A DR. ASHWANI KUMAR

v.

UNION OF INDIA AND ANOTHER

(Miscellaneous Application No. 2560 of 2018)

B In

(Writ Petition (Civil) No. 738 of 2016)

SEPTEMBER 05, 2019

[RANJAN GOGOI, CJI, DINESH MAHESHWARI AND
C **SANJIV KHANNA, JJ.]**

Custodial Torture: Writ petition filed under Art.32 of the Constitution – Seeking effective and purposive legislative framework/law based upon the 'Convention against torture and Other Cruel, inhuman or Degrading Treatment or Punishment'
D *adopted by the United Nations General Assembly – Prayer of applicant was that custodial torture being crime against humanity which directly infracts and violates Art.21, this court should invoke and exercise jurisdiction under Arts.141, 142 for protection and advancement of human dignity, a core and non-negotiable*
E *constitutional right – Held: It is true that in some extraordinary cases where notwithstanding the institutional reasons and the division of power, this Court has laid down general rules/guidelines when there has been a clear, substantive and gross human rights violation, which significantly outweighed and dwarfed any legitimising concerns based upon separation of powers, lack of*
F *expertise and uncertainty of the consequences – However, a mere allegation of violation of human rights or a plea raising environmental concerns cannot be the 'bright-line' to hold that self-restraint must give way to judicial legislation – Where and when directions should be issued by Court are questions and issues*
G *involving constitutional dilemmas that mandate a larger debate and discussion – Such directions are to be issued with great care and circumspection and certainly not when the matter is already pending consideration and debate with the executive or Parliament – This is not a case which requires Court's intervention to give a suggestion for need to frame a law as the matter is already pending active*

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consideration – Any direction at this stage would be interpreted as judicial participation in the enactment of law – When the matter is already pending consideration and is being examined for the purpose of legislation, it would not be appropriate for this Court to enforce its opinion, be it in the form of a direction or even a request, for it would clearly undermine and conflict with the role assigned to the judiciary under the Constitution – No directions can be given to the executive to ratify the UN Convention for it would virtually amount to issuing directions to enact laws in conformity with the UN Convention – Constitution of India – Arts.21, 32, 141, 142.

Supreme Court Employees' Welfare Association v. Union of India and Another **(1989) 4 SCC 187 : [1989] 3 SCR 488;** *V.K. Naswa v. Home Secretary, Union of India and Others* **(2012) 2 SCC 542 : [2012] 2 SCR 912;** *State of Himachal Pradesh and Others v. Satpal Saini* **(2017) 11 SCC 42 : [2017] 1 SCR 658 – relied on.**

Union of India and Another v. *Azadi Bachao Andolan and Another* **(2004) 10 SCC 1 : [2003] 4 Suppl. SCR 222;** *Rosiline George* v. *Union of India and Others* **(1994) 2 SCC 80 : [1993] 3 Suppl. SCR 141;** *Sakshi* v. *Union of India and Others* **(2004) 5 SCC 518 : [2004] 2 Suppl. SCR 723;** *P.B. Samant and Others* v. *Union of India and Others* **AIR 1994 Bom 323;** *Sheela Barse v. State of Maharashtra* **(1983) 2 SCC 96 : [1983] 2 SCR 337;** *State of Madhya Pradesh* v. *Shyamsunder Trivedi and Others* **(1995) 4 SCC 262 : [1995] 1 Suppl. SCR 44;** *Nilabati Behera (Smt) alias Lalita Behera (Through the Supreme Court Legal Aid Committee) v. State of Orissa and Others* **(1993) 2 SCC 746 : [1993] 2 SCR 581;** *Prithipal Singh and Others* v. *State of Punjab and Another* **(2012) 1 SCC 10 : [2012] 14 SCR 862;** *S. Nambi Narayanan* v. *Siby Mathews and Others* **(2018) 10 SCC 804 : [2018] 12 SCR 51 – referred to.**

Regina (Countryside Alliance) and Others v. Attorney General and Another **(2008) 1 AC 719 – referred to.**

Constitution of India: Separation of powers – India has a written Constitution which is supreme and adumbrates as well as

A *divides powers, roles and functions of the three wings of the State - the legislature, the executive and the judiciary – These divisions are boundaries and limits fixed by the Constitution to check and prevent transgression by any one of the three branches into the powers, functions and tasks that fall within the domain of the other wing – The three branches have to respect the constitutional division and not disturb the allocation of roles and functions between the triad – Adherence to the constitutional scheme dividing the powers and functions is a guard and check against potential abuse of power and the rule of law is secured when each branch observes the constitutional limitations to their powers, functions and roles – Modern theory of separation of powers does not accept that the three branches perform mutually isolated roles and functions and accepts a need for coordinated institutional effort for good governance, albeit emphasise on benefits of division of power and labour by accepting the three wings do have separate and distinct roles and functions that are defined by the Constitution – All the institutions must act within their own jurisdictions and not trespass into the jurisdiction of other – By segregating the powers and functions of the institutions, the Constitution ensures a structure where the institutions function as per their institutional strengths.*

Constitution of India: Powers and functions of legislature – Held: The legislature as an elected and representative body enacts laws to give effect to and fulfil democratic aspirations of the people – Legislature functions as a deliberative and representative body – It is directly accountable and answerable to the electorate and citizens of this country – This representativeness and principle of accountability is what gives legitimacy to the legislations and laws made by Parliament or the state legislatures.

Constitution of India: Arts.73 and 162 – Powers and functions of executive – Held: The executive has the primary responsibility of formulating government policies and proposing legislations which when passed by the legislature become laws – By virtue of Arts.73 and 162 of the Constitution, the powers and functions of the executive are wide and expansive, as they cover matters in respect of which Parliament/state legislature can make laws and vests with the executive the authority and jurisdiction exercisable by the Government of India or the State Government, as the case may be –

As a delegate of the legislative bodies and subject to the terms of the legislation, the executive makes second stage laws known as 'subordinate or delegated legislation' – In fields where there is no legislation, the executive has the power to frame policies, schemes, etc., which is co-extensive with the power of Parliament or the state legislature to make laws – At the same time, the political executive is accountable to the legislature and holds office till they enjoy the support and confidence of the legislature – Thus, there is interdependence, interaction and even commonality of personnel/ members of the legislature and the executive – The executive, therefore, performs multi-functional role and is not monolithic.

Constitution of India: Role of judiciary – Judges unlike members of the legislature represent no one, strictly speaking not even the citizens – Judges are not accountable and answerable as the political executive is to the legislature and the elected representatives are to the electorate – This independence ensures that the judges perform the constitutional function of safeguarding the supremacy of the Constitution while exercising the power of judicial review in a fair and even-handed manner without pressure and favours – As an interpreter, guardian and protector of the Constitution, the judiciary checks and curbs violation of the Constitution by the Government when they overstep their constitutional limits, violate the basic structure of the Constitution, infringe fundamental rights or act contrary to law – Power of judicial review has expanded taking within its ambit the concept of social and economic justice – Yet, while exercising this power of judicial review, the courts do not encroach upon the field marked by the Constitution for the legislature and the executive, as the courts examine legality and validity of the legislation or the governmental action, and not the wisdom behind the legislative measure or relative merits or demerits of the governmental action – Neither does the Constitution permit the courts to direct, advise or sermonise others in the spheres reserved for them by the Constitution, provided the legislature or the executive do not transgress their constitutional limits or statutory conditions.

Doctrines/Principles: Doctrine of separation of power – The doctrine restrains the legislature from declaring the judgment of a court to be void and of no effect, while the legislature still possesses

A *the legislative competence of enacting a validating law which remedies the defect pointed out in the judgment – However, this does not ordain and permit the legislature to declare a judgment as invalid by enacting a law, but permits the legislature to take away the basis of the judgment by fundamentally altering the basis on*
B *which it was pronounced – Therefore, while exercising all important checks and balances function, each wing should be conscious of the enormous responsibility that rests on them to ensure that institutional respect and comity is maintained – Constitution of India – Judgment/Order – Legislation.*

C *His Holiness Kesavananda Bharati Sripadagalvaru* v. *State of Kerala and Another* **(1973) 4 SCC 225 : [1973] 0 Suppl. SCR 1;** *State of Rajasthan and Others v. Union of India and Others* **(1977) 3 SCC 592 : [1978] 1 SCR 1;** *I.R. Coelho (Dead) by LRs.* v. *State of Tamil Nadu* **(2007) 2 SCC 1 : [2007] 1 SCR 706;** *State of Tamil*
D *Nadu v. State of Kerala* **(2014) 12 SCC 696 : [2014] 12 SCR 875 – followed**

Binoy Viswam v. *Union of India and Others* **(2017) 7 SCC 59 : [2017] 7 SCR 1;** *Kalpana Mehta and Others* v. *Union of India and Others* **(2018) 7 SCC 1 : [2018] 4 SCR 1 – relied on**
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Doctrines/Principles: Doctrine of separation of power – Distinction between interpretation and adjudication by the courts on one hand and the power to enact legislation by the legislature on the other – Adjudication results in what is often described as
F *judge made law, but the interpretation of the statutes and the rights in accordance with the provisions of Articles 14, 19 and 21 in the course of adjudication is not an attempt or an act of legislation by the judges – Legislature itself entrusts the judiciary to lay down parameters in the form of precedents which is oft-spoken as judge*
G *made law – Such law, even if made by the judiciary, would not infringe the doctrine of separation of powers and is in conformity with the constitutional functions – Thus, law-making within certain limits is a legitimate element of a judge's role, if not inevitable – A judge has to adjudicate and decide on the basis of legal provisions, which when indeterminate on a particular issue require elucidation*
H *and explanation – This requires a judge to interpret the provisions*

to decide the case and, in this process, he may take recourse and rely upon fundamental rights, including the right to life, but even then he does not legislate a law while interpreting such provisions – Such interpretation is called 'judge made law' but not legislation – Constitution of India – Judge made law.

'The Constitutional Separation of Powers' by **Aieleen Kavanagh – referred to.**

Legislation: Power/Duty of legislature and judiciary – Distinction between – Held: Legislating or law-making involves a choice to prioritise certain political, moral and social values over the others from a wide range of choices that exist before the legislature – It is a balancing and integrating exercise to give expression/meaning to diverse and alternative values and blend it in a manner that it is representative of several viewpoints so that it garners support from other elected representatives to pass institutional muster and acceptance – Legislation, in the form of an enactment or laws, lays down broad and general principles – It is the source of law which the judges are called upon to apply – Judges, when they apply the law, are constrained by the rules of language and by well identified background presumptions as to the manner in which the legislature intended the law to be read – Application of law by the judges is not synonymous with the enactment of law by the legislature – Judges have the power to spell out how precisely the statute would apply in a particular case – In this manner, they complete the law formulated by the legislature by applying it – This power of interpretation or the power of judicial review is exercised post the enactment of law, which is then made subject matter of interpretation or challenge before the courts.

Interpretation of statutes: While exercising the interpretative power, the courts can draw strength from the spirit and propelling elements underlying the Constitution to realise the constitutional values but must remain alive to the concept of judicial restraint which requires the judges to decide cases within defined limits of power – Thus, the courts would not accept submissions and pass orders purely on a matter of policy or formulate judicial legislation which is for the executive or elected representatives of the people to enact.

A *D.K. Basu* v. *State of West Bengal* **(1997) 1 SCC 416 : [1996] 10 Suppl. SCR 284;** *Sunil Batra* v. *Delhi Administration and Others* **(1978) 4 SCC 494 : 1979 (1) SCR 392;** *Francis Coralie Mullin* v. *Administrator, Union Territory of Delhi and Others* **(1981) 1 SCC 608**
B **: 1981 (2) SCR 516;** *K.S. Puttaswamy and Another* v. *Union of India and Others* **(2017) 10 SCC 1 : [2017] 10 SCR 569;** *Romila Thapar and Others* v. *Union of India and Others* **(2018) 10 SCC 753 : [2018] 11 SCR 951;** *Tehseen S. Poonawalla* v. *Union of India and*
C *Others* **(2018) 9 SCC 501 : [2018] 9 SCR 291;** *Vishaka and Others* v. *State of Rajasthan and Others* **(1997) 6 SCC 241 : [1997] 3 Suppl. SCR 404;** *Vineet Narain and Others v. Union of India and Another* **(1998) 1 SCC 226 : [1997] 6 Suppl. SCR 595;** *Destruction of*
D *Public and Private Properties, In RE* v. *State of Andhra Pradesh and Others* **(2009) 5 SCC 212;** *Lakshmi Kant Pandey* v. *Union of India* **(1984) 2 SCC 244;** *State of West Bengal and Others* v. *Sampat Lal and Others* **(1985) 1 SCC 317;** *K. Veeraswami* v. *Union of India*
E *and Others* **(1991) 3 SCC 655;** *Delhi Judicial Service Association, Tis Hazari Court, Delhi* v. *State of Gujarat and Others* **(1991) 4 SCC 406;** *Mahender Chawla and Others* v. *Union of India and Others* **(2018) SCC Online 2679;** *Shri Prithvi Cotton Mills Ltd. and Another v. Broach Borough Municipality and Others* **(1969) 2 SCC**
F **283 : [1970] 1 SCR 388;** *Union of India* v. *V. Sriharan alias Murugan and Others* **(2016) 7 SCC 1 : [2015] 14 SCR 613;** *P. Ramachandra Rao* v. *State of Karnataka* **(2002) 4 SCC 578;** *Bhim Singh* v. *Union of India* **(2010) 5 SCC 538 : [2010] 6 SCR 218;** *Manoj Narula* v. *Union*
G *of India* **(2014) 9 SCC 1 : [2014] 9 SCR 965;** *Gainda Ram and Others* v. *Municipal Corporation of Delhi and Others* **(2010) 10 SCC 715 : [2010] 12 SCR 996;** *Common Cause: A Registered Society* v. *Union of India* (2017) **7 SCC 158 : [2017] 3 SCR 291 – referred to.**

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Case Law Reference

[1996] 10 Suppl. SCR 284	**referred to**	**Para 4**
[1979] 1 SCR 392	**referred to**	**Para 4**
[1981] 2 SCR 516	**referred to**	**Para 4**
[2017] 10 SCR 569	**referred to**	**Para 4**
[2018] 11 SCR 951	**referred to**	**Para 4**
[2018] 9 SCR 291	**referred to**	**Para 4**
[1997] 3 Suppl. SCR 404	**referred to**	**Para 4**
[1997] 6 Suppl. SCR 595	**referred to**	**Para 4**
(2009) 5 SCC 212	**referred to**	**Para 4**
(1984) 2 SCC 244	**referred to**	**Para 4**
(1985) 1 SCC 317	**referred to**	**Para 4**
(1991) 3 SCC 655	**referred to**	**Para 4**
(1991) 4 SCC 406	**referred to**	**Para 4**
(2018) SCC Online 2679	**referred to**	**Para 4**
[1973] 0 Suppl. SCR 1	**followed**	**Para 14**
[1978] 1 SCR 1	**followed**	**Para 14**
[2007] 1 SCR 706	**followed**	**Para 14**
[2014] 12 SCR 875	**followed**	**Para 14**
[1970] 1 SCR 388	**referred to**	**Para 14**
[2017] 7 SCR 1	**relied on**	**Para 15**
[2018] 4 SCR 1	**relied on**	**Para 16**
[2015] 14 SCR 613	**referred to**	**Para 21**
(2002) 4 SCC 578	**referred to**	**Para 22**
[2010] 6 SCR 218	**referred to**	**Para 24**
[1989] 3 SCR 488	**relied on**	**Para 28**
[2012] 2 SCR 912	**relied on**	**Para 29**
[2017] 1 SCR 658	**relied on**	**Para 30**
[2014] 9 SCR 965	**referred to**	**Para 30**
[2010] 12 SCR 996	**referred to**	**Para 30**

A	**[2017] 3 SCR 291**	**referred to**	**Para 31**
	[2003] 4 Suppl. SCR 222	**referred to**	**Para 34**
	[1993] 3 Suppl. SCR 141	**referred to**	**Para 34**
	[2004] 2 Suppl. SCR 723	**referred to**	**Para 34**
B	**AIR 1994 Bom 323**	**referred to**	**Para 34**
	[1983] 2 SCR 337	**referred to**	**Para 35**
	[1993] 2 SCR 581	**referred to**	**Para 36**
	[1995] 1 Suppl. SCR 44	**referred to**	**Para 36**
C	**[2018] 12 SCR 51**	**referred to**	**Para 39**
	[2012] 14 SCR 862	**referred to**	**Para 40**

CIVIL ORIGINAL JURISDICTION: Miscellaneous Application No. 2560 of 2018. Writ Petition (Civil) No. 738 of 2016

D

Mr. Colin Gonsalves, Sr. Adv. (AC)

K. K. Venugopal, AG, Ms. Madhavi Divan, ASG, Ms. Divia Bang, Ms. Raushan Tara Jaswal, Ms. Tanushree Nigam, R. Balasubramanian, Ms. Shraddha Deshmukh, B. V. Balram Das, Siddhesh Kotwal, E Ms. Bansuri Swaraj, Ms. Shreya Bhatnagar, Raghunatha Sethupathy, Gagan Narang, Ms. Arshiya Ghose, Ms. Astha Sharma, Ms. Shobha Gupta, Sourav Roy, Ms. Swarupama Chaturvedi, Anoop Kandari, Nishant R. Katneshwarkar, V. N. Raghupathy, Sibo Sankar Mishra, Niranjan Sahu, Leishangthem Roshmani Kh., Ms. Anupama Ngangom, Ms. Maibam Babina, M. Yogesh Kanna, S. Partha Sarathi, S. Raja F Rajeshwaran, Shuvodeep Roy, Kabir Shankar Bose, Rijuk Sarkar, K. V. Jagdishvaran, Mrs. G. Indira, Suhaan Mukerji, Ms. Astha Sharma, Amit Verma, Ms. Dimple Nagpal, (For M/s PLR Chambers & Co.), M. Shoeb Alam, Ujjwal Singh, Gautam Prabhakar, Mojahid Karim Khan, Mrs. K. Enatoli Sema, Amit Kumar Singh, Ms. Aruna Mathur, Avneesh G Arputham, Ms. Anuradha Arputham, Ms. Geetanjali, G. Prakash, Jishnu M. L., Mrs. Priyanka Prakash, Mrs. Beena Prakash, V. G. Pragasam, S. Prabu Ramasubramanian, S. Manuraj, Advs. for the appearing parties.

Dr. Ashwini Kumar- Applicant-in-person.

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The Order of the Court was passed by

SANJIV KHANNA, J.

1. This order would dispose of Miscellaneous Application No. 2560 of 2018 filed by Dr. Ashwani Kumar, applicant in-person, who is a senior advocate and a former Law Minister and Member of Parliament, praying for the following relief:

> "In the aforesaid premises, it is therefore respectfully prayed that since no action has been taken by the Government pursuant to the statement of the Hon'ble Attorney General, the stand taken by the National Human Rights Commission and the Law Commission of India in its report of October 2017 and because the merit of the prayer is virtually admitted and conceded before this Hon'ble Court, the National Human Rights Commission, the Law Commission of India and by Select Committee of Parliament, as an integral constituent of the right to life with dignity under Article 21, this Hon'ble Court may be pleased to direct the Central Government to enact a suitable stand-alone, comprehensive legislation against custodial torture as it has directed in the case of mob violence/lynching vide its judgment 17th July 2018."

2. The applicant had filed the above-captioned Writ Petition (Civil) No. 738 of 2016 under Article 32 of the Constitution of India for an effective and purposive legislative framework/law based upon the 'Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' ("UN Convention", for short) adopted by the United Nations General Assembly and opened for signature, ratification and accession on 10th December 1984. India had signed the UN Convention on 14th October 1997. However, India has not ratified the UN Convention.

3. Writ Petition (Civil) No. 738 of 2016 was disposed of vide order dated 27th November 2017, which reads as under:

> "Mr. K.K. Venugopal, learned Attorney General for India submitted that the prayer made in the writ petition has been the subject matter of discussion in the Law Commission and the Law Commission has already made certain recommendations. He would further submit that the report is being seriously considered by the Government. In view of the aforesaid statement, we do

not intend to keep this writ petition pending and it is accordingly disposed of. There shall be no order as to costs."

4. The applicant predicating his case on the right to life and liberty and judgments of this Court had argued that custodial torture being crime against humanity which directly infracts and violates Article 21 of the Constitution, this Court should invoke and exercise jurisdiction under Articles 141 and 142 of the Constitution for the protection and advancement of human dignity, a core and non-negotiable constitutional right. In ***D.K. Basu*** v. ***State of West Bengal***[1] custodial torture and violence was described as a wound inflicted on the soul, so painful and paralysing that it engenders fear, rage, hatred and despair, and denigrates the individual. In ***Sunil Batra*** v. ***Delhi Administration and Others***[2], this Court had observed that the prisoners have enforceable liberties, though devalued but never demonetised and, therefore, it is within the jurisdictional reach and range of this Court's writ to deal with prison and police caprice and cruelty. Similarly, in ***Francis Coralie Mullin*** v. ***Administrator, Union Territory of Delhi and Others***[3], this Court had observed that torture in any form is inhuman, degrading and offensive to human dignity and constitutes an inroad into the right to life and is prohibited by Article 21 of the Constitution, for no law authorises and no procedure permits torture or cruelty, inhuman or degrading treatment. Reference was made to Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights which prohibits torture in all forms in absolute terms. Recently, in ***K.S. Puttaswamy and Another*** v. ***Union of India and Others***[4] this Court had once again emphased on the right to human dignity which, first and foremost, means the dignity of each human being 'as a human being'. When human dignity in a person's life is infringed and physical or mental welfare is negated and harmed, the Court would intervene to protect and safeguard constitutional values. Reference was also made to the decision in ***Romila Thapar and Others*** v. ***Union of India and Others***[5] claiming that despite existing law and repeated judicial decisions, custodial torture still remains rampant and widespread in India. Our attention was drawn to the report of Asian Centre for Human Rights which was based, *inter alia*, on the

[1] (1997) 1 SCC 416
[2] (1978) 4 SCC 494
[3] (1981) 1 SCC 608
[4] (2017) 10 SCC 1
[5] (2018) 10 SCC 753

information and data furnished by the Government of India in Parliament, acknowledging 1674 custodial deaths, including 1530 deaths in judicial custody and 144 deaths in police custody during the period 1st April 2017 to 28th February 2018. India has consistently and unequivocally condemned and deprecated custodial torture at international forums and has signed the UN Convention but the Government's reluctance to ratify the UN Convention, which envisages a comprehensive and standalone legislation, it was argued, is baffling and unintelligible. Indian statutory law at present is not in harmony and falls short on several accounts, both procedurally and substantively, with the UN Convention and, thus, there is an urgent and immediate need for an all-embracing standalone enactment based on the UN Convention. Articles 51(c) and 253 of the Constitution underscore the 'constitutional imperative' of aligning domestic laws with international law and obligations. The legislation as prayed, it was submitted, would fulfil the constitutional obligations of the Government of India and the constitutional goals which the Government ought to achieve. Accordingly, the directions as prayed for would not entrench upon Parliament's domain to enact laws as they directly relate to the protection and preservation of human rights. The directions are justified and necessary in view of the delay and inaction in enacting the law, notwithstanding the recommendations made by the National Human Rights Commission, report of the Law Commission of India in October 2017, and report of the Select Committee of Parliament dated 2th December 2010 and repeated commitments made by the Indian Government. Reference was made to ***Tehseen S. Poonawalla*** v. ***Union of India and Others***[6] wherein this Court had highlighted the need for enactment of a suitable legislation to deal with mob violence/lynching in the country. Reliance was placed on judgments of this Court in ***Vishaka and Others*** v. ***State of Rajasthan and Others***[7], ***Vineet Narain and Others*** v. ***Union of India and Another***[8], ***Destruction of Public and Private Properties, In RE*** v. ***State of Andhra Pradesh and Others***[9], ***Lakshmi Kant Pandey*** v. ***Union of India***[10], ***State of West Bengal and Others*** v. ***Sampat Lal and Others***[11], ***K. Veeraswami*** v. ***Union of India***

A B C D E F G H

[6] (2018) 9 SCC 501
[7] (1997) 6 SCC 241
[8] (1998) 1 SCC 226
[9] (2009) 5 SCC 212
[10] (1984) 2 SCC 244
[11] (1985) 1 SCC 317

A ***and Others***[12] and ***Delhi Judicial Service Association, Tis Hazari Court, Delhi*** v. ***State of Gujarat and Others***[13]. While referring to ***Mahender Chawla and Others*** v. ***Union of India and Others***[14], and other decisions including ***Tehseen S. Poonawalla*** (supra), it was argued that this Court has not flinched from suggesting, recommending, advising, guiding and directing the Government of India with respect to statutory B enactments. It was submitted that the delay and inaction in implementing the constitutional obligation relates back to the year 1997 when India had signed the UN Convention, but the Government has failed to enact a comprehensive legislation despite commitments and recommendations made and noticed above. This, it was submitted, reflects unreasonable C and unacceptable conduct of the Government in shielding infringement of Article 21 and violates Article 14 of the Constitution of India. Thus, the Court may issue directions to the Union of India to enact a law dealing with custodial torture in terms of the U.N. Convention.

5. It may be noted here that the applicant was the Chairperson of D the Select Committee of the Rajya Sabha that had submitted the report on custodial torture depicting the need for a comprehensive standalone legislation.

6. Respondent No.1 – Union of India, in its response, has stated that the draft legislation prepared on the basis of the Law Commission's E report is under active consideration and was referred to stakeholders, that is, the States and Union Territories for their inputs and suggestions. It was highlighted that the 'Criminal Laws' and the 'Criminal Procedure' fall in the Concurrent List of the Seventh Schedule to the Constitution of India and, therefore, comments and views of the State Governments/ Union Territories were solicited on the recommendations made by the F Law Commission of India. There may have been some delay as some States did not furnish their response, albeit the Union of India took steps by sending reminders on 27th June 2018, 27th November 2018 and 20th December 2018. Subsequent affidavit dated 12th February 2019 discloses that all States and Union Territories have filed their inputs/suggestions G and that the question of enacting a legislation is under consideration. A legislation of this nature given the nuances, niceties and spectrum of divergent views and choices is a complex and challenging task. Laws

[12] (1991) 3 SCC 655
[13] (1991) 4 SCC 406
H [14] (2018) SCC Online 2679

are legislated after due debate, deliberation and once the required consensus is formed. Any direction by this Court requiring the Parliament to frame a law or modify an enactment in a particular manner would violate doctrine of separation of powers, a basic feature of the Constitution. Parliament as an elected body representing the citizenry is bestowed with constitutional power to enact laws, which create rights, obligations and duties with attendant penalties. Existing municipal laws governing the field as interpreted by the Courts apply in matters of custodial torture.

7. We have in addition to Dr. Ashwani Kumar and Mr. K.K. Venugopal, learned Attorney General of India, heard Mr. Colin Gonsalves, senior advocate and *amicus curiae*, and Ms. Shobha Gupta, counsel for the National Human Rights Commission, the second respondent before us.

8. At the outset, we must clarify that by the present order, we would be deciding a very limited controversy, viz. the prayer of the applicant that this Court should direct Parliament to enact a standalone and comprehensive legislation against custodial torture based on the UN Convention. The prayer made requires the Court to examine and answer the question that whether within the constitutional scheme, this Court can and should issue any direction to the Parliament to enact a new law based on the UN Convention.

9. Classical or pure theory of rigid separation of powers as advocated by Montesquieu which forms the bedrock of the American Constitution is clearly inapplicable to parliamentary form of democracy as it exists in India and Britain, for the executive and legislative wings in terms of the powers and functions they exercise are linked and overlap and the personnel they equip are to an extent common. However, unlike Britain, India has a written Constitution, which is supreme and adumbrates as well as divides powers, roles and functions of the three wings of the State – the legislature, the executive and the judiciary. These divisions are boundaries and limits fixed by the Constitution to check and prevent transgression by any one of the three branches into the powers, functions and tasks that fall within the domain of the other wing. The three branches have to respect the constitutional division and not disturb the allocation of roles and functions between the triad. Adherence to the constitutional scheme dividing the powers and functions is a guard and check against potential abuse of power and the rule of law is secured when each

A branch observes the constitutional limitations to their powers, functions and roles.

10. Modern theory of separation of powers does not accept that the three branches perform mutually isolated roles and functions and accepts a need for coordinated institutional effort for good governance, albeit emphasises on benefits of division of power and labour by accepting the three wings do have separate and distinct roles and functions that are defined by the Constitution. All the institutions must act within their own jurisdiction and not trespass into the jurisdiction of the other. Beyond this, each branch must support each other in the general interest of good governance. This separation ensures the rule of law in at least two ways. It gives constitutional and institutional legitimacy to the decisions by each branch, that is, enactments passed by the legislature, orders and policy decisions taken by the executive and adjudication and judgments pronounced by the judiciary in exercise of the power of judicial review on validity of legislation and governmental action. By segregating the powers and functions of the institutions, the Constitution ensures a structure where the institutions function as per their institutional strengths. Secondly, and somewhat paradoxically, it creates a system of checks and balances as the Constitution provides a degree of latitude for interference by each branch into the functions and tasks performed by the other branch. It checks concentration of power in a particular branch or an institution.

11. The legislature as an elected and representative body enacts laws to give effect to and fulfil democratic aspirations of the people. The procedures applied are designed to give careful thought and consideration to wide and divergent interests, voices and all shades of opinion from different social and political groups. Legislature functions as a deliberative and representative body. It is directly accountable and answerable to the electorate and citizens of this country. This representativeness and principle of accountability is what gives legitimacy to the legislations and laws made by Parliament or the state legislatures. Article 245 of the Constitution empowers Parliament and the state legislatures to enact laws for the whole or a part of the territory of India, and for the whole or a part of the State respectively, after due debate and discussion in Parliament/ the state assembly.

12. The executive has the primary responsibility of formulating government policies and proposing legislations which when passed by

the legislature become laws. By virtue of Articles 73 and 162 of the Constitution, the powers and functions of the executive are wide and expansive, as they cover matters in respect of which Parliament/state legislature can make laws and vests with the executive the authority and jurisdiction exercisable by the Government of India or the State Government, as the case may be. As a delegate of the legislative bodies and subject to the terms of the legislation, the executive makes second stage laws known as 'subordinate or delegated legislation'. In fields where there is no legislation, the executive has the power to frame policies, schemes, etc., which is co-extensive with the power of Parliament or the state legislature to make laws. At the same time, the political executive is accountable to the legislature and holds office till they enjoy the support and confidence of the legislature. Thus, there is interdependence, interaction and even commonality of personnel/ members of the legislature and the executive. The executive, therefore, performs multi-functional role and is not monolithic. Notwithstanding this multifunctional and pervasive role, the constitutional scheme ensures that within this interdependence, there is a degree of separation that acts as a mechanism to check interference and protect the non-political executive. Part XIV of the Constitution relates to "Services under the Union and the States", i.e., recruitment, tenure, terms and conditions of service, etc., of persons serving the Union or a State and accords them a substantial degree of protection. "Office of profit" bar, as applicable to legislators and prescribed vide Articles 102 and 191, is to ensure separation and independence between the legislature and the executive.

13. The most significant impact of the doctrine of separation of powers is seen and felt in terms of the institutional independence of the judiciary from other organs of the State. Judiciary, in terms of personnel, the Judges, is independent. Judges unlike members of the legislature represent no one, strictly speaking not even the citizens. Judges are not accountable and answerable as the political executive is to the legislature and the elected representatives are to the electorate. This independence ensures that the judges perform the constitutional function of safeguarding the supremacy of the Constitution while exercising the power of judicial review in a fair and even-handed manner without pressure and favours. As an interpreter, guardian and protector of the Constitution, the judiciary checks and curbs violation of the Constitution by the Government when they overstep their constitutional limits, violate the basic structure of the Constitution, infringe fundamental rights or act contrary to law. Power

A of judicial review has expanded taking within its ambit the concept of social and economic justice. Yet, while exercising this power of judicial review, the courts do not encroach upon the field marked by the Constitution for the legislature and the executive, as the courts examine legality and validity of the legislation or the governmental action, and not the wisdom behind the legislative measure or relative merits or demerits B of the governmental action. Neither does the Constitution permit the courts to direct, advise or sermonise others in the spheres reserved for them by the Constitution, provided the legislature or the executive do not transgress their constitutional limits or statutory conditions. Referring to the phrase "all power is of an encroaching nature", which the judiciary C checks while exercising the power of judicial review, it has been observed[15] that the judiciary must be on guard against encroaching beyond its bounds since the only restraint upon it is the self-imposed discipline of self-restraint. Independence and adherence to constitutional accountability and limits while exercising the power of judicial review gives constitutional legitimacy to the court decisions. This is essence of D the power and function of judicial review that strengthens and promotes the rule of law.

14. Constitutional Bench judgments in ***His Holiness Kesavananda Bharati Sripadagalvaru*** v. ***State of Kerala and Another***[16] , ***State of Rajasthan and Others*** v. ***Union of India and Others***[17]**, *I.R. Coelho (Dead) by LRs.*** v. ***State of Tamil Nadu***[18] and ***State of Tamil Nadu v.*** E

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[15] *Asif Hameed & Others v. State of Jammu & Kashmir & Others,* 1989 Supp. (2) SCC 364 quoting with approval dissenting opinion of Frankfurter J. in *Trop v. Dulles*. Frankfurter J. had observed:

> "Rigorous observance of the difference between limits of power and wise exercise of power — between questions of authority and questions of prudence — requires the most alert appreciation of this decisive but subtle relationship of two concepts that too easily coalesce. No less does it require a disciplined will to adhere to the difference. It is not easy to stand aloof and allow want of wisdom to prevail to disregard one's own strongly held view of what is wise in the conduct of affairs. But it is not the business of this Court to pronounce policy. It must observe a fastidious regard for limitations on its own power, and this precludes the court's giving effect to its own notions of what is wise or politic. That self-restraint is of the essence in the observance of the judicial oath, for the Constitution has not authorized the judges to sit in judgment on the wisdom of what Congress and the executive branch do."

[16] (1973) 4 SCC 225

[17] (1977) 3 SCC 592

[18] (2007) 2 SCC 1

State of Kerala[19] have uniformly ruled that the doctrine of separation of powers, though not specifically engrafted, is constitutionally entrenched and forms part of the basic structure as its sweep, operation and visibility are apparent. Constitution has made demarcation, without drawing formal lines, amongst the three organs with the duty of the judiciary to scrutinise the limits and whether or not the limits have been transgressed. These judgments refer to the constitutional scheme incorporating checks and balances. As a sequitur, the doctrine restrains the legislature from declaring the judgment of a court to be void and of no effect, while the legislature still possesses the legislative competence of enacting a validating law which remedies the defect pointed out in the judgment.[20] However, this does not ordain and permit the legislature to declare a judgment as invalid by enacting a law, but permits the legislature to take away the basis of the judgment by fundamentally altering the basis on which it was pronounced. Therefore, while exercising all important checks and balances function, each wing should be conscious of the enormous responsibility that rests on them to ensure that institutional respect and comity is maintained.

15. In ***Binoy Viswam*** v. ***Union of India and Others***[21], this Court referring to the Constitution had observed that the powers to be exercised by the three wings of the State have an avowed purpose and each branch is constitutionally mandated to act within its sphere and to have mutual institutional respect to realise the constitutional goal and to ensure that there is no constitutional transgression. It is the Constitution which has created the three wings of the State and, thus, each branch must oblige the other by not stepping beyond its territory.

16. In ***Kalpana Mehta and Others*** v. ***Union of India and Others***[22], Mr. Justice Dipak Misra, the then Chief Justice of India, under the headings *'Supremacy of the Constitution', 'Power of judicial review'* and *'Doctrine of separation of powers'*, has held that the Constitution is a supreme fundamental law which requires that all laws, actions and decisions of the three organs should be in consonance and in accord with the constitutional limits, for the legislature, the executive and the judiciary derive their authority and jurisdiction from the

[19] (2014) 12 SCC 696
[20] *Shri Prithvi Cotton Mills Ltd. and Another* v. *Broach Borough Municipality and Others*, (1969) 2 SCC 283
[21] (2017) 7 SCC 59
[22] (2018) 7 SCC 1

A Constitution. Legislature stands vested with an exclusive authority to make laws thereby giving it a supremacy in the field of legislation and law-making, yet this power is distinct from and not at par with the supremacy of the Constitution, as:

> "41. This Court has the constitutional power and the authority to
B interpret the constitutional provisions as well as the statutory provisions. The conferment of the power of judicial review has a great sanctity as the constitutional court has the power to declare any law as unconstitutional if there is lack of competence of the legislature keeping in view the field of legislation as provided in the Constitution or if a provision contravenes or runs counter to
C any of the fundamental rights or any constitutional provision or if a provision is manifestly arbitrary."

17. Having said so, Dipak Misra, CJ went on to observe:

> "42. When we speak about judicial review, it is also necessary to
D be alive to the concept of judicial restraint. The duty of judicial review which the Constitution has bestowed upon the judiciary is not unfettered; it comes within the conception of judicial restraint. The principle of judicial restraint requires that Judges ought to decide cases while being within their defined limits of power. Judges are expected to interpret any law or any provision of the
E Constitution as per the limits laid down by the Constitution."

Earlier, Dipak Misra, CJ had observed:

> "39. From the above authorities, it is quite vivid that the concept of constitutional limitation is a facet of the doctrine of separation
F of powers. At this stage, we may clearly state that there can really be no straitjacket approach in the sphere of separation of powers when issues involve democracy, the essential morality that flows from the Constitution, interest of the citizens in certain spheres like environment, sustenance of social interest, etc. and empowering the populace with the right to information or right to
G know in matters relating to candidates contesting election. There can be many an example where this Court has issued directions to the executive and also formulated guidelines for facilitation and in furtherance of fundamental rights and sometimes for the actualisation and fructification of statutory rights."

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18. D.Y. Chandrachud, J., in his separate and concurring judgment for himself and A.K. Sikri, J. in ***Kalpana Mehta*** (supra) had referred to the nuanced 'doctrine of functional separation' that finds articulation in the articles/books by *Peter A. Gerangelos* in his work titled *'The Separation of Powers and Legislative Interference in Judicial Process, Constitutional Principles and Limitations'*[23], *M.J.C. Vile*'s book titled *'Constitutionalism and the Separation of Powers'*[24], *Aileen Kavanagh* in her work *'The Constitutional Separation of Powers'*[25] and *Eoin Carolan* in his book titled *'The New Separation of Powers – A Theory for the Modern State'*[26]. These authors in the context of modern administrative State have reconstructed the doctrine as consisting of two components: 'division of labour' and 'checks and balances', instead of isolated compartmentalisation, by highlighting the need of interaction and interdependence amongst the three organs in a way that each branch is in cooperative engagement but at the same time acts, when necessary, to check on the other and that no single group of people are able to control the machinery of the State. Independent judiciary acts as a restraining influence on the arbitrary exercise of power.

19. Referring to the functional doctrine, D.Y. Chandrachud, J., had cited the following judgements:

> "249. In *State of U.P.* v. *Jeet S. Bisht*, the Court held that the doctrine of separation of powers limits the "active jurisdiction" of each branch of Government. However, even when the active jurisdiction of an organ of the State is not challenged, the doctrine allows for methods to be used to prod and communicate to an institution either its shortfalls or excesses in discharging its duty. The Court recognised that fundamentally, the purpose of the doctrine is to act as a scheme of checks and balances over the activities of other organs. The Court noted that the modern concept of separation of powers subscribes to the understanding that it should not only demarcate the area of functioning of various organs of the State, but should also, to some extent, define the minimum content in that delineated area of functioning. S.B. Sinha, J. addressed the need for the doctrine to evolve, as administrative

[23] Hart Publishing, 2009
[24] Oxford University Press, 1967
[25] David Dyzenhaus and Malcolm Thorburn (eds.), *Philosophical Foundations of Constitutional Law* (Oxford: Oxford University Press, 2016)
[26] Oxford University Press, 2009

bodies are involved in the dispensation of socio-economic entitlements: (SCC p. 619, para 83)

"*83*. If we notice the evolution of separation of powers doctrine, traditionally the *checks and balances* dimension was only associated with governmental excesses and violations. But in today's world of positive rights and justifiable *social and economic* entitlements, hybrid administrative bodies, private functionaries discharging public functions, we have to perform the oversight function with more urgency and enlarge the field of *checks and balances* to include governmental inaction. Otherwise we envisage the country getting transformed into a *state of repose*. Social engineering as well as institutional engineering therefore forms part of this obligation."

(emphasis in original)

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251. In *Supreme Court Advocates-on-Record Assn.* v. *Union of India*, Madan B. Lokur, J. observed that separation of powers does not envisage that each of the three organs of the State — the legislature, executive and judiciary — work in a silo. The learned Judge held: (SCC p. 583, para 678)

"*678*. There is quite clearly an entire host of parliamentary and legislative checks placed on the judiciary whereby its administrative functioning can be and is controlled, but these do not necessarily violate the theory of separation of powers or infringe the independence of the judiciary as far as decision-making is concerned. As has been repeatedly held, the theory of separation of powers is not rigidly implemented in our Constitution, but if there is an overlap in the form of a check with reference to an essential or a basic function or element of one organ of State as against another, a constitutional issue does arise. It is in this context that the 99th Constitution Amendment Act has to be viewed—whether it impacts on a basic or an essential element of the independence of the judiciary, namely, its decisional independence."

20. Thereafter, D.Y. Chandrachud, J. had observed:

"254. While assessing the impact of the separation of powers upon the present controversy, certain precepts must be

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

255. Parliament and the State Legislatures legislate. The executive frames policies and administers the law. The judiciary decides and adjudicates upon disputes in the course of which facts are proved and the law is applied. The distinction between the legislative function and judicial functions is enhanced by the basic structure doctrine. The legislature is constitutionally entrusted with the power to legislate. Courts are not entrusted with the power to enact law. Yet, in a constitutional democracy which is founded on the supremacy of the Constitution, it is an accepted principle of jurisprudence that the judiciary has the authority to test the validity of legislation. Legislation can be invalidated where the enacting legislature lacks legislative competence or where there is a violation of fundamental rights. A law which is constitutionally ultra vires can be declared to be so in the exercise of the power of judicial review. Judicial review is indeed also a part of the basic features of the

A Constitution. Entrustment to the judiciary of the power to test the validity of law is an established constitutional principle which co-exists with the separation of powers. Where a law is held to be ultra vires there is no breach of parliamentary privileges for the simple reason that all institutions created by the Constitution are subject to constitutional limitations. The
B legislature, it is well settled, cannot simply declare that the judgment of a court is invalid or that it stands nullified. If the legislature were permitted to do so, it would travel beyond the boundaries of constitutional entrustment. While the separation of powers prevents the legislature from issuing a mere
C declaration that a judgment is erroneous or invalid, the law-making body is entitled to enact a law which remedies the defects which have been pointed out by the court. Enactment of a law which takes away the basis of the judgment (as opposed to merely invalidating it) is permissible and does not constitute a violation of the separation doctrine. That indeed is
D the basis on which validating legislation is permitted.

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

21. Having elucidated the doctrinal basis of separation of powers and mutual interaction between the three organs of the State in the democratic set-up, it would be important to draw clear distinction between interpretation and adjudication by the courts on one hand and the power
H to enact legislation by the legislature on the other. Adjudication results in

what is often described as *judge made law*, but the interpretation of the statutes and the rights in accordance with the provisions of Articles 14, 19 and 21 in the course of adjudication is not an attempt or an act of legislation by the judges. Reference in this regard can be made to the opinion expressed by F.M. Ibrahim Kalifulla, J. in ***Union of India*** v. ***V. Sriharan alias Murugan and Others***[27] who had, in the context of capital punishment for offences under Section 302 of the Indian Penal Code ("IPC", for short), held that the lawmakers have entrusted the task of weighing and measuring the gravity of the offence with the institution of judiciary by reposing a very high amount of confidence and trust. It requires a judge to apply his judicial mind after weighing the pros and cons of the crime committed in the golden scales to ensure that the justice is delivered. In a way, therefore, the legislature itself entrusts the judiciary to lay down parameters in the form of precedents which is oft-spoken as *judge made law*. This is true of many a legislations. Such law, even if made by the judiciary, would not infringe the doctrine of separation of powers and is in conformity with the constitutional functions. This distinction between the two has been aptly expressed by *Aileen Kavanagh* in the following words:

> "In general, the ability and power of the courts to make new law is generally more limited than that of the legislators, since courts typically make law by filling in gaps in existing legal frameworks, extending existing doctrines incrementally on a case-by-case basis, adjusting them to changing circumstances, etc. Judicial lawmaking powers tend to be piecemeal and incremental and the courts must reason according to law, even when developing it. By contrast, legislators have the power to make radical, broad-ranging changes in the law, which are not based on existing legal norms...."

22. Seven Judges of this Court in ***P. Ramachandra Rao*** v. ***State of Karnataka***[28] had, while interpreting Articles 21, 32, 141 and 142 of the Constitution, held that prescribing period at which criminal trial would terminate resulting in acquittal or discharge of the accused, or making such directions applicable to all cases in present or in future, would amount to judicial law-making and cannot be done by judicial directives. It was observed that the courts can declare the law, interpret the law, remove obvious lacuna and fill up the gaps, but they cannot entrench upon the

[27] (2016) 7 SCC 1
[28] (2002) 4 SCC 578

A field of legislation. The courts can issue appropriate and binding directions for enforcing the laws, lay down time limits or chalk out a calendar for the proceeding to follow to redeem the injustice and for taking care of the rights violated in the given case or set of cases depending on the facts brought to the notice of the court, but cannot lay down and enact the provisions akin to or on the lines of Chapter XXXVI of the Code of
B Criminal Procedure, 1973. Drawing distinction between legislation as the source of law which consists of declaration of legal rules by a competent authority and judicial decisions pronounced by the judges laying down principles of general application, reference was made to *Salmond on Principles of Jurisprudence* (12th Edition) which says:

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> "we must distinguish law-making by legislators from law-making by the courts. Legislators can lay down rules purely for the future and without reference to any actual dispute; the courts, insofar as they create law, can do so only in application to the cases before them and only insofar as is necessary for their solution. Judicial
> D law-making is incidental to the solving of legal disputes; legislative law-making is the central function of the legislator."

Reference was also made to *Professor S. P Sathe's* work on "*Judicial Activism in India % Transgressing Borders and Enforcing Limits*," evaluating the legitimacy of judicial activism, wherein it was
E observed:

> "Directions are either issued to fill in the gaps in the legislation or to provide for matters that have not been provided by any legislation. The Court has taken over the legislative function not in the traditional interstitial sense but in an overt manner and has
> F justified it as being an essential component of its role as a constitutional court." (p.242)

> "In a strict sense these are instances of judicial excessivism that fly in the face of the doctrine of separation of powers. The doctrine of separation of powers envisages that the legislature should make
> G law, the executive should execute it, and the judiciary should settle disputes in accordance with the existing law. In reality such watertight separation exists nowhere and is impracticable. Broadly, it means that one organ of the State should not perform a function that essentially belongs to another organ. While law-making through interpretation and expansion of the meanings of open-

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textured expressions such as 'due process of law', 'equal protection of law', or 'freedom of speech and expression' is a legitimate judicial function, the making of an entirely new law ... through directions ... is not a legitimate judicial function." (p.250)

23. From the above, it is apparent that law-making within certain limits is a legitimate element of a judge's role, if not inevitable.[29] A judge has to adjudicate and decide on the basis of legal provisions, which when indeterminate on a particular issue require elucidation and explanation.[30] This requires a judge to interpret the provisions to decide the case and, in this process, he may take recourse and rely upon fundamental rights, including the right to life, but even then he does not legislate a law while interpreting such provisions. Such interpretation is called *'judge made law'* but not legislation. *Aileen Kavanagh,* in explaining the aforesaid position, had observed:

"...If there has not been a case in point and the judge has to decide on the basis of legal provisions which may be indeterminate on the issue, then the judge cannot decide the case without making new law...This is because Parliament has formulated the Act in broad terms, which inevitably require elaboration by the courts in order to apply it to the circumstances of each new case. Second, even in cases where judges apply existing law, they cannot avoid facing the question of whether to change and improve it.... Interpretation has an applicative and creative aspect."

Legislating or law-making involves a choice to prioritise certain political, moral and social values over the others from a wide range of choices that exist before the legislature. It is a balancing and integrating exercise to give expression/meaning to diverse and alternative values and blend it in a manner that it is representative of several viewpoints so that it garners support from other elected representatives to pass institutional muster and acceptance. Legislation, in the form of an enactment or laws, lays down broad and general principles. It is the source of law which the judges are called upon to apply. Judges, when they apply the law, are constrained by the rules of language and by well identified background presumptions as to the manner in which the

[29] Lord Irvine: *'Activism and Restraint: Human Rights and Interpretative Process',* (1999) 4 EHRLR 350

[30] Aileen Kavanagh: 'The *Elusive Divide between Interpretation and Legislation under the Human Rights Act 1998'* (2004) 24 Oxford Journal of Legal Studies, 259–285

A legislature intended the law to be read. Application of law by the judges is not synonymous with the enactment of law by the legislature. Judges have the power to spell out how precisely the statute would apply in a particular case. In this manner, they complete the law formulated by the legislature by applying it. This power of interpretation or the power of judicial review is exercised post the enactment of law, which is then made subject matter of interpretation or challenge before the courts.

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24. Legislature, as an institution and a wing of the Government, is a microcosm of the bigger social community possessing qualities of a democratic institution in terms of composition, diversity and accountability. Legislature uses in-built procedures carefully designed and adopted to bring a plenitude of representations and resources as they have access to information, skills, expertise and knowledge of the people working within the institution and outside in the form of executive.[31] Process and method of legislation and judicial adjudication are entirely distinct. Judicial adjudication involves applying rules of interpretation and law of precedents and notwithstanding deep understanding, knowledge and wisdom of an individual judge or the bench, it cannot be equated with law making in a democratic society by legislators given their wider and broader diverse polity. The Constitution states that legislature is supreme and has a final say in matters of legislation when it reflects on alternatives and choices with inputs from different quarters, with a check in the form of democratic accountability and a further check by the courts which exercise the power of judicial review. It is not for the judges to seek to develop new all-embracing principles of law in a way that reflects the stance and opinion of the individual judges when the society/legislators as a whole are unclear and substantially divided on the relevant issues[32]. In ***Bhim Singh* v. *Union of India***[33], while observing that the Constitution does not strictly prohibit overlapping of functions as this is inevitable in the modern parliamentary democracy, the Constitution prohibits exercise of functions of another branch which results in wresting away of the regime of constitutional accountability. Only when accountability is preserved, there will be no violation of principle of separation of powers. Constitution not only requires and mandates that there should be right decisions that govern us, but equal care has to be taken that the right decisions are

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[31] D. Kyritsis, *Constitutional Review in a Representative Democracy* (2012) 32 Oxford Journal of Legal Studies

[32] Lord Browne-Wilkinson in *Airedale NHS Trust* v. *Bland* [1993] AC 789 (p. 879-880)

[33] (2010) 5 SCC 538

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made by the right body and the institution. This is what gives legitimacy, be it a legislation, a policy decision or a court adjudication.

25. It is sometimes contended with force that unpopular and difficult decisions are more easily grasped and taken by the judges rather than by the other two wings. Indeed, such suggestions were indirectly made. This reasoning is predicated on the belief that the judges are not directly accountable to the electorate and, therefore, enjoy the relative freedom from questions of the moment, which enables them to take a detached, fair and just view.[34] The position that judges are not elected and accountable is correct, but this would not justify an order by a court in the nature of judicial legislation for it will run afoul of the constitutional supremacy and invalidate and subvert the democratic process by which legislations are enacted. For the reasons stated above, this reasoning is constitutionally unacceptable and untenable.

26. Dipak Misra, CJ in ***Kalpana Mehta's*** case, under the heading *'Power of judicial review'* had examined several judgments of this Court to reflect upon the impressive expanse of judicial power in the superior courts that requires and demands exercise of tremendous responsibility by the courts. Thus, while exercising the interpretative power, the courts can draw strength from the spirit and propelling elements underlying the Constitution to realise the constitutional values but must remain alive to the concept of judicial restraint which requires the judges to decide cases within defined limits of power. Thus, the courts would not accept submissions and pass orders purely on a matter of policy or formulate judicial legislation which is for the executive or elected representatives of the people to enact. Reference was made to some judgments of this Court in the following words:

> "43. In *S.C. Chandra* v. *State of Jharkhand*, it has been ruled that the judiciary should exercise restraint and ordinarily should not encroach into the legislative domain. In this regard, a reference to a three-Judge Bench decision in *Suresh Seth* v. *Indore Municipal Corpn.* is quite instructive. In the said case, a prayer was made before this Court to issue directions for appropriate amendment in the M.P. Municipal Corporation Act, 1956. Repelling the submission, the Court held that it is purely a matter of policy which is for the elected representatives of the people to decide

[34] See observations of Lord Neuberger in *Regina (Nicklinson) and Another v. Ministry of Justice and Others* [2014] UKSC 38

A and no directions can be issued by the Court in this regard. The Court further observed that this Court cannot issue directions to the legislature to make any particular kind of enactment. In this context, the Court held that under our constitutional scheme, Parliament and Legislative Assemblies exercise sovereign power to enact law and no outside power or authority can issue a direction to enact a particular kind of legislation. While so holding, the Court referred to the decision in *Supreme Court Employees' Welfare Assn.* v. *Union of India* wherein it was held that no court can direct a legislature to enact a particular law and similarly when an executive authority exercises a legislative power by way of a subordinate legislation pursuant to the delegated authority of a legislature, such executive authority cannot be asked to enact a law which it has been empowered to do under the delegated authority."

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

Constitution. These are extraordinary cases where notwithstanding the institutional reasons and the division of power, this Court has laid down general rules/guidelines when there has been a clear, substantive and gross human rights violation, which significantly outweighed and dwarfed any legitimising concerns based upon separation of powers, lack of expertise and uncertainty of the consequences.[35] Same is the position in cases of gross environmental degradation and pollution. However, a mere allegation of violation of human rights or a plea raising environmental concerns cannot be the 'bright-line' to hold that self-restraint must give way to judicial legislation. Where and when court directions should be issued are questions and issues involving constitutional dilemmas that mandate a larger debate and discussion (see observations of Frankfurter J. as quoted in *Asif Hameed & Others v. State of Jammu & Kashmir & Others* in foot note 15 supra).

28. Such directions must be issued with great care and circumspection and certainly not when the matter is already pending consideration and debate with the executive or Parliament. This is not a case which requires Court's intervention to give a suggestion for need to frame a law as the matter is already pending active consideration. Any direction at this stage would be interpreted as judicial participation in the enactment of law. This Court in ***Supreme Court Employees' Welfare Association*** v. ***Union of India and Another***[36] had directed that no court can direct the legislature to enact a particular law. Similarly, when an executive authority exercises the legislative power by way of subordinate legislation pursuant to delegatory authority of the legislature, such executive authority cannot be asked to enact a law which it has been empowered to do under delegated authority. Again, we would quote from Dipak Misra, CJ in ***Kalpana Mehta's*** case, in which it was observed:

> "44. Recently, in *Census Commr.* v. *R. Krishnamurthy*, the Court, after referring to *Premium Granites* v. *State of T.N.*, *M.P. Oil Extraction* v. *State of M.P.*, *State of M.P.* v. *Narmada Bachao Andolan* and *State of Punjab* v. *Ram Lubhaya Bagga*, held: (*R. Krishnamurthy case*, SCC p. 809, para 33)

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[35] See Aileen Kavanagh, *Judicial Restraint in the Pursuit of Justice* (2009) University of Oxford Legal Research Paper Series

[36] (1989) 4 SCC 187

A "*33*. From the aforesaid pronouncement of law, it is clear as noonday that it is not within the domain of the courts to embark upon an enquiry as to whether a particular public policy is wise and acceptable or whether a better policy could be evolved. The court can only interfere if the policy framed is absolutely capricious or not informed by reasons or totally arbitrary and founded ipse dixit offending the basic requirement of Article 14 of the Constitution. In certain matters, as often said, there can be opinions and opinions (*sic*) but the court is not expected to sit as an appellate authority on an opinion."

C 29. In ***V.K. Naswa*** v. ***Home Secretary, Union of India and Others***[37], this Court in clear and categoric terms had observed that we do not issue directions to the legislature directly or indirectly and any such directions if issued would be improper. It is outside the power of judicial review to issue directions to the legislature to enact a law in a particular manner, for the Constitution does not permit the courts to direct D and advice the executive in matters of policy. Parliament, as the legislature, exercises this power to enact a law and no outside authority can issue a particular piece of legislation. It is only in exceptional cases where there is a vacuum and non-existing position that the judiciary, in exercise of its constitutional power, steps in and provides a solution till the legislature comes forward to perform its role.

E 30. In ***State of Himachal Pradesh and Others*** v. ***Satpal Saini***[38], this Court had overturned the directions given by the High Court to amend provisions of the state enactment after what was described as the plight of large population of non-agriculturist *himachalis*. Reference was made to ***Supreme Court Employees' Welfare Association*** (supra) that no F writ of mandamus can be issued to the legislature to enact a particular legislation nor can such direction be issued to the executive which exercises the powers to make rules in the nature of subordinate legislation. Reference was also made to ***V.K. Naswa*** (supra) wherein several earlier judgments were considered and it was held that the courts have a very G limited role and, in its exercise, it is not open to make judicial legislation. Further, the courts do not have competence to issue directions to the legislature to enact a law in a particular manner. Reference was also made to the constitutional bench judgment in ***Manoj Narula*** v. ***Union***

[37] (2012) 2 SCC 542

H [38] (2017) 11 SCC 42

of India[39] in which a discordant note struck by two judges in ***Gainda Ram and Others*** v. ***Municipal Corporation of Delhi and Others***[40] was held to be contrary to the Constitution by observing that the decision whether or not Section 8 of the Representation of the People Act, 1951 should be amended is solely within the domain of Parliament and, therefore, no directions can be issued by this Court. It was observed:

> "6. The grievance, in our view, has a sound constitutional foundation. The High Court has while issuing the above directions acted in a manner contrary to settled limitations on the power of judicial review under Article 226 of the Constitution. A direction, it is well settled, cannot be issued to the legislature to enact a law. The power to enact legislation is a plenary constitutional power which is vested in Parliament and the State Legislatures under Articles 245 and 246 of the Constitution. The legislature as the repository of the sovereign legislative power is vested with the authority to determine whether a law should be enacted. The doctrine of separation of powers entrusts to the court the constitutional function of deciding upon the validity of a law enacted by the legislature, where a challenge is brought before the High Court under Article 226 (or this Court under Article 32) on the ground that the law lacks in legislative competence or has been enacted in violation of a constitutional provision. But judicial review cannot encroach upon the basic constitutional function which is entrusted to the legislature to determine whether a law should be enacted. Whether a provision of law as enacted subserves the object of the law or should be amended is a matter of legislative policy. The court cannot direct the legislature either to enact a law or to amend a law which it has enacted for the simple reason that this constitutional function lies in the exclusive domain of the legislature. For the Court to mandate an amendment of a law — as did the Himachal Pradesh High Court — is a plain usurpation of a power entrusted to another arm of the State. There can be no manner of doubt that the High Court has transgressed the limitations imposed upon the power of judicial review under Article 226 by issuing the above directions to the State Legislature to amend the law. The Government owes a collective responsibility to the State Legislature. The State Legislature is comprised of

[39] (2014) 9 SCC 1
[40] (2010) 10 SCC 715

A elected representatives. The law enacting body is entrusted with the power to enact such legislation as it considers necessary to deal with the problems faced by society and to resolve issues of concern. The courts do not sit in judgment over legislative expediency or upon legislative policy. This position is well settled. Since the High Court has failed to notice it, we will briefly recapitulate the principles which emerge from the precedent on the subject.

B

7. In *Mallikarjuna Rao* v. *State of A.P.* and in *V.K. Sood* v. *Deptt. of Civil Aviation* this Court held that the court under Article 226 has no power to direct the executive to exercise its law-making power.

C

8. In *State of H.P.* v. *Parent of a Student of Medical College* this Court deprecated the practice of issuing directions to the legislature to enact a law: (SCC p. 174, para 4)

D

> "*4*. … The direction given by the Division Bench was really nothing short of an indirect attempt to compel the State Government to initiate legislation with a view to curbing the evil of ragging…."

The same principle was followed in *Asif Hameed* v. *State of J&K* where this Court observed that: (SCC p. 374, para 19)

E

> "*19*. … The Constitution does not permit the court to direct or advise the executive in matter of policy or to sermonise qua any matter which under the Constitution lies within the sphere of the legislature or executive…."

F

In *Union of India* v. *Assn. for Democratic Reforms* this Court observed that: (SCC p. 309, para 19)

> "*19*. … it is not possible for this Court to give any directions for amending the Act or the statutory Rules. It is for Parliament to amend the Act and the Rules."

G

xx xx xx

12. The judiciary is one amongst the three branches of the State; the other two being the executive and the legislature. Each of the three branches is co-equal. Each has specified and enumerated constitutional powers. The judiciary is assigned with the function

H

of ensuring that executive actions accord with the law and that laws and executive decisions accord with the Constitution. The courts do not frame policy or mandate that a particular policy should be followed. The duty to formulate policies is entrusted to the executive whose accountability is to the legislature and, through it, to the people. The peril of adopting an incorrect policy lies in democratic accountability to the people. This is the basis and rationale for holding that the court does not have the power or function to direct the executive to adopt a particular policy or the legislature to convert it into enacted law. It is wise to remind us of these limits and wiser still to enforce them without exception."

31. Even more direct on the facts of the present case would be judgement by one of us, (Mr. Justice Ranjan Gogoi, the Chief Justice), in ***Common Cause: A Registered Society*** v. ***Union of India***[41] to the following effect:

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

[41] (2017) 7 SCC 158

A law engrafted in the Act and its beneficial effects on the citizenry of a democratic country, by itself, will not permit the Court to overstep its jurisdiction. Judicial discipline must caution the Court against such an approach."

32. When the matter is already pending consideration and is being B examined for the purpose of legislation, it would not be appropriate for this Court to enforce its opinion, be it in the form of a direction or even a request, for it would clearly undermine and conflict with the role assigned to the judiciary under the Constitution. In this connection, we may refer to the observation of Lord Bingham in ***Regina (Countryside Alliance) and Others*** v. ***Attorney General and Another***[42], though made in a C different context, to the following effect:

"...The democratic process is liable to be subverted if, on a question of moral and political judgment, opponents of the Act achieve through the courts what they could not achieve in Parliament."

D 33. Confronted with the present situation, Mr. Colin Gonsalves, learned *amicus curiae*, had submitted that directions can be given to the executive to ratify the UN Convention. We do not think that any such direction can be issued for it would virtually amount to issuing directions to enact laws in conformity with the UN Convention, a power which we do not 'possess', while exercising power of judicial review.

E

34. Mr. K.K. Venugopal, learned Attorney General, in his submissions has rightly urged that Article 253 of the Constitution which deals with the legislation for giving effect to international agreements, confers power on Parliament to make laws for the whole or any part of the territory of India for implementing any treaty, agreement or convention, F notwithstanding anything contained in the foregoing provisions of Chapter XI of the Constitution. Thus, notwithstanding Articles 245 and 246 of the Constitution, Parliament has the supreme power to make laws for implementing any treaty or convention which may even encroach upon the exclusive legislative competence of the States. The executive action G under Article 73 of signing and ratifying the convention can be implemented without any violation of the State's right when the legislation is passed by the Parliament under Article 253. 'Police' and 'Prisons' are State subjects. Ratification of the UN Convention would require enactment of laws under Article 253 of the Constitution, for mere ratification would

H [42] (2008) 1 AC 719

not affect and undo the existing laws or result in the enactment of new laws. Ratification, as is well recognised, is a political act and would require consultation with the State Governments/Union Territories and subsequent deliberation of their comments by the Union of India. Union of India has pointed out that they have a reservation on Article 20 of the UN Convention. Reference is also made to the Vienna Convention on the Law of Treaties, 1969, to which India is not a party but which provisions are reflected in the Standard Operating Procedure issued by the Ministry of External Affairs in respect of Memorandum of Understanding/Agreement with foreign countries. The Standard Operating Procedure, clause (iv) under Heading D – Treaty Making Formalities which relates to ratification, states that where a treaty does not provide for its entry into force only upon its signature and makes it subject to ratification, the treaty requires ratification. In order to ensure that India is in a position to efficiently discharge all obligations emanating from treaties/ agreements, such ratification should be undertaken only after relevant domestic clauses have been amended and the enabling legislations enacted when there is absence of domestic law on the subject. On the issue that the treaty making power is a political act, reference has been made to the following decisions: ***Union of India and Another*** v. ***Azadi Bachao Andolan and Another***[43]; ***Rosiline George*** v. ***Union of India and Others***[44]; ***Sakshi*** v. ***Union of India and Others***[45]; and ***P.B. Samant and Others*** v. ***Union of India and Others***[46].

35. However, this is not to state that the courts would not step in, when required, to protect fundamental rights. It is indisputable that the right to life and the right to liberty are of foremost importance in a democratic state and, therefore, any form of torture would violate the right to life and is prohibited by Article 21 of the Constitution. Such action would be unconstitutional under Article 21 and would fail the test of non-arbitrariness under Article 14 of the Constitution. Indeed, the courts have been at the forefront in protecting and safeguarding individual rights. In 1982, on the basis of a letter written by a journalist complaining of custodial violence suffered by women prisoners in police lock-ups in the city of Bombay, this Court in ***Sheela Barse v. State of Maharashtra***[47]

[43] (2004) 10 SCC 1
[44] (1994) 2 SCC 80
[45] (2004) 5 SCC 518
[46] AIR 1994 Bom 323
[47] (1983) 2 SCC 96

had issued the guidelines to safeguard the rights of arrested persons including female prisoners to afford them protection in police lock-ups from possible torture or ill-treatment. A person detained in a prison is entitled to live with human dignity and his detention in prison should be regulated by a procedure established by law which must be reasonable, fair and just. This can be done by applying, elucidating and even creatively expanding existing laws and principles on case to case basis. Judiciary while exercising its jurisdiction in this manner is not enacting or legislating but applying the Constitution and protecting fundamental rights under Article 21 of the Constitution.

36. This human right aspect was again highlighted in ***Nilabati Behera (Smt) alias Lalita Behera (Through the Supreme Court Legal Aid Committee) v. State of Orissa and Others***[48] to state that the convicts, prisoners or under-trials must not be denuded of their fundamental rights under Article 21 and only such restrictions as are permitted by law can be imposed. It is the responsibility of the prison authority and the police to ensure that the person in custody is not deprived of his right to life, even if his liberty is circumscribed by the fact that the person is in confinement. Even limited liberty is precious and it is the duty of the State to ensure that even a person in custody is dealt with in accordance with the procedure established by law. In the ***State of Madhya Pradesh*** v. ***Shyamsunder Trivedi and Others***[49] this Court had highlighted that a sensitive and realistic rather than a narrow technical approach is required while dealing with cases of custodial crime. The court must act within its powers and as far as possible try that the guilty should not escape to ensure that the rule of law prevails.

37. We would take note of the judgment of this Court in ***D.K. Basu*** (supra) wherein the following directions/ guidelines with respect to rights/custodial torture were issued:

> "(1) The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.
>
> (2) That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and

[48] (1993) 2 SCC 746

[49] (1995) 4 SCC 262

such memo shall be attested by atleast one witness, who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be counter signed by the arrestee and shall contain the time and date of arrest.

(3) A person who has been arrested or detained and is being held in custody in a police station or interrogation center or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

(4) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

(5) The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

(6) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

(7) The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.

(8) The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the concerned

A State or Union Territory. Director, Health Services should prepare such a penal for all Tehsils and Districts as well.

(9) Copies of all the documents including the memo of arrest, referred to above, should be sent to the illaqa Magistrate for his record.

B (10) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

(11) A police control room should be provided at all district and state headquarters, where information regarding the arrest and the place of custody of the arrestee shall be

C communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board."

38. The law in this regard is also laid down in Sections 330 and 331 of the IPC which relate to 'voluntarily causing hurt to extort

D confession or to compel restoration of property' and 'voluntarily causing grievous hurt to extort confession or to compel restoration of property' respectively.

39. In terms of the aforesaid edicts, legal jurisprudence has developed for providing compensation for the unconstitutional deprivation

E of fundamental right to life and liberty as a public remedy in addition to claims in private law for damages by tortuous acts of public servants. In ***D.K. Basu*** (supra) the public law remedy for award of compensation was elucidated as arising from indefeasible rights guaranteed under Article 21 and justified on the ground that the purpose of public law is not only to

F civilise public power but also to ensure that the citizens live under a legal system where their rights and interests are protected and preserved. For the grant of compensation, therefore, proceedings under Article 32 or 226 of the Constitution are entertained when violation of the fundamental rights granted under Article 21 is established. In such cases, claims of a citizen are tried on the principle of strict liability where defence

G of sovereignty may not be available. In ***S. Nambi Narayanan*** v. ***Siby Mathews and Others***[50] where criminal proceedings were initiated against Nambi Narayanan but it was found that the prosecution story was a sham, compensation of Rs. 50 lakhs was awarded for the anxiety suffered and maltreatment meted out to him.

H [50] (2018) 10 SCC 804

40. We have no hesitation in observing that notwithstanding the aforesaid directions in ***D.K. Basu*** (supra) and the principles of law laid down in ***Prithipal Singh and Others*** v. ***State of Punjab and Another***[51] and ***S. Nambi Narayanan*** (supra), this Court can, in an appropriate matter and on the basis of pleadings and factual matrix before it, issue appropriate guidelines/directions to elucidate, add and improve upon the directions issued in ***D.K. Basu*** (supra) and other cases when conditions stated in paragraph 27 supra are satisfied. However, this is not what is urged and prayed by the applicant. The contention of the applicant is that this Court must direct the legislature, that is, Parliament, to enact a suitable standalone comprehensive legislation based on the UN Convention and this direction, if issued, would be in consonance with the Constitution of India. This prayer must be rejected in light of the aforesaid discussion.

41. Notwithstanding rejection of the prayer made by the applicant, we would in terms of the above discussion clarify that this would not in any way affect the jurisdiction of the courts to deal with individual cases of alleged custodial torture and pass appropriate orders and directions in accordance with law.

Devika Gujral M.A. disposed of.

[51] (2012) 1 SCC 10

A SUDAM KISAN GAVANE (D) THR. LRS. & ORS.

v.

MANIK ANANTA SHIKKETOD (D) BY LRS. & ORS.

(Civil Appeal No. 5272 of 2010)

B AUGUST 29, 2019

[DEEPAK GUPTA AND ANIRUDDHA BOSE, JJ.]

Code of Civil Procedure, 1908: s.100 – Non-framing of substantial questions of law at the time of dictation of the judgment – Held: This procedure is not fair to the parties – The parties must know what are the substantial questions of law which the Court is required to answer in a particular case – It is only then that the parties and their counsel can properly assist the Court – As per s.100, an appeal can only lie if there is a substantial question of law involved in the appeal – Sub-section (3) states that the memorandum of appeal filed under s.100 should precisely state the substantial question of law involved in the appeal – It is only if the High Court is satisfied that a substantial question of law is involved in the case that it shall formulate that question – A duty is cast upon High Court to formulate the substantial questions of law in terms of sub-section (4) of s.100 – Therefore, normally the order of admission of the appeal should clearly indicate on what substantial questions of law the appeal has been admitted – Even if High Court is of the view that the substantial questions of law, as framed in the memorandum of appeal, are substantial questions of law, the order admitting the appeal should specifically state what are the questions of law on which the appeal is admitted – Thus, hearing of the appeal should revolve around the substantial questions of law and the Court at the final hearing cannot go beyond the substantial questions of law – If at the time of final hearing, the Court feels that there is some other substantial question(s) of law involved, it is not debarred from formulating that question even at that stage but hearing will have to be limited to substantial questions of law – Sub-section (5) also clearly lays down that the respondent has a right to urge that the substantial question(s) of law, as formulated, do not actually arise for consideration or that they are not substantial questions of law.

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Code of Civil Procedure, 1908: s.100, proviso – The proviso to s.100 makes it clear that the Court has the power to hear the appeal from any substantial questions of law not formulated by it, if it is satisfied that the case involves such questions – However, in such eventuality, the Court has to record its reasons for formulating such questions of law – This obviously means that the Court will pass a reasoned order while formulating the substantial question(s) of law at this stage – The natural corollary is that the parties have to be heard after the framing of such substantial questions of law – The hearing cannot be prior to the substantial questions of law.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 5272 of 2010

From the Judgment and Order dated 10.06.2009 of the High Court of Judicature of Judicature of Bombay, Bench at Aurangabad in Second Appeal No.281 of 1989.

Nishant R. Katneshwarkar, Anoop Kandari, B. Sridhar, Advs. for the Appellants.

Sudhanshu S. Choudhari, Adv. for the Respondents.

The following Order of the Court was passed :

O R D E R

1. Without expressing any opinion on the merits of the case, we feel this case should be remanded to the High Court.

2. The second appeal under Section 100 of the Code of Civil Procedure came up for admission before the High Court on 11.06.1990. The High Court admitted the appeal without framing any question of law and the order reads:

3. "Heard. Admit"

4. The appeal came up for hearing on 02.05.2009. Arguments were heard and judgment was reserved. The order dated 02.05.2009 also does not indicate that any question(s) of law was framed on that date. Thereafter, judgment was delivered on 10.06.2009. This judgment makes mention of certain substantial questions of law. It is obvious that these substantial questions of law were framed by the learned Judge at the time of dictation of the judgment. This procedure, in our opinion, is

not fair to the parties. The parties must know what are the substantial questions of law which the Court is required to answer in a particular case. It is only then that the parties and their counsel can properly assist the Court.

5. Section 100 of Code of Civil Procedure reads as under:

"100. Second appeal - (1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.

(2) An appeal may lie under this section from an appellate decree passed *ex parte*.

(3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question."

6. A bare reading of Section 100 of Code of Civil Procedure makes it abundantly clear that an appeal can only lie if there is a substantial question of law involved in the appeal. Sub-section (3) makes it clear that the memorandum of appeal filed under Section 100 of Code of Civil Procedure should precisely state the substantial question of law involved in the appeal. It is only if the High Court is satisfied that a substantial question of law is involved in the case that it shall formulate that question. A duty is cast upon the High Court to formulate the substantial questions of law in terms of sub-section (4) of Section 100 of Code of Civil Procedure.

7. Therefore, normally the order of admission of the appeal should clearly indicate on what substantial questions of law the appeal has been admitted. Even if the High Court is of the view that the substantial questions of law, as framed in the memorandum of appeal, are substantial questions of law, the order admitting the appeal should specifically state what are the questions of law on which the appeal is admitted. Obviously, if no substantial question(s) of law arises then the appeal has to be dismissed at the threshold.

8. Sub-section (5) mandates that the appeal shall be heard on the questions so formulated. It is, thus, clear that the hearing of the appeal should revolve around the substantial questions of law and the Court at the final hearing cannot go beyond the substantial questions of law. We would, however, like to make it clear that if at the time of final hearing, the Court feels that there is some other substantial question(s) of law involved, it is not debarred from formulating that question even at that stage but hearing will have to be limited to substantial questions of law. Sub-section (5) also clearly lays down that the respondent has a right to urge that the substantial question(s) of law, as formulated, do not actually arise for consideration or that they are not substantial questions of law.

9. The proviso to Section 100 of Code of Civil Procedure makes it clear that the Court has the power to hear the appeal from any substantial questions of law not formulated by it if it is satisfied that the case involves such questions. However, it is important to note, that in such eventuality the Court has to record its reasons for formulating such questions of law. This obviously means that the Court will pass a reasoned order while formulating the substantial question(s) of law at this stage. The natural corollary is that the parties have to be heard after the framing of such substantial questions of law. The hearing cannot be prior to the substantial questions of law. We are clearly of the view that the High Court erred in hearing the appeal finally when questions of law have not been framed and formulated the questions of law only in the judgment.

10. Therefore, we set aside the order of the High Court on the short ground that the substantial questions of law were not framed before arguments were heard.

11. We remand the matter to the High Court and request the High Court to decide the questions of law after hearing the parties. We give liberty to the High Court to reframe the questions of law after hearing

A the parties. We further request the High Court to treat this case as a second appeal having been filed in the year 1990 and give it priority accordingly.

It is stated that respondent no.2 has died and his legal representatives are not brought on record. In view of the order, which
B we have passed, we do not want any further delay in the appeal and leave it to the High Court to decide the effect of the death of respondent no.2 on the appeal.

The appeal is allowed in the aforesaid terms.

C

Devika Gujral Appeal allowed.

VASHDEO R BHOJWANI

v.

ABHYUDAYA CO-OPERATIVE BANK LTD & ANR.

(Civil Appeal No. 11020 of 2018)

SEPTEMBER 02, 2019

[R. F. NARIMAN AND SURYA KANT, JJ.]

Limitation Act, 1963:

s.23 and Article 137 – Applicability of the Limitation Act – To the application u/s.7 of Insolvency and Bankruptcy Code, 2016 – It was held in the impugned order that as the default continued, no period of limitation would be attracted – Appeal to Supreme Court – Held: Limitation Act is applicable to the applications filed u/s.7 – Petition u/s. 7 filed after 3 years from the date of default, would be barred u/Art. 137 of the Limitation Act – The limitation would not be saved by virtue of s.23 of the Limitation Act – Appeal allowed – Insolvency and Bankruptcy Code, 2016 – s.7.

B.K. Educational Services Private Limited vs. Parag Gupta and Associates, **2018 (14) SCALE 482;** *Balkrishna Savalram Pujari and Others vs. Shree Dnyaneshwar Maharaj Sansthan & Others,* **[1959] Suppl. 2 S.C.R. 476 – relied on.**

Case Law Reference

2018 (14) SCALE 482	**relied on**	**Para 3**
[1959] Suppl. 2 S.C.R. 476	**relied on**	**Para 4**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 11020 of 2018

From the Judgment and Order dated 05.09.2018 of the National Company Law Appellate Tribunal, New Delhi in Company Appeal (AT) (Insolvency) No. 372 of 2018

Anand Landge, Jay Kishor Singh, Advs. for the Appellant.

Rajeev K. Panday, Rajeev Maheshwaranand Roy, P. Srinivasan, Hrishikesh Chitaley, Ashish Verma, Chandra Prakash, Advs. for the Respondents.

A The Judgment of the Court was delivered by

R. F. NARIMAN, J.

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

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

3. Having heard learned Counsel for both parties, we are of the view that this is a case covered by our recent judgment in *B.K. Educational Services Private Limited* vs. *Parag Gupta and Associates*, 2018 (14) Scale 482, para 27 of which reads as follows:-

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

4. In order to get out of the clutches of para 27, it is urged that Section 23 of the Limitation Act would apply as a result of which limitation

would be saved in the present case. This contention is effectively answered by a judgment of three learned Judges of this Court in *Balkrishna Savalram Pujari and Others* vs. *Shree Dnyaneshwar Maharaj Sansthan & Others*, [1959] Supp. (2) S.C.R. 476. In this case, this Court held as follows:

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

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

5. This being the case, and the claim in the present suit being time barred, there is no debt that is due and payable in law. We allow the appeal and set aside the orders of the NCLT and NCLAT. There will be no order as to costs.

Kalpana K. Tripathy Appeal allowed.

A UNION OF INDIA & ANR.

v.

BALWANT SINGH & ORS.

(Civil Appeal Nos. 6981-6982 of 2019)

B SEPTEMBER 03, 2019

[R. F. NARIMAN AND SURYA KANT, JJ.]

National Highway Act, 1956 – s.3G(5) – Land Acquisition Act, 1894 – s.25 – Union of India contended that the impugned Judgment suffered from an error – It was contended that in the C *impugned judgment, the case of Madishetti Bala Ramul (D) through LRs v. The Land Acquisition Officer was followed, which applied only to the Land Acquisition Act and cannot be made applicable to the National Highways Act – Held: Union of India is right – Under the Land Acquisition Act an award that is made by the Land Acquisition is in the nature of an offer on behalf of the government* D *and hence cannot be challenged by the government – Whereas, the scheme of the National Highways Act as disclosed by s.3G(5) is that the amount determined by the competent authority under the said Act may, on application of either of the parties, if it is not so acceptable, be then determined by the Arbitrator to be appointed by the central government – Thus, matters remanded to be decided* E *u/s.37 of the Arbitration and Conciliation Act by the High Court – In the aforesaid terms, the appeals are allowed.*

Madishetti Bala Ramul (D) through LRs v. The Land Acquisition Officer **[2007] 3 RCR (Civil) 455 – referred to.**

F

Case Law Reference

[2007] 3 RCR (Civil) 455	**referred to**	**Para 2**

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 6981-6982 of 2019

G With

Civil Appeal Nos. 6983-6984 of 2019.

From the Judgment and Order dated 03.02.2016 of the High Court of High Court of Punjab and Haryana at Chandigarh in FAO No. 10168 of 2014 and order dated 09.11.2016 in RA-CR N o. 234-CII of H 2016 (O&M).

Mukul Rohatgi, Narender Hooda, Amit Sibal, Neeraj Kumar Jain, Sr. Advs., Alok Sangwan, Devashish Bharuka, Raghujeet S. Madan, Damanjit Singh Monga, Ms. Ankur Berry, Sunny Kadiyan, Yashveer Singh Balhara, Ravi Bharuka, Mayank Sharma, Rajendra Beniwal, Shashi Pal Laler, R. S. Manhas, Sonit Sinhmar, Ravi Panwar, P. N. Puri, Ms. Reeta Dewan Puri, Abhishek Puri, Paramjit Rajput, Harish Mahajan, Tripurari Ray, Balwant Singh Billowria, Parveen Kumar, Vijay Pratap Singh, Vivekanand Singh, Anirudh Ray, Ms. Shilpa Singh, Gaurav Agrawal, Yashraj Singh Deora, Shyam Agarwal, Vinay Tripathi, Aishvary Vikram, Ms. Sonal Mashankar, Surinder Singh, Satbir Singh Rathore, Arvind Gupta, Manoj Pundir, Navneet Singh, Advs. for the appearing parties.

The Judgment of the Court was delivered by

R. F. NARIMAN, J.

1. Leave granted.

2. Mr. Mukul Rohatgi, learned Senior Advocate appearing for the Union of India, submits that the impugned judgment passed in these two cases suffers from an obvious error in that the judgment of this Court in the case of *Madishetti Bala Ramul (D) through LRs* vs. *The Land Acquisition Officer*, 2007 (3) RCR (Civil) 455 was followed, which judgment applied only to the Land Acquisition Act and which cannot be made applicable to the National Highways Act for the reason that Section 3G (5) contains a scheme entirely different from and at variance from the scheme contained in the Land Acquisition Act.

3. Mr. Gaurav Agrawal, learned counsel and Mr. Neeraj Kumar Jain, learned senior counsel appearing for the respondents were not able to seriously controvert this position. Even though there is a considerable delay in these matters, we find that it has been condoned by this Court. M/s Gaurav Agrawal and Neeraj Kumar Jain also point out that a review petition was filed which was limited only to two types of land and the point which Mr. Rohatgi has argued before us was not urged in the said review petition.

4. Having heard learned counsel for both sides, we are of the view that the arguments based on the review petition need not detain us further as a Special Leave Petition has been filed against the judgment dated 03.02.2016 in which this point has been taken. Also, Mr. Rohatgi

A is right in pointing out that under the Land Acquisition Act an award that is made by the Land Acquisition Officer is in the nature of an offer on behalf of the government and hence cannot be challenged by the government - See Section 25 of the Act. The scheme of the National Highways Act, on the other hand, as disclosed by Section 3G (5) is that the amount determined by the competent authority under the said Act may, on application of either of the parties, if it is not so acceptable, be then determined by the Arbitrator to be appointed by the central government.

5. In this view of the matter, it is obvious that the impugned judgments in these two matters are incorrect and are therefore set aside. We remand these cases to be decided under the Section 37 jurisdiction under the Arbitration Act by the Punjab & Haryana High Court. The appeals are allowed in the aforesaid terms.

6. We are informed that there are a large number of cases dependent on this judgment. The Learned Chief Justice of the Punjab & Haryana High Court is requested to constitute an appropriate bench to hear these matters at the earliest.

Ankit Gyan Appeals allowed.

K. SREEDHAR RAO

v.

UNION OF INDIA THROUGH SECRETARY,
MINISTRY OF LAW & JUSTICE, NEW DELHI

(Writ Petition (C) No. 300 of 2016)

SEPTEMBER 06, 2019

[ARUN MISHRA, M. R. SHAH AND B. R. GAVAI, JJ.]

High Court Judges (Salaries and Conditions of Service) Act, 1954 – rr. 2 and 7 of Part-I of First Schedule – Pensionary benefits of retired Acting Chief Justice of the High Court – Calculation of – Petitioner served as an Acting Chief Justice of the High Court for 14 months and retired in that capacity – Petitioner claimed the pensionary benefits as available to the Chief Justice of the High Court – The said claim was declined by the Central Government – Writ petition before the Supreme Court – Held: There is a clear distinction between a Judge appointed as an Acting Chief Justice u/Art. 223 of the Constitution and a Chief Justice appointed u/Art. 217 of the Constitution – It is only for the limited purpose of salary, such an Acting Chief Justice is treated at par with the Chief Justice and not for any other purpose, more particularly the pension – However for the purposes of pension, r. 2 and r. 7 of Part I of the First Schedule of the 1954 Act are required to be read conjointly and while making the computation of pension u/r. 2 of Part I of the First Schedule, the service rendered as an Acting Chief Justice is required to be considered as a Chief Justice and accordingly his pension is required to be counted and for that period his pension is required to be computed as if he has rendered service as Chief Justice – In the instant case, the services rendered by the petitioner as an Acting Chief Justice was for a period of 14 months and the same is to be counted/calculated as that of the Chief Justice – Therefore, the petitioner is not entitled to the pensionary benefits including the ceiling in the pension which may be available to a retired Chief Justice, but only for the period of service rendered by him as an Acting Chief Justice is required to be considered as service rendered as a Chief Justice for the purpose of computation of pension – Constitution of India – Arts. 217 and 223 – Judiciary – Service Law – Pension.

A **Dismissing the writ petition, the Court**

HELD: 1. It is required to be noted that there is a clear distinction between a Judge appointed as an Acting Chief Justice under Article 223 of the Constitution of India and a Chief Justice appointed under Article 217 of the Constitution. Considering
B **Article 223 of the Constitution of India, it can be seen that a Judge of the High Court is appointed as an Acting Chief Justice under Article 223 of the Constitution for the purposes of the duties of the Chief Justice and the office of the Chief Justice remains vacant. In a case where the office of the Chief Justice of**
C **the High Court is vacant, the duties of the office of the Chief Justice will be performed by any other Judge as Acting Chief Justice. Therefore, only for the limited purpose of salary, such an Acting Chief Justice is treated at par with the Chief Justice and not for any other purpose, more particularly the pension.**
D **For the purposes of pension, the relevant provisions of the High Court Judges (Salaries and Conditions of Service) Act, 1954 are to be considered and while computing the pension as per Rule 2 of Part I of the First Schedule of the 1954 Act, the service rendered by a Judge as an Acting Chief Justice only is required**
E **to be counted as a Chief Justice and his pension is required to be computed accordingly as a Chief Justice for the service rendered as an Acting Chief Justice. Therefore, the services rendered by the petitioner as an Acting Chief Justice, i.e., for a period of 14 months, is to be counted/calculated as that of the Chief Justice,**
F **namely, Rs.1,21,575/- per annum, or as the case may be. Rule 7 of Part I of the First Schedule cannot be read in isolation. Even Rule 7 specifically provides that for the purposes of this part – Part I, service as an Acting Chief Justice of a High Court shall be treated as though it were service rendered as Chief Justice of a High Court. Rule 2 and Rule 7 of Part I of the First Schedule of**
G **the 1954 Act are required to be read conjointly and if are read conjointly, in that case, while making the computation of pension under Rule 2 of Part I of the First Schedule, the service rendered as an Acting Chief Justice is required to be considered as a Chief Justice and accordingly his pension is required to be counted**

H

and for that period his pension is required to be computed as if he has rendered service as Chief Justice. [Para 6.3][93-B-H]

2. Now so far as the reliance placed upon the decision of this Court in the case of *Syad Sarwar Ali* by the respondent is concerned, the petitioner is right to some extent that the said decision is distinguishable on facts. It is true that in the said case, the respondent – Judge retired as a puisne Judge and not as an Acting Chief Justice. However, in the said decision, it is specifically observed that the substantive portion of Rule 2 read with Rule 7 of the First Schedule deals with the calculation of the pension payable to a Judge during his judicial career and that in computing the pension, the time which he had spent as a Judge or Acting Chief Justice or Chief Justice is taken into consideration. It is further observed by this Court in the aforesaid decision that the rules containing First Schedule are conscious of the fact that the retiring incumbent may be a Judge or a Chief Justice or may have acted as an Acting Chief Justice for a period of time where for the purpose of calculating the quantum of pension, the period spent by a Judge as an Acting Chief Justice is taken into consideration for the purpose of fixing the ceiling. It is further observed that however, an Acting Chief Justice, who is one appointed under Article 223 of the Constitution is not equated with the Chief Justice appointed under Article 217 of the Constitution. The above observations clinch the issue. Even otherwise, this Court has considered the question posed independently and are of the opinion that the petitioner is not entitled to the pensionary benefits including the ceiling in the pension which may be available to a retired Chief Justice and as observed, only that period of service rendered by him as an Acting Chief Justice, i.e., 14 months service as an Acting Chief Justice is required to be considered as service rendered as a Chief Justice for the purpose of computation of pension under Rule 2/as per Rule 2 of the Part I of the First Schedule of the 1954 Act. [Para 7][94-A-F]

Union of India v. Syad Sarwar Ali **(1998) 9 SCC 426 – referred to.**

A **Case Law Reference**

(1998) 9 SCC 426	**referred to**	**Para 3.4**

CIVIL ORIGINAL JURISDICTION: Writ Petition (Civil) No. 300 of 2016

B [Under Article 32 of the Constitution of India]

Kailash Vasdev, Sr. Adv., Navin Prakash, Umrao Singh Rawat, Ms. Nayan Tara, A. Joseph, Advs. for the Petitioner.

Ms. V. Mohana, Sr. Adv., S. K. Singhania, D. L. Chidanand, Ms. Ankita Sharma, Ms. Nikita Kapoor, A. K. Sharma, Mukesh Kumar C Maroria, Advs. for the Respondent.

The Judgment of the Court was delivered by

M. R. SHAH, J.

1. By way of this petition filed under Article 32 of the Constitution D of India, the petitioner, who retired as Acting Chief Justice of the Gauhati High Court, has prayed for an appropriate writ, direction or order and declaration that the petitioner is entitled to pensionary benefits, applicable to a retired Chief Justice of a High Court.

2. That the petitioner joined services as a member of the Karnataka E Judicial Service in the year 1988. He was elevated to the High Court of Karnataka in the year 2000. Thereafter, he was transferred to the Gauhati High Court as a puisne Judge. That on 13.08.2014, in exercise of powers under Article 223 of the Constitution of India, the petitioner was appointed as the Acting Chief Justice of the Gauhati High Court. He served in that capacity for 14 months and retired as Acting Chief Justice on 20.10.2015. F While serving as Acting Chief Justice, the petitioner was paid his salaries and allowances admissible to a Chief Justice, as contemplated in the Second Schedule, Part-D, paragraphs 10 and 11 of the Constitution of India and under the High Court Judges (Salaries and Conditions of Service) Act, 1954 (hereinafter referred to as the '1954 Act').

G 2.1 That on 20.07.2015, when the petitioner was holding the post of Acting Chief Justice, the Registry of the Gauhati High Court sent the required documents for fixation of the petitioner's pension and gratuity to the Central Government. The petitioner claimed the pensionary benefits as may be available to the Chief Justice. However, the Department of Law & Justice informed the High H Court that the petitioner is not entitled to the higher pension ceiling

of Rs.5,40,000/- being the pension available to a Chief Justice and therefore requested to furnish the revised pension report fixing the pension at Rs.4,80,000/- annually. The Registry of the High Court wrote to the Department of Law & Justice that vide Rule 7 of Part-I of the First Schedule to the 1954 Act, the petitioner was entitled to pension admissible to the Chief Justice. At this stage, it is required to be noted that initially the petitioner elected to seek pension under Part-III of the First Schedule to the 1954 Act. However, it is the case on behalf of the petitioner that subsequently he clarified that he is seeking pension under Part-I of the First Schedule to the 1954 Act. The aforesaid shall be dealt with hereinbelow.

2.2 That thereafter the Ministry of Law & Justice, Government of India rejected the contention of the High Court that the petitioner was entitled to receive his pension as a Chief Justice, the petitioner has preferred the present petition under Article 32 of the Constitution of India for an appropriate writ, direction or order and declaration that the petitioner is entitled to the pensionary benefits as that of the Chief Justice.

3. Shri Kailash Vasdev, learned Senior Advocate appearing on behalf of the petitioner has vehemently submitted that as per para 10 of Part D of the Second Schedule of the Constitution of India, there shall be paid to the Judges of the High Courts, in respect of time spent on actual service, salary at the rates mentioned therein. It is submitted that as per para 11 of Part D of the Second Schedule of the Constitution of India, the expression "Chief Justice" includes an Acting Chief Justice. It is submitted that therefore Part D of the Second Schedule of the Constitution of India, in the matter of pay and perks, equates the Acting Chief Justice with the Chief Justice.

3.1 It is further submitted by Shri Kailash Vasdev, learned Senior Advocate appearing on behalf of the petitioner that as per Section 2(1)(a) of the 1954 Act, "Acting Chief Justice" means a Judge appointed under Article 223 of the Constitution to perform the duties of the Chief Justice. It is submitted that as per Section 2(1)(g) of the 1954 Act, "Judge" means a Judge of a High Court and includes the Chief Justice, Acting Chief Justice, an additional Judge and Acting Judge of the High Court.

A 3.2 It is further submitted by Shri Kailash Vasdev, learned Senior Advocate appearing on behalf of the petitioner that as per Rule 2 of Part I of the First Schedule of the 1954 Act, the pension payable to a Judge to whom Part I applies for pension shall be for service as Chief Justice in any High Court – Rs.1,21,575/- per annum for each completed year of service and the pension payable to a Chief Justice shall in no case exceed Rs.15,00,000/- per annum. It is submitted that as per Rule 7 of Part I of the First Schedule of the 1954 Act, for the purposes of Part I, service as an Acting Chief Justice of a High Court ……. shall be treated as though it were service rendered as Chief Justice of a High Court. It is submitted that therefore the petitioner who retired as an Acting Chief Justice shall be entitled to all pensionary benefits as may be available to a retired Chief Justice including the maximum limit of Rs.15,00,000/- per annum in the case of a Chief Justice.

D 3.3 Learned Senior Advocate appearing on behalf of the petitioner has submitted that in fact the respondent rejected the claim of the petitioner considering his application under Part III of the First Schedule of the 1954 Act. It is submitted that in fact subsequently the petitioner claimed the pension/pensionary benefits under Part I of the First Schedule of the 1954 Act, and therefore, his case is required to be considered under Part I of the First Schedule of the 1954 Act.

3.4 Now so far as the reliance placed upon the decision of this Court in the case of *Union of India v. Syad Sarwar Ali (1998) 9 SCC 426* by the respondent is concerned, it is vehemently submitted by the learned Senior Advocate appearing on behalf of the petitioner that the said decision shall not be applicable at all to the facts of the case on hand. It is submitted that the facts in the said case are distinguishable. It is submitted that the said judgment deals with a fact situation where the respondent discharged his duties as Acting Chief Justice during his tenure as a Judge and as such he retired as a Judge and not as an Acting Chief Justice. It is submitted that observations of this Court in para 9 of the aforesaid judgment are *obiter dicta*. It is submitted that therefore the decision in the case of *Syad Sarwar Ali(supra)* has no application to the facts of the case on hand.

3.5 It is further submitted by Shri Kailash Vasdev, learned Senior Advocate appearing on behalf of the petitioner that para 11 of Part D of the Second Schedule of the Constitution of India specifically provides the expression "Chief Justice" includes an Acting Chief Justice. It is submitted that Rule 7 of Part I of the First Schedule of the 1954 Act reiterates that "for the purposes of this Part, service as an Acting Chief Justice of a High Court …… shall be treated as though it were service rendered as Chief Justice of a High Court". It is submitted that the Acting Chief Justice discharges the same duties, obligations and functions as the Chief Justice. It is submitted therefore that the petitioner, who retired as an Acting Chief Justice, for all practical purposes, retired as a Chief Justice and therefore he is entitled to the pensionary benefits as may be available to the Chief Justice.

3.6 It is further submitted by Shri Kailash Vasdev, learned Senior Advocate appearing on behalf of the petitioner that as such Part III of the First Schedule of the 1954 Act shall not be applied to a Judge who retires as an Acting Chief Justice. It is submitted that Part III of the First Schedule of the 1954 Act applies to a Judge who has held any pensionable post under the Union or a State …… and who has not elected to receive the pension payable under Part I. It is submitted that Part III deals with pension payable to such a Judge and it does not deal with pension payable to a Judge who retires as an Acting Chief Justice.

3.7 It is further submitted by Shri Kailash Vasdev, learned Senior Advocate appearing on behalf of the petitioner that Section 14 of the 1954 Act provides that "subject to the provisions of this Act, every Judge shall, on his retirement, be paid a pension in accordance with the scale and provisions in Part I of the First Schedule". It is submitted that Rule 7 of the First Schedule equates the service of an Acting Chief Justice as service rendered as a Chief Justice of the High Court for the purposes of Part I. It is submitted that therefore when on the date of retirement the petitioner retired as an Acting Chief Justice after rendering service as an Acting Chief Justice for 14 months, the petitioner shall be entitled to the pensionary benefits which may be available to a Chief Justice.

A 3.8 Making the above submissions, it is prayed to allow the present petition.

4. The present petition is vehemently opposed by Ms. V. Mohana, learned Senior Advocate appearing on behalf of the respondent. It is vehemently submitted that the petitioner being a promotee Judge and B retired as an Acting Chief Justice from the High Court, Part III of the First Schedule of the 1954 Act only shall be applicable. It is submitted that even otherwise as such the petitioner submitted the application for pension under Part III only and therefore his application was processed under Part III only. It is submitted that only before this Court subsequently as an afterthought the petitioner is claiming the pension/pensionary C benefits under Part I. It is submitted that as there was no upper limit so far as the pension payable under Part III is concerned, the petitioner applied for pension under Part III only.

4.1 It is further submitted by Ms. V. Mohana, learned Senior Advocate appearing on behalf of the respondent that para 11 of D Part D of the Second Schedule of the Constitution read with Article 221 shows that the said provisions prescribe entitlement of salaries alone of a Judge/Chief Justice of a High Court and the same is made applicable to an ad-hoc or an Acting Judge/Chief Justice of the High Court. It is submitted that therefore an Acting Chief E Justice of a High Court is equated to a Chief Justice for the limited purpose of salary only and not otherwise.

4.2 It is further submitted by Ms. V. Mohana, learned Senior Advocate appearing on behalf of the respondent that by virtue of the 1954 Act, it is for the limited purpose of computation of salary F that the Acting Chief Justice is treated as Chief Justice.

4.3 It is further submitted by Ms. V. Mohana, learned Senior Advocate appearing on behalf of the respondent that Rule 7 of Part I of the First Schedule of the 1954 Act is required to be read with Rule 2 of Part I. It is submitted that Rule 7 of Part I also G speaks about computation and not grant of equal pension.

4.4 It is further submitted by Ms. V. Mohana, learned Senior Advocate appearing on behalf of the respondent that Rule 7 of Part I of the First Schedule of the 1954 Act when read with Rule 2 of Part I, it can be seen what is contemplated in Part I is only computation as far as the position held by them during a particular H

year either as a Judge/Acting Chief Justice/Chief Justice. It is submitted that in any event, Rule 7 only counts the length of service of a Judge being ad-hoc Judge under Article 127 of the Constitution or one under Article 223 of the Constitution. It is submitted that therefore the prayer of the petitioner for pension as Chief Justice is not sustainable and the petitioner is not entitled to pensionary benefits applicable to a retired Chief Justice of the High Court and is not eligible for consideration to the all statutory posts and assignments for which a retired Chief Justice is eligible.

4.5 It is further submitted by Ms. V. Mohana, learned Senior Advocate appearing on behalf of the respondent that the Acting Chief Justice of a High Court, who is one appointed under Article 223 of the Constitution of India, may not be equated with the Chief Justice of the High Court who is appointed under Article 217 of the Constitution of India. It is submitted that in the case of *Syad Sarwar Ali (supra)*, this Court had categorically held that the Acting Chief Justice is different from Chief Justice. Relying upon paragraphs 10 and 11 of the aforesaid decision, it is submitted by the learned Senior Advocate that an Acting Chief Justice who is one appointed under Article 223 of the Constitution of India may not be equated with a Chief Justice appointed under Article 217 of the Constitution of India.

4.6 It is further submitted by Ms. V. Mohana, learned Senior Advocate appearing on behalf of the respondent that there is a clear distinction between a Chief Justice appointed under Article 217 of the Constitution of India and Acting Chief Justice appointed under Article 223 of the Constitution of India. It is submitted that when an Acting Chief Justice is appointed, the office of the Chief Justice remains vacant. It is submitted that under Article 223 of the Constitution, an Acting Chief Justice is merely appointed by the President to perform the functions of the Chief Justice while the office of the Chief Justice remains vacant. It is submitted that Schedule 3 Para VIII of the Constitution of India provides for an oath for the Chief Justice and other Judges, but not for an Acting Chief Justice. It is submitted that Acting Chief Justice never takes the oath of office. It is submitted that any puisne Judge can be appointed as Acting Chief Justice. It is submitted therefore that there is a material distinction between the Chief Justice appointed

under Article 217 of the Constitution and an Acting Chief Justice appointed under Article 223 of the Constitution. It is submitted that only during the period a Judge is appointed and functioning as an Acting Chief Justice and considering para 11 of the Second Schedule of the Constitution read with Article 221 of the Constitution, such an Acting Chief Justice is entitled to the salaries of a Chief Justice of the High Court. It is submitted therefore that the petitioner shall not be entitled to the pensionary benefits as may be available to a retired Chief Justice and therefore is rightly denied the pension/pensionary benefits as may be available to a retired Chief Justice.

4.7 Making the above submissions, it is prayed to dismiss the present petition.

5. We have heard the learned counsel for the respective parties at length.

5.1 The short question which is posed for the consideration of this Court is, whether the petitioner who retired as an Acting Chief Justice is entitled to the pensionary benefits which may be available to a retired Chief Justice?

5.2 Section 14 of the 1954 Act provides for pension payable to Judges. It provides that subject to the provisions of the 1954 Act, every Judge shall, on his retirement, be paid a pension in accordance with the scale and provisions in Part I of the First Schedule. It further provides that no such pension shall be payable to a Judge unless (a) he has completed not less than twelve years of service for pension; or (b) he has attained the age of sixty-two years; or (c) his retirement is medically certified to be necessitated by ill-health. "Judge" is defined under Section 2(1)(g) of the 1954 Act. According to Section 2(1)(g) of the 1954 Act, "Judge" means a Judge of a High Court and includes the Chief Justice, an Acting Chief Justice, an additional Judge and an Acting Judge of the High Court.

5.3 Part I of the First Schedule of the 1954 Act shall apply to a Judge who has not held any other pensionable post under the Union or a State or a Judge who having held any other pensionable post under the Union or a State has elected to receive the pension payable under Part I. Part III of the First Schedule of the 1954

Act shall apply to a Judge who has held any pensionable post under the Union or a State and who has not elected to receive the pension payable under Part I. In the present case, as such, the petitioner was a promotee Judge and therefore Part III of the First Schedule may be applicable. It is required to be noted that as such the petitioner applied for pension under Part III. However, it is the case on behalf of the petitioner that subsequently having realised the mistake he had applied for pension under Part I of the First Schedule of the 1954 Act. Without entering into the question, whether the petitioner can be permitted to subsequently switch over to Part I of the First Schedule of the 1954 Act, we shall consider the case of the petitioner as if he had applied for pension under Part I of the First Schedule.

6. Rule 2 of Part I of the First Schedule of the 1954 Act provides that subject to the other provisions of Part I, the pension payable to a Judge to whom Part I applies, pension shall be (a) for service as Chief Justice in any High Court – Rs.1,21,575/- per annum for each completed years of service; (b) for service as any other Judge in any High Court – Rs. 96,524/- per annum for each completed years of service. It further provides that the pension under this paragraph shall in no case exceed Rs.15,00,000/- per annum in the case of a Chief Justice and Rs.13,50,000/- per annum in the case of any other Judge.

6.1 Rule 7 of Part I of the First Schedule of the 1954 Act, upon which much reliance has been placed by the learned Senior Advocate appearing on behalf of the petitioner, provides that for the purposes of Part I, service as an Acting Chief Justice of a High Court …. shall be treated as though it were service rendered as Chief Justice of a High Court. Therefore, for the purpose of computation of the pension as per Rule 2, the service rendered by a Judge as an Acting Chief Justice shall be treated as a service rendered as Chief Justice, i.e., Rs.1,21,575/- per annum. For example, like in the present case, for the services rendered by the petitioner as Acting Chief Justice for 14 months, while computing the pension for that 14 months, his pension shall be counted as Chief Justice, i.e., Rs.1,21,575/- per annum and for rest of the completed years of service his pension is to be computed as Judge of the High Court. Rules 2 and 7 of Part I of the First Schedule of the 1954 Act read as under:

A "2. Subject to the other provisions of this Part, the pension payable to a Judge to whom this Part applies for pension shall be, __

(a) for service as Chief Justice in any High Court, Rs.1,21,575/- per annum for each completed year of service;

B (b) for service as any other Judge in any High Court, Rs.96,524/- per annum for each completed year of service:

provided that the pension under this paragraph shall in no case exceed Rs.15,00,000/- per annum in the case of a Chief Justice and Rs.13,50,000/- per annum in the case of any other Judge.

C 7. For the purposes of this Part, service as an acting Chief Justice of a High Court or as an ad hoc Judge of the Supreme Court, shall be treated as though it were service rendered as Chief Justice of a High Court,

D Provided that nothing in this paragraph shall apply—

(a) to an additional Judge or acting Judge; or

(b) to a Judge who at the time of his appointment is in receipt of a pension (other than a disability or wound pension) in respect of any previous service under the Union or a State."

E 6.2 Now so far as the reliance placed upon para 11 Part D of the Second Schedule of the Constitution and Articles 127, 221 and 223 of the Constitution by the learned Senior Advocate appearing on behalf of the petitioner is concerned, on conjoint reading of the aforesaid provisions, we are of the opinion that so long as a Judge F who is performing his duties as an Acting Chief Justice appointed under Article 223 of the Constitution, shall be entitled to the salary and other perks as that of the Chief Justice. Meaning thereby, what is contemplated by the aforesaid provisions is only payment of salary during the tenure while functioning as Acting Chief Justice as that of a Chief Justice. Even by virtue of the provisions of the G 1954 Act, it is for the limited purpose for computation of the salary that Acting Chief Justice is treated as Chief Justice.

6.3 Now so far as the submission on behalf of the petitioner, relying upon para 11 Part D of the Second Schedule that the "Chief Justice" includes an "Acting Chief Justice" and that such a Judge

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who is functioning as an Acting Chief Justice be paid the salary of a Chief Justice and for all practical purposes he has performed the duties of a Chief Justice and therefore he shall be paid the pensionary benefits admissible to a retired Chief Justice is concerned, it is required to be noted that there is a clear distinction between a Judge appointed as an Acting Chief Justice under Article 223 of the Constitution of India and a Chief Justice appointed under Article 217 of the Constitution. Considering Article 223 of the Constitution of India, it can be seen that a Judge of the High Court is appointed as an Acting Chief Justice under Article 223 of the Constitution for the purposes of the duties of the Chief Justice and the office of the Chief Justice remains vacant. In a case where the office of the Chief Justice of the High Court is vacant, the duties of the office of the Chief Justice will be performed by any other Judge as Acting Chief Justice. Therefore, only for the limited purpose of salary, such an Acting Chief Justice is treated at par with the Chief Justice and not for any other purpose, more particularly the pension. For the purposes of pension, the relevant provisions of the 1954 Act are extracted hereinabove and as observed hereinabove while computing the pension as per Rule 2 of Part I of the First Schedule of the 1954 Act, the service rendered by a Judge as an Acting Chief Justice only is required to be counted as a Chief Justice and his pension is required to be computed accordingly as a Chief Justice for the service rendered as an Acting Chief Justice. Therefore, the services rendered by the petitioner as an Acting Chief Justice, i.e., for a period of 14 months, is to be counted/calculated as that of the Chief Justice, namely, Rs.1,21,575/- per annum, or as the case may be. Rule 7 of Part I of the First Schedule cannot be read in isolation. Even Rule 7 specifically provides that for the purposes of this part – Part I, service as an Acting Chief Justice of a High Court shall be treated as though it were service rendered as Chief Justice of a High Court. Rule 2 and Rule 7 of Part I of the First Schedule of the 1954 Act are required to be read conjointly and if are read conjointly, in that case, while making the computation of pension under Rule 2 of Part I of the First Schedule, the service rendered as an Acting Chief Justice is required to be considered as a Chief Justice and accordingly his pension is required to be counted and for that period his pension is required to be computed as if he has rendered service as Chief Justice.

A 7. Now so far as the reliance placed upon the decision of this Court in the case of *Syad Sarwar Ali(supra)* by the learned counsel appearing on behalf of the respondent is concerned, learned counsel appearing on behalf of the petitioner is right to some extent that the said decision is distinguishable on facts. It is true that in the said case, the B respondent – Judge retired as a puisne Judge and not as an Acting Chief Justice. However, in the said decision, it is specifically observed that the substantive portion of Rule 2 read with Rule 7 of the First Schedule deals with the calculation of the pension payable to a Judge during his judicial career and that in computing the pension, the time which he had spent as a Judge or Acting Chief Justice or Chief Justice is taken into C consideration. It is further observed by this Court in the aforesaid decision that the rules containing First Schedule are conscious of the fact that the retiring incumbent may be a Judge or a Chief Justice or may have acted as an Acting Chief Justice for a period of time where for the purpose of calculating the quantum of pension, the period spent by a Judge as an D Acting Chief Justice is taken into consideration for the purpose of fixing the ceiling. It is further observed that however, an Acting Chief Justice, who is one appointed under Article 223 of the Constitution is not equated with the Chief Justice appointed under Article 217 of the Constitution. The above observations clinch the issue. Even otherwise, we have considered the question posed independently and are of the opinion that E the petitioner is not entitled to the pensionary benefits including the ceiling in the pension which may be available to a retired Chief Justice and as observed hereinabove, only that period of service rendered by him as an Acting Chief Justice, i.e., 14 months service as an Acting Chief Justice is required to be considered as service rendered as a Chief Justice for the purpose of computation of pension under Rule 2/as per Rule 2 of the F Part I of the First Schedule of the 1954 Act.

8. In view of the above and for the reasons stated above, the petitioner is not entitled to the relief and the declaration as prayed. The petitioner is not entitled to the pensionary benefits including the ceiling in the pension as may be available to a retired Chief Justice. The instant G petition fails and the same deserves to be dismissed and is accordingly dismissed.

Ankit Gyan Petition dismissed.

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M/S AVINASH HITECH CITY 2 SOCIETY & ORS. A

v.

BODDU MANIKYA MALINI & ANR. ETC.

(Civil Appeal Nos. 7047-7049 of 2019)

SEPTEMBER 06, 2019 B

[ARUN MISHRA AND M. R. SHAH, JJ.]

Arbitration and conciliation Act, 1996 – s. 8 – The original land-owners executed 17 development agreements cum power of attorney in favour of one developer for developing an integrated complex – Subsequently, the owners constituted themselves into three societies which included appellant no.1-society – Thereafter, the parties to each of the Development Agreements executed supplementary Development agreements to their respective Development agreement – Accordingly, the developer was allotted 11 commercial complexes and the owners were allotted 4 commercial complexes – Respondents-owners were allotted a share in a building H1B and they were also the members of the appellant no. 1 society – Respondents and appellants entered into an Addendum to the supplementary Development agreement – Various spaces in building H1B were leased out to a company and rents were collected by the appellant no.1– Respondents sought sharing of the rent of the leased space – Pursuant thereto, respondents filed applications u/s. 23 of Societies Registration Act before the District Judge – Appellants filed applications u/s. 8 of the Arbitration Act and sought the appointment of Arbitrator in the light of the arbitration cl. 19 of the addendum – District Judge held disputes between the parties were not covered u/cl. 19 of the Addendum – Aggrieved, appellants filed appeals before the High Court, which were dismissed – On appeal, held: As per cl. 13 of the Addendum/Agreement, the societies were the "sole authorities" to collect/receive the lease rents in respect of the extends leased out in a given building earmarked as the share of the owners in the completion and pool the entire revenue generated from each of the buildings by way of lease rents and distribute the same to the owners – Therefore, the dispute between the respondents and the appellants with respect to the sharing of the rent with respect to the leased space can be said to be related to C D E F G H

A *the Addendum and /or in connection with or relating to the Addendum – Cl.19 was applicable in the event of any dispute and difference arising among the parties out of, in connection with or relating to the agreement – Both the High Court and District Judge committed error in not referring the dispute between the appellants and the respondents to the arbitration – Parties referred to the Arbitration – Andhra Pradesh Societies Registration Act, 2001 – s. 23.*

Allowing the appeals, the Court

HELD: 1. On reading Clause 19 of the Addendum as a whole, it appears that in the event of dispute or difference among the parties out of, in connection with or relating to the agreement, the same shall be referred to arbitration. However, sub-clauses (c), (d) and (e) provide for different procedure in the event of any disputes and differences between the owners; between two or more societies or owners who are the members of two different societies and between two or more owners of the space in the same building. Sub-clause (c) of Clause 19 provides that any disputes or differences whatsoever arising between owners, which could not be resolved by the parties through negotiations, within a period of 30 days from the service of the notice of dispute, the same shall be referred to and shall finally be settled by the arbitration in accordance with the (Indian) Arbitration and Conciliation Act, 1996. Sub-clause (d) of Clause 19 provides that in the event of any dispute which involves two or more societies or owners who are the members of two different societies, the arbitral tribunal shall comprise of three or more arbitrators. It further provides, "who shall be appointed as a presiding arbitrator; who shall be the Chairman of the arbitral tribunal and the venue of the arbitration". Sub-clause (e) of Clause 19 provides that in the event of any dispute which involves two or more owners of the space in the same building, the arbitral tribunal shall comprise of the sole arbitrator and, in such a situation, each party to the dispute shall refer the matter to the office bearers of their respective Society which shall be the arbitral tribunal and the venue of arbitration shall be in Hyderabad. [Para 7.1][104-H; 105-A-E]

2. As observed hereinabove, Clause 19 shall be applicable in the event of any dispute and difference arising among the

parties out of, in connection with or relating to the agreement. As observed hereinabove, the developers, owners, societies and the original owners and even subsequent societies formed are parties to the agreement and the Addendum. It is also required to be noted and, as observed hereinabove, the dispute is with respect to sharing of the rent of the leased space and it can be said that the respondents are also claiming the share relying upon the Development Agreements; Supplementary Development Agreements and the Addendum. Therefore, the dispute can be said to in connection with or relating to the Agreements also. [Para 7.2][105-F-G]

3. Considering the above facts and circumstances, both the High Court and the District Judge have committed grave error in not referring the dispute between the appellants and the respondents to the arbitration. This Court is of the opinion that Clause 19 of the Addendum to the Supplementary Development Agreement shall be squarely applicable and therefore the disputes between the respondents and the appellants for which the respondents initiated proceedings under the Societies Registration Act, are required to be referred to the Arbitration and/or to the Arbitral Tribunal. [Para 7.3][105-H; 106-A-B]

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 7047-7049 of 2019

From the Judgment and Order dated 22.11.2018 of the High Court of Judicature at Hyderabad in C.M.A. Nos. 1257, 1379 and 1380 of 2017.

Jayant Bhushan, Sr. Adv., Yelamanchili Shiva Santosh Kumar, Tarun Gupta, Advs. for the Appellants.

Joy Basu, Sr. Adv., Ms. Pallavi Sharma, Adv. for the Respondents.

The Judgment of the Court was delivered by

M. R. SHAH, J.

1. Leave granted.

2. Feeling aggrieved and dissatisfied with the impugned common judgment and order dated 22.11.2018 passed by the High Court of

A Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh in C.M.A. Nos. 1257, 1379 and 1380 of 2017 by which the High Court has dismissed the said appeals and has confirmed the order passed by the learned Principal District Judge, Ranga Reddy rejecting applications under Section 8 of the Arbitration and Conciliation
B Act, 1996 filed by the appellants herein and has refused to refer the dispute between the parties to the Arbitrator, the original applicants have preferred the present appeals.

3. The facts leading to the present appeals in nutshell are as under:

3.1 That the original land-owners of the land admeasuring 25 acres
C and 68 cents in aggregate forming part of Survey Nos. 30, 34, 35 and 38 situated at Gachibowli Village, Serilingampally, Rangareddy District executed 17 development agreements cum power of attorney in favour of one Phoenix Infocity Private Limited for developing an integrated complex comprising of residential units,
D commercial and office spaces and service apartments on the project land. Subsequently, the owners constituted themselves into three societies registered under the Andhra Pradesh Societies Registration Act, 2001, namely Avinash Hitech City 2 Society (appellant no. 1), Ganga Hitech City 2 Society and Vignesh Hitech City 2 Society. That the said societies applied for and were granted
E co-developer status in respect of the SEZ Project. It appears that thereafter the parties to each of the Development Agreements executed Supplementary Development Agreements to their respective Development Agreement. That, in terms of the Development Agreements and the Supplementary Development
F Agreements, the constructed space in the proposed buildings were to be shared in the ratio of 37.5 : 62.5 between the owners and the developer. Accordingly, the developer was allotted 11 commercial complexes and the owners were allotted 4 commercial complexes. It seems that the respondents are the owners who have been allotted a share in building H1B and also are the
G members of the appellant no. 1 Society. It appears that, thereafter, an Addendum to the Supplementary Development Agreement was executed by *inter alia* the appellants and the respondents (excluding the lessee, HCL Technologies Limited) on 12.03.2010. Clause 19 of the Addendum provides for the mechanism to resolve the dispute between the parties (which shall be dealt with
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hereinbelow). Clause 13 of the Addendum is with respect to the collection of lease rents in respect of the extends leased out in a given building earmarked as the share of the owners till the completion. Clause 16 empowers the societies to determine and collect monthly maintenance charges from the owners and Clause 18 provides that the owners are liable to pay the proportionate share of common expenses for upkeep and maintenance to the societies.

3.2 A cold shell of building H1B was completed by the developer and appellant no. 1 Society converted the same to warm shell by setting up the air conditioning facilities, back-up generators and back-up power implementation, building management system implementation, electrical works and civil works and the funds for the same were raised by appellant no. 1 Society by way of bank loans. Thereafter, various spaces in building H1B were leased out to HCL Technologies Ltd. and the rents were collected by appellant no. 1 Society.

3.3 That, thereafter, the respondents filed a petition under Section 23 of the Andhra Pradesh Societies Registration Act, 2001 (for short 'the Societies Registration Act') before the Principal District Judge, Ranga Reddy District making an allegation that their purported share in the rentals were not being paid to them and prayed for a direction to appellant no. 1 Society to produce the entire accounts for the rental amounts received by it from the tenants along with audit reports and minute books from 2011 to 2015. The respondents also prayed that appellant no. 1 Society be directed to pay amounts already due to the respondents, being their purported share in the rental amounts. That, thereafter another petition was filed by the respondents praying that the Court split appellant no. 1 Society into two different societies claiming to have "lost all faith and confidence on the integrity" of the executive committee of appellant no. 1 Society and claiming that their interest could no longer be protected by appellant no. 1 Society. That, thereafter, third application was filed by the respondents before the learned District Judge under Section 23 of the Societies Registration Act and prayed for a mandatory injunction against the appellants herein directing them to *inter alia* distribute the rents purportedly received by appellant no. 1 Society.

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3.4 In the light of the arbitration Clause 19 of the Addendum, the appellants filed petitions under Section 8 of the Arbitration and Conciliation Act, 1996 seeking the appointment of an arbitrator in accordance with Clause 19 of the Addendum. All the three applications came to be dismissed by the learned District Judge on the ground that the disputes between the parties in the petition under Section 23 of the Societies Registration Act are not covered under Clause 19 of the Addendum.

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3.5 Aggrieved by the order of the learned District Judge dismissing the application under Section 8 of the Arbitration and Conciliation Act, the appellants herein preferred three separate appeals before the High Court. By the impugned common judgment and order dated 22.11.2018, the High Court has dismissed the said appeals. Hence, the present appeals.

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4. Shri Jayant Bhushan, learned Senior Advocate appearing on behalf of the appellants has vehemently submitted that, in the facts and circumstances of the case, the High Court has materially erred in dismissing the appeals and confirming the order passed by the learned District Judge dismissing the applications filed under Section 8 of the Arbitration and Conciliation Act, 1996. It is vehemently submitted by Shri Jayant Bhushan, learned Senior Advocate appearing on behalf of the appellants that the High Court has failed to appreciate Clause 19 of the Addendum to the Supplementary Development Agreement dated 12.03.2010 in proper perspective while dismissing the applications of the appellants under Section 8 of the Arbitration and Conciliation Act, 1996.

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4.1 It is vehemently submitted by the learned Senior Advocate appearing on behalf of the appellants that the dispute between the appellants and the respondents is the quantum of the share claimed by the respondents in the lease rents collected by appellant no. 1 Society. It is submitted that the respondents are claiming their share in the rent collected by appellant no.1 Society relying upon the relevant provisions of the Development Agreements and the Supplementary Development Agreements and the Addendum. It is submitted that, therefore, the dispute can be said to be arising out of the agreements executed between the parties and the Addendum. It is submitted that, therefore, Clause 19 of the Addendum shall be squarely applicable. It is further submitted that Clause 19 of the Addendum is very clear and, as per Clause

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19, any dispute between the owners, including the dispute relating to the Addendum and all questions relating to its interpretation shall be construed in accordance with the laws of India. It further provides that, except as otherwise specifically provided in the Agreement, in the event of any dispute or difference arising among the parties out of, in connection with or relating to this agreement, shall be governed by Clause 19 of the Addendum and Sub-clauses (a) to (g) of Clause 19 shall be applicable. It is submitted that therefore the dispute between the parties for which the respondents filed the application under Section 23 of the Societies Registration Act before the District Judge shall be squarely covered within Clause 19 and therefore the High Court ought to have allowed the appeals and ought to have referred the dispute to Arbitrator as per Clause 19 of the Addendum.

4.2 It is further submitted by the learned Senior Advocate appearing on behalf of the appellants that the High Court has materially erred in observing and holding that in the event of any dispute which involves two or more owners of the space in the same building only, Clause 19 shall be applicable.

4.3 It is vehemently submitted by Shri Jayant Bhushan, learned Senior Advocate for the appellants that appellant no.1 Society is a co-developer and has received the rent as per Clause 13 of the Agreement. It is submitted that in any case when the respondents are claiming their share in the rent collected and received by the appellant and the dispute is sharing of the rent of the space rented, certainly Clause 19 of the Addendum shall be applicable.

4.4 It is further submitted by the learned Senior Advocate appearing on behalf of the appellants that the High Court has materially erred in considering Sub-clause (e) of Clause 19 of the Addendum only and has materially erred in not considering the entire Clause 19 of the Addendum and the intention of the parties to the Agreement/Addendum.

4.5 Making the above submissions, it is prayed to allow the present appeals and quash and set aside the impugned common judgment and order passed by the High Court and consequently allow the three applications filed under Section 8 of the Arbitration and Conciliation Act and refer the dispute between the parties for

A which the respondents filed an application under Section 23 of the Societies Registration Act to Arbitration.

5. Shri Joy Basu, learned Senior Advocate appearing on behalf of the contesting respondents has opposed the present appeals and has supported the impugned common judgment and order passed by the High B Court.

5.1 It is vehemently submitted by the learned Senior Advocate appearing on behalf of the respondents that, in the facts and circumstances of the case and considering the relevant sub-clauses of Clause 19 of the Addendum, the High Court has rightly not C interfered with the order passed by the learned District Judge while not referring the dispute to Arbitration and not appointing the Arbitrator.

5.2 It is vehemently submitted by learned Senior Advocate appearing on behalf of the respondents that on fair reading of D Clause 19 of the Addendum, only the disputes and differences arising between the Owners [Sub-clause (c) of Clause 19]; the dispute which involves two or more societies or owners who are the members of the different societies [Sub-clause (d) of Clause 19]; or the dispute which involves two or more owners of the space in the same building [Sub-clause (e) of Clause 19], are E required to be referred to Arbitration and to the Arbitral Tribunal comprising of the sole arbitrator. It is submitted that, in the present case, the dispute between the respondents and the appellants cannot be said to be between the owners or between the two or more societies. It is submitted that even the opening part of Clause 19 specifically refers to any dispute between the owners. It is F submitted that therefore the High Court has rightly observed and held that the dispute between the respondents and the appellants shall not fall in any of the Sub-clauses of Clause 19. It is submitted that no error has been committed by the High Court and the learned District Judge.

G 5.3 Making the above submissions, it is prayed to dismiss the present appeals.

6. We have heard the learned counsel appearing on behalf of the respective parties at length. At the outset, it is required to be noted that the dispute between the parties for which the respondents have initiated H proceedings under Section 23 of the Societies Registration Act is with

respect to sharing of the rent of the leased space. It is required to be noted that appellant no. 1 Society claims to be the co-developer. It cannot be disputed and it is not in dispute that owners, societies and developers are the parties to the Development Agreements, Supplementary Development Agreements and the Addendum. According to appellant no. 1-co-developer, after execution of the Development Agreements, Supplementary Development Agreements and the Addendum, a cold shell in building H1B was completed by the developer and appellant no. 1 Society (as co-developer), converted the same to warm shall by setting up the air conditioning facilities, back-up generators and back-up power implementation, building management system implementation, electrical works and civil works and the funds for the same were raised by appellant no. 1 Society by way of bank loans. That, thereafter, various spaces in building H1B were leased out to HCL Technologies Limited and one other and they recovered the rent from the lessee. As per Clause 13 of the Addendum/Agreement which sets out that the societies would be the "sole authorities" to collect/receive the lease rentsin respect of the extends leased out in a given building earmarked as the share of the owners in the completion and pool the entire revenue generated from each of the buildings by way of lease rents and distribute the same to the owners, pro-rata to their respective shares in the build-up space in the project after addressing the liabilities towards loans. Therefore, the dispute between the respondents and the appellants with respect to the sharing of the rent with respect to the leased space can be said to be related to the Addendum and/or in connection with or relating to the Addendum.

7. Clause 19 of the Addendum, which is the arbitration clause and provides how to settle the dispute between the parties, reads as under:

> "The owners agree that any dispute between the Owners, including the dispute relating to this Addendum and all questions relating to its interpretation shall be construed in accordance with the laws of India, without reference to its principles of conflicts of law. Except as otherwise specifically provided in this Agreement, the following provisions apply in the event of any dispute or difference arising among the Parties out of, in connection with or relating to the Agreement (The 'Dispute').
>
> (a) The Dispute shall be deemed to have occurred, when one Party serves on the other Party/ies a notice stating the nature of the Dispute ('Notice of Dispute').

A (b) The Parties hereto agree that they will use all reasonable efforts to resolve among themselves, any Dispute between them through negotiations.

(c) Any Dispute and differences whatsoever arising between the Owners which could not be resolved by Parties through
B negotiations, within a period of thirty (30) days from the service of the Notice of Dispute, the same shall be referred to and shall finally be settled by arbitration in accordance with the (Indian) Arbitration and Conciliation Act, 1996, and all the proceedings shall be conducted in English and a daily transcript in English shall be prepared.
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(d) In the event of any dispute which involves two or more Societies or Owners who are the members of two different Societies, the arbitral tribunal shall comprise of three or more arbitrators. In such a situation, each party to the dispute shall appoint one arbitrator, who shall be from the office bearers of their respective
D Societies and the two or more arbitrators so appointed shall appoint a presiding arbitrator, who shall be one of the office bearers of the Hitech City-2 Owners Welfare Association (HOWA) and the Chairman of the arbitral tribunal; and the venue of arbitration shall be in Hyderabad, India.

E (e) In the event of any dispute which involves two or more Owners of the space in the same building, the arbitral tribunal shall comprise of the sold arbitrator. In such a situation, each party to the dispute shall refer the matter to the office bearers of their respective Society which shall be the arbitral tribunal; and the venue of
F arbitration shall be in Hyderabad, India.

(f) The Parties are debarred from exercising any right or filing any application to any court or tribunal having jurisdiction in connection with matters involving substantial questions of law arising during any arbitration.

G (g) The Parties here by submit to the Arbitrator's award and the award shall be enforceable in any competent court of law."

7.1 On reading Clause 19 of the Addendum as a whole, it appears that in the event of dispute or difference among the parties out of, in connection with or relating to the agreement, the same shall be

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referred to arbitration. However, sub-clauses (c), (d) and (e) provide for different procedure in the event of any disputes and differences between the owners; between two or more societies or owners who are the members of two different societies and between two or more owners of the space in the same building. Sub-clause (c) of Clause 19 provides that any disputes or differences whatsoever arising between owners, which could not be resolved by the parties through negotiations, within a period of 30 days from the service of the notice of dispute, the same shall be referred to and shall finally be settled by the arbitration in accordance with the (Indian) Arbitration and Conciliation Act, 1996. Sub-clause (d) of Clause 19 provides that in the event of any dispute which involves two or more societies or owners who are the members of two different societies, the arbitral tribunal shall comprise of three or more arbitrators. It further provides, "who shall be appointed as a presiding arbitrator; who shall be the Chairman of the arbitral tribunal and the venue of the arbitration". Sub-clause (e) of Clause 19 provides that in the event of any dispute which involves two or more owners of the space in the same building, the arbitral tribunal shall comprise of the sole arbitrator and, in such a situation, each party to the dispute shall refer the matter to the office bearers of their respective Society which shall be the arbitral tribunal and the venue of arbitration shall be in Hyderabad.

7.2 As observed hereinabove, Clause 19 shall be applicable in the event of any dispute and difference arising among the parties out of, in connection with or relating to the agreement. As observed hereinabove, the developers, owners, societies and the original owners and even subsequent societies formed are parties to the agreement and the Addendum. It is also required to be noted and, as observed hereinabove, the dispute is with respect to sharing of the rent of the leased space and it can be said that the respondents are also claiming the share relying upon the Development Agreements; Supplementary Development Agreements and the Addendum. Therefore, the dispute can be said to in connection with or relating to the Agreements also.

7.3 Considering the above facts and circumstances, both the High Court and the learned District Judge have committed grave error

A in not referring the dispute between the appellants and the respondents to the arbitration. We are of the opinion that Clause 19 of the Addendum to the Supplementary Development Agreement shall be squarely applicable and therefore the disputes between the respondents and the appellants for which the respondents initiated proceedings under the Societies Registration Act, are required to be referred to the Arbitration and/or to the Arbitral Tribunal.

8. In view of the above and for the reasons stated above, all these appeals are allowed. The impugned common judgment and order dated 22.11.2018 passed by the High Court in C.M.A. Nos. 1257, 1379 and 1380 of 2017 is hereby quashed and set aside. The order passed by the learned District Judge rejecting the applications submitted by the appellants under Section 8 of the Arbitration and Conciliation Act, 1996 are also hereby quashed and set aside. Consequently, the applications submitted by the appellants under Section 8 of the Arbitration and Conciliation Act, 1996 are hereby allowed and the disputes between the respondents and the appellants are hereby directed to be referred to the Arbitration. No costs.

Ankit Gyan Appeals allowed.

UBER INDIA SYSTEMS PVT. LTD. A

v.

COMPETITION COMMISSION OF INDIA & ORS.

(Civil Appeal No. 641 of 2017)

SEPTEMBER 03, 2019 B

[R. F. NARIMAN AND SURYA KANT, JJ.]

Competition Act, 2002: s. 4 – Abuse of dominant position – Allegation that appellant losing Rs. 204 per trip in respect of every trip made by cars of the fleet owners which does not make any economic sense other than pointing to appellant's intent to eliminate competition in the market – Held: There is prima facie case u/s. 26(1) as to infringement of s. 4 – Two ingredients for abuse of dominant position is, the dominant position itself and its abuse – From the allegation it is clear that if, in fact, a loss is made for trips made, Explanation (a)(ii) would prima facie be attracted as this would certainly affect the appellant's competitors in the appellant's favour or the relevant market in its favour – Under s. 4(2)(a), so long as this dominant position, whether directly or indirectly, imposes an unfair price in purchase or sale including predatory price of services, abuse of dominant position also gets attracted – Thus, the order passed by the appellate tribunal is upheld – Director General to complete investigation within the stipulated period. C D E

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 641 of 2017

From the Judgment and Order dated 07.12.2016 of the Competition Appellate Tribunal in Appeal No. 31 of 2016. F

With

Civil Appeal No. 7012 of 2019.

Dhruv Mehta, Kapil Sibal, Sr. Advs., Anuj Berry, Malak Bhatt, Aman Singh Sethi, P. S. S. Bhargava, S. S. Shroff, Advs. for the Appellant. G

Raju Ramchandran, Sr. Adv., Naveen R. Nath, Rahul Jain, Sonal Jain, Udayan Jain, Ms. Heena Sharma, Kamal Sharma, Ishkaran Singh, Shankar Naryanan, Advs. for the Respondents. H

A The Judgment of the Court was delivered by

R. F. NARIMAN, J.

1. Having heard lengthy arguments of Shri Dhruv Mehta, learned senior counsel appearing for the appellant, and Shri Raju Ramchandran, learned senior counsel appearing on behalf of the respondent, we are of
B the view that interference in these appeals is not called for.

2. The only reason we do so is because we were shown, as part of information that was provided, the following statement:

"23. Uber's discount and incentive offered to consumer pale in comparison with the fidelity inducing discounts offered to drivers
C to keep them attached on its network to the exclusion of other market players. Uber pays drivers/car owners attached on its network unreasonably high incentives over and above and in addition to the trip fare received from the passengers. A summary of the incentives provided to one fleet owner attached to Uber's
D network, having 4 cars, which were driven by 9 drivers is reproduced below.

Statement period		1st June to 28th June
E Total Trips		1,135
Billed to Consumer (Uber's Collection from Consumer)		
Fare		256,187
Surge		18,621
F Surcharges & tolls		23.499
		298,307
Operates Earning [Car Owner's Earning]		
G Operator's Share out of Consumer Revenue Service Tax	100%	274,808
Surcharges & Tolls Reimbursed	4.94%	(12.946)
Others		518
Incentives Received from Uber		230,464

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Operator's net earning		516,343
Uber's Earning		
Revenue Share (Out of Fare and Surge)	0%	0
Incentives Paid to Drivers		(230,464)
Other adjustments		(518)
Net earning (loss)		515,346
Uber's Earning		
Revenue shares (out of Fare and Surge)	0%	0
Incentives Paid to Drives		(230,464)
Other adjustments		(518)
Net earning (Loss)		(230,982)
Per trip Consumer revenue		242
Per trip Uber Net Loss		(204)

3. In light of the abovementioned statement, it can be seen that Uber was losing Rs.204 per trip in respect of the every trip made by the cars of the fleet owners, which does not make any economic sense other than pointing to Uber's intent to eliminate competition in the market. Copies of the statements of aforesaid fleet owners' along with a summary for the period June 1 to June 28,2015 is annexed herewith as Annexure A-15 Colly."

4. Based on this information alone, we are of the view that it would be very difficult to say that there is no *prima facie* case under Section 26(1) as to infringement of Section 4 of the Competition Act, 2002.

5. Section 4 is set out hereinbelow:

6. Abuse of dominant position.-(1) No enterprise or group shall abuse its dominant position.

A (2) There shall be an abuse of dominant position under sub-section (1), if an enterprise or a group,—

(a) directly or indirectly, imposes unfair or discriminatory—

(i) condition in purchase or sale of goods or service; or

B (ii) price in purchase or sale (including predatory price) of goods or service.

7. Explanation.— For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or service referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale
C of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory conditions or prices which may be adopted to meet the competition;

or

(b) limits or restricts—

D

(i) production of goods or provision of services or market therefor; or

(ii) technical or scientific development relating to goods or services to the prejudice of consumers; or

E (c) indulges in practice or practices resulting in denial of market access in any manner; or

(d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such
F contracts; or

(e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.

8. Explanation.—For the purposes of this section, the expression—

G (a) "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to—

(i) operate independently of competitive forces prevailing in the relevant market; or

(ii) affect its competitors or consumers or the relevant market
H in its favour;

(b) "predatory price" means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.

(c)"group" shall have the same meaning as assigned to it in clause (b) of the *Explanation* to section 5."

9. There are two important ingredients which section 4(1) itself refers to if there is to be an abuse of dominant position -

(1) the dominant position itself.

(2) its abuse.

10. 'Dominant position' as defined in *Explanation* (a) refers to a position of strength, enjoyed by an enterprise, in the relevant market, which, in this case is the National Capital Region (NCR), which: (1) enables it to operate independently of the competitive forces prevailing; or (2) is something that would affect its competitors or the relevant market in its favour.

11. Given the allegation made, as extracted above, it is clear that if, in fact, a loss is made for trips made, *Explanation* (a)(ii) would *prima facie* be attracted inasmuch as this would certainly affect the appellant's competitors in the appellant's favour or the relevant market in its favour. Insofar as 'abuse' of dominant position is concerned, under Section 4(2)(a), so long as this dominant position, whether directly or indirectly, imposes an unfair price in purchase or sale including predatory price of services, abuse of dominant position also gets attracted. *Explanation* (b) which defines 'predatory price' means sale of services at a price which is below cost.

12. This being the case, on the facts of this case, on this ground alone, we do not think it fit to interfere with the order made by the Appellate Tribunal.

13. The appeals are dismissed with no orders as to costs.

14. The Director General is requested to complete investigation within a period of six months from today.

Nidhi Jain Appeals dismissed.

A RAJA RAM

v.

JAI PRAKASH SINGH AND OTHERS

(Civil Appeal No. 2896 of 2009)

B SEPTEMBER 11, 2019

[NAVIN SINHA AND INDIRA BANERJEE, JJ.]

Contract Act, 1872: s. 16 – Undue influence – Inference of – Execution of sale deed by father in favour of his son-respondent – Allegation by appellant-son that respondent no. 1 exercised undue influence over the father in having the sale deed executed in favour of respondent because of physical infirmity of the father on account of his old age and that the father was living with the respondents – Held: To infer undue influence merely because a sibling was looking after the family elder, is an extreme proposition which cannot be countenanced in absence of sufficient and adequate evidence – On facts, pleadings in the plaint are completely bereft of any details or circumstances with regard to undue influence exercised by respondents over the deceased – Mere bald statement is attributed to the infirmity of the deceased father – Deceased was not completely physically and mentally incapacitated – Respondents were in a fiduciary relationship with the deceased – Their conduct in looking after the parents in old age may have influenced their thinking – But that per se cannot lead to the conclusion that the original respondents were thus, in a position to dominate the will of the deceased or that the sale deed executed was unconscionable – Onus would shift upon the original respondents u/s. 16 r/w s. 111 of the Evidence Act, only after plaintiff would have established a prima facie case – Sale deed being a registered instrument, there shall be a presumption in favour of the respondents – Onus for rebuttal lay on the appellant which he failed to discharge – First appellate court erred in appreciating the facts and evidence in the case – Cases cannot be decided on assumptions or presumptions – Thus, the order of the High Court setting aside the order of the first appellate court which had set aside the order dismissing the appellant's suit does not call for interference – Evidence Act, 1872 – s. 111.

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Dismissing the appeal, the Court A

HELD: 1.1 The deceased undisputedly was over 80 years and above in age. The plaintiff pleaded that by reason of age and sickness, the deceased was unable to move and walk, with deteriorated eye sight due to cataract. The mental capacity of the deceased was impaired. The impairment in relation to a human B **being is defined as total or partial loss of a body function, total or partial loss of a part of the body, malfunction of a part of the body and malfunction or disfigurement of a part of the body. Except for a bald statement in the plaint that the deceased was mentally impaired there is no evidence whatsoever of his mental status.** C **There can be no presumption with regard to the same only because of old age to equate it with complete loss of mental faculties by senility or dementia. Ageing is a process which affects individuals differently at distinguishable ages. The sale deed executed by the deceased in favour of two people, two years earlier in 1968 has not been assailed by the appellant on the** D **ground that the deceased was devoid of the power of reasoning, because of mental impairment. There is no evidence of any such rapid deterioration in the condition of the deceased in these two years. [Para 9][119-A-D]**

Advanced Law Lexicon by P. Ramanatha Aiyar, **Third** E **Edn Reprint, 2009 – referred to.**

1.2 The deceased on account of his advanced age may have been old and infirm with a deteriorating eye sight, and unable to move freely. There is no credible evidence that he was bed ridden. Hardness of hearing by old age cannot be equated with deafness. F **The plaintiff, despite being the son of the deceased, except for bald statement in the plaint, has not led any evidence in support of his averments. It is an undisputed fact that the deceased appeared before the sub-registrar for registration. It demolishes the entire case of the plaintiff that the deceased was bed ridden.** G **He had put his thumb impression in presence of the sub–registrar after the sale deed had been read over and explained to him. The deceased had acknowledged receipt of the entire consideration in presence of the sub-registrar only after which the deed was executed and registered. The wife of the deceased had**

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A **accompanied him to the office of the sub-registrar. The sale deed being a registered instrument, there shall be a presumption in favour of the defendants. The onus for rebuttal lay on the plaintiff which he failed to discharge. [Para 10][119-E-G]**

1.3 The pleadings in the plaint are completely bereft of any
B **details or circumstances with regard to the nature, manner or kind of undue influence exercised by the original defendants over the deceased. A mere bald statement has been made attributed to the infirmity of the deceased. The deceased was not completely physically and mentally incapacitated. There can be no doubt that the original defendants were in a fiduciary relationship with the**
C **deceased. Their conduct in looking after the deceased and his wife in old age may have influenced the thinking of the deceased. But that *per se* cannot lead to the only irresistible conclusion that the original defendants were therefore, in a position to dominate the will of the deceased or that the sale deed executed was**
D **unconscionable. The onus would shift upon the original defendants under Section 16 of the Contract Act read with Section 111 of the Evidence Act, only after plaintiff would have established a prima facie case. [Para 11][120-B-D]**

1.4 In every cast, creed, religion and civilized society,
E **looking after the elders of the family is considered a sacred and pious duty. Today it has become a matter of serious concern. The Parliament taking note of the same enacted the Maintenance and Welfare of Parents and Senior Citizens Act, 2007. In the changing times and social mores, that to straightway infer undue influence**
F **merely because a sibling was looking after the family elder, is an extreme proposition which cannot be countenanced in absence of sufficient and adequate evidence. Any other interpretation by inferring a reverse burden of proof straightway, on those who were taking care of the elders, as having exercised undue influence can lead to very undesirable consequences. It may not**
G **necessarily lead to neglect, but can certainly create doubts and apprehensions leading to lack of full and proper care under the fear of allegations with regard to exercise of undue influence. Law and life run together. If certain members of the family are looking after the elderly and others by choice or by compulsion**

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of vocation are unable to do so, there is bound to be more affinity between the elder members of the family with those who are looking after them day to day. [Para 11][120-E-H; 121-A]

1.5 The first appellate court erred in appreciation of the facts and evidence in the case. There can be no application of the law sans the facts of a case. The primary ingredients of the law need to be first established by proper pleading supported by relevant evidence. Cases cannot be decided on assumptions or presumptions. The instant case does not call for exercise of any discretionary jurisdiction under Article 136 of the Constitution. [Para 16][122-E]

Krishna Mohan Kul alias Nani Charan Kul and anr. v. Patima Maity and Ors. **(2004) 9 SCC 468 : [2003] 3 Suppl. SCR 496 – distinguished.**

Anil Rishi v. Gurbaksh Singh, **(2006) 5 SCC 558 : [2006] 1 Suppl. SCR 659;** *Jamila Begum (D) thr. L.Rs. v. Shami Mohd. (D) thr. L.Rs. and Ors.* **(2019) 2 SCC 727;** *Bishundeo Narain and Ors. v. Seogeni Rai and Jagernath* **[1951] SCR 548;** *Subhas Chandra Das Mushib v. Ganga Prosad Das Mushib and Ors.* **[1967] 1 SCR 331;** *Krishna Mohan Kul alias Nani Charan Kul and Anr. v. Patima Maity and Ors.* **(2004) 9 SCC 468 : [2003] 3 Suppl. SCR 496 – referred to.**

Case Law Reference

[2006] 1 Suppl. SCR 659	**referred to**	**Para 5**
(2019) 2 SCC 727	**referred to**	**Para 5**
[1951] SCR 548	**referred to**	**Para 5**
[1967] 1 SCR 331	**referred to**	**Para 5**
[2003] 3 Suppl. SCR 496	**distinguished**	**Para 15**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2896 of 2009

A From the Judgment and Order dated 15.12.2008 of the High Court of Judicature at Allahabad, U.P. in Second Appeal No. 2095 of 1975.

Ms. Garima Prashad, Advs. for the Appellants.

Anubhav Kumar, Ankit Agarwal, Abhishek Swarup (For M/s. B Manoj Swarup and Co.), Advs. for the Respondents.

The Judgment of the Court was delivered by

NAVIN SINHA, J.

1. The appellant is aggrieved by the order allowing the second C appeal preferred by the defendants. The High Court set aside the order of the First Appellate Court which had allowed the appeal of the appellant and set aside the order dismissing the appellants suit.

2. The plaintiff and defendant no.2 are brothers. Defendant no.1 was the wife of defendant no.2. Respondents nos.1 to 3 are sons of deceased defendant no.1. Original plaintiff no.2, another brother, has D chosen not to pursue the appeal. The plaintiffs alleged that the original defendants obtained the sale deed dated 02.03.1970 from their father Vaijai, since deceased, in favour of defendant no.1, fraudulently, by deceit and undue influence because of old age and infirmity of the deceased and who was living with the defendants. The suit was dismissed. The E appellate court allowed the appeal holding that the defendants had failed to discharge their burden of being in a position to dominate the will of the deceased by undue influence. The High Court reversed the order of the first appellate court and restored the dismissal of the suit.

3. Learned counsel for the appellant submitted that the deceased F was old, infirm, bedridden and sick for approximately the last 8 to 10 years. His mental faculties were also impaired. He was therefore entirely dependent on the original defendants who were therefore in a position to exercise undue influence over him. The deceased expired on 21.04.1971 within ten months of the execution of the sale deed. The witnesses to the sale deed were related to defendant no.2. It had not been established G that full consideration had been paid. Defendant no.1 had no source of income to pay the purchase price. The wife of the deceased has not been examined as witness. The defendants did not lead the evidence of the Sub-Registrar who had registered the sale deed. The deceased had not sold any land to third persons in the year 1968 as contended by the defendants. H

4. Learned counsel for the respondent/defendants submitted that under Section 101 of the Evidence Act, 1872 the initial onus lay on the plaintiffs by establishing a prima facie case for undue influence and only then the onus would shift to them. The necessary pleadings in respect of the same were completely lacking. The First Appellate Court wrongly shifted the burden upon the respondents. The deceased may have been old and infirm, but he was not deprived of his mental faculties so as not to know the nature of documents executed by him. He was alive approximately for ten months after the execution of the deed, but never questioned the same. The deceased had executed another sale deed two years earlier in 1968, Exhibit 10 in favour of third persons which has not been questioned by the appellant. It establishes that the deceased was not in a condition where undue influence could be exercised over him. There can be no presumptions merely on account of his old age. DW-1 was a witness to the sale deed and was present at the time of registration. The deceased admitted before the sub-registrar having received a sum of Rs.2,000/- earlier and Rs.4,000/- was paid at the time of registration. The Sub-Registrar has not recorded any adverse inferences about the condition or capacity of the deceased at the time of registration. A registered instrument will carry a presumption about its correctness unless rebutted.

5. Reliance in support of the submissions was placed on ***Anil Rishi vs. Gurbaksh Singh***, (2006) 5 SCC 558, ***Jamila Begum (D) thr. L.Rs. vs. Shami Mohd. (D) thr. L.Rs. and ors.***, (2019) 2 SCC 727, ***Bishundeo Narain and Ors. vs. Seogeni Rai and Jagernath***, 1951 SCR 548, ***Subhas Chandra Das Mushib vs. Ganga Prosad Das Mushib and Ors.***, 1967 (1) SCR 331 and ***Krishna Mohan Kul alias Nani Charan Kul and anr. vs. Patima Maity and ors.***, (2004) 9 SCC 468.

6. We have considered the submissions on behalf of the parties. The primary question for our consideration is the physical condition of the deceased and his capacity to execute the sale deed. The second question for our consideration is if the original defendants nos.1 and 2 exercised undue influence over the deceased in having the sale deed executed in favour of defendant no.1 because of the physical infirmity of the deceased on account of his old age.

7. Section 14 of the Indian Contract Act, 1872 defines ‘free consent’ as follows:

A "14. 'Free consent' defined – Consent is said to be free when it is not caused by –

(1) xxxxx

(2) Undue influence, as defined in section 16,…"

B Section 16 defines 'undue influence' as follows:

"16. 'Undue influence' defined—

(1) A contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and
C uses that position to obtain an unfair advantage over the other.

(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another—

D (a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or

(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

E (3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall be upon the person in a position to dominate the will of the other.

F Nothing in the sub-section shall affect the provisions of section 111 of the Indian Evidence Act, 1872 (1 of 1872)."

8. Section 111 of the Indian Evidence Act, 1872, explains good faith in transactions as follows:

G "111. Proof of good faith in transactions where one party is in relation of active confidence.—Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence."

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9. The deceased undisputedly was over 80 years and above in age. The plaintiff pleaded that by reason of age and sickness, the deceased was unable to move and walk, with deteriorated eye sight due to cataract. The mental capacity of the deceased was impaired. The Advanced Law Lexicon by P.Ramanatha Aiyar, third edition reprint,2009 defines impairment in relation to a human being as total or partial loss of a body function, total or partial loss of a part of the body, malfunction of a part of the body and malfunction or disfigurement of a part of the body. Except for a bald statement in the plaint that the deceased was mentally impaired there is no evidence whatsoever of his mental status. There can be no presumption with regard to the same only because of old age to equate it with complete loss of mental faculties by senility or dementia. Ageing is a process which affects individuals differently at distinguishable ages. The sale deed executed by the deceased in favour of one Babu Ram and Munshi Lal two years earlier in 1968 has not been assailed by the appellant on the ground that the deceased was devoid of the power of reasoning, because of mental impairment. There is no evidence of any such rapid deterioration in the condition of the deceased in these two years.

10. The deceased on account of his advanced age may have been old and infirm with a deteriorating eye sight, and unable to move freely. There is no credible evidence that he was bed ridden. Hardness of hearing by old age cannot be equated with deafness. The plaintiff, despite being the son of the deceased, except for bald statement in the plaint, has not led any evidence in support of his averments. It is an undisputed fact that the deceased appeared before the sub-registrar for registration. It demolishes the entire case of the plaintiff that the deceased was bed ridden. He had put his thumb impression in presence of the sub-registrar after the sale deed had been read over and explained to him. The deceased had acknowledged receipt of the entire consideration in presence of the sub-registrar only after which the deed was executed and registered. The wife of the deceased had accompanied him to the office of the sub-registrar. The sale deed being a registered instrument, there shall be a presumption in favour of the defendants. The onus for rebuttal lay on the plaintiff which he failed to discharge. Notwithstanding the finding of enmity between PW-2 and PW-3 with original defendant no.2, the First Appellate Court erred in relying upon these two witnesses by holding that they were independent witnesses and convincing. DW-1, though related was a witness to the sale deed. His evidence in support of the

A events before the sub-registrar therefore has to be accepted. The plaintiff could have led evidence in rebuttal of the sub-registrar but he did not do so.

11. That leads us to the question of undue influence. The pleadings in the plaint are completely bereft of any details or circumstances with B regard to the nature, manner or kind of undue influence exercised by the original defendants over the deceased. A mere bald statement has been made attributed to the infirmity of the deceased. We have already held that the deceased was not completely physically and mentally incapacitated. There can be no doubt that the original defendants were in a fiduciary relationship with the deceased. Their conduct in looking C after the deceased and his wife in old age may have influenced the thinking of the deceased. But that *per se* cannot lead to the only irresistible conclusion that the original defendants were therefore in a position to dominate the will of the deceased or that the sale deed executed was unconscionable. The onus would shift upon the original defendants under D Section 16 of the Contract Act read with Section 111 of the Evidence Act, as held in ***Anil Rishi vs. Gurbaksh Singh*** (supra), only after the plaintiff would have established a prima facie case. The wife of the deceased was living with him and had accompanied him to the office of the sub-registrar. The plaintiff has not pleaded or led any evidence that the wife of the deceased was also completely dominated by the original E defendants. In every cast, creed, religion and civilized society, looking after the elders of the family is considered a sacred and pious duty. Nonetheless, today it has become a matter of serious concern. The Parliament taking note of the same enacted the Maintenance and Welfare of Parents and Senior Citizens Act, 2007. We are of the considered F opinion, in the changing times and social mores, that to straightway infer undue influence merely because a sibling was looking after the family elder, is an extreme proposition which cannot be countenanced in absence of sufficient and adequate evidence. Any other interpretation by inferring a reverse burden of proof straightway, on those who were taking care of the elders, as having exercised undue influence can lead to very G undesirable consequences. It may not necessarily lead to neglect, but can certainly create doubts and apprehensions leading to lack of full and proper care under the fear of allegations with regard to exercise of undue influence. Law and life run together. If certain members of the family are looking after the elderly and others by choice or by compulsion H of vocation are unable to do so, there is bound to be more affinity between

the elder members of the family with those who are looking after them day to day.

12. In ***Bishundeo Narain*** (supra) it was observed as follows:

"We turn next to the questions of undue influence and coercion. Now it is to be observed that these have not been separately pleaded. It is true they may overlap in part in some cases but they are separate and separable categories in law and must be separately pleaded.

It is also to be observed that no proper particulars have been furnished. Now if there is one rule which is better established than any other, it is that in cases of fraud, undue influence and coercion, the parties pleading it must set forth full particulars and the case can only be decided on the particulars as laid. There can be no departure from them in evidence. General allegations are insufficient even to amount to an averment of fraud of which any court ought to take notice however strong the language in which they are couched may be, and the same applies to undue influence and coercion."

13. In ***Subhas Chandra*** (supra), distinguishing between influence and undue influence, it was observed as follows:

> "It must also be noted that merely because the parties were nearly related to each other no presumption of undue influence can arise. As was pointed out by the Judicial Committee of the Privy Council in Poosathurai v. Kappanna Chettiar and others 47 I.A. p. 1 :-
>
> > "It is a mistake (of which there are a good many traces in these proceedings) to treat undue influence as having been established by a proof of the relations of the parties having been such that the one naturally relied upon the other for advice, and the other was in a position to dominate the will of the first in giving it. Up to that point "influence" alone has been made out. Such influence may be used wisely, judiciously and helpfully. But whether by the law of India or the law of England, more than mere influence must be proved so as to render influence, in the language of the law, "undue"."

14. In ***Subhas Chandra*** (supra), it was further observed that there was no presumption of imposition merely because a donor was old and weak. Mere close relation also was insufficient to presume undue influence, observing as follows:

A "Before, however, a court is called upon to examine whether undue influence was exercised or not, it must scrutinise the pleadings to find out that such a case has been made out and that full particulars of undue influence have been given as in the case of fraud. See Order 6, Rule 4 of the Code of Civil Procedure. This aspect of the pleading was also given great stress in the case of Ladli Prasad Jaiswal [1964] 1 SCR 270 above referred to. In that case it was observed (at p. 295):

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> "A vague or general plea can never serve this purpose; the party pleading must therefore be required to plead the precise nature of the influence exercised, the manner of use of the influence, and the unfair advantage obtained by the other."

C

15. ***Krishna Mohan*** **(supra)** is distinguishable on its own fact. The executant was undisputably over 100 years of age. The witnesses proved that he was paralytic and virtually bedridden. None of the witnesses could substantiate that the executant had put his thumb impression.

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16. The first appellate court, completely erred in appreciation of the facts and evidence in the case. There can be no application of the law sans the facts of a case. The primary ingredients of the law need to be first established by proper pleading supported by relevant evidence.

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Cases cannot be decided on assumptions or presumptions. We do not think that the present calls for exercise of any discretionary jurisdiction under Article 136 of the Constitution as a fourth court of appeal. In ***Pritam Singh vs. The State AIR 1950 SC 169*** it was observed:

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> "9. …Generally speaking, this Court will not grant special leave, unless it is shown that exceptional and special circumstances exist, that substantial and grave injustice has been done and that the case in question presents features of sufficient gravity to warrant a review of the decision appealed against. Since the present case does not in our opinion fulfil any of these conditions, we cannot interfere with the decision of the High Court, and the appeal must be dismissed."

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17. On a consideration of the entirety of the matter we find no reason to interfere with the concurrent findings arrived at by two courts. The appeal is dismissed. There shall be no order as to costs.

Nidhi Jain Appeal dismissed.

M/S MAYAVTI TRADING PVT. LTD. A

v.

PRADYUAT DEB BURMAN

(Civil Appeal No. 7023 of 2019)

SEPTEMBER 05, 2019 B

[R. F. NARIMAN, R. SUBHASH REDDY AND SURYA KANT, JJ.]

Arbitration and Conciliation Act, 1996 – Sub-section (6-A) to s.11 [Amendment Act, 2015] and s.11 [Amendment Act, 2019] – Effect of – Held: After the amendment Act of 2019, s.11(6A) has been omitted because appointment of arbitrators is to be done institutionally, in which case the Supreme Court or the High Court under the old statutory regime are no longer required to appoint arbitrators and consequently to determine whether an arbitration agreement exists. C D

Arbitration and Conciliation Act, 1996 – Sub-section (6-A) to s.11 [Amendment Act, 2015] – Effect of – Held: s.11(6A) is confined to the examination of the existence of an arbitration agreement and is to be understood in the narrow sense as has been laid down in the judgment Duro Felguera, S.A. v. Gangavaram Port Limited (2017) 9 SCC 729 *in paras 48 and 59.* E

United India Insurance Company Limited v. Antique Art Exports Private Limited **(2019) 5 SCC 362 – overruled.**

Duro Felguera, S.A. v. Gangavaram Port Limited, **(2017) 9 SCC 729 : [2017] 10 SCR 285;** *SBP & Co. v. Patel Engineering Ltd. and Anr.* **(2005) 8 SCC 618 : [2005] 4 Suppl. SCR 688;** *ONGC Mangalore Petrochemicals Limited v. ANS Constructions Limited and another,* **(2018) 3 SCC 373 : [2018] 2 SCR 598;** *Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engineering Ltd.,* **(2019) SCC OnLine SC 515 – referred to.** F G H

Case Law Reference

(2019) 5 SCC 362	**overruled**	**Para 4**
[2017] 10 SCR 285	**referred to**	**Para 4**
[2005] 4 Suppl. SCR 688	**referred to**	**Para 7**
[2018] 2 SCR 598	**referred to**	**Para 8**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 7023 of 2019

From the Judgment and Order dated 12.03.2019 of the High Court at Calcutta in A.P. No. 565 of 2018.

Mukul Rohatgi, Sr. Adv., Utpal Majumdar, Ms. Ranjeeta Rohatgi, Ms. Samten Doma, Abhishek Thakral, Sagnik Majumdar, Advs. for the Appellant.

Shyam Divan, Sr. Adv., Ms. Sonia Dube, Ms. Labanyasree Sinha, S. Chakraborty, Ms. Kanchan Yadav, Ms. Surbhi Anand, Bhav Ratan (for M/s. Victor Moses & Associates), Advs. for the Respondent.

The Judgment of the Court was delivered by

R. F. NARIMAN, J.

1. Leave granted.

2. We have heard Mr. Mukul Rohatgi, learned Senior Advocate appearing for the appellant and Mr. Shyam Divan, learned Senior Advocate appearing for the respondent at considerable length.

3. On the facts of this case, we do not propose to interfere with the impugned decision of 12.03.2019 and, therefore, do not find it necessary to exercise our extraordinary jurisdiction under Article 136 of the Constitution of India.

4. Having said this, however, during the course of argument, a recent decision of this Court was pointed out, namely, ***United India Insurance Company Limited*** vs. ***Antique Art Exports Private Limited*****,** (2019) 5 SCC 362. In this judgment, purportedly following ***Duro Felguera, S.A.*** vs. ***Gangavaram Port Limited*****,** (2017) 9 SCC 729, this Court held:

> "20. The submission of the learned counsel for the respondent that after insertion of sub-section (6-A) to Section 11 of the

Amendment Act, 2015 the jurisdiction of this Court is denuded and the limited mandate of the Court is to examine the factum of existence of an arbitration and relied on the judgment in *Duro Felguera, S.A. v. Gangavaram Port Ltd. [(2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764]* The exposition in this decision is a general observation about the effect of the amended provisions which came to be examined under reference to six arbitrable agreements (five agreements for works and one corporate guarantee) and each agreement contains a provision for arbitration and there was serious dispute between the parties in reference to constitution of Arbitral Tribunal whether there has to be Arbitral Tribunal pertaining to each agreement. In the facts and circumstances, this Court took note of sub-section (6-A) introduced by the Amendment Act, 2015 to Section 11 of the Act and in that context observed that the preliminary disputes are to be examined by the arbitrator and are not for the Court to be examined within the limited scope available for appointment of arbitrator under Section 11(6) of the Act. Suffice it to say that appointment of an arbitrator is a judicial power and is not a mere administrative function leaving some degree of judicial intervention; when it comes to the question to examine the existence of a prima facie arbitration agreement, it is always necessary to ensure that the dispute resolution process does not become unnecessarily protracted.

21. In the instant case, prima facie no dispute subsisted after the discharge voucher being signed by the respondent without any demur or protest and claim being finally settled with accord and satisfaction and after 11 weeks of the settlement of claim a letter was sent on 27-7-2016 for the first time raising a voice in the form of protest that the discharge voucher was signed under undue influence and coercion with no supportive prima facie evidence being placed on record in absence thereof, it must follow that the claim had been settled with accord and satisfaction leaving no arbitral dispute subsisting under the agreement to be referred to the arbitrator for adjudication."

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

"11. (6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or

A sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement."

6. Mr. Mukul Rohatgi, learned Senior Advocate, has pointed out that by an amendment Act of 2019, which has since been passed, this B sub-section has now been omitted. Section 3 of the amendment Act of 2019 insofar as it pertains to this omission has not yet been brought into force. The omission is pursuant to a High Level Committee Review regarding institutionalization of arbitration in India, headed by Justice B. N. Srikrishna. The Report given by this Committee is dated 30th July, 2017. The omission of the sub-section is not so as to resuscitate the law C that was prevailing prior to the amendment Act of 2015. The reason for omission of S. 11(6A) is given in the Report as follows:

"Thus, the 2015 amendments to section 11 are geared towards facilitating speedy disposal of section 11 applications by: (a) enabling the designation of any person or institution as an appointing D authority for arbitrators in addition to the High Court or Supreme Court under section 11; (b) limiting challenges to the decision made by the appointing authority; and (c) requiring the expeditious disposal of section 11 applications, preferably within the prescribed 60-day time period.

E While these amendments no doubt facilitate the speedy disposal of section 11 applications to a large extent, they do not go all the way in limiting court interference. Pursuant to the amendments, the appointment of arbitrators under section 11 may be done: (a) by the Supreme Court or the High Court; or (b) by a person or institution designated by such court in exercise of an administrative F power following section 11(6B). In either case, the amendments still require the Supreme Court / the High Court to examine whether an arbitration agreement exists, which can lead to delays in the arbitral process as extensive evidence and arguments may be led on the same.

G The Committee notes that the default procedure for appointment of arbitrators in other jurisdictions do not require extensive court involvement as in India.

For instance, in Singapore, the relevant provision of the IAA provides that where the parties fail to agree on the appointment H of the third arbitrator, within 30 days of the receipt of the first

request by either party to appoint the arbitrator, the appointment shall be made by the appointing authority (the President of the SIAC) by the request of the parties. (See section 9A(2) read with sections 2(1) and 8(2), IAA)

The arbitration legislation of Hong Kong incorporates Article 11 of the UNCITRAL Model Law relating to the appointment of arbitrators. Like in the case of Singapore where the SIAC is the appointing authority for arbitrators, the default appointment of arbitrator(s) is done by the HKIAC. (Section 13(2) read with section 24, AO)

In the United Kingdom, in the case of default of one party to appoint an arbitrator, the other party may appoint his arbitrator as the sole arbitrator after giving notice of 7 clear days to the former of his intention to do so. (Section 17, AA) The defaulting party may apply to the court to set aside the appointment. (Section 17(3), AA) In case of a failure of the appointment procedure, any party may apply to the court to make the appointment or give directions regarding the making of an appointment. (Section 18(2), AA)

The Committee recommends the adoption of the practice followed in Singapore and Hong Kong in the Indian scenario — apart from avoiding delays at court level, it may also give impetus to institutional arbitration.

xxx xxx

Recommendations

1. In order to ensure speedy appointment of arbitrators, section 11 may be amended to provide that the appointment of arbitrator(s) under the section shall only be done by arbitral institution(s) designated by the Supreme Court (in case of international commercial arbitrations) or the High Court (in case of all other arbitrations) for such purpose, without the Supreme Court or High Courts being required to determine the existence of an arbitration agreement."

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

A 7. Prior to Section 11(6A), this Court in several judgments beginning with ***SBP & Co.*** vs. ***Patel Engineering Ltd. and Anr.***(2005) 8 SCC 618 has held that at the stage of a Section 11(6) application being filed, the Court need not merely confine itself to the examination of the existence of an arbitration agreement but could also go into certain preliminary B questions such as stale claims, accord and satisfaction having been reached etc.

8. In ***ONGC Mangalore Petrochemicals Limited*** *vs.* ***ANS Constructions Limited and another,***(2018) 3 SCC 373, this Court in a case which arose before the insertion of Section 11(6A) dismissed a C Section 11 petition on the ground that accord and satisfaction had taken place in the following terms: -

> "31. Admittedly, no-dues certificate was submitted by the contractee company on 21-9-2012 and on their request completion certificate was issued by the appellant contractor. The contractee, after a gap of one month, that is, on 24-10-2012, withdrew the no- D dues certificate on the grounds of coercion and duress and the claim for losses incurred during execution of the contract site was made vide letter dated 12-1-2013, i.e. after a gap of 3 ½ (three-and-a-half) months whereas the final bill was settled on 10-10-2012. When the contractee accepted the final payment in E full and final satisfaction of all its claims, there is no point in raising the claim for losses incurred during the execution of the contract at a belated stage which creates an iota of doubt as to why such claim was not settled at the time of submitting final bills that too in the absence of exercising duress or coercion on the contractee by the appellant contractor. In our considered view, the plea raised F by the contractee company is bereft of any details and particulars, and cannot be anything but a bald assertion. In the circumstances, there was full and final settlement of the claim and there was really accord and satisfaction and in our view no arbitrable dispute existed so as to exercise power under Section 11 of the Act. The G High Court was not, therefore, justified in exercising power under Section 11 of the Act."

9. The 246th Law Commission Report dealt with some of these judgments and felt that at the stage of a Section 11(6) application, only "existence" of an arbitration agreement ought to be looked at and not H other preliminary issues. In a recent judgment of this Court, namely,

Garware Wall Ropes Ltd. *vs.* ***Coastal Marine Constructions & Engineering Ltd.,*** (2019 SCC OnLine SC 515), this Court adverted to the said Law Commission Report and held: -

> "14. The case law under Section 11(6) of the Arbitration Act, as it stood prior to the Amendment Act, 2015, has had a chequered history. In *Konkan Railway Corporation Ltd. v. Mehul Construction Co.*, (2000) 7 SCC 201 ["**Konkan Railway I**"], it was held that the powers of the Chief Justice under Section 11(6) of the 1996 Act are administrative in nature, and that the Chief Justice or his designate does not act as a judicial authority while appointing an arbitrator. The same view was reiterated in *Konkan Railway Corporation Ltd. v. Rani Construction (P) Ltd.*, (2002) 2 SCC 388 ["**Konkan Railway II**"].
>
> 15. However, in *SBP & Co.* (supra), a seven-Judge Bench overruled this view and held that the power to appoint an arbitrator under Section is judicial and not administrative. The conclusions of the seven-Judge Bench were summarised in paragraph 47 of the aforesaid judgment. We are concerned directly with sub-paragraphs (i), (iv), and (xii), which read as follows:
>
> > "*(i)* The power exercised by the Chief Justice of the High Court or the Chief Justice of India under Section 11(6) of the Act is not an administrative power. It is a judicial power.
> >
> > xxx xxx xxx
> >
> > *(iv)* The Chief Justice or the designated Judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be his own jurisdiction to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. The Chief Justice or the designated Judge would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of Section 11(8) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the designated Judge.
> >
> > xxx xxx xxx

(xii) The decision in *Konkan Rly. Corpn. Ltd. v. Rani Construction (P) Ltd.* [(2002) 2 SCC 388] is overruled."

16. This position was further clarified in *Boghara Polyfab* (supra) as follows:

"22. Where the intervention of the court is sought for appointment of an Arbitral Tribunal under Section 11, the duty of the Chief Justice or his designate is defined in *SBP & Co.* [(2005) 8 SCC 618]. This Court identified and segregated the preliminary issues that may arise for consideration in an application under Section 11 of the Act into three categories, that is, *(i)* issues which the Chief Justice or his designate is bound to decide; *(ii)* issues which he can also decide, that is, issues which he may choose to decide; and *(iii)* issues which should be left to the Arbitral Tribunal to decide.

22.1. The issues (first category) which the Chief Justice/his designate will have to decide are:

(a) Whether the party making the application has approached the appropriate High Court.

(b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement.

22.2. The issues (second category) which the Chief Justice/ his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are:

(a) Whether the claim is a dead (long-barred) claim or a live claim.

(b) Whether the parties have concluded the contract/ transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

22.3. The issues (third category) which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal are:

(i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a

departmental authority and excepted or excluded from arbitration). A

(ii) Merits or any claim involved in the arbitration."

17. As a result of these judgments, the door was wide open for the Chief Justice or his designate to decide a large number of preliminary aspects which could otherwise have been left to be decided by the arbitrator under Section 16 of the 1996 Act. As a result, the Law Commission of India, by its Report No. 246 submitted in August 2014, suggested that various sweeping changes be made in the 1996 Act. Insofar as *SBP & Co.* (supra) and *Boghara Polyfab* (supra) are concerned, the Law Commission examined the matter and recommended the addition of a new sub-section, namely, sub-section (6A) in Section 11. In so doing, the Law Commission recommendations which are relevant and which led to the introduction of Section 11(6A) are as follows: B C D

"28. The Act recognizes situations where the intervention of the Court is envisaged at the pre-arbitral stage, i.e. prior to the constitution of the arbitral tribunal, which includes sections 8, 9, 11 in the case of Part I arbitrations and section 45 in the case of Part II arbitrations. Sections 8, 45 and also section 11 relating to "reference to arbitration" and "appointment of the tribunal", directly affect the constitution of the tribunal and functioning of the arbitral proceedings. Therefore, their operation has a direct and significant impact on the "conduct" of arbitrations. Section 9, being solely for the purpose of securing interim relief, although having the potential to affect the rights of parties, does not affect the "conduct" of the arbitration in the same way as these other provisions. It is in this context the Commission has examined and deliberated the working of these provisions and proposed certain amendments. E F

29. The Supreme Court has had occasion to deliberate upon the scope and nature of permissible pre-arbitral judicial intervention, especially in the context of section 11 of the Act. Unfortunately, however, the question before the Supreme Court was framed in terms of whether such a power is a "judicial" or an "administrative" power – which obfuscates the real issue underlying such nomenclature/description as to – G H

A -the scope of such powers – i.e. the scope of arguments which a Court (Chief Justice) will consider while deciding whether to appoint an arbitrator or not – i.e. whether the arbitration agreement exists, whether it is null and void, whether it is voidable etc.; and which of these it should leave for decision of the arbitral tribunal.

B -the nature of such intervention – i.e. would the Court (Chief Justice) consider the issues upon a detailed trial and whether the same would be decided finally or be left for determination of the arbitral tribunal.

30. After a series of cases culminating in the decision in *SBP v.* C *Patel Engineering*, (2005) 8 SCC 618, the Supreme Court held that the power to appoint an arbitrator under section 11 is a "judicial" power. The underlying issues in this judgment, relating to the scope of intervention, were subsequently clarified by RAVEENDRAN J in *National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd.,* (2009) 1 SCC 267, where the Supreme Court laid down as follows D –

"1. The issues (first category) which Chief Justice/his designate will have to decide are:

(a) Whether the party making the application has approached the appropriate High Court?

E (b) Whether there is an arbitration agreement and whether the party who has applied under section 11 of the Act, is a party to such an agreement?

2. The issues (second category) which the Chief Justice/his designate may choose to decide are:

F (a) Whether the claim is a dead (long barred) claim or a live claim?

(b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection?

G 3. The issues (third category) which the Chief Justice/his designate should leave exclusively to the arbitral tribunal are:

(a) Whether a claim falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration)?

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(b) Merits of any claim involved in the arbitration."

31. The Commission is of the view that, in this context, the same test regarding scope and nature of judicial intervention, as applicable in the context of section 11, should also apply to sections 8 and 45 of the Act – since the scope and nature of judicial intervention should not change upon whether a party (intending to defeat the arbitration agreement) refuses to appoint an arbitrator in terms of the arbitration agreement, or moves a proceeding before a judicial authority in the face of such an arbitration agreement.

32. In relation to the nature of intervention, the exposition of the law is to be found in the decision of the Supreme Court in *Shin Etsu Chemicals Co. Ltd. v. Aksh Optifibre*, (2005) 7 SCC 234, (in the context of section 45 of the Act), where the Supreme Court has ruled in favour of looking at the issues/controversy only prima facie.

33. It is in this context, the Commission has recommended amendments to sections 8 and 11 of the Arbitration and Conciliation Act, 1996. The scope of the judicial intervention is only restricted to situations where the Court/Judicial Authority finds that the arbitration agreement does not exist or is null and void. In so far as the nature of intervention is concerned, it is recommended that in the event the Court/Judicial Authority is prima facie satisfied against the argument challenging the arbitration agreement, it shall appoint the arbitrator and/or refer the parties to arbitration, as the case may be. The amendment envisages that the judicial authority shall not refer the parties to arbitration only if it finds that there does not exist an arbitration agreement or that it is null and void. If the judicial authority is of the opinion that prima facie the arbitration agreement exists, then it shall refer the dispute to arbitration, and leave the existence of the arbitration agreement to be finally determined by the arbitral tribunal. However, if the judicial authority concludes that the agreement does not exist, then the conclusion will be final and not prima facie. The amendment also envisages that there shall be a conclusive determination as to whether the arbitration agreement is null and void. In the event that the judicial authority refers the dispute to arbitration and/or appoints an arbitrator, under sections 8 and 11 respectively, such a decision will be final and non-appealable. An appeal can be

maintained under section 37 only in the event of refusal to refer parties to arbitration, or refusal to appoint an arbitrator."

18. Pursuant to the Law Commission recommendations, Section 11(6A) was introduced first by Ordinance and then by the Amendment Act, 2015. The Statement of Objects and Reasons which were appended to the Arbitration and Conciliation (Amendment) Bill, 2015 which introduced the Amendment Act, 2015 read as follows:

"STATEMENT OF OBJECTS AND REASONS

xxx xxx xxx

6. It is proposed to introduce the Arbitration and Conciliation (Amendment) Bill, 2015, to replace the Arbitration and Conciliation (Amendment) Ordinance, 2015, which inter alia, provides for the following, namely:-

(i) to amend the definition of "Court" to provide that in the case of international commercial arbitrations, the Court should be the High Court;

(ii) to ensure that an Indian Court can exercise jurisdiction to grant interim measures, etc., even where the seat of the arbitration is outside India;

(iii) an application for appointment of an arbitrator shall be disposed of by the High Court or Supreme Court, as the case may be, as expeditiously as possible and an endeavour should be made to dispose of the matter within a period of sixty days;

(iv) to provide that while considering any application for appointment of arbitrator, the High Court or the Supreme Court shall examine the existence of a prima facie arbitration agreement and not other issues;

(v) to provide that the arbitral tribunal shall make its award within a period of twelve months from the date it enters upon the reference and that the parties may, however, extend such period up to six months, beyond which period any extension can only be granted by the Court, on sufficient cause;

(vi) to provide that a model fee Schedule on the basis of which High Courts may frame rules for the purpose of determination

of fees of arbitral tribunal, where a High Court appoints arbitrator in terms of section 11 of the Act;

(vii) to provide that the parties to dispute may at any stage agree in writing that their dispute be resolved through fast track procedure and the award in such cases shall be made within a period of six months;

(viii) to provide for neutrality of arbitrators, when a person is approached in connection with possible appointment as an arbitrator;

(ix) to provide that application to challenge the award is to be disposed of by the Court within one year.

7. The amendments proposed in the Bill will ensure that arbitration process becomes more user-friendly, cost effective and lead to expeditious disposal of cases.

xxx xxx xxx"

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

10. This being the position, it is clear that the law prior to the 2015 Amendment that has been laid down by this Court, which would have included going into whether accord and satisfaction has taken place, has now been legislatively overruled. This being the position, it is difficult to agree with the reasoning contained in the aforesaid judgment as Section 11(6A) is confined to the examination of the existence of an arbitration agreement and is to be understood in the narrow sense as has been laid down in the judgment *Duro Felguera, S.A.* (supra) – see paras 48 & 59.

11. We, therefore, overrule the judgment in *United India Insurance Company Limited* (supra) as not having laid down the correct law but dismiss this appeal for the reason given in para 3 above.

A 12. Mr. Rohatgi now requests us for an extension of the *status quo* order granted by the trial court for a period of one week from today so that he may adopt other proceedings. This request is granted.

Ankit Gyan Appeal dismissed.

SURINDER KAUR (D) THR. LR. JASINDERJIT SINGH (D) THR. LRS.

v.

BAHADUR SINGH (D) THR. LRS.

(Civil Appeal Nos. 7424-7425 of 2011)

SEPTEMBER 11, 2019

[DEEPAK GUPTA AND ANIRUDDHA BOSE, JJ.]

Specific Relief Act, 1963 – s.16(c) – Performance of the essential terms of the contract – Predecessor-in-interest of the appellants entered into an agreement to sell the suit land with predecessor-in-interest of the respondents for total consideration of Rs. 5605/- – Out of this Rs.1000/- was paid as earnest money at the time of execution of agreement to sell – The possession of the land was handed over to the predecessor-in-interest of the respondents (vendee) – Since there was some litigation with regard to the property it was agreed between the parties that the sale deed would be executed within one month from the date of decision of civil appeal – Clauses of the agreement stipulated that in case decision regarding the property in civil appeal is after one year, then the predecessor-in-interest of respondents shall pay customary rent to the predecessor-in-interest of appellants – Litigation referred to in the agreement was decided after about 13 years – Predecessor-in-interest of appellants failed to execute sale deed in favour of predecessor-in-interest of respondents – Suit for specific performance was filed by predecessor-in-interest of the respondents – The suit was decreed by all the Courts below – Appellants contended that since predecessor-in-interest of the respondents failed to pay the rent of the land, he was not entitled to a decree for specific performance – Held: The suit property was handed over to the predecessor-in-interest of the respondents and he had agreed to pay rent at the customary rate – Therefore, the possession of land was given to him only on this clear-cut understanding – This was a reciprocal promise and was an essential part of the agreement to sell – Admittedly, predecessor-in-interest of the respondents did

not pay rent till the date of filing of the suit – The payment of rent was an essential part of the contract – Equity is totally against him – He by not paying the rent did not act fairly and forfeited his right to get the discretionary relief of specific performance – Thus, judgment and decree of all the Courts below set aside and suit for specific performance dismissed.

Allowing the appeals, the Court

HELD:1. The first issue is whether the promises were reciprocal promises or promises independent of each other. There can be no hard and fast rule and the issue whether promises are reciprocal or not has to be determined in the peculiar facts of each case. As far as the present case is concerned, the vendor-predecessor-in-interest of the appellants, who was a lady received less than 20% of the sale consideration but handed over the possession to the vendee-predecessor-in-interest of the respondents, probably with the hope that the dispute would be decided soon, or at least within a year. Therefore, Clause 3 provided that if the case is not decided within one year, then the second party shall pay to the first party the customary rent for the land. It has been urged by the respondents that the High Court rightly held that this was not a reciprocal promise and had nothing to do with the sale of the land. One cannot lose sight of the fact that the land had been handed over to the vendee and he had agreed that he would pay rent at the customary rate. Therefore, the possession of the land was given to him only on this clear-cut understanding. This was, therefore, a reciprocal promise and was an essential part of the agreement to sell. [Para 9][143-A-C]

2. Admittedly, predecessor-in-interest of the respondents did not even pay a penny as rent till the date of filing of the suit. After such objection was raised in the written statement, in replication filed by him, he instead of offering to pay the rent, denied his liability to pay the same. Even if this Court was to hold that this promise was not a reciprocal promise, as far as the agreement to sell is concerned, it would definitely mean that predecessor-in-interest of the respondents had failed to perform his part of the contract. There can be no manner of doubt that the

payment of rent was an essential term of the contract. Explanation (ii) to Section 16(c) clearly lays down that the plaintiff must prove performance or readiness or willingness to perform the contract according to its true construction. The only construction which can be given to the contract in hand is that predecessor-in-interest of the respondents was required to pay customary rent. [Para 10][143-D-F]

3. In this case, predecessor-in-interest of the respondents having got possession of the land in the year 1964 did not pay the rent for 13 long years and even when he filed the replication in the year 1978, he denied any liability to pay the customary rent. Therefore, he did not act in a proper manner. Equity is totally against him. In considered view of this Court, he was not entitled to claim the discretionary relief of specific performance of the agreement having not performed his part of the contract even if that part is held to be a distinct part of the agreement to sell. The vendee by not paying the rent for 13 long years to the vendor, even when he had been put in possession of the land on payment of less than 18% of the market value, caused undue hardship to her. The land was agricultural land. predecessor-in-interest of the respondents was cultivating the same. He must have been earning a fairly large amount from this land which measured about 9½ acres. He by not paying the rent did not act fairly and, forfeited his right to get the discretionary relief of specific performance. [Para 15][144-E-H]

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 7424-7425 of 2011

From the Judgment and Order dated 06.01.2009 of the High Court of Punjab and Haryana at Chandigarh in R.S.A. No. 611 of 1982 and order dated 26.05.2009 in Review Application No. 23-C of 2009.

Ajay Kumar Talesara, Jamshed Bey, Ekansh Bansal, Advs. for the Appellants.

Onkar Shrivastava, Divyadeep Chaturvedi, Shashwat Sidhant, Rameshwar Prasad Goyal, Advs. for the Respondents.

A The Judgment of the Court was delivered by

DEEPAK GUPTA, J.

1. The question of law arising in these appeals is whether a vendee who does not perform one of his promises in a contract can obtain the discretionary relief of specific performance of that very contract.

B 2. Briefly stated the facts are that Mohinder Kaur, predecessor in interest of the appellantsentered into an agreement with Bahadur Singh, predecessor in interest of the respondents on 13.05.1964 whereby she agreed to sell the suit land to Bahadur Singh for a total sale consideration of Rs.5605/-. Out of this, Rs.1000/- was paid as earnest money at the C time of execution of agreement to sell, and it was agreed that the balance amount would be paid at the time of registration of the sale deed. The possession of the land was handed over to the vendee on the date of agreement to sell itself. Since there was some litigation with regard to the property it was agreed between the parties that the sale deed would D be executed within one month from the date of decision of civil appeal pending before the Punjab and Haryana High Court.

3. To decide the appeals, it would be necessary to refer to Clauses 2 and 3 of the agreement to sell which read as under:-

" xxx xxx xxx

E

2) That an appeal in respect of the above-mentioned land is pending in the High Court and after decision in the said appeal, the First Party shall execute and register Sale Deed in favour of the Second Party in the month of July, 1965.

F 3) That the possession of the land has been handed today and in case the decision by the High Court in the appeal is after one year, then the sale deed shall be executed and registered after one month from the date of decision and in the circumstance, the Second Party shall pay to the First party the customary rent for the said land.

G xxx xxx xxx ,,

4. It is not disputed that the litigation referred to in the agreement was decided on 17.01.1977, i.e., about 13 years after the agreement to sell was entered into. Bahadur Singh requested Mohinder Kaur to execute the sale deed but since she failed to do so, a suit for specific performance

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of the agreement was filed by Bahadur Singh. In the alternative, it was prayed that a decree be passed for a sum of Rs.5605/-, i.e. Rs.1000/- paid as earnest money and Rs.4605/- as damages. This suit was contested on various grounds but we are concerned with only one wherein the defendant raised the plea that since Bahadur Singh had admittedly failed to pay the rent of the land in terms of Clause 3 of the agreement, he was not entitled to a decree for specific performance.

5. The suit has been decreed by all the courts below. There is no dispute with regard to the factual aspects.The only issue is whether the vendee Bahadur Singh who admittedly did not pay the rent is entitled to a decree of specific performance of the agreement dated 13.05.1964. The courts below have held that the agreement contained several promises which may be reciprocal, contingent or separate. Section 51[1] of the Contract Act,1872 provides that when a contract consists of reciprocal promises to be simultaneously performed, no promisor needsto perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

6. The aforesaid provisions have to be read along with Section 16(c)[2] of The Specific Relief Act, 1963 which clearly lays down that the specific performance of a contract cannot be enforced in favour of a person who fails to prove that he has performed or was always ready and willing to perform the essential terms of the contract which were to be performed by him.

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[1] **51. Promisor not bound to perform, unless reciprocal promisee ready and willing to perform.**—When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

[2] **16. Personal bars to relief.**– Specific performance of a contract cannot be enforced in favour of a person –

(a) xxx xxx xxx

(b) xxx xxx xxx

(c) who fails to prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.

Explanation.—For the purposes of clause (c),—

(i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court;

(ii) the plaintiff must prove performance of, or readiness and willingness to perform, the contract according to its true construction.

A 7. We shall also have to take into consideration that the specific performance of contract of an immovable property is a discretionary relief in terms of Section 20[3] of The Specific Relief Act as it stood at the time of filing of the suit.

8. Section 20 of The Specific Relief Act lays down that the B jurisdiction to decree a suit for specific performance is a discretionary jurisdiction and the court is not bound to grant such relief merely because it is lawful.

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[3]**20. Discretion as to decreeing specific performance.—**

C (1) The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.

(2) The following are cases in which the court may properly exercise discretion not to decree specific performance:—

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(a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or

(b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve E no such hardship on the plaintiff; or

(c) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.

Explanation 1.—Mere inadequacy of consideration, or the mere fact that the F contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of clause (a) or hardship within the meaning of clause (b).

Explanation2.— The question whether the performance of a contract would involve hardship on the defendant within the meaning of clause (b) shall, except in cases where the hardship has resulted from any act of the plaintiff subsequent to the contract, be determined with reference to the circumstances existing at G the time of the contract.

(3) The court may properly exercise discretion to decree specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

(4) The court shall not refuse to any party specific performance of a contract merely on H the ground that the contract is not enforceable at the instance of the party.

9. The first issue is whether the promises were reciprocal promises or promises independent of each other. There can be no hard and fast rule and the issue whether promises are reciprocal or not has to be determined in the peculiar facts of each case. As far as the present case is concerned, the vendor, who was a lady received less than 20% of the sale consideration but handed over the possession to the defendant, probably with the hope that the dispute would be decided soon, or at least within a year. Therefore, Clause 3 provided that if the case is not decided within one year, then the second party shall pay to the first party the customary rent for the land. It has been urged by the respondents that the High Court rightly held that this was not a reciprocal promise and had nothing to do with the sale of the land. One cannot lose sight of the fact that the land had been handed over to Bahadur Singh and he had agreed that he would pay rent at the customary rate. Therefore, the possession of the land was given to him only on this clear-cut understanding. This was, therefore, a reciprocal promise and was an essential part of the agreement to sell.

10. Admittedly, Bahadur Singh did not even pay a penny as rent till the date of filing of the suit. After such objection was raised in the written statement, in replication filed by him, he instead of offering to pay the rent,denied his liability to pay the same. Even if we were to hold that this promise was not a reciprocal promise, as far as the agreement to sell is concerned, it would definitely mean that Bahadur Singh had failed to perform his part of the contract. There can be no manner of doubt that the payment of rent was an essential term of the contract. Explanation (ii) to Section 16(c) clearly lays down that the plaintiff must prove performance or readiness or willingness to perform the contract according to its true construction. The only construction which can be given to the contract in hand is that Bahadur Singh was required to pay customary rent.

11. It has been urged that no date was fixed for payment of rent. Tenancy can be monthly or yearly. At least after expiry of one year, Bahadur Singh should have offered to pay the customary rent to the vendor which could have been monthly or yearly. But he could definitely not claim that he is not liable to pay rent for 13 long years.

12. Learned counsel for the respondents urged that in case of non-payment of rent the plaintiff was at liberty to file suit for recovery of rent. We are not impressed with this argument. A party cannot claim

A that though he may not perform his part of the contract he is entitled to specific performance of the same.

13. Explanation (ii) to Section 16(c) of The Specific Relief Act lays down that it is incumbent on the party, who wants to enforce the specific performance of a contract, to aver and prove that he has B performed or has always been ready and willing to perform the essential terms of the contract. This the plaintiff miserably failed to do in so far as payment of rent is concerned.

14. A perusal of Section 20 of The Specific Relief Act clearly indicates that the relief of specific performance is discretionary. Merely C because the plaintiff is legally right, the Court is not bound to grant him the relief. True it is, that the Court while exercising its discretionary power is bound to exercise the same on established judicial principles and in a reasonable manner. Obviously, the discretion cannot be exercised in an arbitrary or whimsical manner. Sub clause(c) of sub-section (2) of Section 20 provides that even if the contract is otherwise not voidable D but the circumstances make it inequitable to enforce specific performance, the Court can refuse to grant such discretionary relief. Explanation (2) to the Section provides that the hardship has to be considered at the time of the contract, unless the hardship is brought in by the action of the plaintiff.

E 15. In this case, Bahadur Singh having got possession of the land in the year 1964 did not pay the rent for 13 long years and even when he filed the replication in the year 1978, he denied any liability to pay the customary rent. Therefore, in our opinion, he did not act in a proper manner. Equity is totally against him. In our considered view, he was F not entitled to claim the discretionary relief of specific performance of the agreement having not performed his part of the contract even if that part is held to be a distinct part of the agreement to sell. The vendee Bahadur Singh by not paying the rent for 13 long years to the vendor Mohinder Kaur, even when he had been put in possession of the land on payment of less than 18% of the market value,caused undue hardship to G her. The land was agricultural land. Bahadur Singh was cultivating the same. He must have been earning a fairly large amount from this land which measured about 9½ acres. He by not paying the rent did not act fairly and, in our opinion, forfeited his right to get the discretionary relief of specific performance.

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16. In view of the above, we allow the appeals, set aside the judgment and decree of all the courts below and dismiss the suit for specific performance. As far as the alternative plea of refund is concerned, we are clearly of the view that since the respondents enjoyed the land for 55 long years without payment of any rent they are not entitled to any relief. No order as to costs.

Ankit Gyan Appeals allowed.

A M/S. SHREE VISHAL PRINTERS LTD., JAIPUR

V.

REGIONAL PROVIDENT FUND COMMISSIONER, JAIPUR & ANR.

B (Civil Appeal No.4474 of 2010)

SEPTEMBER 12, 2019

[SANJAY KISHAN KAUL AND K. M. JOSEPH, JJ]

Employees' Provident Funds and Miscellaneous Provisions
C *Act, 1952:*

ss. 16, 7A – Act not to apply to certain establishments – On facts, three establishments sought exemption u/s. 16(1)(d) that the Act will not apply to their establishments – Order by the Regional Provident Fund Commissioner that establishments not entitled to
D *exemption on the ground that they are effectively part of the same parent establishment – Said order upheld by the Appellate tribunal as also Single Judge and the Division Bench of the High Court – On appeal, held: Findings qua all the three establishment satisfy the functional integrality and the general unity of purpose test, and the same are met in the facts of the instant case – They may be*
E *different legal entities, an arrangement may have been made to have different directors and shareholders, but the nature of control and integrality of functionality, between the three entities is quite apparent from the facts set out – Each one of the facts by itself may not be conclusive, but taken as a whole, the conclusion arrived at*
F *by the Regional Provident Fund Commissioner is upheld – Furthermore, exact amount of liability of each of the establishments is to be determined and would be co-extensive with the parent company – Costs is imposed on all the three establishments, but of varying amounts – Industrial Disputes Act, 1947 – s. 2A.*

Nature of – Exemption from the aegis of Act – Object of –
G *Held: Act is a beneficial legislation - Object of excluding the infancy period of five years which was later reduced to three years from the rigours of the Act, was only to provide to new establishments, a period to establish their business, and not to permit different kinds of routes to be created to evade the liability under the Act.*

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Dismissing the appeals, the Court

HELD: 1.1 Civil Appeal No.4475/2010 is by BCCL, Jaipur, which is not a separate legal entity but was really claimed to be an establishment of the parent company, albeit set up in Jaipur. The counsels appearing for the appellants were of the belief that it was facts of this case which had caused confusion in the mind of the Regional Provident Fund Commissioner as, in their perspective, exemption could not have been really sought within the provisions of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952. This is so, as BCCL, Jaipur was not a separate legal entity, but, part of the parent company directly. The case would, thus, be fully covered by the provisions of Section 2A of the said Act and mere location of departments and branches in other cities would not have extended the benefit of the exemption to this company. [Para 4, 11][153-B; 157-C-D]

1.2 As regards Civil Appeal No. 4476/2010, the agreement dated 25.7.1986 between the two parties, which gave rise to the Provident Fund Commissioner to initiate proceedings, was in supersession of an earlier agreement dated 13.12.1985. The business reason stated for entering into this agreement was the commencement of publication of the Jaipur edition of the daily newspapers of BCCL, Mumbai, i.e., The Times of India and Navbharat Times. The agreement records that TPHL had opened an office in Jaipur, where it had equipped itself with trained and experienced staff and all infrastructural, secretarial, administrative and marketing facilities. Since 23.9.1985, it had been providing various services to BCCL, Mumbai, including office space for use and occupation, accounting facilities, stenographers, typing, and so on. The services which were now further sought to be provided to BCCL, Mumbai included marketing, development work, realisation of dues, adequate office space, accounting facilities, infrastructure, packing/bundling of daily newspapers (at the cost of BCCL, Mumbai), etc. BCCL, Mumbai was to pay to TPHL an amount calculated @ 5% as commissions on Net Advertisement Revenue and Net Circulation Revenue. [Para 12, 13, 14][157-E-H; 158-A, D]

1.3 Once that is conceded that BCCL, Jaipur was really only a part of BCCL, Mumbai. The connection of the other two establishments with BCCL, Mumbai or, for that matter, BCCL, Jaipur would, thus, not cause an intrinsic fallacy in the order of the RPFC. [Para 18][159-C]

1.4 In the instant case, a branch or a unit of BCCL, Mumbai is not dealt with. Thus, a test of unity of ownership, management and control may not really be applicable, but the test would be of functional integrality or general unity of purpose, in the given factual situation. There is no direct unity of employment. In any case, it is the test of functional integrality or general unity of purpose which would have to be applied in the present facts if the two establishments have to be clubbed for the purposes of the provisions of the said Act. [Para 20][159-G; 160-A]

1.5 It was submitted that the two companies were functionally dependent. Practically all three companies were working from the same building, albeit on different floors, and the office of TPHL was open for the use of BCCL, Mumbai employees. It was also sought to be contended that the Manager of BCCL, Mumbai was signing papers relating to TPHL and notices relating to the closure of offices of the two on *Mahashivratri* and *Holi*. However, a perusal of the documents in question shows that they were really endorsements to TPHL, which would be natural considering that there would be no requirement of work to be sourced in case the office of BCCL, Mumbai itself was closed, and no editing, marketing work was required to be carried out. On the issue of security staff, since the building was one, logically common directions were possible. The executive of TPHL was using the letterpad of BCCL, Mumbai. Furthermore, the nature of the agreement provided for both the space and the staff to be made available by TPHL for the benefit of BCCL, Mumbai. The expenses of the establishment, electricity bill, maintenance costs, etc., were to be borne by TPHL. If the said facts are analysed on the touchstone of functional integrality or general unity of purpose, it is difficult, if not impossible, to disagree with the reasoning of four forums.

Thus there is no doubt in rejecting the case of TPHL. [Para 22-24, 28][160-D-H; 161-A, F]

1.6 SVPL for the relevant period of time, was carrying out exclusive work only for BCCL, Mumbai, it was pleaded that there was no commonality of directors and shareholders of the two companies, nor was there a cross shareholding, an aspect for which charts have been filed. The subsequent fact was also that, at some stage, it got merged with another company. As regards the agreement with BCCL, Mumbai, dated 1.10.1985, BCCL, Mumbai, having commenced publication of the Jaipur edition of the two newspapers is stated to have approached SVPL for printing the said newspapers on a contract basis. SVPL was to employ the necessary personnel for carrying out various tasks and had to print the newspapers. The remuneration was payable by BCCL, Mumbai to SVPL at Rs.24,000/- per day, for the two daily newspapers. The printing press was elsewhere, but the business office of SVPL was also located in the same building as BCCL, Jaipur, albeit stated to be at a different floor. There was 'Non-Exclusivity Clause' in the agreement between the two parties. The emphasis was on the two companies being separate legal entities, there being no commonality of directors or shareholders, or direct financial control. The balance sheet and profit and loss accounts were also separate. Another aspect emphasized was that the printing press of SVPL was located at a different premises from where the business was really being carried on, though naturally, the control of the business would be from the office located in the same premises as BCCL, Mumbai. It is not, however, disputed that SVPL had, at its own cost, given adequate covered area adjacent to the printing press to BCCL, Mumbai for storing the newspaper/printing. The consideration, which was being paid to SVPL for printing included the cost of making available the said space for packaging and storage operations.[Para 32, 33, 35][162-F-H; 163-A-B, D-F]

1.7 Respondent sought to emphasise the functional dependence between the companies. The aspect of the Manager of BCCL signing papers relating to SVPL was emphasised, including notices of closure. The common factor, again, is of

BCCL, Mumbai issuing orders on the letter pad of SVPL. In fact, the nature of communications and orders issued do suggest that all three were working towards the common object of bringing out a newspaper. The said would not have been sufficient by itself, but for the application of the functional integrality test, which linked them to be part of the same establishment. [Para 36-37][163-F-H]

1.8 In the impugned orders, it is not very clear as to whether the reference is being made to BCCL, Mumbai or to BCCL, Jaipur. However, the same is not of much consequence for the reason that BCCL, Jaipur is admittedly a branch office of BCCL, Mumbai. In the complete conspectus of facts, after divorcing different aspects of the three establishments, the conclusion different from the one which has come to for TPHL cannot be arrived at. The very nature of the working of SVPL and the other two entities show the functional integrality test to be satisfied. They may be different legal entities, an arrangement may have been made to have different directors and shareholders, but the nature of control and integrality of functionality, between the three entities is quite apparent from the facts set out. Each one of the facts by itself may not be conclusive, but taken as a whole, there can be no other conclusion, than the one arrived at by the RPFC. This is done, quite conscious of the fact that there is undoubtedly some jumbling which has arisen in the order of the RPFC, which has been affirmed throughout. But then, the case of the appellants was built on the principle that all these three entities have really no functional integrality vis-à-vis BCCL, Mumbai. As it emerged subsequently, and was conceded before; there is little doubt that BCCL, Jaipur is a unit of BCCL, Mumbai, and the other two units have linkages and are controlled by BCCL, Jaipur in a manner which would satisfy the functional integrality test. [Para 38, 40]

1.10 The said Act being a beneficial legislation, the object of excluding the infancy period of five years (later reduced to three years) from the rigours of the Act, was only to provide to new establishments, a period to establish their business, and not to permit different kinds of routes to be created to evade the liability under the said Act. [Para 41][164-G]

1.11 The findings *qua* all the three appellants satisfy the functional integrality and the general unity of purpose test, and the same are met in the facts of the instant case. [Para 42] [164-H; 165-A]

1.12 The appellants are getting away lightly on the issue of such liability, the exact amount of which is to be determined. The liability of each of these establishments would be co-extensive with BCCL, Mumbai. The costs is imposed on all the three appellants, but of varying amounts. As there was no case whatsoever of BCCL, Jaipur, appellant in CA No. 4475/2010, the appeal is dismissed with costs of Rs.50,000/-, while imposing costs on the other two appellants of Rs.20,000/- each. [Para 43, 44][165-D-E]

L.N. Gadodia& Sons and Anr. v. Regional Provident Fund Commissioner **(2011) 13 SCC 517;** *Management of Pratap Press, New Delhi v. Secretary, Delhi Press Workers' Union, Delhi & Its Workmen* **AIR 1960 SC 1213;** *Associated Cement Companies Limited, Chaibassa Cement Works, Jhinkpani v. Workmen* **AIR 1960 SC 56 – referred to.**

Case Law Reference

(2011) 13 SCC 517	**referred to**	**Para 1**
AIR 1960 SC 1213	**referred to**	**Para 8**
AIR 1960 SC 56	**referred to**	**Para 8**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 4474 of 2010

From the Judgment and Order dated 11.04.2008 of the High Court of Rajasthan, Jaipur Bench in D.B. Civil Special Appeal (Writ) No. 1229 of 2007

With

Civil Appeal Nos. 4476, 4475 of 2010.

Dhruv Mehta, Jay Deep Gupta, Sr. Advs., Manish Kumar Srivastava, Ms. Niharica Khanna, Praveen Agrawal, K. Datta, Ashish Verma, Praveen Agarwal, Arnav Sanyal, Ms. Anandita, Keshav Mohan, Rishi K. Awasthi, Prashant Kumar, Piyush Choudhary, Ms. Tarini Sinha, Santosh Kumar - I, Surender Kumar Gupta, Bharat Singh, Raj Bahadur Yadav, Arun Kumar Yadav, Advs. for the appearing parties.

A The Judgment of the Court was delivered by

SANJAY KISHAN KAUL, J.

1. Welfare economics, enlightened self-interest and the pressure of trade unions led larger factories and establishments to introduce schemes that would benefit their employees, including schemes like that B of the provident fund.[1] However, with an increasing number of small factories and establishments coming into the market, the employees of such fledgling units remained deprived of these benefits. In order to diffuse such benefits in establishments across the market, the legislature promulgated the Employees' Provident Funds and Miscellaneous C Provisions Act, 1952 (hereinafter referred to as the 'said Act'). The said Act was enacted with the avowed object of providing for the security of workers in organised industries, in the absence of any social security scheme prevalent in our country. To avoid any hardship to new establishments, a provision was made for exempting them from the aegis of the said Act, for a period of five years. This period was reduced to D three years in 1988 and the exemption provision was completely removed from 22.9.1997.

2. The relevant provision of the said Act is reproduced hereinunder:

"**16. Act not to apply to certain establishments. -** (1) This E Act shall not apply-

....

(d) to any other establishment newly set up, until the expiry of a period of three years from the date on which such establishment is, or has been, set up.

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Explanation: For the removal of doubts, it is hereby declared that an establishment shall not be deemed to be newly set up merely by reason of a change in its location."

3. The present appeals are concerned with this exemption provision as the three establishments in question claimed exemption in respect of G application of this provision of the said Act.

4. The three appeals filed before us are by three limited companies (two separate legal entities and one, an establishment of the parent

[1] L.N. Gadodia & Sons and Anr. v. Regional Provident Fund Commissioner, (2011) 13 H SCC 517

company), though the question of their exemption has been dealt with by a common order of the Regional Provident Fund Commissioner, Rajasthan (for short 'RPFC'). This is so, as all the three establishments are sought to be denied exemption on the ground that they are effectively part of the same parent establishment, being M/s. Bennett, Coleman & Company Limited (for short 'BCCL'), Mumbai. Civil Appeal No. 4475/2010 is by BCCL, Jaipur. We may note that the said Company is not a separate legal entity but was really claimed to be an establishment of the parent company, albeit set up in Jaipur. Civil Appeal No. 4476/2010 is by M/s. Times Publishing House Limited, Jaipur (for short 'TPHL, Jaipur') while Civil Appeal No. 4474/2010 is by M/s. Shree Vishal Printers Limited, Jaipur (for short 'SVPL, Jaipur').

5. Before we proceed with the factual matrix as to how the controversy arose, it would be appropriate to examine the contours within which this aspect would have to be examined. It would be appropriate to take note of another provision, Section 2A of the said Act, which was inserted by Act 46 of 1960, w.e.f. 31.12.1960. We may note that there is no definition of an "establishment" under the said Act, and thus, the jurisprudence that developed resorted to the provisions of the Industrial Disputes Act, 1947 (for short 'ID Act') for the said purpose. Section 2A of the said Act reads as under:

> "**2A. Establishment to include all departments and branches.** - For the removal of doubts, it is hereby declared that where an establishment consists of different departments or has branches, whether situate in the same place or in different places, all such departments or branches shall be treated as parts of the same establishment."

6. The aforesaid provision was introduced so as to obviate the chances of creation of different departments and branches by an establishment and then seek exemptions on the basis of the same being new establishments.

7. There is really no dispute on the jurisprudential aspect, as all the learned counsels for the parties, i.e., Mr. Joydeep Gupta, learned senior counsel in Civil Appeal Nos. 4475/2010 and 4476/2010 and Mr. Dhruv Mehta, learned senior advocate in Civil Appeal No. 4474/2010, as well as the counsel for the Department, Mr. Keshav Mohan, Advocate have relied upon the same set of judicial pronouncements. To put the legal perspective at the threshold would, thus, be appropriate.

A 8. The first judgment is in ***Management of Pratap Press, New Delhi v. Secretary, Delhi Press Workers' Union, Delhi & Its Workmen***[2]. The dispute was one under the ID Act and also dealt with the publication of a newspaper as in the present case. Pratap Press was sought to be treated as part of the same industrial unit as Vir Arjun and Daily Pratap. The tests are taken from an earlier judgment, in ***Associated Cement Companies Limited, Chaibassa Cement Works, Jhinkpani v. Workmen***[3]**,** and it was observed in para 5 as under:

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> "5. In Associated Cement Co., Ltd. v. Workmen, this Court had to consider the question whether the employer's defence to a claim for lay-off compensation by the workers of the Chaibasa Cement Works that the laying off was due to a strike in another part of the establishment, viz., limestone quarry at Rajanka was good. In other words the question was whether the limestone quarry of Rajanka formed part of the establishment known as the Chaibasa Cement Works within the meaning of Section 25E(iii) of the Industrial Disputes Act. While pointing out that it was impossible to lay down any one test as an absolute and invariable test for all cases it observed that the real purpose of these tests would be to find out the true relation between the parts, branches, units etc. This court however mentioned certain tests which might be useful in deciding whether two units form part of the same establishment. Unity of ownership, unity of management and control, unity of finance and unity of labour, unity of employment and unity of functional "integrality" were the tests which the Court applied in that case. It is obvious there is an essential difference between the question whether the two units form part of one establishment for the purposes of Section 25E(iii) and the question whether they form part of one single industry for the purposes of calculation of the surplus profits for distribution of bonus to workmen in one of the units. Some assistance can still nevertheless be obtained from the enumeration of the tests in that case. Of all these tests the most important appears to us to be that of functional "integrality" and the question of unity of finance and employment and of labour. Unity of ownership exists ex hypothesi. Where two units belong to a proprietor there is almost always likelihood also of unity of management. In all such cases therefore the Court has

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[2] AIR 1960 SC 1213

H [3] AIR 1960 SC 56

> to consider with care how far there is "functional integrality" meaning thereby such functional interdependence that one unit cannot exist conveniently and reasonably without the other and on the further question whether in matters of finance and employment the employer has actually kept the two units distinct or integrated."

9. The second judgment relied upon for this purpose is in ***L.N. Gadodia & Sons and Anr. v. Regional Provident Fund Commissioner***[4]. This case dealt with the said Act and the question which arose was whether two sister concerns, having different dates of incorporation, could be treated as two separate establishments. The judgments in ***Associated Cement Companies Limited***[5] and ***Management of Pratap Press, New Delhi***[6] were referred to for the said purpose. In para 16 of this case, the observations *qua* the ***Associated Cement Companies***[7] in para 11, insofar as relevant is extracted as under:

> "…11. … What then is 'one establishment' in the ordinary industrial or business sense? … It is, perhaps, impossible to lay down any one test as an absolute and invariable test for all cases. The real purpose of these tests is to find out the true relation between the parts, branches, units, etc. If in their true relation they constitute one integrated whole, we say that the establishment is one; if on the contrary they do not constitute one integrated whole, each unit is then a separate unit. How the relation between the units will be judged must depend on the facts proved, having regard to the scheme and object of the statute which gives the right of unemployment compensation and also prescribes a disqualification therefor. Thus, in one case the unity of ownership, management and control may be the important test; in another case functional integrality or general unity may be the important test; and in still another case, the important test may be the unity of employment. Indeed, in a large number of cases several tests may fall for consideration at the same time. The difficulty of applying these tests arises because of the complexities of modern industrial organization; many enterprises may have functional

[4] (2011) 13 SCC 517
[5] (supra)
[6] (supra)
[7] (supra)

integrality between factories which are separately owned; some may be integrated in part with units or factories having the same ownership and in part with factories or plants which are independently owned."

10. Thereafter, while discussing some subsequent judgments, the following observations were made:

"18. Accordingly, depending upon the facts of the particular case, in some cases the units concerned were held to be the part of one establishment whereas, in some other cases they were held not to be so. *Regl. Provident Fund Commr. v.. Dharamsi Morarji Chemical Co. Ltd*. reported in [(1998) 2 SCC 446] and *Regl. Provident Fund Commr. v. Raj's Continental Exports (P) Ltd.* reported in [(2007) 4 SCC 239] are cases where the two units were held to be independent. In *Dharamsi Morarji* (supra), the appellant company was running a factory manufacturing fertilizers at Ambarnath in District Thane, Maharashtra since 1921. The appellant established another factory at Roha in the adjoining district in the year 1977 to manufacture organic chemicals with separate set of workers, separate profit and loss account, separate works manager, plant superintendents and separate registration under the Factories Act. The two were held to be separate for the purposes of coverage under the Provident Funds Act. In *Raj's Continental Export* (supra), *Dharamsi Morarji* was followed since the two entities had separate registration under the Factories Act, 1948, Central Sales Tax Act, 1956, Income Tax Act, 1961, Employees' State Insurance Act, 1948 separate balance sheets and audited statements and separate employees working under them.

19. As against that in *Rajasthan Prem Krishan Goods Transport Co.v. Regl. Provident Fund Commr.* reported in [(1996) 9 SCC 454] and *Regl. Provident Fund Commr., v. Naraini Udyog* reported in [(1996) 5 SCC 522] the concerned units were held to be the units of the same establishment. In *Rajasthan Prem Krishan Goods Transport Co*. (supra) the trucks plied by the two entities were owned by their partners, ten out of thirteen partners were common, the place of business was common, the management was common, the letter-heads bore the same telephone numbers. In *Naraini Udyog* (supra) the two entities

were located within a distance of three kilometers as separate small-scale industries but were represented by the members of the same Hindu Undivided Family. They had a common head office at New Delhi, common branch at Bombay and common telephone at Kota. The accounts of the two entities were maintained by the same set of clerks. Separate registration under the Factories Act, the Sales Tax Act and the ESI Act were held to be of no relevance and the two units were held to be one establishment for the purpose of the Provident Funds Act."

11. Now turning to the facts of the cases before us, we may note at the inception itself, Civil Appeal No.4475/2010 was not really argued before us. In fact, the impression we got was that the counsels appearing for the appellants were of the belief that it was facts of this case which had caused confusion in the mind of the RPFC as, in their perspective, exemption could not have been really sought within the provisions of the said Act in this case. This is so, as BCCL, Jaipur was not a separate legal entity, but, part of the parent company directly. The case would, thus, be fully covered by the provisions of Section 2A of the said Act and mere location of departments and branches in other cities would not have extended the benefit of the exemption to this company. Thus, this appeal, in any case, has to fail.

12. Insofar as Civil Appeal No. 4476/2010 is concerned, learned senior counsel sought to refer to the provisions of the agreement in question, between the two parties, which gave rise to the Provident Fund Commissioner to initiate proceedings. This agreement is dated 25.7.1986. It appears that this agreement was in supersession of an earlier agreement dated 13.12.1985. The business reason stated for entering into this agreement was the commencement of publication of the Jaipur edition of the daily newspapers of BCCL, Mumbai, i.e., The Times of India and Navbharat Times.

13. The agreement records that TPHL had opened an office at 8-9, Anupam Chambers, Tonk Road, Jaipur, where it had equipped itself with trained and experienced staff and all infrastructural, secretarial, administrative and marketing facilities. Since 23.9.1985, it had been providing various services to BCCL, Mumbai, including office space for use and occupation, accounting facilities, stenographers, typing, and so on. The services which were now further sought to be provided to BCCL, Mumbai included marketing, development work, realisation of dues,

A adequate office space, accounting facilities, infrastructure, packing/ bundling of daily newspapers (at the cost of BCCL, Mumbai), etc. Clause 1(g) of the agreement states as under:

> "1. "TPH" shall render the following services effective from 1st August, 1986 to "Bennett":-
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> xxxx xxxx xxxx xxxx xxxx
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> (g) All staff employed by "TPH" will carry out the instructions given by "Bennett" and in case of working problems; "TPH" shall at the request of "Bennett" remove the problems. The staff employed by TPH shall not be considered as employees of
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> "Bennett" but they will remain the staff of "TPH" and "TPH" shall be responsible to the employees."

14. BCCL, Mumbai was to pay to TPHL an amount calculated @ 5% as commissions on Net Advertisement Revenue and Net Circulation Revenue.
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15. On all the three establishments being called upon to comply with the provisions of the said Act, all three of them sought exemption under Section 16(1)(d) of the said Act. In view thereof, the RPFC initiated proceedings under the said Act, and issued a notice under Section 7A of the said Act, dated 28.10.1987. The proceedings were held thereafter,
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and the RPFC passed a common order in respect of all the three establishments on 4.10.1990 opining that they were not entitled to the exemption. The appeal filed before the Employees' Provident Fund Appellate Tribunal by all the three establishments also failed, as it was dismissed on 10.10.1997. The same fate befell all three in the proceedings
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before the learned Single Judge, *vide* order dated 20.12.2006 and the Division Bench of the High Court, on 11.4.2008. Thus, practically four forums have scrutinised the cases *qua* all these three establishments.

16. The learned senior counsel, Mr. Joydeep Gupta, appearing for TPHL, however, contended that the fallacy which came in the order of
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the RPFC was of jumbling of the facts in issue, relating to the three establishments, and thereafter, there has really been no scrutiny before any of the forums, other than giving their imprimatur to the said order. In fact, the High Court effectively refused to look into the matter as two forums had already gone into that aspect.

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17. Learned senior counsel for the appellant, TPHL, sought to take us through the order of the RPFC, Rajasthan, as according to him, that was the material order to show that from the inception, there was a problem arising from the manner in which the facts relating to the three establishments were mixed up. He contended that each of these establishments were required to be connected to BCCL, Mumbai, and, it was not a case which could have been built on with connectivity with BCCL, Jaipur, as was sought to be done.

18. We may note at this stage itself that though, in principle, there can be no dispute on this proposition, it does not really appeal to us for the reason that it was intrinsically predicated on the ground that BCCL, Jaipur was a different establishment. Once that is conceded as not so, BCCL, Jaipur was really only a part of BCCL, Mumbai. The connection of the other two establishments with BCCL, Mumbai or, for that matter, BCCL, Jaipur would, thus, not cause an intrinsic fallacy in the order of the RPFC.

19. Learned senior counsel sought to emphasise the distinctive features why it could not be said that there was any direct connect between the two establishments, i.e. BCCL, Jaipur and TPHL. A great emphasis was laid on the facts that these are two separate registered companies, under the then Companies Act, 1956, that there is no commonality of directors or shareholders and no direct financial unity. The balance sheet as well as profit and loss accounts are separate, and there were varying figures of independent and separate employees of the two entities, with there being no transfer of employees *inter se* BCCL, Mumbai and TPHL or, for that matter, between BCCL, Jaipur and TPHL.

20. If the aforesaid factual matrix is analysed within the principles of what would constitute one establishment, as set out in the ***Associated Cement Company*** **case,**[8] it is obvious that there are various parameters dependent on the factual matrix of each case, which have to be examined. Undoubtedly we are not dealing, in this case, with a branch or a unit of BCCL, Mumbai. Thus, a test of unity of ownership, management and control may not really be applicable, but the test would be of functional integrality or general unity of purpose, in the given factual situation. There is no direct unity of employment. In any case, it is the test of functional

[8] AIR 1960 SC 56

A integrality or general unity of purpose which would have to be applied in the present facts if the two establishments have to be clubbed for the purposes of the provisions of the said Act.

21. We may note that one of the arguments of learned senior counsel for the appellant was based on the business model of outsourcing
B and it was sought to be suggested that if one aspect of work is outsourced to another company, the same would not satisfy the aforesaid tests. However, we did point out to the learned senior counsel that the business model of outsourcing really does not have history that old or was not much prevalent in respect of the time period which we are discussing;
C but it is a relatively later phenomenon and, thus, that principle would not really be applicable for testing the nature of linkage, if any, for the time with which we are concerned.

22. Learned counsel for the respondent sought to emphasise that the two companies were functionally dependent. In fact, what was
D pointed out was that practically all three companies were working from the same building, albeit on different floors, and the office of TPHL was open for the use of BCCL, Mumbai employees. It was also sought to be contended that Mr. Sunil Gupta, Manager of BCCL, Mumbai was signing papers relating to TPHL and the examples given of the same are notices relating to the closure of offices of the two on *Mahashivratri* and *Holi*.
E However, a perusal of the documents in question shows that they were really endorsements to TPHL, which would be natural considering that there would be no requirement of work to be sourced in case the office of BCCL, Mumbai itself was closed, and no editing, marketing work was required to be carried out. Similarly, on the issue of security staff,
F since the building was one, once again, logically common directions were possible. However, what is also emphasised is that the executive of TPHL was using the letterpad of BCCL, Mumbai.

23. The important aspect, in our view, which was emphasised by learned counsel for the respondent was the nature of the agreement which provided for both the space and the staff to be made available by
G TPHL for the benefit of BCCL, Mumbai. The expenses of the establishment, for example, electricity bill, maintenance costs, etc., were to be borne by TPHL.

24. If we analyse the aforesaid facts on the touchstone of functional integrality or general unity of purpose, it is difficult, if not impossible, to
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disagree with the reasoning of four forums, which are sought to be assailed before us. A

25. Learned counsel for the appellant sought to rely upon the judgment in the ***Management of Pratap Press case***[9] to contend that in the case of similar facts, it was held to the contrary, and the units were held to be distinct establishments. An examination of the said judgment would show that though they were all in the same nature of business, the functions of the press and the newspaper were held not so interdependent that one could not exist without the other. The activities of the press unit were found to be independent of the activities of the paper unit, and the view of the Tribunal, that they are two distinct and separate industrial units was not found worthy of interference. B C

26. The aforesaid judgment had emphasized the most important test to be that of functional integrality and opined that unity of ownership exists *ex hypothesi*.

27. We are, however, not able to persuade ourselves to agree with the submission of the learned senior counsel for the appellant for the reason that what has effectively been done in the present case, under the agreement in question, is that TPHL has handed over its office space, employees and control to BCCL, Mumbai, for all practical purposes, to the extent that the letter pads are also being used without any due regard as to which entity the instructions are being issued from. This is not a case of a singular document being issued, but a number of documents where this practice has been followed. Just to make an endeavour on paper to somehow keep these two segregated for various labour law ramifications would not be an appropriate principle to accept, more so taking into consideration the very purpose for which the said Act was enacted. D E F

28. We have, thus, no doubt in rejecting even the case of TPHL.

29. Now turning to Civil Appeal No. 4474/2010 of SVPL, Mr. Dhruv Mehta, learned senior counsel, while adopting the arguments of Mr. Joydeep Gupta, learned senior counsel, sought to emphasise the same, possibly in a different perspective. G

30. Learned senior counsel contended that since an "establishment" was not defined under the provisions of the said Act, as noticed above,

[9] (supra) H

A the provisions of the ID Act were resorted to for the said purpose. In the context of the approach adopted both, by the learned single Judge, and the Division Bench of the High Court, it was contended that they ought not to have merely rejected the petitions on a broad principle of non-requirement of the relevant facts being looked into, the same having been dealt with by the RPFC and the appellate authority. It is in this B context that he invited our attention to the judgment in the case of ***Associated Cement Company***[10], more specifically to paras 9 and 11. The issue of the Industrial Tribunal under the ID Act, being a final court of facts, was debated in the context of Section 25-E(iii) of the ID Act while referring to the expression "in another part of the establishment." C In that context it was opined that this question could not be treated as a pure question of fact as it involved consideration of the tests which should be applied in determining whether a particular unit is part of a bigger establishment. It was, thus, said that "indeed, it is true that for the application of the tests certain preliminary facts must be found; but the final conclusion to be drawn therefrom is not a mere question of fact." D

31. Elucidating the matter further, *qua* the problem of not having really specific tests, it was observed in para 11 that there were several tests which were required to be resorted to especially where the establishments were in different locations. This paragraph has already been extracted by us before. E

32. On the facts of the case, it was stated that SVPL was incorporated on 20.6.1984 and entered into the agreement in question on 1.10.1985. It claimed exemption on 31.12.1986 and has been making provident fund contributions from 24.2.1988. Though it was not disputed that the said Company, for the relevant period of time, was carrying out F exclusive work only for BCCL, Mumbai, it was pleaded that there was no commonality of directors and shareholders of the two companies, nor was there a cross shareholding, an aspect for which charts have been filed. The subsequent fact was also that, at some stage, it got merged with another company, i.e., M/s. Raghuvar India Limited.

G 33. Now examining the agreement with BCCL, Mumbai, dated 1.10.1985, BCCL, Mumbai, having commenced publication of the Jaipur edition of the two newspapers is stated to have approached SVPL for printing the said newspapers on a contract basis. SVPL was to employ the necessary personnel for carrying out various tasks and had to print

H [10] (supra)

the newspapers. The remuneration was payable by BCCL, Mumbai to SVPL at Rs.24,000/- per day, for the two daily newspapers. The printing press was elsewhere, but the business office of SVPL was also located in the same building as BCCL, Jaipur, albeit stated to be at a different floor. One of the clauses, which has been referred to, which shows that there was no exclusivity of dealing, is clause 28, which reads as under:

> "28. "SHREE VISHAL" will be at full liberty to undertake any other contract for printing newspaper/journals from any other party/s provided it ensures timely printing of the daily newspapers of "Bennett" and complies with Clause 32 of this agreement."

34. In the aforesaid context, it may be noted that clause 32 referred to in this clause is only a 'Confidentiality Clause'.

35. A great emphasis was laid by learned senior counsel appearing for the said entity on the 'Non-Exclusivity Clause' in the agreement between the two parties, i.e., clause 28. Once again, the emphasis was on the two companies being separate legal entities, there being no commonality of directors or shareholders, or direct financial control. The balance sheet and profit and loss accounts were also separate. Another aspect emphasised was that the printing press of SVPL was located at a different premises from where the business was really being carried on, though naturally, the control of the business would be from the office located in the same premises as BCCL, Mumbai. It is not, however, disputed that SVPL had, at its own cost, given adequate covered area adjacent to the printing press to BCCL, Mumbai for storing the newspaper/printing. The consideration, which was being paid to SVPL for printing included the cost of making available the aforesaid space for packaging and storage operations.

36. Learned counsel for the respondent, once again, sought to emphasise the functional dependence between the companies. The aspect of Mr. Sunil Gupta, Manager of BCCL signing papers relating to SVPL was emphasised, including notices of closure, as discussed in the case of TPHL. The common factor, again, is of BCCL, Mumbai issuing orders on the letter pad of SVPL. In fact, the nature of communications and orders issued do suggest that all three were working towards the common object of bringing out a newspaper.

37. The aforesaid would not have been sufficient by itself, but for the application of the functional integrality test, which linked them to be part of the same establishment.

A 38. We may add here that in the impugned orders it is not very clear as to whether the reference is being made to BCCL, Mumbai or to BCCL, Jaipur. However, as noticed before, the same is not of much consequence for the reason that BCCL, Jaipur is admittedly a branch office of BCCL, Mumbai.

B 39. We have examined this case more closely because of the factual pleas raised by learned senior counsel for SVPL. We have also taken note of the fact that as per the submissions of the learned senior counsel, the said unit was subsequently merged into another company, an aspect already noticed aforesaid.

C 40. Despite the aforesaid, in the complete conspectus of facts, after divorcing different aspects of the three establishments, we are unable to come to a conclusion different from the one which we have come to for TPHL. We believe that the very nature of the working of SVPL and the other two entities show the functional integrality test to be satisfied. They may be different legal entities, an arrangement may D have been made to have different directors and shareholders, but the nature of control and integrality of functionality, between the three entities is quite apparent from the facts set out hereinabove. Each one of the facts by itself may not be conclusive, but taken as a whole, there can be no other conclusion, than the one arrived at by the RPFC. We are doing E so, quite conscious of the fact that there is undoubtedly some jumbling which has arisen in the order of the RPFC, which has been affirmed throughout. But then, the case of the appellants was built on the principle that all these three entities have really no functional integrality vis-à-vis BCCL, Mumbai. As it emerged subsequently, and was conceded before us; there is little doubt that BCCL, Jaipur is a unit of BCCL, Mumbai, F and the other two units have linkages and are controlled by BCCL, Jaipur in a manner which would satisfy the functional integrality test.

41. The said Act being a beneficial legislation, the object of excluding the infancy period of five years (later reduced to three years) from the rigours of the Act, was only to provide to new establishments, G a period to establish their business, and not to permit different kinds of routes to be created to evade the liability under the said Act.

Conclusion:

42. We have, thus, no hesitation in coming to the conclusion that H the findings *qua* all the three appellants satisfy the functional integrality

and the general unity of purpose test, and the same are met in the facts of the present case.

43. We may also notice another aspect before parting with the case. On a Court query as to what would be the liability arising from the impugned orders, it was stated to be in the range of only about Rs.15 lakh for which five judicial forums have now been troubled. The other aspect is that this matter has been prolonged over so many years and the only avenue open for the RPFC is to impose damages under Section 14B of the said Act, which, at the relevant time, limited the damages amount to twice the original amount. The net result is that the liability would only double during this long period, over the last more than thirty years. It is only by a subsequent legislative amendment, now repealed, by introduction of Section 7Q, inserted w.e.f. 1.7.1997, that the provision was made for interest to be payable at 12 per cent per annum, which would naturally apply prospectively. Thus, the appellants are getting away lightly on the issue of such liability, the exact amount of which is to be determined. The liability of each of these establishments would be co-extensive with BCCL, Mumbai.

44. In view of the aforesaid facts, we are inclined to impose costs on all the three appellants, but of varying amounts. As there was no case whatsoever of BCCL, Jaipur, appellant in Civil Appeal No. 4475/2010, we, thus, dismiss that appeal with costs of Rs.50,000/-, while imposing costs on the other two appellants of Rs.20,000/- each.

45. The appeals are accordingly dismissed.

Nidhi Jain Appeals dismissed.

A MOHAN CHANDRA TAMTA (DEAD)

THR. LRS.

v.

ALI AHMAD (D) THR LRS & ORS.

B (Civil Appeal No. 4610 of 2014)

SEPTEMBER 12, 2019

[DEEPAK GUPTA AND ANIRUDDHA BOSE, JJ.]

C *Suit – Finding as to ownership – Who cannot challenge – Suit property, three storeyed structure was owned by three brothers, each having 1/3rd share in the property – One of the brother mortgaged his 1/3rd share – Eventually, the predecessor-in-interest of the appellant became the full owner of the property – As per the plaintiff, defendant nos.1 & 2 were permitted to stay in some portion* D *of the house by appellant's predecessor-in-interest – He issued notice to them to vacate the house but they refused– Suit for eviction filed – Dismissed – Appeal also dismissed – Appellant's predecessor-in-interest sold the property to the appellant – Appellant filed suit for recovery of possession of the top floor of the property, in the* E *alternative also prayed for redemption of any un-redeemed portion of the mortgaged property – Defendant nos. 1 & 2 denied the ownership and claimed that the property was owned by defendant no.3 (the mortgagee) – Suit decreed – Defendant no. 2 filed appeal but, no appeal was filed by defendant no.3 – First appellate court* F *dismissed the plaintiff's suit – Appellant filed second appeal in the High Court – Allowed – Appeal filed by one 'MJ' in the Supreme Court on the ground that she was also one of the legal heirs and no notice was served upon her – Allowed – Case remanded to the High Court – High Court held that even in the absence of defendant no.3, the appeal was maintainable – Held: High Court erred in* G *holding that defendant nos.1 & 2 could maintain an appeal challenging the finding of the trial court that defendant no.3 was not the owner of the property when defendant no.3 himself had not challenged this – Tenants remain tenants whoever be the landlord/ owner – Trial court held that the plaintiff had become the full owner*

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of the whole property which stood redeemed and defendant no.3 had no share in the property –This finding should have been challenged by defendant no.3 and cannot be challenged by the defendant nos.1 & 2 who only claimed to be the tenants in the property – Therefore, the appeal filed by them before the District Judge on the issue as to whether the plaintiffs had become the full owner of the property or not, was not maintainable – Judgment of the High Court set aside while that of the trial court decreeing the suit in favour of the appellants is restored.

Disposing of the appeal, the Court

HELD: 1.1 The High Court gravely erred in holding that defendant nos. 1 and 2 could maintain an appeal challenging the finding of the trial court that defendant no. 3 was not the owner of the property when defendant no. 3 himself had not challenged this. Defendant nos. 1 and 2 only claimed to be the tenants in the property. They did not claim any ownership rights. It is true that according to them, it was defendant no. 3 who was the mortgagee of the property but the trial court in the presence of the owner after contest decreed the suit in favour of the plaintiff and against the defendants. It specifically held that the plaintiff had become the full owner of the whole property which stood redeemed and defendant no. 3 had no share in the property. This finding should have been challenged by defendant no. 3. This finding cannot be challenged by the tenants. The tenants remain tenants whoever be the landlord/owner. Once defendant no. 3 had not challenged the decree of the trial court with regard to his title, defendant nos. 1 and 2 cannot be allowed to challenge the finding of ownership with which they are not directly concerned. Therefore, the appeal filed by them before the District Judge on the issue as to whether the plaintiffs had become the full owner of the property or not, was not maintainable. They could have challenged the decree on other grounds but not on this ground. The judgment of the High Court is set aside. The judgment and decree of the trial court decreeing the suit in favour of the appellants is restored. [Paras 11-14][170-G-H; 171-A-D]

A CIVIL APPELLATE JURISDICATION: Civil Appeal No. 4610 of 2014

From the Judgment and Order dated 31.03.2009 of the High Court of Uttarakhand at Nainital in Second Appeal No. 670 of 2001 (Old No. 2341 of 1979).

B Arvind Kumar Shukla, Ms. Reetu Sharma, Nihal Ahmad, Kunal Yadav, Ms. Neena Shukla, Advs. for the Appellants.

The Judgment of the Court was delivered by

DEEPAK GUPTA, J.

C 1. This case has a long andchequered history. The litigation initially started almost 59 years back. The suit property was a three storeyed structure in the town of Almora in Uttarakhand. The first records of this house are from the year 1872 when this property is recorded in the ownership of three brothers namely Pir Bux, Kalia and Subrati. Each brother had 1/3rd share in the property. Pir Bux mortgaged his 1/3rd share D in favour of one AhmadullaKhan for Rs.50/- in the year 1872. One of the brothers, Subrati died issue-less and his share of the property devolved upon his two brothers Pir Bux and Kalia, who got an additional 1/6th share each making them owners of half share each in the property. On the death of Kalia, his share was succeeded by his son Ilahi Bux, and on the death of Ilahi Bux his widow Smt. Hafizan succeeded to his share of E the property. She sold her entire share of the property i.e., 50% to one Lalta Prasad Tamta, predecessor in interest of the present appellant.

2. Half of Subrati's property i.e. 1/6th of the total which had fallen to the share of Pir Bux from Subrati was inherited by his son Gulam Farid who in turn sold this property to Lalta Prasad Tamta by way of a sale deed on 28.07.1944. Thus, Lalta Prasad Tamta became the owner F of 2/3rd of the structure. The remaining 1/3rdcontinued to be under mortgage. According to the plaintiff, Gulam Farid redeemed the property from Ahmadulla Khan and sold the 1/3rd share to Lalta Prasad Tamta on 17.03.1954. Therefore, Lalta Prasad became the full owner of the property.

G 3. It is the case of the plaintiff that defendant no.1 Khalil Ahmed and defendant no.2 Ali Ahmad were permitted to stay in some portion of this house by Lalta Prasad Tamta. Over a period of time the building started subsiding and the ground floor got embedded in the earth and only two storeys were left. In 1960, Lalta Prasad Tamta issued notice to the said two defendants to vacate the house but they refused to do so.

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He then filed Suit No.115 of 1960 for their eviction. The defendant nos. 1 and 2 denied the title of Lalta Prasad Tamta over the property and claimed that they were the tenants of defendant no. 3 Mustaffa Shah Khan, who was not a party in this suit. The said suit instituted by Lalta Prasad Tamta was dismissed. Civil Appeal No. 58 of 1961 filed before the District Judge, Nainital, was also dismissed.

4. Accordingto the plaintiff, encouraged by the dismissal of this suit, the defendants got further emboldened and trespassed over other rooms in the house. It was urged that defendant no. 3 Mustaffa Shah Khan had no right in the property suit.

5. Another relevant fact is that according to the plaintiff after the death of Ahmadulla Khan he was succeeded by three sons. One of his sons Mahmood Shah Khan had 1/3rd share of 1/3rd, i.e. 1/9th share in the property. Mahmood Shah Khan transferred his rights of mortgagee to one Sadiq Hussain and Vilayat Hussain**.** In 1958, Lalta Prasad Tamta instituted a Civil Suit No.216 of 1958 against Sadiq Hussain and Vilayat Hussain. A compromise was arrived at between the parties and Sadiq Hussain and Vilayat Hussain abandoned their rights in the property. Thus, Lalta Prasad Tamta became the owner of this 1/9th share too. There is obviously some confusion because according to Lalta Prasad Tamta he had already redeemed the entire 1/3rd share of Ahmadulla Khan w.e.f. 17.03.1954. His explanation is that to avoid any cloud to his title he settled the matter.

6. Lalta Prasad Tamta in turn sold the property to Mohan Chandra Tamta, appellant herein, on 27.08.1966. Mohan Chandra Tamta filed a suit for recovery of possession of the top floor of the house (3rd floor) and in the alternative also prayed for redemption of any un-redeemed portion of the mortgaged property and expressed his willingness to pay the balance mortgaged amount. The defendant nos. 1 and 2 contested the suit and denied the ownership of the plaintiff on the suit property. They again claimed that the property was owned by defendant no.3 Mustaffa Shah Khan who had been impleaded as party in this suit. Defendant no.3 supported the stand of defendant nos. 1 and 2. It was pleaded that the suit for redemption is barred by time.

7. The Trial courtheld that Lalta Prasad Tamta had acquired full ownership of the property and he had transferred the same to Mohan Chandra Tamta. A finding was given that the entire property transferred