JUDICIAL ACADEMY JHARKHAND

SNIPPETS

OF

SUPREME COURT JUDGMENTS

(August 08-August 18, 2019)

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1. *Pioneer Urban Land and Infrastructure Limited and Another v. Union of India and Others, (2019 SCC OnLine SC 1005)*

Decided on : -09.08.2019

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

(Allottees/home buyers were included in the main provision, i.e. Section 5(8)(f) of the Insolvency and Bankruptcy Code with effect from the inception of the Code, the explanation being added in 2018 merely to clarify doubts that had arisen.)

Facts

A batch of writ petitions were filed challenging the constitutional validity of amendments made to the Insolvency and Bankruptcy Code, 2016 (for short "the Code"), pursuant to a report prepared by the Insolvency Law Committee dated 26th March, 2018 (for short "Insolvency Committee Report"). The amendments so made deem allottees of real estate projects to be "financial creditors" so that they may trigger the Code, under Section 7 thereof, against the real estate developer. In addition, being financial creditors, they are entitled to be represented in the Committee of Creditors by authorised representatives. The provisions of the Insolvency And Bankruptcy Code, 2016 being challenged were Explanation to Section 5(8)(f),[1] Section 21(6A)(b),[2] and Section 25A.[3]

[1] 5. Definitions
In this part, unless the context otherwise requires, -
(8) "financial debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes-
(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;
Explanation. - For the purposes of this sub-clause,-
(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and
(ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);"

[2] 21. Committee of creditors
(6A) Where a financial debt-
(b) is owed to a class of creditors exceeding the number as may be specified, other than the creditors covered under clause (a) or sub-section (6), the interim resolution professional shall make an application to the Adjudicating Authority along with the list of all financial creditors, containing the name of an insolvency professional, other than the interim resolution professional, to act as their authorised representative who shall be appointed by the Adjudicating Authority prior to the first meeting of the committee of creditors;[…]
and such authorised representative under clause (a) or clause (b) or clause (c) shall attend the meetings of the committee of creditors, and vote on behalf of each financial creditor to the extent of his voting share."

[3] 25A. Rights and duties of authorized representatives of financial creditors -

Observations and Decision

The Apex Court noted that in *Swiss Ribbons v. Union of India*,[4] it was observed that the legislature must be given free play in the joints when it comes to economic legislation. Apart from the presumption of constitutionality which arises in such cases, the legislative judgment in economic choices must be given a certain degree of deference by the courts. It is in this background that the Apex Court proceeded to decide the constitutional challenge to the Amendment Act.

The Apex Court observed that the Insolvency Law Committee found that delay in completion of flats/apartments has become a common phenomenon, and that amounts raised from home buyers contributes significantly to the financing of the construction of such flats/apartments. This being the case, it was important, therefore, to clarify that home buyers are treated as financial creditors so that they can trigger the Code under Section 7 and have their rightful place on the Committee of Creditors when it comes to making important decisions as to the future of the building construction company, which is the execution of the real estate project in which such home buyers are ultimately to be housed.

Insolvency and Bankruptcy Code,2016 vis- a-vis the Real Estate (Regulation and Development)Act,2016:

Regarding the Insolvency and Bankruptcy Code,2016 vis- a-vis the Real Estate (Regulation and Development)Act,2016, the Apex Court held that in the present case, the Code as amended, is both later in point of time than RERA, and must be given precedence over RERA, given Section 88 of RERA.

Even by a process of harmonious construction, RERA and the Code must be held to co-exist, and, in the event of a clash, RERA must give way to the Code. RERA, therefore, cannot be held to be a special statute which, in the case of a conflict, would override the general statute, viz. the Code.

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(1) The authorised representative under sub-section (6) or sub-section (6A) of section 21 or sub-section (5) of section 24 shall have the right to participate and vote in meetings of the committee of creditors on behalf of the financial creditor he represents in accordance with the prior voting instructions of such creditors obtained through physical or electronic means.
(2) It shall be the duty of the authorised representative to circulate the agenda and minutes of the meeting of the committee of creditors to the financial creditor he represents.
(3) The authorised representative shall not act against the interest of the financialcreditor he represents and shall always act in accordance with their prior instructions:
Provided that if the authorised representative represents several financial creditors, then he shall cast his vote in respect of each financial creditor in accordance with instructions received from each financial creditor, to the extent of his voting share:
Provided further that if any financial creditor does not give prior instructions through physical or electronic means, the authorised representative shall abstain from voting on behalf of such creditor.
(4) The authorised representative shall file with the committee of creditors any instructions received by way of physical or electronic means, from the financial creditor he represents, for voting in accordance therewith, to ensure that the appropriate voting instructions of the financial creditor he represents is correctly recorded by the interim resolution professional or resolution professional, as the case may be.
Explanation - For the purposes of this section, the "electronic means" shall be such as may be specified."

[4] (2019) 4 SCC 17

The Apex Court also noted that given the different spheres within which these two enactments operate, different parallel remedies are given to allottees - under RERA to see that their flat/apartment is constructed and delivered to them in time, barring which compensation for the same and/or refund of amounts paid together with interest at the very least comes their way. If, however, the allottee wants that the corporate debtor's management itself be removed and replaced, so that the corporate debtor can be rehabilitated, he may prefer a Section 7 application under the Code. That another parallel remedy available is recognised by RERA itself in the proviso to Section 71(1), by which an allottee may continue with an application already filed before the Consumer Protection fora, he being given the choice to withdraw such complaint and file an application before the adjudicating officer under RERA read with Section 88.

Article 14 Challenge:

In the present case, it was argued that unequals are treated as equals as banks and financial institutions are completely different from real estate developers, as has been recognised in *Swiss Ribbons* , and to treat these unequals as equals by making real estate developers financial debtors, infracts Article 14.

The Apex Court noted that when Article 14 is alleged to have been infracted by legislation which is economic in nature, it is important to first restate a few fundamental principles that apply when challenges on the ground of discrimination are made to statutes. (See ***Ram Krishna Dalmia v. Justice S.R. Tendolkar***[5])

[5](1959) SCR 279
"…The principle enunciated above has been consistently adopted and applied in subsequent cases. The decisions of this Court further establish—
(*a*) that a law may be constitutional even though it relates to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself;
(*b*) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;
(*c*) that it must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;
(*d*) that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest;
(*e*) that in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and
(*f*) that while good faith and knowledge of the existing conditions on the part of a legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation. (at page 297, 298)"
This principle has been re-iterated by this Court in *State of Bihar* v. *Shree Baidyanath Ayurved Bhawan (P) Ltd.*, (2005) 2 SCC 762 and more recently in *Karnataka Live Band Restaurants Assn.* v. *State of Karnataka*, (2018) 4 SCC 372 at 393 .

Equally, it is important to note that classification need not be perfect (See ***Venkateshwara Theatre* v. *State of A.P.***[6]). Also, in ***Mardia Chemicals Ltd.* v. *Union of India***[7] , this Court held that Parliamentary intent cannot be thwarted even if it operates a bit harshly on a small section of the public, if otherwise made in the larger public interest.

The Apex Court observed that the principle contained in *Swiss Ribbons*, that far greater deference is accorded to economic legislation, as the legislature is given free play in the joints and is at liberty to conduct economic experiments in public interest, applies in this case. Subparas (b), (c), (d) and (f) of *Ram Krishna Dalmia* are all also attracted in the present case.

Explaining the procedure under the Code and the RERA , the Apex Court stated:

> *"42. It is also important to remember that the Code is not meant to be a debt recovery mechanism [see paragraph 28 of Swiss Ribbons (supra)]. It is a proceeding in rem which, after being triggered, goes completely outside the control of the allottee who triggers it. Thus, any allottee/home buyer who prefers an application under Section 7 of the Code takes the risk of his flat/apartment not being completed in the near future, in the event of there being a breach on the part of the developer. Under the Code, he may never get a refund of the entire principal, let alone interest. This is because, the moment a petition is admitted under Section 7, the resolution professional must first advertise for and find a resolution plan by somebody, usually another developer, which has then to pass muster under the Code, i.e. that it must be approved by at least 66% of the Committee of Creditors and must further go through challenges before NCLT and NCLAT before the new management can take over and either complete construction, or pay out or refund amounts. Depending on the kind of resolution plan that is approved, such home buyer/allottee may have to wait for a very long period for the successful completion of the project. He may never get his full money back together with interest in the event that no suitable resolution plan is forthcoming, in which case, winding up of the corporate debtor alone would ensue. On the other hand, if such allottee were to approach the Real Estate Regulatory Authority under RERA, it is more than likely that the project would be completed early by the persons mentioned therein, and/or full amount of refund and interest together with compensation and penalty, if any, would be awarded. Thus, given the bona fides of the allottee who moves an application under Section 7 of the Code, it is only such allottee who has completely lost faith in the management of the real estate developer who would come before the NCLT under the Code hoping that some other developer takes over and completes the project, while always taking the risk that if no*

[6] (1993) 3 SCC 677
[7] (2004) 4 SCC 311

one were to come forward, corporate death must ensue and the allottee must then stand in line to receive whatever is given to him in winding up. Given the reasons of the Insolvency Committee Report, which show that experience of the real estate sector in this country has not been encouraging, in that huge amounts are advanced by ordinary people to finance housing projects which end up in massive delays on the part of the developer or even worse, i.e. failure of the project itself, and given the state of facts which was existing at the time of the legislation, as adverted to by the Insolvency Committee Report, it is clear that any alleged discrimination has to meet the tests laid down in Ram Krishna Dalmia (supra), V.C. Shukla (supra), Shri Ambica Mills (supra), Venkateshwara Theatre (supra) and Mardia Chemicals (supra)."

Then the Apex Court distinguished between the status of real estate developers vis-a –vis operational debts.

"43.....Here again, what is unique to real estate developers vis-à-vis operational debts, is the fact that, in operational debts generally, when a person supplies goods and services, such person is the creditor and the person who has to pay for such goods and services is the debtor. In the case of real estate developers, the developer who is the supplier of the flat/apartment is the debtor inasmuch as the home buyer/allottee funds his own apartment by paying amounts in advance to the developer for construction of the building in which his apartment is to be found. Another vital difference between operational debts and allottees of real estate projects is that an operational creditor has no interest in or stake in the corporate debtor, unlike the case of an allottee of a real estate project, who is vitally concerned with the financial health of the corporate debtor, for otherwise, the real estate project may not be brought to fruition. Also, in such event, no compensation, nor refund together with interest, which is the other option, will be recoverable from the corporate debtor. One other important distinction is that in an operational debt, there is no consideration for the time value of money - the consideration of the debt is the goods or services that are either sold or availed of from the operational creditor. Payments made in advance for goods and services are not made to fund manufacture of such goods or provision of such services. Examples given of advance payments being made for turnkey projects and capital goods, where customisation and uniqueness of such goods are important by reason of which advance payments are made, are wholly inapposite as examples vis-à-vis advance payments made by allottees. In real estate projects, money is raised from the allottee, being raised against consideration for the time value of money. Even the total consideration agreed at a time when the flat/apartment is non-existent or incomplete, is significantly less than the price the buyer would have to pay for a ready/complete flat/apartment, and therefore, he gains the time value of money. Likewise, the developer who benefits from the amounts disbursed also gains

from the time value of money. The fact that the allottee makes such payments in instalments which are co-terminus with phases of completion of the real estate project does not any the less make such payments as payments involving "exchange", i.e. advances paid only in order to obtain a flat/apartment. What is predominant, insofar as the real estate developer is concerned, is the fact that such instalment payments are used as a means of finance qua the real estate project. One other vital difference with operational debts is the fact that the documentary evidence for amounts being due and payable by the real estate developer is there in the form of the information provided by the real estate developer compulsorily under RERA. This information, like the information from information utilities under the Code, makes it easy for home buyers/allottees to approach the NCLT under Section 7 of the Code to trigger the Code on the real estate developer's own information given on its webpage as to delay in construction, etc. It is these fundamental differences between the real estate developer and the supplier of goods and services that the legislature has focused upon and included real estate developers as financial debtors. This being the case, it is clear that there cannot be said to be any infraction of equal protection of the laws."

The Apex Court then held that real estate developers fall squarely within the object of the Code as originally enacted insofar as they are financial debtors and not operational debtors. Also, so far as unequals being treated as equals is concerned, home buyers/allottees can be assimilated with other individual financial creditors like debenture holders and fixed deposit holders, who have advanced certain amounts to the corporate debtor. Thus, allottees, being individual financial creditors like debenture holders and fixed deposit holders and classified as such, show that they within the larger class of financial creditors, there being no infraction of Article 14.

Challenge to Section 21(6A) and 25A of the Code

In the challenge to Section 21(6A) and Section 25A of the Code, it has been argued by the Petitioners that the allottees would fall in the following five categories and cannot be said, therefore, to be a homogenous class. A glance at the five categories would show, they argue, that they have, in fact, conflicting interests. These five categories are stated to be as follows:

a) "Those who have taken possession and have executed sale deeds, with or without further claims for delay compensation;
b) Those who have taken possession but are yet to execute sale deeds, with or without further claims for delay compensation;
c) Those who are yet to receive possession and seek possession, with or without delay compensation; or
d) Those who are yet to receive possession and seek to obtain refunds of sale consideration with interest.
e) Each of the above may be without or without NCDRC/RERA orders/decrees."

On this point the Apex Court noted that in the given fact that allottees may not be a homogenous group, yet there are only two ways in which they can vote on the Committee of Creditors - either to approve or to disapprove of a proposed resolution plan. Sub-section (3A) goes a long way to iron out any creases that may have been felt in the working of Section 25A in that the authorised representative now casts his vote on behalf of all financial creditors that he represents. If a decision taken by a vote of more than 50% of the voting share of the financial creditors that he represents is that a particular plan be either accepted or rejected, it is clear that the minority of those who vote, and all others, will now be bound by this decision. As has been stated in *Swiss Ribbons*, the legislature must be given free play in the joints to experiment. Minor hiccups that may arise in implementation can always be sorted out later. Thus, the Apex Court held that any challenge to the machinery provisions contained in Sections 21(6A) and 25A of the Code must be repelled.

Interpretation of Section 5(8)(f) of the Code

While interpreting section 5(8)(f), the Apex Court was of the view that the sub-clause does appear to be a residuary provision which is "catch all" in nature which is clear from the words "any amount" and "any other transaction" which means that amounts that are "raised" under "transactions" not covered by any of the other clauses, would amount to a financial debt if they had the commercial effect of a borrowing. Sub-clause (f) Section 5(8) thus read would subsume within it amounts raised under transactions which are not necessarily loan transactions, so long as they have the commercial effect of a borrowing.

Further, explaining the expression "borrow", the Apex Court held that it is wide enough to include an advance given by the home buyers to a real estate developer for "temporary use" i.e. for use in the construction project so long as it is intended by the agreement to give "something equivalent" to money back to the home buyers. The "something equivalent" in these matters is obviously the flat/apartment. Also of importance is the expression "commercial effect". "Commercial" would generally involve transactions having profit as their main aim. Piecing the threads together, the Apex Court held that ***so long as an amount is "raised" under a real estate agreement, which is done with profit as the main aim, such amount would be subsumed within Section 5(8)(f) as the sale agreement between developer and home buyer would have the "commercial effect" of a borrowing, in that, money is paid in advance for temporary use so that a flat/apartment is given back to the lender. Both parties have "commercial" interests in the same - the real estate developer seeking to make a profit on the sale of the apartment, and the flat/apartment purchaser profiting by the sale of the apartment. Thus construed, there can be no difficulty in stating that the amounts raised from allottees under real estate projects would, in fact, be subsumed within Section 5(8)(f) even without adverting to the explanation introduced by the Amendment Act.*** Therefore, the Apex Court held that allottees/home buyers were included in the main provision, i.e. Section 5(8)(f) with effect from the inception of the Code, the explanation being added in 2018 merely to clarify doubts that had arisen.

The Apex Court finally concluded:

i. The Amendment Act to the Code does not infringe Articles 14, 19(1)(g) read with Article 19(6), or 300-A of the Constitution of India.

ii. The RERA is to be read harmoniously with the Code, as amended by the Amendment Act. It is only in the event of conflict that the Code will prevail over the RERA. Remedies that are given to allottees of flats/apartments are therefore concurrent remedies, such allottees of flats/apartments being in a position to avail of remedies under the Consumer Protection Act, 1986, RERA as well as the triggering of the Code.

iii. Section 5(8)(f) as it originally appeared in the Code being a residuary provision, always subsumed within it allottees of flats/apartments. The explanation together with the deeming fiction added by the Amendment Act is only clarificatory of this position in law.

2. *Mahanagar Telephone Nigam Ltd. v. Canara Bank and Others ,(2019 SCC OnLine SC 995)*

Decided on : -08.08.2019

Bench :- 1. Hon'ble Mr. Justice Abhay Manohar Sapre
2. Hon'ble Ms. Justice Indu Malhotra

(-The statement of Claim and Defence filed before the Arbitrator would constitute evidence of the existence of an arbitration agreement, which was not denied by the other party, under Section 7(4)(c) of the 1996 Act.

-The circumstances in which the 'Group of Companies' Doctrine could be invoked to bind the non-signatory affiliate of a parent company, or inclusion of a third party to an arbitration, if there is a direct relationship between the party which is a signatory to the arbitration agreement; direct commonality of the subject matter; the composite nature of the transaction between the parties.)

Facts

The present Special Leave Petitions have been filed to challenge Order dated 16.09.2011 passed in W.P. (C) No. 560 of 1995, Order dated 21.10.2011 passed in C.M. No. 12230 of 2011, Order dated 05.07.2013 passed in C.M. No. 8100 of 2012, and Order dated 10.01.2014 passed in C.M. No. 324 and 325 of 2014 by the Delhi High Court.

In 1992, MTNL floated 17% Non-Cumulative Secured Redeemable Bonds worth Rs. 425 crores. On 10.02.1992, MTNL placed bonds worth Rs. 200 crores with Can Bank Financial Services Ltd. (for short, "CANFINA") under an MOU agreement. The bond amount of Rs. 200 cores was placed as fixed deposit by MTNL with CANFINA. CANFINA paid back Rs. 50 crores of the fixed deposit in 1992. The balance fixed deposit amount of Rs. 150 crores along with interest was not paid by CANFINA to MTNL. As a consequence, MTNL did not service the interest on bonds. MTNL was of the view that since it did not receive the entire bond amount of Rs. 200 crores, the entire deal did not go through. Against payment of Rs. 50 crores received from CANFINA, MTNL serviced the bonds of approximately Rs. 31 crores to the public. MTNL was of the view that only a sum of Rs. 5.41 crores was payable to CANFINA, which was not accepted by CANFINA.

CANFINA was faced with a severe liquidity crunch. In these circumstances, Respondent No. 1 - Canara Bank purchased the Bonds issued by MTNL, of the face value of Rs. 80 crores, from Respondent No. 2 - CANFINA which is its wholly owned subsidiary. Canara Bank requested for registration of these Bonds with MTNL, and lodged letters of allotment for purchase of the bonds from CANFINA. MTNL *vide* letter dated 14.10.1992 addressed to

Canara Bank, refused to transfer the Bonds, on the various grounds mentioned in the letter. MTNL by a subsequent letter dated 16.02.1993, informed Canara Bank that it had registered a part of the face value of Rs. 40 crores, in favour of CANFINA. The bond instruments were however retained on the ground that CANFINA had failed to pay the deposit money of Rs. 150 crores, which was payable to MTNL with an accrued interest of 12% p.a. MTNL *vide* letter dated 20.10.1993, cancelled all the Bonds *inter alia* on the ground that letters of consideration remained with CANFINA. Canara Bank *vide* its reply dated 13.01.1994 contended that it is the holder in due course, and is entitled to have the shares registered in its name, and receive the interest as and when it fell due.

MTNL sent a statement of accounts by adjusting the proceeds of the cancellation of bonds towards the dues of CANFINA. It was stated that the bonds and interest accrued thereon cannot be refunded. MTNL with its letter dated 13.01.1994, attached a cheque for Rs. 5,41,17,463 as the amount payable to Canara Bank. Canara Bank, however, returned the cheque *vide* letter dated 10.02.1994, demanding the restoration and registration of the bonds.

Canara Bank filed W.P. (Civil) No. 560 of 1995 before the Delhi High Court to challenge the cancellation of the Bonds, and a direction to pay the Interest accrued. It is relevant to note that CANFINA was joined as a proforma party in the Writ Petition filed by Canara Bank. The Delhi High Court *vide* Order dated 09.09.1996 directed the Union of India to decide the issues between the parties in light of judgment in *O.N.G.C.* v. *Commissioner of Central Excise*[8]. The Writ Petition was dismissed on the ground of availability of an alternative and efficacious remedy before the Company Law Board under Section 111 of the Companies Act, 1956.The proceedings before the Company Law Board came to be dismissed *vide* Order dated 26.02.1998, since the remedy was no longer available, as per the amendment of Section 111 by the Depositories Act, 1996. Canara Bank filed an application for Restoration of the Writ Petition, which was restored *vide* Order dated 12.05.1999. Canara Bank made a representation to the Cabinet Secretary. On 27.03.2001, a meeting was convened by the Cabinet Secretariat, Litigation Cell which was presided by the Cabinet Secretary, and attended by the representatives of MTNL, Canara Bank, and CANFINA. The Committee directed Canara Bank, CANFINA and MTNL to settle the disputes through arbitration by making an appropriate reference to the Permanent Machinery of Arbitration, functioning in the Department of Public Enterprises. The Committee did not permit Canara Bank, CANFINA and MTNL to pursue the litigation in Court. The Delhi High Court *vide* Order dated 30.05.2008 referred the disputes between the parties to the Committee on Disputes. The Writ Petition was adjourned *sine die.* Canara Bank was granted liberty to revive the Petition in the event that the Committee on Disputes was unable to resolve the disputes between the parties.

The Committee of Disputes held a meeting on 16.12.2008, which was attended by the representatives of MTNL, Canara Bank and CANFINA. The Committee, after hearing the

[8] 1995 Supp (4) SCC 541

parties, expressed the view that all the three parties should take recourse to arbitration in view of the different inter-linked transactions between them. The Committee observed that to expedite arbitration, the parties should expeditiously enter into an arbitration agreement under the Arbitration and Conciliation Act, 1996. Pursuant to the meeting held on 16.12.2008, Canara Bank *vide* its letter dated 05.03.2009 sent a draft arbitration agreement to the Chairman and Managing Director of MTNL. The draft arbitration agreement sent by Canara Bank was between Canara Bank and CANFINA on the one side, with MTNL on the other. By letter dated 17.03.2010, Canara Bank requested the Deputy Secretary, Cabinet Secretariat to advise MTNL to execute the arbitration agreement in accordance with the direction of the Ministry of Law and Justice. The Delhi High Court *vide* Order dated 01.10.2010 disposed of the pending Writ Petition with the observation that the matter should be resolved by the Committee on Disputes expeditiously so that the arbitration agreement between the parties is signed as soon as possible. The decision in *O.N.G.C.* v. *Commissioner of Central Excise* came to be overruled by a Constitution Bench in *Electronics Corporation of India Ltd.* v. *Union of India*[2]. Accordingly, Canara Bank moved the Delhi High Court u/S. 151, CPC for restoration of the disposed of Writ Petition. The Delhi High Court restored the Writ Petition, and *vide* Order dated 16.09.2011.

During the course of the proceedings, the parties before the Delhi High Court agreed that these issues may be referred to arbitration. On 21.10.2011, the name of Mr. Justice A.P. Shah (Retd.) was suggested by the Counsel for Canara Bank, which was accepted by the Counsel for MTNL. On 05.01.2012, the Sole Arbitrator issued notice to all the three parties *i.e.* MTNL, Canara Bank, and CANFINA. Canara Bank raised an objection to joining CANFINA as a party to the arbitration.

The Arbitrator heard the parties on 27.03.2012, on the issue whether CANFINA should be joined as a party to the proceedings. The learned Arbitrator passed an interim award holding that CANFINA had not appeared on 16.09.2011 before the High Court, when the disputes were referred to arbitration. CANFINA was not a party to the arbitration agreement, and cannot be joined as a party to proceedings. MTNL filed C.M. No. 8100 of 2012 before the Delhi High Court seeking clarification of Order dated 16.09.2011, as to whether CANFINA ought to be impleaded as a necessary party to the arbitration agreement. The Delhi Court *vide* order dated 05.07.2013 dismissed the application as "not pressed" on the statement made by the Counsel of MTNL. Canara Bank filed its Statement of Claim before the learned Sole Arbitrator on 06.12.2013. MTNL filed I.A. Nos. 324 - 325 of 2014 before the Delhi High Court for recall of the Orders dated 16.09.2011, 21.10.2011 and 05.07.2013 passed in W.P. (C) No. 560 of 1995. The Delhi High Court *vide* Order dated 10.01.2014, dismissed the Application for Recall on the ground that the application was identical to the application previously filed by MTNL being C.M. No. 8100 of 2012. Since MTNL had not pressed the earlier application, the subsequent application being identical in nature, could not be considered, and was dismissed. In May 2014, MTNL filed its reply to the Statement of Claim filed by Canara Bank, and also made a Counter-Claim against Canara Bank. Aggrieved by

the Orders dated 16.09.2011, 21.10.2011, 05.07.2013, and 10.01.2014 passed by the Delhi High Court in W.P. (C) No. 560 of 1995, C.M. No. 12230 of 2011, C.M. No. 8100 of 2012 and C.M. No. 324 and 325 of 2014 respectively, the Appellant - MTNL filed the present Special Leave Petition. The Apex Court *vide* Order dated 08.05.2014 issued Notice to all the Respondents, including CANFINA which has been joined as Respondent No. 2.

Issues

Two issues arose for consideration: (i) the first issue raised by the Appellant - MTNL with respect to the existence of a valid arbitration agreement between the three parties; (ii) the second issue has been raised by Respondent No. 1 - Canara Bank that the Order dated 16.09.2011 and 21.10.2011 is between Canara Bank and MTNL. Respondent No. 2 - CANFINA, is not a party to the arbitration agreement, and hence cannot be impleaded in the proceedings.

Decision and Observations

(1)The Existence Of A Valid Arbitration Agreement

The Apex Court noted that a binding agreement for disputes to be resolved through arbitration is a *sine-qua-non* for referring the parties to arbitration. Section 7[9] defines "arbitration agreement". The arbitration agreement need not be in any particular form. What is required to be ascertained is the intention of the parties to settle their disputes through arbitration. The essential elements or attributes of an arbitration agreement is the agreement to refer their disputes or differences to arbitration, which is expressly or impliedly spelt out from a clause in an agreement, separate agreement, or documents/correspondence exchanged between the parties.

Section 7(4)(b) of the 1996 Act, states that an arbitration agreement can be derived from exchange of letters, telex, telegram or other means of communication, including through electronic means. The 2015 Amendment Act inserted the words "including communication

[9] 7. Arbitration agreement. -
(1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
(3) An arbitration agreement shall be in writing.
(4) An arbitration agreement is in writing if it is contained in-
(a) A document signed by the parties;
(b) An exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or
(c) An exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.
(5) There reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

through electronic means" in Section 7(4)(b). ***If it can prima facie be shown that parties are ad idem, even though the other party may not have signed a formal contract, it cannot absolve him from the liability under the agreement***[10]

The meaning of a contract must be gathered by adopting a common sense approach, and must not be allowed to be thwarted by a pedantic and legalistic interpretation.[11] An 'arbitration agreement' is a commercial document *inter partes*, and must be interpreted so as to give effect to the intention of the parties, rather than to invalidate it on technicalities.The Apex Court on this point referred to ***Khardah Company Ltd.* v. *Raymon and Co. (India) Pvt. Ltd.***[12] In ***Enercon (India) Ltd.* v. *Enercon GMBH***[13], it was held that a common sense approach has to be adopted to give effect to the intention of the parties to arbitrate the disputes between them. Being a commercial contract, the arbitration clause cannot be construed with a purely legalistic mindset, as in the case of a statute.

In this case, MTNL had raised a preliminary objection that there was no arbitration agreement in writing between the parties, at this stage of the proceedings. The Apex Court noted that the agreement between MTNL and Canara Bank to refer the disputes to arbitration is evidenced from the documents exchanged between the parties, and the proceedings.[14] Also, the agreement between the parties as recorded in a judicial Order, is final and conclusive of the agreement entered into between the parties.[15] Therefore, the Apex Court held that the Appellant - MTNL after giving its consent to refer the disputes to arbitration before the Delhi High Court,[16] was now estopped from contending that there was

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[10] *Govind Rubber Ltd.* v. *Louis Dreyfus Commodities Asia (P) Ltd.*, (2015) 13 SCC 477

[11] *Union of India* v. *DN Revry and Co.*, (1976) 4 SCC 147.

[12][1963] 3 SCR 183.

[13] (2014) 5 SCC 1.

[14] (i) The Minutes of the Meeting dated 27.03.2001 convened by the Cabinet Secretariat, wherein all three parties were present and participated in the proceedings. The Committee on Disputes, in the Meeting dated 16.12.2008 expressed the view that all the three parties should take recourse to arbitration in view of the different inter-liked transactions between them. Canara Bank suggested that to expedite the arbitration, it should be conducted under the Arbitration & Conciliation Act, 1996. This was accepted by MTNL, and no objection was raised.
(ii) Pursuant to the proceedings conducted by the Cabinet Secretariat, Canara Bank addressed letters dated 05.03.2009 and 17.03.2010 to MTNL, wherein it enclosed a draft Arbitration Agreements, wherein all three parties i.e. Canara Bank, CANFINA and MTNL would be joined in the arbitration proceedings.
(iii) In the Writ Petition filed by Canara Bank, the Delhi High Court *vide* Order dated 16.09.2011 recorded the consent of MTNL and Canara Bank to be referred to arbitration by a Sole Arbitrator under the 1996 Act.
(iv) Pursuant thereto, MTNL participated in the proceedings conducted by the Sole Arbitrator, and filed its Claim, and Counter-Claim. No objection was raised before the Sole Arbitrator that there was no arbitration agreement in writing between the parties. The only objection raised was that CANFINA should be joined as a necessary party in the proceedings.

[15] *State of Maharashtra* v. *Ramdas Shrinivas Nayak*, (1982) 2 SCC 463.

[16] The relevant extract of the Order dated 16.09.2011 passed by the Delhi High Court reads as follows:
"Unfortunately, although the parties had displayed their willingness for arbitration, the Committee on Disputes could not resolve the specific clauses of the arbitration agreement. Nor have the parties been able to arrive at a consensus with regard to the specific clauses of the arbitration agreement. As noted in the order dated 01.10.2010, according to the petitioner, it is a matter of arbitration as to whether the petitioner is liable for the acts or omissions of CANFINA. However, the respondents were insisting that the petitioners should agree to take over the liabilities and admit them in the arbitration agreement itself. It has now been agreed by the parties that both these issues could be made the subject matter of the

no written agreement to refer the parties to arbitration. And, Section 7(4)(c) of the Arbitration and Conciliation Act, 1996 provides that there can be an arbitration agreement in the form of exchange of statement of claims and defense, in which the existence of the agreement is asserted by one party, and not denied by the other.[17] In the present case, Canara Bank had filed its Statement of Claim before the Arbitrator, and MTNL filed its Reply to the Statement of Claim, and also made a Counter Claim against Canara Bank. ***The statement of Claim and Defence filed before the Arbitrator would constitute evidence of the existence of an arbitration agreement, which was not denied by the other party, under Section 7(4)(c) of the 1996 Act.*** In view of the aforesaid discussion, the objection raised by MTNL was found to be devoid of any merit.

(2) Joinder Of CANFINA In The Arbitral Proceedings

The Apex Court noted that Canara Bank raised an objection to the joinder of Respondent No. 2 - CANFINA as a party to the arbitration proceedings. CANFINA was set up as a wholly owned subsidiary of Canara Bank which was evident from the Report of the Joint Committee to Enquire into Irregularities in Securities and Banking Transactions, 1993.[18]

The Apex Court noted that the disputes between the parties emanated out of the transaction dated 10.02.1992, whereby CANFINA has subscribed to the bonds floated by MTNL. CANFINA subsequently transferred the Bonds to its holding Company - Canara Bank. It is the contention of MTNL, that since CANFINA did not pay the entire sale consideration for the Bonds, MTNL eventually was constrained to cancel the allotment of the Bonds. While holding that the CANFINA is undoubtedly a necessary and proper party to the arbitration proceedings, Apex Court held that there is a clear and direct nexus between the issuance of the Bonds, its subsequent transfer by CANFINA to Canara Bank, and the cancellation by MTNL, which has led to disputes between the three parties.

It is of relevance to note that CANFINA has participated in the proceedings before the High Court, and the Committee on Disputes. CANFINA was also represented by its separate Counsel before the Sole Arbitrator. There is no justifiable ground advanced by the Counsel for Canara Bank to oppose the impleadment of CANFINA in the arbitration proceedings. The present case is one of implied or tacit consent by Respondent No. 2 - CANFINA to being impleaded in the arbitral proceedings, which is evident from the conduct of the parties.

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arbitration, namely, whether the petitioner is liable for the acts or omissions of CANFINA and whether the petitioner is liable to take over the liabilities of CANFINA. There is no necessity now of requiring the petitioner to agree to take over the liabilities of CANFINA prior to the arbitration proceedings because that itself would not be one of the points to be decided in the course of arbitration. Even though the learned counsel for the petitioner has placed before us the subsequent decisions of the Supreme Court with regard to the scope and ambit of powers of the Committee on Disputes, we are making the present order because the parties themselves have agreed to go in for arbitration as a mode for resolving their disputes. This is welcome because both the parties are PSUs. The counsel for the parties shall suggest names of the arbitrators."

[17] *Savitri Goenka* v. *Kanti Bhai Damini*, 2009 (1) Arb LR 320 (Del) (DB).

[18] Report, Presented to the Lok Sabha on 21st December, 1993.

There was a clear intention of the parties to bind both Canara Bank, and its subsidiary - CANFINA to the proceedings. In this case, there can be no final resolution of the disputes, unless all three parties are joined in the arbitration.

The Apex Court invoked the Group of Companies doctrine, to join Respondent No. 2 - CANFINA *i.e.* the wholly owned subsidiary of Respondent No. 1 - Canara Bank, in the arbitration proceedings pending before the Sole Arbitrator.

According to the Apex Court, a non-signatory can be bound by an arbitration agreement on the basis of the "Group of Companies" doctrine, where the conduct of the parties evidences a clear intention of the parties to bind both the signatory as well as the non-signatory parties. Elaborating on the doctrine of 'Group of Companies', the Apex Court stated that it indicates the implied consent to an agreement to arbitrate, in the context of modern multi-party business transactions.

The Apex Court referred to ***Dow Chemical* v. *Isover-Saint-Gobain***,[19]where the arbitral tribunal held that:

> *"… the arbitration clause expressly accepted by certain of the companies of the group should bind the other companies which, by virtue of their role in the conclusion, performance, or termination of the contracts containing said clauses, and in accordance with the mutual intention of all parties to the proceedings, appear to have been veritable parties to these contracts or to have been principally concerned by them and the disputes to which they may give rise".*

The 'Group of Companies' doctrine has been invoked by courts and tribunals in arbitrations, where an arbitration agreement is entered into by one of the companies in the group; and the non-signatory affiliate, or sister, or parent concern, is held to be bound by the arbitration agreement, if the facts and circumstances of the case demonstrate that it was the mutual intention of all parties to bind both the signatories and the non-signatory affiliates in the group.

The doctrine provides that a non-signatory may be bound by an arbitration agreement where the parent or holding company, or a member of the group of companies is a signatory to the arbitration agreement and the non-signatory entity on the group has been engaged in the negotiation or performance of the commercial contract, or made statements indicating its intention to be bound by the contract, the non-signatory will also be bound and benefitted by the relevant contracts.[20]

The circumstances in which the 'Group of Companies' Doctrine could be invoked to bind the non-signatory affiliate of a parent company, or inclusion of a third party to an arbitration,

[19] 1984 Rev Arb 137

[20] Interim Award in ICC Case No. 4131, IX YB Comm Arb 131 (1984); Award in ICC Case No. 5103, 115 JDI (Clunet) 1206 (1988).

if there is a direct relationship between the party which is a signatory to the arbitration agreement; direct commonality of the subject matter; the composite nature of the transaction between the parties.

The Apex Court then discussed the meaning of a "composite transaction" which refers to a transaction which is inter-linked in nature; or, where the performance of the agreement may not be feasible without the aid, execution, and performance of the supplementary or the ancillary agreement, for achieving the common object, and collectively having a bearing on the dispute.

3. *Joginder Singh and Another v. ICICI Lombard General Insurance Company,(2019 SCC OnLine SC 1029)*

Decided on : -14.08.2019

Bench :- 1. Hon'ble Ms. Justice Indu Malhotra
2. Hon'ble Mr. Justice Sanjiv Khanna

(The Multiplier to be applied in the case of a bachelor, should be computed on the basis of the age of the deceased and not the age of the parents.)

Facts

The Appellants herein have filed the present Civil Appeal for enhancement of the compensation granted by the Motor Accident Claims Tribunal, Shimla ("MACT") and the High Court. The daughter of the Appellants viz. Ambika Thakur was a student who was undertaking an Air Hostess Training Program at the Frankfinn Institute, Chandigarh.On 10.9.2009, Ambika Thakur was travelling in a Verna car from Chandigarh to Bhatinda. The car met with an accident with a Tata Ace vehicle which was being driven in a rash and negligent manner. The offending vehicle suddenly stopped in front of the Verna car, which led to head long collision between the two vehicles, and resulted in the death of Ambika Thakur on the spot. Ambika Thakur was 20 years old at the time of her death. The offending vehicle was insured with the Respondent - Insurance Company. The Appellants herein being the parents of the deceased, filed a Claim Petition before the MACT, Shimla claiming compensation of Rs. 25,00,000/- on the death of their daughter. The MACT *vide* Award dated 15.07.2014 granted compensation of Rs. 10,40,000/- to the Appellant - Claimants along with interest @7.5% p.a.

Observations and Decision

The Apex Court found that the wrong Multiplier has been applied to the facts of the present case and observed that the issue with respect to whether the Multiplier to be applied in the case of a bachelor, should be computed on the basis of the age of the deceased, or the age of the parents, is no longer *res integra*. On this point the Apex Court referred to a three Judge bench of this Court in ***Royal Sundaram Alliance Insurance Co. Ltd. v. Mandala Yadagari Goud,***[21] wherein it has been held that the Multiplier has to be applied on the basis of the age of the deceased.

In the present case, since the deceased was 20 years old, a Multiplier of 18 ought to have been applied as per the decision of this Court in *Sarla Verma* . Also, the Apex Court was of the opinion that the Courts below have failed to award Future Prospects @40% of the income of the deceased, as mandated by the judgment of the Constitution Bench in ***National Insurance***

[21] (2019) 5 SCC 554.

Co. Ltd. **v.** *Pranay Sethi*[22]. Furthermore, the Apex Court noted that the Courts below have failed to award loss of estate @Rs. 15,000/- as per the judgment in *Pranay Sethi* and have awarded a lump sum amount of Rs. 25,000/- towards loss of love and affection. However, in *Magma General Insurance Co. Ltd.* **v.** *Nanu Ram*[23] it has been held that a sum of Rs. 40,000/- is to be paid to each of the parents towards loss of consortium on the death of a child. Therefore, the Appellants were entitled to be awarded Rs. 40,000/- each towards loss of consortium. The funeral expenses and interest awarded by the MACT were maintained.

Therefore, the compensation awarded to the Appellants was enhanced to 13,48,000 which the Respondent Insurance company was directed to pay .

[22] (2017) 16 SCC 680.
[23] (2018) 18 SCC 130

4. *State of Rajasthan and Others v. Shiv Dayal and Another,(2019 SCC OnLine SC 1034)*

Decided on : -14.08.2019

Bench :- 1. Hon'ble Mr. Justice Abhay Manohar Sapre
2. Hon'ble Mr. Justice R. Subhash Reddy

("concurrent finding of fact" is usually binding on the High Court while hearing the second appeal under Section 100 of the Code of Civil Procedure, 1908 but the rule is subject to certain well known exceptions.)

Facts

The appellants were the defendants and respondent No. 1 was the plaintiff in the civil suit out of which the present appeals arose. The appellant No. 1 is the State of Rajasthan and respondent No. 1 claims to be the mining lessee in relation to the suit land under the Mines and Minerals (Development & Regulation) Act (for short "MMRD Act").The respondent No. 1 filed a civil suit against the appellant - State and its authorities and claimed therein a relief of grant of permanent injunction restraining the State and its authorities from interfering in carrying out the mining operations on the suit land by respondent No. 1.Respondent No. 1 claimed this relief inter alia on the averments that the suit land was not the part of any protected Forest area as claimed by the State authorities but it was a part of the Revenue area. It was averred that since the suit land did not fall in the protected forest area, the respondent No. 1 (plaintiff) had a right to carry out mining operation on the suit land without any interference of the State and its authorities.

The State contested the suit by denying the averments made in the plaint. The Trial Court framed issues. Parties led their evidence. By Judgment and decree dated 10.05.1998, the Trial Court decreed in favour of the plaintiff the suit and granted an injunction against the State and its authorities in relation to the suit land, as prayed in the plaint. The State felt aggrieved and filed first appeal before the District Judge. By Judgment dated 03.09.1998, the first Appellate Court dismissed the appeal and affirmed the judgment/decree of the Trial Court giving rise to filing of the second appeals by the State in the High Court.

By impugned order, the High Court dismissed the second appeals holding that the appeals did not involve any substantial question of law. It is against this order, the State felt aggrieved and has filed the present appeals by way of special leave before the Apex Court.

Decision and Observations

The Apex Court allowed the appeals, set aside the impugned order and remanded the case to the High Court for deciding the second appeals afresh on merits in accordance with law.

The Apex Court observed that the High Court dismissed the second appeals essentially on the ground that since the two Courts decreed the suit, no substantial question of law arose in the appeals. The Apex Court was of the view that it is not the principle of law that where the

High Court finds that there is a concurrent finding of two Courts (whether of dismissal or decreeing of the suit), such finding becomes unassailable in the second appeal.

Although it is as has been laid down by the Apex Court in several decisions that "concurrent finding of fact" is usually binding on the High Court while hearing the second appeal under Section 100 of the Code of Civil Procedure, 1908 (for short "the Code"). However, this rule of law is subject to certain well known exceptions.

Then the Apex Court stated that it is a trite law that in order to record any finding on the facts, the Trial Court is required to appreciate the entire evidence (oral and documentary) in the light of the pleadings of the parties. Similarly, it is also a trite law that the Appellate Court also has the jurisdiction to appreciate the evidence *de novo* while hearing the first appeal and either affirm the finding of the Trial Court or reverse it. If the Appellate Court affirms the finding, it is called "concurrent finding of fact" whereas if the finding is reversed, it is called "reversing finding". These expressions are well known in the legal parlance.

When any concurrent finding of fact is assailed in second appeal, the appellant is entitled to point out that it is bad in law because it was recorded *de hors* the pleadings or it was based on no evidence or it was based on misreading of material documentary evidence or it was recorded against any provision of law and lastly, the decision is one which no Judge acting judicially could reasonably have reached. (see observation made by learned Judge-Vivian Bose, J.-as His Lordship then was a Judge of the Nagpur High Court in ***Rajeshwar Vishwanath Mamidwar* v. *Dashrath Narayan Chilwelkar*[24]**)

The Apex Court opined that if any one or more ground, as mentioned above, is made out in an appropriate case on the basis of the pleading and evidence, such ground will constitute substantial question of law within the meaning of Section 100 of the Code.

In the present fact situation, the Court opined that following questions arose for consideration in the suit/appeal for proper adjudication of the rights of the parties to the suit and were in the nature of substantial questions within the meaning of Section 100 of the Code.

First, whether the suit land was a part of a protected Forest area, i.e., Forest land and, if so, whether the parties satisfied all the statutory provisions of the Forest Laws enacted by the Center and the State?

Second, whether the suit land was a part of a Revenue land and, if so, whether the parties to the suit satisfied all the statutory provisions of the State Revenue Laws.

Third, whether a mining lease of the suit land could be granted by the State to the plaintiff for carrying out the mining operation in accordance with the provisions of the MMRD Act and, if so, whether it satisfied all the statutory provisions of the MMRD Act read with relevant Forest and Revenue Laws.

[24] AIR 1943 Nagpur 117

Fourth, whether a suit is hit by any provision of Forest Laws or MMRD Act or/and Revenue Laws expressly or by implication.

Lastly, whether the plaintiff on facts/evidence has proved that the suit land is a part of Revenue land and, therefore, it does not fall in the protected forest area and, if so, whether any *prima facie* case, balance of convenience and irreparable loss is made out for grant of permanent injunction in plaintiff's favour?

Therefore, the Apex Court held that the High Court should have admitted the second appeal by framing appropriate substantial question(s) of law which arose in the present case and answered them on their respective merits rather than to dismiss the appeals without considering any of the aforementioned questions.

5. *Kum C. Yamini v. State of Andhra Pradesh and Another,(2019 SCC OnLine SC 1037)*

Decided on : -14.08.2019

Bench :- 1. Hon'ble Mr. Justice S.A. Bobde
2. Hon'ble Mr. Justice R. Subhash Reddy
3. Hon'ble Mr. Justice B.R. Gavai

(When the appellants were not appointed to any regular posts in the A.P. Judicial Service, appellants cannot claim seniority based on their ad hoc appointments to preside over Fast Track Courts.)

Facts

The present civil appeal was filed, aggrieved by the impugned judgment and final order dated 17.04.2017 passed by the High Court of Judicature at Hyderabad whereby writ petition filed by the appellant was dismissed. In the writ petition, appellant has questioned paragraph nos. 5 and 6[25] of G.O.MS. No. 68 dated 02.07.2013 of Law (LA & J-SC.F) Department as unconstitutional and illegal.

The appellant was appointed to a Fast Track Court, as an *ad hoc* District Judge in the year 2003. Pursuant to her selection to preside over a Fast Track Court, she joined duty on 25.10.2003. On 28.05.2004, the second respondent-High Court issued notification, inviting applications for regular appointments to the posts of District & Sessions Judges in the A.P. Higher Judicial Service. A set of *ad hoc* District Judges appointed to the Fast Track Courts filed writ petition questioning such notification. In the aforesaid writ petition all the *ad hoc* District Judges who were selected to preside over the Fast Track Courts, prayed for absorption against regular vacancies. The writ petition was dismissed by the High Court by order dated 13.07.2004. Aggrieved by the aforesaid judgment, a Special Leave Petition was filed by the *ad hoc* District Judges. While granting leave, the Apex Court, by interim order dated 09.03.2006 passed in Civil Appeal No. 1276 of 2005, has observed that any appointments that would be made in regular selections, will be subject to the result of the civil appeal. Subsequently, the above said civil appeal was disposed of along with a batch of

[25] "5. The probation of the officers will be governed by rule 9 of the A.P. State Judicial Service Rules, 2007, and they will be on probation for a period of two years from the date of joining duty as decided by the High Court of Andhra Pradesh.
6. The seniority of the persons appointed to the category of District Judges by direct recruitment as well as recruitment by transfer shall be fixed as per the roster prescribed in schedule A appended to the Andhra Pradesh State Judicial Service Rules, 2007."

matters, which were decided on 19.04.2012 which is reported as ***Brij Mohan Lal (2) v. Union of India.***[26].

In the aforesaid judgment, while considering their claim for absorption in the regular cadre, while declining to grant the relief of absorption certain directions were issued as contained in paragraph 207.9.[27] In compliance of these directions, the second respondent-High Court has issued notification dated 13.08.2012 inviting applications, to fill up the posts of District Judges in regular cadre from the working/former *ad hoc* Fast Track Court District Judges. All the appellants herein who responded to the aforesaid notification, were selected and appointed by the Government to the posts of regular District Judges (Entry Level) vide G.O.MS. No. 68 dated 02.07.2013 issued by Law (LA & J-SC.F) Department. The appellant availed the benefit of such appointment and completed probation of two years from the date of joining duty. Nearly after four years of her appointment, she has filed the present writ petition, before the High Court questioning paragraphs 5 and 6 of the notification dated 02.07.2013, which resulted in the impugned order rejecting claim of her seniority from the date of her initial appointment as *ad hoc* District Judge. In the impugned order, the High Court has observed that the appellant very conveniently took up the appointment subject to conditions and after getting a declaration of successful completion of probation and after ensuring berth in the judiciary, has chosen to come up with a challenge to the very

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[26] (2012) 6 SCC 502

[27] The directions issued in the aforesaid paragraph read as under :
"207.9. All the persons who have been appointed by way of direct recruitment from the Bar as Judges to preside over FTCs under the FTC Scheme shall be entitled to be appointed to the regular cadre of the Higher Judicial Services of the respective States only in the following manner :
(a) The direct recruits to FTCs who opt for regularisation shall take a written examination to be conducted by the High Courts of the respective States for determining their suitability for absorption in the regular cadre of Additional District Judges.
(b) Thereafter, they shall be subjected to an interview by a Selection Committee consisting of the Chief Justice and four seniormost Judges of that High Court.
(c) There shall be 150 marks for the written examination and 100 marks for the interview. The qualifying marks shall be 40% aggregate for general candidates and 35% for SC/ST/OBC candidates. The examination and interview shall be held in accordance with the relevant Rules enacted by the States for direct appointment to Higher Judicial Services.
(d) Each of the appointees shall be entitled to one mark per year of service in the FTCs, which shall form part of the interview marks.
(e) Needless to point out that this examination and interview should be conducted by the respective High Courts keeping in mind that all these applicants have put in a number of years as FTC Judges and have served the country by administering justice in accordance with law. The written examination and interview module, should, thus, be framed keeping in mind the peculiar facts and circumstances of these cases.
(f) The candidates who qualify the written examination and obtain consolidated percentage as aforeindicated shall be appointed to the post of Additional District Judge in the regular cadre of the State.
(g) If, for any reason, vacancies are not available in the regular cadre, we hereby direct the State Governments to create such additional vacancies as may be necessary keeping in view the number of candidates selected.
(h) All sitting and/or former FTC Judges who were directly appointed from the Bar and are desirous of taking the examination and interview for regular appointment shall be given age relaxation. No application shall be rejected on the ground of age of the applicant being in excess of the prescribed age."

Government Order by which she was appointed. Further, taking note of the rejection of the claim of the appellant and similarly placed persons for their absorption and their challenge to the notification dated 28.05.2004 for selection to the regular cadre of District Judges, the High Court has opined that in view of the rules which govern the appointment to the post of *ad hoc* District Judge, the appellant is not entitled to claim seniority from the date of initial appointment.

Observations and Decision

The Apex Court noted that the claim of the appellants that they were appointed as *ad hoc* District Judges by following the procedure which is similar to the procedure for appointments to the sanctioned posts in the regular cadre, is no ground to accede to their request to reckon their seniority in the permanent cadre of District Judges, from their initial appointment as the District Judges for the Fast Track Courts. The appointments which came to be made for selecting District Judges for Fast Track Courts sanctioned under the 11th Finance Scheme are totally different and distinct, compared to appointments which are to be made for regular vacant posts of District Judges covered under A.P. Higher Judicial Service.

If a person is not appointed to any post in the cadre, such person cannot claim any seniority over the persons who are appointed in vacant posts in the cadre. Merely on the ground that they were selected by following the same procedure akin to that of regular selections, is no ground to consider their claim for grant of seniority from the date of initial appointment. When their claim for regularisation/absorption and challenge to notification issued in the year 2004 for making selections to the vacant regular posts of District Judges is rejected by the High Court and confirmed by this Court, the appellants have no basis to claim seniority from the date of initial appointment. In any event, having applied in response to the notification issued by the High Court in the year 2013 after availing the benefit of appointment, it is not open to the appellants to question the conditions imposed in the order which is in conformity with rules. Undisputedly, appellant was appointed as *ad hoc* District Judges to preside over the Fast Track Courts only. Initially when she was not appointed to a post or category of posts, forming part of cadre strength in such category, appellant cannot claim any seniority over the persons regularly appointed in the category of posts forming part of cadre strength. There is yet another ground to reject the claim of the appellant. Though the appellant claims seniority over the persons who are appointed in regular vacant posts forming part of cadre strength but they are not even made parties. On this ground also, the claim of the appellants deserves rejection.

When the appellants were not appointed to any regular posts in the A.P. Judicial Service, appellants cannot claim seniority based on their ad hoc appointments to preside over Fast Track Courts.

However, the Apex Court referred to ***Mahesh Chandra Verma v. State of Jharkhand***[28]wherein it was held that the service rendered as Fast Track Court Judges is to be counted for their length of service, for the purpose of determining their pension and other retiral benefits. While rejecting the claim for grant of seniority from the date of the initial appointment as Fast Track Court District Judges and other reliefs, the Apex Court held that the appellants and all others who are similarly placed are to be given benefit of counting their service rendered as Fast Track Judges, for the purpose of pensionary and other retiral benefits.

[28] (2018) 7 SCC 270

6. *Sunita Tokas and Another v. New India Insurance Co. Ltd. and Another,(2019 SCC OnLine SC 1045)*

Decided on : -16.08.2019

Bench :- 1. Hon'ble Ms. Justice Indu Malhotra
2. Hon'ble Mr. Justice Sanjiv Khanna

(Multiplier has to be applied on the basis of the age of the deceased and not on the basis of the age of the dependants as there may be a number of dependants of the deceased, whose ages would vary. Therefore, the age of the dependants would have no nexus with the computation of compensation.)

Facts

The Appellants filed the present Civil Appeal for enhancement of the compensation granted by the Motor Accident Claims Tribunal, Patiala House Courts, New Delhi ("MACT") and the High Court. The son of the Appellants *viz*. Pradeep Tokas was a student who was a trained swimmer, and had won prizes in State-level events. On 11.05.2004, Pradeep Tokas was sitting on a two-wheeler as a pillion rider. The said two-wheeler met with an accident with a stationary Truck which was not visible at night. The truck was standing in the middle of the road without any indicator lights on. The two-wheeler dashed against the stationary truck, and both Pradeep Tokas and the driver died on the spot. Pradeep Tokas was 21 years old at the time of his death.The Appellants filed the Claim Petition before the MACT, Patiala House Courts, New Delhi claiming compensation on the death of their son. The MACT *vide* Award dated 25.05.2009 granted compensation of Rs. 14,87,140 along with interest @7% p.a. to the Appellant-Claimants.

Aggrieved by the aforesaid Award, the Appellants filed appeal before the Delhi High Court for enhancement of compensation. The Respondent - Insurance Company also filed a cross-Appeal for reduction of compensation.

The High Court *vide* the impugned common Judgment and Order dated 01.08.2017 dismissed the Appeal filed by the Appellant - Claimants, and allowed the Appeal filed by the Respondent - Insurance Company in part.

The High Court reduced the amount of compensation awarded by the MACT to Rs. 9,25,000. Aggrieved by the aforesaid Judgment, the Appellant - Claimants have filed the present Civil Appeal for enhancement of the compensation awarded.

Observations and Decision

The Apex Court noted that the Multiplier has been fixed on the basis of the age of the mother of the deceased boy. However, the issue whether the Multiplier to be applied in the case of a bachelor, should be computed on the basis of the age of the deceased, or the age of the mother, is no longer *res integra* as there are a catena of judgments rendered by the Apex Court wherein it has been held that the Multiplier has to be applied on the basis of the age of

the deceased, and not on the basis of the age of the dependants. The Apex Court then referred to ***Sarla Verma***[29] and ***Reshma Kumari* v. *Madan Mohan***[30]. In *Reshma Kumari*, a three judge bench of the Apex Court held that :

> *"36. In Sarla Verma, this Court has endeavoured to simplify the otherwise complex exercise of assessment of loss of dependancy and determination of compensation in a claim made under Section 166. It has been rightly stated in Sarla Verma that claimants in case of death claim for the purposes of compensation must establish (a) age of the deceased; (b) income of the deceased; and (c) the number of dependants. To arrive at the loss of dependency, the Tribunal must consider (i) additions/deductions to be made for arriving at the income; (ii) the deductions to be made towards the personal living expenses of the deceased; and (iii) the multiplier to be applied with reference to the age of the deceased. We do not think it is necessary for us to revisit the law on the point as we are in full agreement with the view in Sarla Verma."*
>
> *(emphasis supplied)*

The Apex Court referred to ***Amrit Bhanu Shali* v. *National Insurance Co. Ltd.,***[31] wherein the Apex Court held that the selection of multiplier is based on the age of the deceased, and not on the basis of the age of the dependants as there may be a number of dependants of the deceased, whose ages would vary. Therefore, the age of the dependants would have no nexus with the computation of compensation. In another case of a three judge bench of the Apex Court in ***Munna Lal Jain* v. *Vipin Kumar Sharma***,[32] wherein the Court cited para 36 of the judgment in *Reshma Kumari* and held that :

> *"11. Whether the multiplier should depend on the age of the dependants or that of the deceased, has been hanging fire for sometime; but that has been given a quietus by another three-Judge Bench decision in Reshma Kumari . It was held that the multiplier is to be used with reference to the age of the deceased. One reason appears to be that there is certainty with regard to the age of the deceased but as far as that of dependants is concerned, there will always be room for dispute as to whether the age of the eldest or youngest or even the average, etc., is to be taken."*

The Apex Court referred to the decision ***Sube Singh* v. *Shyam Singh (dead)***[33] *wherein Munna Lal Jain* was followed. Also, the Constitution Bench in ***National Insurance Company Limited v. Pranay Sethi***,[34]affirmed the view taken in *Sarla Verma* and *Reshma Kumari* . Recently, the question came up for consideration before a three judge bench of the Apex Court in ***Royal Sundaram Alliance Insurance Co. Ltd.* v. *Mandala Yadagari Goud.***[35] , the Apex Court after perusing all earlier judgments, observed that the judicial pronouncements

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[29] (2009) 6 SCC 121
[30] (2013) 9 SCC 65
[31] (2012) 11 SCC 738
[32] (2015) 6 SCC 347
[33] (2018) 3 SCC 18
[34] (2017) 16 SCC 680
[35] (2019) 5 SCC 554.

had devised a standard formula for calculation of the compensation qua various components. The amount of compensation is to be paid to the claimants who are dependants in the event of the death of a person, based on what the deceased would have contributed to their support. The amount received by the dependants becomes a part of the estate, as they may live longer, or may be younger than the age limits taken into account for calculation of the multiplier to be applied in such a situation. In the case of the death of a married person, it is an accepted norm that the age of the deceased would be taken into account. The Court held that even in the case of a bachelor, the same principle must be applied. The Court held that once the law is settled, it should not repeatedly be changed, since certainty of law is of crucial importance, to avoid any confusion.

In the present case, the Apex Court observed that since the deceased was 21 years old, the Multiplier of 18 was applicable as per the table set out in the *Sarla Verma case*. Also, it was observed by the Apex Court that the High Court erred in reducing the notional income of the deceased from Rs. 16,246/- as awarded by the MACT, and reduced it to Rs. 7,500/. The deceased was a trained swimmer who had won several State-level competitions. Therefore, the deceased certainly had the potential to earn a living by utilizing his skills. In such circumstances, it was appropriate to fix the notional income of the deceased @Rs. 12,000/- p.m. It was also noted that the Courts below failed to grant Future Prospects @40% of the notional income of the deceased, as per the judgment of the Constitution Bench in *Pranay Sethi*. The amounts awarded by the High Court under the heads of loss of love and affection, loss of estate, funeral expenses, and the Interest awarded by the MACT, were however, maintained. The Respondent - Insurance Company was directed to pay the enhanced amount of Rs. 11,39,400.

7. *Commissioner of Income Tax v. Laxman Das Khandelwal,(2019 SCC OnLine SC 1020)*

Decided on : -13.08.2019

Bench :- 1. Hon'ble Mr. Justice Uday Umesh Lalit
2. Hon'ble Mr. Justice Vineet Saran

(According to Section 292BB of the Act, if the assessee had participated in the proceedings, by way of legal fiction, notice would be deemed to be valid even if there be infractions as detailed in said Section. The scope of the provision is to make service of notice having certain infirmities to be proper and valid if there was requisite participation on part of the assessee. It is, however, to be noted that the Section does not save complete absence of notice.)

Facts

The present appeals are directed against the judgment and final order dated 27.04.2018 passed by the High Court in Income Tax Appeal No. 97 of 2018 and against the order dated 14.09.2018 in Review Petition No. 1289 of 2018 arising from said Income Tax Appeal No. 97 of 2018.

The assessee is an individual carrying a business of brokerage. Search and seizure operation was conducted under Section 132 of the Act of 1961 on 11.03.2010 at his residential premises. The assessee submitted return of income on 24.08.2011, declaring total income of Rs. 9,35,130/-. The assessment was completed under Section 143(3) read with Section 153(D) of 1961 Act. Rupees 9,09,110/- was added on account of unexplained cash under Section 69 of 1961 Act. Rs. 15,09,672/- was added on account of unexplained jewellery. Rupees 45,00,000/- was added on account of unexplained hundies and Rs. 29,53,631/- was added on account of unexplained cash receipts. Aggrieved, the assessee filed an appeal before the Commissioner Income Tax (Appeal). The Commissioner of Income Tax (Appeal) deleted an amount of Rs. 7,48,463/- holding that jewellery found in locker weighing 686.4 gms stood explained in view of circular No. 1916 and further deleted the addition of Rs. 29,23,98,117/- out of Rs. 29,53,52,631/- holding that the correct approach would be to apply the peak formula to determine in such transaction which comes to Rs. 29,54,514/- as on 05.03.2010.Aggrieved, Revenue filed an appeal. The Assessee filed cross objection on the ground of jurisdiction of Assessment Officer regarding non issue of notice under Section 143(2) of the Act of 1961. The Tribunal vide impugned order upheld the cross objection and quashed the entire reassessment proceedings on the finding that the same stood vitiated as the assessment Officer lacked jurisdiction in absence of notice under Section 143(2) of the act of 1961.[36]

[36] "17. In conclusion, we find that there was no notice issued u/s 143(2) prior to the completion of assessment under section 143(3) of the Act by the AO; that the year under consideration was beyond the scope of the

Observations and Decision

The Apex Court noted that the issue that arose before the High Court was the effect of absence of notice under Section 143(2) of the Income Tax Act, 1961 ('the Act', for short).

The Apex Court referred to ***Assistant Commissioner of Income Tax* v. *Hotel Blue Moon***[37] wherein the first question was whether notice under Section 143(2) would be mandatory for the purpose of making the assessment under Section 143(3) of the Act. It was observed:—

> *"27. The case of the Revenue is that the expression "so far as may be, apply" indicates that it is not expected to follow the provisions of Section 142, sub-sections (2) and (3) of Section 143 strictly for the purpose of block assessments. We do not agree with the submissions of the learned counsel for the Revenue, since we do not see any reason to restrict the scope and meaning of the expression "so far as may be, apply". In our view, where the assessing officer in repudiation of the return filed under Section 158-BC(a) proceeds to make an enquiry, he has necessarily to follow the provisions of Section 142, sub-sections (2) and (3) of Section 143."*

The Apex Court noted that the question, however, remains whether Section 292BB[38] which came into effect on and from 01.04.2008 has effected any change. The law on the point as regards applicability of the requirement of notice under Section 143(2) of the Act is quite clear from the decision in *Blue Moon's case*. The issue that however needs to be considered is the impact of Section 292BB of the Act.

The Apex Court held :

"According to Section 292BB of the Act, if the assessee had participated in the proceedings, by way of legal fiction, notice would be deemed to be valid even if there be infractions as detailed in said Section. The scope of the provision is to make service

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provisions of Section 143A of the Act, it being the search year and not covered in the six year to the year of search as per the assessment scheme/procedure defined u/s 153A; that the AO has passed regular assessment u/s 143(3) of the Act; although the Id. CIT has mentioned the section as 143 r.w.s. 153A and that the department had not controverted these facts at the stage of hearing. It is noted that issue of notice u/s 143(2) for completion of regular assessment in the case of the assessee was a statutory requirement as per the provisions of the Act and non issuance thereof is not a curable defect. Even in case of block assessment u/s 158BC, it has been so held by the apex Court in the case of '*ACIT* v. *Hotel Blue Moon*' (2010) 321 ITR 362 (Supra)."

[37] (2010) 3 SCC 259

[38] "**292BB. Notice deemed to be valid in certain circumstances. -** Where an assessee has appeared in any proceeding or cooperated in any inquiry relating to an assessment or reassessment, it shall be deemed that any notice under any provision of this Act, which is required to be served upon him, has been duly served upon him in time in accordance with the provisions of this Act and such assessee shall be precluded from taking any objection in any proceeding or inquiry under this Act that the notice was -

(a) Not served upon him; or

(b) Not served upon him in time; or

(c) Served upon him in an improper manner:

Provided that nothing contained in this section shall apply where the assessee has raised such objection before the completion of such assessment or reassessment."

of notice having certain infirmities to be proper and valid if there was requisite participation on part of the assessee. It is, however, to be noted that the Section does not save complete absence of notice. For Section 292BB to apply, the notice must have emanated from the department. It is only the infirmities in the manner of service of notice that the Section seeks to cure. The Section is not intended to cure complete absence of notice itself."

In the given fact situation, as the facts on record are clear that no notice under Section 143(2) of the Act was ever issued by the Department, the findings rendered by the High Court and the Tribunal and the conclusion arrived at were correct.

8. *Madhukar Nivrutti Jagtap and Others v. Smt. Pramilabai Chandulal Parandekar and Others, (2019) SCC OnLine SC 1026*

Decided on : -13.08.2019

Bench :- 1. Hon'ble Mr. Justice Abhay Manohar Sapre
2. Hon'ble Mr. Justice Dinesh Maheshwari

(The doctrine of *lis pendens* does not render a transfer effected during the pendency of a suit void. It only renders such a transfer subservient to the rights of the parties to such suit, as may be eventually determined in the suit.)

Facts

The plaintiffs filed the suit aforesaid with the averments that the defendant Nos. 1 to 3 had executed an agreement dated 20.09.1965 for sale of the suit property for a consideration of Rs. 22,951/-; and that a sum of Rs. 3,500/- was paid as earnest money. It was further averred that crops were standing on the suit property and hence, possession to the extent of half portion thereof was to be handed over by the end of the year of 1965; and that in part performance of agreement, the plaintiffs made payment of a further sum of Rs. 2,000/- to the defendant Nos. 1 to 3 on 24.09.1965 and the said defendants handed over possession of 25 acres of the land in question to the plaintiffs on 14.11.1965. The plaintiffs further averred that they served a notice on the defendant Nos. 1 to 3 on 05.04.1966 for performance of the agreement in question and, on receipt of this notice, the said defendants executed a supplementary agreement for sale; they accepted an additional amount of Rs. 500/- from the plaintiffs; and they handed over possession of the remaining part of the land in question to the plaintiffs. The plaintiffs also averred that in this manner, a sum of Rs. 6,000/- was paid to the defendant Nos. 1 to 3 as part payment of the total sale consideration and the remaining sale consideration was settled at Rs. 11,951/-, after deducting Rs. 5,000/- towards encumbrances; and on payment of this amount, the defendant Nos. 1 to 3 were liable to execute the sale deed in their favour within a time span of 15 days. The plaintiffs averred that they were ready to perform their part of the contract but the defendant Nos. 1 to 3 failed to execute the sale deed for the land in question. With these averments, the plaintiffs sought the relief of specific performance of the agreement for sale and in the alternative, also prayed for recovery of earnest money with interest and for damages.

On completion of pleadings of parties, the Trial Court framed as many as 20 issues for determination of the questions involved in the matter. After taking the evidence and having heard the parties, the Trial Court proceeded to dismiss the suit for specific performance while recording the basic finding to the effect that the documents in question (the alleged agreement for sale as also the supplementary agreement) were, in fact, executed as security for loan and not for sale of the suit property to the plaintiffs. The Trial Court, *inter alia*, observed that the sale consideration of Rs. 22,951/- was a peculiar one, because in the normal

course, the parties do not fix the consideration amount in such an odd figure and even the rate of Rs. 450/- per acre did not match with the consideration amount stated in the agreement. The Trial Court also held that the plaintiffs had failed to prove that they were handed over possession of the suit property in pursuance of the agreements in question. In view of its finding on the nature of transaction, the Trial Court observed that the issue regarding readiness and willingness of the plaintiffs did not survive for consideration. The Trial Court, of course, held that the transactions effected in favour of defendant Nos. 4 to 6 were hit by the doctrine of *lis pendens* as per Section 52 of the Transfer of Property Act, 1882[4]; and that the defendant Nos. 4 to 6 were not *bona fide* purchasers of suit property. However, in view of its findings on material issues, the Trial Court held that the plaintiffs were not entitled for specific performance and recovery of possession but then, directed that the amount paid by the plaintiffs i.e., the sum of Rs. 6,000/-, be returned to them, together with interest at the rate of 6% per annum from the date of decree until payment.

Aggrieved by the judgment and decree of the Trial Court, the plaintiff Nos. 1, 2 & 4 preferred the first appeal that was considered and dismissed by III Addl. District Judge, Solapur by way of the judgment and decree dated 30.11.1987. The First Appellate Court, on re-appreciation of evidence, affirmed the principal findings of the Trial Court on the nature of transaction, while observing that the plaintiffs had failed to prove that the amount in question was not that of a loan advanced, as contended by the defendant Nos. 1 to 3.

The First Appellate Court also held that the plaintiffs had failed to prove their continuous willingness and readiness to perform their part of the contract, particularly for the reason that despite stating the availability of sufficient consideration with them, the plaintiffs got executed supplementary agreement rather than the sale deed.

The First Appellate Court affirmed the finding that the defendant Nos. 4 to 6 were not *bona fide* purchasers while observing that even if they had alleged want of knowledge about the agreement in question, given the size of the village and the population thereof, they were aware of the pending litigation. However, the First Appellate Court observed that even though the transactions with defendant Nos. 4 to 6 were hit by the doctrine of *lis pendens*, but the same would not affect the validity of sale deeds executed in their favour, as the alleged agreements were executed only for the purpose of collateral security for the loan advanced.

In view of its findings, the First Appellate Court affirmed the decree of the Trial Court and dismissed the appeal. Aggrieved by the decree so passed by the Trial Court and affirmed by the First Appellate Court, the plaintiff Nos. 1, 2 & 4 preferred second appeal before the High Court.

The High Court *inter alia* held that the appellants herein were not *bona fide* purchasers; and also observed that the sale transactions in their favour were made only in order to defeat the claim of the plaintiffs and hence, the said sale deeds were required to be held illegal.

Assailing the judgment of the High Court, the present appellants filed the present appeal before the Supreme Court.

Observations and Decision

The Hon'ble Supreme Court formulated the following questions for determination:-

(i) Whether the agreement dated 20.09.1965 and supplementary agreement dated 28.04.1966 had been for sale and had not been the documents executed towards security for a loan taken by the defendant Nos. 1 to 3?
(ii) Whether the plaintiffs were always ready and willing to perform their part of the contract and no personal bar operates against them so as to enforce the specific performance of the agreement in question.
(iii) Whether the appellants had not been *bona fide* purchasers and the sale transactions in their favour relating to the property in question are hit by the doctrine of *lis pendens*?

The first two questions were questions of fact and the third question was primarily a question of law which has been discussed herein.

The Hon'ble Court, regarding the third issue, referred to Section 52 of the Transfer of Property Act and to the case of ***Guruswamy Nadar* v. *P. Lakshi Ammal (Dead) through LRs*** [39] wherein it had been held as follows :-

> *13. Normally, as a public policy once a suit has been filed pertaining to any subject-matter of the property, in order to put an end to such kind of litigation, the principle of lis pendens has been evolved so that the litigation may finally terminate without intervention of a third party. This is because of public policy otherwise no litigation will come to an end. Therefore, in order to discourage that same subject-matter of property being subjected to subsequent sale to a third person, this kind of transaction is to be checked. Otherwise, litigation will never come to an end."*

The Hon'ble Court also referred to the case of ***A. Nawab John* v. *V.N. Subramaniyam***[40] wherein it had been held by the Supreme Court as follows :-

> *"18. It is settled legal position that the effect of Section 52 is not to render transfers effected during the pendency of a suit by a party to the suit void; but only to render such transfers subservient to the rights of the parties to such suit, as may be, eventually, determined in the suit. In other words, the transfer remains valid subject, of course, to the result of the suit. The pendent lite purchaser would be entitled to or suffer the same legal rights and obligations of his vendor as may be eventually determined by the court."*

After making the aforesaid discussions the Hon'ble reiterated that the doctrine of *lis pendens* does not render a transfer effected during the pendency of a suit void. It only renders such a

[39] (2008) 5 SCC 796.
[40] (2012) 7 SCC 738.

transfer subservient to the rights of the parties to such suit, as may be eventually determined in the suit. Regarding the effect of the doctrine to the facts of the present case, the Hon'ble Court held as follows :-

> ***51.*** *Hence, the effect of Section 52 ibid., for the purpose of the present case would only be that the said sale transactions in favour of the appellants shall have no adverse effect on the rights of the plaintiffs and shall remain subject to the final outcome of the suit in question. However, the High Court, while holding that the said transactions were hit by lis pendens, has proceeded to observe further that the sale deeds so made in favour of the present appellants were illegal. These further observations by the High Court cannot be approved for the reasons foregoing.*

9. *Dr. V.K. Jain v. State of Rajasthan & Ors., Cr. Appeal No. 531 of 2010*

Decided on : -08.08.2019

Bench :- 1. Hon'ble Mr. Justice Navin Sinha
2. Hon'ble Ms. Justice Indira Banerjee

(To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent.)

(ORIGINAL ORDER OF THE SUPREME COURT)

The appellant is aggrieved by the order of the High Court dated 12.12.2008 setting aside the order of the Additional District & Sessions Judge, Kishangarh, Ajmer dated 02.11.2007. The latter order had set aside the order of cognizance dated 30.05.2002 against the appellant under Section 304A of the Indian Penal Code, 1860 ("IPC") passed by the Judicial Magistrate.

Learned counsel for the appellant submits that reading the complaint as it is, on the very face of it no offence is made out under Section 304A, IPC. There is no allegation whatsoever of any medical negligence against the appellant who is an anesthetist at a government hospital. The appellant had only administered anesthesia injection to the wife of respondent no.2 to facilitate a caesarian delivery. Loss of consciousness is a natural consequence of administering the injection. It cannot constitute negligence. The surgery was to be performed by respondent no.3. The allegations themselves state that the lady developed complications and had to be shifted to a bigger hospital at Ajmer where she required a pace maker. In these circumstances if the new born child did not survive, the appellant cannot be held responsible by any reasonable standard of prudence. Reliance is placed on *Jacob Mathew v. State of Punjab & Another,* (2005)6 SCC 1.

Learned counsel for the State submitted that the appellant is stated to have pressurised the complainant to come to his wife's private clinic for the delivery. The allegation is of improper administration of anesthetic injection resulting in the death of the child soon after delivery. In any event, these are matters to be examined in trial.

No one appears on behalf of the complainant, respondent no.2 despite service of notice. We have considered the submissions on behalf of the appearing parties.

The allegations in the complaint are that the wife of respondent no.2 was expecting. She was under the supervision of respondent no.3 at the government hospital, Kishangarh where the appellant was an anesthetist. The appellant had suggested to the complainant to have the child delivered at the private clinic run by the wife of the appellant at lesser expense. The

wife of the complainant lost consciousness upon the appellant administering her injection at the hospital on 23.10.2001. She regained consciousness and had to be shifted to the hospital at Ajmer where a pacemaker was installed but the child did not survive after delivery.

We are of the opinion that loss of consciousness upon administration of anesthesia is but a natural consequence. The complainant himself admits that his wife then regained consciousness at the hospital at Kishangarh. Apparently, there was no fault on part of the appellant. There is no allegation or material annexed to the complaint that the appellant was not a qualified anesthetist or that the anesthesia was administered to the patient in a negligent manner or in improper dosage. The fact that the patient developed complications because of her own bodily infirmity is evident from the fact that a pacemaker had to be installed at the government hospital at Ajmer after which she delivered the child on 26.10.2001. Unfortunately the child did not survive and expired at the hospital at Ajmer on 14.11.2001, after more than two weeks. We find it difficult to accept that the death of the child was a consequence of the anesthesia administered to the patient. There is no material whatsoever with regard to the post mortem report of the child with regard to the cause of death. It cannot be lost sight of that the child survived for more than two weeks. The appellant states that the child was born with the umbilical cord around his neck and response time after delivery was delayed by about seven minutes. There is no rebuttal to this fact. In absence of any prima facie material against the appellant, who is a doctor, it shall not be appropriate to subject him to the travails of a criminal prosecution on vague allegations.

In *Jacob Mathew* (supra), with regard to medical negligence as an offence under Section 304A IPC it was observed:

> "48.(7) To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent."

In the facts and circumstances of the present case, we are satisfied that on the face of the complaint itself no offence is made out against the appellant under Section 304A IPC to sustain the order of cognizance. Resultantly, the order of cognizance dated 30.05.2002 and the order of the High Court dated 12.12.2008 are set aside with regard to the appellant.

The Criminal Appeal is allowed.

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