JUDICIAL ACADEMY JHARKHAND

SNIPPETS

OF

SUPREME COURT JUDGMENTS

(March, 2019)

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1. ***Varun Pahwa v. Mrs. Renu Chaudhary (Civil Appeal No. 2431/2019)***
Decided on – 01.03.2019

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2. Hon'ble Mr. Justice Hemant Gupta

(Amendment in the pleadings cannot be refused merely because of some mistake, negligence, inadvertence or even infraction of the Rules of Procedure. Inadvertent mistake made in the plaint cannot be refused to be corrected when the mistake is apparent from the reading of the plaint.)

FACTS

The appellant as Director of Siddharth Garments Pvt. Ltd. filed a suit for recovery of Rs. 25,00,000/- along with pendente lite and future interest on or about 28.05.2016. The Plaintiff has claimed the said amount advanced as loan of Rs. 25,00,000/- remitted to the defendant through RTGS on 16.06.2013 on HDFC Bank, Delhi. It is also averred that Plaintiff has given Special Power of Attorney to Shri Navneet Gupta.

The defendant raised one of the preliminary objections in the written statement that suit has not been filed by the Plaintiff and even the alleged authorised representative has not filed any document showing that he has been authorised by the above-named Plaintiff. The Special Power of Attorney is neither valid nor admissible.

It was on 29.11.2016, Navneet Gupta appeared in Court as power of attorney of the Plaintiff to examine himself as PW1. It was at that stage; an order was passed by the learned trial court to furnish address of the Plaintiff and why the Plaintiff should be examined through an attorney when the Plaintiff is a resident of Delhi. It is thereafter, the appellant filed an application for amendment of the plaint on the ground that the counsel had inadvertently made the title of the suit wrongly as the loan was advanced through the Company, therefore, the suit was to be in the name of the Company. Therefore, the Plaintiff sought to substitute Para 1 and Para 2 of the plaint.

The trial court declined the amendment on the ground that the application is an attempt to convert the suit filed by a private individual into a suit filed by a Private Limited Company which is not permissible as it completely changes the nature of the suit. It is the said order which was not interfered with by the High Court.

OBSERVATION AND DECISION (Paragraph Nos. – 8, 9, 10)

The Hon'ble Supreme Court observed that the plaint was not properly drafted in as much as in the memo of parties, the Plaintiff was described as Varun Pahwa through Director of Siddharth Garments Pvt. Ltd. though it should have been Siddharth Garments Pvt. Ltd. through its Director Varun Pahwa. Thus, it was a case of mistake of the counsel, may be on account of lack of understanding as to how a Private Limited Company is to sue in a suit for recovery of the amount advanced.

The Hon'ble Apex Court reiterated its decision in ***State of Maharashtra v. Hindustan Construction Company Limited*** and held that the memo of parties clearly was an inadvertent mistake on the part of the counsel who drafted the plaint. Such inadvertent mistake cannot be refused to be corrected when the mistake is apparent from the reading of the plaint. The Rules of Procedure are handmaid of justice and cannot defeat the substantive rights of the parties. It is well settled that amendment in the pleadings cannot be refused merely because of some mistake, negligence, inadvertence or even infraction of the Rules of Procedure. The Court always gives leave to amend the pleadings even if a party is negligent or careless as the power to grant amendment of the pleadings is intended to serve the ends of justice and is not governed by any such narrow or technical limitations.

2. *R. Dhana Sundari @ R.Rajeswari v. A.M. Umakanth and Others (Civil Appeal No. 7292/2009)*

Decided on – 06.03.2019

Bench – 1. Hon'ble Mr. Justice Uday Umesh Lalit

2. Hon'ble Mr. Justice Dinesh Maheshwari

(Power of the Court to allow Transposition of Defendants as Plaintiffs)

FACTS

The civil suit in question was originally instituted in the Court of the Principal Subordinate Judge, Chengalpattu by A.C. Nataraja Mudaliar (original plaintiff) against A.V. Manoharan (defendant No.1 - respondent No. 1 herein) and R. Dhanasundari @ R. Rajeshwari (defendant No. 2 - appellant herein) for cancellation of the sale deed dated 23.03.1985, which was executed by defendant No. 1 in favour of defendant No.2. This suit was initially registered as O.S. No. 122 of 1989.

In the Civil Suit for cancellation of sale deed executed by the defendant No. 1 in favour of the defendant No. 2, the original sole plaintiff had expired; his legal representatives came on record as plaintiff Nos. 2 to 8 with plaintiff No. 5 being the power of attorney holder of the other plaintiffs; the suit was decreed ex parte and the said attorney sold the suit property to three persons; when the ex parte decree was set aside and the suit was restored to its number, the said purchasers came on record as plaintiff Nos. 9 to 11; and later on, the said seller and purchasers (plaintiff Nos. 5 and 9 to 11) were transposed as defendant Nos. 3 to 6. At this juncture and with such change of complexion, the suit was transferred to the file of District Munsif Court, Chengalpattu and was renumbered as O.S. No. 219 of 2004.

After having, thus, been transferred and renumbered with addition and transposition in the array of parties, the suit in question proceeded in trial but, when the matter reached the stage of cross-examination of the defendants' witness DW-3, the plaintiffs filed a memo seeking permission to withdraw the suit, for the matter having been settled with the defendant Nos. 1 and 2. Though the defendant Nos. 1 and 2 did not oppose the prayer so made by the plaintiffs but then, the defendants 3 to 6 (who were transposed as defendants from their earlier position as plaintiffs) filed objections to the memo for withdrawal and also filed the application (IA No. 153 of 2005) under Order XXIII Rule 1-A read with Order I Rule 10 CPC with the prayer that they be transposed as plaintiff Nos.

2 to 5 in this suit. The Trial Court allowed the Application which was also upheld by the High Court of Judicature at Madras.

This appeal was directed against the judgment and order dated 12.10.2006, as passed in C.R.P. (PD) No. 10 of 2006, whereby the High Court of Judicature at Madras had upheld the order dated 07.07.2005, as passed in O.S. No. 219 of 2004 by the District Munsif, Chengalpattu allowing the application filed by defendant Nos. 3 to 6 for transposing them as plaintiffs, after the existing plaintiffs sought permission to withdraw the suit.

OBSERVATION AND DECISION (Paragraph Nos. – 9 and 10)

The Hon'ble Supreme Court held that on the facts and in the circumstances of this case, upon the existing plaintiffs seeking permission to withdraw under Order XXIII Rule 1 CPC, the defendant Nos. 3 to 6 have rightly been allowed to be transposed as plaintiffs under Order XXIII Rule 1-A read with Order I Rule 10 CPC and to continue with the suit, as originally filed against the defendant Nos. 1 and 2.

The Hon'ble Court discussed the laws contained in Order I Rule 10 related to the addition, deletion or substitution of parties and also the laws related to the withdrawal of suits contained in Order XXIII Rules I and IA and held that the very nature of the provisions contained in these Rules leaves nothing to doubt that the powers of the Court to grant such a prayer for transposition are very wide and could be exercised for effectual and comprehensive adjudication of all the matters in controversy in the suit. The basic requirement for exercise of powers under Rule 1-A. would be to examine if the plaintiff is seeking to withdraw or to abandon his claim under Rule 1 of Order XXIII and the defendant seeking transposition is having an interest in the subject-matter of the suit and thereby, a substantial question to be adjudicated against the other defendant. In such a situation, the pro forma defendant is to be allowed to continue with the same suit as plaintiff, thereby averting the likelihood of his right being defeated and also obviating the unnecessary multiplicity of proceedings.

3. *Gurnam Singh (Dead) by LRs and Others v. Lehna Singh (Dead) by LRs (Civil Appeal No. 6567/2014)*

Decided on – 13.03.2019

Bench – 1. Hon'ble Mr. Justice L. Nageswara Rao

2. Hon'ble Mr. Justice M.R. Shah

(Limitations on the Powers of High Courts while entertaining Second Appeal under Section 100 of the CPC)

FACTS

The Hon'ble Punjab and Haryana High Court had admitted the Second Appeal in the present case based on its opinion that the case involved the following substantial questions of law : -

(i) Whether the Appellate Court can reverse the findings recorded by the learned trial court without adverting to the specific finding of the trial Court?

(ii) Whether the judgment passed by the learned lower Appellate Court is perverse and outcome of misreading of evidence?

OBSERVATIONS AND DECISION (Paragraph Nos. – 13.1, 18)

The Hon'ble Supreme Court observed that as per the law laid down by the Supreme Court in a catena of decisions, the jurisdiction of High Court to entertain second appeal under Section 100 CPC, after the 1976 Amendment, is confined only to those cases when the second appeal involves a substantial question of law. The existence of 'a substantial question of law' is a sine qua non for the exercise of the jurisdiction under Section 100 of the CPC.

The Hon'ble Court reiterated the principles related to Second Appeal laid down in ***Kondiba Dagadu Kadam v. Savitribai Sopan Gujar, (1999) 3 SCC 722*** and in ***Ishwar Dass Jain v. Sohan Lal, (2000) 1 SCC 434*** and held that in a second appeal under Section 100 of the CPC, the High Court cannot substitute its own opinion for that of the First Appellate Court, unless it finds that the conclusions drawn by the lower Court were erroneous being:

(i) Contrary to the mandatory provisions of the applicable law; or

(ii) Contrary to the law as pronounced by the Apex Court; or

(iii) Based on in-admissible evidence or no evidence.

If First Appellate Court has exercised its discretion in a judicial manner, its decision cannot be recorded as suffering from an error either of law or of procedure requiring interference in second appeal. The Hon'ble Court further held that the Trial Court could have decided differently is not a question of law justifying interference in second appeal.

There are two situations in which interference with findings of fact is permissible. The first one is when material or relevant evidence is not considered which, if considered, would have led to an opposite conclusion. The second situation in which interference with findings of fact is permissible is where a finding has been arrived at by the appellate court by placing reliance on inadmissible evidence which if it was omitted, an opposite conclusion was possible. In either of the above situations, a substantial question of law can arise.

The Hon'ble Supreme Court, while setting aside the judgement of the Hon'ble High Court passed in the aforesaid Second Appeal, held that the questions framed by the High Court could not be considered substantial questions of law as stipulated under Section 100 of the CPC and reiterated the observations of the Hon'ble Supreme Court in ***Madamanchi Ramappa v. Muthaluru Bojappa, AIR 1963 SC 1633.***

The Hon'ble Supreme Court also reminded the High Courts of the limitations and restrictions to be kept in mind while entertaining Second Appeals under the CPC, in Paragraph No. 18 as follows: -

"Before parting with the present judgment, we remind the High Courts that the jurisdiction of the High Court, in an appeal under Section 100 of the CPC, is strictly confined to the case involving substantial question of law and while deciding the second appeal under Section 100 of the CPC, it is not permissible for the High Court to re-appreciate the evidence on record and interfere with the findings recorded by the Courts below and/or the First Appellate Court and if the First Appellate Court has exercised its discretion in a judicial manner, its decision cannot be recorded as suffering from an error either of law or of procedure requiring interference in Second Appeal. We

have noticed and even as repeatedly observed by this Court and even in the case of Narayanan Rajendran v. Lekshmy Sarojini, (2009) 5 SCC 264, despite the catena of decisions of this Court and even the mandate under Section 100 of the CPC, the High Courts under Section 100 CPC are disturbing the concurrent findings of facts and/or even the findings recorded by the First Appellate Court, either without formulating the substantial question of law or on framing erroneous substantial question of law. Therefore, we are constrained to observe as above and remind the High Courts the limitations under Section 100 of the CPC and again hope that High Courts would keep in mind the legal position before interfering in Second Appeal under Section 100 of the Code of Civil Procedure."

4. *P. Subramaniyam v. Union of India and Others (Civil Appeal No. 7779/2012)*

Decided on – 15.03.2019

Bench – 1. Hon'ble Mr. Justice L. Nageswara Rao

2. Hon'ble Mr. Justice M.R. Shah

(The Department is not expected to advise or tell an employee about service rules. The Employee is expected to know the rules.)

FACTS

By the judgment and order dated 31.10.2006, the Learned Central Administrative Tribunal allowed the impugned O.A. by observing that as an employee respondent No. 4 was not aware of the quota-rota rule maintained by the department and also how the seniority list will be fixed between the LDCE appointee and direct recruitee and if he had been told that as per the quota-rota rule, the LDCE candidate would rank senior even though he was appointed as direct recruitee four months earlier, he would have definitely accepted the promotion through LDCE quota. The learned Tribunal observed that the department has failed to give proper guidance and advice to one of its employees and therefore he could not be denied of his legitimate right which will have a bearing on his seniority. Consequently, the learned Tribunal directed the department to place the original applicant in the seniority list above the appellant herein and one another.

Feeling aggrieved and dissatisfied with the order of the learned Tribunal, the appellant preferred a writ petition before the High Court and, by the impugned judgment and order, the High Court has dismissed the said writ petition and confirmed the order passed by the learned Tribunal. Hence the original writ petitioner has preferred the present appeal.

OBSERVATION AND DECISION (Paragraph Nos. 3 and 4)

The Hon'ble Supreme Court observed that the learned Tribunal as well as the High Court granted the relief to respondent No. 4 on the ground that the department ought to have informed and/or advised the employee with respect to the seniority to be fixed on the basis of rota-quota rule and as the department failed to do so, respondent No. 4 cannot be denied his legitimate right to be placed at an appropriate place in the seniority list, as otherwise also he was selected for a promotion in the LDCE quota also.

The Hon'ble Court held that both the Tribunal and the High Court erred in their judgements because it was for the employee to know the rule. The department was not expected to advise and/or tell the employee about howthe seniority will be fixed and/or about the rota-quota rule. The appellant was appointed in the LDCE quota and in the very year, respondent No. 4 was appointed as a direct recruitee. As per the rule position in that year, the direct recruitee was to be placed before the LDCE, therefore, respondent No. 4 was rightly placed below the appellant in the seniority list being a direct recruitee.

5. *The Govt. of India and Another v. P.Venkatesh (Civil Appeal No. 2425/2019)*

Decided on – 01.03.2019

Bench – 1. Hon'ble Mr. Justice Dr. D.Y. Chandrachud

2. Hon'ble Mr. Justice Hemant Gupta

(Observations of the Hon'ble Supreme Court on orders passed by High Courts and Tribunals directing Respondents to dispose of representation)

FACTS

The father of the respondent, who was working in the Union Ministry of Information and Broadcasting, died on 25 May 1996. The widow of the deceased employee made a representation for compassionate appointment. On 3 January 1997, the representation submitted by her was rejected. Thereafter, a fresh representation was made, which was considered and rejected in the Minutes of a Meeting held on 1 July 1999, which considered similar requests by several other employees.

In 2007, the respondent initiated proceedings before the Madras Bench of the Central Administrative Tribunal. The Tribunal, by its order dated 26 June 2007, directed the appellants to consider the representation of the respondent dated 14 February 2006 by a speaking order. The OA was disposed of. Accordingly, on 13 November 2007, a speaking order was passed rejecting the representation. The respondent then filed another OA before the Tribunal on which an order was passed on 16 March 2011 directing the appellants to dispose of the representation after re-consideration. Again, when the claim for compassionate appointment was rejected on 25 August 2011, the respondent moved the Tribunal in a third OA. The Tribunal dismissed the OA by an order dated 30 April 2013, holding that the claimant was not eligible under the Scheme under which the maximum period for which the name of a candidate for compassionate appointment could be kept for consideration was three years. Following the order of the Tribunal, the respondent filed a Writ Petition before the High Court in which the impugned order has been passed, setting aside the judgment of the Tribunal and granting a mandamus for appointment on a compassionate basis. The High Court observed, after perusing the record, that though the representation had been rejected on the ground that the elder brother of the respondent was gainfully employed, as a matter of fact, his salary certificate indicated that he was working on a daily wage basis.

Aggrieved by the order, the Govt. of India preferred the present Appeal.

OBSERVATIONS AND DECISION

The Hon'ble Supreme Court observed that compassionate appointment is intended to enable the family of a deceased employee to tide over the crisis which is caused as a result of the death of an employee, while in harness. The essence of the claim lies in the immediacy of the need. The Hon'ble Court while stressing upon the relevance and importance of compassionate appointment as discussed in ***Umesh Kumar Nagpal v. State of Haryana, 1994 (4) SCC 138,*** further held that it was unfortunate on the part of the Tribunal to have passed a succession of orders calling upon the appellants to consider and then re-consider the representations for compassionate appointment and made the following observations: -

"***This 'dispose of the representation' mantra is increasingly permeating the judicial process in the High Courts and the Tribunals. Such orders may make for a quick or easy disposal of cases in overburdened adjudicatory institutions. But, they do no service to the cause of justice. The litigant is back again before the Court, as this case shows, having incurred attendant costs and suffered delays of the legal process. This would have been obviated by calling for a counter in the first instance, thereby resulting in finality to the dispute.***"

6. *Sr. Superintendent of Post Offices v. Gursewak Singh and Others (Civil Appeal No. 3150/2019)*

Decided on – 15.03.2019

Bench – 1. Hon'ble Mr. Justice Uday Umesh Lalit

2. Hon'ble Mr. Justice Indu Malhotra

(*Gramin Dak Sewak* is not an "employee" under the Payment of Gratuity Act, 1972 and is not entitled to payment of gratuity under Gramin Dak Sewak (Conduct & Engagement) Rules, 2011 upon voluntary resignation)

ISSUES INVOLVED

(i) Whether a Gramin Dak Sewak is an 'employee' as per Section 2(e) of the 1972 Act, and is entitled to payment of Gratuity under this Act?

(ii) Whether a Gramin Dak Sewak is eligible for payment of Gratuity under the 2011 Rules upon voluntary resignation?

OBSERVATIONS AND DECISION(Paragraph Nos. – 9.4, 10.1, 10.2)

Issue (i)

Section 2(e) of thePayment of Gratuity Act, 1972 excludes persons who hold a post with the Central or State Government and are governed by any other Act or rules providing for payment of gratuity. Gramin Dak Sewaks are engaged as Extra Departmental Agents, a post governed by Gramin Dak Sewak (Conduct & Engagement) Rules, 2011. These Rules have a separate provision for payment of Gratuity to the Extra Departmental Agents. A Gramin Dak Sewak is not an "employee" under the 1972 Act.

Issue (ii)

The 2011 Rules provide that Gramin Dak Sewaks are Extra-Departmental Agents, who are outside the Civil Service of the Union, and shall not claim to be at par with the Central Government Employees. The Extra-Departmental Agents are engaged by the Department of Posts & Telegraphs to cater to the postal requirements in the rural and remote areas. Rule 3-A(i) of the 2011 Rules provides that the Gramin Dak Sewaks shall not be required to perform duties beyond a maximum period of 5 hours a day. This shows the vocational nature of the service. Rule 6(1) of the 2011 Rules provides for payment of gratuity to

Gramin Dak Sewaks. However, Rule 6(13) states that no Gratuity is payable if an Extra-Departmental Agent quits the agency on his own. In the present case, the Order was passed under Rule 6(13) permitting Respondent No. 1 to quit the services of the Gramin Dak Sewak as per his voluntary resignation. As a consequence of his resignation, Respondent No. 1 became disentitled from the payment of Gratuity under the statutory 2011 Rules applicable to Gramin Dak Sewaks.

7. *Sarvepalli Ramaiah (died) as per LRs and Others v. The District Collector, Chitoor District and Others (Civil Appeal No. 7461/2009)*

Decided on – 14.03.2019

Bench – 1. Hon'ble Mrs. Justice R. Banumathi

2. Hon'ble Mrs. Justice Indira Banerjee

(Basic Principles of Judicial Review of Administrative Decisions under Article 226 – "Judicial review under Article 226 is directed, not against the decision, but the decision making process.")

CONCURRING JUDGEMENT OF* HON'BLE INDIRA BANERJEE J. *(PRAGRAPH NOS. 23, 24, 25, 26, 27, 29, 32)

- Administrative decisions are subject to judicial review under Article 226 of the Constitution, only on grounds of perversity, patent illegality, irrationality, want of power to take the decision and procedural irregularity. Except on these grounds administrative decisions are not interfered with, in exercise of the extra ordinary power of judicial review.
- In this case, the impugned decision, taken pursuant to orders of Court, was based on some materials. It cannot be said to be perverse, to warrant interference in exercise of the High Court's extra ordinary power of judicial review. A decision is vitiated by irrationality if the decision is so outrageous, that it is in defiance of all logic; when no person acting reasonably could possibly have taken the decision, having regard to the materials on record. The decision in this case is not irrational.
- A decision may sometimes be set aside and quashed under Article 226 on the ground of illegality. This is when there is an apparent error of law on the face of the decision, which goes to the root of the decision and/or in other words an apparent error, but for which the decision would have been otherwise.
- Judicial review under Article 226 is directed, not against the decision, but the decision making process. Of course, a patent illegality and/or error apparent on the face of the decision, which goes to the root of the decision, may vitiate the decision making process. In this case there is no such patent illegality or apparent error. In exercise of power under Article 226, the Court does not sit in appeal over the decision impugned, nor does it adjudicate hotly disputed questions of fact.

- Relief under Article 226 was also liable to be refused on the grounds of delay, laches, acquiescence and/or omission of the Petitioner to assert their right, if any, within a reasonable time.
- Under Article 226, while exercising its extra ordinary power of judicial review,, it is not for the High Court to reanalyse the evidence on record and adjudicate a disputed question of fact.

At last, the Hon'ble Judge in her concurrent Judgment, referring to ***Susetha vs. State of Tamil Nadu, (2006) 6 SCC 543, M.C. Mehta (Badkhal and Surajkund Lakes Matter) vs. Union of India, (1997) 3 SCC 715 and Intellectuals Forum v. State of Andhra Pradesh, (2006) 3 SCC 549,*** pointed out that the Apex Court has time and again emphasized the need to retain and restore water bodies and held that water bodies are inalienable. Land comprised in water bodies cannot be alienated to any person even if it is dry.

8. *Union of India and Others v. Ex. No. 6492086A SEP/ASH Kulbeer Singh (Civil Appeal No. 3095/2017)*

Decided on – 11.03.2019

Bench – 1. Hon'ble Mrs. Justice Dr. D.Y. Chandrachud

2. Hon'ble Mrs. Justice Hemant Gupta

(Dismissal from service as a punishment to a soldier for unauthorized absence of 302 days is not harsh)

FACTS

The respondent was enrolled in the Indian Army as a Sepoy in the Army Service Corps on 25 April 1996. On 11 November 2007, he was dispatched on a permanent posting to 874 ASC Batallion, which was deployed in Jammu and Kashmir. Having failed to report to his new Unit on 21 November 2007, he was declared as absent without leave on 22 November 2007. In terms of Section 106 of the Army Act 1950, a Court of Inquiry was held and the respondent was declared to be a deserter with effect from 22 November 2007. On 18 September 2008, after a lapse of 302 days, the respondent reported to the ASC Centre (North) at Gaya.

The Respondent was tried in a Summary Court Martial on two counts: the first count was his unauthorized absence over a period of 302 days without leave; while the second count related to the loss of certain equipment and clothing. After he pleaded guilty, he was sentenced to dismissal from service. Partly allowing his plea, the Armed Forces Tribunal observed that the punishment could have been modulated so as to allow him to continue to serve the Army until he qualified for pension. The tribunal held that the soldier would be deemed to be notionally in service w.e.f. 12.11.2008 till he attains the service which entitles him to receive pension and thereafter he shall be granted pension with all consequential benefits.

In the appeal filed by Union of India, the bench comprising Justice DY Chandrachud and Justice Hemant Gupta disagreed with this view taken by the Tribunal and observed that it went wrong in the conclusion that the punishment of dismissal from service was harsh and disproportionate.

ARGUMENTS

Two submissions were urged on behalf of the respondent. Firstly, it was submitted that Section 39 of the Army Act, 1950 provides that on conviction by a Court Martial, a person who has committed an offence inter alia of overstaying the leave granted shall be liable to suffer imprisonment for a term which may extend to three years or such lesser punishment as may be mentioned in the Act. In the present case, it was, hence, urged that instead of subjecting the respondent to a term of imprisonment under Section 39, he was dismissed from service. Secondly, it was submitted that if the statement of the respondent is duly construed, it would be incorrect to hold that he had admitted the charge of misconduct.

OBSERVATION AND DECISION

The Hon'ble Supreme Court did not find any merit in the first submission and held that Section 39 of the Army Act, 1950 is comprised in Chapter VI which deals with "Offences". Section 39 provides that on a conviction by Court Martial for an offence involving absence without leave, a sentence of imprisonment which may extend up to three years may be imposed. Chapter VII which deals with "Punishments" contains Section 71. Clause (e) of Section 71 specifically contemplates the punishment of dismissal from service on conviction by Court Martials.

The second submission was also rejected by the Hon'ble Court on the ground that it was evident from his statement that the respondent had admitted his absence for 302 days without leave. The statement contained a justification for the absence. Also the respondent did not make any effort to apply for extension of his leave. The Hon'ble Court held that absence of 302 days from his duty by a member of the Armed Force could not be condoned and therefore the Armed Forces Tribunal was in error in coming to the conclusion that the punishment which was imposed was harsh. The only basis for the finding was that the respondent had put in twelve years of service. The Hon'ble Court held that this was all the more a reason why any responsible member of the Armed Force should not have absented from service without permission.

9. *Union of India and Others v. All India Trade Union Congress and Others (Civil Appeal No. 3146/2019)*

Decided on – 15.03.2019

Bench – 1. Hon'ble Mrs. Justice Abhay Manohar Sapre

2. Hon'ble Mrs. Justice Dinesh Maheshwari

("The High Court failed to see that it is not the function of the Courts to frame any Scheme but it is the sole prerogative of the Government to do it. All that the High Court, in exercise of its extraordinary power under Article 226 of the Constitution, can do is to direct the Government to consider for framing an appropriate Scheme having regard to the facts and circumstances of any case which this Court did in the case of Union of India(supra) but not beyond it. It is only in an exceptional case where the Court considers it proper to issue appropriate mandatory directions it may do so but not otherwise.")

FACTS

The Respondents had filed a writ petition in the High Court claiming a relief for regularization of the casual workers, who were working for a considerable long period in one project undertaken by the BRO (Border Roads Organization) in the State of Uttarakhand for construction of roads for going to pilgrimage of Char Dham Yatra. According to them these workers though working for number of years for the Union of India and rendering their services, but they were neither being regularized in the Government set up as a Government employee and nor were being paid regular salary/perks/facilities which were being paid to Government employees and nor they were being provided with any protection which was available to any Government employee. The Hon'ble High Court framed a scheme itself to regularize the services of the Casual Paid Labourers and granted them the benefits similar to those of the regular employees under all the Labour Laws, and issued a mandamus to the Government to implement it. The Union of India approached the Hon'ble Supreme Court challenging the order passed by the Hon'ble Uttarakhand High Court.

OBSERVATION AND JUDGEMENT (Paragraph Nos. – 12, 13, 14, 15, 16, 17)

The Hon'ble Supreme Court allowed the present appeal by reiterating the principles laid down by the Apex Court in ***Union of India v. Vartak Labour Union, (2014) 4 SCC 200*** and in ***State of Karnataka v. Uma Devi*** that claim for regularization of the respondents' members merely because they have been working for the BRO for a considerable period of time cannot be granted in light of several decisions of this Court, wherein it has been consistently held that casual employment terminates when the same is discontinued, and merely because a temporary or casual worker has been engaged beyond the period of his employment, he would not be entitled to be absorbed in regular service or made permanent, if the original appointment was not in terms of the process envisaged by the relevant rules.

In the view of the Hon'ble Court, the High Court should have examined the case in the light of the law laid down by this Court in the case of *Union of India* (supra) rather than to evolve its own separate scheme because it is not the function of the Courts to frame any Scheme but it is the sole prerogative of the Government to do it. All that the High Court, in exercise of its extraordinary power under Article 226 of the Constitution, can do is to direct the Government to consider for framing an appropriate Scheme having regard to the facts and circumstances of any case which this Court did in the case of *Union of India* (supra) but not beyond it. It is only in an exceptional case where the Court considers it proper to issue appropriate mandatory directions it may do so but not otherwise.

10. *Babu Ram v. Santokh Singh(deceased) through LRs and Others (Civil Appeal No. 2553/2019)*

Decided on – 07.03.2019

Bench – 1. Hon'ble Mrs. Justice Uday Umesh Lalit

2. Hon'ble Mrs. Justice M.R. Shah

(The Applicability of Section 22 of the Hindu Succession Act in respect of Agricultural Lands has been dealt with in this case. The High Courts had diverse opinions on this issue which the Hon'ble Supreme Court settled in the present case.)

FACTS

The substantial question of law before the Himachal Pradesh High Court in a second appeal was whether Section 22 of the Hindu Succession Act excludes interest in agricultural land of an intestate and the preferential right over "immovable property" as envisaged in the said provision is confined only to business and such immovable property which does not include the agricultural land? The High Court had held that Section 22 does not exclude interest in agricultural land and that the heir has preferential right over such land. This Judgement was under challenge before the Hon'ble Supreme Court in the present case.

***OBSERVATION AND DECISION* (*Paragraph Nos.* – 15,)**

The Hon'ble Supreme Court held that The present Entry 5 of List III shows "succession" in its fullest sense to be a topic in the Concurrent List. The concept of succession will take within its fold testamentary as well as intestate succession. The idea is, therefore, clear that when it comes to "transfer, alienation of agricultural land" which are transfers inter vivos, the competence under Entry 18 of List II is with the State legislatures but when it comes to "intestacy and succession" which are essentially transfers by operation of law as per law applicable to the person upon whose death the succession is to open, both the Union as well as State legislatures are competent to deal with the topic. Consequently, going by the principles of Article 254 of the Constitution of India the matter will have to be dealt with. Though, succession to an agricultural land is otherwise dealt with under Section 22 of the Act, the provisions of Section 4(2) of the Act, before its omission, had made it clear that the provisions of the Act would not apply in cases inter alia of devolution of tenancy rights in respect of agricultural holdings. Thus, the effect of Section

4(2) of the Act before its deletion was quite clear that, though the general field of succession including in respect of agricultural lands was dealt with under Section 22 of the Act, insofar as devolution of tenancy rights with respect to agricultural holdings were concerned, the provisions of Section 22 would be inapplicable.

The Hon'ble Court also dealt with another facet of the issue and observed that even if it be accepted that the provisions of Section 22 would apply in respect of succession to agricultural lands, the question still remains whether the preferential right could be enjoyed by one or more of the heirs. Would that part also be within the competence of the Parliament? The "right in or over land, land tenures....." are within the exclusive competence of the State legislatures under Entry 18 of List II of the Constitution. Pre-emption laws enacted by State legislatures are examples where preferential rights have been conferred upon certain categories and classes of holders in cases of certain transfers of agricultural lands. Whether conferring a preferential right by Section 22 would be consistent with the basic idea and principles is the question. The content of preferential right cannot be disassociated in the present case from the principles of succession. They are both part of the same concept.

The Hon'ble Court concluded that the preferential right given to an heir of a Hindu under Section 22 of the Act is applicable even if the property in question is an agricultural land. All the judgements of High Courts which are contrary to this conclusion have also been overruled.

11. *The Branch Manager, National Insurance Co. Ltd. v. Smt. Mousumi Bhattacharjee and Others (Civil Appeal No. 2614/2019)*

Decided on – 26.03.2019

Bench – 1. Hon'ble Mrs. Justice Dr. D.Y. Chandrachud

2. Hon'ble Mrs. Justice Hemant Gupta

(Where a disease is caused or transmitted by insect bite/virus in the natural course of events, it would not be covered by the definition of an accident. *"In a policy of insurance which covers death due to accident, the peril insured against is an accident: an untoward happening or occurrence which is unforeseen and unexpected in the normal course of human events."*)

FACTS

The present case raised a very interesting question before the Hon'ble Court which was whether a death due to malaria occasioned by a mosquito bite in Mozambique, constituted a death due to accident for the purposes of insurance claim.

The insured was working as a Manager of a Tea Estate in Assam. He thereafter took up employment in 2012 as a Manager of a Tea Factory at Cha-De-Magoma, District Gurue, Province-Zambezia, Republic of Mozambique. During his stay in Mozambique, the insured was admitted to the hospital on 14 November 2012. He was diagnosed with encephalitis malaria and died on 22 November 2012 due to multi-organ failure. The heirs of the deceased filed a complaint under the Consumer Protection Act 1986 before the District Consumer Disputes Redressal Forum, North 24 PGS, Barasat alleging that the insurer had committed a deficiency of service in not settling the claim under the insurance cover. In the written statement filed by the appellant, it set up the plea that Section II of the policy insured the borrower of the loan against personal accident. Death due to malaria caused by a mosquito bite was, in the submission of the insurer, a result of an infection or disease and was not an accidental death under the terms of the insurance policy. By an order dated 28 February 2014, the District Forum allowed the claim and called upon the insurer to pay the entire outstanding EMIs in respect of the loan to the Bank of Baroda. After statutory appeal and revision before the National Consumer Disputes Redressal Commission, it was held that a death caused due to malaria caused by mosquito bite is an accident. Aggrieved by this, the present Appellants approached the Hon'ble Supreme Court.

OBSERVATION AND DECISION (Paragraph Nos. 18, 20)

After discussing the meaning of the word "accident" as held in ***Regional Director, ESI Corporation v. Francis De Costa, (1993) Supp (4) SCC 110,*** and in ***Jyoti Ademma v. Plant Engineer, Nellore, (2006) 5 SCC 513,*** the Hon'ble Supreme Court held that As the law of insurance has developed, there has been a nuanced understanding of the distinction between an accident and a disease which is contracted in the natural course of human events in determining whether a policy of accident insurance would cover a disease. At one end of the spectrum is the theory that an accident postulates a mishap or an untoward happening, something which is unexpected and unforeseen. This understanding of what is an accident indicates that something which arises in the natural course of things is not an accident. This is the basis for holding that a disease may not fall for classification as an accident, when it is caused by a bodily infirmity or a condition. A person who suffers from flu or a viral fever cannot say that it is an accident. Of course, there is an element of chance or probability in contracting any illness. Even when viral disease has proliferated in an area, every individual may not suffer from it. Getting a bout of flu or a viral illness may be a matter of chance. But a person who gets the flu cannot be described as having suffered an accident: the flu was transmitted in the natural course of things. To be bitten by a mosquito and be imbued with a malarial parasite does involve an element of chance. But the disease which is caused as a result of the insect bite in the natural course of events cannot be regarded as an accident. Particularly, when the disease is caused in an area which is malaria prone. On the other hand, there may well be instances where a bodily condition from which an individual suffers may be the direct consequence of an accident. A motor car accident may, for instance, result in bodily injuries, the consequence of which is death or disability which may fall within the cover of a policy of accident insurance. Hence, it has been postulated that where a disease is caused or transmitted in the natural course of events, it would not be covered by the definition of an accident. However, in a given case or circumstance, the affliction or bodily condition may be regarded as an accident where its cause or course of transmission is unexpected and unforeseen.

The Hon'ble Court further held that in a policy of insurance which covers death due to accident, the peril insured against is an accident: an untoward happening or occurrence

which is unforeseen and unexpected in the normal course of human events. The death of the insured in the present case was caused by encephalitis malaria. The claim under the policy is founded on the hypothesis that there is an element of uncertainty about whether or when a person would be the victim of a mosquito bite which is a carrier of a vector-borne disease. The Hon'ble Court did not agree with the submission that being bitten by a mosquito is an unforeseen eventuality and should be regarded as an accident. The illness of encephalitis malaria through a mosquito bite cannot be considered as an accident. It was neither unexpected nor unforeseen. It was not a peril insured against in the policy of accident insurance.

12. *The Managing Director, Kerala Tourism Development Corporation Ltd. v. Deepti Singh and Others (Civil Appeal No. 6038/2015)*

Decided on – 15.03.2019

Bench – 1. Hon'ble Mrs. Justice Dr. D.Y. Chandrachud

2. Hon'ble Mrs. Justice Hemant Gupta

(Discussion on the tort of negligence – A hotel which provides a swimming pool for its guests owes a duty of care. The duty of care arises from the fact that unless the pool is properly maintained and supervised by trained personnel, it is likely to become a potential source of hazard and danger.)

FACTS

Satyendra Pratap Singh and family had come to the Hotel Samudra for a family holiday. While he was swimming in the pool, he suddenly became unconscious and sank into the pool. A foreigner who witnessed this jumped into the pool and took him out. Though he was taken to hospital, the death occurred. His spouse approached the consumer forum against KTDC. The NCDRC held that there was a deficiency of service on the part of the management of the hotel, observing that the lifeguard on duty had also been assigned the task of being a Bartender. Before the Hon'ble Supreme Court, KTDC challenged this order which awarded a compensation of Rs. 62,50,000/- to be paid to the present Respondents for deficiency of service.

OBSERVATIONS AND DECISION (Paragraph Nos.9, 10, 12-24)

The Hon'ble Supreme Court discussed the ingredients of the tort of negligence, namely,

(i) *Existence of a duty of care*;

Referring to cases such as ***Rajkot Municipal Corporation v Manjulben Jayantilal Nakum, (1997) 9 SCC 552***, the Hon'ble Supreme Court held that a hotel which provides a swimming pool for its guests owes a duty of care. The duty of care arises from the fact that unless the pool is properly maintained and supervised by trained personnel, it is likely to become a potential source of hazard and danger. Every guest who enters the pool may not have the same level of proficiency as a swimmer. The management of the hotel can reasonably foresee the consequence which may arise if the pool and its facilities are not properly maintained. The observance of safety requires good physical facilities but in addition, human supervision over those who

use the pool. Allowing or designating a life guard to perform the duties of a Bartender is a clear deviation from the duty of care. Mixing drinks does not augur well in preserving the safety of swimmers. The appellant could have reasonably foreseen that there could be potential harm caused by the absence of a dedicated lifeguard. The imposition of such a duty upon the appellant can be considered to be just, fair and reasonable. The failure to satisfy this duty of care would amount to a deficiency of service on the part of the hotel management.

(ii) *A breach of the duty through action or omission*

The Hon'ble Court, referring to "***Winfield & Jolowicz on Torts"*** and judgements from various countries held that the lifeguard on duty was also functioning as the Bartender, and that a foreigner was the first one to notice the deceased drowning in the swimming pool. The breach of the duty of care lies in the fact that while the hotel had made the facility of a swimming pool available for its guests, it ought to have assigned a lifeguard who would perform his duties only in that capacity. The reasoning of the NCDRC to the effect that a lifeguard on duty should not be distracted by virtue of being assigned other duties, is eminently fair and proper.

*(iii)*Damages arising as a consequence of the breach

Discussing the concept of causation in law of torts by referring to ***Reeves v. Commissioner of Police, [2000] 1 AC 360,*** the Hon'ble Court held that the death of the deceased was due to drowning. Significantly, there was no evidence of the presence of alcohol in the body of the deceased. The death was due to drowning. Considering the delay in the response by the life guard who was preoccupied with bartending duties, the drowning of the deceased was a direct consequence of negligence.

13. *State of Uttarakhand and Others v. Prem Ram (Civil Appeal No. 3152/2019)*

Decided on – 15.03.2019

Bench – 1. Hon'ble Mrs. Justice Dr. D.Y. Chandrachud

2. Hon'ble Mrs. Justice Hemant Gupta

(The Hon'ble Supreme Court upheld the order of dismissal of a Police constable who was found drunk while on duty upholding that such a conduct falls under serious misconduct.)

FACTS

In 1987, the respondent joined service as a Constable and was posted in the District of Pithoragarh, Uttarakhand. While he was posted at Berinag, Uttarakhand it was alleged that he was found in an inebriated state on 1 November 2006 and was misbehaving with the public. He was brought to the police station and was confined to the barracks. A medical examination was done, which showed that he was under the influence of alcohol. A charge sheet was issued to the respondent on 24 February 2007. After a disciplinary enquiry, the enquiry officer found that the charge of misconduct was substantiated. Following this, a notice to show cause was issued on 3 May 2007. The respondent submitted his reply on 8 May 2017. On 16 May 2007, the Superintendent of Police, Pithoragarh passed an order of dismissal, holding that the charge of drunkenness and misbehavior had been proved.

In the writ proceedings instituted by the respondent, on 21 April 2010, the High court disposed of the matter by relegating him to the remedy of a statutory appeal. The appeal was dismissed by the Inspector General of Police, Kumaon Range on 28 August 2010 and a revision was dismissed by the Additional Director General of Police on 19 May 2011. The writ petition instituted by the respondent against the order dated 19 May 2011 was dismissed by a single Judge of the High Court on 15 September 2014. In the Special Appeal instituted by the respondent, a Division Bench of the High Court by its judgment and order dated 30 October 2014 allowed the appeal and directed that the dismissal from service be converted to compulsory retirement. The Division Bench held that the past conduct of the respondent should not have been taken into consideration and that since he had completed 25 years of satisfactory service in the police department, the punishment of dismissal seems to be excessive.

The State of Uttarakhand challenged this order before the Hon'ble Supreme Court.

OBSERVATIONS AND DECISION

The Hon'ble Court held that the charge against the respondent was of a serious act of misconduct involving drunkenness and misbehavior with the public. The fact of intoxication was duly proved in the medical report and, therefore, having regard to the seriousness of the charge of misconduct and the fact that the respondent was a member of the police service, the Hon'ble Supreme Court found no justification for the High Court to interfere with the order of dismissal and held that the learned single Judge in the judgment dated 15 September 2014 was justified in dismissing the writ petition but the Division Bench has erred in allowing the Special Appeal since the order of the learned Single Judge did not suffer from any error of fact or law.

14. M/S Achal Industries v. State of Karnataka (Civil Appeal No. 4837/2011)

Decided on – 28.03.2019

Bench – 1. Hon'ble Mrs. Justice A.M. Khanwilkar

2. Hon'ble Mrs. Justice Ajay Rastogi

(The Hon'ble Supreme Court held that State can include proceeds from Inter-State sale in total turnover to classify dealers for sales tax slab.)

FACTS

The appellant was a manufacturer and registered dealer of the cashew kernels cashew shell oil, etc. Assessments were made for the years 1990-91 to 1999-2000 by the respective assessing authorities under Section 12(3) of the Act. Against the assessment orders of the assessing authorities, appeals/revision petitions were preferred before the appellate/revisional authority and the contention advanced by the learned counsel for the appellant was that levy of tax under Section 6-B of the Act, on the total turnover is a misconstruction of the provision and it has to be on the "taxable turnover" which may be in conformity with Article 286 of the Constitution of India but that was neither accepted by the assessing authority nor at the appellate/revisional stage against which the present appeals have been preferred impugning the assessments made for the years 1990-91 to 1999-2000 in the instant appeals. The main thrust of the submission of the appellant was that Courts below had manifestly erred in appreciating that the 'total turnover' as defined under Section 6-B(1) for the purpose of levy turnover tax can in no event include the 'turnover' with reference to which the State has no power to levy tax under the constitutional scheme and the submission proceeds that the levy of tax under Section 6-B can be on the 'taxable turnover' alone.

OBSERVATION AND DECISION

The Hon'ble Court referred to the judgement of the Supreme Court in ***M/s. Hoechst Pharmaceuticals Ltd. and Others v. State of Bihar and Others, 1983 (4) SCC 45,*** to reiterate the principle of economic superiority for the purpose of levying turnover tax while holding that the interpretation of statute would not depend upon contingency since it is trite law which the Court would ordinary take recourse to golden rule of strict interpretation while interpreting taxing statutes. The Court, in *M/s. Hoechst*

Pharmaceuticals Ltd. And Others case (supra), while examining the *pari meteria* provision of sub-Section (1) of Section 5 of the Bihar Finance Act which provides for levy of surcharge on gross turnover in relation to the tax payable in reference to Article 286 of the Constitution of India read with Entry 54 under List II of Seventh Schedule into consideration had held –

"The decision in Fernandez case [AIR 1957 SC 657] is therefore clearly an authority for the proposition that the State Legislature notwithstanding Article 286 of the Constitution while making a law under Entry 54 of List II of the Seventh Schedule can, for purposes of the registration of a dealer and submission of returns of sales tax, include the transactions covered by Article 286 of the Constitution. That being so, the constitutional validity of sub-section (1) of Section 5 of the Act which provides for the classification of dealers whose gross turnover during a year exceeds Rs 5 lakhs for the purpose of levy of surcharge, in addition to the tax payable by him, is not assailable. So long as sales in the course of inter-State trade and commerce or sales outside the State and sales in the course of import into, or export out of the territory of India are not taxed, there is nothing to prevent the State Legislature while making a law for the levy of a surcharge under Entry 54 of List II of the Seventh Schedule to take into account the total turnover of the dealer within the State and provide, as has been done by sub-section (1) of Section 5 of the Act, that if the gross turnover of such dealer exceeds Rs 5 lakhs in a year, he shall, in addition to the tax, also pay a surcharge at such rate not exceeding 10 per centum of the tax as may be provided. The liability to pay a surcharge is not on the gross turnover including the transactions covered by Article 286 but is only on inside sales and the surcharge is sought to be levied on dealers who have a position of economic superiority."

Relying on the aforesaid judgement, the Hon'ble Court held that the scheme of the Act of which reference has been made in detail, the expression 'total turnover' has been referred to for the purpose of identification/classification of dealers for prescribing various rates/slabs of tax leviable to the dealer and read with first and second proviso to Section 6-B(1), this makes the intention of the legislature clear and unambiguous that except the deductions provided under the first proviso to Section 6-B(1) nothing else can be deducted from the total turnover as defined under Section 2(u-2) for the purpose of levy of turnover tax under Section 6-B of the Act.

15. Chand Kaur (D) Thr. LRs. v. Mehar Kaur (D) Thr. LRs. (Civil Appeal Nos. 3276-3281/2019)

Decided on – 28.03.2019

Bench – 1. Hon'ble Mrs. Justice Abhay Manohar Sapre

2. Hon'ble Mrs. Justice Dinesh Maheshwari

("This Court has constantly held that the High Court has no jurisdiction to allow the second appeal without framing a substantial question of law as provided under Section 100 of the Code. In other words, the sine qua non for allowing the second appeal is to first frame the substantial question(s) of law arising in the case and then decide the second appeal by answering the question(s) framed.")

FACTS

The High Court of Punjab and Haryana had disposed of a bunch of Second Appeals (RSA Nos.2066 to 2068 of 1987 and RSA 2292 to 2294 of 1987) but had done so without framing any substantial question(s) of law as required under Section 100 of the Civil Procedure Code, 1908.

OBSERVATION AND DECISION (Paragraph Nos. 6, 7, 8)

The Hon'ble Court, referring to its decision in ***Vijay Arjun Bhagat and Ors. V. Nana Laxman Tapkire and Ors., (2018) 6 SCC 727,*** held that the High Court failed to frame any substantial question either at the time of admitting the appeal or before final hearing and yet proceeded to allow some of the second appeals in the bunch by modifying the judgment impugned therein, the High Court committed jurisdictional error requiring this Court to interfere. The Hon'ble Court further observed that the Court has constantly held that the High Court has no jurisdiction to allow the second appeal without framing a substantial question of law as provided under Section 100 of the Code. In other words, the sine qua non for allowing the second appeal is to first frame the substantial question(s) of law arising in the case and then decide the second appeal by answering the question(s) framed.

16. Bajaj Auto Limited v. Union of India and Ors. (Civil Appeal Nos. 3239/2019)

Decided on – 27.03.2019

Bench – 1. Hon'ble Mrs. Justice L. Nageswara Rao

2. Hon'ble Mrs. Justice Sanjay Kishan Kaul

(This case deals with the liability towards National Calamity Contingent Duty (for short 'NCCD'), Education Cess and Secondary & Higher Education Cess of a manufacturing establishment, which is exempted from payment of Central Excise Duty (for short 'CENVAT') under the Central Excise Act, 1944.)

OBSERVATIONS AND DECISION (Paragraph Nos. – 12, 16, 19, 22)

The Hon'ble Court relied on its judgement in ***SRD Nutrients Pvt. Ltd. v. Commissioner of Central Excise, Guwahati, (2018 (1) SCC 105,*** which dealt with the same issue related to the Education Cess and the Secondary & Higher Education Cess. However, for the issue related to NCCD, the Hon'ble Court held that while the two cesses discussed aforesaid were in the nature of levy on the excise duty payable, the NCCD is levied on the product itself, as per Section 136 of the Finance Act, 2001. It is this aspect, *inter alia*, which was canvassed by the Department to persuade the Court to take a different view from the one taken qua the other two cesses.

The Hon'ble Court observing that exemption notifications, like the one in question must be read in a manner that give them a liberal interpretation, provided that no violence is done to the language employed. In such cases, it is not as if the principle of strict interpretation of tax law has been given a complete go by, but that rule of interpretation would apply at a different stage, i.e., to determine whether the exemption is applicable to the assessee or not. Once such exemption is indeed found to be applicable to the assessee in question, a liberal approach is to be adopted by the Court in construing the language, such as to allow the benefit to be reaped by the beneficiary in question, as held in ***Novopan India Ltd., Hyderabad v. CCE and Customs, Hyderabad, 1994 Supp. (3) SCC 606.***

Regarding the issue of NCCD, the Hon'ble Court took the same view which had been taken in the case of ***SRD Nutrients Pvt. Ltd.*** (supra) in relation to Education Cess and Secondary & Higher Education Cess. The Court held that in the case of NCCD, it is in the nature of an excise duty. It has to bear the same character as those respective taxes to

which the surcharge is appended. NCCD will not cease to be an excise duty, but is the same as an excise duty, even if it is levied on the product. Thus, when NCCD, at the time of collection, takes the character of a duty on the product, whatever may be the rationale behind it, it is also subject to the provisions relating to excise duty, applicable to it in the manner of collection as well as the obligation of the taxpayer to discharge the duty. Once the excise duty is exempted, NCCD, levied as an excise duty cannot partake a different character and, thus, would be entitled to the benefit of the exemption notification. The exemption notification also states that the exemption is from the "whole of the duty of excise or additional duty of excise."

17. *The State of Madhya Pradesh and Others v. Bunty (Civil Appeal No. 3046/2019)*

Decided on – 14.03.2019

Bench – 1. Hon'ble Mrs. Justice Arun Mishra

2. Hon'ble Mrs. Justice Navin Sinha

(Appointments in cases where the Applicant has been an accused in a criminal case and his acquittal in the case is based on the benefit of the doubt or any other technical reason.)

FACTS

The respondent applied for the post of a Constable in the year 2013. He appeared and cleared the Police Constable Recruitment Test (II). Physical endurance test was held on 06.05.2013. He was medically examined and selected on 09.05.2014. On 05.06.2014 he was called for verification of the marks sheet, caste certificate. He was called for police verification by the Screening Committee on 25.02.2015. On 11.03.2015, the department, on the basis of the Report of the Screening Committee, decided to deny the appointment to the respondent/Bunty for the reasons mentioned therein. As against the denial of the appointment respondent/Bunty filed a writ petition before the High Court of Madhya Pradesh, Bench at Indore. Learned Single Judge of the High Court considered the matter in extensive detail and relied upon the decision of this Court in Commissioner of Police, New Delhi and Another v. Mehar Singh, (2013) 7 SCC 685, and that the petitioner had appeared before the Screening Committee and it was found in objectivity by the Screening Committee that he was involved in a case of moral turpitude and the acquittal was not clean. He was found unfit for being appointed as Police Constable in a disciplined force. Reasons were communicated. However, the Division Bench, by the impugned judgment and order, has allowed the writ appeal preferred by the respondent/Bunty on the ground that the judgment of acquittal is based on material on record, he was acquitted since the offence was not proved beyond reasonable doubt, appointment order has to be issued as a matter of course. Hence, the present appeal by special leave was filed before the Hon'ble Supreme Court.

OBSERVATIONS AND DECISION (Paragraph Nos. – 9, 13)

The Hon'ble Supreme Court held that Considering the nature of allegation in the case, it was a case of impersonation as a police officer and thereby committing the offence under

Sections 392 and 411 of the IPC against the Respondent. It was a case of the serious kind, which involved moral turpitude and having not been granted the clean acquittal in the criminal case merely by the grant of benefit of the doubt, clouds cannot be said to be clear as to the antecedents of the respondent. Thus, the perception formed by the Screening Committee that he was unfit to be inducted in the disciplined police force was appropriate. Therefore, in the aforesaid factual matrix, the Hon'ble Court held that the decision of Scrutiny Committee could not be said to be such which warranted judicial interference.

The Hon'ble Court further discussed the law in this regard laid down in ***Commissioner of Police, New Delhi and Another v. Mehar Singh, (2013) 7 SCC 685***, in ***Union Territory, Chandigarh Administration and Others v. Pradeep Kumar and Another, (2018) 1 SCC 797*** and in ***Avtar Singh v. Union of India and Others, (2016) 8 SCC 471*** and held that the law laid down in the aforesaid decisions makes it clear that in case of acquittal in a criminal case is based on the benefit of the doubt or any other technical reason. The employer can take into consideration all relevant facts to take an appropriate decision as to the fitness of an incumbent for appointment/continuance in service. The decision taken by the Screening Committee in the instant case, therefore, could not have been faulted by the Division Bench.

18. *Anandrao Ramchandra Salunke v. Life Insurance Corporation of India and Anr. (Civil Appeal No. 2568/2019)*

Decided on – 07.03.2019

Bench – 1. Hon'ble Mrs. Justice Dr. D.Y. Chandrachud

2. Hon'ble Mrs. Justice Hemant Gupta

(The interpretation of the provisions of Section 113 of the Insurance Act, 1938, related to "Surrender Value", before the amendment in 2015.)

OBSERVATIONS AND DECISIONS (Paragraph Nos. – 11, 13, 16)

The Hon'ble Court held that there are popular misconceptions about the concept of 'surrender value' in the sphere of life insurance. In a policy of fire insurance, a policy holder has no expectation of a surrender value. In contrast, a holder of a policy of life insurance may believe (as the appellant in this case does) that their surrender value will be equal to the total amount paid as premium. This expectation is misconceived. Simply put, life insurance operates on the basis of the law of averages. Premium is collected from all policy holders in order to create a common fund. Payouts from the fund are received only by those who suffer the peril which is insured. The economic loss suffered by few is divided amongst many. Premia are fixed by the insurer on the basis of expected mortality rates. Hypothetically speaking, if mortality rates of all individuals were to be equal irrespective of age and everyone paid the same premium, the discontinuance of a policy during its term would not entitle the insured to a surrender value since the common fund would be depleted on a regular basis. In reality, the mortality rates increase with age. Actuarial tables provide a guide to the insurer. Hence, when an insurer initially collects premium from individuals of a younger age, the amount it collects is higher than the amount it pays out towards claims. The difference between them is the 'reserve'. Thus if a policy holder wishes to discontinue a policy before the end of the term, they will only be entitled to their share of the 'reserve' as a surrender value. Since the value of the 'reserve' is the amount which the insurer collects as premium from policy holders from which it deducts the amount of the claims it pays out, the surrender value payable to a policy holder can never be equal to the premia paid by them.

The Hon'ble Court further held that in computing the surrender value of any subsisting bonus, reference ought to be made to the stipulations contained in Section 113. The first

proviso to Section 113(1) provides that the requirement of the addition of the surrender value of the bonus attaching to the policy at surrender is deemed to have been fulfilled where the method of calculating the guaranteed surrender value makes provision for the surrender value of the bonus attaching to the policy. The second proviso stipulates that the requirement of showing the guaranteed surrender value on a policy is deemed to have been complied with where the insurer shows on the policy the guaranteed surrender value by means of a formula which is accepted by the authority as satisfying the requirements under the third proviso.

19. Modern Transportation Consultation Services Pvt. Ltd. v. Central Provident Fund Commissioner Employees Provident Fund Organisation (Civil Appeal No. 7698 of 2009)

Decided on – 26.3.2019

Bench – 1. Hon'ble Mr. Justice Abhay Manohar Sapre

2. Hon'ble Mr. Justice Dinesh Maheshwari

(Whether the retired employees of Railways, who had withdrawn all the superannuation benefits, including full amount of accumulations in their provident fund accounts, are to be treated as "excluded employees" in terms of Paragraph 2(f) of the Employees' Provident Fund Scheme of 1952? If they are to be treated as "excluded employees", the said retired employees of Railways, on being re-employed by the appellants, may not be required to join the Fund created under the said Scheme of 1952 and consequently, the appellants may not be obliged to make any contribution in that regard.)

FACTS

The appellant No. 1, a Private Limited Company, had been engaged in manning the Captive Railway System of the Damodar Valley Corporation ('DVC'). The appellant No. 2 is said to be a Director of the appellant No. 1-company. The appellants would submit that their only connection with DVC had been a contract to supply the personnel for manning the cabins and gates on the railway-road; and they were receiving the remuneration for supplying the aforesaid personnel, who were retired employees of the Indian Railways and were engaged on a lump sum honorarium basis.

The Assistant Provident Fund Commissioner Circle-IV, Calcutta informed the appellant-company that the number of employees of its establishment being twenty-eight in the month of May, 1999, the establishment came within the purview of the Act of 1952 with effect from 01.05.1999. In reply, the Director of the appellant-company stated in his letter that all the persons engaged by the company, except two of them, were the retired Railway employees above 58 years of age; that all of them were working only on retainer basis; and that they were not covered under the Employees' Provident Fund Scheme. The said Assistant Provident Fund Commissioner refuted the contentions of the appellants while referring to Paragraph 26 of the Scheme of 1952 and while asserting, inter alia, that on and from 01.11.1990, an employee is eligible for enrolment as a member of the Scheme of 1952 from the date of joining an establishment covered under the Act of 1952; that there was no age bar for an employee to become a member of the Scheme of 1952; and

that the employees in question were not excluded employees in terms of the Scheme of 1952. The appellant-company having failed to remit the requisite contribution in relation to the employees concerned, the competent authority under the Act of 1952 commenced proceedings under Section 7A thereof, for determination of the money due from the appellants.

Aggrieved, the appellants preferred the writ petition before the High Court at Calcutta. The learned Single Judge of High Court, though held that the Act was applicable to the establishment of appellants but, thereafter, concluded that on superannuation, the retired employees of the Railways would fall within the definition of "excluded employees". Aggrieved by the order so passed by the learned Single Judge, the Central Provident Fund Commissioner and the Regional Provident Fund Commissioner preferred the Letters Patent appeal that has been considered and allowed by the Division Bench of High Court at Calcutta. The Division Bench took note of the meaning assigned to the expressions "Fund" and "Scheme" in the Act of 1952 as also the definition of "excluded employee" in Paragraph 2(f) of the Scheme of 1952 and rejected the contentions of the writ petitioners that the employees in question were to be treated as excluded employees.

OBSERVATION AND DECISION

The Hon'ble Court held that the crucial aspect to be considered in this matter is as to whether the definition of "excluded employees" in Paragraph 2(f) as also the stipulation in Paragraphs 26 and 69 of the Scheme of 1952 refer to any provident fund or only to the Fund under the Scheme of 1952?

As noticed above, in the setup and structure of the Act of 1952, specific distinction is maintained between the Fund, which is created by the Central Government under Section 5(1) of the Act and any other provident fund, which is created by an employer. Significantly, clause (f) of Paragraph 2 of the Scheme of 1952 refers to "the Fund" and not to "any Fund"; and Paragraphs 26 and 69 also refer to "the Fund" and not to "any Fund". The determiner "the", as occurring in Paragraph 2(f) as also Paragraph 69 before the expression "Fund" makes it clear that the reference therein is only to the Fund which is created under the Scheme of 1952 and it is not a general reference to any Fund. The requirement of joining the Fund under Paragraph 26 ibid. is also of joining that Fund

which is created under the Scheme of 1952. In other words, obviously and undoubtedly, the Fund referred to in Paragraphs 2(f), 26 and 69 of the Scheme of 1952 is that Fund, which is created under the Scheme of 1952 and the reference is not to any other Fund. Thus, the employee must be such who was a member of the Fund established under the Scheme of 1952 and who had withdrawn full amount of his accumulations in the said Fund on retirement from service after attaining the age of 55 years.

On the plain interpretation aforesaid, the Hon'ble Court held that there is not an iota of doubt that the retired Railway employees, who had withdrawn their accumulations in General Provident Fund or any other Fund of which they were members, could not have been treated as "excluded employees" for the purpose of the Scheme of 1952 for the reason that such a withdrawal had not been from the Fund established under the Scheme of 1952. In fact, there was no occasion for them to make any withdrawal from the Fund established under the Scheme of 1952 because they were never the members of the said Fund. In other words, the employees in question were not answering to the requirements of clause (i) of paragraph 2(f) read with clause (a) of paragraph 69(1) of the Scheme of 1952 and hence, were not the "excluded employees".

To summarise, the Court held that in the framework and setup of the Scheme of 1952 the concept remains plain and clear that if a person is member of the Fund created thereunder i.e., under the Scheme of 1952 and withdraws all his accumulations therein, he may not be obliged to be a member of the same Fund under the Scheme of 1952 over again and could be treated as an "excluded employees". However, such is not the relaxation granted in relation to an employee who was earlier a member of any other Fund but later on joins such an establishment where he would be entitled to membership of the Fund created under the Scheme of 1952. This framework of the provisions and stipulations appears to be best serving the interest of employees, while providing them with continued financial security.

20. The State Of Madhya Pradesh v. Laxmi Narayan, (Criminal Appeal No. 349 of 2019)
Decided on - 5th March, 2019

Bench - Hon'ble Mr. Justice A.K. Sikri, Hon'ble Mr. Justice S. Abdul Nazeer, Hon'ble Mr. Justice M.R. Shah

Powers conferred under Section 482 Cr.P.C. for quashing of criminal proceedings by the High Court

FACTS

The High Court of Madhya Pradesh while exercising its inherent powers under section 482 of the Cr.P.C., quashed the criminal proceedings against the respondent for the offences punishable under Sections 307 and 34 of the IPC on the sole ground of a compromise arrived at between the accused and the complainant, relying upon the decision of this Court in the case of *Shiji @ Pappu* v. *Radhika*[1]. The State of Madhya Pradesh preferred an appeal against that. Also, there was a conflict between the decisions of the court in cases of *Narinder Singh* v. *State of Punjab*[2] and *State of Rajasthan* v. *Shambhu Kewat*[3] which was referred to this bench.

OBSERVATIONS AND DECISIONS

Firstly, with regard to the applicability of the decision in *Shiji* to the present case the Hon'ble Supreme Court held that "the said decision may be applicable in a case which has its origin in the civil dispute between the parties; the parties have resolved the dispute; that the offence is not against the society at large and/or the same may not have social impact; the dispute is a family/matrimonial dispute etc. The aforesaid decision may not be applicable in a case where the offences alleged are very serious and grave offences, having a social impact like offences under Section 307 IPC." Therefore, the Hon'ble Court concluded that the High Court erred in quashing the criminal proceeding against the respondent based on the compromise.

Secondly, as far as the conflict between *Narinder Singh Case* and *Shambhu Kewat Case* is concerned, the Hon'ble Court held that in the case of *Shambhu Kewat* the difference between

[1] (2011) 10 SCC 705
[2] (2014) 6 SCC 466
[3] (2014) 4 SCC 149

the power of compounding of offences conferred on a court under Section 320 Cr.P.C. and the powers conferred under Section 482 Cr.P.C. for quashing of criminal proceedings by the High Court was discussed. It was observed that in compounding the offences, the power of a criminal court is circumscribed by the provisions contained in Section 320 Cr.P.C. and the court is guided solely and squarely thereby, while, on the other hand, the formation of opinion by the High Court for quashing a criminal proceedings or criminal complaint under Section 482 Cr.P.C. is guided by the material on record as to whether ends of justice would justify such exercise of power, although ultimate consequence may be acquittal or dismissal of indictment.

However, later on in the case of *Narinder Singh*, the court held as follows:

"29. In view of the aforesaid discussion, we sum up and lay down the following principles by which the High Court would be guided in giving adequate treatment to the settlement between the parties and exercising its power under Section 482 of the Code while accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings:

29.1. Power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with caution.

29.2. When the parties have reached the settlement and on that basis petition for quashing the criminal proceedings is filed, the guiding factor in such cases would be to secure: (i) ends of justice, or (ii) to prevent abuse of the process of any court. While exercising the power the High Court is to form an opinion on either of the aforesaid two objectives.

29.3. Such a power is not to be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Similarly, for the offences alleged to have been committed under special statute like the Prevention of Corruption Act

or the offences committed by public servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender.

29.4. On the other hand, those criminal cases having overwhelmingly and predominantly civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.

29.5. While exercising its powers, the High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases.

29.6. Offences under Section 307 IPC would fall in the category of heinous and serious offences and therefore are to be generally treated as crime against the society and not against the individual alone. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 22 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to proving the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used, etc. Medical report in respect of injuries suffered by the victim can generally be the guiding factor. On the basis of this prima facie analysis, the High Court can examine as to whether there is a strong possibility of conviction or the chances of conviction are remote and bleak. In the former case it can refuse to accept the settlement and quash the criminal proceedings whereas in the latter case it would be permissible for the High Court to accept the plea compounding the offence based on complete settlement between the parties. At this stage, the Court can also be swayed by the fact that the settlement between the parties is going to result in harmony between them which may improve their future relationship.

29.7. While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under

investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge-sheet has not been filed. Likewise, those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and to come to a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by 23 the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime."

Thirdly, based on the various decisions of the Hon'ble Supreme Court , the court held as follows:

i) that the power conferred under Section 482 of the Code to quash the criminal proceedings for the non-compoundable offences under Section 320 of the Code can be exercised having overwhelmingly and predominantly the civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes and when the parties have resolved the entire dispute amongst themselves;

ii) such power is not to be exercised in those prosecutions which involved heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society;

iii) similarly, such power is not to be exercised for the offences under the special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that 24 capacity are not to be quashed merely on the basis of compromise between the victim and the offender;

iv) offences under Section 307 IPC and the Arms Act etc. would fall in the category of heinous and serious offences and therefore are to be treated as crime against the society and not against the individual alone, and therefore, the criminal proceedings for the offence under Section 307 IPC and/or the Arms Act etc. which have a serious impact on the society cannot be quashed in exercise of powers under Section 482 of the Code, on the ground that the parties have resolved their entire dispute amongst themselves. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to framing the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used etc. However, such an exercise by the High Court would be permissible only after the evidence is collected after investigation and the charge sheet is filed/charge is framed and/or during the trial. Such exercise is not permissible when the matter is still under investigation. Therefore, the ultimate conclusion in paragraphs 29.6 and 29.7 of the decision of this Court in the case of Narinder Singh (supra) should be read harmoniously and to be read as a whole and in the circumstances stated hereinabove;

v) while exercising the power under Section 482 of the Code to quash the criminal proceedings in respect of non-compoundable offences, which are private in nature and do not have a serious impact on society, on the ground that there is a settlement/compromise between the victim and the offender, the High Court is required to consider the antecedents of the accused; the conduct of the accused, namely, whether the accused was absconding and why he was absconding, how he had managed with the complainant to enter into a compromise etc

21. *Sukumaran v. State Represented By The Inspector Of Police, (Criminal Appeal No. 5 of 2019)*

Decided on - 7th March, 2019.

Bench- Hon'ble Mr. Justice Abhay Manohar Sapre, Hon'ble Mr. Justice Dinesh Maheshwari

(Section 304 Part II; and Right to Private Defence)

FACTS

The appellant was working as Forest Range Officer. While on his duty he found the deceased alongwith others driving a lorry. He chased the lorry. On being chased, the deceased stopped the lorry, got down and started running with his associates. At that time the appellant fired a gun shot that hit the deceased causing his death. It is also alleged that the appellant loaded 64 billets of sandal woods weighing 276 kg and also kept one SBML Gun in the lorry with a view to show that the deceased party was smuggling sandal woods from the forest area without holding a valid permit. The Additional Sessions Judge convicted the appellant under section 302 and 203 of the Indian Penal Code, 1860. The High Court, however set aside the conviction under section 302 and altered it to section 304 part II of the IPC.

ISSUE

(i) Whether the prosecution was able to prove beyond reasonable doubt that the appellant was guilty for commission of the offences punishable under section 304 part II of IPC?

(ii) Whether the appellant was justified in exercising his right of private defence when he fired a gun shot on the deceased party that hit his back?

OBSERVATIONS AND DECISION

The witnesses were declared hostile so there was no proof to the fact as to the manner in which the incident took place. Therefore, the prosecution failed to prove the case beyond reasonable doubt. Also, the appellant took the defence that he fired a gun shot on the deceased party in his right of private defence which hit his back. The Supreme Court allowed the private defence on the basis that " firstly, the appellant had every reason to believe due to suspicious movement of the deceased party in the forest, they were trying to smuggle the sandalwood from the forest. Secondly, the deceased party was aggressor because as held

above, they first pelted stones and damaged the appellant's vehicle shouting "fire them". Thirdly, the appellants duty was to apprehend the culprits who were involved in the activity of smuggling sandalwoods and at the same time to protect himself and his driver in case of any eventualityarising while apprehending the culprits."

The Court relied upon *Darshan Singh* v. *State of Punjab*[4] wherein the following ten principles after analyzing section 96to 106 IPC were laid down:

"(i) Self –preservation is the basic human instinct and is duly recognized by the criminal jurisprudence of all civilized countries. All free, democratic and civilized countries recognize the right of private defence with certain reasonable limits.

(ii)The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger and not of self creation.

(iii)A mere reasonable apprehension is enough to put the right of self defence into operation. In other words, it is not necessary that there should be an actual commission of the offence in order to give rise to the right of private defence. It is enough if the accused apprehended that such an offence is contemplated and it is likely to be committed if the right of private defence is not exercised.

(iv)The right of private defence commences as soon as a reasonable apprehension arises and it is coterminous with the duration of such apprehension.

(v)It is unrealistic to expect a person under assault to modulate his defence step by step with any arithmetical exactitude.

(vi) In private defence the force used by the accused ought not to b e wholly disproportionate or much greater than necessary for protection of the person or property.

(vii)It is well settled that even if the accused does not plead self defence, it os open to consider such a plea if the same arises from the material on record.

(viii) The accused need not prove the existence of the right of private defence beyond reasonable doubt.

[4] (2010) 2 SCC 333

(ix) The Penal Code confers the right of private defence only when that unlawful or wrongful act is an offence.

(x) A person who is in imminent and reasonable danger of losing his life or limb may in exercise of self defence inflict any harm even extending to death on his assailant either when the assault is attempted or directly threatened."

The Hon'ble Court held that the test laid down in clause (ii), (iii), (iv), (v), (viii) of the abovementioned case has been satisfied in the given fact situation.

22. State of Madhya Pradesh v. Deepak, (Criminal Appeal No.- 485 of 2019)
Decided on -13th March, 2019

Bench -Hon'ble Dr. Justice D.Y. Chandrachud, Hon'ble Mr. Justice Hemant Gupta

FACTS

A girl named Jyoti Sharma committed suicide by consuming poison owing to the harassment met by her due to the respondent on account of a loan taken fraudulently by the respondent on her name. There was a dying declaration as well. The Special Judge framed charges against the respondent under section 306 of the Indian Penal Code,1860 and section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act,1989. The respondent filed a criminal revision before the High Court challenging the order framing charges. The High Court set aside the order framing charges and ordered the accused to be discharged after coming to the conclusion that there was no provocation, inducement or incitement that would fall within the description of 'abetment ' to sustain a charge under Section 306 of the Penal Code.

ISSUE

Whether the High Court has correctly exercised its revisional jurisdiction under Section 397 read with 401 of the Code of Criminal Procedure, 1973 in discharging the respondent of the charges framed by the Special Judge?

OBSERVATIONS AND DECISION

The judgment of the High Court was set aside. The Hon'ble Supreme Court referred to *Amit Kapoor* v. *Ramesh Chander*[5] wherein the court elucidated a set of principles to be followed while exercising the revisional jurisdiction which are:

"27.2. If the allegations are so patently absurd and inherently improbable that no prudent person can ever reach such a conclusion and where the basic ingredients of a criminal offence are not satisfied then the Court may interfere.

27.3. The High Court should not unduly interfere. No meticulous examination of the evidence is needed for considering whether the case would end in conviction or not at the stage of framing of charge or quashing of charge.

[5] (2012) 9 SCC 460

27.4. Where the exercise of such power is absolutely essential to prevent patent miscarriage of justice and for correcting some grave error that might be committed by the subordinate courts even in such cases, the High Court should be loath to interfere, at the threshold, to throttle the prosecution in exercise of its inherent powers.

27.9. Another very significant caution that the courts have to observe is that it cannot examine the facts, evidence and materials on record to determine whether there is sufficient material on the basis of which the case would end in a conviction; the court is concerned primarily with the allegations taken as a whole whether they will constitute an offence and, if so, is it an abuse of the process of court leading to injustice.

27.13. Quashing of a charge is an exception to the rule of continuous prosecution."

The Court also referred to *State of Rajasthan* v. *Fatehkaran Mehdu*[6] wherein it was held that the framing of charge is not a stage where final test of guilt is to be applied.

The Court relied upon *Chitresh Kumar Chopra* v. *State (NCT of Delhi)*[7] wherein it was held that an instigation may be inferred where the deceased was left with no other option except to commit suicide due to the acts of the accused or the circumstances created by his continued course of conduct.

The Court also relied upon *Rajbir Singh* v. *State of U.P.*[8] wherein it was held that the High Court must ascertain whether there is "sufficient ground for proceeding against the accused" or there is ground for "presuming" that the offence has been committed by the accused. And if the answer is in affirmative, an order of discharge cannot be passed and the accused has to face the trial.

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[6] (2017) 3 SCC 198
[7] (2009) 16 SCC 605
[8] (2006) 4 SCC 51

23. Ripudaman Singh v. Balkrishna, (Criminal Appeal No. 483 of 2019)

Decided on -13th March,2019

Bench -Hon'ble Dr. Justice D.Y. Chandrachud, Hon'ble Mr. Justice Hemant Gupta

Payment made in pursuance of agreement to sell is a payment made in pursuance of a duly enforceable debt or liability for the purposes of Section 138 of NI Act.

FACTS

An agreement to sell an immoveable property was entered into by a couple with the accused for the consideration of Rs. 1.75 crores. Rs. 1.25 crore was paid in cash and for the balance amount two post dated cheques of Rs 25 lakhs each were issued. When the two cheques were deposited for payment they were returned unpaid with remarks of "insufficient funds."

OBSERVATIONS AND DECISION

The Supreme Court held that the " finding of the learned Single Judge of the High Court that the cheques were not issued for creating any liability or debt, but 'only' for the payment of balance consideration and that in consequence, there was no legally enforceable debt or other liability is not acceptable. Admittedly, the cheques were issued under and in pursuance of the agreement to sell. Though it is well settled that an agreement to sell does not create any interest in immoveable property, it nonetheless constitutes a legally enforceable contract between the parties to it. A payment which is made in pursuance of such an agreement is hence a payment made in pursuance of a duly enforceable debt or liability for the purposes of Section 138."

24. Periyasamy v. S. Nallasamy, (Criminal Appeal No. 456 of 2019)

Decided on -14th March, 2019

Bench-Hon'ble Dr. Justice D.Y. Chandrachud, Hon'ble Mr. Justice Hemant Gupta

No allegations made in F.I.R or the statement recorded under 161 Cr.P.C. against the appellant- additional accused cannot be summoned under Section 319 of the Code in casual and cavalier manner in the absence of strong and cogent evidence.

FACTS

The complainant in this case alleged that a group consisting of 15 women and 35 men along with his father-in -law, mother-in-law, brother–in-law and wife forcibly entered his house and demanded 30 lakh rupees towards maintenance. The men folk were carrying weapons like crowbar, knife, ripper etc. And one of them exhorted to not talk but kill. A First Information Report for the offences under Sections 147, 448, 294(b) and 506 of IPC was registered. On the basis of such F.I.R, the Investigating Officer recorded the statement of the complainant but the name of the appellants did not appear in that statement as the persons who were part of the group, said to have assaulted the Complainant and trespassed into his house.

Thereafter, the Complainant appeared as PW1 and disclosed the names of the appellants as part of the group who barged into his house and also attacked him. Thereafter, an application was filed under Section 319 of the Cr.P.C to summon the 20 accused persons named in the application as additional accused.

It is also pointed out that names of the proposed accused were not disclosed in the First Information Report nor came to light during investigation. It is on the said basis the learned Magistrate passed an order on 27.02.2015 declining to summon the appellants as additional accused. The said order was challenged by the Complainant by way of a Revision Petition before the High Court.

The present appeal is directed against an order passed by the High Court of Judicature at Madras on 28.08.2018 whereby an order passed by the trial court on 27.02.2015 dismissing an application under Section 319 of the Code of Criminal Procedure, 1973 was set aside and the appellants were ordered to be impleaded as accused and to be proceeded against in accordance with law.

OBSERVATIONS AND DECISION

The Hon'ble Court held that in the statements recorded under Section 161 of the Code during the course of investigation, the Complainant and his witnesses have not disclosed any other name except the 11 persons named in the FIR. Thus, the Complainant has sought to cast net wide so as to include numerous other persons while moving an application under Section 319 of the Code without there being primary evidence about their role in house trespass or of threatening the Complainant.

In the First Information Report or in the statements recorded under Section 161 of the Code, the names of the appellants or any other description have not been given so as to identify them. The allegations in the FIR are vague and can be used any time to include any person in the absence of description in the First Information Report to identify such person. Therefore, there is no strong or cogent evidence to make the appellants stand the trial for the offences under Sections 147, 448, 294(b) and 506 of IPC.

The additional accused cannot be summoned under Section 319 of the Code in casual and cavalier manner in the absence of strong and cogent evidence. Under Section 319 of the Code additional accused can be summoned only if there is more than prima facie case as is required at the time of framing of charge but which is less than the satisfaction required at the time of conclusion of the trial convicting the accused.

The Hon'ble Court held that mere disclosing the names of the appellants cannot be said to be strong and cogent evidence to make them to stand trial for the offence under Section 319 of the Code, especially when the Complainant is a husband and has initiated criminal proceedings against family of his in-laws and when their names or other identity were not disclosed at the first opportunity.

The Hon'ble Court relied upon the Constitution Bench Judgment in *Hardeep Singh* v. *State of Punjab*[9] wherein it was held that,

"105. Power under Section 319 CrPC is a discretionary and an extraordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the

[9] (2014) 3 SCC 92

opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner. 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."

25. Nandlal v. The State Of Maharashtra,(Criminal Appeal No. 510 of 2019)
Decided on -15th March, 2019

Bench-Hon'ble Mrs. Justice R. Banumathi, Hon'ble Mr. Justice R. Subhash Reddy

Whether the case falls under "sudden fight" modifying the conviction under Section 304 Part II IPC instead of Section 302 IPC?

FACTS

An altercation took place between the appellant and one Dilip, who is his close relative on account of the expenses incurred solely by Dilip for the construction of the common wall between their premises. Accordingly, Gopichand and his brother Lakhichand (deceased) who was disabled went there to pacify them. But Lakhichand abused the appellant.

Being annoyed, the appellant assaulted Lakhichand with a stick. On witnessing that, Gopichand also assaulted the appellant accused. Then, the appellant-accused went his home and brought *gupti* and attacked Lakhichand who could not escape the spot due to his disability.

In appeal, the High Court held that only the appellant caused fatal injuries to the deceased with lethal weapon and the High Court affirmed the conviction of the appellant and the sentence of life imprisonment imposed upon him by the trial court.

ISSUE

Whether the case falls under "sudden fight" modifying the conviction under Section 304 Part II IPC instead of Section 302 IPC?

OBSERVATIONS AND DECISION

The Hon'ble Supreme Court held that even if the fight is unpremeditated and sudden, if the weapon or manner of retaliation is disproportionate to the offence and if the accused had taken the undue advantage of the deceased, the accused cannot be protected under Exception 4 to Section 300 IPC.

The Hon'ble Court relied upon *Sridhar Bhuyan* v. *State of Orissa*[10] wherein it was stated that, " It is to be noted that the "fight" occurring in Exception 4 to Section 300 IPC is not defined in IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. 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 8 taken undue advantage or acted in a cruel or unusual manner. The expression "undue advantage" as used in the provision means "unfair advantage"."

Therefore, in the given fact situation the Hon'ble Court held that inflicting injury on the deceased is part of the same incident and cannot be said to be a different part to hold that the act was premeditated and intentional. Further, one of the conditions of Exception 4 is that the offender ought not to have taken the "undue advantage" or acted in a cruel or unusual manner. The appellant inflicted a single blow injury with *gupti* on the left armpit which pierced through the upper end of the left arm and then entered the chest and reached till the lung. Though, the *gupti* was a dangerous weapon, the appellant-accused caused a single injury which pierced into the lung. So, the case was considered as falling under Exception 4 of the section 300 of the IPC and the conviction was modified to section 304 part II of the IPC.

[10] (2004) 11 SCC 395

26. Rohitbhai J Patel v. The State Of Gujarat,(Criminal Appeal No.508 of 2019)
Decided on-15th March,2019

Bench- Hon'ble Mr. Justice Abhay Manohar Sapre, Hon'ble Mr. Justice Dinesh Maheshwari

Whether the complainant had established the ingredients of Sections 118 and 139 of the NI Act, so as to justify drawing of the presumption envisaged therein; and if so, as to whether the accused had been able to displace such presumption and to establish a probable defence whereby, the onus would again shift to the complainant?

FACTS

The complainant, accused-appellant and one Jagdishbhai became friends. On account of such friendship, the complainant loaned a sum of Rs. 22,50,000 to the accused appellant for his immediate requirement. According to the complainant, upon regular demand for re-payment, the accused gave him 7 cheques of different dates amounting to Rs 3 lakhs each and also gave the acceptance for re-payment on a stamp paper. The complainant alleged that the cheques so issued by the accused, on being presented to the Bank for collection, were returned unpaid either for the reason that the "opening balance was insufficient" or for the reason that the "account was closed". While alleging that the intention of the accused had been of breach of trust and cheating, the complainant pointed out that he got served the notices on the accused after dishonour of the cheques but did not receive the requisite payment. It is noticed that in some of the cases, the accused-appellant did send his reply, denying the transaction as alleged.

ISSUE

Whether the complainant had established the ingredients of Sections 118 and 139 of the NI Act, so as to justify drawing of the presumption envisaged therein; and if so, as to whether the accused had been able to displace such presumption and to establish a probable defence whereby, the onus would again shift to the complainant?

OBSERVATIONS AND DECISION

The Hon'ble Court held that the observations of the Trial Court that there was no documentary evidence to show the source of funds with the respondent to advance the loan,

or that the respondent did not record the transaction in the form of receipt of even kachcha notes, or that there were inconsistencies in the statement of the complainant and his witness, or that the witness of the complaint was more in know of facts etc. would have been relevant if the matter was to be examined with reference to the onus on the complaint to prove his case beyond reasonable doubt. These considerations and observations do not stand in conformity with the presumption existing in favour of the complainant by virtue of Sections 118 and 139 of the NI Act. Needless to reiterate that the result of such presumption is that existence of a legally enforceable debt is to be presumed in favour of the complainant. When such a presumption is drawn, the factors relating to the want of documentary evidence in the form of receipts or accounts or want of evidence as regards source of funds were not of relevant consideration while examining if the accused has been able to rebut the presumption or not.

The Hon'ble Court relied upon *Rangappa* v. *Sri Mohan*[11] wherein the principles relating to presumptions under Sections 118 and 139 of the NI Act and rebuttal thereof have been summarised in the following:-

"27. Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the defendant-accused cannot be expected to discharge an unduly high standard of proof.

28. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of "preponderance of probabilities". Therefore, if the accused is able to

[11] (2010) 11 SCC 441

raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. As clarified in the citations, the accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own."

The Hon'ble Court held that on the aspects relating to preponderance of probabilities, the accused has to bring on record such facts and such circumstances which may lead the Court to conclude either that the consideration did not exist or that its nonexistence was so probable that a prudent man would, under the circumstances of the case, act upon the plea that the consideration did not exist.

Further, the Hon'ble Court emphasized that though there may not be sufficient negative evidence which could be brought on record by the accused to discharge his burden, yet mere denial would not fulfill the requirements of rebuttal as envisaged under Section 118 and 139 of the NI Act. This court stated the principles in the case of *Kumar Exports* v. *Sharma Carpets*[12] as follows:

"20. The accused in a trial under Section 138 of the Act has two options. He can either show that consideration and debt did not exist or that under the particular circumstances of the case the non-existence of consideration and debt is so probable that a prudent man ought to suppose that no consideration and debt existed. To rebut the statutory presumptions an accused is not expected to prove his defence beyond reasonable doubt as is expected of the complainant in a criminal trial. The accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him.

However, the court need not insist in every case that the accused should disprove the nonexistence of consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, it is clear that bare denial of the passing of the consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for

[12] (2009) 2 SCC 519

getting the burden of proof shifted to the complainant. To disprove the presumptions, the accused should bring on record such facts and circumstances, upon consideration of which, the court may either believe that the consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist.

Apart from adducing direct evidence to prove that the note in question was not supported by consideration or that he had not incurred any debt or liability, the accused may also rely upon circumstantial evidence and if the circumstances so relied upon are compelling, the burden may likewise shift again on to the complainant. The accused may also rely upon presumptions of fact, for instance, those mentioned in Section 114 of the Evidence Act to rebut the presumptions arising under Sections 118 and 139.

21. The accused has also an option to prove the non-existence of consideration and debt or liability either by letting in evidence or in some clear and exceptional cases, from the case set out by the complainant, that is, the averments in the complaint, the case set out in the statutory notice and evidence adduced by the complainant during the trial. Once such rebuttal evidence is adduced and accepted by the court, having regard to all the circumstances of the case and the preponderance of 17 probabilities, the evidential burden shifts back to the complainant and, therefore, the presumptions under Sections 118 and 139 of the Act will not again come to the complainant's rescue."

27. Pavan Vasudeo Sharma v. State of Maharashtra, (Criminal Appeal No. 591 of 2019)
Decided on - 25th March, 2019

Bench-Hon'ble Mr. Justice Uday Umesh Lalit, Hon'ble Ms. Justice Indu Malhotra

Circumstantial Evidence- the facts so established should be consistent only with the hypothesis of the guilt of the accused- *Sharad Birdichand Sarda* v. *State of Maharashtra* relied upon-*panchsheel* principle of circumstantial evidence.

FACTS

As per the prosecution story, Police Naik Nagare was robbed of his pistol by three persons. An F.I.R. was registered against unnamed persons but with description of all three persons. Later one Bhima Waghmare was found dead on the Mumbai- Pune Highway. It is alleged that the fire arm used in this case was the same that was robbed from Naik Nagare. Later, two cell phones were also robbed from Bhima Waghmare. And one of them was used to make a ransom call in a kidnapping case of one Akash Lokhande. During the course of investigation of the kidnapping case, Appellant was apprehended and was later identified by Naik Nagare. However, the number of the cell phone robbed from Bhima Waghmare was registered on the name of one Sanjay. The trial court convicted the appellant for the murder of Bhima Waghmare and sentenced him to life imprisonment. The High court also confirmed his involvement in the murder of Bhima Waghmare.

OBSERVATIONS AND DECISION

The Supreme Court held that the circumstances relied upon must rule out every single hypothesis except the guilt of the person accused of an offence which is not so in this case. Therefore, the court acquitted the appellant giving him the benefit of doubt.

The Court relied upon the *Sharad Birdichand Sarda* v. *State of Maharashtra*[13] wherein the following conditions were laid down for the appreciation of circumstantial evidences:

(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

[13] (1984) 4 SCC 116

proved" as was held by this Court in *Shivaji Sahabrao Bobade* v. *State of Maharashtra*[14] where the observations were made:

"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."

(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,

(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

(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."

These five golden principles, if we may say so, constitute the *panchsheel* of the proof of a case based on circumstantial evidence."

[14] (1973) 2 SCC 793

28. Ganga Prasad Mahto v. State Of Bihar,(Criminal Appeal No. 526 of 2019)
Decided on -26th March,2019

Bench- Hon'ble Mr. Justice Abhay Manohar Sapre, Hon'ble Mr. Justice Dinesh Maheshwari

Prosecutrix in habit of implicating all the persons by making wild allegations in the nature of rape- non-reliance on chance witness

FACTS

A woman alleged rape on the Appellant. The trial court convicted and sentenced the appellant for a period of 7 years imprisonment. The High court upheld the sentence against which he has moved to the Supreme Court in appeal.

OBSERVATIONS AND DECISION

Based on the below mentioned seven points the Hon'ble Supreme Court held that the offence of rape was not made out against the appellant.

"First, the complainant was not examined by the Doctor after the alleged incident,

Second, in the absence of any medical examination done, the prosecution did not examine any doctor in the trial in support of their case,

Third, it was not disputed that similar type of complaints were being made in past by the complainant against other persons also and such complaints were later found false,

Fourth, it was also not disputed that there was enmity between the appellant and the husband of the prosecutrix, due to which their relations were not cordial,

Fifth, it had also come in evidence that the prosecutrix was in habit of implicating all the persons by making wild allegations of such nature against those with whom she or/and her husband were having any kind of disputes,

Sixth, there was no eye witness to the alleged incident and the one who was cited as witness was a chance witness on whose testimony a charge of rape could not be established,

And lastly, so far as PW1 , husband of the complainant is concerned, he admitted that he was away and returned to village the next morning of the incident."

29. Serious Fraud Investigation Office v. Rahul Modi, (Criminal Appeal No. 538-539 of 2019)
Decided on -27th March,2019

Bench- Hon'ble Mr. Justice Abhay Manohar Sapre, Hon'ble Mr. Justice Uday Umesh Lalit

(Scope and Extent of Section 212 of the Companies Act, 2013 and whether the compliance of sub-section (3) of Section 212 of the Act is mandatory or directory – Holding that there is no stipulation of any fixed period for completion of a Serious Fraud investigation, the Supreme Court has observed that the stipulation in sub-section (3) of Section 212 of the Companies Act, 2013, in relation to the submission of the report, is not mandatory, but directory.)

FACTS

The investigation was assigned to SFIO vide Order dated 20.6.2018. This Order did stipulate in Para 6 that the Inspectors should complete their investigation and submit their report to the Central Government within three months. The period of three months expired on 19.09.2018. The proposal to arrest three accused persons was placed before the Director, SFIO and after being satisfied in terms of requirements of Section 212(8) of the Companies Act, 2013 Act approval was granted by Director, SFIO on 10.12.2018. After they were arrested on 10.12.2018, the accused were produced before the Judicial Magistrate, who by his order dated 11.12.2018 remanded them to custody till 14.12.2018 and also directed that they be produced before the Special Court on 14.12.2018. On 13.12.2018 a proposal seeking extension of time for completing investigation in respect of 57 cases including the present case was preferred by SFIO. On 14.12.2018 the Special Court, Gurugram remanded the accused to custody till 18.12.2018. On the same date i.e. on 14.12.2018 the proposal for extension was accepted by the Central Government in respect of the Group and extension was granted upto 30.06.2019. On 17.12.2018 the present Writ Petitions were preferred which came up for the first time before the High Court on 18.12.2018. On 18.12.2018 itself the accused were further remanded to police custody till 21.12.2018. On 20.12.2018 Writ Petitions were entertained and the order which is presently under appeal was passed. Pursuant to said order, the original Writ Petitioners were released on bail. In the backdrop of these facts, the High Court found that a case for interim relief was made out. This order was under challenge before the Hon'ble Supreme Court.

OBSERVATION AND DECISION

Referring to several judgments of the Supreme Court such as *Kanu Sanyal v. District Magistrate, Darjeeling and Others*[15], , *Manubhai Ratilal Patel through Ushaben v. State of Gujarat and Others*[16], *Saurabh Kumar v. Jailor, Koneila Jail and Another*[17], *and State of Maharashtra and Others vs. Tasneem Rizwan Siddique*[18], the Hon'ble Court firstly held that "*in Habeas Corpus proceedings a Court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the institution of the proceedings*" and that the act of directing remand of an accused is thus held to be a judicial function and the challenge to the order of remand is not to be entertained in a habeas corpus petition.

Secondly, regarding the submission that with the expiry of the stipulated period, the entire mandate came to an end and as such, there could be no arrest and that illegality in that behalf would continue regardless whether there was a subsequent order of extension, the Hon'ble Court, after discussing the provisions of Sections 211 and 212 of the Companies Act, 2013, held that Section 212(3) of 2013 Act by itself does not lay down any fixed period within which the report has to be submitted. Even under sub-Section (12) which is regarding "investigation report", again there is no stipulation of any period. In fact such a report under sub-Section (12) is to be submitted "on completion of the investigation". There is no stipulation of any fixed period for completion of investigation which is consistent with normal principles under the general law. For instance, there is no fixed period within which the investigation under Criminal Procedure Code must be completed. If the investigation proceeds for a longer period, under Section 167 of the Code certain rights may flow in favour of the Accused. But it is certainly not the idea that in case the investigation is not over within any fixed period, the authority to investigate would come to an end.

The Hon'ble Court further held that sub-Section (2) of Section 213 of 2013 Act does not speak of any period for which the other Investigating Agencies are to hold their hands,

[15] (1974) 4 SCC 141
[16] (2013) 1 SCC 314
[17] (2014) 13 SCC 436
[18] (2018) 9 SCC 745

nor does the provision speak of any re-transfer of the relevant documents and records from SFIO back to said Investigating Agencies after any period or occurring of an event. The very expression "assign" in Section 212(3) of 2013 Act contemplates transfer of investigation for all purposes whereafter the original Investigating Agencies of the Central Government or any State Government are completely denuded of any power to conduct and complete the investigation in respect of the offences contemplated therein. The idea under sub-Section (2) is complete transfer of investigation. The transfer under sub-Section (2) of Section 213 would not stand revoked or recalled in any contingency. If a time limit is construed and contemplated within which the investigation must be completed then logically, the provisions would have dealt with as to what must happen if the time limit is not adhered to.

The Statute must also have contemplated a situation that a valid investigation undertaken by any Investigating Agency of Central Government or State Government which was transferred to SFIO, must then be re-transferred to said Investigating Agencies. But the Statute does not contemplate that. The transfer is irrevocable and cannot be recalled in any manner. Once assigned, SFIO continues to have the power to conduct and complete investigation. The Hon'ble Court further held the provision to be directory and not mandatory because it is well settled that while laying down a particular procedure if no negative or adverse consequences are contemplated for non-adherence to such procedure, the relevant provision is normally not taken to be mandatory and is considered to be purely directory. Hon'ble Justice Abhay Manohar Sapre adding a separate reasoning of purposive interpretation, held the same regarding the nature of the provision.

30. Raghwendra Sharan Singh v. Ram Prasanna Singh (Dead) by LRs (Civil Appeal No. 2960/2019)

Decided on – 13.03.2019

Bench – 1. Hon'ble Mr. Justice L. Nageswara Rao

2. Hon'ble Mr. Justice M.R. Shah

(Scope and ambit of the application under Order 7 Rule 11 of the CPC)

FACTS

The original plaintiff and his brother Sheo Prasanna Singh jointly purchased the suit land in question in the year 1965. The original plaintiff, who is the father of the appellant herein-original defendant, and his late brother Sheo Prasanna Singh executed a registered deed of gift in favour of the appellant herein on 06.03.1981 gifting the suit land and put him in possession thereof. The appellant herein-original defendant instituted one T.S. (Partition) Suit No. 203 of 2001 against his brothers and others for partition of the joint Hindu family properties. The respondent herein-original plaintiff in the present suit was also joined as defendant No. 10 in the same suit. The summons along with a copy of the plaint of the aforesaid partition suit was allegedly served on the plaintiff-respondent herein on 21.12.2001. Sheo Prasanna Singh died on 15.12.2002. Thereafter, the respondent herein-original plaintiff alone filed T.S. No. 19 of 2003 against the appellant herein-original defendant in the Court of Munsif, Danapur for a declaration that the deed of gift dated 06.03.1981 executed in favour of the appellant herein is showy and sham transaction and no title and possession with respect to the gifted property ever passed to the appellant-original defendant and hence the same is not binding on him. A prayer was also made for confirming his possession over the suit property and in case he is found out of possession, then a decree for recovery of possession be passed.

The appellant herein-original defendant after filing his written statement, filed an application under Order 7 Rule 11 r/w Order XIV, Rule 2 CPC for rejection of the plaint on the ground that the suit is clearly barred by law of limitation, as the deed of gift having been executed on 06.03.1981, the suit under Article 59 of the Limitation Act ought to have been filed within three years of the deed of execution of the gift deed, whereas the same has been filed after more than 22 years of the execution of the deed. It was also further averred that the suit is not maintainable in view of Sections 91 and 92 of the

Evidence Act as well as Section 47 of the Registration Act. the Munsif, Danapur rejected the said application vide order dated 28.08.2006 on the ground that from the perusal of records and other documents, for determining the question of Limitation, oral evidence are required to be taken into account. Therefore, the question is to be adjudicated only after the evidence is led by both the parties.

Feeling aggrieved and dissatisfied with the order passed by the Munsif, Danapur rejecting the Order 7 Rule 11 application, the appellant herein-original defendant filed a revision application before the High Court. By the impugned judgment and order, the High Court dismissed the revision application and confirmed the order passed by the Munsif, Danapur rejecting the Order 7 Rule 11 application. Hence, the present appeal was filed before the Hon'ble Supreme Court at the instance of the original defendant.

OBSERVATIONS AND DECISIONS

The Hon'ble Court while discussing the scope and ambit of Order VII Rule 11 of the CPC referred to the following cases :-

***T. Arivandandam v. T.V. Satyapal*, (1977) 4 SCC 467**

"5. We have not the slightest hesitation in condemning the petitioner for the gross abuse of the process of the court repeatedly and unrepentently resorted to. From the statement of the facts found in the judgment of the High Court, it is perfectly plain that the suit now pending before the First Munsif's Court, Bangalore, is a flagrant misuse of the mercies of the law in receiving plaints. The learned Munsif must remember that if on a meaningful — not formal — reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, he should exercise his power under Order 7, Rule 11 CPC taking care to see that the ground mentioned therein is fulfilled. And, if clever drafting has created the illusion of a cause of action, nip it in the bud at the first hearing by examining the party searchingly under Order 10, CPC. An activist Judge is the answer to irresponsible law suits....."

***Church of Christ Charitable Trust & Educational Charitable Society v. Ponniamman Educational Trust*, (2012) 8 SCC 706**

"13. While scrutinizing the plaint averments, it is the bounden duty of the trial Court to ascertain the materials for cause of action. The cause of action is a bundle of facts which taken with the law

applicable to them gives the Plaintiff the right to relief against the Defendant. Every fact which is necessary for the Plaintiff to prove to enable him to get a decree should be set out in clear terms. It is worthwhile to find out the meaning of the words "cause of action". A cause of action must include some act done by the Defendant since in the absence of such an act no cause of action can possibly accrue."

***A.B.C. Laminart Pvt. Ltd. v. A.P. Agencies,* (1989) 2 SCC 163**

***"12.** A cause of action means every fact, which if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the court. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded. It does not comprise evidence necessary to prove such facts, but every fact necessary for the plaintiff to prove to enable him to obtain a decree. Everything which if not proved would give the defendant a right to immediate judgment must be part of the cause of action. But it has no relation whatever to the defence which may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff."*

Referring to several other judgments[19] of the Supreme Court, the Hon'ble Court held that **when the suit is barred by any law, the plaintiff cannot be allowed to circumvent that provision by means of clever drafting so as to avoid mention of those circumstances, by which the suit is barred by law of limitation.**

Applying the law laid down by the Hon'ble Court in the aforesaid decisions on exercise of powers under Order 7 Rule 11 of the CPC to the facts of the case in hand and the averments in the plaint, the Hon'ble Court was of the opinion that both the Courts below have materially erred in not rejecting the plaint in exercise of powers under Order 7 Rule 11 of the CPC. The Hon'ble Court was of the opinion that by clever drafting the plaintiff had tried to bring the suit within the period of limitation which, otherwise, is barred by law of limitation. Therefore, considering the decisions of the Court in the case of *T. Arivandandam* (supra) and others, as stated above, and as the suit is clearly barred by law

[19] *Sopan Sukhdeo Sable* v. *Assistant Charity Commissioner,* (2004) 3 SCC 137; *Ram Singh* v. *Gram Panchayat Mehal Kalan,* (1986) 4 SCC 364; *Madanuri Sri Rama Chandra Murthy* v. *Syed Jalal,* (2017) 13 SCC 174; *I.T.C. Ltd.* v. *Debts Recovery Appellate Tribunal,* (1998) 2 SCC 70.

of limitation, the plaint is required to be rejected in exercise of powers under Order 7 Rule 11 of the CPC.

The Hon'ble Court also pointed out that the plaintiff never prayed for any declaration to set aside the gift deed. Such a prayer is not asked cleverly. If such a prayer would have been asked, in that case, the suit can be said to be clearly barred by limitation considering Article 59 of the Limitation Act and, therefore, only a declaration is sought to get out of the provisions of the Limitation Act, more particularly, Article 59 of the Limitation Act. The aforesaid aspect was also not considered by the High Court as well as the learned trial Court.

So far as the application on behalf of the original plaintiff and even the observations made by the learned trial Court as well as the High Court that the question with respect to the limitation is a mixed question of law and facts, which can be decided only after the parties lead the evidence is concerned, as observed and held by the Supreme Court in the cases of *Sham Lal alias Kuldip* v. *Sanjeev Kumar* (2009) 12 SCC 454; *N.V. Srinivas Murthy* v. *Mariyamma (dead) by proposed LRs* (2005) 5 SCC 548 : AIR 2005 SC 2897 and *Ram Prakash Gupta* v. *Rajiv Kumar Gupta* (2007) 10 SCC 59, the Hon'ble Court, considering the averments in the plaint, found that the suit is clearly barred by law of limitation, the same can be rejected in exercise of powers under Order 7 Rule 11(d) of the CPC.

31. *Prakash Singh and Others v. Union of India and Others (I.A. No. 24616 of 2019 in Writ Petition (Civil) No. 310/1996)*

Decided on – 13.03.2019

Bench – 1. Hon'ble Mr. Justice Ranjan Gogoi

2. Hon'ble Mr. Justice L. Nageswara Rao

2. Hon'ble Mr. Justice Sanjeev Khanna

(Clarification on one of the directions passed by the Hon'ble Supreme Court in the landmark case of *Prakash Singh and Others v. Union of India and Others,* (2006)8 SCC 1.)

FACTS

On September 22, 2006, the Hon'ble Supreme Court, through a 3-Judges Bench, had delivered a judgment in *Prakash Singh* (supra) related to Police Reforms wherein the Hon'ble Court had issued the following detailed directions for compliance till the framing of appropriate legislations, based principally on the recommendations of the National Police Commission(1977-1981 and other Committees and Commissions set-up thereafter in respect of Police Reforms[20], with a view to take measures for insulating police machinery from political/executive interference, to make it more efficient and effective and to strengthen and preserve the rule of law:-

"(1) The State Governments are directed to constitute a State Security Commission in every State to ensure that the State Government does not exercise unwarranted influence or pressure on the State police and for laying down the broad policy guidelines so that the State police always acts according to the laws of the land and the Constitution of the country. This watchdog body shall be headed by the Chief Minister or Home Minister as Chairman and have the DGP of the State as its ex-officio Secretary. The other members of the Commission shall be chosen in such a manner that it is able to function independent of Government control. For this purpose, the State may choose any of the models recommended by the National Human Rights Commission, the Ribeiro Committee or the Sorabjee Committee……. The recommendations of this Commission shall be binding on the State Government. The functions of the State Security Commission

[20] Besides the report submitted to the Government of India by National Police Commission (1977-81), various other high powered Committees and Commissions have examined the issue of police reforms, viz. (i) National Human Rights Commission (ii) Law Commission (iii) Ribeiro Committee (iv) Padmanabhaiah Committee and (v) Malimath Committee on Reforms of Criminal Justice System. In addition to above, the Government of India in terms of Office Memorandum dated 20th September, 2005 constituted a Committee comprising Shri Soli Sorabjee, former Attorney General and five others to draft a new Police Act in view of the changing role of police due to various socio-economic and political changes which have taken place in the country and the challenges posed by modern day global terrorism, extremism, rapid urbanization as well as fast evolving aspirations of a modern democratic society. The Sorabjee Committee has prepared a draft outline for a new Police Act (9th September, 2006).

would include laying down the broad policies and giving directions for the performance of the preventive tasks and service oriented functions of the police, evaluation of the performance of the State police and preparing a report thereon for being placed before the State legislature. Selection and Minimum Tenure of DGP:

(2) The Director General of Police of the State shall be selected by the State Government from amongst the three senior-most officers of the Department who have been empanelled for promotion to that rank by the Union Public Service Commission on the basis of their length of service, very good record and range of experience for heading the police force. And, once he has been selected for the job, he should have a minimum tenure of at least two years irrespective of his date of superannuation. The DGP may, however, be relieved of his responsibilities by the State Government acting in consultation with the State Security Commission consequent upon any action taken against him under the All India Services (Discipline and Appeal) Rules or following his conviction in a court of law in a criminal offence or in a case of corruption, or if he is otherwise incapacitated from discharging his duties. Minimum Tenure of I.G. of Police & other officers:

(3) Police Officers on operational duties in the field like the Inspector General of Police in-charge Zone, Deputy Inspector General of Police in-charge Range, Superintendent of Police in-charge district and Station House Officer in-charge of a Police Station shall also have a prescribed minimum tenure of two years unless it is found necessary to remove them prematurely following disciplinary proceedings against them or their conviction in a criminal offence or in a case of corruption or if the incumbent is otherwise incapacitated from discharging his responsibilities. This would be subject to promotion and retirement of the officer. Separation of Investigation:

(4) The investigating police shall be separated from the law and order police to ensure speedier investigation, better expertise and improved rapport with the people. It must, however, be ensured that there is full coordination between the two wings. The separation, to start with, may be effected in towns/urban areas which have a population of ten lakhs or more, and gradually extended to smaller towns/urban areas also. Police Establishment Board:

(5) There shall be a Police Establishment Board in each State which shall decide all transfers, postings, promotions and other service related matters of officers of and below the rank of Deputy Superintendent of Police. The Establishment Board shall be a departmental body comprising the Director General of Police and four other senior officers of the Department. The State Government may interfere with decision of the Board in exceptional cases only after recording its reasons for doing so. The Board shall also be authorized to make appropriate recommendations to the State Government regarding the posting and transfers of officers of and above the rank of Superintendent of Police, and the Government is expected to give due

weight to these recommendations and shall normally accept it. It shall also function as a forum of appeal for disposing of representations from officers of the rank of Superintendent of Police and above regarding their promotion/transfer/disciplinary proceedings or their being subjected to illegal or irregular orders and generally reviewing the functioning of the police in the State. Police Complaints Authority:

(6) There shall be a Police Complaints Authority at the district level to look into complaints against police officers of and up to the rank of Deputy Superintendent of Police. Similarly, there should be another Police Complaints Authority at the State level to look into complaints against officers of the rank of Superintendent of Police and above. The district level Authority may be headed by a retired District Judge while the State level Authority may be headed by a retired Judge of the High Court/Supreme Court. The head of the State level Complaints Authority shall be chosen by the State Government out of a panel of names proposed by the Chief Justice; the head of the district level Complaints Authority may also be chosen out of a panel of names proposed by the Chief Justice or a Judge of the High Court nominated by him. These Authorities may be assisted by three to five members depending upon the volume of complaints in different States/districts, and they shall be selected by the State Government from a panel prepared by the State Human Rights Commission/Lok Ayukta/State Public Service Commission. The panel may include members from amongst retired civil servants, police officers or officers from any other department, or from the civil society. They would work whole time for the Authority and would have to be suitably remunerated for the services rendered by them. The Authority may also need the services of regular staff to conduct field inquiries. For this purpose, they may utilize the services of retired investigators from the CID, Intelligence, Vigilance or any other organization. The State level Complaints Authority would take cognizance of only allegations of serious misconduct by the police personnel, which would include incidents involving death, grievous hurt or rape in police custody. The district level Complaints Authority would, apart from above cases, may also inquire into allegations of extortion, land/house grabbing or any incident involving serious abuse of authority. The recommendations of the Complaints Authority, both at the district and State levels, for any action, departmental or criminal, against a delinquent police officer shall be binding on the concerned authority. National Security Commission:

(7) The Central Government shall also set up a National Security Commission at the Union level to prepare a panel for being placed before the appropriate Appointing Authority, for selection and placement of Chiefs of the Central Police Organisations (CPO), who should also be given a minimum tenure of two years. The Commission would also review from time to time measures to upgrade the effectiveness of these forces, improve the service conditions of its personnel, ensure that there is proper coordination between them and that the forces are generally utilized for the purposes they were raised and make recommendations in that behalf. The National Security Commission could be headed by the Union Home Minister and comprise heads of the CPOs and a couple of security experts as members with the Union Home Secretary as its

Secretary. The aforesaid directions shall be complied with by the Central Government, State Governments or Union Territories, as the case may be, on or before 31st December, 2006 so that the bodies afore-noted became operational on the onset of the new year. The Cabinet Secretary, Government of India and the Chief Secretaries of State Governments/Union Territories are directed to file affidavits of compliance by 3rd January, 2007."

DECISION IN THE PRESENT CASE:

On 3rd July, 2018, the Hon'ble Court had issued the following directions as clarifications in view of some developments after the judgment in *Prakash Singh* (supra): -

"(a) All the States shall send their proposals in anticipation of the vacancies to the Union Public Service Commission, well in time at least three months prior to the date of retirement of the incumbent on the post of Director General of Police;

(b) The Union Public Service Commission shall prepare the panel as per the directions of this Court in the judgment in Prakash Singh's case (supra) and intimate to the States;

(c) The State shall immediately appoint one of the persons from the panel prepared by the Union Public Service Commission;

(d) None of the States shall ever conceive of the idea of appointing any person on the post of Director General of Police on acting basis for there is no concept of acting Director General of Police as per the decision in Prakash Singh's case (supra);

(e) An endeavour has to be made by all concerned to see that the person who was selected and appointed as the Director General of Police continues despite his date of superannuation. However, the extended term beyond the date of superannuation should be a reasonable period. We say so as it has been brought to our notice that some of the States have adopted a practice to appoint the Director General of Police on the last date of retirement as a consequence of which the person continues for two years after his date of superannuation. Such a practice will not be in conformity with the spirit of the direction.

(f) Our direction No. (c) should be considered by the Union Public Service Commission to mean that the persons are to be empanelled, as far as practicable, from amongst the people within the zone of consideration who have got clear two years of service. Merit and seniority should be given due weightage.

(g) Any legislation/rule framed by any of the States or the Central Government running counter to the direction shall remain in abeyance to the aforesaid extent."

In the present case, clarifications were sought for directions at (e) and at (f) as the grievance of the applicants/petitioners was that the Union Public Service Commission while empanelling officers for consideration for appointment to the post of Director General of Police is considering the minimum residual tenure required to be taken into account as two years. The Hon'ble Court clarifying the directions held that the order of the Court dated 3rd July, 2018 passed in I.A. No. 25307 of 2018 in Writ Petition No. 310 of 1996 shall mean that recommendation for appointment to the post of Director General of Police by the Union

Public Service Commission and preparation of panel should be purely on the basis of merit from officers who have a minimum residual tenure of six months i.e. officers who have at least six months of service prior to the retirement.

32. *State of Himachal Pradesh and Another v. Vijay Kumar @ Pappu and Another (Criminal Appeal No. 753/2010)*

Decided on – 15.03.2019

Bench – 1. Hon'ble Mr. Justice A.M. Khanwilkar

2. Hon'ble Mr. Justice Ajay Rastogi

(Reduction of Sentence and Application of Victim Compensation Scheme under Section 357-A CrPC for offences committed before the 2009 Amendment)

FACTS

On 12th July, 2004 at about 9.00 a.m. PW-13 Shami Verma resident of Mashobra, who was present at BCS at Khalini-Dhalli By-Pass saw PW-5 Kumari Ishita (victim) crying with burn injuries, who had jumped into the water tank nearby. PW-13 Shami Verma took out PW-5 Kumari Ishita-victim from the tank and informed to the Police Post, New Shimla, that a girl with burn injuries was present near her residence and this information (Exhibit PR) was recorded by the Incharge of the Police Post, New Shimla, who deputed a police officer on wireless set to go to the site. PW-36 Shakuntla Sharma went to the site and shifted the victim to the hospital and recorded her statement on which a case was registered. During investigation, PW-5 Kumari Ishita(victim) stated that when she was going to college, two boys came on a scooter and threw some acid over her from a jug and run away from the spot. After investigation, challan was filed against both the accused respondents who were tried by the learned trial Court leading to their conviction which convicted them for offence under Section 307/34 IPC and sentenced them to undergo rigorous imprisonment of 10 years with a fine of Rs. 5,000/- each by judgment dated 30th November, 2005 which came to be challenged by them in appeal before the High Court of Himachal Pradesh.

Taking note of the chemical burns caused by sulphuric acid of around 16%,the High Court arrived at the conclusion that the offence under Section 307/34 IPC was not made out and converted the offence from Section 307/34 IPC to Section 326 IPC and sentenced them for a period of 5 years rigorous imprisonment with a fine of Rs. 25,000/- each vide judgment dated 24th March, 2008, which has been challenged in this appeal.

ISSUE

Whether the imposition of sentence by the High Court is proportionate to the crime in question and whether the victim is entitled for any compensation in addition to what has been awarded under the impugned judgment?

OBSERVATIONS AND DECISION

The Hon'ble Court referred to the judgment of the two-Judges Bench of the Court in ***Sachin Jana v. State of West Bengal***[21] where the accused persons faced trial for offence under Sections 148, 323, 324 and 307 read with Section 149 IPC on account of 50% burn injury which was caused due to acid attack were convicted by the High Court for offence under Section 307/34 IPC but their custodial sentence was reduced to 5 years and a fine of Rs. 25,000/-. The relevant extract is as under:—

> *"**9.** It is to be noted that three persons suffered injuries on account of acid poured on them. The doctor had indicated that each of the injured persons suffered more than 50% burn injury which was caused due to acid and the same was sufficient to cause death if not attended by medical aid at appropriate time.*
>
> *12. When the evidence on record is analysed, it is clear that Section 307 read with Section 34 IPC has clear application. The acid burns caused disfigurement.*
>
> *13. Considering the nature of dispute the custodial sentence is reduced to 5 years. However, each of the appellants is directed to pay a fine of Rs. 25,000/-. If the amount is deposited by the appellants within six weeks from today, out of each deposit, Rs. 10,000/- shall be paid to each of the victims PWs 1, 2 and 3; in case the amount of fine imposed is not deposited, the default custodial sentence of one year each."*

The matter in reference to the victim suffered due to acid attack was further considered by a two-Judge Bench of thE Hon'ble Supreme Court in ***Ravada Sasikala* v. *State of Andhra Pradesh***[22] where learned trial Court convicted the accused person under Section 326 and 448 IPC and sentenced him to suffer rigorous imprisonment for one year and directed to pay a fine of Rs. 5,000/-. The High Court while confirming the conviction under Section 326 IPC released the accused to the period which he had already undergone of 30 days which came to be interfered by this Court and the punishment and sentence of one year under Section 326 IPC was restored. But while doing so, this Court also ousted the compensation which the

[21] (2008) 3 SCC 390.
[22] (2017) 4 SCC 546

victim may be entitled for under Section 357 and Section 357-A of the Code of Criminal Procedure, 1973 (hereinafter being referred to as "CrPC").

Referring to the aforementioned judgments, the Hon'ble Court held that the accused respondents have rightly been held guilty and their conviction under Section 326 IPC and sentence for 5 years at least needs no interference but at the same time, the Court found it important to address on victim compensation which may at least bring same solace to the victim for the sufferings which she had suffered.

As far as the compensation to the victim was concerned, the Hon'ble Court referred to the following cases: -

***Ankush Shivaji Gaikwad v. State of Maharashtra*, (2013) 6 SCC 770** – A two-Judge Bench of the Supreme Court referred to the amended provision, 154th Law Commission Report that has devoted entire chapter of victimology, wherein the emphasis was on the victim.

***Laxmi* v. *Union of India*, (2014) 4 SCC 427** – This Court observed that Section 357-A came to be inserted in the Code of Criminal Procedure, 1973 by Act 5 of 2009 w.e.f. 31st December, 2009 which, inter alia, provides for preparation of a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation. It further directed that acid attack victims shall be paid compensation of at least Rs. 3 lakhs by the State Government/Union Territory concerned as the aftercare and rehabilitation cost.

***State of M.P.* v. *Mehtaab*, (2015) 5 SCC 197** – The Supreme Court directed the compensation of Rs. 2 lakhs noticing the fact that occurrence took place in 1997 and it observed that the said compensation was not adequate and accordingly, in addition to the said compensation to be paid by the accused, held that the State was also required to pay compensation under Section 357-A CrPC and reliance was placed on the decision in ***Suresh* v. *State of Haryana*, (2015) 2 SCC 227.**

***State of H.P.* v. *Rampal*, (2015) 11 SCC 584** – Victim Compensation Scheme was discussed by the Hon'ble Court where it had opined that compensation of Rs. 40,000/- was inadequate taking note of the fact that the life of young child aged 20 years was lost and taking note of

the precedents observed that in the interest of justice, the accused is required to pay a sum of Rs. 1 lakh and the State to pay a sum of Rs. 3 lakhs as compensation.

After referring to these precedents, the Hon'ble Court held that both the accused shall pay the additional compensation of Rs. 1,50,000/-(Rupees One Lakh and Fifty Thousand) each and the State of Himachal Pradesh shall pay the compensation as admissible under the Victim Compensation Scheme as in vogue to the acid victim (Ishita Sandhu, D/o Late Shri Rikhi Ram Sandhu) (Appellant No. 2). If the accused does not pay the additional compensation amount of Rs. 1,50,000/- (Rupees One Lakh and Fifty Thousand) each within six months, the defaulting accused shall suffer rigorous imprisonment of six months. The State shall deposit the compensation before the trial Court within three months from today and the learned trial Court, after proper identification of the victim, disburse at the earliest.

33. Periyasami and Others v. S. Nallasamy (Criminal Appeal No. 456/2019)

Decided on – 14.03.2019

Bench – 1. Hon'ble Mr. Justice Dr. D.Y. Chandrachud

2. Hon'ble Mr. Justice Hemant Gupta

(Application of Section 319 of the CrPC)

NOTE :- The case of *Sugreev Kumar v. State of Punjab and Others* (Criminal Appeal No. 509/2019), decided on 15.03.2019 also dealt with the application of Section 319 of the CrPC.

FACTS

The Complainant married Thangamani in the year 1998. It is alleged that the wife of the Complainant would remain in her father's house generally and occasionally she would come to Saanarpalayam. They have a daughter named Loganithya. It is also mentioned that his wife filed a partition suit which was dismissed in view of compromise when his wife and daughter came to his house. But still, his wife used to pick up quarrel every day. The daughter was admitted in P.K.P. Swamy Matriculation School, Kalanipuram but the wife did not permit the daughter to write examination and left for Ellapayalayam. His mother-in-law, father-in-law and brother-in-law threatened that their daughter will not live with him and demanded Rs. 30 lakhs towards maintenance otherwise they will lodge a dowry case against him and his mother.

On 05.05.2011 at about 11.00 AM, when he was in the house at Nanjappangoundanur, his father-in-law Ramalingam, mother-in-law Lakshmi, brother-in-law Senthilkumar, wife Thangamani and other relatives (15 women and 35 men) came by vehicles namely Maruti Van bearing Registration No. TN-33-AS-5695, TATA ACE TN-33-AT-4640 and TATA 407 TAE-9996 and forcibly entered his house and scolded him. The men folk were having weapons like crowbar, knife and ripper etc. They demanded Rs. 30 lakhs towards maintenance. One of the persons in the group exhorted them not to talk but to kill. The persons came running towards them with sickles and sticks. All the accused shouted to lock the house and took away turmeric bundles in the tempo van.

On the basis of such FIR, the Investigating Officer recorded the statement of Complainant on 29.05.2011. But none of the appellants in the present appeal were referred to in the said statement. Even in the statements of other witnesses associated during the course of investigation, names of the appellants were not disclosed as the persons who were part of the group, said to have assaulted the Complainant and trespassed into his house. After completion of investigation, report under Section 173 of the Code was filed against 11 accused on 09.11.2011.

The Complainant filed application before the learned trial court for further investigations under Section 173(8) of the Code. Such request was resisted by the accused inter alia on the ground that the future investigations can be sought only by the Investigating Officer and not by the Complainant. Such application was dismissed on 30.07.2013. Thereafter, the Complainant appeared as PW1 on 26.12.2013 disclosing the names of the appellants as part of the group who barged into his house and also attacked him. The prosecution also examined PW2 Loganayagi (mother of the Complainant), PW3 Murugaiyan and PW4 Jagadeesan (neighbours of the Complainant).

It is thereafter, an application was filed under Section 319 of the Code to summon the 20 accused persons named in the application as additional accused. Such application was resisted inter alia on the ground that similar relief claimed by the Complainant in Criminal O.P. No. 1680 of 2012 filed before the High Court of Madras was dismissed on 21.02.2012. Thereafter, the Complainant has filed a petition under Section 173(8) of the Code which was dismissed on 30.07.2013. It is also pointed out that names of the proposed accused were not disclosed in the First Information Report nor came to light during investigation. It is on the said basis the learned Magistrate passed an order on 27.02.2015 declining to summon the appellants as additional accused. The said order was challenged before the High Court, which set-aside the order and allowed the application under Section 319 of the CrPC. The said order is under challenge before the Hon'ble Supreme Court.

OBSERVATION AND DECISION

The Hon'ble Court referred to the judgment by the Constitutional Bench of the Court in ***Hardeep Singh v. State of Punjab***[23], wherein it had been held –

"105. Power under Section 319 CrPC is a discretionary and an extraordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.

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."

The Hon'ble Court also referred to ***Labhuji Amratji Thakor v. The State of Gujarat*** [24], where the order of summoning the additional accused on the basis of the statements of some of the witnesses in witness box was set aside for the reason that there is not even suggestion of any act done by the appellants amounting to an offence under Sections 3 and 4 of the Protection of Children from Sexual Offences Act, 2012. Relying on these judgments, the Hon'ble Court allowed the appeal and set-aside the order of the Hon'ble High Court and held that there is no strong or cogent evidence to make the appellants stand the trial for the offences under Sections 147, 448, 294(b) and 506 of IPC because The additional accused cannot be summoned under Section 319 of the Code in casual and cavalier manner in the absence of strong and cogent evidence. **Under Section 319 of the Code additional accused can be summoned only if there is more than prima facie case as is required at the time of framing of charge but which is less than the satisfaction required at the time of conclusion of the trial convicting the accused.**

[23] (2014) 3 SCC 92.
[24] Criminal Appeal No. 1349 of 2018, decided on 13.11.2018.

34. Principal Commissioner of Income Tax-8 v. Yes Bank Ltd. (Civil Appeal No. 3148/2019)

Decided on – 15.03.2019

Bench – 1. Hon'ble Mr. Justice Abhay Manhoar Sapre

2. Hon'ble Mr. Justice Dinesh Maheshwari

(Role of the High Court under Section 260-A of the Income Tax Act)

FACTS

The appellant is the Union of India (Income Tax Department) and the respondent-Bank is the assessee. In the course of assessment proceedings of the respondent-assessee(Bank) for the Assessment Year 2007-2008, the question arose as to whether the respondent-assessee(Bank) was entitled to claim deduction under Section 35-D of the Income Tax Act, 1961 (for short, "the Act") for the Assessment Year in question. In other words, the question arose as to whether the respondent-Bank is an industrial undertaking so as to entitle them to claim deduction under Section 35-D of the Act.

The case of the respondent was that they, being an industrial undertaking, are entitled to claim the deduction under Section 35-D of the Act. The Assessing Officer passed an order dated 31.10.2009 which gave rise to the proceedings before the Commissioner under Section 263 of the Act which resulted in passing of an adverse order dated 14.11.2011 by the Commissioner. This gave rise to filing of the appeal by the respondent before the ITAT against the order of the Commissioner. By order dated 05.12.2014, the ITAT allowed the appeal which gave rise to filing of the appeal by the Revenue (Income Tax Department) in the High Court under Section 260-A of the Act. The High Court dismissed the appeal after hearing both the parties giving rise to filing of this appeal by way of special leave.

OBSERVATIONS AND DECISION

The Hon'ble Court found it appropriate to remand the case to the High Court for the following reasons :-

First, the High Court did not frame any substantial question of law as is required to be framed under Section 260-A of the Act though heard the appeal bipartite. In other words, the High Court did not dismiss the appeal in *limine* on the ground that the appeal does not involve any substantial question of law;

Second, the High Court dismissed the appeal without deciding any issue arising in the case saying that it is not necessary.

Third, the main issue involved in this appeal, as rightly taken note of by the High Court in Para 6, was with regard to the applicability of Section 35-D of the Act to the respondent-assessee(Bank). It was, however, not decided.

According to the Hon'ble Court, the High Court should have framed the substantial question of law on the applicability of Section 35-D of the Act in addition to other questions and then should have answered them in accordance with law rather than to leave the question(s) undecided.

35. ***Lahari Sakhamuri v. Sobhan Kodali (Civil Appeal Nos. 3135-316/2019 with Criminal Appeal No. 500/2019)***

Decided on – 15.03.2019

Bench – 1. Hon'ble Mr. Justice A.M. Khanwilkar

2. Hon'ble Mr. Justice Ajay Rastogi

(Discussion on the factors to be considered while deciding the custody of a child especially when the spouses are non-resident Indians)

FACTS

The appellant (Lahari Sakhamuri) and respondent (Sobhan Kodali) are the parents of the minor children. Appellant (Lahari Sakhamuri) went to USA for her masters in September, 2004 and thereafter started working in USA. She is a Biomedical Engineer by profession. Respondent (Sobhan Kodali) is also highly qualified and went to USA in July 2005 and is presently a Cardiologist by profession. Their marriage was solemnized according to Hindu rites in Hyderabad on 14th March, 2008. From this wedlock, son, namely, Arthin and daughter Neysa were born on 14thMarch, 2012 and 13th October, 2014 and both are US citizens and also hold US passports. The couple purchased house in Pennsylvania on 29th January, 2016 in their joint names and moved to their new home. The son started going to a school in September 2014 and a daughter in December, 2016. Both the children being there in US from their birth, the social and cultural value of US certainly was embedded in both of them.

However, something went wrong in the marriage to the extent that divorce petition was filed in the US and the conciliation proceedings related thereto had started. on the date of filing of the petition for divorce and custody of minor children by the appellant (Lahari Sakhamuri), i.e. 21st December, 2016 in US, the order came to be passed on the petition directing respondent (Sobhan Kodali) to appear for conciliation conference on 20th January, 2017 and both the parties were directed not to change the residence of the children which would affect the other party's ability to exercise custodial rights.

By the time parties could reach to a final consensus by the intervention of the trained conciliators which indisputedly play a very pivotal role in matrimonial matters, there was a sad demise of the maternal grandmother of the appellant (Lahari Sakhamuri) and in providing strength and support to the family, the appellant travelled to India with both the

minor children on 23rd March, 2017 with return tickets of 24th April, 2017 and within 20 days of coming to Hyderabad(India) where her family reside, filed a petition in the Family Court, Hyderabad on 12th April, 2017 seeking custody of minor children and injunction against respondent (Sobhan Kodali) under the Guardians and Wards Act, 1890 and she was able to succeed in getting ex-parte interim injunction on 12th April, 2017.

After few days, she also filed a FIR against respondent (Sobhan Kodali) and his family members for offence under Section 498A IPC i.e. on 21st April, 2017 but after investigation, the police filed closure report on 1st November, 2017. The fact to be noticed here at this stage is that the very appellant (Lahari Sakhamuri) filed a petition for divorce and custody of minor children in US on 21st December, 2016, there was no whisper or an averment that there was any domestic violence or abuse either subjected upon her or the minor children by respondent (Sobhan Kodali) and he was informed on 23rd April, 2017, twelve hours before her flight that she would not be returning and does not have a travel date in mind. Respondent (Sobhan Kodali) and his counsel in the US were orally informed of the ex-parte order which was received by respondent (Sobhan Kodali) on 29th April, 2017 through e-mail from the counsel for appellant (Lahari Sakhamuri) in India.

Immediately, on receiving the oral information, on 26th April, 2017, emergency petition for interim orders in petition for divorce and custody filed at the instance of the appellant (Lahari Sakhamuri) was filed by respondent (Sobhan Kodali). The said application was contested by the appellant (Lahari Sakhamuri) through Attorney and in defence stated that she had only temporarily relocated to India for attending her grandmother's funeral and providing emotional support to her mother. After hearing the parties, the US Court passed order on 22nd May, 2017 for continuing the jurisdiction over the custody matter and granted temporary physical custody of the children to respondent (Sobhan Kodali) with a further direction that children be returned to the jurisdiction of the Court in US by 2nd June, 2017.

Thereafter, the respondent (Sobhan Kodali) moved an application under Order 7 Rule 11 CPC in the proceedings instituted in the Family Court, Hyderabad asserting that the Family Court, Hyderabad has no jurisdiction to decide the application for the custody of minor children as they are not the ordinary resident of Hyderabad but that came to be rejected vide order dated 15th September, 2017 holding that the Family Court, Hyderabad is competent to exercise jurisdiction to examine the application filed at the instance of the appellant (Lahari Sakhamuri) on merits.

At this stage, respondent (Sobhan Kodali) preferred appeal to the High Court under Section 19(1) of the Family Courts Act against the order dated 15th September, 2017 passed by the learned Family Court, Hyderabad holding jurisdiction to examine the application filed by the appellant (Lahari Sakhamuri) regarding custody of the minor children under Guardians and Wards Act, 1890. Simultaneously, without any loss of time, respondent (Sobhan Kodali) also

filed a writ petition seeking Writ of Habeas Corpus for producing the minor children in the custody of the US Court taking note of the earlier order passed dated 21st December, 2016 followed with order dated 22nd May, 2017. The appeal and the writ petition were clubbed but were decided by the High Court by separate orders dated 8th February, 2018 holding that the Family Court, Hyderabad has no jurisdiction as the children are not ordinarily residing within the jurisdiction of the Family Court, Hyderabad as provided under Section 9 of the Guardians and Wards Act, 1890. In consequence thereof, application filed by the appellant (Lahari Sakhamuri) stood rejected. At the same time, in the Habeas Corpus Petition, Order came to be passed dated 8thFebruary, 2018.

Bothe the orders passed by the High Court was under challenge before the Hon'ble Supreme Court.

OBSERVATIONS AND DECISION

The Hon'ble Court was of the opinion that the persons who are affected are the minor children who have been directly impacted because of the fact that their parents have not been able to resolve their differences. Children are very sensitive and due to the conflict of their parents if could not be resolved at the earliest, the minor children became the victim of time for which they are not at fault but indeed the sufferers. It has to be examined in different perspective also that rights of the child as a progressive approach to the best interest of the child and what is needed in the best interest of the child is the one which has to be deciphered by us in the instant proceedings through the manifold arguments being advanced from both sides keeping in view the principles of law on the subject but still remain a guess work. The Hon'ble Court opined that though there are plentitude of judgments of the court but still each case has to be decided on its own facts and circumstances and ultimate goal which has to be kept in mind is the best interest of the child which is of utmost importance and of a paramount consideration.

It further observed that it would have been better and in the interest of the parties themselves to amicably resolve their differences for their better future but as they have failed to do so, the judicial process has to intervene to decide the case on merits based on judicial precedents.

The Hon'ble Court upheld the judgment of the High Court that the minor children were not ordinary residents of Hyderabad (India) as envisaged under Section 9(1) of the Guardians

and Wards Act, 1890. Resultantly, the application for custody of minor children filed before the Family Court, Hyderabad was held to be rightly rejected by the High Court in exercise of power under Order 7 Rule of CPC. At the same time, when the orders have been passed by the US Court, the parties cannot disregard the proceedings instituted before the US Court filed at the instance of the appellant (Lahari Sakhamuri) who is supposed to participate in those proceedings.

The Hon'ble Court also held that he judgment relied upon by the learned counsel for the appellant of ***Jasmeet Kaur* v. *Navtej Singh***[25] may not be of any assistance for the reason that it was a case where one of the child was born in India which was one of the reason prevailed upon this Court to hold that principle of comity of courts or principle of forum convenience cannot determine the threshold bar of jurisdiction and when paramount consideration is the best interest of the child, it can be the subject-matter of final determination in proceedings and not under Order 7 Rule 11 CPC. In our considered view, the application for custody of minor children filed at the instance of the appellant was rightly rejected by the High Court under the impugned judgment, in consequence thereof, no legal proceedings in reference to custody of the minor children remain pending in India.

The Hon'ble Court was of the opinion that the custody of minor children has been considered difficult in adjudication by the Courts apart from raising delicate issues, especially when the spouses are non-resident Indians (NRIs). Therefore, the Hon'ble Court referred to the following judgments of the Supreme Court to further elucidate the legal position on the issue:-

(i) ***Surinder Kaur Sandhu* v. *Harbax Singh Sandhu***[26]

The Court was concerned with the custody of a child who was British citizen by birth whose parents had been settled in England after their marriage. A child was removed by the husband from the house and was brought to India. The wife obtained a judicial order from the UK Court whereby the husband was directed to hand over the custody of a child to her. The said order was later confirmed by Court of England and thereafter the wife came to India and filed a writ petition in

[25] (2018) 4 SCC 295.
[26] (1984) 3 SCC 698.

the High Court of Punjab and Haryana praying for custody and production of the child which came to be dismissed against which the wife appealed to this Court. The Court keeping in view the 'welfare of the child', 'comity of courts' and 'jurisdiction of the State which has most intimate contact with the issues arising in the case' held thus:—

"10. *We may add that the spouses had set up their matrimonial home in England where the wife was working as a clerk and the husband as a bus driver. The boy is a British citizen, having been born in England, and he holds a British passport. It cannot be controverted that, in these circumstances, the English Court had jurisdiction to decide the question of his custody. The modern theory of Conflict of Laws recognises and, in any event, prefers the jurisdiction of the State which has the most intimate contact with the issues arising in the case. Jurisdiction is not attracted by the operation or creation of fortuitous circumstances such as the circumstance as to where the child, whose custody is in issue, is brought or for the time being lodged. To allow the assumption of jurisdiction by another State in such circumstances will only result in encouraging forum-shopping. Ordinarily, jurisdiction must follow upon functional lines. That is to say, for example, that in matters relating to matrimony and custody, the law of that place must govern which has the closest concern with the well-being of the spouses and the welfare of the offsprings of marriage. The spouses in this case had made England their home where this boy was born to them. The father cannot deprive the English Court of its jurisdiction to decide upon his custody by removing him to India, not in the normal movement of the matrimonial home but, by an act which was gravely detrimental to the peace of that home. The fact that the matrimonial home of the spouses was in England, establishes sufficient contacts or ties with that State in order to make it reasonable and just for the courts of that State to assume jurisdiction to enforce obligations which were incurred therein by the spouses (See International Shoe Company v. State of Washington [90 L Ed 95 (1945) : 326 US 310] which was not a matrimonial case but which is regarded as the fountainhead of the subsequent developments of jurisdictional issues like the one involved in the instant case.) It is our duty and function to protect the wife against the burden of litigating in an inconvenient forum which she and her husband had left voluntarily in order to make their living in England, where they gave birth to this unfortunate boy."*

(ii) ***Elizabeth Dinshaw* v. *Arvand M. Dinshaw*[27]**

The Hon'ble Supreme Court had held that it is the duty of courts in all countries to see that a parent doing wrong by removing children out of the country does not gain any advantage by his or her wrongdoing and was guided by the factors such as the longer time spent by the child in the US in which the child was born and became US citizen and also the fact that the child has not taken roots in India and was still not accustomed and acclimatized to the conditions and environment obtaining in the place of his origin in the United States of America. The Court took note of the fact that the child's presence in India is the result of an illegal act of abduction and the father who is guilty of the said act cannot claim any advantage by stating that he has already put the child in some school in Pune.

(iii) ***V. Ravi Chandran(Dr.)* v. *Union of India*[28]**

In this case, the Court was concerned with the custody of the child removed by a parent from one country to another in contravention of the orders of the Court where the parties had set up their matrimonial home. This Court took note of the English decisions, namely *L(Minors) in re*[29] and *McKee* v. *McKee*[30] and also noticed the decision of this Court in *Elizabeth Dinshaw's case* (supra) and *Dhanwanti Joshi* v. *Madhav Unde*[31] keeping into consideration the fact that the child was left with his mother in India for nearly twelve years, this Court held that it would not exercise its jurisdiction summarily to return the child to the US on the ground that his removal from US in 1984 was contrary to the orders of US Courts. However, in a case where the court decides to exercise its jurisdiction summarily to return the child to his own country, keeping in view the jurisdiction of the court in the native country which has the closest concern and the most intimate contact with the issues arising in the case, the court may leave the aspects relating to the welfare of the child to be investigated by the court in his own native country as that could be in the best interests of the child.

[27] (1987) 1 SCC 42.
[28] (2010) 1 SCC 174.
[29] (1974) 1 All ER 913(CA)
[30] (1951) AC 352
[31] (1998) 1 SCC 112.

(iv) ***Surya Vadanan* v. *State of Tamil Nadu***[32]

This was a case where the spouses were of Indian origin and later the husband became the citizen of UK. They got married in India and had two daughters in UK. The wife also became a British citizen and had a British passport. After matrimonial dispute arose between them, the wife returned to India with her daughters and filed a petition under Section 13(1)(ia) of the Hindu Marriage Act, 1955 seeking divorce in the Family Court. At the same time, husband filed a petition in the High Court of Justice. The said Court had passed an order making the children wards of the Court during their minority or until further orders of the court and the wife was directed to return the children to the jurisdiction of the foreign court. This Court applied the principles of (i) "the first strike", i.e the UK Court had passed effective and substantial order declaring the children of the parties as wards of that court, (ii) the comity of courts and (iii) the best interest and welfare of the child. It also held that the "most intimate contact" doctrine and the "closest concern" laid down in *Surinder Kaur Sandhu's case* (supra) are very much alive and cannot be ignored only because their application might be uncomfortable in certain situations. The Court also reiterated that the best interest and welfare of the child are of paramount importance which shall always be kept in mind by the courts while adjudicating the disputes.

This was followed by a three Judge Bench of the Court in ***Nithya Anand Raghavan v. State (NCT of Delhi)***[33]

(v) ***Nithya Anand Raghavan v. State (NCT of Delhi)***[34]

In this case, the couple married on 30th November, 2006 at Chennai and shifted to UK in early 2007. Disputes arose between the spouse. The wife had conceived in December, 2008 came to New Delhi in June 2009 and stayed there with her parents and she gave birth to a girl child in August, 2009 at Delhi. After the husband arrived in India, the couple went back to UK in March, 2010 and following certain unsavoury events, the wife and the daughter returned to India in August 2010. After exchange of legal correspondence, the wife and her daughter went back to

[32] (2015) 5 SCC 450.
[33] (2017) 8 SCC 454.
[34] (2017) 8 SCC 454.

London in December 2011. In July, 2014, the wife returned to India along with her daughter and early 2015 the child became ill and was diagnosed with cardiac disorder and due to the alleged violent behavior of her husband filed complaint against him at the GAW Cell, New Delhi. In 2016, husband filed custody/wardship petition in UK to seek return of the child. He also filed habeas corpus petition in 2017 in Delhi High Court which was allowed. The matter was brought before this Court by the wife. This Court heavily relied upon its earlier judgment in *Dhanwanti Joshi's case* (supra) which in turn referred to *Mckee's case* (supra) where the Privy Council held that the order of foreign court would yield to the welfare of the child and that the comity of courts demanded not its enforcement, but its grave consideration. This Court also relied upon the judgment in *V. Ravi Chandran's case* (supra) and held that the role of the High Court in examining the cases of custody of a minor is on the touchstone of principle of parents patriae jurisdiction, as the minor is within the jurisdiction of the Court. This Court further held that the High Court while dealing with the petition for issuance of habeas corpus concerning a minor child in a given case, may direct return of the child or decline to change the custody of the child keeping in mind all the attending facts and circumstances into consideration. It was held further by this Court that each case must depend on the totality of the facts and circumstances brought before it while considering the welfare of the child which is of paramount consideration and the order of the foreign Court must yield to the welfare of the child and the remedy of writ of habeas corpus cannot be used for mere enforcement of the directions given by the foreign court against a person within its jurisdiction and convert that jurisdiction into that of an executing court. It was further observed that writ petitioner can take recourse to such other remedy as may be permissible in law for enforcement of the order passed by the foreign court or resort to any proceedings as may be permissible in law before the Indian Court for the custody of the child, if so advised. The Court had also laid down the following directions: -

"56. However, if there is a pre-existing order of a foreign court of competent jurisdiction and the domestic court decides to conduct an elaborate inquiry (as against a summary inquiry), it must have special reasons to do so. An elaborate inquiry should not be ordered as a matter of

course. While deciding whether a summary or an elaborate inquiry should be conducted, the domestic court must take into consideration:

(a) The nature and effect of the interim or interlocutory order passed by the foreign court.

(b) The existence of special reasons for repatriating or not repatriating the child to the jurisdiction of the foreign court.

(c) The repatriation of the child does not cause any moral or physical or social or cultural or psychological harm to the child, nor should it cause any legal harm to the parent with whom the child is in India. There are instances where the order of the foreign court may result in the arrest of the parent on his or her return to the foreign country. [Arathi Bandiv. Bandi Jagadrakshaka Rao, (2013) 15 SCC 790 : (2014) 5 SCC (Civ) 475] In such cases, the domestic court is also obliged to ensure the physical safety of the parent.

(d) The alacrity with which the parent moves the foreign court concerned or the domestic court concerned, is also relevant. If the time gap is unusually large and is not reasonably explainable and the child has developed firm roots in India, the domestic court may be well advised to conduct an elaborate inquiry."

The essence of the judgment in *Nithya Anand Raghavan's case* (supra) is that the doctrines of comity of courts, intimate connect, orders passed by foreign courts having jurisdiction in the matter regarding custody of the minor child, citizenship of the parents and the child etc. cannot override the consideration of the best interest and the welfare of the child and that the direction to return the child to the foreign jurisdiction must not result in any physical, mental, psychological, or other harm to the child.

Applying the principles laid down by the Court in the aforementioned judgments to the present facts of the case, the Hon'ble Court held that the doctrines of comity of courts, intimate connect, orders passed by foreign courts having jurisdiction in the matter regarding custody of the minor child, citizenship of the parents and the child etc., cannot override the consideration of the best interest and the welfare of the child and that the direction to return the child to the foreign jurisdiction must not result in any physical, mental, psychological, or other harm to the child. Taking a holistic consideration of the entire case, the Court was satisfied that all the criteria such as comity of courts, orders of foreign court having jurisdiction over the matter regarding custody of the children, citizenship of the spouse and the children, intimate connect, and above all, welfare and best interest of the minor children weigh in favour of the respondent (Sobhan Kodali) and that has been looked into by the High Court in the impugned judgment in detail and, therefore, that needed no interference under Article 136 of the Constitution of India.

36. Senior Divisional Manager, Life Insurance Corporation of India and Others v. Shree Lal Meena (Civil Appeal No. 14739/2015)

Decided on – 15.03.2019

Bench – 1. Hon'ble Mr. Justice Ranjan Gogoi

2. Hon'ble Mr. Justice Sanjay Kishan Kaul

3. Hon'ble Mr. Justice K.M. Joseph

(When the Legislature, in its wisdom, brings forth certain beneficial provisions in the form of Pension Regulations from a particular date and on particular terms and conditions, aspects which are excluded cannot be included in it by implication.)

FACTS

Shree Lal Meena, the respondent in the appeal was an employee of the Life Insurance Corporation of India Limited (for short 'LIC'). On completion of more than 20 years of service, he addressed a letter dated 15.6.1990 to the LIC, expressing concerns about the poor health of his wife and himself and the possibility that he may be seeking voluntary retirement on account thereof. There being no response to this letter, Shree Lal Meena followed the said letter with another letter dated 18.6.1990, reiterating the same aspect. Once again, there was no response. Finally, he tendered a letter of resignation on 14.7.1990, for it to take effect immediately, by waiving off the mandatory notice period of three months under Regulation 18 of the Life Insurance Corporation of India (Staff) Regulations, 1960 (hereinafter referred to as the 'Staff Regulations'). The acceptance of the resignation was communicated by the LIC vide letter dated 11.1.1991, to take effect from 14.7.1990, waiving off the statutory notice period.

There was no scheme or provision for voluntary retirement applicable to Shree Lal Meena during this period of time. Shree Lal Meena was paid all his dues as were admissible to him. The beneficial scheme operating at the relevant time was a Contributory Provident Fund Scheme under Regulation 76 of the Staff Regulations.

More than 5 years later, the Life Insurance Corporation of India (Employees) Pension Rules, 1995 (for short 'Pension Rules') were promulgated, on 28.6.1995, but were brought into force with retrospective effect, from 1.11.1993, unless expressly provided against. The applicability of Section 3(1)(a) of the Pension Rules made the scheme applicable to all the employees who were in service of the LIC on or after 1.1.1986, but had retired before 1.11.1993, given that the employees satisfied the other conditions provided for in the Pension Rules.

Shree Lal Meena was in service after 1.1.1986. He had, however, resigned with effect from 14.7.1990. Had he not resigned he would have continued in service and would have retired

sometime around the year 2000. He had also made an endeavour, prior to his resignation, proposing voluntary retirement for himself. Shree Lal Meena was, thus, of the view that the Pension Rules should be made applicable to him and accordingly made a request, which was, however, declined on 6.4.1996 by the LIC on the ground that he had 'resigned' from service. He, thus, issued a notice of demand vide letter dated 28.8.1997, which met with the same fate and finally filed a writ petition before the Rajasthan High Court in 1997 itself, which was decided in his favour, by the learned Single Judge of that Court, vide judgment dated 8.9.2006.

The gravamen of the judgment of the learned Single Judge is the request made by Shree Lal Meena for voluntary retirement and that it was the absence of any provision for the same under the Staff Regulations, which had caused him to tender his resignation. This view was sought to be supported by the judgment of this Court in ***JK Cotton Spinning & Weaving Mills Co. Ltd., Kanpur v. State of U.P***.[35], opining that where an employee voluntarily tenders his resignation, termination of service, post acceptance of such resignation by the employer would fall in the category of 'voluntary retirement', given all other ingredients of voluntary retirement were being met. It may be noted that in the factual contours of the controversy of that judgment, the question really posed was whether in the case of services of an employee being terminated consequent to a voluntary resignation, such termination so brought about would amount to retrenchment within the meaning of Section 2(s) read with Section 6N of the Uttar Pradesh Industrial Disputes Act, 1947. As per the provisions of Section 2(s) of that Act, the definition of 'retrenchment' excludes a case of voluntary retirement. Since the employee had tendered his resignation voluntarily, and had subsequently claimed compensation on account of retrenchment, this Court, in that case had opined against the employee. The learned Single Judge of the Rajasthan High Court also recorded that there was no dispute that Shree Lal Meena had the requisite years of service to be entitled to pensionary benefits if the scheme had existed at the relevant point of time.

LIC, aggrieved by this order, appealed to the Division Bench of the High Court, which endeavour, however, failed as the appeal was dismissed vide order dated 16.8.2011. The plea of the LIC, based on the judgment of this Court in ***Reserve Bank of India v. Cecil Dennis Solomon***[36] and of the Division Bench of the Punjab & Haryana High Court in ***J.M. Singh* v. *Life Insurance Corporation of India*** was repelled. LIC, therefore, filed the present appeal.

[35] (1990) 4 SCC 27.
[36] (2004) 9 SCC 461.

ISSUE

Whether these employees, who had resigned from service post the date from which the pension schemes were made applicable, but prior to the date on which the schemes got notified, would be entitled to the benefit of the pension schemes in question?

A Bench of two Judges of the Hon'ble Supreme Court found that there was a divergence of judicial views of this Court, and the matter needed to be examined by a larger Bench and thus this issue was before the present bench.

OBSERVATIONS AND DECISIONS

The Hon'ble referred to the definitions contained in Rule 2(s) and in Rule 23 of the Pension Rules, which are as follows:-

Rule 2(s) – *"retirement" means,-*

(i) retirement in accordance with the provisions contained in sub-regulation (1) or sub-regulation (2) or sub-regulation (3) of regulation 19 of the Life Insurance Corporation of India (Staff) Regulations, 1960 and rule 14 of the Life Insurance Corporation of India Class III and Class IV Employees (Revision of Terms and Conditions of Service) Rules, 1985 made under the Act;

(ii) voluntary retirement in accordance with the provisions contained in rule 31 of these rules;

Rule 23 – *Forfeiture of service - Resignation or dismissal or removal or termination or compulsory retirement of an employee from the service of the Corporation shall entail forfeiture of his entire past service and consequently shall not qualify for pensionary benefits.*

The Hon'ble Court concluded that the definition of 'retirement' envisages two eventualities - first a person who had retired in terms of the Staff Regulations; and secondly, a voluntary retirement under the provisions of the Pension Rules themselves. resignation entails forfeiture of the entire past service and consequently would not qualify for pensionary benefits. Rule 31 deals with 'Pension on voluntary retirement', which is admissible on completion of 20 years of qualifying service, with a notice of not less than 90 days in writing.

Analyzing the facts of the case, the Hon'ble Court observed that as on the date when Shree Lal Meena was revolving the thought in his mind of voluntary retirement, there was no such provision in the Staff Regulations applicable. Thus, his repeated communications setting forth a thought process for 'voluntary retirement' had no legal backing on that date. It is in these circumstances that no response was forthcoming to his letters, when he talked about a concept which did not exist. Conscious of this aspect and wanting to leave the services of the LIC, Shree Lal Meena took recourse to what was permissible on that date, i.e., 'resignation'. Section 3 of the Staff Regulations has a heading 'Termination'. The other

expression used before the relevant Regulation 18 is 'Determination of Service'. The Regulation itself uses the expression 'leave or discontinue' service. In whatever manner these expressions are understood, in legal and common parlance, they amount to, first a unilateral act on the part of an employee, desirous of not continuing with her/his service with the employer and then, the acceptance of the same by the employer, subject to a notice period, which, in the present facts, had been waived at the request of the employee. Thus, on the relevant date he took a conscious decision to disengage himself from the services of the appellant, on the terms & conditions as prevalent on that date. As to what happened five years hence would have no bearing on any benefit, which can accrue to such employee as a respondent, except to the extent which is specifically made applicable to him.

The Hon'ble reiterating the principle that statutory provisions must be given their clear meaning unless there is ambiguity in the wordings, observed that there is no ambiguity in the Pension Rules in question as to require any import to be given that is different from its plain words. The Pension Rules have been brought into force from a retrospective date of 1.11.1993. Thus, they would logically apply to all employees in service on or after 1.11.1993. The respondent was not such a person. There is only one further twist to the Pension Rules. Rule 3(1)(a) of the Pension Rules refers to applicability of these Pension Rules even to such of the employees who "retired" on or after 1.1.1986 and before 1.11.1993. Even for such of the employees, there is a requirement for an option to be exercised, in writing, that within a period of time of 120 days from the notified date they become member of the Life Insurance Corporation of India (Employees) Pension Fund, and refund within 60 days thereafter, the entire amount of LIC's contribution to the Provident Fund, including interest accrued thereon. This is so, as employees who retired during this period of time had availed of the contributory provident fund benefit under the then existing Staff Regulations, and would have to surrender the benefits under those Regulations to the extent they were contributed for by the LIC, for the new Pension Rules to be made applicable to them. The expression used in Rule 3(1)(a) is clear and unequivocal - 'retired'. It has not used any alternative expression also, for determination of the relationship of employer-employee, like 'resignation'. In the same Rules, expressions like 'resignation', 'dismissal', 'removal' have been used, more specifically in Rule 23 of the Pension Rules. When different expressions are used in the same Rules, in different contexts then all of them cannot be given the same meaning.[37]

In the present case, the employee had resigned. The Hon'ble Court observed that when the Pension Rules are applicable, and an employee resigns, the consequences are forfeiture of service, under Rule 23 of the Pension Rules. In our view, attempting to apply the Pension Rules to the respondent would be a self-defeating argument. As, suppose, the Pension Rules were applicable and the employee like the respondent was in service and sought to resign,

[37] *Member, Board of Revenue* v. *Arthur Paul Benthall,* (1955) 2 SCR 842; *Kanhaiyalal Vishindas Gidwani* v. *Arun Dattatray Mehta,* (2001) 1 SCC 78 : "*It is true that when the same statute uses two different words then prima facie one has to construe that these two different words must have been used to mean differently.*"

the entire past service would be forfeited, and consequently, he would not qualify for pensionary benefits. To hold otherwise would imply that an employee resigning during the currency of the Rules would be deprived of pensionary benefits, while an employee who resigns when these Rules were not even in existence, would be given the benefit of these Rules.

The Hon'ble Court referred to the judgments delivered in ***JK Cotton Spinning & Weaving Mills Co. Ltd., Kanpur***[38], wherein the Hon'ble Court had held that the employee, having voluntarily resigned, the termination of relationship of employer and employee could not come within the meaning of 'retrenchment'. The Court analysed the difference between the meaning of resignation and retrenchment. The resignation was voluntary. It is in this context that it was observed that a voluntary tendering of resignation would be similar to voluntary retirement and not retrenchment. Nothing more and nothing less. The Hon'ble Court, thus, observed that in the present case the High Court, both the learned Single Judge and the Division Bench, appeared to have read much more into this judgment than the legal proposition which it sought to propound.

The Hon'ble Court further observed that the principles in the context of the controversy are well enunciated in the judgment of the Court in ***Reserve Bank of India v. Cecil Dennis Solomon***[39]**.** On a similar factual matrix, the employees had resigned some time in 1988. The RBI Pension Regulations came in operation in 1990. The employees who had resigned earlier sought applicability of these Pension Regulations to themselves. The provisions, once again, had a similar clause of forfeiture of service, on resignation or dismissal or termination. The relevant paragraphs from the judgments are:-

> *"10. In service jurisprudence, the expressions "superannuation", "voluntary retirement", "compulsory retirement" and "resignation" convey different connotations. Voluntary retirement and resignation involve voluntary acts on the part of the employee to leave service. Though both involve voluntary acts, they operate differently. One of the basic distinctions is that in case of resignation it can be tendered at any time, but in the case of voluntary retirement, it can only be sought for after rendering prescribed period of qualifying service. Other fundamental distinction is that in case of the former, normally retiral benefits are denied but in case of the latter, the same is not denied. In case of the former, permission or notice is not mandated, while in case of the latter, permission of the employer concerned is a requisite condition. Though resignation is a bilateral concept, and becomes effective on acceptance by the competent authority, yet the general rule can be displaced by express provisions to the contrary. In Punjab National Bank v. P.K. Mittal [1989 Supp (2) SCC 175 : AIR 1989 SC 1083] on interpretation of Regulation 20(2) of the Punjab National Bank Regulations, it was held that resignation would automatically take effect from the date specified in the notice as there was no provision for any acceptance or rejection of the resignation by the employer. In Union of India v. Gopal Chandra Misra [(1978) 2 SCC 301] it was*

[38] (1990) 4 SCC 27.
[39] (2004) 9 SCC 461. *See* also, *UCO Bank* v. *Sanwar Mal,* (2004) 4 SCC 412*; M.R. Prabhakar* v. *Canara Bank,* (2012) 9 SCC 671.

held in the case of a judge of the High Court having regard to Article 217 of the Constitution that he has a unilateral right or privilege to resign his office and his resignation becomes effective from the date which he, of his own volition, chooses. But where there is a provision empowering the employer not to accept the resignation, on certain circumstances e.g. pendency of disciplinary proceedings, the employer can exercise the power.

11. On the contrary, as noted by this Court in Dinesh Chandra Sangma v. State of Assam [(1977) 4 SCC 441] while the Government reserves its right to compulsorily retire a government servant, even against his wish, there is a corresponding right of the government servant to voluntarily retire from service. Voluntary retirement is a condition of service created by statutory provision whereas resignation is an implied term of any employer-employee relationship."

The Hon'ble Court observed that there are some observations on the principles of public sectors being model employers and provisions of pension being beneficial legislations.[40] The Court, however, held that as per what the Court had opined aforesaid, the issue cannot be dealt with on a charity principle. **When the Legislature, in its wisdom, brings forth certain beneficial provisions in the form of Pension Regulations from a particular date and on particular terms and conditions, aspects which are excluded cannot be included in it by implication.** The provisions will have to be read as they read unless there is some confusion or they are capable of another interpretation. The Hon'ble Court also noted that while framing such schemes, there is an important aspect of them being of a contributory nature and their financial implications. Such financial implications are both, for the contributors and for the State. Thus, it would be inadvisable to expand such beneficial schemes beyond their contours to extend them to employees for whom they were not meant for by the Legislature.

Thus, the Hon'ble Court was of the view that the impugned orders in this case cannot be sustained and are liable to be set aside, and the writ petition filed by the respondent consequently stands dismissed.

[40] *Shashikala Devi* v. *Central Bank of India*, (2014) 16 SCC 260; *Asger Ibrahim Amin* v. *Life Insurance Corporation of India* (2016) 13 SCC 797

37. Hanuman Laxman Aroskar v. Union of India (Civil Appeal No. 12251/2018)

Decided on – 29.03.2019

Bench – 1. Hon'ble Mr. Justice Dr. D.Y. Chandrachud

2. Hon'ble Mr. Justice Hemant Gupta

(Procedure to be followed before granting or rejecting Environmental Clearance as per the 2006 MoEF Notification;

Environmental Rule of Law;

Requirement of Merits Review by NGT under Section 16(h) of the NGT Act;

The scope of "substantial question of law" for Section 22 of the NGT Act)

FACTS

Village Mopa is situated in North Goa, in close proximity to the inter-state boundary which the state shares with Maharashtra. The site of the proposed airport lies at a distance of 35 kilometres from Panaji, the capital of Goa. The village of Mopa is situated in Pernem taluka. The site for the development of the airport is situated on a tabletop plateau which rises to a height of 150 to 180 meters above mean sea level and is surrounded by steep slopes. The soil is predominantly of a laterite character.

The airport which presently serves the region is situated at Dabolim, Goa. Since the airport at Dabolim is saturated in terms of its capacity for annual air traffic, the state government initiated a process in 1997 to commission studies and project reports for a proposed international airport. On 1 May 2000, the Government of India communicated its approval for the setting up of an airport at Mopa and for the closure of the existing airport for civilian operations on the commissioning of the new airport. Subsequently, on 1 July 2010, the earlier decision was modified to allow for the continuation of civilian aircraft operations at Dabolim even after the commissioning of the new airport. The process of land acquisition commenced in 2008 under the Land Acquisition Act, 1894.

The proposed international airport, being a Category 'A' project, is governed by the second, third and fourth stages of scoping, public consultation and appraisal respectively

envisaged under the 2006 notification. In addition to the 2006 notification, the Guidance manual furnishes a significant sign post in the procedure envisaged prior to the grant of an EC. The project proponent is required to submit Form 1 complete with relevant details of the proposed project and the status of the environment.

On 28 October 2015, the MoEFCC, as the regulatory authority under the 2006 notification for Category 'A' projects, communicated its approval for the grant of an EC. Following the grant of the EC, the tender process which had been initiated on 3 October 2014 was concluded on 26 August 2016. Consequent to the opening of the final bids, a technical scrutiny, evaluation coupled with pre-bid meetings, deliberations on the draft concession agreement and other required steps, GMR Goa International Airport Limited was awarded the contract on a revenue sharing of 36.99 percent to the State of Goa. On 8 November 2016, the concession agreement was executed between the Government of Goa and GGIAL for the development and operation of the airport with the concession period of 40 years. Upon financial closure, the three-year period for the construction of the airport commenced on 4 September 2017. The target date for the commissioning of the first phase of the project is 3 September 2020. The grant of the EC was challenged before the Western Zonal Bench of the NGT by the Federation of Rainbow Warriors. Hanuman Laxman Aroskar also filed an appeal before the Western Zonal Bench of the NGT. These appeals were subsequently renumbered before the Principal Bench of the NGT at New Delhi. On 7 November 2017, the NGT issued an ad-interim order restraining the cutting or felling of trees in the area designated as the site of the proposed airport. On 22 November 2017, the order of restraint was modified on the statement of the Advocate General of Goa that the state shall not cut or fell any trees, nor allow it to take place without valid permission from the lawful authority for a fortnight thereafter in order to enable the appellants to pursue their remedies. On 6 February 2018, the Deputy Conservator of Forests granted permission for felling 21,703 trees at the airport site.

The appellate authority under the Goa, Daman and Diu Preservation of Trees Act 198415 dismissed the appeal on 7 March 2018. On 8 March 2018, the High Court of Judicature at Bombay at its seat at Goa set aside the order of the Deputy Conservator of Forests and

remanded the matter to be heard by the Principal Chief Conservator of Forests. On 2 April 2018, the Principal Chief Conservator of Forests stipulated several conditions for the cutting and the felling of trees at the site of the airport including: (i) enumeration of trees; and (ii) the plantation of ten times the number of trees felled. Upon being moved in a Public Interest Litigation16, the High Court by its order dated 25 April 2018 allowed the exercise of enumeration to be carried out. As a result, 54,676 trees were enumerated, including the 1,548 trees which had been felled earlier in terms of the order dated 6 February 2018 of the Deputy Conservator of Forests. On 13 January 2018, the High Court issued final directions in the PIL directing the State of Goa to approach the NGT seeking permission for felling and cutting trees. The state was directed to carry out the cutting and felling of trees only after prior permission was granted by the NGT.

A Miscellaneous Application was filed by the State of Goa before the NGT on 2 July 2018 seeking permission for the felling of trees. By its judgment dated 21 August 2018, the NGT disposed of both the appeals and the Miscellaneous Application filed by the State of Goa, upholding the EC and imposing additional conditions to safeguard the environment. This Court has been informed that the felling of trees was initiated on 3 September 2018 and completed on 14 January 2019. Assailing the judgment of the NGT, two appeals have been filed before the Hon'ble Supreme Court: one by Hanuman Laxman Aroskar and the other by the Federation of Rainbow Warriors

OBSERVATIONS, DISCUSSION AND DECISION

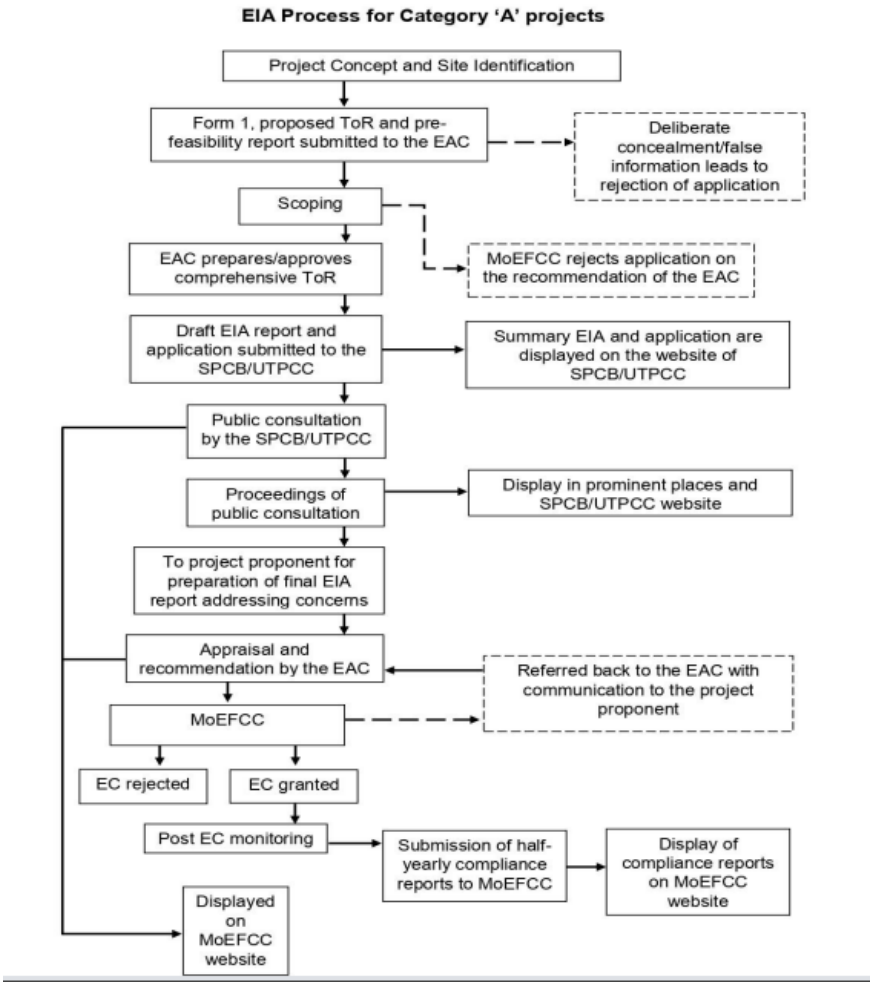
Discussion on: -

(i) THE 2006 NOTIFICATION ISSUED BY THE MOEF

The salient objective which underlies the 2006 notification[41] is the protection, preservation and continued sustenance of the environment when the execution of new projects or the expansion or modernization of existing projects is envisaged. It imposes certain restrictions and prohibitions based on the potential environmental

[41] S.O. No. 1533, published on 14th September 2006, this Notification replaced the earlier 1994 Notification of the MoEF and was substantially different from the previous Notification. The differences have been discussed elaborately in Paragraph 39 of the Judgment which, for the sake of brevity, has not been reproduced hereinabove.

impact of projects unless prior EC[42] has been granted by the concerned authority. The EC is required before any construction work, or preparation of land (except for securing the land) is started on the project or activity listed in the Schedule to the notification.



Based on the spatial extent of the potential impact and the potential impacts on human health and natural and man-made resources, the 2006 notification categorizes all projects into Category 'A' and Category 'B' projects. The MoEFCC in the Central Government and the SEIAA[43] at the state level constitute the regulatory authorities for the purposes of the notification. Category 'A' projects require prior environmental clearance from the MoEFCC, based on the recommendation of the EAC[44] constituted by the Central Government for this purpose. Category 'B' projects will require prior environmental clearance from the SEIAA, based on the recommendations of the

[42] Environmental Clearance
[43] State Environment Impact Assessment Authority
[44] Expert Appraisal Committee

SEAC[45]. Where no SEIAA or SEAC has been constituted, Category 'B' projects are treated as Category 'A' projects.

Once a prospective site has been identified by the applicant for the proposed project, all applications seeking an EC shall be made in the prescribed Form 1 and Supplementary Form 1A, if applicable. The application must be submitted prior to the commencement of any construction activity, or preparation of the land at the site.

A pre-feasibility report must also be submitted with the application except in the cases of construction projects in item 8 of the Schedule, for which a conceptual plan must be submitted. The process to obtain environmental clearance as stipulated by the notification for new projects comprises a maximum of four stages, all of which may not apply depending on the specific case stipulated under the notification:

1) Screening;
   This step is restricted only to Category 'B' projects. This stage entails an examination of whether the proposed project or activity requires further environmental studies for the preparation of an EIA[46] for its appraisal prior to the grant of an EC.
2) Scoping;
   At this stage, the EAC or the SEAC, as the case may be, formulates detailed and comprehensive Terms of Reference which address all relevant environmental concerns for the preparation of the EIA. Amongst other things, the information furnished by the applicant in Form 1/Form 1A along with the proposed ToR by the applicant form the basis for the preparation of the ToR. The ToR must be conveyed to the applicant within 60 days of the receipt of Form 1, failing which, the ToR proposed by the applicant shall be deemed as approved. Significantly, applications for EC may be rejected by the regulatory authority at this stage itself on the recommendation of the EAC or the SEAC, as the case may be, and the decision along with reasons is to be communicated to the applicant within 60 days of receipt of application.
3) Public Consultation;

[45] State Expert Appraisal Committee
[46] Environmental Impact Assessment

This stage involves the process "by which the concerns of local affected persons and others who have plausible stake in the environmental impacts of the project or activity are ascertained with a view of taking into account all the material concerns in the project or activity design as appropriate." The public hearing should be arranged in a "systematic, time bound and transparent manner" to ensure the "widest possible public participation at the project site(s) or in its close proximity District-wise". The public hearing proceeding is filmed and a copy of the video is submitted to the concerned regulatory authority. After the public consultation process, the applicant is duty bound to address all the material environmental concerns expressed during the process and make appropriate changes to the Draft EIA and EMP[47].

4) Appraisal;

This stage involves detailed scrutiny by the EAC or the SEAC of all the documents submitted by the applicant for the grant of EC. The appraisal is carried out in a transparent manner in a process to which the applicant shall be invited for furnishing clarification in person or through an authorized representative. The regulatory authority must examine the documents "strictly with reference to the ToR" and communicate any inadequacy to the EAC or the SEAC, as the case may be, within 30 days of receipt of the documents. Within sixty days of the receipt of all the documents, the EAC or the SEAC, as the case may be, shall complete the appraisal process. Deliberate concealment and/or the submission of false or misleading information material to the steps involved in the grant of an EC make the application liable for rejection and cancellation of any EC granted on that basis.

According to the Hon'ble Court, the 2006 notification embodies the notion that the development agenda of the nation must be carried out in compliance with norms stipulated for the protection of the environment and its complexities. "***It serves as a balance between development and protection of the environment: there is no trade-off between the two. The protection of the environment is an essential facet of development".*****(emphasis supplied)** It cannot be reduced to a technical formula. The notification demonstrates an increasing awareness of the complexities of the

[47] Environmental Management Plan

environment and the heightened scrutiny required to ensure its continued sustenance, for today and for generations to come. It embodies a commitment to sustainable development. In laying down a detailed procedure for the grant of an EC, the 2006 notification attempts to bridge the perceived gap between the environment and development.

In February 2010, the MoEF brought out its Guidance manual for airports. The need for a sector specific manual arose because the 2006 notification "re-engineered the entire EC process" under its earlier avatar of 1994 and new sectors were incorporated into the ambit of the EC process. The 2006 notification noted that as many as 39 developmental sectors require prior ECs. Sector specific manuals, it was hoped, would bring about standardisation in the quality of appraisal and obviate potential inconsistencies between the work performed by SEIAAs and SEACs.

(ii) FORESTS

The Hon'ble Court opined that it cannot gloss over the patent and abject failure of the State of Goa as the project proponent in failing to disclose wet lands, water sources, water bodies, biospheres, mountains and forests within an aerial distance of 15 kilometres as required by Form 1. The disclosure in Form 1 constitutes the very foundation of the process which is initiated on the basis of the information supplied by the project proponent. Following the disclosure in Form 1, ToR are formulated, and this leads to the preparation of the EIA report. A duty is cast upon the project proponent to make a full, complete and candid disclosure of all aspects bearing upon the environment in the area of study. The project proponent cannot profess ignorance about the environment in the study area. ***The project proponent is bound by the highest duty of transparency and rectitude in making the disclosures in Form 1.***

An applicant cannot claim an EC, under the 2006 notification, based on substantial or proportionate compliance with the terms stipulated in the notification. The terms of the notification lay down strict standards that must be complied with by an applicant seeking an EC for a proposed project. The burden of establishing environmental compliance rests on a project proponent who intends to bring about a change in the existing state of the environment. Whereas, in the present case,

there has thus been a patent failure on part of the project proponent to make mandatory disclosures stipulated in Form 1 under the 2006 notification, that must have consequences in law. According to the Hon'ble Court, here can be no gambles with the environment: a 'heads I win, tails you lose' approach is simply unacceptable; unacceptable if we are to preserve environmental governance under the rule of law.

(iii) ECOLOGICALLY SENSITIVE ZONES

In deducing the impact of a proposed activity on an ESZ, it is not sufficient to take recourse to a generic assessment of a proposed activity on the ecology of the study area. The EIA report must factor in those specific features which make an area ecologically sensitive. These would encompass all aspects of environmental concern which render the area ecologically sensitive. This would include wet lands, water sources, water bodies, costal zones, biospheres, mountains and forests. The vulnerabilities of each of them must be studied as distinctive components together with a holistic analysis of their existence in a chain of bio-diversity. Where an area is ecologically sensitive because of the presence of flora or fauna requiring protection, that must be specifically adverted to and studied. The deficiency of the EIA report emanates from its failure to notice that the purpose of the study was not only to determine whether the project site is ecologically sensitive.

(iv) FELLING OF TREES

The Hon'ble Court expressed serious displeasure with the manner in which the EIA report made an attempt to gloss over the existence of trees. The EIA report prevaricated by recording that the area required for the proposed airport has only a few trees, mostly bushes. To realise later that the project involved the felling of 54,676 trees is indicative of the cavalier approach to the issue and a process of fact finding which is parsimonious with the truth. ***Post facto explanations are inadequate to deal with a failure of due process in the field of environmental governance.*** The State of Goa would have the Hon'ble Court gloss over the felling of trees by submitting that 54,676 trees over a project area of 2,133 acres averages out to 25 trees per acre or one tree over an area of 160 square metres which, according to the Hon'ble Court, was a fallacious approach to the issue.

Mathematical averages cannot displace factual data about the actual number of trees which were affected by the project. The EIA report ought to have scrutinized the number of trees, their nature and longevity. Issues such as the extent to which the trees or some of them were capable of being transplanted had to be considered in the EIA report. The location of the trees is also significant.

(v) PUBLIC CONSULTATION APPRAISAL BY THE EAC

Discussing the relevance and significance of public consultation as per the 2006 notification, the Hon'ble Court held that the EAC is duty bound to apply its mind to the environmental concerns raised by stakeholders. The duty of the project proponent to place fairly all the environmental concerns raised during the public hearing is the crucial link in the appraisal by the EAC.

Regarding the role of the EAC in appraisal of a project, the Hon'ble Court held that the EAC is an expert body. It must speak in the manner of an expert. Its remit is to apply itself to every relevant aspect of the project bearing upon the environment. It is not bound by the analysis which is conducted in the EIA report. It is duty bound to analyse the EIA report. Where it finds it deficient it can adopt such modalities which, in its expert decision-making capacity, are required. The reasons which are furnished by the EAC constitute a live link between its processes and the outcome of its adjudicatory function. In the absence of cogent reasons, the process by its very nature, together with the outcome stands vitiated.

THE APPELLATE JURISDICTION OF THE NGT: THE REQUIREMENT OF A MERITS REVIEW

The NGT is an expert adjudicatory body on the environment. The NGT is entrusted with appellate jurisdiction under Section 16 of the NGT Act 2010[48]. Section 20 mandates that the Tribunal shall, while passing any order, decision or award, apply the principles of sustainable development, the precautionary principle and the polluter pays principle. Several decisions of this Court have given meaning to these principles.[49]

[48] "16 – Tribunal to have appellate jurisdiction – Any person aggrieved by :-

(h) an order made, on or after the commencement of the National Green Tribunal Act, 2010, granting environmental clearance in the area in which any industries, operations or processes or class of industries, operations and processes shall not be carried out or shall be carried out subject to certain safeguards under the Environment (Protection) Act, 1986 (29 of 1986);"

[49] *Vellore Citizens Welfare Forum v Union Of India*, (1996) 5 SCC 647; *M C Mehta v Kamal Nath*, (1997) 1 SCC 388; *M C Mehta v Union of India*, (1997) 2 SCC 353; *A P Pollution Control Board v Prof M V Nayudu (Retd.)*, (1999) 2 SCC

In the present case, the Hon'ble Court was of the view that the order passed by the NGT under its Appellate Jurisdiction under Section 16 read with Section 20 of the NGT Act did not fulfil the requirement of a merits review and further opined that the mix of judicial and technical members envisaged by the statute is for the reason that the Tribunal is called upon to consider questions which involve the application and assessment of science and its interface with the environment by an expert adjudicatory body vested with appellate jurisdiction.

The Hon'ble Court referred to the judgments[50] of the NGT where it had shown the path along which it must traverse in arriving at its decisions, as per the NGT Act. In the present case, The failure to consider materials on a vital issue and indeed the non-consideration of vital issues raises a substantial question of law leading to the invoking of the jurisdiction of this Court under Section 22 of the NGT Act 2010. The failure of process in the present case has been compounded by the absence of a merits review by the NGT.

The Hon'ble Court relied on the decision of ***Mantri Techzone Pvt. Ltd. v Forward Foundation***[51] and ***Sir Chunilal v Mehta and Sons, Ltd. v Century Spinning and Manufacturing***[52] to discuss the test for determining whether a question of law raised for the purposes of Section 22 of the NGT Act for invoking the jurisdiction of the Supreme Court is a substantial one and therefore. Held that in the present case, the NGT as an adjudicatory body failed to exercise the jurisdiction entrusted to it under Section 16(h) read with Section 20 of the NGT Act 2010 by merely deferring to the decision to recommend and grant an EC and, thus, the parameters in regard to the existence of substantial questions of law have hence been established in the classical or conventional sense of that expression.

ENVIRONMENTAL RULE OF LAW

The environmental rule of law provides an essential platform underpinning the four pillars of sustainable development— economic, social, environmental, and peace. It imbues environmental objectives with the essentials of rule of law and underpins the reform of

718; *Narmada Bachao Andolan v Union of India*, (2000) 10 SCC 664; *Indian Council for Enviro Legal Action v Union of India*, (2011) 8 SCC 161.

[50] *Save Mon Region Federation v. Union of India*, 2013 (1) All India NGT Reporter 1; *Shreeranganathan K P v Union of India*, 2014 ALL (I) NGT Reporter (1) (SZ) 1.

[51] (2019) 4 SCALE 218

[52] 1962 Supp. (3) SCR 549

environmental law and governance. The environmental rule of law becomes a priority particularly when we acknowledge that the benefits of environmental rule of law extend far beyond the environmental sector. While the most direct effects are on protection of the environment, it also strengthens rule of law more broadly, supports sustainable economic and social development, protects public health, contributes to peace and security by avoiding and defusing conflict, and protects human and constitutional rights. Similarly, the rule of law in environmental matters is indispensable "for equity in terms of the advancement of the Sustainable Development Goals, the provision of fair access by assuring a rights-based approach, and the promotion and protection of environmental and other socio-economic rights."[53]

The rule of law requires a regime which has effective, accountable and transparent institutions. Responsive, inclusive, participatory and representative decision making are key ingredients to the rule of law. Public access to information is, in similar terms, fundamental to the preservation of the rule of law. In a domestic context, environmental governance that is founded on the rule of law emerges from the values of our Constitution. The health of the environment is key to preserving the right to life as a constitutionally recognized 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. **The processes of decision are as crucial as the ultimate decision.**

Vague aspersions on the intention of public-spirited individuals does not constitute an adequate response to those interested in the protection of the environment. If a court comes to the finding that the appeal before it was lacking bona fides, it may issue directions which it thinks appropriate in that case. In cases concerning environmental governance, it is a duty of courts to assess the case on its merits based on the materials present before it. Matters concerning environmental governance concern not just the living, but generations to come. The protection of the environment, as an essential facet of human development, ensures sustainable development for today and tomorrow.

[53] UN Environment, Environmental Rule of Law. Available at https://www.unenvironment.org/explore-topics/environmental-rights-and-governance/what-we-do/promoting-environmental-rule-law-0

38. *Khoday Distilleries Ltd v. Sri Mahadeshwara Sahakara Sakkare Karkhane Ltd., (Civil Appeal No. 2432 of 2019)*

Decided on – 01.03.2019

Bench – 1. Hon'ble Mr. Justice A.K. Sikri

2. Hon'ble Mr. Justice Sanjay Kishan Kaul

ISSUE

Whether review petition is maintainable before the High Court seeking review of a judgment against which the special leave petition has already been dismissed by this Court?

DECISION AND OBSERVATIONS

There are two 3 judges bench decisions of the Hon'ble Supreme Court. One is ***Abbai Maligai Partnership Firm* v. *K. Santhakumaran***[54]. In this judgment, it is pleaded that this Court held that when the judgment and decree passed by the High Court is affirmed by the Supreme Court with the dismissal of the special leave petition, there is no question of entertaining the review petition by the High Court, thereafter. Other judgment is in the case of ***Kunhayammed* v. *State of Kerala***[55]. In this judgment the Court laid down various ways in which special leave petitions can be disposed of and decided in which cases review would be permissible and where such a review is not entertainable, on the doctrine of merger and *res judicata*, etc.

The Hon'ble Court summed up its decision as follows:

(a) The conclusions rendered by the three Judge Bench of this Court in *Kunhayammed* and summed up in paragraph 44[56] are affirmed and reiterated.

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[54] (1998) 7 SCC 386

[55] (2000) 6 SCC 359

[56](*i*) Where an appeal or revision is provided against an order passed by a court, tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of law.

(*ii*) The jurisdiction conferred by Article 136 of the Constitution is divisible into two stages. The first stage is upto the disposal of prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and the special leave petition is converted into an appeal.

(*iii*) The doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under Article 136 of the Constitution the

(b) We reiterate the conclusions relevant for these cases as under:

> "(*iv*) An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.
>
> (*v.*) If the order refusing leave to appeal is a speaking order, i.e., gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting the special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties.
>
> (*vi*) Once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order passed in appeal would attract the

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Supreme Court may reverse, modify or affirm the judgment-decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter.

(*iv*) An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

(*v.*) If the order refusing leave to appeal is a speaking order, i.e., gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting the special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties.

(*vi*) Once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation.

(*vii*) On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before the Supreme Court the jurisdiction of High Court to entertain a review petition is lost thereafter as provided by sub-rule (1) of Rule 1 of Order 47 CPC.

doctrine of merger; the order may be of reversal, modification or merely affirmation.

(*vii*) On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before the Supreme Court the jurisdiction of High Court to entertain a review petition is lost thereafter as provided by sub-rule (1) of Rule 1 of Order 47 CPC."

(c) Once we hold that law laid down in *Kunhayammed* is to be followed, it will not make any difference whether the review petition was filed before the filing of special leave petition or was filed after the dismissal of special leave petition. Such a situation is covered in para 37[57] of *Kunhayammed case*.

[57] Let us assume that the review is *filed first* and the delay in SLP is condoned and the special leave is ultimately granted and the appeal is pending in this Court. The position then, under Order 47 Rule 1 CPC is that still the review can be disposed of by the High Court. If the review of a decree is granted before the disposal of the appeal against the decree, the decree appealed against will cease to exist and the appeal would be rendered incompetent. An appeal cannot be preferred against a decree after a review against the decree has been granted. This is because the decree reviewed gets merged in the decree passed on review and the appeal to the superior court preferred against the earlier decree - the one before review - becomes infructuous

39. Fed. of Bank of India Staff Unions v. Union of India(Civil Appeal No. 5570 of 2014)

Decided on – 01.03.2019

Bench – 1. Hon'ble Mr. Justice Abhay Manohar Sapre

2. Hon'ble Mr. Justice Dinesh Maheshwari

(There lies a distinction between the worker and the officer. The former, i.e., worker is defined under Section 2(s) of the Industrial Disputes Act, 1947 and is governed by that Act whereas the latter, i.e., officer is not governed by the Industrial Disputes Act but is governed by separate service rules. Both these categories of employees, therefore, cannot be equated with each other and nor can be placed at par for providing equal qualification or/and disqualification for their nomination as a Director in the Board of Directors)

FACTS

Appellant No. 1 is an Association of various Staff Unions of the employees working in the Bank of India - respondent No. 2 herein. Appellant No. 1 is a registered Association under the Trade Unions Act, 1926. Appellant No. 2 is an employee of Respondent No. 2 - Bank and at the relevant time was working as Deputy General Secretary of appellant No. 1-Association. The Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970/1980 deals with Banking Companies and their internal affairs. Section 9(3) of the Act provides for composition of Board of Directors and also provides as to who can be nominated as Directors in the Board of Directors. Clauses (a) to (i) of sub-section (3) of Section 9 of the Act sets out various categories from which one Director from each of such categories is nominated in the Board of Directors. Clause(e) deals with a category of workman/employee Director whereas clause(f) deals with a category of officer/employee Director for their nomination in the Board of Directors. In exercise of powers conferred under Section 9(1) of the Act, the Central Government has framed a Scheme called-The Nationalized Banks (Management and Miscellaneous provisions) Scheme, 1970. Chapter II of the Scheme deals with Board of Directors. Clause 3 of the Scheme deals with the constitution of the Board whereas Clause 3(2)(iii) deals with disqualification of a workman/employee for being nominated as a Director.

So far as the case at hand is concerned, it relates to the nomination of a Director from the workman/employee category falling in clause (e) of Section 9(3) of the Act and also relates to his disqualification for being nominated as a Director in that category.

The issue for consideration is whether Clause 3(2)(iii)[58] of the The Nationalized Banks (Management and Miscellaneous provisions) Scheme, 1970, is legal or ultra vires the

[58] (iii) A workman of a Nationalised Bank shall be disqualified for being nominated as a director unless-

Constitution. The High Court, in the impugned order, has held that the Clause 3(2)(iii) of the Scheme is legal and valid.

DECISION AND OBSERVATIONS

The Hon'ble Supreme Court held that it would be clear from a perusal of clauses (e) and (f) of Section 9(3) of the Act that both the categories of employees are different - one is worker/employee category as defined under Section 9(3)(e) and the other is officer/employee category as defined under Section 9(3)(f) of the Act. Second, it is for the legislature to decide as to what qualifications and disqualifications should be prescribed for various categories of the employees for their nomination on the post of Director. Third**, there lies a distinction between the worker and the officer. The former, i.e., worker is defined under Section 2(s) of the Industrial Disputes Act, 1947 and is governed by that Act whereas the latter, i.e., officer is not governed by the Industrial Disputes Act but is governed by separate service rules. Both these categories of employees, therefore, cannot be equated with each other and nor can be placed at par for providing equal qualification or/and disqualification for their nomination as a Director in the Board of Directors.** Fourth, Article 14 of the Constitution applies *inter se* two equals and not *inter se* unequals. The case at hand falls under the latter category and, therefore, reliance placed on the principle enshrined under Article 14 of the Constitution by the appellants is wholly misplaced. Fifth, the nominee worker/employee has only a right under the Act to be appointed as Director from the category of worker/employee in terms of Section 9(3)(e) of the Act provided the concerned nominee whose name is recommended by the Union fulfills the qualifications laid down in Clause 3(2)(iii) of the Scheme but not beyond it.

Further, the Hon'ble court was of the opinion that a mere reading of Section 9(3) clause (a) to (i) would go to show that the Board of Directors consists of persons coming from different fields. There cannot, therefore, be a uniform qualification or/and disqualification for such persons. Indeed, the qualifications and disqualifications are bound to vary from category to category and would depend on the post, experience and the stream from where a person is

(a) he is and has been, serving for a continuous period of not less than five years in the Nationalised Bank, and
(b) he is of such age that there is no likelihood of his attaining the age of superannuation during his terms of office as director."

being nominated as a Director. Moreover, the qualification and disqualification has to be seen prior to his/her becoming a Director and not after his/her appointment as a Director.

40. State Of Gujarat Through Principal Secretary v. Jayeshbhai Kanjibhai Kalathiya (Civil Appeal No. 10373-10374 of 2010)

Decided on – 01.03.2019

Bench – 1. Hon'ble Mr. Justice A.K. Sikri

2. Hon'ble Mr. Justice S. Abdul Nazeer

3. Hon'ble Mr. Justice M.R. Shah

(It is constitutionally impermissible for a state to restrict the movement of the sand legally excavated within the territory of India and, therefore, the Hon'ble Court struck down the Rules brought in by the State of Gujarat prohibiting the movement of sand beyond the border of the State.)

ISSUES

(a) Whether the impugned rules framed by the State of Gujarat as a delegate of Parliament are beyond the powers granted to it under the Mines and Minerals (Development and Regulation) Act, 1957 Act? In other words, whether the impugned rules are *ultra vires* Sections 15, 15A and 23-C of the Mines and Minerals (Development and Regulation) Act, 1957Act?

(b) Whether the impugned rules are violative of Part XIII of the Constitution of India?

FACTS

Two writ petitions were filed in the High Court of Gujarat under Article 226 of the Constitution of India. One writ petition was filed by a single person who had been awarded contract for one year to extract, collect, gather and remove ordinary sand from river Tapi. The sand being a mine and mineral, it is the State Government which is empowered to grant such leases. After the excavation of sand, a part there of was subjected to further processing by addition of fly ash and the other part was sold as sand outside the State of Gujarat. Second petition was filed by ten petitioners (respondents in the second appeal). They are in the business of processing ordinary river sand after buying it from leaseholders. The process involves washing, cleaning and mixing fly ash to convert it into IS-Zone-2-Sand, which is then sold. These respondents supply that sand to builders in the State of Maharashtra.

The challenge laid in the writ petitions was against the Resolution dated May 04, 2010 whereby all leaseholders, stockists, traders and exporters were prohibited from exporting ordinary sand excavated from the areas in the State of Gujarat to other States within the country or other countries by transporting such sand outside the State or the country.

When these writ petitions were pending consideration, the Government of Gujarat issued a Notification on June 11, 2010 thereby amending the Gujarat Minor Mineral Rules, 1966 by making the Gujarat Minor Mineral (Amendment) Rules, 2010 with the insertion of Rule 44-BB, with immediate effect. This amendment was done in purported exercise of powers conferred under Section 15 read with Section 23-C of the Mines and Minerals (Development and Regulation) Act, 1957 (hereinafter referred to as the 'MMDR Act'). By way of Rule 44-BB[59], movement of sand beyond the border of the State of Gujarat was prohibited.

Within two months thereafter, i.e. on August 26, 2010, the State of Gujarat also notified the Gujarat Minor Mineral Concession Rules, 2010 so as to repeal the Gujarat Minor Mineral Rules, 1966. Rule 71[60] of the new Rules was to the same effect as Rule 44-BB.

The question that arose before the High Court is whether in exercise of such powers delegated by the Legislature upon the State Government, could the State Government make a rule to the effect that the sand which is a minor mineral would not be allowed to be taken beyond the borders of the State of Gujarat and making such movement as punishable offence. According to the High Court, delegation of powers to the State Government under the aforesaid provisions does not include or envisage restriction on inter-State trade, commerce and intercourse which shall be free. Thus, the impugned rules are held to be *ultra vires* the provisions of Section 15 and 23-C of the MMDR Act. They are also held to be violative of Article 301 of the Constitution.

[59] No movement of sand shall be allowed beyond the border of the State. In case any vehicle is found transporting sand to the neighbouring State, even with authorized royalty pass or delivery challan, it shall be treated as violation of the Act and the Rules made thereunder and the penal provisions as specified therein shall be applicable

[60] **Rule 71. Prohibition to transport sand beyond border. -** No movement of sand shall be allowed beyond the border of the State. In case any vehicle is found transporting sand to the neighbouring State even with authorized royalty pass or delivery challan, it shall be treated as violation of the Act and the rules made thereunder and the penal provisions, except compounding, as specified therein shall be applicable.

DECISION AND OBSERVATIONS

The Hon'ble Court referred to the judgments in *State of Tamil Nadu* v. *M.P.P. Kavery Chetty*[61] and *K.T. Varghese* v. *State of Kerala*[62] wherein it was held that power of the State Government under Section 15 of the MMDR Act does not include control over minor minerals after they are excavated.

Also, **the prohibition on the transport or sale of the already mined minerals outside the State has no direct nexus with the object and purpose of the MMDR Act which is concerned with conservation and prudent exploitation of minerals**.

Insofar as Section 23-C of the MMDR Act is concerned, it was inserted by the Amendment Act of 1999 with the objective to prevent illegal mining. That is clearly spelled out in the Statement of Objects and Reasons. It is in this context the words 'transportation' and 'storage' in Section 23-C are to be interpreted. Here the two words are used in the context of 'illegal mining'. It is clear that it is the transportation and storage of illegal mining and not the mining of minor minerals like sand which is legal and backed by duly granted license, which can be regulated under this provision. Therefore, **no power flows from this provision to make rule for regulating transportation of the legally excavated minerals.**

Regarding issue no. (b) the Hon'ble Court is of the considered opinion that the impugned rules violate Part XIII of the Constitution as the effect thereof is to fetter the freedom of trade, commerce and intercourse under Article 301 of the Constitution. Under this Article, the expression 'freedom' must be read with the expression 'throughout the territory of India'. Under Article 302, Parliament may impose restrictions on the freedom of trade, commerce or intercourse between one State and another as may be required in the public interest. The expression 'public interest' may include a regional interest as well. However, **Article 302 is qualified by Article 303 which prohibits Parliament and the State Legislatures from making any law that gives preference to one State over another or discriminates between one State and another**. Situations of scarcity are to be dealt with by Parliament under Article 302(2). The power of State Legislature to impose reasonable restrictions on the freedom of trade, commerce or intercourse, as may be required in the public interest, requires such a Bill

[61] (1995) 2 SCC 402
[62] (2008) 3 SCC 735

or amendment to be moved in the State Legislature only after receiving previous sanction from the President. The President, being the head of the State and the guardian of the federation, must be satisfied that such a law is indeed required and, thus, acts as a check on the promotion of provincial interests over national interest. Going by the aforesaid scheme of this Chapter, it becomes apparent that when there are such restrictions on a State Legislature, then **the State Government could not have imposed such a prohibition under a statute whose object is to regulate mines and mineral development, and not trade and commerce *per se*.**

Part XIII of the Constitution is a code on checks and balances on the legislative power intended to achieve the objective of economic integration of the country which was emphasised in ***Video Electronics Pvt. Ltd.* v. *State of Punjab***.[63] Freedom of movement of goods, services and the creation of a common market must be understood contextually and as necessary for creating an economic union. Part XIII permits some forms of differentiation, for example, to encourage a backward region or to create a level playing field for parts of the country that may not have reached the desired level of development. In this context, **Part XIII envisions a two-fold object: (i) facilitation of a common market through ease of trade, commerce and intercourse by erasing barriers; and (ii) Regulations (or restrictions) which may have the effect of differentiating between States or regions which may be necessary not only in emergent circumstances of scarcity etc. or but even for development of economically backward regions or otherwise justified in the public interest. That Part XIII is not about "freedom" alone but is a code of checks and balances, intended at achieving economic unity and parity.**

The Hon'ble Court concluded that in order to justify any 'preference' or 'discrimination' under Article 303, a scarcity of goods would have to be made out. It is a matter of record that the Study Group's report on which reliance is placed by the appellant focuses on the need to restrict the export of sand outside India and not within India. In any case, nothing prevents the appellant from restricting the quantum of sand being excavated. However, once the appellant State permits sand to be excavated, neither can it legally restrict its movement within the territory of India nor is the same constitutionally permissible. Likewise, there is no restriction on the State importing sand from other states. If it is the case that the demand of

[63] (1990) 3 SCC 87

any State is not being met, it may purchase sand from other states. In any event, the market will dictate trade in sand inasmuch as it may make no business sense for mining company to transport and sell its sand in a far away destination after incurring large costs on transportation.

41. Vijay Industries v. Commissioner of Income Tax (Civil Appeal No. 1581-1582 of 2005)

Decided on – 01.03.2019

Bench – 1. Hon'ble Mr. Justice A.K. Sikri
2. Hon'ble Mr. Justice S. Abdul Nazeer
3. Hon'ble Mr. Justice M.R. Shah

(Interpretation of the provisions of Section 80HH of the Income Tax Act, 1961)

ISSUE

The issue relates to the interpretation that is to be accorded to the provisions of Section 80HH[64] of the Income Tax Act, 1961 (hereinafter referred to as the 'Act'). Section 80HH provides deduction from income at specified rates in respect of certain industrial undertakings which are covered by the said provision. Issue is limited, namely, while computing the deduction whether it is to be available out of 'income' as computed under the Act or out of 'profits and gains', without deducting therefrom 'depreciation' and 'investment allowance'.

FACTS

Section 80HH grants deduction from profits and gains to an undertaking engaged in manufacturing or in the business of the hotel. The deduction is admissible at the rate of 20% of the profits and gains of undertaking for 10 assessment years. Certain conditions are to be fulfilled in order to be eligible for such a deduction, about which there is no dispute insofar as these appeals are concerned. Conflict is confined to one aspect viz. 20% deduction of gross profits and gains or net income. Whereas assessees want deduction at the rate of 20% of profits and gains, i.e., gross profits, as per the Department, the income of the assessee is to computed in accordance with the provisions contained in Sections 28 to 44DB which are the provisions for computation of 'income' under the head 'profits and gains of business or profession'. Once income is arrived at after the application of the aforesaid provisions, 20% thereof is allowable as deduction under Section 80HH. The assessees, on the other hand, submit that

[64] 80HH. Deduction in respect of profits and gains from newly established industrial undertakings or hotel business in backward areas.
(1) Where the gross total income of an assessee includes any profits and gains derived from an industrial undertaking, or the business of a hotel, to which this section applies, there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction from such profits and gains of an amount equal to twenty per cent thereof

Section 80HH uses the expression 'profits and gains' which is different from 'income'. Therefore, whatever profit and gains are earned by an undertaking covered by Section 80HH of the Act, 20% thereof is admissible as deduction. As a corollary, from such profits and gains of the industrial undertaking, depreciation or unabsorbed investment allowances which are the deductions admissible under Sections 32 and 32AB of the Act, cannot be taken into consideration. In the case of *Motilal Pesticides (I) Pvt. Ltd.* v. *Commissioner of Income Tax, Delhi-II*[65] , the court has taken the view which is favourable to the Department. This view is followed by the High Court in the impugned judgment thereby dismissing the appeals of the appellants/assessees herein.

DECISION AND OBSERVATIONS

In the light of the scheme of taxation on the income of the assessee, the Hon'ble Court held that one has to consider whether deductions under Section 80HH, which falls under Chapter VIA, is to be given after applying the provisions for computation of income as mentioned in Chapter IV of the Act. Once, we examine the matter keeping in view the aforesaid nature of scheme, answer becomes obvious. Chapter VIA, is a stand alone chapter *dehors* Chapter IV. Therefore, provisions relating to various kinds of deductions mentioned therein have to be construed independent of Chapter IV of the Act. Another pertinent aspect which is to be borne in mind is that conceptually 'income or total income' is different from 'profits and gains'. There are various heads of income and if an assessee is earning income under more than one heads, all these are to be clubbed together to arrive at total income. Profits and gains from the business or profession is only one of the heads of income.

Insofar as computation of income under the head 'profits and gains' from business or profession is concerned, Section 28 of the Act mentions various kinds of incomes which are chargeable under this head. Therefore, all those incomes specifically mentioned in that provision when earned by a particular assessee, are to be aggregated to arrive at profits and gains of the assessee. Section 29 thereof mentions the method of arriving at 'income' which is to be computed in accordance with the provisions contained in Sections 30-43D of the Act. Sections 30-43D contain deductions of various kinds which are in the nature of expenditure or the like nature. After providing the deductions admissible in these provisions, one arrives at the figure of net profits which would become the net income under the head 'profits and gains of business or profession'. In contrast, as mentioned above, under Chapter VI-A of the Act certain deductions are given by way of incentives. Assessees may earn these deductions on fulfilling the eligibility conditions contained therein, even when they are not in the nature of any expenditure incurred by the assessee. Here, Section 80A of the Act provides that in

[65] (2000) 9 SCC 63.

computing the total income of assessee, there shall be allowed from his gross total income, in accordance with the subject of the provisions of this Chapter, the deductions specified in Sections 80C to 80U. As mentioned above, Sections 80C to 80U contain different subject matters and also specify particular percentage of deductions for a particular period. Significantly, Section 80A itself uses the expression 'from his gross total income' as it states that deduction is to be allowed to an assessee 'from his gross total income'. Moreover, different provisions from Sections 80C to 80U, while mentioning the percentage at which and for which period a particular deduction is allowable, also specifies as to how such a deduction is to be worked out, namely, specific percentage of deduction of which component. These sections provide different parameters. Insofar as Section 80HH is concerned, it specifically mentions that deduction @ 20% of 'profits and gains'.

Also, the Hon'ble Court overruled the decision in *Motilal Pesticides* case. The Hon'ble Court stated that reading of Section 80HH along with Section 80A would clearly signify that such a deduction has to be of gross profits and gains, i.e., before computing the income as specified in Sections 30 to 43D of the Act. It is correctly pointed out by Division Bench in the reference order that in *Motilal Pesticides case*, the Court followed the judgment rendered in the *Cloth Traders (P) Ltd.* v. *Additional C.I.T., Gujarat-I*[66] which was a case under Section 80M of the Act, on the premise that language of Section 80HH and Section 80M is the same. This basis is clearly incorrect as the language of two provisions is materially different..

[66] (1979) 3 SCC 538

42. Birla Institute of Technology v. State of Jharkhand(Civil Appeal No. 2530 of 2012)

Decided on – 07.03.2019

Bench – 1. Hon'ble Mr. Justice Abhay Manohar Sapre

2. Hon'ble Ms. Justice Indu Malhotra

ISSUE

Whether the Courts below were justified in holding that respondent No. 4 was entitled to claim gratuity amount from the appellant (employer) under the Payment of Gratuity Act, 1972?

FACTS

The appellant is a premier technical educational institute known as "Birla Institute of Technology" (BIT).Respondent No. 4 joined the appellant-Institute as Assistant Professor on 16.09.1971 and superannuated on 30.11.2001 after attaining the age of superannuation. Respondent No. 4 then made a representation to the appellant and prayed therein for payment of gratuity amount which, according to respondent, was payable to him by the appellant under the Payment of Gratuity Act, 1972. The appellant, however, declined to pay the amount of gratuity as demanded by respondent No. 4.

Respondent No. 4, therefore, filed an application before the controlling authority under the Act against the appellant and claimed the amount of gratuity which was allowed. The appellant felt aggrieved and filed appeal before the appellate authority under the Act. The appeal was dismissed. The appellant felt aggrieved and carried the matter to the High Court in a writ petition. The High Court (Single Judge) by order dated 12.01.2007 dismissed the writ petition and upheld the orders of the authorities passed under the Act. The appellant then filed Letters Patent Appeal before the Division Bench against the order passed by the Single Judge. The LPA was also dismissed by the impugned order which has given rise to filing of the present appeal by way of special leave by the appellant-Institute in this Court.

On 07.01.2019, this Court placing reliance on the decision of this Court in ***Ahmadabad Pvt. Primary Teachers Association* v. *Administrative Officer***[67]allowed the appeal and set aside the order of the High Court. However, after the pronouncement of the order in this appeal, it came to the notice of this Court that consequent upon the decision of this Court rendered in *Ahmadabad Pvt. Primary Teachers Association* case the Parliament amended the definition of the word "employee" as defined in Section 2(e) of the Payment of Gratuity Act, 1972 by Amending Act No. 47 of 2009 on 31.12.2009 with

[67] (2004) 1 SCC 755

retrospective effect from 03.04.1997. This Court, therefore, suo motu took up the appeal to its file.

DECISION AND OBSERVATIONS

In *Ahmadabad Pvt. Primary Teachers Association* the Hon'ble Supreme Court had examined the question of payment of gratuity to the teachers in the light of the definition of the word "employee" defined in Section 2(e)[68] of the Act as it stood then. It was held that **the teachers are clearly not intended to be covered by the definition of "employee".**

Further, the Hon'ble court said that the legislature was alive to various kinds of definitions of the word "employee" contained in various previous labour enactments when the Act was passed in 1972. If it intended to cover in the definition of "employee" all kinds of employees, it could have as well used such wide language as is contained in Section 2(f) of the Employees' Provident Funds Act, 1952 which defines "employee" to mean "any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of an establishment …". Non-use of such wide language in the definition of "employee" in Section 2(e) of the Act of 1972 reinforces our conclusion that teachers are clearly not covered in the definition.

The decision rendered in *Ahmadabad Pvt. Primary Teachers Association* therefore, led the Parliament to amend the definition of "employee"[69] on 31.12.2009 with retrospective effect from 03.04.1997.

In the light of the amendment the teachers were brought within the purview of "employee" as defined in Section 2(e) of the Payment of Gratuity Act by Amending Act with retrospective effect. Thus, the law laid down by this Court in the case of *Ahmadabad Pvt. Primary Teachers Association* was no longer applicable against the teachers.

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[68] 2.(e) 'employee' means any person (other than an apprentice) employed on wages, in any establishment, factory, mine, oilfield, plantation, port, railway company or shop, ***to do any skilled, semi-skilled, or unskilled, manual, supervisory, technical or clerical work,*** whether the terms of such employment are express or implied, and whether or not such person is employed in a managerial or administrative capacity, but does not include any such person who holds a post under the Central Government or a State Government and is governed by any other Act or by any rules providing for payment of gratuity."

[69] The amended definition reads as under:
"(e) "employee" means any person (other than an apprentice) who is employed for wages, whether the terms of such employment are express or implied, in any kind of work, manual or otherwise, in or in connection with the work of a factory, mine, oilfield, plantation, port, railway company, shop or other establishment to which this Act applies, but does not include any such person who holds a post under the Central Government or a State Government and is governed by any other Act or by any rules providing for payment of gratuity."

43. K. Ananda Rao v. S.S. Rawat, IAS (Contempt Petition (civil) No. 1045-1055 of 2018)

Decided on – 07.03.2019

Bench – 1. Hon'ble Mr. Justice Uday Umesh Lalit

2. Hon'ble Mr. Justice M. R. Shah

ISSUE

Whether the expression "consequential benefits" occurring in the order dated 09.08.2017 must be given the interpretation that the employees were entitled to all salaries and emoluments for the period that they had not even worked in their respective organization?

FACTS

In this case the age of superannuation in respect of Government employees under section 3 of the Andhra Pradesh Public Employment(Regulation of Age of Superannuation)Act, 1984 was initially 58 years of age. Consequent upon bifurcation of the erstwhile State of Andhra Pradesh, the Government of Andhra Pradesh took a decision on 27.06.2014 to raise the age of superannuation from 58 years to 60 years. Section 3 of the 1984 Act was amended accordingly and the age of superannuation was raised to 60 years. On 02.07.2014, Finance Department the Government of Andhra Pradesh issued a circular clarifying that the enhanced age of superannuation from 58 years to 60 years would not be applicable to State Public Enterprises and other autonomous Institutions and Training Centres included in the X Schedule of the 2014 Act and non – teaching employees of the Universities. The petitioners are the employees of a society included in the schedule X of the 2014 Act. The Society then passed a resolution agreeing in principle to enhance the age of superannuation from 58 years to 60 years on par with the Government employees. On 05.08.2015, order was issued by the Government of Andhra Pradesh, Tribal Welfare Department raising the age of superannuation from 58 years to 60 years. However, a resolution was again issued by the Finance Department State Government of Andhra Pradesh on 18.06.2016 to keep the Resolution dated 05.08.2015 in abeyance. This particular resolution of 18.06.2016 was challenged before the High Court which held that these employees cannot claim any right to continue in service till they attain the age of 60 years. Special Leave Petition was preferred by the present contempt petitioners wherein the Hon'ble Supreme Court directed that in case

any employee has retired only on the ground of attaining the age of 58 years, such employees shall be reinstated and continued in service but in no case beyond 60 years.

The contempt petitions alleged violation of the judgment and order dated 09.08.2017 passed by this court in appeals arising out of Special Leave Petition (Civil) No.13623 of 2017(*A Veerraju* v. *State of Andhra Pradesh*) and all connected matters wherein it was held that the Government order dated 08.08.2017 permitting the employees to continue up to the age of 60 years has come into effect with effect from 02.06.2014. Therefore all employees who have superannuated on account of attainment of age of 58 years on 02.06.2014 or thereafter are entitled to the protection of their service up to 60 years of age and naturally to all ***consequential benefits*** arising there from.

Thereafter, Contempt petitions were filed by the employees submitting *interalia* that in terms of the order dated 09.08.2017 all consequential benefits arising out of raising the age of superannuation had to be extended to those who had superannuated on attaining the age of 58 years on or after 02.06.2014. According to the petitioners the"***consequential benefits "would and must include all back wages even for the period the petitioners had not actually worked in their respective organizations***.

DECISION AND OBSERVATIONS

In para 26 of the judgment, the Hon'ble Supreme Court said that raising of age of superannuation by amending Section 3 of 1984 Act was soon after the bifurcation of the erstwhile State of Andhra Pradesh. The concern as to what would be the situation if the employees were finally allocated to the newly carved State of Andhra Pradesh and the employees by that time had attained the age of 58 years, was dealt with in newly inserted Section 3A in 2014 Act. The principle was to re-induct them in the services under the State of Andhra Pradesh without any break in service. Further, if the employee had not attained the age of 60 years, he would be re-inducted; and in case he had attained the age of 60 years, ***what would in such cases be conferred upon the employees was notional advantage for the purpose of calculation of his pensionary benefits as if he had rendered service in the State of Andhra Pradesh.***

After the policy decision was taken on 05.08.2015 to raise the age of superannuation from 58 years to 60 years in respect of employees of Society, that decision was kept in abeyance by

Resolution dated 18.06.2016. This Resolution states that the Government had taken stock of all the developments and had decided that the issue regarding enhancement of age of superannuation in respect of employees of the entities and institutions listed in IX and X Schedule of 2014 Act would be taken only after the issue of division of assets and liabilities of the concerned institutions between the two States was settled and the allotment of employees was finalized. This was followed by GO dated 28.06.2016 which dealt with issues like how after re-induction of the employees pursuant to enhancement of age of superannuation, the period that the employees were out of employment, was to be dealt with. Such period was referred to as the interregnum period or gap period, and was then dealt with under various heads. These developments are indicative that ***it was always in contemplation that if an employee had superannuated on attaining the age of 58 years and was thereafter re-inducted in service with superannuation age being 60 years, he would not be entitled to any salary or normal emoluments for what was referred to as the interregnum period or gap period, but would be entitled to certain notional benefits stipulated therein.***

The Hon'ble Supreme Court was of the opinion that these issues were not referred or discussed before the court on 09.08.2017. Therefore, the order dated 09.08.2017 does not indicate that any such aspect of the matter was in contemplation of this court or the matter was addressed from this stand point of giving an interpretation to the expression of the term "consequential benefits" to include the salaries and emoluments to the employees even for the term that they have not worked in their respective organization.

The Hon'ble Court referred to the decision in *Sureshchandra Singh and others v. Fertilier Corporation of India*[70] on the matter of principle of parity and held that purely on the principle of parity the employees of the institution or entities in Schedule IX and X of 2014 Act could not demand the benefit of enhancement of the age of superannuation from 58 years to 60 years.

[70] (2004) 1 SCC 592

44. Pattu Ranjan v. State of Tamil Nadu (Criminal Appeal No. 680-681 of 2009)

Decided on – 29.03.2019

Bench – 1. Hon'ble Mr. Justice N.V.Ramana

2. Hon'ble Mr. Justice M.M. Shantanagoudar

3. Hon'ble Ms. Justice Indira Banerjee

(- Registration of second FIR

- Propriety of superimposition test)

FACTS

The brief facts of this case are that the Accused No. 1 is the proprietor of chain of hotels. He had evinced a keen desire to take PW1 as his 3rd wife who was already married to one Santhakumar (the deceased). On 1.10.2001, PW1 and her husband were abducted by Accused No.1 and his henchmen (including the appellants herein) for which separate trial was conducted on the filing of a complaint by PW 1.Later Accused No.1 took help of other appellants to eliminate the husband of PW1 for securing PW1 as his 3rd wife. F.I.R. An FI.R. was lodged by PW1 accusing the Accused no. 1 and his henchmen for the murder of her husband.

DECISION AND OBSERVATIONS

On the issue of ***filing of second F.I.R.,*** the Hon'ble Supreme Court held that in respect of an offence or different offences committed in the course of the same transaction is not vonly impermissible but also violates Article 21 of the Constitution. The Hon'ble Court referred to *T.T. Antony v. State of Kerala*[71], wherein the same was held.[72]

[71] (2001) 6 SCC 181

[72] 19. The scheme of CrPC is that an officer in charge of a police station has to commence investigation as provided in Section 156 or 157 CrPC on the basis of entry of the first information report, on coming to know of the commission of a cognizable offence. On completion of investigation and on the basis of the evidence collected, he has to form an opinion under Section 169 or 170 CrPC, as the case may be, and forward his report to the Magistrate concerned under Section 173(2) CrPC. However, even after filing such a report, if he comes into possession of further information or material, he need not register a fresh FIR; he is empowered to make further investigation, normally with the leave of the court, and where during further investigation he collects

However, the Court was quick to state that the aforementioned principles of law may not be applicable to the facts of the present incident, as the criomes underlying the two F.I.Rs are distinct and different. The offence punishable under section 302 in the present case, was committed during the course of investigation of the case of Abduction in the first F.I.R. As mentioned, the facts and circumstamces of the matter clearly indicate that the offence of abuction committed by the appellants and the offence of murder were two different and distinct offences and therefore, there is no question of further investigation to be made in the crime of abduction by the investigating agency relating to the offence of murder which was committed during the subsistence of the investigation relating to abduction.

Further investigation, as envisaged under subsection 8 of section 173 of the Criminal Procedure Code, 1973 connotes investigation of the case in continuation of an earlier investigation with respect to which the charge sheet has already been filed. In case a fresh offence is committed during the course of the earlier investigation, which is distinct from the

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further evidence, oral or documentary, he is obliged to forward the same with one or more further reports; this is the import of sub-section (8) of Section 173 CrPC.

20. From the above discussion it follows that under the scheme of the provisions of Sections 154, 155, 156, 157, 162, 169, 170 and 173 CrPC only the earliest or the first information in regard to the commission of a cognizable offence satisfies the requirements of Section 154 CrPC. Thus there can be no second FIR and consequently there can be no fresh investigation on receipt of every subsequent information in respect of the same cognizable offence or the same occurrence or incident giving rise to one or more cognizable offences. On receipt of information about a cognizable offence or an incident giving rise to a cognizable offence or offences and on entering the FIR in the station house diary, the officer in charge of a police station has to investigate not merely the cognizable offence reported in the FIR but also other connected offences found to have been committed in the course of the same transaction or the same occurrence and file one or more reports as provided in Section 173 CrPC.

27. A just balance between the fundamental rights of the citizens under Articles 19 and 21 of the Constitution and the expansive power of the police to investigate a cognizable offence has to be struck by the court. There cannot be any controversy that sub-section (8) of Section 173 CrPC empowers the police to make further investigation, obtain further evidence (both oral and documentary) and forward a further report or reports to the Magistrate. In *Narang case* [*Ram Lal Narang* v. *State (Delhi Admn.)*, (1979) 2 SCC 322 : 1979 SCC (Cri) 479] it was, however, observed that it would be appropriate to conduct further investigation with the permission of the court. However, the sweeping power of investigation does not warrant subjecting a citizen each time to fresh investigation by the police in respect of the same incident, giving rise to one or more cognizable offences, consequent upon filing of successive FIRs whether before or after filing the final report under Section 173(2) CrPC. It would clearly be beyond the purview of Sections 154 and 156 CrPC, nay, a case of abuse of the statutory power of investigation in a given case. In our view a case of fresh investigation based on the second or successive FIRs, not being a counter-case, filed in connection with the same or connected cognizable offence alleged to have been committed in the course of the same transaction and in respect of which pursuant to the first FIR either investigation is under way or final report under Section 173(2) has been forwarded to the Magistrate, may be a fit case for exercise of power under Section 482 CrPC or under Articles 226/227 of the Constitution.

offence being investigated, such fresh offence cannot be investigated as part of the pending case, and should instead be investigated afresh.

The Hon'ble Court referred to the decision in ***Awadesh Kumar Jha* v. *State of Bihar***[73] and ***Rameshchandra Nandlal Parikh* v. *State of Gujarat***[74] wherein the Court held that the case arising out of a second F.I.R., if relating to a separate transaction, cannot be investigated along with a previous F.I.R. under the clause "further investigation" as contemplated under subsection 8 of section 173 of the Criminal Procedure Code,1973.

The Hon'ble Court referred to the decision in ***Babubhai* v. *State of Gujarat***[75], wherein the court held that where the version in the second F.I.R.is different and they are in respect of the two different incidents/crimes, the second F.I.R. is permissible. In case in respect of the same incident the accused in the first F.I.R. comes forward with a different version or counterclaim, investigation on both the F.I.Rs has to be conducted. Thus, the Court was of the opinion that in the present case the separate F.I.Rs lodged is just, legal and proper.

On the matter of circumstantial evidence, the Court referred to ***Sharad Birdichand Sarda* v. *State of Maharashtra***[76] wherein the following was held:

(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*[77] where the following observations were made.

"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."

[73] (2016) 3 SCC 8
[74] (2006) 1 SCC 732
[75] (2010) 12 SCC 254
[76] (1984) 4 SCC 116
[77] 1973 CriLJ 1783

(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,

(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

(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.

These five golden principles, if we may say so, constitute the ***panchsheel*** of the proof of a case based on circumstantial evidence."

On the ***propriety of superimposition test*** conducted in the present case, the court noted there cannot be any dispute that evidence on superimposition is also based on experts' opinion. The Court noted that the use of the superimposition technique in Indian investigations for identification purposes is not a new phenomenon.[78] This Court itself has placed reliance on identification of the deceased through superimposition on several occasions (see *Shankar* v. *State of Tamil Nadu*[79], *Swamy Shraddananda* v. *State of Karnataka*[80], *Inspector of Police, Tamil Nadu* v. *John David*[81], ; *Mahesh Dhanaji Shinde* v. *State of Maharashtra*[82], clearly indicating that it is an acceptable piece of opinion evidence.

It is relevant to note that all of the decisions of this Court cited in the above paragraph were based on circumstantial evidence, involving aspects such as the last seen circumstance, motive, recovery of personal belongings of the deceased, and so on, and therefore in none of the cases was the superimposition technique the sole incriminating factor relied upon to reach a conclusion of guilt of the accused. Indeed, in *Mahesh Dhanaji Shinde* the Court also had the advantage of referring to a DNA test, and in *John David* of referring to a DNA test as

[78] Notably, it has been employed in the investigations pertaining to the Nithari murders, the Russian murder incident in Goa in 2008, and even before that in the Morni Hill murder case and the Paharganj bomb blast case as far back as in 1996, and the Udhampur murder case in 2005 (See Modi, *A Textbook of Medical Jurisprudence and Toxicology*, 26th edn., 2018, pp. 267-271).
[79] (1994) 4 SCC 478
[80](2007) 12 SCC 288
[81] (2011) 5 SCC 509
[82] (2014) 4 SCC 292

well as dental examination of the deceased, to determine the identity of the victim. ***This is in line with the settled practice of the Courts, which generally do not rely upon opinion evidence as the sole incriminating circumstance, given its fallibility. This is particularly true for the superimposition technique, which cannot be regarded as infallible.***

The Court concluded by stating that ***while it is necessary that proof beyond reasonable doubt should be adduced in all criminal cases, it is not necessary that such proof should be perfect, and someone who is guilty cannot get away with impunity only because the truth may develop some infirmity when projected through human processes***. The traditional dogmatic hyper technical approach has to be replaced by a rational, realistic and genuine approach for administering justice in a criminal trial. Justice cannot be made sterile by exaggerated adherence to the rule of proof, inasmuch as the benefit of doubt must always be reasonable and not fanciful. (See *Inder Singh v. State (Delhi Administration)*[83], *State of H.P. v. Lekh Raj*[84], *Takhaji Hiraji v. Thakore Kubersing Chamansing*[85], *Chaman v. State of Uttarakhand*[86]).

Therefore, the conviction was upheld.

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[83] (1978) 4 SCC 161
[84] (2000) 1 SCC 247
[85] (2001) 6 SCC 145
[86](2016) 12 SCC 76

45. Commissioner of Income Tax, New Delhi v. Ram Kishan Dass (Civil Appeal No. 3211 of 2019)

Decided on –26.03.2019

Bench – 1. Hon'ble Mr. Justice D. Y. Chandrachud

2. Hon'ble Mr. Justice Hemant Gupta

(Interpretation of Section 142 (2C) of the Income Tax Act)

FACTS

The appeal involves the interpretation of Section 142(2C)[87] of the Income Tax Act 1961. A Division Bench of the Delhi High Court by its judgment dated 27 May 2011 dismissed a batch of appeals filed by the Revenue against an order dated 18 September 2009 of the Income Tax Appellate Tribunal.

The Tribunal came to the conclusion that prior to the insertion of the expression "*suo motu*" with effect from 1 April 2008 in Section 142(2C), the assessing officer had no jurisdiction to extend time for the submission of the report of an auditor appointed under sub section (2A), of his own accord. As a consequence, it was held that the assessment which was made under Section 153A, in respect of the assessment years in question, was barred by limitation.

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[87] Section 142(2A) - If, at any stage of the proceedings before him, the Assessing Officer, having regard to the nature and complexity of the accounts of the assessee and the interests of the revenue, is of the opinion that it is necessary so to do, he may, with the previous approval of the Chief Commissioner of Commissioner, direct the assessee to get the accounts audited by an accountant, as defined in the *Explanation* below sub-section (2) of section 288, nominated by the Chief Commissioner or Commissioner in this behalf and to furnish a report of such audit in the prescribed form - duly signed and verified by such accountant and setting forth such particulars as may prescribed and such other particulars as the Assessing Officer may require:

Provided that the Assessing Officer shall not direct the assessee to get the accounts so audited unless the assessee has been given a reasonable opportunity of being heard.

(2C) Every report under sub-section (2A) shall be furnished by the assessee to the Assessing Officer within such period as may be specified by the Assessing Officer:

Provided that the Assessing Officer may, on an application made in this behalf by the assessee and for any good and sufficient reason, extend the said period by such further period or periods as he thinks fit; so, however, that the aggregate of the period originally fixed and the period or periods so extended shall not, in any case, exceed one hundred and eighty days from the date on which the direction under sub-section (2A) is received by the assessee

In the present batch of cases, the submission of the assesses is that the assessing officer had no jurisdiction or authority under Section 142(2C), as it stood prior to 1 April 2008, to extend time for the submission of the audit report of the auditor appointed under the provisions of sub section (2A). In essence, the submission is that the assessing officer was authorized to extend time (not exceeding 180 days) from the date on which a direction under sub section (2A) was received by the assessee, only on an application made by the assessee and for any good and sufficient reason. If the assessee made no application, the assessing officer would have no jurisdiction - according to the assessees - to extend time.

The Revenue adopted a contrary position, submitting that even before 1 April 2008, the jurisdiction of the assessing officer to extend time for the submission of the audit report was not confined to a situation in which the assessee had made an application for extension. Consequently, the incorporation of a provision for a *suo motu* exercise of power by the assessing officer, with effect from 1 April 2008 by the Finance Act, 2008[3], was only intended to remove an ambiguity and was clarificatory in nature.

DECISION AND OBSERVATIONS

The substantive part of sub section (2C) mandates that the report under sub section (2A) shall be furnished by the assessee to the assessing officer within the period that is specified by the assessing officer under the proviso, as it stood prior to its amendment by the Finance Act. The assessing officer was further empowered, on an application made by the assessee and for any good and sufficient reason, to extend the period further, subject to the stipulation that it shall not exceed an aggregate of 180 days from the date on which the direction under sub section (2A) has been received by the assessee.

The crucial words which fall for interpretation are "On an application made in this behalf by the assessee and for any good and sufficient reason…"

The issue as to whether the amendment which has been brought about by the legislature is intended to be clarificatory or to remove an ambiguity in the law must depend upon the context. The Court would have due regard to (i) the general scope and purview of the statute; (ii) the remedy sought to be applied; (iii) the former state of the law; and (iv) what

power that the legislature contemplated (See *Zile Singh* v. *State of Haryana*)[88]. The decision in *Sedco Forex International Drill Inc.* v. *Commissioner of Income Tax*[89] on which learned counsel for the assesses relied involved a substitution of the Explanation to Section 9(1)(ii) of the IT Act, 1961 with effect from 1 April 2000. A two Judge Bench of this Court held that given the legislative history of Section 9(1)(ii), it can only be assumed that it was deliberately introduced with effect from 1 April 2000 and was therefore intended to be prospective. This was also so construed by the CBDT, and in the explanatory notes to the provisions of the Finance Act, 1999. As we have indicated, interpretation is a matter of determining the path on the basis of statutory context and legislative history. In taking the view that we have, we have also taken note of the fact that the same view was adopted by several High Courts. Among them are (i) the Punjab and Haryana High Court in *Jagatjit Sugar Mills Co. Ltd.* v. *Commissioner of Income Tax*[90]; (ii) the Kerala High Court in *Commissioner of Income Tax, Cochin* v. *Popular Automobiles*[91]; and (iii) the Allahabad High Court in *Ghaziabad Development Authority* v. *Commissioner of Income Tax, Ghaziabad (UP)*[92]. The decision of the Kerala High Court in *Popular Automobiles* is the subject matter of Civil Appeal No 2951 of 2012 in these proceedings.

The Hon'ble court concluded that the provisions of Section 142(2C) of the Income Tax Act 1961, as they stood prior to the amendment which was enacted with effect from 1 April 2008 by the Finance Act, ***2008 did not preclude the exercise of jurisdiction and authority by the assessing officer to extend time for the submission of the audit report directed under subsection (2A), without an application by the assessee***. The court declared that the amendment was intended to remove an ambiguity and is clarificatory in nature. As a consequence, the Court specifically overruled the judgment of a Division Bench of the Delhi High Court in *Commissioner of Income Tax* v. *Bishan Swaroop Ram Kishan Agro Pvt. Ltd.*[93]

[88] (2004) 8 SCC 1
[89] (2005) 12 SCC 717
[90] [1994] 210 ITR 468
[91](2011) 333 ITR 308
[92] 2011 SCC OnLine All 1151
[93] 2011 SCC OnLine Del 2463