the appeals be placed before appropriate Bench for decision in terms of the answers rendered above, after obtaining administrative directions from Hon'ble the Chief Justice.

*Result of the case:* Reference answered.

<sup>†</sup>*Headnotes prepared by:* Ankit Gyan

**Oachira Parabrahma Temple & Anr.**

v.

**G. Vijayanathakurup and Ors.**

(Civil Appeal No(s). 13708-13709 of 2024)

With

(Contempt Petition (C) No(s). 987-988 of 2023)

03 December 2024

**[Sanjiv Khanna, CJI, Sanjay Kumar and  
R. Mahadevan,\* JJ.]**

**Issue for Consideration**

Matter pertains to the dispute as regards administration and management of Oachira Parabrahma temple and its institutions by the Administrative Head appointed by the High Court and the alleged Executive Committee.

**Headnotes<sup>†</sup>**

**Trust and charities – Oachira Parabrahma Temple – Administration and management of temple – Serious disputes in administering and managing the temple and its institutions by the Administrative Head appointed by the High Court and the alleged Executive Committee:**

**Held:** The subject temple is a unique, ancient and historical one – It administers/runs a hospital, a Nursing College and a Nursing School, to cater to the needs of the general public – It is imperative to restore, protect and preserve temples and their properties with utmost care – Thus, it is just and necessary to conduct election under the aegis of a new Administrative Head/Administrator, for the smooth and effective administration of the subject temple and the institutions – Retired Judge of High Court appointed as Administrative Head/Administrator to conduct election – Administrative Head/Administrator to commence the election process strictly in accordance with the Bye-laws of the temple, within the stipulated period – Administrative Head/Administrator/ Advocate Commissioner appointed by the High Court, ceases to exist and thus, directed to hand over the charge/accounts to the

\* Author

**Oachira Parabrahma Temple & Anr. v. G. Vijayanathakurup and Ors.**

newly appointed Administrative Head/Administrator with immediate effect – Newly Appointed Administrator/Administrative Head to manage the affairs of the Temple/Samithis until the elections are held and to handover the charge to the elected body – Existing arrangements relating to the functions/duties/affairs of the subject temple and its institutions to continue, until further orders from the trial court – Trial court to complete the final decree proceedings in the suit filed for framing of Scheme, as expeditiously as possible. [Paras 15, 16]

**List of Keywords**

Oachira Parabrahma Temple; Administration and management of temple; Administrative Head; Administrator; Executive Committee; Election; Bye-laws of the temple; Advocate Commissioner; Retired Judge of High Court.

**Case Arising From**

CIVIL APPELLATE JURISDICTION/INHERENT JURISDICTION:  
Civil Appeal Nos. 13708-13709 of 2024

From the Judgment and Order dated 02.03.2020 and 07.02.2023 of the High Court of Kerala at Ernakulam in RFA No. 562 of 2010 and IA No. 5 of 2022 respectively

With

Contempt Petition (C) Nos. 987-988 of 2023 In Civil Appeal Nos. 13708-13709 of 2024

**Appearances for Parties**

Colin Gonsalves, Sr. Adv., Ms. Mugdha, Deepak Kumar Singh, Rameshwar Prasad Goyal, Advs. for the Appellants.

V. Chitambaresh, Thomas P Joseph, Sr. Advs., Koshy John, M.S. Vishnu Sankar, Sriram Parakkat, Ms. Athira G Nair, Ms. Viddusshi, Aditya Santhosh, Ms. Anjali Singh, Anandhu S. Nair, M/s. Lawfic, Anshuman Siddharth Nayak, Rahul Kulhare, Gagan Singh Parmar, Ms. Ekta Choudhary, Ms. Jeba Khan, Anand Krishna, Bijo Mathew Joy, Ms. Gifty Marium Joseph, Atul Shankar Vinod, R. Krishnaraj, Tom Joseph, Dr. Linto KB, Satyajeet Kumar, Advs. for the Respondents.

**Digital Supreme Court Reports****Judgment / Order of the Supreme Court****Judgment****R. Mahadevan, J.**

Leave granted.

2. The appellants, claiming themselves as elected Secretary and President of a temple viz., Oachira Parabrahma Temple situated at Kerala (hereinafter shortly referred to as "the subject temple"), have preferred these Civil Appeals against two orders passed by a learned Single Judge of the High Court of Kerala at Ernakulam viz. one is a final Judgment and order dated 02.03.2020 passed in RFA No. 562/2010 and another is an order dated 07.02.2023 passed in I.A No. 5/2022.

***Brief background***

3. According to the averments made in the Civil Appeals, the subject temple is a unique, ancient and historical one as there is no building, consecrated idol or deity and sanctum sanctorum. The management of the temple and the institutions being run under it, such as, super speciality hospital, nursing college, etc., are governed by the bye-laws of the temple. As per the Bye-laws, the administration is vested in a system of three-tier elected Committees, viz., Pothubharana Samithi (General Board), Pravarthaka Samithi (Working Committee) and Karya Nirvahana Samithi (Executive Committee). The Appellant Nos.1 and 2 were elected as Secretary and President respectively of the Executive Committee in the election held during May 2017 and thereafter, no election has been conducted so far. However, on 07.04.2022, the Executive Committee, which existed till then, was voted out in a no-confidence motion, and a new committee consisting of 11 members, including the appellants, assumed office.
4. In the year 2006, some devotees filed a suit in OS.No.1/2006 before the 1<sup>st</sup> Additional District Court, Kollam, seeking to frame a Scheme for administration of the subject temple and the institutions thereunder. By judgment and decree dated 09.04.2010, the trial Court passed a preliminary decree directing framing a Scheme; and further, directed the parties to file a draft Scheme. It was also observed by the trial Court that till the Scheme is framed, the administration of the subject temple would continue as per the Bye-laws of the temple.

**Oachira Parabrahma Temple & Anr. v. G. Vijayanathakurup and Ors.**

5. Aggrieved by the aforesaid preliminary decree of the trial Court, the defendant Nos.12 and 13 who are Sthanis (Hereditary Trustees) of the temple, preferred a Regular First Appeal bearing No.562/2010 before the High Court of Kerala at Ernakulam, seeking a direction to the trial Court to make adequate safeguards for them, with respect to their share of amounts and their roles to play, in the proposed Scheme. During the pendency of the said RFA, an interim order dated 05.10.2010 came to be passed by a learned Single Judge of the High Court, appointing an Advocate Commissioner *viz.*, Mr.B.Premnath, for the purpose of counting the offerings in the temple. According to the appellants, the Advocate Commissioner so appointed was only to the limited purpose of counting the offerings in the temple and he had not been given any power to administer the subject temple over and above the Committees or to supervise the Committees at any point of time.
6. By the 1<sup>st</sup> impugned order, the High Court disposed of the aforesaid Regular First Appeal, *inter alia*, directing the trial Court to frame a Scheme for the management of the temple and its institutions and to formulate Rules with respect to their functioning, after giving opportunity to all the parties to produce draft Scheme as expeditiously as possible, but not later than one year from the date of production of copy of the Judgment. Further, the High Court appointed Hon'ble Mr. Justice A.V. Ramakrishna Pillai, a retired Judge of the High Court of Kerala, as the Administrative Head of the subject temple and the Trust/ Managing Committee. It was further observed in the 1<sup>st</sup> impugned order that the Administrative Committee (the bodies elected as per the bye-laws of the temple) shall be under the supervision and full control of the said Administrative Head; until such time the scheme is framed by the Trial Court; all decisions of the elected bodies shall require to be ratified by the Administrative Head before the decisions are put to implementation; the parties concerned would be at liberty to place within one month from the date of receipt of the judgment, their suggestions before the Administrative Head regarding the draft Scheme, so as to enable the Administrative Head to settle the Scheme through consensus, if it is possible.
7. Seeking a direction to the Administrator to conduct election to elect a Pothu Bharana Samithi of the subject temple, the Respondent Nos.5 and 31 in the aforesaid RFA filed an Interlocutory Application *viz.*, I.A.No.5 of 2022 in RFA No.562 of 2010. By the 2<sup>nd</sup> impugned order, the High Court disposed of the said application by removing

**Digital Supreme Court Reports**

the elected Executive Committee of the temple and appointing an unelected Committee comprising persons of its choice contrary to the Bye-laws of the temple and the prevailing customs. Being aggrieved, the appellants who were the elected Secretary and President of the Executive Committee, are before this Court with these appeals. Along with these appeals, the appellants have also taken out various Interlocutory Applications.

8. The issues that arise for consideration in these Civil Appeals are:
  - (i) When the entire proceedings in RFA was concluded by the 1<sup>st</sup> impugned order, whether the High Court, which had become *functus officio* and *coram non judice* losing its jurisdiction upon disposal of the RFA, was correct in entertaining the interlocutory application No.5 of 2022 and passing the 2<sup>nd</sup> impugned order; and
  - (ii) Contrary to the convention and practice being followed in the administration of the subject temple and its institutions thereunder that the elected bodies in vogue would continue till the next election, whether the High Court was justified in passing the 2<sup>nd</sup> impugned order, removing the elected Executive Committee and appointing an unelected 5 member Committee of its choice, under the supervision of an Administrative Head and an Advocate Commissioner, on the application filed to allow the elected Committees in vogue to function until the next elections.
9. On 04.05.2023, this Court granted an order of interim stay. Pursuant to the same, the Appellant No.1 being Secretary of the elected Committee, sent letters dated 05.05.2023 to the Manager, Kerala Gramin Bank, Oachira, and the Manager, Punjab National Bank, Oachira, stating that the elected Committee has resumed the office and therefore, the accounts of the subject temple should not be allowed to be operated by anybody except the Secretary and Treasurer of the elected Committee as contemplated in the bye-laws. However, the Bank replied that there being no specific direction in the interim order, they cannot accede to the said request of the office bearers. Being dissatisfied with the same, the appellants preferred Contempt Petition (Civil) bearing No(s).987-988/2023 in SLP (C) No(s).10598-10599/2023.
10. Heard learned senior counsel appearing on behalf of all the parties and perused the materials placed before us.

**Oachira Parabrahma Temple & Anr. v. G. Vijayanathakurup and Ors.**

11. It is evident from the records that the administration of the subject temple and the institutions thereunder is governed by the Bye-laws of the temple. Clause 9 of the Bye-laws makes it clear that the term of office of the elected General Body is five years from the date of the election. As per Clause 11, the term of the other elected bodies is co-terminus with that of the General Body. Concededly, after the election in May 2017, no election has been conducted so far.
12. The learned senior counsel appearing on behalf of the appellants expressed serious grievances about the functioning of the Administrative Head appointed by the High Court. According to the learned senior counsel, the Administrative Head has not understood the ground realities and the emergent situation prevailing over the subject temple and its institutions; that he refused to meet the elected representatives and accede to the decisions taken by them; and that he has not even visited the subject temple, which is essentially required to resolve the problems and streamline the development. It is further alleged that the Administrative Head has been issuing orders without proper consultation with the elected bodies and he has gone to the extent of appointing a Monitoring Committee with the assistance of Advocate Commissioner for maintenance and general issues relating to the administration of the hospital, nursing college and school.
13. The learned senior counsel appearing on the other side has stoutly refuted the aforesaid submissions made on behalf of the appellants and submitted that steps are only taken for administration of the temple until scheme is framed and elections are held for the Samithis.
14. However, we are not inclined to go into the contentions/issues raised by the appellants at this stage as the High Court has granted liberty to the parties to raise all the contentions before the Trial Court. At the same time, the fact remains that there are serious disputes in administering and managing the subject temple and its institutions by the Administrative Head appointed by the High Court and the alleged Executive Committee. The appellants have taken out various Interlocutory Applications before the trial Court and the same are pending without there being any orders.
15. At this juncture, it is to be noted that the subject temple is a unique, ancient and historical one and its area comprises a sprawling of 21.25 acres of land. That apart, it administers/runs a hospital, viz., Parabrahma Super Speciality Hospital & Research Centre, a

**Digital Supreme Court Reports**

Nursing College and a Nursing School, to cater to the needs of the general public. In the given facts, it is imperative to restore, protect and preserve temples and their properties with utmost care. It is also an admitted fact that the suit for framing of Scheme for the subject temple is pending before the District Court and stands at the final decree stage. In such circumstances, we feel that it is just and necessary to conduct election under the aegis of a new Administrative Head/Administrator, for the smooth and effective administration of the subject temple and the institutions thereunder, which proposition has been agreed upon by the learned senior counsel appearing on behalf of all the parties.

16. In that view of the matter, we pass the following orders:

- (i) Hon'ble Mr. Justice K.Ramakrishnan, a retired Judge of High Court of Kerala is appointed as Administrative Head/Administrator to conduct election for the administration and management of the subject temple and its allied institutions, in a free and fair manner.
- (ii) The Administrative Head/Administrator so appointed shall commence the election process by finalising the voters' list and publishing the same, etc., and complete the same strictly in accordance with the Bye-laws of the temple, within a period of four months from the date of receipt of a copy of this judgment and thereafter, file his report to this Court.
- (iii) The Administrative Head/Administrator can appoint two officers i.e., one in the cadre of District Judge (Retd.) and another in the legal profession, to assist him for speedy completion of the assignment entrusted to him.
- (iv) The Administrative Head/Administrator shall be paid an honorarium of Rs.2,00,000/= per month, apart from reimbursement of all the expenses incurred by him, including travelling expenses, and those incurred towards the discharge of his duties, from the funds maintained by the subject temple. In case, he appoints a retired District Judge and an Advocate for his assistance, the Retired District Judge shall be paid an honorarium of Rs.75,000/= per month and the Advocate shall be paid a sum of Rs. 50,000/= per month.
- (v) The Administrative Head/Administrator shall incur all the expenses for smooth conduct of election and administration of

**Oachira Parabrahma Temple & Anr. v. G. Vijayanathakurup and Ors.**

temple and its institutions from and out of the funds maintained by the subject temple.

- (vi) It is open to the newly appointed Administrative Head to approach the trial Court for any clarification/directions relating to conduct of election, administration and management of the subject temple and its institutions.
  - (vii) All the parties shall render their assistance/co-operation to the Administrative Head to complete the election within the time frame as stipulated in clause (ii) *supra* of this paragraph.
  - (viii) In view of the order thus being passed by us, the Administrative Head/Administrator/Advocate Commissioner appointed by the High Court, ceases to exist and hence, they are directed to hand over the charge/accounts to the newly appointed Administrative Head/Administrator with immediate effect. The newly Appointed Administrator/Administrative Head shall manage the affairs of the Temple/Samithis until the election(s) is/are held and shall handover the charge to the elected body.
  - (ix) The existing arrangements relating to the functions/duties/affairs of the subject temple and its institutions shall stand continued, until further orders from the trial Court.
  - (x) The trial Court shall complete the final decree proceedings in the suit filed for framing of Scheme, as expeditiously as possible. The parties shall participate and raise all the issues touching upon their rights, Scheme, etc., before the trial Court in the final decree proceedings.
  - (xi) The orders impugned herein are modified accordingly.
17. The Civil Appeals are disposed of in the above terms. Contempt Petitions shall stand closed. Pending application(s), if any, shall stand disposed of.
- Post after four months for reporting compliance.

*Result of the case:* Appeals disposed of.  
Contempt petition closed.

<sup>†</sup>Headnotes prepared by: Nidhi Jain

**Tej Bhan (D) Through Lr. & Ors.**  
v.  
**Ram Kishan (D) Through Lrs. & Ors.**

(Civil Appeal No. 6557 of 2022)

09 December 2024

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

**Issue for Consideration**

Clarity and certainty in the interpretation of Section 14 of the Hindu Succession Act, 1956.

**Headnotes<sup>†</sup>**

**Hindu Succession Act, 1956 – s.14 – Clarity and certainty in interpretation:**

**Held:** This Court noticed that while following Tulsamma, the subsequent decisions in Thota Sesharathamma, Masilamani Mudaliar and Shakuntala Devi have made passing observations about the discordant note in the case of Karmi, Bhura and Gumpha but they have not been clearly and categorically overruled – Perhaps this is the reason why the subsequent decisions consistently followed the idea in Karmi and enunciated different principles in the subsequent decisions of Gumpha, Sadhu Singh and that perspective continued on its own strength – This Court having realised that there are a large number of decisions which are not only inconsistent with one another on principle but have tried to negotiate a contrary view by distinguishing them on facts or by simply ignoring the binding decision – This Court is of the view that there must be clarity and certainty in the interpretation of Section 14 of the Act – In view of the above, the Registry is directed to place the order of this Court along with the appeal paper book before the Hon'ble Chief Justice of India for constituting an appropriate larger bench for reconciling the principles laid down in various judgments of this Court and for restating the law on the interplay between sub-section (1) and (2) of Section 14 of the Hindu Succession Act. [Paras 23, 24 and 25]

**Case Law Cited**

*V. Tulasamma & Ors. v. Sesha Reddy (Dead) by LRs* [1977] 3 SCR 261 : (1977) 3 SCC 99; *Karmi v. Amru* (1972) 4 SCC 86;

**Tej Bhan (D) Through Lr. & Ors. v. Ram Kishan (D) Through Lrs. & Ors.**

*Sadhu Singh v. Gurdwara Sahib Narike & Ors* [2006] Supp. 5 SCR 799 : (2006) 8 SCC 75; *Gulwant Kaur v. Mohinder Singh* [1987] 3 SCR 576 : (1987) 3 SCC 674; *Thota Sesharathamma v. Thota Manikyamma* [1991] 3 SCR 717 : (1991) 4 SCC 312; *Balwant Kaur v. Chanan Singh & Ors.* [2000] 3 SCR 61 : (2000) 6 SCC 310; *Shakuntala Devi v. Kamla* (2005) 5 SCC 390; *Jupudy Pardha Sarathy v. Pentapati Rama Krishna* [2015] 14 SCR 374 : (2016) 2 SCC 56; *V. Kalyanaswamy v. L. Bakthavatsalam* [2020] 9 SCR 619 : (2021) 16 SCC 543; *Bhura and Ors. v. Kashiram* [1994] 1 SCR 16 : (1994) 2 SCC 111; *Gaddam Ramakrishnareddy and Ors. v. Gaddam Ramireddy and Anr.* [2010] 11 SCR 656 : (2010) 9 SCC 602; *Jagan Singh (Dead) through LRs. v. Dhanwanti and Anr.* [2012] 2 SCR 303 : (2012) 2 SCC 628; *Shivdev Kaur (Dead) by LRs. and Ors. v. RS Grewal* [2013] 5 SCR 267 : (2013) 4 SCC 636; *Ranvir Dewan v. Rashmi Khanna and Anr.* [2017] 13 SCR 542 : (2018) 12 SCC 1; *Jogi Ram v. Suresh Kumar and Ors.* [2022] 9 SCR 766 : (2022) 4 SCC 274; *Mangal Singh and Ors. v. Rattno (Dead) by LRs. and Anr.* [1967] 3 SCR 454 : AIR 1967 SC 1786; *Seth Badri Prasad v. Smt. Kanso Devi* [1970] 2 SCR 95 : (1969) 2 SCC 586; *Jaswant Kaur v. Major Harpal Singh* (1989) 3 SCC 572; *C. Masilamani Mudaliar and Ors. v. Idol of Sri Swaminathaswami Swaminathaswami Thirukoil and Ors* [1996] 1 SCR 1068 : (1996) 8 SCC 525; *Gumpha v. Jaibal* [1994] 1 SCR 901 : (1994) 2 SCC 511; *Bhoomireddy Chenna Reddy v. Bhoospalli Pedda Verrappa* [1996] Supp. 9 SCR 332 : (1997) 10 SCC 673; ; *Nazar Singh v. Jagjit Kaur* [1995] Supp. 5 SCR 162 : (1996) 1 SCC 35; *Santosh & Ors. v. Smt Saraswathibai & Anr* [2007] 12 SCR 375 : (2008) 1 SCC 465; *Munni Devi Alias Nathi Devi (D) v. Rajendra Alias Lallu Lal (D)* [2022] 3 SCR 876 : (2022) 17 SCC 434; *Kallakuri Pattabhiramswamy (D) Through LRs v. Kallakuri Kamaraju & Ors,* 2024 INSC 883 – referred to.

**List of Acts**

Hindu Succession Act, 1956.

**List of Keywords**

Section 14 of Hindu Succession Act, 1956; Disposition of property in favour of hindu female.

## Digital Supreme Court Reports

### **Case Arising From**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 6557 of 2022

From the Judgment and Order dated 07.08.2013 of the High Court of Punjab & Haryana at Chandigarh in RSA No. 2897 of 1986

### **Appearances for Parties**

Dhruv Mehta, Sr. Adv., Sachin Jain, Ajay Kumar Agarwal, Ms. Nishi Sangtani, Vishal, Mrs. Subhadra Dwivedi, Rajiv Ranjan Dwivedi, Advs. for the Appellants.

Sunil K. Mittal, Anshul Mittal, Archit Upadhyay, Sameer Dawar, Mrs. Vaishali Mittal Dawar, Ms. Khushi Aggarwal, Ayush Kumar, Advs. for the Respondents.

### **Judgment / Order of the Supreme Court**

#### **Order**

- Interpreting Section 14 of the Hindu Succession Act, 1956,<sup>1</sup> in V. Tulasamma & Ors. v. Sesha Reddy (Dead) by LRs.<sup>2</sup>", Justice Bhagwati observed that this is a classic instance of a statutory provision which, by reason of its inapt draftsmanship, has created endless confusion for litigants and has proved to be a paradise for lawyers. Raising concern about the legislative indifference and interpretative difficulties presented by sub-sections (1) and (2) of Section 14, leading to judicial divergence, which might as well be described as chaotic, robbing the law of that modicum of certainty which it must always possess, Justice Bhagwati observed;

*"67. .... The question is of some complexity and it has evoked wide diversity of judicial opinion not only amongst the different High Courts but also within some of the High Courts themselves. It is indeed unfortunate that though it became evident as far back as 1967 that sub-sections (1) and (2) of Section 14 were presenting serious difficulties of construction in cases where property was received by a Hindu female in lieu of maintenance and the instrument granting*

1 Hereinafter the 'Act'.

2 [1977] 3 SCR 261 : (1977) 3 SCC 99

**Tej Bhan (D) Through Lr. & Ors. v. Ram Kishan (D) Through Lrs. & Ors.**

*such property prescribed a restricted estate for her in the property and divergence of judicial opinion was creating a situation which might well be described as chaotic, robbing the law of that modicum of certainty which it must always possess in order to guide the affairs of men, the legislature, for all these years, did not care to step in to remove the constructional dilemma facing the courts and adopted an attitude of indifference and inaction, untroubled and unmoved by the large number of cases on this point encumbering the files of different courts in the country, when by the simple expedient of an amendment, it could have silenced judicial conflict and put an end to needless litigation. This is a classic instance of a statutory provision which, by reason of its inapt draftsmanship, has created endless confusion for litigants and proved a paradise for lawyers....”*

2. With this trepidation, they proceeded to resolve the confusion surrounding the interplay between sub-sections (1) and (2) of Section 14 of the Act and to enunciate the principles that govern disposition of property in favour of Hindu female. The principles formulated in *Tulsamma*, as extracted in paragraph 4 of this judgment, substantially hold the field. However as of date, there are atleast 18 judgments from this Court comprising decisions from two and three Judge benches that are varying and sometimes inconsistent with the view taken in *Tulsamma's* case. While arriving at their respective decisions, these judgments sought to explain, distinguish, negotiate or ignore the principles in *Tulsamma* and in the process they have either contradicted *Tulsamma* or implicitly departed from its principles *sub-silentio*. Almost four decades after the judgment in *Tulsamma*, we have two streams of thoughts. While the first applies principles in *Tulsamma* as an inviolable principle steadfastly holding that property possessed by a Hindu female before or after the commencement of the Act shall be held by her as a full owner. The other seems to be evolving from case to case, influenced by, i) the method and manner by which the Hindu female is possessed of the property, ii) the instrument through which the right is acquired, and iii) the time at which such possession takes place, to mention a few.
3. Having gone through the precedents in detail, our endeavour was to reconcile the judgments and restate the principles with clarity and certainty. However, in view of the fact that we are in a combination of a

**Digital Supreme Court Reports**

two-Judge bench, such an exercise will not be fruitful as our judgment would be subject to the decision of many three Judge benches which need to be reconciled. The issue is of utmost importance as it affects the rights of every Hindu female, her larger family and such claims and objections that may be pending consideration in almost all original and appellate courts across the length and breadth of the country. It is absolutely necessary that there must be clarity and certainty in the position of law that would govern proprietary interests of parties involving interpretation of Section 14.

4. In this view of the matter, we have directed the Registry to place our order along with the appeal paper book before the Hon'ble Chief Justice of India for referring the matter to an appropriate larger bench. In order to assist the Hon'ble CJI, we have reviewed the precedents that have caused some inconsistencies and uncertainties.
5. Before we examine the precedents in detail, the short facts involved in the present appeal are as under:
6. The appellant before the court is the purchaser of the suit scheduled property under a sale deed dated 02.03.1981 executed by the wife of one Kanwar Bhan, the testator, who was the original owner of the property. Mr. Kanwar Bhan during his lifetime executed a will dated 03.03.1965 in favour of his wife. The will created a life estate in favour of his wife. The relevant portion of the will creating the life estate is as under:

*"After my death, whatever rights I will be having in my above said property, in that eventuality, out of the land situated at village Nalvi Kalan, my wife Smt. Lachhmi Bai shall be having ownership of land measuring about 2½ Acre comprised in Rectangle No.4, Killa No.17/2, 18, 19/1, 23/1, and she will be entitled to maintain herself out of the proceeds from the same. She will not be entitled to mortgage or sell the said land. Of the remaining property, my son Shri Mool Chand will be owner to the extent of 1/2 share and Ram Kishan and Nand Lal sons of Shri Mool Chand (my grand-sons), will be absolute owners of 1/2 share in equal shares. My wife Smt. Lachhmi Bai will be owner, of the houses situated at village Kunjpura and she will be entitled to reside in the said house or to rent out the same. She will not be able to mortgage or sell*

**Tej Bhan (D) Through Lr. & Ors. v. Ram Kishan (D) Through Lrs. & Ors.**

*the same. After her death, my son Shri Mool Chand will be absolute owner of the same to the extent of 1/2 share and my grand-sons Shri Ram Kishan Lal and Nand Lal to the extent of 1/2 share."*

7. After the execution of the above referred will, the testator Kanwar Bhan died on 11.10.1965. As indicated earlier, his wife executed a sale deed in favour of the appellant herein leading to the son and grandson of Tej Bhan instituting a suit for declaration that the sale deed in favour of the petitioner is void and also sought delivery of possession.
8. In its judgment dated 31.01.1986, the Trial Court relied on decision in Tulsamma's case and held that the property given to the wife of Kanwar Bhan is in the nature of maintenance and such a pre-existing right shall enlarge into full estate. Rejecting the contention of the respondent plaintiffs based on Section 14(2) and also rejecting the applicability of the judgment of this Court in *Karmiv. Amru*<sup>3</sup> and certain other decisions of the same High Court, the Trial Court dismissed the suit. Even in the first appeal, the respondent-plaintiffs relied on *Karmi* (supra) and certain other decisions of this Court to submit that the disposition of the property by the wife of the testator falls under sub-section (2) of Section 14. The First Appellate Court dismissed the appeal and affirmed the decision of the Trial Court following the principle in Tulsamma and also rejected the submission of the respondent based on *Karmi*'s decision. The High Court, from which the impugned order arises reversed the concurrent findings of the court below only on a question of law. According to the High Court, the correct principles were laid down in the decision of Sadhu Singh v. Gurdwara Sahib Narike & Ors.<sup>4</sup>
9. Mr. Dhruv Mehta, learned senior counsel appearing on behalf of the appellant submitted that Sadhu Singh (supra) is wrongly decided and is contrary to the principles laid down in Tulsamma. He has also referred to a number of other decisions such as Gulwant Kaur v. Mohinder Singh,<sup>5</sup> Thota Sesharathamma v. Thota Manikyamma,<sup>6</sup>

3 (1972) 4 SCC 86

4 [2006] Supp. 5 SCR 799 : (2006) 8 SCC 75

5 [1987] 3 SCR 576 : (1987) 3 SCC 674

6 [1991] 3 SCR 717 : (1991) 4 SCC 312

## Digital Supreme Court Reports

Balwant Kaur v. Chanan Singh & Ors.,<sup>7</sup> Shakuntala Devi v. Kamla,<sup>8</sup> Jupudy Pardha Sarathy v. Pentapati Rama Krishna<sup>9</sup> and V. Kalyanaswamy v. L. Bakthavatsalam.<sup>10</sup> On the other hand, Mr. Sunil K. Mittal, learned counsel for the respondents has submitted that the decision of *Karmi* (supra) is of a three-Judge bench and it has not been overruled. He would further submit that the said judgment was in fact followed in Bhura and Ors. v. Kashiram<sup>11</sup> where the position of law involving interplay between sub-section 1 and 2 of Section 14 has been explained. He would also rely on the decision in Sadhu Singh (supra) which was also relied on by the High Court. Further, it was submitted that judgments in Gaddam Ramakrishnareddy and Ors. v. Gaddam Ramireddy and Anr.,<sup>12</sup> Jagan Singh (Dead) through LRs. v. Dhanwanti and Anr.,<sup>13</sup> Shivdev Kaur (Dead) by LRs. and Ors. v. RS Grewal,<sup>14</sup> Ranvir Dewan v. Rashmi Khanna and Anr.,<sup>15</sup> and Jogi Ram v. Suresh Kumar and Ors<sup>16</sup> adopt the same line.

10. We will first reproduce Section 14 of the Act, before referring and reviewing the judgments of this Court interpreting the Section.

***“Sec 14. Property of a female Hindu to be her absolute property.— (1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.***

*Explanation.—In this sub-section, “property” includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase*

7 [2000] 3 SCR 61 : (2000) 6 SCC 310

8 (2005) 5 SCC 390

9 [2015] 14 SCR 374 : (2016) 2 SCC 56

10 [2020] 9 SCR 619 : (2021) 16 SCC 543

11 [1994] 1 SCR 16 : (1994) 2 SCC 111

12 [2010] 11 SCR 656 : (2010) 9 SCC 602

13 [2012] 2 SCR 303 : (2012) 2 SCC 628

14 [2013] 5 SCR 267 : (2013) 4 SCC 636

15 [2017] 13 SCR 542 : (2018) 12 SCC 1

16 [2022] 9 SCR 766 : (2022) 4 SCC 274

## Tej Bhan (D) Through Lr. & Ors. v. Ram Kishan (D) Through Lrs. & Ors.

*or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhana immediately before the commencement of this Act.*

*(2) Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property.”*

11. We will commence with a 1967 judgment of this Court in Mangal Singh and Ors. v. Rattno (Dead) by LRs. and Anr.<sup>17</sup> In this decision, the court explained the scope and ambit of the expression of “any property possessed by a female Hindu” in Section 14(1) of the Act. In Seth Badri Prasad v. Smt. Kanso Devi,<sup>18</sup> a three Judge bench observed that sub-section (2) of Section 14 is more in the nature of a proviso or an exception to sub-section (1) and it comes into operation if acquisition of the property by a female Hindu is made through any of the methods mentioned therein for the first time and without their being any pre-existing right.
12. Tulsamma was decided in 1977. It referred<sup>19</sup> to a number of decisions of this Court and that of the High Courts and has followed,<sup>20</sup> approved<sup>21</sup> or overruled<sup>22</sup> them.

17 [1967] 3 SCR 454 : AIR 1967 SC 1786

18 [1970] 2 SCR 95 : (1969) 2 SCC 586

19 **Referred to:** Gummalapura Taggina Matada Kotturuswami v. Setra Veeravva [1959] Supp. 1 SCR 968; SS Munna Lal v. SS Rajkumar [1962] Supp. 3 SCR 418, Mangal Singh v. Rattno, AIR 1967 SC 1786; Narayan Rao Ramachandra Pant v. Ramabai, LR 5 IA 114; Mst Dan Kuer v. Mst Sarla Devi, LR 73 IA 208; Pratapmull Agarwalla v. Dhanabati Bibi, LR 63 IA 33; Namangini Dasi v. Kedarnath Kundu Chowdhry, ILR 16 Cal 758 (PC).

20 **Followed:** Seth Badri Parsad v. Smt. Kanso Devi (1969) 2 SCC 586; Nirmal Chand v. Vidya Wanti (1969) 3 SCC 628; Rani Bai v. Yadunandan Ram (1969) 1 SCC 604; SS Munnalal v. SS Raj Kumar [1962] Supp. 3 SCR 418; Eramma v. Veerupana [1966] 2 SCR 626; Mangal Singh v. Rattno [1967] 2 SCR 454; Sukhram v. Gauri Shankar [1968] 1 SCR 476;

21 **Approved:** B.B. Patil v. Gangabai, AIR 1972 Bom 16, Sumeshwar Misra v. Swami Nath Tiwari, AIR 1970 Pat 348; Gadev Reddayya v. Varapula Venkataraju, AIR 1965 AP 66; Lakshmi Devi v. Shankar Jha, AIR 1967 Mad 428; H Venkanagouda v. Hanamanagouda, AIR 1972 Mys 286; Smt Sharbat Devi v. Pt. Hiralal, AIR 1964 Punj 114; Seshadhar Chandra Devi v. Tara Sundari Dasi, AIR 1962 Cal 438; Saraswathi Ammal v. Anantha Shenoi, AIR 1966 Ker 66; Kunji Thomman v. Meenakshi, ILR (1970) 2 Ker 45; Sumeshwar Mishra v. Swami Nath Tiwari, AIR 1970 Pat 348; Sasadhar Chandra Day v. Tara Sundari Dasi, AIR 1962 Cal 438.

22 **Overruled:** Naraini Devi v. Ramo Devi (1976) 1 SCC 574, Gurunadham v. Sundrarajulu, ILR (1968) 1 Mad 467; Santhanam v. Subramania, ILR (1967) 1 Mad 68; S Kachapalaya Gurakkal v. Subramania Gurukkal, AIR 1972 Mad 219; Shiva Pujan Rai v. Jamuna Missir, ILR (1947) Pat 1118; Gopisetty Kondaiah

**Digital Supreme Court Reports**

The principles that were formulated in this landmark decision are as follows;

*"(1) The Hindu female's right to maintenance is not an empty formality or an illusory claim being conceded as a matter of grace and generosity, but is a tangible right against property which flows from the spiritual relationship between the husband and the wife and is recognised and enjoined by pure Shastric Hindu Law and has been strongly stressed even by the earlier Hindu jurists starting from Yajnavalkya to Manu. Such a right may not be a right to property but it is a right against property and the husband has a personal obligation to maintain his wife and if he or the family has property, the female has the legal right to be maintained therefrom. If a charge is created for the maintenance of a female, the said right becomes a legally enforceable one. At any rate, even without a charge the claim for maintenance is doubtless a pre-existing right so that any transfer declaring or recognising such a right does not confer any new title but merely endorses or confirms the pre-existing rights.*

*(2) Section 14(1) and the Explanation thereto have been couched in the widest possible terms and must be liberally construed in favour of the females so as to advance the object of the 1956 Act and promote the socio-economic ends, sought to be achieved by this long needed legislation.*

*(3) Sub-section (2) of s. 14 is in the nature of a proviso and has a field of its own without interfering with the operation of s.14(1) materially. The proviso should not be construed in a manner so as to destroy the effect of the main provision or the protection granted by s. 14(1) or in a way so as to become totally inconsistent with the main provision.*

---

v. Gunda Subbarayudu, ILR (1968) AP 621; Ram Jag Misir v. Director of Consolidation, AIR 1975 All 151; Ajab Singh v. Ram Singh, AIR 1959 J&K 92; Narayan Patra v. Tara Patrani (1970) 36 Cut LT 567; Gopisetty Kondaiah v. Gunde Subbarayodu, ILR 1968 AP 621; Gurunadham v. Sundrajulu Chetty, ILR (1968) 1 Mad 567.

**Tej Bhan (D) Through Lr. & Ors. v. Ram Kishan (D) Through Lrs. & Ors.**

(4) Sub-section (2) of s. 14 applies to instruments, decrees, awards, gifts etc. which create independent and new titles in favour of the females for the first time and has no application where the instrument concerned merely seeks to confirm, endorse, declare or recognise preexisting rights. In such cases a restricted estate in favour of a female is legally permissible and s. 14(1) will not operate in this sphere. Where, however, an instrument merely declares or recognises a pre-existing right, such as a claim to maintenance or partition or share to which the female is entitled, the sub-section has absolutely no application and the female's limited interest would automatically be enlarged into an absolute one by force of s. 14(1) and the restrictions placed, if any, under the document would have to be ignored. Thus where a property is allotted or transferred to a female in lieu of maintenance or a share at partition, the instrument is taken out of the ambit of subsection (2) and would be governed by s. 14(1) despite any restrictions placed on the powers of the transferee.

(5) The use of express terms like "property acquired by a female Hindu at a partition", "or in lieu of maintenance", "or arrears of maintenance" etc. in the Explanation to s. 14(1) clearly makes sub-s. (2) inapplicable to these categories which have been expressly excepted from the operation of sub-s. (2).

(6) The words "possessed by" used by the Legislature in s. 14(1) are of the widest possible amplitude and include the state of owning a property even though the owner is not in actual or physical possession of the same: Thus, where a widow gets a share in the property under a preliminary decree before or at the time when the 1956 Act had been passed but had not been given actual possession under a final decree, the property would be deemed to be possessed by her and by force of s. 14(1) she would get absolute interest in the property. It is equally well settled that the possession of the widow, however, must be under some vestige of a claim, right or title, because the section does not contemplate the possession of any trespasser without any right or title.

## Digital Supreme Court Reports

*(7) That the words “restricted estate” used in s. 4(2) are wider than limited interest as indicated in s. 14(1) and they include not only limited interest, but also any other kind of limitation that may be placed on the transferee.”*

13. The decision in *Tulsamma* (supra) was followed in the case of *Gulwant Kaur v. Mohinder Singh*<sup>23</sup> and this was affirmed by a three-Judge bench in *Jaswant Kaur v. Major Harpal Singh*.<sup>24</sup>
14. In a 1991 decision, a two-Judge bench in *Thota Sesharathamma* (supra), while following the decision in *Tulsamma* (supra), noticed another three-Judge bench decision in *Karmi* (supra) which was not noticed in *Tulsamma*. Having examined the matter in detail, one of the Judges observed that the decision in *Karmi* (supra) “is a short judgment without advertting to any provisions of Section 14(1) or 14(2) of the Act. The judgment neither makes any mention of any argument raised in this regard nor there is any mention of the earlier decision in *Badri Pershad v. Smt Kanso Devi*. The decision in *Mst Karmi* cannot be considered as an authority on the ambit and scope of Section 14(1) and (2) of the Act”.<sup>25</sup> Taking a similar stand, the concurring Judge held that in *Karmi* (supra) “the attention of this Court to Section 14(1) was not drawn nor had an occasion to angulate in this perspective. Therefore, the ratio therein is of little assistance to the appellant”.<sup>26</sup>
15. It is true that the decision in *Karmi* (supra) neither analysed the provisions of the Act nor has considered the purpose and object of Section 14 and the precedents on this subject. However, the principle on the basis of which the Court in *Karmi* (supra) decided the case resonates in many subsequent decisions which have in fact followed it as a precedent.
16. A 1996 decision of this Court in the case of *C. Masilamani Mudaliar and Ors. v. Idol of Sri Swaminathaswami Swaminathaswami Thirukoil and Ors*<sup>27</sup> is important for the reason that it is of a three Judge bench

23 Id no. 5- See para nos. 4 and 9.

24 (1989) 3 SCC 572

25 Id n 6 – See para 10

26 Ibid – See para 29

27 [1996] 1 SCR 1068 : (1996) 8 SCC 525

**Tej Bhan (D) Through Lr. & Ors. v. Ram Kishan (D) Through Lrs. & Ors.**

and it identifies a discordant note in a subsequent case of a two Judge bench in *Gumpha v. Jaibai*,<sup>28</sup> the court observed that :

*"28. In Gumpha case though the Will was executed in 1941 and the executor died in 1958 after the Act had come into force, the concept of limited right in lieu of maintenance was very much in the mind of the executor when Will was executed in 1941 but after the Act came into force, the Will became operative. The restrictive covenant would have enlarged it into an absolute estate; but unfortunately the Bench had put a restrictive interpretation which in our considered view does not appear to be sound in law."*

17. The above referred decision in *Masilamani Mudaliar* (supra) was followed in *Bhoomireddy Chenna Reddy v. Bhoospalli Pedda Verrappa*<sup>29</sup> and *V. Kalyanaswamy v. L. Bakthavatsalam, Nazar Singh v. Jagjit Kaur*,<sup>30</sup> *Balwant Kaur* (supra), *Shakuntala Devi* (supra), *Santosh & Ors. v. Smt Saraswathibai & Anr*,<sup>31</sup> *Jupudy Pardha Sarathy* (supra) as well as the recent, *Munni Devi Alias Nathi Devi (D) v. Rajendra Alias Lallu Lal (D)*<sup>32</sup> and *Kallakuri Pattabhiramswamy (D) Through LRs v. Kallakuri Kamaraju & Ors*<sup>33</sup> are other decisions that have followed *Tulsamma* (supra).
18. The other stream of thought seems to have originated in a three-Judge bench of this Court in *Karmi* (supra) about which we have already mentioned. The conclusion in this decision is drawn from a different perspective of statutory construction, elucidation of which is seen in the subsequent decision of this Court in *Bhura* (supra). However, it is only in *Gumpha* (supra) that the principle of the alternate thoughts are formulated as under:
  1. *While qualifying the law relating to intestate succession, to become a complete code, the Act also deals with testamentary succession. In Section*

28 [1994] 1 SCR 901 : (1994) 2 SCC 511

29 [1996] Supp. 9 SCR 332 : (1997) 10 SCC 673

30 [1995] Supp. 5 SCR 162 : (1996) 1 SCC 35

31 [2007] 12 SCR 375 : (2008) 1 SCC 465

32 [2022] 3 SCR 876 : (2022) 17 SCC 434

33 2024 INSC 883; in addition to *Tulsamma* this case also relied on *Raghubar Singh v. Gulab Singh* (1998) 6 SCC 314, *Mangat Mal v. Punni Devi* (1995) 6 SCC 88 and *Jaswant Kaur v. Harpal Singh* (1989) 3 SCC 572.

**Digital Supreme Court Reports**

*30, the law which had been judicially expounded is incorporated by creating absolute power in a Hindu to dispose of his property by will. This power extends to creating restricted right in favour of a female.*

2. *Will under Indian Succession Act, applies to Hindu Succession Act as well, operates from the date of death of the testator.*
3. *Position of the property contemplated in Section 14(1) cannot include acquisition by will.*
4. *The expression, ‘any manner whatsoever’, will not include a will, which is specifically mentioned in Section 14(2).*
5. *Even though the instances in the explanation are not exhaustive, it cannot include disposition by way of a will under Section 14(2).*
6. *Parliament has never intended to confirm a higher right on a Hindu female, than what was enjoyed by a male Hindu.*
7. *Possession under Section 14(1) must be legal, therefore if the position is placeable to a will, then she cannot get a higher right than what is stipulated in the document.*
8. *A combined reading of the Sections is that when the law attempts to remove the disability imposed by customary Hindu law, it does not enlarge and exchange the right she will get under a will.*
9. *The judgement in the case of *Thota* (*supra*) is not relevant for interpretation. As in that case, the testator died before the Hindu Succession Act came into force and the widow was in possession as limited owner and her rights became absolute.*
10. *In the present case succession opened after the Act has come into force.*
19. In the above referred decision of this Court in *Gumpha* (*supra*), the Court distinguishes the decision in *Thota Sesharathamma* (*supra*)

**Tej Bhan (D) Through Lr. & Ors. v. Ram Kishan (D) Through Lrs. & Ors.**

on the ground that the testator died before the commencement of the Hindu Succession Act.

20. The next important decision of this Court is Sadhu Singh (supra) the principle as formulated in this judgment can be restated as under:

1. *A hindu wife is entitled to be maintained by her husband u/s.18 HAMA and a hindu widow, being a dependent u/s.21 HAMA, is entitled to claim maintenance from heirs of her husband u/s.22 HAMA to the extent of the estate inherited by them. Further, s.28 HAMA entitles her to claim maintenance against a transferee even. However, this aforesaid entitlement nowhere allows her to create a charge on her husband's property. In fact, s.27 HAMA expressly states to the contrary.*
2. *The test therefore is to look at the nature of right acquired by a female hindu - If she takes as an heir, she does it absolutely. But if it's under a devise, then any restriction placed will apply in view of s.14(2).*
3. *S.30 is an affirmation to an owner's right to deal with his property. Thus, when an owner executes a will, laying down the bequest with respect to his estate, the legatee takes subject to terms therein. S.14(2) reaffirms the affirmation in s.30. Any interpretation of s.14(1) which renders s.14(2) and s.30 otios cannot be allowed.*
4. *Ratio in Tulasamma has application only when a female Hindu is possessed of the property on the date of the Act under semblance of a right (limited or pre-existing). The decision in Karmi can only be justified on the premise that the widow had no pre-existing right in the self-acquired property of her husband. Decision in Bhura and Sharad Subramanyan Vs. Soumi Mazumdar & Ors.<sup>34</sup> is along the same lines.*
5. *Thus, the essential ingredients for determining application of s.14(1) are as follows - antecedents*

**Digital Supreme Court Reports**

*of the property, the possession of the property as on the date of the Act and the existence of a right in the female over it, however limited it may be.*

6. *Any acquisition of possession of property (not right) by a female Hindu after the coming into force of the Act, cannot normally attract Section 14(1) of the Act.*
21. As this judgment is argued to be contrary to the principles laid down in Tulsamma and also bad in law for the reason that it is a decision of a two-Judge bench, it is necessary to extract the portion of the judgment. The extract will also indicate how Tulsamma was understood and analysed in this judgment. The relevant portion of this judgment is extracted herein for ready reference:

*"4. Under Section 18 of the Hindu Adoptions and Maintenance Act, a Hindu wife is entitled to be maintained by her husband during her lifetime, subject to her not incurring the disqualifications provided for in sub-section (3) of that section. The widow is in the list of dependants as defined in Section 21 of the Act. The widow remains a dependant so long as she does not remarry. Under Section 22, an obligation is cast on the heirs of the deceased Hindu to maintain the dependant of the deceased out of the estate inherited by them from the deceased. Under sub-section (2), where a dependant has not obtained by testamentary or intestate succession, any share in the estate of a Hindu dying after the commencement of the Act, the dependant would be entitled, but subject to the provisions of the Act, to maintenance from those who take the estate. It is seen that neither Section 18 relating to a wife nor Section 21 dealing with a widow, provides for any charge for the maintenance on the property of the husband. To the contrary, Section 27 specifies that a dependant's claim for maintenance under that Act, shall not be a charge on the estate of the deceased unless one would have been created by the will of the deceased, by a decree of court, by an agreement between the dependant and the owner of the estate or otherwise. Thus a widow has no charge on the property of the husband. Section 28 provides that where a dependant had a right to receive*

**Tej Bhan (D) Through Lr. & Ors. v. Ram Kishan (D) Through Lrs. & Ors.**

*maintenance out of an estate, that right could be enforced even against a transferee of the property if the transferee had notice of the right, or if the transfer is gratuitous, but not against a transferee for consideration without notice of the right. Section 28 is in pari materia with Section 39 of the Transfer of Property Act. The Kerala High Court in Kaveri Amma v. Parameswari Amma [AIR 1971 Ker 216 : 1971 KLT 299] has liberally interpreted the expression "right to receive maintenance" occurring in the section as including a right to claim enhanced maintenance against the transferee. The sum and subtotal of the right under the Hindu Adoptions and Maintenance Act is only to claim maintenance and the right to receive it even against a transferee. In the absence of any instrument or decree providing for it, no charge for such maintenance is created in the separate properties of the husband.*

11. *On the wording of the section and in the context of these decisions, it is clear that the ratio in V. Tulasamma v. Shesha Reddy [(1977) 3 SCC 99 : [\(1977\) 3 SCR 261](#)] has application only when a female Hindu is possessed of the property on the date of the Act under semblance of a right, whether it be a limited or a pre-existing right to maintenance in lieu of which she was put in possession of the property. Tulasamma [(1977) 3 SCC 99 : [\(1977\) 3 SCR 261](#)] ratio cannot be applied ignoring the requirement of the female Hindu having to be in possession of the property either directly or constructively as on the date of the Act, though she may acquire a right to it even after the Act. The same is the position in [Raghubar Singh v. Gulab Singh](#) [(1998) 6 SCC 314 : AIR 1998 SC 2401] wherein the testamentary succession was before the Act. The widow had obtained possession under a will. A suit was filed challenging the will. The suit was compromised. The compromise sought to restrict the right of the widow. This Court held that since the widow was in possession of the property on the date of the Act under the will as of right and since the compromise decree created no new or independent right in her, Section 14(2) of the Act had no application and Section 14(1) governed the case, her*

**Digital Supreme Court Reports**

right to maintenance being a pre-existing right. In *Karmi v. Amru* [(1972) 4 SCC 86 : AIR 1971 SC 745] the owner of the property executed a will in respect of a self-acquired property. The testamentary succession opened in favour of the wife in the year 1938. But it restricted her right. Thus, though she was in possession of the property on the date of the Act, this Court held that the life estate given to her under the will cannot become an absolute estate under the provisions of the Act. This can only be on the premise that the widow had no pre-existing right in the self-acquired property of her husband. In a case where a Hindu female was in possession of the property as on the date of the coming into force of the Act, the same being bequeathed to her by her father under a will, this Court in *Bhura v. Kashi Ram* [(1994) 2 SCC 111] after finding on a construction of the will that it only conferred a restricted right in the property in her, held that Section 14(2) of the Act was attracted and it was not a case in which by virtue of the operation of Section 14(1) of the Act, her right would get enlarged into an absolute estate. This again could only be on the basis that she had no pre-existing right in the property. In *Sharad Subramanyan v. Soumi Mazumdar* [(2006) 8 SCC 91 : JT (2006) 11 SC 535] this Court held that since the legatee under the will in that case, did not have a pre-existing right in the property, she would not be entitled to rely on Section 14(1) of the Act to claim an absolute estate in the property bequeathed to her and her rights were controlled by the terms of the will and Section 14(2) of the Act. This Court in the said decision has made a survey of the earlier decisions including the one in *Tulasamma* [(1977) 3 SCC 99 : (1977) 3 SCR 261]. Thus, it is seen that the antecedents of the property, the possession of the property as on the date of the Act and the existence of a right in the female over it, however limited it may be, are the essential ingredients in determining whether sub-section (1) of Section 14 of the Act would come into play. What emerges according to us is that any acquisition of possession of property (not right) by a female Hindu after the coming into force of the Act, cannot normally attract Section 14(1) of the Act. It would

**Tej Bhan (D) Through Lr. & Ors. v. Ram Kishan (D) Through Lrs. & Ors.**

*depend on the nature of the right acquired by her. If she takes it as an heir under the Act, she takes it absolutely. If while getting possession of the property after the Act, under a devise, gift or other transaction, any restriction is placed on her right, the restriction will have play in view of Section 14(2) of the Act.*

*13. An owner of property has normally the right to deal with that property including the right to devise or bequeath the property. He could thus dispose it of by a testament. Section 30 of the Act, not only does not curtail or affect this right, it actually reaffirms that right. Thus, a Hindu male could testamentarily dispose of his property. When he does that, a succession under the Act stands excluded and the property passes to the testamentary heirs. Hence, when a male Hindu executes a will bequeathing the properties, the legatees take it subject to the terms of the will unless of course, any stipulation therein is found invalid. Therefore, there is nothing in the Act which affects the right of a male Hindu to dispose of his property by providing only a life estate or limited estate for his widow. The Act does not stand in the way of his separate properties being dealt with by him as he deems fit. His will hence could not be challenged as being hit by the Act.*

*14. When he thus validly disposes of his property by providing for a limited estate to his heir, the wife, the wife or widow has to take it as the estate falls. This restriction on her right so provided, is really respected by the Act. It provides in Section 14(2) of the Act, that in such a case, the widow is bound by the limitation on her right and she cannot claim any higher right by invoking Section 14(1) of the Act. In other words, conferment of a limited estate which is otherwise valid in law is reinforced by this Act by the introduction of Section 14(2) of the Act and excluding the operation of Section 14(1) of the Act, even if that provision is held to be attracted in the case of a succession under the Act. Invocation of Section 14(1) of the Act in the case of a testamentary disposition taking effect after the Act,*

**Digital Supreme Court Reports**

*would make Sections 30 and 14(2) redundant or otiose. It will also make redundant, the expression “property possessed by a female Hindu” occurring in Section 14(1) of the Act. An interpretation that leads to such a result cannot certainly be accepted. Surely, there is nothing in the Act compelling such an interpretation. Sections 14 and 30 both have play. Section 14(1) applies in a case where the female had received the property prior to the Act being entitled to it as a matter of right, even if the right be to a limited estate under the Mitakshara law or the right to maintenance.”*

22. It is important to note that except, *Karmi* (supra), the decisions in *Bhura*, *Gumpha* and *Sadhu Singh* (supra) are all by two Judge benches. The larger perspective in which Section 14 was interpreted holistically commenced from *Karmi* and was followed in many subsequent cases. Some of the decisions in the same line are *Gaddam Ramakrishnareddy*, *Jagan Singh*, *Shivdev Kaur*, *Ranvir Dewan* and *Jogi Ram* (supra).
23. We have noticed that while following *Tulsamma*, the subsequent decisions in *Thota Sesharathamma*, *Masilamani Mudaliar* and *Shakuntala Devi* (supra) have made passing observations about the discordant note in the case of *Karmi*, *Bhura* and *Gumpha* (supra) but they have not been clearly and categorically overruled. Perhaps this is the reason why the subsequent decisions consistently followed the idea in *Karmi* and enunciated different principles in the subsequent decisions of *Gumpha*, *Sadhu Singh* (supra) and that perspective continued on its own strength.
24. We heard the present appeal in detail and have also taken a view in the matter, but having realised that there are a large number of decisions which are not only inconsistent with one another on principle but have tried to negotiate a contrary view by distinguishing them on facts or by simply ignoring the binding decision, we are of the view that there must be clarity and certainty in the interpretation of Section 14 of the Act.
25. In view of the above, we direct the Registry to place our order along with the appeal paper book before the Hon'ble Chief Justice of India for constituting an appropriate larger bench for reconciling

**Tej Bhan (D) Through Lr. & Ors. v. Ram Kishan (D) Through Lrs. & Ors.**

the principles laid down in various judgments of this Court and for restating the law on the interplay between sub-section (1) and (2) of Section 14 of the Hindu Succession Act.

*Result of the case:* Matter referred to Chief Justice for constituting appropriate Bench.

<sup>†</sup>*Headnotes prepared by:* Ankit Gyan

**Dara Lakshmi Narayana & Others**

v.

**State of Telangana & Another**

(Criminal Appeal No. 5199 of 2024)

10 December 2024

**[B.V. Nagarathna\* and Nongmeikapam Kotiswar Singh, JJ.]**

**Issue for Consideration**

In the facts and circumstances of the case and after examining the FIR, whether the High Court was correct in refusing to quash the ongoing criminal proceedings against the appellants under Section 498A of the IPC and Sections 3 and 4 of the Dowry Act.

**Headnotes<sup>†</sup>**

**Code of Criminal Procedure, 1973 – s.482 – Penal Code, 1860 – s.498A – Dowry Prohibition Act, 1961 – ss.3, 4 – Refusal to quash criminal proceedings, when not justified – FIR lodged by respondent No.2-wife against appellants under Section 498A, IPC and Sections 3 and 4, Dowry Act – Appellants sought quashing of the criminal proceedings – Refused by High Court – Challenge to:**

**Held:** Respondent No.2 left the matrimonial house after quarrelling with appellant No.1-husband with respect to her interactions with a third person in their marriage – Later, she came back assuring to have a cordial relationship however, once again left the matrimonial house – Complaint under Section 498A, IPC was lodged by the respondent No.2 as a counterblast to the petition for dissolution of marriage sought by the appellant No.1 – No substantial and specific allegations were made against appellant Nos.2 to 6 (family members of appellant No.1) other than stating that they used to instigate appellant No.1 for demanding more dowry – Allegations against the appellants were vague and omnibus, too far-fetched and not believable – Appellant Nos.2 to 6 were living in different cities and admittedly, never resided with the couple and their children – FIR filed by respondent No.2 was initiated with ulterior motives and is not a genuine complaint rather it is a retaliatory measure intended to settle scores with appellant No.1 and his family members – Present case falls within category (7)

\* Author

## Digital Supreme Court Reports

of illustrative parameters highlighted in Bhajan Lal case – High Court erred in not exercising the powers under Section 482, CrPC – Impugned order set aside – Quashing petition allowed – FIR under Section 498A, IPC and Sections 3 and 4, Dowry Act, chargesheet and the trial pending against the appellants, quashed. [Paras 21, 22, 24-26, 29, 32, 33]

**Penal Code, 1860 – s.498A – Growing misuse of, to seek compliance with the unreasonable demands of a wife – Matrimonial discords – Implication of all the members of the husband's family without specific allegations indicating their active involvement – Generalised and sweeping accusations unsupported by concrete evidence – Practice deprecated – Cautioned against prosecuting the husband and his family in the absence of a clear *prima facie* case.**

**Words and Phrases – ‘Cruelty’ – Penal Code, 1860 – s.498A – Discussed.**

### Case Law Cited

*State of Haryana v. Bhajan Lal* [[1990 Supp. 3 SCR 259](#)] : (1992) Supp. 1 SCC 335; *G.V. Rao v. L.H.V. Prasad* [[2000\] 2 SCR 123](#)] : (2000) 3 SCC 693; *Preeti Gupta v. State of Jharkhand* [[2010\] 9 SCR 1168](#)] : (2010) 7 SCC 667 – relied on.

*Arnesh Kumar v. State of Bihar* [[2014\] 8 SCR 128](#)] : (2014) 8 SCC 273 – referred to.

### List of Acts

Code of Criminal Procedure, 1973; Penal Code, 1860; Dowry Prohibition Act, 1961.

### List of Keywords

Quashing; Refusal to quash; FIR; Ongoing criminal proceedings; Complaint under Section 498A, IPC; Matrimonial house/home; Counterblast; Petition for dissolution of marriage; Family members of husband; No substantial and specific allegations; Harassment of innocent family members; Family members living in different cities; Instigate; No harassment for dowry; Allegations vague and omnibus; Matrimonial dispute/discord; Domestic disputes; Ulterior motives; Cruelty; Not a genuine complaint; Retaliatory measure; Settle scores/grudges; Abuse of Court's process; Mere reference to the names of

**Dara Lakshmi Narayana & Others v. State of Telangana & Another**

family members; Without active involvement; Tendency to implicate all the members of the husband's family; Generalised and sweeping accusations; Misuse of legal provisions and legal process.

**Case Arising From**

CRIMINAL APPELLATE JURISDICTION: Special Leave Petition (Criminal) No. 16239 of 2024

From the Judgment and Order dated 16.02.2022 of the High Court for the State of Telangana at Hyderabad in CRLP No. 1479 of 2022

**Appearances for Parties**

Shubham Kumar, Anubhav Jain, Ms. Nayan Saini, Dhruv Goyal, Ms. Honey Verma, Rahul Mohod, Sanjay Gyan, Dr. Varnit Sharma, Chand Qureshi, Advs. for the Petitioners.

Ms. Devina Sehgal, S Uday Bhanu, Advs. for the Respondents.

**Judgment / Order of the Supreme Court****Judgment****Nagarathna, J.**

Leave granted.

2. Being aggrieved by the order dated 16.02.2022 passed by the High Court for the State of Telangana in Criminal Petition No.1479 of 2022 refusing to quash the criminal proceedings in FIR No.82 of 2022 dated 01.02.2022 registered with Neredmet Police Station, Rachakonda against the appellant Nos.1 to 6 herein (collectively referred as "appellants") under Sections 498A of the Indian Penal Code, 1860 ("IPC", for short) and Section 3 and 4 of Dowry Prohibition Act, 1961 ("Dowry Act", for short), the appellants have preferred this appeal.
3. Briefly stated the facts of this case are that the marriage of appellant No.1 husband and respondent No.2 wife was solemnised on 08.03.2015 as per Hindu rites and rituals at Chennakesava Swamy Temple, Marakapuram, Andhra Pradesh. Appellant Nos.2 and 3 are the father-in-law and mother-in-law respectively of respondent No.2 and appellant Nos.4 to 6 are sisters-in-law of respondent No.2. Respondent No.2 lodged a complaint against the appellant Nos.1

**Digital Supreme Court Reports**

to 6 and accused No.7 who is her brother-in-law which was registered as FIR No.82 of 2022 dated 01.02.2022 for the offences punishable under Section 498A of the IPC and Sections 3 and 4 of the Dowry Act registered with Neredmet Police Station, Rachakonda. As per the said FIR, it was alleged that at the time of her marriage, the father of respondent No.2 gave net cash of Rs.10 lakhs, 10 tolas of gold, and other household articles as dowry and also spent Rs. 5 lakhs towards marriage expenses. After the marriage, the couple started residing at Jollarpeta, Tamil Nadu where appellant No.1 was working in Southern Railways. Out of their wedlock, respondent No.2 and appellant No.1 have 2 minor children. The first child was born in the year 2016 and the second child was born in the year 2017. After marriage, appellant No.1 started harassing her both physically and mentally for want of additional dowry. Appellant No.1 also used to abuse respondent No.1 in filthy language and used to suspect her character. He also used to come home inebriated and harassed her by having an illegal affair with one Mounika. In so far as appellant Nos.2 to 6 are concerned, respondent No.2 alleged that they used to instigate appellant No.1 for demanding more dowry her.

4. Being aggrieved by the said criminal proceedings pending against them, the appellants and accused No.7 approached the High Court by filing Criminal Petition No.1479 of 2022 under Section 482 of the Code of Criminal Procedure, 1908 ("CrPC") seeking quashing of the FIR No.82 of 2022 dated 01.02.2022 registered with Neredmet Police Station, Rachakonda.
5. By the impugned order dated 16.02.2024, the High Court refused to quash the criminal proceedings pending against the appellants and accused No.7 in FIR No.82 of 2022 dated 01.02.2022 and disposed of the Criminal Petition No.1479 of 2022 directing the Investigation Officer to follow the mandatory procedure contemplated under Section 41-A of CrPC and also the guidelines issued by this Court in *Arness Kumar vs. State of Bihar (2014) 8 SCC 273*. The High Court further granted protection by directing the Investigation Officer not to arrest to appellants until the chargesheet is filed. The High Court noted that there are matrimonial disputes between appellant No.1 and respondent No.2 and that in matrimonial disputes, custodial interrogation of the accused is not required. Being aggrieved by the High Court's refusal to quash the criminal proceedings arising out

**Dara Lakshmi Narayana & Others v. State of Telangana & Another**

of FIR No.82 of 2022 dated 01.02.2022, the appellants herein have preferred the instant appeal.

6. Subsequent to the impugned order dated 16.02.2022, the police have filed a chargesheet dated 03.06.2022 before the Court of 1<sup>st</sup> Metropolitan Magistrate, Malkajgiri, Cyberabad vide C.C. No.1544 of 2022 against the appellant Nos.1 to 6 under Section 498A of the IPC and Sections 3 and 4 of the Dowry Act. However, the charges were dropped against accused No.7 (respondent No.2's brother-in-law). The criminal case against the appellants herein is pending trial in the Court of 1<sup>st</sup> Additional Junior Civil Judge-cum- Additional Metropolitan Magistrate, Malkajgiri.
7. We have heard learned counsel for the appellants and learned counsel for the respondent-State and perused FIR No.82 of 2022 dated 01.02.2022. There is no appearance on behalf of respondent No.2 despite service of notice.
8. Learned counsel for the appellants submitted that the appellants never demanded any dowry from respondent No.2. Respondent No.2 in fact used to leave the matrimonial house uninformed. In fact, on one such occasion when she left the matrimonial house on 03.10.2021, appellant No.1 made a police complaint on 05.10.2021. When the police found her whereabouts, she was allegedly living with someone. Respondent No.2 after being counselled, returned to her matrimonial house. It was further submitted that respondent No.2 addressed a letter dated 11.11.2021 to the Deputy Superintendent of Police, Thirupathur Sub Division requesting to close the complaint made by appellant No.1 wherein she admitted that she had left her matrimonial house after quarrelling with appellant No.1 because of one Govindan, with whom she was talking over the phone for the past ten days continuously. She also stated that she would not repeat such acts in future. Learned counsel for the appellants further submitted that respondent No.2 again left the matrimonial house leaving appellant No.1 and children behind. It was submitted that having no other option, appellant No.1 issued a legal notice dated 13.12.2021 to respondent No.2 seeking divorce by mutual consent. Therefore, it was argued that only as a counterblast, the present FIR has been lodged by respondent No.2 on 01.02.2022. Insofar as appellant Nos.2 to 6 are concerned, learned counsel for the appellants submitted that no specific allegation is made against them in the

**Digital Supreme Court Reports**

FIR. It was further submitted that appellant Nos.2 to 6 did not live in the matrimonial house of the couple and have been unnecessarily dragged into this case. Therefore, it was submitted that the present case is a fit case for quashing the FIR and accordingly prayed that this Court may set-aside the impugned order dated 16.02.2022 and quash the criminal proceedings pending against the appellants herein arising out of FIR No. 82 of 2022 dated 01.02.2022.

9. Per contra, the learned counsel for the respondent-State submitted that on a perusal of the FIR, it would reveal that a *prima facie* case has been made out against the appellants. It was submitted that, as per the FIR, respondent No.2 was harassed both physically and mentally for want of additional dowry and that appellant No.1 used to come home in a drunken state and used to have an illicit affair with one Mounika. Learned counsel for the respondent-State submitted that the father of respondent No.2 was examined as LW3 who stated in the examination that at the time of marriage, he gave Rs.10 lakhs and 10 tolas of gold as dowry. It was further submitted that after the marriage, appellant No.1 used to harass and abuse respondent No.2 and appellant Nos.2 to 6 used to provoke and instigate appellant No.1. Hence, learned counsel for the respondent-State argued that the High Court, vide impugned order, was justified in declining to quash the criminal proceedings pending against the appellants herein arising out of FIR No.82 of 2022 dated 01.02.2022 and prayed for the dismissal of the present appeal as well.
10. Having heard the learned counsel for the respective parties and having perused the material on record, the only question that arises for our consideration is whether FIR No.82 of 2022, dated 01.02.2022, lodged against the appellants herein should be quashed.
11. In *State of Haryana vs. Bhajan Lal*, 1992 Supp (1) SCC 335 (“*Bhajan Lal*”), this Court formulated the parameters under which the powers under Section 482 of the CrPC could be exercised. While it is not necessary to revisit all the parameters, a few that are relevant to the present case may be set out as under:

“102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under

**Dara Lakshmi Narayana & Others v. State of Telangana & Another**

Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not *prima facie* constitute any offence or make out a case against the accused.

x    x    x

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.”

12. In the instant case, the allegations in the FIR are under Section 498A of the IPC and Sections 3 and 4 of the Dowry Act.
13. Section 498A of the IPC deals with offences committed by the husband or relatives of the husband subjecting cruelty towards the wife. The said provision reads as under:

**“498A. Husband or relative of husband of a woman subjecting her to cruelty.—** Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

*Explanation.—* For the purpose of this section, “cruelty” means—

- (a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

**Digital Supreme Court Reports**

- (b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.”
14. Further, Sections 3 and 4 of the Dowry Act talk about the penalty for giving or taking or demanding a dowry.

**“3. Penalty for giving or taking dowry.—**

- (1) If any person, after the commencement of this Act, gives or takes or abets the giving or taking of dowry, he shall be punishable with imprisonment for a term which shall not be less than five years, and with fine which shall not be less than fifteen thousand rupees or the amount of the value of such dowry, whichever is more.

Provided that the Court may, for adequate and special reasons to be recorded in the judgment, impose a sentence of imprisonment for a term of less than five years.

- (2) Nothing in sub-section (1) shall apply to, or in relation to,—  
(a) presents which are given at the time of a marriage to the bride without any demand having been made in that behalf:

Provided that such presents are entered in a list maintained in accordance with the rules made under this Act;

- (b) presents which are given at the time of a marriage to the bridegroom without any demand having been made in that behalf:

Provided that such presents are entered in a list maintained in accordance with the rules made under this Act:

Provided further that where such presents are made by or on behalf of the bride or any person related to the bride, such presents are of a customary nature and the value thereof is not excessive having regard to the financial status of the person by whom, or on whose behalf, such presents are given.

**Dara Lakshmi Narayana & Others v. State of Telangana & Another**

**4. Penalty for demanding dowry.**—If any person demands, directly or indirectly, from the parents or other relatives or guardian of a bride or bridegroom, as the case may be, any dowry, he shall be punishable with imprisonment for a term which shall not be less than six months, but which may extend to two years and with fine which may extend to ten thousand rupees:

Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than six months.”

15. An offence is punishable under Section 498A of the IPC when a husband or his relative subjects a woman to cruelty, which may result in imprisonment for a term extending up to three years and a fine. The Explanation under Section 498A of the IPC defines “cruelty” for the purpose of Section 498A of the IPC to mean any of the acts mentioned in clauses (a) or (b). The first limb of clause (a) of the Explanation of Section 498A of the IPC, states that “cruelty” means any wilful conduct that is of such a nature as is likely to drive the woman to commit suicide. The second limb of clause (a) of the Explanation of Section 498A of the IPC, states that cruelty means any wilful conduct that is of such a nature as to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman. Further, clause (b) of the Explanation of Section 498A of the IPC states that cruelty would also include harassment of the woman where such harassment is to coerce her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.
16. Further, Section 3 of the Dowry Act deals with penalty for giving or taking dowry. It states that any person who engages in giving, taking, or abetting the exchange of dowry, shall face a punishment of imprisonment for a minimum of five years and a fine of not less than fifteen thousand rupees or the value of the dowry, whichever is greater. Section 4 of the Dowry Act talks of penalty for demanding dowry. It states that any person demanding dowry directly or indirectly, from the parents or other relatives or guardians of a bride or bridegroom shall be punishable with imprisonment for a term which shall not be

**Digital Supreme Court Reports**

less than six months, but which may extend to two years and with fine which may extend to ten thousand rupees.

17. The issue for consideration is whether, given the facts and circumstances of the case and after examining the FIR, the High Court was correct in refusing to quash the ongoing criminal proceedings against the appellants arising out of FIR No. 82 of 2022 dated 01.02.2022 under Section 498A of the IPC and Sections 3 and 4 of the Dowry Act.
18. A bare perusal of the FIR shows that the allegations made by respondent No.2 are vague and omnibus. Other than claiming that appellant No.1 harassed her and that appellant Nos.2 to 6 instigated him to do so, respondent No.2 has not provided any specific details or described any particular instance of harassment. She has also not mentioned the time, date, place, or manner in which the alleged harassment occurred. Therefore, the FIR lacks concrete and precise allegations.
19. Further, the record reveals that respondent No.2 on 03.10.2021 left the matrimonial house leading appellant No.1 to file a police complaint on 05.10.2021. When the police officials traced her, respondent No.2 addressed a letter dated 11.11.2021 to the Deputy Superintendent of Police, Thirupathur Sub Division requesting to close the complaint made by appellant No.1. In the said letter, respondent No.2 admitted that she left her matrimonial house after quarrelling with appellant No.1 as she was talking to a person by name Govindan over the phone for the past ten days continuously. She further admitted that appellant No.1 was taking good care of her. She also stated that she will not engage in such actions in future. Despite that, in 2021 itself, respondent No.2 once again left the matrimonial house leaving appellant No.1 and also her minor children.
20. Losing hope in the marriage, appellant No.1 issued a legal notice to respondent No.1 seeking divorce by mutual consent on 13.12.2021. Instead of responding to the said legal notice issued by appellant No.1, respondent No.2 lodged the present FIR 82 of 2022 on 01.02.2022 registered with Neredmet Police Station, Rachakonda under Section 498A of the IPC and Sections 3 and 4 of the Dowry Act.
21. Given the facts of this case and in view of the timing and context of the FIR, we find that respondent No.2 left the matrimonial house on 03.10.2021 after quarrelling with appellant No.1 with respect to her

**Dara Lakshmi Narayana & Others v. State of Telangana & Another**

interactions with a third person in their marriage. Later she came back to her matrimonial house assuring to have a cordial relationship with appellant No.1. However, she again left the matrimonial house. When appellant No.1 issued a legal notice seeking divorce on 13.12.2021, the present FIR came to be lodged on 01.02.2022 by respondent No.2. Therefore, we are of the opinion that the FIR filed by respondent No. 2 is not a genuine complaint rather it is a retaliatory measure intended to settle scores with appellant No.1 and his family members.

22. Learned counsel for respondent No.1 State contended that a *prima facie* case was made out against the appellants for harassing respondent No.2 and demanding dowry from her. However, we observe that the allegations made by respondent No.2 in the FIR seem to be motivated by a desire for retribution rather than a legitimate grievance. Further, the allegations attributed against the appellants herein are vague and omnibus.
23. Respondent No.2 has not contested the present case either before the High Court or this Court. Furthermore, it is noteworthy that respondent No.2 has not only deserted appellant No.1 but has also abandoned her two children as well, who are now in the care and custody of appellant No.1. The counsel for the appellants has specifically submitted that respondent No.2 has shown no inclination to re-establish any relationship with her children.
24. Insofar as appellant Nos.2 to 6 are concerned, we find that they have no connection to the matter at hand and have been dragged into the web of crime without any rhyme or reason. A perusal of the FIR would indicate that no substantial and specific allegations have been made against appellant Nos.2 to 6 other than stating that they used to instigate appellant No.1 for demanding more dowry. It is also an admitted fact that they never resided with the couple namely appellant No.1 and respondent No.2 and their children. Appellant Nos.2 and 3 resided together at Guntakal, Andhra Pradesh. Appellant Nos.4 to 6 live in Nellore, Bengaluru and Guntur respectively.
25. A mere reference to the names of family members in a criminal case arising out of a matrimonial dispute, without specific allegations indicating their active involvement should be nipped in the bud. It is a well-recognised fact, borne out of judicial experience, that there

**Digital Supreme Court Reports**

is often a tendency to implicate all the members of the husband's family when domestic disputes arise out of a matrimonial discord. Such generalised and sweeping accusations unsupported by concrete evidence or particularised allegations cannot form the basis for criminal prosecution. Courts must exercise caution in such cases to prevent misuse of legal provisions and the legal process and avoid unnecessary harassment of innocent family members. In the present case, appellant Nos.2 to 6, who are the members of the family of appellant No.1 have been living in different cities and have not resided in the matrimonial house of appellant No.1 and respondent No.2 herein. Hence, they cannot be dragged into criminal prosecution and the same would be an abuse of the process of the law in the absence of specific allegations made against each of them.

26. In fact, in the instant case, the first appellant and his wife i.e. the second respondent herein resided at Jollarpeta, Tamil Nadu where he was working in Southern Railways. They were married in the year 2015 and soon thereafter in the years 2016 and 2017, the second respondent gave birth to two children. Therefore, it cannot be believed that there was any harassment for dowry during the said period or that there was any matrimonial discord. Further, the second respondent in response to the missing complaint filed by the first appellant herein on 05.10.2021 addressed a letter dated 11.11.2021 to the Deputy Superintendent of Police, Thirupathur Sub Division requesting for closure of the said complaint as she had stated that she had left the matrimonial home on her own accord owing to a quarrel with the appellant No.1 because of one Govindan with whom the second respondent was in contact over telephone for a period of ten days. She had also admitted that she would not repeat such acts in future. In the above conspectus of facts, we find that the allegations of the second respondent against the appellants herein are too far-fetched and are not believable.
27. We find that the High Court noted that there were also allegations against respondent No.2 and matrimonial disputes are pending between the parties. Therefore, the High Court came to the conclusion that custodial interrogation of the appellants was not necessary and protected the personal liberty of the appellants directing the Investigation Officer not to arrest the appellants till the completion of the investigation and filing of the charge-sheet. Albeit the said

**Dara Lakshmi Narayana & Others v. State of Telangana & Another**

findings and observations, the High Court ultimately refused to quash the criminal proceedings against the appellants.

28. The inclusion of Section 498A of the IPC by way of an amendment was intended to curb cruelty inflicted on a woman by her husband and his family, ensuring swift intervention by the State. However, in recent years, as there have been a notable rise in matrimonial disputes across the country, accompanied by growing discord and tension within the institution of marriage, consequently, there has been a growing tendency to misuse provisions like Section 498A of the IPC as a tool for unleashing personal vendetta against the husband and his family by a wife. Making vague and generalised allegations during matrimonial conflicts, if not scrutinized, will lead to the misuse of legal processes and an encouragement for use of arm twisting tactics by a wife and/or her family. Sometimes, recourse is taken to invoke Section 498A of the IPC against the husband and his family in order to seek compliance with the unreasonable demands of a wife. Consequently, this Court has, time and again, cautioned against prosecuting the husband and his family in the absence of a clear *prima facie* case against them.
29. We are not, for a moment, stating that any woman who has suffered cruelty in terms of what has been contemplated under Section 498A of the IPC should remain silent and forbear herself from making a complaint or initiating any criminal proceeding. That is not the intention of our aforesaid observations but we should not encourage a case like as in the present one, where as a counterblast to the petition for dissolution of marriage sought by the first appellant-husband of the second respondent herein, a complaint under Section 498A of the IPC is lodged by the latter. In fact, the insertion of the said provision is meant mainly for the protection of a woman who is subjected to cruelty in the matrimonial home primarily due to an unlawful demand for any property or valuable security in the form of dowry. However, sometimes it is misused as in the present case.
30. In the above context, this Court in ***G.V. Rao vs. L.H.V. Prasad (2000) 3 SCC 693*** observed as follows:

“12. There has been an outburst of matrimonial disputes in recent times. Marriage is a sacred ceremony, the main purpose of which is to enable the young couple to settle

**Digital Supreme Court Reports**

down in life and live peacefully. But little matrimonial skirmishes suddenly erupt which often assume serious proportions resulting in commission of heinous crimes in which elders of the family are also involved with the result that those who could have counselled and brought about rapprochement are rendered helpless on their being arrayed as accused in the criminal case. There are many other reasons which need not be mentioned here for not encouraging matrimonial litigation so that the parties may ponder over their defaults and terminate their disputes amicably by mutual agreement instead of fighting it out in a court of law where it takes years and years to conclude and in that process the parties lose their “young” days in chasing their “cases” in different courts.”

31. Further, this Court in ***Preeti Gupta vs. State of Jharkhand (2010) 7 SCC 667*** held that the courts have to be extremely careful and cautious in dealing with these complaints and must take pragmatic realties into consideration while dealing with matrimonial cases. The allegations of harassment by the husband’s close relatives who had been living in different cities and never visited or rarely visited the place where the complainant resided would have an entirely different complexion. The allegations of the complainant are required to be scrutinized with great care and circumspection.
32. We, therefore, are of the opinion that the impugned FIR No.82 of 2022 filed by respondent No.2 was initiated with ulterior motives to settle personal scores and grudges against appellant No.1 and his family members i.e., appellant Nos.2 to 6 herein. Hence, the present case at hand falls within category (7) of illustrative parameters highlighted in ***Bhajan Lal***. Therefore, the High Court, in the present case, erred in not exercising the powers available to it under Section 482 CrPC and thereby failed to prevent abuse of the Court’s process by continuing the criminal prosecution against the appellants.
33. We, accordingly allow the appeal and set aside the impugned order of the High Court dated 16.02.2022 in Criminal Petition No.1479 of 2022 filed under Section 482 CrPC. The Criminal Petition No.1479 of 2022 under Section 482 of CrPC shall accordingly stand allowed. FIR No.82 of 2022 dated 01.02.2022 registered with Neredmet Police Station, Rachakonda under Section 498A of the IPC and Sections 3

**Dara Lakshmi Narayana & Others v. State of Telangana & Another**

and 4 of the Dowry Act against appellant Nos.1 to 6, charge-sheet dated 03.06.2022 filed in the Court of 1<sup>st</sup> Metropolitan Magistrate, Malkajgiri, Cyberabad and the trial pending in the Court of 1<sup>st</sup> Additional Junior Civil Judge-cum-Additional Metropolitan Magistrate, Malkajgiri against the appellants herein shall accordingly stand quashed.

*Result of the case:* Appeal allowed.

<sup>†</sup>*Headnotes prepared by:* Divya Pandey

**Nutan Bharti Gram Vidyapith  
v.  
Government of Gujarat and Anr.**

(Civil Appeal No(s). 13958-13959 of 2024)

02 December 2024

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

**Issue for Consideration**

Issue arose as regards the liability of the appellant-private college covered under the grant-in-aid scheme of the State Government, to pay retiral benefits to the respondent-employee.

**Headnotes<sup>†</sup>**

**Service law – Retiral benefits – Liability of the appellant-private college covered under the grant-in-aid scheme of the State Government, to pay retiral benefits to the respondent-employee – Respondent dismissed from service on account of misconduct – Challenge to – Respondent directed to be reinstated as the dismissal was found to be an extreme punishment by the appellate authority – High Court upheld the order of reinstatement since the respondent had already superannuated, however directed the appellant to pay back wages to the extent of 75% – In appeal, back wages granted to the respondent set aside, however, the appellant and the State directed to pay retiral dues to the respondent – Thereagainst, the review petitions filed wherein the appellant directed to pay the retiral dues – Correctness:**

**Held:** Appellant is an institution entitled to Grant-in-Aid and the employees thereof are entitled to pensionary benefits in terms of the said Scheme – State directing the reinstatement of the Respondent no. 2 cannot be fatal for the Appellant and burden it with the retiral benefits of Respondent no. 2 whereas the Scheme provides for otherwise – No exception provided in the Scheme to enable the State to deny payment of retiral benefits to an employee of the Grant-in-Aid Institution under certain circumstances and shift the burden on the institution – There were serious charges against the Respondent no. 2 which included inter alia instigation of students to go on strike, improper behaviour with the co-employees, attempt to pollute the atmosphere in the institution,

---

\* Author

**Nutan Bharti Gram Vidyapith v. Government of Gujarat and Anr.**

violation of rules and regulations of the institution and involvement in the activities which may cause damage to the institution – After inquiry, with a view to maintain discipline in the institution, it was found appropriate that the Respondent no. 2 be dismissed from service – However, appellate authority found that the punishment of dismissal too harsh and the issues could have been resolved by way of discussion – Appellant, keeping in view the discipline in the institution, thought it appropriate to challenge the same – In such circumstances, it cannot be opined that its conduct was such that it should be burdened with the retiral benefits of delinquent employee – It cannot be said that the action taken by the appellant against the Respondent no. 2 was without jurisdiction – Impugned order passed by the High Court set aside – State to pay retiral dues to Respondent no. 2. [Paras 13-16]

**Case Law Cited**

[Educational Society, Tumsar and Others v. State of Maharashtra and Others \(2016\) 3 SCC 512 : 2016 SCC Online SC 93 – distinguished.](#)

**List of Keywords**

Liability of private college to pay retiral benefits to employee; Grant-in-aid scheme of the State Government; Retiral benefits; Misconduct; Reinstatement; Dismissal; Punishment; Back wages; Review petitions; Pensionary benefits; Discipline in the institution.

**Case Arising From**

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 13958-13959 of 2024

From the Judgment and Order dated 26.07.2022 and 21.04.2023 of the High Court of Gujarat at Ahmedabad in LPA No. 1456 of 2010 and MCA (for review) No. 1 of 2022 respectively

**Appearances for Parties**

Nikhil Goel, Sr. Adv., Mrs. Taruna Singh Gohil, Alapati Sahithya Krishna, Ms. Hetvi Patel, Ms. Navin Goel, Ms. Siddhi Gupta, Advs. for the Appellant.

Bhashkar Tanna, Sr. Adv., Ms. Swati Ghildiyal, Ms. Devyani Bhatt, Ms. Dharita Malkan, Alok Kumar, Dhruva Kumar, Ms. Khushboo Aakash Sheth, Advs. for the Respondents.

**Digital Supreme Court Reports****Judgment / Order of the Supreme Court****Judgment****Rajesh Bindal, J.**

1. Leave granted.
2. The Private College<sup>1</sup> covered under the Grant-in-Aid scheme of the State Government has filed the present appeal impugning the orders passed by the High Court<sup>2</sup> dated 26.07.2022<sup>3</sup> and 21.04.2023.<sup>4</sup>
3. At the time of hearing, the learned senior counsel appearing for the appellant submitted that he only wishes to press the claim regarding liability of the appellant-college to pay retiral benefits to the respondent-employee.
4. Briefly noticed, the facts are that the respondent no.2 was appointed as lecturer by the appellant. On account of certain misconduct, he was issued a chargesheet on 07.08.1993. After inquiry, he was dismissed from service on 06.06.1994.
  - 4.1. Aggrieved by the dismissal, the respondent no. 2 preferred an appeal to the Joint Director of Higher Education (appellate authority). The said appeal was dismissed as not maintainable *vide* order dated 15.11.1994.
  - 4.2. By order dated 20.03.1996, in an application<sup>5</sup> filed by the respondent no. 2 before the High Court, his appeal before the Joint Director of Higher Education was held to be maintainable and the same was directed to be heard by appellate authority-respondent no. 1. The appeal was allowed *vide* order dated 21.08.1996.
  - 4.3. Aggrieved against the aforesaid order, the appellant preferred an application<sup>6</sup> before the High Court where the above said order was set aside and the matter was directed to be heard

1 Nutan Bharti Gram Vidyapith

2 High Court of Gujarat at Ahmedabad

3 Letters Patent Appeal Number 1456 of 2010

4 Miscellaneous Civil Application (for Review) Number 01 of 2022

5 Special Civil Application Number 12822 of 1994

6 Special Civil Application No. 7111 of 1996

**Nutan Bharti Gram Vidyapith v. Government of Gujarat and Anr.**

afresh *vide* order dated 07.10.1996. Thereafter *vide* order dated 02.03.2000, the appeal filed by the private respondent was allowed by appellate authority. He was directed to be reinstated as the dismissal was found to be an extreme punishment.

5. The appellant challenged the aforesaid order before the High Court by filing an application.<sup>7</sup> The Learned Single Judge *vide* order dated 30.06.2010, noticing the fact that the private respondent had already superannuated, upheld the order of reinstatement passed in the aforesaid appeal. However, the High Court directed the appellant to pay back wages to the extent of 75%. The aforesaid order was challenged by the appellant by filing Letters Patent Appeal.<sup>8</sup> *Vide* order dated 26.07.2022, the appeal was disposed of while passing the following directions:

*"Private respondent No. 2 would not be entitled for any backwages as ordered by learned Single Judge.*

*Services of the private respondent No.2 shall be treated as continuous service from the date of his appointment till date of his superannuation. Private respondent shall be entitled for all the retiral benefits of his employment.*

*All the benefits shall be granted to the private respondent No. 2 by the appellant as well as by the State authority within a period of eight weeks from the date of receipt of this order along with interest, as per the prevailing policy in such cases.*

*If the amount is not paid within a period of eight weeks, the appellant as well as respondent authority shall pay the entire amount along with interest at the rate of 9% per annum till it is actually paid."*

6. A perusal of the aforesaid direction shows that the back wages granted to the respondent no. 2 were set aside and the appellant as well as the State were directed to pay retiral dues to the respondent No. 2. Aggrieved against the aforesaid order, the State as well as

---

7 Special Civil Application Number 4357 of 2000

8 Appeal No. 1456 of 2010

## Digital Supreme Court Reports

the appellant filed Review Petitions.<sup>9</sup> The review filed by the State was allowed *vide* order dated 21.04.2023 and it was directed that the appellant shall be liable to pay the retiral dues. The order as modified is extracted below:

*"7. We do recollect that the parties – the appellant University and the employee (original respondent No. 2) have agreed for such order and, therefore, the order was passed directing to grant benefits to the employee. However, through oversight, we have observed appellant as well as respondent – State shall be liable to pay the amount. Hence, we hereby modify the order. Paragraphs 6 sub-para (3) and (4) shall read as under:*

*"All the benefits shall be granted to the private respondent No.2 by the appellant within a period of eight weeks from the date of receipt of today's order along with interest, as per the prevailing policy in such cases.*

*If the amount is not paid within a period of eight weeks, the appellant shall pay the entire amount along with interest at the rate of 9% per annum till it is actually paid".*

7. Aggrieved against the aforesaid modification, where the direction has been issued to the appellant to pay retiral dues to the private respondent, the college is before this Court.
8. Learned counsel appearing for the appellant submitted that the order passed by the High Court is not in consonance with the Scheme<sup>10</sup> applicable for grant of retiral dues to an employee of an aided institution. The relevant paragraph of the Scheme applicable is extracted below:

*"11. The pension papers of the members of the staff entitled to pension, gratuity, etc. under the scheme should be prepared in case of Gram Vidyapeeth staff by the Principal of the Gram Vidyapeeth on the basis of service record maintained by the Gram Vidyapeeth concerned. The entries*

<sup>9</sup> Miscellaneous Civil Application Number 01 of 2022 and Miscellaneous Civil Application Number 01 of 2023

<sup>10</sup> Pension Scheme for the teaching/ non-teaching staff in the Gram Vidyapeeth, Government of Gujarat, Education Department, Resolution Number GUS/1089-5369/B Sachivalaya, Gandhinagar dated 13.07.1990

**Nutan Bharti Gram Vidyapith v. Government of Gujarat and Anr.**

*in the service book of the staff will be made and attested by the Principal of Gram Vidyapeeths and in case of Principal, by the management of the Gram Vidyapeeth concerned and such entries should be verified by the Director of Higher Education of the officer authorized by him and a certificate of verification recorded in the service books. The Director of Higher Education should sanction the pension, gratuity, etc. and forward the pension completed to the Director of Pension and Provisions Fund. **The pension, gratuity, etc. so sanctioned will be payable from the Government Treasurers.** The Director of pension and Provident Fund will produce be clean and issue a pension payment order and/or gratuity payment order on the Treasury, from which the pensioner illegal pension gratuity, under intimation to Director of Higher Education.”*

9. Learned counsel argued that the aforesaid Paragraph 11 of the Scheme provides that the liability to pay pension is on the State Government. The direction given by the High Court in the order passed in the Review Application is not in consonance with the aforesaid provisions. Hence, the same be set aside and the State should be held liable to pay retiral dues to the respondent no. 2.
10. On the other hand, learned counsel for the State submitted that the conduct of the appellant is to be seen before putting any liability with the State to pay retiral dues to an employee. It is a case in which the respondent no. 1/appellate authority *vide* order dated 02.03.2000 directed reinstatement of the respondent no. 2. However, thereafter the college continued litigating, raising frivolous grounds, as a result of which, the State is now sought to be burdened with liability to pay pension to the respondent no. 2, who had not actually worked for the requisite period. More than two decades have passed thereafter and during this period, respondent no. 2 attained the age of superannuation. In support, reliance has been placed upon judgment of this Court in Educational Society, Tumsar and Others vs. State of Maharashtra and Others.<sup>11</sup>
11. Learned counsel appearing for respondent no. 2 supported the argument raised by learned counsel for the appellant while stating

**Digital Supreme Court Reports**

that in terms of the laws applicable to the appellant, being Grant-in-Aid Institution, the duty to pay retiral dues lies with the State, which cannot escape it's liability.

12. Heard learned counsel for the parties and perused the paper book.
13. It is not a matter of dispute that the appellant is an institution entitled to Grant-in-Aid and the employees thereof are entitled to pensionary benefits in terms of the aforesaid Scheme. The only argument raised by the learned counsel for the State is regarding conduct of the appellant in fighting litigation after the State had directed reinstatement of the respondent no. 2 and finally settling the matter before the High Court. In our opinion, the same cannot be fatal for the appellant and burden it with the retiral benefits of respondent no. 2 whereas the Scheme provides for otherwise. There is no exception provided in the Scheme to enable the State to deny payment of retiral benefits to an employee of the Grant-in-Aid Institution under certain circumstances and shift the burden on the institution.
14. The judgment relied upon by the State may not have application in the facts of the case, wherein it was found that the action of the Education Institution was without jurisdiction, transgressing its power to terminate its employee. If the facts of the present case are concerned, no such finding has been recorded by the appellate authority. There were serious charges against the respondent no. 2 which included *inter alia* instigation of students to go on strike, improper behaviour with the co-employees, attempt to pollute the atmosphere in the institution, violation of rules and regulations of the institution and involvement in the activities which may cause damage to the institution. Out of 30 charges, 10 were proved. After inquiry, with a view to maintain discipline in the institution, it was found appropriate that the respondent no. 2 be dismissed from service. However, the appellate authority found the charges established to be trivial in nature and opined that those should have been sorted out. The appellate authority found that the punishment of dismissal is too harsh and the issues could have been resolved by way of discussion.
15. The appellant, keeping in view the discipline in the institution, thought it appropriate to challenge the same. In such circumstances, it cannot be opined that it's conduct was such that it should be burdened with the retiral benefits of delinquent employee. It is not the opinion

**Nutan Bharti Gram Vidyapith v. Government of Gujarat and Anr.**

of the appellate authority or any Court that the action taken by the appellant against the respondent no. 2 was without jurisdiction as was the case in Educational Society, Tumsar and Others (supra).

16. For the reasons mentioned above, the appeals are allowed. The impugned order dated 21.04.2023 passed by the High Court, allowing the Review Application filed by the State and dismissing the Review Application filed by the appellant, is set aside. The Review Application filed by the appellant is allowed. As a consequence, the order dated 26.07.2022 is modified. The consequence thereof is that the State, respondent no. 1 shall be liable to pay retiral dues to respondent no. 2.

*Result of the case:* Appeals allowed.

<sup>†</sup>*Headnotes prepared:* by Nidhi Jain

**Central Bureau of Investigation**  
v.  
**Jagat Ram**

(Criminal Appeal No(s). 4964 of 2024)

03 December 2024

**[Pamidighantam Sri Narasimha\* and Manoj Misra, JJ.]**

**Issue for Consideration**

Respondent was convicted u/ss.7, 13(1)(d) r/w 13(2), Prevention of Corruption Act, 1988 by the Trial Court. High Court acquitted the respondent holding that the findings of the Trial Court were based on evidence however, as regards the issue of sanction it found that though the sanction order was proved but the official who gave the sanction was not examined. Appeal by CBI. Whether the irregularity of the sanction order, if any, has occasioned or resulted in a failure of justice.

**Headnotes<sup>†</sup>**

**Prevention of Corruption Act, 1988 – ss.19, 19(3)(a), (4) – Previous sanction necessary for prosecution – “Failure of Justice” – Respondent, if ought to be permitted to contest the issue of failure of justice due to irregularity in sanction before the High Court:**

**Held:** Yes – Under s.19(3)(a), no finding, sentence or order by a Special Judge shall be reversed by a court of appeal on the ground of absence, error, omission or irregularity in the sanction – However, such a restraint against reversal or alteration is subject to the opinion of the court that failure of justice has in fact been occasioned thereby – Further, s.19(4) provides that while construing whether the absence, error, omission or irregularity has occasioned or resulted in failure of justice, the court will examine the fact that whether an objection could and should have been raised at an earlier stage in the proceedings – High Court held that the findings of fact of the Trial Court were based on evidence and the prosecution proved the demand and acceptance which the defence failed to rebut and thus, a presumption arose u/s.20 of the Act regarding acceptance of money – High Court took up the issue of sanction, rather than the proof of sanction on its own without

\* Author

## Digital Supreme Court Reports

the assistance of the counsel for the respondent – Judgment of High Court set aside to the extent it set aside the sanction and the consequent acquittal – Matter remanded to High Court for considering the question of legality of the order of sanction u/s.19 to consider if the irregularity, if any, has occasioned or resulted in a failure of justice – Code of Criminal Procedure, 1973 – s.465. [Paras 6, 14, 15]

**Words and Phrases – “Failure of Justice” – Discussed.**

### Case Law Cited

*C.B.I v. Ashok Kumar Aggarwal* [\[2013\] 14 SCR 983](#) : (2014) 14 SCC 295; *State of Bihar v. Rajmangal Ram* [\[2014\] 4 SCR 602](#) : 2014 (11) SCC 388 – relied on.

*State of Goa v. Babu Thomas* [\[2005\] Supp. 3 SCR 712](#) : (2005) 8 SCC 130; *State of M.P. v. Virender Kumar Tripathi* [\[2009\] 7 SCR 89](#) : (2009) 15 SCC 533; *Ashok Tshering Bhutia v. State of Sikkim* [\[2011\] 3 SCR 242](#) : (2011) 4 SCC 402 – referred to.

### List of Acts

Prevention of Corruption Act, 1988; Code of Criminal Procedure, 1973.

### List of Keywords

Sanction for prosecution; Irregularity in the sanction order; “Failure of Justice”; Irregularity if occasioned or resulted in failure of justice; Sanction order proved; Official not examined; Absence, error, omission, irregularity; Question of legality of the order of sanction; Restraint against reversal or alteration; Objection raised at an earlier stage; Findings of fact based on evidence; Prosecution proved the demand and acceptance; Defence failed to rebut; Acceptance of money; Presumption; Proof of sanction; Without the assistance of the counsel for the accused.

### Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No.4964 of 2024

From the Judgment and Order dated 10.05.2017 of the High Court of Punjab & Haryana at Chandigarh in CRAS No. 1192 of 2002

## Central Bureau of Investigation v. Jagat Ram

### Appearances for Parties

Rajkumar Bhaskar Thakare, A.S.G., Ms. Rukmini Bobde, Ms. Prerna Kumari, Amish Agarwal, Arvind Kumar Sharma Mukesh Kumar Maroria, Ms. Rukhmini Bobde, Chandra Prakash, Astha Singh, Padmesh Mishra, Nitesh Shrivastava, Advs. for the Appellant.

Sangram S. Saron, Ms. Shubreet Kaur, Madhavrao B. Rajwade, Nikhil Jain, Ms. Divya Jain, Advs. for the Respondent.

### Judgment / Order of the Supreme Court

#### Judgment

#### **Pamidighantam Sri Narasimha, J.**

1. Delay Condoned. Leave granted.
2. The Central Bureau of Investigation is in appeal against the judgment of Punjab and Haryana High Court allowing the criminal appeal<sup>1</sup> filed by the accused under the Prevention of Corruption Act, 1988<sup>2</sup>.
3. On the basis of F.I.R. on 02.12.1994, the C.B.I registered a case under Sections 7, 13(1)(d) r/w 13(2) of the Act and a trap was arranged leading to the respondent-accused getting caught demanding and collecting a bribe as evidenced by a positive test for phenolphthalein and sodium bicarbonate. After trial, the Special Judge, Chandigarh convicted the accused under Sections 7, 13(1)(d) r/w 13(2) of the Act and sentenced him to undergo rigorous imprisonment for two years and also imposed a fine of Rs.1000/-.
4. Having considered the evidence in detail, the High Court came to the following conclusion:

*“9. I agree with the findings of the fact which are based on evidence and, therefore, I hold that the prosecution proved the demand and acceptance. The defence failed to rebut the prosecution evidence. Presumption arises under Section 20 of the Act regarding acceptance of money.”*

However, the High Court then took up the issue of sanction and found that though PW-9, M.S. Mahi Pal had proved the sanction

<sup>1</sup> CRA-S-No. 1192-SB of 2002 dated 10.05.2017.

<sup>2</sup> Hereinafter referred to as the ‘Act’.

**Digital Supreme Court Reports**

order Exhibit PW-9/A, it came to the conclusion that the prosecution had “*not examined any official who had actually applied his/her mind and given the sanction*”. In this view of the matter, learned Judge proceeded to acquit the accused.

5. Heard Ms. Rukhmini Bobde, learned counsel appearing on behalf of the CBI and Mr. Sangram S. Saron, learned counsel appearing on behalf of the respondent. For our analysis, Section 19 of the Act, to the degree its relevant, is reproduced herein as follows:

*“Sec. 19. Previous sanction necessary for prosecution.-*

*(1) No court shall take cognizance of an offence punishable under Sections 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction,-*

*[...]*

*(3) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),*

*(a) no finding, sentence or order passed by a special Judge shall be reversed or altered by a Court in appeal, confirmation or revision on the ground of the absence of, or any error, omission or irregularity in, the sanction required under sub-section (1), unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby;*

*(b) no Court shall stay the proceedings under this Act on the ground of any error, omission or irregularity in the sanction granted by the authority, unless it is satisfied that such error, omission or irregularity has resulted in a failure of justice;*

*(c) no Court shall stay the proceedings under this Act on any other ground and no Court shall exercise the powers of revision in relation to any interlocutory order passed in any inquiry, trial, appeal or other proceedings.*

*(4) In determining under sub-section (3) whether the absence of, or any error, omission or irregularity in, such sanction has occasioned or resulted in a failure of justice*

### Central Bureau of Investigation v. Jagat Ram

*the court shall have regard to the fact whether the objection could and should have been raised at any earlier stage in the proceedings."*

6. It is clear that under sub-section 3(a) of Section 19 of the Act, no finding, sentence or order by a Special Judge shall be reversed by a court of appeal on the ground of absence, error, omission or irregularity in the sanction. This is the first principle. However, such a restraint against reversal or alteration is always subject to the opinion of the court that failure of justice has in fact been occasioned thereby. Sub-section (4) of Section 19 of the Act further provides that while construing whether the absence, error, omission or irregularity has occasioned or resulted in failure of justice, the court will examine the fact that whether an objection could and should have been raised at an earlier stage in the proceedings.
7. *Failure of Justice*, what it entails and the scope of such enquiry was explained by this Court in C.B.I v. Ashok Kumar Aggarwal<sup>3</sup> in the following terms:

*"18. ....The failure of justice would be relatable to error, omission or irregularity in the grant of sanction. However, a mere error, omission or irregularity in sanction is not considered to be fatal unless it has resulted in the failure of justice or has been occasioned thereby.*

*19. The court must examine whether the issue raised regarding failure of justice is actually a failure of justice in the true sense or whether it is only a camouflage argument. The expression "failure of justice" is an extremely pliable or facile an expression which can be made to fit into any case. The court must endeavour to find out the truth. There would be "failure of justice" not only by unjust conviction but also by acquittal of the guilty as a result of unjust or negligent failure to produce requisite evidence. Of course,*

---

3 [2013] 14 SCR 983 : (2014) 14 SCC 295.

[Vide Nageshwar Shri Krishna Chobe v. State of Maharashtra [(1973) 4 SCC 23 : 1973 SCC (Cri) 664 : AIR 1973 SC 165], Shamsaheb M. Multtani v. State of Karnataka [(2001) 2 SCC 577 : 2001 SCC (Cri) 358], State v. T. Venkatesh Murthy [(2004) 7 SCC 763 : 2004 SCC (Cri) 2140], Rafiq Ahmad v. State of U.P. [(2011) 8 SCC 300 : (2011) 3 SCC (Cri) 498], Rattiram v. State of M.P. [(2012) 4 SCC 516 : (2012) 2 SCC (Cri) 481], Bhimanna v. State of Karnataka [(2012) 9 SCC 650 : (2012) 3 SCC (Cri) 1210], Darbara Singh v. State of Punjab [(2012) 10 SCC 476 : (2013) 1 SCC (Cri) 1037 : AIR 2013 SC 840] and Union of India v. Ajeeet Singh [(2013) 4 SCC 186 : (2013) 2 SCC (Cri) 347 : (2013) 2 SCC (L&S) 321]

**Digital Supreme Court Reports**

*the rights of the accused have to be kept in mind and safeguarded but they should not be overemphasised to the extent of forgetting that the victims also have certain rights. It has to be shown that the accused has suffered some disability or detriment in the protections available to him under the Indian criminal jurisprudence. “Prejudice” is incapable of being interpreted in its generic sense and applied to criminal jurisprudence. The plea of prejudice has to be in relation to investigation or trial and not matters falling beyond their scope. Once the accused is able to show that there has been serious prejudice caused to him with respect to either of these aspects, and that the same has defeated the rights available to him under legal jurisprudence, the accused can seek relief from the court.”*

8. The meaning behind the text of the phrase ‘failure of justice’ must be understood in the context of the object behind the larger public policy on sanction for prosecution. The inter-relationship or the nexus between the act complained of and the discharge of official duties and the test to be applied has been explained in the decision of this Court in *State of Bihar v. Rajmangal Ram*,<sup>4</sup> where this Court held that:

*“4. The object behind the requirement of grant of sanction to prosecute a public servant need not detain the court save and except to reiterate that the provisions in this regard either under the Code of Criminal Procedure or the Prevention of Corruption Act, 1988 are designed as a check on frivolous, mischievous and unscrupulous attempts to prosecute an honest public servant for acts arising out of due discharge of duty and also to enable him to efficiently perform the wide range of duties cast on him by virtue of his office. The test, therefore, always is—whether the act complained of has a reasonable connection with the discharge of official duties by the government or the public servant. If such connection exists and the discharge or exercise of the governmental function is, *prima facie*, founded on the bona fide judgment of the public servant, the requirement of sanction will be insisted upon so as*

**Central Bureau of Investigation v. Jagat Ram**

*to act as a filter to keep at bay any motivated, ill-founded and frivolous prosecution against the public servant. However, realising that the dividing line between an act in the discharge of official duty and an act that is not, may, at times, get blurred thereby enabling certain unjustified claims to be raised also on behalf of the public servant so as to derive undue advantage of the requirement of sanction, specific provisions have been incorporated in Section 19(3) of the Prevention of Corruption Act as well as in Section 465 of the Code of Criminal Procedure which, inter alia, make it clear that any error, omission or irregularity in the grant of sanction will not affect any finding, sentence or order passed by a competent court unless in the opinion of the court a failure of justice has been occasioned. This is how the balance is sought to be struck.”*

9. Apart from the clear statutory prescription of Section 19 of the Act, as informed by relevant court precedents, the High Court has also lost sight of Section 465 of the Criminal Procedure Code, 1973<sup>5</sup>, which provides that a sentence or an order passed by the court of competent jurisdiction shall not be reversed or altered by a court of appeal, confirmation or revision on account of any error or irregularity in any sanction for the prosecution unless in the opinion of the court, a failure of justice has in fact been occasioned thereby. Section 465 of the Cr.P.C is as under:

*“Sec. 465 Finding or sentence when reversible by reason of error, omission or irregularity:- (1) Subject to the provisions hereinbefore contained, on finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any error, or irregularity in any sanction for the prosecution unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby.*

---

5      Hereinafter referred to as ‘Cr.P.C’.

## Digital Supreme Court Reports

*(2) In determining whether any error, omission or irregularity in any proceeding under this Code, or any error, or irregularity in any sanction for the prosecution has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings."*

10. The substantial principle of requiring a sanction for prosecution and at the same time the principle in not negating the sentence or order of a court of competent jurisdiction are both incorporated in the Prevention of Corruption Act and the Criminal Procedure Code. The Court balances these values by the measure of whether failure of justice has in fact been occasioned.
11. Though a contrary view seems to have been taken in *State of Goa v. Babu Thomas*,<sup>6</sup> a larger bench of this Court in *State of M.P. v. Virender Kumar Tripathi*<sup>7</sup> has explained the position and affirmed the principles as laid down in *Ashok Tshering Bhutia v. State of Sikkim*<sup>8</sup>.
12. Justice Gogoi, (as he then was) has explained this position in *State of Bihar* (supra):

*"6. In a situation where under both the enactments any error, omission or irregularity in the sanction, which would also include the competence of the authority to grant sanction, does not vitiate the eventual conclusion in the trial including the conviction and sentence, unless of course a failure of justice has occurred, it is difficult to see how at the intermediary stage a criminal prosecution can be nullified or interdicted on account of any such error, omission or irregularity in the sanction order without arriving at the satisfaction that a failure of justice has also been occasioned. This is what was decided by this Court in *State v. T. Venkatesh Murthy*<sup>9</sup> wherein it has been inter alia observed that:*

6 [2005] Supp. 3 SCR 712 : (2005) 8 SCC 130

7 [2009] 7 SCR 89 : (2009) 15 SCC 533

8 [2011] 3 SCR 242 : (2011) 4 SCC 402

9 [2004] Supp. 4 SCR 279 : (2004) 7 SCC 763 : 2004 SCC (Cri) 2140 paras 10 and 11, SCC p. 767, para 14

**Central Bureau of Investigation v. Jagat Ram**

*"14. ... Merely because there is any omission, error or irregularity in the matter of according sanction, that does not affect the validity of the proceeding unless the court records the satisfaction that such error, omission or irregularity has resulted in failure of justice."*

7. The above view also found reiteration in Parkash Singh Badal v. State of Punjab [(2007) 1 SCC 1 : (2007) 1 SCC (Cri) 193 (para 29)] wherein it was, *inter alia*, held that mere omission, error or irregularity in sanction is not to be considered fatal unless it has resulted in failure of justice. In Parkash Singh Badal [(2007) 1 SCC 1 : (2007) 1 SCC (Cri) 193 (para 29)] it was further held that Section 19(1) of the PC Act is a matter of procedure and does not go to the root of jurisdiction. On the same line is the decision of this Court in R. Venkatkrishnan v. CBI [(2009) 11 SCC 737 : (2010) 1 SCC (Cri) 164]. In fact, a three-Judge Bench in State of M.P. v. Virender Kumar Tripathi [(2009) 15 SCC 533 : (2010) 2 SCC (Cri) 667] while considering an identical issue, namely, the validity of the grant of sanction by the Additional Secretary of the Department of Law and Legislative Affairs of the Government of Madhya Pradesh instead of the authority in the parent department, this Court held that in view of Section 19(3) of the PC Act, interdicting a criminal proceeding mid-course on ground of invalidity of the sanction order will not be appropriate unless the court can also reach the conclusion that failure of justice had been occasioned by any such error, omission or irregularity in the sanction. It was further held that failure of justice can be established not at the stage of framing of charge but only after the trial has commenced and the evidence is led (para 10 of the report).

8. There is a contrary view of this Court in State of Goa v. Babu Thomas [(2005) 8 SCC 130 : 2005 SCC (Cri) 1995] holding that an error in grant of sanction goes to the root of the prosecution. But the decision in Babu Thomas [(2005) 8 SCC 130 : 2005 SCC (Cri) 1995] has to be necessarily understood in the facts thereof, namely, that the authority itself had admitted the invalidity of the initial sanction by issuing a second sanction with retrospective

**Digital Supreme Court Reports**

*effect to validate the cognizance already taken on the basis of the initial sanction order. Even otherwise, the position has been clarified by the larger Bench in [State of M.P. v. Virender Kumar Tripathi](#) [(2009) 15 SCC 533 : (2010) 2 SCC (Cri) 667].”*

13. Really speaking, nothing remains for us to consider if absence, omission, error or irregularity of the sanction order has occasioned or resulted in failure of justice as the High Court came to the conclusion that findings of fact of the Trial Court, *are based on evidence*. The High Court also held that, ‘*the prosecution proved the demand and acceptance. The defence failed to rebut the prosecution evidence. Presumption arises under Section 20 of the Act regarding acceptance of money*’. We have already extracted the relevant portion of the High Court judgment.
14. Mr. Sangram S. Saron, learned counsel has submitted that one more opportunity may be given to the respondent to demonstrate that ‘*irregularity in the sanction order has led to failure of justice*’. It appears that the High Court has taken up the issue of sanction, rather than the proof of sanction on its own and without the assistance of the learned counsel for the respondent-accused. In the circumstances and in the interest of justice, even if it is a formality we consider it appropriate to permit the respondent to raise and contest this issue of failure of justice due to irregularity in sanction before the High Court.
15. For the reasons stated above, we allow the appeal and set aside the judgment and order dated 10.05.2017 in CRA-S-No. 1192-SB of 2002 by the High Court to the extent that it set aside the sanction and the consequent acquittal. While we confirm the other findings, we remand the matter to the High Court for considering the question of legality of the order of sanction under Section 19 of the Act to consider if the irregularity, if any, has occasioned or resulted in a failure of justice.
16. The Criminal Appeal is disposed of in above terms.
17. Pending application(s), if any, shall stand disposed of.

*Result of the case:* Appeal allowed.

<sup>†</sup>*Headnotes prepared by:* Divya Pandey

**Ajay Kumar Jain**  
v.  
**The State of Uttar Pradesh & Anr.**

(Miscellaneous Application No. 2565 of 2024)

In  
M.A.D. No. 14381 of 2024

In  
M.A. No. 714 of 2022  
In  
W.P.(C) No. 429 of 2020

09 December 2024

**[J.B. Pardiwala and R. Mahadevan, JJ.]**

**Issue for Consideration**

Whether miscellaneous application is maintainable in a writ petition to revive proceedings in respect of subsequent events.

**Headnotes<sup>†</sup>**

**Miscellaneous Application – Whether miscellaneous application is maintainable in a writ petition to revive proceedings in respect of subsequent events:**

**Held:** The miscellaneous applications filed with fresh cause of action that might have arisen with a very remote connection with the main proceedings – No miscellaneous application is maintainable in a writ petition to revive proceedings in respect of subsequent events – In fact, the Court has no jurisdiction to entertain such application as no proceedings could be said to be pending before it – When proceedings stand terminated by final disposal of the writ petition be it under Article 32 of the Constitution or Article 226 of the Constitution before the High Court, it is not open to the Court to re-open the proceedings by means of a miscellaneous application in respect of a matter which provided a fresh cause of action – If this principle is not followed, there would be confusion and chaos and the finality of the proceedings would cease to have any meaning – It is settled that a miscellaneous application filed in a disposed of proceedings would be maintainable only for the purpose of correcting any clerical or arithmetical error – A post disposal application for modification or clarification of the order

**Ajay Kumar Jain v. The State of Uttar Pradesh & Anr.**

would lie only in rare cases where the order passed by this Court is executory in nature and the directions of the Court may have become impossible to be implemented because of subsequent events or developments. [Paras 13, 14, 15, 17]

**Directions by the Supreme Court – Miscellaneous Applications – Regarding:**

**Held:** The Registry directed not to circulate any miscellaneous application filed in a disposed of proceedings unless and until there is a specific averment on oath that the filing of the miscellaneous application has been necessitated as the order passed in the main proceedings being executory in nature and have become impossible to be implemented because of subsequent events or developments – The Registry to insist from every applicant who intends to file any miscellaneous application in a disposed of proceedings for such a declaration as above on solemn affirmation. [Paras 18, 19]

**Case Law Cited**

*Jaipur Vidyut Vitran Nigam Ltd. and Others v. Adani Power Rajasthan Ltd. and Another* [\[2024\] 3 SCR 1023 : 2024 SCC OnLine SC 313 – relied on.](#)

**List of Keywords**

Miscellaneous Application; Revival of proceedings; Subsequent events; Proceedings terminated by final disposal; Modification of the order; Clarification of the order; Clerical or arithmetical error.

**Case Arising From**

CIVIL ORIGINAL JURISDICTION: Miscellaneous Application No. 2565 of 2024

In

M.A.D. No. 14381 of 2024

In

M.A. No. 714 of 2022

In

W.P.(C) No. 429 of 2020

From the Judgment and Order dated 08.08.2024 of the Supreme Court of India in DY No. 14381 of 2024

**Digital Supreme Court Reports****Appearances for Parties**

Petitioner-in-person.

**Judgment / Order of the Supreme Court****Order**

1. Delay condoned.
2. Application seeking permission to appear and argue-in-person is allowed.
3. This miscellaneous application is at the instance of the original petitioner of Writ Petition (Civil) No. 429 of 2020.
4. In this miscellaneous application, the applicant has prayed for the following reliefs:-
  - A. To Direct the Hon'ble Distt. Judge, Agra; The S.S.P., Agra to grant protection to the applicant during the pendency of Civil appeal number 126/2021 pending before the Hon'ble Distt. Judge, Agra on 29th March, 2022 and subsequent dates; and
  - B. pass such a order and directions as deemed fit and proper in the facts and circumstances of this case.”
5. We take notice of the fact that the Writ Petition (Civil) No.429/2020 came to be disposed of vide order dated 6-8-2021 in the following terms:-

“The petitioner, who appears in person, seeks a two-fold direction under Article 32 of the Constitution:

  - (i) A direction to the first respondent to devise a mechanism for enforcing court orders; and
  - (ii) A direction to the District Judge to dispose of the proceedings which have been initiated by the petitioner for breach of the order which enures to his benefit.

2. The wider relief which has been sought by the petitioner in (i) above cannot be entertained in these proceedings under Article 32, However, insofar as the specific grievance of the petitioner is concerned, we direct that the application,

**Ajay Kumar Jain v. The State of Uttar Pradesh & Anr.**

Contempt Application No 26 of 2016, which has been filed by him complaining of a breach of the order enuring to his benefit may be disposed of expeditiously, if it has not already been disposed of, within a period of three months from the date of receipt of a certified copy of this order.

3. We clarify that we have made no observations on the merits of the issues which are sought to be raised in the contempt proceedings.
4. The writ petition is accordingly disposed of.
5. Pending application, if any, stands disposed of."
6. Thus, while disposing of the main matter, this Court observed that in so far as the wider relief which was prayed for by the applicant – herein, could not have been granted in proceedings under Article 32 of the Constitution of India. However, this Court proceeded to issue directions to the District Judge to dispose of the contempt application No.26/2016 filed by the applicant herein expeditiously.
7. We have heard Dr. Ajay Kumar Jain appearing in-person.
8. Dr. Jain brought to our notice that in pursuance of the directions issued by this Court, referred to above, his contempt application No.26/2016 was heard and the same was allowed. Against such order, the contemnor went in appeal and his appeal is also dismissed vide order dated 11-11-2024.
9. His grievance is that despite all the aforestated developments, he has not been able to achieve any positive result in his litigation
10. Today, he apprehends threat to himself and his family members at the end of the contemnor.
11. This Miscellaneous Application on the face of it is not maintainable in law.
12. It is high time that this Court says something on the practice of the litigants filing miscellaneous applications in disposed of proceedings and that too after a period of 5 years, 7 years, 10 years.
13. These miscellaneous applications which are being filed on daily basis have something to do with fresh cause of action that might have arisen with a very remote connection with the main proceedings.

**Digital Supreme Court Reports**

14. No miscellaneous application is maintainable in a writ petition to revive proceedings in respect of subsequent events.
15. In fact, the Court has no jurisdiction to entertain such application as no proceedings could be said to be pending before it. When proceedings stand terminated by final disposal of the writ petition be it under Article 32 of the Constitution or Article 226 of the Constitution before the High Court, it is not open to the Court to re-open the proceedings by means of a miscellaneous application in respect of a matter which provided a fresh cause of action. If this principle is not followed, there would be confusion and chaos and the finality of the proceedings would cease to have any meaning.
16. In the recent past, a co-ordinate bench of this Court observed the following in "[Jaipur Vidyut Vitran Nigam Ltd. and Others vs. Adani Power Rajasthan Ltd. and Another](#)" reported in 2024 SCC OnLine SC 313":-

"We felt it necessary to examine the question about maintainability of the present application as we are of the view that it was necessary to spell out the position of law as to when such post-disposal miscellaneous applications can be entertained after a matter is disposed of. This Court has become *functus officio* and does not retain jurisdiction to entertain an application after the appeal was disposed of by the judgment of a three-Judge Bench of this Court on 31.08.2020 through a course beyond that specified in the statute. This is not an application for correcting any clerical or arithmetical error. Neither it is an application for extension of time. A post disposal application for modification and clarification of the order of disposal shall lie only in rare cases, where the order passed by this Court is executory in nature and the directions of the Court may become impossible to be implemented because of subsequent events or developments. The factual background of this Application does not fit into that description."

(Emphasis supplied)

17. Thus, this Court made it abundantly clear that a miscellaneous application filed in a disposed of proceedings would be maintainable only for the purpose of correcting any clerical or arithmetical error. The Court further clarified that a post disposal application for modification

**Ajay Kumar Jain v. The State of Uttar Pradesh & Anr.**

or clarification of the order would lie only in rare cases where the order passed by this Court is executory in nature and the directions of the Court may have become impossible to be implemented because of subsequent events or developments.

18. The Registry shall not circulate any miscellaneous application filed in a disposed of proceedings unless and until there is a specific averment on oath that the filing of the miscellaneous application has been necessitated as the order passed in the main proceedings being executory in nature and have become impossible to be implemented because of subsequent events or developments.
19. The Registry shall insist from every applicant who intends to file any miscellaneous application in a disposed of proceedings for such a declaration as above on solemn affirmation.
20. If the applicant appearing in-person has an apprehension that the contemnor is likely to cause any harm to him or any of his family members, it is open for him to file a writ petition before the territorial High Court under Article 226 of the Constitution and seek appropriate relief in that regard.
21. This Miscellaneous Application stands rejected with liberty to the applicant appearing in-person to avail appropriate legal remedy before the appropriate forum in accordance with law.
22. Application for appeal against Registrar's order is also rejected.
23. If any writ petition is filed by the applicant before the High Court, seeking protection the High Court may look into it in accordance with law at the earliest.
24. Pending applications, if any, also stand disposed of.

*Result of the case: Miscellaneous Application Rejected.*

<sup>†</sup>Headnotes prepared by: Ankit Gyan

**Kirloskar Ferrous Industries Limited & Anr.**

v.

**Union of India & Ors.**

(Writ Petition No. 715 of 2024)

07 November 2024

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

#### **Issue for Consideration**

Whether, the Explanation(s) appended to Rule 38 of the Mineral (Other than Atomic and Hydrocarbons Energy Minerals) Concession Rules, 2016 and Rule 45 of the Mineral Conservation and Development Rules, 2017 respectively are unreasonable and manifestly arbitrary and in consequence of violation of Article 14 of the Constitution.

#### **Headnotes<sup>†</sup>**

**Mineral (Other than Atomic and Hydrocarbons Energy Minerals) Concession Rules, 2016 – Explanation to r.38 – Mineral Conservation and Development Rules, 2017 – Explanation to r.45 – Validity challenged – Computation of royalty levied for the extraction or consumption of mined ores – Change in the methodology/formula of computation of royalty – Compounding effect on the rate of royalty for every subsequent month – Petitioner argued that the inclusion of the royalty and contributions towards District Mineral Foundation (DMF) and National Mineral Exploration Trust (NMET) paid previously for computation of the requisite royalty for subsequent months has a cascading effect on the rate of royalty for every subsequent month – New methodology of computation of royalty, if unreasonable or arbitrary:**

**Held:** No – Merely because the methodology or formula for computation of royalty has been altered from what it was under the erstwhile MCR, 1960 will not make the new mechanism or methodology unreasonable or arbitrary and liable to be struck down – It is possible that at the relevant time in respect of some of the minerals, royalty was being computed without inclusion of the royalty, DMF and NMET contributions previously paid, however, that

\*Author

**Kirloskar Ferrous Industries Limited & Anr v. Union of India & Ors.**

does not mean that the Central Government's power is restricted and it cannot alter the mode of computation of royalty – Matters such as computation of royalty or the levy of such royalty on different minerals is entirely a matter of policy making beyond the expertise and domain of the Courts – Whether a particular policy is wise or a better public policy can be evolved is purely the domain of the executive – Judicial review of policy decisions is limited to assessing the legality of the decision making process rather than the substantive merits of the policy itself – Court should confine itself to the question of legality as to whether the policy making authority exceeded its powers, or committed an error of law or breached the rules of natural justice or reached a decision which no reasonable authority would have reached or whether it abused its powers – Though the mechanism for computation of royalty in terms of r.38, MCR, 2016 and r.45, MCDR, 2017 might have onerous implications in monetary terms on the mining leaseholders as there is a compounding effect on the rate of royalty for every subsequent month however, in absence of anything to show that the policy was in excess of the powers or domain of the respondents or in breach of any statutory provision, it cannot be struck down – Mineral (Development and Regulation) Amendment Act, 2015. [Paras 50, 51, 61]

**Economic policies/laws relating to economic activities – Mineral (Development and Regulation) Amendment Act, 2015 – Mineral (Other than Atomic and Hydrocarbons Energy Minerals) Concession Rules, 2016 – Explanation to r.38 – Mineral Conservation and Development Rules, 2017 – Explanation to r.45 – Different mechanism for computation of royalty for coal and other minerals – Whether the exclusion of royalty, and contributions towards DMF and NMET paid previously for coal but not for other minerals is unreasonable and manifestly arbitrary:**

**Held:** No – The exclusion of royalty, and contributions towards DMF and NMET paid previously for coal but not for other minerals cannot be termed as arbitrary or unreasonable, merely because the computation for one differs from the other in certain aspects – Deference needs to be shown to the legislature in deciding how royalty must be computed in respect of different mineral grades/ concentrates – Although, the computation of royalty for different minerals is purely a matter of policy yet, it cannot be ignored that *prima facie* there is anomaly both in the very computation

## Digital Supreme Court Reports

mechanism of average sale price for minerals and the perplexing stance of exclusion of only coal from such mechanism despite the general nature and application of the aforesaid rules – Also, the legislature itself has acknowledged the anomaly in compounding of royalty etc. for the purpose of computation of average sale price – Respondents granted 2 months to conclude the public consultation process undertaken by themselves for amending the MMDR Act and take a final decisive call as regards the cascading impact of royalty on royalty in the calculation of the ‘average sale price’ by virtue of the Explanations to r.38 of the MCR, 2016 and r.45 of the MCDR, 2017. [Paras 71, 76, 84]

### **Principle of separation of powers – Doctrine of judicial restraint:**

**Held:** Each branch of government has a unique, defined role and operates within its designated boundaries – Separation of powers ensures that one branch does not encroach upon the functions of the others, with checks and balances crucial to democratic governance – Courts should respect the decisions made by the legislative and executive branches, provided the decisions are legally sound and constitutionally valid – Doctrine of judicial restraint emphasizes that courts should exercise caution and avoid involvement in policy decisions, as these are complex judgments requiring a balancing of diverse and often competing interests – Courts should not replace policymakers' judgments with their own unless absolutely necessary. [Paras 52-54]

### **Policy decisions – Power of judicial review:**

**Held:** Not absolute – Policy decisions often require the expertise of professionals and specialists in fields such as economics, public health, national security, and environmental science etc. – These domains involve specialized knowledge that judges, as generalists in legal matters, may lack – Judicial review does not mean a comprehensive re-evaluation of the policy's wisdom – It is limited to assessing the legality of the decision-making process rather than the substantive merits of the policy itself. [Para 56]

### **Interpretation of Statutes – Explanation(s) to r.38 of Mineral (Other than Atomic and Hydrocarbons Energy Minerals) Concession Rules, 2016 and r.45 of Mineral Conservation and Development Rules, 2017 – Interpretation of Explanation – Aforesaid Explanations, if exceeded the ambit of the main provisions:**

## Kirloskar Ferrous Industries Limited & Anr v. Union of India & Ors.

**Held:** No – Explanation added to a statutory provision is not a substantive provision – It is merely meant to explain or clarify certain ambiguities which may have crept in the statutory provision and thus, must be read so as to harmonise with and clear up the ambiguity in the main section – An explanation does not either restrict or extend the enacting part; it does not enlarge or narrow down the scope of the original section that it is supposed to explain – The construction of the explanation must depend upon its terms, and no theory of its purpose can be entertained unless it is to be inferred from the language used – An 'explanation' must be interpreted according to its own tenor; that it is meant to explain and not vice versa – Merely because the Explanations to r.38 of the MCR, 2016 and r.45 of the MCDR, 2017 provides that there shall be no deduction of royalty, payments to the DMF and NMET from the gross amount for the purpose of computing sale value does not make the aforesaid Explanation in derogation of the main provision – The Explanations are merely clarificatory in nature inasmuch as they explain the ambiguities in the main provisions of r.38 of the MCR, 2016 and r.45 of the MCDR, 2017, and thus, do not exceed the ambit of the main provisions or in contravention of the statutory scheme. [Paras 65, 66]

### Case Law Cited

*Mineral Area Development Authority & Anr. v. Steel Authority of India Limited & Anr.* [2024] 8 SCR 540 : 2024 SCC OnLine SC 1974; *Manish Kumar v. Union of India* [2021] 14 SCR 895 : (2021) 5 SCC 1; *Dy. Commissioner of Income Tax & Anr. v. Pepsi Foods Limited* [2021] 4 SCR 1 : (2021) 7 SCC 413; *K.P. Varghese v. ITO* [1982] 1 SCR 629 : (1981) 4 SCC 173; *Natural Resources Allocation, In Re: Special Reference No. 1 of 2012* [2012] 9 SCR 311 : (2012) 10 SCC 1 – referred to.

*M.P. Oil Extraction & Anr. v. State of Madhya Pradesh & Ors* [1997] Supp. 1 SCR 671 : (1997) 7 SCC 592; *Premium Granites & Anr. v. State of Tamil Nadu & Ors.* [1994] 1 SCR 579 : (1994) 2 SCC 691; *Delhi Science Forum and Others v. Union of India and Another* [1996] 2 SCR 767 : (1996) 2 SCC 405; *Balco Employees' Union v. Union of India* [2001] Supp. 5 SCR 511 : (2002) 2 SCC 333; *State of Punjab v. Principal Secretary to the Governor of Punjab & Anr.* [2023] 15 SCR 777 : 2023 INSC 1017; *State of U.P. v. Achal Singh* [2018] 9 SCR 912 : (2018) 17 SCC 578; *R.K. Garg v. Union of India* [1982] 1 SCR 947 : (1981) 4 SCC 675; *State of Tamil Nadu*

## Digital Supreme Court Reports

*and Anr. v. National South Indian River Interlinking Agriculturist Association* [2021] 7 SCR 479 : (2021) 15 SCC 534; *Tata Steel Ltd. v. Union of India* [2015] 6 SCR 29 : (2015) 6 SCC 193; *State of Jharkhand v. Brahmaputra Metallics Ltd* [2020] 14 S.C.R. 45 : (2023) 10 SCC 634; *Ramana Dayaram Shetty v. International Airport Authority of India & Ors.* [1979] 3 SCR 1014 : AIR 1979 SC 1628; *Narottam Kishore Deb Varma v. Union of India* [1964] 7 SCR 55; *H.H. Shri Swamiji of Shri Amar Mutt v. Commr., Hindu Religious and Charitable Endowments Deptt.* [1980] 1 SCR 368 : (1979) 4 SCC 642 – relied on.

### List of Acts

Mines and Minerals (Development and Regulation) Act, 1957; Mineral (Development and Regulation) Amendment Act, 2015; Mineral (Other than Atomic and Hydrocarbons Energy Minerals) Concession Rules, 2016; Mineral Conservation and Development Rules, 2017; Mineral Concession Rules, 1960; Mines and Minerals (Contribution to District Mineral Foundation) Rules, 2015; Mineral (Auction) Rules, 2015; Constitution of India.

### List of Keywords

Royalty; Extraction or consumption of mined ores; Mode of computation of royalty; Methodology/formula of computation of royalty changed; Not unreasonable or arbitrary; New mechanism/methodology; Compounding effect on rate of royalty for every subsequent month; Cascading effect; Mining leasehold company; Iron ores; 'Sale Value'; Mineral concession; Non-profit autonomous body; District Mineral Foundation (DMF); National Mineral Exploration Trust (NMET); Exclusion of royalty; Deduction of royalty, Payments to the DMF, NMET from gross amount for computing sale value; Computation of royalty for different minerals; Policy matter; Policy decisions; Public policy; Compounding of royalty; Average Sale Price; Wise policy; Better public policy; Domain of the executive; Natural resources; Economic policies/laws relating to economic activities; Mining leaseholders; Principle of separation of powers; Doctrine of judicial restraint; Substantive merits of the policy; Judicial review; Decision making process; Legality; Policy making authority; Rules of natural justice; Explanation; Ambiguities in the statutory provision; Ambiguity in the main section; Explanations clarificatory in nature; Different mechanism for computation of royalty for coal and other minerals; Indian Bureau of Mines.

**Kirloskar Ferrous Industries Limited & Anr v. Union of India & Ors.****Case Arising From**

CIVIL ORIGINAL JURISDICTION: Writ Petition (C) No. 715 of 2024  
(Under Article 32 of The Constitution of India)

**Appearances for Parties**

Rakesh Dwivedi, Ms. Kiran Suri, Dr. A.M. Singhvi, Dhruv Mehta, Yashraj Deora Singh, Sr. Advs., S.J. Amith, Mrs. Maria Carmita Dcosta Mashelkar, Ms. Vidushi Garg, Eklavya Dwivedi, Ms. Preetika Dwivedi, Dr. Mrs. Vipin Gupta, M/s. Legal Options, Ninad Laud, M.S. Ananth, Ms. Aanchal Mullick, Ms. Kamakshi Sehgal, Siddharth Seem, Abhinav Agrawal, Ms. Ranjeeta Rohatgi, Saket Sikri, Linette Rodrigues, Ajay Pal Singh Kullar, Naveen Kumar, Tanmaya Agarwal, Abhishek Gupta, Advs. for the Petitioners.

Shiv Mangal Sharma, AAG, Shailesh Madiyal, Sr. Adv., M/s. K J John & Co., Gurmeet Singh Makker, Ms. Chinmayee Chandra, Sridhar Potaraju, Veer Vikrant Singh, Shailesh Madiyal, Sandeep Singh, Milind Kumar, Rohit K. Singh, Harsh V. Surana, Irshad Ahmad, Advs. for the Respondents.

**Judgment / Order of the Supreme Court****Judgment**

**J.B. Pardiwala, J.**

1. The petitioners have invoked the jurisdiction of this Court under Article 32 of the Constitution *inter-alia* seeking to challenge the validity of the Explanation to Rule 38 of the Mineral (Other than Atomic and Hydrocarbons Energy Minerals) Concession Rules, 2016 (for short, the “**MCR, 2016**”) and the Explanation to Rule 45(8)(a) of the Mineral Conservation and Development Rules, 2017 (for short, the “**MCDR, 2017**”) that stipulates the computation of royalty to be levied for the extraction or consumption of mined ores.

**A. BRIEF FACTUAL MATRIX**

2. The petitioner no.1 herein is a mining leasehold company *inter-alia* engaged in the extraction of pig iron and the manufacturing and sale of its byproducts by way of a mining lease for iron ores in the State of Karnataka in terms of the provisions and procedure envisaged under

**Digital Supreme Court Reports**

the Mineral (Development and Regulation) Amendment Act, 2015 (for short the “**2015 Amendment Act**”). The petitioner no.2 herein is one of the shareholders in the petitioner no.1 company. The respondent no. 1 herein is the Union of India through the Secretary, Ministry of Mines, whereas the respondent no. 2 herein is the Indian Bureau of Mines.

3. As per Section 9 of the Mines and Minerals (Development and Regulation) Act, 1957 (for short, the (“**MMDR, Act**”), the revenue required to be paid for any mineral removed or consumed from the leasehold area would be in the form of royalty and mandates the mining leaseholder to pay such royalty as may be specified in the Second Schedule in respect of any minerals removed or consumed in the leased area allotted to him. Section 9 sub-section (3) of the MMDR Act further empowers the Central Government to enhance or reduce the rate of royalty payable by the leaseholders by way of a notification once every 3-years. The aforesaid provision reads as under: -

**“9. Royalties in respect of mining leases. –**

*(1) The holder of a mining lease granted before the commencement of this Act shall, notwithstanding anything contained in the instrument of lease or in any law in force at such commencement, pay royalty in respect of any mineral removed or consumed by him or by his agent, manager, employee, contractor or sub-lessee from the leased area after such commencement, at the rate for the time being specified in the Second Schedule in respect of that mineral.*

*(2) The holder of a mining lease granted on or after the commencement of this Act shall pay royalty in respect of any mineral removed or consumed by him or by his agent, manager, employee, contractor or sub-lessee from the leased area at the rate for the time being specified in the Second Schedule in respect of that mineral.*

*(2A) The holder of a mining lease, whether granted before or after the commencement of the Mines and Minerals (Regulation and Development) Amendment Act, 1972*

**Kirloskar Ferrous Industries Limited & Anr v. Union of India & Ors.**

*(56 of 1972) shall not be liable to pay any royalty in respect of any coal consumed by a workman engaged in a colliery provided that such consumption by the workman does not exceed one-third of a tonne per month.*

*(3) The Central Government may, by notification in the Official Gazette, amend the Second Schedule so as to enhance or reduce the rate at which royalty shall be payable in respect of any mineral with effect from such date as may be specified in the notification:*

*Provided that the Central Government shall not enhance the rate of royalty in respect of any mineral more than once during any period of three years.”*

4. Section(s) 13 and 18 of the MMDR Act respectively further empowers the Central Government to frame Rules for regulating the grant of mineral concession and for the conservation and systematic development of minerals respectively. Pursuant to the above provisions, the Central Government enacted the Mineral Concession Rules, 1960 (for short, the “**MCR, 1960**”) which later came to be replaced by the MCR, 2016 for the computation and payment of royalty in terms of Section 9 read with Schedule II of the MMDR, Act.
5. The erstwhile MCR, 1960, more particularly Rule 64D that was inserted *vide* Notification bearing no. GSR 883(E) dated 10.12.2009, stipulated that the royalty to be paid for all non-atomic and non-fuel minerals would be computed on the basis of the State-wise sale price of different minerals as published by the Indian Bureau of Mines / the respondent no. 2. The said provision reads as under: -

***“64 D. Manner of payment of royalty on minerals on ad valorem basis:***

- (1) *Every mine owner, his agent, manager, employee, contractor or sub-lessee shall compute the amount of royalty on minerals where such royalty is charged on ad valorem basis as follows:*
  - (i) *for all non-atomic and non fuel minerals sold in the domestic market or consumed in captive plants or exported by the mine owners (other than*

**Digital Supreme Court Reports**

*bauxite and laterite despatched for use in alumina and metallurgical industries, copper, lead, zinc, tin, nickel, gold, silver and minerals specified under Atomic Energy Act), the State-wise sale prices for different minerals as published by Indian Bureau of Mines shall be the sale price for computation of royalty in respect of any mineral produced any time during a month in any mine in that State, and the royalty shall be computed as per the formula given below:*

*Royalty = Sale price of mineral (grade wise and State-wise) published by IBM X Rate of royalty (in percentage) X Total quantity of mineral grade produced/ dispatched:*

*Provided that if for a particular mineral, the information for a State for a particular month is not published by the Indian Bureau of Mines, the latest information available for that mineral in the State shall be referred, failing which the latest information for All India for the mineral shall be referred.*

*(ii) for the grades of minerals produced for captive consumption (other than bauxite and laterite despatched for use in alumina and metallurgical industries, copper, lead, zinc, tin, nickel, gold and silver) and those not despatched for sale in domestic market or export, the sale price published by the Indian Bureau of Mines shall be used as the benchmark price for computation of royalty.*

*(iii) for primary gold, silver, copper, nickel, tin, lead and zinc, the total contained metal in the ore or concentrate produced during the period for which the royalty is computed and reported in the statutory monthly returns under Mineral Conservation and Development Rules, 1988 or recorded in the books of the mine owners shall be considered for the purposes of computing the royalty in the first place and then the royalty shall be computed as the percentage of the*

**Kirloskar Ferrous Industries Limited & Anr v. Union of India & Ors.**

*average metal prices published by the Indian Bureau of Mines for primary gold, silver, copper, nickel, tin, lead and zinc during the period of computation of royalty as follows:*

*Royalty = sale price X rate of royalty in percentage*

*where sale price = Average price of metal as published by Indian Bureau of Mines during the month X Total contained metal in ore or concentrate produced X Rupee or Dollar exchange rate selling as on the last date of the month of computation of royalty:*

*Provided that in case of by-product gold and silver the royalty shall be based on the total quantity of metal produced and such royalty shall be calculated as follows:*

*Royalty = Sale price X rate of royalty in percentage*

*Explanation - For the purpose of this sub-clause sale price means, average price of metal as published by Indian Bureau of Mines during the month X Total byproduct metal actually produced X Rupee or Dollar Exchange rate selling as on the last date of the month of computation of royalty.*

(iv) *For bauxite or laterite ore despatched for use in alumina and aluminium metal extraction or despatched to alumina or aluminium metal extraction industry within India, the total contained alumina in the bauxite or laterite ore on dry basis produced during the period for which the royalty is computed and reported in the statutory monthly returns under Mineral Conservation and Development Rules, 1988 or recorded in the books of the mine owners shall be considered for the purpose of computing the royalty in the first place and then the royalty shall be computed as the percentage of the average monthly price for the contained aluminium metal in the said alumina content of the ore published by the Indian Bureau of Mines, on the following basis namely:-*

## Digital Supreme Court Reports

*Royalty =*

| 52.9<br>100 | <i>X Percentage of Al2O3 in the bauxite on dry basis (as reported in the Statutory Monthly return under MCDR)</i> | <i>X Average monthly price of aluminium as published by the IBM</i> | <i>X Rupee/dollar exchange rate (selling) as on the last date of the period of the computation of royalty</i> | <i>X Rate of royalty (in percentage)</i> |
|-------------|---|---|---|--|
|-------------|---|---|---|--|

*Provided that for computing the royalty for bauxite or laterite despatched for end use other than alumina and aluminium metal extraction and for exports provisions of this clause shall not apply.*

- (2) *In case of metallic ores based on metal contained in ore and metal prices based on benchmark prices, the royalty shall be charged on dry basis, and the mine owner shall establish suitable facilities for collection of sample and its analysis on dry basis at the mine site.”*
- 6. A bare perusal of the aforesaid provision makes it clear that for computing the royalty that may be payable both the i) grade-wise and State wise sale price of mineral as published by IBM and the ii) rate of royalty were being factored along with the quantity of mineral that is produced or dispatched in order to determine the ultimate royalty that may be payable.
- 7. Thereafter, the Central Government by way of the aforesaid 2015 Amendment Act *inter-alia* inserted Section(s) 9B and 9C into the MMDR Act whereby contributions were required to be paid to the District Mineral Foundation (“DMF”), a non-profit body established to work for the interest and benefit of persons and areas affected by mining related operation and to the National Mineral Exploration Trust (“NMET”) a non-profit autonomous body for the purposes of regional and detailed exploration.
- 8. As per Section 9B sub-section (5) of the MMDR Act, the contributions towards the DMF were computed as a percentage of the royalty paid by the mining leaseholder that could extend upto a sum equivalent

### Kirloskar Ferrous Industries Limited & Anr v. Union of India & Ors.

to a maximum of one-third of such royalty. Thereafter, the Mines and Minerals (Contribution to District Mineral Foundation) Rules, 2015 (“**DMF Rules**”) came to be enacted, Rule 2(a) of which stipulated that the contributions towards DMF shall be computed as ten percent of the royalty paid in accordance with the Second Schedule. On the other hand, the contributions towards the NMET under Section 9C of the MMDR Act, were calculated as a sum equivalent to two percent of the royalty paid.

9. On 04.03.2016, the Central Government vide Notification no. GSR 278(E) enacted and notified the MCR, 2016 rules replacing the erstwhile rules of MCR, 1960, in order to revamp the entire mechanism *inter-alia* for the calculation of royalty on minerals and the grant of concessions.
10. Rule 38 of the MCR, 2016 defines the term ‘Sale Value’ as the gross amount payable as per the sale invoice where the sale transaction is on an arms’ length basis and such price is the sole consideration for the sale excluding taxes. The Explanation appended to the said rule further provides that for computation of ‘Sale Value’ there shall no deduction in respect of royalty, payments or contributions towards DMF and NMET. The relevant provision reads as under: -

***“38. Sale Value. –***

*Sale value is the gross amount payable by the purchaser as indicated in the sale invoice where the sale transaction is on an arms' length basis and the price is the sole consideration for the sale, excluding taxes, if any.*

*Explanation - For the purpose of computing sale value no deduction from the gross amount will be made in respect of royalty, payments to the District Mineral Foundation and payments to the National Mineral Exploration Trust.”*

(Emphasis supplied)

11. Rule 39 sub-rule (3) of the MCR, 2016 further provides how royalty is to be paid and the manner in which it is to be computed. It stipulates that royalty in respect of any mineral is to be paid on an Ad valorem basis. It further provides that royalty shall be calculated at the specified percentage of the ‘average sale price’ of such mineral for the month of removal / consumption as published by the Indian Bureau of Mines.

**Digital Supreme Court Reports**

12. Rule 42 of the MCR, 2016 provides the manner in which the ‘average sale price’ shall be computed. Rule 42 sub-rule (1) stipulates that the average sale price of mineral grade / concentrate shall be computed on the basis of its ‘ex-mine price’. Rule 42 sub-rule (3) further provides that the ‘average sale price’ shall be the weighted average of the ‘ex-mine price’ as computed in terms of sub-rule (2) of Rule 42. Rule 42 sub-rule (2)(b) provides that the ‘ex-mine price’ shall be computed as the sale value of the mineral less the actual expenditure incurred where the sale takes place domestically but beyond the mining lease area. The said provision reads as under: -

***“42. Computation of average sale price.***

- (1) *The ex-mine price shall be used to compute average sale price of mineral grade/concentrate.*
- (2) *The ex-mine price of mineral grade or concentrate shall be:*
  - (a) *where export has occurred, the free-on-board (F.O.B) price of the mineral less the actual expenditure incurred beyond the mining lease area towards transportation charges by road, loading and unloading charges, railway freight (if applicable), port handling charges/export duty, charges for sampling and analysis, rent for the plot at the stocking yard, handling charges in port, charges for stevedoring and trimming, any other incidental charges incurred outside the mining lease area as notified by the Indian Bureau of Mines from time-to-time, divided by the total quantity exported.*
  - (b) *where domestic sale has occurred, sale value of the mineral less the actual expenditure incurred towards transportation loading, unloading, rent for the plot at the stocking yard, charges for sampling and analysis and any other charges beyond mining lease area as notified by the Indian Bureau of Mines from time-to-time, divided by the total quantity sold.*
  - (c) *where sale has occurred, between related parties and/or where the sale is not on arms’ length basis, then such sale shall not be recognized as a sale*

**Kirloskar Ferrous Industries Limited & Anr v. Union of India & Ors.**

*for the purpose of this rule and in such case, sub-clause (d) shall be applicable.*

*(d) where sale has not occurred, the average sale price published monthly by the Indian Bureau of Mines for that mineral grade / concentrate for a particular State:*

*Provided that if for a particular mineral grade / concentrate, the information for a State for a particular month is not published by the Indian Bureau of Mines, the last available information published for that mineral grade / concentrate for that particular State by the Indian Bureau of Mines in the last six months previous to the reporting month shall be used, failing which the latest information for All India for the mineral grade / concentrate, shall be used.*

- (3) *The average sale price of any mineral grade/ concentrate in respect of a month shall be the weighted average of the ex-mine prices of the non-captive mines, accordance with computed the in above provisions, the weight being the quantity dispatched from the mining lease area of mineral grade I concentrate relevant to each ex-mine price.”*
- 13. In other words, Rule 39(3) of the MCR, 2016 provides that royalty would be calculated as the percentage of the average of the ‘Sale Value’. The Sale Value of any graded mineral / concentrate for the purposes of these rules in terms of Rule 38 is the gross amount payable as per the sale invoice including the royalty, DMF and NMET paid. This Sale Value minus the actual expenditure incurred (without deducting the royalty, DMF and NMET in terms of the Explanation to Rule 38) would be the ex-mine price of such mineral grade / concentrate. The weighted average of this ‘ex-mine price’ shall be the ‘Average Sale Price’ for the purposes of calculating royalty.
- 14. Similarly, under the Mineral Conservation and Development Rules, 2017 (for short, the “MCDR, 2017”) that was enacted by the Central Government for the conservation and systematic development of minerals in exercise of its powers under Rule 18 of the MMDR Act, Rule 45(8)(b) provides that the ‘Sale Value’ for the purposes of the said rules is the gross amount payable without any deduction in respect of royalty, DMF and NMET paid. The said rule reads as under: -

**Digital Supreme Court Reports*****"45. Monthly and annual returns –***

*(8) In case of mining of minerals by the holder of a mining lease, the –*

*(b) ex-mine price of mineral grade or concentrate shall be,–*

*(I) where export has occurred, the total of, sale value on free-on-board (F.O.B) basis, less the actual expenditure incurred beyond the mining lease area towards –*

- (i) transportation charges by road;*
- (ii) loading and unloading charges;*
- (iii) railway freight (if applicable);*
- (iv) port handling charges or export duty;*
- (v) charges for sampling and analysis;*
- (vi) rent for the plot at the stocking yard;*
- (vii) handling charges in port;*
- (viii) charges for stevedoring and trimming;*
- (ix) any other incidental charges incurred outside the mining lease area as notified by the Indian Bureau of Mines from time-to-time, divided by the total quantity exported;*

*(II) where domestic sale of mineral has occurred, the total of sale value of the mineral, less the actual expenditure incurred towards loading, unloading, transportation, rent for the plot at the stocking yard, charges for sampling and analysis and any other charges beyond mining lease area as notified by the Indian Bureau of Mines from time-to-time, divided by the total quantity sold;*

*(III) where sale has occurred, between related parties and is not on arms' length basis, then such sale shall not be recognised as a sale for the purposes of this rule and in such case, sub-clause shall be applicable;*

*(IV) where the sale has not occurred, the average sale price published monthly by the Indian Bureau of Mines for that mineral grade or concentrate for a particular State:*

**Kirloskar Ferrous Industries Limited & Anr v. Union of India & Ors.**

*Provided that if for a particular mineral grade or concentrate, the information for a State for a particular month is not published by the Indian Bureau of Mines, the last available information published for that mineral grade or concentrate for that particular State by the Indian Bureau of Mines in the last six months previous to the reporting month shall be referred, failing which the latest information for all India for the mineral grade or concentrate, shall be referred;*

*(V) the per unit cost of production in case of captive mines.”*

15. It is the case of the petitioners that, in view of the Explanation(s) appended to the definition of ‘Sale Value’ in Rule 38 of the MCR, 2016 and Rule 45 of the MCDR, 2017, royalty which has already been paid in the previous month is again being factored for the purposes of computation of royalty to be paid for the subsequent months. Thus, it is the contention of the petitioners that this “compounding” of royalty by virtue of the aforesaid Explanations is manifestly arbitrary inasmuch as it has led to a cascading effect within the fold of determination of the rate of royalty under Section 9 sub-section (3) of the MMDR Act.
16. However, when it comes to computation of royalty in respect of coal, it was submitted by the petitioners that the Central Government has remedied the aforesaid anomaly by excluding the previously paid royalty and contributions towards DMF and NMET in its calculation, by way of an amendment *vide* Notification No. GSR 445(E) by inserting an Explanation in Entry A, Item 10 in the Second Schedule of the MMDR Act. The relevant provision reads as under: -

*“Explanation:- For the purposes of this sub entry –*

*(iii)*

*(iv) Actual price means the sale invoice value of coal, net of statutory dues including taxes, · contribution to levies, · royalty, National Mineral Exploration Trust and District Mineral Foundation ... “*

17. The petitioners have contended that for the purposes of computation of royalty there exists no intelligible differentia between coal and iron ore and thus, the exclusion of royalty, DMF and NMET contributions for computation of sale value for coal but not for other minerals such as iron is manifestly arbitrary and the aforesaid Explanation(s) to

**Digital Supreme Court Reports**

Rule 38 of the MCR, 2016 and Rule 45 of the MCDR, 2017 is in consequence of violation of Article 14 of the Constitution and liable to be struck down.

18. During the course of hearing, our attention was also drawn to the fact that on 25.05.2021, a notice was issued by a committee of the Ministry of Mines inviting comments and suggestions from all stakeholders on this issue of double calculation of royalty for computation of the 'average sale price', and that after receiving the responses, a report dated 31.01.2022 was submitted by the said committee to the Ministry of Mines giving its recommendations on the incidence of compounding royalty.
19. Although the aforesaid report has not been made publicly available, yet the Ministry of Mines pursuant to the aforesaid report has issued a Notice dated 25.05.2022 for public consultation on amending the MMDR Act to bring reforms in the mining sector by *inter-alia* proposing amendment to the relevant rules for removing the cascading impact of royalty on royalty in the calculation of the 'average sale price'. The relevant portion of the aforesaid notice reads as under: -

*"1. Calculation of ASP: Removing the cascading impact of royalty on royalty*

*(iv) A committee was constituted by the Ministry of Mines under chairmanship by Shri Praveen Kumar, /AS (Retd.) with members from Ministry of Mines, NIT/Aayog, Ministry of Steel, Indian Bureau of Mines (IBM) and Indian Statistical Institute to examine the incidence of double calculation of royalty. The committee concluded that since the sale value already includes royalty, DMF and NMET, the Jessee pays royalty on royalty, DMF and NMET. Due to this, there is an additional charge on the miners under the current methodology.*

*(vi) Accordingly, it is proposed to (i) introduce new section in the MMDR Act regarding ASP; (ii) the provision shall specifically provide that ex-mine price for determination of ASP shall exclude GST, export duty, royalty, DMF & NMET & such other levies as may be prescribed; (iii) the change will be applicable for all the MLs, whether auctioned/granted before or after the commencement of the proposed MMDR*

**Kirloskar Ferrous Industries Limited & Anr v. Union of India & Ors.**

*Amendment Act, for the minerals removed or consumed from the leased area after the commencement of the said Act; and (iv) adoption of new formula only for the future dues for existing MLs arising after the amendment”*

20. The petitioners on the strength of the aforesaid notices issued by the Ministry of Mines have contended that although the respondents themselves have acknowledged the compounding of royalty in the computation of ‘average sale price’ yet no action or amendment has been made to the MMDR Act and the relevant rules thereunder in this regard.
21. In such circumstances referred to above, the petitioners have come up before this Court with the present writ petition.

**B. SUBMISSIONS OF THE PETITIONER**

22. Dr. A.M. Singhvi, the learned senior counsel for the petitioners presented the statutory background to us in his submissions. He submitted that Section 9(2) of the MMDR Act contemplates payment of royalty at the rates specified in the Second Schedule to the MMDR Act and that Section 9(3) of the MMDR Act affords revision of the rates, but with a proviso restricting it to once every 3 years.
23. Dr. Singhvi apprised us of the fact that Section 13 of the MMDR Act empowers the Government of India to make rules, *inter alia*, with respect to the manner in which royalty shall be payable and consequent to such powers, the MCR, 2016 have been enacted. He submitted that Rule 39(3) of the MCR, 2016 provides that where royalty is to be paid on *ad valorem* basis, it shall be calculated as a specified percentage of the ASP as published by the Indian Bureau of Mines for the month of removal/consumption. Moreover, he underlined that Rule 42 provides for the manner of computation of the ASP, and sub-rule (2)(b) thereof excludes the actual expenditure incurred from the sale value, in its prescriptions of the manner of computation.
24. We were further apprised of the fact that the method to compute ASP is in turn governed by Rule 38 of the MCR, 2016 which defines the term “sale value” and the Explanation thereto which stipulates that the royalty as well as the contributions made to DMF and NMET will not be deducted while computing the “sale value”. He pointed out a similar method of computation in Rule 45(8)(a) of the MCDR, 2017 which prescribes the manner of filing of monthly and annual returns.

**Digital Supreme Court Reports**

25. He submitted that the present petition seeks to challenge the Explanation to Rule 38 of the MCR, 2016 and Explanation to Rule 45(8)(a) of the MCDR, 2017 as they mandate the non-exclusion of royalty and the contributions made to DMF and NMET, in the computation of the “sale value”.
26. The learned senior counsel contended that the Impugned Explanations lead to a situation where the royalty as well as payments to DMF and NMET made previously, are included in the ASP, which, in turn, is used as the basis to compute royalty for the next month. Such method of computation of ASP effectively results in the payment of royalty as well as DMF and NMET contributions not only on the value of the ore/mineral, but also on the royalty, DMF and NMET contributions paid in the previous month. Thus, there is an imposition of royalty on a royalty. It was contended that the Impugned Explanations create a twin charge on royalty: *first*, a charge on the value of the mineral before payment of royalty at the prescribed rate; and, *secondly*, a re-charge of royalty on royalty at a prescribed rate. It was submitted that such re-charge of royalty on royalty is *ultra vires* to the scope of Section 9(3) of the MMDR Act.
27. The learned senior counsel contended that the Impugned Explanations are manifestly arbitrary for the following reasons:
  - (i) The present methodology for computing royalty leads to a compounding or cascading effect as it creates a charge of royalty on previous month's royalty.
  - (ii) It has been held by a 9-Judge Bench of this Court in [Mineral Area Development Authority & Anr. v. Steel Authority of India Limited & Anr.](#) reported in **2024 SCC OnLine SC 1974** that royalty is a consideration for extracting minerals. Therefore, such consideration cannot be compounded every month.
  - (iii) Rule 42(2)(b) of the MCR, 2016 excludes actual expenditure incurred towards transportation, loading, unloading, rent for the plot at the stocking yard, charges for sampling and analysis and any other charges beyond mining lease area. However, the impugned Explanations do not exclude royalty, DMF and NMET contributions from such actual expenditure. It was contended that royalty is also an expense as it has been excluded from the category of taxes, therefore, it is illogical to not exclude the same from the ex-mine price.

**Kirloskar Ferrous Industries Limited & Anr v. Union of India & Ors.**

28. The learned senior counsel referred to the following judgments pronounced by this Court to submit that manifest arbitrariness is a well-recognized ground to challenge the validity of a legislation and the same has been acknowledged as a facet of Article 14:
- *Manish Kumar v. Union of India* reported in **(2021) 5 SCC 1**;
  - *Dy. Commissioner of Income Tax & Anr. v. Pepsi Foods Limited* reported in **(2021) 7 SCC 413**.
29. Dr. Singhvi also submitted that there is no statutory prescription for the inclusion of royalty, DMF and NMET contributions while computing ASP. It is only the Impugned Explanations which save these payments from being excluded thereby resulting in a compounding or cascading effect.
30. We were informed by the learned senior counsel that this anomaly has been noticed by the Government of India in a report of a committee set up by the Ministry of Mines and a public notice dated 25.05.2022 has been published to call for suggestions in this regard. He submitted that the Ministry of Mines is charged with administering the MMDR Act. Therefore, the Consultation Paper of 2022, published by it is *contemporeo exposito* and is a valid aid of construction of the relevant Rules and the Impugned Explanations as per the dictum of this Court in *K.P. Varghese v. ITO* reported in **(1981) 4 SCC 173**.
31. Furthermore, such anomaly was remedied by the Ministry of Coal with respect to only coal by effecting an amendment to Schedule II of the MMDR Act, which defined “actual price” for the purpose of imposing royalty at *ad valorem* rates, to mean the sale invoice value of coal, net of statutory dues including taxes, levies, royalty, contribution to National Mineral Exploration Trust and District Mineral Foundation. The learned senior counsel submitted that remedying such anomaly for coal but not for iron ore creates a classification which has no intelligible differentia and is in violation of Article 14.
32. It was also submitted that lessees such as the petitioner herein, who have secured a mine in an auction, also pay a premium in terms of Rules 8 and 13(2) of the Mineral (Auction) Rules, 2015 respectively which is calculated on the basis of the flawed definition of ASP.

**Digital Supreme Court Reports**

33. Dr. Singhvi while countering the submissions of the learned senior counsel for the Union of India, submitted that the compounding or cascading effect occurring every single month cannot come within the fold of determination of the rate of royalty under Section 9(3) of the MMDR Act, as it would be in contravention to the proviso thereto which prohibits a change of rate of royalty for three years.

**C. SUBMISSIONS OF THE RESPONDENT**

34. Mr. Shailesh Madiyal, the learned ASG appearing on behalf of the Union of India presented the scheme of the MMDR Act and the MCR, 2016 in relation to the computation of royalty and submitted that Section 9(1) of the MMDR Act requires the holder of a mining lease to pay royalty in respect of the mineral being mined from the lease area at the rate specified in Schedule II of the MMDR Act. He apprised us of the fact that Section 9(3) permits the Government of India to issue notifications to amend Schedule II to increase or reduce the rate at which royalty is payable. He informed that the rate of royalty for iron ore at present is 15% of average sale price on *ad valorem* basis.
35. The learned ASG submitted that the computation of the ASP is to be done on a monthly basis and as per Rule 42(3), the ASP of any mineral grade/concentrate for a particular month shall be the weighted average of the ex-mine prices of the non-captive mine. He submitted that the ASP with respect to a particular month is unrelated to the ASP of the previous month and there can be no cumulative effect on the royalty charged.
36. It was submitted that Rule 42(2)(b) of the MCR, 2016 provided that where domestic sale has occurred, the ex-mine price of a mineral grade or concentrate is the “sale value” of the mineral less the actual expenditure incurred towards transportation, loading and unloading, etc. divided by the total quantity sold.
37. The learned senior counsel then proceeded to submit that the term “sale value” is defined in Rule 38 of the MCR, 2016 and the Explanation thereto provides that no deduction from the gross amount will be made in respect of royalty, payments to the DMF and NMET.
38. Mr. Madiyal submitted that the writ petition, challenging the Impugned Explanations, has been filed under Article 32 of the Constitution of

**Kirloskar Ferrous Industries Limited & Anr v. Union of India & Ors.**

India and therefore, is not maintainable as the petitioner ought to have approached the High Court under Article 226.

39. The learned senior counsel referred to the decision of a 5-Judge Bench of this Court in the case of Natural Resources Allocation, In Re: Special Reference No. 1 of 2012 reported in (2012) 10 SCC 1 to submit that the methodology pertaining to disposal of natural resources is an economic policy entailing intricate economic choices. Therefore, the manner of computation of royalty is a matter of policy and must be left to the discretion of the executive and legislative authorities, as the case may be.
40. The learned ASG that the petitioner's challenge to the Impugned Explanations does not meet the threshold of 'manifest arbitrariness' that is, whether an action was done or legislation was enacted capriciously, irrationally and/or without adequate determining principle, and cannot be excessive and disproportionate. He vehemently argued that no evidence or data was provided by the petitioner to show that the Impugned Explanations result in an endless monthly cumulative exaction of royalty. He submitted that the ASP for a succeeding month could in fact be lower than that of the previous month and no consistent monthly cumulative effect was possible.
41. Mr. Madiyal also contended that at the time of the auction of mining leases, the bids submitted are taking into consideration the existing legal regime, which includes Rule 38 of the MCR, 2016 as well as the Explanation thereto, and the bidders are aware that royalty and auction premium is calculated on the basis of the sale value which is inclusive of the royalty and contributions to DMF and NMET of the previous month. He submitted that the revenue of a State comprises of the royalty collected from such mining leases. Changing the methodology of calculation of "sale value" by excluding the royalty payable for mining leases which have already been auctioned would therefore, result in loss of revenue to the States as estimated at the beginning of the auctioning process. It was submitted that it is important that the revenue of the state Governments should be protected.
42. He further submitted that there is no legal bar on the imposition of royalty on royalty and cannot be adjudged on the same footing as a case of "tax on tax", in light of this Court's decision in Mineral Area Development Authority (supra) wherein it was held that royalty is not a tax.

**Digital Supreme Court Reports**

43. On the status of public consultations, Mr. Madiyal submitted that the Committee constituted by the Ministry of Mines has received the views & suggestions from various stakeholders as well as from the State Governments. However, the issue is under consideration and no decision yet has been taken on the matter. The learned ASG apprised us of the fact that the Committee is deliberating on the question of the amendment of the Rules and the impact of such amendment on the determination of royalty and auction premium payable in respect of mining leases auctioned prior to the amendment, if any carried out in the future.

**D. ISSUE FOR DETERMINATION**

44. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the pivotal question of law that falls for our consideration: -
- I. Whether, the Explanation(s) appended to Rule 38 of the MCR, 2016 and Rule 45 of the MCDR, 2017 respectively are unreasonable and manifestly arbitrary and in consequence of violation of Article 14 of the Constitution?

**E. ANALYSIS**

45. Before, we proceed with the analysis, it is necessary to understand the case of the petitioners in the present litigation as discernible from their pleadings. The argument of the petitioners in sum is twofold: -
- (i) **First**, that the very inclusion of the royalty, and contributions towards DMF and NMET paid previously for the purpose of computation of the requisite royalty for subsequent months is manifestly arbitrary. The said mechanism of computation of royalty has a cascading effect on the rate of royalty for every subsequent month.
  - (ii) **Secondly**, the exclusion of the royalty, and contributions towards DMF and NMET paid previously for coal but not for other minerals such as iron ore for computation of royalty is unreasonable and manifestly arbitrary. There exists no intelligible differentia between coal and iron ore or any other similar mineral and thus the act of the legislature in excluding the royalty, and contributions towards DMF and NMET for one but not for the other i.e., for coal but not for iron is in violation of Article 14

**Kirloskar Ferrous Industries Limited & Anr v. Union of India & Ors.**

of the Constitution and thus, the Explanation(s) to Rule 38 of the MCR, 2016 and Rule 45 of the MCDR, 2017 is liable to be struck down.

- i. **Whether the manner or mechanism of computation of royalty under the MCR, 2016 and MCDR, 2017 is manifestly arbitrary?**
46. In **M.P. Oil Extraction & Anr. v. State of Madhya Pradesh & Ors**, reported in **(1997) 7 SCC 592**, this Court held that policy decisions are the domain of the executive authority of the State and that the courts should not embark on the unchartered ocean of public policy and should not question the efficacy or otherwise of such policy so long the same does not offend any provision of the statute or the Constitution of India. It further observed that unless the policy framed is absolutely capricious or not informed by reasons, the court cannot and should not outstep its limit and tinker with the policy decision of the executive functionary of the State. The relevant observations read as under: -

*"41. After giving our careful consideration to the facts and circumstances of the case and to the submissions made by the learned counsel for the parties, it appears to us that the Industrial Policy of 1979 which was subsequently revised from time to time cannot be held to be arbitrary and based on no reason whatsoever but founded on mere ipse dixit of the State Government of M.P. The executive authority of the State must be held to be within its competence to frame a policy for the administration of the State. Unless the policy framed is absolutely capricious and, not being informed by any reason whatsoever, can be clearly held to be arbitrary and founded on mere ipse dixit of the executive functionaries thereby offending Article 14 of the Constitution or such policy offends other constitutional provisions or comes into conflict with any statutory provision, the Court cannot and should not outstep its limit and tinker with the policy decision of the executive functionary of the State. This Court, in no uncertain terms, has sounded a note of caution by indicating that policy decision is in the domain of the executive authority of the State and the Court should not embark on the unchartered ocean of public policy*

## Digital Supreme Court Reports

*and should not question the efficacy or otherwise of such policy so long the same does not offend any provision of the statute or the Constitution of India. The supremacy of each of the three organs of the State i.e. legislature, executive and judiciary in their respective fields of operation needs to be emphasised. The power of judicial review of the executive and legislative action must be kept within the bounds of constitutional scheme so that there may not be any occasion to entertain misgivings about the role of judiciary in outstepping its limit by unwarranted judicial activism being very often talked of in these days. The democratic set-up to which the polity is so deeply committed cannot function properly unless each of the three organs appreciate the need for mutual respect and supremacy in their respective fields.”*

(Emphasis supplied)

47. Similarly, in Premium Granites & Anr. v. State of Tamil Nadu & Ors. reported in (1994) 2 SCC 691, this Court observed that it is not the domain of the courts to consider as to whether a particular policy is wise or that a better public policy can be evolved, and that such matters must be left to the discretion of the executive and legislature. The relevant observations read as under: -

*"54. It is not the domain of the Court to embark upon unchartered ocean of public policy in an exercise to consider as to whether the particular public policy is wise or a better, public policy can be evolved. Such exercise must be left to the discretion of the executive and legislative authorities as the case may be. ..."*

(Emphasis supplied)

48. In yet one another decision of this Court in Delhi Science Forum and Others v. Union of India and Another reported in (1996) 2 SCC 405 it was observed that the courts should not express opinion as to whether a particular policy should be adopted or not, and no such direction can be given unless they pertain to the implementation of any policy as a result of which there is a violation or infringement of any constitutional or statutory provision. The relevant observations read as under: -

**Kirloskar Ferrous Industries Limited & Anr v. Union of India & Ors.**

*"7. What has been said in respect of legislations is applicable even in respect of policies which have been adopted by Parliament. They cannot be tested in Court of Law. The courts cannot express their opinion as to whether at a particular juncture or under a particular situation prevailing in the country any such national policy should have been adopted or not. There may be views and views, opinions and opinions which may be shared and believed by citizens of the country including the representatives of the people in Parliament. But that has to be sorted out in Parliament which has to approve such policies. Privatisation is a fundamental concept underlying the questions about the power to make economic decisions. What should be the role of the State in the economic development of the nation? How the resources of the country shall be used? How the goals fixed shall be attained? What are to be the safeguards to prevent the abuse of the economic power? What is the mechanism of accountability to ensure that the decision regarding privatisation is in public interest? All these questions have to be answered by a vigilant Parliament. Courts have their limitations because these issues rest with the policy-makers for the nation. No direction can be given or is expected from the courts unless while implementing such policies, there is violation or infringement of any of the constitutional or statutory provision. The new Telecom policy was placed before Parliament and it shall be deemed that Parliament has approved the same. This Court cannot review and examine as to whether the said policy should have been adopted. Of course, whether there is any legal or constitutional bar in adopting such policy can certainly be examined by the Court".*

(Emphasis supplied)

49. In *Balco Employees' Union v. Union of India* reported in (2002) 2 SCC 333 this Court held that it is not for the courts to consider the relative merits of different economic policies and consider whether a better policy may be evolved. It further held that when it comes to policy decisions on economic matters, the courts ought to be very circumspect in disturbing such conclusions unless there is

**Digital Supreme Court Reports**

an illegality in the decision itself. The relevant observations read as under: -

*"93. Wisdom and advisability of economic policies are ordinarily not amenable to judicial review unless it can be demonstrated that the policy is contrary to any statutory provision or the Constitution. In other words, it is not for the Courts to consider relative merits of different economic policies and consider whether a wiser or better one can be evolved. For testing the correctness of a policy, the appropriate forum is the Parliament and not the Courts."*

xxx

xxx

xxx

*"98. In the case of a policy decision on economic matters, the Courts should be very circumspect in conducting any enquiry or investigation and must be most reluctant to impugn the judgement of the experts who may have arrived at a conclusion unless the Court is satisfied that there is illegality in the decision itself."*

(Emphasis supplied)

50. It is possible that at the relevant time in respect of some of the minerals, royalty was being computed without inclusion of the royalty, DMF and NMET contributions previously paid, however, that does not mean that the Central Government's power is restricted and that the Central Government cannot alter the mode of computation of royalty. Merely, because the methodology or formula for computation of royalty has been altered from what it was under the erstwhile MCR, 1960 will not make the new mechanism or methodology unreasonable or arbitrary and liable to be struck down.
51. From the above conspectus of decisions referred to by us, it is clear that the whether a particular policy is wise or that a better public policy can be evolved is purely the domain of the executive of the state. Matters such as computation of royalty or the levy of such royalty on different minerals is entirely a matter of policy making which is beyond the expertise and domain of the courts. It is no longer res-integra, that a question as regards the validity of a particular policy is concerned with reviewing not the merits of such decision or policy, but the very policy making process itself. The duty of the courts is to confine itself to the question of legality and

**Kirloskar Ferrous Industries Limited & Anr v. Union of India & Ors.**

its concern should be whether a policymaking authority exceeded its powers, whether it committed an error of law or committed a breach of the rules of natural justice or reached a decision which no reasonable authority would have reached or whether it has abused its powers.

52. In a constitutional democracy, each branch of government—executive, legislative, and judiciary — has a defined role and operates within its designated boundaries. This separation of powers ensures that one branch does not encroach upon the functions of the others, preserving a system of checks and balances crucial to democratic governance. Within this framework, courts are primarily responsible for interpreting and upholding the law, while the executive and legislature hold the mandate to formulate and implement policy. This division is essential, as it aligns with the principle that policy-making, particularly in areas requiring specialized knowledge, foresight, and discretion, should remain within the domain of the elected representatives and those with the requisite expertise.
53. Judicial restraint is rooted in the understanding that courts should respect the decisions made by the legislative and executive branches, provided these decisions are legally sound and constitutionally valid. By adhering to judicial restraint, courts avoid overstepping their constitutional role and thereby prevent potential conflicts with the executive and legislative branches. The principle of separation of powers supports the idea that each branch has a unique role, and mutual respect between these branches is essential for the proper functioning of government. The courts are to ensure that laws and policies do not infringe upon citizens' rights or exceed the authority granted by law. However, this role does not extend to evaluating whether a policy is "wise" or whether a better one could be devised, and rather this process is entrusted to the legislature and executive, which have the expertise to make these determinations.
54. The doctrine of judicial restraint, which is central to this discussion, emphasizes that courts should exercise caution and avoid involvement in policy decisions, as these are complex judgments that require a balancing of diverse and often competing interests. Policies are crafted based on thorough analysis of social, economic, and political factors, considerations beyond the court's purview. The court is tasked with ensuring that policies do not breach constitutional provisions

**Digital Supreme Court Reports**

or statutory limits; however, they should not replace policymakers' judgments with their own unless absolutely necessary.

55. Policy decisions often require the expertise of professionals and specialists in fields such as economics, public health, national security, and environmental science. These domains involve specialized knowledge that judges, as generalists in legal matters, may lack. For instance, in economic policy, the executive may decide on trade tariffs or subsidies based on extensive data and projections that aim to balance domestic industry support with global trade commitments. The courts, lacking the same level of economic expertise and without the authority to make trade-offs among competing policy objectives, is typically not equipped to second-guess these kinds of decisions.
56. While courts have the power of judicial review to ensure that executive actions and legislative enactments comply with the Constitution, this power is not absolute. Judicial review is meant to act as a safeguard against actions that overstep legal boundaries or infringe on fundamental rights, but it does not entail a comprehensive re-evaluation of the policy's wisdom. The judicial review of policy decisions is limited to assessing the legality of the decision-making process rather than the substantive merits of the policy itself. For example, if a government policy infringes on fundamental rights or discriminates against a particular group, the courts have a duty to strike down such policies. However, in the absence of constitutional or legal violations, the courts should respect the policy choices made by the executive or legislature.
57. The duty of the court in policy-related cases is primarily to determine whether the policy falls within the scope of the authority granted to the relevant body. If the policy decision is within the executive's legal authority and has been made following proper procedures, the courts should defer to the expertise and discretion of the policy-makers, even if the policy appears unwise or imprudent. This restraint ensures that the courts do not impose its own perspective on policy matters that are rightly the responsibility of other branches.
58. Economic and social policies often involve significant redistribution of resources, prioritization of interests, and balancing of public needs, which requires careful consideration by those with specialized knowledge and broad perspectives. In the realm of economic policy, for instance, questions regarding the allocation of subsidies, fiscal

**Kirloskar Ferrous Industries Limited & Anr v. Union of India & Ors.**

deficits, or budget allocations are best managed by the executive, which has access to economic data and is accountable to the public for its financial management. Judicial interference in such areas risks creating disruptions in the economic balance that policy-makers are trying to achieve.

59. Courts should assume that policy-makers act in good faith unless there is clear evidence to the contrary. As long as the policy does not contravene the Constitution or violate statutory provisions, it is not the role of the courts to question the wisdom or fairness of such policy.
60. While judicial restraint is essential in respecting the boundaries of each branch of government, it does not mean that courts abdicate their responsibility to protect constitutional rights. The courts must still intervene if a policy infringes on fundamental rights, discriminates unfairly, or breaches statutory provisions. The role of the court in such instances is to protect individuals and groups from unlawful actions while maintaining the overall integrity of the policy-making process. This balance ensures that while courts do not interfere in matters of policy wisdom, they remain vigilant guardians of constitutional rights.
61. In the present case, there is no doubt that the mechanism for computation of royalty in terms of Rule 38 of the MCR, 2016 and Rule 45 of the MCDR, 2017 devised by the respondents might have onerous implications in monetary terms on the mining leaseholders inasmuch as there is a compounding effect on the rate of royalty for every subsequent month. However, this Court in the absence of anything to show that such policy is in excess of the powers or domain of the respondents herein or in breach of any statutory provision, cannot strike down the same.
62. It was argued by the petitioners, that here is no statutory prescription for the inclusion of royalty, DMF and NMET contributions while computing ASP. In other words, but for these Explanations, there would be no compounding or cascading effect in the computation of royalty.
63. This Court in *State of Punjab v. Principal Secretary to the Governor of Punjab & Anr.* reported in **2023 INSC 1017** it was held that a proviso may be in the form of an exception or in the form of an explanation or in addition to the substantive provision of a statute. The relevant observations read as under:-

*"22. A proviso, as is well settled, may fulfil the purpose of being an exception. Sometimes, however, a proviso*

## Digital Supreme Court Reports

*may be in the form of an explanation or in addition to the substantive provision of a statute. [...]”*

64. Similarly in ***State of U.P. v. Achal Singh***, reported in (2018) 17 SCC 578 this Court reiterated that an Explanation becomes part of the main section and can be read as proviso and be understood as explaining the scope of the main provision. The relevant observations read as under: -

*“19. Reliance was also placed on the decision rendered by this Court in State of Bombay v. United Motors (India) Ltd. [[State of Bombay v. United Motors \(India\) Ltd.](#) (1953) 1 SCC 514 : AIR 1953 SC 252] and Bengal Immunity Co. Ltd. v. State of Bihar [[Bengal Immunity Co. Ltd. v. State of Bihar](#), AIR 1955 SC 661] , in which it has been observed that Explanation can be read as proviso and it explains the scope of the main provision and the Explanation becomes part of the main section. There is no dispute with the aforesaid proposition. The Explanation in the Rules in question has to be applied to both the situations as contemplated in Rule 56(c) and is applicable to both the exigencies not only when the Government decides to retire an employee, but also applicable where voluntary retirement is sought by an employee. It cannot be said that no further restriction by Explanation has been added in a case where an employee has decided to obtain voluntary retirement. The public interest is the prime consideration on which authority has to decide such a prayer as per the rules applicable in the State of Uttar Pradesh.”*

(Emphasis supplied)

65. What can be discerned from the above is that an Explanation must be read so as to harmonise with and clear up any ambiguity in the main section. It should not be so construed as to widen the ambit of the section. An explanation does not enlarge the scope of the original section that it is supposed to explain. It is axiomatic that an explanation only explains and does not expand or add to the scope of the original section. The purpose of an explanation is, however, not to limit the scope of the main provision. The construction of the explanation must depend upon its terms, and no theory of its purpose can be entertained unless it is to be inferred from the language used. An ‘explanation’ must

**Kirloskar Ferrous Industries Limited & Anr v. Union of India & Ors.**

be interpreted according to its own tenor. Sometimes an explanation is appended to stress upon a particular thing which ordinarily would not appear clearly from the provisions of the section. The proper function of an explanation is to make plain or elucidate what is enacted in the substantive provision and not to add or subtract from it. Thus, an explanation does not either restrict or extend the enacting part; it does not enlarge or narrow down the scope of the original section that it is supposed to explain. The Explanation must be interpreted according to its own tenor; that it is meant to explain and not vice versa. Explanation added to a statutory provision is not a substantive provision in any sense of the term but as the plain meaning of the word itself shows it is merely meant to explain or clarify certain ambiguities which may have crept in the statutory provision.

66. Merely because the Explanation(s) to Rule 38 of the MCR, 2016 and Rule 45 of the MCDR, 2017 provides that there shall be no deduction of royalty, payments to the District Mineral Foundation and payments to the National Mineral Exploration Trust from the gross amount for the purpose of computing sale value does not in any manner makes the aforesaid Explanation in derogation of the main provision. The aforesaid Explanation(s) are merely clarificatory in nature inasmuch as it explains the ambiguities in the main provisions of Rule 38 of the MCR, 2016 and Rule 45 of the MCDR, 2017, and thus, they cannot be said to exceed the ambit of the main provisions or in contravention of the statutory scheme.

ii. **Whether the exclusion of royalty, and contributions towards DMF and NMET paid previously for coal but not for other minerals is unreasonable and manifestly arbitrary?**

67. In *R.K. Garg v. Union of India* reported in (1981) 4 SCC 675, this Court observed that laws relating to economic activities should be viewed with greater latitude and the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or strait-jacket formula. The relevant observations read as under: -

*"8. Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion, etc. It has been said by no less a person than*

**Digital Supreme Court Reports**

*Holmes, J. that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or strait-jacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature. The court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved.”*

(Emphasis supplied)

68. Similarly in ***State of Tamil Nadu and Anr. v. National South Indian River Interlinking Agriculturist Association*** reported in (2021) 15 SCC 534 it was held that courts should show a higher degree of deference to matters concerning economic policy. The relevant observations read as under: -

*“11. ... It is also settled that the Courts would show a higher degree of deference to matters concerning economic policy, compared to other matters of civil and political rights. ...”*

69. While examining the challenge to the validity of laws relating to economic activities, the courts must be slow and circumspect. A higher degree of deference needs to be shown in such matters, and sufficient flexibility should be given to the legislature and the executive in dealing with economic matters. Complex issues of economic and fiscal nature cannot be construed by any strait-jacket formula or unidirectional approach. This Court has time and again recognised that a judicial hands-off approach must be followed *qua* economic legislation and that the legislature is to be allowed wide latitude in experimenting with economic legislation, by virtue of it being an extension of the Government’s economic policy.
70. Since the MMDR Act and the rules thereunder pertain to the extraction, disposal and sale of natural resources which is an economic policy that entails intricate economic choices and have a direct effect on the macroeconomics, we are of the considered opinion that when it comes to computation of royalty the legislature must have greater play in the joints.

**Kirloskar Ferrous Industries Limited & Anr v. Union of India & Ors.**

71. The exclusion of royalty, and contributions towards DMF and NMET paid previously for coal but not for other minerals cannot be termed as arbitrary or unreasonable, merely because the computation for one differs from the other in certain aspects. Deference needs to be shown to the legislature in deciding how royalty must be computed in respect of different mineral grades / concentrates.
72. However, the present petition particularly the challenge to the validity of the Explanation(s) to Rule 38 of the MCR, 2016 and Rule 45 of the MCDR, 2017 is unique in its own way. While there is nothing to show that such policy is in excess of the powers or domain of the respondents herein or in breach of any statutory provision, at the same time, we should not ignore or overlook the fact that the legislature itself has acknowledged the anomaly in compounding of royalty etc. for the purpose of computation of average sale price.
73. Similarly, though the discretion to exclude previously paid royalty and contributions for coal but not for other minerals cannot be approached in a rigid manner and it would be incorrect to import policies framed and tailored by the executive for one particular subject-area and blanketly apply it to other related subject-areas, as it is the executive which is best suited to determine the fine distinctions existing between interlacing or seemingly similar domains and formulate distinct policies to best factor in the dissimilarities.
74. However, this Court in Tata Steel Ltd. v. Union of India, reported in (2015) 6 SCC 193 while examining Rule 64B of the erstwhile MCR, 1960 has observed that the aforesaid rules were general in nature and applicable to types of minerals including coal. This Court rejected the categorization of coal on a different pedestal from other minerals under the MMDR Act for the purpose of levy of royalty. The relevant observations read as under: -

*"70. There is nothing to indicate in Rule 64-B and Rule 64-C of the MCR that coal has been put on a different pedestal from other minerals mentioned in the MMDR Act read with the Second Schedule thereto. It is, therefore, difficult to accept the view canvassed by the Union of India that these Rules "may not be particularly applicable on coal minerals". That apart, the stand of the Union of India is not definite or categorical ("may not be"). In any event,*

**Digital Supreme Court Reports**

*we are not bound to accept the interpretation given by the Union of India to Rule 64-B and Rule 64-C of the MCR as excluding only coal. On the contrary, in NMDC [National Mineral Development Corp. Ltd. v. State of M.P. (2004) 6 SCC 281] this Court has observed that these Rules are general in nature, applicable to all types of minerals, which includes coal. The expression of opinion by the Union of India is contrary to the observations of this Court.*

**71.** *Therefore, on a plain reading of Rule 64-B and Rule 64-C of the MCR, we are of the opinion that with effect from 25-9-2000 when these Rules were inserted in the MCR, royalty is payable on all minerals including coal at the stage mentioned in these Rules, that is, on removal of the mineral from the boundaries of the leased area. For the period prior to that, the law laid down in Central Coalfields Ltd. [Central Coalfields Ltd. v. State of Jharkhand, Civil Appeal No. 8395 of 2001 decided by three learned Judges on 24-9-2003. Ed. : Now reported at (2015) 6 SCC 220.] will operate, as far as coal is concerned, from 10-8-1998 when SAIL [State of Orissa v. SAIL (1998) 6 SCC 476] was decided, though for different reasons.”*

(Emphasis supplied)

75. Even the respondents herein appear to have acknowledged that the differing mechanism for computation of royalty for coal and other minerals is not based on any fine distinction between the two, but rather an anomaly in the MCR, 2016 and MCDR, 2017, which is why it constituted a committee to look into the same and has proposed amendments for rectifying the same.
76. In view of the fact that the appropriate authorities are actively considering the issue of compounding royalties in the computation of average sale price for all other minerals, and the fact that a notice for public consultation on amending the MMDR Act to *inter-alia* address the aforementioned issue, we may not say anything further as regards whether the Explanation(s) to Rule 38 of the MCR, 2016 and Rule 45 of the MCDR, 2017 are manifestly arbitrary or not. Although, the computation of royalty for different minerals is purely a matter of policy yet we should not just shut our eyes to the *prima-facie* anomaly that exists both in the very computation mechanism of average sale price

**Kirloskar Ferrous Industries Limited & Anr v. Union of India & Ors.**

for minerals in terms of the aforesaid provisions and the perplexing stance of exclusion of only coal from such mechanism despite the general nature and application of the aforesaid rules.

77. However, we intend to grant one last opportunity to the respondents herein to seriously consider the mechanism of computation of average sale for the purposes of determining the rate of royalty for all other minerals in terms of the Explanation(s) to Rule 38 of the MCR, 2016 and Rule 45 of the MCDR, 2017. We direct the respondents to conclude the process of public consultation in respect of the compounding of royalties and take a well-meaning decision keeping in mind the representations made by the petitioners herein.
78. We may remind the respondents that, it cannot continue to keep the aforesaid issue in limbo on the pretext of ongoing process of public consultation process. In this regard, we may refer to the decision in *[State of Jharkhand v. Brahmaputra Metallics Ltd.](#)*, reported in **(2023) 10 SCC 634**, wherein the following observations of this Court are significant: -

*"50. It is one thing for the State to assert that the writ petitioner had no vested right but quite another for the State to assert that it is not duty-bound to disclose its reasons for not giving effect to the exemption notification within the period that was envisaged in the Industrial Policy, 2012. Both the accountability of the State and the solemn obligation which it undertook in terms of the policy document militate against accepting such a notion of State power. The State must discard the colonial notion that it is a sovereign handing out doles at its will. Its policies give rise to legitimate expectations that the State will act according to what it puts forth in the public realm. In all its actions, the State is bound to act fairly, in a transparent manner. This is an elementary requirement of the guarantee against arbitrary State action which Article 14 of the Constitution adopts. A deprivation of the entitlement of private citizens and private business must be proportional to a requirement grounded in public interest. This conception of State power has been recognised by this Court in a consistent line of decisions. As an illustration, we would like to extract this Court's observations in National Buildings Construction*

## Digital Supreme Court Reports

*Corpn. [National Buildings Construction Corpn. v. S. Raghunathan (1998) 7 SCC 66 : 1998 SCC (L&S) 1770] : (SCC p. 75, para 18)*

*"18. ... The Government and its departments, in administering the affairs of the country, are expected to honour their statements of policy or intention and treat the citizens with full personal consideration without any iota of abuse of discretion. The policy statements cannot be disregarded unfairly or applied selectively. Unfairness in the form of unreasonableness is akin to violation of natural justice."*

(Emphasis supplied)

79. We may also remind the respondents of one another decision of this Court in *Ramana Dayaram Shetty v. International Airport Authority of India & Ors.* reported in AIR 1979 SC 1628 wherein it was held that an executive authority must be rigorously held to the standard by which it professes its actions to be judged. The relevant observations read as under: -

*"10. [...] It is a well-settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them. [...]"*

(Emphasis supplied)

80. Once the respondents have themselves initiated a public consultation process for amending the MMDR Act to *inter-alia* address the aforementioned anomaly in computation of royalty, they must take a prompt decision in this regard. Merely because it has the discretion to take such policy decision does not mean that it can endlessly keep on prolonging the decision-making process whereby the very discretion is rendered ad-lib and the issue in itself a forgone conclusion.
81. Before, we close this matter, we must make a reference to the decision in *Narottam Kishore Deb Varman v. Union of India*, reported in **(1964) 7 SCR 55** wherein this Court was called upon to decide a batch of petitions challenging the validity of Section 87B of the Code

**Kirloskar Ferrous Industries Limited & Anr v. Union of India & Ors.**

of Civil Procedure, 1908. In the said decision, although this Court stopped short from holding the provision as unconstitutional yet it called upon the government to examine if the provision was to be allowed to continue for all times to come. It further observed that the considerations on which the validity of the provision is founded will wear out with the passage of time and may later become open to a serious challenge. The relevant observations read as under: -

*"11. Before we part with this matter, however, we would like to invite the Central Government to consider seriously whether it is necessary to allow Section 87-B to operate prospectively for all time. The agreements made with the Rulers of Indian States may, no doubt, have to be accepted and the assurances given to them may have to be observed. But considered broadly in the light of the basic principle of the equality before law, it seems somewhat odd that Section 87-B should continue to operate for all time. For past dealings and transactions, protection may justifiably be given to Rulers of former Indian States; but the Central Government may examine the question as to whether for transactions subsequent to 26th of January, 1950, this protection need or should be continued. If under the Constitution all citizens are equal, it may be desirable to confine the operation of Section 87-B to past transactions and not to perpetuate the anomaly of the distinction between the rest of the citizens and Rulers of former Indian States. With the passage of time, the validity of historical considerations on which Section 87-B is founded will wear out and the continuance of the said section in the Code of Civil Procedure may later be open to serious challenge."*

(Emphasis supplied)

82. Similarly in H.H. Shri Swamiji of Shri Amar Mutt v. Commr., Hindu Religious and Charitable Endowments Deptt., reported in (1979) 4 SCC 642, this Court was called upon to determine the constitutionality of application of the Madras Hindu Religious Charitable Endowments Act to South Kanara District. This Court observed that even after the passage of 23 years, no serious attempts were made to remove the inequality that was being caused in the South Kanara District by the

**Digital Supreme Court Reports**

said Act. However, this Court while refraining itself from declaring the law as inapplicable, called upon the legislature look into the issue in the hope that it would act promptly, lest the said Act suffer a serious and successful challenge in the not-so-distant future. The relevant observations read as under: -

*"31. But that is how the matter stands today. Twenty-three years have gone by since the States Reorganisation Act was passed but unhappily, no serious effort has been made by the State Legislature to introduce any legislation — apart from two abortive attempts in 1963 and 1977 — to remove the inequality between the temples and Mutts situated in the South Kanara District and those situated in other areas of Karnataka. Inequality is so clearly writ large on the face of the impugned statute in its application to the district of South Kanara only, that it is perilously near the periphery of unconstitutionality. We have restrained ourselves from declaring the law as inapplicable to the district of South Kanara from today but we would like to make it clear that if the Karnataka Legislature does not act promptly and remove the inequality arising out of the application of the Madras Act of 1951 to the district of South Kanara only, the Act will have to suffer a serious and successful challenge in the not distant future. We do hope that the Government of Karnataka will act promptly and move an appropriate legislation, say, within a year or so. A comprehensive legislation which will apply to all temples and Mutts in Karnataka, which are equally situated in the context of the levy of fee, may perhaps afford a satisfactory solution to the problem. This, however, is a tentative view-point because we have not investigated whether the Madras Act of 1951, particularly Section 76(1) thereof, is a piece of hostile legislation of the kind that would involve the violation of Article 14. Facts in regard thereto may have to be explored, if and when occasion arises."*

(Emphasis supplied)

83. In view of the decisions referred to above, we may only say that since the respondents herein are already in *seisin* of the anomaly in computation of royalty and the policy is being reconsidered on

**Kirloskar Ferrous Industries Limited & Anr v. Union of India & Ors.**

the grounds raised by the petitioners herein, we do not say anything further as regards the provisions in question other than what we have observed. We clarify that this decision shall not preclude the petitioners from challenging the final policy decision that the respondents may take on completion of the ongoing consultation process.

**F. CONCLUSION**

84. In view of the aforesaid, we grant the respondents a period of 2-months from the date of pronouncement of this judgment to conclude the public consultation process undertaken for amending the MMDR Act initiated pursuant to the Notice dated 25.05.2022 and take a final decisive call in regard to the cascading impact of royalty on royalty in the calculation of the ‘average sale price’ by virtue of the Explanation(s) to Rule 38 of the MCR, 2016 and Rule 45 of the MCDR, 2017.
85. The challenge to the validity of Explanation(s) appended to Rule 38 of the MCR, 2016 and Rule 45 of the MCDR, 2017 is answered accordingly.
86. The Registry shall notify this matter before an appropriate Bench after a period of two months from the date of pronouncement of this judgment to report compliance of our directions.

*Result of the case:* Matter to be notified to report compliance of directions.

<sup>†</sup>Headnotes prepared by: Divya Pandey

**Dushyant Janbandhu**  
v.  
**M/s Hyundai Autoever India Pvt. Ltd.**

(Civil Appeal No. 14299 of 2024)

11 December 2024

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

**Issue for Consideration**

High Court allowing the petition filed by the respondent under Section 11(6) under the Arbitration and Conciliation Act, 1996 appointed an arbitrator. Whether the disputes relating to non-payment of wages and the legality and validity of the termination order were arbitrable.

**Headnotes<sup>†</sup>**

**Payment of Wages Act, 1936 – ss.15(2), 22 – Industrial Disputes Act, 1947 – s.2(A) – Disputes relating to non-payment of wages and the legality and validity of the termination order, if arbitrable:**

**Held:** No – Disputes related to non-payment of wages and legality and propriety of termination which are non-arbitrable and the appellant approached the statutory authorities under the PW Act and the ID Act much prior to the filing of petition under Section 11(6) by the respondent and thus, the disputes were anyway pending before the statutory authorities which would exercise their jurisdiction to the exclusion of civil courts – Further, the alleged violation of clause 19 of the appointment order relating to non-disclosure obligation was only an afterthought as it was not raised in the show cause notice, inquiry report, chargesheet and termination order and as such is non-existent – Section 11(6) petition filed by the respondent was an abuse of process intended to threaten the appellant for having approached the statutory authorities under the PW Act and the ID Act – Judgment of High Court set aside – Petition filed by the respondent under Section 11(6) under the Arbitration and Conciliation Act dismissed with cost – Arbitration and Conciliation Act, 1996. [Paras 17, 12, 14, 18]

**Case Law Cited**

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

\* Author

**Dushyant Janbandhu v. M/s Hyundai Autoever India Pvt. Ltd.**

*Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd.*  
[2019] 17 SCR 275 : (2020) 20 SCC 760 – referred to.

**List of Acts**

Payment of Wages Act, 1936; Industrial Disputes Act, 1947; Arbitration and Conciliation Act, 1996.

**List of Keywords**

Non-payment of wages; Termination order; Legality and validity of the termination order; Disputes whether arbitrable; Disputes non-arbitrable; Authority under the Payment of Wages Act, 1936; Industrial Court; Charge memo; Non-cooperation; Absenteeism; Disciplinary action; Jurisdiction to the exclusion of the civil courts; Arbitration agreement; Arbitrator unilaterally appointed; Petition under Section 11(6) of the Arbitration and Conciliation Act, 1996; Alleged violation of non-disclosure obligation; Appointment order; Bar of Suits; Statutory authorities; Abuse of process; Show cause notice; Inquiry report, Chargesheet; Compensation.

**Case Arising From**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 14299 of 2024

From the Judgment and Order dated 20.12.2022 of the High Court of Judicature at Madras in Arb O.P No. 31 of 2022

**Appearances for Parties**

Anurag Ojha, Karnlesh K Mishra, Dipak Raj, Advs. for the Appellant.

Ms. Jaikriti S. Jadeja, Shivang Goel, Ishaan Aggarwal, Advs. for the Respondent.

**Judgment / Order of the Supreme Court****Judgment**

**Pamidighantam Sri Narasimha, J.**

1. Delay condoned. Leave Granted.
2. Questioning the appointment of an arbitrator by the High Court of Madras under Section 11(6) of the Arbitration and Conciliation

**Digital Supreme Court Reports**

Act, 1996,<sup>1</sup> by the order impugned before us,<sup>2</sup> the appellant has filed this appeal on the ground that the dispute with the respondent-employer, M/S Hyundai AutoEver India Pvt. Ltd. is governed by statute under the Payment of Wages Act, 1936<sup>3</sup> and the Industrial Disputes Act, 1947.<sup>4</sup> In the normal course and in recognition of judicial restraint, as incorporated in Section 5 of the Act, we would have asked the appellant to raise these objections before the Arbitral Tribunal itself. However, as the following narration of facts speaks for itself, we have found that the application under Section 11 of the Act is a clear abuse of the remedial process. We have therefore allowed the appeal and dismissed the Section 11(6) petition with cost.

3. The appellant was appointed as an Assistant Manager on 15.03.2019. Within a year, due to Covid-19 pandemic, the appellant was asked to work from home from 22.03.2020 to 06.01.2021. However, the respondent called upon the appellant to resume physical attendance of office from August 2020. As the appellant refused to comply, a show cause notice was issued on 04.09.2020, followed by an inquiry, report of which is in the following terms;

*“Conclusion*

- *There has been prima facie evidence against Dushyant for his purposeful absenteeism to work and its impact on Company's business and Customer relations.*
- *Possibility of too due to his absenteeism. A detailed Charge sheet can be issued to Mr. Dushyant and refer to Disciplinary committee to take final decision.*
- *Till the final decision, he should attend office regularly as per the roster.*
- *If he is having access from remote, those days should be recorded separately by his HOS.*
- *Based on the final decision of the disciplinary committee further action can be taken.”*

---

1 Hereinafter referred to as the 'Act'.

2 Order passed by the High Court of Judicature at Madras in Arb O.P. No. 31 of 2022 dated 20.12.2022.

3 Hereinafter referred to as the 'PW Act'.

4 Hereinafter referred to as the 'ID Act'.

**Dushyant Janbandhu v. M/s Hyundai Autoever India Pvt. Ltd.**

4. The inquiry led to issuance of a charge memo on 25.11.2020 for violating certain contractual clauses and these related to non-cooperation and absenteeism. It is necessary to mention here itself that there is no reference to Clause 19<sup>5</sup> of the appointment conditions relating to violation of the non-disclosure obligation. Ultimately, an order of termination was passed on 21.01.2021, the relevant portion of the said order of termination is important for our consideration and it is extracted hereinbelow for ready reference.

*"Please refer our Show Cause Notices dated 4<sup>th</sup> Sep 2020, Emails dated (05<sup>th</sup> Aug, 03<sup>rd</sup> Sep, 07 Sep 2020 & 07 Jan 2021) and the charge sheet dated (26 Nov 2020). You have continued to remain absent at work premises without authorisation and also you did not present yourself for our enquiry meetings called for as per our disciplinary Policy. Considering all the above, as per your agreed employment terms Clause 11, 12(V), 17, 24 & 25, your employment has been terminated with effect from the closing hours of 06 Jan 2021. [...]"*

5. It is evident from the above that there is no allegation whatsoever that the appellant has violated clause 19 of the appointment order leading to the order of termination.
6. During the pendency of disciplinary action, as the appellant was not paid his salary, he issued a legal notice for payment of wages on 29.05.2021 and filed a petition under Section 15(2) of the PW Act before the authority under the PW Act. As a counterblast, the respondent issued a notice alleging that the disputes must be settled through arbitration and proceeded to unilaterally appoint an arbitrator. We may mention here itself that even in the said reply notice dated 22.06.2021 issued by the respondent, there is no specific allegation of violation of the non-disclosure obligations by the appellant herein. The claim for arbitration naturally related to stoppage of payment of wages, which according to the appellant was within the jurisdiction of the Authority under the PW Act as per its statutory provisions.

---

5 "You will not give out to any one, by word of mouth or otherwise, particulars of HAEI's business or an administrative or organizational matter of a confidential nature which may be your privilege to know by virtue of you being HAEI's employee."

**Digital Supreme Court Reports**

7. Before we deal with the facts relating to the proceedings before the Authority under the PW Act, it is necessary to mention that as the unilaterally appointed arbitrator commenced the arbitral proceedings, the appellant filed an application under Section 16 of the Act calling upon the arbitrator to rule on his competence. It is interesting to note that the arbitrator himself passed an order on 01.05.2022 taking into account the decision of this Court in *Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd.*<sup>6</sup> and closing the arbitral proceedings. The relevant portion is reproduced here as follows:

*[...] In the present case, as detailed herein above, the appointment of the undersigned as the Arbitrator and the Constitution of the Arbitral Tribunal thereof are without the consent or the participation of the Respondent. Once the jurisdiction of this Arbitral Tribunal has been put into question on that ground, this Tribunal ceases to have the power or authority to proceed with the matter in any manner.*

*I therefore have no hesitation in holding that the constitution of this Arbitral Tribunal is not in accordance with or in consonance with the provisions of Section 11 of the Arbitration and Conciliation Act as amended, particularly in the light of the ratio set out by the Hon'ble Supreme Court in Perkins Eastman Architects DPC & another V/s HSCC (India) Ltd.*

*In the light of the same, the arbitral proceedings between the parties above-named before this Tribunal is closed forthwith with liberty being granted to both the parties to work out their respective remedies in accordance with law."*

8. Returning to the proceedings commenced before the Authority, we note that the respondent moved an application under Section 8 of the Act seeking reference of the dispute involved in the petition under Section 15(2) of the PW Act to arbitration. The Authority under PW Act dismissed the said application on 03.03.2022 holding that; *"In view of Section 23 of the Payment of Wages Act, arbitration agreement cannot stand in the way of the claimant in respect of illegally deducted wages under Payment of Wages Act."*

**Dushyant Janbandhu v. M/s Hyundai Autoever India Pvt. Ltd.**

9. There is yet another development. Questioning the order of termination dated 21.01.2021, the appellant approached the Industrial Tribunal by filing a petition under Section 2(A) of the ID Act and the same is pending adjudication and determination by the Industrial Tribunal.
10. It is in the above referred background that the respondent approached the High Court by filing a petition under Section 11(6) of the Act in August 2022 seeking appointment of an arbitrator. The disputes between the appellant and the respondent, as indicated in the arbitration petition relate to non-payment of wages and also the legality and validity of termination order dated 21.01.2021. Over and above these disputes, for the first time the respondent sought to give a new angle to the dispute by stating that the appellant has also violated the non-disclosure obligations under clause 19 of the appointment order.
11. In the order impugned before us, the High Court has proceeded to note an arbitration agreement and therefore, appointed an advocate as the arbitrator.
12. The issue relating to violation of the non-disclosure obligation under clause 19 is only an afterthought. This was evidently not the ground when the respondent issued the show cause notice on 04.09.2020, nor was it a part of the inquiry report, the relevant portion of which we have extracted in the para 3 above. This is also not a part of the charge memo dated 25.11.2020.
13. Crucially, the termination was not based on any such allegation as is evident from the termination order dated 21.01.2021 that we have extracted earlier. Under these circumstances, we can conclude that there is no dispute about violation of non-disclosure obligations and Section 11(6) petition, to this extent is non-existent.
14. Insofar as other disputes are concerned, they relate to non-payment of wages and the legality and validity of the order of termination dated 21.01.2021. The appellant approached the Authority under the PW Act much before the order of termination and the said authority would exercise jurisdiction under Section 15(2) of the PW Act to the exclusion of civil courts and these disputes are non-arbitrable. Section 22 of the PW Act reads as under:

**“22. Bar of Suits.—No Court shall entertain any suit for the recovery of wages or of any deduction from wages in so far as the sum so claimed—**

**Digital Supreme Court Reports**

- (a) forms the subject of an application under section 15 which has been presented by the plaintiff and which is pending before the authority appointed under that section or of an appeal under section 17; or
- (b) has formed the subject of a direction under section 15 in favour of the plaintiff; or
- (c) has been adjudged, in any proceeding under section 15, not to be owed to the plaintiff; or
- (d) could have been recovered by an application under section 15.”
15. Equally, legality of the order of termination dated 21.01.2021 is within the jurisdiction of Industrial Tribunal under Section 2(A) of the ID Act and it is important to mention that the jurisdiction of the Industrial Court is also to the exclusion of the civil courts and is not arbitrable. It is also important to note that remedies under these statutes were invoked much prior to the filing of petition under Section 11(6) by the respondent. In Vidya Drolia v. Durga Trading Corporation,<sup>7</sup> the principle of subject-matter arbitrability is enunciated as follows:
- “76. In view of the above discussion, we would like to propound a fourfold test for determining when the subject-matter of a dispute in an arbitration agreement is not arbitrable:
- 76.1 (1) When cause of action and subject-matter of the dispute relates to actions in rem, that do not pertain to subordinate rights in personam that arise from rights in rem.
- 76.2 (2) When cause of action and subject-matter of the dispute affects third-party rights; have erga omnes effect; require centralised adjudication, and mutual adjudication would not be appropriate and enforceable.
- 76.3 (3) When cause of action and subject-matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable.

---

<sup>7</sup> [2020] 11 SCR 1001 : (2021) 2 SCC 1

**Dushyant Janbandhu v. M/s Hyundai Autoever India Pvt. Ltd.**

*76.4 (4) When the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s)."*

*(emphasis supplied)*

16. Having considered the factual background in which the Section 11(6) petition has been filed, we are of the opinion that it is an abuse of process. It was clearly intended to threaten the appellant for having approached the statutory authorities under the PW Act and the ID Act. There is no basis for invoking clause 19 of the agreement and demanding compensation of Rs. 14,02,822/- when that fact situation did not arise.
17. The Section 11(6) petition has two facets. The first relates to disputes that were anyway pending before the statutory authorities, and they related to non-payment of wages and legality and propriety of termination which are non-arbitrable. The second facet relates to the alleged violation of clause 19 relating to non-disclosure obligation, which was not raised in the show cause notice, inquiry report, chargesheet and termination order and as such is non-existent.
18. In view of the above, we allow the Civil Appeal and set-aside the judgment and the order passed by the High Court and dismiss the petition under Section 11(6) filed by the respondent under the Arbitration and Conciliation Act.
19. The appellant will also be entitled to cost quantified at Rs. 5 lakhs payable within a period of 3 months from today.

*Result of the case:* Civil Appeal allowed.

<sup>†</sup>*Headnotes prepared by:* Divya Pandey

**Anjum Kadari & Anr.**

v.

**Union of India & Ors.**

(Special Leave Petition (C) No. 8541 of 2024)

05 November 2024

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

**Issue for Consideration**

Issue arose as to correctness of the order passed by the High Court holding the Uttar Pradesh Board of Madarsa Education Act, 2004 to be unconstitutional on the ground that it violates the principle of secularism and Articles 14 and 21A of the Constitution.

**Headnotes<sup>†</sup>**

**Uttar Pradesh Board of Madarsa Education Act, 2004 – Constitutional validity – Madarsa Act established the Uttar Pradesh Board of Madarsa Education, to regulate, among other things, the standards of education, qualifications for teachers, and conduct of examinations in Madarsas in the State of Uttar Pradesh – High Court struck down the entirety of the Act – Correctness:**

**Held:** Madarsa Act regulates the standard of education in Madarsas recognized by the Board for imparting Madarsa education – Madarsa Act is consistent with the positive obligation of the State to ensure that students studying in recognised Madarsas attain a level of competency which will allow them to effectively participate in society and earn a living – Art.21-A and the RTE Act have to be read consistently with the right of religious and linguistic minorities to establish and administer educational institutions of their choice – Board with the approval of the State government can enact regulations to ensure that religious minority institutions impart secular education of a requisite standard without destroying their minority character – Thus, Madarsa Act is within the legislative competence of the State legislature and traceable to Entry 25 of List III – However, the provisions of the Madarsa Act seeking to regulate higher-education degrees, such

\* Author

**Digital Supreme Court Reports**

as Fazil and Kamil unconstitutional as they are in conflict with the UGC Act, enacted under Entry 66 of List I – Judgment of the High Court set aside. [Para 104]

**Uttar Pradesh Board of Madarsa Education Act, 2004 – Legislative competence – Madarsa Act, if within the legislative competence of the State under Entry 25, List III – Provisions of Madrasa Act, if in conflict with the UGC Act enacted under entry 66, List I – Entire Madrasa Act, if need to be struck down as some of its provisions contravened the provisions of the UGC Act:**

**Held:** Provisions of the Madarsa Act seek to “regulate” Madarsas which are educational institutions run by religious minority – While the Madarsas do impart religious instruction, their primary aim is education – Mere fact that the education which is sought to be regulated includes some religious teachings or instruction, does not automatically push the legislation outside the legislative competence of the state – No jurisprudential basis to read Entry 25, List III to be limited to only education that is devoid of any religious teaching or instruction – Thus, cannot be said that the Madarsa Act (in its entirety) which seeks to regulate the functioning of Madarsas in Uttar Pradesh is outside the competence of the state legislature – Madarsa Act has been enacted pursuant to Entry 25 of List III – UGC Act enacted by Parliament pursuant to Entry 66, occupies the field with regard to the coordination and determination of standards in Universities – Thus, State legislation which seeks to regulate higher education, in conflict with the UGC Act, would be beyond the legislative competence of the State legislature – Madarsa Act to the extent to which it seeks to regulate higher education, including the ‘degrees’ of Fazil and Kamil, is beyond the legislative competence of the State Legislature since it conflicts with s.22 of the UGC Act – UGC Act governs the standards for higher education and a state legislation cannot seek to regulate higher education, in contravention of the provisions of the UGC Act – Furthermore, entire statute does not need to be struck down each time that certain provisions of the statute are held to not meet constitutional muster – Statute is void to the extent that it contravenes the Constitution – On an examination of the Madarsa Act, it is clear that prescribing the instructional material, conducting exams and conferring degrees for Fazil and Kamil were only a part of the functions of the Board – Infirmitiy lies in the said provisions which can be severed from the rest of the Madarsa Act – Severance of these functions from the Board does

**Anjum Kadari & Anr. v. Union of India & Ors.**

not impact its entire character, the Act can continue to be enforced in a real and substantial manner – Thus, only the provisions which pertain to Fazil and Kamil are unconstitutional, and Madarsa Act otherwise remains valid. [Paras 85, 90, 93, 99, 101, 103]

**Uttar Pradesh Board of Madarsa Education Act, 2004 – Regulatory legislation:**

**Held:** Enactment of the Act of 2004 is to regulate the standard of education in Madarsas recognized by the Board for imparting Madarsa education – Madarsa Act grants recognition to Madarsas to enable students to sit for an examination and obtain a degree, diploma, or certificate conferred by the Board – Statute envisages granting recognition to Madarsas which fulfil the prescribed standards for staff, instructions, equipment and buildings – Grant of recognition imposes a responsibility on the Madarsas to attain certain standards of education laid down by the Board – Failure of the Madarsas to maintain the standards of education will result in the withdrawal of their recognition – Regulations pertaining to standards of education or qualification of teachers do not directly interfere with the administration of the recognized Madarsas – Such regulations are “designed to prevent maladministration of an educational institution” – Provisions of the Madarsa Act are “conducive to making the institution an effective vehicle of education for minority community” without depriving the educational institutions of their minority character – Madarsa Act secures the interests of the minority community in Uttar Pradesh because it regulates the standard of education imparted by the recognised Madarsas; and it conducts examinations and confers certificates to students, allowing them the opportunity to pursue higher education – Madarsa Act is consistent with the positive obligation of the State to ensure that students studying in the recognised Madarsas attain a minimum level of competency which will allow them to effectively participate in society and earn a living – Thus, the Madarsa Act furthers substantive equality for the minority community – State legislature has established a Board to recognise and regulate Madarsa education is not violative of Art.14. [Paras 58, 65, 72, 73]

**Constitution of India – Art.21-A and 30 – Interplay of Art.21-A and Art.30 – Explanation:**

**Held:** Art.21-A provides that the State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine – It

**Digital Supreme Court Reports**

imposes a constitutional obligation on the State to impart elementary and basic education – Art.30(1) guarantees the right to establish and administer educational institutions of their choice to religious and linguistic minorities – However, the State has an interest in ensuring that the minority educational institutions impart secular education along with religious education or instruction – State generally strikes a balance by enacting regulations accompanying the recognition of minority educational institutions – High Court erred in holding that education provided under the 2004 Act is violative of Art.21A because RTE Act which facilitates the fulfilment of the fundamental right u/Art.21 contains a specific provision by which it does not apply to minority educational institutions; the right of a religious minority to establish and administer Madarsas to impart both religious and secular education is protected by Art.30; and Board and State Government have sufficient regulatory powers to prescribe and regulate standards of education for the Madarsas – Uttar Pradesh Board of Madarsa Education Act, 2004 – Right of Children to Free and Compulsory Education Act, 2009. [Paras 74-79]

**Education/Educational Institutions – Madarassas – History of Madarsas – Teaching in Madarsas – Elucidated.** [Paras 2-23]

**Constitution of India – Arts.25-30, 14-16 – Secularism in the constitutional context – Secularism and regulation of minority educational institutions – Stated.** [Paras 37-45]

**Constitution of India – Art.30(1) – Secularism – Concept of positive secularism:**

**Held:** In the spirit of positive secularism, Art.30 confers special rights on religious and linguistic minorities because of their numerical handicap and to instil in them a sense of security and confidence – Positive concept of secularism requires the State to take active steps to treat minority institutions on par with secular institutions while allowing them to retain their minority character – Positive secularism allows the State to treat some persons differently to treat all persons equally – Concept of positive secularism finds consonance in principle of substantive equality. [Para 70]

**Constitution of India – Basis structure doctrine – Testing the validity of a statute for violation of the basic structure:**

**Held:** Statute can be struck down only for the violation of Part III or any other provision of the Constitution or for being without

**Anjum Kadari & Anr. v. Union of India & Ors.**

legislative competence – Constitutional validity of a statute cannot be challenged for the violation of the basic structure of the Constitution since the concepts such as democracy, federalism, and secularism are undefined concepts – Allowing courts to strike down legislation for violation of such concepts will introduce an element of uncertainty – Challenge to the constitutional validity of a statute for violation of the basic structure is a technical aspect because the infraction has to be traced to the express provisions of the Constitution – Thus, in a challenge to the validity of a statute for violation of the principle of secularism, it must be shown that the statute violates provisions of the Constitution pertaining to secularism – High Court erred in holding that a statute is bound to be struck down if it is violative of the basic structure. [Para 55]

**Constitution of India – Minority educational institutions – Regulation of, by the State:**

**Held:** State has an interest in ensuring that minority educational institutions provide standards of education similar to other educational institutions – State can enact regulatory measures to promote efficiency and excellence of educational standards – Regulations about standards of education do not directly bear upon the management of minority institutions – State can regulate aspects of standards of education such as course of study, qualification and appointment of teachers, health and hygiene of students, and facilities for libraries – Affiliation or recognition of minority educational institutions by the Government secures the academic interests of students studying in such institutions to pursue higher education. [Paras 58, 62]

**Constitution of India – Legislative competence of the state legislature – Interpretation of the entries in the Seventh Schedule – Relevant principles – Elucidated. [Para 84]**

**Case Law Cited**

*Anshuman Singh Rathore v. Union of India and Others, Writ (C) No. 6049 of 2023; S.R. Bommai v. Union of India [1994] 2 SCR 644; Dr. M. Ismail Faruqui v. Union of India [1994] Supp. 5 SCR 1 : (1994) 6 SCC 360; Seshammal v. State of Tamil Nadu [1972] 3 SCR 815 : (1972) 2 SCC 11; Ratilal Panachand Gandhi v. State of Bombay [1954] 1 SCR 1055 : (1954) 1 SCC 487; D.A.V. College v. State of Punjab [1971] Supp. 1 SCR 677 : (1971) 2 SCC 269; Aruna Roy v. Union of India [2002] Supp. 2*

**Digital Supreme Court Reports**

**SCR 266** : (2002) 7 SCC 368; Ahmedabad St Xavier's College Society v. State of Gujarat [1975] 1 SCR 173 : (1974) 1 SCC 717; T.M.A. Pai Foundation v. State of Karnataka [2002] Supp. 3 SCR 587 : (2002) 8 SCC 481; Indira Nehru Gandhi v. Raj Narain [1978] 2 SCR 405 : 1975 Supp SCC 1; State of Kerala v. Peoples Union for Civil Liberties [2009] 11 SCR 142 : (2009) 8 SCC 46; State of A.P. v. McDowell & Co. [1996] 3 SCR 721 : (1996) 3 SCC 709; State of Karnataka v. Union of India [1978] 2 SCR 1 : (1977) 4 SCC 608; Kuldip Nayar v. Union of India [2006] Supp. 5 SCR 1 : (2006) 7 SCC 1; Madras Bar Association v. Union of India [2014] 10 SCR 1 : (2014) 10 SCC 1; Ashok Kumar Thakur v. Union of India [2007] 7 SCR 63 : (2008) 6 SCC 1; Supreme Court Advocates-on-Record Association v. Union of India (2016) 5 SCC 1; State of Kerala v. Very Rev. Mother Provincial [1971] 1 SCR 734 : (1970) 2 SCC 417; In re Kerala Education Bill 1957 [1959] 1 SCR 995 : 1958 SCC OnLine SC 8; Saints High School v. Government of AP [1980] 2 SCR 924 : (1980) 2 SCC 478; Dayanand Anglo Vedic (DAV) College Trust and Management Society v. State of Maharashtra [2013] 4 SCR 821 : (2013) 4 SCC 14; Sidhajbhai Sabhai v. State of Bombay [1963] 3 SCR 837 : 1962 SCC OnLine SC 150; Milli Talimi Mission v. State of Bihar [1985] 1 SCR 410 : (1984) 4 SCC 500; Frank Anthony Public School Employees' Association v. Union of India [1987] 1 SCR 238 : (1986) 4 SCC 707; Bihar State Madarasa Education Board v. Madarasa Hanfia Arabic College [1989] Supp. 2 SCR 399 : (1990) 1 SCC 428; Supriyo v. Union of India [2023] 16 SCR 1209 : 2023 SCC OnLine SC 1348; St Stephens College v. University of Delhi [1991] Supp. 3 SCR 121 : (1992) 1 SCC 558; Joseph Shine v. Union of India [2018] 11 SCR 765 : (2019) 3 SCC 39; Ravinder Kumar Dharival v. Union of India [2021] 13 SCR 823 : (2023) 2 SCC 209; Neil Aurelio Nunes v. Union of India [2022] 1 SCR 970 : (2022) 4 SCC 1; Bharatiya Seva Samaj Trust v. Yogeshbhai Ambalal Patel [2012] 7 SCR 1054 : (2012) 9 SCC 310; State of Tamil Nadu v. K Shyam Sunder [2011] 11 SCR 1094 : (2011) 8 SCC 737; Society for Unaided Private Schools of Rajasthan v. Union of India [2012] 2 SCR 715 : (2012) 6 SCC 1; Pramati Educational and Cultural Trust v. Union of India [2014] 11 SCR 712 : (2014) 8 SCC 1; Maharashtra State Board of Secondary and Higher Secondary Education v. K S Gandhi [1991] 1 SCR 772 : (1991) 2 SCC 716; Mineral Area Development Authority & Anr. v Steel Authority of India & Anr. [2024] 8 SCR 540 : 2024 INSC

### Anjum Kadari & Anr. v. Union of India & Ors.

**607; Forum for People's Collective Efforts v. State of W.B. [2021]**

**5 SCR 613 : (2021) 8 SCC 599; Prof. Yashpal & Anr. v. State of Chhattisgarh [2005] 2 SCR 23 : (2005) 5 SCC 420; R.M.D. Chamarbaugwalla v. Union of India [1957] 1 SCR 930 : 1957 SCC OnLine SC 11 – referred to.**

#### Books and Periodicals Cited

Yoginder Sikand, Bastions of the Believers: Madrasas and Islamic Education in India (Penguin Books, 2005); Arshad Alam, 'Understanding Madrasas' (2003) 38(22) Economic and Political Weekly 2123; Padmaja Nair, The State and madrasas in India (Working Paper 15, University of Birmingham 2009) 11; Social, Economic and Educational Status of the Muslim Community of India: A Report (Prime Minister's High Level Committee, Cabinet Secretariat, Government of India) Appendix Table 4.4 (293).

#### List of Websites

<https://archive.pib.gov.in/archive/releases98/lyr2003/rdec2003/12122003/r1212200330.html>; Department of School Education and Literacy, <https://dsel.education.gov.in/spemm>; Central Sponsored Scheme for Providing Quality Education in Madrasa, [https://www.education.gov.in/sites/upload\\_files/mhrd/files/upload\\_document/SPQEM-scheme.pdf](https://www.education.gov.in/sites/upload_files/mhrd/files/upload_document/SPQEM-scheme.pdf).

#### List of Acts

Uttar Pradesh Board of Madarsa Education Act, 2004; Right of Children to Free and Compulsory Education Act, 2009; University Grants Commission Act 1956; Constitution of India; Constitution (Forty-second Amendment) Act, 1976; Uttar Pradesh Non-governmental Arabic and Persian Madarsa Recognition, Administration and Services (Second Amendment) Regulations, 2018; Madrasa Education Rules 1969; Non-Government Arabic and Persian Madrasa Recognition Rules 1987; Uttar Pradesh Non-Governmental Arabic and Persian Madarsa Recognition, Administration and Services Regulations, 2016; Bihar State Madarasa Education Board Act 1982; Government of India Act 1935.

#### List of Keywords

Constitutionality of Uttar Pradesh Board of Madarsa Education Act, 2004; Principle of secularism; Regulate standards of education, qualifications for teachers, and conduct of examinations

## Digital Supreme Court Reports

in Madarsas; Standard of education in Madarsas; Imparting Madarsa education; Positive obligation of State; Level of competency; Religious and linguistic minorities to establish and administer educational institutions; Religious minority institutions; Secular education; Minority character; Legislative competence; Higher-education degrees; Fazil and Kamil degrees; Religious teachings or instruction; Coordination and determination of standards in Universities; Regulatory legislation; Interplay of Art. 21-A and Art. 30 of Constitution; Impart elementary and basic education; Madarasas; History of Madarsas; Teaching in Madarsas; Secularism in constitutional context; Secularism and regulation of minority educational institutions; Secularism; Positive secularism; Basis structure doctrine; Constitutional validity of statute; Democracy; Federalism; Element of uncertainty; Regulatory measures to promote efficiency and excellence of educational standards; Legislative competence of state legislature; Interpretation of entries in Seventh Schedule.

### Case Arising From

CIVIL APPELLATE/ ORIGINAL JURISDICTION: Special Leave Petition (C) No. 8541 of 2024

From the Judgment and Order dated 22.03.2024 of the High Court of Judicature at Allahabad, Lucknow Bench in WC No. 6049 of 2023

With

Special Leave Petition (C) Nos. 7857, 7821, 7878, 7890 and 13038 of 2024, Contempt Petition (C) No. 591 of 2024 In SLP (C) No. 7878 of 2024 and Transfer Petition (C) No. 2697 of 2024

### Appearances for Parties

Tushar Mehta, SG, KM Nataraj, A.S.G., Sharan Dev Singh Thakur, Sr. A.A.G., Ms. Swarupama Chaturvedi, M.R. Shamshad, P. Chidambaram, Dr. Abhishek Manu Singhvi, Mukul Rohatgi, P. S. Patwalia, Salman Khurshid, Dr. Menaka Guruswamy, Ms. Madhavi Divan, Nachiketa Joshi, Guru Krishna Kumar, M.R. Shamshad, Sr. Advs., Abhaid Parikh, Mohd Kumail Haider, Arijit Sarkar, Syed Jafar Raza Zaidi, Ms. Zeb Hasan, Mohd. Waquas, Shariq Ahmed, Talha Abdul Rahman, Tariq Ahmed, Vinay Vats, Faizan Ahmad, M/s. Ahmadi Law Offices, Rohit Amit Sthalekar, Sankalp Narain, M.A. Ausaf, Hritudhwaj Pratap Sahi, H.P. Sahi, Srivats Narain, Ms. Ranjeeta Rohatgi, Yash Johri, Ms. Lubna Naaz,

**Anjum Kadari & Anr. v. Union of India & Ors.**

Pradeep Kumar Yadav, Gopal Singh, Vishal Thakre, Ms. Anjale Patel, Ms. Chhaya, Utkarsh Pratap, Ms. Arunima Das, Gagan Kumar, Sanjeev Malhotra, Mahesh Thakur, Santosh Kumar, Mrs. Santosh Kumar, Praneet Pranav, Ms. Sindoora Vnl, Sai Shashank, Ms. Aarushi Singh, Amit Sharma, Vikash Chandra Shukla, Rahul G. Tanwani, Ms. Bhavya Tyagi, Ms. Aishaani Narain, Ms. Nidhi Khanna, Ms. Aditi Tripathi, Ms. Ruchira Goel, Siddharth Thakur, Ms. Indira Bhakar, Amrish Kumar, Kanu Agrawal, Sansriti Pathak, Aaditya Dixit, Amit Sharma V, Ms. Rajeshwari Shankar, Gurmeet Singh Makker, Anas Tanwir, Ebad Ur Rahman, Afzal Ahmad Siddiqui, Ms. Masoom Raj Singh, Mohd. Asif Abbas, Tadimalla Bhaskar Gowtham, Subodh S. Patil, Alabhyaa Dhamija, Pulkit Shrivastava, Shuvodeep Roy, Gautam Singh, Bhakti Vardhan Singh, Ashwin K., Ranjeet Mishra, Krishna Kant Dubey, Mohneesh Pratap Singh, Ms. Saumya Kapoor, Aayush Shivam, Ms. Kavita Chaturvedi, Manoj Ranjan Sinha, Vishal Agrawal, Advs. for the appearing parties.

**Judgment / Order of the Supreme Court**

**Judgment**

**Dr Dhananjaya Y Chandrachud, CJI.**

Table of Contents\*

|  |           |
|--|-----------|
| <b>A. Introduction .....</b>   | <b>4</b>  |
| <b>B. Background .....</b>   | <b>4</b>  |
| a. History of Madarsas .....   | 4         |
| b. Teaching in Madarsas .....  | 6         |
| c. Madarsa Act .....   | 9         |
| d. Steps taken by the State Government and the Board pursuant to the Madarsa Act ..... | 18        |
| e. Proceedings before the High Court and Impugned Judgment .....                       | 20        |
| f. Steps taken by the State Government and the proceedings before this Court .....     | 23        |
| <b>C. Submissions .....</b>  | <b>24</b> |
| <b>D. Secularism and regulation of minority educational institutions .....</b>         | <b>29</b> |

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

## Digital Supreme Court Reports

|           |   |           |
|-----------|---|-----------|
| <b>a.</b> | <b>Secularism in the constitutional context .....</b>   | <b>29</b> |
| <b>b.</b> | <b>Testing the validity of a statute for violation of the basic structure of the Constitution .....</b>     | <b>34</b> |
| <b>c.</b> | <b>Regulation of minority educational institutions ....</b>   | <b>41</b> |
| <b>d.</b> | <b>The Madarsa Act is a regulatory legislation .....</b>  | <b>45</b> |
| <b>e.</b> | <b>Interplay of Article 21-A and Article 30 .....</b>   | <b>51</b> |
| <b>E.</b> | <b>Legislative Competence .....</b>   | <b>54</b> |
| <b>a.</b> | <b>The Madarsa Act is within the legislative competence of the State under Entry 25, List III .....</b>     | <b>54</b> |
| <b>b.</b> | <b>Certain provisions of the Madarsa Act conflict with the UGC Act enacted under Entry 66, List I .....</b> | <b>59</b> |
| <b>c.</b> | <b>The entire Madarsa Act need not be struck down on the above ground .....</b>                             | <b>65</b> |
| <b>F.</b> | <b>Conclusion .....</b>   | <b>69</b> |

### **A. Introduction**

1. The High Court of Judicature at Allahabad<sup>1</sup> has held the Uttar Pradesh Board of Madarsa Education Act, 2004<sup>2</sup> to be unconstitutional on the ground that it violates the principle of secularism and Articles 14 and 21A of the Constitution. The Madarsa Act established the Uttar Pradesh Board of Madarsa Education,<sup>3</sup> to regulate, among other things, the standards of education, qualifications for teachers, and conduct of examinations in Madarsas in the State of Uttar Pradesh. The entirety of the Act has been struck down by the High Court.

### **B. Background**

- a. History of Madarsas
2. The term ‘madarsa’ refers to any school or college where any sort of education is imparted.<sup>4</sup> The history of the establishment of Madarsas

<sup>1</sup> “High Court”

<sup>2</sup> “Madarsa Act”

<sup>3</sup> “Board”

<sup>4</sup> Yoginder Sikand, *Bastions of the Believers: Madrasas and Islamic Education in India* (Penguin Books, 2005)

**Anjum Kadari & Anr. v. Union of India & Ors.**

in the Indian subcontinent may be traced to the rule of the Tughlaqs.<sup>5</sup> The pre-colonial Madarsas were of two types: (i) the Maktabs which were attached to mosques and imparted elementary education; and (ii) the Madarsas which were centres of higher learning and contributed to the administrative, religious, and cultural needs of the prevalent society.<sup>6</sup> During colonial rule, the relative importance of Madarsas diminished with the introduction of English as the language of the colonial administration.<sup>7</sup>

3. The colonial government formulated the Education Code of 1908 to recognize Madarsas in Uttar Pradesh for conducting Arabi-Pharsi examinations. The Arabic institutions preparing candidates for Maulvi, Alim, and Fazil examinations and the Persian institutions preparing candidates for Munshi and Kamil examinations were required to make an application to the Registrar of Arabic and Persian Exams.
4. After Independence, the Department of Education of the UP government issued the Madrasa Education Rules 1969 to bring Madarsas under the domain of the Education Department. Subsequently, the State government framed the UP Non-Government Arabic and Persian Madrasa Recognition Rules 1987<sup>8</sup> to govern the procedure for recognition and the terms and conditions of service of teachers in the Madarsas. According to the 1987 Rules, recognition to Madarsas was granted by the Recognition Committee and confirmed by the Registrar of Arabic and Persian Exams. The 1987 Rules also prescribed requirements for the quality of buildings and eligibility qualifications for teaching staff as a precondition to the grant of recognition. In 1996, the management of Madarsas was transferred to the Minority Welfare and Waqf Department of the UP government.
5. The Central government has also framed schemes to modernize education imparted in Madarsas. In 1993-1994, the Central Government implemented the Area Intensive and Madrasa Modernization Programme<sup>9</sup> to encourage Madarsas and Maktabs

<sup>5</sup> ibid

<sup>6</sup> Arshad Alam, 'Understanding Madrasas' (2003) 38(22) Economic and Political Weekly 2123

<sup>7</sup> Padmaja Nair, The State and madrasas in India (Working Paper 15, University of Birmingham 2009) 11

<sup>8</sup> "1987 Rules"

<sup>9</sup> "Madrasa Modernization Programme" (Under the Madrasa Modernization Programme, the government covered the salary of two madrasa teachers who taught modern subjects. It also provided one-time grants for purchase of science and math kits and book-banks for the madrasa libraries. See PIB,

## Digital Supreme Court Reports

to teach modern subjects such as Science, Mathematics, English, Hindi, and Social Studies alongside the traditional curriculum. The Madrasa Modernization Programme subsequently became a part of the Sarva Shiksha Abhiyan. During the 11<sup>th</sup> Five Year Plan (2007 to 2011), the Ministry of Human Resource Development implemented the Scheme for Providing Quality Education in Madrasas to encourage and incentivize Madarsas and Maktabs to impart education in modern subjects by providing them financial assistance.<sup>10</sup> Only Madarsas which have been in existence for at least three years and registered under central or state legislation, Madarsa boards, or waqf boards are eligible to apply for assistance under this scheme.<sup>11</sup>

### b. Teaching in Madarsas

6. According to the data placed on record in the affidavit filed by the State of Uttar Pradesh, there are presently around thirteen thousand Madarsas catering to more than twelve lakh students in the state. The following table is instructive:

| Type of Madarsas                          | Number of Madarsas | Number of students |
|---|--------------------|--------------------|
| State funded                              | 560                | 1,92,317           |
| Permanently recognized (non-state funded) | 3,834              | 4,37,237           |
| Temporarily recognized (non-state funded) | 8,970              | 6,04,834           |
| Total                                     | 13,364             | 12,34,388          |

7. The state government has an annual budget of Rupees one thousand and ninety-six crores for the salaries of teaching and non-teaching staff working in the state-aided Madarsas. The state government also provides books and midday meals to students of state-funded Madarsas. Moreover, it also operates Industrial Training Institutes in

---

Ministry of Human Resource Development, Centre Releases Rs. 5.9 crore for madrasa modernization (12 December 2003) [https://archive.pib.gov.in/archive/releases98/lyr2003/rdec2003/1212200330.html](https://archive.pib.gov.in/archive/releases98/lyr2003/rdec2003/12122003/r1212200330.html))

10 Department of School Education and Literacy, <https://dsej.education.gov.in/spemm>

11 Central Sponsored Scheme for Providing Quality Education in Madrasa, [https://www.education.gov.in/sites/upload\\_files/mhrd/files/upload\\_document/SPQEM-scheme.pdf](https://www.education.gov.in/sites/upload_files/mhrd/files/upload_document/SPQEM-scheme.pdf)

**Anjum Kadari & Anr. v. Union of India & Ors.**

recognised Madarsas to teach trades such as welding, mechanics, and stenography.

8. Academic education in Madarsas is broadly divided into four levels: (i) Tathania (equivalent of elementary classes I to V); (ii) Fauquania (equivalent to upper elementary classes VI to VIII); (iii) Maulvi or munshi (equivalent to a certificate of secondary school or Xth standard); and (iv) Alim (certificate of senior secondary level examination or XIIth standard).
9. The syllabus until the Alim classes is in accordance with the syllabus of the Uttar Pradesh State Council of Educational Research and Training.<sup>12</sup> For the Munshi/Maulvi and Alim levels, the Madarsas teach subjects such as theology (Sunni and Shia), Arabic literature, Persian literature, Urdu literature, General English, General Hindi, and optional subjects such as Mathematics, Home Sciences, Logic and Philosophy, Social Sciences, Science, Tibb (medical science), and Typing. The Munshi/Maulvi and Alim certificates are treated equivalent to High School and Intermediate levels respectively by the Uttar Pradesh government and the Government of India. The Sachar Committee Report suggests that most students study in Madarsas only till primary and middle classes.<sup>13</sup>
10. A few Madarsas also award certificates of Kamil (undergraduate degree) and Fazil (post-graduate degree). The State of Uttar Pradesh has stated in its affidavit that Kamil and Fazil degrees awarded by Madarsas are not recognised as alternatives to graduate and post-graduate degrees respectively. The government further states:

“At the undergraduate and post graduate level, the U.P Madrasa Board grants the Qamil and Fazil degrees respectively, specialized courses for the education of Arabic-Persian and Deeniyat subjects, which are the minimum educational qualifications required for imparting education of Arabic-Persian and Deeniyat subjects in Madrasas. These courses have not been given equivalence by the Government of Uttar Pradesh/Government of India/

12 “SCERT”

13 Social, Economic and Educational Status of the Muslim Community of India: A Report (Prime Minister’s High Level Committee, Cabinet Secretariat, Government of India) Appendix Table 4.4 (293)

**Digital Supreme Court Reports**

any university established by law, nor has the education of these courses been recognized as an alternative to the graduation/post-graduation degree of a university established by law for employment at the level of Uttar Pradesh Government or Government of India.”

11. Consequently, students educated in Madarsas are only eligible for occupations that have High School or Intermediate as qualification requirements. While Kamil and Fazil are not considered to be alternatives to the regular undergraduate and post-graduate degrees, a notification issued by the University Grants Commission<sup>14</sup> in March 2014 which lists the degrees governed by the University Grants Commission Act 1956<sup>15</sup> includes both Fazil and Kamil under the title of ‘Specification of Degrees with Urdu/Persian/Arabic nomenclature’. The effect of the notification shall be considered in the course of the judgment.

c. Madarsa Act

12. The State legislature of Uttar Pradesh enacted the Madarsa Act which was deemed to come into force on 3 September 2004. The long title of the Madarsa Act states that it is “an Act to provide for the establishment of a Board of Madarsa Education in the State and for the matters connected therewith and incidental thereto”. The Statement of Objects and Reasons indicates the reason for the enactment:

“In para 55 of the Education Code the Registrar, Arabi-Pharasi Examinations, Uttar Pradesh, Allahabad had been authorised to recognise the Arabi-Pharasi Madarsas in the State and for conducting the examinations of such Madarsas. These Madarsas were managed by the Education Department. But with the creation of the Minority Welfare and Wakfs Department in 1995 all the works relating to such Madarsas were transferred from Education Department to the Minority Welfare Departments by virtue of which all the works relating to Madarsas are being performed under the control of the Director, Minority

---

14 “UGC”

15 “UGC Act”

**Anjum Kadari & Anr. v. Union of India & Ors.**

Welfare, Uttar Pradesh and the Registrar/Inspector Arabi-Pharasi Madarsas, Uttar Pradesh. The Arabi-Pharasi Madarsas were being administered under the Arabi-Pharasi Madarsas Rules, 1987 but since the said rules have not been made under an Act, many complication [sic] arose in running the Madarsas under the said rules. **Therefore, with a view to removing the difficulties arisen in running the Madarsas, improving the merit therein and making available the best facility of study to the students studying in Madarsas it was decided to make a law to provide for the establishment of a Board of Madarsa Education in the state and for the matters connected therewith or incidental thereto.**

..."

(emphasis supplied)

13. Section 2 provides definitions. The expressions “institution”, “Madarsa Education” and “recognition” have been defined as follows:

**“2. Definitions. —** In this Act unless the context otherwise requires: —

...

(j) “institution” means the Government Oriental College, Rampur and includes a Madarsa or an Oriental College established and administered by Muslim Minorites and recognized by the Board for imparting Madarsa-Education;

(h) “Madarsa-Education” means education in Arabic, Urdu, Parsian, Islamic studies, Tibb Logic, Philosophy **and includes such other branches of learning as may be specified by the Board from time to time;**

...

(j) “recognition” means, recognition for the purpose of preparing candidates for admission to the Board’s Examination;

..."

(emphasis supplied)

**Digital Supreme Court Reports**

14. Section 3 provides the constitution of the Board. Sub-section (1) of Section 3 provides that the Board shall be established at Lucknow on the date declared by the State government by a notification. Sub-section (2) states that the Board shall be a body corporate, while Sub-section (3) details the composition of the Board. The majority of the members of the Board are either part of the State Government (or the legislature) or nominated by the State Government. The Board consists of the following members:
- a. a renowned Muslim educationist in the field of Madarsa Education, nominated by the State Government, who is the **Chairperson**;
  - b. the Director, Minority Welfare, Uttar Pradesh, who is the **Vice Chairperson**;
  - c. principal, Government Oriental College, Rampur;
  - d. one Sunni-Muslim Legislator to be elected by both houses of the State Legislature;
  - e. one Shia-Muslim Legislator to be elected by both houses of the State Legislature;
  - f. one representative of the National Council for Educational Research and Training (NCERT);
  - g. two heads of institutions established and administered by Sunni Muslims, **nominated by the State Government**;
  - h. one head of institution established and administered by Shia Muslims, **nominated by the State Government**;
  - i. two teachers of institutions established and administered by Sunni Muslims **nominated by the State Government**;
  - j. one teacher of an institution established and administered by Shia Muslims, **nominated by the State Government**;
  - k. one Science or Tibb teacher of an institution **nominated by the State Government**;
  - l. the Account and Finance Officer in the Directorate of Minority Welfare, Uttar Pradesh;

**Anjum Kadari & Anr. v. Union of India & Ors.**

- m. the Inspector;<sup>16</sup> and
  - n. an officer not below the rank of Deputy Director nominated by the State Government, who is the **Registrar**.
15. Sub-section (4) of Section 3 deals with the issuance of a notification by the State Government that the Board has been duly constituted, after the election and nomination of the members. Sub-section (5) pertains to the procedure to nominate or elect members who are Sunni-Muslim or Shia-Muslim legislators in certain special circumstances. Sub-section (6) stipulates that from the date of the establishment of the Board, the erstwhile Arbi and Farsi Education Board shall stand dissolved.
16. Section 4 pertains to the power of the State Government to remove members, other than *ex-officio* members, from the Board. This removal may be ordered, if in the opinion of the State Government, the member has “so flagrantly abused his position ... as to render his continuance on the Board detrimental to the public interest”. Section 5 specifies the term of office of the members and Section 6 mandates that the State Government take steps to reconstitute the Board before the expiry of the terms of office of the members. Section 7 governs the procedural specificities of the meetings of the Board, while Section 8 clarifies that no acts of the Board or its committees may be invalidated on the ground of a vacancy or defect in its constitution.
17. Section 9 which enunciates the functions of the Board, is relevant to the constitutional challenge before us. The functions of the Board are wide-ranging and relate to *inter alia* prescribing the course material, granting degrees or diplomas, conducting examinations, recognizing institutions to conduct exams, conducting research and training, and other incidental functions. These functions are exercised at various levels of education detailed above – Tahtania, Fauquania, Munshi, Maulvi, Alim, Kamil, Fazil, and other courses. The provision reads thus:

---

16 “Inspector” has been defined in S.2(e) of the Act as: “(e) “Inspector” means the inspector, Arabic Madarsas, Uttar Pradesh and includes an officer authorised by the State Government to perform all or any of the functions of the inspector under this Act”

**Digital Supreme Court Reports**

**“9. Functions of the Board.** — Subject to the other provisions of this Act the Board shall have the following functions, namely: —

- (a) to prescribe course of instructions, textbooks, other books and instructional material, if any, for Tahtania, Fauquania, Munshi, Maulavi, Alim, Kamil, Fazil and other courses;
- (b) prescribe the course books, other books and instruction material of courses of Arbi, Urdu and Pharsi for classes up to High School and Intermediate standard in accordance with the course determined there for by the Board of High School and Intermediate Education;
- (c) to prepare manuscript of the course books, other books and instruction material referred to in clause (b) by excluding the matters therein wholly or partially or otherwise and to publish them;
- (d) prescribe standard for the appointment of Urdu translators in the various offices of the State and ensure through the appointing authority necessary action with respect to filling up of the vacant posts;
- (e) to grant Degrees, Diplomas, Certificates or other academic distinctions to persons, who—
  - (i) have pursued a course of study in an institution admitted to the privileges or recognition by the Board;
  - (ii) have studied privately under conditions laid down in the regulations and have passed an examination of the Board under like conditions;
- (f) to conduct examinations of the Munshi, Maulavi, Alim and of Kamil and Fazil courses;
- (g) to recognize institutions for the purposes of its examination;
- (h) to admit candidates to its examination;

**Anjum Kadari & Anr. v. Union of India & Ors.**

- (i) to demand and receive such fee as may be prescribed in the regulations;
- (j) to publish or withhold publication of the result of its examinations wholly or in part;
- (k) to co-operate with other authorities in such a manner and for such purposes as the Board may determine;
- (l) to call for reports from the Director on the condition of recognised institutions or of institutions applying for recognition;
- (m) to submit to the State Government its views on any matter with which it is concerned;
- (n) to see the schedules of new demands proposed to be included in the budget relating to institutions recognised by it and to submit if it thinks fit its views thereon for the consideration of the State Government;
- (o) to do all such other acts and things as may be requisite in order to further the objects of the Board as a body constituted for regulating and supervising Madarsa-Education up to Fazil;
- (p) to provide for research or training in any branch of Madarsa-Education viz, Darul Uloom Nav Uloom, Lucknow, Madarsa Babul lim, Mubarakpur, Azamgarh, Darul Uloom Devband, Saharanpur, Oriental College Rampur and any other institution which the State Government may notify time to time.
- (q) to constitute a committee at district level consisting of not less than three members for education up to Tahtania or Faukania standard, to delegate such committee the power of giving recognition to the educational institutions under its control.
- (r) to take all such steps as may be necessary or convenient for or as may be incidental to the exercise of any power, or the performance or discharge of any function or duty, conferred or imposed on it by this Act.”

**Digital Supreme Court Reports**

18. Section 10 pertains to the ‘Powers of the Board’. Sub-section (1) defines these powers in general terms and stipulates that the Board shall have all such powers as may be necessary for the performance of its functions and the discharge of its duties under the Madarsa Act or the allied rules and regulations. Sub-section (2) details specific powers of the Board, without prejudice to the generality of the powers of the Board detailed in sub-section (1). These powers *inter alia* include the power to cancel or withhold the result of an examination, prescribe fees for the examinations conducted, refuse recognition of an institution, call for reports from and inspect institutions to ensure compliance with the prescribed rules and regulations and fix the maximum number of students to be admitted to a course. Sub-section (3) clarifies that the decision of the Board with regard to the matters dealt with in this provision shall be final. Section 11 allows the Board, to recognize an institution “in any new subject or group of subjects for a higher class”, with the prior approval of the State government. Section 12 deals with the proper utilization of donations by the institutions.
19. Section 13 details the ‘Power of the State Government’ to *inter alia* issue directions and orders which are binding on the Board. Sub-section (1) states that the State Government shall have the right to address and to communicate its views to the Board on any matter with which it is concerned. Sub-section (2) requires the Board to report to the State Government if any action has been taken pursuant to the communications or proposals made by the State Government. Sub-section (3) stipulates that in circumstances where the Board does not act within a reasonable time to the satisfaction of the State Government, after considering the explanation or representation by the Board, the State Government may issue necessary directions with which the Board shall comply. Sub-section (4) states that in cases, where the State Government is of the opinion that it is necessary or expedient to take immediate action, it may, without making any reference to the Board, pass an order or take other action consistent with the Act, including modifying, rescinding or making any regulation. Sub-section (5) stipulates that such actions by the State Government shall not be called into question in any court.
20. Section 14 deals with officers and other employees of the Board and provides that they are appointed by the Board, with the prior approval of the State Government. Sections 15 and 16 pertain to

**Anjum Kadari & Anr. v. Union of India & Ors.**

the powers and duties of the Chairperson and Registrar of the Board, respectively, while Section 17 deals with the appointment and constitution of committees and sub-committees.

21. Section 20 stipulates the power of the Board to make regulations.<sup>17</sup> Sub-section (1) provides this power in general terms and empowers the Board to make regulations “for carrying out the purposes of the Act”. Sub-section (2) details particular matters for which the Board may make regulations, without prejudice to the generality of its powers. This includes subjects such as *inter alia* the conferment of degrees, diplomas and certificates, conditions for recognition of institutions, the course of study, and the conduct of examinations. Section 21 mandates that these regulations shall be made with the prior approval of the State Government and published in the Gazette. The State Government may approve the regulations with or without modifications. Pursuant to these provisions, the Board has framed the Uttar Pradesh Non-Governmental Arabic and Persian Madarsa Recognition, Administration and Services Regulations, 2016, with the approval of the State Government.<sup>18</sup>
22. Sections 22 to 26 deal with subjects such as the requirement of a ‘scheme of administration’ for every institution; the procedure for appointment and conditions of service of heads of institutions, teachers, and other employees; casual vacancies; and the power of the Board and Committees to make by-laws, respectively. Section 27 states that no suit, prosecution or legal proceedings shall lie against the State Government, the Board or any of its committees/sub-committees in respect of anything which is done in good faith or under

---

17 Section 20 reads: “20. (1) The Board may make regulations for carrying out the purposes of this Act. (2) In particular and without prejudice to the generality of the foregoing powers, the Board may make regulations providing for all or any of the following matters, namely:—  
 (a) constitution, power and duties of committees and sub-committees;  
 (b) the conferment of Degrees, Diplomas and Certificates;  
 (c) the conditions of recognition of institutions;  
 (d) the courses of study to be laid down for all Degrees, Diplomas and Certificates;  
 (e) the conditions under which candidates shall be admitted to the examinations and research programme of the Board and shall be eligible for Degrees, Diplomas and Certificates;  
 (f) the fees for admission to the examination of the Board;  
 (g) the conduct of examination;  
 (h) the appointment of examiners, moderators, collators, scrutineers, tabulators, Centre inspectors, Superintendents of Centres and invigilators and their duties and powers in relation to the Board’s examinations and the rates of their remuneration;  
 (i) the admission of institutions to the privilege of recognition and the withdrawal of recognition;  
 (j) all matters which are to be, or may, provided for by regulations.”

18 “2016 Regulations”

**Digital Supreme Court Reports**

the Madarsa Act and its allied rules, regulations, by-laws, orders or directions. Section 28 bars the jurisdiction of Courts and states that no order or decision of the Board or its committees/sub-committees shall be called into question in any court.

23. Section 32 confers on the State Government the power to make rules for carrying out the purposes of the Madarsa Act.<sup>19</sup>
  - d. Steps taken by the State Government and the Board pursuant to the Madarsa Act
24. The provisions of the Madarsa Act grant the Board and the State Government wide-ranging powers to frame regulations, directions and rules and to regulate education in the Madarsas. After the enactment of the Madarsa Act, both the Board and the State Government have in fact taken various steps. Some of the steps detailed below indicate that there is a marked shift by the State Government and the Board towards including modern subjects in the curriculum and adopting the established curriculum (such as the NCERT curriculum). These steps are:
  - a. On 15 May 2018, the Board issued a circular with the stated aim of “bringing educational upgradation in standardization and uniformity” in the Madarsas. The circular states that it has been decided that for education in the Madarsas in Mathematics, Science, English, Hindi, Computer Science and Social Science, the curriculum will be based on the available textbooks of NCERT. Subsequently, by a letter dated 30 May 2018, the State Government sent a copy of the Circular and directed all the District Minority Welfare Officers to include the books prescribed by the NCERT in the syllabus of Madarsa Education from the Academic Session of 2018-19. The District Minority Welfare Officers were directed to take steps to ensure that there are sufficient NCERT Books and to apprise the Board if training is required for the teachers in the Madarsas in the district;
  - b. Pursuant to Section 20, the Board has framed the 2016 Regulations with the approval of the State Government. Two amendments were made to the 2016 Regulations in 2017 and

19 Section 32 reads: “32. The State Government may, by notification, make rules for carrying out the purposes of this Act.”

**Anjum Kadari & Anr. v. Union of India & Ors.**

2018, respectively. The latter amended the provision which dealt with the medium of instruction in the Madarsas. Originally, the Regulations provided that while all subjects could be taught, the medium of education should be Urdu, Arabic and Persian. However, the provision was amended to stipulate that while the medium of instruction in “Deenayat and other Arabic, Persian subjects” shall remain in Urdu, Arabic and Persian, the medium of instruction for “Maths, Science, Social Science, Computer etc.” may be Urdu, Hindi or English, as the case may be;<sup>20</sup> and

- c. The functions of the Board under the Madarsa Act include prescribing the course of instruction, textbooks and instructional material for courses at various educational levels and classes. For this purpose, the Board has held several meetings from time to time. The Minutes of one such meeting dated 12 October 2021 have been placed on record before this Court, which contains a discussion on the curriculum to be implemented in Madarsas. It is noted in the Minutes of the Meeting that the Board has approved the inclusion of Elementary Math and Elementary Science, History and Civics as compulsory subjects from Class 1 to secondary level in accordance with the NCERT curriculum.

- e. Proceedings before the High Court and Impugned Judgment
- 25. In 2019, a Writ Petition was instituted before the High Court by an individual appointed as a part-time assistant teacher in one of the Madarsas.<sup>21</sup> He sought regularization of his services and salary at par with regular teachers, relying on several provisions of the Madarsa Act and the allied Regulations. By an Order dated 23 October 2019, a Single Judge of the High Court issued notice on the Writ Petition and observed that certain questions related to the vires of the Madarsa Act arose for consideration, which warranted consideration by a larger bench. The Single Judge observed as follows:

“...

- 7. From perusal of the same, following questions arise for consideration: -

<sup>20</sup> Uttar Pradesh Non-governmental Arabic and Persian Madarsa Recognition, Administration and Services (Second Amendment) Regulations, 2018

<sup>21</sup> Writ A No. 29324 of 2019.

**Digital Supreme Court Reports**

- (i) Since the Madarsa Board is constituted for education in 'Arabic, Urdu, Parsian, Islamic-studies, Tibb Logic, Philosophy and includes such other branches of learning as may be specified by the Board from time to time', how come persons of a particular religion are provided to be member of the same? It does not talk about exponent (sic) in the aforesaid fields, for the purposes of which the Board is constituted, but persons of specific religion. It was put to learned Additional Chief Standing Counsel as to whether the purpose of the Board is to impart religious education only, to which he submits that a perusal of the Madarsa Education Act, 2004 does not indicate so.
- (ii) With a secular constitution in India can persons of a particular religion be appointed/nominated in a Board for education purposes or it should be persons belonging to any religion, who are exponent in the fields for the purposes of which the Board is constituted or such persons should be appointed, without any regard to religion, who are exponent in the field for the purposes of which the Board is constituted?
- (iii) The Act further provides the Board to function under the Minority Welfare Ministry of State of U.P., hence, a question arises as to whether it is arbitrary for providing the Madarsa education to be run under the Minority Welfare Department while all the other education institutions including those belonging to other minorities communities like Jains, Sikhs, Christians etc being run under the Education Ministry and whether it arbitrarily denies the benefit of experts of education and their policies to the children studying in Madarsa?

**8. All these questions impacts the vires of the Madarsa Act, 2004 and are important questions to be decided before looking into the application of the Madarsa Act, 2004 and the regulations framed thereunder. Thus, I**

**Anjum Kadari & Anr. v. Union of India & Ors.**

**find it appropriate that the matter may be placed before the Larger Bench for decision on the aforesaid issue.**

..."

(emphasis supplied)

26. Other similar Writ Petitions were also referred to a larger bench and the Chief Justice of the High Court constituted a bench to hear the reference. During the pendency of the reference, another Writ Petition was filed challenging the *vires* of the Madarsa Act on the ground that it violates the principle of secularism and Articles 14, 15 and 21-A of the Constitution.<sup>22</sup> A challenge was also mounted on the constitutionality of Section 1(5) of the Right of Children to Free and Compulsory Education Act, 2009,<sup>23</sup> which *inter alia* states that the Act does not apply to Madarsas.<sup>24</sup> This petition was filed by an advocate practicing before the High Court.
27. All these petitions were tagged together and placed before the Division Bench of the High Court. By an Order dated 14 July 2023, the High Court appointed three *amici curiae* to assist the Court. Several organizations, some of whom are before this Court in the present proceedings, moved intervention applications before the High Court. In the Impugned Judgement, the Division Bench recorded the position of the State of Uttar Pradesh and the Madarsa Board, to the effect that the Madarsas impart not only religious education but also "religious instruction and teachings." Accordingly, the reference was re-framed by the High Court in the following terms:

"Whether the provisions of the Madarsa Act stand the test of Secularism, which forms a part of the basic structure of the Constitution of India."<sup>25</sup>

28. By a judgment dated 22 March 2024, the High Court rejected the preliminary objections raised by some of the parties with respect to the *locus standi* of the petitioner and the purported absence of adequate pleadings on the subject. On the merits, the High Court

22 Writ (C) No. 6049 of 2023 - Anshuman Singh Rathore versus Union of India and others.

23 "RTE Act"

24 Section 1(5) reads: "(5) Nothing contained in this Act shall apply to Madrasas, Vedic Pathsalas and educational institutions primarily imparting religious instruction."

25 Para 9, Impugned Judgment.

**Digital Supreme Court Reports**

held that the Madarsa Act violates the principle of secularism and Articles 14, 21 and 21-A of the Constitution of India and is *ultra vires* Section 22 of the UGC Act. According to the High Court, the object and purpose of the Madarsa Act itself violated the principle of secularism, and thus, it is not possible to segregate or save any portion of the legislation.

29. The High Court held that the Madarsa Act in its entirety was unconstitutional and directed that the State Government take steps to accommodate all students studying in the Madarsas in regular schools recognized under the Primary Education Board and the High School and Intermediate Education Board of the State of Uttar Pradesh. The State Government was directed to establish a sufficient number of additional seats and new schools, if required for this purpose and to ensure that no child between the ages of six and fourteen is left without admission in a duly recognized institution.
  - f. Steps taken by the State Government and the proceedings before this Court
30. In view of the Impugned Judgement, the Government of Uttar Pradesh took steps to implement the directions. On 4 April 2024, a Government Order was issued by the Chief Secretary, Government of Uttar Pradesh, with the following directions:
  - a. Madarsas eligible to get recognition from the education boards, at the state or central level, based on various parameters, can run primary or secondary schools after getting recognized by the concerned education boards; and
  - b. Madarsas which cannot get formal recognition because of “sub-standard” facilities will be closed. Committees are to be set up at the district level to ensure that the students studying in such Madarsas are admitted to the schools run by the education department.<sup>26</sup>
31. Special leave petitions were instituted by the appellant(s) before this Court assailing the correctness of the Impugned Judgement. On 5 April 2024, this Court heard the counsel for the various parties and issued notice on the lead petition. While staying the implementation

---

26 G.O. No. 43/52-3-3034-2099/4/2024.

**Anjum Kadari & Anr. v. Union of India & Ors.**

of the Impugned Judgement, this Court recorded the brief reasons for issuing the interim direction. Accordingly, on 12 April 2024, in view of the stay on the Impugned Judgement, the above Government Order issuing directions for implementation were withdrawn by the State Government.

**C. Submissions**

32. Dr Abhishek Manu Singhvi, Mr Salman Khurshid, and Dr Menaka Guruswamy, senior counsel assailed the Impugned Judgment and advanced the following submissions:
- a. The State legislature is empowered under Article 246 read with Entry 25 of List III of the Seventh Schedule to enact legislation to regulate Madarsa education. The Madarsa Act principally deals with the regulation of Madarsas concerning curriculum, instruction, standard of education, conduct of examination, and qualifications for teaching. The enactment of laws for regulating secular activities of minority institutions or prescribing standards of education is consistent with Articles 25 to 30;
  - b. In S R Bommai v. Union of India,<sup>27</sup> it was held that secularism is a positive concept of equal treatment of all religions. Articles 25 to 30 secure the rights of religious and linguistic minorities, including their right to establish and administer educational institutions. By recognizing and regulating the Madarsa education, the State legislature is taking positive action to safeguard the educational rights of the minorities;
  - c. Article 28 prohibits religious instructions in educational institutions wholly maintained out of state funds. Madarsas impart education based on modern curriculum such as Mathematics, Social Sciences, and Science. Additionally, Madarsas impart education about religion and not “religious instructions.” Article 28 does not bar the State from funding schools providing religious education;
  - d. Article 21-A recognizes the fundamental right of children between the ages of six to fourteen to free and compulsory education. Section 1(5) of the RTE Act excludes Madarsas from

27 [1994] 2 SCR 644

**Digital Supreme Court Reports**

the purview of the legislation. The law enacted by the State in pursuance of Article 21-A cannot violate the fundamental rights of minorities to establish and administer educational institutions; and

- e. Striking down the Madarsa Act will create a legislative vacuum and result in the deregulation of Madarsas. This will affect the future of more than twelve lakh students studying across the Madarsas in UP. Further, the direction of the High Court to relocate students studying in Madarsas to regular schools will effectively shut down all Madarsas in the state and result in violation of Article 30.
33. Mr KM Nataraj, Learned Additional Solicitor General, appeared for the State of Uttar Pradesh. In its Counter Affidavit, the State of Uttar Pradesh states that it had accepted the decision in the Impugned Judgement and taken steps to implement it. However, it would comply with the final decision of this Court and has accordingly, withdrawn the government order which sought to implement the Impugned Judgement. Mr Nataraj contended that while some provisions of the Madarsa Act may be unconstitutional, the High Court erred in striking down the entire Madarsa Act without severing the invalid provisions from the rest of the Madarsa Act.
34. Mr Guru Krishna Kumar, learned Senior Counsel made the following submissions:
  - a. The Act does not make any provisions to impart secular subjects as part of the curriculum and is a measure undertaken by the state to recognize and regulate “religious instruction” traceable to a particular community;
  - b. Article 28 *inter alia* prohibits institutions which receive funds from the state from imparting ‘religious instruction’. Thus, as a corollary, the state cannot seek to regulate and thereby, recognize religious instruction;
  - c. The preamble which specifies that India is a “secular” republic, Article 21-A, Article 25, Article 28, Article 30 and Article 41 all point to the “pervasive principle” of secularism underlying the Constitution. This principle militates against the state regulating religious instruction;

**Anjum Kadari & Anr. v. Union of India & Ors.**

- d. The striking down of the Act would only discontinue the functioning of the Board and the consequent state recognition of religious instruction. The education provided in the Madarsas and their existence would continue to be protected by Article 30;
  - e. The word “education” in Entry 25, List III of the Seventh Schedule must be construed to mean “secular education” and cannot include “religious instruction”. Thus, the state legislature only has the competence to enact a law that regulates educational institutions, but no power to recognize and regulate religious instruction; and
  - f. Entry 25, List III is subject to Entry 66 List I, which pertains to higher education and standards. The Parliament has enacted the UGC Act under Entry 66, List I. Section 22 of the UGC Act provides that no degrees can be conferred by any institution other than the institutions defined under the UGC Act. Thus, the provisions of the Madarsa Act which regulate higher education, at the undergraduate, graduate and grant the Board power to grant equivalent degrees are beyond the legislative competence of the state legislature.
35. Ms Madhavi Divan, learned Senior Counsel, advanced the following submissions:
- a. The Madarsa Act deprives students enrolled in such institutions of the benefits of mainstream, holistic, secular education, thereby violating Articles 21 and 21A;
  - b. The Madarsa Act divests students of equal opportunity in relation to future employment opportunities (Articles 14, 15, 16) and the right to practice any profession, occupation, trade or business of their choice (Article 19(1)(g)). It creates two classes of children — the first, who receive secular, mainstream education, and the second, who receive religious instruction, which prohibits them from even attempting to adopt professions which are easily available for the former class. This deprivation of choice also violates the constitutional value of dignity and deprives students of the liberty of thought and expression protected under Article 19;
  - c. The Madarsa Act violates the constitutional value of ‘fraternity’ as the dissemination of Madarsa education creates intellectual

**Digital Supreme Court Reports**

- and outlook barriers, which prevent students from integrating into a pluralistic society;
- d. The definition of “Madarsa Education” in Section 2(h) indicates that the focus on “other branches of learning” is only tertiary. The focus of the statute and the competence of the Board is restricted to religious instruction;
  - e. The Board is disproportionately populated by persons whose competence is in the field of religious instruction. As decisions of the Board are taken by a majority of members, present and voting, the views of the “non-secular” members would prevail and the curriculum is likely to be skewed in favour of religious education. The functions of the Board delineated in Section 9 also indicate disproportionate weightage to religious instruction; and
  - f. The qualifications for teachers in the Madarsas laid down in the regulations are not adequate to ensure quality education. The qualifications are rooted in the “same Madarsa echo chamber”, and the minimum requirements for teaching in regular educational institutions are not prescribed.
36. The National Commission for the Protection of Child Rights (NCPCR) supported the arguments of the respondents and assailed the constitutional validity of the Madarsa Act.
- D. Secularism and regulation of minority educational institutions**
- 37. The preamble to the Constitution enshrines the declaration to constitute India into a sovereign, socialist, secular, democratic, republic. The 42<sup>nd</sup> Amendment to the Constitution incorporated the expression ‘secular’ in the preamble. However, the constitutional amendment merely made explicit what is implicit according to the scheme of the Constitution.<sup>28</sup>
    - a. Secularism in the constitutional context
  - 38. Articles 14, 15, and 16 mandate the State to treat all people equally irrespective of their religion, faith, or belief.<sup>29</sup> Article 14 provides that

28 [S R Bommai](#), [304] Justice BP Jeevan Reddy (for himself and Justice Agrawal)

29 [S R Bommai](#) (supra) [304] (Justice BP Jeevan Reddy)

### Anjum Kadari & Anr. v. Union of India & Ors.

the State shall not deny to any person equality before the law or equal protection of laws within the territory of India. Article 15 provides that the State shall not discriminate against any citizen on grounds only of **religion**, race, caste, sex, place of birth or any of them. Article 16 mandates that there shall be equality of opportunity for all citizens in matters relating to public employment or appointment to any office under the State. Article 16(2) further provides that no citizen shall be discriminated against in respect of any employment or office under the State on the grounds of **religion**, race, caste, sex, descent, place of birth, residence, or any of them.

39. Secularism is one of the facets of the right to equality.<sup>30</sup> The equality code outlined in Articles 14, 15, and 16 is based on the principle that all persons, irrespective of their religion, should have equal access to participate in society. The State cannot give preference to persons belonging to a particular religion in matters of public employment. As a corollary, the equality code prohibits the State from mixing religion with any secular activity of the State.<sup>31</sup> However, the Constitution recognizes that equal treatment of persons is illusionary unless the State takes active steps in that regard. Therefore, the equality code imposes certain positive obligations on the State to provide equal treatment to all persons irrespective of their religion, faith, or beliefs.<sup>32</sup>
40. Articles 25 to 30 contain the other facet of secularism, that is, the practice of religious tolerance by the State.<sup>33</sup> Article 25 provides

---

30 [Dr M Ismail Faruqui v. Union of India](#) (1994) 6 SCC 360 [37]

31 [S R Bommai](#) (supra) [148] Justice Sawant ["148. One thing which prominently emerges from the above discussion on secularism under our Constitution is that whatever the attitude of the State towards the religions, religious sects and denominations, religion cannot be mixed with any secular activity of the State. In fact, the encroachment of religion into secular activities is strictly prohibited."]

32 [S R Bommai](#) (supra) [304] (Justice B P Jeevan Reddy) ["148. [...] Articles 14, 15 and 16 enjoin upon the State to treat all its people equally irrespective of their religion, caste, faith or belief. While the citizens of this country are free to profess, practice and propagate such religion, faith or belief as they choose, so far as the State is concerned, i.e., from the point of view of the State, the religion, faith or belief of a person is immaterial. To it, all are equal and all are entitled to be treated equally. How is this equal treatment possible, if the State were to prefer or promote a particular religion, race or caste, which necessarily means a less favourable treatment of all other religions, races and castes. How are the constitutional promises of social justice, liberty of belief, faith or worship and equality of status and of opportunity to be attained unless the State eschews the religion, faith or belief of a person from its consideration altogether while dealing with him, his rights, his duties and his entitlements? Secularism is thus more than a passive attitude of religious tolerance. It is a positive concept of equal treatment of all religions. This attitude is described by some as one of neutrality towards religion or as one of benevolent neutrality. This may be a concept evolved by western liberal thought or it may be, as some say, an abiding faith with the Indian people at all points of time."]

33 [S R Bommai](#) (supra) [183] Justice K Ramaswamy ["183. [...] Constitution made demarcation between

## Digital Supreme Court Reports

that all persons are equally entitled to freedom of conscience and the right to freely profess, practise, and propagate religion subject to public order, morality, health, and other provisions of Part III. The provision allows the State to make any law to regulate or restrict any economic, financial, political or other secular activity associated with religious practice. The Constitution distinguishes between religious and secular activities, permitting the State to regulate the latter.<sup>34</sup>

41. Article 26 guarantees every religious denomination the right to establish and maintain institutions for religious and charitable purposes. It further guarantees religious and charitable institutions the right to manage their own affairs in matters of religion; own and acquire movable and immovable property; and administer the property in accordance with law. The right of management given to a religious body is a fundamental right that cannot be abridged by any legislation. On the other hand, the State can regulate the administration of property owned or acquired by a religious denomination through validly enacted laws.<sup>35</sup>
42. Article 27 provides that no person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination. The rationale underlying Article 27 is that public funds should not be utilized for the promotion or maintenance of any particular religion or religious denomination.<sup>36</sup>

---

religious part personal to the individual and secular part thereof. The State does not extend patronage to any particular religion, State is neither pro particular religion nor anti particular religion. It stands aloof, in other words maintains neutrality in matters of religion and provides equal protection to all religions subject to regulation and actively acts on secular part.]

34 [Seshamal v. State of Tamil Nadu](#) (1972) 2 SCC 11 [19]; [Bijoe Emmanuel v. State of Kerala](#) (1986) 3 SCC 615 [19]

35 [Ratilal Panachand Gandhi v. State of Bombay](#) (1954) 1 SCC 487 [16] [“16. [...] The language of the two clauses (b) and (d) of Article 26 would at once bring out the difference between the two. In regard to affairs in matters of religion, the right of management given to a religious body is a guaranteed fundamental right which no legislation can take away. On the other hand, as regards administration of property which a religious denomination is entitled to own and acquire, it has undoubtedly the right to administer such property but only in accordance with law. This means that the State can regulate the administration of trust properties by means of laws validly enacted; but here again it should be remembered that under Article 26(d), it is the religious denomination itself which has been given the right to administer its property in accordance with any law which the State may validly impose. A law, which takes away the right of administration altogether from the religious denomination and vests it in any other or secular authority, would amount to violation of the right which is guaranteed by Article 26(d) of the Constitution.”]

36 [S R Bommai](#) [304] (Justice BP Jeevan Reddy)

### Anjum Kadari & Anr. v. Union of India & Ors.

43. Article 28 prohibits the imparting of “religious instruction” in any educational institutions wholly maintained out of State funds. The provision further provides that no person attending any educational institution recognised by the State or receiving aid from the State funds should be compelled to take part in any religious instruction without their consent. Religious instruction is the inculcation of tenets, rituals, observances, ceremonies, and modes of worship of a particular sect or denomination.<sup>37</sup> Article 28 does not prohibit educational institutions maintained out of State funds from imparting religious education. Religious education is imparted to children “to make them aware of thoughts and philosophies in religions without indoctrinating them and without curbing their free-thinking, right to make choices for conducting their own life and deciding upon their course of action according to their individual inclinations.”<sup>38</sup> Article 28 does not prohibit educational institutions from teaching about the philosophy and culture of a particular religion or a saint associated with that religion.<sup>39</sup> Article 28 does not prohibit the State from granting recognition to educational institutions imparting religious instruction in addition to secular education.<sup>40</sup>
44. Articles 29 and 30 deal with the cultural and educational rights of minorities. Article 29(1) provides that Indian citizens have a right to conserve their distinct language, script, or culture. Article 29(2) guarantees that no citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them. A citizen who has requisite academic qualifications cannot be denied admission into any educational institution funded by the State on grounds of religion.<sup>41</sup>

37 [D A V College v. State of Punjab](#) (1971) 2 SCC 269 [26]

38 [Aruna Roy v. Union of India](#) (2002) 7 SCC 368 [78] (Justice D M Dharmadhikari)

39 [D A V College](#) (supra) [26] [26. [...] To provide for academic study of life and teaching or the philosophy and culture of any great saint of India in relation to or the impact on the Indian and world civilizations cannot be considered as making provision for religious instructions.]

40 [Ahmedabad St Xavier's College Society v. State of Gujarat](#) (1974) 1 SCC 717 [139] (Justice K K Mathe and Justice Y V Chandrachud) [“139. We fail to see how affiliation of an educational institution imparting religious instruction in addition to secular education to pupils as visualized in Article 28(3) would derogate from the secular character of the state. Our Constitution has not erected a rigid wall of separation between church and state. We have grave doubts whether the expression “secular state” as it denotes a definite pattern of church and state relationship can with propriety be applied to India. It is only in a qualified sense that India can be said to be a secular state. There are provisions in the Constitution which make one hesitate to characterize our state as secular.”]

41 [See In re Kerala Education Bill 1957](#), 1958 SCC OnLine SC 8 [22]

## Digital Supreme Court Reports

45. Article 30 pertains to the right of minorities to establish and administer educational institutions. It provides that all minorities, whether based on religion or language, have the right to establish and administer educational institutions of their choice. Article 30(2) enjoins the State not to discriminate against any educational institution in granting aid on the ground that it is under the management of a minority, whether based on religion or language. Article 30 confers a special right on religious and linguistic minorities to instill in them a sense of security and confidence.<sup>42</sup> It secures equal treatment of majority and minority institutions and preserves secularism<sup>43</sup> by allaying all apprehensions of interference by the executive and legislature in matters of religion.<sup>44</sup> The constitutional scheme under Articles 25 to 30 distinguishes between the right of an individual to practice religion and the secular part of religion, which is amenable to State regulation.<sup>45</sup>
- b. Testing the validity of a statute for violation of the basic structure of the Constitution
46. The provisions discussed in the above segment indicate that secularism is embodied in the constitutional scheme, particularly Part III. In ***Kesavananda Bharati v. State of Kerala***, this Court held that Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution.<sup>46</sup> It was held that the power of Parliament to amend the Constitution cannot have the effect of destroying or abrogating the basic structure or framework of the Constitution.<sup>47</sup> Further, the judges constituting the majority

42 [T M A Pai Foundation v. State of Karnataka](#) (2002) 8 SCC 481 [157]

43 [Ahmedabad St Xavier's College Society](#) (supra) [9]; [T M A Pai Foundation](#) (supra) [138] ["138. As we look at it, Article 30(1) is a sort of guarantee or assurance to the linguistic and religious minority institutions of their right to establish and administer educational institutions of their choice. Secularism and equality being two of the basic features of the Constitution, Article 30(1) ensures protection to the linguistic and religious minorities, thereby preserving the secularism of the country. Furthermore, the principles of equality must necessarily apply to the enjoyment of such rights. No law can be framed that will discriminate against such minorities with regard to the establishment and administration of educational institutions vis-à-vis other educational institutions. Any law or rule or regulation that would put the educational institutions run by the minorities at a disadvantage when compared to the institutions run by the others will have to be struck down."]

44 [Ahmedabad St Xavier's College Society](#) (supra) [75] (Justice H R Khanna)

45 [S R Bommai](#) (supra) [183]

46 [\[1973\] Supp. 1 SCR 1](#) : (1973) 4 SCC 225

47 [Kesavananda Bharati](#) (supra) [1426] (Justice H R Khanna) ["1426. [...] The word "amendment" postulates that the old Constitution survives without loss of its identity despite the change and continues even though it has been subjected to alterations. As a result of the amendment, the old Constitution

### Anjum Kadari & Anr. v. Union of India & Ors.

enumerated certain basic features of our Constitution, including the secular character of the Constitution.<sup>48</sup> In S R Bommai v. Union of India,<sup>49</sup> a nine-Judge Bench held that secularism is a basic feature of the Constitution. The issue that arises for our consideration is whether the basic structure doctrine can be applied to invalidate ordinary legislation.

47. The Constitution imposes certain limitations on the legislative powers of Parliament and the State legislatures. Article 13(2) provides that the State shall not make any law that takes away or abridges the rights conferred by Part III. Statutes enacted by the State legislatures must be consistent with the fundamental rights enumerated under Part III of the Constitution. Further, Article 246 defines the scope and limitations of the legislative competence of Parliament and State legislatures. A statute can be declared ultra vires on two grounds alone: (i) it is beyond the ambit of the legislative competence of the legislature; or (ii) it violates Part III or any other provision of the Constitution.<sup>50</sup>
48. In Indira Nehru Gandhi v. Raj Narain,<sup>51</sup> the Allahabad High Court disqualified the then Prime Minister for indulging in corrupt practices according to the Representation of the People Act, 1951. To nullify the decision of the High Court, Parliament enacted the Representation of the People (Amendment) Act 1974 and Election Laws (Amendment) Act 1975 and placed them under the Ninth

cannot be destroyed and done away with; it is regained though in the amended form. What then is meant by the retention of the old Constitution? It means the retention of the basic structure or framework of the old Constitution. A mere retention of some provisions of the old Constitution even though the basic structure or framework of the Constitution has been destroyed would not amount to the retention of the old Constitution. Although it is permissible under the power of amendment to effect changes, howsoever important, and to adapt the system to the requirements of changing conditions, it is not permissible to touch the foundation or to alter the basic institutional pattern. The words "amendment of the Constitution" with all their wide sweep and amplitude cannot have the effect of destroying or abrogating the basic structure or framework of the Constitution.]

- 48 Kesavananda Bharati (supra) [292] (Chief Justice Sikri); [487] (Justice Shelat and Grover); [1426] (Justice H R Khanna).
- 49 [1994] 2 SCR 644 : (1994) 3 SCC 1; [29] (Justice AM Ahmadi); [151] (Justice P B Sawant (for himself and Justice Kuldeep Singh)); [182] (Justice K Ramaswamy); [304] (Justice B P Jeevan Reddy (for himself and Justice S C Agrawal))
- 50 State of A P v. McDowell & Co. (1996) 3 SCC 709 [43] ["43. [...] The power of Parliament or for that matter, the State Legislatures is restricted in two ways. A law made by Parliament or the legislature can be struck down by courts on two grounds and two grounds alone, viz., (1) lack of legislative competence and (2) violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision."]; State of Kerala v. Peoples Union for Civil Liberties (2009) 8 SCC 46 [45]
- 51 [1978] 2 SCR 405 : 1975 Supp SCC 1

**Digital Supreme Court Reports**

Schedule of the Constitution. The issue before this Court was whether the amendments violated the basic structure of the Constitution.

49. Chief Justice A N Ray held that the constitutional validity of a statute depends entirely on the existence of the legislative power and the express provision in Article 13. Since the legislation is not subject to any other constitutional limitation, applying the basic structure doctrine to test the validity of a statute will amount to “rewriting the Constitution.”<sup>52</sup> The learned Judge further observed that application of the undefinable theory of basic structure to test the validity of a statute would denude legislatures of the power of legislation and deprive them of laying down legislative policies.<sup>53</sup> Justice K K Mathew similarly observed that the concept of a basic structure is “too vague and indefinite to provide a yardstick to determine the validity of an ordinary law.”<sup>54</sup> Justice Y V Chandrachud (as the learned Chief Justice then was) observed that constitutional amendment and ordinary laws operate in different fields and are subject to different limitations.<sup>55</sup>
50. The majority in Indira Nehru Gandhi (supra) held that the constitutional validity of a statute cannot be challenged for the violation of the basic structure doctrine. However, Justice M H Beg (as the learned Chief Justice then was) dissented with the majority view by observing that the basic structure test can be used to test

---

52 Indira Nehru Gandhi (supra) [134] and [137]

53 Indira Nehru Gandhi (supra) [136] [“136. The theory of basic structures or basic features is an exercise in imponderables. Basic structures or basic features are indefinable. The legislative entries are the fields of legislation. The pith and substance doctrine has been applied in order to find out legislative competency, and eliminate encroachment on legislative entries. If the theory of basic structures or basic features will be applied to legislative measures it will denude Parliament and State Legislatures of the power of legislation and deprive them of laying down legislative policies. This will be encroachment on the separation of powers.”]

54 Indira Nehru Gandhi (supra) [357]

55 Indira Nehru Gandhi (supra) [691] and [692]. [“691 [...] The constitutional amendments may, on the ratio of the Fundamental Rights case, be tested on the anvil of basic structure. But apart from the principle that a case is only an authority for what it decides, it does not logically follow from the majority judgment in the Fundamental Rights case that ordinary legislation must also answer the same test as a constitutional amendment. Ordinary laws have to answer two tests for their validity: (1) The law must be within the legislative competence of the legislature as defined and specified in Chapter I, Part XI of the Constitution, and (2) it must not offend against the provisions of Article 13(1) and (2) of the Constitution. “Basic structure”, by the majority judgment, is not a part of the fundamental rights nor indeed a provision of the Constitution. The theory of basic structure is woven out of the conspectus of the Constitution and the amending power is subjected to it because it is a constituent power. “The power to amend the fundamental instrument cannot carry with it the power to destroy its essential features — this, in brief, is the arch of the theory of basic structure. It is wholly out of place in matters relating to the validity of ordinary laws made under the Constitution.]

**Anjum Kadari & Anr. v. Union of India & Ors.**

the validity of statutes because statutes cannot go beyond the range of constituent power.<sup>56</sup>

51. In **State of Karnataka v. Union of India**,<sup>57</sup> Justice N L Untwalia (writing for himself, Justice P N Shingal, and Justice Jaswant Singh) reiterated that the validity of a statute cannot be tested for violation of the basic structure of the Constitution. Justice Y V Chandrachud (as the learned Chief Justice then was) also observed that a statute cannot be invalidated on supposed grounds so long as it is within the legislative competence of the legislature and consistent with Part III of the Constitution.<sup>58</sup> However, Chief Justice M H Beg observed that testing a statute for violation of basic structure does not “add to the contents of the Constitution.”<sup>59</sup> He held that any inference about a limitation based on the basic structure doctrine upon legislative power must co-relate to the express provisions of the Constitution.<sup>60</sup>
52. In **Kuldip Nayar v. Union of India**,<sup>61</sup> a Constitution Bench held that ordinary legislation cannot be challenged for the violation of the basic structure of the Constitution. Statutes, including State legislation, can only be challenged for violating the provisions of the Constitution.<sup>62</sup> However, in **Madras Bar Association v. Union of India**,<sup>63</sup> a Constitution Bench applied the basic structure doctrine to test the validity of Parliamentary legislation seeking to transfer judicial

56 [Indira Nehru Gandhi](#) (supra) [622]

57 [\[1978\] 2 SCR 1](#) : (1977) 4 SCC 608 [238]

58 [State of Karnataka](#) (supra) [197]

59 [State of Karnataka](#) (supra) [128]

60 [State of Karnataka](#) (supra) [123]

61 [\[2006\] Supp. 5 SCR 1](#) : (2006) 7 SCC 1 [“107. The basic structure theory imposes limitation on the power of Parliament to amend the Constitution. An amendment to the Constitution under Article 368 could be challenged on the ground of violation of the basic structure of the Constitution. An ordinary legislation cannot be so challenged. The challenge to a law made, within its legislative competence, by Parliament on the ground of violation of the basic structure of the Constitution is thus not available to the petitioners.”]

62 [Ashok Kumar Thakur v. Union of India](#) (2008) 6 SCC 1 [116]

63 [Madras Bar Association v. Union of India](#) (2014) 10 SCC 1 [109] [“This Court has repeatedly held that an amendment to the provisions of the Constitution would not be sustainable if it violated the “basic structure” of the Constitution, even though the amendment had been carried out by following the procedure contemplated under “Part XI” of the Constitution. This leads to the determination that the “basic structure” is inviolable. In our view, the same would apply to all other legislations (other than amendments to the Constitution) as well, even though the legislation had been enacted by following the prescribed procedure, and was within the domain of the enacting legislature, any infringement to the “basic structure” would be unacceptable.”]

**Digital Supreme Court Reports**

power from High Courts to tribunals. Justice J S Khehar (as the learned Chief Justice then was), writing for the Constitution Bench, held that the basic structure of the Constitution will stand violated if Parliament does not ensure that the newly created tribunals do not “conform with the salient characteristics and standards of the court sought to be substituted.”<sup>64</sup>

53. In **Supreme Court Advocates-on-Record Association v. Union of India**,<sup>65</sup> this Court had to decide the constitutional validity of the Constitution (Ninety-ninth Amendment) Act 2014 and the National Judicial Appointments Commission Act 2014. Justice J S Khehar (as the learned Chief Justice then was) built upon his reasoning in **Madras Bar Association** (*supra*) by observing that a challenge to ordinary legislation for violation of the basic structure would only be a “technical flaw” and “cannot be treated to suffer from a legal infirmity.”<sup>66</sup> He observed that the determination of the basic structure of the Constitution is made exclusively from the provisions of the Constitution. The observations of the learned Judge are instructive and extracted below:

“381. [...] when a challenge is raised to a legislative enactment based on the cumulative effect of a number of articles of the Constitution, it is not always necessary to refer to each of the articles concerned when a cumulative effect of the said articles has already been determined as constituting one of the “basic features” of the Constitution. Reference to the “basic structure” while dealing with an ordinary legislation would obviate the necessity of recording the same conclusion which has already been scripted while interpreting the article(s) under reference harmoniously. We would therefore reiterate that the “basic structure” of the Constitution is inviolable and as such the Constitution cannot be amended so as to negate any “basic features” thereof, and so also, if a challenge is

64 **Madras Bar Association** (*supra*) [136]. “[136. (iii) The “basic structure” of the Constitution will stand violated if while enacting legislation pertaining to transfer of judicial power, Parliament does not ensure that the newly created court/tribunal conforms with the salient characteristics and standards of the court sought to be substituted.]”

65 (2016) 5 SCC 1

66 Supreme Court Advocates-on-Record Association (*supra*) [381]

**Anjum Kadari & Anr. v. Union of India & Ors.**

raised to an ordinary legislation based on one of the “basic features” of the Constitution, it would be valid to do so. If such a challenge is accepted on the ground of violation of the “basic structure”, it would mean that the bunch of articles of the Constitution (including the Preamble thereof, wherever relevant), which constitute the particular “basic feature”, had been violated. We must however credit the contention of the learned Attorney General by accepting that it would be technically sound to refer to the articles which are violated, when an ordinary legislation is sought to be struck down as being ultra vires the provisions of the Constitution.”

54. However, Justice Lokur differed with Justice Khehar on the issue of testing the validity of a statute for violation of the basic structure doctrine. Justice Lokur followed the view of the majority in the [State of Karnataka \(supra\)](#)<sup>67</sup> that a statute cannot be challenged for violating the basic structure doctrine.
55. From the above discussion, it can be concluded that a statute can be struck down only for the violation of Part III or any other provision of the Constitution or for being without legislative competence. The constitutional validity of a statute cannot be challenged for the violation of the basic structure of the Constitution. The reason is that concepts such as democracy, federalism, and secularism are undefined concepts. Allowing courts to strike down legislation for violation of such concepts will introduce an element of uncertainty in our constitutional adjudication. Recently, this Court has accepted that a challenge to the constitutional validity of a statute for violation of the basic structure is a technical aspect because the infraction has to be traced to the express provisions of the Constitution. Hence, in a challenge to the validity of a statute for violation of the principle of secularism, it must be shown that the statute violates provisions of the Constitution pertaining to secularism.

---

67 Supreme Court Advocates-on-Record Association (supra) [795] [“795. For the purposes of the present discussion, I would prefer to follow the view expressed by a Bench of seven learned Judges in [State of Karnataka v. Union of India \[State of Karnataka v. Union of India \(1977\) 4 SCC 608 \(Seven-Judge Bench\)\]](#) that it is only an amendment of the Constitution that can be challenged on the ground that it violates the basic structure of the Constitution—a statute cannot be challenged on the ground that it violates the basic structure of the Constitution. [The only exception to this perhaps could be a statute placed in the Ninth Schedule of the Constitution.] The principles for challenging the constitutionality of a statute are quite different.”]

## Digital Supreme Court Reports

- c. Regulation of minority educational institutions
- 56. The right of minorities to administer educational institutions includes the right to manage the affairs of the institution in accordance with the ideas and interests of the community in general and the institution in particular.<sup>68</sup> The right to administer minority educational institutions encompasses: (i) the right to constitute the managing or governing body; (ii) the right to appoint teachers; (iii) the right to admit students subject to reasonable regulations; and (iv) the right to use property and assets for the benefit of the institution.<sup>69</sup> However, the right to administer minority educational institutions is not absolute. The right to administer educational institutions implies an obligation and duty of minority institutions to provide a standard of education to the students.<sup>70</sup> The right to administer is, it is trite law, not the right to maladminister.
- 57. In re Kerala Education Bill 1957,<sup>71</sup> this Court classified minority educational institutions into three categories: (i) those which do not seek either aid or recognition from the State; (ii) those which want aid; and (iii) those which want only recognition but not aid. The first category of institutions is protected by Article 30(1).<sup>72</sup> As regards the second and third categories, Chief Justice S R Das observed that the “minority cannot surely ask for aid or recognition for an educational institution run by them in unhealthy surroundings, without any competent teachers, possessing any semblance of qualification,

68 [State of Kerala v. Very Rev. Mother Provincial](#) (1970) 2 SCC 417 [9].

69 [Ahmedabad St Xavier's College Society](#) (supra) [19] (Chief Justice A N Ray) [“19. [...] The right to administer is said to consist of four principal matters. First is the right to choose its managing or governing body. It is said that the founders of the minority institution have faith and confidence in their own committee or body consisting of persons elected by them. Second is the right to choose its teachers. It is said that minority institutions want teachers to have compatibility with the ideals, aims and aspirations of the institution. Third is the right not to be compelled to refuse admission to students. In other words, the minority institutions want to have the right to admit students of their choice subject to reasonable regulations about academic qualifications. Fourth is the right to use its properties and assets for the benefit of its own institution.”]

70 [Ahmedabad St Xavier's College Society](#) (supra) [30] [“30. [...] The minority institutions have the right to administer institutions. This right implies the obligation and duty of the minority institutions to render the very best to the students. In the right of administration, checks and balances in the shape of regulatory measures are required to ensure the appointment of good teachers and their conditions of service. The right to administer is to be tempered with regulatory measures to facilitate smooth administration.”]

71 [\[1959\] 1 SCR 995](#) : 1958 SCC OnLine SC 8 [23]

72 [In re Kerala Education Bill](#) (supra) [24]

**Anjum Kadari & Anr. v. Union of India & Ors.**

and which does not maintain even a fair standard of teaching or which teaches matters subversive of the welfare of the scholars.”<sup>73</sup>

58. The State has an interest in ensuring that minority educational institutions provide standards of education similar to other educational institutions.<sup>74</sup> The State can enact regulatory measures to promote efficiency and excellence of educational standards.<sup>75</sup> Regulations about standards of education do not directly bear upon the management of minority institutions.<sup>76</sup> The State can regulate aspects of the standards of education such as the course of study, the qualification and appointment of teachers, the health and hygiene of students, and facilities for libraries.<sup>77</sup>
59. The State may impose regulation as a condition for grant of aid or recognition. Such regulation must satisfy the following three tests: (i) it must be reasonable and rational; (ii) it must be conducive to making the institution an effective vehicle of education for the minority community or other persons who resort to it; and (iii) it must be directed towards maintaining the excellence of education and efficiency of administration to prevent it from falling standards.<sup>78</sup> To determine the issue of the reasonableness of a regulation, the court has to determine whether the regulation is calculated to subserve or will in effect subserve the purpose of recognition or affiliation.<sup>79</sup>
60. In **P A Inamdar v. State of Maharashtra**, this Court held that the considerations for granting recognition to a minority educational institution are subject to two overriding conditions: (i) the recognition is not denied solely on the ground of the educational institution being one belonging to minority; and (ii) the regulation is neither aimed at nor has the effect of depriving the institution of its minority status.<sup>80</sup>

73 [In re Kerala Education Bill](#) (supra) [31]

74 [Very Rev Mother Provincial](#) (supra) [10]

75 [All Saints High School v. Government of AP](#) (1980) 2 SCC 478 [63]; [Dayanand Anglo Vedic \(DAV\) College Trust and Management Society v. State of Maharashtra](#) (2013) 4 SCC 14 [32]

76 [Ahmedabad St Xavier's College Society](#) (supra) [90]

77 [Very Rev Mother Provincial](#) (supra) [10]; St Xavier's College (supra) [18]

78 [Sidhajbhai Sabhai v. State of Bombay](#), 1962 SCC OnLine SC 150 [15]; [P A Inamdar v. State of Maharashtra](#) (2005) 6 SCC 537 [94], [122]

79 [Ahmedabad St. Xavier's College Society](#) (supra) [176] (Justice KK Mathew and Justice Y V Chandrachud)

80 [P A Inamdar](#) (supra) [103]

**Digital Supreme Court Reports**

61. In Ahmedabad St Xavier's College Society v. State of Gujarat,<sup>81</sup> the issue before a Bench of nine Judges was whether religious and linguistic minorities who have the right to establish and administer educational institutions of their choice have a fundamental right to affiliation or recognition. Chief Justice A N Ray held that minority educational institutions have no fundamental right to recognition. The learned Chief Justice observed that the primary purpose of recognition is to ensure that students reading in minority educational institutions have "qualifications in the shape of degrees necessary for a useful career in life."<sup>82</sup> He further observed that a minority educational institution seeking affiliation must follow the statutory educational standards and efficiency, the prescribed courses of study, courses of instruction, qualification of teachers, and educational qualifications for entry of students.<sup>83</sup> However, the learned Chief Justice held that a law providing for recognition should not result in abridgement of the right of linguistic and religious minorities to administer and establish educational institutions of their choice under Article 30(1).<sup>84</sup>
62. Justice K K Mathew (writing for himself and Justice Y V Chandrachud), in his concurring opinion stated that the principle of juridical equality ensures the "co-existence of several types of schools and colleges including affiliated colleges" with proportionate equal encouragement and support from the State.<sup>85</sup> The learned judge further held that the State's interest in the education of religious minorities would be served if minority educational institutions impart secular education accompanied by religious education. He also observed:

**"145.** The State's interest in secular education may be defined broadly as an interest in ensuring that children within its boundaries acquire a minimum level of competency in skills, as well as a minimum amount of information and knowledge in certain subjects. Without such skill and knowledge, an individual will be at a severe disadvantage both in participating in democratic self-Government and in earning a living. No one can question the constitutional

81 [1975] 1 SCR 173 : (1974) 1 SCC 717

82 Ahmedabad St. Xavier's College Society (supra) [14]

83 Ahmedabad St. Xavier's College Society (supra) [16]

84 Ahmedabad St. Xavier's College Society (supra) [14]

85 Ahmedabad St. Xavier's College Society (supra) [144]

**Anjum Kadari & Anr. v. Union of India & Ors.**

right of parents to satisfy their State-imposed obligation to educate their children by sending them to schools or colleges established and administered by their own religious minority so long as these schools and colleges meet the standards established for secular education.”

The State has an interest in maintaining the standards of education in minority educational institutions. Affiliation or recognition of minority educational institutions by the Government secures the academic interests of students studying in such institutions to pursue higher education.<sup>86</sup>

d. The Madarsa Act is a regulatory legislation

63. The Statement of Objects and Reasons of the Madarsa Act indicates that it is enacted to remove difficulties in running Madarsas and improve the merit of students studying in Madarsas by making available to them facilities of study of the requisite standard. Section 3 provides for the constitution of the Board. The Board comprises persons who are related to or know about education in Madarsas. The Board has been statutorily empowered to:
- (i) prescribe courses of instruction and text-books for courses;
  - (ii) grant degrees, diplomas, certificates and other academic distinctions;
  - (iii) conduct examinations;
  - (iv) recognise institutions for examination;
  - (v) admit candidates for examinations;
  - (vi) publish the results of the examination; and
  - (vii) to provide for research and training in any branch of Madarsa education.

---

86 In re Kerala Education Bill 1957 (supra) [32] “[32. [...] The minorities evidently desire that education should be imparted to the children of their community in an atmosphere congenial to the growth of their culture. Our Constitution makers recognised the validity of their claim and to allay their fears conferred on them the fundamental rights referred to above. But the conservation of the distinct language, script or culture is not the only object of choice of the minority communities. They also desire that scholars of their educational institutions should go out in the world well and sufficiently equipped with the qualifications necessary for a useful career in life. But according to the Education Code now in operation to which it is permissible to refer for ascertaining the effect of the impugned provisions on existing state of affairs, the scholars of unrecognised schools are not permitted to avail themselves of the opportunities for higher education in the university and are not eligible for entering the public services. Without recognition, therefore, the educational institutions established or to be established by the minority communities cannot fulfil the real objects of their choice and the rights under Article 30(1) cannot be effectively exercised. The right to establish educational institutions of their choice must, therefore, mean the right to establish real institutions which will effectively serve the needs of their community and the scholars who resort to their educational institutions. There is, no doubt, no such thing as fundamental right to recognition by the State but to deny recognition to the educational institutions except upon terms tantamount to the surrender of their constitutional right of administration of the educational institutions of their choice is in truth and in effect to deprive them of their rights under Article 30(1).”]; Milli Talimi Mission v. State of Bihar (1984) 4 SCC 500 [4]

**Digital Supreme Court Reports**

64. Section 10 empowers the Board to: (i) cancel an examination or withhold the result of an examination; (ii) prescribe fees for conducting examinations; (iii) refuse recognition to institutions that do not fulfil the standards of staff, instructions, equipment, or buildings laid down by the Board; (iv) withdraw recognition to an institution not able to adhere to the standards of staff, instructions, equipment, or buildings laid down by the Board; and (v) inspect an institution to ensure due observance of the prescribed courses of study and facilities for instruction.
65. The legislative scheme of the Madarsa Act suggests that it has been enacted to regulate the standard of education in Madarsas recognized by the Board for imparting Madarsa education. The Madarsa Act grants recognition to Madarsas to enable students to sit for an examination and obtain a degree, diploma, or certificate conferred by the Board. The statute envisages granting recognition to Madarsas which fulfil the prescribed standards for staff, instructions, equipment and buildings. The grant of recognition imposes a responsibility on the Madarsas to attain certain standards of education laid down by the Board. Access to quality teachers, course materials, and equipment will allow Madarsa students to achieve stipulated educational and professional standards.<sup>87</sup> Failure of the Madarsas to maintain the standards of education will result in the withdrawal of their recognition.
66. In Bihar State Madarasa Education Board v. Madarasa Hanfia Arabic College,<sup>88</sup> the State legislature enacted the Bihar State Madarasa Education Board Act 1982 to constitute an autonomous State Madarasa Education Board to grant recognition, aid, and to supervise and control the academic efficiency in the Madarsas aided and recognized by it. Section 7(2)(n) of the legislation empowered the Board to dissolve the managing committee of a Madarsa for non-compliance with its directions. The issue before this Court was

87 Frank Anthony Public School Employees' Association v. Union of India (1986) 4 SCC 707 [16]. The excellence of the instruction provided by an institution would depend directly on the excellence of the teaching staff, and in turn, that would depend on the quality and the contentment of the teachers. Conditions of service pertaining to minimum qualifications of teachers, their salaries, allowances and other conditions of service which ensure security, contentment and decent living standards to teachers and which will consequently enable them to render better service to the institution and the pupils cannot surely be said to be violative of the fundamental right guaranteed by Article 30(1) of the Constitution.]

88 [1989] Supp. 2 SCR 399 : (1990) 1 SCC 428

**Anjum Kadari & Anr. v. Union of India & Ors.**

whether the provision was violative of Article 30(1) of the Constitution. This Court observed that the State has the power to regulate the administration of minority educational institutions in the interests of educational needs and discipline of the institution. However, it was observed that the State has no power to frame rules to completely take over the management of such institutions by superseding or dissolving their management. Hence, Section 7(2)(n) was declared invalid for violating Article 30(1).

67. The other issue before this Court was whether a statutory Board established for recognition of minority educational institutions must only comprise of persons belonging to the minority community. It was held that there is no constitutional obligation that such a Board must exclusively consist of members belonging to the minority community. It was observed:

“7. [...] Article 30(1) does not contemplate that an autonomous Educational Board entrusted with the duty of regulating the aided and recognised minorities institution, should be constituted only by persons belonging to minority community. Article 30(1) protects the minorities' right to manage and administer institutions established by them according to their choice, but while seeking aid and recognition for their institutions there is no constitutional obligation that the Board granting aid or recognition or regulating efficiency in minority institution should consist of members exclusively belonging to minority communities. In the instant case the constitution of the Board under Section 3 of the Act ensures that its members are only those who are interested in teaching and research of Persian, Arabic and Islamic studies. This provision fully safeguards the interest of Madarasa of the Muslim community.”

68. The Madarsa Act allows the Board to prescribe curriculum and textbooks, conduct examinations, qualifications of teachers, and standards of equipment and buildings geared to ensure the maintenance of standards of education in Madarsas. The provisions of the Madarsa Act are reasonable because they subserve the object of recognition, that is, improving the academic excellence of students in the recognised Madarsas and making them capable to sit for examinations conducted by the Board. The statute also enables

## Digital Supreme Court Reports

the students studying in the recognised Madarsas to pursue fields of higher education and seek employment.

69. Regulations pertaining to standards of education or qualification of teachers do not directly interfere with the administration of the recognized Madarsas. Such regulations are “designed to prevent maladministration of an educational institution”.<sup>89</sup> The Madarsa Act does not directly interfere with the day-to-day administration of the recognized Madarsas.<sup>90</sup> Further, the provisions of the Madarsa Act are “conducive to making the institution an effective vehicle of education for minority community” without depriving the educational institutions of their minority character.
70. Fundamental rights consist of both negative and positive postulates. They require the State to restrain its exercise of power and create conducive conditions for the exercise of rights.<sup>91</sup> The essence of Article 30(1) is the recognition and preservation of different types of people, with diverse languages and different beliefs, while maintaining the basic principle of equality and secularism.<sup>92</sup> In the spirit of positive secularism, Article 30 confers special rights on religious and linguistic minorities “because of their numerical handicap and to instil in them a sense of security and confidence”.<sup>93</sup> The positive concept of secularism requires the State to take active steps to treat minority institutions on par with secular institutions while allowing them to retain their minority character. Positive secularism allows the State to treat some persons differently to treat all persons equally.<sup>94</sup> The

89 [Ahmedabad St. Xavier's College Society](#) (supra) [92]

90 [P A Inamdar](#) (supra) [121] “[121. [...] the urge or need for affiliation or recognition brings in the concept of regulation by way of laying down conditions consistent with the requirement of ensuring merit, excellence of education and preventing maladministration. For example, provisions can be made indicating the quality of the teachers by prescribing the minimum qualifications that they must possess and the courses of studies and curricula. The existence of infrastructure sufficient for its growth can be stipulated as a prerequisite to the grant of recognition or affiliation. However, there cannot be interference in the day-to-day administration. The essential ingredients of the management, including admission of students, recruiting of staff and the quantum of fee to be charged, cannot be regulated.”]

91 [Supriyo v. Union of India](#), 2023 SCC OnLine SC 1348 [158]

92 [T M A Pai Foundation](#) (supra) [160-161]

93 [T M A Pai Foundation](#) (supra) [157]

94 [St Stephens College v. University of Delhi](#) (1992) 1 SCC 558 [97] “[97. The Constitution establishes secular democracy. The animating principle of any democracy is the equality of the people. But the idea that all people are equal is profoundly speculative. It is well said that in order to treat some persons equally, we must treat them differently. We have to recognise a fair degree of discrimination in favour of minorities. But it is impossible to have an affirmative action for religious minorities in religious neutral way. In order to get beyond religion, we cannot ignore religion. We must first take account of religion. It

**Anjum Kadari & Anr. v. Union of India & Ors.**

concept of positive secularism finds consonance in the principle of substantive equality.

71. In **Joseph Shine v. Union of India**,<sup>95</sup> one of us (Justice D Y Chandrachud) held that the notion of formal equality is contrary to the constitutional vision of a just social order. On the contrary, substantive equality is aimed at producing equality of outcomes through different modes of affirmative actions or state support.<sup>96</sup> Substantive equality is directed at eliminating individual, institutional and systemic discrimination against disadvantaged groups which effectively undermines their full and equal social, economic, political, and cultural participation in society.<sup>97</sup> Enactment of special provisions or giving preferential treatment by the State allows the disadvantaged individual or community to overcome social and economic barriers and participate in society on equal terms.<sup>98</sup>
72. The Madarsa Act secures the interests of the minority community in Uttar Pradesh because: (i) it regulates the standard of education imparted by the recognised Madarsas; and (ii) it conducts examinations and confers certificates to students, allowing them the opportunity to pursue higher education. The Madarsa Act is consistent with the positive obligation of the State to ensure that students studying in the recognised Madarsas attain a minimum level of competency which will allow them to effectively participate in society and earn a living.<sup>99</sup> Therefore, the Madarsa Act furthers substantive equality for the minority community.
73. The High Court erred in holding that a statute is bound to be struck down if it is violative of the basic structure. Invalidation of a statute on the grounds of violation of secularism has to be traced to express provisions of the Constitution. Further, the fact that the State legislature has established a Board to recognise and regulate

---

is exactly in the spirit of these considerations that this Court in its advisory opinion in Kerala Education Bill case [1959 SCR 995 : AIR 1958 SC 956] recognised a fair degree of discrimination in favour of religious minorities. In this respect the Court seems to have acted on the same principle which is applied to socially and educationally backward classes, that is the principle of protective discrimination.”]

95 [\[2018\] 11 SCR 765](#) : (2019) 3 SCC 39

96 [Ravinder Kumar Dhariwal v. Union of India](#) (2023) 2 SCC 209 [37]

97 [Joseph Shine](#) (supra) [171]

98 [Neil Aurelio Nunes v. Union of India](#) (2022) 4 SCC 1 [33]

99 [Ahmedabad St. Xavier's College Society](#) (supra) [145] (Justice K K Mathew and Justice Y V Chandrachud)

## Digital Supreme Court Reports

Madarsa education is not violative of Article 14. The Madarsa Act furthers substantive equality.

e. Interplay of Article 21-A and Article 30

74. Article 21-A provides that the State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine. It imposes a constitutional obligation on the State to impart elementary and basic education. Parliament enacted the RTE Act to provide full-time elementary education of satisfactory and equitable quality to every child in pursuance of Article 21-A. The RTE Act seeks to provide a “quality education without any discrimination on economic, social, and cultural grounds.”<sup>100</sup> Section 3 makes the right of children to free and compulsory education justiciable.<sup>101</sup>
75. In **Society for Unaided Private Schools of Rajasthan v. Union of India**,<sup>102</sup> a three-Judge Bench of this Court upheld the constitutional validity of the RTE Act. It further held that the statute applies to an aided school including a minority school receiving aid or grant to meet whole or part of its expenses from the appropriate Government or local authority. Subsequently, Parliament amended the RTE Act to exempt its application to Madarsas, vedic pathsalas and educational institutions primarily imparting religious instruction.<sup>103</sup>
76. In **Pramati Educational and Cultural Trust v. Union of India**,<sup>104</sup> a Constitution Bench had to determine the constitutional validity of Article 21-A. One of the issues before this Court was whether Article 21-A conflicts with Article 30. This Court held that the law enacted by Parliament under Article 21-A cannot abrogate the right of minorities to establish and administer schools of their choice. It held that application of the RTE Act to minority educational institutions, whether aided or unaided, “may destroy the minority character of

100 [State of Tamil Nadu v. K Shyam Sunder](#) (2011) 8 SCC 737 [21]; [Bharatiya Seva Samaj Trust v. Yogeshbhai Ambal Patel](#) (2012) 9 SCC 310 [26]

101 Section 3, RTE Act

102 [\[2012\] 2 SCR 715](#) : (2012) 6 SCC 1 [64]

103 Section 1(4) and (5), RTE Act. [It reads:

“[(4) Subject to the provisions of Articles 29 and 30 of the Constitution, the provisions of this Act shall apply to conferment of rights on children to free and compulsory education.

(5) Nothing contained in this Act shall apply to Madrasas, Vedic Pathsalas and educational institutions primarily imparting religious instruction.”]

104 [\[2014\] 11 SCR 712](#) : (2014) 8 SCC 1

### Anjum Kadari & Anr. v. Union of India & Ors.

the school.”<sup>105</sup> Therefore, it held that the RTE Act is ultra vires the Constitution to the extent it applied to minority educational institutions.

- 77. The purpose of education is to provide for the intellectual, moral, and physical development of a child. A good education system is correlated to the social, economic, and political needs of our country.<sup>106</sup>
- 78. Article 30(1) guarantees the right to establish and administer educational institutions of their choice to religious and linguistic minorities. However, the State has an interest in ensuring that the minority educational institutions impart secular education along with religious education or instruction.<sup>107</sup> The constitutional scheme allows the State to strike a balance between two objectives: (i) ensuring the standard of excellence of minority educational institutions; and (ii) preserving the right of the minority to establish and administer its educational institution.<sup>108</sup> The State generally strikes a balance by enacting regulations accompanying the recognition of minority educational institutions.
- 79. The High Court erred in holding that education provided under the 2004 Act is violative of Article 21A because (i) The RTE Act which facilitates the fulfilment of the fundamental right under Article 21 – A contains a specific provision by which it does not apply to

---

105 [Pramati Educational and Cultural Trust](#) (supra) [55] “[55. When we look at the 2009 Act, we find that Section 12(1)(b) read with Section 2(n)(ii) provides that an aided school receiving aid and grants, whole or part, of its expenses from the appropriate Government or the local authority has to provide free and compulsory education to such proportion of children admitted therein as its annual recurring aid or grants so received bears to its annual recurring expenses, subject to a minimum of twenty-five per cent. Thus, a minority aided school is put under a legal obligation to provide free and compulsory elementary education to children who need not be children of members of the minority community which has established the school. We also find that under Section 12(1)(c) read with Section 2(n)(iv), an unaided school has to admit into twenty-five per cent of the strength of Class I children belonging to weaker sections and disadvantaged groups in the neighbourhood. Hence, unaided minority schools will have a legal obligation to admit children belonging to weaker sections and disadvantaged groups in the neighbourhood who need not be children of the members of the minority community which has established the school. While discussing the validity of clause (5) of Article 15 of the Constitution, we have held that members of communities other than the minority community which has established the school cannot be forced upon a minority institution because that may destroy the minority character of the school. In our view, if the 2009 Act is made applicable to minority schools, aided or unaided, the right of the minorities under Article 30(1) of the Constitution will be abrogated. Therefore, the 2009 Act insofar it is made applicable to minority schools referred in clause (1) of Article 30 of the Constitution is ultra vires the Constitution. We are thus of the view that the majority judgment of this Court in [Society for Unaided Private Schools of Rajasthan v. Union of India](#) [(2012) 6 SCC 1] insofar as it holds that the 2009 Act is applicable to aided minority schools is not correct.]”]

106 [Maharashtra State Board of Secondary and Higher Secondary Education v. K S Gandhi](#) (1991) 2 SCC 716 [13]

107 [Ahmedabad St. Xavier's College Society](#) (supra) [138] (Justice K K Mathew and Justice Y V Chandrachud)

108 [P A Inamdar](#) (supra) [122]

**Digital Supreme Court Reports**

minority educational institutions; (ii) The right of a religious minority to establish and administer Madarsas to impart both religious and secular education is protected by Article 30; and (iii) the Board and the state government have sufficient regulatory powers to prescribe and regulate standards of education for the Madarsas.

**E. Legislative Competence**

- a. The Madarsa Act is within the legislative competence of the State under Entry 25, List III
80. The distribution of legislative powers is contained in Part XI of the Constitution. Article 246(2) confers exclusive power on Parliament to make laws “with respect to” any of the matters enumerated in List I (the Union List) of the Seventh Schedule. Clause (1) is prefaced with a non-obstante provision which gives it precedence over Clauses (2) and (3). Article 246(2) enunciates the legislative principles with regard to List III (the Concurrent List) and states that both Parliament and State legislatures have concurrent powers of legislation “with respect to” the matters enumerated in this list. This clause also begins with a non-obstante provision giving it precedence over clause (3). Finally, Article 264(3) states that the State Legislature has exclusive power to make laws on the matters enumerated in List II (the State List).
81. When the Constitution was enacted, the subject of “education” was part of List II (the State List) of the Seventh Schedule. This followed the scheme of distribution of powers in the Government of India Act 1935, whereby, the entry titled “Education” was placed in the Provincial List. At the time of the enactment of the Constitution, Entry 11 of List II read as follows:

“**11. Education including universities, subject to the provisions of entries 63, 64, 65 and 66 of List I and entry 25 of List III.**”

82. At this time, Entry 25 of List III read as follows:

“**25. Vocational and technical training of labour.**”
83. With effect from 3 January 1977, by the Constitution (Forty-Second Amendment Act),<sup>109</sup> Entry 11 of List II was omitted, and Entry 25 of

---

<sup>109</sup> Constitution (Forty-second Amendment) Act, 1976, s. 57 (w.e.f. 3-1-1977).

**Anjum Kadari & Anr. v. Union of India & Ors.**

List III was amended to account for it. In other words, the legislative entry pertaining to “education” was moved from the State List to the Concurrent List. Entry 25, List III now reads as follows:

**“25. Education, including technical education, medical education and universities, subject to the provisions of entries 63, 64, 65 and 66 of List I; vocational and technical training of labour.”**

84. To address the contention raised by the respondents regarding the legislative competence of the state legislature, the following settled principles governing the interpretation of the entries in the Seventh Schedule are relevant<sup>110</sup>:
- a. The entries are legislative heads and not sources of legislative powers. The legislative entries use general words to define and delineate the legislative powers of Parliament and State legislatures, and the words should receive their ordinary, natural, and grammatical meaning;
  - b. The legislative entries should not be read in a narrow or pedantic sense but must be given their “broadest meaning and the widest amplitude”. The ambit of the entries extends to all ancillary and subsidiary matters which can fairly and reasonably be said to be comprehended in them;
  - c. There is a possibility of an overlap and conflict between two or more entries. In such cases, the doctrine of pith and substance comes into play to determine whether the legislature in question has the competence to enact a law;
  - d. There may arise situations where a legislature may frame a law that in substance and reality transgresses its legislative competence. Such a piece of legislation is called “colourable legislation”. The substance of the legislation is material. If the subject matter is in substance beyond the legislative powers of the legislature, the form in which the law is clothed would not save it from being declared unconstitutional; and
  - e. In certain entries, such as Entry 25 in List III, the Constitution uses specific expressions such as “subject to” in order to

<sup>110</sup> [Mineral Area Development Authority & Anr. vs Steel Authority of India & Anr.](#), 2024 INSC 554 [40-42]

**Digital Supreme Court Reports**

resolve potential overlaps between entries in the three lists. This is used in cases where the Constitution stipulates that the exercise of power traceable to certain legislative entries overrides the exercise of power traceable to another entry in a different list.

85. The provisions of the Madarsa Act seek to “regulate” Madarsas. These are educational institutions run by a religious minority. There is a distinction between “religious instruction” and “religious education”. While the Madarsas do impart religious instruction, their primary aim is education. Legislative entries must be given their widest meaning, and their ambit also extends to ancillary subjects which may be comprehended within the entry. The mere fact that the education which is sought to be regulated includes some religious teachings or instruction, does not automatically push the legislation outside the legislative competence of the state.
86. Article 28 is titled “Freedom as to attendance at religious instruction or religious worship in certain educational institutions”. Article 28(1) states that no religious instruction shall be provided in any educational institution wholly maintained out of State funds. Article 28(3) provides that no person who is attending any educational institution recognised by the state or receiving aid out of state funds shall be compelled to take part in religious instruction or attend religious worship without their consent. The corollary to this provision is that religious instruction may be imparted in an educational institution which is recognized by the state, or which receives state aid but no student can be compelled to participate in religious instruction in such an institution. However, the dissemination of religious instruction does not change its fundamental character as an institution that imparts education. To read Entry 25, List III in the manner proposed by the respondent, would render it inapplicable to all legislation which deal with any institution “established and administered” by minorities, which may provide some religious instruction. This runs contrary to the constitutional scheme in Article 30, which recognizes the right of minorities to establish and administer educational institutions. Merely because an educational institution is run by a minority or even a majority community and professes some of its teachings, does not mean that the teachings in such institutions fall outside the ambit of the term “education”.

**Anjum Kadari & Anr. v. Union of India & Ors.**

87. In fact, reference was made to an eleven-judge bench of this Court in **T.M.A. Pai Foundation v. State of Karnataka**,<sup>111</sup> on the “scope of the right of minorities to establish and administer educational institutions of their choice under Article 30(1) read with Article 29(2)” in view of the inclusion of Entry 25 in List III of the seventh schedule.<sup>112</sup> One of the questions before this Court was whether the “minority status” of an institution under Article 30(1) would be determined with the unit being the state or the entire country, since both the state and the union can legislate on the subject of “education”. Therefore, it is beyond the pale of doubt that the regulation of minority institutions was assumed to fall within the ambit of Entry 25, List III by an eleven-judge bench of this Court.
88. Further, Entry 25, List III itself provides specific carve-outs. The entry is subject to entries 63, 64, 65 and 66 of List I. None of these entries in the Union List seek to regulate ‘religious education’. Further, Mr Guru Krishna Kumar, Senior Counsel has not indicated any other entry in List I with which there is a conflict so as to indicate that the legislation is a “colourable legislation” within the competence of the Parliament and not within the competence of the state legislature.
89. With respect to the concurrent exercise of power by the State Legislature and the Parliament with respect to matters in List III (the Concurrent List), the Constitution also provides for the doctrine of repugnancy to resolve inconsistencies between laws made by the Parliament and the state legislatures.<sup>113</sup> In such cases, the law made by the State legislature gives way to the law made by the Parliament, subject to certain exceptions.<sup>114</sup> In the present instance, the question of repugnancy does not even arise as there is no central law which purports to regulate the functioning of Madarsas. As noted above, the RTE Act, which is the legislation framed by Parliament pursuant to Entry 25, specifically states that it is inapplicable to Madarsas, and thus, there is no issue of a conflict or repugnancy between the two Acts.
90. In view of the above, there is no jurisprudential basis to read Entry 25, List III to be limited to only education that is devoid of any religious

<sup>111</sup> [2002] Supp. 3 SCR 587 : (2002) 8 SCC 481

<sup>112</sup> *Ibid* [3-4].

<sup>113</sup> Article 254, Constitution of India.

<sup>114</sup> Forum for People's Collective Efforts v. State of W.B., (2021) 8 SCC 599 [116]

**Digital Supreme Court Reports**

teaching or instruction and to contend that the Madarsa Act (in its entirety) which seeks to regulate the functioning of Madarsas in Uttar Pradesh is outside the competence of the state legislature. The challenge on the ground of legislative competence fails.

- b. Certain provisions of the Madarsa Act conflict with the UGC Act enacted under Entry 66, List I
91. As noted above, Entry 25 of List III has been made subject to certain entries in List I. One of these entries is Entry 66 of List I, which reads as follows:
- “66. Co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions.”**
92. In *Mineral Area Development Authority & Anr. vs. Steel Authority of India & Anr.*,<sup>115</sup> a Constitution Bench of this Court had occasion to observe the purport of the legislative entries in List II using the phrase “subject to” in the following terms:

**“44. Where the entries have used the phrase “subject to”, the legislative power of the State is made subordinate to Parliament with respect to either the Union List or the Concurrent List. The expression “subject to” conveys the idea of a provision yielding place to another provision or other provisions to which it is made subject. Therefore, where the Constitution intends to displace or override the legislative powers of the States, it has used specific terminology – “subject to”. However, the Constitution has also indicated the extent to which a particular legislative entry under List II is subordinated. For instance, the subjection is either with respect to provisions of List I or List III, or it can also be to the extent of “any limitations” imposed by Parliament by law. Thus, it is imperative that the entries in List II must be read and interpreted in their proper context to understand the extent of their subordination to Union powers.”**

(emphasis supplied)

**Anjum Kadari & Anr. v. Union of India & Ors.**

93. The UGC Act has been enacted by Parliament pursuant to Entry 66 and seeks to make provisions for the “co-ordination and determination of standards in Universities and for that purpose, to establish a University Grants Commission.”<sup>116</sup> The Madarsa Act has been enacted pursuant to Entry 25 of List III. This Court has held in a consistent line of precedent that the UGC Act occupies the field with regard to the coordination and determination of standards in higher education. Therefore, state legislation which seeks to regulate higher education, in conflict with the UGC Act, would be beyond the legislative competence of the State legislature.<sup>117</sup>
94. In **Prof. Yashpal & Anr vs. State of Chhattisgarh**,<sup>118</sup> a three-Judge Bench of this Court adjudicated on the constitutionality of the provisions of a state legislation in Chhattisgarh, which *inter alia*, granted the state government the power to recognise and establish universities, which offered degrees that were not recognised by the UGC. The state relied on Entry 32 of List II which pertains to the incorporation of universities and Entry 25 of List III, to justify the legislative competence of the state legislature. This Court declared that the provisions of the state legislation which conflict with the provisions of the UGC Act are unconstitutional as the UGC Act was validly enacted by Parliament under Entry 66 of List I. After considering the consistent line of precedent on this question, this Court observed thus:

**“45. The State Legislature can make an enactment providing for incorporation of universities under Entry 32 of List II and also generally for universities under Entry 25 of List III. The subject “university” as a legislative head must be interpreted in the same manner as it is generally or commonly understood, namely, with proper facilities for teaching of higher level and continuing research activity. An enactment which simply clothes a proposal submitted**

116 Long Title, UGC Act.

117 Osmania University Teachers' Association vs. State of Andhra Pradesh (1987) 4 SCC 671; Dr Preeti Srivastava and another vs. State of M.P. (1999) 7 SCC 120; **Prof. Yashpal & Anr vs. State of Chhattisgarh** (2005) 5 SCC 420; Annamalai University, Represented by Registrar vs. Secretary to Government, Information and Tourism Department (2009) 4 SCC 590; Kalyani Mathivanan versus K.V. Jeyaraj (2015) 6 SCC 363.

118 **[2005] 2 SCR 23** : (2005) 5 SCC 420

**Digital Supreme Court Reports**

by a sponsoring body or the sponsoring body itself with the juristic personality of a university so as to take advantage of Section 22 of the UGC Act and thereby acquires the right of conferring or granting academic degrees but without having any infrastructure or teaching facility for higher studies or facility for research is not contemplated by either of these entries. Sections 5 and 6 of the impugned enactment are, therefore, wholly ultra vires, being a fraud on the Constitution.

**46.** [...] The impugned Act which enables a proposal on paper only to be notified as a university and thereby conferring the power upon such university under Section 22 of the UGC Act to confer degrees has the effect of completely stultifying the functioning of the University Grants Commission insofar as these universities are concerned. Such incorporation of a university makes it impossible for UGC to perform its duties and responsibilities of ensuring coordination and determination of standards. In the absence of any campus and other infrastructural facilities, UGC cannot take any measures whatsoever to ensure a proper syllabus, level of teaching, standard of examination and evaluation of academic achievement of the students or even to ensure that the students have undergone the course of study for the prescribed period before the degree is awarded to them."

95. Section 22 of the UGC Act pertains to the right to confer degrees and reads as follows:

**"22. Right to confer degrees –** (1) The right of conferring or granting degrees shall be exercised only by a University established or incorporated by or under a Central Act, a Provincial Act or a State Act or an institution deemed to be a University under section 3 or an institution specially empowered by an Act of Parliament to confer or grant degrees.

(2) Save as provided in sub-section (1), no person or authority shall confer, or grant, or hold himself or itself out as entitled to confer or grant, any degree.

**Anjum Kadari & Anr. v. Union of India & Ors.**

- (3) For the purposes of this section, “degree” means any such degree as may, with the previous approval of the Central Government, be specified in this behalf by the Commission by notification in the official Gazette.”
96. Sub-section (1) expressly restricts the right to confer or grant degrees to (i) universities established or incorporated by a Central or State statute; or (ii) an institution deemed to be a university under Section 3;<sup>119</sup> or (iii) an institution specially empowered by an Act of Parliament to confer degrees. Sub-section (2) provides the same in the negative and stipulates that no person or authority, except those stipulated in sub-section (1) is entitled to confer or grant a degree or present himself as entitled to confer or grant a degree. Sub-section (3) provides that, for the application of Section 22, “degree” includes those degrees which are specified in this regard by the UGC by a notification issued in the Official Gazette, after previous approval of the Central Government.
97. During the course of the hearing, in response to queries posed by this Court, the Standing Counsel for the UGC clarified on instructions that the notification referred to in sub-section (3) of Section 22 has been issued. The latest notification in this regard, which currently holds the field, was issued by the UGC in March 2014.<sup>120</sup> The notification lists the nomenclature of all the degrees which fall within the ambit of Section 22 of the UGC Act. Under the title of ‘Specification of Degrees with Urdu/Persian/Arabic nomenclature’, the following degrees are specified:

| Specification of Degrees with Urdu/Persian/Arabic nomenclature |                   |            |                          |   |
|--|-------------------|------------|--------------------------|---|
| Sl. No.  | Specified Degrees | Level      | Minimum duration (Years) | Entry Qualification                       |
| 126.   | Fazil             | BACHELOR'S | 3 years                  | 10+2 (Alim/ Afzal- Ul- Ulema Preliminary) |

<sup>119</sup> Section 3 reads: “**Application of Act to institutions for higher studies other than Universities** – The Central Government may, on the advice of the Commission, declare by notification in the Official Gazette, that any institution for higher education, other than a University, shall be deemed to be a University for the purposes of this Act, and on such a declaration being made, all the provisions of this Act shall apply to such institution as if it were a University within the meaning of clause (f) of section 2”

<sup>120</sup> NO. F. 5-1/2013 (CPP-II).

## Digital Supreme Court Reports

|   |  |            |         |                                       |
|---|--|------------|---------|---------------------------------------|
| 127.  | Afzal-Ul-Ulma  | BACHELOR'S | 3 years | 10+2 (Alim/Afzal-Ul-Ulma Preliminary) |
| 128.  | Kamil  | MASTER'S   | 2 years | Fazil/Afzal-Ul-Ulma (BA)              |
| 129.  | Mumtaz. (Mumtazul Tafseer. Mumtazul Mohaddisin, Mumtazul Fiqh, Mumtazul Adah etc.) | M.PHIL.    | 1 year  | Kamil (MA)                            |
| <p>The universities shall be free to write English equivalent of these degrees, if they so desire in the mark sheet/degree certificates either in parentheses or slash.</p> |  |            |         |                                       |

98. Section 9 of the Madarsa Act specifies the functions of the Board under the Madarsa Act. Several of these functions pertain to the regulation of the Fazil and Kamil degrees, which correspond to a bachelor's level and a post-graduate degree, respectively. In particular, the following provisions deal with regulating these higher education degrees:
- Sub-clause (a) empowers the Board to prescribe courses of instructions, textbooks and other material for *inter alia* the Kamil and Fazil courses;
  - Sub-clause (e) empowers the Board to grant degrees, diplomas, certificates and academic distinctions to those who have either studied in institutions recognized by the board or studied privately under the conditions mandated by regulations and passed an examination conducted by the Board;
  - Sub-clause (f) empowers the Board to conduct the examinations of *inter alia* the Kamil and Fazil courses. Sub-clauses (g), (h) and (j) further empower the Board to recognize institutions for the purpose of examinations, admit candidates for the examinations, and publish or withhold the publication of the examination results; and
  - Sub-clause (o) empowers the Board to carry out all acts which are required to further the object of the Board, which is a body

**Anjum Kadari & Anr. v. Union of India & Ors.**

constituted to regulate and supervise “Madrasa-Education up to Fazil”.

Pursuant to the above provisions, several provisions in the Regulations framed by the Board also seek to regulate the Kamil and Fazil courses and degrees.

99. The Madarsa Act to the extent to which it seeks to regulate higher education, including the ‘degrees’ of Fazil and Kamil, is beyond the legislative competence of the State Legislature since it conflicts with Section 22 of the UGC Act. Entry 25 of List III, pursuant to which the Madarsa Act has been enacted, has been expressly made subject to Entry 66 of List I. The UGC Act governs the standards for higher education and a state legislation cannot seek to regulate higher education, in contravention of the provisions of the UGC Act.
  - c. The entire Madarsa Act need not be struck down on the above ground
100. In the foregoing sections of this Judgment, we have upheld the constitutionality of the Madarsa Act on various grounds, that were urged before the High Court and subsequently, before this Court. However, certain provisions of the Madarsa Act which pertain to the regulation of higher education and the conferment of such degrees have been held to be unconstitutional on the ground of lack of legislative competence. Thus, the question that arises is whether the entire legislation must be struck down on this ground. In our view, it is in failing to adequately address this question of severability that the High Court falls into error and ends up throwing the baby out with the bathwater.
101. The entire statute does not need to be struck down each time that certain provisions of the statute are held to not meet constitutional muster. The statute is only void to the extent that it contravenes the Constitution. This position may be derived from the text of Article 13(2) itself, which states:

“(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.”

**Digital Supreme Court Reports**

102. Although Article 13(2) upholds this proposition in the context of laws which abridge the fundamental rights in Part III, the same doctrine is equally applicable to provisions of a statute which are set aside on the ground of lack of legislative competence. This position has also been affirmed by a steady line of precedent of this Court. We may helpfully refer to the observations in the *locus classicus* on the subject. In R.M.D. Chamarbaugwalla v. Union of India,<sup>121</sup> a Constitution bench of this Court adjudicated on the constitutionality of certain provisions of the Prize Competitions Act, 1956 and its allied rules. This Court, speaking through Justice TL Venkatarama Ayyar, had occasion to lay down the contours of the doctrine of severability and held that when a statute is in part void, it will be enforced as regards the rest, if that part is severable from what is invalid. It was clarified that it is immaterial whether the invalidity of the statute arises by reason of its subject matter being outside the competence of the legislature or by reason of its provisions contravening other constitutional provisions. To determine whether the specific provisions or the portion of the statute which is invalid is severable from the rest of the statute, this Court adopted certain rules of construction, which are as follows:

**“22. [...]”**

1. In determining whether the valid parts of a statute are separable from the invalid parts thereof, it is the intention of the legislature that is the determining factor. **The test to be applied is whether the legislature would have enacted the valid part if it had known that the rest of the statute was invalid. [...]**
2. If the valid and invalid provisions are so inextricably mixed up that they cannot be separated from one another, then the invalidity of a portion must result in the invalidity of the Act in its entirety. On the other hand, **if they are so distinct and separate that after striking out what is invalid, what remains is in itself a complete code independent of the**

**Anjum Kadari & Anr. v. Union of India & Ors.**

**rest, then it will be upheld notwithstanding that the rest has become unenforceable. [...]**

3. Even when the provisions which are valid are distinct and separate from those which are invalid, if they all form part of a single scheme which is intended to be operative as a whole, then also the invalidity of a part will result in the failure of the whole. [...]
4. Likewise, when the valid and invalid parts of a statute are independent and do not form part of a scheme but what is left after omitting the invalid portion is so thin and truncated as to be in substance different from what it was when it emerged out of the legislature, then also it will be rejected in its entirety.
5. The separability of the valid and invalid provisions of a statute does not depend on whether the law is enacted in the same section or different sections; [...] **it is not the form, but the substance of the matter that is material, and that has to be ascertained on an examination of the Act as a whole and of the setting of the relevant provision therein.**
6. If after the invalid portion is expunged from the statute what remains cannot be enforced without making alterations and modifications therein, then the whole of it must be struck down as void, as otherwise it will amount to judicial legislation. [...]
7. In determining the legislative intent on the question of separability, it will be legitimate to take into account the history of the legislation, its object, the title and the preamble to it. [...]

**(emphasis supplied)**

103. Having already disagreed with the High Court on the question of whether the entire Madarsa Act suffers from an infirmity on the principle of secularism and other contentions, the only infirmity lies in those provisions which pertain to higher education, namely Fazil and Kamil. These provisions can be severed from the rest of the Madarsa Act. As noted earlier, the purpose behind the Madarsa Act

**Digital Supreme Court Reports**

was to remove the difficulties in running the Madarsas, improve their merit and provide adequate facilities to students studying in these institutions. The purpose was not limited to only regulating Fazil and Kamil, and the legislature would have still enacted the statute if it were aware that the portions pertaining to higher education were invalid. Further, if the provisions relating to higher education are separated from the rest of the statute, the Act can continue to be enforced in a real and substantial manner. On an examination of the Madarsa Act, it is clear that prescribing the instructional material, conducting exams and conferring degrees for Fazil and Kamil were only a part of the functions of the Board. The severance of these functions from the Board does not impact its entire character. Thus, only the provisions which pertain to Fazil and Kamil are unconstitutional, and the Madarsa Act otherwise remains valid.

**F. Conclusion**

104. In view of the above discussion, we conclude that:

- a. The Madarsa Act regulates the standard of education in Madarsas recognized by the Board for imparting Madarsa education;
- b. The Madarsa Act is consistent with the positive obligation of the State to ensure that students studying in recognised Madarsas attain a level of competency which will allow them to effectively participate in society and earn a living;
- c. Article 21-A and the RTE Act have to be read consistently with the right of religious and linguistic minorities to establish and administer educational institutions of their choice. The Board with the approval of the State government can enact regulations to ensure that religious minority institutions impart secular education of a requisite standard without destroying their minority character;
- d. The Madarsa Act is within the legislative competence of the State legislature and traceable to Entry 25 of List III. However, the provisions of the Madarsa Act which seek to regulate higher-education degrees, such as Fazil and Kamil are unconstitutional as they are in conflict with the UGC Act, which has been enacted under Entry 66 of List I.

**Anjum Kadari & Anr. v. Union of India & Ors.**

105. The judgment of the High Court of Judicature at Allahabad dated 22 March 2024 is accordingly set aside and the petitions shall stand disposed of in the above terms.
106. Pending applications, if any, stand disposed of.

*Result of the case:* Petitions disposed of.

<sup>†</sup>Headnotes prepared by: Nidhi Jain

**Ashok  
v.  
State of Uttar Pradesh**

(Criminal Appeal No. 771 of 2024)

02 December 2024

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

**Issue for Consideration**

Matter pertains to the correctness of the order of conviction and sentence against the appellant, for the offences punishable u/ss.376, 302, 201 IPC as also SC and ST Act 1989; and as regards the role of the Public Prosecutor and appointment of legal aid lawyers.

**Headnotes<sup>†</sup>**

**Penal Code, 1860 – ss.376, 302, 201 – Rape and murder – Prosecution case that appellant committed rape and murder of a ten year old girl – Victim's cousin-witness to the incident, and narrated the same to the victim's father – Dead body found hidden at the place of incident – Appellant fled from the spot when questioned by the victim's father and thereafter, FIR was registered – Order of conviction and imposition of death sentence against the appellant, for the offences punishable u/ss.376, 302, 201 as also the 1989 Act – High Court upheld the conviction, however reduced the sentence to life imprisonment – Correctness:**

**Held:** Evidence of victim's cousin, the only eyewitness, cannot be held to be of sterling quality – It is unsafe to base conviction only on his testimony – At the most, it can be the evidence of the last seen together – As regards, the recovery of articles at instance of the appellant, the prosecution failed to prove that the recovery was from a particular place – Thus, evidence of recovery to be kept out of consideration – Appellant's guilt beyond reasonable doubt not established – As regards, the examination of the appellant u/s.313 Cr.P.C., material circumstances appearing in evidence against the appellant, version of the main prosecution witnesses not been put to him – Unless all material circumstances appearing against him

---

\* Author

**Digital Supreme Court Reports**

in evidence are put to the accused, he cannot decide whether he wants to lead any defence evidence – Even the date and place of the crime allegedly committed by the appellant not put to the appellant – Thus, the appellant was prejudiced – Even assuming that failure to put material to the appellant in his examination was an irregularity, it cannot be cured by remanding the case to the trial court, since the incident is fifteen and a half years old and after such a long gap, it would be unjust to ask the appellant to explain the circumstances and material specifically appearing against him in the evidence – Moreover, the appellant had been incarcerated for about twelve years and nine months before he was released on bail – Even assuming that the evidence of eye witness can be believed, the appellant entitled to acquittal on the ground of the failure to put incriminating material to him in his examination u/s.313 CrPC – Both the trial court and High Court overlooked non-compliance with the requirements of s.313 CrPC – Shockingly, the trial court imposed the death penalty in a case which ought to have resulted in acquittal – Imposing capital punishment in such a case shocks the conscience of this Court – There was failure of the State to provide timely and quality of legal aid to the appellant – Thus, impugned judgments and orders set aside and the appellant is acquitted – Directions regarding the role of the Public Prosecutor and appointment of legal aid lawyers issued – Code of Criminal Procedure, 1973 – Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. [Paras 12, 13, 14-17, 19, 21-24]

**Code of Criminal Procedure, 1973 – s.313(5) – Power to examine accused – Role of the public prosecutor:**

**Held:** Under sub-Section (5) of s.313 (sub-Section (5) of s.351 of Bharatiya Nagarik Suraksha Sanhita, 2023), the court is entitled to secure the assistance of the public prosecutor and the advocate representing the accused to prepare the questions to be put in the examination u/s.313 – Public Prosecutor has to play an active role in ensuring that every trial is conducted in a fair manner and in accordance with the law – It is the Public Prosecutor's duty to invite the Court's attention to the requirement of putting all incriminating material to the accused – Thus, the Public Prosecutor under an obligation to remain present when the examination of the accused is made to assist the Court – Bharatiya Nagarik Suraksha Sanhita, 2023. [Para 18]

**Ashok v. State of Uttar Pradesh****Constitution of India – Arts.21 and 39A – Equal justice and free legal aid – Failure to provide legal aid to the accused – Effect:**

**Held:** Right to get legal aid is a fundamental right of the accused, guaranteed by Art.21 – Even u/s.303 CrPC, every accused has a right to be defended by a pleader of his choice – Under s.304 CrPC, it is the duty of the Court to ensure that a legal aid lawyer is appointed to espouse the cause of the accused free of costs – When an accused has either not engaged an advocate or does not have sufficient means to engage an advocate, it is the trial court's duty to inform the accused of his right to obtain free legal aid, which is a right covered by Art.21 – ss.340 and 341 of the Bharatiya Nagarik Suraksha Sanhita, 2023 correspond to ss.303 and 304 CrPC – On facts, there was failure of the State to provide timely and quality of legal aid to the appellant – Code of Criminal Procedure, 1973 – Bharatiya Nagarik Suraksha Sanhita, 2023. [Paras 19, 20]

**Criminal trial – Role of the Public Prosecutor and appointment of legal aid lawyers – Issuance of directions regarding the role of the Public Prosecutor and appointment of legal aid lawyers:**

- Held:** (i) Duty of the Court to ensure that proper legal aid is provided to an accused;
- (ii) Duty of Public Prosecutor to point out to the Court the requirement of providing accused free legal aid;
- (iii) Public Prosecutor to request the Court not to proceed without offering to provide legal aid to the accused;
- (iv) Duty of the Public Prosecutor to assist the trial court in recording the accused's statement u/s. 313 CrPC. If the Court omits any material circumstance against the accused, the Public Prosecutor must bring it to the Court's notice and assist in framing questions. It is the Public Prosecutor's duty to prevent trial infirmities that may prejudice the accused.;
- (v) Accused entitled to free legal aid at all material stages, starting from remand, including bail petitions;

**Digital Supreme Court Reports**

- (vi) Accused to be made aware of his right to get free legal aid at all material stages;
- (vii) For all the cases where there is a possibility of a life sentence or death sentence, appoint legal aid advocates with at least 10 years of criminal practice, and in other cases the accused entitled to a legal aid advocate who has good knowledge of the law and experience of conducting trials on the criminal side. Legal Services Authorities at all levels to give proper training to the newly appointed legal aid advocates;
- (viii) Legal Services Authorities to monitor the work of the legal aid advocate and to ensure that they attend the court regularly and punctually when the cases entrusted to them are fixed;
- (ix) It is necessary to ensure that the same legal aid advocate is continued throughout the trial unless there are compelling reasons to do so;
- (x) In cases of serious nature and complicated legal and factual issues, the Court may appoint a senior member of the Bar who has a vast experience of conducting trials;
- (xi) Accused is entitled to free trial and if effective legal aid is not made available to an accused it would amount to infringement of his fundamental rights guaranteed by Art. 21; and
- (xii) Legal aid must be effective. Advocates appointed to espouse the cause of the accused must have good knowledge of criminal laws, law of evidence and procedural laws. If the legal aid advocate provided to an accused is not competent enough to conduct the trial efficiently, the rights of the accused will be violated. [Para 23]

**Case Law Cited**

*Raj Kumar v. State (NCT of Delhi)* [\[2023\] 5 SCR 754 : 2023 SCC OnLine SC 609](#); *Shivaji Sahabroo Bobade v. State of Maharashtra* [\[1974\] 1 SCR 489 : \(1973\) 2 SCC 793](#); *Hussainara Khatoon (IV) v.*

**Ashok v. State of Uttar Pradesh**

*Home Secy., State of Bihar* [1979] 3 SCR 1276 : (1980) 1 SCC 98;  
*M.H. Hoskot v. State of Maharashtra* [1979] 1 SCR 192 : (1978) 3  
SCC 544; *Anokhilal v. State of M.P.* [2019] 18 SCR 1196 : (2019)  
20 SCC 196 – referred to.

**List of Acts**

Penal Code, 1860; Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989; Code of Criminal Procedure, 1973; Bharatiya Nagarik Suraksha Sanhita, 2023.

**List of Keywords**

Role of Public Prosecutor; Appointment of legal aid lawyers; Rape and murder; Imposition of death sentence; Eyewitness; Last seen together; Recovery of articles; Established beyond reasonable doubt; Examination u/s.313 Cr.P.C; Material circumstances appearing in evidence; Defence evidence; Irregularity; Incarceration; Failure to put incriminating material to accused in his examination u/s.313 CrPC; Death penalty; Capital punishment; Assistance of public prosecutor; Failure to provide legal aid to accused; Right to get legal aid; Right to be defended by a pleader of his choice; Espouse the cause of accused free of costs; State to provide timely and quality of legal aid to accused; Directions regarding role of Public Prosecutor and appointment of legal aid lawyers.

**Case Arising From**

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 771 of 2024

From the Judgment and Order dated 28.11.2013 of the High Court of Judicature at Allahabad in CC No. 170 of 2013

**Appearances for Parties**

M. Shoeb Alam, Sr. Adv./Amicus Curiae, Talha Abdul Rahman, Amicus Curiae, M Shaz Khan, Sudhanshu Tewari, Faizan Ahmad, Advs. for the Appellant.

K Parameshwar, Sr. A.A.G., Ms. Sakshi Kakkar, Advs. for the Respondent.

**Digital Supreme Court Reports****Judgment / Order of the Supreme Court****Judgment****Abhay S. Oka, J.****FACTUAL ASPECT**

1. This is a very unfortunate case. The victim of the offence was ten years old at the time of the incident. On 27<sup>th</sup> May 2009, around 9.00 a.m., she and her first cousin, PW-2, had gone to a pasture to graze her goats. The age of PW-2 was seven years at that time. As the victim was thirsty, she went near a tubewell cabin. The appellant-accused was working as an operator of the tubewell appointed by the owner of the tubewell. The victim requested the appellant to provide drinking water. The allegation of the prosecution is that, with evil intentions, the appellant took her inside the cabin. He committed rape on her and, after that, murdered her. According to the prosecution's case, PW-2 saw the appellant forcibly taking the victim inside the cabin and raping her. By 11.00 a.m., PW-2 returned to PW-1, the victim's father. PW-1 was the uncle of PW-2. After PW-2 narrated the story to PW-1, he went to the tubewell cabin to find the victim and found the dead body of the victim hidden in a haystack in that cabin. On being questioned by PW-1, the appellant fled from the spot and thereafter, PW-1 registered the First Information Report.
2. The Trial Court, by judgment and order dated 24<sup>th</sup> December 2012, convicted the appellant for the offences punishable under Sections 376, 302 and 201 of the Indian Penal Code (for short, 'the IPC'). The Trial Court also convicted the appellant under the provisions of Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short, 'the SCST Act'). The Trial Court imposed capital punishment.
3. The High Court heard the reference under Section 366 of the Code of Criminal Procedure, 1973 (for short, 'the CrPC') with an appeal preferred by the appellant. Though the High Court confirmed the conviction, the death penalty was set aside and the appellant was sentenced to undergo life imprisonment for the remainder of his natural life subject to the exercise of powers of grant of remission or grant of clemency by the constitutional functionaries.

**Ashok v. State of Uttar Pradesh**

4. The present appeal is against the judgments mentioned above. By order dated 20<sup>th</sup> May 2022, this Court granted bail to the appellant after noting that he had undergone actual incarceration for about 13 years. We may note here that earlier, learned counsel Shri M Shoeb Alam was appointed as amicus curiae to espouse the cause of the appellant. After his designation as a senior advocate, he continued to assist this Court. Shri Talha Abdul Rahman, Advocate-on-Record, was appointed amicus curiae to assist the learned senior counsel.

**SUBMISSIONS**

5. The learned senior counsel appearing for the appellant has taken us through the evidence of the prosecution witnesses. Inviting our attention to evidence of PW-1, Heera Lal, the father of the victim, he pointed out that the version of the witness in his examination-in-chief is based on what was reported to him by PW-2, the minor witness. But, if we compare the depositions of PW-2 with the examination-in-chief of PW-1, there is a significant variance between the version of PW-2 as stated by PW-1 and what PW-2 stated in his examination-in-chief. He pointed out that in the cross-examination, PW-1 has tried to improve upon his version by trying to depose consistently with the version of PW-2. Inviting our attention to the proceedings before the Trial Court, he submitted that when the examination-in-chief of the PW-1 was recorded, the appellant-accused was not represented by any advocate. Therefore, the cross-examination was adjourned to enable the appellant to engage an advocate. An advocate was appointed to espouse his cause after the examination-in-chief of PW-1 was recorded. The appellant was not represented by any advocate at the time of the framing of the charge.
6. Coming to the depositions of PW-2, the learned senior counsel for the appellant urged that considering the difference between the version of PW-1 in his examination-in-chief and cross-examination, the possibility of PW-2 being tutored cannot be ruled out. He submitted that evidence of PW-2 was recorded two and half years after the incident, and on the date of the recording of evidence, his age was ten years. Possibly, he was tutored. He pointed out that the evidence of PW-2 was not of sterling quality and, therefore, cannot be the sole basis for the conviction, especially when evidence regarding recovery is doubtful.

**Digital Supreme Court Reports**

7. The learned senior counsel appearing for the appellant as amicus curiae pointed out that the alleged recovery of the victim's slippers and underwear, at the instance of the appellant, is highly doubtful as the place and time of recovery have not been mentioned in the recovery memo. The prosecution did not examine the two witnesses to the recovery memo. He pointed out that the prosecution made no attempt to prove that blood stains on the undergarments of the appellant were that of the blood of the victim. No analysis was made.
8. More importantly, he submitted that the incriminating circumstances brought on record in the evidence against the appellant were not put to him in his examination under Section 313 of the CrPC. Therefore, the appellant's right of defence was seriously prejudiced. He relied upon a decision of this Court in the case of *Raj Kumar v. State (NCT of Delhi)*.<sup>1</sup>
9. Shri K. Parameshwar, the learned senior counsel appearing for the State, supported the impugned judgments. However, he has assisted us on the issue of legal aid to the accused.

**CONSIDERATION OF SUBMISSIONS**

10. In the examination-in-chief, PW-1 stated that PW-2 witnessed the commission of rape and murder of the victim. According to the witness, PW-2 told him that as the door of the room was open while he was standing outside, he saw the act of commission of rape and murder. He deposed that after the PW-2 told him about the incident, he rushed along with two or three other persons to the spot. He found that the appellant was present there, and he questioned the appellant. Thereafter, the appellant fled. He tried to search for the victim. He found the dead body of the victim under the haystack in the room. It is pertinent to note that PW-2 had informed PW-1 that the appellant was the offender. Though two to three persons accompanied PW-1, he did not attempt to apprehend the accused and take him to the police. The conduct of PW-1 of not apprehending the appellant, though he was present, is unnatural.
11. Examination-in-chief of PW-1 was recorded by learned Trial Judge on 11<sup>th</sup> May 2011. At the end of the examination-in-chief, the learned Trial Judge recorded that the case was adjourned at the oral request

**Ashok v. State of Uttar Pradesh**

of the appellant to engage a counsel. Before the cross-examination was recorded on 2<sup>nd</sup> July 2011, an advocate was appointed to espouse the appellant's cause. The cross-examination of PW-1 was recorded on 2<sup>nd</sup> July 2011 and 24<sup>th</sup> September 2011. The witness reiterated that he had narrated the facts stated to him by PW-2.

12. As far as PW-2 is concerned, he was 10 years old when his deposition was recorded. Many preliminary questions were put to the witness by the learned Trial Judge. After satisfying himself that the witness was able to understand the questions and give a reply to the same, an oath was administered to him. His version in the examination-in-chief is that the appellant gave drinking water to him and the victim. After drinking the water, when they tried to leave, the appellant caught the victim from behind, took off her undergarments, and the victim started screaming. He did not depose that he had seen the commission of rape and murder by the appellant. To this extent, the version of PW-2, as told to PW-1, is entirely different. PW-1 claims that PW-2 reported to him that he had seen the appellant committing rape and murder from outside the cabin. PW-8, the investigating officer, stated that he had recorded the Statement of PW-2 on 18<sup>th</sup> June 2009. Thus, there was a delay of 21 days in recording his statement, though the FIR recorded that this witness had seen the appellant committing the crime. There is some dispute about whether the witness's statement recorded under Section 161 of CrPC was produced with the charge sheet. The learned senior counsel appointed as amicus pointed out that it is not on the record of the Trial Court. In the list of witnesses mentioned in the charge sheet, the name of PW-2 has not been included. Therefore, for all the reasons discussed above, the evidence of PW-2, the only eyewitness, cannot be held to be of sterling quality. It is unsafe to base conviction only on his testimony. Even otherwise, taking his testimony as correct, the evidence of the PW-2 can, at the highest, be the evidence of the last seen together.
13. Therefore, it is necessary to consider the other circumstantial evidence. In this case, the recovery of the victim's slipper and underwear is alleged at the appellant's instance. We have perused the recovery memo signed by the circle officer and two independent witnesses. The prosecution did not examine the two independent witnesses. Though the date of recovery is mentioned in the memo, the time and, most importantly, the place of recovery are not mentioned. Therefore, it

**Digital Supreme Court Reports**

cannot be said that pursuant to the statement made by the appellant, in accordance with Section 27 of the Indian Evidence Act, 1972 (for short, 'the Evidence Act'), the articles were found at the place stated by the appellant. Hence, the prosecution failed to prove that the recovery was from a particular place. Thus, evidence of recovery will have to be kept out of consideration. The recovery of the articles at the instance of the appellant is a very important circumstance in the chain of circumstances. It is not proved. Hence, the appellant's guilt beyond reasonable doubt has not been established.

**EXAMINATION OF THE APPELLANT UNDER SECTION 313  
OF CR.P.C**

14. Now, we come to the appellant's statement, recorded per Section 313 of the CrPC. Only three questions were put to the appellant. In the first question, the names of ten prosecution witnesses were incorporated, and the only question asked to the appellant was what he had to say about the testimony of ten prosecution witnesses. In the second question, all the documents produced by the prosecution were referred, and a question was asked, what the appellant has to say about the documents. In the third question, it was put to the appellant that knowing the fact that the victim belongs to a scheduled caste, he caused her death after raping her and concealed her dead body, and he was asked for his reaction to the same. What PW-1 and PW-2 deposed against the appellant was not put to the appellant. The contents of the incriminating documents were not put to the appellant.
15. In the case of *Raj Kumar*,<sup>1</sup> in paragraph 17, this Court has summarised the law laid down by this Court from time to time on Section 313 of the CrPC. Paragraph 17 reads thus:

“17. The law consistently laid down by this Court can be summarized as under:

- (i) **It is the duty of the Trial Court to put each material circumstance appearing in the evidence against the accused specifically, distinctively and separately. The material circumstance means the circumstance or the material on the basis of which the prosecution is seeking his conviction;**

**Ashok v. State of Uttar Pradesh**

- (ii) The object of examination of the accused under Section 313 is to enable the accused to explain any circumstance appearing against him in the evidence;
- (iii) **The Court must ordinarily eschew material circumstances not put to the accused from consideration while dealing with the case of the particular accused;**
- (iv) The failure to put material circumstances to the accused amounts to a serious irregularity. It will vitiate the trial if it is shown to have prejudiced the accused;
- (v) **If any irregularity in putting the material circumstance to the accused does not result in failure of justice, it becomes a curable defect. However, while deciding whether the defect can be cured, one of the considerations will be the passage of time from the date of the incident;**
- (vi) In case such irregularity is curable, even the appellate court can question the accused on the material circumstance which is not put to him; and
- (vii) In a given case, the case can be remanded to the Trial Court from the stage of recording the supplementary statement of the concerned accused under Section 313 of CrPC.
- (viii) While deciding the question whether prejudice has been caused to the accused because of the omission, the delay in raising the contention is only one of the several factors to be considered.”

This Court based its decision on several decisions, including the decision in the case of *Shivaji Sahabroo Bobade v. State of Maharashtra*.<sup>2</sup> This Court relied upon what was held in paragraph 16 of the said case. Paragraph 16 of the said case reads thus:

**Digital Supreme Court Reports**

**"16. .... It is trite law, nevertheless fundamental, that the prisoner's attention should be drawn to every inculpatory material so as to enable him to explain it. This is the basic fairness of a criminal trial and failures in this area may gravely imperil the validity of the trial itself, if consequential miscarriage of justice has flowed. However, where such an omission has occurred it does not ipso facto vitiate the proceedings and prejudice occasioned by such defect must be established by the accused. In the event of evidentiary material not being put to the accused, the court must ordinarily eschew such material from consideration. It is also open to the appellate court to call upon the counsel for the accused to show what explanation the accused has as regards the circumstances established against him but not put to him and if the accused is unable to offer the appellate court any plausible or reasonable explanation of such circumstances, the Court may assume that no acceptable answer exists and that even if the accused had been questioned at the proper time in the trial court he would not have been able to furnish any good ground to get out of the circumstances on which the trial court had relied for its conviction. In such a case, the Court proceeds on the footing that though a grave irregularity has occurred as regards compliance with Section 342, CrPC, the omission has not been shown to have caused prejudice to the accused. In the present case, however, the High Court, though not the trial court has relied upon the presence of blood on the pants of the blood group of the deceased. We have not been shown what explanation the accused could have offered to this chemical finding particularly when we remember that his answer to the question regarding the human blood on the blade of the knife was "I do not know". Counsel for the appellants could not make out any intelligent explanation and the "blood" testimony takes the crime closer to the accused. However, we are not inclined to rely over much on this evidentiary circumstance, although we should emphasise how this**

**Ashok v. State of Uttar Pradesh**

inadverntance of the trial court had led to a relevant fact being argued as unavailable to the prosecution. Great care is expected of Sessions Judges who try grave cases to collect every incriminating circumstance and put it to the accused even though at the end of a long trial the Judge may be a little fagged out.”

(emphasis added)

In a given case, the witnesses may have deposed in a language not known to the accused. In such a case, if the material circumstances appearing in evidence are not put to the accused and explained to the accused, in a language understood by him, it will cause prejudice to the accused.

16. In the present case, there is no doubt that material circumstances appearing in evidence against the appellant have not been put to him. The version of the main prosecution witnesses PWs-1 and 2 was not put to him. The stage of the accused leading defence evidence arises only after his statement is recorded under Section 313 of the CrPC. Unless all material circumstances appearing against him in evidence are put to the accused, he cannot decide whether he wants to lead any defence evidence. In this case, even the date and place of the crime allegedly committed by the appellant were not put to the appellant. What was reportedly seen by PW-2 was not put to the appellant in his examination. Therefore, the appellant was prejudiced. Even assuming that failure to put material to the appellant in his examination is an irregularity, the question is whether it can be cured by remanding the case to the Trial Court.
17. The date of occurrence is of 27<sup>th</sup> May 2009. Thus, the incident is fifteen and a half years old. After such a long gap of fifteen and half years, it will be unjust if the appellant is now told to explain the circumstances and material specifically appearing against him in the evidence. Moreover, the appellant had been incarcerated for about twelve years and nine months before he was released on bail. Therefore, considering the long passage of time, there is no option but to hold that the defect cannot be cured at this stage. Even assuming that the evidence of PW-2 can be believed, the appellant is entitled to acquittal on the ground of the failure to put incriminating material to him in his examination under Section 313 of the CrPC. We are surprised to note that both the Trial Court and

## Digital Supreme Court Reports

High Court have overlooked non-compliance with the requirements of Section 313 of the CrPC. Shockingly, the Trial Court imposed the death penalty in a case which ought to have resulted in acquittal. Imposing capital punishment in such a case shocks the conscience of this Court.

### **ROLE OF THE PUBLIC PROSECUTOR**

18. Under sub-Section (5) of Section 313 of CrPC (sub-Section (5) of Section 351 of Bharatiya Nagarik Suraksha Sanhita, 2023), the Court is entitled to secure the assistance of the public prosecutor and the advocate representing the accused to prepare the questions to be put in the examination under Section 313. A Public Prosecutor has to play an active role in ensuring that every trial is conducted in a fair manner and in accordance with the law. Hence, it is the Public Prosecutor's duty to invite the Court's attention to the requirement of putting all incriminating material to the accused. Therefore, the Public Prosecutor is under an obligation to remain present when the examination of the accused is made to assist the Court.

### **FAILURE TO PROVIDE LEGAL AID TO THE ACCUSED**

19. After having perused the record of the case, we found a very disturbing feature. It is about the failure of the State to provide timely legal aid to the appellant. The other issue is about the quality of legal aid. Apart from provisions of Article 21 and Article 39A of the Constitution of India, the law on the issue of the right to legal aid has been evolved by this Court through its landmark decisions. This Court's first well-known decision is in the case of *Hussainara Khatoon (IV) v. Home Secy., State of Bihar*.<sup>3</sup> In Paragraph 7, this Court held thus:

“7. We may also refer to Article 39-A the fundamental constitutional directive which reads as follows:

“39-A. *Equal justice and free legal aid*.—The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are

3 [1979] 3 SCR 1276 : (1980) 1 SCC 98

**Ashok v. State of Uttar Pradesh**

not denied to any citizen by reason of economic or other disabilities.”

(emphasis added)

This article also emphasises that free legal service is an unalienable element of “reasonable, fair and just” procedure for without it a person suffering from economic or other disabilities would be deprived of the opportunity for securing justice. **The right to free legal services is, therefore, clearly an essential ingredient of “reasonable, fair and just”, procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21. This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicado situation and the State is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require, provided of course the accused person does not object to the provision of such lawyer.** We would, therefore, direct that on the next remand dates, when the undertrial prisoners, charged with bailable offences, are produced before the Magistrates, the State Government should provide them a lawyer at its own cost for the purpose of making an application for bail, provided that no objection is raised to such lawyer on behalf of such undertrial prisoners and if any application for bail is made, the Magistrates should dispose of the same in accordance with the broad outlines set out by us in our judgment dated February 12, 1979. The State Government will report to the High Court of Patna its compliance with this direction within a period of six weeks from today.”

(emphasis added)

The second decision is in the case of *M.H. Hoskot v. State of Maharashtra*.<sup>4</sup> In paragraphs 14 and 25 of the decision, this Court held thus:

**Digital Supreme Court Reports**

**“14. The other ingredient of fair procedure to a prisoner, who has to seek his liberation through the court process is lawyer’s services. Judicial justice, with procedural intricacies, legal submissions and critical examination of evidence, leans upon professional expertise; and a failure of equal justice under the law is on the cards where such supportive skill is absent for one side.** Our judicature, moulded by Anglo-American models and our judicial process, engineered by kindred legal technology, compel the collaboration of lawyer-power for steering the wheels of equal justice under the law. Free legal services to the needy is part of the English criminal justice system. And the American jurist, Prof. Vance of Yale, sounded sense for India too when he said: [ Justice and Reform, Earl Johnson, Jr. p. 11]

“What does it profit a poor and ignorant man that he is equal to his strong antagonist before the law if there is no one to inform him what the law is? Or that the courts are open to him on the same terms as to all other persons when he has not the wherewithal to pay the admission fee?””

(emphasis added)

**“25. If a prisoner sentenced to imprisonment, is virtually unable to exercise his constitutional and statutory right of appeal, inclusive of special leave to appeal, for want of legal assistance, there is implicit in the Court under Article 142, read with Articles 21 and 39-A of the Constitution, power to assign counsel for such imprisoned individual “for doing complete justice”. This is a necessary incident of the right of appeal conferred by the Code and allowed by Article 136 of the Constitution. The inference is inevitable that this is a State’s duty and not Government’s charity. Equally affirmative is the implication that while legal services must be free to the beneficiary, the lawyer himself has to be reasonably remunerated for his services.** Surely, the profession has a public commitment to the people but mere philanthropy of its members yields short mileage in the long run. Their services, especially when they are on behalf of the State must be paid for. Naturally, the State

### Ashok v. State of Uttar Pradesh

concerned must pay a reasonable sum that the court may fix when assigning counsel to the prisoner. Of course, the court may judge the situation and consider from all angles whether it is necessary for the ends of justice to make available legal aid in the particular case. In every country where free legal services are given it is not done in all cases but only where public justice suffers otherwise. That discretion resides in the court.”

(emphasis added)

This issue was again dealt with by a Bench of three Judges in the case of *Anokhilal v. State of M.P.*<sup>5</sup> In this decision, this Court revisited the law on this aspect. In paragraph 11, this Court relied upon the decision in the case of *Hussainara Khatoon (IV)*.<sup>3</sup> In paragraph 20, this Court summarised the principles laid down from time to time. Paragraph 20 reads thus:

**“20. The following principles, therefore, emerge from the decisions referred to hereinabove:**

**20.1.** Article 39-A inserted by the 42nd Amendment to the Constitution, effected in the year 1977, provides for free legal aid to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. The statutory regime put in place including the enactment of the Legal Services Authorities Act, 1987 is designed to achieve the mandate of Article 39-A.

**20.2. It has been well accepted that right to free legal services is an essential ingredient of “reasonable, fair and just” procedure for a person accused of an offence and it must be held implicit in the right guaranteed by Article 21. The extract from the decision of this Court in *Best Bakery case* [*Zahira Habibulla H. Sheikh v. State of Gujarat* (2004) 4 SCC 158 : 2004 SCC (Cri) 999] (as quoted in the decision in *Mohd. Hussain [Mohd. Hussain v. State (NCT of Delhi)* (2012) 9 SCC 408 : (2012) 3 SCC (Cri) 1139] ) emphasises that the object of criminal trial is to search for the truth and**

**Digital Supreme Court Reports**

**the trial is not a bout over technicalities and must be conducted in such manner as will protect the innocent and punish the guilty.**

**20.3.** Even before insertion of Article 39-A in the Constitution, the decision of this Court in *Bashira [Bashira v. State of U.P. (1969) 1 SCR 32]* : AIR 1968 SC 1313 : 1968 Cri LJ 1495] put the matter beyond any doubt and held that the time granted to the Amicus Curiae in that matter to prepare for the defence was completely insufficient and that the award of sentence of death resulted in deprivation of the life of the accused and was in breach of the procedure established by law.

**20.4.** The portion quoted in *Bashira [Bashira v. State of U.P. (1969) 1 SCR 32]* : AIR 1968 SC 1313 : 1968 Cri LJ 1495] from the judgment of the Andhra Pradesh High Court authored [*Alla Nageswara Rao, In re*, 1954 SCC OnLine AP 115 : AIR 1957 AP 505] by Subba Rao, J., the then Chief Justice of the High Court, stated with clarity that mere formal compliance of the rule under which sufficient time had to be given to the counsel to prepare for the defence would not carry out the object underlying the rule. It was further stated that the opportunity must be real where the counsel is given sufficient and adequate time to prepare.

**20.5.** In *Bashira [Bashira v. State of U.P. (1969) 1 SCR 32]* : AIR 1968 SC 1313 : 1968 Cri LJ 1495] as well as in *Ambadas [Ambadas Laxman Shinde v. State of Maharashtra]* (2018) 18 SCC 788 : (2019) 3 SCC (Cri) 452 : (2018) 14 Scale 730], making substantial progress in the matter on the very day after a counsel was engaged as Amicus Curiae, was not accepted by this Court as compliance with “sufficient opportunity” to the counsel.”

(emphasis added)

In paragraph 31, norms were laid down by this Court, which read thus:

**“31.** Before we part, we must lay down certain norms so that the infirmities that we have noticed in the present matter are not repeated:

**Ashok v. State of Uttar Pradesh**

**31.1. In all cases where there is a possibility of life sentence or death sentence, learned advocates who have put in minimum of 10 years' practice at the Bar alone be considered to be appointed as Amicus Curiae or through legal services to represent an accused.**

**31.2. In all matters dealt with by the High Court concerning confirmation of death sentence, Senior Advocates of the Court must first be considered to be appointed as Amicus Curiae.**

**31.3. Whenever any learned counsel is appointed as Amicus Curiae, some reasonable time may be provided to enable the counsel to prepare the matter. There cannot be any hard-and-fast rule in that behalf. However, a minimum of seven days' time may normally be considered to be appropriate and adequate.**

**31.4. Any learned counsel, who is appointed as Amicus Curiae on behalf of the accused must normally be granted to have meetings and discussion with the accused concerned. Such interactions may prove to be helpful as was noticed in *Imtiyaz Ramzan Khan* [*Imtiyaz Ramzan Khan v. State of Maharashtra* (2018) 9 SCC 160 : (2018) 3 SCC (Cri) 721].”**

(emphasis added)

20. Thus, the right to get legal aid is a fundamental right of the accused, guaranteed by Article 21 of the Constitution. Even under Section 303 of the CrPC, every accused has a right to be defended by a pleader of his choice. Section 304 provides for the grant of legal aid to an accused free of costs. When an accused has either not engaged an advocate or does not have sufficient means to engage an advocate, it is the trial court's duty to inform the accused of his right to obtain free legal aid, which is a right covered by Article 21 of the Constitution of India. Sub-Section (1) of Section 304 reads thus:

**“304. Legal aid to accused at State expense in certain cases.—(1) Where, in a trial before the Court of Session, the accused is not represented by a pleader, and where it appears to the Court that the accused has**

**Digital Supreme Court Reports**

**not sufficient means to engage a pleader, the Court shall assign a pleader for his defence at the expense of the State.**

- (2).....  
(3) ....."

(emphasis added)

Sections 340 and 341 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (for short, 'BNSS') are the Sections which correspond to Sections 303 and 304 of the CrPC. Thus, under Section 304 of the CrPC, it is the duty of the Court to ensure that a legal aid lawyer is appointed to espouse the cause of the accused.

21. Now, we come back to the facts of the case. From the proceedings of the Trial Court, it appears that when the charges were framed on 8th September 2010, and when the plea was recorded, the appellant was not represented by any advocate. Proceedings of 26th February 2011 record that though three witnesses of the prosecution were present, the appellant was not represented by any advocate. Therefore, assurance of the appellant has been recorded that he would call his counsel on the next date. On 11th May 2011, the examination-in-chief of PW-1 was recorded. In the proceedings, the court recorded that the appellant had not engaged any advocate on that day, and he was not desirous of taking legal aid. However, on 8th June 2011, an advocate was appointed to espouse his cause. We find that on 20th July 2012, 4th October 2012, 1st November 2012, 7th November 2012, 9th November 2012 and 23rd November 2012, the advocate appointed as amicus curiae for the appellant was absent. Applications were required to be made by him to recall certain witnesses as the cross-examination was closed due to his absence. Thus, the evidence of more than one prosecution witness was recorded in the absence of the legal aid advocate. On 7th November 2012, another advocate was appointed to espouse the appellant's cause. We find that a third advocate conducted the cross-examination of PW-8.
22. At the stage of framing the charge, the appellant was not represented by an advocate. From 8<sup>th</sup> June 2011, the appellant never declined legal aid. We are surprised to note that the examination-in-chief of PW-1 was allowed to be recorded without giving legal aid counsel

**Ashok v. State of Uttar Pradesh**

to the appellant, who was not represented by an advocate. If the examination-in-chief of a prosecution witness is recorded in the absence of the advocate for the accused, a very valuable right of objecting to the questions asked in examination-in-chief is taken away. The accused is also deprived of the right to object to leading questions. It will not be appropriate to comment on the capabilities of the two legal aid lawyers appointed in this case as they are not parties before us. But suffice it to say that the cross-examination of the witnesses was not up to the mark. Some of the crucial questions that normally would have been put in the cross-examination have not been asked.

**CONCLUDING PART**

23. Our conclusions and directions regarding the role of the Public Prosecutor and appointment of legal aid lawyers are as follows:
  - a. It is the duty of the Court to ensure that proper legal aid is provided to an accused;
  - b. When an accused is not represented by an advocate, it is the duty of every Public Prosecutor to point out to the Court the requirement of providing him free legal aid. The reason is that it is the duty of the Public Prosecutor to ensure that the trial is conducted fairly and lawfully;
  - c. Even if the Court is inclined to frame charges or record examination-in-chief of the prosecution witnesses in a case where the accused has not engaged any advocate, it is incumbent upon the Public Prosecutor to request the Court not to proceed without offering legal aid to the accused;
  - d. It is the duty of the Public Prosecutor to assist the Trial Court in recording the statement of the accused under Section 313 of the CrPC. If the Court omits to put any material circumstance brought on record against the accused, the Public Prosecutor must bring it to the notice of the Court while the examination of the accused is being recorded. He must assist the Court in framing the questions to be put to the accused. As it is the duty of the Public Prosecutor to ensure that those who are guilty of the commission of offence must be punished, it is also his duty to ensure that there are no infirmities in the conduct of the trial which will cause prejudice to the accused;

**Digital Supreme Court Reports**

- e. An accused who is not represented by an advocate is entitled to free legal aid at all material stages starting from remand. Every accused has the right to get legal aid, even to file bail petitions;
- f. At all material stages, including the stage of framing the charge, recording the evidence, etc., it is the duty of the Court to make the accused aware of his right to get free legal aid. If the accused expresses that he needs legal aid, the Trial Court must ensure that a legal aid advocate is appointed to represent the accused;
- g. As held in the case of *Anokhilal*,<sup>5</sup> in all the cases where there is a possibility of a life sentence or death sentence, only those learned advocates who have put in a minimum of ten years of practice on the criminal side should be considered to be appointed as *amicus curiae* or as a legal aid advocate. Even in the cases not covered by the categories mentioned above, the accused is entitled to a legal aid advocate who has good knowledge of the law and has an experience of conducting trials on the criminal side. It would be ideal if the Legal Services Authorities at all levels give proper training to the newly appointed legal aid advocates not only by conducting lectures but also by allowing the newly appointed legal aid advocates to work with senior members of the Bar in a requisite number of trials;
- h. The State Legal Services Authorities shall issue directions to the Legal Services Authorities at all levels to monitor the work of the legal aid advocate and shall ensure that the legal aid advocates attend the court regularly and punctually when the cases entrusted to them are fixed;
- i. It is necessary to ensure that the same legal aid advocate is continued throughout the trial unless there are compelling reasons to do so or unless the accused appoints an advocate of his choice;
- j. In the cases where the offences are of a very serious nature and complicated legal and factual issues are involved, the Court, instead of appointing an empanelled legal aid advocate, may appoint a senior member of the Bar who has a vast experience of conducting trials to espouse the cause of the accused so that the accused gets best possible legal assistance;

**Ashok v. State of Uttar Pradesh**

- k. The right of the accused to defend himself in a criminal trial is guaranteed by Article 21 of the Constitution of India. He is entitled to a fair trial. But if effective legal aid is not made available to an accused who is unable to engage an advocate, it will amount to infringement of his fundamental rights guaranteed by Article 21;
  - I. If legal aid is provided only for the sake of providing it, it will serve no purpose. Legal aid must be effective. Advocates appointed to espouse the cause of the accused must have good knowledge of criminal laws, law of evidence and procedural laws apart from other important statutes. As there is a constitutional right to legal aid, that right will be effective only if the legal aid provided is of a good quality. If the legal aid advocate provided to an accused is not competent enough to conduct the trial efficiently, the rights of the accused will be violated.
24. For the reasons recorded earlier, the appeal is allowed. The impugned judgments and orders are set aside, and the appellant is acquitted of offences alleged against him. The bail bonds of the appellant stand cancelled.
25. A copy of this judgment shall be forwarded to all State Legal Services Authorities to enable the authorities to take necessary measures.
26. We record our appreciation for the able assistance rendered to the Court by the learned senior counsel Shri M.Shoeb Alam, appointed to espouse the cause of the appellant. We must also record that the learned senior counsel, Shri K.Parameshwar, appearing for the respondent, has fairly assisted the Court.

*Result of the case:* Appeal allowed.

<sup>†</sup>Headnotes prepared by: Nidhi Jain

**Banwari and Others**

v.

**Haryana State Industrial and Infrastructure Development Corporation Limited (HSIIDC) and Another**

(Civil Appeal No. 13348 of 2024)

10 December 2024

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

**Issue for Consideration**

Matter pertains to the correctness of the order passed by the High Court allowing the writ petition filed by the respondent relying on Ramsinghbai (Ramsanghbai) Jerambhai's case and setting aside the order passed by the LAC holding that the application u/s.28-A can only be filed within a period of three months from any judgment of the Reference Court u/s.18, arising from the same acquisition but not from the date of judgment of this Court or the High Court.

**Headnotes<sup>†</sup>**

**Land Acquisition Act, 1894 – ss.4, 18, 28-A – Enhancement of compensation – Appellants awarded compensation for the land acquired for Kundli Manesar Palwal Expressway – Reference u/s.18 by similarly circumstanced land-owners for enhancement of compensation and the same was dismissed – However, the High Court allowed the Regular First Appeal and enhanced the compensation in respect of the land covered by the same notification under which the appellants' land also covered – Subsequently, the appellants did not file Reference but filed an application u/s.28-A within a period of three months from the order of the High Court – LAC held that the appellants were entitled to the benefit of the order passed by the High Court and enhanced the compensation payable to the appellants as awarded to similarly circumstanced land-owners – Thereagainst, writ petition filed by the respondent was allowed by the High Court relying on Ramsinghbai (Ramsanghbai) Jerambhai's case and the order passed by the LAC was set aside holding that the application u/s.28-A can only be filed within a period of three months from any judgment of the Reference Court**

---

\* Author

**Digital Supreme Court Reports**

**u/s.18, arising from the same acquisition but not from the date of judgment of this Court or the High Court – Correctness:**

**Held:** An earlier decision of a Bench of particular strength would be binding on the subsequent Benches of this Court having the same or lesser number of judges – A decision or judgment can be said to be per incuriam if it is not possible to reconcile its ratio with that of a previously pronounced judgment of a co-equal or larger Bench – Limitation for moving the application u/s.28-A will begin to run only from the date of the award on the basis of which redetermination of the compensation is sought – Application of the appellants u/s.28-A is within a period of three months from the order passed by the High Court – Judgment rendered in Ramsingbhai (Ramsangbhai) Jerambhai's case would reveal that the said case did not take note of the earlier view taken by three judges of this Court in the case of Pradeep Kumari and Others's case – Judgment in Pradeep Kumari and Others case has been rendered after considering the relevant provisions of the Statute and the principles of interpretation – However, the judgment in the case of Ramsingbhai (Ramsangbhai) Jerambhai's case is a short judgment only referring to the text of s.28-A(1) – Statement of Objects and Reasons of s.28-A would reveal that the object underlying the enactment of the said provision is to remove inequality in the payment of compensation for same or similar quality of land – Said provision is for giving benefit to inarticulate and poor people not being able to take advantage of the right of reference to the civil court u/s.18 – This is sought to be achieved by providing an opportunity to all aggrieved parties whose land is covered by the same notification to seek redetermination once any of them has obtained orders for payment of higher compensation from the reference court u/s.18 – Same benefit would be available to the other landholders u/s.28-A – s.28-A being a beneficent legislation, the principle of interpretation to be adopted is which advances the policy of the legislation to extend the benefit rather than a construction which has the effect of curtailing the benefit conferred by it – Thus, the judgment and order passed by the High Court is quashed and set aside, and the order of the LAC is upheld. [Paras 15, 16, 19, 21, 22-25]

***Per incuriam – Rule of per incuriam – Judgment, when per incuriam:***

**Held:** Decision or judgment can be said to be *per incuriam* if it is not possible to reconcile its ratio with that of a previously pronounced judgment of a co-equal or larger Bench. [Para 21]

**Banwari and Others v. Haryana State Industrial and Infrastructure Development Corporation Limited(HSIIDC) and Another**

**Land Acquisition Act, 1894 – s.28-A – Re-determination of the amount of compensation on the basis of the award of the Court – Invocation of the provisions of s.28-A(1) – Conditions to be satisfied – Stated – Explanation of Union of India and Another v. Pradeep Kumari and Others's case. [Paras 11-14]**

**Case Law Cited**

*Union of India and Another v. Pradeep Kumari and Others, 1995 INSC 180 : [1995] 2 SCR 703 : (1995) 2 SCC 736 – relied on.*

*Ramsinghbhai (Ramsangbhai) Jerambhai v. State of Gujarat and Another, 2018 INSC 405 : [2018] 3 SCR 1019 : (2018) 16 SCC 445 – per incuriam.*

*National Insurance Company Limited v. Pranay Sethi and Others, 2017 INSC 1068 : [2017] 13 SCR 100 : (2017) 16 SCC 680 – referred to.*

**List of Acts**

Land Acquisition Act, 1894.

**List of Keywords**

Ramsinghbhai (Ramsangbhai) Jerambhai's case; Application u/s.28-A of the LA Act; Reference Court u/s.18 of the LA Act; Enhancement of compensation; Land acquired for Kundli Manesar Palwal Expressway; Similarly circumstanced land-owners; *Per incuriam*; Limitation for moving the application u/s.28-A of the LA Act; Redetermination of compensation; Beneficent legislation; Union of India and Another v. Pradeep Kumari and Others's case.

**Case Arising From**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 13348 of 2024

From the Judgment and Order dated 25.11.2021 of the High Court of Punjab & Haryana at Chandigarh in CWP No. 19814 of 2021

**Appearances for Parties**

Piyush Sharma, Anuj Kumar Sharma, Advs. for the Appellants.

Alok Sangwan, Sr. A.A.G., Samar Vijay Singh, Sumit Kumar Sharma, Rajat Sangwan, Ms. Sabarni Som, Fateh Singh, Advs. for the Respondents.

**Digital Supreme Court Reports****Judgment / Order of the Supreme Court****Judgment****B.R. Gavai, J.**

1. Leave granted.
2. This appeal challenges the judgment and order dated 25<sup>th</sup> November 2021 passed by the learned Single Judge of the High Court of Punjab and Haryana at Chandigarh in CWP No. 19814 of 2021 (O&M), whereby the writ petition filed by respondent No.1 under Articles 226/227 of the Constitution of India praying for a writ of certiorari for quashing the order passed by the District Revenue Officer-cum-Land Acquisition Collector, Jhajjar (hereinafter referred to as "LAC") dated 15<sup>th</sup> September 2020, came to be allowed.
3. The facts, in brief, giving rise to the present appeal are as under:
  - 3.1. By a notification under Section 4 of the Land Acquisition Act, 1894 (hereinafter referred to as "1894 Act") dated 17<sup>th</sup> November 2004, the land of the appellants admeasuring 8 Kanal 17 Marla of village Majri, Tehsil Bahadurgarh, District Jhajjar was acquired for Kundli Manesar Palwal Expressway. By an award dated 1<sup>st</sup> March 2006, a compensation of Rs.12,50,000/- per acre was determined.
  - 3.2. Aggrieved by the said award, similarly circumstanced land-owners preferred a reference for enhancement of compensation before the learned Additional District Judge, Jhajjar under Section 18 of the 1894 Act. Vide order dated 17<sup>th</sup> January 2012, the said reference was dismissed.
  - 3.3. The said land-owners preferred a Regular First Appeal (RFA) being No. 429 of 2013 before the High Court of Punjab and Haryana. Vide judgment and order dated 2<sup>nd</sup> May 2016, the High Court of Punjab and Haryana allowed the said RFA and enhanced the compensation to Rs.19,91,300/- along with statutory benefits.
  - 3.4. Immediately thereafter the appellants on 30<sup>th</sup> June 2016 filed an application under Section 28-A of the 1894 Act before the LAC, Jhajjar as reference was not filed by the appellants.

**Banwari and Others v. Haryana State Industrial and Infrastructure Development Corporation Limited(HSIIDC) and Another**

- 3.5. Vide order dated 15<sup>th</sup> September 2020, the LAC held that the appellants were entitled to the benefit of the judgment and order of the High Court in RFA No. 429 of 2013 dated 2<sup>nd</sup> May 2016 and enhanced the compensation payable to the appellants to Rs.19,91,300/- per acre along with statutory benefits as awarded by the High Court to the similarly circumstanced land-owners.
- 3.6. Being aggrieved thereby, respondent No.1 preferred a writ petition before the High Court. The High Court vide impugned judgment and order, relying on its earlier judgment in CWP No. 8456 of 2020 titled "**Haryana State Industrial and Infrastructure Development Corporation Limited v. Smt. Shanti and Others**" decided on 6<sup>th</sup> September 2021, allowed the writ petition and set aside the order dated 15<sup>th</sup> September 2020 passed by the LAC. In its earlier judgment, the High Court has placed reliance on the judgments of this Court including the case of **Ramsinghbhai (Ramsangbhai) Jerambhai v. State of Gujarat and Another**,<sup>1</sup> whereby this Court has held that the application under Section 28-A of the 1894 Act can only be filed within a period of three months from any judgment of the Reference Court under Section 18 of the 1894 Act, arising from the same acquisition but not from the date of judgment of this Court or the High Court.
- 3.7. Being aggrieved thereby, the appellants have approached this Court.
4. We have heard Shri Piyush Sharma, learned counsel appearing for the appellants and Shri Rajat Sangwan, learned counsel appearing for the respondents.
5. Learned counsel for the appellants submits that the High Court has erred in relying on the judgment of this Court in the case of **Ramsinghbhai (Ramsangbhai) Jerambhai** (supra), inasmuch as the said judgment does not take into consideration the earlier judgment of this Court in the case of **Union of India and Another v. Pradeep Kumari and Others**.<sup>2</sup> He, therefore, submits that the appeal be allowed.

1 [2018 INSC 405 : \[2018\] 3 SCR 1019](#) : (2018) 16 SCC 445

2 [1995 INSC 180 : \[1995\] 2 SCR 703](#) : (1995) 2 SCC 736

**Digital Supreme Court Reports**

6. *Per contra*, learned counsel for the respondents would submit that the High Court has rightly relied on the judgment of this Court in the case of Ramsinghbhai (Ramsangbhai) Jerambhai (supra). He, therefore, submits that the appeal be dismissed.
7. This Court, speaking through a bench of three learned Judges, in the case of Ramsinghbhai (Ramsangbhai) Jerambhai (supra), has observed thus:

“3. It is clear from the opening words of the provision that the redetermination under Section 28-A is available only in respect of an “award” passed by the “court” under Part III of the Act, comprising Sections 18 to 28-A (both inclusive). The “Court” referred to in Section 28-A of the Act is the Court as defined under Section 3(d) to mean “... a Principal Civil Court of Original Jurisdiction ...”. Thus, the judgment of the appellate court is not within the purview of Section 28-A. It is also to be noted that the appellate courts under Section 54 are under Part VIII of the Act whereas the redetermination is only in respect of the award passed by the Reference Court under Part III of the Act. [See Jose Antonio Cruz Dos R. Rodriguese v. LAO [Jose Antonio Cruz Dos R. Rodriguese v. LAO (1996) 6 SCC 746] ]. In its recent judgment in Bharatsing v State of Maharashtra [Bharatsing v. State of Maharashtra (2018) 11 SCC 92 : (2018) 5 SCC (Civ) 44], this Court has surveyed the decisions on this issue and reiterated the legal principle.

4. What the appellant seeks is redetermination of compensation under the Act in terms of the judgment in Ramsinghbhai v. State of Gujarat [Ramsinghbhai v. State of Gujarat, 2014 SCC OnLine Guj 5840 : 2015 AIR CC 1046] of the High Court passed under Section 54 of the Act. In view of the settled legal position which we have explained above, the appellant is not entitled to such a relief; his entitlement, if any, is only in terms of Section 28-A of the Act based on the award of the Reference Court.”
8. It can thus be seen that, this Court has held that as the appellant therein was seeking redetermination of compensation on the basis of the judgment of the High Court passed under Section 54 of the

**Banwari and Others v. Haryana State Industrial and Infrastructure Development Corporation Limited(HSIIDC) and Another**

1894 Act, he was not entitled to such a relief. It was held that the application under Section 28-A of the 1894 Act had to be made within a period of three months from the date of the award passed by the Court under Part-III of the Act and the appellate courts are not within purview of Section 28-A of the 1894 Act.

9. It, however, appears that this Court in the case of *Ramsinghbai (Ramsanghbai) Jerambhai* (supra), has not noticed an earlier judgment rendered by this Court in *Pradeep Kumari and Others* (supra).
10. In the case of *Pradeep Kumari and Others* (supra), though the award of LAC therein was not challenged by *Pradeep Kumari*, the similarly circumstanced persons whose land was acquired had made references. In one of the references, an award was made on 21<sup>st</sup> February 1987. Immediately within a period of three months, the said *Pradeep Kumari* filed an application under Section 28-A of the 1894 Act before LAC for claiming the benefit of the said award. On the said application, the Collector made an order dated 14<sup>th</sup> March 1988 awarding an additional amount of compensation on the basis of the award of the Reference Court dated 21<sup>st</sup> February 1987. Feeling aggrieved by the said order of Collector, the Union of India filed a writ petition before the High Court of Himachal Pradesh. The High Court dismissed the writ petition. Civil Appeals were filed before this Court, challenging the judgment of the High Court. The same were dismissed. Aggrieved still, Review Petitions were filed. This Court, speaking in a combination of three learned Judges, observed thus:

**“8. We may, at the outset, state that having regard to the Statement of Objects and Reasons, referred to earlier, the object underlying the enactment of Section 28-A is to remove inequality in the payment of compensation for same or similar quality of land arising on account of inarticulate and poor people not being able to take advantage of the right of reference to the civil court under Section 18 of the Act. This is sought to be achieved by providing an opportunity to all aggrieved parties whose land is covered by the same notification to seek redetermination once any of them has obtained orders for payment of higher compensation from the reference court under Section 18 of the Act. Section 28-A is, therefore, in the nature of a beneficent provision intended to remove inequality and**

**Digital Supreme Court Reports**

to give relief to the inarticulate and poor people who are not able to take advantage of right of reference to the civil court under Section 18 of the Act. In relation to beneficent legislation, the law is well-settled that while construing the provisions of such a legislation the court should adopt a construction which advances the policy of the legislation to extend the benefit rather than a construction which has the effect of curtailing the benefit conferred by it. The provisions of Section 28-A should, therefore, be construed keeping in view the object underlying the said provision.

**9.** A perusal of the provisions contained in sub-section (1) of Section 28-A of the Act would show that after an award is made under Part III whereby the court allows to the applicant any amount of compensation in excess of the amount awarded by the Collector under Section 11, a right accrues to a person interested in the other land covered by the same notification under sub-section (1) of Section 4 who is also aggrieved by the award of the Collector but who had not made an application to the Collector under Section 18, to move an application before the Collector for redetermination of the amount of compensation payable to him on the basis of the amount of compensation awarded by the court. This application for redetermination of the compensation is required to be made within three months from the date of the award of the court. The right to make the application under Section 28-A arises from the award of the court on the basis of which the person making the application is seeking redetermination of the compensation. There is nothing in sub-section (1) of Section 28-A to indicate that this right is confined in respect of the earliest award that is made by the court after the coming into force of Section 28-A. By construing the expression "where in an award under this Part" in sub-section (1) of Section 28-A to mean "where in the first award made by the court under this Part", the word 'first', which is not found in sub-section (1) of Section 28-A, is being read therein and thereby the amplitude of the said provision is being curtailed so as to restrict the benefit conferred by it. In the matter of construction of a beneficent provision it is not permissible by judicial interpretation to read words

**Banwari and Others v. Haryana State Industrial and Infrastructure Development Corporation Limited(HSIIDC) and Another**

which are not there and thereby restrict the scope of the said provision.

**10.** It is possible to visualise a situation where in the first award that is made by the court after the coming into force of Section 28-A the enhancement in the amount of compensation by the said award is not very significant for the reason that the person who sought the reference was not able to produce adequate evidence in support of his claim and in another reference where the award was made by the court subsequently such evidence is produced before the court and a much higher amount is awarded as compensation in the said award. By restricting the benefit of Section 28-A to the first award that is made by the court after the coming into force of Section 28-A the benefit of higher amount of compensation on the basis of the subsequent award made by the court would be denied to the persons invoking Section 28-A and the benefit of the said provision would be confined to redetermination of compensation on the basis of lesser amount of compensation awarded under the first award that is made after the coming into force of Section 28-A. There is nothing in the wordings of Section 28-A to indicate that the legislature intended to confer such a limited benefit under Section 28-A. Similarly, there may be a situation, as in the present case, where the notification under Section 4(1) of the Act covers lands falling in different villages and a number of references at the instance of persons having lands in different villages were pending in the court on the date of coming into force of Section 28-A and awards in those references are made by the court on different dates. A person who is entitled to apply under Section 28-A belonging to a particular village may come to know of the first award that is made by the court after the coming into force of Section 28-A in a reference at the instance of a person belonging to another village, after the expiry of the period of three months from the date of the said award but he may come to know of the subsequent award that is made by the court in the reference at the instance of a person belonging to the same village before the expiry of the period of three months from the date of the said award. This is more likely to happen in the cases of inarticulate and

**Digital Supreme Court Reports**

poor people who cannot be expected to keep track of all the references that were pending in court on the date of coming into force of Section 28-A and may not be in a position to know, in time, about the first award that is made by the court after the coming into force of Section 28-A. By holding that the award referred to in Section 28-A(1) is the first award made after the coming into force of Section 28-A, such persons would be deprived of the benefit extended by Section 28-A. Such a construction would thus result in perpetuating the inequality in the payment of compensation which the legislature wanted to remove by enacting Section 28-A. The object underlying Section 28-A would be better achieved by giving the expression "an award" in Section 28-A its natural meaning as meaning the award that is made by the court in Part III of the Act after the coming into force of Section 28-A. If the said expression in Section 28-A(1) is thus construed, a person would be able to seek redetermination of the amount of compensation payable to him provided the following conditions are satisfied:

- (i) An award has been made by the court under Part III after the coming into force of Section 28-A;
- (ii) By the said award the amount of compensation in excess of the amount awarded by the Collector under Section 11 has been allowed to the applicant in that reference;
- (iii) The person moving the application under Section 28-A is interested in other land covered by the same notification under Section 4(1) to which the said award relates;
- (iv) The person moving the application did not make an application to the Collector under Section 18;
- (v) The application is moved within three months from the date of the award on the basis of which the redetermination of amount of compensation is sought; and
- (vi) Only one application can be moved under Section 28-A for redetermination of compensation by an applicant.

**11.** Since the cause of action for moving the application for redetermination of compensation under Section 28-A arises from the award on the basis of which redetermination

**Banwari and Others v. Haryana State Industrial and Infrastructure Development Corporation Limited(HSIIDC) and Another**

of compensation is sought, the principle that “once the limitation begins to run, it runs in its full course until its running is interdicted by an order of the court” can have no application because the limitation for moving the application under Section 28-A will begin to run only from the date of the award on the basis of which redetermination of compensation is sought.”

11. It can thus be seen that this Court has held that the object underlying the enactment of Section 28-A of the 1894 Act is to remove inequality in the payment of compensation for same or similar quality of land arising on account of inarticulate and poor people not being able to take advantage of the right of reference to the civil court under Section 18 of the 1894 Act. It was held that this is sought to be achieved by providing an opportunity to all aggrieved parties whose land is covered by the same notification to seek redetermination once any of them has obtained orders for payment of higher compensation from the Reference Court under Section 18 of the 1894 Act. It was held that while construing the provisions of such a legislation, the Court should adopt a construction which advances the policy of the legislation to extend the benefit rather than a construction which has the effect of curtailing the benefit conferred by it.
12. It has further been held by this Court that under Section 28-A of the 1894 Act, a right accrues to a person interested in the other land covered by the same notification under sub-section (1) of Section 4, where the Court allows a higher compensation to the similarly circumstanced persons who are covered by the said notification. It has been held that the application for redetermination of the compensation is required to be made within three months from the date of the award by the Court. It has been held that the right to make an application under Section 28-A of the 1894 Act arises from the award of the Court on the basis of which the person making the application is seeking redetermination of the compensation. The Court further held that there is nothing in sub-section (1) of Section 28-A of the 1894 Act to indicate that this right is confined in respect of the earliest award that is made by the Court after coming into force of Section 28-A of the 1894 Act. This Court held that Section 28-A of the 1894 Act if read in such a manner, it will be contrary to the principles of construction of a beneficial provision. It is further held that by judicial interpretation,

**Digital Supreme Court Reports**

the Court could not read the words which are not there and thereby restrict the scope of a provision.

13. In paragraph 10 of the said case, this Court had referred to various eventualities that may occur if such a restrictive interpretation is given to the provision of Section 28-A of the 1894 Act. The Court observed that it has to be seen from the point of view of inarticulate and poor people. The Court held that the object underlying Section 28-A of the 1894 Act would be better achieved by giving the expression "an award" in Section 28-A of the 1894 Act, its natural meaning as meaning the award that is made by the Court in Part III of the 1894 Act after coming into force of Section 28-A.
14. This Court has laid down the conditions which are required to be satisfied for invoking the provisions of Section 28-A(1) of the 1894 Act as follows:
  - (i) An award has been made by the Court under Part III of the Act after coming into force of Section 28-A;
  - (ii) By the said Award, the amount of compensation in excess of the amount awarded by the Collector under Section 11 has been allowed to the applicant in that reference;
  - (iii) The person moving the application under Section 28-A is interested in other land covered by the same notification under Section 4(1) to which the said award relates;
  - (iv) The person moving the application did not move the application under Section 18;
  - (v) The application is moved within three months from the date of the award on the basis of which redetermination of amount of compensation is sought; and
  - (vi) Only one such application can be moved under Section 28-A for redetermination of the compensation by the applicant.
15. In the present case, it is not in dispute that the First Appeal which was allowed by the High Court vide judgment and order dated 2<sup>nd</sup> May 2016 was in respect of the land which was covered by the same notification under which notification the appellants' land is also covered. It is also not in dispute that the amount awarded by the High Court in the said First Appeal is in excess of the amount awarded

**Banwari and Others v. Haryana State Industrial and Infrastructure Development Corporation Limited(HSIIDC) and Another**

by the Collector under Section 11 of the 1894 Act in the case of the land of the appellants. It is also not in dispute that the appellants had not made an application to the Collector under Section 18 of the 1894 Act. It is also not in dispute that the application made by the appellants under Section 28-A of the 1894 Act to the Collector was within a period of three months from the date of the judgment and order of the High Court.

16. From the perusal of the judgment of this Court in the case of *Pradeep Kumari and Others* (supra), it is clear that the limitation for moving the application under Section 28-A of the 1894 Act will begin to run only from the date of the award on the basis of which redetermination of the compensation is sought. The appellants are seeking redetermination of the compensation on the basis of the judgment and order of the High Court in First Appeal No.429 of 2023 dated 2<sup>nd</sup> May 2016. It is not disputed that the application of the appellants under Section 28-A of the 1894 Act is within a period of three months from 2<sup>nd</sup> May 2016.
17. We are, therefore, of the considered view that the case of the appellants is fully covered by the judgment of this Court in the case of *Pradeep Kumari and Others* (supra).
18. It is further to be noted that the cases of *Pradeep Kumari and Others* (supra) and *Ramsinghbhai (Ramsangbhai) Jerambhai* (supra), both have been decided by a Bench strength of three learned Judges of this Court. The case of *Pradeep Kumari and Others* (supra) is decided on 10<sup>th</sup> March 1995, whereas *Ramsinghbhai (Ramsangbhai) Jerambhai* (supra), has been decided on 24<sup>th</sup> April 2018.
19. A perusal of the judgment rendered in *Ramsinghbhai (Ramsangbhai) Jerambhai* (supra), would reveal that the said case does not take note of the earlier view taken by three learned judges of this Court in the case of *Pradeep Kumari and Others* (supra).
20. In this respect, we may gainfully refer to the observations of a Constitution Bench of this Court in the case of *National Insurance Company Limited v. Pranay Sethi and Others*.<sup>3</sup> The relevant paragraphs of the judgment read as under:

3 2017 INSC 1068 : [2017] 13 SCR 100 : (2017) 16 SCC 680

**Digital Supreme Court Reports**

**“27.** We are compelled to state here that in *Munna Lal Jain*, the three-Judge Bench should have been guided by the principle stated in *Reshma Kumari* which has concurred with the view expressed in *Sarla Verma* or in case of disagreement, it should have been well advised to refer the case to a larger Bench. We say so, as we have already expressed the opinion that the dicta laid down in *Reshma Kumari* being earlier in point of time would be a binding precedent and not the decision in *Rajesh*.

**28.** In this context, we may also refer to *Sundeep Kumar Bafna v. State of Maharashtra* [*Sundeep Kumar Bafna v. State of Maharashtra* (2014) 16 SCC 623 : (2015) 3 SCC (Cri) 558] which correctly lays down the principle that discipline demanded by a precedent or the disqualification or diminution of a decision on the application of the per incuriam rule is of great importance, since without it, certainty of law, consistency of rulings and comity of courts would become a costly casualty. A decision or judgment can be per incuriam any provision in a statute, rule or regulation, which was not brought to the notice of the court. A decision or judgment can also be per incuriam if it is not possible to reconcile its ratio with that of a previously pronounced judgment of a co-equal or larger Bench. There can be no scintilla of doubt that an earlier decision of co-equal Bench binds the Bench of same strength. Though the judgment in *Rajesh* case was delivered on a later date, it had not apprised itself of the law stated in *Reshma Kumari* but had been guided by *Santosh Devi*. We have no hesitation that it is not a binding precedent on the co-equal Bench.”

21. It can thus be seen that, this Court in unequivocal terms has held that an earlier decision of a Bench of particular strength would be binding on the subsequent Benches of this Court having the same or lesser number of judges.
22. While considering the rule of *per incuriam*, the Constitution Bench of this Court has held that a decision or judgment can be said to be *per incuriam* if it is not possible to reconcile its ratio with that of a previously pronounced judgment of a co-equal or larger Bench.

**Banwari and Others v. Haryana State Industrial and Infrastructure Development Corporation Limited(HSIIDC) and Another**

23. In any case, the judgment in *Pradeep Kumari and Others* (supra) has been rendered by three learned Judges of this Court after considering the relevant provisions of the Statute and the principles of interpretation. However, the judgment in the case of *Ramsinghbhai (Ramsanghbhai) Jerambhai* (supra) is a short judgment only referring to the text of Section 28-A(1) of the 1894 Act.
24. As already discussed hereinabove, the provisions of Section 28-A(1) of the 1894 Act have been elaborately considered by a three Judges Bench of this Court in the case of *Pradeep Kumari and Others* (supra). In the said case, it has been held that the Statement of Objects and Reasons of Section 28-A would reveal that the object underlying the enactment of the said provision is to remove inequality in the payment of compensation for same or similar quality of land. It has been held that the said provision is for giving benefit to inarticulate and poor people not being able to take advantage of the right of reference to the civil court under Section 18 of the Act. It has been held that this is sought to be achieved by providing an opportunity to all aggrieved parties whose land is covered by the same notification to seek redetermination once any of them has obtained orders for payment of higher compensation from the reference court under Section 18 of the Act. The same benefit would be available to the other landholders under Section 28-A. It has been held that Section 28-A being a beneficent legislation enacted in order to give relief to the inarticulate and poor people, the principle of interpretation which would be required to be adopted is the one which advances the policy of the legislation to extend the benefit rather than a construction which has the effect of curtailing the benefit conferred by it.
25. We are, therefore, inclined to allow the appeal. The impugned judgment and order of the High Court dated 25<sup>th</sup> November 2021 is quashed and set aside and the order of the LAC dated 15<sup>th</sup> September 2020 is upheld.
26. Pending application(s), if any, shall stand disposed of.

*Result of the case:* Appeal allowed.

<sup>†</sup>Headnotes prepared by: Nidhi Jain

**Aslam Ismail Khan Deshmukh**

v.

**Asap Fluids Pvt. Ltd. & Anr.**

(Arbitration Petition No. 20 of 2019)

07 November 2024

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

**Issue for Consideration**

Petitioner sought appointment of an arbitrator for the adjudication of disputes and claims in terms of the Shareholders Agreement between the parties. Whether the reference under Section 11(6) of the Arbitration & Conciliation Act, 1996, should be declined by examining whether the substantive claims of the petitioner are *ex facie* and hopelessly time barred.

**Headnotes<sup>†</sup>**

**Arbitration & Conciliation Act, 1996 – s.11(6) – Appointment of Arbitrators – Jurisdiction of referral court – Scope of interference – Petitions filed u/s.11(6), if within limitation:**

**Held:** Courts at the referral stage can interfere only in rare cases where it is manifest that the claims are *ex facie* time-barred and dead, or there is no subsisting dispute – While determining the issue of limitation in the exercise of powers u/s.11(6), the referral court must only conduct a limited enquiry for the purpose of examining whether the s.11(6) application has been filed within the limitation period of three years or not – At this stage, the referral court would not indulge in an intricate evidentiary enquiry into the question of whether the claims raised by the petitioner are time barred – Such a determination must be left to the decision of the arbitrator – Petitioner had issued notice invoking arbitration on 23.01.2017 which was delivered to both the respondents on 24.01.2017 – However, the respondents failed to reply to the said notice within 30 days i.e. within 23.02.2017 – Therefore, the period of limitation of three years, for the purposes of a s.11(6) petition, would begin to run from 23.02.2017 i.e., the date of failure or refusal by the other party to comply with the requirements mentioned

\*Author

**Aslam Ismail Khan Deshmukh v. Asap Fluids Pvt. Ltd. & Anr.**

in the notice invoking arbitration – Thus, the present petitions u/s.11(6) filed on 09.04.2019 were within limitation – Furthermore, at the stage of s.11 application, the referral Courts need only to examine whether the arbitration agreement exists or not – The existence of the arbitration agreement in the Shareholders Agreement is not disputed – Petitions allowed – Sole arbitrator already appointed for the adjudicating disputes between the parties in relation to the Service Agreement, appointed for adjudication of the present disputes pertaining to the Shareholders Agreement – Issue as regards the claim of the petitioner being *ex facie* time barred may be adjudicated as a preliminary issue – Limitation Act, 1963. [Paras 32, 39, 41, 44-46]

**Arbitration & Conciliation Act, 1996 – s.11(6) – Limited scope of interference by referral courts – Interests of the party forced to participate in the arbitration proceedings to be balanced, arbitral tribunal may impose costs on the party abusing process of law:**

**Held:** At the stage of s.11 application, the referral Courts need only to examine whether the arbitration agreement exists or not, nothing more, nothing less – However, some parties might take undue advantage of such a limited scope of judicial interference of the referral courts and force other parties to the agreement into participating in a time consuming and costly arbitration process in cases, including but not limited to, where the claims are either *ex facie* time-barred or are discharged through "accord and satisfaction", or cases where the impleadment of a non-signatory to the arbitration agreement is sought etc. – In order to balance such a limited scope of judicial interference with the interests of the parties who might be constrained to participate in the arbitration proceedings, the arbitral tribunal may impose costs of the arbitration on the party which the Tribunal ultimately finds to have abused the process of law and caused unnecessary harassment to the other party to the arbitration. [Para 44]

**Case Law Cited**

*Interplay between Arbitration Agreements Under the Arbitration and Conciliation Act, 1996 and the Indian Stamp Act, 1899, In Re [2023] 15 SCR 1081 – followed.*

## Digital Supreme Court Reports

*Vidya Drolia & Ors v. Durga Trading Corporation* [2020] 11 SCR 1001 : (2021) 2 SCC 1; *Bharat Sanchar Nigam Limited and Another v. Nortel Networks India Private Limited* [2021] 2 SCR 644 : (2021) 5 SCC 738; *SBI General Insurance Co. Ltd. v. Krish Spinning* [2024] 7 SCR 840 : 2024 SCC OnLine SC 1754 – relied on.

*Arif Azim Company Limited v. Aptech Limited* [2024] 3 SCR 73 : (2024) 5 SCC 313 – referred to.

### List of Acts

Arbitration & Conciliation Act, 1996; Limitation Act, 1963.

### List of Keywords

Section 11(6) of the Arbitration & Conciliation Act, 1996; Referral court; Jurisdiction of referral court; Limitation; Petitions filed under Section 11(6) of the Arbitration & Conciliation Act, 1996 within limitation; Appointment of an arbitrator; Shareholders Agreement; Service Agreement; Non-Resident Indian; Claims *ex facie* and hopelessly time barred; Limited enquiry; No intricate evidentiary enquiry; Period of limitation of three years for Section 11(6) petition; Notice invoking arbitration; Failure or refusal by the other party to comply with the requirements; Arbitration agreement; Existence of a *prima facie* arbitration agreement; Sole arbitrator; Time consuming, Costly arbitration process; Claims *ex facie* time-barred; Preliminary issue; Claims discharged through "accord and satisfaction"; Impleadment of a non-signatory to the arbitration agreement sought; Costs; Abuse of process of law; Harassment caused to the other party to the arbitration.

### Case Arising From

CIVIL ORIGINAL JURISDICTION: Arbitration Petition No. 20 of 2019

(Under Section 11(6) read with Section 11(12)(a) of the Arbitration & Conciliation Act, 1996)

With

Arbitration Petition No. 22 of 2019

### Appearances for Parties

Kunal Cheema, Raghav Deshpande, Shubham Chandankhede, Advs. for the Petitioner.

**Aslam Ismail Khan Deshmukh v. Asap Fluids Pvt. Ltd. & Anr.**

Ms. Jasmine Damkewala, Rajesh Kumar, Ms. Vaishali Sharma, Ms. Rachita Sood, Ms. Nishtha Tyagi, Divyam Khera, Tushar, Advs. for the Respondents.

**Judgment / Order of the Supreme Court****Judgment**

**J.B. Pardiwala, J.**

1. Since the captioned petitions raise analogous issues between the same parties, those were taken up together and are being disposed of by this common judgment and order.
2. The petitioner has filed the present two petitions in terms of Section 11(6) read with Section 11(12)(a) of the Arbitration & Conciliation Act, 1996 (for short “**the Act, 1996**”), seeking appointment of an arbitrator for the adjudication of disputes and claims in terms of Clause 13.10 of the Shareholders Agreement dated 25.07.2011 entered into between the petitioner and the respondents.

**I. FACTUAL MATRIX**

3. Aslam Ismail Khan Deshmukh (hereinafter referred to as the “**petitioner**”) is a Non-Resident Indian, who is currently residing and working in Dubai, UAE, having experience and expertise in the drilling fluid industry.
4. ASAP Fluids Pvt. Ltd. (hereinafter referred to as the “**respondent no.1**”) is an Indian private limited company engaged in providing drilling fluids services to the oil and gas industry, whereas Gumpro Drilling Fluids Pvt. Ltd. (hereinafter referred to as the “**respondent no. 2**”) is a private limited company that specializes in oil field services and offers mud services.
5. A Shareholders Agreement dated 25.07.2011 (hereinafter referred to as “**Shareholders Agreement**”) was executed by and among the petitioner, respondent no.1, respondent no.2, Mr. Robert Wayne Pantermuehl, and Mr. Sunil B. Shitole. In terms of the said Shareholders Agreement, the petitioner was to hold 4,00,000 equity shares of respondent no. 1 and also participate in the management of respondent no.1 company. The relevant clauses from the same are reproduced hereinbelow:

**Digital Supreme Court Reports****"4. RIGHT OF PRE-EMPTION FOR ISSUE OF NEW DILUTION INSTRUMENTS OR DILUTION OF SHAREHOLDING**

*Present issued, subscribed and paid up share capital of the Company is Rs.2,64,00,000/- divided into 26,40,000 equity shares of INR 10 each which is held by the members as mentioned below:*

- a. *Gumpro holding 18,00,000 equity shares of Rs. 10/- each in the Company.*
- b. *Bob currently holding only 40,000 equity shares of Rs. 10/- each and shall be allotted additional 360,000 equity shares subject to getting the approval of Foreign Investment Promotion Board (FIPB). Ministry of Finance and Reserve Bank of India or such other approval as may be required as per Indian Law.*
- c. *Aslam Khan holding 400,000 equity shares of Rs. 10/- each in the Company and*
- d. *Sunil Shitole holding 400,000 equity shares of Rs. 10/- each in the Company.*

*On allotment of further 360,000 equity shares to Bob, the issued, subscribed and paid up share capital of the Company will be Rs. 3 Crores divided into 30,00,000 equity shares of Rs. 10/- each which will be held as follow:*

- a. *Gumpro 18,00,000 equity shares of Rs. 10/- each in the Company*
- b. *Bob 400,000 equity shares of Rs. 10/- each in the Company*
- c. *Aslam Khan 400,000 equity shares of Rs. 10/- each in the Company and*
- d. *Sunil Shitole 400,000 equity shares of Rs. 10/- each in the Company-*

*Gumpro has provided Rs.4,58,39,200 Crores as unsecured Loan (as on 31<sup>st</sup> March 2011) and Gumpro will additionally raise Rs.6.6 Crores for the Company from private equity*

**Aslam Ismail Khan Deshmukh v. Asap Fluids Pvt. Ltd. & Anr.**

*fund or venture capital fund and advance it to the Company as secured loan against the security of equipments of the Company.*

General. Subject to the terms and conditions specified in Section 4.3, the affirmative approval provisions contained in Section 9 and applicable Indian law, in the event that the Company proposes to issue any Dilution Instruments, the Company shall first offer such Dilution Instruments to all the Shareholders on rights basis, in proportion to their shareholding ratio in the Company on the date immediately prior to such further issue, in accordance with the procedure set forth in Section 4.2. It is clarified that the shareholding pattern of the Company as stated in Clause 4.1 shall be maintained at all times, save and except in the circumstances specified in Clause 4.2 below. It is agreed and understood by all the Parties to this Agreement that any Shares offered/ issued or subscribed by the Other Shareholder will be under lock -in period of 3 (Three) years from the date of its allotment. The Board shall prior to undertaking any such issue appoint any reputed investment banker/ Chartered accountant to carry out a valuation of the Company. The Board shall ensure that the capital shall be raised at valuation no lower than the valuation set forth in the report of such investment banker/ Chartered Accountant.

xxx

xxx

xxx

**5 RESTRICTIONS ON TRANSFER OF SHARES AND PROVISIONS RELATING TO TRANSMISSION OF SHARES**

5.1 Other Shareholder Share Sale Restriction. Notwithstanding anything contained elsewhere in this Shareholder's Agreement, the Other Shareholder agree that they shall not, whether collectively or individually, directly or indirectly, Transfer any part of their shareholding in the Company in whatever form, or any legal or beneficial interest therein, until the earlier of: (a) Gumpro ceasing to hold a minimum of two percent (2%) of its shareholding in the Company and (b) the completion of a Qualified Public

**Digital Supreme Court Reports**

*Offering, except in compliance with this Shareholders' Agreement, particularly Section 6. Without prejudice to the generality of the foregoing. The Other Shareholder shall not Transfer any part of their individual shareholding until the expiry of three (03) years from the date of issue of such shares. It has been clearly understood and agreed that the shares of the Other Shareholder are locked-in for a period of three years from the date of its issuance or conversion of it into equity shares.*

xxx

xxx

xxx

**6. RIGHT OF FIRST REFUSAL AND RIGHT OF CO-SALE**

6.1 General. Subject to the provisions of Section 5, the Other Shareholder (for this Section "**Selling Shareholder**") hereby unconditionally and irrevocably grants to Gumpro a right (the "**Right of First Refusal**") to purchase all or a portion of the Shares that such Selling Shareholder may propose to Transfer ("**Sale Shares**").

6. Mr. Anand Gupta, the Managing Director of respondent no.2 informed the petitioner, *vide* letter dated 22.09.2011, that 2,00,010 equity shares of respondent no.1 which belong to the petitioner were being held by respondent no.2 in its name. It was stated therein that this arrangement was made to provide comfort to the potential investors in respondent nos.1 and 2 respectively. It was further clarified that the abovementioned shares held by respondent no.2 would be governed by the Shareholders Agreement dated 25.07.2011 and that those shall not be pledged or sold at any time without the written consent of the petitioner. At the time of sale of respondent no.1, it was confirmed that the value of these shares net of taxes would be paid to the petitioner or his nominee.
7. Subsequently, the respondent no.1 along with its Dubai subsidiary company, ASAP Fluids DMCC (hereinafter referred to as the "**Dubai subsidiary**") entered into a **Service Agreement** dated 18.10.2011 (hereinafter referred to as, the "**Service Agreement**") with the petitioner. By the Service Agreement, the petitioner was appointed as a Director of respondent no.1 and its Dubai subsidiary. Among his responsibilities in relation to respondent no.1, the petitioner was also required to carry on the responsibilities of the full operations of

**Aslam Ismail Khan Deshmukh v. Asap Fluids Pvt. Ltd. & Anr.**

the Dubai subsidiary. He was obligated to hold office for an initial period of 3 years w.e.f. 01.01.2011. The Service Agreement provided for the remuneration and benefits that the petitioner was entitled to. The relevant clauses from the same are reproduced hereinbelow:

**"3. TERM**

*3.1 The Director shall hold the office for a period of three years commencing from \_\_\_\_\_ subject to the determination thereof as hereinafter provided.*

xxx

xxx

xxx

**10. TERM AND TERMINATION**

[...]

*10.2 Aslam Khan shall not for a period of three (3) years from the Effective Date (**Initial Term**), terminate this Agreement. In case if he terminates his employment prior to Initial Term, he shall transfer all the equity shares held by him in favour of the Promoter of the Company at zero consideration implying his outstation from the register of members of the Company.”*

8. On the same day, i.e., on 18.10.2011, the petitioner signed an Agreement for Transfer of Commercial Expertise (hereinafter referred to as "**Commercial Expertise Agreement**") with respondent nos. 1 and 2 respectively, agreeing to the transfer of all his commercial expertise, knowledge and experience in the field of getting approvals from the government, and handling administrative and legal aspects of the business to respondent no. 1. In return, respondent no. 1 agreed to issue 4,00,000 equity shares of Rs. 10/- each to the petitioner for consideration other than cash. The relevant recitals and clauses from the same are reproduced hereinbelow:

**" WHEREAS**

[...]

*3. The Parties have agreed before starting this venture that the Transferor shall transfer all his commercial expertise knowledge and experience in the field of getting the approvals of government. handling administrative and legal aspects of the Business ("Commercial Expertise") to the*

**Digital Supreme Court Reports**

*Transferee and the Transferee shall issue him 400,000 equity shares of Rs.10/- each in the Transferee Company for the consideration other than cash for transferring such Commercial Expertise to the Transferee and continuing with the transferee Company for minimum period of three (3) years and the such shares allotted to him shall be under lock in for three years.*

xxx

xxx

xxx

**3. TRANSFER OF COMMERCIAL EXPERTISE AND ISSUE OF SHARES**

*3.1 It is hereby agreed by and between the parties hereto that all the Commercial Expertise of the Transferor pertaining to or referable to all expertise in the management of the Business and its related activities including Administration, ensuring smooth performance, high efficiency and productivity along with knowledge on tender participations etc. shall be transferred to and unto the transferee and the Transferor shall work for a minimum period of 3 years for the Transferee or its affiliate or group company either in India or Overseas effective from 1<sup>st</sup> January 2011 and the Transferee shall issue and allot 400,000 Equity Shares of Rs. 10/- each at par in the Transferee Company in lieu thereof by way of consideration for transfer of such Commercial Expertise as mentioned above and holding such shares under lock in for minimum period of 3 years. The Transferor shall then assign and transfer all the Transferor's right, title and interest in all the Commercial Expertise for the entire world and for entire period during which this Commercial Expertise subsists to and unto the Transferee absolutely.*

xxx

xxx

xxx

**4. COVENANTS OF THE TRANSFEROR**

*4.1 The Transferor ensures that he shall continue in the employment of the Transferee for minimum period of three years effective from 1<sup>st</sup> January 2011.*

[...]

**Aslam Ismail Khan Deshmukh v. Asap Fluids Pvt. Ltd. & Anr.**

*4.3 If at any time after a minimum period of 3 years as locking of shares the transferee wish to sell his share to the transferee he must first offer for sale to management, all (and not only some unless management agrees otherwise) of the shares owned by him ("the Sale Shares") at a price as mutually agreed with him and the management at the relevant time."*

xxx

xxx

xxx

**10. TERM OF THE AGREEMENT**

[...]

*10.2 The term for this Agreement will start on Allotment of Shares by the Transferee to the Transferor and the such allotted Shares will be under Lock in for a period of three years from the date of its Allotment and the Transferor shall not leave the services with the Transferee for a period of three years from the date of Allotment of Shares in the Company as per terms of this Agreement"*

(Emphasis supplied)

9. Upon certain other issues arising between the parties, the petitioner tendered his resignation as the Director in respondent no. 1 and its Dubai subsidiary. The resignation was accepted by the Dubai subsidiary *vide* Director's Resolution dated 18.07.2013.
10. The petitioner was concerned with the failure of respondent no.2 in transferring 2,00,010 shares in respondent no.1 which belonged to the petitioner despite confirmation of the same *vide* letter dated 22.09.2011 and also the non-issuance of the share certificates evidencing allotment of additional 2,00,010 shares in the name of the petitioner by respondent no. 1. The petitioner further contended that despite holding 4,00,000 equity shares in respondent no.1 as per the Shareholders Agreement, respondent no.1 failed to issue duly stamped, signed and sealed share certificates evidencing such an allotment to the petitioner.
11. It is the case of the petitioner that he had requested respondent no.1 on several occasions to either issue the share certificates evidencing allotment of 4,00,000 equity shares or in the alternate, return the amount equivalent to such shares. The petitioner alleged that, since the share certificates were not issued to him, he was unable to send

**Digital Supreme Court Reports**

an ‘offer notice’ to sell his portion of equity shares to respondent no.2 who has the “Right of First Refusal” under Clause 6 of the Shareholders Agreement.

12. The petitioner stated that since the respondents were not paying heed to his repeated requests for issuance of share certificates, the petitioner sent a Common Notice dated 23.01.2017 (hereinafter referred to as “**Arbitration Notice**”) to both the respondents, directing them to either issue the share certificates evidencing allotment of 2,00,010 and 4,00,000 shares respectively or in the alternate, to return the amount equivalent to those shares. The same was received by both the respondents on 24.01.2017. In the event of a dispute, the Arbitration Notice called upon the respondents to appoint arbitrators in terms of Clause 13.10 of the Shareholders Agreement. The said clause is reproduced hereinbelow:

*"13.10. Dispute Resolution. Any dispute, claim or controversy arising under or relating to this Agreement, including without limitation any dispute concerning the existence or enforceability hereof, shall be resolved by arbitration in Mumbai in accordance with the Arbitration and Conciliation Act, 1996. The dispute will be referred to the arbitrator, and Gumpro has right to appoint 2 (two) arbitrators and Other Shareholder have the right to appoint 1(one) arbitrator. All these three (03) arbitrators, will appoint one of them to act as umpire of the arbitral tribunal. The language of the arbitration shall be English. Any arbitration award by the arbitral tribunal shall be final and binding upon the Parties, shall not be subject to appeal, and shall be enforced by judgment of a court of competent jurisdiction."*

13. As there was no response from the respondents, the petitioner filed two separate applications dated 03.03.2017 under Section 11(6) of the Act, 1996, bearing Arbitration Application No. 50 of 2017 for adjudication of disputes pertaining to the 4,00,000 equity shares and Arbitration Application No. 51 of 2017 for adjudication of disputes pertaining to 2,00,010 equity shares, before the High Court of Bombay, praying for the appointment of an arbitral tribunal.
14. After nearly 10 months from the date of the arbitration notice, on 07.11.2017, the respondents sent a reply denying and disputing all

**Aslam Ismail Khan Deshmukh v. Asap Fluids Pvt. Ltd. & Anr.**

the claims and allegations made by the petitioner. Without prejudice to the contentions in the reply, the respondents appointed two arbitrators in terms of clause 13.10 of the Shareholders Agreement and called upon the petitioner to nominate the third arbitrator. It was asserted that the alleged claim of 2,00,010 shares or the value thereof cannot be referred to arbitration as it does not fall within the remit of the dispute resolution clause of the Shareholders Agreement.

15. The High Court of Bombay *vide* Judgment and final order dated 22.02.2019 held that the petitioner is a Non-Resident Indian who habitually resides and works in Dubai. The proceedings would constitute an “international commercial arbitration” and therefore, the Section 11 applications filed before it were not maintainable.
16. In light of the above and upon the dismissal of the Section 11 applications by the High Court, the petitioner has filed the present petitions before this Court i.e., Arbitration Petition No.20 and Arbitration Petition No. 22 under Section 11(6), for appointment of an arbitral tribunal, to adjudicate the disputes under the Shareholders Agreement pertaining to 2,00,010 shares and 4,00,000 shares respectively.

**II. SUBMISSIONS ON BEHALF OF THE PETITIONER**

17. Mr. Kunal Cheema, the learned counsel appearing for the petitioner, submitted that both the arbitration petitions arise out of disputes under the Shareholders Agreement. Clause 13.10 of the agreement provides for the arbitration clause and the same has not been disputed by the parties.
18. It was submitted that the petitioner was entitled to be allotted 4,00,000 equity shares of Rs. 10 each in respondent no.1 company under the Shareholders Agreement. In addition, as per the letter dated 22.09.2011, respondent no.2 further confirmed that 2,00,010 equity shares in respondent no.1 which belonged to the petitioner, were being held by respondent no.2. Despite repeated reminders to both the respondents, the share certificates of the aforementioned shares were not issued to the petitioner.
19. The counsel submitted that the respondents have raised two broad contentions - *one*, with respect to the merits of the dispute; and *two*, that the claims made in the petitions are not maintainable as they are barred by limitation. As regards the first aspect, it was submitted

**Digital Supreme Court Reports**

that the merits of the dispute can be looked into by the arbitral tribunal and arguments on merit can be made after the parties file their pleadings and lead evidence therein.

20. On the issue of limitation, it was submitted that under the Shareholders Agreement, there was no time frame within which the share certificates were to be issued to the petitioner. On a reading of the letter dated 22.09.2011, the value of the share was to be paid to the petitioner at the time of sale of respondent no.1 company. As far as the petitioner is aware, such a sale has not been made, at least till the issuance of notice dated 23.02.2017. Hence, there is no specific date/day on which it can be ascertained that the cause of action had arisen.
21. The counsel submitted that it is the case of the respondents that certain correspondence was exchanged between the parties in the period between 06.08.2015 and 15.10.2015. Therefore, the Arbitration Notice dated 23.01.2017 was sent within 3 years from 15.10.2015 which is the date of the last legal notice sent by the respondents to the petitioner. Thereafter, the petitioner filed two arbitration applications on 03.03.2017 before the High Court of Bombay which were ultimately dismissed on 22.02.2019. Immediately thereafter, on 09.04.2019, the present petitions were filed before this Court. Therefore, the arbitration petitions cannot be said to be ex-facie time barred and the implication or interpretation of the said correspondences could be looked into by the arbitral tribunal while deciding the claim and its maintainability on the question of limitation and merits.
22. It was submitted that, without prejudice to the aforesaid contention, even if it is assumed that the “cause of action” had arisen at any specific point of time, there is a continuing breach of contract since the respondents failed to provide the share certificates and abide by the Shareholders Agreement and the letter dated 22.09.2011. Therefore, in view of Section 22 of the Limitation Act, 1963, a fresh period of limitation would begin to run at every moment of time during which the breach continues.
23. Another submission of the counsel was that the respondents, on 07.11.2017 had sent a reply to the Arbitration Notice dated 23.01.2017 wherein they appointed two arbitrators as per Clause 13.10 of the Shareholders Agreement. The same was sent after the applications under Section 11(6) were filed before the High Court of Bombay. In

**Aslam Ismail Khan Deshmukh v. Asap Fluids Pvt. Ltd. & Anr.**

the said letter, the respondents have not contended that the claim is time barred.

24. It was further submitted that, in reply to the Arbitration Notice, the only case of the respondents is that the issue regarding the 2,00,010 shares cannot be referred to arbitration under clause 13.10 of the Shareholders Agreement and that the scope of arbitration should be confined only to the issue of the 4,00,000 shares. However, the letter dated 22.09.2011 clearly states that the 2,00,010 shares will be governed by the Shareholders Agreement. Therefore, this being a contentious issue should be considered by the arbitral tribunal.
25. The counsel finally submitted that, in the event the Court is inclined to allow the petition, then, considering the nature and low value of the claim, instead of a three-member tribunal, a sole arbitrator may be appointed.

**III. SUBMISSIONS ON BEHALF OF THE RESPONDENTS**

26. On the other hand, Ms. Jasmine Damkewala, the learned counsel appearing for the respondents submitted that the petitioner is seeking implementation of the Shareholders Agreement dated 25.07.2011. However, the petitioner has violated the Lock-in Period of 3 years, in as much as the petitioner's date of employment is 01.01.2011 and the date of acceptance of resignation *vide* the board resolution is 18.07.2013.
27. It was submitted that in terms of Clause 4 of the Shareholders Agreement, the petitioner was holding 4,00,000 equity shares in respondent no.1. Clause 5.1 of the said Shareholders Agreement specifically indicates that the petitioner shall not transfer any part of his individual shareholding until the expiry of 3 years from the date of issue of such shares. It was argued that there was a clear understanding which was agreed upon by the parties that the shares of the petitioner shall remain locked for a period of 3 years from the date of their issuance or conversion of it into equity shares. However, any right over the said shares would accrue only if the petitioner remained in employment.
28. Clause 3 of the Service Agreement indicates that the Director shall hold office for a period of 3 years commencing from the date of employment (w.e.f. 01.01.2011) which is a Lock-in Period. Further Clause 10.2 of the Service Agreement states that the petitioner shall transfer all the equity shares held by him in favour of the Promoter of

**Digital Supreme Court Reports**

respondent no.1 at zero consideration if he terminates his employment prior to the Initial Term of 3 years. Accordingly, the petitioner would in any case, have no valid right or claim over the subject shares having terminated his employment before a period of 3 years.

29. It was submitted that as per Recital 3, and Clauses 3.1 and 4.1 respectively of the Commercial Expertise Agreement, for the petitioner to hold the shares, he ought to have worked for a period of 3 years. Since the petitioner resigned on 18.07.2013, he is not entitled to these shares. In any case, any claim regarding the 4,00,000 equity shares, howsoever misconceived, can arise only upon the date of resignation i.e., 18.07.2013 and the Arbitration Notice being issued on 23.01.2017 was clearly outside of limitation. Therefore, the present petition is stale, belated and misconceived.
30. The counsel, in the last, submitted that Section 43 of the Act, 1996 lays down that the Limitation Act, 1963 is applicable to arbitrations. An arbitration commences upon issuing the notice of invocation of arbitration in accordance with the arbitral clause i.e., Clause 13.10 of the Shareholders Agreement. Accordingly, where the petitioner seeks enforcement of the letter dated 22.09.2011, the Notice for Invocation of Arbitration was served 6 years later i.e., on 23.01.2017 and is hopelessly outside of limitation. For the sake of argument and without admitting, even if limitation for the claim of the petitioner with respect to the 2,00,010 shares is calculated from the date when he ceased to be in employment, i.e., from 18.07.2013, the claim is still clearly time-barred.

**IV. ANALYSIS**

31. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the short question that falls for our consideration is whether we should decline to make a reference under Section 11(6) of the Act, 1996 by examining whether the substantive claims of the petitioner are *ex facie* and hopelessly time barred?
32. A three-judge bench of this Court in *Vidya Drolia & Ors v. Durga Trading Corporation* reported in (2021) 2 SCC 1 while dealing with the scope of powers of the referral court under Sections 8 and 11 respectively, endorsed the *prima facie* test and opined that Courts at the referral stage can interfere only in rare cases where it is manifest

**Aslam Ismail Khan Deshmukh v. Asap Fluids Pvt. Ltd. & Anr.**

that the claims are *ex facie* time-barred and dead, or there is no subsisting dispute. Such a restricted and limited review was considered necessary to check and protect parties from being forced to arbitrate when the matter is demonstrably “non-arbitrable” and to cut off the deadwood. The relevant observations are reproduced hereinbelow:

*"148. Section 43(1) of the Arbitration Act states that the Limitation Act, 1963 shall apply to arbitrations as it applies to court proceedings. Sub-section (2) states that for the purposes of the Arbitration Act and Limitation Act, arbitration shall be deemed to have commenced on the date referred to in Section 21. Limitation law is procedural and normally disputes, being factual, would be for the arbitrator to decide guided by the facts found and the law applicable. The court at the referral stage can interfere only when it is manifest that the claims are ex facie time-barred and dead, or there is no subsisting dispute. All other cases should be referred to the Arbitral Tribunal for decision on merits. Similar would be the position in case of disputed "no-claim certificate" or defence on the plea of novation and "accord and satisfaction". As observed in Premium Nafta Products Ltd. [Fili Shipping Co. Ltd. v. Premium Nafta Products Ltd., 2007 UKHL 40 : 2007 Bus LR 1719 (HL)], it is not to be expected that commercial men while entering transactions inter se would knowingly create a system which would require that the court should first decide whether the contract should be rectified or avoided or rescinded, as the case may be, and then if the contract is held to be valid, it would require the arbitrator to resolve the issues that have arisen.*

xxx

xxx

xxx

*154.4. Rarely as a demurrer the court may interfere at Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably*

## Digital Supreme Court Reports

*“non-arbitrable” and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the Arbitral Tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism.”*

(Emphasis supplied)

33. In ***Bharat Sanchar Nigam Limited and Another v. Nortel Networks India Private Limited*** reported in (2021) 5 SCC 738, the notice invoking arbitration was issued 5 ½ years after the cause of action arose, i.e., rejection of the claims of Nortel by BSNL and the claim was therefore held to be *ex facie* time-barred. This Court clarified that the period of limitation for filing a petition seeking appointment of an arbitrator(s) cannot be confused or conflated with the period of limitation applicable to substantive claims made in the underlying commercial contract. By placing reliance on ***Vidya Drolia* (supra)** it was held that, a referral court exercising its jurisdiction under section 11 may decline to make the reference in a very limited category of cases, where there is not even a vestige of doubt that the claim is *ex facie* time-barred. The relevant observations are reproduced hereinbelow:

*“44. The issue of limitation which concerns the “admissibility” of the claim, must be decided by the Arbitral Tribunal either as a preliminary issue, or at the final stage after evidence is led by the parties.*

xxx

xxx

xxx

*47. It is only in the very limited category of cases, where there is not even a vestige of doubt that the claim is *ex facie* time-barred, or that the dispute is non-arbitrable, that the court may decline to make the reference. However, if there is even the slightest doubt, the rule is to refer the disputes to arbitration, otherwise it would encroach*

**Aslam Ismail Khan Deshmukh v. Asap Fluids Pvt. Ltd. & Anr.**

upon what is essentially a matter to be determined by the tribunal.

48. Applying the law to the facts of the present case, it is clear that this is a case where the claims are ex facie time-barred by over 5½ years, since Nortel did not take any action whatsoever after the rejection of its claim by BSNL on 4-8-2014. The notice of arbitration was invoked on 29-4-2020. There is not even an averment either in the notice of arbitration, or the petition filed under Section 11, or before this Court, of any intervening facts which may have occurred, which would extend the period of limitation falling within Sections 5 to 20 of the Limitation Act. Unless, there is a pleaded case specifically adverting to the applicable section, and how it extends the limitation from the date on which the cause of action originally arose, there can be no basis to save the time of limitation.

49. The present case is a case of deadwood/no subsisting dispute since the cause of action arose on 4-8-2014, when the claims made by Nortel were rejected by BSNL. The respondent has not stated any event which would extend the period of limitation, which commenced as per Article 55 of the Schedule of the Limitation Act (which provides the limitation for cases pertaining to breach of contract) immediately after the rejection of the final bill by making deductions.”

(Emphasis supplied)

34. This very Bench in ***Arif Azim Company Limited v. Aptech Limited*** reported in **(2024) 5 SCC 313** was concerned with the following two issues while deciding an application for the appointment of an arbitrator under Section 11(6) of the Act, 1996 – *first*, whether the Limitation Act, 1963 is applicable to an application for appointment of arbitrator under Section 11(6) of the Act, 1996?; and *second*, whether the Court may decline to make a reference under Section 11 of the Act, 1996 where the claims are *ex-facie* and hopelessly time barred.
35. On the first issue in ***Arif Azim* (supra)**, it was observed that Section 11(6) of the Act, 1996 would be covered by Article 137 of

**Digital Supreme Court Reports**

the Limitation Act, 1963 which prescribes a limitation period of 3 years from the date when the right to apply accrues. The limitation period for filing an application seeking appointment of an arbitrator was held to commence only after a valid notice invoking arbitration had been issued by one of the parties to the other party and there had been either a failure or refusal on the part of the other party to comply with the requirements of the said notice.

36. On the second issue in *Arif Azim* (*supra*), which is identical to the issue raised in the present petitions, it was observed that, although, limitation is an admissibility issue, yet it is the duty of the Courts to *prima facie* examine and reject non-arbitrable or dead claims, so as to protect the other party from being drawn into a time-consuming and costly arbitration process. The findings on both the issues were summarized as thus:

*"92. Thus, from an exhaustive analysis of the position of law on the issues, we are of the view that while considering the issue of limitation in relation to a petition under Section 11(6) of the 1996 Act, the Courts should satisfy themselves on two aspects by employing a two-pronged test – first, whether the petition under Section 11(6) of the 1996 Act is barred by limitation; and secondly, whether the claims sought to be arbitrated are *ex facie* dead claims and are thus barred by limitation on the date of commencement of arbitration proceedings. If either of these issues are answered against the party seeking referral of disputes to arbitration, the Court may refuse to appoint an Arbitral Tribunal."*

(Emphasis supplied)

37. However, subsequently, very pertinent observations were made by a seven-judge Bench of this Court in *Interplay between Arbitration Agreements Under the Arbitration and Conciliation Act, 1996 and the Indian Stamp Act, 1899, In Re*, reported in 2023 INSC 1066 regarding the scope of judicial interference at the Section 11 stage with a view to give complete meaning to the legislative intention behind the insertion of Section 11(6-A) of the Act, 1996. This Court referred to the Statement of Objects and Reasons of the 2015 Amendment Act and opined that the same indicated that the referral courts shall "examine the existence of a *prima facie* arbitration agreement and

**Aslam Ismail Khan Deshmukh v. Asap Fluids Pvt. Ltd. & Anr.**

**not other issues**" at the stage of appointment of an arbitrator. These "other issues" would include the examination of any other issue which has the consequence of unnecessary judicial interference in the arbitral proceedings. The relevant observations are reproduced hereinbelow:

*"208. The Statement of Objects and Reasons of the 2015 Amendment Act are as follows:*

*"(iii) an application for appointment of an arbitrator shall be disposed of by the High Court or Supreme Court, as the case may be, as expeditiously as possible and an endeavour should be made to dispose of the matter within a period of sixty days.*

*(iv) to provide that while considering any application for appointment of arbitrator, the High Court or the Supreme Court shall examine the existence of a prima facie arbitration agreement and not other issues."*

*209. The above extract indicates that the Supreme Court or High Court at the stage of the appointment of an arbitrator shall "examine the existence of a prima facie arbitration agreement and not other issues". These other issues not only pertain to the validity of the arbitration agreement, but also include any other issues which are a consequence of unnecessary judicial interference in the arbitration proceedings. Accordingly, the "other issues" also include examination and impounding of an unstamped instrument by the referral court at the Section 8 or Section 11 stage [...]"*

(Emphasis supplied)

38. In light of the aforesaid observations, the ratio of *Arif Azim* (*supra*) was reconsidered by this very Bench in *SBI General Insurance Co. Ltd. v. Krish Spinning* reported in 2024 SCC OnLine SC 1754. The position of law was clarified as thus:

*"128. On the first issue, it was observed by us that the Limitation Act, 1963 is applicable to the applications filed under Section 11(6) of the Act, 1996. Further, we also held that it is the duty of the referral court to examine*

**Digital Supreme Court Reports**

*that the application under Section 11(6) of the Act, 1996 is not barred by period of limitation as prescribed under Article 137 of the Limitation Act, 1963, i.e., 3 years from the date when the right to apply accrues in favour of the applicant. To determine as to when the right to apply would accrue, we had observed in paragraph 56 of the said decision that “the limitation period for filing a petition under Section 11(6) of the Act, 1996 can only commence once a valid notice invoking arbitration has been sent by the applicant to the other party, and there has been a failure or refusal on part of that other party in complying with the requirements mentioned in such notice.”*

**129.** *Insofar as the first issue is concerned, we are of the opinion that the observations made by us in Arif Azim (supra) do not require any clarification and should be construed as explained therein.*

xxx

xxx

xxx

**132.** *Insofar as our observations on the second issue are concerned, we clarify that the same were made in light of the observations made by this Court in many of its previous decisions, more particularly in Vidya Drolia (supra) and NTPC v. SPML (supra). However, in the case at hand, as is evident from the discussion in the preceding parts of this judgment, we have had the benefit of reconsidering certain aspects of the two decisions referred to above in the light of the pertinent observations made by a seven-Judge Bench of this Court in In Re : Interplay (supra).*

**133.** *Thus, we clarify that while determining the issue of limitation in exercise of the powers under Section 11(6) of the Act, 1996, the referral court should limit its enquiry to examining whether Section 11(6) application has been filed within the period of limitation of three years or not. The date of commencement of limitation period for this purpose shall have to be construed as per the decision in Arif Azim (supra). As a natural corollary, it is further clarified that the referral courts, at the stage of deciding an application for appointment of arbitrator, must not conduct an intricate evidentiary enquiry into the question whether the claims*

**Aslam Ismail Khan Deshmukh v. Asap Fluids Pvt. Ltd. & Anr.**

*raised by the applicant are time barred and should leave that question for determination by the arbitrator. Such an approach gives true meaning to the legislative intention underlying Section 11(6-A) of the Act, and also to the view taken in In Re : Interplay (supra).*

*134. The observations made by us in [Arif Azim](#) (supra) are accordingly clarified. We need not mention that the effect of the aforesaid clarification is only to streamline the position of law, so as to bring it in conformity with the evolving principles of modern-day arbitration, and further to avoid the possibility of any conflict between the two decisions that may arise in future. These clarifications shall not be construed as affecting the verdict given by us in the facts of [Arif Azim](#) (supra), which shall be given full effect notwithstanding the observations made herein."*

(Emphasis supplied)

39. Therefore, while determining the issue of limitation in the exercise of powers under Section 11(6) of the Act, 1996, the referral court must only conduct a limited enquiry for the purpose of examining whether the Section 11(6) application has been filed within the limitation period of three years or not. At this stage, it would not be proper for the referral court to indulge in an intricate evidentiary enquiry into the question of whether the claims raised by the petitioner are time barred. Such a determination must be left to the decision of the arbitrator. After all, in a scenario where the referral court is able to discern the frivolity in the litigation on the basis of bare minimum pleadings, it would be incorrect to assume or doubt that the arbitral tribunal would not be able to arrive at the same inference, especially when they are equipped with the power to undertake an extensive examination of the pleadings and evidence adduced before them.
40. As observed by us in [Krish Spinning](#) (supra), the power of the referral court under Section 11 must essentially be seen in light of the fact that the parties do not have the right of appeal against any order passed by the referral court under Section 11, be it for either appointing or refusing to appoint an arbitrator. Therefore, if the referral court delves into the domain of the arbitral tribunal at the Section 11 stage and rejects the application of the claimant, we run a serious risk of leaving the claimant remediless for the adjudication of their claims. Moreover,

**Digital Supreme Court Reports**

the Courts are vested with the power of subsequent review in which the award passed by the arbitrator may be subjected to challenge by any party to the arbitration. Therefore, the Courts may take a second look at the adjudication done by the arbitral tribunal at a later stage, if considered necessary and appropriate in the circumstances.

41. In view of the above discussion, we must restrict ourselves to examining whether the Section 11 petitions made before us are within limitation. The petitioner herein issued a notice invoking arbitration on 23.01.2017 and the same was delivered to both the respondents on 24.01.2017. However, the respondents failed to reply to the said notice within a period of 30 days i.e. within 23.02.2017. Therefore, the period of limitation of three years, for the purposes of a Section 11(6) petition, would begin to run from 23.02.2017 i.e., the date of failure or refusal by the other party to comply with the requirements mentioned in the notice invoking arbitration. The present petitions under Section 11(6) were filed on 09.04.2019. Even including the period during which the parties proceeded before the Bombay High Court which ultimately held that the applications before it were not maintainable i.e., 03.03.2017 to 22.02.2019, these petitions are well within the bounds of limitation.
42. The primary issue that has been canvassed by the respondents is that the substantive claims of the petitioner are *ex-facie* time barred and therefore, incapable of being referred to arbitration. The respondents contend that, with respect to the issue relating to the 2,00,010 equity shares, the petitioner has sought enforcement of the letter dated 22.09.2011 but has however, served a notice invoking arbitration 6 years later on 23.01.2017. Further, with respect to the 4,00,000 equity shares, it was contended that the claim can only arise upon the date of resignation i.e., 18.07.2013 and the claim would, therefore, again be time-barred. Conversely, the case of the petitioners is that the date of 15.10.2015 i.e., the date of the last legal notice sent by the respondents to the petitioner, can be considered as the date of cause of action for the purposes of limitation. In the alternative, they assert that there is no specific date or day on which it can be ascertained that the cause of action had arisen since there is a continuous breach of contract on part of the respondents. As evident from the aforesaid discussion and especially in light of the observations made in ***Krish Spinning*** (*supra*), this Court cannot conduct an intricate evidentiary enquiry into the question of when

**Aslam Ismail Khan Deshmukh v. Asap Fluids Pvt. Ltd. & Anr.**

the cause of action can be said to have arisen between the parties and whether the claim raised by the petitioner is time barred. This has to be strictly left for the determination by the arbitral tribunal.

43. All other submissions made by the parties regarding the entitlement of the petitioner to 4,00,000 and 2,00,010 equity shares in the respondent no.1 company are concerned with the merits of the dispute which squarely falls within the domain of the arbitral tribunal.
44. It is now well settled law that, at the stage of Section 11 application, the referral Courts need only to examine whether the arbitration agreement exists – nothing more, nothing less. This approach upholds the intention of the parties, at the time of entering into the agreement, to refer all disputes arising between themselves to arbitration. However, some parties might take undue advantage of such a limited scope of judicial interference of the referral courts and force other parties to the agreement into participating in a time-consuming and costly arbitration process. This is especially possible in instances, including but not limited to, where the claimant canvasses either *ex facie* time-barred claims or claims which have been discharged through “accord and satisfaction”, or cases where the impleadment of a non-signatory to the arbitration agreement is sought etc. In order to balance such a limited scope of judicial interference with the interests of the parties who might be constrained to participate in the arbitration proceedings, the arbitral tribunal may direct that the costs of the arbitration shall be borne by the party which the Tribunal ultimately finds to have abused the process of law and caused unnecessary harassment to the other party to the arbitration.

**V. CONCLUSION**

45. The existence of the arbitration agreement as contained in Clause 13.10 of the Shareholders Agreement is not disputed by either of the parties. The submissions as regard the claim of the petitioner being *ex-facie* time barred may be adjudicated upon by the arbitral tribunal as a preliminary issue.
46. In view of the aforesaid, the present petitions are allowed. Taking into consideration the fact that an arbitral tribunal comprising of a sole arbitrator, Mr. Mayur Khandeparkar (Advocate, High Court of Judicature at Bombay) has already been constituted for the adjudication of disputes between the same parties in relation to

**Digital Supreme Court Reports**

the Service Agreement dated 18.10.2011, it would be desirable to constitute an arbitral tribunal comprising of the same sole arbitrator for adjudication of the present disputes pertaining to the Shareholders Agreement dated 25.07.2011. The fees of the arbitrator including other modalities shall be fixed in consultation with the parties.

47. In the facts of the present case, it would be apposite to observe that, in the event the arbitral tribunal ultimately finds the present claims of the petitioner to be time-barred, it may direct that the costs of the arbitration pertaining to these claims be borne solely by the petitioner herein.
48. It is made clear that all the other rights and contentions of the parties are left open for adjudication by the learned arbitrator.
49. Pending applications(s), if any, shall stand disposed of.

*Result of the case:* Petitions allowed.

<sup>†</sup>*Headnotes prepared by:* Divya Pandey

**Tej Prakash Pathak & Ors.**  
v.  
**Rajasthan High Court & Ors.**

(Civil Appeal No. 2634 of 2013)

07 November 2024

**[Dr Dhananjaya Y Chandrachud, CJI, Hrishikesh Roy,  
Pamidighantam Sri Narasimha, Pankaj Mithal and  
Manoj Misra,\* JJ.]**

**Issue for Consideration**

- (a) When the recruitment process commences and comes to an end; (b) Basis of the doctrine that ‘rules of the game’ must not be changed during the course of the game, or after the game is played; (c) Whether the decision in [K. Manjusree](#) is at variance with earlier precedents on the subject; (d) Whether recruiting bodies can devise an appropriate procedure for concluding recruiting process; (e) Whether the procedure prescribed in the Extant Rule can be violated; (f) Whether appointment could be denied even after placement in select list.

**Headnotes<sup>†</sup>**

**Service Law – Recruitment – Commencement and end of the recruitment process:**

**Held:** The process of recruitment begins with the issuance of advertisement and ends with the filling up of notified vacancies – It consists of various steps like inviting applications, scrutiny of applications, rejection of defective applications or elimination of ineligible candidates, conducting examinations, calling for interview or *viva voce* and preparation of list of successful candidates for appointment. [Para 13]

**Service Law – Recruitment – Basis of the doctrine that ‘rules of the game’ must not be changed during the course of the game, or after the game is played:**

**Held:** The doctrine proscribing change of rules midway through the game, or after the game is played, is predicated on the rule against arbitrariness enshrined in Article 14 of the Constitution – Article 16 is only an instance of the application of the concept of

\* Author

**Tej Prakash Pathak & Ors. v. Rajasthan High Court & Ors.**

equality enshrined in Article 14 – In other words, Article 14 is the genus while Article 16 is a species – Article 16 gives effect to the concept of equality in all matters relating to public employment – These two articles strike at arbitrariness in State action and ensure fairness and equality of treatment – Eligibility criteria for being placed in the Select List, notified at the commencement of the recruitment process, cannot be changed midway through the recruitment process unless the extant Rules so permit, or the advertisement, which is not contrary to the extant Rules, so permit – Even if such change is permissible under the extant Rules or the advertisement, the change would have to meet the requirement of Article 14 of the Constitution and satisfy the test of non-arbitrariness. [Paras 14, 42(2)]

**Service Law – Recruitment – Whether the decision in K. Manjusree is at variance with earlier precedents on the subject:**

**Held:** K. Manjusree case is not at variance with earlier precedents – The decision in K. Manjusree does not proscribe setting of benchmarks for various stages of the recruitment process but mandates that it should not be set after the stage is over, in other words after the game has already been played – This view is in consonance with the rule against arbitrariness enshrined in Article 14 of the Constitution and meets the legitimate expectation of the candidates as also the requirement of transparency in recruitment to public services and thereby obviates malpractices in preparation of select list – The decision in K. Manjusree case lays down good law and is not in conflict with the decision in Subash Chander Marwaha case – Subash Chander Marwaha deals with the right to be appointed from the Select List whereas K. Manjusree deals with the right to be placed in the Select List – The two cases therefore deal with altogether different issues. [Paras 18, 30, 42(3)]

**Service Law – Recruitment – Whether recruiting bodies can devise an appropriate procedure for concluding recruiting process:**

**Held:** Recruiting bodies, subject to the extant Rules, may devise appropriate procedure for bringing the recruitment process to its logical end provided the procedure so adopted is transparent, non-discriminatory/non-arbitrary and has a rational nexus to the object sought to be achieved. [Para 42(4)]

## Digital Supreme Court Reports

### **Service Law – Recruitment – Whether the procedure prescribed in the Extant Rule can be violated:**

**Held:** Procedure prescribed in the Extant Rule cannot be violated – Extant Rules having statutory force are binding on the recruiting body both in terms of procedure and eligibility – Where there are no Rules or the Rules are silent on the subject, administrative instructions may be issued to supplement and fill in the gaps in the Rules – In that event administrative instructions would govern the field provided they are not *ultra vires* the provisions of the Rules or the Statute or the Constitution – But where the Rules expressly or impliedly cover the field, the recruiting body would have to abide by the Rules. [Paras 39, 42(5)]

### **Service Law – Name in select list – Right to appointment – Whether appointment could be denied even after placement in select list:**

**Held:** Appointment may be denied even after placement in select list – A candidate placed in the select list gets no indefeasible right to be appointed even if vacancies are available – But there is a caveat – The State or its instrumentality cannot arbitrarily deny appointment to a selected candidate – Therefore, when a challenge is laid to State's action in respect of denying appointment to a selected candidate, the burden is on the State to justify its decision for not making appointment from the Select List. [Para 40]

### **Service Law – Recruitment – Legitimate Expectation – Discretion of Public Authority – Public Interest:**

**Held:** Candidates participating in a recruitment process have legitimate expectation that the process of selection will be fair and non-arbitrary – The basis of doctrine of legitimate expectation in public law is founded on the principles of fairness and non-arbitrariness in government dealings with individuals – However, the doctrine of legitimate expectation does not impede or hinder the power of the public authorities to lay down a policy or withdraw it – The public authority has the discretion to exercise the full range of choices available within its executive power – The public authority often has to take into consideration diverse factors, concerns, and interests before arriving at a particular policy decision – The courts are generally cautious in interfering with a *bona fide* decision of public authorities which denies legitimate expectation provided such a decision is taken in the larger public interest – Thus, public

### Tej Prakash Pathak & Ors. v. Rajasthan High Court & Ors.

interest serves as a limitation on the application of the doctrine of legitimate expectation – Courts have to determine whether the public interest is compelling and sufficient to outweigh the legitimate expectation of the claimant. [Para 16]

#### Case Law Cited

*K. Manjusree v. State of A.P.* [\[2008\] 2 SCR 1025](#) : (2008) 3 SCC 512 – held good law.

*Sivanandan CT & Ors. v. High Court of Kerala & Ors.* [\[2023\] 11 SCR 674](#) : 2023 INSC 709 – followed.

*Ramesh Kumar v. High Court of Delhi* [\[2010\] 2 SCR 256](#) : (2010) 3 SCC 104; *K. H. Siraj v. High Court of Kerala & Ors.* [\[2006\] Supp. 2 SCR 790](#) : (2006) 6 SCC 395; *M.P. Public Service Commission v. Navnit Kumar Potdar* [\[1994\] Supp. 3 SCR 665](#) : (1994) 6 SCC 293; *Union of India v. T. Sundararaman* [\[1997\] 3 SCR 792](#) : (1997) 4 SCC 664; *Tridip Kumar Dingal v. State of W.B.* [\[2008\] 15 SCR 194](#) : (2009) 1 SCC 768; *Salam Samarjeet Singh v. The High Court of Manipur at Imphal & Anr.* [\[2024\] 8 SCR 885](#) : 2024 INSC 647 – relied on.

*State of Haryana v. Subash Chander Marwaha* [\[1974\] 1 SCR 165](#) : (1974) 3 SCC 220; *Tej Prakash Pathak & Others v. Rajasthan High Court and Others* (2013) 4 SCC 540; *Shankar K. Mandal v. State of Bihar* [\[2003\] 3 SCR 796](#) : (2003) 9 SCC 519; *Mohd. Sohrab Khan v. Aligarh Muslim University and Others* [\[2009\] 2 SCR 907](#) : (2009) 4 SCC 555; *A.P. Public Service Commission v. B. Sarat Chandra* [\[1990\] 2 SCR 463](#) : (1990) 2 SCC 669; *Rakhi Ray v. High Court of Delhi* [\[2010\] 2 SCR 239](#) : (2010) 2 SCC 637; *E.P. Royappa v. State of T.N.* [\[1974\] 2 SCR 348](#) : (1974) 4 SCC 3; *State of Jharkhand v. Brahmputra Metallics Ltd.* [\[2020\] 14 SCR 45](#) : (2023) 10 SCC 634; *Shankarsan Dash v. Union of India* [\[1991\] 2 SCR 567](#) : (1991) 3 SCC 47; *All India SC & ST Employees Association v. A. Arthur Jeen & Others* [\[2001\] 2 SCR 1183](#) : (2001) 6 SCC 380; *M. Ramesh v. Union of India* [\[2018\] 6 SCR 763](#) : (2018) 16 SCC 195; *P.K. Ramachandra Iyer v. Union of India* [\[1984\] 2 SCR 200](#) : (1984) 2 SCC 141; *Hemani Malhotra v. High Court of Delhi* [\[2008\] 5 SCR 1066](#) : (2008) 7 SCC 11; *Ashok Kumar Yadav v. State of Haryana* [\[1985\] Supp. 1 SCR 657](#) : (1985) 4 SCC 417; *Lila Dhar v. State of Rajasthan and Others* [\[1982\] 1 SCR 320](#) : (1981) 4 SCC 159; *Santosh Kumar Tripathi v. U.P. Power Corporation* (2009) 14 SCC 210; *Banking Service Recruitment Board, Madras v. V. Ramalingam* (1998) 8 SCC 523 – referred to.

## Digital Supreme Court Reports

### Books and Periodicals Cited

United Nations Handbook of Civil Service Laws and Practices.

### List of Acts

Constitution of India; Rajasthan High Court Staff Service Rules 2002; Kerala Judicial Service Rules, 1991.

### List of Keywords

Service Law; Recruitment; Appointment; 'Rules of the game'; Recruiting bodies; Appropriate procedure; Recruiting process; Name in select list; Right to appointment; Procedure prescribed in the Extant Rule; Recruiting process; Article 14 of the Constitution; Article 16 of the Constitution; Article 309 of the Constitution; Transparent; Non-discriminatory; Non-arbitrary; Eligibility criteria; Select List; Extant Rule; Principle of fairness; Legitimate expectation; Rule against arbitrariness.

### Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2634 of 2013

From the Judgment and Order dated 11.03.2011 of the High Court of Rajasthan at Jodhpur in DBCWP No. 2174 of 2010

With

Civil Appeal Nos. 2635 And 2636 of 2013

### Appearances for Parties

Dr. Ritu Bhardwaj, Mohan Kumar, Anurag Katarki, Amit Kumar, Ms. Neetu Singh, Ms. Asia Beg, Mrs. Haripriya Padmanabhan, Kuriakose Varghese, V. Shyamohan, Shrutanjaya Bhardwaj, Ms. Aishwarya Hariharan, Vishal Sinha, Akshat Gogna, Ms. Isha Ghai (for M/s. Kmnp Law), Raghenth Basant, Ms. Liz Mathew, Ms. Aakashi Lodha, Ms. Mallika Agarwal, P. V. Dinesh, Ms. Oommen Anna A, Ms. Urvashi Chauhan, Chetan Garg, Ranjit Kumar, Ajay Vikram Singh, Advs. for the Appellants.

K.M. Nataraj, ASG, Vijay Hansaria, Sr. Adv., Pawanshree Agrawal, Sunil Kumar Jain, Ms. Rashika Swarup, Ms. Tanya Agarwal, Anil Kumar, Maibam Nabaghanashyam Singh, Mahesh Thakur, Shakti K Pattanaik, Advs. for the Respondents.

**Tej Prakash Pathak & Ors. v. Rajasthan High Court & Ors.****Judgment / Order of the Supreme Court****Judgment****Manoj Misra, J.***The ideal in recruitment is to do away with unfairness<sup>1</sup>***REFERENCE**

1. A three-Judge Bench of this Court while accepting the salutary principle that once the recruitment process commences the State or its instrumentality cannot tinker with the “rules of the game” insofar as the prescription of eligibility criteria is concerned, wondered whether that should apply also to the procedure for selection. In that context, doubting the correctness of a coordinate Bench decision in *K. Manjusree*<sup>2</sup> for not having noticed an earlier decision in *Subash Chander Marwaha*,<sup>3</sup> vide order<sup>4</sup> dated 20 March 2013, it was directed that the matter be placed before the Chief Justice for constituting a larger Bench for an authoritative pronouncement on the subject.

**THE FACTUAL CONTEXT FOR THE REFERENCE**

2. The relevant facts giving rise to the reference are as follows:
  - (a) The Rajasthan High Court<sup>5</sup> vide notification dated 17 September 2009 invited applications from amongst Judicial Assistants and Junior Judicial Assistants, having an experience of three years in the establishment of the High Court and possessing degree of M. A. in English Literature, for appointment on 13 posts of Translators. Preference was to be accorded to law graduates.
  - (b) At the relevant time, ‘The Rajasthan High Court Staff Service Rules 2002’<sup>6</sup> framed by the Chief Justice of the High Court under Article 229 (2) of the Constitution of India<sup>7</sup> governed the appointments.

1 UNITED NATIONS HANDBOOK OF CIVIL SERVICE LAWS AND PRACTICES.

2 *K. Manjusree v. State of A.P.* (2008) 3 SCC 512

3 *State of Haryana v. Subash Chander Marwaha* (1974) 3 SCC 220

4 Tej Prakash Pathak & Others v. Rajasthan High Court and Others (2013) 4 SCC 540

5 The High Court.

6 2002 Rules.

7 Constitution.

**Digital Supreme Court Reports**

- (c) Under the 2002 Rules, the Chief Justice of the High Court *vide* Office Order dated 5 December 2002, *inter alia*, specified the qualifications as well as the method of recruitment for the post of 'Translator' (Ordinary Scale) in the following terms:

**"TRANSLATORS (ORDINARY SCALE)**

Recruitment to the post of Translators (Ordinary Scale) shall be made on the recommendation of a Committee nominated by the Appointing Authority on the criteria of selection from amongst the graduate Upper Division Clerks or officials in equivalent or above grade but below the grade of Translators (Ordinary Scale), with Hindi or English Literature as one of the optional subject in Graduation or Lower Division Clerks with Hindi or English Literature as subject in post-graduation and having minimum experience of five years.

**COMPETITIVE EXAMINATION**

A qualifying examination shall be held to test the ability of the candidates of translation from English to Hindi and Hindi to English.

Paper-I English to Hindi translation      100 marks

Paper-II Hindi to English translation      100 marks

Explanation: For the qualifying examination the officials appearing therein shall be given passages for translation from English to Hindi and Hindi to English from the judgment and records.

**Personal Interview:**

There shall be a personal interview  
of the candidate.                                    50 marks

Note: A candidate who secures in aggregate 75% marks and minimum 60% marks in each paper shall only be called for interview."

- (d) Later, *vide* Office Order dated 24 July 2004, amendments were made in the Office Order dated 5 December 2002 thereby substituting the provision relating to recruitment of Translators (Ordinary Scale) by the following:

**Tej Prakash Pathak & Ors. v. Rajasthan High Court & Ors.****"TRANSLATORS**

Recruitment shall be made from amongst the judicial assistants or junior judicial assistants having experience of 3 years by holding a test in English and Hindi translation. Candidates shall be given passages in English from the judgments and records and shall be asked to translate them into Hindi. Similarly passages in Hindi from the records or from some other books etc. shall be given and the candidates shall be asked to translate them into English.

Minimum qualification shall be Graduate

Preference shall be given to a Law Graduate”

- (e) Thereafter, on 8 September 2009, the Office Order dated 5 December 2002 was further amended to substitute the specified minimum qualification with the following:

“Minimum qualification shall be Post Graduate in English Literature from any recognized University established by law in India”

- (f) On 19 December 2009 examination was held. Twenty-one aspirants appeared in the examination. Result was declared on 20 February 2010, wherein only 3 candidates were declared successful. This was so, because the Chief Justice of the High Court ordered that only those candidates who secured a minimum of 75% marks will be selected to fill up the posts in question. As only three candidates could secure a minimum of 75% marks, the list of successful candidates comprised of only three candidates.
- (g) Some of the unsuccessful candidates filed writ petition before the High Court questioning the decision of the Chief Justice of the High Court in fixing the cut off at 75% on the ground that it amounted to “changing the rules of the game after the game is played”. The High Court on its administrative side defended the decision of the Chief Justice by claiming it to have been taken in good faith for appointing a suitable candidate.
- (h) The writ petition came to be dismissed by the High Court *vide* judgment under appeal dated 11 March 2011. The High Court

**Digital Supreme Court Reports**

took the view that on mere placement in the select list no indefeasible right accrues to a candidate for appointment. The employer may fix a higher benchmark to ensure that a person suitable to the post is appointed.

- (i) On a special leave petition challenging the judgment of the High Court, while granting leave, *vide* order dated 20 March 2013, the matter was referred for an authoritative pronouncement by a larger Bench of this Court.

**RELEVANT EXTRACTS FROM THE REFERENCE ORDER**

3. To have a clear understanding of the scope of the reference, the relevant paragraphs of the reference order are extracted below:

“5. Admittedly, the requirement of securing the minimum qualifying marks of 75% is not a stipulation of the Service Rules (referred to earlier) of the first respondent High Court as on the date of initiation of the recruitment process in question (i.e. 17-9-2009). It appears that such a prescription had existed earlier under the Rules, but by an amendment, the said prescription was dropped with effect from 14-7-2004.

6. Therefore, the appellants challenged the selection process on the ground that the decision of the Chief Justice to select only those candidates who secured a minimum of 75% marks would amount to “changing the rules of the game after the game is played”—a cliché whose true purport is required to be examined notwithstanding the declaration of this Court in *Manjusree case* [*K. Manjusree v. State of A.P.* (2008) 3 SCC 512 at p. 524, para 27 : (2008) 1 SCC (L&S) 841] that it is “clearly impermissible”.

7. The question whether the “rules of the game” could be changed was considered by this Court on a number of occasions in different circumstances. Such question arose in the context of employment under the State which under the scheme of our Constitution is required to be regulated by “law” made under Article 309 or employment under the

**Tej Prakash Pathak & Ors. v. Rajasthan High Court & Ors.**

instrumentalities of the State which could be regulated either by statute or subordinate legislation. In either case the “law” dealing with the recruitment is subject to the discipline of Article 14.

**8.** The legal relationship between employer and employee is essentially contractual. Though in the context of employment under the State the contract of employment is generally regulated by statutory provisions or subordinate legislation which restricts the freedom of the employer i.e. the “State” in certain respects.

**9.** In the context of the employment covered by the regime of Article 309, the “law”—the recruitment rules in theory could be either prospective or retrospective subject of course to the rule of non-arbitrariness. However, in the context of employment under the instrumentalities of the State which is normally regulated by subordinate legislation, such rules cannot be made retrospectively unless specifically authorised by some constitutionally valid statute.

**10.** Under the scheme of our Constitution an absolute and non-negotiable prohibition against retrospective law-making is made only with reference to the creation of crimes. Any other legal right or obligation could be created, altered, extinguished retrospectively by the sovereign law-making bodies. However, such drastic power is required to be exercised in a manner that it does not conflict with any other constitutionally guaranteed rights, such as, Articles 14 and 16, etc. Changing the “rules of game” either midstream or after the game is played is an aspect of retrospective law-making power.

**11.** Those various cases [ (a) *C. Channabasavaih v. State of Mysore*, AIR 1965 SC 1293; *State of Haryana v. Subash Chander Marwaha* (1974) 3 SCC 220 : 1973 SCC (L&S) 488; *P.K. Ramachandra Iyer v. Union of India* (1984) 2 SCC 141 : 1984 SCC (L&S) 214; *Umesh Chandra Shukla v. Union of India* (1985) 3 SCC 721 : 1985

**Digital Supreme Court Reports**

SCC (L&S) 919; *Durgacharan Misra v. State of Orissa* (1987) 4 SCC 646 : 1988 SCC (L&S) 36 : (1987) 5 ATC 148; *State of U.P. v. Rafiquddin*, 1987 Supp SCC 401 : 1988 SCC (L&S) 183 : (1987) 5 ATC 257; *Maharashtra SRTC v. Rajendra Bhimrao Mandve* (2001) 10 SCC 51 : 2002 SCC (L&S) 720; *Pitta Naveen Kumar v. Narasaiah Zangiti* (2006) 10 SCC 261 : (2007) 1 SCC (L&S) 92; *K. Manjusree v. State of A.P.* (2008) 3 SCC 512 : (2008) 1 SCC (L&S) 841; *Hemani Malhotra v. High Court of Delhi* (2008) 7 SCC 11 : (2008) 2 SCC (L&S) 203; *K.H. Siraj v. High Court of Kerala* (2006) 6 SCC 395 : 2006 SCC (L&S) 1345; *Ramesh Kumar v. High Court of Delhi* (2010) 3 SCC 104 : (2010) 1 SCC (L&S) 756; *Rakhi Ray v. High Court of Delhi* (2010) 2 SCC 637 : (2010) 1 SCC (L&S) 652; *Hardev Singh v. Union of India* (2011) 10 SCC 121 : (2012) 1 SCC (L&S) 390 — Where procedural rules were altered.(b) *P. Mahendran v. State of Karnataka* (1990) 1 SCC 411 : 1990 SCC (L&S) 163 : (1990) 12 ATC 727; *M.P. Public Service Commission v. Navnit Kumar Potdar* (1994) 6 SCC 293 : 1994 SCC (L&S) 1377 : (1994) 28 ATC 286; *Gopal Krishna Rath v. M.A.A. Baig* (1999) 1 SCC 544 : 1999 SCC (L&S) 325; *Umrao Singh v. Punjabi University* (2005) 13 SCC 365 : 2006 SCC (L&S) 1071; *Mohd. Sohrab Khan v. Aligarh Muslim University* (2009) 4 SCC 555 : (2009) 1 SCC (L&S) 917 — Where the eligibility criteria were altered.] deal with situations where the State sought to alter (1) the eligibility criteria of the candidates seeking employment, or (2) the method and manner of making the selection of the suitable candidates. The latter could be termed as the procedure adopted for the selection, such as, prescribing minimum cut-off marks to be secured by the candidates either in the written examination or viva voce as was done in *Manjusree [K. Manjusree v. State of A.P.* (2008) 3 SCC 512 at p. 524, para 27 : (2008) 1 SCC (L&S) 841] or the present case or calling upon the candidates to undergo some test relevant to the nature of the employment (such as driving test as was in *Maharashtra SRTC* [*Maharashtra*

**Tej Prakash Pathak & Ors. v. Rajasthan High Court & Ors.**

*SRTC v. Rajendra Bhimrao Mandve* (2001) 10 SCC 51 at pp. 55-56, para 5 : 2002 SCC (L&S) 720] ).

**12.** If the principle of *Manjusree case* [*K. Manjusree v. State of A.P.* (2008) 3 SCC 512 at p. 524, para 27 : (2008) 1 SCC (L&S) 841] is applied strictly to the present case, the respondent High Court is bound to recruit 13 of the “best” candidates out of the 21 who applied irrespective of their performance in the examination held. In such cases, theoretically it is possible that candidates securing very low marks but higher than some other competing candidates may have to be appointed. In our opinion, application of the principle as laid down in *Manjusree case* [*K. Manjusree v. State of A.P.* (2008) 3 SCC 512 at p. 524, para 27 : (2008) 1 SCC (L&S) 841] without any further scrutiny would not be in the larger public interest or the goal of establishing an efficient administrative machinery.

**13.** This Court in *State of Haryana v. Subash Chander Marwaha* [(1974) 3 SCC 220 : 1973 SCC (L&S) 488] while dealing with the recruitment of Subordinate Judges of the Punjab Civil Services (Judicial Branch) had to deal with the situation where the relevant rule prescribed minimum qualifying marks. The recruitment was for filling up of 15 vacancies. 40 candidates secured the minimum qualifying marks (45%). Only 7 candidates who secured 55% and above marks were appointed and the remaining vacancies were kept unfilled. The decision of the State Government not to fill up the remaining vacancies in spite of the availability of candidates who secured the minimum qualifying marks was challenged. The State Government defended its decision not to fill up posts on the ground that the decision was taken to maintain the high standards of competence in judicial service. The High Court upheld the challenge and issued a mandamus. In appeal, this Court reversed and opined that the candidates securing minimum qualifying marks at an examination held for the purpose of recruitment into the service of the State have no legal right to be appointed. In the context, it was held: (*Subash Chander Marwaha*

**Digital Supreme Court Reports**

case [(1974) 3 SCC 220 : 1973 SCC (L&S) 488] , SCC p. 227, para 12)

"12. ... In a case where appointments are made by selection from a number of eligible candidates it is open to the Government with a view to maintain high standards of competence to fix a score which is much higher than the one required for mere (sic mere) eligibility."

**14.** Unfortunately, the decision in Subash Chander Marwaha [(1974) 3 SCC 220 : 1973 SCC (L&S) 488] does not appear to have been brought to the notice of Their Lordships in Manjusree [K. Manjusree v. State of A.P. (2008) 3 SCC 512 at p. 524, para 27 : (2008) 1 SCC (L&S) 841]. This Court in Manjusree [K. Manjusree v. State of A.P. (2008) 3 SCC 512 at p. 524, para 27 : (2008) 1 SCC (L&S) 841] relied upon P.K. Ramachandra Iyer v. Union of India [(1984) 2 SCC 141 : 1984 SCC (L&S) 214], Umesh Chandra Shukla v. Union of India [(1985) 3 SCC 721 : 1985 SCC (L&S) 919] and Durgacharan Misra v. State of Orissa [(1987) 4 SCC 646 : 1988 SCC (L&S) 36]. In none of the cases, was the decision in Subash Chander Marwaha [(1974) 3 SCC 220 : 1973 SCC (L&S) 488] considered.

**15.** No doubt it is a salutary principle not to permit the State or its instrumentalities to tinker with the "rules of the game" insofar as the prescription of eligibility criteria is concerned as was done in C. Channabasavaih v. State of Mysore [AIR 1965 SC 1293], etc. in order to avoid manipulation of the recruitment process and its results. Whether such a principle should be applied in the context of the "rules of the game" stipulating the procedure for selection more particularly when the change sought is to impose a more rigorous scrutiny for selection requires an authoritative pronouncement of a larger Bench of this Court. We, therefore, order that the matter be placed before the Hon'ble Chief Justice of India for appropriate orders in this regard."

(Emphasis supplied)

**Tej Prakash Pathak & Ors. v. Rajasthan High Court & Ors.****SCOPE OF THE REFERENCE**

4. Public services broadly fall in two categories. One, where services are in connection with the affairs of the State/ Union. Second, where services are under the instrumentalities of the State. In either category, law governing recruitment must conform to the overarching principles enshrined in Articles 14 and 16 of the Constitution.
5. In various judicial pronouncements, the law governing recruitment to public services has been colloquially termed as ‘the rules of the game’. The ‘game’ is the process of selection and appointment. Courts have consistently frowned upon tinkering with the rules of the game once the recruitment process commences. This has crystallised into an oft-quoted legal phrase that “the rules of the game must not be changed mid-way, or after the game has been played”. Broadly-speaking these rules fall in two categories. One which prescribes the eligibility criteria (i.e., essential qualifications) of the candidates seeking employment; and the other which stipulates the method and manner of making the selection from amongst the eligible candidates.
6. Cut-off date with reference to which eligibility has to be determined is the date appointed by the relevant service rules; where no such cut-off date is provided in the rules, then it will be the date appointed in the advertisement inviting applications; and if there is no such date appointed, then eligibility criteria shall be applied by reference to the last date appointed by which the applications were to be received.<sup>8</sup>
7. The law is settled that after commencement of the recruitment process the eligibility criteria is not to be altered because candidates even if eligible under the altered criteria might not apply by the last date under the belief that they are not eligible as per the advertised criteria.<sup>9</sup> Such alteration/ change, therefore, deprives a person of the guarantee of equal opportunity in matters of public employment provided by Article 16 of the Constitution. The reference order therefore acknowledges this legal position and in clear terms accepts that ‘the rules of the game’ cannot be changed after commencement of the recruitment process insofar as the eligibility criteria is concerned.

8 [Shankar K. Mandal v. State of Bihar](#) (2003) 9 SCC 519

9 [Mohd. Sohrab Khan v. Aligarh Muslim University and others](#) (2009) 4 SCC 555

## Digital Supreme Court Reports

8. However, in regard to changing the rules of the game *qua* method or procedure for selection, the three-Judge Bench in the reference order doubted the correctness of the decision in *K. Manjusree* (supra) *inter alia* on the ground that it failed to notice an earlier decision in *Subash Chander Marwaha* (supra). Accordingly, the reference order seeks an authoritative pronouncement in that regard from a larger Bench of this Court. The scope of the reference is therefore limited to (a) whether *K. Manjusree* (supra) lays down the correct law; and (b) whether the rules of the game *qua* method and manner of making selection can be changed or altered after commencement of the recruitment process.

### **SUBMISSIONS**

9. We have heard a battery of counsels both in support as well as against the strict applicability of the doctrine. During their arguments, they have either questioned or supported the decision of the High Court. For an effective analysis of their submissions and to properly adjudicate upon the issues which would arise while addressing the reference, we deem it appropriate to segregate their submissions into two parts. One which propounds that after commencement of the recruitment process, the stipulated procedure (i.e., rules of the game) for selection cannot be changed mid-way, or after the game is played, and the other which propounds that it is permissible to change / alter the stipulated procedure or method for selection to ensure that the most meritorious person, who is suitable for the post, gets appointed.

### **SUBMISSIONS AGAINST CHANGE**

10. Submissions propounding that ‘rules of the game’ *qua* the procedure for selection must not be changed in the midst of the game, or after the game is played, are summarised below:
  - (a) Equality of opportunity in matters of public employment and fairness in State action are guaranteed by Articles 16 and 14, respectively, of the Constitution which proscribe a change in the rules of the game *qua* selection criteria, once the game has begun. These rights would be infringed if candidates, otherwise eligible, are excluded from the zone of consideration based on a *post facto* change in the selection criteria.

**Tej Prakash Pathak & Ors. v. Rajasthan High Court & Ors.**

- (b) Candidates have a right to know, before the selection process commences, the standards/ criteria on which they will be assessed/ evaluated so that they could modulate their level of preparedness accordingly.
- (c) A change in the advertised cut off marks for eligibility to be placed in the select list, after the game is played, may seriously prejudice a candidate on two counts. First, the candidate may not put in effort more than required for achieving the advertised cut off marks. Second, the interviewer or evaluator may unknowingly place the candidate in a non-eligible category while imagining that he has been placed in an eligible category. Thus a change in the eligibility cut off, after evaluation is done, denies the evaluator an opportunity to modulate the marks for placing the candidate in a category to which he/she, in the view of the evaluator, is entitled to be placed.
- (d) If eligibility cut-off marks is to be prescribed, it should be done before the test or the interview so that both the examinee and the examiner are aware as to how many marks would qualify a candidate for further consideration.
- (e) Recruitment to public services must not only be fair but must appear to be so. A change in the selection criteria mid-way would create an impression that the State is not acting fairly and the change is to favour certain individuals. It thus violates transparency in decision making process, which is fundamental to rule out arbitrariness, and fosters nepotism.
- (f) Discretion is antithesis to the Rule of law which is the hallmark of our Constitution. Rule of law suffers when rules of the game are left to be altered at the discretion of the employer.
- (g) K. Manjusree (supra) is not in conflict with Subash Chander Marwaha (supra). Subash Chander Marwaha proceeds on the principle that existence of vacancies does not confer a right to a candidate placed in the select list to be appointed. K. Manjusree on the other hand deals with a situation where a candidate is denied placement in the select list only because after the interviews were over, minimum marks for the interviews, not prescribed earlier, were prescribed. The two decisions, therefore, operate in different fields.

**Digital Supreme Court Reports****SUBMISSIONS PROPOUNDING CHANGE IS PERMISSIBLE**

11. Submissions propounding that change in the selection procedure or criteria is permissible even in the midst of the recruitment process are summarised below:
- (a) In absence of service rules, or the advertisement, prescribing or proscribing a cut off, employer has discretion to fix cut-off as may be considered necessary to appoint a candidate suitable to the post.
  - (b) Even if no cut-off is stipulated for eligibility *qua* placement in the merit list, the employer may choose to appoint only such of those from the merit list who are higher than a particular cut-off and such cut-off may be fixed later. This is so, because no selected candidate has an indefeasible right to be appointed.
  - (c) Considering the nature of the post, cut-off even if not prescribed by the Rules or the advertisement can be prescribed to appoint a person suitable to the post. Fixation of such cut-off would not be deemed arbitrary, as efficiency in service is the paramount consideration for the employer.
  - (d) A change in the selection criteria which does not bear on the merit list but only affects appointment based thereupon, would not fall foul of either Article 16 or Article 14 of the Constitution if such a change is in the larger interest of efficiency in the service.

**ANALYSIS**

12. To effectively analyse and adjudicate upon the questions referred, we would divide our discussion into following parts:
- (a) When the recruitment process commences and comes to an end;
  - (b) Basis of the doctrine that ‘rules of the game’ must not be changed during the course of the game, or after the game is played;
  - (c) Whether the decision in *K. Manjusree* (supra) is at variance with earlier precedents on the subject;
  - (d) Whether the above doctrine applies with equal strictness *qua* method or procedure for selection as it does *qua* eligibility criteria;

## **Tej Prakash Pathak & Ors. v. Rajasthan High Court & Ors.**

- (e) Whether procedure for selection stipulated by Act or Rules framed either under the proviso to Article 309<sup>10</sup> of the Constitution or a Statute could be given a go-bye;
- (f) Whether appointment could be denied by change in the eligibility criteria after the game is played.

### **(A) COMMENCEMENT-END OF THE RECRUITMENT PROCESS**

- 13.** The process of recruitment begins with the issuance of advertisement and ends with the filling up of notified vacancies. It consists of various steps like inviting applications, scrutiny of applications, rejection of defective applications or elimination of ineligible candidates, conducting examinations, calling for interview or viva voce and preparation of list of successful candidates for appointment.<sup>11</sup>

### **(B) BASIS OF THE DOCTRINE**

- 14.** The doctrine proscribing change of rules midway through the game, or after the game is played, is predicated on the rule against arbitrariness enshrined in Article 14<sup>12</sup> of the Constitution. Article 16<sup>13</sup> is only an

**10 Article 309. Recruitment and conditions of service of persons serving the Union or a State.**— Subject to the provisions of this Constitution, Acts of the appropriate legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State.

Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act.

**11 A.P. Public Service Commission v. B. Sarat Chandra** (1990) 2 SCC 669; and **Rakhi Ray v. High Court of Delhi** (2010) 2 SCC 637

**12 Article 14. Equality before law.** - The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

**13 Article 16. Equality of opportunity in matters of public employment.** - (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. (2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State. (3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, or State or Union territory, any requirement as to residents within that State or Union territory prior to such employment or appointment.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favor of any backward class of citizens which, in the opinion of the state, is not adequately represented in the services under the State.

(4-A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

## Digital Supreme Court Reports

instance of the application of the concept of equality enshrined in Article 14. In other words Article 14 is the genus while Article 16 is a species. Article 16 gives effect to the concept of equality in all matters relating to public employment. These two articles strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on valid relevant principles alike to all similarly situate and not to be guided by any extraneous or irrelevant considerations.<sup>14</sup> In all its actions, the State is bound to act fairly, in a transparent manner. This is an elementary requirement of the guarantee against arbitrary State action which Article 14 of the Constitution adopts. A deprivation of the entitlement of private citizens and private business must be proportional to a requirement grounded in public interest.<sup>15</sup>

15. The principle of fairness in action requires that public authorities be held accountable for their representations. Good administration requires public authorities to act in a predictable manner and honour the promises made or practices established unless there is good reason not to do so.<sup>16</sup>
16. Candidates participating in a recruitment process have legitimate expectation that the process of selection will be fair and non-arbitrary. The basis of doctrine of legitimate expectation in public law is founded on the principles of fairness and non-arbitrariness in government dealings with individuals. It recognises that a public authority's promise or past conduct will give rise to a legitimate expectation. This doctrine is premised on the notion that public authorities, while

(4-B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4-A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the sealing of 50% reservation on total number of vacancies of that year.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

(6) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favor of any economically weaker sections of citizens other than the classes mentioned in clause (4) in addition to the existing reservation and subject to a maximum of 10% of the posts in each category.

14 [E. P. Royappa v. State of T.N.](#) (1974) 4 SCC 3

15 [State of Jharkhand v. Brahmaputra Metallics Ltd.](#) (2023) 10 SCC 634

16 [Sivanandan CT & Ors. v. High Court of Kerala & Ors.](#), 2023 INSC 709

**Tej Prakash Pathak & Ors. v. Rajasthan High Court & Ors.**

performing their public duties, ought to honour their promises or past practices. The legitimacy of an expectation can be inferred if it is rooted in law, custom, or established procedure.<sup>17</sup> However, the doctrine of legitimate expectation does not impede or hinder the power of the public authorities to lay down a policy or withdraw it. The public authority has the discretion to exercise the full range of choices available within its executive power. The public authority often has to take into consideration diverse factors, concerns, and interests before arriving at a particular policy decision. The courts are generally cautious in interfering with a bona fide decision of public authorities which denies legitimate expectation provided such a decision is taken in the larger public interest. Thus, public interest serves as a limitation on the application of the doctrine of legitimate expectation. Courts have to determine whether the public interest is compelling and sufficient to outweigh the legitimate expectation of the claimant. While performing a balancing exercise, courts have to often grapple with the issues of burden and standard of proof required to dislodge the claim of legitimate expectation.<sup>18</sup>

17. In Sivanandan CT,<sup>19</sup> the Constitution Bench, speaking through one of us (Dr. D.Y. Chandrachud, CJ), held that for a public authority to frustrate a claim of legitimate expectation, it must objectively demonstrate by placing relevant material before the court that its decision was in the public interest. This standard is consistent with the principles of good administration which require that State actions must be held to scrupulous standards to prevent misuse of public power and ensure fairness to citizens. It was also highlighted that the doctrine of legitimate expectation lays emphasis on predictability and consistency in decision-making which is a facet of non-arbitrariness. In addition, the Court observed:

"43. The underlying basis for the application of the doctrine of legitimate expectation has expanded and evolved to include the principles of good administration. .... The principles of good administration require that the decisions of public authorities must withstand the test of consistency,

17 Sivanandan CT (supra), paragraph 18.

18 Sivanandan CT (supra), paragraph 37.

19 See Footnote 13, paragraph 38.

**Digital Supreme Court Reports**

transparency, and predictability to avoid being regarded as arbitrary and therefore violative of Article 14.”

**(C) K. MANJUSREE IS NOT AT VARIANCE WITH EARLIER PRECEDENTS**

18. In *K. Manjusree* (supra) the recruitment exercise was for selection and appointments to the posts of District & Sessions Judges (Grade II). The extant rules prescribed the eligibility qualifications but were silent on the procedure for selection. The manner and method of selection was therefore to be decided by the High Court for every selection as and when the vacancies were notified for selection. The vacancies were notified by the State Government. As per the advertisement for selection a written examination followed by an interview were to be held. By a resolution dated 30.11.2004, the Administrative Committee of the High Court resolved to conduct written examination for 75 marks and interview for 25 marks. It was also resolved that the minimum qualifying marks for the OC,<sup>20</sup> BC,<sup>21</sup> SC<sup>22</sup> and ST<sup>23</sup> candidates shall be as prescribed earlier. Following the High Court’s direction, written examination was held on 30.1.2005, and its results were declared on 24.2.2005 wherein 83 candidates were successful. Interviews were held in March 2006. Thereafter, the marks obtained by those 83 candidates were aggregated and a consolidated merit list was prepared in the order of merit on the basis of the aggregate marks. The merit list *inter alia* contained marks secured in the written examinations out of 100; marks secured in the interview out of 25; and the total marks secured in the written examination and interview out of 125. Based on that list, the Administrative Committee approved the selection of ten candidates as per merit and reservation. However, the Full Court did not agree with the select list prepared. Consequently, the Chief Justice constituted a Committee of Judges for preparing a fresh list. The Committee recommended that in place of 100 marks for the written examination and 25 marks for the interview, the candidates should be evaluated with reference to 75 marks for the written examination and 25 marks

20 Open Category or Unreserved Category.

21 Backward Class Category.

22 Scheduled Caste Category.

23 Scheduled Tribe Category.

**Tej Prakash Pathak & Ors. v. Rajasthan High Court & Ors.**

for the interview in line with earlier resolution dated 30.11.2004. The Committee also recommended that the minimum pass percentage applied for the written examination to determine the eligibility of the candidates for appearance in the interview should also be applied for interview marks, and those who failed to secure such minimum marks in the interview should be considered as having failed. Based on the recommendation of the Committee, the minimum percentage for passing the written examination (i.e., 50% for OC, 40% for BC, and 35% for SC and ST) was applied for interview and, therefore, only those candidates who secured the minimum of 12.5 marks in OC, 10 marks in BC and 8.7 marks in SC and ST were considered as having succeeded in the interview. As a result, only 31 candidates were found to have qualified both in the written examination and interview. In consequence, a revised merit list of only 31 successful candidates was prepared wherein few candidates, earlier selected, were ousted and few others who did not find place in the earlier select list gained entry. However, out of those 31 candidates only 9 were recommended for appointment.

19. In that factual context, two candidates whose names found mention in the first list, and who got excluded in the second list, filed writ petitions by claiming that High Court's decision to prepare selection list by prescribing minimum qualifying marks for the interview was arbitrary and illegal. They thus sought a direction to the High Court to redraw the select list without adopting minimum qualifying marks for the interview. The writ petitions were dismissed by the High Court. Being aggrieved, the writ petitioners preferred SLPs<sup>24</sup> before this Court. This Court while granting leave and allowing the appeal of the writ petitioners held that the High Court, though was correct in scaling down marks of written examination from 100 to 75, was not legally justified in directing that only those candidates would be placed in the merit list who obtained such minimum marks in the interview as was specified by the Committee. Key observations of this Court in *K. Manjusree* (supra) are being extracted below:

"22. ... the interview Committee conducted the interviews on 13.3.2006 ... on the understanding that there were no minimum marks for interviews, that the marks awarded

---

24 Special Leave Petitions.

**Digital Supreme Court Reports**

by them would not by itself have the effect of excluding or ousting any candidate from being selected, and that marks awarded by them in the interviews will merely be added to the written examination marks, for preparation of the merit list and selection list. We are referring to this aspect, as the matter of conducting interviews and awarding marks in interviews, by five members of the interviewing committee would have been markedly different if they had to proceed on the basis that there were minimum marks to be secured in the interview for being considered for selection and that the marks are awarded by them would have the effect of barring or ousting any candidate from being considered for selection. Thus, the entire process of selection – from the stage of holding the examination, holding interviews and finalising the list of candidates to be selected – was done by the Selection Committee on the basis that there was no minimum marks for the interview. To put it differently the game was played under the rule that there was no minimum marks for the interview.

27. ...Therefore, introduction of the requirement of minimum marks for interview, after the entire selection process consisting of written examination and interview was completed, would amount to changing the rules of the game after the game was played which is clearly impermissible.

33. ...We may clarify that prescription of minimum marks for any interview is not illegal. We have no doubt that the authority making rules regulating the selection, can prescribe by rules, the minimum marks both for written examination and interviews, or prescribe minimum marks for written examination but not for interview, or may not prescribe any minimum marks for either written examination or interview. Where the rules do not prescribe any procedure, the Selection Committee may also prescribe the minimum marks, as stated above. But if the Selection Committee wants to prescribe minimum marks for interview, it should do so before the commencement of selection process. If the Selection committee prescribe minimum marks only for the written examination, before the commencement

**Tej Prakash Pathak & Ors. v. Rajasthan High Court & Ors.**

of selection process, it cannot either during the selection process or after the selection process, add an additional requirement that the candidates should also secure minimum marks in the interview. What we have found to be illegal, is changing the criteria after completion of the selection process, when the entire selection proceeded on the basis that there will be no minimum marks for the interview."

(Emphasis supplied)

20. The discernible ratio in *K. Manjusree* (supra) is that the criterion for selection is not to be changed after completion of the selection process, though in absence of rules to the contrary the Selection Committee may fix minimum marks either for written examination or for interview for the purposes of selection. But if such minimum marks are fixed, it must be done before commencement of selection process. This view has been followed by another three-Judge Bench of this Court in *Ramesh Kumar v. High Court of Delhi*<sup>25</sup> wherein the law on the issue has been summarized thus:

"15. ... in case the statutory rules prescribe a particular mode of selection, it has to be given strict adherence accordingly. In case, no procedure is prescribed by the rules and there is no other impediment in law, the competent authority while laying down the norms for selection may prescribe for the tests and further specify the minimum benchmarks for written tests as well as for viva voce."

21. What is important in *K. Manjusree* (supra) is that the minimum marks for the interview was fixed after the interviews were over. In that context, it was observed (a) that the game was played under the rule that there was no minimum marks for the interview, therefore introduction of the requirement of minimum marks for interview, after the entire selection process consisting of written examination and interview was completed, would amount to changing the rules of the game after the game was played; and (b) if the interviewers had to proceed on the basis that there were minimum marks to be secured in the interview for being considered for selection and

25 [2010] 2 SCR 256 : (2010) 3 SCC 104

## Digital Supreme Court Reports

that the marks awarded by them would have the effect of barring or ousting any candidate from being considered for selection, the awarding of marks might have been markedly different. The above observation (b) lends credence to the submission made before us that a change in the eligibility cut off, after evaluation is done, denies the evaluator an opportunity to modulate the marks for placing the candidate in a category to which he/she, in the view of the evaluator, is entitled to be placed.

22. In the reference order the correctness of the decision in *K. Manjusree* has been doubted on two counts: (a) if the principle laid down in *K. Manjushree* is applied strictly, the High Court would be bound to recruit 13 of the “best” candidates out of the 21 who applied irrespective of their performance in the examination held, which would not be in the larger public interest or the goal of establishing an efficient administrative machinery; and (b) the decision of this Court in *Subash Chander Marwaha* (supra) was neither noticed in *K. Manjusree* nor in the decisions relied upon in *K. Manjusree*.
23. Insofar as the first reason to doubt *K. Manjusree* is concerned, we are of the view that the apprehension expressed in the referring order that all selected candidates regardless of their suitability to the establishment would have to be appointed, if the principle laid down in *K. Manjusree* is strictly applied, is unfounded. Because *K. Manjusree* does not propound that mere placement in the list of selected candidates would confer an indefeasible right on the empanelled candidate to be appointed. The law in this regard is already settled by a Constitution Bench of this Court in *Shankarsan Dash*<sup>26</sup> in the following terms:

"7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire

---

26 *Shankarsan Dash v. Union of India* (1991) 3 SCC 47, which has been consistently followed. See also *All India SC & ST Employees Association v. A. Arthur Jeen & Others* (2001) 6 SCC 380; *M. Ramesh v. Union of India* (2018) 16 SCC 195; and *Rakhi Ray and Others v. High Court of Delhi and Others* (2010) 2 SCC 637

**Tej Prakash Pathak & Ors. v. Rajasthan High Court & Ors.**

any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the license of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken *bona fide* for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted”.

24. As regards the second reason (i.e., K. Manjusree not considering earlier decision in Subash Chander Marwaha), it would be appropriate for us to first examine the facts of Marwaha's case. In Subash Chander Marwaha (supra) against 15 vacancies in Haryana Civil Service (Judicial Branch) a select list of 40 candidates, who obtained minimum 45% or more marks in the competitive examination, was prepared. The State Government, however, which was the appointing authority, made only 7 appointments from amongst top seven in the select list. Candidates who were ranked 8, 9 and 13 filed writ petitions in the High Court for a direction to the State Government to fill up the remaining vacancies as per the order of merit in the select list. State Government contested the petitions by claiming that in its view, to maintain high standards of competence in judicial service, candidates getting less than 55% marks in the examination were not suitable to be appointed as subordinate judges. The High Court allowed the writ petition by taking a view that the State Government was not entitled to impose a new standard of 55% of marks for selection as that was against the rule which provided for a minimum of 45% only.
25. After taking note of the relevant extant rules (i.e., Rules 8 and 10)<sup>27</sup> this Court allowed State's appeal with the following observations:

**"10. ... The mere fact that a candidate's name appears in the list will not entitle him to a mandamus that he be**

---

27 Rule 8. -No candidate shall be considered to have qualified unless he obtains 45% marks in the aggregate of all the papers and at least 33% marks in the language paper, that is, Hindi (in Devnagri script).

Rule 10.- (i) The result of the examination will be published in the Punjab Government Gazette;  
(ii) Candidates will be selected for appointment strictly in the order in which they have been placed by the Punjab Public Service Commission in the list of those who have qualified under Rule 8;....”

**Digital Supreme Court Reports**

appointed. Indeed, if the State Government while making the selection for appointment had departed from the ranking given in the list, there would have been a legitimate grievance on the ground that the State Government had departed from the rules in this respect. The true effect of Rule 10 ..... is that if and when the State Government propose to make appointments of Subordinate Judges the State Government (i) shall not make such appointments by travelling outside the list, and (ii) shall make the selection for appointments strictly in the order the candidates have been placed in the list published in the Government Gazette. In the present case neither of these two requirements is infringed by the Government. They have appointed the first seven persons in the list as Subordinate Judges. Apart from these constraints on the power to make the appointments, Rule 10 does not impose any other constraint. There is no constraint that the Government shall make an appointment of a Subordinate Judge either because there are vacancies or because a list of candidates has been prepared and is in existence.

**11.** It must be remembered that the petition is for a mandamus. This Court has pointed out in *Dr Rai Shivendra Bahadur v. Governing Body of the Nalanda College* [AIR 1962 SC 1210 : [1962 Supp \(2\) SCR 144](#) : (1962) 2 SCJ 208 : (1962) 1 Lab LJ 247 : (1962) 4 FIR 507.] that in order that mandamus may issue to compel an authority to do something, it must be shown that the statute imposes a legal duty on that authority and the aggrieved party has a legal right under the statute to enforce its performance. Since there is no legal duty on the State Government to appoint all the 15 persons who are in the list and the petitioners have no legal right under the rules to enforce its performance the petition is clearly misconceived.

**12.** It was, however, contended by Dr Singhvi on behalf of the respondents that since Rule 8 ..... makes candidates who obtained 45% or more in the competitive examination eligible for appointment, the State Government had no right to introduce a new rule by which they can restrict the appointments to only those who have scored not less than

**Tej Prakash Pathak & Ors. v. Rajasthan High Court & Ors.**

55%. It is contended that the State Government have acted arbitrarily in fixing 55% as the minimum for selection and this is contrary to the rule referred to above. The argument has no force. Rule 8 is a step in the preparation of a list of eligible candidates with minimum qualifications who may be considered for appointment. The list is prepared in order of merit. The one higher in rank is deemed to be more meritorious than the one who is lower in rank. It could never be said that one who tops the list is equal in merit to the one who is at the bottom of the list. Except that they are all mentioned in one list, each one of them stands on a separate level of competence as compared with another. That is why Rule 10(ii) .... speaks of "selection for appointment". Even as there is no constraint on the State Government in respect of the number of appointments to be made, there is no constraint on the Government fixing a higher score of marks for the purpose of selection. In a case where appointments are made by selection from a number of eligible candidates it is open to the Government with a view to maintain high standards of competence to fix a score which is much higher than the one required for mere eligibility. As shown in the letter of the Chief Secretary already referred to, they fixed a minimum of 55% for selection as they had done on a previous occasion. There is nothing arbitrary in fixing the score of 55% for the purpose of selection, because that was the view of the High Court also previously intimated to the Punjab Government on which the Haryana Government thought fit to act. That the Punjab Government later on fixed a lower score is no reason for the Haryana Government to change their mind. This is essentially a matter of administrative policy and if the Haryana State Government think that in the interest of judicial competence persons securing less than 55% of marks in the competitive examination should not be selected for appointment, those who got less than 55% have no right to claim that the selections be made of also those candidates who obtained less than the minimum fixed by the State Government. In our view the High Court was in error in thinking that the State Government had somehow contravened Rule 8 of .....”

**Digital Supreme Court Reports**

26. A close reading of the judgment in *Subash Chander Marwaha* (supra) would disclose that there was no change in the rules of the game *qua* eligibility for placement in the select list. There the select list was prepared in accordance with the extant rules. But, since the extant rules did not create any obligation on the part of the State Government to make appointments against all notified vacancies, this Court opined that the State could take a policy decision not to appoint candidates securing less than 55% marks. With that reasoning and by taking into account that appointments made were of top seven candidates in the select list, who had secured 55% or higher marks, this Court found no merit in the petition of the writ petitioners. On the other hand, in *K. Manjusree* (supra), the eligibility criteria for placement in the select list was changed after interviews were held which had a material bearing on the select list. Thus, *Subash Chander Marwaha* (supra) dealt with the right to be appointed from the select list whereas *K. Manjusree* (supra) dealt with the right to be placed in the select list. The two cases therefore dealt with altogether different issues. For the foregoing reasons, in our view, *K. Manjusree* (supra) could not have been doubted for having failed to consider *Subash Chander Marwaha* (supra).
27. In *K. H. Siraj v. High Court of Kerala & Ors.*<sup>28</sup> the High Court of Kerala invited applications for appointment to the post of Munsif Magistrate in the Kerala Judicial Service. Out of more than 1800 candidates who had applied, 1292 applications were found valid. 118 candidates passed the written examination. Out of the said candidates, 88 passed the interview and select list was prepared from amongst these 88 candidates. Candidates who were not selected as they had not secured the prescribed minimum marks in the interview filed writ petitions contending that in the absence of specific legislative mandate prescribing cut-off marks in interviews, the fixing of separate minimum cut-off marks in the interview for further elimination of candidates after a comprehensive written test touching the required subjects in detail, was violative of the statute. The writ petitions were allowed by a single judge of the High Court against which intra-court appeal was filed before division bench of the High Court. The division bench set aside the order of the learned single judge against which appeals came before this Court. While

28 [2006] Supp. 2 SCR 790 : (2006) 6 SCC 395

**Tej Prakash Pathak & Ors. v. Rajasthan High Court & Ors.**

dismissing the appeals upon interpretation of Rule 7 of the Kerala Judicial Service Rules, 1991,<sup>29</sup> this Court held:

"50. What the High Court has done by the notification dated 26.3.2001 is to evolve a procedure to choose the best available talent. It cannot for a moment be stated that prescription of minimum pass marks for the written examination or for the oral examination is in any manner irrelevant or not having any nexus to the object sought to be achieved. The merit of a candidate and his suitability are always assessed with reference to his performance at the examination and it is a well-accepted norm to adjudge the merit and suitability of any candidate for any service, whether it be the Public Service Commission (IAS, IFS, etc) or any other. Therefore, the powers conferred by Rule 7 fully justified the prescription of the minimum eligibility condition in Rule 10 of the notification dated 26.3.2001. The very concept of examination envisaged by Rule 7 is a concept justifying prescription of a minimum as benchmark for passing the same. In addition, further requirements are necessary for assessment of suitability of the candidate and that is why power is vested in a high-powered body like the High Court to evolve its own procedure as it is the best judge in the matter.....

xxx

xxx

xxx

62. Thus it is seen that apart from the amplitude of the power under rule 7 it is clearly open for the High Court to prescribe benchmarks for the written test and oral test in order to achieve the purpose of getting the best available talent. There is nothing in the rules barring such a procedure from being adopted. It may also be mentioned

29 **Rule 7.- Preparation of lists of approved candidates and reservation of appointments.** – (1) The High Court of Kerala shall, from time to time, hold examinations, written and oral, after notifying the probable number of vacancies likely to be filled up and prepare a list of candidates considered suitable for appointment to category 2. The list shall be prepared after following such procedure as the High Court deems fit and by following the rules relating to reservation of appointments contained in Rules 14 to 17 of part 2 of the Kerala State and Subordinate Services Rules, 1958.  
 (2) The list consisting of not more than double the number of probable vacancies notified shall be forwarded for the approval of the Governor. The list approved by the Governor shall come into force from the date of the approval and shall remain in force for a period of two years or until a fresh approved list is prepared, whichever is earlier.

## Digital Supreme Court Reports

that executive instructions can always supplement the rules which may not deal with every aspect of a matter. Even assuming that Rule 7 did not prescribe any particular minimum, it was open to the High Court to supplement the rule with a view to implement them by prescribing relevant standards in the advertisement for selection.”

After observing as above, in *K.H. Siraj* (supra), this Court distinguished its earlier decision in *P.K. Ramachandra Iyer v. Union of India*<sup>30</sup> with the following reasoning:

“65. .... In *Ramachandra Iyer* case Rule 14 (....) mandated that the marks at the written test and the oral examination have to be aggregated and the merit list prepared on the basis of such aggregation of marks. Therefore, the marks obtained at the written test and the oral test were both relevant whatever be the percentage, in the preparation of the merit list. Nevertheless, the examining board prescribed minimum for viva voce test and eliminated those who failed to get the minimum. Resultantly, candidates who would have found a place in the rank list based on the aggregate of the marks for the two tests stood eliminated because they did not get the minimum in the test. This was contrary to Rule 14 and that was the reason why the prescription of minimum marks for viva voce test was held invalid in *Ramachandra Iyer* case.”

28. The decision in *K.H. Siraj* (supra) makes it clear that if the rules governing recruitment provides latitude to the competent authority to devise its procedure for selection it may do so subject to the rule against arbitrariness enshrined in Article 14 of the Constitution. Even *K. Manjusree* (supra) does not proscribe fixing minimum marks for either the written test, or the interview, as an eligibility criterion for selection. What *K. Manjusree* (supra) does is to regulate the stage at which it could be done. This is clear from the decision of this Court in *Hemani Malhotra v. High Court of Delhi*.<sup>31</sup> In *Hemani* (supra) a contention was raised that the decision in *K. Manjusree* (supra)

30 [1984] 2 SCR 200 : (1984) 2 SCC 141

31 [2008] 5 SCR 1066 : (2008) 7 SCC 11

**Tej Prakash Pathak & Ors. v. Rajasthan High Court & Ors.**

should be regarded as per incuriam for not having noticed earlier decisions in *Ashok Kumar Yadav v. State of Haryana*<sup>32</sup> as well as *K.H. Siraj* (supra). Rejecting the contention, this Court observed:

"16. ... what is laid down in the decisions relied upon by the learned counsel for the respondent is that it is always open to the authority making the rules regulating the selection to prescribe the minimum marks both for examination and interview. The question whether introduction of the requirement of minimum marks for interview after the entire selection process was completed was valid or not, never fell for consideration of this Court in the decisions referred to by the learned counsel for the respondent. While deciding the case of *K Manjusree* the Court noticed the decisions in *P K Ramachandra Iyer v. Union of India*, Umesh Chandra Shukla v. Union of India and *Durgacharan Misra v. State of Orissa*, and has thereafter laid down the proposition of law..... . On the facts and in the circumstances of the case this Court is of the opinion that the decisions rendered by this court in *K. Manjusree* can neither be regarded as judgment per incuriam nor good case is made out by the respondent for referring the matter to the larger Bench for reconsidering the said decision."

29. The ultimate object of any process of selection for entry into a public service is to secure the best and the most suitable person for the job, avoiding patronage and favoritism. Selection based on merit, tested impartially and objectively, is the essential foundation of any useful and efficient public service. So, open competitive examination has come to be accepted almost universally as the gateway to public services.<sup>33</sup> It is now well settled that while a written examination assesses a candidate's knowledge and intellectual ability, an interview test is valuable to assess a candidate's overall intellectual and personal qualities. While written examination has certain distinct advantages over the interview test there are yet no written tests which can evaluate a candidate's initiative, alertness, resourcefulness, dependableness, cooperativeness, capacity for clear

32 [1985] Supp. 1 SCR 657 : (1985) 4 SCC 417

33 *Lila Dhar v. State of Rajasthan and Others* (1981) 4 SCC 159 paragraph 4.

**Digital Supreme Court Reports**

and logical presentation, effectiveness in discussion, effectiveness in meeting and dealing with others, adaptability, judgment, ability to make decision, ability to lead, intellectual and moral integrity.<sup>34</sup> Thus, the written examination assesses the man's intellect and the interview test the man himself and "the twain shall meet" for a proper selection.<sup>35</sup>

30. What is clear from above is that the object of any process of selection for entry into a public service is to ensure that a person most suitable for the post is selected. What is suitable for one post may not be for the other. Thus, a degree of discretion is necessary to be left to the employer to devise its method/ procedure to select a candidate most suitable for the post *albeit* subject to the overarching principles enshrined in Articles 14 and 16 of the Constitution as also the Rules/ Statute governing service and reservation. Thus, in our view, the appointing authority/ recruiting authority/ competent authority, in absence of Rules to the contrary, can devise a procedure for selection of a candidate suitable to the post and while doing so it may also set benchmarks for different stages of the recruitment process including written examination and interview. However, if any such benchmark is set, the same should be stipulated before the commencement of the recruitment process. But if the extant Rules or the advertisement inviting applications empower the competent authority to set benchmarks at different stages of the recruitment process, then such benchmarks may be set any time before that stage is reached so that neither the candidate nor the evaluator/ examiner/ interviewer is taken by surprise. The decision in *K. Manjusree* (supra) does not proscribe setting of benchmarks for various stages of the recruitment process but mandates that it should not be set after the stage is over, in other words after the game has already been played. This view is in consonance with the rule against arbitrariness enshrined in Article 14 of the Constitution and meets the legitimate expectation of the candidates as also the requirement of transparency in recruitment to public services and thereby obviates mal practices in preparation of select list.

---

34 See paragraph 5 of *Lila Dhar* (supra)

35 See paragraph 6 of *Lila Dhar* (supra)

**Tej Prakash Pathak & Ors. v. Rajasthan High Court & Ors.**

**(D) RULE DOES NOT APPLY WITH EQUAL STRICTNESS TO STEPS FOR SELECTION**

31. As already noticed in Section (A), a recruitment process *inter alia* comprises of various steps like inviting applications, scrutiny of applications, rejection of defective applications or elimination of ineligible candidates, conducting examinations, calling for interview or viva voce and preparation of list of successful candidates for appointment. Subject to the rule against arbitrariness, how tests or viva voce are to be conducted, what questions are to be put, in what manner evaluation is to be done, whether a short listing exercise is needed are all matters of procedure which, in absence of rules to the contrary, may be devised by the competent authority. Often advertisement(s) inviting applications are open-ended in terms of these steps and leave it to the discretion of the competent authority to adopt such steps as may be considered necessary in the circumstances *albeit* subject to the overarching principle of rule against arbitrariness enshrined in Article 14 of the Constitution.
32. To elucidate the above proposition we shall notice few instances where the procedure devised by the recruiting body has been approved by this Court. In ***Santosh Kumar Tripathi v. U.P. Power Corporation***,<sup>36</sup> this Court was required to consider whether the Rule enabling Service Commission to examine, interview, select and recommend suitable candidates would include power to hold written examination. This Court accepted the High Court's view that power to 'examine' would include holding of written examination.
33. In ***M.P. Public Service Commission v. Navnit Kumar Potdar***<sup>37</sup> the question which arose before this Court was as to whether in the process of short-listing, the Commission has altered or substituted the criteria or the eligibility of a candidate to be considered for being appointed against the post of Presiding Officer, Labour Court. In that context it was observed:

"6. ... It may be mentioned at the outset that whenever applications are invited for recruitment to the different posts, certain basic qualifications and criteria are fixed and the

<sup>36</sup> (2009) 14 SCC 210

<sup>37</sup> [1994] Supp. 3 SCR 665 : (1994) 6 SCC 293

**Digital Supreme Court Reports**

applicants must possess those basic qualifications and criteria before their applications can be entertained for consideration. The Selection Board or the Commission has to decide as to what procedure is to be followed for selecting the best candidates from amongst the applicants. In most of the services, screening tests or written tests have been introduced to limit the number of candidates who have to be called for interview. Such screening tests or written tests have been provided in the concerned statutes or prospectus which govern the selection of the candidates. But where the selection is to be made only on basis of interview, the Commission or the Selection Board can adopt any rational procedure to fix the number of candidates who should be called for interview. It has been impressed by the courts from time to time that where selections are to be made only on the basis of interview, then such interviews / viva voce tests must be carried out in a thorough and scientific manner in order to arrive at a fair and satisfactory evaluation of the personality of the candidate.”

34. Likewise in *Union of India v. T. Sundararaman*<sup>38</sup> where the eligibility conditions referred to a minimum of 5 years' experience, the selection committee was held justified in shortlisting those candidates with more than 7 years' experience having regard to the large number of applicants compared to the vacancies to be filled. The relevant observations are being extracted below:

"4. ....Note 21 to the advertisement expressly provides that if a large number of applications are received the Commission may shortlist candidates for interview on the basis of higher qualifications although all applicants may possess the requisite minimum qualifications. In the case of *M.P. Public Service Commission v. Navnit Kumar Potdar* [(1994) 6 SCC 293 : 1994 SCC (L&S) 1377 : (1994) 28 ATC 286 : JT (1994) 6 SC 302] this Court has upheld shortlisting of candidates on some rational and reasonable basis. In that case, for the purpose of shortlisting, a longer

**Tej Prakash Pathak & Ors. v. Rajasthan High Court & Ors.**

period of experience than the minimum prescribed was used as a criterion by the Public Service Commission for calling candidates for an interview. This was upheld by this Court. In the case of *Govt. of A.P. v. P. Dilip Kumar* [(1993) 2 SCC 310 : 1993 SCC (L&S) 464 : (1993) 24 ATC 123 : JT (1993) 2 SC 138] also this Court said that it is always open to the recruiting agency to screen candidates due for consideration at the threshold of the process of selection by prescribing higher eligibility qualification so that the field of selection can be narrowed down with the ultimate objective of promoting candidates with higher qualifications to enter the zone of consideration. The procedure, therefore, adopted in the present case by the Commission was legitimate....”

35. Similarly, in *Tridip Kumar Dingal v. State of W.B.*<sup>39</sup> it was held that shortlisting is permissible on the basis of administrative instructions provided the action is *bona fide* and reasonable. The relevant observations in the judgment are extracted below:

“38. ... The contention on behalf of the State Government that written examination was for shortlisting the candidates and was in the nature of “elimination test” has no doubt substance in it in view of the fact that the records disclose that there were about 80 posts of Medical Technologists and a huge number of candidates, approximately 4000 applied for appointment. The State authorities had, therefore, no other option but to “screen” candidates by holding written examination. It was observed that no recruitment rules were framed in exercise of the power under the proviso to Article 309 of the Constitution and hence no such action could be taken. In our opinion, however, even in absence of statutory provision, such an action can always be taken on the basis of administrative instructions—for the purpose of “elimination” and “shortlisting” of huge number of candidates provided the action is otherwise *bona fide* and reasonable.”

39 [2008] 15 SCR 194 : (2009) 1 SCC 768

**Digital Supreme Court Reports**

36. Another example is in respect of fixing different cutoffs for different subjects having regard to the relative importance of the subjects and their degree of relevance.<sup>40</sup> These instances make it clear that this Court has been lenient in letting recruiting bodies devise an appropriate procedure for successfully concluding the recruitment process provided the procedure adopted has been transparent, non-discriminatory/ non-arbitrary and having a rational nexus to the object sought to be achieved.

**(E) PROCEDURE PRESCRIBED IN THE EXTANT RULE NOT TO BE VIOLATED**

37. In *Sivanandan C.T.* (supra) the issue before the Constitution Bench was whether for selection minimum marks could be prescribed contrary to the extant rules and the advertisement. Answering in the negative, the Constitution Bench, speaking through one of us (Dr. D.Y. Chandrachud, CJ), held:

"15. The Administrative Committee of the High Court decided to impose a cut off for the viva-voce examination actuated by the bona fide reason of ensuring that candidates with requisite personality assume judicial office. However laudable that approach of the Administrative Committee may have been, such a change would be required to be brought in by a substantive amendment to the rules which came in much later as noticed above. This is not a case where the rules of the scheme of the High Court were silent. Where the statutory rules are silent, they can be supplemented in a manner consistent with the object and spirit of the Rules by an administrative order.

16. In the present case, the statutory rules expressly provided that the select list would be drawn up on the basis of the aggregate marks obtained in the written examination and the viva-voce. This was further elaborated in the scheme of examination which prescribed that there would be no cut off marks for the viva-voce. This position is also reflected in the notification of the High Court dated 30 September 2015. In this backdrop we have come to

---

40 Banking Service Recruitment Board, Madras v. V. Ramalingam (1998) 8 SCC 523

**Tej Prakash Pathak & Ors. v. Rajasthan High Court & Ors.**

the conclusion that the decision of the High Court suffered from its being ultra vires the 1961 Rules besides being manifestly arbitrary."

38. Following *Sivanandan CT* (supra), a three-Judge Bench of this Court in *Salam Samarjeet Singh v. The High Court of Manipur at Imphal & Anr.*<sup>41</sup> held:

"31. ... Prescribing minimum marks for viva-voce segment may be justified for the holistic assessment of a candidate, but in the present case such a requirement was introduced only after commencement of the recruitment process and in violation of the statutory rules. The decision of the Full Court to depart from the expected exercise of preparing the merit list as per the unamended rules is clearly violative of the substantive legitimate expectation of the petitioner. It also fails the tests of fairness, consistency and predictability and hence is violative of Article 14 of the Constitution of India."

39. There can therefore be no doubt that where there are no Rules or the Rules are silent on the subject, administrative instructions may be issued to supplement and fill in the gaps in the Rules. In that event administrative instructions would govern the field provided they are not *ultra vires* the provisions of the Rules or the Statute or the Constitution. But where the Rules expressly or impliedly cover the field, the recruiting body would have to abide by the Rules.

**(F) APPOINTMENT MAY BE DENIED EVEN AFTER PLACEMENT IN SELECT LIST.**

40. In Section (C) above, we have already noticed the Constitution Bench decision of this Court in *Shankarsan Das* (supra) where it was held:

"Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the license of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken *bona fide* for appropriate reasons. And if the vacancies or any of them are filled up,

## Digital Supreme Court Reports

the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted."

41. Thus, in light of the decision in *Shankarsan Das* (supra), a candidate placed in the select list gets no indefeasible right to be appointed even if vacancies are available. Similar was the view taken by this Court in *Subash Chander Marwaha* (supra) where against 15 vacancies only top 7 from the select list were appointed. But there is a caveat. The State or its instrumentality cannot arbitrarily deny appointment to a selected candidate. Therefore, when a challenge is laid to State's action in respect of denying appointment to a selected candidate, the burden is on the State to justify its decision for not making appointment from the Select List.

## CONCLUSIONS

42. We, therefore, answer the reference in the following terms:
- (1) Recruitment process commences from the issuance of the advertisement calling for applications and ends with filling up of vacancies;
  - (2) Eligibility criteria for being placed in the Select List, notified at the commencement of the recruitment process, cannot be changed midway through the recruitment process unless the extant Rules so permit, or the advertisement, which is not contrary to the extant Rules, so permit. Even if such change is permissible under the extant Rules or the advertisement, the change would have to meet the requirement of Article 14 of the Constitution and satisfy the test of non-arbitrariness;
  - (3) The decision in *K. Manjusree* (supra) lays down good law and is not in conflict with the decision in *Subash Chander Marwaha* (supra). *Subash Chander Marwaha* (supra) deals with the right to be appointed from the Select List whereas *K. Manjusree* (supra) deals with the right to be placed in the Select List. The two cases therefore deal with altogether different issues;
  - (4) Recruiting bodies, subject to the extant Rules, may devise appropriate procedure for bringing the recruitment process to its logical end provided the procedure so adopted is transparent, non-discriminatory/ non-arbitrary and has a rational nexus to the object sought to be achieved.

**Tej Prakash Pathak & Ors. v. Rajasthan High Court & Ors.**

- (5) Extant Rules having statutory force are binding on the recruiting body both in terms of procedure and eligibility. However, where the Rules are non-existent, or silent, administrative instructions may fill in the gaps;
  - (6) Placement in the select list gives no indefeasible right to appointment. The State or its instrumentality for bona fide reasons may choose not to fill up the vacancies. However, if vacancies exist, the State or its instrumentality cannot arbitrarily deny appointment to a person within the zone of consideration in the select list.
- 43.** Let the appeals be placed before appropriate Bench for decision in terms of the answers rendered above, after obtaining administrative directions from Hon'ble the Chief Justice.

*Result of the case:* Reference answered.

<sup>†</sup>Headnotes prepared by: Ankit Gyan

**Lt. Col. Suprita Chandel**

v.

**Union of India and Ors.**

(Civil Appeal No. 1943 of 2022)

09 December 2024

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

**Issue for Consideration**

Matter pertains to the correctness of the order passed by the Armed Forces Tribunal, dismissing the application of the Appellant seeking relief of Permanent Commissioning, granted by the AFT, Principal Bench to the applicants therein, who were identically situated officers.

**Headnotes<sup>†</sup>**

**Armed Forces – Permanent Commissioning – Benefit of – Extension of benefit to similarly situated persons – Appellant- Short Commissioned Officer in Army Dental Corps, denied third opportunity for permanent Commission in view of amendment in 2013 – However, the Principle Bench of the AFT holding that the applicants (identically situated officers) were denied the third chance directed consideration of their cases for permanent absorption by granting one-time age relaxation by considering them under the unamended policy – Appellant not considered because she was not part of the application – Appellant filed Original Application before the AFT, Regional Bench seeking the relief granted to the batch of similarly situated ones by AFT, Principal Bench, which attained finality– Said application dismissed – Correctness:**

**Held:** Where a citizen aggrieved by an action of the government department has approached the court and obtained a declaration of law in his/her favour, others similarly situated ought to be extended the benefit without the need for them to go to court – No doubt, in exceptional cases where the court has expressly prohibited the extension of the benefit to those who have not approached the court till then or in cases where a grievance in personam is redressed, the matter may acquire a different dimension, and the department may be justified in denying the relief to an individual who claims

\* Author

## Digital Supreme Court Reports

the extension of the benefit of the said judgment – While the AFT Principal Bench granted relief to the applicants, it did not prohibit the department from considering similarly situated persons – Appellant is entitled to parity with those applicants who succeeded before the AFT, Principal Bench – Union of India not been able to point out any valid justification as to how the applicants who obtained the benefit from the AFT, Principal Bench and batch are not identically situated with the Appellant – Accepting the stand of the Union of India would result in this Court putting its imprimatur on an unreasonable stand adopted by the authorities – If the applicants who are identically situated to the appellant were found to be eligible to be given a third chance for promotion, because they acquired eligibility before the amendment, no reason why the appellant should not be treated alike – No delay in the appellant approaching the tribunal – Appellant wrongly excluded from consideration when other similarly situated officers were considered and granted permanent commission – Since nothing adverse placed on record with regard to performance of the Appellant, in exercise of powers u/Art. 142 of the Constitution, the Appellant ought to be given Permanent Commission – Appellant's case be taken up for grant of Permanent Commission and be extended the benefit of Permanent Commission along with the all consequential benefits with effect from the same date the similarly situated persons who obtained benefits pursuant to the judgment of the AFT, Principal Bench – Order of the AFT, Regional Bench quashed and set aside – Constitution of India – Art. 142. [Paras 10, 13, 14, 16, 17, 18, 19, 21, 23-25]

### Case Law Cited

*Amrit Lal Berry v. Collector of Central Excise, New Delhi and Others* [\[1975\] 2 SCR 960 : \(1975\) 4 SCC 714](#); *K.I. Shephard and Others v. Union of India and Others* [\[1988\] 1 SCR 188 : \(1987\) 4 SCC 431](#); *State of Maharashtra and Another v. Chandrakant Anant Kulkarni and Others* [\[1982\] 1 SCR 665 : \(1981\) 4 SCC 130](#) – referred to.

### List of Keywords

Armed Forces Tribunal; Permanent Commissioning; Identically situated officers; Extension of benefit to similarly situated persons; Short Commissioned Officer; Army Dental Corps; Third opportunity for permanent Commission; Permanent absorption; One-time age relaxation; Delay; Non-suited.

**Lt. Col. Suprita Chandel v. Union of India and Ors.****Case Arising From**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1943 of 2022

From the Judgment and Order dated 05.01.2022 of the Armed Forces Tribunal in OA No. 241 of 2021

**Appearances for Parties**

Ms. Vibha Datta Makhija, Sr. Adv., Rakesh Kumar, Advs. for the Appellant.

R Bala, Sr. Adv., Mukesh Kumar Maroria, Vatsal Joshi, Sanjay Kumar Tyagi, S S Rebello, Anuj Srinivas Udupa, Akshay Amritanshu, Siddhant Kohli, Advs. for the Respondents.

**Judgment / Order of the Supreme Court****Judgment**

**K.V. Viswanathan, J.**

1. This appeal challenges the order of the Armed Forces Tribunal (AFT) Regional Bench, Lucknow dated 05.01.2022 in Original Application No. 241 of 2021. By the said order, the AFT dismissed the application of the appellant and declined her prayer for reliefs similar to the ones granted by the judgment dated 22.01.2014 of the AFT Principal Bench in O.A. No. 111 of 2013 and batch, to the applicants therein. The appellant claims that those applicants were identically situated with her.
2. The appellant on 10.03.2008 was commissioned as a Short Service Commissioned Officer in the Army Dental Corps (AD Corps). She was at that time 27 years 11 months and 28 days of age. The regulation, as it then stood, entitled her to three chances for taking up the departmental examination for permanent commission. It also provided extension of age limit. The relevant clauses, namely, Para 12 of Army Instruction 15 of 79 and Para 4(a) and 4(b) of AI 37 of 78 read as under:

“...Officers granted Short Service Commission will be given three chances for taking up the departmental examination for permanent commission. Two chances will be given after completion of 2 years of service and before completion of

**Digital Supreme Court Reports**

4 years of service and third chance in extended tenure after completion of 5 years of service and before completion of 8 years of service provided they fulfill the conditions of eligibility as laid down in AI 37/78, as amended.”

Paras 4(a) and 4(b) of Annexure ‘A’ to the AI 37/78

“(a) Candidates must not have attained 28 years of age on 31st December of the year of receipt of application from them. This age limit may be extended upto 30 years by the Government of India on the recommendation of the AD Corps Selection Board in the case of candidates with additional Post-Graduate qualifications.

(b) A candidate with previous commissioned service in the Army Dental Corps will be entitled to extension of the above age limits as given below:-

Full period of previous reckonable service if such service was rendered while in possession of dental qualification recognized by the Dental Council of India (vide para 3 above). ”

(Emphasis supplied)

3. It is undisputed that the appellant could not qualify in the first two chances on completion of two years of service and four years of service respectively. On 15.11.2012, her services were extended for another five years. By 9<sup>th</sup> of March 2013 the appellant had completed five years of service and was eligible to avail of her third chance, subject to age relaxation up to the full period of reckonable service.
4. However, on 20<sup>th</sup> of March, 2013, amendments were carried out to clause 4(a) and 4(b) of AI 37 of 78 as amended in AI 15 of 79, inasmuch as, while Para 4(a) was amended, Para 4(b) came to be deleted. The amended Para 4(a) of AI 37 of 78 introduced on 20.03.2013, reads as under:

“(a) Para 4(a) of Annexure ‘A’ to AI 37/78

Candidates must not have attained 30 years of age on 31st December of the year of receipt of application form from them for Departmental Permanent Commission. The age limit may be extended up to 35 years in respect of those candidates who are in receipt of PG qualification

**Lt. Col. Suprita Chandel v. Union of India and Ors.**

of Masters in Dental Surgery duly recognized by Dental Council of India, at the time of initial commission to Army Dental Corps.”

5. The net result was the appellant was deprived of her third chance since the extension was capped at 35 years and was confined to those who were in receipt of PG qualification of Masters in Dental Surgery on and from 20.03.2013.
6. According to the appellant, Officers similarly situated with the appellant who were also not given an opportunity to appear for the clinical test and interview, in view of the amendment, quickly moved applications before the AFT, Principal Bench in O.A. No. 111 of 2013 and batch of matters raising various contentions and contended that they have been wrongly deprived of availing the third chance for no fault of theirs. Though the amendments to the policy were upheld, the Principal Bench of the AFT granted relief in the following terms in the said batch of matters.

“35. The other contention of the learned counsel for the petitioners is that the Government can grant age relaxation in the given facts and circumstances of the case. It is trite that the Government has the power to relax the upper age limit if it is found that operation of the rule or policy has hardship on the persons working in the Corps. Nothing has been shown that the Government has no power to relax the upper age limit. Now coming to the question as to whether the operation of the policy has hardship, it would be seen that an exception was provided for SSC Officers for giving the benefit by extending the upper age limit. It is also admitted by the respondents in para-41 of their counter that one time age relaxation in the upper age limit has been granted in the case of an AMC officer who had joined as SSC Officer prior to the issuance of the impugned amendment. By deletion of para-4(b) some of the SSC Officers became ineligible for permanent absorption. The petitioners, who were working in the Corps continuously, expected to be given three chances to seek their permanent absorption. However, due to impugned amendment, they have been denied these chances. Therefore, as one time exception, the Government can relax the upper age limit

**Digital Supreme Court Reports**

in respect of those petitioners who have become ineligible on account of the impugned amendment.

36. In view of the above discussions, all the four petitions stand partly allowed with following directions:-

(1) The impugned policy of 2013 is held to be intra vires.

(2) A direction is issued to the respondents to consider the case of the petitioners, who were eligible in the year 2012 but became ineligible in the year 2013 for grant of permanent absorption on account of amendment of policy after clubbing the selection of 2012 with 2013. Their case shall be considered in terms of the previous policy.

(3) A further direction is issued to the respondents to grant one time age relaxation in favour of the petitioners for seeking permanent absorption as has been done in the case of AMC officers who had joined as SSC Officer prior to the issuance of the impugned amendment. The entire exercise for consideration of the petitioners for grant of permanent commission shall be completed within a period of two months from the date of receipt of a copy of this order. The petitioners' case thereafter shall be considered by the ensuing Board for their permanent absorption in the Corps."

7. According to the appellant, she could not join the applicants therein in the litigation as she was in her advance stage of pregnancy and while posted at Bareilly, she proceeded on maternity leave on 16.05.2013. The appellant delivered a child on 01.07.2013.
8. Consequent to the order of the Principal Bench, permanent commissions were granted to officers who were eligible prior to the amendment to avail a third chance but could not avail in view of the amendment of 20.03.2013. The appellant was not considered because she was not part of the Original Application.
9. A representation submitted by the appellant on 06.09.2014 did not yield any favorable result and was rejected with the following endorsement on 15.09.2014:-

"1. Ref advance copy of your application No.  
DS-12301/05/2004 dated 06 Sep 2014.

**Lt. Col. Suprita Chandel v. Union of India and Ors.**

2. As per directions of MoD communicated vide DGAFMS letter No.12252/CC/AKJ/DGAFMS/LC dated 12 Aug 2014, hon'ble Armed Forces Tribunal (Principal Bench), New Delhi has granted 'one time' age relaxation in the eligibility criteria 'only to the petitioners'. Hon'ble AFT has further clarified that this order will not form a precedence.

3. For your info please."

(Emphasis Supplied)

10. At the outset itself, we may say that the phrase "Only to the Petitioners" in the order rejecting the representation is patently erroneous. While the AFT Principal Bench granted relief to the petitioners, it did not prohibit the department from considering similarly situated persons. Another representation was disposed of on 9<sup>th</sup> November 2017, *inter alia*, on the primary ground that she did not meet the criterion. In the meantime, the appellant's services were further extended for a period of 4 years on 31.10.2017.
11. The appellant thereafter filed Original Application No. 241 of 2021 before the AFT, Regional Bench, Lucknow seeking relief similar to the ones granted to the batch of petitioners in O.A. 111 of 2013 by AFT, Principal Bench, New Delhi which attained finality. For the sake of completion of record, it should be mentioned that the appellant had in 2014 itself moved to the Armed Forces Tribunal by filing an application in Diary No. 1761 of 2014. However, the said application was withdrawn with liberty to move afresh. Thereafter, again she filed O.A. 70 of 2017 before the Principal Bench which was again withdrawn with liberty to move the appropriate Tribunal. It was thereafter that after making the representation on 4<sup>th</sup> October 2017 which was rejected on 09.11.2017 and after returning from the Arunachal Pradesh posting and further after the Covid-19 ordeal had reasonably subsided in January, 2021, she moved the AFT, Regional Bench, Lucknow by filing O.A. No. 241 of 2021, which has been dismissed by the impugned order.
12. The only reasoning given in the impugned order is in the following terms.

"(d) The applicant was not a petitioner in those petitions filed before AFT (PB), New Delhi, therefore, applicant cannot be granted any relief with regard to relaxation of

**Digital Supreme Court Reports**

age limit which is clarified by AFT (PB) in its judgment dated 22.01.2014 that 'an officer is not entitled to be absorbed permanent, if he/she has crossed the upper age limits'. The benefit of age relaxation was granted to the petitioners of Original Applications who were eligible in the year 2012 but became ineligible in the year 2013 for grant of permanent absorption on account of amendment of policy after clubbing the selection of 2012 with 2013 considering the terms of the previous policy and were granted one time age relaxation."

13. We have heard Ms. Vibha Datta Makhija, learned senior counsel for the appellant and Mr. R Balasubramanian, learned senior counsel for the respondents. Having considered the submissions of the learned counsels and perused the records, we are of the opinion that the appellant is entitled to parity with those applicants who succeeded before the AFT, Principal Bench in O.A. No. 111 of 2013. We say so for the following reasons.
14. It is a well settled principle of law that where a citizen aggrieved by an action of the government department has approached the court and obtained a declaration of law in his/her favour, others similarly situated ought to be extended the benefit without the need for them to go to court. [See *Amrit Lal Berry vs. Collector of Central Excise, New Delhi and Others* (1975) 4 SCC 714]
15. In *K.I. Shephard and Others vs. Union of India and Others* (1987) 4 SCC 431, this Court while reinforcing the above principle held as under:-

"19. The writ petitions and the appeals must succeed. We set aside the impugned judgments of the Single Judge and Division Bench of the Kerala High Court and direct that each of the three transferee banks should take over the excluded employees on the same terms and conditions of employment under the respective banking companies prior to amalgamation. The employees would be entitled to the benefit of continuity of service for all purposes including salary and perks throughout the period. We leave it open to the transferee banks to take such action as they consider proper against these employees in accordance with law. Some of the excluded employees have not come to court.

**Lt. Col. Suprita Chandel v. Union of India and Ors.**

There is no justification to penalise them for not having litigated. They too shall be entitled to the same benefits as the petitioners. ....”

(Emphasis Supplied)

16. No doubt, in exceptional cases where the court has expressly prohibited the extension of the benefit to those who have not approached the court till then or in cases where a grievance in personam is redressed, the matter may acquire a different dimension, and the department may be justified in denying the relief to an individual who claims the extension of the benefit of the said judgment.
17. That is not the situation here. In the submissions too, the respondents have not been able to point out any valid justification as to how the applicants who obtained the benefit from the AFT, Principal Bench in OA No. 111 of 2013 and batch are not identically situated with the appellant. Like the applicants who succeeded, the appellant was also ripe for the third chance before the amended para 4(a) of AI No. 37 of 1978 was introduced on 20.03.2013. The Principal Bench of the AFT in OA No. 111 of 2013 after clearly holding that the applicants therein were denied the third chance directed consideration of their cases for permanent absorption by granting one-time age relaxation by considering them under the unamended policy.
18. The respondent authorities on their own should have extended the benefit of the judgment of AFT, Principal Bench in OA No. 111 of 2013 and batch to the appellant. To illustrate, take the case of the valiant Indian soldiers bravely guarding the frontiers at Siachen or in other difficult terrain. Thoughts on conditions of service and job perquisites will be last in their mind. Will it be fair to tell them that they will not be given relief even if they are similarly situated, since the judgment they seek to rely on, was passed in the case of certain applicants alone who moved the court? We think that would be a very unfair scenario. Accepting the stand of the respondents in this case would result in this Court putting its imprimatur on an unreasonable stand adopted by the authorities.
19. The stand of the Department relying on the judgment of this Court in *State of Maharashtra and Another vs. Chandrakant Anant Kulkarni and Others* (1981) 4 SCC 130 to contend that mere reduction in chance of consideration did not result in deprivation of any right does not appeal to us. The appellant's case is founded on

**Digital Supreme Court Reports**

the principle of discrimination. What is sauce for the goose ought to be sauce for the gander. If the applicants in O.A. No. 111 of 2013 whom we find are identically situated to the appellant were found to be eligible to be given a third chance for promotion, because they acquired eligibility before the amendment to AI No. 37 of 1978 on 20.03.2013, we find no reason why the appellant should not be treated alike.

20. The order dated 13.03.2014 in the application for clarification of the AFT, Principal Bench, order of 22.01.2014 and the order dated 19.05.2014 in the review relied upon in the counter affidavit do not in any manner dilute the case of the appellant herein. In fact, the order dated 13.03.2014 fully supports the appellant since it extended the benefit to those persons who acquired the eligibility in 2013. As far as the order in review dated 19.05.2014 directing that there would be no dilution in the laid down criterion and the further direction that the order in review shall not form a precedent does not imply that the main order of 22.01.2014 of the Principal Bench, AFT, should not be extended to similarly situated individuals like the appellant, who has been knocking the doors for relief since September, 2014.
21. We see no delay in the appellant approaching the Tribunal. The appellant has been seeking justice from 2014 and the only delay between 2017 to 2021 after the withdrawal of the earlier applications with liberty, was due to the fact that between August, 2017 and 2019 she was posted in Arunachal Pradesh and it was during this time that the appellant made a second representation. Thereafter, the period between March, 2020 and January, 2021 was on account of Covid-19 pandemic. In any event, since a clear case of discrimination has been made out, we do not want to non-suit the appellant on the ground of delay. We say so on the special facts of this case.
22. We also find that the appellant - a woman officer has continuously worked since 2007 and even as late as on 31.10.2017, she was granted extension of another four years of service, and she continues to be in service thereafter also on account of the status quo granted by this Court on 08.03.2022. Not only this, the appellant was awarded Commendation Card by the Chief of Army Staff on 14.01.2019. It is also undisputed that the appellant has had a distinguished service and is now posted as Lieutenant Colonel in the Army Dental Corps at Agra.

**Lt. Col. Suprita Chandel v. Union of India and Ors.**

23. We hold that the appellant was wrongly excluded from consideration when other similarly situated officers were considered and granted permanent commission. Today, eleven years have elapsed. It will not be fair to subject her to the rigors of the 2013 parameters as she is now nearly 45 years of age. There has been no fault on the part of the appellant.
24. On the peculiar facts of this case and since nothing adverse has been placed on record with regard to performance of the appellant, in exercise of powers under Article 142 of the Constitution, we direct that the appellant ought to be given Permanent Commission. We direct that the appellant's case be taken up for grant of Permanent Commission and she be extended the benefit of Permanent Commission with effect from the same date the similarly situated persons who obtained benefits pursuant to the judgment dated 22.01.2014 in O.A. No. 111 of 2013 of the Principal Bench of the AFT. All consequential benefits like seniority, promotion and monetary benefits, including arrears shall be extended to the appellant. The above directions shall be implemented within a period of four weeks from today.
25. The appeal is allowed and the order of the AFT, Regional Bench, Lucknow, dated 05.01.2022 in O. A. No. 241 of 2021 is quashed and set aside. No costs.

*Result of the case:* Appeal allowed.

<sup>†</sup>*Headnotes prepared by:* Nidhi Jain

**M/s HPCL Bio-Fuels Ltd.**  
v.  
**M/s Shahaji Bhanudas Bhad**  
(Civil Appeal No. 12233 of 2024)  
07 November 2024  
**[Dr Dhananjaya Y. Chandrachud, CJI and  
J.B. Pardiwala,\* JJ.]**

**Issue for Consideration**

(i) Whether a fresh application u/s.11(6) of the Arbitration and Conciliation Act, 1996 filed by the respondent could be said to be maintainable more particularly when no liberty to file a fresh application was granted by the High Court at the time of withdrawal of the first application u/s.11(6) of the Act, 1996; (ii) whether the fresh application u/s.11(6) of the Act, 1996 filed by the respondent on 09.12.2022 could be said to be time-barred. If yes, whether the respondent is entitled to the benefit of Section 14 of the Limitation Act. In other words, whether the period spent by the respondent in pursuing proceedings under the IBC is liable to be excluded while computing the limitation period for filing the application u/s.11(6); (iii) whether the delay caused by the respondent in filing the fresh arbitration application u/s.11(6) of the Act, 1996 can be condoned u/s.5 of the Limitation Act.

**Headnotes<sup>†</sup>**

**Arbitration and Conciliation Act, 1996 – s.11(6) – Code of Civil Procedure, 1908 – Or.23 , R.1 – Insolvency & Bankruptcy Code, 2016 – Whether a fresh application u/s.11(6) of the Arbitration and Conciliation Act, 1996 filed by the respondent could be said to be maintainable more particularly when no liberty to file a fresh application was granted by the High Court at the time of withdrawal of the first application u/s.11(6) of the Act, 1996 – The appellant contended that in lieu of the principles contained in Or.23 R.1 of the CPC, the respondent could not have filed a subsequent application u/s.11(6) for adjudication of the same disputes, having previously withdrawn unconditionally an application filed for the same purpose:**

\*Author

**Digital Supreme Court Reports**

**Held:** In the instant case, both the applications u/s.11(6) of the Act, 1996 were filed seeking adjudication of the dispute which arose on 02.02.2014 upon refusal of the appellant to pay the dues of the respondent – The first application u/s.11(6) was filed on 16.02.2018 and was subsequently withdrawn unconditionally on 01.10.2018 – After a gap of more than four years, the respondent filed a subsequent application u/s.11(6) before the High Court on 09.12.2022 which came to be allowed by the impugned order – The chronology of events clearly indicates that the respondent did not withdraw the first arbitration application because of some defect which would have led to its dismissal – It is also clear from the order dated 01.10.2018 of the High Court permitting the respondent to withdraw the application that neither any liberty was sought by the respondent nor the court had granted any liberty to file a fresh arbitration application – It appears that the only reason the respondent withdrew the arbitration application was to get his application u/s.9 of the IBC any how admitted by the NCLT – It can be said without any doubt that the respondent took a calculated risk of abandoning the arbitration proceedings to maximise the chances of succeeding in the IBC proceedings – The respondent was within its right to abandon the arbitration proceedings in favour of IBC proceedings – However, having done so, it would no longer be open to it to file a fresh application for appointment of arbitrator without having obtained the liberty of the court to file a fresh application at the time of the withdrawal – The principles underlying Order 23 Rule 1 can be extended to applications for appointment of arbitrator, the only recourse to the respondent to defend the second application as maintainable despite it having been withdrawn earlier without liberty was to show *bona fides* on its part – From the conduct of the respondent, it is evident that it thought fit to initiate insolvency proceedings perhaps thinking that the issues existing between the parties may not get resolved through arbitration – The failure on the part of the respondent to withdraw the first Section 11 application without seeking any liberty cannot be condoned in the facts of the present case – Therefore, in the absence of any liberty sought by the respondents from the High Court at the time of withdrawal of the first arbitration application, the fresh Section 11 petition arising out of the same cause of action cannot be said to be maintainable. [Paras 51, 52, 55, 58, 59, 61]

**M/s HPCL Bio-Fuels Ltd. v. M/s Shahaji Bhanudas Bhad**

**Arbitration and Conciliation Act, 1996 – Code of Civil Procedure, 1908 – Insolvency & Bankruptcy Code, 2016 – Limitation Act, 1963 – s.14 – Whether the fresh application u/s.11(6) of the Act, 1996 filed by the respondent on 09.12.2022 could be said to be time-barred – If yes, whether the respondent is entitled to the benefit of s.14 of the Limitation Act:**

**Held:** The first application u/s.11(6) filed on 16.02.2018 was well within the prescribed limitation period of three years for filing such applications – The second application u/s.11(6) was required to be filed within a period of three years from the expiry of one month from the date of receipt of the notice invoking arbitration by the appellant – This period of three years came to an end in August, 2019 – The second application u/s.11(6) came to be filed by the respondent much later on 12.12.2022 and is clearly time-barred – As far as benefit of s.14 of the Limitation Act is concerned, there is a body of decisions of this Court taking the view that by virtue of s.43 of the Act, 1996, the Limitation Act is applicable to applications for appointment of arbitrator filed u/s.11(6) of the said Act – It thus follows that the benefit u/s.14 of the Limitation Act can be availed by an applicant subject to the fulfilment of the conditions specified therein – First, the benefit of s.14(1) can be availed of where the subsequent proceeding is a suit, whereas the benefit of s.14(2) can be availed of where the subsequent proceeding is an application – Secondly, s.14(1) applies if both the earlier and the subsequent proceedings have the same matter in issue, whereas s.14(2) applies when both the earlier and the subsequent proceedings are filed for seeking the same relief – As a petition u/s.11(6) of the Act, 1996 is not a suit, hence it would not be governed by sub-section (1) of s.14 of the Limitation Act – Instead, it would be governed by sub-section (2) of s.14 of the Limitation Act – As far as same relief is concerned, the High Court fell in error in holding that an application u/s.9 of the IBC and an application u/s.11(6) of the Act, 1996 are filed for seeking the same relief – While the relief sought in the former is the initiation of the CIRP of the corporate debtor, the relief sought in the latter is the appointment of an arbitrator for the adjudication of disputes arising out of a contract – As the relief sought in an application u/s.11(6) of the Act, 1996 is not the same as the relief sought in an application u/s.9 of the IBC, the benefit of s.14(2) cannot be given to the respondent in the present case.

[Paras 74, 77, 83, 107]

**Digital Supreme Court Reports**

**Arbitration and Conciliation Act, 1996 – Code of Civil Procedure, 1908 – Insolvency & Bankruptcy Code, 2016 – Limitation Act, 1963 – Whether the respondent was prosecuting the IBC proceedings in good faith and in a bonafide manner.**

**Held:** The respondent couldn't be said to have had been prosecuting the IBC proceedings in good faith and in a bonafide manner – An element of mistake is inherent in the relief envisaged under Section 14 of the Limitation Act – In the present case, the respondent had initially approached the High Court with an application u/s.11(6) – However, for reasons best known to it, the respondent abandoned the said proceedings for appointment of arbitrator and approached the NCLT, Kolkata with an application u/s.9 of the IBC – The respondent was fully aware of the objection of a pre-existing dispute raised by the appellant in response to its second statutory demand notice issued u/s.8 of the IBC – Despite having preferred an application u/s.11(6) of the Act, 1996 before the jurisdictional court, and also being fully aware of the infirmities in the s.9 application filed under the IBC, the respondent took a conscious decision to abandon the right course of proceedings – The conduct of the respondent cannot be termed to be a mistake in any manner – Having taken a conscious decision to opt for specific remedy under the IBC which is not for the same relief as an application u/s.11(6) of the Act, 1996, the respondent cannot be now allowed to take the plea of ignorance or mistake and must bear the consequences of its decisions. [Para 110]

**Arbitration and Conciliation Act, 1996 – s.11(6) – Code of Civil Procedure, 1908 – Insolvency & Bankruptcy Code, 2016 – Limitation Act, 1963 – s.5 – Whether the delay caused by the respondent in filing the fresh arbitration application u/s.11(6) of the Act, 1996 can be condoned u/s.5 of the Limitation Act:**

**Held:** The position of law is that the benefit u/s.5 of the Limitation Act is available in respect of the applications filed for appointment of arbitrator u/s.11(6) of the Act, 1996 – Further, the requirement of filing an application u/s.5 of the Limitation Act is not a mandatory pre-requisite for a court to exercise its discretion under the said provision and condone the delay in institution of an application or appeal – The respondent took a conscious decision to abandon its first s.11(6) application with a view to pursue proceedings u/s.9 of the IBC – The respondent

**M/s HPCL Bio-Fuels Ltd. v. M/s Shahaji Bhanudas Bhad**

made such choice despite a specific objection raised by the appellant in its reply to the statutory demand notice that there were pre-existing disputes between the parties – In view of this, maximisation of the chances of getting the application u/s.9 of the IBC admitted by the NCLT seems to have been the only reason for the abandonment of the first s.11(6) application by the respondent – In light of such conduct on the part of the respondent, this Court is of the view that the present case does not warrant the exercise of discretion u/s.5 of the Limitation Act. [Paras 121, 122]

**Limitation – Object of having a limitation period:**

**Held:** The basic premise behind the statutes providing for a limitation period is encapsulated by the maxim “*Vigilantibus non dormientibus jura subveniunt*” which means that the law assists those who are vigilant and not those who sleep over their rights – The object behind having a prescribed limitation period is to ensure that there is certainty and finality to the litigation and assurance to the opposite party that it will not be subject to an indefinite period of liability – Another object achieved by a fixed limitation period is that only those claims which are initiated before the deterioration of evidence takes place are allowed to be litigated – The law of limitation does not act to extinguish the right but only bars the remedy. [Para 68]

**Arbitration and Conciliation Act, 1996 – s.11(6) – Limitation Act, 1963 – When the limitation period for filing an application seeking appointment of arbitrator would commence:**

**Held:** On the aspect of when the limitation period for filing an application seeking appointment of arbitrator would commence, it is only after a valid notice invoking arbitration has been issued by one of the parties to the other party and there has been either a failure or refusal on part of the other party to make an appointment as per the appointment procedure agreed upon between the parties, that the clock would start ticking for the purpose of the limitation of three years. [Para 70]

**Limitation Act, 1963 – s.14 (1) – Ingredients need to be fulfilled for the applicability of Section 14(1):**

**Held:** (i) The subsequent proceeding must be a suit; (ii) Both the earlier and the subsequent proceeding must be civil proceedings;

**Digital Supreme Court Reports**

(iii) Both the earlier and subsequent proceedings must be between the same parties; (iv) The earlier and subsequent proceeding must have the same matter in issue; (v) The earlier proceeding must have failed owing to a defect of jurisdiction of the earlier court or any other cause of a like nature; (vi) The earlier proceedings must have been prosecuted in good faith and with due-diligence; and (vii) Both the earlier and the subsequent proceedings must be before a court. [Para 78]

**Limitation Act, 1963 – s.14 (2) – Conditions required to be fulfilled for seeking the benefit of exclusion u/s.14(2) are as follows:**

**Held:** (i) Both the earlier and the subsequent proceeding must be civil proceedings; (ii) Both the earlier and subsequent proceedings must be between the same parties; (iii) The earlier and subsequent proceeding must be for the same relief; (iv) The earlier proceeding must have failed owing to a defect of jurisdiction of the earlier court or any other cause of a like nature; (v) The earlier proceedings must have been prosecuted in good faith and with due-diligence; and (vi) Both the earlier and the subsequent proceedings are before a court. [Para 83]

**Limitation Act, 1963 – s.14(1) and s.14(2) – The key difference between sub-sections (1) and (2) of Section 14 respectively is two-fold:**

**Held:** (i) First, the benefit of Section 14(1) can be availed of where the subsequent proceeding is a suit, whereas the benefit of Section 14(2) can be availed of where the subsequent proceeding is an application; (ii) Secondly, Section 14(1) applies if both the earlier and the subsequent proceedings have the same matter in issue, whereas Section 14(2) applies when both the earlier and the subsequent proceedings are filed for seeking the same relief. [Para 84]

**Arbitration and Conciliation Act, 1996 – s.11(6) – Insolvency & Bankruptcy Code, 2016 – Object of initiation of insolvency proceedings and the objective behind the appointment of an arbitrator:**

**Held:** The object of initiation of insolvency proceedings under the IBC is to seek rehabilitation of the corporate debtor by

**M/s HPCL Bio-Fuels Ltd. v. M/s Shahaji Bhanudas Bhad**

appointment of a new management, whereas the objective behind the appointment of an arbitrator is to resolve the disputes arising between the parties out of a private contract – As soon as the CIRP of a corporate debtor is initiated, it becomes a proceeding in rem – On the contrary, arbitration being concerned with private disputes is not an in-rem proceeding. [Para 98]

**Insolvency & Bankruptcy Code, 2016 – Distinguishing feature that sets apart ordinary recovery proceedings from insolvency proceedings:**

**Held:** Insolvency proceedings are fundamentally different from proceedings for recovery of debt such as a suit for recovery of money, execution of decree or claims for amount due under arbitration, etc. – The first distinguishing feature that sets apart ordinary recovery proceedings from insolvency proceedings is that under the former the primary relief is the recovery of dues whereas under the latter the primary concern is the revival and rehabilitation of the corporate debtor – No doubt both proceedings contemplate an aspect of recovery of debt, however in insolvency proceedings, the recovery is only a consequence of the rehabilitation/ resolution of the corporate debtor and not the main relief – The second distinguishing feature is that although both proceedings entail recovery of debt to a certain extent, however they are different inasmuch as when it comes to recovery proceedings it is the individual creditor's debt which is sought to be recovered, whereas in insolvency proceedings it is the entire debt of the company which is sought to be resolved – The former is only for the benefit of the individual creditor who initiates the recovery proceedings whereas the latter is for the benefit of all creditors irrespective of who initiates insolvency – The last distinguishing feature is that, a recovery proceeding be it a suit or arbitration is initiated by a creditor where an amount is due and is unpaid by a debtor, in other words the intention behind initiating a recovery proceeding is simpliciter for the full recovery of amount which is unpaid to it – Whereas, the underlying intention behind initiating insolvency is not with the intention of recovering the amount owed to it, but rather with the intention that the corporate debtor is resolved / rehabilitated through a new management as soon as possible before it becomes unviable with no prospect of any meaningful recovery of its dues in the near future. [Paras 103, 104, 105]

## Digital Supreme Court Reports

### Case Law Cited

*Vallabh Das v. Madan Lal (Dr) [1971] 1 SCR 211 : (1970) 1 SCC 761; V. Rajendran v. Annasamy Pandian [2017] 2 SCR 508 : (2017) 5 SCC 63; Sarguja Transport Service v. State Transport Appellate Tribunal, M.P., Gwalior and Others [1987] 1 SCR 200 : (1987) 1 SCC 5; Upadhyay & Co. v. State of U.P. and Others [1998] Supp. 3 SCR 234 : (1999) 1 SCC 81; Commissioner, Madhya Pradesh Housing Board & Ors. v. Mohanlal and Company [2016] 3 SCR 357 : (2016) 14 SCC 199; Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India & Ors. [2019] 3 SCR 535 : (2019) 4 SCC 17; Pioneer Urban Land & Infrastructure Ltd. & Anr. v. Union of India & Ors. [2019] 10 SCR 381 : (2019) 8 SCC 416; Hindustan Construction Company Ltd. & Anr. v. Union of India [2019] 17 SCR 331 : (2020) 17 SCC 324; Jaypee Kensington Boulevard Apartments Welfare Assn. v. NBCC (India) Ltd. [2021] 12 SCR 603 : (2022) 1 SCC 401; Yeshwant Deorao Deshmukh v. Walchand Ramchand Kothari [1950] 1 SCR 852; Pathapati Subba Reddy (Died) by Lrs. and Others v. The Special Deputy Collector (LA) [2024] 4 SCR 241 : (2024) 4 SCR 241; Ramlal v. Rewa Coalfields Ltd. [1962] 2 SCR 762 : 1961 SCC OnLine SC 39 – relied on.*

*Arif Azim Co. Ltd. v. Aptech Ltd. [2024] 3 SCR 73 : 2024 SCC OnLine SC 215; BSNL v. Nortel Networks (India) (P) Ltd. [2021] 2 SCR 644 : (2021) 5 SCC 738; Natesan Agencies (Plantations) v. State [2019] 11 SCR 508 : (2019) 15 SCC 70; Consolidated Engg. Enterprises & Ors. v. Principal Secy. Irrigation Department & Ors. [2008] 5 SCR 1108 : (2008) 7 SCC 169; J. Kumaradasan Nair v. Iric Sohan [2009] 3 SCR 238 : 2009 (12) SCC 175; Union of India v. West Coast Paper Mills Ltd. [2004] 2 SCR 642 : (2004) 3 SCC 458; Maharashtra State Farming Corporation Ltd. v. Belapur Sugar & Allied Industries Ltd., 2004 (3) MHLF 414; Sarva Shramik Sanghatana v. State of Maharashtra [2007] 12 SCR 645 : 2008 1 SCC 494; Vanna Claire Kaura v. Gauri Anil Indulkar & Ors. [2009] 11 SCR 280 : (2009) 7 SCC 541; Mobilox Innovations Private Limited v. Kirusa Software Private Limited [2017] 10 SCR 1006 : (2018) 1 SCC 353; M.P. Housing Board v. Mohanlal & Co. [2016] 3 SCR 357 : (2016) 14 SCC 199; Sesh Nath Singh v. Baidyabati Sheoraphuli Coop. Bank Ltd. [2021] 3 SCR 806 : (2021) 7 SCC 313; BSNL v.*

**M/s HPCL Bio-Fuels Ltd. v. M/s Shahaji Bhanudas Bhad**

*Telephone Cables Limited* [2010] 3 SCR 291 : 2010 5 SCC 213 – referred to.

*Deepdharshan Builders Pvt. Ltd. v. Saroj, Widow of Satish Sunderrao Trasikar*, 2018 SCC OnLine Bom 4885; *Yogesh Kumar Gupta v. Anuradha Rangarajan*, 2007 SCC OnLine Del 287 – referred to.

**Books and Periodicals Cited**

Treatise on the Insolvency and Bankruptcy Code, 2016  
by Dr. Dilip K. Sheth.

**List of Acts**

Insolvency & Bankruptcy Code, 2016; Code of Civil Procedure, 1908;  
Arbitration and Conciliation Act, 1996; Companies Act, 2013;  
Limitation Act, 1963; Code of Civil Procedure (Amendment)  
Act, 1976; Industrial Disputes Act, 1947.

**List of Keywords**

Section 11(6) of the Arbitration and Conciliation Act, 1996;  
Section 14 of Limitation Act, 1963; Order 23 Rule 1 of the Code  
of Civil Procedure, 1908; Object of having a limitation period;  
Recovery Proceedings; Insolvency Proceedings; Appointment  
of an arbitrator; Ordinary recovery proceedings; *Vigilantibus non  
dormientibus jura subveniunt*.

**Case Arising From**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 12233 of 2024

From the Judgment and Order dated 31.01.2024 of the High Court  
of Judicature at Bombay in COMAP No. 1 of 2023

**Appearances for Parties**

Tushar Mehta, Solicitor General, Sanjay Kapur, Surya Prakash,  
Ms. Mahima Kapur, Ms. Divya Singh Pundir, Advs. for the Appellant.

Jay Savla, Sr. Adv., Prakash Shah, Durgaprasad Poojari, Jasdeep  
Singh Dhillon, Prabhat Kumar Chaurasia, Anirudh Jamwal, M/s.  
Mps Legal, Advs. for the Respondent.

## Digital Supreme Court Reports

### Judgment / Order of the Supreme Court

#### Judgment

#### **J.B. Pardiwala, J.**

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

|  |            |
|--|------------|
| <b>A. FACTUAL MATRIX.....</b>  | <b>2*</b>  |
| i. Proceedings under the IBC.....  | 5*         |
| ii. Proceedings before the High Court.....   | 10*        |
| <b>B. SUBMISSIONS ON BEHALF OF THE APPELLANT.....</b>  | <b>14*</b> |
| <b>C. SUBMISSIONS ON BEHALF OF THE RESPONDENT.....</b>   | <b>17*</b> |
| <b>D. ISSUES FOR DETERMINATION.....</b>  | <b>19*</b> |
| <b>E. ANALYSIS.....</b>  | <b>20*</b> |
| i. Issue No. 1.....  | 23*        |
| a. Scope and applicability of Order 23 Rule 1 of the CPC to proceedings other than suits.....                                    | 23*        |
| ii. Issue No. 2.....   | 44*        |
| a. Application under Section 11(6) of the Act, 1996 is not for the same relief as an application under Section 9 of the IBC..... | 57*        |
| iii. Issue No. 3.....  | 67*        |
| <b>F. CONCLUSION.....</b>  | <b>78*</b> |

1. Leave granted.
2. This appeal arises from the final judgment and order dated 31.01.2024 (“**impugned order**”) passed by the High Court of Judicature at Bombay in Commercial Arbitration Petition No. 1 of 2023, wherein the High Court allowed the petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short, “**the Act, 1996**”) at the instance of the M/s Shahaji Bhanudas Bhad (“**the respondent**”) and appointed Justice (Retd.) Dilip Bhosale as the sole arbitrator

---

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

**M/s HPCL Bio-Fuels Ltd. v. M/s Shahaji Bhanudas Bhad**

to adjudicate the disputes and differences between HPCL Biofuels Ltd. (“**the appellant**”) and the respondent.

**A. FACTUAL MATRIX**

3. The appellant is a Government company within the meaning of Section 4(35) of the Companies Act, 2013 and is engaged *inter alia* in the business of manufacturing bio-fuels. The appellant is a wholly-owned subsidiary of Hindustan Petroleum Corporation Ltd.
4. The respondent is engaged in the business of manufacture, supply and erection of the equipment and machinery required for the setting up of sugar factories and allied products in the name of M/s S.S. Engineer, as a sole proprietor.
5. Between 27.06.2012 and 30.08.2012, the appellant floated tenders for enhancing the capacity of various process stations and Boiling House at Lauriya (West Champaran) and Sugauli (East Champaran). The respondent participated in the bidding process and was declared as the successful bidder. Subsequently, in accordance with the terms and conditions of the tender, the appellant in October and November of 2012 issued purchase orders in favour of the respondent for enhancing the capacity of the concerned Boiling House on a turn-key basis. Between 21.11.2012 and 25.03.2014, the respondent supplied various equipment under the purchase orders and raised invoices for the same.
6. While the work was in progress, the appellant expressed its concerns about the slow progress of work, quality of materials supplied and non-adherence to timelines by the respondent and attempts were made to resolve the same through mutual discussions between the parties.
7. On 13.06.2013, the appellant floated two more tenders for the purpose of completion of certain work and supplies at the Sugauli and Lauriya plants respectively. In August 2013, the appellant issued purchase orders in favour of the respondent, for completing various works including supplies on a lump-sum turnkey basis. The respondent raised invoices between 29.03.2013 & 25.03.2014 for the service portion of the turn-key contract. Accordingly, as per the respondent, the total sum payable to it under the various purchase orders aggregated to Rs. 38,18,71,026/-.

**Digital Supreme Court Reports**

8. Between 18.12.2012 and 07.11.2013, the appellant made an aggregate payment of Rs. 19.02 crore to the respondent, with the last payment being made on 07.11.2013. As per the case of the respondent, the balance amount of Rs. 18,12,21,452/- remained outstanding. The discussions between the parties undertaken between October 2013 and January 2014 did not yield any fruits as the issues relating to payment and deficiency in services rendered could not be resolved. In this regard, the respondent *vide* an e-mail dated 02.02.2014 made a request to release the balance amount at the earliest, so as to enable it to complete the balance work. The appellant *vide* an e-mail dated 04.02.2014 responded to the said email and reiterated that the performance of the respondent was unsatisfactory and it had failed in fulfilling its obligations in accordance with the terms of the purchase orders. In such circumstances, the appellant refused to clear the outstanding dues of the respondent.
9. On 09.07.2016, the respondent issued a legal notice to the appellant, seeking release of the alleged outstanding payment amounting to Rs. 18,12,21,452/- along with interest. The respondent also specified in the said notice that in the event of failure of the appellant to settle the outstanding amount, the notice shall be construed as the notice for invocation of arbitration in terms of Clause 14 of the tender. The appellant, however, did not respond to the aforesaid notice.
10. On 16.02.2018, the respondent filed Arbitration Petition (ST) No. 5095 of 2018 before the High Court of Judicature at Bombay seeking appointment of an arbitrator in terms of Section 11 of the Act, 1996. However, prior to filing the Section 11 application, the respondent also sent a demand notice dated 30.08.2017 under Section 8 of the Insolvency & Bankruptcy Code, 2016 (for short “**the IBC**”) to the appellant, claiming the alleged outstanding amount along with interest.
11. On 01.10.2018, upon the request made by the respondent, the Arbitration Petition (ST) No. 5095 of 2018 was disposed of as withdrawn. The relevant portions of the order dated 01.10.2018 are reproduced below: -

*“1. Not on board. Upon mentioning, taken on board.*

*2. The Learned Advocate appearing for the Petitioner*

**M/s HPCL Bio-Fuels Ltd. v. M/s Shahaji Bhanudas Bhad**

*on instructions seeks to withdraw the above Arbitration Petition. In view thereof, the above Arbitration Petition is disposed of as withdrawn."*

**i. Proceedings under the IBC**

12. After withdrawing the Section 11(6) application from the High Court, the respondent, on 15.10.2018, filed CP(IB) No. 1422/KB/2018 under Section 9 of the IBC before the National Company Law Tribunal, Kolkata ("NCLT, Kolkata") seeking initiation of the corporate insolvency resolution process of the appellant. The appellant opposed the application, *inter alia*, on the ground that there were disputes between the parties even prior to the issuance of demand notice under Section 8 of IBC. The appellant also relied on the notice invoking the arbitration clause in support of its contention.
13. The NCLT, Kolkata vide order dated 12.02.2020, admitted the application of the respondent and appointed an Interim Resolution Professional (IRP). On the aspect of existence of disputes between the parties, the following observations were made:

*"17. As regards the pre-existing dispute, we have gone through all the facts stated by the Corporate Debtor but having regard to the quantum of claim in respect of supplies order, in our considered view, the amount of disputed claim due and payable will be more than Rs. One lakh in any case. Hence, such claims do not help the case of Corporate Debtor in substantial manner. Having said so, we would further refer to the provisional statement attached with the letter of the Corporate Debtor dated June 25, 2014 copy of which has been placed at Page 1779 of Vol. 10 of the paper book to find as to what is the factual position as per the stand of Corporate Debtor on various issues. As per this provisional statement, the total purchase order value has been shown as Rs. 3818.72 lakhs. There have been several deductions including for services provided by Corporate Debtor to the Operational Creditor in the execution of the contract, entry tax, TDS, WCD, payment to parties/ payment to Operational Creditor by the Corporate Debtor / sub-vendors and sub-contractors/vendors of the Operational Creditor. These are normal deductions as per business practice and terms of contract. However, it*

**Digital Supreme Court Reports**

*is noteworthy that Liquidated Damage @ 5% amounting to Rs. 190.94 lakhs, Performance Bank Guarantee to the tune of 673.6 lakhs, work claim of Rs. 352.00 lakhs for boiler house extension P.O. finalisation and additional work 71 lakh have also been considered. The net effect has been worked out by Corporate Debtor as Rs. 500 lakhs receivable from the Operational Creditor. If the boiler house extension and additional work are ignored, the amount recoverable from the Operational Creditor gets reduced to 63.13 lakhs. Further, if the amount retained for Performance Bank Guarantee is taken into consideration, then the amount payable to Operational Creditor works out at Rs. 610.23 lakhs (i.e., 673-63.13). As noted earlier, L.D. is applicable @ 5% amounting to Rs. 190.94 lakhs has already been deducted. Further, amount of Rs. 400.55 lakhs in respect of Purchase Orders issued at the risk and cost of the vendor have also been deducted. Thus, all recoveries for non-performance / default has been considered and therefore, amount of Performance Bank Guarantee minus recovery i.e., 610.23 lakhs at least becomes payable by Corporate Debtor to the Operational Creditor. As an adjudicating authority in the proceedings, we are not supposed to do this kind of working, but to find out the genuineness of the claim of pre-existing dispute, and amount of outstanding debt, it was necessary in the facts and circumstances of the case, hence, it has been so analysed on the basis of the provisional statement prepared and filed by the Corporate Debtor itself. At the cost of repetition, we again state that this statement takes into consideration all these disputes raised by the Corporate Debtor, hence, the amount payable by the Corporate Debtor remains in positive which is more than one lakh ultimately that too when we have considered the project as a whole against the claim of Operational Creditor of undisputed dues of supply portion only. We have also gone through the emails which have been taken into consideration while preparing this provisional statement. Hence, on the basis of material on record, it cannot be said that any other dispute remains to be considered. Apart from this, the fact which is crucial to note is that the Corporate Debtor*

**M/s HPCL Bio-Fuels Ltd. v. M/s Shahaji Bhanudas Bhad**

has awarded new work orders to the Operational Creditor subsequently which means that all the disputes relating to this contract had been considered / resolved and this fact has remained undisputed. Further, Form "C"s have been issued as late as up to March 2018. We further make it clear that we have analysed the provisional statement with limited objective of admissibility of this application and this analysis cannot be considered as expression of opinion on the amount of claim in any manner which may be actually due and payable."

(Emphasis supplied)

14. The order of the NCLT, Kolkata was subsequently set aside by the NCLAT, New Delhi vide order dated 10.01.2022. The NCLAT, on the aspect of pre-existing disputes between the parties, observed thus:

"18. It is clear from Section 8(2)(a) that 'Existence of a Dispute', (if any, or) record of the pendency of the Suit or Arbitration Proceeding filed before the receipt of such Notice or invoice in relation to such dispute should be brought to the notice of the 'Operational Creditor' within 10 days of receipt of the Demand Notice. In this case, the Demand Notice under Section 8 of the Code claiming a sum of Rs.13.69 Crores was issued on 25.07.2018. On 07.08.2018, the 'Corporate Debtor' responded to the Demand Notice referring to various communications, Minutes of the Meeting and submitted that there was a 'Pre-Existing Dispute'. Though we are conscious of the fact that the 'Corporate Debtor' responded to the Demand Notice belatedly, the fact remains that the Appellant raised the issue of Existence of a Dispute' in their Reply filed before the Adjudicating Authority with all the supporting documents.

19. It is pertinent to note that on 09.07.2016, 'prior to the issuance of the Demand Notice under Section 8 of the Code', the 'Operational Creditor' invoked Arbitration pursuant to the 8 project orders issued by the 'Corporate Debtor', which itself substantiates the 'Existence of a Dispute'. In the 'Notice' invoking Arbitration, the 'Operational Creditor' has stated that there is an outstanding of

**Digital Supreme Court Reports**

Rs. 18,12,21,452/- and has further stated that they are ready to settle the disputes through Arbitration. A brief perusal of the documents on record evidence that the 'Operational Creditor' admitted that the contract was on lumpsum turnkey basis and stated in the Arbitration 'Notice' that the 'Corporate Debtor' had raised issues relating to non-adherence of the terms of the contract.

**XXX XXX XXX**

21. The facts of the present case are being examined in the light of the law laid down by the Hon'ble Supreme Court, though the Learned Counsel for the 'Operational Creditor' has strenuously contended that the issuance of further work orders and the Notice issued by the Operational Creditor invoking Arbitration does not amount to Existence of a Dispute', the nature of communication on record with rival contentions clarify the 'Existence of a Dispute' between the parties prior to issuance of the Demand Notice. It has been time and again held that it is enough that a 'dispute exists' between the parties.

22. The communication between the parties as noted in para 10 read together with the Arbitration invoked by the 'Operational Creditor', we are of the considered view that there is an Existence of a Dispute between the parties which is a genuine dispute and not a spurious, patently feeble legal argument or an assertion of fact unsupported by evidence. Therefore, we are of the opinion that the ratio laid down by the Hon'ble Apex Court in the aforesaid **'Mobilox Innovations (P) Ltd.' (Supra)** and **'K. Kishan' (Supra)** is squarely applicable to the facts of this case."

(Emphasis supplied)

15. The respondent challenged the aforesaid order of the NCLAT before this Court by filing the Civil Appeal No. 4583 of 2022. The appeal ultimately came to be dismissed by a two-Judge Bench *vide* judgment dated 15.07.2022 wherein the order of the NCLAT was upheld. The relevant observations made by this Court are reproduced below:

*"30. This Court finds that there was a pre-existing dispute with regard to the alleged claim of the appellant against*

**M/s HPCL Bio-Fuels Ltd. v. M/s Shahaji Bhanudas Bhad**

*HPCL or its subsidiary HBL. The NCLAT rightly allowed the appeal filed on behalf of HBL. It is not for this Court to adjudicate the disputes between the parties and determine whether, in fact, any amount was due from the appellant to the HPCL/HBL or vice-versa. The question is, whether the application of the Operational Creditor under Section 9 of the IBC, should have been admitted by the Adjudicating Authority. The answer to the aforesaid question has to be in the negative. The Adjudicating Authority (NCLT) clearly fell in error in admitting the application.*

*31. The NCLT, exercising powers under Section 7 or Section 9 of IBC, is not a debt collection forum. The IBC tackles and/or deals with insolvency and bankruptcy. It is not the object of the IBC that CIRP should be initiated to penalize solvent companies for non-payment of disputed dues claimed by an operational creditor.*

*32. There are noticeable differences in the IBC between the procedure of initiation of CIRP by a financial creditor and initiation of CIRP by an operational creditor. On a reading of Sections 8 and 9 of the IBC, it is patently clear that an Operational Creditor can only trigger the CIRP process, when there is an undisputed debt and a default in payment thereof. If the claim of an operational creditor is undisputed and the operational debt remains unpaid, CIRP must commence, for IBC does not countenance dishonesty or deliberate failure to repay the dues of an Operational Creditor. However, if the debt is disputed, the application of the Operational Creditor for initiation of CIRP must be dismissed.*

*33. We find no grounds to interfere with the judgment and order of the NCLAT impugned in this appeal.*

*34. The appeal is dismissed.*

*35. Needles to mention that the appellant may avail such other remedies as may be available in accordance with law including arbitration to realise its dues, if any.”*

**ii. Proceedings before the High Court**

16. Consequent to the dismissal of the insolvency proceedings, the respondent, on 09.12.2022, filed a fresh petition under the

**Digital Supreme Court Reports**

Section 11(6) of the Act, 1996 before the High Court of Bombay seeking appointment of an arbitrator in terms of clause 14 of the tender. The appellant opposed the petition, *inter-alia* on the ground that the same was barred by limitation and that the claim sought to be referred to arbitration was also a deadwood.

17. The High Court *vide* the impugned order allowed the application of the respondent and proceeded to appoint an arbitrator. The High Court took the view that the fresh Section 11 petition filed by the respondent, after withdrawal of the first, was not time-barred and neither the claim was a deadwood. The relevant observations of the High Court are reproduced below:

*"8. As regards the first submission of Mr. Paranjape, that once the Section 11 Petition is withdrawn no second Petition shall lie, I do not find any provision in the Act imposing such a restraint.*

*It is not the case, where the appointment of Arbitrator was prayed before the Court and the Application was turned down on merits, holding that no arbitrator deserves to be appointed in absence on an Arbitration Agreement. The Petitioner chose to withdraw the Petition and as it is categorically stated in the Petition that he was under advise to do so and pursuant thereto he approached NCLT under the IBC but did not succeed in the endeavour as the NCLT did not find such proceedings to be maintainable and even the Apex Court upheld the said order by recording that an Operational Creditor can only trigger the CIRP process when there is an undisputed debt and default in payment thereof, but if the debt is disputed, then the Application of the Operational Creditor for initiation of CIRP must be declined.*

*Be that as it may be, while dismissing the Appeal, being conscious of the position that the dues of the Petitioner/Appellant are yet to be realized, liberty was conferred to avail such remedies in accordance with law which shall include the remedy of arbitration.*

*With this clear indication, by the Highest Court of the country, I am not persuaded to accept the submission of Mr. Paranjape that an Application under Section 11 of the Act seeking appointment of an Arbitrator is not maintainable.*

**M/s HPCL Bio-Fuels Ltd. v. M/s Shahaji Bhanudas Bhad**

*9. The Petitioner by his invocation notice had triggered the arbitration and accordingly approached the Court seeking appointment of an Arbitrator as the Respondent failed to agree to the appointment of Arbitrator within the period stipulated under Section 11, but instead of prosecuting the said remedy, he chose to adopt the path of initiating the proceedings under the IBC, but unfortunately, remained unsuccessful.*

*It is, thus, imperatively clear that the Petitioner was prosecuting the IBC proceedings before the NCLT or NCLAT, which was a completely wrong forum for him for redressal of his grievance, he was ultimately turned away by the Apex Court on 15.07.2022 by declaring that since the debt which he claims is disputed, he cannot initiate the CIRP.*

*10. Since he was availing a wrong remedy, he was turned down on 15.07.2022, by availing the liberty conferred, he has filed the Arbitration Petition.*

*Worth it to note that initially when he approached the NCLT, Kolkata, under Section 8 and 9 of the IBC for institution of CIRP process against the Respondent, his claim was entertained and it is only the Respondents, who approached the Appellate Tribunal, the order passed by the NCLT in favour of the Applicant came to be reversed. Therefore, it cannot be said that the Petitioner was sitting idle and not taking any steps for recovery of his dues, but it is a case where he was availing remedy for recovery of his dues before a wrong forum and he is entitled to take benefit of Section 14 of the Limitation Act, 1963.*

*In fact, the NCLT by its order dated 28.02.2020, admitted the Application under Section 8 and 9 of the IBC and even declared the said moratorium public announcement and in accordance with Section 13 and 14 of the IBC and Moratorium under Section 14 of the IBC was also imposed.*

*11. Another point raised by Mr. Paranjape in respect of time barred claim being prosecuted by the Petitioner must also meet the same fate.*

**Digital Supreme Court Reports**

*The learned counsel would place reliance upon the decision in case of Bharat Sanchar Nigam Limited and Another vs. Nortel Networks India Private Limited (2021) 5 SCC 738, where it is held that since there is no provision in the 1996 Act specifying the period of limitation for filing an application under Section 11, recourse must be held to the Limitation Act as per Section 43 of the 1996 Act and since none of the Articles in the schedule to Limitation Act provide time for filing such Application, it would be governed by residual provision in Article 137.*

*A reading of the said decision would also disclose that, it has been held that limitation is normally mixed question of fact and law and would lie within the domain of Arbitral Tribunal, but claim is hopelessly barred or a deadwood, in that case, the Court exercising the power under Section 11 may not deem it expedient to refer an ex facie time barred and dead claim to the Arbitrator. [...]*

**xxx xxx xxx**

*13. I do not agree with the learned counsel that the claim of Petitioner is ex facie time-barred as a deadwood, as all the while the claim was kept alive, though it was being agitated before a wrong forum, but ultimately when the Petition was turned down by the Apex Court, he was granted liberty to stake his claim by availing such remedies as may be available to him, in accordance with law, including the remedy of Arbitration. Since the remedy of Arbitration cannot be denied to him, merely on the ground that he had at earlier point of time, before knocking the doors of NCLT withdrew the Petition filed for appointment of Arbitrator, on validly invoking arbitration. Since I do not find that the claim is ex facie time-barred for it was being prosecuted though before a wrong forum, the objection cannot be sustained.*

*14. In the wake of existence of an arbitration agreement between the parties, the dispute must be referred to an Arbitrator, though I leave it open to the Respondent to agitate the point of limitation before the Arbitrator.*

*15. In the wake of the above, Mr. Justice Dilip Bhosale (retired Chief Justice of Allahabad High Court) is appointed*

**M/s HPCL Bio-Fuels Ltd. v. M/s Shahaji Bhanudas Bhad**

*as Sole Arbitrator to adjudicate the disputes and differences that have arisen between the applicant and the respondent in the two applications.*

*The Arbitrator shall, within a period of 15 days before entering the arbitration reference forward a statement of disclosure as contemplated u/s. 11(8) r/w Section 12 of the Arbitration and Conciliation Act, 1996, to the Prothonotary and Senior Master of this Court to be placed on record. [...]”*

18. Aggrieved by the aforesaid order appointing an arbitrator for adjudicating the disputes between the parties, the appellant has come up before this Court with the present appeal.

**B. SUBMISSIONS ON BEHALF OF THE APPELLANT**

19. Mr. Tushar Mehta, the learned Solicitor General of India, appearing for the appellant submitted that the Section 11(6) petition filed by the respondent before the High Court as well as the claims sought to be referred to arbitration were time-barred.
20. He submitted that the cause of action in the present case arose on 04.02.2014, i.e., on the date when the claim of the respondent was denied by the appellant. The respondent invoked arbitration *vide* the notice dated 09.07.2016 and filed a Section 11 petition on 16.02.2018 before unconditionally withdrawing the same. The period of limitation as per Article 137 of the First Schedule to the Limitation Act, 1963 (“**the Limitation Act**”) for filing a Section 11 petition is three years. In the present case, the limitation period for filing an application under Section 11(6) of the Act, 1996 came to an end on 07.08.2019. Therefore, the subsequent Section 11 application filed before the High Court on 09.12.2022 was clearly time-barred.
21. He further submitted that in addition to the limitation period for filing the Section 11 application having expired, the underlying claim sought to be referred to arbitration also became time barred on 04.02.2017, that is, after the expiry of three years from the date when the cause of action first arose. To buttress his submissions on the aspect of limitation, he placed reliance on the decisions of this Court in ***Arif Azim Co. Ltd. v. Aptech Ltd.*** reported in **2024 SCC OnLine SC 215** and ***BSNL v. Nortel Networks (India) (P) Ltd.*** reported in **(2021) 5 SCC 738.**

**Digital Supreme Court Reports**

22. By placing reliance on the decision of this Court in ***Sarguja Transport Service v. S.T.A.T*** reported in (1987) 1 SCC 5, he argued that although the Code of Civil Procedure, 1908 (for short “**CPC**”) may not apply *stricto sensu* to the arbitration proceedings, yet the principle underlying Order 23 Rule 1(3) which imposes a bar on the institution of subsequent proceedings against the same defendant for the same cause of action where liberty to institute fresh proceedings is not granted by the court, can be extended to it in view of the expeditious and time-bound nature of arbitration proceedings.
23. He submitted that the respondent is not entitled to avail the benefit available under Section 14 of the Limitation Act, 1963 (for short “**the Limitation Act**”) as the said provision would not be applicable to the present case. He argued that Section 14 of the Limitation Act provides for exclusion of time spent in prosecuting proceedings in a non-jurisdictional court, where the earlier and later proceedings relate to the same matter in issue or are for seeking the same relief. However, he submitted, that the insolvency and arbitral proceedings are distinct proceedings and are not for seeking the same relief. The remedy in arbitral proceedings is *in personam* whereas the remedy in insolvency proceedings is *in rem*. He submitted that the High Court failed to appreciate this distinction and erroneously allowed the arbitration petition filed by the respondent by extending to it the benefit under Section 14 of the Limitation Act.
24. He further submitted that the IBC was enacted to consolidate and amend the laws relating to the reorganisation and insolvency resolution of corporate persons in a time-bound manner for maximising the value of assets and balance the interests of all the stakeholders. On the other hand, arbitration proceedings are for the purpose of adjudication of disputes. Therefore, the objective, relief that may be granted and the procedure governing IBC and arbitration proceedings are widely divergent.
25. He argued that the period spent by the respondent pursuing insolvency proceedings instead of arbitration does not entitle them to the benefit of Section 14 of the Limitation Act, more particularly having unconditionally withdrawn the first Section 11 petition. In this regard reliance was placed by him on the decisions of this Court in ***Yeswant Deorao Deshmukh v. Walchand Ramchand Kothari*** reported in **1950 SCR 852** and ***Natesan Agencies (Plantations) v. State*** reported in (2019) 15 SCC 70.

**M/s HPCL Bio-Fuels Ltd. v. M/s Shahaji Bhanudas Bhad**

26. In the last, he submitted that this Court while dismissing the appeal filed by the respondent against the order of the NCLAT, had only granted conditional liberty to the respondent to pursue arbitration, which would be permitted only if it is available in law. However, in the present case, since the Section 11 application as well as the claims are time-barred, the remedy of pursuing arbitration cannot be available to the respondent in law.

**C. SUBMISSIONS ON BEHALF OF THE RESPONDENT**

27. Mr. Jay Savla, the learned Senior Counsel appearing on behalf of the respondent submitted that the High Court rightly excluded the time taken by the respondent in pursuing the IBC proceedings, that is, the period between the date of filing of the Section 9 application before the NCLT and the date of the order of this Court concluding the IBC proceedings by disposing of the appeal filed by the respondent against the order of the NCLAT, while calculating the limitation period for the purpose of filing a fresh application under Section 11(6) of the Act, 1996.
28. He submitted that the aforesaid period is liable to be excluded under Section 14 of the Limitation Act as the respondent was pursuing the IBC proceedings diligently and in a *bonafide* manner. He relied on the following decisions of this Court to submit that the phrase “other cause of like nature” used in Section 14 of the Limitation Act should be given a wide and liberal interpretation:
- i. *Consolidated Engg. Enterprises & Ors. v. Principal Secy. Irrigation Department & Ors.* reported in **(2008) 7 SCC 169**
  - ii. *J. Kumaradasan Nair v. Irin Sohan* reported in **2009 (12) SCC 175**
  - iii. *Union of India v. West Coast Paper Mills Ltd.* reported in **2004 (3) SCC 458**
  - iv. *Maharashtra State Farming Corporation Ltd. v. Belapur Sugar & Allied Industries Ltd.* reported in **2004 (3) MHLF 414**
29. He submitted that the second application under Section 11(6) of the Act, 1996 was maintainable as the first application was withdrawn without any adjudication on merits and even before any formal notice could be issued by the High Court. By placing reliance on the decision of this Court in *Sarva Shramik Sanghatana v. State of Maharashtra* reported in **2008 1 SCC 494**, he argued that the

**Digital Supreme Court Reports**

withdrawal of an application under Section 11(6) of the Act, 1996 is not the same as withdrawal of a suit or a claim, and thus the principles enshrined under Order 23 Rule 1 of the CPC will have no application to the present case.

30. It was submitted that Section 32 of the Act, 1996 provides for termination of arbitration proceedings and is the only provision that relates to termination of arbitration proceedings upon their commencement under Section 21. In the present case, arbitration was invoked by the respondent *vide* notice dated 09.07.2016, and there has been no termination of such arbitration proceedings as per Section 32 of the Act, 1996. Hence, in the absence of any express bar on filing of more than one 11(6) application under the provisions of the Act, 1996, the second 11(6) application filed by the respondent cannot be said to be not maintainable.

**D. ISSUES FOR DETERMINATION**

31. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the following questions fall for our consideration:
- i. **Whether a fresh application under Section 11(6) of the Act, 1996 filed by the respondent could be said to be maintainable more particularly when no liberty to file a fresh application was granted by the High Court at the time of withdrawal of the first application under Section 11(6) of the act, 1996?**
  - ii. **Whether the fresh application under Section 11(6) of the Act, 1996 filed by the respondent on 09.12.2022 could be said to be time-barred? If yes, whether the respondent is entitled to the benefit of Section 14 of the Limitation Act? in other words, whether the period spent by the respondent in pursuing proceedings under the ibc is liable to be excluded while computing the limitation period for filing the application under section 11(6)?**
  - iii. **Whether the delay caused by the respondent in filing the fresh arbitration application under Section 11(6) of the Act, 1996 can be condoned under section 5 of the limitation act?**

**M/s HPCL Bio-Fuels Ltd. v. M/s Shahaji Bhanudas Bhad****E. ANALYSIS**

32. Clause 14 of the General Terms and Conditions of the tender document contained the arbitration clause and is reproduced hereinbelow:

**"14. ARBITRATION**

*14.1 All disputes and differences of whatsoever nature, whether existing or which shall at any time arise between the parties hereto touching or concerning the agreement, meaning, operation or effect thereof or to the rights and liabilities of the parties or arising out of or in relation thereto whether during or after completion of the contract or whether before after determination, foreclosure, termination or breach of the agreement (other than those in respect of which the decision of any person is, by the contract, expressed to be final and binding) shall, after written notice by either party to the agreement to the other of them and to the Appointing Authority hereinafter mentioned, be referred for adjudication to the Sole Arbitrator to be appointed as hereinafter provided.*

*14.2 The appointing authority shall either himself act as the Sole Arbitrator or nominate some officer/retired officer of HBL/Hindustan Petroleum Corporation Limited (referred to as owner or HBL) or any other Government Company, or any retired officer of the Central Government not below the rank of a Director, to act as the Sole Arbitrator to adjudicate the disputes and differences between the parties. The contractor/vendor shall not be entitled to raise any objection to the appointment of such person as the Sole Arbitrator on the ground that the said person is/was an officer and/or shareholder of the owner, another Govt. Company or the Central Government or that he/she has to deal or had dealt with the matter to which the contract relates or that in the course of his/her duties, he/she has/had expressed views on all or any of the matters in dispute or difference.*

*14.3 In the event of the Arbitrator to whom the matter is referred to, does not accept the appointment, or is unable or unwilling to act or resigns or vacates his office for any*

**Digital Supreme Court Reports**

*reasons whatsoever, the Appointing Authority aforesaid, shall nominate another person as aforesaid, to act as the Sole Arbitrator.*

**14.4** *Such another person nominated as the Sole Arbitrator shall be entitled to proceed with the arbitration from the stage at which it was left by his predecessor. It is expressly agreed between the parties that no person other than the Appointing Authority or a person nominated by the Appointing Authority as aforesaid, shall act as an Arbitrator. The failure on the part of the Appointing Authority to make an appointment on time shall only give rise to a right to a Contractor to get such an appointment made and not to have any other person appointed as the Sole Arbitrator.*

**14.5** *The Award of the Sole Arbitrator shall be final and binding on the parties to the Agreement.*

**14.6** *The work under the Contract shall, however, continue during the Arbitration proceedings and no payment due or payable to the concerned party shall be withheld (except to the extent disputed) on account of initiation, commencement or pendency of such proceedings.*

**14.7** *The Arbitrator may give a composite or separate Award(s) in respect of each dispute or difference referred to him and may also make interim award(s) if necessary.*

**14.8** *The fees of the Arbitrator and expenses of arbitration, if any, shall be borne equally by the parties unless the Sole Arbitrator otherwise directs in his award with reasons. The lumpsum fees of the Arbitrator shall be Rs 60,000/- per case and if the sole Arbitrator completes the arbitration including his award within 5 months of accepting his appointment, he shall be paid Rs. 10,000/- additionally as bonus. Reasonable actual expenses for stenographer, etc. will be reimbursed. Fees shall be paid stage wise i.e. 25% on acceptance, 25% on completion of pleadings/ documentation, 25% on completion of arguments and balance on receipt of award by the parties.*

**14.9** *Subject to the aforesaid, the provisions of the Arbitration and Conciliation Act, 1996 or any statutory*

**M/s HPCL Bio-Fuels Ltd. v. M/s Shahaji Bhanudas Bhad**

*modification or re-enactment thereof and the rules made thereunder, shall apply to the Arbitration proceedings under this Clause.*

**14.10** *The Contract shall be governed by and construed according to the laws in force in India. The parties hereby submit to the exclusive jurisdiction of the Courts situated at Mumbai for all purposes. The Arbitration shall be held at Mumbai and conducted in English language.*

**14.11** *The Appointing Authority is the Functional Director of Hindustan Petroleum Corporation Limited.”*

33. Neither the existence nor the validity of the arbitration agreement has been disputed by the appellant. However, the appellant has challenged the allowing of the application for appointment of arbitrator by the High Court on two grounds – (i) the application before the High Court was not maintainable as it was filed for the second time having been withdrawn previously without seeking any liberty to file afresh; and (ii) the application is time-barred for being beyond the time period of three years prescribed under Article 137 of the Limitation Act. We shall address both these contentions in seriatim as they are pivotal to the fate of the present appeal.

**i. Issue No. 1**

34. Section 11 of the Act, 1996 lays down the procedure for appointment of arbitrators through the intervention of the High Court or the Supreme Court, as the case may be. A reading of the said provision indicates that there is nothing therein which prevents a party from filing more than one application seeking the appointment of arbitrator for adjudicating disputes arising from the same contract.
35. However, the appellant has contended that in lieu of the principles contained in Order 23 Rule 1 of the CPC, the respondent could not have filed a subsequent application under Section 11(6) for adjudication of the same disputes, having previously withdrawn unconditionally an application filed for the same purpose. To address the contention of the appellant, we need to determine whether the principles contained in Order 23 Rule 1 of the CPC will apply to an application under Section 11(6) of the Act, 1996.

**Digital Supreme Court Reports**

- a. **Scope and applicability of Order 23 Rule 1 of the CPC to proceedings other than suits**
36. Prior to its amendment by the Code of Civil Procedure (Amendment) Act, 1976, Order 23 Rule 1 of the CPC provided for two kinds of withdrawal of a suit, namely absolute withdrawal and withdrawal with the permission of the court to institute a fresh suit on the same cause of action. The first category of withdrawal was governed by sub-rule (1) thereof, as it stood then, which provided that at any time after the institution of a suit, the plaintiff may, as against all or any of the defendants withdraw his suit or abandon a part of his claim. The second category was governed by sub-rule (2) thereof which provided that where the court was satisfied (a) that a suit must fail by reason of some formal defect, or (b) that there were sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thought fit, grant the plaintiff permission to withdraw from such suit or abandon a part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim. Sub-rule (3) of the former Order 23 Rule 1 of the CPC provided that where the plaintiff withdrew from a suit or abandoned a part of a claim without the permission referred to in sub-rule (2), he would be liable to such costs as the court may award and would also be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim. The legislature felt that the use of the word "withdrawal" in relation to both the aforesaid categories had led to confusion and thus amended the rule to avoid such confusion.
37. Order 23 Rule 1 of the CPC as it stands now post the amendment is reproduced hereinbelow:

***"Withdrawal of suit or abandonment of part of claim.—***

***(1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim:***

***Provided that where the plaintiff is a minor or other person to whom the provisions contained in rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.***

**M/s HPCL Bio-Fuels Ltd. v. M/s Shahaji Bhanudas Bhad**

*(2) An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person.*

*(3) Where the Court is satisfied,—*

*(a) that a suit must fail by reason of some formal defect, or*

*(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of suit or part of a claim,*

*It may, on such terms as it thinks fit grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.*

*(4) Where the plaintiff—*

*(a) abandons any suit or part of claim under sub-rule (1), or*

*(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3),*

*he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.*

*(5) Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiff”*

38. The key difference between Order 23 Rule 1 as it stood prior to the amendment and as it stands now is that while in sub-rule (1) of the former Order 23 Rule 1, the expression “withdraw his suit” had been used, whereas in sub-rule (1) of the amended Order 23 Rule 1, the expression “abandon his suit” has been used. The new sub-rule (1) is applicable to a case where the court declines to accord permission to withdraw from a suit or such part of the claim with liberty to institute

**Digital Supreme Court Reports**

a fresh suit in respect of the subject-matter of such suit or such part of the claim. In the new sub-rule (3) which corresponds to the former sub-rule (2), practically no change is made. Under sub-rule (3), the court is empowered to grant, subject to the conditions mentioned therein, permission to withdraw from a suit with liberty to institute a fresh suit in respect of the subject-matter of such suit. Sub-rule (4) of the amended Order 23 Rule 1 provides that where the plaintiff abandons any suit or part of claim under sub-rule (1) or withdraws from a suit or part of a claim without the permission referred to in sub-rule (3), he would be liable for such costs as the court may award and would also be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

39. Order 23 Rule 1, as it now stands post the amendment, makes a distinction between “abandonment” of a suit and “withdrawal” from a suit with permission to file a fresh suit and provides for – *first*, abandonment of suit or a part of claim; and *secondly*, withdrawal from suit or part of claim with the leave of the court. Abandonment of suit or a part of claim against all or any of the defendants is an absolute and unqualified right of a plaintiff and the court has no power to preclude the plaintiff from abandoning the suit or direct him to proceed with it. Sub-rule (1) of Order 23 Rule 1 embodies this principle. However, if the plaintiff abandons the suit or part of claim, then he is precluded from instituting a fresh suit in respect of such subject-matter or such part of claim. Upon abandoning the suit or part of claim, the plaintiff also becomes liable to pay such costs as may be imposed by the Court. This is specified under sub-rule (4) of Order 23 Rule 1.
40. However, if the plaintiff desires to withdraw from a suit or part of a claim with liberty to file a fresh suit on the same subject matter or part of the claim, then he must obtain the permission of the court under sub-rule (3) of Order 23 Rule 1. The failure to obtain such permission would preclude the plaintiff from instituting any fresh suit in respect of such subject-matter or such part of the claim, and also to any costs that may be imposed by the court.
41. The court granting liberty under sub-rule (3) of Order 23 Rule 1 may do so only upon being satisfied of one of the following two conditions— *first*, that the suit suffers from some formal defect and would fail by reason of such defect; and *second*, that there are sufficient grounds for allowing the plaintiff to institute a fresh suit

**M/s HPCL Bio-Fuels Ltd. v. M/s Shahaji Bhanudas Bhad**

for the same subject-matter or part of the claim. The court may grant liberty on such terms as it deems fit. It is also apparent from the text of the provision that the liberty under sub-rule (3) can only be granted by the court trying the earlier suit and not by the court before which the subsequent suit is instituted.

42. On meaning of the phrase 'subject-matter' appearing in Order 23 Rule 1, this Court in *Vallabh Das v. Madan Lal (Dr)* reported in (1970) 1 SCC 761 held thus:

*"5. Rule 1 of the Order 23, Code of Civil Procedure empowers the courts to permit a plaintiff to withdraw from the suit brought by him with liberty to institute a fresh suit in respect of the subject-matter of that suit on such terms as it thinks fit. The term imposed on the plaintiff in the previous suit was that before bringing a fresh suit on the same cause of action, he must pay the costs of the defendants. Therefore we have to see whether that condition governs the institution of the present suit. For deciding that question we have to see whether the suit from which this appeal arises is in respect of the same subject-matter that was in litigation in the previous suit. The expression "subject-matter" is not defined in the Civil Procedure Code. It does not mean property. That expression has a reference to a right in the property which the plaintiff seeks to enforce. That expression includes the cause of action and the relief claimed. Unless the cause of action and the relief claimed in the second suit are the same as in the first suit, it cannot be said, that the subject-matter of the second suit is the same as that in the previous suit. Now coming to the case before us in the first suit Dr Madan Lal was seeking to enforce his right to partition and separate possession. In the present suit he seeks to get possession of the suit properties from a trespasser on the basis of his title. In the first suit the cause of action was the division of status between Dr Madan Lal and his adoptive father and the relief claimed was the conversion of joint possession into separate possession. In the present suit the plaintiff is seeking possession of the suit properties from a trespasser. In the first case his cause of action arose on the day he got separated from his family. In the present suit the cause*

## Digital Supreme Court Reports

*of action, namely, the series of transactions which formed the basis of his title to the suit properties, arose on the death of his adoptive father and mother. It is true that both in the previous suit as well as in the present suit the factum and validity of adoption of Dr Madan Lal came up for decision. But that adoption was not the cause of action in the first nor is it the cause of action in the present suit. It was merely an antecedent event which conferred certain rights on him. Mere identity of some of the issues in the two suits do not bring about an identity of the subject-matter in the two suits. As observed in Rukhma Bai v. Mahadeo Narayan, [ILR 42 Bom 155] the expression "subject-matter" in Order 23 of the Rule 1, Code of Civil Procedure means the series of acts or transactions alleged to exist giving rise to the relief claimed. In other words "subject-matter" means the bundle of facts which have to be proved in order to entitle the plaintiff to the relief claimed by him. We accept as correct the observations of Wallis, C.J., in Singa Reddi v. Subba Reddi [ILR 39 Mad 987] that where the cause of action and the relief claimed in the second suit are not the same as the cause of action and the relief claimed in the first suit, the second suit cannot be considered to have been brought in respect of the same subject-matter as the first suit."*

(Emphasis supplied)

43. Discussing on the meaning of the phrases ‘formal defect’ and ‘sufficient grounds’, a two-Judge Bench of this Court in [V. Rajendran v. Annasamy Pandian](#) reported in **(2017) 5 SCC 63** observed thus:

*“9. [...] As per Order 23 Rule 1(3) CPC, suit may only be withdrawn with permission to bring a fresh suit when the Court is satisfied that the suit must fail for reason of some formal defect or that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit. The power to allow withdrawal of a suit is discretionary. In the application, the plaintiff must make out a case in terms of Order 23 Rules 1(3)(a) or (b) CPC and must ask for leave. The Court can allow the application filed under Order 23 Rule 1(3) CPC for withdrawal of the suit with liberty to bring a fresh*

**M/s HPCL Bio-Fuels Ltd. v. M/s Shahaji Bhanudas Bhad**

suit only if the condition in either of the clauses (a) or (b), that is, existence of a “formal defect” or “sufficient grounds”. The principle under Order 23 Rule 1(3) CPC is founded on public policy to prevent institution of suit again and again on the same cause of action.

10. In K.S. Bhoopathy v. Kokila [(2000) 5 SCC 458], it has been held that it is the duty of the Court to be satisfied about the existence of “formal defect” or “sufficient grounds” before granting permission to withdraw the suit with liberty to file a fresh suit under the same cause of action. Though, liberty may lie with the plaintiff in a suit to withdraw the suit at any time after the institution of suit on establishing the “formal defect” or “sufficient grounds”, such right cannot be considered to be so absolute as to permit or encourage abuse of process of court. The fact that the plaintiff is entitled to abandon or withdraw the suit or part of the claim by itself, is no licence to the plaintiff to claim or to do so to the detriment of legitimate right of the defendant. When an application is filed under Order 23 Rule 1(3) CPC, the Court must be satisfied about the “formal defect” or “sufficient grounds”. “Formal defect” is a defect of form prescribed by the rules of procedure such as, want of notice under Section 80 CPC, improper valuation of the suit, insufficient court fee, confusion regarding identification of the suit property, misjoinder of parties, failure to disclose a cause of action, etc. “Formal defect” must be given a liberal meaning which connotes various kinds of defects not affecting the merits of the plea raised by either of the parties.

11. In terms of Order 23 Rule 1(3)(b) where the court is satisfied that there are sufficient grounds for allowing the plaintiff to institute a fresh suit, the Court may permit the plaintiff to withdraw the suit. In interpretation of the words “sufficient grounds”, there are two views : one view is that these grounds in clause (b) must be “eiusdem generis” with those in clause (a), that is, it must be of the same nature as the ground in clause (a), that is, formal defect or at least analogous to them; and the other view was that the words “other sufficient grounds” in clause (b) should

**Digital Supreme Court Reports**

*be read independent of the words a “formal defect” and clause (a). Court has been given a wider discretion to allow withdrawal from suit in the interest of justice in cases where such a prayer is not covered by clause (a). Since in the present case, we are only concerned with “formal defect” envisaged under clause (a) of Rule 1 sub-rule (3), we choose not to elaborate any further on the ground contemplated under clause (b), that is, “sufficient grounds.”*

(Emphasis supplied)

44. The main purpose of permitting the withdrawal of a suit and its re-filing is to ensure that justice is not thwarted due to technicalities. Where permission under Order 23 Rule 1 is granted, the principle of estoppel does not operate and the principle of *res judicata* would also not apply. However, Order 23 Rule 1 is not intended to enable the plaintiff to get a chance to commence litigation afresh in order to avoid the results of his previous suit, or to engage in multiple proceedings with the motive of bench-hunting.
45. Order 23 Rule 2 stipulates that any fresh suit instituted on permission granted under Order 23 Rule 1 shall be governed by the law of limitation in the same manner as if the first suit had not been instituted. The object underlying this Rule is to prevent a party from misusing the liberty of filing a fresh suit for evading the limitation period governing the said suit. The said rule is reproduced hereinbelow:

*“2. Limitation law not affected by first suit.—In any fresh suit instituted on permission granted under the last preceding rule, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted.”*

46. Undoubtedly, an application under Section 11(6) of the Act, 1996 is not a suit and hence will not be governed *stricto-sensu* by Order 23 Rule 1 of the CPC. However, in a number of decisions, this Court has extended the principle underlying Order 23 Rule 1 to proceedings other than suits on the ground of public policy underlying the said rule. The appellant has submitted that in view of the aforesaid decisions, there is no reason why the principles of Order 23 Rule 1 should not be extended to an application for appointment of arbitrator under Section 11(6) of the Act, 1996.
47. A two-Judge Bench of this Court in *Sarguja Transport Service v. State Transport Appellate Tribunal, M.P., Gwalior and Others*

**M/s HPCL Bio-Fuels Ltd. v. M/s Shahaji Bhanudas Bhad**

reported in **(1987) 1 SCC 5** while elaborating upon the principle underlying Order 23 Rule 1 of CPC, extended them to writ petitions under Articles 226 and 227. Relevant observations from the said decision are as follows:

*"7. [...] The principle underlying Rule 1 of Order XXIII of the Code is that when a plaintiff once institutes a suit in a court and thereby avails of a remedy given to him under law, he cannot be permitted to institute a fresh suit in respect of the same subject-matter again after abandoning the earlier suit or by withdrawing it without the permission of the court to file fresh suit. Invito beneficium non datur — the law confers upon a man no rights or benefits which he does not desire. Whoever waives, abandons or disclaims a right will loose it. In order to prevent a litigant from abusing the process of the court by instituting suits again and again on the same cause of action without any good reason the Code insists that he should obtain the permission of the court to file a fresh suit after establishing either of the two grounds mentioned in sub-rule (3) of Rule 1 of Order XXIII. The principle underlying the above rule is founded on public policy, but it is not the same as the rule of res judicata contained in Section 11 of the Code which provides that no court shall try any suit or issue in which the matter directly or substantially in issue has been directly or substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court. The rule of res judicata applies to a case where the suit or an issue has already been heard and finally decided by a court. In the case of abandonment or withdrawal of a suit without the permission of the court to file a fresh suit, there is no prior adjudication of a suit or an issue is involved, yet the Code provides, as stated earlier, that a second suit will not lie in sub-rule (4) of Rule 1 of Order XXIII of the Code when the first suit is withdrawn without the permission referred to in sub-rule (3) in order to prevent the abuse of the process of the court.*

## Digital Supreme Court Reports

*8. The question for our consideration is whether it would or would not advance the cause of justice if the principle underlying Rule 1 of Order XXIII of the Code is adopted in respect of writ petitions filed under Articles 226/227 of the Constitution of India also. It is common knowledge that very often after a writ petition is heard for some time when the petitioner or his counsel finds that the court is not likely to pass an order admitting the petition, request is made by the petitioner or by his counsel to permit the petitioner to withdraw from the writ petition without seeking permission to institute a fresh writ petition. A court which is unwilling to admit the petition would not ordinarily grant liberty to file a fresh petition while it may just agree to permit the withdrawal of the petition. It is plain that when once a writ petition filed in a High Court is withdrawn by the petitioner himself he is precluded from filing an appeal against the order passed in the writ petition because he cannot be considered as a party aggrieved by the order passed by the High Court."*

(Emphasis supplied)

48. The principles enunciated in *Sarguja Transport* (*supra*) were extended to Special Leave Petitions filed before this Court by a two-Judge Bench of this Court in *Upadhyay & Co. v. State of U.P. and Others* reported in (1999) 1 SCC 81. It was observed by the bench thus:

*11. [...] It is not a permissible practice to challenge the same order over again after withdrawing the special leave petition without obtaining permission of the court for withdrawing it with liberty to move for special leave again subsequently.*

**xxx xxx xxx**

*13. The aforesaid ban for filing a fresh suit is based on public policy. This Court has made the said rule of public policy applicable to jurisdiction under Article 226 of the Constitution (*Sarguja Transport Service v. STAT* [(1987) 1 SCC 5]). The reasoning for adopting it in writ jurisdiction is that very often it happens, when the petitioner or his counsel finds that the court is not likely to pass an order*

**M/s HPCL Bio-Fuels Ltd. v. M/s Shahaji Bhanudas Bhad**

*admitting the writ petition after it is heard for some time, that a request is made by the petitioner or his counsel to permit him to withdraw it without seeking permission to institute a fresh writ petition. A court which is unwilling to admit the petition would not ordinarily grant liberty to file a fresh petition while it may just agree to permit withdrawal of the petition. When once a writ petition filed in a High Court is withdrawn by the party concerned, he is precluded from filing an appeal against the order passed in the writ petition because he cannot be considered as a party aggrieved by the order passed by the High Court. If so, he cannot file a fresh petition for the same cause once again. [...]*

**xxx xxx xxx**

15. We have no doubt that the above rule of public policy, for the very same reasoning, should apply to special leave petitions filed under Article 136 of the Constitution also. [...]"

(Emphasis supplied)

49. The respondent has relied upon the decision of this Court in Sarva Shramik Sanghatana (*supra*) to contend that the principles underlying Order 23 Rule 1 of the CPC cannot be applied as a matter of fact in every legal proceeding. In the said case, an application seeking permission for closure under Section 25-O(1) of the Industrial Disputes Act, 1947 had been filed by the respondent Company therein. However, before the application could be decided, the Company received a letter from the Deputy Commissioner of Labour, Mumbai inviting it to a meeting for exploring the possibility of an amicable settlement. The Company withdrew its application in lieu of the invite and Section 25-O(3) which provides that an application made under Section 25-O(1) will be deemed to have been allowed if it is not decided within a period of 60 days from the date of filing. However, after the attempts for an amicable settlement failed, the Company moved a fresh application under Section 25-O(1). The application was opposed by the appellant therein, *inter-alia*, on the ground that since the first application was withdrawn by the Company without obtaining liberty to file a fresh application, the same would not be maintainable as per the principles underlying Order 23 Rule 1 of the CPC. In this regard, reliance was placed by the appellant therein upon the decision of this Court in Sarguja Transport (*supra*).

**Digital Supreme Court Reports**

However, this Court distinguished the decision in *Sarguja Transport* (*supra*) on the ground that the objective in the said decision was to prevent such situations where the petitioner withdraws a case to file it before a more convenient Bench or for some other *mala fide* purpose. The relevant observations from the said decision are reproduced hereinbelow:

*"19. In the present case, we are satisfied that the application for withdrawal of the first petition under Section 25-O(1) was made bona fide because the respondent Company had received a letter from the Deputy Labour Commissioner on 5-4-2007 calling for a meeting of the parties so that an effort could be made for an amicable settlement. In fact, the respondent Company could have waited for the expiry of 60 days from the date of filing of its application under Section 25-O(1), on the expiry of which the application would have deemed to have been allowed under Section 25-O(3). The fact that it did not do so, and instead applied for withdrawal of its application under Section 25-O(1), shows its bona fide. The respondent Company was trying for an amicable settlement, and this was clearly bona fide, and it was not a case of Bench-hunting when it found that an adverse order was likely to be passed against it. Hence, *Sarguja Transport* case [(1987) 1 SCC 5 : 1987 SCC (Cri) 19 : AIR 1987 SC 88] is clearly distinguishable, and will only apply where the first petition was withdrawn in order to do Bench-hunting or for some other mala fide purpose.*

*20. We agree with the learned counsel for the appellant that although the Code of Civil Procedure does not strictly apply to proceedings under Section 25-O(1) of the Industrial Disputes Act, or other judicial or quasi-judicial proceedings under any other Act, some of the general principles in CPC may be applicable. For instance, even if Section 11 CPC does not in terms strictly apply because both the proceedings may not be suits, the general principle of res judicata may apply vide *Pondicherry Khadi & Village Industries Board v. P. Kulothangan* [(2004) 1 SCC 68 : 2004 SCC (L&S) 32]. However, this does not mean that all provisions in CPC will strictly apply to proceedings which are not suits.*

**M/s HPCL Bio-Fuels Ltd. v. M/s Shahaji Bhanudas Bhad**

22. No doubt, Order 23 Rule 1(4) CPC states that where the plaintiff withdraws a suit without permission of the court, he is precluded from instituting any fresh suit in respect of the same subject-matter. However, in our opinion, this provision will apply only to suits. An application under Section 25-O(1) is not a suit, and hence, the said provision will not apply to such an application."

(Emphasis supplied)

50. While we agree with the decision in the aforesaid case to the extent that it declined to apply the principles of Order 23 Rule 1 and refused to dismiss a *bonafide* subsequent application filed after the earlier one was withdrawn in good faith to attempt conciliation, we are of the view that it cannot be declared as a general rule that merely because a legal proceeding is not a 'suit', it would be completely exempted from the application of principles underlying Order 23 Rule 1. These principles, being in the nature of public policy, bring efficiency and certainty to the administration of justice by any court and should be invoked and enforced unless they are expressly prohibited by statute or appear to counter serve the interest of justice, rather than advancing it.
51. One important policy consideration which permeates the scheme of Order 23 Rule 1 is the legislative intent that legal proceedings in respect of a subject-matter are not stretched for unduly long periods by allowing a party to reagitate the same issue over and over again, which also leads to uncertainty for the responding parties. Arbitration as a dispute resolution method, too, seeks to curtail the time spent by disputing parties in pursuing legal proceedings. This is evident from the various provisions of the Act, 1996 which provide a timeline for compliance with various procedural requirements under the said Act. An application for appointment of arbitrator under Section 11(6) of the Act, 1996 is required to be filed when there is failure on the part of the parties or their nominated arbitrators to commence the arbitration proceedings as per the agreed upon procedure. This Court, being conscious of the temporally sensitive nature of proceedings under Section 11(6), has issued various directions from time to time to ensure that applications for appointment of arbitrators are decided in an expeditious manner. Keeping in view the approach of this Court and the nature of

**Digital Supreme Court Reports**

applications under Section 11(6) of the Act, 1996, we find no reason to not extend the principles of Order 23 Rule 1 to such proceedings, when the very same principles have been extended to writ proceedings before High Courts under Articles 226 & 227 and SLPs before this Court under Article 136.

52. One important aspect that needs to be kept in mind while applying the principles of Order 23 Rule 1 to applications under Section 11(6) of the Act, 1996 is that it will act as a bar to only those applications which are filed subsequent to the withdrawal of a previous Section 11(6) application filed on the basis of the same cause of action. The extension of the aforesaid principle cannot be construed to mean that it bars invocation of the same arbitration clause on more than one occasion. It is possible that certain claims or disputes may arise between the parties after a tribunal has already been appointed in furtherance of an application under Section 11(6). In such a scenario, a party cannot be precluded from invoking the arbitration clause only on the ground that it had previously invoked the same arbitration clause. If the cause of action for invoking subsequent arbitration has arisen after the invocation of the first arbitration, then the application for appointment of arbitrator cannot be rejected on the ground of multiplicity alone.
53. The principles of Order 23 Rule 1 are extended to proceedings other than suits with a view to bring in certainty, expediency and efficiency in legal proceedings. However, at the same time, it must also be kept in mind while extending the principles to legal proceedings other than suits that the principles are not applied in a rigid or hyper-technical manner. While the nature of the proceedings, that is, whether such proceeding is a suit or otherwise, should not be a consideration in deciding whether the principles of Order 23 Rule 1 should be extended to such proceedings or not, the *bonafide* conduct of a party in the unique facts of a case must be considered before precluding such a party from moving ahead with the proceedings.
54. In the case of Vanna Claire Kaura v. Gauri Anil Indulkar & Ors. reported in (2009) 7 SCC 541 the applicant filed a Section 11(6) application before the High Court of Bombay. A dispute was raised that the application was not maintainable as the agreements were in the nature of international commercial arbitration agreement under the Act, 1996 and the application for appointment would only lie before

**M/s HPCL Bio-Fuels Ltd. v. M/s Shahaji Bhanudas Bhad**

the Chief Justice of India. Accordingly, the applicant withdrew the Section 11 application and filed a Section 11(6) application before this Court. The subsequent application was opposed *inter alia* on the ground that arbitration was invoked by notice dated 14.03.2006 and was thereafter abandoned with the withdrawal of the petition from the High Court. Hence, the second application without the leave of the High Court would not be maintainable. However, this Court, negatived the objections against the application and proceeded to appoint the arbitrator.

55. Coming to the facts of the case at hand, both the applications under Section 11(6) of the Act, 1996 were filed seeking adjudication of the dispute which arose on 02.02.2014 upon refusal of the appellant to pay the dues of the respondent. The first application under Section 11(6) was filed on 16.02.2018 and was subsequently withdrawn unconditionally on 01.10.2018. After a gap of more than four years, the respondent filed a subsequent application under Section 11(6) before the High Court on 09.12.2022 which came to be allowed by the impugned order.
56. The High Court was of the view that the respondent chose to withdraw the petition under legal advice and thereafter approached NCLT under the IBC but did not succeed in its endeavor. Further, the High Court observed that while dismissing the appeal, this Court vide Order dated 15.07.2022 granted liberty to the respondent to avail such remedies in accordance with law, which shall include the remedy of arbitration. Accepting the explanation given by the respondent as *bonafide* and relying on the order dated 15.07.2022 of this Court, the High Court held the fresh petition under Section 11(6) to be maintainable.
57. A perusal of paragraph 18 of the order dated 10.01.2022 passed by the NCLAT setting aside the order of the NCLT reveals that after invoking the arbitration clause by the notice dated 09.07.2016, the respondent issued a statutory demand notice to the appellant under Section 8 of the IBC on 30.08.2017. When no reply was sent by the appellant to the said demand notice, the respondent, rather than filing an application under Section 9 of the IBC, filed an application for the appointment of arbitrator on 16.02.2018. During the pendency of the application under Section 11(6) of the Act, 1996 before the High Court, the respondent issued a second statutory demand notice under Section 8 of the IBC to the appellant on 25.07.2018. The appellant filed a reply to the said demand notice on 07.08.2018, wherein, *inter*

**Digital Supreme Court Reports**

*alia*, it took the defence that there was a pre-existing dispute between the parties, which was evidenced by the existence of the pending arbitration proceedings. Subsequently, the respondent withdrew the arbitration application on 01.10.2018 and thereafter proceeded to file an application before the NCLT, Kolkata on 05.10.2018.

58. The chronology of events as discussed above clearly indicates that the respondent did not withdraw the first arbitration application because of some defect which would have led to its dismissal. It is also clear from the order dated 01.10.2018 of the High Court permitting the respondent to withdraw the application that neither any liberty was sought by the respondent nor the court had granted any liberty to file a fresh arbitration application. It appears to us that the only reason the respondent withdrew the arbitration application was to get his application under Section 9 of the IBC any how admitted by the NCLT. It is also evident that the existence of a pre-existing dispute was brought to the notice of the respondent by the appellant much prior to the withdrawal of the arbitration application in reply to the demand notice issued by the respondent under Section 8 of the IBC. Thus, it can be said without any doubt that the respondent took a calculated risk of abandoning the arbitration proceedings to maximise the chances of succeeding in the IBC proceedings.
59. The respondent was within its right to abandon the arbitration proceedings in favour of IBC proceedings. However, having done so, it would no longer be open to it to file a fresh application for appointment of arbitrator without having obtained the liberty of the court to file a fresh application at the time of the withdrawal. We say so particularly because the withdrawal of the first arbitration application was not with a view to cure some formal defect or any other sufficient ground. The application was withdrawn with the hope that the application filed by the respondent under Section 9 of the IBC may succeed, as the pendency of the arbitration application would have proven to be an indicator of existence of a pre-existing dispute between the parties, and thus fatal to the IBC proceedings.
60. As we are of the view that the principles underlying Order 23 Rule 1 can be extended to applications for appointment of arbitrator, the only recourse to the respondent to defend the second application as maintainable despite it having been withdrawn earlier without liberty was to show *bona fides* on its part. From the conduct of

**M/s HPCL Bio-Fuels Ltd. v. M/s Shahaji Bhanudas Bhad**

the respondent, it is evident that it thought fit to initiate insolvency proceedings perhaps thinking that the issues existing between the parties may not get resolved through arbitration. Further, no document has been placed on record to substantiate the so called incorrect legal advice the respondent claims to have received. Therefore, the failure on the part of the respondent to withdraw the first Section 11 application without seeking any liberty cannot be condoned in the facts of the present case.

61. In light of the aforesaid discussion, we are of the view that in the absence of any liberty sought by the respondents from the High Court at the time of withdrawal of the first arbitration application, the fresh Section 11 petition arising out of the same cause of action cannot be said to be maintainable.
62. Another way of looking at the abandonment of Section 11(6) application is by understanding the importance of such an application in view of Sections 21 and 43(2) of the Act, 1996 respectively. By virtue of Section 21, the arbitral proceedings commence on the date on which the respondent receives the petitioner's notice invoking arbitration. The said provision is reproduced below:

***“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.”***

63. Section 43(2) of the Act, 1996 provides that for the purposes of limitation, an arbitration shall be 'deemed' to have commenced on the date referred to in Section 21. Section 43(2) is reproduced below:

***“(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 to in section 21.”***

64. As is clear from the word "deemed" used in Section 43(2), the commencement of arbitration proceedings, as contemplated in Section 21, is in the nature of a legal or deeming fiction. It is a notional commencement and not a factual or actual commencement of arbitration. However, the factual or actual arbitration proceeding commences only once an arbitrator is appointed either by the High Court under Section 11 or by consent of parties.

**Digital Supreme Court Reports**

65. Hence, a petition under Section 11(6) of the Act, 1996 is not a proceeding merely seeking the appointment of an arbitrator. It is in reality a proceeding for appointing an arbitrator and for commencing the actual or real arbitration proceedings.
66. If that is so, the unconditional withdrawal of a Section 11(6) petition amounts to abandoning not only the formal prayer for appointing an arbitrator but also the substantive prayer for commencing the actual arbitration proceedings. It amounts to abandoning the arbitration itself. It results in abandonment of the notional ‘arbitration proceeding’ that had commenced by virtue of Section 21 and thus amounts to an abandonment of a significant nature. Therefore, it is all the more important to import and apply the principles underlying Order 23 Rule 1 of the CPC to abandonment of applications under Section 11(6).

**ii. Issue No. 2**

67. It was submitted by the appellant that the fresh application filed by the respondent under Section 11(6) of the Act, 1996 before the High Court was beyond the period of limitation prescribed for filing of such an application and was not maintainable. The appellant also contended that the substantive claims raised by the respondent are also *ex-facie* time-barred and thus the High Court ought to have dismissed the fresh arbitration application filed by the respondent on this ground as well.
68. The basic premise behind the statutes providing for a limitation period is encapsulated by the maxim “*Vigilantibus non dormientibus jura subveniunt*” which means that the law assists those who are vigilant and not those who sleep over their rights. The object behind having a prescribed limitation period is to ensure that there is certainty and finality to the litigation and assurance to the opposite party that it will not be subject to an indefinite period of liability. Another object achieved by a fixed limitation period is that only those claims which are initiated before the deterioration of evidence takes place are allowed to be litigated. The law of limitation does not act to extinguish the right but only bars the remedy.
69. The limitation period governing applications under Section 11(6) of the Act, 1996 has recently been explained by a three-Judge Bench of this Court, to which My Lord, the Chief Justice of India and myself

**M/s HPCL Bio-Fuels Ltd. v. M/s Shahaji Bhanudas Bhad**

were a part, in [\*\*M/s Arif Azim Co. Ltd. v. M/s Aptech Ltd.\*\*](#) reported in **2024 INSC 155**. The said decision has referred to Article 137 of the Limitation Act, 1963 to hold that the limitation period for making an application under Section 11(6) of the Act, 1996 is three years from the date when the right to apply accrues.

70. On the aspect of when the limitation period for filing an application seeking appointment of arbitrator would commence, the aforesaid decision has held that it is only after a valid notice invoking arbitration has been issued by one of the parties to the other party and there has been either a failure or refusal on part of the other party to make an appointment as per the appointment procedure agreed upon between the parties, that the clock would start ticking for the purpose of the limitation of three years.
71. In the case at hand, the respondent invoked the arbitration clause vide a notice dated 09.07.2016. Since there was no response to the said notice by the appellant, the respondent filed an application for appointment of arbitrator before the High Court under Section 11(6) of the Act, 1996 on 16.02.2018. Subsequently, it abandoned the application to pursue proceedings under the IBC.
72. On 15.10.2018, the respondent filed an application under Section 9 of the IBC for initiation of Corporate Insolvency Resolution Process against the appellant. The IBC proceedings initiated by the respondent under Section 9 were ultimately dismissed by this Court vide order dated 15.07.2022 by way of which the order of the NCLAT was upheld and the order of the NCLT was set-aside. This Court took the view that the NCLT had committed a grave error of law by admitting the application of the respondent even though there was a pre-existing dispute between the parties. Placing reliance on the decision of this Court in [\*\*Mobilox Innovations Private Limited v. Kirusa Software Private Limited\*\*](#) reported in **(2018) 1 SCC 353**, this Court held that upon the occurrence of a pre-existing dispute regarding the alleged claims of the respondent against the appellant, the Section 9 application of the respondent as an 'Operational Creditor' could not have been entertained.
73. Upon rejection of the Section 9 application by this Court, the respondent filed a fresh application under Section 11(6) on 09.12.2022 before the High Court. The High Court allowed the application and proceeded to appoint the arbitrator vide the impugned order.

**Digital Supreme Court Reports**

74. An overview of the facts as discussed above indicates that the first application under Section 11(6) filed on 16.02.2018 was well within the prescribed limitation period of three years for filing such applications. However, even assuming that the second application under Section 11(6) is not barred by the principles underlying Order 23 Rule 1, the same was required to be filed within a period of three years from the expiry of one month from the date of receipt of the notice invoking arbitration by the appellant. This period of three years came to an end in August, 2019. The second application under Section 11(6) came to be filed by the respondent much later on 12.12.2022 and is clearly time-barred.
75. However, to save the second Section 11(6) application from being dismissed on account of being time-barred, the respondent has contended that it is entitled to invoke the benefit under Section 14 of the Limitation Act, 1963 to seek exclusion of the period spent by it in pursuing the proceedings under Section 9 of the IBC. The respondent has further submitted that even otherwise, this Court in exercise of its discretion available under Section 5 of the Limitation Act may condone the delay in filing the second 11(6) application before the High Court, as it was pursuing the insolvency proceedings in a *bona fide* manner and would be left remediless if the appointment of arbitrator by the High Court is set aside by this Court.
76. Section 14 of the Limitation Act provides for exclusion of time of proceeding bona fide in court without jurisdiction and is reproduced below: -

***"14. Exclusion of time of proceeding bona fide in court without jurisdiction.—***

*(1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.*

*(2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a*

**M/s HPCL Bio-Fuels Ltd. v. M/s Shahaji Bhanudas Bhad**

*court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.*

*(3) Notwithstanding anything contained in rule 2 of Order XXIII of the Code of Civil Procedure, 1908 (5 of 1908), the provisions of sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the court under rule 1 of that Order, where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the court or other cause of a like nature.*

*Explanation.—For the purposes of this section,—*

*(a) in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted;*

*(b) a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding;*

*(c) misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction.”*

77. There is a body of decisions of this Court taking the view that by virtue of Section 43 of the Act, 1996, the Limitation Act is applicable to applications for appointment of arbitrator filed under Section 11(6) of the said Act. It thus follows that the benefit under Section 14 of the Limitation Act can be availed by an applicant subject to the fulfilment of the conditions specified therein. However, a bare perusal of the aforesaid provision indicates that sub-sections (1) and (2) respectively of Section 14 are materially different from each other. Thus, it is important to ascertain as to which provision would be applicable to an application for appointment of arbitrator under Section 11(6) of the Act, 1996.
78. Under Section 14(1), in computing the period of limitation for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first

**Digital Supreme Court Reports**

instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it. Thus, the following ingredients need to be fulfilled for the applicability of Section 14(1):

- i. The subsequent proceeding must be a suit;
  - ii. Both the earlier and the subsequent proceeding must be civil proceedings;
  - iii. Both the earlier and subsequent proceedings must be between the same parties;
  - iv. The earlier and subsequent proceeding must have the same matter in issue;
  - v. The earlier proceeding must have failed owing to a defect of jurisdiction of the earlier court or any other cause of a like nature;
  - vi. The earlier proceedings must have been prosecuted in good faith and with due-diligence; and
  - vii. Both the earlier and the subsequent proceedings must be before a court.
79. A three-Judge Bench of this Court in *Consolidated Engg. Enterprises v. Irrigation Deptt.*, reported in (2008) 7 SCC 169, dealt with the question as to whether Section 14 of the Limitation Act would be applicable to an application submitted under Section 34 of the Act, 1996 for setting aside the award made by the arbitrator. The Court enumerated the conditions for the applicability of Section 14(1) as follows:
- “21. Section 14 of the Limitation Act deals with exclusion of time of proceeding bona fide in a court without jurisdiction. On analysis of the said section, it becomes evident that the following conditions must be satisfied before Section 14 can be pressed into service:*
- (1) *Both the prior and subsequent proceedings are civil proceedings prosecuted by the same party;*
  - (2) *The prior proceeding had been prosecuted with due diligence and in good faith;*

**M/s HPCL Bio-Fuels Ltd. v. M/s Shahaji Bhanudas Bhad**

- (3) *The failure of the prior proceeding was due to defect of jurisdiction or other cause of like nature;*
  - (4) *The earlier proceeding and the latter proceeding must relate to the same matter in issue and;*
  - (5) *Both the proceedings are in a court.”*
80. Section 2 of the Limitation Act provides certain definitions. Some of them which are pertinent to the present discussion are reproduced hereinbelow:
- “In this Act, unless the context otherwise requires,—*
- (a) *“applicant” includes—*
    - (i) *a petitioner;*
    - (ii) *any person from or through whom an applicant derives his right to apply;*
    - (iii) *any person whose estate is represented by the applicant as executor, administrator or other representative;*

**xxx xxx xxx**
  - (b) *“application” includes a petition;*
- xxx xxx xxx**
- (h) *“good faith” - nothing shall be deemed to be done in good faith which is not done with due care and attention;*
- xxx xxx xxx**
- (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;*
- xxx xxx xxx**
- (l) *“suit” does not include an appeal or an application;*
81. Section 2(1) as reproduced above clearly provides for a distinction between a ‘suit’ and an ‘application’ under the Limitation Act. Thus, the clear intention of the legislature was that they are not to be considered as the same for the purpose of Limitation Act.

**Digital Supreme Court Reports**

82. In Section 11(6) of the Act, 1996, the words ‘the appointment shall be made, on an application of the party’ are used, thereby signifying that a Section 11 petition is in the nature of an ‘application’ and cannot be considered to be a ‘suit’ for the purposes of the Limitation Act. Even otherwise, ‘application’ under the Limitation Act includes a ‘petition’, thereby leaving no room for any doubt that a Section 11(6) petition is to be treated as an application.
83. As a petition under Section 11(6) of the Act, 1996 is not a suit, hence it would not be governed by sub-section (1) of Section 14 of the Limitation Act. Instead, it would be governed by sub-section (2) of Section 14 of the Limitation Act. Some of the conditions required to be fulfilled for seeking the benefit of exclusion under Section 14(2) are materially different from those required under Section 14(1) and are as follows:
  - i. Both the earlier and the subsequent proceeding must be civil proceedings;
  - ii. Both the earlier and subsequent proceedings must be between the same parties;
  - iii. The earlier and subsequent proceeding must be for the same relief;
  - iv. The earlier proceeding must have failed owing to a defect of jurisdiction of the earlier court or any other cause of a like nature;
  - v. The earlier proceedings must have been prosecuted in good faith and with due-diligence; and
  - vi. Both the earlier and the subsequent proceedings are before a court.
84. With every other ingredient remaining the same, the key difference between sub-sections (1) and (2) of Section 14 respectively is two-fold:
  - i. First, the benefit of Section 14(1) can be availed of where the subsequent proceeding is a suit, whereas the benefit of Section 14(2) can be availed of where the subsequent proceeding is an application.
  - ii. Secondly, Section 14(1) applies if both the earlier and the subsequent proceedings have the same matter in issue, whereas Section 14(2) applies when both the earlier and the subsequent proceedings are filed for seeking the same relief.

**M/s HPCL Bio-Fuels Ltd. v. M/s Shahaji Bhanudas Bhad**

85. Clearly, the scope of the expression “same matter in issue” appearing in Section 14(1) is much wider than that of the expression “for the same relief” appearing in Section 14(2) of the Limitation Act. This is evident on account of the difference between the nature of a suit vis-à-vis an application. In a suit, a party generally seeks relief in the nature of the cause of action which is established on the basis of oral and documentary evidence and arguments. Whereas, an application is made under a particular provision of a statute and if it appears to the court that such provision of the statute is not applicable, then the application as a whole cannot be sustained. Thus, an application is made for a specific purpose as provided by the statutory provision under which it is made unlike a suit which is instituted based on a cause of action and is for seeking remedies falling in a wider conspectus.
86. Sub-section (3) of Section 14 stipulates that where liberty to withdraw any suit is granted under sub-rule (3) of Order 23 Rule 1 on the ground of defect of jurisdiction or other cause of a like nature, then, the exclusion of limitation period as provided by Section 14(1) will be available to the plaintiff to institute any fresh suit on the same subject-matter.
87. The respondent has contended that the expression “other cause of a like nature” used in Section 14 of the Limitation Act should be given a wide interpretation as Section 14 is meant to advance the cause of the justice and not thwart it by procedural impediments. In view of liberal interpretation of Section 14, the respondent submitted that the case at hand is one fit for the grant of relief under Section 14 of the Limitation Act.
88. This Court in ***M.P. Housing Board v. Mohanlal & Co.*** reported in **(2016) 14 SCC 199** observed thus on the liberal interpretation of Section 14 of the Limitation Act:

*“16. From the aforesaid passage, it is clear as noonday that there has to be a liberal interpretation to advance the cause of justice. However, it has also been laid down that it would be applicable in cases of mistaken remedy or selection of a wrong forum. As per the conditions enumerated, the earlier proceeding and the latter proceeding must relate to the same matter in issue. It is worthy to mention here that the words “matter in*

**Digital Supreme Court Reports**

*issue" are used under Section 11 of the Code of Civil Procedure, 1908. As has been held in [Ramadhar Shrivs v. Bhagwandas](#) [(2005) 13 SCC 1], the said expression connotes the matter which is directly and substantially in issue. We have only referred to the said authority to highlight that despite liberal interpretation placed under Section 14 of the Act, the matter in issue in the earlier proceeding and the latter proceeding has to be conferred requisite importance. That apart, the prosecution of the prior proceeding should also show due diligence and good faith.*

(Emphasis supplied)

89. Undoubtedly, this Court over a period of time has taken a consistent view that the expression "other cause of a like nature" appearing in Section 14 should be given a wide interpretation. However, while considering the applicability of Section 14 of the Limitation Act, one must not lose sight of the fact that the applicability of the provision is contingent upon not just the reason for the failure of the earlier proceedings, but is also dependent on several other factors as explained in the preceding paragraphs. It is only when all the ingredients required for the applicability of Section 14 are fulfilled that the benefit would become available. In this context the appellant has submitted that as the proceedings undertaken by the respondent before the IBC and the proceedings for the appointment of arbitrator before the High Court are not for the "same relief", hence the benefit of Section 14 of the Limitation Act will not be available to the respondent. To address this contention of the appellant, it is important to understand the purpose of IBC proceedings vis-à-vis proceedings under Section 11(6) of the Act, 1996.
  - a. **Application under Section 11(6) of the Act, 1996 is not for the same relief as an application under Section 9 of the IBC**
90. In the introduction to the *Treatise on the Insolvency and Bankruptcy Code, 2016* by Dr. Dilip K. Sheth, the author has opined that IBC was enacted on the basis of recommendations of various committees and suggestions received from various stakeholders to address the infirmities of the erstwhile insolvency regime and fulfil the following objectives:

**M/s HPCL Bio-Fuels Ltd. v. M/s Shahaji Bhanudas Bhad**

- i. To balance the interest of stakeholders and creditors by reviewing and restructuring insolvent businesses having potential for a turn-around.
  - ii. To provide robust mechanism for earlier resolution of insolvency in time-bound manner.
91. A reading of the Preamble to the IBC reveals the following avowed objects behind its enactment:
- i. To consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a timebound manner for maximization of value of assets of such persons;
  - ii. To promote entrepreneurship and availability of credit;
  - iii. To balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues; and
  - iv. To establish the Insolvency and Bankruptcy Board of India.
92. One of the cardinal objectives of the IBC is to protect and preserve the life of the corporate debtor “as a going concern” by providing for the resolution of its insolvency through restructuring and keeping liquidation only as a measure of last resort.
93. One of the essential ingredients of an application filed under Section 9 of the IBC is that there is an existence of a default. The term ‘default’ is defined under Section 3(12) of the IBC to mean non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor.
94. ‘Debt’ is defined under Section 3(11) of the IBC to mean a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt.
95. On the other hand, arbitration is a consent-based private dispute resolution method for the expeditious adjudication of disputes. Arbitration is initiated when one or both parties are not able to resolve their disputes amicably and seek to have the matter resolved by an independent arbitrator.
96. The High Court in the impugned order thought fit to exclude the time-period spent by the respondent before the NCLT, Kolkata under the

**Digital Supreme Court Reports**

IBC since it was of the view that the respondent was availing remedy for recovery of dues before a wrong forum and was thus squarely covered by Section 14(2) of the Limitation Act. The High Court took the view that since the proceedings for initiating corporate insolvency resolution process (“**CIRP**”) under IBC as well as the proceeding sought to be initiated by way of arbitration were ultimately for the recovery of debts, both proceedings could be said to be for the same relief, and thus entitled the respondent for the benefit under Section 14(2) of the Limitation Act. The relevant observations read as under: -

*“10. [...] Worth it to note that initially when he approached the NCLT, Kolkata, under Section 8 and 9 of the IBC for institution of CIRP process against the Respondent, his claim was entertained and it is only the Respondents, who approached the Appellate Tribunal, the order passed by the NCLT in favour of the Applicant came to be reversed. Therefore, it cannot be said that the Petitioner was sitting idle and not taking any steps for recovery of his dues, but it is a case where he was availing remedy for recovery of his dues before a wrong forum and he is entitled to take benefit of Section 14 of the Limitation Act, 1963.”*

97. We are of the view that the High Court fell in error in holding that an application under Section 9 of the IBC and an application under Section 11(6) of the Act, 1996 are filed for seeking the same relief. While the relief sought in the former is the initiation of the CIRP of the corporate debtor, the relief sought in the latter is the appointment of an arbitrator for the adjudication of disputes arising out of a contract.
98. The object of initiation of insolvency proceedings under the IBC is to seek rehabilitation of the corporate debtor by appointment of a new management, whereas the objective behind the appointment of an arbitrator is to resolve the disputes arising between the parties out of a private contract. As soon as the CIRP of a corporate debtor is initiated, it becomes a proceeding in rem. On the contrary, arbitration being concerned with private disputes is not an in-rem proceeding.
99. In ***Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India & Ors.***, reported in **(2019) 4 SCC 17** this Court, speaking through R.F Nariman J., held that IBC was not a mere recovery legislation for the creditors

**M/s HPCL Bio-Fuels Ltd. v. M/s Shahaji Bhanudas Bhad**

but rather a beneficial legislation intended to revive and rehabilitate the corporate debtor. The relevant observations read as under:

*"28. It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors. The interests of the corporate debtor have, therefore, been bifurcated and separated from that of its promoters/those who are in management. Thus, the resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests. The moratorium imposed by Section 14 is in the interest of the corporate debtor itself, thereby preserving the assets of the corporate debtor during the resolution process. The timelines within which the resolution process is to take place again protects the corporate debtor's assets from further dilution, and also protects all its creditors and workers by seeing that the resolution process goes through as fast as possible so that another management can, through its entrepreneurial skills, resuscitate the corporate debtor to achieve all these ends."*

(Emphasis supplied)

100. Similarly, in **Pioneer Urban Land & Infrastructure Ltd. & Anr. v. Union of India & Ors.** reported in (2019) 8 SCC 416, this Court reiterated that IBC is not a debt recovery mechanism. It observed that when CIRP is initiated the aspect of recovery of debt is completely outside the control of the creditor and there is no guarantee of recovery or refund of the entire amount in default. A creditor initiates insolvency under the Code not for the relief of recovery of debt but rather for rehabilitating the corporate debtor and for a new management to take over. The relevant observations read as under:

*"It is also important to remember that the Code is not meant to be a debt recovery mechanism (see para 28 of Swiss Ribbons). It is a proceeding in rem which, after being triggered, goes completely outside the control of the allottee who triggers it. Thus, any allottee/home buyer*

## Digital Supreme Court Reports

*who prefers an application under Section 7 of the Code takes the risk of his flat/apartment not being completed in the near future, in the event of there being a breach on the part of the developer. Under the Code, he may never get a refund of the entire principal, let alone interest. [...]”*

(Emphasis supplied)

101. In yet another decision of this Court in Hindustan Construction Company Ltd. & Anr. v. Union of India reported in (2020) 17 SCC 324 it was held that IBC is not meant to be a recovery mechanism as it is an economic legislation meant for the resolution of stressed assets. The relevant observations read as under: -

*“79. Dr Singhvi then argued that under Section 5(9) of the Insolvency Code, “financial position” is defined, which is only taken into account after a resolution professional is appointed, and is not taken into account when adjudicating “default” under Section 3(12) of the Insolvency Code. This does not in any manner lead to the position that such provision is manifestly arbitrary. As has been held by our judgment in Pioneer Urban Land & Infrastructure Ltd. v. Union of India, IBC is not meant to be a recovery mechanism (see para 41 thereof)—the idea of the Insolvency Code being a mechanism which is triggered in order that resolution of stressed assets then takes place. For this purpose, the definitions of “dispute” under Section 5(6), “claim” under Section 3(6), “debt” under Section 3(11), and “default” under Section 3(12), have all to be read together. Also, IBC, belonging to the realm of economic legislation, raises a higher threshold of challenge, leaving Parliament a free play in the joints, as has been held in Swiss Ribbons (P) Ltd. v. Union of India [...]”*

(Emphasis supplied)

102. Similarly, in Jaypee Kensington Boulevard Apartments Welfare Assn. v. NBCC (India) Ltd., reported in (2022) 1 SCC 401 this Court held that the focus of IBC was more on ensuring the revival and continuation of the corporate debtor rather than mere recovery of the debt owed by the corporate debtor to its creditors. The relevant observations read as under: -

**M/s HPCL Bio-Fuels Ltd. v. M/s Shahaji Bhanudas Bhad**

*"88.2. In the judgment delivered on 25-1-2019 in Swiss Ribbons (P) Ltd. v. Union of India 82 (hereinafter also referred to as the case of "Swiss Ribbons"), this Court traversed through the historical background and scheme of the Code in the wake of challenge to the constitutional validity of various provisions therein. One part of such challenge had been founded on the ground that the classification between "financial creditor" and "operational creditor" was discriminatory and violative of Article 14 of the Constitution of India. This ground as also several other grounds pertaining to various provisions of the Code were rejected by this Court after elaborate dilation on the vast variety of rival contentions. In the course, this Court took note, inter alia, of the pre-existing state of law as also the objects and reasons for enactment of the Code. While observing that focus of the Code was to ensure revival and continuation of the corporate debtor, where liquidation would be the last resort, this Court pointed out that on its scheme and framework, the Code was a beneficial legislation to put the corporate debtor on its feet, and not a mere recovery legislation for the creditors."*

(Emphasis supplied)

103. What can be discerned from aforesaid decisions is that insolvency proceedings are fundamentally different from proceedings for recovery of debt such as a suit for recovery of money, execution of decree or claims for amount due under arbitration, etc. The first distinguishing feature that sets apart ordinary recovery proceedings from insolvency proceedings is that under the former the primary relief is the recovery of dues whereas under the latter the primary concern is the revival and rehabilitation of the corporate debtor. No doubt both proceedings contemplate an aspect of recovery of debt, however in insolvency proceedings, the recovery is only a consequence of the rehabilitation/ resolution of the corporate debtor and not the main relief.
104. The second distinguishing feature is that although both proceedings entail recovery of debt to a certain extent, however they are different inasmuch as when it comes to recovery proceedings it is the individual creditor's debt which is sought to be recovered, whereas in insolvency proceedings it is the entire debt of the company which is sought

**Digital Supreme Court Reports**

to be resolved. The former is only for the benefit of the individual creditor who initiates the recovery proceedings whereas the latter is for the benefit of all creditors irrespective of who initiates insolvency.

105. The last distinguishing feature is that, a recovery proceeding be it a suit or arbitration is initiated by a creditor where an amount is due and is unpaid by a debtor, in other words the intention behind initiating a recovery proceeding is *simpliciter* for the full recovery of amount which is unpaid to it. However, in an insolvency proceeding there is no guarantee of recovery of the entire debt. A creditor opts for insolvency where an amount of such threshold is unpaid, that the creditor has an apprehension that the debtor in its current state and under the existing management in all likelihood will be unable to repay that debt in the future i.e., there is no likely prospect of any recovery, and thus it would be beneficial to take the risk of initiating insolvency which even though does not guarantee full recovery, in order for a new management to take over the corporate debtor and to recover at least some amount of debt before it is too late. Thus, the underlying intention behind initiating insolvency is not with the intention of recovering the amount owed to it, but rather with the intention that the corporate debtor is resolved / rehabilitated through a new management as soon as possible before it becomes unviable with no prospect of any meaningful recovery of its dues in the near future.
106. Thus, by no stretch of imagination can insolvency proceedings be construed as being for the same relief as any ordinary recovery proceedings, and therefore no case is made out for exclusion of time under Section 14(2) of the Limitation Act, 1963.
107. As the relief sought in an application under Section 11(6) of the Act, 1996 is not the same as the relief sought in an application under Section 9 of the IBC, the benefit of Section 14(2) cannot be given to the respondent in the present case.
108. In ***Yeshwant Deorao Deshmukh v. Walchand Ramchand Kothari*** reported in **(1950) 1 SCR 852** this Court held that the relief sought under insolvency is completely different from the relief sought under an execution application for a decree for recovery of money. In the former, the estate of the insolvent is apportioned or realised for the benefit of all creditors whereas in the latter the money due is

**M/s HPCL Bio-Fuels Ltd. v. M/s Shahaji Bhanudas Bhad**

sought to be realised only for the benefit of the decree-holder alone. Although both proceedings envisage an aspect of recovery of debt, yet in insolvency, the recovery is a mere consequence and not the ultimate relief. Thus, insolvency proceedings are not one for recovery of debt and cannot be equated with execution proceedings as both proceedings are different in nature and for different reliefs and as such no benefit can be given under Section 14(2) of the Limitation Act which stipulates the requirement of “*same relief*”. The relevant observations read as under: -

*“5. [...] There could be no exclusion for the time occupied by the insolvency proceedings which clearly was not for the purpose of obtaining the same relief. The relief sought in insolvency is obviously different from the relief sought in the execution of application. In the former, an adjudication of the debtors as insolvency is sought as preliminary to the vesting of all his estate and the administration of it by the Official Receiver or the Official Assignee, as the case may be, for the benefit of all the creditors; but in the latter the money due is sought to be realised for the benefit of the decree-holder alone, by processes like attachment of property and arrest of person. It may that ultimately in the insolvency proceedings the decree-holder may be able to realise his debt wholly or in part, but this is a mere consequence or result. Not only is the relief of a different nature in the two proceedings but the procedure is also widely divergent.”*

(Emphasis supplied)

109. This Court in *Commissioner, Madhya Pradesh Housing Board & Ors. v. Mohanlal and Company* reported in (2016) 14 SCC 199 considered whether benefit of Section 14 of the Limitation Act would be available when a party instead of challenging an arbitral award under Section 34, filed a Section 11 application for appointment of arbitrator. This Court while setting aside the appointment, observed that the proceedings for appointment of an arbitrator are entirely different from the proceedings for challenging an award. Therefore, even after adopting a liberal interpretation, it would not be appropriate to grant benefit of exclusion of time-period under Section 14.

**Digital Supreme Court Reports**

110. Even otherwise, the respondent couldn't be said to have had been prosecuting the IBC proceedings in good faith and in a bonafide manner. It was observed by this Court in *Consolidated Engg. Enterprises* (*supra*) and *M.P. Housing Board* (*supra*) that an element of mistake is inherent in the relief envisaged under Section 14 of the Limitation Act. However, in the present case, the respondent had initially approached the High Court with an application under Section 11(6). However, for reasons best known to it, the respondent abandoned the said proceedings for appointment of arbitrator and approached the NCLT, Kolkata with an application under Section 9 of the IBC. The respondent was fully aware of the objection of a pre-existing dispute raised by the appellant in response to its second statutory demand notice issued under Section 8 of the IBC. Despite having preferred an application under 11(6) of the Act, 1996 before the jurisdictional court, and also being fully aware of the infirmities in the Section 9 application filed under the IBC, the respondent took a conscious decision to abandon the right course of proceedings. The conduct of the respondent cannot be termed to be a mistake in any manner. Having taken a conscious decision to opt for specific remedy under the IBC which is not for the same relief as an application under Section 11(6) of the Act, 1996, the respondent cannot be now allowed to take the plea of ignorance or mistake and must bear the consequences of its decisions.

**iii. Issue No. 3**

111. It was submitted on behalf of the respondent that in the event the benefit under Section 14(2) of the Limitation Act is not extended to it, then in such circumstance, this Court may consider to condone the delay in filing the second arbitration petition by exercising its discretion under Section 5 of the Limitation Act. In response to the said submission, the appellant contended that the benefit of condonation of delay under Section 5 of the Limitation Act cannot be extended to a petition for the appointment of an arbitrator under Section 11(6) of the Act, 1996. The appellant also submitted that assuming without conceding that delay can be condoned in exercise of powers under Section 5 of the Limitation Act, the facts do not warrant exercise of discretionary powers as no application for the condonation of delay has been filed by the respondent. It was further contended that the nature of relief sought for under Section 5 of the Limitation Act being discretionary in nature, the conduct of the respondent disentitles him to grant of such relief.

**M/s HPCL Bio-Fuels Ltd. v. M/s Shahaji Bhanudas Bhad**

112. The following three questions fall for our consideration on the basis of the aforesaid submissions –
- i. Whether the benefit of condonation of delay under Section 5 of the Limitation Act is available in respect of an application for appointment of arbitrator under Section 11(6) of the Act, 1996?
  - ii. Whether it is permissible for the courts to condone delay under Section 5 of the Limitation Act in the absence of any application seeking such condonation?
  - iii. Whether the facts of the present case warrant the exercise of discretion in favour of the respondent to condone the delay in filing the second arbitration application?

113. Section 5 of the Limitation Act provides that any appeal or application other than an application under the provisions of Order 21 of the CPC may be admitted after the prescribed period of limitation if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within the prescribed period. The provision is extracted hereinbelow:

***"5. Extension of prescribed period in certain cases.—***

*Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908 (5 of 1908), may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period.*

*Explanation.—The fact that the appellant or the applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this section.”*

114. The use of the expression “may be admitted” in the aforesaid provision indicates that the nature of relief that can be granted under Section 5 is discretionary and not mandatory in nature. The applicant or the appellant, even upon showing sufficient cause, cannot assert as a matter of right that the delay be condoned. Thus, unlike Section 14 of the Limitation Act, where the applicant can seek the exclusion of time period as a matter of right upon fulfilment of the mandatory conditions, Section 5 of the Limitation Act leaves the ultimate decision

## Digital Supreme Court Reports

of extending the benefit of condonation of delay to the court before which the application for such condonation is made.

115. In a recent pronouncement in ***Pathapati Subba Reddy (Died) by LRs and Others v. The Special Deputy Collector (LA)*** reported in [\(2024\) 4 SCR 241](#) this Court observed thus:

*“12. In view of the above provision, the appeal which is preferred after the expiry of the limitation is liable to be dismissed. The use of the word ‘shall’ in the aforesaid provision connotes that the dismissal is mandatory subject to the exceptions. Section 3 of the Act is peremptory and had to be given effect to even though no objection regarding limitation is taken by the other side or referred to in the pleadings. In other words, it casts an obligation upon the court to dismiss an appeal which is presented beyond limitation. This is the general law of limitation. The exceptions are carved out under Sections 4 to 24 (inclusive) of the Limitation Act but we are concerned only with the exception contained in Section 5 which empowers the courts to admit an appeal even if it is preferred after the prescribed period provided the proposed appellant gives ‘sufficient cause’ for not preferring the appeal within the period prescribed. In other words, the courts are conferred with discretionary powers to admit an appeal even after the expiry of the prescribed period provided the proposed appellant is able to establish ‘sufficient cause’ for not filing it within time. The said power to condone the delay or to admit the appeal preferred after the expiry of time is discretionary in nature and may not be exercised even if sufficient cause is shown based upon host of other factors such as negligence, failure to exercise due diligence etc.”*

(Emphasis supplied)

116. This Court in [Ramlal v. Rewa Coalfields Ltd., 1961 SCC OnLine SC 39](#) observed as follows:

*“12. It is, however, necessary to emphasise that even after sufficient cause has been shown a party is not entitled to the condonation of delay in question as a matter of right. The proof of a sufficient cause is a condition precedent for*

**M/s HPCL Bio-Fuels Ltd. v. M/s Shahaji Bhanudas Bhad**

*the exercise of the discretionary jurisdiction vested in the court by Section 5. If sufficient cause is not proved nothing further has to be done; the application for condoning delay has to be dismissed on that ground alone. If sufficient cause is shown then the court has to enquire whether in its discretion it should condone the delay. This aspect of the matter naturally introduces the consideration of all relevant facts and it is at this stage that diligence of the party or its bona fides may fall for consideration; but the scope of the enquiry while exercising the discretionary power after sufficient cause is shown would naturally be limited only to such facts as the court may regard as relevant. It cannot justify an enquiry as to why the party was sitting idle during all the time available to it. In this connection we may point out that considerations of bona fides or due diligence are always material and relevant when the court is dealing with applications made under Section 14 of the Limitation Act. In dealing with such applications the court is called upon to consider the effect of the combined provisions of Sections 5 and 14. Therefore, in our opinion, considerations which have been expressly made material and relevant by the provisions of Section 14 cannot to the same extent and in the same manner be invoked in dealing with applications which fall to be decided only under Section 5 without reference to Section 14."*

(Emphasis supplied)

117. As discussed in the foregoing parts of this judgment, the period of limitation to file an application under Section 11(6) of the Act, 1996 is governed as provided in Article 137 of the Schedule to the Limitation Act, that is, three years. We have observed that the benefit available under Section 14 of the Limitation Act will also be available in respect of applications made under Section 11(6) of the Act, 1996. Thus, in the absence of any specific statutory exclusion, there is no good reason to hold that the benefit under Section 5 of the Limitation Act cannot be availed for the purpose of condonation of delay caused in filing a Section 11(6) application.
118. In **Deepdharshan Builders Pvt. Ltd. v. Saroj, Widow of Satish Sunderrao Trasikar** reported in 2018 SCC OnLine Bom 4885, the

**Digital Supreme Court Reports**

Bombay High Court held that Section 5 of the Limitation Act would apply to an application filed under Section 11(6) of the Act, 1996. The relevant observations from the said decision are extracted hereinbelow:

*“42. In my view, since the proceedings under Section 11(6) of the Arbitration Act are required to be filed before the High Court, Article 137 of the Schedule to the Limitation Act, 1963 would apply to such application filed under Section 11(6) of the Arbitration Act. In my view, since Article 137 of the Schedule to the Limitation Act, 1963 would apply to the arbitration application under Section 11(6) of the Arbitration Act, Section 5 of the Limitation Act, 1963 would also apply to the arbitration application filed under Section 11(6) of Arbitration Act.”*

119. Similarly, the Delhi High Court in ***Yogesh Kumar Gupta v. Anuradha Rangarajan*** reported in **2007 SCC OnLine Del 287** had observed that in view of Section 43 of the Act, 1996, Section 5 of the Limitation Act would be applicable to applications filed under Section 11(6) of the Act, 1996. Relevant observations from the said decision are extracted hereinbelow:

*“30. There is yet another alternative route which leads to some conclusion. Section 21 of the Act states that unless otherwise agreed by the parties (there is no agreement of the parties on this aspect), 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. Consequently, when the petitioner issued the notice dated 10.4.2002 raising the dispute regarding rendition of accounts of the partnership business, the arbitral proceedings commenced as soon as the communication dated 10.4.2002 was received by the respondent. It is not the respondent’s case that he did not receive the communication dated 10.4.2002 sent by the petitioner and since it was sent by registered post (as appears from the postal receipt filed on record along with the said communication), it can be safely presumed that the communication was received by the respondent within a matter of few days. Consequently, the arbitral*

**M/s HPCL Bio-Fuels Ltd. v. M/s Shahaji Bhanudas Bhad**

*proceedings stood commenced sometime in middle of April, 2002. The application under Section 11(5) of the Act is an application or a petition in relation to arbitral proceedings which have commenced with the issuance of a request for the reference of disputes to arbitration (Section 2(b) of the Limitation Act). Since Limitation Act, 1963 specifically applies to arbitrations, Section 5 of the Limitation Act would also apply to an application/petition under Section 11 (5) of the Limitation Act. Any application (other than under the provisions of Order 21 of CPC) may be admitted after the prescribed period, if the applicant satisfies the Court that he had sufficient cause for not preferring or making the application within such period. In my view, therefore, Section 5 of the Limitation Act would apply to, and be available to the petitioner filing an application/petition under Section 11 (5) of the Act."*

(Emphasis supplied)

120. The necessary pre-condition for availing the remedy under Section 5 of the Limitation Act is that the applicant must satisfy the court that there was a sufficient cause which prevented him from instituting the application within the prescribed time period. Although it is a general practice that a formal application under Section 5 of the Limitation Act has to be filed by the applicant, yet no such requirement can be gathered from a bare reading of the statute. Thus, even in the absence of a formal application, a court or tribunal may consider exercising its discretion under Section 5 of the Limitation Act subject to the applicant assigning sufficient cause for condoning the delay. A similar view was taken by this Court in *Sesh Nath Singh v. Baidyabati Sheoraphuli Coop. Bank Ltd.* reported in (2021) 7 SCC 313 wherein it was observed thus:

*"63. Section 5 of the Limitation Act, 1963 does not speak of any application. The Section enables the Court to admit an application or appeal if the applicant or the appellant, as the case may be, satisfies the Court that he had sufficient cause for not making the application and/or preferring the appeal, within the time prescribed. Although, it is the general practice to make a formal application under Section 5 of the Limitation Act, 1963, in order to enable*

**Digital Supreme Court Reports**

*the Court or Tribunal to weigh the sufficiency of the cause for the inability of the appellant/applicant to approach the Court/Tribunal within the time prescribed by limitation, there is no bar to exercise by the Court/Tribunal of its discretion to condone delay, in the absence of a formal application.*

*64. A plain reading of Section 5 of the Limitation Act makes it amply clear that, it is not mandatory to file an application in writing before relief can be granted under the said section. Had such an application been mandatory, Section 5 of the Limitation Act would have expressly provided so. Section 5 would then have read that the Court might condone delay beyond the time prescribed by limitation for filing an application or appeal, if on consideration of the application of the appellant or the applicant, as the case may be, for condonation of delay, the Court is satisfied that the appellant/applicant had sufficient cause for not preferring the appeal or making the application within such period."*

(Emphasis supplied)

121. The position of law that emerges from the aforesaid discussion is that the benefit under Section 5 of the Limitation Act is available in respect of the applications filed for appointment of arbitrator under Section 11(6) of the Act, 1996. Further, the requirement of filing an application under Section 5 of the Limitation Act is not a mandatory prerequisite for a court to exercise its discretion under the said provision and condone the delay in institution of an application or appeal. Thus, the only question that remains to be considered is whether in the facts of the present case, the respondent could be said to have made out a case for condonation of delay in instituting the fresh Section 11(6) application.
122. As discussed, the respondent took a conscious decision to abandon its first Section 11(6) application with a view to pursue proceedings under Section 9 of the IBC. The respondent made such choice despite a specific objection raised by the appellant in its reply to the statutory demand notice that there were pre-existing disputes between the parties. In view of this, maximisation of the chances of

**M/s HPCL Bio-Fuels Ltd. v. M/s Shahaji Bhanudas Bhad**

getting the application under Section 9 of the IBC admitted by the NCLT seems to have been the only reason for the abandonment of the first Section 11(6) application by the respondent. In light of such conduct on the part of the respondent, we are of the view that the present case does not warrant the exercise of our discretion under Section 5 of the Limitation Act.

123. The primary intent behind Section 5 of the Limitation Act is not to permit litigants to exploit procedural loopholes and continue with the legal proceedings in multiple forums. Rather, it aims to provide a safeguard for genuinely deserving applicants who might have missed a deadline due to unavoidable circumstances. This provision reflects the intent of the legislature to balance the principles of justice and fairness, ensuring that procedural delays do not hinder the pursuit of substantive justice. Section 5 of the Limitation Act embodies the principle that genuine delay should not be a bar access to justice, thus allowing flexibility in the interest of equity, while simultaneously deterring abuse of this leniency to prolong litigation unnecessarily.
124. The legislative intent of expeditious dispute resolution under the Act, 1996 must also be kept in mind by the courts while considering an application for condonation of delay in the filing of an application for appointment of arbitrator under Section 11(6). Thus, the court should exercise its discretion under Section 5 of the Limitation Act only in exceptional cases where a very strong case is made by the applicant for the condonation of delay in filing a Section 11(6) application.
125. Before we part with the matter, we would like to address the submission of the respondent that this Court, while dismissing its appeal against the order of the NCLAT, had granted it liberty to avail such remedies, including arbitration, as may be available to it in law, to realise its dues from the appellant. The relevant paragraph is reproduced hereinbelow:

*"35. Needless to mention that the appellant may avail such other remedies as may be available in accordance with law including arbitration to realise its dues, if any."*
126. The liberty granted by this Court to the respondent has been prefixed by the words "*Needless to mention...*". Hence, it is amply clear that the observations were merely clarificatory and not intended to confer

**Digital Supreme Court Reports**

upon the respondent a special right or privilege to file a proceeding which is not otherwise permissible under law. The intention cannot be said to have been to help the respondent come out of its action of unconditionally withdrawing the first Arbitration Petition or to deprive the appellant of defences available to it under law. Such intention cannot be attributed to this Court, particularly in the absence of any discussion on this point.

127. Further, the said paragraph only gives liberty to the respondent to avail such other remedies “*as may be available*” “*in accordance with law*”. Hence, it cannot be construed as giving the respondent the liberty to file a proceeding that is not available or that is not in accordance with law.
128. The reliance placed by the petitioner upon the paragraph 35 referred to above is nothing but a completely incorrect reading of the said paragraph. In ***BSNL v. Telephone Cables Limited*** reported in **2010 5 SCC 213**, this Court observed thus:

*“41. Instances abound where observations of the court reserving liberty to a litigant to further litigate have been misused by litigants to pursue remedies which were wholly barred by time or to revive stale claims or create rights or remedies where there were none. It is needless to say that courts should take care to ensure that reservation of liberty is made only where it is necessary, such reservation should always be subject to a remedy being available in law, and subject to remedy being sought in accordance with law.”*

(Emphasis supplied)

129. The liberty to avail remedies available in law does not confer a right to avail such remedies. Seen from the perspective of Hohfeld's analysis of jural relations, liberties (or privileges) do not entail corresponding duties on others. Thus, having the freedom to seek a remedy does not imply an enforceable claim to it. This distinction underscores the fine difference between what one is free to do and what one is entitled to demand.
130. Hence, we are of the view that paragraph 35 as extracted above does not help the respondent as the fresh Section 11 petition could

**M/s HPCL Bio-Fuels Ltd. v. M/s Shahaji Bhanudas Bhad**

be said to be hit by the principles analogous to Order 23 Rule 1 and is also barred by limitation for being beyond the prescribed period of 3 years.

**F. CONCLUSION**

131. In view of the aforesaid discussion, we have reached to the following conclusion:
  - (i) In the absence of any liberty being granted at the time of withdrawal of the first application under Section 11(6) of the Act, 1996, the fresh application filed by the respondent under the same provision was not maintainable;
  - (ii) The fresh application filed by the respondent under Section 11(6) of the Act, 1996 was time-barred;
  - (iii) The respondent is not entitled to the benefit of Section 14(2) of the Limitation Act; and
  - (iv) The respondent is also not entitled to the benefit of condonation of delay under Section 5 of the Limitation Act.
132. As a result, the appeal filed by the appellant is allowed and the impugned order passed by the High Court of Bombay is hereby set aside.
133. Pending application(s), if any, shall stand disposed of.
134. The parties shall bear their own costs.

*Result of the case:* Appeal allowed.

<sup>†</sup>*Headnotes prepared by:* Ankit Gyan

**National Highway Authority of India<sup>1</sup>**

v.

**G Athipathi and Others**

(Civil Appeal No. 14100 of 2024)

09 December 2024

**[Sudhanshu Dhulia and Ahsanuddin Amanullah,\* JJ.]**

**Issue for Consideration**

Issue arose as regards the criteria for promotion to the post of Deputy General Manager in the appellant-authority; and whether the respondent has to be treated as a fresh entrant with the benefit of his past service on deputation or he has to be treated as a fresh appointee, from the date he was selected.

**Headnotes<sup>†</sup>**

**Service law – Promotion – Counting of deputation service period for promotion – Respondent repatriated to parent department after his deputation in appellant-authority for 6 years – Respondent re-joined the appellant on direct recruitment basis to the post of Manager (Technical) after a gap of 1 year – Thereafter, the appellant-Authority invited applications from the Managers for promotion to the post of Deputy General Manager – Application of the respondent rejected due to minimum experience criteria of 4 years not being met – Challenge to – Tribunal directed the Authority to count the deputation service period for promotion and pursuant thereto, the respondent was appointed – High Court upheld the said order of tribunal – Correctness:**

**Held:** Past services can be taken into consideration only when the Rules permit the same or where a special situation exists, which would entitle the employee to obtain such benefit of past service – Circular would not confer any legal right on the respondent for consideration for promotion to the post of Deputy General Manager (Technical) with effect from the date from which the tribunal directed the appellant-authority to promote

---

<sup>1</sup> To be read as 'National Highways Authority of India'.

\* Author

**National Highway Authority of India v. G Athipathi and Others**

the respondent to the said post – Repatriation of the respondent back to his parent Department was on full time basis and unconnected with the appellant-authority – Respondent was a fresh and new recruit into the service of the appellant-authority directly to the post of the Manager (Technical), totally unrelated/unconnected to his previous service with the appellant-authority, which transaction was complete and reached finality when the respondent was repatriated to his parent department – As he had been repatriated to his parent department more than a year prior to such permanent appointment, it cannot be termed ‘absorption’ which finds mention in the Clause 6 of the Circular – Respondent does not stand in the same queue in which other persons were, as they were working with the appellant-authority at the relevant time – Object of Clause 6 was to obliterate the difference between a person working on deputation and a person regularly working – Respondent was absent from the service of the appellant-authority not for any of the specific purposes, but on a permanent basis-being sent back to his parent department – In ‘fulfilling administrative formalities-submission/ acceptance of technical resignation/ retirement etc’ would not cover situation of respondent – Decision taken by the appellant-authority not to grant promotion to the respondent to be upheld – Respondent could not have been considered for promotion from the date of issuance of circular inviting applications to the posts of Deputy General Manager as per the direction of the tribunal since he had not completed four years on the post of the Manager (Technical) after having joined pursuant to direct recruitment on such post, on which service could only be reckoned from date of his appointment to the post – Impugned Order as also tribunal’s order cannot be sustained and set aside – Respondent to be considered for promotion in terms of the Recruitment Regulations and the Circular. [Paras 23-29]

**Case Law Cited**

*National Highways Authority of India v. Sanjeev Kumar Sharma, 2016 SCC OnLine Del 2698; Indu Shekhar Singh v. State of Uttar Pradesh* [\[2006\] Supp. 1 SCR 497 : \(2006\) 8 SCC 129 – referred to.](#)

**List of Acts**

National Highways Authority of India (Recruitment, Seniority and Promotion) Regulations, 1996.

## Digital Supreme Court Reports

### List of Keywords

Criteria for promotion; Post of Deputy General Manager; Benefit of past service on deputation; Fresh appointee; Promotion; Counting of deputation service period for promotion; Repatriation; Deputation; Direct recruitment; Post of Manager (Technical); Minimum experience criteria; Parent Department; Absorption; Minutes of the Executive Committee; Absent from service; Fulfilling administrative formalities; Permanent basis; Submission/acceptance of technical resignation/retirement.

### Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No.14100 of 2024

From the Judgment and Order dated 01.03.2023 of the High Court of Judicature at Madras in WP No. 11060 of 2021

### Appearances for Parties

Santosh Kumar-I, Arjun Singh Bhati, Advs. for the Appellant.

A. Lakshminarayanan, Adv. for the Respondents.

### Judgment / Order of the Supreme Court

#### Judgment

**Ahsanuddin Amanullah, J.**

Leave granted.

2. Heard Mr. Santosh Kumar, learned counsel for the appellant and Mr. A. Lakshminarayanan, learned counsel for the respondent no.1.
3. The present appeal arises from the Final Judgment and Order dated 01.03.2023 (hereinafter referred to as the “Impugned Order”), passed by the Division Bench of the High Court of Judicature at Madras (hereinafter referred to as the “High Court”) in W.P. No.11060 of 2021, whereby the appeal filed by the appellant was dismissed and the judgment dated 30.12.2020 rendered by the Central Administrative Tribunal, Chennai Bench (hereinafter referred to as the “CAT”) in O.A. No.310/01633/202W0 was upheld.

**National Highway Authority of India v. G Athipathi and Others****THE FACTUAL SETTING:**

4. The respondent no.1 was initially working as an Assistant Engineer in the service of the Government of Tamil Nadu. The appellant, by an order dated 27.05.2008, appointed him on deputation basis as Manager (Technical) with effect from 21.05.2008, initially for a period of three years. He worked continuously for a period of six years till 13.06.2014, when he was repatriated to the parent department *viz.* the Highways & Minor Ports Department, Government of Tamil Nadu. In the meantime, an advertisement dated 15.03.2014 had been issued by the appellant inviting applications for recruitment to the post of Manager (Technical) on direct recruitment basis. The respondent no.1, on 11.04.2014, had applied for the said post after receiving approval from the parent department. Subsequent to his repatriation, he appeared in the written examination on 23.08.2014 and was selected as Manager (Technical) *vide* order dated 11.09.2014 by the appellant. On 26.08.2015, the respondent no.1 joined as Manager (Technical). The order of appointment of respondent no.1 was passed by the appellant on 02.09.2015 with effect from 26.08.2015.
5. The post of Manager (Technical) is the feeding cadre for promotion to the post of Deputy General Manager (Technical). As per the Schedule appended to the National Highways Authority of India (Recruitment, Seniority and Promotion) Regulations, 1996 (hereinafter referred to as the "Recruitment Regulations"), promotion to the post of Deputy General Manager (Technical) may be made from candidates holding the post of Manager (Technical) for a period of at least 4 years. As such, a Circular was issued by the appellant on 22.05.2017 (hereinafter referred to as the "Circular") inviting applications from all eligible Managers (Technical) for promotion to the post of Deputy General Manager (Technical). Clause 6 of the said Circular is extracted hereunder:

*"6. It has also been decided to treat the deputation service (if any) rendered on the post of Manager (Technical) in NHAI as regular service for the purpose of promotion to the post of DGM (Technical). It has also been decided that the Manager (Technical), when found suitable for promotion, shall be promoted to the post of DGM (Technical) notionally with effect from the date they fulfil the eligibility criteria for the promotion, but not before the*

**Digital Supreme Court Reports**

*date of absorption and the date of promotion of applicants in OA 3696/2014 and 3762/2014 i.e. dated 29.12.2014, subject to recommendations of the Selection Committee. The actual promotion shall take effect from the date of assumption of charge against the post of DGM (Technical)."*

6. The issue of considering deputation service as regular service for promotion to the post of Deputy General Manager (Technical) was deliberated on in a Meeting of the Executive Committee of the appellant held on 12.10.2017. The decision thereon, as recorded in the Minutes of Meeting dated 20.10.2017, is reproduced hereunder:

*"(c) As a strict one time measure and a special case, the deputation service (including period of absence from NHAI for fulfilling administrative formalities e.g. submission/ acceptance of technical resignation / retirement etc.) will be treated as regular service for the purpose of reckoning eligibility for the promotion to the post of DGM (Tech.), in respect of Managers (Tech.) who have subsequently been appointed in NHAI on Direct Recruitment basis as Manager (Tech.). This will also end prolonged litigation and ensure fairness and justice to the candidates who chose to face competition by going for direct recruitment."*

7. The respondent no.1 applied for promotion to the post of Deputy General Manager (Technical). The Screening Committee of the appellant declared him '*not eligible*'. Accordingly, a promotion order dated 26.09.2017 was passed by the appellant in respect of thirty-nine Managers (Technical) to the posts of Deputy General Managers (Technical). Thereafter, the respondent no.1 sent Representations dated 18.06.2018, 22.11.2018 and 24.04.2019 to the appellant to consider his candidature. As no decision was taken on the same, he approached the CAT by way of O.A. No.310/00992/2019, which was disposed of *vide* order dated 26.07.2019. The CAT directed the appellant to consider the representations *supra* in light of the Circular and pass a speaking order within four months.
8. After considering the Representations of respondent no.1, the appellant *vide* order dated 05.11.2019 observed that his case may not be treated as similar to that of three other officers, since, those officers had appeared in the direct recruitment examination of Manager (Technical) while working in the appellant whereas respondent no.1

**National Highway Authority of India v. G Athipathi and Others**

had taken the examination after his repatriation and was working in his parent department. Aggrieved, the respondent no.1 again approached the CAT by filing O.A. No.310/01633/2020 and praying:

*"To call for the records pertaining to the impugned Office Order No. 11041/242/2017-Adm.II (Pt) dated 05.11.2019 of the 4th Respondent and quash the same and direct the Respondents to count the applicant's deputation service from 21.05.2008 to 13.06.2014 for promotion as Deputy General Manager (T) and to promote the applicant as Deputy General Manager as was done in respect of three similarly placed officers on and with effect from 27.10.2017 and as General Manager (T) with effect from 27.04.2018 along with all other services and monetary benefits including pay fixation, seniority, etc., and pass such further or other orders as the Hon'ble Tribunal may be deem fit proper under the facts and circumstances of the case and thus render justice."*

9. The CAT, after hearing parties and considering the material on record, *vide* order dated 30.12.2020 allowed the Original Application filed by the respondent no.1. It directed the appellant to count the respondent no.1's deputation service period from 21.05.2008 to 13.06.2014 for promotion to the post of Deputy General Manager (Technical) and to promote him as Deputy General Manager (Technical) with effect from 27.10.2017 with all consequential benefits. The appellant was further directed to consider his case for promotion to the post of General Manager (Technical) as per rules. In compliance of the CAT's order, respondent no.1 was promoted to the post of Deputy General Manager (Technical) on 07.06.2021. The appellant challenged the CAT order dated 30.12.2020 in the High Court through W.P. No. 11060 of 2021, which has been dismissed by the High Court *vide* the Impugned Order dated 01.03.2023.

**SUBMISSIONS BY THE APPELLANT:**

10. It was submitted by the learned counsel that the High Court failed to consider that as per the Schedule to the Recruitment Regulations, promotion to the post of Deputy General Manager (Technical) *inter alia*, could be made by promoting candidates continuously holding the post of Manager (Technical) for a period of at least

**Digital Supreme Court Reports**

four years. It was pointed out that the respondent no.1 joined the appellant on deputation basis and worked till 13.06.2014, when he was repatriated to his parent department. Thereafter, the respondent no.1 re-joined the appellant on direct recruitment basis to the post of Manager (Technical) on 26.08.2015 i.e., after a gap of 1 year and 2 months. It was argued that the service rendered by the respondent no.1 on deputation basis could not be considered due to this gap and in view of the same, he could be eligible for promotion to the post of Deputy General Manager (Technical) only after four years of service from the date of appointment on direct recruitment basis i.e., 26.08.2015. Thus, the respondent no.1 was ineligible for promotion as on 27.07.2017 i.e., the date from which the CAT has directed the appellant to promote the respondent no.1 to the post of Deputy General Manager (Technical).

11. Learned counsel contended that the respondent no.1 and other candidates on deputation service on the post of Manager (Technical) cannot be considered equally for promotion to the post of Deputy General Manager (Technical) as, on the date of direct recruitment examination, i.e., 23.08.2014, the respondent no.1 was not incumbent as a Manager (Technical) as he was already repatriated to his parent department. Whereas, the three other candidates, with whom respondent no.1 claims parity, were continuing in the service of the appellant as on the date of the written examination for the post of Manager (Technical).
12. It was next submitted that the High Court failed to consider that neither the Recruitment Regulations nor the decision of the 320<sup>th</sup> Executive Committee meeting dated 12.10.2017, regularize any extended period of absence and rather, had only condoned a period for administrative reasons which is only 20 days in the case of the respondent no.1. It was submitted that this period of 20 days has been regularized by the appellant, however, the period from 13.06.2014 to 26.08.2015 wherein the respondent no.1 was under the administrative control of his parent department cannot be considered for promotion to the post of Deputy General Manager (Technical) as per the Recruitment Regulations. In view of the same, the Screening Committee had rejected the application of respondent no.1.
13. It was further submitted that the Circular was issued on the basis of the decision of the Delhi High Court in **W.P. (Civil) No.9227 of 2014**

**National Highway Authority of India v. G Athipathi and Others**

titled ***National Highways Authority of India v Sanjeev Kumar Sharma***.<sup>2</sup> In the aforementioned case, the Delhi High Court *vide* order dated 05.04.2016 had observed that the petitioners therein had no gap in service. Thus, the Circular did not contemplate the regularization of any gap in the service.

14. Next, it was submitted that promotion was through a selection process and not based on seniority. Regulation 12(2) of the Recruitment Regulations provides that, on receipt of applications, the Screening Committee shall screen the applications with respect to the eligibility criteria prescribed for the post, and recommend the eligible candidates for consideration of the Selection Committee for final selection on the basis of written test or interview or as decided by the Selection Committee. It was pointed out that 93 applications were received for the post in question, out of which only 64 candidates were declared eligible and 29 candidates, including the respondent no.1 were declared ineligible. Thereafter, interview was conducted of the eligible candidates and promotion order dated 26.09.2017 was issued whereby out of the 64 candidates, only 39 were promoted to the posts of Deputy General Manager (Technical). Thus, it was submitted, that even if it is assumed that the respondent no.1 was fulfilling the eligibility criteria, the CAT in the order dated 30.12.2020 and the High Court in the Impugned Order could not have issued directions for appointment of the respondent no.1 as Deputy General Manager (Technical). It was submitted that directions could only have been issued for considering the respondent no.1 for promotion to the post in question. Prayer was, accordingly, made to allow this appeal.

**SUBMISSIONS BY RESPONDENT NO.1:**

15. *Per contra*, learned counsel for the respondent no.1 (sole contesting respondent) submitted that the CAT has held that there was no requirement in the Recruitment Regulations or the Circular that a candidate who had finished the qualifying service of four years must fulfill the additional requirement of being absorbed into the appellant without any break. It was submitted that this order of CAT has been upheld by the Impugned Order, observing that the Circular was clear and unambiguous that deputation service was to be considered and

**Digital Supreme Court Reports**

did not provide that the person must continue to be on deputation or be absorbed for that service to be considered.

16. It was further submitted that the appellant had failed to make any case for interference with the well-reasoned orders of the CAT and the High Court. Admittedly, the respondent no.1 had served on deputation basis for six years without a break, which is well beyond the requirement of four years. It was submitted that he had to return to the parent department as the maximum period of deputation was over but returned to the appellant at the earliest opportunity on direct recruitment basis after clearing the examination. It was submitted that his compliance with the service rules governing his deputation at the relevant time should not be held against him.
17. Learned counsel contended that if the appellant's submissions are accepted, then even persons who joined the appellant in 2013 but just happened to be in service on the date of the Circular would be eligible for promotion, but the respondent no.1 would not be despite having joined in 2008. This would be manifestly arbitrary and unfair. Further, as noted by CAT, the appellant granted the benefit of the Circular to three other candidates but only in the respondent no.1's case, the Circular and the Executive Committee decision has not been applied, which is discriminatory. It was pointed out that even these three other candidates are junior to the respondent no.1 and have joined in 2010-11.
18. Next, it was submitted that the concept of '*break in service*' is inapplicable in the instant case as the qualifying service of four years has admittedly been met. As noted by the CAT and High Court, the appellant's contention amounts to inserting an additional requirement into the Circular, which is not supported by the plain language of the Recruitment Regulations, Circular or the Executive Committee decision. It was further submitted that the decision in *Sanjeev Kumar Sharma (supra)* relied on by the appellants would not help their case, as the question of '*break in service*' or '*absorption*' was not an issue before the Delhi High Court. For these reasons, learned counsel sought dismissal of the appeal.

**ANALYSIS, REASONING & CONCLUSION:**

19. Having given our anxious thought, we find that two basic issues need to be addressed before arriving at a final conclusion.

**National Highway Authority of India v. G Athipathi and Others**

20. *Firstly*, and most importantly, as to what would be the criteria for considering such one-time promotion to the post of Deputy General Manager (Technical) in terms of the Circular dated 22.05.2017, and; *secondly*, as to whether the respondent no.1 fulfils such criteria on the relevant date.
21. In the Circular, the language of Clause 6 is very clear and stipulates that a person's deputation service, if any, rendered on the post of Manager (Technical) in the appellant shall be treated as regular service for the purposes of promotion to the post of Deputy General Manager (Technical) and such promotion would be notional with effect from the date he fulfils the eligibility criteria of promotion but not before the date of absorption of applicants in OA Nos.3696/2014 and 3762/2014 orders dated 29.12.2014, subject to recommendations of the Selection Committee.
22. From the above, it is clear that the period of deputation is also to be considered while considering such promotion but the question lies in the fact that whether a person, who before coming into effect of Clause 6, stood repatriated to his parent department and was no more in the service of the appellant can take advantage of the said Clause.
23. In the present case, respondent no.1 was initially appointed as Manager (Technical) on deputation by order dated 27.05.2008 and worked as such till 13.06.2014. Thereafter, he was repatriated to his parent department namely the Highways & Minor Ports Department, Government of Tamil Nadu. Thus, it is clear that the repatriation of respondent no.1 from 13.06.2014 was back to a Government Department in the State of Tamil Nadu on a full-time basis since it was the parent department of the respondent no.1 and unconnected with the appellant. The respondent no.1 later on joined in the service of the appellant on direct recruitment basis to the post of Manager (Technical) for which he was selected on 26.08.2015 and finally appointed on 02.09.2015 albeit with effect from 26.08.2015. Thus, for all practical purposes, it meant direct and fresh entry on a permanent basis of the respondent no.1 into the appellant. As he had been repatriated to his parent department more than a year prior to such permanent appointment, it cannot be termed '*absorption*' which finds mention in the aforesaid Clause 6. Thus, respondent no.1 was a fresh and new recruit into the service of the appellant directly to the post of

**Digital Supreme Court Reports**

Manager (Technical). This was totally unrelated/unconnected to his previous service with the NHAI from 27.05.2008 till 13.06.2014 which transaction was complete and reached finality when the respondent no.1 was repatriated to his parent department.

24. The respondent no.1 thus does not stand in the same queue in which the other three persons were, the difference being that the other persons were working with/in the appellant at the relevant point(s) in time. In this view of the matter, there can be no other meaning given to the benefit being extended to persons, who were on deputation service and as such had put in more than four years on such post. The respondent no.1 clearly on 22.05.2017 had not completed 4 years as that in law has to be counted afresh from 26.08.2015 and not from a previous date. This is for the reason that had the respondent no.1 not applied for and taken part in the selection process as a direct recruit, being selected, his claim would not have arisen for any promotion under Clause 6 of the Circular. The persons already working with the appellant on the day of consideration and having completed more than four years of service on the post of Manager (Technical) were only required to be considered. Here, we may clarify that the only object of Clause 6 was to obliterate the difference between a person working on deputation on the post of Manager (Technical) and a person regularly working on the post of Manager (Technical) under the service of the appellant. This also was done as a '*one-time measure*'. Thus, the legal issue to be decided is as to whether respondent no.1 has to be treated as a fresh entrant without the benefit of his past service on deputation from 21.05.2008 till 13.06.2014 or he has to be treated as a fresh appointee, in which case the clock would, to say so, start ticking only from 26.08.2015.
25. The contention of the learned counsel for the appellant is correct that if the interpretation advanced by the respondent no.1 is given to Clause 6, then it would cover all persons who, at any point of time, may have worked with the appellant for four years, getting the benefit, even with gaps in service in the appellant. A person on deputation was given a one-time benefit for being considered for promotion to the post of Deputy General Manager (Technical) by the appellant for ending prolonged litigation and for ensuring fairness and justice to the candidates who chose to face competition by going for direct recruitment as would be clear from the Minutes dated 20.10.2017 quoted above of the Executive Committee's Meeting

**National Highway Authority of India v. G Athipathi and Others**

held on 12.10.2017. The said Minutes leave a window open for people who may have been absent from service in the appellant for certain period, but with the caveat that such period of absence was restricted to the purposes of fulfilling administrative formalities e.g. submission/acceptance of technical resignation/retirement etc.

26. In the present case, respondent no.1 was absent from the service of the appellant not for any of the above specific purposes, but on a permanent basis i.e., being sent back to his parent department. Unfortunately, to our mind, the 'etc.' in '*fulfilling administrative formalities e.g. submission/ acceptance of technical resignation/retirement etc*' would not cover situation of respondent no.1. Obviously, respondent no.1 cannot take advantage of a saving provision for such deputationists who, for some period, had to go back but for the purposes of returning to the appellant, which have been incorporated in the Minutes *supra*.
27. For reasons aforesaid, we find that the appellant has made out a case for interference and the decision taken by the appellant not to grant promotion to the respondent no.1 needs to be upheld. The other three persons had been granted promotion for the reason that those three persons were very much working in/with the appellant on the date of consideration and had completed more than four years of minimum required service whereas the respondent no.1 had not completed four years of minimum required service. Hence, he could not have been considered for promotion from 23.07.2017 as per the direction of the CAT since he had not completed four years on the post of the Manager (Technical) after having joined pursuant to direct recruitment on such post, on which service could only be reckoned from 26.08.2015. Even otherwise, '*...past services can be taken into consideration only when the Rules permit the same or where a special situation exists, which would entitle the employee to obtain such benefit of past service.*'<sup>3</sup> The instant case, as projected by respondent no.1 is not covered under the Circular or the Minutes dated 20.10.2017 of the Meeting dated 12.10.2017.
28. Further, Circular dated 25.05.2017 itself was the outcome of the order of a Division Bench of the Delhi High Court in ***Sanjeev Kumar Sharma (supra)***, wherein it was observed that the petitioners therein

3 [Indu Shekhar Singh v State of Uttar Pradesh](#) (2006) 8 SCC 129

**Digital Supreme Court Reports**

be considered for promotion as there was no gap in service. In the case at hand, upon repatriation, there was no subsequent deputation of respondent no.1 to the appellant. Only after more than one year pursuant to taking part in a process for direct and regular recruitment to the post of Manager (Technical), respondent no.1 was appointed, with effect from 26.08.2015. Therefore, we have no doubt that the Circular dated 22.05.2017 would not confer any legal right on the respondent no.1 for consideration for promotion to the post of Deputy General Manager (Technical) with effect from 27.07.2017.

29. Accordingly, the Impugned Order dated 01.03.2023 as also CAT's order dated 30.12.2020 in O. A. No.310/01633/2020 cannot be sustained and are set aside. Resultantly, the said Original Application filed by the respondent no.1 shall stand dismissed. Respondent no.1 shall be considered for promotion(s) in terms of the Recruitment Regulations and the Circular and the discussions made in this order and all consequential benefits of service (including pension etc., if and as applicable) shall be reckoned treating his date of entry into service of the appellant as 26.08.2015. However, no recovery/adjustment shall be made of excess payment(s) made to the respondent no.1, if any.
30. The appeal is allowed.
31. No order as to cost.

*Result of the case:* Appeal allowed.

<sup>†</sup>Headnotes prepared by: Nidhi Jain

**Banwari and Others**

v.

**Haryana State Industrial and Infrastructure Development Corporation Limited (HSIIDC) and Another**

(Civil Appeal No. 13348 of 2024)

10 December 2024

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

**Issue for Consideration**

Matter pertains to the correctness of the order passed by the High Court allowing the writ petition filed by the respondent relying on Ramsinghbai (Ramsanghbai) Jerambhai's case and setting aside the order passed by the LAC holding that the application u/s.28-A can only be filed within a period of three months from any judgment of the Reference Court u/s.18, arising from the same acquisition but not from the date of judgment of this Court or the High Court.

**Headnotes<sup>†</sup>**

**Land Acquisition Act, 1894 – ss.4, 18, 28-A – Enhancement of compensation – Appellants awarded compensation for the land acquired for Kundli Manesar Palwal Expressway – Reference u/s.18 by similarly circumstanced land-owners for enhancement of compensation and the same was dismissed – However, the High Court allowed the Regular First Appeal and enhanced the compensation in respect of the land covered by the same notification under which the appellants' land also covered – Subsequently, the appellants did not file Reference but filed an application u/s.28-A within a period of three months from the order of the High Court – LAC held that the appellants were entitled to the benefit of the order passed by the High Court and enhanced the compensation payable to the appellants as awarded to similarly circumstanced land-owners – Thereagainst, writ petition filed by the respondent was allowed by the High Court relying on Ramsinghbai (Ramsanghbai) Jerambhai's case and the order passed by the LAC was set aside holding that the application u/s.28-A can only be filed within a period of three months from any judgment of the Reference Court**

---

\* Author

**Digital Supreme Court Reports**

**u/s.18, arising from the same acquisition but not from the date of judgment of this Court or the High Court – Correctness:**

**Held:** An earlier decision of a Bench of particular strength would be binding on the subsequent Benches of this Court having the same or lesser number of judges – A decision or judgment can be said to be per incuriam if it is not possible to reconcile its ratio with that of a previously pronounced judgment of a co-equal or larger Bench – Limitation for moving the application u/s.28-A will begin to run only from the date of the award on the basis of which redetermination of the compensation is sought – Application of the appellants u/s.28-A is within a period of three months from the order passed by the High Court – Judgment rendered in Ramsingbhai (Ramsangbhai) Jerambhai's case would reveal that the said case did not take note of the earlier view taken by three judges of this Court in the case of Pradeep Kumari and Others's case – Judgment in Pradeep Kumari and Others case has been rendered after considering the relevant provisions of the Statute and the principles of interpretation – However, the judgment in the case of Ramsingbhai (Ramsangbhai) Jerambhai's case is a short judgment only referring to the text of s.28-A(1) – Statement of Objects and Reasons of s.28-A would reveal that the object underlying the enactment of the said provision is to remove inequality in the payment of compensation for same or similar quality of land – Said provision is for giving benefit to inarticulate and poor people not being able to take advantage of the right of reference to the civil court u/s.18 – This is sought to be achieved by providing an opportunity to all aggrieved parties whose land is covered by the same notification to seek redetermination once any of them has obtained orders for payment of higher compensation from the reference court u/s.18 – Same benefit would be available to the other landholders u/s.28-A – s.28-A being a beneficent legislation, the principle of interpretation to be adopted is which advances the policy of the legislation to extend the benefit rather than a construction which has the effect of curtailing the benefit conferred by it – Thus, the judgment and order passed by the High Court is quashed and set aside, and the order of the LAC is upheld. [Paras 15, 16, 19, 21, 22-25]

***Per incuriam – Rule of per incuriam – Judgment, when per incuriam:***

**Held:** Decision or judgment can be said to be *per incuriam* if it is not possible to reconcile its ratio with that of a previously pronounced judgment of a co-equal or larger Bench. [Para 21]

**Banwari and Others v. Haryana State Industrial and Infrastructure Development Corporation Limited(HSIIDC) and Another**

**Land Acquisition Act, 1894 – s.28-A – Re-determination of the amount of compensation on the basis of the award of the Court – Invocation of the provisions of s.28-A(1) – Conditions to be satisfied – Stated – Explanation of Union of India and Another v. Pradeep Kumari and Others's case. [Paras 11-14]**

**Case Law Cited**

*Union of India and Another v. Pradeep Kumari and Others, 1995 INSC 180 : [1995] 2 SCR 703 : (1995) 2 SCC 736 – relied on.*

*Ramsinghbhai (Ramsangbhai) Jerambhai v. State of Gujarat and Another, 2018 INSC 405 : [2018] 3 SCR 1019 : (2018) 16 SCC 445 – per incuriam.*

*National Insurance Company Limited v. Pranay Sethi and Others, 2017 INSC 1068 : [2017] 13 SCR 100 : (2017) 16 SCC 680 – referred to.*

**List of Acts**

Land Acquisition Act, 1894.

**List of Keywords**

Ramsinghbhai (Ramsangbhai) Jerambhai's case; Application u/s.28-A of the LA Act; Reference Court u/s.18 of the LA Act; Enhancement of compensation; Land acquired for Kundli Manesar Palwal Expressway; Similarly circumstanced land-owners; *Per incuriam*; Limitation for moving the application u/s.28-A of the LA Act; Redetermination of compensation; Beneficent legislation; Union of India and Another v. Pradeep Kumari and Others's case.

**Case Arising From**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 13348 of 2024

From the Judgment and Order dated 25.11.2021 of the High Court of Punjab & Haryana at Chandigarh in CWP No. 19814 of 2021

**Appearances for Parties**

Piyush Sharma, Anuj Kumar Sharma, Advs. for the Appellants.

Alok Sangwan, Sr. A.A.G., Samar Vijay Singh, Sumit Kumar Sharma, Rajat Sangwan, Ms. Sabarni Som, Fateh Singh, Advs. for the Respondents.

**Digital Supreme Court Reports****Judgment / Order of the Supreme Court****Judgment****B.R. Gavai, J.**

1. Leave granted.
2. This appeal challenges the judgment and order dated 25<sup>th</sup> November 2021 passed by the learned Single Judge of the High Court of Punjab and Haryana at Chandigarh in CWP No. 19814 of 2021 (O&M), whereby the writ petition filed by respondent No.1 under Articles 226/227 of the Constitution of India praying for a writ of certiorari for quashing the order passed by the District Revenue Officer-cum-Land Acquisition Collector, Jhajjar (hereinafter referred to as "LAC") dated 15<sup>th</sup> September 2020, came to be allowed.
3. The facts, in brief, giving rise to the present appeal are as under:
  - 3.1. By a notification under Section 4 of the Land Acquisition Act, 1894 (hereinafter referred to as "1894 Act") dated 17<sup>th</sup> November 2004, the land of the appellants admeasuring 8 Kanal 17 Marla of village Majri, Tehsil Bahadurgarh, District Jhajjar was acquired for Kundli Manesar Palwal Expressway. By an award dated 1<sup>st</sup> March 2006, a compensation of Rs.12,50,000/- per acre was determined.
  - 3.2. Aggrieved by the said award, similarly circumstanced land-owners preferred a reference for enhancement of compensation before the learned Additional District Judge, Jhajjar under Section 18 of the 1894 Act. Vide order dated 17<sup>th</sup> January 2012, the said reference was dismissed.
  - 3.3. The said land-owners preferred a Regular First Appeal (RFA) being No. 429 of 2013 before the High Court of Punjab and Haryana. Vide judgment and order dated 2<sup>nd</sup> May 2016, the High Court of Punjab and Haryana allowed the said RFA and enhanced the compensation to Rs.19,91,300/- along with statutory benefits.
  - 3.4. Immediately thereafter the appellants on 30<sup>th</sup> June 2016 filed an application under Section 28-A of the 1894 Act before the LAC, Jhajjar as reference was not filed by the appellants.

**Banwari and Others v. Haryana State Industrial and Infrastructure Development Corporation Limited(HSIIDC) and Another**

- 3.5. Vide order dated 15<sup>th</sup> September 2020, the LAC held that the appellants were entitled to the benefit of the judgment and order of the High Court in RFA No. 429 of 2013 dated 2<sup>nd</sup> May 2016 and enhanced the compensation payable to the appellants to Rs.19,91,300/- per acre along with statutory benefits as awarded by the High Court to the similarly circumstanced land-owners.
- 3.6. Being aggrieved thereby, respondent No.1 preferred a writ petition before the High Court. The High Court vide impugned judgment and order, relying on its earlier judgment in CWP No. 8456 of 2020 titled "**Haryana State Industrial and Infrastructure Development Corporation Limited v. Smt. Shanti and Others**" decided on 6<sup>th</sup> September 2021, allowed the writ petition and set aside the order dated 15<sup>th</sup> September 2020 passed by the LAC. In its earlier judgment, the High Court has placed reliance on the judgments of this Court including the case of **Ramsinghbhai (Ramsangbhai) Jerambhai v. State of Gujarat and Another**,<sup>1</sup> whereby this Court has held that the application under Section 28-A of the 1894 Act can only be filed within a period of three months from any judgment of the Reference Court under Section 18 of the 1894 Act, arising from the same acquisition but not from the date of judgment of this Court or the High Court.
- 3.7. Being aggrieved thereby, the appellants have approached this Court.
4. We have heard Shri Piyush Sharma, learned counsel appearing for the appellants and Shri Rajat Sangwan, learned counsel appearing for the respondents.
5. Learned counsel for the appellants submits that the High Court has erred in relying on the judgment of this Court in the case of **Ramsinghbhai (Ramsangbhai) Jerambhai** (supra), inasmuch as the said judgment does not take into consideration the earlier judgment of this Court in the case of **Union of India and Another v. Pradeep Kumari and Others**.<sup>2</sup> He, therefore, submits that the appeal be allowed.

1 [2018 INSC 405 : \[2018\] 3 SCR 1019](#) : (2018) 16 SCC 445

2 [1995 INSC 180 : \[1995\] 2 SCR 703](#) : (1995) 2 SCC 736

**Digital Supreme Court Reports**

6. *Per contra*, learned counsel for the respondents would submit that the High Court has rightly relied on the judgment of this Court in the case of Ramsinghbhai (Ramsangbhai) Jerambhai (supra). He, therefore, submits that the appeal be dismissed.
7. This Court, speaking through a bench of three learned Judges, in the case of Ramsinghbhai (Ramsangbhai) Jerambhai (supra), has observed thus:

“3. It is clear from the opening words of the provision that the redetermination under Section 28-A is available only in respect of an “award” passed by the “court” under Part III of the Act, comprising Sections 18 to 28-A (both inclusive). The “Court” referred to in Section 28-A of the Act is the Court as defined under Section 3(d) to mean “... a Principal Civil Court of Original Jurisdiction ...”. Thus, the judgment of the appellate court is not within the purview of Section 28-A. It is also to be noted that the appellate courts under Section 54 are under Part VIII of the Act whereas the redetermination is only in respect of the award passed by the Reference Court under Part III of the Act. [See Jose Antonio Cruz Dos R. Rodriguese v. LAO [Jose Antonio Cruz Dos R. Rodriguese v. LAO (1996) 6 SCC 746] ]. In its recent judgment in Bharatsing v State of Maharashtra [Bharatsing v. State of Maharashtra (2018) 11 SCC 92 : (2018) 5 SCC (Civ) 44], this Court has surveyed the decisions on this issue and reiterated the legal principle.

4. What the appellant seeks is redetermination of compensation under the Act in terms of the judgment in Ramsinghbhai v. State of Gujarat [Ramsinghbhai v. State of Gujarat, 2014 SCC OnLine Guj 5840 : 2015 AIR CC 1046] of the High Court passed under Section 54 of the Act. In view of the settled legal position which we have explained above, the appellant is not entitled to such a relief; his entitlement, if any, is only in terms of Section 28-A of the Act based on the award of the Reference Court.”
8. It can thus be seen that, this Court has held that as the appellant therein was seeking redetermination of compensation on the basis of the judgment of the High Court passed under Section 54 of the

**Banwari and Others v. Haryana State Industrial and Infrastructure Development Corporation Limited(HSIIDC) and Another**

1894 Act, he was not entitled to such a relief. It was held that the application under Section 28-A of the 1894 Act had to be made within a period of three months from the date of the award passed by the Court under Part-III of the Act and the appellate courts are not within purview of Section 28-A of the 1894 Act.

9. It, however, appears that this Court in the case of *Ramsinghbai (Ramsanghbai) Jerambhai* (supra), has not noticed an earlier judgment rendered by this Court in *Pradeep Kumari and Others* (supra).
10. In the case of *Pradeep Kumari and Others* (supra), though the award of LAC therein was not challenged by *Pradeep Kumari*, the similarly circumstanced persons whose land was acquired had made references. In one of the references, an award was made on 21<sup>st</sup> February 1987. Immediately within a period of three months, the said *Pradeep Kumari* filed an application under Section 28-A of the 1894 Act before LAC for claiming the benefit of the said award. On the said application, the Collector made an order dated 14<sup>th</sup> March 1988 awarding an additional amount of compensation on the basis of the award of the Reference Court dated 21<sup>st</sup> February 1987. Feeling aggrieved by the said order of Collector, the Union of India filed a writ petition before the High Court of Himachal Pradesh. The High Court dismissed the writ petition. Civil Appeals were filed before this Court, challenging the judgment of the High Court. The same were dismissed. Aggrieved still, Review Petitions were filed. This Court, speaking in a combination of three learned Judges, observed thus:

“8. We may, at the outset, state that having regard to the Statement of Objects and Reasons, referred to earlier, the object underlying the enactment of Section 28-A is to remove inequality in the payment of compensation for same or similar quality of land arising on account of inarticulate and poor people not being able to take advantage of the right of reference to the civil court under Section 18 of the Act. This is sought to be achieved by providing an opportunity to all aggrieved parties whose land is covered by the same notification to seek redetermination once any of them has obtained orders for payment of higher compensation from the reference court under Section 18 of the Act. Section 28-A is, therefore, in the nature of a beneficent provision intended to remove inequality and

**Digital Supreme Court Reports**

to give relief to the inarticulate and poor people who are not able to take advantage of right of reference to the civil court under Section 18 of the Act. In relation to beneficent legislation, the law is well-settled that while construing the provisions of such a legislation the court should adopt a construction which advances the policy of the legislation to extend the benefit rather than a construction which has the effect of curtailing the benefit conferred by it. The provisions of Section 28-A should, therefore, be construed keeping in view the object underlying the said provision.

**9.** A perusal of the provisions contained in sub-section (1) of Section 28-A of the Act would show that after an award is made under Part III whereby the court allows to the applicant any amount of compensation in excess of the amount awarded by the Collector under Section 11, a right accrues to a person interested in the other land covered by the same notification under sub-section (1) of Section 4 who is also aggrieved by the award of the Collector but who had not made an application to the Collector under Section 18, to move an application before the Collector for redetermination of the amount of compensation payable to him on the basis of the amount of compensation awarded by the court. This application for redetermination of the compensation is required to be made within three months from the date of the award of the court. The right to make the application under Section 28-A arises from the award of the court on the basis of which the person making the application is seeking redetermination of the compensation. There is nothing in sub-section (1) of Section 28-A to indicate that this right is confined in respect of the earliest award that is made by the court after the coming into force of Section 28-A. By construing the expression "where in an award under this Part" in sub-section (1) of Section 28-A to mean "where in the first award made by the court under this Part", the word 'first', which is not found in sub-section (1) of Section 28-A, is being read therein and thereby the amplitude of the said provision is being curtailed so as to restrict the benefit conferred by it. In the matter of construction of a beneficent provision it is not permissible by judicial interpretation to read words

**Banwari and Others v. Haryana State Industrial and Infrastructure Development Corporation Limited(HSIIDC) and Another**

which are not there and thereby restrict the scope of the said provision.

**10.** It is possible to visualise a situation where in the first award that is made by the court after the coming into force of Section 28-A the enhancement in the amount of compensation by the said award is not very significant for the reason that the person who sought the reference was not able to produce adequate evidence in support of his claim and in another reference where the award was made by the court subsequently such evidence is produced before the court and a much higher amount is awarded as compensation in the said award. By restricting the benefit of Section 28-A to the first award that is made by the court after the coming into force of Section 28-A the benefit of higher amount of compensation on the basis of the subsequent award made by the court would be denied to the persons invoking Section 28-A and the benefit of the said provision would be confined to redetermination of compensation on the basis of lesser amount of compensation awarded under the first award that is made after the coming into force of Section 28-A. There is nothing in the wordings of Section 28-A to indicate that the legislature intended to confer such a limited benefit under Section 28-A. Similarly, there may be a situation, as in the present case, where the notification under Section 4(1) of the Act covers lands falling in different villages and a number of references at the instance of persons having lands in different villages were pending in the court on the date of coming into force of Section 28-A and awards in those references are made by the court on different dates. A person who is entitled to apply under Section 28-A belonging to a particular village may come to know of the first award that is made by the court after the coming into force of Section 28-A in a reference at the instance of a person belonging to another village, after the expiry of the period of three months from the date of the said award but he may come to know of the subsequent award that is made by the court in the reference at the instance of a person belonging to the same village before the expiry of the period of three months from the date of the said award. This is more likely to happen in the cases of inarticulate and

**Digital Supreme Court Reports**

poor people who cannot be expected to keep track of all the references that were pending in court on the date of coming into force of Section 28-A and may not be in a position to know, in time, about the first award that is made by the court after the coming into force of Section 28-A. By holding that the award referred to in Section 28-A(1) is the first award made after the coming into force of Section 28-A, such persons would be deprived of the benefit extended by Section 28-A. Such a construction would thus result in perpetuating the inequality in the payment of compensation which the legislature wanted to remove by enacting Section 28-A. The object underlying Section 28-A would be better achieved by giving the expression "an award" in Section 28-A its natural meaning as meaning the award that is made by the court in Part III of the Act after the coming into force of Section 28-A. If the said expression in Section 28-A(1) is thus construed, a person would be able to seek redetermination of the amount of compensation payable to him provided the following conditions are satisfied:

- (i) An award has been made by the court under Part III after the coming into force of Section 28-A;
- (ii) By the said award the amount of compensation in excess of the amount awarded by the Collector under Section 11 has been allowed to the applicant in that reference;
- (iii) The person moving the application under Section 28-A is interested in other land covered by the same notification under Section 4(1) to which the said award relates;
- (iv) The person moving the application did not make an application to the Collector under Section 18;
- (v) The application is moved within three months from the date of the award on the basis of which the redetermination of amount of compensation is sought; and
- (vi) Only one application can be moved under Section 28-A for redetermination of compensation by an applicant.

**11.** Since the cause of action for moving the application for redetermination of compensation under Section 28-A arises from the award on the basis of which redetermination

**Banwari and Others v. Haryana State Industrial and Infrastructure Development Corporation Limited(HSIIDC) and Another**

of compensation is sought, the principle that “once the limitation begins to run, it runs in its full course until its running is interdicted by an order of the court” can have no application because the limitation for moving the application under Section 28-A will begin to run only from the date of the award on the basis of which redetermination of compensation is sought.”

11. It can thus be seen that this Court has held that the object underlying the enactment of Section 28-A of the 1894 Act is to remove inequality in the payment of compensation for same or similar quality of land arising on account of inarticulate and poor people not being able to take advantage of the right of reference to the civil court under Section 18 of the 1894 Act. It was held that this is sought to be achieved by providing an opportunity to all aggrieved parties whose land is covered by the same notification to seek redetermination once any of them has obtained orders for payment of higher compensation from the Reference Court under Section 18 of the 1894 Act. It was held that while construing the provisions of such a legislation, the Court should adopt a construction which advances the policy of the legislation to extend the benefit rather than a construction which has the effect of curtailing the benefit conferred by it.
12. It has further been held by this Court that under Section 28-A of the 1894 Act, a right accrues to a person interested in the other land covered by the same notification under sub-section (1) of Section 4, where the Court allows a higher compensation to the similarly circumstanced persons who are covered by the said notification. It has been held that the application for redetermination of the compensation is required to be made within three months from the date of the award by the Court. It has been held that the right to make an application under Section 28-A of the 1894 Act arises from the award of the Court on the basis of which the person making the application is seeking redetermination of the compensation. The Court further held that there is nothing in sub-section (1) of Section 28-A of the 1894 Act to indicate that this right is confined in respect of the earliest award that is made by the Court after coming into force of Section 28-A of the 1894 Act. This Court held that Section 28-A of the 1894 Act if read in such a manner, it will be contrary to the principles of construction of a beneficial provision. It is further held that by judicial interpretation,

**Digital Supreme Court Reports**

the Court could not read the words which are not there and thereby restrict the scope of a provision.

13. In paragraph 10 of the said case, this Court had referred to various eventualities that may occur if such a restrictive interpretation is given to the provision of Section 28-A of the 1894 Act. The Court observed that it has to be seen from the point of view of inarticulate and poor people. The Court held that the object underlying Section 28-A of the 1894 Act would be better achieved by giving the expression "an award" in Section 28-A of the 1894 Act, its natural meaning as meaning the award that is made by the Court in Part III of the 1894 Act after coming into force of Section 28-A.
14. This Court has laid down the conditions which are required to be satisfied for invoking the provisions of Section 28-A(1) of the 1894 Act as follows:
  - (i) An award has been made by the Court under Part III of the Act after coming into force of Section 28-A;
  - (ii) By the said Award, the amount of compensation in excess of the amount awarded by the Collector under Section 11 has been allowed to the applicant in that reference;
  - (iii) The person moving the application under Section 28-A is interested in other land covered by the same notification under Section 4(1) to which the said award relates;
  - (iv) The person moving the application did not move the application under Section 18;
  - (v) The application is moved within three months from the date of the award on the basis of which redetermination of amount of compensation is sought; and
  - (vi) Only one such application can be moved under Section 28-A for redetermination of the compensation by the applicant.
15. In the present case, it is not in dispute that the First Appeal which was allowed by the High Court vide judgment and order dated 2<sup>nd</sup> May 2016 was in respect of the land which was covered by the same notification under which notification the appellants' land is also covered. It is also not in dispute that the amount awarded by the High Court in the said First Appeal is in excess of the amount awarded

**Banwari and Others v. Haryana State Industrial and Infrastructure Development Corporation Limited(HSIIDC) and Another**

by the Collector under Section 11 of the 1894 Act in the case of the land of the appellants. It is also not in dispute that the appellants had not made an application to the Collector under Section 18 of the 1894 Act. It is also not in dispute that the application made by the appellants under Section 28-A of the 1894 Act to the Collector was within a period of three months from the date of the judgment and order of the High Court.

16. From the perusal of the judgment of this Court in the case of *Pradeep Kumari and Others* (supra), it is clear that the limitation for moving the application under Section 28-A of the 1894 Act will begin to run only from the date of the award on the basis of which redetermination of the compensation is sought. The appellants are seeking redetermination of the compensation on the basis of the judgment and order of the High Court in First Appeal No.429 of 2023 dated 2<sup>nd</sup> May 2016. It is not disputed that the application of the appellants under Section 28-A of the 1894 Act is within a period of three months from 2<sup>nd</sup> May 2016.
17. We are, therefore, of the considered view that the case of the appellants is fully covered by the judgment of this Court in the case of *Pradeep Kumari and Others* (supra).
18. It is further to be noted that the cases of *Pradeep Kumari and Others* (supra) and *Ramsinghbhai (Ramsanghbhai) Jerambhai* (supra), both have been decided by a Bench strength of three learned Judges of this Court. The case of *Pradeep Kumari and Others* (supra) is decided on 10<sup>th</sup> March 1995, whereas *Ramsinghbhai (Ramsanghbhai) Jerambhai* (supra), has been decided on 24<sup>th</sup> April 2018.
19. A perusal of the judgment rendered in *Ramsinghbhai (Ramsanghbhai) Jerambhai* (supra), would reveal that the said case does not take note of the earlier view taken by three learned judges of this Court in the case of *Pradeep Kumari and Others* (supra).
20. In this respect, we may gainfully refer to the observations of a Constitution Bench of this Court in the case of *National Insurance Company Limited v. Pranay Sethi and Others*.<sup>3</sup> The relevant paragraphs of the judgment read as under:

3 2017 INSC 1068 : [2017] 13 SCR 100 : (2017) 16 SCC 680

**Digital Supreme Court Reports**

**“27.** We are compelled to state here that in *Munna Lal Jain*, the three-Judge Bench should have been guided by the principle stated in *Reshma Kumari* which has concurred with the view expressed in *Sarla Verma* or in case of disagreement, it should have been well advised to refer the case to a larger Bench. We say so, as we have already expressed the opinion that the dicta laid down in *Reshma Kumari* being earlier in point of time would be a binding precedent and not the decision in *Rajesh*.

**28.** In this context, we may also refer to *Sundeep Kumar Bafna v. State of Maharashtra* [*Sundeep Kumar Bafna v. State of Maharashtra* (2014) 16 SCC 623 : (2015) 3 SCC (Cri) 558] which correctly lays down the principle that discipline demanded by a precedent or the disqualification or diminution of a decision on the application of the per incuriam rule is of great importance, since without it, certainty of law, consistency of rulings and comity of courts would become a costly casualty. A decision or judgment can be per incuriam any provision in a statute, rule or regulation, which was not brought to the notice of the court. A decision or judgment can also be per incuriam if it is not possible to reconcile its ratio with that of a previously pronounced judgment of a co-equal or larger Bench. There can be no scintilla of doubt that an earlier decision of co-equal Bench binds the Bench of same strength. Though the judgment in *Rajesh* case was delivered on a later date, it had not apprised itself of the law stated in *Reshma Kumari* but had been guided by *Santosh Devi*. We have no hesitation that it is not a binding precedent on the co-equal Bench.”

21. It can thus be seen that, this Court in unequivocal terms has held that an earlier decision of a Bench of particular strength would be binding on the subsequent Benches of this Court having the same or lesser number of judges.
22. While considering the rule of *per incuriam*, the Constitution Bench of this Court has held that a decision or judgment can be said to be *per incuriam* if it is not possible to reconcile its ratio with that of a previously pronounced judgment of a co-equal or larger Bench.

**Banwari and Others v. Haryana State Industrial and Infrastructure Development Corporation Limited(HSIIDC) and Another**

23. In any case, the judgment in *Pradeep Kumari and Others* (supra) has been rendered by three learned Judges of this Court after considering the relevant provisions of the Statute and the principles of interpretation. However, the judgment in the case of *Ramsinghbhai (Ramsanghbhai) Jerambhai* (supra) is a short judgment only referring to the text of Section 28-A(1) of the 1894 Act.
24. As already discussed hereinabove, the provisions of Section 28-A(1) of the 1894 Act have been elaborately considered by a three Judges Bench of this Court in the case of *Pradeep Kumari and Others* (supra). In the said case, it has been held that the Statement of Objects and Reasons of Section 28-A would reveal that the object underlying the enactment of the said provision is to remove inequality in the payment of compensation for same or similar quality of land. It has been held that the said provision is for giving benefit to inarticulate and poor people not being able to take advantage of the right of reference to the civil court under Section 18 of the Act. It has been held that this is sought to be achieved by providing an opportunity to all aggrieved parties whose land is covered by the same notification to seek redetermination once any of them has obtained orders for payment of higher compensation from the reference court under Section 18 of the Act. The same benefit would be available to the other landholders under Section 28-A. It has been held that Section 28-A being a beneficent legislation enacted in order to give relief to the inarticulate and poor people, the principle of interpretation which would be required to be adopted is the one which advances the policy of the legislation to extend the benefit rather than a construction which has the effect of curtailing the benefit conferred by it.
25. We are, therefore, inclined to allow the appeal. The impugned judgment and order of the High Court dated 25<sup>th</sup> November 2021 is quashed and set aside and the order of the LAC dated 15<sup>th</sup> September 2020 is upheld.
26. Pending application(s), if any, shall stand disposed of.

*Result of the case:* Appeal allowed.

<sup>†</sup>Headnotes prepared by: Nidhi Jain

**State of Maharashtra & Ors.**  
v.  
**Pradeep Yashwant Kokade & Anr.**

(Criminal Appeal No. 2831 of 2023)

09 December 2024

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

**Issue for Consideration**

Effect of delay in executing the death sentence.

**Headnotes<sup>†</sup>**

**Sentence – Death sentence – Inordinate, unexplained delay in execution of – Delay in processing, disposal of mercy petitions and issue of warrant of execution of the death sentence – High Court commuted the death sentence of the convicts to thirty-five years of imprisonment holding that there was an undue and avoidable delay in executing the death sentence – Challenge to:**

**Held:** Impugned judgment upheld – An inordinate and unexplained delay caused by circumstances beyond the prisoners' control mandates the commutation of a death sentence – When the delay from the date of filing of mercy petitions till the date of issue of a warrant of execution is inordinate and unexplained, the right of the convicts guaranteed by Article 21 is violated – The time consumed from the filing of mercy petitions before the Hon'ble Governor to the date of issue of the execution of warrants by the Sessions Court is of three years, eleven months and fourteen days – On facts, time was consumed from 10<sup>th</sup> July 2015 till 10<sup>th</sup> April 2019 in deciding the mercy petitions filed before the Hon'ble Governor of the State and the Hon'ble President of India, and in issuing warrants for executing the death sentence – There has been an undue, unexplained and inordinate delay at all three stages – Undue delays occurred in placing the mercy petitions before the Hon'ble Governor for the State and the Hon'ble President of India which delay was on the part of the executive and not on the part of the Constitutional functionaries – When the mercy petitions

---

\* Author

**State of Maharashtra & Ors. v. Pradeep Yashwant Kokade & Anr.**

were pending, the Sessions Court could not have issued a warrant to execute the death sentence – Sessions Court ought to have acted upon the several letters from the Prison and issued notice to the State Government however, that was not done – High Court rightly held that there was a violation of the rights of the convicts guaranteed u/Article 21 – Commutation of the death sentence to a fixed term sentence of thirty-five years cannot be faulted with. [Paras 34-36, 42]

**Directions by Supreme Court – Death Sentence – Administrative delays in dealing with mercy petitions or execution of death penalty – Directions/Guidelines issued to State Governments, Union Territories and Sessions Court to curb the delays – Code of Criminal Procedure, 1973 – ss.413, 414:**

**Held:** A dedicated cell to be constituted by the Home Department or the Prison Department of the State Governments/Union Territories for dealing with mercy petitions, which shall be responsible for the prompt processing of the mercy petitions within the time frame laid down by the respective governments – An officer-in-charge of the dedicated cell shall be nominated by designation who shall receive and issue communications on behalf of the dedicated cell – An official of the Law and Judiciary or Justice Department of the State Governments/Union Territories should be attached to the dedicated cell – All the prisons to be informed about the designation of the officer-in-charge of the dedicated cell and his address and email ID – Further, as soon as the Superintendent of Prison/officer-in-charge receives the mercy petitions, he shall immediately forward the copies thereof to the dedicated cell and call for the details/information, as stated, from the officer-in-charge of the concerned Police Station and/or the concerned investigation agency – On receipt of the request made by the jail authorities, the officer-in-charge of the concerned police station shall furnish the said information to the jail authorities immediately – On receipt of the said information, without any delay, the jail authorities shall forward the documents as enumertaed to the officer-in-charge of the dedicated cell and the Secretary of the Home Department of the State Government – As soon as mercy petitions are received by the dedicated cell, copies thereof shall be forwarded to the Secretariats of the Hon'ble Governor of the State or the Hon'ble President of India, as the case may be so that the Secretariat can initiate action at their end – All correspondence, as far as possible,

**Digital Supreme Court Reports**

be made by email, unless confidential – State Government to issue office orders/executive orders containing guidelines for dealing with the mercy petitions in terms of the present judgment – Guidelines to be followed by Sessions Court, enumerated – Directions issued by the Allahabad High Court in People's Union for Democratic Rights (PUDR) v. Union of India & Ors., further elaborated. [Para 43]

**Sentence – Death Sentence – Inordinate, unexplained delay in execution – Effect – Constitution of India – Articles 21, 32, 226 – Code of Criminal Procedure, 1973 – ss.413, 414:**

**Held:** Undue, unexplained and inordinate delay in execution of the sentence of death will entitle the convict to approach this Court under Article 32 – However, this Court will only examine the nature of the delay caused and circumstances that ensued after the judicial process finally confirmed the sentence and will have no jurisdiction to reopen the conclusions reached by the Court while finally maintaining the sentence of death – This Court, however, may consider the question of inordinate delay in the light of all circumstances of the case to decide whether the execution of sentence should be carried out or should be commuted to imprisonment for life – While exercising its jurisdiction under Article 32 r/w Article 21, this Court must consider the effect of inordinate delay in disposal of the clemency petition by the highest Constitutional authorities and cannot excuse the agonising delay caused only on the basis of the gravity of the crime – Article 21 does not end with the pronouncement of the sentence but extends to the stage of execution of that sentence – An inordinate delay in the execution of the sentence of death has a dehumanising effect on the accused – An inordinate and unexplained delay caused by circumstances beyond the prisoners' control mandates the commutation of a death sentence – The aforesaid principles will also apply to a case where there is a long and unexplained delay on the part of the Sessions Court in issuing the warrant of execution in accordance with Section 413 or Section 414, CrPC – A convict can also invoke the jurisdiction of High Court under Article 226 in the event there is an inordinate and unexplained delay in the execution of the death sentence, post confirmation of the sentence – Furthermore, it is the duty of the Executive to promptly process the mercy petitions invoking Articles 72 or 161 of the Constitution and forward the petitions along with requisite documents to the concerned constitutional functionary without

## **State of Maharashtra & Ors. v. Pradeep Yashwant Kokade & Anr.**

undue delay – Bhartiya Nagarik Suraksha Sanhita, 2023 – ss.453, 454. [Para 42]

**Sentence – Death sentence – Delay in execution – “Inordinate”/“undue” delay – Length of delay whether inordinate:**

**Held:** Terms “undue” or “inordinate” cannot be interpreted by applying the rules of mathematics – No hard and fast rule can be laid down as regards the length of delay, which can be said to be inordinate – What delay is inordinate depends on the facts of the case. [Para 42]

### **Case Law Cited**

*Triveniben v. State of Gujarat* [\[1989\] 1 SCR 509](#) : (1989) 1 SCC 678 – followed.

*T.V. Vatheeswaran v. State of Tamil Nadu* [\[1983\] 2 SCR 348](#) : (1983) 2 SCC 68; *Sher Singh & Ors. v. State of Punjab* [\[1983\] 2 SCR 582](#) : (1983) 2 SCC 344; *Shatrughan Chauhan & Anr. v. Union of India & Ors.* [\[2014\] 1 SCR 609](#) : (2014) 3 SCC 1; *Ajay Kumar Pal v. Union of India & Anr* [\[2014\] 12 SCR 441](#) : (2015) 2 SCC 478; *Mukesh v. Union of India & Ors.* [\[2020\] 1 SCR 761](#) : (2020) 16 SCC 424; *B.A. Umesh v. Union of India & Ors* [\[2022\] 8 SCR 628](#) : 2022 SCC OnLine SC 1528; *Vinay Sharma v. Union of India & Ors* [\[2020\] 10 SCR 393](#) : (2020) 4 SCC 391; *Shabnam v. Union of India* [\[2015\] 8 SCR 289](#) : (2015) 6 SCC 702 – referred to.

*People’s Union for Democratic Rights (PUDR) v. Union of India & Ors.* 2015 SCC OnLine All 143 – referred to.

### **List of Acts**

Constitution of India; Code of Criminal Procedure, 1973; Bhartiya Nagarik Suraksha Sanhita, 2023.

### **List of Keywords**

Death penalty/sentence; Confirmation of the death penalty/sentence; ‘Rarest of the rare case’; Delay in execution of the sentence of death; Undue, unexplained, avoidable, inordinate delay; Effect of delay in executing the death sentence; Commutation of death sentence; Death sentence commuted to thirty-five years of imprisonment; Warrant to execute the death

## Digital Supreme Court Reports

sentence; Circumstances beyond prisoners' control; Right of the convicts guaranteed by Article 21 violated; Delay in issuing warrants for executing the death sentence; "Inordinate"/"undue" delay; Length of delay; Review/curative petitions; Mercy petitions; Mercy petitions before the Hon'ble Governor for the State and the Hon'ble President of India; Duty of the Sessions Court; Issue of the execution of warrants by the Sessions Court; Delay on the part of the executive; Duty of the executive; Constitutional functionaries; Administrative delays in dealing with the mercy petitions or issuing warrants for execution of death sentence; Solitary confinement; Directions/Guidelines; Dedicated cell; Rights of the victims; Prison authorities.

### Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 2831 of 2023

From the Judgment and Order dated 29.07.2019 of the High Court of Judicature at Bombay in WP No. 2607 of 2019

With

Criminal Appeal No. 2832 of 2023

### Appearances for Parties

Shreeyash Lalit, Aaditya Aniruddha Pande, Siddharth Dharmadhikari, Bharat Bagla, Sourav Singh, Aditya Krishna, Ms. Preet S. Phanse, Adarsh Dubey, Ms. Runjhun Garg, Advs. for the Appellants.

Ms. Swarupama Chaturvedi, Sr. Adv., Ms. Payoshi Roy, Yug Chaudhary, Siddhartha, S.Prabu Ramasubramanian, Bharathimohan M., Vairawan A.S, Vinayak Sharma, Kritagya Kumar Kait, Sarthak Karol, Arvind Kumar Sharma, Advs. for the Respondents.

### Judgment / Order of the Supreme Court

#### Judgment

**Abhay S. Oka, J.**

1. The main question involved in these appeals is about the effect of delay in executing the death sentence.

**State of Maharashtra & Ors. v. Pradeep Yashwant Kokade & Anr.****FACTUAL ASPECTS**

2. The deceased was employed in a company as an Associate. The deceased was required to attend the night shift between 11:00 pm and 09:00 am. On 1<sup>st</sup> November 2007, one Purushottam Dasrath Borate (Convict no.2) was scheduled to pick up the deceased from her residence at 10:30 pm. Convict no.2 was the driver of the cab hired by the employer of the deceased. As per usual practice, Convict no.2 gave a missed call to the deceased. After receiving the missed call, the deceased came down. After picking up the deceased, Convict no.2 was supposed to pick up one Sagar Bidkar, an employee of the same company. Though Sagar repeatedly called Convict no.2, there was no response. At about 12:45 am, Convict no.2 came to pick up Sagar. When Sagar sat in the vehicle, one Pradeep Yashwant Kokade (Convict no.1/Respondent no.1) was already occupying the car's rear seat. Convict no.1 introduced convict no.2 to Sagar as his friend. Before the vehicle reached the company's office, Convict no.1 alighted from the car. Convict no.2 requested Sagar to endorse in the company's record that the delay was due to the puncture of a tyre in the vehicle.
3. On the morning of 2<sup>nd</sup> November 2007, when the deceased did not return home, her sister enquired with the office of the deceased. She was told that the deceased had not reported for duty. The deceased's sister lodged a missing person report with the local Police Station. The body of the deceased was found on the morning of 2<sup>nd</sup> November 2007. In the postmortem report, the cause of death was stated as shock and haemorrhage due to grievous injuries to the vital organs. There was a fracture of the skull involving the frontal, left temporal, and parietal bones with a laceration to the brain. Rib nos.2, 3 and 4 were fractured and the right lung was ruptured. The postmortem report recorded that the deceased was raped before her death. On 3<sup>rd</sup> November 2007, both the convicts were taken into judicial custody. By the judgment dated 20<sup>th</sup> March 2012, the learned Sessions Judge, Pune, convicted both the convicts for the offences punishable under Sections 302, 376(2)(g), 364, and 404, read with Section 120-B of the Indian Penal Code, 1860 (for short, 'the IPC'). Both the convicts were sentenced to death. The proceedings were sent to the High Court of Judicature at Bombay in accordance with Section 366 of the Code of Criminal Procedure, 1973 (for short, 'the CrPC') for confirmation of the death penalty.

**Digital Supreme Court Reports**

By the judgment dated 25<sup>th</sup> September 2012, the High Court held that the case of the convicts was falling in the category of 'rarest of the rare case'. Therefore, the High Court proceeded to confirm the death sentence. This Court also confirmed the death sentence by the judgment dated 8<sup>th</sup> May 2015.

4. On 29<sup>th</sup> May 2015, the Superintendent of Yerawada Central Prison, Pune (for short, 'the Superintendent of Prison') informed the Registrar of this Court that the contents of the judgment dated 8<sup>th</sup> May 2015 of this Court had been explained to the convicts in the language known to them. On 1<sup>st</sup> June 2015, the convicts gave a statement to the jail officers that they were desirous of filing a review petition before this Court. The decision was informed to the Home Department, Government of Maharashtra on 2<sup>nd</sup> June 2015, by a letter issued by the Superintendent of Prison. On 10<sup>th</sup> July 2015, the convicts filed mercy petitions addressed to the Hon'ble Governor of the State of Maharashtra. On 16<sup>th</sup> July 2015, the Superintendent of Prison forwarded the mercy petitions to the Principal Secretary of the Home Department, Government of Maharashtra. On 17<sup>th</sup> August 2015, the Home Department, Government of Maharashtra, addressed a letter to the Superintendent of Prison to verify whether the convicts had filed any review petition before this Court. On 22<sup>nd</sup> August 2015, the convicts confirmed to the Superintendent of Prison that they had not filed any review petition. The Superintendent of Prison communicated this fact to the Home Department, State of Maharashtra, vide a letter dated 24<sup>th</sup> August 2015. Even the Office of the Additional Director General of Police and Inspector General of Prisons (for short, 'the ADG (Prisons)') addressed a similar communication on 26<sup>th</sup> August 2015, confirming that the convicts had filed no review petition.
5. Five months after receiving the mercy petitions, on 25<sup>th</sup> January 2016, a note was prepared by the Section Officer of the Home Department, State Government for the benefit of the Hon'ble Governor. Pursuant to the letter dated 17<sup>th</sup> July 2015 sent by the ADG (Prisons), the Superintendent of Prison by his letter dated 27<sup>th</sup> January 2016, forwarded necessary factual details to the Principal Secretary of the Home Department along with a copy of the judgment of conviction of the Sessions Court. On 1<sup>st</sup> February 2016, the Superintendent of Prison requested the Senior Inspector of Police of the concerned Police Station to supply English translations of the police diary, a short crime history in English, copies of FIR, dying declaration and a

**State of Maharashtra & Ors. v. Pradeep Yashwant Kokade & Anr.**

copy of the charge and reason for commitment. On 29<sup>th</sup> March 2016, the Hon'ble Governor rejected the mercy petitions. A communication to that effect was issued by the Deputy Secretary to the Hon'ble Governor to the Additional Chief Secretary of the Home Department, Government of Maharashtra by a letter dated 29<sup>th</sup> March 2016. On 9<sup>th</sup> April 2016, the Superintendent of Prison received a letter dated 6<sup>th</sup> April 2016 from the Home Department, Government of Maharashtra, informing about the rejection of the mercy petitions. According to the case of the appellant state of Maharashtra, the Hon'ble Governor's rejection of the mercy petitions was communicated to the convicts on the same day.

6. Convict no.1 intimated his desire to file a mercy petition before the Hon'ble President of India. This desire was recorded in the statement of Convict no.1 dated 11<sup>th</sup> April 2016 by the prison officials. After that, there was correspondence exchanged by the ADG (Prisons), the Superintendent of Prison, the concerned Police Station, the State Government, etc., between 13<sup>th</sup> April 2016 and 31<sup>st</sup> May 2016.
7. On 11<sup>th</sup> June 2016, relatives of the convicts submitted fresh mercy petitions before the Hon'ble President of India. On 15<sup>th</sup> June 2016 and 22<sup>nd</sup> July 2016, the Under Secretary (Judicial), Ministry of Home Affairs, Government of India (for short, 'Under Secretary (GOI)') issued letters of request to the Principal Secretary, Home Department, Government of Maharashtra for the supply of documents. On 9<sup>th</sup> August 2016, the Under Secretary, Home Department, Government of Maharashtra addressed a letter to the ADG (Prisons) and the Superintendent of Prison to supply information regarding the past criminal history of the convicts, the economic condition of the families of convicts and the filing of any review petitions by the convicts. On 5<sup>th</sup> September 2016, the Superintendent of Prison addressed a letter to the concerned Police Station requesting information regarding the past criminal history and economic condition of the family of convicts. The Under Secretary (GOI) addressed a reminder on 6<sup>th</sup> September 2016 to the Home Department, Government of Maharashtra, requesting to supply the documents. On 9<sup>th</sup> September 2016, the Superintendent of Prison confirmed by addressing a letter to the Home Department, Government of Maharashtra, that the convicts had not filed review petitions. On 12<sup>th</sup> September 2016, the concerned Police Station forwarded to the Home Department, Government of Maharashtra, the details regarding the criminal history and economic condition of

**Digital Supreme Court Reports**

the convicts. On 30<sup>th</sup> September 2016, the Home Department of the State Government addressed a letter to the Under Secretary (GOI) giving information about the criminal history and economic condition of the convicts and filing of review petitions by the convict. On 26<sup>th</sup> December 2016, the Under Secretary (GOI) addressed a letter to the Home Department, Government of Maharashtra, for confirmation regarding the decision of the convicts not to file review petitions. This information was sought by the Home Department, Government of Maharashtra, by the letter dated 16<sup>th</sup> January 2017 from the ADG (Prisons) and the Superintendent of Prison. Accordingly, on 21<sup>st</sup> January 2017, statements of the convicts were recorded in which they stated that though they intended to file review petitions, the same have not been filed. This information was furnished by the Offices of Superintendent of Prison and the ADG (Prisons) to the Home Department of the State Government in separate letters dated 23<sup>rd</sup> January 2017 and 7<sup>th</sup> February 2017, respectively. On 22<sup>nd</sup> February 2017, the Home Department, Government of Maharashtra, informed the Under Secretary (Judicial), Home Department, Government of India, confirming that the convicts intended to file review petitions. The said letter recorded that both the convicts had decided to file review petitions after the decision of the Hon'ble President of India on the mercy petitions. The Hon'ble President on 26<sup>th</sup> May 2017 rejected the mercy petitions. This information was submitted by the Under Secretary, Ministry of Home Affairs, Government of India, to the Principal Secretary, Home Department, Government of Maharashtra, in a letter dated 6<sup>th</sup> June 2017. By separate letters dated 19<sup>th</sup> June 2017 addressed to the family members of the convicts and the learned Sessions Judge, Pune, the Superintendent of Prison informed them about the rejection of the mercy petitions.

8. On 10<sup>th</sup> August 2017, the Superintendent of Prison addressed a letter to the learned Sessions Judge, Pune, requesting him to issue a warrant for the execution of the death sentence. On 24<sup>th</sup> August 2017, the Superintendent of Prison addressed a letter to the Registrar of this Court requesting him to provide information about any review petition filed by the convicts. By a letter dated 9<sup>th</sup> September 2017, the Registrar of this Court communicated to the Superintendent of Prison that no review petitions were filed by the convicts. On 5<sup>th</sup> October 2017, 18<sup>th</sup> July 2018 and 29<sup>th</sup> August 2018, letters were addressed by the Superintendent of Prison to the

**State of Maharashtra & Ors. v. Pradeep Yashwant Kokade & Anr.**

learned Sessions Judge, Pune, requesting him to issue a warrant of execution of the death sentence. On 17<sup>th</sup> October 2018, a letter was sent by the ADG (Prisons) to the learned Sessions Judge, Pune, requesting him to fix a date for the execution of the death sentence. As no action was taken by the Sessions Court, Pune, the Home Department of the Government of Maharashtra on 30<sup>th</sup> October 2018, addressed a letter to the Law and Judiciary Department of the State Government making a query whether the Home Department could proceed with the execution of death sentence in accordance with the provisions of the Maharashtra Prison Manual. By the letter dated 12<sup>th</sup> November 2018, the Law and Judiciary Department of the State Government informed the Home Department of the State Government that the exclusive jurisdiction to issue warrants for executing the death sentence was of the learned Sessions Court. Meanwhile, on 2<sup>nd</sup> November 2018, the learned Sessions Judge, Pune, addressed a letter to the Home Department, Government of Maharashtra, seeking information about the status of mercy petitions. On 7<sup>th</sup> December 2018 and 27<sup>th</sup> December 2018, the ADG (Prisons) and the Superintendent of Prison addressed letters to the learned Sessions Court, Pune, requesting him to fix a date for executing the death sentence. On 31<sup>st</sup> January 2019, the Home Department of the State Government wrote a letter to the ADG (Prisons) and the Superintendent of Prison informing them about the letter dated 2<sup>nd</sup> November 2018 sent by the learned Sessions Court, Pune. On 10<sup>th</sup> April 2019, warrants for the execution of the death sentence were issued by the Sessions Court, Pune.

**GROUNDS OF CHALLENGE BEFORE THE HIGH COURT**

9. On 2<sup>nd</sup> May 2019, the convicts filed separate writ petitions before the High Court. A prayer was made in the petitions for quashing the warrants of execution of the death sentence, *inter alia*, on the following grounds:
  - i. Inordinate and unexplained delay in execution of death sentence on the part of the State Government as well as the Sessions Court, Pune;
  - ii. Inordinate and unexplained delay in deciding mercy petitions;
  - iii. The convicts were kept in solitary confinement during the pendency of the appeals before this Court as well as the

**Digital Supreme Court Reports**

- mercy petitions before the Hon'ble Governor of the State of Maharashtra and the Hon'ble President of India;
- iv. Rejection of mercy petitions was illegal on account of non-application of mind due to non-placement of relevant information before the concerned authorities; and,
  - v. The Sessions Court, Pune, issued death warrants without notice to the convicts or their family members.
10. Counter affidavits were filed in the writ petitions before the High Court by various officers. By the impugned judgment dated 29<sup>th</sup> July 2019, the High Court held that there was an undue and avoidable delay in executing the death sentence. Moreover, the convicts were kept in solitary confinement from 20<sup>th</sup> March 2012. Therefore, the High Court proceeded to commute the death sentence to life imprisonment for a total period of thirty-five years. The warrants for the execution of the death sentence issued by the learned Sessions Court, Pune, were set aside.

**SUBMISSIONS**

11. Mr Shreeyash Lalit, the learned counsel representing the appellants, made detailed submissions. He referred to a decision of this Court in the case of T.V. Vatheeswaran v. State of Tamil Nadu.<sup>1</sup> He also pointed out a decision of the three Judge Bench of this Court in the case of Sher Singh & Ors. v. State of Punjab.<sup>2</sup> He pointed out that in the case of T.V. Vatheeswaran,<sup>1</sup> it was held that a delay beyond two years in the execution of the death sentence was enough to commute the death sentence to life imprisonment. However, in the case of Sher Singh & Ors,<sup>2</sup> it was held that a delay of two years is not enough for the commutation of a death sentence. Ultimately, this conflict was resolved by a decision by the Constitution Bench of this Court in the case of Triveniben v. State of Gujarat.<sup>3</sup> He also pointed out various decisions of this Court in the cases of Shatrughan Chauhan & Anr. v. Union of India & Ors.,<sup>4</sup> Ajay Kumar Pal v.

1 [1983] 2 SCR 348 : (1983) 2 SCC 68

2 [1983] 2 SCR 582 : (1983) 2 SCC 344

3 [1989] 1 SCR 509 : (1989) 1 SCC 678

4 [2014] 1 SCR 609 : (2014) 3 SCC 1

**State of Maharashtra & Ors. v. Pradeep Yashwant Kokade & Anr.**

*Union of India & Anr*,<sup>5</sup> *Mukesh v. Union of India & Ors.*<sup>6</sup> and *B.A. Umesh v. Union of India & Ors.*<sup>7</sup> He submitted that though undue delay in the execution of a death sentence will entitle convicts to seek commutation, no fixed period of delay can be laid down as a criterion for commutation. He submitted that in such a case, the twin test must be satisfied. The first test is whether there was an avoidable delay. The second test is whether the quantum of delay was unduly long or inordinate, which must warrant the commutation of a death sentence to life imprisonment. The learned counsel urged that both the tests must be satisfied to make out a case for commutation of a death sentence. He submitted that neither of these two tests alone would be sufficient to commute the death sentence.

12. The learned counsel submitted that the High Court has committed an error by holding that the quantum of delay is not material. He submitted that the delay has to be inordinate and, therefore, the quantum of delay is very material. He submitted that the time consumed for the disposal of mercy petitions by the Hon'ble Governor and the Hon'ble President of India was from 10<sup>th</sup> July 2015 to 26<sup>th</sup> May 2017, which is about one year and ten months. His submission is that this delay cannot be held to be inordinate or unexplained. He submitted that, in any case, there is an explanation for the delay. He submitted that there was some delay as time was required to ascertain whether the convicts wanted to file review petitions. He submitted that the time taken of a few months to prepare a note for presenting it to the Hon'ble Governor could not be said to be unreasonable as it required scanning of voluminous records. Even the time of three months taken by the Hon'ble Governor cannot be said to be unreasonable.
13. As regards the delay in the disposal of mercy petitions by the Hon'ble President of India, he submitted that the time of five months was consumed in getting information on the criminal antecedents and economic condition of the convicts. Time of about four months or more was required to get the information on the issue of convicts filing review petitions before this Court. The Hon'ble President of India took about four months to decide on the mercy petitions, which is not at all long or inordinate considering the fact that the issue was the

5 [2014] 12 SCR 441 : (2015) 2 SCC 478

6 [2020] 1 SCR 761 : (2020) 16 SCC 424

7 [2022] 8 SCR 628 : 2022 SCC OnLine SC 1528

**Digital Supreme Court Reports**

life and death of the convicts. He submitted that in the case of B.A. Umesh,<sup>7</sup> the delay of two years and three months in the disposal of the mercy petition was held as not excessive.

14. The learned counsel submitted that the major delay is on the part of the Sessions Court in issuing the warrants of execution of the death sentence. He submitted that on 19<sup>th</sup> June 2017, the Superintendent of Prison had communicated to the Sessions Court about the Hon'ble President of India's rejection of the mercy petitions. There was an exchange of correspondence by the Government Officers with the Sessions Court, and only on 10<sup>th</sup> April 2019 were warrants issued for the execution of the death sentence issued by the Sessions Court. He submitted that in view of the decision of the Constitution Bench in the case of Triveniben,<sup>3</sup> only the delay caused by the executive could be taken into consideration to decide whether there was any violation of Article 21 of the Constitution of India.
15. As regards the finding of the High Court on keeping the convicts in solitary confinement before rejection of mercy petitions, the learned counsel pointed out that in the affidavit of the Superintendent of Prison, it was pointed out that the convicts were kept in a security yard wherein they were allowed to access the veranda and interact with other prisoners from 06:00 am to 06:30 pm. He pointed out that there was a fan and light bulb in their cell. In their room, there was usually more than one inmate. Moreover, they had access to an open ground. He, therefore, submitted that in view of the law laid down by this Court in the case of Vinay Sharma v. Union of India & Ors,<sup>8</sup> it cannot be said that the convicts were kept in solitary confinement.
16. The learned counsel submitted that in the execution warrants, more than a reasonable period was provided from the date of warrants till the date of execution. Copies of the warrants were immediately supplied to the convicts. He submitted that merely because the convicts were not brought before the Sessions Court while proceeding with issuance of warrants, this lapse by itself, was not sufficient to commute the sentence to life imprisonment. The learned counsel also made suggestions for issuing guidelines for effective compliance with Sections 413 and 414 of the CrPC corresponding to Sections 453 and

**State of Maharashtra & Ors. v. Pradeep Yashwant Kokade & Anr.**

454 of the Bhartiya Nagarik Suraksha Sanhita, 2023 (for short, 'the BNSS'). In short, the submission of the learned counsel appearing for the appellants is that there was no warrant for commuting the death sentence.

17. Ms. Payoshi Roy, the learned counsel representing the respondents-convicts submitted that as held by this Court in the case of *Sher Singh & Ors.*<sup>2</sup>, Article 21 of the Constitution of India inheres in every person till his last breath. The learned counsel submitted that unreasonable delay in adjudicating upon the mercy petitions makes the punishment barbaric and, hence, unconstitutional. She submitted that, in fact, avoidable delay in deciding the mercy petitions violates constitutional due process, which includes fair, just and reasonable procedure. The learned counsel relied upon the observations made by this Court in the cases of *Sher Singh & Ors.*<sup>2</sup> and *Ajay Kumar Pal*.<sup>5</sup> The learned counsel submitted that the executive authorities should follow a self-imposed rule that every mercy petition must be disposed of within three months. The delay beyond a period of three months must be, *prima facie*, presumed to be excessive, which puts the burden on the State Government to explain the delay. She submitted that no fixed length of delay can be determinative, and, in that context, the High Court observed that the quantum of delay is not material. She pointed out that the total delay in execution of the death sentence, in this case, starting from the date of filing of mercy petitions till the date of issuance of execution warrants, was three years, eleven months and fifteen days.
18. The learned counsel for the convicts submitted that the poor economic condition of the convicts was not considered by the Hon'ble Governor of the State of Maharashtra and the Hon'ble President of India. Even the fact of relatively young ages of the convicts has not been considered while deciding the mercy petitions. In the facts of the case, delay post the rejection of the mercy petitions will have to be treated as executive delay as there was a gross delay in doing the ministerial act of issuing execution warrants.
19. The learned counsel also submitted that the finding of the High Court regarding keeping the convicts in solitary confinement is just and proper, and no interference is called for with that finding.

**Digital Supreme Court Reports****CONSIDERATION****LEGAL POSITION**

20. Law on the subject has been laid down in the case of *Triveniben*<sup>3</sup> by a Constitution Bench. G.L. Oza, J. rendered the main opinion for himself and on behalf of three other Hon'ble Judges. The controversy which led to a reference to the Constitution Bench has been set out in the majority judgment in paragraphs 1, 2 and 3, which read thus:

“1. These matters came up before us because of the conflict in the two decisions of this Court: (i) *T.V. Vatheeswaran v. State of T.N.* [(1983) 2 SCC 68: 1983 SCC (Cri) 342 : (1983) 2 SCR 348], *Sher Singh v. State of Punjab* [(1983) 2 SCC 344 : 1983 SCC (Cri) 461 : (1983) 2 SCR 582] and observations in the case of *Javed Ahmed Abdul Hamid Pawala v. State of Maharashtra* [(1985) 1 SCC 275: 1984 SCC (Cri) 653 : (1985) 2 SCR 8]. In *Vatheeswaran* case [(1983) 2 SCC 68 : 1983 SCC (Cri) 342 : (1983) 2 SCR 348] a Bench of two Judges of this Court held that two years delay in execution of the sentence after the judgment of the trial court will entitle the condemned prisoner to ask for commutation of his sentence of death to imprisonment for life. The court observed that: [SCC p. 79 : SCC (Cri) p. 353, para 21]

**‘Making all reasonable allowance for the time necessary for appeal and consideration of reprieve, we think that delay exceeding two years in the execution of a sentence of death should be considered sufficient to entitle the person under sentence of death to invoke Article 21 and demand the quashing of the sentence of death.’**

2. In *Sher Singh* case [(1983) 2 SCC 344 : 1983 SCC (Cri) 461 : (1983) 2 SCR 582] which was a decision of a three-Judges' Bench it was held that a condemned prisoner has a right of fair procedure at all stages, trial, sentence and incarceration but delay alone is not good enough for commutation and two years rule could not be laid down in cases of delay. It was held that the court in the context of the nature of offence and delay could consider the question

**State of Maharashtra & Ors. v. Pradeep Yashwant Kokade & Anr.**

of commutation of death sentence. The court observed:  
[SCC p. 356 : SCC (Cri) p. 473, para 19]

**'Apart from the fact that the rule of two years runs in the teeth of common experience as regards the time generally occupied by proceedings in the High Court, the Supreme Court and before the executive authorities, we are of the opinion that no absolute or unqualified rule can be laid down that in every case in which there is a long delay in the execution of a death sentence, the sentence must be substituted by the sentence of life imprisonment.** There are several other factors which must be taken into account while considering the question as to whether the death sentence should be vacated. A convict is undoubtedly entitled to pursue all remedies lawfully open to him to get rid of the sentence of death imposed upon him and indeed, there is no one, be he blind, lame, starving or suffering from a terminal illness, who does not want to live.'

It was further observed: [SCC p. 357 : SCC (Cri) p. 474, para 20]

'Finally, and that is no less important, the nature of the offence, the diverse circumstances attendant upon it, its impact upon the contemporary society and the question whether the motivation and pattern of the crime are such as are likely to lead to its repetition, if the death sentence is vacated, are matters which must enter into the verdict as to whether the sentence should be vacated for the reason that its execution is delayed. The substitution of the death sentence by a sentence of life imprisonment cannot follow by the application of the two years' formula, as a matter of quod erat demonstrandum.'

3. In Javed case [(1985) 1 SCC 275 : 1984 SCC (Cri) 653 : (1985) 2 SCR 8] it was observed that the condemned man who had suffered more than two years and nine months and was repenting and there was nothing adverse against him

**Digital Supreme Court Reports**

in the jail records, this period of two years and nine months with the sentence of death heavily weighing on his mind will entitle him for commutation of sentence of death into imprisonment for life. **It is because of this controversy that the matter was referred to a five-Judges' Bench and hence it is before us."**

(emphasis added)

Ultimately, in paragraph 23, the Constitution Bench held thus:

**"23.** So far as our conclusions are concerned we had delivered our order on 11-10-1988 and we had reserved the reasons to be given later. Accordingly in the light of the discussions above our conclusion is as recorded in our order dated 11-10-1988 [*Triveniben v. State of Gujarat*, (1988) 4 SCC 574 : 1989 SCC (Cri) 25], reproduced below: [SCC p. 576: SCC (Cri) pp. 26-27, para 2]

**'Undue long delay in execution of the sentence of death will entitle the condemned person to approach this Court under Article 32 but this Court will only examine the nature of delay caused and circumstances that ensued after sentence was finally confirmed by the judicial process and will have no jurisdiction to reopen the conclusions reached by the court while finally maintaining the sentence of death. This Court, however, may consider the question of inordinate delay in the light of all circumstances of the case to decide whether the execution of sentence should be carried out or should be altered into imprisonment for life. No fixed period of delay could be held to make the sentence of death inexecutable and to this extent the decision in *Vatheeswaran* case [(1983) 2 SCC 68 : 1983 SCC (Cri) 342 : (1983) 2 SCR 348] cannot be said to lay down the correct law and therefore to that extent stands overruled."**

(emphasis added)

In paragraph 16, the Constitution Bench held that while considering the delay, the period consumed in the judicial process culminating

**State of Maharashtra & Ors. v. Pradeep Yashwant Kokade & Anr.**

in confirmation of the death sentence should not be considered. K. Jagannatha Shetty, J, rendered a concurring opinion. In paragraphs 75 and 76 of his opinion, it was observed thus:

**“75. As between funeral fire and mental worry, it is the latter which is more devastating, for, funeral fire burns only the dead body while the mental worry burns the living one. This mental torment may become acute when the judicial verdict is finally set against the accused. Earlier to it, there is every reason for him to hope for acquittal. That hope is extinguished after the final verdict. If, therefore, there is inordinate delay in execution, the condemned prisoner is entitled to come to the court requesting to examine whether it is just and fair to allow the sentence of death to be executed.**

**76. What should be done by the court is the next point for consideration. It is necessary to emphasise that the jurisdiction of the court at this stage is extremely limited. If the court wants to have a look at the grievance as to delay, it is needless to state, that there should not be any delay either in listing or in disposal of the matter. The person who complains about the delay in the execution should not be put to further delay. The matter, therefore, must be expeditiously and on top priority basis, disposed of. The court while examining the matter, for the reasons already stated, cannot take into account the time utilised in the judicial proceedings up to the final verdict. The court also cannot take into consideration the time taken for disposal of any petition filed by or on behalf of the accused either under Article 226 or under Article 32 of the Constitution after the final judgment affirming the conviction and sentence. The court may only consider whether there was undue long delay in disposing of mercy petition; whether the State was guilty of dilatory conduct and whether the delay was for no reason at all. The inordinate delay, may be a significant factor, but that by itself cannot render the execution unconstitutional. Nor it can be divorced from the dastardly and diabolical circumstances of the crime itself. The court has still to consider as observed in Sher Singh case [(1983) 2 SCC**

**Digital Supreme Court Reports**

344 : 1983 SCC (Cri) 461 : ([1983\) 2 SCR 582](#)] : [SCR p. 596 : SCC p. 357 : SCC (Cri) p. 474, para 20]"

(emphasis added)

21. Thereafter, a Bench of three Hon'ble Judges in the case of *Shatrughan Chauhan & Anr.*<sup>4</sup> dealt with the same issue. Paragraphs 44 to 49 of the decision are material, which read thus:

**"44. In view of the above, we hold that undue long delay in execution of sentence of death will entitle the condemned prisoner to approach this Court under Article 32. However, this Court will only examine the circumstances surrounding the delay that has occurred and those that have ensued after the sentence was finally confirmed by the judicial process. This Court cannot reopen the conclusion already reached but may consider the question of inordinate delay to decide whether the execution of sentence should be carried out or should be altered into imprisonment for life.**

**45. Keeping a convict in suspense while consideration of his mercy petition by the President for many years is certainly an agony for him/her. It creates adverse physical conditions and psychological stresses on the convict under sentence of death. Indisputably, this Court, while considering the rejection of the clemency petition by the President, under Article 32 read with Article 21 of the Constitution, cannot excuse the agonising delay caused to the convict only on the basis of the gravity of the crime.**

**46. India has been a signatory to the Universal Declaration of Human Rights, 1948 as well as to the United Nations Covenant on Civil and Political Rights, 1966. Both these conventions contain provisions outlawing cruel and degrading treatment and/or punishment. Pursuant to the judgment of this Court in *Vishaka v. State of Rajasthan* [(1997) 6 SCC 241 : 1997 SCC (Cri) 932], international covenants to which India is a party are a part of domestic law unless they are contrary to a specific law in force. It is this expression ("cruel and degrading treatment**

**State of Maharashtra & Ors. v. Pradeep Yashwant Kokade & Anr.**

and/or punishment") which has ignited the philosophy of Vatheeswaran [T.V. Vatheeswaran v. State of T.N., (1983) 2 SCC 68 : 1983 SCC (Cri) 342] and the cases which follow it. It is in this light, the Indian cases, particularly, the leading case of Triveniben [Triveniben v. State of Gujarat, (1989) 1 SCC 678 : 1989 SCC (Cri) 248] has been followed in the Commonwealth countries. It is useful to refer the following foreign judgments which followed the proposition: (i) Pratt v. Attorney General for Jamaica [(1994) 2 AC 1 : (1993) 3 WLR 995 : (1993) 4 All ER 769 (PC)], (ii) Catholic Commission for Justice & Peace in Zimbabwe v. Attorney General [(1993) 4 SA 239 (Zimbabwe SC)] , (iii) Soering v. United Kingdom [ Application No. 14038 of 1988 : (1989) 11 EHRR 439], (iv) Attorney General v. Susan Kigula [Constitutional Appeal No. 3 of 2006, decided on 21-1-2009 (Uganda SC)], (v) Herman Mejia v. Attorney General [ AD 2006 Action No. 296, decided on 11-6-2001 (Belize SC)].

**47.** It is clear that after the completion of the judicial process, if the convict files a mercy petition to the Governor/President, it is incumbent on the authorities to dispose of the same expeditiously. **Though no time-limit can be fixed for the Governor and the President, it is the duty of the executive to expedite the matter at every stage viz. calling for the records, orders and documents filed in the court, preparation of the note for approval of the Minister concerned, and the ultimate decision of the constitutional authorities.** This Court, in Triveniben [Triveniben v. State of Gujarat (1989) 1 SCC 678 : 1989 SCC (Cri) 248], further held that in doing so, if it is established that there was prolonged delay in the execution of death sentence, it is an important and relevant consideration for determining whether the sentence should be allowed to be executed or not.

**48.** Accordingly, if there is undue, unexplained and inordinate delay in execution due to pendency of mercy petitions or the executive as well as the constitutional authorities have failed to take note of/consider the relevant aspects, this Court is well within its powers under Article 32 to hear the grievance of the convict and

**Digital Supreme Court Reports**

**commute thone death sentence into life imprisonment this ground alone however, only after satisfying that the delay was not caused at the instance of the accused himself.** To this extent, the jurisprudence has developed in the light of the mandate given in our Constitution as well as various Universal Declarations and directions issued by the United Nations.

**49.** The procedure prescribed by law, which deprives a person of his life and liberty must be just, fair and reasonable and such procedure mandates humane conditions of detention preventive or punitive. In this line, although the petitioners were sentenced to death based on the procedure established by law, the inexplicable delay on account of executive is inexcusable. **Since it is well established that Article 21 of the Constitution does not end with the pronouncement of sentence but extends to the stage of execution of that sentence, as already asserted, prolonged delay in execution of sentence of death has a dehumanising effect on the accused. Delay caused by circumstances beyond the prisoners' control mandates commutation of death sentence.** In fact, in Vatheeswaran [T.V.Vatheeswaran v. State of T.N. (1983) 2 SCC 68 : 1983 SCC (Cri) 342], particularly, in para 10, it was elaborated where amongst other authorities, the minority view of Lords Scarman and Brightman in the 1982 Privy Council case of Riley v. Attorney General of Jamaica [Riley v. Attorney General of Jamaica (1983) 1 AC 719 : (1982) 3 WLR 557 : (1982) 3 All ER 469 : 1982 Cri Law Review 679 (PC)], by quoting: (Vatheeswaran case [T.V.Vatheeswaran v. State of T.N. (1983) 2 SCC 68 : 1983 SCC (Cri) 342], SCC p. 72)

“10. ‘... Sentence of death is one thing: sentence of death followed by lengthy imprisonment prior to execution is another.’” (Riley case [Riley v. Attorney General of Jamaica, (1983) 1 AC 719 : (1982) 3 WLR 557 : (1982) 3 All ER 469 : 1982 Cri Law Review 679 (PC)], AC p. 735 B)

(emphasis supplied)

**State of Maharashtra & Ors. v. Pradeep Yashwant Kokade & Anr.**

The appropriate relief in cases where the execution of death sentence is delayed, the Court held, is to vacate the sentence of death. In para 13, the Court made it clear that Articles 14, 19 and 21 supplement one another and the right which was spelled out from the Constitution was a substantive right of the convict and not merely a matter of procedure established by law. This was the consequence of the judgment in Maneka Gandhi v. Union of India [Maneka Gandhi v. Union of India (1978) 1 SCC 248] which made the content of Article 21 substantive as distinguished from merely procedural.”

(emphasis added)

In paragraph 244, the Bench proceeded to hold thus:

**“244. It is well established that exercising of power under Articles 72/161 by the President or the Governor is a constitutional obligation and not a mere prerogative. Considering the high status of office, the Constitution Framers did not stipulate any outer time-limit for disposing of the mercy petitions under the said Articles, which means it should be decided within reasonable time. However, when the delay caused in disposing of the mercy petitions is seen to be unreasonable, unexplained and exorbitant, it is the duty of this Court to step in and consider this aspect. Right to seek for mercy under Articles 72/161 of the Constitution is a constitutional right and not at the discretion or whims of the executive. Every constitutional duty must be fulfilled with due care and diligence, otherwise judicial interference is the command of the Constitution for upholding its values.”**

(emphasis added)

This Court also issued several other directions regarding the procedure to be followed in placing mercy petitions before the Hon'ble Governor or the Hon'ble President of India.

22. The decision of this Court in the case of **B.A.Umesh<sup>7</sup>** does not make a departure from the law laid down in the case of **Shatrughan Chauhan & Anr.<sup>4</sup>** On the contrary, paragraphs 44, 47 and 48 of the decision

**Digital Supreme Court Reports**

have been quoted therein with approval. We have carefully perused several other decisions of this Court which have been rendered in the facts of the case before this Court. The propositions laid down in these decisions can be summarized as under:

- (i) Undue, unexplained and inordinate delay in execution of the sentence of death will entitle the convict to approach this Court under Article 32. But this Court will only examine the nature of the delay caused and circumstances that ensued after the judicial process finally confirmed the sentence and will have no jurisdiction to reopen the conclusions reached by the court while finally maintaining the sentence of death. This Court, however, may consider the question of inordinate delay in the light of all circumstances of the case to decide whether the execution of sentence should be carried out or should be altered into imprisonment for life. No fixed period of delay could be held to make the sentence of death inexecutable.
  - (ii) Keeping a convict sentenced to death in suspense while considering his mercy petitions by the Governor or the President for an inordinately long time is certainly agony for him/her. It creates adverse physical conditions and psychological stress on the convict under sentence of death. Therefore, this Court, while considering the delay in the disposal of clemency petitions by the highest constitutional authorities, while exercising its jurisdiction under Article 32 read with Article 21 of the Constitution, cannot excuse the agonising delay caused to the convict only based on the gravity of the crime; and
  - (iii) It is well established that Article 21 of the Constitution does not end with the pronouncement of the sentence but extends to the execution stage of that sentence. An inordinate delay in the execution of the sentence of death has a dehumanising effect on the accused. An inordinate delay caused by circumstances beyond the prisoners' control mandates the commutation of a death sentence.
23. In paragraph 16 of the decision of this Court in the case of *Triveniben*,<sup>3</sup> the Constitution Bench held that while considering the delay in the execution of the death sentence, the period consumed in the judicial process culminating in the confirmation of the death sentence should not be taken into consideration. The reason for the said conclusion

**State of Maharashtra & Ors. v. Pradeep Yashwant Kokade & Anr.**

is that only after the judicial process in the form of the judgment of this Court in appeal / special leave petition arising out of the order of conviction does the order of death sentence become final. Therefore, the period required for judicial consideration cannot be termed as a delay in the execution of the death sentence, as till the conclusion of judicial proceedings arising out of the order of conviction, a sentence of death does not attain finality. The question of execution thereof arises only when the death sentence becomes final.

24. We may refer to Sections 413 and 414 of the CrPC, which read thus:

**"413. Execution of order passed under section 368.—**

When in a case submitted to the High Court for the confirmation of a sentence of death, the Court of Session receives the order of confirmation or other order of the High Court thereon, it shall cause such order to be carried into effect by issuing a warrant or taking such other steps as may be necessary.

**414. Execution of sentence of death passed by High Court.—** When a sentence of death is passed by the High Court in appeal or in revision, the Court of Session shall, on receiving the order of the High Court, cause the sentence to be carried into effect by issuing a warrant."

There are identical provisions in the BNSS in the form of Sections 453 and 454. These provisions constitute a vital safeguard. These provisions ensure that the execution of the death sentence takes place only after all remedies available to the convicts are exhausted. The executive cannot execute the death sentence unless the Sessions Court issues a warrant.

25. The proceedings for issuing a warrant for executing a death sentence under Sections 413 and 414 of the CrPC do not require any judicial adjudication. Before issuing the warrant, the Sessions Court must satisfy itself that the order of death sentence has attained finality and the review/curative or mercy petitions, if filed, have been finally rejected. Before issuing a warrant, the Sessions Court has to issue notice to the convict so that even the convict can state whether any other proceedings are pending before the Courts or Constitutional authorities. In a given case, the convict may not be interested in pursuing remedies. The Sessions Court can verify this aspect after

**Digital Supreme Court Reports**

issuing a notice to the convict. The Sessions Court, in such a case, must appraise the convict of the remedies available and, if required, provide legal aid to enable the convict to take recourse to such remedies. After the convict has been made aware of the remedies available, reasonable time be granted to the convict to consider, weigh and even consult a member of his family or friend to finally take a decision on adopting remedies as the possibility of thinking logically and rationally may be impeded or hampered because of the situation being faced by the convict. The Sessions Court can issue a warrant only after providing such reasonable time to the convict and after satisfying itself that the convict has taken a conscious decision of not pursuing the available remedies. The reasonable time can be of seven days. The Sessions Court can direct the counselling of the convict if it is not satisfied that the decision is a well-informed, considered and conscious decision. If such a procedure is followed, it enables the convict to take recourse to the available legal remedy. Moreover, if an order of issue of warrant of execution is passed after notice to the convict, it enables the convict to challenge the order of issuing a warrant of execution. But after the convict exhausts all remedies, including filing mercy petitions or after the Sessions Court is satisfied that the convict has taken a conscious decision of not availing the remedies, the execution warrant must be issued without any delay. It is the responsibility of the trial court to take up and conclude the proceedings of issuing a warrant of execution as expeditiously as possible. The trial court must give necessary out of turn priority.

26. After the decisions on mercy petitions, if there is an inordinate and unexplained delay in actual execution for no fault on the part of the convict, there is no reason why the principles set out in paragraph 23 should not apply. The principles will also apply to a case where there is a long and unexplained delay on the part of the Sessions Court in issuing the warrant of execution in accordance with Sections 413 and 414 of CrPC. After the order of rejection of mercy petitions is communicated to a convict, the sword of Damocles cannot be kept hanging on him for inordinately long time. This can be very agonising, both mentally and physically. Such inordinate and unreasonable delay will violate his rights under Article 21 of the Constitution. In such a case, this Court will be justified in commuting the death penalty into life imprisonment.

**State of Maharashtra & Ors. v. Pradeep Yashwant Kokade & Anr.**

27. A convict can invoke even the jurisdiction of a High Court under Article 226 of the Constitution if there is an inordinate and unexplained delay in the execution of the death sentence post-confirmation of the sentence. The High Court will apply the same principles summarised in paragraphs 22 to 25.
28. No hard and fast rule can be laid down as regards the length of delay, which can be said to be inordinate. It all depends on the facts of the case. In a given case, a delay of two years may not be fatal. In another case, a delay of six months can be a ground to commute sentence. The terms “undue” or “inordinate” cannot be interpreted by applying the rules of mathematics. The Courts, in such cases, deal with human issues and the effect of the delay on a particular convict. What delay is inordinate must depend on the facts of the case. For example, if a convict is more than seventy years old and is suffering from multiple ailments, an unexplained delay of even six months in deciding a mercy petition can amount to a violation of Article 21. Ultimately, the Courts will have to determine the effect of delay in the light of the principles laid down as aforesaid, considering the facts of the case before it.

**APPLICATION OF THE PRINCIPLES TO THE FACTS OF THE CASE**

29. In this case, there is a delay in the following three stages:
  - i. On 10<sup>th</sup> July 2015, the convicts filed mercy petitions addressed to the Hon'ble Governor of the State of Maharashtra, which were rejected on 29<sup>th</sup> March 2016. This is the first part of the delay;
  - ii. On 11<sup>th</sup> June 2016, mercy petitions were addressed by the convicts to the Hon'ble President of India, which were rejected on 26<sup>th</sup> May 2017. This is the second part of the delay, and
  - iii. The third part of the delay started on 19<sup>th</sup> June 2017, when the Superintendent of Prison informed the learned Sessions Judge, Pune, about the rejection of mercy petitions by the Hon'ble President of India. Ultimately, it was only on 10<sup>th</sup> April 2019 that the learned Sessions Court, Pune, issued the warrants for the execution of the death sentence.

Thus, from 10<sup>th</sup> July 2015 till 10<sup>th</sup> April 2019, time was consumed in deciding the mercy petitions filed before the Hon'ble Governor of the State and the Hon'ble President of India, and in issuing warrants for executing the death sentence.

## Digital Supreme Court Reports

### **DELAY IN PROCESSING AND DISPOSAL OF MERCY PETITIONS**

30. We are dealing with the first part of the delay in deciding the mercy petitions made to the Hon'ble Governor which was as follows:

| <b>Date</b>  | <b>Particulars</b>  | <b>Time taken</b>  |
|--|---|--|
| 10 <sup>th</sup> July 2015                                     | Convicts filed mercy petitions addressed to the Hon'ble Governor of the State of Maharashtra  | -  |
| 16 <sup>th</sup> July 2015                                     | Prison authorities forwarded the mercy petitions along with the letter  | 6 days   |
| 20 <sup>th</sup> July 2015                                     | Home Department of the State Government received the mercy petitions forwarded by the prison authorities  | 4 days   |
| 17 <sup>th</sup> August 2015                                   | Home Department of the State Government addressed a letter to the Superintendent of Prison seeking confirmation regarding the decision of the convicts to prefer review petitions | 28 days  |
| 22 <sup>nd</sup> August 2015                                   | Superintendent of Prison recorded the statements of the convicts stating that they had not preferred review petitions.  | 5 days   |
| 24 <sup>th</sup> August 2015 and 26 <sup>th</sup> August 2015. | Fact of convicts not having preferred review petitions was communicated by the prison authorities and the ADG (Prisons)   | 7/9 days since receipt of letter dated 17 <sup>th</sup> August 2015 and 2/4 days since recording convicts' statement |
| 25 <sup>th</sup> January 2016                                  | Note prepared by the Home Department of the State Government for the benefit of the Hon'ble Governor  | 152 days   |
| 29 <sup>th</sup> March 2016                                    | Mercy petitions rejected by the Hon'ble Governor.   | 64 days  |

**State of Maharashtra & Ors. v. Pradeep Yashwant Kokade & Anr.**

From the above table, it appears that nothing was done by the Home Department of the State Government for five months (152 days) after receiving confirmation that the convicts had not preferred a review petition. Further, a perusal of the note prepared for the benefit of the Hon'ble Governor shows that it consists of three and a half pages. The recommendation is in three lines in the last paragraph. It is interesting to note that while forwarding the mercy petitions along with the letter dated 16<sup>th</sup> July 2015, the following documents were sent to the Home Department:

- i. Nominal roll of the convicts;
- ii. Medical report of mental and physical health;
- iii. A summary of crime;
- iv. Warrant of conviction issued by the Sessions Court; and
- v. A copy of the judgment of the High Court confirming the death sentence and the order/judgment of this Court.

The note appears to be based only on these documents, which were available to the Home Department in July 2015. A lot of time was wasted on correspondence made by various officers. All this was avoidable. Immediately upon receipt of the mercy petitions, all the required information/documents ought to have been called for by the Home Ministry. That was not done. Perhaps the officers in the Home Ministry showed a lack of sensitivity. Ultimately, on 29<sup>th</sup> March 2016, mercy petitions were rejected by the Hon'ble Governor. Thus, the delay of 5 months between 16<sup>th</sup> July 2015 and 25<sup>th</sup> January 2016 is unexplained and unjustified.

31. Now, we come to the second part of the delay which was as follows:

| Date                        | Particulars  | Time taken |
|-----------------------------|--|------------|
| 11 <sup>th</sup> April 2016 | Convict no.1 intimated that he was desirous of filing a mercy petition before the Hon'ble President of India.  | -          |
| 13 <sup>th</sup> April 2016 | Letter sent by the ADG (Prisons) to the Superintendent of Prison, requesting to forward updated nominal roll, report on the mental and physical health of the convicts and information about criminal antecedents. | 2 days     |

## Digital Supreme Court Reports

|                                |   |   |
|--------------------------------|---|---|
| 28 <sup>th</sup> April 2016    | Home Department of the State Government informed the Under Secretary (GOI) that the Hon'ble Governor had rejected mercy petitions. Mercy petitions addressed to the Hon'ble President were forwarded with this letter. Apart from the copies of the mercy petitions, the judgments of the Sessions Court, Pune, the High Court and this Court, along with the communication of rejection of mercy petitions by the Hon'ble Governor, were forwarded to the Under Secretary (GOI). | -   |
| 31 <sup>st</sup> May 2016      | Under Secretary (GOI) addressed a letter to the Home Department of the State Government requesting to provide criminal history, economic condition and information regarding the filing of review petition by the convicts within two weeks.  | 33 days   |
| 11 <sup>th</sup> June 2016     | Fresh set of mercy petitions were filed by the relatives of both convicts   | -   |
| 15 <sup>th</sup> June 2016     | Under Secretary (GOI) reminded the Home Department of the State Government to forward the documents mentioned in the letter dated 31 <sup>st</sup> May 2016.  | -   |
| 22 <sup>nd</sup> June 2016     | Letter dated 31 <sup>st</sup> May 2016 was received by the Home Department of the State Government.   | 22 days   |
| 22 <sup>nd</sup> July 2016     | Under Secretary (GOI) reminded the Home Department of the State Government to forward the documents mentioned in the letter dated 31 <sup>st</sup> May 2016.  | -   |
| 9 <sup>th</sup> August 2016    | Home Department of the State Government wrote to the ADG (Prisons) and Superintendent of Prison to supply documents as mentioned in the letter dated 31 <sup>st</sup> May 2016.   | 48 days since receipt of letter dated 31 <sup>st</sup> May 2016 |
| 5 <sup>th</sup> September 2016 | Superintendent of Prison acted upon letter dated 9 <sup>th</sup> August 2016 by addressing a letter to the Senior Inspector of the concerned Police Station to forward details regarding the antecedents and economic condition of the family of the convicts.  | 27 days   |

**State of Maharashtra & Ors. v. Pradeep Yashwant Kokade & Anr.**

|                                 |  |  |
|---------------------------------|--|--|
| 6 <sup>th</sup> September 2016  | Under Secretary (GOI) reminded the Home Department of the State Government to forward the documents mentioned in the letter dated 31 <sup>st</sup> May 2016.   | -  |
| 9 <sup>th</sup> September 2016  | Information was sent by the Superintendent of Prison to the Home Department of the State Government recording the fact that no review petitions were filed by the convicts.  | 31 days since letter dated 9 <sup>th</sup> August 2016 |
| 12 <sup>th</sup> September 2016 | The concerned Police Station forwarded a report regarding the criminal history and economic condition of the convicts to the Home Department of the State Government.  | 7 days   |
| 30 <sup>th</sup> September 2016 | Home Department of the State Government communicated the information mentioned above to the Under Secretary (GOI).   | 14 days  |
| 26 <sup>th</sup> December 2016  | Under Secretary (GOI) again requested confirmation about the review petitions filed by the convicts, despite the State Government having already provided this information to the Under Secretary (GOI) vide letter dated 30 <sup>th</sup> September 2016. | 87 days  |
| 16 <sup>th</sup> January 2017   | In view of the letter dated 26 <sup>th</sup> December 2016, correspondences were again started by the Home Department of the State Government.   | -  |
| 23 <sup>rd</sup> January 2017   | ADG (Prisons) communicated to the Home Department of the State Government that the review petitions were not filed.  | -  |
| 7 <sup>th</sup> February 2017   | Superintendent of Prison communicated to the Home Department of the State Government that the review petitions were not filed.   | -  |
| 22 <sup>nd</sup> February 2017  | Home Department of the State Government confirmed to the Under Secretary (GOI) that a review petition had not been filed.  | 58 days  |
| 26 <sup>th</sup> May 2017       | Ultimately, the Hon'ble President rejected the mercy petitions.  | 93 days  |

A period of about three months taken by the Hon'ble President cannot amount to undue delay. However, the delay from 28<sup>th</sup> April 2016, when

## Digital Supreme Court Reports

the mercy petitions were forwarded to the Under Secretary (GOI) till 22<sup>nd</sup> February 2017, is entirely unexplained and unwarranted.

### **DELAY IN ISSUE OF WARRANT OF EXECUTION**

32. We have already held that the undue delay in issuing a warrant of execution can violate the rights of convicts under Article 21 of the Constitution of India. Accordingly, the third part of the delay was as follows:

| <b>Date</b>                    | <b>Particulars</b>  | <b>Time taken</b>                            |
|--------------------------------|---|--|
| 6 <sup>th</sup> June 2017      | Information was submitted by the Under Secretary, Ministry of Home Affairs, Government of India, to the Principal Secretary, Home Department, Government of Maharashtra regarding rejection of mercy petition | 11 days since rejection by Hon'ble President |
| 19 <sup>th</sup> June 2017     | Superintendent of Prison addressed separate letters to the family members of the convicts and learned Sessions Judge, Pune, informing them about the rejection of the mercy petitions.                        | 24 days since rejection by Hon'ble President |
| 10 <sup>th</sup> August 2017   | Superintendent of Prison addressed a letter to the learned Sessions Judge, Pune, requesting him to issue a warrant for the execution of the death sentence.   | -  |
| 24 <sup>th</sup> August 2017   | Superintendent of Prison addressed a letter to the Registrar of this Court requesting him to provide information about any review petition filed by the convicts.   | -  |
| 9 <sup>th</sup> September 2017 | Registrar of this Court communicated to the Superintendent of Prison that no review petitions were filed by the convicts.   | 16 days                                      |
| 5 <sup>th</sup> October 2017   | Letter was addressed by the Superintendent of Prison to the learned Sessions Judge, Pune, requesting him to issue a warrant of execution of the death sentence.   | -  |

**State of Maharashtra & Ors. v. Pradeep Yashwant Kokade & Anr.**

|                                |   |  |
|--------------------------------|---|--|
| 18 <sup>th</sup> July 2018     | Letter was addressed by the Superintendent of Prison to the learned Sessions Judge, Pune, requesting him to issue a warrant of execution of the death sentence.   | -  |
| 29 <sup>th</sup> August 2018   | Letter was addressed by the Superintendent of Prison to the learned Sessions Judge, Pune, requesting him to issue a warrant of execution of the death sentence.   | -  |
| 17 <sup>th</sup> October 2018, | Letter was addressed by the ADG (Prisons) to the learned Sessions Judge, Pune, requesting him to fix a date for the execution of the death sentence.  | -  |
| 30 <sup>th</sup> October 2018  | As no action was taken by the Sessions Court, Pune, the Home Department of the Government of Maharashtra addressed a letter to the Law and Judiciary Department of the State Government making a query whether the Home Department could proceed with the execution of death sentence in accordance with the provisions of the Maharashtra Prison Manual. | -  |
| 2 <sup>nd</sup> November 2018  | Learned Sessions Judge, Pune, addressed a letter to the Home Department, Government of Maharashtra, seeking information about the status of mercy petitions   | 502 days since letter dated 19 <sup>th</sup> June 2017 |
| 12 <sup>th</sup> November 2018 | Law and Judiciary Department of the State Government informed the Home Department of the State Government that the exclusive jurisdiction to issue warrants for executing the death sentence was of the learned Sessions Court  | 13 days  |
| 7 <sup>th</sup> December 2018  | ADG (Prisons) addressed letter to the learned Sessions Court, Pune, requesting him to fix a date for executing the death sentence.  | -  |

## Digital Supreme Court Reports

|                                |   |  |
|--------------------------------|---|--|
| 27 <sup>th</sup> December 2018 | Superintendent of Prison addressed letter to the learned Sessions Court, Pune, requesting him to fix a date for executing the death sentence.   | -  |
| 31 <sup>st</sup> January 2019  | Home Department of the State Government wrote a letter to the ADG (Prisons) and the Superintendent of Prison informing them about the letter dated 2 <sup>nd</sup> November 2018 sent by the Learned Sessions Judge, Pune | 90 days  |
| 10 <sup>th</sup> April 2019    | Warrants for the execution of the death sentence were issued by the Sessions Court, Pune.   | 661 days since letter dated 19 <sup>th</sup> June 2017 |

33. When the mercy petitions were pending, the Sessions Court could not have issued a warrant to execute the death sentence. The most straightforward procedure that the State Government could have followed was to apply through the Public Prosecutor before the learned Sessions Court on the judicial side by placing on record the rejection of the mercy petitions and seeking the issuance of warrants for the execution. Even the Sessions Court ought to have acted upon the several letters from the Prison and issued notice to the State Government. However, that was not done. Thus, there was an inordinate delay in issuing warrants for executing the death sentence. This delay from June 2017 to April 2019 was entirely avoidable. This also is a delay post-confirmation of the death sentence by this Court, which must be taken into consideration.

### **THE EFFECT OF THE DELAY**

34. Thus, on facts, it can be said that there was undue and unexplained delay at all three stages. The undue delays have occurred in placing the mercy petitions before the Hon'ble Governor for the State and the Hon'ble President of India. In the facts of the case, the inordinate delay is on the part of the executive and not on the part of the Constitutional functionaries.
35. The time consumed from the filing of mercy petitions before the Hon'ble Governor to the date of issue of the execution of warrants by the learned Sessions Court, Pune, is of three years, eleven months

**State of Maharashtra & Ors. v. Pradeep Yashwant Kokade & Anr.**

and fourteen days. Even if we exclude the time actually taken by the constitutional functionaries to decide mercy petitions, still the delay will be of more than three years. The Court must consider the cumulative effect of the delays at three stages after taking into consideration the facts of the case. The reason is that in a given case, there may not be an inordinate delay in one stage, but there may be an inordinate delay in two other stages. The only conclusion in this case is that the delay is unexplained and inordinate. Therefore, it is impossible to find fault with the view taken by the High Court that there was a violation of the rights of the convicts guaranteed under Article 21 of the Constitution of India. Therefore, the commutation of the death sentence to a fixed term sentence of thirty-five years by the High Court cannot be faulted.

**DUTY OF THE EXECUTIVE AND THE SESSIONS COURT**

36. The Executive must promptly deal with the mercy petitions filed by the convicts of the death sentence. In this case, the approach of the Executive, and especially the State Government, has been casual and negligent. Even the Sessions Court ought to have been pro-active. When the delay from the date of filing of mercy petitions till the date of issue of a warrant of execution is inordinate and unexplained, the right of the convicts guaranteed by Article 21 of the Constitution of India is violated. This right must be upheld, and it is the duty of the Constitutional Courts to do so.
37. We must also consider the rights of the victims of the offences to justice. Their right is to ensure that there is a prompt and proper investigation. However, we hasten to add that there is no right vested in the victim to insist on imposing capital punishment. The law must be enforced with all the vigour, and the Executive Branch of the State Government cannot show laxity in implementing the orders of conviction passed by the competent Courts. The very purpose of passing orders of sentence cannot be allowed to be defeated. We cannot ignore the effect of the laxity shown by law enforcement agencies on society. Therefore, we propose to issue directions to ensure that there are no administrative delays in dealing with the mercy petitions or issuing warrants for execution of death sentence.

**Digital Supreme Court Reports****DIRECTIONS TO CURB THE DELAYS**

38. The first direction which we propose to issue is regarding the nature of documents which ought to be immediately forwarded with the mercy petitions. The second direction we propose is that the State Government must set up a dedicated cell in either the Home Department or Prison Department to ensure prompt and expeditious processing of the mercy petitions. We also propose to direct the State Government to issue executive orders to ensure prompt processing of the mercy petitions.
39. Now, we come to the role of the Sessions Court. There cannot be any dispute that unless a warrant is issued for the execution of the death sentence under Section 413 or Section 414 of the CrPC, the death sentence cannot be executed. On this aspect, we must refer to a decision of this Court in the case of *Shabnam v. Union of India*<sup>9</sup> and, in particular, paragraph 21. This Court held that the procedure laid down by the High Court of Allahabad in its decision in the case of *People's Union for Democratic Rights (PUDR) v. Union of India & Ors.*<sup>10</sup> is in consonance with Article 21 of the Constitution of India. Therefore, while executing the death sentence, it is mandatory to follow the procedure laid down by the Allahabad High Court in the decision mentioned above. The decision of the Allahabad High Court can be summarised as follows:
  - i. The principles of natural justice must be drawn into the provisions of Sections 413 and 414 of the CrPC, and sufficient notice ought to be given to the convict before issuance of a warrant for the execution of the death sentence by the Sessions Court, which would enable the convict to consult an advocate and represent him in the proceedings;
  - ii. The warrant for the execution of the death sentence must specify the exact date and time of the execution and not a range of dates within which the death sentence will be executed, which places the convict in a state of uncertainty. A reasonable time must be provided between the date of the

9 [2015] 8 SCR 289 : (2015) 6 SCC 702

10 2015 SCC OnLine All 143

**State of Maharashtra & Ors. v. Pradeep Yashwant Kokade & Anr.**

order of issue of the execution warrant and the date fixed for actual execution so that the convict gets an opportunity to adopt a remedy against the warrant and to have a final meeting with the family members;

- iii. A copy of the warrant must be immediately supplied to the convict, and
- iv. After issuing a notice and before issuing a warrant of execution, if the convict is not represented by an advocate, legal aid should be provided to him.

As held by this Court, the procedure described above is in conformity with Article 21 of the Constitution of India.

40. To avoid the situation that arose in this case, we need to elaborate further upon the directions already issued by the Allahabad High Court. When a death sentence is confirmed or the High Court imposes a death sentence, a writ/order of the High Court is always sent to the Sessions Court. When the Sessions Court receives intimation of such order, the disposed of sessions case must be taken on board by the Sessions Court, and notice should be issued to the Public Prosecutor/investigating agency to ascertain whether the convicts have challenged the judgment of the High Court. Depending upon the rules of procedure of the concerned court, the proceeding can be numbered as a Misc. Application in the disposed of case. If the Public Prosecutor informs the Sessions Court that the challenge before this Court is pending, the Sessions Court should pass no further order. As soon as the intimation of confirmation of the death sentence by this Court is received, the disposed of case should be taken on the cause list and notice should be issued to the convicts through the Jail Superintendent calling upon the convicts to disclose whether they intend to file review petition and/or mercy petition. It is the duty of the State/investigating agency to inform the Sessions Court about the outcome of the review and mercy petitions by filing a proper application in the disposed of case. The reason is that it is the responsibility of the State/investigating agency to ensure that the death penalty is executed. To ensure that there is no delay, the Sessions Court, after confirmation of the death sentence by the Court, shall periodically fix dates in the disposed of case so that an up-to-date report can be submitted on behalf of the State Government/investigating

**Digital Supreme Court Reports**

agency through the Public Prosecutor. It will be the duty of the State Government/investigating agency to make an application and inform the Sessions Court about the rejection of the mercy petitions made to the Constitutional authorities so that the Sessions Court can take further steps. Such information shall be furnished by making a regular application on the judicial side and not by sending a letter. After such an application is filed before the Court, notice should be issued to the convicts informing them that the Court is proposing to issue a warrant for executing the death sentence. After hearing the convict and/or his advocate or legal aid advocate provided to the convict, the Court should pass an order directing issuance of the warrant of execution, a copy of which shall be immediately forwarded to the convict. As directed earlier by this Court, the warrant must contain a precise date and time of execution. The time should be fixed in such a manner that the convict gets at least a period of fifteen clear days from the date of receipt of the warrant of execution of the death sentence and the actual date of execution to enable him to take recourse to legal remedies or to allow him to meet his relatives finally.

41. As we are confirming the impugned judgment on the ground of inordinate and unexplained delay in the execution of the death sentence, it is not necessary to decide the controversy whether the convicts were kept in solitary confinement even before the rejection of the mercy petitions.

**OUR CONCLUSIONS**

42. We hold that:-
  - (i) Undue, unexplained and inordinate delay in execution of the sentence of death will entitle the convict to approach this Court under Article 32. However, this Court will only examine the nature of the delay caused and circumstances that ensued after the judicial process finally confirmed the sentence and will have no jurisdiction to reopen the conclusions reached by the Court while finally maintaining the sentence of death. This Court, however, may consider the question of inordinate delay in the light of all circumstances of the case to decide whether the execution of sentence should be carried out or should be commuted to imprisonment for life;

**State of Maharashtra & Ors. v. Pradeep Yashwant Kokade & Anr.**

- (ii) Keeping a convict in suspense while considering his mercy petitions by the Governor or the President for an inordinately long time will certainly cause agony to him/her. It creates adverse physical conditions and psychological stress on the convict. Therefore, this Court, while exercising its jurisdiction under Article 32 read with Article 21 of the Constitution, must consider the effect of inordinate delay in disposal of the clemency petition by the highest Constitutional authorities and cannot excuse the agonising delay caused only on the basis of the gravity of the crime;
- (iii) It is well established that Article 21 of the Constitution does not end with the pronouncement of the sentence but extends to the stage of execution of that sentence. An inordinate delay in the execution of the sentence of death has a dehumanising effect on the accused. An inordinate and unexplained delay caused by circumstances beyond the prisoners' control mandates the commutation of a death sentence;
- (iv) The above principles will also apply to a case where there is a long and unexplained delay on the part of the Sessions Court in issuing the warrant of execution in accordance with Section 413 or Section 414 of CrPC. After the order of rejection of mercy petitions is communicated to a convict, the sword of Damocles cannot be kept hanging on him for an inordinately long time. This can be very agonising, both mentally and physically. Such inordinate delay will violate his rights under Article 21 of the Constitution. In such a case, this Court will be justified in commuting the death penalty into life imprisonment;
- (v) No hard and fast rule can be laid down as regards the length of delay, which can be said to be inordinate. It all depends on the facts of the case. The terms "undue" or "inordinate" cannot be interpreted by applying the rules of mathematics. The Courts, in such cases, deal with human issues and the effect of the delay on individual convicts. What delay is inordinate must depend on the facts of the case;
- (vi) A convict can invoke even the jurisdiction of a High Court under Article 226 of the Constitution in the event there is an inordinate and unexplained delay in the execution of the death sentence,

**Digital Supreme Court Reports**

post-confirmation of the sentence. The same principles will be applied by the High Court, which are summarised above; and,

- (vii) It is the duty of the Executive to promptly process the mercy petitions invoking Articles 72 or 161 of the Constitution and forward the petitions along with requisite documents to the concerned constitutional functionary without undue delay.

**OPERATIVE DIRECTIONS**

43. Hence, we pass the following order:

- i. The impugned judgment and order, by which the death sentence of the convicts has been commuted to a fixed sentence of thirty-five years of imprisonment, is upheld, and Criminal Appeals are dismissed;
- ii. As regards the mercy petitions, we issue the following directions to all the State Governments and Union Territories:
  - A. A dedicated cell shall be constituted by the Home Department or the Prison Department of the State Governments/Union Territories for dealing with mercy petitions. The dedicated cell shall be responsible for the prompt processing of the mercy petitions within the time frame laid down by the respective governments. An officer-in-charge of the dedicated cell shall be nominated by designation who shall receive and issue communications on behalf of the dedicated cell;
  - B. An official of the Law and Judiciary or Justice Department of the State Governments/Union Territories should be attached to the dedicated cell so constituted;
  - C. All the prisons shall be informed about the designation of the officer-in-charge of the dedicated cell and his address and email ID;
  - D. As soon as the Superintendent of Prison/officer-in-charge receives the mercy petitions, he shall immediately forward the copies thereof to the dedicated cell and call for the following details/information from the officer-in-charge

**State of Maharashtra & Ors. v. Pradeep Yashwant Kokade & Anr.**

of the concerned Police Station and/or the concerned investigation agency;

- a. The criminal antecedents of the convict;
- b. Information about family members of the convict;
- c. Economic condition of the convict and his/her family;
- d. The date of arrest of the convict and the period of incarceration as an undertrial; and,
- e. The date of filing charge sheet and a copy of the committal order, if any.

On receipt of the request made by the jail authorities, the officer-in-charge of the concerned police station shall be under an obligation to furnish the said information to the jail authorities immediately;

E. On receipt of the said information, without any delay, the jail authorities shall forward the following documents to the officer-in-charge of the dedicated cell and the Secretary of the Home Department of the State Government:

- a. Information furnished as aforesaid by the concerned Police Station with its English translation;
- b. Copy of the First Information Report with its English translation;
- c. Details, such as date of arrest of the convict, date of filing of chargesheet and actual period of incarceration undergone by the convict;
- d. A copy of the committal order, if any, passed by the learned Judicial Magistrate;
- e. A copy of charge-sheet with its English translation;
- f. Report about the conduct of the convict in prison;
- g. Copies of the notes of evidence, all exhibited documents in the trial and copies of statements of convicts under Section 313 of the CrPC with its English translation;

**Digital Supreme Court Reports**

- h. Copies of the judgments of the Sessions Court (with its English translation, if it is in vernacular language), High Court and this Court;
  - F. As soon as mercy petitions are received by the dedicated cell, copies of the mercy petitions shall be forwarded to the Secretariats of the Hon'ble Governor of the State or the Hon'ble President of India, as the case may be so that the Secretariat can initiate action at their end;
  - G. All correspondence, as far as possible, be made by email, unless confidentiality is involved; and,
  - H. The State Government shall issue office orders/executive orders containing guidelines for dealing with the mercy petitions in terms of this judgment.
- iii. The Registry of this Court shall forward copies of this judgment to the Secretaries of the Home Department of the respective State Governments/Union Territories for its implementation. The Secretaries shall report compliance within three months from today to the Registrar (Judicial) of this Court;
  - iv. The Sessions Court shall endeavour to follow the following guidelines:
    - a. As soon as the order of the High Court confirming or imposing the death sentence is received by the Sessions Court, a note thereof must be taken, and the disposed of case shall be listed on the cause list. The proceedings can be numbered as Misc. Application depending upon the applicable Rules of the procedure. The Sessions Court shall immediately issue notice to the State Public Prosecutor or the investigating agency calling upon them to state whether any appeal or special leave petition has been preferred before this Court and what is the outcome of the said petition/appeal;
    - b. If the State Public Prosecutor or the investigating agency reports that the appeal is pending, as soon as the order of this Court confirming or restoring the death sentence is received by the Sessions Court, again, the disposed

**State of Maharashtra & Ors. v. Pradeep Yashwant Kokade & Anr.**

of case or miscellaneous applications should be listed on the cause list and notice be issued to the State Public Prosecutor or the investigating agency to ascertain whether any review/curative petitions or mercy petitions are pending. If information is received regarding the pendency of review/curative petitions or mercy petitions, the Sessions Court shall keep on listing the disposed of case after intervals of one month so that it gets the information about the status of the pending petitions. This will enable the Sessions Court to issue a warrant for the execution of the death sentence as soon as all the proceedings culminate;

- c. However, before issuing the warrant, notice should be issued to the convict, and the directions issued by the Allahabad High Court in the case of **People's Union for Democratic Rights (PUDR)**,<sup>10</sup> and as elaborated above, shall be implemented by the Sessions Court;
  - d. The Sessions Courts shall consider what is held in Paragraph 25 above;
  - e. Copies of the order issuing the warrant and the warrant shall be immediately provided to the convicts, and the Prison authorities must explain the implications thereof to the convicts. If the convict so desires, legal aid be immediately provided to the convicts by the Prison authorities for challenging the warrant. There shall be a gap of fifteen clear days between the date of the receipt of the order as well as warrant by the convict and the actual date of the execution; and,
  - f. It shall also be the responsibility of the concerned State Government or the Union Territory administration to apply to the Sessions Court for the issuance of a warrant immediately after the death penalty attains finality and becomes enforceable.
- v. A copy of this judgment shall be forwarded to both the convicts through the Jail Superintendent of the concerned jail.

**Digital Supreme Court Reports**

- vi. A copy of this judgment shall be forwarded to the Registrar Generals of all the High Courts, who in turn shall forward the copies thereof to all the Sessions Courts.
- vii. These disposed of appeals shall be listed on 17<sup>th</sup> March 2025 for considering compliance.

*Result of the case:* Appeals disposed of.

To be listed on 17.03.2025 for considering  
compliance.

<sup>†</sup>*Headnotes prepared by:* Divya Pandey

**Parvin Kumar Jain**  
v.  
**Anju Jain**

(Civil Appeal No(s). 14277-14278 of 2024)

10 December 2024

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

**Issue for Consideration**

In the instant case, the parties were married and have a son born from their wedlock, however, the relationship soured and they have been living separately for more than two decades. The main issue between the parties all these years, since separation, is the quantum of maintenance to be paid by the appellant-husband to the respondent-wife.

**Headnotes<sup>†</sup>**

**Hindu Marriage Act, 1955 – Quantum of maintenance – Permanent alimony – The respondent's application for enhanced interim maintenance rested on her assertion of significant changes in circumstances since the last maintenance order, including the increased financial requirements of herself and the son:**

**Held:** It is evident from the records that the relationship between the parties appears to be strained from the beginning and only further soured over the years – Reconciliation proceedings during the pendency of the divorce petition also failed – The parties have been litigating maintenance proceedings for a prolonged period, and there appears to be no cogent reason to only deal with the issue of interim maintenance after twenty years of strained relationship and separation – These facts are admitted by the parties, and they have also mutually agreed for the dissolution of their marriage – Therefore, the marriage between the parties is dissolved while exercising the discretionary power u/Art. 142 of the Constitution of India – Now, the issue of maintenance *pendente lite* is infructuous with the dissolution of marriage, but the financial interest of the wife still needs to be protected through grant of permanent alimony – There cannot be strict guidelines or a fixed formula

---

\* Author

## Digital Supreme Court Reports

for fixing the amount of permanent maintenance – The quantum of maintenance is subjective to each case and is dependent on various circumstances and factors – In the instant case, it is a matter of record and an admitted fact that the respondent is unemployed while the appellant is a well accomplished banker who has worked in multiple senior roles at various banks over the years – The appellant is currently working as the Chief Executive Officer of Vision Bank in Dubai and his estimated salary is about AED 50,000 per month which means that he is earning around Rs. 10 to 12 Lakhs per month – His DEMAT account details from 2010 reveal investment of Rs. 5 crores – Further, he has three properties – For the respondent, considering the standard of living enjoyed by her during subsistence of the marriage, the prolonged period of separation, and the appellant's financial capacity, a one-time settlement amount of Rs. 5 crores (Rupees five crores only), appears to be just, fair and reasonable amount for the respondent to be paid by the appellant towards settlement of all pending claims also – Since, the appellant herein has sufficient means to support his child, and thus provision should also be made for his maintenance and financial security as well – An amount of Rs. 1 crore (Rupees one crore only) towards the maintenance and care of the son appears to be fair, which he can utilize for his higher education and as security till he becomes financially independent.

[Paras 27, 31, 34, 36, 40, 41]

### Case Law Cited

*Ajay Mohan and Ors. v. H.N. Rai and Ors.* [2007] 13 SCR 298 : (2008) 2 SCC 507; *Rajnesh v. Neha and Another* [2020] 13 SCR 1093 : (2021) 2 SCC 32; *Shilpa Sailesh v. Varun Sreenivasan* [2023] 5 SCR 165 : (2022) 15 SCC 754; *Kiran Jyoti Maini v. Anish Pramod Patel* [2024] 7 SCR 942 : (2024) SCC OnLine SC 1724; *Ashok Hurra v. Rupa Bipin Zaveri* [1997] 2 SCR 875 : (1997) 4 SCC 226; *Hitesh Bhatnagar v. Deepa Bhatnagar* [2011] 6 SCR 118 : (2011) 5 SCC 234; *Vinny Paramvir Parmar v. Paramvir Parmar* [2011] 9 SCR 371 : (2011) 13 SCC 112; *Vishwanath Agrawal v. Sarla Vishwanath Agrawal* [2012] 7 SCR 607 : (2012) 7 SCC 288 – referred to.

### List of Acts

Hindu Marriage Act, 1955.

**Parvin Kumar Jain v. Anju Jain****List of Keywords**

Quantum of maintenance; Permanent alimony; Pendente lite maintenance; Divorce; One-time settlement amount; Maintenance and financial security; Increased financial requirements; Article 142 of the Constitution.

**Case Arising From**

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 14277-14278 of 2024

From the Judgment and Order dated 01.08.2024 of the High Court of Delhi at New Delhi in MATAPP (FC) Nos. 226 of 2018 and 120 of 2019

**Appearances for Parties**

Ms. Mukta Gupta, Sr. Adv., Viresh B. Saharya, Ujas Kumar, Ms. Tara Narula, Ms. Nitya Gupta, Ms. Aditi Gupta, Akshat Agarwal, Rishabh Mathur, Advs. for the Appellant.

Sanjay Jain, Sr. Adv., Ms. Anu Narula, Sarfaraz Ahmad, Ms. Harshita Sukhija, Nishank Tripathi, Ms. Palak Jain, Rishi Raj Sharma, Advs. for the Respondent.

**Judgment / Order of the Supreme Court****Judgment****Vikram Nath, J.**

1. Leave granted.
2. The present appeals arise out of the impugned order dated 01.08.2024 passed by the Delhi High Court in MAT. APP.(F.C.) 226/2018 & CM APPL. 36723/2018. CM APPL. 4245/2021. CM APPL. 51379/2022, CM APPL. 52044/2022 and MAT.APP. (F.C.) 120/2019. Vide the impugned order, the High Court dismissed MAT. APP. (F.C.) 226/2018 filed by the Husband against the order of the Family Court, in an application for maintenance *pendente lite* under section 24 of the Hindu Marriage Act, 1955<sup>1</sup> along with all pending applications, with costs of

**Digital Supreme Court Reports**

Rs. 1,00,000/- (Rupees one lakh only). By the same common order, the MAT.APP. (F.C) 120/2019 filed by the Wife is allowed to the extent that the interim maintenance granted to the Wife under Section 24 of the HMA is enhanced from Rs.1,15,000/- (Rupees one lakh fifteen thousand only) to Rs.1,45,000/- (Rupees one lakh forty five thousand only) per month from the date of filing of enhancement application.

3. The parties were married as per Hindu rites and ceremonies on 13.12.1998 and have one son born from their wedlock on 28.05.2001. However, the marital relationship soured and the parties began living separately from January, 2004. Since the date of separation, the son has been residing with the respondent–wife. Subsequently, on 11.05.2004, the appellant–husband filed a petition under Section 13(1) (ia) of the HMA, before the Family Court seeking divorce on the ground of cruelty. During the pendency of the divorce petition, the respondent, on 27.05.2004, filed an application under Section 24 of the HMA seeking *pendente lite* maintenance for herself and the son. This application was disposed of by the Family Court vide order dated 20.09.2004, directing the appellant to pay a cumulative sum of ₹18,000/- (Rupees eighteen thousand only) per month, comprising ₹15,000/- (Rupees fifteen thousand only) to the respondent and ₹3,000/- to the son.
4. Both parties challenged the Family Court's order through separate appeals before the High Court. Consequently, vide order dated 21.11.2005, the High Court enhanced the maintenance amount to ₹20,000/- (Rupees twenty thousand only) per month, allocating ₹15,000/- (Rupees fifteen thousand only) to the respondent and ₹5,000/- (Rupees five thousand only) to the son. Subsequently, the respondent filed an application under Sections 24 and 26 of the HMA, seeking further enhancement of interim maintenance. In her application, she claimed an enhanced amount of ₹1,45,000/- (Rupees one lakh forty five thousand only) per month, contending that the appellant's income had increased significantly, exceeding ₹4,00,000/- (Rupees four lakhs only) per month, inclusive of salary, perks, allowances, and bonuses. She further argued that the financial needs of both, her and the son, had increased manifold since the prior determination of maintenance.
5. During the pendency of the application, the appellant, in July 2015, voluntarily increased the interim maintenance to ₹65,000/- (Rupees

**Parvin Kumar Jain v. Anju Jain**

sixty five thousand only) per month. He agreed to pay ₹50,000/- (Rupees fifty thousand only) to the respondent, effective from the date of filing the enhancement application on 28.02.2009, and ₹15,000/- (Rupees fifteen thousand only) to the son, effective from July 2015. However, the appellant contended that following the dismissal of his divorce petition on 14.07.2016 upon being withdrawn by him, the Family Court had become *functus officio*, rendering it incapable of granting any further relief under Sections 24 and 26 of the HMA. He also submitted that the provisions of Section 26 of the HMA do not permit granting of maintenance to an adult male child.

6. The respondent's application for enhanced interim maintenance rested on her assertion of significant changes in circumstances since the last maintenance order, including the increased financial requirements of herself and the son. On the other hand, the appellant's position focused on the legal implications of the withdrawal of his divorce petition and the applicability of Section 26 of the HMA concerning the maintenance of an adult male child.
7. The Family Court, in its order dated 16.08.2018, allowed the respondent's application for enhancement of maintenance and held that the relief in an application filed under Section 24 of the HMA can only be granted from the date of filing of the application, i.e., 28.02.2009, until the date the main divorce petition was dismissed as withdrawn, i.e., 14.07.2016. Proceedings under Section 26 of the HMA are independent of the main divorce proceedings, and relief under this section can be granted for a period beyond the dismissal of the main divorce petition. The Court therein observed that the appellant had adopted delaying tactics, which prevented the timely resolution of the respondent's enhancement application. The appellant had been evasive in disclosing his actual income and assets, concealing his true financial status, including his movable and immovable properties. Therefore, he failed to discharge his moral and legal obligations to provide reasonable and just maintenance to his wife and son, commensurate with their social and economic standing.
8. The Family Court held that the respondent and her son are entitled to enhanced maintenance considering the increased expenditures for a growing child and the respondent's requirements aligned with her social status. Accordingly, the Family Court directed the appellant to pay the following amounts:

**Digital Supreme Court Reports**

- i. ₹1,15,000/- (Rupees one lakh fifteen thousand only) per month as *pendente lite* maintenance to the wife and the son from 28.02.2009 to 14.07.2016, when the divorce petition was withdrawn.
  - ii. ₹35,000/- (Rupees thirty five thousand only) per month to the son from 15.07.2016, until he attains the age of 26 years or becomes financially independent, whichever is earlier. This amount shall be subject to a 10% increase every two years starting 28.05.2019.
  - iii. Litigation costs of ₹2,00,000/- (Rupees two lakhs only).
9. Both the parties challenged the above order of the Family Court vide two separate appeals before the High Court. It is the judgment passed in these appeals by the High Court, which is challenged before us by the appellant.
10. The High Court considered whether the Family Court loses its jurisdiction to decide pending applications under Sections 24 and 26 of the HMA, upon withdrawal of the main divorce petition. The appellant argued that the Family Court becomes *functus officio* upon such withdrawal, and therefore, proceedings for interim maintenance and child-related relief under Sections 24 and 26 of the HMA, respectively, could not be adjudicated. This contention was based on the assumption that the statutory jurisdiction under Sections 24 and 26 of the HMA is ancillary to the divorce proceedings and cannot survive withdrawal of the main case. The High Court rejected this argument, holding that both provisions are independent in nature and continue to operate despite the withdrawal of the divorce petition. The High Court observed that the legislature's intent behind Section 24 of the HMA is to ensure that a financially dependent spouse is not left without resources during the pendency of matrimonial disputes, and this obligation cannot be unilaterally nullified by withdrawal of the petition. It emphasized that allowing withdrawal of the main petition to terminate Section 24 of the HMA proceedings would render the dependent spouse financially vulnerable and create a procedural loophole for evasion of legal obligations. The High Court concluded that interim maintenance proceedings have an independent existence and are not strictly ancillary to the main proceedings. It held that the Family Court's jurisdiction to adjudicate interim maintenance under Section 24 of the HMA extends until the date of withdrawal of the

**Parvin Kumar Jain v. Anju Jain**

main petition, thereby ensuring that the dependent spouse's financial security is not abruptly disrupted by procedural tactics.

11. With respect to Section 26 of the HMA, which pertains to custody, maintenance, and education of minor children, the High Court provided a detailed analysis of the statutory language and intention. It held that the provision explicitly permits Courts to make orders "from time to time," granting or modifying reliefs related to children, irrespective of the pendency or withdrawal of the main matrimonial proceedings. The High Court reasoned that matters concerning the welfare of children are not merely incidental to the matrimonial dispute but are of paramount and enduring importance. Recognizing that the interests of the children are paramount, the High Court clarified that the Family Court retains jurisdiction under Section 26 of the HMA even after withdrawal of the main petition, ensuring that children's needs are addressed in an ongoing and dynamic manner.
12. The High Court also dismissed the appellant's appeal placing reliance on the this Court's decision in *Ajay Mohan and Ors. v. H.N. Rai and Ors.*,<sup>2</sup> observing that the judgment was delivered in a different context and was not applicable to matrimonial proceedings under the HMA. It noted that this Court in *Ajay Mohan (Supra)*, did not address the specific statutory framework or the unique considerations governing Sections 24 and 26 of the HMA. Reaffirming its position, the High Court underscored that the provisions under Sections 24 and 26 of the HMA serve distinct and independent purposes—one ensuring financial support for the dependent spouse and the other protecting the welfare of minor children. It concluded that the Family Court's jurisdiction to adjudicate these matters persists independent of the status of the primary matrimonial dispute, thereby reinforcing the legislative objective of ensuring fairness and equity in matrimonial proceedings.
13. The High Court, while deciding the correctness of interim maintenance provided by the Family Court, heavily relied on the judgment of this Court in *Rajnesh v. Neha and Another*.<sup>3</sup> This Court, in this judgment laid down the principles to ensure equitable determination of financial support for the wife and dependent child. It reiterated that

2 [2007] 13 SCR 298 : (2008) 2 SCC 507

3 [2020] 13 SCR 1093 : (2021) 2 SCC 32

**Digital Supreme Court Reports**

maintenance should be determined after considering the status and lifestyle of the parties, reasonable needs of the wife and children, the wife's educational qualifications, professional skills, and earning capacity, as well as the appellant's financial standing and obligations. It must also address the rising cost of living and inflation to ensure a standard of living that is proportionate to the appellant's financial capacity and consistent with the standard of living the wife and children were accustomed to prior to separation. This Court highlighted that a husband cannot evade his duty of disclosure by concealing assets, as financial transparency is critical to the fair adjudication of maintenance claims.

14. In this case, the High Court observed that the appellant's income, primarily from employment and investments, demonstrated his ability to provide for the wife and child's maintenance adequately. The evidence revealed that the appellant earned over ₹4,00,000 (Rupees four lakhs only) per month between 2007 and 2016. Although he claimed higher living expenses due to his residence in Mauritius, the High Court found his arguments to be unsubstantiated, as his financial resources allowed him to meet maintenance obligations without undue hardship. The High Court further noted several instances of the appellant's deliberate attempts to mislead the judicial process. He withheld critical financial documents and selectively disclosed information to conceal the full extent of his wealth. The inquiry into the statutory forms of the appellant revealed that he had investments in mutual funds valued at ₹5.10 crores as early as 2009-2010, significant sums deposited in bank accounts, and other financial transactions that were not initially disclosed.
15. The High Court also identified false representations by the appellant regarding his property and income. He denied ownership of a property located at F-146, Richmond Park, Gurgaon, despite evidence of its ownership and rental income accruing to him. Additionally, the appellant misrepresented his association with Prasham Consultants LLP, wherein he continued to receive financial benefits until his father replaced him in 2016. These findings demonstrated a pattern of deliberate suppression of material facts and assets by the appellant, aimed at minimizing his maintenance liability. Such conduct warranted judicial intervention to ensure justice and provide adequate financial support to the wife and child, reflecting principles of fairness, transparency, and equity. Consequently, the High Court directed the

**Parvin Kumar Jain v. Anju Jain**

appellant to pay interim maintenance that adequately addressed the needs of the wife and child, proportionate to his financial capacity and consistent with the obligations of a responsible spouse and parent.

16. Consequently, the High Court dismissed the appellant's appeal challenging the order of interim maintenance granted by the Family Court, and, while allowing the respondent's appeal, granted the following relief:
  - i. MAT.APP. (F.C) 120/2019 filed by the wife is allowed to the extent that the interim maintenance granted to the wife under Section 24 of the HMA is enhanced from Rs. 1,15,000/- (Rupees one lakh fifteen thousand only) to Rs. 1,45,000/- (Rupees one lakh forty five thousand only) per month from the date of filing of enhancement application i.e. 28.02.2009 till the date of withdrawal of divorce petition by the appellant i.e. 14.07.2016.
  - ii. All amounts paid by the appellant to the wife and the son till date shall be duly adjusted.
  - iii. The appellant shall also be liable to pay interest at the rate of 12% per annum towards the shortfall in the maintenance amount for the concerned period. The interest shall be calculated on the amount of deficit from the time it became due in a particular month and till the time it is paid.
  - iv. Based on the aforesaid, the arrears of maintenance to both the wife and the son, along with the interest, shall be paid within a period of eight (8) weeks from today.
17. The appellant is before us challenging the above judgment of the High Court on the grounds that the respondent has played a fraud on the Courts by concealing material/relevant documents and by filing false affidavits in support of her enhancement application, and that the son could not be granted maintenance till the age of twenty-six years as per the law. The interest @ 12% per annum is punitive in nature even though he had never defaulted in payment of interim maintenance.
18. We heard the parties in camera to discuss the possibility of an amicable solution but during the proceedings both the parties submitted that they are willing to have the marriage annulled by mutual consent as there remains no possibility of a reunion between them.

**Digital Supreme Court Reports**

19. During the interaction before this Court, we found both the parties to be fair and reasonable in their approach, demeanor and conduct. They have shown an honest intention to amicably settle their disputes instead of maligning each other and unnecessarily delaying the proceedings.
20. Learned senior counsels for the respective parties have made their submissions at length. The parties have also filed their affidavits of assets as directed by this Court.
21. Before we proceed further, it is relevant to note that the parties stayed together only for around five years of the marriage, and even though they have a son out of the wedlock, they have been staying separately for almost over two decades now. They have made multiple serious allegations against each other and have been conducting litigations. They have no intention of reconciling, their marriage exists only for namesake, and there has been no cohabitation between the parties since 2004. Though the petition for dissolution of marriage has been withdrawn by the appellant, the interim maintenance proceedings have been going on between the parties since 2004.
22. The admitted long-standing separation, nature of differences, prolonged litigations pending adjudication, and the unwillingness of the parties to reconcile, are evidence enough to show that the marriage between the parties has completely broken down irretrievably.
23. A Constitution Bench of this Court in its judgment in the case of *Shilpa Sailesh v. Varun Sreenivasan*,<sup>4</sup> laid down that it has the discretionary power to dissolve a marriage which in its opinion and on the evidence has broken down irretrievably. The Court is required to exercise this discretion cautiously while analyzing the facts and evidence of each case. In order to arrive at the decision regarding whether the marriage has irretrievably broken down, the Court needs to factually examine and firmly establish the same, after careful consideration.
24. In *Shilpa Sailesh (Supra)*, this Court further laid down the factors to be considered for such examination, and the same were reiterated in the case of *Kiran Jyoti Maini v. Anish Pramod Patel*.<sup>5</sup> This Court

<sup>4</sup> [2023] 5 SCR 165 : (2022) 15 SCC 754

<sup>5</sup> [2024] 7 SCR 942 : (2024) SCC OnLine SC 1724

**Parvin Kumar Jain v. Anju Jain**

in both these judgments opined that the factors to be examined include the period of cohabitation between the parties, the period of separation, the attempts made for reconciliation, nature and gravity of allegations made between the parties, and such other similar factors.

25. This Court in plethora of judgments, such as *Shilpa Sailesh (Supra)* and *Kiran Jyoti Maini (Supra)*, *Ashok Hurra v. Rupa Bipin Zaveri*<sup>6</sup> and *Hitesh Bhatnagar v. Deepa Bhatnagar*,<sup>7</sup> has laid down the clear position that a marriage can be dissolved by this Court on the ground of irretrievable breakdown when the relationship is so strained that the marriage has succumbed to the long standing differences between the parties and it has become impossible to save such a relationship. When the Court is convinced that there is no scope for the marriage to survive and no useful purpose, emotional or practical, would be served by continuing the soured relationship, and it finds that the marriage is completely dead, then it can exercise its inherent power under Article 142 of the Constitution of India to dissolve the marriage.
26. In the present case, even though the parties cohabited for about five to six years after marriage, but they have been living separately for more than two decades now. From the material on record, it also appears that even during the period of cohabitation the relationship between the parties was strained. The parties have made multiple serious allegations against each other. The appellant has contended that the respondent was short-tempered, hostile and behaved inappropriately with him and his parents, which led him into depression. The respondent has alleged that the appellant's family was indifferent towards her from the beginning, they had created an uncomfortable environment for her, and the appellant showed no concern or care towards her. She further alleged that in the five years of cohabitation, the appellant was hostile towards her, she was treated like a domestic help, was never taken care of, and she was never treated as a wife by him. She finally left her matrimonial house fearing threat to her life, after hearing conversations between the appellant and his mother.

6 [1997] 2 SCR 875 : (1997) 4 SCC 226

7 [2011] 6 SCR 118 : (2011) 5 SCC 234

**Digital Supreme Court Reports**

27. It is evident that the relationship between the parties appears to be strained from the beginning and only further soured over the years. Reconciliation proceedings during the pendency of the divorce petition also failed. The parties have been litigating maintenance proceedings for a prolonged period, and there appears to be no cogent reason to only deal with the issue of interim maintenance after twenty years of strained relationship and separation. These facts are admitted by the parties before us, and they have also mutually agreed for the dissolution of their marriage. Therefore, we believe that the marriage between the parties should be dissolved by this Court while exercising the discretionary power under Article 142 of the Constitution of India.
28. Thus, considering the facts of this case, all the material on record, submissions of the parties and analyzing the same in light of the factors stated above, the marriage between the appellant and the respondent is ordered to be dissolved.
29. The main issue between the parties all these years, since separation, is the quantum of maintenance to be paid by the appellant to the respondent. The issue of maintenance *pendente lite* is now infructuous with the dissolution of marriage, but the financial interest of the wife still needs to be protected through grant of permanent alimony. The learned senior counsels for the parties have made submissions at length regarding the financial condition of both the parties. In order to establish the correct financial position of both the parties, they have filed their respective affidavits of income and assets as ordered by this Court.
30. Before going into the details of the financial position of the parties, it is imperative that we highlight the position of law with regard to determination of permanent alimony. This Court, in a catena of judgments, has laid down the factors that needs to be considered in order to arrive at a just, fair and reasonable amount of permanent alimony.
31. There cannot be strict guidelines or a fixed formula for fixing the amount of permanent maintenance. The quantum of maintenance is subjective to each case and is dependent on various circumstances and factors. The Court needs to look into factors such as income of both the parties; conduct during the subsistence of marriage; their

### Parvin Kumar Jain v. Anju Jain

individual social and financial status; personal expenses of each of the parties; their individual capacities and duties to maintain their dependents; the quality of life enjoyed by the wife during the subsistence of the marriage; and such other similar factors. This position was laid down by this Court in *Vinny Paramvir Parmar v. Paramvir Parmar*,<sup>8</sup> and *Vishwanath Agrawal v. Sarla Vishwanath Agrawal*.<sup>9</sup>

32. This Court in the case of *Rajnesh v. Neha (Supra)*, provided a comprehensive criterion and a list of factors to be looked into while deciding the question of permanent alimony. This judgment lays down an elaborate and comprehensive framework necessary for deciding the amount of maintenance in all matrimonial proceedings, with specific emphasis on permanent alimony. The same has been reiterated by this Court in *Kiran Jyot Maini v. Anish Pramod Patel (Supra)*. The primary objective of granting permanent alimony is to ensure that the dependent spouse is not left without any support and means after the dissolution of the marriage. It aims at protecting the interests of the dependent spouse and does not provide for penalizing the other spouse in the process. The Court in these two judgments laid down the following factors to be looked into:
- i. Status of the parties, social and financial.
  - ii. Reasonable needs of the wife and the dependent children.
  - iii. Parties' individual qualifications and employment statuses.
  - iv. Independent income or assets owned by the applicant.
  - v. Standard of life enjoyed by the wife in the matrimonial home.
  - vi. Any employment sacrifices made for the family responsibilities.
  - vii. Reasonable litigation costs for a non-working wife.
  - viii. Financial capacity of the husband, his income, maintenance obligations, and liabilities.

These are only guidelines and not a straitjacket rubric. These among such other similar factors become relevant.

8 [2011] 9 SCR 371 : (2011) 13 SCC 112

9 [2012] 7 SCR 607 : (2012) 7 SCC 288

**Digital Supreme Court Reports**

33. This Court in *Kiran Jyoti Maini (Supra)*, while discussing the husband's obligation to maintain the wife and the importance of his financial capacity in deciding the quantum, observed that:
- “26. Furthermore, the financial capacity of the husband is a critical factor in determining permanent alimony. The Court shall examine the husband's actual income, reasonable expenses for his own maintenance, and any dependents he is legally obligated to support. His liabilities and financial commitments are also to be considered to ensure a balanced and fair maintenance award. The court must consider the husband's standard of living and the impact of inflation and high living costs. Even if the husband claims to have no source of income, his ability to earn, given his education and qualifications, is to be taken into account. The courts shall ensure that the relief granted is fair, reasonable, and consistent with the standard of living to which the aggrieved party was accustomed. The court's approach should be to balance all relevant factors to avoid maintenance amounts that are either excessively high or unduly low, ensuring that the dependent spouse can live with reasonable comfort post-separation.”
34. In the present case, it is a matter of record and an admitted fact that the respondent is unemployed while the appellant is a well accomplished banker who has worked in multiple senior roles at various banks over the years. We have perused the records of finances produced before us. Even though the records of the DEMAT accounts and the employment letters produced by the appellant are almost ten years ago or earlier, his financial position can be suitably ascertained from them.
35. It is admitted on record that the respondent is a home maker and has not been working in all these years, the son lives with her, who has now completed his B. Tech. course, and they reside in a house owned by the respondent's mother. The appellant has paid for the son's education as well as paid the interim maintenance as ordered by the Family Court. The son is now major and has also completed his graduation.
36. The appellant is currently working as the Chief Executive Officer of Vision Bank in Dubai and his estimated salary is about AED 50,000

**Parvin Kumar Jain v. Anju Jain**

per month which means that he is earning around Rs. 10 to 12 Lakhs per month. Though he has filed details of his DEMAT accounts from 2010, it is revealed that he had investments of around Rs.5 crores at that time. Further, he has three properties worth approximately Rs.2 crores, Rs.5 crores and Rs.10 crores, respectively.

37. During the period of cohabitation, the parties were initially residing in Mumbai when the appellant was working as a Foreign Exchange Executive with Global Trust Bank and subsequently in Chennai when the appellant changed his job. The appellant has worked at multiple positions in prestigious Banks and stayed in metropolitan cities with the respondent during the subsistence of the marriage.
38. In compliance of this Court's order dated 23.09.2024, the appellant has also paid Rs. 72 Lakhs as arrears of maintenance in addition to the maintenance already paid by him.
39. It is not disputed that the appellant has the legal obligation as well as the financial capacity to maintain the respondent after dissolution of the marriage. As held by us in *Kiran Jyoti Maine (Supra)*, it is also necessary to ensure that the amount of permanent alimony should not penalize the husband but should be made with the aim of ensuring a decent standard of living for the wife.
40. Considering the material on record, the totality of the circumstances and the facts of this case, a one-time settlement amount with provision for the respondent as well as the son, would be a fair arrangement. For the respondent, considering the standard of living enjoyed by her during subsistence of the marriage, the prolonged period of separation, and the appellant's financial capacity, a one-time settlement amount of Rs. 5 crores (Rupees five crores only), appears to be just, fair and reasonable amount for the respondent to be paid by the appellant towards settlement of all pending claims also.
41. It is also equitable and only obligatory for a father to provide for his children, especially when they have the means and the capacity to do the same. Even though the son is now major and has just finished his engineering degree, the High Court has rightly observed that it is only after completion of a college/ university degree and in some cases, completing a post-graduation/ professional degree, would the child be able to secure employment. In fact, it can safely be concluded that, in today's competitive world, gainful employment

**Digital Supreme Court Reports**

may be feasible only after the child has pursued education beyond 18 years of age. Mere completion of his engineering degree does not guarantee a gainful employment, in these competitive times. The appellant herein has sufficient means to support his child, and thus provision should also be made for his maintenance and financial security as well. An amount of Rs. 1 crore (Rupees one crore only) towards the maintenance and care of the son appears to be fair, which he can utilize for his higher education and as security till he becomes financially independent.

42. Therefore, we fix the above mentioned amount as one-time settlement amount to be paid by the appellant to the respondent and his son within a period of four months from the date of this judgment.
43. Consequently, the appeals are disposed of with the above observations and directions to the parties. Accordingly, decree of divorce be granted in exercise of this Court's power under Article 142 of the Constitution of India. Further, the appellant shall pay the amount provided above towards permanent alimony to the respondent and his son within the time stipulated above. The Registry to draw a decree accordingly.

*Result of the case:* Appeals disposed of.

<sup>†</sup>*Headnotes prepared by:* Ankit Gyan