JUDICIAL ACADEMY JHARKHAND

SNIPPETS

OF

SUPREME COURT JUDGMENTS

(November 16-30,2020)

Prepared by :-

ABHIJEET TUSHAR
ISHA ANUPRIYA
JUDICIAL ACADEMY JHARKHAND

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1. ***UMC Technologies Private Limited v. Food Corporation of India and Another, 2020 SCC OnLine SC 934***

Decided on: 16.11.2020

Bench: 1. Hon'ble Mr. Justice **S. Abdul Nazeer**

2. Hon'ble Mr. Justice B. R. Gavai

(For a show cause notice to constitute the valid basis of a blacklisting order, such notice must spell out clearly, or its contents be such that it can be clearly inferred therefrom, that there is intention on the part of the issuer of the notice to blacklist the noticee.

The mere existence of a clause in the Bid Document, which mentions blacklisting as a bar against eligibility, cannot satisfy the mandatory requirement of a clear mention of the proposed action in the show cause notice)

Facts

The present appeal is directed against the order dated 13.02.2019 passed by the High Court of Madhya Pradesh at Jabalpur in Writ Petition No. 2778 of 2019. By the impugned order, the High Court has dismissed the writ petition and has upheld the validity of the order dated 09.01.2019 passed by respondent no. 1, namely Food Corporation of India (for short 'the Corporation') through its Deputy General Manager (Personnel), who is respondent no. 2 herein, to terminate a contract of service with the appellant and to blacklist the appellant from participating in any future tenders of the Corporation for a period of 5 years.

The Corporation had issued a Bid Document on 25.11.2016 inviting bids for appointment of a recruitment agency to conduct the process of recruitment for hiring watchmen for the Corporation's office. The appellant submitted its bid on 21.12.2016 and was eventually declared as the successful bidder vide the Corporation's letter dated 28.03.2017. After completion of the formalities, the appellant was appointed for a period of 2 years w.e.f. 14.02.2017 for undertaking the tendered work of conducting recruitment of watchmen for the Corporation.

As part of its work, on 01.04.2018, the appellant conducted a written exam for eligible aspirants for the post of watchman with the Corporation at various centres in Madhya Pradesh. On the same day, a Special Task Force of Bhopal Police arrested 50 persons in Gwalior, who were in possession of certain handwritten documents which *prima facie* appeared to be the question papers related to the examination conducted by the appellant. The police filed a charge sheet on 03.08.2018 against certain persons including an employee of the appellant. Upon receipt of the above information, the Corporation issued a show cause notice dated 10.04.2018 to the appellant informing the appellant about the said arrest and seizure of documents which appeared to contain question papers related to the examination conducted by the appellant. This notice alleged that the appellant had breached various clauses of the Bid Document dated 25.11.2016 on the ground that it was the sole responsibility of the appellant to prepare and distribute the question papers as well as conduct the examination in a highly confidential manner. Several clauses of the Bid

Document were listed in the said notice dated 10.04.2018 and the Corporation alleged that the appellant had violated the same due to its abject failure and clear negligence in ensuring smooth conduct of the examination. The said notice directed the appellant to furnish an explanation within 15 days, failing which an appropriate *ex-parte* decision would be taken by the Corporation.

The appellant replied to the aforesaid notice vide its letter dated 12.04.2018 denying any negligence or leak of question papers from its end. In its communication, the appellant furnished several factual justifications in support of its position and also requested the Corporation to make the documents seized by the police available to the appellant for forensic analysis. These documents were provided to the appellant vide the Corporation's letter dated 18.10.2018. The Corporation addressed another letter dated 22.10.2018 calling upon the appellant to submit its final reply/explanation. Thereafter, on 27.10.2018, the appellant submitted an Observation Report-cum-Reply/Explanation which compared the seized documents with the original question papers and contended that there were many dissimilarities between the two and thus there had been no leakage or dissemination of the original question papers.

By its aforesaid order dated 09.01.2019, the Corporation concluded that the shortcomings/negligence on part of the appellant stood established beyond any reasonable doubt and proceeded to terminate its contract with the appellant and also blacklisted the appellant from participating in any future tenders of the corporation for a period of 5 years. Further, the appellant's security deposit with the Corporation was forfeited and the appellant was directed to execute the unexpired portion of the contract at its own cost and risk.

Aggrieved by the above order of the Corporation, the appellant, after issuing a legal notice, filed Writ Petition No. 2778 of 2019 before the High Court. This petition came to be dismissed by the High Court's aforesaid order dated 13.02.2019 which is under challenge.

Decision and Observations

The Apex court before deciding the case stated that the validity of the impugned order of the Corporation dated 09.01.2019, so far as the blacklisting of the appellant thereunder is concerned, would in turn be determined by the validity of the underlying show cause notice dated 10.04.2018 issued by the Corporation to the appellant. Regarding the notice, the Apex Court was of the opinion that such notice should be adequate and the grounds necessitating action and the penalty/action proposed should be mentioned specifically and unambiguously. An order travelling beyond the bounds of notice is impermissible and without jurisdiction to that extent. ***Nasir Ahmad v. Assistant Custodian General, Evacuee Property, Lucknow***[1] has been referred on this point wherein it has been held that it is essential for the notice to specify the particular grounds on the basis of which an action is proposed to be taken so as to enable the noticee to answer the case against him. If these conditions are not satisfied, the person cannot be said to have been granted any reasonable opportunity of being heard.

[1](1980) 3 SCC 1

On the severity of the effects of blacklisting and the resultant need for strict observance of the principles of natural justice before passing an order of blacklisting, the Apex court referred to *Erusian Equipment & Chemicals Ltd. v. State of West Bengal*,[2] *Raghunath Thakur v. State of Bihar*,[3] *Gorkha Security Services v. Government (NCT of Delhi)*.[4]
The Apex court then stated in para 19 of the judgment, "In light of the above decisions, it is clear that a prior show cause notice granting a reasonable opportunity of being heard is an essential element of all administrative decision-making and particularly so in decisions pertaining to blacklisting which entail grave consequences for the entity being blacklisted. In these cases, furnishing of a valid show cause notice is critical and a failure to do so would be fatal to any order of blacklisting pursuant thereto."

It was argued on behalf of the Appellants that the contents of the said show cause notice were not such that the appellant could have anticipated that an order of blacklisting was being contemplated by the Corporation. On this point the Apex Court once again referred to *Gorkha Security Services* where the Court had to decide whether the action of blacklisting could have been taken without specifically proposing/contemplating such an action in the show-cause notice and also laid down guidelines as to the contents of a show cause notice pursuant to which adverse action such as blacklisting may be adopted.

In Para 21 of the judgment, the Apex court then stated, "Thus, from the above discussion, a clear legal position emerges that ***for a show cause notice to constitute the valid basis of a blacklisting order, such notice must spell out clearly, or its contents be such that it can be clearly inferred therefrom, that there is intention on the part of the issuer of the notice to blacklist the noticee. Such a clear notice is essential for ensuring that the person against whom the penalty of blacklisting is intended to be imposed, has an adequate, informed and meaningful opportunity to show cause against his possible blacklisting***."

The Apex court further held:

> **25. *The mere existence of a clause in the Bid Document, which mentions blacklisting as a bar against eligibility, cannot satisfy the mandatory requirement of a clear mention of the proposed action in the show cause notice.*** The Corporation's notice is completely silent about blacklisting and as such, it could not have led the appellant to infer that such an action could be taken by the Corporation in pursuance of this notice. Had the Corporation expressed its mind in the show cause notice to black list, the appellant could have filed a suitable reply for the same. Therefore, we are of the opinion that the show cause notice dated 10.04.2018 does not fulfil the requirements of a valid show cause notice for blacklisting. In our view, the order of blacklisting the appellant clearly traversed beyond the bounds of the show cause notice which is

[2](1975) 1 SCC 70
[3](1989) 1 SCC 229
[4](2014) 9 SCC 105

impermissible in law. As a result, the consequent blacklisting order dated 09.01.2019 cannot be sustained.

26. In view of our conclusion that the blacklisting order dated 09.01.2019 passed by the Corporation is contrary to the principles of natural justice, it is unnecessary for us to consider the other contentions of the learned counsel for the appellant. Having regard to the peculiar facts and circumstances of the present case, we deem it appropriate not to remit the matter to the Corporation for fresh consideration.

27. For the foregoing reasons, the appeal succeeds and it is accordingly allowed. The order dated 13.02.2019 passed by the High Court is set aside. The Corporation's order dated 09.01.2019 is hereby quashed only so far as it blacklists the appellant from participating in future tenders. The parties will bear their own costs.

2. ***Fertico Marketing and Investment Pvt. Ltd. and Others v. Central Bureau of Investigation and Another, 2020 SCC OnLine SC 938***

Decided on: 17.11.2020

Bench: 1. Hon'ble Mr. Justice A. M. Khanwilkar
2. Hon'ble Mr. Justice **B. R. Gavai**

(The cognizance and the trial cannot be set aside unless the illegality in the investigation can be shown to have brought about miscarriage of justice. It has been held, that the illegality may have a bearing on the question of prejudice or miscarriage of justice but the invalidity of the investigation has no relation to the competence of the court)

Facts

On 18th October 2007, Coal India Limited had introduced a new policy, whereunder the Fuel Supply Agreement (hereinafter referred to as 'FSA') was required to be entered into by coal companies and purchasers of coal. In pursuance of the said policy, on 30th April 2008, an FSA was entered into between the appellants in appeals arising out of SLP(Crl.) Nos. 8342-46 of 2019 and the Coal India Limited. On 25th March 2011, a joint surprise raid was conducted by the CBI in factory premises of Fertico Marketing and Investment Private Limited and it was found that the coal purchased under the FSA was sold in the black market. It was further found by CBI that this was done in connivance with the unknown government officials which led to loss of Rs. 36.28 crore to the Central Government. Accordingly, on 13th April 2011, an FIR came to be registered by CBI for the offences punishable under Sections 120B and 420 of the IPC and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 (hereinafter referred to as 'the PC Act') against Mr. Anil Kumar Agarwal, Director of said M/s. Fertico Marketing and Investment Pvt. Ltd. and unknown officials of the District Industries Centre (hereinafter referred to as 'DIC'), District Chandauli, so also unknown officials of Northern Coalfields Limited, Singrauli, Madhya Pradesh.

During the course of investigation, it was found that two officers namely Ram Ji Singh, the then General Manager, DIC, Chandauli and Yogendra Nath Pandey, Assistant Manager, DIC, Chandauli were also part of the conspiracy. Investigation revealed that these two officials had abused their official positions and fraudulently and dishonestly sent false status reports regarding working conditions of the accused companies and thereby, dishonestly induced the Northern Coalfields Limited to supply coal on subsidized rates, for obtaining pecuniary advantage.

The competent authority granted sanction to prosecute the two public servants on 31st May 2012, under Section 19 of the PC Act. Charge-sheet was filed on 31st May 2012, against the appellants under Section 120B read with Section 420, Sections 467, 468 and 471 of the IPC. Various petitioners approached the High Court by filing petitions under Section 482 Cr.P.C. praying for quashing the charge-sheet/summoning order and consequential proceedings pending before the Special Judge, Anti-Corruption, CBI.

The learned Single Judge vide the impugned order found, that the State Government had granted Post-Facto consent vide notification dated 7th September 2018, against the two public servants of the State Government whose names had figured during the course of investigation. The learned Single Judge found, that the Post-Facto consent was sufficient for investigation by the CBI for the offences against the two public servants, whose names though did not find place in the FIR but were found in charge-sheet. The learned Single Judge held, that if the names of the said public servants did not figure in the FIR and their names came to light during the course of investigation and charge-sheet was filed against the said public servants of the State Government, the consent given after completion of investigation would be a valid consent under Section 6 of the DSPE Act. The learned Single Judge further found, that the question of consent can be raised only by the public servants who have been named in the FIR and not by the private individuals, who had come before the Court. The learned Single Judge therefore, dismissed all the petitions. Being aggrieved thereby, the present appeals.

Decision and Observations

Though Section 5 enables the Central Government to extend the powers and jurisdiction of Members of the DSPE beyond the Union Territories to a State, the same is not permissible unless, a State grants its consent for such an extension within the area of State concerned under Section 6 of the DSPE Act. It is relevant to reproduce the notification issued by the Government of Uttar Pradesh dated 15th June 1989, which reads as under: —

"Government of Uttar Pradesh

Home(Police) Section-1

No. 3442/VIII-1-84/88

Lucknow, dated : June 15, 1989

Notification

In pursuance of the Provisions of Section 6 of the Delhi Special Police Establishment Act, 1946 (25 of 1946) the Governor of the State of Uttar Pradesh is pleased to accord consent to the extension of powers and jurisdiction of the members of the Delhi Special Police establishment in whole of the State of Uttar Pradesh, for investigation of offences punishable under the Prevention of Corruption Act, 1988 (49 of 1988), and attempts, abetments and conspiracies in relation to all or any of the offence or offences mentioned above and any other offence or offences committed in the course of the transaction and arising out of the same facts, subject however to the condition that no such investigation shall be taken up in cases relating to the public servants, under the control of the State Government except with the prior permission of the State Government.

BY ORDER IN THE NAME OF THE GOVERNOR.

Sd/-

(S.K. TRIPATHI)

HOME SECRETARY TO THE GOVT OF UTTAR PRADESH"

Explaining the notification, the Apex Court stated :

> **16.** It could thus be seen, that the State of Uttar Pradesh has accorded a general consent for extension of powers and jurisdiction of the Members of DSPE, in the whole of State of Uttar Pradesh for investigation of offences under the Prevention of Corruption Act, 1988 and attempts, abetments and conspiracies in relation to all or any of the offence or offences committed in the course of the transaction and arising out of the same facts. The same is however with a rider, that no such investigation shall be taken up in cases relating to the public servants, under the control of the State Government, except with prior permission of the State Government. As such, insofar as the private individuals are concerned, there is no embargo with regard to registration of FIR against them inasmuch as, no specific consent would be required under Section 6 of the DSPE Act. Vide notification dated 15th June 1989, the State of Uttar Pradesh has accorded a general consent thereby, enabling the Members of DSPE to exercise powers and jurisdiction in the entire State of Uttar Pradesh with regard to investigation of offences under the Prevention of Corruption Act, 1988 and also to all or any of the offence or offences committed in the course of the same transaction or arising out of the same facts. As such, for registration of FIR against the private individuals for the offences punishable under the Prevention of Corruption Act and other offences under the IPC, committed in the course of the same transaction or arising out of the same facts, the Members of DSPE have all the powers and jurisdiction. As such, we find absolutely no merits in the appeals filed by the private individuals.
>
> **17.** Insofar as the two public servants who have been undoubtedly working under the State Government are concerned, initially, they were not named in the FIR. However, their names surfaced during the course of investigation and thus sanction was granted for their prosecution under Section 19 of the Prevention of Corruption Act vide order dated 31st May 2012, prior to filing of the charge-sheet. It

> is also not in dispute that Post-Facto consent was given by the State Government vide notification dated 7th September 2018, under Section 6 of the DSPE Act to the authorities to investigate the public servants.

Regarding the breach of a mandatory provision relating to investigation a question arose as to whether and to what extent, the trial which follows such investigation, is vitiated. On this point the Apex court referred to ***H.N. Rishbud and Inder Singh v. The State of Delhi***[5] and said the following:

> 19. It could thus be seen, that this Court has held, that ***the cognizance and the trial cannot be set aside unless the illegality in the investigation can be shown to have brought about miscarriage of justice. It has been held, that the illegality may have a bearing on the question of prejudice or miscarriage of justice but the invalidity of the investigation has no relation to the competence of the court.***

It was further observed by the Apex Court, "*in the present case, there are no pleadings by the public servants with regard to the prejudice caused to them on account of non-obtaining of prior consent under Section 6 of the DSPE Act qua them specifically in addition to the general consent in force, nor with regard to miscarriage of justice*. Therefore the Apex court concluded, "*In the result, we find no reason to interfere with the finding of the High Court with regard to not obtaining prior consent of the State Government under Section 6 of the DSPE Act.*"

[5] (1955) 1 SCR 1150

3. *Kaledonia Jute and Fibres Pvt. Ltd. v. Axis Nirman and Industries Ltd. and Others, 2020 SCC OnLine SC 943*

Decided on: 19.11.2020

Bench: 1. Hon'ble Mr. Chief Justice S.A. Bobde
2. Hon'ble Mr. Justice A. S. Bopanna
3. Hon'ble Mr. Justice **V. Ramasubramanian**

(What are the circumstances under which a winding up proceeding pending on the file of a High court could be transferred to the NCLT)

Facts

M/s. Girdhar Trading Co., the 2nd respondent herein, filed a petition in Company Petition No. 24 of 2015 before the High Court of Allahabad under Section 433 of the Companies Act, 1956, for the winding up of the first respondent company, on the ground that the Company was unable to pay its debts. The Company Court ordered notice to the 1st respondent herein, but the 1st respondent failed to appear before the Company Court.

Therefore, by an order dated 08.01.2016 the Company Court ordered the admission of the Company Petition and also directed publication of the advertisement of the petition in accordance with Rule 24 of the Companies (Court) Rules, 1959. Pursuant to the said order, the 2nd respondent herein (petitioning creditor) effected a publication of the advertisement in the Official Gazette in Form No. 48 on 30.01.2016. Newspaper publications were also made, indicating the date of hearing of the Company Petition as 29.02.2016.

Thereafter, the Company Court passed an order dated 10.03.2016 directing the winding up of the 1st respondent Company on the ground that the Company has been unable to pay its debts and that it was just and equitable to wind up the 1st respondent Company.

By the aforesaid order dated 10.03.2016, the Company Court appointed the official liquidator attached to the High Court of Allahabad as the Liquidator and directed him to take over the assets and books of accounts of the Company. The order of winding up was also directed to be advertised in Form 53 in two newspapers, as required under Rule 113 of the Companies (Courts) Rules 1959.

Thereafter, the 1st respondent filed an application for recalling the order of winding up dated 10.03.2016. The 1st respondent, in order to prove their bonafides paid the entire amount due to the petitioning creditor (the second respondent herein) along with costs. Therefore, the petitioning creditor had no objection to the recall of the order of winding up.

But the official liquidator opposed the application for recall on the ground that the 1st respondent-Company owed money to various creditors to the tune of Rs. 27 Crores and that unless the said amount is paid, the order of winding up cannot be recalled. The Official

Liquidator also submitted that he had already taken over charge of the assets of the Company.

In the light of the rival contentions, the Company Court passed an order on 22.08.2016 keeping the winding up order dated 10.03.2016 in abeyance. However, the Company Court directed the Official Liquidator to continue to be in custody of the assets of the Company.

While things stood thus, the appellant herein, claiming to be a creditor of the first respondent herein, moved an application before the NCLT, Allahabad under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for short the 'IBC, 2016'). The claim of the appellant herein before the NCLT was that the 1st respondent was due and liable to pay a sum of Rs. 32 lakhs and that despite repeated demands, the 1st respondent failed to pay the said amount.

Thereafter, the appellant moved an application in Civil Miscellaneous Application No. 23 of 2020 before the Company Court (High court) seeking a transfer of the winding up petition to the NCLT, Allahabad. This application was rejected by the Company Court by a cryptic order dated 24.02.2020, on the sole ground that the requirement of Rule 24 had already been complied with and that a winding up order had already been passed. It is against this order of the High court, refusing to transfer the winding up proceedings from the Company Court to the NCLT that the financial creditor has come up with this civil appeal.

Issues

(i) what are the circumstances under which a winding up proceeding pending on the file of a High court could be transferred to the NCLT and

(ii) at whose instance, such transfer could be ordered.

Decision and Observations

Section 434 of the Companies Act, 2013 as substituted by Insolvency and Bankruptcy Code, 2016 together with subsequent amendments thereto, reads as follows:

434. Transfer of certain pending proceedings.-(1) On such date as may be notified by the Central Government in this behalf,-

(a) all matters, proceedings or cases pending before the Board of Company Law Administration (herein in this section referred to as the Company Law Board) constituted under sub-section (1) of section 10E of the Companies Act, 1956 (1 of 1956) immediately before such date shall stand transferred to the Tribunal and the Tribunal shall dispose of such matters, proceedings or cases in accordance with the provisions of this Act;

(b) any person aggrieved by any decision or order of the Company Law Board made before such date may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Company Law Board to him on any question of law arising out of such order:

Provided that the High Court may if it is satisfied that the appellant was prevented by sufficient cause from filing an appeal within the said period, allow it to be filed within a further period not exceeding sixty days; and

(c) all proceedings under the Companies Act, 1956 (1 of 1956), including proceedings relating to arbitration, compromise, arrangements and reconstruction and winding up of companies, pending immediately before such date before any District Court or High Court, shall stand transferred to the Tribunal and the Tribunal may proceed to deal with such proceedings from the stage before their transfer:

Provided that only such proceedings relating to the winding up of companies shall be transferred to the Tribunal that are at a stage as may be prescribed by the Central Government:

[Provided further that only such proceedings relating to cases other than winding-up, for which orders for allowing or otherwise of the proceedings are not reserved by the High Court shall be transferred to the Tribunal:

[Provided also that-]

(i) all proceedings under the Companies Act, 1956 other than the cases relating to winding-up of companies that are reserved for orders for allowing or otherwise such proceedings; or

(ii) the proceedings relating to winding-up of companies which have not been transferred from the High Courts;

shall be dealt with in accordance with provisions of the Companies Act, 1956 and the Companies (Court) Rules, 1959:]

[Provided also that proceedings relating to cases of voluntary winding up of a company where notice of the resolution by advertisement has been given under sub-section (1) of section 485 of the Companies Act, 1956 but the company has not been dissolved before the 1st April, 2017 shall continue to be dealt with in accordance with provisions of the Companies Act, 1956 and the Companies (Court) Rules, 1959.]

[Provided further that any party or parties to any proceedings relating to the winding up of companies pending before the any Court immediately before the commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018, may file an application for transfer of such proceedings and the Court may by order transfer such proceedings to the Tribunal and the proceedings so transferred shall be dealt with by the Tribunal as an application for initiation of corporate insolvency resolution process under the Insolvency and Bankruptcy Code, 2016 (31 of 2016).]

(2) The Central Government may make rules consistent with the provisions of this Act to ensure timely transfer of all matters, proceedings or cases pending before the Company Law Board or the courts, to the Tribunal under this section.]

Elaborating upon the scheme of section 434, the Apex court said the following:

> 21. [...] The first proviso to Clause (c) which was not there in the original Section 434, but which was inserted only under IBC Act of 2016 when Section 434 was substituted, circumscribes what is contained in the main part of Clause (c). The first proviso to Clause (c) restricts the transferability of proceedings for winding up from the High Court to the tribunal, by stipulating that only such proceedings for winding up which are at a stage as may be prescribed by the Central Government, be transferred to the Tribunal.
>
> **22.** Sub-section (2) of Section 434 empowers the Central Government to make Rules consistent with the provisions of the Act, to ensure timely transfer of all matters pending before the Company Law Board or the Courts, to the Tribunal. Therefore, in exercise of the power conferred by Sub-section (2) of Section 434 of the Companies Act, 2013 read with Sub-section (1) of Section 239 of the IBC, 2016,

the Central Government issued a set of Rules known as 'The Companies (Transfer of Pending Proceedings) Rules, 2016.

23. Before we have a look at the Rules it is necessary to note that for the purpose of transfer, winding up proceedings pending before the High Courts, are classified by Section 434 into two categories namely:—

(a) Proceedings for voluntary winding up where notice of resolution by advertisement has been given under Section 485(1) of the Companies Act, 1956, but the company has not been dissolved before 01.04.2017; and

(b) Other types of winding up proceedings.

24. The first of the above 2 categories of cases are covered by the fourth proviso under Clause (c) of Sub-section (1) of Section 434, which states:

"Provided also that proceedings relating to cases of voluntary winding up of a company where notice of the resolution by advertisement has been given under subsection (1) of section 485 of the Companies Act, 1956 but the company has not been dissolved before the 1st April, 2017 shall continue to be dealt with in accordance with provisions of the Companies Act, 1956 and the Companies (Court) Rules, 1959".

25. Such cases of voluntary winding up covered by the above proviso shall continue to be dealt with by the High court. It is only (i) cases of voluntary winding up falling outside the scope of the 4th Proviso and (ii) other types of winding up proceedings, that can be transferred by the High Courts to the Tribunal, subject however to the Rules made by the Central Government under Section 434(2).

26. The transferability, by operation of law, of winding up proceedings, other than those covered by the 4th Proviso, depends upon the stage at which they are pending before the Company Court. But this is left by the law makers to be determined through subordinate legislation, in the form of Rules.

27. Apart from providing for the transfer of certain types of winding up proceedings by operation of law, Section 434(1)(c) also gives a choice to the parties to those proceedings to seek a transfer of such proceedings to the NCLT. This is under the fifth proviso to Clause (c).

The Companies (Transfer of Pending Proceedings) Rule, 2016 were issued in exercise of the powers conferred by Section 434(2) read with Section 239(1) of IBC, 2016. The aforesaid Rules categorise the pending proceedings for winding up into three types *namely* **(i)** proceedings for voluntary winding up covered by the fourth proviso to Clause (c) of Subsection (1) of Section 434, which shall continue to be dealt with in accordance with the provisions of the 1956 Act; **(ii)** proceedings for winding up on the ground of inability to pay debts; and **(iii)** proceedings for winding up on grounds other than inability to pay debts.

Rule 5 of the aforesaid Rules provides for transfer of proceedings for winding up on the ground of inability to pay debts. Rule 6 of the aforesaid Rules deals with transfer of proceedings for winding up, on grounds other than inability to pay debts.

33. The transferability of a winding up proceeding, both under Rule 5 as well as under Rule 6, is directly linked to the service of the winding up petition on the respondent under Rule 26 of the Companies (Court) Rules, 1959. If the winding up petition has already been served on the respondent in terms of Rule 26 of the 1959 Rules, the proceedings are not liable to be transferred. But if service of the winding up petition on the respondent in terms of Rule 26 had not been completed, such winding up proceedings, whether they are under Clause (c) of Section 433 or under Clauses (a) and (f) of Section 433, shall peremptorily be transferred to the NCLT.

34. In other words, Rules 5 and 6 of the Companies (Transfer of Pending Proceedings) Rules 2016, fix the stage of service of notice under Rule 26 of the Companies (Court) Rules, 1959, as the stage at which a winding up proceeding can be transferred. This is because the first proviso under Clause (c) of Sub-section (1) of Section 434 enables the Central Government to prescribe the stage at which proceedings for winding up can be transferred and subsection (2) of section 434 confers rule making power on the Central Government.

The notice of the petition, required under Rule 26 to be served along with the copy of the petition, should be in Form No. 6, due to the mandate of Rule 27.Due to the usage of the words "*was admitted*" in Form No. 6, there was a confusion as to whether the service referred to in Rule 26, is of a pre-admission notice or post-admission notice, in a winding up proceeding. The Apex Court settled the position in *Forech India Ltd.* v. *Edelweiss Assets Reconstruction Co. Ltd.* by holding "*that Rules 26 and 27 clearly refer to a pre-admission scenario*." After so interpreting Rules 26 and 27 of the Companies (Court) Rules, 1959, the Apex Court pointed out in *Forech India Ltd.* that "*when the Code was enacted, only winding up petitions where no notice under Rule 26 was served, were to be transferred to NCLT and treated as petitions under the Code*". However, after Section 434 was substituted by a new provision under Act 31 of 2016 and the 5th proviso was inserted by Act 26 of 2018, the transfer of the winding up proceedings, even at the instance of the party or parties to the proceedings became permissible. This change of position was also noted in *Forech India Limited* (supra). The Apex Court then said:

40. But we do not think that the decision in *Forech India Limited* (supra) is an authority for the proposition that the 5th proviso to Clause (c) of Sub-section (1) of Section 434 could be invoked by any person who is not a party to the proceeding for winding up. The 5th proviso which we have already extracted uses the words "***any party or parties to any proceedings relating to the winding up of companies pending before any Court***."

41. In other words, ***the right to invoke the 5th proviso is specifically conferred only upon the parties to the proceedings***. Therefore, on a literal interpretation, such a right should be held to be confined only to "*the parties to the proceedings*."

The Apex Court then considered the question as to ***who are the parties to the winding up proceedings*** and said the following:

> **44.** Thus, the proceedings for winding up of a company are actually proceedings in rem to which the entire body of creditors is a party. The proceeding might have been initiated by one or more creditors, but by a deeming fiction the petition is treated as a joint petition. The official liquidator acts for and on behalf of the entire body of creditors. Therefore, the word "*party*" appearing in the 5th proviso to Clause (c) of Sub-section (1) of section 434 cannot be construed to mean only the single petitioning creditor or the company or the official liquidator. The words "*party or parties*" appearing in the 5th proviso to Clause (c) of Sub-section (1) of Section 434 would take within its fold any creditor of the company in liquidation.
>
> **45.** The above conclusion can be reached through another method of deductive logic also. If any creditor is aggrieved by any decision of the official liquidator, he is entitled under the 1956 Act to challenge the same before the Company Court. Once he does that, he becomes a party to the proceeding, even by the plain language of the section. Instead of asking a party to adopt such a circuitous route and then take recourse to the 5th proviso to section 434(1)(c), it would be better to recognise the right of such a party to seek transfer directly.

4. *Tej Bahadur v. Narendra Modi, 2020 SCC OnLine SC 951*

Decided on: 24.11.2020

Bench: 1. Hon'ble Mr. Chief Justice **S. A. Bobde**

2. Hon'ble Mr. Justice A. S. Bopanna

3. Hon'ble Mr. Justice V. Ramasubramanian

(It is a condition for a valid nomination of a person who has been dismissed from service, that the nomination paper must be accompanied by a certificate to the effect that the person seeking nomination has not been dismissed for corruption or disloyalty to the State. Section 33(3) of the Act itself provides the consequence of the absence of such certificate and that is that such a person "shall not be deemed to be duly nominated as a candidate.)

Facts

This appeal arises out of the order passed by the Allahabad High Court in Election Petition No. 17 of 2019 allowing the respondent's application under Order VI Rule 16 and Order VII Rule 11 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'CPC') read with Section 86(1) of the Representation of the People Act, 1951 (hereinafter referred to as 'Act') and thereby dismissing the Election Petition filed against him. The said application was filed in the Election Petition questioning the election of the respondent Shri Narendra Modi to the 17th Lok Sabha from 77th Parliamentary Constituency (Varanasi), held in April - May 2019.

The Allahabad High Court after hearing parties, by a detailed order dismissed the Election Petition on the ground that the appellant had no locus to challenge the election of the respondent from the Varanasi Parliamentary Constituency since the appellant was neither an elector for such constituency nor was he a candidate.

The instant appeal accordingly arises from an order passed by the Election Tribunal while considering and disposing the application filed under Order VII Rule 11 CPC seeking rejection of the Election Petition.

The appellant was an employee of the Border Security Force and as such held office under the Government of India. The appellant was dismissed from service on 19.4.2017. He filed two nominations, one on 24.4.2019 and another on 29.4.2019. The nominations have been found to be invalid by the returning officer because they were not accompanied by a certificate to the effect that the appellant has not been dismissed for corruption or disloyalty to the State as required by Section 9(2) read with Section 33(3) of the Act.

Clause (6) of Part IIIA of Form 2A of the nomination paper contains a query whether the candidate was dismissed for corruption or for disloyalty while holding office under the Government of India or Government of any State. In the first nomination form filed by the appellant on 24.4.2019, the appellant stated 'Yes' against this query and disclosed the date of his dismissal as 19.4.2017. In the reply to the same query in the second nomination form filed by him on 29.4.2019, he stated 'No'. The Returning Officer issued two notices on 30.4.2019 referring to the different answers in the two nominations. The notices further pointed out that the appellant had placed on record evidence that he was dismissed from the service of

Government of India within five years before the date of the nomination. But that his nomination form was not accompanied by the requisite certificate. He was required to submit a certificate of the Election Commission to prove that he was not dismissed from service on the ground of corruption or disloyalty to the State as required under Section 9(2) and Section 33(3) of the Act. He was given time up to 11:00 am on the next day i.e. 01.05.2019 by both notices to furnish such a certificate from the Election Commission. This time was given in accordance with the provision of Sub-section (5) of Section 36which allows a candidate to rebut any objection not later than the next day but one.

The appellant replied to the first notice stating that he had not been dismissed from service on the ground of corruption or disloyalty to the State without however, making any attempt to provide a certificate from the Election Commission to that effect. After receiving the second notice on the same date he sent a letter and also wrote an email in the evening of 30.5.2019 to the Election Commission asking for a certificate when the time to produce it was to expire on 01.05.2019 at 11:00 am i.e. the next day. Obviously, the appellant did not have any such certificate in his possession.

The Returning Officer rejected the appellant's nomination papers on 01.05.2019 on the ground that it was not accompanied by a certificate from the Election Commission that his dismissal from service was not on the ground of corruption or disloyalty to the State. This rejection of the appellant's nomination form on the ground that it was not accompanied by the requisite certificate constitutes the major challenge in the Election Petition.

Decision and Observations

The relevant extract of the judgement are as follows:

> **16.** Section 81 of the Act provides that an Election Petition may be presented by (a) any elector or (b) any candidate at such election. The Explanation to Section 81 provides that an "elector" means a person who was entitled to vote at the election to which the election petition relates. In this case the election is to the Varanasi Parliamentary seat. Obviously, the appellant is not an elector registered in the Varanasi constituency since he is admittedly enrolled as an elector of Bhiwani, Mahendragarh Parliamentary Constituency, Haryana. His locus thus depends entirely on the question whether he is a candidate or can claim to be a duly nominated candidate.
>
> **17.** The term 'candidate' is defined in Section 79(b) of the Act. The first part of definition is intended to cover a person who has been duly nominated as a candidate. Inter-alia the second part covers a person who considers himself entitled to have been duly nominated as a candidate.
>
> **19.** The question that arises is whether the appellant can claim to have been a duly nominated candidate at the said election. The answer must be in the negative. *It is a condition for a valid nomination of a person who has been dismissed from service, that the nomination paper must be accompanied by a certificate to the effect that the person seeking nomination has not been dismissed for corruption or disloyalty to the State. Section 33(3) of the Act itself provides the consequence of the absence of such certificate and that is that such a person "shall not be deemed to be duly nominated as a candidate*". The law itself deems that such a person cannot be duly nominated.

20. The requirement of Section 33(3) that a nomination of a dismissed officer must be accompanied by a certificate that he was not dismissed on the ground of corruption or disloyalty to the State must be read as obligatory. It is couched in a language which is imperative and provides for a certain consequence viz. that such a person shall not be deemed to be a duly nominated candidate. The word 'deemed' in this provision does not create a legal fiction. It clarifies any doubt anyone might entertain as to the legal character of a person who has not and states with definiteness that such a person shall not be deemed to be duly nominated. It would, therefore, be absurd to construe the legislative scheme as permitting a person who has not filed his nomination in accordance with Section 33(3), as enabling him to claim that he is a duly nominated candidate even though the provision mandates that such a person shall not be deemed to be a duly nominated candidate.

21. We are of the view that the mandate of the law that such a person shall not be deemed to be duly nominated must be given full effect and no person must be considered as entitled to claim that he has been duly nominated even though he does not comply with the requirement of law. Though these observations were made in the context of different requirements as to nominations, the law laid down by this Court in several decisions including *Charan Lal Sahu* v. *Giani Zail Singh*, (1984) 1 SCC 390 must clearly govern the present case.....

22. Applying the above decision to the present case it was necessary for the appellant to show that his nomination paper conformed to the provisions of Section 33(3) of the Act.

23. Admittedly appellant's nomination paper was not accompanied by a certificate to the effect that he had not been dismissed for corruption or disloyalty to the State. Any other construction of the scheme of the law in this regard would be startling as it would enable a person who was not an elector and not even entitled to be nominated as a candidate for an election to question the election of a returned candidate.

The Apex Court stated, ***"It is settled that for a person to make claim that he was duly nominated, his nomination paper must comply with statutory requirements which govern the filing of nomination papers and not otherwise."*** On this point the Apex court mentioned the following decisions :

Charan Lal Sahu v. *Neelam Sanjeeva Reddy*, (1978) 2 SCC 500; *Charan Lal Sahu* v. *Giani Zail Singh* (Supra); *Mithilesh Kumar Sinha* v. *Returning Officer for Presidential Election* 1993 Supp (4) SCC 386; *Charan Lal Sahu* v. *K.R. Narayanan* (1998) 1 SCC 56; *Charan Lal Sahu* v. *Dr. A.P.J. Abdul Kalam*, (2003) 1 SCC 609].

5. *Madras Bar Association v. Union of India and Another, 2020 SCC OnLine SC 962*

Decided on: 27.11.2020

Bench: 1. Hon'ble Mr. Justice **L. Nageswara Rao**
2. Hon'ble Mr. Justice Hemant Gupta
3. Hon'ble Mr. Justice S. Ravindra Bhat

(Constitutional validity of the "Tribunal, Appellate Tribunal and other Authorities [Qualification, Experience and Other Conditions of Service of Members] Rules, 2020" considered)

Background

The core controversy that arose for consideration was the constitutional validity of the "Tribunal, Appellate Tribunal and other Authorities [Qualification, Experience and Other Conditions of Service of Members] Rules, 2020" (hereinafter referred to as "the 2020 Rules"). by a Notification dated 12.02.2020, the Central Government in exercise of the power conferred by Section 184 of the Finance Act, 2017 made the impugned 2020 Rules. The 2020 Rules which deal with the qualification and appointment of members by recruitment, procedure for inquiry into misbehavior, House Rent Allowance and other Conditions of Service are the subject matter of challenge in these cases before us and will be dealt with in detail in the succeeding paragraphs.

Pursuant to the liberty granted by the Apex Court in the judgment of *Rojer Mathew* (supra), the Union of India filed Miscellaneous Application No. 1152 of 2020 placing the 2020 Rules before this Court and seeking a direction that the 2020 Rules would apply to all persons appointed as Members, President, Chairperson, etc. of Tribunals after the appointed day *i.e.* 26.05.2017. Several applications were filed by Bar Associations and the Members of the Tribunals seeking directions to fill up the vacant posts by making appointments to the Tribunals and for clarifications relating to the retrospective operation of the 2020 Rules. The Madras Bar Association filed a Writ Petition under Article 32 seeking a declaration that the 2020 Rules are *ultra vires* of Article 14, 21 and 50 of the Constitution apart from being violative of the principles of separation of powers and independence of the judiciary. According to the Writ Petitioner, the 2020 Rules were also contrary to the earlier judgments of this Court in *Union of India* v. *Madras Bar Association* [(2010) 11 SCC 1], *Madras Bar Association* v. *Union of India* [(2014) 10 SCC 1]. and *Rojer Mathew* [(2020) 6 SCC 1]. Other Writ Petitions filed in the High Courts were transferred to the Apex Court.

Issues

The main issues raised in the Writ Petition are that the 2020 Rules are unconstitutional as:

a) The Search-cum-Selection Committees provided for in the 2020 Rules did not conform to the principles of judicial dominance;

b) Appointment of persons without judicial experience to the posts of Judicial Members/Presiding Officer/Chairpersons is in contravention to the earlier judgments of this Court;

c) The term of office of the Members for four years is contrary to the earlier decisions of this Court;

d) Advocates are not being made eligible for appointment to most of the Tribunals;

e) Administrative control of the executive in matters relating to appointments and conditions of service is violative of the principles of separation of powers and independence of judiciary and demonstrates non-application of mind

Decision and Observations

The relevant extract of the judgment are as follows related to the establishment of the National tribunals Commission:

> **19.** While considering the vires of validity of the 2017 Rules, this Court in *Rojer Mathew* (supra) referred to the current problems faced by the Tribunals. Administration of the Tribunals by the sponsoring or parent Ministry or Department concerned and dependence for financial, administrative or other facilities by the Tribunals on the said Department which is a litigant before them are some of the serious problems highlighted by this Court. There is a likelihood of the independence of adjudication process being compromised in a situation where the Tribunal is made dependent for its needs on a litigant. The need for financial independence of the Tribunals has been dealt with by this Court in *Rojer Mathew* (supra). A direction was given to the Ministry of Finance to earmark separate and dedicated funds for the Tribunals from the Consolidated Fund of India so that the Tribunals will not be under the financial control of the parent Departments. We reiterate the importance of the constitution of an autonomous oversight body for recruitment and supervision of the performance of the Tribunals. It is high time that the observations and suggestions made in this regard by this Court shall be implemented by the Union of India. An independent body headed by a retired Judge of the Supreme Court supervising the appointments and the functioning of the Tribunals apart from being in control of any disciplinary proceedings against the Members would not only improve the functioning of the Tribunals but would also be in accordance with the principles of judicial independence. We also notice that in the final directions and conclusions recorded in *Roger Mathew* (supra)[15], the wisdom or legality of setting up such an independent oversight body was not doubted and it was not referred to a larger Bench, since the view in *L. Chandra Kumar* on this point was not doubted.
>
> **20.** In view of the preceding discussion, we direct the Union of India to set up a National Tribunals Commission as suggested by this Court by its order dated 07.05.2018 at the earliest. Setting up of such Commission would enhance the image of the Tribunals and instill confidence in the minds of the litigants. Dependence of the Tribunals for all their requirements on the parent Department will not extricate

them from the control of the executive. Judicial independence of the Tribunals can be achieved only when the Tribunals are provided the necessary infrastructure and other facilities without having to lean on the shoulders of the executive. This can be achieved by establishment of an independent National Tribunals Commission as suggested above. To stop the dependence of the Tribunals on their parent Departments for routing their requirements and to ensure speedy administrative decision making, as an interregnum measure, we direct that there should be a separate "tribunals wing" established in the Ministry of Finance, Government of India to take up, deal with and finalize requirements of all the Tribunals till the National Tribunals Commission is established.

The Apex Court issued the following directions:

53. The upshot of the above discussion leads this court to issue the following directions:

(i) The Union of India shall constitute a National Tribunals Commission which shall act as an independent body to supervise the appointments and functioning of Tribunals, as well as to conduct disciplinary proceedings against members of Tribunals and to take care of administrative and infrastructural needs of the Tribunals, in an appropriate manner. Till the National Tribunals Commission is constituted, a separate wing in the Ministry of Finance, Government of India shall be established to cater to the requirements of the Tribunals.

(ii) Instead of the four-member Search-cum-Selection Committees provided for in Column (4) of the Schedule to the 2020 Rules with the Chief Justice of India or his nominee, outgoing or sitting Chairman or Chairperson or President of the Tribunal and two Secretaries to the Government of India, the Search-cum-Selection Committees should comprise of the following members:

(a) The Chief Justice of India or his nominee—Chairperson (with a casting vote).

(b) The outgoing Chairman or Chairperson or President of the Tribunal in case of appointment of the Chairman or Chairperson or President of the Tribunal (or) the sitting Chairman or Chairperson or President of the Tribunal in case of appointment of other members of the Tribunal (or) a retired Judge of the Supreme Court of India or a retired Chief Justice of a High Court in case the Chairman or Chairperson or President of the Tribunal is not a Judicial member or if the Chairman or Chairperson or President of the Tribunal is seeking re-appointment—member;

(c) Secretary to the Ministry of Law and Justice, Government of India—member;

(d) Secretary to the Government of India from a department other than the parent or sponsoring department, nominated by the Cabinet Secretary—member;

(e) Secretary to the sponsoring or parent Ministry or Department—Member Secretary/Convener (without a vote). Till amendments are carried out, the 2020 Rules shall be read in the manner indicated.

(iii) Rule 4(2) of the 2020 Rules shall be amended to provide that the Search-cum-Selection Committee shall recommend the name of one person for appointment to each post instead of a panel of two or three persons for appointment to each post. Another name may be recommended to be included in the waiting list.

(iv) The Chairpersons, Vice-Chairpersons and the members of the Tribunal shall hold office for a term of five years and shall be eligible for reappointment. Rule 9(2) of the 2020 Rules shall be

amended to provide that the Vice-Chairman, Vice-Chairperson and Vice President and other members shall hold office till they attain the age of sixty-seven years.

(v) The Union of India shall make serious efforts to provide suitable housing to the Chairman or Chairperson or President and other members of the Tribunals. If providing housing is not possible, the Union of India shall pay the Chairman or Chairperson or President and Vice-Chairman, Vice-Chairperson, Vice President of the Tribunals an amount of Rs. 1,50,000/- per month as house rent allowance and Rs. 1,25,000/- per month for other members of the Tribunals. This direction shall be effective from 01.01.2021.

(vi) The 2020 Rules shall be amended to make advocates with an experience of at least 10 years eligible for appointment as judicial members in the Tribunals. While considering advocates for appointment as judicial members in the Tribunals, the Search-cum-Selection Committee shall take into account the experience of the Advocate at the bar and their specialization in the relevant branches of law. They shall be entitled for reappointment for at least one term by giving preference to the service rendered by them for the Tribunals.

(vii) The members of the Indian Legal Service shall be eligible for appointment as judicial members in the Tribunals, provided that they fulfil the criteria applicable to advocates subject to suitability to be assessed by the Search-cum-Selection Committee on the basis of their experience and knowledge in the specialized branch of law.

(viii) Rule 8 of the 2020 Rules shall be amended to reflect that the recommendations of the Search-cum-Selection Committee in matters of disciplinary actions shall be final and the recommendations of the Search-cum-Selection Committee shall be implemented by the Central Government.

(ix) The Union of India shall make appointments to Tribunals within three months from the date on which the Search-cum-Selection Committee completes the selection process and makes its recommendations.

(x) The 2020 Rules shall have prospective effect and will be applicable from 12.02.2020, as per Rule 1(2) of the 2020 Rules.

(xi) Appointments made prior to the 2017 Rules are governed by the parent Acts and Rules which established the concerned Tribunals. In view of the interim orders passed by the Court in *Rojer Mathew* (supra), appointments made during the pendency of *Rojer Mathew* (supra) were also governed by the parent Acts and Rules. Any appointments that were made after the 2020 Rules came into force i.e. on or after 12.02.2020 shall be governed by the 2020 Rules subject to the modifications directed in the preceding paragraphs of this judgment.

(xii) Appointments made under the 2020 Rules till the date of this judgment, shall not be considered invalid, insofar as they conformed to the recommendations of the Search-cum-Selection Committees in terms of the 2020 Rules. Such appointments are upheld, and shall not be called into question on the ground that the Search-cum-Selection Committees which recommended the appointment of Chairman, Chairperson, President or other members were in terms of the 2020 Rules, as they stood before the modifications directed in this judgment. They are, in other words, saved.

(xiii) In case the Search-cum-Selection Committees have made recommendations after conducting selections in accordance with the 2020 Rules, appointments shall be made within three months from today and shall not be subject matter of challenge on the ground that they are not in accord with this judgment.

(xiv) The terms and conditions relating to salary, benefits, allowances, house rent allowance etc. shall be in accordance with the terms indicated in, and directed by this judgment.

(xv) The Chairpersons, Vice Chairpersons and members of the Tribunals appointed prior to 12.02.2020 shall be governed by the parent statutes and Rules as per which they were appointed. The 2020 Rules shall be applicable with the modifications directed in the preceding paragraphs to those who were appointed after 12.02.2020. While reserving the matter for judgment on 09.10.2020, we extended the term of the Chairpersons, Vice-Chairpersons and members of the Tribunals till 31.12.2020. In view of the final judgment on the 2020 Rules, the retirements of the Chairpersons, Vice-Chairpersons and the members of the Tribunals shall be in accordance with the applicable Rules as mentioned above.

6. *Arnab Manoranjan Goswami v. State of Maharashtra and Others, 2020 SCC OnLine SC 964*

Decided on: 27.11.2020

Bench: 1. Hon'ble Mr. Justice **D. Y. Chandrachud**

2. Hon'ble Ms. Justice Indira Banerjee

(The High Court recited the legal position that the jurisdiction to quash under Section 482 has to be exercised sparingly. These words, however, are not meaningless incantations, but have to be assessed with reference to the contents of the particular FIR before the High Court.

Factors to be considered while considering an application for bail under Article 226 enumerated)

Facts

While invoking the jurisdiction of the High Court of Judicature at Bombay under Articles 226 and 227 of the Constitution of India and Section 482 of the Code of Criminal Procedure, 1973 ("**CrPC**"), the appellant sought three substantive reliefs:

(i) A writ of Habeas Corpus, claiming that he had been illegally arrested and wrongfully detained by the Station House Officer ("**SHO**") at Alibaug Police Station in the district of Raigad in Maharashtra in relation to a First Information Report[1] ("**FIR**") registered on 5 May 2018 under Sections 306 and 34 of the Penal Code, 1860 ("**IPC**") in spite of an earlier closure report which was accepted by the Magistrate;

(ii) The quashing of the above-mentioned FIR; and

(iii) The quashing of the arrest memo on the basis of which the appellant had been arrested.

Pending the disposal of the petition, by an interim application in the proceedings, the appellant sought his release from custody and a stay of all further proceedings including the investigation in pursuance of the FIR.

A Division Bench of the High Court, by its order dated 9 November 2020, noted that prayer (a) by which a writ of habeas corpus was sought was not pressed. The High Court posted the hearing of the petition for considering the prayer for quashing of the FIR on 10 December 2020. It declined to accede to the prayer for the grant of bail, placing reliance on a decision of this Court in *State of Telangana* v. *Habib Abdullah Jeelani*[6] ("*Habib Jeelani*"). The High Court was of the view that the prayers for interim relief proceeded on the premise that the appellant had been illegally detained and since he was in judicial custody, it would not entertain the request for bail or for stay of the investigation in the exercise of its extra-ordinary

[6] (2017) 2 SCC 779

jurisdiction. The High Court held that since the appellant was in judicial custody, it was open to him to avail of the remedy of bail under Section 439 of the CrPC. The High Court declined *prima facie* to consider the submission of the appellant that the allegations in the FIR, read as they stand, do not disclose the commission of an offence under Section 306 of the IPC. That is how the case has come to this Court. The appellant is aggrieved by the denial of his interim prayer for the grant of bail.

Decision and Observations

Jurisdiction of the High Court under Article 226 and Section 482 CrPC

In para 46 of the judgment the Apex court noted that the High Court has dwelt at length on the decision of *Habib Jeelani*. The High Court observed that the powers to quash "are to be exercised sparingly and that too, in rare and appropriate cases and in extreme circumstances to prevent abuse of process of law". The High Court has declined to even *prima facie* enquire into whether the allegations contained in the FIR attract the provisions of Section 306 read with Section 34 of the IPC. In its view, since the petition was being posted for hearing on 10 December 2020, it was not inclined to enquire into this aspect of the case and the appellant would be at liberty to apply for regular bail under Section 439.

On this aspect, the Apex Court was of the following opinion:

> **51.** The above decision thus arose in a situation where the High Court had declined to entertain a petition for quashing an FIR under Section 482 of the CrPC. However, it nonetheless directed the investigating agency not to arrest the accused during the pendency of the investigation. This was held to be impermissible by this Court. On the other hand, this Court clarified that the High Court if it thinks fit, having regard to the parameters for quashing and the self-restraint imposed by law, has the jurisdiction to quash the investigation "and may pass appropriate interim orders as thought apposite in law". Clearly therefore, the High Court in the present case has misdirected itself in declining to enquire *prima facie* on a petition for quashing whether the parameters in the exercise of that jurisdiction have been duly established and if so whether a case for the grant of interim bail has been made out. The settled principles which have been consistently reiterated since the judgment of this Court in *State of Haryana* v. *Bhajan Lal* ("*Bhajan Lal*") [1992 Supp (1) SCC 335] include a situation where the allegations made in the FIR or the complaint, even if they are taken at their face value and accepted in their entirety, do not *prima facie* constitute any offence or make out a case against the accused. This legal position was recently reiterated in a decision by a two-judge Bench of this Court in *Kamal Shivaji Pokarnekar* v. *State of Maharashtra* [(2019) 14 SCC 350].

The Apex Court then elaborated upon the Prima Facie evaluation of the FIR and the grant of bail as the High Court failed to apply its mind to a fundamental issue i.e to evaluate *prima*

facie whether the allegations in the FIR bring the case within the fold of Section 306 read with Section 34 of the IPC. In this regard the Apex Court referred to several precedents:

Amalendu Pal* v. *State of West Bengal[7] wherein the Court noted that before a person may be said to have abetted the commission of suicide, they "must have played an active role by an act of instigation or by doing certain act to facilitate the commission of suicide".

Madan Mohan Singh* v. *State of Gujarat[8] wherein the Court noted that the suicide note expressed a state of anguish of the deceased and "cannot be depicted as expressing anything intentional on the part of the accused that the deceased might commit suicide". Reversing the judgment of the High Court, the petition under Section 482 was allowed and the FIR was quashed.

Apart from ***M Arjunan* v. *State (represented by its Inspector of Police)***,[9] ***Ude Singh* v. *State of Haryana***,[10] ***Rajesh* v. *State of Haryana***,[11] ***Gurcharan Singh* v. *State of Punjab***,[12] ***Vaijnath Kondiba Khandke* v. *State of Maharashtra***,[13] the Apex Court also referred to ***Praveen Pradhan* v. *State of Uttaranchal***,[14] wherein the contents of the FIR indicated that the deceased had been subjected to harassment persistently and continuously and this was coupled by words used by the accused which led to the commission of suicide.

In ***Narayan Malhari Thorat* v. *Vinayak Deorao Bhagat***[15] there was a specific allegation in the FIR bearing on the imputation that the respondent had actively facilitated the commission of suicide by continuously harassing the spouse of the victim and in failing to rectify his conduct despite the efforts of the victim. The Apex Court then said the following:

> **69.** Now in this backdrop, it becomes necessary to advert briefly to the contents of the FIR in the present case. The FIR recites that the spouse of the informant had a company carrying on the business of architecture, interior design and engineering consultancy. According to the informant, her husband was over the previous two years "having pressure as he did not receive the money of work carried out by him". The FIR recites that the deceased had called at the office of the appellant and spoken to his accountant for the payment of money. Apart from the above statements, it has been stated that the deceased left behind a suicide note stating that his "money is stuck and following owners of respective companies are not paying our legitimate

[7] (2010) 1 SCC 707
[8] (2010) 8 SCC 628
[9] (2019) 3 SCC 315
[10] Criminal Appeal No. 233 of 2010 decided on 25 July 2019
[11] Criminal Appeal No. 93 of 2019 decided on 18 January 2019
[12] Criminal Appeal No. 40 of 2011 decided on 1 October 2020
[13] (2018) 7 SCC 781
[14] (2012) 9 SCC 734
[15] (2019) 13 SCC 598

dues". ***Prima facie, on the application of the test which has been laid down by this Court in a consistent line of authority which has been noted above, it cannot be said that the appellant was guilty of having abetted the suicide within the meaning of Section 306 of the IPC***. These observations, we must note, are *prima facie* at this stage since the High Court is still to take up the petition for quashing. Clearly however, the High Court in failing to notice the contents of the FIR and to make a *prima facie* evaluation abdicated its role, functions and jurisdiction when seized of a petition under Section 482 of the CrPC. ***The High Court recited the legal position that the jurisdiction to quash under Section 482 has to be exercised sparingly. These words, however, are not meaningless incantations, but have to be assessed with reference to the contents of the particular FIR before the High Court***. If the High Court were to carry out a *prima facie* evaluation, it would have been impossible for it not to notice the disconnect between the FIR and the provisions of Section 306 of the IPC. The failure of the High Court to do so has led it to adopting a position where it left the appellant to pursue his remedies for regular bail under Section 439. The High Court was clearly in error in failing to perform a duty which is entrusted to it while evaluating a petition under Section 482 albeit at the interim stage.

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71. While considering ***an application for the grant of bail under Article 226 in a suitable case,*** the High Court must consider the settled factors which emerge from the precedents of this Court. These factors can be summarized as follows:

(i) The nature of the alleged offence, the nature of the accusation and the severity of the punishment in the case of a conviction;

(ii) Whether there exists a reasonable apprehension of the accused tampering with the witnesses or being a threat to the complainant or the witnesses;

(iii) The possibility of securing the presence of the accused at the trial or the likelihood of the accused fleeing from justice;

(iv) The antecedents of and circumstances which are peculiar to the accused;

(v) Whether *prima facie* the ingredients of the offence are made out, on the basis of the allegations as they stand, in the FIR; and

(vi) The significant interests of the public or the State and other similar considerations.

72. These principles have evolved over a period of time and emanate from the following (among other) decisions : *Prahlad Singh Bhati* v. *NCT, Delhi*[(2001) 4 SCC 280]; *Ram Govind Upadhyay* v. *Sudarshan Singh*[(2002) 3 SCC 598]; *State of UP* v. *Amarmani Tripathi* [(2005) 8 SCC 21]; *Prasanta Kumar Sarkar* v. *Ashis Chatterjee*[(2010) 14 SCC 496]; *Sanjay Chandra* v. *CBI* [(2012) 1 SCC 40]; and *P. Chidambaram* v. *Central Bureau of Investigation*[Criminal Appeal No. 1605 of 2019 decided on 22 October 2019].

73. These principles are equally applicable to the exercise of jurisdiction under Article 226 of the Constitution when the court is called upon to secure the liberty of

the accused. The High Court must exercise its power with caution and circumspection, cognizant of the fact that this jurisdiction is not a ready substitute for recourse to the remedy of bail under Section 439 of the CrPC.....