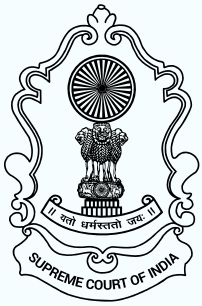

SUPREME COURT REPORTS

The Official Law Report
Fortnightly

2025 I Volume 8 I Part 1

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

Digitally Published by
Supreme Court of India

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Digitally Published by
Supreme Court of India

Editorial Board

Digitally Published by
Supreme Court of India

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

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Indian Oil Corporation Limited & Ors.
v.
M/s Shree Niwas Ramgopal & Ors.

(Special Leave Petition (Civil) No. 1381 of 2025)

14 July 2025

[Pankaj Mithal* and Ahsanuddin Amanullah, JJ.]

Issue for Consideration

Whether the Division Bench of the High Court rightly upheld the mandamus issued by the Single Judge directing the IOCL to maintain the supply of kerosene to the respondent No.1-partnership firm till it is reconstituted or its dealership agreement is terminated.

Headnotes†

Partnership Act, 1932 – s.42 – Kerosene dealership agreement entered into between IOCL and respondent No.1-partnership firm having three partners – However, on the death of one of the partners of the partnership firm, IOCL discontinued the supply of kerosene to the existing firm without terminating its dealership – Writ Petition filed by the firm and its partners – Allowed, IOCL was directed to continue the supply of kerosene to the existing partnership firm till it is reconstituted subject to the condition stated – Correctness:

Held: No error or illegality in the order of the High Court – The partnership consisted of three partners and the deed of partnership itself, in unequivocal terms, provided that the death of a partner shall not cause discontinuance of partnership and the surviving partners may continue with the business – Therefore, the principle laid down in s.42 is not applicable and the partnership would continue despite the death of one of the partners – Furthermore, the firm was reconstituted as per the proposal submitted having the surviving partners and one of the heirs and legal representatives of the deceased, as the third partner – However, the said reconstituted firm was not recognised by the IOCL as all the heirs and legal representatives of the deceased persons did not join or did not express their unwillingness to join the partnership firm – The insistence of the respondent that all the legal heirs of the deceased partner should join the reconstituted firm or give

* Author

'No Objection Certificate' to the reconstituted firm is contrary to the spirit of the original deed of partnership – Respondent has no role to play in determining as to who is the competent heir of the deceased partner – It should be left on the wisdom of the existing partners – IOCL misconstrued its own guidelines in not recognising the reconstitution of the partnership firm – Approach of IOCL arbitrary, creating hinderance in the running business – Deprecated – Impugned order not interfered with. [Paras 18, 22, 25-27, 28, 30]

Case Law Cited

M/s Wazid Ali Abid Ali v. Commissioner of Income Tax, Lucknow **[1987] SCR 3 1049 : (1988) Supp. SCC 193 – relied on.**

Sandersons & Morgans v. ITO **(1973) 87 ITR 270;** *Noor Mohammad and Co. v. Commissioner of Income-Tax* **(1991) 191 ITR 550;** *Indian Oil Corporation v. Roy and Company,* **2018 (1) CHN (Cal) 199 – referred to.**

List of Acts

Partnership Act, 1932.

List of Keywords

Kerosene dealership agreement; Indian Oil Corporation Limited (IOCL); Death of one of the partners; No discontinuance of the partnership business; Surviving partners to continue the business; Partnership to continue despite the death of one of the partners; Supply of kerosene discontinued; Reconstitution of the partnership firm; Firm reconstituted; Reconstituted firm; Existing partnership firm; Partnership deed; Partnership firm; Proprietorship firm; Agency/ distributor of kerosene oil; Deceased partner; Legal representatives/ heirs of the deceased partner; Heirs and legal representatives; Mandamus; State instrumentality; Arbitrary powers; Statutory corporation; No fairness; Exercising arbitrary powers; Matter of commercial interest; Partnership business.

Case Arising From

EXTRAORDINARY APPELLATE JURISDICTION: Special Leave Petition (Civil) No. 1381 of 2025

From the Judgment and Order dated 04.07.2018 of the High Court at Calcutta in APO No. 42 of 2014

Indian Oil Corporation Limited & Ors. v.
M/s Shree Niwas Ramgopal & Ors.

Appearances for Parties

Advs. for the Petitioners:
Ms. Madhavi Goradia Divan, Sr. Adv., Ms. Mala Narayan, Shashwat Goel, Ms. Isha Ray.

Advs. for the Respondents:
Yashraj Singh Deora, Sr. Adv., Ramanand Aggarwal, Anindo Mukherjee, Rameshwar Prasad Goyal, Ms. Pallavi Pratap, Ashag Gutgutia, Amjid Maqbooc, Ms. Yashvi Aswani.

Judgment / Order of the Supreme Court

Judgment

Pankaj Mithal, J.

1. Heard Smt. Madhavi Goradia Divan, learned senior counsel for the Petitioner, Shri Yashraj Singh Deora, learned senior counsel for the Respondent Nos. 1 to 3 and Smt. Pallavi Pratap, learned counsel for the Respondent Nos.7 and 8.

2. It is a classic case where instead of acting in a just, fair and equitable manner, the statutory corporation, a state instrumentality, has acted in a high-handed manner while exercising arbitrary powers with no sense of fairness in a matter of commercial interest.

3. The Indian Oil Corporation Limited[1] after having lost before the Single Judge and the Division Bench of the High Court of Calcutta in successfully defending its above action has preferred this Special Leave Petition, probably in order to cover its illegal action.

4. The Special Leave Petition is directed against the judgment and order dated 04.07.2018 passed by the Division Bench of the High Court upholding the mandamus issued by the Single Judge on 03.07.2012 in a writ petition directing the IOCL to maintain the supply of kerosene to the respondent No.1 till it is reconstituted or its dealership agreement is terminated.

5. The brief facts giving rise to the present dispute and to this Special Leave Petition are that Respondent No.1 – M/s Shree Niwas Ramgopal herein was a proprietorship firm of one Kanhaiyalal

1 In short 'IOCL'

Sonthalia. The said Kanhaiyalal Sonthalia reconstituted the firm on 24.11.1989 and included his two sons, Ramesh Sonthalia and Gobinda Sonthalia along with himself as partners in the said firm. The firm was reconstituted as a partnership firm with Kanhaiyalal Sonthalia having 55% share, Ramesh Sonthalia having 35% share and Gobinda Sonthalia holding 10% share in the said partnership business.

6. The partnership was to work as an agency/distributor of kerosene oil for the IOCL. The said partnership firm entered into a kerosene dealership agreement with the IOCL on 11.05.1990 which *inter alia* specifically provided that in the event of death of any of the partners of the partnership firm, the dealer shall immediately inform the corporation and provide details of the heirs and legal representatives of the deceased partner. It further provided that IOCL shall have an option:- i) to continue with the dealership with the existing firm; or ii) to have fresh agreement of dealership with the reconstituted firm; or iii) to terminate the dealership agreement. The decision of the IOCL in this behalf shall be final and binding upon all parties.

7. One of the partners of the aforesaid partnership firm Kanhaiyalal Sonthalia, having 55% shares in the firm, died on 29.11.2009 leaving behind his wife, seven sons and four daughters as his heirs and legal representatives which included Ramesh Sonthalia and Gobinda Sonthalia, the two sons who were already working as partners in the firm.

8. On the death of aforesaid Kanhaiyalal Sonthalia, as usually happens in all business families, disputes cropped up amongst his heirs with regard to the stake of 55% shareholding of the deceased in the partnership firm.

9. One of his legal heirs Ananda Sonthalia addressed a letter dated 19.01.2010 to the existing partners staking claim in the partnership and that he be inducted as one of the partners. An undated letter was written by another heir Jagdish Prasad Sonthalia stating he has a bitter experience about the firm's business and he does not know about the assets and liabilities of his deceased father, therefore, the remaining partners be directed to furnish the details of the assets and liabilities, failing which it would not be possible for him to take a decision in the matter. Another legal heir Rakesh Sonthalia sent a letter to the Chief Divisional Retail Sales Manager of IOCL on 07.02.2010, informing him that his deceased father had left a will

dated 28.05.2008, bequeathing his 55% share in the firm to him and that after his death he should be taken as a partner. It was later informed that he had already applied for probate of the said will through Miscellaneous Case No.11 of 2010 in the court of Civil Judge, Junior Division, Jangipur.

10. Pending the above confusion regarding the reconstitution of the partnership firm, the IOCL approved the continuation of the firm till 14.06.2010 and advised them to furnish documents for the reconstitution of the firm. Accordingly, the subsisting partners on 13.04.2010 submitted a proposal for the reconstitution of the firm with the surviving partners and one another legal heir of the deceased i.e., Bijoy Sonthalia, with necessary documents and the reconstitution fee of Rs.25,000/-.

11. Despite the above, the firm was informed that the validity of the token to supply kerosene would not be extended beyond 14.06.2010 if a fresh agreement is not executed. The representations of the partners to continue supplies were all in vain. Thus, the firm and its partners were compelled to invoke the writ jurisdiction of the High Court under Article 226 of the Constitution by filing Writ Petition No.758 of 2010[2]. The firm and its subsisting partners therein prayed for declaring Clause 1.5 of the policy guidelines dated 01.12.2008 to be illegal and contrary to the provisions of the Indian Partnership Act, 1932, for a mandamus to renew the licence to supply kerosene and to allow reconstitution of the partnership firm in terms of the partnership deed dated 24.11.1989. A further prayer was made to extend the validity of the token for the supply of the kerosene and not to stop it after 14.06.2010 so that the partnership firm may continue its business till the reconstitution of the firm.

12. The aforesaid writ petition was allowed *vide* judgment and order dated 03.07.2012 directing the IOCL to allow the partnership firm to be reconstituted subject to any order that may be passed in the probate case or by the competent civil court in the event any of the legal heirs approaches the court. The aggrieved heirs were given liberty to get their rights decided by the competent civil court. The court directed that till their rights are not decided, the partnership firm will be allowed to continue with its subsisting partners and to receive supplies of kerosene.

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2 M/s Shree Niwas Ramgopal & Ors. vs. The Director of Consumer Goods & Ors.

13. Aggrieved by the aforesaid directions of the learned Single Judge of the High Court, only the IOCL appealed against it. No grievance was raised by any of the heirs and legal representatives of the deceased Kanhaiyalal Sonthalia. None of them assailed the aforesaid order before the Division Bench meaning thereby that they felt satisfied and accepted the directions of the Single Judge.

14. The appeal by the IOCL was disposed of by the Division Bench on 04.07.2018 holding that in view of the law laid down earlier by the High Court in ***Indian Oil Corporation vs. Roy and Company***[3], the IOCL is not entitled to discontinue the supply of kerosene oil to the partnership firm. The IOCL being a state authority ought to act in the interest of consumers, the common people, and should continue to supply kerosene oil to the firm for a period of one year and thereafter review the same on yearly basis till the partnership firm is reconstituted amongst the surviving partners and the heirs of the deceased partner.

15. The sheet anchor of Smt. Madhavi Divan, learned senior counsel for the IOCL, is the revised policy guidelines dated 01.12.2008. Her main submission is that the IOCL is following the said guidelines uniformly throughout the country. The said guidelines *vide* Clause 1.5 provides that in case of death of a partner(s), the partnership shall be reconstituted with the legal heir(s) of the deceased partner(s) and the surviving partner(s). Since all the heirs of deceased Kanhaiyalal Sonthalia have not applied or joined as partners to the reconstituted partnership firm, the IOCL is not bound to continue business with the existing partnership or to recognise the alleged reconstituted partnership, so as to continue the supply of kerosene.

16. In order to counter the above arguments, the counsel for the Respondents 1,2 and 3 i.e., the partnership firm and the surviving partners submitted that under the deed of partnership dated 24.11.1989, it has been specifically stipulated *vide* Clause 18 that in the event of death of any of the partner, the partnership will not cease to function, rather it shall continue to carry on the business and the surviving partners may admit any of the competent heirs of the deceased partner to the partnership so as to reconstitute it. The Dealership Agreement dated 11.05.1990 also does not provide for the cessation of the existing partnership on the death of one of

3 2018 (1) CHN (Cal) 199

the partners, rather it provides to continue the dealership with the existing firm or to have a fresh dealership agreement with the firm, if reconstituted, or to terminate the dealership agreement. Since the dealership agreement was never terminated, the IOCL is not empowered to stop the supplies of the kerosene or to treat the business having come to an end.

17. In the light of the facts as narrated above and the submissions advanced by the counsel for the parties, it would be prudent to first refer to the Dealership Agreement dated 11.05.1990 which lays down the conditions of dealership *inter alia* that in the event of death of any partner, the subsisting partners of the dealership shall immediately inform to the IOCL about the death of the partner with necessary details of legal heirs of the deceased partner; whereupon it would be open for the IOCL to:- (i) either continue the dealership with the existing firm; or (ii) to have the fresh agreement of the dealership with the firm if reconstituted; or (iii) to terminate the dealership agreement. The above three conditions are evident from the plain and simple reading of Clause 30 of the dealership agreement.

18. It is an admitted position that the IOCL till date has not exercised the option of terminating the dealership of the firm, rather has provided opportunity to the firm to reconstitute itself. The firm has been reconstituted as per the proposal submitted on 13.04.2010 having the surviving partners and Vijay Sonthalia, one of the heirs and legal representatives of the deceased, as the third partner. However, the said reconstituted firm has not been recognised by the IOCL simply for the reason that all the heirs and legal representatives of the deceased persons have not joined or have not expressed their unwillingness to join the partnership firm.

19. The deed of partnership on the other hand *vide* Clause 18 clearly stipulates that the death of any partner shall not cause discontinuance of the partnership business and that the surviving partners may continue the business and the interest of the deceased partner shall vest in the legal heirs of the deceased. The surviving partners have the option to admit any of the competent heirs of the deceased partner to the partnership on such terms and conditions as may be agreed upon.

20. The aforesaid clause thus permits the existing partners to continue with the partnership business notwithstanding the death of one of

the partners, leaving it open for the surviving partners to induct any of the competent heirs of the deceased partner in the partnership business. It is not necessary for the surviving partners to include all the heirs of the deceased partners in the partnership or to wait for their consent to be included or not to be included in the partnership.

21. It is settled in law by virtue of Section 42 of the Partnership Act, 1932[4] that the partnership will stand dissolved *inter alia* on the death of the partner but this is applicable in cases where there are only two partners constituting the partnership firm. The aforesaid principle would not apply where there are more than two partners in a partnership firm and the deed of partnership provides otherwise that the firm will not stand automatically dissolved on the death of one of the partners.

22. In the case at hand, the partnership consisted of three partners and the deed of partnership, in unequivocal terms, provided that the death of a partner shall not cause discontinuance of partnership and the surviving partners may continue with the business. Therefore, the principle laid down under Section 42 of the Partnership Act would not be applicable and the partnership would continue despite the death of one of the partners.

23. This Court in ***M/s Wazid Ali Abid Ali vs. Commissioner of Income Tax, Lucknow***[5] observed that under the Partnership Act, on death or demise of a partner, the firm shall not be dissolved but shall be carried on with the remaining partners or by including the heirs and representative of the deceased partner on such terms and conditions mutually agreed upon. The aforesaid decision relied upon the decision of Calcutta High Court in ***Sandersons & Morgans vs. ITO***[6] wherein it was reiterated that if one of the partners dies or retires, there is change in the constitution of the firm but there is no dissolution. A similar view was expressed by the Allahabad High Court in ***Noor Mohammad and Co. vs. Commissioner of Income-Tax***[7] wherein it was held that the partnership would continue despite the death of one of the partners in terms of the Partnership Deed.

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4 Hereinafter referred to as the "Partnership Act"

5 (1988) Supp. SCC 193

6 (1973) 87 ITR 270

7 (1991) 191 ITR 550

24. Moreover, the dealership agreement itself recognises that in the event of death of one of the partners, the IOCL may continue the dealership with the said firm. Therefore, on the death of one of the partners of the firm, the business of the firm would not come to an end in view of Clause 18 of the deed of partnership read with Clause 13 of the dealership agreement. In such a situation, the IOCL could not have discontinued the supply of kerosene to the existing firm without terminating its dealership.

25. The IOCL has refused to recognise the reconstituted firm on the pretext that all the heirs of the deceased partners have not joined or expressed their willingness either way to join or not to join the firm. In this connection, Clause 1.5 of the guidelines dated 01.12.2008 is very relevant and important. The said guidelines simply provide that in the case of death of one of the partners, the partnership shall be reconstituted with the legal heirs of the deceased partner and the surviving partners. It further provides that if there are no legal heirs or any of them have expressed unwillingness to join the firm, the dealership shall be reconstituted with the surviving partners or with the willing heirs of the deceased partner. The aforesaid guidelines nowhere stipulates that it is mandatory for all the legal heirs to join or reconstitute the partnership firm or otherwise to express their unwillingness to participate. It simply provides that a firm can be reconstituted with the legal heirs of the deceased partner which does not in any manner mean that it is mandatory for all the legal heirs to join for reconstitution of the firm. In fact, the deed of partnership specifically provides that on the death of any of the partners, the business of the partnership will continue with the surviving partners and they may induct any of the competent heirs of the deceased partners, which means that it is not imperative upon the surviving partners to induct all the heirs of the deceased partner in the reconstituted partnership firm. The insistence of the IOCL that all the legal heirs of the deceased partner should join the reconstituted firm or give 'No Objection Certificate' to the reconstituted firm would be contrary to the spirit of the original deed of partnership. The IOCL has no role to play in determining as to who is the competent heir of the deceased partner. It should be left on the wisdom of the existing partners.

26. In the wake of the above analysis and the discussion, the IOCL appeared to have misconstrued its own guidelines in not recognising the reconstitution of the partnership firm with the surviving partners

and one new partner being one of the competent heir and legal representative of the deceased partner.

27. It is trite to mention that the IOCL is supposed to act in a manner which is beneficial for the continuance of the business and not to adopt an arbitrary approach thereby creating hinderance in the running business. It is for this reason that the learned Single Judge and the Division Bench of the High Court issued *Mandamus,* directing IOCL to continue the supply of kerosene to the existing partnership firm till it is properly reconstituted, subject to any order that may be passed in the probate case or by the competent Civil Court, if any of the heirs of the deceased partners approaches such a court and that the situation be reviewed on yearly basis to allow reconstitution of the firm with the surviving partners.

28. In the facts and circumstances of the case, there is no error or illegality on the part of the High Court in issuing the above directions.

29. It may be pertinent to note that none of the heirs and legal representatives were dissatisfied by the directions issued by the High Court as they have not assailed the same in any forum. Therefore, when the heirs and legal representatives of the deceased partner were not aggrieved, it was not appropriate for the IOCL to have taken a hyper-technical approach on the interpretation of the guidelines, so as not to extend the period of supply of kerosene or to stop the supply which, in effect, is axiomatic to the continuance and the smooth flow of business which was continuing for past many years.

30. Accordingly, in view of the aforesaid facts and circumstances, we do not propose to entertain the Special Leave Petition and to interfere with the impugned order(s) of the High Court.

31. The Special Leave Petition is devoid of merit and is dismissed with the observation that the IOCL ought to avoid such litigations by interfering with the continuance of any running business by taking a narrow approach.

Result of the case: Special Leave Petition dismissed.

[†]*Headnotes prepared by:* Divya Pandey

[2025] 8 S.C.R. 11 : 2025 INSC 833

M/s United Spirits Ltd.
v.
The State of Madhya Pradesh & Ors.

(Civil Appeal No. 5113 of 2025)

14 July 2025

[J.B. Pardiwala and K.V. Viswanathan,* JJ.]

Issue for Consideration

Did the appellants-manufacturers cause to effect the entry of goods into the local area as required u/s.3(1)(a) r/w ss.2(1)(aa), 2(1)(b) and 2(3), M.P. Entry Tax Act, 1976, rendering them liable for entry tax for the period 01.04.2007 to 31.03.2008; is there an inseverable link between the manufacturers and the ultimate retailers.

Headnotes†

M.P. Entry Tax Act, 1976 – s.3(1)(a) r/w ss.2(1)(aa), 2(1)(b) and 2(3) – Incidence of taxation – "entry of goods into a local area"; "entry tax"; "caused to be effected the entry of goods" – Appellants, manufacturers and suppliers of beer and Indian Made Foreign Liquor (IMFL), if caused to effect the entry of goods into the local area as required u/s.3(1)(a) r/w s.2(1)(aa), 2(1)(b) and 2(3) rendering them liable for entry tax – Plea of the appellants that sales are made by the State Government warehouse in charge to the authorized retailers, who are also license holders for retail sale of IMFL and beer and there is no privity of contract between the appellants and the retailers and; it is only the State Government warehouse which cause to effect the entry of the goods – High Court upheld the levy of entry tax on the appellants – Challenge to:

Held: Impugned order not interfered with – s.3(1) r/w s.2(1)(aa) and 2(1)(b) and 2(3), makes it clear that the appellants by the sale to the warehouse caused to be effected the entry of goods and the entry was occasioned on the account of the sale into the local area for consumption, use or sale therein – Also, it is not disputed that the appellant is a dealer as defined under

* Author

the Madhya Pradesh VAT Act 2002, as it stood then – The only contention of the appellants is that the State warehouse is also a dealer – That makes no difference since it cannot be disputed that the appellants occasioned the entry of goods and the levy of entry tax on them, which could always be passed on, is justifiable in law. [Paras 31-33, 36]

M.P. Entry Tax Act, 1976 – ss.3B, 14 – Appellants contended that as notification u/s.3B was not issued, no entry tax could be levied:

Held: Contention rejected – High Court rightly held that s.3B is only a machinery provision and in the teeth of s.14, it is not correct to say that there cannot be any assessment or collection of Entry Tax merely because there is no notification u/s.3B – s.3B is an enabling provision – Further, the 'non-obstante' in s.3B will not foreclose the operation of s.14, since s.3B will override only if there is a contrary provision – In the absence of any notification u/s.3B, there is nothing contrary in s.14 for the non-obstante in s.3B to be invoked to override s.14. [Paras 32, 33]

M.P. Entry Tax Act, 1976 – State canalising the supply of beer and Indian made foreign liquor (IMFL) into the local area – If there is an inseverable link between the manufacturers and the ultimate retailers:

Held: In case a canalising agency or intermediary agency is involved, unless their role is merely that of a name lender, the sale will not be treated as an inseparable or an inseverable sale – If an independent canalising agency enters into back-to-back contracts and there is no direct linkage or causal connection between the export by foreign exporter and the receipt of the imported goods in India by local users, then the integrity of the entire transaction would be disrupted and would be substituted by two independent transactions – Applying the tests to the present canalising transaction, there is no doubt that there are two independent transactions, one between the appellant-manufacturers and the State Warehouse and the other between the State warehouse and the retailers – Contention of the State that its role is only supervisory and the warehouses didn't purchase beer and IMFL from the manufacturer, not accepted. [Paras 25, 27]

Words and Phrases – "caused to be effected the entry of goods"; "Cause" – M.P. Entry Tax Act, 1976. [Paras 29, 31]

Case Law Cited

Hyderabad Industries Ltd. v. Union of India & Ors. **[1999] 3 SCR 471 : (2000) 1 SCC 718;** *Coffee Board, Bangalore v. Joint Commercial Tax Officer, Madras & Anr.* **[1970] 3 SCR 147 : (1969) 3 SCC 349**; *State of Karnataka v. Azad Coach Builders Private Ltd. & Anr.* **[2010] 12 SCR 895 : (2010) 9 SCC 524 – followed.**

M/s Bhagatram Rajeevkumar vs. Commissioner of Sales Tax, M.P. and Others **[1994] Supp. 6 SCR 91 : (1995) Supp. 1 SCC 673 – held inapplicable.**

K. Gopinathan Nair & Ors. v. State of Kerala **[1997] 3 SCR 226 : (1997) 10 SCC 1;** *Kerala State Warehousing Corpn. v. State of Kerala* **(2005) 10 SCC 142 – relied on.**

A.G. Varadarajulu & Anr. v. State of T.N. & Ors. **[1998] 2 SCR 390 : (1998) 4 SCC 231;** *Union of India and Anr. v. G.M. Kokil & Ors.* **[1984] 3 SCR 292 : (1984) Supp. SCC 196 – referred to.**

Books and Periodicals Cited

Oxford Dictionary, 8th Edition.

List of Acts

Central Sales Tax Act, 1956; Madhya Pradesh Sthaniya Kshetra Me Mal Ke Pravesh Par Kar Adhiniyam, 1976; Madhya Pradesh VAT Act, 2002; M.P. Entry Tax Act, 1976; M.P. Entry Tax (Amendment) Act No. 9 of 2007; The Madhya Pradesh Sthaniya Kshetra Me Mal Ke Pravesh Par Kar (Sanshodhan) Adhiniyam, 2007; M.P. Foreign Liquor Rules, 1996.

List of Keywords

Entry tax; Payment of entry tax; Entry of goods; “Entry of goods into the local area”; “Caused to be effected the entry of goods”; Movement of the goods into the local area; Incidence for the levy; Beer; Indian Made Foreign Liquor (IMFL); State Government warehouses; Retailers; Manufacturer; License to manufacture and supply; Manufacturer, supplier of beer and IMFL; License holders for retail sale of IMFL and beer; Sales made by the warehouse; Sale into the local area for consumption; Canalising the supply of beer and Indian made foreign liquor into the local area; Canalising agency; Intermediary agency; No privity of contract; Dealer; Independent transactions; Transportation expenses; FL-9 license; FL-9A license; FL-10 license; FL-1 license.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 5113 of 2025

From the Judgment and Order dated 19.08.2010 and 20.08.2010 of the High Court of Madhya Pradesh Principal Seat at Jabalpur in WP No. 9678 of 2007

With

Civil Appeal No. 5114 of 2025

Appearances for Parties

Advs. for the Appellant:
Rohan Shah, Sumit Nema, Sr. Advs., Akshat Shrivastava, Satvic Mathur, Ms. Manjeet Kirpal, Akshat Shrivastava, Satvic Mathur, Mrs Pooja Shrivastava.

Advs. for the Respondents:
Nachiketa Joshi, Sr. A.A.G., Pashupathi Nath Razdan, Sidhartha Sinha.

Judgment / Order of the Supreme Court

Judgment

K.V. Viswanathan, J.

1. A short and interesting question falls for consideration in these appeals. The issue is whether the appellants are liable for the payment of entry tax under Section 3 of the *Madhya Pradesh Sthaniya Kshetra Me Mal Ke Pravesh Par Kar Adhiniyam*, *1976* [hereinafter referred to as the 'M.P. Entry Tax Act, 1976']. The High Court has repelled the challenge of the appellants. Aggrieved, they are in appeal(s) before us.

BRIEF FACTS: -

CASE OF THE APPELLANTS: -

2. In the writ petition filed by the appellants, their case was that they are involved in bottling and supplying of Beer and Indian Made Foreign Liquor (for short 'IMFL'). The appellants hold license under the M.P. Excise Act, 1944 to manufacture and supply beer and IMFL. They

supply the said goods after obtaining a No Objection Certificate [NOC] from the officer-in-charge posted at the factory. It was contended that the goods are transported to the State Government warehouse and the transportation pass is issued in the name of the concerned warehouse. According to the appellants, the sales are made by the warehouse in charge to the authorized retailers, who are also license holders for retail sale of IMFL and beer.

3. The appellants averred that under the M.P. Excise Act, FL-9 license is to manufacture IMFL products and FL-9A license is to produce franchisee products. FL-9 and FL-9A licensees can sell to FL-10 licensees only. According to the appellants, the FL-10 licensee in M.P. is the Excise Department, which runs the State Government warehouse. The retailers hold the FL-1 license and they purchase from FL-10 licensee after issuance of NOC by the respective District Excise Officers. According to the appellants, the sale is made by the Government warehouses to the retailers through the sale bill issued in the name of the retailers; that the Government warehouses deposit the amount payable to the appellants in their bank accounts and send intimation in respect of the goods sold in respect of the appellants to the Commissioner, who in turn transfers the amount from the bank of the Department to the appellants' bank account. The appellants submit that the retailers pay license fee in equal installments and at that point were paying 6% '*Parivahan Shulk*' (transportation expenses) by depositing the same with the Treasury. The appellants contend that the transaction is between the Government warehouses and the retailers.

CASE OF THE RESPONDENT- STATE: -

4. In the return filed by the State, they contended that the State Government neither purchases nor sells the liquor. The State referred to three documents that had a crucial bearing on the disposal of the present case.

   i) First is the communication issued by the Additional Secretary, (Finance Department), Government of M.P. to the Excise Commissioner under the subject "Collection of Indian Made Foreign Liquor and provision of its supply to its retail licensees". The communication states that the Manufacturing Units are allowed to store liquor in the departmental godowns. The

Manufacturing units declare the Ex-godown price of their liquor in due course and supply of liquor is effected to retail contractors by adding 5% additional fee on this cost. Retail contractors would deposit the amount with the specified bank and the bank would deposit the amount through the treasury in the government account. The Deputy Commissioners would be sent the statement of the amount deposited twice every month. Out of the amount collected during the previous month, payment of amount due to the manufacturing unit would be made by the Excise Commissioner and the expenditure would be debited from the expenditure account pertaining to the Commercial Tax Department.

ii) The second communication also dealt with the same issue as above with certain minor changes which are not material. There was a clarification that the 5% amount would be transferred to the departmental head, and the remaining amount to the concerned manufacturing unit.

iii) The third and the most important document annexed to the counter affidavit is the "Guidelines for the Officers-in-charge of Foreign liquor warehouse" issued on 27.3.2002. Under the guidelines, it is mentioned that Foreign liquor warehouse be established at the Divisional Headquarters of the State. Manufacturing Units would store foreign liquor and that supply of collected liquor would be effected to the retail contractors at the rates reckoned after adding 5% amount to the rates declared by the manufacturing units. All arrangements of storage was to remain under the control of the Deputy Commissioners posted at the Divisional Headquarters; and the Divisional Deputy Commissioners would issue directions to the Officer-in-charge for issuance of No Objection Certificates to the manufacturing units after assessing the local demand. Retail sale licensee would make arrangement of loading on their own for effecting supply of foreign liquor stored in the warehouse. Collection Counter of Punjab National Bank is established in each and every store. Retail contractor would deposit the necessary amount in the account of the concerned manufacturing unit at the counter of this bank. Under Supply process, the following guidelines are mentioned:-

a) Demand note of each and every shop would be submitted individually in the prescribed form for taking supply of foreign liquor and beer by the licensee of retail sale from the store. Brand-wise/label-wise/size-wise and quantity of the manufacturing units would be clearly recorded in this demand note.

b) Warehouse officer would scrutinize the submitted demand letter. In case a few labels of liquor/beer mentioned in the submitted demand letter are not available, then the necessary amendment would be made in the demand letter.

c) Warehouse officer would give demand letter to the licensee after recording the note "liquor may be supplied according to the demand letter" for further submission in the computer room.

d) Computer room would prepare a delivery challan in the prescribed form and the manufacturing unit would make available the information about the amount to be deposited, to the retail contractor who is/are going to receive the supply.

e) In case liquor/beer is supplied to the licensee of retail sale without depositing the amount on the responsibility of the manufacturing unit on the basis of the authority letter issued by any manufacturing unit with the prior permission of the Excise Commissioner, the same would have to be mentioned categorically in the prescribed form.

f) In case any quantity of liquor/beer is supplied without depositing the prescribed amount on the responsibility of the manufacturing unit with the prior permission from the Excise Commissioner, then in each and every situation, supply of liquor/beer could be effected only after depositing the 5% amount reckoned at rates declared by the manufacturing unit.

g) Retail sale licensee would deposit the amount at the bank counter established in the warehouse itself and would tender the deposit receipt issued by the bank in the computer room.

h) After loading the information about the amount deposited in the computer room, Accounts-in-charge would submit the delivery challan to the Officer-in-charge for issuing the delivery order.

i) After issuance of the supply order by the Officer-in-charge/ liquor officer (whosoever would be in charge of the store) would take out liquor/beer for the purpose of effecting the supply. Batch number of the liquor/beer would be recorded in the delivery challan. Final information of the batches under supply along with vehicle number would be given in the computer branch and the Officer-in-charge so that transportation permit may be issued from the computer room. Permits would be issued through the computer only except in the cases of defects in which situation the work will be completed manually.

j) Officer-in-charge would ensure that necessary particulars of the liquor/beer, date and time of leaving vehicle, amount of duty, challan number and period given to take liquor to the place of destination are recorded on the permit.

k) Only after ensuring compliance of the above-said process, the Officer-in-charge would give permission to vehicle loaded with liquor/beer to move from the store.

l) At the end of each and every working day, stock verification would be carried out. The complete accounts statement of wine/liquor supplied up to 25th of each and every month would be prepared. All the accounts of the amount lying deposited in the collection account of the manufacturing units would be tallied. Officer-in-charge would submit the said accounts before the concerned Deputy Commissioners and Deputy Commissioners would direct the bank as to how much amount is to be transferred by them in their accounts out of the collection accounts of each and every manufacturing unit and how much amount would be deposited in the government treasury. Thereafter, Deputy Commissioners would issue directions to the bank to first of all deposit that much amount in the government treasury and the remaining amount would be credited to the accounts of the manufacturing unit. The available stock was to be insured.

5. An additional return was filed wherein it was averred that the appellants are under liability to pay VAT tax and the list of the dealers who are liable to pay VAT tax was annexed.

RELEVANT STATUTORY PROVISIONS: -

6. Till 31.03.2007, no entry tax was levied in the State of Madhya Pradesh on beer and IMFL. On 01.04.2007, the M.P. Entry Tax Act was amended by the M.P. Entry Tax (Amendment) Act No. 9 of 2007 i.e. *The Madhya Pradesh Sthaniya Kshetra Me Mal Ke Pravesh Par Kar (Sanshodhan) Adhiniyam, 2007* (hereinafter referred to as 'the Amendment Act of 2007')

7. The original Act in Section 3 provided that an entry tax shall be levied on the entry in the course of business of a dealer of goods specified in Schedule-II, into each local area for consumption, use or sale therein.

8. Section 3 reads as follows:-

> "3- **Incidence of taxation**
>
> (1) There shall be levied an entry tax,-
>
> (a) **on the entry in the course of business of a dealer of goods** specified in Schedule-II, into each local area for consumption, use or sale therein; and
>
> (b) on the entry in the course of business of a dealer of goods specified in Schedule-III into each local area for consumption or use of such goods but not for sale therein; **and such tax shall be paid by every dealer liable to tax under the [M.P.VAT Act, 2002] who has effected entry of such goods**:.."
>
> (Emphasis supplied)

9. By the Amendment Act of 2007, an entry was added to Schedule-II which reads as follows:-

> "Indian made foreign liquor and beer."
>
> The rate of tax prescribed was @ 2%.

10. The Amending Act of 2007 introduced Section 3B which reads as follows:-

> ""**3-B. Special provisions for collection of entry tax on foreign liquor; -**
>
> Notwithstanding anything contained in this Act, the State Government may, by notification, specify the manner and appoint the competent authority, to collect entry tax in respect of India made foreign liquor and beer on such terms and conditions as may be specified therein."
>
> **4A. Provision for entry tax at enhanced rate.** –
>
> (ii) for sub-section (1), the following sub-section shall be substituted, namely: -
>
> (1) Notwithstanding anything to the contrary contained in this Act, the State Government may, by notification, specify the manner and appoint the competent authority to collect entry tax in respect of India made foreign liquor and Beer on such terms and conditions as may be specified therein, the entry tax payable by a dealer under this Act shall be charged on the value of such goods at a rate not exceeding thirty per centum as may be specified in such notification.. "

11. The other relevant sections from the Entry Tax Act are Section 2(1) (aa), 2(1) (b), 2(1)(l), 2(1)(m), 2(2), 2(3) and Section 14 which read as follows:-

> "2(1)(aa) *"entry of goods into a local area"* with all its grammatical variations and cognate expressions means entry of goods into that local area from any place outside thereof including a place outside the State for consumption, use or sale therein;"
>
> 2(1)(b) *"Entry tax"* means a tax on entry of goods into a local area for consumption, use or sale therein levied and payable in accordance with the provisions of this Act and includes composition money payable under Section 7-A"
>
> 2(1)(l) *"Value of goods"* in relation to a dealer or any person who has effected entry of goods into a local area shall mean the purchase price of such goods as defined in clause (s) of Section 2 of the Madhya Pradesh VAT Act, 2002 (No. 20 of 2002) and shall include excise duty and/

or additional excise duty and/or customs duty, if levied under the Central Excise and Salt Act, 1944 (No. 1 of 1944), the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (No. 58 of 1957) or the Customs Act, 1962 (No. 52 of 1962), as the case may be or the market value of such goods if they have been acquired or obtained otherwise than by way of purchase;

2(1)(m) *"VAT Act"* means the Madhya Pradesh VAT Act, 2002 (No. 20 of 2002).

2(2) All those expressions, other than expression "goods" and "sale" which are used but are not defined in this Act and are defined in the Madhya Pradesh VAT Act, 2002 (No. 20 of 2002) shall have the meanings assigned to them in that Act.

2(3) Any reference in this Act to the expression "**has effected entry of goods**" with its grammatical variations and cognate expressions, whether used in isolation or in conjunction with any other words shall, wherever necessary, **be construed as including a reference to "has caused to be effected entry of goods**"

(Emphasis supplied)

"14. Assessment, collection etc. of entry tax.- Subject to the provisions of this Act and the rules made thereunder, the administration of this Act in so far as it relates to levy, assessment and collection of entry tax from dealers shall vest in the authorities specified in Section 3 of the Madhya Pradesh VAT Act, 2002 (No. 20 of 2002), and accordingly the authorities for the time being empowered to assess, re-assess, collect and enforce payment of any tax under the Madhya Pradesh VAT Act, 2002 (No. 20 of 2002) shall assess, re-assess, collect and enforce the payment of entry tax including any penalty payable by a dealer under this Act as if the tax or penalty payable by such dealer under this Act or under the provisions of the Madhya Pradesh VAT Act, 2002 (No 20 of 2002) as made applicable under Section 13 to dealers in relation to tax levied under this Act is a tax or penalty payable under that Act and for

this purpose they may exercise all or any of the powers conferred upon them by or under that Act."

12. "Dealer" as defined under Section 2(i) of the Madhya Pradesh VAT Act, 2002 reads as under:-

> "**2(i)** - Dealer" means any person, who carries on the business of buying, selling, supplying or distributing goods, directly or otherwise, whether for cash, or for deferred payment or for commission, remuneration or other valuable consideration and includes –
>
> (i) a local authority, a company, an undivided Hindu family or any society (including a cooperative society), club, firm or association which carries on such business;
>
> (ii) a society (including a co-operative society), club, firm or association which buys goods from, or sells, supplies or distributes goods to its;
>
> (iii) a commission agent, broker, a del-credere agent, an auctioneer or any other mercantile agent, by whatever name called, who carries on the business of buying, selling, supplying or distributing goods on behalf of the principal;
>
> (iv) any person who transfers the right to use any goods including leasing thereof for any purpose, (whether or not for a specified period) in the course of business to any other person;"
>
> Explanation I - Every person who acts as an agent of a non- resident dealer, that is as an agent on behalf of a dealer residing outside the State and buys, sells, supplies or distributes goods in the State or acts on behalf of such dealer as - (i) a mercantile agent as defined in the Sale of Goods Act, 1930 (III of 1930); or (ii) an agent for handling goods or documents of title relating to goods; or (iii) an agent for the collection or the payment of the sale price of goods or as a guarantor for such collection or payment, and every local branch of a firm or company situated outside the State, shall be deemed to be a dealer for the purpose of this Act.
>
> **Explanation II - The Central or a State Government or any of their departments or offices which, whether**

or not in the course of business, buy, sell, supply or distribute goods, directly or otherwise, for cash or for deferred payment, or for commission, remuneration or for other valuable consideration, shall be deemed to be a dealer for the purpose of this Act.

Explanation III - Any non-trading, commercial or financial establishment including a bank, an insurance company, a transport company and the like which whether or not in the course of business buys, sells, supplies or distributes goods, directly or otherwise, for cash or for deferred payment, commission, remuneration or for other valuable consideration, shall be deemed to be a dealer for the purposes of this Act:

(Emphasis supplied)

13. "Goods" as defined in Section 2(m) reads as under:-

"2(m) "Goods" means all kinds of movable property including computer software but excluding actionable claims, newspapers, stocks, shares, securities or Government stamps and includes all materials, articles and commodities, whether or not to be used in the construction, fitting out, improvement or repair of movable or immovable property, and also includes all growing crops, grass, trees, plants and things attached to, or forming part of the land which are agreed to be severed before the sale or under the contract of sale;"

14. "Sale" as defined in the M.P. VAT Act reads as under:-

"2(u) "Sale" with all its grammatical variations and cognate expressions means any transfer of property in goods for cash or deferred payment or for other valuable consideration and includes –

(i) a transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;

(ii) a transfer of property in goods whether as goods or in some other form, involved in the execution of works contract;

(iii) a delivery of goods on hire purchase or any system of payment by installments;

(iv) a supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

(v) a supply, by way of or as part of any service or in any other manner whatsoever, of goods being food or any other article for human consumption or any drink (whether or not intoxicating) where such supply or service is for cash, deferred payment or other valuable consideration;

(vi) a transfer of the right to use any goods including leasing thereof for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration, and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and purchase of those goods by the person to whom such transfer, delivery or supply is made, but does not include a mortgage, hypothecation, charge or pledge;"

CONTENTIONS OF PARTIES: -

15. We have heard Mr. Rohan Shah, learned Senior Advocate and Mr. Sumit Nema, learned Senior Advocate for the appellants and Mr. Nachiketa Joshi, learned Additional Advocate General for the respondent-State.

16. Learned counsels for the appellants reiterated the *modus operandi* of the transaction as set out hereinabove. They contended that depending upon the estimation of the retailers' requirement, each State Government warehouse would issue an indent on different manufacturers of different brands of IMFL to supply goods to the State Government warehouse.

17. Learned counsels contended that only after complying with the formalities of receipt of NOC from the State Government warehouse, the State Excise Officer would allow removal of exact quantity of the relevant brand by issuing a Transit Pass under Rule 14(1) of the M.P. Foreign Liquor Rules, 1996 to enable transportation for storage in the State Government Warehouse. They contend that an invoice

specifying the brand and quantities of IMFL was to be issued by the manufacturer, in the name of the State Government warehouse. They contend that there was no privity between the retailers and the manufacturers. Learned Counsels contend that from the price paid by the retailer, the State Excise Duty, VAT, and transportation Fees/commission are all deducted and only then the amount is transferred to the manufacturer by the Government warehouse. Learned Counsels contend that no direct sales can be made by the manufacturer to the retailers.

18. According to the learned Counsels for the appellants, it is the Government warehouse which causes the movement of goods into the local area, which is the incidence for the levy as defined under Section 3(1)(a) read with Section 2(1)(aa), 2(1)(b) and 2(3) of the M.P. Entry Tax Act. According to the learned Counsels, since the State Government warehouses not only sells but, in any event, undisputably distributes the goods they would be "dealer" as per Explanation II to Section 2(i) of M.P. VAT Act, 2002. According to the learned counsels, levy cannot be mulcted on the manufacturers as they do not effect the entry of goods or cause to effect the entry of goods and it is only the State Government warehouse which cause to effect the entry of the goods. That even otherwise, the manufacturers cannot be mulcted with the liability as the value of the goods would be clear only at the hands of the State Government warehouse which effects the sale to the retailer and for this reason, without notification being issued under Section 3B of the Entry Tax Act, no levy can be effected. Further, they contend that since the State Government warehouse causes to effect the entry of the goods, it is they who will ultimately pass it on to the retailers after the levy is made. They further contend that with effect from 01.04.2008 when the entry tax on IMFL and beer was withdrawn, an increase in 2% of the transportation fee was brought in and it was made to 8% from the originally fixed 6% chargeable by the warehouse on the retailers. So praying, they contend that the writ petitions ought to have been allowed, and the communication dated 13.06.2007 issued by respondent no. 2 and the communication 21.06.2007 issued by respondent no. 3 directing the manufacturers to pay entry tax ought to have been quashed. To buttress the submission, they further referred to the communication dated 02.06.2007 issued by Commissioner, Commercial Tax to the Excise Commissioner directing that the entry tax ought to be paid by the warehouse of the excise department.

19. Mr. Nachiketa Joshi, learned Additional Advocate General, submitted that the judgment of the High Court upholding the levy on the manufacturers called for no interference. Learned Senior Advocate contends that the High Court has correctly found that the warehouses neither purchase liquor nor sell liquor and that the Department only supervises the sale made by the manufacturer to the retail contractors. Learned Senior Advocate contends that the High Court has rightly found that Section 3B was only an enabling provision which was in the nature of a machinery provision and even without a notification under Section 3B of the Act, Section 14 could enable the levy of entry tax on the manufacturers. Learned Senior Advocate contends that the non-obstante part of Section 3B will not override Section 14 as there is no conflict between the two provisions and the two can be harmoniously interpreted. Learned Senior Advocate for the State also drew our attention to the communication of the Commissioner, Commercial Tax dated 04.10.2008 to the Excise Commissioner correcting the communication of 02.06.2007 and clarifying the position that it is only the manufacturing units which were liable to pay the entry tax. Learned Senior Advocate contended that the High Court has correctly relied on the judgment of this Court in ***M/s Bhagatram Rajeevkumar*** vs. ***Commissioner of Sales Tax, M.P. and Others***, 1995 Supp. (1) SCC 673 to sustain the levy on the manufacturers.

QUESTION FOR CONSIDERATION:-

20. The question that arises for consideration is: -

Did the appellants cause to effect the entry of goods into the local area as required under Section 3(1)(a) read with Section 2(1)(aa), 2(1)(b) and 2(3) of the M.P. Entry Tax Act, 1976, rendering them liable for entry tax for the period 01.04.2007 to 31.03.2008?

ANALYSIS AND REASONS: -

21. The principal argument of the learned Counsels for the appellants is that there is no privity of contract between them and the retailers and that it is the State Government warehouse which sells the goods to the retailers. According to the learned Counsels for the appellants, it is the warehouse which causes the movement of the goods into the local area. Alternatively, it is contended that undisputedly the State Government warehouse distributes the goods and whether as a seller or as a distributor they acquire the status of a dealer under

the Act, which makes them liable for the payment of the Entry Tax. The stand of the State Government is that the warehouse neither purchases nor sells the liquor and the work undertaken is only to supervise the sale made by the manufacturer to the retailer. This contention of the State found favour with the High Court.

22. The model adopted by the State, as set out in the Paragraphs hereinabove for the transaction, clearly points to the State canalising the supply of beer and Indian made foreign liquor into the local area. The question that would then arise is: - is there an inseverable link between the manufacturers like the appellants and the ultimate retailers? While the manufacturers contend that the sale by them is made to the State warehouse and thereafter the State warehouse makes the sale to the retailers, the State contends that there is an inseverable link and it is the manufacturers who causes the sale to the retailers and the State is discharging only a supervisory role.

23. Under the *modus operandi* adopted, as set out in hereinabove, it will be clear that demand note for each and every shop is submitted to the warehouse by the retailer. After assessing the local demand, the Divisional Commissioner issues directions to the Officer in charge for issuance of a No Objection Certificate to the manufacturing units. The manufacturing units were allowed to store beer and IMFL in departmental godowns. The manufacturing units declare the Ex-godown price and supply of liquor is effected by the warehouse after levying 5 per cent additional fee. The retail buyer deposits the amount with the warehouse and the transfer of money to the manufacturer is made by the warehouse and thereafter, delivery is taken by the retailer from the warehouse.

24. The issue of when can a sale which involves a canalizing agent/ intermediary be said to be inseverable has arisen in the context of exemption sought by assessees under the Central Sales Tax Act before this Court in several cases. In ***K. Gopinathan Nair & Ors.*** v. ***State of Kerala***, (1997) 10 SCC 1, this Court, after analyzing the precedents applicable to the issue, summarised the law in Para 14 and 15 as under: -

> **"14.** In the light of the aforesaid settled legal position emerging from the Constitution Bench decisions of this Court the following propositions clearly get projected for deciding whether the concerned sale or purchase of goods

can be deemed to take place in the course of import as laid down by Section 5(2) of the Central Sales Tax Act:

(1) The sale or the purchase, as the case may be, must actually take place.

(2) Such sale or purchase in India must itself occasion such import, and not vice versa i.e. import should not occasion such sale.

(3) The goods must have entered the import stream when they are subjected to sale or purchase.

(4) The import of the goods concerned must be effected as a direct result of the sale or purchase transaction concerned.

(5) **The course of import can be taken to have continued till the imported goods reach the local users only if the import has commenced through the agreement between foreign exporter and an intermediary who does not act on his own in the transaction with the foreign exporter and who in his turn does not sell as principal the imported goods to the local users.**

(6) **There must be either a single sale which itself causes the import or is in the progress or process of import or though there may appear to be two sale transactions they are so integrally interconnected that they almost resemble one transaction so that the movement of goods from a foreign country to India can be ascribed to such a composite well-integrated transaction consisting of two transactions dovetailing into each other.**

(7) A sale or purchase can be treated to be in the course of import if there is a direct privity of contract between the Indian importer and the foreign exporter and the intermediary through which such import is effected merely acts as an agent or a contractor for and on behalf of the Indian importer.

(8) **The transaction in substance must be such that the canalising agency or the intermediary agency through**

which the imports are effected into India so as to reach the ultimate local users appears only as a mere name lender through whom it is the local importer-cum-local user who masquerades.

15. If the aforesaid conditions are satisfied then obviously the transaction of sale or purchase would be in the realm of sale or purchase in the course of import entitling it to earn exemption under Section 5(2) of the Central Sales Tax Act. **But if on the contrary the transactions between the foreign exporter and the local users in India get transmitted through an independent canalising import agency which enters into back-to-back contracts and there is no direct linkage or causal connection between the export by foreign exporter and the receipt of the imported goods in India by the local users, the integrity of the entire transaction would get disrupted and would be substituted by two independent transactions, one between the canalising agency and the foreign exporter which would make the canalising agency the owner of the goods imported and the other between the import canalising agency and the local users for whose benefit the goods were imported by the wholesale importer being the canalising agency. In such a case the sale by the canalising agency to the local users would not be a sale in the course of import but would be a sale because of or by import which would not be covered by the exemption provision of Section 5 sub-section (2) of the Central Sales Tax Act**."

(Emphasis supplied)

25. From the summary of principles set out hereinabove, it will be clear that in case a canalising agency or intermediary agency is involved, unless their role is merely that of a name lender, the sale will not be treated as an inseparable or an inseverable sale. It will also be clear that if an independent canalising agency enters into back-to-back contracts and there is no direct linkage or causal connection between the export by foreign exporter and the receipt of the imported goods in India by local users, then the integrity of the entire transaction would be disrupted and would be substituted

by two independent transactions. In ***K. Gopinathan Nair (supra)*** it was held that transactions were not integral and were two separate transactions.

26. Similar view has been expressed by this Court in ***Hyderabad Industries Ltd.*** v. ***Union of India & Ors.***, (2000) 1 SCC 718, ***Kerala State Warehousing Corpn***. v. ***State of Kerala***, (2005) 10 SCC 142 and ***State of Karnataka*** v. ***Azad Coach Builders Private Ltd. & Anr.***, (2010) 9 SCC 524. It will be observed that while the tests applied have been common, factually differing conclusions have been arrived at by this Court depending upon the facts operating in the respective cases.

27. Applying the tests to the present canalising transaction, we have no manner of doubt that there were two independent transactions, one between the appellant – manufacturers and the State Warehouse and the other between the State warehouse and the retailers. Hence, it will be difficult to accept the contention of the State that the role of the State is only supervisory and the warehouses didn't purchase beer and IMFL from the manufacturer.

28. This, however, does not resolve the issue in favour of the appellants. Under Section 3 of the M.P. Entry Tax Act, 1976, the incidence of taxation is on the entry in the course of business of a dealer of goods specified in Schedule II, into each local area for consumption, use or sale therein. The further requirement is that such tax was to be paid by every dealer liable to tax under the VAT Act who has effected entry of such goods. Entry Tax is defined as a tax on entry of goods into a local area for use, consumption or sale therein levied and payable in accordance with the provisions of the M.P. Entry Tax Act. Section 2(3) of the M.P. Entry Tax Act states that any reference to the expression "has effected entry of goods" shall be construed as including a reference to "has caused to be effected entry of goods."

29. The other crucial question that arises is whether the appellant manufacturers have "caused to be effected the entry of goods." In the pocket Oxford Dictionary, 8th Edition, "Cause" is defined as follows:

> "person or thing that occasions or produces something"

In the context of construing Section 5(3) of the Central Sales Tax Act, 1956 which used the phrase "occasioning the export", this Court in ***Azad Coach Builders (supra***) held as follows: -

> **"27.** The phrase "sale in the course of export" comprises in itself three essentials: (*i*) that there must be a sale; (*ii*) that goods must actually be exported; and (*iii*) that the sale must be a part and parcel of the export. **The word "occasion" is used as a verb and means "to cause" or "to be the immediate cause of". Therefore, the words "occasioning the export" mean the factors, which were the immediate cause of export.** The words "to comply with the agreement or order" mean all transactions which are inextricably linked with the agreement or order occasioning that export. The expression "in relation to" are words of comprehensiveness, which might both have a direct significance as well as an indirect significance, depending on the context in which it is used and they are not words of restrictive content and ought not be so construed. Therefore, the test to be applied is, whether there is an inseverable link between the local sale or purchase and export and if it is clear that the local sale or purchase between the parties is inextricably linked with the export of the goods, then a claim under Section 5(3) for exemption from State sales tax is justified, in which case, the same goods theory has no application."

30. In ***Coffee Board, Bangalore*** v. ***Joint Commercial Tax Officer, Madras & Anr.***, (1969) 3 SCC 349, Chief Justice Hidayatullah, speaking for the Court, held as follows:

> **"28.** ……. The word "occasion" is used as a verb and means "to cause" or "to be the immediate cause of". Read in this way the sale which is to be regarded as exempt is a sale which causes the export to take place or is the immediate cause of the export……."

31. Reverting back to Sections 3(1) read with 2(1)(aa) and 2(1)(b) and 2(3), it is clear that the appellants by the sale to the warehouse caused to be effected the entry of goods and the entry was occasioned on the account of the sale into the local area for consumption, use or sale therein. It is also not disputed that the appellant is a dealer as defined under the Madhya Pradesh VAT Act 2002, as it stood then. The only contention of the appellants is this that the State warehouse is also a dealer. That makes no difference since it cannot be disputed

that the appellants certainly occasioned the entry of goods and the levy of entry tax on them, which could always be passed on, is perfectly justifiable in law.

32. The further contention that no notification having been issued under Section 3B of the M.P. Entry Tax Act 1976, there could be no levy of entry tax has only to be stated to be rejected. The High Court has rightly held that Section 3B is only a machinery provision and in the teeth of Section 14 of the M.P. Entry Tax Act, it is not correct to say that there cannot be any assessment or collection of Entry Tax merely because there is no notification under Section 3B.

33. Section 3B of the M.P. Entry Tax is an enabling provision. Further, the 'non-obstante' in Section 3B will not foreclose the operation of Section 14, since Section 3B will override only if there is a contrary provision. In the absence of any notification under Section 3B, there is nothing contrary in Section 14 for the non-obstante in Section 3B to be invoked to override Section 14. (See ***A.G. Varadarajulu & Anr.*** v. ***State of T.N. & Ors.***, (1998) 4 SCC 231 and ***Union of India and Anr.*** v. ***G.M. Kokil & Ors.***, 1984 Supp SCC 196).

34. On this score, The High Court in the impugned order has found rightly as follows:

> "**13.** In our opinion as Section 14 deals with the assessment and collection of entry tax and State has chosen not to issue notification under Section 3B by enacting special procedure for collection of entry tax on foreign liquor, it is open to the State to recover as per general procedure prescribed in Section 14. We do not find any legal impediment for applicability of the provision of Section 14 as under Section 3B no notification to the contrary or otherwise has been issued by the State Government so as to override the procedure provided in Section 14. When something is required to be done so as to bring the non-obstante clause into play till that thing has been done, non-obstante clause would not come into play. Thus in the instant case, we are of the considered opinion that charging section is Section 3(1) and in the absence of the notification under Section 3B which is a machinery provision, State can recover the entry tax as per general machinery provided under Section 14."

35. In ***Bhagatram (supra)*** cited by the State the question was whether entry tax on goods such as sugar on which no sales tax is leviable, was justified. This Court answered the question in favor of the State. For the reasons that we have stated above, we find no relevance of ***Bhagatram (supra)*** for the present controversy.

36. For the reasons aforestated, we find no grounds to interfere with the impugned order. Civil Appeals are dismissed. No order as to costs.

Result of the case: Appeals dismissed.

†*Headnotes prepared by:* Divya Pandey

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Mandeep Singh & Ors.
v.
State of Punjab and Ors.

(Civil Appeal No. 9471 of 2025)

14 July 2025

[Sudhanshu Dhulia* and K. Vinod Chandran, JJ.]

Issue for Consideration

The matter pertains to legality of recruitment/selection of Assistant Professors and Librarians in Government Degree colleges of Punjab. The Division Bench of the High Court has reversed the findings of the Single Judge and has thereby upheld the selections made by the State. Whether there is a gross illegality in the recruitment process.

Headnotes†

Constitution of India – Art.320 – Punjab Public Service Commission (Limitation of Functions) Regulations, 1955 – UGC (Minimum Qualifications for Appointment of Teachers and Other Academic Staff in Universities and Colleges and Measures for the Maintenance of Standards in Higher Education) Regulations, 2010 – Recruitment – Legality of recruitment of Assistant Professors and Librarians, in Government Degree Colleges in the State – The Single Judge of the High Court quashed the entire recruitment process for being in violation of law inasmuch as the Commission not having been excluded as per procedure prescribed and State having not followed the UGC guidelines and adopting an arbitrary process for the recruitment – In intra-court appeals, vide the impugned order dated 23.09.2024, the Division Bench of the High Court upheld the recruitment by quashing the order passed by the Single Judge of the High Court – Correctness:

Held: In the present case, the State has miserably failed to justify the departure from the standard norms of the recruitment process – There is a gross illegality in the recruitment process – Art.320(3) of the Constitution provides that the Commission shall be consulted

* Author

in the recruitment of different services – This Court in Manbodhan Lal Srivastava, had recognised the importance of Regulations framed under the proviso to Art.320(3) of the Constitution and had cautioned against the casual bypassing of the Regulations – In the case at hand, Regulations as contemplated under the Proviso were already in existence in Punjab known as Punjab Public Service Commission (Limitation of Functions) Regulations, 1955 – The posts of Assistant Professors and Librarians in Degree Colleges were within the purview of the Commission – Thus, selection of these posts was within the purview of the State Commission, and it was mandatory that it ought to be consulted – The respondents have tried to meet this deficiency by stating that the State had amended the 1955 Regulations in March 2022 (by retrospective effect), by mentioning these posts in the 1955 Regulations and these posts were then taken out from the purview of Commission – However, the amendment was made after concluding the entire recruitment process and giving appointment letters to the selected candidates – It was hence a *post facto* exercise – The 1955 Regulations prescribed a procedure under which posts within the purview of the Commission could be withdrawn – It is admitted that in the present case the required procedure was not followed – In case the State government was dissatisfied with the manner in which the Commission was conducting the recruitment ought to have followed the due procedure and withdrawn the posts from the purview of the Commission in accordance with the 1955 Regulations – As far as UGC Regulations are concerned, a method of selection to these posts is also provided in the 2010 UGC Regulations which has not been followed in the present case – Besides that, there are multiple deficiencies – The giving away of a rigorous criteria laid down in the UGC regulations with a single, multiple-choice question based written test, and the complete elimination of the *viva-voce*, all establish the arbitrary nature of the exercise which cannot pass the test of reasonableness laid down u/Art.14 of the Constitution – Hence, the Single Judge had rightly struck down the entire selection process, and the Division Bench of the High Court erred in interfering with that conclusion. [Paras 9, 24, 25, 26, 28, 31, 40, 56, 59, 60]

UGC Act, 1956 – UGC Regulations of 2010 – UGC Regulations 2018 – The distinction between adoption by incorporation as opposed to reference – Discussed:

Held: The distinction here is that in case of adoption by incorporation, the subsequent amendment or repeal of the incorporated statute will be of no consequences on the incorporation – The adoption then becomes frozen at the point in time when the incorporation was made – But the question whether a provision of law is adopted by reference or incorporation also depends upon the language of the order/statute in which such provision is being adopted – It may also depend upon the conduct of the State and how it has been recognised and accepted in that State – 2018 UGC Regulations may have repealed the 2010 UGC Regulations but still they were being considered and recognised in the State of Punjab for all purposes, even after its repeal – In the instant case, this Court has already referred the order dated 30.07.2013 whereby the State Government had adopted 2010 Regulations and the reasons assigned by the State Government in doing so which was to uplift the standard of higher education. [Para 38]

Constitution of India – Art.320(3) – Art.320(3)(a) – Nature and Scope:

Held: Art.320(3) speaks of a variety of matters where the Commission is to be consulted- (a) Recruitment in Service and (c) disciplinary matters, being two such instances – Whereas Art.320(3)(c) is generally concerned with individual matters relating to disciplinary proceedings, Art.320(3)(a) deals with policy issues where an entire recruitment process is at stake. [Para 20]

Constitution of India – Art.14 – Duties and Responsibilities of State and its instrumentality:

Held: The State and its instrumentalities have a duty and responsibility to act fairly and reasonably in terms of the mandate of Art.14 of the Constitution – Any decision taken by the State must be reasoned, and not arbitrary – This Court has consistently held that when a thing is done in a post-haste manner, *mala fides* would be presumed, and further that anything done in undue haste can also be termed as arbitrary and cannot be condoned in law – In the present case there are multiple deficiencies, as stated above – The giving away of a rigorous criteria laid down in the UGC regulations with a single, multiple-choice question based written test, and the complete elimination of the viva-voce, all establish the arbitrary nature of the exercise which cannot pass the test of reasonableness

laid down under Art.14 of the Constitution – Hence, the Single Judge had rightly struck down the entire selection process, and the Division Bench of the High Court erred in interfering with that conclusion. [Paras 52, 56]

Public Service Commissions – Purpose, Role and Evolution in India – Discussed. [Paras 8-16]

Case Law Cited

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Mahindra & Mahindra Ltd. v. Union of India **[1979] 2 SCR 1038 : (1979) 2 SCC 529;** *Ramana Dayaram Shetty v. International Airport Authority of India* **[1979] 3 SCR 1014 : (1979) 3 SCC 489;** *Gambhirdan K. Gadhvi v. State of Gujarat* **[2022] 4 SCR 406 : (2022) 5 SCC 179;** *State of T.N. v. Adhiyaman Educational & Research Institute* **[1995] 2 SCR 1075 : (1995) 4 SCC 104;** *Fuljit Kaur v. State of Punjab* **[2010] 7 SCR 317 : (2010) 11 SCC 455;** *Bahadursinh Lakhubhai Gohil v. Jagdishbhai M. Kamalia* **[2003] Supp. 6 SCR 1023 : (2004) 2 SCC 65;** *Zenit Mataplast (P) Ltd. v. State of Maharashtra* **[2009] 14 SCR 403 : (2009) 10 SCC 388;** *Bannari Amman Sugars Ltd. v. CTO* **[2004] Supp. 6 SCR 264 : (2005) 1 SCC 625 – relied on.**

State of U.P v. Manbodhan Lal Srivastava **[1958] 1 SCR 533 : 1957 SCC OnLine SC 4;** *Kalyani Mathivanan v. KV Jeyaraj & Ors.* **[2015] 3 SCR 467: (2015) 6 SCC 363;** *Cherukuri Mani v. Chief Secretary, Govt of Andhra Pradesh & Ors.* **[2014] 6 SCR 750 : (2015) 13 SCC 722;** *Dharmin Bai Kashyap v. Babli Sahu* **[2023] 11 SCR 150 : (2023) 10 SCC 461;** *Babu Verghese & Ors. v. Bar Council of India & Ors.* **[1999] 1 SCR 1121 : (1999) 3 SCC 422 – referred to.**

Nazir Ahmed v. King-Emperor **(LR 63 IA 372) – referred to.**

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List of Acts

Constitution of India; Government of India Act, 1919; Public Service Commission (Function) Rules, 1926; Government of India Act, 1935; UGC Act, 1956; Punjab Public Service Commission (Limitation of Functions) Regulations, 1955; UGC (Minimum Qualifications for Appointment of Teachers and Other Academic Staff in Universities and Colleges and Measures for the Maintenance of Standards in Higher Education) Regulations, 2010; UGC Regulations, 2018; Punjab Educational Service (College Cadre) (Class II) Rules, 1976.

List of Keywords

Service Law; Recruitment/selection of Assistant Professors and Librarians; Duties and Responsibilities of State and its instrumentality; Public Service Commissions; Departmental Selection Committee; Article 320(3) & Article 320(3)(a) of Constitution; Distinction between adoption by incorporation as opposed to reference; Departure from the standard norms of the recruitment.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 9471 of 2025

From the Judgment and Order dated 23.09.2024 of the High Court of Punjab & Haryana at Chandigarh in LPA No. 89 of 2023

With

Civil Appeal No(s). 9472 and 9473 of 2025

Appearances for Parties

Advs. for the Appellant:
Mrs. Rekha Palli, Sr. Adv., Preetesh Kapur, Sr. Adv, Nidhesh Gupta, Sr. Adv., Raju Ramachandran, Sr. Adv., Chritarth Palli, Vivek Sharma, Rajat Gupta, Mrs. Harsheen Madan Palli, Agam Aggarwal, Karan Dewan, Miss Aanchal Jain, Ms. Anindita Mitra, Vivek Sharma, Rajiv Sethi, Ms. Aditi Gupta.

Advs. for the Respondents:
Shadan Farasat, Sr.Adv./A.A.G., Vivek Jain, A.A.G., Kapil Sibal, Rakesh Dwivedi, Paramjit Singh Patwalia, Sr. Advs., Vikrant Pachnanda, Avinit Avasthi, Rishabh Parikh, Mukul Katyal, Yasir Saifi, Talha Abdul Rahman, M Shaz Khan, Sudhanshu Tewari, Rafid Akhter, Faizan Ahmad, Mohit D. Ram, Anup Jain, Ms. Nayan Gupta.

Judgment / Order of the Supreme Court

Judgment

Sudhanshu Dhulia, J.

1. Leave granted.

2. The appellants before this Court have challenged the judgment dated 23.09.2024, of the Division Bench of Punjab and Haryana High Court which has reversed the findings of the learned Single Judge and has thereby upheld the selections made by the State of Punjab for the posts of Assistant Professors and Librarians in Government Degree colleges of Punjab.

3. The brief facts of the case are as follows:

   a. In January 2021, the State of Punjab had sent separate requisitions to the Punjab Public Service Commission (hereinafter referred to as 'Commission'), for recruitment of 931 Assistant Professors (dated 15.01.2021) and 50 Librarians (dated 29.01.2021), in Government Degree Colleges in the State. Consequent to this and based on correspondences exchanged, the Commission engaged 24 subject experts to prepare the syllabus for the competitive examinations and honorarium was paid to them.

   b. Later, an additional 160 posts of Assistant Professors and 17 posts for Librarians were created and sanctioned for newly established colleges, and on 15.09.2021, the State's Department of Higher Education (hereinafter referred to as 'the Department') sought Commission's consent to fill these posts through the Departmental Selection Committee rather than the Commission.

   c. The Commission replied by letter dated 16.09.2021, expressing their inability to respond on the ground of the Chairman having retired and the new appointment having not taken place. The Government then by a memorandum dated 17.09.2021 approved the recruitment of 160 and 17 posts of Assistant Professors and Librarians respectively, through Departmental Selection Committees which though had to follow the University Grants Commission (hereinafter 'UGC') guidelines or regulations.

d. A change in Government happened on 20.09.2021 after which on 09.10.2021, the selection process was reviewed in a meeting chaired by the Secretary, Department of Higher Education. In this meeting, the entire process of recruitment was changed and it was decided that selection would now be made only on the basis of a Written Test, which will be conducted by two separate selection committees of two State Universities: (a) Punjab University, Patiala, and (b) the Guru Nanak Dev University, Amritsar. Further, it was decided that all the 1091 posts (931 plus 160 posts) of Assistant Professors and 67 posts (50 plus 17 posts) of Librarians; and not just the posts recently created, are to be filled through these departmental selection committees. This decision was placed for approval before the Chief Minister on 12.10.2021, with the observation that it shall subsequently be placed for approval before the Council of Ministers; latter approval was never obtained.

e. On 18.10.2021, Government issued a memorandum conveying to Director Public Instructions (Colleges) (hereinafter 'DPI') the decision for recruitment of 1091 Assistant Professors and 67 Librarians on the basis of two departmental selection committees of two State Universities. On 19.10.2021, advertisements for the above posts were issued.

f. In a little over a month, the exam was conducted and the result was announced on 28.11.2021. Meanwhile, in the first week of November, Writ Petitions were filed before the High Court, challenging the memorandum dated 18.10.2021 and advertisements dated 19.10.2021. On 26.11.2021 in CWP No. 22446 of 2021, before the results were published, while issuing notice, it was clarified that the selection shall be subject to the result of the writ petition.

g. Vide order dated 08.08.2022, the learned Single Judge allowed the Writ Petitions and quashed the entire recruitment process for being in violation of law inasmuch as the Commission not having been excluded as per procedure prescribed and State having not followed the UGC guidelines and adopting an arbitrary process for the recruitment.

h. Against the order of the learned Single Judge, the State of Punjab as well as the candidates who were selected/appointed

filed intra-court appeals. Vide the impugned order dated 23.09.2024, the Division Bench of the High Court allowed these intra-court appeals and upheld the recruitment by quashing the order passed by the learned Single Judge. Assailing the same, appellants are before us.

4. Before the learned Single Judge, the Division Bench as well as before this Court, the appellants' have been consistent in their submission that the recruitment process was vitiated on more than one count. Most importantly the recruitment was made in violation of UGC Regulations of 2010 (hereinafter '2010 UGC Regulations') which were adopted by the State of Punjab on 30.07.2013, and which mandated an entirely different criterion and procedure for recruitment. Further the selection to these posts ought to have been made through the Commission, as admittedly these were the posts within the purview of Commission [under Article 320 of the Constitution of India read with Punjab Public Service Commission (Limitation of Functions) Regulations, 1955 (hereinafter 'the 1955 Regulations')]. In any case, the entire process is arbitrary and was followed not in the interest of the State or for the cause of higher education but for narrow political gains.

5. The State and the private respondents would though argue that Article 320(3) is directory and not mandatory in nature. They would submit that the State government is empowered to decide its own method and procedure of recruitment for the posts of Assistant Professors and Librarians in Degree colleges under the State government; and it is not bound to make these selections through the Commission.

6. We have heard Senior Advocates Mr. Raju Ramchandran, Mr. Nidhesh Gupta, Mr. Preetesh Kapur and Mrs. Rekha Palli appearing for the appellants, and Senior Advocates Mr. Kapil Sibal, Mr. Rakesh Dwivedi and Mr. P.S. Patwalia for the private respondents. We have also heard Mr. Shadan Farasat, Additional Advocate-General appearing on behalf of the State of Punjab.

7. It is first necessary to narrate the sequence of events and their context as this would give us a better perspective. A large number of posts of Assistant Professor and Librarians in Degree Colleges remained unfilled for the last 20 years or so in Punjab. The last selection to these posts was only made in the year 2002, and this too got into trouble due to allegations of corruption which led to a

protracted litigation. Later, another recruitment was attempted in the year 2008 for 265 posts which was again stuck in litigation for many years. The issue of large unfilled vacancies in Punjab had come earlier before this Court by the guest/part-time faculties where a Three-Judge Bench of this Court vide its order dated 02.12.2014 had directed the Commission to fill the sanctioned vacant posts as soon as possible. The relevant portion of that order reads as under:

> *"4. We do not intend to keep these Special Leave Petitions on board. Accordingly, we dispose of the Special Leave Petitions with an observation that the Punjab Public Service Commission, Patiala will take all effective steps to fill up all the sanctioned posts of the lecturers in the State of Punjab as expeditiously as possible, at any rate, within 12 months' time from today."*

The argument of the State is that the main reason for these vacancies remaining unfilled for all these years was that these posts were within the purview of the Commission which had failed to fill these posts and hence the decision taken by the State to remove these posts from the purview of the Commission and to expedite the process of selection was in public interest.

8. The Commission has a duty to make selections for different services in response to the requisition of the State government. In the present case, in January 2021, the State government had sent two requisitions for the recruitment of 931 Assistant Professors and 50 Librarians respectively, yet no decision had been taken by the Commission.

9. Article 320(3) of the Constitution provides that the Commission shall be consulted in the recruitment of different services. The relevant portion of Article 320 of the Constitution reads as follows:

> ***"Article 320: Functions of Public Service Commissions-***
>
> *(1)...*
>
> *(2)...*
>
> *(3) The Union Public Service Commission or the State Public Service Commission, as the case may be, shall be consulted—*

(a) on all matters relating to methods of recruitment to civil services and for civil posts;

(b) on the principles to be followed in making appointments to civil services and posts and in making promotions and transfers from one service to another and on the suitability of candidates for such appointments, promotions or transfers;

(c) on all disciplinary matters affecting a person serving under the Government of India or the Government of a State in a civil capacity, including memorials or petitions relating to such matters;

(d) on any claim by or in respect of a person who is serving or has served under the Government of India or the Government of a State or under the Crown in India or under the Government of an Indian State, in a civil capacity, that any costs incurred by him in defending legal proceedings instituted against him in respect of acts done or purporting to be done in the execution of his duty should be paid out of the Consolidated Fund of India, or, as the case may be, out of the Consolidated Fund of the State;

(e) on any claim for the award of a pension in respect of injuries sustained by a person while serving under the Government of India or the Government of a State or under the Crown in India or under the Government of an Indian State, in a civil capacity, and any question as to the amount of any such award, and it shall be the duty of a Public Service Commission to advise on any matter so referred to them and on any other matter which the President, or, as the case may be, the Governor of the State, may refer to them:

Provided that the President as respects the all-India services and also as respects other services and posts in connection with the affairs of the Union, and the Governor, as respects other services and posts in connection with the affairs of a State, may make regulations specifying the matters in which either generally, or in any particular

class of case or in any particular circumstances, it shall not be necessary for a Public Service Commission to be consulted."

Public Service Commission at the Union and at the State levels are constitutional bodies. There is a purpose for which these institutions have been created, which we shall discuss in a while. All the same, it is not necessary that all posts in the States or Union must be filled through Commission. It is not mandatory. But there is a method prescribed under the law to take out these posts from the purview of the Commission. This has been violated in the present case; is the argument. But first, for the role of the Commission.

10. Impartiality, fairness and recognition of merit while selecting Public Servants are absolutely necessary in modern democracies. The basic purpose of a Union Public Service Commission or State Public Service Commission(s) for that matter, is to remove impartiality and political influence while making selection on Public Posts. It is necessary to have an impartial Public Service Commission in a Democracy, or everything will be reduced to a mere scramble for jobs[1]. The concept is not new. It goes back to the Government of India Act, 1919, and even earlier to the pre 1857 era. The East India Company, which had under its administration a vast area, felt the need to replace the system based on recommendations and nominations to a merit-based system, which was also the recommendation of the Macaulay Committee Report[2]. A Civil Service Commission was then established in 1854 to conduct competitive examinations which were held for the first time in the year 1855.

11. It was the Government of India Act, 1919 that formally introduced the concept of Public Service Commissions in India. Section 96C[3] provided for the establishment of a Central Public Service

1 Dr. Naresh Chandra Roy, The Working of the Public Service Commission in Bengal, Indian Political Science Conference, Third Session, Mysore, Dec 1940, p.192.

2 *See* Macaulay Report on the Indian Civil Service 1854.

3 **Section 96C: Public Service Commission-** (1) There shall be established in India a public service commission, consisting of not more than five members, of whom one shall be chairman, appointed by the Secretary of State in Council. Each member shall be removed before the expiry of his term of office, except by order of the Secretary of State in Council. The qualifications for the appointment, and the pay and pension (if any) attaching to the office of chairman and member, shall be prescribed by rules made by the Secretary of State in Council.

(2) The public service commission shall discharge, in regard to recruitment and control of the public services in India, such functions as may be assigned thereto by rules made by the Secretary of State in Council

Commission in India. But the Public Service Commission was not set up immediately till its need was emphasized by the Lee Commission in its report of 1924:

> *"Wherever democratic institutions exist, experience has shown that to secure an efficient Civil Service it is essential to protect it so far as possible from political or personal influences and to give it that position of stability and security which is vital to its successful working as the impartial and efficient instrument by which Governments, of whatever political complexion, may give effect to their policies. In countries where this principle has been neglected, and where the "spoils system" has taken place, an inefficient and disorganized Civil Service has been the inevitable result and corruption has been rampant. In America a Civil Service Commission has been constituted to control recruitment of the Services, but, for the purposes of India it is from the Dominions of the British Empire that more relevant and useful lessons can perhaps be drawn. Canada, Australia and South Africa now possess Public or Civil Services Acts regulating the position and control of the Public Services, and a common feature of them all is the constitution of a Public Service Commission, to which the duty of administering the Acts is entrusted. It was this need which framers of the Government of India Act had in mind when they made provision in Section 96C for the establishment of a Public Service Commission to discharge "in regard to recruitment and control of the Public Services in India such functions as may be assigned thereto by rules made by the Secretary of State in Council". Since the passing of the Act, a prolonged correspondence, extending over nearly four years, has been passed between the Secretary of State, the Government of India, and Local Governments, regarding the function and machinery of the body to be set up. No decisions have, however, been arrived at, and the subject has been referred to this Commission for consideration"*[4]

4 Report of the Royal Commission on Superior Civil Services in India, dated 27th March, 1924 at pp.13-14 and 16.

12. It was based on the recommendation of the Lee Commission that the Commission was formed as contemplated under the Government of India Act, 1919. The Central Public Service Commission was thus established in the year 1926, and its functions were governed by the Public Service Commission (Function) Rules, 1926. Till this stage, the role of a similar Commission at Provincial level was not much in discussions.

13. It was only with the Simon Commission Report that we have an official recommendation for the first time for the setting up of Provincial Public Service Commissions. It is well-known that the formation of the Simon Commission was resented by the leaders of the Indian freedom struggle, primarily because it had no Indian representative, and because senior officials of the British Raj had questioned the very ability of Indians to draft a Constitution. In response, an all-party committee under the chairmanship of Congress stalwart Motilal Nehru was formed, which was tasked with drafting a Constitution for India. The report submitted by this committee (which came to be known as the Nehru Report) also favoured the creation of a Permanent Public Service Commission to deal with issues such as the recruitment, appointment, emoluments etc. of civil servants in India.

14. Finally, a Federal Public Service Commission and Public Service Commissions for Provinces were established under Section 264[5] of the Government of India Act, 1935 and their functions were given in Section 266, which was *pari materia* to Article 320 of the Constitution.

15. While the Constituent Assembly was busy in drafting the Constitution for free India, the Public Service Commission at the Centre and in some of the States were already functioning.

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5 **264. Public Service Commission**: (1) Subject to the provisions of this Section, there shall be a Public Service Commission for the Federation and a Public Service Commission for each Province.

(2) Two or more Provinces may agree-

(a) that there shall be one Public Service Commission for that group of Provinces; or

(b) that the Public Service Commission for one of the Provinces shall serve the needs of all the Provinces,

and any such agreement may contain such incidental and consequential provisions as may appear necessary or desirable for giving effect to the purposes of the agreement and shall, in the case of an agreement that there shall be one Commission for a group of Provinces, specify by what Governor or Governors the functions which are under this Part of this Act to be discharged by the Governor of a Province are to be discharged.

(3) The Public Service Commission for the Federation, if requested so to do by the Governor of a Province, may, with the approval of the Governor-General, agree to serve all or any of the needs of the Province…

16. During discussion on Public Service Commissions in the Constituent Assembly Debates, Dr. P.S Deshmukh highlighted the purpose and importance of the Public Service Commissions in these words:

> *"...these Commissions are said to be a necessity of a modern State. These Commissions are primarily meant to keep appointments away from day to day politics, party preferences and influences and the attempt is made, by having recourse to these Commissions, that the appointments shall be as far as possible on merit and there shall be no interference in their choice or in their selection from day to day by the executive authorities of the State."*

17. Our entire purpose here of giving this background to the formation of Public Service Commission in India both at the Union as well as State level, was to emphasize the purpose for its establishment, which was to have an impartial and autonomous body which should select the best possible persons for Government posts, and to have fairness and transparency in the procedure. The present dispute which is before this Court reflects this concern.

18. Article 320(3)(a) of the Constitution, *inter alia*, states that the State Public Service Commission *"shall be consulted on all matters relating to methods of recruitment to civil services and for civil posts"*. The provision appears to be mandatory as the words *"shall be consulted"* suggest. All the same, the learned counsel for the respondents would rely on a 1957 Constitution Bench decision of this Court in ***State of U.P*** *v.* ***Manbodhan Lal Srivastava 1957 SCC OnLine SC 4*** which had laid down that the provision is not mandatory but merely directory.

19. The above decision is binding on us. Yet, we must examine the context in which the above judgment was rendered. The context is important. Although the findings in the judgment are generally worded, this Court in ***Manbodhan Lal Srivastava*** was not dealing with Article 320(3)(a), as is the case before us, but was concerned with Article 320(3)(c) i.e. a disciplinary matter in an individual case. In ***Manbodhan Lal Srivastava***, a government servant who was posted as an officer-on-special-duty in the Education Department from 1948 to 1951 was accused of giving favours to his friends and relatives, while working in a Book Selection Committee, as he had approved books written by his 14 year old nephew and other publishers from whom he had taken certain money on interest. In

August 1952, he was suspended from service and a departmental enquiry was conducted against him. On the recommendations of the departmental enquiry report, the Government issued a show cause notice under Article 311(2) of the Constitution and finally, after hearing the concerned employee, the Government issued a notification reducing his rank and compulsorily retiring him. These were the facts of the case before this Court.

20. Article 320(3) speaks of a variety of matters where the Commission is to be consulted- (a) Recruitment in Service and (c) disciplinary matters, being two such instances. Whereas Article 320(3)(c) is generally concerned with individual matters relating to disciplinary proceedings, Article 320(3)(a) deals with policy issues where an entire recruitment process is at stake. ***Manbodhan Lal Srivastava***, was a case dealing with Article 320(3)(c), and not with Article 320(3)(a), which is before us.

21. Another question in ***Manbodhan Lal Srivastava***, was whether Article 311 of the Constitution of India is subject to Article 320(3)(c). Para 4 of the Judgment reads like this:

> *"Hence, the main question in controversy in Appeal No. 27 of 1955, is whether the High Court was right in taking the view that Article 311 was subject to the provisions of Article 320(3)(c) of the Constitution, which were mandatory, and as such, non-compliance with those provisions in the instant case, was fatal to the proceedings ending with the order passed by the Government on September 12, 1953."*

22. The judgment also restricts itself to the facts relating to Article 320(3)(c). This is how it concludes :

> *"13. In view of these considerations, it must be held that the provisions of Article 320(3)(c) are not mandatory and that non-compliance with those provisions, does not afford a cause of action to the respondent in a court of law. It is not for this Court further to consider what other remedy, if any, the respondent has. Appeal No. 27 is, therefore, allowed and Appeal No. 28 dismissed. In view of the fact that the appellant did not strictly comply with the terms of Article 320(3)(c) of the Constitution, we direct that each party bear its own costs throughout."*

23. Thus, it was in the background of the above facts that it was held by this Court that consultation with the Commission to be directory and not mandatory. ***Manbodhan Lal Srivastava*** also emphasized the purpose of the proviso to Article 320(3) of the Constitution which states that the Governor of a State is empowered to make regulations specifying the matters in which it is not necessary for the State to consult the Public Service Commission. This is what was said by this Court:

> *"7…Perhaps, because of the use of the word "shall" in several parts of Article 320, the High Court was led to assume that the provisions of Article 320(3)(c) were mandatory, but in our opinion, there are several cogent reasons for holding to the contrary. In the first place, the proviso to Article 320, itself, contemplates that the President or the Governor, as the case may be, "may make regulations specifying the matters in which either generally, or in any particular class of case or in particular circumstances, it shall not be necessary for a Public Service Commission to be consulted". The words quoted above give a clear indication of the intention of the Constitution makers that they did envisage certain cases or classes of cases in which the Commission need not be consulted. If the provisions of Article 320 were of a mandatory character, the Constitution would not have left it to the discretion of the Head of the Executive Government to undo those provisions by making regulations to the contrary. If it had been intended by the makers of the Constitution that consultation with the Commission should be mandatory, the proviso would not have been there, or, at any rate, in the terms in which it stands. That does not amount to saying that it is open to the Executive Government, completely to ignore the existence of the Commission or to pick and choose cases in which it may or may not be consulted. Once, relevant regulations have been made, they are meant to be followed in letter and in spirit and it goes without saying that consultation with the Commission on all disciplinary matters affecting a public servant has been specifically provided for, in order, first, to give an assurance to the Services that a wholly independent body not directly*

> *concerned with the making of orders adversely affecting public servants, has considered the action proposed to be taken against a particular public servant, with an open mind; and secondly, to afford the Government unbiased advice and opinion on matters vitally affecting the morale of public services. It is, therefore, incumbent upon the Executive Government, when it proposes to take any disciplinary action against a public servant, to consult the Commission as to whether the action proposed to be taken was justified and was not in excess of the requirements of the situation."*
>
> *(Emphasis Provided)*

Thus, even if, for arguments sake, consultation with Commission is held to be directory then also there is no doubt that once Regulations are framed these are to be followed, "in letter and spirit".

24. In other words, this Court in ***Manbodhan Lal Srivastava***, had recognised the importance of Regulations framed under the proviso to Article 320(3) of the Constitution and had cautioned against the casual bypassing of the Regulations. In the case at hand, Regulations as contemplated under the Proviso were already in existence in Punjab known as Punjab Public Service Commission (Limitation of Functions) Regulations, 1955. For our purposes, it is relevant to note that with these Regulations the State had taken out certain posts outside the purview of the Commission. Admittedly, the posts of Assistant Professors and Librarians in Degree Colleges were not amongst them. In other words, these posts were within the purview of the Commission. Thus, selection of these posts was within the purview of the State Commission, and it was mandatory that it ought to be consulted.

25. The respondents have tried to meet this deficiency by stating that the State had amended the 1955 Regulations in March 2022 (by retrospective effect), by mentioning these posts in the 1955 Regulations and these posts were then taken out from the purview of Commission. All the same, we are unable to accept this argument inasmuch as the amendment was made after concluding the entire recruitment process and giving appointment letters to the selected candidates. It was hence a *post facto* exercise. The Government

had already made its selections on the posts which could only have been done by the Commission under Article 320 of the Constitution of India.

26. This apart, the 1955 Regulations prescribed a procedure under which posts within the purview of the Commission could be withdrawn. Part III-B and Part III-C of the *'Regulations and Instructions Governing the Work of the Punjab Public Service Commission'* provide a procedure for the exclusion of posts/services from the purview of the Commission. Regulation 20 reads as under:

> *"20. For exclusion of posts/services and other matters from the purview of the Punjab Public Service Commission, the following procedure is to be followed:*
>
> *(i) Individual proposals for taking out posts from the purview of the Commission would be processed by the Administrative Departments concerned. After the Department had taken a tentative decision to take out certain posts from the purview of the Commission, the Department would obtain the views/comments of the Public Service Commission by making a self-contained reference to the Commission.*
>
> *(ii) On receipt of the comments/views of the Commission, the matter would further be examined by the Department concerned keeping in view the comments/views so received and the advice of the Department of Personnel and Administrative Reforms. If the Department comes to a definite conclusion that the posts in question must be taken out of the purview of the Commission, the Department would take the matter to the Council of Ministers incorporating the advice of the Department of Personnel and Administrative Reforms in the Memorandum to be placed before the Council of Ministers.*
>
> *(iii) After the proposal of the Administrative Department is approved by the Council of Ministers, necessary action to amend the Punjab Public Service Commission (Limitation of Functions) Regulations, 1955 would be taken by the Department of Personnel and Administrative Reforms."*

27. Further, Part III-C of the Regulations provides that in cases where a difference of opinion between a Department of Government and Public Service Commission arises then what is to be done. Regulation 21 reads as under:

> *"21. In order to secure uniformity of practice in cases of difference of opinion between a Department of Government and the Commission and to ensure that the Commission is duly consulted in all cases in which such consultation is necessary, all cases, in which there is difference of opinion between a Department and the Commission, should be referred to the Chief Minister.*
>
> *22. The procedure for submitting cases to the Chief Minister should be that whenever as department finds itself unable to arrive at an agreement with the Commission, the cases should be sent over to the Chief Secretary on an early stage, if possible before any decisive action is taken…"*

28. It is admitted that in the present case the required procedure was not followed. In relation to 160 posts of Assistant Professor and 17 posts of Librarians, the Department had sent a reference to take the posts out of the purview of the Commission, but the Commission could not take any decision, in the absence of its Chairperson; a post which remained unfilled for long years. Meanwhile the concerned department proceeded without the views of the Commission. 931 posts of Assistant Professors and 50 posts of Librarians; admittedly with the Commission, pending recruitment as requisitioned by the State itself, and not taken out of the purview of the Commission, were also added and the advertisement inviting applications for the posts was issued on 19.10.2021. On the same day, the Department wrote to Commission to return its requisition sent to Commission for these posts. The Commission, however, on 16.11.2021 wrote to the Department disagreeing with the idea of taking the posts out of the purview of the Commission since the action as required at the end of the Government was not followed. Without any further action, the examinations were conducted between 20th to 22nd November, 2022.

29. It was after the selection and appointments were made that retrospectively on 26.03.2022 an amendment was made taking out these posts out of the purview of the Commission. The learned Single Judge has rightly observed that the retrospective amendment to the

1955 Regulations, which was made much after the conclusion of the recruitment process, was nothing but a response to the Writ Petitions which had been filed by this time by the appellants. The learned Single Judge also notes that in the last 30 years, five advertisements had been issued for filling of posts of Assistant Professors/Lecturers[6] and these selections were to be conducted by the Commission. The State never took the recruitment for these posts in its hands.

30. What was the need to bypass the Commission in the present case? The learned counsel who appear for the appellants would argue that a new Government was formed in Punjab in September, 2021 which had to face elections in February, 2022 and the burning hurry to make selections and appointments to more than 1000 such posts, on the eve of State elections was an act of political pragmatism, and nothing more.

31. In case the State government was dissatisfied with the manner in which the Commission was conducting the recruitment (an argument which appears to have found favour with the Division Bench), then it ought to have followed the due procedure and withdrawn the posts from the purview of the Commission in accordance with the 1955 Regulations. The case at hand is a prime example where Commission's role was totally eliminated in the recruitment and well considered selection parameters, prescribed by an expert body, like UGC, were replaced with a simple Multiple-Choice Question type test, which is unheard of where appointments for the posts of Assistant Professor in degree colleges are concerned.

32. Let us for the moment keep aside the ground of political expediency and look at what transpired leading to the volte face insofar as the selection entrusted to the Commission as early as in January 2021. At the risk of repetition, the decision of the Council of Ministers on 17.09.2021, as approved by the Chief Minister was to take out 160 posts of Assistant Proffesors and 17 posts of Librarians from the purview of the Commission, which were the freshly created posts in the newly established Colleges. The selection committee proposed for the said exercise was also to be Chaired by a Former Chairman of the UGC. On 20.09.2021, a new Government took over and on 09.10.2021, a committee headed by the Secretary, Department of Higher Education reviewed the earlier decisions and constituted two

6 Now the posts of Lecturers have been re-designated as Assistant Professors.

separate Committees, each headed by the Vice-Chancellors of the two Universities and the selection criteria was confined to a written test. The proposal was put up before the Chief Minister, with the observation that it shall subsequently be placed before the Council of Ministers. Though the Chief Minister accepted the proposal on 13.10.2021, it was never placed before the Council of Ministers and a Memo was issued on 18.10.2021 including the entire posts of Assistant Professors and Librarians available, to be filled up. As noticed above the decision to remove the said posts from the purview of the Commission was taken much later, after the selection process stood completed.

33. Let us also understand the scheme of UGC Regulations. Entry 66 of List I of Schedule VII of the Constitution empowers Union to make laws relating to *"Co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions"*. Under this entry, the Parliament had enacted the UGC Act, 1956 setting up an expert body named UGC for the purposes of the Act, which is clear from the Preamble of the UGC Act which reads as follows:

> *"An Act to make provision for the co-ordination and determination of standards in Universities and for that purpose, to establish a University Grants Commission."*

34. Under provisions of the UGC Act, UGC frames Regulations from time to time setting qualifications and other standards for teaching and non-teaching staff. Under Section 26(1)(e) and (g)[7], the UGC (Minimum Qualifications for Appointment of Teachers and Other Academic Staff in Universities and Colleges and Measures for the Maintenance of Standards in Higher Education) Regulations, 2010 were framed. These Regulations set the minimum eligibility criterion for the appointment to various posts including Assistant Professors

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7 The Commission may, by notification in Official Gazette, make regulations consistent with this Act and the rules made thereunder-

(a) …

(b) …

…

(e) defining the qualifications that should ordinarily be required of any person to be appointed to the teaching staff of the University, having regard to the branch of education in which he is expected to give instruction.

(f) …

(g) regulating the maintenance of standards and the co-ordination of work or facilities in Universities.

and Librarians. A method of selection to these posts is also provided in the 2010 UGC Regulations which has not been followed in the present case. To this, the private respondents as well as the State have taken the stand that these Regulations are directory in nature and non-compliance of these Regulations would not vitiate the recruitment.

35. The respondents would place reliance upon ***Kalyani Mathivanan*** *v.* ***KV Jeyaraj & Ors. (2015) 6 SCC 363*** to contend that UGC Regulations are not binding on the State if the State has not adopted the UGC Regulations 2018 which were in force at the relevant time, as was the case here. What were adopted by the State in the present case were the 2010 UGC Regulations, which stood superseded by this time by the subsequent Regulations of 2018 of UGC which were not adopted by the State till the completion of recruitment process.

36. All the same, the adoption of 2010 UGC Regulations by the State vide order dated 30.07.2013 was an adoption by incorporation and not an adoption by mere reference. This means that the 2010 UGC Regulations were in force in the State of Punjab despite its repeal by the 2018 Regulations by the UGC. This is clear from the intention and purpose of the order dated 30.07.2013 where it was stated in no uncertain terms that the 2010 Regulations are being adopted with a view to raise the standard of Higher Education in the State, with a specific mention of adoption of API Scores. Now API as we know means Academic Performance Indicator which is a method used in Higher Education to assess the quality and merit of teachers in Higher Education which would include teaching experience and research and academic contribution, which are extremely relevant factors to judge the merit of a teacher in Higher Education. The relevant part of the order dated 30.07.2013 reads as follows:

> *"With a view to raise the standard of Higher Education in the State of Punjab, the Notification issued by the U.G.C dated 30.06.2010 and 14.06.2013 pertaining to governing the appointment and promotion of Principals/Professors/ Associate Professors/Asst. Professors, the relevant API scores with modifications mentioned below are ordered to be applied in the Universities, Govt, aided and private colleges : -*

1. The term/tenure of the Principal of a private college is raised from 5 to 10 years.

2. D.P.T. Punjab or his representatives will be associated with the selection committee constituted for the appointment of Principals/Asst. Professors (covered under Grant-in-aid posts) in private colleges."

37. The distinction between adoption by incorporation as opposed to reference has been explained by Bhagwati, J., speaking for a three-judge Bench of this Court in ***Mahindra & Mahindra Ltd. v. Union of India, (1979) 2 SCC 529***, in the following terms:

"…It ignores the distinction between a mere reference to or citation of one statute in another and an incorporation which in effect means bodily lifting a provision of one enactment and making it a part of another. Where there is mere reference to or citation of one enactment in another without incorporation. Section 8(1) applies and the repeal and re-enactment of the provision referred to or cited has the effect set out in that section and the reference to the provision repealed is required to be construed as reference to the provision as re-enacted. Such was the case in Collector of Customs v. Nathella Sampathu Chetty [AIR 1962 SC 316 : (1962) 3 SCR 786] and New Central Jute Mills Co. Ltd. v. Assistant Collector of Central Excise [(1970) 2 SCC 820 : AIR 1971 SC 454 : (1971) 2 SCR 92]. But where a provision of one statute is incorporated in another, the repeal or amendment of the former does not affect the latter. The effect of incorporation is as if the provision incorporated were written out in the incorporating statute and were a part of it. Legislation by incorporation is a common legislative device employed by the legislature, where the legislature for convenience of drafting incorporates provisions from an existing statute by reference to that statute instead of setting out for itself at length the provisions which it desires to adopt. Once the incorporation is made, the provision incorporated becomes an integral part of the statute in which it is transposed and thereafter there is no need to refer to the statute from which the incorporation is made and any subsequent amendment made in it has no effect on the incorporation statute…"

38. The distinction here is that in case of adoption by incorporation, the subsequent amendment or repeal of the incorporated statute will be of no consequences on the incorporation. The adoption then becomes frozen at the point in time when the incorporation was made. But the question whether a provision of law is adopted by reference or incorporation also depends upon the language of the order/statute in which such provision is being adopted. It may also depend upon the conduct of the State and how it has been recognised and accepted in that State. 2018 UGC Regulations may have repealed the 2010 UGC Regulations but still they were being considered and recognised in the State of Punjab for all purposes, even after its repeal. We have already referred above the order dated 30.07.2013 whereby the State Government had adopted 2010 Regulations and the reasons assigned by the State Government in doing so which was to uplift the standard of higher education.

39. Further the memorandum passed by Council of Ministers on 17.09.2021 makes it clear that the State of Punjab was still referring to the 2010 UGC Regulations irrespective of the fact that 2010 UGC Regulations had been repealed in 2018. In this memorandum, the Council of Ministers has explicitly mentioned the 2010 UGC Regulations and also admitted that the 2010 UGC Regulations have to be followed strictly since they were adopted by the State of Punjab. The relevant portion of the said memo reads as under:

> *1.4 The UGC has already notified rules and regulations for recruitment of Assistant Professors and Librarians in its notification "UGC Regulation on Minimum Qualifications for Appointment of Teachers and Other Academic Staff in Universities and Colleges and Measures for the Maintenance of Standards in Higher Education" of 2010, which has been adopted by the Government of Punjab along with the subsequent amendments.*
>
> *The Departmental Selection Committee will strictly follow the guidelines as per above UGC notification for recruitment of 160 Assistant Professors and 17 Librarians. The relevant portion of the notification for short listing"/ appointment of candidates to the post of Assistant Professor and Librarians under the University System (in University and colleges) in Appendix III Table II-C is reproduced as under:*

Selection Committee Criteria / Weightage (Total Weightage=100)	*a) Academic Record and Research Performance (50%)* *b) Assessment of Domain Knowledge and Teaching Skills (30%)* *c) Interview Performance (20%)*

40. Thus, officially the 2010 UGC Regulations were in force in the State of Punjab as these were adopted by way of incorporation and not by reference. The repeal of 2010 Regulations by the UGC Regulations of 2018 had no impact insofar as applicability of 2010 Regulations in the State of Punjab was concerned. Also, it is on record that after the impugned order of the Division Bench, the State adopted the 2018 UGC Regulations. This shows that the State recognises the importance of the UGC Regulations. The chief intention of the G.O. dated 30.07.2013 is that while making selection to the posts of Assistant Professors API Scores are to be seen. This was the purpose; which negates a simple objective type test.

41. Doing away with the 2010 Regulations was also a last minute decision. In January 2021 requisition for recruitment of 931 Assistant Professors and 50 Librarians was sent by the State government to the Commission. Then, a meeting of the Council of Ministers was held on 17.09.2021 in relation to the recruitment of additional 160 posts of Assistant Professors and 17 posts of Librarians which had come up in 16 new Government Colleges where a decision was taken to remove these posts from the purview of the Public Service Commission so that recruitment can be made through a Departmental Selection Committee, which we have already mentioned above, but what is significant here is that till this time the Government had all the intentions of following the 2010 Regulations as the memorandum dated 17.09.2021 *inter-alia* states :-

> *1.4 The UGC has already notified rules and regulations for recruitment of Assistant Professors and Librarians in its notification "UGC Regulation on Minimum Qualifications for Appointment of Teachers and Other Academic Staff in Universities and Colleges and Measures for the Maintenance of Standards in Higher Education" of 2010,*

which has been adopted by the Government of Punjab along with the subsequent amendments.

The Departmental Selection Committee will strictly follow the guidelines as per above UGC notification for recruitment of 160 Assistant Professors and 17 Librarians. The relevant portion of the notification for short listing"/appointment of candidates to the post of Assistant Professor and Librarians under the University System (in University and colleges) in Appendix III Table II-C is reproduced as under:

Selection Committee Criteria / Weightage (Total Weightage=100)	*Academic Record and Research Performance (50%)* *Assessment of Domain Knowledge and Teaching Skills (30%)* *Interview Performance (20%)*

(Emphasis provided)

Till 17.09.2021, therefore, the Government had full intentions of following the 2010 Regulations. The decision earlier was only to remove the posts out of the purview of Commission.

42. In a more recent judgment of a Division Bench of this Court in ***Gambhirdan K. Gadhvi v. State of Gujarat*** **(2022) 5 SCC 179**, it is held that UGC Regulations have a mandatory character and are binding on all universities, State or Central, that have opted to receive the financial assistance of the UGC under its Scheme dated 31.12.2008 (which later came to be incorporated as Appendix I of the 2010 UGC Regulations). In that case, what weighed in the mind of the Division Bench of this Court was the fact that the concerned University had availed of the above-mentioned UGC Scheme, and as part of the same, it had agreed to adhere to UGC regulations (2010 and 2018 regulations, in that case). As a result, the University was bound to follow the UGC Regulations for the purposes of appointment of Vice-Chancellors, and it had to amend the relevant rules/statutes to bring them in line with the UGC Regulations. This is what was said:

> *"29. It is not in dispute that the SP University is receiving Central financial assistance under the Scheme and it*

is included in the State Universities receiving Central financial assistance as per Section 12(b) of the UGC Act, 1956. Therefore, having adopted the UGC Scheme and implemented the same and getting Central financial assistance to the extent of 80% of the maintenance expenditure, the State Government and the SP University are bound by the UGC Regulations, 2010. The UGC Regulations, 2010 are superseded by the UGC Regulations, 2018. However, the eligibility criteria for the post of Vice-Chancellor and the constitution of the Search Committee for appointment of a Vice-Chancellor remains the same. Therefore, the State of Gujarat and the universities thereunder including the SP University are bound to follow UGC Regulations, 2010 and UGC Regulations, 2018."

43. It was held that UGC Regulations became a part of the parent Act i.e. the UGC Act, being a piece of subordinate legislation that is laid before both Houses of Parliament. As a result, these would prevail in case there is any inconsistency between State legislation and UGC regulations, by application of the doctrine of repugnancy:

"50. It cannot be disputed that the UGC Regulations are enacted by the UGC in exercise of powers under Sections 26(1)(e) and 26(1)(g) of the UGC Act, 1956. Even as per the UGC Act every rule and regulation made under the said Act, shall be laid before each House of Parliament. Therefore, being a subordinate legislation, UGC Regulations becomes part of the Act. In case of any conflict between the State legislation and the Central legislation, Central legislation shall prevail by applying the rule/principle of repugnancy as enunciated in Article 254 of the Constitution as the subject "education" is in the Concurrent List (List III) of the Seventh Schedule to the Constitution. Therefore, any appointment as a Vice-Chancellor contrary to the provisions of the UGC Regulations can be said to be in violation of the statutory provisions, warranting a writ of quo warranto."

(Emphasis provided)

44. UGC Regulations are made under UGC Act which was enacted by Parliament under Entry 66 of List I of the Schedule VII, whereas

State Governments exercise powers under Entry 25 of the List III of the Schedule VII to make laws relating to "education". Further, it is to be noted that Entry 25 of the List III is subject to Entry 66 of List I. Hence, laws, including the subordinate legislations as in the present case, made under Entry 66 of the Union List would prevail over any law made under Entry 25 of the Concurrent List.

45. This Court in ***State of T.N. v. Adhiyaman Educational & Research Institute*, (1995) 4 SCC 104** while dealing with Entry 66 and Entry 25 of the Union List and Concurrent List, respectively, observed thus:

> *"41. What emerges from the above discussion is as follows:*
>
> *(i) The expression 'coordination' used in Entry 66 of the Union List of the Seventh Schedule to the Constitution does not merely mean evaluation. It means harmonisation with a view to forge a uniform pattern for a concerted action according to a certain design, scheme or plan of development. It, therefore, includes action not only for removal of disparities in standards but also for preventing the occurrence of such disparities. It would, therefore, also include power to do all things which are necessary to prevent what would make 'coordination' either impossible or difficult. This power is absolute and unconditional and in the absence of any valid compelling reasons, it must be given its full effect according to its plain and express intention.*
>
> *(ii) To the extent that the State legislation is in conflict with the Central legislation though the former is purported to have been made under Entry 25 of the Concurrent List but in effect encroaches upon legislation including subordinate legislation made by the Centre under Entry 25 of the Concurrent List or to give effect to Entry 66 of the Union List, it would be void and inoperative.*
>
> *(iii) If there is a conflict between the two legislations, unless the State legislation is saved by the provisions of the main part of clause (2) of Article 254, the State legislation being repugnant to the Central legislation, the same would be inoperative.*
>
> *(iv) Whether the State law encroaches upon Entry 66 of the Union List or is repugnant to the law made by the*

> *Centre under Entry 25 of the Concurrent List, will have to be determined by the examination of the two laws and will depend upon the facts of each case…"*
>
> (Emphasis provided)

46. In short, in the present case the UGC Regulations would be binding particularly when the State of Punjab vide its order dated 30.07.2013 had adopted 2010 UGC Regulations.

47. We may add here that what also weighed with the Division Bench of the High Court was the fact that it was the Punjab Educational Service (College Cadre) (Class II) Rules, 1976 (hereinafter '1976 Rules') which were applicable, and not the UGC Regulations. While it is true that the 1976 Rules were applicable to the recruitment but a perusal of the same shows that these only mandate that the recruitment to posts of Assistant Professors and Librarians should be through direct recruitment. It does not prescribe any mode or method of recruitment. This aspect was rightly noticed by the learned Single Judge. As discussed in detail above, the State of Punjab itself adopted the standards and process laid down by the UGC. Therefore, it was bound to follow these Regulations, notwithstanding the 1976 Rules.

48. In short, we find that there is a total arbitrariness in the present selection. The memo of Council of Ministers dated 17.09.2021 shows that State wanted to recruit only on 160 posts of Assistant Professors and on 17 posts of Librarians through departmental selection committee on an urgent basis as these were for the newly opened colleges. As we have already stated, even in those cases, the recruitment was to be made by following the UGC Regulations. Next, the 931 and 50 posts of Assistant Professors and Librarians, which were lying vacant and in regard to which requisition had already been sent to Commission, were added and it was decided that the sole basis of the selection would be a single exam. Moreover, a mere 45-day deadline was set for the commencement and conclusion of the whole recruitment process and ultimately within a span of two months, not only was the recruitment process concluded, but even appointment letters were issued. One cannot fail to notice the burning haste with which this entire exercise was undertaken by the powers that be. It has thus been repeatedly pressed by the appellants that all this was motivated by political exigency in the form of the impending Assembly elections in the State of Punjab.

49. An attempt was made by the State and the private respondents to argue that the selection process which was ultimately adopted was in any case better than the one prescribed by the UGC. The logic given is that a written test would be impartial and will be same to all, whereas there are always chances of abuse, favouritism, nepotism, even corruption in a test based on API. Written test is also less time consuming it was argued. However, we are not at all convinced with this argument. The recruitment for teaching posts in higher education on the basis of scores in an objective type written test, on grounds that such a test is non arbitrary whereas *viva voce* and appreciation of other aspects such as academic work could be abused and could be unfairly applied, is an argument which is puerile to say the least. Abandoning a time tested and uniformly followed method of selecting Assistant Professors in higher education with Multiple-Choice Questions based written examination is unacceptable; especially when the State itself has adopted the selection process laid down by the expert body which is also the apex statutory body, the UGC constituted under Entry 66 in the Union List of the Seventh Schedule of the Constitution.

50. The State cannot defend such an arbitrary practice in the garb of a policy decision. We have to keep in mind that these were the posts of Assistant Professors for which a specialized body like UGC has prescribed a process for the selections, which includes appreciation of academic work of a candidate, his/her performance in *viva-voce*, amongst others. Just a simple Multiple-Choice Question based written exam cannot be sufficient to check the suitability of such candidates. Even if it is, then also, in the present case, the sudden replacement of a time tested recruitment process with a new process, was not only arbitrary but was done without following the due procedure, which vitiates the entire process. Even if we ignore the argument of political expediency, we cannot but notice the executive hegemony in reversing a decision of the Council of Ministers, without reference to the said body. It also undermines the quality of selection, since there was no comprehensive exercise to examine the merit of a candidate. The written test did not challenge the innovative faculty of a candidate. One was not required to give an elaborate answer to a question as is done in a subjective type of test. Instead, it was an objective type of test in which the correct answer was to be given from multiple-choice of answers. The elimination of the *viva-voce*,

which is such a vital component in the overall appreciation of merit of a candidate, who has to teach in a higher education institute, was another grave error.

51. All this goes on to show that the intention of the authorities was to conclude the exercise as quickly as possible; which though sought to be justified on grounds of expediency in filling up the posts, undermines the selection by reason of no qualitative assessment of the candidates carried out. The learned Single Judge rightly observed that this approach casts serious doubts on the fairness of the process and the impartiality of the selectors, who were likely to be under pressure to complete the exercise within the timeline, regardless of the quality of the selections. The selection process is further impaired by the inclusion of posts already requisitioned to the Commission, which as per the Regulations were required to be filled up by the Commission and the apparent deviation from the UGC Guidelines which were adopted by the State and required to be followed, in this very selection, by the Council of Ministers.

52. The State and its instrumentalities have a duty and responsibility to act fairly and reasonably in terms of the mandate of Article 14 of the Constitution. Any decision taken by the State must be reasoned, and not arbitrary. This Court has consistently held that when a thing is done in a post-haste manner, *mala fides* would be presumed, and further that anything done in undue haste can also be termed as arbitrary and cannot be condoned in law. We may refer here to a few judgments of this Court which lay down this proposition.

53. In ***Fuljit Kaur v. State of Punjab*** **(2010) 11 SCC 455***,* this Court held that any State action undertaken in a hasty manner could be arbitrary State action cannot be condoned in law. This is what was said by this Court:

> *"25. Before parting with the case, it may be pertinent to mention here that the allotment had been made to the appellant within 48 hours of submission of her application though in ordinary cases, it takes about a year. The appellant had further been favoured to pay the aforesaid provisional price of Rs. 93,000 in four instalments in two years, as is evident from the letter dated 8-4-1987. Making the allotment in such a hasty manner itself is arbitrary and unreasonable and is hit by Article 14 of the*

Constitution. This Court has consistently held that "when a thing is done in a post-haste manner, mala fides would be presumed". Anything done in undue haste can also be termed as "arbitrary and cannot be condoned in law". [Vide S.P. Kapoor (Dr.) v. State of H.P. [(1981) 4 SCC 716 : 1982 SCC (L&S) 14 : AIR 1981 SC 2181], M.P. Hasta Shilpa Vikas Nigam Ltd. v. Devendra Kumar Jain [(1995) 1 SCC 638 : 1995 SCC (L&S) 364 : (1995) 29 ATC 159], Bahadursinh Lakhubhai Gohil v. Jagdishbhai M. Kamalia [(2004) 2 SCC 65 : AIR 2004 SC 1159] and ZenitMataplast (P) Ltd. v. State of Maharashtra [(2009) 10 SCC 388].] Thus, such an allotment in favour of the appellant is liable to be declared to have been made in arbitrary and unreasonable manner. However, we are not inclined to take such drastic steps as the appellant has developed the land subsequent to allotment."

(Emphasis provided)

54. In ***Bahadursinh Lakhubhai Gohil v. Jagdishbhai M. Kamalia*** **(2004) 2 SCC 65**, this Court reiterated the above principle while dealing with a case where the change in the office-bearer had resulted in a hasty and arbitrary change in the policy, which is also the case here. The relevant observations in the said judgment are as follows:

"24. The impugned order was preceded by a direction of the Home Minister on 7-9-1996. A change in the opinion came into being only upon change in the holder of the office and that too within a few days. Not only had the matter not been admittedly placed on the agenda of the meeting dated 25-7-1997, the same was considered showing undue haste.

25. In S.P. Kapoor (Dr) v. State of H.P. [(1981) 4 SCC 716 : 1982 SCC (L&S) 14 : AIR 1981 SC 2181] this Court held that when a thing is done in a post-haste manner, mala fide would be presumed, stating: (SCC p. 739, para 33)

"33. … The post-haste manner in which these things have been done on 3-11-1979 suggests that some higher-up was interested in pushing through the matter hastily when

the Regular Secretary, Health and Family Welfare was on leave."

(Emphasis provided)

55. In ***Zenit Mataplast (P) Ltd. v. State of Maharashtra*** **(2009) 10 SCC 388**, this Court laid down the general principle that State action should be grounded in sound principles and should not be unpredictable or without basis. This Court noted as follows:

> *"27. Every action of the State or its instrumentalities should not only be fair, legitimate and above-board but should be without any affection or aversion. It should neither be suggestive of discrimination nor even apparently give an impression of bias, favouritism and nepotism. The decision should be made by the application of known principles and rules and in general such decision should be predictable and the citizen should know where he is, but if a decision is taken without any principle or without any rule, it is unpredictable and such a decision is antithesis to the decision taken in accordance with the rule of law (vide S.G. Jaisinghani v. Union of India [AIR 1967 SC 1427], AIR p. 1434, para 14 and Haji T.M. Hassan Rawther v. Kerala Financial Corpn. [(1988) 1 SCC 166 : AIR 1988 SC 157])."*
>
> (Emphasis provided)

56. In the present case there are multiple deficiencies, as stated above. The giving away of a rigorous criteria laid down in the UGC regulations with a single, multiple-choice question based written test, and the complete elimination of the *viva-voce*, all establish the arbitrary nature of the exercise which cannot pass the test of reasonableness laid down under Article 14 of the Constitution. Hence, the learned Single Judge had rightly struck down the entire selection process, and the Division Bench of the High Court erred in interfering with that conclusion.

57. Lastly we need to state that it is a settled principle that when the law prescribes a thing to be done in a particular manner, then it should be done in that manner alone. [***See: Cherukuri Mani*** *v.* ***Chief Secretary, Govt of Andhra Pradesh & Ors. (2015) 13 SCC 722,***

Dharmin Bai Kashyap** v. **Babli Sahu (2023) 10 SCC 461, Nazir Ahmed** v. **King-Emperor (LR 63 IA 372**), **Babu Verghese & Ors.** v. **Bar Council of India & Ors. (1999) 3 SCC 422]

58. True, the State is entitled to change its policy, yet a sudden change without valid reasons will always be seen with suspicion. Even in cases where there is no statutory prescription of any particular way of doing a thing, the executive must observe the long-standing practice, and a deviation from such a practice would require passing the muster of reasonableness, which is a facet of Article 14 of the Constitution. In this regard, this Court in ***Bannari Amman Sugars Ltd.** v. **CTO (2005) 1 SCC 625*** observed that:

> *"9. While the discretion to change the policy in exercise of the executive power, when not trammelled by any statute or rule is wide enough, what is imperative and implicit in terms of Article 14 is that a change in policy must be made fairly and should not give the impression that it was so done arbitrarily or by any ulterior criteria. The wide sweep of Article 14 and the requirement of every State action qualifying for its validity on this touchstone irrespective of the field of activity of the State is an accepted tenet. The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. Actions are amenable, in the panorama of judicial review only to the extent that the State must act validly for discernible reasons, not whimsically for any ulterior purpose…"*

In the case at hand, the State did not adhere to UGC Regulations and took the posts out of the purview of the Commission without following the procedure prescribed under the law. And this was done suddenly without any valid reason and thus, it would amount to arbitrariness and cannot be sustained in the eyes of law. In ***Sivanandan C.T.** v. **High Court of Kerala (2024) 3 SCC 799***, the Constitution Bench of this Court observed that:

> *"45. The underlying basis for the application of the doctrine of legitimate expectation has expanded and evolved to include the principles of good administration. Since citizens repose their trust in the State, the actions and policies of the State give rise to legitimate expectations that the State*

will adhere to its assurance or past practice by acting in a consistent, transparent, and predictable manner. The principles of good administration require that the decisions of public authorities must withstand the test of consistency, transparency, and predictability to avoid being regarded as arbitrary and therefore violative of Article 14."

59. As far back as in the year 1979, this Court in ***Ramana Dayaram Shetty*** *v.* ***International Airport Authority of India, (1979) 3 SCC 489,*** speaking through Justice PN Bhagwati, had said that government jobs are also a kind of wealth and the State cannot distribute or withhold such wealth on the basis of arbitrary principles. The relevant portion from the said case law is as follows:

> *"**11.*** Today the Government in a welfare State, is the regulator and dispe*nser of special services and provider of a large number of benefits, including jobs, contracts, licences, quotas, mineral rights, etc. The Government pours forth wealth, money, benefits, services, contracts, quotas and licences. The valuables dispensed by Government take many forms, but they all share one characteristic. They are steadily taking the place of traditional forms of wealth…..The discretion of the Government has been held to be not unlimited in that the Government cannot give or withhold largesse in its arbitrary discretion or at its sweet will. It is insisted, as pointed out by Prof. Reich in an especially stimulating article on "The New Property" in 73 Yale Law Journal 733, "that Government action be based on standards that are not arbitrary or unauthorised". The Government cannot be permitted to say that it will give jobs or enter into contracts or issue quotas or licences only in favour of those having grey hair or belonging to a particular political party or professing a particular religious faith…*
>
> ***12****…It must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largesse, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norms which is not arbitrary, irrational or irrelevant. The power*

or discretion of the Government in the matter of grant of largesse including award of jobs, contracts, quotas, licences, etc. must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory."

In the present case, the State has miserably failed to justify the departure from the standard norms of the recruitment process. It has failed to give any valid reason for not adopting the UGC Regulations and avoiding the Public Service Commission in the recruitment in question. Moreover, as discussed earlier, the reason for this departure were narrow political and clearly arbitrary.

60. Before parting, we would like to observe that we are aware of the fact that quashing of the entire recruitment process may cause hardships for the selected candidates, but at the same time, there is no equity in the favour of selected candidates as challenge to the recruitment was made during the pendency of the process and appointments were subject to the Court orders. A gross illegality like the present recruitment cannot be ignored.

61. Thus, considering the entire facts of the case, we allow these appeals and set aside the order dated 23.09.2024 passed by the Division Bench of the Punjab and Haryana High Court and quash the entire recruitment and direct the State to initiate the recruitment process as per the 2018 UGC Regulations which are now in force in the State of Punjab.

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

Result of the case: Appeals Allowed.

†*Headnotes prepared by:* Ankit Gyan

[2025] 8 S.C.R. 70 : 2025 INSC 841

M/s Stemcyte India Therapeutics Pvt. Ltd.
v.
Commissioner of Central Excise and Service Tax, Ahmedabad - III

(Civil Appeal No(s). 3816-3817 of 2025)

14 July 2025

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

Issue for Consideration

Whether the services of enrolment, collection, processing, and storage of umbilical cord blood stem cells, provided by the appellant fell within the scope of "Healthcare Services" during the disputed period and thus, whether eligible for exemption from payment of service tax during the said period.

Headnotes†

Finance Act, 1994 – Exemption notification – "Healthcare Services" – Exemption from payment of service tax – Entitlement to – Services of enrolment, collection, processing, and storage of umbilical cord blood stem cells, provided by the appellant, if fell within the scope of "Healthcare Services" during the disputed period and thus, whether exempted from the levy of service tax as per the 2012 and 2014 Notifications dtd.20.06.2012 and 17.02.2014 issued by the Ministry of Finance – Show cause notice was issued to the appellant stating that its services during the period from 01.07.2012 to 16.02.2014 were a taxable service – CESTAT held that the services provided by the appellants during the disputed period, did not fall within the scope of "Healthcare Services" and thus, the appellant was held liable to pay service tax on the said services along with interest and penalties – Interference with:

Held: Appellant's services are well within the ambit of "Healthcare Services" – As per Entry 2 of the 2012 Notification, services provided by clinical establishments in the nature of healthcare were exempt from service tax – Appellant qualifies as a clinical establishment u/clause 2(j) of the said Notification which fact is not disputed by the Department – Appellant's core activities i.e. collection and

* Author

preservation of umbilical cord blood stem cells are preventive in nature, with potential curative applications for life-threatening diseases – The processing, testing, cryopreservation, and eventual release for transplantation constitute integral components of healthcare aimed at future diagnosis, treatment and care – Further, the appellant is also actively involved in post-transplant monitoring, clinical trials (including those for spinal cord injuries), and collaborations with international medical experts – Their services also support research on conditions like autism and cerebral palsy – Recognition under the Drugs and Cosmetics Act (post-amendment dated 17.12.2012) reinforces their status as a legitimate healthcare provider – The Department contends that the appellant's services were exempted only from 17.02.2014 under Entry 2A of the 2014 Notification – However, the insertion of Entry 2A does not curtail the scope of Serial No.2 under the 2012 Notification – The absence of express inclusion of cord blood services in earlier notifications does not alter their essential healthcare nature – Also, the Ministry of Health and Family Welfare, through a 2013 Office Memorandum clarified that stem cell banking is a part of "health care services" and qualifies for exemption – Appellant's services fall within the ambit of "Healthcare Services" as defined under the exemption notification – These services are preventive and curative in nature and encompass diagnosis, treatment, and care – Further, show cause notice issued by the Department is time-barred therefore, the imposition of penalties is not warranted – Moreover, during the course of investigation, the appellant deposited Rs.40,00,000/- – However, on facts, imposition of penalties and interest are unsustainable in law – Impugned order set aside, deposit of Rs.40,00,000/- made by the appellant to be refunded – Service Tax Rules, 1994. [Paras 6, 11.2, 11.4, 11.5, 11.8, 12, 13, 13.2, 14]

Finance Act, 1994 – s.73 – Invocation of extended period of limitation, when not justified – The disputed period is from 01.07.2012 to 16.02.2014 however, show cause notice was issued after more than three years only on 28.07.2017, demanding a sum of over Rs.2 crores towards service tax, by invoking the extended period of limitation:

Held: U/s.73(1), a show cause notice must ordinarily be issued within one year from the relevant date – Proviso to s.73(1) allows an extended period of up to five years only where the non-payment or short payment of service tax is due to fraud, collusion, wilful misstatement, suppression of facts, or contravention

of the provisions of the Act or Rules, with an intent to evade payment of service tax – Thus, for the department to invoke the extended period of limitation, there must be an active and deliberate act on the part of the assessee to evade payment of tax – Mere non-payment of tax, without any element of intent or suppression, is not sufficient to attract the extended limitation period – Services rendered by the appellant were not exempt from service tax until the 2012 Notification was issued – Appellant was under a *bona fide* belief that the activity of enrolment, collection, processing, and storage of umbilical cord blood stem cells fell within the scope of exempted "Healthcare Services" and therefore, was not liable to service tax – Nothing on record to suggest that the appellant suppressed any material facts – On the contrary, they responded promptly to departmental communications and even deposited a sum of Rs.40,00,000/- during the investigation – In the absence of fraud, collusion, wilful misstatement, or suppression of facts with an intent to evade payment of service tax, the invocation of the extended period of limitation u/s.73 was wholly unwarranted – Mere non-payment of service tax, by itself, does not justify the invocation of the extended limitation period – Thus, show cause notice issued by the department is time-barred. [Paras 9, 9.2-9.4]

Notification/Circular – Notification No. 4/2014-ST dtd.17.02.2014 issued by the Ministry of Finance – Clarificatory in nature – Operation of notification, prospective – Finance Act, 1994. [Paras 10.1, 10.2]

Case Law Cited

K.P. Mohammed Salim v. Commissioner of Income-tax **[2008] 6 SCR 949 : (2008) 11 SCC 573;** *Lucknow Development Authority v. M.K. Gupta* **[1993] Supp. 3 SCR 615 : (1994) 1 SCC 243;** *Padmini Products v. CCE* **[1989] 3 SCR 873 : (1989) 4 SCC 275;** *CCE v. Chemphar Drugs and Liniments* **[1989] 1 SCR 711 : (1989) 2 SCC 127;** *Pushpam Pharmaceuticals Co. v. CCE* **(1995) Supp. 3 SCC 462;** *CCE v. Punjab Laminates (P) Ltd.* **[2006] Supp. 5 SCR 264 : (2006) 7 SCC 431;** *CCE, Bombay-I & Anr. v. Parle Exports Pvt. Ltd.* **[1988] Supp. 3 SCR 933 : (1989) 1 SCC 345 – referred to.**

Life Cell International (P) Ltd. v. Union of India and Others **(2016) 6 VST-OL 50 – partly overruled.**

M. Satyanarayana Raju Charitable Trust v. UOI, **2017 SCC OnLine Hyd 168 – approved.**

M/s Stemcyte India Therapeutics Pvt. Ltd. v. Commissioner of Central Excise and Service Tax, Ahmedabad - III

Books and Periodicals Cited

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List of Acts

Finance Act, 1994; Service Tax Rules, 1994; Drugs and Cosmetics Act; Drugs and Cosmetics (3rd Amendment) Rules, 2011; Drugs and Cosmetics (Amendment) Rules, 2018,

List of Keywords

Services of enrolment, collection, processing, and storage of umbilical cord blood stem cells; "Healthcare Services"; Stem cell banking; Stem Cell Banks; Diagnosis, treatment and care; Legitimate healthcare provider; Essential healthcare nature; Cord blood banks; Levy of service tax; Exemption from payment of service tax; Disputed period; Exemption notification; Ministry of Finance; Ministry of Health and Family Welfare; Interest and penalties; Penalties; Interest; Imposition of penalties and interest unsustainable; Show cause notice; Clinical establishments; Services preventive and curative in nature; Show cause notice time-barred; Deposit to be refunded; Extended period of limitation; Non-payment or short payment of service tax; Fraud; Collusion; Wilful misstatement; Suppression of facts; Intent to evade payment of service tax; Element of intent or suppression; Notification Clarificatory; Notification prospective; Clarificatory Office Memorandum; *Bona fide* belief/conduct; No material facts suppressed nor concealed; Constant communications with the Department; CESTAT.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No(s). 3816-3817 of 2025

From the Judgment and Order dated 02.08.2024 of the Custom Excise Service Tax Appellate Tribunal, West Zonal Bench at Ahmedabad in STA No. 12168 of 2018 & STA No. 11738 of 2016

Appearances for Parties

Advs. for the Appellant:
Tarun Gulati, Sr. Adv., Krishnamohan K., Ms. Dania Nayyar, Pramod Kandpal, Ms. Meetika Baghel.

Adv. for the Respondent:
N. Venkataraman, ASG.

Judgment / Order of the Supreme Court

Judgment

R. Mahadevan, J.

1. These appeals have been preferred by the appellant / assessee challenging the common Final Order dated 02.08.2024 passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench at Ahmedabad[1], in Service Tax Appeal Nos. 12168/2018 and 11738/2016. By the impugned order, the CESTAT rejected the appeals filed by the appellant and upheld the orders passed by the lower authorities. In doing so, it held that the services of enrolment, collection, processing, and storage of umbilical cord blood stem cells, provided by the appellant during the period from 01.07.2012 to 16.02.2014, do not fall within the scope of "Healthcare Services". Consequently, the appellant was held liable to pay service tax on the said services along with interest and penalties.

2. The basic facts of the case, as projected by the appellant, are as follows:

   2.1. The appellant is a joint venture company of M/s. Stemcyte Inc., USA, M/s. Apollo Hospital Enterprises Ltd., and M/s. Cadila Pharmaceuticals Ltd., established in 2008. It is engaged in the collection, processing, testing, and storage of umbilical cord blood units and their therapeutic application. The appellant is a member of the Association of Stem Cell Banks of India.

   2.2. On 27.12.2011, the Ministry of Health and Family Welfare, Government of India, issued notification No. GSR 899(E) notifying the Drugs and Cosmetics (3rd Amendment) Rules, 2011. Under these rules, cord blood banks were required to obtain registration. Part XII-D of the Rules set out detailed requirements relating to the collection, processing, testing, and release of umbilical cord blood-derived stem cells.

   2.3. Subsequently, the Ministry of Finance, Government of India, issued Notification No.25/2012–Service Tax dated 20.06.2012, which provided a consolidated list of services exempt from service tax. Under Serial No.2 of the said notification, "Healthcare Services" were exempted. This notification superseded the earlier Notification

1 For short, "CESTAT"

No. 12/2012–Service Tax dated 17.03.2012. Accordingly, with effect from 01.07.2012, the negative list regime of service tax was introduced, rendering all services taxable unless specifically included in the in the negative list or expressly exempted otherwise.

2.4. On 21.09.2012, the Association of Stem Cell Banks of India submitted a representation to the Ministry of Health and Family Welfare, Government of India, seeking clarification on whether the services rendered by stem cell banks qualified as "Healthcare Services". In response, the Ministry, after consultation with the National AIDS Control Organization, issued an Office Memorandum dated 22.05.2013, clarifying that the services rendered by stem cell banks are part of "Healthcare Services" and may be considered for exemption from service tax.

2.5. On 24.10.2013, the appellant obtained Service Tax Registration No. AALCS7174BSD001 under the category "healthcare services by clinical establishment, health check-up / diagnosis, etc." from the Central Board of Excise and Customs.

2.6. Subsequently, the Deputy Commissioner of Central Excise, Ahmedabad-III, issued a letter dated 02.12.2013 to the appellant requiring them to submit documents relating to the services provided by it. The appellant submitted the requested documents on 30.12.2013.

2.7. Thereafter, a search was conducted at the appellant's premises on 06.01.2014, during which, statements were recorded and a panchnama was drawn.

2.8. In the meanwhile, the Ministry of Finance issued Notification No. 4/2014-ST dated 17.02.2014, inserting Entry 2A, which exempted from service tax the services provided by cord blood banks by way of preservation of stem cells or any other services in relation to such preservation.

2.9. Subsequently, the Commissioner issued summons and letters to the appellant demanding service tax for the period from 01.07.2012 to 16.02.2014. In response, the appellant submitted replies along with the necessary documents and deposited a sum of Rs. 40,00,000/-, stating that the payment was made under protest, as the services provided by it, were exempt under Notification No.25/2012-ST dated 20.06.2012 under the heading "Healthcare Services".

2.10. On 26.03.2015, the appellant filed an application seeking refund of the deposited amount of Rs.40,00,000/-. However, by communication dated 27.03.2015, the Superintendent of Central Excise, Ahmedabad-III, refused to refund the said amount.

2.11. Thereafter, the Commissioner issued a show cause notice dated 08.04.2015 calling upon the appellant to show cause why their refund claim should not be rejected under Section 11B of the Central Excise Act, 1944. The appellant filed a written reply, but the Commissioner passed Order-in-Original No. 108/Ref/ST/DC/2015-16 dated 31.08.2015, rejecting the refund claim on the ground that the investigation was still pending. The Commissioner (Appeals) also dismissed the appellant's appeal by Order-in-Appeal dated 28.07.2016. Aggrieved, the appellant preferred a further appeal before the CESTAT under Section 86(1) of the Finance Act, 1994.

2.12. During the pendency of the aforesaid appeal, the Commissioner, CGST & Central Excise, Gandhinagar issued a show cause notice dated 28.07.2017 demanding service tax of Rs. 2,07,29,576/- along with interest for services rendered between 01.07.2012 and 16.02.2014, and also proposed imposition of penalties under sections 77(1)(a), 77(1)(d), 77(2) and 78 of the Finance Act, 1994. The appellant filed a detailed reply.

2.13. Meanwhile, the Ministry of Health and Family Welfare issued Notification No. GSR 334(E), notifying the Drugs and Cosmetics (Amendment) Rules, 2018, wherein, stem cell and cell-based products were classified as 'Drugs'. The appellant submitted an additional reply to the show cause notice, on 04.05.2018. Thereafter, the Commissioner passed Order-in-Original dated 18.05.2018, confirming the demand and penalties. Aggrieved, the appellant filed a statutory appeal before the CESTAT.

2.14. By a common order dated 02.08.2024, the CESTAT dismissed both the appeals filed by the appellant and upheld the Orders-in-Original. The appellant is therefore before this Court by way of the present appeal.

3. The learned senior counsel for the appellant submitted that the CESTAT failed to properly consider the various documents, expert opinions, and submissions placed on record. These included the Office Memorandum No.X.11035/41/2012-DFQC (Pt.) dated 22.05.2013

issued by the Ministry of Health and Family Welfare, Government of India, clarifying that the services rendered by the appellant – relating to enrolment, collection, processing, and storage of umbilical cord blood stem cells – fall within the ambit of "Healthcare Services", and are thus exempt under Serial No.2 of Notification No. 25/2012-ST dated 20.06.2012. It was further contended that the subsequent insertion of Entry 2A by Notification No.4/2014-ST dated 17.02.2014 was merely clarificatory in nature and did not imply that the services were not covered earlier under Entry 2.

3.1. It was submitted that the exemption under Entry 2 is broad and does not distinguish between types of illnesses based on their frequency or severity. The CESTAT erred in narrowly interpreting the term "Healthcare Services" holding that although stem cells stored and supplied by the appellant are used for treatment of grave illnesses, these would not qualify as health care services as they are not used for treatment of regular illnesses.

3.2. It was argued that "Healthcare Services" have always been exempt under the Finance Act, 1994 and that such exemption continued under the negative list regime from 01.07.2012. Referring to Clause 2(t) of Notification No.25/2012-ST, the learned senior counsel submitted that the expression "any service" used therein must be interpreted liberally, covering services for diagnosis, treatment, or care of illness, injury, deformity, abnormality, or pregnancy. Judicial precedents including *K.P. Mohammed Salim v. Commissioner of Income-tax*[2]*, and Lucknow Development Authority v. M.K. Gupta*[3], were relied upon to demonstrate that the word "any" has wide import and must be read expansively.

3.3. It was further submitted that the CESTAT failed to appreciate the beneficial nature of the exemption under Notification No. 25/2012-ST. Such exemptions, being in furtherance of public health, must be interpreted liberally in favour of the assessee. The later insertion of Entry 2A could not curtail the scope of Entry 2, as both pertain to the same class of services.

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2 (2008) 11 SCC 573

3 (1994) 1 SCC 243

3.4. The learned senior counsel further argued that the CESTAT's finding – that the appellant's services are not part of any recognized system of medicine – is perverse and unsupported by evidence. This finding merely reiterated the reasoning of the Order-in-Original dated 18.05.2018 without independently evaluating the appellant's submissions.

3.5. It was pointed out that the appellant's services are regulated under the Drugs and Cosmetics Act and the 2011 Third Amendment Rules. Part XII D of these Rules prescribes conditions for registration and regulation of stem cell banks. Furthermore, Notification No. 213 dated 04.04.2018 classifies stem cell-based products as "drugs", thereby placing the services within a recognized statutory framework. The appellant, having obtained all necessary registrations and certifications, acted under a *bona fide* belief that their services were exempt.

3.6. The learned senior counsel further contended that the extended period of limitation invoked by the department was impermissible. The demand raised after more than three years from the conclusion of the investigation is barred by limitation. In the absence of suppression, misstatement, or intent to evade, the invocation of the extended limitation period was unjustified.

3.7. It was also submitted that the penalties imposed under Section 78 were unwarranted. Given the appellant's reasonable and bona fide belief regarding exemption, their conduct falls within the protective ambit of section 80 of the Finance Act, 1994.

3.8. In support of the submissions, the learned senior counsel placed reliance on a compilation of judgments of this Court.

3.9. Accordingly, it was submitted that the appellant is not liable to pay service tax, interest, or penalties for the disputed period and hence, the impugned order is liable to be set aside.

4. On the contrary, the learned Additional Solicitor General appearing for the respondent submitted that there existed an element of mutual trust and confidence between the department and the appellant regarding compliance with service tax provisions. Based on such mutual trust, the appellant was required to maintain statutory records

under the Service Tax Rules. However, the appellant breached this trust and contravened Section 68 of the Finance Act, 1994, read with Rule 6 of the Service Tax Rules, 1994, by failing to pay service tax for the relevant period.

4.1. It was further argued that the services provided by the appellant cannot be classified as falling within the ambit of "Healthcare Services by clinical establishments". Therefore, as per clause 2(t) of Notification No. 25/2012-ST, the activities of enrolment, collection, processing, and storage of umbilical cord blood stem cells are not covered under the said notification for exemption.

4.2. It was also submitted that the exemption for the appellant's services was specifically introduced only by Notification No. 4/2014-ST dated 17.02.2014 through insertion of Entry 2A. Hence, during the period from 01.07.2012 to 16.02.2014, the appellant's services were neither covered under the Negative List nor exempted by Notification No. 25/2012-ST and they are chargeable to service tax.

4.3. The learned counsel further submitted that the appellant had failed to obtain proper service tax registration for the said services and also failed to declare and assess the correct value of taxable services. Consequently, the appellant was rightly held liable to pay penalties under Sections 77(1)(a), 77(1)(d), 77(2) and 78 of the Finance Act, 1994.

4.4. Accordingly, the learned counsel submitted that the impugned order calls for no interference and that the present appeal deserves to be dismissed.

5. We have considered the rival submissions and carefully perused the materials placed on record.

6. Admittedly, the appellant is engaged in the business of stem cell banking services, and has been issued a registration certificate under the category of "Healthcare Services by clinical establishments" as per the provisions of the Finance Act, 1994. As per Entry 2 of Notification No.25/2012-ST dated 20.06.2012, services provided by clinical establishments in the nature of health care were exempt from service tax. Subsequently, Notification No.4/2014-ST dated 17.02.2014 introduced Entry 2A, specifically exempting services provided by cord blood banks for the preservation of stem cells or

related services. During investigation, the appellant deposited a sum of Rs.40,00,000/- with the department under protest. Observing that the activity of enrolment, collection, processing and storage of umbilical cord blood stem cells performed by the appellant is a taxable service during the period from 01.07.2012 to 16.02.2014, show cause notice dated 28.07.2017 came to be issued to the appellant, and the same culminated in Order-in-Original dated 18.05.2018, the operative portion of which reads as follows:

> *"(i) I confirm the demand of Service Tax amounting to Rs.2,07,29,576/- (Rupees Two crore seven lakhs Twenty-nine thousand five hundred and seventy-Six only) not paid by them, during the period from 01.07.2012 to 16.02.2014 on activity of enrollment, collection, processing and storage of Umbilical Cord Blood Stem Cells …*
>
> *(ii) as of Section 73(2) of the Finance Act, 1994 by invoking the extended, and order it to be recovered from them. Since an amount of Rs.40,00,000/- (Rupees Forty Lakhs only) has already been deposited by them, I order it to be appropriated towards the above Service Tax liability payable by them against the said demand;*
>
> *(iii) I order to recover interest at appropriate rate, on the Service Tax amounting to Rs.2,07,29,576/- (Rupees Two crore seven lakhs twenty-nine thousand five hundred and seventy-six only) from them under Section 75 of the Finance Act, 1994, as amended from time to time.*
>
> *(iv) I impose penalty of Rs.10,000/- (Rupees Ten thousand only) upon them under Section 77(1)(a) of the Finance Act, 1994 for their failure to obtain service tax registration for the said service within the stipulated time frame;*
>
> *(v) I impose penalty of Rs.10,000/- (Rupees Ten thousand only) upon them under Section 77(I)(d) of the Finance Act, 1994 for their failure to pay service tax through internet banking;*
>
> *(vi) I impose penalty of Rs.10,000/- (Rupees Ten Thousand Only) upon them under Section 77(2) of the Finance Act, 1994 for their failure to assess their service tax liability & failure to file prescribed returns in Form ST-3 within*

stipulated time frame for the said service under Section 70 of the Finance Act, 1994;

(vii) I impose penalty of Rs.1,03,64,788/- (Rupees One Crore Three Lakhs Sixty Four Thousand Seven Hundred and Eighty Eight Only) (Fifty percent of the service tax demanded) upon them under Section 78 of the Finance Act, 1994 for non-payment of service tax on account of misstatement / suppression of facts and contravention of provisions of the Finance Act, 1994 and Service Tax Rules, 1994 with intent to evade payment of Service Tax."

The CESTAT confirmed the demand of service tax, interest and penalties imposed, and the rejection of refund claim made by the appellant, by the order impugned herein.

7. Now, the primary dispute involved herein, relates to the period between 01.07.2012 and 16.02.2014 and whether the appellant's services during this period fell within the ambit of "Healthcare Services" and are therefore, eligible for exemption from payment of service tax.

8. The contentions raised by the appellant can be summarised under two broad grounds: first, that the show cause notice is barred by limitation; and second, that the services rendered by it fall within the ambit of "Healthcare Services".

9. In the present case, the disputed period is from 01.07.2012 to 16.02.2014. However, the show cause notice was issued only on 28.07.2017, demanding a sum of Rs.2,07,29,576/- towards service tax, by invoking the extended period of limitation. Under section 73(1) of the Finance Act, 1994, a show cause notice must ordinarily be issued within one year from the relevant date. The proviso to section 73(1) allows an extended period of up to five years only where the non-payment or short payment of service tax is due to fraud, collusion, wilful misstatement, suppression of facts, or contravention of the provisions of the Act or Rules, with an intent to evade payment of service tax.

9.1. It is evident from the communication dated 02.12.2013 issued by the Deputy Commissioner of Central Excise, Ahmedabad-III, directing the appellant to furnish the documents relating to their activities, that the department was already aware of the nature of the appellant's operations as early as in 2013. Despite such

awareness, the department issued the show cause notice after an inordinate delay, well beyond the ordinary period of limitation, and sought to justify it by invoking the extended period.

9.2. There is no dispute that the services rendered by the appellant were not exempt from service tax until Notification No. 25/2012-ST dated 20.06.2012 was issued. The records reveal that the appellant was under a *bona fide* belief that the activity of enrolment, collection, processing, and storage of umbilical cord blood stem cells fell within the scope of exempted "Healthcare Services" and therefore, was not liable to service tax. There is nothing on record to suggest that the appellant suppressed any material facts. On the contrary, they responded promptly to departmental communications and even deposited a sum of Rs. 40,00,000/- during the investigation. There was no allegation or evidence of fraud, collusion, wilful misstatement, or contravention of statutory provisions with intent to evade tax.

9.3. It is a settled principle of law that, for the department to invoke the extended period of limitation, there must be an active and deliberate act on the part of the assessee to evade payment of tax. Mere non-payment of tax, without any element of intent or suppression, is not sufficient to attract the extended limitation period. In this regard, reference may be made to the following judgments:

(i) Padmini Products v. CCE[4]

"12. Shri V. Lakshmi Kumaran, learned counsel for the appellant drew our attention to the observations of this Court in CCE v. Chemphar Drugs and Liniments, Hyderabad [(1989) 2 SCC 127 : 1989 SCC (Tax) 245] where at p. 131 of the report, this Court observed that in order to sustain an order of the Tribunal beyond a period of six months and up to a period of five years in view of the proviso to sub-section (1) of Section 11-A of the Act, it had to be established that the duty of excise had not been levied or paid or short-levied or short-paid, or erroneously refunded by reasons

4 (1989) 4 SCC 275

of either fraud or collusion or wilful misstatement or suppression of facts or contravention of any provision of the Act or Rules made thereunder, with intent to evade payment of duty. It was observed by this Court that something positive other than mere inaction or failure on the part of the manufacturer or producer of conscious or deliberate withholding of information when the manufacturer knew otherwise, is required to be established before it is saddled with any liability beyond the period of six months. Whether in a particular set of facts and circumstances there was any fraud or collusion or wilful misstatement or suppression or contravention of any provision of any Act, is a question of fact depending upon the facts and circumstances of a particular case. The Tribunal, however, had held contrary to the contention of the appellant. The Tribunal noted that dhoop sticks are different products from agarbatis even though they belonged to the same category and the Tribunal was of the view that these were to be treated differently. Therefore, the clarification given in the context of the agarbatis could not be applicable to dhoop sticks etc. and the Tribunal came to the conclusion that inasmuch as the appellant had manufactured the goods without informing the central excise authorities and had been removing these without payment of duty, these would have to be taken to attract the mischief of the provisions of Rule 9(2) and the longer period of limitation was available. But the Tribunal reduced the penalty. Counsel for the appellant contended before us that in view of the trade notices which were referred to by the Tribunal, there is scope for believing that agarbatis were entitled to exemption and if that is so, then there is enough scope for believing that there was no need of taking out a licence under Rule 174 of the said Rules and also that there was no need of paying duty at the time of removal of dhoop sticks, etc. Counsel further submitted that in any event apart from the fact that no licence had been taken and for which no licence was required because the whole

duty was exempt in view of Notification No.111 of 1978, referred to hereinbefore, and in view of the fact that there was scope for believing that it was exempt under Schedule annexed to the first notification i.e. No.55 of 1975, being handicrafts, the appellant could not be held to be guilty of the fact that excise duty had not been paid or short-levied or short-paid or erroneously refunded because of either any fraud or collusion or wilful misstatement or suppression of facts or contravention of any provision of the Act or Rules made thereunder. These ingredients postulate a positive act. Failure to pay duty or take out a licence is not necessarily due to fraud or collusion or wilful misstatement or suppression of facts or contravention of any provision of the Act. Suppression of facts is not failure to disclose the legal consequences of a certain provision. Shri Ganguly, appearing for the Revenue, contended before us that the appellant should have taken out a licence under Rule 174 of the said Rules because all the goods were not handicrafts and as such were not exempted under Notification No. 55 of 1975 and therefore, the appellant were obliged to take out a licence. The failure to take out the licence and thereafter to take the goods out of the factory gate without payment of duty was itself sufficient, according to Shri Ganguly, to infer that the appellant came within the mischief of Section 11-A of the Act. We are unable to accept this position canvassed on behalf of the Revenue. As mentioned hereinbefore, mere failure or negligence on the part of the producer or manufacturer either not to take out a licence in case where there was scope for doubt as to whether licence was required to be taken out or where there was scope for doubt whether goods were dutiable or not, would not attract Section 11-A of the Act. In the facts and circumstances of this case, there were materials, as indicated to suggest that there was scope for confusion and the appellant believing that the goods came within the purview of the concept of handicrafts and as such were exempt. If there was

scope for such a belief or opinion, then failure either to take out a licence or to pay duty on that behalf, when there was no contrary evidence that the producer or the manufacturer knew these were excisable or required to be licensed, would not attract the penal provisions of Section 11-A of the Act. If the facts are otherwise, then the position would be different. It is true that the Tribunal has come to a conclusion that there was failure in terms of Section 11-A of the Act. Section 35-L of the Act, inter alia, provides that an appeal shall lie to this Court from any order passed by the appellate tribunal relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purpose of assessment. Therefore, in this appeal, we have to examine the correctness of the decision of the Tribunal. For the reasons indicated above, the Tribunal was in error in applying the provisions of Section 11-A of the Act. There were no materials from which it could be inferred or established that the duty of excise had not been levied or paid or short-levied or short-paid or erroneously refunded by reason of fraud, collusion or any wilful misstatement or suppression of facts, or contravention of any of the provisions of the Act or of the Rules made thereunder. The Tribunal in the appellate order has, however, reduced the penalty to Rs 5000 and had also upheld the order of the confiscation of the goods. In view of the fact that the claim of the Revenue is not sustainable beyond a period of six months on the ground that these dhoop sticks, etc. were not handicrafts entitled to exemption, we set aside the order of the Tribunal and remand the matter to the Tribunal to modify the demand by confining it to the period of six months prior to issue of show-cause notice and pass consequential orders in the appeal on the question of penalty and confiscation. The appeal is allowed to the extent indicated above and the matter is, therefore, remanded to the Tribunal with the aforesaid directions. This appeal is disposed of accordingly."

(ii) CCE v. Chemphar Drugs and Liniments[5]

"7. The respondent filed an appeal before the Tribunal. The Tribunal considered the matter and noted that the appellant's case was that the demand for duty for the period beyond six months was time-barred; and the respondent's case was that the demand for the period beyond 6 months from the receipt of show-cause notice, was time-barred inasmuch as there was no suppression or misstatement of facts by the appellant with a view to evade payment of duty. In support of its claim the respondent produced classification list approved by the authorities during the period 1978-79, and also produced extracts from the survey register showing that the officers had been visiting its factory from time to time and also taking note of the previous goods manufactured by the respondent. The plea of the Revenue was that there was suppression and/or mis-declaration and/or wrong information furnished in the declaration itself. The Tribunal noted the facts as follows:

"We observe it is not denied by the Revenue that the appellants had been submitting their classification lists from time to time showing the various products manufactured by them including those falling under T.I. 14-E and 68 also these containing alcohol. The officers who visited the factory as seen from the survey register at the factory also took note of the various products being manufactured by the appellants. It cannot be said that the appellants had held back any information in regard to the range and the nature of the goods manufactured by them. The appellants have maintained that the value of the exempted goods under T.I. 68 and also value of medicines containing alcohol, according to their interpretation, were not required to be included for the purpose of reckoning of the total excisable goods cleared by them. There

5 (1989) 2 SCC 127

is nothing on record to show that the appellants non-bona fidely held back information about the total value of the goods cleared by them with a view to evade payment of duty. Their explanation that it was only on the basis of their interpretation that the value of the exempted goods were not required to be included that they did not include the value of the exempted goods which they manufactured at the relevant time and falling under T.I. 68 is acceptable in the facts of that case. The departmental authorities were in full knowledge of the facts about manufacture of all the goods manufactured by them when the declaration was filed by the appellants. That they did not include the value of the product other than those falling under T.I. 14-E manufactured by the appellants has to be taken to be within the knowledge of the authorities. They could have taken corrective action in time. We therefore find there was no warrant in invoking longer time-limit beyond six months available for raising the demand. So far as the demand for the period within six months reckoned from the date of receipt of the show-cause notice is concerned, we observe that the appellants' case is that value of the goods under T.I. 68 was not required to be included but the Revenue's plea is that only value of the specified goods under Notifications Nos. 71/78 and 80/80 was not required to be excluded."

8. On the aforesaid view the Tribunal came to the conclusion that the demand raised on this for a period beyond 6 months was not maintainable.

9. Aggrieved thereby, the Revenue has come up in appeal to this Court. In our opinion, the order of the Tribunal must be sustained. In order to make the demand for duty sustainable beyond a period of six months and up to a period of 5 years in view of the proviso to sub-section (1) of Section 11-A of the Act, it has to be established that the duty of excise has not been levied or paid or short-levied or short-paid, or erroneously refunded by reasons of either fraud

or collusion or wilful misstatement or suppression of facts or contravention of any provision of the Act or Rules made thereunder, with intent to evade payment of duty. Something positive other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise, is required before it is saddled with any liability, before (sic beyond) the period of six months. Whether in a particular set of facts and circumstances there was any fraud or collusion or wilful misstatement or suppression or contravention of any provision of any Act, is a question of fact depending upon the facts and circumstances of a particular case. The Tribunal came to the conclusion that the facts referred to hereinbefore do not warrant any inference of fraud. The assessee declared the goods on the basis of their belief of the interpretation of the provisions of the law that the exempted goods were not required to be included and these did not include the value of the exempted goods which they manufactured at the relevant time. The Tribunal found that explanation was plausible, and also noted that the department had full knowledge of the facts about manufacture of all the goods manufactured by the respondent when the declaration was filed by the respondent. The respondent did not include the value of the product other than those falling under T.I. 14-E manufactured by the respondent and this was in the knowledge, according to the Tribunal, of the authorities. These findings of the Tribunal have not been challenged before us or before the Tribunal itself as being based on no evidence."

(iii) Pushpam Pharmaceuticals Co. v. CCE[6]

"4. Section 11-A empowers the Department to reopen proceedings if the levy has been short-levied or not

6 (1995) Supp. 3 SCC 462

levied within six months from the relevant date. But the proviso carves out an exception and permits the authority to exercise this power within five years from the relevant date in the circumstances mentioned in the proviso, one of it being suppression of facts. The meaning of the word both in law and even otherwise is well known. In normal understanding it is not different that what is explained in various dictionaries unless of course the context in which it has been used indicates otherwise. A perusal of the proviso indicates that it has been used in company of such strong words as fraud, collusion or wilful default. Infact it is the mildest expression used in the proviso. Yet the surroundings in which it has been used it has to be construed strictly. It does not mean any omission. The act must be deliberate. In taxation, it can have only one meaning that the correct information was not disclosed deliberately to escape from payment of duty. Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression."

(iv) CCE v. Punjab Laminates (P) Ltd.[7]

"12. At no point of time, the Revenue doubted the correctness or otherwise of the manufacturing process or the ingredients disclosed by the respondent. The stand of the respondent that the industry as such had adopted the same manufacturing process and had been extended the benefit of the exemption notification of 1989 has not been called in question. If the stand of the manufacturer is correct, there was no reason as to why it should be singled out.

13. This Court decided Bakelite Hylam Ltd. [(1997) 10 SCC 350] on 10-3-1997. The impugned notice was issued only on 9-12-1997 evidently relying on or on the basis thereof.

7 (2006) 7 SCC 431

14. It is not a case where the respondents had not disclosed the activities of manufacturing products carried out by them by declaration or otherwise. They responded to each and every query of the appellant, as and when called upon to do so. The authorities of the appellant must have verified the said disclosures. At least they are expected to do so. The disclosure made by the respondent was acceptable to them. Their bona fides were never questioned.

15. The applicability of the extended period of limitation is, therefore, required to be considered in the aforementioned context. The proviso, it is trite, provides for an exception. It is not the rule. A case, therefore, has to be made out for attracting the same.

16. In Primella Sanitary Products (P) Ltd. v. CCE [(2005) 10 SCC 644 : (2005) 184 ELT 117] a three-Judge Bench of this Court was dealing with a case where a concession was made by a counsel appearing on behalf of the Revenue. The Court opined that although the item was put under the right classification list but they had not been permitted to take a different stand stating: (SCC p. 648, para 13)

"As the matter of classification has proceeded on a matter of concession of facts we do not allow the appellants to withdraw from that concession. They are now not permitted to argue on the question of classification."

17. In Pahwa Chemicals (P) Ltd. v. CCE [(2005) 189 ELT 257] this Court held:

"The appellants have all along claimed that merely because they were affixing the label of a foreign party, they did not lose the benefit of Notification No. 175/86-CE as amended by Notification No. 1/93-CE The view taken by the appellants had, in some cases, been approved by the Tribunal which had held that mere use of the name of a foreign party did not disentitle a party from getting benefit of the notifications. It is only after larger Bench held in Namtech Systems Ltd. v.

CCE [(2000) 115 ELT 238 (cegat)] that the position has become clear. It is settled law that mere failure to declare does not amount to wilful misdeclaration or wilful suppression. There must be some positive act on the part of the party to establish either wilful misdeclaration or wilful suppression. When all facts are before the Department and a party in the belief that affixing of a label makes no difference does not make a declaration, then there would be no wilful misdeclaration or wilful suppression. If the Department felt that the party was not entitled to the benefit of the notification, it was for the Department to immediately take up the contention that the benefit of the notification was lost."

18. Keeping in view the peculiar facts and circumstances of this case, we are of the opinion that it is not a fit case where this Court should interfere. The appeal is, therefore, dismissed. The parties shall, however, pay and bear their own costs."

9.4. Therefore, in the absence of fraud, collusion, wilful misstatement, or suppression of facts with an intent to evade payment of service tax, the invocation of the extended period of limitation under Section 73 of the Finance Act, 1994 is wholly unwarranted. Mere non-payment of service tax, by itself, does not justify the invocation of the extended limitation period. Accordingly, the show cause notice issued by the department is clearly time-barred. On this ground alone, the impugned order deserves to be set aside.

10. We next come to the question of the period between 01.07.2012 to 17.02.2014, for the purpose of exemption from the levy of service tax. Undoubtedly, the services provided by cord blood banks, including preservation of stem cells or any other services related to such preservation, are exempt from service tax, under Entry 2A of Notification No. 4/2014-ST dated 17.02.2014. According to the appellant, the said notification is clarificatory in nature and therefore, ought to be applied retrospectively with effect from 01.07.2012.

10.1. In the present case, since we have rendered a finding that stem cell banking services constitute a healthcare service, which was

specifically so stated by the notification dated 17.02.2014, the said notification must necessarily be held to be illustrative and clarificatory to that extent. This clarification/specific exemption, coupled with our finding that stem cell banking services fall within the ambit of "Healthcare Services", must necessarily inure to the benefit of the appellant. This is not to say that the notification dated 17.02.2014 is retrospective in operation. In other words, the said notification cannot be applied to cases where assessments have already been made and service tax has been paid without demur. However, in respect of pending claims, ongoing assessments, and existing disputes that are sub judice, it can be said that the notification dated 17.02.2014 is in the nature of a clarification to the earlier notification dated 01.07.2012. At this juncture, it is pertinent to mention that we have also noted and perused the judgment of the Madras High Court in *Life Cell International (P) Ltd. v. Union of India and others*[8], wherein the nature of the 2014 notification was considered and it was held that the amendment introduced by Notification No. 4/2014-ST cannot be construed as clarificatory and hence, does not have retrospective effect. However, the Court explicitly stated that it did not render any finding on whether the activities of the petitioner therein, fell within the ambit of "Healthcare Services" so as to qualify for the exemption. For better appreciation, the relevant paragraphs of the said decision are extracted below:

> ***"24.*** *Reverting to the case on hand, the so-called amendment, admittedly, has been inserted by way of Entry 2A into the exemption Notification, dated 20.6.2012 by Notification No. 4/2014-ST dated 17.2.2014 to the effect that "Services provided by cord blood banks by way of preservation of stem cells or any other service in relation to such preservation". Therefore, the intention of the legislature is clear that bringing the services provided by cord blood banks by way of preservation of stem cells under the exemption Notification in order to give exemption of service tax, however, it has not been specifically*

8 (2016) 6 VST-OL 50

mentioned that the said amendment should be with effect from the date of exemption Notification. i.e. 20.6.2012, wherein, originally, Entry No. 2 has been inserted, giving exemption towards healthcare services by clinical establishment, an authorised medical practitioner or para-medics. Therefore, by virtue of such amendment, it should be construed that the establishments which provides the above said services will get exemption of service tax with effect from the date of amendment, i.e. 17.2.2014 only and they cannot claim it with retrospective effect. The uncontroverted position is that before the amendment came into force, for the services provided by the cord blood banks were leviable and in fact, the petitioner has also paid Rs. 1 Crores each towards service tax with effect from 01.07.2012. Therefore, from 17.2.2014 onwards, by virtue of amendment, the said services were exempted from levy of service tax, which by itself explicit that the said amendment is extending remedial effect to the cord blood banks from being levied with service tax. Therefore, having regard to the same, this Court is of the considered view that the so-called amendment is only a remedial nature and it can have prospective effect only. If at all the legislature thought it fit to extend exemption with retrospective effect, it would have certainly expressed by mentioning specifically to the effect that the amendment would be with effect from 20.6.2012. Since the amendment having been brought into force from a particular date, i.e. 17.2.2014, no retrospective operation thereof can be contemplated prior thereto.

25. *As regards the decisions (cited supra) relied upon by the learned senior counsel for the petitioner are concerned, I am of the view that those decisions will no way helpful to the case of the petitioner. In "WPIL Ltd., case (cited supra), the Hon'ble Supreme Court, having considered the fact that already, the Government issued Notification dated 1.3.1994, giving exemption from imposing excise duty on parts of power driven*

pumps used in the factory premises for manufacture of power driven pumps and to clarify the position, the subsequent notification dated 25.4.1994 was issued giving exemption towards the goods that are used within the factory of production in the manufacture, held that the subsequent notification was not a new one granting exemption for the first time in respect of parts of power driven pumps to be used in the factory and therefore, the subsequent notification is clarificatory nature and it has to be given with retrospective effect. But in the present case, it is not in dispute that the so-called amendment Notification issued by the Government, giving exemption for the first time towards the services provided by cord blood banks by way of preservation of stem cells and hence, it cannot be considered as clarificatory in order to give retrospective effect.

26. *In "Golden Coin case (cited supra), the expression "income" in the statute appearing in Section 2(24) of the Act has been clarified to mean that it is an inclusive definition and includes losses, that is, negative profit. This has been held so by the Apex Court on the strength of its earlier judgments in "CIT v. Harprasad and Co. (P) Ltd. [(1975) 3 SCC 868: 1975 SCC (Tax) 158: (1975) 99 ITR 118] and followed in "Reliance Jute and Industries Ltd. v. CIT [(1980) 1 SCC 139: 1980 SCC (Tax) 67: (1979) 120 ITR 921]. After an elaborate and detailed discussion, the Apex Court held with reference to the charging provisions of the statute that the expression "income" should be understood to include losses. The expression "profits and gains" refers to positive income whereas "losses" represents negative profit or in other words minus income. Considering this aspect of the matter in greater detail, the Apex Court overruled the view expressed by the two learned Judges in "Virtual Soft Systems [(2007) 9 SCC 665: (2007) 289 ITR 83]. The Apex Court adopted the proposition of law that though retrospectivity is not to be presumed and*

rather there is presumption against retrospectivity, it is open for the legislature to enact laws having retrospective operation. This can be achieved by express enactment or by necessary implication from the language employed and if it is a necessary implication from the language employed that the legislature intended a particular section to have a retrospective operation, the courts will give it such an operation and in the absence of a retrospective operation having been expressly given, the courts may be called upon to construe the provisions and answer the question whether the legislature had sufficiently expressed that intention giving the statute retrospectivity. When this ratio is applied to the case on hand, I am of the view that the language used in the so-called amendment is clear that the exemption is given towards the services provided by cord blood banks by way of preservation of stem cells and it cannot be construed that such exemption shall have retrospective effect.

27. *For the foregoing discussion, I am of the considered opinion that the so-called amendment cannot be viewed as a clarificatory one and therefore, this Court is unable to countenance the argument advanced by the learned senior counsel that the so-called amendment is only a clarificatory nature.*

28. *Accordingly, the Writ Petition fails and it is dismissed. No costs. Consequently, connected MPs are closed. However, it is once again made clear that this Court has not rendered any finding regarding whether the activities of the petitioner would fall within the ambit of "health care service" and thereby, the so-called amendment would apply in order to claim exemption of service tax. The authorities are at liberty to determine this aspect in accordance with law."*

10.2. It is a well-settled principle of law that unless a notification or circular explicitly provides for retrospective operation, it must be construed as prospective. Admittedly, the said notification

does not contain any express provision indicating retrospective effect. Therefore, it can only be applied prospectively. However, for the reasons stated in the preceding paragraphs, while we concur with the decision of the Madras High Court to the extent that Notification No. 4/2014-ST cannot be considered to be retrospective, we are of the considered opinion that the said amendment is indeed clarificatory. To this limited extent, the judgment in *Life Cell International (P) Ltd. (supra)* stands overruled in principle. Accordingly, the impugned order overlooks the comprehensive scope of the exemption and is therefore, liable to be set aside.

11. The next aspect to be considered herein is, whether the services rendered by the appellant – relating to enrolment, collection, processing, and storage of umbilical cord blood stem cells – fall within the definition of "Healthcare Services", so as to qualify for exemption from service tax during the disputed period.

11.1. Notification No.25/2012-ST dated 20.06.2012 issued by the Ministry of Finance, provided a consolidated list of services exempt from service tax. Under Serial No.2, "Healthcare Services" are exempt and the same reads as under:

> *"2. Healthcare services by a clinical establishment, an authorized medical practitioner or para-medics".*

Clause 2(t) of the said Notification defines "health care services" broadly covering diagnosis, treatment, or care for illness, injury, deformity, abnormality, or pregnancy in any recognised system of medicines in India. The said clause reads as under:

> *""health care services" means any service by way of diagnosis or treatment or care for illness, injury, deformity, abnormality or pregnancy in any recognised system of medicines in India and includes services by way of transportation of the patient to and from a clinical establishment, but does not include hair transplant or cosmetic or plastic surgery, except when undertaken to restore or to reconstruct anatomy or functions of body affected due to congenital defects, developmental abnormalities, injury or trauma."*

It is clear that the use of the phrase "any service" gives an expansive scope to the term. Though the terms "diagnosis", "treatment", and "care" are not specifically defined under the Finance Act, 1994, their ordinary meanings (as per Oxford and Black's Law Dictionaries) include acts like identifying illness causes, curing diseases or injuries, and ensuring well-being or preventive healthcare.

11.2. The appellant qualifies as a clinical establishment under clause 2(j) of the Notification No.25/2012-ST, which fact is not disputed by the Department. The appellant's core activities – collection and preservation of umbilical cord blood (UCB) stem cells – are preventive in nature, with potential curative applications for life-threatening diseases. The processing, testing, cryopreservation, and eventual release for transplantation constitute integral components of healthcare aimed at future diagnosis, treatment, and care.

11.3. The appellant has submitted various materials – brochures, laboratory processes, transplant coordination protocols, clinical trials, and scientific articles – demonstrating that their services include not only storage but also vital diagnostic and therapeutic support. Stem cell transplantation depends on extensive matching and testing conducted by the appellant. Doctors, who have utilised their services have certified the critical role played by the appellant in treating blood-related disorders.

11.4. Further, the appellant is actively involved in post-transplant monitoring, clinical trials (including those for spinal cord injuries), and collaborations with international medical experts. Their services also support research on conditions like autism and cerebral palsy. Recognition under the Drugs and Cosmetics Act (post-amendment dated 17.12.2012) reinforces their status as a legitimate healthcare provider.

11.5. The Department contends that the appellant's services were exempted only from 17.02.2014 under Entry 2A of Notification No. 4/2014-ST. However, the insertion of Entry 2A does not curtail the scope of Serial No.2 under Notification No. 25/2012-ST. The absence of express inclusion of cord blood services in earlier notifications does not alter their essential healthcare

nature. Therefore, the appellant's services are well within the ambit of "Healthcare Services".

11.6. The Andhra Pradesh High Court in *M. Satyanarayana Raju Charitable Trust v. UOI*[9], interpreted "Healthcare Services" to include preventive services. Being a beneficial exemption, the provision must be liberally construed. The following paragraphs of the said judgment is pertinent:

> *"18. Where the second respondent appears to have gone wrong is that the second respondent has taken the services provided by the petitioner for the wellbeing of an individual, as something out of the purview of the diagnosis or treatment. The second respondent has fallen into an error in thinking so, due to a fundamental misconception that is normally prevalent in society. While allopathic system of medicine is only for diagnosis and treatment of illness, many of the indigenous system of medicines, seek to prevent rather than prescribe.*
>
> *…*
>
> *20. Therefore, an exemption notification, which is understood by the respondents to confer a benefit upon the clinical establishments, cannot be made inapplicable to a holistic health care institution such as the petitioner herein, as the same would tantamount to killing our indigenous system of health and well being. A system of medicine which focused mainly on healthy living and not merely a prolonged existence cannot be denied the benefit of the exemption notification on the basis of a misconception that a clinical establishment is one that would treat people after they fall ill and not one which will prevent people from falling ill."*

11.7. In *CCE, Bombay-I & Anr. vs. Parle Exports Pvt. Ltd.*[10], this Court held that an exemption notification has statutory force

9 2017 SCC OnLine Hyd 168

10 (1989) 1 SCC 345

equivalent to that of the Act. The relevant paragraphs are extracted as under:

> ***"17.*** *……. The expressions in the Schedule and in the notification for exemption should be understood by the language employed therein bearing in mind the context in which the expressions occur. The words used in the provision, imposing taxes or granting exemption should be understood in the same way in which these are understood in ordinary parlance in the area in which the law is in force or by the people who ordinarily deal with them. It is, however, necessary to bear in mind certain principles. The notification in this case was issued under Rule 8 of the Central Excise Rules and should be read along with the Act. The notification must be read as a whole in the context of the other relevant provisions. When a notification is issued in accordance with power conferred by the statute, it has statutory force and validity and, therefore, the exemption under the notification is as if it were contained in the Act itself.*
>
> *…….*
>
> *While interpreting an exemption clause, liberal interpretation should be imparted to the language thereof, provided no violence is done to the language employed. It must, however, be borne in mind that absurd results of construction should be avoided.*
>
> ***18.*** *In Hindustan Aluminium Corpn. Ltd. v. State of U.P. [(1981) 3 SCC 578 : 1981 SCC (Tax) 280 : (1982) 1 SCR 129] this Court emphasised that the notification should not only be confined to its grammatical or ordinary parlance but it should also be construed in the light of the context. This Court reiterated that the expression should be construed in a manner in which similar expression have been employed by those who framed relevant notification. The court emphasised the need to derive the intent from a contextual scheme. In this case, therefore,*

it is necessary to endeavour to find out the true intent of the expressions "food products and food preparations" having regard to the object and the purpose for which the exemption is granted bearing in mind the context and also taking note of the literal or common parlance meaning by those who deal with those goods, of course bearing in mind, that in case of doubt only it should be resolved in favour of the assessee or the dealer avoiding, however, an absurd meaning. Bearing the aforesaid principles in mind, in our opinion, the revenue is right that the non-alcoholic beverage bases in India cannot be treated or understood as new "nutritive material absorbed or taken into the body of an organism which serves for the purpose of growth, work or repair and for the maintenance of the vital process" and an average Indian will not treat non-alcoholic beverage bases as food products or food preparations in that light."

Additionally, in Advance Ruling No. KAR ADRG 24/2020, the Karnataka Authority for Advance Ruling held that stem cell donor - related services are exempt as healthcare services.

11.8. Notably, the Ministry of Health and Family Welfare, through an Office Memorandum dated 22.05.2013 clarified in consultation with the National AIDS control Organization that stem cell banking is a part of "health care services" and qualifies for exemption. The said O.M. is reproduced below, for the sake of reference:

X-11035/41/2012-DFQC (Pt)
Government of India
Ministry of Health & Family Welfare
Department of Health and Family Welfare
(DFQC Section)

Nirman Bhawan, New Delhi
Dated the 22 May, 2013

OFFICE MEMORANDUM
Subject: Service Tax Exemption to Stem Cell Banks – Regarding.

The undersigned is directed to refer to representations dated 24.07.2012, 21.09.2012, 27.02.2013, 08.03.2013 and 20.03.2013 of Association of Stem Cell Banks of India on the subject cited above and to say that this Department has examined the matter in consultation with National Aids Control Organization, Department of Aids Control, Ministry of Health and Family Welfare. In this connection, this Department recommends that the services rendered by the Stem Cell Banks are part of healthcare services and hence they may be considered for service tax exemption.

2. This issues with the approval of the Secretary

(Health and Family Welfare).

(Sudhir Kumar)
Under Secretary to the
Government of India
Telefax: 23062419

The Secretary,
Department of Revenue,
Ministry of Finance,
North Block, New Delhi.

12. Thus, it is evident that the appellant's services fall within the ambit of "Healthcare Services" as defined under the exemption notification. These services are preventive and curative in nature and encompass diagnosis, treatment, and care.

13. As regards the imposition of penalties, it is evident that the appellant neither suppressed nor concealed any material facts from the Department. On the contrary, they were in constant communications with the Department, seeking clarifications on whether their services were exempt from the levy of service tax. As already held by us, the show cause notice issued by the Department is time-barred. Therefore, the imposition of penalties is not warranted.

    13.1. Further, there is nothing on record to indicate any intent on the part of the appellant to evade payment of service tax. All relevant information and documents were duly disclosed and furnished to the Department. The appellant acted under

a *bona fide* belief that their activities were covered under Entry 2 of the Exemption Notification dated 20.06.2012. The records substantiate that the appellant had addressed multiple representations – dated 24.07.2012, 21.09.2012, 27.02.2013, 08.03.2013 and 20.03.2013 to the Ministry, seeking clarifications on the applicability of the exemption. Their consistent engagement with the authorities further reinforces their *bona fide* conduct.

13.2. Moreover, during the course of investigation, the appellant deposited a sum of Rs. 40,00,000/- on 30.03.2014. It is a well settled legal position that penal provisions are meant to deter deliberate contravention of statutory provisions and are not intended to penalize *bona fide* taxpayers. In this context, the imposition of penalties and interest appears arbitrary, unjust, and unsustainable in law.

14. For the foregoing reasons, the impugned order is set aside in its entirety. Accordingly, these appeals stand allowed. The deposit of Rs. 40,00,000/- made by the appellant shall be refunded to them within a period of four weeks from the date of receipt of this judgment. No costs. Connected miscellaneous application(s), if any, shall stand closed.

Result of the case: Appeals allowed.

[†]*Headnotes prepared by:* Divya Pandey

[2025] 8 S.C.R. 103 : 2025 INSC 842

Binod Pathak & Ors.
v.
Shankar Choudhary & Ors.

(Civil Appeal No. 7706 of 2025)

14 July 2025

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

Issue for Consideration

Matter pertains to the correctness of the order passed by the High Court that as some of the defendants before the first appellate court had passed away and their legal heirs were not brought on record in accordance with the provisions of Or.XXII r.4 CPC, the first appellate court could not have heard the first appeal on merits and decided the same in favour of the plaintiffs as it already stood abated.

Headnotes†

Code of Civil Procedure, 1908 – Or.XXII rr.4(3), 10A – Duty of pleader to communicate to court death of a party – Title suit instituted by appellants-plaintiffs – Dismissed by the trial court, however, allowed by the first appellate court – Second appeal by the respondent-defendant – Allowed by the High Court holding that as some of the defendants before the first appellate court had passed away and their legal heirs were not brought on record, and in absence thereof, the first appellate court could not have heard the first appeal on merits and decided the same in favour of the plaintiffs as it already stood abated – Correctness:

Held: Provisions of Or.XXII r.10A were not complied with by the High Court – While the first appeal was being heard, the defendants could have brought to the notice of the first appellate court that some of the defendants had passed away and the appeal had stood abated – Defendants being fully aware of the death of some of the defendants kept quiet and allowed the first appellate court to proceed with the hearing of the first appeal on merits – When the first appeal came to be allowed and the matter reached the High

* Author

Court in Second Appeal the issue as regards the abatement of suit came to be raised by the defendants due to non-substitution of legal heirs by the plaintiff, within the statutorily prescribed period of time – Abatement of suit is not a right that accrues to a party when the other party has failed to substitute legal heirs within the specified period of limitation – Abatement may be disallowed by the court if it has sufficient cause for condoning the delay of the party that ought to have filed for the substitution of legal heirs – u/Or.XXII r.10A, the duty of a pleader to apprise the court as well as the other parties to the suit or appeal of the death of his client is a duty of candour and propriety as a responsible officer of the court – Failure of a party to perform the duty u/r.10A constitutes a wrongful act and such party must not be allowed to avail the benefit arising therefrom in the form of abatement – High Court erred in holding that Or.XXII r.10A is not mandatory and would not override the mandatory provisions relating to abatement in Or.XXII r.4 – Court should know how to apply the provision in the facts of each case – Line of reasoning adopted by the High Court if upheld would render Or.XXII r.10A otiose – Lawyer appearing for the defendants also kept quiet and proceeded to argue the matter on merits, smacks of lack of good faith – Thus, impugned order set aside – Matter remanded to the High Court. [Paras 23, 24, 58, 59, 65-73]

Code of Civil Procedure, 1908 – Or.XXII r.10A – Duty of pleader:

Held: Providing merely an information with regard to the fact of death is not sufficient compliance of the r.10A unless and until the counsel furnishes the information with regard to the details of the persons on whom and against whom the right to sue survives and the information u/r.10A and the object behind it would remain incomplete as the parties would still be labouring to inquire who are the legal representatives and find out as to upon whom and against whom the right to sue survives. [Para 63]

Code of Civil Procedure, 1908 – Or.XXII r.10A – Duty of pleader to communicate to Court death of a party – Scope, objective and rationale of Or.XXII r. 10A – Nature of salutary provision of Or.XXII r.10A – Stated. [Paras 29-44, 50]

Maxims – '*ex injuria ius non oritur*' and '*nullus commodum capere potest de injuria sua propia*' – Distinction between:

Held: Maxim *'ex injuria ius non oritur'* is a principle that a right cannot emanate or emerge from a wrongful act, and the maxim *'nullus commodum capere potest de injuria sua propria'*, confirms the general rule of equity and prudence that no one can benefit from their own wrongdoing – Scope of the latter is wider than the former – First maxim explains that the legitimacy of a right stands vitiated if such right, which otherwise would have been legitimately exercisable, accrues from a wrongdoing of the person claiming under or exercising such right – Maxim solidifies the faith in law that no wrong action will be given a legal validity **–** Maxim, *'nullus commodum capere potest de injuria sua propria*', on the other hand, lays itself as a rule of equity **–** Advantage falling from wrongdoing may be a legal or illegal advantage – Maxim dictates that, no profit or advantage of a person's wrongful act may be validated by the seal of law – Interpretation of Ord. XXII r.10A is a manifestation of the latter and not the former – Thus, the principle that no party can take advantage of his/her own wrong, *'nullus commodum capere potest de injuria sua propria'* is squarely attracted in the event of a failure in complying with the provision of r.10A of Ord. XXII CPC, and any abatement as a result of such wrongdoing or failure ought not to be validated by the courts – Thus, the maxim '*ex injuria ius non oritur*' is different from the maxim '*nullus commodum capere potest de inuria sua propria*' for the reason that the former pertains to a 'right' that may become available to a wrongdoer due to the wrongful act and the latter relates to an 'advantage' or 'benefit' that a wrongdoer may derive from his wrongful conduct – Although both are in essence a byproduct of the doctrine of equity and share a common genealogy under the doctrine of clean hands, the field in which they operate are different and distinct. [Paras 45-54]

Judicial deprecation – Procedural errors by High Court – Disappointment with the manner in which the High Court dealt with the Second Appeal and its understanding as regards the position of law on provisions of Ord. XXII r.10A CPC – High Court took the view that in the absence of the legal heirs being substituted in accordance with the provisions of Ord. XXII r.4 CPC, the first appellate court could not have heard the first appeal on merits and decided the same in favour of the plaintiffs; and that the first appeal had already stood abated as the decree was joint and indivisible – Such procedural errors not expected at the level of any High Court – Code of Civil Procedure, 1908. [Paras 12, 13, 23]

Case Law Cited

Gangadhar v. Raj Kumar **(1984) 1 SCC 121;** *United Bank of India v. Kanan Bala* **[1987] 2 SCR 1090 : (1987) 2 SCC 583;** *Kathpalia v. Lakhmir Singh* **(1984) 4 SCC 66;** *Kusheshwar Prasad Singh v. State of Bihar* **[2007] 4 SCR 95 : (2007) 11 SCC 447;** *Perumon Bhagvathy Devaswom Perinadu Village v. Bhargavi Amma (Dead) by Lrs. and Others* **[2008] 11 SCR 1 : (2008) 8 SCC 321;** *P. Jesaya (dead) by Lrs. v. Sub-collector and Anr.* **(2004) 13 SCC 431 – referred to.**

Books and Periodicals Cited

Schwebel, Stephen M. "Clean Hands, Principle" Eds., Rüdiger Wolfrum, Oxford University Press, 2009; Aaron X. Fellmeth and Maurice Horwitz "Guide to Latin Maxims in International Law" 1st Ed., Oxford University Press; Niel MacCormick, "Rights in Legislation"; Law, Morality and Society: Essays in Honour of H.L.A. Hart, P.M.S. Hacker, and Joseph Raz (eds). 189-206, Oxford: Clarendon Press (1977) **– referred to.**

List of Acts

Code of Civil Procedure, 1908; Code of Civil Procedure (Amendment) Act, 1976; Code of Criminal Procedure, 1973.

List of Keywords

Abatement; Duty of pleader; Intimate court about death of client; Doctrine of clean hands; Maxim '*ex injuria ius non oritur*'; Maxim '*nullus commodum capere potest de injuria sua propia*'; Procedural errors; Non-substitution of legal heirs; Contract between client and pleader; Statement of Objects and Reasons for the Code of Civil Procedure (Amendment) Bill, 1976; First appellate court; Scope, objective and rationale of Or.XXII r.10A CPC; Nature of salutary provision of Or.XXII r.10A CPC; Procedural errors by High Court.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 7706 of 2025

From the Judgment and Order dated 22.10.2014 of the High Court of Judicature at Patna in SA No. 190 of 2008

Appearances for Parties

Advs. for the Appellants:
Gagan Gupta, Sr. Adv., Jayesh Gaurav, Ishwar Chandra Roy, Farrukh Rasheed.

Advs. for the Respondents:
Shantanu Sagar, Anil Kumar, Gunjesh Ranjan, Ms. Tara Chauhan, Manoneet Dwivedi, Gopal Jha, Prem Prakash, Kanhaiya Priyadarshi.

Judgment / Order of the Supreme Court

Judgment

J.B. Pardiwala, J.

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

INDEX*

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

1. Leave Granted.

2. This appeal arises from the judgment and order passed by the High court of Judicature at Patna dated 22.10.2014 (hereinafter referred to as the "**Impugned Order**") in Second Appeal No. 190 of 2008 by which the Second Appeal filed the respondents herein; the original defendants, came to be allowed thereby setting aside the judgment and order passed by the First Appellate Court allowing the First Appeal filed by the appellants herein; the original plaintiffs, and decreeing the suit in their favour.

3. For the sake of convenience, the appellants herein shall be referred to as the original plaintiffs and the respondents herein shall be referred to as the original defendants.

A. FACTUAL MATRIX

4. The plaintiffs instituted Title Suit No. 106 of 1984 in the Court of the Sub Judge – (I) Gopalganj (hereinafter, the "**title suit**") for declaration of title and recovery of possession of suit land bearing Khewat Nos. 11 and 12 respectively, revisional survey Nos. 688, 689 and 690 respectively under Khata Nos. 571 and 574 respectively situated in the Village Harkhauli, P.S. Mirganj, District Gopalganj.

5. We need not go into the details of the nature of the suit instituted by the plaintiffs as we are inclined to dispose of this appeal on a neat question of law and remand the matter to the High Court for fresh consideration on merits.

6. In the aforesaid title suit instituted by the original plaintiffs referred to above, the trial court framed the following issues: -

   (i) Is the suit, as framed, maintainable?

   (ii) Have the plaintiffs got a valid cause of action or right to sue?

   (iii) Whether the ancestors of Defendant nos. 7 to 10 had acquired occupancy right in respect of the suit land?

   (iv) Have the plaintiffs got subsisting title and possession over the suit lands at the time of vesting of the intermediary interest in the state of Bihar as also on the date of proceeding under Section 145 of the Code of Criminal Procedure, 1973 (for short, the "**Cr.P.C.**")?

   (v) To what relief or reliefs, if any, are the plaintiffs entitled to in the aforesaid suit?

7. Upon appreciation of the oral as well as documentary evidence on record the trial court recorded a finding that the plaintiffs had failed to establish their case and accordingly the suit came to be dismissed *vide* the judgment and decree dated 05.07.1989.

8. The original plaintiffs being dissatisfied with the judgment and order passed by the trial court dismissing the suit went in First Appeal before the Court of Additional District Judge – (I), Gopalganj. The appeal came to be registered bearing Title Appeal No. 60/1989 renumbered as Title Appeal No. 58 of 2007.

9. The appeal filed by the plaintiffs came to be allowed by the First Appellate Court *vide* the judgment and order dated 02.06.2009.

10. The First Appellate Court while allowing the First Appeal of the plaintiffs held as under: -

> *"18. In view of aforesaid finding I hold that plaintiffs have title on the suit land and they have been illegally dispossessed by the defendants, so plaintiffs title on suit land mentioned in schedule 2,3 and 4 of plaint is hereby upheld and the plaintiffs are entitled for recovery of possession of suit land. Plaintiffs have claimed mesne profit, but the lower court neither framed issue nor decided the same but in the light of aforesaid finding plaintiffs are entitled to mesne profit from the date of dispossession upto getting possession on the suit land which has to be determined by the lower court in separated proceeding if it will be initiated by the plaintiffs after delivery of possession.*
>
> *Hence, the appeal is allowed with cost, the judgment and decree of the lower court is hereby set aside and the suit is decreed with cost. The plaintiffs have title and possession on schedule K. 2, 3 and 4 of the plaint and they are entitled for mesne profit from date of dispossession upto the date of getting delivery of possession. Defendants (respondents) are directed to deliver possession of the suit land to the plaintiffs within thirty days from today failing which plaintiffs (appellants) will be entitled to get delivery of possession according to the process of law.*
>
> *I have already recorded finding that defendants (respondents) have constructed house and structures on*

suit land during pendency of the suit so plaintiffs will have obtain to take delivery of possession either with house or structures by evicting persons residing in it or if they so like they may apply for demotion of house and structures at the cost of the defendants and to take vacant possession of the suit land. Pleaders fee Rs. 1000/- and Pleader's clerk fee Rs. 250/-."

11. The original defendants being dissatisfied with the judgment and order passed by the First Appellate Court referred to above challenged the same before the High Court by way of Second Appeal. In the Second Appeal, the High Court formulated the following substantial questions of law: -

    i. *"Whether the judgment and decree of the appellate court could be said to be illegal in view of the same having been passed against several dead respondents, i.e. respondent nos. 3, 6(gh), 8, 9, 11 and 12?*

    ii. *Whether the entry in the concerned 'record of right can be presumed to be the entry in favour of the erstwhile intermediary as his private land?*

    iii. *Whether in absence of any finding regarding the method and manner of dispossession as alleged by the plaintiffs, the relief of restoration of possession could have been granted especially when the plaintiffs have not adduced any evidence on this aspect of the matter?*

    iv. *Whether the finding of the appellate Court that in absence of plea taken in the written statement no such plea can be allowed to be taken by the defendants is sustainable in law when both the parties had understood the respective cases and adduce evidence?"*

12. It appears from the materials on record that when the aforesaid Second Appeal was taken up for hearing it came to the notice of the High Court that some of the respondents before the First Appellate Court i.e., some of the original defendants had passed away and their legal heirs were not brought on record. The High Court took

the view that in the absence of the legal heirs being substituted in accordance with the provisions of Order XXII Rule 4 of the Code of Civil Procedure, 1908 (for short, the "**CPC**") the First Appellate Court could not have heard the First Appeal on merits and decided the same in favour of the plaintiffs. The High Court took the view that the First Appeal had already stood abated as the decree was joint and indivisible.

13. The High Court held that in case of joint and indivisible decree the abatement of proceedings in relation to one or more of the appellant(s) or respondent(s) on account of omission or lapse and failure to bring on record his or their legal representatives in time would prove fatal to the entire appeal and the appeal would be liable to be dismissed.

14. The High Court while allowing the Second Appeal filed by the defendants held as under: -

> *"At this juncture, it would be pertinent to mention that the judgment and decree in the suit has been passed on 25.07.1989 and the appeal thereafter came to be decided on 02.06.2008 reversing the judgment and decree in the suit and granting the decree to the plaintiff as prayed. The memo of this second appeal has been filed on 27.06.2008 by the original defendant no. 2 Bihari Choudhary, defendant no. 4 Baijnath Chaudhary and defendant no. 5 Harilal Choudhary along with the substituted heirs of the deceased defendant no. 1 Khobhari Choudhary and deceased defendant no. 6 Yamuna Choudhary. The appellant no. 7 Dhananjay Choudhary in this appeal is the substituted heir of Yadunandan Choudhary who was one of the substituted heirs of deceased defendant no. 6 Jamuna Choudhary in the appellate court below. From the perusal of the memo of the instant appeal, it further transpires that the respondent nos. 10 to 13 in this appeal' have been impleaded as heirs of deceased defendant no. 3 Sheonath Choudhary.*
>
> *On behalf of the appellants, it has been emphatically submitted that the defendant no. 3-respondent no. 3 (in the appellate court below) namely Sheonath Choudhary died on 07.05.1997 and similarly the substituted respondent no. 6 (Gha) (one of the substituted heirs of the deceased defendant no. 6 Yamuna Choudhary in the appellate court*

below) died on 29.09.2000 during the pendency of the appeal in the court below. It has been further pointed out that the substituted respondent no. 7 (ka) Most. Dipiya (one of the substituted heirs of the deceased defendant no. 7 Mangaru Bhagat) died on 07.08.1999, the defendant no. 8- respondent no. 8 Bacha Bhagat died on 05.04.2003 and respondent no. 9 Nagina Bhagat also died on 05.11.2005 during the pendency of the appeal in the court below. From the order dated 14.11.2008 passed in this appeal, it becomes evident that the fact of death of the aforesaid defendant respondents during the pendency of the appeal in the court below has been admitted by the plaintiff-respondents and it has been also admitted that their heirs could not be substituted in the said appeal.

Examined in the backdrop of these facts, it is vivid that the deceased defendant no. 3-respondent no. 3 Sheonath Choudhary was one of the purchasers of the suit land and similarly the deceased respondent no. 6 (Gha) was one of the substituted heirs of the original purchaser (Yamuna Choudhary) of the suit land. The remaining deceased respondent nos. 7(ka), 8 and 9 in the appeal in the court below were the heirs of the vendor of the defendant no. 1 to 6. The impugned judgment and decree by the appellate court below granting the declaration of title and entitlement of recovery of possession in favour of the plaintiffs has been passed against these deceased persons as well, along with the other respondents. In view of the nature of the decree as prayed for and granted by the appellate court below being joint and inseverable, it is evincible therefore that the same has been passed against the defendant no. 3-respondent no. 3 Sheonath Choudhary, respondent no. 6 (gha) Sheonandan Choudhary and some other respondents as abovementioned who were already 'dead and their interest was not represented.

Tested on the anvil of the aforesaid principle the conclusion is inevitable that the decree dismissing the suit as against the aforesaid deceased respondents had attained finality and could not have been varied or overturned in absence

of their heirs and legal representatives by the appellate court below. In other words, the appeal before the appellate court at the time of passing of the decree had become defective (not properly constituted) as all the necessary parties for the determination of the controversy were not before the court and the non-substitution of the heirs of the deceased respondents was fatal to the entire appeal.

The proposition by the learned senior counsel on behalf of the plaintiff-respondents on the strength of the decision of the Apex Court in the case of K. Naina Mohamed (supra), in the peculiar facts and circumstances of this case as mentioned, is clearly misplaced. In the said decision the purchaser was already on record to represent the interest of his deceased vendors and, in fact, it was the purchaser who filed the appeal as well as contested the second appeal thereafter. In the present case, one of the purchasers and one of the substituted heirs of another purchaser of the suit land died during the pendency of the appeal and their interest remained unrepresented as no substitution was admittedly done. Similarly, no rule has been laid down in the said decision prescribing that the provision of Order 22 Rule 10 A shall override the mandatory provision relating to abatement as contained in Order 22 Rule 4 C.P.C. for want of substitution of a defendant/respondent who was a necessary party. In this fact situation, this Court is inclined to hold that the impugned judgment and decree passed by the appellate court below cannot be stained in law, and the same is, accordingly, set aside. The substantial question of law, as formulated in this regard, is accordingly answered in favour of the appellants.

In view of the aforesaid conclusions, there remains no necessity for determining the other substantial questions of law as framed/suggested.

In the result, this appeal is allowed. In the facts and circumstances, there shall be no order as to cost."

15. In such circumstances referred to above, the plaintiffs are here before this Court with the present appeal.

B. SUBMISSIONS OF THE PARTIES

i. Submissions on behalf of the Appellants / Original Plaintiffs.

16. Mr. Gagan Gupta, the learned counsel appearing for the plaintiffs vehemently submitted that the High Court committed a serious error in passing the impugned judgment and order. He would submit that the impugned judgment and order passed by the High Court is in gross violation of the provisions of Order XXII Rule 10A of the CPC. He would submit that respondents / defendants in the First Appeal deliberately omitted to bring it to the notice of the plaintiffs that some of the defendants had passed away. According to the learned counsel, the respondents in the First Appeal not only failed to bring it to the notice of the First Appellate Court about the passing away of some of the defendants but allowed the First Appeal to be heard on merits. The failure on the part of the respondents to bring to the notice of the plaintiffs as well as to the Court concerned the factum of death of some of the defendants could be said to be in gross violation of Order XXII Rule 10A of the CPC.

17. Mr. Gupta submitted that even while conceding to the fact that some of the respondents before the First Appellate Court had passed away and their legal heirs were not brought on record, still the appeal as a whole could not be said to have stood abated. In this regard, Mr. Gupta has given a chart indicating why the First Appeal could not be said to have wholly abated in absence of the legal heirs being brought on record. The chart indicates as follows: -

S.N	Respondent	Position before the Trial Court	Position before the High Court	Position before this Court	Particulars
1.	***Hari Lal Choudhary*** *(First Sale Deed)*	Defendant No. 5	Appellant No. 6	Respondent No. 6	No Dispute w.r.t abatement
2.	***Yamuna Choudhary*** *(Second Sale Deed)*	Defendant No. 6	His LRs were Appellants Nos. 11 & 12	His LRs are Respondents Nos. 8,11 and 12	No Dispute w.r.t abatement

3.	***Khobari Choudhary*** *(Third Sale Deed)*	Defendant No. 1	His LRs were Appellants Nos. 1-3	His LRs are Respondents Nos. 1-3	No Dispute w.r.t abatement
4.	***Bihari Choudhary*** *(Third Sale Deed)*	Defendant No. 2	Appellant No. 4	Respondent No. 4	No Dispute w.r.t abatement
5.	***Sheonath Choudhary*** *(Fourth Sale Deed)*	Defendant No. 3	His LRs were Appellants Nos. 10-13	His LRs are Respondents Nos. 30-33	***Dispute w.r.t. abatement*** *(As he died on 07.5.1997 during First Appeal however in the Second Appeal his LRs were Impleaded.*
6.	***Baijnath Choudhary*** *(Fourth Sale Deed)*	*Defendant No. 4*	*Appellant No. 5*	*Respondent No. 5*	*No Dispute w.r.t abatement*

18. Mr. Gupta thereafter, by way of one another chart pointed out that all those respondents who passed away during the pendency of the First Appeal before the district court were only “Performa respondents”. The said chart reads as under: -

S.N	Respondent	Position before the High Court	Position before this Court	Particulars
1.	***Sheo Nandan Choudhary*** *(Died on 07.05.1997)*	His LRs were Appellant No. 10 & Respondent Nos. 14-20	His LRs are Respondents Nos. 10 and Nos. 36-41	*His LRs were not impleaded in First Appeal but he has no connection with the impugned sale deeds and LRs were impleaded in the High Court.*
2.	***Dipiya*** *(Died on 07.08.1999)*	Not a Party.	Not a Party.	*No connection with the impugned sale deeds or the proceedings.*

3.	***Bachha Bhagat*** *(Died on 05.04.2003)*	Not a Party.	Not a Party.	*No connection with the impugned sale deeds or the proceedings.*
4.	***Nagina Bhagat*** *(Died on 05.11.2005)*	Not a Party.	Not a Party.	*No connection with the impugned sale deeds or the proceedings.*
5.	***Md. Islam*** *(Died on 08.03.2001)*	His LRs were Respondents Nos. 27 & 28	His LRs are Respondents Nos. 46 & 47	*No connection with the impugned sale deeds or the proceedings.*
6.	***Sheo Dhari Bhagat*** *(Died on 08.07.2008 i.e., after the passing of the judgment in First Appeal)*	His LRs were Respondents Nos. 29 & 30	His LRs are Respondents Nos. 48 & 49	*No connection with the impugned sale deeds or the proceedings.*

19. In such circumstances referred to above, the learned counsel appearing for the plaintiffs prayed that there being merit in his appeal the same may be allowed and an appropriate order be passed with a view to do substantial justice between the parties.

ii. Submissions on behalf of the Respondents / Original Defendants.

20. Mr. Shantanu Sagar, the learned counsel appearing for the defendants on the other hand submitted that no error not to speak of any error of law could be said to have been committed by the High Court in passing the impugned judgment and order. According to the learned counsel the High Court is right in saying that provisions of Order XXII Rule 4 CPC would override the provisions of Order XXII Rule 10A of the CPC.

21. In such circumstances referred to above, the learned counsel prayed that there being no merit in the present appeal, the same may be dismissed.

C. ANALYSIS

22. Having heard the learned counsel appearing for the parties and having gone through the materials on record the only question that falls for our consideration is whether the High Court committed any error in passing the impugned judgment and order?

23. We regret to state that we are thoroughly disappointed with the manner in which the High Court dealt with the Second Appeal and more particularly the understanding of the High Court as regards the position of law on the issues in question. Such procedural errors are not expected at the level of any High Court. It is not in dispute that the provisions of Order XXII Rule 10A of the CPC were not complied with.

24. While the First Appeal was being heard, the defendants could have brought to the notice of the First Appellate Court that some of the respondents had passed away and the appeal had stood abated. Had the defendants brought this fact to the notice of the First Appellate Court, the Court could have looked into the matter accordingly. It appears that the defendants being fully aware of the death of some of the respondents kept quiet and allowed the First Appellate Court to proceed with the hearing of the First Appeal on merits. When the First Appeal came to be allowed and the matter reached the High Court in Second Appeal that the issue as regards the abatement came to be raised.

i. Relevant Statutory Provisions.

25. Order XXII Rule 1 of the CPC reads thus: -

> ***"1. No abatement by party's death if right to sue survives.—***
>
> *The death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives."*

26. Order XXII Rule 2 of the CPC reads thus: -

> ***"2. Procedure where one of several plaintiffs or defendants dies and right to sue survives.—***
>
> *Where there are more plaintiffs or defendants than one, and any of them dies, and where the right to sue survives*

to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the Court shall cause an entry to the effect to be made on the record,. and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants"

27. Order XXII Rule 4 and 4A, of the CPC reads thus: -

"4. Procedure in case of death of one of several defendants or of sole defendant.—

(1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendants to be made a party and shall proceed with the suit. (2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant. (3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.

(4) The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place. (5) Where— (a) the plaintiff was ignorant of the death of a defendant, and could not, for that reason, make an application for the substitution of the legal representative of the defendant under this rule within the period specified in the Limitation Act, 1963 (36 of 1963), and the suit has, in consequence, abated, and (b) the plaintiff applies after the expiry of the period specified therefore in the Limitation Act, 1963 (36 of 1963), for setting

aside the abatement and also for the admission of that application under section 5 of that Act on the ground that he had, by reason of such ignorance, sufficient cause for not making the application with the period specified in the said Act, the Court shall, in considering the application under the said section 5, have due regard to the fact of such ignorance, if proved.

4A. Procedure where there is no legal representative.—

(1) If, in any suit, it shall appear to the Court that any party who has died during the pendency of the suit has no legal representative, the Court may, on the application of any party to the suit, proceed in the absence of a person representing the estate of the deceased person, or may be order appoint the Administrator-General, or an officer of the Court or such other person as it thinks fit to represent the estate of the deceased person for the purpose of the suit; and any judgment or order subsequently given or made in the suit shall bind the estate of the deceased person to the same extent as he would have been bound if a personal representative of the deceased person had been a party to the suit. (2) Before making an order under this rule, the Court— (a) may require notice of the application for the order to be given to such (if any) of the persons having an interest in the estate of the deceased person as it thinks fit; and (b) shall as certain that the person proposed to be appointed to represent the estate of the deceased person is willing to be so appointed and has no interest adverse to that of the deceased person."

28. Rule 1 of Order XXII of the CPC provides that the death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives. Rule 4, Order XXII of the CPC prescribes that where a defendant dies, on an application made by the plaintiff, the Court shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit. It cannot be disputed that such an application has to be filed within the time limit prescribed by law; otherwise, the suit would stand abated against the deceased defendant. A clear provision is to be found to that effect in sub-rule (3) of Rule 4. Obviously in case of failure to bring

the legal representative on record within prescribed time, the suit having abated, the plaintiff will have to seek the remedy of setting aside abatement in accordance with the provisions of law.

ii. Order XXII, Rule 10A of the CPC.

29. With enforcement of 1976's amendment to the CPC, once a party to the suit dies, a duty is cast upon the lawyer representing such party, to communicate the fact of death to the opposite party in terms of provisions contain in Rule 10A of Order XXII of the CPC. It is nobody's case that there was compliance of this rule in the case at hand by the advocate appearing for the defendants. Unless this primary obligation is discharged and it is established with cogent evidence that the opposite party had sufficient opportunity to know and, had, in fact, knowledge of the death of the defendant, the plea of abatement of the suit at the instance of party having failed to comply with the obligation mentioned under Rule 10A of Order XXII of the CPC cannot be entertained. Nobody can be allowed to reap the benefit of his own lapse and to non-suit the plaintiff.

30. Order XXII, Rule 10A reads thus: -

> ***"10A. Duty of pleader to communicate to Court death of a party.—***
>
> *Wherever a pleader appearing for a party to the suit comes to know of the death of that party, he shall inform the Court about it, and the Court shall thereupon give notice of such death to the other party, and, for this purpose, the contract between the pleader and the deceased party shall be deemed to subsist."*

31. Rule 10A has been newly inserted by the Code of Civil Procedure (Amendment) Act, 1976.

32. Rule 10A is intended to avoid delay in making an application for bringing legal representatives of the deceased party on record. It seeks to mitigate the hardship arising from the fact that a party to a suit may not come to know about the death of the other side during the pendency of the proceedings. In such a situation, it would be appropriate to ask the advocate of the party to give intimation of the death of the party represented by him so as to enable the other side to take appropriate steps.

33. The Law Commission stated thus: -

> *"A new rule is proposed to be inserted to the effect that where a pleader comes to know of the death of a party to the suit, he shall inform the court, and the court, in its turn, shall give notice to the plaintiff of the death. Such a provision will, to some extent reduce the complications that arise by reason of the plaintiff's ignorance of the death of a defendant."*

34. In the Statement of Objects and Reasons for the Code of Civil Procedure (Amendment) Bill, 1976, it was observed: -

> "*Clause 76—Sub-clause* (v).—New Rule 10-A is being inserted to impose an obligation on the *pleaders* of the parties to communicate to the Court the death of the party represented by him."

35. The Joint Committee also said: -

> *"Clause 73 (Original clause 76).—(iii) During the course of evidence, a point was raised, that, on the death of the client, the contract with the pleader comes to an end and so the obligation of the pleader to act on behalf of his client ceases on the death of the client. The Committee, however, feel that it should be made obligatory on the part of the pleader to inform the Court about the death of his client and for this purpose the contract between the pleader and the party should be deemed to subsist. Sub-rule (1) of new proposed Rule 10-A of Order 22 has been amended accordingly.*
>
> *[...] The Committee feel that in view of the amendment made in sub-rule (1) of new proposed Rule 10-A proposed sub-rule (2) in Rule 10-A is not necessary as the provision is likely to cause hardship to the pleader. Sub-rule (2) of the new proposed Rule 10-A of Order 22 has been omitted accordingly."*

36. Rule 10A, as inserted by the Amendment Act, 1976, imposes an obligation on the pleader of the parties to communicate to the court the fact of the death of the party represented by him.

37. Rule 10A of Order XXII should be read with Rule 4 of Order III of the Code. Rule 4 of Order III reads thus: -

> ***"4. Appointment of pleader.—***
>
> *(1) No pleader shall act for any person in any Court, unless he has been appointed for the purpose by such person by a document in writing signed by such person or by his recognised agent or by some other person duly authorised by or under a power-of-attorney to make such appointment. (2) Every such appointment shall be filed in Court and shall, for the purposes of sub-rule (1), be deemed to be in force until determined with the leave of the Court by a writing signed by the client or the pleader, as the case may be, and filed in Court, or until the client or the pleader dies, or until all proceedings in the suit are ended so far as regards the client."*

38. Order III, Rule 4 prescribes the manner of appointment of a pleader and also the limit upto which such appointment remains in force. Every appointment of a pleader will be continued *inter alia* until the client or the pleader dies. As a general rule, therefore, on the death of the client his contract with the pleader comes to an end. So also, his authority to act on behalf of his client expires.

39. Rule 10A, as inserted by the Amendment Act, 1976 carves out an exception to the above general rule and casts a duty upon the advocate appearing for the party to intimate the court about the death of his client. For this purpose, a deeming fiction has been created that the contract between the (deceased) client and the pleader subsists to that limited extent. **[See: *Gangadhar v. Raj Kumar,* (1984) 1 SCC 121]**

40. Rule 10A of Order XXII is salutary in nature. It has been introduced to mitigate hardship arising from the fact that a suit, appeal or other proceeding may take long time and a party to a suit, appeal or other proceeding may die and the other party may not be aware of such a situation. Rule 10A seeks to do justice over technicalities by requiring an advocate appearing for the party to intimate the court about the death of his client and provides an opportunity to the other side to take necessary steps to bring heirs and legal representatives of the deceased party on record. Rule 10A is thus not an empty formality. Pre-eminent object of the rule is to do full and complete justice.

a. Rationale behind Order XXII Rule 10A.

41. An "innovative provision" in the form of Rule 10A has been introduced by the Amendment Act, 1976 in the Code to avoid procedural technicality scoring march over substantial justice.

42. In ***Gangadhar (supra),*** dealing with the object underlying Rule 10A, this Court observed that it was introduced to mitigate the hardship arising from the fact that the party to a suit or appeal, as the case may be, may not come to know about the death of the other party during the pendency of such suit or appeal. A suit or appeal takes years to come up for hearing and it is very difficult to expect the other party to be a watch-dog for day-to-day survival of his opponent. Then when the suit / appeal comes up for hearing, it comes to the light that not only one of the parties to the suit / appeal had died but the time for substitution had also run out and the suit or appeal had abated. It is with a view to avoid technicalities and to do full and complete justice that an important provision has been inserted in CPC, in the form of Order XXII Rule 10A, requiring the advocate appearing for the party to inform death of his client to the court so as to enable the other side to take appropriate steps to bring on record legal representatives of the deceased. For that purpose, a deeming fiction is introduced that the contract between the dead client and pleader will subsist to the limited extent to supply information to the court about the death of his client. This Court stated that: -

> *"The Legislative intention of casting a burden on the learned advocate of a party to give intimation of the death of the party represented by him and for this limited purpose to introduce a deeming fiction of the contract being kept subsisting between the learned advocate and the deceased party was that the other party may not be taken unawares at the time of hearing of the appeal by springing surprise on it that the respondent is dead and appeal has abated. In order to avoid procedural justice scoring a march over substantial justice Rule 10-A was introduced by the Code of Civil Procedure (Amendment) Act of 1976 which came into force on February 1, 1977."*
>
> (Emphasis supplied)

b. Nature of the salutary provision of Order XXII Rule 10A.

43. Rule 10A is procedural in nature. No penalty is provided for non-compliance with the rule. The provision is not "absolutely mandatory" **[See*: United Bank of India v. Kanan Bala,* (1987) 2 SCC 583]**.

44. The new provision has been inserted with a view that just delay in preferring substitution application may not be put forward a ground for dismissal of the application. Since a lawyer for the party is obliged to inform the court about the death of his client, his failure to do so should be treated as good and sufficient ground for condonation of delay. **[See*: Kathpalia v. Lakhmir Singh,* (1984) 4 SCC 66]**.

I. Distinction between the legal maxims '*ex injuria ius non oritur' and 'nullus commodum capere potest de injuria sua propia'*.

45. The genesis of the provision of Rule 10A of the Order XXII lies in the doctrine of 'clean hands'. The doctrine of 'clean hands' originates from the Roman Law, and finds expression in two latin maxims being **(i)** *ex injuria ius non oritur* and **(ii)** *nullus commodum capere potest de injuria sua propia*, which mean "from wrong, no right arises" and "no one can take advantage of their own wrong", respectively. **[See: Schwebel, Stephen M. "*Clean Hands, Principle*" Eds., Rüdiger Wolfrum, Oxford University Press, 2009]**.

46. Although the aforesaid two maxims, semantically appear to be one and the same, with the courts often applying the two interchangeably, yet there lies a very fine but pertinent distinction between the two maxims. The two maxims are comparable to each other but they are not interchangeable, and differ in their scope. Aaron X. Fellmeth and Maurice Horwitz in the "*Guide to Latin Maxims in International Law*" 1st Ed., Oxford University Press, has explained the maxim *ex injuria ius non oritur* as follows: -

> *"A right does not arise from wrongdoing." A maxim meaning that one cannot generally rely on a violation of law to establish a new legal right or to confirm a claimed right. E.g., "As Lauterpacht has indicated the maxim ex injuria ius non oritur is not so severe as to deny that any source of right whatever can accrue to third persons acting in*

> *good faith. Were it otherwise the general interest in the security of transactions would be too greatly invaded and the cause of minimizing needless hardship and friction would be hindered rather than helped." Advisory Opinion on Legal Consequences For States Of The Continued Presence Of South Africa In Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. Rep. 16, 167 (separate opinion of Judge Dillard). An alternative formulation is Ius ex iniuria non oritur. Compare with Nullus commodum capere (potest) de sua iniuria propria."*
>
> (Emphasis supplied)

47. On the other hand, they have explained the maxim '*nullus commodum capere potest de injuria sua propia'* as follows: -

> *"No advantage (may be) gained from one's own wrong." A maxim meaning that the law will not recognize or validate any profit a person derives from his own wrongdoing. For example, one may not destroy evidence of the extent of damages caused by one's illegal act, then counter a claim for damages based on that act by pointing to the lack of evidence. E.g., "[T]he State must not be allowed to benefit by its inconsistency when it is through its own wrong or illegal act that the other party has been deprived of its right or prevented from exercising it [...]"*
>
> (Emphasis supplied)

48. A perusal of the aforesaid makes it abundantly clear, that while the maxim '*ex injuria ius non oritur'* is a principle governing the general spirit of the jurisprudence of "rights", that a right cannot emanate or emerge from a wrongful act, the maxim '*nullus commodum capere potest de injuria sua propria'*, on the other hand, confirms the general rule of equity and prudence that no one can benefit from their own wrongdoing. The scope of the latter is wider than the former. The first maxim explains that the legitimacy of a right stands vitiated if such right, which otherwise would have been legitimately exercisable, accrues from a wrongdoing of the person claiming under or exercising such right. Although, under the law, a right may arise even if from a

wrongdoing, yet if exercise of such right is allowed, it would malign the very jurisprudential underpinning of 'right' and 'duty'. A right has a legal sanctity and backing to it, in order for it to have a legitimising effect, since the jural correlative of a right is duty. More particularly, the term "right" is very specific to not include every benefit, profit or advantage. The maxim solidifies the faith in law that no wrong action will be given a legal validity. The legal validity of a right flows from other legal norms or from a source of law **[See: Niel MacCormick, "Rights in Legislation", Law, Morality and Society: Essays in Honour of H.L.A. Hart, P.M.S. Hacker, and Joseph Raz (eds). 189-206, Oxford: Clarendon Press (1977)]**.

49. The maxim, '*nullus commodum capere potest de injuria sua propria'*, on the other hand, lays itself as a rule of equity. An advantage falling from wrongdoing may be a legal or illegal advantage. The maxim dictates that, be that as it may, no profit or advantage of a person's wrongful act may be validated by the seal of law. It may very well happen, that the advantage may be legal or illegal, but the validation of law will not be extended to it by the law. Thus, the courts that have the discretion to allow or disallow the availment of such advantage in ordinary circumstances, are constrained to not permit a person who has committed a wrongful act to benefit from the advantageous position afforded to him because of such wrongful action as a matter of justice, equity and fairness. Fellmeth and Horwitz rightly extend an illustration, that when a person himself destroys evidence, he cannot take shelter of the defence of lack of evidence. The advantage falling from the wrong will not be validated by the courts of law.

50. The interpretation of Order XXII Rule 10A is a manifestation of the latter and not the former i.e., the cornerstone of its nature and the effect is the maxim '*nullus commodum capere potest de injuria sua propria'* or no one should derive benefit from their own wrong. This is because of the procedural nature of the provision as held in ***Kanan Bala*** (supra) and a catena of other decisions of this Court. Although, the provision aims to do justice over technicalities by casting a duty upon the pleader to apprise the court as-well as all parties about the demise of his client, yet it does not prescribe any penalty for the non-compliance of the same, wilful or inadvertent. A pleader may not be put to the perils of any penalty for his failure in performing the duty under Rule 10A in law, yet it does not mean that such failure would also be of no bearing in equity or of inconsequence to the ultimate

abatement of the suit or appeal. The benevolent object underlying Order XXII Rule 10A to ensure complete justice on one hand and the contrasting patent absence of any penalty for non-compliance on the other, would simpliciter be irreconcilable, without the resort to the maxim '*nullus commodum capere potest de injuria sua propria'*. It would be preposterous to say that a court of conscience would take no cognizance of such a failure in duty of the pleader in deciding whether the suit or appeal could be said to be abated for want of any application in the stipulated time in terms of sub-rule (3) of Rule 4, Order XXII, and allow an erring party through its pleader to derive undue advantage thereof. To ignore such lapses in equity would render Rule 10A completely otiose and do violence to the legislative intent behind it.

51. Thus, the principle that no party can take advantage of his/her own wrong i.e. '*nullus commodum capere potest de injuria sua propria'* is squarely attracted in the event of a failure in complying with the provision of Rule 10A of Order XXII of the CPC, and any abatement as a result of such wrongdoing or failure ought not to be validated by the courts.

52. In ***Kusheshwar Prasad Singh v State of Bihar, (2007) 11 SCC 447***, it was held that the aforesaid maxim is based on elementary principles, is fully recognised in courts of law and of equity, and, admits of illustration from every branch of legal procedure. The relevant observations read as under: -

> *"14. In this connection, our attention has been invited by the learned counsel for the appellant to a decision of this Court in Mrutunjay Pani v. Narmada Bala Sasmal [AIR 1961 SC 1353] wherein it was held by this Court that where an obligation is cast on a party and he commits a breach of such obligation, he cannot be permitted to take advantage of such situation. This is based on the Latin maxim commodum ex injuria sua nemo habere debet (no party can_take undue advantage of his own wrong).*
>
> *15. In Union of India v. Major General Madan Lal Yadav [(1996) 4 SCC 127: 1996 SCC (Cri) 592] the accused army personnel himself was responsible for delay as he escaped from detention. Then he raised an objection against initiation of proceedings on the ground that such*

proceedings ought to have been initiated within six months under the Army Act, 1950. Referring to the above maxim, this Court held that the accused could not take undue advantage of his own wrong. Considering the relevant provisions of the Act, the Court held that presence of the accused was an essential condition for the commencement of trial and when the accused did not make himself available, he could not be allowed to raise a contention that proceedings were time-barred. This Court (at SCC p. 142, para 28) referred to Broom's Legal Maxims (10th Edn.), p. 191 wherein it was stated:

"It is a maxim of law, recognised and established, that no man shall take advantage of his own wrong; and this maxim. which is based on elementary principles, is fully recognised in courts of law and of equity, and, indeed, admits of illustration from every branch of legal procedure."

16. It is settled principle of law that a man cannot be permitted to take undue and unfair advantage of his own wrong to gain favourable interpretation of law. It is sound principle that he who prevents a thing from being done shall not avail himself of the non-performance he has occasioned. To put it differently, "a wrongdoer ought not to be permitted to make a profit out of his own wrong".

(emphasis supplied)

53. We would like to remind the High Court of this very important legal maxim of '*nullus commodum capere potest de inuria sua propria'.* It is the duty of the court to ensure that dishonesty or any attempt to abuse the legal process must be effectively curbed and the court must ensure that there is no wrongful, unauthorised or unjust gain for anyone by abusing of the process of the court. No one should be permitted to use the judicial process for earning undeserved gains for unjust profits. The courts' constant endeavour should be to ensure that everyone gets just and fair treatment.

54. We may clarify with a view to obviate any possibility of confusion that the maxim '*ex injuria ius non oritur'* is different from the maxim '*nullus commodum capere potest de inuria sua propria'* for the reason that the former pertains to a 'right' that may become available to

a wrongdoer due to the wrongful act and the latter relates to an 'advantage' or 'benefit' that a wrongdoer may derive from his wrongful conduct. Although both are in essence a byproduct of the doctrine of equity and share a common genealogy under the doctrine of clean hands, the field in which they operate are different and distinct. In case of the first maxim, had the right not emanated from a wrongful act, it would have been cemented in law and the person in whose favour such right had accrued, could have pleaded for vindication of the same, with sufficient guarantee, that his plea would be accepted by the court. However, in the case of the second maxim, if the advantage was not being derived from a wrongful act, the courts would nevertheless still have the discretion to hold whether the person in whose favour such advantage had arisen, could avail such advantage or not. While in such a case there would be no embargo on the courts to deny the advantage to the person eligible to benefit from the same, the courts could still rule that such person could not avail the benefit. Having considered the cases in which there is no wrong done by the person deriving the right or benefit from their actions, we shall now see how the wrongful action affects the conclusion of the courts in both such scenarios as-well. The answer to this is straightforward. In the first case, when a right accrues to the person who has committed the wrongful act due to such act, and while the law regards it as an enforceable right, yet the courts are armed with power to deny the vindication of such rights, which they ordinarily could not have done. Put it differently, while the existence of such rights is undeniable in the eyes of law, yet the exercise or enforceability of such rights would nevertheless be deniable by the courts in equity. The way the maxim envisages the application of this principle is based on one another well-known principle; that equity cannot supplant the law. When the courts deny the right that may have accrued by a wrongdoing, the courts in essence are not denying the right itself i.e., they are not supplanting the right emanating from a law, rather, they are drawing upon the reservoir of equity within their conscience, to withhold its enforcement, not to contradict the law, but to ensure that the law does not become an instrument for legitimizing its own violation through the hands of courts who are expected and reposed of the faith to uphold the law in the first place. Hence, under the first maxim, the courts cannot deny such rights, as they flow from the law, but any vindication or enforcement can be if they require the touch of courts, by invoking a higher standard

of fairness that guards against the instrumentalization of legal rights as vehicles of injustice.

55. Whereas, when it comes to the second maxim, irrespective of how the advantage has accrued, it is not an enforceable advantage. The reason being a simple one, that they are simply not a 'right' so as to have the force or backing of any law. In the absence of any enforceability flowing from a law or legal norm, the enforcement or vindication of such advantage as a natural corollary can only flow from the discretion of the courts, who are required to supply the legal formalities to make them enforceable in the first place. Hence, the courts in the case of the latter, being a court of conscience, built upon the edifice of fair-play, would prohibit inurement of any such benefit lacking the backing of law by virtue of this discretion and as a matter of fairness disallow a person who has committed the wrongful action to avail the benefit or advantage derived from his own wrong. The second maxim encapsulates the aforesaid principle and mandates that courts, having the conscience of justice, equity and fairness, ought to necessarily disallow the benefit of the wrong to such a person.

56. This distinction marks a crucial difference in the scope of the two maxims; in the former, equity steps in after the law has recognized a right, to decide whether justice permits its enforcement; in the latter, however, equity acts more preemptively, interrogating the moral propriety of allowing any gain from potentially tainted conduct. In either case, where no wrong is committed, the courts duty remains guided by legal principle, more so in the case of the second maxim. However, in the instance of the first maxim, once wrongdoing results in contaminating the jural relation of 'rights and duty', a shift occurs, where equity steps in in the sphere of entitlement from such 'rights'.

57. On the basis of the aforesaid, we are of the considered view that the underlying ethos of Order XXII, Rule 10A is not based on the maxim of '*ex injuria ius non oritur'*. A 'right' accrues in the eyes of law through two principal channels: *first* through the force of any law or statute itself, and *secondly,* through acts enabled by the law that possess the normative force to create enforceable claims backed by the operation of law or facilitated by conventional legal norms such as a gift, will, consent, contract etc., acts that have the capacity to create legal rights. Any legal norm, must possess normativity and

generality, which together must have such an effect that the norm ought to become valid in law or through the law, in order for it to give birth to a right. In other words, only those acts which attain legal validity inherently within the legal system or through its mechanism can be said to give rise to a 'right'.

58. In the case on hand, the respondents or the original defendants have pleaded for the abatement of the suit due to non-substitution of legal heirs therein by the plaintiff, within the statutorily prescribed period of time. Abatement of suit is not a right that accrues to a party when the other party has failed to substitute legal heirs within the specified period of limitation. Abatement may be disallowed by the court if it has sufficient cause for condoning the delay of the party that ought to have filed for the substitution of legal heirs. In fact, Rule 10A was enacted for the purpose to allow for mitigation of the legal effects of delay and can be used to request for condonation of delay.

59. The question of allowing abatement of suit is one of discretion and therefore, an advantage. Under Rule 10A of Order XXII, the duty of a pleader to apprise the court as well as the other parties to the suit or appeal of the death of his client is a duty of candour and propriety as a responsible officer of the court. The failure of a party to perform the duty under Rule 10A constitutes a wrongful act and such party must not be allowed to avail the benefit arising therefrom in the form of abatement of suit.

II. Duty of Pleader.

60. Rule 10A of Order XXII, as inserted by the Amendment Act, 1976 imposes an obligation on the pleader appearing for the party to intimate death of his client to the court. But there is difference of opinion as to whether the duty imposed on the pleader is confined to factum of death of a party or also to furnish names and particulars of legal representatives.

61. According to one view, there is no obligation on the pleader appearing on behalf of the deceased party to furnish or supply list of legal representatives of the deceased.

62. According to the other view, however, the pleader has not only to inform the court as to death of the party but he must also furnish particulars of legal representatives.

63. However, we are of the view that providing merely an information with regard to the fact of death is not sufficient compliance of the Rule 10A of the CPC. unless and until the counsel furnishes the information with regard to the details of the persons on whom and against whom the right to sue survives and the information under Rule 10A of the CPC. and the object behind it would remain incomplete as the parties would still be labouring to inquire who are the legal representatives and find out as to upon whom and against whom the right to sue survives.

64. This Court in ***Perumon Bhagvathy Devaswom Perinadu Village v. Bhargavi Amma (Dead) by Lrs. and Others*** reported in **(2008) 8 SCC 321** has explained the principles applicable in considering applications for setting aside the abatement and as summarised such principles as under: -

> *"12. In State of M.P. v. S.S. Akolkar [(1996) 2 SCC 568] this Court held: (SCC pp. 569-70, paras 6-7)*
>
> > *"6. [...] Under Order 22 Rule 10-A, it is the duty of the counsel, on coming to know of the death of a party, to inform it to the court and the court shall give notice to the other party of the death. By necessary implication delay for substitution of legal representatives begins to run from the date of knowledge. [...]*
> >
> > *7. It is settled law that the consideration for condonation of delay under Section 5 of the Limitation Act and setting aside of the abatement under Order 22 are entirely distinct and different. The court always liberally considers the latter, though in some case, the court may refuse to condone the delay under Section 5 in filing the appeals. After the appeal has been filed and is pending, the Government is not expected to keep watch whether the contesting respondent is alive or has passed away. After the matter was brought to the notice of the counsel for the State, steps were taken even thereafter; after due verification belated application came to be filed. It is true that Section 5 of the Limitation*

Act would be applicable and delay is required to be explained. The delay in official business requires its broach and approach from public justice perspective."

(i) The words "sufficient cause for not making the application within the period of limitation" should be understood and applied in a reasonable, pragmatic, practical and liberal manner, depending upon the facts and circumstances of the case, and the type of case. The words "sufficient cause" in Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice, when the delay is not on account of any dilatory tactics, want of bona fides, deliberate inaction or negligence on the part of the appellant.

(ii) In considering the reasons for condonation of delay, the courts are more liberal with reference to applications for setting aside abatement, than other cases. While the court will have to keep in view that a valuable right accrues to the legal representatives of the deceased respondent when the appeal abates, it will not punish an appellant with foreclosure of the appeal, for unintended lapses. The courts tend to set aside abatement and decide the matter on merits, rather than terminate the appeal on the ground of abatement.

(iii) The decisive factor in condonation of delay, is not the length of delay, but sufficiency of a satisfactory explanation.

(iv) The extent or degree of leniency to be shown by a court depends on the nature of application and facts and circumstances of the case. For example, courts view delays in making applications in a pending appeal more leniently than delays in the institution of an appeal. The courts view applications relating to lawyer's lapses more leniently than applications relating to litigant's lapses. The classic example is the difference in approach of courts to applications for condonation of delay in filing an appeal and applications for condonation of delay in refiling the appeal after rectification of defects.

> *(v) Want of "diligence" or "inaction" can be attributed to an appellant only when something required to be done by him, is not done. When nothing is required to be done, courts do not expect the appellant to be diligent. Where an appeal is admitted by the High Court and is not expected to be listed for final hearing for a few years, an appellant is not expected to visit the court or his lawyer every few weeks to ascertain the position nor keep checking whether the contesting respondent is alive. He merely awaits the call or information from his counsel about the listing of the appeal."*
>
> (Emphasis supplied)

65. The High Court in its impugned judgment and order has with a great air of conviction observed that Order XXII Rule 10A of the CPC is not mandatory and would not override the mandatory provisions relating to abatement as contained in Order XXII Rule 4 of the CPC. We are afraid, the understanding of the High Court is not correct.

66. The legislative intention of casting a burden on the advocate of a party to give intimation of the death of the party represented by him and for this limited purpose to introduce a deeming fiction of the contract being kept subsisting between the advocate and the deceased party was that the other party may not be taken unaware at the time of hearing of the appeal by springing surprise on it that the respondent is dead and appeal has abated. In order to avoid procedural justice scoring a march over substantial justice the Rule 10A was introduced by the Code of Civil Procedure (Amendment) Act of 1976 which came into force on February 1st, 1977. Unfortunately, the High Court took no notice of the wholesome provision and fell back on the earlier legal position which automatically stands modified by the new provision and reached an unsustainable conclusion.

67. It is not the question of Order XXII Rule 10A being directory or mandatory. The court should know how to apply the provision in the facts of each case. The line of reasoning adopted by the High Court if upheld would render Order XXII Rule 10A otiose.

68. Before we close this matter, we would like to observe that it is not even the case of the defendants that the plaintiffs had knowledge of

the death of some of the defendants. If such would have been the position, then probably the applicability of the Order XXII Rule 10A would have been inconsequential.

69. In the present appeal the plaintiffs as well as the defendants have filed their written submissions. The defendants in their written submissions have talked about the merits of the case but very conveniently have not said a word as to why it was not brought to the notice of First Appellate court when the First Appeal was taken up for hearing that the first appeal had in fact stood abated with the death of some of the defendants. Why the lawyer appearing for the defendants also kept quiet and proceeded to argue the matter on merits? This smacks of lack of good faith.

70. In the aforesaid context we may refer to and rely upon a decision of this Court in ***P. Jesaya (dead) by Lrs. v. Sub-collector and Anr.*** reported in ***(2004) 13 SCC 431*** wherein the only contention taken up in appeal before this Court was that one of the respondents in the appeal before the High Court had died during the pendency of that appeal. It was contended that his heirs were not brought on record and therefore the appeal before the High Court had abated. It was also submitted that as the appeal had abated, the judgment delivered by the High Court was *non-est* and could not have been enforced. In the case at hand the appeal stood abated according to the High Court before the First Appellate court whereas in ***P. Jesaya (supra)*** it had stood abated before the High Court. This is the only difference.

71. This Court observed that although the arguments were attractive, yet one must keep in mind Order XXII Rule 10-A of the C.P.C. This Court observed that it is obligatory on the pleader of the deceased to inform the court and the other side about the factum of the death of a party. This Court observed thus: -

> *"4. Though the arguments are attractive one must also keep in mind Order 22 Rule 10 of the Code of Civil Procedure. It is obligatory on the pleader of a deceased to inform the court and the other side about the factum of death of a party. In this case we find that no intimation was given to the court or to the other side that the first respondent had died. On the contrary a counsel appeared on behalf of the deceased person and argued the matter. It is clear that the attempt was to see whether a favourable order*

could be obtained. It is clear that the intention was that if the order went against them, then thereafter this would be made a ground for having that order set aside. This is in effect an attempt to take not just the other side but also the court for a ride. These sort of tactics must not be permitted to prevail. We, therefore, see no reason to interfere. The appeal stands dismissed. There will be no order as to costs."

(Emphasis supplied)

72. Had the lawyer of the defendants or the defendants themselves would have brought to the notice of the First Appellate court that some of the defendants had died then probably the defendants could have taken steps to first get the abatement set aside and bring the legal heirs on record.

D. CONCLUSION

73. In such circumstances referred to above we are left with no other option but to partly allow this appeal and set aside the impugned judgment and order passed by the High Court.

74. We are inclined to remand the matter to the High Court for fresh hearing of the second appeal keeping in mind the principles of law as discussed in this judgment.

75. In the result, this appeal succeeds and is hereby partly allowed. The impugned judgment of the High Court is set aside.

76. The matter is remanded to the High Court. The Second Appeal No. 190 of 2008 is restored to its original file and shall be heard afresh and decided on its own merits after giving opportunity of hearing to both the parties.

77. We clarify that so far as the question whether the decree can be said to be joint and indivisible or otherwise shall be looked into by the High Court while hearing the Second Appeal afresh. If the High Court reaches the conclusion that the decree is joint and indivisible and with the death of some of the defendants, the entire First Appeal could be said to have abated then it shall remand the matter to the First Appellate Court so as to give an opportunity to the plaintiffs to prefer an appropriate application for setting aside of the abatement

and bring the legal heirs on record and thereafter hear the first appeal once again on its own merits.

78. In the event the High Court reaches the conclusion that the First Appeal as a whole could not be said to have stood abated as the nature of the decree is such that it cannot be said to be joint and indivisible then the High Court shall hear the Second Appeal on its own merits on other issues involved in the litigation.

79. Since this litigation is of 1984, we direct the High Court to take up the Second Appeal No. 190 of 2008 for fresh hearing and decide the same within a period of three months from the date of receipt of the writ of this order. High Court shall inform about the disposal of the second appeal to this Court.

80. The Registry is directed to circulate one copy each of this judgment to all the High Courts.

Result of the case: Appeal partly allowed.

[†]*Headnotes prepared by:* Nidhi Jain

[2025] 8 S.C.R. 138 : 2025 INSC 846

Jaykishor Chaturvedi & Etc.
v.
Securities and Exchange Board of India

(Civil Appeal No(s). 1551-1553 of 2023)

15 July 2025

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

Issue for Consideration

Whether interest on penalties imposed by the Adjudicating Officer is payable by the appellants, and if so, from which date- whether from the date of the adjudication orders passed by the Adjudicating Officer or the demand notices issued by the respondent-SEBI.

Headnotes†

Securities and Exchange Board of India Act, 1992 – s.28A – Income Tax Act, 1961 – s.220(1), (2), (4) – Recovery of amounts – When tax payable and when assessee deemed in default – Interest on unpaid penalties imposed by the Adjudicating Officer, if payable by the appellants – If yes, from which date- whether interest on the unpaid penalty should accrue from the expiry of the 45-day period stipulated in the Adjudicating Officer's orders dtd.28.08.2014, or from the expiry of 30 days following the respondent's notices dtd.13.05.2022:

Held: Adjudicating Officer's order itself constituted a clear and enforceable demand for payment of penalties within 45 days – This order attained finality following the appellants' unsuccessful challenges before the SAT and this Court, thereby crystallizing the liability – Once the adjudication order has attained finality, the obligation to pay the penalty stands revived from the date of adjudication – U/s.220(1), Income Tax Act r/w s.28A, SEBI Act, interest becomes payable upon failure to meet the demand within the prescribed time – Thus, appellants' failure to comply within the specified time rendered them 'defaulters' u/s.220(4), Income Tax Act, justifying the accrual of interest from the expiry of the 45-day compliance period – Further, since s.156, Income Tax Act

* Author

is not incorporated into the SEBI Act, the original order must be treated as the statutory trigger for the purpose of calculation of interest – Moreover, the demand notice dtd.13.05.2022 merely reiterated the earlier demand and did not create a fresh liability – The enabling provision to recover interest was already in vogue when the adjudication order was passed – Appellants liable to pay interest at 12% p.a on the unpaid penalty amounts for the period of delay – Plea of the appellants that interest cannot be levied retrospectively, misplaced – Interest to accrue from the expiry of the 45-day compliance period following the adjudication orders dtd.28.08.2014 – Order of the Tribunal dismissing the challenge to the notices of attachment issued against the appellants, not interfered with – SEBI Rules, 1995 – SEBI (Prohibition of Insider Trading) Regulations, 1992 – Regulation Nos.13(4) and 13(4A) r/w 13(5). [Paras 10, 11.3, 11.5, 11.6]

Securities and Exchange Board of India Act, 1992 – Explanation 4 to s.28A – Appellants contended that the Explanation 4 to s.28A inserted in 2019, cannot be applied retrospectively, as it alters the legal position as it stood earlier by introducing provisions relating to the levy of interest:

Held: An "explanation" in any law clarifies, restricts, or expands the scope of the main provision – The nature and effect of an Explanation must be understood in the context of the object of the Act, and in particular, the provision to which the Explanation is inserted – Explanation 4 to s.28A inserted on 21.02.2019, explicitly states that interest u/s.220, Income Tax Act shall accrue from the date the amount became payable – The liability to pay penalty stood triggered from the date of adjudication and that no separate notice of demand is necessary – Further, in the present case, as the adjudication order itself specified the time for payment of the penalty, the liability to pay interest would commence upon the expiry of the period mentioned in the assessment notice – The Explanation introduced in 2019, did not bring about any substantive change but merely clarified the existing legal position – Also, where the original adjudication order under the SEBI Act does not specify any time for payment, the period of 30 days u/s.220, Income Tax Act should be deemed to apply for making the payment, failure of which would trigger the liability to pay interest – Thus, the adjudication officer's order which specified payment within 45 days, effectively

operates as a notice of demand, rendering any separate demand notice redundant – Adjudication amounts to a crystallization of liability, and the demand is a natural sequitur – Thus, there is no corresponding requirement for issuance a separate notice of demand seeking payment of the amount determined under the adjudication order – Adjudication authority is well within his powers to fix a period for payment of the amount specified in the adjudication order, and upon default, the liability to pay interest becomes inevitable – Securities Laws (Amendment) Act, 2014 – Securities and Exchange Board of India (Procedure for Holding Inquiry and Imposing Penalties) Rules, 1995 – Income Tax Act, 1961. [Paras 11.4, 9.9]

"Legislation by incorporation"; "Legislation by reference" – Income Tax Act, 1961 – ss.220(1), 156 – Limited reference to s.156 in s.220(1) not to be treated either as a "legislation by incorporation" or a "legislation by reference" – Explained – Securities and Exchange Board of India Act, 1992. [Para 9.6, 9.8]

Income Tax Act, 1961 – Securities and Exchange Board of India Act, 1992 – Interest on unpaid penalties – Nature – Compensatory, not penal – Purpose, stated. [Para 11.5]

Securities and Exchange Board of India Act, 1992 – Adjudication, when triggered – Chapter VIA – s.28A – Levy of penalties – Penalties and Adjudication – Securities Laws (Amendment) Act, 2014 – SEBI (Prohibition of Insider Trading) Regulations, 1992 – Securities and Exchange Board of India (Procedure for Holding Inquiry and Imposing Penalties) Rules, 1995 – Income Tax Act, 1961 – ss. – s.220(1), (2), (4), 156. [Para 9.9]

Case Law Cited

Sedco Forex International Drill Inc. v. Commissioner of Income Tax **[2005] Supp. 5 SCR 302 : (2005) 12 SCC 717;** *Shyam Sundar & others v. Ram Kumar and Another* **[2001] Supp. 1 SCR 115 : (2001) 8 SCC 24;** *Keshavlal Jethalal Shah v. Mohanlal Bhagwandas and Another* **[1968] 3 SCR 623 – distinguished.**

J.K. Synthetics Ltd. v. CTO **[1994] 3 SCR 964 : (1994) 4 SCC 276 – held not applicable.**

State of Punjab v. Bhajan Kaur **[2008] 7 SCR 1111 : (2008) 12 SCC 112;** *Shiv Kumar Sharma v. Santhosh Kumari* **[2007] 10 SCR 17 : (2007) 8 SCC 600;** *Shamsu Suhara Beevi v. G.Alex and another* **[2004] Supp. 3 SCR 653 : (2004) 8 SCC 569;** *The Collector of Customs, Madras v. Nathella Sampathu Chetty and Ors.,* **MANU/SC/0089/1961 : AIR 1962 SC 316;** *Ujagar Prints and Ors. v. Union of India (UOI) and Ors.,* **MANU/SC/0675/1988 : AIR 1989 SC 516;** *Girnar Traders and Ors. v. State of Maharashtra and Ors.* **(2011) 3 SCC 1;** *Calcutta Jute Manufacturing Co. and Another v. Commercial Tax Officer* **[1997] Supp. 1 SCR 474 : (1997) 106 (STC) 433;** *Bhai Jaspal Singh v. CCT* **[2010] 14 SCR 41 : (2011) 1 SCC 39;** *Dushyant N. Dalal and Another v. SEBI* **[2017] 11 SCR 448 : (2017) 9 SCC 660 – referred to.**

Commissioner of Income-Tax v. Dhanalakshmy Weaving Works **(2000) 245 ITR 13 : 1999 SCC OnLine Ker 597 – referred to.**

List of Acts

Securities and Exchange Board of India Act, 1992; Income Tax Act, 1961; Securities and Exchange Board of India (Procedure for Holding Inquiry and Imposing Penalties) Rules, 1995; SEBI (Prohibition of Insider Trading) Regulations, 1992; Securities Laws (Amendment) Act, 2014; Income Tax (Certificate Proceedings) Rules, 1962; Companies Act.

List of Keywords

Violation of the SEBI (Prohibition of Insider Trading) Regulations, 1992; Adjudication order; Penalties; Interest on penalties; Adjudicating Officer; Date of the adjudication orders; Demand notices issued by SEBI; Interest on the unpaid penalty; From the expiry of the 45-day period stipulated in the Adjudicating Officer's orders; From the expiry of 30 days following SEBI's notices; Interest on unpaid penalty levied retrospectively; Adjudicating Officer's order; Demand for payment of penalties within 45 days; Show cause notices; Obligation to pay penalty; Revived from the date of adjudication; Defaulters; Accrual of interest from the expiry of the 45-day compliance period; Unpaid penalty amounts; Period of delay; Enabling provision; Notices of attachment; No separate notice of demand necessary; Separate demand notice; No fresh liability; Legislation by incorporation; Legislation by reference; Explanation; Notice of demand; Adjudication authority; Arrears of income tax.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No(s). 1551-1553 of 2023

From the Judgment and Order dated 29.09.2022 of the Securities Appellate Tribunal, Mumbai in AN Nos. 626, 627 and 628 of 2022

Appearances for Parties

Advs. for the Appellants:
Dr. Purvish Jitendra Malkan, Benni Chatterji, Sr. Advs., Dharita Malkan, Khushboo Aakash Sheth.

Advs. for the Respondent:
Pratap Venugopal, Sr. Adv., M/S. K J John And Co, Amarjit Singh Bedi, Ms. Surekha Raman, Shreyash Kumar, Imlikaba Jamit.

Judgment / Order of the Supreme Court

Judgment

R. Mahadevan, J.

1. All these appeals are filed under Section 15Z of the Securities and Exchange Board of India Act, 1992[1] challenging the common judgment and order dated 29.09.2022[2] passed by the Securities Appellate Tribunal, Mumbai[3], in Appeal Nos.626 to 628 of 2022 preferred by the appellants. By the impugned order, the Tribunal dismissed the challenge to the notices of attachment dated 23.06.2022 issued against the appellants.

FACTUAL MATRIX

2. According to the appellants, they are the promoter-directors of M/s. Brijlaxmi Leasing and Finance Limited, a company incorporated under the Companies Act and limited by shares, which is listed on the Bombay Stock Exchange and engaged in providing various financial services, including lending, loan syndication, advisory, and portfolio management, among others.

1 Hereinafter referred to as "SEBI Act"

2 For short, "the impugned order"

3 For short, "the Tribunal"

2.1. The company in the year 1995-96 went in to initial public offer for fully paid-up share capital of 56,48,500 shares of face value of Rs.10/- each. The fully paid up 5,64,85,000 shares of the company were split from Rs.10/- to Re.1 each from 30.06.2005.

2.2. While so, the respondent conducted examination of scrip of the company and found that the promoters and directors of the company purchased shares of the company on various dates between October 2012 and July 2013 in violation of the provisions of Regulation Nos.13(4) and 13(4A) read with 13(5) of the SEBI (Prohibition of Insider Trading) Regulations, 1992[4].

2.3. Upon issuance of show cause notices, the Adjudicating Officer passed adjudication orders on 28.08.2014 under section 15-I of the SEBI Act read with Rule 5 of the SEBI Rules, 1995, imposing penalty on the appellants.

2.4. Challenging the aforesaid orders, the appellants by names Jaykishor Chaturvedi, Siddharth Jaykishor Chaturvedi, and Ankur Jaykishor Chaturvedi preferred appeals bearing Nos.435, 436 and 434 of 2014, respectively, before the Tribunal under Section 15E of the SEBI Act. *Vide* order dated 04.08.2015, the Tribunal dismissed these appeals. Aggrieved by the same, the appellants preferred further appeals bearing Civil Appeal Nos.14729, 14730, and 14728 of 2015, respectively, before this Court.

2.5. By a common judgment dated 28.02.2019 in C.A.No(s).11311 of 2013 etc. cases, a 3-Judge Bench of this Court disposed of all these appeals upholding the quantum of penalty imposed on the appellants.

2.6. Thereafter, the respondent through its Recovery Officer, Western Regional Office, issued demand notices dated 13.05.2022 directing the appellants to pay the penalties imposed by the Adjudicating Officer *vide* orders dated 28.08.2014 along with interest @ 12% p.a. from 28.08.2014 to 13.05.2022. However, the appellants failed to comply with the demand for payment issued by the respondent.

4 For short, "the PTI Regulations"

2.7. Consequently, the respondent issued notices of attachment of bank accounts on 23.06.2022, to the Principal Officer / Chairman & Managing Director /CEO of all Banks in India, ordering the following attachment with immediate effect:

(a) All account/s by whatever name called including lockers of the Defaulter (appellants), either singly or jointly with any other person/s held with the Bank.

(b) All other amount/ proceeds due or may become due to the Defaulter (appellants) or any money held or may subsequently hold for or on account of the Defaulter (appellants).

2.8. The Respondent also issued notices of attachment of demat accounts on 23.06.2022 to National Securities Depository Ltd. and Central Depository Services (I) Ltd., ordering the following attachment with immediate effect:

(a) All Demat account/s by whatever name called of the Defaulter, either singly or jointly with any other person/s held with the Depositories.

(b) All funds/folios/schemes held by whatever name called of the defaulters (appellants), either singly or jointly with any other person/s held with the Depositories.

2.9. Aggrieved by the aforesaid actions taken by the respondent, the appellants preferred appeals bearing Nos.626, 627, and 628 of 2022 before the Tribunal on the ground that the recovery proceedings and attachment notices issued are excessive in nature and grossly disproportionate to the penalties imposed by the Adjudicating Officer. By the impugned order, the Tribunal dismissed all these appeals. Hence, the appellants are before us with the present Civil Appeals.

CONTENTIONS OF THE PARTIES

3. The main contention of the learned counsel for the appellants is that the Recovery Officer of the respondent exceeded the powers vested under section 28A of the SEBI Act by imposing retrospective interest computed from the date of the original adjudication orders dated 28.08.2014 under section 15-I of the SEBI Act, despite the absence of any provision for the imposition of interest in the said order.

3.1. Elaborating further, the learned counsel submitted that the scheme of recovery proceedings under the SEBI Act is governed by Section 28A read with Sections 220 to 227, 228A, 229, 232, along with the Second and Third Schedules to the Income Tax Act, 1961, and the Income Tax (Certificate Proceedings) Rules, 1962. Section 220(2) in unambiguous terms, stipulates that interest would be imposable at the rate of 1% per month after the 30th day from the date of the demand notice as it stood prior to insertion of Explanation– 4 to Section 28A, which came into force on 21.02.2019. Explanation – 4 states that the interest referred to in Section 220 of the Income Tax Act, 1961 shall commence from the date the amount becomes payable by the person. This implies that prior to the insertion of Explanation – 4 to Section 28A of the SEBI Act, interest was to be levied in accordance with Section 220 of the Income Tax Act, 1961 – that is, after 30 days from the issuance of the notice of demand, and not from the date the amount became payable by the person. Whereas, the notice of demand dated 13.05.2022 issued under section 28A of the SEBI Act by the respondent comprised the penalty amount imposed along with interest at 12% p.a. computed from the date of the adjudication orders.

3.2. It is further submitted that Section 220 of the Income Tax Act, 1961 provides for the recovery of any amount payable under a notice of demand. Section 156 of the Income Tax Act, 1961 defines a notice of demand as a demand, in the prescribed form for the payment of any tax, interest, penalty, fine or any other sum payable in consequence of any order passed. The phrase, "in consequence of any order passed" refers to the original adjudication orders dated 28.08.2014 which imposed only a penalty and did not award any interest. Therefore, the Recovery Officer of the respondent exceeded his jurisdiction by computing interest on the penalty amount at 12% per annum from the date of the adjudication orders, when such order did not direct the payment of any interest.

3.3. It is also submitted that the demand notices, in essence, amount to a rewriting of the original adjudication orders, which had already attained finality. Hence, interest on the penalty would be leviable only at the rate of 1% per month from 13.05.2022, i.e., 30 days after the date of the demand notices issued by

the respondent, and not from 28.08.2014, the date of the adjudication orders.

3.4. Placing reliance on the decisions of this Court in *Sedco Forex International Drill Inc. v. Commissioner of Income Tax*[5], *Shyam Sundar & others v. Ram Kumar and another*[6], and *Keshavlal Jethalal Shah v. Mohanlal Bhagwandas and another*[7], the learned counsel submitted that the insertion of Explanation - 4 to Section 28A of the SEBI Act, which came into effect from 21.02.2019, cannot be applied retrospectively, as it alters the legal position as it stood earlier by introducing provisions relating to the levy of interest. It is also submitted that the imposition of interest is a matter of substantive law, and therefore, cannot have retrospective application [See: *J.K. Synthetics Ltd v. CTO*[8] and *State of Punjab v. Bhajan Kaur*[9]]. Thus, according to the learned counsel, Explanation - 4 to Section 28A of the SEBI Act, would not apply to the case of the appellants, as the amendment was introduced long after the original adjudication orders, which had attained finality by a common judgment dated 28.02.2019 in C.A.No(s).11311 of 2013 etc. cases. Since the amendment cannot be applied retrospectively, in light of the decisions referred to above, interest for the purposes of Section 28A shall not commence from the date of the adjudication orders. Instead, it shall be computed in accordance with the plain language of Section 220(2) of the Income Tax Act, 1961 i.e., after 30 days from the date of notice of demand.

3.5. The learned counsel further pointed out that in *Dushyant N. Dalal and another v. SEBI*[10], this Court after referring to various judgments, upheld the levy of interest in equity as a principle of law, in the absence of express statutory provisions for interest. In that case, the appeal related to an adjudication order of penalty dated 13.11.2009 i.e., prior to the insertion of Section 28A into the SEBI Act, which provision was introduced by the Securities

5 (2005) 12 SCC 717

6 (2001) 8 SCC 24

7 [1968] 3 SCR 623

8 (1994) 4 SCC 276

9 (2008) 12 SCC 112

10 (2017) 9 SCC 660

Laws (Amendment) Act, 2014, with effect from 18.07.2013. Whereas, in the present case, the adjudication orders against the appellants are dated 28.08.2014 i.e., after the insertion of Section 28A into the SEBI Act. Section 28A as it then stood, was clear and unambiguous, providing for the levy of interest under section 220(2) of the Income Tax Act, 1961 at the stage of recovery, in the event of non-payment of penalties imposed under the adjudication orders within 30 days from the date of service of the demand notices by the Recovery Officer. Despite being cognizant of the power to provide for future interest, as was done in *Dushyant N. Dalal*, the Adjudicating Officer in the case of the present appellants, made no such provision for future interest and the adjudication orders therefore attained finality in their existing form.

3.6. Referring to the judgments of this Court in *Shiv Kumar Sharma v. Santhosh Kumari*[11], and *Shamsu Suhara Beevi v. G.Alex and another*[12], the learned counsel submitted that it is trite law that the exercise of equity cannot override or violate express statutory provisions; and the equity jurisdiction may be invoked only where the law is silent or does not operate in the field.

3.7. With these submissions and case laws, the learned counsel prayed that these appeals be allowed by setting aside the levy of interest at 12% p.a. charged from 28.08.2014, as well as the recovery certificates issued by the respondent and the notices of attachment issued in pursuance thereof.

4. Per contra, the learned counsel for the respondent submitted that the issues involved herein are no longer *res integra*, having been conclusively adjudicated by this Court in *Dushyant N. Dalal* (supra), wherein, this Court affirmed the authority of SEBI to levy interest, including on penalty amounts, pursuant to Section 28A of the SEBI Act read with Section 220 of the Income Tax Act, 1961. In doing so, this Court expressly rejected the contrary views previously adopted by the Securities Appellate Tribunal, which had limited the recovery of interest to periods subsequent to the enactment of Section 28A in 2013. This Court further clarified that the provision for levying

11 (2007) 8 SCC 600

12 (2004) 8 SCC 569

interest embodies both substantive and procedural elements of law, thereby enabling SEBI to recover interest from the date on which the liability originally arose, in consonance with principles of equity and the Interest Act, 1978.

4.1. It was further submitted that in the present case, the cause of action arose on 28.08.2014, i.e., upon the imposition of penalties by the Adjudicating Officer of SEBI, on each of the appellants, accompanied by a direction to effect payment within 45 days from the date of receipt of the adjudication orders. Section 220(1) of the Income Tax Act, 1961 does not contemplate the issuance of any independent notice of demand, but refers to the notice of demand served under Section 156. It mandates that the amount specified in such notice shall be paid within 30 days, failing which interest at the rate of 12% per annum becomes payable under Section 220(2) on the amounts specified therein, calculated from the expiry of the period prescribed under Section 220(1). Since Section 156 of the Income Tax Act is not incorporated into Section 28A of the SEBI Act, the expression 'notice of demand' referred to in Section 220(1), for the purposes of recovery under the SEBI Act would be referrable to the demand raised by SEBI - *inter alia* through a penalty order passed under Chapter VIA of the SEBI Act. In the instant case, the direction issued by the Adjudicating Officer of SEBI in the adjudication orders dated 28.08.2014, requiring payment of penalties by the appellants within 45 days from the receipt of the said orders, would constitute the 'notice of demand' contemplated under section 156 of the Income Tax Act (with necessary modification as envisaged by Section 28A (1) of the SEBI Act). Consequently, the appellants' failure to comply with the said direction would render them 'deemed defaulters' within the meaning of Section 220(4) of the Income Tax Act. Therefore, the levy of interest from 28.08.2014 until the date of payment is fully warranted and justified as per the applicable statutes and the settled legal position.

4.2. It was also submitted that Section 28A of the SEBI Act makes the provisions of Sections 220 to 227, 228A, 229, 232 and the Second and Third Schedules to the Income Tax Act, 1961 and the Income Tax (Certificate Proceedings) Rules, 1962 apply

"with necessary modifications" as if the said provisions and Rules made thereunder were the provisions of the SEBI Act. In the present case, the order of the Adjudicating Officer of SEBI dated 28.08.2014 itself required that the penalty amount be paid within 45 days from the date of receipt of the order. The demand notices dated 13.05.2022 issued by the Recovery Officer of SEBI were necessitated solely due to the appellants' failure to pay the penalty demanded and were intended to inform them of the outstanding dues as on that date, along with the proposed recovery actions, such as, attachment and detention. The appellants had unsuccessfully challenged the imposition of the penalty before both the Tribunal and this Court. Therefore, they cannot now contend that the cause of action for payment of the penalty arose only on 13.05.2022, when notice was issued by the Recovery Officer of SEBI.

4.3. Ultimately, it was submitted that as on date, the appellants remain liable to pay the following sums by way of interest:

Name	Penalty amount (Rs.)	Recovered amount till date (Rs.)	Interest pending (Rs.)
Siddharth J.Chaturvedi	5,00,000/-	5,00,465.85	5,34,640.77
Jaykishore Chaturvedi	11,00,000/-	11,00,000/-	11,79,533.33
Ankur J. Chaturvedi	7,00,000/-	7,00,000/-	7,41,133,33

4.4. Thus, according to the learned counsel, there is no merit in the present appeals and the same are liable to be dismissed.

DISCUSSION AND FINDINGS

5. We have heard the learned counsel appearing on either side and perused the materials available on record.

6. Concededly, the Adjudicating Officer passed the adjudication orders dated 28.08.2014, imposing penalties of Rs.11,00,000/- in the case of Jaykishor Chaturvedi, Rs.5,00,000/- in the case of Siddharth Jaykishor Chaturvedi and Rs.7,00,000/- in the case of Ankur Jaykishor Chaturvedi, for the alleged violation of Regulation Nos.13(4) and 13(4A) read with 13(5) of the PIT Regulations. The said adjudication orders were affirmed by the 3-Judge Bench of this

Court *vide* judgment dated 28.02.2019 in C.A. No (s).11311 of 2013 etc. cases and hence, the same had attained finality.

7. Seemingly, the appellants failed to pay the penalties imposed by the Adjudicating Officer, even after the same was affirmed by this Court. Consequently, the respondent issued demand notices dated 13.05.2022, directing the appellants to pay the penalties along with interest @ 12% per annum from 28.08.2014 to 13.05.2022 within 15 days from the date of receipt of the notices, failing which, recovery proceedings would be initiated against them. Even then, the appellants failed to make the payments. As a result, the respondent issued notices of attachment of the bank accounts and demat accounts against the appellants. Challenging the same, the appellants preferred appeals, which were dismissed by the Tribunal, by the impugned order dated 29.09.2022, observing that the penalty amount had not been paid even though the adjudication orders were passed eight years ago. It further held that if the amount is not paid within 45 days, interest becomes payable under Section 28A of the SEBI Act. Aggrieved by the dismissal of the appeals, the appellants have preferred these appeals before us.

8. Now, the questions to be determined in these appeals are, whether interest on penalties imposed by the Adjudicating Officer is payable by the appellants, and if so, from which date – whether from the date of the adjudication orders passed by the Adjudicating Officer or the demand notices issued by the respondent?

9. Before proceeding further, it is necessary to examine the legal position related to the issue involved herein.

   9.1. Chapter VI A, comprising of Sections 15A–15HB prescribe penalties for various defaults under the SEBI Act *viz*., failure to furnish information, return, *etc*. Section 15A provides that a person who fails to file a return or furnish information, *shall be liable to a penalty which shall not be less than one lakh rupees but which may extend to one lakh rupees for each day during which, such failure continues, subject to a maximum of one crore rupees*. Likewise, Sections 15B–15HB impose monetary penalties for other contraventions. However, none of these sections themselves mention that interest is payable on the penalty; and they only set out the penalty amounts.

Even Section 15JA merely directs that penalties recovered are credited to the Consolidated Fund.

9.2. Section 15I authorizes SEBI to appoint adjudicating officers to impose penalties under Sections 15A–15HB. But, it does not by itself mention any interest liability on delayed payment.

9.3. Section 15J directs that in determining the penalty amount under Sections 15A–15HB, the adjudicating officer shall have due regard to certain factors *viz*., disproportionate gain, loss to investors, repetitive nature of default, *etc*. It also contains no provision for interest on delayed payments.

9.4. Although outside Chapter VI-A, Section 28A which was inserted by the Securities Laws (Amendment) Act, 2014 in Chapter VII, dealing with Miscellaneous matter, with effect from 18.07.2013, deals with the recovery when any person fails to pay amounts due under the Act. It states that if a person fails to pay a penalty imposed under the SEBI Act, the SEBI Recovery Officer may prepare a certificate specifying the amount due and recover it by attachment or other measures. Crucially, it provides that for the purposes of recovery, the provisions of Sections 220 to 227, 228A, 229, 232, the Second and Third Schedules to the Income-tax Act, 1961 and the Income-tax (Certificate Proceedings) Rules, 1962 – shall apply, with necessary modifications, as if those provisions and the rules were the provisions of the SEBI Act and referred to amounts due under this Act, instead of income-tax. In particular, Income-tax Act, Section 220 (which is thereby incorporated) imposes interest at 1% per month (or part thereof) on any tax (here, SEBI dues) remaining unpaid after the due date. Thus, Section 28A effectively makes all sums due to SEBI (including penalties) recoverable as arrears and subjects them to statutory interest under the Income-tax Act. For ease of reference and specificity, the provisions of Section 28A of the SEBI Act and Section 220 of the Income Tax Act, 1961 are reproduced below:

> "***28-A. Recovery of amounts.*** - *(1) If a person fails to pay the penalty imposed by the adjudicating officer or fails to comply with any direction of the Board for refund of monies or fails to comply with a direction of disgorgement order issued under section 11-B or*

fails to pay any fees due to the Board, the Recovery Officer may draw up under his signature a statement in the specified form specifying the amount due from the person (such statement being hereafter in this Chapter referred to as certificate) and shall proceed to recover from such person the amount specified in the certificate by one or more of the following modes, namely:-

(a) attachment and sale of the person's movable property;

(b) attachment of the person's bank accounts;

(c) attachment and sale of the person's immovable property;

(d) arrest of the person and his detention in prison;

(e)appointing a receiver for the management of the person's movable and immovable properties,

and for this purpose, the provisions of sections 220 to 227, 228A, 229, 232, the Second and Third Schedules to the Income-tax Act, 1961 and the Income-tax (Certificate Proceedings) Rules, 1962, as in force from time to time, insofar as may be, apply with necessary modifications as if the said provisions and the rules made thereunder were the provisions of this Act and referred to the amount due under this Act instead of to income-tax under the Income-tax Act, 1961.

Explanation 1.- For the purposes of this sub-section, the person's movable or immovable property or monies held in bank accounts shall include any property or monies held in bank accounts which has been transferred directly or indirectly on or after the date when the amount specified in certificate had become due, by the person to his spouse or minor child or son's wife or son's minor child, otherwise than for adequate consideration, and which is held by, or stands in the name of, any of the persons aforesaid; and so far as the movable or immovable property or

monies held in bank accounts so transferred to his minor child or his son's minor child is concerned, it shall, even after the date of attainment of majority by such minor child or son's minor child, as the case may be, continue to be included in the person's movable or immovable property or monies held in bank accounts for recovering any amount due from the person under this Act.

Explanation 2.- Any reference under the provisions of the Second and Third Schedules to the Income-tax Act, 1961 and the Income-tax (Certificate Proceedings) Rules, 1962 to the assessee shall be construed as a reference to the person specified in the certificate.

Explanation 3. - Any reference to appeal in Chapter XVIID and the Second Schedule to the Income-tax Act, 1961 shall be construed as a reference to appeal before the Securities Appellate Tribunal under section 15T of this Act.

[13]*[Explanation 4.*

The interest referred to in section 220 of the Income-tax Act, 1961 shall commence from the date the amount became payable by the person.

(2) The Recovery Officer shall be empowered to seek the assistance of the local district administration while exercising the powers under sub-section (1).

(3) Notwithstanding anything contained in any other law for the time being in force, the recovery of amounts by a Recovery Officer under sub-section (1), pursuant to non-compliance with any direction issued by the Board under section 11B, shall have precedence over any other claim against such person.

(4) For the purposes of sub-sections (1), (2) and (3), the expression "Recovery Officer" means any officer

13 The Explanation Inserted by Act 21 of 2019, s. 42 and the Second Schedule (w.e.f. 21.2.2019)

of the Board who may be authorised, by general or special order in writing, to exercise the powers of a Recovery Officer.]"

"220. When tax payable and when assessee deemed in default.

(1) Any amount, otherwise than by way of advance tax, specified as payable in a notice of demand under section 156 shall be paid within [thirty days][14] of the service of the notice at the place and to the person mentioned in the notice:

Provided that, where the [Assessing Officer][15] has any reason to believe that it will be detrimental to revenue if the full period of [thirty days] aforesaid is allowed, he may, with the previous approval of the [Joint Commissioner][16], direct that the sum specified in the notice of demand shall be paid within such period being a period less than the period of [thirty days] aforesaid, as may be specified by him in the notice of demand.

[(1A) Where any notice of demand has been served upon an assessee and any appeal or other proceeding, as the case may be, is filed or initiated in respect of the amount specified in the said notice of demand, then, such demand shall be deemed to be valid till the disposal of the appeal by the last appellate authority or disposal of the proceedings, as the case may be, and any such notice of demand shall have the effect as specified in section 3 of the Taxation Laws (Continuation and Validation of Recovery Proceedings) Act, 1964 (11 of 1964).]

(2) *If the amount specified in any notice of demand under section 156 is not paid within the period limited*

14 Substituted by Act 4 of 1988, Section 85, for " thirty-five days" (w.e.f. 1.4.1989)

15 Substituted by Act 4 of 1988, Section 2, for " Income-tax Officer" (w.e.f. 1.4.1988)

16 Substituted by Act 21 of 1998, Section 3, for " Deputy Commissioner" (w.e.f. 1.10.1998)

under sub-section (1), the assessee shall be liable to pay simple interest at [one per cent.][17][for every month or part of a month comprised in the period commencing from the day immediately following the end of the period mentioned in sub-section (1)][18] and ending with the day on which the amount is paid:

[Provided that, where as a result of an order under section 154, or section 155, or section 250, or section 254, or section 260, or section 262, or section 264][19] [or an order of the Settlement Commission under sub-section (4) of section 245-D][20][the amount on which interest was payable under this section had been reduced, the interest shall be reduced accordingly and the excess interest paid, if any, shall be refunded:][21]

[Provided further that where as a result of an order under sections specified in the first proviso, the amount on which interest was payable under this section had been reduced and subsequently as a result of an order under said sections or section 263, the amount on which interest was payable under this section is increased, the assessee shall be liable to pay interest under sub-section (2) from the day immediately following the end of the period mentioned in the first notice of demand, referred to in sub-section (1) and ending with the day on which the amount is paid:]

[Provided further that in respect of any period commencing on or before the 31st day of March, 1989 and ending after that date, such interest

17 Substituted by Act 4 of 1988, Section 85, for " fifteen per cent. per annum from the day commencing after the end of the period mentioned in sub-Section (1)" (w.e.f. 1.4.1989)

18 Substituted by Act 4 of 1988, Section 85, for "fifteen per cent. per annum from the day commencing after the end of the period mentioned in sub-Section (1)" (w.e.f. 1.4.1989)

19 Inserted by Act 13 of 1963, Section 14 (w.e.f. 1.4.1962)

20 Inserted by Act 4 of 1988, Section 85 (w.e.f. 1.4.1989)

21 Inserted by Act 13 of 1963, Section 14 (w.e.f. 1.4.1962)

shall, in respect of so much of such period as falls after that date, be calculated at the rate of one and one-half per cent for every month or part of a month.][22]

…."

In conclusion, once Section 28A of the SEBI Act came into force with effect from 18.07.2013, the legal position stands settled that any penalty imposed by the Adjudicating Officer under the SEBI Act and remaining unpaid beyond the stipulated period is recoverable in the same manner as arrears of income tax under the Income Tax Act, 1961. As a necessary corollary, interest on such unpaid penalty also becomes statutorily leviable under section 220(2) of the Income Tax Act, which prescribes simple interest at the rate of 1% per month (12% per annum) for any amount specified in a demand notice that is not paid within the prescribed time.

9.5. To elucidate further, we will also look into the provision of Section 156 of the Income Tax Act, 1961, which reads as under:

*"**156.** Notice of demand- When any tax, interest, penalty, fine or any other sum [Certain words omitted by Act 13 of 1966, Section 32 and Schedule III (w.e.f. 1.4.1967).] is payable in consequence of any order passed under this Act, the [Assessing Officer]*[23] *shall serve upon the assessee a notice of demand in the prescribed form specifying the sum so payable:*

[Provided that where any sum is determined to be payable by the assessee under sub-section (1) of section 143, the intimation under that sub-section shall be deemed to be a notice of demand for the purposes of this section.][24]

9.6. It is clear from the above provision that when any tax, interest, penalty, fine or any other sum (other than advance tax) is

22 Inserted by Act 4 of 1988, Section 85 (w.e.f. 1.4.1989)

23 Substituted by Act 4 of 1988, Section 2, for" Income-tax Officer" (w.e.f. 1.4.1988)

24 Inserted by Act 18 of 2008, Section 40 (w.e.f. 1.4.2008)

payable under the Income Tax Act, the Assessing Officer is required to serve a notice of demand upon the assessee. This notice mandates payment of the specified amount within 30 days from the date of its service. A reading of the provisions makes it clear that for the purpose of recovery of amounts due under the SEBI Act, certain provisions of the Income Tax Act have been incorporated into the SEBI Act. At this juncture, it will be relevant to point out the difference between "legislation by incorporation" and "legislation by reference". In the case of "legislation by incorporation", the provisions of the original Act, once specified, become an integral and independent part of the subsequent Act. The provisions of the original Act are deemed to be incorporated in the subsequent Act as if they were enacted within it. On the other hand, in the case of "legislation by reference", the provisions are generally referred to for applicability, and the effect of such reference is that not only the provisions existing at the time the subsequent Act was enacted are applied, but also any subsequent amendments made to the provisions referred to in the original enactment. Therefore, in the case of "legislation by incorporation", only the provisions as they existed on the date of incorporation into the subsequent law are applicable. In contrast, in the case of "legislation by reference", the law as it exists on the date of application, including any subsequent modifications or amendment, is applicable. Thus, in the case of "legislation by incorporation", modifications to the provisions in the original Act are not carried into the subsequent Act.

9.7. It will be useful to refer to the following judgments of this court on this aspect:

(i) The Collector of Customs, Madras v. Nathella Sampathu Chetty and Ors.[25]

> *".....To consider that the decision of the Privy Council has any relevance to the construction of the legal effect of the terms of section 23A of the Foreign Exchange Regulation Act is to*

25 MANU/SC/0089/1961 : AIR 1962 SC 316

ignore the distinction between a mere reference to or a citation of one statute in another and an incorporation which in effect means the bodily lifting of the provisions of one enactment and making it part of another so much so that the repeal of the former leaves the latter wholly untouched. In the case, however, of a reference or a citation of one enactment by another without incorporation, the effect of a repeal of the one "referred to" is that set out in section 8(1) of the General Clauses Act:

"8(1) Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals and re-enacts, with or without modification, any provision of a former enactment, then references in any other enactment or in any instrument to the provision so repealed shall, unless a different intention appears : be construed as references to the provision so re-enacted. "

52. On the other hand, the effect of incorporation is as stated by Brett, L. J., in Clarke v. Bradlaugh (1881) 8 Q.B.D. 63:

"Where a statute is incorporated, by reference, into a second statute the repeal of the first statute by a third does not affect the second".

53. This is analogous to, though not identical with the principle embodied in section 6A of the General Clauses Act enacted to define the effect of repeals effected by repealing and amending Acts which runs in these terms:

"6A. Where any Central Act or Regulation made after the commencement of this Act repeals any enactment by which the text of any Central Act or Regulation was amended by the express omission, insertion or substitution of any matter, then, unless a different intention appears, the

repeal shall not affect the continuance of any such amendment made by the enactment so repealed and in operation at the time of such repeal."

54. We say 'not identical' because in the class of cases contemplated by section 6A of the General Clauses Act, the function of the incorporating legislation is almost wholly to effect the incorporation and when that is accomplished, they die as it were a natural death which is formally effected by their repeal. In cases, however, dealt with by Brett, L. J., the legislation from which provisions are absorbed continue to retain their efficacy and usefulness and their independent operation even after the incorporation is effected."

(ii) Ujagar Prints and Ors. v. Union of India (UOI) and Ors.[26]

"49. Referential legislation is of two types. One is where an earlier Act or some of its provisions are incorporated by reference into a later Act. In this event, the provisions of the earlier Act or those so incorporated as they stand in the earlier Act at the time of incorporation, will be read into the later Act. Subsequent changes in the earlier Act or the incorporated provisions will have to be ignored because, for all practical purposes, the existing provisions of the earlier Act have been re-enacted by such reference into the later one, rendering irrelevant what happens to the earlier statute thereafter.

Examples of this can be seen in Secretary of State v. Hindustan Co-operative Insurance Society MANU/PR/0038/1931 : AIR 1931 PC 149, Bolani Ores Ltd. v. State MANU/SC/0313/1974 : AIR 1975 SC 17, Mahindra

26 MANU/SC/0675/1988: AIR 1989 SC 516

and Mahindra Ltd v. Union of India MANU/SC/0391/1979 : AIR 1979 SC 798. On the other hand, the later statute may not incorporate the earlier provisions. It may only make a reference of a broad nature as to the law on a subject generally, as in Bhajiya v.Gopikabai MANU/SC/0403/1978 : (1978) 3 SCR 561 : AIR 1978 SC 793, or contain a general reference to the terms of an earlier statute which are to be made applicable. In this case any modification, repeal or re-enactment of the earlier statute will also be carried into in the later, for here, the idea is that certain provisions of an earlier statute which become applicable in certain circumstances are to be made use of for the purpose of the latter Act also. Examples of this type of legislation are to be seen in Collector of Customs v. Nathella Sampathu Chetty MANU/SC/0089/1961 : (1962) 3 SCR 786 : AIR 1962 SC 316, New Central Jute Mills Co. Ltd. v. Assistant Collector MANU/SC/0339/1970 : (1971) 2 SCR 92 : AIR 1971 SC 454 and Special Land Acquisition Officer, City Improvement Trust Board Mysore v. P. Govindan MANU/SC/0384/1976 : (1977) 1 SCR 549 : AIR 1976 SC 2517...Ed. Whether a particular statute falls into the first or second category is always a question of construction. In the present case, in my view, the legislation falls into the second category. Section 3(3) of the 1957 Act does not incorporate into the 1957 Act any specific provisions of the 1944 Act. It only declares generally that the provisions of the 1944 Act shall apply "so far as may be", that is, to the extent necessary and practical, for the purposes of the 1957 Act as well.

50. That apart, it has been held even when a specific provision is incorporated and the case apparently falls in the first of the above categories, that the rule that repeals, modifications or amendments of the earlier Act will have to be

ignored is not adhered to in certain situations. These have been set out in State of Madhya Pradesh v. Narasimhan MANU/SC/0226/1975 : (1976) 1 SCR 6 : AIR 1975 SC 1835. In that case, the Supreme Court was considering the question whether the amendment of Section 21 of the Penal Code by the Criminal Law Amendment Act, 1958, was also applicable for purposes of the Prevention of Corruption Act 1947, which by Section 2 incorporates, for the purposes of that Act, the definition of 'public servant' in Section 21 of the Penal Code. Answering the question in the affirmative, the Court outlined the following propositions:

Where a subsequent Act incorporates provisions of a previous Act, then the borrowed provisions become an integral and independent part of the subsequent Act and are totally unaffected by any repeal or amendment in the previous Act. This principle, however, will not apply in the following cases:

(a) Where the subsequent Act and the previous Act are supplemental to each other;

(b) where the two Acts are in pari materia;

(c) where the amendment in the previous Act, if not imported into the subsequent Act also, would render the subsequent Act wholly unworkable and ineffectual; and

(d) where the amendment of the previous Act, either expressly or by necessary intendment, applies the said provisions to the subsequent Act."

(iii) Girnar Traders and Ors. v. State of Maharashtra and Ors.[27]

***"86.** At the very outset, we may notice that in the preceding paragraphs of the judgment,*

27 MANU/SC/0029/2011: 2011 3 SCC 1

we have specifically held that the MRTP Act is a self-contained code. Once such finding is recorded, application of either of the doctrines i.e. "legislation by reference" or "legislation by incorporation", would lose their significance particularly when the two Acts can coexist and operate without conflict.

87. *However, since this aspect was argued by the learned Counsel appearing for the parties at great length, we will proceed to discuss the merit or otherwise of this contention without prejudice to the above findings and as an alternative plea. These principles have been applied by the courts for a considerable period now.* ***When there is general reference in the Act in question to some earlier Act but there is no specific mention of the provisions of the former Act, then it is clearly considered as legislation by reference. In the case of legislation by reference, the amending laws of the former Act would normally become applicable to the later Act; but, when the provisions of an Act are specifically referred and incorporated in the later statute, then those provisions alone are applicable and the amending provisions of the former Act would not become part of the later Act. This principle is generally called legislation by incorporation.*** *General reference, ordinarily, will imply exclusion of specific reference and this is precisely the fine line of distinction between these two doctrines. Both are referential legislations, one merely by way of reference and the other by incorporation. It, normally, will depend on the language used in the later law and other relevant considerations. While the principle of legislation by incorporation has well-defined exceptions, the law enunciated as of now provides for no exceptions to the principle*

of legislation by reference. Furthermore, despite strict application of doctrine of incorporation, it may still not operate in certain legislations and such legislation may fall within one of the stated exceptions.

xxx xxx xxx

121. *These are the few examples and principles stated by this Court dealing with both the doctrines of legislation by incorporation as well as by reference. Normally, when it is by reference or citation, the amendment to the earlier law is accepted to be applicable to the later law while in the case of incorporation, the subsequent amendments to the earlier law are irrelevant for application to the subsequent law unless it falls in the exceptions stated by this Court in M.V. Narasimhan case [State of M.P. v. M.V. Narasimhan, MANU/SC/0226/1975 : (1975) 2 SCC 377: 1975 SCC (Cri) 589]. It could well be said that even where there is legislation by reference, the Court needs to apply its mind as to what effect the subsequent amendments to the earlier law would have on the application of the later law. The objective of all these principles of interpretation and their application is to ensure that both the Acts operate in harmony and the object of the principal statute is not defeated by such incorporation. Courts have made attempts to clarify this distinction by reference to various established canons. But still there are certain grey areas which may require the court to consider other angles of interpretation.*

122. In Maharashtra SRTC [MANU/SC/0187/2003 : 2003:INSC:137 : (2003) 4 SCC 200] the Court was considering the provisions of the MRTP Act as well as the provisions of the Land Acquisition Act. The Court finally took the view by adopting the principle stated in U.P. Avas

Evam Vikas Parishad [MANU/SC/0055/1998 : 1998:INSC:31 : (1998) 2 SCC 467] and held that there is nothing in the MRTP Act which precludes the adoption of the construction that the provisions of the Land Acquisition Act as amended by Central Act 68 of 1984, relating to award of compensation would apply with full vigour to the acquisition of land under the MRTP Act, as otherwise it would be hit by invidious discrimination and palpable arbitrariness and consequently invite the wrath of Article 14 of the Constitution. While referring to the principle stated in Hindusthan Coop. Insurance Society Ltd. [MANU/PR/0038/1931 : (1930-31) 58 IA 259: AIR 1931 PC 149] and clarifying the distinction between the two doctrines, the Court declined to apply any specific doctrine and primarily based its view on the plea of discrimination but still observed: (Maharashtra SRTC case [MANU/SC/0187/2003 : 2003:INSC:137 : (2003) 4 SCC 200], SCC p. 208, para 11)

11. ... The fact that no clear-cut guidelines or distinguishing features have been spelt out to ascertain whether it belongs to one or the other category makes the task of identification difficult. The semantics associated with interpretation play their role to a limited extent. Ultimately, it is a matter of probe into legislative intention and/or taking an insight into the working of the enactment if one or the other view is adopted. The doctrinaire approach to ascertain whether the legislation is by incorporation or reference is, on ultimate analysis, directed towards that end. The distinction often pales into insignificance with the exceptions enveloping the main rule.

123. In the case in hand, it is clear that both these Acts are self-contained codes within themselves. The State Legislature while enacting the MRTP Act has referred to the

> ***specific Sections of the Land Acquisition Act in the provisions of the State Act. None of the Sections require application of the provisions of the Land Acquisition Act generally or mutatis mutandis. On the contrary, there is a specific reference to certain Sections and/or content/language of the Section of the Land Acquisition Act in the provisions of the MRTP Act."***
>
> *[Emphasis supplied]*

9.8. There is yet another possibility, where, in the original Act, there can be an incorporation of another provision from the same or a different enactment. In such cases, the incorporated provision should also be deemed to have been incorporated into the subsequent Act. Furthermore, when there is a general reference in the original Act that forms part of the incorporation in the subsequent Act, the general reference also gets incorporated into the subsequent Act as a reference. Section 220 of the Income Tax Act deals with the period within which the demand made under Section 156 is to be paid. Section 156, by itself, does not specify any period within which the payment is to be made. However, the proviso to Section 156 makes it clear that a separate demand is not necessary when an assessment is made under Section 143(1) of the Income Tax Act, and the intimation of assessment is to be treated as the notice of demand. At this juncture, it is necessary to point out that the period of 30 days mentioned in Section 220 can also be reduced for the reasons stated in the proviso, provided the prescribed procedure is followed. The reference in Section 220(1) to Section 156 is limited to the purpose of reckoning the period of 30 days from the date of issuance of the demand notice. Therefore, in the strict sense, the limited reference to Section 156 in Section 220(1) cannot be treated either as a "legislation by incorporation" or a "legislation by reference".

9.9. The SEBI Act, 1992 was primarily enacted to protect the interests of investors in securities, to promote the development and regulation of the securities market, and to address matters

incidental thereto. These include, but are not limited to, preventing fraudulent activities and malpractices in trading, guiding investors through the mobilisation and allocation of resources, ensuring safety in investments by prohibiting insider trading, curtailing price rigging, promoting fair practices in the trading of securities and stocks, and regulating financial intermediaries through the creation of codes of conduct for take overs, as well as conducting inquiries and audits of the stock market. To achieve these objects, the SEBI Board takes cognizance of offences committed by companies and their directors and initiates action by way of levying penalties, suspending trading privileges, or recommending imprisonment. A company, though a juristic person, capable of suing and being sued in its own name, can be inflicted with punishments of penalty or suspension from trading, but cannot be punished by imprisonment. However, the directors and other connected persons covered by the PTI Regulations, who were at the helm of affairs at the time of the violation, can be subjected to punishment. It is trite law that in cases where directors of a company are prosecuted, the company is also liable to be prosecuted, because, in certain cases, but for the violation by the company, the directors cannot be prosecuted. The Board, armed with powers under Sections 29 and 30 of the SEBI Act, has also framed various rules and regulations to achieve the Act's objectives. Any violation of the SEBI Act, its rules or its regulations – and violations of certain provisions under the Companies Act by a listed company – can trigger adjudication by SEBI. Thus, it can be seen that adjudication under SEBI Act is triggered only by a violation. In contract, under the Income Tax Act, the levy and collection are enabled by charging provisions. Section 156 of the Income Tax Act, which deals with the issuance of a demand notice before recovery, has not been incorporated into the SEBI Act. Under the SEBI Act, the levy of penalties under various circumstances is governed by Chapter VIA, which deals with penalties and adjudication. The adjudication is carried out in accordance with the procedure laid down in the Securities and Exchange Board of India (Procedure for Holding Inquiry and Imposing Penalties) Rules, 1995. Section 28A of the SEBI Act, introduced with effect from 18.07.2013, provides the mechanism for recovery of penalties and, in cases of default, contemplates

the payment of interest by incorporating certain provisions of the Income Tax Act. In effect, Section 28A is a substantive law insofar as the levy of interest. The adjudication is conducted as per the mechanism outlined under SEBI Act and the rules framed thereunder. Notably, the provisions of the SEBI Act or its rules do not mandate the issuance of a separate demand notice before recovery. Adjudication amounts to a crystallization of liability, and the demand is a natural sequitur. Therefore, there is no corresponding requirement for issuance a separate notice of demand seeking payment of the amount determined under the adjudication order. The adjudication authority is well within his powers to fix a period for payment of the amount specified in the adjudication order, and upon default, the liability to pay interest becomes inevitable.

10. In the present case, although the original adjudication orders dated 28.08.2014 did not expressly mention interest, the liability to pay interest arises as a matter of law by operation of section 28A read with section 220 of the Income Tax Act. The appellants admittedly failed to pay the penalty within the 45-day period as directed in the adjudication orders, and the payment was eventually made after nearly nine years, only pursuant to the order of this Court dated 24.04.2023. It is a settled principle that statutory dues not paid within the prescribed time attract statutory interest, irrespective of whether such interest was specifically mentioned in the original order or not. All that is required is an enabling provision to demand interest. Once such a provision is available, the liability to pay interest becomes axiomatic upon the expiry of the period provided for payment of the penalty. As stated earlier, the enabling provision to recover interest was already in vogue when the adjudication order was passed. Accordingly, the appellants are liable to pay interest at 12% per annum on the unpaid penalty amounts for the period of delay. Therefore, the contentions of the appellants that interest cannot be levied retrospectively is misplaced, as is their reliance on the judgments of this court – since not only are the facts different, but also are the statutory provisions involved. In fact, in *J.K. Synthetics Ltd*, the issue was the interpretation of the provisions of the Rajasthan Sales Tax Act, 1954, specifically whether interest was to be calculated from the date of filing the return or from the date of assessment. The Constitutional Bench of this court held that the liability to pay interest would accrue

only after the tax liability was crystallized upon assessment. In the present case, interest is demanded after adjudication – not from the date of the violation – and therefore, the principle laid down in *J.K. Synthetics* is not applicable.

11. Now, the next question is whether interest on the unpaid penalty should accrue from the expiry of the 45-day period stipulated in the Adjudicating Officer's orders dated 28.08.2014, or from the expiry of 30 days following the SEBI's notices dated 13.05.2022.

11.1. The appellants contend that interest, if payable, should accrue only from the date of the demand notices issued on 13.05.2022, rather than from the date of the adjudication orders. Conversely, the respondent argues that interest is due from the expiry of the 45-day period following the adjudicating orders dated 28.08.2014 as those orders constituted enforceable demands.

11.2. As seen above, section 220(1) of the Income Tax Act, 1961 does not independently envisage the issuance of a demand notice. Instead, it refers to the notice served under section 156, requiring payment within 30 days. Failure to comply attracts interest at 12% per annum under section 220(2), calculated from the expiry of the 30-day period. However, since section 156 is not incorporated into section 28A of the SEBI Act, the expression 'notice of demand' for recovery under the SEBI Act must be understood to include adjudication orders issued under Chapter VIA of the SEBI Act. We have already held that the adjudication officer was well within his rights to fix a period for payment. One of the purposes of specifying such a period in the adjudication order is to determine the period from which payment of interest is to be calculated, if the assessee commits a default.

11.3. In the present case, the Adjudicating Officer's order itself constituted a clear and enforceable demand for payment of penalties within 45 days. This order attained finality following the appellants' unsuccessful challenges before the SAT and this Court, thereby crystallizing the liability. Once the adjudication order has attained finality, the obligation to pay the penalty stands revived from the date of adjudication. The pendency of any challenge after the period specified for payment only postpones or reduces the liability to pay interest; and the interim order granted if any, would also not absolve the appellants

from the obligation to pay interest. [*See: Calcutta Jute Manufacturing Co. and another v. Commercial Tax Officer*[28]]. Under section 220(1) read with section 28A of the SEBI Act, interest becomes payable upon failure to meet the demand within the prescribed time. The appellants' failure to comply within the specified time rendered them 'defaulters' under Section 220(4) of the Income Tax Act, justifying the accrual of interest from the expiry of the 45-day compliance period. As already mentioned, since section 156 is not incorporated into the SEBI Act, the original order must be treated as the statutory trigger for the purpose of calculation of interest. Moreover, the demand notice dated 13.05.2022 merely reiterated the earlier demand and did not create a fresh liability. To hold otherwise would undermine the effectiveness of the original compliance period and incentivize delay.

11.4. In *Dushyant Dalal (supra)*, this court affirmed that the Interest Act, 1978 empowers tribunals, including SAT, to award interest from the date the cause of action arose until the initiation of recovery proceedings based on equitable considerations. The following passage of the said decision is relevant:

> *"32. We agree with the aforesaid statement of the law. It is clear, therefore, that the Interest Act of 1978 would enable Tribunals such as SAT to award interest from the date on which the cause of action arose till the date of commencement of proceedings for recovery of such interest in equity. The present is a case where interest would be payable in equity for the reason that all penalties collected by SEBI would be credited to the Consolidated Fund under Section 15-JA of the SEBI Act. There is no greater equity than such money being used for public purposes. Deprivation of the use of such money would, therefore, sound in equity. This being the case, it is clear that, despite the fact that Section 28-A belongs to the realm of procedural law and would ordinarily be retrospective, when it seeks to levy interest, which belongs to the realm of substantive law, the Tribunal is correct in stating that*

28 1997 106 (STC) 433

> *such interest would be chargeable under Section 28-A read with Section 220(2) of the Income Tax Act only prospectively.*[29] *However, since it has not taken into account the Interest Act, 1978 at all, we set aside the Tribunal's findings that no interest could be charged from the date on which penalty became due. Civil Appeals Nos. 10410-12 of 2017 are allowed insofar as the penalty cases are concerned."*

The liability of interest is fortified after the enactment of section 28A, which is a substantive law. Furthermore, Explanation 4 to section 28A inserted on 21.02.2019, explicitly states that interest under section 220 shall accrue from the date the amount became payable. We have already held that the liability to pay penalty stood triggered from the date of adjudication and that no separate notice of demand is necessary. Further, in the present case, as the adjudication order itself specified the time for payment of the penalty, the liability to pay interest would commence upon the expiry of the period mentioned in the assessment notice. An "explanation" in any law serves to clarify, restrict, or expand the scope of the main provision. The nature and effect of an Explanation must be understood in the context of the object of the Act, and in particular, the provision to which the Explanation is inserted. The Explanation introduced in 2019, in our view, did not bring about any substantive change but merely clarified the existing legal position. We also foresee another situation: where the original adjudication order under the SEBI Act does not specify any time for payment, the period of 30 days under Section 220 of the Income Tax Act should be deemed to apply for making the payment, failure of which would trigger the liability to pay interest. Thus, the adjudication officer's order which specified payment within 45 days, effectively operates as a notice of demand, rendering any separate demand notice redundant.

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29 The same 2014 Amendment which introduced Section 28-A, with effect from 18-7-2013, also introduced Section 15-JB retrospectively, with effect from 20-4-2007. This is a positive indication that Section 28-A was intended only to have prospective application. It must be clarified, however, that interest is chargeable only with effect from 25-8-2014, as Section 220 was not referred to, while enacting Section 28-A, in any of the three Ordinances preceding the Amendment Act of 2014.

11.5. At this juncture, it is to be pointed out that interest on unpaid penalties is compensatory in nature, not penal. Its primary purpose is not to punish the defaulter, but to make good the financial loss occurred to the Revenue on account of delay in receiving the payment that was lawfully due. When a penalty is imposed, a specific period is granted for compliance. If the payment is not made within that stipulated period, the delay deprives the Revenue of the timely use of funds that rightfully belong to the public exchequer. Therefore, the accrual of interest upon default is automatic and flows from the nature of the liability – serving to compensate for the time value of money and the disruption caused by delayed payment, rather than to impose an additional punitive burden. In this regard, it will be useful to refer to the following decisions:

(i) *Bhai Jaspal Singh v. CCT*[30]:

> *"36. Interest is compensatory in character and is imposed on an assessee who has withheld payment of any tax as and when it is due and payable. The interest is levied on the actual amount of tax withheld and the extent of delay in paying the tax on the due date. Essentially, it is compensatory and different from penalty which is penal in character (see Pratibha Processors v. Union of India [(1996) 11 SCC 101: AIR 1997 SC 138]).*

(ii) *Commissioner of Income-Tax v. Dhanalakshmy Weaving Works*[31]**:**

> *"8…*
>
> *"Interest" is a consideration paid either for use of money or for forbearance in demanding it after it has fallen due. It is a compensation allowed by law or fixed by parties or permitted by custom or usage for use of money belonging to another*

30 (2011) 1 SCC 39 : (2010) 35 VST 456

31 (2000) 245 ITR 13 : 1999 SCC OnLine Ker 597 : (2000) 160 CTR 374

or for the delay in paying the money after it has become payable. It can be said to be the cost of using credit or funds of another. The liability for payment of interest at the rate stipulated accrues automatically on a failure to pay the amount of tax by the due date. This is so because such a provision is not a claim for any tax, but is a procedural matter providing machinery for recovery of tax which is compensatory in nature (see Karimtharuvi Tea Estate Ltd. v. State of Kerala, [1966] 60 ITR 262 (SC); CST v. Qureshi Crucible Centre, [1993] 89 STC 467 (SC) and Prahlad Rai v. STO, [1992] 84 STC 375 (SC)). Liability to pay interest arises by operation of law, being automatic. Looking at the nature of levy, it is clear that it is compensatory in character and not in the nature of penalty. It is seen that there are several provisions where the Legislature has made a distinction between interest payable and penalty imposable. The ultimate liability for tax being not there does not dilute the requirements for the non-compliance of which interest is levied under section 201(1A).

9. *Judged in that background, the levy of interest is justified and the Tribunal was not justified in deleting it. The answer to the reframed question is in the negative, in favour of the Revenue and against the assessee. Reference application is accordingly answered."*

Thus, we hold that interest must accrue from the expiry of the 45-day compliance period following the adjudication orders dated 28.08.2014. The subsequent demand notices are nothing but reminders and are not the first demand notices before the accrual of liability for interest. Accepting the appellants' position would encourage defaulters to delay payment indefinitely under the guise of awaiting formal orders, thereby undermining the efficacy of the enforcement framework and resulting in a loss to the revenue.

11.6. In view thereof, the authorities relied upon by the appellants lack persuasive value, and we find no infirmity or illegality in the order passed by the Tribunal that would warrant our interference.

CONCLUSION

11.7. Accordingly, all these appeals stand dismissed. The appellants are directed to pay interest calculated by the respondent, within a period of 15 days from the date of receipt of a copy of this judgment. No costs. Consequently, connected miscellaneous application(s), if any, shall stand closed.

Result of the case: Appeals dismissed.

†*Headnotes prepared by:* Divya Pandey

[2025] 8 S.C.R. 174 : 2025 INSC 849

M/s Torino Laboratories Pvt. Ltd.
v.
Union of India & Ors.

(Civil Appeal No. 9540 of 2018)

15 July 2025

[K.V. Viswanathan* and Joymalya Bagchi, JJ.]

Issue for Consideration

Whether the EPF Authorities were justified in treating the appellant and the Respondent No.3 as one unit for the purpose of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952.

Headnotes†

Employees' Provident Funds and Miscellaneous Provisions Act, 1952 – s.2A – Establishment to include all departments and branches – Appellant's unit manufactured tablets and syrups, while the Respondent No.3 manufactured injections and capsules – Assistant Provident Fund Commissioner (APFC) held that the appellant was part and parcel of the Respondent No.3 for the purpose of applicability of the EPF Act on account of having various common factors *inter alia* unity of management with commonality of some Directors belonging to the same HUF; unity of finance; both the units dealing with products of pharmaceutical industry, etc. – Order upheld by the Appellate Tribunal and High Court:

Held: Appellant and respondent No.3 were engaged in the same industry i.e. pharmaceutical; they carried on business in premises built on contiguous plots of land; shared common telephone and facsimile numbers; had common website and e-mail IDs; their Registered Office/Head Office and administrative office were the same; both employed common security to guard the premises; there was unity of management inasmuch as while the two brothers were Directors of respondent No.3; one of them was also the Director of the appellant while another brother and wife of one the brothers were Directors in the appellant Company – There was also unity of finance inasmuch as the HUF of one the brothers and his family members funded both the companies – These findings by the APFC cumulatively establish beyond doubt that the two entities were

* Author

rightly treated as common for the purpose of the EPF Act – Plea of the appellant that since the appellant and respondent No.3 are two different juristic entities thus, s.2A cannot be applied and also, the theory of clubbing cannot be invoked is rejected – Authorities justified in seeking remittance of the dues from September 1995 – No merit in the appeal – Theory of clubbing. [Paras 12, 31, 34-37]

Theory of clubbing – Determination of unity of ownership; unity of management and control; features demonstrating the presence of functional integrality – Tests for:

Held: No absolute and invariable test can be laid down for all cases – The real purpose of the test is to find out the true relation between the Parts, Branches and Units – If in their true relation they constitute one integrated whole, it could be said that establishment is one and if not, they are to be treated as separate units – Each case has to be decided on its own peculiar facts, with regard to the scheme and object of the statute under consideration and in the context of the claim – In a given case, unity of ownership, management and control may be the important test, while in certain other cases Functional Integrality or general unity may be the determinative consideration – In some instances, unity of employment could be the most vital test – The employer/management's own conduct in mixing up or not mixing up the capital, staff and management could in a given case be a significant pointer – Mere separate registration under the different statutes cannot be a basis to claim that the units are separate – Similarly, maintenance of separate accounts and independent financial statement is also not conclusive – Onus lies on the employer/management to lead necessary evidence to bring home their contention – Employees' Provident Funds and Miscellaneous Provisions Act, 1952 – s.2A. [Para 34]

Employees' Provident Funds and Miscellaneous Provisions Act, 1952 – s.2A – Establishment to include all departments and branches – Plea of the appellant that since the appellant and respondent No.3 are two different juristic entities thus, s.2A cannot be applied and also, the theory of clubbing cannot be invoked:

Held: Rejected – While s.2A sets out that the establishment will include all departments and branches it does not deal with a scenario as to the tests for determining whether two juristic entities are set up as an artificial device and subterfuge to sidestep the provisions of the Act – Artificial devices, subterfuges and facades are commonly

resorted to, to create a smokescreen of separate entities for a variety of purposes – Courts faced with such a scenario have a duty to lift the veil and see behind applying the well-established tests to determine whether the entities are really separate entities or are they really a single entity – Hence, the contention that s.2A cannot be applied if ostensibly two separately registered entities under the Companies Act are involved is rejected, especially when the Court is interpreting a beneficial legislation like the EPF Act. [Paras 12, 31]

Employees' Provident Funds and Miscellaneous Provisions Act, 1952 – s.16(1)(d) – Benefit of infancy protection for the period 26.09.1995 to 22.09.1997 u/s.16(1)(d) as it then stood, if to be given:

Held: No – In the present case, the claim for infancy protection under the erstwhile s.16(1)(d) would not arise in view of the finding of clubbing – Being an integrated unit of respondent no.3 since 1995, no separate infancy protection will enure to the benefit of appellant. [Para 36]

Case Law Cited

Management of Pratap Press, New Delhi v. Secretary, Delhi Press Workers' Union, Delhi and Another, **AIR 1960 SC 1213;** *Regional Provident Fund Commissioner and Another v. Dharamsi Morarji Chemical Co. Ltd.* **(1998) 2 SCC 446;** *Regional Provident Fund Commr. v. Raj's Continental Exports (P) Ltd.* **[2007] 3 SCR 636 : (2007) 4 SCC 239;** *Associated Cement Companies Limited, Chaibassa Cement Works, Jhinkpani v. Workmen* **[1960] 1 SCR 703 : AIR 1960 SC 56;** *L.N. Gadodia & Sons v. Regional Provident Fund Commissioner* **[2011] 11 SCR 5008 : (2011) 13 SCC 517;** *Shree Vishal Printers Ltd. v. Provident Fund Commissioner* **[2019] 12 SCR 146 : (2019) 9 SCC 508;** *Regional Provident Fund Commissioner v. Naraini Udyog* **[1996] Supp. 3 SCR 202 : (1996) 5 SCC 522;** *Sayaji Mills Ltd. v. Regional Provident Fund Commissioner* **[1985] 2 SCR 516 : (1984) Supp. SCC 610;** *The Honorary Secretary, South India Millowners' Association and Others v. The Secretary, Coimbatore Distruict Textile Workers' Union* **[1962] Supp. 2 SCR 926;** *Management of Wenger and Co. v. Their Workmen* **[1963] Supp. 2 SCR 862;** *Rajasthan Prem Krishan Goods Transport Co. v. Regional Provident Fund Commissioner, New Delhi and Others*, **[1996] Supp. 3 SCR 1 : (1996) 9 SCC 454;** *Sumangali v. Regional Director, Employees' State Insurance Corporation* **[2008] 10 SCR 1129 : (2008) 9 SCC 106 – referred to.**

List of Acts

Employees' Provident Funds and Miscellaneous Provisions Act, 1952.

List of Keywords

Establishment to include all departments and branches; One unit for the purpose of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952; Two entities treated as common for the purpose of the EPF Act; Common factors; Both units dealing with products of Pharmaceutical industry; Both units engaged in the same industry; Part and parcel; Tablets and syrups, Injections and capsules; Assistant Provident Fund Commissioner (APFC); Business in premises built on contiguous plots of land; Common telephone and facsimile numbers; Common website and e-mail IDs; Same registered Office/Head Office and administrative office; Common security to guard the premises; Unity of ownership; Unity of finance; Unity of management; Two different juristic entities; Theory of clubbing invoked; Remittance of the dues; Functional integrality; General unity; Unity of employment; Mixing up/not mixing up the capital, staff and management; Separate registration under different statutes; Separate units; Maintenance of separate accounts; Independent financial statement; Artificial devices, subterfuges and facades; Duty to lift the veil; Infancy protection; Integrated unit; Beneficial legislation; Unity of labour; Transferability of employees.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 9540 of 2018

From the Judgment and Order dated 22.04.2016 of the High Court of Madhya Pradesh at Indore in WP No. 2503 of 2011

Appearances for Parties

Advs. for the Appellant:
Gagan Gupta, Sr. Adv., Ananta Prasad Mishra.

Advs. for the Respondents:
Brijender Chahar, A.S.G., Vishnu Jain, Ms. Mani Munjal, Shantanu Sharma, Aaditya Dixit, Amrish Kumar, Raj Bahadur Yadav, Siddharth, Prateek Goyal, Harshit Manwani, Ujjwal Singh.

Judgment / Order of the Supreme Court

Judgment

K.V. Viswanathan, J.

1. The present appeal arises out of a judgment and order of the Division Bench of the High Court of Madhya Pradesh, Bench at Indore dated 22.04.2016 in Writ Petition No. 2503 of 2011. By the said judgment and order, the High Court dismissed the writ petition under Article 227 of the Constitution of India filed by the appellant-herein and upheld the order of the Employees' Provident Fund Appellate Tribunal, (for short 'the Appellate Tribunal') New Delhi dated 24.01.2011 which order had, in turn, upheld the order dated 17.02.2006 passed by the Assistant Provident Fund Commissioner, (for short 'APFC') Indore. The APFC had held that the appellant was part and parcel of M/s Vindas Chemical Industries Private Limited (hereinafter referred to as 'Vindas') – the third respondent herein for the purpose of applicability of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (for short the 'EPF Act') with effect from September, 1995. Appropriate consequential directions to remit the dues were also passed. Aggrieved by the judgment and order of the High Court, the appellant has preferred this appeal, by way of special leave.

BRIEF FACTS: -

2. Indisputably, on 22.11.1988, Dr. Darshan Kataria and his brother Niranjan Kataria set up the respondent No.3-Vindas for manufacturing injections and capsules of certain specified drugs.

   2.1 The factory was situated at Plot No.65, Sector-1, Pithampur, District Dhar, Madhya Pradesh. Vindas was incorporated with the Registrar of Companies, Madhya Pradesh.

   2.2 Subsequently, on 05.09.1990, Shri Vasudev Kataria and Smt. Rajni Kataria, wife of Darshan Kataria incorporated the appellant-Company with the Registrar of Companies in the State of Maharashtra. Later it transpires from the record that Mr. Darshan Kataria was also a director in the appellant-Company.

2.3 However, the factory of the appellant was set up and business of production of tablets and later liquid syrups was set up at Plot No. 65/1, Sector-1, Pithampur, Dhar, Madhya Pradesh. It is also undisputed that Vindas was covered under the EPF Act.

2.4 Inspections were carried out at the appellant's premises on 17/20.01.2005 and a communication was sent on 24.01.2005 to deposit the provident fund contribution and administrative charges w.e.f. 01.04.2004, though it was mentioned that the date was liable to change and a final decision would be taken after the inspection of previous records.

2.5 The appellant, by its reply of 04.02.2005, opposed the applicability of the EPF Act on the ground that the workers/ employees did not exceed the prescribed number. It must also be pointed out that in the communication of 20.01.2005, the issue that was highlighted by the Department was about the number of employees exceeding twenty.

2.6 Another inspection was carried out on 28.03.2005 and in the inspection note it was categorically stated that the establishment of the appellant was situated within the premises of Vindas-the third respondent and common security was employed for both the establishments and that the Managing Director of Vindas was Dr. Darshan Kataria.

2.7 Thereafter, on 29.04.2005, a summons to appear in person under Section 7A of the EPF Act was issued to the appellant. Section 7A empowers the authorities to conduct such enquiry as they may deem necessary and pass orders with regard to disputes about coverage of establishments under the EPF Act. The appellant was asked to produce all the attested copies of the relevant records to determine the amount due for the period April, 2004 to March, 2005.

2.8 The appellant, though by its reply dated 03.05.2005, denied any liability however, stated that they were voluntarily accepting coverage of the unit and will start contributing from 01.04.2005. Hence, this appeal really concerns the period prior to 01.04.2005 and the liability thereon. The appellant also responded to the summons by its letters of 13.06.2005, 10.10.2005 and 17.10.2005.

2.9 What is significant is in the submission of 10.10.2005, the appellant adverted to the proceedings at the hearing on 23.09.2005 wherein they were informed that the authorities are evaluating the possibility of clubbing the unit of the appellant with Vindas-respondent No.3 and that the appellant was provided with the inspection reports of the unit of Vindas-Respondent No.3. The appellant also in the submission of 10.10.2005 dealt with in detail as to how clubbing with Vindas-Respondent No.3 was not warranted and how the appellant was an independent and separate entity.

2.10 It is also not in dispute that the Inspection Report of 28.03.2005 along with the Inspection Report of 17.01.2005 and 20.01.2005 have been furnished to the appellant on 10.10.2005, as set out in the written submissions filed before us.

2.11 When matters stood thus, it appears that there was a further report of 10.11.2005 where again clubbing of the two units, namely, of the appellant and of Vindas was adverted to by the Department to which the appellant filed its submission on 20.12.2005 disputing the said position.

2.12 On 17.02.2006, the APFC passed an order rejecting the contentions of the appellant, including the contention on the *locus standi* of the Trade Union which had raised the issue of the two units being the same by holding that the issue of *locus standi* was immaterial if otherwise a case for clubbing was established. The APFC found the following common factors:-

a) that both the units dealt with products of pharmaceutical industry;

b) that both worked from the same premises with the common entry and without any visible demarcation with addresses of the appellant being Plot No. 65/1, Sector-1, Pithampur and of Vindas – Respondent No.3 being Plot No. 65, Sector-1, Pithampur, District Dhar;

c) that the telephone nos. of both the appellant and Vindas-respondent No.3 were common and the order set out the actual telephone no. That the entire factory was guarded by the same security personnel, namely, M/s Benaras Security Services;

d) that both the companies maintained their common Administrative Office at 102, Prabhudeep Apartment, 11 Indrapuri Colony, Indore and the Administrative Office had common telephone nos. and facsimile no.;

e) That the two companies shared the same website and same e-mail IDs;

f) that the Registered Office of the appellant at 210, Adamji Building, 413, Narsi Natha Street, Masjid Bunder Road, Mumbai was the Head Office of Respondent No.3-Vindas with same telephone no. and facsimile no.

g) That there was commonality of some Directors and that too belonging to the same Hindu Undivided Family.;

h) That the source of finance was the same Hindu Undivided Family in the name of Director, Creditor or Shareholder;

2.13 In view of this, the APFC found that there was Unity of Purpose and Functional Integrality as there was common factory, common administration/Head Office/Registered Office, common e-mail ID/website and common source of finance. The APFC disregarded the aspect of separate registration with the Registrar of Companies and different Government Departments and held that the two units are one and the same for the purpose of the EPF Act.

2.14 The appellant filed an appeal under Section 7-I of the EPF Act before the Appellate Tribunal. According to the appellant, after the Appellate Tribunal adjourned the hearing to 09.12.2010, the files were not traceable and no further notice of hearing after 09.12.2010 was received. In spite of that, on 24.01.2011, the Appellate Tribunal dismissed the appeal.

2.15 A Writ Petition being W.P. No. 2503 of 2011 filed before the High Court of Madhya Pradesh, Indore Bench was unsuccessful. That is how the case presents itself before us.

CONTENTIONS OF LEARNED COUNSEL: -

3. We have heard Mr. Gagan Gupta, learned Senior Advocate, for the appellant and Mr. Siddharth, learned counsel for the APFC-Respondent No. 2 Authorities and Mr. Brijender Chahar, learned Additional Solicitor General for the Union of India.

4. Mr. Gagan Gupta, learned Senior Advocate, contends that initially the Authorities proceeded on the basis of the numerical strength of the employees being in excess of 20 at the appellant's unit and the aspect of clubbing was introduced as an afterthought. That notice of clubbing ought to have been issued to Vindas-respondent No.3 instead of issuing to the appellant; that Section 2A of the EPF Act cannot apply to two juristic entities; that both the appellant and the respondent No.3-Vindas are separately registered under the Drugs and Cosmetics Act, 1940, the Factories Act, 1948 and the two entities hold separate account numbers/registrations under the Central Sales Tax, Central Excise, Service Tax, ESI and also hold separate PAN and Corporate Identification Nos.

5. Learned Senior Advocate contends that the electricity and water connections for both the establishments are separate and that the Municipal Corporation Property Tax is being separately levied. Learned Senior Advocate further contends that the summon issued was for the period April, 2004 to March, 2005. However, the APFC, by its order, has directed compliance from September, 1995. Learned Senior Advocate contents that admittedly there was no interchange of employees. Learned Senior Advocate relied on the award of the Labour Court dated 21.07.2010 where the stand of the employees of the appellant that they should be permitted to work at Respondent No.3-Vindas was rejected. Learned Senior Advocate contended that there was no functional integrality or interdependence between the two establishments and that while the appellant manufactures tablets and syrup, respondent No.3-Vindas manufactures injections and capsules. Without prejudice, learned Senior Advocate contends that in the event of the submissions being rejected, the benefit of infancy protection be given for the period 26.09.1995 to 22.09.1997 under Section 16(1)(d) of the EPF Act as it then stood. Learned Senior Advocate relied on the judgments of this Court in ***Management of Pratap Press, New Delhi*** vs. ***Secretary, Delhi Press Workers' Union, Delhi and Another***, AIR1960 SC 1213, ***Regional Provident Fund Commissioner and Another*** vs. ***Dharamsi Morarji Chemical Co. Ltd.,*** (1998) 2 SCC 446 and ***Regional Provident Fund Commr.*** vs. ***Raj's Continental Exports (P) Ltd***, (2007) 4 SCC 239 in support of his submissions.

6. Mr. Siddharth, learned counsel for the EPF Authorities countered the submissions by contending that the question as to what constitutes an establishment is a mixed question of fact and law which ought to

be answered in the context of the facts of the given case, keeping in mind the object of the statute. The learned counsel contended that the appellant and Vindas-Respondent No.3 constituted a common establishment for the purpose of the EPF Act and that the findings of the APFC on the aspect of the two entities being engaged in the pharmaceutical business, carrying on the business in the same factory premises by sharing the common telephone/facsimile nos., same website and e-mail ID called for no interference. According to the learned counsel the unity in management and unity in finance and the existence of common administrative/Head Office/Registered Office also pointed to the functional integrality. Learned counsel contended that the burden to establish that there was no unity was on the appellant which the appellant failed to discharge; that since the appellant and respondent No.3 would be collectively assessed but since the liability will be only for the respective employees of the units there was no need to issue separate summons to Vindas-Respondent No.3; that the order of the Labour Court cannot bind the authorities under the EPF Act as the rights under the two Acts are different and that the Labour Court when it decided that there was no unity of employment did not have occasion to deal with the other aspects dealt with by the APFC. Learned counsel refuted the arguments of the appellant that they were not heard by the Tribunal since no document was placed to establish the fact that no notice was issued to the appellant by the Tribunal and that, in any event, the said argument was not raised before the High Court. Learned counsel relied on the judgments of this Court in ***Associated Cement Companies Limited, Chaibassa Cement Works, Jhinkpani*** vs. ***Workmen***, AIR 1960 SC 56, ***L.N. Gadodia & Sons*** vs. ***Regional Provident Fund Commissioner***, (2011) 13 SCC 517, ***Shree Vishal Printers Ltd.*** vs. ***Provident Fund Commissioner***, (2019) 9 SCC 508 and ***Regional Provident Fund Commissioner*** vs. ***Naraini Udyog***, (1996) 5 SCC 522 to make good his submissions.

7. We have considered the submissions of the respective parties and carefully perused the records of the case.

QUESTION FOR CONSIDERATION: -

8. The question that arises for consideration is whether the EPF Authorities were justified in treating the appellant and the Vindas-Respondent No. 3 as one unit for the purpose of the EPF Act?

CERTAIN PRELIMINARY ASPECTS: -

9. Before we deal with the main issue, we would, at the outset, dispose of certain preliminary points raised for consideration. The aspect of violation of natural justice before the Tribunal was not argued before the High Court. In any event, we are considering the matter in detail on merits here and, as such, that aspect need not detain us any further. The contention based on the award of the Labour Court dated 21.07.2010 also does not carry the case of the appellant any further. First of all, the APFC, by its order of 17.02.2006, elaborately considered the matter applying the various tests and concluded that the two units are the same for the purpose of the EPF Act. The issue before the Labour Court was about the entitlement of the workers of the appellant to claim employment in Vindas-respondent No.3 and while answering that reference the Labour Court held that there was no clear evidence regarding the aspect of the workers of the appellant having worked in the unit of respondent No.3-Vindas. None of the other indicia for clubbing referred to by the APFC were considered relevant. In any case, in view of the multiplicity of factors adverted to by the APFC, the award has no bearing for the determination of the issue.

ANALYSIS AND REASONS: -

EPF ACT - A BENEFICIAL LEGISLATION

10. The EPF Act is a beneficial legislation intended to provide for the institution of provident funds, pension fund and deposit-linked insurance fund for employees in factories and other establishments. It is a welfare legislation intended to ameliorate the conditions of workmen in factories and other establishments. This Court in ***Sayaji Mills Ltd.*** vs. ***Regional Provident Fund Commissioner***, 1984 Supp. SCC 610 has held that the EPF Act should be construed so as to advance the object with which it is passed and any construction which would facilitate evasion of the provisions of the Act should be avoided.

LAW ON CLUBBING: -

11. The crucial issue that arises for consideration in this case is - whether the authorities were justified in treating the appellant and Vindas-respondent No.3 as one unit for the purpose of the EPF Act and

were the correct tests to determine the same applied? Section 2-A of the EPF Act reads as under:-

> "**2A. Establishment to include all departments and branches**.—For the removal of doubts, it is hereby declared that where an establishment consists of different departments or has branches, whether situate in the same place or in different places, all such departments or branches shall be treated as parts of the same establishment."

12. The argument of the learned Senior Counsel for the appellant that since the appellant and Vindas-respondent No.3 are two different juristic entities and that would not be covered within the sweep of Section 2A is only stated to be rejected. While Section 2A sets out that the establishment will include all departments and branches it does not deal with a scenario as to the tests for determining whether two juristic entities are set up as an artificial device and subterfuge to sidestep the provisions of the Act.

13. The question in this case has to be answered by applying the well-established theories to determine what would constitute unity of ownership or unity of management and control and the features that will demonstrate the presence of functional integrality. This issue is no longer *res integra* and has been settled by a long line of judgments of this Court.

14. The earliest case where this issue was discussed was in ***Associated Cement Companies Ltd. (supra)*** where this Court had to examine the question whether the lay off of the workers in certain sections of the Chaibasa Cement Works due to a strike on the part of the workmen at the Rajanka limestone quarry was justified under Section 25-E (iii) of the Industrial Disputes Act, 1947. Section 25-E (iii) of the I.D. Act stated that no compensation was to be paid to workmen who have been laid off due to a strike or slowing-down of production on the part of workmen in another part of establishment. In the process of examining the said question, this Court held as under:-

> "11. The Act not having prescribed any specific tests for determining what is 'one establishment', we must fall back on such considerations as in the ordinary industrial or business sense determine the unity of an industrial establishment, having regard no doubt to the scheme and

object of the Act and other relevant provisions of the Mines Act, 1952, or the Factories Act, 1948. What then is 'one establishment' in the ordinary industrial or business sense? The question of unity or oneness presents difficulties when the industrial establishment consists of parts, units, departments, branches etc. If it is strictly unitary in the sense of having one location and one unit only, there is little difficulty in saying that it is one establishment. Where, however, the industrial undertaking has parts, branches, departments, units etc. with different locations, near or distant, the question arises what tests should be applied for determining what constitutes 'one establishment'. Several tests were referred to in the course of arguments before us, such as, geographical proximity, unity of ownership, management and control, unity of employment and conditions of service, functional integrality, general unity of purpose etc. To most of these we have referred while summarising the evidence of Mr Dongray and the findings of the Tribunal thereon. It is, perhaps, impossible to lay down any one test as an absolute and invariable test for all cases. The real purpose of these tests is to find out the true relation between the parts, branches, units etc. If in their true relation they constitute one integrated whole, we say that the establishment is one; if on the contrary they do not constitute one integrated whole, each unit is then a separate unit. How the relation between the units will be judged must depend on the facts proved, having regard to the scheme and object of the statute which gives the right of unemployment compensation and also prescribes disqualification therefor. Thus, in one case the unity of ownership, management and control may be the important test; in another case functional integrality or general unity may be the important test; and in still another case, the important test may be the unity of employment. Indeed, in a large number of cases several tests may fall for consideration at the same time. The difficulty of applying these tests arises because of the complexities of modern industrial organisation; many enterprises may have functional integrality between factories which are separately owned; some may be integrated in part with

> units or factories having the same ownership and in part with factories or plants which are independently owned. In the midst of all these complexities it may be difficult to discover the real thread of unity. In an American decision (*Donald L. Nordling v. Ford Motor Company, (1950*) 28 AIR, 2d 272 there is an example of an industrial product consisting of 3800 or 4000 parts, about 900 of which came out of one plant; some came from other plants owned by the same Company and still others came from plants independently owned, and a shutdown caused by a strike or other labour dispute at any one of the plants might conceivably cause a closure of the main plant or factory."

15. As was rightly pointed out, it is impossible to lay down any one test as an absolute and invariable test for all cases.

16. ***Associated Cement Companies Ltd. (supra)*** was followed in ***Pratap Press (supra)***. In ***Pratap Press (supra),*** the issue was whether the profit or loss of the Press and the publications "Vir Arjun" and "Daily Pratap" were to be pooled for the question of deciding bonus. While the employer contended that the press and Vir Arjun were one establishment and Daily Pratap was a separate partnership firm, the workers contended that the accounts of all the three should be taken into account or alternatively only the Press should be taken into account. While answering the issue, the Court acknowledged that the question whether the two activities in which the single owner is engaged are one industrial unit or two distinct industrial units was not always easy of solution and no hard and fast rule could be laid down. It was also acknowledged that each case has to be decided on its own peculiar facts. It was held that in some cases, two activities would be so closely linked that no reasonable man would consider them as independent industries. Para 2 of the said judgment is set out hereunder:-

> "2. The question whether the two activities in which the single owner is engaged are one industrial unit or two distinct industrial units is not always easy of solution. No hard and fast rule can be laid down for the decision of the question and each case has to be decided on its own peculiar facts. In some cases the two activities each of which by itself comes within the definition of industry are so closely linked together that no reasonable man would

consider them as independent industries. There may be other cases where the connection between the two activities is not by itself sufficient to justify an answer one way or the other, but the employer's own conduct in mixing up or not mixing up the capital, staff and management may often provide a certain answer".

17. This Court first examined the question whether the Press and the paper were so interdependent that one could not exist without the other. It concluded that there was no functional interdependence between the press unit and the paper unit for the two to be considered one industrial unit. Not stopping there, this Court also held that it was necessary to further consider the conduct of the businessman himself to see whether he mixed up the capital of the two, the profits of the two and the labour force of the two units. This Court also considered whether there was evidence to show as to whether the capital employed in the two units came out from one fund. Para 6 and 7 of ***Pratap Press (supra)*** are extracted hereinbelow:-

> "6. Coming now to the facts of the present appeals we find that the functions of the Press and the Vir Arjun paper cannot be considered to be so interdependent that one cannot exist without the other. That many presses exist without any paper being published by the same owner is common knowledge and is not seriously disputed. Nor is it disputed that an industry of publishing a paper may well exist without the same owner running a press for the printing of the paper. The very fact that Daily Pratap owned by a partnership firm, was being printed at the Pratap Press belonging to Shri Narendra itself shows this very clearly. It cannot therefore be said that there is such functional interdependence between the press unit and the paper unit that the two should reasonably be considered as forming one industrial unit.
>
> 7. Along with this it is necessary to consider the conduct of the businessman himself. Has he mixed up the capital of the two, the profits of the two and the labour force of the two units? These are matters on which the employer is the best person to give evidence from the records of his concerns. No evidence has however been produced

> to show that at any time before the dispute was raised he treated the capital employed in the two units as coming from one single capital fund, nor anything to show that he pooled the profits or that the workmen were treated as belonging to one establishment. It is interesting to note that there is no record showing whether for his own purposes he treated the assets of the two units as forming one composite whole or the assets of two distinct units has been produced. The profit and loss accounts which we find on the record appear to have been prepared sometime in 26-12-1951, — apparently after the reference had been made and the dispute whether these units were one or two, had arisen. No weight can therefore be attached to the fact that in this profit and loss account — both the receipts from the press and the receipts from the Vir Arjun were shown as the income."

Ultimately, this Court concluded that the Press was a standalone unit.

18. ***The Honorary Secretary, South India Millowners' Association and Others*** vs. ***The Secretary, Coimbatore Distruict Textile Workers' Union***, [1962] Supp. 2 SCR 926, was a case that arose in the context of award of bonus to employees. This Court considered the question whether Saroja Mills Ltd. Coimbatore and Thiagaraja Mills, Madurai run by Saroja Mills Ltd. constituted separate units or they were to be treated as one. While the Management contended that the units were separate, the workmen contended to the contrary. Answering the question, this Court while acknowledging that the issue has to be determined in the light of the facts of each case (at page 943) set out the following principles:-

> "The question thus raised for our decision is not always easy to decide. In dealing with the problem, several factors are relevant and it must be remembered that the significance of the several relevant factors would not be the same in each case nor their importance. Unity of ownership and management and control would be relevant factors. So would the general unity of the two concerns; the unity of finance may not be irrelevant and geographical location may also be of some relevance; functional integrality can also be a relevant and important factor in some cases. It is

> also possible that in some cases, the test would be whether one concern forms an integral part of another so that the two together constitute one concern, and in dealing with this question the nexus of integration in the form of some essential dependence of the one on the other may assume relevance. Unity of purpose or design, or even parallel or co-ordinate activity intended to achieve a common object for the purpose of carrying out the business of the one or the other can also assume relevance and importance, vide *Ahmedabad Manufacturing & Calico Printing Co. Ltd.* v. *Their Workmen [1951] 2 LLJ 657*."

19. It will be seen that this Court held that several factors are relevant and the significance and importance of the several relevant factors would not be the same in each case. It was also held that unity of ownership and management and control, general unity of the two concerns; unity of finance; geographical location, functional integrality would all be relevant factors depending on the facts of each case. It was further held that unity of purpose or design or even parallel or coordinate activity intended to achieve a common object for the purpose of carrying out the business of the one or the other would also assume relevance and importance.

20. Specifically repelling the argument of the Management that the test of functional integrality was the only test and absent functional integrality the units will have to be considered separate, this Court in ***South India Millowners' Association (supra)*** held as under: -

> "Mr Sastri, however, contends that functional integrality is a very important test and he went so far as to suggest that if the said test is not satisfied, then the claim that two mills constitute one unit must break down. We are not prepared to accept this argument. In the complex and complicated forms which modern industrial enterprise assumes it would be unreasonable to suggest that any one of the relevant tests is decisive; the importance and significance of the tests would vary according to the facts in each case and so, the question must always be determined bearing in mind all the relevant tests and corelating them to the nature of the enterprise with which the Court is concerned. It would be seen that the test of functional

integrality would be relevant and very significant when the Court is dealing with different kinds of businesses run by the same industrial establishment or employer. Where an employer runs two different kinds of business which are allied to each other, it is pertinent to enquire whether the two lines of business are functionally integrated or are mutually inter-dependent. If they are, that would, no doubt, be a very important factor in favour of the plea that the two lines of business constitute one unit. But the test of functional integrality would not be as important when we are dealing with the case of an employer who runs the same business in two different places. The fact that the test of functional integrality is not and generally cannot be satisfied by two such concerns run by the same employer in the same line, will not necessarily mean that the two concerns do not constitute one unit. Therefore, in our opinion, Mr Sastri is not justified in elevating the test of functional integrality to the position of a decisive test in every case. If the said test is treated as decisive, an industrial establishment which runs different factories in the same line and in the same place may be able to claim that the different factories are different units for the purpose of bonus. Besides, the context in which the plea of the unity of two establishments is raised cannot be ignored. If the context is one of the claim for bonus, then it may be relevant to remember that generally a claim for bonus is allowed to be made by all the employees together when they happen to be the employees employed by the same employer. We have carefully considered the contentions raised by the parties before us and we are unable to come to the conclusion that the finding of the Tribunal that the two mills run by the Saroja Mills Ltd. constitute one unit, is erroneous in law.

In this connection, it would be necessary to refer to some of the decisions to which our attention was drawn. In the case of *Associated Cement Companies Ltd. and their Workmen,* this Court held that on the evidence on record, the limestone quarry run by the employer was another part of the establishment (factory) run by the

same employer within the meaning of Section 25-E(iii) of the Industrial Disputes Act. It would thus be seen that the question with which this Court was concerned was one under Section 25-E(iii) of the Act and it arose in reference to the limestone quarry run by the appellant Company and the cement factory owned and conducted by it which are normally two different businesses. It was in dealing with this problem that this Court referred to several tests which would be relevant, amongst them being the test of functional integrality. In dealing with the question, S.K. Das, J., who spoke for the Court, observed that it is perhaps impossible to lay down any one test as an absolute and invariable test for all cases. The real purpose of these tests is to find out the true relation between the parts, branches, units, etc. If in their true relation they constitute one integrated whole, we say that the establishment is one; if, on the contrary, they do not constitute one integrated whole, each unit is then a separate unit. It was also observed by the Court that in one case, the unity of ownership, management and control may be the important test; in another case, functional integrality or general unity may be an important test; and in still another case, the important test may be the unity of employment. Therefore, it is clear that in applying the test of functional integrality in dealing with the question about the interrelation between the limestone quarry and the factory, this Court has been careful to point out that no test can be treated as decisive and the relevance and importance of all the tests will have to be judged in the light of the facts in each case."

21. In ***Management of Wenger and Co.*** vs. ***Their Workmen***, (1963) Supp. 2 SCR 862, one of the questions considered was whether industrial establishments owned by the same management constituted separate units or they constituted one establishment. In the said case, the question was whether the wine shops and the restaurants form part of one establishment or not. For the Management, in that case, it was contended that absent functional integrality, it has to be necessarily concluded that the units are separate in all cases. Rejecting this argument, this Court held as under:-

> "The question as to whether industrial establishments owned by the same managements constitute separate units or one establishment has been considered by this Court on several occasions. Several factors are relevant in deciding this question. But it is important to bear in mind that the significance or importance of these relevant factors would not be the same in each case; whether or not the two units constitute one establishment or are really two separate and independent units, must be decided on the facts of each case. Mr Pathak contends that the Tribunal was in error in holding that the restaurants cannot exist without the wine shops and that there is functional integrality between them. It may be conceded that the observation of the Tribunal that there is functional integrality between a restaurant and a wine shop and that the restaurants cannot exist without wine shops is not strictly accurate or correct. But the test of functional integrality or the test whether one unit can exist without the other, though important in some cases, cannot be stressed in every case without having regard to the relevant facts of that case, and so, we are not prepared to accede to the argument that the absence of functional integrality and the fact that the two units can exist one without the other necessarily show that where they exist they are necessarily separate units and do not amount to one establishment. It is hardly necessary to deal with this point elaborately because this Court had occasion to examine this problem in several decisions in the past, vide *Associated Cement Companies Ltd.* v. *Their Workmen; Pratap Press, etc.* v. *Their Workmen*, *Pakshiraja Studios* v. *Its Workmen; South India Millowners' Association* v. *Coimbatore District Textile Workers Union; Fine Knitting Co. Ltd.* v. *Industrial Court* and *D.C.M. Chemical Works* v. *Its Workmen."*

22. Hence, it is very clear that while the test of functional integrality, namely, the test whether one unit can exist without the other may be important in some cases, it may not be stressed in every case without having regard to the relevant facts of the case and it is not the correct legal position that absent functional integrality the units have to be necessarily concluded as separate. Thereafter, applying the law to the facts, this Court held as under:-

"Let us then consider the relevant facts in the present dispute. It is common ground that wherever the employer runs a restaurant and a wine shop, the persons interested in the trade are the same partners. The capital supplied to both the units is the same. Prior to 1956, wine shops and restaurants were not conducted separately, but after 1956 when partial prohibition was introduced in New Delhi, wine shops had to be separated because wine cannot be sold in restaurants. But it is significant that the licence for running the wine shop is issued on the strength of the fact that the management was running a wine shop before the introduction of prohibition. In fact, LII licence to run wine shops has been given in many cases to previous restaurants on condition that the wine shops are run separately according to the prohibition rules. It is true that many establishments keep separate accounts and independent balance-sheets for wine shops and restaurants; but that clearly is not decisive because it may be that the establishments want to determine from stage to stage which line of business is yielding more profit. Ultimately, the profits and losses are usually pooled, together. Thus, generally stated, there is unity of ownership, unity of finances, unity of management and unity of labour; employees from the restaurant can be transferred to the wine shop and vice versa. Besides, it is significant that in no case has the establishment registered the wine shops and the restaurants separately under Section 5 of the Delhi Shops and Establishments Act, 1954 (7 of 1954). In fact, when Mr Nirula, the Secretary of the Employers' Association, was called upon to register his wine shop separately, he protested and urged that separate registration of the several departments was unnecessary; and that clearly indicated that wine shop was treated by the establishment as one of its departments and nothing more. The failure to register a wine shop as a separate establishment is, in our opinion, not consistent with the employers' case that wine shops are separate and independent units. Having regard to all the facts to which we have just referred, we do not think it would be possible

> to accept Mr Pathak's argument that the Tribunal was in error in holding that the wine shops and restaurants form part of the same industrial establishments."

23. Thus, it will be seen that this Court considered unity of ownership, unity of finance, unity of management and unity of labour and the transferability of employees as relevant indicia.

24. It will be clear from ***South India Millowners' Association (supra), Wengers (supra)*** and ***Pratap (supra)*** that Courts cannot stop with only examining whether the two units are so functionally integrated that one cannot exist without the other and absent functional integrality conclude that the units are separate. In the facts of the present case, it is the case of the appellant that while the appellant's unit manufactures tablets and syrups, the respondent No.3-Vindas manufactures injections and capsules. According to the written submissions, the appellant contends that the establishments have completely different range of products and any movement of man and material between the two of these may cause gross contamination and there is no interdependence of any raw material. On the other hand, the authorities contend that while the manufactured products may be different the industrial activity is common, namely, they are part of the pharmaceutical industry.

25. In ***Rajasthan Prem Krishan Goods Transport Co.*** vs. ***Regional Provident Fund Commissioner***, ***New Delhi and Others***, (1996) 9 SCC 454, the authorities found unity of ownership, management, supervision and control, employment, finance, and general purpose to treat M/s Rajasthan Prem Krishan Goods Transport Co. and M/s Rajasthan Prem Krishan Transport Company as a single establishment for the purpose of the EPF Act. This was on the finding that ten partners were common for both the entities; the place of business, address and telephone numbers were common and the management was also common. It was also found that the trucks plied by the two entities were owned by the partners and were being hired through both the units. This Court endorsed the finding of the authorities and upheld the clubbing of the two units.

26. In ***Regional Provident Fund Commissioner, Jaipur*** vs. ***Naraini Udyog and Others***, (1996) 5 SCC 522, the question was whether two entities M/s Naraini Udyog, Kota and M/s Modern Steels, Kota were to be treated as one for the purpose of the EPF Act. The

authorities found that there was common Head Office, common Branch Office, common telephone for residence and factories. It was found that the submission of the Department that the office of M/s Modern Steels was situated in the premises of M/s Naraini Udyog and accounts of the two units were maintained by the same set of clerks was not controverted by the employer. The contention of the employer was that they have registered the two entities separately under the Factories Act, Sales Tax Act and ESIC Act; that the units were located at a distance of three kilometers apart and had separate central excise nos. and were registered as separate small-scale industries and hence should be treated as separate units. The employer also denied the assertion of the authorities that workers of one unit were working in the other. The authorities considered the aspect of separate registration as a point devoid of merit. With regard to denial of interchange of workers, the authorities held that the aspect was not crucial to the point at issue. On a challenge before the High Court, the Division Bench in the said case held in favour of the employer by holding that since they were registered under the Companies Act as two different individual identities though represented by members of the same family, and that the companies were independent. On a challenge to the said judgment by the authorities, this Court held that the findings of the High Court that due to the separate registration under the Companies Act, they were different individual identities was wholly unjustified. This Court held that there was functional unity and integrality and that the authorities were justified in clubbing the two units.

27. In ***Regional Provident Fund Commissioner and Another*** vs. ***Dharamsi Morarji Chemical Co. Ltd.***, (1998) 2 SCC 446, this Court held in favour of the employer on the finding that there was no evidence of supervisory, financial or managerial control and the only communicating link was that both was owned by the common owner. It was held on facts that that by itself was not sufficient unless there was interconnection between the two units and there was common supervisory, financial or managerial control. This case cannot help the appellant as it turned on its own peculiar facts as was clearly recorded in para five of the said judgment.

28. In ***Raj's Continental Exports (P) Ltd. (supra)***, this Court found for the employer that there was total independence of the two units and upheld the judgment of the learned Single Judge and of the Division

Bench. Here again, the case turned on the peculiar facts of the case and can be of no assistance to the appellant.

29. In ***Sumangali*** vs. ***Regional Director***, ***Employees' State Insurance Corporation***, (2008) 9 SCC 106, this Court found that the authorities had held that the clubbing of the entities was justified and there was functional integrality, unity in management, financial unity, geographical proximity, unity in supervision and control and general unity of purpose. It was also found by the authorities and the High Court that even if each unit had separate registration under different statutes, all units were inter-dependent and were supplementary and complementary to each for the sake of their textile business. This Court upheld the finding of the authorities and the High Court and dismissed the appeal of the employer.

30. In ***L.N. Gadodia and Sons and Another*** vs. ***Regional Provident Fund Commissioner***, (2011) 13 SCC 517, the issue was whether the appellant - L.N. Gadodia and Sons and appellant No.2 in that case M/s Delhi Farming and Construction (P) Ltd. were rightly clubbed by the authorities as one entity for the purpose of the EPF Act? The Registered Office was common; one Director was admittedly common; the authorities found that there was a common Managing Director; that there were loans advanced by the appellant No.2 in that case to appellant No.1; two officers were found to be common, the telephone numbers were common and even the gram nos. "*Gadodia Son*" were common. The Tribunal reversed the finding of the authorities on the ground that the entities were separately registered. On a challenge by the authorities before the High Court, the High Court restored the finding of the Provident Fund Commissioner, after holding that the Tribunal was swayed by the factum of the companies being separate legal entities. On a further challenge to this Court, this Court upheld the finding of the Provident Fund Commissioner. Dealing with the question on the interpretation of Section 2-A of the Act and the submission that only different departments of an establishment can be clubbed but not different establishments altogether, this Court, while rejecting the submission held as under:-

> "23. The petitioners have contended that the two entities are two separate establishments. They have tried to draw support from Section 2-A of the Act which declares that where an establishment consists of different departments

> or has branches whether situated in the same place or in different places, all such departments or branches shall be treated as parts of the same establishment. It was submitted that only different departments or branches of an establishment can be clubbed together, but not different establishments altogether. In this connection, what is to be noted is that, this is an enabling provision in a welfare enactment. The two petitioners may not be different departments of one establishment in the strict sense. However, when we notice that they are run by the same family under a common management with common workforce and with financial integrity, they are expected to be treated as branches of one establishment for the purposes of the Provident Funds Act. The issue is with respect to the application of a welfare enactment and the approach has to be as indicated by this Court in *Sayaji Mills Ltd.* [1984 Supp SCC 610.] The test has to be the one as laid down in *Associated Cement Companies Ltd.* [AIR 1960 SC 56] which has been explained in Pratap Press [AIR 1960 SC 1213]."

31. Hence, it will be clear from this judgment that the contention of the appellant herein that once there are two separate juristic entities, theory of clubbing cannot be invoked is completely untenable and is only stated to be rejected. It is common knowledge that artificial devices, subterfuges and facades are commonly resorted to, to create a smokescreen of separate entities for a variety of purposes. The Court of law faced with such a scenario has a duty to lift the veil and see behind applying the well-established tests to determine whether the entities are really separate entities or are they really a single entity. Myriad fact situations may arise. Hence, the contention that Section 2A cannot be applied if ostensibly two separately registered entities under the Companies Act are involved, has only to be stated to be rejected. This is especially so when the Court is interpreting a beneficial legislation like in the present case, namely, the EPF Act.

32. In ***L.N. Gadodia (supra)***, dealing with the aspect of burden of proof, this Court had the following pertinent observations to make:-

> "24. The Provident Fund Department had issued notice to the petitioners on 11-6-1990 on the basis of their inspection. It had relied upon the 1988 Audit Report of the petitioners.

> The petitioners had full opportunity to explain their position in the inquiry before the Provident Fund Commissioner conducted under Section 7-A of the Provident Funds Act. The petitioners, however, confined themselves only to a facile explanation. If according to them, the management, workforce and financial affairs of the two companies were genuinely independent, they ought to have led the necessary evidence, since they would be in the best know of it. When any fact is especially within the knowledge of any person, the burden of proving that fact lies on him. This rule (which is also embodied in Section 106 of the Evidence Act) expects such a party to produce the best evidence before the authority concerned, failing which the authority cannot be faulted for drawing the necessary inference. In the facts and circumstances of the present case, the Provident Fund Commissioner was therefore justified in drawing the inference of integrity of finance, management and workforce in the two petitioners on the basis of the material on record."

33. The last in the line that we propose to discuss is ***Shree Vishal Printers Limited, Jaipur*** vs. ***Regional Provident Fund Commissioner, Jaipur and Another***, (2019) 9 SCC 508. This Court emphasised that facts would have to be viewed as a whole while each one of the facts by itself may not be conclusive. What is important is to consider cumulatively the facts of the case while applying the different tests laid down (See para 40).

34. A survey of the cases cited hereinabove reveal that it will be impossible to lay down any one test as an absolute and invariable test for all cases. The real purpose of the test is to find out the true relation between the Parts, Branches and Units. If in their true relation they constitute one integrated whole, it could be said that establishment is one and if not, they are to be treated as separate units. Each case has to be decided on its own peculiar facts, regard being had to the scheme and object of the statute under consideration and in the context of the claim. In a given case, unity of ownership, management and control may be the important test, while in certain other cases Functional Integrality or general unity may be the determinative consideration. In some instances, unity of employment could be the most vital test. Several tests may fall for consideration at the same

time since the mandate of the law is that the facts will have to be viewed as a whole. While each aspect may not by itself be conclusive, what is important is to consider cumulatively the facts while applying the different tests. The employer/management's own conduct in mixing up or not mixing up the capital, staff and management could in a given case be a significant pointer. Mere separate registration under the different statutes cannot be a basis to claim that the units are separate. Similarly, maintenance of separate accounts and independent financial statement is also not conclusive. The onus lies on the employer/management to lead necessary evidence to bring home their contention.

35. Applying the above principles to the case, the findings arrived at by the APFC that the appellant and Vindas-respondent No.3 were engaged in the same industry; they carried on business in premises built on contiguous plots of land; that they shared common telephone and facsimile numbers; they shared common website and e-mail IDs; that their Registered Office/Head Office and administrative office were the same; they have employed common security to guard the premises; that there was unity of management inasmuch as while Dr. Darshan Kataria and Niranjan Kataria – the two brothers were Directors of respondent No.3-Vindas; Dr. Darshan Kataria was also the Director of the appellant while the other brother Vasudev Kataria and Mr. Rajni Kumari – wife of Darshan Kataria were Directors in the appellant-Company; that there was unity of finance inasmuch as the Hindu Undivided Family of Darshan Kataria and his family members funded both the companies, cumulatively establish beyond doubt that the two entities were rightly treated as common for the purpose of the EPF Act. If a common man were to be asked as to whether the two units are the same, the answer will be an emphatic yes.

36. The claim for infancy protection under the erstwhile Section 16(1)(d) would also not arise in view of our finding of clubbing. Being an integrated unit of Vindas respondent no. 3 since 1995 no separate infancy protection will enure to the benefit of appellant. Equally, untenable is the argument that the show cause notice originally being issued for coverage from 01.04.2004 the authorities were not justified to direct deposit of dues from September 1995. In fact, as would be clear from the factual narration hereinabove from the submissions of 10.10.2005 of the appellant itself it is clear that the authorities were evaluating the possibility of clubbing. Apart from

this, in the communication of 24.01.2005 it was clearly indicated that the stipulated date of 01.04.2004 was liable to change and a final decision was to be taken after inspection of previous report. The further report of 10.11.2005 furnished to the parties clearly dealt with the aspect of clubbing and appellant also responded to the same by its submission of 20.12.2005. In view of the same, we have no hesitation in rejecting the submissions of the appellant that the authorities were not justified in seeking remittance of the dues from September 1995. Similarly, the contention of the appellant that notice of clubbing ought to have been issued to Vindas-respondent No.3 also lacks merit. As rightly contended for the Authorities since the ultimate contribution was to be levied only for the respective employees of the units and since employees of Vindas-respondent No.3 were already covered for the period in question, there was no necessity for issuing notice to Vindas-respondent No.3.

37. For the reasons stated above, we find no merit in the appeal. The appeal is dismissed. No order as to costs.

Result of the case: Appeal dismissed.

†*Headnotes prepared by:* Divya Pandey

[2025] 8 S.C.R. 202 : 2025 INSC 840

State by Deputy Superintendent of Police
v.
B.T. Ramesh & Anr.

(Civil Appeal No(s). 9463-9465 of 2025)

14 July 2025

[Dipankar Datta* and Manmohan, JJ.]

Issue for Consideration

Issue arose whether the High Court was justified in quashing the criminal proceedings, on the grounds of the chargesheet having been filed more than four years after the date of the alleged incident and lack of sanction; and whether r.214 of the Karnataka Civil Services Rules, 1958 has any application to stifle criminal proceedings for offences punishable under the IPC or the PC Act or any analogous law.

Headnotes†

Code of Criminal Procedure, 1973 – ss.197, 482 – Prevention of Corruption Act, 1988 – Karnataka Civil Services Rules, 1958 – r.214 – Quashing of criminal proceedings – Sanction for prosecution – Application of r.214 to stifle criminal proceedings under IPC or PC Act – Respondent-chief engineer in the government department allegedly abused his official position, thereby causing loss to the public exchequer – FIR lodged for offences punishable under IPC and PC Act – Filing of chargesheet – High Court quashed criminal proceedings against the respondent on the grounds that chargesheet was filed more than four years after the date of the alleged incident and lack of sanction – Correctness:

Held: r.214, by any rule of construction, has no application to suppress pending criminal proceedings in the early stage or for stifling such proceedings after cognisance of offence has been taken for no better reason than that the timelines embodied therein have not been adhered to – High Court quashed the proceedings against the respondent by referring to r.214 which, had no application – Ground that the chargesheet having been filed more than four years after the date of the alleged incident for quashing the proceedings

* Author

unsustainable – As regards, sanction u/s.197, High Court erred in quashing the proceedings *qua* the offences under the PC Act as it did not appreciate that s.19 thereof, prior to its amendment in 2018, applied only to public servants who were in office at the time of taking of cognisance of offence – Thus, since the respondent retired in 2012 and the cognisance of the offence was taken, four years after his retirement, he was not entitled to the protection u/s.19 PC Act – Such protection would have been available to him only if cognisance were taken while he was still in service – High Court erred in quashing the proceedings on the first ground that chargesheet having been filed more than four years after the date of the alleged incident, completely; and on the second ground of lack of sanction, partly –Impugned order, quashing the proceedings for the offences punishable u/s.13(1)(c) &(d) rw s.13(2) PC Act set aside – Proceedings against respondent restored and may continue for such offences. [Paras 16-25]

Karnataka Civil Services Rules, 1958 – r.214 – Withholding or withdrawing pension for misconduct or negligence – Scope of r.214 – Explained. [Paras 16-17]

Case Law Cited

State of Punjab v. Kailash Nath **[1988] Supp. 3 SCR 911 : (1989) 1 SCC 321;** *A. Srinivasulu v. State of T.N.* **[2023] 10 SCR 11 : (2023) 13 SCC 705 – referred to.**

Mohamed Haneef v. Thirthahalli Police, **1985 SCC OnLine Kar 203;** *A.K. Chowdekar v State of Karnataka,* **2013 SCC OnLine Kar 10754;** *State of Karnataka v. P. Giridhar Kudva,* **2020 SCC OnLine Kar 5723 – referred to.**

List of Acts

Code of Criminal Procedure, 1973; Prevention of Corruption Act, 1988; Karnataka Civil Services Rules, 1958; Constitution of India; Bharatiya Nagarik Suraksha Sanhita, 2023; Karnataka Civil Services (Second Amendment) Rules, 1985.

List of Keywords

Quashing; Quashing the criminal proceedings; Public servant; Abused official positions; Sanction; Sanction for prosecution Discharge of official duties; Retired public servants; Lack of

sanction; Stifle criminal proceedings; Interpretation of statutes; Rule of construction; Chargesheet; Loss to the public exchequer; Cognisance.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No(s). 9463-9465 of 2025

From the Judgment and Order dated 05.07.2022 of the High Court of Karnataka at Bengaluru in WP Nos. 61305, 61306 and 61307 of 2016

Appearances for Parties

Advs. for the Appellant:
Devadatt Kamat, Sr. Adv., D. L. Chidananda, Ajay Desai, Revanta Solanki.

Advs. for the Respondents:
Gopal Sankaranarayanan, Anand Sanjay M Nuli, Sr. Advs., Mrigank Prabhakar, Ms. Ishita Choudhary, Shourya Dasgupta, Ms. Aditi Gupta, Siddharth Sahu, Suraj Kaushik, M/s. Nuli & Nuli.

Judgment / Order of the Supreme Court

Judgment

Dipankar Datta, J.

1. Leave granted.

2. The present appeals by the State of Karnataka register a challenge to the common judgment and order dated 5th July, 2022[1] of the High Court of Karnataka[2] in three Writ Petitions[3] filed by the 1st respondent – B.T. Ramesh[4] under Articles 226 and 227 of the Constitution read with Section 482 of Code of Criminal Procedure, 1973[5]. *Vide* the impugned order, the three writ petitions were allowed

1 impugned order

2 High Court

3 W.P. No.61305/2016 (GM-RES) c/w W.P. No.61306 of 2016 c/w W.P. No.61307/2016

4 Ramesh

5 Cr. PC

with the consequence that proceedings against Ramesh, in three complaint cases[6], stood quashed.

3. The occasion for filing three separate Writ Petitions before the High Court arose as three separate criminal proceedings (Special C.C. Nos. 252, 273 and 253 of 2016) were pending against Ramesh. In all such proceedings, a common chargesheet dated 3rd June, 2016 was filed, wherein Ramesh was arraigned as one of several accused.

4. Facts, in brief, necessary for the disposal of the present appeals are these:

   a. From 15th February, 2008 to 15th January, 2011, Ramesh was working as Chief Engineer, Bruhath Bengaluru Mahanagara Palike[7] (West) and had the power to grant technical sanction for works estimated between 30 lakh and 60 lakh.

   b. On 26th March, 2009, Ramesh had granted technical sanction for asphalting of certain main roads and cross roads.

   c. On 3rd November, 2011, the 2nd respondent[8] lodged a complaint alleging irregularities in execution of works by the office of the BBMP. No one was named in this complaint as an accused.

   d. Next day, on 4th November, 2011, an FIR was registered against unknown persons on the basis of the said complaint under FIR number 4/2011 under Sections 420, 406, 409, 465, 468, 471, 477(a) and 120B of the Indian Penal Code, 1860[9] and Section 23 of Karnataka Transparency Public Procurement Act, 1999.

   e. On 31st May, 2013, Ramesh retired from service on attaining the age of superannuation.

   f. More than three years after such retirement and almost four years and seven months after the lodging of the complaint, Crime Investigation Department (CID) filed a chargesheet in Crime No. 4/2011 (Special C.C. No. 252/2016) on 3rd June, 2016, wherein Ramesh figured as accused no. 6, under Sections 120(B), 409,

6 Special C.C. No. 252/2016, 253/2016 & 273/2016

7 BBMP

8 The Commissioner, BBMP, N R Square, Bangalore

9 IPC

465, 468, 477 of the IPC r/w Section 13(1)(c) &(d) and 13(2) of the Prevention of Corruption Act, 1988[10].

g. As per the chargesheet, Ramesh while serving as the Chief Engineer of BBMP at the relevant time was alleged to have colluded with the co-accused (other officer of BBMP and the contractor) in abusing his official position for adopting NH SR rates instead of the prescribed PWD SR rates for black-topping items. This resulted in the misuse of an additional sum in excess of Rs.22 lakh 40 thousand, thereby causing loss to the public exchequer.

h. Praying for quashing of the proceedings in Special C.C. Nos. 252, 273 and 253 of 2016, Ramesh presented the three Writ Petitions before the High Court on which the impugned order was passed.

5. Before the High Court, Ramesh advanced three-fold submissions: (i) for offences allegedly having taken place in 2009-2010, the chargesheet was filed on 3rd June, 2016, more than seven years after the alleged incident. He argued that this delay renders the proceedings barred under Rule 214(3) of the Karnataka Civil Services Rules, 1958[11], which prescribes a limitation period of four years for initiation of judicial proceedings, calculated from the date on which the alleged misconduct or offence took place; (ii) as per rule 214(6)(b) of the KCS Rules, 1958, "judicial proceeding", in respect of a criminal proceeding, shall be deemed to have commenced on the date the Magistrate takes cognisance on the chargesheet and the date of filing of the FIR is irrelevant; and (iii) no sanction under section 197, Cr. PC was obtained for prosecution of Ramesh for offences allegedly committed by him in discharge of his official duties.

6. Rebutting the aforesaid arguments, the State submitted: (i) the proceedings were initiated within two years from the date of alleged incident as the FIR was registered in 2011; and (ii) since the chargesheet was filed after retirement of Ramesh, there was no need to obtain sanction under Section 197, Cr. PC.

7. Accepting the arguments advanced by Ramesh, the High Court quashed the proceedings. It was *inter alia* held that:

10 PC Act

11 KCS Rules, 1958

"8. Rule 214(3) and Sub-Rule-(6)(b) of the Rules, specifies that no judicial proceedings, if not instituted while the Government servant was in service, whether before his retirement or during his re-employment shall be instituted in respect of a cause of action which arose or in respect of an event which took place, more than four years before such institution.

9. In the present case, the alleged offence of misappropriation has taken place during the year 2009- 2010. Though FIR was lodged in the year 2011 against the unknown persons, the charge sheet was submitted on 03.06.2016, after expiry of four years from the date of cause of action arose. Hence, the cognizance taken by the learned Sessions Judge is contrary to the Rule 214(3) and Sub-Rule-6 of the Rules and same is held to be one without authority of law.

10. The charge sheet has been filed for the offences punishable under provisions of the Prevention of Corruption Act and also offences under IPC though there is no requirement of obtaining prior sanction for prosecuting petitioner-accused No.6 for the offences punishable under the provisions of the Prevention of Corruption Act, since he had retired from service as on the date of charge sheet was filed. Section 197(1) specifies that no Court shall take cognizance for the offences punishable under the provisions of IPC against any person who is or was Judge as Magistrate or public servant not removable from his office without the previous sanction. Hence, the police before submitting the charge sheet for the offences punishable under IPC were required to obtain sanction as specified under Section 197(1) of Cr.P.C. and in the absence of grant of sanction as specified under Section 197(1) of Cr.P.C, the cognizance taken by the learned Sessions Judge insofar as it relates to the offences punishable under the provisions of IPC is held to be one without authority of law.

11. In view of the preceding analysis, I am of the view that continuation of criminal proceedings against the petitioner- accused No.6 will be an abuse of process of law and accordingly, I pass the following:

ORDER

i. Writ petitions are allowed.

ii. The impugned proceedings in Spl.C.C. No.252/2016, Spl.C.C. No.273/2016 and Spl.C.C. No.253/2016 in WP Nos.61305/2016, 61306/2016 and 61307/2016 respectively pending on the file of 77th Addl. City Civil Judge and Sessions Judge, Bengaluru insofar as it relates to accused No.6 is hereby quashed."

8. Mr. Devdatt Kamat, learned senior counsel appearing for the appellant, prayed for setting aside of the impugned judgment on the following grounds:

a. The plea regarding requirement of sanction under Section 197, Cr. PC is ordinarily to be raised before the Trial Court at the stage of taking cognisance;

b. Rule 214(3) of KCS Rules, 1958 does not bar criminal proceedings against retired public servants. In support of this contention, reference was made to two decisions of the High Court.

i. First, in ***Mohamed Haneef v. Thirthahalli Police***[12], the High Court, while interpreting proviso (c) of Rule 214 of the Karnataka Civil Services (Second Amendment) Rules, 1985 [which is *pari materia* with Rule 214(3) of the KCS Rules, 1958] held that:

> "**13.** A close examination of the provisions contained in Rules 213 and 214 would reveal that Rule 213 is based upon the concept that future good conduct shall be an implied condition of every grant of pension and appropriate action could be taken against the pensioner respecting the payment of pension, if the pensioner is convicted of a serious crime or is found guilty of grave misconduct during the period, the pensioner receives pension without any period of limitation for being convicted of a serious crime or found guilty of grave misconduct;

12 1985 SCC OnLine Kar 203

whereas Rule 214 can be invoked and action be taken against a pensioner if in any departmental or judicial proceeding, the pensioner is found guilty of grave misconduct or negligence during the period of his service including service rendered upon re-employment after retirement, subject to the conditions and limitations stipulated therein for instituting departmental or judicial proceedings. In other words, action could be taken under Rule 213 respecting the future acts and conduct of a pensioner resulting in the conviction of a serious crime or guilty of grave misconduct after his retirement; whereas Rule 214 applies in respect of the acts and conduct of the pensioner while he was in service resulting in a finding either in departmental or judicial proceeding that he is guilty of grave misconduct or negligence. That is why no period of limitation is prescribed in respect of the acts and conduct of a pensioner resulting in a conviction of a serious crime or finding of guilty of grave misconduct as they relate to future acts and conduct after the pensioner retired from service and period of limitation has been prescribed respecting departmental as well as judicial proceedings under Rule 214 because it applies to past acts and conduct of the pensioner while he was in service. Both clause (b) as well as clause (c) of the proviso to Rule 214 prescribe a period of four years for instituting a departmental or judicial proceeding in respect of any event in the case of former or any event or cause of action from the date of its taking place or arising in the case of latter if no such departmental or judicial proceeding was instituted while the officer was in service whether before his retirement or during his re-employment. This period of limitation does not apply to a case where departmental or judicial proceeding had been initiated in respect of an employee while he was in service. It is abundantly clear that clause (c) of the proviso to Rule 214 governs only the judicial proceedings referred to in Rule 214. This is clear from the terms 'such judicial proceeding' thereby

> meaning judicial proceeding referred to in Rule 214 and not other judicial proceedings including criminal proceedings before any Criminal Court dealing with general criminal law. The prohibition against the institution of a judicial proceedings in respect of a cause of action which arose or an event which took place more than 4 years before such institution as contained in clause (c) or against the institution of a departmental enquiry in respect of any event which took place more than 4 years before such institution as stipulated under clause (b) of the proviso is only for the purpose of exercising the powers under Rule 214 and not for any other purpose. The period of limitation provided in clauses (b) and (c) of the proviso appears to be intended to prevent harassment, by instituting either departmental or judicial proceedings in respect of a stale or remote event or cause of action which arose more than 4 years before such institution after the officer has retired. It seems to me that the prohibitory words in clause (c) relied upon by Sri Desai cannot be construed as a bar against criminal prosecutions in general."
>
> (emphasis laid by the appellant)

Pithily, the High Court held that this limitation under Rule 214 applies only to proceedings under Rule 214 and not to general criminal prosecutions, which can proceed under regular criminal law without being affected by this rule.

ii. Secondly, in ***A.K. Chowdekar v State of Karnataka***[13], the High Court, while dealing with Rule 214(3) of the KCS Rules, 1958, observed that:

> "**9.** The words 'judicial proceedings' appearing in sub-rule (3) of Rule 214 of (sic) is not defined. The intention of the State is that no judicial proceedings can be initiated against a Government servant while in service or after retirement or during his re-employment

13 2013 SCC OnLine Kar 10754

in respect of a cause of action which arose or in respect of any event which took place more than four years from such institution, is in relation to 'civil proceedings' and not 'criminal proceedings'. Thus, we hold that sub-rule (3) of Rule 214 of KCSR does not bar initiating criminal action against a Government servant who is alleged to have committed an offence under the Penal Code, 1860.

10. It is pertinent to mention that it cannot be the intention of the State to absolve a Government servant who has committed an offence under the Penal Code, 1860. …"

(emphasis laid by the appellant)

c. Rules enacted under Article 309 of the Constitution cannot bar criminal prosecution. In support of the same, reliance was placed on ***State of Punjab v. Kailash Nath***[14]:

"**7.** In the normal course what falls within the purview of the term 'conditions of service' may be classified as salary or wages including subsistence allowance during suspension, the periodical increments, pay scale, leave, provident fund, gratuity, confirmation, promotion, seniority, tenure or termination of service, compulsory or premature retirement, superannuation, pension, changing the age of superannuation, deputation and disciplinary proceedings. Whether or not a Government servant should be prosecuted for an offence committed by him obviously cannot be treated to be something pertaining to conditions of service. Making a provision that a Government servant, even if he is guilty of grave misconduct or negligence which constitutes an offence punishable either under the Penal Code or Prevention of Corruption Act or an analogous law should be granted immunity from such prosecution after the lapse of a particular period so as to provide incentive

14 (1989) 1 SCC 321

> for efficient work would not only be against public policy but would also be counter-productive. It is likely to be an incentive not for efficient work but for committing offences including embezzlement and misappropriation by some of them at the fag end of their tenure of service and making an effort that the offence is not detected within the period prescribed for launching prosecution or manipulating delay in the matter of launching prosecution. Further, instances are not wanting where a Government servant may escape prosecution at the initial stage for want of evidence but during the course of prosecution of some other person evidence may be led or material may be produced which establishes complicity and guilt of such Government servant. By that time period prescribed, if any, for launching prosecution may have expired and in that event on account of such period having expired the Government servant concerned would succeed in avoiding prosecution even though there may be sufficient evidence of an offence having been committed by him. Such a situation, in our opinion, cannot be created by framing a rule under Article 309 of the Constitution laying down an embargo on prosecution as a condition of service."
>
> (emphasis laid by the appellant)

d. Relying upon the decision of this Court in ***Kailash Nath*** (supra), the High Court in the case of ***State of Karnataka v. P. Giridhar Kudva***[15] held as follows:

> "**10.** In that view of the matter, issuance of charge sheet for conducting disciplinary proceedings, though belated, it is proper and should not be interfered with. We are also of the opinion that when the said officer accepted that he has deliberately given false date of birth in his reply dated 17.2.2006, much earlier to his

15 2020 SCC OnLine Kar 5723

> retirement on the basis of false date of birth issued by him, it is a fit case where criminal prosecution is required to be initiated. In fact, though Rule 214(3) and (6) of the Karnataka Civil Services Rules, initially was an obstacle for initiating proceedings against a retired officer, the Apex Court in the matter of State of Punjab v. Kailash Nath, (1989) 1 SCC 321 : AIR 1989 SC 558 has read down the similar Rule which was in Punjab Civil Services and has held that the same would not come in the way of holding criminal prosecution. Therefore, in the present case also, while considering the writ petition filed by the petitioner-State, we set aside not only the order passed by the Tribunal, but also reserve liberty to the petitioner-State herein to initiate criminal prosecution against respondent-delinquent officer for gross abuse of process of law, as well as for making deliberate false declaration of his date of birth to secure illegal benefit to continue in service for seven years beyond the date on which he was required to superannuate and consequently causing financial loss to the State."
>
> (emphasis laid by the appellant)

9. Mr. Gopal Sankaranarayanan, learned senior counsel appearing for Ramesh, asserted that the impugned order is well reasoned and does not require any interference. *Pro argumento*, he submitted:

   a. The High Court rightly held that the police report (chargesheet) was filed after the limitation period of four years as provided under Rule 214(3) read with sub-Rule (6)(b) of Rule 214 of the KCS Rules, 1958.

   b. Judicial proceedings cannot be deemed to have commenced from the date of the FIR. As per sub-rule (6)(b) of Rule 214 of the KCS Rules, 1958, the date of institution of judicial proceedings is considered to be the date on which the Magistrate takes cognisance of the police report (chargesheet) or the complaint. In the present case, the chargesheet was filed only in 2016, seven years after the alleged offence and hence, cognisance taken by the trial court was barred by limitation.

c. The requirement of prior sanction under Section 197(1), Cr. PC applies to both serving and retired civil servants.

10. The short issue arising for determination is, whether the High Court was justified in quashing the criminal proceedings, as prayed by Ramesh, on the grounds of (i) the chargesheet having been filed more than four years after the date of the alleged incident and (ii) lack of sanction.

11. It is considered appropriate to examine the challenge laid by the appellant by reading Rule 214 first in its entirety. For ease of understanding, Rule 214 is extracted below:

> **RULE 214**
>
> "**214(1)(a)** Withholding or withdrawing pension for misconduct or negligence.-
>
> The Government reserve to themselves the right of either withholding or withdrawing a pension or part thereof, whether permanently or for a specified period, if in any departmental or judicial proceedings, the pensioner is found guilty of grave misconduct or negligence during the period of his service including the service under a foreign employer and the service rendered upon re-employment after retirement.
>
> **(b)** Recovery of pecuniary loss from pension:
>
> The Government reserve to themselves the right of ordering recovery from a pension, the whole or part of any pecuniary loss caused to the Government or to a foreign employer under whom the Government servant has worked on deputation or otherwise. If in any departmental or judicial proceedings, the pensioner is found guilty of grave negligence during the period of his service, including the service rendered upon re-employment after retirement:
>
> Provided that the Public Service Commission shall be consulted before any final orders are passed: Provided further that where a part of pension is withheld or withdrawn, the amount of pension shall not be reduced below the amount of minimum pension prescribed under the rules.

(2)(a) The departmental proceedings referred to in sub-rule (1), if instituted while the Government servant was in service whether before his retirement or during his re-employment, shall, after the final retirement of the Government servant, be deemed to be proceedings under this rule and shall be continued and concluded by the authority by which they were commenced in the same manner as if the Government servant had continued in service:

Provided that where the departmental proceedings are instituted by an authority other than Government, that authority shall submit a report recording its findings to the Government.

(b) The departmental proceedings, if not instituted while the Government servant was in service, whether before his retirement or during his re-employment.

(i) shall not be instituted save with the sanction of the Government.

(ii) shall not be in respect of any event which took place more than four years before such institution, and

(iii) shall be conducted by such authority and in such place as the Government may direct and in accordance with the procedure applicable to departmental proceedings in which an order of dismissal from service could be made in relation to the Government servant during his service.

(3) No judicial proceedings, if not instituted while the Government servant was in service, whether before his retirement or during his re-employment, shall be instituted in respect of a cause of action which arose or in respect of an event which took place, more than four years before such institution.

(4) In the case of a Government servant who has retired on attaining the age of superannuation or otherwise and against whom any departmental or judicial proceedings are instituted or where departmental proceedings are continued under sub-rule (2), a provisional pension as provided in Rule 214A shall be sanctioned.

> **(5)** Where the Government decided not to withhold or withdraw pension but orders recovery of pecuniary loss from pension, the recovery shall not ordinarily be made at a rate exceeding one third of the pension admissible on the date of retirement of a Government servant.
>
> **(6)** For the purpose of this rule,-
>
> (a) departmental proceedings shall be deemed to be instituted on the date on which the statement of charges is issued to the Government servant or pensioner, or if the Government servant has been placed under suspension from an earlier date, on such date: and
>
> (b) judicial proceedings shall be deemed to be instituted-
>
> (i) in the case of criminal proceedings, on the date on which the complaint or report of a police officer, of which the Magistrate takes cognisance is made; and
>
> (ii) in the case of civil proceedings, on the date the plaint is presented in the court."

12. Rule 214 is part of Chapter XV (titled GENERAL RULES) under Part IV (titled ORDINARY PENSION) of the KCS Rules, 1958. On a plain reading, Rule 214 is relatable to withholding and withdrawal of pension. Rule 214(1)(a) is a provision that empowers the Government to either withhold or withdraw a pension, or any part thereof, whether permanently or for a specified period, in a case where the pensioner is found guilty of grave misconduct or negligence in any departmental or judicial proceedings. This provision can be invoked for misconduct or negligence committed during the period of the pensioner's service, including any service rendered during re-employment after retirement.

13. Rule 214(3) provides for a bar on initiation of a "judicial proceeding" against a public servant after four years of the cause of action having arisen or event having taken place. The date on which the judicial proceeding is deemed to have been instituted is provided under Rule 214(6)(b).

14. Does Rule 214 have any application to stifle criminal proceedings for offences punishable under the IPC or the PC Act or any analogous law?

15. It is an acknowledged art of interpretation of statutes to harmonise the textual meaning of a particular provision with its contextual significance; and, to gain a deeper insight, the interpreter may uncover the underlying policy for the same to be codified.

16. In our considered opinion, the text of Rule 214 read in the context in which it is invocable and its underlying policy make it clear as daylight that the relevance of the same would arise only when the Government, in its discretion, elects to invoke it for a proposed withholding or withdrawal of pension, due to a pensioner, for misconduct or for the purpose of recovery of any loss that it has sustained by reason of his delinquency, subject of course to the pre-conditions for such invocation being satisfied. Rule 214, by any rule of construction, has no application to nip pending criminal proceedings in the bud or for stifling such proceedings after cognisance of offence has been taken for no better reason than that the timelines embodied therein have not been adhered to.

17. The reason is simple. Though Rule 214 operates in a distinct domain, separate from investigation and prosecution following registration of an FIR and submission of a police report (chargesheet) and taking of cognisance of offence under Chapters XII and XIV of the Cr. PC, respectively, there is no conflict between the two. The policy behind Rule 214 is that a pensioner's entitlement to pension is contingent upon a clean record, both during and after service. This rule seeks to ensure that a pensioner does not go scot-free despite having indulged in misconduct or criminal activity while in service or even after quitting service (as future good conduct is a condition for continuous entitlement to pension). The need for a clean record is, thus, essential. Needless to observe, the scope of Rule 214 extends beyond corruption-related crimes, enabling withholding or withdrawal of pension for any offence punishable under the law. The timelines in Rule 214, as embodied, would bear significance to ensure that no pensioner is unnecessarily harassed or made to wait indefinitely for release of the whole of his pension and other retiral benefits owing to institution/pendency of disciplinary/judicial proceedings in relation to events of the distant past. In a particular case, the Government could find itself disabled to withhold or withdraw pension owing to the timelines creating a bar, but that *per se* cannot be seen as reason enough for stifling an otherwise valid investigative process including submission of police report in terms of the provisions of the

Cr. PC., or for taking cognisance of the offence, once such report is submitted. Mr. Kamat has rightly argued that Rule 214 cannot be read in a manner so as to have the effect of whittling down the powers conferred on the investigative agencies by Part XII of the Cr. PC or the relevant magistrate under Chapter XIV thereof. Even without an order/action for withholding or withdrawing pension, an investigation of a cognisable offence punishable under the IPC or the PC Act or any analogous law is not barred either under Rule 214 or by any other statutory intendment.

18. For the purpose of deciding the present appeals, we are not concerned as to whether the timelines that Rule 214 embody operate as a bar or not for withholding or withdrawing pension that Ramesh is entitled to as per the relevant rules, or whether there has been any valid order/action in that regard. Here, the High Court has quashed the proceedings against Ramesh by referring to Rule 214 which, indubitably, had no application. The first ground on which the proceedings have been quashed is, thus, manifestly unsustainable.

19. Next, we move on to examine whether the High Court was justified in quashing the proceedings against Ramesh on the ground that sanction under Section 197, Cr. PC had not been obtained.

20. The acts of commission of offence in the discharge of official duties by a public servant, punishable under the IPC and the PC Act, have obviously to be dealt with firmly. But Section 197, Cr. PC contemplates protection to responsible public servants against institution of possible vexatious criminal proceedings alleged to have been committed by them while acting or purporting to act as public servants. Protection under Section 197, Cr. PC extends both to serving as well as retired public servants. Prior to taking cognisance of offences punishable under the IPC, sanction ought to have been obtained. No sanction has, admittedly, been obtained and hence we hold that quashing of the proceedings *qua* IPC offences was just and proper.

21. However, the High Court fell in error in quashing the proceedings *qua* the offences under the PC Act as it did not appreciate that Section 19 thereof, prior to its amendment with effect from 26th July, 2018, applied only to public servants who were in office at the time of taking of cognisance of offence.

22. At paragraphs 33 and 34 of the decision in ***A. Srinivasulu v. State of T.N.***[16], this Court explained that before the PC Act was amended by Act 16 of 2018, prior sanction under Section 19(1)(a) was required only for public servants who were in service at the time of taking cognisance and not for those who had retired. However, after the 2018 amendment, prior sanction became necessary even for those who were in service at the time the offence was committed, regardless of whether they had retired by the time cognisance was taken. The Court thereafter noted that Accused No. 1 (therein) had retired in 1997, the chargesheet was filed in 2002, and cognisance was taken in 2003. Since the accused was not in service at the time cognisance was taken, no prior sanction under Section 19 of the PC Act was needed for his prosecution.

23. Therefore, since Ramesh had retired on 31st May 2012 and cognisance of the offence was taken only on 3rd June 2016, he was not entitled to the protection under Section 19 of the PC Act. Such protection would have been available to him only if cognisance were taken while he was still in service.

24. For the reasons aforesaid, the issue formulated in paragraph 10 is answered by holding that the High Court erred in quashing the proceedings on the first ground, completely, and on the second ground, partly.

25. The appeals, therefore, succeed in part. The impugned order, quashing the proceedings for the offence(s) punishable under Section 13(1)(c) &(d) read with Section 13(2) of the PC Act, stands set aside. The proceedings against Ramesh are restored and may continue for such offence(s).

26. In view of the provisions of Section 531 of the Bharatiya Nagarik Suraksha Sanhita, 2023, the Cr. PC stands repealed; yet, pending proceedings are expressly permitted to be continued under the repealed law. We, therefore, observe that Ramesh may be prosecuted for offences punishable under the IPC, if so advised, but only after obtaining sanction therefor according to the repealed law for which liberty is reserved.

16 (2023) 13 SCC 705

27. The appeals stand disposed of on the aforesaid terms.

28. Connected applications, if pending, stand closed.

29. Before parting, we place on record that although the present appellate proceedings stemmed from writ petitions concerning predominantly penal laws and quashing of criminal proceedings, the special leave petitions were registered as civil petitions. If there has been a mistake, to correct the records, Registry may renumber the special leave petitions as criminal petitions and based thereon assign appropriate numbers to the appeals treating the same to be appeals arising on the criminal side.

Result of the case: Appeals partly allowed.

†*Headnotes prepared by:* Nidhi Jain

[2025] 8 S.C.R. 221 : 2025 INSC 855

Mala Devi
v.
Union of India & Ors.

(Civil Appeal No. 10672 of 2016)

16 July 2025

[Sanjay Karol and Satish Chandra Sharma,* JJ.]

Issue for Consideration

Whether in the facts and circumstances of the case, the Appellant is entitled to family pension of her late husband, and whether a denial of such relief was justified.

Headnotes†

Indian Railway Establishment Manual & the Railway Pension Rules, 1993 – rr.75, 18(3) – Family pension – Entitlement to – Appellant's husband, a temporary employee with the Eastern Indian Railways died in harness – Claim of the Appellant for family pension was denied on the ground that it is not admissible to the wife of an employee whose services were not regularized – Justifiability:

Held: Unjustifiable – r.75 makes it clear that the qualifying service for a temporary railway servant to be entitled for the grant of benefit of family pension is a continuous service of one year – More so, this benefit of family pension is accrued to the family of the deceased railway servant who died in harness after completion of one year of continuous service, without any discrimination, whether the post was temporary or had been regularized – Appellant's husband, after one year of continuous service, clearing his medical examination, screening and upon being subsequently deputed on a different post, acquired the status of a temporary railway servant for the purposes of the 1993 Pension Rules and thus, became entitled to the benefit of family pension, as any other temporary railway servant – Depriving the Appellant of family pension from her deceased husband for not completing 10 years of qualifying service by falling short of hardly 3 months, is not in congruence with the legislative intent of the 1993 Pension Rules – Appellant entitled to family pension in light of the decision in Prabhavati Devi case – Family pension

* Author

qua the deceased governed as per r.75 r/w r.18(3) – Impugned order of High Court and the order of the CAT, Patna, set aside – *Ex-gratia* amount of Rs.5,00,000/- awarded to the Appellant in exercise of power u/Art.142. [Paras 9-11, 13-15]

Case Law Cited

Prabhavati Devi v. Union of India & Ors. **[1995] Supp. 5 SCR 421 : AIR 1996 SC 752 – relied on.**

Uttar Haryana Bijli Vitran Nigam Ltd. & Ors. v. Surji Devi **[2008] 1 SCR 1042 : (2008) 2 SCC 310 – referred to.**

List of Acts

Indian Railway Establishment Manual & the Railway Pension Rules, 1993; Constitution of India.

List of Keywords

Family pension; Benefit of family pension; Entitled to Benefit of family pension; Eastern Indian Railways; Temporary employee with the Eastern Indian Railways; Temporary employee died in harness; Temporary railway servant; Regularization; Railway servant died in harness; Summer Waterman; Guard/Shuntman; One year of continuous service; 10 years in service not completed; Minimum qualifying service; *Ex-gratia* amount awarded; Article 142 of the Constitution of India.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 10672 of 2016

From the Judgment and Order dated 12.05.2016 of the High Court of Judicature at Patna in CWJC No. 8524 of 2016

Appearances for Parties

Advs. for the Appellant:
Brijesh Kumar, Ritik Malik, Ms. Geetanjali Setia, Mainsha Suri, Akhil Suri, Nishi Kant Singh, Rajiv Ranjan Dwivedi.

Advs. for the Respondents:
S.D. Sanjay, A.S.G., Sachin Sharma, Amit Sharma, Anmol Chandan, Vinayak Sharma, Sachin Sharma, Harish Pandey, Alabhya Dhamija, Arvind Kumar Sharma.

Judgment / Order of the Supreme Court

Judgment

Satish Chandra Sharma, J.

1. The Appellant herein is the widow of Late Shri Om Prakash Maharaj, a temporary employee with the Eastern Indian Railways, who died in harness on 10.07.1996, having completed 9 years 8 months and 26 days of service from the date of his appointment on 15.10.1986.

2. The Appellant had approached the Learned Central Administrative Tribunal vide O.A./050/00276/2014 seeking family pension from the date of death of her husband with all consequential benefits along with interest at the rate of 18% per annum, which was dismissed by the Learned Tribunal vide Judgment/Order dated 23.12.2015. Vide the said decision, the Learned Tribunal held that the claim of the Appellant was devoid of any merit, inasmuch as in absence of a document for regularization and permanent absorption of the husband of the Appellant, Appellant is not entitled for the grant of family pension. Even though, the deceased husband of the Appellant had reached the stage of screening for regularization of his employment with the Railways, the Learned Tribunal observed that "*the screening will not confer any right to pension*."

3. Aggrieved thereby, the Appellant preferred a W. P. (C) No. 8524 of 2016 before the High Court of Judicature at Patna, which was ultimately dismissed vide Impugned Order dated 12.05.2016. In drawing reference to the decision in ***Uttar Haryana Bijli Vitran Nigam Ltd. & Ors. v. Surji Devi***[1], the High Court observed that family pension is not admissible to the wife of an employee whose services were not regularized. It was further noted that since the service rendered by the husband of the Appellant is 9 years 8 months and 26 days, it falls short of 10 years, which is the minimum qualifying service for grant of family pension. The said Order is under challenge before this Court.

4. The factual conspectus of the captioned Appeal reveals that the deceased, Mr. Om Prakash Maharaj, was appointed "Summer Waterman", Danapur, vide letter dated 15.10.1986 upon qualifying

1 (2008) 2 SCC 310

the medical examinations. Upon completion of more than 7 years of continuous service as a Substitute Porter, he cleared the Screening Test and was deputed at Garhara as a Guard/Shuntman upon instructions of the Dy. Chief Yard Master, Garhara. Unfortunately, on 10.07.1996, the deceased met with a fatal accident while at work and died in harness.

5. The deceased kept working as a 'substitute' till his death and had admittedly been in continuous service for 9 years 8 months and 26 days. Upon his demise, the Appellant wife has received *ex-gratia* to the *next kin of deceased* and was subsequently appointed as a Substitute Gangman on compassionate grounds, and the employment was regularized after completion of 120 days. The controversy arose when the Appellant wife sought family pension, which has been denied by the Railways on the premise that since the employment of the deceased had not been regularized, the question of family pension does not arise.

6. It was argued on behalf of the Appellant that Rule 1515 of the Indian Railway Establishment Manual confers upon the Substitutes, certain rights and privileges as may be admissible to temporary railway servants, from time to time, on completion of four (04) months of continuous service. In the same breadth, reliance was also placed on Rule 18(3) Railway Service (Pension) Rules, 1993 which extends benefit of family pension and death gratuity in the event of death in harness of a temporary railway servant on the same scale of a temporary railway servant. The said Rule read in conjunction with Rule 75(2)(a) of the Pension Rules, 1993 also confers upon the family of a railway servant, family pension (hereinafter in this rule referred to as family pension) under the Family Pension Scheme for Railway Servants, 1964, in the event a railway servant dies after competition of one year of continuous service. Indubitably, the deceased was in service for 9 years 8 months and 26 days till the date of his death, and in terms of the said provisions, has also crossed the necessary threshold to be granted the status of a temporary railway servant. The relevant provisions are reproduced as under:

"Indian Railway Establishment Manual-Vol-I"

"1515- Rights and privileges admissible to the Substitutes—*Substitutes should be afforded all the rights and privileges as may be admissible to temporary railway*

servants, from time to time on completion of four months continuous service. Substitute school teachers may, however, be afforded temporary status after they have put in continuous service of three months and their services and their services should be treated as continuous for all purposes except seniority on their eventual absorption against regular posts after selection.

"Railway Pension Rules, 1993"

18. Pensionary, terminal or death benefits to temporary railway servant. - *(1) A temporary railway servant who retires on superannuation or on being declared permanently incapacitated for further railway service by the appropriate medical authority after having rendered temporary service not less than ten years shall be eligible for grant of superannuation, invalid pension, retirement gratuity and family pension at the same scale as admissible to permanent railway servant under these rules.*

Rule 75:

.....

(2) Subject to the provisions of sub-rule (18) and without prejudice to the provisions contained in sub-rule(4), where a railway servant dies,— (a) after completion of one year of continuous service; or (b) before completion of one year of continuous service, provided the deceased railway servant concerned immediately prior to his appointment to the service or post was examined by the appropriate medical authority and declared fit by that authority for railway service; or (c) after retirement from service and was on the date of death in receipt of a pension, or compassionate allowance, referred to in these rules, the family of the deceased shall be entitled to family pension (hereinafter in this rule referred to as family pension) under the Family Pension Scheme for Railway Servants, 1964, the amount of which shall be determined at a uniform rate of thirty per cent. of basic pay subject to a minimum of three thousand and five hundred rupees per mensem and a maximum of twenty-seven thousand rupees per mensem."

7. *Per contra*, it was the contention of the Respondents that the deceased had not completed 10 years in service which is the minimum qualifying service for the grant of family pension and as he was also not regularized, the question of grant of family pension does not arise. It was further averred that the deceased had also not been in continuous service as a substitute for more than four (04) months, and the hence the status of a temporary railway servant for the purposes of grant of family pension cannot be extended to him. The Counsel for the Respondents has argued that the argument in reference to Rule 1515 of the Railway Establishment Manual and the Railway Pension Rules, 1993 was not made by the Appellant before the courts below and cannot be taken at this stage of the proceedings.

8. We have heard the submissions on behalf of both the parties. The intervention of this Court is limited to the question whether in the facts and circumstances of the case, the Appellant is entitled to family pension of her late husband, and whether a denial of such relief is justified.

9. At the outset, we refer to the ratio in the case of ***Prabhavati Devi v. Union of India & Ors.***[2] whereby this Court had extended the relief of family pension of the widow of the deceased railway servant, who had died in harness. It was held that the orders of the Tribunal to deny family pension to the widow and children of the deceased were unsustainable as the deceased had acquired the temporary status and was already working at his regular post at the time of his death. In the present case however, the deceased was absorbed in service as a substitute in 1986, and served for 9 years 8 months and 26 days, just 3 months short of completing the threshold of a decade in service. After one year of continuous service, clearing his medical examination and screening, and upon being subsequently deputed on a different post, on the instructions of Dy. CYM, Garhara, he acquired the status of a temporary railway servant for the purposes of the Railway Service (Pension) Rules, 1993 and hence became entitled to the benefit of family pension, as any other temporary railway servant. Hence, in light of the decision in ***Prabhavati Devi (supra),*** the petitioner is certainly entitled for grant of family pension.

2 AIR 1996 SC 752

10. Rule 75 of Railway Pension Rules, 1993, makes it further clear that the qualifying service for a temporary railway servant to be entitled for the grant of benefit of family pension is a continuous service of one year. More so, this benefit of family pension is accrued to the family of the deceased railway servant who died in harness after completion of one year of continuous service, without any discrimination, whether the post was temporary or had been regularized. On this ground alone, the denial of family pension accrued to the Appellant is unjustifiable.

11. We have further carefully examined the facts, and legal principles applicable in the present case, and we find that the argument canvassed by the Respondents in depriving the Appellant of family pension from her deceased husband for not completing 10 years of qualifying service by falling short of hardly 3 months, is not in congruence with the legislative intent of the Indian Railway Establishment Manual & the Railway Pension Rules, 1993. The salutary purpose of the rules thereunder is to extend the benefit of family pension to the families of those servants who have served for a considerable strength of time. The present case is not a case of a casual labourer being simply accorded a temporary status, without any scrutiny or examination as cautioned against in Clause 4.4. of the Master Circular issued by the Ministry of Railways. The said Circular also gives a clear mandate in clause 5.1 that substitutes who have acquired temporary status were to be screened by a Screening Committee, a stage which was admittedly passed by the deceased. It is an admitted factum that the deceased had reached the necessary stage of scrutiny/screening for regularization of the post, and had been carrying out his services, literally till his last breath.

12. In the light of above statutory provisions governing the field, this Court is of the considered opinion that the Appellant is entitled for grant of family pension along with arrears of family pension.

13. For the purpose of computation of family pension in the present case, the family pension *qua* the deceased shall be governed as per Rule 75 r/w Rule 18(3) Railway Service (Pension) Rules, 1993 which extends benefit of family pension and death gratuity in the event of death in harness of a temporary railway servant on the same scale of a temporary railway servant. The Respondents shall calculate the arrears of family pension and shall pay the arrears as well as shall pay regular family pension to the Appellant within a period of four months.

14. Resultantly, keeping in view the peculiar facts and circumstances of the case, the plight of the Appellant who has been pursuing the litigation seeking family pension since 2014, and the salient purpose of a family pension to serve dependents tide over the crisis, we further deem it appropriate exercise of our power under Article 142 of the Constitution of India, and award *ex-gratia* amount of Rs. 5,00,000/- to the Appellant.

15. In light thereof, the Appeal is allowed. The Impugned Order dated 12.05.2016 passed by the High Court of Judicature at Patna, and the Order dated 23.12.2015 passed by the Learned Central Administrative Tribunal, Patna, are set aside. The Respondents are directed to ensure compliance within four months. Applications if any, stand disposed of.

Result of the case: Appeal allowed.

†*Headnotes prepared by:* Divya Pandey

[2025] 8 S.C.R. 229 : 2025 INSC 860

Shiv Baran
v.
State of U.P. & Anr.

(Criminal Appeal No. 3008 of 2025)

16 July 2025

[Sanjay Karol* and Joymalya Bagchi, JJ.]

Issue for Consideration

Matter pertains to the correctness of the order passed by the High Court quashing the summons issued against respondent u/s.319 CrPC by the trial court.

Headnotes†

Code of Criminal Procedure, 1973 – s.319 – Power to proceed against other persons appearing to be guilty of offence – Exercise of power u/s.319 – High Court quashed the summons issued against respondent u/s.319 by the trial court – Challenge to:

Held: Summoning order passed by the trial court restored and the impugned order set aside – Power u/s.319 must be exercised sparingly – However, where the evidence reveals the complicity of the prospective accused, it becomes obligatory for the authority to exercise the power provided u/s.319 – High Court proceeded to conduct a mini trial solely relying upon the affidavits submitted before the Superintendent of Police qua the innocence of respondent – It erred in giving a categorical finding on the merits of the injured eyewitness not to have named respondent, which is based on erroneous assumption and contrary to the factual position – High Court erred in observing that witnesses have stated nothing about the motive of the crime, that the depositions are silent on the aspect of common intention, absence of the manner or sequence of occurrence of the incident, or that it cannot be inferred who is the aggressor – Respondent, although not charge sheeted, was named in the FIR, and the evidence of the alleged eyewitnesses, although *prima facie*, suggests the complicity of respondent, specific role being assigned to him, indicating that he was present at the scene of the occurrence, armed with a stick – High Court tried to apply the same standard in deciding this application as is

* Author

ordinarily used at the end of the trial in determining the conviction or otherwise of the accused, whereas it ought to have considered that the standard of satisfaction required is short of the standard necessary for passing final judgment after trial. [Paras 22-26]

Code of Criminal Procedure, 1973 – s.319 – Power to proceed against other persons appearing to be guilty of offence – Exercise of power u/s.319 – Statutory requisites for summoning person not being the accused – Principles to be followed by the trial court while exercising power u/s.319 – Stated. [Paras 14, 15]

Case Law Cited

Hardeep Singh v. State of Punjab **[2014] 2 SCR 1 : (2014) 3 SCC 92;** *Labhuji Amratji Thakor v. State of Gujarat* **[2018] 13 SCR 822 : (2019) 12 SCC 644;** *Ramesh Chandra Srivastava v. State of U.P.* **[2021] 6 SCR 219 : (2021) 12 SCC 608;** *S. Mohammed Ispahani v. Yogendra Chandak* **[2017] 10 SCR 29 : (2017) 16 SCC 226;** *Omi v. State of M.P.* **[2025] 1 SCR 266 : (2025) 2 SCC 621;** *Brijendra Singh v. State of Rajasthan* **[2017] 3 SCR 374 : (2017) 7 SCC 706 – referred to.**

List of Acts

Code of Criminal Procedure, 1973.

List of Keywords

Quashing the summons issued u/s.319 CrPC; Exercise of power u/s.319 CrPC; Motive; Common intention; Aggressor; Stage of final adjudication; Summoning order.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 3008 of 2025

From the Judgment and Order dated 23.07.2024 of the High Court of Judicature at Allahabad in CRR No. 5517 of 2023

Appearances for Parties

Advs. for the Appellant:
Gaurav, Shaurya Krishna, Shivendra Vikram Singh, Ravi Bhushan, Gaurav Srivastava.

Advs. for the Respondents:
Adarsh Upadhyay, Jitendra Kumar Tripathi, Ms. Pallavi Kumari, Shashank Pachauri, Ansar Ahmad Chaudhary, Shoaib Ahmad Khan, Sandeep Garausa, Md. Anas Chaudhary, Mohd. Sharyab Ali, Ms. Shehla Chaudhary, Ms. Alia Bano Zaidi.

Judgment / Order of the Supreme Court

Judgment

Sanjay Karol, J.

Leave Granted

2. The instant appeal preferred by the appellant-complainant, arises out of judgment and order dated 23rd July 2024 passed by the High Court of Judicature at Allahabad in Criminal Revision No.5517 of 2023, quashing the summons issued against Rajendra Prasad Yadav, Respondent No.2 herein, under Section 319 of the Code of Criminal Procedure, 1973[1] *vide* order dated 28th September 2023 passed by the Additional Sessions Judge, Kaushambi[2] in Sessions Trial No.109 of 2018, arising out of Case Crime No.303 of 2017.

3. Brief facts giving rise to the present appeal are :

   (i) Two FIRs were lodged in respect of an incident which allegedly took place on 29th November 2017. First FIR[3] was registered by the appellant-complainant, namely, Shiv Baran[4], under Sections 302, 307, 504 and 506 of the Indian Penal Code, 1860[5] against four persons, namely, Rahul, Dinesh, Rajendra and Shiv Moorat[6], alleging the said accused of having, with the common intention, entered his house and assaulted his brother, who, when taken to the Hospital, succumbed to the injuries.

   (ii) Second FIR[7] was lodged by one Suresh Kumar under Sections 452, 323, 504, 506 and 325 of IPC, alleging that the accused

1 Hereinafter 'CrPC

2 Hereinafter "Trial Court"

3 Case Crime No. 303 of 2017

4 The first informant

5 Hereinafter 'IPC'

6 Moorat and Murat are referred for the same person in the record.

7 Case Crime No. 315 of 2017

persons entered his house, hurled abuses, and assaulted the first informant and his wife. Here, we may clarify that the matter pertains only to the first FIR.

(iii) The Investigating Officer, based on the material collected during the course of investigation, concluded that the accused, Rajendra Prasad, not to have played any role in the alleged crime and, as such, in connection with the first FIR, submitted a chargesheet dated 24th February 2018 only with respect to accused persons, *viz.*, Dinesh Yadav and Shiv Murat Yadav, in relation to offences committed under Sections 302, 307, 504 and 506 read with Section 34 of the IPC.

(iv) During the course of the said trial, finding witnesses PW1 - Shiv Baran Yadav, PW2 - Raj Baran and PW3 - Subhash Yadav, to have deposed about the role of accused Rajendra Prasad Yadav, the complainant moved an application under Section 319 CrPC praying therein to add his name as co-accused, which application, though initially stood rejected by the Sessions Court *vide* order dated 31st January 2022 but on remand by the High Court, was eventually allowed by the Trial Court *vide* order dated 28th September 2023.

(v) In a petition preferred by Rajendra Prasad Yadav, the High Court while setting aside the said order of summoning passed by the Trial Court, *inter alia* observed that PW-1 had not ascribed any role to the accused and that the testimonies of PWs 2 and 3 could not be said to be implicating the said accused, for there being no specific reference with regard to the description and the manner of occurrence of the incident. Further, they had not ascribed any motive to the crime. Unless and until there is evidence of a strong motive, a person cannot be summoned as an accused. In the absence of any cogent material *prima facie* indicating complicity of the said accused, the Trial Court committed an error in passing the order impugned.

(vi) Challenging this order of the High Court, the complainant/first informant is before us.

4. Heard learned counsel for the parties and perused the record.

5. Here only, it would be pertinent to extract the relevant provision of CrPC :

> "319 Power to proceed against other persons appearing to be guilty of offence - (1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.
>
> (2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.
>
> (3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.
>
> (4) Where the Court proceeds against any person under sub-section (1) then—
>
> (*a*) the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard;
>
> (*b*) subject to the provisions of clause (*a*), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced."
>
> (Emphasis supplied)

6. A perusal of the said section would reveal it to be an enabling provision, empowering the Court to proceed against any person, even if not cited as an accused, based on the evidence collected during the inquiry or trial, revealing the complicity of such a person to be arrayed as an accused. The object is to ensure that no guilty person should be allowed to escape the process of law, which is based on the doctrine of *judex damnatur cum nocens absolviture* (Judge is condemned when guilty is acquitted). The provision casts duty upon the Court to ensure that the real culprit does not get away unpunished, for the same to be part of a fair trial. However, the power under the said Section has to be invoked only upon the satisfaction of cogent material brought on record, necessitating

such impleadment. The power to be exercised, needless to add, is to be with utmost caution and not in a casual, callous or cavalier manner – for the same is only to advance the cause of justice and not be a tool to harass the individual or result into an abuse of the process of law.

7. The question whether the word 'evidence' used in Section 319(1) CrPC means only evidence tested by cross-examination or the statements made in the examination-in-chief would be sufficient for exercising the power under this Section, has been answered by the Constitution Bench of this Court in ***Hardeep Singh v. State of Punjab***[8] in the following manner **:**

> **"89.** … Once examination-in-chief is conducted, the statement becomes part of the record. It is evidence as per law and in the true sense, for at best, it may be rebuttable. An evidence being rebutted or controverted becomes a matter of consideration, relevance and belief, which is the stage of judgment by the court. Yet it is evidence and it is material on the basis whereof the court can come to a prima facie opinion as to complicity of some other person who may be connected with the offence.
>
> **90.** As held in *Mohd. Shafi* [*Mohd. Shafi* v. *Mohd. Rafiq*, (2007) 14 SCC 544 : (2009) 1 SCC (Cri) 889 : AIR 2007 SC 1899] and *Harbhajan Singh* [(2009) 13 SCC 608 : (2010) 1 SCC (Cri) 1135] , all that is required for the exercise of the power under Section 319 CrPC is that, it must *appear* to the court that some other person also who is not facing the trial, may also have been involved in the offence. The prerequisite for the exercise of this power is similar to the prima facie view which the Magistrate must come to in order to take cognizance of the offence. Therefore, no straitjacket formula can and should be laid with respect to conditions precedent for arriving at such an opinion and, if the Magistrate/court is convinced even on the basis of evidence appearing in examination-in-chief, it can exercise the power under Section 319 CrPC and can proceed against such other person(s). It is essential

8 (2014) 3 SCC 92

to note that the section also uses the words "such person *could* be tried" instead of *should* be tried. Hence, what is required is not to have a mini-trial at this stage by having examination and cross-examination and thereafter rendering a decision on the overt act of such person sought to be added. In fact, it is this mini-trial that would affect the right of the person sought to be arraigned as an accused rather than not having any cross-examination at all, for in light of sub-section (4) of Section 319 CrPC, the person would be entitled to a fresh trial where he would have all the rights including the right to cross-examine prosecution witnesses and examine defence witnesses and advance his arguments upon the same. Therefore, even on the basis of examination-in-chief, the court or the Magistrate can proceed against a person as long as the *court is satisfied* that the evidence appearing against such person is such that it prima facie necessitates bringing such person to face trial. In fact, examination-in-chief untested by cross-examination, undoubtedly in itself, is an evidence.

...

92. Thus, in view of the above, we hold that power under Section 319 CrPC can be exercised at the stage of completion of examination-in-chief and the court does not need to wait till the said evidence is tested on cross-examination for it is the satisfaction of the court which can be gathered from the reasons recorded by the court, in respect of complicity of some other person(s), not facing the trial in the offence.

...

117.4. Considering the fact that under Section 319 CrPC a person against whom material is disclosed is only summoned to face the trial and in such an event under Section 319(4) CrPC the proceeding against such person is to commence from the stage of taking of cognizance, the court need not wait for the evidence against the accused proposed to be summoned to be tested by cross-examination."

(Emphasis supplied)

8. This Court in ***Labhuji Amratji Thakor v. State of Gujarat***[9] reiterated the test of satisfaction laid down in ***Hardeep Singh*** (supra) to be the one that is more than a *prima facie* case required at the time of framing of charges, but less than the satisfaction that would warrant conviction :

> "9. Answering Issue (iv) as noticed above in Hardeep Singh [**Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86**], in paras 105 and 106 of the judgment, the following was laid down by the Constitution Bench:
>
> > "105...
> >
> > 106. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court, not necessarily tested on the anvil of cross-examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 CrPC. In Section 319 CrPC the purpose of providing if "it appears from the evidence that any person not being the accused has committed any offence" is clear from the words "*for which such person could be tried together with the accused*". The words used are not "for which such person could be convicted". There is, therefore, no scope for the court acting under Section 319 CrPC to form any opinion as to the guilt of the accused."
>
> (Emphasis supplied)

9 (2019) 12 SCC 644

9. This Court, in ***Ramesh Chandra Srivastava v. State of U.P.***[10] reiterated that the power under Section 319 CrPC should only be exercised when strong and cogent evidence is presented against a person and the test to be applied is one that is more than a *prima facie* case, as applied at the time of framing of charges.

10. The Court, under this Section, can also proceed against a person who, though named in FIR, is not implicated by the Investigating Officer in the chargesheet, provided the statutory mandates are fulfilled. In ***S. Mohammed Ispahani v. Yogendra Chandak***[11], it was observed :

> **"35.** It needs to be highlighted that when a person is named in the FIR by the complainant, but police, after investigation, finds no role of that particular person and files the charge-sheet without implicating him, the Court is not powerless, and at the stage of summoning, if the trial court finds that a particular person should be summoned as accused, even though not named in the charge-sheet, it can do so. At that stage, chance is given to the complainant also to file a protest petition urging upon the trial court to summon other persons as well who were named in the FIR but not implicated in the charge-sheet. Once that stage has gone, the Court is still not powerless by virtue of Section 319 CrPC. However, this section gets triggered when during the trial some evidence surfaces against the proposed accused."
>
> (Emphasis supplied)
>
> [See also ***Hardeep Singh*** (supra); and ***Labhuji Amratji Thakor*** (supra)]

11. Most recently, this Court in ***Omi v. State of M.P.***[12], summarized the principles that need to be kept in mind for the summoning of additional accused :

> "**19.** The principles of law as regards Section 319CrPC may be summarised as under:

10 (2021) 12 SCC 608

11 (2017) 16 SCC 226

12 (2025) 2 SCC 621

19.1. On a careful reading of Section 319CrPC as well as the aforesaid two decisions, it becomes clear that the trial court has undoubted jurisdiction to add any person not being the accused before it to face the trial along with other accused persons, if the Court is satisfied at any stage of the proceedings on the evidence adduced that the persons who have not been arrayed as accused should face the trial. It is further evident that such person even though had initially been named in the FIR as an accused, but not charge-sheeted, can also be added to face the trial.

19.2. The trial court can take such a step to add such persons as accused only on the basis of evidence adduced before it and not on the basis of materials available in the charge-sheet or the case diary, because such materials contained in the charge-sheet or the case diary do not constitute evidence.

19.3. The power of the court under Section 319CrPC is not controlled or governed by naming or not naming of the person concerned in the FIR. Nor the same is dependent upon submission of the charge-sheet by the police against the person concerned. As regards the contention that the phrase "any person not being the accused" occurred in Section 319 excludes from its operation an accused who has been released by the police under Section 169 of the Code and has been shown in Column 2 of the charge-sheet, the contention has merely to be stated to be rejected. The said expression clearly covers any person who is not being tried already by the Court and the very purpose of enacting such a provision like Section 319(1) clearly shows that even persons who have been dropped by the police during investigation but against whom evidence showing their involvement in the offence comes before the criminal court are included in the said expression.

19.4. It would not be proper for the trial court to reject the application for addition of new accused by considering records of the investigating officer. When the evidence of complainant is found to be worthy of acceptance then

> the satisfaction of the investigating officer hardly matters. If satisfaction of investigating officer is to be treated as determinative then the purpose of Section 319 would be frustrated."
>
> (Emphasis supplied)

12. We may emphasize that this Court in ***S. Mohammed Ispahani*** (supra) has already observed that the 'evidence' led before the Court has to be considered, and statements recorded under 161 CrPC could only be treated as corroborative material and not as independent evidence.

13. In ***Brijendra Singh v. State of Rajasthan***[13], this Court observed that 'evidence' recorded during the trial was nothing more than the statements which were already there under Section 161 CrPC; the Trial Court ought to have looked into the evidence collected during the investigation which suggested otherwise and to see whether much stronger evidence than the mere possibility of complicity of accused person has come on record.

OUR VIEW

14. The foregoing discussion would reveal the following statutory requisites for summoning any person not being the accused:

> *(a)* such person has committed an offence; (b) his complicity is revealed from the evidence collected during inquiry or trial; and (c) for such offence, he can be tried together with the accused already facing trial.

15. The principles that the Trial Court ought to follow while exercising power under this Section are :

    (a) This provision is a facet of that area of law which gives protection to victims and society at large, ensuring that the perpetrators of crime should not escape the force of law;

    (b) It is the duty cast upon the Court not to let the guilty get away unpunished;

13 (2017) 7 SCC 706

(c) The Trial Court has broad but not unbridled power as this power can be exercised only on the basis of evidence adduced before it and not any other material collected during investigation;

(d) The Trial Court is not powerless to summon a person who is not named in the FIR or Chargesheet; they can be impleaded if the evidence adduced inculpates him;

(e) This power is not to be exercised in a regular or cavalier manner, but only when strong or cogent evidence is available than the mere probability of complicity;

(f) The degree of satisfaction required is much stricter than the *prima facie* case, which is needed at the time of framing of charge(s);

(g) The Court should not conduct a mini-trial at this stage as the expression used is 'such person *could* be tried' and not '*should* be tried'.

16. Reverting to the facts of the case, it is pertinent to reproduce the relevant extract of the FIR, wherein the name of Respondent No.2 was referred :

> "....I was sitting with my brother Yadunath at my doorstep taking sun bath when Rahul and Dinesh, sons of Hurbalal Rajendra, son of Lallu, Shivamust, son of Kamta, from my own village, came to my door with sticks, batons and axes in their hands with the intention of killing me and started abusing me...."

17. PW1, in his statement recorded before the Trial Court on 21st August 2018, deposed :

> "…I and my brother Yadunath were at the door, we were sitting and taking sunlight. Rahul, Dinesh, Rajesh, Shivmurat of my own village came with sticks and axes and started abusing us…"

18. PW1's statement was again recorded on 10th March 2021 after the consolidation of Case No.146/2018[14] and Session Trial No.109/2018, where he deposed :

14 Against accused-Rahul

> "..I and my brother Yadunath were sitting at the door taking sun. Rajendra, Dinesh, Rahul and Shivmurti of my own village were carrying axes. Dinesh and Rahul were carrying sticks... Rajendra had a baton. They came together and started abusing us…"

19. A perusal of the three extracted statements would reveal four persons being consistently named by this witness; it is only in the statement dated 21st August 2018 that Rajesh, instead of Rajendra, is mentioned. The remaining three names remained the same. Not only is he named, but a specific role is assigned to him, i.e., carrying a baton (weapon of offence).

20. Here, we may clarify, as is evident from our order dated 3rd March 2025, that Rajesh and Rajendra are the same person.

21. PW2 also deposed that when his father and uncle were basking under the sun, '*Rajendra* armed with stick' came to the door of his house with a common objective and started assaulting him and his family members. PW3 also deposed to the effect that *Rajendra*, who had a stick, started assaulting both his father and grandfather.

22. The evidence from all three alleged eyewitnesses, although *prima facie,* suggests the complicity of Rajendra (Respondent No. 2); a specific role being assigned to him, indicating that he was present at the scene of the occurrence, armed with a stick. The High Court tried to apply the same standard in deciding this application as is ordinarily used at the end of the trial in determining the conviction or otherwise of the accused. Whereas it ought to have considered that the standard of satisfaction required is short of the standard necessary for passing a final judgment after trial.

23. Rajendra, although not charge sheeted, was named in the FIR, and the evidence thus far, leads, *prima facie,* to reveal his role. Therefore, at this stage, there is sufficient material to put him on trial; whether he will ultimately be convicted or not is left to be determined by a full-fledged inquiry at the end of the trial. It would be premature to comment anything on his conviction. The first informant categorically mentioned him as the one who came along with the others, with a common intent, abusing and beating, causing the death of his brother, apart from causing serious injuries to the others.

24. In our considered view, the High Court proceeded to conduct a mini trial solely relying upon the affidavits submitted before the Superintendent of Police *qua* the innocence of Respondent No.2. It erred in giving a categorical finding on the merits of PW1, the injured eyewitness not to have named Respondent No.2, which we find is based on erroneous assumption and contrary to the factual position emerging from the record. The High Court erred in observing that witnesses have stated nothing about the motive of the crime; that the depositions are silent on the aspect of common intention; absence of the manner or sequence of occurrence of the incident; or that it cannot be inferred who is the aggressor. All these questions, amongst others, are relevant or not is a matter to be considered at the stage of final adjudication.

25. It is a settled law that the power under Section 319 CrPC must be exercised sparingly. However, where the evidence reveals the complicity of the prospective accused, it becomes obligatory for the authority to exercise the power provided under the said Section.

26. With the aforesaid observations, the appeal is accordingly allowed. The impugned order dated 23rd July 2024 is set aside, and the summoning order dated 28th September 2023, passed by the Trial Court in Sessions Trial No.109/2018, is restored.

27. Parties are directed to appear before the Trial Court on 28th August, 2025. We direct them to fully co-operate and not take any unnecessary adjournments. The trial is expedited to be positively completed within a period of 18 months.

28. Pending application(s), if any, are disposed of.

Result of the case: Appeal allowed.

†*Headnotes prepared by:* Nidhi Jain

[2025] 8 S.C.R. 243 : 2025 INSC 861

Jai Prakash
v.
State of Uttarakhand

(Criminal Appeal No(s). 331-332 of 2022)

16 July 2025

[Vikram Nath, Sanjay Karol* and Sandeep Mehta JJ.]

Issue for Consideration

Allegation against the appellant herein that he committed a forceful rape and strangulated a 10 year old girl child. The punishment handed down to the appellant by the Courts below was of death penalty. Whether the conviction and sentence imposed by the Trial Court, as affirmed by the High Court, are sustainable in law or not.

Headnotes†

Penal Code, 1860 – ss.376, 377, 302 – Protection of Children from Sexual Offences Act, 2012 – ss.5, 6 – Allegation against the appellant that he lured innocent children to his dwelling, took his pick from them and let others go – He allegedly exploited a girl child and killed her – The punishment handed down to the appellant by the Courts below was of death penalty – Correctness:

Held: 1. There are no grounds for interference as far as conviction is concerned and the sentence of appellant is reduced to life imprisonment without remission extending to the natural life. [Paras 13 and 22]

2. There is no dispute about the identity or the cause of death of X – PW4-doctor, conducted the post-mortem of X – In his deposition, he stated that the injuries on the body indicate sexual assault – All injuries were caused prior to the death – The causation of death was ascertained as strangulation by hand, after the commission of forceful rape – Body of X was discovered from the hut of appellant – It was proven beyond doubt that the appellant was last seen with X inside his hut on the date of incident, and this was immediately prior to the occurrence of the incident – Furthermore, the DNA obtained from Ext.9 (underwear of the appellant) matches with samples of both X and the appellant – Taking a cumulative

* Author

view of all the above circumstances, the prosecution has proven its case against the appellant, beyond reasonable doubt. [Paras 9-12]

3. Examining the death sentence handed down to the appellant, the Courts below have failed to make any detailed reference to the aggravating and mitigating circumstances surrounding the appellant – Moreover, the High Court, which was the Reference Court for confirmation of death sentence, though expounded on the requirement of law to consider aggravating and mitigating circumstances, failed to consider any of these circumstances – only dealt with the brutality of the incident – Coming to the mitigating circumstances relating to the appellant, the condition of the family of the appellant is "very pathetic" and they earned their livelihood by doing labor work – The appellant could not attend school due to the socio-economic condition of the family and started working at an early age – He does not suffer from any psychiatric disturbance – Taking into account the above mitigating circumstances and the threshold of "rarest of rare" category, this Court deems it appropriate to award life imprisonment without remission extending to the natural life of the appellant instead of the punishment of the death penalty. [Paras 14, 18, 20, 21, 22]

Case Law Cited

Mohd. Farooq Abdul Gafur v. State of Maharashtra **[2009] 12 SCR 1093 : (2010) 14 SCC 641;** *Gudda v. State of M.P.* **[2013] 11 SCR 293 : (2013) 16 SCC 596;** *Manoj v. State of M.P.* **[2022] 9 SCR 452 : (2023) 2 SCC 353;** *Sundar @ Sundarrajan v. State by Inspector of Police* **[2023] 5 SCR 1016 : 2023 SCC Online SC 310 – relied on.**

Nipun Saxena v. Union of India **[2018] 14 SCR 755 : (2019) 2 SCC 703 – referred.**

List of Acts

Penal Code, 1860; Protection of Children from Sexual Offences Act, 2012.

List of Keywords

Rape; Strangulation; Minor child; Recovery of body; Last seen theory; DNA evidence; Death penalty; Aggravating and mitigating circumstances; Rarest of rare; Confirmation of death sentence.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No(s). 331-332 of 2022

From the Judgment and Order dated 07.01.2020 of the High Court of Uttarakhand at Nainital in CRLJA No. 64 and CRLR No. 02 of 2019

Appearances for Parties

Advs. for the Appellant:
Ranji Thomas, Sr. Adv., Ms. Minakshi Vij.

Advs. for the Respondents:
Sudarshan Singh Rawat, Ms. Saakshi Singh Rawat, Ms. Rachna Gandhi.

Judgment / Order of the Supreme Court

Judgment

Sanjay Karol, J.

1. A simple afternoon of play and frolic with family members yielded catastrophic results for a 10-year-old female child. The most innocent desire of either a candy or a toy was exploited in the worst manner possible by the appellant. He lured innocent children to his dwelling, took his pick from among them and let the others go. He allegedly assaulted and exploited her, killed her and then, if the prosecution is to be believed, lied to the parents of the victim saying that he was not aware of her whereabouts. The Courts below have concurrently found the appellant to be guilty of offences against the victim and also of taking her life. This Court is now called upon to examine the correctness of these conclusions.

2. The present Appeals arise from the final judgment and order dated 7th January 2020, passed by the High Court of Uttarakhand at Nainital in Criminal Jail Appeal No.64 of 2019 & Criminal Reference No.02 of 2019, whereby the Judgment and sentencing Order dated 26th/28th August 2019 passed by Fast Track Court, Special Judge (POCSO)/Additional District and Sessions Judge, Dehradun, in Special Sessions Trial Number 119/2018, convicting the appellant

under Sections 376, 377, 302 of the Indian Penal Code, 1860[1] and Section 5/6 of the Protection of Children from Sexual Offences Act, 2012[2] came to be affirmed. The punishment handed down to the appellant by the Courts below was of death penalty, for the murder of the victim, whose name[3] stands redacted in view of the judgment of this Court in ***Nipun Saxena v. Union of India***[4].

Prosecution Case

3. The case set out by the prosecution against the appellant, as emerging from the record and also as set out by the Courts below, is as under :

3.1 On 28th July 2018, at around 12:30 p.m., while playing outside her house, with cousins and friends, X the child of PW1 went missing. Concerned, PW1 - Sant Pratap (*father of the victim*) started looking for his daughter. On enquiry, from other children present, he got to know that the appellant took all the children to his hut and gave them Rs.10/- each to go to the shop. Somwati - PW13, his sister-in-law also corroborated the version of the children. When he asked the appellant regarding the whereabouts of her daughter, he was apparently told that she had taken the gift of 10 rupees note and left the place. Eventually, after a few hours of exasperated searching, which included Kulbhushan - PW2 sending one Mohd. Alam - PW3, to search the hut of the appellant, the victim was found dead underneath empty cement bags. PW1, therefore, lodged an FIR at P.S. Sahaspur, District – Dehradun. It was stated therein that he resided with his family in a hut, in the under-construction premises of Shivalik Engineering College, narrating the facts as above, asking for action to be taken against the appellant.

3.2 After registration of the abovementioned FIR, the Investigating Officer commenced the investigation. The inquest report was prepared, and the body of X was sent for post-mortem to Dr. Chirag Bahugana - PW4. The cause of death came to be determined as '*manual throttling by hand causes asphyxia*.' After

1 hereinafter referred to as 'IPC'

2 hereinafter referred to as 'POCSO'

3 hereinafter referred to as 'X'

4 (2019) 2 SCC 703

completion of the investigation, charges were framed against the appellant under Sections 302, 201, 376 and 377 IPC and Section 6 of the POCSO Act.

Reasoning of the Courts below

4. The Trial Court, after careful consideration of the evidence-on-record, *vide* judgment and order dated 26th/28th August 2019, convicted the appellant under **Sections 376(AB), 377, 302 of the IPC and Section 5/6 of POCSO.** The Court arrived at the following findings :

   4.1 Master Rakesh - PW11, Rani @ Radha Rani - PW12, and PW13 - Somwati have proven that X was last seen with the appellant;

   4.2 PW1, PW2, PW3, SI Lakshmi Joshi - PW5, Rani W/o Sant Partap - PW8 and PW12 have proven the recovery of the body of X from the hut of the appellant. Their testimonies have withstood cross-examination;

   4.3 The DNA evidence obtained from X, matches with the samples of the appellant. Dr. Manoj Kumar Aggarwal, Scientific Officer, Forensic Science Laboratory, Dehradun - PW17, has proven the report, Ex.Ka-43, to that effect;

   4.4 In view of the above circumstances, the prosecution has proven its case beyond reasonable doubt;

   4.5 The cruelty of the crime is displayed by strangulation by hand of a defenseless child. The case at hand is '*rarest of rare*' and, therefore, the punishment of death penalty is just and proper;

   4.6 The order of sentencing highlighted the grave nature of the crime. It was observed that the rarest of the rare test comes into play when a person, by way of his crime which is heinous or brutal, challenges the harmonious and peaceful co-existence of the society, with reference to ***Sunderajan v. State***[5]***.*** It was held that the accused was in his 30s and himself is the father of two children with one of these children being similar in age to X. Since, as per his age, he was mature enough to understand the implications of his acts, no benefit could be given on this count. In the sum total of facts and circumstances of this case, the extreme penalty of death by hanging was found to be justified.

5 (2013) 3 SCC 215

5. The appellant preferred an Appeal before the High Court of Uttarakhand at Nainital, which came to be numbered as Criminal Jail Appeal No.64 of 2019. A reference for confirmation of the death sentence was also submitted to the High Court, which came to be numbered as Criminal Reference No.02 of 2019, in consonance with Section 366 of the Code of Criminal Procedure, 1973. *Vide* the impugned Judgment, the High Court confirmed the conviction and death sentence awarded to the appellant, *inter alia*, recording that the appellant himself admitted to being in his room on the date of the offence and since the body of X was also found in his room, later point to his having committed the crime. That apart, the DNA of the appellant matched with the DNA which was found on the undergarments of X, thereby directly pointing to his involvement and guilt. The argument that PW-11 and PW12, who are child witnesses, have been tutored, was rejected on account of the fact that there is other evidence corroborating their statements against the appellant. Regarding DNA, evidence reference has been made to the report prepared by PW17, the relevant extract whereof is as under:

> "Conclusion:-
>
> The DNA test performed on the exhibits provided as sufficient to conclude that,
>
> 1. The DNA obtained from Exhibits-4 and 5 (hair recovered from deceased and underwear of accused) are from a single male human source and matching with the DNA obtained from the Exhibit-24 (blood sample of accused).
>
> 2. The DNA obtained from the Exhibit-9 (underwear of deceased) is matching with the DNA obtained from the Exhibits – 23 and 24 (blood sample of deceased and blood sample of accused).
>
> 3. The DNA obtained from the Exhibits – 13,14,15,16,17,18,19,20 and 22 (throat swab, throat slide, internal vaginal swab, internal vaginal slide, internal vaginal swab, internal vaginal slide and nails clipping of victim) are from a single female human source and matching with the DNA obtained from Exhibit-23 (blood sample of deceased)."

On the aspect of sentencing, the concurring judgment makes reference to a judgment of this Court ***Ram Naresh v. State of Chattisgarh***[6] which has attempted to list out aggravating and mitigating circumstances. In the end, it was observed that there was no doubt as to the culpability of the appellant and in actuality, the conclusion reached by the Court was from a point of absolute certainty that this case qualified as the rarest of rare.

Issue for consideration

6. The question that arises for consideration before this Court is whether the conviction and sentence imposed by the Trial Court, as affirmed by the High Court, are sustainable in law or not.

Our View

7. We have heard the learned Senior counsel for the appellant and counsel for the Respondent-State. The case of the prosecution, relies on the following circumstances against the appellant:

   (a) Recovery of the body of X from the appellant's hut.

   (b) Last seen theory.

   (c) DNA evidence, linking the appellant to X.

8. 17 witnesses came to be examined by the prosecution. A tabular chart capturing their role in the investigation and their relationship with X is as below:

PW	Name	Role	Relation to X
1.	**Sant Pratap**	Complainant / Spot witness	Father of X
2.	**Kulbhushan**	Spot witness	Employer
3.	**Mohd. Naiyar**	Spot witness / Recovered dead body	-
4.	**Dr. Chirag Bahugana**	Conducted post-mortem	Doctor

6 (2012) 4 SCC 257

5.	**S.I. Lakshmi Joshi**	Initiated panchanama of deceased / Recovery of dead body	-
6.	**Yogesh**	Resided with the appellant	-
7.	**Constable Harishankar**	Recorded GD entry of the crime in question	-
8.	**Rani**	Spot witness	Mother of X
9.	**Prasun Shukla**	Verified age of X	Principal of School
10.	**SI Raj Vikram Singh Panwar**	Sent items for FSL	-
11.	**Master Rakesh**	Child witness (last seen)	Cousin
12.	**Rani**	Child witness (last seen)	Cousin
13.	**Somwati**	Spot witness	Aunt of X
14.	**Constable Rajeev Kumar**	Sent case property for FSL testing	-
15.	**Dr. R.C. Arya**	Conducted medical examination of the appellant	-
16.	**SI N.S. Rathore**	Investigating officer	-
17.	**Dr. Manoj Kumar Aggarwal**	FSL examination of recovered articles	-

9. There is no dispute about the identity or the cause of death of X. Dr. Chirag Bahugana - PW4, conducted the post-mortem of X. In his deposition, he stated that the injuries on the body indicate sexual assault. All injuries were caused prior to the death. The causation of death was ascertained as strangulation by hand, after the commission of forceful rape. The age of X also cannot be doubted, on the basis of the evidence of PW9, the Headmaster of the School, in which X was enrolled for studies. He verified that the date of birth of X was 20th October 2008, which makes her 10 years old on the date of the incident.

10. Coming to the recovery of the body, Mohd. Naiyar - PW-3, had, at the first instance, searched the hut of the appellant. In his deposition, he stated that the Contractor of the site (PW-2), told him to go and search the hut of the appellant for X. Upon his search, he discovered the dead body of X concealed under empty cement bags in the corner of the hut. He identified his signatures on the *panchnama* and the appellant in Court. His testimony stood the test of cross-examination and nothing was brought about to impeach his credit or doubt his testimony. PWs 1 and 2, who support his testimony, do state that PW3 informed them about the discovery of X's body, after which, the police report came to be lodged. They identified their signatures on the recovery memos. SI Raj Vikram Singh, PW10, deposed on similar lines, stating that the dead body of X was lying in the hut of the appellant. Given the testimonies of these witnesses, this circumstance has been rightly held by the Courts below, as against the appellant.

11. The next circumstance against the appellant is that of last seen theory. Somwati - PW13, deposed that she saw X and her children being taken by the appellant, however only her children (*two in number*) had left the hut. She also identified the appellant in Court. This witness also stood the test of cross-examination. The children who had accompanied X, also lend support to the last-seen theory. Master Rakesh - PW10, deposed that the appellant handed them Rs.10/- each, but stopped X in his hut, while he left with Rani. Rani - PW11, supports this chain of events. Despite being minors, there is nothing on record to disbelieve their testimonies, for we find the witnesses to be inspiring in confidence and the children's deposition to be in a natural form. It cannot be doubted, therefore, in fact, proven beyond doubt that the appellant was last seen with X inside his hut on the date of the incident, and this was immediately prior to the occurrence of the incident. In fact, they clearly established the presence of the appellant inside the hut where no one else other than him was present. It is nobody's case that the other two roommates residing with the appellant in the very same hut were also present there. None has deposed about their presence either inside or outside the hut or anywhere near the scene of occurrence of the incident.

12. Coming to the DNA evidence of the case at hand, we must advert to the testimony of, Dr. Manoj Kumar Aggarwal - PW17, who

conducted the FSL examination. Upon such examination, Ext.4 (*hair found on the dead body of X*) matched with Ext.5 (*underwear of the appellant*), both of which matched with the DNA sample of the appellant. Furthermore, the DNA obtained from Ext.9 (*underwear of the appellant*) matches with samples of both X and the appellant. There is no infirmity which has been brought about in the chain of the seizure of these articles and their consequent examination by the appellant. Taking a cumulative view of all the above circumstances, in our view, the prosecution has proven its case against the appellant, beyond reasonable doubt.

13. In view of the above, we are not inclined to interfere with the findings of conviction concurrent in nature against the appellant. The Courts below have correctly placed reliance on the last-seen theory and DNA evidence against the appellant. In our view, no ground for interference, pointing out any infirmity in the findings of the Courts below has been made out by the appellant, warranting interference as far as conviction is concerned.

14. We now proceed to examine the sentence that has been handed down to the appellant, i.e., death penalty. The case at hand is one, based on admittedly circumstantial evidence. This Court in ***Mohd. Farooq Abdul Gafur v. State of Maharashtra***[7]**,** expounded:

> **"164.** Capital sentencing is not a normal penalty discharging the social function of punishment. In this particular punishment, there is a heavy burden on the Court to meet the procedural justice requirements, both emerging from the black letter law as also conventions. In terms of rule of prudence and from the point of view of principle, a Court may choose to give primacy to life imprisonment over death penalty in cases which are solely based on circumstantial evidence or where the High Court has given a life imprisonment or acquittal.
>
> **165.** At this juncture, it will be pertinent to assess the nature of the rarest of rare expression. In the light of serious objections to disparity in sentencing by this Court flowing out of varied interpretations to the rarest of rare

7 (2010) 14 SCC 641

> expression, it is clear that the test has to be more than what a particular Judge locates as rarest of rare in his personal consideration. There has to be an objective value to the term "rarest of rare", otherwise it will fall foul of Article 14. In such a scenario, a robust approach to arrive at the rarest of rare situations will give primacy to what can be called the consensus approach to the test. In our tiered court system, an attempt towards deciphering a common view as to what can be called to be the rarest of rare, vertically across the trial court, the High Court and Apex Court and horizontally across a Bench at any particular level, will introduce some objectivity to the precedent on death penalty which is crumbling down under the weight of disparate interpretations. This is only a rule of prudence and as such there is no statutory provision to this effect."
>
> (Emphasis supplied)

15. Keeping the above exposition of law in mind, we are also conscious of the brutality of the crime in question. A helpless child was at first, mercilessly raped after being lured into the appellant's hut on the pretext of buying sweets with the offered money. Thereafter, to hide the evidence of his crime, the child was strangulated by hand, in a defenseless condition. That being said, this Court in ***Gudda v. State of M.P.***[8], while commuting the sentence of the appellant therein from death penalty to life imprisonment, where the victims of the crime were a pregnant lady and a five-year old child, had reiterated that the brutality of a crime cannot be the only criterion for determining whether a case falls under the "*rarest of the rare*" category. The Courts below have only commented on the brutality of the crime in question, to hand down the death penalty to the appellant. No other circumstance came to be discussed by the Courts in reaching the conclusion that the case forms part of the "*rarest of the rare*" category. Such an approach in our view cannot be sustained.

8 (2013) 16 SCC 596

16. In ***Gudda*** (supra), it was further observed:

> **"32.** In a civilised society — a tooth for a tooth and an eye for an eye ought not to be the criterion to clothe a case with "the rarest of the rare" jacket and the courts must not be propelled by such notions in a haste resorting to capital punishment. Our criminal jurisprudence cautions the courts of law to act with utmost responsibility by analysing the finest strands of the matter and it is in that perspective that a reasonable proportion has to be maintained between the brutality of the crime and the punishment. It falls squarely upon the court to award the sentence having due regard to the nature of offence such that neither is the punishment disproportionately severe nor is it manifestly inadequate, as either case would not subserve the cause of justice to the society. In jurisprudential terms, an individual›s right of not to be subjected to cruel, arbitrary or excessive punishment cannot be outweighed by the utilitarian value of that punishment."

17. More recently, in ***Manoj v. State of M.P.***[9], this Court had recognized the disparity in the application of the "*rarest of rare*" test for imposition of the death penalty and re-emphasized the two-step process to determine whether a case belongs to the rarest of rare category:

> **"224.** This aspect was dealt with extensively in Santosh Bariyar [Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra, (2009) 6 SCC 498, para 112 : (2009) 2 SCC (Cri) 1150] where the Court articulated the test to be a two-step process to determine whether a case deserves the death sentence — firstly, that the case belongs to the "rarest of rare" category, and secondly, that the option of life imprisonment would simply not suffice. For the first step, the aggravating and mitigating circumstances would have to be identified and considered equally. For the second test, the court had to consider whether the alternative of life imprisonment was unquestionably foreclosed as the

9 (2023) 2 SCC 353

> sentencing aim of reformation was unachievable, for which the State must provide material."
>
> (Emphasis supplied)

18. The Courts below have failed to make any detailed reference to the aggravating and mitigating circumstances surrounding the appellant. Moreover, the High Court, which was the Reference Court for confirmation of death sentence, though expounded on the requirement of law to consider aggravating and mitigating circumstances, failed to consider any of these circumstances – only dealing with the brutality of the incident.

19. In similar circumstances in ***Sundar @ Sundarrajan v. State by Inspector of Police***[10], this Court commuted the death sentence awarded to the appellant therein, for murder of a seven-year-old child while observing:

> **"81.** No such inquiry has been conducted for enabling a consideration of the factors mentioned above in case of the petitioner. Neither the trial court, nor the appellate courts have looked into any factors to conclusively state that the petitioner cannot be reformed or rehabilitated. In the present case, the Courts have reiterated the gruesome nature of crime to award the death penalty.
>
> **....**
>
> **83.** The duty of the court to enquire into mitigating circumstances as well as to foreclose the possibility of reformation and rehabilitation before imposing the death penalty has been highlighted in multiple judgments of this Court. Despite this, in the present case, no such enquiry was conducted and the grievous nature of the crime was the only factor that was considered while awarding the death penalty."

20. Coming to the mitigating circumstances relating to the appellant, this Court *vide* 2nd March 2022, had called for the reports of the probation officer, jail administration and psychological evaluation

10 2023 SCC Online SC 310

of the appellant. It is borne from the report of the District Probation Officer, Ayodhya, dated 12th April 2022, that the condition of the family of the appellant is "*very pathetic*" and they earned their livelihood by doing labor work.

21. The psychological report of the appellant was prepared on 19th April 2022. It is stated therein that the appellant could not attend school due to the socio-economic condition of the family and had started working at the age of twelve. He has good relations with other inmates. He does not suffer from any psychiatric disturbance.

22. In light of the above discussion, taking into account the above mitigating circumstances and the threshold of "*rarest of rare*" category, we deem it appropriate to award life imprisonment without remission extending to the natural life of the appellant instead of the punishment of the death penalty.

23. Therefore, the present Appeals are partly allowed. The impugned order dated 7th January 2020 passed by the High Court of Uttarakhand at Nainital in Criminal Jail Appeal No.64 of 2019 & Criminal Reference No.02 of 2019, is modified to the above extent.

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

Result of the case: Appeals partly allowed.

†*Headnotes prepared by:* Ankit Gyan

[2025] 8 S.C.R. 257 : 2025 INSC 866

Gurdial Singh (Dead) Through LR
v.
Jagir Kaur (Dead) and Anr. Etc.

(Civil Appeal No(s). 3509-3510 of 2010)

17 July 2025

[Sanjay Karol and Joymalya Bagchi,* JJ.]

Issue for Consideration

Issue arose as to whether the High Court was justified in reversing the concurrent findings of the courts below and holding the Will was vitiated due to existence of suspicious circumstances, non-mention of the existence of wife and failure to give reasons for her disinheritance in the Will.

Headnotes†

Will – Proof of Will – Suspicious circumstances' vitiating a Will – Ascertainment – Suit by the appellant-nephew of the testator of the Will that his deceased uncle bequeathed certain land to him and 1st respondent is not testator's lawfully wedded wife, and 2nd respondent was not their adopted son – Suit by the respondents seeking declaration that 1st respondent is testator's lawfully wedded wife, and 2nd respondent is their adopted son – Trial court held that the 1st respondent was the lawfully wedded wife of the testator but 2nd respondent was not their adopted son; and declared that the Will propounded by the testator was genuine and by virtue of the Will, the appellant was the lawful owner of the suit land – Upheld by the appellate court – In appeal, the High Court held that the 1st respondent was entitled to the possession of the land since the suspicious circumstance, non-mention of the wife of the testator and the reasons for her disinheritance in the Will exposed absence of 'free disposing mind' of the testator – Correctness:

Held: Deprivation of a natural heir, by itself, may not amount to a suspicious circumstance because the whole idea behind

* Author

the execution of the Will is to interfere with the normal line of succession – However, prudence requires reason for denying the benefit of inheritance to natural heirs – Suspicious circumstance, non-mention of the status of wife or the reason for her disinheritance in the Will ought not to be examined in isolation but in the light of all attending circumstances of the case – It cannot be said testator had during his lifetime, denied his marriage with 1st respondent or admitted that their relation was strained, so as to prompt him to erase her very existence in the Will – Such erasure of marital status is the tell-tale insignia of the propounder and not the testator himself – Cumulative assessment of the attending circumstances including this unusual omission to mention the very existence of his wife in the Will, gives rise to serious doubt that the Will was executed as per the dictates of the appellant and is not the 'free will' of the testator – Non-mention of 1st respondent or the reasons for her disinheritance in the Will, shows that the free disposition of the testator was vitiated by the undue influence of the appellant – No evidence to show whether the quantum of money said to be settled in favour of 1st respondent was reasonable and would satisfy the conscience of a man of ordinary prudence with regard to her complete expungement in the Will – Thus, the impugned judgment upheld. [Paras 16, 18-22]

Case Law Cited

Ram Piari v. Bhagwant & Ors. **[1993] 3 SCR 1018 : (1993) 3 SCC 364;** *Leela Rajagopal v. Kamala Menon Cocharan* **[2014] 7 SCR 697 : (2014) 15 SCC 570 – relied on.**

Smt. Jaswant Kaur v. Smt. Amrit Kaur and others **[1977] 1 SCR 925 : (1977) 1 SCC 369;** *H. Venkatachala Iyengar v. B.N. Thimmajamma & Ors.* **[1959] Supp. 1 SCR 426;** *Indu Bala Bose & Ors. v. Manindra Chandra Bose & Anr.* **[1982] 1 SCR 1188 : (1982) 1 SCC 20;** *PPK Gopalan Nambier v. PPK Balakrishnan Nambiar & Ors.* **[1995] 2 SCR 585 : (1995) Supp. 2 SCC 664;** *Dhanpat v. Sheo Ram (deceased) through LRs. & Ors.* **[2020] 7 SCR 131 : (2020) 16 SCC 209 – referred to.**

Hames v. Hinkson, **AIR 1946 PC 156 – referred to.**

List of Acts

Succession Act, 1925; Evidence Act, 1872.

List of Keywords

Will; Existence of suspicious circumstances; Non-mention of existence of wife in the Will; Failure to give reasons for wife's disinheritance in the Will; Proof of Will; Suspicious circumstances' vitiating Will; Testator's lawfully wedded wife; Testator's adopted son; Deprivation of natural heir; Execution of Will; Normal line of succession; Prudence; Benefit of inheritance to natural heirs; Invalidating the Will; Proof of signatures on Will; Registration; Performance of last rites of testator; Hindu/Sikh family, last rites performed by Male Sapinda relations; Free Will' of testator; Expungement in Will.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No(s). 3509-3510 of 2010

From the Judgment and Order dated 13.11.2009 of the High Court of Punjab and Haryana at Chandigarh in RSA Nos. 837 & 958 of 1996.

Appearances for Parties

Advs. for the Appellants:
Manoj Swarup, Sr. Adv., Ms. Jyoti Mendiratta, Neelmani Pant, Ms. Ananya Basudha, Ravindra Pal Singh.

Advs. for the Respondents:
Arun Bhardwaj, Sr. Adv., Vishal Mahajan, Anil Kumar, Bhaskar Y. Kulkarni.

Judgment / Order of the Supreme Court

Judgment

Joymalya Bagchi, J.

1. The appeals are directed against the common judgment and decree dated 13.11.2009 passed by the Punjab & Haryana High Court in R.S.A. No.837 of 1996 and R.S.A. No.958 of 1996 setting aside the concurrent findings of the Trial Court and the First Appellate Court, and declaring the 1st respondent as the owner and in possession of the suit land.

Facts

2. One Maya Singh was owner of land measuring 67 kanals 4 marlas in village Sathiala[1]. Appellant is the nephew of Maya Singh. 1st respondent is Maya Singh's wife. Gurpal Singh (hereinafter referred to as 2nd respondent) claimed to be the adopted son of Maya Singh and 1st respondent. Maya Singh died on 10.11.1991. On 27.10.1992, the suit land was mutated in favour of 1st respondent. Apprehending that 1st respondent was taking steps to alienate the property, appellant filed a Suit RBT No. 329/1992 by propounding a Will executed by Maya Singh on 16.05.1991, bequeathing the land to him. In this suit, appellant contended his uncle, Maya Singh was married to one Joginder Kaur who had pre-deceased him and 1st respondent was not his lawfully wedded wife or 2nd respondent, their adopted son.

3. Whereas respondents filed another suit seeking declaration that 1st respondent is the lawfully wedded wife of Maya Singh and 2nd respondent is their adopted son.

4. Trial Court dismissed the respondents' suit holding that 2nd respondent was not the adopted son of Maya Singh and decreed the appellant's suit declaring that the Will dated 16.05.1991 propounded by the latter was genuine and by virtue of the Will, he was the lawful owner of the suit land. However, the Court held 1st respondent is the lawfully wedded wife of Maya Singh.

5. 1st respondent preferred two appeals challenging the dismissal of her suit as well as against the judgment and decree passed in the appellant's suit. The appeals were disposed of by the Additional District Judge, Amritsar (hereinafter referred to as the "First Appellate Court") upholding the judgment and decree passed in the appellant's suit.

6. Being aggrieved, 1st respondent filed Second Appeals being RSA No.958 of 1996 and RSA No.837 of 1996. The High Court framed the following substantial question of law:-

> *"Whether the execution of Will dated 16.05.1991, set up by Gurdial Singh, was duly proved?"*

Holding that the suspicious circumstance namely, non-mention of 1st respondent who is the wife of the testator Maya Singh and the reasons for her disinheritance in the Will exposed absence of 'free disposing

1 Hereinafter referred to as "the suit land".

mind' of the testator, High Court reversed the concurrent findings of the Trial Court and First Appellate Court and held 1st respondent was the owner and was entitled to possession of the suit land.

7. Being aggrieved by the impugned judgment, the appellant is before us. During the pendency of the appeal, both the appellant and 1st respondent died and have been substituted by their respective legal representatives.

8. The principal issue which falls for consideration is as follows:-

> *Whether, in the facts and circumstances of the case, non-mention of the status of 1st respondent as wife of the testator and failure to give reasons for her disinheritance in the Will dated 16.05.1991 is a suspicious circumstance which exposes lack of a free disposing mind of the testator, rendering the Will invalid?*

Arguments

9. Mr. Manoj Swarup, learned Senior Counsel argued that the Will is a registered one and its execution has been lawfully proved. Appellant had examined PW-2 Surinder Kumar, Scribe of the Will and PW-3 Chanan Singh, one of the attesting witnesses. PW-2 deposed he scribed the Will at the instance of Maya Singh. It was read over to Maya Singh and the latter had signed in presence of the attesting witnesses Chanan Singh (PW-3) and Pesra Singh. PW-3 stated he was the attesting witness and the Will was presented before Sub-Registrar where it was again read over to the testator. Their evidence could not be discredited during cross-examination. Mere non-mention of 1st respondent's name cannot be a ground to hold that the Will is not a genuine one. It was further contended that the monies left by Maya Singh had been given to 1st respondent and she was also entitled to his pension.

10. Per contra, Mr. Arun Bhardwaj, learned Senior Counsel submitted 1st respondent was the lawfully wedded wife of Maya Singh. Relationship between the couple was good as would be evidenced from 1st respondent's deposition that she was living with Maya Singh till his death. The Trial Court glossed over this evidence and came to a perverse finding that she had not served Maya Singh. While relations between the couple were good, appellant disputed 1st respondent's status as the wife of Maya Singh. Non-mention of

1st respondent's name and the reasons for her disinheritance in the Will must be viewed from this sinister design of the appellant. His effort not only to disinherit the 1st respondent but also to deny her the very status as his wife is eloquent in the omission of her status as wife in the Will. Viewed from this perspective, the tenor of the Will demonstrates the masked voice and intention of the appellant and not the free disposing mind of the testator. Courts below erred in applying the correct legal principles and erroneously held that this suspicious circumstance did not vitiate the Will.

Proof of Will: Legal Principles

11. A Will has to be proved like any other document subject to the requirements of Section 63 of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872, that is examination of at least of one of the attesting witnesses**.** However, unlike other documents, when a Will is propounded, its maker is no longer in the land of living. This casts a solemn duty on the Court to ascertain whether the Will propounded had been duly proved. Onus lies on the propounder not only to prove due execution but dispel from the mind of the court, all suspicious circumstances which cast doubt on the free disposing mind of the testator. Only when the propounder dispels the suspicious circumstances and satisfies the conscience of the court that the testator had duly executed the Will out of his free volition without coercion or undue influence, would the Will be accepted as genuine. In *Smt. Jaswant Kaur v. Smt. Amrit Kaur and others*[2], this Court referring to *H. Venkatachala Iyengar vs. B.N. Thimmajamma & Ors*.[3] enumerated the principles relating to proof of Will:-

> **"10.** ***** **** **** ****
>
> *"1. Stated generally, a will has to be proved like any other document, the test to be applied being the usual test of the satisfaction of the prudent mind in such matters. As in the case of proof of other documents, so in the case of proof of wills, one cannot insist on proof with mathematical certainty.*

2 (1977) 1 SCC 369.

3 [1959] Supp. 1 SCR 426.

2. Since Section 63 of the Succession Act requires a will to be attested, it cannot be used as evidence until, as required by Section 68 of the Evidence Act, one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence.

3. Unlike other documents, the will speaks from the death of the testator and therefore the maker of the will is never available for deposing as to the circumstances in which the will came to be executed. This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last will and testament of the testator. Normally, the onus which lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the will.

4. Cases in which the execution of the will is surrounded by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit and such other circumstances raise suspicion about the execution of the will. That suspicion cannot be removed by the mere assertion of the propounder that the will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the will excite the suspicion of the court, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.

5. It is in connection with wills, the execution of which is surrounded by suspicious circumstances that the test of

> *satisfaction of the judicial conscience has been evolved. That test emphasises that in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is called upon to decide a solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the will has been validly executed by the testator.*
>
> *6. If a caveator alleges fraud, undue influence, coercion etc. in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the will may raise a doubt as to whether the testator was acting of his own free will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter."*

The Court further held:-

> *"**9.** In cases where the execution of a will is shrouded in suspicion, its proof ceases to be a simple lis between the plaintiff and the defendant. What, generally, is an adversary proceeding becomes in such cases a matter of the court›s conscience and then the true question which arises for consideration is whether the evidence led by the propounder of the will is such as to satisfy the conscience of the court that the will was duly executed by the testator. It is impossible to reach such satisfaction unless the party which sets up the will offers a cogent and convincing explanation of the suspicious circumstances surrounding the making of the will."*

12. Similarly in *Ram Piari vs. Bhagwant & Ors.*[4] this Court held when suspicious circumstance exists, Courts should not be swayed by due execution of the Will alone:

> *"**3.** ……Unfortunately none of the courts paid any attention to these probably because they were swayed with due execution even when this Court in Venkatachaliah*

4 (1993) 3 SCC 364.

> *case [AIR 1959 SC 443 : 1959 Supp 1 SCR 426] had held that, proof of signature raises a presumption about knowledge but the existence of suspicious circumstances rebuts it……."*

13. There is no cavil when suspicious circumstances exist and have not been repelled to the satisfaction of the Court, the Court would not be justified in holding that the Will is genuine since the signatures have been duly proved and the Will is registered one[5].

Parameters to ascertain 'suspicious circumstances' vitiating a Will:-

14. This brings us to the next issue i.e. what are the suspicious circumstances which may vitiate the disposition. In *Indu Bala Bose & Ors. vs. Manindra Chandra Bose & Anr.*[6] the Court held any and every circumstance is not a "suspicious" circumstance.

> **"8.** *Needless to say that any and every circumstance is not a "suspicious" circumstance. A circumstance would be "suspicious" when it is not normal or is not normally expected in a normal situation or is not expected of a normal person."*

The Court quoted the Privy Council's elucidation in *Hames v. Hinkson*[7] of suspicious circumstances as follows:

> "**17**……*where a Will is charged with suspicion, the rules enjoin a reasonable scepticism, not an obdurate persistence in disbelief. They do not demand from the Judge, even in circumstances of grave suspicion, a resolute and impenetrable incredulity. He is never required to close his mind to the truth."*

It was again reiterated in *PPK Gopalan Nambier vs. PPK Balakrishnan Nambiar & Ors.*[8] that suspected features should not be mere fantasies of a doubting mind.

5 AIR 1962 SC 567, Para 23.

6 (1982) 1 SCC 20.

7 AIR 1946 PC 156.

8 (1995) Supp. 2 SCC 664.

> *"***5***……It is trite that it is the duty of the propounder of the will to prove the will and to remove all the suspected features. But there must be real, germane and valid suspicious features and not fantasy of the doubting mind."*

15. It is from this prism, we need to examine whether the High Court was justified in reversing the concurrent findings of the Trial Court and the appellate court and holding the Will was vitiated due to existence of suspicious circumstances.

Findings of the Trial Court

Trial Court dealt with this issue in the following manner:

> *"As discussed above, defendant No. 1 is the widow of Maya Singh deceased. In Smt. Bhagya Wati Jain's case (supra) it was held that deprivation of legal heir from succession may be one of the suspicious circumstances along with other but that by itself is not sufficient ground to raise presumption against the Will. Admittedly, defendant No. 1, who is widow of Maya Singh, has been dis-inherited. Statement of Jagir Kaur defendant No. 1 who appeared as DW3 reads as follow:-*
>
> > *"I was married with Maya Singh, I lived with Maya Singh as his wife till his death. We took Guirpal Singh as our adopted son. He is the son of my sister. At the time of adoption Gurwas distributed. Maya Singh was in service and I draw pension. We are in possession of the land in suit. Maya Singh never told me having executed a Will in favour of the plaintiff. He was not on speaking terms with the plaintiff. I reside in the house of Maya Singh".*
>
> *Jagir kaur has no where stated that the served Maya Singh during his life time. That she actually resided with Maya Singh on the day the Will was executed i.e. on 16.5.91. She is again silent whether she performed the last rites of Maya Singh. In the circumstances if Maya Singh did not mention about her in the Will the same is not required to be explained by the plaintiff. No doubt Arjan*

Singh and Naranjan Singh have stated that last rites were performed by the defendant No. 1. But their statements are to corroborate the statement of the defendant No. 1 and when the defendant No. 1 herself is silent about the service rendered to Maya Singh, statement of Arjan Singh and Naranjan Singh did not prove that Maya Singh was actually served and lived with defendant No. 1. As stated above there is nothing against Surinder Kumar and Chanan Singh PWs who proved the due execution of the Will by Maya Singh and if the widow had been deprived, of the Will cannot be discarded on this sole ground."

Findings of the First Appellate Court

First Appellate Court upheld the findings of the Trial Court holding:

"From this catena of judicial pronouncements there can be no manner of doubt that mere deprivation of a legal; heir or mere non mention of such legal heir's name in the testamentary disposition, in itself, does not invalidate the will. A careful perusal of the will would reveal that the same purport to beat the signatures of testator Maya Singh (since deceased) in English. It is an admitted case of the parties that Maya Singh had been serving as a Havaldar in the Army and had retired from Military service which implies that he was an educated person. The will in dispute is a registered document on which the signatures of the testator or of the attesting witnesses have not been challenged by Jagir Kaur. There is nothing on the record, if Maya Singh was suffering from any mental incapacity to execute the will. The written statement of Jagir Kaur is quite silent with regards to the fact that Maya Singh was not in sound state of disposing mind. She has alleged that Maya Singh deceased was suffering from paralysis for the last more than 10 months before his death. Assuming it to be so, he might had been treated upon. Evidence regarding his treatment could have been produced by Jagir Kaur. There is no such evidence to the effect that he was paralytic without there being evidence, this plea remains unsubstantiated. Jagir Kaur, appearing as DW3 stated in her cross examination that Maya Singh

had executed a will in her favour. She has not set up the same in her written statement nor produced the sesame on record for the reasons best known to her. Therefore, an adverse inference can be drawn to the effect that no valid will has been executed by Maya Singh deceased in her favour. Further, there is no allegation from the side of Jagir Kaur defendant that the marginal witnesses of the will Ex. P. 1 or the Sub Registrar by whom the same was registered were in collusion with the legatee Gurdial Singh. There is no gain saying the fact that Jagir Kaur is drawing pension of Maya Singh being his widow. Ex. P. 7, is the certified copy of the order dated 29.9.1994 which purport to have been handed down by Commissioner (Appeals) Jalandhar Division. In its concluding paragraph, it has been mentioned that the petitioner (referring to Gurdial Singh) has explained that respondent No. 1 (referring to Jagir Kaur) was given the entire money left by the deceased (Maya Singh) and she was also entitled to get pension. My be that due to adjustment of pension and other deposits, Maya Singh had deprived Jagir Kaur of her state in the will and for that he did not think it proper to make reference to her in the disputed will."

Findings of the High Court

High Court reversed these findings and held as under:-

"The complete silence on the part of the executant qua his wife, while executing the Will, renders the will a suspicious document and leads to the inference that the same had not been executed by the executant of his free disposing mind. Rather it leads to the inference that the propounder of the Will might have influenced the executant to execute the Will in his favour. In these circumstances, the Courts below erred in holding that the Will dated 16.5.1991 was a genuine document."

Analysis

16. We are conscious that deprivation of a natural heir, by itself, may not amount to a suspicious circumstance because the whole idea

behind the execution of the Will is to interfere with the normal line of succession.[9] However, in *Ram Piari* (supra), this Court held prudence requires reason for denying the benefit of inheritance to natural heirs and an absence of it, though not invalidating the Will in all cases, shrouds the disposition with suspicion as it does not give inkling to the mind of the testator to enable the court to judge that the disposition was a voluntary act.[10]

17. It was rightly indicated in *Leela Rajagopal* vs. *Kamala Menon Cocharan*[11] when unusual features appear in a Will or unnatural circumstances surround its execution, the Court must undertake a close scrutiny and make an overall assessment of the unusual circumstances before accepting the Will. The Court held as follows:

> ***"13.*** *A will may have certain features and may have been executed in certain circumstances which may appear to be somewhat unnatural. Such unusual features appearing in a will or the unnatural circumstances surrounding its execution will definitely justify a close scrutiny before the same can be accepted. It is the overall assessment of the court on the basis of such scrutiny; the cumulative effect of the unusual features and circumstances which would weigh with the court in the determination required to be made by it. The judicial verdict, in the last resort, will be on the basis of a consideration of all the unusual features and suspicious circumstances put together and not on the impact of any single feature that may be found in a will or a singular circumstance that may appear from the process leading to its execution or registration. This, is the essence of the repeated pronouncements made by this Court on the subject including the decisions referred to and relied upon before us."*

18. What boils down from this discussion is that suspicious circumstance i.e. non-mention of the status of wife or the reason for her disinheritance in the Will ought not to be examined in isolation[#] but

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9 (1995) 4 SCC 459, (2004) 2 SCC 321 and (1995) Supp. 2 SCC 665.

10 (1990) 3 SCC 364, Para 2.

11 (2014) 15 SCC 570.

Ed. Note: "isolation" instead of "insolation" in terms of subsequent corrigendum.

in the light of all attending circumstances of the case. It would be argued that proof of signatures on the Will and its registration dispels such suspicious circumstance. On a first blush, this submission appears to be attractive till one delves further into the peculiar and unique circumstances of the case.

19. Appellant's case was not only to propound the Will in his favour but even to deny the very status of 1st respondent as Maya Singh's wife. When one reads the contents of the Will, appellant's stand is stark and palpable in its tenor and purport. The Will is a cryptic one where Maya Singh bequests his properties to his nephew i.e. the appellant, as the latter was taking care of him. However, the Will is completely silent with regard to the existence of his own wife and natural heir, i.e. the 1st respondent, or the reason for her disinheritance. Evidence on record shows 1st respondent was residing with Maya Singh till the latter's death. Nothing has come on record to show the relation between the couple was bitter. As per the appellant, she was nominated by Maya Singh and was entitled to receive his pension which demonstrates the testator's conduct in accepting 1st respondent as his lawfully wedded wife. Further, the Trial Court erroneously observed that non-performance of last rites of Maya Singh by 1st respondent hinted at sour relations between the couple. Ordinarily, in a Hindu/Sikh family, last rites are performed by Male Sapinda relations. Given this practice, 1st respondent not performing last rites could not be treated as a contra indicator of indifferent relationship with her husband during the latter's lifetime. In this backdrop, it cannot be said Maya Singh had during his lifetime, denied his marriage with 1st respondent or admitted that their relation was strained, so as to prompt him to erase her very existence in the Will. Such erasure of marital status is the tell-tale insignia of the propounder and not the testator himself. A cumulative assessment of the attending circumstances including this unusual omission to mention the very existence of his wife in the Will, gives rise to serious doubt that the Will was executed as per the dictates of the appellant and is not the 'free will' of the testator.

20. In this background, we have no hesitation to hold that non-mention of 1st respondent or the reasons for her disinheritance in the Will, is an eloquent reminder that the free disposition of the testator was

vitiated by the undue influence of the appellant.

21. We are not impressed with reference to *Dhanpat vs. Sheo Ram (deceased) through LRs. & Ors.*[12] that mere non-mention of some natural heirs would not vitiate the Will. In *Dhanpat* (Supra), the wife who had been disinherited, herself admitted that she had been ousted by her husband. On the other hand, DW3 unequivocally stated that she was living with her husband till his death and the specious rationale given that she may have been disinherited as Maya Singh's monies had been settled in her favour and she was entitled to pension is hardly convincing. No evidence was led to show whether the quantum of money said to be settled in favour of 1st respondent was reasonable and would satisfy the conscience of a man of ordinary prudence with regard to her complete expungement in the Will.

22. For the aforesaid reasons, we affirm the impugned judgment and dismiss the appeals. Pending application (s), if any, stands disposed of.

Result of the case: Appeals dismissed.

†*Headnotes prepared by:* Nidhi Jain

12 (2020) 16 SCC 209.

[2025] 8 S.C.R. 272 : 2025 INSC 865

Ram Charan & Ors.
v.
Sukhram & Ors.

(Civil Appeal No. 9537 of 2025)

17 July 2025

[Sanjay Karol* and Joymalya Bagchi, JJ.]

Issue for Consideration

Issue arose whether a tribal woman or her legal heirs would be entitled to an equal share in her ancestral property or not.

Headnotes†

Succession – Right of inheritance of tribal woman to ancestral property – Legal heirs of a woman belonging to a Scheduled Tribe, sought declaration of title and partition of a property, belonging to their maternal grandfather – Suit dismissed by the courts below holding that the legal heirs failed to establish their right over such property by way of custom, showing that female heir entitled thereto – Correctness:

Held: Keeping with the principles of justice, equity and good conscience, read along with the overarching effect of Art.14, the legal heirs of the deceased mother belonging to a Scheduled Tribe entitled to their equal share in the property – Denying the female heir a right in the property only exacerbates gender division and discrimination, which the law should ensure to weed out – No such custom of female succession could be established by the legal heirs, but nonetheless a custom to the contrary also could not be shown in the slightest, much less proved – Denying legal heirs deceased mother her share in her father's property, when the custom is silent, would violate her right to equality *vis-à-vis* her brothers or those of her legal heirs *vis-à-vis* their cousin – Also, Hindu Succession Act, 1956, which excludes the Scheduled Tribes from its application, not applicable – Neither any particular law of a community nor custom could be brought into application by either side – Customs too, like the law, cannot remain stuck in time and others cannot be allowed to take refuge in customs to deprive others of their right – Furthermore, the principle of

* Author

justice, equity, and good conscience find statutory recognition in the Central Provinces Laws Act, 1875, the High Court held that the same has been repealed and, thus, cannot be applied, is a mistaken position – Effect of s. 4 of the Repealed Act, is clear that no right having been accrued prior to the repeal of the Act shall be affected thereby – Parties to the instant *lis* are neither governed by Hindu nor Muslim laws and, thus, would be covered by s.6 of the 1875 Act – Rights of the mother had crystallized upon the death of her father, 30 years before the filing of the plaint, would not be affected by the fact that the Act was no longer in the statute book – Furthermore, there appears to be no rational nexus or reasonable classification for only males to be granted succession over the property of their forebears and not women, more so in the case where no prohibition to such effect can be shown to be prevalent as per law – Thus, the impugned judgment set aside – Central Provinces Laws Act, 1875 – ss.4, 6 – Constitution of India – Art.14. [Paras 12, 13, 15-20, 27-29]

Doctrines/Principles – Principles of 'justice, equity and good conscience – Meaning of:

Held: Principle of 'justice, equity and good conscience can be applied only when there is a void or, in other words, in the absence of any law governing that aspect – Since no custom to the effect that women were entitled to the property, the application thereof would be consistent with this position – When applying the principle of justice, equity and good conscience, the Courts have to be mindful. [Paras 18, 19]

Case Law Cited

Salekh Chand v. Satya Gupta and Ors. **[2008] 3 SCR 833 : (2008) 13 SCC 119;** *Ratanlal v. Sundarabai Govardhandas Samsuka* **[2017] 11 SCR 28 : (2018) 11 SCC 119;** *Aliyathammuda Beethathebiyyappura Pookoya v. Pattakal Cheriyakoya* **[2019] 10 SCR 961 : (2019) 16 SCC 1;** *Daduram and Others v. Bhuri Bai & Ors.,* **SA No.270 of 2023;** *Tirith Kumar v. Daduram* **[2024] 12 SCR 665 : 2024 SCC OnLine SC 3810;** *Niemla Textile Finishing Mills Ltd. v. 2nd Punjab Tribunal* **[1957] 1 SCR 335 : 1957 SCC OnLine SC 64;** *Superintendent and Remembrancer of Legal Affairs v. Corpn. of Calcutta* **[1967] SCR 170 : 1966 SCC OnLine SC 42;** *M. Siddiq v. Suresh Das* **[2019] 18 SCR 1 : (2020) 1 SCC 1;**

Western U.P. Electric Power and Supply Co. Ltd. v. State of U.P. **[1968] 3 SCR 312 : (1969) 1 SCC 817;** *Air India v. Nergesh Meerza* **[1982] 1 SCR 438 : (1981) 4 SCC 335;** *Maneka Gandhi v. Union of India* **[1978] 2 SCR 621 : (1978) 1 SCC 248;** *State of J&K v. Triloki Nath Khosa* **[1974] 1 SCR 771 : (1974) 1 SCC 19;** *Vijay Lakshmi v. Punjab University* **[2003] Supp. 3 SCR 1034 : (2003) 8 SCC 440;** *Shayara Bano v. Union of India* **[2017] 9 SCR 797 : (2017) 9 SCC 1 – referred to.**

Mst. Sarwango and others v. Mst. Urchamahin and Others, **2013 SCC OnLine Chh 5 – referred to.**

List of Acts

Central Provinces Laws Act, 1875; Constitution of India; Hindu Succession Act, 1956; Hindu Succession (Amendment) Act, 2005.

List of Keywords

Tribal women right in ancestral property; Constitutional goal of equality; Equality between successors of common ancestor; Female heir entitled to property; Customs; Absence of custom; Principles of justice, equity and good conscience; Exclusionary custom; Patriarchal pre-disposition; Inheritance in custom; Reasonable classification; Article 14; Gender equality; Gender division and discrimination; Right to equality; Succession; Legal heirs of woman belonging to Scheduled Tribe; Establish right over such property by way of custom.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 9537 of 2025

From the Judgment and Order dated 01.07.2022 of the High Court of Chhatisgarh at Bilaspur in SA No. 465 of 2009

Appearances for Parties

Advs. for the Appellants:
Padmesh Mishra, Ms. Vastvikta Bhardwaj, Nikunj Goyal, Aditya, Vijant, Ms. Neelam Singh.

Advs. for the Respondents:
Bipin Bihari Singh, Ashok Anand, Anand Kumar Singh, Ajay Gupta, Mukul Dev Mishra, Sumeer Sodhi.

Judgment / Order of the Supreme Court

Judgment

Sanjay Karol, J.

Leave Granted

2. The instant appeal is preferred against the judgment dated 1st July 2022 passed by the High Court of Chhattisgarh, Bilaspur, in Second Appeal No.465 of 2009, whereby it affirmed the judgment and decree dated 21st April 2009 passed by the Second Additional District Judge (FTC)[1], Surajpur, District Sarguja (C.G.) in Civil Appeal No.1A/08 and the judgment and decree dated 29th February 2008 passed by the Second Civil Judge, Class-2, Surajpur, Sarguja (C.G.)[2] in Civil Suit No.21A/08, dismissing the suit of partition filed by the appellant-plaintiffs.

3. The short question involved in this appeal is whether a tribal woman (or her legal heirs) would be entitled to an equal share in her ancestral property or not. One would think that in this day and age, where great strides have been made in realizing the constitutional goal of equality, this Court would not need to intervene for equality between the successors of a common ancestor and the same should be a given, irrespective of their biological differences, but it is not so.

4. The facts lie in a narrow compass. The appellants-plaintiffs are the legal heirs of one Dhaiya, a woman belonging to a Scheduled Tribe. They sought partition of a property belonging to their maternal grandfather, Bhajju alias Bhanjan Gond. Their mother was one of the six children - five sons and one daughter, stating that their mother is entitled to an equal share in the scheduled property. The cause of action arose in October 1992 when defendant Nos.6 to 16 refused to make a partition. The appellant-plaintiffs approached the Trial Court seeking a declaration of title and partition of the suit property.

5. By judgment dated 29th February 2008, the suit was dismissed holding as follows :

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1 Hereinafter referred to as 'First Appellate Court'

2 Hereinafter referred to as 'Trial Court'

> "11. From the contentions of the above three Plaintiff Witness it is clear that they have stated the fact of the right of the Bua and her sons i.e. the rights of the daughters on the land of the father. The judicial review Heera Lal Gond Vs Sukhbariya Bai M.P. V. No.1993 (Part-2) 143 has been presented on behalf of the plaintiffs, wherein it has held that as per the custom of parties of the Gond Caste that on proving the succession of the widow and daughter they shall get the succession. This Judicial Review is not applied in this case, because the plaintiffs have not certified their caste customs. They have only stated to be claimed the rights of the daughters to get into the properties of their father, but who can say that in their knowledge such right has been given to any specific person. In this regard a judicial review Bihari Vs. Yashwantin 1973 R.N.. 64 has been presented on behalf of the defendants, wherein the Hon'ble High Court has opined that the peoples of the Gond Caste are not governed by the Hindu custom, but they shall be governed by their specific tradition in their all cases including succession. In regard to the certification of tradition, the opinion of the Hon'ble Court is that the statement being tradition is not sufficient, they should be presented the real events.
>
> 12. Thus, from the analysis of the above evidence it is made clear that the plaintiff has not made the statement of even any witness for providing their custom. Apart from this, they have also not made the claim of the fact of governing their custom from the caste tradition in their contentions. They are telling themselves Hindu and claiming that they are governed under the Hindu Succession Act, which is a specific provision in sub-section 2 of section 2 of the Hindu Succession Act, 1956 that the member of the Scheduled Tribe shall not be governed by this Act. Accordingly, the plaintiffs have failed to prove suit issues No.1 to 3 in their favor. Resultantly, their conclusion is made in the 'not certified'."
>
> (Emphasis supplied)

6. The First Appellate Court, by its judgment dated 21st April 2009 concurred with the findings of the Trial Court that the mother of the

appellant-plaintiffs had no right in the property of her father. It is held so for the reason that no evidence had been led to show that children of a female heir are also entitled to property.

7. An appeal under Section 100 Code of Civil Procedure, 1908[3] has been admitted on the following substantial question of law :

> "(I) Whether both the Courts below were justified in dismissing the suit of the plaintiffs by recording a finding which is perverse and contrary to the record?"

8. The High Court, having considered the contentions of the parties *qua* the first argument of custom, held that the finding of the Trial Court is in consonance with the judgments of this Court in ***Salekh Chand v. Satya Gupta and Ors.***[4]; ***Ratanlal v. Sundarabai Govardhandas Samsuka***[5]; and ***Aliyathammuda Beethathebiyyappura Pookoya v. Pattakal Cheriyakoya***[6]. It was held that the appellant-plaintiffs seeking partition of property had failed to establish their right over such property by way of custom, showing that a female heir is also entitled thereto.

9. The second argument of the counsel for the appellant-plaintiffs is that in the absence of custom, justice, equity and good conscience must prevail, in accordance with ***Daduram and Others v. Bhuri Bai & Ors.***[7], the judgment of a coordinate Bench of the said Court. This argument was rejected on the ground that the coordinate Bench of the High Court was not informed that the 1875 Act stood repealed on 30th March 2018. It is the latter order from which the judgment of this Court in ***Tirith Kumar v. Daduram***[8] arose.

10. In so far as the argument of the appellant-plaintiffs that they had adopted Hindu traditions, it was held that since there was no evidence to that effect brought on record, the Trial Court as well as the First Appellate Court had rightly rejected this contention. In terms of the above, the substantial question of law was answered in the negative.

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3 Hereinafter 'CPC'

4 (2008) 13 SCC 119

5 (2018) 11 SCC 119

6 (2019) 16 SCC 1

7 SA No.270 of 2023

8 2024 SCC OnLine SC 3810

11. In that view of the matter, the appellant-plaintiffs are before us. We have heard the learned counsel for the parties at length and perused their written submissions.

12. At the outset of our consideration, it is clarified that the question of the parties having adopted Hindu customs and way of life is no longer in play. That apart, we may also notice Section 2(2) of the Hindu Succession Act, 1956, which unequivocally excludes from its application, Scheduled Tribes. It reads :

> "**Section 2(2)**: Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of clause (25) of article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs."

13. Since the Hindu Law has no application, the next possibility to be considered is that of the application of the custom. For the application of a custom to be shown, it has to be proved, but it was not in the present case. In fact, the Courts below proceeded, in our view, with an assumption in mind and that assumption was misplaced. The point of inception regarding the discussion of customs was at the exclusion stage, meaning thereby that they assumed there to be an exclusionary custom in a place where the daughters would not be entitled to any inheritance and expected the appellant-plaintiffs to prove otherwise. An alternate scenario was also possible where not exclusion, but inclusion could have been presumed and the defendants then could have been asked to show that women were not entitled to inherit property. This patriarchal predisposition appears to be an inference from Hindu law, which has no place in the present case.

14. The Chhattisgarh High Court in ***Mst. Sarwango and others v. Mst. Urchamahin and others***[9] has observed :

> "10. In the present case, both the parties have failed to prove any law of inheritance or custom prevailing in their Gond caste i.e. member of Scheduled Caste whom Hindu law or other law governing inheritance is not applicable. In absence of any law of inheritance or custom prevailing

9 2013 SCC OnLine Chh 5

> in their caste governing the inheritance the Courts are required to decide the rights according to justice, equity and good conscience in term of Section 6 of the Act. Plaintiffs Sawango and Jaituniya are daughters of Jhangal, nearest relative rather the respondents, who were daughter-in-law of brother of Jhangal and legitimate or illegitimate son of Balam Singh, son of Dakhal.
>
> 11. In these circumstances, plaintiffs Sawango and Jaituniya would be the persons' best entitlement to inherit the property left by their father. The Courts below ought to have decreed the suit for partition to the extent of share of Jhangal, but the Court below i.e. the lower appellate Court has allowed the appeal and dismissed the suit in absence of any law or custom for inheritance for a member of Schedule Tribe. The Courts below are required to decide their rights of inheritance in accordance with the provisions of Section 6 of the Act applicable to the State of Chhattisgarh and undivided State of Madhya Pradesh"
>
> (Emphasis supplied)

15. Given the above situation that neither any particular law of a community nor custom could be brought into application by either side, we now proceed to examine the argument advanced before the High Court that is the principle of justice, equity, and good conscience. These principles find statutory recognition in the Central Provinces Laws Act, 1875, Section 6 whereof is extracted herein below :

> "6. In cases not provided for by section five, or by Rule in cases any other law for the time being in force, the Courts shall act according to justice, equity and good conscience."

16. At the outset, it is observed that regarding the 1875 law, the impugned judgment notes that the same has been repealed as of March 2018 and, therefore, cannot be applied. We find this position to be mistaken. The Repeal Act No.4 of 2018 provides for a saving clause, which reads as under :

> "**4. Savings**.— The repeal by this Act of any enactment shall not affect any other enactment in which the repealed enactment has been applied, incorporated or referred to;

> and this Act shall not affect the validity, invalidity, effect or consequences of anything already done or suffered, or any right, title, obligation or liability already acquired, accrued or incurred, or any remedy or proceeding in respect thereof, or any release or discharge of or from any debt, penalty, obligation, liability, claim or demand, or any indemnity already granted, or the proof of any past act or thing;
>
> nor shall this Act affect any principle or rule of law, or established jurisdiction, form or course of pleading, practice or procedure, or existing usage, custom, privilege, restriction, exemption, office or appointment, notwithstanding that the same respectively may have been in any manner affirmed or recognised or derived by, in or from any enactment hereby repealed;
>
> nor shall the repeal by this Act of any enactment revive or restore any jurisdiction, office, custom, liability, right, title, privilege, restriction, exemption, usage, practice, procedure or other matter or thing not now existing or in force."
>
> (Emphasis supplied)

17. The effect of Section 4 is clear that no right having been accrued prior to the repeal of the Act shall be affected thereby. As we have already observed, the parties to the instant *lis* are neither governed by Hindu nor Muslim laws and, therefore, would be covered by Section 6 of the 1875 Act. So, the right having been accrued in favour of the appellant-plaintiffs' mother upon the death of her father, which was approximately 30 years before the filing of the plaint became crystallized and would not be affected by the fact that the Act was no longer in the statute book. This Act, therefore, necessarily had to be applied by the High Court. At this juncture, it is pertinent to consider the meaning of 'justice, equity and good conscience'.

18. It is trite in law that this principle can be applied only when there is a void or, in other words, in the absence of any law governing that aspect. Since no custom to the effect that women were entitled to the property, the application thereof would be consistent with this position. What exactly this phrase 'justice, equity and good conscience' entails has been considered by this Court on a few occasions. We may refer to certain instances :

(a) In ***Niemla Textile Finishing Mills Ltd. v. 2nd Punjab Tribunal***[10], it was held by a Constitution Bench of this Court that this principle can be applied even in the context of labour disputes, so long as the law on the question in consideration is not codified for there are many situations that arise in everyday function, which, it is not possible for a legislature to foresee and account for in the principal legislation.

(b) The principle of 'justice, equity and good conscience' is not of recent application. As J.C. Shah, J. demonstrated the Courts, which functioned in the former British Indian territory, were also equipped to apply the said principle. See ***Superintendent and Remembrancer of Legal Affairs v. Corpn. of Calcutta***[11].

(c) This principle found an extensive discussion in the decision of a Constitution Bench of this Court in ***M. Siddiq v. Suresh Das***[12] ***(Ram Janmabhoomi Temple),*** relevant extracts whereof are as follows :

> ***"Justice, Equity and Good Conscience today***
>
> **1019.** With the development of statutory law and judicial precedent, including the progressive codification of customs in the Hindu Code and in the Shariat Act, 1937, the need to place reliance on justice, equity and good conscience gradually reduced. There is (at least in theory) a reduced scope for the application of justice, equity and good conscience when doctrinal positions established under a statute cover factual situations or where the principles underlying the system of personal law in question can be definitively ascertained. But even then, it would do disservice to judicial craft to adopt a theory which excludes the application of justice, equity and good conscience to areas of law governed by statute. For the law develops interstitially, as Judges work themselves in tandem with statute law to arrive

10 1957 SCC OnLine SC 64

11 1966 SCC OnLine SC 42

12 (2020) 1 SCC 1

at just outcomes. Where the rights of the parties are not governed by a particular personal law, or where the personal law is silent or incapable of being ascertained by a court, where a code has a lacuna, or where the source of law fails or requires to be supplemented, justice, equity and good conscience may properly be referred to.

…

1022. The common underlying thread is that justice, good conscience and equity plays a supplementary role in enabling courts to mould the relief to suit the circumstances that present themselves before courts with the principal purpose of ensuring a just outcome. Where the existing statutory framework is inadequate for courts to adjudicate upon the dispute before them, or no settled judicial doctrine or custom can be availed of, courts may legitimately take recourse to the principles of justice, equity and good conscience to effectively and fairly dispose of the case. A court cannot abdicate its responsibility to decide a dispute over legal rights merely because the facts of a case do not readily submit themselves to the application of the letter of the existing law. Courts in India have long availed of the principles of justice, good conscience and equity to supplement the incompleteness or inapplicability of the letter of the law with the ground realities of legal disputes to do justice between the parties. Equity, as an essential component of justice, formed the final step in the just adjudication of disputes. After taking recourse to legal principles from varied legal systems, scholarly written work on the subject, and the experience of the Bar and Bench, if no decisive or just outcome could be reached, a Judge may apply the principles of equity between the parties to ensure that justice is done. This has often found form in the power of the court to craft reliefs that are both legally sustainable and just."

(Emphasis supplied)

(d) In ***Tirith Kumar*** (supra), which was also an appeal arising from a judgment of the High Court of Chhattisgarh, this Court speaking through one of us (Sanjay Karol J.) had the occasion to consider the application of this principle and in accordance with it, the order of the High Court granting right over the property to the female heirs was confirmed.

19. When applying the principle of justice, equity and good conscience, the Courts have to be mindful of the above and apply this otherwise open-ended principle contextually. In the present case, a woman or her successors, if the views of the lower Court are upheld, would be denied a right to property on the basis of the absence of a positive assertion to such inheritance in custom. However, customs too, like the law, cannot remain stuck in time and others cannot be allowed to take refuge in customs or hide behind them to deprive others of their right.

20. Apart from the application of this general principle, we also find this to be a question of violation of Article 14 of the Constitution of India. There appears to be no rational nexus or reasonable classification for only males to be granted succession over the property of their forebears and not women, more so in the case where no prohibition to such effect can be shown to be prevalent as per law. Article 15(1) states that the State shall not discriminate against any person on grounds of religion, race, caste, sex or place of birth. This, along with Articles 38 and 46, points to the collective ethos of the Constitution in ensuring that there is no discrimination against women.

21. In ***Western U.P. Electric Power and Supply Co. Ltd. v. State of U.P.***[13], it was observed :

> **"7.** Article 14 of the Constitution ensures equality among equals; its aim is to protect persons similarly placed against discriminatory treatment. It does not, however, operate against rational classification. A person setting up a grievance of denial of equal treatment by law must establish that between persons similarly circumstanced, some were treated to their prejudice and the differential treatment had no reasonable relation to the object sought to be achieved by the law..."

13 (1969) 1 SCC 817

22. This Court in the seminal case of ***Air India v. Nergesh Meerza***[14], laid down the following propositions, among others, in regard to Article 14 :

> "**39.** Thus, from a detailed analysis and close examination of the cases of this Court starting from 1952 till today, the following propositions emerge:
>
> …
>
> (2) Article 14 forbids hostile discrimination but not reasonable classification. Thus, where persons belonging to a particular class in view of their special attributes, qualities, mode of recruitment and the like, are differently treated in public interest to advance and boost members belonging to backward classes, such a classification would not amount to discrimination having a close nexus with the objects sought to be achieved so that in such cases Article 14 will be completely out of the way.
>
> (3) Article 14 certainly applies where equals are treated differently without any reasonable basis.
>
> (4) Where equals and unequals are treated differently, Article 14 would have no application.…"

23. In ***Maneka Gandhi v. Union of India***[15], it was observed :

> "**7.** Now, the question immediately arises as to what is the requirement of Article 14 : what is the content and reach of the great equalising principle enunciated in this article? There can be no doubt that it is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic. And, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire

14 (1981) 4 SCC 335

15 (1978) 1 SCC 248

> limits. We must reiterate here what was pointed out by the majority in *E.P. Royappa* v. *State of Tamil Nadu* [(1974) 4 SCC 3 : 1974 SCC (L&S) 165 : (1974) 2 SCR 348] namely, that "from a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14". Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it .would be no procedure at all and the requirement of Article 21 would not be satisfied…"
>
> (Emphasis supplied)

24. While relying on ***State of J&K v. Triloki Nath Khosa***[16], this Court in ***Vijay Lakshmi v. Punjab University***[17], observed as follows :

> "**8.** …
>
> It was also observed that discrimination is the essence of classification and does violence to the constitutional guarantee of equality only if it rests on an unreasonable basis and it was for the respondents to establish that classification was unreasonable and bore no rational nexus with its purported object. Further, dealing with the right to equality, the Court (in paras 29 & 30) held thus: (SCC p. 33)

16 (1974) 1 SCC 19

17 (2003) 8 SCC 440

> "But the concept of equality has an inherent limitation arising from the very nature of the constitutional guarantee. Equality is for equals. That is to say that those who are similarly circumstanced are entitled to an equal treatment.
>
> ...."

25. A Constitution Bench in ***Shayara Bano v. Union of India***[18], while dealing with the issue of triple talaq, referred to Article 14 in the following terms :

> **"62.** Article 14 of the Constitution of India is a facet of equality of status and opportunity spoken of in the Preamble to the Constitution. The Article naturally divides itself into two parts—(1) equality before the law, and (2) the equal protection of the law. Judgments of this Court have referred to the fact that the equality before law concept has been derived from the law in the UK, and the equal protection of the laws has been borrowed from the 14th Amendment to the Constitution of the United States of America. In a revealing judgment, Subba Rao, J., dissenting, in *State of U.P.* v. *Deoman Upadhyaya* [*State of U.P.* v. *Deoman Upadhyaya*, (1961) 1 SCR 14 : AIR 1960 SC 1125 : 1960 Cri LJ 1504] , AIR p. 1134 para 26 : SCR at p. 34 further went on to state that whereas equality before law is a negative concept, the equal protection of the law has positive content. The early judgments of this Court referred to the "discrimination" aspect of Article 14, and evolved a rule by which subjects could be classified. If the classification was "intelligible" having regard to the object sought to be achieved, it would pass muster under Article 14's anti-discrimination aspect. Again, Subba Rao, J., dissenting, in *Lachhman Dass* v. *State of Punjab* [*Lachhman Dass* v. *State of Punjab*, (1963) 2 SCR 353 : AIR 1963 SC 222] , SCR at p. 395, warned that: (AIR p. 240, para 50)
>
> > "*50*. ... Overemphasis on the doctrine of classification or an anxious and sustained attempt to discover some basis for classification

18 (2017) 9 SCC 1

> may gradually and imperceptibly deprive the Article of its glorious content…"
>
> (Emphasis supplied)

26. This discussion on equality under Article 14, which, needless to state, includes the aspect of gender equality within its fold will be, in our view, incomplete without reference to the first and most commendable step taken under the Hindu Law by way of the Hindu Succession (Amendment) Act, 2005 which made daughters the coparceners in joint family property. The object and reasons as stated in the Bill are instructive in the general sense and we reproduce the same with profit :

> "…The law by excluding the daughter from participating in the coparcenary ownership not only contributes to her discrimination on the ground of gender but also has led to oppression and negation of her fundamental right of equality guaranteed by the Constitution. having regard to the need to render social justice to women, the States of Andhra Pradesh, Tamil Nadu, Karnataka and Maharashtra have made necessary changes in the law giving equal right to daughters in Hindu Mitakshara coparcenary property. The Kerala Legislature has enacted the Kerala Joint Hindu Family System (Abolition) Act, 1975..."
>
> (Emphasis supplied)

27. Similarly, we are of the view that, unless otherwise prescribed in law, denying the female heir a right in the property only exacerbates gender division and discrimination, which the law should ensure to weed out.

28. Granted that no such custom of female succession could be established by the appellant-plaintiffs, but nonetheless it is also equally true that a custom to the contrary also could not be shown in the slightest, much less proved. That being the case, denying Dhaiya her share in her father's property, when the custom is silent, would violate her right to equality *vis-à-vis* her brothers or those of her legal heirs *vis-à-vis* their cousin.

29. In view of the above discussion, we are of the firm view that in keeping with the principles of justice, equity and good conscience,

read along with the overarching effect of Article 14 of the Constitution, the appellant-plaintiffs, being Dhaiya's legal heirs, are entitled to their equal share in the property. The judgments of the Courts below are accordingly set aside to that extent. The civil appeal is allowed accordingly.

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

30. No costs.

Result of the case: Appeal allowed.

[†]*Headnotes prepared by:* Nidhi Jain

[2025] 8 S.C.R. 289 : 2025 INSC 872

Narayan Das
v.
State of Chhattisgarh

(Special Leave Petition (Crl.) No. 10310 of 2025)

17 July 2025

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

Issue for Consideration

Issue arose as regards the interpretation of s.32-B of the NDPS Act by the High Court that u/s.32-B minimum punishment is considered as maximum punishment.

Headnotes†

Narcotic Drugs and Psychotropic Substances Act, 1985 – s.32-B – Factors to be taken into account for imposing higher than the minimum punishment – High Court's understanding that u/s.32-B minimum punishment is considered as maximum punishment; and that at the time of imposing sentence the trial court to keep in mind the factors as provided in clauses (a) to (f) of s.32-B – Correctness:

Held: Understanding of the High Court not correct – s.32-B provides that the court in addition to various relevant factors may also take into account the factors as prescribed in Clauses (a) to (f) – Thus, in a given case, the trial court may not find it necessary to consider the factors as prescribed in s.32-B – Having regard to the quantity of the contraband, the nature of the narcotic or the psychotropic substance, as the case may be, the antecedents, if any, etc., may deem fit to impose punishment which can be more than the minimum – Thus, no good reason for the High Court to reduce the sentence from 12 years to 10 years relying on *Rafiq Qureshi's* case – Dictum laid down in *Rafiq Qureshi's* case was not understood in its true perspective – This Court in *Rafiq Qureshi's case* clarified that the language of s.32-B inherently preserves the court's discretion to consider other relevant factors beyond those listed – Thus, factors mentioned in s.32-B are in addition to other relevant facts, and it cannot be said that the minimum sentence under the NDPS Act is to be considered as a maximum sentence – However, order of the High Court reducing the sentence not interfered with. [Paras 14, 17]

Case Law Cited

Rafiq Qureshi v. Narcotic Control Bureau Eastern Zonal Unit **[2019] 7 SCR 248 : (2019) 6 SCC 492 – explained.**

Sakshi v. Union of India **[2004] Supp. 2 SCR 723 : (2004) 5 SCC 518;** *Gurdev Singh v. State of Punjab* **(2021) 6 SCC 558 – referred to.**

List of Acts

Narcotic Drugs and Psychotropic Substances Act, 1985.

List of Keywords

Psychotropic substance; Misconception of law; Interpretation of s.32-B, NDPS Act; Minimum sentence considered as maximum sentence; *Rafiq Qureshi's* case; Reduction of sentence.

Case Arising From

EXTRAORDINARY CRIMINAL JURISDICTION: Special Leave Petition (Crl.) No. 10310 of 2025

From the Judgment and Order dated 16.01.2025 of the High Court of Chhatisgarh at Bilaspur in CRA No. 349 of 2021

Appearances for Parties

Advs. for the Petitioner:
Ms. Sampa Sengupta Ray, Tushar Mudgil, Ashish Pandey, Piyush Merani, Ashutosh Bhardwaj, Vikram Kumar, Ali Mohammed Khan.

Judgment / Order of the Supreme Court

Order

1. Delay condoned.

2. The petitioner was put to trial in the Court of Special Judge (NDPS Act), Surguja, Ambikapur, District-Surguja (C.G.) in Special Criminal (NDPS) Case No.04/2019 for the offence punishable under Section 21(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "the NDPS Act").

3. It is the case of the prosecution that on 20th September, 2018, the Investigating Officer attached with the Ambikapur, police station

received information that two individuals namely Ambika Vishwakarma and Narayan Das (petitioner herein) were standing on the side of the main road of Parsa and were in possession of psychotropic substance in a bag.

4. A search was undertaken of the two individuals and the same resulted in seizure of R.C. Kuff cough syrup in all 143 vials each containing 100ml, Codectus cough Syrup 70 vials each containing 100ml and Elderqurex cough syrup 23 vials each containing 100ml with labels containing a substance Codeine Phosphate. In all 236 vials were recovered from the possession of the petitioner herein along with the co-accused.

5. At the end of the trial the petitioner herein stood convicted and was sentenced to undergo 12 years of rigorous imprisonment with fine of Rs.1,00,000/-. The petitioner went in appeal before the High Court. The High Court dismissed the appeal. However, while dismissing the appeal, the High Court reduced the sentence of 12 years as imposed by the trial court to 10 years i.e. the minimum as provided under the NDPS Act.

6. We heard Mr. Ashish Pandey, the learned counsel appearing for the petitioner.

7. This is a legal aid matter.

8. Manifold contentions were raised by the learned counsel to persuade us to take the view that the entire seizure was vitiated as the same suffered from serious infirmities.

9. There is no good reason for us to disturb the impugned judgment of the High Court dismissing the appeal. However, there is something which we have noticed and must not be ignored. The High Court seems to be labouring under a serious misconception of law so far as the interpretation of Section 32-B of the NDPS Act is concerned.

10. The High Court from paragraph 25 onwards has observed thus:-

> *"25. The last contention that has been raised on behalf of the appellants is that without assigning any special reason, the learned trial Court has awarded sentence for a period of 12 years to the appellants, which is more than the minimum sentence prescribed for offence under Section 21(c) of the NDPS Act.*

26. Section 32B of the NDPS Act states about the facts to be taken into account for imposing higher than the minimum punishment, which reads as under:

> *"Where a minimum term of imprisonment or amount of fine is prescribed for any offence committed under this Act, the court may, in addition to such factors as it may deem fit, take into account the following factors for imposing a punishment higher than the minimum term of imprisonment or amount of fine, namely:--*
>
> *(a) the use or threat of use of violence or arms by the offender;*
>
> *(b) the fact that the offender holds a public office and that he has taken advantage of that office in committing the offence;*
>
> *(c) the fact that the minors are affected by the offence or the minors are used for the commission of an offence;*
>
> *(d) the fact that the offence is committed in an educational institution or social service facility or in the immediate vicinity of such institution or faculty or in other place to which school children and students resort for educational, sports and social activities.;*
>
> *(e) the fact that the offender belongs to organised international or any other criminal group which is involved in the commission of the offences; and*
>
> *(f) the fact that the offender is involved in other illegal activities facilitated by commission of the offence."*

27. The Supreme Court in the matter of Rafiq Qureshi (supra) has held that in a case where the court imposes a punishment higher than minimum relying on an irrelevant factor and no other facts as enumerated in Sections 32B(a)

to (f) is present, award of sentence higher than minimum can be interfere with and observed in Para-23 & 24 as under:

> *"23. In view of the foregoing discussion, we are of the view that punishment awarded by the trial court of a sentence higher than the minimum relying on the quantity of substance cannot be faulted even though the Court had not adverted to the factors mentioned in clauses (a) to (b) as enumerated under Section 32B. However, when taking any factor into consideration other than the factors enumerated in Section 32B, (a) to (f), the Court imposes a punishment higher than the minimum sentence, it can be examined by higher Courts as to whether factor taken into consideration by the Court is a relevant factor or not. Thus in a case where Court imposes a punishment higher than minimum relying on a irrelevant factor and no other factor as enumerated in Section 32B(a to f) are present award of sentence higher than minimum can be interfered with.*
>
> *24. In the present case The High Court held that although gross quantity of 8.175 Kg. of Heroin was alleged to have been recovered from the appellant but actual quantity of Heroine which was found to be in possession was only 609.6 gm. The High Court held that since the appellant was found in possession of Narcotic Drugs as per the analysis report to 609.6 gm. which is much higher than the commercial quantity, punishment higher than the minimum is justified. The High Court reduced the punishment from 18 years to 16 years. We, thus, uphold the judgment of the trial court and the High Court awarding the punishment higher than the minimum, however, looking to all the facts and circumstances of the present case including the fact that it was found by the High Court that the*

appellant was only a carrier, we find that the ends of justice will be sub-served in reducing the sentence from 16 years to 12 years. Thus, while maintaining the conviction of the appellant the appellant is sentenced to undergo 12 years rigorous imprisonment with fine of Rs. 2 lakh and in default of payment of such fine the appellant shall further undergo for a simple imprisonment for six months. The appeal is partly allowed to the extent as indicated above."

28. As such, in view of discussion made hereinabove, in light of Section 32B of the NDPS Act coupled with above-quoted principle of law laid down in Rafiq Qureshi (supra), since no specific or any special reason has been assigned by the learned trial Court for awarding sentence higher than minimum to the appellants for having committed offence under Section 21(c) of the NDPS Act, in the considered opinion of this Court, while affirming the conviction of the appellants for offence under Section 20(c) of the NDPS Act, we deem it appropriate to reduce his sentence of 12 years rigorous imprisonment, as awarded to them by the learned trial Court, to 10 years rigorous imprisonment. So far as the default sentence is concerned, the same is modified to the extent that in case of failure to deposit the fine amount awarded by the trial Court, the appellants shall undergo further rigorous imprisonment for one year instead of three years, as awarded by trial Court. It is ordered accordingly.

29. Consequently, both the criminal appeals are partly allowed to the extent indicated hereinabove. It is stated that the appellants are in jail, they shall serve out the remaining sentence as modified by this Court."

(Emphasis supplied)

11. According to the High Court if the trial court wants to impose sentence more than the minimum prescribed under the NDPS Act, then it is obliged to assign reasons. This according to the High Court is because of the provision of Section 32-B of the NDPS Act.

12. Section 32-B of the NDPS Act reads thus:-

> *"32-B. Factors to be taken into account for imposing higher than the minimum punishment.—Where a minimum term of imprisonment or amount of fine is prescribed for any offence committed under this Act, the court may, in addition to such factors as it may deem fit, take into account the following factors for imposing a punishment higher than the minimum term of imprisonment or amount of fine, namely:—*
>
> *(a) the use or threat of use of violence or arms by the offender;*
>
> *(b) the fact that the offender holds a public office and that he has taken advantage of that office in committing the offence;*
>
> *(c) the fact that the minors are affected by the offence or the minors are used for the commission of an offence;*
>
> *(d) the fact that the offence is committed in an educational institution or social service facility or in the immediate vicinity of such institution or faculty or in other place to which school children and students resort for educational, sports and social activities;*
>
> *(e) the fact that the offender belongs to organised international or any other criminal group which is involved in the commission of the offence; and*
>
> *(f) the fact that the offender is involved in other illegal activities facilitated by commission of the offence."*

13. While interpreting Section 32-B of the NDPS Act, the High Court also looked into the decision of this Court in the case of *Rafiq Qureshi vs. Narcotic Control Bureau Eastern Zonal Unit*, (2019) 6 SCC 492. According to the High Court, at the time of imposing sentence the trial court need to keep in mind the factors as provided in Clauses (a) to (f) of Section 32-B respectively.

14. We are afraid the understanding of the High Court is not correct. Section 32-B provides that the court in addition to various relevant factors may also take into account the factors as prescribed in Clauses (a) to (f).

15. Therefore, in a given case, the trial court may not find it necessary to consider the factors as prescribed in Section 32-B. Having regard to the quantity of the contraband, the nature of the narcotic or the psychotropic substance, as the case may be, the antecedents, if any, etc., may deem fit to impose punishment which can be more than the minimum. In such circumstances, there was no good reason for the High Court to reduce the sentence from 12 years to 10 years relying on *Rafiq Qureshi* (supra). The dictum as laid down in *Rafiq Qureshi* (supra) has not been understood in its true perspective.

16. In *Rafiq Qureshi* (supra), this Court observed as follows:-

> *"12. Section 32-B is also inserted by Act 9 of 2001. It is useful to refer to the Statement of Objects and Reasons of Amendment Act 9 of 2001 which is to the following effect:*
>
> > *"Statement of Objects and Reasons.— Amendment Act 9 of 2001.— The Narcotic Drugs and Psychotropic Substances Act, 1985 provides deterrent punishment for various offences relating to illicit trafficking in narcotic drugs and psychotropic substances. Most of the offences invite uniform punishment of minimum ten years' rigorous imprisonment which may extend up to twenty years. While the Act envisages severe punishments for drug traffickers, it envisages reformative approach towards addicts. In view of the general delay in trial it has been found that the addicts prefer not to invoke the provisions of the Act. The strict bail provisions under the Act add to their misery. Therefore, it is proposed to rationalise the sentence structure so as to ensure that while drug traffickers who traffic in significant quantities of drugs are punished with deterrent sentences, the addicts and those who commit less serious offences are sentenced to less severe punishment. This requires rationalisation of the sentence structure provided under the Act. It is also proposed to restrict the application of strict bail provisions to those offenders who indulge in serious offences."*
>
> *13. The Statement of Objects and Reasons reveals that the Amendment Act has inserted provisions for rationalisation of the sentencing structure. Section 32-B is a provision*

which is brought in the statute to rationalise the sentencing structure. Section 32-B from clauses (a) to (f) enumerates various factors for imposing a punishment higher than the minimum term of imprisonment.

14. The submission made by the counsel for the appellant is that unless in the facts of a case, any of the factors mentioned in clauses (a) to (f) are not present, the Court cannot impose punishment higher than the minimum term of the imprisonment. It is submitted that the factors have been brought in the statute for the purpose of imposing the punishment higher than the minimum, hence, in the absence of any such factor only minimum punishment should be awarded.

15. We have to first see the actual words used in the statute to find out the object and purpose of inserting Section 32-B. The court after conviction of an accused hears the accused and takes into consideration different circumstances of the accused and the offence for awarding the appropriate sentence. Section 32-B uses the phrase

> *"the court may, in addition to such factors as it may deem fit, take into account the following factors for imposing a punishment higher than the minimum term of imprisonment".*

The above statutory scheme clearly indicates the following:

15.1. The court may where minimum term of punishment is prescribed take into consideration "such factors as it may deem fit" for imposing a punishment higher than the minimum term of imprisonment or fine.

15.2. In addition, take into account the factors for imposing a punishment higher than the minimum as enumerated in clauses (a) to (f).

16. The statutory scheme indicates that the decision to impose a punishment higher than the minimum is not confined or limited to the factors enumerated in clauses (a) to (f). The Court's discretion to consider such factors as it may deem fit is not taken away or tinkered. In case a

person is found in possession of a manufactured drug whose quantity is equivalent to commercial quantity, the punishment as per Section 21(c) has to be not less than ten years which may extend to twenty years. But suppose the quantity of manufactured drug is 20 times of the commercial quantity, it may be a relevant factor to impose punishment higher than minimum. Thus, quantity of substance with which an accused is charged is a relevant factor, which can be taken into consideration while fixing quantum of the punishment. Clauses (a) to (f) as enumerated in Section 32-B do not enumerate any factor regarding quantity of substance as a factor for determining the punishment. In the event the Court takes into consideration the magnitude of quantity with regard to which an accused is convicted, the said factor is relevant factor and the court cannot be said to have committed an error when taking into consideration any such factor, higher than the minimum term of punishment is awarded.

17. This Court in Sakshi v. Union of India [Sakshi v. Union of India, (2004) 5 SCC 518 : 2004 SCC (Cri) 1645], held that it is a well-settled principle that the intention of the legislature is primarily to be gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said. A construction which requires for its support addition or substitution of words has to be avoided. In para 19 of the judgment the following was laid down: (SCC p. 537)

> *"19. It is well-settled principle that the intention of the legislature is primarily to be gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said. As a consequence a construction which requires for its support addition or substitution of words or which results in rejection of words as meaningless has to be avoided. It is contrary to all rules of construction to read words into an Act unless it is absolutely necessary to do so. Similarly it is wrong and dangerous to proceed by substituting some other words for words of the statute. It is equally*

well settled that a statute enacting an offence or imposing a penalty is strictly construed. The fact that an enactment is a penal provision is in itself a reason for hesitating before ascribing to phrases used in it a meaning broader than that they would ordinarily bear. (Justice G.P. Singh: Principles of Statutory Interpretation, pp. 58 and 751, 9th Edn.)"

18. The specific words used in Section 32-B that court may, in addition to such factors as it may deem fit clearly indicates that court's discretion to take such factor as it may deem fit is not fettered by factors which are enumerated in clauses (a) to (f) of Section 32-B.

19. The learned counsel for the appellant has relied on a judgment of the Allahabad High Court in Raj Kumar Bajpaee v. Union of India [Raj Kumar Bajpaee v. Union of India, (2016) 95 ACC 896]. A Single Judge of the Allahabad High Court referring to Section 32-B of the Act stated the following in paras 39 and 40:

"39. After going through the impugned judgment and order very carefully, I find that the trial court while imposing higher than the minimum punishment prescribed under the NDPS Act on conviction under Sections 8/20 of the NDPS Act, upon the appellants has failed even to advert to the factors enumerated in Section 32-B of the NDPS Act. In fact, no reason whatsoever is forthcoming in the impugned judgment which lead the trial court to impose higher than the minimum punishment prescribed under the Act upon the appellants.

40. After going through the evidence on record, I am satisfied that in the present case none of the factors as spelt out in Section 32-B of the Act exist which could have prompted the trial court to award higher than the minimum punishment prescribed under the Act. The sentence awarded to the appellants thus cannot be sustained. While maintaining the conviction of the appellants under Sections 8/20, I allow this appeal in part and modify the sentence awarded to them by

> *the trial court by the impugned judgment and order to 10 years' RI and a fine of Rs 1 lakh and in default of payment of fine the appellants shall be liable to undergo further simple imprisonment for one month. The impugned judgment stands modified accordingly."*

20. Although in the above judgment it has not been categorically held that punishment higher than the minimum cannot be awarded unless any of the factors spelt out in Section 32-B are present but the Court proceeded to set aside the award of higher punishment on the above ground. There are two other judgments of the learned Single Judges of the Allahabad High Court which have been brought to our notice. First is the judgment of the Single Judge in Krishna Murari Pal v. State of U.P. [Krishna Murari Pal v. State of U.P., 2015 SCC OnLine All 4909], where the learned Single Judge in para 13 has considered Section 32-B in the following words: (SCC OnLine All)

> *"13. The trial court has awarded the sentence of 12 years' rigorous imprisonment and fine of Rs 1 lakh to the appellant-accused under Sections 8/20(b)(ii)(c) of the NDPS Act on the ground that huge quantity of the said contraband (ganja) has been recovered from the possession of the appellant-accused. There is nothing on record to show that the appellant-accused had committed any act which may lie under any of the clauses of Section 32-B of the NDPS Act hereinabove mentioned. But that does not mean that the Court cannot award the sentence more than the minimum sentence in the absence of any of the above conditions mentioned in clauses (a) to (f) because these conditions are in addition to the factors as the Court may deem fit in awarding higher punishment to the accused. In the case at hand, there is nothing on record to show that the appellant-accused and previous criminal history or he is a previous convict and that the appellant is now advanced in years and is aged about 56 years as mentioned in the supplementary affidavit filed on behalf of the appellant-accused. Undisputedly the*

> *appellant-accused had licence of the retailer shop of bhang. Thus, regard being had to all the facts and circumstances of the case I think that reduction of sentence of 12 years' rigorous imprisonment awarded to the appellant to the period of imprisonment already undergone by him and in default of payment of fine, reduction of sentence of one year imprisonment to six months' simple imprisonment would meet the ends of justice."*

21. Another case which has been relied by the counsel is in Ram Asre v. State of U.P. [Ram Asre v. State of U.P., 2017 SCC OnLine All 2891], where a learned Single Judge of the Allahabad High Court after referring to Section 32-B made the following observation: (SCC OnLine All para 61)

> *"61. … In opinion of this Court, if the said section be read with greater attention, it would reveal that the words used in it are "it may deem fit", therefore word "may" would indicate that it would be discretionary for the Court to take the grounds into consideration which are mentioned in sub-sections (a) to (f) of the said section, while awarding punishment higher than the minimum prescribed. Therefore there is no force found in the argument in this regard made by the learned amicus curiae that in the case at hand the punishment awarded needs to be curtailed keeping in view that the lower court did not take into consideration the above factors."*

22. The views expressed by the learned Single Judges in Krishna Murari Pal [Krishna Murari Pal v. State of U.P., 2015 SCC OnLine All 4909] and Ram Asre [Ram Asre v. State of U.P., 2017 SCC OnLine All 2891] correctly notice the ambit and scope of Section 32-B.

23. In view of the foregoing discussion, we are of the view that punishment awarded by the trial court of a sentence higher than the minimum relying on the quantity of substance cannot be faulted even though the court had

not adverted to the factors mentioned in clauses (a) to (f) as enumerated under Section 32-B. However, when taking any factor into consideration other than the factors enumerated in Sections 32-B(a) to (f), the court imposes a punishment higher than the minimum sentence, it can be examined by higher courts as to whether factor taken into consideration by the court is a relevant factor or not. Thus in a case where the court imposes a punishment higher than minimum relying on an irrelevant factor and no other factor as enumerated in Sections 32-B(a) to (f) is present, award of sentence higher than minimum can be interfered with."

(Emphasis supplied)

17. The seminal issue in *Rafiq Qureshi* (supra) revolved around the interpretation of Section 32-B of the NDPS Act. In other words, whether the absence of any factors enumerated in Section 32-B in Clauses (a) to (f) restricts the trial courts from imposing sentence higher than the minimum prescribed. This Court in *Rafiq Qureshi* (supra) clarified that the language of Section 32-B inherently preserves the court's discretion to consider other relevant factors beyond those listed. Specifically, the quantity of the narcotic substance was deemed a pertinent factor warranting a sentence above the statutory minimum, despite the absence of any enumerated aggravating factors in Section 32-B. Referring to *Sakshi vs. Union of India*, reported in (2004) 5 SCC 518, this Court emphasized the principle that legislative intent is derived from the explicit language of the statute, avoiding the insertion of words not present. Since Section 32-B uses "may deem fit" in addition to the enumerated factors, it does not restrict the courts to only those factors but allows broader discretion in sentencing.

18. We may also refer to the decision of this Court in *Gurdev Singh vs. State of Punjab,* reported in (2021) 6 SCC 558. In the said case, it was held that the court should be guided by the factors mentioned in Section 32-B of the NDPS Act and other relevant factors while imposing a sentence higher than the minimum. Therefore, factors mentioned in Section 32-B of the NDPS Act are in addition to other relevant facts, and it cannot be said that the minimum sentence

under the NDPS Act is to be considered as a maximum sentence. It was observed at page 564:

> *"7. Therefore, while imposing a punishment higher than the minimum term of the imprisonment or an amount of fine, the court may take into account the factors enumerated in Section 32-B of the Act referred to hereinabove. However, it is required to be noted (2025:HHC:2309) that Section 32-B of the Act itself further provides that the court may, in addition to such factors as it may deem fit, take into account the factors for imposing a punishment higher than the minimum term of imprisonment or amount of fine as mentioned in Section 32- B of the Act. Therefore, while imposing the punishment higher than the minimum term of imprisonment or amount of fine, the court may take into account such factors as it may deem fit and also the factors enumerated/mentioned in Section 32-B of the Act. Therefore, on fair reading of Section 32-B of the Act, it cannot be said that while imposing a punishment higher than the minimum term of imprisonment or amount of fine, the court has to consider only those factors which are mentioned/enumerated in Section 32-B of the Act.*
>
> *xx xx xx xx xx xx*
>
> *10. Therefore, the quantity of substance would fall into "such factors as it may deem fit" and while exercising its discretion of imposing the sentence/imprisonment higher than the minimum, if the court has taken into consideration such factor of larger/higher quantity of substance, it cannot be said that the court has committed an error. The court has a wide discretion to impose the sentence/imprisonment ranging between 10 years to 20 years and while imposing such sentence/imprisonment in addition, the court may also take into consideration other factors as enumerated in Sections 32-B(a) to (f). Therefore, while imposing a punishment higher than the minimum sentence, if the court has considered such factor as it may deem fit other than the factors enumerated in Sections 32-B(a) to (f), the High Court has to only consider whether "such factor" is a relevant factor or not."*

19. It appears that the understanding of the High Court so far as Section 32-B of the NDPS is concerned is that the minimum sentence should be considered as maximum sentence. That is not the correct understanding of Section 32-B of the NDPS Act.

20. Be that as it may. We do not want to interfere with that part of the order of the High Court reducing the sentence.

21. However, we do not find any merit in this petition. The petition, accordingly, fails and is hereby dismissed.

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

Result of the case: Special Leave Petition dismissed.

†*Headnotes prepared by:* Nidhi Jain

SUPREME COURT REPORTS

The Official Law Report
Fortnightly

2025 | Volume 8 | Part 2

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

Digitally Published by
Supreme Court of India

SUPREME COURT REPORTS

The Official Law Report
Fortnightly

2025 I Volume 8 I Part 2

Digitally Published by
Supreme Court of India

Editorial Board

Digitally Published by
Supreme Court of India

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

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v.
The State of Uttar Pradesh & Anr.
R1: State of Uttar Pradesh
R2: Devi Singh

(Criminal Appeal No. 347 of 2018)

01 August 2025

[Pankaj Mithal and Ahsanuddin Amanullah,* JJ.]

Issue for Consideration

Whether the Courts below erred in declaring the Respondent No.2 as a 'juvenile' under the Juvenile Justice (Care and Protection of Children) Act, 2000, on the date of the incident.

Headnotes†

Juvenile Justice (Care and Protection of Children) Act, 2000 – Juvenile Justice (Care and Protection of Children) Rules, 2007 – r.12 – Procedure to be followed in determination of Age – FIR was filed against Respondent No.2 and his father u/ss.452 and 302, IPC – Respondent No.2 pleaded juvenility – Trial Court declared the Respondent No.2 to be a 'juvenile' on the date of the incident – Challenged by appellant – Order upheld by High Court – Interference with:

Held: r.12(3)(a) lays down the sequential list of certificates to be examined and the order thereof – In the present case, as no 'matriculation or equivalent certificates' were available u/r.12(3)(a)(i), thus u/r.12(3)(a)(ii), 'date of birth certificate from the school (other than a play school) first attended' was attracted and the certificate issued by the first attended school was taken as conclusive proof of date of birth – However, the deposition of the School's Headmaster to the effect that the birth-date was noted on an oral representation by Respondent No.2's father, makes the said certificate unreliable – Other school certificates were issued following this and therefore, are not correct, in the face of conflicting public records and public documents as also the Medical Report which state to the contrary – Thus, the certificate issued by the first attended school could not have been taken as conclusive proof of date of birth of Respondent No.2, discarding Form (A) u/r.2 of

* Author

the Rules under the U.P. Panchayat Raj Act 1947; the entry in the Voters' List for the Legislative Assembly of the year 2012, and; the Medical Report – Respondent No.2 was not a 'juvenile' on the date of the incident – Declaration of Respondent No.2 as a 'juvenile' was improper – Impugned order of the High Court as well as the order of the Trial Court holding the Respondent No.2 to be a 'juvenile', set aside – Evidence Act, 1872 – ss.35, 74. [Paras 23-26]

Evidence Act, 1872 – ss.35, 74 – Juvenile Justice (Care and Protection of Children) Act, 2000 – Juvenile Justice (Care and Protection of Children) Rules, 2007 – Certificate issued by the first attended school was taken as conclusive proof of date of birth of the Respondent No.2-accused and he was held a 'juvenile' on the date of the incident:

Held: The first attended school is not a Government School and thus, the records maintained by the said School would not be 'public documents' – Moreover, the Headmaster/Principal of such School cannot be said to be a 'public servant' for the purposes of the Evidence Act – Thus, neither the Headmaster/Principal of the first attended school nor its records would qualify as 'public servant' or 'public record' or 'public document' respectively. [Paras 21, 22]

Case Law Cited

Om Prakash v. State of Rajasthan **[2012] 5 SCR 237 : (2012) 5 SCC 201 – relied on.**

Birad Mal Singhvi v. Anand Purohit **[1988] Supp. 2 SCR 1 : (1988) Supp. SCC 604 – referred to.**

List of Acts

Juvenile Justice (Care and Protection of Children) Act, 2000; Juvenile Justice (Care and Protection. of Children) Rules, 2007; Penal Code, 1860; Evidence Act, 1872; UP Panchayat Raj Act, 1947.

List of Keywords

Juvenile; Juvenility; Rule 12 of Juvenile Justice (Care and Protection of Children) Rules, 2007; Determination of Age; Juvenility not established; First attended school; School transfer certificate; Birth-date entry; Birth-date noted as per an oral representation; Date of birth certificate; Equivalent certificates; Other school certificates;

Conflicting public records and public documents; Conclusive proof of date of birth; Family Register; Entry in the Voters' List for the Legislative Assembly; Gram Panchayat; Not a 'juvenile' on the date of the incident; Declaration as 'juvenile' improper; Public servant; Public record; Public documents; First attended school not a Government School; Headmaster/Principal of first attended school not a public servant; Relevancy of an entry in a public record; Certificate of the Municipal Corporation; Murder; House-trespass; Exhortation; Country-made pistol; Deceased shot; Matriculation certificate; Statutory document.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 347 of 2018

From the Judgment and Order dated 29.03.2016 of the High Court Of Judicature at Allahabad in CRLR No. 2144 of 2015

Appearances for Parties

Advs. for the Appellant:
Ms. Neema, Rajesh.

Advs. for the Respondents:
Vishwa Pal Singh, Mukesh Kumar, Prateek Rai, Vikrant Rana, Prafulla, Anurag Pandey, Ms. Asha Gopalan Nair, Ms. Nivedita Nair, Shashikant Pralhad Chaudhari.

Judgment / Order of the Supreme Court

Judgment

Ahsanuddin Amanullah, J.

The present appeal emanates from the Final Judgment and Order passed by the High Court of Judicature at Allahabad (hereinafter referred to as the 'High Court') in Criminal Revision No.2144/2015 dated 29.03.2016 (hereinafter referred to as the 'Impugned Order') [**2016:AHC:50543**], whereby the High Court dismissed the criminal revision petition filed by the Appellant and upheld the Order passed by the Court of the learned Additional Sessions Judge, Court No.1, Kairana, Muzaffarnagar (hereinafter referred to as the 'Trial Court') on 19.05.2015, declaring Respondent No.2 as a '*juvenile*' under

the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to as the 'Juvenile Justice Act') [as it then was].

BRIEF FACTS:

2. The Appellant alleges that, on 31.08.2011, while the Appellant, his father, mother and his brother/Rajesh Singh (hereinafter referred to as 'Rajesh') had gone to their fields, his *chacha* (paternal uncle)/Lillu Singh and his son Devi Singh/Respondent No.2 forcibly entered his house at around 10 am. When restrained by his wife who was alone at the house, the Appellant alleges that the two persons – father and son i.e., Lillu Singh and Respondent No.2 – manhandled her. When the said incident was narrated to the Appellant and his brother by the Appellant's parents who had reached the house during the incident, Rajesh went to the accused/father-son duo, to enquire about the same. In this interaction, it is alleged that his *chacha* and Respondent No.2 forcibly took Rajesh inside their house, where the *chacha* caught/held him, and Respondent No.2 took out a country-made pistol and fired it on Rajesh with the intention to kill him. It is stated that pursuant to this, Rajesh suffered injuries and died *en route* to Kairana hospital.

3. Thereafter, the Appellant lodged a First Information Report being Crime Case No.385/2011 at Kairana Police Station, Muzaffarnagar against Lillu Singh and Respondent No.2 under Sections 452[1] and 302[2] of the Indian Penal Code, 1860 (hereinafter referred to as the 'IPC').

4. This complaint proceeded to be converted into Sessions Trial No.123/2012 before the Court of the learned Additional Sessions Judge, Kairana, Muzaffarnagar. With a plea that his date of birth was 18.04.1995, and as on the date of the incident, he was aged 16 years, 4 months and 13 days, Respondent No.2 filed a miscellaneous application numbered as Miscellaneous Case No.04/11/2015 before the Trial Court seeking to establish his juvenility, which was connected

1 '***452. House-trespass after preparation for hurt, assault or wrongful restraint***.—*Whoever commits house-trespass, having made preparation for causing hurt to any person or for assaulting any person, or for wrongfully restraining any person, or for putting any person in fear of hurt, or of assault, or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.*'

2 '***302. Punishment for murder***.—*Whoever commits murder shall be punished with death, or imprisonment for life, and shall also be liable to fine.*'

with Sessions Trial No.123/2012. The Trial Court, on appreciating the evidence and material placed on record, *vide* Order dated 19.05.2015, confirmed that as on the date of the incident, the Respondent No.2 was 16 years, 4 months and 13 days old and thereby established his juvenility.

5. Aggrieved by the Order of the Trial Court, the Appellant preferred a criminal revision petition before the High Court, which was dismissed *vide* the Impugned Order. Consequently, the juvenility of the Respondent No. 2 stood confirmed by the High Court.

THE APPELLANT'S SUBMISSIONS:

6. The Appellant's submissions majorly revolved around pointing out how the Courts below erred in establishing and confirming the Respondent No.2's juvenility based on a transfer certificate issued by the first school attended by Respondent No.2, i.e., Kaushik Modern Public School, Khurgaon, to which he was directly admitted in Class V. Learned counsel for the Appellant submitted that the Courts' reliance on this certificate issued by the school was incorrect, when a statutory document like the Family Register maintained under the U.P. Panchayat Raj Act, 1947 by the Gram Panchayat declared the age of the Respondent No.2 as 20, mentioning his year of birth as 1991. Further, the Voters' List also, of the year 2012, mentioned Respondent No.2's age as 22 years as on 01.01.2012. In this light, learned counsel urged that though there were school certificates which declared the date of birth of the Respondent No.2 as 18.04.1995, relying on the date of birth mentioned in the transfer certificate issued by the first school attended, these ought not to have been relied on, when there is evidence contradicting this claim, especially in light of the fact that the first school attended by the Respondent No.2 directly admitted him into Class V, recording his date of birth as 18.04.1995 – on the oral mention of his father, without enquiring/ looking into any proof for his date of birth being such.

7. In this light, learned counsel sought to buttress his argument on the basis of Section 35 of the Indian Evidence Act, 1872 (hereinafter referred to as the 'Evidence Act'), which would make admissible a document if it states a relevant fact or fact in issue and if it is made by a public servant in discharge of his official duty or by any other person in performance of a duty specially enjoined by law. It was submitted that Section 35 of the Evidence Act would be attracted

both in civil and criminal proceedings. To support this argument, learned counsel for the Appellant placed reliance on a decision of this Court in ***Birad Mal Singhvi v Anand Purohit,*** **1988 Supp SCC 604**, which held:

> '***15.*** *… To render a document admissible under Section 35, three conditions must be satisfied, firstly, entry that is relied on must be one in a public or other official book, register or record, secondly; It must be an entry stating a fact in issue or relevant fact, and thirdly, it must be made by a public servant in discharge of his official duty, or any other person in performance of a duty specially enjoined by law. An entry relating to date of birth made in the school register is relevant and admissible under section 35 of the Act, but the entry regarding the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded. …*'

8. Importantly, learned counsel submitted that the age of the accused-Respondent No.2 was over 18 years even as per the medical evidence/report given by the Chief Medical Officer, on 01.12.2012, which stated that his age was 22 years, which meant that at the time of the incident, the accused was over 20 years of age, and thus, could not raise any claim of juvenility. To support this submission, learned counsel placed reliance on the decision in ***Om Prakash v State of Rajasthan,*** **(2012) 5 SCC 201**, wherein this Court held that in cases of serious offences like murder, rape, *etcetera*, an accused cannot be allowed to abuse the statutory protection afforded to him by attempting to prove himself as a minor when the documentary evidence to prove his minority gives rise to a reasonable doubt about his assertion of minority. This Court also held that under such circumstances, medical evidence based on scientific investigation will have to be given due weight and precedence over the evidence based on school administration records, which give rise to hypothesis and speculation about the age of the accused. It was prayed that the appeal be allowed.

SUBMISSIONS OF RESPONDENT NO.1-STATE:

9. Respondent No.1/State of Uttar Pradesh succinctly submitted that since Respondent No.2 neither produced a birth certificate nor a

matriculation certificate, in such case, date of birth as mentioned in the transfer certificate cannot be made the basis for giving benefit of the Juvenile Justice Act to the accused-Respondent No.2, especially when the Appellant produced a Voters' List, Family Register and Medical Report which shows that at the time of the incident, Respondent No.2 was a major. Thus, the State also prayed that the Orders of the courts below be interfered with and set aside, and the instant appeal be allowed.

SUBMISSIONS OF RESPONDENT NO.2:

10. The learned counsel for the Respondent No.2 canvassed three-fold arguments. *Firstly*, learned counsel contended that the Trial Court established the Respondent No.2's juvenility based on the date(s) of birth consistently recorded in the transfer certificates of multiple schools attended by him. This date of birth, i.e., 18.04.1995, as recorded in the school transfer certificates of 4 schools where Respondent No.2 studied from Classes Vth to IXth suggests that, as on the date of the incident, he was 16 years, 4 months, and 13 days old and, thus, entitled to the benefit conferred under the Juvenile Justice Act read with Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to as the 'Rules'). Learned counsel contended that the officials of the schools which gave these school certificates were also examined, and the validity of these certificates was testified by these witnesses. In light of such evidence and testimonies placed, learned counsel contended that the Trial Court rightly established juvenility of Respondent No.2.

11. *Secondly*, learned counsel submitted that Rule 12 of the Rules provide that the Court determining the juvenility of an accused can seek evidence by obtaining a matriculation certificate, in absence whereof, a date of birth certificate from the school first attended, in absence whereof a birth certificate given by a corporation or a municipal authority, and only in absence of these documents, a medical opinion declaring the age of the juvenile would be considered. Learned counsel submitted that in the present case, since matriculation certificate in respect of Respondent No.2 was not available, the school transfer certificate issued by the Kaushik Modern Public School, Khurgaon, Shamli, Uttar Pradesh, which is a certificate of the first school attended, is exclusive proof that the date of birth of Respondent No.2 is 18.04.1995, and there is no need

to consider any other evidence such as certificate of the Municipal Corporation or Family Register or certificate of the Medical Board.

12. *Thirdly*, learned counsel submitted that Respondent No.2 has been released by the Juvenile Justice Board after completing the maximum punishment of three years prescribed by law. It was, accordingly, urged that the appeal be dismissed.

ANALYSIS, REASONING AND CONCLUSION:

13. Having bestowed anxious thoughts to the issue, we find that the approach adopted by the Trial Court as well as the High Court was not proper. Though the issue of juvenility, indubitably and primarily has to be determined as per the relevant provisions of the Juvenile Justice Act and the Rules framed thereunder, as applicable at the relevant time, yet under appropriate circumstances and with justifiable reasons, the Court examing the issue has the discretion to take other relevant materials and factors into account, for ultimately the cause of justice has to prevail.

14. In the present case, the serious allegation against Respondent No.2 is that on the exhortation of his father, he along with his father forcibly took the deceased Rajesh inside their house, whereafter Respondent No.2 took out a country-made pistol and shot the deceased Rajesh, resulting in his death.

15. With regard to the modalities of the enquiry governing determination of juvenility, Rule 12(3) of the Rules provides:

> '***12. Procedure to be followed in determination of Age.—***
>
> *…*
>
> ***(3)*** *In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining –*
>
> *(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;*
>
> *(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;*
>
> *(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;*

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.'

16. In the present case, four certificates have been produced from schools said to have been attended by Respondent No.2 *viz*. Public Inter College, Kairana, Muzaffarnagar; S. N. Junior High School, Kairana; Sarvoday Public Junior High School, Mohalla Shitla, Kairana, Muzaffarnagar, and; Kaushik Modern Public School, Khurgaon, but all are based on the certificates issued by the first attended school, Kaushik Modern Public School, Khurgaon.

17. The first school certificate issued by Kaushik Modern Public School, Khurgaon, where Respondent No.2 was admitted in Class V, records his date of birth as 18.04.1995. Pausing here, it is also relevant to indicate that the Headmaster of the said School while deposing has stated that this birth-date entry was made only on an oral representation by Respondent No.2's father.

18. On the other side, the Appellant produced the relevant page from a Family Register maintained under the U.P. Panchayat Raj Act, 1947 which records the year of birth of the Respondent No.2 as 1991. The Appellant further relied on the Report of the Medical Board which was constituted pursuant to a reference made by the Trial Court when the plea of juvenility was raised before it by Respondent No.2. Such examination was conducted and Report submitted on 01.12.2012 i.e., nearly after a year of the date of the incident. The Medical Board through its Report opined that Respondent No.2 was aged about 22 years, which would make him between 20-21

years of age, as on the date of the incident, whereas, as per the school certificates, his age was estimated to be 16 years, 4 months and 13 days. Another factor which cannot be ignored is the Voters' List of the Kairana Legislative Assembly Constituency of the year 2012. The List shows Respondent No.2 to be approximately 21 years old as on 01.01.2012. This entry is not conclusive proof, but the fact remains that such entry is made only on representation of either person concerned or his/her parent/guardian. No objection to Respondent No.2's name figuring in the Voters' List by either him or his parent was raised contemporaneously. In our considered view, such conduct would have a bearing, especially when there are rival and competing documents denying his juvenility.

19. The relevancy of an entry in a '*public record*' is guided by Section 35 of the Evidence Act:

> '***35. Relevancy of entry in public record or an electronic record, made in performance of duty.—*** *An entry in any public or other official book, register or record or an electronic record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record or an electronic record, is kept, is itself a relevant fact.*'

20. Section 74 of the Evidence Act deals with '*public documents*':

> '***74. Public documents****.—The following documents are public documents: —*
>
> *(1) Documents forming the acts, or records of the acts —*
>
> *(i) of the sovereign authority,*
>
> *(ii) of official bodies and tribunals, and*
>
> *(iii) of public officers, legislative, judicial and executive, of any part of India or of the Commonwealth, or of a foreign country;*
>
> *(2) public records kept in any State of private documents.*'

21. There is no dispute on the factum that Kaushik Modern Public School, Khurgaon – the first attended school – is not a Government

School and thus, the records maintained by the said School would not be '*public documents*'. Moreover, the Headmaster/Principal of such School cannot be said to be a '*public servant*' for the purposes of the Evidence Act. The Headmaster when examined has himself taken the stand that Kaushik Modern Public School, Khurgaon was only a State Government-recognized school.

22. Therefore, neither the Headmaster/Principal of the first attended school nor its records would qualify as '*public servant*' or '*public record*' or '*public document*' respectively.

23. Even otherwise, in the case at hand, except for the Headmaster's sole testimony, there is no material to establish that the date 18.04.1995 as Respondent No.2's date of birth, as recorded in the certificate issued by Kaushik Modern Public School, Khurgaon, was correct. As a matter of fact, the Principal in his cross-examination stated that when the Respondent No.2 was leaving the school on that day after making cutting he had written the correct date of birth. Moreover, the Principal has also stated that the birth-date entry was made on the basis of an oral representation alone by Respondent No.2's father and when he was asked for the horoscope or any other document in support of the date of birth of the Respondent No.2, nothing was submitted. This, in our view, discredits the certificate issued by the Kaushik Modern Public School, Khurgaon. As noted hereinbefore, the other school certificates were issued following this and therefore, meet the same fate inasmuch as they cannot be treated as correct, in the face of conflicting public records and public documents as also the Medical Report which state to the contrary. The observations by a Bench of 2 learned Judges in *Om Prakash v State of Rajasthan* (*supra*) are clearly attracted, and the relevant excerpts therefrom read as under:

> '***22.*** *It is no doubt true that if there is a clear and unambiguous case in favour of the juvenile accused that he was a minor below the age of 18 years on the date of the incident and the documentary evidence at least prima facie proves the same, he would be entitled for this special protection under the Juvenile Justice Act. But when an accused commits a grave and heinous offence and thereafter attempts to take statutory shelter under the guise of being a minor, a casual or cavalier approach*

while recording as to whether an accused is a juvenile or not cannot be permitted as the courts are enjoined upon to perform their duties with the object of protecting the confidence of common man in the institution entrusted with the administration of justice.

23. *Hence, while the courts must be sensitive in dealing with the juvenile who is involved in cases of serious nature like sexual molestation, rape, gang rape, murder and host of other offences, the accused cannot be allowed to abuse the statutory protection by attempting to prove himself as a minor when the documentary evidence to prove his minority gives rise to a reasonable doubt about his assertion of minority. Under such circumstance, the medical evidence based on scientific investigation will have to be given due weight and precedence over the evidence based on school administration records which give rise to hypothesis and speculation about the age of the accused. The matter however would stand on a different footing if the academic certificates and school records are alleged to have been withheld deliberately with ulterior motive and authenticity of the medical evidence is under challenge by the prosecution.*

xxx

33. *Similarly, if the conduct of an accused or the method and manner of commission of the offence indicates an evil and a well-planned design of the accused committing the offence which indicates more towards the matured skill of an accused than that of an innocent child, then in the absence of reliable documentary evidence in support of the age of the accused, medical evidence indicating that the accused was a major cannot be allowed to be ignored taking shelter of the principle of benevolent legislation like the Juvenile Justice Act, subverting the course of justice as statutory protection of the Juvenile Justice Act is meant for minors who are innocent law-breakers and not the accused of matured mind who use the plea of minority as a ploy or shield to protect himself from the sentence of the offence committed by him.*

> ***34.*** *The benefit of benevolent legislation under the Juvenile Justice Act obviously will offer protection to a genuine child accused/juvenile who does not put the court into any dilemma as to whether he is a juvenile or not by adducing evidence in support of his plea of minority but in absence of the same, reliance placed merely on shaky evidence like the school admission register which is not proved or oral evidence based on conjectures leading to further ambiguity, cannot be relied upon in preference to the medical evidence for assessing the age of the accused.*
>
> ***35.*** *While considering the relevance and value of the medical evidence, the doctor's estimation of age although is not a sturdy substance for proof as it is only an opinion, such opinion based on scientific medical tests like ossification and radiological examination will have to be treated as a strong evidence having corroborative value while determining the age of the alleged juvenile accused.*
>
> xxx
>
> ***38.*** *The Juvenile Justice Act which is certainly meant to treat a child accused with care and sensitivity offering him a chance to reform and settle into the mainstream of society, the same cannot be allowed to be used as a ploy to dupe the course of justice while conducting the trial and treatment of heinous offences. This would clearly be treated as an effort to weaken the justice dispensation system and hence cannot be encouraged.*'
>
> (emphasis supplied)

24. Rule 12(3)(a) of the Rules lays down the sequential list of certificates to be examined and the order thereof. As no '*matriculation or equivalent certificates*' were available under Rule 12(3)(a)(i) of the Rules, thus under Rule 12(3)(a)(ii) of the Rules, '*date of birth certificate from the school (other than a play school) first attended*' was attracted and certificate issued by Kaushik Modern Public School, Khurgaon was taken as conclusive proof of date of birth. However, the deposition of the School's Headmaster, especially to the effect that the birth-date was noted as per an oral representation by Respondent No.2's father, makes the said certificate unreliable. Moving on, Rule 12(3)

(a)(iii) and Rule 12(3)(b) of the Rules, respectively, provide for '*birth certificate given by a corporation or a municipal authority or a panchayat*' and '*only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child*.'

25. From an overall circumspection of all the facts and circumstances surrounding the case, including the Rules, the picture which emerges is that on the one hand, there is the certificate backed by the testimony of the Headmaster of the first school (which as indicated *supra* notes that the recordal was made on the oral say-so of Respondent No.2's father) relating to the date of birth and the three consequentially-made/issued certificates, whereas on the other hand, there exists a statutory document, being a public record and a public document, in Form (A) under Rule 2 of the Rules framed under the U.P. Panchayat Raj Act, 1947 disclosing the year of birth of Respondent No.2 as 1991 as also the entry in the Voters' List for the Legislative Assembly of the year 2012 and the Medical Report apropos the age of Respondent No.2 given by the Chief Medical Officer, Muzaffarnagar, who opined that Respondent No.2 was aged about 22 years on 01.12.2012. As such, the certificate issued by Kaushik Modern Public School, Khurgaon could not have been taken as conclusive proof of date of birth of Respondent No.2, discarding Form (A) under Rule 2 of the Rules under the U. P. Panchayat Raj Act, 1947; the entry in the Voters' List for the Legislative Assembly of the year 2012, and; the Medical Report. On the basis of the latter three documents, it is clear that Respondent No.2 cannot be said to have been a '*juvenile*' on the date of the unfortunate incident.

26. Accordingly, for the reasons aforesaid, the declaration of Respondent No.2 as a '*juvenile*' being plainly improper, the Impugned Order as well as the Order dated 19.05.2015 of the Trial Court holding the Respondent No.2 to be a '*juvenile*' are hereby set aside. Respondent No.2 is held to have been a major as on the date of commission of the alleged offence and liable to be tried as a major for Crime No. 385/2011, Police Station - Kairana.

27. The trial be expedited. The Trial Court is directed to conclude the trial on priority basis ensuring that the same is taken to its logical conclusion, latest by the end of July, 2026.

28. In view of Respondent No.2's Written Submissions to the effect that the accused/Respondent No.2 was released by the Juvenile Justice Board, it is directed that he shall appear before the Trial Court within three weeks from date and shall be at liberty to pray for bail, to be considered on its own merits by the Trial Court. Failure to appear within three weeks will enable the State to resort to coercive measures to ensure his production. For completeness, the Order directing his release upon completing three years under the Juvenile Justice Act would also require to be and is set aside.

29. The trial shall proceed on its own merits in accordance with law without being prejudiced on merits by the instant Judgment. If the trial results in conviction, benefit of set-off in relation to 3 years shall be afforded to Respondent No.2.

30. The Appeal is allowed in the aforesaid terms.

Result of the case: Appeal allowed.

†*Headnotes prepared by:* Divya Pandey

[2025] 8 S.C.R. 320 : 2025 INSC 920

Ch. Joseph
v.
The Telangana State Road Transport Corporation & Other

(Civil Appeal No. 9986 of 2025)

01 August 2025

[J.K. Maheshwari and Aravind Kumar,* JJ.]

Issue for Consideration

i) Whether the retirement of the appellant on medical grounds due to colour blindness, without offering alternative employment, is legally sustainable in light of applicable service regulations and binding settlements; ii) whether Clause 14 of the Memorandum of Settlement dated 17.12.1979, executed u/s.12(3) of the Industrial Disputes Act, 1947, remains valid, binding, and enforceable despite the subsequent 1986 settlement and internal administrative circulars; iii) whether the respondents complied with their duty to make a *bona fide* assessment of alternative employment options for the appellant, as required by law, policy, and principles of natural justice; iv) whether the reliance placed by the High Court on *B.S. Reddy* was legally tenable in the context of the appellant's independent rights under a binding industrial settlement.

Headnotes†

Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 – APSRTC Employees (Service) Regulations, 1964 – Regn. 6A(5)(b) – Appellant-driver was found to be colour blind and was declared unfit to hold the post of driver – The appellant's representation seeking alternate employment came to be rejected by the respondent-corporation – The corporation passed an order retiring the appellant – Whether the retirement of the appellant on medical grounds due to colour blindness, without offering alternative employment, is legally sustainable in light of applicable service regulations and binding settlements:

Held: 1. The appellant's retirement from service on the ground of colour blindness was effected without any demonstrable effort by the respondent-corporation to identify or assess the feasibility of

* Author

alternative employment, despite the appellant having expressed willingness to be reassigned to a non-driving post – Such inaction violates both statutory obligation and administrative fairness. [Para 10.1]

2. The primary legal flaw lies in the assumption that medical unfitness for a particular post automatically entails incapacity for public service altogether – Colour blindness, though a disqualification for driving, does not render the appellant unfit to serve in any other non-driving role – There is no evidence that he was declared wholly incapacitated or incapable of performing other duties. [Para 13]

3. The MOS dated 17.12.1979 entered into u/s.12 (3) of Industrial Disputes Act, 1947 between the employer and the union representing the workmen under Clause 14 would indicate that the drivers found with "colour blindness" would be provided an alternate job and all service benefits would stand protected – However, the Corporation has relied upon the subsequent agreement, namely Memorandum of Settlement (MOS) dated 22.12.1986 to stave off the claim for alternate employment raised by the appellant in the instant case – A plea has been raised in the Counter affidavit filed by the Corporation that the MOS dated 17.12.1979 has been superseded by the agreement of 1986 – The said contention is rejected – The agreement dated 22.12.1986 does not refer to the agreement dated 17.12.1979 – In fact, Clause 5 (d) of the settlement agreement 22.12.1986 would indicate, suitable alternate jobs would have to be identified and only in the event of not being possible to identify such job, recourse to payment of additional monetary benefit as per the proposal sent to the government will be given after government's approval – The Settlement dated 22.12.1986 does not specifically supersede the settlement agreement of 17.12.1979 – It is only by way of a communication dated 10.11.2014, the benefit of alternate employment given to the drivers declared unfit due to "colour blindness" has been sought to be taken away which benefit was extended till that date. [Paras 14, 16, 16.1, 16.2, 16.3]

4. Retirement on medical grounds must be a measure of last resort, only after the employer exhausts all reasonable avenues for redeployment – This principle is inherent in the concept of "reasonable accommodation", which is now recognised as an aspect of substantive equality under Articles 14 and 21 – The failure to explore alternate employment before resorting to medical

retirement is not merely a procedural lapse—it is a substantive illegality that violates the appellant's right to livelihood and equal treatment. [Para 17]

Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 – Industrial Disputes Act, 1947 – s.12(3) – APSRTC Employees (Service) Regulations, 1964 – Regn. 6A(5)(b) – Whether Clause 14 of the Memorandum of Settlement dated 17.12.1979, executed u/s.12(3) of the Industrial Disputes Act, 1947, remains valid, binding, and enforceable despite the subsequent 1986 settlement and internal administrative circulars:

Held: 1. The appellant's entitlement to re-deployment arises from Clause 14 of the binding Memorandum of Settlement dated 17.12.1979, executed u/s.12(3) of the Industrial Disputes Act, 1947, which specifically provides for alternate employment to drivers declared colour blind, with pay protection and continuity of service – This clause remains valid and enforceable. [Para 10.2]

2. The Memorandum of Settlement dated 17.12.1979, was executed between the Corporation and its recognised union u/s.12(3) of the Industrial Disputes Act, 1947 – The Memorandum of Settlement is not a mere administrative circular—it is a binding statutory contract forged between labour and management. [Para 18]

3. The enforceability of this settlement is not diminished by the subsequent settlement dated 22.12.1986, which the Corporation claims to be governing the field – Clause 5(d) of the 1986 settlement provides that drivers who are medically unfit may, "to the extent possible", be provided alternative employment, and where not feasible, will be granted Additional Monetary Benefit (AMB) – Crucially, this clause does not contain any express language annulling or modifying Clause 14 of the 1979 agreement – Also, the absence of a termination clause in the 1986 settlement, coupled with the Corporation's continued adherence to Clause 14 in other cases even after 1986, confirms that the earlier agreement remained operational – Accordingly, this Court finds that 1986 settlement does not explicitly abrogate or nullify Clause 14 of the 1979 settlement. [Para 21]

Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 – Industrial Disputes

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Act, 1947 – APSRTC Employees (Service) Regulations, 1964 – Whether the respondents complied with their duty to make a *bona fide* assessment of alternative employment options for the appellant, as required by law, policy, and principles of natural justice:

Held: 1. From the record, it is evident that the Corporation made no effort whatsoever to assess the feasibility of assigning the appellant to a non-driving post – There is no file noting, committee report, vacancy statement, or suitability assessment relating to the appellant – His representation requesting the post of Shramik remained unanswered – No comparative evaluation was conducted, and no individualized inquiry was held – The only justification offered is that the Corporation's circulars bar such alternate employment. [Para 24]

2. In the instant case, there is no evidence that the respondents examined even the most basic parameters—availability of vacancies, suitability of tasks, or the appellant's qualifications – This total failure undermines the Corporation's claim of compliance with either the 1979 or 1986 framework, and renders the retirement order void for non-consideration of appellant's claim in proper perspective. [Para 27]

Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 – Industrial Disputes Act, 1947 – s.47 – APSRTC Employees (Service) Regulations, 1964 – Whether the reliance placed by the High Court on *B.S. Reddy* was legally tenable in the context of the appellant's independent rights under a binding industrial settlement:

Held: 1. The Division Bench of the High Court erred in applying the judgment in *B.S. Reddy*, which dealt with the limited scope of s.47 of the 1995 Act, and did not consider claims arising independently under industrial settlements – The present case stands on an entirely different legal footing. [Para 10.5]

2. The *B.S. Reddy* judgment did not deal with the enforceability of a clause in an agreement/settlement entered into u/s.12(3) of Industrial Dispute Act, 1947 or the Corporation's obligations under bilateral agreements with its workers – The High Court overlooked the fundamental distinction between statutory rights under disability law and contractual service conditions enforceable through settlements. [Para 29]

3. The Court in *Mohamed Ibrahim* clarified that employees with conditions like colour blindness, although not falling within the defined categories of the statute, must still be accommodated wherever their functional capacity permits – To do otherwise would result in a regressive interpretation of the law, undermining the very foundation of equal opportunity in public employment. [Para 36]

4. Even though in the present case the appellant had an enforceable right under a statutory industrial settlement—placing his claim on firmer footing—this Court finds it necessary to reaffirm that even in the absence of such contractual rights, employees who acquire disabilities during service must not be abandoned or prematurely retired without being afforded a fair and reasonable opportunity for reassignment. [Para 37]

Case Law Cited

Kunal Singh v. Union of India and Another **[2003] 1 SCR 1059 : (2003) 4 SCC 524;** *Mohamed Ibrahim v. The Chairman and Managing Director and Others* **[2023] 13 SCR 924 – relied on.**

Andhra Pradesh State Road Transport Corporation Represented by its Managing Director and Others v. B.S. Reddy **(2018) 12 SCC 704;** *Vikash Kumar v. Union Public Service Commission and Others* **[2021] 12 SCR 311 : (2021) 5 SCC 370;** *Ravinder Kumar Dhariwal and Another v. Union of India and Others* **[2021] 13 SCR 823 – referred to.**

List of Acts

Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995; Industrial Disputes Act, 1947.

List of Keywords

Service Law; Retirement; Medical grounds; Retirement on medical grounds; Colour blind; Post of driver; Alternative employment; Service regulations; Binding settlements; Internal administrative circulars; Principles of Natural Justice; Statutory obligation; Administrative fairness; Incapacity for public service; Additional monetary benefit; Concept of reasonable accommodation; Termination clause; Right to livelihood; Equal treatment; Article 14 of Constitution; Article 21 of Constitution; Statutory rights under disability law; Reasonable opportunity for reassignment.

Ch. Joseph v.
The Telangana State Road Transport Corporation & Other

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 9986 of 2025

From the Judgment and Order dated 21.08.2017 of the High Court Of Judicature at Hyderabad for The State of Telangana and The State of Andhra Pradesh in WA No. 1343 of 2017

Appearances for Parties

Advs. for the Appellant:
C. Mohan Rao, Sr. Adv., R. Santhana Krishnan, Lokesh Kumar Sharma, Dharmendra Kumar Sinha.

Advs. for the Respondents:
Satyam Reddy Sarasani, Sr. Adv. Ms. Sri Ruma Sarasani, Shishir Pinaki.

Judgment / Order of the Supreme Court

Judgment

Aravind Kumar, J.

1. Leave granted.

2. Appellant herein is aggrieved by the judgment passed by the High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh (hereinafter referred to as High Court) in Writ Appeal No. 1343 of 2017 dated 21.08.2017, whereunder the writ appeal filed by Telangana State Road Transport Corporation [hereinafter referred to as **"TSRTC"**] i.e., Respondent No. 1, came to be allowed and the judgment of the single Judge dated 10.03.2016 passed in Writ Petition No. 5164 of 2016 directing the Respondent No.1 to provide the appellant an alternate employment came to be set-aside and permitted the appellant to make a detailed representation to the respondent-corporation to seek alternate employment.

FACTUAL BACKGROUND:

3. Appellant herein was selected and appointed as a 'driver' in the Andhra Pradesh State Road Transport Corporation **("APSRTC"** –i.e., the predecessor-in-title of the respondent-corporation) on 01.05.2014, after fulfilling the eligibility criteria fixed for the post. On a periodical

medical examination conducted by the medical officer of the dispensary belonging to the respondent-corporation, it was found that the appellant was 'colour blind' and was declared unfit to hold the post of 'driver'. The appellant preferred an appeal challenging the observation regarding his fitness for the post of 'driver', alternatively, the appellant also sought for alternate employment in the event, he was declared 'medically unfit'. The appellate authority dismissed the appeal filed by the appellant, upon which appellant made a representation to the Medical Board, to consider his case by the hospital belonging to the corporation. The Medical Board after considering the case of the appellant, reiterated the findings of the medical officer and the Appellate Authority.

4. The appellant's representation seeking alternate employment came to be rejected by the corporation on the ground that extant rules do not provide for granting alternate employment to colour blind drivers. The corporation, vide order dated 27.01.2016, passed an order retiring the appellant w.e.f. 06.01.2016 and directed him to avail the additional monetary benefits provided under the policy governing the same.

5. The appellant approached the High Court by filing a Writ Petition No. 5164/2016, impugning the order dated 27.01.2016 and sought for a direction to the corporation to provide him alternate employment contending his disability falls under the category of disablement under the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter referred to as **"the Act"**) and therefore he cannot be discriminated; it was also contended that such discrimination would be in violation of Section 47 of the Act and Article 14 and Article 21 of the Constitution of India. The appellant also relied on a Memorandum of Settlement (hereinafter referred to as **"MOS"**) dated 17.12.1979 entered between the respondent-corporation and the recognized union, which had a provision, namely, Clause 14 of the MOS, which stated that the 'drivers' would be provided with an alternate employment.

6. The Single Judge *vide* order dated 10.03.2016, allowed the Writ Petition. No. 25577/2014 wherein it was held that the category of 'colour also falls within the category of disablement within the provisions of the Act. Aggrieved by the direction of the Single Judge, the corporation filed an appeal and the Division Bench relying on the

judgment of this Court in ***Andhra Pradesh State Road Transport Corporation Represented by its Managing Director and Others v. B.S. Reddy***[1] *and connected matters* set-aside the order of the Single Judge and directed the appellant to make a representation to the corporation seeking the benefit as prescribed under the regulations and the scheme governing the corporation.

SUBMISSIONS OF THE PARTIES:

7. Mr. C. Mohan Rao, learned Senior Advocate representing the Appellant contends as follows:

   7.1. The Memorandum of Settlement (MOS) entered between the APSRTC and the recognized unions u/s 12(3) of the Industrial Disputes Act,1947 dated 17.12.1979 is binding on the respondent-corporation and according to the same, the appellant herein being the 'driver' of the corporation is entitled for an alternate employment and therefore, the appellant has the right to seek alternate employment.

   7.2. The High Court ought to have considered the case of the appellant positively and has failed to appreciate that the case of the Appellant falls within the category of people who have acquired the disability during service and thus appellant would be entitled for alternate employment.

   7.3. The High Court failed to appreciate the principles enunciated in the case of ***Kunal Singh v. Union of India and Another***[2] by this Court wherein this Court differentiated between the disability of a person and acquired disability while in service and contended that appellant having acquired disability while in service is entitled to alternate employment.

   7.4. The High Court ought to have considered that the Appellant herein is entitled to the benefit of Section 47 of the Act and therefore has the right to alternate employment.

   7.5. The appellant also relied on the judgment of this Court in ***Mohamed Ibrahim v. The Chairman and Managing Director and Others in Civil Appeal No. 6785 of 2023,*** wherein this court

1 (2018) 12 SCC 704

2 (2003) 4 SCC 524

directed Respondent-Corporation therein to give the appellant, who was colour blind, an alternate employment.

8. Mr. Satyam Reddy Sarasani, Senior Advocate appearing on behalf of the respondent-corporation, supporting the impugned order, has contended:

8.1. That MOS dated 17.12.1979 was replaced by the Memorandum of Settlement dated 22.12.1986, and the previous clause relating to alternate employment to the drivers came to be replaced by Clause 5(d) under the MOS dated 22.12.1986, which state as follows:

> *"5(d) Medically unfit driver- it is agreed that to the extent possible suitable alternative job will be identified. In case it is not possible to identify suitable jobs, additional monetary benefit as per the proposals sent to the Government will be given after Government's approval"*

8.2. As the appellant being an illiterate person and being a person without qualification, does not fall in the category of persons who can be given alternate employment as per clause 5(d) of the MOS dated 22.12.1986 and therefore, as there is no suitable post available in the corporation to accommodate the appellant, the decision of the corporation to terminate the services of the appellant is correct. The corporation also relied on the regulations governing the workmen of the corporation to demonstrate that, no provision is available in the regulation which imposes an obligation on the corporation to appoint the appellant by providing an alternate employment.

8.3. The term 'colour blindness' does not fall under the category of 'disability' as defined under Section 2(i) of the Act and therefore Section 47 of the Act does not apply. It is further contended that, the judgment passed in Civil Appeal No. 3529 of 2017, relied on by the High Court is correct and therefore supported the impugned order passed by the High Court.

8.4. On the bare reading of the definition given in Section 2(i) it can be seen that, persons who have more than 40% of disability will fall into the category of 'persons with disability', and appellant's case therefore does not fall in the category of 'persons with disability'.

8.5. That the corporation has also introduced a scheme for providing employment to one of the family members of the medically invalidated workers of the Corporation, therefore appellant should opt for the same.

9. Upon hearing the learned counsels appearing for the parties and perusing the material available on record the following questions arise for our consideration.

I. Whether the retirement of the Appellant on medical grounds due to colour blindness, without offering alternative employment, is legally sustainable in light of applicable service regulations and binding settlements?

II. Whether Clause 14 of the Memorandum of Settlement dated 17.12.1979, executed under Section 12(3) of the Industrial Disputes Act, 1947, remains valid, binding, and enforceable despite the subsequent 1986 settlement and internal administrative circulars?

III. Whether the Respondents complied with their duty to make a bona fide assessment of alternative employment options for the Appellant , as required by law, policy, and principles of natural justice?

IV. Whether the reliance placed by the High Court on ***B.S. Reddy*** (supra) was legally tenable in the context of the Appellant's independent rights under a binding industrial settlement?

FINDINGS:

10. Before we proceed to elaborate on the detailed analysis of the issues arising in the present case, we deem it appropriate to set out in brief the principal grounds which compel us to set aside the impugned order passed by the High Court and to allow the present petition. We do so for the following reasons:

10.1. **Firstly**, the Appellant's retirement from service on the ground of colour blindness was effected without any demonstrable effort by the Respondent–Corporation to identify or assess the feasibility of alternative employment, despite the Appellant having expressed willingness to be reassigned to a non-driving post. Such inaction violates both statutory obligation and administrative fairness.

10.2. **Secondly**, the Appellant's entitlement to redeployment arises from Clause 14 of the binding Memorandum of Settlement dated 17.12.1979, executed under Section 12(3) of the Industrial Disputes Act, 1947, which specifically provides for alternate employment to drivers declared colour blind, with pay protection and continuity of service. This clause remains valid and enforceable.

10.3. **Thirdly**, the subsequent settlement dated 22.12.1986 neither expressly overrides nor impliedly nullifies the 1979 settlement. Both settlements operate harmoniously, with the latter being general in scope and the former addressing a specific category of disability. Hence, the Respondents' reliance on the 1986 settlement to deny relief is misplaced.

10.4. **Fourthly**, internal circulars issued by the Corporation in 2014 and 2015, which purport to deny alternate employment to colour-blind drivers, are administrative instructions that cannot override binding service conditions created by a statutory settlement under the Industrial Disputes Act.

10.5. **Fifthly**, the Division Bench of the High Court erred in applying the judgment in ***B.S. Reddy*** (supra), which dealt with the limited scope of Section 47 of the Act, and did not consider claims arising independently under industrial settlements. The present case stands on an entirely different legal footing.

11. We now proceed to examine each of these issues in detail.

RE: ISSUE – I

12. The undisputed factual position is that the Appellant was appointed as a driver with the Telangana State Road Transport Corporation (TSRTC), was medically examined and declared fit at the time of entry and discharged his duties until he was found colour blind during a routine medical check-up. Pursuant to the medical report declaring him unfit for driving duties, he was retired from service under Regulation 6A(5)(b) of the APSRTC Employees (Service) Regulations, 1964. The Respondents have sought to justify this action by referring to internal circulars dated 10.11.2014 and 14.05.2015, which stipulate that employees found medically unfit due to colour blindness shall not be offered alternate employment, and shall be retired with the grant of "Additional Monetary Benefit" (AMB).

13. The primary legal flaw in this approach lies in the assumption that medical unfitness for a particular post automatically entails incapacity for public service altogether. Colour blindness, though a disqualification for driving, does not render the Appellant unfit to serve in any other non-driving role. There is no evidence that he was declared wholly incapacitated or incapable of performing other duties. This Court in ***Kunal Singh*** (supra), held that when an employee acquires a disability in the course of service, the employer must retain the employee by providing suitable alternate employment, unless no such post exists. In the present case, the Appellant had requested reassignment to the post of Shramik, which, by its nature, does not demand normal colour vision. No effort was made by the Corporation to assess his suitability or to examine the availability of such posts.

14. Further, it can be seen that, Rule 6A (5) (b) only provides for the extent of terminal benefits which an employee may be entitled to, in the case of retirement of a driver on medical grounds. The MOS dated 17.12.1979 entered into under Section 12 (3) of Industrial Disputes Act, 1947 between the employer and the union representing the workmen under Clause 14 would indicate that the drivers found with "colour blindness" would be provided an alternate job and all service benefits would stand protected.

15. For immediate reference Clause 14 of the said MOS dated 17.12.1979 is extracted below:

> ***"14. Colour Blind Drivers***
>
> *a) The long pending issue has been decided and it was agreed to give alternate job to the Drivers found colour blind during the periodical examination. While giving the alternate job, the time scale and pay drawn by the Driver at the time of disqualification would be protected. Circular instructions would be issued in this regard incorporating the cases arising after the issue of circular No. P1/210(1)/76-PD, dt. 16-8-1976.*
>
> *b) Having given the alternative job, the seniority of Drivers will, however, be continued in the Drivers cadre, and they shall take their further promotions at appropriate time as per Cadre & Recruitment Regulations.*

c) Drivers who are found Colour Blind during periodical Medical Examination would be given day duties subject to availability of such duties in the Depots.

d) Regarding the suggestion of the Union for finding out an alternate test for Ishara test, the VC & GM agreed to request the Eye Specialist of RTC Hospital Dr. E. Babu Rao and after hearing the views of few other eye Specialists, the decision would be taken whether to continue the Ishara Test or a suitable alternate test is available for determination of colour blindness keeping in view the safety of passengers and the vehicle."

16. However as can be seen from the Counter affidavit, the Corporation has relied upon the subsequent agreement, namely Memorandum of Settlement (MOS) dated 22.12.1986 to stave off the claim for alternate employment raised by the Appellant in the instant case. A perusal of the said MOS dated 22.12.1986 would indicate that it was referrable to two earlier agreements dated 9.10.1985 and 10.03.1986. Though a plea has been raised in the Counter affidavit filed by the Corporation that the MOS dated 17.12.1979 has been superseded by the agreement of 1986, we are loath in accepting the said contention for reasons more than one which are as under:

16.1. ***Firstly***, the agreement dated 22.12.1986 does not refer to the agreement dated 17.12.1979

16.2. ***Secondly***, 17.12.1979 agreement, there is a specific reference to 'Colour Blind Drivers' (Clause 14) which refers to the same, has been extracted supra. In fact, Clause 5 (d) of the settlement agreement 22.12.1986 which has been heavily relied upon by the Corporation to reject the claim of the Appellant requires to be noticed to the benefit of the Appellant. It reads thus:

"5. Problems of Drivers:

*"….. **d) MEDICALLY UNFIT DRIVERS :** It is agreed that to the extent possible suitable alternate jobs will be identified. In case it is not possible to identify suitable jobs, additional monetary benefit· as per the proposals sent to the Government will be given after Govt's approval."*

A perusal of the above clause would indicate, suitable alternate jobs would have to be identified and only in the event of not being possible to identify such job, recourse to payment of additional monetary benefit as per the proposal sent to the government will be given after government's approval.

16.3. ***Thirdly***, the Settlement dated 22.12.1986 does not specifically supersede the settlement agreement of 17.12.1979. It is only by way of a communication dated 10.11.2014, the benefit of alternate employment given to the drivers declared unfit due to "colour blindness" has been sought to be taken away which benefit was extended till that date. The only ground on which the aforesaid communication 10.11.2014 came to be issued is on account of the reliance on the dicta laid down by this Court in ***Union of India v. Devendra Kumar Pant and Others***[3].

17. The Respondents' defence based solely on internal circulars and a mechanical reading of Regulation 6A(5)(b) cannot override this obligation. Retirement on medical grounds must be a measure of last resort, only after the employer exhausts all reasonable avenues for redeployment. This principle is inherent in the concept of "reasonable accommodation", which is now recognised as an aspect of substantive equality under Articles 14 and 21. The failure to explore alternate employment before resorting to medical retirement is not merely a procedural lapse—it is a substantive illegality that violates the Appellant's right to livelihood and equal treatment.

RE: ISSUE – II

18. The Appellant relies upon the Memorandum of Settlement dated 17.12.1979, executed between the Corporation and its recognised union under Section 12(3) of the Industrial Disputes Act, 1947. The Memorandum of Settlement is not a mere administrative circular—it is a binding statutory contract forged between labour and management.

19. Clause 14 of the Memorandum of Settlement dated 17.12.1979 provides as follows:

> *"(a)…It was agreed to give alternate job to the Drivers found colour blind during the periodical examination. While giving*

3 (2009) 14 SCC 546

the alternate job, the time scale and pay drawn by the Driver at the time of disqualification would be protected…"

20. This provision was incorporated into a settlement concluded under Section 12(3) of the Industrial Disputes Act, 1947, during conciliation proceedings before the Assistant Commissioner of Labour. By virtue of Section 18(3) of the Act, such a settlement binds not only the parties to the dispute but also all workmen of the establishment and their successors.

21. The enforceability of this settlement is not diminished by the subsequent settlement dated 22.12.1986, which the Corporation claims to be governing the field. Clause 5(d) of the 1986 settlement provides that drivers who are medically unfit may, "to the extent possible", be provided alternative employment, and where not feasible, will be granted AMB. Crucially, this clause does not contain any express language annulling or modifying Clause 14 of the 1979 agreement. Clause 14 of the 1979 Settlement specifically provides for alternative employment in cases of colour blindness, with pay protection and continuity of seniority. It is neither time-barred nor ambiguous. The Corporation's submission that this was superseded by the later settlement dated 22.12.1986 is both misplaced and misconceived. This industrial settlement, being a bilateral agreement between employer and workmen, has statutory force and is binding. In industrial law, a beneficial provision in a prior settlement cannot be deemed overridden unless there is an express revocation or contradiction. No such conflict exists in the present case. Additionally, the 1986 clause is general in nature, addressing medically unfit drivers as a class. The 1979 clause is specific, dealing solely with colour blindness. Applying the principle of ***generalia specialibus non derogant [A general provision does not override a specific provision***], the 1979 clause continues to govern the case of colour-blind drivers. The absence of a termination clause in the 1986 settlement, coupled with the Corporation's continued adherence to Clause 14 in other cases even after 1986, confirms that the earlier agreement remained operational. Accordingly, we find that 1986 settlement does not explicitly abrogate or nullify Clause 14 of the 1979 settlement.

22. Settlements entered under Section 12(3) of the Industrial Disputes Act are not administrative conveniences. They are quasi-statutory instruments reflecting negotiated justice, and they bind both employer

and employee with the force of law. Where such settlements create specific entitlements, courts must give them purposive effect, unless expressly rescinded or demonstrably superseded. Their terms are not to be overridden by internal policy or circulars issued in contravention thereof.

23. Further, the Corporation's internal circulars dated 10.11.2014 and 14.05.2015, which purport to deny alternate employment to colour-blind drivers and limit them to AMB, are administrative in nature and cannot override the binding effect of a statutory settlement under Section 12(3). Therefore, the Respondents' reliance on internal instructions in disregard Clause 14 is both procedurally and substantively invalid.

RE: ISSUE – III

24. From the record, it is evident that the Corporation made no effort whatsoever to assess the feasibility of assigning the Appellant to a non-driving post. There is no file noting, committee report, vacancy statement, or suitability assessment relating to the Appellant. His representation requesting the post of Shramik remained unanswered. No comparative evaluation was conducted, and no individualized inquiry was held. The only justification offered is that the Corporation's circulars bar such alternate employment.

25. Such inaction is wholly unjustified. Even assuming the applicability of the 1986 settlement, it expressly mandates that alternate jobs be identified "to the extent possible". The phrase itself presumes an active, documented effort to explore available posts. The failure to discharge this obligation violates not only the terms of the settlement but also the principle of natural justice, which demands that before depriving a person of livelihood, relevant material be gathered and considered.

26. The burden lies on the Corporation—not the employee—to establish that no suitable alternate post was available or could reasonably be created. Mere invocation of a medical certificate, or the silence of a circular, cannot constitute compliance. Inaction is not neutrality; in such cases, it is a form of institutional exclusion.

27. In the present case, there is no evidence that the Respondents examined even the most basic parameters—availability of vacancies, suitability of tasks, or the Appellant's qualifications. This total failure

undermines the Corporation's claim of compliance with either the 1979 or 1986 framework, and renders the retirement order void for non-consideration of Appellant's claim in proper perspective.

RE: ISSUE – IV

28. The Division Bench of the High Court reversed the relief granted by the learned Single Judge by placing reliance on the decision in ***B.S. Reddy*** (supra), where this Court held that the protection of Section 47 of the Persons with Disabilities Act, 1995 is limited to disabilities enumerated under Section 2(i) of that Act[4]. However, the Division Bench erred in applying that ruling to the present case, as the Appellant's rights do not solely emanate from Section 47[5], but rather from a contractual settlement which carries independent statutory force under Section 18(3) of the Industrial Disputes Act,1947.

29. The ***B.S. Reddy*** (supra) judgment did not deal with the enforceability of a clause in an agreement/settlement entered into under Section 12(3)[6] or the Corporation's obligations under bilateral agreements with its workers. The High Court overlooked the fundamental distinction between statutory rights under disability law and contractual service conditions enforceable through settlements. The correct line of precedent is that found in ***Kunal Singh (supra)*** and ***Vikash Kumar v. Union Public Service Commission and Others***[7], which recognise that even beyond codified statutes, constitutional obligations of non-discrimination and fairness demand that employers seek to retain employees with acquired impairments through accommodation and redeployment. In this case, where a specific settlement exists and a broad practice of redeployment was followed for similarly placed employees, the denial of relief to the Appellant amounts to arbitrary discrimination and failure of equal protection.

30. While we have, in the preceding analysis, demonstrated sufficient and independent grounds to set aside the impugned action on the basis of binding industrial obligations and procedural infirmities, we consider it necessary to also reaffirm the broader legal framework that governs

4 Persons with Disabilities Act, 1995

5 Persons with Disabilities Act, 1995

6 Industrial Disputes Act,1947

7 (2021) 5 SCC 370

cases involving employees who acquire disability during service. Our concern is not confined to the facts of the present case but extends to the systemic risk that employers, particularly public sector entities, may attempt to bypass their obligation to offer alternate employment by drawing rigid distinctions between recognised and unrecognised disabilities under statutory frameworks. To safeguard against such evasion, and to reinforce the constitutional and statutory principles of non-discrimination, reasonable accommodation, and substantive equality, we draw guidance from a consistent line of precedent that interprets such protections not narrowly, but purposively.

In ***Kunal Singh*** (supra), this Court made a clear distinction between "disability" and "person with disability" under the 1995 Act, and emphasised the mandatory obligation imposed by Section 47 to protect the employment of persons who acquire a disability during their tenure. The Court held:

> *"**9.** …It must be remembered that a person does not acquire or suffer disability by choice. An employee, who acquires disability during his service, is sought to be protected under Section 47 of the Act specifically. Such employee, acquiring disability, if not protected, would not only suffer himself, but possibly all those who depend on him would also suffer. The very frame and contents of Section 47 clearly indicate its mandatory nature. The very opening part of the Section reads "no establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service".*
>
> *The Section further provides that if an employee after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefits; if it is not possible to adjust the employee against any post he will be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier. Added to this no promotion shall be denied to a person merely on the ground of his disability as is evident from sub-section (2) of Section 47. Section 47 contains a clear directive that the employer shall not dispense with or reduce in rank an employee who acquires a disability during*

the service. In construing a provision of social beneficial enactment that too dealing with disabled persons intended to give them equal opportunities, protection of rights and full participation, the view that advances the object of the Act and serves its purpose must be preferred to the one which obstructs the object and paralyses the purpose of the Act. Language of Section 47 is plain and certain casting statutory obligation on the employer to protect an employee acquiring disability during service."

31. Perusal of the above judgment in ***Kunal Singh*** (supra) rendered by this court makes it clear that there is a distinction between persons suffering from disability and persons who have acquired disability during service. It would be apposite to reproduce Section 47 of the Act. It reads thus:

> *"**47. Non-discrimination in Government employment.-** (1) No establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service:*
>
> *Provided that, if an employee, after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefits:*
>
> *Provided further that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier.'*
>
> *(2) No promotion shall be denied to a person merely on the ground of his disability:*
>
> *Provided that the appropriate Government may, having regard to the type of work carried on in any establishment, by notification and subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section."*

32. Section 47 mandates that such an employee be shifted to another post with the same pay and service benefits, and if no such post is available, be retained on a supernumerary post until one becomes available or until the date of superannuation. The provision further

ensures that no promotion is denied merely on the ground of disability, recognizing that employment security is central not only to individual dignity but also to familial survival.

33. This principle was further extended in ***Mohamed Ibrahim v. The Chairman and Managing Director & Ors***.[8], wherein one of us (Aravind Kumar, J.) was party to the judgment. The Court held that even if colour blindness does not fall within the statutory definition of "disability" under Section 2(i) or "persons with disability" under Section 2(t) of the Rights of Persons with Disabilities Act, 2016, the employer is still bound to provide reasonable accommodation and cannot terminate employment without exploring alternate roles. This Court observed:

> *"**19**. The Act contains a general non-discriminatory provision:*
>
> > ***"3. Equality and non-discrimination**.*
> >
> > *(1) The appropriate Government shall ensure that the persons with disabilities enjoy the right to equality, life with dignity and respect for his or her integrity equally with others.*
> >
> > *(2) The appropriate Government shall take steps to utilise the capacity of persons with disabilities by providing appropriate environment.*
> >
> > *(3) No person with disability shall be discriminated on the ground of disability, unless it is shown that the impugned act or omission is a proportionate means of achieving a legitimate aim.*
> >
> > *(4) No person shall be deprived of his or her personal liberty only on the ground of disability.*
> >
> > *(5) The appropriate Government shall take necessary steps to ensure reasonable accommodation for persons with disabilities."*
>
> ***20.** The twin conditions of falling within defined categories, and also a threshold condition of a minimum percentage,*

8 Civil Appeal No. 6785 of 2023

of such disabilities, in fact are a barrier. The facts of this case demonstrate that the appellant is fit, in all senses of the term, to discharge the duties attached to the post he applied and was selected for. Yet, he is denied the position, for being "disabled" as he is colour blind. At the same time, he does not fit the category of PWD under the lexicon of the universe contained within the Act. These challenges traditional understandings of what constitute "disabilities". The court has to, therefore, travel beyond the provisions of the Act and discern a principle which can be rationally applied.

21. *In Jeeja Ghosh v. Union of India, [2016] 4 SCR 638. this court observed:*

> *"40. In international human rights law, equality is founded upon two complementary principles: non-discrimination and reasonable differentiation. The principle of non-discrimination seeks to ensure that all persons can equally enjoy and exercise all their rights and freedoms. Discrimination occurs due to arbitrary denial of opportunities for equal participation. For example, when public facilities and services are set on standards out of the reach of persons with disabilities, it leads to exclusion and denial of rights. Equality not only implies preventing discrimination (example, the protection of individuals against unfavourable treatment by introducing antidiscrimination laws), but goes beyond in remedying discrimination against groups suffering systematic discrimination in society. In concrete terms, it means embracing the notion of positive rights, affirmative action and reasonable accommodation."*

22. *Ravinder Kumar Dhariwal v. Union of India, 2021 (13) SCR 823 highlighted on the right to equality and underlined the two aspects: formal equality and substantive equality. It stated that substantive equality aims at producing equality of outcomes, and in the context of the case, observed that the "principle of reasonable accommodation is one of the means for achieving substantive equality, pursuant to which*

disabled individuals must be reasonably accommodated based on their individual capacities." The court recollected Vikash Kumar v. Union Public Service Commission, 2021 (12) SCR 311, which held as follows:

> *"The principle of reasonable accommodation acknowledges that if disability" should be remedied and opportunities are "to be affirmatively created for facilitating the development of the disabled. Reasonable accommodation is founded in the norm of inclusion. Exclusion results in the negation of individual dignity and worth or they can choose the route of reasonable accommodation, where each individual's dignity and worth is respected."*

23. *It was also noted that provisions of Chapters VII and VIII of the Act are in furtherance of the principle of reasonable accommodation which is a component of the guarantee of equality. This has been recognised by a line of precedent. This court, in multiple cases has held that the principle of reasonable differentiation, recognising the different needs of persons with disabilities is a facet of the principle of equality.*

24. *The significant impact of Vikash Kumar (supra) is that the case dealt with a person with a chronic neurological condition resulting in Writer's Cramp, experiencing extreme difficulty in writing. He was denied a scribe for the civil services exam by the UPSC, because he did not come within the definition of person with benchmark disability (40% or more of a specified disability). This court, rejected this stand, and held him to be a person with disability. It was also stated that the provision of scribe to him fell within the scope of reasonable accommodation. The Court said:*

> *"… the accommodation which the law mandates is 'reasonable' because it has to be tailored to the requirements of each condition of disability. The expectations which every disabled person has are unique to the nature of the disability and the character of the impediments which are encountered as its consequence…"*

> ***25.*** *The appellant is, for all purposes, treated as a person with disability, but does not fall within the categories defined in the Act, nor does he possess the requisite benchmark eligibility condition. The objective material on the record shows that the colour vision impairment is mild. Yet, TANGEDCO's concerns cannot be characterised as unreasonable. However, TANGEDCO is under an obligation to work under the framework of "reasonable accommodation", which is defined by Section 2 (y) as follows:*
>
> > *"(y) "reasonable accommodation" means necessary and appropriate modification and adjustments, without imposing a disproportionate or undue burden in a particular case, to ensure to persons with disabilities the enjoyment or exercise of rights equally with others;.."*
>
> ***26.*** *Reasonable accommodation thus, is "appropriate modification and adjustments" that should be taken by the employer, in the present case, without that duty being imposed with "disproportionate or undue burden".*

34. Similarly, in ***Ravinder Kumar Dhariwal and Another v. Union of India and Others***[9], the Court reaffirmed that reasonable accommodation is a means to achieve substantive equality, and obligates the employer to assess each case individually, based on the employee's residual functional ability and not just on formal disability classifications.

35. When a disability is acquired in the course of service, the legal framework must respond not with exclusion but with adjustment. The duty of a public employer is not merely to discharge functionaries, but to preserve human potential where it continues to exist. The law does not permit the severance of service by the stroke of a medical certificate without first exhausting the possibility of meaningful redeployment. Such obligation is not rooted in compassion, but in constitutional discipline and statutory expectation.

36. In light of this evolving doctrine, the Court in ***Mohamed Ibrahim*** clarified that employees with conditions like colour blindness, although not

9 [2021] 13 SCR 823

falling within the defined categories of the statute, must still be accommodated wherever their functional capacity permits. To do otherwise would result in a regressive interpretation of the law, undermining the very foundation of equal opportunity in public employment.

37. Thus, even though in the present case the Appellant had an enforceable right under a statutory industrial settlement—placing his claim on firmer footing—we find it necessary to reaffirm that even in the absence of such contractual rights, employees who acquire disabilities during service must not be abandoned or prematurely retired without being afforded a fair and reasonable opportunity for reassignment. The obligation to reasonably accommodate such employees is not just a matter of administrative grace, but a constitutional and statutory imperative, rooted in the principles of non-discrimination, dignity, and equal treatment.

38. This Court, therefore, affirms that beneficial and remedial legislation must not be diluted by narrow interpretation, and the protections offered therein must be extended purposively to protect the livelihood, dignity and service continuity of employees who acquire disabilities during employment. In doing so, we not only vindicate the Appellant's rights but also reaffirm our constitutional commitment to a just and humane employer-employee relationship.

CONCLUSION:

39. To conclude, the record before us makes it clear that the Appellant was prematurely retired from service on medical grounds without any meaningful effort by the Respondent–Corporation to explore his suitability for alternate employment. This action, taken in disregard of Clause 14 of the binding Memorandum of Settlement dated 17.12.1979 and without adherence to principles of fairness or accommodation, cannot be sustained in law.

40. The Corporation's omission to consider redeployment violates both statutory and constitutional obligations. Settled jurisprudence, including ***Kunal Singh*** (supra), which mandates that an employee who acquires a disability during service must be protected through reassignment where possible. The duty to reasonably accommodate such employees is now part of our constitutional fabric, rooted in Articles 14 and 21.

41. While judicial restraint guards against overreach, it must not become an excuse for disengagement from injustice. When an employee is removed from service for a condition he did not choose, and where viable alternatives are ignored, the Court is not crossing a line by intervening, it is upholding one drawn by the Constitution itself. The employer's discretion ends where the employee's dignity begins.

42. In light of the foregoing, the judgment of the High Court in W.A. No. 1343 of 2017 is set aside. The Respondent–Corporation is directed to appoint the Appellant to a suitable post, consistent with his condition, and on the same pay grade as he held on 06.01.2016, within eight weeks from the date of receipt of this order. The Appellant shall be entitled to 25% of the arrears of salary, allowances, and benefits from the date of his termination to the date of reinstatement. The intervening period shall be reckoned as continuous service for all purposes.

43. The Appeal stands allowed. There shall be no order as to costs.

Result of the case: Appeal allowed.

[†]*Headnotes prepared by:* Ankit Gyan

[2025] 8 S.C.R. 345 : 2025 INSC 922

Gujarat Urja Vikas Nigam Limited
v.
Green Infra Corporate Wind Private Limited and Others Etc.

(Civil Appeal No(s). 14098-14101 of 2015)

04 August 2025

[Sanjay Kumar* and Satish Chandra Sharma, JJ.]

Issue for Consideration

Whether the four respondent companies were entitled to approach the Gujarat Electricity Regulatory Commission (GERC) for determination of the tariff for procurement of power by Appellant-GUVNL from their wind energy projects.

Headnotes†

Electricity Act, 2003 – ss.61, 62, 64, 86 – Income Tax Act, 1961 – s.32 – Power Purchase Agreements (PPAs) entered into between GUVNL and the respondent companies containing a clause w.r.t the tariff applicable for purchase of power from the respondent companies' wind energy projects – Respondent companies approached the GERC seeking project-wise determination of tariff, claiming that they had not availed accelerated depreciation under the Income Tax Act, 1961 – Claim contested by GUVNL, arguing that they had willingly entered into PPAs and were bound to the tariff rate of ₹3.56 per kWh, and therefore, could not seek determination of tariff on a case-to-case basis – GERC decided the issue in favour of respondent companies – Order confirmed by the APTEL – Correctness:

Held: GUVNL, an instrumentality of the State is bound to promote and give effect to the Government's policy of encouraging generation of power from renewable energy sources – When the Government promulgated a policy in that regard, offering various incentives to wind energy projects, GUVNL cannot act contrary thereto by fixing a tariff for purchase of power from such wind energy projects contrary to the mandate of Order dated 30.01.2010 issued by GERC as per which the tariff of ₹3.56 per kWh was applicable only to those wind energy projects that availed the benefit of accelerated depreciation –

* Author

It is not disputed that the four respondent companies did not avail such benefit – Thus, the question of applying to them the tariff that was only meant for wind energy projects that did avail accelerated depreciation would not arise – GUVNL cannot be guided only by its own commercial interests, like a private business entity and it's conduct, as a State instrumentality, must be of the standard of a model citizen – It cannot contend that the respondent companies are estopped from seeking determination of tariff by the GERC as they had willingly signed PPAs with it at the tariff fixed for wind energy projects availing accelerated depreciation – As GUVNL failed to obtain commitments from the respondent companies that they would only avail accelerated depreciation at the time they had to choose that option, GUVNL has no indefeasible right to bind them to a tariff which was applicable only to such wind energy projects that availed accelerated depreciation – Orders passed by the GERC and the APTEL not interfered with – Income Tax Rules, 1962. [Paras 24, 25]

Case Law Cited

Gujarat Urja Vikas Nigam Limited v. Tarini Infrastructure Limited and Others **[2016] 5 SCR 990 : (2016) 8 SCC 743 – relied on.**

Gujarat Urja Vikas Nigam Limited v. EMCO Limited and Another **[2016] 1 SCR 857 : (2016) 11 SCC 182 – referred to.**

List of Acts

Electricity Act, 2003; Income Tax Act, 1961; Income Tax Rules, 1962.

List of Keywords

Gujarat Electricity Regulatory Commission (GERC); Determination of the tariff; Gujarat Urja Vikas Nigam Limited (GUVNL); Procurement of power by GUVNL; Wind energy projects; Accelerated Depreciation; Procurement of power by distribution licensees; Project-wise determination of tariff; Determination of tariff on a case to case basis; Appellate Tribunal for Electricity (APTEL); Instrumentality of the State; State instrumentality; Renewable energy sources; Generation of power from renewable energy sources; Wind power, Solar power; National Electricity Policy; National Electricity Policy and Plan; Tariff policy; Ministry of New and Renewable Energy; Government of Gujarat; Wind Power Policy 2007; Non-conventional renewable energy; Normal depreciation; Gujarat Energy Development Agency (GEDA).

Gujarat Urja Vikas Nigam Limited v.
Green Infra Corporate Wind Private Limited and Others Etc.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No(s). 14098-14101 of 2015

From the Judgment and Order dated 28.09.2015 of the Appellate Tribunal for Electricity at New Delhi in FA No. 198, 199, 200 and 291 of 2014

Appearances for Parties

Advs. for the Appellant:
C A Sundaram, Mr Ramachandran, Sr. Advs., Ms. Hemantika Wahi, Ms. Ranjitha Ramachandran, Ms. Jesal Wahi, Ms. Srishti Khindaria.

Advs. for the Respondents:
Sanjay Sen, Shyam Divan, Sr. Adv., Vishal Gupta, Anupam Chaudhary, Sarthak Garg, Shri Venkatesh, Ms. Kanika Chugh, Ashutosh Kumar Srivastava, Shryeshth Ramesh Sharma, Siddharth Nigotia, Harsh Vardhan, Nitin Saluja, Divyakant Lahoti, Akshaya Babu, Ms. Praveena Bisht, Siddharth Tripathi, Rongon Choudhary.

Judgment / Order of the Supreme Court

Judgment

Sanjay Kumar, J.

1. Gujarat Urja Vikas Nigam Limited (GUVNL), the appellant in these four appeals, assails the common judgment dated 28.09.2015 rendered by the Appellate Tribunal for Electricity (APTEL), New Delhi, in Appeal Nos. 198, 199, 200 and 291 of 2014. Thereby, the APTEL confirmed the orders dated 13.06.2014, 11.06.2014, 13.06.2014 and 20.09.2014 passed by the Gujarat Electricity Regulatory Commission (GERC), Gandhi Nagar, in Petition Nos. 1239 of 2012, 1221 of 2012, 1241 of 2012 and 1365 of 2013 filed by Green Infra Corporate Wind Private Limited, New Delhi; Vaayu (India) Power Corporation Private Limited, Daman; Green Infra Wind Power Limited, New Delhi; and Tadas Wind Energy Private Limited, Mumbai, respectively, viz., the four contesting respondent companies.

2. By order dated 05.05.2016, this Court requested the GERC to defer its proceedings till the matter was finally decided and disposed of by

this Court. This order was passed in view of the fact that, pursuant to the APTEL's common judgment under appeal, the GERC began hearings for determination of tariff on the petitions filed by each of the four respondent companies. Thereafter, by order dated 03.02.2023, this Court permitted the GERC to proceed with the tariff determination hearings subject to the condition that no final order should be passed without the leave of this Court. We are informed that the hearings before the GERC have concluded but the final orders have not been pronounced owing to the aforestated order.

3. The short issue for consideration is whether the four respondent companies were entitled to approach the GERC for determination of the tariff for procurement of power by GUVNL from their wind energy projects. The GERC answered this issue in their favour and the same stood confirmed by the APTEL. Hence, these statutory appeals.

4. By Order No. 1 of 2010 dated 30.01.2010, passed in exercise of the powers conferred by Sections 61(h), 62(1)(a) and 86(1)(e) of the Electricity Act, 2003 (for brevity, 'the Act of 2003'), the GERC determined the tariff for procurement of power by distribution licensees, such as GUVNL, from wind energy projects. This order was applicable for a control period of 3 years with effect from 11.08.2009. In consequence, all wind energy projects commissioned during that 3-year control period were covered by this order. One of the factors considered by the GERC for tariff determination thereunder is 'Depreciation'. In relation thereto, GUVNL and others had pointed out that some of the wind energy projects availed the benefit of 'Accelerated Depreciation' as a tax-planning measure and if the same is taken into account, the tariff would reduce drastically, i.e., to about ₹3.05 per unit, but if it is not taken into account, the tariff would be higher, working out to ₹3.77 per unit. They, therefore, suggested that the GERC should specify either an average tariff of ₹3.50 per unit or two different tariffs for wind energy projects - (i) those which are availing the benefit of accelerated depreciation; and (ii) those which are not availing the benefit of accelerated depreciation. They also suggested that the wind energy projects which did not avail accelerated depreciation benefit should be asked to submit affidavits along with supporting documents that accelerated depreciation was not being claimed by them. Upon considering these objections/ suggestions, the GERC ruled as follows: -

> 'Commission's Ruling
>
> Depreciation is a non-cash flow expenditure and it is linked with the loan repayment. The loan repayment period is considered by the Commission as 10 years. Hence, the requirement of cash flow in the initial 10 years is more to match with the loan repayment. After considering the suggestions of the objectors, the Commission decided to allow 6% of the capital cost per annum as depreciation for the initial 10 years and 2% per annum from 11th to 25th year of the plant.
>
> The provisions of Accelerated Depreciation are provided in the Income Tax Act, 1961 and Rules framed thereunder. A person who qualifies under the above statutory provisions is entitled to get benefits of the Accelerated Depreciation. Hence, the Commission decides to determine the tariff taking into account the benefit of accelerated depreciation available under Income Tax Act, 1961 and Rules framed under it. Those who do not avail of such benefit may submit petitions on case-to-case basis.'

5. In effect, the GERC made it clear that those wind energy projects which did not avail the benefit of accelerated depreciation under the Income-Tax Act, 1961 (for brevity, 'the Act of 1961'), were entitled to approach it on a case-to-case basis for determination of tariff for the power supplied by them to distribution licensees. As regards those wind energy projects which did avail accelerated depreciation, the GERC took into consideration various factors and determined the levelized tariff for wind energy generation at ₹3.56 per kWh (Kilowatt-hour), a much higher tariff than that suggested by GUVNL. The GERC also made it clear that the said tariff took into account the benefit of accelerated depreciation under the Act of 1961 and the Rules made thereunder and again reiterated that for a project which did not get such benefit, the GERC would, on a petition filed in that respect, determine a separate tariff taking into account all the relevant facts. The GERC further clarified that the tariff determined at ₹3.56 (constant) was applicable for the entire project life of 25 years, i.e., from the 1st year to the 25th year, in the case of wind energy projects which availed accelerated depreciation.

6. Section 32 of the Act of 1961 deals with depreciation of buildings, machinery, plant or furniture, being tangible assets. Section 32(1) provides that in the case of assets of an undertaking engaged in generation or generation and distribution of power, such percentage on the actual cost thereof would be allowed as depreciation to the assessee, as may be prescribed. Rule 5 of the Income-Tax Rules, 1962 (for brevity, 'the Rules of 1962'), deals with depreciation. Rules 5(1) and 5(1A) read thus: -

> '(1) Subject to the provisions of sub-rule (2), the allowance under clause (ii) of sub-section (1) of section 32 in respect of depreciation of any block of assets shall be calculated at the percentages specified in the second column of the Table in Appendix I to these rules on the written down value of such block of assets as are used for the purposes of the business or profession of the assessee at any time during the previous year:
>
> (1A) The allowance under clause (i) of sub-section (1) of section 32 of the Act in respect of depreciation of assets acquired on or after 1st day of April, 1997 shall be calculated at the percentage specified in the second column of the Table in Appendix IA of these rules on the actual cost thereof to the assessee as are used for the purposes of the business of the assessee at any time during the previous year:….'

The second and third *provisos* thereunder are of relevance insofar as 'Accelerated Depreciation' is concerned. The *provisos* read as follows: -

> *'Provided further* that the undertaking specified in clause (i) of sub-section (1) of section 32 of the Act may, instead of the depreciation specified in Appendix I-A, at its option, be allowed depreciation under sub-rule (1) read with Appendix I, if such option is exercised before the due date for furnishing the return of income under sub-section (1) of section 139 of the Act,
>
> (a) for the assessment year 1998-99, in the case of an undertaking which began to generate power prior to 1st day of April, 1997; and

(b) for the assessment year relevant to the previous year in which it begins to generate power, in case of any other undertaking:

Provided also that any such option once exercised shall be final and shall apply to all the subsequent assessment years.'

7. Appendix I to the Rules of 1962 provides that, insofar as 'Renewable energy devices' are concerned, the rate of accelerated depreciation effective from Assessment Year 2006-2007 would be 80%. Wind mills and specially designed devices which run on wind mills are classified as 'Renewable energy devices' thereunder. Thus, if a wind energy project which began power generation after 01.04.1997 wishes to avail acceleration depreciation of 80%, as aforestated, it is required to exercise such option before the due date for furnishing its return of income for the Assessment Year relevant to the previous year in which it began generation of power.

8. In so far as tariff determination is concerned, Section 61 of the Act of 2003 vests the Appropriate Commission, i.e., the Central Electricity Regulatory Commission or the State Electricity Regulatory Commission, with the power to specify the terms and conditions for determination of tariff, guided by the factors enumerated therein under Clauses (a) to (i). Safeguarding of consumers' interest is one such factor but promotion of co-generation and generation of electricity from renewable sources of energy is also a factor. Section 62 of the Act of 2003 deals with determination of tariff. It states that the Appropriate Commission shall determine the tariff in accordance with the provisions of the Act of 2003 for supply of electricity by a generating company to a distribution licensee. Section 64 enables a generating company or licensee to apply to the Appropriate Commission for determination of tariff under Section 62. A detailed procedure is prescribed thereunder as to how the Commission would then go about dealing with such an application. Once the Commission issues a tariff order upon such an application, Section 64(6) provides that such tariff order, unless amended or revoked, shall continue to be in force for such period as may be specified in the tariff order. The functions of State Electricity Regulatory Commissions, such as the GERC, are set out in Section 86 of the Act of 2003. Section 86(1)(a) states that such Commission shall determine the tariff for

generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State. Section 86(1)(b) provides that the Commission shall regulate electricity purchase and procurement process of distribution licensees, including the price at which electricity shall be procured from the generating companies or licensees or from other sources, through agreements for purchase of power for distribution and supply within the State.

9. This being the scheme forming the backdrop of the case, we may now take note of relevant case law. The decision of this Court in ***Gujarat Urja Vikas Nigam Limited vs. EMCO Limited and another***[1] pertained to a solar energy project and determination of tariff for that project. The GERC's First Tariff Order, *viz*., Order No. 2 of 2010, was dated 29.01.2010 and the tariff per unit was fixed thereunder by the GERC for solar energy projects that availed the benefit of accelerated depreciation. The GERC made it clear that, for projects not availing such benefit, it would, on a petition in that respect, determine a separate tariff taking into account all the relevant facts. GUVNL entered into a PPA on 09.12.2010 for purchase of power from EMCO Ltd.'s solar energy project. While so, the Second Tariff Order came to be issued by the GERC on 27.01.2012 and was made applicable to solar power projects commissioned on or after 29.01.2012. EMCO Ltd. commissioned its project on 02.03.2012 due to some delays and it did not avail accelerated depreciation under the Act of 1961. The tariff under the Second Tariff Order for projects availing accelerated depreciation was less favourable to them and the tariff payable to power producers which did not avail such benefit was more favourable.

10. EMCO Ltd., thereupon, approached the GERC claiming entitlement to determination of tariff under the Second Tariff Order on the ground that it had not availed accelerated depreciation. The GERC held in its favour and the APTEL confirmed the same, holding that the Second Tariff Order applied as EMCO Ltd.'s project was commissioned only on 02.03.2012. Further, as it had not availed accelerated depreciation, the APTEL held that the tariff determined without accelerated depreciation should be applied to it. GUVNL, thereupon, approached this Court. The case of EMCO Ltd. was that, though it had entered into a PPA

1 (2016) 11 SCC 182

during the control period specified in the First Tariff Order, it was not bound by the tariff mentioned therein and was entitled to seek fixation of tariff by the GERC under the Second Tariff Order. *Per contra*, GUVNL contended that the First Tariff Order was applicable only to those projects which availed the benefit of accelerated depreciation and if EMCO Ltd. did not wish to avail that benefit, it ought not to have entered into a PPA without first seeking determination of the tariff. GUVNL contended that, having chosen to enter into a PPA, EMCO Ltd. could not opt for not availing accelerated depreciation at a later point of time and claim the benefit of a more advantageous tariff under the Second Tariff Order. GUVNL further contended that the tariff under the First Tariff Order would not apply to only those power generating projects which, by operation of law and not by their own violation, were not entitled to claim accelerated depreciation.

11. Noting that neither party had contended that, in law, there was a possibility of a power project not getting the benefit of accelerated depreciation if it opted for it, but assuming for the sake of argument that in law such a possibility exists, this Court observed that the construction sought to be placed on the relevant portion of the First Tariff Order by GUVNL could not be accepted, because it would be inherently illogical. The relevant portion of the First Tariff Order, in this context, stated that for a project that does not get such benefit of accelerated depreciation under the Act of 1961, the Commission would, on a petition in that respect, determine a separate tariff taking into account all the relevant facts. The submission of GUVNL as to the construction of the aforestated clause in the First Tariff Order was accordingly rejected by this Court.

12. This Court, thereafter, dealt with the issue as to whether EMCO Ltd. had the right to exercise its choice not to avail accelerated depreciation after signing the PPA. This Court also considered the question as to whether it's right under the Act of 1961 to make such a choice could be so exercised, resulting in a situation whereby GUVNL would be obliged under the PPA to purchase the power generated by it for a period of 25 years without knowing the price at which EMCO Ltd. would supply such power. The real question, *per* this Court, was as to what would be the point of time at which the power producer can exercise the right to seek the determination of a separate tariff? It was noted that the Act of 1961 gave the option to

the power producer to avail or not to avail accelerated depreciation and also specified the point of time at which that option was to be exercised. However, the availability of such an option was held not to relieve the power producer of the contractual obligations incurred under the PPA. Significantly, no finding was recorded as to whether EMCO Ltd. had given a commitment to GUVNL about availing accelerated depreciation. It was also noted that the PPA contained a condition that, in case commissioning of the project was delayed beyond 31.12.2011, GUVNL would pay the tariff determined by GERC for solar energy projects effective on the date of commissioning of such project or the tariff mentioned in the PPA, whichever was lower. This stipulation, *per* this Court, envisaged a situation where EMCO Ltd. was not able to commence generation of electricity within the control period stipulated in the First Tariff Order and dealt with that contingency. It was, therefore, held that EMCO Ltd. could not seek tariff fixation under the Second Tariff Order.

13. Certain observations in the above decision, taken in isolation, undoubtedly support the GUVNL presently but the law laid down in the said decision would have to be understood in the factual context thereof, involving two tariff orders and a specific condition in the PPA. This aspect was pointed out by this Court in ***Gujarat Urja Vikas Nigam Limited vs. Tarini Infrastructure Limited and others***[2]. Therein, this Court had occasion to consider the power of the GERC to redetermine tariff even after execution of a PPA, incorporating a particular tariff. The question for consideration was specifically framed as to whether the tariff fixed under a PPA was sacrosanct or inviolable and beyond review and correction by the GERC, which is the statutory authority for fixation of tariff under the Act of 2003. The GERC had not conferred upon itself such power but the APTEL disagreed and held that such power would be available to the GERC. That is how the matter came before this Court at the behest of the GUVNL. Tarini Infrastructure Ltd. was a power producer which had setup hydropower projects. It entered into a PPA with GUVNL to supply power for a period of 35 years at a determined tariff. Thereafter, it sought enhancement of the tariff on the ground that additional infrastructure was required to be put up by it, in the

2 (2016) 8 SCC 743

form of a transmission line over 23 kilometres instead of the originally envisaged 4 kilometres. It applied to the GERC for redetermination of the tariff. The GERC, however, negated its plea on the ground that once the tariff was determined and incorporated in the PPA, there was no scope for redetermination at the unilateral request of the power producer. In another set of appeals, redetermination of the tariff was sought by power producer(s) therein on the ground of increase in the price of biomass fuel but it was rejected by the GERC on a similar ground.

14. In appeal, the APTEL held that the GERC was clothed by the statute with the power to determine the tariff and, therefore, the tariff incorporated in a PPA was also liable to be reviewed in the light of changed circumstances of a given case. Taking note of the statutory scheme of the Act of 2003, this Court held that it would not be possible to hold that the tariff agreed by and between the parties, though it found mention in a contractual context, was the result of an act of volition of the parties which can, in no case, be altered except by mutual consent. It was affirmed that tariff determination was made in exercise of statutory powers and the same only got incorporated in a mutual agreement between the two parties involved. Referring to Section 86(1)(b) of the Act of 2003, this Court held that it must lean in favour of flexibility and not read inviolability into the terms of a PPA in so far as the tariff stipulated therein is concerned. It was further held that it would be a sound principle of interpretation to confer such power if public interest, dictated by surrounding events and circumstances, required review of the tariff. Dealing with the earlier judgment in ***EMCO Limited*** (*supra*), this Court observed that the power producer in that case did not seek determination of a separate tariff under the First Tariff Order, as it ought to have done, but sought tariff fixation under the Second Tariff Order, which was wholly inapplicable to it, given the terms of the First Tariff Order and the PPA. The decision in ***EMCO Limited*** (*supra*) was, therefore, distinguished on facts.

15. We may now note certain facts which are of particular relevance to this adjudication. GUVNL entered into individual Power Purchase Agreements (PPAs) with the four respondent companies. These PPAs were entered into by them between June, 2010, and March, 2012, i.e., during the 3-year control period specified in Order No.1 of

2010 dated 30.01.2010 issued by the GERC and the four respondent companies also commissioned their wind energy projects during the said control period. Each of these PPAs contained a clause with regard to the tariff applicable for purchase of power from the respondent companies' wind energy projects. For the purpose of illustration, clause 5.2 in the Power Purchase Agreement dated 28.03.2011 pertaining to Green Infra Wind Power Limited is extracted hereunder:

> '5.2 GUVNL shall pay a fixed rate of Rs.3.56 per kWh for delivered energy as certified by SEA of Gujarat SLDC during the 25 years life of the project as determined by the Commission through Order No.1 of 2010 dated 30th January, 2010.'

16. It is an admitted fact that the four respondent companies signed PPAs with GUVNL with identical clauses therein. Having done so, they then approached the GERC seeking project-wise determination of tariff, claiming that they had not availed accelerated depreciation. This prayer was made by them in the subject petitions filed in 2012/2013 before the GERC. GUVNL contested their claim before the GERC, arguing that these wind energy projects had willingly entered into PPAs with it, binding themselves to the tariff rate of ₹3.56 per kWh, and were, therefore, not at liberty to seek determination of tariff on a case-to-case basis thereafter. GUVNL asserted that, in the light of the valid, binding and enforceable contracts between the parties, embodied in the PPAs, the wind energy projects could not seek such benefit. It further asserted that, had these projects opted for a case-to-case specific tariff, it would not have even entered into PPAs with them. It claimed that it had not entered into any PPAs with wind energy projects that had not availed the benefit of accelerated depreciation and asserted that it could not be compelled to abide by the change of mind on the part of these wind energy projects and, thereby, be compelled to pay a higher tariff to them on the basis of a case-to-case determination by the GERC.

17. This argument on the part of GUVNL would have been compelling, had it simply been a commercial contract between two profit-oriented business entities. However, we cannot lose sight of the fact that GUVNL is an instrumentality of the State and was, therefore, bound by the policy directives of the State. It cannot advance commercial considerations in isolation on par with a private party, divorced from

its responsibility to abide by and further the policy objectives of the State. In that context, it would be relevant to note the objectives underlying the Act of 2003 in relation to non-conventional and renewable energy sources, such as wind power, solar power, etc. Part II of the Act of 2003 is titled 'National Electricity Policy and Plan'. Section 3 therein provides that the Central Government shall, from time to time, prepare the National Electricity Policy and tariff policy, in consultation with the State Governments and the Authority for development of the power system based on optimal utilization of resources such as coal, natural gas, nuclear substances or materials, hydro and renewable sources of energy.

18. A separate Ministry of New and Renewable Energy was setup by the Government of India as the nodal Ministry for all matters relating to new and renewable energy. The broad aim of this Ministry is to develop and deploy new and renewable energy to supplement the energy requirements of the country. Energy self-sufficiency was identified as the major driver for developing and promoting new and renewable energy generation in the country in the wake of the two oil shocks of 1970s; the sudden increase in the price of oil; the uncertainties associated with its supply; and the adverse impact on the balance of payments position.

19. In furtherance of the policy and vision of the Government of India in relation to non-conventional renewable energy generation, the Government of Gujarat, through its Energy and Petro-chemicals Department, promulgated the Wind Power Policy – 2007 dated 13.06.2007. It stated therein that it was keen on development of the renewable energy sector, given the dwindling resources of fossil fuels; increased threat of global warming; and the concerns of environmental protection. It further stated that it was committed to having investment in clean and green energy to reduce carbon dioxide emissions. In order to accelerate investment in this sector, the Government of Gujarat recognized that there was a need to extend Governmental support and, in that context, the Government reviewed its wind power policy. This new policy was to come into effect on 20.06.2007 and remain in operation till 30.06.2012. Wind Turbine Generators (WTGs) installed and commissioned during the operative period were to be considered eligible for the incentives declared under the policy for 20 years or for their life span, whichever

was shorter. With regard to sale of such energy, the policy provided that the electricity generated by the WTGs may be sold to GUVNL and/or any distribution licensee within the State at the rate of ₹3.37 per unit of electricity as per the GERC order, as amended from time to time. The requisite PPA was to be made between the purchaser of power and the eligible unit. Notably, the tariff of ₹3.37 per unit mentioned in the policy was relatable to the earlier Tariff Order of the GERC, viz., Order No.2 of 2006 dated 11.08.2006, which was in operation for a period of 3 years, i.e., upto 10.08.2009. Various other incentives were offered to WTGs under the aforestated policy of the Government of Gujarat. Thereafter, the Government of Gujarat's Wind Power Policy-2013, effective from 25.07.2013 to 31.03.2016, reaffirmed its resolve and commitment to develop and promote wind energy projects, by offering them various incentives.

20. In the light of the aforestated policies and directives of the Government of Gujarat and as an instrumentality of the State, GUVNL was bound to promote and advance the objectives of the said policy. It may be noted that the PPAs executed by and between GUVNL and the four respondent companies specifically referred to the approvals given by the Gujarat Energy Development Agency (GEDA) for setting up of their wind energy projects. One such approval letter dated 01.08.2011 issued by GEDA in favour of Green Infra Corporate Wind Private Limited was placed before us. Perusal thereof reflects that permission was granted to the said company to setup two WTGs subject to the terms and conditions specified in the Government of Gujarat's Wind Policy, GERC orders pertaining to wind power and the conditions stipulated in the said letter. One of the conditions stipulated therein was that the company should enter into an Agreement with the GUVNL/DISCOM for selling or wheeling of the electricity generated from the Wind Farm. Though GUVNL was not the only distribution licensee in the State of Gujarat at that point of time, we cannot lose sight of the fact that, being a State-instrumentality, it was and is a major distributor of electricity across the State of Gujarat.

21. Further, it is manifest and demonstrable from the statutory scheme obtaining under the Act of 2003 that the price at which power is to be procured by a distribution licensee from a generating company is not a matter of consensus and private agreement between the parties as it is to be fixed statutorily by the Appropriate Commission. GUVNL

cannot, therefore, fix its own price or bind a generating company to such price, contrary to the dictum of the GERC. Significantly, in Tariff Order No. 1 of 2010 dated 30.01.2010, the GERC clearly stipulated that the levelized price of ₹3.56 per kWh was to apply only to those wind energy projects that availed the benefit of accelerated depreciation under the Act of 1961 and the Rules of 1962.

22. Pertinently, the scheme of the Act of 1961 and the Rules of 1962 makes it clear that an assessee is required to choose the option of either availing accelerated depreciation or normal depreciation only at the time it files its return for the assessment year relatable to the previous year in which it started generation of power, if the same was after 01.04.1997. This liberty and discretion given to an assessee could not be truncated or cut-short by GUVNL by fixing a binding price unilaterally in the PPA executed long before the assessee had to statutorily choose its option, i.e., at the time it filed its return of income for the assessment year relatable to the previous year in which it actually started generation of power.

23. The conundrum in which a power producer is placed in this scenario is patent. Unless it generates power and sells it to a distribution licensee under a PPA, the power producer would not file its return of income in relation thereto. It is only at that stage that it is required to exercise its option to choose the rate of depreciation, but it would have already signed a PPA as it cannot sell the power generated by it without first entering into a PPA. In such circumstances, the tariff mentioned in the PPA would necessarily have to be conditional and dependent upon exercise of the statutory option by the power producer at the relevant point of time. The situation would, however, be different if the power producer chooses its option at the time of entering into the PPA with the distribution licensee itself and gives a commitment to such distribution licensee that it would only avail accelerated depreciation when the time comes and would, therefore, be bound by the tariff fixed for power producers availing such benefit.

24. Admittedly, GUVNL never secured any written commitments from the four respondent companies that they would only avail accelerated depreciation and would not choose to opt for the regular depreciation rate when the time came. Without securing such commitments from them, merely because these companies signed the PPAs with a fixed tariff which was applicable only to those projects that availed accelerated depreciation, GUVNL cannot take advantage of

its dominant position and its PPAs so as to bind them to the price mentioned therein for the entire life of their projects. As pointed out earlier, GUVNL is bound to promote and give effect to the Government's policy of encouraging generation of power from renewable energy sources. When the Government promulgated a policy in that regard, offering various incentives to wind energy projects, GUVNL cannot act contrary thereto by fixing a tariff for purchase of power from such wind energy projects, which, on the face of it, is contrary to the mandate of Order No.1 of 2010 dated 30.01.2010 issued by the GERC. The said order put it beyond the pale of doubt that the tariff of ₹3.56 per kWh was applicable only to those wind energy projects that availed the benefit of accelerated depreciation. GUVNL does not dispute the fact that the four respondent companies did not avail such benefit. *Ergo*, the question of applying to them the tariff that was only meant for wind energy projects that did avail accelerated depreciation would not arise. GUVNL cannot be guided only by its own commercial interests, like a private business entity and it's conduct, as a State-instrumentality, must be of the standard of a model citizen. However, patently unfair treatment was sought to be meted out by GUVNL to the respondent companies by binding them to a rate that was wholly inapplicable to them. Such conduct, akin to a Shylock, does not reflect positively upon GUVNL.

25. Given the circumstances obtaining in the appeals on hand and in the light of the law laid down by this Court earlier in ***Tarini Infrastructure Limited*** (*supra*), it is not open to GUVNL to contend that the four respondent companies are estopped from seeking determination of tariff by the GERC as they had willingly signed PPAs with it at the tariff fixed for wind energy projects availing accelerated depreciation. As GUVNL failed to obtain commitments from the respondent companies that they would only avail accelerated depreciation at the time they had to choose that option, GUVNL has no indefeasible right to bind them to a tariff which was applicable only to such wind energy projects that availed accelerated depreciation. The GERC had made it quite clear that the tariff of ₹3.56 per kWh would apply only to those wind energy projects that availed accelerated depreciation. Therefore, that tariff has no application to a wind energy project that did not avail accelerated depreciation. GUVNL cannot apply that wholly inapplicable tariff to the respondent companies which,

admittedly, did not avail accelerated depreciation. The orders passed by the GERC and the APTEL holding to this effect, therefore, do not brook any interference.

The appeals are bereft of merit and are, accordingly, dismissed.

Order dated 03.02.2023 shall stand vacated.

Pending applications, if any, shall also stand dismissed.

Result of the case: Appeals dismissed.

†*Headnotes prepared by:* Divya Pandey

[2025] 8 S.C.R. 362 : 2025 INSC 923

Delhi Pollution Control Committee
v.
Lodhi Property Co. Ltd. Etc.

(Civil Appeal No(s). 757-760 of 2013)

04 August 2025

[Pamidighantam Sri Narasimha and Manoj Misra, JJ.]

Issue for Consideration

Whether the regulatory boards can, in exercise of powers u/s.33A of the Water Act and s.31A of the Air Act, impose and collect as restitutionary and compensatory damages fixed sums of monies or require furnishing bank guarantees as an *ex-ante* measure towards potential environmental damage.

Headnotes†

Water (Prevention and Control of Pollution) Act, 1974 – s.33A – Air (Prevention and Control of Pollution) Act, 1981 – s.31A – The Division Bench of the High Court held that DPCC (regulatory body/Board) is not empowered to levy compensatory damages in exercise of powers u/s.33A of the Water (Prevention and Control of Pollution) Act, 1974 and s.31A of the Air (Prevention and Control of Pollution) Act, 1981 on the ground that such an action amounts to imposition of penalty provided for in Chapters VII and VI of the respective Acts, and as such, procedure contemplated thereunder will be the only method for imposing and collecting compensatory damage – Correctness:

Held: 1. Having considered the principles that governing environmental laws and on interpretation of ss.33A and 31A of the Water and Air Acts, this Court is of the opinion that the Division Bench of the High Court was not correct in restrictively reading powers of the Boards – The environmental regulators, the Pollution Control Boards exercising powers under the Water and Air Acts, can impose and collect restitutionary or compensatory damages in the form of fixed sum of monies or require furnishing of bank guarantees as an *ex-ante* measure to prevent potential environmental damage – These powers are incidental and ancillary to the empowerment u/ss.33A and 31A of the Water and Air Acts – The powers must be exercised as per procedure laid down by

subordinate legislation incorporating necessary principles of natural justice, transparency and certainty. [Paras 2, 28]

2. The Board's powers u/s.33A of the Water Act and s.31A of the Air Act have to be read in light of the legal position on the application of Polluter Pays principle as formulated and explained – This means that State Board cannot impose environmental damages in case of every contravention or offence under the Water Act and Air Act – It is only when the State Board has made a determination that some form of environmental damage or harm has been caused by the erring entity, or the same is so imminent, that the State Board must initiate action u/s.33A of the Water Act and s.31A of the Air Act. [Para 30]

Water (Prevention and Control of Pollution) Act, 1974 – s.33A – Air (Prevention and Control of Pollution) Act, 1981 – s.31A – Board's responsibility to choose appropriate course of action:

Held: Given their broad statutory mandate and the significant duty towards public health and environmental protection the Boards must have the power and distinction to decide the appropriate action against a polluting entity – It is essential that the Boards function effectively and efficiently by adopting such measures as is necessary in a given situation – The Boards can decide whether a polluting entity needs to be punished by imposition of penalty or if the situation demands immediate restoration of the environmental damage by the polluter or both. [Para 32]

Water (Prevention and Control of Pollution) Act, 1974 – Air (Prevention and Control of Pollution) Act, 1981 – 2024 amendments – Decriminalisation and Adjudicatory Officer:

Held: There is no conflict between the powers of the State Boards to direct payment of environmental damages u/ss.33A and 31A of the Water and Air Acts and the powers of the Adjudicating Officer to impose penalties under Chapter VII of the Water Act and Chapter VI of the Air Act – The decriminalization of offences under these Chapters has not removed the punitive nature of actions that can be taken under them – There remains a clear distinction between the nature of directions that the State Boards can issue u/ss.33A and 31A of the Water and Air Acts for payment of environmental damage and the determination by Adjudicating Officers – The former is compensatory in nature and will be resorted to when remedial measures are being undertaken to restore the

degraded environment or pollution caused – The latter is a penalty for an offence under the law and is imposed with the objective of punishing the offender. [Para 31]

Water (Prevention and Control of Pollution) Act, 1974 – s.33A – Air (Prevention and Control of Pollution) Act, 1981 – s.31A – Power of Boards to direct the payment of environmental damages – Powers must be guided by transparency and non-arbitrariness:

Held: The Boards have the power to direct the payment of environmental damages, this Court makes it clear that this power must always be guided by two overarching principles – First, that the power cannot be exercised in an arbitrary manner; and second, the process of exercising this power must be infused with transparency. [Para 33]

Water (Prevention and Control of Pollution) Act, 1974 – s.17 – Air (Prevention and Control of Pollution) Act, 1981 – s.17 – Existing Legal Regime for Pollution Control in India – discussed. [Paras 9 and 10]

Water (Prevention and Control of Pollution) Act, 1974 – s.33A – Air (Prevention and Control of Pollution) Act, 1981 – s.31A – Insertion of ss.33A & 31A in Water and Air Acts – Discussed. [Paras 11 to 15]

Constitution of India – Part IV A and Arts. 48A, 51A – Interpretation of and for Environmental Institutions – Discussed. [Paras 16-17]

Environment – Pollution control – Duty to Restitute v. Power to Punish and Penalise – Discussed. [Paras 18 to 26]

Water (Prevention and Control of Pollution) Act, 1974 – Chapters VII – Air (Prevention and Control of Pollution) Act, 1981 – Chapters VI – Environmental damage – Distinction between restitution and punitive action:

Held: There is a distinction between a direction for payment of restitutionary and compensatory damages as a remedial measure for environmental damage or as an *ex-ante* measure towards potential environmental damage on the one hand; and a punitive action of fine or imprisonment for violations under Chapters VII of the Water Act and VI of the Air Act on the other hand – If directions

in furtherance of restitutionary and compensatory measures are issued, these are not to be considered as punitive in nature – Punitive action can only be taken through the procedure prescribed in the statute for example under chapters VII and VI of the Water and Air Acts respectively. [Paras 27(I)(II)]

Environmental Law – Indian environmental law assimilation of Principle of Polluter Pays:

Held: Indian environmental law has assimilated the principle of Polluter Pays and there is also a statutory incorporation of this principle in our laws – The invocation of this principle is triggered in the situations – i) when an established threshold or prescribed requirement is exceeded or breached, and it does result in environmental damage, ii) when an established threshold or prescribed requirement is not exceeded or breached, nevertheless the act in question results in environmental damage and also iii) when a potential risk or a likely adverse impact to the environment is anticipated, irrespective of whether or not prescribed thresholds or requirements are exceeded or breached. [Para 27(III)]

Water (Prevention and Control of Pollution) Act, 1974 – s.33A – Air (Prevention and Control of Pollution) Act, 1981 – s.31A – Duty of Environmental regulators:

Held: Environmental regulators have a compelling duty to adopt and apply preventive measures irrespective of actual environmental damage – *Ex-ante* action shall be taken by these regulators and for this purpose a certain measure in exercise of powers u/ss.33A and 31A of the Water and Air Acts is necessary. [Para 27(IV)]

Water (Prevention and Control of Pollution) Act, 1974 – s.33A – Air (Prevention and Control of Pollution) Act, 1981 – s.31A – Environment Protection Act – s.5 – Powers of Board under Environment Protection Act and Water and Air Acts:

Held: The powers of the Boards u/ss.33A and 31A of the Water and Air Acts are identical to that of s.5 of the Environment Protection Act – Under Section 5, the Central Government or its delegate has the power to issue directions to the polluting industry to pay certain amounts and utilise the said fund for carrying out remedial measures – The Boards are empowered to take similar actions u/ss.33A and 31A of the Acts. [Para 27(V)]

Water (Prevention and Control of Pollution) Act, 1974 – s.33A – Air (Prevention and Control of Pollution) Act, 1981 – s.31A – Directions issued by the Supreme Court:

Held: (a) The judgement and order dated 23.01.2012, passed by the Division Bench of the High Court of Delhi is set aside to the extent of declaration of law but direct that the show cause notices that have been set aside by the High Court shall not be revived; (b) This Court directs that the Pollution Control Boards can impose and collect as restitutionary and compensatory damages fixed sums of monies or require furnishing bank guarantees as an *ex-ante* measure towards potential environmental damage in exercise of powers u/ss. 33A and 31A of the Water and Air Acts; (c) It is further directed that the power to impose or collect restitutionary or compensatory damages or the requirement to furnish bank guarantees as an *ex-ante* measure u/ss. 33A and 31A of the Water and Air Acts shall be enforced only after detailing the principle and procedure incorporating basic principles of natural justice in the subordinate legislation. [Para 39]

Case Law Cited

MC Mehta v. Kamal Nath **[2000] Supp. 1 SCR 389 : (2000) 6 SCC 213;** *Vellore Citizens' Welfare Forum v. Union of India* **[1996] Supp. 5 SCR 241 : (1996) 5 SCC 647;** *Research Foundation for Science (18) v. Union of India* **[2005] 1 SCR 115 : (2005) 13 SCC 186;** *Deepak Nitrite Ltd. v. State of Gujarat* **[2004] Supp. 2 SCR 49 : (2004) 6 SCC 402;** *T.N. Godavarman Thirumulpad, In Re v. Union of India* **[2024] 3 SCR 187 : (2025) 2 SCC 641;** *Bengaluru Development Authority v. Sudhakar Hegde* **[2020] 5 SCR 755 : (2020) 15 SCC 63 – relied on.**

State of MP v. Centre for Environment Protection Research & Development **[2020] 12 SCR 1139 : (2020) 9 SCC 781;** *Chandra Kishore Jha v. Mahavir Prasad & Ors.* **[1999] Supp. 2 SCR 754 : (1999) 8 SCC 266;** *Indian Council for Enviro-Legal Action v. Union of India* **[1996] 2 SCR 503 : (1996) 3 SCC 212;** *Bengaluru Development Authority v. Sudhakar Hegde* **[2020] 5 SCR 755 : (2020) 15 SCC 63 – referred to.**

Splendor Landbase Ltd. v. DPCC, **2012 (195) DLT 177;** *State Pollution Control Board, Odisha v. M/s Swastik Ispat Pvt Ltd and Others,* **2014 SCC OnLine NGT 13 – referred to.**

List of Acts

Water (Prevention and Control of Pollution) Act, 1974; Air (Prevention and Control of Pollution) Act, 1981; Constitution of India; Environment (Protection) Act 1986.

List of Keywords

Restitutionary and compensatory damages; Bank guarantees as an *ex-ante* measure; Potential environmental damage; Violation of the environmental norms; Power of Boards; Principle of Natural Justice in the subordinate legislation; Polluter Pays principle; Broad statutory mandate; Appropriate action against a polluting entity; Payment of environmental damages; Pollution control; Section 33A of Water (Prevention and Control of Pollution) Act, 1974; Section 31A of Air (Prevention and Control of Pollution) Act, 1981; Environmental regulators; Punitive action; Remedial measure; Power to issue directions to the polluting industry; Decriminalization of offences; Powers of the Adjudicating Officer to impose penalties; Remedial jurisprudence; Injunctory, mandatory and compensatory remedies; Restitutionary directives; Fundamental rights of citizens; Environmental wrongs; Institutional foresight; Institutional memory; Institutional integrity; Institutional transparency and accountability; Independent and objective decisions.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No(s). 757-760 of 2013

From the Judgment and Order dated 23.01.2012 of the HIGH COURT OF DELHI AT NEW DELHI in LPA No(s). 709, 710, 866 and 867 of 2011

With

Civil Appeal No(s). 1977-2011 of 2013

Appearances for Parties

Advs. for the Appellant:
Ninad Laud, Saurabh Kulkarni, Ms. Rashika Narain, Ms. Ishani Shekhar, Dcosta Ivo Manuel Simon, Pradeep Misra, Daleep Dhyani, Suraj Singh.

Advs. for the Respondents:
S. D. Sanjay, Satya Darshi Sanjay, A.S.Gs., Pinaki Mishra, B.b.gupta, Ms. Swarupma Chaturvedi, Kailash Vashudev, Pravin Bahadur, Kishan Rawat, Ms. Rubi Singh Ahuja, Ms. Kanika Gomber, Rajan Narain, Umesh Kumar Khaitan, Ajit Warrier, Angad Kochhar, S. S. Shroff, Gurmeet Singh Makker, Ms. Ruchi Kohli, Chinmayee Chandra, Chitvan Singhal, Mohit D. Ram, Ms. Nayan Gupta, Mrs. Priya Puri, Navin Prakash, Ms. Srishti Prakash, Ms. Swarupama Chaturvedi, Ms. Ruchi Kohli, Ms. Chinmayee Chandra, Chitvan Singhal, Amit Sharma V, Dr. N. Visakamurthy, Avijit Roy.

Judgment / Order of the Supreme Court

Judgment

Contents*

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

1. Introduction.

1. The Delhi Pollution Control Committee (DPCC)[1] is in appeal against the judgment of the Division Bench of the High Court holding that it is not empowered to levy compensatory damages in exercise of powers under Section 33A of the Water (Prevention and Control of Pollution) Act, 1974 and Section 31A of the Air (Prevention and Control of Pollution) Act, 1981[2] on the ground that such an action amounts to imposition of penalty provided for in Chapters VII and VI of the respective Acts, and as such, procedure contemplated thereunder will be the only method for imposing and collecting compensatory damage.

2. Having considered the principles that govern Indian environmental laws, we have held that the environmental regulators, the Pollution Control Boards exercising powers under the Water and Air Acts, can impose and collect restitutionary or compensatory damages in the form of fixed sum of monies or require furnishing of bank guarantees as an *ex-ante* measure to prevent potential environmental damage. These powers are incidental and ancillary to the empowerment under Sections 33A and 31A of the Water and Air Acts. At the same time, we have directed that the powers must be exercised as per procedure laid down by subordinate legislation incorporating necessary principles of natural justice, transparency and certainty.

2. Facts.

3. It is the case of the Delhi Pollution Control Committee that pursuant to the directions of the Ministry of Environment, Forest and Climate Change (MoEFCC) to take appropriate action against certain entities operating in violation of the environmental norms, show cause notices were issued for violation of Section 25 of the Water Act and Sections 21 and 22 of the Air Act. These entities were either residential complexes, commercial complexes or shopping malls. The show cause notices were issued on the ground that they proceeded with construction and in fact, were operating without obtaining the mandatory "consent to

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1 DPCC is a regulatory body in the National Capital Territory of Delhi, established as a 'State Board'. These Boards are constituted under section 4 of the Water Act and under section 4 or section 5 of the Air Act, and exercise powers granted under section 33A of the Water Act and section 31A of the Air Act. Our interpretation of section 33A and 31A herein will apply to any such body established under said Acts.

2 Hereinafter referred to as the Water Act and Air Act respectively.

establish" and "consent to operate" under Section 25 of the Water Act and Section 21 of the Air Act. The show cause notices were challenged by way of 38 writ petitions before the Delhi High Court. The challenge culminated in the judgement of a single judge dated 30.09.2010 in the case of *Splendor Landbase Ltd. v. DPCC*[3]. The learned single judge considered the question as to whether a State Board can levy environmental damages in the form of fixed sums of money or require an entity to furnish a bank guarantee as a condition for grant of consent under Section 33A of Water Act and/or Section 31A of Air Act. Similar writ petitions were considered and decided by another single judge bench in *Bharti Realty Ltd. v. DPCC* and *Anush Finlease and Construction v. DPCC* on 20.07.2011 and 15.09.2011 and were disposed of in terms of the decision in *Splendor Landbase Ltd. v. DPCC*. The reasoning adopted in the judgement and orders passed by the Single Judges are as follows.

3. Single Judge's Judgement and Orders.

4. In *Splendor Landbase Ltd. v. DPCC*[4], the ld. single judge by his judgement dated 30.09.2010 dealt with two major issues – firstly, whether proprietors of properties over 20,000 square meters are required to obtain *consent to establish* and *consent to operate* under Water Act and Air Act independently, despite obtaining EIA Clearance from the Ministry; and secondly, whether Boards can levy penalties, fines, environmental damages in form of fixed sums of monies or call for bank guaranties as a condition to grant consent under Water and Air Acts? While the first question was answered in the affirmative, the second was answered in the negative.

   4.1 It was held that the power to levy penalty is in the nature of a penal power and as such a penalty cannot be imposed without there being an enabling statutory power. For this reason, the single judge held that Board has no power to levy penalty or damage, even on the basis of the general powers under Sections 31A or 33A of the Acts. The learned Judge criticized the monetary demand as a pre-condition for grant of consent under the Acts on the ground that it has no statutory backing.

3 2012 (195) DLT 177.

4 Hereinafter referred to as *Splendor*.

4.2 In the other batch of cases i.e. in *Bharti Realty Ltd. v. DPCC* and *Anush Finlease and Construction Ltd. v. DPCC*, decided on 12.07.2011 and 15.09.2011, the learned Single Judge was constrained to enquire into the matter in detail as writ appeals against the judgement in *Splendor* were already pending before a Division Bench. Therefore, the Single Judge allowed the writ petitions following the decision in *Splendor* and holding that the Board has no power to impose and collect compensatory damages. In these cases, the learned Judge also directed refund of the amounts collected. However, no interest was granted to the respondents as they chose to comply with the demand instead of challenging the same at the relevant point in time.

4. Impugned Order of the Division Bench.

5. The decisions of the single judges were challenged by the appellant before the Division Bench of the High Court. By the judgement impugned before us, the Division Bench upheld the findings of the Single Judge in *Splendor* that the power to issue directions under Sections 33A and 31A under the two Acts does not confer the power to levy 'penalty'. The High Court further observed that under Chapter VII and Chapter VI of the Water and Air Acts penalties can be levied only by courts and that too after taking cognizance of offences specified under the two Acts. Provided that the procedure so prescribed under the statute has to be followed mandatorily, the Division Bench held that the appellant would not be entitled to impose compensation or direct deposit of bank guarantees. The relevant portion of the Division Bench of the High Court is as follows –

> *"37. We concur with the reasoning of the learned Single Judge in paras 58 to 64 of the impugned decision and thus do not elaborate any further, but would additionally highlight that, the power to issue directions under Section 33A of the Water Act and the power to issue directions under Section 31A of the Air Act, on their plain language, does not confer the power to levy any penalty. We would further highlight that under Chapter VII of the Water Act and under Chapter VI of the Air Act penalties and procedure to levy the same have been set out. A perusal of the provisions under the Water Act would reveal that penalties can be levied as per procedure prescribed and only Courts can take*

cognizance of offences under the Act and levy penalties, whether by way of imprisonment or fine. Similar is the position under the Air Act. The legislature having enacted specific provisions for levy of penalties and procedures to be followed has specifically made the offences cognizable by Courts and the power to levy penalties under both Acts has been vested in the Courts. The role of the Pollution Control Boards is to initiate proceedings before the Court of Competent jurisdiction and no more.

40. The language of Sub-Section 5 of Section 25 of the Water Act makes it plain clear that the only solution to a situation of a building being constructed to establish an industry, operation or process without obtaining prior consent of the State Pollution Control Board is the power of the Board to serve upon the person concerned a notice imposing such conditions as might have been imposed on an application, seeking prior consent and we find that the learned Single Judge has correctly so opined and has rightly issued the direction that the only way out, pertaining to the Water Act is to permit DPCC to inspect the shopping malls and the shopping commercial complexes and if it is found that pertaining to discharge of sewage from these buildings any steps are required to prevent water pollution DPCC would be authorized to issue notices requiring the owner of the building to take steps in terms of the notice issued. Pertaining to the Air Act notwithstanding there being no similar provision, but the concept of a post decisional hearing may be made applicable with the modification that no hearing would be required inasmuch as there is no decision, but DPCC should be empowered to inspect the shopping malls and the shopping, commercial complexes and pertaining to air pollution, if the owners of the buildings do not take corrective action, DPCC would always have the power to file criminal complaints before the Courts of Competent Jurisdiction, which Courts would alone have the power to impose fine and additionally impose sentence of imprisonment upon the offending persons.

42. In a few cases, we find that since DPCC was not permitting the buildings to be occupied, under protest, the

owners paid the penalty to DPCC and have immediately approached the Court seeking refund and the same has been ordered for the reason neither under the Water Act nor under the Air Act there exists any power in DPCC to levy penalty or impose conditions of furnishing bank guarantee. The decision of the learned Single Judge is correct in directing the bank guarantees to be discharged and penalties levied to be refunded for the reason the said act of DPCC is ultra-vires its power under the two statutes and the levy of penalty is without any authority of law. In the decision reported as 1997 [5] SCC 535 Mafatlal Industries Ltd. & Ors. Vs UOI & Ors., under writ jurisdiction refund can be directed where the levy is without jurisdiction and the same would include a penalty levied without any jurisdiction. In the instant case the penalty levied is unconstitutional being not sanctioned by any power vested in DPCC either under the Water Act or the Air Act. The impugned decisions where penalty levied has been directed to be refunded are upheld."

5. Submissions.

6. Mr. Pradeep Mishra appearing on behalf of the appellant DPCC submitted that the High Court erred in holding that the State Boards are not empowered to impose environmental damages under Sections 33A and 31A of Water and Air Acts. He has argued that the application of the principle of *Polluter Pays* is distinct from the requirement of authority of law to impose tax or penalty.

7. We have requested Mr. Ninad Laud, learned counsel to assist us in the matter. He has gracefully accepted and has eminently assisted the Court. He has submitted[#] that as per broad scheme of the Acts and also the statement of objects and reasons, State Boards are empowered to act on their own while enforcing Sections 25 and 26 and also while issuing directions under Sections 33A and 31A. However, when faced with non-compliances, recourse to judicial process is contemplated under Sections 49 and 43 of Water and Air Acts respectively. Further, neither Rule 34 of Water (Prevention

Ed. Note: "We have requested Mr. Ninad Laud, learned counsel to assist us in the matter. He has gracefully accepted and has eminently assisted the Court. He has submitted" instead of "On behalf of the respondents, Mr. Ninad Laud has submitted" in terms of subsequent corrigendum.

& Control of Pollution) Rules 1975 nor Rule 20A of Air (Prevention & Control of Pollution) Rules 1983, while providing a mechanism to administer Section 33A and Section 31A, contemplate monetary penalties. Countering the submission of Mr. Pradeep Misra on the principle of *Polluter Pays* to encourage reading the power to impose and collect environmental damages under Sections 33A and 31A of the respective Acts, he would submit such an approach is impermissible as the said power is specifically and separately provided under Chapters VII and VI therein. Relying on the decision of this Court in *MC Mehta v. Kamal Nath*[5], he would submit, after considering the scheme of penal provisions under Water Act, Air Act and Environment (Protection) Act 1986, the Supreme Court held that penalties under the Acts befall a person only after finding of guilt upon trial by a court of law. Referring to the legitimacy of State Board's action demanding bank guarantees to secure compliance with conditions, he would submit that no penalty, other than that contemplated in the statute or statutory scheme can be imposed.[6] We have also heard Mr. Pinaki Misra, Senior Advocate and other learned counsel and they have strongly supported the decision of the Division Bench.

7.1 Counsel for M/s Laxmi Buildtech Pvt Ltd[7] has submitted that they have neither violated nor acted in breach of any provision of environmental laws and therefore they cannot be subjected to any penalty or criminal prosecution. Counsel for other respondents further submitted that they have deemed consent as well as EIA clearance from the Ministry. They have also submitted that imposition and collection of damages by the State Boards is outside the powers vested in them under the Water and Air Acts.

7.2 Counsel for M/s Bharti Realty Ltd has submitted that it is a settled principle of law that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and no other.[8] This principle, according to the learned counsel, squarely applies to the present case as Chapter VII and Chapter VI of the Water and Air Acts have a prescribed

5 (2000) 6 SCC 213, para 13-17.

6 *State of MP v. Centre for Environment Protection Research & Development,* (2020) 9 SCC 781.

7 Civil Appeal No. 2001 of 2013.

8 *Chandra Kishore Jha v. Mahavir Prasad & Ors*, (1999) 8 SCC 266.

procedure to be followed before imposing penalties. It is further argued that the role of any State Board is in the nature of a complainant and not that of an adjudicatory authority. In this vein, it is submitted that any other interpretation would render the chapter on 'Penalties and Procedures' nugatory and otiose. It is also submitted that the power to give directions under Sections 33A and 31A of the Water and Air Acts is "subject to provisions of this Act". Written submissions also refer to the recent amendments to the Water and Air Acts, empowering an Adjudicating Officer, not below the rank of Joint Secretary of Government of India or Secretary to State Government, for imposing penalties for contravention of provisions of the Acts.

6. Issue.

8. The core question in these appeals is - whether the regulatory boards can, in exercise of powers under Section 33A of the Water Act and Section 31A of the Air Act, impose and collect as restitutionary and compensatory damages fixed sums of monies or require furnishing bank guarantees as an *ex-ante* measure towards potential environmental damage?

7. Existing Legal Regime for Pollution Control in India.

9. Under the Water Act and the Air Act, the State Boards have a broad statutory mandate to prevent, control and abate water pollution and air pollution. Under Section 17 of the Water Act, the State Boards are to shoulder enormous responsibilities and their functions are reproduced herein for ready reference -

> ***"Section 17. Functions of State Board*** *– (1) Subject to the provisions of this Act, the functions of a State Board shall be— (a) to plan a comprehensive programme for the prevention, control or abatement of pollution of streams and wells in the State and to secure the execution thereof;*
>
> *(b) to advise the State Government on any matter concerning the prevention, control or abatement of water pollution;*
>
> *(c) to collect and disseminate information relating to water pollution and the prevention, control or abatement thereof;*

(d) to encourage, conduct and participate in investigations and research relating to problems of water pollution and prevention, control or abatement of water pollution;

(e) to collaborate with the Central Board in organising the training of persons engaged or to be engaged in programmes relating to prevention, control or abatement of water pollution and to organise mass education programmes relating thereto;

(f) to inspect sewage or trade effluents, works and plants for the treatment of sewage and trade effluents and to review plans, specifications or other data relating to plants set up for the treatment of water, works for the purification thereof and the system for the disposal of sewage or trade effluents or in connection with the grant of any consent as required by this Act;

(g) to lay down, modify or annul effluent standards for the sewage and trade effluents and for the quality of receiving waters (not being water in an inter-State stream) resulting from the discharge of effluents and to classify waters of the State;

(h) to evolve economical and reliable methods of treatment of sewage and trade effluents, having regard to the peculiar conditions of soils, climate and water resources of different regions and more especially the prevailing flow characteristics of water in streams and wells which render it impossible to attain even the minimum degree of dilution;

(i) to evolve methods of utilisation of sewage and suitable trade effluents in agriculture;

(j) to evolve efficient methods of disposal of sewage and trade effluents on land, as are necessary on account of the predominant conditions of scant stream flows that do not provide for major part of the year the minimum degree of dilution;

(k) to lay down standards of treatment of sewage and trade effluents to be discharged into any particular stream taking into account the minimum fair weather dilution

available in that stream and the tolerance limits of pollution permissible in the water of the stream, after the discharge of such effluents;

(l) to make, vary or revoke any order—

(i) for the prevention, control or abatement of discharges of waste into streams or wells;

(ii) requiring any person concerned to construct new systems for the disposal of sewage and trade effluents or to modify, alter or extend any such existing system or adopt such remedial measures as are necessary to prevent, control or abate water pollution;

(m) to lay down effluent standards to be complied with by persons while causing discharge of sewage or sullage or both and to lay down, modify or annul effluent standards for the sewage and trade effluents;

(n) to advise the State Government with respect to the location of any industry the carrying on of which is likely to pollute a stream or well;

(o) to perform such other functions as may be prescribed or as may, from time to time, be entrusted to it by the Central Board or the State Government.

(2) The Board may establish or recognize a laboratory or laboratories to enable the Board to perform its functions under this section efficiently, including the analysis of samples of water from any stream or well or of samples of any sewage or trade effluents."

10. Section 17 of the Air Act[9], substantially similar to its equivalent

9 Section 17 of Air Act states –

17. Functions of State Boards.— *(1) Subject to the provisions of this Act, and without prejudice to the performance of its functions, if any, under the Water (Prevention and Control of Pollution) Act, 1974, the functions of a State Board shall be—*

(a) to plan a comprehensive programme for the prevention, control or abatement of air pollution and to secure the execution thereof;

(b) to advise the State Government on any matter concerning the prevention, control or abatement relating to air pollution;

(c) to collect and disseminate information relating to air pollution;

(d) to collaborate with the Central Board in organising the training of persons engaged or to be engaged in programmes relating to prevention, control or abatement of air pollution and to organise a mass-education programme relating thereto;

under the Water Act, also indicates the crucial responsibilities of the State Boards in discharge of their mandate. Chapter V of the Water Act and Chapter IV of the Air Act include provisions that prescribe the regulatory powers of the State Boards. These powers include the power to issue, modify or withdraw consent[10], power to obtain information[11], power of entry and inspection[12] and power to take samples[13].

8. Insertion of Sections 33A & 31A in Water and Air Acts.

11. In 1988, both Acts were amended. Notably, through amendments the State Boards were further empowered to give directions under Section 33A of the Water Act and Section 31A[14] of the Air Act. These

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(e) to inspect, at all reasonable times, any control equipment, industrial plant or manufacturing process and to give, by order, such directions to such persons as it may consider necessary to take steps for the prevention, control or abatement of air pollution;

(f) to inspect air pollution control areas at such intervals as it may think necessary, assess the quality of air therein and take steps for the prevention, control or abatement of air pollution in such areas;

(g) to lay down, in consultation with the Central Board and having regard to the standards for the quality of air laid down by the Central Board, standards for emission of air pollutants into the atmosphere from industrial plants and automobiles or for the discharge of any air pollutant into the atmosphere from any other source whatsoever not being a ship or an aircraft: Provided that different standards for emission may be laid down under this clause for different industrial plants having regard to the quantity and composition of emission of air pollutants into the atmosphere from such industrial plants;

(h) to advise the State Government with respect to the suitability of any premises or location for carrying on any industry which is likely to cause air pollution;

(i) to perform such other functions as may be prescribed or as may, from time to time, be entrusted to it by the Central Board or the State Government;

(j) to do such other things and to perform such other acts as it may think necessary for the proper discharge of its functions and generally for the purpose of carrying into effect the purposes of this Act.

(2) A State Board may establish or recognise a laboratory or laboratories to enable the State Board to perform its functions under this section efficiently.

10 Sections 25, 27 of Water Act and Section 21 of Air Act

11 Section 20 of Water Act and Section 25 of Air Act

12 Section 23 of Water Act and Section 24 of Air Act

13 Section 21 of Water Act and Section 26 of Air Act

14 Section 31A of the Air Act states –

***31A. Power to give directions**.—Notwithstanding anything contained in any other law, but subject to the provisions of this Act, and to any directions that the Central Government may give in this behalf, a Board may, in the exercise of its powers and performance of its functions under this Act, issue any directions in writing to any person, officer or authority, and such person, officer or authority shall be bound to comply with such directions.*

Explanation.—For the avoidance of doubts, it is hereby declared that the power to issue directions under this section includes the power to direct—

(a) the closure, prohibition or regulation of any industry, operation or process; or

(b) the stoppage or regulation of supply of electricity, water or any other service.

two provisions are identically worded. Section 33A of the Water Act is as under;

> ***"Section 33A. Power to give directions.—****Notwithstanding anything contained in any other law, but subject to the provisions of this Act, and to any directions that the Central Government may give in this behalf, a Board may, in the exercise of its powers and performance of its functions under this Act, issue any directions in writing to any person, officer or authority, and such person, officer or authority shall be bound to comply with such directions.*
>
> *Explanation.—For the avoidance of doubts, it is hereby declared that the power to issue directions under this section includes the power to direct—*
>
> *(a) the closure, prohibition or regulation of any industry, operation or process; or*
>
> *(b) the stoppage or regulation of supply of electricity, water or any other service."*

12. The directions contemplated under Sections 33A and 31A of the Water and Air Acts must be in furtherance of the powers and functions of the Boards and they must be in writing. These provisions, declares that the power to issue directions will include the power to direct closure, prohibition or regulation of any industry, operation or process. Further, this power extends to directing the stoppage or regulation of supply of electricity, water or any other service. The power to give directions has been worded broadly, and it allows the Boards significant flexibility in deciding the nature of directions. The legislative intention of granting these powers through the 1988 amendment can be inferred from the Statement of Objects and Reasons of the Water Act, which reads as follows –

> *"2. The Water Act is implemented by the Central and State Governments and the Central and State Pollution Control Boards. Over the past few years, the implementing agencies have experienced some more administrative and practical difficulties in effectively implementing the provisions of the Act. The ways and means to remove these difficulties have been thoroughly examined in consultation*

with the implementing agencies. Taking into account the views expressed, it is proposed to amend certain provisions of the Act in order to remove such difficulties….

3. The Bill, inter alia, seeks to make the following amendments in the Act, namely:—

….

(iv) in order to effectively prevent water pollution, the penal provisions of the Act are proposed to be made stricter and bring them at par with the punishments prescribed in the Air (Prevention and Control of Pollution) Act, 1981 as amended by Act 47 of 1987;

….

(vi) it is proposed to empower the Boards to give directions to any person, officer or authority including the power to direct closure or regulation of offending industry, operation or process or stoppage or regulation of supply of services such as water and electricity;"

13. Similar objective is expressed for the amendment introduced in the Air Act. [15]

14. An appeal against directions issued under Section 33A of the Water Act by the State Board can be filed before the National Green Tribunal under Section 33B, introduced in 2010[16]. Unlike the

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15 Statement of Objects and Reasons for Air Act states, *"2. The Air Act is implemented by the Central and State Governments and the Central and State Boards. Over the past few years, the implementing agencies have experienced some administrative and practical difficulties in effectively implementing the provisions of this Act and have brought these to the notice of Government. The ways and means to remove these difficulties have been thoroughly examined in consultation with the concerned Central Government departments, the State Governments and the Central and State Boards. Taking into account the views expressed, the Government have decided to make certain amendments to the Act in order to remove such difficulties. 3. The Bill, inter alia, seeks to make the following amendments in the Act, namely—*

….

iv) In order to prevent effectively air pollution, the punishments provided in the Act are proposed to be made stricter.

….

(vii) It is proposed to empower the Boards to give directions to any person, officer or authority including the power to direct closure or regulation of offending establishments or stoppage or regulation of supply of services such as, water and electricity. (viii) It is proposed to empower the Boards to approach courts to obtain orders restraining any person from causing air pollution."

16 Act 19 of 2010.

Water Act there is no specific Appeal provision against directions issued under Section 31A of the Air Act. This asymmetry must be addressed legislatively.

15. Offences and penalties under the two Acts, and the related procedures, are covered in Chapter VII of the Water Act and Chapter VI of the Air Act. These chapters have undergone significant and substantial amendments. Prior to the amendments, the two Acts stipulated penalties in the form of imprisonment, monetary fine or both for offences under the statute. Courts could only take cognizance of an offence if a complaint was filed by a Board or any officer authorized by it, or by any person who had given notice of the alleged offence and of his intention to make a complaint. No court inferior to that of a Metropolitan Magistrate or a Judicial magistrate of the first class can try an offence punishable under the two Acts. Be that as it may, for the present purpose we have to examine and interpret Sections 33A and 31A of the Water and Air Acts.

9. Interpretation of and for Environmental Institutions.

16. Our constitutionalism bears the hallmark of an expansive interpretation of fundamental rights. But such creative expansion is only a job half done if the depth of the remedies, consequent upon infringement, remain shallow. In other words, remedial jurisprudence must keep pace with expanding rights and regulatory challenges. It is not sufficient that courts adopt injunctory, mandatory and compensatory remedies, but our regulators also must be empowered in that regard. However, the legislative grammar must be elastic for us to infuse the regulators with power to fashion different remedies. This infusion must also be tempered‡ with the necessary guidelines and parameters of exercise of remedial powers, failing which such infusion would aid arbitrary use. Our firm view is that remedial powers or restitutionary directives are a necessary concomitant of both the fundamental rights of citizens who suffer environmental wrongs and an equal concomitant of the duties of a statutory regulator, which are informed by Part IV A of the constitution. To that extent, the functions and powers of a regulator must be inspired by the obligation in Part IV A and Article 48 A. The State's *'endeavour to protect and improve the environment'* will be partial, if it does not encompass a duty to restitute.

‡ Ed. Note: "tempered" instead of "tampered" in terms of subsequent corrigendum.

17. Of all the duties imposed under Article 51A, the obligation to conserve and protect water and air, is perhaps the most significant, amidst our climate change crisis. The Water Act and the Air Act institutionalised all efforts and actions that need to be taken to protect air that we breathe and water that we consume by creating the Pollution Control Boards. These Boards functioning as our environment regulators are expected to act with *institutional foresight* by evolving necessary policy perspectives and action plans. Working with perpetual seal and succession, they are to develop and retain *institutional memory* so that they can act on the basis of the experience, data and information that they would have gathered and processed. *Institutional expertise* is critical, and these bodies are to employ human resource which have domain expertise and talent. These bodies are intended to maintain *institutional integrity* by taking independent and objective decisions without governmental or industrial control. These values flow naturally if there is *institutional transparency and accountability*. It is in this perspective that we need to interpret Section 33A of the Water Act and 31A of the Air Act.

10. Duty to Restitute v. Power to Punish and Penalise.

18. There is a distinction between an action for environmental damages for restitution or remediation and imposition of penalties or fines levied at the culmination of a punitive action. This Court in *M.C. Mehta* (supra), while referring to the provisions of the Water Act, Air Act and the Environment Protection Act observed –

> *"17. All the three Acts, referred to above, also contemplate the taking of the cognizance of the offences by the court. Thus, a person guilty of contravention of provisions of any of the three Acts which constitutes an offence has to be prosecuted for such offence and in case the offence is found proved then alone can he be punished with imprisonment and fine or both. The sine qua non for punishment of imprisonment and fine is a fair trial in a competent court. The punishment of imprisonment or fine can be imposed only after the person is found guilty."*
>
> *"24. Pollution is a civil wrong. By its very nature, it is a tort committed against the community as a whole. A person, therefore, who is guilty of causing pollution has to pay damages (compensation) for restoration of the environment*

and ecology. He has also to pay damages to those who have suffered loss on account of the act of the offender.…"

19. Therefore, Indian law distinguishes between the imposition of a monetary penalty or fine, which constitutes punitive action following a determination of guilt after adherence to the statutorily prescribed procedure, and the payment of damages for restitution or remediation as compensatory relief.

20. In this context, it is important to turn to one of the key principles of Indian environmental law – the *Polluter Pays* principle. This principle has been a part of Indian jurisprudence since 1996. In *Indian Council for Enviro-Legal Action* v. *Union of India*[17], this Court held that according to the *Polluter Pays* principle the responsibility for repairing the damage is that of the offending industry. The Court further held that the powers of the Central Government to issue directions under Section 5 read with Section 3 of the Environment Protection Act include the power to impose costs for remedial measures -

> *"60. … Section 3 of the Environment (Protection) Act, 1986 expressly empowers the Central Government (or its delegate, as the case may be) to "take all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of environment…". Section 5 clothes the Central Government (or its delegate) with the power to issue directions for achieving the objects of the Act. Read with the wide definition of 'environment' in Section 2(a), Sections 3 and 5 clothe the Central Government with all such powers as are "necessary or expedient for the purpose of protecting and improving the quality of the environment". The Central Government is empowered to take all measures and issue all such directions as are called for for the above purpose. In the present case, the said powers will include giving directions for the removal of sludge, for undertaking remedial measures and also the power to impose the cost of remedial measures on the offending industry and utilise the amount so recovered for carrying out remedial measures. This Court can certainly give directions to the*

17 (1996) 3 SCC 212

> *Central Government/its delegate to take all such measures, if in a given case this Court finds that such directions are warranted. …*
>
> *67. The question of liability of the respondents to defray the costs of remedial measures can also be looked into from another angle, which has now come to be accepted universally as a sound principle, viz., the "Polluter Pays" principle. …Thus, according to this principle, the responsibility for repairing the damage is that of the offending industry. Sections 3 and 5 empower the Central Government to give directions and take measures for giving effect to this principle. In all the circumstances of the case, we think it appropriate that the task of determining the amount required for carrying out the remedial measures, its recovery/realisation and the task of undertaking the remedial measures is placed upon the Central Government in the light of the provisions of the Environment (Protection) Act, 1986. It is, of course, open to the Central Government to take the help and assistance of State Government, RPCB or such other agency or authority, as they think fit."*
>
> (emphasis added)

21. Subsequently, the Court in *Vellore Citizens' Welfare Forum* v. *Union of India*[18], has held that the liability for environmental damage includes both a compensatory aspect and a restorative or remedial aspect-

> *"12. … The "Polluter Pays Principle" as interpreted by this Court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. Remediation of the damaged environment is part of the process of "Sustainable Development" and as such the polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology."*
>
> (emphasis added)

18 (1996) 5 SCC 647

22. Application of the *Polluter Pays* principle not only includes payment for restoring the damaged environment, taking remedial action to deal with the damage and compensating for the direct harm caused, but also for avoiding pollution. In *Research Foundation for Science (18)* v. *Union of India*[19], this Court held -

> *"29. The polluter-pays principle basically means that the producer of goods or other items should be responsible for the cost of preventing or dealing with any pollution that the process causes. This includes environmental cost as well as direct cost to the people or property, it also covers cost incurred in avoiding pollution and not just those related to remedying any damage. It will include full environmental cost and not just those which are immediately tangible. The principle also does not mean that the polluter can pollute and pay for it. The nature and extent of cost and the circumstances in which the principle will apply may differ from case to case."*
>
> (emphasis added)

23. The Court further held that the observations of the Court in in *Deepak Nitrite Ltd*. v. *State of Gujarat*[20] that *"mere violation of the law in not observing the norms would result in degradation of environment would not be correct"* were confined to the facts of that case. The Court clarified that the actual degradation of the environment is not a necessary condition for the application of polluter pays principle, as long as the offending activities have the potential of degrading the environment -

> *"30…The decision also cannot be said to have laid down a proposition that in the absence of actual degradation of environment by the offending activities, the payment for repair on application of the polluter-pays principle cannot be ordered. The said case is not relevant for considering cases like the present one where offending activities have the potential of degrading the environment. In any case, in the present case, the point simply is about the payments to be*

19 (2005) 13 SCC 186.

20 (2004) 6 SCC 402

made for the expenditure to be incurred for the destruction of imported hazardous waste and amount spent for conducting tests for determining whether it is such a waste or not…"

(emphasis added)

24. The distinction between a punitive action and a direction to pay environmental damages was made by the National Green Tribunal in *State Pollution Control Board, Odisha* v *M/s Swastik Ispat Pvt Ltd and Others*[21]. The Tribunal in this case was considering the legality of forfeiture of bank guarantees in case a defaulting industry did not comply with the regulatory conditions within the stipulated timeframe. The Tribunal expressly considered the opinion of the High Court in the impugned judgment before us today and held -

"45. It is evident from the above facts and the reasoning that there was actual levy of penalty or damages by the DPCC and it was in consequence of such imposition of penalty/damages that the Units were called upon to furnish bank guarantees for granting of consent. In other words, bank guarantee was required to be furnished in furtherance to the imposition of a penalty or damages in that case. It was not an act de hors the imposition of penalty and had the element of punitive action. In the present case, it is not a consequence of a punitive or penal action but is in exercise of the powers vested in the Board in relation to recalling the conditions of consent and ensuring their implementation while also making compensatory provision for remedying the apprehended wrong to the environment. In the cases in hand, the Board has not imposed any penalty upon the units but has granted consent to them on certain conditions, none of which is punitive. They squarely fall within the power of the Board to prevent and control pollution in consonance with the scheme of the Acts concerned. Thus, on facts, the judgments of the High Court in Splendor (supra) do not have any application to the present case. In any case, we are of the considered view that asking for a bank

21 2014 SCC OnLine NGT 13.

> *guarantee as an interim measure for due performance of the conditions of the consent order being compensatory in nature, is not punitive.*
>
> *46. We have already noticed above that there is a clear distinction between a penal and a compensatory provision. In such matters, the paramount question that would normally fall for determination before a court or tribunal would be whether the action contemplated is penal or compensatory. This issue shall have to be decided with reference to the facts of the case, the provisions of the law applicable and the intent of the authority concerned. Once it falls in the 'compensatory' field, then it will necessarily be beyond the purview of penalty…."*
>
> (emphasis added)

25. In *Swastik Ispat,* the Green Tribunal correctly interpreted Sections 33A and 31A of the Water and Air Acts. The judgment of the High Court in *Splendor* had not yet been taken up or considered by this Court at that time, the Tribunal had to distinguish the facts of *Splendor* to arrive at its own conclusion. In view of our reasoning and interpretation of Sections 33A and 31A of the Water and Air Acts, we have no hesitation to hold that the Green Tribunal is correct in its approach.

26. More recently, in *T.N. Godavarman Thirumulpad, In Re* v. *Union of India*[22], this Court while considering the issue of illegal construction in the Corbett Tiger Reserve drew the distinction between action against persons violating the law and measures for restoration of the environmental damage. The Court held -

> *"173. … However, the principle of restoration of damaged ecosystem would require the States to promote the recovery of threatened species. We are of the considered view that the States would be required to take steps for the identification and effective implementation of active restoration measures that are localised to the particular ecosystem that was damaged. The focus has to be on*

22 (2025) 2 SCC 641

restoration of the ecosystem as close and similar as possible to the specific one that was damaged.

175. We find that, bringing the culprits to face the proceedings is a different matter and restoration of the damage already done is a different matter. We are of the considered view that the State cannot run away from its responsibilities to restore the damage done to the forest. The State, apart from preventing such acts in the future, should take immediate steps for restoration of the damage already done; undertake an exercise for determining the valuation of the damage done and recover it from the persons found responsible for causing such a damage."

(emphasis added)

11. Principles.

27. Based on a review of precedents on this issue, the following legal position emerges –

I. There is a distinction between a direction for payment of restitutionary and compensatory damages as a remedial measure for environmental damage or as an *ex-ante* measure towards potential environmental damage on the one hand; and a punitive action of fine or imprisonment for violations under Chapters VII of the Water Act and VI of the Air Act on the other hand.

II. If directions in furtherance of restitutionary and compensatory measures are issued, these are not to be considered as punitive in nature. Punitive action can only be taken through the procedure prescribed in the statute for example under chapters VII and VI of the Water and Air Acts respectively.

III. Indian environmental law has assimilated[23] the principle of *Polluter Pays* and there is also a statutory incorporation of this principle in our laws.[24] The invocation of this principle is

23 *Indian Council for Enviro-Legal Action* (supra n.12); *Vellore* (supra n 13).

24 ***Section 20. Tribunal to apply certain principles-*** *The Tribunal shall, while passing any order or decision or award, apply the principles of sustainable development, the precautionary principle and the polluter pays principle.*

triggered in the situations[25]; i) when an established threshold or prescribed requirement is exceeded or breached, and it does result in environmental damage, ii) when an established threshold or prescribed requirement is not exceeded or breached, nevertheless the act in question results in environmental damage and also iii) when a potential risk or a likely adverse impact to the environment is anticipated, irrespective of whether or not prescribed thresholds or requirements are exceeded or breached.

IV. Environmental regulators have a compelling duty to adopt and apply preventive measures irrespective of actual environmental damage. *Ex-ante* action shall be taken by these regulators and for this purpose a certain measure in exercise of powers under Sections 33A and 31A of the Water and Air Acts is necessary.

V. The powers of the Boards under Sections 33A and 31A of the Water and Air Acts are identical to that of Section 5 of the Environment Protection Act. Under Section 5, the Central Government or its delegate has the power to issue directions to the polluting industry to pay certain amounts and utilise the said fund for carrying out remedial measures. The Boards are empowered to take similar actions under Sections 33A and 31A of the Acts.

28. Having considered the principles that govern our environmental laws and on interpretation of Sections 33A and 31A of the Water and Air Acts, we are of the opinion that that the Division Bench of the High Court was not correct in restrictively reading powers of the Boards. We are of the opinion that these regulators in exercise of these powers can impose and collect, as restitutionary or compensatory damages fixed sum of monies or require furnishing bank guarantees as an *ex-ante* measure towards potential or actual environmental damage.

29. There is no doubt that Section 33A of the Water Act and Section 31A of the Air Act give the State Boards powers to issue necessary directions for environmental restoration, remediation and compensation and for the payment of costs for the same. The National Green Tribunal's judgment in *Swastik Ispat* correctly identified the Boards powers to issue directions for payment of environmental damages under Section

25 Loveleen Bhullar, 'The Polluter Pays Principle: Scope and Limits or Judicial Decisions'; in Shibani Ghosh (ed.), *Indian Environmental Law* (Orient BlackSwan 2019).

33A of the Water Act and the Section 31A of the Air Act. A restrictive interpretation which fails to differentiate between environmental damages and punitive action significantly encumbers the Boards ability to discharge its duties.

30. The Board's powers under Section 33A of the Water Act and Section 31A of the Air Act have to be read in light of the legal position on the application of *Polluter Pays* principle as formulated and explained. This means that State Board cannot impose environmental damages in case of every contravention or offence under the Water Act and Air Act. It is only when the State Board has made a determination that some form of environmental damage or harm has been caused by the erring entity, or the same is so imminent, that the State Board must initiate action under Section 33A of the Water Act and Section 31A of the Air Act.

31. At this stage, we must also take note of the recent 2024 amendments[26] to the Water and Air Acts. Two major changes relevant for our consideration are that of decriminalisation[27] and introduction of the office of "Adjudicatory Officer"[28]. Even after the amendments, in our opinion, there is no conflict between the powers of the State Boards to direct payment of environmental damages under Sections 33A and 31A of the Water and Air Acts and the powers of the Adjudicating Officer to impose penalties under Chapter VII of the Water Act and Chapter VI of the Air Act. The decriminalization of offences under these Chapters has not removed the punitive

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26 The Water (Prevention and Control of Pollution) Amendment Act, 2024, Jan Vishwas (Amendment of Provisions) Act, 2023.

27 Section 41 in the erstwhile Water Act has been substituted by sections 41 and 41A, whereby contravention of directions issued under section 20 (for obtaining information), 32 (for imposing emergency measures in case of pollution), 33 (for restraining apprehended pollution) or 33A would now be punishable by penalty alone; thereby replacing the earlier penal framework comprising of imprisonment *and* fine. Similar amendments done for section 42 (penalty for certain acts), section 43 for contravention of directions under section 24 (prohibiting use of stream or well), section 44 (prohibiting alteration of meter, etc.), and section 45A (residuary). Correspondingly, under the Air Act criminal liability under section 37 for contravention of directions under section 22 (restricting emission beyond standards) or section 31A has been restricted to fine alone. Similar amendments have been brought in section 38 and 39 (residuary). Punishment for imprisonment has been retained only for violation of section 21 and failure to pay penalty or additional penalty under section 39D.

28 In the Water Act, section 45B puts in place a new office by the title of 'Adjudicating Officer', who would be an officer not below the rank of Joint Secretary to the Centre or Secretary to the State, appointed by the Central Government. Adjudicating Officer is empowered to inquire and impose penalties under sections 41, 41A, 42, 43, 44, 45A and 48. Appeal against such imposition lies before the National Green Tribunal as per section 45C. The Adjudicating Officer is further empowered to file a complaint for cognizance under section 49. Corresponding additions have been made under the Air Act as well under sections 39A (Adjudicating Officer), 39B (Appeal to NGT) and 43 (Cognizance of offences).

nature of actions that can be taken under them. There remains a clear distinction between the nature of directions that the State Boards can issue under Sections 33A and 31A of the Water and Air Acts for payment of environmental damage and the determination by Adjudicating Officers. The former is compensatory in nature and will be resorted to when remedial measures are being undertaken to restore the degraded environment or pollution caused. The latter is a penalty for an offence under the law and is imposed with the objective of punishing the offender. This penalty collected here will not be specifically directed towards the restoration of the degraded environment (for instance, to decontaminate a pond that has been polluted due to discharge of untreated sewage). It will be deposited in the Environmental Protection Fund that is to be set up under Section 16 of the Environment (Protection) Act. According to Section 16(3) of the EP Act, the Fund shall be used for, (a) the promotion of awareness, education and research for the protection of environment; (b) the expenses for achieving the objects and for purposes of the Air (Prevention and Control of Pollution) Act, 1981(14 of 1981) and under this Act; and (c) such other purposes, as may be prescribed.

A. Board's Responsibility to Choose Appropriate Course of Action.

32. Given their broad statutory mandate and the significant duty towards public health and environmental protection the Boards must have the power and distinction to decide the appropriate action against a polluting entity. It is essential that the Boards function effectively and efficiently by adopting such measures as is necessary in a given situation. The Boards can decide whether a polluting entity needs to be punished by imposition of penalty or if the situation demands immediate restoration of the environmental damage by the polluter or both.

B. Powers Must Be Guided by Transparency and Non-Arbitrariness.

33. While we hold that the Boards have the power to direct the payment of environmental damages, we make it clear that this power must always be guided by two overarching principles. First, that the power cannot be exercised in an arbitrary manner; and second, the process of exercising this power must be infused with transparency.

34. This Court has underscored the importance of strong institutional frameworks in environmental governance that are effective, accountable and transparent. In *Bengaluru Development Authority* v. *Sudhakar Hegde*[29], this Court held -

> *"95. The protection of the environment is premised not only on the active role of courts, but also on robust institutional frameworks within which every stakeholder complies with its duty to ensure sustainable development. A framework of environmental governance committed to the rule of law requires a regime which has effective, accountable and transparent institutions. Equally important is responsive, inclusive, participatory and representative decision-making. Environmental governance is founded on the rule of law and emerges from the values of our Constitution. Where the health of the environment is key to preserving the right to life as a constitutionally recognised value under Article 21 of the Constitution, proper structures for environmental decision-making find expression in the guarantee against arbitrary action and the affirmative duty of fair treatment under Article 14 of the Constitution. Sustainable development is premised not merely on the redressal of the failure of democratic institutions in the protection of the environment, but ensuring that such failures do not take place."*
>
> (emphasis added)

35. To ensure that the Boards impose restitutionary and the compensatory environmental damages in a fair transparent, non-arbitrary manner, with procedural certainty, necessary subordinate legislation in the form of rules and regulations must be notified. This shall include methods by which environmental damage is determined, and the consequent quantum of damages are assessed. They may also incorporate certain basic principles of natural justice for fairness in action. At present environmental damages are being levied by the Boards on the basis of certain guidelines issued by the Central

29 (2020) 15 SCC 63

Pollution Control Board in its document "*General framework for imposing environmental damage compensation*" issue in December, 2022. These guidelines seem to have been issued pursuant to the directions of the NGT.[30] It is important that these guidelines are reviewed thoroughly and issued in the form of Rules and Regulations. This will enable declaration of a law that applies and ensures its recognition and easy implementation.

36. These Rules must also create enabling framework for citizens to file complaints about environmental damage. Public participation in environmental protection has assumed great importance with climate change threatening to drastically disrupt our way of living. Boards, being the first line of defence against polluting activities, must provide easy accessibility and encourage public participation in their function and decision making.

37. While we have reversed the decision of the High Court on the principle of law and hold that the environmental regulators, the Pollution Control Boards, can impose and collect as restitutionary and compensatory damages fixed sums of monies or require furnishing bank guarantees as an *ex-ante* measure towards potential environmental damage in exercise of powers under Sections 33A and 31A of the Water and Air Acts, we issue the following consequential directions.

38. In view of the fact that the show cause notices in these cases relate to the year 2006 and those show cause notices were set-aside by the Single as well as by the Division Benches of the High Court, we are of the opinion that no purpose will be served in reviving the said show cause notices at this point of time. In the facts and circumstances of the case while we allow the appeal on the principle of law there shall not be any consequential direction for reviving the show cause notices which have been set-aside concurrently by the Single as well as by the Division Bench of the High Court. If certain amounts have been collected on the basis of the said show cause notices they shall be returned by DPCC within a period of six weeks from the date of this order, and if amounts are not deposited or collected the appellant, DPCC shall not take any further action.

30 Pursuant to the NGT in its order in O.A. No. 606/2018 dated 24.04.2019.

39. For the reasons stated above:

(a) we allow these appeals and set aside the judgement and order dated 23.01.2012, passed by the Division Bench of the High Court of Delhi to the extent of declaration of law but direct that the show cause notices that have been set aside by the High Court shall not be revived.

(b) we direct that the Pollution Control Boards can impose and collect as restitutionary and compensatory damages fixed sums of monies or require furnishing bank guarantees as an *ex-ante* measure towards potential environmental damage in exercise of powers under Sections 33A and 31A of the Water and Air Acts.

(c) it is further directed that the power to impose or collect restitutionary or compensatory damages or the requirement to furnish bank guarantees as an *ex-ante* measure under Sections 33A and 31A of the Water and Air Acts shall be enforced only after detailing the principle and procedure incorporating basic principles of natural justice in the subordinate legislation.

Result of the case: Appeals allowed.

†*Headnotes prepared by:* Ankit Gyan

[2025] 8 S.C.R. 395 : 2025 INSC 929

Deepak Kumar Sahu
v.
State of Chhattisgarh

(Criminal Appeal No. 3352 of 2025)

05 August 2025

[Sudhanshu Dhulia and N.V. Anjaria,* JJ.]

Issue for Consideration

The appellant came to be convicted and sentenced for the offences punishable u/ss.450 and 376(2) of the IPC and s.4 of the Protection of Children from Sexual Offences Act, 2012 [POCSO Act]. Whether the High Court was justified in upholding and confirming the conviction and sentence awarded to the appellant-convict, by the trial court.

Headnotes†

Penal Code, 1860 – ss. 450, 376(2) – Protection of Children from Sexual Offences Act, 2012 – s.4 – Allegation that appellant-accused entered the house of victim aged about 15 years and sent her brother aged about 11 years to bring a pack of chewing tobacco – Once the brother left the house, the accused forced the victim to lie on the cot lying in the porch of the house, gagged her mouth and then committed sexual intercourse – Trial Court convicted accused u/ss.450, 376(2) of IPC and s.4 of the POCSO Act – The High Court upheld and confirm the conviction – Correctness:

Held: 1. The High Court was wholly justified in upholding and confirming the conviction and sentence awarded to the appellant-convict, by the trial court. [Para 6.3]

2. Evaluating the total evidence in light of the principles of law, evidentiary appreciation and application, with the evidence of the victim at the forefront, it has to be stated that victim's evidence was entirely probable, natural and trustworthy who with lucidity narrated the whole incident about commission of offence against her by the accused – There exists no reason, much less compelling reasons, to disbelieve and discard her testimony – Her brother's testimony as a child witness was rationally and logically supportive

* Author

of what the prosecutrix narrated – The factum that the cot was in the porch and the victim was forced to lay there by the accused could also be called out from the evidence. [Para 6]

3. There was a consistency lent – The conduct of the victim, soon after the incident was quite natural, as she went to cousin sister's neighbouring house and through her, informed cousin brother and her parents who were away. [Para 6.1]

4. The crux of the incident, of accused overpowering the victim and committing forcible act by forcing her to the bed, could be clearly established from the totality of evidence adduced by the prosecution. [Para 6.2]

Penal Code, 1860 – ss.450, 376(2) – Protection of Children from Sexual Offences Act, 2012 – s.4 – Appellant-accused convicted by the trial Court u/ss.450, 376(2) of IPC and s.4 of the POCSO Act – It was contended by the accused that non-availability of emphatic medical evidence about occurrence of physical intercourse and absence of external injury marks make it imperative to doubt and disregard the evidence of the prosecutrix:

Held: 1. The contention that non-availability of emphatic medical evidence about occurrence of physical intercourse and absence of external injury marks make it imperative to doubt and disregard the evidence of the prosecutrix, could hardly be countenanced. [Para 5.4.1]

2. The crux of the incident, of accused overpowering the victim and committing forcible act by forcing her to the bed, could be clearly established from the totality of evidence adduced by the prosecution – Merely because the medical evidence was less corroborative and less supportive or absent in details or indictive of no external injuries – It in no way weakened the prosecution case – Sole testimony of the victim was a strong evidence to rely on along with available attendant evidence. [Para 6.2]

Case Law Cited

State of Punjab v. Gurmit Singh **[1996] 1 SCR 532 : (1996) 2 SCC 384;** *Lok Mal alias Loku v. State of Uttar Pradesh* **(2025) 4 SCC 470;** *State of Himachal Pradesh v. Manga Singh* **[2018] 14 SCR 904 : (2019) 16 SCC 759 – relied on.**

Wahid Khan v. State of Madhya Pradesh **[2009] 15 SCR 1207 : (2010) 2 SCC 9;** *Raju alias Umakant v. State of Madhya Pradesh,* **2025 SCC OnLine SC 997;** *State of Maharashtra v. Chandraprakash Kewalchand Jain* **[1990] 1 SCR 115 : (1990) 1 SCC 550;** *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat* **[1983] 3 SCR 280 : (1983) 3 SCC 217;** *State of Himachal Pradesh v. Lekh Raj* **[1999] Supp. 4 SCR 286 : (2001) 1 SCC 247;** *Ousu Varghese v. State of Kerala* **(1974) 3 SCC 767;** *Jagdish v. State of Madhya Pradesh* **(1981) SCC (Crl.) 676;** *State of Rajasthan v. N.K. The Accused* **[2000] 2 SCR 818 : (2000) 5 SCC 30 – referred to.**

List of Acts

Protection of Children from Sexual Offences Act, 2012; Penal Code, 1860; Code of Criminal Procedure, 1973.

List of Keywords

Sexual intercourse; Absence of external injury marks; Evidence of the prosecutrix; Sole testimony of the victim.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 3352 of 2025

From the Judgment and Order dated 22.09.2023 of the High Court of Chhatisgarh at Bilaspur in CRA No. 34 of 2020

Appearances for Parties

Advs. for the Appellant:
Manish Kumar Saran, Ms. Ananya Tyagi, Sidhant Sharma.

Judgment / Order of the Supreme Court

Judgment

N.V. Anjaria, J.

Delay condoned. Leave granted.

2. Preferred by the appellant-accused, the present appeal addresses the challenge to judgment and order 22nd September, 2023 passed by the High Court of Chhattisgarh, at Bilaspur, in CRA No. 34 of

2020 whereby the High Court continued the judgement and order of the Special Judge (SC/ST Court), Rajnandgaon, (CG) in Special Criminal (T) Case No. 10 of 2018, convicting and sentencing the appellant.

2.1 The appellant came to be convicted for the offence punishable under Section 450 of the Indian Penal Code, 1860 to undergo rigorous imprisonment for five years with fine of ₹5,00/-. He was also convicted for the offence punishable under Section 4 of the Protection of Children from Sexual Offences Act, 2012 [POCSO Act] and further came to be convicted for the offence under Section 376 (2), IPC to be sentenced to undergo rigorous imprisonment for ten years and with a fine of ₹1,000/-. The punishment for the offence under Section 376 (2), IPC, which was more severe to one provided for the offence under the POCSO Act therefore the same came to be awarded.

3. As per the prosecution case, the incident occurred on 03.04.2018 at about 12:00 Noon. On the fateful day, the victim aged about 15 years and her younger brother named Mayank, aged about 11 years were inside their house. The parents had gone to village Karate to attend the funeral as there was a death in their family. Finding the victim alone in the house, the appellant-accused entered the house. He thereafter sent the brother of the victim to bring a pack of chewing tobacco. Once the brother of the victim left the house, the accused forced the victim to lie on the cot lying in the porch of the house, gagged her mouth and then committed sexual intercourse. When the brother of the victim came back, seeing him, the appellant-accused fled away from the house, threatening the victim not to tell anything to anyone.

3.1 Soon after the incident the victim went to her cousin sister-Dushyantin's house in the neighbourhood and told about the incident. The brother of the Dushyantin named Khomendra, who had gone to village Kareti with the parents of the victim, was also informed through mobile phone about the incident. The parents of the victim rushed back to home. When they reached the home, the victim narrated the entire story of the incident to her parents. A police complaint was lodged, and FIR (Ex. P-08) was registered.

3.2 The victim was subjected to medical examination, statement under Section 164 of the Code of Criminal Procedure, 1978 was

recorded and a criminal case was registered for the offences as above, which was tried before the Special Court culminating into conviction and sentence of the appellant upheld by the High Court.

3.3 Amongst the witnesses examined by the prosecution in course of the trial, included the prosecutrix herself (PW-2), mother Alka (PW-1), father Mayaram (PW-3), brother Mayank (PW-9), Dushyantin (PW-14), Medical Officer, Dr. R.K. Pashi (PW-11), Dr. Kiran, Block Medical Officer (PW-17), Investigating Officer (PW-18).

4. Learned advocate Mr. Manish Kumar Saran, AOR appearing for the appellant assailed the judgment of the High Court primarily and mainly on three grounds, as highlighted from the memorandum of appeal and elaborated in course of submissions. It was contended that the prosecution had failed to establish its case beyond the reasonable doubt and that it was not possible to rule out the theory of innocence of the appellant. In this regard, it was submitted that the evidence of the prosecutrix could not be relied on and needed to be analysed with caution when the medical report was not categorical to confirm the offence of sexual assault and rape on the victim. Secondly, it was contended that there were contradiction between the evidence of the victim (PW-2) and her younger brother (PW-9). Lastly it was sought to be contended that the prosecution could not establish that the victim was minor on the date of commission of offence so as to attract the provisions of POCSO Act, 2012.

5. Dealing with the last contended aspect at the outset, that the prosecutrix was not shown to be minor, this contention is stated to be rejected. There was a cogent and reliable evidence in the nature of 8th standard marksheet of the victim which showed her date of birth to be 09.10.2002. The said marksheet was obtained by the investigating officer (PW-18) from the mother of the victim and he had testified about it in his evidence. The birth date of 09.10.2002 was also corroborated by the evidence of the mother of the victim (PW-1) and father of the victim (PW-3) who stated that her daughter was less than 16 years of age. The trial court rightly recorded that on the date of the incidence which was 03.04.2018, the age of the victim was 15 years 5 months 24 days.

5.1 Before proceeding further, the evidence brought on record and appreciated by the court of the first instance and considered

by the High Court may be briefly visited with. The prosecutrix herself deposed as PW-2. Her testimony weighed pivotal by the courts below, along with the other evidence, in establishing the commission of the offence.

5.2 Looking at the evidence of the Prosecutrix with some elaboration, she stated that on that particular day, she and her younger brother Mayank were at home and that she had been serving lunch to her brother, at which time the accused whom she could recognized, came inside the house, sent away her brother to buy some chewing tobacco. She stated that thereafter the accused forced her to lay down on the cot which was in the porch of the house and gagged her mouth. She stated that after disrobing her, the accused committed a misdeed and raped her.

5.2.1. The victim further stated that when her brother returned, seeing him, the accused ran away. After the incident, it was stated, she went to the house of her uncle in the neighbourhood and asked her sister named Dushyantin to give her mobile, using which she contacted cousin brother Khomendra who had gone with her parents at Kareti village, and informed him about what has happened. She stated that after her parents came back, she informed the all about the incident. They went to the police station to get the complaint registered. The report to the police was made her own signature.

5.2.2. In her cross-examination, the victim stated that her brother when questioned by her parents, told the parents that he saw both of them namely herself and the accused on the cot. She further stated that her father phoned his friend named Sudarshan Manikpuri, who also had come to the police station. She stated that at the police station, she was questioned orally.

5.3 Noticing the other evidence would not be out of place. The brother-Mayank (PW-09) who was aged about 11 years and a child witness, came to be examined. He was put to certain questions to ensure that he was capable of giving evidence. He stated that when he came back from the school on the day of happening, except her sister nobody was at home. He stated that accused-Deepak who saw him coming inside their house

sent him to buy chewing tobacco and when he came back with the tobacco he saw the accused gagging his sister's mouth with his hand and had laid her down on the cot. It was stated that his sister at that time was seen without clothes and that the accused was also noticed in a similar state, off the trouser.

5.3.1. The evidence of Dusyantin (PW-10) as well as that of Khomendra (PW-14) corroborated with what was testified by the victim that after the incident she has gone to the house of Dushyantin from where she using the mobile phone of Dushyantin, contacted and informed Khomendra, who in turn informed the parents of the victim about the incident and that knowing about the incident they had returned back.

5.3.2. The mother of the victim, Alka Barsagarhe, (PW-1) and the father Myaram Barsagarhe (PW-3) were consistent in deposing, *inter alia,* that the accused-Deepak Kumar lived in their neighbour and they knew him, that on the date of incident they had gone to village Kareti to attend a funeral and that son of the brother-in-law Khomendra had also accompanied them along with other relatives. PW-1 stated that her husband informed her about the incident, upon being informed by Khomendra who had received the phone call from her daughter. Both in their depositions narrated the incident which was told to them by the victim-daughter, that the accused came inside the house and gagged her to lay her down on the bed in the porch of the house and raped her. PW-1 stated in terms in her cross examination that her daughter told her that the accused had committed misdeed with her after removing her inner clothes.

5.3.3. The record of the medical examination obtained by the police post-complaint showed that there where no injury marks on the private parts of the victim. It was however, mentioned that the hymen was ruptured and healing up was indicated. The accused was found to be fully capable physically, mentally and medically of having sexual intercourse as was stated by PW – 11. He in his cross-examination have stated that if the bath is taken

and clean, the semen can be absent. PW-17, who was the Block Medical Officer has also stated that there where no external signs of injury marks or scratch marks on the genitals of the victim.

5.4 The evidence of the prosecutrix is highlighted in Para 5.2 to 5.2.2 above is not is only clear and consistent in the narration of the incident, and natural as well. The sequence of events including her approaching the house of Dushyantin and through her mobile contacting her parents by talking to Khomendra etc. which facts were duly corroborated from the evidence of PW-1 and PW-3 as well as PW -10 and PW-14. The facts relating to the actual commission of offence and attendant circumstances thereof matched in the testimony of prosecutrix (PW-2) and her brother, Mayank (PW-9).

5.4.1. An attentive look at the evidence of the prosecutrix (PW-2) would reveal that her testimony in narrating the incident and to describe what happened with her, is natural. Even when read independently, excepting the oral testimonies of others highlighted above, it inspires confidence and veracity for its clarity and consistency. The contention that non-availability of emphatic medical evidence about occurrence of physical intercourse and absence of external injury marks make it imperative to doubt and disregard the evidence of the prosecutrix, could hardly be countenanced.

5.5 In cases of offences committed under Section 376, IPC, when the story of the victim girl as told in the evidence is found credit-worthy, the apparent insufficiency of medical evidence pitted against acceptable testimony of the victim, the latter would prevail. In **State of Punjab vs. Gurmit Singh [(1996) 2 SCC 384]** it was observed:

> In the absence of injury on the private part of the prosecutrix, it cannot be concluded that the incident had not taken place or the sexual intercourse was committed with the consent of the prosecutrix. The prosecutrix being a small child of about nine years of age, there could be no question of her giving consent to sexual intercourse. The absence of injuries

on the private part of the prosecutrix can be of no consequence in the facts and circumstances of the present case.

(Para 16)

5.5.1. In **State of Himachal Pradesh vs. Manga Singh, [(2019) 16 SCC 759],** which was also a case in relation to the offence committed under Section 376, IPC where the prosecutrix was minor girl aged 9 years, she was staying in her aunt's house pursuing her studies. When the offence of rape was committed against her, she narrated the story to her teacher. The High Court gave the benefit of doubt to the accused on the ground, *inter alia,* that the medical evidence of the doctor was not conclusive to hold that the prosecutrix was subjected to sexual intercourse.

5.5.2. This Court observed that if the evidence of the victim does not suffer from any basic infirmities and the factor of probability does not render it unworthy evidence, the conviction could base solely on the evidence of the prosecutrix. It was further observed that as a general rule there is no reason to insist on the corroboration accept in certain cases, it was stated.

5.5.3. The medical evidence may not be available in which circumstance, solitary testimony of the prosecutrix could be sufficient to base the conviction.

> "The conviction can be sustained on the sole testimony of the prosecutrix, if it inspires confidence. The conviction can be based solely on the solitary evidence of the prosecutrix and no corroboration be required unless there are compelling reasons which necessitate the courts to insist for corroboration of her statement. Corroboration of the testimony of the prosecutrix is not a requirement of law; but a guidance of prudence under the given facts and circumstances. Minor contractions or

> small discrepancies should not be a ground for throwing the evidence of the prosecutrix."
>
> (Para 11)

5.5.4. It may be true that in the present case the evidence of the medical officer (PW-17) spoke about absence of external injury marks on the genitals of the victim. However, the proposition that the corroboration from the medical evidence is not sine qua non when the cogent evidence of the victim is available, was reiterated in a recent judgement of this Court in **Lok Mal alias Loku vs. State of Uttar Pradesh, [(2025) 4 SCC 470]**, observed:

> "Merely because in the medical evidence, there are no major injury marks, this merely cannot a be a reason to discard the otherwise reliable evidence of the prosecutrix. It is not necessary that in each and every case where rape is alleged there has to be an injury to the private parts of the victim and it depends on the facts and circumstances of a particular case. We reiterate that absence of injuries on the private parts of the victim is not always fatal to the case of the prosecution.
>
> (Para 4)

5.5.5. Akin to the facts of the present case, it was stated in **Lok Mal (supra)**, according to the version of the prosecutrix, that the accused overpowered her and pushed her to bed in spite of her resistance and gagged her mouth using a piece of cloth. Thus, considering this very aspect, it is possible that there were no major injury marks. The appellant made an attempt to raise the defence of false implication, however, he was unable to support his defence by any cogent evidence.

5.5.6. The credible and reliable evidence of prosecutrix could not be jettisoned for want of corroboration including the corroboration by medical report or evidence. The Court observed in ***Manga Singh (supra)*** that *"in absence of*

injury on the private part of the prosecutrix, it cannot be concluded that the incident had not taken place or the sexual intercourse was committed with the consent of the prosecutrix". It was stated that it is well settled that in the cases of rape it is not always necessary that external injury is to be found on the body of the victim.

5.5.7. In **Wahid Khan vs. State of Madhya Pradesh, [(2010) 2 SCC 9]**, this Court repelled the contention of the appellant that since the hymen of the prosecutrix was found to be intact, it cannot be said that an offence of rape has been committed. The Court refuse to accept such contention in light of the definition of offence of rape in Section 375 of the Indian Penal Code. It was further observed that it is the consistent view of this Court that even the slightest penetration is sufficient to make out an offence of rape.

5.6 It is an opt-reiterated dictum of law that in cases of rape, the testimony of the prosecutrix alone may be sufficient and sole evidence of the victim, when cogent and consistent, could be properly used to arrive at a finding of the guilt. In the **State of Himachal Pradesh vs. Manga Singh, (2019) 16 SCC 759**, this Court in terms stated that conviction can be rested on the testimony of the prosecutrix alone.

> The conviction can be sustained on the sole testimony of the prosecutrix, if it inspires confidence. The conviction can be based solely on the solitary evidence of the prosecutrix and no corroboration be required unless there are compelling reasons which necessitate the courts to insist for corroboration of her statement. Corroboration of the testimony of the prosecutrix is not a requirement of law, but a guidance of prudence under the given facts and circumstances. Minor contractions or small discrepancies should not be a ground for throwing the evidence of the prosecutrix."
>
> (Para 10)

5.6.1. It was further asserted that corroboration is not an essential requirement for conviction in the cases of rape.

> It is well settled by a catena of decisions of the Supreme Court that corroboration is not a sine qua non for conviction in a rape case. If the evidence of the victim does not suffer from any basic infirmity and the "probabilities factor" does not render it unworthy of credence. As a general rule, there is no reason to insist on corroboration except from medical evidence. However, having regard to the circumstances of the case, medical evidence may not be available. In such cases, solitary testimony of the prosecutrix would be sufficient to base the conviction, if it inspires the confidence of the court.
>
> (Para 11)

5.6.2. In **Gurmit Singh (supra)** it was observed to reiterate that in all cases, the corroboration to the statements made by the victim in her evidence could not be insisted upon as a rule of thumb:

> In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook.
>
> (Para 8)

5.6.3. It was asserted that only compelling reasons would justify rejection of testimony of a rape victim, and not otherwise:

> "….the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable.

> Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury….."
>
> (Para 8)

5.6.4. From a recent decision in **Raju alias Umakant vs. State of Madhya Pradesh, (2025 SCC OnLine SC 997)**, following observations could be noticed:

> "…….a woman or a girl subjected to sexual assault is not an accomplice but a victim of another person's lust and it will be improper and undesirable to test her evidence with suspicion. All that the law mandates is that the Court should be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of charge levelled by her and if after keeping that aspect in mind if the Court is thereafter satisfied that the evidence is trustworthy, there is nothing that can stop the Court from acting on the sole testimony of the prosecutrix. ***[See State of Rajasthan v. N.K. the Accused, (2000) 5 SCC 30, Rameshwar v. State of Rajasthan, 1951 SCC 1213, State of Maharashtra v. Chandraprakash Kewal Chand Jain, (1990) 1 SCC 550, State of Punjab v. Gurmit Singh, (1996) 2 SCC 384]"***
>
> **(Para 18)**

5.6.5. As early as in **State of Maharashtra vs. Chandraprakash Kewalchand Jain**, **[(1990) 1 SCC 550]**, this court observed that the prosecutrix of a sex offence cannot be put on a par with the accomplice, it was further observed that she is a victim of crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. It was further observed that evidence of a rape victim must receive the same weight as is attached to an injured in cases of physical violence. It was stated that there is no rule of

law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 of the Evidence Act which may require it to look for corroboration.

5.7 The last submission on behalf of the appellant that there were discrepancies in the evidences of victim (PW-2) and her brother (PW-11) has no room to stand, for, no material discrepancy could be noticed by the Court on comparison of the evidence of the two witnesses. Even otherwise, discrepancies in evidence which are of minor nature not going to the root have to be ignored. This Court observed in **Lok Mal alias Loku (supra)** that in criminal jurisprudence the principle is that the evidence of prosecutrix in case of rape is of the same value as that of an injured witness and conviction can be made on the basis of the sole testimony of the prosecutrix, while reiterating this.

5.7.1. The sensitive approach and greater inclination to rely on the creditworthy evidence of the victim is guided by the aspect as observed in **Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat, [(1983) 3 SCC 217]** it was observed thus:

> In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion?"
>
> (Para 9)

5.7.2. Insignificance of minor discrepancies was pointed out by this Court in **State of Himachal Pradesh vs. Lekh Raj, [(2001) 1 SCC 247]**. By referring to earlier judgment in **Ousu Varghese vs. State of Kerala, [(1974) 3 SCC 767**], it was observed that minor variation in the accounts of the witnesses are often the hallmark of the truth of their testimony and the discrepancies are found to be of minor character not going to the root of the prosecution story, they need not be given undue importance.

5.7.3. It was observed in **Jagdish vs. State of Madhya Pradesh, [(1981) SCC (Crl.) 676],** that mere congruity or consistency is not the sole test of truth of depositions. The discrepancies have to be such which could be characterized as material, which are not normal and of the nature not expected from the normal person.

5.8 There is no gainsaying that the Court should remain sensitive while dealing with the charges of sexual assault on the helpless woman. In **State of Rajasthan vs. N.K. The Accused**, **[(2000) 5 SCC 30],** this Court observed that *"an unmerited acquittal encourages wolves in the society being on the prowl for easy prey, more so when the victim of crime are helpless females."* Similar was expressed in **Gurmit Singh (supra)** that the rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. It was stated that the rape is not merely a physical assault and subsequently destructs the whole personality of the victim.

6. Evaluating the total evidence in light of the principles of law, evidentiary appreciation and application, with the evidence of the victim at the forefront, it has to be stated that victim's evidence was entirely probable, natural and trustworthy who with lucidity narrated the whole incident about commission of offence against her by the accused. There exists no reason, much less compelling reasons, to disbelieve and discard her testimony. Her brother Mayank's testimony as a child witness was rationally and logically supportive of what the prosecutrix narrated. The factum that the cot was in the porch and the victim was forced to lay there by the accused could also be called out from the evidence.

6.1 There was a consistency lent. The conduct of the victim, soon after the incident was quite natural, as she went to cousin sister's neighbouring house and through her, informed cousin brother and her parents who were away.

6.2 The crux of the incident, of accused overpowering the victim and committing forcible act by forcing her to the bed, could be clearly established from the totality of evidence adduced by the prosecution. Merely because the medical evidence was less corroborative and less supportive or absent in details or indictive

of no external injuries. It in no way weakened the prosecution case. Sole testimony of the victim was a strong evidence to rely on along with available attendant evidence.

6.3 The High Court was wholly justified in upholding and confirming the conviction and sentence awarded to the appellant-convict, by the trial court.

7. The Criminal Appeal is accordingly dismissed.

Result of the case: Appeal dismissed.

[†]*Headnotes prepared by:* Ankit Gyan

[2025] 8 S.C.R. 411 : 2025 INSC 932

Operation Asha
v.
Shelly Batra & Ors.

(Civil Appeal No. 10048 of 2025)

05 August 2025

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

Issue for Consideration

Issue arose as to whether the appellant Society registered under the Societies Registration Act, 1860 can be said to have fulfilled all the requirements stipulated u/s.92 CPC for the purpose of instituting a suit under the said provision.

Headnotes†

Code of Civil Procedure, 1908 – s.92 – Public charities – Requirements to be fulfilled for instituting a suit u/s.92 – Appellant society, is a not-for-profit society, registered under the 1860 Act – Respondent no.3-CEO of the appellant society, terminated the services/employment of respondent no.1-medical health professional and co-founder – After the removal of the respondent no.1 as a Board member, both the respondent no.1 and her mother-respondent no.2 instituted a suit u/s.92 for declaration, permanent and prohibitory injunction and, rendition of accounts alleging misconduct and breach of several society's by-laws by the respondent no.3 and respondent no.4 – Thereafter, respondent nos. 1 and 2 filed an application seeking leave to institute the civil suit against the appellant Society along with the respondent nos.3 to 10 – Single Judge granted leave to the respondent nos.1 and 2 for instituting a suit u/s.92 holding that all the elements and ingredients u/s.92 stood fulfilled – Appeal thereagainst dismissed by the Division Bench – Challenge to:

Held: Respondent nos.1 and 2 made several allegations of siphoning of funds by the respondent nos.3 and 4, for their own personal use, could be said to have *prima facie* satisfied the condition required to apply the doctrine of constructive trust to the present facts – If these allegations are found to have no substance or plainly false, the entire suit would fail – That would happen

* Author

also when the circumstances which required the imposition of a constructive trust do not exist/have not been proven – However, if found true, all the property diverted for the purpose of obtaining a pecuniary advantage would be subject to a constructive trust, the administration of which can be sought in a suit u/s.92 and the respondent nos.3 and 4 respectively would be considered to be 'constructive trustees'– While scrutinising whether the respondent nos.1 and 2 are persons interested in the trust and whether they are bringing the suit in a representative capacity, it is not just their designation or position which must be looked into or given importance to – While recognising that they have also sought some remedies related to personal grievances and the wrongful dismissal of the respondent no. 1 which could be seen as unduly magnifying an election dispute, there are several other allegations in the plaint which cannot simply be ignored and which give the respondent nos.1 and 2, a dual role/capacity, whilst they're agitating the matter u/s.92 – Larger background in which the suit is brought alludes to the existence of public interest also at play – Reliefs claimed by the plaintiffs, must fall within those reliefs outlined u/s.92(1) – Reliefs in the present plaint, insofar as they agitate private rights, cannot be granted under a suit of this nature – Suit filed before the Single Judge of the High Court to be commenced – Societies Registration Act, 1860. [Paras 137 (xv), (xvii), 138]

Code of Civil Procedure, 1908 – s.92 – Object and purpose – Conditions to be fulfilled for the applicability of s.92:

Held: Suit u/s.92 is a representative suit of a special nature since the action is instituted on behalf of the public beneficiaries and in public interest – Obtaining a 'grant of leave' from the court before the suit can be proceeded with, acts as a procedural and legislative safeguard in order to prevent public trusts from being subjected to undue harassment through frivolous suits being filed against them – However, at the stage of grant of leave, the court neither adjudicates upon the merits of the dispute nor confers any substantive rights upon the parties – Certain conditions or essential pre-requisites need to be fulfilled for a suit to be maintainable under this provision are-the trust in question must be created for public purposes of a charitable or religious nature; there must exist a breach of trust or a direction of the court must be necessary for the administration of the trust; and the relief claimed must be one or other of the reliefs as enumerated u/s.92(1) – To establish that a suit is not maintainable u/s.92, it is sufficient to prove that any one

of the conditions enumerated above has not been met, however, in order to assert its maintainability, all the said conditions need to be satisfied – Furthermore, special nature of the suit u/s.92 requires it to be filed fundamentally on behalf of the public for the vindication of public rights – Thus, courts must go beyond the reliefs and also give due regard to the object and purpose for which the suit is brought – True nature of the suit must be determined on a comprehensive understanding of the facts of the matter and a hard-and-fast rule cannot be made – Fact that certain private rights are being agitated must not be reason enough to ignore the other allegations made in the suit and dismiss it outrightly, provided the suit is instituted in a representative capacity – Issues involving the day-to-day management of the institution and grievances by members qua other members as regards the election of members or certain board decisions, must not be made in a suit of this nature, especially when such grievances can be redressed through other mechanisms or under a regular suit not falling within s.92. [Para 137(i), (ii), (xix), (xx)]

Societies Registration Act, 1860 – s.5 – Property of society how vested – Doctrine of constructive trust and its applicability to a society:

Held: Effect of registration under the 1860 Act would not be to automatically invest the properties of the society with the character of trust property – s.5 provides two options, or mechanisms through which a society can hold the property belonging to itself, one, in trustee(s) or, two, in the governing body of the society – While the society cannot be considered as an 'express trust', for an entity to be brought within the rigours of s.92, the plaintiff has the option of also contending that a 'constructive trust' exists in the circumstances and a breach of such a constructive trust has occurred or that the directions of the Court are necessary for the administration of such a constructive trust – Constructive trust, arises by operation of law, without regard to or irrespective of the intention of the parties to create a trust – It is imposed predominantly because the person holding the title to the property would profit by a wrong or would be unjustly enriched if they were permitted to keep the property – For this equitable doctrine to be applied, fiduciary must receive property or money which he cannot conscientiously retain – It is only thereafter that a constructive trust would be raised in favour of the beneficiaries on whose account the money was originally received – Factum that the fiduciary 'withheld' the property from its

rightful beneficiaries must be established – That such a fiduciary sought to misapply the property in contravention to the covenants that bound him, or sought to gain an advantage for himself, must be proved for a constructive trust to come into existence by the operation of law – That he further divested the said siphoned property/funds, would have to be proved in order to assert that the 'constructive trust' has additionally been breached – Even in the absence of such a further divestment, the directions of the court may still be necessary for the administration of the constructive trust. [Para 137 (vii), (xi), (xii), (xiii), (xiv)]

Case Law Cited

Ashok Kumar Gupta & Anr. v. Sitalaxmi Sahuwala Medical Trust & Ors. **[2020] 2 SCR 983 : (2020) 4 SCC 321;** *Shiromani Gurudwara Prabandhak Committee v. Som Nath Dass* **[2000] 2 SCR 705 : (2000) 4 SCC 146;** *Swami Paramatmanand Saraswati v. Ramji Tripathi* **[1975] 1 SCR 790 : (1974) 2 SCC 695;** *Ahman Adam Sait and Others v. M.E. Makhri and Others,* **1963 SCC OnLine SC 71;** *Shiromani Gurdwara Parbandhak Committee v. Mahant Harnam Singh* **[2003] Supp. 3 SCR 805 : (2003) 11 SCC 377;** *Vidyodaya Trust v. Mohan Prasad* **[2008] 3 SCR 569 : (2008) 4 SCC 115;** *Swami Shivshankargiri Chella Swami v. Satya Gyan Niketan* **[2017] 2 SCR 365 : (2017) 4 SCC 771;** *Bihar State Board Religious Trust, Patna v. Mahant Sri Biseshwar Das* **[1971] 3 SCR 680 : (1971) 1 SCC 574;** *Kuldip Chand and Another v. Advocate-General to Government of H.P. and Others* **[2003] 1 SCR 1195 : (2003) 5 SCC 46;** *Board of Trustees, Ayurvedic and Unani Tibia College, Delhi v. State of Delhi and Another* **[1962] Supp. 1 SCR 156 : 1961 SCC OnLine SC 145;** *Illachi Devi and Ors. v. Jain Society, Protection of Orphans India and Others* **[2003] Supp. 4 SCR 62 : (2003) 8 SCC 413;** *Tata Memorial Hospital Workers Union v. Tata Memorial Centre and Another* **[2010] 9 SCR 723 : (2010) 8 SCC 480;** *Janardan Dagdu Khomane and Another v. Eknath Bhiku Yadav & Ors.* **[2019] 13 SCR 390 : (2019) 10 SCC 395;** *Syed Mohd. Salie Labbai v. Mohd. Hanifa* **[1976] 3 SCR 721 : (1976) 4 SCC 780;** *T. Varghese George v. Kora K. George* **[2011] 12 SCR 1070 : (2012) 1 SCC 369;** *Mahant Pragdasji Guru Bhagwandasji v. Patel Ishwarlalbhai Narsibhai* **[1952] 1 SCR 513 : (1952) 1 SCC 323;** *Charan Singh v. Darshan Singh* **[1975] 3 SCR 48 : (1975) 1 SCC 298;** *Sugra Bibi v. Hazi Kummu Mia* **[1969] 3 SCR 83 : 1968 SCC OnLine SC 99 – referred to.**

S.R. Bahugana v. All India Women's Conference and Ors. **(2009) ILR 7 Delhi 614;** *Abhaya v. JA Raheem,* **2005 SCC OnLine Ker 234;** *K. Rajamanickam v. Periyar Self Respect Propaganda Institution, Thiruchirapalli,* **2006 SCC OnLine Mad 379;** *The Young Mens Christian Association of Ernakulam and Ors. v. National Council YMCAS of India,* **2018 SCC OnLine Del 9909;** *Babu Bhagwan Din and Ors. v. Gir Har Saroop and Ors.,* **1939 SCC OnLine PC 47;** *Gurunatharudhaswami Guru Shidharudhaswami v. Bhimappa Gangadhrawappa Divate,* **1948 SCC OnLine PC 43;** *Kesava Panicker v. Damodara Panicker and Others,* **1974 SCC OnLine Ker 58;** *C. Chikka Venkatappa & Another v. D. Hanumanthappa & Others,* **1970 SCC OnLine Kar 16;** *Shri Dnyaneshwar Madhuradwait Sampradayik Mandal, Amravati v. Charity Commissioner, Bombay and Another,* **1980 SCC OnLine Bom 120;** *Board of Governors St. Thomas School and Others v. A.K. George and Another,* **1984 SCC OnLine Cal 56;** *The Advocate General v. Bhartiya Adam Jati Sewak Sangh and Ors.,* **MANU/HP/0182/2001;** *Gopal L. Raheja v. Vijay B. Raheja,* **2007 SCC OnLine Bom 399;** *Budreedas v. Choonilal,* **ILR 33 Cal 789;** *Tirumalai-Tirupati Devasthanams Committee v. Udiayar Krishnayya Shanbhaga,* **1943 SCC OnLine Mad 48 – referred to.**

Knight v. Knight **(1840) 3 Beav 148;** *Beatty v. Guggenhein Exploration Co.* **(1919) 225 N. Y. 380;** *Meinhard v. Salmon* **(1928) 249 N.Y. 458;** *Newton v. Porter,* **69 N.Y. 133 (1877);** *Campbell v. Drake,* **39 N.C. 94 (1845);** *Pope v. Garrett,* **147 Tex. 18 (1948);** *McAnulty v. Std. Ins. Co.* **(2023) 81 F.4th 1091;** *Bailey v. Angove's Pty Ltd.* **(2016) UKSC 47;** *Keech v. Sandford* **(1726) Sel Cah Ch 61;** *Paragon Finance plc v. Thakerar & Co.* **(1999) 1 All ER 400;** *Stevens v. Hotel Portfolio II UK Ltd.* **(2025) UKSC 28 – referred to.**

Books and Periodicals Cited

Mukherjee on the Indian Trust Act, 1881 (2021); Halsbury Laws of India; P Ramantha Aiyar in Advanced Law Lexicon **– referred to.**

List of Acts

Code of Civil Procedure, 1908; Societies Registration Act, 1860; Trusts Act, 1882; Prohibition of Benami Property Transactions Act, 1988.

List of Keywords

Section 92 CPC; Public charitable institutions; Public charities; Trust; Public purpose; Charitable or religious nature; Society construed as trust or constructive trust; Vesting of properties in Executive Committee; Doctrine of constructive trust; Breach of trust; Administration of trust; Persons having an interest in the trust; Constructive trustees; Public interest; Express trust; Gross financial impropriety; Siphoning off funds/donations; Representative suit of a special nature; If not vested in trustee.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 10048 of 2025

From the Judgment and Order dated 21.08.2024 of the High Court of Delhi at New Delhi in FAOOS No. 114 of 2024

Appearances for Parties

Advs. for the Appellant:
Dama Seshadri Naidu, Sr. Adv., Bishwajit Dubey, Ms. Radhika Bishwajit Dubey, Karan Khetani, Umesh Dubey, Ms. Madhulika, Ms. Vuzmal Nehru, Manoj K. Mishra.

Advs. for the Respondents:
Jai Anant Dehadrai, Sidharth Sharma, Anubhav Lamba, Pulkit Agarwal.

Judgment / Order of the Supreme Court

Judgment

J.B. Pardiwala, J.

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

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

1. Leave granted.

2. This appeal arises from the judgment and order passed by the High Court of Delhi dated 21.08.2024 in FAO(OS) No. 114 of 2024 (hereinafter, the "**impugned decision**"), by which the High Court dismissed the appeal filed by the appellant herein against the judgment and order dated 03.05.2024 passed by a learned Single Judge of the High Court in CS(OS) No. 153 of 2020 allowing the application under Section 92 of the Code of Civil Procedure, 1908 (hereinafter, the "**CPC**") filed by the respondent nos. 1 and 2 respectively, seeking leave to institute the subject suit.

A. FACTUAL MATRIX

3. Operation ASHA (hereinafter, the "**appellant Society/original defendant no. 1**") is a not-for-profit society founded in the year 2005 and registered under the Societies Registration Act, 1860 with its registered office in New Delhi. The appellant Society is engaged in providing health services through a plethora of activities primarily to the underprivileged sections of the society across India with special emphasis on the treatment, education and prevention of tuberculosis and other diseases. The same can be inferred from the Memorandum of Association (hereinafter, the "**MoA**") of the appellant Society. The aims and objectives of the appellant Society are as follows:

> "***4. AIMS AND OBJECTS***
>
> ***MAIN OBJECTIVES OF THE SOCIETY ARE GIVEN BELOW.***
>
> ***4.1.1*** *To develop, establish, maintain and provide health and all other related services, and to help, aid, assist, arrange, co-ordinate, organize maintain and carry on activities connected with one of health quality of life, nursing facilities, socio-economic aspects, general welfare and problems of the society with special emphasis on provision of services for the underprivileged sections of the society as per Govt. rule.*
>
> ***4.1.2*** *To develop, establish, make and provide microcredit microfinance and all other related services, and to help, aid, assist, arrange, contribute, co-ordinate, organize maintain and carry on activities connected with concerns*

of microcredit and micro finance. Socio-economic aspects, general welfare and problems of the society with special emphasis on provision of services for the underprivileged sections of the society as per Govt. rule.

4.1.3 *To establish hospitals, medical schools and colleges, nursing schools and colleges, dispensaries, laboratories research institutions and other educational institutions as per Govt. rule.*

4.1.4 *To purchase or otherwise deal in medicines and equipment required for maintenance of health, hygiene and microcredit/ microfinance.*

4.1.5 *To aid, promote establish, maintain, run and encourage alternative systems of medicine and establish training and research centers for this purpose as Govt, rule.*

4.1.6 *To aid, promote, establish, maintain, run and encourage microcredit/microfinance as per Govt. rule.*

4.1.7 *To open centers and institutes for diagnostic, curative, therapeutic and research of medical sciences as per Govt. rule,*

4.1.8 *To provide free medicines to the poor."*

4. The MoA of the appellant Society also stipulates that all the incomes and earnings of the society, whether movable or immovable, shall solely be utilised to further the aims and objectives of the appellant Society. Furthermore, it is also stated that the members of the appellant society would not be entitled to any profits by virtue of their membership. The relevant portion of the MoA is extracted hereinbelow:

"*All the incomes, earnings, movable or immovable properties of the society shall be solely utilized and applied towards the promotion of its aims and objectives only as set forth in the memorandum of association and no profits thereof shall be paid or transferred directly or indirectly by way of dividends, bonus, profits or in any manner whatsoever to the present or past members or to any person claiming through any one or more of the present or the past members, no member of the society shall have any profits, whatsoever by virtue of his membership, the*

names, addresses, occupations and signatures of the present members of the executive committee to whom the management and affairs of the society are entrusted as required under section 2 of the societies registration act, 1860 (punjab amendment act of 1957) as extended and applicable to the national capital territory & all state of india."

(Emphasis supplied)

5. A few other relevant clauses from the Articles of Association (hereinafter, the "**AoA**") of the appellant Society are reproduced hereinbelow:

*"**6. DUTIES & OBLIGATIONS OF MEMBERS***

All and every member

***6.1** Shall attend the Board of meetings regularly;*

***6.2** Shall give necessary information to the Society, pertaining to matters necessary to be known by the Society;*

***6.3** Shall not indulge in activities, which may prove prejudicial to the Aims and Objects of the Society and/or to the Rules and Regulations of the Society;*

***6.4** Shall maintain sanctity of the secrets and confidentiality of police matters of the Society and its members;*

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11.2 POWERS & DUTIES OF THE EXECUTIVE COMMITTEE

***11.2.1** All the properties, movable, immovable, and other kind of assets shall stand vested in the Committee.*

***11.2.2** The business and the affairs of the Society shall be managed and administered by the Committee.*

***11.2.3** Without prejudice to the generality of the foregoing provisions, the Committee shall have the following powers.*

***11.2.3.1** To acquire by gift, purchase, exchange, lease or in any other manner land, building, or other immovable, property together with all rights pertaining thereto.*

11.2.3.2 *To manage the properties of the Society.*

11.2.3.3 *To accept the management of any trust, fund, or endowment or any other … in which the Society is interested.*

11.2.3.4 *To raise funds for the Society by way of gifts, donations, grants-in-aid or otherwise within India or outside, as provided in the bye-laws.*

11.2.3.5 *To raise loans, stand guarantee for loans and do all acts necessary to raising the loans to further the objects of the Society.*

11.2.3.6 *To receive monies, securities, instruments, investments, or any other assets for and on behalf of the Society.*

11.2.3.7 *To enter into agreements contracts for and on behalf of the Society.*

11.2.3.8 *To manage, serve, transfer or otherwise dispose-off any property, movable or immovable of the Society.*

11.2.3.9 *To prescribe the powers, duties and functions of the office-bearers.*

11.2.3.10 *To exercise control over the President and the General secretary of the Society including the powers of dismissal.*

11.2.3.11 *To appoint the Secretary of the Society.*

11.2.3.12 *To elect new members to the Committee when casual vacancies occur.*

11.2.3.13 *To appoint the Secretary of the society.*

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13. SOURCES OF INCOME & UTILIAZATION OF FUNDS

Funds will be raised by way of grants-in-aid, donations, gifts, subscriptions fees, and income from investments, loans and other means available to the Society under the Act. Funds will be used to carry out the Aims and Objectives of the Society."

6. Dr. Shelly Batra (hereinafter, the "**respondent no. 1/original plaintiff no. 1**") is a medical health professional and co-founder of the appellant Society. *Vide* communication dated 19.06.2020, Mr. Sandeep Ahuja (hereinafter, the "**respondent no. 3/original defendant no. 2**") who is also the co-founder and CEO of the appellant Society terminated the services/employment of the respondent no. 1. The communication alleged that the termination of the respondent no. 1 was on account of various "*omissions including misrepresentation*" of her daughter's previous employment, fabrication of documents, misappropriation of the assets and funds of the NGO as well as gross misbehaviour with the staff and the employees. Subsequently, on 23.06.2020, the Board of the appellant Society is said to have passed a resolution terminating the respondent no. 1 from the post/office of President of the appellant Society. Soon thereafter, on 27.06.2020, the Board of the appellant Society is also said to have removed the respondent no. 1 from her capacity as a member of their Board.

7. Mrs. Usha Gupta, (hereinafter, the "**Respondent No. 2/original plaintiff no. 2**"), who is the mother of the respondent no. 1, is one of the current members of the Board of the appellant Society. Immediately after the removal of the respondent no. 1 as a Board member, both the respondent no. 1 and respondent no. 2 (collectively also referred to as the "**original plaintiffs**") instituted an Original Suit bearing CS (OS) No. 153 of 2020 on 28.06.2020 under Section 92 of the CPC before a learned Single Judge of the High Court for declaration, permanent & prohibitory injunction and, rendition of accounts. They alleged misconduct and breach of several of the society's by-laws by the respondent no.3 and one Ms. Suniti Ahuja (hereinafter, the "**respondent no. 4/original defendant no. 3**"). The original defendant nos. 4 to 8 respectively are current Board members and the original defendant no. 9 is a former Board member of the appellant Society.

8. To further elaborate in detail, the respondent nos. 1 and 2 respectively (original plaintiffs) alleged the following in the suit instituted by them:

    i. That the respondent nos. 3 and 4 respectively, were indulging in gross financial impropriety, misconduct and siphoning off funds/ donations which were received by the appellant Society into various shell companies/entities controlled by them and their friends/relatives. Such funds were utilised and misappropriated

for personal gains. Furthermore, that the funds received by the society have been utilised for activities outside India, which is impermissible, since the requisite permission was not taken from the appropriate governmental authorities and yet, tax benefits were illegally availed for the same.

ii. That there has been a severe mismanagement in the administration of the appellant Society by the respondent nos. 3 and 4 respectively. They have avoided making accounting provisions for statutory disbursements in the form of provident fund or gratuity to their employees and are also engaging in cross-payment of salaries to employees through their sister concerns with a view to avoid the grant of statutorily mandated employee benefits.

iii. That the respondent no. 3 has misrepresented information and thereby misled the donors of the appellant Society with an intent to defraud them by claiming that the appellant society had provided COVID-19 related services to more than 12,600 families and 10,000 migrants, however, the same remains entirely uncorroborated and unsubstantiated.

iv. That the respondent nos. 3 and 4 respectively, used force and coerced several employees in order to illegally take away the property of the appellant Society. This includes pressurizing the original defendant no. 8 to hand over the ATM card, passbook etc. of the account in which his salary is remitted and utilising those funds for personal needs. Furthermore, it was alleged that they have also demanded compulsory kickbacks from the employees engaged by the appellant Society by threatening, coercing and blackmailing them with immediate termination of employment, with a view to siphon employee payments.

v. That respondent no. 3 has also regularly misbehaved by issuing threats of personal injury and also indulged in discriminatory behaviour against the employees of the appellant society on the basis of race, caste, religion and sex.

vi. That, around February 2020, the respondent no. 1 approached the respondent nos. 3 and 4 respectively to resolve the aforesaid issues, amongst others. In retaliation, she was harassed and threatened to exit from her position at the appellant Society.

9. The reliefs prayed for in the aforesaid suit are reproduced hereinbelow:

"***PRAYER***

35. In light of the above facts and circumstances of the case, Plaintiffs most humbly pray that this Hon'ble Court may grant the following reliefs in its favour:

(a) Pass a decree of declaration holding that all the decisions taken by the Board of Defendant No.1 and/or any Board member or employee or personnel w.e.f. 01-06-2020 onwards are illegal, wrong and void, in the present facts and circumstances, and therefore, set-aside; and/or

(b) Pass a decree of declaration holding that the termination of Dr.Shelly Batra (Plaintiff No. 1) from the post/office of President vide Board Resolution dated 23-06-2020 and ouster from the Board of Defendant No. I vide Board Resolution dated 27-06-2020 is illegal, wrong and void in the present facts and circumstances, and restoring her office/post in the affairs of Defendant No. 1; and/or

c) Pass a decree for permanent & prohibitory injunction against the Defendant Nos.2 and 3 by removing them from the Board of Defendant No.1 on account of the illegalities & breach of the bye-laws of Defendant No.1, and restraining them from being involved in the activities/affairs of the Board of Defendant No.1 either as member or employee or contractor or advisor or anyway whatsoever;

(d) Pass a decree for rendition of accounts of profits/ monies siphoned, misappropriated, illegally earned by Defendant Nos.2-3 for their personal use/benefit from the accounts/funds of Defendant No.1, and further a decree for recovery of the amount be found to be due, siphoned, misappropriated, etc. by the Defendant Nos. 2-3 along with interest @18% in favour of Defendant No. 1; and/or

I Pass a decree or order regarding settling the scheme of the Defendant No. 1 by amending its bye-laws in such manner that no one family gets complete control of the affairs of Defendant No. 1:

(f) Costs:

(g) Any other relief (s) which this Hon'ble Court deems, fit, just and proper may also be awarded in favour of the Plaintiffs, in the interest of justice."

10. In pursuance of the aforesaid, the respondent nos. 1 and 2 respectively, filed an application being I.A. No. 5009 of 2020 in CS (OS) No. 153 of 2020 seeking leave to institute the civil suit against the appellant Society along with the respondent nos. 3 to 10 (collectively referred to as the "**original defendants**") before the learned Single Judge of the High Court. In the said application, it was stated that the appellant Society is a public charitable institution - an NGO engaged in the healthcare industry. The main objectives of the society as evidenced by its by-laws is public welfare and therefore, it would fall under the ambit of "public charities" mentioned under Section 92 of the CPC. The respondent nos. 1 and 2 respectively (original plaintiffs) have been involved in the functioning of the appellant Society since its inception and have a justified and *bona fide* interest in the society, Therefore, they are "interested persons" as required by Section 92. Furthermore, since numerous breaches have occurred in the conduct of business/affairs of the appellant Society, the direction of the court would be of utmost necessity for its administration.

11. After taking *seisin* of the matter, *vide* order dated 05.08.2020, the learned Single Judge of the High Court appointed Justice (retd.) R.V. Easwar as the Chairperson of the Board of the appellant Society with the consent of both the parties. Directions were issued to the Chairperson to submit a report and conduct a financial audit in order to ascertain, amongst others, whether there has been a defalcation or siphoning off of funds that the donors have contributed towards the appellant Society and to make suggestions as to how the working of the society can be improved. The Chairperson submitted three reports dated 26.08.2020, 03.10.2020 and 09.12.2020 respectively. On, 13.08.2021, an Interim Forensic Audit Report and on 20.09.2021, a Final Forensic Audit Report respectively, are also said to have been submitted by the auditors appointed for the said purpose.

12. The learned Single Judge of the High Court *vide* the judgment and order dated 03.05.2024 granted leave to the respondent nos. 1 and 2 (original plaintiffs) for the purpose of instituting a suit under Section 92 of the CPC. While holding that all the elements and ingredients

under Section 92 of the CPC stood fulfilled and granting leave, the learned Single Judge observed as follows:

i. ***First***, whether it be the Interim Forensic Audit Report dated 13.08.2021 or the various reports submitted under the Chairmanship of Justice (retd.) R.V. Easwar, there was no gainsaying that actions are required to be taken to remedy the state of affairs of the appellant Society, particularly in relation to its financial affairs and administrations, for which the directions of the court may be necessary.

ii. ***Secondly,*** heavy reliance was placed on the decision of this Court in ***Ashok Kumar Gupta & Anr vs. Sitalaxmi Sahuwala Medical Trust & Ors.*** reported in **(2020) 4 SCC 321** to grant leave under Section 92 of the CPC since the enunciation of law in the said decision is also said to have been made in a strikingly similar factual background. It was reiterated that it is the *dominant purpose* of the suit, as discernible strictly from the allegations made in the plaint that is required to be assessed by the court while considering whether leave must be granted to institute the suit or not.

iii. ***Thirdly*****,** that the respondent no. 1 (original plaintiff no. 1) being one of the co-founders of the appellant Society and a long-time President of its Board, along with the respondent no. 2 (original plaintiff no. 2) who has been associated with the appellant Society for an extended period of time while also continuing to be a member of its Board, would constitute '*persons having an interest in the trust*'.

iv. ***Fourthly***, while referring to Article 13 of the AoA as per which the society is entitled to raise funds by way of gifts, donations, grants-in-aid or otherwise strictly for the purpose of carrying out the aims and objectives of the society, it was opined that the formal 'entrustment' of property or funds by a third-party to the appellant Society would not be a necessary ingredient to hold that the society is a 'constructive trust'. If that formality were a *sine-qua-non*, the very distinction between a 'trust' and a 'constructive trust' would stand obliterated. Since any grant-in-aid, donation or gift made by a third-party to the society would, by its very nature, be intended to be used for the benefit of those in need of medical care in furtherance of

the objects of the society, it was held that this in-itself would be sufficient to infer that all such grants-in-aid, donations gifts etc., made to the society would become property 'entrusted' to it, by reason of which the society would acquire the character of a 'constructive trust'.

v. ***Fifthly***, after perusing the aims and objects of the appellant Society as detailed in the MoA it was declared that the appellant Society is evidently engaged in a 'public purpose of charitable nature' since they principally provide health care services to the underprivileged sections of the society, specifically with respect to the treatment, education and prevention of tuberculosis.

vi. ***Lastly,*** that the claims made in the suit also co-relate and fall within the scope of the reliefs contemplated under Section 92 of the CPC, more particularly sub-sections (1)(d) and (1)(h) thereof.

13. The relevant observations made by the learned Single Judge are reproduced hereinbelow:

> "***20.*** *Therefore, we must not lose sight of the fact, that for purposes of deciding whether leave should be granted under section 92 CPC, it is only the allegations in the plaint that should be looked into in the first instance; it being available to the court to even dismiss the suit if after evidence is led it is found that the breach of the trust alleged was not made-out.*
>
> ***21.*** *To reiterate it is the dominant purpose of the suit, as discernible only from the allegations in the plaint, that is required to be assessed by the court at the stage of considering whether leave should be granted under section 92 CPC to institute a suit.*"
>
> ***22.*** *In the present case, the following assertions are found in the plaint:*
>
> ***22.1.*** *Plaintiff No.1 is one of the co-founders of defendant No. 1 society and has been a long time President of its Board, Plaintiff No.2. has been associated with defendant No.1 society for a long time and continues to be a member of the Board of the society, even if she is plaintiff No.1's mother. In fact these assertions appear to reflect the admitted position.*

22.2. *Plaintiff No.1 has played a pivotal role in the functioning of the society ever since it was established.*

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"***22.4****. Furthermore, a perusal of the Articles of Association ('AOA') of defendant No.1 society inter-alia shows that the management of the society is entrusted to an Executive Committee, which is entitled to raise funds for the society by way of gifts, donations, grants-in-aid or otherwise, which funds are to be used to carry-out the aims and objectives of the society. Attention in this behalf may be drawn to Article 13 of the AoA of the society, which reads as follows […]*

In the opinion of this court, the formal 'entrustment' of property or funds by a third-party to defendant No.1 society is not a necessary ingredient to hold that the society is a constructive trust'. If that formality were a sine-qua-non, the very distinction between a 'trust' and a 'constructive trust' would get obliterated. This court is of the view, that any grant-in-aid, donation or gift made by a third-party to the society is, by its very nature, meant and intended to be used for the benefit of those in need of medical care in furtherance of the objects and purpose of the society. This, in itself, is sufficient to infer that all such grants-in-aid, donations, gifts etc. made to the society are property entrusted to it, by reason of which the society acquires the character of a 'constructive trust'."

22.5. Also, defendant No.1 is evidently engaged in a public purpose of charitable nature, since it provides medical-aid and relief to patients of tuberculosis who otherwise cannot afford treatment, thereby fulfilling the other criterion of section 92 CPC.

22.6. In this manner, defendant No.1 society fulfils all conditions necessary to invoke section 92 CPC, as enunciated by the Supreme Court in Ashok Kumar Gupta (supra) and the elements required to qualify as a 'constructive trust' as laid down by a Co-ordinate Bench of this court in The Young Mens Christian Association of Ernakulam (supra) cited above.

23. In addition, the IFAR as well as the multiple audit reports submitted in relation to the administration and financial affairs of the society, including under the chairmanship of Justice Easwar, clearly disclose that the manner in which the affairs of the society are being run, requires closer consideration and scrutiny.

24. Furthermore, the claims made in the suit also co-relate and fall within the scope of the reliefs contemplated in section 92 CPC, especially section 92(d) and (h) thereof;

25. In the above view of the matter, this court is persuaded to hold that all elements and ingredients of section 92 CPC are satisfied; and that therefore, the plaintiffs are entitled to grant of leave to institute the present suit under section 92, CPC.

26. To obviate any ambiguity, it may be clarified that the grant of leave to the plaintiffs to institute the suit would not prevent the court from dismissing die suit subsequently, if the allegations contained in the plaint are found not to be substantiated.

27. The application is accordingly allowed."

(Emphasis supplied)

B. THE IMPUGNED JUDGMENT

14. Aggrieved by the aforesaid judgment and order of the learned Single Judge dated 03.05.2024, the appellant Society preferred an appeal being FAO (OS) No. 114 of 2024 before the Division Bench of the High Court. The Division Bench while dismissing the appeal, observed as follows:

i. ***First,*** reliance was, again, placed on the decision of this Court in ***Ashok Kumar Gupta*** *(supra)* in order to delineate the conditions that are required to be satisfied under Section 92 of the CPC.

ii. ***Secondly,*** the Division Bench echoed the observations made by the Single Judge in as much as observing that the appellant Society is admittedly of a charitable nature as evident from its MoA.

iii. ***Thirdly,*** reliance was placed on the relevant provisions of the MoA which stipulated that all the incomes, earnings, movable or immovable properties of the society shall be solely applied towards furthering the objectives of the society and no profits shall be paid, either directly or indirectly, to the members of the Board or any person claiming through or under them. Furthermore, while referring to Article 11.2.1 of the AoA which specifically stated that all the properties, movable, immovable and other kinds of assets shall stand vested in the Executive Committee of the appellant Society, the Division Bench expressed its agreement with the views of the Single Judge that all donations, gifts etc. made to the appellant Society are property 'entrusted' to it, due to which the society would acquire the character of a 'constructive trust'.

iv. ***Fourthly,*** referring to the decision of this Court in ***Shiromani Gurudwara Prabandhak Committee vs. Som Nath Dass*** reported in **2000 (4) SCC 146,** it opined that the donations, gifts, etc., being received by the appellant Society and being vested in the Committee from various institutions would constitute an 'endowment' for public purpose.

v. ***Lastly,*** although the Bench acknowledged the contention of the counsel for the appellant Society that prayer (b) of the plaint agitates a personal/private grievance, yet it took the view that the reliefs sought in prayers (d) and (e) of the plaint fall within those reliefs contemplated under sub-section (1) of Section 92 of the CPC. The relevant observations of the Division Bench are reproduced hereinbelow:

> "***12.*** *Admittedly, the Appellant-society is of a charitable nature as it has been formed primarily for serving the under-privileged sections of the society, in particular, patients suffering from tuberculosis. […]*
>
> ***13.*** *The Memorandum of Association further stipulates that all the incomes, earnings, movable or immovable properties of the society shall be solely utilized and applied towards the promotion of its aims and objectives only as set forth in the Memorandum of Association and no profits thereof shall be paid or transferred directly or indirectly by way of dividends,*

bonus or profits in any manner whatsoever to the present or past members or to any person claiming through any one or more of the present or the past members. The Memorandum of Association also states that no member of the society shall have any profits, whatsoever by virtue of his membership, the names, addresses, occupations and signatures of the present members of the Executive Committee to whom the management and affairs of the society are entrusted, as required under Section 2 of the Societies Registration Act, 1860 (Punjab Amendment Act of 1957).

***14**. Article 11.2.1 of the Articles of Association specifically stipulates that all the properties, movable, immovable and other kinds of assets shall stand vested in the Committee.*

***15**. Keeping in view the aforesaid as well as the fact that the Appellant has been set-up with the primary objective of providing medical relief to patients, who otherwise cannot afford such treatment, this Court is in agreement with the view of the learned Single Judge that all the donations, gifts etc. made to the Appellant-society are property entrusted to it, by reason of which the society acquires the character of a 'constructive trust'.*

***16.** In the above context, it would also be necessary to refer to the judgment of Supreme Court in Shiromani Gurudwara Prabandhak Committee vs. Som Nath Dass 2000 (4) SCC 146, wherein it has been held that an "endowment" is, when the donor parts with his property for it to be used for a public purpose and its entrustment is to a person or group of persons for carrying out the objective of such entrustment. It was held that once an endowment is made, it is final and irrevocable and it is onerous duty of the persons entrusted with such endowment to carry out the objectives of this entrustment. It was further held once an endowment, it never reverts even to the donor. The Supreme Court has also considered*

that endowment" means property or pecuniary means bestowed as a permanent fund, as endowment of a college, hospital or library, and is understood in common parlance as a fund yielding income for support of an institution. Having regard to the aforesaid, it is clear that donations, gifts etc. which were being received by the Appellant, and being vested in the committee, from various institutions would be endowment for public purpose."

17. *Though the learned senior counsel for the Appellant is correct in contending that prayer (b) of the plaint agitates a personal/private grievance yet this Court is of the view that the reliefs sought in prayers (d) and (e) of the plaint fall within the reliefs mentioned in sub section (1) of Section 92 CPC.*

18. *Consequently, this Court is of the view that the impugned order calls for no interference. Accordingly, the present appeal along with the application is dismissed.*"

(Emphasis supplied)

C. SUBMISSIONS OF THE PARTIES

i. Submissions on behalf of the Appellant

15. Mr. Dama Seshadri Naidu, the learned Senior Counsel appearing for the appellant Society submitted that the appellant Society is a 'registered society' under the Societies Registration Act, 1960 and is not a 'Trust' for the purposes of Section 92 of the CPC. It was argued that it is a settled law that the governing body members of the society shall only become 'trustees' if a trust is created for the purpose of managing the assets of the society. The same not being the case in the present scenario, the suit cannot be held to be maintainable. To fortify his argument that a suit under Section 92 would not be maintainable against a 'registered society', the counsel placed reliance on the decision of the Delhi High Court in ***S.R. Bahugana v. All India Women's Conference and Ors.*** reported in **(2009) ILR 7 Delhi 614** and that of the Kerala High Court in ***Abhaya vs. JA Raheem*** reported in **2005 SCC OnLine Ker 234**.

16. The counsel submitted that as per the AoA of the appellant Society, the property of the society is not held in a 'trust', which is the fundamental requirement for the appellant Society to be termed as a 'constructive trust'. Specific reference was made to Clauses 11.2.1 and 11.2.3.8 of the AoA respectively to contend that the property of the society stands vested in the 'Committee' or Governing Body of the Society, as per the mandate of Section 5 of the Societies Registration Act, 1860. On this aspect, reliance was placed on the decision of the Madras High Court in ***K. Rajamanickam v. Periyar Self Respect Propaganda Institution, Thiruchirapalli*** reported in **2006 SCC OnLine Mad 379**.

17. Taking recourse to the decision of this Court in ***Swami Paramatmanand Saraswati v. Ramji Tripathi*** reported in **1974 2 SCC 695,** it was submitted that, while deciding an application under Section 92 of the CPC, the court must only look at the averments made in the plaint. The plaint, in the present case, is conspicuously silent on how the appellant Society falls within the definition of the term 'constructive trust'. Therefore, it was submitted that the underlying suit is clearly beyond the ambit of Section 92.

18. To further substantiate his submissions as regards the appellant Society not being a 'constructive trust', the counsel stated that "*a constructive trust is another species of trust where a trust is automatically imposed by equity on an owner of property but in special circumstances where it is unconscionable for the owner of property to hold the property purely for his own benefit*". To illustrate, where a trustee of a leasehold property at the termination of the lease renews the lease purportedly in his own personal favour or where a trustee has wrongfully gratuitously transferred trust property to an innocent done who upon subsequently discovering the trust attempts to retain the property for himself. It was submitted that Mukherjee on the Indian Trust Act, 1881 (2021) also elaborated on the Doctrine of Constructive Trust by arguing that a 'constructive trust' arises not by the act of parties but by operation of law. When a trustee gains some personal advantage by utilising his trusteeship, he becomes a constructive trustee in respect of the advantages gained.

19. The counsel submitted that the Halsbury Laws of India on the nature of a constructive trust remarks that a constructive trust attaches by

law to a specific property which is neither expressly subject to any trust nor subject to a resulting trust but, which is held by a person in circumstances where it would be inequitable to allow him to assert full beneficial ownership of the property. In the present case, he argued that the factual situation is entirely different and the property of the appellant Society is vested in the governing body of the Society.

20. It was also submitted that the prayers made in the present suit demonstrate that the same has been filed solely for the purpose of vindication of personal rights of the respondent no. 1. More specifically, the prayers seek to declare the board decisions taken by the appellant Society from 01.06.2020 as null and void, since her employment/ services were terminated during this time. The respondent no. 1 also seeks a declaration that her termination was bad in law along with a direction that the respondent no. 3 be removed from the appellant Society. These reliefs are clearly beyond the scope of Section 92 and smack of personal vendetta and enmity. No relief has been sought for the benefit of the society or to improve its functioning.

21. It was submitted that the provisions under Section 92 of the CPC can be invoked only when two conditions are satisfied i.e. (a) it should be with regard to a public trust to obtain a decree for the purposes mentioned in the said provision, and (b) the suit should be on behalf of the Advocate General or two or more persons having an interest in the trust. He submitted that both the aforesaid conditions have not been fulfilled in the present case since the appellant Society is not a public trust and there is no pleading in the plaint showing that the respondent no. 2 (original plaintiff no. 2) is a party having an "interest" in the society. Moreover, the respondent no. 2 has not even signed the plaint in the instant suit.

22. In light of the aforesaid, it was submitted that the impugned decision is upheld, it would obliterate the distinction carved out by law between a 'trust' and a 'society' for which two different legislations have been enacted. Therefore, it was prayed that the impugned decision be set aside and the underlying suit, pending before the High Court, be dismissed.

ii. Submissions on behalf of the respondent no. 1

23. On the other hand, Mr. Jai Anant Dehadrai, the learned counsel appearing for the respondent no. 1 submitted that the ingredients

required to be satisfied before invoking Section 92 of the CPC was clearly laid down in ***Ashok Kumar Gupta*** *(supra)* as follows:

(a) There should be a breach of express or constructive trust;

(b) The trust must have been created for a public purpose, either of a charitable or religious nature;

(c) The suit must seek for reliefs as enumerated under Section 92(1) of the CPC.

24. The counsel submitted that the appellant society was formed with the specific aim to serve the underprivileged members of the society who are suffering from tuberculosis and who cannot afford its treatment. The same is evident from the MoA of the appellant Society. The donors, who are based in India as well as abroad, primarily the United States, were providing funds in order to further this very objective. Therefore, the appellant Society, being engaged in the social welfare of the general public, possesses the characteristics of an organisation with a 'charitable nature'.

25. In order to canvass the argument that a society registered under the Societies Registration Act, 1860 can be construed as a 'constructive trust', the counsel placed reliance on the decision of the Delhi High Court in ***The Young Mens Christian Association of Ernakulam and Ors. v. National Council YMCAS of India*** reported in **2018 SCC OnLine Del 9909** wherein it was opined that a society registered under the Societies Registration Act, 1860 can be construed as a constructive trust if its satisfies the elements mentioned in Section 3 of the Indian Trusts Act, 1882.

26. It was submitted that the appellant Society is being entrusted with the funds from the donors for public service. Upon a perusal of the Memorandum of Association, it is evident that all the earnings and income generated, or funds received by the society shall only be utilised for the betterment of the general public and to provide free health services, and no profits shall be transferred directly or indirectly to the members of the society. Additionally, Clause 11.2.1 of the AoA specifically provides that "*All the properties, movable, immovable and other kind of assets shall stand vested in the Committee*". Therefore, all the donor funds, gifts etc. are entrusted to the appellant Society to be utilised for the public purpose as enumerated in the aims and objectives contained in

its MoA. For all these reasons, the society acquires the character of a 'constructive trust'.

27. It was submitted that the reliefs sought in the plaint are in complete consonance with Section 92(1) of the CPC and the impugned decision has specifically held that the reliefs sought by the respondent nos. 1 and 2 respectively in their plaint, in particular, prayers (d) and (e) fall within the reliefs mentioned under Section 92(1). Hence, the plaint satisfies yet another ingredient required under Section 92 of the CPC.

28. In light of the aforesaid, it was submitted that the appellant Society though registered under the Societies Registration Act, 1860 yet must be construed as falling within the expression of a 'constructive trust' under Section 92 of the CPC as it holds property for charitable work. Therefore, the impugned decision granting leave to institute the suit, suffers from no infirmity and may not be interfered with.

iii. Submissions on behalf of the respondent nos. 3 and 4

29. The learned Counsel appearing on behalf of the respondent nos. 3 and 4 respectively, submitted that the application seeking leave to institute the present suit has been filed in complete disregard of the mandatory conditions stipulated under Section 92 of the CPC. Section 92 requires a suit of this nature to be filed by at least two interested parties. While the respondent no. 2 (original plaintiff no. 2) has been included as one of the plaintiffs, it is pertinent to note that the plaint has not been signed by the respondent no. 2. Additionally, there is neither any verification on behalf of the respondent no. 2 nor an affidavit in support of the plaint, as required under Section 26(2) of the CPC. These substantial procedural breaches render the plaint non-*est* in the eyes of law, and consequently, make it liable to be rejected at the very threshold. It was further submitted that there is a strong likelihood that the signatures of the respondent no. 2 was fraudulently affixed in the suit documents.

30. The counsel vehemently submitted that the suit under Section 92 of the CPC is legally untenable as it falls to fulfil the requisite conditions as regards maintainability and also for the reason that it is completely based on false allegations and has been filed to wreck a personal vendetta against the respondent nos. 3 and 4 respectively. Therefore, it was prayed that the present appeal be allowed and the impugned decision be set aside.

D. ISSUES FOR DETERMINATION

31. Having heard the learned counsel appearing on behalf of the parties and having gone through the materials on record, the only question that falls for our consideration is whether in the facts and circumstances of the present case, the appellant Society registered under the Societies Registration Act, 1860 can be said to have fulfilled all the requirements stipulated under Section 92 of the CPC for the purpose of instituting a suit under the said provision?

E. ANALYSIS

i. The Object and purpose behind Section 92 of the CPC.

32. Section 92 of the CPC reads as follows:

> " ***92. Public charities***—
>
> *(1) In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General, or two or more persons having an interest in the trust and having obtained the [leave of the Court,] may institute a suit, whether contentious or not, in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the State Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate to obtain a decree—*
>
> *(a) removing any trustee;*
>
> *(b) appointing a new trustee;*
>
> *I vesting any property in a trustee;*
>
> *[(cc) directing a trustee who has been removed or a person who has ceased to be a trustee, to deliver possession of any trust property in his possession to the person entitled to the possession of such property;]*
>
> *(d) directing accounts and inquiries;*

I declaring what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust;

(f) authorising the whole or any part of the trust property to be let, sold, mortgaged or exchanged;

(g) settling a scheme; or

(h) granting such further or other relief as the nature of the case may require.

(2) Save as provided by the Religious Endowments Act, 1863 (20 of 1863), [or by any corresponding law in force in [the territories which, immediately before the 1st November, 1956, were comprised in Part B States]], no suit claiming any of the reliefs specified in sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section.

[(3) The Court may alter the original purposes of an express or constructive trust created for public purposes of a charitable or religious nature and allow the property or income of such trust or any portion thereof to be applied cy pres in one or more of the following circumstances, namely:—

(a) where the original purposes of the trust, in whole or in part,—

(i) have been, as far as may be, fulfilled; or

(ii) cannot be carried out at all, or cannot be carried out according to the directions given in the instrument creating the trust or, where there is no such instrument, according to the spirit of the trust; or

(b) where the original purposes of the trust provide a use for a part only of the property available by virtue of the trust; or

I where the property available by virtue of the trust and other property applicable for similar purposes can be more effectively used in conjunction with, and to that end can

suitably be made applicable to any other purpose, regard being had to the spirit of the trust and its applicability to common purposes; or

(d) where the original purposes, in whole or in part, were laid down by reference to an area which then was, but has since ceased to be, a unit for such purposes; or

I where the original purposes, in whole or in part, have, since they were laid down,—

(i) been adequately provided for by other means, or

(ii) ceased, as being useless or harmful to the community, or

(iii) ceased to be, in law, charitable, or

(iv) ceased in any other way to provide a suitable and effective method of using the property available by virtue of the trust, regard being had to the spirit of the trust.]"

(Emphasis supplied)

33. A suit under this provision can be termed as a '*representative suit of a special nature'* since the object behind the enactment of this provision is the protection of public rights in the public trust. Therefore, the parties filing a suit by invoking this section are considered to be representatives of the public.

34. A three-judge bench of this Court in ***Ahman Adam Sait and Others v. M.E. Makhri and Others*** reported in **1963 SCC OnLine SC 71** had elaborated on how a suit under Section 92 of the CPC is a 'representative suit' while deciding whether the second suit would be barred by constructive *res judicata*. It was stated that when a suit is brought under Section 92, by two or more persons interested in the trust, they could be said to have taken upon themselves the responsibility of representing all the beneficiaries in the trust and though, all the said beneficiaries may not be expressly impleaded in the suit, the action is essentially instituted on their behalf and the relief claimed is representative in character. While stating so, however, it was clarified that the plaintiffs bringing the second suit must have the 'same interest' as that of the plaintiffs or defendants of the earlier representative suit, for the principle of *res judicata* to apply. In other words, it must be examined if the interest of the plaintiffs in

the second suit was represented in the earlier representative suit. The relevant observations are thus:

> "*16. In assessing the validity of this argument, it is necessary to consider the basis of the decisions that a decree passed in a suit under Section 92 binds all parties. The basis of this view is that a suit under Section 92 is a representative suit and is brought with the necessary sanction required by it on behalf of all the beneficiaries interested in the Trust. The said section authorises two or more persons having an interest in the trust to file a suit for claiming one or more of the reliefs specified in clauses (a) to (h) of sub-section (1) after consent in writing there prescribed has been obtained. Thus, when a suit is brought under Section 92, it is brought by two or more persons interested in the trust who have taken upon themselves the responsibility of representing all the beneficiaries of the Trust. In such a suit, though all the beneficiaries may not be expressly impleaded, the action is instituted on their behalf and relief is claimed in a representative character. This position immediately attracts the provisions of Explanation VI to Section 11 of the Code. Explanation VI provides that where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating. It is clear that Section 11 read with its Explanation VI leads to the result that a decree passed in suit instituted by persons to which Explanation VI applies will bar further claims by persons interested in the same right in respect of which the prior suit had been instituted. Explanation VI thus illustrates one aspect of constructive res judicata. Where a representative suit is brought under Section 92 and a decree is passed in such a suit, law assumes that all persons who have the same interest as the plaintiffs in the representative suit were represented by the said plaintiffs and, therefore, are constructively barred by res judicata from reagitating the matters directly and substantially in issue in the said earlier suit.*"
>
> (Emphasis supplied)

35. Similarly, in ***Shiromani Gurdwara Parbandhak Committee v. Mahant Harnam Singh*** reported in **(2003) 11 SCC 377,** this Court had opined that a suit under Section 92 is of a special nature and for the protection of public rights in public trust and charities. It is for the vindication of public rights since the suit is instituted fundamentally on behalf of the entire body of persons who are interested in the trust. It cannot be said that only those persons whose names are in the suit-title would be considered to be the parties to the suit. The named plaintiffs are only the representatives of the public at large who are interested in the suit and therefore, in the eyes of law, all such interested persons would be considered to be parties to the suit. The relevant observations are reproduced hereinbelow:

> "*19. As observed by this Court in R. Venugopala Naidu v. Venkatarayulu Naidu Charities [1989 Supp (2) SCC 356 : AIR 1990 SC 444] a suit under Section 92 CPC is a suit of special nature for the protection of public rights in the public trust and charities. The suit is fundamentally on behalf of the entire body of persons who are interested in the trust. It is for the vindication of public rights. The beneficiaries of the trust, which may consist of the public at large, may choose two or more persons amongst themselves for the purpose of filing a suit under Section 92 CPC and the suit-title in that event would show only their names as plaintiffs. Can we say that the persons whose names are in the suit-title are the only parties to the suit? The answer would be in the negative. The named plaintiffs being the representatives of the public at large which is interested in the trust, all such interested persons would be considered in the eyes of the law to be parties to the suit. A suit under Section 92 CPC is thus a representative suit and as such binds not only the parties named in the suit-title but all those who share common interest and are interested in the trust. It is for that reason that Explanation VI to Section 11 CPC constructively bars by res judicata the entire body of interested persons from reagitating the matters directly and substantially in issue in an earlier suit under Section 92 CPC.*"
>
> (Emphasis supplied)

36. In ***Vidyodaya Trust*** **v.** ***Mohan Prasad*** reported in **(2008) 4 SCC 115**, this Court had emphasised that it is not every suit which relates to a public trust of religious or charitable nature and which contains reliefs which fall within some of the clauses under sub-section (1) of Section 92 that can be brought under the ambit of Section 92 of the CPC. Those suits must also essentially be initiated by individuals as representatives of the public for the vindication of public rights. While opining so, this Court also elaborated on the object behind requiring a 'grant of leave' from the appropriate court before the suit can be proceeded with. The same was said to have been mandated as a pre-requisite or a procedural safeguard in order to prevent the public trusts from being subjected to undue harassment through frivolous suits being filed against them. If the persons responsible for the management of the trusts are subjected to multiplicity of legal proceedings, then it would be the ultimate beneficiaries of the trust who would lose out since the trust would have to dedicate time to defend the suit and the funds which are to be utilised to further the objectives of the public trust would also have to be re-routed and wasted on litigation. In the opinion of the Court, this ordeal might also dissuade persons of high moral character and honest intentions from becoming trustees of public trusts. The pertinent observations are reproduced hereinbelow:

> ***18.*** *Prior to legislative change made by the Code of Civil Procedure (Amendment) Act (104 of 1976) the expression used was "consent in writing of the Advocate General". This expression has been substituted by the words "leave of the Court". Sub-section (3) has also been inserted by the Amendment Act. The object of Section 92 CPC is to protect the public trust of a charitable and religious nature from being subjected to harassment by suits filed against them. Public trusts for charitable and religious purpose are run for the benefit of the public. No individual should take benefit from them. If the persons in management of the trusts are subjected to multiplicity of legal proceedings, funds which are to be used for charitable or religious purposes would be wasted on litigation. The harassment might dissuade respectable and honest people from becoming trustees of pubic trusts. Thus, there is need for scrutiny.*
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> *-xxx-*

> ***25.*** *In Sugra Bibi v. Hazi Kummu Mia [AIR 1943 Mad 466] it was held that the mere fact that the suit relates to public trust of religious or charitable nature and the reliefs claimed fall within some of the clauses of sub-section (1) of Section 92 would not by itself attract the operation of the section, unless the suit is of a representative character instituted in the interest of the public and not merely for vindication of the individual or personal rights of the plaintiffs.*
>
> ***26.*** *To put it differently, it is not every suit claiming reliefs specified in Section 92 that can be brought under the section; but only the suits which besides claiming any of the reliefs are brought by individuals as representatives of the public for vindication of public rights. As a decisive factor the Court has to go beyond the relief and have regard to the capacity in which the plaintiff has sued and the purpose for which the suit was brought. The courts have to be careful to eliminate the possibility of a suit being laid against public trusts under Section 92 by persons whose activities were not for protection of the interests of the public trusts.[…]"*
>
> (Emphasis supplied)

37. In ***Swami Shivshankargiri Chella Swami* v*. Satya Gyan Niketan*,** reported in **(2017) 4 SCC 771,** while holding that a trust can be created by virtue of a conditional gift, this Court had also elaborated on the purpose behind requiring grant of leave from the court under Section 92 before a suit can be instituted. It was opined that such a condition has been legislatively prescribed in order to prevent a public trust from being harassed or to obviate the institution of reckless or frivolous suits against its trustees. The relevant observations are as thus:

> "***11.*** *The present Section 92 CPC corresponds to Section 539 of the old Code of 1883 and has been borrowed in part from 52 Geo. 3, c. 101, called Romilly's Act of the United Kingdom. A bare perusal of the said section would show that a suit can be instituted in respect of a public trust by the Advocate General or two or more persons having an interest in the trust after obtaining leave of the Court in the Principal Civil Court of Original Jurisdiction. An analysis*

> *of these provisions would show that it was considered desirable to prevent a public trust from being harassed or put to legal expenses by reckless or frivolous suits being brought against the trustees and hence a provision was made for leave of the court having to be obtained before the suit is instituted.*
>
> (Emphasis supplied)

38. Thus, the grant of leave under Section 92 of CPC serves as a procedural safeguard, ensuring that public charitable trusts are protected from *mala fide* suits that may have the consequence of impeding their operations. At this stage, however, the court neither adjudicates upon the merits of the dispute nor confers any substantive rights upon the parties; what is established is merely the maintainability of the suit which is sought to be initiated by the plaintiffs.

ii. Conditions to be fulfilled for the applicability of Section 92 of the CPC

39. Section 92 of the CPC has been created for a specific purpose and to address a specific kind of grievance which has the impact of affecting public rights as enumerated above. Therefore, not all suits can be blindly brought within the fold of this provision. In the facts and circumstances of each case, the court granting leave must examine whether the suit qualifies certain conditions which align with the intent behind the creation of this provision. Courts must tread with caution so as to weed out those suits which are camouflaged as falling within its ambit just with a view to take an undue benefit of provision and for causing harassment to the public trust or for the vindication of personal rights.

40. This Court in ***Ashok Kumar Gupta*** *(supra)* had laid down three conditions which are a *sine qua non* in order to invoke Section 92 of the CPC and maintain an action under the said provision. Upon placing reliance on various decisions of this Court, the conditions were delineated as follows – (a) the trust in question must be created for public purposes of a charitable or religious nature; (b) there must exist a breach of trust or a direction of the court must be necessary for the administration of the trust; and (c) the relief claimed must be one or other of the reliefs as enumerated under Section 92(1) of the CPC. The relevant observations are reproduced as thus:

"*10. While considering the scope of Section 92(1), as it existed then, a Constitution Bench of this Court observed in Madappa v. M.N. Mahanthadevaru [Madappa v. M.N. Mahanthadevaru, (1966) 2 SCR 151 : AIR 1966 SC 878] , as under : (AIR p. 881, para 10)*

> *"10. … Section 92(1) provides for two classes of cases, namely, (i) where there is a breach of trust in a trust created for public purposes of a charitable or religious nature, and (ii) where the direction of the court is deemed necessary for the administration of any such trust. The main purpose of Section 92(1) is to give protection to public trusts of a charitable or religious nature from being subjected to harassment by suits being filed against them. That is why it provides that suits under that section can only be filed either by the Advocate General, or two or more persons having an interest in the trust with the consent in writing of the Advocate General. The object clearly is that before the Advocate General files a suit or gives his consent for filing a suit under Section 92, he would satisfy himself that there is a prima facie case either of breach of trust or of the necessity for obtaining directions of the Court. The reliefs to be sought in a suit under Section 92(1) are indicated in that section and include removal of any trustee, appointment of a new trustee, vesting of any property in a trustee, directing a removed trustee or person who has ceased to be a trustee to deliver possession of trust property in his possession to the person entitled to the possession of such property, directing accounts and enquiries, declaring what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust, authorisation of the whole or any part of the trust property to be let, sold, mortgaged or exchanged or settlement of a scheme. The nature of these reliefs will show that a suit under Section 92 may be filed when there is a breach of trust or when the administration of the trust generally requires improvement."*

11. The statement of law so laid down was reiterated:

11.1. In Bishwanath v. Radha Ballabhji [Bishwanath v. Radha Ballabhji, (1967) 2 SCR 618 : AIR 1967 SC 1044] : (AIR p. 1046, para 7)

> *"7. It is settled law that to invoke Section 92 of the Code of Civil Procedure, 3 conditions have to be satisfied, namely, (i) the trust is created for public purposes of a charitable or religious nature; (ii) there was a breach of trust or a direction of court is necessary in the administration of such a trust; and (iii) the relief claimed is one or other of the reliefs enumerated therein. If any of the 3 conditions is not satisfied, the suit falls outside the scope of the said section."*

11.2. In Sugra Bibi v. Hazi Kummu Mia [Sugra Bibi v. Hazi Kummu Mia, (1969) 3 SCR 83 : AIR 1969 SC 884] : (AIR p. 885, para 5)

> *"5. It is evident that this section has no application unless three conditions are fulfilled : (1) the suit must relate to a public charitable or religious trust, (2) the suit must be founded on an allegation of breach of trust or the direction of the court is required for administration of the trust, and (3) the reliefs claimed are those which are mentioned in the section."*

12. Three conditions are, therefore, required to be satisfied in order to invoke Section 92 of the Code and to maintain an action under the said section, namely, that:

(i) the Trust in question is created for public purposes of a charitable or religious nature;

(ii) there is a breach of trust or a direction of court is necessary in the administration of such a Trust; and

(iii) the relief claimed is one or other of the reliefs as enumerated in the said section.

Consequently, if any of these three conditions is not satisfied, the matter would be outside the scope of said Section 92."

(Emphasis supplied)

41. As a natural corollary, it follows that in order to successfully establish that a suit is beyond the scope of Section 92 of the CPC, it would be sufficient to prove that any one of the conditions enumerated above has not been met. However, on the other hand, for a suit to be maintainable under this provision, the plaintiffs must be able to satisfy the court that all the conditions, or in other words, the necessary ingredients, under this section, have been fulfilled.

A. The trust being created for a public purpose of a charitable or religious nature.

42. A trust can be said to have been created for a 'public purpose' when the beneficiaries are the general public who are incapable of exact ascertainment. Even if the beneficiaries are not necessarily the public at large, they must at least be a classified section of it and not a pre-ascertained group of specific individuals.

43. What constitutes "charitable purpose" has been defined under Section 2 of the Charitable Endowments Act, 1890 as follows:

> "***2. Definition.—****In this Act "charitable purpose" includes relief of the poor, education, medical relief and the advancement of any other object of general public utility, but does not include a purpose which relates exclusively to religious teaching or worship*."
>
> (Emphasis supplied)

Therefore, the term includes relief to the poor, education, medical relief and the advancement of any other object of 'general public utility', while excluding activities whose purpose relates exclusively to religious teaching or worship.

44. There remains no doubt that the appellant Society in the instant case, working towards bringing equity in public health, with particular focus on providing for the education, treatment and prevention of tuberculosis, has been created for a 'public purpose of charitable nature'. This is clearly evident from its objectives outlined in the MoA and the beneficiaries that it seeks to serve, amongst others. The same is an admitted position and we need not delve into the nitty-gritties of whether the appellant society qualifies this aspect of the aforesaid condition. What remains contested, however, is that the appellant society which has been registered under the Societies Registration

Act, 1860 cannot be construed to be a 'trust' or a 'constructive trust' in order to subject it to the jurisdiction under Section 92 of the CPC.

I. Whether a Society can be construed to be a 'trust or a 'constructive trust'?

45. A suit under Section 92 of the CPC being one of special nature, presupposes the existence of a public trust of a religious or charitable character. The existence of a public trust is essential, whether express or constructive. Therefore, a crucial condition that needs satisfaction is whether the institution/organisation in relation to which certain reliefs are sought can in fact be considered to be a 'trust' or a 'constructive trust'. Having said so, however, an express declaration clearly signifying that an entity is a trust or that the properties are trust properties would not be a *sine qua non* in order to render a suit under Section 92 maintainable.

a. Circumstances under which the creation of a trust has been inferred

46. When no formal recognition has been given to the institution, the creation of a trust can be inferred from the relevant circumstances surrounding the coming into existence of and functioning of the institution/entity in question. The Privy Council in ***Babu Bhagwan Din and Ors. v. Gir Har Saroop and Ors.*** reported in **1939 SCC OnLine PC 47** was concerned with the question whether a public trust of a religious character existed in the facts and circumstances of the case. The decision also established when a private temple may become dedicated to the public by subsequent dealings. While negativing the contention that the private temple constituted a public trust, emphasis was particularly laid on two aspects i.e., - *First,* the land in question granted by the then Nawab of Oudh in 1781was not a grant to the idol or an endowment of a temple or a gift made by way of trust for a public religious purpose. Instead, it was a grant to a private individual and to his heirs in perpetuity. Therefore, the historical setting and the circumstances of the grant was given importance to. *Secondly*, While acknowledging that a private temple may become dedicated to the public and morph into a public trust of a religious nature over the course of years, it was held that such dedication has to be proved and the mere fact that the public were never turned away and that offerings from them were accepted would not by itself be sufficient

proof of dedication, especially in the absence of an inference that the public user exercised any 'right' pertaining to the temple or had acquired any interest. Another pertinent factual aspect was also that the various forms of profit, whether by offerings or rents received by letting out portions of the lands in their own names, were divided amongst the family. The relevant observations are thus:

> "*Their Lordships agree with the Chief Court in holding that the grant of 1781 is not a grant to the idol or an endowment of a temple or a gift made by way of trust for a public religious purpose. The grant is to Daryao Gir and his heirs in perpetuity.[…] The general effect of the evidence is that the family have treated the temple as family property, dividing the various forms of profit whether offerings or rents, closing it so as to exclude the public from worship when marriage or other ceremonies required the attendance of the members of the family at its original home, and erecting samadhs to the honour of its dead. In these circumstances it is not enough, in their Lordships' opinion, to deprive the family of their private property to show that Hindus willing to worship have never been turned away or even that the deity has acquired considerable popularity among Hindus of the locality or among persons resorting to the annual mela. Worshippers are naturally welcome at a temple because of the offerings they bring and the repute they give to the idol : they do not have to be turned away on pain of forfeiture of the temple property as having become property belonging to a public trust. Facts and circumstances, in order to be accepted as sufficient proof of dedication of a temple as a public temple, must be considered in their historical setting in such a case as the present; and dedication to the public is not to be readily inferred when it is known that the temple property was acquired by grant to an individual or family. Such an inference, if made from the fact of user by the public, is hazardous, since it would not in general be consonant with Hindu sentiments or practice that worshippers should be, turned away; and as worship generally implies offerings of some kind, it is not to be expected that the managers of a private temple should in all circumstances desire to*

> *discourage popularity. […] The Chief Court have, in the opinion of the Board correctly estimated the particular facts of the case, before them and have rightly negatived the contentions that the temple is a public temple and that the property in suit is impressed with a trust of a public religious character.*"
>
> (Emphasis supplied)

47. On the other hand, the Privy Council in ***Gurunatharudhaswami Guru Shidharudhaswami v. Bhimappa Gangadhrawappa Divate*** reported in **1948 SCC OnLine PC 43**, the issue related to whether the Court under Section 92 could direct the removal of the head of the mutt while settling a scheme for the administration of public trust properties despite the fact that the previous swami desired the said person to succeed as the head of the mutt. The suit under Section 92, apart from the aforesaid relief, was also concerned with whether the institution in question could be called a 'public trust' of a religious or charitable nature. In deciding the aforesaid, particular reference was made to the circumstances in which the various properties used in connection with the institution was acquired. Predominantly, all the offerings made and gifts given by the public to the Swami was for the purposes of the 'Math' and additional properties were purchased out of the offerings initially given, except one property which was concluded as having been received as a gift by the Swami's for his own personal benefit since there was no evidence to show that the said solitary land was ever used for the benefit of the 'Math'. Therefore, all the suit properties with the exception of one, were regarded as accretions to the original foundation/institution, and subject to an express or constructive trust created for public purposes of a charitable or religious nature within the meaning of Section 92 of the CPC. The relevant observations are reproduced hereinbelow:

> "*The learned trial Judge discussed in detail and with much care the documentary and oral evidence, particularly in relation to the circumstances in which the various properties used in connection with the Math had been acquired. In appeal the High Court again discussed the evidence in considerable detail, and both Courts reached the conclusions that the institution, whether it be called a Math or a Temple, was founded by the public for a public,*

charitable and religious purpose, viz., the worship of the Swami during his lifetime and of his Samadhi (tomb) after his death, and for the purpose of the various festivals which had been started in connection with the institution, and that the offerings made to the Swami, the properties purchased out of those offerings and those acquired by gifts after 1912 (when the Swami assumed control of the Math), must all be regarded as accretions to the original foundation, and that all the properties in suit form part of a trust created for purposes of a charitable or religious nature. Counsellor the appellant has referred their Lordships to all the relevant evidence and no useful purpose would be served by a further discussion of it in detail. Their Lordships can state shortly and in general terms their reasons for agreeing with the conclusions of the Courts in India.

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The only question in this appeal is whether the suit properties used for the purposes of the Math belonged to the Swami at the time of his death, or appertained to the Math and were subject to an express or constructive trust created for public purposes of a charitable or religious nature within the meaning of Section 92 of the Code of Civil Procedure. Except in regard to one small property, which will be presently mentioned, their Lordships have no doubt that the Courts in India were right in answering this question against the appellant. The evidence establishes beyond doubt, in their Lordships' view, that the properties in suit were either originally given, or were dedicated by the Swami, to the purposes of the Math which was a charitable or religious institution. It has been argued by Counsel for the appellant that even if this be so the trust was not for public, but for private, purposes. But this is clearly not so. It is common ground that anybody was at liberty to go at any time to the Math to worship the Swami and take food there. The trust was plainly one for public purposes.

The only property in suit which in their Lordships' view the respondents have failed to show belonged to the Math is that comprised in Exhibit D.127 by which a piece of land

expressed to be of the value of Rs. 400 situate in Mouji Harti in Taluka Gadag was conveyed to the Swami, the motive expressed being the spiritual good of the donor. There is nothing in the conveyance to suggest that the land was given to the Swami for the purpose of the Math. There is no evidence that this land, which is situate, their Lordships are told, some 40 miles from Hubli was ever used, or that its rents or profits were applied, for the benefit of the Math. The fact that the Swami received many gifts of property for charitable purposes does not disqualify him from receiving gifts for his own personal benefit, and their Lordships think that this small piece of land must be excluded from the decree in the present suit.

By the decree which the learned trial Judge passed it was declared that the properties in suit were properties belonging to a public trust of a religious and charitable character: and that it was necessary to settle a scheme for the administration of the trust. […]'

(Emphasis supplied)

48. This Court in ***Bihar State Board Religious Trust, Patna v. Mahant Sri Biseshwar Das*** reported in **(1971) 1 SCC 574** had to determine whether the entity in question constituted a religious trust so that it may be brought within the purview of a 'public trust' under Section 2(1) of the Bihar Hindu Religious Trusts Act, 1951. The Trial Court had also placed a lot of importance on ascertaining how the properties were originally acquired and since, the respondent did not produce the Sanads under which the founding Mahant had acquired the said properties and therefore, the nature of the gifts and the manner in which they were made could not be determined, an adverse inference was drawn against the respondent. However, this conclusion was held to be misplaced since the onus of proof to show that the properties were being held for public purposes of a religious or charitable character was said to rest on the appellant Board who alleged that it was so. In holding thus, this Court also observed as follows:

i. ***First***, that it is true that a charitable trust might either be created by a grant for an express purpose or a grant having been made

in favour of an individual or a class of individuals, and that individual or that class of individuals might, after obtaining the grant, create a charitable trust.

ii. ***Secondly,*** that a property can be granted solely for the 'grantee's' personal benefit too, without there being any intention on part of the grantor to fetter the grantee with any obligation in dealing with the property granted. Courts have arrived at a conclusion whether the grant was for the benefit of the public, or an unascertained section of the public, or for the benefit of the grantee himself, or for class of ascertained individuals, either by keeping the manner and conditions of the grant itself at the forefront or, from the other circumstances of the case. Further, an inference can also be drawn from the usage and custom of the institution or from the mode in which its properties have been dealt with along with other established circumstances.

iii. ***Lastly,*** that if a property is described as 'appertaining to an organisation/institution' then for those properties to be considered as properties of a public trust, the said organisation/ institution must by itself first be a public trust for religious or charitable purposes.

49. The relevant observations in ***Bihar State Board*** *(supra)* are thus:

> "*8. It is true that the respondent Mahant did not produce the original Sanads whereunder certain lands had been gifted to the founding Mahant by the various zamindars. They were not produced because, as the respondent deposed, they could not be traced, but, as stated earlier, it was not impossible for the Board also, if it wanted to rely on them, to produce the record, such as that of Darbhanga Estate, and show therefrom the nature and the terms of those gifts. The trial court, however, was not entitled, as we shall presently show, from the mere failure of the Mahant to produce the original Sanads to draw an adverse inference which it did against him.*
>
> ***-xxx-***
>
> *10. Properties of the temple being thus admittedly in the possession of the Mahants ever since the time of Gaibi*

Ramdasji, the onus of proof that the respondent Mahant held them on trust for public purposes of a religious or charitable character was clearly on the appellant Board who alleged that it was so. The trial Judge was, therefore, clearly in error in holding that the respondent Mahant ought to have produced the Sanads and that on his failure to do so an adverse inference could be drawn, namely, that had they been produced they would have shown that the grants to Gaibi Ramdasji were for public purposes of a religious or charitable character. (See Parmanand v. Nihal Chand.) [1938 ILR 65 IA 252]

11. The Sanads not having been available, the appellant Board tried to establish through the oral evidence of six witnesses (DWs 1 to 6), that the temple was founded and the properties in question were acquired for the benefit of the public or a section thereof.[…]

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16. True it is that a charitable trust might either be created by a grant for an expresss purpose or a grant having been made in favour of an individual or a class of individuals, that individual or that class of individuals might, after obtaining the grant, create a charitable trust. […]

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18. The existence of a private Mutt, where the property was given to the head of the Mutt for his personal benefit only, has in the past been recognised. (See Matam Nadipudi v. Board of Commissioners for Hindu Religious Endowments, Madras [AIR 1938 Mad 810] and Missir v. Das [(1949) ILR 28 Pat 890] .) In such cases there is no intention on the part of the grantor to fetter the grantee with any obligation in dealing with the property granted. In each case the Court has to come to its conclusion either from the grant itself or from the circumstances of the case whether the grant was for the benefit of the public or a section of it i.e. an unascertained class, or for the benefit of the grantee himself or for a class of ascertained individuals. An inference can also be drawn from the usage and custom of the institution

or from the mode in which its/properties have been dealt with as also other established circumstances.

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21. Lastly, reference was made to some of the deeds of gifts made by the reigning Mahants in favour of their nominees as successors where the properties were described as appertaining to the Asthal. Assuming that the scribes of these documents used the expression "appertaining to the Asthal" in the sense in which such expression is sometimes used in the deeds of conveyance, the expression means things which are appurtenant to and forming part of the principal property which is the subject-matter of the instrument. [See Stroud's Judicial Dictionary, (3rd Edn.), Vol. I, 177.] The expression "appertaining to the Asthal" in these deeds, therefore, would at best mean that the properties formed part of the Asthal and are not the properties of the Mahant as distinct from those of the Asthal. (See Sri Thakurji Ramji v. Mathura Prasad [AIR 1941 Pat 354 at 358] .) But unless the Asthal itself is a public trust for religious or charitable purposes, the properties appertaining thereto would not be properties of a public trust for religious or charitable purposes. The use of the expression "appertaining to the Asthal", therefore, cannot lead to the conclusion that the properties in question were stamped with a trust for public purposes."

(Emphasis supplied)

50. In another decision of this Court in ***Kuldip Chand and Another v. Advocate-General to Government of H.P. and Others*** reported in **(2003) 5 SCC 46,** it was held that the history of the institution, conduct of the parties and the user of the properties are all factors to be examined to arrive to a determination as regards a public trust. The issue related to whether by the mere use of the premises as a Dharamsala for about 125 years an inference could be drawn that the same belongs to a public trust. Answering in the negative and holding that the Dharamsala was a private property and not a public trust, this Court observed that a dedication for public purposes and for the benefit of the general public would involve the complete cessation of ownership on the part of the founder and vesting of the

property for the religious object. However, in circumstances where this dedication is not made *via* a formal or express endowment, its character may have to be determined on the basis of the history of the institution along with the conduct of the founder and his heirs. A dedication would involve the complete relinquishment of individual right of ownership. The owner must intend to divest himself of his ownership in the dedicated property. The relevant observations are reproduced hereinbelow:

> "*37. From the materials brought on record by the parties, as noticed hereinbefore, the following facts emerge: (1) That the shops were let out to other people. (2) People could come and stay in the Dharamsala but for stay of more than three days, only upon seeking permission therefor. (3) Rent received from the shops was being used by the owners for their own purpose. (4) The Dharamsala was being managed/maintained from the personal funds of the owner. (5) The management and control of the Dharamsala was all along with the owners. (6) A school was opened in the Dharamsala. (7) A chowkidar was appointed by Ranzor Singh to look after the Dharamsala and his salary used to be paid by the owner from his own pocket. (8) The Dharamsala could be used for marriage purpose but only with the permission of the owners. (9) The first-floor rooms could be used only by the officers or by others with the permission of the owner. (10) The Dharamsala was ordinarily being used by the pilgrims only during fair. (11) The public never contributed anything for maintenance of the Dharamsala. (12) No member of the public had any say as regards management of the Dharamsala and had no legal right to use the same. (13) No member of public the ever participated in the management of the Dharamsala. (14) No manager had ever been appointed to look after and manage the property. (15) The Dharamsala was not registered under the Sarais Act. (16) There is no evidence to show that the owners acted as shebaits or trustees.*
>
> *38. A dedication for public purposes and for the benefit of the general public would involve complete cessation of ownership on the part of the founder and vesting of the property for the religious object. In absence of a formal*

and express endowment, the character of the dedication may have to be determined on the basis of the history of the institution and the conduct of the founder and his heirs. Such dedication may either be complete or partial. A right of easement in favour of a community or a part of the community would not constitute such dedication where the owner retained the property for himself. It may be that right of the owner of the property is qualified by public right of user but such right in the instant case, as noticed hereinbefore, is not wholly unrestricted. Apart from the fact that the public in general and/or any particular community did not have any right of participation in the management of the property nor for the maintenance thereof any contribution was made is a matter of much significance. A dedication, it may bear repetition to state, would mean complete relinquishment of his right of ownership and proprietary. A benevolent act on the part of a ruler of the State for the benefit of the general public may or may not amount to dedication for charitable purpose.

39. When the complete control is retained by the owner — be it appointment of a chowkidar, appropriation of rents, maintenance thereof from his personal funds — dedication cannot be said to be complete. There is no evidence except oral statements of some witnesses to the effect that Raj Kumar Bir Singh became its first trustee. Evidence adduced in this behalf is presumptive in nature. How such trust was administered by Raj Kumar Bir Singh and upon his death by his successors-in-interest has not been disclosed. It appears that the family of the donor retained the control over the property and, therefore, a complete dedication cannot be inferred far less presumed. Furthermore, a trust which has been created may be a private trust or a public trust. The provisions of Section 92 of the Code of Civil Procedure would be attracted only when a public trust comes into being and not otherwise.

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42. When a dedication to a charity is sought to be established in absence of an instrument or grant, the law

> *requires that such dedication be established by cogent and satisfactory evidence of conduct of the parties and user of the property which show the extinction of the private secular character of the property and its complete dedication to charity. It must be proved that the donor intended to divest himself of his ownership in the dedicated property. The meaning of charitable purpose may depend upon the statute defining the same.*".
>
> (Emphasis supplied)

51. In ***Kuldip Chand*** *(supra)*, of the several factual circumstances that led this Court to reach the conclusion that the Dharamsala was not a public trust in addition to the owner's intention to not relinquish ownership of the property, some are especially pertinent – (a) in the premises of the Dharamsala, some portion was let out as shops to other people, unconnected with the religious or charitable purpose; (b) the income/rent received from those shops were not used to further the purpose of the alleged trust but was being used by the owners for their own purpose; (c) the maintenance of the Dharamsala was also being done from the personal funds of the owner and no contribution was made by the public for the maintenance of the Dharamsala. All these facts were taken into account in arriving at the decision that the Dharamsala was not a public trust.

52. On a conspectus of the aforesaid decisions, it could be said that the method of devolution of the property to the institution or its acquisition, the intention behind the grant of property i.e. whether it was for the benefit of the organization or for the personal benefit of any particular individual/family – *in other words,* the historical setting and the circumstances of the grant has been given considerable significance while concluding whether a trust of a public charitable or religious nature exists. Even if the grant was initially of a private nature, any subsequent dealings could transform the organization into a public trust, however, such a 'dedication' to the public must be sufficiently proved. That the public user or an unascertained class of individuals could exercise any 'right' over the organization and its properties, could also be a significant factor in concluding that a public trust has come into existence. The manner of use of the profits accrued, more particularly, whether it was applied towards the benefit of the organization or its objectives, could also lead to an

inference as regards the nature of the organization or the creation of a public trust.

53. ***Bihar State Board*** *(supra)* has reiterated that a charitable trust may either be created by a grant for an express purpose or a grant having been made in favour of an individual(s), who might thereafter create a charitable trust. Due attention must also be paid to whether the grant is accompanied with any fetter/obligation or qualified with a condition, either express or implied, regarding its use by the grantee. Therefore, the trifecta i.e., the intention, manner and conditions of the grant might have to be scrutinized to see whether the grant was for the benefit of the public or an unascertained section of the public. The intention to create a trust must be indicated, either by words or acts with reasonable certainty. Other established circumstances, including the method of use of the property and customs of the institution or the mode and manner in which they have dealt with the properties in the past, could also prove to be relevant.

54. ***Kuldip Chand*** *(supra)* had also placed emphasis on the history of the institution/organization, the conduct of the parties and the beneficiaries of the properties as relevant factors. Whether the 'dedication' was complete i.e., whether there was an absolute cessation or complete relinquishment of ownership of the property on the part of the grantor and a subsequent vesting of the property for the said object, was also considered a key factor in determining if the dedication was for public purposes. Furthermore, how the properties are managed, more specifically, for whose benefit they are being managed; whether the profits are being re-routed to the public and for their benefit; whether any personal funds of any founder/proprietor are being applied for the running of the organization or is it maintained through funds sourced from the public, are also aspects that one might need to paid due attention to. Therefore, the overarching and fundamental purpose of the organization, the mode in which properties are acquired and its beneficiaries could color it with the characteristics of a trust.

55. However, it must be noted that the aforementioned characteristics bear high significance, when, as mentioned previously, there has been no formal recognition of the entity in question and it has not been given a legal identity otherwise. Now, the next question would be, how an entity which satisfies the aforementioned criteria but has been, much later in time, registered as a society under the Societies

Registration Act, 1860, would be treated in the eyes of law. The answer to this lies in the decision given by the Full Bench of the Kerala High Court in ***Kesava Panicker v. Damodara Panicker and others*** reported in **1974 SCC OnLine Ker 58.**

56. In ***Kesava Panicker*** *(supra),* the Full Bench had to decide, on the face of it, a strikingly similar question i.e., whether a society registered under the Societies Registration Act, 1860 could be considered to be a trust or a constructive trust for the purposes of Section 92 of the CPC. However, the facts revealed that a public trust was formed much before the society was registered. It is in such circumstances that the Court arrived at the conclusion that the subject school, its properties and monies formed a public trust of a charitable nature and that the suit under Section 92 was maintainable. The High Court elaborated as follows:

    i. ***First,*** several factors led to the conclusion that the trust had been created, – that the entire community in the area took an active interest and contributed funds for the purpose of creating a 'trust fund' in order that the school may be established; A committee was formed for collecting funds either as donations or as share capital; that long before the registration of the society, funds were collected from the public towards share money; and there were other forms of contributions as well. This according to the Full Bench reflected that there existed a clear intention to form a trust and also that a trust fund was created. These funds were utilized for the construction of the school building and for other ancillary purposes including establishing and maintaining the other functions of the school.

    ii. ***Secondly,*** referring to *Tudor on Charities, Sixth Edition*, pg 128, it was opined that a trust may be created by any language sufficient to show the intention, and no technical words are necessary. Further, it was stated that the use of words such as 'intent' or 'purpose' or a direction that a fund shall be applied by, or be at the disposal of a person for certain intended charitable purposes, may very well be as effective as the use of the word 'trust'.

    iii. ***Lastly,*** the mere factum of registration of a society under the Societies Registration Act, 1860 could not change the character of the properties which had already been constituted as trust

properties and impressed with the trust, especially when a trust has clearly been created by the public for a public charitable purpose i.e., the establishing, maintaining and running of a school. Any addition to the said properties would also possess the characteristics of a trust property.

57. The relevant observations of the Full Bench are reproduced hereinbelow:

> "*5. When once it has been found that the school building and the furniture etc. as well as the funds of the school did not belong to the appellant as is contended by him he was certainly liable to account for the property of the school including the monies and the direction to account cannot also be interfered with. Considering the nature of the contentions raised by the appellant the direction to remove him from management must also stand. It is further essential that a scheme must be framed for the management of the school and the decree permitting that being done cannot also be altered.*
>
> *6. All this we have said on the basis that the school and its properties and its monies formed a public trust of a charitable nature and that a suit such as the one envisaged by Section 92 of the CPC and which was the type of suit that was instituted - it is not even suggested that this is not so would be permissible and that the suit in question was maintainable and that the plaintiffs were entitled to sue. Regarding those questions the appellant's Counsel vehemently argued that there has been no trust at all justifying such an action. […] For a suit under Section 92 there must be a public trust of the religious or charitable character. Herendra Nath Bhattacharya v. Kaliram Das, (1972) 1 SCC 115 : AIR 1972 SC 246. The allegation in the plaint is that there is such a charitable trust and that the appellant acting as a trustee de son tort has misused the funds of the trust and have mismanaged the properties. If the existence of a trust as alleged is established the suit will have to be decreed. We shall presently consider whether there is such a trust as alleged. Before going to that question we shall refer to the other decisions as well relied on by counsel for the appellant.*

7. Counsel very strongly relied on the decision in G. Chikka Venkatappa v. D. Hanumanthappa, (1970) 1 Mys LJ 296. The decision is authority for the proposition that the formation of a society under the Societies Registration Act to carry out any charitable or useful or social purpose cannot be regarded as amounting to creation of a trust for the application of Section 92 of the CPC. The effect of the Societies Registration Act is not to invest properties of the society with the character of trust property. Even if the purpose for which the society was formed was charitable purpose the property acquired for this purpose will belong to the society and there is no trust and no trust can be predicated. So it was urged that even if the properties were acquired by the Keralasseri High School Society there was no trust which would enable a suit being instituted in accordance with the provisions of Section 92 of the CPC. If we may say so, with great respect, the position stated in the decision is the correct one. That was stated with reference to the facts of that case and the conclusion arrived at after discussing the facts is seen from paragraph 21 of the judgment which we shall extract.

> *"21. On the evidence, therefore, there cannot be the slightest doubt that the construction of this building was purely and exclusively an activity and concern of the registered society called the Devanga Sangha. It was not and cannot be described as a matter in which the entire Devanga Community as Community took any interest or any steps in such a way as to make it possible to suggest that a specified item of property was dedicated by it, or some members thereof, to public purpose, viz. some welfare of the community at large."*

8. On the other hand the facts of this case show that the entire community in the area took an active interest and contributed funds for the purpose of creating a "trust fund" in order that a school may be established. Though it was what was called the "Keralasseri Food Committee" that first made a move for the establishment of a High School by submitting Ext. A9 memorandum to the Chief Minister,

Madras, the public took up the matter and there was a meeting of the public on the 1st February, 1947 and at that conference a resolution was passed to start a private school. A committee was formed for collecting funds either as donations or as share capital. Ext. A14 is the proceedings of that meeting embodying the decisions taken at the meeting. These proceedings clearly indicate that the intention was to create a trust fund. It is so specifically stated in Ext. A14. We shall extract the relevant part.

(Text in Malayalam Language.)

9. Long before the registration of the society funds were collected from the public towards share money is evidenced by Exts. A3, A4, A24 and B26 receipts. There have been contributions as well, has been established and this aspect has been discussed in the judgment of the court below. It is thus clear that there has been a clear intention to form a trust and that a trust fund was created and that the fund was utilised for the construction of the school building and for the ancillary purposes for establishing and maintaining the work of the school.

> *"A trust may be created by any language sufficient to show the intention, and no technical words are necessary. The use of such words as 'intent' or 'purpose' or a direction that a fund shall be applied by, or be at the disposal of, a person for the charitable purposes intended, may be as effectual as the use of the word 'trust'. Even the words 'authorise and empower' may be enough, upon the true construction of the instrument". (See Tudor on Charities, Sixth Edition, Page 128).*

10. No corporation would be created within the meaning of the word "incorporated" occurring in Entry 44 of List 1 of the Seventh Schedule to the Constitution by the formation and registration of a society under the Societies Registration Act. The society would continue to remain as an unincorporated society though under the Societies Registration Act it would have certain privileges some of them being analogous to those of corporations. See

> *Board of Trustees, Ayurvedic and Unani College, Delhi v. State of Delhi, AIR 1962 SC 458. If there was a trust created by the public for a public charitable purpose namely establishing, maintaining and running a school the fact of the registration of a society could not change the character of the properties which had already been constituted as trust properties and impressed with the trust and any addition to those properties must also have the same character.*
>
> *11. We have therefore no hesitation in reaching the conclusion that a trust has been created and the High School buildings, the land, all appurtenances, furniture, equipment and all other properties are trust properties.*
>
> *-xxx-*
>
> *13. The suit is maintainable. By virtue of the registration of the society the nature of the trust properties has not been changed and on the allegations and the findings, a suit for the reliefs asked for is competent. We dismiss this appeal with costs.*"
>
> (Emphasis supplied)

58. As indicated above, a crucial factual aspect in ***Kesava Panicker*** *(supra)*, was that the public trust was already created by the public and that it pre-existed the registration of the society. It was in such circumstances that it was held that a 'subsequent' registration of the same entity as a society under the Societies Registration Act, 1860 would not take away from its character as a public trust and affect the maintainability of a suit under Section 92 of the CPC. A trust was already created by the public for a public charitable purpose and the properties were already imbued with the character of trust properties and impressed with the trust. The mere registration as a society to alter or circumvent the status of things which was already present, was what was disallowed. However, whether this factual peculiarity has a bearing on the facts of the present matter remains to be seen.

b. Views of different High Courts on the issue

59. Over the period of time, several decisions of different High Courts have been faced with the same question which remains at the centre

of the present litigation i.e., whether a society can be considered to be a public trust for the purposes of Section 92 of the CPC. The High Court of Mysore in ***C. Chikka Venkatappa & Another v. D. Hanumanthappa & Others*** reported in **1970 SCC OnLine Kar 16** was concerned with a suit filed under Section 92 in relation to 'Devanga Sangha', a society registered under the Mysore Societies Registration Act of 1904 whose object was to advance the educational, economic and social welfare of the members of the Devanga community who are a section of Hindus. The plaintiffs prayed that the defendants be removed from the office they held in the Devanga Sangha and that they also be directed to render true and proper accounts as regards the collections made by them on behalf of the Sangha in connection with the Silver Jubilee Building Fund of the Sangha. The suit was decreed and while the first prayer was not granted, the second prayer was granted only against two out of the five defendants. The High Court while holding that the suit was entirely misconceived on law and also wholly unnecessary on facts, observed as follows:

i. ***First,*** that the words 'creation of a trust' under Section 92 obviously has reference to similar phraseology employed in the Indian Trusts Act, 1882 although the same pertains to 'private trust'. 'Trust' is therefore, an obligation annexed to the ownership of property.

ii. ***Secondly***, due regard was given to the object behind the enactment of the Karnataka Societies Registration Act, 1960 and the Mysore Societies Registration Act of 1904 respectively, along with the express provisions in those legislations which provided that the property, whether moveable or immoveable, belonging to a society shall be deemed to be vested in the Governing Body of the Society unless it is separately vested in trustees. While also referring to the provisions which provide that a society may sue or be sued, it was concluded that the obvious effect of these legal provisions would be that such property would belong to the society and be owned by the society like any other individual since the society by itself is invested with the character of a legal person. This is despite the fact that the society's object may be described as being one of a charitable nature and that it acquires property for the purpose of achieving those objects. The existence of a trust, an author of the trust and a transfer of the said property

as trust property to any trustee cannot be predicated in such circumstances where a society is involved. Further, it cannot be said that whenever a society acquires property, it declares itself as a trustee in respect of that property. On the contrary, the obligation to use the property for the purposes of the society is an obligation which is inherent or implicit in the MoA, which is the basic document constituting the society. The same cannot be construed as amounting to any declaration of trust in respect of a specified property.

iii. ***Thirdly,*** after clarifying the aforesaid differences in law between a trust and a society, it was stated that it would not be possible to begin with the assumption that there is a trust created for public purposes for the invocation of Section 92 of the CPC, unless some special circumstances are made out.

iv. ***Fourthly,*** it was stated that one must be able to draw a difference between an act which is purely and exclusively an activity or concern of the registered society in contrast to a matter in which an entire community takes any interest or steps, which may suggest that a specified item of property was dedicated for a public purpose or for the welfare of the community at large. Unless there are indications of a separate vesting of the society's property in a trust, effect must be given to the normal provisions of law which vest the property in the Executive Council.

v. ***Lastly***, while agreeing that a trusteeship can be vested in a 'committee of persons' and that they can be treated as trustees for the purposes of Section 92, it was however, held that the same would be different from the vesting of properties in the governing body of a society registered under the Societies Registration Act, 1860.

60. The relevant observations in ***Chikka Venkatappa*** *(supra)* are reproduced hereinbelow:

> "*2. […] There is in Bangalore an association called the Devanga Sangha, which was registered as a society on the 12th of February 1924 under the Mysore Societies Registration Act of 1904. Like all other societies of that nature, the Sangha is governed by a Memorandum of Association, a set of Articles of Association and subsidiary bye-laws framed by the Society. The objects of the*

Sangha set out in the Memorandum are to advance the educational, economic and social welfare of the members of the Devanga community who are a section of Hindus. The membership is limited to those belonging to the said community and is subject to payment of donations or periodical subscriptions. There are, as in other cases, different classes of members like Patrons who are called by two different Kannada names 'Poshaka and Sahavaka', Life members. Hon. members and ordinary members. The management of affairs of the Sangha is vested in a body called the Executive Council consisting of a President, four Vice-Presidents, a Secretary, a Treasurer and 50 other members.

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16. It is clear that the trust referred to in this section is one actually created for a public purpose, whether that purpose be a charitable one or a religious one. The choice of the words 'creation of a trust' obviously has reference to the similar phraseology adopted in the Indian Trusts Act. 'Trust' is an obligation annexed to the ownership of property—vide S. 3 of the Act. A trust is created when the author of the trust indicates with reasonable certainty by any words or acts an intention on his part to create thereby a trust, the purpose of the trust, the beneficiary and the trust property and (unless the trust is declared by will or the author of the trust is himself to be the trustee) transfers the trust property to the trustee—(vide S. 6 of the Act).

17. The question is whether the formation of a society under the Societies Registration Act to carry out any charitable or useful or social purpose can at all be regarded as amounting to creation of a trust in the sense mentioned above. The Societies Registration Act is an Act promulgated for the ??? of making provision for regulating, controlling and improving the legal condition of societies established for the promotion of literature, science or fine arts or for the diffusion of useful knowledge or for any charitable purposes. The Act of 1960 which was substituted for the

previous Mysore Act No. 3 of 1904, has, however, limited the object to the mere provision for registration of literary, scientific, charitable or other societies in the State of Mysore. The manner in which the said objects are given effect to in the two statutes is the same. They enable individuals to get themselves formed into an incorporated body, like Corporations or Companies with a separate legal personality conferred upon the incorporated body. And express provision is made (in S. 6 of the Act of 1904 and S. 14 of the Act of 1960) to the effect that the property, moveable or immoveable, belonging to a Society registered under the Act, unless it is vested separately in trustees, shall be deemed to be vested for the time being in the Governing Body of the society. S. 7 of the Act of 1904 corresponding to S. 15 of the Act of 1960 makes provision for the manner in which the societies may sue or be sued. The general provision is that every society registered under the Act may sue or be sued in the name of President or other office bearer specified for the purpose by the Rules and Regulations of the Society.

18. The obvious legal effect of these provisions is that although the object of a society may be described as a charitable purpose and by its regulations it is empowered to acquire property and use the same for achieving its objects, the property belongs to the society and is owned by the society like any other individual, because, the society is itself invested with the character of a legal person by virtue of the provisions of the statute. It is not property in respect of which it is possible to predicate a trust, an author of the trust and a transfer of the said property as trust property to any trustee, nor can it be said that whenever a society acquires property, it declares itself as a trustee in respect of that property. The obligation to use the property for purposes of the society is an obligation which is inherent or implicit in the Memorandum of Association which is the basic document constituting the society. That does not amount to nor can it be, by any stretch of imagination, read as amounting to any declaration of trust in respect of a specified property.

19. Such being the clear position in law in regard to trusts and in regard to registered societies and the clear difference between the two, the prima facie opinion in this case should necessarily be that unless some special circumstances are made out, it is not possible to start with an assumption that there is a trust created for public purposes, in regard to which the provisions of S. 92 CPC. could be invoked.

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25. On the evidence, therefore, there cannot be the slightest doubt that the construction of this building was purely and exclusively an activity and concern of the registered society called the Devanga Sangha. It was not and cannot be described as a matter in which the entire Devanga community as community took any interest or any steps in such a way as to make it possible to suggest that a specified item of property, was dedicated by it, or some members thereof, to public purpose, viz., some welfare of the community at large.

26. […] All that happens is that the registered society acquires a certain item of property which, under the law, must be deemed to vest in the governing body unless they take steps to vest it separately in trustees. There is no suggestion here of any such separate vesting. Hence effect should be given to the normal provisions of law which vest the property in the Executive Council.

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29. The other four-decisions are relied upon to make out one general proposition, namely, that for the purpose of applying the provisions of S. 92 CPC., it is not obligatory that the trustees should be individual human beings, but may be statutory committees or statutory bodies including incorporated bodies. In T. Sitharama Chetty's case [ILR. 39 Mad. 700.] , it was held that an Area Committee appointed under one of the provisions of the Madras Endowments Act, which was in management of a certain temple, may clearly be regarded as a trust for the purpose of S. 92 CPC. In Commissioner, Lucknow Division's case [AIR.

1937 PC. 240.] , there was an unincorporated informal committee of persons who collected subscriptions for a specific purpose. In Gomathinayagam's case [AIR. 1963 Mad. 387.] , the founder of a certain school who had endowed properties for purposes of the school transferred those properties on trust to a Committee of persons who got themselves incorporated into a company without any motive of profits under S. 26 of the Indians Companies Act of 1913 (corresponding to S. 25 of the 1956 Act). In all these cares, it was held that the fact that the trusteeship vested in a Committee of persons, whether incorporated or not, made no difference to treating them as trustees for the purpose of S. 92 CPC. But that does not carry the plaintiffs' case any further in this case. In every one of these decided cases, there was a clear creation of a trust for public purposes within the meaning of S. 92 CPC. as explained by us. In every case, there was already either a temple with endowed properties managed by the Area Committee or an actual transfer of property on trust by the founder of the school in favour of the Committee or the collection of funds by an informal committee for a specified public purpose amounting in law to a declaration of trust by themselves.

30. But one case which comes very near the present case is that in P. Mahadevayya's case [53 Mys H.C.R. 167] . That was a case of a registered society formed for the educational advancement of the Veerasaiva community which became the victim of serious differences of opinion between its members resulting in a split threatening to put an end to the useful activities of the society. A suit was filed with the consent of the Deputy Commissioner of the relevant district under S. 92 CPC. for the framing of a scheme. The bulk of the reported judgment discusses the facts and there is no discussion of the legal principles adverted to by us above. The Court seems to proceed upon the assumption that the case was one to which S. 92, CPC. could be rightly applied. There is reference made to the case reported in T. Sitharama Chetty's case [ILR. 39 Mad. 700.] at page 175 of the Mysore High Court Reports. The

contention disposed of by reference to the said decision was that according to one of the rules governing the society, no changes in the rules can be made without the consent of ¾th of the members of the general committee and that as the rules themselves provided a proper procedure, it was not competent for the Court to interfere and frame a scheme. This is what the Court has stated in rejecting that contention:

> *"We do not think that there is much substance in this contention. The fact that there is a statutory body or committee which governs an institution does not bar the jurisdiction of the Court to frame a scheme because the Court is the ultimate protector of charities and it is the inherent right of the Court always to intervene to safeguard and preserve a charity whenever it is necessary to do so. In Sitharama Chetty v. S. Subramanja Iyer (ILR. 39 Mad. 700) where a similar contention was raised that the Court ought not to frame a scheme for a temple when there is a temple committee functioning under a statute, their Lordships Sir John Wallis and Seshagiri Ayyar repelled the contention and held that they had jurisdiction to do so."*

31. It will be seen that the analogy sought to be drawn between the case in Sitarama Chetty's case [ILR. 39 Mad. 700.] and the case before the erstwhile High Court of Mysore may not have been possible if the great distinction that existed between a temple governed by an Area Committee under the Madras Endowments Act and a society registered under the Societies Registration Act had been brought to the notice of the Court. The Area Committee referred to in Sitharama Chetty's case [ILR. 39 Mad. 700.] is certainly not the same as the governing body of a society registered under the Societies Registration Act.

32. As the ruling relied upon did not discuss the principle of law ??? before us we do not consider it to be a clear authority in support of the proposition sought to be made by Mr. Nagaraja Rao on behalf of the plaintiffs. If the decision

should be regarded as laying down by implication, that even in the case of an ordinary society registered under the Societies Registration Act, a matter exclusively and completely governed by the provisions of the said Act and the general law, can be brought within the scope of S. 92 CPC. as if the position is clearly one of creation of a trust for public purposes, with respect, we find ourselves unable to agree with it."

(Emphasis supplied)

61. On the other hand, the High Court of Bombay in ***Shri Dnyaneshwar Madhuradwait Sampradayik Mandal, Amravati v. Charity Commissioner, Bombay and another*** reported in **1980 SCC OnLine Bom 120** while dealing with Section 2(13) of the Bombay Public Trusts Act, 1950 observed that a society registered under the Societies Registration Act, 1860 having an object which is religious or charitable or both, would be covered by the definition of a 'public trust' under Section 2(13). However, the said observation was made since the aforesaid State legislation which governed public trusts explicitly included societies functioning for a public purpose of a religious or charitable nature within the definition of a 'public trust'. The relevant observations are thus:

"7. Section 2(13) of the Bombay Public Trusts Act, 1950 which defines "public trust" is in the following terms:

"2(13) "public trust" means an express or constructive trust for either a public, religious or charitable purpose or both and includes a temple, a math, a wakf, church synagogue, agiary or other place of public religious worship, a dharmada or any other religious or charitable endowment and a society formed either for a religious or charitable purpose or for both and registered under the Societies Registration Act, 1860."

8. The present case falls under the last clause of this definition and satisfies both the conditions, namely, that it is a registered society under the Societies Registration Act and as pointed out above, the society was formed for a religious purpose."

(Emphasis supplied)

62. In ***Board of Governors St. Thomas School and Others v. A.K. George and another*** reported in **1984 SCC OnLine Cal 56** leave to institute a suit under Section 92 of the CPC pertaining to St. Thomas School, a statutory body constituted under the St. Thomas School Act, 1923 was sought on the allegation that the Board of Governors were not properly constituted and that the trust property was not being properly managed by the trustees i.e., the Board of Governors of the said school. Leave was granted *ex-parte* on the ground that the school constituted a public charitable trust. While holding that the school was not a public charitable trust, the High Court of Calcutta observed that the fact that a provision under the St. Thomas School Act, 1923 provided that all the property vested in the Governors by itself was not sufficient to lead to the conclusion that they were held in trust or that a charitable trust of a public nature was created. The relevant observations are thus:

> "*11. As regards the next contention that there is no public charitable trust in respect of the St. Thomas School which is expressly governed by the said St. Thomas School Act 1923, it was tried to be contended on behalf of the respondents by referring to Section 11 of the said Act that all the property vested in the Governors by or under this Act should be deemed to be held in Trust, thereby meaning constructive charitable trust of a public nature. This contention, in our opinion, is totally devoid of any merit in view of the fact that Section 11 of the said Act does not at all either expressly or impliedly purport to create a charitable trust of a public nature. St. Thomas School and its property have to be administered in accordance with the provisions of St. Thomas School Act 1923 and if there is any breach of the provision of the Act then the remedy is to be sought under the said Act. The mode of constitution of the Board of Governors had been specifically laid down in S. 2 of the said Act. In these circumstances the contention that the St. Thomas School is a public charitable trust cannot be sustained. Hence the instant suit filed under Section 92 of the Civil P.C. with the leave of the Court granted under the said section is not competent and the ex parte leave that was granted is liable to be revoked and withdrawn. […]I have already held that the*

> *St. Thomas School and its properties do not constitute a public charitable trust at all but they are governed by the provisions of the St. Thomas School Act, 1923 (Bengal Act XII of 1923).*"
>
> (Emphasis supplied)

63. In ***The Advocate General v. Bhartiya Adam Jati Sewak Sangh and Ors*** reported in **MANU/HP/0182/2001,** the High Court of Himachal Pradesh held that even if the defendant no. 1 and 2 societies respectively were performing charitable functions, the same by itself would not attract the provisions of Section 92 of the CPC since there was no evidence that any trust was expressly or impliedly created. In the said case also the societies functioning for a charitable aim, i.e., the social and economic upliftment of the weaker section of the society and money was being raised from various sources, including the public at large as well as in the form of grants-in-aid from the government. Further, the High Court interpreted Section 5 of the Societies Registration Act, 1860 to mean that if the properties were already vested in trustees, only then it shall not be deemed to be vested in the governing body of the society. In other words, the subsequent registration of a trust as a society would not have the effect of altering the properties belonging to the trust and the trustees would continue to be the legal owners of such properties. It adopted the interpretation given in ***Kesava Panicker*** *(supra)*. In this context, it was held that there was no evidence to show that any funds were collected from the general public before the defendant nos. 1 and 2 societies respectively came to be registered as societies and therefore, no trust as such could be said to have been existed. Hence, all the monies received or collected by them would vest in the governing body of the society only. Therefore, there being no trust and the defendant nos. 1 and 2 respectively admittedly being societies, the suit under Section 92 was not maintainable. The relevant observations are reproduced hereinbelow:

> "*17. At this stage, reference is required to be made to Section 5 of the Societies Registration Act, 1860, which provides :*
>
> > *The property, movable and immovable, belonging to a society registered under this Act, if not vested in Trustees, shall be deemed to be vested, for the time*

being in the governing body of such society, and in all proceedings, civil and criminal may be described as the property of the governing body of such society by their proper title.

(Emphasis supplied in original)

18. Under the above provisions the properties shall not vest in the Society, if such properties were already with the trustees. In other words, the registration of a Trust as a Society under the Societies Registration Act, 1860 would not alter the position and the properties belonging to the trust would not vest in the society but the trustees would continue to be the legal owners of such properties.

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21. In the present case, there are neither pleadings nor evidence to show that any funds were collected from the general public before the Defendants No. 1 and 2 came to be registered as Societies under the Societies Registration Act, 1860. Therefore there was no trust as such and vide Section 20 of the Societies Registration Act, 1860, all moneys received by the Defendants No. 1 and 2 either by way of grants-in-aid or in the form of contributions from the public would vest in the societies, that is, Defendants No. 1 and 2.

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24. In the present case, the very first condition is lacking. As stated above, it is the admitted case of the Plaintiff that Defendants No. 1 and 2 are "societies" registered under the Societies Registration Act, 1860. There is no averment and/or evidence that any trust was expressly or impliedly created. Even if Defendants No. 1 and 2 are carrying on charitable purpose, the same by itself would not attract the provisions of Section 92, Code of Civil Procedure.

25. On the facts and circumstances of the case neither the Defendants No. 1 and 2 are public trusts nor the Defendants No. 3 to 7 are the trustees. The issue is decided against the Plaintiff."

(Emphasis supplied)

64. In ***Abhaya*** *(supra)*, the Kerala High Court also refused to accept the contention that a society can be considered to be a public trust for the purposes of Section 92 of the CPC. The organisation therein was registered under the Travancore-Cochin Literary, Scientific, and Charitable Societies Registration Act, 1955 and was constituted with the objectives of serving the mentally-ill, improving the social and non-social environment of the mental hospitals in Kerala, provision of facilities to improve the life-conditions of the mentally-ill, and rehabilitation of the recovered patients, especially those patients who have no familial support. The required capital of the society was also raised by membership/subscription fees, donations, loans, grants and other voluntary contributions, including from the public. Allegations of mismanagement, misconduct and misappropriation were levelled against the defendants. While dismissing the original petition, it was held as follows:

i. ***First,*** that there was absolutely nothing in the Rules and Regulations of the Memorandum of Association which indicated that prior to the formation and registration of the society there was a trust having any property. In such a scenario, the formation of a society to carry out any charitable or social purpose would not *ipso facto* make the society a public trust, especially since the society is also empowered to acquire property to use for its purposes. Such a property which is then acquired will only be the property of the society which is a legal person by virtue of the provisions of the statute and will not be a property in respect of which a trust can be predicated. It cannot be said that whenever a society acquires property, it declares itself as a trustee in respect of that property. While it does have a legal obligation to use the property for its prescribed purposes and strictly in accordance with the Rules and Regulations of the Memorandum of Association, by no stretch of imagination can it be considered as a declaration of trust.

ii. ***Secondly,*** on a reading of Section 8 of the Travancore-Cochin Literary, Scientific, and Charitable Societies Registration Act, 1955, which is *pari materia* to Section 5 of the Societies Registration Act, 1860, it was inferred that unless the properties had already vested separately in trustees, they shall vest in the governing body of the society.

iii. ***Thirdly,*** it was opined that a procedure for the removal of the existing governing body, appointment of a fresh governing body and framing a scheme for the better and efficient management of the society was already contemplated within the Travancore-Cochin Literary, Scientific, and Charitable Societies Registration Act, 1955. Such a relief could be availed by the members of the society as well, however, provided that a minimum of 10% of the members on the rolls of the society join together. It was opined that this express provision cannot be sought to be circumvented by the aggrieved members of the society by making an allegation that the society is a public trust and adopting the route under Section 92 of the CPC instead.

iv. ***Lastly,*** while acknowledging that it is the allegation in the plaint that determines the jurisdiction of the court under Section 92 of the CPC and that if a breach of trust is 'alleged', the grant of leave may be given, it was cautioned that when the very existence of a trust of any kind is seriously disputed/denied, the court must *prima facie* satisfy itself of the existence of the trust. It is true that if the contention is that there is no public trust but only a private one, a decision on whether the trust is of a public or private nature can only be made after taking in evidence. However, the same principle would not apply when the issue is that a trust by itself is absent in the circumstances. There must be some material to convince the court that a trust has been created.

65. The relevant observations made in ***Abhaya*** *(supra)* are reproduced hereinbelow:

> "*7. In the 1st paragraph of the petition itself it is admitted that the first petitioner-organisation "Abhaya" was constituted with the objectives of serving the mentally ill-persons, improving the social and non-social environment of the mental hospitals of Kerala, providing the mentally ill-persons with facilities to improve their life conditions and rehabilitating the recovered patients, especially those who are unwanted by their families. It is also admitted that in a general body meeting of the 1st petitioner held on 5-1-1986 it was decided to register the 1st petitioner-organisation under the provisions of Act XII of 1955 and*

the same was registered with Reg. No. 71 of 1986 by the Registrar of Co-operative Societies having its registered office at "Varda" Nandavanam, Trivandrum. In paragraphs 3 to 13 the respondents 1 to 6 have extracted the various provisions of the Rules and Regulation of the Society. A copy of the Memorandum of Association is produced by respondents 1 to 6. The Memorandum of Association shows that the name of the Society is "Abhaya" and its registered office is at "Varada" Nandavanam, Trivandrum. The area of activity of the Society is limited to State of Kerala. Clause 4 of the Rules and Regulations of the Memorandum of Association deals with the main objectives of the Society, which reads as follows:—

> *4. The main objectives of the Society shall be the service of the mentally ill, alcoholics and drug addicts, women in distress and children and other groups in distress. The society shall aim at—*
>
> *(a) Improving the social and non-social environment of the mental hospitals of Kerala.*
>
> *(b) Providing the mentally ill with facilities to improve their life conditions.*
>
> *(c) Rehabilitating the recovered patients, especially those who are unwanted by their families."*

[…] Clause 10 deals with the capital of the society, which reads as follows:—

> *"10. The required capital of the society shall be raised by the membership and subscription fees and donations, loans, grants and other voluntary contributions from the public State and Central Governments and other institutions or organisations."*

[…]

8. It is true that Clause 4 of the Rules and Regulations shows that the Society is constituted with the main objectives of rendering service of the mentally ill, alcoholics and drug addicts, women in distress and children and other groups in distress. But, there is absolutely nothing in

the Rules and Regulations of Memorandum of Association to show that prior to the formation and registration, of the society there was a trust haying any property. On the other hand, a reading of the memorandum of Association shows that there were 7 promotees and they convened a General Body meeting on 5-1-1986. The General Body held on 5-1-1986 decided to register the 1st petitioner as a Society under Act XII of 1955. Clause 10 shows that on the date of formation of the Society there was no property over which the Society had any ownership. A formation of a Society under the provisions of Act XII of 1955 to carry out any charitable or social purpose will not make the Society a public Trust. The Society is empowered to acquire property also to use for its purposes. But, that property which is to be Acquired will only be the property of the Society and it will not be a property in respect of which it is possible to predicate a trust. The preamble of the Act XII of 1955 is relevant. It states as follows:—

> *"Whereas it is expedient that provision should be made for improving the legal condition of Societies, established for the promotion of literature, science, or the fine arts, or for the diffusion of useful knowledge or for charitable purposes."*

Section 3 of the Act provides that any seven or more persons associated for any charitable purpose may by subscribing their names to a memorandum of association and filing the same with the Registrar, form themselves into a society. Section 32 of the Act provides that the following Societies may be registered under the Act:

> *"Charitable societies, societies established for the promotion of science literature or the fine arts, the diffusion of useful knowledge, the foundation or maintenance of libraries or reading rooms for general use among the members or open to the public, or public museums and galleries of painting and other works of art collections of natural history mechanical and philosophical inventions, instruments or designs."*

Section 8 of the Act deals with the property of the Society. It reads as follows:—

> *"8. Property of society how vested. The property, movable and immovable, belonging to a society, if not vested in trustees, shall be deemed to be vested, for the time being, in the governing body of such society, and in all proceedings, civil and criminal, may be described as the property of the governing body of such society by their proper title."*

A reading of Section 8 makes it clear that unless the properties had already vested separately in trustees, it shall vest in the governing body of the society. […] Section 25 deals with application to court for dissolution framing schemes, etc. Section 25 reads as follows:—

> *"25. Application to Court for dissolution, framing a scheme, etc. — (1) When an application is made by the State Government or ten per cent of the members on the rolls of a society to the District Court within the jurisdiction of which the society is registered, the Court may, after enquiry and on being satisfied that it is just and equitable pass any of the following orders:—*
>
> *(a) removing the existing governing body and appointing a fresh governing body; or*
>
> *(b) framing a scheme for the better and efficient management of the society; or*
>
> *(c) dissolving the Society.*
>
> *(2) Where the application under sub-section (1) is by the members of the society, the applicant shall deposit in Court along with the application the sum of one hundred rupees in cash as security for costs."*

Section 25 makes it very clear that a suit can be filed before the District Court by 10% of the members of the society against the Society for removing the existing governing body and appointing a fresh governing body or for framing a scheme for the better and efficient management of the

society. The right to file the suit to frame a scheme is not confined to the State Government alone. The relief that the District Court can grant is not restricted to ordering dissolution of the society only. Section 25 confers power on the members of the society to institute a suit for removing the governing body or for appointing a fresh governing body and for framing a scheme. The only condition is that to file such suit minimum 10% of the members on the rolls of the society shall join together and the suit is to be filed before the District Court, Sub-section (2) of Section 25 provides that the plaintiff has to deposit Rs. 100/- as security for costs.

9. A reading of the various Sections of Act XII of 1955 shows that even if the object of a society formed under the provisions of Act XII of 1955 is a charitable purpose and even if it acquires property and use the same for achieving the object of the society, the property is owned by the Society and it belongs to it. The property is that of the society which is a legal person by virtue of the provisions of the statute. It cannot be said that whenever a society acquires property, it declares itself as a trustee in respect of that property. The Society has a legal obligation to use the property for purposes of the society acquired strictly in accordance with the provisions contained in the Rules and Regulations of Memorandum of Association. By no stretch of imagination it can be considered as a declaration of trust in respect of a property acquired by the Society.

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11. The preamble of the Indian Trusts Act, 182, states that it was enacted to define and amend the law relating to private trusts and trustees. Section 3 of the Indian Trusts Act defines "trust". It reads as follows:—

> *"A "Trust" is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner."*

To constitute a trust, there must be an author of the trust, trustees, beneficiary, trust property and beneficial interest. The concept of trust involves four ingredients; a settlor or donor, a trustee or trustees, the beneficiaries and the subject matter. Of course, the beneficiaries may be a specified group or general public. Trust may be either express or constructive. But, a trust is created only when the author of the trust indicates with reasonable certainty by words or act the intention in his part to create a trust, beneficiary and the trust property. The subject matter of a trust must be a property transferable to the beneficiary. It must not be merely a beneficial interest.

12. In Kesava Panicker v. Damodara Panicker 1975 Ker LT 797: (AIR 1976 Kerala 86) a Full Bench of this Court considered the effect of the subsequent registration of a society. […] That principle was followed in Sukumaran v. Akamala Sree Dharma Sastha Idol (1992) 1 Ker LT 432: (AIR 1992 Kerala 406), but in both those cases there were materials to show that a public trust was in existence and later that trust got registered under the provisions of Act XII of 1955. I shall consider whether there is any material in this case to show that the 1st petitioner was a trust and later it got itself registered under the provisions of Act XII of 1955.

13. […] A reading of various averments in the Original Petition shows that though the word "Trust" is used to describe the 1st petitioner, there is no averments in the pleadings to show the existence of a Trust, whether Public or Private. On the other hand, the materials on record clearly shows that the 1st petitioner is a Society registered under Act XII of 1955.

14. A comparison of Section 25 of the Act XII of 1955 and Section 92 of C.P. Code shows that the reliefs provided under Section 25 of the Act and under Section 92 of the C.P. Code are similar. The suit under Section 25 of the Act is also to be filed before the District Court. The main difference is that to file a suit under Section 25 of the Act a minimum 10% of the members of the Society

must join together as plaintiffs. But they need not obtain any permission as contemplated under Section 92 of the C.P. Code. The minimum number of 10% of the members is insisted to see that the Society is not unnecessarily dragged to court of law. The member of the Society cannot be allowed to circumvent that provision by making an allegation that the Society is a Trust.

15. The learned counsel appearing for the contesting respondents has argued that when there are averments in the petition regarding the existence of a trust, the Court is bound to grant the permission sought for and the Court cannot consider whether the allegation regarding the existence of trust is true or not. It is argued that is a matter to be decided after taking evidence.

16. It is true that it is the allegation in the plaint that determines the jurisdiction of the Court under Section 92 of C.P. Code. If a breach of trust is alleged in the plaint, it is sufficient to confer jurisdiction to the Court. But, when the very existence of a trust of any kind is denied, the court must look into the pleadings and the documents produced by the plaintiffs to see whether there is any material to show a prima facie case of existence of the trust. Of course, if the contention is that there is no public trust but only a private trust, a decision as to whether the trust is public or private can be taken only after taking evidence.

17. The learned counsel for the respondents 1 to 6 has argued that if there are averments in the original Petition to the effect that the O.P. relates to a trust the District Court shall not reject the O.P. on the ground that there is no trust. It is argued that the Apex Court has held that it is not even necessary to hear the respondent before granting leave. It is true that in B.S. Adityan v. B. Ramachandran Adityan 2004 AIR SCW 3044: (AIR 2004 SC 3448), the Apex Court has held that leave can be granted without issuing notice to the respondent. But in the very same decision it was also held that the respondent after appearing in the suit, can file petition to revoke the leave already granted. So, there is no merit in the contention of the contesting respondent that if there are averments in the petition regarding the

existence of trust, the District Court shall entertain the application and grant leave.

18. The learned counsel appearing for respondents 1 to 6 has argued that the scope of enquiry in an Original Petition is very limited and the District Court has merely to see whether there is prima facie case for granting the relief. […] It is true that the plaintiff need only establish a prima facie case of existence of a trust. But, there must be materials to make a prima facie case of existence of a trust. There is total lack of any such materials in this case.

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21. The learned District Judge allowed the Original Petition on a wrong assumption that the 1st petitioner Society is a Trust. There is absolutely no material to show prima facie that 1st petitioner is a Trust, either public or private. There is also no material to show that there was a Trust of public nature, which subsequently got registered under the provisions of Act XII of 1955. Since there is no material to make out a prima facie case that the 1st petitioner is a public Trust and any person had settled any properties for the benefit of the beneficiaries, the provisions of Section 92 of C.P.C. cannot be invoked. So, the impugned order is illegal, unsustainable and liable to be set aside."

(Emphasis supplied)

66. While dealing with the same issue, the Madras High Court also in ***Periyar Self Respect Propaganda Institution*** *(supra),* took the view that the properties in question vested with a society and not a trust, thereby rendering the suit under Section 92 not maintainable. Therein, the fact that the institution was registered under the Societies Registration Act, 1860 and that the properties were vested in the President and Secretary of the institution who were empowered to purchase and sell properties on behalf of the institution, were, in the opinion of the High Court, factors which indicated that a trust neither existed nor was created. The relevant observations are as thus:

"9. In order to maintain the suit under Section 92 CPC the petitioners/plaintiffs should show the existence of a Trust and the alleged breach of the terms of the Trust; besides

which the interestedness of the petitioners/plaintiffs in the running the Trust shall also be made known.

10. But as seen from the Memorandum of Articles of Association of the Periyar Self Respect Propaganda Institution (first defendant), Tiruchirapalli, it is found that it was incorporated and found to have been registered under the Societies Registration Act 21/1860. That Certificate number is 13/1952 with a Memorandum of Articles of Association containing 13 life members and 30 Rules; according to Clause 22, the life members of the Executive Committee alone shall be the Trustees of the properties already purchased. According to Clause 23, the properties of the Institution shall be in the names of the President and the Secretary and they shall have to power to purchase and sell the properties on behalf of the Institution. If it is a Trust Property, there will not be a clause empowering the President to sell the properties. That itself indicates that it is not a Trust. The fact that it was registered under the Societies Act may also lend support to the above view.

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14. In this case also the property vest with the President and Secretary of the first defendant as per clause 23 of the Memorandum of Articles of Association of the first defendant Institution, which was registered under the Societies Registration Act 21/1860. Therefore, the property is vested with a society and not with a Trust and as per the observations made in the above cited case a suit under Section 92, CPC is not maintainable, (to) which Societies Registration Act is applicable, proceeding with a suit under Section 92, CPC was deprecated in Babaji Kondaji Garad v. Nasik Merchants Co-operative Bank Ltd., Nasik ((1984) 2 SCC 50 : AIR 1984 SC 192). There is also no interestedness shown upon the plaintiffs in the running of the Trust."

(Emphasis supplied)

67. In ***S.R. Bahuguna*** *(supra)*, the Delhi High Court had held that the suit under Section 92 was not maintainable for not having satisfied

two crucial ingredients i.e., the defendant no. 1 was a society and not a public charitable trust, and the plaintiffs were also not 'persons interested' in the trust. Therein, for the purpose of constructing a building on a plot of land belonging to defendant society and develop it, a board of five trustees was set up by the standing committee of the defendant society through a registered trust deed dated 01.09.1975 where the President of the defendant society was the Managing Trustee. However, the trust was revoked almost two years later since the construction was complete and the purposes for which it had been set up was fulfilled. In this context, the Delhi High Court emphasized that Section 5 of the Societies Registration Act, 1860 cannot be construed to mean that the governing body members of the society would automatically become trustees if no trust is created to manage the assets of the society. The relevant observations are as follows:

> "*12. The sum and substance of the suit averments is that the AIWC, a registered Society, constituted a trust on 01.09.1975 for the purpose of constructing upon a plot of land allotted to it in 1962. This was part of the avowed objectives that govern the Society. The AIWC had resolved that after construction, the building would be utilized to provide housing for as many working women as was feasible and also at the same time generate rental income to sustain its other welfare activities. The plaintiffs allege various acts of financial irregularities in relation to construction activity undertaken by the AIWC as well as alleged acts of embezzlement on part of the Treasurer. They also rely upon certain observations by the AIWC's Chartered Accountants or Auditors. Their claim to be persons interested for the purpose of obtaining leave is that they were associated with the Society having worked there for some time and are, therefore, 'interested for its proper management and functioning'.*
>
> *-xxx-*
>
> *14. […] Besides, there is no denial that the first defendant is a society, not a Trust; a Trust was set up for a limited period, for a special purpose, i.e. to construct a building. Apparently, after that objective was achieved, the Trust*

was dissolved or wound up. In these circumstances, the Court is of opinion that the suit is not maintainable.

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16. In view of the above discussion, the Court is of opinion that the suit is not maintainable, because two crucial ingredients, which are essential pre-requisites for action under Section 92 are lacking; the first, defendant is a society, and not a public charitable Trust. The Trust which had been set up earlier was dissolved in 1997; that has not been disputed. The suit was filed in 2001. Section 5 of the Societies Registration Act 1860, says that the property and assets of a registered society vest either in a trust, set up for that purpose, or the society's governing council or body. This however, does not mean that the governing body members if no trust is created to manage the society's assets, become trustees. No authority was shown to advance such an argument. The second ingredient, i.e. the plaintiffs being 'persons interested' is also lacking, in this case.

17. For the above reasons, the plaintiffs cannot be granted leave to file a suit, under Section 92 of the CPC. The suit and all pending applications are, therefore, dismissed without any order on costs."

(Emphasis supplied)

68. In ***Young Mens Christian Association of Ernakulam*** *(supra)*, the plaintiffs alleged before the Delhi High Court that the defendant society owned a large number of movable and immovable properties across India and held in trust, various properties of its member associations. The High Court accepted such a contention and leave to institute a suit under Section 92 was granted by delineating the following:

i. ***First***, emphasis was laid on several Articles of the Memorandum of Association of the defendant society of which one provided that certain properties were indeed held in trust by the defendant society on behalf of the member YMCAs. Furthermore, the historical background indicated that the defendant society started administering and looking after existing member YMCAs which were formed even before it was registered as a society, quite

similar to the factual scenario in ***Kesava Panicker*** *(supra)*. The defendant society was not only holding properties in trust but also exercised the power to enter into transactions in respect of such properties. On a consideration of all the above, it was held that there remained no doubt that the defendant society was in both 'express' and 'constructive' trust of the properties belonging to its members.

ii. ***Secondly***, by interpreting Section 3 of the Indian Trusts Act, 1882, the elements that were required to be fulfilled for an express or constructive trust were said to be – (a) ownership of a property, (b) a confidence reposed by the owner, and (c) the said confidence being accepted for the benefit of another. It was stated that if these elements are satisfied a trust could be said to be created. It was, however acknowledged that the term "express or constructive trust" in Section 92 of the CPC does not relate to a trust constituted under the Indian Trust Act, 1882 but any body or entity which holds in trust any property and is created for public purposes of a religious or charitable nature. Hence, a society might also be able to satisfy the test of an express or constructive trust, when the facts reveal the creation of a trust.

69. The relevant observations are reproduced as follows:

"*11. A perusal of the above clauses of the Defendant's Memorandum reveals that the Society is one which possesses a public character. It is working for the people who constitute its members as also for the larger interest of the community. It is common knowledge that the Defendant not only has a large number of affiliated member associations in India but is also affiliated to the international network of YMCAs. It has been clearly created for a 'public purpose' and is both of a charitable and a religious nature.*

12. The Defendant has two bodies which manage and administer its duties and functions. The National Board is the governing body of the Defendant and under Article III(1), the management of the society vests with it. […]

13. As per Article X of the rules and regulations, all the property of the society is deemed to vest in the National

Board which consists of all the members of the National Executive, Secretary members, immediate past National President, and Chairmen of the National Standing Committees, etc.

14. The second body is the National Executive which is primarily an elected body […]

15. Article X is relevant for the present purpose and is set out herein below:

"X (1). All property of the Society, whether movable or immovable, shall be deemed to be vested in the National Board who shall have power to sell, lease, mortgage or otherwise deal with the same, and also to purchase, take on lease, accept, grants of or otherwise acquire movable or immovable property on behalf of the society, and to enter into all contracts and convenants on its behalf."

16. Article XV in respect of 'Property matters' is extremely relevant and is set out below:

"1. All matters related to the use and management of properties owned and directly managed by the National Council shall be authorized by the National Board or its Executive Committee. Documents of such properties to which the seal of the society is affixed shall be signed on behalf of the society by the National General Secretary and by the President or Treasurer.

2. In respect of Property owned by the National Council and used for National Council projects, the signing authority will be the National General Secretary or his nominee as approved by the National Executive Committee and by the President of the National Council or the chairman of the project concerned as approved by the National Executive Committee.

3. In respect of the properties held in trust by the National Council on behalf of the member YMCA, for all dealings the Executive Committee may give a power of attorney on written requisition with a resolution of the Board of the member YMCA, to the President and Secretary of

the member YMCA and such other representatives of the National Executive Committee if deemed necessary by the National Executive Committee.

In respect of properties mentioned in section (1) and [2] above, all sales or disposals are to be approved by the National Board."

(Emphasis in original)

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18. Considering the nature and constitution of the Defendant, the question is whether it comes under the purview of the Section 92 of the CPC, it being a Registered Society under the Societies Registration Act.

19. Section 3 of the Indian Trusts Act reads as under:

*"**Section 3 - Interpretation clause - 'trust' -** A "trust" is an obligation annexed to the ownership of property, and arising out of a confidence reposed in an accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner"*

20. From a perusal of the above definition, it is clear that the elements that are required to be fulfilled for an express or constructive trust are:

i) Ownership of a property;

ii) A confidence reposed by the owner;

iii) The said confidence being accepted for the benefit of another.

21. If these elements are satisfied, a trust is created.

22. In this backdrop, a perusal of Section 92 of the CPC reveals that the term "express or constructive trust" does not relate to a trust constituted under the Indian Trusts Act, but any body or entity which holds in trust any property and is created for public purposes of a charitable or religious nature. A society can also satisfy the test of express or constructive trust created for public purposes.

23. In Abhaya (supra) cited by the Defendant, the case involved a charitable Society which did not show that it held 'in trust' any property belonging to a different organisation. The property vested in the governing body of the Society itself. Thus, the Kerala High Court held that a suit under Section 92 of the CPC would not be maintainable. […]

24. Thus, in the facts of the said case, the Court held that there was no prima facie material to show existence of a trust.

25. Even in Rukmini Devi Arundale (supra), the Court held that the question was as to whether the property belonged to the Trust or the Society. In Bhartiya Adam Jati Sewak Sangh (supra), the High Court of Himachal Pradesh held that there was no evidence to show that any funds were collected from the general public before the Society was created. […]

26. In the present case, as per Clause 3(ii) of the Preamble of the Memorandum, one of the main objectives of the Defendant was to promote the work of the Young Men's Christian Association Movement in India and to resuscitate the existing languishing YMCAs and aid in formation of new YMCAs in India. In effect, the Defendant started administering and looking after the existing YMCAs which were formed even before it came into existence as a Society. Paragraph 14 of the Plaint clearly sets out the past YMCA movement which dates back to 1857, the fore-runner of the Defendant being formed in 1891 and thereafter the registration of the Defendant as a Society only in 1964. All these organisations came under the administration and supervision of the Defendant. As per the Rules and Regulations set out hereinabove, the Defendant holds in trust, properties on behalf of the member YMCAs. The immovable properties are located across the country. Thus, there is no doubt that the Defendant is in both 'express' and 'constructive' trust of the properties belonging to its members. In fact, as pointed out by counsels, the agreements in respect of immovable properties are actually signed for and on behalf of the members by the

> *Defendant. One such example is that of the property in Vishakhapatnam. The Defendant is thus playing the role of not merely an association holding something in trust but also has the power to enter into a transaction in respect of such properties.*"
>
> (Emphasis supplied)

70. A conspectus of the aforesaid decisions of several High Courts indicate that they are unanimous in their view as regards the fact that a society registered under the Societies Registration Act, 1860 cannot be termed as a trust or a constructive trust merely by virtue of the fact that its properties are vested in its governing body. The facts must contain circumstances clearly indicating the creation of a trust.

c. Section 5 of the Societies Registration Act, 1860 and the 'vesting' of properties in the Executive Committee.

71. The appellant Society has submitted that no trust has been created for the purpose of holding the society's properties or its assets and it has been 'vested' in its Executive Committee only as per the mandate under Section 5 of the Societies Registration Act, 1860 which reads as thus:

> "***5. Property of society how vested.—****The property, movable and immovable, belonging to a society registered under this Act, if not vested in trustees, shall be deemed to be vested, for the time being, in the governing body of such society, and in all proceedings, civil and criminal, may be described as the property of the governing body of such society by their proper title.*"

72. A five-judge bench of this Court in ***Board of Trustees, Ayurvedic and Unani Tibia College, Delhi v. State of Delhi and Another*** reported in **1961 SCC OnLine SC 145** while deciding a challenge to a State legislation, had the occasion to decide whether an entity registered as a society can be considered to be a 'corporation'. Answering in the negative, it was stated that the most important aspect in resolving the said issue would be to determine whether there was an intention to incorporate. Upon perusal of the various provisions of the Societies Registration Act, 1860, it was concluded that there were no sufficient words to indicate an intention to incorporate; on the contrary, the

provisions only revealed the absence of such an intention. Further, it was stated that the expression "property belonging to the society" under Section 5, did not give the society a corporate status in the matter of holding or acquiring property and that it merely described the property which either vests in the trustees or the governing body for the time being. Though the provisions of the Act undoubtedly confer certain privileges to a registered society and those privileges are of considerable importance, some may even be analogous to the privileges enjoyed by a corporation, it was held that there is no incorporation in the sense in which the word is legally understood. The relevant observations are thus:

> "*9. The first and foremost question is whether the old Board was a corporation in the legal sense of that word. What is a corporation?[…]*
>
> *10. The learned Advocate for the petitioners has referred us to various provisions of the Societies Registration Act, 1860 and has contended that the result of these provisions was to make the Board a corporation on registration. It is necessary now to read some of the provisions of that Act.[…]*
>
> *11. Now, the question before us is — regard being had to the aforesaid provisions — was the Board a corporation? Our conclusion is that it was not. The most important point to be noticed in this connection is that in the various provisions of the Societies Registration Act, 1860, there are no sufficient words to indicate an intention to incorporate; on the contrary, the provisions show that there was an absence of such intention. Section 2 no doubt provides for a name as also for the objects of the society. Section 5, however, states that the property belonging to the society, if not vested in trustees, shall be deemed to be vested in the governing body of the society and in all proceedings, civil and criminal, the property will be described as the property of the governing body. The section talks of property belonging to the society; but the property is vested in the trustees or in the governing body for the time being. The expression "property belonging to the society" does not give the society a corporate status in the matter of holding*

or acquiring property; it merely describes the property which vests in the trustees or governing body for the time being. Section 6 gives the society the right to sue or be sued in the name of the president, chairman etc. and Section 7 provides that no suit or proceeding in a civil court shall abate by reason of the death etc. of the person by or against whom the suit has been brought. Section 8 again says that any judgment obtained in a suit brought by or against the society shall be enforced against it. It has been submitted before us that Sections 6, 7 and 8 clothe the society with a legal personality and a perpetual succession; and Section 10 enables the members of the society to be sued as strangers, in certain circumstances, by the society, and the costs awarded to the defendant in such a suit may be recovered, at his election, from the officer in whose name the suit was brought. Dealing with very similar provisions (Sections 7, 8 and 9) of the English Trade Union Act, 1871 (34 and 35 Vict. c. 31) Lord Lindley said in the celebrated case of Taff Vale Railway v. Amalgamated Society of Railway Servants [1901 AC 426] […]

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13. It is clear from the aforesaid decision that provisions similar to the provisions of Sections 5, 6, 7 and 8 of the Societies Registration Act, 1860 were held not to show any intention to incorporate; on the contrary, the very resort to the machinery of trustees or the governing body for the time being acquiring and holding the property showed that there was no intention to incorporate the society or union so as to give it a corporate capacity for the purpose of holding and acquiring property. It appears to us that the legal position is exactly the same with regard to the provisions in Sections 5, 6, 7 and 8 of the Societies Registration Act, 1860. They do not show any intention to incorporate, though they confer certain privileges on a registered society, which would be wholly unnecessary if the registered society were a corporation. Sections 13 and 14 do not carry the matter any further in favour of the petitioners. Section 13 provides for dissolution of

societies and adjustment of their affairs. It says in effect that on dissolution of a society necessary steps shall be taken for the disposal and settlement of the property of the society, its claims and liabilities, according to the Rules of the society; if there be no rules, then as the governing body shall find it expedient provided that in the event of any dispute arising among the said governing body or the members of the said society, the adjustment of the affairs shall be referred to the court. Here again the governing body is given a legal power somewhat distinct from that of the society itself; because under Section 16 the governing body shall be the governors, council, directors, committee, trustees or other body to whom by the Rules and regulations of the society the management of its affairs is entrusted.

14. *We have, therefore, come to the conclusion that the provisions aforesaid do not establish the main essential characteristic of a corporation aggregate, namely, that of an intention to incorporate the society. […] Those provisions undoubtedly give certain privileges to a society registered under that Act and the privileges are of considerable importance and some of those privileges are analogous to the privileges enjoyed by a corporation, but there is really no incorporation in the sense in which that word is legally understood.*"

(Emphasis supplied)

73. In ***Board of Trustees*** *(supra)*, this Court while deciding on the question whether the Board members enjoyed any rights over the property of the society, clarified that, during the subsistence of the society, the right of the members was to ensure that the property was utilised for the charitable objects as set out in its memorandum and as such, that did not include any beneficial enjoyment on the part of the board members. The members also do not acquire any beneficial interest *vis-à-vis* the property on the dissolution of the society since Section 14 of the Societies Registration Act, 1860 expressly negatives the right of the members of the society to any distribution of the assets of the dissolved body. Upon dissolution, the property has to be given over to some other society to be utilised for like purposes and the only right of the members was to determine

which society the funds or property might be transferred to. The aforesaid right of the members to determine which new society the funds and property may be transferred to, was held to be not a right to "acquire, hold and dispose of property" within the meaning of the then Article 19(1)(f). The context in which the words "dispose of" occurred in Article 19(1)(f) was said to denote that the kind of property which a citizen has a right to hold and upon dissolution of the society, the members cannot be said to acquire any right to "hold" the property in their individual capacity. The relevant observations made are reproduced hereinbelow:

> "*23. […] We have already held that the impugned legislation was well within the legislative competence of the Delhi State Legislature. Now the question is — is the impugned legislation bad on the ground that it violates the right of the petitioners under Article 19(1)(f)? The property for the protection of which Article 19(1)(f) is invoked belonged either to the Board or to the members composing the Board at the date of the dissolution. In either event, on the terms of Section 5 of the Societies Registration Act, 1860, the property was to be deemed to be vested in the governing body of the Board. There could be no doubt that if the Board was dissolved by competent legislative action, and in view of our conclusions on the first point raised it must be held that this had taken place, the Board would cease to exist and having ceased to exist cannot obviously lay any claim to the property. This however may not be sufficient to negative the contention urged before us by the petitioners. If the legal ownership of the property by the Board or the vesting of it in the governing body was merely a method or mechanism permitted by the law whereby the members exercised their rights quoad the property, the dissolution of the Board and with it of the governing body thereof would merely result in the emergence of the right of the members to that property. It is, therefore, necessary to ascertain the precise rights the members of the Board possessed to see whether the changes effected by the impugned Act amount to an infringement of their rights within the meaning of Article 19(1)(f). During the subsistence of the society, the right of*

the members was to ensure that the property was utilised for the charitable objects set out in the memorandum and these did not include any beneficial enjoyment. Nor did the members of the society acquire any beneficial interest on the dissolution of the society; for Section 14 of the Act, quoted earlier, expressly negatived the right of the members to any distribution of the assets of the dissolved body. In such an event the property had to be given over to some other society i.e. for being managed by some other charitable organisation and to be utilised for like purposes, and the only right of the members was to determine the society to whom the funds or property might be transferred and this had to be done by not less than three-fifths of the members present at the meeting for the purpose and, in default of such determination, by the civil court. The effect of the impugned legislation is to vary or affect this privilege of the members and to vest the property in a new body created by it enjoined to administer it so as to serve the same purposes as the dissolved society. The only question is whether the right to determine the body which shall administer the funds or property of the dissolved society which they had under the pre-existing law is a right to "acquire, hold and dispose of property" within the meaning of Article 19(1)(f), and if so whether the legislation is not saved by Article 19(5). We are clearly of the opinion that that right is not a right of property within the meaning of Article 19(1)(f). In the context in which the words "to dispose of" occur in Article 19(1)(f), they denote that kind of property which a citizen has a right to hold — the right to dispose of being part of or being incidental to the right to hold. Where however the citizen has no right to hold the property, for on the terms of Section 14 of the Societies Registration Act the members have no right to "hold" the property of the dissolved society, there is, in our opinion, no infringement of any right to property within the meaning of Article 19(1)(f). In this view, the question as to whether the impugned enactment satisfies the requirements of Article 19(5) does not fall to be determined."

(Emphasis supplied)

74. In ***Illachi Devi and Others v. Jain Society, Protection of Orphans India and Others*** reported in **(2003) 8 SCC 413**, this Court held that a society cannot be the grantee of a probate or a letter of administration in accordance with the Indian Succession Act, 1925 by reiterating that a society registered under the Societies Registration Act, 1860 is not a body corporate or a juristic person and therefore, ineligible to be a grantee for the aforesaid purposes. The fact that a society is not capable of ownership of any property by itself was a characteristic which assumed significance in arriving at the conclusion that it cannot be construed to be a body corporate. It is due to this incapability that the property is vested either in trustees or the governing body of the society. Nevertheless, it was held that a probate or letter of administration can be granted to a person who is authorised by the society, either under the statute or through a resolution, so that a Will or gift in favour of a society does not become totally unenforceable in law. Such an authorised person would carry out the wishes of the testator for the benefit of the society. The relevant observations made are reproduced hereinbelow:

> "*20. […] The mere fact of registration of a society under the Societies Registration Act will not make the said society distinct from association of persons. Sections 223 and 236 of the Act in very categorical terms provide that an association of persons, be it a society, a partnership or other forms of associations, a Letter of Administration can be granted only to a company fulfilling the conditions laid down under the Rules. […] A society registered under the Societies Registration Act is not a "company" within the meaning of "company", as provided in the Act and the Rules. In terms of Sections 223 and 236, a "company" must be a "company" registered under the Companies Act. We are, therefore, of the considered opinion that neither the provisions of the Act nor the Rules framed thereunder contemplate that the societies registered under the Societies Registration Act would qualify to be considered as a company for the purpose of Sections 223 and 236.*
>
> *21. A society registered under the Societies Registration Act is not a body corporate as is the case in respect of a company registered under the Companies Act. In that view of the matter, a society registered under the*

Societies Registration Act is not a juristic person. The law for the purpose of grant of a probate or Letter of Administration recognises only a juristic person and not a mere conglomeration of persons or a body which does not have any statutory recognition as a juristic person.

22. It is well known that there exist certain salient differences between a society registered under the Societies Registration Act, on the one hand, and a company corporate, on the other, principal amongst which is that a company is a juristic person by virtue of being a body corporate, whereas the society, even when it is registered, is not possessed of these characteristics. Moreover, a society whether registered or unregistered, may not be prosecuted in a criminal court, nor is it capable of ownership of any property or of suing or being sued in its own name.

23. Although admittedly, a registered society is endowed with an existence separate from that of its members for certain purposes, that is not to say that it is a legal person for the purposes of Sections 223 and 236 of the Act. Whereas a company can be regarded as having a complete legal personality, the same is not possible for a society, whose existence is closely connected, and even contingent, upon the persons who originally formed it. Inasmuch as a company enjoys an identity distinct from its original shareholders, whereas the society is undistinguishable, in some aspects, from its own members, that would qualify as a material distinction, which prevents societies from obtaining Letters of Administration.

26. Vesting of property, therefore, does not take place in the society. Similarly, the society cannot sue or be sued. It must sue or be sued through a person nominated in that behalf.

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48. The apprehension of the High Court that in a case of this nature, in the event, a Letter of Administration is not granted in favour of the beneficiary society, the purport of the "Will" will be frustrated, is not wholly correct and for grant of Letter of Administration what is necessary is that

the person duly authorised by the society in accordance with the law may file such an application.

52. We, however, intend to lay emphasis on the fact that a Will or gift in favour of a society is not totally unenforceable in law. A probate or Letter of Administration with a copy of the Will annexed although may not be granted in favour of a society but may be granted in favour of a person authorised by a society either in terms of the statute or a resolution adopted in this behalf by the society, as the case may be, so that such person may be answerable to the court. On grant of a Letter of Administration the person so nominated by the society shall carry out the wishes of the testator for the benefit of the society.

55. For reasons stated above, the appeal is allowed in part. The judgment under challenge stands modified. The matter is sent back to the High Court with liberty to the respondent to amend the petition for grant of the Letter of Administration. It would be open to the respondent Society to nominate any of its office-bearers to whom the Letter of Administration is granted. Such nominated person may move an application for substitution of his name for grant of the Letter of Administration. If such amendment application is made, the High Court shall permit this amendment and grant the Letter of Administration in favour of the person nominated by the Society for carrying out the wishes of the testator which is for the benefit of the Society."

(Emphasis supplied)

75. In ***Tata Memorial Hospital Workers Union v. Tata Memorial Centre and Another*** reported in **(2010) 8 SCC 480**, this court considered in detail the effect of Section 5 of the Societies Registration Act, 1860. Therein, the Rules and Regulations of the respondent society had provided for the vesting of certain properties in the governing body of the society distinct from what was or may be vested separately in the trustees. While explaining the *raison d'être* behind Section 5, it was opined that:

i. ***First,*** the deeming provision, by default, creates a fictional vesting in favour of the governing body of the society and not

automatically in the society itself or under a trust. The vesting is not with the society for the obvious reason that a society is not a body corporate capable of holding the property by itself. On the other hand, for a trust to hold the properties of the society, the creation of a separate trust and the dedication of the property belonging to society, to itself, must be made out. By keeping the smooth functioning of the society and its autonomy at the forefront, this Court opined that the law has created this automatic vesting of the property belonging to the society in its governing body since – (a) the society cannot hold property in its name, and (b) the vesting of properties solely in trusts would likely hinder the administration of the property, more particularly, when the trustees themselves or their legal representatives claim adversely to the trust,.

ii. ***Secondly,*** that the phrase, "property belonging to a person" has two general meanings – *One,* ownership, and *two,* the absolute right of user. The words "property belonging to the society" would therefore, in the context of Section 5, indicate that the society has an absolute right of user over its immovable properties which is vested in its governing body.

76. The relevant observations are reproduced hereinbelow:

"*68. Rule 26 of the Rules and Regulations of the first respondent Society provides that all properties and funds of the Centre (except the immovable properties as specified) vest in the Council:*

"26. Properties and funds vested in the Council.—Except the existing immovable properties of the Centre and such immovable properties as may be vested in the holding trustees, all the other properties of the Centre shall vest in the Council and more particularly the following:

(a) recurring and non-recurring grants made by the Government;

(b) other grants, donations and gifts (periodical or otherwise), other than those intended to form the corpus of the property and funds of the Centre or held for the benefit of the Centre by the holding trustees;

(c) the income derived from the immovable properties and the income of the funds vested in the holding trustees and income of the funds vested in the Council and also fees, subscription and other annual receipts; and

(d) all plant and machinery, equipment and instruments (whether medical, surgical, laboratory, workshop or of any other kind), books and journals, furniture, furnishings and fixtures belonging to the Centre."

69. However, even when it comes to the immovable properties, Section 5 of the Societies Registration Act provides for deemed vesting of the properties belonging to a society into the governing body of such society. Section 5 of the Societies Registration Act reads as follows:

"5. Property of society how vested.—The property, movable or immovable, belonging to a society registered under this Act, if not vested in trustees, shall be deemed to be vested, for the time being, in the governing body of such society, and in all proceedings, civil and criminal, may be described as the property of the governing body of such society by their proper title."

70. In this behalf, we must keep in mind, the raison d'être of the above referred to Section 5 that once a trust is established and a society is registered for the administration of the trust, the statute contemplates that the society should be fully autonomous and that the lack of actual transfer of property of the trust should not prevent the governing body in its administration. Law recognises that it would be proper to regard that as done which ought to have been done. The deeming provision creates a fictional vesting in favour of the Governing Council and not in favour of the society or the trust. This is also for the reason that society is not a body corporate which has also been held by this Court in Ayurvedic and Unani Tibia College v. State of Delhi [AIR 1962 SC 458] and reiterated in Illachi Devi v. Jain Society, Protection of Orphans India [(2003) 8 SCC 413 : AIR 2003 SC 3397] . Since the society cannot hold the property in its name, vesting of the property in the trustees is likely to hinder the administration of the trust

property, particularly where the trustees themselves or their legal representatives claim adversely to the trust. It is for this reason that the law vests the property belonging to the society in its governing body.

71. The phrase "property belonging to a person" has two general meanings (1) ownership, (2) the absolute right of user (per Martin, B. in Attorney General v. Oxford & C. Railway Co. [(1862) 31 LJ 218] , LJ at p. 227). "Belonging" connotes either ownership or absolute right of user (Wills, J. in Governors of St. Thomas's, St. Bartholomew's and Bridewell Hospitals v. Hudgell [(1901) 1 KB 364]). The Centre has an absolute right of user over its immovable properties which it has been exclusively exercising all throughout. Section 5 of the Societies Registration Act clearly declares that the property belonging to the society, meaning under its user, if not vested in the trustees shall be deemed to be vested in the Governing Council of the society.

72. In the present case, it is nobody's case that the property remains vested in the trustees of Dorabji Tata Trust. It has been canvassed on behalf of the first respondent that the property is vested in the Central Government. However, the Central Government has never claimed any title to the property adverse to the first respondent Tata Memorial Centre. It is true that the property dedicated to Tata Memorial Centre has not been transferred to the Society by the Central Government. But the fact is that it is the Governing Council of the first respondent which has been administering and controlling the day-to-day affairs of Tata Memorial Centre and its property funds, employment of its staff and their conditions of service. Hence, in view of the above referred to factual as well as legal scenario the first issue will have to be decided that the property dedicated to the first respondent will be deemed to be vested in the Governing Council of the first respondent Society."

(Emphasis supplied)

77. What follows from a conspectus of the aforesaid decisions discussing Section 5 of the Societies Registration Act, 1860 and the vesting

of property in the governing body of the society is that, a society registered under the aforesaid Act is not a juristic person or a body corporate capable of holding property by itself. It is for this reason that a fictional vesting of the 'property belonging to the society' has been made in favour of the governing body of the society.

78. However, it is to be noted that the property can also be held in trust by certain trustees and this is evident from the use of the phrase "*if not vested in trustees*". Several decisions have interpreted this to mean that there must be certain circumstances which give rise to the existence of a trust prior to the registration of the entity/institution as a society. However, it is our view that the aforesaid phrase cannot be restricted to such a narrow interpretation i.e., that the formation of the trust, either expressly or impliedly, must pre-exist the registration of the society. We say this simply because, if it were so, instead of using the phrase "*if not vested in trustees*", the language employed in the provision would have read "*if not already vested in trustees*". Therefore, the property belonging to the society can be vested in trustees even after its registration as a society. There is nothing under Section 5 which bars the same.

79. However, if it is argued that a trust has instead separately been created for holding the property of the society after its registration as a society, the same must be clear and sufficiently proven. The considerations that would have to be weighed in order to ascertain if a public trust has been created prior to the registration of the society are already very lucidly elaborated in the decisions of this Court in ***Babu Bhagwan Din*** *(supra),* ***Gurunatharudhaswami*** *(supra)*, ***Bihar State Board*** *(supra)* and ***Kuldip Chand*** *(supra).* Therein there remained no formal recognition of any sort of the entity/institution and the court was tasked to see if - (a) properties were vested in a public trust and, (b) if the trustee(s) was fettered with any obligation that required the properties to be applied for a certain purpose and, (c) if there was any condition or conduct which revealed a restriction of the exercise of individual rights over the said property or its proceeds. The aforesaid considerations, along with some others may also be pertinent to determine if the society, after its registration, has created a trust or entrusted other trustees with the property belonging to itself. It is not possible to exhaustively lay down all those circumstances in which such a separate trust can be said to be created. Having said so, one of the possible methods in which

the society can create or intend to create a separate trust for holding its properties is when its Rules and Regulations or the Articles of its Memorandum of Association provide for a separate trust or trustee(s) for the purpose of holding its properties. Alternatively, as in ***Young Mens Christian Association of Ernakulam*** *(supra)*, the trustee (if they happen to also be a society) can mention in their Articles of Memorandum of Association that they hold the property belonging to another society as trustees. Further, the existence of an unequivocal trust deed executed by the society or its member representative, in favour of another trustee, for the purpose of holding its properties, could also seal the deal as far as the separate creation of a trust is concerned. All these could be a pertinent factors in determining the existence of a trust, separate from the governing body of the society, in which the property belonging to the society is vested. In this scenario, such a trust could be subjected to the jurisdiction under Section 92 of the CPC provided the other conditions for its invocation are met.

80. In the absence of the creation of a trust as aforesaid, property would be deemed to be vested in the governing body only. The governing body of the society upon which property is otherwise vested is duty bound to ensure that the property is put towards and utilised for the purposes/aims of the society as laid out in its Memorandum of Association or any Rules and Regulations governing the said matter. In case the society is dissolved, a decision must be made to transfer or vest all the property in another society working towards a like cause and the members would not have any right to distribute the assets belonging to the society between themselves. Therefore, both during the subsistence and dissolution of the society, the members or the governing body cannot be said to possess any beneficial or individual interest over the property vested in them.

81. Hence, it follows that whenever a property is transferred to a society which is working towards a public purpose of a religious or charitable nature, the property would be said to belong to the society and be automatically vested in its governing body. Once a society is registered, all gifts, donations, grants-in-aid, etc. would vest in its governing body as per the mandate of Section 5 of the Societies Registration Act, 1860, in the absence of the creation of a separate trust/entrustment to other trustee(s), for the said purpose.

82. Moving ahead, the mere fact that a distinct trust can also be created i.e., either prior to or post the registration of a society under the Societies Registration Act, 1860 would not alter the capacity in which the governing body holds the properties belonging to the society. The governing body would also hold such properties in a well-confined fiduciary capacity. In other words, the phrasing of Section 5, more specifically that "*if not vested in trustees, shall be deemed to be vested, for the time being, in the governing body of such society*", does not indicate that if a trust has not be created for the purpose of holding the society's properties, any fiduciary obligation that the governing body might owe to the society *vis-à-vis* the management and administration of the properties would dissipate into thin air. The aforesaid language employed in Section 5 must not be seen as giving rise to two polar opposite mechanisms through which the property of the society can be held i.e., either in a trust with air-tight fiduciary obligations or not in a fiduciary capacity at all. In other words, it must not be read to mean that if the property is not vested in trustees, then it would remain vested in the governing body who would have zero fiduciary obligations. The governing body is also bound by duties of that of a fiduciary and this remains further fortified by the fact that the governing body does not enjoy any beneficial interest over the properties that it holds and must ensure that it is used for the object for which the society has been created.

83. In our opinion, the reason behind the use of the word "*trustees*" in the phrase "*if not vested in trustees*", is a reflection of the intention of the legislature that the vesting of the property belonging to the society cannot be made in a casual manner to any and all persons regardless of any obligation. For argument, let's say that the phrase instead read as "*if not vested in any person*". In such a scenario, the persons in whom the property of the society vested would be able to possibly assert their own individual title or a competing claim to the property. This would give rise to a conflicting situation and deviate from the original purpose for which the property belonging to the society came to be vested in a third person. This is precisely the reason due to which the word "*trustees*" has been used under Section 5 of the Societies Registration Act, 1860. While interpreting the words employed in Section 5, we must not detract from the underlying purpose and objective for which it came to be enacted. Legislative creativity was employed to ensure that the incapability of the society to hold the

property by itself does not have any practical effect on its ability to use and administer those properties. The idea was to ensure that the property of the society may not be squandered or the object and purpose for which the society was formed may not be defeated by persons having control of the properties. The property was vested in such persons such that, in all circumstances, they would remain bound and accountable to the society. The governing body of the society would, no doubt, remain tethered to the aims and objectives for which the society was formed and would be able to deal with the properties only as per the Rules and Regulations of the Memorandum of Association. The other persons who are capable and allowed to hold the property of the society were also intended to be bound in a similar fashion and hence, the provisions incorporated the word "*trustees*" to instil in such person(s), a fiduciary obligation which they could not deviate from or ignore. However, this by itself, by no stretch of imagination, can be interpreted to mean that since the provision allows for the property to be held by trustees separately, the governing body of the society would not be constrained with any fetter as regards their dealing with the property belonging to the society. It may happen, more often than not, that a society does not create a trust for the purpose of holding its properties and that is precisely why, there is an automatic vesting in the governing body. What must instead reinforced is that, despite this automatic vesting in the governing body, the fiduciary capacity in which the governing body would hold the properties, not be altered. In simpler words, Section 5 seemingly provides two options, or mechanisms through which a society can hold the property belonging to itself – *One,* in trustee(s) or, *two,* in the governing body of the society. Both these mechanisms/options belong to the same genus (fiduciaries), albeit they don't fall in the same species (the former is a trustee *stricto sensu* and the latter is not).

84. The governing body of the society would not only hold the properties and administer it as per their bye laws to fulfil its fundamental aims but also safeguard it for the future members of the society or the future governing body who would also have to tread the same path and continue the aims and objects of the society as envisaged by the founding members or as reflected in its governing documents. Therefore, perpetuity is assigned not only to the identity of the society but also to the properties which belong to it, provided the society is not dissolved. This adds to the reason that the governing body also acts within the contours of a strict fiduciary relationship.

85. Therefore, while it cannot be considered as an 'express trust', what must also be noted, at this crucial juncture, is that, for an entity to be brought within the rigours of Section 92, the plaintiff has the option of also contending that a 'constructive trust' exists in the circumstances and a breach of such a constructive trust has occurred or that the directions of the Court are necessary for the administration of such a constructive trust.

d. The doctrine of constructive trust and its applicability to a society functioning for public purposes of a religious or charitable nature

86. In light of the discussion in the preceding paragraphs, we are tasked with determining whether a constructive trust could be created in a circumstance wherein a society vests its property in its governing body through the deeming fiction employed under Section 5 of the Societies Registration Act, 1860.

87. On the one hand, an express trust is a legal relationship which is created by an individual(s) out of his own volition, while manifesting an intention to create a trust. This manifestation of intention can be express, either by words or through conduct. However, it is not always necessary that such intention be overt, unambiguous and unequivocal. Sometimes, the existence of an express trust might have to be inferred from the attending circumstances. In other words, a trust would be an express trust whether expressed in certain unambiguous language or whether inferred from uncertain ambiguous words and conduct of the settlor, *for example,* where precatory words are used by the settlor indicating a prayer or expectation that something be done in a specific manner such that it be imperative and binding in the circumstances. In English private trust jurisprudence, as expounded in the landmark decision in ***Knight v. Knight*** reported in **(1840) 3 Beav 148,** 'three certainties' were required – (a) certainty of intention or an imperative that a trust be created; (b) certainty of the subject-matter or the property subject to the trust and; (c) the certainty of objects or the beneficiaries and the interest to be enjoyed by them. In that context, it was observed as thus:

> "*[…] To create by precatory words such a trust as the Court will carry into execution, there are three requisites; first, the precatory words must be sufficiently clear; secondly,*

there must be a certainty as to subject of the gift; and, thirdly, the objects to take must be certain. […]

[…] As to the first requisite, no particular form of words is necessary; it is sufficient for a testator " to express a desire as to the disposition of the property, and the desire so expressed amounts to a command […]

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Secondly, the subject of the gift is sufficiently certain, being the estates and personal property devised and bequeathed by the will.

Thirdly, the persons to take are sufficiently defined being persons in the male line in succession; a description much more perfect than the expressions "family," "relations," which have been held sufficiently certain to be carried into execution; […]

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On the whole, I am under the necessity of saying, that for the creation of a trust, which ought to be characterised by certainty, there is not sufficient clearness to make it certain that the words of trust were intended to be imperative, or to make it certain what was precisely the subject intended to be affected, or to make it certain what were the interests to be enjoyed by the objects."

(Emphasis supplied)

88. The aforesaid principle has been codified in Indian jurisprudence under the Indian Trust Act, 1882 governing private trust which defines a private trust as a an obligation annexed to the ownership of property and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner. While we are not directly importing the aforesaid principles laid out under the Indian Trusts Act, 1882, which governs private trusts, for application to a 'public trust', these principles aid in construing how an express trust, whether public or private, may be created. **P Ramantha Aiyar** in his ***Advanced Law Lexicon*** also adds that it is not necessary that the word 'trust' be

used. The trust would be express even if it has to be made out from the terms of an instrument. Therefore, a declared and ascertainable intention to create a trust is the cornerstone of an express trust which further determines where the trustee's fiduciary obligation can be sourced from.

89. Importing these principles to a society and its governing body which holds property on its behalf, it cannot be ascertained with reasonable certainty whether a fairly clear intention to create a trust on part of the settlor could be said to exist when the deeming fiction under Section 5 of the Societies Registration Act, 1860 is set into motion. It goes without saying that if the society creates a trust separately, as reflected in the words "*if not vested in trustees*", an express trust would be created. However, in the absence of the same, the intention of the settlor to create a trust is difficult to ascertain, more so because the legislative framework under which this vesting is done is distinct. This is notwithstanding the fact that the governing body would still be acting in a fiduciary capacity.

90. On the other hand, a constructive trust, arises by operation of law, without regard to or irrespective of the intention of the parties to create a trust. It is imposed predominantly because the person(s) holding the title to the property would profit by a wrong or would be unjustly enriched if they were permitted to keep the property. In other words, a constructive trust, does not, like an express trust, arise because of a manifestation of an intention to create it, but it is imposed as a remedy to prevent unjust enrichment. A fiduciary element may be present in the declaration of a constructive trust when, say, *for example*, whenever a person clothed with a fiduciary character, gains some personal advantage by availing himself of his situation as a trustee. In such cases, such person would also become a trustee of the advantage so gained. In other words, if a trustee, by reason of his position, acquires any advantage of a valuable kind, he would be a constructive trustee of that advantage. Furthermore, although some form of wrongdoing is generally required for the imposition of a constructive trust, it is not always a necessary element. It may also be imposed in case of a mistake where no wrongdoing is involved, say, for instance, when a fiduciary makes some profit even though he has not acted fraudulently.

91. However, it cannot be strictly said that only cases which contain a fiduciary element would serve as a bedrock for the declaration of a constructive trust. The circumstances which give rise to it may or may not involve a fiduciary relation - at least, this is the proposition laid down under American jurisprudence. Quoting the observations of Cardozo, J. in ***Beatty v. Guggenhein Exploration Co.*** reported in **(1919) 225 N. Y. 380** - "*a constructive trust is a formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee*". In his subsequent decision rendered in ***Meinhard v. Salmon*** reported in **(1928) 249 N.Y. 458,** he also observed that – "*A constructive trust is then the remedial device through which the preference of the self is made subordinate to loyalty to others*". It is, therefore, designed to prevent fraud or other inequity. In applying this doctrine, courts be said to also resort to the maxim – "*equity regards as done that which ought to be done*". According to American jurisprudence, an express trust is a substantive institution whereas a constructive trust is purely a remedial institution. That the term "constructive trust" was an expansive remedial concept and quite different from a fiduciary relation present in express trusts, was set in stone by the **Restatement of the Law, Restitution** promulgated by the American Law Institute in the year 1936. Comment (a) to Section 160 defining a constructive trust reads as follows:

> "*The term "constructive trust" is not altogether a felicitous one. It might be thought to suggest the idea that it is a fiduciary relation similar to an express trust, whereas it is in fact something quite different from an express trust. An express trust and a constructive trust are not divisions of the same fundamental concept. They are not species of the same genus. They are distinct concepts. A constructive trust does not, like an express trust, arise because of a manifestation of an intention to create it, but it is imposed as a remedy to prevent unjust enrichment. A constructive trust, unlike an express trust, is not a fiduciary relation, although the circumstances which give rise to a constructive trust may or may not involve a fiduciary relation.*"
>
> (Emphasis supplied)

92. It is largely believed that English Courts are generally reluctant to accept the doctrine of unjust enrichment as a broad ground for imposing a constructive trust, whereas the United States is more open to recognising it as a sufficient basis. In other words, American courts more often use constructive trust as a remedial device where specific restitution is appropriate on detailed consideration of the facts, whereas English Courts adopt a more institutional approach where some form of a fiduciary or quasi-fiduciary relationship is a pre-requisite instead of just prioritizing the overall equities. Therefore, in implying the existence of a constructive trust, the English Courts recognise or give legal efficacy to a relationship or 'institution' that already exists. Some critics argue that the traditional American approach was, however, akin to that of England but that the doctrine was slowly expanded beyond the parallels of a fiduciary relationship over the period of time.

93. An example of the modern American approach is evident from the decision in ***Newton v. Porter*** reported in **69 N.Y. 133 (1877)** wherein a constructive trust was imposed on the products of larceny. According to experts, this decision marked the cusp in the change of approach by the American Courts (from the English model to a remedial one) because in ***Campbell v. Drake*** reported in **39 N.C. 94 (1845)**, on similar facts, the Supreme Court of North Carolina had held that where a clerk in a store pilfered money and goods from his employer and uses those proceeds in the purchase of a tract of land, the employer who was robbed could neither hold the clerk nor his representatives after his death, as trustees of the land for the benefit of the employer, so as to enable him to call for a conveyance of the legal title to himself. To further elaborate, ***Campbell*** *(supra)* held as follows:

> "*Nevertheless, we believe the bill cannot be sustained. The object of it is to have the land itself, claiming it as if it had been purchased for the plaintiff by an agent expressly constituted; and it seems to us, thus stated, to be a bill of the first impression. We will not say, if the plaintiff had obtained judgment against the administrator for the money as a debt, that he might not come here to have the land declared liable, as a security, for the money laid out for it. But that is not the object of this suit. It is to get the land, which the plaintiff claims as his; and, upon*

the same principle, would claim it, if it were worth twenty times his money, which was laid out for it. Now, we know not any precedent of such a bill. It is not at all like the cases of dealings with trust funds by trustees, executors, guardians, factors, and the like; in which the owner of the fund may elect to take either the money or that in which it was invested. For, in all those cases, the legal title, if we may use the expression, of the fund, is in the party thus misapplying it. He has been entrusted with the whole possession of it, and that for the purpose of laying it out for the benefit of the equitable owner; and therefore all the benefit and profit the trustee ought, in the nature of his office, and from his relation to the cestui que trust, to account for to that person. But the case of a servant or a shop-keeper is very different. He is not charged with the duty of investing his employer's stock, but merely to buy and sell at the counter. The possession of the goods or money is not in him, but in his master; so entirely so, that he may be convicted of stealing them, in which both a cepit and asportavit are constituents. This person was in truth guilty of a felony in possessing himself of the plaintiff's effects, for the purpose of laying them out for his own lucre; and that fully rebuts the idea of converting him into a trustee. If that could be done, there would be, at once, an end to punishing thefts by shop men. If, indeed, the plaintiff could actually trace the identical money taken from him, into the hands of a person who got it without paying value, no doubt he could recover it; for his title was not destroyed by the theft. But we do not see how a felon is to be turned into a trustee of property, merely by showing that he bought it with stolen money. […]"

(Emphasis supplied)

94. However, in ***Newton*** *(supra)*, the Court of Appeals of New York took the view that the absence of a conventional relation of a trustee and *cestui que* trust between the plaintiff and the persons who committed larceny, would not stand in the way of enforcing an equitable remedy in the form of a constructive trust. It was opined that this would place the owner, who had been a victim of larceny and was deprived of

his property, in a less favourable position in a court of equity than persons who lost their property through an abuse of trust or by the wrongful acts of a trustee to whom the possession of that trust property was confided. This must not be countenanced, according to the Court. The relevant observations are thus:

> "*It is insisted by the counsel for the defendants that the doctrine which subjects property acquired by the fraudulent misuse of trust moneys by a trustee to the influence of the trust, and converts it into trust property and the wrong-doer into a trustee at the election of the beneficiary, has no application to a case where money or property acquired by felony has been converted into other property. There is, it is said, in such cases, no trust relation between the owner of the stolen property and the thief, and the law will not imply one for the purpose of subjecting the avails of the stolen property to the claim of the owner. It would seem to be an anomaly in the law, if the owner who has been deprived of his property by a larceny should be less favorably situated in a court of equity, in respect to his remedy to recover it, or the property into which it had been converted, than one who, by an abuse of trust, has been injured by the wrongful act of a trustee to whom the possession of trust property has been confided. The law in such a case will raise a trust invitum out of the transaction, for the very purpose of subjecting the substituted property to the purposes of indemnity and recompense. "One of the most common cases," remarks Judge Story, "in which a court of equity acts upon the ground of implied trusts in invitum, is when a party receives money which he cannot conscientiously withhold from another party." (Sto. Eq. Juris., § 1255.) And he states it to be a general principle that "whenever the property of a party has been wrongfully misapplied, or a trust fund has been wrongfully converted into another species of property, if its identity can be traced, it will be held in its new form liable to the rights of the original owner, or the cestui que trust." (§ 1258. See also, Hill on Trustees, p. 222.)*
>
> *We are of opinion that the absence of the conventional relation of trustee and cestui que trust between the plaintiff and the Warners, is no obstacle to giving the plaintiff the*

benefit of the notes and mortgage, or the proceeds in part of the stolen bonds. (See Bank of America v. Pollock, 4 Ed. Ch., 215.)"

(Emphasis supplied)

95. In a similar fashion, in ***Pope v. Garrett*** reported in **147 Tex. 18 (1948),** the Supreme Court of Texas had opined that a constructive trust could arise in a situation wherein the testator was prevented, by physical force or by creating a disturbance, shortly before her death, by two of her heirs, from executing a will solely in favour of the plaintiff who was the intended beneficiary. Therein, the legal title to the heirs has passed on account of intestate succession and it was held that the heirs who were guilty of the wrongful acts would become constructive trustees for the intended beneficiary. Additionally, since some of the other innocent heirs would not have inherited interest in the property but for the wrongful acts committed by some of the heirs, it was opined that the imposition of a constructive trust on the property that passed to all the heirs was a necessary remedy in the interests of justice. In other words, the policy against unjust enrichment was also considered sufficient to justify the imposition of a constructive trust upon the other innocent heirs as well. In deciding so, it was observed as follows:

"*[…] In Binford v. Snyder, 144 Texas 134, 138, 189 S.W. (2d) 471, the court quoted with approval the general rule as to the use of the constructive trust thus stated in Ruling Case Law:*

"It is a well settled general rule that if one person obtains the legal title to property, not only by fraud, or by violation of confidence of fiduciary relations, but in any other unconscientious manner, so that he cannot equitably retain the property which really belongs to another, equity carrier out its theory of a double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the one who is in good conscience entitled to it, and who is considered in equity as the beneficial owner." See also 54 Am. Jur., pp. 167-169, Sec. 218.

It has been said that "The specific instances in which equity impresses a constructive trust are numberless,

-- as numberless as the modes by which property may be obtained through bad faith and unconsientious acts." Pomeroy's Equity Jurisprudence, (5th Ed.) Vol. 4, p. 97, Sec. 1045. A few cases will be cited where trusts have been raised on account of facts like, or somewhat like, those in the instant case.

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The argument is often made that the imposition of the constructive trust in a case like this contravenes or circumvents the statute of descent and distribution, the statute of wills, the statute of frauds, or particularly a statute which prohibits the creation of a trust unless it is declared by an instrument in writing. It is generally held, however, that the constructive trust is not within such statutes or is an exception to them. It is the creature of equity. It does not arise out of the parol agreement of the parties. It is imposed irrespective of and even contrary to the intention of the parties. Resort is had to it in order that a statute enacted for the purpose of preventing fraud may not be used as an instrument for perpetrating or protecting a fraud. […]

In this case Claytonia Garrett does not acquire title through the will. The trust does not owe its validity to the will. The statute of descent and distribution is untouched. The legal title passed to the heirs of Carrie Simons when she died intestate, but equity deals with the holder of the legal title for the wrong done in preventing the execution of the will and impresses a trust on the property in favor of the one who is in good conscience entitled to it.

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The policy against unjust enrichment argues in favor of the judgment rendered herein by the district court rather than that of the Court of Civil Appeals. But for the wrongful acts the innocent defendants would not have inherited interests in the property. Dean Roscoe Pound speaks of the constructive trust as a remedial institution and says that it is sometimes used "to develop a new field of equitable interposition, as in what we have come to think the typical

> *case of constructive trust, namely, specific restitution of a received benefit in order to prevent unjust enrichment." 33 Harvard Law Review, pp. 420-421. See also Pomeroy's Equity Jurisdiction, (5th Ed.) Vol. 4, p. 95, Sec. 1044; 54 Am. Jur. p. 169, Sec. 219; Restatement of the Law of Restitution, Sec 160, Subdivisions c and d, pp. 642-643. Further and in the same trend, it has been said that equity is never wanting in power to do complete justice. Hillv. Stampfli (Com. App.) 290 S.W. 522,524.*"
>
> (Emphasis supplied)

96. In ***Pope*** *(supra),* it was clarified that there may be multiple circumstances in the background of which a constructive trust may be impressed upon the property in favour of the one who is, in good conscience, entitled to it and who would be considered as its beneficial owner in equity. It may be when one person obtains legal title to property by (a) fraud, or (b) violation of confidence of fiduciary relations, or (c) in any other unconscientious manner, such that he cannot equitably retain the property which belongs to another. Further, it was added that there may be a numberless amount of situations, as numberless as the modes by which the property may be obtained through bad faith and unconscientious acts, wherein equity can impress a constructive trust.

97. In ***McAnulty v. Std. Ins. Co.*** reported in **(2023) 81 F.4th 1091**, the United States Court of Appeals for the Tenth Circuit was faced with a dispute over the life insurance proceeds between a decedent's ex-wife and his wife during his death. The ex-wife complained of unjust enrichment and imposition of a constructive trust on her behalf. The decedent's only life insurance policy named his wife as the beneficiary while a divorce decree between the decedent and his ex-wife required him to maintain a $10,000 life insurance policy with the plaintiff as the sole beneficiary until his maintenance obligation to her was lawfully terminated. Amongst other things, while remanding the matter for further proceedings, it was underscored that unjust enrichment must first be established before the doctrine of constructive trust is resorted to as a remedy and that gaining an advantage for oneself through fraud or breach of fiduciary duty would not be the exclusive ground for establishing a constructive trust. The relevant observations are thus:

> "*One final comment on constructive trusts. The district court apparently assumed that a claim of unjust enrichment requires a showing that the defendant's property can be traced back to the plaintiff. But this is not so. The constructive-trust doctrine, including the practice of tracing, arises only after the plaintiff has established a cause of action for unjust enrichment. "The first step [in an unjust-enrichment constructive-trust claim] is to establish that the defendant is liable in restitution." Restatement (Third) § 55 cmt. a. Only once a cause of action has been shown does the inquiry turn to whether "the transaction that is the source of the liability is one in which the defendant acquired specifically identifiable property." Id. If the answer is yes, that property can be subject to a constructive trust with no need for any tracing analysis. But that entrusted property can then be traced forward to other property upon which a constructive trust can be imposed. […] That a "constructive trust is a remedy," Restatement (Third) § 55 cmt. a. not a prerequisite to a showing of unjust enrichment, is underscored by the Restatement (Third)'s placement of § 55 (the section dedicated to constructive trusts) in Chapter 7, which is titled "Remedies."*
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> *-xxx-*
>
> *however, Coriell did not say that gaining an advantage for oneself through fraud or breach of fiduciary duty is the exclusive ground for establishing a constructive trust. Indeed, the very next sentence of the opinion states: "Constructive trusts are such as are raised by equity in respect of property which has been acquired by fraud, or where, though acquired originally without fraud, it is against equity that it should be retained by him who holds it." 563 F.2d at 982 (internal quotation marks omitted; emphasis added). Hence, Coriell is fully consistent with imposing a constructive trust in this case.*"
>
> (Emphasis supplied)

98. Therefore, the American approach is that there is no unyielding formula to which a court of equity is bound to, in deciding whether

a constructive trust can be imposed since it is the equity of the transaction which will shape the measure of the relief. To put it simply, the focus of judicial enquiry would shift from the establishment of a fiduciary/confidential relationship and its abuse, to a determination of only whether someone has been unjustly enriched and should therefore, be subject to an 'equitable duty' to return the unjust benefit.

99. On the other hand, English courts have stuck to the institutional model which is underpinned by the existence of a fiduciary/confidential relationship between the person(s) upon whom a constructive trust is imposed and the person(s) in whose favour it is created. Since the imposition of a constructive trust would have an impact on property rights, the English Court are circumspect in imposing it for the bare reason that justice be done *inter se* parties. According to English jurisprudence, a constructive trust is an institution very much like the express trust – a *trust by analogy*. It arises by operation of the law but when one person is under an existent obligation to hold a certain property for another. The constructive trust would come into existence from the date of the circumstances which give rise to it and the function of the court would only be to declare that such a trust has arisen in the past. In ***Bailey v. Angove's Pty Ltd.*** reported in **(2016) UKSC 47**, the United Kingdom Supreme Court stressed on the differences between an institutional and a remedial constructive trust as follows:

> "*27 English law is generally averse to the discretionary adjustment of property rights, and has not recognised the remedial constructive trust favoured in some other jurisdictions, notably the United States and Canada. It has recognised only the institutional constructive trust: Westdeutsche Landesbank Girozentrale v Islington London Borough Council [1996] AC 669, 714–715 (per Lord Browne-Wilkinson), FHR European Ventures LLP v Cedar Capital Partners LLC [2015 AC 250, para 47. In the former case, the difference was explained by Lord Browne-Wilkinson in the following terms:*
>
> *"Under an institutional constructive trust, the trust arises by operation of law as from the date of the circumstances which give rise to it: the function of the court is merely to declare that such trust has arisen in the past. The*

> *consequences that flow from such trust having arisen (including the possibly unfair consequences to third parties who in the interim have received the trust property) are also determined by rules of law, not under a discretion. A remedial constructive trust, as I understand it, is different. It is a judicial remedy giving rise to an enforceable equitable obligation: the extent to which it operates retrospectively to the prejudice of third parties lies in the discretion of the court.*"
>
> (Emphasis supplied)

100. ***Keech v. Sandford*** reported in **(1726) Sel Cah Ch 61** is a landmark English decision on constructive trusts and a reflection of the rule that a person in a fiduciary position must not put himself in a position where his interest conflicts with that of the *cestui que trust*. Therein, a trustee, who held a lease on behalf of an infant beneficiary, made use of his influence in order to obtain a renewal of the lease for himself. Applying the principles of equity, the trustee was declared as holding the renewed lease also for the beneficiary and it was observed as thus:

> *"If a trustee on the refusal of a lessor to renew a lease to the trust were permitted to take a lease for himself, few leases would ever be renewed in favour of trusts. This prohibition was wholly understandable at that time. Many ecclesiastical , charitable and public bodies were by law restricted as to the length of leases which they were able to grant and leases were therefore renewed more or less as a matter of right. By taking a renewal of a lease for himself, a trustee was therefore in practice depriving the trust of a grant which it had a right to expect."*

101. In ***Paragon Finance plc v. Thakerar & Co.*** reported in **(1999) 1 All ER 400**, the Court of Appeal highlighted a fine distinction between the use of the words 'constructive trust' and 'constructive trustee' by equity lawyers in two entirely different situations. The *first,* is where, a person, though not expressly appointed as a trustee, has assumed the duties of a trustee and is holding property by virtue of a lawful transaction or legal arrangement and subsequently, commits a breach of trust. The legal arrangement through which he assumes the duties

of a trustee/fiduciary in the first place, is independent of the breach of trust and such an underlying relationship by which control of the property is obtained is not what is assailed or impeached by any plaintiff. He does not receive the trust property in his own right but by an agreeable transaction and his possession of the property is characterised by the confidence/trust reposed in him. The subsequent appropriation of the property by him for his own use is a breach of that trust and he is made accountable since he was entrusted with obligations of a trustee and it would be unconscionable for him to assert any adverse beneficial interest over the property entrusted to him. The *second,* is where the trust obligation itself arises as a direct consequence of the transaction through which control of the property is obtained. That very transaction is impeached by the plaintiff, as fraudulent. No obligation or confidence is reposed on the defendant and if he received any trust property at all, it would be by means of an unlawful transaction and from the moment of receipt, be adverse to the plaintiff. What English jurisprudence refers to as the 'institutional constructive trust' is the former scenario and not the latter. The relevant observations are reproduced below:

> "*Regrettably, however, the expressions 'constructive trust' and 'constructive trustee' have been used by equity lawyers to describe two entirely different situations. The first covers those cases already mentioned, where the defendant, though not expressly appointed as trustee, has assumed the duties of a trustee by a lawful transaction which was independent of and preceded the breach of trust and is not impeached by the plaintiff. The second covers those cases where the trust obligation arises as a direct consequence of the unlawful transaction which is impeached by the plaintiff.*
>
> *A constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of property (usually but not necessarily the legal estate) to assert his own beneficial interest in the property and deny the beneficial interest of another. In the first class of case, however, the constructive trustee really is a trustee. He does not receive the trust property in his own right but by a transaction by which both parties intend to create a trust from the outset and which is not*

impugned by the plaintiff. His possession of the property is coloured from the first by the trust and confidence by means of which he obtained it, and his subsequent appropriation of the property to his own use is a breach of that trust. Well-known examples of such a constructive trust are McCormick v Grogan (1869_ LR 4 HL 82 (a case of a secret trust) and Rochefoucald v Boustead [1897] 1 Ch 196 (where the defendant agreed to buy property for the plaintiff but the trust was imperfectly recorded). Pallant v Morgan [1952] 2 All ER 951, [1953] Ch 43 (where the defendant sought to keep for himself property which the plaintiff trusted him to buy for both parties) is another. In these cases the plaintiff does not impugn the transaction by which the defendant obtained control of the property. He alleges that the circumstances in which the defendant obtained control make it unconscionable for him thereafter to assert a beneficial interest in the property.

The second class of case is different. It arises when the defendant is implicated in a fraud. Equity has always given relief against fraud by making any person sufficiently implicated in the fraud accountable in equity. In such a case he is traditionally though I think unfortunately described as a constructive trustee and said to be 'liable to account as constructive trustee'. Such a person is not in fact a trustee at all, even though he may be liable to account as if he were. He never assumes the position of a trustee, and if he receives the trust property at all it is adversely to the plaintiff by an unlawful transaction which is impugned by the plaintiff. In such a case the expressions 'constructive trust' and 'constructive trustee' are misleading, for there is no trust and usually no possibility of a proprietary remedy; they are 'nothing more than a formula for equitable relief': Selangor United Rubber Estates Ltd v Cradock (No 3) [1968] 2 All ER 1073 at 1097, [1968] 1 WLR 1555 at 1582 per Ungoed-Thomas J.

The constructive trust on which the plaintiffs seek to rely is of the second kind. The defendants were fiduciaries, and held the plaintiffs' money on a resulting trust for them pending completion of the sub-purchase. But the plaintiffs

cannot establish and do not rely upon a breach of this trust. They allege that the money which was obtained from them and which would otherwise have been subject to it was obtained by fraud and they seek to raise a constructive trust in their own favour in its place."

(Emphasis supplied)

102. In ***Stevens v. Hotel Portfolio II UK Ltd.*** reported in **(2025) UKSC 28**, one Mr. Ruhan, a director of Hotel Portfolio II UK Ltd (hereinafter HPII) was a constructive trustee of unauthorised profits in the sum of around £95m made in breach of his fiduciary duty as the director of HPII. Starting about a week later, the whole of that dividend was spent by him upon speculative projects of his own such that all of it was lost, untraceable and could not be recovered. Therefore, there was a breach of his duties as a constructive trustee as well. The main issue was whether a constructive trust of this kind would give rise to any liability on part of the dishonest assistant of the constructive trustee to compensate the beneficiary (HPII) for loss caused by such breach. While answering in the affirmative, the majority opinion observed as follows:

i. ***First,*** that there was no fundamental difference in the relationship between a trustee and beneficiary on one hand, and the analogous relationship between a fiduciary and principal on the other. Therefore, when unauthorised profits were made by the fiduciary, he became a constructive trustee of the said monies immediately upon its receipt under an institutional constructive trust. This principle, that a trustee or fiduciary hold such profits upon an immediate institutional constructive trust for the beneficiary cannot be said to depend upon the fact that the fiduciary acted dishonestly. This rule of equity must not be solely anchored on the existence of fraud or the absence of *bona fides* on part of the fiduciary. A constructive trust can be imposed in the absence of fraud as well.

ii. ***Secondly***, when the unauthorised profits are dissipated, the constructive trustee is said to have breached his duties because, at the very least, he must conserve the said property/money for the benefit of the beneficiary and not deploy it in such a manner which destroys the beneficiary's proprietary interest in it. The relevant observations are thus:

"*21. […] First, there is no fundamental difference between the relationship between trustee and beneficiary and the analogous relationship between fiduciary and principal (such as director and company) in the present context. Most of the basic principles were originally fashioned to regulate the former and later applied analogically to the latter, once it was clearly established, over a century ago, that a company is both legal and beneficial owner of its property: see Rukhadze v Recovery Partners GP Ltd [2025] UKSC 10; [2025] 2 WLR 529, paras 3, 16, 24-25. In what follows I will refer generally to trustee and beneficiary, save where it is necessary to speak distinctly of fiduciary and principal.*

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23. Thirdly and importantly, it is common ground that Mr Ruhan became a constructive trustee of the dividend immediately upon its receipt, under an institutional (rather than purely remedial) constructive trust. Furthermore, although there may be debate in particular cases about the precise nature and extent of the duties of the trustee under such a constructive trust, it is common ground that Mr Ruhan's dissipation of the dividend was a breach of them. This is because at the very least the constructive trustee's duty is to conserve the trust property for the benefit of the beneficiary, rather than to deploy it in a way which destroys the beneficiary's proprietary interest in it, as Mr Ruhan did, dishonestly assisted in that regard by Mr Stevens. And it is inherent in that common ground that, whereas Mr Ruhan had been a fiduciary for HPII rather than a trustee stricto sensu, the relationship between them in relation to the dividend once received by Mr Ruhan was that of trustee and sole beneficiary, in which capacity HPII had a right to call on Mr Ruhan for the transfer of the property on demand, albeit in fact in ignorance of that right, or indeed of the existence

of the dividend itself or of the constructive trust of it affecting Mr Ruhan. […]

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25. The present case is not of course about bribes, but it is an example of a profit made by a fiduciary "as a result of his fiduciary position", squarely within the settled equitable principle which Lord Neuberger derived from Keech v Sandford and recently examined by this court in Aquila Advisory Ltd v Faichney [2021] UKSC 49; [2021] 1 WLR 5666 and Rukhadze. Applied to this case, it means that Mr Ruhan is to be taken as having made the profit constituted by the dividend on behalf of HPII, so that from the moment of its receipt it was beneficially owned by HPII. Furthermore, to the extent that there is any discernible distinction between Keech v Sandford and this appeal, it is that this is a plain case of fraud, whereas the older case was not. But the principle that a trustee or fiduciary holds such profits upon an immediate institutional constructive trust for the beneficiary does not depend at all upon the fiduciary having acted dishonestly. As Lord Russell of Killowen put it in relation to the parallel liability to account in Regal (Hastings) Ltd v Gulliver [1967] 2 AC 134 at 144:

"The rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides".

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29. […] This is not how the constructive trust arises. It is equity's automatic and immediate response to a set of facts, just as is the common intention trust which ordinarily comes into existence when two people together buy a home which is conveyed into the name of one of them, with the mutual intent that they should be co-owners of it.

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> *42. […] The constructive trust of profits imposes the usual obligation on the constructive trustee not to dissipate the trust property, and the usual obligation on both him, and upon any dishonest assistant in the dissipation, to compensate the beneficiary for any loss caused thereby.*
>
> *-xxx-*
>
> *100. It may assist in the digestion of this over-long judgment if I summarise my essential conclusions of law, as follows:*
>
> *(1) Like any other trust, a constructive trust of unauthorised profits gives rise to an immediate proprietary interest of the beneficiary in the fund representing those profits, from the moment of their receipt by the trustee.*
>
> *(2) A dissipation of the fund by the trustee is a breach of trust for which the trustee is liable to compensate the beneficiary for the loss of its proprietary interest. That loss is generally to be assessed by reference to the value of that proprietary interest, but for the dissipation of which would still belong to the beneficiary.*
>
> *(3) A person who dishonestly assists the trustee in the dissipation is jointly liable with the trustee for the loss caused by the dissipation.*
>
> *(4) Those general principles are unaffected by the facts that (a) the fund held on constructive trust is or represents unauthorised profits made in an earlier breach of fiduciary duty to the same beneficiary, (b) the making of the profits caused the beneficiary no loss and (c) the effect of the constructive trust of the profits was to confer a gain on the beneficiary.[…]*'
>
> (Emphasis supplied)

103. The constructive trust, according to England, arises the moment the breach of fiduciary duty occurs which obliges the fiduciary to treat the profit as belonging to the principal. They reject the idea that this

constructive trust could be regarded as remedial which is imposed at some later date by the court in exercise of their remedial discretion. It is merely recognized at a later date but is 'institutional' since it is deemed to arise automatically as a matter of law in specified circumstances as opposed to being dependent on the discretion of the court.

104. Therefore, constructive trusts are usually regarded as a residual category and is a legal fiction 'constructed' by equity i.e., it attaches by law to specific property which is not expressly subject to any trust but held by a person in circumstances where it would be inequitable to allow said person to assert full beneficial ownership of the property. Therefore, it is imposed not necessarily to effectuate an expressed or implied intention but to redress a wrong. It is the result of judicial intervention. A constructive trustee is not necessarily a trustee in the traditional sense but is nevertheless treated as such by equity. While English courts emphasize on a pre-existing and underlying fiduciary obligation, American courts are much more liberal with the concept and impose it as a remedy where circumstances warrant such intervention.

105. Most common law jurisdictions are accepting towards the doctrine of constructive trust as adopted in England i.e., the institutional model rather than a purely remedial one. Therefore, jurisprudentially there would remain no bar for India to also adopt such an approach. We say so also because, the Indian Trusts Act, 1882 (although dealing with private trusts) recognises the concept of an English 'constructive trust'. Under Chapter IX titled 'Obligation in the nature of trusts' delineates several provisions wherein a resulting or a constructive trust, as accepted in common law may be created. Additionally, the Statement of Objects and Reasons of the Act reads as follows:

> "*With the few exceptions mentioned in this Statement, the rules contained in the Bill are substantially those now administered by English Courts of Equity and (under the name of 'justice, equity and good conscience') by the Courts of British India.*
>
> *The Bill distributes the subject under the following heads : I, Preliminary : II, the creation of trusts : III, the duties and liabilities of trustees : IV, their rights and powers : V, their disabilities : VI, the rights and liabilities of the beneficiary :*

VII, vacating the office of trustee : VIII, the extinction of trusts; and IX, certain obligations of the nature of trusts.

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Where no trust is declared, but for the purposes of justice the law deems one to have been created, the trust is by English lawyers termed constructive. Benami transactions, where property is transferred to A for a consideration paid by B, and B makes the payment for his own benefit, have for centuries been familiar to the people of India : gains made by one person at the cost of another are an everyday source of litigation; and in no country, owing to the extreme sub-division of immovable property and the partition of inheritances, are constructive trusts more common. Chapter IX avoids the fiction implied in the term 'constructive trusts' by treating such confidences as obligations in the nature of trusts properly so called. It specifies the fourteen principal cases in which such an obligation arises, as follows:

1. Where it does not appear that the transferor of property intended to dispose of the beneficial interest (Section 80):

2. Where property is transferred to one person for a consideration paid by another (Section 81):

3. Where the trust is incapable of execution or is executed without exhausting the property (Section 82):

4. Where a transfer of property is made for an illegal purpose (Section 83):

5. Where a bequest is made for an illegal purpose, or where the revocation of a bequest is forcibly prevented (Section 84):

6. Where a transfer is made in pursuance of a rescindable contract (Section 85):

7. Where a transfer is made in fraud of the transferor's creditors (Section 86):

8. Where a debtor becomes his creditor's legal representative (Section 87):

9. Where a pecuniary advantage is gained by a person in a fiduciary character (Section 88):

10. Where an advantage is gained by the exercise of undue influence (Section 89):

11. Where an advantage is gained by a tenant for life or other qualified owner in derogation of the rights of other persons interested in the property (Section 90):

12. Where property is acquired with notice of an existing contract affecting it (Section 91):

13. Where a person contracts to buy property to be held on trust (Section 92):

14. Where one of several compounding creditors, by a secret arrangement with the debtor, gains an advantage over his co-creditors (Section 93):

The Bill also contains a general clause (Section 94) providing for cases not so specified. It is believed that this clause will cover that form of constructive trust which the Punjab Courts have held to arise when a co-sharer in a village community absents himself without expressly abandoning his rights."

(Emphasis supplied)

106. It is evident from the Statement of Objects and Reasons that the provisions contained in the Indian Trusts Act, 1882 are substantially those which were administered by the English Courts of Equity. As regards Chapter IX, a reference is made to the English approach of constructive trusts and it is stated that where no trust is declared but the law deems one to have been created for the purposes of justice, such a trust would be termed as 'constructive'. The rationale behind the enactment of Chapter IX was to avoid the fiction implied in the term 'constructive trusts' and to codify the doctrine within established parameters so that, even when motivated by the canons of justice, equity and good conscience, unfettered discretion is not employed by the courts while declaring a constructive trust (like in American jurisprudence). However, merely because the Chapter is titled 'Obligations in the nature of a trust', it cannot be stated

that the concept of constructive trusts have been effaced from our statute books. Furthermore, the repeal of a few provisions under this Chapter, more specifically Sections 81, 82 and 94 respectively, by the Prohibition of Benami Property Transactions Act, 1988, cannot be considered to reflect the intention of the legislature to do away with the concept of constructive trusts in the Indian context, in its entirety. At the most, it could be said that certain types of constructive trusts were declared to be impermissible under the Indian regime. Therefore, there being no prohibition on the declaration of 'constructive trusts' or as we call it, 'obligations in the nature of a trust' as far as private trusts are concerned, there would also remain no inhibition on courts to declare or impose a constructive trust on public entities. The same is an equitable doctrine which can be resorted to when the conditions for its imposition are met.

107. That constructive trusts can be imposed in the Indian regime was also alluded to by this Court in ***Janardan Dagdu Khomane and Another v. Eknath Bhiku Yadav & Ors.*** reported in **(2019) 10 SCC 395** which elaborated on the doctrine of constructive trust. While also quoting Story who explained the doctrine of 'constructive trust' in equity jurisprudence, it was stated that the receiving of money which cannot be conscientiously retained is sufficient to raise a trust, in equity, in favour of the party for whom or on whose account the money was received. It was reiterated that a constructive trust arises by operation of law, irrespective of whether the parties harboured any intention to create a trust. The relevant observations are reproduced as thus:

> "*32. A constructive trust arises by operation of law, without regard to the intention of the parties to create a trust. It does not require a deed signifying the institution of trust. Under a constructive trust, the trust arises by operation of law as from the date of the circumstances which give rise to it. The function of the court is only to declare that such a trust has arisen in the past.*
>
> *33. Constructive trust can arise over a wide range of situations. To quote Cardozo, J., "a constructive trust is a formula through which the conscience of equity finds expression".*
>
> *34. Story on Equity Jurisprudence has explained "Constructive Trust" as:*

"One of the most common cases in which a Court of equity acts upon the ground of implied trusts in invitum, is where a party has received money which he cannot conscientiously withhold from another party. It has been well remarked, that the receiving of money which consistently with conscience cannot be retained is, in equity, sufficient to raise a trust in favour of the party for whom or on whose account it was received. This is the governing principle in all such cases. And therefore, whenever any controversy arises, the true question is, not whether money has been received by a party of which he could not have compelled the payment, but whether he can now, with a safe conscience, ex aequo et bono, retain it. Illustrations of this doctrine are familiar in cases of money paid by accident, or mistake, or fraud. And the difference between the payment of money under a mistake of fact, and a payment under a mistake of law, in its operation upon the conscience of the party, presents the equitable qualifications of the doctrine in a striking manner. It is true that Courts of Law now entertain jurisdiction in many cases of this sort where formerly the remedy was solely in Equity; as for example, in an action of assumption for money had and received, where the money cannot conscientiously be withheld by the party; following out the rule of the Civil Law; Quod condition in debiti non datur uitra, quam locupletior factus est, qui accepit. But this does not oust the general jurisdiction of Courts of Equity over the subject-matter, which had for many ages before been in full exercise, although it renders a resort to them for relief less common, as well as less necessary, than it formerly was. Still, however, there are many cases of this sort where it is indispensable to resort to Courts of Equity for adequate relief and especially where the transactions are complicated, and a discovery from the defendant is requisite.

35. Section 90 (sic) of the Trusts Act states that if there is a person in a fiduciary relation to another, he cannot take advantage of that position so as to gain something exclusively for himself, which he otherwise would not have obtained, but for the position which he held.

> *36. Section 94 of the Trusts Act, 1882 has allowed the creation of a constructive trust when situations went beyond the confines of the Act. Section 94 has later been repealed by the Benami Transactions Prohibition Act, 1988. Section 94 of the Trusts Act read:*
>
> *"**94. Constructive trusts in cases not expressly provided for**.—In any case not coming within the scope of any of the preceding sections, where there is no trust, but the person having possession of property has not the whole beneficial interest therein, he must hold the property for the benefit of the persons having such interest, or the residue thereof (as the case may be), to the extent necessary to satisfy their just demands."*
>
> *37. In Gopal L. Raheja v. Vijay B. Raheja [Gopal L. Raheja v. Vijay B. Raheja, 2007 SCC OnLine Bom 399 : (2007) 4 Bom CR 288] , the Bombay High Court restrained itself from exercising its equitable jurisdiction to apply the English doctrine of constructive trust when the legislature had specifically deleted it from the Trusts Act.*
>
> *38. In our view, the repeal of Section 94 of the Act does not put any fetter in declaring a trust, even if the situation falls outside the purview of the Act. Its jurisdiction can be derived from Section 151 CPC and Section 88 of the Trusts Act.*
>
> (Emphasis supplied)

108. In ***Janardan Dagdu Khomane*** *(supra)*, this Court also noted that Section 88 of the Indian Trusts Act, 1882 provides that if a person is in a fiduciary relation to another, he cannot take advantage of that position so as to gain something exclusively for himself, which he otherwise would not have obtained but for the position he held. Although the decision of the Bombay High Court in ***Gopal L. Raheja v. Vijay B. Raheja*** reported in **2007 SCC OnLine Bom 399** had refrained from exercising its equitable jurisdiction to apply the English doctrine of 'constructive trust' citing the repeal of Section 94 in the Indian Trusts Act, 1882 by the Prohibition of Benami Property Transactions Act, 1988, this Court disagreed with the said view and remarked that such a repeal does not put any fetter in declaring a trust "*even if the*

situation falls outside the purview of the Act". It was opined that the jurisdiction to invoke the said doctrine can always be derived from Section 151 of the CPC and Section 88 of the Indian Trusts Act, 1882.

109. However, it must be noted that an institutional constructive trust would arise the very moment any fiduciary removes or diverts the property from its intended beneficiaries for his exclusive benefit or for the benefit of those who are not the intended beneficiaries. This need not necessarily be due to an intention to defraud but may also arise due to a mistake. In other words, the moment the fiduciary receives money which he cannot conscientiously retain for himself, a constructive trust would be raised in favour of the beneficiaries on whose account the money was originally received. To put it simply, the factum that the fiduciary 'withheld' the property from its rightful beneficiaries must be established. This would constitute a breach of his/her fiduciary duty and this benefit which has accrued to him would be held in constructive trust. The breach of his fiduciary duty i.e., his duty towards the society and its intended beneficiaries, must exist.

110. Coming back to the facts of the present case, the main aim and objective of the appellant Society is of a public and charitable nature. It is also limpid from the MoA, that all the incomes, earnings, movable or immovable properties are to be solely dedicated and applied towards to the promotion of the society's aims. The MoA also lays down a strict "no profit rule" to the members of the Board, in any manner whatsoever. Article 11.2.1 of the AoA vests all the properties, both movable and immovable and all other kinds of assets in the Executive Committee of the appellant Society. Article 11.2.3.4 provides for a fundraising mechanism by way of gifts, donations, grants-in-aid or otherwise, both within and outside India. Article 11.2.3.5 allows for the Executive Committee to raise loans for the purpose of furthering the objects of the appellant Society. Article 11.2.3.6 allows the receiving of monies, securities, instruments, investments or any other assets for and on behalf of the appellant Society. Article 13, in the most unambiguous manner states that funds will be raised by way of grants-in-aid, donations, gifts, subscription fees and income from investments, loans and other means available to the Society and that they will be used to carry out the aims and objectives of the Society.

111. A perusal of the MoA and AoA of the appellant society reveals that it is a society of a charitable nature, having its properties vested in the

governing body, who act as its fiduciaries. As elaborated previously, any conduct by the fiduciary which deprived the intended beneficiaries of their beneficial interest in the property, in such a manner that is in contravention to the covenants that bind him and confers an advantage to him to the detriment of the intended beneficiaries, must be taken into consideration to see if a constructive trust can be raised in law. All those diverted properties would then be held in a constructive trust by those fiduciaries who diverted it, in the capacity of 'constructive trustees'. The respondent nos. 1 and 2 respectively have levelled several allegations of siphoning of funds by the respondent nos. 3 and 4 respectively. The same would have to be conclusively proved for a constructive trust to have been created in equity. Obviously, at the stage of this present litigation, it is not possible for this Court to enter into an extensive factual inquiry in this regard. That is for the High Court to satisfy after the suit is allowed to progress. However, the allegations in the plaint may be said to *prima facie* satisfy the condition required to apply the doctrine of constructive trust to the present facts. Not to mention that, if these allegations are found to have no substance or plainly false, the entire suit would fail. But, in the peculiar circumstance in which the present matter rests, that would happen also for the reason that the circumstances which required the imposition of a constructive trust do not exist.

112. Thus, yet another ingredient under Section 92 of the CPC which requires to be satisfied, has been fulfilled. The counsel for the appellant society has also submitted that the plaint is not entirely convincing on the whether the appellant society can be considered to be a constructive trust for the purposes of Section 92 and that there is only one paragraph in the plaint devoted to the aforesaid question. However, it is our view that the plaint cannot be scrutinised in such a mechanical manner. It is the substance of the claim which must be looked into and not merely the wording. Read in the right context, the plaint is sufficiently forthcoming about the facts and circumstances which evidence the existence of a constructive trust, at least at present, under the eyes of law.

B. A breach of trust or the directions of the court being necessary for the administration of the trust

113. A suit under Section 92 can be maintainable for two broad reasons – *one,* that there has been a breach of any express or constructive

trust created for a charitable or religious purpose or, *two,* that the directions of the court are necessary for the administration of such an express or constructive trust. The same was also emphasized by the decision of this Court in ***Syed Mohd. Salie Labbai v. Mohd. Hanifa*** reported in (**1976) 4 SCC 780**. Therein, it was held that a suit against persons exercising *de facto* control over property which has been dedicated for public use, would be maintainable, specifically when such properties are alleged to have been mismanaged and not maintained. The relevant observations are thus:

> "*64. […] It is true that Section 92 of the Code of Civil Procedure applies only when there is any alleged breach of any express or constructive trust created for a public, charitable or religious purpose. It also applies where the direction of the court is necessary for the administration of any such public trust. In the instant case the defendants have no doubt been looking after the properties in one capacity or the other and had been enjoying the usufruct thereof. They are, therefore, trustees de son tort and the mere fact that they put forward their own title to the properties would not make them trespassers […] We, therefore, hold that Section 92 of the Code of Civil Procedure is clearly applicable to the case.*
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> ***65.*** *Counsel for the appellants lastly argued that there is no evidence to show that the appellants have committed any negligence in managing the trust properties. Even the trial court which had dismissed the plaintiffs' suit had returned a clear finding of fact that the defendants were guilty of gross negligence in managing the properties. In this connection the trial court found as follows:*
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> > *"It was pointed out that there was mismanagement. That there is mismanagement cannot be disputed. For one thing, in spite of the decree of the court for removal of certain superstructures on the burial ground the Labbais evaded the issues for a period of over twenty years. The plaintiffs have proved that Plaint B schedule property has been dedicated to the durga. But this property has been alienated by the predecessors-in-interest of the defendants. In*

> *exchange, they have obtained C Schedule property.... The next contention was that the defendants have not maintained accounts. It is true that the evidence does not disclose that any accounts were maintained or being maintained by the Labbais defendants."*
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> *The learned Judge, however, tried to explain away these acts of misfeasance on the ground that as the Rowthers undertook not to interfere with the management or ask for the account, the negligence committed by the defendants, if any, was not actionable. In view of our findings, however, that the mosque, its adjuncts and the burial ground are public wakfs the question of negligence assumes a new complexion. Apart from the acts of mismanagement, there is definite oral evidence of the plaintiffs to show that the graveyard is not properly managed and maintained. The boundary wall has broken and cattle enter the graveyard leading to its desecration. The evidence of the plaintiffs also shows that even the mosque is in a state of disrepair and no attempt is made to repair or maintain it properly. Further-more, the defendants have constructed shops on a part of the graveyard and in spite of several decrees of the courts to demolish those shops they have not yet obeyed the orders of the court to demolish the same. In these circumstances, therefore, there is overwhelming evidence on the record to show that the defendants were guilty of grave mismanagement, and therefore a clear case for formulating a scheme under Section 92 of the Code of Civil Procedure by a suit has been made out by the plaintiffs. The scheme, however, will be confined only to the mosque, its adjuncts and the burial ground and not to the durgah which has been held to be the private property of the defendants."*
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> (Emphasis supplied)

114. In ***Ramji Tripathi*** *(supra),* this Court while holding that a suit for the vindication of personal or individual rights was not maintainable, observed that:

    i. **First,** the facts and particulars as regards the defect in the machinery for administration which plagued the trust and which

required rectification, must be specifically pleaded. A bald and standalone prayer that the direction of the court may be necessary would not be enough and would be a mere pretence for the purpose of bringing the suit under Section 92. In simpler words, it must be shown that the directions of the court are 'necessary' in the facts and circumstances of the matter and such a statement must not be made in vacuum without any basis in reason or facts.

ii. ***Secondly***, that it is only the allegations in the plaint that need to be looked into in the first instance to determine whether a suit would fall within the contours of Section 92. However, once the evidence is taken, if the court is of the opinion that the alleged breach of trust has not been made out and the prayer seeking directions from the court is vague and/or rests on a flimsy foundation, then the suit may be dismissed. The relevant observations are thus:

> "*13. The trial court as well as the High Court found that there was no evidence to substantiate the allegations regarding the breach of trust said to have been committed by Respondent 1. In para 20 of the plaint, there was an allegation that the direction of the Court was necessary for the administration of the Trust. But no reasons were given in the plaint why the plaintiffs were seeking the direction of the Court. There were no clear allegations of maladministration viz. that Respondent 1 was diverting the Trust properties for his personal benefit or that he was committing any devastavit. The High Court was of the view that since the plaintiffs did not plead facts and particulars as regards the defect in the machinery for administration which had crept in under custom or rules which required rectification, the prayer for direction was a mere pretence to bring the suit under Section 92. A direction cannot be given by the Court unless it is shown that it is necessary for the proper administration of the Trust. We do not think it necessary to decide for the purpose of this case whether the words "where the direction of the court is deemed necessary for the administration of any such Trust" must be interpreted*

as meaning that where the court has to give directions in the nature of framing a scheme or otherwise for the administration of the Trust or whether those words can refer only to directions given to existing trustee when there is one or to new trustee when one is to be appointed or to directions when there are allegations of maladministration amounting to breach of trust. It is sufficient for the purpose of this case to say that the prayer for direction was a prayer in vacuum without any basis in reason or facts.

14. It is, no doubt, true that it is only the allegations in the plaint that should be looked into in the first instance to see whether the suit falls within the ambit of Section 92 (See Association of R.D.B. Bagga Singh v. Gurnam Singh [AIR 1972 Raj 263 : 1972 WLN 157 : 1972 Raj LW 182] , Sohan Singh v. Achhar Singh [AIR 1968 P&H 463 : ILR 1968 Punj 359 : 1968 Cur LJ 480] and Radha Krishna v. Lachhmi Narain [AIR 1948 Oudh 203 : 1948 OWN 179] . But, if after evidence is taken, it is found that the breach of trust alleged has not been made out and that the prayer for direction of the court is vague and is not based on any solid foundation in facts or reason but is made only with a view to bring the suit under the section, then a suit purporting to be brought under Section 92 must be dismissed. This was one of the grounds relied on by the High Court for holding that the suit was not maintainable under Section 92."

(Emphasis supplied)

115. In ***Vidyodaya Trust*** *(supra)*, this Court had explained that in order to constitute a breach of trust, there must be an element of dishonest intention and lack of probity. If a mistaken action has been undertaken but with all *bona fides,* the same would not amount to a breach of trust. The Court also employed the test of a 'prudent man' to see whether the required standards of care, caution, rectitude and accuracy, without any reckless indifference has been exhibited by the trust and its trustees. In the first instance, the court is required to only look into the allegations in the plaint to see whether a suit

under this provision lies. Once the suit commences and after the evidence is taken, if it is revealed that the breach of trust which has been alleged is not made out or, that the prayer for direction of the court is vague and not based on any solid factual or reasonable foundation, the court would be free to dismiss the suit for the said reasons. The relevant observations are reproduced hereinbelow:

> "*12. […] Only if the preconditions are satisfied then only leave can be granted as provided in Section 92. There must be an element of dishonest intention and lack of probity. When action is taken bona fide though there may be mistaken action, that would not amount to breach of trust.*
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> *-xxx-*
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> *14. In reply, learned counsel for the respondents submitted that while deciding on the question whether leave is to be granted the statements in the plaint have to be seen and not the allegations in the written submissions. It is permissible to strike down the portion of averment. Though the general principle may apply to the facts of the present case, what is expected to be seen is if the trust has acted as a prudent man would do and the standards of care and caution required to be taken by a prudent man, and there should not be reckless indifference and highest standard of rectitude and accuracy is to be maintained.*
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> *-xxx-*
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> *20. In Swami Paramatmanand case [R.M. Narayana Chettiar v. N. Lakshmanan Chettiar, (1991) 1 SCC 48] it was held that it is only the allegations in the plaint that should be looked into in the first instance to see whether the suit falls within the ambit of Section 92. But if after evidence is taken it is found that the breach of trust alleged has not been made out and that the prayer for direction of the Court is vague and is not based on any solid foundation in fact or reason but is made only with a view to bringing the suit under the section then suit purporting to be brought under Section 92 must be dismissed*."
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> (Emphasis supplied)

116. In the present case, the respondent nos. 1 and 2 respectively have alleged that the respondent nos. 3 and 4 respectively, were indulging in gross financial impropriety, misconduct and siphoning off of funds/ donations received by the appellant Society for personal gains. As discussed in the previous section of this judgment, having arrived at the conclusion that the present situation pertains to a 'constructive' and not an 'express' trust, the question remains how the aforesaid allegations are to be considered, particularly in light of the condition *vis-à-vis* Section 92 CPC presently discussed in this section. As elaborated, the aforesaid allegations would have to be proven to serve a dual purpose i.e., to *first*, attract the doctrine of 'constructive trust' to be imposed in equity and *second,* to proceed to prove that there has been a subsequent breach of that constructive trust or at least, that the directions of the court would be necessary for the administration of that constructive trust. To assert that there has been a breach of the constructive trust which was imposed upon an fiduciary who became a constructive trustee by virtue of his/her actions, it must be proven that the funds or property of the society that were allegedly diverted or siphoned by the respondent nos. 3 and 4 respectively were further 'divested' by them for purposes which do not align with the aims and objectives of the appellant Society, similar to that which occurred in ***Stevens*** *(supra).* In other words, the duties which bound the respondent nos. 3 and 4 respectively upon being designated as 'constructive trustees' must have also been breached. Even if a further divestment of those diverted/siphoned funds had not occurred and they still remained intact but in the possession of the constructive trustees (respondent nos. 3 and 4 respectively) in their individual and not their fiduciary capacity, the plaintiffs can assert that directions pertaining to that constructive trust would still be needed from the court. Presently, we are convinced that directions, at the very least, are indeed necessary.

117. The respondent nos. 3 and 4 respectively have vehemently assailed the credibility of the Interim Forensic Audit Report and the Final Forensic Audit Report as being riddled with inconsistencies, unsubstantiated findings and categorical bias. However, at this stage of the proceeding, it would not be appropriate for the court to assess the veracity and legitimacy of all those observations/findings arrived at in the aforesaid reports with a view to verify the allegations made by the respondent nos. 3 and 4 respectively.

118. This Court in ***Ramji Tripathi*** *(supra)* had observed that at the stage of grant of leave, it is only the allegations in the plaint which must be looked into in the first instance with a view to ascertain if the alleged breach of trust or the fact that the directions of the Court may be necessary, is evident or palpable and if the suit can be brought within the ambit of Section 92. Even keeping aside the several forensic and audit reports which suggest that the affairs of the appellant Society must be scrutinised, a reading of the averments of the plaint fairly reveals the questionable conduct on behalf of respondent nos. 3 and 4 respectively. The allegations made therein are serious and cannot be ignored. Ultimately, as explained by us in the preceding paragraphs, if those allegations are proven to be false, *mala fide* and unfounded in the course of the suit proceedings, the entire case of the plaintiffs may fall and the suit be dismissed. However, to force a halt and sever the suit at its root, on the aforesaid contentions of the respondent nos. 3 and 4 respectively, which require an extensive factual inquiry, would not be proper at this stage.

C. The institution of the suit must be made by two or more persons "*having an interest in the trust*"

119. The phrase "*persons having an interest in the trust*" must neither be construed too narrowly or too widely. It must not be narrow for the reason that the word used is "*interest*" instead of "*direct interest*". However, it must also be remembered that while no direct interest is required, the interest must denote a present and substantial interest and not a sentimental, remote, fictitious or purely illusory interest. It must be clear and direct. The reason behind the incorporation of this phrase under Section 92 of the CPC again boils down to the object of preventing frivolous and mischievous applications being filed by busy bodies, unconnected members of the public, and persons who do not possess a specific interest in the trust.

120. In ***T. Varghese George v. Kora K. George*** reported in **(2012) 1 SCC 369**, this Court considered the *locus standi* of the plaintiffs to institute the suit under Section 92 concerning a secular public educational trust. Therein, of the three plaintiffs, one was a member of the Board of Trustees nominated by the founder himself, the second plaintiff was the brother-in-law of the founder who had raised funds for buying lands for the institution and for the construction of its school buildings and the third plaintiff was a parent of a student attending the

institution. Considering the above, this Court had opined that none of these persons could be criticised as persons who lacked any good intention for the Trust and that they were persons interested in the functioning of the Trust. The relevant observations are reproduced hereinbelow:

> "*31. As can be seen from this section two or more persons having interest in the trust may institute a suit in the Principal Civil Court of Original Jurisdiction to obtain a decree concerning a public charity for various purposes mentioned therein. Such suit will lie where these persons make out a case of alleged breach of any trust created for public purposes or for directions of the court for administration of the trust. One of the purposes set out in sub-section (1)(g) is settling a scheme, sub-section (1)(b) speaks about a new trustee being appointed, and sub-section (1)(a) speaks about removing a trustee. Out of the three persons who filed Civil Suit No. 601 of 1987, Shri D.V.D. Monte was a member of the Board of Trustees nominated by the founder Shri T. Thomas himself. Shri Kora K. George is brother-in-law of Shri T. Thomas. He has raised funds for buying lands for the Institution, and for constructing the buildings of the School. Therefore, although the Single Judge held that he could not be said to be a person having interest in the Trust, that finding was reversed by the Division Bench in OSA No. 49 of 1995. Dr. Natrajan is a parent of a student of the Institution. None of these persons can be criticised as persons lacking good intention for the Trust.*"
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> (Emphasis supplied)

121. Coming back to the facts of the present case, it can be seen that the respondent no. 1 (original plaintiff no. 1) was the co-founder-cum-President of the board of the appellant Society who had devoted around 15 years in service of the appellant Society and the public at large. The respondent no. 2 (original plaintiff no. 2) *albeit* being the mother of the respondent no. 1, is a current board member of the appellant Society. Both of them can be said to have been closely associated with the functioning of the appellant Society. Therefore, they can also be said to have a genuine, clear and direct interest in

the preservation and proper management of the appellant Society and the properties which may be subject to a constructive trust, especially since they have devoted time and energy into the establishing and running of the appellant Society.

122. While scrutinising whether the respondent nos. 1 and 2 respectively are persons interested in the trust and whether they are bringing the suit in a representative capacity, it is not just their designation or position which must be given importance to. They might be seen members of a society (former and current), who happen to be agitating a suit against other members, however, due regard must be given to whether they're representing themselves solely as members in seeking certain remedies or if they have also brought the suit in the interest of the public at large, especially the beneficiaries. It must also be seen whether it is a vested interest in the matter which is the pure and sole reason for bringing the suit or if public interest is also brought to the notice of the court. We are not convinced that the respondent nos. 1 and 2 respectively are merely bringing forward some issues pertaining to disputes between members. While they have sought some remedies related to personal grievances and the wrongful dismissal of the respondent no. 1 which could be seen as unduly magnifying an election dispute, there are several other allegations in the plaint which cannot simply be ignored and which give the respondent nos. 1 and 2 respectively, a dual role/ capacity, whilst they're agitating the matter under Section 92 of the CPC. The larger background in which the suit is brought alludes to the existence of public interest also at play.

123. The respondent nos. 3 and 4 respectively have primarily objected to the inclusion of the respondent no. 2 as one of the original plaintiffs since they contend that she has been roped in merely to fulfil the mandatory condition of having a minimum of two plaintiffs under Section 92. They have also alleged that there might be some discrepancies in the signatures of the respondent no. 2 and that there is a possibility of them being forged. However, it is not for a court at this stage of the suit to assess the validity of these allegations, especially when the respondent nos. 3 and 4 have not been able to categorically assert that the respondent no. 2 is not a board member of the appellant Society or is in no manner associated with the organisation or is a person not having a direct interest in the functioning of the appellant Society. Such being the

case, the impugned decision was right in so far as taking the view that the respondent nos. 1 and 2 respectively are "*persons having an interest in the trust*".

D. The reliefs falling within the scope of those enumerated under Section 92(1) of the CPC along with the object, purpose and capacity in which the suit is brought.

124. Section 92(1) of the CPC provides for a list of reliefs which can be obtained by the plaintiffs through a decree from the court. They relate to removing a trustee, appointing a new trustee, vesting any property in a trustee, directing accounts and inquiries, declaring what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust, authorising the whole or any part of the trust property to be let, sold, mortgaged, or exchanged, settling a scheme, or granting such further or other reliefs as the nature of the case may require. As has been indicated by us in the preceding paragraphs, a suit under Section 92 is a special suit of a representative nature which must essentially be brought by plaintiffs in their capacity as representatives of the public and for the vindication of public rights.

125. In ***Mahant Pragdasji Guru Bhagwandasji v. Patel Ishwarlalbhai Narsibhai*** reported in **(1952) 1 SCC 323**, this Court had held that the plaintiffs must pray for one or the other of the reliefs that are specifically mentioned under Section 92(1). Therein, the courts had concurrently found, after examining the evidence on record that was adduced by the parties, that the allegations of breach of trust were not made out. The plaintiffs therein, had not sought for any direction from the court for the proper administration of the trust either. Therefore, the very foundation of the suit under Section 92 became wanting and there remained no cause of action for the institution of the suit. In such circumstances, while dismissing the suit, the High Court had, however, recorded a conclusive finding about the existence of a public trust and made a declaration to that effect. This Court was of the view that such a finding was wholly inconsequential and could not be made a part of the decree or the final order in the shape of a declaratory relief for the reason that it cannot fall under those reliefs mentioned under Section 92(1). The relevant observations are thus:

> "*9. […]Such suit can proceed only on the allegation that there is a breach of such trust or that directions from the*

court are necessary for the administration thereof, and it must pray for one or other of the reliefs that are specifically mentioned in the section. It is only when these conditions are fulfilled that the suit has got to be brought in conformity with the provision of Section 92CPC. As was observed by the Privy Council in Abdur Rahim v. Mohd. Barkat Ali [Abdur Rahim v. Mohd. Barkat Ali, (1927-28) 55 IA 96 : 1927 SCC OnLine PC 98] , a suit for a declaration that certain property appertains to a religious trust may lie under the general law but is outside the scope of Section 92CPC.

10. In the case before us, the prayers made in the plaint are undoubtedly appropriate to the terms of Section 92CPC and the suit proceeded on the footing that the defendant, who was alleged to be the trustee in respect of a public trust, was guilty of breach of trust. The defendant denied the existence of the trust and denied further that he was guilty of misconduct or breach of trust. The denial could not certainly oust the jurisdiction of the court, but when the courts found concurrently, on the evidence adduced by the parties, that the allegations of breach of trust were not made out, and as it was not the case of the plaintiffs, that any direction of the court was necessary for proper administration of the trust, the very foundation of a suit under Section 92CPC, became wanting and the plaintiffs had absolutely no cause of action for the suit they instituted. In these circumstances, the finding of the High Court about the existence of a public trust was wholly inconsequential and as it was unconnected with the grounds upon which the case was actually disposed of, it could not be made a part of the decree or the final order in the shape of a declaratory relief in favour of the plaintiffs.

11. It has been argued by the learned counsel for the respondents that even if the plaintiffs failed to prove the other allegations made in the plaint, they did succeed in proving that the properties were public and charitable trust properties—a fact which the defendant denied. In these circumstances, there was nothing wrong for the court to give the plaintiffs a lesser relief than what they actually claimed. The reply to this is, that in a suit framed under

Section 92CPC the only reliefs which the plaintiff can claim and the court can grant are those enumerated specifically in the different clauses of the section. A relief praying for a declaration that the properties in suit are trust properties does not come under any of these clauses. When the defendant denies the existence of a trust, a declaration that the trust does exist might be made as ancillary to the main relief claimed under the section if the plaintiff is held entitled to it; but when the case of the plaintiff fails for want of a cause of action, there is no warrant for giving him a declaratory relief under the provision of Section 92CPC. The finding as to the existence of a public trust in such circumstances would be no more than an obiter dictum and cannot constitute the final decision in the suit.

12. The result is that in our opinion the decision of the High Court should stand, but the decree and the concluding portion of the judgment passed by the trial court and affirmed by the High Court on appeal shall direct a dismissal of the plaintiff's suit merely without it being made subject to any declaration as to the character of the properties. To this extent the appeal is allowed and the final decree modified. The order for costs made by the courts below will stand. Each party will bear his own costs in this appeal."

(Emphasis supplied)

126. In ***Mahant Pragdasji*** *(supra)*, it was argued that even though the plaintiffs failed to prove the other allegations in the plaint, they had indeed succeeded in proving that the properties in question were public and charitable trust properties and that, therefore, the High Court had merely granted a 'lesser' relief than what was claimed under the suit, which relief did not offend Section 92. However, this Court had categorically held that in such a suit, the only reliefs which the plaintiff(s) can claim and the court can grant, are those enumerated specifically under the different clauses under section 92(1). Therefore, the relief granted by the High Court in the form of a declaration that the properties in suit are in fact trust properties does not come under any of the clauses under Section 92(1). Had the situation been different i.e., if the plaintiff had succeeded in bringing an action under Section 92 and where the defendant had

denied the existence of a trust, a declaratory relief that the trust does exist may be made as ancillary to the main relief under Section 92(1) claimed by the plaintiff(s). However, if the suit fails for want of cause of action, it would not be appropriate for the court to grant a declaratory relief purportedly under Section 92(1).

127. The aforesaid decision has been discussed only with a view to emphasise that the reliefs claimed by the plaintiffs, must fall within those reliefs outlined under Section 92(1). In this context, the nature of relief(s) which could be claimed or granted under the residual clause (h) under Section 92(1) was discussed by the three-judge bench decision of this Court in ***Charan Singh v. Darshan Singh*** reported in **(1975) 1 SCC 298**. This Court elaborated on whether clause (h) providing for "*further or other relief*" must be taken in connection with or considered as akin to clauses (a) to (g) or, whether any relief other than those outlined under clauses (a) to (g) would in all circumstances be covered by clause (h) in case of an alleged breach of an express or constructive trust. Attention was drawn to the fact that the word used after clause (g) and before clause (h) was "***or***". In a given context, it was stated that it may be construed as "***and***" conjunctively and in others, it would remain as "***or***" in the disjunctive sense. Further elaborating on the aforesaid, it was stated that if any "*further relief*" was asked for in addition to any of the reliefs already mentioned under clauses (a) to (g), then the word "or" must be construed as "and". However, if the relief prayed for is an "*other relief*" which is not in any way consequential to or in addition of the reliefs already mentioned under clauses (a) to (g), then the word "or" must be construed in the literal sense as an "or". It is in the latter scenario, where an "*other relief*" is claimed that the relief must be akin to or of the same nature as any of the reliefs enumerated under clauses (a) to (g). The relevant observations are thus:

> *"1. […]The plaintiffs respondents in this appeal filed by the defendants-appellants by special leave of this Court from the decision of the High Court of Judicature of Punjab and Haryana filed a suit in the year 1963 against Appellant 1 alone (for the sake of brevity described as the appellant hereinafter in this judgment) praying for a decree for permanent injunction against him to restrain him.*

"from interfering with the maintaining of the Guru Granth Sahib for religious recitals in the Darbar Sahib in the Dharamsala also known as Dharamsala Dera Baba Jaimal Singh situated in Village Balsarai Tehsil and District Amritsar as also restraining him from interfering with the plaintiffs and other satsangis' rights of reciting the Guru Granth Sahib and holding and joining the religious congregations and Satsang in the abovementioned Gurdwara Baba Jaimal Singh."

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6. […] Out of the three conditions which are necessary to be fulfilled for the application of Section 92, two are indisputably present in this case viz. (1) the suit relates to a public charitable or religious trust; (2) it is founded on an allegation of a breach of trust and the direction of the Court is required for administration of the trust. The debate and dispute between the parties centered round the requirement of the fulfilment of the third condition, namely, whether the reliefs claimed are those which are mentioned in sub-section (1) of Section 92 of the Code. […]

7. The High Court in the letters patent appeal has taken the view that the relief sought for in the suit does not fall under any of the clauses (a) to (h) of Section 92 of the Code. Learned counsel for the appellant has assailed this view and submitted that the relief sought for falls under clause (e) or (g) or in any event under clause (h). In our judgment the relief sought for in this case does not strictly or squarely fall within clause (e) or (g) but is very much akin to either and hence is covered by the residuary clause (h).

8. Lord Sinha delivering the judgment of the Judicial Committee of the Privy Council in Abdur Rahim v. Syed Abu Mahomed Barkat Ali Shah [AIR 1928 PC 16 : 55 IA 96 : 108 IC 361] rejected the argument that the words "such further or other relief as the nature of the case may require" occurring in clause (h) must be taken, not in connection with the previous clauses (a) to (g) but in connection with the nature of the suit. The argument was that any relief other than (a) to (g) in the case of an alleged breach of

an express or constructive trust as may be required in the circumstances of any particular case was covered by clause (h). It was repelled on the ground that the words "further or other relief" must on general principles of construction be taken to mean relief of the same nature as clauses (a) to (g). It would be noticed that the word used after clause (g) and before clause (h) is "or". It may mean "and" in the context, or remain "or" in the disjunctive sense in a given case. If any further relief is asked for in addition to any of the reliefs mentioned in clauses (a) to (g) as the nature of the case may require, then the word "or" would mean "and". But if the relief asked for is other relief which is not by way of a consequential or additional relief to any of the reliefs in terms of clauses (a) to (g), then the word "or" will mean "or". The other relief however, cannot be of a nature which is not akin to or of the same nature as any of the reliefs mentioned in clauses (a) to (g). According to the plaintiffs case one of the objects of the religious trust was the worship of Granth Sahib and its recital in congregations of the public. In the suit a decree declaring what portion of the trust property should be allocated to the said object could be asked for under clause (e). The plaintiffs could also ask for the settling of a scheme under clause (g) alleging mismanagement of the religious trust on the part of the trustees. In the settlement of the scheme could be included the worship and recital of Granth Sahib — the holy Granth. The plaintiffs in their plaint did not in terms ask for the one or the other. They, however, alleged acts of breach of trust, mismanagement, undue interference with the right of the public in the worship of Granth Sahib. They wanted a decree of the Court against the appellant to force him to carry out the objects of the trust and to perform his duties as a trustee. Reading the plaint as a whole it is not a suit where the plaintiffs wanted a declaration of their right in the religious institution in respect of the Granth Sahib. But it was a suit where they wanted enforcement of due performance of the duties of the trustee in relation to a particular object of the trust. It is well-settled that the maintainability of the suit under Section 92 of the Code depends upon the allegations in

> *the plaint and does not fall for decision with reference to the averments in the written statement.*
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> *11. […] In our judgment therefore the courts below were right in taking the view that the present suit was a suit for a decree under Section 92 of the Code and since it was not filed in conformity with the requirement of the said provision of law it was not maintainable. The contrary view taken by the Division Bench of the High Court in the letters patent appeal is not correct."*
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> (Emphasis supplied)

128. In ***Charan Singh*** *(supra)*, the contentious relief prayed for was not a "*further relief*" under clause (h) i.e., there were not multiple prayers of which some already fell under the reliefs contemplated under clauses (a) to (g) and the prayer in question fell outside the scope of clauses (a) to (g). It was a solitary relief which solely and completely fell under the ambit of "*other relief*" mentioned under clause (h). Therefore, this Court had to delve into whether the "*other relief*" claimed could be said to be akin to or of the same nature as those already enumerated under clauses (a) to (g). In conducting such an examination, it was opined that the relief prayed for was in the background of allegations of breach of trust, mismanagement and undue interference with the right of the public in the worship of the Granth Sahib. In essence, what the plaintiffs wanted was a decree of the Court against the defendant in order to force him to carry out the objects of the trust and to perform his duties as a trustee. It was further held that, upon reading the plaint as a whole, what was claimed was not a declaration of the rights of the plaintiffs in the religious institution in respect of the Granth Sahib, but an enforcement of due performance of the duties of the trustee in relation to a particular object of the trust. Therefore, this solitary "*other relief*" was akin to those already mentioned under clauses (a) to (g) and was held to fall within the clause (h) and consequentially, under Section 92 of the CPC.

129. It has been sufficiently explained that the special nature of the suit under Section 92 requires it to be filed fundamentally on behalf of the public for the vindication of public rights. In ***Sugra Bibi v. Hazi***

Kummu Mia reported in **1968 SCC OnLine SC 99**, this Court had placed reliance on the reasoning given by Woodroffe, J., in ***Budreedas v. Choonilal*** reported in **ILR 33 Cal 789** and the opinion of Leach, C.J. in ***Tirumalai-Tirupati Devasthanams Committee v. Udiayar Krishnayya Shanbhaga*** reported in **1943 SCC OnLine Mad 48**, to state that, the fact that a suit relates to a public trust of a religious or charitable nature and that the reliefs claimed fall within clauses (a) to (h) of Section 92(1) 'would not by themselves attract the operation of the section'. It must be shown that the suit is of a representative character which is instituted in the interests of the public and not merely for the vindication of the individual or personal rights of the plaintiff(s). In other words, the Court must go beyond the reliefs and also give due regard to the capacity in which the plaintiffs are suing along with the purpose for which the suit is brought. The relevant observations are reproduced hereinbelow:

> *8. […] It is true that the facts that a suit relates to public trust of a religious or charitable nature and the reliefs claimed fall within clauses (a) to (h) of sub-section (1) of Section 92 of the Civil Procedure Code would not by themselves attract the operation of the section, unless the suit is of a representative character instituted in the interests of the public and not merely for vindication of the individual or personal rights of the plaintiff. As was stated by Woodroffe, J. in Budreedas v. Choonilal [ILR 33 Cal 789 at p 807] :*
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> > *"It is obvious that the Advocate-General, Collector or other public officer can and do sue only as representing the public, and if, instead of these officers, two or more persons having an interest in the trust sue with their consent, they sue under a warrant to represent the public as the objects of the trust. It follows from this, that when a person or persons sue not to establish the general rights of the public, of which they are a member or members, but to remedy a particular infringement of their own individual right, the suit is not within or need not be brought under the section."*
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> *9. This principle was accepted as sound by a Full Bench of the Madras High Court in Appanna v. Narasigna [ILR 45*

Mad 113] . In that case, a suit was instituted by a trustee of a public religious trust against a co-trustee for accounts and the Full Bench decided that it did not come within Section 92 of the Civil Procedure Code, the claim being to enforce a purely personal right of the plaintiff as a trustee against his co-trustees. The same view was taken by the Madras High Court in The Tirumalai-Tirupati Devasthanams Committee v. Udiayar Krishnayya Shanbhaga [ILR 1943 Mad 619] . In this case the general trustees of a public temple filed a suit against the trustees for the recovery of moneys which the latter had collected on behalf of the former praying for a decree directing accounts and inquiries. It was held that the right to collect moneys was entirely independent of Section 92 of the Civil Procedure Code and no sanction of the Advocate-General was necessary for the institution of the suit. Leach, C.J. who delivered the judgment of the Court observed as follows:

> *"After hearing the arguments of learned Counsel in the present case we can see no reason for disagreeing with anything said in Shanmukham Chetty v. Govinda Chetty [ILR 1938 Mad 39] . On the order hand we find ourselves in full agreement with the opinion of Varadachariar, J. that, in deciding whether a suit falls within Section 92, the Court must go beyond the reliefs and have regard to the capacity in which the plaintiffs are suing and to the purpose for which the suit is brought. The judgment of the Privy Council in Abdur Rahim v. Mahomed Barkat Ali [(1927) ILR 55 Cal 519 (PC)] lends no support for the opinion expressed by the Full Bench in Janki Bai v. Thiruchitrambala Vinayakar [(1935) ILR 58 Mad 988 (FB)] ".*

10. Applying the principle laid down in these authorities, we are of opinion that in the present case the suit brought by the appellant must be treated as a suit brought by her in a representative capacity on behalf of all the beneficiaries of the Wakf. As we have already stated, the Wakf created by Haji Elahi Bux was a Wakf created for a public purpose of charitable or religious nature. The reliefs claimed by the appellant in the suit are not reliefs for enforcing any

> *private rights but reliefs for the removal of the defendant as trustee and for appointment of a new trustee in his place. The reliefs asked for by the appellant fall within clauses (a) and (b) of Section 92(1) of the Civil Procedure Code and these reliefs claimed by the appellant indicate that the suit was brought by the appellant not in an individual capacity but as representing all the beneficiaries of the Wakf estate. We are accordingly of the opinion that the suit falls within the purview of the provisions of Section 92, Civil Procedure Code and in the absence of the consent in writing of the Advocate-General the suit is not maintainable.*"
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> (Emphasis supplied)

130. In ***Sugra Bibi*** *(supra),* the suit was brought by the plaintiff-appellant who was the wife of a deceased joint-Mutwalli praying that the defendant-respondent who was the other joint-Mutwalli, be removed from his office and that her minor son be instead appointed as Mutwalli of the Wakf Estate. Still, this Court had held that the suit brought by the appellant must be treated as one instituted in a representative capacity on behalf of all the beneficiaries of the Wakf. It was stated that the reliefs were not for enforcing any private rights but for the removal of the defendant as a trustee and for the appointment of a new trustee in his place. Therefore, what follows is that the true nature of the suit must be determined on a comprehensive understanding of the facts of the matter and not merely on a superficial consideration of who is bringing the suit.

131. The aforesaid principle was reiterated in ***Ramji Tripathi*** *(supra)* wherein this Court endeavoured to ascertain the 'real nature of the suit' to assess whether it was for the vindication of personal or public rights. It was stated that it is the object or purpose of the suit and not the reliefs that must decide whether the suit is one for agitating personal or public rights. Further, it was opined that taking into account the dominant purpose of the suit in light of the allegations made in the plaint would also aid is assessing the true nature of the suit. Applying the said principle, the suit was ultimately said to not fall within the contours of Section 92 of the CPC since the issue centred around the succession to the headship of a Math and was concerned with the right to the office of a trustee. The Court also observed that if the real purpose in bringing the suit was to vindicate the general

right of the public i.e., to have the rightful person appointed to the office, then there was no reason for the plaintiffs to have omitted to implead or at least refer to the other persons who were nominated by the predecessor in his Will, in the plaint. The relevant observations are reproduced hereinbelow:

> "*10. A suit under Section 92 is a suit of a special nature which presupposes the existence of a public Trust of a religious or charitable character. Such a suit can proceed only on the allegation that there was a breach of such trust or that the direction of the court is necessary for the administration of the trust and the plaintiff must pray for one or more of the reliefs that are mentioned in the section. It is, therefore, clear that if the allegation of breach of trust is not substantiated or that the plaintiff had not made out a case for any direction by the court for proper administration of the trust, the very foundation of a suit under the section would fail; and, even if all the other ingredients of a suit under Section 92 are made out, if it is clear that the plaintiffs are not suing to vindicate the right of the public but are seeking a declaration of their individual or personal rights or the individual or personal rights of any other person or persons in whom they are interested, then the suit would be outside the scope of Section 92 (see N. Shanmukham Chetty v. V.M. Govinda Chetty [AIR 1938 Mad 92 : 176 IC 26 : 1937 MWN 849] , Tirumalai Devasthanams v. Udiavar Krishnayya Shanbhaga [AIR 1943 Mad 466 : (1943) 56 LW 260] , Sugra Bibi v. Hazi Kummu Mia [AIR 1969 SC 884 : (1969) 3 SCR 83 : (1969) 2 SCJ 365] and Mulla: Civil Procedure Code (13th edn.) Vol. 1, p. 400). A suit whose primary object or purpose is to remedy the infringement of an individual right or to vindicate a private right does not fall under the section. It is not every suit claiming the reliefs specified in the section that can be brought under the section but only the suits which, besides claiming any of the reliefs, are brought by individuals as representatives of the public for vindication of public rights, and in deciding whether a suit falls within Section 92 the court must go beyond the reliefs and have regard to the capacity in which the*

plaintiffs are suing and to the purpose for which the suit was brought. This is the reason why trustees of public trust of a religious nature are precluded from suing under the section to vindicate their individual or personal rights. It is quite immaterial whether the trustees pray for declaration of their personal rights or deny the personal rights of one or more defendants. When the right to the office of a trustee is asserted or denied and relief asked for on that basis, the suit falls outside Section 92.

11. We see no reason why the same principle should not apply, if what the plaintiffs seek to vindicate here is the individual or personal right of Krishnabodhashram to be installed as Shankaracharya of the Math. Where two or more persons interested in a Trust bring a suit purporting to be under Section 92, the question whether the suit is to vindicate the personal or individual right of a third person or to assert the right of the public must be decided after taking into account the dominant purpose of the suit in the light of the allegations in the plaint. If, on the allegations in the plaint, it is clear that the purpose of the suit was to vindicate the individual right of Krishnabodhashram to be the Shankaracharya, there is no reason to hold that the suit was brought to uphold the right of the beneficiaries of the Trust, merely because the suit was filed by two or more members of the public after obtaining the sanction of the Advocate-General and claiming one or more of the reliefs specified in the section. There is no reason to think that whenever a suit is brought by two or more persons under Section 92, the suit is to vindicate the right of the public. As we said, it is the object or the purpose of the suit and not the reliefs that should decide whether it is one for vindicating the right of the public or the individual right of the plaintiffs or third persons.

12. The trial court, after reading the allegations in the plaint and after looking into the entire evidence in the case, came to the conclusion that the suit was primarily one for declaration that Krishnabodhashram was duly installed as the Shankaracharya of the Math on June 25, 1953 and that Respondent 1 had no right to be nominated as the Head of

> *the Math by Brahmanand as he did not possess the requisite qualification and that his possession of the Trust property was only in the capacity of a trustee de son tort, and so he must be removed from the headship of the Math. The High Court saw no reason to differ from the finding. We would be slow to disturb a finding of this nature especially when we see that the allegations in the plaint are reasonably susceptible of being so read. We think that the purpose of the suit was to settle the controversy as to whether Krishnabodhashram or Respondent 1 had the better claim to the headship of the Math and to the possession and management of its properties by obtaining a declaration of the Court. If the real purpose in bringing the suit was to vindicate the general right of the public to have the rightful claimant appointed to the office, there was no reason why the plaintiffs omitted to implead or at least refer in the plaint to the three persons nominated by Brahmanand in his Will to succeed him in the order indicated therein especially when it is seen that the plaintiffs accepted the custom of the Math to have the successor nominated by the incumbent for the time being of the office of Shankaracharya.*"
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> (Emphasis supplied)

132. The same was reiterated in by this Court in ***Vidyodaya Trust*** *(supra).* It was cemented that the court must go beyond what is literally stated in the reliefs and focus also on the purpose and object for which the suit was filed. On a comprehensive analysis of the averments in the plaint, if it is revealed that the primary object was the vindication of individual or personal rights of some person, then such a suit must fall. That a hard-and-fast rule cannot be made for ascertaining what the real purpose of the suit is was also emphasized. The same was elaborated as follows:

> ***13.*** *To find out whether the suit was for vindicating public rights there is necessity to go beyond the relief and to focus on the purpose for which the suit was filed. It is the object and purpose and not the relief which is material. A co-trustee is not remediless if the leave is not granted under Section 92.*
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> *-xxx-*

19. *In the suit against public trusts, if on analysis of the averments contained in the plaint it transpires that the primary object behind the suit was the vindication of individual or personal rights of some persons an action under the provision does not lie. As noted in Swami Paramatmanand case [R.M. Narayana Chettiar v. N. Lakshmanan Chettiar, (1991) 1 SCC 48] a suit under Section 92 CPC is a suit of special nature, which presupposes the existence of a public trust of religious or charitable character. When the plaintiffs do not sue to vindicate the right of the public but seek a declaration of their individual or personal rights or the individual or personal rights of any other persons or persons in whom they are interested, Section 92 has no application.*

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23. *One of the factual aspects which needs to be highlighted is that the allegations which have been made against Respondents 2, 3 and 10 are referable to a decision taken by the Board, though may be by majority. The fundamental question that arises is whether allegations against three of them would be sufficient to taint the Board's decision. As was observed by this Court in Swami Paramatmanand case [R.M. Narayana Chettiar v. N. Lakshmanan Chettiar, (1991) 1 SCC 48] , to gauge whether the suit was for vindicating public rights, the Court has to go beyond the relief and to focus on the purpose for which the suit is filed. To put it differently, it is the object or the purpose for filing the suit and not essentially the relief which is of paramount importance. There cannot be any hard-and-fast rule to find out whether the real purpose of the suit was vindicating public right or the object was vindication of some personal rights. For this purpose the focus has to be on personal grievances.*

24. *On a close reading of the plaint averments, it is clear that though the colour of legitimacy was sought to be given by projecting as if the suit was for vindicating public rights the emphasis was on certain purely private and personal disputes.*"

(Emphasis supplied)

133. On a comprehensive reading of the averments of the plaint in the instant case, what comes across is that the plaintiffs have made serious allegations as regards the misadministration of the appellant Society along with levelling accusations of gross financial impropriety, misconduct and siphoning off of funds by the respondent nos. 3 and 4 respectively. This, they contend, has ultimately affected the public at large who are the beneficiaries of the activities of the appellant society. However, having said the above, it cannot be ignored that the respondent nos. 1 and 2 respectively have also vehemently made averments regarding the wrongful dismissal of the respondent no. 1 from the post of the President and also as a board member of the appellant Society, and seek her reinstatement in one of the prayers. Additionally, they seek a declaration that all the decisions made by the board of the appellant Society after the date of dismissal of the respondent no. 1 be termed as illegal and void. The impugned decision is right in so far as observing that the respondent no. 1 has also sought to agitate personal/private grievances through this suit. It must be kept in mind that a suit under Section 92 is one of a 'special nature'. Therefore, issues involving the day-to-day management of the institution and grievances regarding election of members or certain board decisions pertaining to the reshuffling of the elected/board members, must not be made in a suit of this nature, especially when such grievances can be redressed through other mechanisms or under a regular suit not falling within Section 92. Such issues must not be deviously magnified or amplified as if there is a breach of trust warranting intervention under this provision.

134. However, the fact that certain private rights are being agitated must not be reason enough to ignore the other allegations made in the suit regarding the functioning of the appellant Society and dismiss the suit outrightly, provided the suit is instituted in a representative capacity. It would always be open for the High Court, during the course of the suit proceedings, to grant not all but only some of the reliefs claimed by the respondent nos. 1 and 2 respectively, for the reason that the others are clearly beyond the scope of what is contemplated under Section 92 of the CPC. The reliefs in the present plaint, insofar as they agitate private rights, cannot be granted under a suit of this nature.

135. Additionally, as opined in ***Charan Singh (****supra)*, when there exist some reliefs which clearly fall under clauses (a) to (g), the other

prayers must be seen as constituting "*further relief*" and be interpreted with a conjunctive "and". The non-conformity of those "*further reliefs*" with the reliefs enumerated under clauses (a) to (g) would not necessarily affect the maintainability of the suit itself. Herein, it is limpid that prayers (c), (d) and (e) of the plaint respectively, fall within clauses (a), (d) and (g) respectively of Section 92(1) for the removal of trustee(s), directing accounts and inquiries, and settling a scheme respectively for the appellant Society. In other words, there exist prayers which clearly bring the scope of the suit within that of Section 92. In such a scenario, the prayers in the plaint which are specific to the vindication of personal rights of the respondent no. 1 would fall under "*further relief(s)*" and not "*other relief(s)*" and not have the consequence of affecting the maintainability of the suit, by themselves. For the sake of argument, had they been the only reliefs prayed for by the respondent nos. 1 and 2, they would have instead fell under the ambit of "*other relief(s)*", and the word "or" under clause (h) would have literally been construed as a disjunctive "or". We would have then examined whether those "*other relief(s)*" were akin to or of the same nature as those already enumerated under clauses (a) to (g) of Section 92(1). Those prayers clearly being for vindication of personal rights would have revealed that the suit's sole and unequivocal purpose was not for any public purpose and have resulted the application for grant of leave to be dismissed. However, that not being the case presently, the prayers made by the respondent nos. 1 and 2 respectively largely fall under the ambit of Section 92(1).

136. As expounded by us in the preceding paragraphs and rightly pointed out in ***Sugra Bibi*** *(supra),* ***Ramji Tripathi*** *(supra)* and ***Vidyodaya Trust*** *(supra)*, what must be looked at, is not only whether the reliefs prayed for fall within clauses (a) to (h) of Section 92(1) but also the predominant object or purpose for which the suit has been filed on a holistic reading of the entire plaint. The question as to whether the suit has been filed by the plaintiffs, as representatives of the public for the vindication of public rights must assume paramount importance. The capacity in which the plaintiffs are suing must be given due consideration. As elaborated by us above, some prayers i.e., prayers (a) and (b) of the plaint fall outside the scope of Section 92(1) and some i.e., prayers (c), (d) and (e) of the plaint fall within the scope of Section 92(1). A reading of the contents of the plaint

reveal several averments regarding the circumstances which led to the dismissal of the respondent no. 1 as also circumstances and events indicating the questionable conduct on part of respondent nos. 3 and 4 respectively in their capacity as fiduciaries. Therefore, the allegations in the plaint by themselves are also not clearly indicative of a single object/purpose for which the suit has been instituted i.e., whether it has been instituted by the respondent nos. 1 and 2 for the vindication of public rights in a representative capacity or for the purpose of canvassing personal grievances alone. No doubt, the respondent nos. 1 and 2 respectively may also have a personal axe to grind with the appellant Society and also respondent nos. 3 and 4 respectively, however, insofar as the background in which prayers (c), (d) and (e) have been made, it cannot be said with certainty that these prayers are also made with an absence of bona fides and a with vested interests. It cannot be said that the appellant Society is being needlessly entangled in a frivolous litigation or in a dispute which only pertains to the election/day-to-day management of the appellant Society.

F. CONCLUSION

137. For the sake of convenience, a conspectus of the legal and factual discussion in the preceding paragraphs is as follows:

i. A suit under Section 92 of the CPC is a representative suit of a special nature since the action is instituted on behalf of the public beneficiaries and in public interest. Obtaining a 'grant of leave' from the court before the suit can be proceeded with, acts as a procedural and legislative safeguard in order to prevent public trusts from being subjected to undue harassment through frivolous suits being filed against them and also to obviate a situation that would cause a further wastage of resources which can otherwise be put towards public charitable or religious aims. However, at the stage of grant of leave, the court neither adjudicates upon the merits of the dispute nor confers any substantive rights upon the parties.

ii. Several decisions of this Court have outlined certain conditions or essential pre-requisites that need to be fulfilled for a suit to be maintainable under this provision. This Court in ***Ashok Kumar Gupta*** *(supra)* delineated them as follows – (a) the trust

in question must be created for public purposes of a charitable or religious nature; (b) there must exist a breach of trust or a direction of the court must be necessary for the administration of the trust; and (c) the relief claimed must be one or other of the reliefs as enumerated under Section 92(1) of the CPC. In order to successfully establish that a suit is not maintainable under Section 92, it would be sufficient to prove that any one of the conditions enumerated above has not been met, however, in order to assert its maintainability, all the aforesaid conditions need to be satisfied.

iii. A trust can be said to have been created for a 'public purpose' when the beneficiaries are the general public who are incapable of exact ascertainment. Even if the beneficiaries are not necessarily the public at large, they must at least be a classified section of it and not a pre-ascertained group of specific individuals.

iv. A crucial condition that needs satisfaction is whether the institution/organisation in relation to which certain reliefs are sought can in fact be considered to be a 'trust' or a 'constructive trust'.

v. When no formal recognition has been given to the institution, the creation of a public trust can be inferred from the relevant circumstances surrounding the coming into existence of and functioning of the institution/entity in question. Although it is not possible to provide an exhaustive list of the same, yet they may include – (a) the method of devolution of the property to the institution or its acquisition and the circumstances along with the intention behind the grant of property i.e. whether it was for the benefit of the organization/public beneficiaries or for the personal benefit of any particular individual/family; (b) whether the grant is accompanied with any fetter/obligation or qualified with a condition, either express or implied, regarding its use by the grantee; (c) whether the 'dedication' was complete i.e., whether there was an absolute cessation or complete relinquishment of ownership of the property on the part of the grantor and a subsequent vesting of the property in another individual (trustee) for the said object; (d) whether the public user or an unascertained class of individuals could exercise any

'right' over the organization and its properties; (e) the manner of use of the profits accrued, more particularly, whether it is applied/re-applied towards the benefit of the organization and its objectives, etc.

vi. If the aforementioned circumstances exist and the entity has been, much later in time, registered as a society under the Societies Registration Act, 1860, it would still be treated as a 'public trust' as per the dictum of the Full Bench of the Kerala High Court in ***Kesava Panicker*** *(supra)* wherein it was observed that the mere factum of registration of a society under the Societies Registration Act, 1860, after it attained the characteristics of a public trust, could not change the character of the properties which had already been constituted as trust properties.

vii. However, if the institution has been registered, from its inception, as a society under the Societies Registration Act, 1860, it is true that whenever a society acquires property, it cannot be said that it declares itself a trustee in respect of said property. In other words, the effect of registration under the Societies Registration Act, 1860 would not be to automatically invest the properties of the society with the character of trust property. This has been consistently laid down by the decisions of several High Courts.

viii. Having said so, one must examine what effect the mechanism of vesting provided under Section 5 of the Societies Registration Act, 1860 has on the society. It reads that – "*The property, movable and immovable, belonging to a society registered under this Act, if not vested in trustees, shall be deemed to be vested, for the time being, in the governing body of such society[…]*". What follows is that the property belonging to the society can either be vested in 'trustees' or in the governing body of the society. This vesting has been envisaged because a society registered under the aforesaid Act is not a juristic person or a body corporate capable of holding property by itself.

ix. The phrase, "*if not vested in trustees*" must be read to mean that a trust can be created, either expressly or impliedly, before or after the registration of a society, for the purpose of holding its properties. A public trust would be created prior to the registration of a society if the broad circumstances enumerated under point (v) are met. In such a case, all the properties of

the society which had been imbued with the character of 'trust property' would be subject to Section 92. However, if it is argued that a trust has instead separately been created for holding the property of the society after its registration as a society, the same must be clearly and sufficiently proven. Here, the separate trust which has been created and the properties which has been vested in said trust would be subject to scrutiny under Section 92. In both these scenarios, an 'express trust' would be created and in a suit under Section 92 CPC, the first criteria i.e., the existence of an express or constructive trust, would be met.

x. In the absence of such a separate vesting in trustees as aforesaid, the property belonging to the society would be automatically vested, through a deeming fiction, in the governing body of the society. Such a governing body is duty bound to ensure that the property is put towards and utilised for the purposes/aims of the society as laid out in its Memorandum of Association or any Rules and Regulations governing the said matter. In the event of the society's dissolution, the members would not derive any right to distribute the assets belonging to the society between themselves. Both during the subsistence and dissolution of the society, the members or the governing body cannot be said to possess any beneficial or individual interest over the property vested in them. They would also safeguard the society's property for the future members of the society or the future governing body such that perpetuity is assigned to both the society and its property, unless expressly dissolved. All these factors evidence that the governing body must also act within the contours of a strict fiduciary relationship.

xi. Legislative creativity was employed to ensure that the incapability of the society to hold the property by itself does not have any practical effect on its ability to use and administer those properties while also ensuring that the property of the society may not be squandered or the object and purpose for which the society was formed may not be defeated by persons having control of the properties. Therefore, Section 5 can be seen as providing two options, or mechanisms through which a society can hold the property belonging to itself – *One,* in trustee(s) or, *two,* in the governing body of the society. Both these mechanisms/options belong to the same genus (fiduciaries),

albeit they don't fall in the same species (the former is a trustee *stricto sensu* and the latter is not).

xii. Therefore, while the society cannot be considered as an 'express trust', what must also be noted, at this crucial juncture, is that, for an entity to be brought within the rigours of Section 92, the plaintiff has the option of also contending that a 'constructive trust' exists in the circumstances and a breach of such a constructive trust has occurred or that the directions of the Court are necessary for the administration of such a constructive trust.

xiii. A constructive trust, arises by operation of law, without regard to or irrespective of the intention of the parties to create a trust. It is imposed predominantly because the person(s) holding the title to the property would profit by a wrong or would be unjustly enriched if they were permitted to keep the property. The American and English models of 'constructive trust' although similar in nomenclature, bears a doctrinal difference, the former is remedial while the latter is institutional. In other words, in implying the existence of a constructive trust, the English Courts recognise or give legal efficacy to a fiduciary/ confidential relationship or 'institution' that already exists. It would arise, by operation of law, but when one person is under an existent obligation to hold a certain property for another. This constructive trust would come into existence from the date of the circumstances which give rise to it and the function of the court would only be to declare that such a trust has arisen in the past.

xiv. What must, however, be noted is that, for this equitable doctrine to be applied, the fiduciary must receive property or money which he cannot conscientiously retain. It is only thereafter that a constructive trust would be raised in favour of the beneficiaries on whose account the money was originally received. To put it simply, the factum that the fiduciary 'withheld' the property from its rightful beneficiaries must be established. That such a fiduciary sought to misapply the property in contravention to the covenants that bound him, or sought to gain an advantage for himself, must be proved for a constructive trust to come into existence by the operation of law. That he further divested the said siphoned property/funds, would have to be proved in

order to assert that the 'constructive trust' has additionally been breached. Even in the absence of such a further divestment, the directions of the court may still be necessary for the administration of the constructive trust.

xv. The respondent nos. 1 and 2 respectively, having made several allegations of siphoning of funds by the respondent nos. 3 and 4 respectively, for their own personal use, could be said to have *prima facie* satisfied the condition required to apply the doctrine of constructive trust to the present facts. Not to mention that, if these allegations are found to have no substance or plainly false, the entire suit would fail. But, in the peculiar circumstance in which the present matter rests, that would happen also for the reason that the circumstances which required the imposition of a constructive trust do not exist/have not been proven. However, if found true, all the property diverted for the purpose of obtaining a pecuniary advantage would be subject to a constructive trust, the administration of which can be sought in a suit under Section 92 of the CPC and the respondent nos. 3 and 4 respectively would be considered to be 'constructive trustees'.

xvi. The phrase "*persons having an interest in the trust*" must neither be construed too narrowly nor too widely. It must not be narrow for the reason that the word used is "*interest*" instead of "*direct interest*". However, it must also be remembered that while no direct interest is required, the interest must denote a present and substantial interest and not a sentimental, remote, fictitious or purely illusory interest.

xvii. While scrutinising whether the respondent nos. 1 and 2 respectively are persons interested in the trust and whether they are bringing the suit in a representative capacity, it is not just their designation or position which must be looked into or given importance to. While recognising that they have also sought some remedies related to personal grievances and the wrongful dismissal of the respondent no. 1 which could be seen as unduly magnifying an election dispute, there are several other allegations in the plaint which cannot simply be ignored and which give the respondent nos. 1 and 2 respectively, a dual role/capacity, whilst they're agitating the matter under Section 92 of the CPC. The larger background in which the suit is brought alludes to the existence of public interest also at play.

xviii. The reliefs claimed by the plaintiffs, must fall within those reliefs outlined under Section 92(1). As regards the question when a relief can be considered to fall under the residual clause (h) providing for "*further or other relief*" under Section 92(1), this Court in ***Charan Singh*** *(supra)* elaborated that if the relief prayed for is not a "*further relief*" but an "*other relief*" which is not in any way consequential to or in addition of the certain other reliefs already mentioned under clauses (a) to (g) and prayed for, then the "*other relief*" must be akin to or of the same nature as any of the reliefs enumerated under clauses (a) to (g).

xix. Furthermore, the special nature of the suit under Section 92 requires it to be filed fundamentally on behalf of the public for the vindication of public rights. Therefore, courts must go beyond the reliefs and also give due regard to the object and purpose for which the suit is brought. The true nature of the suit must be determined on a comprehensive understanding of the facts of the matter and a hard-and-fast rule cannot be made for the same. The fact that certain private rights are being agitated must not be reason enough to ignore the other allegations made in the suit and dismiss it outrightly, provided the suit is instituted in a representative capacity. The reliefs in the present plaint, insofar as they agitate private rights, cannot be granted under a suit of this nature.

xx. It is clarified that the issues involving the day-to-day management of the institution and grievances by members *qua* other members as regards the election of members or certain board decisions pertaining to the reshuffling of the elected/board members, must not be made in a suit of this nature, especially when such grievances can be redressed through other mechanisms or under a regular suit not falling within Section 92. Such issues must not be deviously magnified or amplified as if there is a breach of trust warranting intervention under this provision. Therefore, the reliefs insofar as the removal of the respondent no. 1 from the post of President and board member respectively are concerned along with the grievances which the respondent nos. 1 and 2 respectively may have with the other board members, would have to be agitated in a separate suit not being falling under Section 92 of the CPC.

138. For all the foregoing reasons, this appeal fails and is hereby dismissed. The underlying suit bearing CS (OS) No. 153 of 2020 filed before the Single Judge of the High Court must be commenced at the earliest and the High Court must pay careful attention to whether the circumstances necessitating the imposition of a 'constructive trust' is made out. If yes, it must delineate the properties which would be subjected to the constructive trust and assess whether the reliefs prayed for under prayers (c), (d) and (e) respectively of the present plaint may be granted.

139. The Registry shall circulate one copy each of this judgment to all the High Courts.

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

Result of the case: Appeal dismissed.

†*Headnotes prepared by:* Nidhi Jain

[2025] 8 S.C.R. 568 : 2025 INSC 927

Narayan Yadav
v.
State of Chhattisgarh

(Criminal Appeal No. 3343 of 2025)

05 August 2025

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

Issue for Consideration

Whether the High Court erred in passing the impugned judgment relying on the confessional FIR filed by the appellant-accused himself and the medical evidence to uphold his conviction, however, altering it from s.302, IPC to s.304 Part I.

Headnotes†

Evidence Act, 1872 – s.25 – Penal Code, 1860 – ss.302, 304 Part I – Confessional FIR, not admissible in evidence – Appellant-accused himself lodged FIR confessing the murder of the deceased in a drunken quarrel after the deceased allegedly made an obscene remark about the appellant's girlfriend – Convicted u/s.302, IPC – High Court relied on the confessional FIR and medical evidence to uphold conviction, however, it was altered from s.302, IPC to s.304 Part I, giving benefit of Exception 4 to s.300 – Sustainability:

Held: Not sustainable – Confessional FIR is not admissible in evidence – Contents of the FIR are hit by s.25, Evidence Act, being a confession before a police officer – An FIR of a confessional nature made by an accused person is inadmissible in evidence against him, except to the extent that it shows he made a statement soon after the offence, thereby identifying him as the maker of the report, which is admissible as evidence of his conduct u/s.8, Evidence Act – High Court erred in reading the contents of the FIR lodged by the appellant into evidence – There was no question at all for the High Court to seek corroboration of the medical evidence on record with the confessional part of the FIR lodged by the appellant – Further, the High Court should have been mindful of the fact that a doctor is not a witness of fact – Evidence of such an expert is of an advisory character – An accused cannot be held guilty of the offence of murder solely on the basis of medical evidence on record – Furthermore, the depositions of the panch witnesses do not inspire any confidence –

* Author

Most of them turned hostile – No discovery of fact at the instance of the appellant, relevant and admissible u/s.27, Evidence Act, was established – Also, the High Court erred in invoking Exception 4 to s.300, IPC – Appellant acquitted. [Paras 24, 25, 28, 29, 52]

Penal Code, 1860 – Exception 4 to s.300 – When cannot be invoked – Discussed. [Paras 40-43, 48-50]

Evidence Act, 1872 – ss.27, 8 – Implication of – Conditions necessary for the applicability of s.27 – Discussed. [Paras 33, 36]

Evidence – Of expert witness – Nature – Advisory:

Held: An expert witness is examined by the prosecution because of his specialized knowledge on certain subjects, which the judge may not be fully equipped to assess – The evidence of such an expert is of an advisory character – The credibility of the expert witness depends on the reasons provided in support of his conclusions, as well as the data and material forming the basis of those conclusions. [Para 28]

Case Law Cited

Nisar Ali v. State of U.P. **[1957] 1 SCR 657 : 1957 SCC OnLine SC 42;** *Faddi v. State of M.P.* **[1964] 6 SCR 312 : 1964 SCC OnLine SC 123;** *Aghnoo Nagesia v. State of Bihar* **[1966] 1 SCR 134 : 1965 SCC OnLine SC 109;** *Murli v. State of Rajasthan* **[2009] 13 SCR 378 : (2009) 9 SCC 417;** *A. N. Venkatesh & Anr. v. State of Karnataka* **(2005) 7 SCC 714;** *State of Andhra Pradesh v. Rayavarapu Punnayya & Anr.* **[1977] 1 SCR 601 : (1976) 4 SCC 382;** *Budhi Singh v. State of Himachal Pradesh* **[2012] 11 SCR 848 : (2012) 13 SCC 663;** *Kikar Singh v. State of Rajasthan* **[1993] 3 SCR 696 : (1993) 4 SCC 238;** *Surain Singh v. State of Punjab* **[2017] 2 SCR 824 : (2017) 5 SCC 796 – relied on.**

List of Acts

Evidence Act, 1872; Penal Code, 1860.

List of Keywords

Confessional FIR; Confessional FIR not admissible in evidence; Conviction altered from Section 302, Penal Code, 1860 to Section 304 Part I; Confession before a police officer; FIR of confessional nature made by accused; Confession made by accused before the police; Contents of the FIR hit by Section 25, Evidence Act, 1872;

Murder; Obscene remark about girlfriend; Section 27, Evidence Act, 1872; Section 8, Evidence Act, 1872; Corroboration of medical evidence with the confessional part of the FIR; Doctor not a witness of fact; Expert Witness; Incorrect application of Exception 4 to Section 300, Penal Code, 1860; Panch witnesses turned hostile; Non-confessional FIR admissible against the accused.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 3343 of 2025

From the Judgment and Order dated 16.01.2025 of the High Court of Chhattisgarh at Bilaspur in CRA No. 1538 of 2021

Appearances for Parties

Advs. for the Appellant:
A Sirajudeen, Sr. Adv., Ms. Manjeet Chawla, Vishek Vats, Ms. Shaik Soni Ahamed, Ms. Kiran Bala Agarwal.

Advs. for the Respondent:
Ms. Sugandha Jain, Prabodh Kumar.

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*

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

1. Leave granted.

2. This appeal arises from the judgment and order passed by the High Court of Chhattisgarh in Criminal Appeal No. 1538 of 2021 dated 16.01.2025 (*hereinafter* referred to as "**Impugned Judgment**") by which the appeal preferred by the appellant herein against the judgment and order of conviction passed by the Trial Court came to be partly allowed by altering the conviction of the appellant herein from Section 302 of the Indian Penal Code, 1860 (for short, "**the IPC**") to Section 304 Part I of the IPC.

A. FACTUAL MATRIX

3. The appellant (original accused) himself lodged a First Information Report (FIR) dated 27.09.2019 with Korba Kotwali Police Station, District Korba, which came to be registered for the offence punishable under Section 302 of the IPC. The FIR reads thus:

> *"On 27.09.2019 I came to the P.S. Kotwali on the orders of Chowki Incharge for getting the Nalsi number in Crime No. 0/19 for the offence under Sections 302 and 380 IPC respectively. Nalsi number detailed that I am residing in the house of my relative Rajnath Yadav situated near the Pump House, Korba. I earn my livelihood as a milk supplier. I started work with Ram Babu Sharma, Thekedar past 15-20 days. Ram Babu Sharma used to call me for having drink at his house. Ram Baby invited me at his place on 24.09.2019. I went to his house at about 9.30 PM situated at Parshuram Nagar. We both sat and drank. Meanwhile I showed my girlfriend's pic from my mobile. Then he said that get your girlfriend at my place and leave her with me for one night. Hearing this quarrel started between us and we started to fight. Then I picked up a knife kept in his house for cutting vegetables and inflicted blows on his neck and stomach in anger and killed him by hitting a log of wood on his head, legs and private part. Thereafter I dragged his dead body near the bedside and covered it with a cloth that I took out from an almirah. Then I ransacked his room and took away his purse containing Rs. 7000 and keys of the Bolero car. I locked the room from outside and got the Bolero outside and locked the main door and ran towards Bilaspur in Bolero. I met with*

an accident at Raipur Road, ahead of Bilaspur. When I regained consciousness in morning I found myself in Saragaon Hospital where my mother and Yuvraj Yadu both were present. Today morning I came to Korba after getting discharged from the hospital. I informed about the incident to my mausa Rajnath Yadav, Rahul Chaudhari and Anuj Yadav and also informed the CSEB Chowki. Then I went to Ram Babu's house with police people and pointed out the dead body. My vehicle is at the place of accident. I am filing the report. Investigation to be done."

4. Upon registration of the FIR, lodged by the appellant himself, at the concerned Police Station referred to above, the investigation commenced. It appears that the investigating officer, after arresting the appellant, took him to the house of the deceased. After breaking open the house, the dead body of the deceased was found lying in a pool of blood inside his residence. A *panchnama* of the scene of offence was prepared in the presence of *panch* witnesses. The knife allegedly used by the appellant to inflict injuries on the deceased was recovered from the place of occurrence, i.e., the deceased's house. The clothes and other articles were also collected in presence of the *panch* witnesses by preparing a *panchnama*, and were sent to the Forensic Science Laboratory for chemical analysis. The clothes of the appellant were discovered at his instance from the residence of his uncle, Rajnath Yadav, by drawing a *panchnama*.

5. The inquest *panchnama* of the dead body of the deceased was drawn in the presence of the *panch* witnesses. The body of the deceased was then sent for post-mortem examination. The post-mortem report Exhibit-PW 34 recorded the following injuries found on the body of the deceased:

"1. An incised wound was present on the right Side of his forehead measuring 6 X 2 cm, deep to the bone, in a vertical position.

2. An incised wound was present on the left side of his forehead, the size of which was 3 X 1 cm, deep to the bone, in a vertical position.

3. An incised wound was present on the skin of the right parietal bone of the head, which was 4 X 2 cm, deep to the bone, in a vertical position.

4. An incised lesion was present on the skin of the left parietal bone, which was 5 X 2 cm in size, deep to the bone, in a vertical position, which was on the middle part of parietal bone.

5. An incised wound was present on the anterior part of the abdomen at the iliac fossa part which was 4 X 2 X 2 cm in size.

6. An incised wound was present on the upper right side of the chest, below the clavicle bone, the size of which was 4 X 2 deep to the upper part of the lung."

6. The cause of death, as stated in the post-mortem report and duly proved by Dr. R.K. Divya (PW-10), was shock resulting from excessive bleeding from the right side of the chest and injury to the upper lobe of the right lung.

7. Upon completion of the investigation, chargesheet came to be filed by the investigating officer, and the filing of chargesheet for the offence enumerated above culminated in the Sessions Case No. 9 of 2020.

8. The Sessions Judge, Korba, proceeded to frame charge against the appellant for the offences mentioned above. The appellant pleaded not guilty to the charge and claimed to be tried. In the course of trial, the prosecution examined the following witnesses:

   i. PW-1, Rahul Kumar Chaudhari, *panch* witness (turned hostile);

   ii. PW-2 Kamlesh Kumar, son of the deceased;

   iii. PW-3 Ravishanker Sriniwas, *panch* witness;

   iv. PW-4 Rampradeep Sharma, *panch* witness;

   v. PW-5 Ramniwas Sharma, *panch* witness;

   vi. PW-6 Jalashwar Sakar, *panch* witness;

   vii. PW-7 B.R. Chaudhary, Police witness

   viii. PW-8 Sudama Prasad, Police witness

   ix. PW-9 Ashok Pandey, Police witness

   x. PW-10 Dr. R.K. Divya, Medical Officer who performed post-mortem

   xi. PW-11 Hemant Patle, Police witness

9. The prosecution also adduced a few documentary evidence.

10. Upon completion of the recording of the oral evidence, further statement of the appellant was recorded under Section 313 of the Code of Criminal Procedure, 1973. In his statement, the appellant claimed that he had been falsely implicated in the alleged crime and asserted his complete innocence.

11. The Trial Court, upon overall appreciation of both oral as well as the documentary evidence on record, reached the conclusion that the prosecution had proved its case beyond reasonable doubt, and accordingly, it held the appellant guilty of the offence of murder and sentenced him to undergo life imprisonment.

12. The appellant being aggrieved by the judgment and order of conviction passed by the Trial Court, preferred an appeal before the High Court. The High Court partly allowed the appeal and altered the conviction of the appellant from Section 302 of the IPC to Section 304 Part I of the IPC, giving benefit of *Exception 4* to Section 300 of the IPC

13. In such circumstances referred to above the appellant is before this Court with the present appeal.

B. ANAYLYSIS

14. Having heard the learned counsel appearing for the parties and having gone through the materials on record the only question that falls for our consideration is whether the High Court committed any error in passing the Impugned Judgment.

15. The entire judgment of the High Court could be termed as erroneous on several grounds, there are errors apparent on the face of the Impugned Judgment. The first misstep was that the High Court examined the medical evidence on record in detail and then proceeded to directly corroborate it with the contents of the FIR lodged by the appellant himself. In doing so, the High Court fully convinced itself that the appellant's statements in the form of a confession, as contained in the FIR, were entirely corroborated by the medical evidence. Consequently, the Court concluded that the appellant had committed the alleged crime. In arriving at such a conclusion, the High Court overlooked some fundamental principles of criminal jurisprudence.

a. Confessional FIR is not Admissible in Evidence

16. The FIR was exhibited in evidence (Exhibit P-14) through the oral evidence of the investigating officer PW-9, Ashok Pandey. PW-9 proved his signature on the FIR and also identified the signature of the first informant i.e., the appellant-herein. However, the other contents of the FIR could not have been proved through the testimony of the investigating officer. A plain reading of the FIR indicates that it contains a confession by its maker i.e., the appellant-herein, regarding the commission of the alleged offence.

17. A statement in an FIR can normally be used only to contradict its maker as provided in Section 145 of the Indian Evidence Act, 1872 (for short, "**the Act of 1872**"), or to corroborate his evidence as envisaged in Section 157 of the Act of 1872. In a criminal trial, however, neither of these is possible as long as the maker of the statement is an accused in the case, unless he offers himself to be examined as a witness [See: ***Nisar Ali* v. *State of U.P.*, 1957 SCC OnLine SC 42**]. J.L. Kapur, J. speaking for the three-Judge Bench in that decision has observed:

> *"A first information report is not a substantive piece of evidence and can only be used to corroborate the statement of the maker under Section 157, Evidence Act, or to contradict it under Section 145 of that Act. It cannot be used as evidence against the maker at the trial if he himself becomes an accused, nor to corroborate or contradict other witnesses. In this case, therefore, it is not evidence."*
>
> (Emphasis supplied)

18. The High Court failed to take into consideration two landmark decisions of this Court – one in ***Faddi* v. *State of M.P.***, **1964 SCC OnLine SC 123**, and the other in ***Aghnoo Nagesia* v. *State of Bihar***, **1965 SCC OnLine SC 109**.

19. In ***Faddi*** (*supra*), this Court stated that:

> "*If the FIR given by the accused contains any admission as defined in Section 17 of the Evidence Act there is no bar in using such an admission against the maker thereof as permitted under Section 21 of the Act, provided such*

admission is not inculpatory in character. In the judgment their Lordships distinguished Nisar Ali case [AIR 1957 SC 366] in the following lines:

> *"But it appears to us that in the context in which the observation is made and in the circumstances, which we have verified from the record of that case, that the Sessions Judge had definitely held the first information report lodged by the co-accused who was acquitted to be inadmissible against Nisar Ali, and that the High Court did not refer to it at all in its judgment, this observation really refers to a first information report which is in the nature of a confession by the maker thereof. Of course, a confessional first information report cannot be used against the maker when he be an accused and necessarily cannot be used against a co-accused*."

(Emphasis supplied)

20. In ***Aghnoo Nagesia*** (*supra*), this Court sounded a note of caution that when the statement in the FIR given by an accused contains incriminating materials and it is difficult to sift the exculpatory portion therefrom, the whole of it must be excluded from evidence.

21. In ***Faddi*** (*supra*), the issue before this Court was whether the FIR lodged by the accused himself therein was admissible in evidence. In the facts of the said case, this Court held that the objection to the admissibility of the FIR lodged by the appellant was not sound, as the FIR only contained a few admissions, and those admissions did not amount to a confession so as to render the entire FIR inadmissible in evidence. We quote the relevant observations made by this Court in ***Faddi*** (*supra*) as under:

> "*14. It is contended for the appellant that the first information report was inadmissible in evidence and should not have been therefore taken on the record. In support, reliance is placed on the case reported as Nisar Ali v. State of U.P [AIR 1957 SC 366]. We have considered this contention and do not see any force in it.*
>
> *15. The report is not a confession of the appellant. It is not a statement made to a police officer during the*

course of investigation. Section 25 of the Evidence Act and Section 162 of the Code of Criminal Procedure do not bar its admissibility. The report is an admission by the accused of certain facts which have a bearing on the question to be determined by the Court viz. how and by whom the murder of Gulab was committed, or whether the appellant's statement in Court denying the correctness of certain statements' of the prosecution witnesses is correct or not. Admissions are admissible in evidence under Section 21 of the Act. Section 17 defines an admission to be a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, thereafter mentioned, in the Act. Section 21 provides that admissions are relevant and may be proved as against a person who makes them. Illustrations (c), (d) and (e) to Section 21 are of the circumstances in which an accused could prove his own admissions which go in his favour in view of the exceptions mentioned in Section 21 to the provision that admissions could not be proved by the person who makes them. It is therefore clear that admissions of an accused can be proved against him.

16. The Privy Council, in very similar circumstances, held long ago in Dal Singh v. King Emperor [LR 44 IA 137] such first information reports to be admissible in evidence. It was said in that case at p. 142:

> *"It is important to compare the story told by Dal Singh when making his statement at the trial with that what he said in the report he made to the police in the document which he signed, a document which is sufficiently authenticated. The report is clearly admissible. It was in no sense a confession. As appears from its terms, it was rather in the nature of an information or charge laid against Mohan and Jhunni in respect of the assault alleged to have been made on Dal Singh on his way from Hardua to Jubbulpur. As such the statement is proper evidence against him.…*

> *It will be observed that this statement is at several points at complete variance with what Dal Singh afterwards stated in Court. The Sessions Judge regarded the document as discrediting his defence. He had to decide between the story for the prosecution and that told for Dal Singh."*

Learned counsel for the appellant submits that the facts of that case were distinguishable in some respects from the facts of this case. Such a distinction, if any, has no bearing on the question of the admissibility of the report. The report was held admissible because it was not a confession and it was helpful in determining the matter before the Court.

17. In Nisar Ali case [AIR 1957 SC 366] Kapur, J. who spoke for the Court said, after narrating the facts:

> *"An objection has been taken to the admissibility of this report as it was made by a person who was a co-accused. A first information report is not a substantive piece of evidence and can only be used to corroborate the statement of the maker under Section 157, Evidence Act, or to contradict it under Section 145 of that Act. It cannot be used as evidence against the maker at the trial if he himself becomes an accused, not to corroborate or contradict other witnesses. In this case, therefore, it is not evidence."*

It is on these observations that it has been contended for the appellant that his report was inadmissible in evidence. Ostensibly, the expression 'it cannot be used as evidence against the maker at the trial if he himself becomes an accused' supports the appellant's contention. But it appears to us that in the context in which the observation is made and in the circumstances, which we have verified from the record of that case, that the Sessions Judge had definitely held the first information report lodged by the co-accused who was acquitted to be inadmissible against Nisar Ali, and that the High Court did not refer to it at all in its judgment, this observation really refers to a first information report which is in the nature of a confession by the maker thereof.

Of course a confessional first information report cannot be used against the maker when he be an accused and necessarily cannot be used against a co-accused. Further, the last sentence of the above-quoted observation is significant and indicates what the Court meant was that the first information report lodged by Qudratullah, the co-accused, was not evidence against Nisar Ali. This Court did not mean — as it had not to determine in that case — that a first information report which is not a confession cannot be used as an admission under Section 21 of the Evidence Act or as a relevant statement under any other provisions of that Act. We find also that this observation has been understood in this way by the Rajasthan High Court in State v. Balchand [AIR 1960 Raj 101] and in State of Rajasthan v. Shiv Singh [AIR 1962 Raj 3] and by the Allahabad High Court in Allahdia v. State [1959 All LJ 340] .

18. We therefore hold that the objection to the admissibility of the first information report lodged by the appellant is not sound and that the Courts below have rightly admitted it in evidence and have made proper use of it."

(Emphasis supplied)

22. We now proceed to look into the decision of this Court in **Aghnoo Nagesia** (*supra*). The following observations of this Court at paragraphs 9 to 18 are relevant and are quoted below:-

"9. Section 25 of the Evidence Act is one of the provisions of law dealing with confessions made by an accused. The law relating to confessions is to be found generally in Ss. 24 to 30 of the Evidence Act and Ss. 162 and 164 of the Code of Criminal Procedure, 1898. Sections 17 to 31 of the Evidence Act are to be found under the heading "Admissions". Confession is a species of admission, and is dealt with in Ss. 24 to 30. A confession or an admission is evidence against the maker of it, unless its admissibility is excluded by some provision of law. Section 24 excludes confession caused by certain inducements, threats and promises. Section 25 provides: "No confession made to a police officer shall be proved as against a

person accused of an offence". The terms of S. 25 are imperative. A confession made to a police officer under any circumstances is not admissible in evidence against the accused. It covers a confession made when he was free and not in police custody, as also a confession made before any investigation has begun. The expression "accused of any offence" covers a person accused of an offence at the trial whether or not he was accused of the offence when he made the confession. Section 26 prohibits proof against any person of a confession made by him in the custody of a police officer, unless it is made in the immediate presence of a Magistrate. The partial ban imposed by S. 26 relates to a confession made to a person other than a police officer. Section 26 does not qualify the absolute ban imposed by S. 25 on a confession made to a police officer. Section 27 is in the form of a proviso, and partially lifts the ban imposed by Ss. 24, 25 and 26.It provides that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. Section 162 of the Code of Criminal Procedure forbids the use of any statement made by any person to a police officer in the course of an investigation for any purpose at any enquiry or trial in respect of the offence under investigation, save as mentioned in the proviso and in cases falling under sub-s. (2), and it specifically provides that nothing in it shall be deemed to affect the provisions of S. 27 of the Evidence Act. The words of S. 162 are wide enough to include a confession made to a police officer in the course of an investigation. A statement or confession made in the course of an investigation may be recorded by a Magistrate under S. 164 of the Code of Criminal Procedure subject to the safeguards imposed by the section. Thus, except as provided by S. 27 of the Evidence Act, a confession by an accused to a police officer is absolutely protected under S. 25 of the Evidence Act, and if it is made in the

course of an investigation, it is also protected by S. 162 of the Code of Criminal Procedure, and a confession to any other person made by him while in the custody of a police officer is protected by S. 26, unless it is made in the immediate presence of a Magistrate. These provisions seem to proceed upon the view that confessions made by an accused to a police officer or made by him while he is in the custody of a police officer are not to be trusted, and should not be used in evidence against him. They are based upon grounds of public policy and the fullest effect should be given to them.

10. Section 154 of the Code of Criminal Procedure provides for the recording of the first information. The information report as such is not substantive evidence. It may be used to corroborate the informant under S. 157 of the Evidence Act or to contradict him under S. 145 of the Act, if the informant is called as a witness. If the first information is given by the accused himself, the fact of his giving the information is admissible against him as evidence of his conduct under S. 8 of the Evidence Act. If the information is a non-confessional statement, it is admissible against the accused as an admission under S. 21 of the Evidence Act and is relevant, see Faddi v. State of Madhya Pradesh, Cri. Appeal No. 210 of 1963, dated 24-1-1964: (AIR 1964 SC 1850), explaining Nisar Ali v. State of U. P., (S) AIR 1957 SC 366 and Dal Singh v. King Emperor, 44 Ind App 137: (AIR 1917 PC 25). But a confessional first information report to a police Officer cannot be used against the accused in view of S. 25 of the Evidence Act.

11. The Indian Evidence Act does not define "confession". For a long time, the Courts in India adopted the definition of "confession" given in Art. 22 of Stephen's Digest of the Law of Evidence. According to that definition a confession is an admission made at any time by a person charged with crime, stating or suggesting the inference that he committed that crime. This definition was discarded by the Judicial Committee in Pakala Narayanaswami v. Emperor, 66 Ind App 66 at p. 81: (AIR 1939 PC 47 at p. 52). Lord Atkin observed:

> *".....no statement that contains self exculpatory matter can amount to confession, if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed. Moreover, a confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact, is not of itself a confession, e.g., an admission that the accused is the owner of and was in recent possession of the knife or revolver which caused a death with no explanation of any other man's possession." These observations received the approval of this Court in Palvinder Kaur v. State of Punjab (1), 1953 SCR 94 at p. 104; (AIR 1952 SC 354 at p. 357). In State of U. P. v. Deoman Upadhyaya, (1961) 1 SCR 14 at p. 21: (AIR 1960 SC 1125 at pp. 1128-1129). Shah, J., referred to a confession as a statement made by a person stating or suggesting the inference that he has committed a crime.*

12. Shortly put, a confession may be defined as an admission of the offence by a person charged with the offence. A statement which contains self-exculpatory matter cannot amount to a confession, if the exculpatory statement is of some fact which, if true, would negative the offence alleged to be confessed. If an admission of an accused is to be used against him, the whole of it should be tendered in evidence and if part of the admission is exculpatory and part inculpatory, the prosecution is not at liberty to use in evidence the inculpatory part only. See Hanumant Govind v. State of M. P. 1952 SCR 1091 at p. 1111: (AIR 1952 SC 343 at p. 350) and 1953 SCR 94 : (AIR 1952 SC 354). The accused is entitled to insist that the entire admission including the exculpatory part must be tendered in evidence. But this principle is of no assistance to the accused where no part of his statement is self-exculpatory; and the prosecution intends to use the whole of the statement against the accused.

13. Now, a confession may consist of several parts and may reveal not only the actual commission of the crime but also the motive, the preparation, the opportunity, the provocation, the weapons used, the intention, the concealment of the weapon and the subsequent conduct of the accused. If the confession is tainted the taint attaches to each part of it. It is not permissible in law to separate one part and to admit it in evidence as a non-confessional statement. Each part discloses some incriminating fact, i.e., some fact which by itself or along with other admitted or proved facts suggests the inference that the accused committed the crime, and though each part taken singly may not amount to a confession, each of them being part of a confessional statement partakes of the character of a confession. If a statement contains an admission of an offence, not only that admission but also every other admission of an incriminating fact contained in the statement is part of the confession.

14. If proof of the confession is excluded by any provision of law such as S.24, S. 25 and S. 26 of the Evidence Act, the entire confessional statement in all its parts including the admissions of minor incriminating facts must also be excluded, unless proof of it is permitted by some other section under as S. 27 of the Evidence Act. Little substance and content would be left in Ss. 24, 25 and 26 if proof of admission of incriminating facts in a confessional statement is permitted.

15. Sometimes, a single sentence in a statement may not amount to a confession at all. Take a case of a person charged under S. 301-A of the Indian Penal Code and a statement made by him to a police officer that "I was drunk: I was driving a car at a speed of 80 miles per hour. I could see A on the road at a distance of 80 yards; I did not blow the horn: I made no attempt to stop the car; the car knocked down A". No single sentence in this statement amounts to a confession; but the statement read as a whole amounts to a confession of an offence under S. 304-A of the Indian Penal Code, and it would not be permissible to admit in evidence each sentence

separately as a nonconfessional statement. Again, take a case where a single sentence in a statement amounts to an admission of an offence. 'A' states "I struck 'B' with a tangi and hurt him". In consequence of the injury 'B' died. 'A' committed an offence and is chargeable under various sections of the Indian Penal Code. Unless he brings his case within one of the recognised exceptions, his statement amounts to an admission of an offence, but the other parts of the statement such as the motive, the preparation, the absence of provocation, concealment of the weapon and the subsequent conduct, all throw light upon the gravity of the offence and the intention and knowledge of the accused, and negatives the right of private defence, accident and other possible defences. Each and every admission of an incriminating fact contained in the confessional statement is part of the confession.

16. If the confession is caused by an inducement, threat or promise as contemplated by S. 24 of the Evidence Act, the whole of the confession is excluded by S. 24. Proof of not only the admission of the offence but also the admission of every other incriminating fact such as the motive, the preparation and the subsequent conduct is excluded by S. 24. To hold that the proof of the admission of other incriminating facts is not barred by S. 24 is to rob the section of its practical utility and content. It may be suggested that the bar of S. 24 does not apply to the other admissions, but though receivable in evidence, they are of no weight, as they were caused by inducement, threat or promise. According to this suggestion, the other admissions are relevant but are of no value. But we think that on a plain construction of S. 24, proof of all the admissions of incriminating facts contained in a confessional statement is excluded by the section. Similarly, Ss. 25 and 26 bar not only proof of admission of an offence by an accused to a police officer or made by him while in the custody of a police officer but also admissions contained in the confessional statement of all incriminating facts related to the offence.

17. A little reflection will show that the expression "confession" in Ss. 24 to 30 refers to the confessional

statement as a whole including not only the admissions of the offence but also all other admissions of incriminating facts related to the offence. Section 27 partially lifts the ban imposed by Ss. 24, 25 and 26 in respect of so much of the information whether it amounts to a confession or not, as relates distinctly to the fact discovered in consequence of the information, if the other conditions of the section are satisfied. Section 27 distinctly contemplates that an information leading to a discovery may be a part of the confession of the accused and thus fall within the purview of Ss. 24, 25 and 26. Section 27 thus shows that a confessional statement admitting the offence may contain additional information as part of the confession. Again, S. 30 permits the Court to take into consideration against a co-accused a confession of another accused affecting not only himself but the other co-accused. Section 30 thus shows that matters affecting other persons may form part of the confession.

18. If the first information report is given by the accused to a police officer and amounts to a confessional statement, proof of the confession is prohibited by S. 25. The confession includes not only the admission of the offence but all other admissions of incriminating facts related to the offence contained in the confessional statement. No part of the confessional statement is receivable in evidence except to the extent that the ban of S. 25 is lifted by S. 27."

(Emphasis supplied)

23. The legal position, therefore, is this – a statement contained in the FIR furnished by one of the accused in the case cannot, in any manner, be used against another accused. Even as against the accused who made it, the statement cannot be used if it is inculpatory in nature nor can it be used for the purpose of corroboration or contradiction unless its maker offers himself as a witness in the trial. The very limited use of it is, as an admission under Section 21 of the Act of 1872, against its maker alone, and only if the admission does not amount to a confession.

24. To put the aforesaid in simpler terms, an FIR of a confessional nature made by an accused person is inadmissible in evidence against him,

except to the extent that it shows he made a statement soon after the offence, thereby identifying him as the maker of the report, which is admissible as evidence of his conduct under Section 8 of the Act of 1872. Additionally, any information furnished by him that leads to the discovery of a fact is admissible under Section 27 of the Act of 1872. However, a non-confessional FIR is admissible against the accused as an admission under Section 21 of the Act of 1872 and is relevant.

25. Thus, the first error that the High Court committed was to read the contents of the FIR lodged by the appellant into evidence. As observed earlier, the FIR lodged by the appellant amounts to a confession, and any confession made by an accused before the police is hit by Section 25 of the Act of 1872. There was no question at all for the High Court to seek corroboration of the medical evidence on record with the confessional part of the FIR lodged by the appellant.

26. Once we say that the contents of the FIR are hit by Section 25 of the Act of 1872, being a confession before a police officer, the only remaining evidence on record is the medical evidence and the oral evidence of the *panch* witnesses.

b. Evidence of an Expert Witness is only Advisory in Nature

27. At this stage, we may look into some curious findings recorded by the High Court in its Impugned Judgement. We quote the relevant paragraphs as under:

> "*16. Now, the next question for consideration would be whether the accused/appellant herein is the perpetrator of the crime in question, which the learned trial Court has recorded in affirmative by relying upon the testimony of Dr. R.K. Divya (PW-10), who conducted post-mortem had opined that the cause of death is shock due to right side of haemothorax due to laceration of apex lobe of right lung secondary to incised wound over upper part of right side of front of chest. The Doctor ultimately opined through his report the nature of death to be homicidal. Thus, on the basis of testimony of Dr R.K. Divya (PW-10), it is clear that it is the appellant herein who on the fateful date and time has caused grievous injuries to the deceased, due to which he died. As such, the learned trial Court has rightly held that it is the appellant/accused who has caused injuries*

over the body of the deceased and caused his death. Accordingly, we hereby affirm the said finding.

26. Conviction of the appellant is based on the evidence of Dr. R.K. Divya (PW-10), who has conducted postmortem on the body of deceased, vide Ex.P/34 and he found following injuries on the dead body of the deceased.

27. According to Dr. R.K. Divya (PW-10). the cause of death of deceased is shock due to right side of haemothorax due to laceration of apex lobe of right lung secondary to incised wound over upper part of right side of front of chest and nature of death was homicidal. It has been also opined by the concerned Doctor that the injury caused to the deceased has been by the sharp edged weapon and the same may be caused by knife.

28. Reverting to the facts of the present case, in light of principles of law laid down by their Lordships of the Supreme Court in the above stated judgments, it is quite vivid that the appellant himself has lodged a First Information Report alleging that, on the date of incident, some quarrel took place between the appellant and the deceased on the ground of showing the photograph of his girlfriend to the deceased and the deceased stated to bring his girlfriend and left her with him for one night, then out of anger and on sudden quarrel, the appellant assaulted the deceased with a knife on his chest, by which, he received grievous injury and died on the same day of the incident on account of excessive bleeding due to injury on his chest. It further appears from the fact on record that appellant after committing the crime in question, has lodged the report and upon his memorandum some incriminating articles have been recovered from his instance and upon further investigation, second memorandum has been recorded, by which, his clothes were recorded. It is apparent that though there was no premeditation on the part of the appellant to cause death of deceased, but he had given false version."

28. The High Court should have been mindful of the fact that a doctor is not a witness of fact. A doctor is examined by the prosecution as a medical expert for the purpose of proving the contents of the

post-mortem report and the medical certificates on record, if any. An expert witness is examined by the prosecution because of his specialized knowledge on certain subjects, which the judge may not be fully equipped to assess. The evidence of such an expert is of an advisory character. The credibility of the expert witness depends on the reasons provided in support of his conclusions, as well as the data and material forming the basis of those conclusions. An accused cannot be held guilty of the offence of murder solely on the basis of medical evidence on record. So far as the *panch* witnesses are concerned their depositions do not inspire any confidence.

29. Most of the *panch* witnesses turned hostile. If at all, the public prosecutor wanted to prove the contents of the *panchnamas* after the *panch* witnesses turned hostile, he could have done so through the evidence of the investigating officer. However, the investigating officer also failed to prove the contents of the *panchnamas* in accordance with law. Thus, there is nothing on record by way of evidence relating to any discovery of fact is concerned. In other words, no discovery of fact at the instance of the appellant, relevant and admissible under Section 27 of the Act of 1872, has been established.

c. Implication of Section(s) 27 and 8 of the Act of 1872

30. The learned counsel appearing for the State, strenuously urged before us to take into consideration the conduct of the appellant which, according to him, is relevant under Section 8 of the Act of 1872. He led stress on the following circumstances:

i. The appellant himself went to police station and lodged the FIR;

ii. While, at the scene of offence *panchnama* was being drawn, appellant pointed out that the body of the deceased was lying in between the two walls inside the house of the deceased;

iii. The appellant led the Investigating Officer and the *panchnama* witnesses to the house of his uncle, Rajnath Yadav, and pointed out the place where he had kept his clothes worn at the time of the incident.

iv. A bloodstain was also found on the shirt of the appellant, however, the learned counsel fairly conceded that there is nothing to indicate that the bloodstain matched with the blood group of the deceased.

31. The first and most fundamental flaw in the testimony of all the aforementioned prosecution witnesses is that none of them have specifically deposed to the exact statement allegedly made by the appellant, which purportedly led to the discovery of a fact relevant under Section 27 of the Act of 1872.

32. Section 27 of the Act of 1872 reads thus:

> "*27. How much of information received from accused may be proved.—Provided that, when any fact is deposed to as discovered inconsequence of information received from a person accused of any offence, in the custody of a police-officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved*."

33. The conditions necessary for the applicability of Section 27 of the Act of 1872 are:

    i. That consequent to the information given by the accused, it led to the discovery of some fact;

    ii. The fact discovered must be one which was not within the knowledge of the police and the knowledge of the fact for the first time was derived from the information given by the accused;

    iii. The discovery of a fact which is the direct outcome of such information;

    iv. Only such portion of the information as connected with the said discovery is admissible;

    v. The discovery of the fact must relate to the commission of some offence.

34. In the aforesaid context, we may refer to and rely upon the decision of this Court in ***Murli* v*. State of Rajasthan***, reported in **(2009) 9 SCC 417**, which held that the contents of the *panchnama* are not the substantive piece of evidence. It reads thus;

> "*34. The contents of the panchnama are not the substantive evidence. The law is settled on that issue. What is substantive evidence is what has been stated by the panchas or the person concerned in the witness box*.[…]"
>
> (Emphasis supplied)

35. In the aforesaid context, our attention was drawn to a decision of this Court in the case of **A. N. Venkatesh & Anr. v. State of Karnataka**, reported in **(2005) 7 SCC 714**, which states thus:

> "*9. By virtue of Section 8 of the Evidence Act, the conduct of the accused person is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact. The evidence of the circumstance, simpliciter, that the accused pointed out to the police officer, the place where the dead body of the kidnapped boy was found and on their pointing out the body was exhumed, would be admissible as conduct under Section 8 irrespective of the fact whether the statement made by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 or not as held by this Court in Prakash Chand v. State (UT of Delhi) [Prakash Chand v. State (UT of Delhi), (1979) 3 SCC 90 : 1979 SCC (Cri) 656] . Even if we hold that the disclosure statement made by the appellant-accused (Exts. P-15 and P-16) is not admissible under Section 27 of the Evidence Act, still it is relevant under Section 8.*"
>
> (Emphasis supplied)

36. In this context, we deem it necessary to sound a note of caution. While the conduct of an accused may be a relevant fact under Section 8 of the Act of 1872, it cannot, by itself, serve as the sole basis for conviction, especially in a grave charge such as murder. Like any other piece of evidence, the conduct of the accused is merely one of the circumstances the court may consider, in conjunction with other direct or circumstantial evidence on record. To put it succinctly, although relevant, the accused's conduct alone cannot justify a conviction in the absence of cogent and credible supporting evidence.

d. Incorrect application of *Exception 4* to Section 300 of the IPC

37. We could have concluded the judgment at this stage by allowing the appeal and thereby acquitting the appellant of all the charges against him. However, we consider it necessary to make certain observations regarding *Exception 4* to Section 300 of the IPC. We wish to explain why the High Court could not have invoked *Exception 4* to Section 300 of the IPC and altered the conviction from Section 302 to 304

Part I of the IPC. Had there been any other oral or documentary evidence on record connecting the appellant herein with the alleged crime, we would have dismissed his appeal. Even while dismissing his appeal and holding him guilty of the offence of murder, we would not have been in a position to interfere with the erroneous application of *Exception 4*, as there is no appeal at the instance of the State challenging the acquittal under Section 302 of the IPC. Nevertheless, it is necessary to explain why the High Court committed an error in bringing the case within *Exception 4* of Section 300 of the IPC.

38. Section 299 of the IPC explains culpable homicide as, causing death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that the act complained of is likely to cause death. The first two categories require the intention to cause death, or the likelihood of causing death. While, the third category confines itself to the knowledge that the act complained of is likely to cause death. On the facts of this case, the offence of culpable homicide is clearly made out.

39. Section 300 of the IPC explains murder and it provides that culpable homicide is murder if, the act by which the death is caused is done with the intention of causing death, or the act complained of is so imminently dangerous that it must in all probability cause death, or "such bodily injury as is likely to cause death". There are some exceptions when culpable homicide is not murder and we are concerned with *Exception 4* which reads:

> "*Exception 4. - Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner." Explanation. - It is immaterial in such cases which party offers the provocation or commits the first assault.*"

40. *Exception 4* to Section 300 of the IPC applies in the absence of any premeditation. This is very clear from the words used in the provision itself. It contemplates that the sudden fight must occur in the heat of passion, or upon a sudden quarrel. The Exception deals with a case of provocation not covered by *Exception 1*, although it would have been more appropriately placed after that exception. It is founded upon the same principle, as both involve the absence of

premeditation. However, while *Exception 1* involves total deprivation of self-control, *Exception 4* refers to that heat of passion which clouds a person's sober reason and urges them to commit acts they would not otherwise commit. There is provocation in *Exception 4*, as there is in *Exception 1*, but the injury caused is not the direct consequence of that provocation. In fact, *Exception 4* addresses cases where, notwithstanding that a blow may have been struck or provocation given at the outset of the dispute, regardless of how the quarrel originated, yet the subsequent conduct of both parties' places them on an equal footing with respect to guilt.

41. A "sudden fight" implies mutual provocation and the exchange of blows on both sides. In such cases, the homicide committed is clearly not attributable to unilateral provocation, nor can the entire blame be placed on one side. If it were, *Exception 1* would be the more appropriate provision. There is no prior deliberation or intention to fight; the fight breaks out suddenly, and both parties are more or less to blame. One party may have initiated it, but had the other not aggravated the situation by their own conduct, it may not have escalated to such a serious level. In such scenarios, there is mutual provocation and aggravation, making it difficult to determine the precise share of blame attributable to each participant. The protection of *Exception 4* may be invoked if death is caused: (a) without premeditation; (b) in a sudden fight; (c) without the offender having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the deceased.

42. To bring a case within *Exception 4*, all the ingredients mentioned therein must be satisfied. It is important to note that the term "fight" occurring in *Exception 4* to Section 300 of the IPC is not defined in the IPC. A fight necessarily involves two parties – *it takes two to make a fight*. The heat of passion requires that there must be no time for the passions to cool, and in such case, the parties may have worked themselves into a fury due to a prior verbal altercation. A fight is a combat between two and more persons, whether with or without weapons. It is not possible to enunciate any general rule as to what constitutes a "sudden quarrel". This is a question of fact, and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of *Exception 4*, it is not enough to show that there was a sudden quarrel and no premeditation. It must also be shown that the offender did not take

undue advantage or act in a cruel or unusual manner. The expression "undue advantage" as used in the provision means "unfair advantage".

43. From the above conspectus, it emerges that whenever a court is confronted with the question whether the offence is "murder" or "culpable homicide not amounting to murder", it will be convenient to approach the problem in three stages. The question to be considered at the first stage is, whether the accused committed an act which caused the death of another person. Proof of a causal connection between the act of the accused and the resulting death leads to the second stage, for considering whether that act of the accused amounts to "culpable homicide" as defined in Section 299 of the IPC. If the answer to this question is, *prima facie*, found in the affirmative, the next stage involves considering the application of Section 300 of the IPC. At this stage, the court must determine whether the facts proved by the prosecution bring the case within the ambit of any of the four clauses of the definition of "murder" contained in Section 300. If the answer to this is in the negative, the offence would be "culpable homicide not amounting to murder", punishable under either the first or the second part of Section 304, depending respectively on whether the second or the third clause of Section 299 is applicable. However, if the answer is in the positive, but the case falls within any of the exceptions enumerated in Section 300, the offence would still be "culpable homicide not amounting to murder", punishable under the Part I of Section 304 of the IPC.

44. In ***State of Andhra Pradesh* v*. Rayavarapu Punnayya & Anr.***, reported in **(1976) 4 SCC 382**, this Court, while drawing a distinction between Section 302 and Section 304, held as under:-

> "*12. In the scheme of the Penal Code, "culpable homicide" is genus and "murder" its specie. All "murder" is "culpable homicide" but not vice- versa. Speaking generally, "culpable homicide" sans "special characteristics of murder", is "culpable homicide not amounting to murder". For the purpose of fixing punishment, proportionate to the gravity of this generic offence, the Code practically recognises three degrees of culpable homicide. The first is, what may be called, "culpable homicide of the first degree". This is the greatest form of culpable homicide, which is defined in Section 300 as "murder". The second may be*

termed as "culpable homicide of the second degree". This is punishable under the first part of Section 304. Then, there is "culpable homicide of the third degree". This is the lowest type of culpable homicide and the punishment provided for it is, also, the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304."

(Emphasis supplied)

45. In ***Budhi Singh* v*. State of Himachal Pradesh***, reported in (**2012) 13 SCC 663**, this Court has held as under:-

"*18. The doctrine of sudden and grave provocation is incapable of rigid construction leading to or stating any principle of universal application. This will always have to depend on the facts of a given case. While applying this principle, the primary obligation of the court is to examine from the point of view of a person of reasonable prudence if there was such grave and sudden provocation so as to reasonably conclude that it was possible to commit the offence of culpable homicide, and as per the facts, was not a culpable homicide amounting to murder. An offence resulting from grave and sudden provocation would normally mean that a person placed in such circumstances could lose selfcontrol but only temporarily and that too, in proximity to the time of provocation. The provocation could be an act or series of acts done by the deceased to the accused resulting in inflicting of injury. Another test that is applied more often than not is that the behaviour of the assailant was that of a reasonable person. A fine distinction has to be kept in mind between sudden and grave provocation resulting in sudden and temporary loss of selfcontrol and the one which inspires an actual intention to kill. Such act should have been done during the continuation of the state of mind and the time for such person to kill and reasons to regain the dominion over the mind. Once there is premeditated act with the intention to kill, it will obviously fall beyond the scope of culpable homicide not amounting to murder.....*"

(Emphasis supplied)

46. In the case of ***Kikar Singh* v*. State of Rajasthan***, reported in **(1993) 4 SCC 238**, this Court held as under:-

> "*8. The counsel attempted to bring the case within Exception 4. For its application all the conditions enumerated therein must be satisfied. The act must be committed without premeditation in a sudden fight in the heat of passion; (2) upon a sudden quarrel; (3) without the offender's having taken undue advantage; (4) and the accused had not acted in a cruel or unusual manner. Therefore, there must be a mutual combat or exchanging blows on each other. And however slight the first blow, or provocation, every fresh blow becomes a fresh provocation. The blood is already heated or warms up at every subsequent stroke. The voice of reason is heard on neither side in the heat of passion. Therefore, it is difficult to apportion between them respective degrees of blame with reference to the state of things at the commencement of the fray but it must occur as a consequence of a sudden fight i.e. mutual combat and not one side track. It matters not what the cause of the quarrel is, whether real or imaginary, or who draws or strikes first. The strike of the blow must be without any intention to kill or seriously injure the other. If two men start fighting and one of them is unarmed while the other uses a deadly weapon, the one who uses such weapon must be held to have taken an undue advantage denying him the entitlement to Exception 4. True the number of wounds is not the criterion, but the position of the accused and the deceased with regard to their arms used, the manner of combat must be kept in mind when applying Exception 4. When the deceased was not armed but the accused was and caused injuries to the deceased with fatal results, the Exception 4 engrafted to Section 300 is excepted and the offences committed would be one of murder. 9. The occasion for sudden quarrel must not only be sudden but the party assaulted must be on an equal footing in point of defence, at least at the onset. This is specially so where the attack is made with dangerous weapons. Where the deceased was unarmed and did not cause any injury to the accused even following a sudden quarrel*

if the accused has inflicted fatal blows on the deceased, Exception 4 is not attracted and commission must be one of murder punishable under Section 302. Equally for attracting Exception 4 it is necessary that blows should be exchanged even if they do not all find their target. Even if the fight is unpremeditated and sudden, yet if the instrument or manner of retaliation be greatly disproportionate to the offence given, and cruel and dangerous in its nature, the accused cannot be protected under Exception 4...."

(Emphasis supplied)

47. This Court, in the case of ***Surain Singh* v*. State of Punjab***, reported in **(2017) 5 SCC 796** has observed that:

"*The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight, (c) without the offenders having taken undue advantage or acted in a cruel or unusual manner, and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the "fight" occurring in Exception 4 to Section 300, IPC is not defined in IPC..... A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in a cruel or unusual manner. The expression "undue advantage" as used in the provision means "unfair advantage"."*

(Emphasis supplied)

48. Section 304 of the IPC prescribes the punishment for culpable homicide not amounting to murder. Part I of this Section provides that if the act by which death is caused is done with the intention of causing death, or causing such bodily injury as is likely to cause death, then the punishment may extend up to imprisonment for life.

On the other hand, Part II of Section 304 provides that if the offending act is done with the knowledge that it is likely to cause death, but without any intention to cause death or to cause such bodily injury as is likely to cause death, then the punishment may extend to imprisonment for 10 years.

49. The High Court considered only the first part of *Exception 4* to Section 300 of the IPC. This part refers to the absence of premeditation in a sudden fight arising from a sudden quarrel in a heat of passion. However, it does not end there. The exception further requires that the offender must not have taken undue advantage or acted in a cruel or unusual manner. Having regard to the manner in which the assault was carried out, could it not be said that the offender i.e., the appellant-herein took undue advantage and also could be said to have acted in a cruel or unusual manner. The deceased was unarmed, it was not mutual fight between two individuals that would bring the case within the ambit of *Exception 4*. The deceased was absolutely harmless when the appellant inflicted injuries all over his body indiscriminately.

50. Therefore, if at all the High Court intended to extend the benefit of any of the Exceptions to Section 300 of the IPC, it ought to have considered *Exception 1* of Section 300 of the IPC. However, it is not necessary for us to delve into *Exception 1* i.e., grave and sudden provocation since, we have already reached the conclusion that the case in hand is, one of no legal evidence and therefore, the appellant deserves to be acquitted. We refer to *Exception 1* merely to illustrate that, if at all, it was this exception that could have been examined. It is alleged that while the appellant and the deceased were consuming alcohol at the deceased's residence, the appellant showed the deceased a photograph of his girlfriend. The deceased allegedly made an obscene remark, "*get your girlfriend to my place and leave her with me for one night*." Such a statement might have provoked the appellant, who then picked up a vegetable-cutting knife lying in one corner of the house and inflicted injuries upon the deceased. This aspect could have been considered in that context.

C. CONCLUSION

51. In the overall view of the matter, we are convinced that the Impugned Judgement passed by the High Court of Chhattisgarh in Criminal Appeal No. 1538 of 2021 dated 16.01.2025 is not sustainable in law.

52. In the result, this appeal succeeds and is hereby allowed.

53. The appellant is acquitted of all the charges, and he be set free forthwith if not required in any other case. The bail bonds stand discharged, if any.

54. The Registry shall circulate one copy each of this judgment to all the High Courts.

Result of the case: Appeal allowed.

†*Headnotes prepared by:* Divya Pandey

[2025] 8 S.C.R. 599 : 2025 INSC 936

Shail Kumari
v.
State of Chhattisgarh

(Criminal Appeal No. 2189 of 2017)

06 August 2025

[B.R. Gavai,* CJI and K. Vinod Chandran, JJ.]

Issue for Consideration

Whether the conviction, as recorded by the trial Court and affirmed by the High Court was totally based on conjectures and surmises; whether the conviction of the appellant u/s.302 IPC is sustainable in law.

Headnotes†

Penal Code, 1860 – s.302 – Allegation against the appellant-accused that she took her children to a pond/lake and drowned them – Trial Court convicted accused u/s.302 of IPC solely on the basis of evidence of PW-2 – The High Court upheld the conviction – Correctness:

Held: The conviction in the present case could be sustainable only if the prosecution is in a position to prove the case beyond reasonable doubt and also establish a chain of events which is so connected to each other that it leads to no other conclusion than the guilt of the accused – The conviction is based solely on the evidence of PW-2 – The perusal of the cross-examination of PW-2 would reveal that he has fully improved his case in his examination-in-chief – He has narrated what does not find place in his statement u/s.161, CrPC – As such his evidence is totally contradictory and therefore totally unworthy – Apart from the testimony of PW-2, there is nothing to connect the present appellant with the crime in question – The prosecution has not even examined the Rickshaw Puller who was stated to have seen the appellant going towards the Pujari Talab and the children floating in the lake – The testimony of PW-2 being unreliable, at the most, can be treated as hearsay evidence – This Court is of the considered opinion that the conviction, as recorded by the trial Court and affirmed by the High Court is totally based on conjectures and surmises – The conviction of the appellant is not sustainable in law. [Paras 7, 8, 12, 13, 14]

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* Author

Evidence – Law on conviction in the case of circumstantial evidence – Discussed. [Paras 6 and 7]

Case Law Cited

Sharad Birdhichand Sarda v. State of Maharashtra **[1985] 1 SCR 88 : (1984) 4 SCC 116;** *Vadivelu Thevar v. State of Madras* **[1957] 1 SCR 981 : 1957 SCC OnLine SC 13 – relied on.**

List of Acts

Penal Code, 1860; Code of Criminal Procedure, 1973.

List of Keywords

Circumstantial evidence; Chain of events; Improving examination-in-chief; Conviction on the basis of circumstantial evidence; Conjectures and surmises; Murder.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 2189 of 2017

From the Judgment and Order dated 08.09.2010 of the High Court of Chhatisgarh at Bilaspur in CRLA No. 713 of 2004

Appearances for Parties

Advs. for the Appellant:
Mrs. Nanita Sharma.

Advs. for the Respondent:
Prashant Singh, Mrs. Prerna Dhall, Ambuj Swaroop, Shivam Ganeshiya, Kapil Katare, Ms. Rajnandani Kumari.

Judgment / Order of the Supreme Court

Judgment

B.R. Gavai, CJI.

FACTUAL ASPECT

1. The present appeal challenges the judgment and order dated 8th September 2010, passed by a Division Bench of the High Court

of Chhattisgarh at Bilaspur (hereinafter referred to as "the High Court") in Criminal Appeal No. 713 of 2004, wherein the Division Bench dismissed the appeal filed by the appellant herein - Shail Kumari. By the said judgment and order, the High Court upheld the judgment and order dated 18th June 2004 rendered by the 2nd Additional Sessions Judge, Durg (hereinafter referred to as "the Trial Court") in Sessions Trial No. 286 of 2003 convicting the appellant for the offence punishable under Section 302 of the Indian Penal Code, 1860 (hereinafter referred to as "IPC") and sentencing her to undergo rigorous imprisonment for life.

2. Shorn of details, the facts leading to the present appeal are as under:

2.1 The case of the prosecution is that on 11th October 2003, one Santosh Kumar Pandey (PW-2), who was an owner of Beetel Kiosk shop, saw the appellant with her two children (son aged – 2 years and daughter aged – 4 months) going towards Pujari Talab (a water body situated near the Beetel Kiosk shop of PW-2). He observed that the appellant was taking the kids in a disordered condition and grew suspicious. He asked a nearby Rickshaw Puller to go and see where the appellant was going. After five to seven minutes, the Rickshaw Puller came back and stated that two children were floating in the water body. Thereafter, PW-2 saw the appellant going towards the railway tracks. PW-2 then sat on a motorbike driven by someone else coming from the other side of the water body and he asked the rider to turn around and go towards the train tracks. PW-2 then saw a train coming towards the appellant but somehow, he managed to drag her away from the train tracks.

2.2 On being asked by PW-2 the reason for killing her children, the appellant replied that she had been fighting with her husband. PW-2 informed the Police about the incident and the *Dehati merg* intimation was lodged which was signed by PW-2. Then the First Information Report was lodged.

2.3 The dead bodies of the victims were sent for post-mortem. The post-mortem was conducted by Dr. P. Akhtar (PW-6) and the cause of death for both of the victims was found to be asphyxia due to drowning.

2.4 The statements of the witnesses were recorded under Section 161 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "Cr.P.C"). After completion of the investigation, Charge Sheet was filed against the appellant before the Court of Judicial Magistrate First Class, Durg, who then, committed the case to the trial court.

2.5 Nine witnesses were examined during the trial and the appellant was examined under Section 313 of the Cr.P.C. The appellant, in her statement, denied the circumstances appearing against her. She further stated that she had been in a state of tension, because her husband - Kanhaiya Lal Kharre had performed a second marriage. She lastly stated that she was innocent and that she had been falsely implicated in the case.

2.6 At the conclusion of the trial, the Trial Court *vide* its judgment and order dated 18th June 2004 convicted the present appellant for the offence punishable under Section 302 of the IPC. On the same day, in a separate hearing, the Trial Court sentenced the appellant to undergo rigorous imprisonment for life.

2.7 Being aggrieved thereby, the present appellant preferred a criminal appeal before the High Court challenging the judgment and order of conviction and sentence awarded by the Trial Court. The High Court *vide* the impugned judgment and order dismissed the appeal and affirmed the conviction and sentence awarded by the Trial Court.

2.8 Being aggrieved thereby, a Special Leave Petition was filed before this Court on 21st July 2017. This Court, vide Order dated 15th December 2017 condoned the delay and granted leave in the matter. The appellant was also directed to be released on interim bail on the conditions which may be imposed by the Trial Court.

SUBMISSIONS

3. We have heard Smt. Nanita Sharma, learned counsel appearing on behalf of the appellant and Shri Prashant Singh, learned counsel appearing on behalf of the respondent - State.

4. Smt. Nanita Sharma, learned counsel appearing for the appellant submitted that the present case is a case of no evidence. The High Court, only on the basis of conjectures and surmises, has convicted the appellant. It is, therefore, submitted that the present appeal deserves to be allowed and the appellant be acquitted of the charges.

5. Per contra, Shri Prashant Singh, learned counsel appearing on behalf of the respondent would submit that no perversity could be noticed in the concurrent findings of facts, so as to warrant interference of this Court. It is submitted that both the Courts below, upon correct appreciation of evidence, have found that it is the appellant alone who is responsible for committing the crime in question. It is, therefore, submitted that the appeal is liable to be dismissed.

DISCUSSION AND ANALYSIS

6. Indisputably, the present case rests on circumstantial evidence. The law on conviction in the case of circumstantial evidence has been very well crystallized by this Court in the case of ***Sharad Birdhichand Sarda v. State of Maharashtra***[1]. It will be relevant to refer to the observations made by this Court in the aforesaid case:

> "**151.** It is well settled that the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. This is trite law and no decision has taken a contrary view. What some cases have held is only this: where various links in a chain are in themselves complete, then a false plea or a false defence may be called into aid only to lend assurance to the court. In other words, before using the additional link it must be proved that all the links in the chain are complete and do not suffer from any infirmity. It is not the law that where there is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defence or a plea which is not accepted by a court.
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> **152.** Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the

1 (1984) 4 SCC 116

nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is *Hanumant* v. *State of Madhya Pradesh* [(1952) 2 SCC 71 : AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cri LJ 129]. This case has been uniformly followed and applied by this Court in a large number of later decisions up-to-date, for instance, the cases of *Tufail (Alias) Simmi* v. *State of Uttar Pradesh* [(1969) 3 SCC 198 : 1970 SCC (Cri) 55] and *Ramgopal* v. *State of Maharashtra* [(1972) 4 SCC 625 : AIR 1972 SC 656] . It may be useful to extract what Mahajan, J. has laid down in *Hanumant case* [(1952) 2 SCC 71 : AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cri LJ 129] :

> "It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

> (*1*) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may

be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in *Shivaji Sahabrao Bobade* v. *State of Maharashtra* [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 Crl LJ 1783] where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]

> "Certainly, it is a primary principle that the accused *must* be and not merely *may* be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."
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> (*2*) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,
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> (*3*) the circumstances should be of a conclusive nature and tendency,
>
> (*4*) they should exclude every possible hypothesis except the one to be proved, and
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> (*5*) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

7. The law laid down in ***Sharad Birdhichand Sarda*** (supra) has been consistently followed by this Court in a catena of judgments. In that view of the matter, the conviction in the present case could be sustainable only if the prosecution is in a position to prove the case beyond reasonable doubt and also establish a chain of events which

is so connected to each other that it leads to no other conclusion than the guilt of the accused.

8. The perusal of both the impugned judgments and orders passed by the High Court as well as the Trial Court would reveal that though the prosecution has examined nine witnesses, the conviction is based solely on the evidence of PW-2.

9. The perusal of the testimony of PW-2 would reveal that on the day of the incident, after opening his shop, he went to urinate, and while returning from there, he saw that accused was abnormally going towards the Pujari Talab, she was keeping one child in her hands and another child was walking with her. He stated that Pujari Talab is situated at a distance of 10 feet away from his shop. He stated that in the meantime, he directed a nearby Rickshaw Puller to watch where she was going. He further stated that after one and half hour, the appellant was going alone behind an STD nearby. Rickshaw Puller told him that woman was going empty handed. He asked the Rickshaw Puller where the child was. He said that he didn't know, she took them to pond. He then asked the Rickshaw Puller to go to the pond. After 5-7 minutes, he returned and told him that both the children were floating in the water. Later on, he stated that he saw that the accused was going to lie on the railway track. One Hero Honda motorbike was coming from the other side of the pond. He asked the rider to turn around and he went to the railway track. By the time train had come near, he dragged the accused away from railway track by holding her waist. He stated that he then brought her to his STD and asked her as to why she killed her children to which she replied that she had a fight with her husband.

10. From the cross-examination of this witness, it would reveal that his statement in the examination-in-chief is a complete improvement than what was stated by him in his police statement. Whatever he narrated before the Court does not find place in his police statement.

11. This Court in the case of ***Vadivelu Thevar v. State of Madras***[2] held thus:

2 AIR 1957 SC 614 : 1957 SCC OnLine SC 13

"**11.** In view of these considerations, we have no hesitation in holding that the contention that in a murder case, the court should insist upon plurality of witnesses, is much too broadly stated. Section 134 of the Indian Evidence Act, has categorically laid it down that "no particular number of witnesses shall, in any case, be required for the proof of any fact". The legislature determined, as long ago as 1872, presumably after due consideration of the pros and cons, that it shall not be necessary for proof or disproof of a fact, to call any particular number of witnesses. In England, both before and after the passing of the Indian Evidence Act, 1872, there have been a number of statutes as set out in Sarkar's Law of Evidence — 9th Edn., at pp. 1100 and 1101, forbidding convictions on the testimony of a single witness. The Indian Legislature has not insisted on laying down any such exceptions to the general rule recognized in Section 134 quoted above. The section enshrines the well recognized maxim that "Evidence has to be weighed and not counted". Our Legislature has given statutory recognition to the fact that administration of justice may be hampered if a particular number of witnesses were to be insisted upon. It is not seldom that a crime has been committed in the presence of only one witness, leaving aside those cases which are not of uncommon occurrence, where determination of guilt depends entirely on circumstantial evidence. If the legislature were to insist upon plurality of witnesses, cases where the testimony of a single witness only could be available in proof of the crime, would go unpunished. It is here that the discretion of the presiding judge comes into play. The matter thus must depend upon the circumstances of each case and the quality of the evidence of the single witness whose testimony has to be either accepted or rejected. If such a testimony is found by the court to be entirely reliable, there is no legal impediment to the conviction of the accused person on such proof. Even as the guilt of an accused person may be proved by the testimony of a single witness, the innocence of an accused person may be established on the testimony of a single witness, even though a

considerable number of witnesses may be forthcoming to testify to the truth of the case for the prosecution. **Hence, in our opinion, it is a sound and well-established rule of law that the court is concerned with the quality and not with the quantity of the evidence necessary for proving or disproving a fact. Generally speaking, oral testimony in this context may be classified into three categories, namely:**

(1) Wholly reliable.

(2) Wholly unreliable.

(3) Neither wholly reliable nor wholly unreliable.

12. In the first category of proof, the court should have no difficulty in coming to its conclusion either way — it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subornation. In the second category, the court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial. There is another danger in insisting on plurality of witnesses. Irrespective of the quality of the oral evidence of a single witness, if courts were to insist on plurality of witnesses in proof of any fact, they will be indirectly encouraging subornation of witnesses. Situations may arise and do arise where only a single person is available to give evidence in support of a disputed fact. The court naturally has to weigh carefully such a testimony and if it is satisfied that the evidence is reliable and free from all taints which tend to render oral testimony open to suspicion, it becomes its duty to act upon such testimony. The law reports contain many precedents where the court had to depend and act upon the testimony of a single witness in support of the prosecution. There are exceptions to this rule, for example, in cases of sexual offences or of the testimony of an approver; both these are cases in

> which the oral testimony is, by its very nature, suspect, being that of a participator in crime. But, where there are no such exceptional reasons operating, it becomes the duty of the court to convict, if it is satisfied that the testimony of a single witness is entirely reliable. We have therefore, no reasons to refuse to act upon the testimony of the first witness, which is the only reliable evidence in support of the prosecution."
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> **(emphasis supplied)**

12. This Court in ***Vadivelu Thevar*** (supra) has classified the witnesses into three types: (i) wholly reliable, (ii) wholly unreliable, and (iii) neither wholly reliable nor wholly unreliable. It has been held that in the first category of cases, there is no difficulty inasmuch as if the testimony of such witness is found to be fully reliable, it may convict or may acquit on the basis of his statement. Even in the second category cases, there is no difficulty that if evidence of such a witness is found to be wholly unreliable, the testimony must be discarded. The difficulty arises only in the case of third type of witnesses, where the Court is required to separate the chaff from grain to arrive at a conclusion. The perusal of the cross-examination of PW-2 would reveal that he has fully improved his case in his examination-in-chief. He has narrated what does not find place in his statement under Section 161, Cr.P.C. As such, his evidence is totally contradictory and therefore totally unworthy.

13. Apart from the testimony of PW-2, there is nothing to connect the present appellant with the crime in question. The prosecution has not even examined the Rickshaw Puller who was stated to have seen the appellant going towards the Pujari Talab and the children floating in the lake. The testimony of PW-2 being unreliable, at the most, can be treated as hearsay evidence.

14. In that view of the matter, we are of the considered opinion that the conviction, as recorded by the Trial Court and affirmed by the High Court is totally based on conjectures and surmises. We are of the considered view that the conviction of the appellant is not sustainable in law at all.

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

i. The present appeal is allowed;

ii. The impugned judgment and order dated 8th September 2010, passed by the High Court in Criminal Appeal No. 713 of 2004 and the judgment and order dated 18th June 2004 passed by the Trial Court in Sessions Trial No. 286 of 2003 are hereby quashed and set aside; and

iii. The appellant is acquitted of all the charges levelled against her and is directed to be released forthwith, if her detention is not required in any other case.

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

Result of the case: Appeal allowed.

†*Headnotes prepared by:* Ankit Gyan