JUDICIAL ACADEMY JHARKHAND

SNIPPETS

OF

SUPREME COURT JUDGMENTS

(September 02-September 08, 2019)

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Decided on : -05.09.2019

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(Parliament, as the legislature, exercises this power to enact a law and no outside authority can issue a particular piece of legislation. It is only in exceptional cases where there is a vacuum and non-existing position that the judiciary, in exercise of its constitutional power, steps in and provides a solution till the legislature comes forward to perform its role.)

Issue

Whether within the constitutional scheme, the Apex Court can and should issue any direction to the Parliament to enact a new law based on the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment?

Decision and Observations

The Apex Court distinguished between the Classical theory of separation of powers and the modern theory. Where the classical or pure theory of rigid separation of powers as advocated by Montesquieu which forms the bedrock of the American Constitution is clearly inapplicable to parliamentary form of democracy as it exists in India and Britain, the Modern theory of separation of powers does not accept that the three branches perform mutually isolated roles and functions and accepts a need for coordinated institutional effort for good governance, albeit emphasises on benefits of division of power and labour by accepting that the three wings do have separate and distinct roles and functions that are defined by the Constitution.

This separation ensures the rule of law in at least two ways. It gives constitutional and institutional legitimacy to the decisions by each branch, that is, enactments passed by the legislature, orders and policy decisions taken by the executive and adjudication and judgments pronounced by the judiciary in exercise of the power of judicial review on validity of legislation and governmental action. By segregating the powers and functions of the institutions, the Constitution ensures a structure where the institutions function as per their institutional strengths. Secondly, and somewhat paradoxically, it creates a system of checks and balances as the Constitution provides a degree of latitude for interference by each

branch into the functions and tasks performed by the other branch. It checks concentration of power in a particular branch or an institution.

Then the Apex Court explained the role played by the legislature, executive and the Judiciary. The Apex Court also stressed the fact that the most significant impact of the doctrine of separation of powers is seen and felt in terms of the institutional independence of judiciary.

On the doctrine of separation of powers the Apex Court referred to its decision in ***Binoy Viswam v. Union of India***[1] and the opinion of the then Chief Justice Dipak Misra in ***Kalpana Mehta v. Union of India***.[2] The Apex Court also quoted extensively from the separate and concurring judgment of Justice D.Y. Chandrachud in *Kalpana Mehta Case* wherein he had referred to the "doctrine of functional separation." The relevant observations in the *Kalpana Mehta Case* are:

> "254. While assessing the impact of the separation of powers upon the present controversy, certain precepts must be formulated. Separation of powers between the legislature, the executive and the judiciary is a basic feature of the Constitution. As a foundational principle which is comprised within the basic structure, it lies beyond the reach of the constituent power to amend. It cannot be substituted or abrogated. While recognising this position, decided cases indicate that the Indian Constitution does not adopt a separation of powers in the strict sense. Textbook examples of exceptions to the doctrine include the power of the executive to frame subordinate legislation, the power of the legislature to punish for contempt of its privileges and the authority entrusted to the Supreme Court and the High Courts to regulate their own procedures by framing rules. In making subordinate legislation, the executive is entrusted by the legislature to make delegated legislation, subject to its control. The rule-making power of the higher judiciary has trappings of a legislative character. The power of the legislature to punish for contempt of its privileges has a judicial character. These exceptions indicate that the separation doctrine has not been adopted in the strict form in our Constitution. But the importance of the doctrine lies in its postulate that the essential functions entrusted to one organ of the State cannot be exercised by the other. By standing against the usurpation of constitutional powers entrusted to other organs, separation of powers supports the rule of law and guards against authoritarian excesses.
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> 255. Parliament and the State Legislatures legislate. The executive frames policies and administers the law. The judiciary decides and adjudicates upon

[1] (2017) 7 SCC 59

[2] (2018) 7 SCC 1

disputes in the course of which facts are proved and the law is applied. The distinction between the legislative function and judicial functions is enhanced by the basic structure doctrine. The legislature is constitutionally entrusted with the power to legislate. Courts are not entrusted with the power to enact law. Yet, in a constitutional democracy which is founded on the supremacy of the Constitution, it is an accepted principle of jurisprudence that the judiciary has the authority to test the validity of legislation. Legislation can be invalidated where the enacting legislature lacks legislative competence or where there is a violation of fundamental rights. A law which is constitutionally ultra vires can be declared to be so in the exercise of the power of judicial review. Judicial review is indeed also a part of the basic features of the Constitution. Entrustment to the judiciary of the power to test the validity of law is an established constitutional principle which co-exists with the separation of powers. Where a law is held to be ultra vires there is no breach of parliamentary privileges for the simple reason that all institutions created by the Constitution are subject to constitutional limitations. The legislature, it is well settled, cannot simply declare that the judgment of a court is invalid or that it stands nullified. If the legislature were permitted to do so, it would travel beyond the boundaries of constitutional entrustment. While the separation of powers prevents the legislature from issuing a mere declaration that a judgment is erroneous or invalid, the law-making body is entitled to enact a law which remedies the defects which have been pointed out by the court. Enactment of a law which takes away the basis of the judgment (as opposed to merely invalidating it) is permissible and does not constitute a violation of the separation doctrine. That indeed is the basis on which validating legislation is permitted.

256. This discussion leads to the conclusion that while the separation of powers, as a principle, constitutes the cornerstone of our democratic Constitution, its application in the actual governance of the polity is nuanced. The nuances of the doctrine recognise that while the essential functions of one organ of the State cannot be taken over by the other and that a sense of institutional comity must guide the work of the legislature, executive and judiciary, the practical problems which arise in the unfolding of democracy can be resolved through robust constitutional cultures and mechanisms. The separation doctrine cannot be reduced to its descriptive content, bereft of its normative features. Evidently, it has both normative and descriptive features. In applying it to the Indian Constitution, the significant precept to be borne in mind is that no institution of governance lies above the Constitution. No entrustment of power is absolute."

Then the Apex Court drew distinction between interpretation and adjudication by the courts on one hand and the legislature's power to enact legislation on the other. The Apex Court said that adjudication results in what is often described as *judge made law*, but the interpretation of the statutes and the rights in accordance with the provisions of Articles 14,

19 and 21 in the course of adjudication is not an attempt or an act of legislation by the judges. Further, the Apex Court stated:

> "...it is apparent that law-making within certain limits is a legitimate element of a judge's role, if not inevitable. A judge has to adjudicate and decide on the basis of legal provisions, which when indeterminate on a particular issue require elucidation and explanation. This requires a judge to interpret the provisions to decide the case and, in this process, he may take recourse and rely upon fundamental rights, including the right to life, but even then he does not legislate a law while interpreting such provisions. Such interpretation is called 'judge made law' but not legislation."

The Apex Court emphasised on the fact that application of law by the judges is not synonymous with the enactment of law by the legislature. Judges have the power to spell out how precisely the statute would apply in a particular case. In this manner, they complete the law formulated by the legislature by applying it. This power of interpretation or the power of judicial review is exercised post the enactment of law, which is then made subject matter of interpretation or challenge before the courts. Thereafter, in paragraph 27 of the judgment, the Apex Court observed:

> **"27.** Legislature, as an institution and a wing of the Government, is a microcosm of the bigger social community possessing qualities of a democratic institution in terms of composition, diversity and accountability. Legislature uses in-built procedures carefully designed and adopted to bring a plenitude of representations and resources as they have access to information, skills, expertise and knowledge of the people working within the institution and outside in the form of executive. Process and method of legislation and judicial adjudication are entirely distinct. Judicial adjudication involves applying rules of interpretation and law of precedents and notwithstanding deep understanding, knowledge and wisdom of an individual judge or the bench, it cannot be equated with law making in a democratic society by legislators given their wider and broader diverse polity. The Constitution states that legislature is supreme and has a final say in matters of legislation when it reflects on alternatives and choices with inputs from different quarters, with a check in the form of democratic accountability and a further check by the courts which exercise the power of judicial review. It is not for the judges to seek to develop new all-embracing principles of law in a way that reflects the stance and opinion of the individual judges when the society/legislators as a whole are unclear and substantially divided on the relevant issues. In Bhim Singh v. Union of India, while observing that the Constitution does not strictly prohibit overlapping of functions as this is inevitable in the modern parliamentary democracy, the Constitution prohibits exercise of functions of

another branch which results in wresting away of the regime of constitutional accountability. Only when accountability is preserved, there will be no violation of principle of separation of powers. Constitution not only requires and mandates that there should be right decisions that govern us, but equal care has to be taken that the right decisions are made by the right body and the institution. This is what gives legitimacy, be it a legislation, a policy decision or a court adjudication."

In paragraph 30 of the judgment, the Apex Court stated:

"30. It can be argued that there have been occasions when this Court has 'legislated' beyond what can be strictly construed as pure interpretation or judicial review but this has been in cases where the constitutional courts, on the legitimate path of interpreting fundamental rights, have acted benevolently with an object to infuse and ardently guard the rights of individuals so that no person or citizen is wronged, as has been observed in paragraph 46 of the judgment of Dipak Misra, CJ in Kalpana Mehta's case. Secondly, these directions were given subject to the legislature enacting the law and merely to fill the vacuum until the legislative takes upon it to legislate. These judgments were based upon gross violations of fundamental rights which were noticed and in view of the vacuum or absence of law/guidelines. The directions were interim in nature and had to be applied till Parliament or the state legislature would enact and were a mere stop-gap arrangement. These guidelines and directions in some cases as in the case of Vishaka (supra) had continued for long till the enactment of 'The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013' because the legislature (it would also include the executive) impliedly and tacitly had accepted the need for the said legislation even if made by the judiciary without enacting the law. Such law when enacted by Parliament or the state legislature, even if assumably contrary to the directions or guidelines issued by the Court, cannot be struck down by reason of the directions/guidelines; it can be struck down only if it violates the fundamental rights or the right to equality under Article 14 of the Constitution. These are extraordinary cases where notwithstanding the institutional reasons and the division of power, this Court has laid down general rules/guidelines when there has been a clear, substantive and gross human rights violation, which significantly outweighed and dwarfed any legitimising concerns based upon separation of powers, lack of expertise and uncertainty of the

> consequences. Same is the position in cases of gross environmental degradation and pollution. However, a mere allegation of violation of human rights or a plea raising environmental concerns cannot be the 'bright-line' to hold that self-restraint must give way to judicial legislation. Where and when court directions should be issued are questions and issues involving constitutional dilemmas that mandate a larger debate and discussion (see observations of Frankfurter J. as quoted in Asif Hameed v. State of Jammu & Kashmir)."

However, deliberating on the present issue the Apex Court was of the opinion that the present is the not a case which requires Court's intervention to give a suggestion for need to frame a law as the matter is already pending active consideration. Any direction at this stage would be interpreted as judicial participation in the enactment of law. The Apex Court then referred to ***V.K. Naswa* v. *Home Secretary, Union of India***,[3] wherein it was observed that the Court does not issue directions to the legislature directly or indirectly and any such directions if issued would be improper. It is outside the power of judicial review to issue directions to the legislature to enact a law in a particular manner, for the Constitution does not permit the courts to direct and advice the executive in matters of policy. ***Parliament, as the legislature, exercises this power to enact a law and no outside authority can issue a particular piece of legislation. It is only in exceptional cases where there is a vacuum and non-existing position that the judiciary, in exercise of its constitutional power, steps in and provides a solution till the legislature comes forward to perform its role.***

The Apex Court also referred to ***State of Himachal Pradesh* v. *Satpal Saini***,[4] wherein reference was made to the decision in ***Supreme Court Employees' Welfare Association* v. *Union of India*** [5]that no writ of mandamus can be issued to the legislature to enact a particular legislation nor can such direction be issued to the executive which exercises the powers to make rules in the nature of subordinate legislation. The Apex Court also mentioned ***Common Cause: A Registered Society* v. *Union of India***[6] to the following effect:

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[3] (2012) 2 SCC 542
[4] (2017) 11 SCC 42
[5] (1989) 4 SCC 187
[6] (2017) 7 SCC 158

"18. There can be no manner of doubt that the parliamentary wisdom of seeking changes in an existing law by means of an amendment lies within the exclusive domain of the legislature and it is not the province of the Court to express any opinion on the exercise of the legislative prerogative in this regard. The framing of the Amendment Bill; reference of the same to the Parliamentary Standing Committee; the consideration thereof by the said Committee; the report prepared along with further steps that are required to be taken and the time-frame thereof are essential legislative functions which should not be ordinarily subjected to interference or intervention of the Court. The constitutional doctrine of separation of powers and the demarcation of the respective jurisdiction of the Executive, the Legislature and the Judiciary under the constitutional framework would lead the Court to the conclusion that the exercise of the amendment of the Act, which is presently underway, must be allowed to be completed without any intervention of the Court. Any other view and any interference, at this juncture, would negate the basic constitutional principle that the legislature is supreme in the sphere of law-making. Reading down a statute to make it workable in a situation where an exercise of amendment of the law is pending, will not be justified either. A perception, however strong, of the imminent need of the law engrafted in the Act and its beneficial effects on the citizenry of a democratic country, by itself, will not permit the Court to overstep its jurisdiction. Judicial discipline must caution the Court against such an approach."

In the concluding paragraph the Apex Court stated:

" **43.** We have no hesitation in observing that notwithstanding the aforesaid directions in *D.K. Basu* (supra) and the principles of law laid down in *Prithipal Singh* v. *State of Punjab* and *S. Nambi Narayanan* (supra), this Court can, in an appropriate matter and on the basis of pleadings and factual matrix before it, issue appropriate guidelines/directions to elucidate, add and improve upon the directions issued in *D.K. Basu* (supra) and other cases when conditions stated in paragraph 27 supra are satisfied. However, this is not what is urged and prayed by the applicant. The contention of the applicant is that this Court must direct the legislature, that is, Parliament, to enact a suitable standalone comprehensive legislation based on the UN Convention and this direction, if issued, would be in consonance with the Constitution of India. This prayer must be rejected in light of the aforesaid discussion."

2. *P. Chidambaram v. Directorate of Enforcement, (2019 SCC OnLine SC 1143)*

Decided on : -05.09.2019

Bench :- 1. Hon'ble Ms. Justice R. Banumathi
2. Hon'ble Mr. Justice A. S. Bopanna

(The court can peruse the case diary/materials collected during investigation by the prosecution even before the commencement of the trial –circumstances illustrated.

Grant of anticipatory bail, particularly in economic offences would definitely hamper the effective investigation.)

Facts

The present appeal relates to the alleged irregularities in Foreign Investment Promotion Board (FIPB) clearance given to the INX Media for receiving foreign investment to the tune of Rs. 305 crores against approved inflow of Rs. 4.62 crores. The High Court of Delhi rejected the appellant's plea for anticipatory bail in the case registered by Central Bureau of Investigation (CBI) on 15.05.2017 being RC No. 220/2017-E-0011 under Section 120B IPC read with Section 420 IPC, Section 8 and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988. By the impugned order dated 20.08.2019, the High Court also refused to grant anticipatory bail in the case registered by the Enforcement Directorate in ECIR No. 07/HIU/2017 punishable under Sections 3 and 4 of the Prevention of Money-Laundering Act, 2002(for short, PMLA).

Grievance of the appellant is that against the impugned order of the High Court, the appellant tried to get the matter listed in the Supreme Court on 21.08.2019; but the appellant could not get an urgent hearing in the Supreme Court seeking stay of the impugned order of the High Court. The appellant was arrested by the CBI on the night of 21.08.2019. Since the appellant was arrested and remanded to custody in CBI case, in view of the judgment of the Constitution Bench in *Shri Gurbaksh Singh Sibbia* v. *State of Punjab* **(1980) 2 SCC 565**, the appellant cannot seek anticipatory bail after he is arrested. Accordingly, SLP(Crl.) No. 7525 of 2019 preferred by the appellant qua the CBI case was dismissed as infructuous vide order dated 26.08.2019 on the ground that the appellant has already been arrested and remanded

to custody. This Court granted liberty to the appellant to work out his remedy in accordance with law.

Decision and Observations

The Apex Court considered the point whether the appellant was entitled to the privilege of anticipatory bail. In order to consider the same, the Apex Court mentioned the salient features of the special enactment -Prevention of Money Laundering Act,2002.[7] With regard to the issue of grant of bail, Section 45 of the PMLA was found to be relevant. The Apex Court said:

> ".....Section 45 imposes two conditions for grant of bail to any person accused of any offence punishable for a term of imprisonment of more than three years under Part-A of the Schedule of the Act viz., (i) that the prosecutor must be given an opportunity to oppose the application for such bail; (ii) that the court must be satisfied that there are reasonable grounds for believing that the accused persons is not guilty of such offence and that he is not likely to commit any offence while on bail.
>
> **38.** The twin conditions under Section 45(1) for the offences classified thereunder in Part-A of the Schedule was held arbitrary and discriminatory and invalid in *Nikesh Tarachand Shah* v. *Union of India* **(2018) 11 SCC 1**. Insofar as the twin conditions for release of accused on bail under Section 45 of the Act, the Supreme Court held the same to be unconstitutional as it violates Articles 14 and 21 of the Constitution of India. Subsequently, Section 45 has been amended by Amendment Act 13 of 2008. The words *"imprisonment for a term of imprisonment of more than three years under Part A of the Schedule"* has been substituted with *"accused of an offence under this Act....."*. Section 45 prior to *Nikesh Tarachand* and post *Nikesh Tarachand* reads as under:—

Section 45 - Prior to Nikesh Tarachand Shah	**Section 45 - Post Nikesh Tarachand Shah**
Section 45. Offence to be cognizable and non-bailable.	Section 45. Offences to be cognizable and non-bailable.
(1) Notwithstanding contained in the Code of Criminal Procedure, 1973 (2 of 1974), **no person accused of an offence punishable for a term of imprisonment of**	(2) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), **no person accused of an offence under this Act shall be released on bail or**

[7] The Apex Court referred to the statement of objects and Reasons, Chapter II of the Act, Sections 3, 4,5, 73, 17, 19 and 71 of the PMLA.

more than three years under Part A of the Schedule shall be released on bail or on his own bond unless-

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail;

Provided that a person, who, is under the age of sixteen years, or is a woman or is sick or infirm, may be released on bail, if the Special Court so directs:

on his own bond unless-

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail;

Provided that a person, who, is under the age of sixteen years, or is a woman or is sick or infirm, or is accused either on his own or along with other co-accused of money laundering a sum of **less than one crore rupees may be released on bail, if the Special court so directs:"**

Further, the Apex Court stated :

"FIR for the predicate offence has been registered by CBI under Section 120B IPC, 420 IPC and Section 13 of the Prevention of Corruption Act and also under Section 8 of the Prevention of Corruption Act. As discussed earlier, Section 120B IPC and Section 420 IPC were included in Part A of the Schedule only by Amendment Act 21 of 2009 w.e.f. 01.06.2009. Section 13 of the Prevention of Corruption Act was included in Part A of the Schedule by Amendment Act 16 of 2018 w.e.f. 26.07.2018. Section 8 of the Prevention of Corruption Act is punishable with imprisonment extending upto seven years. Section 8 of the Prevention of Corruption Act was very much available in Part A of the Schedule of PMLA at the time of alleged commission of offence in 2007-2008. It cannot therefore be said that the appellant is proceeded against in violation of Article 20(1) of the Constitution of India for the alleged commission of the acts which was not an offence as per law then in existence. The merits of the contention that Section 8 of the Prevention of Corruption Act cannot be the predicate offence qua the appellant, cannot be gone into at this stage when this Court is only considering the prayer for anticipatory bail."

The Apex Court refused the contention that the registration of FIR against the appellant under PMLA was not maintainable. It was held that Section 8 of the Prevention of Corruption Act is punishable for a term extending to seven years. Therefore, the essential requirement of section 45 of PMLA i.e "accused of an offence punishable for a term of imprisonment of more than three years under Part 'A' of the Schedule" is satisfied making the offence under PMLA.

Regarding the second issue i.e ***whether the court can/cannot look into the documents/materials produced before the court unless the accused was earlier confronted with those documents/materials***, the Apex Court referred to section 172(2) of the Criminal Procedure Code as it permits any court to send for case diary to use them in the trial. Section 172(3) Cr.P.C. specifically provides that neither the accused nor his agents shall be entitled to call for case diary nor shall he or they be entitled to see them merely because they are referred to by the court. The Apex Court then referred to the decision in ***Balakram v. State of Uttarakhand***[8] wherein it was observed that the confidentiality is always kept in the matter of investigation and it is not desirable to make available the police diary to the accused on his demand. ***Sidharth v. State of Bihar***[9] was also referred alongwith a mention of ***Naresh Kumar Yadav v. Ravindra Kumar***[10] and ***Malkiat Singh v. State of Punjab***[11]on this point. Therefore, the Apex Court stated that on several instances the Court received and perused the case diaries/materials collected by the prosecution during investigation to satisfy itself as to whether the investigation is proceeding in the right direction or for consideration of the question of grant of bail etc. In ***Directorate of Enforcement* v. *P.V. Prabhakar Rao***,[12] the Supreme Court perused the records to examine the correctness of the order passed by the High Court granting bail. The Apex Court also mentioned ***R.K. Krishna Kumar* v. *State of Assam***[13] and ***Romila***

[8] (2017) 7 SCC 668
[9] (2005) 12 SCC 545
[10] (2008) 1 SCC 632
[11] (1991) 4 SCC 341
[12](1997) 6 SCC 647
[13] (1998) 1 SCC 474

Thapar v. *Union of India*[14] on this point. In *Mukund Lal* v. *Union of India*,[15] the Supreme Court held as under:

> "When in the enquiry or trial, everything which may appear against the accused has to be established and brought before the court by evidence other than the diary and the accused can have the benefit of cross-examining the witnesses and the court has power to call for the diary and use it, of course not as evidence but in aid of the enquiry or trial, I am clearly of the opinion, that the provisions under Section 172(3) CrPC cannot be said to be unconstitutional."
>
> We fully endorse the reasoning of the High Court and concur with its conclusion. We are of the opinion that the provision embodied in sub-section (3) of Section 172 of the CrPC cannot be characterised as unreasonable or arbitrary."

It was opined by the Apex Court that it is well settled that ***the court can peruse the case diary/materials collected during investigation by the prosecution even before the commencement of the trial inter-alia in circumstances like:-*** (i) to satisfy its conscience as to whether the investigation is proceeding in the right direction; (ii) to satisfy itself that the investigation has been conducted in the right lines and that there is no misuse or abuse of process in the investigation; (iii) whether regular or anticipatory bail is to be granted to the accused or not; (iv) whether any further custody of the accused is required for the prosecution; (v) to satisfy itself as to the correctness of the decision of the High Court/trial court which is under challenge. The above instances are only illustrative and not exhaustive. Where the interest of justice requires, the court has the powers, to receive the case diary/materials collected during the investigation.

Regarding the contention that the appellant should have been confronted with the materials collected by the Enforcement Directorate earlier, before being produced to the court, the Apex Court held:

> **"68.** It is one thing to say that if the power of investigation has been exercised by an investigating officer *mala fide* or non-compliance of the provisions of the Criminal Procedure Code in the conduct of the investigation, it is open to the court to quash the proceedings where there is a clear case of abuse of power. It is a different matter that the High Court in exercise of its inherent power under Section 482 Cr.P.C., the court can always issue appropriate direction at the instance of an aggrieved person if the High Court is convinced that the power of

[14] (2018) 10 SCC 753
[15] 1989 Supp (1) SCC 622

> investigation has been exercised by the investigating officer *mala fide* and not in accordance with the provisions of the Criminal Procedure Code. However, as pointed out earlier that power is to be exercised in rare cases where there is a clear abuse of power and non-compliance of the provisions falling under Chapter-XII of the Code of Criminal Procedure requiring the interference of the High Court. In the initial stages of investigation where the court is considering the question of grant of regular bail or pre-arrest bail, it is not for the court to enter into the demarcated function of the investigation and collection of evidence/materials for establishing the offence and interrogation of the accused and the witnesses."

Further, the Apex Court concluded that:

> "**79.** Power under Section 438 Cr.P.C. being an extraordinary remedy, has to be exercised sparingly; more so, in cases of economic offences. Economic offences stand as a different class as they affect the economic fabric of the society. In *Directorate of Enforcement* v. *Ashok Kumar Jain* **(1998) 2 SCC 105**, it was held that in economic offences, the accused is not entitled to anticipatory bail."
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> *****
>
> **84.** Grant of anticipatory bail at the stage of investigation may frustrate the investigating agency in interrogating the accused and in collecting the useful information and also the materials which might have been concealed. Success in such interrogation would elude if the accused knows that he is protected by the order of the court. Grant of anticipatory bail, particularly in economic offences would definitely hamper the effective investigation. Having regard to the materials said to have been collected by the respondent-Enforcement Directorate and considering the stage of the investigation, we are of the view that it is not a fit case to grant anticipatory bail."

3. *Mayavti Trading Pvt. Ltd v. Pradyuat Deb Burman, (2019 SCC OnLine SC 1164)*

Decided on : -05.09.2019

Bench :- 1. Hon'ble Mr. Justice R. F. Nariman
2. Hon'ble Mr. Justice R. Subhash Reddy
3. Hon'ble Mr. Justice Surya Kant

(Law prior to the 2015 Amendment of the Arbitration Act that has been laid down by the Apex Court, which would have included going into whether accord and satisfaction has taken place, has now been legislatively overruled. Therefore, the judgment in *United India Insurance Company Limited* v. *Antique Art Exports Private Limited* overruled.)

Background

during the course of argument in the present case, a recent decision of the Apex Court was pointed out, namely, *United India Insurance Company Limited* v. *Antique Art Exports Private Limited*[16] wherein purportedly following *Duro Felguera, S.A.* v. *Gangavaram Port Limited*,[17] the Apex Court had held:

> *"20. The submission of the learned counsel for the respondent that after insertion of sub-section (6-A) to Section 11 of the Amendment Act, 2015 the jurisdiction of this Court is denuded and the limited mandate of the Court is to examine the factum of existence of an arbitration and relied on the judgment in Duro Felguera, S.A. v. Gangavaram Port Ltd. [(2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764] The exposition in this decision is a general observation about the effect of the amended provisions which came to be examined under reference to six arbitrable agreements (five agreements for works and one corporate guarantee) and each agreement contains a provision for arbitration and there was serious dispute between the parties in reference to constitution of Arbitral Tribunal whether there has to be Arbitral Tribunal pertaining to each agreement. In the facts and circumstances, this Court took note of sub-section (6-A) introduced by the Amendment Act, 2015 to Section 11 of the Act and in that context observed that the preliminary disputes are to be examined by the arbitrator and are not for the Court to be examined within the limited scope available for appointment of arbitrator under Section 11(6) of the Act. Suffice it to say that appointment of an arbitrator is a judicial power and is not a mere administrative function leaving some degree of judicial intervention; when it comes to the question to examine the existence of a prima facie arbitration agreement, it is always necessary to ensure that the dispute resolution process does not become unnecessarily protracted.*
>
> *21. In the instant case, prima facie no dispute subsisted after the discharge voucher being signed by the respondent without any demur or protest and*

[16] (2019) 5 SCC 362
[17] (2017) 9 SCC 729

> *claim being finally settled with accord and satisfaction and after 11 weeks of the settlement of claim a letter was sent on 27-7-2016 for the first time raising a voice in the form of protest that the discharge voucher was signed under undue influence and coercion with no supportive prima facie evidence being placed on record in absence thereof, it must follow that the claim had been settled with accord and satisfaction leaving no arbitral dispute subsisting under the agreement to be referred to the arbitrator for adjudication."*

However, Section 11(6A) was added by the amendment Act of 2015 and states as follows:

"11.(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement."

Decision and Observations

The Apex Court stated that after the amendment Act of 2019, Section 11(6A) has been omitted because appointment of arbitrators is to be done institutionally, in which case the Supreme Court or the High Court under the old statutory regime are no longer required to appoint arbitrators and consequently to determine whether an arbitration agreement exists.

Prior to Section 11(6A), the Apex Court in several judgments beginning with ***SBP & Co. v. Patel Engineering Ltd.,***[18] has held that at the stage of a Section 11(6) application being filed, the Court need not merely confine itself to the examination of the existence of an arbitration agreement but could also go into certain preliminary questions such as stale claims, accord and satisfaction having been reached etc.

The Apex court then referred extensively to its decision in ***Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engineering Ltd.***[19] wherein it was stated that :

> "19. A reading of the Law Commission Report, together with the Statement of Objects and Reasons,[20] shows that the Law Commission felt that the judgments in *SBP & Co.* (supra) and *Boghara Polyfab* (supra) required a relook, as a result of which, so far as Section 11 is concerned, the Supreme Court or, as the case may be, the High Court, while considering any application under Section 11(4) to 11(6) is to confine itself to the examination of the existence of an arbitration agreement and leave all other preliminary issues to be decided by the arbitrator."

[18] (2005) 8 SCC 618
[19] 2019 SCC OnLine SC 515
[20] The Arbitration and Conciliation (Amendment) Bill, 2015

The Apex court while concluding the present case held as under:

> **"11.** This being the position, it is clear that the law prior to the 2015 Amendment that has been laid down by this Court, which would have included going into whether accord and satisfaction has taken place, has now been legislatively overruled. This being the position, it is difficult to agree with the reasoning contained in the aforesaid judgment as Section 11(6A) is confined to the examination of the existence of an arbitration agreement and is to be understood in the narrow sense as has been laid down in the judgment *Duro Felguera, S.A.* (supra) - see paras 48 & 59.
>
> **12.** We, therefore, overrule the judgment in *United India Insurance Company Limited* (supra) as not having laid down the correct law but dismiss this appeal for the reason given in para 3 above."

4. *Jagbir Singh v. State (N.C.T. of Delhi), (2019 SCC OnLine SC 1148)*

Decided on : 04.09.2019

Bench :- 1. Hon'ble Mr. Justice Sanjay Kishan Kaul
2. Hon'ble Mr. Justice K.M. Joseph

(Multiple dying declarations-If the court finds that the incriminatory dying declaration brings out the truthful position particularly in conjunction with the capacity of the deceased to make such declaration, the voluntariness with which it was made which involves, no doubt, ruling out tutoring and prompting and also the other evidence which support the contents of the incriminatory dying declaration, it can be acted upon. Equally, the circumstances which render the earlier dying declaration, worthy or unworthy of acceptance, can be considered.)

Facts

The deceased was married to the appellant in the year 1999. He was unemployed at that time. Later, he secured employment in the C.R.P.F.. He did not take his wife on the basis that he could not take her far away. The deceased wife continued to reside with the mother of the deceased at her house. Appellant used to harass his wife and had illicit relationship with the wife of his brother. A Panchayat was held. A settlement was arrived at, pursuant to which, after four years, when the appellant was transferred to Delhi, he assured the mother of the deceased that he will not harass his wife and he started residing at the house along with his wife and mother-in-law. It is the further case of the prosecution that the appellant continued to have an affair with the wife of his brother. On 23.01.2008, the mother of the deceased went to the matrimonial home of another daughter. On 24.01.2008, at about 06.00 P.M., the appellant came to the house under influence of liquor, and in short, poured kerosene oil upon his wife and also some kerosene oil over himself and threw a lighted matchstick on his wife. Initially, both, the appellant and the deceased, were taken to the hospital. Initially, the wife gave statement which did not implicate the appellant. However, on 27.01.2008, a dying declaration was made by the deceased pointing the finger of blame clearly at the appellant and attributing the act of pouring kerosene and setting her ablaze to him. Initially, a First Information Report was lodged on 27.01.2008 on the basis of the dying declaration dated 27.01.2008 under Section 307 of the IPC, which was, upon the deceased succumbing to the

burn injuries, converted to Section 302 of the IPC. This is besides a charge under Section 506 of the IPC for extending threat to his wife.

The appellant was convicted under Sections 302 and 506 of the Indian Penal Code, 1860 by the Trial court, and the appeal carried by him before the High Court was unsuccessful, therefore the present appeal.

Decision and Observations

The Apex Court considered the law relating to dying declaration. In order to do so, the Apex court first distinguished between the English law and the Indian law with regard to dying declaration. The Apex Court referred to ***Kishan Lal v. State of Rajasthan,***[21] wherein it has been said that under the English law, credence and the relevancy of a dying declaration is only when a person making such a statement is in a hopeless condition and expecting an imminent death. So under the English law, for its admissibility, the declarant should have been in actual danger of death at the time when they are made, and that he should have had a full apprehension of this danger and the death should have ensued. Under the Indian law the dying declaration is relevant whether the person who makes it was or was not under expectation of death at the time of declaration. Dying declaration is admissible not only in the case of homicide but also in civil suits.

Then the Apex Court attended the issue of multiple dying declaration. The Apex Court referred to ***Kundula Bala Subrahmanyam v. State of Andhra Pradesh,***[22] wherein it was held as follows:

> *"Once the statement of the dying person and the evidence of the witnesses testifying to the same passes the test of careful scrutiny of the courts, it becomes a very important and a reliable piece of evidence and if the court is satisfied that the dying declaration is true and free from any embellishment such a dying declaration, by itself, can be sufficient for recording conviction even without looking for any corroboration. If there are more than one dying declarations then the court has also to scrutinise all the dying declarations to find out if each one of these passes the test of being trustworthy. The Court must further find out whether the different dying declarations are consistent with each other in material particulars before accepting and relying upon the same..."*

[21] (2000) 1 SCC 310
[22] (1993) 2 SCC 684

In *Lella Srinivasa Rao* v. *State of A.P.*[23], the Court did not rely upon the second dying declaration. However, in *Sayarabano Alias Sultanabegum* v. *State of Maharashtra*,[24] the second dying declaration was relied upon. In *Lakhan* v. *State of M.P.*,[25] the Court held:

> "In case there are multiple dying declarations and there are inconsistencies between them, generally, the dying declaration recorded by the higher officer like a Magistrate can be relied upon, provided that there is no circumstance giving rise to any suspicion about its truthfulness. In case there are circumstances wherein the declaration had been made, not voluntarily and even otherwise, it is not supported by the other evidence, the court has to scrutinise the facts of an individual case very carefully and take a decision as to which of the declarations is worth reliance."

After referring to several judgments, the Apex Court culled out the following principles:

> "a. Conviction of a person can be made solely on the basis of a dying declaration which inspires confidence of the court;
>
> b. If there is nothing suspicious about the declaration, no corroboration may be necessary;
>
> c. No doubt, the court must be satisfied that there is no tutoring or prompting;
>
> d. The court must also analyse and come to the conclusion that imagination of the deceased was not at play in making the declaration. In this regard, the court must look to the entirety of the language of the dying declaration;
>
> e. Considering material before it, both in the form of oral and documentary evidence, the court must be satisfied that the version is compatible with the reality and the truth as can be gleaned from the facts established;
>
> f. However, there may be cases where there are more than one dying declaration. If there are more than one dying declaration, the dying declarations may entirely agree with one another. There may be dying declarations where inconsistencies between the declarations emerge. The extent of the inconsistencies would then have to be considered by the court. The inconsistencies may turn out to be reconciliable.
>
> g. In such cases, where the inconsistencies go to some matter of detail or description but is incriminatory in nature as far as the accused is concerned, the court would look to the material on record to conclude as to which dying declaration is to be relied on unless it be shown that they are unreliable;
>
> h. The third category of cases is that where there are more than one dying declaration and inconsistencies between the declarations are absolute and

[23] (2004) 9 SCC 713
[24] (2007) 12 SCC 562
[25] (2010) 8 SCC 514

the dying declarations are irreconcilable being repugnant to one another. In a dying declaration, the accused may not be blamed at all and the cause of death may be placed at the doorstep of an unfortunate accident. This may be followed up by another dying declaration which is diametrically opposed to the first dying declaration. In fact, in that scenario, it may not be a question of an inconsistent dying declaration but a dying declaration which is completely opposed to the dying declaration which is given earlier. There may be more than two.

i. In the third scenario, what is the duty of the court? Should the court, without looking into anything else, conclude that in view of complete inconsistency, the second or the third dying declaration which is relied on by the prosecution is demolished by the earlier dying declaration or dying declarations or is it the duty of the court to carefully attend to not only the dying declarations but examine the rest of the materials in the form of evidence placed before the court and still conclude that the incriminatory dying declaration is capable of being relied upon?"

The Apex Court concluded:

> **"34.** We would think that on a conspectus of the law as laid down by this court, when there are more than one dying declaration, and in the earlier dying declaration, the accused is not sought to be roped in but in the later dying declaration, a summersault is made by the deceased, the case must be decided on the facts of each case. The court will not be relived of its duty to carefully examine the entirety of materials as also the circumstances surrounding the making of the different dying declarations. If the court finds that the incriminatory dying declaration brings out the truthful position particularly in conjunction with the capacity of the deceased to make such declaration, the voluntariness with which it was made which involves, no doubt, ruling out tutoring and prompting and also the other evidence which support the contents of the incriminatory dying declaration, it can be acted upon. Equally, the circumstances which render the earlier dying declaration, worthy or unworthy of acceptance, can be considered."

Regarding the statements made on 24.01.2008 and 25.01.2008 which were contended as not being the dying declaration, the Apex Court said:

> "Under Section 32 of the Evidence Act any statement made by a person as to the cause of his death or to any circumstance of the transaction which resulted in his death would be relevant. Once it is proved that such statement is made by the deceased then it cannot be brushed aside on the basis that it is not elaborate or that it was not recorded in a particular fashion. We have already noted that the principle that the statement is brief, would not detract from it being reliable. Equally, when there are divergent dying declarations it is not the law that the court must invariably prefer the statement which is incriminatory and

> must reject the statement which does not implicate the accused. The real point is to ascertain which contains the truth."

Regarding the dying declaration dated 27.01.2008, the Apex Court said:

> "The dying declaration dated 27.01.2008 is a fairly lengthy narration. It contains details about what happened on the fateful day, viz., 24.01.2008 in a fairly graphic manner including details regarding the place where it happened, the manner in which it happened, the specific role played by the appellant, even things (presence of the motorcycle), the door being locked, are reflected. Even reference was made to the relationship which the appellant was having with his sister-in-law.
>
> ****
>
> The version, as projected in the declaration dated 27.01.2008, is clinchingly proved by this circumstance that kerosene was indeed the fuel used which caused the burn injuries and its position in the inner room is entire compatible with the dying declaration dated 27.01.2008."

5. *Rashid Raza v. Sadaf Akhtar (2019 SCC OnLine SC 1170)*

Decided on : 04.09.2019

Bench :- 1. Hon'ble Mr. Justice Rohinton Fali Nariman
2. Hon'ble Mr. Justice R. Subhash Reddy
3. Hon'ble Mr. Justice Surya Kant

(Where there are simple allegations of fraud touching upon the internal affairs of the party inter se and it has no implication in the public domain, the arbitration clause need not be avoided and the parties can be relegated to arbitration-Test laid down in *A. Ayyasamy* case reiterated)

Facts

The present case arises out of a partnership dispute in which an FIR dated 17.11.2017 was lodged by one of the partners alleging siphoning of funds and various other business improprieties that were committed. The FIR is at present under investigation.

An Arbitration Petition dated 02.01.2018 was filed by the appellant before the High Court under Section 11 of the Arbitration and Conciliation Act, 1996, seeking appointment of an Arbitrator under the Arbitration clause which was to be found in the partnership deed between the parties, dated 30.01.2015. The High Court, by the impugned order dated 06.12.2018, has cited the judgment in *A. Ayyasamy v. A. Paramasivam*[26] and after extracting paragraph 26 from the said judgment held the below mentioned and dismissed the section 11 application.

> ".....The allegation of fraud that was levelled against the appellant was that he had signed and issued a cheque of Rs. 10,00,050 on 17th June, 2010 of Hotel Arunagiri in favour of his son without the knowledge and consent of the other partners i.e. respondents. It was a mere matter of account which could be looked into and found out even by the arbitrator. The facts of the instant case however are much more complex as the materials on records disclose. This Court however does not intend to make any comments on the merits of the allegations lest it may prejudice the case of the parties in an appropriate proceeding before competent court. However, considered in totality this Court is of the firm view that the nature of the dispute involving serious allegations of fraud of complicated nature are not fit to be decided in an arbitration proceedings. The dispute may require voluminous evidence on the part of both the parties to come to a finding which can be only properly undertaken by a civil court of competent jurisdiction."

[26] (2016) 10 SCC 386

Decision and Observations

The Apex Court held that the law laid down in ***A. Ayyasamy's case*** is in paragraph 25 and not in paragraph 26. Paragraph 25 of the said judgment states as follows:

> "25. In view of our aforesaid discussions, we are of the opinion that mere allegation of fraud simplicitor may not be a ground to nullify the effect of arbitration agreement between the parties. It is only in those cases where the Court, while dealing with Section 8 of the Act, finds that there are very serious allegations of fraud which make a virtual case of criminal offence or where allegations of fraud are so complicated that it becomes absolutely essential that such complex issues can be decided only by civil court on the appreciation of the voluminous evidence that needs to be produced, the Court can sidetrack the agreement by dismissing application under Section 8 and proceed with the suit on merits. It can be so done also in those cases where there are serious allegations of forgery/fabrication of documents in support of the plea of fraud or where fraud is alleged against the arbitration provision itself or is of such a nature that permeates the entire contract, including the agreement to arbitrate, meaning thereby in those cases where fraud goes to the validity of the contract itself of the entire contract which contains the arbitration clause or the validity of the arbitration clause itself. Reverse position thereof would be that where there are simple allegations of fraud touching upon the internal affairs of the party inter se and it has no implication in the public domain, the arbitration clause need not be avoided and the parties can be relegated to arbitration. While dealing with such an issue in an application under Section 8 of the Act, the focus of the Court has to be on the question as to whether jurisdiction of the Court has been ousted instead of focusing on the issue as to whether the Court has jurisdiction or not. It has to be kept in mind that insofar as the statutory scheme of the Act is concerned, it does not specifically exclude any category of cases as nonarbitrable. Such categories of non-arbitrable subjects are carved out by the Courts, keeping in mind the principle of common law that certain disputes which are of public nature, etc. are not capable of adjudication and settlement by arbitration and for resolution of such disputes, Courts, i.e. public fora, are better suited than a private forum of arbitration. Therefore, the inquiry of the Court, while dealing with an application under Section 8 of the Act, should be on the aforesaid aspect, viz. whether the nature of dispute is such that it cannot be referred to arbitration, even if there is an arbitration agreement between the parties. When the case of fraud is set up by one of the parties and on that basis that party wants to wriggle out of that arbitration agreement, a strict and meticulous inquiry into the allegations of fraud is needed and only when the Court is satisfied that the allegations are of serious and complicated nature that it would be more appropriate for the Court to deal with the subject matter rather than relegating the parties to arbitration, then alone such an application under Section 8 should be rejected."

Further, the Apex Court stated that the principles of law laid down in the present appeal makes a distinction between serious allegations of forgery/fabrication in support of the plea of fraud as opposed to "simple allegations". Two working tests laid down in paragraph 25 are : (1) does this plea permeate the entire contract and above all, the agreement of arbitration, rendering it void, or (2) whether the allegations of fraud touch upon the internal affairs of the parties inter se having no implication in the public domain.

The Apex Court concluded that :

> "Judged by these two tests, it is clear that this is a case which falls on the side of "simple allegations" as there is no allegation of fraud which would vitiate the partnership deed as a whole or, in particular, the arbitration clause concerned in the said deed. Secondly, all the allegations made which have been relied upon by the learned counsel appearing on behalf of the respondent, pertain to the affairs of the partnership and siphoning of funds therefrom and not to any matter in the public domain."

On this basis the Apex Court was of the view that the disputes raised between the parties were arbitrable and, hence, a Section 11 application under the Arbitration Act would be maintainable.

6. *Vashdeo R Bhojwani v. Abhyudaya Co-operative Bank Ltd. and Another,(2019 SCC OnLine SC 1159)*

Decided on : 02.09.2019

Bench :- 1. Hon'ble Mr. Justice Rohinton Fali Nariman
2. Hon'ble Mr. Justice Surya Kant

(Issuance of Recovery Certificate injured effectively and completely the appellant's rights as a result of which limitation would have begun ticking - since the Limitation Act is applicable to applications filed under Sections 7 and 9 of the Insolvency and Bankruptcy Code from the inception of the Code, Article 137 of the Limitation Act gets attracted. "The right to sue", therefore, accrues when a default occurs. If the default has occurred over three years prior to the date of filing of the application, the application would be barred under Article 137 of the Limitation Act, save and except in those cases where, in the facts of the case, Section 5 of the Limitation Act may be applied to condone the delay in filing such application.)

Facts

In the facts of the present case, at the relevant time, a default of Rs. 6.7 Crores was found as against the respondent No. 2. The respondent No. 2 had been declared a NPA by Abhyudaya Cooperative Bank Limited on 23.12.1999. Ultimately, a Recovery Certificate dated 24.12.2001 was issued for this amount. A Section 7 petition was filed by the Respondent No. 1 on 21.07.2017 before the NCLT claiming that this amount together with interest, which kept ticking from 1998, was payable to the respondent as the loan granted to Respondent No. 2 had originally been assigned, and, due to a merger with another Cooperative Bank in 2006, the respondent became a Financial Creditor to whom these moneys were owed. A petition under Section 7 was admitted on 05.03.2018 by the NCLT, stating that as the default continued, no period of limitation would attach and the petition would, therefore, have to be admitted.

An appeal filed to the NCLAT resulted in a dismissal on 05.09.2018, stating that since the cause of action in the present case was continuing no limitation period would attach. It was further held that the Recovery Certificate of 2001 plainly shows that there is a default and that there is no statable defence.

Decision and Observations

The Apex Court referred to ***B.K. Educational Services Private Limited* v. *Parag Gupta and Associates,***[27], para 27 of which reads as follows:—

> "27. It is thus clear that since the Limitation Act is applicable to applications filed under Sections 7 and 9 of the Code from the inception of the Code, Article 137 of the Limitation Act gets attracted. "The right to sue", therefore, accrues when a default occurs. If the default has occurred over three years prior to the date of filing of the application, the application would be barred under Article 137 of the Limitation Act, save and except in those cases where, in the facts of the case, Section 5 of the Limitation Act may be applied to condone the delay in filing such application."

The Apex Court further referred to ***Balkrishna Savalram Pujari* v. *Shree Dnyaneshwar Maharaj Sansthan,***[28] on the application of section 23 of the Limitation Act, wherein it was held :

> "... .... In dealing with this argument it is necessary to bear in mind that s.23 refers not to a continuing right but to a continuing wrong. It is the very essence of a continuing wrong that it is an act which creates a continuing source of injury and renders the doer of the act responsible and liable for the continuance of the said injury. If the wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from the act may continue. If, however, a wrongful act is of such a character that the injury caused by it itself continues then the act constitutes a continuing wrong. In this connection it is necessary to draw a distinction between the injury caused by the wrongful act and what may be described as the effect of the said injury. It is only in regard to acts which can be properly characterised as continuing wrongs that s.23 can be invoked. Thus considered it is difficult to hold that the trustees' act in denying altogether the alleged rights of the Guravs as hereditary worshippers and in claiming and obtaining possession from them by their suit in 1922 was a continuing wrong. The decree obtained by the trustees in the said litigation had injured effectively and completely the appellants' rights though the damage caused by the said decree subsequently continued..." (at page 496)

Following the above mentioned judgment the Apex Court held that it is clear that when the Recovery Certificate dated 24.12.2001 was issued, this Certificate injured effectively and completely the appellant's rights as a result of which limitation would have begun ticking.

[27] 2018 (14) Scale 482
[28] [1959] Supp. (2) S.C.R. 476

The Apex Court held:

"This being the case, and the claim in the present suit being time barred, there is no doubt that is due and payable in law. We allow the appeal and set aside the orders of the NCLT and NCLAT. "

7. *Prakash Sahu v. Saulal and Others, Civil Appeal no. 6772/2019*

Decided on : 02.09.2019

Bench :- 1. Hon'ble Mr. Justice Navin Sinha
2. Hon'ble Mr. Justice B.R. Gavai

(Whether an unregistered agreement of sale can be seen for collateral purposes under the proviso to Section 49 of the Registration Act, 1908.)

(ORIGINAL ORDER OF THE HON'BLE SUPREME COURT)

Leave granted.

We have heard learned counsel for the parties.

The short question in the present appeal is whether an unregistered agreement of sale can be seen for collateral purposes under the proviso to Section 49 of the Registration Act, 1908.

The Trial Court based its reasoning on a decision of this Court in **S. Kaladevi vs. V.R. Somasundaram & Ors.** (2010) 5 SCC 401 elucidating as follows:-

> "(I) In that situation it is essential for the registration of the document, if, unregistered is not admissible in evidence under Section 49 of the Registration Act.
>
> (ii) Yet, such unregistered document can be used by way of collateral evidences provided in the proviso to the Section 49 of the Registration Act.
>
> (iii) For effecting with the collateral transaction, whose registration is required by law should be free from the transaction or be divisible from that.
>
> (iv) Collateral transaction should be such a transaction which may not be automatically expected of effecting by the registered document, i.e. Rupees One Hundred or any transaction or instrument or right or interest in any immovable property of the value of more than Rupees One Hundred.
>
> (v) If the document is inadmissible in evidence in the absence of registration then any of its estopple cannot be admitted in evidence and for use of the document for purposes of proving important part, it would not be utilized by way of collateral purpose."

The High Court failed to consider the aforesaid while holding that the unregistered document could not be taken into consideration for collateral purposes.

We consider the same as sufficient reason to set aside the order of the High Court and restore the order of the Trial Court dated 18 March, 2016.

The appeal is accordingly, allowed.

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

8. *Colonel Shrawan Kumar Jaipuriyar @ Sarwan Kumar Jaipuriyar v. Krishna Nandan Singh And Another, Civil Appeal No. 6760/2019*

Decided on : 02.09.2019

Bench :- 1. Hon'ble Mr. Justice Mohan M. Shantanagoudar
2. Hon'ble Mr. Justice Sanjiv Khanna

(If the plaint is manifestly vexatious, meritless and groundless, in the sense that it does not disclose a clear right to sue, it would be right and proper to exercise power under Order VII Rule 11 of the Code of Civil Procedure, 1908 ('Code', for short). A mere contemplation or possibility that a right may be infringed without any legitimate basis for that right, would not be sufficient to hold that the plaint discloses a cause of action.) – (Para 10)

(ORIGINAL ORDER OF THE HON'BLE SUPREME COURT)

Leave granted.

2. In spite of second call, there is no appearance on behalf of Krishna Nandan Singh, the plaintiff, the first respondent before us.

3. The first respondent has filed a civil suit T.S. No. 97/16 against Sarwan Kumar Jaipuriyar, the appellant before us and Anil Kumar, the second respondent before us. The second respondent is the brother of the first respondent.

4. The plaint admits that there was amicable division and partition of property bearing Holding no. 163 old Holding no. 42, Ward No. 10 (New) 7 (Old), Mahal No.1, Mohalla-Mainpura, P.S. Danapur, Patna amongst respondent no.1, respondent no.2 and their brother Sunil Kumar Mehta. This partition was evidenced by recording Memorandum of Partition dated 04.12.2008, which was signed and executed by the three brothers.

5. The factum of partition and the partition deed itself is not challenged and questioned in the civil suit preferred by the first respondent. In fact, Sunil Kumar Mehta, the third brother is not even a party to the suit. The suit also acknowledges that the second respondent was allotted and became the owner of south-eastern part of the aforesaid holding whereas the first respondent stands recorded as the owner of another portion and that the first respondent and second respondent have been paying taxes for the respective portions to Nagar Parishad under receipts.

6. The grievance and the cause of action as pleaded in the civil suit by the first respondent is that the second respondent had sold the portion allotted to him on partition to the appellant vide registered sale deed dated 25.01.2016. This sale deed, it is claimed, is void ab initio and inoperative as there is every chance that the privacy of the first respondent's family would be affected and destroyed. It is pleaded that the first respondent has got a

right and authority to repurchase the portion allotted to the second respondent under the partition evidenced by the Memorandum of Partition dated 04.12.2008.

7. The Memorandum of Partition dated 04.12.2008 which is placed on record and an accepted/admitted document does not give any right of pre-emption to the first respondent. There is also no pleading to the said effect in the plaint. As the partition and the Memorandum of Partition are not denied or challenged, ownership of the second respondent and his right to sell the property in terms of the Memorandum of Partition are and would be undisputed legal rights under the Transfer of Property Act, 1882. There was no restraint to exercise of this right vested with the second respondent by contract or under any statute. This is not alleged and adverted to in the plaint. It is also an undisputed position that Sunil Kumar Mehta who was on partition allotted the third portion of the property, has sold and transferred his portion to a third party vide registered sale deed dated 15.10.2009. The said sale deed is not under challenge and was not questioned by the first respondent.

8. The aforesaid factual and legal position being admitted and accepted in the plaint, we fail to understand how and on what basis, the first respondent claims right of pre-emption or repurchase of the portion that was allotted to the second respondent in terms of amicable division as evidenced by Memorandum of Partition dated 04.12.2008. On the aforesaid partition, the second respondent became the sole and exclusive owner of the portion allotted to him, a legal position, which is not even controverted and denied by the first respondent in the plaint.

9. In the aforesaid background, it is to be held that the plaint does not disclose any cause of action for the relief prayed, that is, a direction to the second respondent to execute and register a sale deed in favour of the first respondent and to put the first respondent in possession. There does not exist any legal right which the plaintiff or the first respondent is entitled to invoke and enforce. For a right to exist, there must be a corelative duty which can be enforced in a law suit. A right cannot exist without an enforceable duty. Ownership means a bundle of rights which would normally include the right to exclude and transfer the property in a manner one wants, subject to contractual obligations as agreed or statutory restrictions imposed on the owner. In the present case, the pleadings fail to establish violation of a statutory right or breach of a contractual obligation which creates an enforceable right in the court of law. In the absence of any such right or even a claim, the plaint would not disclose cause of action.

10. This Court in ***Church of Christ Charitable Trust and Educational Society Represented by its Chairman v. Ponniamman Educational Trust Represented by its Chairman/ Managing Trustee***[29] has referred to the earlier judgment of this Court in ***A.B.C. Laminart Pvt. Ltd.***

[29] (2012) 8 SCC 706

and Anotherv. A.P. Agencies, Salem[30] to explain that the cause of action means every fact which, if traversed, would be necessary for the plaintiff to prove in order to seek a decree and relief against the defendant. Cause of action requires infringement of the right or breach of an obligation and comprises of all material facts on which the right and claim for breach is founded, that is, some act done by the defendant to infringe and violate the right or breach an obligation. In ***T. Arivandanam v. T.V. Satyapal and Another***[31] this Court has held that if the plaint is manifestly vexatious, meritless and groundless, in the sense that it does not disclose a clear right to sue, it would be right and proper to exercise power under Order VII Rule 11 of the Code of Civil Procedure, 1908 ('Code', for short). A mere contemplation or possibility that a right may be infringed without any legitimate basis for that right, would not be sufficient to hold that the plaint discloses a cause of action.

11. In view of the aforesaid discussion, we would allow the present appeal and set aside the impugned order. The application under Order VII Rule 11 of the Code filed by the appellant is allowed and the plaint preferred by the first respondent is rejected as it discloses no cause of action.

    There shall be no order as to costs.

[30] (1989) 2 SCC 163
[31] (1977) 4 SCC 467

9. *State of Odisha (Vigilance) v. Purna Chandra Kandi, Special Leave Petition (Criminal) Diary No(s). 29657/2019*

Decided on : 02.09.2019

Bench :- 1. Hon'ble Mr. Justice Sanjay Kishan Kaul
2. Hon'ble Mr. Justice K.M. Joseph

(Condonation of delay when Government is the Applicant – "A mere government inefficiency cannot be a ground for condoning the delay. It is for the petitioner to put its own house in order.")

In this case the State of Odisha had filed an appeal against the order of the High Court by which a public servant had been discharged in a corruption case. The Hon'ble Supreme Court dismissed the SLP on the ground of delay on the basis of the judgment of the Supreme Court in *Post Master General & Ors. v. Living Media India Ltd. & Anr., (2012) 3 SCC 563.*

(ORIGINAL ORDER OF THE HON'BLE SUPREME COURT)

We do not find that the delay is satisfactorily explained in terms of the judgment of this Court in the case of *Post Master General & Ors. v. Living Media India Ltd. & Anr*. reported in (2012) 3 SCC 563. A mere government inefficiency cannot be a ground for condoning the delay. It is for the petitioner to put its own house in order.

The special leave petition is dismissed on the ground of limitation.

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

10. Kishore Sharma v. Sachin Dubey, Criminal Appeal No. 1325/ 2019

Decided on : 03.09.2019

Bench :- 1. Hon'ble Mr. Justice A.M. Khanwilkar
2. Hon'ble Mr. Justice Dinesh Maheshwari

(The fact that notice was duly served on the respondent or otherwise, is a triable issue; and cannot be proceeded as an indisputable position-as is expounded by the Supreme Court in 'Ajeet Seeds Limited vs. K. Gopala Krishnaiah' reported in (2014) 12 SCC 685 and in 'Laxmi Dyechem vs. State of Gujarat and Others' reported in (2012) 13 SCC 375.)

(ORIGINAL ORDER OF THE HON'BLE SUPREME COURT)

Crl.A. @ SLP(Crl.) No(s).137/2019

1. Leave granted.

2. Despite successive notices served on the respondent, he has chosen not to appear. The last notice clearly mentioned that the matter will be finally disposed of at notice stage.

3. The present appeal takes exception to the order dated 15th November, 2018 passed by the High Court of Madhya Pradesh, Indore Bench, thereby it allowed the application filed by the respondent for quashing of proceedings instituted against him under Section 138 of the Negotiable Instruments Act, 1881. The sole argument of the respondent commended to the High Court was that a legal notice was not duly served on him within the statutory period.

4. After hearing counsel for the appellant, we have no manner of doubt that the reason commended to the High Court, is unacceptable. For, the fact that notice was duly served on the respondent or otherwise, is a triable issue; and cannot be proceeded as an indisputable position-as is expounded by this Court in '*Ajeet Seeds Limited vs. K. Gopala Krishnaiah*' reported in (2014) 12 SCC 685.

5. Accordingly, the impugned judgment and order is set aside and the appeal is allowed. Consequently, the complaint shall now proceed against the respondent in accordance with law.

6. The parties shall appear before the Trial Court on 14th October, 2019.

Crl.A. @ SLP(Crl.) No.166/2019

1. Leave granted.

2. Despite successive notices served on the respondent, he has chosen not to appear. The last notice clearly mentioned that the matter will be finally disposed of at notice stage.

3. The present appeal arises from the judgment and order dated 15.11.2018 passed by the High Court of Madhya Pradesh, Indore Bench in M.Cr.C. No.17894 of 2018 whereby the High Court allowed the quashing petition filed by the respondent under Section 482 of Cr.P.C. on two counts. Firstly, that the legal notice has not been served on the respondent within the statutory period and secondly, because of the remark noted on the cheque return memo.

4. Both these facts would require the parties to produce evidence and are triable issues, as expounded by this Court in '*Ajeet Seeds Limited vs. K. Gopala Krishnaiah*' reported in (2014) 12 SCC 685 and in '*Laxmi Dyechem vs. State of Gujarat and Others*' reported in (2012) 13 SCC 375. As a result, even this appeal ought to succeed. The impugned judgment and order is accordingly set aside and the appeal is allowed.

5. Consequently, the complaint shall now proceed against the respondent in accordance with law.

6. The parties shall appear before the Trial Court on 14th October, 2019 before the Trial Court.
